NUS National University of Singapore | Centre for Asian Legal Studies, Faculty of Law

NUS National University of Singapore | Centre for Legal Theory, Faculty of Law

Jointly Present

Roundtable Discussion on The Structure and Nature of Constitutional Rights

Panel 1 – Nature and Content of Rights (10am – 11am)
Chair: Mike Dowdle

Speakers:

Jack Lee
Assistant Professor, Singapore Management University
Patriotism and Belief: Judicial Approaches to Freedom of Thought, Conscience and Religion in Japan and Singapore

In 1999 in *Nappalli Peter Williams v Institute of Technical Education* [1999] 2 SLR(R) 529, the Court of Appeal, Singapore's highest court, was asked to rule on whether a requirement that students and staff of a vocational training school established by statute had to take the national pledge and sing the national anthem during morning assembly infringed a trainee teacher's right to freedom of religion protected by Article 15(1) of the Singapore Constitution. The teacher, a Jehovah's Witness, believed these activities amounted to acts of worship, which were reserved for God and not for country. The Court disagreed with his contention, holding that the activities were entirely secular in nature. Thus, the teacher's right to freely exercise his religion did not come into play at all.

About a decade later, between 2007 and 2011, a series of strikingly similar cases came before the Supreme Court of Japan. In them, public school teachers objected to being required to participate in enrolment and graduation ceremonies at which the *Hinomaru* (national flag) was raised and the *Kimigayo* (national anthem) was sung. For instance, in the *Piano Accompaniment Case* 2004 (Gyo-Tsu) 328, Minshu vol 61, no 1 (27 February 2007), the appellant, a music teacher, contended that an admonition given to her by the Metropolitan Board of Education for refusing to comply with an order by the principal of her school to provide accompaniment for the singing of the *Kimigayo* on the piano during an enrolment ceremony violated the right to freedom of thought and conscience guaranteed to her by Article 19 of the Japanese Constitution. In her eyes, the *Kimigayo* was inseparably connected with Japan's military aggression in Asia during World War II. Like the Singapore Court of Appeal, a majority of the Supreme Court of Japan found that no infringement of the Constitution had occurred. Among other things, the Court held that the teacher's act of refusal "cannot generally be regarded as being inseparably connected" with her "view of history or view of the world". The principal's order "cannot be construed to immediately deny the appellant's view of history or view of the world".

The Singaporean and Japanese cases were based on different fundamental rights. Article 15(1) of the Singapore Constitution specifically protects religious faith; it states: "Every person has the right to profess and practise his religion and to propagate it." On the other hand, Article 19 of the Japanese Constitution is wider, providing that "[f]reedom of thought and conscience shall not be violated". Nonetheless, the cases share the characteristic of the courts giving scant weight to the applicants' views of what their personal systems of belief called for. Rather, the courts essentially took the position that they were entitled to determine the matters for themselves.

This presentation submits that the courts should not have done so. It was somewhat strange, for example, for the Japanese court to have discounted the music teacher's personal opinion that her view of history caused her to feel unable to take part in the singing of the *Kimigayo*. Particularly in the Singapore context, it is problematic for a secular court to purport to declare what practices should be regarded as not part of or not required by an individual's religious belief. The presentation then examines whether, and if so how, judges have balanced the relevant rights – the freedom of thought and conscience guaranteed by Article 19 of the Japanese Constitution; and the right to profess, practise and propagate one's religion protected by Article 15(1) of the Singapore Constitution – against other public interests said to be promoted by the government policies in question.

David Bilchitz
Professor, University of Johannesburg
The Content of Socio-Economic Rights and the Separation of Powers: Conflation or Separation?

In this paper, I examine what the appropriate relationship should be between institutional concerns relating to the separation of powers and a determination of the content of fundamental rights. First, I attempt to illustrate the manner in which separation of powers considerations have influenced the determination of the content of socio-economic rights with a particular focus on the 'reasonableness' approach to the adjudication of these rights that has been adopted by the South African Constitutional Court. I then argue that the conflation of these two sets of concerns is unjustifiable both, conceptually, where two incommensurable sets of issues are not adequately distinguished and, normatively, in terms of the weakening of the entitlements that invariably results. Having argued against such a conflation, I shall contend, however, that there is indeed a *relationship* between the two sets of issues. Centrally important to the argument will be the claim that we must distinguish reasoning relating to fundamental rights from reasoning relating to the obligations which flow from such rights. Institutional and agent-centred considerations are inappropriate when constructing the substance of a constitutional entitlement; they may legitimately enter into the picture when the concrete obligations flowing from such a right are under consideration. The primacy of fundamental rights entails that an understanding of their content is necessary in order to evaluate any reasons for the attenuation of the obligations flowing from them and the 'separation of powers' questions that may arise in this context. A substantive understanding of fundamental rights thus provides one key set of normative considerations that conditions the application of the separation of powers doctrine rather than the other way round.

Panel 2 – Structuring Limits on Rights (11am - 12:30pm)

Chair: Maartje De Visser

Speakers:

Rosalind Dixon
Professor, University of New South Wales
Proportionality & Comparative Constitutional Practice

The doctrine of proportionality has been one of the most successful exports in comparative constitutional law in the last few decades. Yet in its application, the doctrine remains only partially, or inconsistently, grounded in comparative constitutional practice. The article attempts to fill this gap in existing understandings of the relationship between proportionality doctrine and comparative practice – by suggesting that domestic courts should give consistent attention to comparative constitutional practices in assessing the requirements of necessity and legitimacy under a test of proportionality in domestic constitutional law.

Swati Jhaveri & Jaclyn Neo
Assistant Professors, National University of Singapore
Comparing Uses of Proportionality in Constitutional and Administrative Law Cases

In recent years, proportionality analysis has spread from its German origins across Europe and into Commonwealth systems, including in the UK and Australia – systems that have been relatively resistant to substantive review of decisions on grounds of proportionality. This paper considers these developments, with a view to identifying the different structures of proportionality analysis across the Commonwealth but also across constitutional and administrative law cases. It will utilise this analysis to consider whether there is an optimal structure and, if so, what that may look like.

Panel 3 – Models of Rights and Remedies (2pm - 3:30pm)

Chair: Andrew Harding

Speakers:

David S Law
Professor, Sir Y.K. Pao Chair in Public Law, The University of Hong Kong
The Global Language of Human Rights: A Computational Linguistic Analysis

Human rights discourse has been likened to a global lingua franca, and in more ways than one, the analogy seems apt. Human rights discourse is a language that is used by all yet belongs uniquely to no particular place. It crosses not only the

borders between nation-states, but also the divide between national law and international law: it appears in national constitutions and international treaties alike. But is it possible to conceive of human rights as a global language or lingua franca not just in a figurative or metaphorical sense, but in a linguistic or semantic sense as a legal dialect defined by distinctive patterns of word choice and usage? This paper evaluates the notion that there exists a global language of human rights in a literal or linguistic sense by addressing two questions. First, what kind of language is characteristic of international and regional human rights instruments? Second, to what extent, and in what ways, does the type of language found in international and regional human rights instruments overlap with the language found in national constitutions? New techniques for performing automated content analysis enable us to scan the bulk of all national constitutions over the last two centuries, together with the world's leading regional and international human rights instruments, in order to ascertain what type of language they share in common. Specifically, we employ a technique known as topic modelling that breaks constitutions down into verbal patterns or "topics". The results highlight the existence of what is, if not a full-blown language, then at least a dialect of constitutionalism that is characteristic of human rights discourse and common to both human rights treaties and national constitutions.

Arif Jamal
Assistant Professor, National University of Singapore
Judicial consideration of freedom of religion: hopeful or hapless?

Freedom of religion is much debated these days. Some suggest it may be an impossible concept to deal with, others wonder if it is a special right and still others ask if we should tolerate claims coming from religion. These debates are arising especially now it seems because our religions landscapes – or at least our perceptions of our religious landscapes -- are becoming more diverse, plural and fluid. Migration, the emergence of 'new religions' and the increase, in some parts of the world at least, of those with no religious affiliation are complicating our 'old truths'. These factors are changing our social contexts. This paper seeks to consider the freedom of religion in this context. In particular, it aims to look at judicial considerations of selected cases involving freedom of religion claims to see if these cases bear out the fears of those who raise concerns about the viability of freedom of religion and lead us to view that freedom of religion is hapless or, alternatively, if these cases show the hopeful potential of freedom of religion. I argue that these cases indicate that freedom of religion is indeed of value notwithstanding that its definitions are being challenged and buffeted by the heightened social flux of our current secular or post-secular condition(s). I further argue that judicial considerations of freedom of religion are hopeful not because they give us perfect answers – they do not – but because of their capacity to help us struggle with important questions of our social and political identity through law.

Po Jen Yap
Associate Professor, The University of Hong Kong
New Democracies and Novel Remedies

Common law courts in new democracies have responded to the systemic challenges inherent in their political systems by devising novel constitutional remedies to ameliorate the challenges they face operating within their environments. In dominant-party democracies, like Hong Kong and South Africa, where the semi-permanent ruling government may simply ignore the court's constitutional determinations, or in India, where the State machinery is bogged down by corruption and bureaucratic inertia, the judges in these three new democracies perceive their role within their regime to be more dynamic in nature. Their judges are more 'managerial' or 'catalytic' as they play a more critical role in shaping policy by issuing constitutional remedies, which are completely foreign to the rest of the common law world, so as to mitigate the deficiencies found within their political systems. Three such novel constitutional remedies will be examined in this paper: (1) Engagement Orders; (2) Suspension Orders with 'Bite'; and (3) Judicial Directives. While the three constitutional remedies may differ in terms of their degree of 'robustness', all of them are innovative judicial strategies created by their courts to secure the observance of the law by their governments and extend social justice to the underprivileged or marginalised in their societies.