The Changing Scope of Human Rights in the Context of Counter-Terrorism in Singapore: A comparative Perspective

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This article conducts a brief comparative survey of human rights practice and policy in the context of counter-terrorism, looking particularly at the measures of preventive detention and torture. The article focuses on Singapore, with a comparative analysis between the United States and the United Kingdom. The way each jurisdiction deals with the key tension between individual liberty and collective security is discussed. The latter can jurisdictions were chosen as they are often perceived to be vocal advocates of human rights, Singapore, by contrast, eschews 'rights' discourse in favour of a 'responsibilities' discourse and holds firm to the view that rights are culture-specific; drawing lines between Singapore and "Western societies" to justify differences in the scope of protection afforded to human rights in this country. The article examines the three jurisdictions to explore whether the two Western societies do indeed stand apart from Singapore in the context of counter-terrorism. The comparative analysis will reveal that the practices of the executive government in the three countries are in fact broadly similar. Yet, the UK and the US have taken a more robust role in judicially reviewing executive action, in contrast with the Singapore judiciary, which has been said to be 'deferential' to the executive.

INTRODUCTION

Terrorism, the watchword of the past decade, is arguably here to stay, with the precarious equilibrium further endangered by the increasing availability of nuclear capabilities. Inevitably, many states have responded to the problem with heightened counter-terrorism measures, which invariably impinge on human rights, leading to observations that the scope of protection afforded to human rights in the "age of terror" is increasingly shrinking. The intersection of national security and human rights has long been one of the most troubling areas of law, the key underlying tension being that between individual liberty and collective security.† The state’s struggle against terrorism

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1. However, to take the view that the two are inversely proportional would be overly simplistic for three reasons. First, the state is tasked with the responsibility of protecting its citizens; and it can be argued that without the state, individual rights cannot be protected. Second, there is an inevitable clash between the terrorist’s (or terrorist suspect’s) rights and the rights of each member of the public whose life is being threatened by the terrorists’ acts. While the recognition of dignity as an inalienable right prevents the utilitarian approach of viewing the matter as a numbers-game, it is clear that the state has to take action and cannot simply be allowed to throw its hands up in the air where the rights of two individuals clash. This would amount to an utter abdication of its responsibility. The third point follows from the second, and is based on the notion that the right to all other rights is contingent on the right
must be conducted inside the law. The rules to be complied with are based on balancing; they are not “all or nothing” – in this balancing, human rights cannot receive their full protection as if there was no terrorism, likewise state security cannot receive its full protection as if there were no human rights.

Most states have implemented a counter-terrorism framework, and such frameworks must be constantly reworked to meet or pre-empt new threats. This article explores how Singapore, the United States and the United Kingdom have implemented counter-terrorism measures. The focus of the article is on Singapore, with the latter two jurisdictions being chosen for a comparative analysis, since they are often perceived as the most vocal advocates of human rights. The Singapore government has been said to eschew ‘rights’ discourse in favour of a ‘responsibilities’ discourse, consistently maintaining that rights are culture-specific, and often making a distinction between Singapore and “Western societies” to justify differences in the scope of protection afforded to human rights in Singapore. This article argues that the human rights practices of the executive government in the three countries are more similar than what

to life. Where life is extinguished through the operation of terrorism, the individuals have lost not only their right to life, but all their other rights. In comparison, terrorist suspects who have been subject to preventive detention or even torture have lost a portion of their rights (though recognising that these are fundamental rights which have been infringed) and that too, only temporarily. It is regretted that this article cannot engage more deeply in rights theories, the brief exegesis is intended to answer the threshold question of whether counter-terrorism practices can be implemented at all.

2. Public Committee Against Torture in Israel v. Government of Israel, HCJ 769/02 (Israel), at 61. ("PCAT v. Israel").
3. Id., at 62.
is often pre-conceived, at least in the context of counter-terrorism.\textsuperscript{8} However, the judiciary in the UK and US have taken a more robust role in the judicial review of executive action, in contrast with the Singapore judiciary, which has adopted an attitude of "deference"\textsuperscript{9} for arguably various reasons.\textsuperscript{10}

The sharpened focus on terrorism can be traced to the events of 11 September 2001, which constituted a turning point in the relationships between international law, global institutions, and terrorism.\textsuperscript{11} The response to the tragedy saw the affirmation of states' powers to adopt counter-terrorism measures. The Counter-Terrorism Committee ("CTC") was set up to monitor the implementation of the Security Council resolutions passed pursuant to September 11.\textsuperscript{12} However, the first Chair of the CTC has stated that monitoring performance against other international conventions, including human rights law, is outside the scope of CTC's mandate.\textsuperscript{13}

This has led commentators to contend that this gives rise to the potential for repressive states to exploit the anti-terrorism discourse. There is a danger that some states might deploy the international legitimacy conferred by Council authorisation to define terrorism such as to repress or delegitimise political opponents.\textsuperscript{14} Human Rights Watch has found that many countries around the globe cynically take advantage of the struggle against terrorism to intensify their own crackdowns on political opponents, or to suggest that they should be immune from criticism for their practices.\textsuperscript{15}


\textsuperscript{9} Hang, supra note 6, at 301, 312, 316.

\textsuperscript{10} The Singapore judiciary may be perceived as being hampered by constitutional provisions, as will be discussed further below. On the other hand, it may be suggested that this is a result of the judiciary having assimilated and adopted the prevailing "supreme political ideology". See generally Hang, id.


\textsuperscript{12} For example, Security Council Resolution 1368 which denounced the attacks and recognised the 'inherent right of individual or collective self-defence' in accordance with the UN Charter; and Resolution 1373 which required all states to adopt financial, penal and other regulatory measures against individuals and organisations involved in terrorist activities.

\textsuperscript{13} Steiner et al., supra note 11, at 381.

\textsuperscript{14} See generally Ben Saul, Definition of "Terrorism" in the UN Security Council: 1985 – 2004, 4 Chinese J. Int'L L. 141 (2005); See also Reetta Toivanen, 'War on Terror' and Human Rights, in Avonius & Kingsbury, supra note 6, at 203.

Such opportunistic exploitation is a real danger, particularly in the face of preventive detention, where suspects are denied recourse to the usual avenues of judicial redress. The whole apparatus of the state can be brought to bear on recalcitrant individuals, often out of the media spotlight, which potentially closes off avenues of political redress as well.

Nevertheless, given the constraints of limited intelligence and the need for immediate action, the argument that it is a necessary measure is persuasive.\textsuperscript{16} Even so, preventive detention is draconian, and should not be utilised lightly, since the possibility of a preventive detention turning out to be unjustified may be substantial.\textsuperscript{17} It must be remembered that not every efficient means of protecting national security is also legal.\textsuperscript{18}

In all three countries, the authority to exercise preventive detention powers is vested in the executive branch of the government; and across the jurisdictions, there have been attempts with varying degrees of success to curtail the judicial power of review.

Further, there is a risk of torture occurring during the course of preventive detention, in order to extract information from the suspects. It is beyond the scope of this article to fully engage with the arguments in the long-standing debate on whether torture can be justified; instead, the article assumes as valid the argument of the ‘ticking time bomb’ scenario in support of using torture in extreme exceptional circumstances. While the assumption supports the relativism of the prohibition against torture and accepts that the scope of the prohibition may be teleologically reduced in light of security concerns, it must be emphasized that only extremely exceptional circumstances can ever justify the use of torture.

While there has been a huge growth of national terrorism laws worldwide since September 11, there is a need to recognise that for counter-terrorism to be effective, each country must tailor its legislation and practice to the security threats it faces, in line with the human rights safeguards suited to the

\textsuperscript{16} Hence in the past, the English courts had taken a deferential attitude in regard to national security issues. See, e.g., Liversage v. Anderson [1942] A.C. 206 (H.L.), where four of the five Law Lords held it sufficient that the Home Secretary thought he had good cause to believe that the detainee was of hostile origin or association under Defence Regulation 18B—a wholly subjective question and not vulnerable to judicial review. Notably, Lord Atkin was the lone dissenter: “the laws are not silent ... [judges should not] when face to face with claims involving the liberty of the subject show themselves more executive minded than the executive” (id., at 224). Such a view shifted only post-WWII, in Nakkuda Ali v. Jayaratne [1951] A.C. 66. (England).


\textsuperscript{18} PCAT v. Israel, supra note 2 at 63.
particular socio-political context. There is an old debate in international human rights law on the extent to which rights can be said to be universal as opposed to being culture-specific. Although this article does not cover the in-depth jurisprudential debate, it broadly supports the approach of context-specificity, while recognising that there is a minimum core of rights that cannot be derogated from, and which, it is believed, has not been derogated from in Singapore. However, the core of rights that are truly universal is perhaps smaller than we would sometimes like to believe. Nonetheless, a study of the three jurisdictions reveals that rights have in fact been read down in a similar manner in each jurisdiction.

I. MEASURES TAKEN IN RESPONSE TO TERRORISM

A. Preventive Detention

1. Introduction

Among the government’s arsenal of measures to deal with suspected terrorists, preventive detention seems prima facie to be one of the most draconian. As its name suggests, there is no requirement for suspects to have committed the acts allegedly detrimental to national security prior to their arrest and detention. National legislation often provides that such arrests can occur


24. For a discussion on the comparison between preventive detention and the ordinary criminal law process in the Singapore context, see Michael Hor, Terrorism and the Criminal Law: Singapore’s Solution, 1 SING. J.L.S. 30, 43 (2002).
without a warrant. While noting the draconian nature of the measure, it must be remembered that all criminal justice systems impose liability for inchoate crimes; so it might be argued that preventive detention is simply the logical extension of the concept of imposing punishment for inchoate crimes. In fact, it might even be said to be especially defensible, given the national security context and the changing nature of terrorism. Terrorism today extends beyond state boundaries, and the increased sophistication of the methods employed demands a swift response from governments in order to minimise the loss of innocent lives and destruction of infrastructure.

Due to the limitations of gathering intelligence, to draw a bright line and insist that the state has to, in all cases, prove the existence of a terrorist threat beyond reasonable doubt might unnecessarily place many innocents in the way of harm. There is a need for swift executive action and the ordinary processes of criminal justice may not suffice. First, the scale and irreversibility of harm call for preventive, not reactive action. Second, judges may lack the necessary expertise to make decisions related to counter-terrorism—for example, they may not have the requisite competency to do complex risk analyses weighing the damage that terrorism may wreak on the country's infrastructure in the long term. Third, judges may not be party to confidential information critical to decision making.

Having said that, conjecture does not suffice as a rationale for severe infringements of civil rights, and the executive should not be allowed to detain persons on the flimsiest of grounds. Two separate issues thus arise – the test for sufficiency of the grounds of detention; and the issue of who gets to decide. As stated earlier, there are good reasons why the judiciary is not suited to be the primary decision maker. However, this is not to say that the judiciary cannot exercise a secondary power of review. It is clear that a system of checks and balances needs to be set up to prevent any one branch of government from unduly infringing on individual liberties. In the US, the Supreme Court has taken this task on hand, enabling a dialogue with the legislature and executive to be forged. The UK has seen a form of dialogue as well, but perhaps to a lesser extent. On the other end of the spectrum is Singapore, where the judiciary has been prevented from exercising robust review by amendments to the Constitution,25 and challenges to the Constitutional provisions in question have not been raised.

2. The Legal Basis for Preventive Detention26

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25. See infra note 34.
26. It is to be noted that the legislations listed in this section may not represent the present position of the law, especially the US and UK legislation. To get the updated picture, this section must be read together with the section following immediately after on the judicial response. The reason for this organisation is that it will present a clear picture of the level
The logically prior issue to the manner in which the three jurisdictions exercise the power of preventive detention is the basis on which their powers can be exercised. The various pieces of domestic legislation will be briefly laid out and scrutinised to elucidate their similarities and differences. National legislation greatly informs the counter-terrorism practice of states and it is here that any comparative study must begin.

a. *Singapore*

Singapore’s preventive detention laws pre-date September 11 by 53 years in the form of the Emergency Regulations Ordinance 1948 enacted by the British colonial government post-World War II to deal with communist insurgents.27 This was understandable in light of communist extremists who had resorted to violent demonstrations to achieve their political ends.28

The Ordinance was succeeded by the Internal Security Act (“ISA”), the modern day incarnation of the law providing for preventive detention. The ISA provides for the power to detain a person for up to two years on the President’s satisfaction that the statutory grounds are met.29 Insofar as the grounds for detention exist, detention can be indefinitely renewed in these two year blocs.30 The Act further provides that the police may arrest and detain any suspect without warrant, pending enquiries, for up to 30 days.31 The remit of this power is extremely wide – persons may be arrested or detained on the grounds that he has acted or is about to act or is likely to act in any manner prejudicial to the security of Singapore (emphasis authors’ own).32 The Singapore constitution expressly provides for the constitutionality of the ISA.33

In 1989, the Constitution34 and the ISA35 were amended to reverse certain judicial developments: these developments will be examined later at greater length. These amendments are the subject of some infamy. The ISA was amended to provide36 that “the law governing the judicial review of any

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28. *Id.*, at 70.
29. *Id.*
30. ISA 1960, § 8(2).
31. ISA. 1960, § 74
32. *Id.*
33. *Id.*
36. ISA 1960, § 88(1).
decision... shall be the same as was applicable and declared in Singapore on the 13th day of July 1971 [the date of the judgment of Lee Mau Seng]. On the face of it, this provision appears to be a clear violation of judicial power as it nullifies the development of the law. However, this violation was preempted by the new Art. 149(3), which provided that nothing in Art. 93 would invalidate any law.

As a result, the judicial role has become confined to procedural oversight. Discretion over preventive detention is expressly reserved for the executive rather than the judiciary, with checks and balances internal within the executive. The judiciary is compelled by the express wording of the texts to defer to the executive. Legislative and executive powers thus appear to be substantially unlimited.

b. The USA

Pre September 11, immigration laws allowed the Attorney General to detain an alien pending removal proceedings. Such detention was indefinite, and judicial review was excluded.

After September 11, Congress enacted the PATRIOT Act, which allows the Attorney-General to certify detention of any alien whom he has ‘reasonable grounds to believe’ that the person is ‘engaged in any other activity that endangers the national security of the USA’. Detention may be indefinite.

37. See infra note 65.
38. Art. 93 of the Singapore Constitution provides that the judicial power of Singapore shall be vested in a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force.
39. Professor Kevin Tan of the National University of Singapore opines that the amendments are nonetheless a violation, notwithstanding Art. 149(3), as judicial power cannot be ousted in this way. Even so, he recognises that if the government had wanted judges to use the test laid down in Lee Mau Seng, all they had to do was to codify the subjective test, but due to an oversight, this route was not taken, and the unsatisfactory drafting of the ISA remains to the present day. Indeed, such an awkward stipulation for the application of the test in Lee Mau Seng is potentially problematic, since there is always a possibility of a subsequent court of appeal to reinterpret the ratio decidendi of Lee Mau Seng.
40. S. 88(2) of the ISA expressly limits judicial review to compliance with procedural requirements.
44. §1226(e) Immigration and Nationality Act 8 U.S.C. (1952).
as there is no stipulated maximum period of detention. The alien may apply, every six months, for the certification to be reconsidered.47

Judicial review of any action or decision relating to this section, including judicial review of the merits of a certification, can be held under habeas corpus proceedings.48

c. The UK

Anti-terrorism laws in the UK pre-date 11 September 2001 by approximately 30 years, as a response to political violence in Northern Ireland.49

With the enactment of the Human Rights Act 1998 ("HRA"), the UK had to bring its counter-terrorism laws in line with the human rights paradigm of the European Convention of Human Rights ("ECHR"). In particular, the right to liberty and the security of person and freedom from arbitrary arrest, detention or exile had to be protected.50 The Terrorism Act, 2000 was enacted pursuant to this impetus. The former system of detention of terrorist suspects without trial for 7 days and without being brought before a magistrate was replaced with a system that allowed for judicial oversight from an earlier stage, i.e. no later than the end of the second day in detention.51

This position was soon to change following September 11. Within a month of the tragedy, the UK Parliament enacted the Anti Terrorism, Crime and Security Act, 2001 ("ATCSA"),52 which allowed preventive detention on the basis of "reasonable belief" in the threat posed by a terrorist suspect.53

47. PATRIOT Act, §412 amending The Immigration and Nationality Act (8 U.S.C. 1101 et seq.) by inserting § 236A(a)(6).
48. PATRIOT Act, §412 amending The Immigration and Nationality Act (8 U.S.C. 1101 et seq.) by inserting § 236A(b)(1). Title V of the PATRIOT Act was the cause of considerable controversy as it provided for gag orders preventing the recipient of National Security Letters (NSLs) from disclosing that the letter was ever issued; which stultified the power of judicial review. This was subsequently declared unconstitutional (Doe v. Ashcroft, 334 F.Supp.2d 471 (S.D.N.Y. 2004)). In response, the Act was amended to specify a process of judicial review of NSLs (USA PATRIOT and Terrorism Prevention Reauthorization Act of 2005 (U.S. H.R. 3199, Public Law 109-177) Title I, §§ 115 & 116). However even the re-authorized Act was found not to pass constitutional muster and was struck down by the U.S. District Court as it prevented the courts from a meaningful judicial review of the gag orders. See Federal Court Strikes Down National Security Letter Provision of Patriot Act, Sept. 6, 2007, http://www.aclu.org/national-security/federal-court-strikes-down-national-security-letter-provision-patriot-act (last visited Feb. 6, 2011).
49. ¶ 2(a) of Schedule 3, Immigration Act 1971 provided that an alien terrorist suspect could be detained pending his deportation from the country. See CONOR GEARTY, ESSAYS ON HUMAN RIGHTS AND TERRORISM: COMPARATIVE APPROACHES TO CIVIL LIBERTIES IN ASIA, THE EU AND NORTH AMERICA 503 (2008).
50. See Universal Declaration of Human Rights, arts. 3, 9; European Convention on Human Rights, art. 5; International Covenant on Civil and Political Rights, arts. 9(1), 10.
ATCSA does not provide a time limit within which proceedings must be commenced against a detained suspect. Further, a suspected international terrorist may be detained "despite the fact that his removal or departure from the United Kingdom is prevented (whether temporarily or indefinitely)." The net result is potentially indefinite detention. Judicial review is absolutely excluded under ATCSA.

It is clear that this breaches the ECHR, and the UK Government anticipated this by making a Derogation Order on the basis of the terrorist threat to the UK from foreign nationals suspected of involvement in international terrorism.

The Terrorism Act 2006 subsequently extended the detention period of a "suspected international terrorist" to 28 days, consequent on the Home Secretary's reasonable belief that such person's presence in the UK is a risk to national security. The suspect has a right to appeal only to a government-appointed commission. This gives rise to a risk of conflict of interest for the persons sitting on the commission, in a manner similar to that noted in the context of the military commissions in Guantanamo Bay, as will be discussed later in the article.

d. Convergence or Divergence? A broad pattern of convergence

All three jurisdictions have provisions for suspects to be detained for an indefinite period of time. The difference lies in their historical pedigree: Singapore's preventive detention legislation had been in force since 1948 as a response to the violent threat of communism; in the UK, such legislation had been in force since the 1970s, and was similarly a response to political violence in Northern Ireland; the US legislation since the 1950s had dealt with illegal immigrants. However, the modern successor to the Singapore legislation was adopted as early as the 1960s, whereas the relevant US and UK legislations are more recent innovations, developed in response to September 11. The fact that such different security threats operated as the triggers for the imposition of such laws in each jurisdiction buttresses the view that rights, and

54. Id., § 23(1).
55. See generally Yang Ziliang, Preventive Detention as a Counter-Terrorism Strategy: They have Stopped Using it and so Should We, 25 SING. L. REV. 2 (2007); Eunice Chua, Reactions to Indefinite Preventive Detention: An Analysis of How the Singapore, United Kingdom and American Judiciary give Voice to the Law in the Face of (Counter) Terrorism 25 SING. L. REV. 1 (2007).
56. ATCSA 2000, §§ 21, 23.
57. ECHR, art. 5(1)(f) -- "Everyone has the right to liberty and security of person. No one shall be deprived of his liberty save in the following cases and in accordance with a procedure prescribed by law: the lawful arrest or detention of a person to prevent his effecting an unauthorised entry into the country or of a person against whom action is being taken with a view to deportation or extradition".
58. Pursuant to Art. 15 of the ECHR.
59. Prior to the 2006 Act, the first increase of the period of detention was provided for by the Criminal Justice Act 2003 which raised it to 14 days.
the derogation from such rights, are simultaneously a commonality and yet context-specific. Nevertheless, it may be critiqued that Singapore retained such laws, which were calibrated for a general scope of application, as a political weapon of the state, whereas the UK and US had refrained from doing so before September 11.

Nevertheless, certain safeguards have been put in place. Periodic reviews are carried out in Singapore and the US before detention is extended. However, such periodic review is not provided for in the UK. Yet, the mere fact that periodic review is provided for does not of itself amount to an effective safeguard if the persons exercising review are the same persons responsible for the decision to detain in the first place. Arguably, in principle, there should be an independent review.

With regard to judicial review, Singapore courts are constrained to only reviewing detention orders for procedural compliance; the UK courts are absolutely prohibited from judicial review; in contrast, the US courts are free to judicially review the executive’s decisions to certify continued detention, including the merits of the decision. However, as will be seen shortly, the UK judiciary, unlike its Singaporean counterparts, has circumvented such restrictions on its judicial power.

Therefore, even though the legislation in Singapore and the UK appear similar, judicial intervention by interpretation of the relevant laws has led to the ultimate result that the UK and the US lie on one side, where judicial safeguards of individual rights are upheld, and Singapore on the other.

2. Judicial Intervention

It might have been observed that the US and UK legislations detailed in the immediately preceding section are not entirely up-to-date. The reason for this is that amendments have been enacted pursuant to a dialogue between the judicial and executive branches of these two jurisdictions. By contrast, in Singapore, judicial review of the merits of the decisions taken under the ISA has been greatly subdued ever since Parliament intervened after Chng Suan Tze.

a. Singapore

It appears that the Singapore judiciary’s responses to preventive detention

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61. In Singapore, pursuant to § 8 of the ISA, the review is carried out every two years, while in the US the review is carried out every 6 months pursuant to § 412 of the PATRIOT Act.
62. ISA § 8B(2).
63. ATCSA, §§21, 23.
64. PATRIOT Act, § 412.
65. See supra notes 34 and 35, and accompanying text.
have shifted awkwardly over time, particularly in response to legislative intervention. To understand the development, three significant cases where the highest court of the land, the Singapore Court of Appeal (SGCA), dealt with the ISA are highlighted here.

In *Lee Mau Seng v. Minister for Home Affairs*, the SGCA held that the President’s satisfaction (a precondition for detention) was purely subjective; the sufficiency of grounds justifying detention was not justiciable, so the courts were not allowed to substitute their own subjective discretion for that of the President’s as the power was expressly allocated to the President under the ISA.

There appeared to be a breakthrough in *Chng Suan Tze v. Minister of Home Affairs*, where the SGCA asserted a stronger role for the judiciary by rejecting the subjective approach and preferring the objective standard. This allowed the court to exercise substantive review, to scrutinise the sufficiency of the executive’s grounds for detention. The court firmly declared the paramountcy of the rule of law: “all power has legal limits and the rule of law demands that the courts be able to examine the exercise of discretionary power”.

However, this state of affairs lasted only a month as the Singapore Parliament swiftly intervened to amend the Constitution and the ISA. The ousting of judicial review by the amendments has appeared to tie the court’s hands, such that in the subsequent case of *Teo Soh Lung v. Minister of Home Affairs*, the SGCA applied the subjective standard upheld in *Lee Mau Seng*, as was legislatively stipulated.

There have been no further challenges brought since, possibly due to the government’s increased circumspection in its use of the ISA.

b. The USA

Detainees brought into Guantanamo Bay are categorically denied ‘prisoner of war’ status and may face indefinite detention. ‘Special military commissions’ are set up to try the detainees. Such commissions essentially comprise a panel of five military officers, employees of the same authority that detains and prosecutes the defendants. This casts doubt on the independence of

66. [1971] SGHC 10 (Sing.).
67. [1988] 1 SMC L.R. 347 (C.A.) (Sing.)
68. Id., at 86.
69. See supra notes 34 and 35, and accompanying text.
70. [1990] 1 S.L.R.(R) 347 (C.A.) (Sing.).
71. Although it has been suggested that this is arguably due to the internalization by the Singapore judiciary of the ruling party’s political ideology which, consequent to the fused-executive-legislature’s constitutional and statutory intervention, resulted in a deference to the executive’s determinations of public interests, thereby abdicating its role as a guardian of individual liberties. See generally Hang, supra note 6.
the commission and may violate the detainees’ right to a fair trial. Military commissions have come under criticism for being “flawed and untested” and “extremely vulnerable to appellate challenge”, in contrast to the “federal court system [which] has been tested over time”. This issue came to a head with the 2010 trial of Ahmed Khalfan Ghailani, which will be dealt with in detail shortly hereafter.

The happenings at Guantanamo have received worldwide scrutiny and have not escaped the notice of the US Supreme Court (SCOTUS). In Rasul v. Bush, SCOTUS held that the right of habeas corpus extended to non-US citizen detainees at Guantanamo Bay. In Hamdi v. Rumsfeld, while SCOTUS upheld the constitutionality of the Authorisation for Use of Military Force Against Terrorists, the independence of the special military commission was doubted: “[i]nterrogation by one’s captor, however effective an intelligence-gathering tool, hardly constitutes a constitutionally adequate fact finding before a neutral decision maker”. Even so, SCOTUS held that where the exigencies of the circumstances demanded, enemy combatant proceedings might be tailored to alleviate their uncommon potential to burden the executive at a time of ongoing military conflict. Thus, hearsay evidence from the government could be accepted and there could be a rebuttable presumption favouring the government’s evidence. This concession reflects an acknowledgment of the exceptional nature of terrorist threats, thereby justifying the reduction of the scope of individual rights.

In response, the US Department of Defence convened Combatant Status Review Tribunals (“CSRT”) to provide detainees at Guantanamo Bay the chance to challenge their classification as “enemy combatants”. The Detainee Treatment Act 2005 (“DTA”) was passed to, inter alia, protect detainees from torture and prevent detainees from initiating habeas corpus in the civilian judicial system. In 2005, SCOTUS volleyed back in Hamdan v. Rumsfeld that the CSRTs and the procedure under the 2005 Act still failed to satisfy the core elements of due process.

75. 542 U.S. 466 (2004).
78. Hamdi v. Rumsfeld, supra note 76 at 537.
79. Id., at 533-534.
Consequently, Congress passed the Military Commissions Act 2006 ("MCA") authorising the military commissions, which constituted the CSRTs and provided that evidence extracted from detainees under "extended interrogation techniques" was admissible.82 In 2008, SCOTUS held the MCA unconstitutional in *Boumediene v. Bush*83 by a bare majority. Detainees in Guantanamo Bay were found to have the right to *habeas corpus*. The dissenting judges, Justice Scalia and Chief Justice Roberts amongst them, opposed on the bases of extraterritoriality and the sufficiency of the existing processes under the MCA and the DTA.

In June 2009, President Obama ordered the closure of Guantanamo Bay and the release of the detainees.84 However, the unfolding of recent events leaves the President facing an ever steeper uphill climb. In the first ever civilian trial of a former Guantanamo detainee, Ahmed Khalfan Ghailani, the jury acquitted him of all but one of the 280 charges.85 This verdict has been hailed by some as a movement in the right direction86 away from "flawed, ad hoc military commission[s]."87 However other commentators have voiced a deep concern, arguing that the near total acquittal is the "last gasp for President Obama's misguided effort to wage the war on terrorism in the courtroom."88 Civilian trials were criticised for placing the "nation's most vital intelligence secrets" at risk, and for "distract[ing] soldiers and intelligence agents from their primary war-fighting mission."89 The arguments on both sides are finely balanced, and this reflects the immense difficulty in striking a balance between individual liberty and collective security tension that runs through this area of the law. Each country has to come up with its own balance, and one should not be too quick to say that one particular country's solution is any better than another's.

The American experience reflects a dialogic approach between the judiciary and the legislature. It is clear that SCOTUS takes its role as the guardian of individual rights seriously and has not hesitated to strike down legislations as unconstitutional. The legislature in turn proposes amendments or new

87. *Id.*
89. *Id.*
legislation in the interest of national security, which remain in force unless and until SCOTUS holds otherwise. This judiciary-legislature volleying allows for a consensual equilibrium to be reached, which arguably reflects a constitutional balance between individual suspects’ rights and state security interests.

c. The UK

The House of Lords in A. v. Secretary of State for the Home Department⁹⁰ declared the ATCSA incompatible with the ECHR and found the derogation to be disproportionate and thus invalid⁹¹ as the measures were not “strictly required by the exigencies of the situation”.⁹² The differentiation on the basis of citizenship⁹³ was found to be discriminatory – if British citizens were suspected of terrorism, there was no procedure to detain them without trial, whereas an alien could be detained under ATCSA. Nevertheless, the derogation simpliciter was held to be justified, as such a matter was deemed a political judgment and the judiciary would defer to the executive’s decision.⁹⁴ There was a lone dissent by Lord Hoffmann who considered that the HRA allowed the courts to review the existence of a public emergency.⁹⁵

After A., the UK Parliament repealed the offending provision of ATCSA and abolished indefinite preventive detention. The power to detain was replaced by the power to issue control orders against individuals on similar grounds.⁹⁶ However, it was contended that most of the obligations imposed on the controlees “fall not very far short of house arrest and certainly inhibit normal life considerably”.⁹⁷

It is therefore arguable that control orders themselves amount to violations of rights. In Secretary of State for the Home Department v. AP,⁹⁸ the newly constituted Supreme Court of the UK held that the appellant’s confinement to a flat 150 miles away from his family amounted to a breach of his right to liberty under Art. 5 of the ECHR. In a series of cases, the courts progressively chipped away at the controversial scheme.⁹⁹

d. Convergence or Divergence? A spectrum

Broadly speaking, there appears to be a spectrum of judicial attitudes to

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⁹¹ Id., at 198.
⁹² ECHR, art.15(1).
⁹³ ATCSA, § 25.
⁹⁴ A. v. Secretary of State, supra note 90, at ¶¶18, 29.
⁹⁵ Id., at ¶92.
⁹⁹ See, e.g., CA v. Secretary of State for the Home Department [2010] EWHC 2278 (UK), where the High Court ruled that a control order was illegal.
intervention in fulfilling the judicial role as the guardian of individual liberties: the US at one end with judicial activism, Singapore at the other with judicial restrain, and the UK in the middle, albeit leaning largely towards the American position.

In A., the majority deferred to the executive with regard to the making of the derogation order and applied a self-imposed limitation on their scope of judicial review, a position which has also been adopted by the Singapore judiciary. Even so, the House of Lords went on to make a declaration of incompatibility under §4 of the HRA. While the UK judiciary is not empowered to strike down Acts of Parliament on grounds of their incompatibility with the ECHR, the making of such a declaration imposes substantial political pressure for the offending Act (or provisions of the Act) to be repealed, as was the case with respect to the ATCSA. The UK Supreme Court also displayed a similar robustness in the AP case, as have the lower courts in the string of cases on control orders. It remains to be seen whether the scheme of control orders will endure for much longer given the spate of judicial criticism.

Whether such judicial activism is warranted can be questioned – the control order scheme was devised as a compromise between individual liberty and collective security, and if it is to be found unconstitutional, the government might be hard pressed to take any form of preventive action against terrorist suspects. It is worth reiterating that in the context of counter-terrorism, reactive action in itself might not be a sufficient course of action, given the potential scale of damage that can be caused. The reason why the UK judiciary feels empowered to make judgments second-guessing the executive can be traced to the enactment of the HRA. It must be noted that the passing of the Act led to no small amount of disquiet with regard to its impact on Parliamentary sovereignty. 100 By contrast, Singapore has no equivalent Human Rights Act, nor has it agreed to the jurisdiction of any supra-national court to act as the highest court of the land in issues pertaining to human rights. This might explain the judges’ reluctance to overturn the presumption of constitutionality of Acts of Parliament in Teo Soh Lung, even though it can be argued that the two amendments in question were particularly ripe opportunities for judicial activism.

Like the UK, the Singapore legislature (albeit without judicial prompting in the Singapore case) has attempted to strive for a more calibrated approach towards preventive detention. While Singapore has not adopted control orders as such, there is an analogous scheme of Restriction Orders issued in lieu of detention under the ISA, to provide a response sensitive to the suspect’s

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degree of radicalisation.101

Interestingly, while the American judiciary seems to take a polar opposite stance to the Singaporean judiciary, the executive branches of the two states appear to be on the same page. Post-September 11, the application of preventive detention laws in Singapore against alleged terrorist elements, received a congratulatory affirmation from then US Defence Secretary, Donald Rumsfeld.102

B. Torture

1. Introduction

The right to freedom from torture or other cruel, inhuman, degrading treatment or punishment ("CIDTP") is widely considered to be a fundamental human right and is enshrined in several human rights instruments and treaties.103

This section focuses on torture being used in the context of interrogations in order to elicit information from detainees. Torture and preventive detention are often used in synchrony as the twin arms of the state security apparatus (as clearly demonstrated in Ireland v. UK104 later in the discussion).

The debate on the justification is well rehearsed.105 This article does not purport to add any novel argument to it, but assumes valid the argument of the 'ticking time bomb' scenario for the moral justification of torture in extreme exceptional circumstances.

The 'ticking time bomb' scenario has several prerequisites:106 there must be

103: See, e.g., UDHR, art. 5; ICCPR, art. 7; ECHR, art. 3; common art. 3 of the 1949 Geneva Conventions.
104: See infra note 123, and accompanying text.
106: The hypothetical scenario may be that a terrorist who planted the bomb is apprehended and makes extravagant demands in exchange for revealing its location; if the bomb goes off, all the persons in the city will die a horrible death, but the police are unable to evacuate the city and cannot give into his demands.
a clear, imminent and severe danger, and the only person who can avert it is
the terrorist, who has a duty to do so, but is unwilling, and thus needs force to
be compelled. Many commentators have argued that this is the only situation
in which torture can be applied.107

In this situation, an unavoidable conflict between rights is created – the right
to life of the persons who would die if the bomb goes off; and the right of
the terrorist not to be tortured.108 This unpreventable clash of rights should
arguably be resolved in favour of the innocent parties, as is the case where the
police exercise their right of self-defence and use lethal force against suspects.
However, in the context of detention, the situation is not as straightforward.
Detained persons are typically helpless and in need of special protection.
However, in the ‘ticking time bomb’ scenario, the terrorist is in command, and
the situation is thus analogical.

The ‘ticking time bomb’ argument is persuasive, and assuming its normative
validity, it buttresses the view that the absolute prohibition on torture should, in
certain circumstances, give way to national security. The issue is thus when these
circumstances can be said to arise. It is clear that states do not adhere strictly
to the hypothetical but adopt measures which amount to torture or CIDTP
at a much lower threshold. This will be discussed further in the comparative
analysis under this section.

2. Incidences of torture and the judicial response

Three snapshots illustrative of the position in each jurisdiction will be
highlighted here. A caveat is necessary: while the highlighted instances are
meant to be illustrative, they obviously cannot provide a holistic picture of the
terrorist threat in the various jurisdictions. This is a limitation of the article,
which correspondingly limits the comparative analysis embarked on.

a. Singapore

Judicial discussion on torture and CIDTP in Singapore has centred on the
death penalty and caning.109 There have been no ascertained instances of
torture in Singapore in the context of counter-terrorism, nor have there been
any challenges lodged before the courts. There have, however, been unproven
allegations of torture, in particular by the persons detained under the ISA for
participation in the “Marxist conspiracy” of 1987.110 A joint statement issued

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107. See supra note 105, and accompanying text.
108. Further, the hypothetical assumes that the dignity of the innocent civilians is at stake as well,
since they would die horrible deaths if the bomb went off, and this is weighed against the
dignity of the terrorist which would be compromised by torture.
thnemo.htm (last visited Nov. 25, 2010).
by nine such persons alleged:

"We were subjected to harsh and intensive interrogation, deprived of sleep and rest, some of us for as long as 70 hours inside freezing cold rooms... Most of us were hit hard in the face, some of us for not less than 50 times... We were threatened with the arrests, assault and battery of our spouses, loved ones and friends... [and] with INDEFINITE detention without trial" (emphasis original).\footnote{\textsuperscript{111}}

After the release of the joint statement, the Singapore government announced that it would appoint a commission of inquiry to look into the allegations of ill-treatment by Internal Security Division (ISD) officers. However, this commission was never set up as the relevant persons subsequently retracted their allegations.\footnote{\textsuperscript{112}}

The joint statement implicitly alleged that the statutory declarations taken by the ISD during the 1987 detentions were false – the former detainees categorically denied any involvement in a Marxist conspiracy i.e. the statements recorded during their detention, which suggest otherwise, must be untrue. Read together with the asserted ill-treatment during detention, this suggests that the veracity of their statements taken during detention perhaps should not be taken at face value. Therefore, it is highly questionable on logic and principle that the proposed commission of inquiry could have been deemed unnecessary on the strength of statements which were themselves taken in the course of detention. This is so notwithstanding the change in the ISD regime which, in 1988, introduced a routine general physical check-up after each day’s interrogation. However, detainees have asserted that their interrogating officers accompanied them during the medical examinations.\footnote{\textsuperscript{113}} If so, this prevents candour on the detainee’s part – to point the finger at one’s torturer in the presence of the self-same torturer would only be attempted by the most foolhardy of detainees. In an analogous context, the Special Rapporteur on torture and other CIDTP found that the presence of the same police officer responsible for the alleged crime of torture or ill-treatment at the medical examination was a “serious shortcoming” as “the independence of the examination is jeopardised”.\footnote{\textsuperscript{114}}

Further, brief medical examinations are only able to ascertain the physical rather than psychological harm caused to the detainees.\footnote{\textsuperscript{115}} The threats

\footnote{\textsuperscript{111} Teo Soh Lung, Beyond the Blue Gate – Recollections of a Political Prisoner 105-106 (2010).}
\footnote{\textsuperscript{112} Id., at 119. It is notable that the only co-signatory who has stood by the statement's truth was one Tang Fong Har, who incidentally, was out of the country when the arrests took place. In a BBC World Service interview in London, she challenged the government's statement. See Francis Seow, To Catch a Tartar – A Dissident in Lee Kuan Yew's Person 95 (1994).}
\footnote{\textsuperscript{113} Lung, supra note 111, at 117; Seow, supra note 112, at 118.}
\footnote{\textsuperscript{114} Manfred Nowak, Report of the Special Rapporteur on torture and other cruel, inhuman or degrading treatment or punishment-Mission to Sri Lanka, ¶38, UN Doc. A/HRC/7/3/Add.6 (Feb. 26, 2008).}
\footnote{\textsuperscript{115} Thus, a formal psychiatric assessment may also be necessary in such cases. See Jason Paton-James et al., Forensic Medicine: Clinical and Pathological Aspects 62 (2003); Dr. Mariam}
allegedly levelled against the supposed Marxist conspirators might amount to psychological CIDTP, and this would not have been noted during the medical examination. As noted by Judge Matscher in his separate opinion Ireland v. UK,\textsuperscript{116} the modern methods of torture differ markedly from primitive brutal methods – techniques which cause intense physical and mental suffering and acute psychiatric disturbances can amount to torture.

This does not necessitate that all statements taken during detention are untrue, for if this were the case, the whole exercise of extracting statements during detention would lose its purpose. However, it is necessary to have independent checks on what goes on during detention, much in the same way as it is necessary to have independent checks for the reasons given by the executive for detaining persons in the first place. However, in Singapore, the judiciary has not had the chance to intervene to perform this checking role, as the independent commission never materialised, and since then, no challenges have been mounted before the courts.

b. The US

The Abu Gharib controversy provided the political impetus for the replacement of the Bybee Memorandum with the Levin Memorandum. The public was outraged at the revelations of torture and sexual humiliation at the Abu Gharib prison in Iraq.\textsuperscript{117} Eleven soldiers were convicted in court martial as a result.

Congress responded to the controversy by enacting the Detainee Treatment Act 2005 (DTA) which prohibits inhumane treatment of prisoners, including those overseas. In Hamdan v. Rumsfeld\textsuperscript{118} SCOTUS declared that common Art. 3 of the Geneva Conventions applied to detainees in the war on terror. This means that the Secretary of Defence is theoretically liable for a federal war crime.

Congress then passed the Military Commissions Act 2006 (MCA) to decriminalise humiliating and degrading treatment, along with the practice of subjecting detainees to sentences and punishments resulting from unfair

\textsuperscript{116} See infra note 123.


\textsuperscript{118} 415 F.3d 33 (2005).
trials, with retroactive effect dating back to 1997. This makes it more difficult for detainees to allege torture or CIDTP. Further, the courts were stripped of jurisdiction over habeas corpus petitions by aliens found to be properly detained as enemy combatants. The Center for Constitutional Rights has thus claimed that the MCA retroactively immunises some US officials who have engaged in illegal actions which have been authorised by the Executive. However, as noted under the section on preventive detention, in Boumediene v. Bush, SCOTUS found the MCA unconstitutional and held that detainees in Guantanamo Bay had the right to habeas corpus.

These legislative developments reveal that counter-terrorism is a rapidly changing area of law. The dialogic exchange between the legislature and judiciary observed in the context of preventive detention is also present in the context of the prohibition of torture. Further, it is clear that the two issues of preventive detention and torture are closely intertwined, as can be seen in the case of Hamdan v. Rumsfeld.

c. The UK

The European Court of Human Rights ("ECtHR") sits as the final court of appeal in matters related to the Convention rights. The arguments of the UK government before the ECtHR in Ireland v. the United Kingdom ("Ireland v. UK") are illuminating as they reveal a facet of the central tension between individual liberty and collective security – the extent to which harsh treatment can be meted out to extract information. The UK's argument, put at its bluntest, was simply this: torture works. It serves its purpose of extracting information that would not have been otherwise available. However, the consequentialist arguments from necessity failed to impress the court and the majority made a finding of inhuman and degrading treatment, not amounting to torture.

Even so, the ECtHR appeared sympathetic to the UK government, and a substantial part of the judgment detailed the background of escalating violence perpetrated by the Irish Republican Army (IRA). The court noted that prior to introducing the programme of internment of suspected terrorists, the security forces had intensified operations against suspected terrorists, but this had yielded no significant results. The government argued that the normal procedures of investigation and criminal prosecution were inadequate and that ordinary criminal courts could not be relied on as the sole process for

119. There remains limited scope for review of detention proceedings under the Graham-Levin Amendment.
restoring peace and order due to the scale and virulence of the terrorist threat. Further, the widespread intimidation of the population made it impossible to obtain sufficient evidence to secure a criminal conviction against a known IRA terrorist.\textsuperscript{124} In other words, detention was a last resort. The programme of detention and internment allowed for interrogations which yielded a considerable quantity of intelligence. In short, the prohibited methods had succeeded where other methods had failed.

The dissenting opinions are notable as they reveal a diversity of opinions as to what can properly be characterised as torture. Judges Evrigenis and Matscher went further than the majority to argue that the treatment amounted to torture; whereas Judge Fitzmaurice argued that the treatment did not even rise to the level of inhuman or degrading. It is clear from this judgment that the concepts of CIDTP and torture have an inevitable degree of subjectivity.

d. Convergence or Divergence? Convergence among the executive

It is here that the ‘ticking time bomb’ scenario will be returned to, as it is a helpful matrix to allow for a comparison between the different and seemingly incommensurable factual situations that the three jurisdictions have found themselves in.

If the allegations of ill-treatment made by the “Marxist conspirators” in Singapore is to be believed, the Singapore executive has taken a very interventionist approach. The supposed Marxists had not actually perpetuated any form of activity aimed at overthrowing the government or inciting their fellow citizens to do so. They were, by the government’s own admission, “do gooders, who wanted to help the poor and the dispossessed, getting perverted along the way to Marxism” but who, “given sufficient time, would eventually become like the communists in the Philippines” (emphasis original).\textsuperscript{125} This later statement is far removed from the initial government statement, which asserted that there was a “Marxist conspiracy to subvert the existing social and political system in Singapore” and which “if left unchecked, would lead to unmanageable political instability and chaos”.\textsuperscript{126} Even if it is assumed that the former of the two conflicting government reports is the accurate portrayal of the situation at the time, the circumstances arguably might suffice for preventive detention, since the very purpose of preventive detention is to allow for swift executive action instead of the reactive mechanism of the ordinary judicial process. However, commentators argue that even so, the circumstances would not have allowed for torture or CIDTP to be exacted on the detainees. There was no necessity for ill-treatment, and no unpreventable clash of rights had occurred. If torture

\textsuperscript{124} These difficulties were compounded by the ease of escape of the terrorists across the territorial border between Northern Ireland and the Republic of Ireland.

\textsuperscript{125} See, supra note 112, at 70.

\textsuperscript{126} The statement was released on May 26 1987 by the Ministry of Home Affairs.
is to only, if ever, be utilised as a last resort, the treatment of the detainees here, if true, would have amounted to a violation of customary international law.

However, it is notable that the 'ticking time bomb' scenario typically presumes torture but not CIDTP. If this argument is followed, then treatment amounting to CIDTP but not torture would not need to be justified by only the strictest circumstances of necessity. While acknowledging that the alleged treatment in this case might amount to CIDTP, it is submitted that it did not rise to the level of torture. Judge Fitzmaurice's warning in his dissent in *Ireland n. UK* is to be kept in mind – we should not devalue the language of torture.

The wider the definition of torture is cast, the less likely the international community is to be outraged at so-called torture and political pressure is thus less likely to be exerted on recalcitrant states. As the International Court of Justice only has jurisdiction where the states have given consent; and not every state has ratified the Rome Statute of the International Criminal Court (e.g. Singapore has not, and neither has the US), the extent of political pressure may be determinative of whether alleged torturers are brought to justice. While recognising that torture should not be defined within extremely narrow boundaries as in the much-criticised Bybee Memorandum in the US, it is submitted that the concept of torture should also not be unduly stretched.

Even so, the combination of an interventionist executive and a deferent judiciary in Singapore does not augur well for the delicate balance between individual rights and collective security to be maintained. Yet again, this may be understandable from the Singapore government's stance that there is a trade-off between economic prosperity (which presupposes the necessity for collective security) and individual cultural and political rights.127

As for the Abu Ghraib detainees, their placement in the prison effectively neutralised their threat to American security for the period of their detention. Therefore, there was arguably no imminent, clear and severe threat that required torture to be used to obtain information necessary to avert the threat. There was no necessity for torture in this case. Further, the treatment that the detainees were subjected to far exceeded the alleged ill-treatment faced by the "Marxist conspirators" in Singapore. One detainee died in the course of detention, and this was said by the US military to have been a homicide.128 Photographic evidence has emerged which allegedly reveals "torture, abuse, rape and every indecency" perpetrated against the detainees.129 Some images also showed homicide and corpses, some shot in the head and some with slit

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throats.\textsuperscript{130} It is arguable that the more extreme the treatment, the higher the threshold for torture should be. The courts martial thus found eleven of the soldiers involved guilty of various offences, though it might be arguable that the severity of the sentences did not sufficiently address the severity of the ill-treatment perpetrated.

The threshold for torture was arguably met in the case of \textit{Ireland v. UK}, given the imminent, clear and severe threat to the stability of Northern Ireland. The IRA was a well-organised group, which had demonstrated disregard for human life.\textsuperscript{131} However, the ECtHR did not adopt the relativistic understanding of the prohibition on torture and CIDTP, but adhered to the absolute nature of the provision provided for by the express wording of Art. 3 ECHR. Viewed against the comparative analysis, the approach of the ECtHR is particularly striking. Out of the three incidents examined in this article\textsuperscript{132}, the situation confronting the UK provides the strongest case for torture. Even so, the government's actions were found to have violated Article 3 by the majority of the ECtHR. However, it appears that the UK government's arguments from necessity were taken into account, as reflected in the majority's finding of CIDTP rather than torture. A finding of torture would be a severe blight on the country's human rights track record, and the court was cognisant of this, and thus the decision reveals sympathy for the government's position.

It is worth mentioning that as far as the writers are aware, no court has adopted the relativistic understanding that the article contends for.

3. \textit{The Procedural Dimension}

A crucial element in the prevention of torture is that the perpetrators must be brought to justice, and that evidence obtained through torture or CIDTP is prohibited from being raised in a court of law. The latter element is no less critical than the former, as the admissibility of such evidence might be seen to be an effective sanctioning of the methods brought to bear on suspects which led to the confessions or admissions being obtained. A failure to do so could lead to impunity for the perpetrators. As the UN Special Rapporteur on torture noted, "impunity continues to be the principal cause of the perpetuation and encouragement of human rights violations and, in particular, torture."\textsuperscript{133}

Even in the context of information being required for swift executive action to minimise or prevent imminent, clear and severe danger, when the executive

\textsuperscript{131} McCann v. UK, 2008 ECHR 385.
\textsuperscript{132} Namely, the Marxist conspiracy in Singapore, the Abu Ghraib incident in the US, and the IRA in the UK.
\textsuperscript{133} Nigel Rodley, \textit{Report on Torture and other Cruel, Inhuman or Degrading Treatment or Punishment}, UN Doc A/54/426, ¶48 (Oct. 1, 1999).
chooses to torture, it takes the risk of acting outside the law. This article would not go so far as to argue that there should be a prior justification allowing for torture; rather, it argues that on the fundamental assumption stated above, there may be, in the appropriate case, an *ex post* excuse for the persons who have perpetrated torture.\textsuperscript{134} Notwithstanding this however, when a statement is made by an accused under torture, it is submitted that such a statement should not be admitted, otherwise, it would amount to a judicial sanction of torture.

a. **Singapore**

While there have been no cases specifically on torture or CIDTP in the context of counter-terrorism, the procedures under the Evidence Act (EA) and Criminal Procedure Code 2010 ("CPG 2010") elucidate the general framework of admissibility of evidence in Singapore.

A voluntariness threshold is set up under the CPC 2010 which provides that a statement of the accused is irrelevant and thus inadmissible in a criminal proceeding if the making of the statement appears to the court to have been caused by any inducement, threat or promise.\textsuperscript{135}

However, the mere fact of impropriety on the part of the law enforcement authorities in their treatment of the accused is not a basis for excluding the confession, unless it amounts to oppression.\textsuperscript{136} The threshold set is a very high one – the suspect has to have been subjected to acts, which tend to sap and have in fact sapped his free will.\textsuperscript{137} Sleep deprivation and a lack of food or drink will not necessarily constitute oppression.\textsuperscript{138}

The burden of proof is on the prosecution to show that the statement was made voluntarily. However, it is not the case that the slightest suspicion of an inducement, threat or promise will be sufficient to rule out a statement.\textsuperscript{139}

The judiciary is concerned not to clog on the proper exercise by the police of their investigatory function. The recognition that robust interrogation is an essential and integral aspect of police investigation\textsuperscript{140} has resulted in a high threshold being implemented before oppression is found.

\textsuperscript{134} This is similar to the position adopted in PCAT v. Israel, supra note 2, where the court held that there might be a post factum necessity defence for persons who had authorised torture; but it could not state in advance that interrogations under the conditions of necessity were justified.

\textsuperscript{135} CPC 2010, §258(3). However, if the statement is procured through deception, this does not negate voluntariness. See CPC 2010, §258, Explanation 2(a). Even so, this does not extend to the positive misrepresentations, which remain inadmissible. See Public Prosecutor v. Mazlan bin Maidun [1992] 3 SLR(R) 968 (Singapore) (on §29 of the Evidence Act, which is in all material respects similar to Explanation 2(a) to §258 of the CPC 2010).

\textsuperscript{136} JEFFREY PINSKY, EVIDENCE AND THE LITIGATION PROCESS 153 (2010).

\textsuperscript{137} CPC 2010, §258.

\textsuperscript{138} This has been held in several cases. See, e.g., Public Prosecutor v. Tan Boon Tst [1990] 2 MLJ 466 (HC) (Sing.); Fung Yuk Shing v. Public Prosecutor [1993] 2 SLR(R) 665 (Sing.).

\textsuperscript{139} Panyus Martmontree v. Public Prosecutor [1995] 2 SLR(R) 806 (Sing.).

\textsuperscript{140} Seow Choon Meng v. Public Prosecutor [1994] 2 SLR(R) 338 (Sing.).
b. The US

The MCA 2006 expressly provides that statements obtained by coercive interrogation (i.e. CIDTP short of torture) are admissible evidence before a military commission.141 While the evidence “obtained by use of torture”142 is ostensibly excluded under the Act, there is no definition of which interrogation methods constitute torture, and military commission judges are left to draw the line between torture and CIDTP. Given the inevitable subjectivity with regard to where the line between torture and CIDTP lies, it is arguable that the Act should have provided a definition. However, the argument against defining torture is that to do so would allow for methods just short of torture to be devised, resulting with impunity being perpetuated.143 This argument carries great force, and the price of subjectivity is perhaps a necessary one that needs to be paid.

Other procedural innovations under the MCA are the admissibility of hearsay evidence, and the placement of the burden of proof on the defendant to prove that evidence is unreliable or lacking in probative value.144 Further, under certain circumstances, the MCA permits the government to withhold from discovery the classified sources, methods and activities by which evidence was obtained.145

This violates the Due Process Clause of the US Constitution. SCOTUS has repeatedly held that due process prohibits the government’s use of involuntary statements extracted through psychological pressure, physical intimidation, torture or other mistreatment.146

There are no emergency exceptions to the prohibition on the use of coerced confessions. In Chambers v. Florida,147 SCOTUS was “not impressed by the argument that law enforcement methods such as those under review are necessary to uphold our laws”; the Constitution “proscribes such lawless means irrespective of the end”.148

141. This is provided that “the totality of the circumstances renders the statement[s] reliable and possessing sufficient probative value” and their introduction serves the “best interest of justice”. See MCA 2006, 10 U.S.C. § 948r (c) (1) and (2).
142. 10 U.S.C. § 948r(b).
146. See, e.g., Schnecloth v. Bustamante, 412 U.S. 218, 225 (1973); Lego v. Twomey, 444 U.S. 477, 489 (1977) (where the voluntariness of a confession is challenged, “the prosecution must prove by at least a preponderance of the evidence that the confession was voluntary”). See also Colorado v. Connelly, 479 U.S. 157, 168 (1986) (affirming Lego); Hutto v. Ross, 429 U.S. 28, 30 (1976) (The test is whether the confession was "extracted by any sort of threats or violence, (or) obtained by any direct or implied promises, however slight, (or) by the exertion of any improper influence,“ citing Bram v. United States, 168 U.S. 532, 542-43 (1897)).
147. 309 U.S. 227 (1940).
148. Id., at 240-241.
The MCA completely disregards this prohibition. On the one hand, it allows military commission judges to consider the reliability and probative value of statements made under coercion. And on the other, it disables detainees from effectively challenging reliability or from proving that the abuse they endured amounted to torture.\(^{149}\)

This unsatisfactory state was improved by the Military Commissions Act of 2009 which amended some of the provisions of the MCA 2006 to improve protections for defendants. The admissibility of coerced and hearsay evidence was restricted, though it has been contended that the law still falls “short of providing the due process required by the Constitution”.\(^{150}\)

c. The UK

In *A v. Secretary of State for the Home Department (No 2)*,\(^{151}\) the House of Lords held that evidence obtained during interrogation under torture could not be admitted. The Special Immigration Appeals Commission (SIAC),\(^{152}\) which hears appeals by detainees under the ATCSA, was held to be bound to act in accordance with Art. 3 of the ECHR.

In *Al Rawi v. Security Service*,\(^{153}\) the government argued for the use of “closed material procedure”, in which key parts of the trial would be held in secret, preventing the claimants and their lawyers from knowing the government’s evidence. It contended that the use of secret evidence would be necessary because of the sheer volume of classified material involved, and the disclosure of such material would endanger national security. The court rejected these arguments, holding that a secret trial cuts across the absolutely fundamental principle of the right to a fair trial. If the government were to win on the basis of secret evidence, it would be but a Pyrrhic victory, resulting in damage to the reputation of both the government and the courts. There would be a substantial risk that justice would not be seen to have been done. Therefore, the use of secret trials was prohibited.

d. Convergence or Divergence? Broad convergence.

It is interesting to note that Singapore has not had specific innovations for admissibility of evidence in the counter-terrorism context. Instead, it may be

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\(^{151}\) [2005] UKHL 71.

\(^{152}\) A statutorily constituted court pursuant to the ATCSA.

\(^{153}\) [2010] EWCA Civ 482 (U.K.).
argued that the applicability of the general framework in any possible counter-terrorism scenario ensures a minimal standard of fairness. Yet, this view may be misconceived. From past empirical cases, those previously detained under the ISA do not seem to have made declarations under the general framework for admissibility of evidence. It should be recalled that the supposed Marxist conspirators subsequently denied their signed statements which were alleged to have been acceded to only in consequence of alleged ill-treatment, and that the subsequent retraction of that denial led to an inquiry of commission being deemed unnecessary. The entire process seemed to circumvent the general framework, and the detainees did not or perhaps could not seek judicial redress in this aspect. Hence, there remains a dubious questionability about the admissibility of evidence in the context of preventive detention.

On the other hand, the US and UK share the commonality of the executive once again being thwarted by judicial intervention, maintaining ‘due process’ and the ‘fundamental principle of a right to fair trial’. Again, this executive-judiciary to-and-fro ensures the possibility of equilibrium in the over-arching tension between individual detainees’ rights and collective state security interests, which is constitutionally arrived at. This constitutional check-and-balance seems to remain absent in the Singapore context, thus inviting doubts as to whether the protection of individual rights has been determinatively ‘trumped’ by the collective security interest, or perhaps by a “supreme political ideology”.

CONCLUSION

Madison postulated that “the aim of every political constitution is to ... obtain rulers [who] ... pursue the common good of society.” Indeed, the Singapore government has stated in its Shared Values White Paper 1991 (“SVWP”) that the government is the “trustee [sic] of the people”, i.e. it exists to serve the best interests of the people. Voltaire said that morality was the same in all civilised nations. However, this is but a half truth, for while we share a common humanity, each state has its own hierarchy of moral values, its own culturally-determined sense of what is fair and unfair, which shapes the pursuit of the common good. While it is not controversial that normatively, the role of governments is to pursue the ‘common good’ and the best interest of the people, the most fundamental question is then: what is this ‘common good’ supposed to be?

154. See generally Hang, supra note 6.
157. SVWP, id., ¶48.
158. Hoffmann, supra note 20.
The Singapore government has insisted on the ‘Asian values’ rhetoric, placing economic prosperity as the paramount goal which, being buttressed by the ‘shared value’ of ‘communitarianism’, is deemed to ‘trump’ individual interests such as individual rights and liberties.\(^{159}\)

In the US, a letter, drafted and signed in the aftermath of September 11, by many leading American intellectuals, entitled “What We’re Fighting For”, \(^{160}\) reveals a contrasting image: the authors affirmed four key American values: (i) the conviction that all persons possess innate human dignity as a birthright, and that consequently each person must always be treated as an end rather than used as a means; \(^{161}\) (ii) the conviction that universal moral truths exist and are accessible to all people; (iii) the conviction that most disagreements about values call for civility, openness to other views and reasonable argument in pursuit of truth; (iv) the freedom of conscience and freedom of religion.

The contrast is stark. One is demanded by government; the other is a consensual declaration by many citizens who claim to represent America. One upholds economic prosperity over individual rights; the other is rooted in universal ideals. It may well be that every nation-state (i.e., the collective of its citizens) is entitled to autonomously decide for itself what its ‘common good’ should be; but it must be kept in mind that such discussions can only be possible in a stable environment free from terrorism.

The comparative analysis of the three countries has revealed that in its pursuit of achieving the ‘common good’, the executive branch of government of all three nation-states has broadly speaking, traversed the same path – a path arguably paved with good intentions, yet fraught with the ills of arbitrary power which threatens the fundamental dignity of the individual. This very arbitrary power was feared by Madison, who thus believed in the separation of powers in government so that “ambition ... counteract ambition”. \(^{162}\) Indeed, fundamental liberties of citizens may be protected by one branch of government from oppression by another – often this crucial role is left to the judiciary, the “guardian of fundamental liberties”. \(^{163}\)

Yet, in some respects, the Singapore judiciary has fared poorly in comparison with its US and UK counterparts. Thus, it has been said that the Singapore

\(^{159}\) See Li-ann, *supra* note 127.


\(^{163}\) Thio Li-ann, *Courting Religion: the Judge between Caesar and God in Asian Courts*, 8 Sino. J.L.S. 52, 72 (2009); Hang, *supra* note 6, at 335.
judiciary has abdicated its role as guardian of liberties.\textsuperscript{164} Conversely, the US and UK judiciary are said to err on the side of ‘judicial activism’.\textsuperscript{165} However, the comparison must surely be located in the context of the constitutional role of the judiciary. In this regard, UK Law Lord Steyn once commented “the theory that courts must always defer to elected representatives on matters of security is seductive. But there is a different view, namely that... courts... must never on constitutional grounds, surrender the constitutional duties placed on them”.\textsuperscript{166}

It is perhaps in this aspect of Singapore’s constitutional architecture\textsuperscript{167}, that there is more than a mere crack. This handicap – whether it is due to an executive-legislative imposition or a political ideological internalization – possibly has a gargantuan adverse impact on the individuals who may fall outside the ordinary legal framework, into the treacherous legal terrain of preventive detention or torture, in light of heightened counter-terrorism measures.

Although the above analysis buttresses the thesis that human rights, and the derogation of such rights, are at the same time context-specific (in application and historical pedigree) and universal (in its broad existence), it remains to be seen whether the differences in application are in fact justified by context-specificity and the relativity of norms, or whether it is the mere consequence of a restrained guardian of liberties – i.e., whether the ideals of human rights should be practically divided between the East and West, or that it is merely a spectrum of conservatism to progressiveness. After all, it was only not too long ago that the SCOTUS upheld the constitutionality of a mass evacuation of 126,000 Japanese Americans during World War II in Korematsu v. United States,\textsuperscript{168} which marked the nadir of the jurisprudence of human rights in the very same court that today appears to be the bulwark against the state’s infringement of individual human rights. The area of counter-terrorism law is constantly changing as states adapt their practices to meet new threats. In conclusion, it must always be remembered that every struggle of the state against terrorism is to be conducted inside the law – the war on terrorism is also law’s war against those who rise up against it.\textsuperscript{169}

\textsuperscript{164} Hang, supra note 6, at 335.
\textsuperscript{167} See supra notes 34 & 35, and accompanying text.
\textsuperscript{168} 323 U.S. 214 (1944). See Richard Goldstone, The Tension between Combating Terrorism and Protecting Civil Liberties, in Wilson, supra note 60, at 159.
\textsuperscript{169} PCAT v. Israel, supra note 2, at 61.