DAVID MARSHALL – HIS LIFE AND LEGACY
(A Symposium in Commemoration of the
100th Birthday Anniversary of Mr David Marshall)
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DAVID MARSHALL AND THE LAW – SOME REFLECTIONS ON HIS CONTRIBUTIONS TO CRIMINAL AND CIVIL JUSTICE IN SINGAPORE

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Introduction

1 The centenary of David Marshall's birthday is an appropriate occasion to commemorate his contributions to the administration of justice in Singapore and to evaluate his place in Singapore's legal history. His legal career spanned four decades, from 1938–1942 and 1946–1978, during which he defended hundreds of criminal defendants for all types of crime and also many detainees under the public order and security laws. Marshall's most famous and sensational cases were trials before juries and assessors. Alex Josey has written about some of them in his book "*The David Marshall Trials*".[1] He called one of these cases "*The Miracle Case".* Many people believed that Marshall was capable of performing miracles in court.

2 Many of us gathered here this morning knew Marshall personally. But except perhaps for Mr President, Tommy Koh and Amarjeet Singh, most of us would not have seen Marshall in action before a jury or even before a judge. So, Marshall's role as the Great Defender is a legend in the true sense of the word. I was once privileged to have been asked to act as his junior counsel on some point of company law, but he did not need my assistance as he persuaded Justice Kulasekaran to dismiss the case on a preliminary point.

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1 Alex Josey, *The David Marshall Trials* (Singapore, Times Books International, 1981).

3 I have a few memories of Marshall. In 1961 (as I recall), Tommy Koh brought me along with him to the Johor Baru prison where Marshall would be interviewing his client on a murder charge. Tommy was the interpreter. This incident stuck in my memory because at a certain point in the interview, when the accused was about to reply to a question that Marshall had asked, Marshall immediately said: "Stop, I don't want to know the answer." I learnt something which was not taught in law school. In 1992, shortly after I was appointed Attorney General, I met Marshall at a dinner hosted for him by Lena and William Lim. I remember him saying that our people, especially the young, must have fire in their bellies, but I came away from the dinner with the distinct impression that he did not care much for Attorneys General.

4 When Ambassador Kesavapany asked me to speak at this symposium, I readily agreed because I admired Marshall as a lawyer and an advocate, and I wanted to evaluate his positive and enduring contributions to the administration of justice in Singapore, especially in the field of criminal justice and judicial review. I did not have in mind his ephemeral contributions to his clients, invaluable though they were in securing their personal liberties. Nor did I have in mind his status as an icon or a role model for the Bar as a fearless and indomitable defence counsel, invaluable as that would be for future generations of lawyers. These accomplishments by themselves are, in the long run, of lesser importance than his influence on how the criminal justice system developed as a result of his successes as a criminal lawyer.

5 Marshall has not left a large corpus of writings on the law. The major published writings by and about him and the law include the following: (a) a speech to the Rotary Club in 1969 on the Rule of Law;[2] (b) his Braddell Memorial Lecture in 1978 on criminal justice;[3] (c) a short interview he gave to

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[2] David Marshall, "Facets of the Accusatorial & Inquisitorial Systems" (1979) MLJ xxix.

[3] David Marshall, "The Rule of Law" (1969) 4 The Law Times 3.

the Singapore Law Review;[4] and (d) a tribute to his memory in the Singapore Law Review in 1996.[5] There is, of course, "*The David Marshall Trials*" (as mentioned above) which was a journalistic account of his best-known trials. That was mainly it. I read all these materials and decided to study the primary materials, *viz*, the reported cases, to learn about his substantive work as a criminal lawyer and as a constitutional lawyer. There are 133 reported cases in which Marshall appeared as counsel, of which there are 100 criminal cases, 8 constitutional or judicial review cases, 3 Muslim law cases, 2 election petition cases, and the remainder civil cases. One can see immediately from these statistics where his legal forte lay.

Marshall as an advocate

6 He was undoubtedly the greatest criminal advocate that has ever graced the halls of justice in Singapore and Malaya: a giant among pigmies at the criminal Bar, including the prosecutors. If Marshall had practised in England, he would have been another Edward Marshall-Hall, definitely greater on a verdict count of acquittals. Alex Josey's accounts, short as they are, will give you some idea of Marshall's court craft in attacking the soft spots in the prosecution's case and his eloquence in keeping juries and assessors enthralled. In 1955, the Minister Mentor, when debating the Preservation of Public Security Bill which Marshall, then the Chief Minister, had introduced, said:[6]

> "I have always been an admirer of his tactics in Court, for he is the supreme advocate of the strategy of attack when you are on the defensive."

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4 "In Conversation: An Interview with Dr David Marshall" (1994) 15 Sing L Rev 1.

5 "In Memorium: A tribute to the late Mr David Saul Marshall" (1996) 17 Sing L Rev 17.

6 Legislative Assembly Debates, 21 September 1955, col 718.

The Minister Mentor further acknowledged, not once, but twice, Marshall's flair and inclination for colourful metaphor. According to Dennis Bloodworth,[7] a legal colleague had told him:

> "He goes to court like a good counsel ready to defend his client whatever he privately thinks of him. He's a great actor, and by the end [of the case] he not only convinced the court that the man must be freed, but convinced himself that he is innocent. It's only after he comes out into the sunshine that he says "Good God, what have I done? I have just abetted a crime."

Marshall is reported to have commented:

> "Only once did I feel uncomfortable. I always felt good helping to free a human being from the threat of official murder."

In 1996, the Far Eastern Economic Review published an article touching on Marshall which attributed to the Minister Mentor the statement that Marshall was responsible for 200 murderers walking free.[8] Marshall commented that he was convinced of their innocence and acted according to his conscience. According to Alex Josey, however, Marshall was successfully involved in about 100 murder trials. I don't think it matters which number is correct. Even half of the smaller number would be enough to make him a legend. He won many of his cases on account of the ineptitude of the prosecution and judicial errors in giving inadequate directions to the jury on the law and the evidence, especially on the need for certain types of evidence to be corroborated.

7 Unfortunately, most of his speeches as defence counsel before juries, assessors and judges, may have been lost to the legal community. I do not know whether any transcripts of his trials, particularly his cross-examinations and closing speeches, have survived or can be retrieved from our judicial records. This will be the next project for the Legal Heritage Committee of the

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[7] Dennis Bloodworth, *The Tiger and the Trojan Horse*, (Times Books International, 1986) at pp 121–122.

[8] "An Independent Voice", *Far Eastern Economic Review* (28 December 1995 to 4 January 1996).

Singapore Academy of Law. There is a book published recently entitled "Ladies and Gentlemen of the Jury – Greatest Closing Arguments in Modern Law".[9] It is a collection of the closing speeches of prosecution and defence counsel in 10 landmark trials in American history. Each speech is regarded as a finely crafted verbal work of art. The first in the list is the closing speech of Justice Robert H Jackson at the War Crimes Trial at Nuremberg on 26 July 1946. If a similar selection were made of court trials in Singapore and Malaya, you can be sure that the greater majority of them would be those delivered by Marshall.

8 But we do have bits and pieces of his arguments recorded in the reported cases that show his linguistic flair. Let me give you some examples. The first comes from *Karam Singh v Menteri Hal Ehwal Dalam Negeri*,[10] one of the most famous cases on preventive detention in Malaysia decided in 1969. Marshall acted for Karam Singh. In his judgment, HT Ong CJ (Malaya) said:

> "For the appellant, it has been impressed upon us by learned counsel for Karam Singh, the man, is but a mere pebble cast upon still waters, yet the ripples which it spreads affects a great number of people far and wide."

The second case is *Tong Keng Wah v PP* [11] where a police officer had been convicted of an offence under the Police Force Act for failing to return his revolver and ammunition to the Police Force after his dismissal. Chua J recorded Marshall's submission as follows:

> "The first ground taken is this: "There is a miscarriage of justice in that: A vast mass of irrelevant, inadmissible and occasionally, prejudicial evidence (both oral and documentary) was adduced to an extent which

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[9] Michael S Lief, et al, *Ladies and Gentlemen of the Jury: Greatest Closing Arguments in Modern Law* (Scribner, 2000).

[10] [1969] 2 MLJ 129 at 140

[11] [1978–79] SLR 405

> transformed a judicial proceeding into a riot of gossip and scandal mongering."[12]

9 However, even at the age of 86, Marshall could have challenged William Safire (or Janadas Devan) as a wordsmith. In April 1994, the Straits Times published a report on a dinner held to raise funds for the David Marshall Professorship of Law only 7 days after the event. Marshall was annoyed with the tone of the report and wrote to complain to the Minister for Information and the Arts about the "work of art of the slimy snakes" who had distorted the event to "vent their petty vengeance" against him. He called them by other choice epithets, and ended by asking the Minister "where he could go for redress against the privileged puppies of the authority." The Minister replied:

> "Dear Mr Marshall….Your reputation is too mountainous for any newspaper to be able to enlarge or reduce by acts of commission or omission…"

Marshall as a criminal lawyer

10 If you read his reported cases, you would also be justified in concluding that Marshall was also the best criminal lawyer and the best constitutional lawyer of his time. On many occasions, he was able to produce creative and novel legal arguments based on the textual readings of the Constitution and the related statutes. His many fine points of criminal procedure and evidence left many prosecutors befuddled and in many cases also persuaded the lowest to the highest courts to agree with him.

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[12] Another illustration is from the case of *Teo Cheng Leong v PP* [1969–71] SLR 128 where an accused who had been charged for discharging a firearm in the course of a robbery. He was committed for trial before a jury but was tried before two judges after the abolition of jury trial in between. . Marshall's submission on one ground of appeal was as follows:

> "There was a miscarriage of justice in that by reason of the unlawful delays in bringing the appellant to trial in flagrant contravention of specific statutory provisions …"

The Chief Justice was not happy with this submission and said:

> "We reiterate that this ground of appeal couched in unusually extravagant language is without foundation in fact and in law."

Criminal justice

11 But what were Marshall's ideas on the kind of criminal justice system appropriate for Singapore? We know that he was the leading proponent and defender of jury trials, especially for murder.[13] In 1978 he delivered the Braddell Memorial Lecture where he expounded his ideas on the subject. He compared the merits and demerits of the common law adversarial trial (which he identified as a trial of the person) with the civil law inquisitorial investigation (which he identified as an investigation of the offence). But both seek the truth in their own way. He admitted his bias for the adversarial system, but suggested that it should seek the truth within the framework of human dignity. He described the adversarial system as "magnificent" but less than "perfect", and he gave the reasons for his comments. Some of the things he espoused there are still relevant today, but basically he was, I believe, affirming the merits of the system that I have referred to as the due process model of criminal justice in a lecture I gave to NUS law students in 1996. Co-incidentally, the lecture was published in the same issue of the Singapore Law Review that published an *In Memoriam* tribute to Marshall.

12 Marshall expressed the hope that his lecture would start a movement among academics and practitioners to recast a criminal procedure for Singapore that reflected its values, needs and resources. In this regard, Marshall was a legal nationalist, but it is difficult to tell what kind of criminal justice process he had in mind. But, having regard to his admiration for the common law adversarial process, he could have been expressing his disapproval of the 1976 amendments to the Criminal Procedure Code and the Evidence Act. These amendments were revolutionary in 1976 as they departed

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[13] He defended it in 1969 in his talk to the Rotary Club on the Rule of Law. He had the support of the Council of Singapore Advocates and Solicitors Society and the University of Singapore Law Society. The Judges supported abolition and Parliament abolished it in 1970 and put in place a trial before two Judges.

quite radically from the existing due process model in the direction of the crime control model.

Due process model of criminal justice

13 Before I discuss some of these amendments, let me now sketch out for you the features of the criminal justice process that was in place in Singapore before 1976. We then had an investigative and trial process regulated by the Criminal Procedure Code and the Evidence Act which basically provided the framework for a common law trial process which was highly admired, if not revered, in England at that time. The fundamental principle was the presumption of innocence. This meant that (a) the prosecution must prove every ingredient of the offence against the accused beyond a reasonable doubt; (b) the accused had the right to remain silent at any stage of the criminal justice process, from investigation to trial; (c) the accused had the right not to incriminate himself, except in restricted circumstances; (d) the accused's statements to the police were not admissible except in restricted circumstances; (e) he had the right to give an unsworn statement from the dock; (f) all evidence, even if true, was not admissible if it might have a prejudicial effect on the jury; and (g) the practice of the courts was to require strict compliance with the rules of evidence and procedure and to have strict oversight of jury directions on accomplice evidence and corroboration, especially for capital and life imprisonment offences.

14 In a paper published in 1964[14] on the criminal justice process in USA, Professor Herbert Packer of Stanford University described two models of criminal justice process, namely, due process and crime control. This paper has since been regarded as one of the most important contributions to systematic thought about criminal justice. Under the due process model, criminal justice looks like an obstacle course, consisting of a series of obstacles to the

[14] 113 U. PA. L Rev. 1, 1964)

conviction of what he called the factually guilty on the premise that it was better to let 10 guilty men go free than to convict an innocent one. The basic features are those I have just described of our criminal justice process before 1976. Because of the presumption of innocence, priority must be given to the protection of the accused's rights in a fair manner. Police powers of arrest and investigation should be limited to prevent potential official oppression of the individual. Procedural rights are not mere technicalities. Law enforcement officers and the prosecution should be held accountable to rules, procedures, and guidelines to ensure fairness and consistency in the justice process. An accused should not be convicted because he has committed the crime, *i.e.*, factually guilty, but only in accordance with the legal procedures in fact-finding. At the appeal stage, due process ideology says convictions, even of factually guilty people, must be quashed if the court considers the conviction unsafe.

Crime control model of criminal justice

15 Marshall achieved great success under this system. Many other lesser lights also shone. But it was inevitable that the prosecution would sooner or later take note of the defects (from its point of view) of the existing process which had been so ably and amply demonstrated by Marshall. It must have led the Government to rethink seriously about the objectives of the criminal justice process and how to achieve those objectives. Let me now introduce the other model of criminal justice process that Professor Packer had identified in his paper, *viz*, the crime control model. The features of this model are as follows:

(a) The repression of crime should be the most important function of criminal justice because order is a necessary condition for a free society.

(b) Criminal justice should concentrate on vindicating victims' rights rather than on protecting defendants' rights.

(c) Police powers should be expanded to make it easier to investigate, arrest, search, seize and convict.

(d) Legal technicalities that handcuff the police should be eliminated.

(e) If the police make an arrest and a prosecutor files criminal charges, the accused should be presumed guilty because the fact-finding of police and prosecutors is highly reliable.

(f) The criminal justice process should operate like an assembly-line conveyor belt, moving cases swiftly along toward their disposition.

(g) The main objective of the criminal justice process should be to discover the truth or to establish the factual guilt of the accused.

16 The 1976 amendments introduced many features of the crime control model. Ironically, these amendments were based on the recommendations of the 1972 Eleventh Report of the UK Criminal Law Revision Committee which the UK Government had rejected. Obviously, England had the same problems with the due process model. However, the recommendations were a breakthrough for law enforcement in Singapore. Let me enumerate the more important ones:

(a) The first important change was in the realm of police investigations. Essentially all statements made by an accused to a police officer in the course of investigation, except an involuntary confession, would be admissible in evidence. The accused, if charged with or informed that he would be prosecuted for an offence, is cautioned that he must disclose any fact he intended to rely on in court, and that if he failed to do so, his evidence might be less likely to be believed if he mentioned it in court later. He was not asked to incriminate himself, but effectively to disclose what he knew about the offence. The use of this form of caution has prevented many suspects from inventing defences or excuses at the trial.

(b) The second broad change was in the trial procedure. If the accused is called upon to enter his defence, he has no right to make an unsworn statement from the dock. He must give evidence on oath or affirmation and subject himself to cross-examination. If he elects not to give evidence, the court may draw an adverse inference against him. Concurrently, the Evidence Act was also amended to give effect to the investigative and procedural changes. One change allowed the previous statement of a witness to be used to discredit him if he changed his evidence. Another provided that even if he retracted a statement, the court may still accept it as the truth.

17 These two broad changes led to an increase in the conviction of the factually guilty through pleas of guilt or at trials. Crime control was strengthened with the use of rebuttable and irrebuttable presumptions in substantive offences. These developments, together with better and more dedicated and efficient law enforcement, have reduced the crime rate over the years and have made Singapore a safer place to live in. You might think that this statement is somewhat simplistic, but many people would agree that law enforcement in Singapore, although not perfect, is among the best in the world.

18 Marshall, as defence counsel, would not have approved of such a system. But as a citizen, he made the following remark in his Braddell Memorial Lecture:

> "Truth can at times be purchased at too great a cost to society, and countries that conceived that ascertainment of truth as the sole object of criminal procedure have been driven by irrefutable logic to introduce and rely on torture as the main instrument of such procedure."

Perhaps he was hinting that the 1976 amendments went too far. Maybe he was merely making a debating point since in 1978, the law was (and still is today) that involuntary confessions were not admissible in evidence. The best answer

to his concern would be to institutionalise a corps of competent, honest and professional police investigators, like the French investigating judges, imbued with the desire only to ascertain the truth and not to achieve a good clearance rate.

Marshall and constitutional law and judicial review

19 Let me now move to Marshall's contributions to civil justice in the area of constitutional and administrative law, in particular on constitutional rights and liberties, equality before the law[15] and preventive detention. He was certainly the best public law (*i.e.*, constitutional and administrative law) advocate of the day. But success in court eluded him, due to no fault of his, but because the structure of the law defeated him. Only one success is reported in the Malayan Law Journal, *viz*, the case of *Re Datuk James Wong*.[16] In that case, he succeeded in arguing that his client was wrongfully detained in Kamunting Detention Centre, Taiping, under the Sarawak Preservation of Public Security Ordinance 1962. The Ordinance, although declared a Federal law, only permitted detention of Sarawak residents in Sarawak.[17]

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[15] See *Lee Keng Guan v PP* [1975–1977] SLR 231, where the Court of Appeal did not address directly the constitutional argument that Marshall had advanced, In that case, the appellant was charged with the offence using a firearm in the course of a robbery. Using a firearm was an offence under the Penal Code and also under the Armed Offences Act, which offence carried a higher penalty. The appellant was charged under the Armed Offences Act. Marshall argued that the existence of two offences gave an unfettered and arbitrary discretion to the Public Prosecutor to pick and choose as against offenders in identical circumstances which of the two provisions to apply. This state of affairs infringed the constitutional protection of equality before the law and equal protection of the law.

The Court of Appeal rejected the argument on the ground that the Armed Offences Act was not inherently discriminatory and therefore did not violate art 8(1) of the Constitution. The response was given later by the Privy Council in the case of *Teh Cheng Poh* [1980] AC 458 where it was held that the Public Prosecutor took into account many factors in his deciding under which law he would prefer a charge, and that there was no factual basis on which the appellant could impugn the exercise of his discretion. It was a question of proof, and not of constitutional law.

[16] [1975] MLJ 244

[17] He did not succeed in an earlier case on restricted residence under the Johor Enactment, viz, *Assa Singh v Mentri Besar, Johore* [1969] 2 MLJ 30 where he argued that the Enactment was inconsistent with Articles 5(3) and 5(4) of the Malaysian Constitution in not providing the

20 Marshall was an exemplary advocate in such cases: he argued purely on legal principles and carefully avoided bringing politics into the courts. He had great respect for the Judges even though they ruled against him in case after case. The only time he brought politics into the courtroom was in 1963[18] when he, as the candidate for the constituency of Anson, applied to court to order the Returning Officer to cancel the elections and nominate another polling day on the ground that he had been given only 9 days' notice instead of 9 clear days' notice. The Chief Justice delivered judgment very late in the evening on the eve of polling day and dismissed his application on the ground that as the Returning Officer was a servant of the Crown, he could not be sued in the way Marshall had done, and that in any case, he had suffered no substantial damage even if Marshall had been denied one day of canvassing time.[18]

21 In 1955, when he was Chief Minister, Marshall moved the Legislative Assembly to enact the Preservation of Public Security Order ("PPSO") Bill to replace the Emergency Regulations. The PPSO allowed the Chief Secretary to detain a person for a period not exceeding two years if the Governor was *satisfied* that the detention was necessary to prevent that person from acting in any manner prejudicial to the security of Malaya, the maintenance of public order or the maintenance of essential services. The PPSO was modelled on Indian legislation with respect to which the Supreme Court of India had decided in many cases that the satisfaction of the executive in such cases was subjective and could not be challenged in court. The PPSO was subsequently replaced by the Internal Security Act ("ISA") after Singapore left Malaysia. Marshall lost all his PPSO and ISA cases because he could not persuade the local courts to lift the veil of subjective satisfaction of the Ministers, both in Singapore and Malaya.

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procedural safeguards in those provisions. The Federal Court rejected his argument on the ground that Article 162(4) allowed the court to modify the Enactment by reading the constitutional safeguards into the Enactment.

[18] *David Marshall v M Ponnuduray, Returning Officer* (Suit No 1180 of 1963).

22 In his first case under the PPSO in 1959, Marshall argued in *Re Choo Jee Jeng*[19] that the PPSO which made provision for extraterritorial matters, namely the security of the Federation of Malaya, was ultra vires to that extent as the Legislative Assembly being a subordinate legislature had no extraterritorial jurisdiction. Here, Marshall, like a true lawyer, argued that the law he had introduced as Chief Minister was ultra vires. The Judge rejected it, and also decided that the grounds of detention supplied to the detainee could not be challenged for inadequacy as the Governor's satisfaction was a subjective judgment and the court could not inquire into whether in fact the Governor had reasonable grounds for being satisfied that the detention was necessary.[20]

23 Marshall's most famous cases on preventive detention were *Karam Singh,* a 1969 Malaysian case and *Lee Mau Seng,* a 1971 Singapore case*.* Karam Singh was detained on the ground that he acted in a manner prejudicial to the security of Malaysia in that he had participated in activities which furthered the cause of the Communist Party of Malaysia. He was served with a statement setting out this ground and also 12 allegations of fact. Marshall argued, *inter alia*, that the allegations of fact supplied to the appellant were vague, insufficient and irrelevant and thus hampered the appellant in the exercise of his right to make representations, consequently invalidating the original order of detention. The Federal Court held that such matters were not reviewable as they were solely for the executive to decide.[21]

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[19] (1959) 25 MLJ 217

[20] The Judge then made the surprising ruling that even if the PPSO did not impose a subjective test, he would have refused a writ of habeas corpus on the ground that he could have appealed to the Appeal Tribunal established under the PPSO.

[21] Suffian FJ said (at 151):

> … it is not for a court of law to pronounce on the sufficiency, relevancy or otherwise of the allegations of fact furnished to him. The discretion whether or not the appellant should be detained is placed in the hands of the Yang di-Pertuan Agong acting on

24 The law as stated in *Karam Singh* was applied in the case of *Lee Mau Seng.* Lee was detained on the ground that he had consciously, knowingly and willingly veered the editorial policy of the Nanyang Siang Pau to glamourising communism and stirring up communal and chauvinistic sentiments over Chinese language, education and culture. The detention order also set out 4 allegations of fact. Marshall raised practically all the grounds which had been rejected by the Federal Court in *Karam Singh*. However, he managed to raise 2 new grounds which showed his mastery of legal argumentation. The new points were: (a) the applicant was denied his constitutional right to counsel, and therefore this amounted to an abuse of power; and (b) as the relevant provision required the President to act in his personal discretion, it was inconsistent with Article 5(1) of the Constitution which required the President to act on the advice of Cabinet in the exercise of his functions under the Constitution or any law. The Chief Justice accepted that the applicant had been denied his constitutional right to counsel, but held that it was not an abuse of power sufficient to nullify the detention order. He also rejected the second argument on the ground that the President's discretion was not personal to him. He also held that it was not open to a court to examine the grounds and allegations of fact for the purpose of deciding whether or not some of them were so vague, unintelligible or indefinite as to be insufficient for the purpose of making an effective representation against the order of detention.[22]

25 The case of *Lee Mau Seng* was argued two years after Marshall had given his address to the Rotary Club on the subject of the Rule of Law. There, he defended the need for the PPSO at that time even though he was of the view that it was contrary to the rule of law, which he sincerely believed in. He

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> Cabinet advice. Whether or not the facts on which the order of detention is to be based are sufficient or relevant, is a matter to be decided solely by the executive. In making their decision, they have complete discretion and it is not for a court of law to question the sufficiency or relevance of these allegations of fact.

[22] At 525, a ruling which went beyond *Karam Singh* which accepted that the grounds were reviewable.

said that the PPSO was "essential for the protection of the healthy development of our people at this juncture". In 1992, Marshall expressed "a tinge of guilt" in enacting the PPSO as it transgressed the traditions of British justice. However, he explained that to prevent its abuse, he established a review body consisting of judges to oversee its operation, and he managed to persuade the then Chief Justice to agree to the scheme in the national interest. In 1959, the PAP Government brought in legislation to change the structure of the review body and removed the Judges as members.

26 I have earlier stated that Marshall failed in all his preventive detention cases because of the structure of the law. In 1988, in *Chng Suan Tze v Minister of Home Affairs*[23] the Court of Appeal took the view that *Karam Singh* was wrongly decided having regard to later Privy Council decisions from Malaysia and Singapore and other Commonwealth countries on the exercise of discretionary power. The Court stated as a basic proposition of law that:

> "The notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power."

In the light of this principle, the Court made the following statements in relation to the ISA:

> "… although a court will not question the executive's decision as to what national security requires, the court can examine whether the executive's decision was in fact based on national security considerations; similarly, although the court will not question whether detention was necessary for the purpose specified in s 8(1), the courts can examine whether the matters relied on by the executive fall within the scope of those specified purposes"[24]

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[23] [1988] SLR 132

[24] At 168.

This is a very compressed and dense statement of law. To unpack it will take me another speech to go through the facts and legal arguments in all the ISA cases. Was the CA's statement of the law a vindication of Marshall's views on the scope of the PPSO and the ISA? He would certainly have approved of it. The aftermath we know. Parliament amended the ISA in 1989 to declare that the law governing the judicial review of any decision made or act done in pursuance of any power conferred upon the President or the Minister by the provisions of this Act shall be the same as was applicable and declared in Singapore on the 13th day of July 1971;[25] and no part of the law before, on or after that date of any other country in the Commonwealth relating to judicial review shall apply.

Conclusion

27 How should I conclude? David Marshall will always remain a criminal lawyer non-pariel in Singapore's legal history. As a constitutional lawyer, his creativity was circumscribed but not wholly stifled by his own creation. Having set out all the materials on or by Marshall, I leave it to you to judge his contributions to or influence on the criminal and civil justice system of Singapore. But I would like to believe that in the fullness of time, Marshall might be regarded as the Cicero of the city state of Singapore.[26]

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[25] The date on which *Lee Mau Seng* was decided.

[26] Marcus Tullius Cicero (3/11/106 BC – 3/12/43 BC) is regarded by some as the greatest orator and lawyer of ancient Rome. He was also a statesman, political theorist and philosopher, who according to an entry in Wikipedia, "probably thought his political career his most important achievement. However, today he is appreciated primarily for his humanism and philosophical and political writings."