Asian Journal of Comparative Law (2025), 1–19
doi:10.1017/asjcl.2024.18

ASIAN JOURNAL OF COMPARATIVE LAW
CAMBRIDGE UNIVERSITY PRESS

ARTICLE

Legality and Legitimacy in Making, Amending & Consolidating the Singapore Constitution

Kevin YL Tan*

Faculty of Law, National University of Singapore, Singapore
Email: lawtylk@nus.edu.sg

(Received 23 December 2024; accepted 29 December 2024)

Abstract

This article examines the relationship between legality and legitimacy in postcolonial constitution-making, focusing on Singapore's two stages of sovereignty transfer from colonial rule to independent statehood: its decolonisation from Britain in 1963, achieved through merger with Malaysia, and its separation from Malaysia in 1965. The article shows how different forms of legitimacy were established and sustained during these transitions. The first independence was characterised by legal continuity and political legitimacy, solidified through peaceful negotiations and the strategic use of a 1962 referendum that helped mitigate internal opposition. By contrast, the second independence in 1965 was a 'legal revolution', as neither the *Malaysian Federal Constitution* nor the *State of Singapore Constitution* 1963 provided for secession and the People's Action Party (PAP) government lacked an explicit public mandate to negotiate the secession. This break in legal continuity required new sources of (revolutionary) legitimacy, which the PAP government secured through subsequent electoral dominance, constitutional consolidation, and political manoeuvres. This article underscores the fact that legitimacy in making, amending, and consolidating constitutions is inherently transient and unstable, requiring continuous renewal through various political and legal mechanisms.

Introduction

What are the legitimising forces behind the legalities of decolonisation and the making of new constitutional orders? What legitimises the transfer of sovereignty from the colonial metropolis to the former colony? In many instances, the answer is contingent. Much depends on how that process was carried out, since decolonisation can be effected peacefully or forcibly claimed in a revolutionary fashion. Where the transfer of power has been peacefully negotiated, legal continuity is the most obvious legitimising force. In such cases, the line of legality is maintained as sovereign power is transferred from the colonial power to the new state. Often, legality begets legitimacy. When the line of legality is unbroken, it may be argued that the constitutional change is both legal and legitimate. But what happens if there occurs a break in legal continuity, such as in a revolution where the old legal order is replaced by a new one? In such situations, the new state comes into being by fiat, and this break necessarily requires a new legitimacy, founded on the revolution's success, to justify the new state's legal existence. But where is this new legitimacy to be found?

In this article, I examine this question in the light of the extraordinary events that led to Singapore's decolonisation in 1963 and its subsequent secession from the Federation of Malaysia in 1965. The

*LLB (Hons); LLM, JSD (Yale); Adjunct Professor, Faculty of Law, National University of Singapore, Singapore; Senior Fellow, S Rajaratnam School of International Studies, Nanyang Technological University, Singapore; Editor-in-Chief, Asian Journal of Comparative Law.

historical facts that attended each stage of Singapore's journey to nationhood posed serious legal and legitimacy challenges to the key actors who ended up framing the Constitution. These challenges were especially serious and problematic when, upon seceding from the Federation of Malaysia in 1965, Singapore's Parliament proceeded to exercise plenary powers to cobble together a new constitution. The legitimacy problem was further exacerbated when, in 1979, Parliament granted the Attorney-General power to consolidate the disparate constitutional documents into a single document. I argue that legality alone was insufficient to legitimise the constitution-making and amending enterprise and that the key actors found it necessary to bolster their legitimacy politically.

Independence from the United Kingdom, 1963

Forming up for the 'Battle for Merger'

Negotiations for Singapore's independence began back in 1956, shortly after Singapore was granted partial self-government under the Rendel Constitution of 1955.[1] The Legislative Assembly election of April 1955 returned a coalition government consisting of the Labour Front and the UMNO-MCA Alliance. A year later, in April 1956, Chief Minister David Marshall led a thirteen-man All-Party delegation to London for the first of what came to be known as the 'Merdeka Talks' (literally 'Independence Talks'). Marshall's delegation put forward a plan for Singapore to be independent by April 1957, but simultaneously proposed that Britain retain control over foreign policy and external defence. The British, anxious over the increased open-front activities of the outlawed Communist Party of Malaya (CPM), including the hundreds of strikes and industrial disturbances in the first year of Marshall's leadership, insisted on retaining control over internal security, and the talks broke down over the composition and powers of the proposed defence council.

Having failed to deliver on his promise to the people that he would secure independence for Singapore, Marshall resigned and was replaced by his deputy, Lim Yew Hock. Lim led a second All-Party Mission to London in March 1957 to renew discussions on Singapore's independence. This time, the internal security issue was resolved when Lim's team proposed that the Internal Security Council be made up of three representatives each from the United Kingdom and Singapore, and a seventh member from the soon-to-be independent Federation of Malaya. Instead of independence, Britain would grant Singapore internal self-government with control over all matters except defence, foreign policy, and internal security. A third All-Party delegation went to London in May 1958 to finalise the terms of the new constitution. To effect this transfer of powers, the British Parliament passed the State of Singapore Act on 1 August 1958[2] and enacted the State of Singapore (Constitution) Order in Council in November that year.[3] Elections for a completely elected Legislative Assembly were held on 30 May 1959 and the People's Action Party (PAP) won 43 of the 51 seats.[4]

Complete independence would come only four years later, in 1963. While the British knew that Singapore would have to be given its independence at some time in the future, it was also clear that it could only do so as part of a larger political entity. This was because the British were convinced that Singapore, being a densely populated city-state with no natural resources nor hinterland, could not otherwise survive as an independent state. And all the Singapore politicians knew that the only way for Singapore to wrestle its independence from the British was to become part of the Federation of Malaya. From 1959, any discussion of independence invariably included strategies for 'Merger' – the joining of the Malayan Federation.[5]

[1]Singapore Colony Order in Council, 1955.
[2]6 & 7 Eliz 2, C 59 (UK).
[3]SI 1958 No 1956, dated 21 Nov 1958.
[4]See Ong Chit Chung, 'The 1959 Singapore General Election' (1975) 6(1) Journal of Southeast Asian Studies 61–86.
[5]On the formation of the Federation of Malaysia, see Tan Tai Yong, *Creating 'Greater Malaysia': Decolonization and the Politics of Merger* (Institute of Southeast Asia 2015); Mohd Noordin Sopiee, *From Malayan Union to Singapore Separation*

https://doi.org/10.1017/asjcl.2024.18 Published online by Cambridge University Press

A key plank in the ruling PAP's 1959 election manifesto was that it would work to secure independence through a merger with the Federation of Malaya. However, the road would not be a smooth one. There were hurdles on several fronts. First, the Malayans needed to be persuaded to admit Singapore into the Federation. Tunku Abdul Rahman ('the Tunku'), founding Prime Minister of the Federation, was vehemently anti-communist and deeply concerned that a Chinese-majority Singapore would eventually fall into communist hands, and he could not afford to have 'a second Cuba' at his doorstep.[6] Neither did the Tunku wish to upset the racial balance of his Malay-dominated Federation by suddenly taking in 1.3 million Chinese from Singapore. Second, dissension within the ranks of the PAP led to a split in the Party. In July 1961, thirteen erstwhile PAP Assemblymen were expelled from the Party. They crossed the floor and formed the left-wing opposition Barisan Sosialis (Socialist Front) party (hereinafter 'the Barisan'). The PAP's 41-seat majority in the Assembly was suddenly down to 28. The Barisan was determined to avoid merger because it knew that the staunchly anti-communist Federation government would arrest and preventively detain the bulk of their pro-communist leaders and members. As Barisan leader Dr Lee Siew Choh astutely observed, the PAP 'is now hoping … that such [merger] arrangements will allow the Federation Government to purge its political opponents before the next general elections'.[7] Third, the British, who were also in the process of decolonising their Borneo territories (North Borneo, Sarawak, and Brunei), were keen to manage the whole federation in two phases: first to federate the Borneo states, then to incorporate the Borneo federation with Singapore into Malaysia.

The Barisan could not possibly reject the merger idea outright, as that would mean favouring an independent Singapore, a scenario that no right-thinking Singapore voter could accept as a viable option. To demolish the PAP's plan, the Barisan proposed an alternative merger plan that would be totally unacceptable to the Federation, thereby leading the Tunku to reject the merger totally. To do this, the Barisan capitalised on the citizenship provisions, which would give Singaporeans Singapore state citizenship but not Federal citizenship.

The Battle for Merger … and Legitimacy

The Barisan's attack on the PAP's merger was launched on two fronts. First, it argued that while it generally agreed with the Merger concept, the PAP's terms amounted to no more than a 'phoney merger' since the PAP 'did not tell the people of Singapore they wanted to make [them] … second-class citizens'.[8] This was especially so since the Heads of Agreement made it clear that Singapore citizens would not automatically become citizens of the Federation. I shall return to this particular point of objection later in my discussion of the referendum problem. One problem with the Barisan's first objection was that all the Barisan politicians had gone along with the same plan while they were members of the PAP, and never demurred until they defected. Indeed, as the PAP Assemblymen were at pains to point out in the Legislative Assembly, all the Barisan Assemblymen took an oath 'to abide by the Fourth Anniversary policy statement',[9] which endorsed merger with the Federation as a main priority.

However, the accusation that the PAP had failed to 'place the matter before the people'[10] is an altogether more serious one. David Marshall pointed out that while every political party would have

(2nd edn, University of Malay Press 2005); RS Milne, 'Malaysia: A New Federation in the Making' (1962) 3(2) Asian Survey 76; and Gerald P Dartford, 'Plan for Malaysian Federation' (1962) 45 Current History 278.

[6]'An UMNO warning of Singapore as "second Cuba"' (Straits Times, 15 Nov 1962) 5.

[7]See Singapore Legislative Assembly Official Reports (17 Jan 1962) col 235.

[8]Speech of the Barisan's ST Bani in the Legislative Assembly, Singapore Legislative Assembly Official Reports (17 Jan 1962) col 268.

[9]Speech of Prime Minister Lee Kuan Yew, Singapore Legislative Assembly Official Reports (17 Jan 1962) cols 253–254. In this speech, Prime Minister Lee pointed out that Dr Lee Siew Choh, Secretary-General of the Barisan Sosialis, had subscribed to this oath, which endorsed the PAP's policy of securing merger with the Federation.

[10]Singapore Legislative Assembly Official Reports, vol 16 (17 Jan 1962) col 227.

https://doi.org/10.1017/asjcl.2024.18 Published online by Cambridge University Press

had the mandate to negotiate for a merger, the PAP certainly 'never have [n]or ever had any mandate for this type of absurdity'.[11] Marshall attacked the PAP's lack of consultation in failing to convene an All-Party Conference to discuss the terms of the merger. The Barisan also pointed out that the PAP's failure to convene an All-Party Conference to finalise the merger plan denied the opposition parties 'the right to participate in charting the course of our own constitutional future',[12] and that

> … the people know only one road of constitutional advance, and that is that the future of Singapore should be planned and decided by the people of Singapore themselves and not by one political Party in conjunction with people outside Singapore.[13]

In the event that the All-Party Conference fails to resolve the terms of the merger, Dr Lee suggested that the Legislative Assembly be dissolved and general elections be called to resolve the problem.[14] The Barisan's constitutional objections were not as dubious as some press reports made them out to be. The argument put forth by the opposition leaders finds authority in constitutional theory. The Westminster parliamentary model of government utilises general elections to renew a particular party's mandate to govern in the next parliament, a mandate that is renewable periodically. On specific issues, a snap election is called to determine the issue, and if the government is defeated, it resigns. Thus, while the PAP may have had the *general* mandate to negotiate terms for the merger, it is doubtful if they ever had the mandate to enter into an agreement on specific terms of the agreement without prior consultation with the people. The Opposition was right in calling for an election to determine the issue of citizenship under the merger terms once and for all. In a nutshell, the Opposition accused the ruling PAP of lacking legitimacy – legal or political – to negotiate and enter into any agreement concerning merger with the Federation.

The PAP rejected Dr Lee's suggestions, arguing that there was no need to go to an election or to constitute an All-Party Conference, since it was merely carrying out its election promise to secure merger on terms as favourable to Singapore as possible. As the PAP's Culture Minister S Rajaratnam said:

> … the PAP Government was elected on the merger platform. It was known to everybody … It is quite clear … that we are carrying out a specific mandate which the people know, and, therefore, there is no need for an All-Party Committee to carry out an election programme … because we were elected on this programme, … politically and morally, we have every right to negotiate to carry out our election programme, and there is no need for us to have an All-Party Committee to decide whether or not we should implement our political programme … the PAP will decide what to do and when to consult the people in its own way. But what will it do is carry through its election programme without any reference to whatever the Barisan Sosialis might say …[15]

In any case, Prime Minister Lee offered a most unconvincing argument against the calling of an election. He argued that a general election was not the way to resolve the problem because the voters would be further confused by the multitude of election programmes and party stands on Singapore's constitutional future. In reality, Lee knew that if he acceded to the Barisan's demands of a general election, he would be falling into their trap, since the PAP would in all probability lose the election.

[11] ibid col 278.
[12] ibid col 229.
[13] ibid col 232.
[14] ibid col 233.
[15] ibid cols 239–244.

https://doi.org/10.1017/asjcl.2024.18 Published online by Cambridge University Press

The PAP was also unconvinced that an All-Party Conference would achieve anything since parties like the Barisan would arrive at the conference table with fixed minds and immutable agendas. PAP's Chairman, Dr Toh Chin Chye, further pointed out that in August 1961, he had written to all the opposition parties seeking clarification on their respective party's stand on whether defence, external affairs, and security should come under the control of the Central Government; and whether they felt that Singapore should retain autonomy in education and labour. None of the replies he received dealt directly with the two questions posed.[16]

How was the PAP going to deal with the legitimacy gap that had arisen? If independence was what the people of Singapore wanted, how was this desire being manifested and acted upon? The idea of holding a referendum to ascertain the electorate's wishes was first mooted in Borneo at a meeting between the Bornean political leaders and the Tunku in July 1961.[17] When asked if a referendum in all the territories would be held before a final decision was taken on the merger, the Tunku stated that he would 'leave the question to the people themselves'.[18] In September that year, Prime Minister Lee Kuan Yew – just back from his London meeting with the Tunku – was non-committal when asked by the press if he would call a referendum.[19] But clearly he had decided that this would be the best course of action to take, because three days later, Finance Minister Dr Goh Keng Swee announced that a referendum would be held during a radio forum on 'The Political Situation in Singapore Today'. Goh said that 'the correct way of determining the wishes of the people' on the merger issue was 'to have a referendum as soon as the constitutional and other details of merger had been settled, and as soon as these had been announced in the Legislative Assembly'.[20] The referendum proposal had the support of the United People's Party and the Singapore People's Alliance, but not the Barisan.[21]

The National Referendum Bill was introduced in the Singapore Legislative Assembly on 27 November 1961.[22] In the meantime, on 20 November 1961, the PAP government introduced its *White Paper*[23] setting out the details of the proposed merger plan. The debate on the *White Paper* ran from 20 November 1961 to 17 January 1962, with very few interruptions. During this debate, Lee Siew Choh made a speech lasting 7½ hours, a record that has never been beaten.[24] The Barisan was not alone in attacking the Government's *White Paper*. It was joined by the entire opposition bench, including former Chief Minister David Marshall (now Labour Party) and former PAP stalwart and Singapore mayor Ong Eng Guan (United People's Party). At the conclusion of the debate on 6 December 1961, the Legislative Assembly voted 33–0 in favour of accepting the *White Paper* 'as a working basis for a reunification of the two territories'. The 18 Barisan Assemblymen abstained.[25]

Having lost the vote on the *White Paper*, the Barisan filed a motion to require the Government to 'convene forthwith an All-Party Conference to discuss and to agree on all basic questions on the constitutional future of Singapore, and failing agreement' to 'seek without delay a new mandate from the people' on 17 January 1962.[26] When a division was called after a five-hour debate, it

[16]ibid cols 285–286.

[17]Roland Challis, 'Borneo men meet on big merger' (Straits Times, 9 Jul 1961) 1.

[18]ibid.

[19]'Merger "in orbit"' (Straits Times, 18 Sep 1961) 1.

[20]'Merger Referendum: Dr Goh says "the people must decide"' (Straits Times, 22 Sep 1961) 1.

[21]'Merger: An important point' (Singapore Free Press, 23 Sep 1961) 6; and 'Merger referendum: A Barisan query for government' (Straits Times, 2 Oct 1961) 4.

[22]Singapore National Referendum Bill, Singapore Legislative Assembly Official Reports, vol 15 (27 Nov 1961) col 718.

[23]White Paper on Reunification of Singapore and the Federation of Malaya, Cmd 33 of 1961 (hereinafter 'White Paper').

[24]In June 1964, the Standing Orders of Parliament were amended to curtail lengthy and repetitious speeches in Parliament. Members of the House are now limited to one hour. Incidentally, Dr Lee Siew Choh made another seven hour speech during the debates described above.

[25]'White Paper on Reunification of Singapore and Federation of Malaya', Motion, Singapore Legislative Assembly Official Reports, vol 15 (6 Dec 1961) col 1525.

[26]'Merger and Constitutional Future (Singapore)', Motion, Singapore Legislative Assembly Official Reports, vol 16 (17 Jan 1962) col 227.

https://doi.org/10.1017/asjcl.2024.18 Published online by Cambridge University Press

was defeated by a vote of 25–14, with seven abstentions and three absent.[27] Having lost the parliamentary motion, the Barisan now focused its attack on the National Referendum Bill, which was read for a second time on 14 March 1962.[28] The debate on this bill was long and relentless and it was finally passed on 6 July 1962 by a vote of 26–25, the slimmest of all possible margins.[29]

Having been defeated on the parliamentary motion to establish an All-Party Conference to discuss merger, and failing to pressure the PAP into calling a snap election, the opposition parties pushed for a referendum to determine the issue. The UPP's Ong Eng Guan offered perhaps the best rationale for the referendum:

> We support a referendum to thrash out the merger issue. Because it is only one issue, a referendum would be more suitable. The Liberal Socialist Party has the same views as the Workers' Party, the Barisan Sosialis and us on the merger proposals – Automatic citizenship for all Singapore citizens. But in a general election, if the people want to vote for automatic Federal citizenship for all Singapore citizens, they have to make up their minds whether to vote for the Liberal Socialists or the Singapore Congress who have the same stand, or to vote for the Barisan Sosialis or the Workers' Party or the United People's Party. Therefore … it is on that basis that we have called for a referendum to thrash out the matter of merger.[30]

In June 1962, the Barisan formed a Council of Joint Action with the Liberal Socialist Party, the Worker's Party, the United Democratic Party, and the Partai Rakyat to block the referendum. The idea was to take the referendum issue to the United Nations Committee on Colonialism.[31] Nineteen members of the Council signed a memorandum condemning the referendum on the grounds that the proposed constitutional changes were 'devised by the British Government to assure its continued right to bases in Singapore, and to protect its privileged economic position'.[32] The Council also criticised the terms and the lack of choice in the referendum. The PAP submitted its own memorandum, arguing that it obtained a mandate in the 1959 elections to negotiate merger. It also asked for and obtained a right of hearing before the Committee. On 26 July 1962, both Lee Siew Choh and Lee Kuan Yew appeared before the Committee and presented their respective cases. The Committee decided not to take any action on the protest.[33]

The date for the referendum was fixed for 1 September 1962. During the entire run-up to this date, the Barisan tried every means imaginable to unseat the PAP government. Between 27 June 1962 and 11 July 1962, the Legislative Assembly met to decide on the framing of the questions to be asked at the referendum. This was the Barisan's last chance to topple the PAP government. It tried its best to pressure PAP Assemblymen to cross the floor and join the opposition. Once the PAP lost its majority, the Government would have had to resign. On 13 July 1962, Dr Lee Siew Choh tabled a motion of no-confidence in the Government, but this was defeated by a majority of 24 votes against 16, with seven abstentions.[34]

The electorate was offered three options in the referendum. Since all the political parties in Singapore favoured merger, the Government argued that there was no live question as to whether

[27]ibid.

[28]'Singapore National Referendum Bill', Second Reading, Singapore Legislative Assembly Official Reports, vol 17 (14 Mar 1962) col 66.

[29]'Singapore National Referendum Bill', Third Reading, Singapore Legislative Assembly Official Reports, vol 18 (6 Jul 1962) col 924.

[30]Singapore Legislative Assembly Official Reports, vol 16 (17 Jan 1962) cols 247–248.

[31]The full name of the Committee was 'The United Nations Special Committee on the Situation With Regard to the Implementation of the Declaration on the Granting of Independence to Colonial Countries and Peoples'.

[32]Milton Osborne, *Singapore and Malaysia* (Cornell University Southeast Asia Program 1964) 26 (hereinafter 'Osborne').

[33]ibid 27.

[34]The seven Alliance members and the independent member abstained. Three Assemblymen were absent.

https://doi.org/10.1017/asjcl.2024.18 Published online by Cambridge University Press

or not the people wanted Merger. The issue concerned the terms and arrangements under which Merger should be effected. The first option, *Option A*, was the PAP's proposal, which, in keeping with the Heads of Agreement set out in the *White Paper*, gave Singapore autonomy in labour, education, and other agreed matters set out therein, and with Singapore citizens automatically becoming citizens of Malaysia. *Option B* – which the Barisan favoured – offered the voter a 'complete and unconditional merger for Singapore as a state on an equal basis with the other eleven states in accordance with the Constitutional documents of the Federation of Malaya', and *Option C* – which the Singapore People's Alliance preferred – offered the electorate merger on 'terms no less favourable than those given to the Borneo territories'.

Both the PAP and the Barisan campaigned hard for their respective proposals. The Barisan's proposal was for Singapore to enter the Federation on the same terms as Penang and Malacca (two former Straits Settlements colonies) as the 12th state of the Federation, which meant automatic federal citizenship for everyone. As the PAP's Dr Goh Keng Swee gleefully pointed out, this assumption was wrong because the law provided that only persons born in Penang or Malacca automatically qualified as citizens. Out of the 634,000 voters in Singapore, only slightly more than half of them – about 320,000 – were actually born in Singapore. Opting for the Barisan's proposal would mean disenfranchising half of the voting population. Furthermore, Prime Minister Lee had secured the Tunku's agreement to give all Singaporeans federal citizenship. Realising its mistake, the Barisan then tried to persuade voters to cast blank votes instead. This was a curious strategy considering that the terms of the referendum provided that any person casting a blank vote was deemed to have consented to the Legislative Assembly making the decision for him or her. Even with its slim majority in the Assembly, this meant giving the vote to the PAP's Option A. This tactical change was calculated to score a propaganda victory if most of the votes were blank. If this came to pass, the Barisan could accuse the PAP of having 'faked the people's wishes' and attempting 'to bring about a phoney merger'.[35] The PAP was quick to counter-attack by telling the people that if most of the votes were for Option B, they would have no choice but to count the blank votes as being in favour of Option B. This clever manoeuvre sent half the electorate not born in Singapore 'into a state of confused panic, which Goh Keng Swee cultivated by sending out some 40 trucks fitted with loudspeakers to warn the flummoxed masses that if they cast blank votes, they stood to lose their citizenship'.[36]

The final results of the referendum swung overwhelmingly in favour of the PAP's Option A, with 71% of the voters opting for the merger on the Government's terms.[37] On 16 September 1963, Singapore gained its independence from Great Britain – which had ruled the island for 140 years – and joined the newly formed Federation of Malaysia as a constituent state. Independence from the United Kingdom was obtained through two primary documents: (a) the *Agreement Relating to Malaysia* ('Malaysia Agreement') signed by the governments of the Federation of Malaya, Singapore, North Borneo, and Sarawak on 9 July 1963; and (b) the *Malaysia Act 1963*, enacted by the UK Parliament.[38] Section 1(1) of the Malaysia Act 1963 provides that 'Her Majesty's sovereignty and jurisdiction in respect of the new States shall be relinquished so as to vest in the manner agreed' under the Malaysia Agreement.

As we have seen, the extraordinary political journey that brought Singapore from self-government in 1959 to independence in 1963 proved to be a perilous one for the People's Action Party, which attained legal and political legitimacy by dint of its landslide victory in the 1959 general election. However, its political legitimacy was significantly weakened first by the party's internal split in 1961 (leading to the establishment of the Barisan Sosialis) and further defections and even fatalities.

[35]John Drysdale, *Singapore: Struggle for Success* (Times Books International 1984) 312.
[36]Dennis Bloodworth, *The Tiger and Trojan Horse* (Times Books International 1986) 261.
[37]ibid.
[38]Malaysia Act, C 35 (UK).

https://doi.org/10.1017/asjcl.2024.18 Published online by Cambridge University Press

The situation was so dire that at one point, the PAP lost its majority in the Assembly. Dennis Bloodworth gives the most graphic description of those heady days in the Assembly:

> The fight in the Assembly was still a needle match – with the needle hovering at the halfway mark to indicate the frailty of a government majority dependent on crucial votes from the right-wing opposition that Lee had always been so rude to. A single turncoat could change history …
>
> The stout but sick Madame Sahorah, now shuttling regularly between hospital and House, was once more chivvied to the brink of defection, only to be hauled back by a loyal PAP assemblyman in the nick of time. But in July another assemblywoman[39] suddenly resigned, and when she joined the Barisan Sosialis five weeks later, the government lost its majority of one to the opposition. Within a week, however, a former member of the PAP[40] who had deserted to Ong Eng Guan recrossed the floor, and the party was one up again. Score: 26 to 25, with 16 days to go to the referendum. Five days after that a PAP minister died[41] and the two sides were back to 25 all, but as Lee said, "until the opposition outvotes us, we are the constitutional government." Referendum Day came like the final bell on 1 September, and Lee had kept his title.[42]

Realising that the PAP's legitimacy to negotiate Merger stood on a crumbling precipice, Prime Minister Lee Kuan Yew needed a plebiscitary device to bolster his party's legitimacy. However, he could not afford to call fresh elections and face almost certain defeat. His party's legitimacy, which had hitherto been based on the ballot box, needed to be refreshed, and he cleverly chose the device of a national referendum. To succeed, a new law would need to be passed and the terms of the referendum needed to be hammered out, but this could be managed as long as the PAP held on to its wafer-thin majority in the Assembly. With a referendum, the PAP could control the agenda and the voters could focus squarely on the most important question in their political lives. The overwhelming vote in favour of the Government's Option A proposal not only restored whatever political and numerical legitimacy the PAP may have lost in the intervening four years, but effectively transformed the PAP into the state's leading political party.

The legitimacy of the Agreement and the 1963 *State of Singapore Constitution* that emerged from the independence talks flowed from the legalities that attended the decolonisation process. But this was significantly bolstered and buttressed by the PAP government's decision to call for a national referendum in 1962 to shore up its emaciated parliamentary majority. Thus, while no constituent assembly was formed to draft this new constitution, the terms of Singapore's independence and entry into the Federation of Malaysia had been comprehensively hammered out and agreed upon by the political leaders on all sides and, more importantly, by a Singapore government that, thanks to the 1962 referendum, had what was then seen as an unassailable right to do so.

Secession and a Second Independence, 1965

A Break in Legal Continuity: Whither Legitimacy?

Singapore became independent for the second time on 9 August 1965. The circumstances leading to Singapore's secession from the Federation of Malaysia differed from those that led to its independence from Britain. The secession from the Federation of Malaysia had been secretly negotiated by a

[39]The assemblywoman was Madam Ho Puay Choo, who, according to the PAP, lost her nerves under pressure.

[40]This was SV Lingam.

[41]The much respected and well-liked Minister for Labour, Ahmad bin Ibrahim, who had been ill for some time, died on 21 August 1962 at the age of 35. Universal bereavement for Ahmad Ibrahim was marked by a two-day suspension of political activity. Today, one of the longest roads in the Jurong Industrial Estate, Jalan Ahmad Ibrahim, is named after him.

[42]Bloodworth (n 36) 252.

https://doi.org/10.1017/asjcl.2024.18 Published online by Cambridge University Press

small cabal of top ministers from the Federation and the State of Singapore, and the Separation Agreement[43] and the Malaysia (Singapore) Act were drafted in secret in the days leading up to the Proclamation of Singapore on 9 August 1965,[44] when Singapore's independence was publicly announced. The nature of these negotiations was made public by Malaysian Prime Minister Tunku Abdul Rahman when he announced the secession of Singapore at the Dewan Ra'ayat (House of Representatives) on 9 August 1965:

> This matter was discussed with the leaders of Singapore as a result of which we had drawn up an agreement – this sets out the terms agreed upon … This agreement has been signed by all the members of the Singapore Government and by selected members of the Central Government. The agreement is to grant Singapore complete independence and sovereignty.[45]

In the days that followed, the people of Singapore were promised a new constitution, drafted with the expert advice of top jurists, but four months later, there was none.[46] Instead, Parliament – which was convening for the very first time since Singapore left the Federation on 8 December 1965 – decided to cobble together a new constitution, using the 1963 State of Singapore Constitution as its primary source document. Fourteen years later, the Constitution was amended to empower the Attorney-General to consolidate and publish the composite constitution into a single coherent document known as the 'Reprint of the Constitution'.[47]

By any account, Singapore's secession from the Federation of Malaysia was a sudden event. The only people who could be assumed to have planned it in any way were the inner circle leaders of the PAP (on Singapore's side) and the ruling Alliance (on the Federation's side). Indeed, negotiations were kept secret from some key members of the PAP cabinet for fear that they would jettison the talks.[48] And because of the secrecy involved, there was obviously no consultation with any other political actors, and throughout, everyone was kept in the dark. Indeed, Prime Minister Lee Kuan Yew was not wrong when he thanked his Law Minister EW Barker for successfully negotiating 'a bloodless coup'.[49]

What authority did the PAP government have to negotiate Singapore's secession from Malaysia? Neither the Federal Constitution nor the State of Singapore Constitution 1963 contain any clause or procedure for state secession. In other words, there were no Hartian secondary rules of recognition to facilitate Singapore's secession from the Federation. And unlike in 1959, the PAP did not promise its voters an exit from the Federation when it campaigned for the 1963 general election and could thus not rely on its previous argument that its electoral majority invested it with sufficient legitimacy to speak for the people. Though the PAP won 37 of the 51 seats (72.5% of the seats), it cannot be said to speak unequivocally for 'the people' of Singapore, especially since the opposition Barisan Sosialis still held thirteen seats and Ong Eng Guan's UPP one seat in the Legislative Assembly. And unlike in the lead-up to merger in 1961–1963, none of the opposition parties were involved in negotiating Singapore's exit from Malaysia. The successful secession of Singapore from the

[43]'Agreement relating to the separation of Singapore from Malaysia as an independent and sovereign State', (1966) UN Treaty Series, No 8206; Independence of Singapore Agreement 1965 (Singapore Statutes, 2020 Revised Edition).

[44]'Proclamation of Singapore' by Prime Minister Lee Kuan Yew, 9 Aug 1965, Independence of Singapore Agreement 1965 (Singapore Statutes, 2020 Revised Edition).

[45]Tunku Abdul Rahman, 'Statement by Prime Minister, Malaysia', Parliamentary Debates Official Reports, vol 11(8) (9 Aug 1965) col 1466.

[46]See 'Singapore's constitution: a full debate' (Straits Budget, 1 Dec 1965) 2; David Marshall, 'The "temporary" constitution for Singapore' (Straits Budget, 8 Dec 1965) 2; and David Marshall, 'Singapore's "untidy" constitution' (Straits Times, 21 Dec 1965) 12.

[47]The Constitution (Amendment) Act, No 10 of 1979.

[48]An account of these negotiations can be found in Kevin YL Tan, 'The Legalists', in Kevin YL Tan & Lam Peng Er (eds), *Lee's Lieutenants: Singapore's Old Guard* (rev edn, Singapore Straits Times 2018) 140, 165–169.

[49]ibid 168.

https://doi.org/10.1017/asjcl.2024.18 Published online by Cambridge University Press

Federation was accomplished by political fiat and not by law. What happened was, in the words of Andrew Harding, a 'legal revolution' which, if successful, 'begets its own legality'[50] and, one might add, its own legitimacy as well. There was a clear legal break from the legal past and a new legality was thus established – the old *grundnorm* had now been replaced by a new one.[51] What, then, was the exact nature of this new *grundnorm*? Did Singapore's former Legislative Assembly (now Parliament) wield unfettered power and authority to establish a new constitutional order?

Framing Singapore's Independence Constitution

The legalities of Singapore's secession and independence involved a Separation Agreement[52] signed by all members of the Singapore cabinet and five members of the Federal cabinet, including Prime Minister Tunku Abdul Rahman,[53] the Proclamation of Singapore to be made by the Malaysian Prime Minister,[54] and the Constitution and Malaysia (Singapore Amendment) Act,[55] which was passed unanimously by the Federal Parliament on 9 August 1965.[56] While the Separation Agreement had been signed between the two governments, it was the Malaysian government that undertook to relinquish sovereign control of Singapore. There was no corresponding action on Singapore's part on Singapore Day (9 August 1965) to constitute itself as a sovereign republic, nor to establish a constituent body or commission to draft a new constitution. Let us consider the series of documents by which Singapore's independence was effected. It should be noted that all three laws were passed on the same day – 22 December 1965 – with the unanimous approval of Parliament. The 14 opposition members of Parliament boycotted Parliament that day,[57] leaving the PAP the hegemon in Parliament that day. Interestingly, Culture Minister S Rajaratnam, commenting on the boycott a few days later, remarked that 'Singapore is for the time being a one-party State by consent'.[58]

The Constitution and Malaysia (Singapore Amendment) Act (Malaysia)

The first legal move to facilitate Singapore's secession from the Federation of Malaysia was for the Federal Parliament to enact the Constitution and Malaysia (Singapore Amendment) Act[59] on 9 August 1965. This Act effectively transferred all legislative and executive powers previously possessed by the Federal Government to the new Government of Singapore. Under section 4 of this Act, the Malaysian Parliament affirmed that the '*Government of Singapore*' retained its executive authority and legislative powers to make laws. Under section 5, the 'executive and legislative powers of the Parliament of Malaysia to make laws for any of its constituent States … shall be transferred so as to *vest in the Government of Singapore*' (emphasis added). The fact that the parliamentary

[50]See AJ Harding, 'Parliament and the Grundnorm in Singapore' (1983) 25 Malaya Law Review 351, 360–361 (hereinafter 'Harding').

[51]ibid 360.

[52]An Agreement Relating to the Separation of Singapore from Malaysia as an Independent and Sovereign State (signed at Kuala Lumpur, 7 Aug 1965), United Nations Treaty Series 1966, vol 287, No 8206, 90–102.

[53]The other signatories from the Federation were Tun Abdul Razak (Deputy Prime Minister); Dato Dr Ismail bin Dato Abdul Rahman (Home Affairs Minister); Tan Siew Sin (Finance Minister); and Dato VT Sambanthan (Minister of Works, Post and Telecommunications).

[54]Proclamation of Singapore by Tunku Abdul Rahman, 9 Aug 1965, Independence of Singapore Agreement 1965 (Singapore Statutes, 2020 Revised Edition).

[55]Act No 53 of 1965 (Malaysia).

[56]After a debate that lasted over three hours, the Bill was passed by a vote of 126 in favour, none against and one abstention. See 'The Constitution and Malaysia (Singapore Amendment) Bill', Parliamentary Debates Official Reports, vol 11(8) (9 Aug 1965) col 1518.

[57]'Barisan MPs won't be there' (Straits Times, 8 Dec 1965) 1; 'The missing Opposition' (Straits Times, 9 Dec 1965) 1; J Francis, 'Opposition boycott "a gross dereliction of duty"' (Straits Times, 16 Dec 1965) 13.

[58]'S'pore a one-party State by consent says Raja' (Straits Times, 15 Dec 1965) 15.

[59]ibid.

https://doi.org/10.1017/asjcl.2024.18 Published online by Cambridge University Press

draftsmen used the phrase 'Government of Singapore' in these two sections has given rise to doubts as to whether the whole of Malaysia's erstwhile *legislative and executive powers* in relation to Singapore had been legally transferred to the *executive branch* of the new Singapore state. If this were so, then the Cabinet would technically be vested with legislative powers.

This appears to be a reasonable implication. If these powers were indeed to be conferred on the *executive as well as the legislative bodies*, the draftsman might have worded the section to read 'Singapore Legislative Assembly' instead of 'Government of Singapore'. This problem is further compounded when one reads section 7, which provides that all laws in force in Singapore immediately before Singapore Day 'shall continue to have effect according to their tenor … subject however to amendment or repeal by the *Legislature of Singapore*'. The semantic argument is that if the draftsman had deliberately used the phrases 'Legislature of Singapore' and 'Government of Singapore', they cannot possibly be used interchangeably and must therefore refer to different entities.

Section 8 of the Constitution and Malaysia (Singapore Amendment) Act preserved the existing judicial structure and provided that appeals from the High Court 'shall continue to lie to the Federal Court of Appeal of Malaysia and then to the Privy Council'.

The Constitution of Singapore (Amendment) Act – Act No 8 of 1965

The second enactment was the Constitution of Singapore (Amendment) Act[60] – Act No 8 of 1965 – which was passed by the Singapore Parliament on 22 December 1965, and made retrospective to 9 August 1965. It should be noted that the Singapore Parliament did not sit for almost four months after leaving the Federation. The first session of Singapore's First Parliament opened on 8 December 1965.

This Act amended the Singapore State Constitution 1963 by changing the procedure required for making constitutional amendments. The two-thirds majority was abolished and only a simple majority was required for an amendment to the Constitution. In addition, this Act also changed the relevant nomenclatures to bring the Constitution into line with Singapore's independence status.

The Republic of Singapore Independence Act – Act No 9 of 1965

The final document of importance is the Republic of Singapore Independence Act (RSIA) – Act No 9 of 1965[61] – which was passed immediately after the Constitution (Amendment) Act. This Act was also passed retrospectively, and certain provisions of the Malaysian Federal Constitution were made applicable to Singapore.[62] Section 6(1) of the RSIA further provides that the Malaysian provisions shall be 'subject to such modifications, adaptations and qualifications and exceptions as may be necessary to bring them into conformity with the independent status of Singapore upon separation from Malaysia'. The RSIA also assumed for the Singapore executive and legislature the powers relinquished by the Federation of Malaysia under the Constitution and Malaysia (Singapore Amendment) Act.

As the RSIA was enacted immediately after Act No 8 of 1965 – which, *inter alia*, reduced the majority required for a constitutional amendment from two-thirds to a simple majority – is it a fresh Act of Parliament or a constitution amendment act? Put another way, was Parliament acting

[60]Act No 8 of 1965 (passed on 22 Dec 1965). See 'Republic of Singapore Independence Bill', Second Reading, Singapore Parliamentary Debates Official Reports, vol 24 (22 Dec 1965) col 452; Third Reading, col 455.

[61]Act No 9 of 1965.

[62]Section 6 of the RSIA provided that save for the following provisions, the whole of the Federation of Malaysia Constitution would continue to be in force in Singapore: Part I; Article 13; Articles 14 to 18; Article 19A; Article 22; Articles 28 and 28A; Articles 30, 30A and 30B; Part IV; Part V; Part VI; Part VII; Part VIII; Articles 133 and 134; Article 139; Articles 141 to 143; Articles 146A to 148; Part XII; Part XIII; Part XIV; as well as the Third, Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, Eleventh, and Thirteenth Schedules.

https://doi.org/10.1017/asjcl.2024.18 Published online by Cambridge University Press

under its legislative authority under the State Constitution 1963, or was it acting extra-legally under its assumed plenary powers?

Harding argues that the curious wording used in the Constitution and Malaysia (Singapore Amendment) Act necessarily leads us to the reasonable conclusion that when the Singapore Parliament passed the RSIA, it was acting beyond the limits of the power conferred on it by the Singapore Amendment. As the Singapore Parliament had no powers to grant Singapore a new Constitution, it effectively took upon itself the right to determine the entire content of the new Constitution and established its plenary competence at the same time when it passed the RSIA:

> … a legislature cannot grant itself plenary powers – either it has them or it has not, but should we not see the RSIA and in particular section 5 as an assertion of fact, the fact of legislative supremacy? The RSIA resembles a Constitution … in all respects save one – it is a gift of the legislature. No Constitution authorises this gift because the Constitution is itself a gift. The Constitution is not the *grundnorm*, but merely a manifestation of the *grundnorm*. The *grundnorm* is the supremacy of the legislature. Parliament in passing the RSIA assumed the mantle of supremacy in Singapore.[63]

In conclusion, Harding points out that if the Singapore Parliament can enact a constitution by the RSIA, it can also easily enact another Constitution by another Act of Parliament. There would then be no need to hold a referendum or establish a special Constituent Assembly; a simple Act passed by Parliament would be sufficient.

Now, if the RSIA is no more than an ordinary parliamentary act (as Harding suggests), then it can be repealed in the same way as any other ordinary legislation, ie, by a simple majority of votes in Parliament. But if the RSIA is repealed in this way, does that mean that the provisions of the Malaysian Federal Constitution, which it made applicable to Singapore, would also be extinguished at the same time?

In 1979, Parliament passed the *Constitution (Amendment) Act*, No 10 of 1979.[64] Among other things, the Act amended the amendment procedure of the Constitution[65] and, as has already been mentioned, authorised the Attorney-General to print and publish a reprint a single composite document called the 'Reprint of the Constitution of the Republic of Singapore, 1979'.[66] Both these provisions pose a set of related problems. The first pertains to the power to amend the Constitution. Act No 10 of 1979 restored the constitution amendment requirement to a two-thirds majority since '[a]ll consequential amendments that have been necessitated by our constitutional advancement have now been enacted.'[67] This 1979 amendment obviously refers only to the amendment procedure for the 1963 State Constitution and does not appear to affect provisions of the Malaysian Federal Constitution introduced by section 6 of the RSIA. Yet, in the first consolidated (and subsequent) reprints of the Constitution, Article 5(2) provides that

> [a] Bill seeking to amend *any provision in this constitution* shall not be passed by Parliament unless it has been supported on Second and Third Readings by the votes of not less than two-thirds of the total number of the Members thereof. (emphasis added)

[63]Harding, 'Parliament and the Grundnorm in Singapore' (n 50) 366.

[64]See also S Jayakumar, 'Legislation Comment: The Constitution (Amendment) Act, 1979 (No 10)' (1979) 21 Malaya Law Review 111.

[65]Article 90 of the Singapore State Constitution 1963, which became Article 5 of the 1980 and 1985 Reprints.

[66]Article 93 of the Singapore State Constitution 1963, which became Article 155 of the 1980 and 1985 Reprints.

[67]See Singapore Parliamentary Debates Official Reports, vol 39 (30 Mar 1979) col 235.

https://doi.org/10.1017/asjcl.2024.18 Published online by Cambridge University Press

It thus appears that in consolidating the Constitution for reprint, the Attorney-General has 'in effect amended the amendment procedure by making it applicable to the Malaysian provisions' as well.[68]

Legitimacy of the New *Grundnorm*

While Harding is certainly right in locating the sovereignty and legitimacy of Singapore's post-1965 Parliament in a new revolutionary *grundnorm* that established and begot its own legality, Singapore's Parliament did not suddenly become sovereign. What, then, was the status of Singapore's Parliament, and what power or legitimacy did it possess to make a new constitution? The Court of Appeal had occasion to consider this question – albeit in a tangential enquiry – in the case of *PP v Taw Cheng Kong*.[69] The question before the Court of Appeal was whether, at independence, Singapore's Parliament had power to enact laws with extra-territorial effect. In the course of its judgment, the Court of Appeal considered the nature of Parliament's legislative power at this time and concluded that the Parliament that sat on 22 December 1965 exercised plenary powers:

> 30 … The inherent nature of being an independent free sovereign republic, in our view, meant that Parliament could pass a law to regulate the rights and liabilities between persons in Singapore or, for that matter, anywhere else. The laws which Parliament had enacted would be perfectly valid in Singapore and would be given effect to by local courts as far as they could. In this sense, on the assumption of independence, Parliament in Singapore had plenary power, and if it chose to, it could also empower the local courts to punish any person present in its territories for having done physical acts wherever the acts were done and wherever their consequences took effect. Parliament's power, however, would have no legal effect in other countries, except to the extent that those countries permit it. Thus, the political fact of Singapore's independence on 9 August 1965 meant that Parliament possessed unlimited legislative powers. It had full plenary powers of legislation, including the power to enact extraterritorial laws, however limited the scope of its legislative powers might have been under the 1963 State Constitution.
>
> 31 On 22 December 1965, Parliament enacted the Constitution of Singapore (Amendment) Act and the RSIA with retrospective effect to Singapore Day. In particular, it seemed to us that there were three main reasons for enacting the RSIA. First, it was to ensure that there was no hiatus in the written laws of Singapore; second, the passing of s 5 of the RSIA was to pass the legislative powers of the Malaysian Parliament to the Parliament in Singapore so as to avoid any doubts over the extent of its legislative powers; and third, it was to enact a Constitution for Singapore, incorporating certain fundamental rights which, together with the State Constitution and Constitution of Singapore (Amendment) Act, could be put into one simple document.
>
> 32 However, where did Parliament obtain its power to enact the Constitution of Singapore (Amendment) Act and the RSIA? The only possible answer, it appeared, was in its exercise of its plenary legislative powers as the Legislature of an independent and sovereign state (s 5 of the Constitution and Malaysia (Singapore Amendment) Act 1965 having failed to do so …). Thus, it was the political fact of Singapore's independence and sovereignty that had the consequence of vesting the Legislative Assembly of Singapore with plenary powers on Singapore Day …

[68]See AJ Harding, 'The 1980 Reprint of the Constitution of the Republic of Singapore: Old Wine in a New Bottle?' (1983) 25 Malaya Law Review 134, 136.

[69][1998] 2 SLR(R) 489.

https://doi.org/10.1017/asjcl.2024.18 Published online by Cambridge University Press

35 The consequence of acquiring the attributes of sovereignty was that Parliament became fully competent and capable of enacting the RSIA despite the hiatus in constitutional law between 9 August and 22 December 1965. But what was also significant, as we mentioned earlier, was that in passing the RSIA, Parliament took the precaution of vesting the plenary legislative powers of the Malaysian Parliament in the Singapore Parliament under s 5 so as to avoid any doubt about its legislative powers.

36 The preamble to the RSIA states:

> An Act to make provision for the Government of Singapore consequent on her becoming an independent and sovereign republic separate from and independent of Malaysia.

Section 5 of the RSIA then states:

> The legislative powers of the Yang di-Pertuan Agong and of the Parliament of Malaysia shall on Singapore Day cease to extend to Singapore and shall be transferred so as to vest in the Head of State and in the Legislature of Singapore respectively.

37 Therefore, under s 5 of the RSIA, all plenary legislative powers previously possessed by the Malaysian Parliament (which must also necessarily include the power to legislate extraterritorially) ceased to extend to Singapore and were transferred to and vested in the Singapore Parliament instead.

Writing in 2017, Chan Sek Keong, who as Attorney-General argued the *Taw Cheng Kong* case (above), reiterated the significance of the 1963 Constitution and argued that the RSIA was in fact an amendment to that Constitution:

47 The significance of the 1963 Singapore Constitution cannot be understated. The text of the 1963 Singapore Constitution was annexed to the Malaysia Agreement, under which the UK relinquished its sovereignty and jurisdiction in respect of North Borneo, Sarawak and Singapore and vested it in Malaysia, 'in accordance with this Agreement and the constitutional instruments annexed to this Agreement.' The 1963 Singapore Constitution came into force in Singapore *immediately before* Malaysia Day under Art 94 of the Malaysian Constitution.'

48 The 1963 Singapore Constitution provided a complete framework for the Government of the 1963 State of Singapore. It provided, *inter alia*, a structure of government based on the separation of powers, consisting of: (a) Yang di-Pertuan Negara as the constitutional Head of state who must act in accordance with the advice of the Cabinet; (b) an executive consisting of the Head of State and the Cabinet; (c) the Legislature consisting of the Head of State and the Legislative Assembly; and (d) a high court sitting in Singapore but which is part of the federal judiciary. The 1963 Singapore constitution did not incorporate fundamental rights, but Part II ('Fundamental Liberties') of the Malaysian Constitution was applicable to Singapore. In short, the 1963 Singapore Constitution incorporated all the basic features of the Westminster model of constitution.[70]

The 'framing' of Singapore's post-Malaysia constitution was thus undertaken by Singapore's Parliament acting in a plenary capacity. The power to do so is necessarily an assumed or asserted one since no legal provision existed to imbue Parliament with such extensive authority and power.

[70]Chan Sek Keong, 'Basic Structure and Supremacy of the Singapore Constitution' (2017) 29 Singapore Academy of Law Journal 629, 647.

https://doi.org/10.1017/asjcl.2024.18 Published online by Cambridge University Press

There was, as noted above, a clear break in legal continuity, and nothing in the PAP government's plebiscitary mandate from its electoral victory in the 1963 general election could conceivably have authorised it to negotiate a secession from the Malaysian Federation nor to establish Singapore as an independent unitary state. Legitimacy for the PAP's actions and for Parliament's subsequent legislative forging of a new constitution stemmed neither from the PAP's parliamentary majority nor its incumbency as the Government but rather from the revolutionary situation it had engineered. The political fact and reality of Singapore's independence from the Federation placed both the new state and its government in an exceptional, revolutionary-type situation, which allowed the incumbent government and legislature to step into the legal void and assume the entire sovereignty of the new state. The fact that the Barisan decided to boycott Parliament also obliterated any possible objection to the PAP government assuming full sovereign powers. This tentative legitimacy was, however, strengthened three years later when independent Singapore went to the polls for the first time in April 1968. The Barisan boycotted the elections and urged voters not to take part in the polls, arguing that Singapore's independence was 'phoney'.[71] Because of this, the PAP was returned to power on Nomination Day on 17 February 1968, winning the remaining seven contested seats with an 86.72% majority.[72] The PAP's clean sweep at the polls reinforced not only its legitimacy to rule, but also to continue making and remaking the constitution. Of course, the PAP's overwhelming win was due to the performance legitimacy that it acquired in the intervening three years.

The Reprint of the Singapore Constitution: Legalities & Legitimacy

Under the 1979 Amendment, Article 93 of the 1963 State Constitution as reprinted in RS(A) 14/1966 was amended to authorise the Attorney-General to

> cause to be printed and published a consolidated reprint of the Constitution of Singapore as amended from time to time, amalgamated with such of the provisions of the Constitution of Malaysia as are applicable to Singapore, into a single, composite document to be known as the Reprint of the Constitution of the Republic of Singapore, 1979.

This amendment gives the Attorney-General considerable discretionary powers in the consolidation of the Constitution. Clause 5 of this Article 93 (the present Article 155) provides, *inter alia*, that he 'shall have the power in his discretion' to make such 'modifications as may be necessary or expedient in consequence of the independence of Singapore upon Separation from Malaysia'[73], to 're-arrange the Parts, Articles and provisions of the Constitution of Singapore and of the Constitution of Malaysia',[74] and 'generally, to do all other things necessitated by, or consequential upon, … or which may be necessary or expedient for the perfecting of the consolidated Reprint'.[75]

Two issues arise for consideration here. First, if the 1980 Reprint is a consolidation of the existing Constitution of the Republic of Singapore, then Harding must be correct in asserting that the RSIA is nothing more than an ordinary act passed by the legislature because the 1980 Reprint did not include provisions of the RSIA. Notably, sections 7 (official languages of Singapore) and 8 (President's power of pardon) were absent from the Reprint.[76] This brings us back to the question

[71]Joseph Yeo, 'Feb 17 is line-up day: Barisan to boycott polls' *Straits Times*, 10 Feb 1968, at 1; and 'Barisan starts its "Don't vote" campaign' (Straits Times, 15 Feb 1968) 16.

[72]"The PAP sweep to victory' (Straits Times, 14 Apr 1968) 1.

[73]cl 5(a).

[74]cl 5(b).

[75]cl 5(d).

[76]See RH Hickling, 'Legislation Comment: Reprint of the Constitution of the Republic of Singapore' (1980) 22 Malaya Law Review 142, 144; Kevin Tan Yew Lee, 'The Evolution of Singapore's Modern Constitution: Developments from 1945 to the Present Day' (1989) 1 Singapore Academy of Law Journal 1, 21–22.

https://doi.org/10.1017/asjcl.2024.18 Published online by Cambridge University Press

of the status of the RSIA. In 1979, according to the then Attorney-General Tan Boon Teik, it was clear that the RSIA was not part of the consolidated Constitution of the Republic of Singapore. If it were indeed part of the Constitution, the whole part of the Act would have been included in the first Reprint of 31 March 1980. It wasn't.

Between 1965 and 1999, Parliament and the Attorney-General appeared to regard the RSIA as an ordinary document and not part of the constitution. This was noticed by several academics who asked if the RSIA was an ordinary Act of Parliament or a constitutional enactment.[77] Back in 1989, I noted that sections 7 and 8 of the RSIA were not incorporated into the 1980 Reprint, as mentioned above.[78] The second Reprint of 1992 continued to omit these provisions. However, these provisions were incorporated in the 1999 Reprint in articles 153A (official languages) and 22P (grant of pardon). With their inclusion, it appears that the then Attorney-General, Chan Sek Keong – consistent with the position he later articulated[79] – considered the RSIA to be a constitutional document whose substantive provisions needed to be entrenched in the Constitution. The 2020 Reprint continues incorporating these provisions.

Article 155(3) provides that any Reprint of the Constitution issued by the Attorney-General 'shall be deemed to be and shall be, without any question whatsoever in all courts of justice and for all purposes whatsoever, the authentic text of the Constitution of the Republic of Singapore in force as from the date specified in that reprint until superseded by the next or subsequent reprint'. By dint of this presumption and the Attorney-General's actions in 1999, substantive provisions of the RSIA are now part of 'this Constitution'. Chan Sek Keong, who was Attorney-General when the 1999 Reprint was published, explains the basis of his view:

> … since the word 'amendment' includes 'addition' [under Article 90], the Legislative Assembly by enacting the RSIA to add the provisions of the Malaysian Constitution by incorporating them into the 1963 Singapore Constitution was doing precisely what it was empowered to do under Art 90. When PM Lee moved the bill at its second and third readings to enact the RSIA, he requested a two-thirds majority vote, contrary to the Speaker's opinion that only a simple majority was needed, for the reasons that the bill 'does make a fundamental alteration to the nature of the Singapore Constitution enactment, for it incorporates into that enactment all the Federal powers which were, whilst we were in Malaysia, part of the Federal Constitution. The incorporation of new provisions into the 1963 Singapore Constitution would have the effect of amending it. Therefore, the RSIA was, in substance, a constitutional amendment, although it did not recite as such … It is therefore argued that the RSIA … was indeed passed by the Legislative Assembly pursuant to its amending power under Art 90 of the 1963/1965 Singapore Constitution.[80]

What is worrying about the presumption under Article 155(3) is that it appears to be irrebuttable. In *Heng Kai Kok v Attorney-General of Singapore,*[81] Chan Sek Keong JC (as he then was) held (albeit in *dicta*) that

> [b]y virtue of Article 155 thereof, the Reprint shall be deemed to be and shall be, without any question whatsoever in all courts of justice and for all purposes whatsoever, the authentic text of the Constitution of the Republic of Singapore in force as from March 31, 1980 until superseded by the next or subsequent authorised reprint.[82]

[77]See, eg, Hickling (n 76) and Tan (n 76).
[78]Tan (n 76) 21–22.
[79]Chan, 'Basic Structure and Supremacy (n 70).
[80]ibid 653–654.
[81][1987] 1 MLJ 98.
[82]ibid 102.

https://doi.org/10.1017/asjcl.2024.18 Published online by Cambridge University Press

This holding would imply that, technically speaking, even if the Attorney-General were to make a *bona fide* mistake in the consolidation process, the wording of the provision in question could not be called into question in any court of law. The only remedy would be for Parliament to be summoned and the errant provision amended or repealed according to the procedure established under Article 5(2). This cannot possibly be correct.

Despite his best efforts, the Attorney-General can still make mistakes in consolidating the Constitution. Take the instance of Article 2(9) of the Constitution, which reads:

> 2.—(9) Subject to this Article, the Interpretation Act 1965 shall apply for the purpose of interpreting this Constitution and otherwise in relation thereto as it applies for the purpose of interpreting and otherwise in relation to any written law within the meaning of the Act.

The first iteration of the present Article 2(9) is to be found in Article 1(15) of the 1958 State of Singapore (Constitution) Order in Council, which provided:

> 1.—(15) Save as is in this Order otherwise provided or required by the context, the Interpretation Act, 1889, shall apply for the interpretation of this Order as it applies for the interpretation of an Act of Parliament.

The second iteration is to be found in Article 91(9) of the 1963 State Constitution of Singapore, which provided:

> 91.—(9) Subject to the provisions of this Article, the Interpretation and General Clauses Ordinance, *as in force immediately before the date of the coming into operation of this Constitution*, shall apply for the purpose of interpreting this Constitution and otherwise in relation thereto as it applies for the purpose of interpreting and otherwise in relation to any written law within the meaning of that Ordinance. (emphasis added)

It will be noted from the italicised words that the framers intended to apply the *Interpretation and General Clauses Ordinance* (precursor to the present-day *Interpretation Act*) 'as in force *immediately before*' the commencement of the Constitution. This was to prevent an inadvertent amendment to the Constitution through an ordinary amendment to the Ordinance. Amendments made to the Ordinance would not apply to the interpretation of the Constitution. Unfortunately, when the Attorney-General consolidated the Constitution in the 1980 Reprint, the wording of Article 91(9) was not, in substance, retained but *altered* to the present wording of Article 2(9).

The framers of the Constitution never intended to subject the entire process of interpreting the Constitution to the Interpretation Act, but to supplement whatever common law interpretive canons the courts might adopt, with provisions of the Interpretation Act. The wording of the 1958 Constitution applies the Interpretation Act 1889 only where the context is right, and not in all cases. The 1963 version limits the application of the Interpretation and General Clauses Ordinance of Malaysia to whatever was enacted in that Ordinance at the point the 1963 Constitution came into force, ie, 31 August 1963.

As the Attorney-General's power to consolidate the Constitution into a Reprint does not include the power to alter the law, the present Article 2(9) must be read to reflect what was provided for under Article 91(9) of the 1963 State Constitution of Singapore. That being the case, all subsequent amendments to the Interpretation Act, including section 9A inserted in 1993, would be inapplicable.

The Attorney-General derives his authority and legitimacy to consolidate the constitution from its provisions. It is an extremely limited power and does not afford the Attorney-General any licence to amend the Constitution in any substantive way. As I have tried to show, this already gives rise to

https://doi.org/10.1017/asjcl.2024.18 Published online by Cambridge University Press

problems when old clauses are reworked into a new consolidated document and legal meanings get distorted in the process. The fact that Article 155(3) prohibits any legal challenge to a particular version of the Reprint is highly problematic and must be considered an incursion of the judicial power, since it is the courts who are the final interpreters of the Constitution. While it may have been logical and efficient in 1979 to consign the task of consolidating the triptych of constitutional documents so hurriedly cobbled together in December 1965 into a single document to the Attorney-General, this should have been a 'one-off' exercise, or at most one that afforded the Attorney-General a limited period of time – say five years – to get the job done correctly. Furthermore, the resultant product of the Attorney-General's efforts – starting with the 1980 Reprint – should not simply be accepted as final, conclusive and authoritative, but should be subject to a further legitimising move. For example, Article 155(3) could be amended to add greater legitimacy to each consolidated Reprint by subjecting the Attorney-General's consolidation to an endorsement process by the whole Parliament sitting and voting or by some other unique constitutionally appointed body.

Conclusion

Legitimacy is transient. It cannot be attained in a single moment and then retained forever. Even in the cases where legitimacy is of the traditional or charismatic variety in the Weberian sense,[83] it wanes when the masses' belief in the relevant religion, tradition, custom, or personality evaporates. In the age of modern democratic politics, the legitimacy of political actors and what they do typically stand on legal and constitutional foundations, which, in turn, rest on a direct appeal to the people's sovereignty. And when legitimacy begins flagging, it may be revived and resuscitated by a renewed appeal to the people. Whether this is done through elections, referenda, or constituent assemblies, the ultimate appeal is to the body politic, however constituted or imagined. This is what happened in Singapore's journey to nationhood.

In our retelling of the Singapore constitution-making story, we saw how, between 1959 and 1965, Singapore became independent and rewrote its constitution, not once but twice. In its first journey to independence, legality and legitimacy combined to reinforce the PAP government's right to negotiate for the former colony and shepherd it to nationhood. The strong electoral mandate it obtained in 1959 had, by the end of 1961, been whittled down to a bare majority of one in the Legislative Assembly. Legally, the PAP government was still in power, but its political legitimacy had weakened considerably. The masterstroke of calling a national referendum salvaged the PAP's political and legal legitimacy and placed it in an unassailable position to negotiate the Malaysia Agreement. There is no magic in the referendum process, but it is the closest proxy to an engagement and endorsement of the people as sovereign. Majoritarianism defines the democratic process, and an overwhelming vote in a general election or referendum provides the most palpable bestowing of political legitimacy on the winning side.

In sharp contrast, the PAP's manoeuvres in negotiating separation from Malaysia lacked both legal and political legitimacy. There were no provisions in either the Federal Constitution or in Singapore's State Constitution for the secession of states within the Federation. At the same time, the PAP's electoral majority in the 1963 general election was smaller than when it won the 1959 election. None of the other political parties were consulted or involved in the secession negotiations, and when Singapore became independent again on 9 August 1965, the world was stunned. It was, in effect, a revolution, even if no shots were fired. A legal revolution that begot its own legality and legitimacy allowed the PAP government to shape the constitution by amalgamating and augmenting the 1963 State Constitution and subsequently empowering the Attorney-General to consolidate it.

[83]See Max Weber, *Economy and Society: An Outline of Interpretive Sociology* (4th edn, Gunther Roth & Claus Wittich eds, vol 1, University of Chicago Press 1978) 212–301.

https://doi.org/10.1017/asjcl.2024.18 Published online by Cambridge University Press

In this last move, the legality that protects the Attorney-General's consolidating efforts fails to legitimise his powers to do so correspondingly. The revolutionary legitimacy assumed by the Government of Singapore in 1965 was further buttressed by the total withdrawal of any political opposition to the PAP's rule, allowing it to win every single seat in the 1968 general election and to continue to do so until 1980.

Cite this article: Tan KYL (2025). Legality and Legitimacy in Making, Amending & Consolidating the Singapore Constitution. *Asian Journal of Comparative Law* 1–19. https://doi.org/10.1017/asjcl.2024.18