

Judging the Constitution: The Theory and Practice of Constitutional Interpretation in Singapore

Abstracts of Papers

1. Into the Matrix: Interpreting the Westminster Model Constitution (*Kevin Tan, National University of Singapore & Nanyang Technological University*)

Of the various approaches courts can adopt in interpreting the constitution, the Singapore courts have often chosen the structural approach. This was an approach much favoured by the judges of the Judicial Committee of the Privy Council when called upon to interpret Constitutions of former British colonies. By looking at the organisation and structure of the constitutional text – and the historical conditions that led to their development – this chapter argues that interpretations based on structure allow judges to avoid the appearance of adventurism characteristic of bolder judiciaries and the ‘tabulated legalism’ of the most conservative courts. Reasoning based on structure therefore is a way for judges to find a comfortable middle ground in interpreting the Singapore constitution.

2. Should Singapore’s Constitution be Interpreted in Line with the Basic Structure Doctrine? (*Andrew J. Harding, National University of Singapore*)

In 1972 the Indian Supreme Court set out, in an epoch-making decision, its idea that constitutional amendments are subject to an implied limitation under the Indian Constitution – the limitation that no amendment can destroy the constitution’s basic structure, even if the procedure prescribed by the constitution for effecting an amendment is complied with. This set off a process of consideration of the applicability of the basic structure doctrine in the constitutions of the region, including Singapore’s. This chapter discusses the

Singapore cases on this issue interpreting the Constitution, and argues that the basic structure doctrine is not necessarily of general application in constitutional systems, and has no application to Singapore's constitution. This, it is argued, is due to the manner in which Singapore's constitution has evolved via a gradual process of combining different sources, including the old state constitution during the Malaysia period (1963-5), the Republic of Singapore Independence Act 1965, the continuing in force of provisions of the Malaysian constitution, the manner of consolidation of the applicable provisions in 1980, and subsequent amendments such as the introduction of an elected presidency. There was in other words no constitutional moment in which Singapore's constitution was created and therefore no process whereby constitution-makers expressly or impliedly laid down a basic structure for Singapore's constitution. The chapter goes on to explore the implications of this argument for the fundamental principles of constitutional law in Singapore.

3. Rethinking the Presumption of Constitutionality (*Jack Tsen-Ta Lee, Singapore Management University*)

Singapore courts apply a "strong presumption of constitutional validity" when considering whether legislative or executive action infringes the Constitution. They have also stated that the related doctrine of *omnia praesumuntur rite esse acta* – all things are presumed to have been done rightly – should be applied to the acts of persons holding high constitutional office such as the President, the Attorney-General, Cabinet members, and judges. The presumption of constitutionality casts a heavy onus on an applicant for judicial review to make arguments or adduce evidence sufficient to require the government to justify the constitutionality of the action. This chapter traces the origin of the presumption and examines whether its application in constitutional cases is justified.

4. Balancing Act: Balancing Metaphor as Deference and Dialogue in Constitutional Cases in Singapore (*Jaclyn L Neo, National University of Singapore*)

This paper examines the use of the balancing metaphor in constitutional adjudication in Singapore. It argues that while balancing was used in earlier cases, it did not reflect a mode of judicial reasoning where the identification, valuing, and weighing of rights and interests was undertaken. This use of the balancing metaphor, the paper contends, is a mode of deference. However, there has been another, more recent, way in which the balancing metaphor has been used in Singapore, which takes balancing more seriously. Nonetheless, while the reasoning pattern of balancing is more consciously and substantively employed, some deference remains. The paper terms this alternative use of balancing: balancing as dialogue. This paper reflects upon this change and examines the reasons why balancing has a particular allure for constitutional adjudication within Singapore's legal and political context.

5. Uncovering Originalism and Textualism in Singapore (*Yap Po Jen, Hong Kong University*)

In recent years, the Singapore judiciary has upheld the constitutionality on various laws on the basis that these impugned laws were either within the contemplation of the constitutional framers or that the text of the Singapore Constitution mandates that particular substantive outcome. Through a close analysis of three landmark cases, *Yong Vui Kong (No.2)*, *Yong Vui Kong (No 3)*, and *Chee Siok Chin v AG*, this chapter explores whether the judicial appeal to originalism and textualism as modes of constitutional interpretation is defensible in Singapore or whether these constitutional theories are mere fig leaves for judicial passivity.

6. Whither the Autochthonous Narrative of Freedom of Speech in Singapore?: A Guide to Defaming Politicians and Scandalising Judges in Singapore (*David Tan, National University of Singapore*)

This paper questions whether there can be a truly autochthonous approach to giving effect to the constitutional guarantee of the freedom of speech under Art 14 independent of developments in other comparable common law jurisdictions. It analyses how recent decisions of the Singapore Court of Appeal and High Court, like *Review Publishing Co Ltd v Lee Hsien Loong* (2009), *Shadrake Alan v*

Attorney General (2011) and *Lee Hsien Loong v Roy Ngerng Yi Ling* (2014), have calibrated the balance between free speech and the protection of other compelling interests in defamation and scandalising contempt scenarios. It concludes that while local political and social conditions may arguably necessitate a more restrictive treatment of freedom of speech, the Singapore government's politics of communitarian democracy may nonetheless impel the adoption of a "responsible freedom" framework that allows citizens greater breathing space in the criticism of political leaders and judges.

7. Resisting Foreign Law in Constitutional Interpretation in Singapore: Trends Across 50 years (Arun K. Thiruvengadam, National University of Singapore)

The field of comparative constitutional law has witnessed a heated debate, lasting nearly a quarter-century, over the appropriate manner in which judges ought to engage with foreign cases while adjudicating upon constitutional disputes that involve interpreting rights provisions in their domestic constitutions. An influential scholar in the field, Vicki Jackson, has argued that the way judges have used foreign law can broadly be characterised as conforming to one of three models: convergence, resistance or engagement. There is a small body of literature that has documented how courts in Singapore have engaged (or, to put it more accurately, resisted engaging with) foreign law in constitutional cases. In a previous work, published in a volume to mark 40 years of the Singapore Constitution, I have documented trends in use of foreign law across the tenures of Singapore's first three Chief Justices (Chief Justices Wee, Yong and Chan). This analysis showed that while judges in Singapore have generally resisted engaging with foreign law, this trend has varied over time, with some Chief Justices advocating an absolutist position (evident in Chief Justice Yong's adoption of the 'four walls' doctrine) while others adopted a less equivocal position (evident in Chief Justice Wee's more nuanced resistance, justified by a careful distinguishing of individual foreign cases). In this paper, for a volume that marks the 50th year of the adoption of the Singapore Constitution, I seek to update that analysis, focusing more closely on cases decided in recent years. I will focus on two significant constitutional decisions that were handed down recently, where

lawyers sought to invoke and apply foreign decisions from common law countries. These are respectively, a constitutional challenge to Singapore's anti-sodomy law, Section 377A, and a constitutional challenge to the practice of caning in Singapore. In both these cases, the Singapore Court of Appeal ultimately resisted applying both foreign and international law, showing some of the same tendencies that were on display during the height of the 'Four Walls' era. I will argue that the record of the Chan and Menon courts on the use of foreign law, while less absolutist than that of the Yong court, is nevertheless closer to the 'resistance' than the 'engagement' model.

8. Developing the Content of "Fundamental Rules of Natural Justice" (*Swati Jhaveri, National University of Singapore*)

This chapter will explore the development of the concept of "fundamental rules of natural justice", a concept that was first introduced into constitutional jurisprudence in *Ong Ah Chuan v. PP*. In adopting a generous approach to constitutional interpretation, the Privy Council held that the meaning of 'in accordance with law' in the context of Art 9(1) refers to 'law' that incorporates the "fundamental rules of natural justice". In *Ong*, the Privy Council left open the precise scope and meaning of the phrase. This study will track the development of this concept in subsequent cases. In particular, it will analyse the judicial reluctance to interpret the fundamental rules of natural justice to have substantive content, including substantive rights such as the right to silence. It will highlight how the courts have instead preferred a procedural approach to the interpretation of the concept and have incorporated procedural standards through it.

9. Interpreting Constitutions and Statutes: Are Different Approaches Justified? (*Goh Yihan, Singapore Management University*)

It is often said that the constitution is not a statute and should not be interpreted as such. This chapter will discuss the approaches towards statutory and constitutional interpretation and highlight any differences in practice between them. It will question whether these differences can be justified due to the varied nature of the

documents. It also considers whether a unified interpretative approach, guided by specific rules applicable to different documents, better describes the appropriate approach to take.

10. The Shifting Boundaries of Constitutional and Administrative Law in Singapore (*Victor V. Ramraj, University of Victoria*)

The recent Singapore Court of Appeal decision in *Yong Vui Kong* [2011] SGCA 9, has signalled a judicial rethinking of the respective domains of constitutional and administrative law, and has started exploring the uneasy relationship between their underlying principles. In the case, the court sought to delineate the levels on which constitutional and administrative law principles operate (legislative or administrative), while acknowledging their functional similarity, with reference to the rules of natural justice. This chapter looks at the Singapore courts' historical treatment of the relationship between the two areas of law, before critically examining *Yong Vui Kong* and other recent judicial attempts to explain and rationalize it. Finally, the chapter considers the extent to which constitutional and administrative law ought to play distinct roles, drawing from global judicial trends in conceptualizing administrative and constitutional law, while exploring different ways of reconciling the two domains practically and normatively.

11. Principled Pragmatism as an Approach in Constitutional Interpretation (*Thio Li-ann, National University of Singapore*)

The Singapore Court of Appeal has located the judicial role of courts in examining the exercise of discretionary power and in declaring the unconstitutionality of legislation upon the bedrock of the principle of the rule of law. This serves the constitutionalist goal of limited government, an antidote to the organic state and political totalitarianism. However, for a good forty years of the Republic's existence, the judiciary has never struck down a single legislation as being unconstitutional. In fact, the seemingly pro-government outcomes of many constitutional law cases have led to the criticism that the judiciary is

motivated by pragmatic political concerns. This chapter argues that a 'sea change' was initiated when the third Chief Justice, Chan Sek Keong, took office and that public law jurisprudence began to focus more on the intrinsic value of norms. While pragmatism remains an important factor in judicial philosophy, this chapter will demonstrate that there has been a shift towards more principled modes of judicial reasoning.

12. Constitutional Evolution Through Interpretation: Is Law or Politics the Best Route for Singapore? A Dialogue (Michael Dowdle & Kevin Tan, National University of Singapore)

In this essay, Kevin Tan and Michael Dowdle use *Lim Meng Suang and another v Attorney General* as a framing device to engage in a normative dialogue about how the Singaporean Constitution should be conceptualized so as to best serve its future evolution. Following Lim, Kevin Tan will argue that Singapore's constitutional future is best served by the current, juristic conceptualization, which locates the constitution in law, and through that in processes of judicial interpretation. Michael Dowdle will argue that Singapore's constitutional future would actually be better served by a conceptualization that recognizes that Singaporean constitutionalism is currently actually located in politics rather than law – a conceptualization that has been referred to as 'political constitutionalism' or 'popular constitutionalism'.