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# THE CENTRAL CASE APPROACH TO HUMAN RIGHTS: ITS UNIVERSAL APPLICATION AND THE SINGAPORE EXAMPLE

Tai-Heng Cheng<sup>†</sup>

*Abstract:* Human rights situations are often analyzed and described in binary terms, that is, whether rights have been violated or upheld. This Article argues that it is more meaningful to measure human rights situations in terms of deviations from a central case of key characteristics, and to understand the subtle interplay of social, political, and economic vectors that cause such deviations. Using Singapore as a case study, this Article demonstrates that in any State the real human rights situation revealed by central case analysis can be dramatically different than the traditional binary assessment of that situation. The Article concludes by showing how the central case methodology can be used by all decision-makers in every State to promote human rights, with particular reference to recent disputes over Muslim minority rights in France and Singapore, and the executive detention of enemy combatants in the United States.

## I. INTRODUCTION

### A. *A New Approach to Human Rights*

All over the world, human rights are evaluated in binary terms, that is, whether a right has been violated or upheld, or whether or not a government has complied with a human rights standard. For instance, Amnesty International has stated that it has “documented violations with regards to the administration of justice, including torture”<sup>1</sup> in Thailand, that “the Royal Thai Government does not comply with international human rights standards, particularly Articles 7 and 10 of the International Covenant on Civil and Political Rights”,<sup>2</sup> and that the Thai government violates the rights of individuals to enjoy effective remedies for violations, to be free from

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<sup>1</sup> Press Release, Amnesty International, Thailand: Extra-judicial Killings is not the Way to Suppress Drug Trafficking (Feb. 20, 2003), available at <http://web.amnesty.org/library/print/ENGASA390012003> (last visited Jan. 20, 2004).

<sup>2</sup> AMNESTY INTERNATIONAL, THAILAND: WIDESPREAD ABUSES IN THE ADMINISTRATION OF JUSTICE (2002), available at <http://web.amnesty.org/library/index/engasa390032002> (last visited Feb. 8, 2004).

torture, and to fair trials.<sup>3</sup> The United States has been criticized for its repatriation of Haitian refugees on the grounds that these repatriations violated the rights of refugees,<sup>4</sup> and has itself criticized China's policy of forced abortions under its strict birth control laws as violations of human rights.<sup>5</sup>

This Article argues that this binary view of human rights does not promote in-depth and accurate understandings of human rights situations. Consequently, decision-makers and human rights activists relying solely on the binary approach may be blindsided to pitfalls and fail to take the avenues that best promote human rights. To overcome these limitations, this Article proposes a "central case" approach as an alternative way to understand human rights. Through the examination of human rights within Singapore and other international contexts, this Article argues that the central case approach helps scholars, advocates, and other decision-makers capture the nuances of any human rights situation and deploy strategies to promote human rights more effectively.

### B. *Limitations of the Binary Approach*

Although the binary approach allows accusations to be flung with ease and is often used as an advocacy tool, it also irons out the bumps and wrinkles inherent in any human rights situation. This can lead to conclusions about human rights that are at best flat and dull and at worst wholly misleading. Conceptually, this binary view of rights does not permit degrees of derogation from a human rights standard. For example, although using heavy shackles on prisoners and beating blindfolded detainees with rifle butts may both be regarded as forms of torture, the binary view of rights precludes an inquiry into the extent to which these forms of torture are of concern.

As a pragmatic matter, it is important to recognize degrees of departures from a human rights norm in order to effectively allocate limited resources to combat the plethora of global human rights abuses. It is even less meaningful to speak of rights in binary terms when examining the aggregate level of human rights in a State, or over a period of time. Within

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<sup>3</sup> AMNESTY INTERNATIONAL, A HUMAN RIGHTS REVIEW BASED ON THE INTERNATIONAL COVENANT ON CIVIL AND POLITICAL RIGHTS (1999), *available at* <http://web.amnesty.org/library/print/engasa390011999> (last visited Jan. 20, 2004).

<sup>4</sup> Thomas David Jones, *International Decision, Cuban American Bar Association, Inc. v. Christopher, Haitian Refugee Center, Inc. v. Christopher*, 90 AM. J. INT'L L. 477, 477 (1996).

<sup>5</sup> Graciela Gómez, *China's Eugenics Law as Grounds for Granting Asylum*, 5 PAC. RIM L. & POL'Y J. 563, 564 (1996).

any State, different rights enjoy varying levels of protection. Even within the context of any one right, there are usually instances of departures from that right, and other instances in which government policies support that right.

The binary approach also often misinterprets the true human rights situation within a State because it fails to account for important political, economic and social considerations that shape human rights policies. For instance, Australia's September 2001 decision to pay AUS \$30 million to the island State of Nauru to intern in a Nauruan refugee camp 300 Afghan refugees who fled the Taliban by boat has been criticized as a violation of the refugees' rights.<sup>6</sup> However, this assessment does not consider the exponential increase in refugee volumes due to improved international travel and the debilitating social and economic costs that these high volumes can impose on host States. Binary assessments, which do not account for political, economic, and social concerns, can never lead to optimal solutions that respond to the constraints imposed upon international and municipal decision-making.

### C. *The Central Case Approach*

The better way to understand a human rights situation is by comparison to a "central case" of human rights. In the 1980s, Professor John Finnis developed the Aristotelian notion of "focal meaning" (*pros hen* or *aph henos*) and Max Weber's "ideal-type" device into the "central case" concept. Finnis defines this concept as the typical or ideal case in which general traits that mark the case are present to a very high degree.<sup>7</sup> While Finnis used this concept to identify and evaluate legal systems, one may also apply this heuristic device to evaluate human rights. For instance, the central case for the right to life can be described as a political and legal system in which no person is sentenced to death, there are no extra-judicial killings by the ruling elite or their agents, individuals are protected from criminal killings by an effective police force, and where social, economic, and political conditions are optimized to allow each individual's self-actualization.

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<sup>6</sup> See Sarah Macdonald, *Australia's Pacific Solution*, BBC NEWS, Sept. 26, 2002, <http://news.bbc.co.uk/1/hi/programmes/correspondent/2279330.stm> (last visited Jan. 12, 2003); Pam O'Toole, *Australia's Asylum Policies Attacked*, BBC NEWS, Sept. 26, 2002, <http://news.bbc.co.uk/1/hi/world/asia-pacific/2282398.stm> (last visited Jan. 12, 2003).

<sup>7</sup> JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 9-11 (H.L.A. Hart ed., 1986) (1996).

The central case concept allows textured comparisons to the ideal human rights system, rather than resort to the traditional binary "upheld/violated" conclusion. Instead of simply stating whether a particular State has violated a human right, the central case device requires a more considered statement as to whether the State context matches the central case exactly, falls within the umbra of the central case, has shifted to the penumbra, or is so different from the central case that it is beyond the outer edges of the penumbra.

The central case theory also helps overcome the definitional problems associated with many fundamental rights. The binary heuristic requires one to define the content of a particular right in absolute terms, so that one can conclude whether that right has been violated. The binary approach causes immense difficulty in many instances where it is impossible to define the content of a human right precisely. In contrast, while the ideal central case may not have a clearly defined or universally accepted set of traits, the central case approach nonetheless provides useful comparison. For instance, the Singaporean police have been known to deprive adolescent detainees of food for more than half a day while interrogating them.<sup>8</sup> Even if it is unclear whether the deprivation of food for twelve hours constitutes torture, the central case for the prohibition of torture has other traits such as the preservation of dignity, the protection from pain and suffering, and the maintenance of standards of living to which an ordinary person would be accustomed.<sup>9</sup> Consequently, the central case device allows meaningful discussion about the similarities and dissimilarities from the central case, thereby illuminating the full range of concerns regarding this interrogation tactic.

The central case approach also responds to the cultural relativist apology for human rights abuses, which typically argues that every State should be allowed to have its own unique human rights standards to account for the specific cultural attitudes of its citizens. While the central case theory accepts that an assessment of human rights must consider a State's social and political context, it also demands an inquiry into whether this socio-political context provides a normatively acceptable explanation for apparent departures from certain traits of the central case.

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<sup>8</sup> See *Tan Choon Huat v. Public Prosecutor*, 1991-3 Malay L. J. 230 (Sing. High Ct.) (noting that the eighteen year old appellant was questioned by the police for almost five hours and deprived of food and rest for fifteen hours).

<sup>9</sup> See also FINNIS, *supra* note 7, at 11-18, 100-27 (discussing "practical reasonableness" as the method to determine the focal criteria of a central case, i.e., what traits are of importance and significance. This natural law methodology ultimately entails accepting that the basic values that underpin central case traits are self-evident).

This Article demonstrates the benefits of the central case approach by examining the human rights situation within Singapore and by comparison to similar situations in other States. The central case approach overcomes the deficiencies of the binary approach in three key ways. First, the central case approach accounts for the social and political factors that shape human rights policies. These factors may draw attention to a society's true human rights concerns, which a binary analysis may overlook. The benefit of recognizing the influence of socio-political forces on human rights is shown to be critical in Part II.A., which considers political rights in Singapore. Although legal controls over political participation and expression are significant in Singapore, the deeper concern revealed only through central case analysis is that the combination of enforcement policies, monolithic power structures, and surveillance laws create a paralyzing culture of fear and political self-censorship within that State.

Second, whereas the binary approach reduces the description of a human rights situation to statements about whether rights are violated or upheld, the central case approach requires detailed analyses of the degrees of derogations of different traits from the central case. The benefit of differentiating between different aspects of a given human right is demonstrated in Part II.B. through consideration of due process rights in Singapore. The central case approach reveals that due process rights in Singapore deviate from the central case of due process to varying degrees, thereby helping decision-makers identify the critical deviations at which to direct their human rights strategies. In addition, the central case approach accounts for the impact of governmental policies on different subjects of these policies. This benefit is demonstrated in Part II.C., which examines the rights of aliens within Singapore. Although there is virtually no deviation from the central case in relation to white-collar aliens, there are dramatic deviations in relation to blue-collar aliens. Decision-makers who do not understand this distinction cannot promote human rights effectively.

Third, the central case approach allows advocates to understand human rights situations that are in a state of flux. Conclusions about whether rights are violated or upheld necessarily freeze analysis at a given point in time. Evolving rights require analyses that account for social and political shifts that occur over time. The central case approach is well suited to analyze evolving rights in terms of greater or lesser departures from the central case. This benefit is demonstrated in Part II.D., which examines gay and lesbian rights in Singapore. By freezing the human rights situation, the binary approach misleads activists into believing that gay rights in Singapore are uniformly violated. In fact, the salient observation about gay and lesbian

rights in Singapore is that they are in a state of dramatic change. In situations in which rights are evolving, decision-makers and activists must recognize and adjust the conditioning factors that influence the changing trends in order to promote human rights. The central case approach helps activists understand the Singaporean government's strategy for improving gay and lesbian rights, the political constraints that limit these improvements, as well as the dangers of pushing for change too rapidly.

These three benefits of the central case approach enable the approach to be used by decision-makers to promote human rights. This Article explains how human rights advocates can use the central case approach by examining within Part III.A. a recent dispute regarding the prohibition of Muslim headscarves in Singapore schools. Had advocates used a central case analysis rather than a binary analysis, they may have been able to produce a more favorable outcome for Singaporean Muslims. This Article also demonstrates that the central case approach extends beyond advocacy to all decision-making. Part III.B. addresses how the central case approach can help decision-makers plan their strategies in relation to the recent debates in France over the prohibition of Muslim headscarves in schools. Part III.C. demonstrates how the central case approach helps the U.S. courts determine their judicial response to the executive detention of enemy combatants.

## II. SINGAPORE AND THE CENTRAL CASE

Examining human rights in Singapore demonstrates the limitations of the binary approach and the comparative advantages of the central case approach. Critics who review Singapore's human rights through the binary approach often reach overly simplistic conclusions. When Singapore is measured against a checklist of human rights, it appears to violate numerous human rights, especially political rights and freedom of expression rights.<sup>10</sup> A more careful look at the interactions between the governed and the government, however, reveals that human rights are in fact being advanced in more subtle ways. The central case theory allows jurists to consider the various implicit and explicit compacts between the governed and the ruling elite, in which power and subservience, long-term goals and short-term costs, and rights and duties are regularly traded.

Apologists that rely on the binary approach are equally guilty of oversimplification. These apologists conveniently sidestep Singapore's lack of

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<sup>10</sup> See, e.g., AMNESTY INTERNATIONAL, ANNUAL REPORT 2002, SINGAPORE, available at <http://web.amnesty.org/web/ar2002.nsf/asa/singapore!Open> (last visited Jan. 11, 2004) [hereinafter AMNESTY INTERNATIONAL REPORT 2002].

freedoms and strict rules by pointing to the State's formal mechanisms of democracy and positivistic evidence of rule by law: a constitution, clear laws, and a formally independent judiciary.<sup>11</sup> Alternatively, apologists may point to Singapore's astounding economic development and the attendant increase in economic rights.<sup>12</sup> Finally, apologists argue that rights have not been violated because human rights have a different meaning in the "Asian" cultural context.<sup>13</sup> In contrast, the central case approach allows deeper investigation into the subtle interactions between legal, political, and social norms within Singapore's society, which is both poly-ethnic<sup>14</sup> and comprised of a highly mobile and educated cosmopolitan social class and a broad population of blue-collar workers.<sup>15</sup> This central case investigation reveals that the consequences of some government policies are more damaging than they appear to be under a superficial analysis, and cannot be conveniently excused by different cultural norms or economic growth.

#### A. *Political Rights*

The central case analysis of political rights in Singapore is far more illuminating than a binary analysis of these rights. The binary view suggests that political opposition and dissent in Singapore is tightly controlled through various legal mechanisms and executive powers. In contrast, the central case approach reveals that while the various legal controls depart from the central case of political rights, there are other factors that bring Singapore closer to the central case. At the same time, the central case approach unearths more insidious methods of oppression that are not detected by binary analysis. In sum, the central case approach helps human rights advocates and decision-makers identify the real concerns over political rights that the binary approach misses, thereby allowing human rights advocates to direct their strategies at fundamental problems rather than peripheral concerns.

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<sup>11</sup> See SING. CONST. art. 11(1), 58, 94(2), 98 (1999).

<sup>12</sup> See Bilhari Kausikan, *Asia's Different Standard*, in STEINER & ALSTON, INTERNATIONAL HUMAN RIGHTS IN CONTEXT 226, 230 (1996).

<sup>13</sup> See, e.g., *id.*; Yash Ghai, *Human Rights and Governance: The Asia Debate*, 15 AUSTRAL. Y.B. INT'L L. 1, 5 (1994); Simon S.C. Tay, *Human Rights, Culture, and the Singapore Example*, 41 MCGILL L.J. 743, 749-57 (1996).

<sup>14</sup> The main ethnic groups in Singapore are Chinese, Malays, Indians and Eurasians. See SING. DEP'T OF STATISTICS, SINGAPORE RESIDENTS BY AGE GROUP AND ETHNIC GROUP (2003), available at <http://www.singstat.gov.sg/keystats/mqstats/mds/mds21a.pdf> (last visited Jan. 2, 2004).

<sup>15</sup> See SING. DEP'T OF STATISTICS, YEARBOOK OF STATISTICS: SINGAPORE (2001), available at <http://www.singstat.gov.sg/keystats/annual/yos/yos112.pdf> (last visited Jan. 2, 2004).



### 1. *Binary Analysis of Political Rights*

The binary analysis identifies violations of political rights in three key categories, the first of which is rights in connection with public demonstrations. Galvanizing public opinion and applying pressure to elected officials through public demonstrations provides private persons with the ability to influence their State's decision-making process. In Singapore, the right to be involved in the decision-making process through public expressions of political views is so tightly curtailed that under a binary analysis, one would have to conclude that these rights are violated.

All public speeches, exhibitions, performances pieces, or installations must be licensed under Singapore's Public Entertainments and Meetings Act. The licensing regime applies even to mere chanting or the carrying of slogans.<sup>16</sup> If more than four people gather to demonstrate for a cause, they must have obtained a permit under the Miscellaneous Offences (Public Order & Nuisance) Act (Assemblies and Processions) Rules.<sup>17</sup> For demonstrations outside key government installations, such as Parliament and the Supreme Court, this requirement to obtain a permit applies to a "gathering" of even two persons.<sup>18</sup> While the right to freedom of speech and expression and peaceful assembly are protected by Singapore's Constitution,<sup>19</sup> Singapore courts have not struck down these legislative restrictions as unconstitutional.

Through the Public Entertainment and Meetings Act and Miscellaneous Offences (Public Order & Nuisance) Act, Singapore's ruling elite is able to prevent public demonstrations by refusing licenses for political events. Although the government has been quick to note that between 2001 and November 2002, it approved 1341 applications and rejected only five applications for public talks,<sup>20</sup> most of the approved applications were for apolitical talks. Evidence suggests the existence of a long-standing government policy to refuse licenses for public criticisms of

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<sup>16</sup> Public Entertainment and Meetings Act, ch. 257, § 19 (2001) (Sing.).

<sup>17</sup> Miscellaneous Offences (Public Order & Nuisance) Act, ch. 184, § 5(1), R. 2, 4, 5 (2001) (Sing.).

<sup>18</sup> See Schedule Miscellaneous Offences (Public Order and Nuisance) (Prohibition of Assemblies and Processions – Parliament and Supreme Court), ch. 184, § 2 (2002) (Sing.); Schedule Miscellaneous Offences (Public Order and Nuisance) (Prohibition of Assemblies and Processions – Istana) Order 2002, ch. 184, § 2 (2002) (Sing.).

<sup>19</sup> SING. CONST. art. 14(1)(a), (b).

<sup>20</sup> See *Jeyaretnam Slams Police Refusal To Allow March*, AGENCE FR. PRESSE, Dec. 30, 2002, <http://www.singapore-window.org/sw02/021230a1.htm> (last visited Jan. 2, 2004) [hereinafter *Jeyaretnam Slams Police Refusal*].

key government issues or public speeches by opposition politicians.<sup>21</sup> For example, in December 2002, opposition politician Joshua Benjamin Jeyaretnam was denied a permit to hold a peaceful march against an increase in the Goods and Services Tax.<sup>22</sup> In February 2003, when there were global protests against the United States' invasion of Iraq, two women raised placards outside the United States Embassy in Singapore while four other persons proceeded to the Embassy with placards in plastic bags. All six were instructed by police officers to follow them to the station,<sup>23</sup> where they were subjected to questioning.<sup>24</sup>

In the absence of a license, the only way one may lawfully demonstrate for a cause in Singapore is to have a gathering of fewer than five persons in a public area without doing anything else. The four persons may distinguish themselves from others by dressing in a particular way, such as wearing an armband. These protesters may not, however, give speeches, chant, carry placards, perform, or allow others to join them.<sup>25</sup> Such a farcical silent protest, which has not yet been attempted in Singapore, demonstrates the extreme lengths to which individuals must go to circumvent Singapore's restrictions on political expression and supports the argument that the right to demonstrate publicly is illusory.

Under a binary analysis, the right to freely express one's political views in Singapore is also violated by the State's strict defamation laws. Opposition politicians who have been highly critical of the government have sometimes been found liable for civil defamation, and have had judgments amounting to tens or even hundreds of thousands of dollars entered against them.<sup>26</sup> Some critics have even been investigated for criminal defamation.<sup>27</sup>

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<sup>21</sup> See AMNESTY INTERNATIONAL REPORT 2002, *supra* note 10 (noting that in 2001, 15 Falun Gong spiritual group members were arrested in Singapore for holding a vigil in memory of members who died in custody in China. Seven members were sentenced to four weeks in prison for refusal to disperse during the vigil. An additional eight were fined for "holding a rally without a police permit.").

<sup>22</sup> See *Jeyaretnam Slams Police Refusal*, *supra* note 20.

<sup>23</sup> The six persons were arguably arrested. Under Singapore law, a person is arrested when a reasonable person in the position of the arrested person could not have arrived at any position other than that he was compelled to accompany a police officer. This may occur before he is 'formally' placed under arrest. See *Zainal bin Kuning v. Chan Sin Mian*, 1996-3 Sing. L. Rep. 121, 1996 SLR LEXIS 360, \*35 (Sing. C.A.).

<sup>24</sup> See *Two Women Stage Brief Protest Outside US Embassy*, AGENCE FR. PRESSE, Feb. 15, 2003, available at <http://www.singapore-window.org/sw03/030215a1.htm> (last visited Jan. 2, 2004).

<sup>25</sup> Even then, if anyone complains to the police of a public nuisance, or if a police officer lodges a complaint qua member of the public the police may have grounds to arrest the protesters for committing a "public nuisance." Penal Code, ch. 224, §§ 268, 290 (1985) (Sing.).

<sup>26</sup> See *Goh Chok Tong v. Jeyaretnam*, 1998-3 Sing. L. Rep. 337 (Sing. C.A.). See also Paul Bentley, *The Politics of Defamation in Singapore*, THE PROVINCIAL JUDGES' JOURNAL (1997), available at <http://www.singapore-window.org/80217can.htm> (last visited Jan. 2, 2004); Stewart Littlemore, *Report To The International Commission of Jurists Geneva, Switzerland on a Defamation Trial In the High Court of Singapore Goh Chok Tong vs. J.B. Jeyaretnam August 18-22*, in INT'L COMMISSION OF JURISTS (1997).

Citizens' rights to organize opposition to the government are also violated in Singapore under a binary analysis. The Internal Security Act allows the government to thoroughly crush political opposition. Under the Act, persons who are deemed to act in a manner prejudicial to Singapore may be detained indefinitely without trial.<sup>28</sup> This executive power is not subject to substantive controls by the judiciary to prevent abuses.<sup>29</sup> The only substantive review body is an executive advisory board,<sup>30</sup> and proceedings need not be, and indeed are not, open to the public. The Internal Security Act has been used against people who appeared to be organizing opposition to Singapore's ruling elite outside the electoral process. From Singapore's independence in 1965 to 1998, there have only been four years in which no one was detained without trial under the Act.<sup>31</sup> Political activist Chia Thye Poh was detained for twenty-two and a half years without trial, and then subjected to nine and a half years of restricted movement,<sup>32</sup> making him the world's longest prisoner of conscience after Nelson Mandela.<sup>33</sup> In 1987, the government detained twenty-two Christian activists as alleged Marxists.<sup>34</sup>

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<sup>27</sup> See *Police Investigate Muslim Group Over Alleged Defamation*, AGENCE FR. PRESSE, Jul. 3, 2002, available at <http://www.singapore-window.org/sw02/020703af.htm> (last visited Jan. 2, 2004); Amy Tan, *Muslim Activist Seeks Australian Refuge*, REUTERS, Jul. 24, 2002, available at <http://www.singapore-window.org/sw02/020724re.htm> (last visited Jan. 2, 2004).

<sup>28</sup> Internal Security Act, ch. 143, § 8 (1985) (Sing.).

<sup>29</sup> See Internal Security Act, ch. 143, § 8B(2) (Sing.). The courts have upheld this section as valid law. See *Teo Soh Lung v. Minister for Home Affairs*, 1989-2 Malay L. J. 449, 1989 MLJ LEXIS 402 (Sing. High Ct.). For a black letter critique of the changes in judicial review tests of the Internal Security Act, see PREVENTIVE DETENTION AND SECURITY LAW: A COMPARATIVE SURVEY 193, 193-208 (Andrew Harding & John Pritchard eds., 1993).

<sup>30</sup> Internal Security Act, ch. 143, § 12, 13 (Sing.).

<sup>31</sup> See Minister for Home Affairs Wong Kan Seng, Speech in Parliament on Detention Under the Internal Security Act (Jan. 20, 1999), in 69 SINGAPORE PARLIAMENTARY REPORTS. See also THINK CENTER, SINGAPORE HUMAN RIGHTS REPORT 2002, 2 (Mar. 2002), available at <http://www.thinkcentre.org/article.cfm?ArticleID=1842> (citing a United Nations Human Rights Commission Report noting that the 1987 detainees were subjected to round the clock interrogations and sometimes physically abused); Chia Thye Poh, *Statement by Child on the Lapse of Restriction Order*, Nov. 26, 1999, available at <http://www.singapore-window.org/81126ctp.htm> (last visited Jan. 2, 2004) (first person account that detainees "can be subjected to all sorts of pressure and even torture", and that the author was put in a dark cell under solitary confinement, and other detainees were "abused, stripped or rinsed with cold water in chilled air-conditioned rooms").

<sup>32</sup> See Chia, *supra* note 31. See also David Lamb, *Chia Tries to Understand Past While Figuring Out Future*, L.A. TIMES, Feb. 13, 1999, available at <http://www.singapore-window.org/sw99/90213la.htm> (last visited Jan. 2, 2004).

<sup>33</sup> See Barry Potter, *Singapore's Gentle Revolutionary*, S. CH. MORNING POST, Nov. 30, 1998, available at <http://www.singapore-window.org/81130sc.htm> (last visited Jan. 2, 2004).

<sup>34</sup> See Tang Fong Har, *A Detainee Remembers*, INDEX ON CENSORSHIP, AUG. 1989, available at <http://www.singapore-window.org/tfmemo.htm> (last visited Jan. 2, 2004). But see Minister for Home Affairs Wong Kan Seng, *supra* note 31 (stating that sixteen persons were arrested in 1987). See also 'Marxist Plot' Revisited, SING. WINDOW, available at <http://www.singapore-window.org/sw01/010521m1.htm> (last visited Jan. 2, 2004); *White Paper: The Jemaah Islamiyah Arrests and the Threat of Terrorism*, MINISTRY OF HOME AFFAIRS, Cmd. 2 of 2003, Jan. 7, 2003 (stating that in

The use of the Internal Security Act against political opponents who appear to be able to galvanize public opinion clearly violates the right to political participation. The Singapore government has claimed that the Internal Security Act is necessary to combat terrorism and other disruptive elements, and that the Act is used with the greatest caution.<sup>35</sup> This argument paints no more than the thinnest veneer of legitimacy over the egregious violations of political rights. The ruling elite has proven more than willing to use the Act against political opponents. While it has more recently been used against alleged terrorists, the Act provides executive powers that are not limited to counter-terrorist purposes, and indeed are not subject to substantive judicial checks regarding the purposes for which the Act is used.

Although a binary analysis of political rights in Singapore generally shows violations of these rights, it also suggests that political rights are upheld in relation to political participation in elections. The constitutional structure under which politicians gain power satisfies the minimum requirements for political participation. Singapore holds periodic national elections, ostensibly to allow the electorate to express their will by choosing their legislative leaders. Anyone may stand for election, subject to unremarkable restrictions.<sup>36</sup> As a supplement to this electoral process, persons with slightly divergent views from the conservative establishment may be appointed as Nominated Members of Parliament (“NMPs”) by the President on advice from a Special Select Committee of Parliament.<sup>37</sup> In addition, Parliament can, and has, also appointed as Non-Constituency Members of Parliament opposition politicians who have not been elected.<sup>38</sup> These two creatures of the Singapore Constitution may vote on any issue except motions pertaining to money, a no confidence vote in the government, Constitutional amendments, and the President’s removal.<sup>39</sup> As the central case analysis below demonstrates, however, these supposed democratic protections are in practice undermined in Singapore.

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September 2002, eighteen alleged Muslim terrorists were arrested and detained without trial and in December 2002, fifteen alleged Islamic terrorists were arrested under the Internal Security Act).

<sup>35</sup> See, e.g., Minister for Home Affairs S. Jayakumar, Speech in Parliament on the Internal Security Act (Abolition) (Nov. 29, 1989), in 54 SINGAPORE PARLIAMENTARY REPORTS (1989); *White Paper: The Jemaah Islamiyah Arrests and the Threat of Terrorism*, *supra* note 34, at 20.

<sup>36</sup> See Parliamentary Elections Act, ch. 218, § 6 (1985) (Sing.) (containing restrictions such as, in § 6(1A)(c), the prohibition against any person who has been “convicted by any court in Singapore of any offense punishable with imprisonment for a term exceeding 12 months and [against whom] a warrant of arrest by a court in Singapore authorizing his apprehension in relation to that offense remains in force.”).

<sup>37</sup> See SING. CONST. art. 39(1)(c), *citing* Fourth Schedule.

<sup>38</sup> See *id.* art. 39(1)(b).

<sup>39</sup> See *id.* art. 39(2).

## 2. *Central Case Analysis of Political Rights*

The central case approach reveals a more nuanced picture of political rights in Singapore than the binary approach. The central case of political rights entails being able to freely express one's political views in both the common civic space and in private areas. All persons should be free to participate in the political decision-making process without standing for elections. This includes the ability to galvanize public support through peaceful demonstrations, as well as the ability to influence political outcomes in more subtle ways, such as through backroom diplomacy with the ruling elite.

When measured against this central case, Singapore's violations of political rights identified under the binary approach are not as serious as they may appear because the central case approach unearths subtler methods of political participation. On the other hand, close examination of Singapore's social and political vectors reveals that protections of democratic elections are weaker than they appear on the face of the Constitution. Central case analysis reveals that the real concerns regarding political rights arise not from the controls over public demonstrations, defamation laws, or the Internal Security Act themselves, but from the socio-legal strategies deployed by the ruling elite to create a culture of fear. This control through fear crushes opposition to the ruling elite and brings Singapore furthest from the central case.

### a. *Avenues for political participation*

Singapore's restrictions on public assembly and demonstrations, although severe, are not as absolute as suggested by the binary approach. Although legislative provisions provide the executive with wide powers to quash dissent, the exercise of this power is constrained by the need to manage the public dissatisfaction that can fester if oppression is sustained for an extended period of time. This consideration has led Singapore's government to tolerate mild dissent. For instance, in March 2003, the government allowed a civic group, the Think Center, to exhibit 200 female dolls with various labels, such as "mother" and "prostitute," to draw attention to women's issues in Singapore.<sup>40</sup> In addition, individuals have been allowed to register civic groups as societies under Singapore's

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<sup>40</sup> See *In Singapore, 200 Dolls with Labels such as "Mother", "Prostitute" or "Maid" were Exhibited to Highlight Discrimination*, BBC NEWS, available at <http://www.thinkcentre.org/photoessays/photoessay.cfm?EssayID=79> (last visited Jan. 2, 2004).

Societies Act, and to meet to discuss political views and devise strategies to influence political decision-making.<sup>41</sup>

When public demonstrations have been disallowed, the ruling elite has had to provide explanations for their decisions. In November 2002, Senior Minister of State for Home Affairs Ho Peng Kee stated in Parliament that the government operates its controls over public speeches out of fear that “a public talk on even an innocuous topic may become unruly or degenerate into mob violence, if troublemakers are at work.”<sup>42</sup> This alleged concern has defined the government’s strategies for controlling public dissent and has limited its political power to reject demonstrations when public order can be maintained. For instance, when the Films and Publications Department rejected an application by the Think Center to display twenty dolls to mark Children’s Day in 2002, the Department attempted to justify their decision by stating that holding the exhibition at the proposed venue, an open grass patch in front of a subway station in the downtown commercial district, might create “law and order” disruptions. In order to make their concern for law and order more credible and deflect criticism that the government was opposed to political expression *per se*, the Department cleverly suggested that it would allow the exhibition to proceed in an indoor venue or at the “Speakers Corner”, a designated park area that was modeled after its namesake in England.<sup>43</sup> Although these alternatives did not have the benefit of high levels of human traffic and would limit the exhibition’s reach, they nonetheless allowed for political expression and participation.

In addition to identifying the degrees of deviations from the central case of political rights, the central case approach draws attention to the even more critical consideration that political participation is not limited to demonstrations. Within Singapore, there are other ways to influence political decision-making and public opinion, thereby lessening concerns over the government’s restrictions on demonstrations.

Entry into the administrative bureaucracy provides one less obvious, but potentially effective, route to participate in Singapore’s political process. Decision-making in Singapore is not dominated by the political elite alone,

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<sup>41</sup> See, e.g., *About A.W.A.R.E.*, A.W.A.R.E.: ASSOCIATION OF WOMEN FOR ACTION & RESEARCH, available at <http://www.aware.org.sg> (last visited Jan. 2, 2004) (noting that A.W.A.R.E., a civic group that promotes women’s rights, has operated in Singapore since 1985).

<sup>42</sup> See Jake Lloyd-Smith, *Singapore’s Curbs on Free Speech Look Set to Stay*, S. CH. MORNING POST, Nov. 27, 2002, available at <http://www.singapore-window.org/sw02/021127sc.htm> (last visited Jan. 2, 2004).

<sup>43</sup> See *Dear Minister, Regarding the Dolls*, TODAY, Oct. 5, 2002, at 4; *Think Center Wants to Know Why Dolls Were Disallowed*, STRAITS TIMES, Oct. 5, 2002, at H9; *Venue Not Suitable for Doll Display*, STRAITS TIMES, Oct. 7, 2002 at H16.

but is often the result of some influence by elder Mandarins in the civil service.<sup>44</sup> These senior “Administrative Officers”, such as Permanent Secretaries, hold sway by controlling what information reaches Cabinet Ministers and how this information is presented. Similarly, subordinates can influence senior administrative officers. For instance, Dr. Ross Worthington describes an incident in which the involvement of bureaucrats softened the Singaporean government’s hard line stance. In 1992, Tharman Shanmugaratnam, a senior officer in the Monetary Authority, Singapore’s central bank, violated the Official Secrets Act by leaking economic growth estimates.<sup>45</sup> The Internal Security Department (“ISD”), which is responsible for policing the Act, allegedly recommended to the Prime Minister that all parties involved in the leak be prosecuted, and civil service disciplinary action, such as dismissal, be taken against Shanmugaratnam.<sup>46</sup> This “typical ISD hard-line”<sup>47</sup> was neutralized by the Monetary Authority’s Managing Director, who brokered the support of other key decision-makers such as the former Minister for Finance and a permanent secretary whose seniority outranked most cabinet ministers.<sup>48</sup> A compromise agreement was reached in which those who were directly involved in the offense would plead guilty and would receive a minor fine.<sup>49</sup> In the end, Shanmugaratnam was fined only S\$1,500, an amount that would not bar him from standing for elections.<sup>50</sup> He is now the Acting Minister for Education.<sup>51</sup>

The opportunities for administrative bureaucrats to influence decision-making has increased as Singapore experiences unprecedented political divisions among cabinet ministers, members of parliament, politicians, and the senior administrative elite. Some of Singapore’s political leaders believe that the State’s economic survival requires political and social liberalization.<sup>52</sup> These leaders have called for the “remaking” of Singapore, in the belief that a more open environment is necessary to encourage creativity and entrepreneurship.<sup>53</sup> While a shift away from Singapore’s iron

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<sup>44</sup> See ROSS WORTHINGTON, *GOVERNANCE IN SINGAPORE* 144-52 (2003).

<sup>45</sup> *Id.* at 155-63.

<sup>46</sup> *Id.* at 158.

<sup>47</sup> See *id.* at 158.

<sup>48</sup> *Id.* at 159-61.

<sup>49</sup> *Id.* at 161.

<sup>50</sup> *Id.* at 162. See also *The Stars of Asia – Policymakers: Tharman Shanmugaratnam*, BUSINESSWEEK ONLINE, Jul. 2, 2001, available at [http://www.businessweek.com/magazine/content/01\\_27/b3739052.htm](http://www.businessweek.com/magazine/content/01_27/b3739052.htm) (last visited Dec. 22, 2003).

<sup>51</sup> This information is accurate as of Jan. 2, 2004.

<sup>52</sup> See WORTHINGTON, *supra* note 44, at 163-64.

<sup>53</sup> See, e.g., Lynette Ong, *Singapore’s Search for Creativity*, ASIA TIMES, Nov. 15, 2001, available at <http://www.singapore-window.org/sw01/011115at.htm> (last visited Jan. 2, 2004); Seah Chiang Nee,

clad rule faces strong opposition from the ruling elite's more conservative members, this bifurcation of political opinion is likely to result in some loosening of State controls. This bifurcation allows bureaucrats to align themselves with different decision-makers on different issues, and ultimately to exert more influence on political outcomes.

There are, of course, limitations to political participation through the administrative service. Bureaucrats are expected to perpetuate the regime's values and agenda. Those who fail to do so may be excluded from critical decisions,<sup>54</sup> or in extreme cases, face formal sanctions.<sup>55</sup> An administrative officer is only promoted to a key decision-making position after years of working under the supervision of elder Mandarins and Ministers, who through this intricate filtration process are able to assess if the candidate is sufficiently aligned with the establishment. Nonetheless, one should not underestimate the potential for a wizened senior bureaucrat to exercise independent judgment and to chart a pragmatic course of action around political constraints. This method of political participation gives at least some private persons significant power to negotiate with the legislature and cabinet ministers.

The human rights activist who uses the binary approach may not notice these alternative strategies for political participation, whereas the activist who uses the central case approach will be able to understand these strategies and turn them to his advantage. In addition, the issues discussed above demonstrate that in order to regulate the dissatisfaction that builds up after a period of sustained oppression, from time to time the ruling elite softens its policies on political participation, such as by offering justifications for their repressive decisions or by allowing mild dissent. The

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*Safety Net Being Lifted Slowly*, THE STAR, May 26, 2002, available at <http://www.singapore-window.org/sw02/020526st.htm> (last visited Jan. 2, 2004).

<sup>54</sup> For example, in 1986, Senior District Judge Michael Khoo, the head of the Subordinate Courts, found in favor of opposition politician Jeyaretnam. Soon after, he was transferred to the Attorney-Generals Chambers. The government has stated that the two events were not related. See WORTHINGTON, *supra* note 44, at 294 n.3; Francis Seow, Lecture on the Politics of Judicial Institutions in Singapore (1997), transcript available at <http://www.singapore-window.org/1028judi.htm> (last visited Jan. 24, 2004).

<sup>55</sup> For example, former Solicitor General Francis Seow became involved in politics when he became the President of the Law Society in Singapore, criticized Singtel, the Singapore telecommunications group, and stood for elections as an opposition candidate. Soon after, he was arrested and detained for seventy-two days for allegedly committing tax evasion. He is now in exile in the United States. See WORTHINGTON, *supra* note 44, at 49, 50; Australian Broadcasting Corporation, Dateline (Aug. 23, 2001), transcript available at <http://www.singapore-window.org/sw01/010823ab.htm> (last visited Jan. 24, 2004); Singtel Security Concerns, AUSTRALIAN BROADCASTING CORPORATION, Mar. 17, 2001; *Developmental Journalism in Singapore*, AUSTRALIAN BROADCASTING CORPORATION, Mar. 17, 2001, transcript available at <http://www.singapore-window.org/sw01/010317ab.htm> (last visited Jan. 24, 2004) (interviewing Francis Seow).



activist using the central case approach can anticipate these policy shifts and promote human rights more aggressively during periods of liberalization.

*b. Insidious repression through a culture of fear*

Although the central case analysis of Singapore identifies some political rights that the binary analysis overlooks, in fact it paints a grimmer picture of political rights, because the central case analysis identifies insidious methods of control that are not revealed under the binary approach. Potential opposition candidates may be discouraged from standing for elections because some strategies of the Singaporean ruling elite cause these potential candidates to believe that the electoral process is skewed against them. Although from a binary perspective democratic elections and the appointment of non-elected persons into Parliament appear to protect the right to political participation, the mechanisms of elections make it extremely difficult for even able candidates to be elected without being members of the ruling People's Action Party ("PAP"). Many constituencies are "Group Representation Constituencies" and require a slate of up to six political nominees.<sup>56</sup> For the weak opposition in Singapore, it can be extremely difficult to find that many candidates to field in a single constituency. Even if there are sufficient opposition candidates, the constituency boundaries can and have been changed from election to election,<sup>57</sup> which may, intentionally or otherwise, cut away the electoral power base of opposition politicians.

Talented persons who would otherwise stand for elections as opposition politicians may also be discouraged by certain interpretations of electoral laws. For example, in the 1997 election, the Attorney General interpreted legislative prohibitions that prohibited political candidates from being present at polling stations as not extending to the incumbent Prime Minister and some members of his party when they were present at the polling stations.<sup>58</sup> While the flawed interpretation of electoral law<sup>59</sup> applied

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<sup>56</sup> See SING. CONST. art. 39(A).

<sup>57</sup> See Dawn Kua Su-Wen, *Boundaries Report Perplexing*, STRAITS TIMES, Nov. 28, 1996, at 54.

<sup>58</sup> Parliamentary Elections Act, § 82(1)(d), prohibits any person from waiting outside any polling station on any polling day, except for the purpose of gaining entry to vote. The Attorney General took the view that the candidates had not breached § 82(1)(d) because the candidates were found inside the polling station. Section 82(1)(e) prohibits any person from "loitering in any street or public place within a radius of 200 meters of any polling station on polling day". The Attorney General took the view that the candidates had not breached § 82(1)(e) because he interpreted "within a radius of 200 meters" to mean "200 meters from the perimeter of any polling station". See Letter from Attorney General Chan Sek Keong to the Minister for Law S. Jayakumar, Presence of Unauthorized Persons inside Polling Stations (July 21, 1997), available at <http://www.singapore-window.org/ag0721.htm> (last visited Jan. 2, 2004).

equally to all candidates, the context in which the interpretation was offered created the impression that electoral laws benefited the incumbent ruling party's candidates.

The central case approach also reveals the deepest concern, which is that the ruling elite has created a culture of fear through a combination of social, legal, and political strategies. Singapore's electorate has accordingly adopted a risk-adverse attitude towards political participation because it believes that the government may engage in reprisals against its opponents, but is unclear as to the precise extent of the ruling elite's power and willingness to do so. This culture of fear pervades at least four aspects of the central case of political rights.

First, the main concern with the legal prohibitions against political expression is not the prohibitions themselves, but the chilling effect that these prohibitions produce. The chilling effect of Singapore's defamation laws, the Public Entertainments and Meetings Act, and the Internal Security Act cause persons who otherwise would have galvanized public opinion to avoid engaging in even lawful actions out of fear of criminal misconduct allegations. This fear is magnified by the manner in which the police force enforces the law against opposition politicians. The government's proven willingness to use such laws against dissidents and opponents in an intimidatory fashion, and the uncertainty as to when the laws will be used and to what effect, creates a culture of fear that silences both lawful and unlawful criticism. In 2003, for example, opposition politician Chee Soon Juan took the opportunity of an "open house" at the *Istana*, the Presidential compound, to deliver a speech at the *Istana*'s gates. The speech technically occurred on *Istana* grounds, and the permission granted by the government to the public to be present did not extend to giving speeches. In a heavy-handed and intimidating response to attempted political speech, the government arrested Chee. The arresting officer was a very high-ranking police officer: the Deputy Superintendent who was the police precinct's Acting Commander.<sup>60</sup> At best, the police force, which is run by Oxbridge

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<sup>59</sup> The purpose of the provisions, as determined by the Attorney General based on the Elias Report, from which the Act was drafted, was to "prevent voters being made subject to any form of undue influence or harassment." While the report confined its comments to activities outside polling stations, it is clear that such undue influence could be exerted just as effectively inside polling stations if there are no restrictions on who may loiter in the stations. If the underlying goal of upholding free elections was to be achieved, sub-section (e) should have been interpreted to include loitering in the station. See Letter from Attorney General Chan Sek Keong to the Minister for Law S. Jayakumar, *supra* note 58.

<sup>60</sup> See Farah Abdul Rahim, *Dr. Chee Arrested for Trying to Hold Rally Outside Istana*, CHANNEL NEWS ASIA, May 1, 2002, available at <http://www.singapore-window.org/sw02/020501cn.htm> (last visited Jan. 2, 2004); Straits Times, *Chee Arrested for Rally at Istana*, May 2, 2002, available at <http://www.singapore-window.org/sw02/020502st.htm> (last visited Feb. 27, 2004).

and Ivy League educated officers with years of experience working under cabinet ministers, lacked political savvy in having such a high ranking officer arrest Chee. At worst, the police or the Minister for Home Affairs intended their actions to have a chilling effect on civic society. By creating a culture of fear and self-censorship, Singapore's ruling elite not only limits the relatively small class of unlawful political expression, but also undermines the universe of lawful opposition strategies.

Second, Singapore's culture of fear permeates to even Nominated Members of Parliament, who exercise a level of self-restraint in Parliament that would be remarkable in many other democratic systems. For instance, when Nominated Member of Parliament Simon Tay broached the issue of detention without trial under the Internal Security Act, he did not criticize the Act directly but merely asked the Minister for Home Affairs to report to Parliament the number of persons held in detention without trial.<sup>61</sup> This question drew the public's attention to the injustice of detentions without trial and reminded the Minister that the policy did not find universal support in Singapore without openly opposing the policy or the Minister. In the current context of a PAP-dominated Parliament, it may be that the most effective way to influence decision-making is to imply criticism rather than confront established policies directly. This diplomatic strategy avoids embarrassing the government and gives the government political space to reverse their policies. On the other hand, the fact that persons nominated to Parliament to provide an alternative voice only feel able to speak coyly against government policies indicates the stranglehold that the ruling elite maintains over political participation.

Third, Singapore's culture of fear is intensified by legislative enactment and publication of surveillance laws, which remind the electorate that their actions and communications are being monitored. These surveillance laws promote fear and uncertainty by not specifying clearly how surveillance information will be used and whether oversight procedures against the misuse of information even exist. Websites that are deemed to have political content are required by law to be registered with the government.<sup>62</sup> While the government has stressed that this law is not

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<sup>61</sup> See Simon S.C. Tay, *Speech in Parliament on Detention under the Internal Security Act* (Jan. 20, 1999), in 69 SINGAPORE PARLIAMENTARY REPORTS (1991).

<sup>62</sup> See Media Development Authority of Singapore Act, ch. 172, §§ 11, 12 (2003) (Sing.); MEDIA DEVELOPMENT AUTHORITY, LICENSES AND PERMITS: INTERNET, available at [http://www.mda.gov.sg/licences/1\\_internet.html](http://www.mda.gov.sg/licences/1_internet.html) (last visited Jan. 2, 2004).

intended to exert overt control over website content,<sup>63</sup> this move increases pressure for self-censorship by reminding citizens that Big Brother is watching. Civic groups know that they are being monitored due to the requirement that all civic groups seek permission to form as societies under the Societies Act.<sup>64</sup> A group that fails to gain approval is deemed an “unlawful society”<sup>65</sup> and can run afoul of a gamut of criminal laws.<sup>66</sup> This surveillance, coupled with the secrecy regarding how surveillance information is used, paralyzes the electorate with fear and effectively silences political dissent within Singapore.<sup>67</sup>

Fourth, Singapore’s culture of fear is reinforced by the dominance of the ruling elite within the business sector because this wide-reaching power can potentially be directed against political opponents. The ruling elite is actively involved in the directorships of government-linked companies,<sup>68</sup> which are some of Singapore’s largest employers. This involvement of the ruling elite in businesses can lead to the perception, rightly or wrongly, that political opposition may result in indeterminate harm to one’s career and investments.<sup>69</sup>

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<sup>63</sup> See, e.g., *Pro Bin Laden Singapore Group to Register as Political Website*, AGENCE FR. PRESSE, Jan. 20, 2002, available at <http://www.singapore-window.org/sw02/020120a1.htm> (last visited Jan. 2, 2004).

<sup>64</sup> Societies Act, ch. 311, § 4 (1985) (Sing.).

<sup>65</sup> *Id.* ch. 311, § 14.

<sup>66</sup> *Id.* ch. 311, §§ 16, 17, 18.

<sup>67</sup> See e.g., WORTHINGTON, *supra* note 44, at 8 (citing Constance Singham, who notes: “The Singapore experience—the experience of legal sanctions and the erosion of civic space and liberties, instills in people an often inexplicable fear and fosters a sense of uncertainty about the limits to peoples freedom of action”).

<sup>68</sup> See Tan Boon Seng, *Why it Might be Difficult for the Government to Withdraw from Business*, Feb. 10, 2002, at <http://www.singapore-window.org/sw02/020210gl.htm> (last visited Jan. 2, 2004) (recording exhaustively the list of directorships held by the ruling elite).

<sup>69</sup> See also CHUA BENG HUAT, COMMUNITARIAN IDEOLOGY AND DEMOCRACY IN SINGAPORE 42-43 (1995); WORTHINGTON, *supra* note 44 at 24-27, 172-219. This Article expressly states that the ability to abuse power does not in any way suggest that any of the ruling elite have or would do so, because suggesting such improper behavior without basis would be defamatory under Singapore law. Indeed, Bloomberg LP paid Prime Minister Goh, Senior Minister Lee and his son \$550,000 to settle a defamation suit brought against Bloomberg for insinuating that the appointment of Ho Ching, the Deputy Prime Minister’s wife and the Senior Minister’s daughter-in-law, as the executive director of the powerful Temasek Holdings, was not based on merit and did not follow the proper process. See Eric Ellis, *Singapore Leaders Use Libel Laws to Silence Critics*, AUSTRALIAN, Sept. 26, 2002, available at <http://www.singapore-window.org/sw02/020926au.htm> (last visited Jan. 2, 2004).

c. *Central case analysis of Singapore's purported justifications for repression*

In order to understand fully the extent to which deviations from key characteristics of political rights are causes for concern, the central case approach examines the underlying policy reasons, if any, for such deviations. In the case of Singapore, apologist justifications for repression are not persuasive. Apologists for Singapore's governmental oppression argue that strict controls are necessary to ensure the State's economic survival. Apologists allege that unrest and social disorder will negatively impact economic growth and standards of living because unrest increases business risks and discourages foreign investment.<sup>70</sup>

The argument that oppression of political rights is necessary for Singapore's economic growth is fallacious. The apologists' utilitarian argument assumes that economic and political rights are commensurable and that economic rights take precedence. Leaving aside theoretical arguments about whether these rights are commensurable, and if so, which right takes precedence, with Singapore's economic advancement there is a need to satisfy important non-economic rights, including those necessary for citizens' self-actualization and self-determination. The apologists' argument also has a flawed causative link. Unrest does not necessarily result from peaceful protests. A moderate level of civil ferment, which is common in other healthy capitalist democracies, is unlikely to drive businesses and investors away from Singapore. For example, there is no evidence to suggest that the presence of six anti-war protestors outside the U.S. Embassy in February 2003 would have triggered widespread violence had they not been arrested. In short, the sacrifice of political rights is not the *sine qua non* of Singapore's economic development.

Having considered political rights using the binary and central case approaches, it is clear that binary analysis offers a distorted view of political rights in Singapore. Violations of political rights through repressive laws

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<sup>70</sup> See, e.g., Interview by Asiaweek with Lee Kuan Yew (June 9, 2000), transcript available at <http://www.singapore-window.org/sw00/000609a1.htm> (last visited Jan. 24, 2004) ("internal conditions of the country must be such as to enable it to make use of the capital, technology, management expertise and markets of the fast-growing regions of the world . . . Leaders must establish stability, law and order, and a certainty"); See Lee Kuan Yew, Speech at the Philippine Business Conference (Nov. 18, 1992) (transcript on file with author) ("Unless these kidnappings stop [in the Philippines] most investors will stay away"); Lee Kuan Yew, Speech to the Foreign Correspondent's Club, Hong Kong (Oct. 26, 1990) (transcript on file with author) ("Japan's successful economy is based on her political and social stability, her orderliness, low crime rates, negligible drug taking and strong communitarian values"); Lee Kuan Yew, Speech at Asahi Shimbun Symposium (May 9, 1991) (transcript on file with author) ("Stability is the basic pre-condition for success").

turn out to be of secondary concern to the more subtle and powerful controls over dissent. In Singapore, the greatest threat to political rights is the culture of fear perpetuated by the ruling elite. The purported justifications for these controls do not stand up to scrutiny. This case study is emblematic of political rights in many other States, in which true concerns smolder beneath the surface. For advocates to formulate effective strategies to improve political rights, they must move beyond the superficial binary approach and undertake a more sophisticated central case analysis of underlying social, legal, and political vectors.

### *B. Due Process Rights*

Due process rights are ancillary rights in the sense that they protect primary rights, such as liberty and privacy, from being abused in the criminal justice system. A meaningful examination of these rights must look at the consequences of due process violations, including the likelihood of abuse of primary rights, the consequences of such abuse, and considerations that may justify due process abuse. Unlike the central case analysis, the binary approach focuses on whether due process rights have been violated, without necessarily giving due weight to the consequences of such violations. In contrast, the central case analysis helps determine the consequences of ancillary rights abuses by requiring the advocate to account for a State's criminal justice context to determine the extent of deviations from the central case, and whether such deviations are justified.

This section compares the binary and central case approaches in relation to arrest, search, and interrogations in Singapore. This section demonstrates that the central case approach allows differentiation between minor deviations from the due process central case that are necessary to achieve compelling social goals and major deviations that cannot be legitimized by socio-cultural or political considerations.

#### *1. Arrests*

The binary analysis of the Singaporean police's arrest powers suggests that a suspect's rights are generally upheld following arrest. Singapore's Constitution prohibits the deprivation of life or personal liberty except in accordance with law.<sup>71</sup> Generally, arrests may occur only upon a

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<sup>71</sup> SING. CONST. art. 9(1).

police officer's reasonable suspicion of an offense.<sup>72</sup> An arrested person must be informed of the grounds for his arrest and must be allowed to consult with, and be defended by, a legal practitioner of his choice.<sup>73</sup>

This binary analysis, however, does not evaluate fully due process rights in relation to powers of arrest because it measures these rights against an absolute standard. It is more appropriate to judge these rights against a standard that shifts in response to the specific circumstances of the arrest. The central case approach rejects an absolute standard, requiring that the loss of liberty caused by an arrest be balanced with the gravity of the suspected offense, the risk of harm to the person arrested, and the potential for police to abuse their arrest powers.

When measured against this central case, due process rights in relation to arrest are revealed to be less protected in Singapore. Although many arrests are justified by the severity of the offense suspected, in other cases, the powers of arrest are disproportionate to the gravity of offense suspected. For example, a police officer in Singapore may arrest individuals for making excessive noise<sup>74</sup> or for spitting on a public road.<sup>75</sup> Police may also arrest a person known to be habitual robber, housebreaker, or thief, even if that person is in fact not suspected of committing an offense.<sup>76</sup> This power clearly deviates from the central case because it allows the police to victimize innocent individuals on the basis of prior convictions without having any suspicion of the commission of an offense.

In determining appropriate arrest powers, the central case approach also evaluates the potential harm to arrestees and the likelihood of police abuses. For instance, powers to arrest delinquent youths in Singapore depart from the central case because of youths' vulnerability and the possibility of police abuse. The Societies Act makes it an offense to be a member of an "unlawful society" or to attend an unlawful society meeting.<sup>77</sup> Under this Act, police may arrest youths who loiter in groups where officers suspect them of belonging to street corner gangs.<sup>78</sup> This Act creates a significant risk of harm to youths, who may suffer higher levels of emotional and physical strain when held in police custody. People may be detained under the Societies Act for up to forty-eight hours before being charged or

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<sup>72</sup> See, e.g., Criminal Procedure Code, ch. 68, § 32 (Sing.).

<sup>73</sup> SING. CONST. art. 9(3).

<sup>74</sup> See Miscellaneous Offences (Public Order & Nuisance) Act, ch. 184, §§ 14(1), 40(1) (Sing.).

<sup>75</sup> See Miscellaneous Offences Act, ch. 184, §§ 11(f), 40(1) (Sing.).

<sup>76</sup> See Criminal Procedure Code, ch. 68, § 32(1)(i) (1985) (Sing.).

<sup>77</sup> Societies Act, ch. 311, § 14(3) (Sing.).

<sup>78</sup> Criminal Procedure Code, ch. 68, §§ 14(4), 32(1)(a) (Sing.).

produced before a magistrate.<sup>79</sup> The Act also creates a risk of police abuse because youths have few protections from police harassment. The law's low threshold for "reasonable suspicion" justifying arrest makes it very difficult to successfully sue the police for false imprisonment. Under the Societies Act, an officer may reasonably suspect a youth of being a member of an unlawful society, and may therefore arrest him, simply on the basis that a youth looked delinquent and was found in the company of other delinquents. If indeed such abuse were rampant, it would be very difficult for plaintiffs to prove because government records of such abuse would be considered official secrets.<sup>80</sup> Moreover, delinquent youths in Singapore often are not aware of their legal rights, do not have the financial resources to seek redress, and are culturally disinclined to challenge the police using establishment institutions such as the courts.

## 2. *Searches*

A comparison of the binary and central case approaches to areas of human rights that are inherently ambiguous, such as police searches in Singapore, demonstrates that the binary analysis is an unsuitable methodology. The binary approach requires a clear-cut conclusion about whether rights are violated, which necessarily obfuscates the complexity of a given human rights situation. In contrast, the central case approach considers the socio-cultural context within which the central case of searches exists, and thereby facilitates a more careful presentation of the ambiguity inherent in many human rights situations.

Under the binary approach, police searches within Singapore do not appear to violate human rights norms. The laws that grant search powers also place limits upon these powers. For example, § 29 of the Criminal Procedure Code prevents the police from searching persons who have not yet been arrested. Under a binary analysis, the availability of judicial remedies for police abuses<sup>81</sup> and the general lack of suits against the police for abusive searches suggests that police search powers are not used in violation of human rights.

The central case approach looks beyond legislative provisions regarding searches and examines a wider universe of considerations, including what the search provisions do not say, the public's knowledge and access to information about their rights and the limits of police powers, and

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<sup>79</sup> SING. CONST. art. 9(4).

<sup>80</sup> See Official Secrets Act, ch. 213, § 5 (1985) (Sing.).

<sup>81</sup> For example, victims of police abuse can bring tort claims against the police.



the effectiveness of judicial remedies. While the Criminal Procedure Code has detailed provisions on police search powers and their limits, it contains no procedural checks to prevent the abuse and humiliation of suspects during intimate and strip searches.<sup>82</sup> Any internal policies or procedures are not made known to the public. Accordingly, it is difficult to determine if these procedures are adequate, or if officers comply with these procedures. The lack of litigation against the police for abusive searches cannot be regarded as an indication that no abuse exists. Singaporeans are not litigious by nature, especially against the government. As a pragmatic matter, it is unclear if the courts would award sufficient damages to create the incentive to sue the police for abusive strip searches. Unlike the binary approach, the central case acknowledges the complexity and ambiguity of the rights in relation to searches in Singapore.

### 3. *Interrogations*

In contrast to the ambiguity of rights under police searches in Singapore, there is no doubt that police interrogations offer insufficient protections of suspects' due process rights. However, even where clear violations exist, the central case approach is preferable. The binary approach merely identifies a checklist of human rights violations without recognizing fully the grave implications that these violations present within Singapore's socio-cultural context. In contrast, the central case approach facilitates a deeper inquiry into the extent to which interrogations depart from the ideal situation.

Under a binary analysis, police interrogations clearly violate due process. While Singaporeans enjoy the right against self-incrimination,<sup>83</sup> the courts have undermined this right by holding that the courts may draw adverse inferences from one's silence.<sup>84</sup> In addition, the police, prosecutor, and the courts are not required to inform a suspect of his right against self-incrimination.<sup>85</sup> The courts have determined that the constitutional right to

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<sup>82</sup> See TAN YOCK LIN, I CRIMINAL PROCEDURE IV 801-50 (2002).

<sup>83</sup> See Criminal Procedure Code, ch. 68, § 121(2) (Sing.).

<sup>84</sup> See *Taw Cheng Kong v. Public Prosecutor*, 1998-1 Sing. L. Rep. 943 (Sing. High Ct.).

<sup>85</sup> See *Public Prosecutor v. Mazlan bin Maidun*, 1993-1 Sing. L. Rep. 512 (Sing. C.A.) (holding, *inter alia*, that the police had no duty to expressly inform a suspect of his right to remain silent when his statement was recorded); *Soon Hee Sin v. Public Prosecutor*, 2001-2 Sing. L. Rep. 253, 277 (Sing. High Ct.) (holding that courts are not obligated to inform suspects of their right to counsel because the judiciary must remain an impartial umpire.); *Rajeevan Edakalavan v. Public Prosecutor*, 1998-1 Sing. L. Rep. 815, 824 (Sing. High Ct.).

consult with, and to be defended by, a legal practitioner is so narrow that the police may interrogate an arrested person without the presence of counsel.<sup>86</sup>

In addition to acknowledging the due process deficiencies identified by the binary approach, the central case approach examines the consequences of such deficiencies. An examination of Singapore's socio-cultural context brings into focus the true gravity of the curtailment of due process rights. During interrogations, the main purpose of due process rights is to protect suspects from police abuse and from providing evidence that falsely points to their guilt. Due process checks on the executive are more important when the person being interrogated is less able or less willing to engage in remedial or corrective action against police interrogation abuses. In Singapore, suspects generally have limited ability to protect themselves against police abuse during interrogations because they may be poorly educated, have a more limited command of language, be culturally disinclined to question authority, and be ignorant of their rights. In this context, the absence of legal counsel from questionings further raises the specter of police brutality<sup>87</sup> and forced statements.<sup>88</sup>

Departures from due process rights raise significant concerns because they create systemic risks that the truth of the criminal matter may be distorted. Since most Singaporeans are not aware of their criminal rights, the failure to inform a person of his right against self-incrimination often effectively prevents the suspect from deciding how best to respond to questioning. Considering that many Singaporeans have limited knowledge of how their statements will be interpreted in court, the exclusion of counsel during questioning prevents innocent suspects from knowing what sort of statements may incriminate them. The removal of any judicial obligation to inform a defendant of his right to retain counsel opens the last gate that could hold back inadvertent or willful abuses of innocent defendants. Since the State only provides legal counsel to criminal defendants in capital cases,<sup>89</sup> and many criminal defendants in Singapore are unaware of their right to obtain counsel, a criminal defendant's constitutional right to be

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<sup>86</sup> See *Jasbir Singh v. Public Prosecutor*, 1994-2 Sing. L. Rep. 18 (Sing. C.A.) (holding that an arrested suspect counsel could be denied counsel for two weeks); SING. CONST. art. 9(3).

<sup>87</sup> See *Zainal bin Kunning v. Chan Sin Mian*, 1993-3 Sing. L. Rep. 121 (Sing. C.A.) (noting allegations of police brutality during interrogation).

<sup>88</sup> See *Tan Choon Huat v. Public Prosecutor*, 1991-1 Malay. L. J. 230 (Sing. High Ct.) (holding defendant's statement to the police was given involuntarily and was inadmissible evidence because, *inter alia*, the statement had been given after the eighteen-year-old defendant was detained and interrogated from 10:48 a.m. to 4:50 p.m. without rest or lunch, despite police knowledge that he had not had breakfast).

<sup>89</sup> See *Re Seed Nigel John QC*, 2003-3 Sing. L. Rep. 407 (Sing. High Ct.) (noting that there are criminal defense attorneys who are designated as counsel for the purposes of the "Assignment List of the High Court" for capital cases).

defended by an attorney against non-capital charges cannot be protected unless the judge, public prosecutor, or police informs the defendant of his right.

In the absence of counsel during questioning, the central case approach requires a survey of other legal mechanisms to ensure that suspects' rights are not prejudiced. This further inquiry reveals that few alternative mechanisms to prevent the police from taking distorted statements exist in Singapore, thus moving Singapore further from the central case. Unlike in England,<sup>90</sup> defendants' statements in Singapore are not recorded via audio or videotape. Instead, statements are reduced to writing and may be paraphrased by the interviewing officer.<sup>91</sup> This practice opens the possibility that an officer may knowingly or unwittingly twist a statement in a manner that prejudices the suspect. While § 121(3) of the Criminal Procedure Code requires the statement to be signed by the interviewed suspect, failure to comply with § 121(3) does not render the statement inadmissible.<sup>92</sup> Further, courts do not require police to read back statements or explain statements to the accused before he signs his statement.<sup>93</sup> These due process rules increase the likelihood that courts will admit statements that distort a suspect's words, thereby misleading courts as to the defendant's culpability. It is unlikely that these risks will be mitigated by legislative intervention; Parliament has indicated that it is unwilling to require the police to record statements on tape.<sup>94</sup>

The central case approach identifies the true implications of removing safeguards that ensure the veracity of statements. Individually, the limitations on the rights to counsel and against self-incrimination within Singapore's criminal justice system can be said to be violations under the binary approach. However, it is clear that the concern about wrongful convictions runs much deeper when the criminal process is viewed as a whole under the central case approach.

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<sup>90</sup> See CODE OF PRACTICE ON TAPE RECORDING OF INTERVIEWS WITH SUSPECTS, POLICE AND CRIMINAL EVIDENCE ACT 1984. See also JACK ENGLISH & RICHARD CARD, BUTTERWORTH'S POLICE LAW 77 (1999).

<sup>91</sup> See Criminal Procedure Code, ch. 68, §§ 121, 122 (Sing.).

<sup>92</sup> *Vasavan Sathiadew v. Public Prosecutor*, 1989-1 Sing. L. Rep. 944 (Sing. High Ct.). See also *Lim Young Sien v. Public Prosecutor*, 1994-2 Sing. L. Rep. 257 (Sing. C.A.) (holding that the § 121 provisions regarding reducing statements into writing, reading them back to a suspect, and having the suspect sign them are directory and not mandatory).

<sup>93</sup> *Seow Choon Meng v. Public Prosecutor*, 1994-2 Sing. L. Rep. 853 (Sing. C.A.) (holding that the practice of reading back a statement and explaining it to the accused person before he signed the statement was not a legal requirement).

<sup>94</sup> See Assoc. Prof. Ho Peng Kee, Speech in Parliament (June 1, 1998), in 69 Singapore Parliamentary Reports (1998).

#### 4. *Differentiating Deviations from the Central Case*

An important advantage of the central case approach is that it permits a holistic examination of all due process concerns. Unlike the binary approach, the central case approach allows comparison between different deviations from the central case. The central case approach also allows decision-makers to determine if some deviations are necessary to serve certain social purposes and whether such deviations bring the overall due process situation out of the penumbra of the central case.

The central case for due process is, generally speaking, a system of criminal procedures in which the accused person or suspect is protected by safeguards sufficient to ensure that one is not wrongly convicted, and that he is treated with dignity and humanity throughout the criminal process. When the due process system in Singapore is laid over this central case, one finds a highly imperfect, but nonetheless working, system of due process. In spite of the deviations in connection with arrest, searches, and interrogations, Singapore remains within the penumbra of the due process central case because these deviations serve important social goals. Singapore has one of the lowest crime rates in the world. Singapore's tough criminal law regime probably contributes to this outcome, albeit with the risk of catching innocent persons in the dragnet. Singapore's criminal laws may also have deterred organized crime from making serious pushes into Singapore, as it has into some other States in the region.

With regards to less dramatic departures from this central case, such as the wide powers of arrest, it is arguably within the ambit of State sovereignty to determine the manner in which Singapore should be run and the governance relationship between the ruling elite and the governed. There appears to be broad acceptance of the tough criminal law system by the electorate; the lesser departures from due process standards should be understood in this light.

Further, the policy alternative of imposing dramatic restrictions on current police practices ignores the real likelihood that if the police are not given sufficient time to develop more sophisticated investigative methods before their current methods are disallowed, crimes will remain unsolved. As the criminal justice system collapses, the public's sense of security will be shattered. The social costs of this policy alternative are simply too high to seriously entertain this scenario.

This contextual argument does not, however, excuse gross violations of due process, such as Singapore's drug trafficking laws, which involve presumptions of guilt and mandatory hanging. These laws cannot be

justified by Singapore's social goals because the consequences of substantive abuses that are not prevented by due process protections are irrevocable. A person who is found with prohibited drugs on his person is presumed to have committed the offense of possession. The burden of proof is on the accused to prove lack of knowledge, including constructive knowledge, that he had prohibited drugs on his person. Constructive knowledge is imputed unless the accused can show that he had no reason to suspect that prohibited drugs were on his person or in his possessions.<sup>95</sup> If one possesses a quantity of drugs greater than a prescribed amount, such as three grams of cocaine, he is presumed to be a trafficker unless he can present evidence to dispel that presumption.<sup>96</sup> A person found to be a trafficker of more than specified amounts of drugs, such as thirty grams cocaine, is mandatorily sentenced to death.<sup>97</sup> Under this sliding definition of trafficking and double presumption of guilt, a person who has no actual knowledge of drugs in his possession and who has no intention to trade in drugs may be executed by the State. Between 1991 and 2001, 247 people were executed for drug trafficking under this regime.<sup>98</sup> The risk that some of these people were killed even though they were not actually traffickers brings Singapore farthest from the central case of due process.

Singapore's social goals also cannot justify the detention of alleged criminals without trial. In addition to political opponents and persons deemed a threat to Singapore under the Internal Security Act, suspected drug offenders may also be detained without trial.<sup>99</sup> The Minister of Home

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<sup>95</sup> Cheng Heng Lee v. Public Prosecutor, 1999-1 Sing. L. Rep. 504 (Sing. C.A.) (holding that the fact that the defendant had noticed white packages in his bag and that he had opportunities to inspect the packages were sufficient grounds for constructive knowledge); Zulfikar bin Mustaffah v. Public Prosecutor, 2001-1 Sing. L. Rep. 633 (Sing. C.A.) (imputing constructive knowledge because the defendant failed to show that he no reason to suspect that a bag in his possession contained 70 grams of diamorphine). *But see* Abdul Ra'uf bin Abdul Rahman v. Public Prosecutor, 2000-1 Sing. L. Rep. 683 (Sing. C.A.) (holding that actual knowledge of the drugs was an element of the offense of importing illicit drugs under the Misuse of Drugs Act §7). *See also* Michael Hor, *Misuse of Drugs and Aberrations in the Criminal Law*, 13 S. AC. L.J. 54 (2001).

<sup>96</sup> *See* Misuse of Drugs Act, ch. 185, § 17 (1998) (Sing.). For a comprehensive analysis of the Misuse of Drugs Act, *see* Hor, *supra* note 95, at 54.

<sup>97</sup> Misuse of Drugs Act, Second Schedule, ch. 185, §§ 2, 33 (Sing.). *See also* Zulfikar bin Mustaffah, 2001-1 Sing. L. Rep. 633 (Sing. C.A.) (sentencing the defendant to death for trafficking on the basis of presumptions of possession and trafficking based on the quantity of drugs found in the defendant's bag).

<sup>98</sup> *See* Think Center, *Right to Life, Drug Addicts and Death Penalty*, in SINGAPORE HUMAN RIGHTS REPORT 1 (2002).

<sup>99</sup> Under the Misuse of Drugs Act, the Director of the Central Narcotics Bureau may require any person to undergo medical tests or observation. Based on this examination or observation the Director may detain without trial any person whom he suspects of being in need of drug rehabilitation for an initial period of up to six months. This detention may be extended for up to three years without prior judicial

Affairs, with the concurrence of the Public Prosecutor (i.e., the Attorney General), may also detain alleged criminals without trial under the Criminal Law (Temporary Provisions) Act, if the Minister believes that such detention is necessary for the preservation of public safety, peace, and good order.<sup>100</sup> Although the courts will review the executive order upon an application for a writ of *habeas corpus*, the level of judicial inquiry is too low to protect against executive abuse. A court need only find that the Minister had objective grounds for meeting the substantive requirements of the Criminal Law (Temporary Provisions) Act.<sup>101</sup> While this Act lapses every five years, it has always been reenacted before its lapse on the basis that Singapore still faces such significant criminal threats.<sup>102</sup> This reasoning is remarkable given that Singapore has one of the lowest crime rates globally.<sup>103</sup>

Whereas the binary approach conceptually evaluates all due process violations as equally detrimental, the central case approach differentiates between deviations that cannot be legitimized and deviations that are acceptable. In Singapore, the central case approach accordingly allows the nuanced evaluation of presumptions of guilt, detentions without trial, and the limitations on the rights to counsel and against self-incrimination. This approach presents a more complex picture in which Singapore is generally within the penumbra of the due process central case, but deviates furthest in relation to presumptions of guilt and executive detentions. By allowing a differentiated assessment of a human rights situation, central case analysis enables human rights advocates and policy-makers to address the problems that are of the greatest and most immediate concern.

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determination, although the Act provides for judicial review and judicial power to quash the executive detention order. Misuse of Drugs Act, ch. 185, § 37 (Sing.).

<sup>100</sup> Criminal Law (Temporary Provisions) Act, ch. 67, § 30 (2000) (Sing.).

<sup>101</sup> See *Kamal Jit Singh v. Minister for Home Affairs*, 1993-1 Sing. L. Rep. 24 (Sing. C.A.) (holding that there were objective grounds for the detention because the detainee's assertions of innocence and of being framed were examined fully by the police and that the private investigator's report had been considered by the Minister); *Shamm bin Sulong v. Minister for Home Affairs*, 1996-2 Sing. L. Rep. 736 (Sing. High Ct.).

<sup>102</sup> See Minister for Home Affairs Wong Kan Seng, Speech in Parliament on the Second Reading of the Criminal Law (Temporary Provisions) (Amendment) Bill (Aug. 25, 1994), in 63 Singapore Parliamentary Reports; Minister of State for Law Assoc. Prof. Ho Peng Kee, Speech in Parliament on the Second Reading of the Criminal Law (Temporary Provisions) (Amendment) Bill (Apr. 15, 1999), in 70 Singapore Parliamentary Reports.

<sup>103</sup> In 1999, there were only 1,005 cases involving seizable offenses (which are similar to felonies) per 100,000 people. See SINGAPORE POLICE FORCE ANNUAL REPORT 2000, available at <http://www.spinet.gov.sg/publication/pla/02p01.htm> (last visited Jan. 2, 2004).

### C. *The Rights of Aliens*

Comparing the binary and central case analyses of the rights of aliens in Singapore demonstrates that the binary analysis produces insufficient differentiation and detail to understand the human rights situation of aliens fully. In contrast, the central case device allows differentiation between alien groups, a necessary analysis because of the vastly different responses of Singaporean government to these groups. In 2002, Singapore had 612,200 foreign workers, or 29.2% of the 2.2 million total workforce,<sup>104</sup> excluding illegal migrants and social visitors. Singapore's aliens include both blue and white-collar workers.

A binary analysis of the government's treatment of aliens leads to the conclusion that alien rights are protected. White-collar professionals from developed nations such as Australia, the United Kingdom, and the United States tend to be handled with great care by the authorities. These aliens are given special protection from terrorists, as evidenced by the deployment of *gurkhas*, the government's elite security troops, at the American Club in Singapore.<sup>105</sup> Nationals from developed countries at times receive preferential treatment within the criminal system. When U.S. citizen Michael Fay was convicted for vandalizing cars,<sup>106</sup> Singapore's President intervened to lessen his sentence from six strokes of the cane to four strokes. According to the Singaporean government, Fay's sentence was reduced at least in part because "the government values Singapore's good relations with the United States and the constructive economic and security role of the United States in the region."<sup>107</sup>

This binary conclusion that alien rights are protected is misleading. Different alien groups are treated so differently within Singapore that it is not meaningful to draw sweeping conclusions about the treatment of aliens as a unitary group. While the central case acknowledges that the treatment of Western European, American, and other white-collar aliens falls within the umbra of alien rights, it also identifies deviations from the central case in relation to the mistreatment of blue-collar aliens from less developed States.

Blue-collar workers face a greater risk of mistreatment during criminal proceedings in Singapore. Their frequent inability to speak one of

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<sup>104</sup> See THINK CENTER, SINGAPORE HUMAN RIGHTS REPORT (2002).

<sup>105</sup> *Gurkhas Guard Singapore From Terror*, REUTERS, Apr. 17, 2002, available at <http://www.singapore-window.org/sw02/020417re.htm> (last visited Jan. 11, 2004).

<sup>106</sup> See *Fay v. Public Prosecutor*, 1994-2 Sing. L. Rep. 154 (Sing. High Ct.) (dismissing appeal against the sentence of six strokes of the cane and two months in prison for two counts of vandalism).

<sup>107</sup> See William Branigin, *Singapore Reduces American's Sentence*, WASH. POST, May 5, 1994, available at <http://www.corpun.com/sju9405.htm> (last visited Jan. 2, 2004).

Singapore's four official languages and the lack of procedural checks to ensure that accurate statements are taken creates a real risk that blue-collar workers may inadvertently provide incriminating statements. This concern regarding false convictions is compounded by the haste with which immigration offenses are tried. In 2001 and 2002, a total of 29,550 illegal immigrants and over-stayers were arrested.<sup>108</sup> Arrested immigrants may be detained and repatriated by the Controller of Immigration.<sup>109</sup> Although the courts previously conducted substantive judicial review of such executive detentions,<sup>110</sup> the Immigration Act has now been amended to prohibit the courts from inquiring into the substantive aspects of executive detentions and repatriations.<sup>111</sup> Without substantive judicial review, there is an increased risk that executive abuses of alien rights, such as the right to asylum, will not be detected or corrected.

Central case analysis also reveals that blue-collar aliens' protections from private abuse are no better than their due process rights. About 140,000 foreign domestic workers live in Singapore; about one in eight households employs a live-in domestic worker, who typically plays the role of maid, nanny, and gardener. These workers, who tend to come from the less developed Southeast Asian States, sometimes to suffer physical harm.<sup>112</sup> In 1999, between twenty-seven to forty-three domestic workers fell to their deaths while washing the windows of their employers' apartments. No employers were given police warnings or charged.<sup>113</sup> Domestic workers have also been raped, molested, and beaten by their employers.<sup>114</sup>

Whereas the binary approach obfuscates the different treatments of white collar and blue-collar aliens, the central case analysis draws attention

<sup>108</sup> See Press Release, Immigration & Checkpoints Authority, 75 Immigration Offenders Nabbed In First Island-Wide Operation (Apr. 8, 2003), available at [http://app.ica.gov.sg/pressrelease/pressrelease\\_view.asp?pr\\_id=131](http://app.ica.gov.sg/pressrelease/pressrelease_view.asp?pr_id=131) (last visited Jan. 2, 2004).

<sup>109</sup> See Immigration Act, ch. 133, §§ 33, 34 (2000) (Sing.).

<sup>110</sup> See, e.g., *Lau Seng Poh v. Controller of Immigration*, Singapore, 1984-1985-1 Sing. L. Rep. 650 (Sing. High Ct.).

<sup>111</sup> Immigration Act, ch. 133, § 39A (Sing.).

<sup>112</sup> Think Center, *Migrant Workers Situation*, in SINGAPORE HUMAN RIGHTS REPORT 1 (2002).

<sup>113</sup> *Id.*

<sup>114</sup> *Id.* at 2. See also *Public Prosecutor v. Ng Hua Chye*, 2002-4 Sing. L. Rep. 412 (Sing. High Ct.) (sentencing the defendant to eighteen and a half years in prison and twelve strokes of the cane for beating his domestic worker for a period of nine months prior to her death. The worker was so starved that she was compelled to steal food meant for the defendant's child. Nonetheless, her weight of 110 lbs. fell to 79 lbs. at the time of death); *Public Prosecutor v. Sng Siew Ngoh*, 1996-1 Sing. L. Rep. 143 (Sing. High Ct.) (allowing the prosecution of a Singaporean employer for poking her maid with her fingers causing the victim to go blind); *Lim Chuan Huat v. Public Prosecutor*, 2002-1 Sing. L. Rep. 105 (Sing. High Ct.) (fining the defendants, a husband and wife \$1,500 and sentencing them to three months imprisonment each for, among other abuses, beating their domestic worker with a rattan cane, forcibly dragging her, and drenching her with cold water. The medical doctor who examined the worker found thirteen bruises and three abrasions on her face and body, and erythemas of both breasts).



to this critical distinction. Although “expatriate” foreign workers are generally accorded a high level of protection, blue-collar foreign workers receive few due process, criminal, or workplace rights. This differential treatment of the economic classes of aliens suggests that the ruling elite may not be motivated to protect the rights of aliens as such. Any protection of rights may be the result of explicit or implicit national policies to attract highly skilled workers and to maintain good diplomatic relations with strategic international partners such as the United States and the United Kingdom. The binary analysis fails to account for such factors and is therefore inadequate.

#### *D. Gay and Lesbian Rights*

An examination of gay and lesbian rights within Singapore reveals the benefits of the central case analysis for evaluating situations in which human rights are in flux. A binary analysis leads to the misleading conclusion that gay and lesbian rights are uniformly violated in Singapore. While the central case approach recognizes many important points of deviation, it also identifies traits that fall within the umbra of the central case. The contrast between the traits that deviate and the traits that comply with the central case triggers further inquiry into the real human rights situation. This deeper analysis reveals a more complicated situation in which powerful socio-legal vectors conflict and the dynamic equilibrium of gay and lesbian rights is shifting.

##### *1. Binary Approach*

The binary assessment of gay and lesbian rights in Singapore is that that these rights are uniformly violated because of the criminal prohibitions of homosexual acts and other forms of legal discrimination. § 377 of the Penal Code is Singapore’s main homophobic criminal provision. It was originally enacted by colonial England, and the Singaporean Parliament has elected not to remove this provision, despite the legalization of homosexual acts between consenting adults in England. Under this section, homosexual acts between consenting adults are punishable with imprisonment for life and a fine.<sup>115</sup> Indeed, § 377 prohibits all “acts against the order of nature”, a phrase interpreted by the courts as covering a whole gamut of sexual acts.<sup>116</sup>

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<sup>115</sup> Penal Code, ch. 224, § 377 (Sing.).

<sup>116</sup> See *Lim Hock Hin Kelvin v. Public Prosecutor*, 1998-1 Sing. L. Rep. 801 (Sing. C.A.) (convicting a man for having engaged in anal intercourse); *Kanagasuntharam v. Public Prosecutor*, 1992-1 Sing. L.

The State has also elected to punish homosexual acts between consenting adults under § 354 of the Penal Code, which punishes “assault or use of criminal force to a person with intent to outrage modesty.” The range of acts punished under § 354 is wider than § 377: it includes everything from anal intercourse to simply placing one’s hand on another man’s crotch.<sup>117</sup>

In addition to outlawing homosexual acts, the ruling elite has discriminated against homosexuals through other legal provisions. In 2000, the police refused to grant a permit to hold a public forum themed “Gays and Lesbians Within Singapore 21,” on the basis that the event was “contrary to the public interest.”<sup>118</sup> To date, there have been no reports of any openly gay or lesbian groups being allowed to register as a society. In addition, gay marriages are not recognized in Singapore<sup>119</sup> and gay couples do not enjoy any legal benefits from cohabitation, unlike married heterosexual partners, who may be eligible for tax relief, spousal benefits and subsidized public housing. Employers and government bodies have been known to discriminate against employees on the basis of their sexuality.<sup>120</sup>

## 2. *Central Case Approach*

In contrast to the binary analysis of Singapore’s various homophobic laws, the central case approach examines the application of these laws and the societal responses to the legal regime. This deeper inquiry reveals that although discrimination against homosexuals exists, it is more meaningful to assess homosexual rights as being in a developmental state in Singapore.

Whereas the binary approach simply concludes that homosexual rights are violated by the existence of homophobic laws, the central case recognizes that these laws are not generally enforced. The vast majority of

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Rep. 81, 1991 SLR LEXIS 346 (Sing. C.A.); *Public Prosecutor v. Kwan Kwong Weng*, 1997-1 Sing. L. Rep. 967 (Sing. C.A.) (convicting the male defendant for receiving fellatio from a woman without continuing to engage in “normal” vaginal intercourse with that woman).

<sup>117</sup> See *Tan Boon Hock v. Public Prosecutor*, 1994-2 Sing. L. Rep. 150, 1994 SLR LEXIS 477 (Sing. High Ct.).

<sup>118</sup> See Letter from Khor Chor Huat Assistant Director Operations (Licensing), Regarding: Proposed Public Forum “Gays and Lesbians Within Singapore 21” on 28 May 2000 (May 23, 2000), available at [http://www.geocities.com/yawning\\_bread/yax-210.htm](http://www.geocities.com/yawning_bread/yax-210.htm) (last visited Jan. 2, 2004).

<sup>119</sup> See Women’s Charter, ch. 353, § 12(1) (1994) (Sing.).

<sup>120</sup> See Lim Chi Sharn, *Serving Singapore as a Gay Man Part I*, Sept. 2002, available at [http://www.geocities.com/yawning\\_bread/guw-080.htm](http://www.geocities.com/yawning_bread/guw-080.htm) (last visited Jan. 2, 2004) (first person account by an officer cadet who not allowed to complete his cadetship to graduate as an officer, was given the rank of third sergeant and posted as a personal assistant to an officer after he “came out” about his homosexuality to his superiors); Alex Au, *Security Clearance*, Feb. 2000, available at [http://www.geocities.com/yawning\\_bread/yax-197.htm](http://www.geocities.com/yawning_bread/yax-197.htm) (last visited Jan. 2, 2004) (reporting that openly gay civil servants have been denied higher levels of security clearance, a pre-requisite to working in certain government departments).

homosexual acts between consenting adults in private are not prosecuted and police generally do not monitor the sexual proclivities of private citizens. Indeed, there are even public areas where gay men congregate with the intention of meeting other gay men for the purpose of sex. It is inconceivable that the police are unaware of these areas since they are advertised on the Internet.<sup>121</sup> At least during the last three years, there have been no reported arrests or prosecutions of homosexuals who frequent these public areas.

The true human rights concern in Singapore is the potential for these laws to be used by the government against homosexuals without warning and without transparency about the criteria for enforcement. For example, there were reports that police officers conducted an undercover operation in a private gay sauna in 2003 without any warning. The officers climbed over the walls of a private cubicle and witnessed two men engaging in fellatio. These men were arrested.<sup>122</sup> No other sauna was apparently targeted, and there have been no further reports of undercover operations against these private clubs as of this writing. Although this strategy of selective and apparently arbitrary enforcement does not prevent all homosexual acts, it creates an insidious culture of fear among homosexuals.

While the central case approach recognizes that the use of assembly laws against homosexual groups deviates from the central case, this policy is counter-balanced by the government's strategy of permitting the gay community to exist and even grow within Singapore. While no gay society has been allowed to register, Singaporean gay Internet sites that allow gay and gay-friendly Singaporeans to contact one another and to obtain information on topics of interest have flourished.<sup>123</sup> The government has not exercised the same level of control over these gay sites as it has over political websites. In addition, there has been a proliferation of gay social venues recent years.<sup>124</sup> While the government exercises strict control over all "entertainment outlets" through the Public Entertainment and Meetings Act's mandatory licensing regime, it continues to issue licenses to openly gay venues. Gay-themed movies and plays are screened or performed from

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<sup>121</sup> See, e.g., <http://www.fridae.com/resources/sg-cruising.php> (last visited Jan. 30, 2004).

<sup>122</sup> See Yawning Bread, *The Arrests at One Seven and Section 20*, Nov. 2001, available at [http://www.geocities.com/yawning\\_bread/yax-248.htm](http://www.geocities.com/yawning_bread/yax-248.htm) (last visited Jan. 2, 2004).

<sup>123</sup> See, e.g., <http://www.fridae.com> (last visited Jan. 30, 2004); <http://www.sgboy.com> (last visited Jan. 11, 2004).

<sup>124</sup> Venues include gay bars and clubs. For example, the clubs "Taboo" and "Y-Not" are patronized almost exclusively by gays and lesbians. "Centro" attracts an almost exclusively gay and lesbian crowd on certain nights. Similarly, massage parlors openly operating as gay saunas for men to engage in sexual activities with other men have been licensed to operate by the government. As of January 1, 2004, there were no less than four gay saunas within in the central business district.

time to time with permission from the Board of Censors.<sup>125</sup> There has also been a proliferation of gay and lesbian activities, gay themed publications,<sup>126</sup> and even media recognition of gay events.<sup>127</sup> Since 2001, gay groups have organized an annual “circuit party” to coincide with Singapore’s National Day, which has been attended by gays and lesbians from Singapore, Asia, and beyond. Despite the wide media coverage of this event, the authorities have continued to grant licenses for it.<sup>128</sup>

### 3. *Central Case Conclusions on Gay and Lesbian Rights*

Under the central case approach, one discovers that gay rights are evolving in Singapore. The government’s decision to preserve homophobic laws while permitting homosexual communities to grow suggests that the ruling elite has opted for a policy that implicitly accepts some gay rights. Such a policy stance may be explained by Singapore’s political constraints. While the government may acknowledge internally the need for Singapore to modernize, it knows that there can be social disruptions if conservative religious groups, such as some Muslims, Confucian Chinese, and Christians,<sup>129</sup> feel that their right-wing values are not protected. Therefore, the ruling elite continues to use anti-gay laws to signal its official objection to homosexuality while pursuing a strategy of quiet and incremental change.

Prime Minister Goh’s recent actions support the argument that the government wishes to incrementally change the rights of homosexuals in Singapore. In a recent interview with TIME Magazine, Goh noted that his government has changed its long-standing policy of not employing gays. The government implemented this policy without fanfare to avoid raising the hackles of more conservative Singaporeans. Significantly, Goh also alluded

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<sup>125</sup> For example, “Lan Yu”, a gay themed Chinese movie was screened at the fifteenth Singapore International Film Festival in 2002. The play adaptation of “Beautiful Thing” was staged in 2003, and a play on Singapore’s gay scene was staged in 2000.

<sup>126</sup> See, e.g., LEONA LO, MY SISTERS — THEIR STORIES (2003).

<sup>127</sup> See, e.g., Angeline Song, *Breaking Taboos*, THE NEW PAPER, Mar. 2, 2003, available at [http://www.geocities.com/yawning\\_bread/imp-093.htm](http://www.geocities.com/yawning_bread/imp-093.htm) (last visited Jan. 2, 2004).

<sup>128</sup> See *Singapore is Asia’s New Gay Capital*, REUTERS, Sept. 14, 2003, available at <http://www.singapore-window.org/sw03/030914af.htm> (last visited Jan. 11, 2004).

<sup>129</sup> See Wyanne Arnold, *Quietly Singapore Lifts Its Ban on Hiring Gays*, INT’L HERALD TRIB., Jul. 4, 2003, available at <http://www.singapore-window.org/sw03/030704ih.htm> (last visited Jan. 2, 2004) (“Goh said the governments policies reflected the conservatism of the majority of its constituents. In addition to a traditionally Confucian ethnic Chinese minority, Singapore also has a sizable Muslim Malay minority whose religion condemns homosexuality.”); *Policy on Gays Triggers Christian Backlash, Dialogue Urged*, AGENCE FR. PRESSE, July 24, 2003, available at <http://www.singapore-window.org/sw03/030724a1.htm> (last visited Jan. 2, 2004).

to the need to allow social views to “evolve.”<sup>130</sup> Goh’s decision to expressly state a softening stance towards gay rights can be interpreted as a carefully considered move to trigger dialogue in the public domain, thereby taking the first important step towards increasing understanding between social groups on gay issues. Eventually, as society changes its views, the government can then appear to follow the lead of society when it finally reverses its other homophobic policies and repeals Singapore’s homophobic laws. On the other hand, should a backlash occur,<sup>131</sup> there is still political room for the government to maneuver because it has not yet committed to any clear position on gay issues.

The binary approach is wholly inadequate to understand human rights situations that are in a state of flux, such as the treatment of gays and lesbians in Singapore. In these situations of evolving rights, the more sophisticated analytical tools of the central case approach are needed to, first, recognize that rights are evolving and, second, to chart how these developmental trends may change over time or in response to the changing balance of social forces. A State’s formalistic legal picture is misleading because the true rights situation is determined by the interaction between enforcement, social responses to authority, and the various implicit or explicit compacts and bargains between the governed and the government. For the time being at least, the social compact that the Singaporean government has in effect extracted is that, so long as homosexuals do not press for change and sexual equality before the law too quickly or publicly, gay rights will be allowed to move incrementally closer to the central case. Ultimately, these rights are tenuous and may be revoked unilaterally and without warning or accountability by the ruling elite, since the existence of these rights in Singapore are contingent on the ruling elite exercising its discretion not to enforce homophobic laws or impose a homophobic licensing regime. However, a reversal of the government’s strategy is unlikely unless Singapore experiences a strong and unexpected surge of homophobia among the electoral heartlands or conservative ethnic and religious groups, or more conservative politicians come to power.

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<sup>130</sup> Simon Elegant, *The Lion In Winter*, TIME, July 7, 2003, available at [http://www.time.com/time/asia/covers/501030707/sea\\_singapore.html](http://www.time.com/time/asia/covers/501030707/sea_singapore.html) (last visited Jan. 2, 2004).

<sup>131</sup> See, e.g., National Council of Churches of Singapore, *Statement On Homosexuality*, Jul. 29, 2003, available at [http://www.geocities.com/yawning\\_bread/yax-331.htm](http://www.geocities.com/yawning_bread/yax-331.htm) (last visited Jan. 2, 2004) (condemning homosexual practice and “lifestyle” as “sinful and unacceptable” in response to media discussions of homosexuality following Prime Minister Goh’s remarks on homosexuality).

### III. DECISION-MAKING AND THE CENTRAL CASE

The constitutive process of decision-making, whether internationally or municipally, involves a wide range of decision-makers, including human rights advocates, the disparate branches of government, civic groups, the media, international non-profit organizations, foreign governments, and international tribunals. Outcomes, including the enforcement of government policies and the responses to these policies, are determined by the equilibriums of the competing strategies deployed by all decision-makers in different arenas.<sup>132</sup>

The central case approach enables all decision-makers to deploy effective human rights strategies in three ways. First, the central case approach helps decision-makers assess the human rights situation accurately to allocate their limited resources between different geographical regions and different human rights issues.

Second, the central case approach provides an increased awareness of how the governed respond to different rights or lack thereof. This awareness is necessary for decision-makers to leverage public support in some areas, and to be prepared to face an indifferent or intransigent electorate in others. In other instances where overwhelming public support is anticipated, aggressive strategies can be pursued with an expectation that the critical level of support from the governed is likely to force the ruling elite to reconsider their abusive policies.

Finally, the central case approach helps decision-makers navigate the power dynamics between the governed and ruling elite by identifying the compromises that are expressly or impliedly negotiated between these two groups. Such compromises are often trade-offs that allow the ruling elite to preserve its general authority, which ultimately depends on a critical degree of acceptance by the governed, in exchange for a minimum bedrock of rights demanded by the governed. Pressure to improve certain human rights may be seen a breach of the social compact between the governed and the ruling elite and thus lead the ruling elite to curtail rights that it previously protected under the compact. By promoting the understanding of these compacts, the

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<sup>132</sup> On policy-oriented approaches to law, see generally, Myers McDougal, Harold Laswell, & Michael Reisman, *The World Constitutive Process of Authoritative Decision-Making*, 19 J. LEGAL EDUC. 253, 253-300, 403-37 (1966-1967); Harold Laswell & Myers McDougal, *Jurisprudence in Policy-Oriented Perspective*, 19 U. FLA. L. REV. 487-513 (1966-1967); William Morison, *Myres S. McDougal and Twentieth-Century Jurisprudence: A Comparative Essay*, in TOWARD WORLD ORDER AND HUMAN DIGNITY 3-78 (W. Michael Reisman & Burns H. Weston eds., 1979); Siegfried Wiesner & Andrew R. Willard, *Policy Oriented Jurisprudence and Human Rights Abuses in Internal Conflict*, 93 AM. J. INT'L L. 316, 316-34 (1999).

central case approach helps decision-makers avoid inadvertently harming human rights.

This Part demonstrates how the central case approach can be used to deploy human rights strategies more effectively by examining how human rights advocates could have promoted religious rights in their recent struggles to protect the rights of Muslims to wear headscarves in Singapore. This Part also demonstrates that the central case approach can be used by not just advocates in Singapore, but by all decision-makers in all States. The universality of the central case approach is demonstrated by recommending the central case analysis of Muslim rights in France to French decision-makers and appraising the U.S. courts' uses of the central case approach in some of their recent judgments regarding executive detentions.

#### A. *The Prohibition against Muslim Headscarves in Singapore Schools*

In late 2002, several Muslim fathers in Singapore began sending their daughters to State schools wearing the traditional Muslim headscarf for women, the *tudung* or *hijab*. Wearing this headscarf violated school rules because the headscarf is not part of the uniforms of the secular State schools. However, Sheik students are allowed to wear turbans to school, Christians are allowed to wear crosses, and Buddhists are allowed to wear religious beads.<sup>133</sup> When the fathers refused to stop dressing their daughters in *tudungs*, the school principals suspended the students. In what became a widely publicized event, the Ministry of Education supported the ban on the *tudung* and the suspension of the girls. One father announced his intentions to file suit against the government to lift the ban. The Singaporean government refused to back down from the ban, and most of the fathers capitulated. One parent who insisted on dressing his daughter in the *tudung* was left with no choice but to send his daughter to a private Muslim school.<sup>134</sup>

The fathers of these girls failed to improve the rights of Muslims because they analyzed the *tudung* prohibition in a binary fashion and

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<sup>133</sup> See Zubadah Abu Bakar, *DAP Urges Singapore to Rescind School Tudung Ban*, NEW STRAITS TIMES, Feb. 1, 2002, available at <http://www.singapore-window.org/sw02/020201ns.htm> (last visited Jan. 11, 2004).

<sup>134</sup> See Amy Tan, *Singapore Suspends Third Headscarf Clad Schoolgirl*, REUTERS, Feb. 11 2002, available at <http://www.singapore-window.org/sw02/020211re.htm> (last visited Jan. 2, 2004); *Schoolgirls Hire Malaysian Lawyer Over Headscarf Row*, AGENCE FR. PRESSE, Apr. 20, 2002, available at <http://www.singapore-window.org/sw02/020420a1.htm> (last visited Jan. 2, 2004); *Dateline: Singapore—The Tudung Affair* (SBS television broadcast, Mar. 27, 2002), transcript available at <http://www.singapore-window.org/sw02/020327sb.htm> (last visited Jan. 2, 2004).

adopted strategies pursuant to this binary analysis. The fathers regarded the wearing of the *tudung* as a Muslim duty, and the ban on wearing the *tudung* in schools as a violation of their Muslim rights.<sup>135</sup> They did not appear to consider the extent to which the ban departed from the ideal state of Muslim rights, the consequences of the ban on the rights of Muslims, and the implicit political compacts between the government and the minority Muslim community that underpinned the prohibition. As a consequence, the fathers adopted a strategy of direct confrontation that involved the bold assertion of their daughters' right to wear *tudungs* in schools. Ultimately, the Muslim students were still not allowed to wear the *tudung* in State schools. This strategy may also have harmed the rights of Muslims by causing subtle shifts in the overarching government policies concerning the Muslim minority.

The fathers were likely to have been more successful had they used the central case approach. Under a central case analysis, they would have assessed the extent to which the *tudung* prohibition departed from the central case for Muslim rights, and would have concluded that the departure was not significant in Singapore's overall socio-political context. There can be no doubt that the prohibition departed from the central case, because it restricted the public expression of Muslims' religious and cultural identity. The prohibition was also discriminatory because Christians and Sheiks are allowed to wear their religious ornaments in schools. In addition, the prohibition cannot be justified as a protection of women's rights. Unlike in other States, in which the *tudung* represents the continuing subservience of women, in the cultural context of Singapore, the *tudung* is more an expression of the Malay community's ethnic and religious identification.<sup>136</sup>

Although the prohibition deviated from the central case of Muslim rights, it did not bring the overall situation on Muslim rights out of the penumbra of the central case. Within Singapore, mosques are allowed to flourish, Muslim employees are given time off work to attend Friday prayers, children may attend Muslim schools, or *Madarasas*, and the government recognizes two Muslim festivals as national public holidays.<sup>137</sup> Indeed, the special role of racial and religious minorities and the special

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<sup>135</sup> See Amy Tan, *Muslim Girls To Fight Government Over Headscarf Ban*, REUTERS, Aug. 2, 2002, available at <http://www.singapore-window.org/sw02/020802re.htm> (last visited Jan. 2, 2004) ("The government is going against the constitution. They are doing something which is against the law,' the girl's father, Mohamad Nasser Jamaludin, told Reuters.").

<sup>136</sup> See *Tudung a Mark of Difference Not Subversion*, NEW STRAITS TIMES, Feb. 5, 2002, available at <http://www.singapore-window.org/sw02/020205ns.htm> (last visited Jan. 2, 2004).

<sup>137</sup> See SINGAPORE NATIONAL HOLIDAYS 2003, available at <http://www3.sympatico.ca/ccsr/s2003.html> (last visited Jan. 11, 2003) (citing Singapore Consulate, Canada).



position of the Malays as the indigenous people of Singapore are protected by Singapore's Constitution, which imposes a duty on the government to care for their interests.<sup>138</sup>

The central case approach would also recognize compelling reasons for the *tudung* prohibition, which would explain, if not justify, the deviation from the central case of religious rights. Singapore has a strong need to preserve a secular common social space in which people of different faiths and ethnicities can build upon their similarities rather than be divided by their differences. The need to protect this common space is especially strong in schools, where children's views and values are formed. While there is merit to the view that schools can teach children to embrace diversity by allowing visible signs of cultural differences, there is also a danger that these visible differences will segregate schoolchildren along ethnic lines. In the long run, allowing religious symbols in schools could undermine efforts to create a common identity that binds Singaporeans in spite of their different ethnic or religious backgrounds.

The central case approach would also have accounted for the compact that the Singaporean government maintains with the different racial groups. Singapore's style of government is conciliatory; controversial issues are debated behind closed doors rather than aired publicly. Once an issue is brought to the public's imagination, it is difficult for the government to back down. In short, the government maintains an implicit compact with all minorities, be they ethnic, religious, or sexual minorities: so long as minorities do not enter the common social space with strident expressions of identity, minority rights will be generally protected.

This compact is especially important with Muslims, given the Chinese majority and possible racial tensions smoldering below the surface. Regardless of the injustice of the *tudung* prohibition, had the government reversed the ban, there may have been a backlash from Singapore's Chinese community.<sup>139</sup> A reversal of the ban may have also been seen as a concession to public pressure and thereby encouraged militant Islamists to become more strident.

In view of Singapore's social compact with minorities, any strategy of public confrontation risks a strong and uncompromising response from the government. Public confrontation should be considered only if the government's policy brought the rights situation far beyond the penumbra of the central case, and no other foreseeable way existed to shift the policy

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<sup>138</sup> See SING. CONST. arts. 152, 153.

<sup>139</sup> See LEE KUAN YEW, *THE SINGAPORE STORY: MEMOIRS OF LEE KUAN YEW I*, 556-69 (1998) (discussing Singapore's history of racial violence between the Malays and Chinese).

closer toward the central case. Had the fathers used the central case approach, they would not have embarked on their confrontational strategy that was doomed to failure. The threat of the *tudung* prohibition to the overall state of Muslim rights was limited and did not require urgent action. Moreover, the Muslim advocates' direct conflict with the government was unlikely to produce their desired outcome. Therefore, patience and constructive engagement would have been the more efficacious approach. A central case strategy would have involved more prolonged back door diplomacy with the ruling elite. If the government proved unwilling to make concessions at that time, the central case approach would recommend pragmatically waiting until the public was less focused on the relationship between Muslim fundamentalism and terrorism. By following a central case approach, Muslim advocates would have dramatically increased their likelihood of advancing their rights.

### *B. The Proposed Ban on Muslim Headscarves in French State Schools*

The central case approach can be applied universally to help all decision-makers on human rights issues in any State. Just as the central case approach can help advocates address the *tudung* prohibition in Singapore, it can benefit other decision-makers involved in a similar debate in France. In December 2003, controversy erupted after the French Commission on Secularism recommended a new law banning all religious symbols from French State schools, and after President Chirac supported the proposed law.<sup>140</sup> The proposed law would, if enacted, forbid Muslims from wearing religious headwear within French schools. As of this writing, the proposed law has not yet been enacted, and decision-makers continue to deploy strategies to affect the possible prohibition of Muslim headscarves. This Part evaluates the proposed ban in binary and central case terms and compares the French proposal to Singapore's ban on *tudungs* to demonstrate that the central case approach helps decision-makers in all States design appropriate human rights strategies.

The binary approach indicates that the proposed law, if passed, would clearly violate French citizens' right to religious identity and expression. Some French Muslim women have publicly stated that the headscarf

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<sup>140</sup> See Elaine Sciolino, *Chirac Backs Law To Keep Signs Of Faith Out of School*, N.Y. TIMES, Dec. 17, 2003, at A17; Caroline Wyatt, *Headscarf Row Hides Deeper Issues*, BBC NEWS, Dec. 11, 2003, <http://news.bbc.co.uk/2/hi/europe/3311485.htm> (accessed on Jan. 2, 2004).

represents a vital part of their religious identity.<sup>141</sup> Like the binary analysis of the *tudung* prohibition in Singapore, the binary analysis of the French situation suggests that the headscarf should not be banned from State schools.

The central case approach provides a much deeper understanding of the French situation, and assists policy-makers and human rights advocates in France in their decision-making. Like Singapore, France faces the challenge of creating social unity among an ethnically diverse population. In France, the population includes a Caucasian-Christian majority and a Muslim minority that has ties with, and is influenced by, Muslim populations in Europe. According to some reports, divisions between the ethnic groups in France have widened and fears of Islamic fundamentalism have grown since the September 11, 2001 attacks in the United States.<sup>142</sup> This socio-political backdrop reveals that the critical human rights concern in France is not simply the right to religious identity, but the balance between assimilating different cultures to create social cohesion and respecting individual identities within public and civic spaces.<sup>143</sup> The binary analysis of the proposed ban on religious symbols in State schools does not address France's fundamental need to preserve social unity.

If France decides to ban religious symbols in State schools, the central case approach supplies analytic tools that help decision-makers implement this ban in an appropriate way within France's socio-political context. The central case approach would recommend managing public sentiment to promote unity among France's different ethnic groups and to weaken the divisive influence of radical religious fundamentalists. To achieve these objectives, decision-makers could enlist the media, religious leaders in France, and, if possible, influential religious teachers from Middle Eastern States to explain the necessity of a secular civic space and that the ban does not violate Islamic doctrine.<sup>144</sup> Decision-makers using the central case approach would also conduct a wider survey of Muslim rights in France to ensure that the deviation from the central case caused by the prohibition on headscarves is balanced by the protection of other religious rights, such as

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<sup>141</sup> See Wyatt, *id.*; Clare Murphy, *Headscarfs: Contentious Cloths*, BBC News Online, Dec. 11, 2003, <http://news.bbc.co.uk/1/hi/world/europe/3311485.stm> (last visited Jan. 2, 2004).

<sup>142</sup> Wyatt, *supra* note 140 ("The September 11 attacks hardened attitudes here, with unspoken fears about Islamic fundamentalism underlying the public rhetoric.")

<sup>143</sup> See *French Press Debates Headscarf Ban*, BBC NEWS, Dec. 18, 2003, available at <http://news.bbc.co.uk/2/hi/europe/3330831.stm> (last visited Jan. 2, 2004) ("[President Chirac] wants to prevent the far-right from exploiting the increasing number of identity problems, which worsen as the failure of the policy of integration fuels the trend for minorities to turn inward.")

<sup>144</sup> See, e.g., Magdi Abdelhadi, *Shiek Sanctions Headscarf Ban*, BBC NEWS, Dec. 30, 2003, available at <http://news.bbc.co.uk/2/hi/europe/3358363.stm> (last visited Jan. 2, 2004).

access to mosques and membership in Muslim groups, so that Muslim rights in France do not move out of the umbra of the central case. These central case strategies demonstrate that the central case approach can be used not only by human rights advocates, but also by other decision-makers, such as the ruling elite, to appraise policy issues and promote human rights.

*C. Judicial Review of Executive Detentions of Enemy Combatants in the United States*

Judges may also use the central case approach. The usefulness of the central case approach to judges is demonstrated by the current litigation in the United States concerning the executive detention of alleged “enemy combatants”. Following the attacks on the United States on September 11, 2001, the U.S. government waged “war on terrorism.” The government’s “war” efforts included detaining Jose Padilla, an American citizen, in a Charleston brig for over eighteen months without trial and without access to counsel.<sup>145</sup> This denial of access to counsel has been challenged in U.S. courts.

The U.S. courts have had to state their legal conclusions that Padilla’s rights have been violated in binary terms because the courts are bound, at least superficially, by legal formalism. In *Padilla v. Rumsfeld*, the Second Circuit Court of Appeals held that Padilla’s executive detention was unlawful because the President had exceeded his powers under the Non-Detention Act and Art. II, § 2 of the Constitution, and because Congress had not granted the President authorization to detain U.S. citizens without trial.<sup>146</sup>

However, this binary approach to judicial decision-making does not help the courts select judicial outcomes that maximize the well-being of those affected by their decisions. The binary conclusion that the President violated Padilla’s legal due process rights offers no guidance on the impact of that judicial determination on competing social, political, national, and international policies, such as the preservation of freedom and protection from terrorism. Black letter analysis of the President’s powers also does not enable judges to anticipate the responses of other decision-makers, such as Congress, the President, and foreign States, to their rulings, nor to structure their decisions in a way that will create their preferred final outcomes.

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<sup>145</sup> See *Padilla v. Rumsfeld* (“Padilla II”), 352 F.3d 695, 699-700 (2d Cir. 2003).

<sup>146</sup> *Id.* at 712, 724.

In contrast, the central case approach helps judges understand the competing policy considerations in the cases over which they preside and to anticipate the full impact of the various policy outcomes that they can select. Behind the cloak of legal formalism, U.S. courts have in fact used the central case approach to appraise the underlying policy considerations and to determine the appropriate judicial response to Padilla's detention. The U.S. courts demonstrated an awareness that the complete denial of access to counsel was a great deviation from the due process central case when they stated: "there is no practical way for Padilla to vindicate that right [to present facts to the court] other than through a lawyer"<sup>147</sup> and that Padilla's "right to pursue a remedy through the [Great] writ would be meaningless if he had to do so [without counsel]"<sup>148</sup>. The Southern District of New York also demonstrated an awareness of the need to differentiate between various instances in which there may have been different degrees of deviations from the central case when appraising the complete human rights situation. The Court noted: "since September 11, 2001 . . . Padilla's [detention without access to counsel] is not only the first, but also the only case of its kind. There is every reason to not only hope, but also to expect that this case will be just another of the isolated cases."<sup>149</sup>

The courts have also used the central case approach to appraise whether this deviation is legitimate by balancing competing policies.<sup>150</sup> Although the impact of Padilla's access to counsel on national security was not relevant to the Second Circuit's formal legal interpretation of the President's powers under the Constitution and the Non-Detention Act, the Court of Appeals nonetheless hinted at some of its wider concerns when it prefaced its majority opinion with an acknowledgement of the potentially terrible consequences of a successful terror attack.<sup>151</sup> Similarly, the District Court went to some length in its decision to anticipate the range of counter-terrorism and national security outcomes that may result from allowing Padilla access to counsel,<sup>152</sup> even though these outcomes were not formally determinative of Padilla's legal right to counsel.<sup>153</sup> The District Court also

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<sup>147</sup> See *Padilla v. Rumsfeld* ("Padilla I"), 243 F.Supp.2d 42, 54 (S.D.N.Y. 2003).

<sup>148</sup> *Padilla II*, 352 F.3d at 732.

<sup>149</sup> *Padilla I*, 243 F. Supp. 2d at 57.

<sup>150</sup> See also Florentino P. Feliciano, *The Application of Law: Some Recurring Aspects of the Process of Judicial Review and Decision-Making*, 37 AM. J. JURIS. 17, 52 (1992) (discussing the process of judicial decision-making).

<sup>151</sup> *Padilla II*, 352 F.3d at 699 ("we are keenly aware as anyone of the threat al Qaeda poses to our country").

<sup>152</sup> See *Padilla I*, 243 F.Supp.2d at 50-53.

<sup>153</sup> *Id.* at 53 ("Even if predictions in the Jacoby Declaration were reliably more certain than they in fact are, I would not be free . . . on that basis alone [to] deny Padilla access to a lawyer.").

offered another clue that it was appraising the case in a manner similar to the central approach. As a formal matter, the court did not have to mention the *amicus curiae* submissions, nor did it have to consider the policy concerns raised therein in determining the President's constitutional powers. Nonetheless, the District Court recited these policy concerns, stated somewhat melodramatically in an *amicus curiae* submission that, "if Padilla does not receive the full panoply of protections . . . a dictatorship will be upon us, and tanks will have rolled."<sup>154</sup>

Although the litigation concerning executive detentions is ongoing as of this writing,<sup>155</sup> it is clear from the decisions of U.S. courts thus far that the central case approach is a sophisticated guide to judicial decision-making and that the courts supplement their formal binary analysis with central case analysis. In conjunction with the Singapore case study and the French example, the U.S. litigation concerning executive detentions demonstrates that activists, legislators, judges, and other decision-makers in any State can use the central case approach to promote human rights.

#### IV. CONCLUSION

Using Singapore as a case study alongside comparative examples from other States, this Article has demonstrated that the commonly used binary approach to human rights provides an inadequate understanding of human rights. In contrast, the central case heuristic is a universally applicable approach that permits decision-makers, including human rights advocates and policy-makers, to focus and tailor their human rights strategies to different deviations from the central case of human rights. The central case approach accounts for the social and political factors that shape human rights policies and helps advocates to understand their political strengths and limitations. The central case approach also distinguishes between different rights and social populations, thus allowing more effective allocation of resources. Unlike the static binary approach, the central case approach permits advocates to understand evolving human rights situations.

While the central case approach is superior to the binary approach, the latter approach nonetheless has some utility. In appropriate situations, the binary approach can be used in combination with the central case approach. After using the central case approach to appraise a human rights situation, activists may decide to criticize abusive governmental policies in binary

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<sup>154</sup> Padilla I, 243 F.Supp.2d at 57.

<sup>155</sup> See, e.g., *Al Odah v. United States*, 321 F.3d 1134, 1143 (D.C. Cir. 2003), cert. granted, 124 S. Ct. 534 (2003).

terms in the mass media because central case appraisals may be too nuanced and lengthy for their target audience. In other situations, decision-makers may examine a State using the simple binary approach, and then shift to central case analysis once *prima facie* violations are identified. At this point, decision-makers would look more carefully at the degree of violations in relation to different aspects of the human rights under examination, the consequences of violations, the social and political vectors in connection with these violations, and the decision-making dynamics of the State under examination. In addition, in judicial proceedings judges can rely on binary legal reasoning to justify the policy outcomes that they selected using the central case approach.

Although there is utility in the binary approach, it should only be used in conjunction with the central case approach and not in lieu of it. The central case approach combines an understanding of how the law plays out in reality and the unique social and political considerations of a particular State to present a fuller exposition of that State's human rights situation. This exposition is critical to the selection of human rights strategies. In view of the myriad socio-political cultures of different States, human rights strategies must vary depending upon the human rights situation that they face. There are no universal solutions applicable to the varied human rights situations of different cultures; the central case approach is specifically designed to consider the unique socio-political vectors of different situations and States. Through the central case approach, decision-makers are able to select human right issues to address based on the likelihood of resistance or support, as well as the degree of deviation from the central case. Decision-makers may also time their strategies more appropriately and predict the consequences of their strategies with greater accuracy, thereby promoting human rights more effectively.