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Constitutional Essentials: *Ravi* and the future of Implied Substantive Limits on Constitutional Amendments in Singapore

***Ravi s/o Madasamy v Attorney-General and other matters* [2017] SGHC 163**

MARCUS TEO*

Under the doctrine of implied substantive limits on constitutional amendments ("the Doctrine"), courts invalidate amendments passed without procedural impropriety. As far as implied constitutional norms go, it is extremely controversial. Unsurprisingly, the Doctrine's fledgling existence in Singapore has been troubled by theoretical difficulties.

Yet, a lasting judicial reluctance to categorically renounce its existence hints at its continued relevance to Singaporean constitutionalism. Most recently, in *Ravi s/o Madasamy v Attorney-General and other matters* [2017] SGHC 163 ("*Ravi*"), the High Court addressed issues concerning the Doctrine, while refusing to conclusively rule on its applicability in Singapore.

I argue that the Doctrine should apply in Singapore. This article traces the Doctrine's development in Singapore, surveys theoretical justifications for it in comparative constitutional law scholarship, assesses their defensibility and considers whether they might inform the Doctrine's applicability in Singapore's constitutional context.

The Doctrine's Development in Singapore

The "basic structure" doctrine is commonly understood to refer to the ratio of *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225 ("*Kesavananda*"), which declared the Doctrine applicable in India. *Kesavananda*'s judgment is complicated and incoherent; different judges relied on different justifications for the Doctrine, and espoused different grounds on

* Final-year student enrolled in the LL.B. (Honours) programme at the National University of Singapore.

which amendments might be invalidated. Today, *Kesavananda* only uncontroversially represents the Doctrine as a concept, not any specific justification for it.

The notion of a constitutional "basic structure" based on the "Westminster-model" was referenced in *Law Society of Singapore v Tan Guat Neo Phyllis* [2007] SGHC 207[1] , *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] SGHC 163 ("*Faizal*")[2], *Vellama d/o Marie Muthu v Attorney-General* [2013] SGCA 39 ("*Vellama*")[3] and *Prabagaran a/l Srivijayan v Public Prosecutor and other matters* [2016] SGCA 67[4], where it informed the interpretation of constitutional provisions. Importantly, however, none of these judgments referenced *Kesavananda*. Thus, the court in Ravi opined that the "basic structure" referenced in *Faizal* may not be the same as the "basic structure" doctrine in *Kesavananda* – the former might merely be a canon of constitutional interpretation, while the latter refers to the Doctrine[5].

Semantic confusion notwithstanding, a separate line of cases, clearly concerning the Doctrine, does exist in Singapore. While the High Court in *Teo Soh Lung v Minister of Home Affairs and others* [1989] SGHC 108 ("*Teo Soh Lung*") initially rejected the Doctrine[6], on appeal, the court found it "unnecessary" to consider the issue[7]. In *Yong Vui Kong v Public Prosecutor* [2015] SGCA 11 ("*Yong Vui Kong*"), the Court of Appeal clearly stated that the Doctrine's applicability remained an open question in Singapore[8]. Likewise, the High Court in *Ravi* explicitly refused to declare whether the Doctrine, separate from the canon of constitutional interpretation mentioned in *Faizal*, applies in Singapore[9]. *Kesavananda* was explicitly referenced in these cases.

Four points may be gleaned from *Teo Soh Lung*, *Yong Vui Kong* and *Ravi*.

Firstly, the Doctrine can only be applicable in Singapore if it is consistent with Article 5 of the *Constitution of the Republic of Singapore* (1985 Rev Ed) ("the Constitution"). Article 5 states that "the provisions of this Constitution may be amended (or repealed) by a law enacted by the Legislature". In *Teo Soh Lung*, the court found that the express wording of Article 5 excluded implied amendment limits[10]. In *Ravi*, Article 5's "broadness" militated, though not conclusively, against the Doctrine's applicability in Singapore[11].

Secondly, the Doctrine, if applicable, protects liberal democratic features. In *Yong Yui Kong*, the "separation of powers" and the "right to vote" were among the "features" which the Doctrine might protect[12], while *Ravi* hinted that amendments "curtail[ing]... the judicial

[1] [144] – [146].
[2] *Faizal*, [43] – [45].
[3] *Vellama*, [82].
[4] [61] – [62].
[5] *Ravi*, [58], [59] & [66].
[6] *Teo Soh Lung*, [47].
[7] [1990] SGCA 5, [44].
[8] *Yong Vui Kong*, [72].
[9] *Ravi*, [67] – [68].
[10] *Teo Soh Lung*, [34].
[11] *Ravi*, [67].
[12] *Yong Vui Kong*, [69].

power" might possibly be invalid[13]. However, while all 3 features also exist in a "Westminster-model" government, our courts have not declared the Westminster-model itself a part of the "basic structure". Further, since it protects democracy, the Doctrine would also have to be consistent with the democratic principles of "popular sovereignty", self-government and the idea "that no generation ha[s] an exclusive claim on constitutional wisdom"[14].

Thirdly, the Doctrine, if applicable, protects only constitutional essentials. In *Yong Vui Kong*, the court stated that "in order for a feature to be considered part of the basic structure of the Constitution, it must be something fundamental and essential to the political system that is established thereunder"[15]. In *Ravi* the Doctrine was taken to protect only "an overarching principled framework embracing the precepts of the rule of law and the separation of powers"[16]. It thus remains a very limited doctrine[17].

Finally, the manner in which a polity's constitution is adopted affects whether the Doctrine applies in its legal system. In *Teo Soh Lung*, "the differences in the making of the Indian and our Constitution" rendered the Doctrine inapplicable in Singapore[18]. In *Ravi*, a broad power of amendment was considered "suitable" given the "degree of flexibility...necessary and appropriate in the context of our unexpected journey into nationhood"[19]. However, these cryptic statements leave the precise relationship between a constitution's adoption and the Doctrine's applicability shrouded in ambiguity.

Theoretical Justifications for the Doctrine

Scholars adopt 3 different theoretical justifications for the Doctrine, leading to different substantive grounds for invalidating amendments. Whatever the grounds, they generally agree that the Doctrine should be leniently enforced; only amendments grossly contravening essential principles should be invalidated[20], limiting reasonable disagreement on the Doctrine's operation and making it objectively enforceable.

Universal Principles of Constitutional Law

Some scholars justify the Doctrine on universal principles of constitutional law. A constitution falling short of such principles is, literally, not a constitution. Consequently, the Constitution is a constitution only because it accords with these principles. This is not repugnant to Article 5 – attempts to turn the Constitution into a non-constitution go beyond amendment or repeal[21].

[13] *Ravi*, [66].
[14] *Ravi*, [64].
[15] *Yong Vui Kong*, [71].
[16] *Ravi*, [66].
[17] *Ravi*, [65].
[18] *Teo Soh Lung*, [47].
[19] *Ravi*, [67].
[20] *Infra* n35, 221-224; *Infra* n24, 338; *Infra* n25, 486-487.
[21] Andrew J. Harding, "Parliament and the grundnorm in Singapore", (1983) 23 *Malaya Law Review* 351, 358.

The question, thus, is what a "constitution" is. A constitution should achieve a minimal degree of constitutionalism, for otherwise it is no more a constitution than any other law. It should "set...out how political power is organised and divided between the organs of State in a particular society"[22]. However, when leniently enforced, the Doctrine so understood only prevents literally absolute power from vesting in one entity. It certainly does not prescribe a specific political system.

Absent a universally-accepted political philosophy, reliance on other ostensibly "universal" principles (like democracy or certain fundamental rights) would be judicial law-making *par excellence*. Judges who do so face the "counter-majoritarian difficulty", frustrating their legal legitimacy by making policy instead of enforcing law. No court enforcing the Doctrine has ever relied on such indefensible propositions.

Constitutional Identity

Short of universal principles, one might turn to norms inherent in specific constitutions to justify the Doctrine's existence. A constitution is always based on certain political presuppositions, forming its internal "logic"[23] – its "constitutional identity". Amendment, it is said, is not replacement – and an amendment replacing a constitutional identity purports, in fact, to replace the entire constitution itself[24].

Constitutional identities contain only constitutional essentials; the Doctrine so justified would thus be quite limited. It would also be consistent with Article 5. One might differentiate between "larger (constitutional) purposes and principles", and "transient...formal arrangements" such as specific constitutional rules and institutions; the Doctrine should preserve only the former[25]. Arguably, Article 5 confers a power to amend or repeal "the provisions" of the Constitution, not "the Constitution" itself. Apex or constitutional courts in India[26], Colombia[27], Bangladesh[28], Taiwan[29] and Kenya[30] have relied on this justification when invalidating constitutional amendments.

Nevertheless, this elegant justification remains fraught with conceptual difficulties, making it untenable as a basis for the Doctrine.

First, Singapore may not have a clear constitutional identity. Discerning the constitutional identity of any polity is difficult, since identities are always in flux[31]. Further, identities are only clearly observed in polities with stable constitutions – with "transitional" constitutions a

[22] Calvin Liang & Sarah Shi, "The Constitution of Our Constitution, A Vindication of the Basic Structure Doctrine" *Singapore Law Gazette* (August 2014) 12, [38].
[23] R. George Wright, "Could a Constitutional Amendment Be Unconstitutional?" (1991) 22 *Loyola University Law Journal* 741, 743-744 & 746-747.
[24] Aharon Barak, "Unconstitutional Constitutional Amendments" (2011) 44 *Israel Law Review* 321, 335.
[25] Gary Jeffrey Jacobsohn, "An unconstitutional constitution? A comparative perspective" (2006) 4(4) *International Journal of Constitutional Law* 460, 485.
[26] *Minerva Mills v Union of India AIR* 1980 SC 1789.
[27] C-970/2004 & C-1040/2005.
[28] *Anwar Hossain Chowdhury v Bangladesh* (1989) 41 DLR (AD) 165.
[29] Interpretation No. 499 (2000).
[30] *Njoya v Attorney General* [2004] LLR 4788.
[31] *Supra* n25, 486.

clear constitutional identity is unlikely[32]. Indeed, with constitutional bricolages of colonial transplants, international norms, and autochthonous values and institutions, many Asian states struggle to define their constitutional identities. In Singapore, rhetoric comparing our Constitution to a malleable "shoe" which should be "stretch[ed] and ease[d]" to accommodate political exigencies[33] persists. Pragmatism, then, is our culture – and it precludes no change. Courts need denounce such rhetoric before relying on this justification.

Second, without entrenchment clauses, reasonable disagreements will arise on which principles should be considered fundamental. A comparative analysis of "Westminster-model" constitutions concluded that the "principal features" of such constitutions include constitutional supremacy, fundamental rights, judicial independence, a separation between the head of state and the head of government, and free and fair elections[34]. Yet, the Doctrine in Singapore apparently only involves 3 of those features. This difficulty is not circumvented by lenient enforcement; all those features may reasonably be considered equally important, as would be the case in conventional political discourse.

Third – and most important – a constitutional identity is, by itself, an "is", not an "ought". Identifying our Constitution as a "Westminster-model" constitution does not explain, normatively, why it must remain so. This is perhaps why our courts only rely on the "Westminster-model" as a canon of constitutional interpretation, since interpretation (unlike the Doctrine) does not assert a permanent constitutional identity. To show that our Constitution *should* remain a "Westminster-model" constitution, reference must be made to the will of a supraconstitutional authority.

The Constituent Power

Such reference is made in constituent power theory, which justifies the Doctrine by conceptualizing the amendment power as a delegated limited power. The constituent power (the people) creates the constitution, which creates the amendment power (the legislature). Thereafter, the latter acts as the former's agent, and is thus limited by the former's will[35].

The focus, therefore, is not primarily on principles affected by the amendment, but the source of a constitution's legal authority – a question which may be answered with reference to the manner in which that constitution was adopted. As the concerns here are supraconstitutional, the provisions of the Constitution (including Article 5) are, strictly speaking, irrelevant. The judgments referenced above from India, Colombia, Bangladesh, Taiwan and Kenya also rely on this justification[36].

[32] *Supra* n24, 340-341.
[33] Lee Kuan Yew in *Singapore Parliamentary Debates* (24 July 1984), col 1735-1736.
[34] Andrew J. Harding, "The 'Westminster Model' Constitution Overseas: Transplantation, Adaptation and Development in Commonwealth States", (2004) 4(2) *Oxford University Commonwealth Law Journal* 143, 146-148.
[35] Yaniv Roznai, *Unconstitutional Constitutional Amendments: the Limits of Amendment Powers* (OUP, 2017), 118-120 & 133-134.
[36] *Supra* n26-30.

As an agent, the legislature cannot act *ultra vires*, or in *mala fides*. The former (*ultra vires*) prevents it from replacing the constitution[37]. Minimally, a constitution is replaced when an amendment literally purports to adopt a new constitution.

The latter (*mala fides*) prevents the legislature from acting against the people's interests[38]. In principle, the "counter-majoritarian difficulty" does not arise, for the court would be protecting the interests of the people as a whole. However, it is largely an impossible question of fact what those interests are. Judges are ill-equipped to determine the interests of a class as diverse as the citizenry of an entire nation. Indeed, it is politicians who are the subject-matter experts in this field.

Nevertheless, one interest remains uncontroversial. Though a principal might give his agent considerable discretion to act, he will never wish to relinquish control entirely. The power of appointment is perhaps the most basic form of agent constraint available – an agent who does not perform risks not being reappointed. In Singapore, the ruling party maintains that elections are the primary check on its power[39].

Thus, this thin principle of democracy, maintaining legislative accountability through elections and preventing a legislature from "extend[ing] its own life indefinitely"[40], should be protected from any constitutional amendment, for amendments abolishing it can never be in the interests of the people, and thus are always adopted in *mala fides*.

What are examples of such amendments? Surely, those which completely abolish democratic elections. Further, amendments which abolish democratic elections in substance, though not in form, should equally be invalidated; otherwise, the Doctrine would easily be circumvented. Of course, an amendment's effect cannot be judged *in vacuo*; a nation's specific socio-political context – including factors like the length of electoral terms, the extent of suffrage, or the existence of other issues which the amendment might deal with – is relevant. When in doubt, a court should defer to the legislature, since the Doctrine should be leniently enforced.

But does constituent power theory apply in Singapore? On one hand, Chua J's statements in *Teo Soh Lung* on the "differences" between the adoption of Singapore's and Indian's constitutions suggests that it might not; he was, arguably, alluding to the fact that India's Constitution was adopted by a constituent assembly, unlike Singapore's, which was adopted through an act of Parliament[41]. Further, in *Public Prosecutor v Taw Cheng Kong* [1998] SGCA 37 ("*Taw Cheng Kong*"), the Court of Appeal noted that "the political fact of Singapore's independence and sovereignty...had the consequence of vesting the Legislative Assembly of Singapore with plenary powers on Singapore Day"[42].

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[37] *Ibid*, 141-143.
[38] *Ibid*, 143-144.
[39] "Do wrong, go soft or don't deliver, and no party machinery will keep PAP in power", an interview with K Shanmugam (15 July 2017), online: http://www.channelnewsasia.com/news/singapore/do-wrong-go-soft-or-don-t-deliver-and-no-party-machinery-will-9032878 (accessed 1 August 2017).
[40] *Kesavananda*, [704].
[41] *Supra* n21, 366.
[42] *Taw Cheng Kong*, [32].

However, in *Taw Cheng Kong* the court was arguably concerned with whether full legislative powers of a predecessor state over a territory once within its jurisdiction would, upon that territory becoming a newly independent state, vest entirely in the government of that latter successor state – and not whether Singapore's Parliament is sovereign over the people. Further, in *Vellama*, the court stated unequivocally that "[t]he authority of [Singapore's] government emanates from the people...[and] none of [the] modifications (to our Constitution) changes the basic character of an elected MP who represents the citizens who voted him into Parliament"[43]. It would seem, therefore, that the *locus* of sovereignty, even if initially vested in Parliament, may somehow have shifted to the people of Singapore[44].

Conclusion

In sum, the literature on the Doctrine reveals 3 legally defensible substantive grounds upon which a constitutional amendment may be considered unconstitutional:

(a) Since a constitution must maintain a minimum degree of constitutionalism, no amendment can vest literally absolute power in one entity, for otherwise that "constitution" would be no more a constitution than any other law.

(b) Since parliament is created by the constitution, no amendment can literally replace the constitution, for then parliament would be acting *ultra vires* by cutting off the legal authority that creates it.

(c) Since parliament is the agent of the people, no amendment can abolish parliamentary elections, for then it would be acting in *mala fides* by rendering itself entirely unaccountable to the will of the people.

As all 3 grounds are consistent with the 4 themes found in *Teo Soh Lung*, *Yong Yui Kong* and *Ravi*, courts in Singapore may rely on them to invalidate such constitutional amendments.

Clearly, the Doctrine is a "safeguard against political worse-case scenarios"[45], when a legislature attempts to repudiate the very spirit of constitutionalism and, in all likelihood, establish a dictatorship. One might wonder whether, in such circumstances, efforts to frustrate the schemes of a legislature so hell-bent on constitutional destruction are even worth embarking on. Nevertheless, if in the critical hour society chooses to rally around the rule of law rather than its elected politicians, a court might find itself well-placed to counter such nefarious legislative designs, as the Supreme Court of India was in *Kesavananda* and the line of cases that followed it. A theory for the Doctrine is essential for the court to maintain its legal legitimacy, if ever it is compelled to invalidate constitutional amendments.

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[43] *Vellama*, [79-80].
[44] This possibility was considered in Andrew J. Harding "Does the 'basic structure doctrine' apply in Singapore's Constitution? An inquiry into some fundamental constitutional premises", Jaclyn L. Neo ed., *Constitutional Interpretation in Singapore: Theory and Practice* (New York: Routledge, 2017) 30, 34.
[45] Yap Po Jen, "The conundrum of unconstitutional constitutional amendments", (2015) 4:1 *Global Constitutionalism* 114, 128.

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