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Rediscovering the Constitution

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Rediscovering the Constitution*

JACK LEE TSEN-TA

“To say that freedom is Western or un-Asian is to offend our own traditions. It is true that Asians lay great emphasis on order and societal stability. But it is certainly wrong to regard society as a kind of false god upon whose altar the individual must melt into the faceless community.”

– Datuk Anwar Ibrahim,
Deputy Prime Minister of Malaysia¹

The fundamental liberties in our Constitution involve a study of tensions: between an individual’s rights and the community’s interests, between the role of the judiciary on the one hand and the executive and legislature on the other. How we should interpret them depends on where we think equilibrium should be established.

This depends on two main factors. The first is the proper function of the judiciary as laid down by our Constitution, which is discussed in Part I of this article. The second is the nature of our fundamental liberties, for they are worded with varying degrees

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¹ “Be Prepared to Champion Universal Ideals, Says Anwar” *The Straits Times*, 3 December 1994 at 15.

of generality. Broadly speaking, Arts 10 (prohibition of slavery and forced labour), 11 (protection against retrospective criminal laws and repeated trials), 13 (prohibition of banishment and freedom of movement) and 16 (rights in respect of education) are mostly free from doubt. Articles 14 (freedom of speech, assembly and association) and 15 (freedom of religion) bear an intermediate level of generality. Still relatively intelligible, they involve concepts such as “speech and expression” and “religion” which are more difficult to interpret. But Arts 9 and 12 possess a high degree of generality as they embody the broad concepts of “personal liberty”, “equality” and “equal protection”. Taking these factors into account, Part II looks at two general approaches to constitutional interpretation and explains why one of them – moderate textualism – should be adopted by the courts. Finally, Part III illustrates moderate textualism in action by proposing a reinterpretation of Art 9(1) of the Constitution.

This is the thrust of the article: our judges, charged by the supreme law of the land with responsibility to interpret our fundamental liberties freely where such freedom is due, must rediscover their proper constitutional role.

I. THE COURT'S ROLE: REVIEWING THE CONSTITUTIONALITY OF LEGISLATION²

We begin with an analysis of the judiciary's role as revealed through the text of the Constitution.³ Although the Constitution is silent on the point, it is taken for granted today that courts possess a “judicial review jurisdiction” – a power to declare Parliamentary

² See A Wilson, “The Doctrine and Practice of Judicial Review of Legislation” (1962) 4 *Me Judice* 20; Kevin Tan Yew Lee, Yeo Tiong Min & Lee Kiat Seng, *Constitutional Law in Malaysia and Singapore* (1991) at 72-78, 276-80.

³ 1992 Ed.

legislation void if it contravenes the Constitution. It was not always so.

It is unclear where the idea that government is subject to a fundamental or higher law springs from.⁴ American constitutional law has long viewed the common law as the source. Often cited as authority are the words of Coke CJ in the 17th-century English decision *Dr Bonham's Case*: “[W]hen an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the Common Law will controul it and adjudge such Act to be void.”⁵ Unfortunately, the situation is more hazy: It is questionable whether Coke was actually appealing to the existence of a fundamental law,⁶ and even if the doctrine had existed in England in the first place it was soon whittled down by judges in favour of Parliamentary supremacy.⁷

Yet in the 1780s American courts began exercising judicial review by striking down legislation with reference to higher unwritten, common law concepts, sometimes termed “natural justice”. This was extremely controversial. The practice was opposed by some lawyers and judges. There were mass public protests and popular petitions to state legislatures against it. Some legislatures voted to censure the courts, and even tried to remove from office judges perceived to be exercising it. Yet judicial review rapidly gained acceptance in the 1790s after prominent framers of the Constitution like James Iredell, Alexander Hamilton and James Wilson came forward to justify the practice.⁸ They did so not on the

⁴ See Thorne, “*Dr Bonham's Case*” (1938) 54 LQR 543 at 543.

⁵ (1610) 8 Co Rep 113b at 118a, 77 ER 646 at 652 (Ct of Common Pleas).

⁶ See Thorne, *supra*, n 4, who argues that Coke CJ's words dealt only with statutory interpretation. He concludes at 552, “Coke's ambitious political theory is found to be not his, but the work of a later generation of judges, commentators, and lawyers.”

⁷ Wilson, *supra*, n 2 at 30-34.

⁸ Leslie Friedman Goldstein, *In Defense of the Text: Democracy and Constitutional Theory* (1991) at 18-23, 76-84.

basis of unwritten law but on the written Constitution. For instance, in *Calder v Bull*,⁹ Iredell J was of the view that:

The ideas of natural justice are regulated by no fixed standard; the ablest and the purest men have differed upon the subject; and all that the court could properly say, in such an event, would be, that the legislature, possessed of an equal right of opinion, had passed an act which, in the opinion of the judges, was inconsistent with the abstract principles of natural justice. [By contrast,] If any act of Congress or of the legislature of a state, violates [the] constitutional provisions, it is unquestionably void [because the people,] when they framed the federal Constitution, ... define[d] with precision the objects of the legislative power, and ... restrain[ed] its exercise within marked and settled boundaries.

Judicial review, grounded firmly in the Constitution, had gained a stable and coherent foundation. This justification was given eloquent expression in the Supreme Court decision of *Marbury v Madison*.¹⁰ According to John Marshall CJ, the basic nature of a constitution as fundamental law stems from the original right of a nation's people to establish principles of government that most contribute to their own happiness: "The exercise of this original right is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental." The principles of government set down in the United States Constitution embody the well-known doctrine of the separation of powers advocated by 18th-century French jurist

9 (1798) 3 US (3 Dallas) 356 at 399 (*obiter dicta*). This quotation rearranges the original order of Iredell J's sentences. The bracketed phrases indicate the breaks between passages that have been reordered.

10 (1803) 5 US (1 Cranch) 137 at 176-80, 2 L Ed 60 at 73-74. See also *Calder v Bull*, *ibid*; *Fletcher v Peck* (1810) 10 US (6 Cranch) 87 (in these two cases the court relied on both unwritten law and the constitutional text); *New Jersey v Wilson* (1812) 11 US (7 Cranch) 164; *Dartmouth College v Woodward* (1819) 17 US (4 Wheat) 518.

and political philosopher, Baron de la Montesquieu. Montesquieu championed the separation and balancing of the powers possessed by the three branches of government – executive, legislature and judiciary – to combat tyranny and as a guarantee for freedom of the individual:

Again, there is no liberty, if the judiciary power be not separated from the legislative and executive. Were it joined with the legislative, the life and liberty of the subject would be exposed to arbitrary control; for the judge would be then the legislator. Were it joined to the executive power, the judge might behave with violence and oppression.¹¹

If the purpose of instituting a constitution is to define the limits on the powers of government, it logically follows that a constitution must be fundamental law, unchangeable by ordinary legislative means. If it were not so, then written constitutions are merely “absurd attempts, on the part of the people, to limit a power in its own nature illimitable.”¹² The fact that a constitution is written down reinforces its fundamental nature by ensuring that limitations on governmental power cannot be mistaken or forgotten.

The power of judicial review lies not with the executive or legislature but the judiciary. This is because the Constitution is a kind of *law* – a law on a higher level than ordinary legislation, but still law – and “[i]t is emphatically the province and duty of the judicial department to say what the law is. ... So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case... the court must determine which of these conflicting rules governs the case. This is the very essence of judicial duty.”¹³ The judiciary derives power to

11 Montesquieu, *Les Spirits de Lois* (1748); *The Spirit of the Laws* (Thomas Nugent translator, 1949) book XI ch 6 at 151. However this doctrine has existed since the time of the ancient Greeks: Tan, Yeo & Lee, *supra*, n 2 at 15-16.

12 *Marbury v Madison*, *supra*, n 10.

interpret the law from the people, since it is established under the Constitution which represents the will of the people.

There is another reason why the judiciary alone is considered the correct branch of government to interpret the Constitution: in theory, it is the branch of government most free from political bias.¹⁴ Both the legislature and executive are largely politically motivated. They owe an obligation to pursue policies which promote the interests of those who elect them into office. Therefore they should not be entrusted with power to interpret the Constitution since it is possible that they might bend the Constitution to accommodate these policies.¹⁵

Thus it is rightly the role of the courts to test executive and legislative acts against the Constitution. In the case of a conflict the Constitution must prevail, for it is a higher, more fundamental law. In the words of *Marbury v Madison*: “Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and, consequently, the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.”

Our courts possess judicial review jurisdiction because the Singapore Constitution is founded on the same premise as the United States Constitution, *ie* the separation of powers doctrine.¹⁶ Our

13 *Ibid.* See also *PP v Oh Keng Seng* [1976] 2 MLJ 125 at 127 (HC, Seremban) and *Chan Hiang Leng Colin v PP* [1994] 3 SLR 662 at 681 (HC, Singapore): “[T]he court has the power and duty to ensure that the provisions of the Constitution are observed. The court also has a duty to declare invalid any exercise of power, legislative and executive, which exceeds the limits of the power conferred by the Constitution, or which contravenes any prohibition which the Constitution provides.”

14 Theory and reality frequently diverge. On safeguards against judicial activism, see *infra*, n 122-24, and the accompanying text.

15 MP Jain, “Constitutional Remedies” in *The Constitution of Malaysia: Further Perspectives and Developments* (FA Trindade & HP Lee eds, 1986) 151 at 159.

16 *Cheong Seok Leng v PP* [1988] 2 MLJ 481 at 487 col 2F (HC) *per* Chan

Constitution, like the constitutions of other former British colonies, is based on the “Westminster model”,¹⁷ capturing the spirit if not the exact form of British institutions.¹⁸ As the Privy Council on appeal from Jamaica explained in *Hinds v The Queen*:¹⁹

Sek Keong JC, as he then was: “[T]he Constitution of the Republic of Singapore is. . . based on the doctrine of separation of powers (as modified to accommodate the Westminster model of Parliamentary government). . .”

¹⁷ *Ong Ah Chuan v PP* [1981] 1 MLJ 64 at 68 (PC on appeal from Singapore); *JB Jeyaratnam v Attorney-General of Singapore* [1988] 3 MLJ 465 at 466-67 (HC): “. . . [O]ur Constitution is based essentially on the Westminster model and adopts and codifies most, if not all, of the laws, customs, conventions and practices of the British constitutional and parliamentary system.”

¹⁸ Unlike the United Kingdom, Parliamentary supremacy theoretically does not exist in Singapore and Malaysia: see *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112 at 113A (FC, Malaysia): “The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written Constitution. The power of Parliament and of state legislatures in Malaysia is limited by the Constitution; and they cannot make any law they please.” Note, however, the comments of NMP and Vice-Dean of Law Faculty, NUS, Associate Professor Walter Woon in an interview with *The Straits Times*, 6 July 1991 at 28: “We effectively don’t have a Constitution. We have a law that can be easily changed by Parliament, and by the party in power because the party is Parliament. The changes themselves might not be controversial, but it is unsettling how flexible the Constitution is, unlike, say, the United States.” In reply, Prime Minister Goh Chok Tong pointed out that past changes to the Constitution were made only with a two-thirds parliamentary majority and not done light-heartedly, as the intensive discussions and the two-year gestation period of the Elected President Bill proved. He affirmed that the Constitution had to evolve to reflect the changing needs of the people, and that it could not be assumed that the Constitution, drafted in 1965, would be the best Constitution for always and should be frozen in time. “So to say that because the Government in power changes the Constitution there is no Constitution is ridiculous, to put it mildly.”: *The Straits Times*, 8 July 1991 at 22.

¹⁹ [1977] AC 195 at 211-12 (PC on appeal from Jamaica) *per* Lord Diplock (emphasis added).

[Westminster constitutions] embody what is in substance an agreement reached between representatives of the various shades of political opinion in the state as to the structure of the organs of government through which the plenitude of the sovereign power of the state is to be exercised in the future. All of them were negotiated as well as drafted by persons nurtured in the tradition of that branch of the common law of England that is concerned with public law *and familiar in particular with the basic concept of separation of legislative, executive and judicial power as it had been developed in the unwritten constitution of the United Kingdom.*

It should be noted that the separation of powers doctrine is modified in Westminster constitutions. Unlike the “true” division of power between the three branches of government in United States-based systems, Parliamentary systems under Westminster constitutions fuse the executive and legislative branches and balance their joint power against that of the judiciary. Singapore’s constitutional system falls somewhere in between as we now have an Elected President whose executive veto serves as a partial check on the legislature in certain key areas such as the use of financial reserves and the appointment of public officers.

The court’s power to pronounce on the constitutionality of executive and legislative acts may not be express in our Constitution, but from the reasoning of *Marbury v Madison* such a power is clearly possessed. This is buttressed by several Articles of the Constitution.

The Constitution’s nature as fundamental law is placed beyond doubt by Arts 4 and 162. Article 4 states that the Constitution is the supreme law of the Republic of Singapore and that any law enacted by the legislature after the commencement of the Constitution which is inconsistent with it is void to the extent of the inconsistency.²⁰ Article 162 has much the same effect but

²⁰ “[I]t cannot be disputed that this ‘supremacy clause’ owes its origins to the constitutional doctrine of supremacy of the constitution and judicial review established by the United States Supreme Court in the classic case

applies to laws which pre-date the Constitution. It declares that all existing laws continue in force after the commencement of the Constitution but shall be construed with such modifications, adaptations, qualifications and exceptions necessary for them to conform with the Constitution. Two other Articles, dealing with constitutional amendments, also show that the Constitution is not on par with ordinary legislation. Article 5(2) provides that the Constitution may only be amended by a bill passed by a special majority (*ie* supported on its Second and Third Readings by not less than two-thirds of the total number of Members of Parliament). There is also a new Art 5(2A), not yet in force,²¹ which entrenches certain Articles of the Constitution including the fundamental liberties in Part IV by providing that they cannot be amended unless supported by at least a two-thirds majority at a national referendum. However, the President acting in his personal discretion may override this procedure by writing to the Speaker of Parliament.

Finally, it is also evident from the Constitution that it is the courts which should exercise judicial review, since Art 93 establishes that judicial power of Singapore is vested in the Supreme

of *Marbury v Madison*.”: S Jayakumar, “The Singapore Constitution and the United States Constitution” in *Constitutionalism in Asia: Asian Views of the American Influence* (Lawrence Ward Beer ed, 1978) 181 at 184.

21 Article 5(2A) was inserted into the Constitution by s 3 of the Constitution of the Republic of Singapore (Amendment) Act 1991 (No 5 of 1991), but has not been brought into force yet as the government is still fine-tuning provisions of the Constitution dealing with the Elected President. At the Third Reading of the Bill leading to Act No 5 of 1991, Prime Minister Goh Chok Tong suggested a four-year period for adjustments, modifications and refinements: *Singapore Parliamentary Debates Official Report*, vol 56, 3 January 1991, at col 722, quoted in *Constitutional Reference No 1 of 1995* [1995] 2 SLR 201 at 204F-G. The government recently announced that it will be several years more before Act 5(2A) is brought into operation because legislation on the Elected President has turned out to be “more complex than expected”: “Long Way to Go Before EP Legislation is Final”, *The Straits Times*, 8 July 1995 at 1.

Court and such subordinate courts provided by written law for the time being in force. In recognising this, we ought not overlook the President's role in protecting fundamental liberties. Under Arts 21(2)(h) and 22I of the Constitution, he may act in his discretion to cancel, vary, confirm or refuse to confirm a restraining order under the Maintenance of Religious Harmony Act (Cap 167A, 1991 Ed) where the advice of Cabinet is contrary to the recommendation of the Presidential Council for Religious Harmony. He may also withhold concurrence under Art 151(4) to the detention without trial of any person.²² But it is submitted that the judiciary is still the primary guardian of our fundamental liberties.

II. APPROACHES TO INTERPRETING THE FUNDAMENTAL LIBERTIES

The above discussion shows the judiciary plays a vital role in ensuring a proper balance between executive and legislative policy, and the rights of individuals in Singapore.²³ How, then, should

²² The President exercises a personal discretion in these areas, as Art 21(1) specifies that he need only exercise his functions in accordance with the advice of the Cabinet or a Minister authorised by Cabinet if the Constitution does not otherwise provide.

²³ Since the Constitution envisages the judiciary as a check on the power of the legislature and executive, the courts have no jurisdiction to protect a person's fundamental liberties from being breached by another private individual or non-governmental body. See *PD Shamdasani v Central Bank of India* [1952] AIR SC 59 at 60: "There is no express reference to the State in article 21 [Singapore's Art 9(1)]. But could it be suggested on that account that that article was intended to afford protection to life and personal liberty against violation by private individuals? The words 'except by procedure established by law' plainly exclude such a suggestion." This was applied in *Vidya Verma v Shiv Narain Verma* [1956] AIR SC 108 at 109-10 paras 6-7, where it was held that as a rule constitutional safeguards are directed against the State and its organs, and that protection against violation of rights by individuals must be sought in the ordinary law. Perhaps the

judges go about interpreting the Constitution, especially the fundamental liberties in Part IV which are the focus of this article? We will examine two major schools of thought.²⁴ Using headings suggested by Leslie Goldstein,²⁵ they are *intentionalism* and *textualism*.

A. *Intentionalism*

Intentionalism requires a judge to determine how the original framers (or drafters) and adopters of the Constitution would have applied a provision to a given situation, and to apply it in the same way.²⁶ The actual wording of the Constitution is considered

time is right for a “Fundamental Liberties Act” providing for the enforcement of civil rights against private persons.

²⁴ Other schools of thought include *extratextualism* (*non-interpretivism*) and *indeterminacy*. See, generally, Goldstein, *supra*, n 8. Extratextualism is constitutional interpretation based not only on the constitutional text and implications from the text but other kinds of higher law such as natural law, national ideals, national legal custom, and what judges perceive as “fundamental rights” possessed by individuals: see *eg* Ronald Dworkin, *Taking Rights Seriously* (1977); Kenneth Karst, “Foreword: Equal Citizenship” (1977) 91 Harv L Rev 1; John Hart Ely, *Democracy and Distrust: A Theory of Judicial Review* (1980); and Michael Perry, *The Constitution, the Courts and Human Rights* (1982) and *Morality, Politics and Law: A Bicentennial Essay* (1988).

Indeterminists feel that the Constitution is so malleable that it can be interpreted to say anything, and therefore find it impossible for the law, especially constitutional law, to constrain the discretion of judges. A particularly influential group of indeterminists forms what is known as the Critical Legal Studies movement. Some indeterminists suggest turning away from law and politics to other areas of knowledge such as literary criticism and aesthetic philosophy for guidance on constitutional interpretation: see Sanford Levinson, “Law as Literature” (1982) 60 Texas LR 373; Leif Carter, *Contemporary Constitutional Lawmaking: The Supreme Court and the Art of Politics* (1985).

²⁵ *Supra*, n 8 at 2-3.

²⁶ Paul Brest, “The Misconceived Quest for the Original Understanding” (1980)

inconclusive and nothing more than a useful guide to these intentions. This theory as currently vaunted by its proponents²⁷ suffers from great weaknesses.

1. *Practical Difficulties*

The first difficulty is practical: how do we determine what the framers and adopters actually thought? This rests on whether historical records are available and how dependable they are. We will examine the historical evidence relating to the framing and adoption of the United States and Indian Constitutions, and compare it to available evidence pertaining to the Malaysian and Singapore Constitutions.

(1) *United States Constitution*: The United States Constitution was drawn up by a Federal Constitutional Convention held in Philadelphia from May to September 1787. It was presided over by George Washington, and James Madison was the chief drafter. Despite opposition, sufficient states ratified it by the summer of 1788, and the Constitution was put into effect in June 1789 when elections named Washington as President.

Proceedings of the Constitutional Convention of 1787 were held in private, and reports were not published till several years later. Although the extensive notes made by James Madison at the Convention and also at state ratification conventions held between 1787 and 1788 have been established as essentially reliable in the sense that he did not rewrite them later to suit his own views,²⁸ the reports are at best only a partial record. Madison

60 Boston ULR 204 at 222, reprinted in *Interpreting the Constitution: The Debate Over Original Intent* (Jack N Rakove ed, 1990) at 227.

27 Eg Edwin Meese III, "Interpreting the Constitution" reprinted in Rakove, *supra*, n 26 at 13; Raoul Berger, "New Theories of 'Interpretation': The Activist Flight from the Constitution" (1986) 47 Ohio St LJ 1.

28 James H Hutson, "The Creation of the Constitution: The Integrity of the

did not attempt to make verbatim notes of speeches by delegates. If written notes of a speech were available he obtained them from the speaker. There is no telling whether the speakers edited their notes before passing them to him. Other notes made by Madison were merely summaries of many hours of debate.²⁹ Therefore, we cannot be sure if the large volume of documentary material on the founding of the Constitution is a historical record accurate enough to aid in interpretation.

Subsequently, Art 1 s 5 para 3 of the Constitution mandated the keeping and regular publication of a journal of legislative proceedings, which appeared as the *Annals of Congress* (1789-1824), *Congressional Debates* (1824-37), *Congressional Globe* (1833-73) and *Congressional Record* (1874 to present). Hence there are reliable records covering the debates leading up to the 1st to 10th Amendments added in 1791, and the other twelve between 1798 and 1951.

(2) *Indian Constitution*:³⁰ After India's independence from British rule, its Constitution was drafted by a Constituent Assembly specially formed for this purpose. To aid it in its monumental task, the Assembly appointed 21 different committees dealing with specific areas of the proposed Constitution. Its Constitutional Adviser then prepared a draft constitution based on committee reports and foreign constitutions. On 29 August 1947 a Drafting Committee was appointed by the Assembly. Its duty was to scrutinize the draft Constitution prepared by the Constitutional Adviser and revise it if necessary, then to submit it to the Assembly for

Documentary Record" (1986) 65 Texas LR 1, reprinted in Rakove, *supra*, n 26 at 151.

29 Hutson, *ibid*, and Judith A Baer, "The Fruitless Search for Original Intent" in *Judging the Constitution: Critical Essays on Judicial Lawmaking* (Michael W McCann & Gerald L Houseman eds, 1989) 49 at 52-53.

30 M Rama Jois, *Legal and Constitutional History of India* (1984) vol 2, at 330-33, 344-46.

consideration. The Drafting Committee began its work on 27 October 1947, giving wide publicity to proposals contained in the draft Constitution by sending copies to all members of the Assembly, ministries of the Indian government, provincial governments and legislatures, and judges of the Federal Court and High Courts.

The revised draft Constitution was considered clause by clause by the Constituent Assembly from 15 November 1948 to 17 October 1949, then submitted to the President of the Assembly on 3 November 1949. On 17 November 1949 the Drafting Committee chairman moved a resolution in the Assembly that the draft Constitution be passed. It was adopted by the Assembly on 26 November 1949, and came into force on 26 January 1950. The Constituent Assembly became a provisional Parliament by virtue of the transitional provision Art 379 until general elections in 1952.

Unlike the United States Constitutional Convention of 1787, deliberations of the Indian Constituent Assembly were held in public and reported in great detail.³¹ There is thus no lack of historical material relating to the framing of the Indian Constitution.

(3) *Malaysian and Singapore Constitutions*.³² The Singapore Constitution, including the fundamental liberties, is derived from

³¹ *Constituent Assembly Debates: Official Report* (1946-50), 12 vols; B Shiva Rao, *The Framing of India's Constitution: Select Documents* (1967), 4 vols.

³² See Harry E Groves, "Fundamental Liberties in the Constitution of the Federation of Malaya – A Comparative Study" (1959) 5 Howard LJ 190 at 196-200; Kevin Tan Yew Lee, "A Short Legal and Constitutional History of Singapore" in *The Singapore Legal System* (Walter Woon ed, 1989) at 3; Kevin Tan Yew Lee, "The Evolution of Singapore's Modern Constitution: Developments from 1945 to the Present Day" (1989) 1 S Ac LJ 1; RH Hickling, "The Historical Background to the Malaysian Constitution" in *Essays in Malaysian Law* (1991) 76 at 90-92; RH Hickling, "The Origins of Constitutional Government in Singapore" in *Essays in Singapore Law* (1992) 1 at 29-32.

the Malaysian Federal Constitution. In January 1956, a conference was held in London to discuss how independence of Malaya from the United Kingdom should be achieved. It was agreed between Crown representatives and the Alliance (then the major political party in the Federation of Malaya, a coalition of the United Malays National Organisation (UMNO), Malayan Chinese Association and Malayan Indian Congress), that an independent Constitutional Commission should be appointed “to make recommendations for a form of constitution for a fully self-governing and independent Federation of Malaya within the Commonwealth”.

Consequently, the Reid Constitutional Commission was formed. Its chairman, Lord Reid, and one other member were nominated by the United Kingdom, the remaining three members by Australia, India and Pakistan. The Commission travelled around Malaysia, holding public discussions and debates, and collecting views from political parties, organisations and individuals.³³ It issued its report together with a draft constitution borrowed mostly from the Indian Constitution on 21 February 1957. For the first time it was proposed that the Constitution should contain a guarantee of fundamental liberties.

Between 22 February and 27 April 1957, a Working Party was appointed in the Federation to examine the report. It consisted of the High Commissioner, four representatives of the Malay Rulers, four Alliance Government representatives, the Chief Secretary and the Attorney-General. The Working Party held a series of meetings, then in early May 1957 presented a report to the Conference of Rulers and Federal Executive Council. A delegation returned to London to discuss the Reid Commission report and agree on final details. Some amendments were made to the draft Constitution, but its basic structure followed the recommendations of the Reid Constitutional Commission. Talks culminated

³³ Tun Dr Mohamed Suffian bin Hashim, “The Influence of the American Constitution on the Malaysian Constitution” [1976] 2 MLJ xxxii at xxxiii.

in the signing of the Federation of Malaya Agreement 1957, which contained in one of its schedules the new Federal Constitution. The British Parliament passed the UK Federation of Malaya Independence Act 1957, and an Order in Council made under the Act gave force of law to the Federal Constitution set out in the Agreement. In Malaysia the Federal Constitution Ordinance 1957 was enacted by the Federal Legislative Council. In each of the Malay states, state enactments were passed to approve and give force of law to the Federal Constitution, which finally came into force on 31 August 1957.

Singapore had been a British colony since 1946. But full internal self-government was achieved in 1958, and Singapore was given a new Constitution. This Constitution contained no fundamental liberties. In 1963, on becoming a state of the Federation of Malaysia, Singapore gained a state Constitution which Hickling calls the “immediate parent” of Singapore’s modern Constitution.³⁴ As it was designed to interlock into Malaysia’s federal government structure, it also contained no fundamental liberties since these were already provided for in Part II of the Malaysian Federal Constitution.

Two years later, on 9 August 1965, Singapore declared its independence from the Federation of Malaysia. Needing a working constitution at short notice, the Republic of Singapore Independence Act 1965 (No 9 of 1965) was enacted by the Singapore Parliament, assented to by the President on 23 December 1965 and made retrospective to 9 August 1965. Section 6(1) provided:

The provisions of the Constitution of Malaysia, other than those set out in subsection (3), shall continue in force in Singapore subject to such modifications, adaptations and qualifications and exceptions as may be necessary to bring them into conformity with the independent status of Singapore upon separation from Malaysia.

³⁴ Hickling, *Essays in Singapore Law*, *supra*, n 32 at 29.

In this unusual manner, Part II of the Malaysian Constitution dealing with fundamental liberties (now Part IV) was introduced into our Constitution. In December 1965 a Constitutional Commission, chaired by the then Chief Justice Wee Chong Jin, was appointed to formulate constitutional safeguards for multi-racialism and equality of all citizens whether belonging to majority or minority groups.³⁵ The Commission obtained representations from the public through written memoranda and public hearings, and held private discussions among its members.³⁶ Presenting its report³⁷ on 27 August 1966, it generally approved the fundamental liberties imported from the Malaysian Constitution. The government made its views on the report known to Parliament on 21 December 1966, and debates on it were held in March 1967. Except for a few recommendations, the Wee Commission report was accepted.

The likely sources of information on the intention of the framers and adopters of our Constitution are thus (1) records of the private deliberations of the Reid Commission 1957, Wee Commission 1966 and other committees, (2) reports of their recommendations, and (3) records of legislative debates on these reports in Malaysia and Singapore.³⁸

Unfortunately, unlike the United States and India, no records of either Constitutional Commission's closed-door meetings were ever published. We have little idea how members of the Commissions viewed the fundamental liberties they proposed. While both Commissions did publish their final recommendations, remarks on fundamental liberties were limited to very general statements

35 Speech of the Minister for Law and National Development to Parliament on 22 December 1965. See the Wee Commission report, *infra*, n 37 at 1 para 1.

36 Wee Commission report, *ibid* at 1 paras 3-5.

37 *Report of the Constitutional Commission 1966* (Chairman: Wee Chong Jin CJ), reprinted in Tan, Yeo & Lee, *supra*, n 2 at 794 (Appendix D).

38 See the Appendix, *infra*.

of policy or bare enumeration of the rights themselves. While Parliamentary debates on the Commission reports were recorded verbatim, they are unhelpful in practically all cases for interpreting the fundamental liberties because Ministers concentrated mainly on other matters.³⁹ For the most part, the fundamental liberties recommended for inclusion in the Constitution were accepted without any comment on their meaning or scope. Constitutional scholar Harry Groves comments thus on the adoption of the Constitution recommended by the Reid Commission:

As contemporary evidence of the meanings of controversial provisions the debates on the Constitution in the Legislative Council [of Malaya] are not too helpful... No real discussion was had of its provisions. The Chief Minister restated some of them; but members were generally keenly conscious of the fact that they were expected to act favorably and quickly on the Constitution as a whole. Indeed, any desire to delay impending Merdeka by constitutional controversy was pointedly eschewed by more than one speaker, most of whom rose simply to defend, or occasionally attack, not to debate or expound or clarify any section of, the Constitution. Many took the floor for the sole purpose of congratulating the Chief Minister.⁴⁰

Compared to the United States and India, this paucity of historical sources makes it extremely difficult to determine what the framers and adopters of our Constitution actually intended with regard to the fundamental liberties.

2. *Conceptual Difficulties*

Even if a reliable historical record existed, the intentionalist approach has fundamental problems. Judith Baer believes that a complete record can never be a record of original intention. People

³⁹ *Ibid.*

⁴⁰ Groves, *supra*, n 32 at 214.

do not say everything that is on their minds, so a record is at best a reporting of what was said, not what was meant. When legislators speak in Parliament, they do so not to interpret provisions but to get them passed or dismissed. Thus they may well keep to themselves certain thoughts for fear of an unwanted reaction from their colleagues. Thoughts may also go unexpressed if they are so obvious in a given time or place that they do not need to be said. However such thoughts may not be clear to others reading the debates at a later date. Also, debates are normally dominated by a few vocal individuals. The majority's silence leaves much unsaid.⁴¹

Then there is the problem of whose intention actually counts. Should we concentrate on the intentions of the persons who framed or drafted the Constitution, or on the intentions of the adopters – the members of legislatures who approved the draft by voting it into law?⁴² Even treating both intentions as equally relevant does not solve all our problems. The adopters of Singapore's Constitution are clearly our Members of Parliament. But our Bill of Rights stems from the Malaysian Federal Constitution, and ultimately the Indian Constitution. It is an interesting question whether the views of the framers and adopters of these foreign constitutions are relevant in interpreting corresponding Articles of the Singapore Constitution.

Even if we can identify with certainty whose intent is relevant, we may still be unable to identify a clear collective intention as to a provision's meaning because of conflicting intents. For example, of all the Members of Parliament who vote in favour of a Constitutional provision, if 50% intend the provision to mean one thing, 30% to mean another, and 20% to mean a third thing, what is the relevant intent? In fact, many adopters probably have no specific intent regarding a provision. They supported it believing

41 Baer, *supra*, n 29 at 59.

42 C Edwin Baker, *Human Liberty and Freedom of Speech* (1989) at 272.

that one or more of their colleagues had thought adequately about its meaning. It may be that their intent was simply to complete the debate so they could go home for dinner.⁴³

The framers and adopters may also have had intents at different levels of generality. Take for instance Art 12(1) of the Singapore Constitution which guarantees equality before the law and equal protection of the law. From the Reid and Wee Commission reports and the Parliamentary debates on these reports, it is clear that many of the framers and adopters saw that Art 12(1) (and its Malaysian counterpart Art 8(1)) promoted the need to ensure fairness to racial and religious minorities. This is a fairly low level of generality. But it is not unlikely that some framers and adopters understood Art 12(1) to promote equality before the law and equal protection of the laws at a higher level of generality, which would include protection of other groups such as women which may not be outright minorities when compared to the population as a whole but are minorities in certain situations such as employment. In fact it is submitted that such an interpretation is mandated by the Constitution, otherwise Art 12(1) would be meaningless, given the presence of Art 12(2) which already prohibits governmental discrimination against persons on the basis *inter alia* of race and religion. Also, Art 16, which guarantees educational rights, is expressly stated to be “without prejudice to the generality of Article 12”.

Because it is difficult to identify the existence of collective intent and its level of generality, any doctrine of constitutional interpretation based wholly on framers’ and adopters’ intent is doomed to failure. Due to these inherent uncertainties, historical records can be interpreted in conflicting yet plausible ways by different interpreters. In effect the problem of interpretation is not solved. The focus merely shifts from the constitutional text to historical records on the text.

⁴³ Baker, *ibid.*

Finally, it is also highly plausible that the intention of the framers and adopters of the Constitution was not for their own views on its scope and meaning to control its interpretation at all, but to delegate discretion to the courts to interpret the Constitution based on prevailing social conditions.⁴⁴ This is supported by the use of broad, general language in the Constitution instead of a more precise wording. Social mores change, and it is more sensible to treat the Constitution as laying down a dynamic framework which can be used to solve present-day problems, rather than a rigid one which provides only answers to questions that nobody is asking any longer. For instance, when drafting Art 12(2), the framers of the Malaysian Federal Constitution made a conscious effort not to follow the Indian Constitution, specifically excluding gender or sex from the list of forbidden classifications. Are we to take it that gender discrimination which may have been more acceptable in the past is forever written into the Constitution though it does not accord with present-day thinking? The American experience shows that Constitutions are to be treated as living organisms which grow and evolve with the times. In 1872 the Supreme Court declared in *Bradwell v Illinois*⁴⁵ that a statute prohibiting women from practising law was constitutional because:

[T]he civil law, as well as nature herself, has always recognized a wide difference in the respective spheres and destinies of man and woman. Man is, or should be, woman's protector and defender. The natural and proper timidity and delicacy which belongs to the female sex evidently unfits it for many of the occupations of civil life. The constitution of the family organisation, which is founded in the divine ordinance, as well as in the nature of things, indicates the domestic sphere as that which

44 See Powell, "The Original Understanding of Original Intent" (1988) 98 Harv L Rev 885.

45 (1872) 83 US (16 Wall) 130 at 141. Now see s 11(3) of the Legal Profession Act (Cap 161, 1994 Ed): "A person shall not be disqualified by sex from being admitted and enrolled as an advocate and solicitor."

properly belongs to the domain and functions of womanhood. The harmony, not to say identity, of interests and views which belong, or should belong, to the family institution is repugnant to the idea of a woman adopting a distinct and independent career from that of her husband.

How archaic this view seems today, in an era of increasing gender equality. It would be repugnant to interpret the Constitution in accordance with such outdated views, especially when the text does not mandate such a reading.

Another example: Raoul Berger suggests that the original purpose of the 14th Amendment's equal protection clause was to protect the Civil Rights Act 1866 from repeal. If this is correct, the framers' intent was to prohibit discrimination relating only to rights to contract, to own property and to have access to the courts, provided for in the 1866 Act.⁴⁶ But American courts have never interpreted equal protection so narrowly. In *Plessy v Ferguson*⁴⁷ the Supreme Court upheld a Louisiana law of 1890 requiring "equal but separate" accommodations for white and "coloured" railroad passengers. Plessy, who alleged he was "seven-eighths Caucasian and one-eighth African blood", was arrested for refusing to leave a seat in a coach for whites. Held the Supreme Court: "The object of the [14th] Amendment was undoubtedly to enforce the absolute equality of the races before the law, but in the nature of things it could not have been intended to abolish distinctions based on colour, or to enforce social, as distinguished from political equality, or a commingling of the two races upon terms unsatisfactory to either." Subsequently, even the "equal but separate" doctrine was struck down. In *Brown v Board of Education*,⁴⁸ black schoolchildren were denied admission to schools attended by white children under laws requiring or permitting

⁴⁶ Berger, *supra*, n 27 at 19.

⁴⁷ (1896) 163 US 537.

⁴⁸ (1954) 347 US 483.

segregation according to race. Overruling *Plessy*, the Supreme Court stated that to separate black children from others of similar age and qualification solely because of their race generated a feeling of inferiority as to their status in the community that could “affect their hearts and minds in a way unlikely ever to be undone.” Following *Brown*, applications of the “equal but separate” doctrine in other public facilities were declared void.

Plessy and *Brown* were referred to locally in *PP v Su Liang Yu*,⁴⁹ the court recognising that “values may change from time to time”. The court also detected shifts in attitude and approach in decisions of the Indian Supreme Court. These cases forcefully make the point that it is wrong to interpret the Constitution so as to freeze it in history.

B. Textualism

A textualist interprets the Constitution by construing its text. The words used in framing each Article are considered the primary or even the exclusive source of higher law. Paul Brest⁵⁰ understands textualists to favour this form of interpretation because of the following rationales:

- There is some definitional or suprallegal principle that only a written text can impose constitutional obligations.⁵¹
- ii. The framers and adopters of the Constitution probably intended for it to be interpreted according to a textualist canon.
 - iii. The text of the Constitution is the surest guide to the intentions of the framers and adopters as to what it means. This is the most important rationale for textualism. It stems

⁴⁹ [1976] 2 MLJ 128 at 130 (HC, Ipoh).

⁵⁰ Brest, *supra*, n 26 at 205.

⁵¹ *Supra*, nn 8-9, and the accompanying text.

from the rudimentary tenet of statutory interpretation that a provision is to be interpreted with reference to the words used in framing it and not to any extrinsic materials, because it is through the text and the text alone that Parliament has chosen to make known its intentions.

The strictest form of textualism is *literalism* – a narrow and literal construction of words and phrases. It was frequently used in the early days of the American Constitution⁵² principally because the only rules of interpretation that judges of the time were familiar with were common law canons of statutory interpretation. But literalism only applies where the text of the Constitution is free from ambiguity. When the scope of a phrase is broad and imprecise – examples from our own Constitution include “personal liberty”, “equal protection” and “in accordance with law” – literalism is of little help in determining if a particular issue before the court warrants constitutional protection.⁵³

In contrast, *moderate* textualism takes into account the “open-textured” nature of certain Articles of the Constitution, *ie* the fact that they are broadly-worded, and their linguistic and social context. Apart from giving prominence to the constitutional text,⁵⁴ moderate textualists feel that judges should examine the form of government which it incorporates⁵⁵ as well as cases interpreting

⁵² *Eg Sturges v Crowningshield* (1819) 17 US (4 Wheat) 122 at 202-3 *per* Marshall CJ: “[A]lthough the spirit of an instrument, especially of a constitution, is to be respected not less than its letter, yet the spirit is to be collected chiefly from its words...”

⁵³ Brest, *supra*, n 26 at 222. See also *supra*, n 42 at 272.

⁵⁴ Goldstein, *supra*, n 8 at 4, 154; Laurence H Tribe & Michael C Dorf, *On Reading the Constitution* (1991) at 9.

⁵⁵ See *eg McCulloch v Maryland* (1819) 17 US (4 Wheat) 316; *Barron v Baltimore* (1833) 32 US (7 Peters) 243; *American Communications Association v Douds* (1980) 339 US 382 at 453 (Black J, dissenting).

it to discover the basic principles underlying it. These basic principles can then be applied to novel situations.

The political framework established by our Constitution embodies the concept of separation of powers and limited government. Political power is divided between the executive (Art 23) and legislature (Art 38 read with Art 58) on the one hand, and the judiciary (Art 93) on the other. It has been said that judicial review is “undemocratic” and contrary to the concept of representative government because it permits an unelected group of people to uphold minority rights in the face of majority opinion. But to accept this criticism is to forget that this is the very system of government founded by our Constitution, which is the voice of a sovereign people deciding how they will be ruled. The Constitution establishes that the majority’s power, exercised through its representatives in the executive and legislature, is not to succeed in all situations but is to be balanced against judicial power exercised to protect minority interests.⁵⁶ On the other hand, judicial power is controlled by explicit Constitutional limitations which allow the legislature to curtail fundamental liberties in appropriate situations, such as where public order or public health are threatened.

How should judges go about identifying constitutional rights within a concept like “personal liberty”? The common law approach suggests that they must identify the principles underlying prior related decisions, and reformulate them in a way that adequately explains the rights already protected without referring to the right claimed to exist. This done, the right should be tested against the principles identified. If it is encompassed within the general principle, then it is a fundamental liberty. If not, it is to be rejected.⁵⁷ In determining what are basic principles, judges cannot be blind to norms of the community, expressed through public attitudes

⁵⁶ Baer, *supra*, n 29 at 65.

⁵⁷ Tribe & Dorf, *supra*, n 54 at 111.

towards issues, legislation, and decided cases. However an important caveat is in order. Judges must prefer deep principles over transient majority preferences. They must not act as a mere reflex of popular passions and opinion, but must preserve fundamental and enduring national values “against the assaults of opportunism, the expediency of the passing hour, the erosion of small encroachments, the scorn and derision of those who have no patience with general principles.” They are to apply not the hasty and unconsidered impressions of crowds but the stable underlying moral convictions of “those sections of the crowd whose impressions have ripened into genuine opinion.”⁵⁸

Of course changing societal values may prove a judge to be wrong or cause his views to become hopelessly out of date. But this does not mean that judicial review has failed. In a sense, judges are established by the Constitution as neutral umpires or referees to resolve issues by giving authoritative statements and achieving finality in disputes for the time being. They are not meant to lay down perfect rules for all time.⁵⁹ Fortunately, the Constitution’s open-textured nature permits errors of judgment to be corrected. It is submitted that moderate textualism is the correct approach to constitutional interpretation as it best accords with the structure of the Constitution.

C. *Impact of S 9A of the Interpretation Act*⁶⁰

Our conclusions on intentionalism and textualism are validated

⁵⁸ Benjamin Cardozo, *The Paradoxes of Legal Science* (1928) at 50, cited in Gregory Bassham, *Original Intent and the Court* (1992) at 117-18. See also Cardozo at 37: “The law will... follow, or strive to follow, the principle and practice of men and women whom the social mind would rank as intelligent and virtuous.”

⁵⁹ Baer, *supra*, n 29 at 65-66; Goldstein, *supra*, n 8 at 164-65.

⁶⁰ On s 9A generally, see Robert C Beckman & Andrew Phang, “Beyond *Pepper v Hart*: The Legislative Reform of Statutory Interpretation in Singapore” (1994) 15 Stat LR 69.

by recent legal developments. The Interpretation (Amendment) Act 1993 (No 11 of 1993) inserted a new s 9A into the Interpretation Act (Cap 1, 1985 Rev Ed), establishing that in Singapore a purposive approach is to be used to interpret statutes, and that courts may refer to extrinsic materials to resolve ambiguities:⁶¹

- 9A(1). In the interpretation of a provision of written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object.
- (2). ... in the interpretation of a provision of a written law, if any material not forming any part of the written law is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material –
- (a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law; or
 - (b) to ascertain the meaning of the provision when –
 - (i) the provision is ambiguous or obscure; or
 - (ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law leads to a result that is manifestly absurd or unreasonable.

Without limiting the generality of s 9A(2), sub-s (3) provides examples of extrinsic materials that may be referred to. These

⁶¹ Shortly before s 9A came into force, this rule was affirmed in the common law by *Pepper (Inspector of Taxes) v Hart* [1992] 3 WLR 1032 (HL), applied in Singapore by *Tan Boon Yong v Comptroller of Income Tax* [1993] 2 SLR 48 (CA).

include the explanatory statement in a Bill containing the provision to be interpreted, and the speech made in Parliament by a Minister moving a motion that the Bill containing the provision be read for a second time. Read together, ss 9A(2) and (3) permit the court to refer to all the materials examined previously which might assist in interpreting the Constitution.⁶²

Section 9A is relevant to constitutional interpretation because “written law” is defined by s 2(1) of the Interpretation Act to include the Constitution. This was recently confirmed by *Constitutional Reference No 1 of 1995*,⁶³ which is the first application of s 9A to the Constitution. In its decision, the Constitutional Tribunal considered as well-established the principle that a purposive interpretation should be adopted in interpreting the Constitution to give effect to the intent and will of Parliament. It also stated that legislative material such as speeches in Parliament and other contemporaneous documents can be resorted to. Therefore courts must employ an interpretation that promotes the purpose or object underlying the Constitution or particular Articles of the Constitution.⁶⁴ It is submitted that this does not mandate intentionalism. In laying down the purposive approach, s 9A(1) merely expresses the general philosophy and spirit behind statutory

⁶² *Supra*, n 38, and the accompanying text; and the Appendix, *infra*.

⁶³ [1995] 2 SLR 201 at 210H-211E. Although the Constitution came into force prior to s 9A, *Raffles City Pte Ltd v Attorney-General Singapore* [1993] 3 SLR 580 (HC) establishes that since s 9A is a declaratory enactment it has retrospective effect. This was affirmed by the Court of Appeal in *Comptroller of Income Tax v GE Pacific Pte Ltd* [1994] 2 SLR 690 at 698D.

⁶⁴ There is technically a distinction between the purpose or object underlying a particular written law and the purpose or object underlying a particular provision of that written law, and s 9A(1) refers only to the former. But Beckman & Phang, *supra*, n 60 at 82-84, point out that in practice the courts are likely to treat both as interchangeable, and that the specific purpose or object of a particular provision is likely to be of greater assistance to the court in ascertaining the meaning of the provision.

interpretation.⁶⁵ The difficulties described above with regard to determining the legislature's intention still remain.⁶⁶ In fact, Parliament's choice of a broad wording over a more precise one in Arts 9(1) and 12(1) suggests strongly that their purpose or object is to ensure that individuals' rights of personal liberty and equality are generally not to be impaired, and that the scope of these liberties is to be determined by the courts when issues arise.

Section 9A(2)(a) rejects literalism since extrinsic materials revealing a provision's purpose or object may be considered even if just to confirm that words are to be interpreted according to their ordinary meaning.⁶⁷ Therefore the approach that accords best with s 9A is moderate textualism. However this approach must be adjusted since, where open-textured and ambiguous provisions are encountered, s 9A(2)(b) permits reference to extrinsic

⁶⁵ Beckman & Phang, *supra*, n 60 at 83.

⁶⁶ *Supra*, nn 41-49, and the accompanying text.

⁶⁷ Beckman & Phang, *supra*, n 60 at 82-83. However, in *Re Section 21 of the Legal Profession Act (Cap 161, 1990 Ed) and Re An Application by William Gun How, One of Her Britannic Majesty's Counsel*, Originating Motion 39/1994, 11 May 1994, the High Court stated that s 9A does not in any way affect the rule stated by Tindal CJ in the *Sussex Peerage Case* (1844) 8 ER 1034 at 1057: "If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in their natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. But if any doubt arises from the terms employed by the legislature, it has always been held a safe mean of collecting the intention, to call in aid the ground and cause of making the statute..." The court concluded that when the words of the statute are clear the courts can neither apply the purposive approach nor call in aid the extrinsic material enumerated in s 9A. This approach has been rejected by *Constitutional Reference No 1 of 1995, supra*, n 63 at 211F-H. The Constitutional Tribunal held that it is wrong to adopt a literal approach even if there is no ambiguity or inconsistency, if the literal approach does not give effect to the will and intent of Parliament. Beckman & Phang have been vindicated.

materials.⁶⁸ But as such materials are unlikely to be “capable of assisting in the ascertainment of the meaning” of the fundamental liberties in our Constitution,⁶⁹ it is submitted that courts are probably not permitted to consider them under s 9A(2).

III. MODERATE TEXTUALISM APPLIED:

THE RIGHT TO PERSONAL LIBERTY IN ART 9(1)

Article 9(1) of the Constitution, identical to Art 5(1) of the Malaysian Federal Constitution, reads: “No person shall be deprived of his life or personal liberty save in accordance with law”. It bears a resemblance to its progenitors, Art 21 of the Indian Constitution: “No person shall be deprived of his life or personal liberty except according to procedure established by law”, and the 5th and 14th Amendments of the Constitution of the United States of America, the relevant parts of which provide that no person shall be deprived “of his life, liberty, or property, without due process of law”.

Local courts have repeatedly warned against relying on cases from foreign jurisdictions to interpret the fundamental liberties in the Singapore Constitution.⁷⁰ Our judges have rightly asserted

⁶⁸ As a result, *Theresa Lim Chin Chin v Inspector General of Police* [1988] 1 MLJ 293 at 296 col 2B-C (SC, Malaysia) and *Teo Soh Lung v Minister for Home Affairs* [1989] 2 MLJ 449 at 459 col 2B (HC, Singapore), which rejected use of the Reid Commission report as the basis for constitutional interpretation, can no longer be considered as good law.

⁶⁹ *Supra*, nn 41-49, and the accompanying text.

⁷⁰ *Government of the State of Kelantan v Government of the Federation of Malaya* [1963] MLJ 355 at 358: “[T]he Constitution is primarily to be interpreted within its own four walls and not in the light of analogies drawn from other countries such as Great Britain, the United States of America or Australia.” See also *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129 at 141, 147 (FC, Malaysia); *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187 at 188-89 (FC, Malaysia);

that in the end it is the Constitution itself that is to be interpreted and applied, and that its text can never be overridden by the extraneous principles of other Constitutions.⁷¹ But it is imprudent to reject outright constitutional developments in other jurisdictions as our Constitution shares many fundamental principles with foreign constitutions, especially those which are its fore-runners. Furthermore, Singapore and Malaysia have not developed a sufficient body of authoritative decisions in many areas of constitutional law to enable principles to be developed independently by analogy and extension. If judges are not to pull interpretations out of the air, recourse to judgments from foreign jurisdictions is inevitable. Indeed, as these two Constitutions draw inspiration from the Indian and United States Constitutions, reference to cases from those jurisdictions is only natural.⁷²

Ong Ah Chuan, supra, n 17 at 70; *Phang Chin Hock v PP* [1980] 1 MLJ 70 at 72-73 (FC, Malaysia); *PP v Pung Chen Choon* [1994] 1 MLJ 566 at 576 (SC, Malaysia); and *Chan Hiang Leng Colin, supra*, n 13 at 681. On constitutional interpretation generally, see Harry E Groves, "Some Principles of Constitutional Interpretation" (1962) 4 *Me Judice* 48; Datuk Ahmad Ibrahim, "Interpreting the Constitution: Some General Principles" in *The Constitution of Malaysia: Further Perspectives and Developments* (FA Trindade & HP Lee eds, 1986) at 18; Tan, Yeo & Lee, *supra*, n 2 at 130-34.

⁷¹ *Merdeka University Bhd v Government of Malaysia* [1982] 2 MLJ 243 at 251 (FC, Malaysia).

⁷² See for instance Abdoolcader J's comments on Indian cases as "of great persuasive authority", having "great weight" and "entitled to the greatest respect" due to the dearth of local cases: *Yeap Hock Seng v Minister for Home Affairs, Malaysia* [1975] 2 MLJ 279 at 281 (HC, Kuala Lumpur). In *Selangor Pilot Association (1946) v Government of Malaysia* [1975] 2 MLJ 66 at 71, Lee Hun Hoe CJ (Borneo) held that since the Malaysian Federal Constitution was modelled on the Indian Constitution it was "natural" to look to Indian cases for assistance. Although noting the Indian Constitution is not word for word the same as the Federal Constitution, he felt the "substance [is] parallel".

A. “Personal Liberty”

To date, the only local case properly considering the scope of “personal liberty” in the Constitution is *Government of Malaysia v Loh Wai Kong*.⁷³ In this case, the defendant was denied renewal of his passport because of criminal charges pending against him. He asserted that he had a fundamental right to travel abroad under Art 5(1) of the Malaysian Federal Constitution (Singapore’s Art 9(1)), and that the denial of a passport to him violated this right. The Federal Court of Malaysia rejected this argument. It began with the premise that:

It is well-settled that the meaning of words used in any portion of a statute – and the same principle applies to a constitution – depends on the context in which they are placed, that words used in an Act take their colour from the context in which they appear and that they may be given a wider or more restricted meaning than they ordinarily bear if the context requires it.⁷⁴

It went on to consider the other clauses of Art 5 which deal with an arrested person’s right to be informed as soon as may be of the grounds of his arrest and to consult and be defended by his own lawyer, his right to be released without undue delay and in any case within 24 hours to be produced before a magistrate, and his right not to be further detained in custody without the magistrate’s authority. Noting that “these are all rights relating to the *person* or *body* of the individual” (original emphasis), the court declared it was “convinced that [Art 5(1)] only guarantees a person... freedom from being ‘unlawfully detained’”, and that it did not encompass the right to travel overseas and to be issued a passport. It supported this reading with Mukherjee J’s remarks in the Indian case *AK Gopalan v State of Madras*,⁷⁵

⁷³ [1979] 2 MLJ 33 (FC, Malaysia).

⁷⁴ *Ibid* at 34 col 2I.

⁷⁵ (1950) AIR SC 27.

which defined “personal liberty” as the “antithesis of physical restraint or coercion” and “a personal right not to be subjected to imprisonment, arrest or other physical coercion in any manner that does not admit of legal justification”.⁷⁶

It is respectfully submitted that while the result in the case is correct, the Federal Court achieved it through an undesirable interpretation of “personal liberty”. The ordinary, natural meaning of the phrase does not suggest any such limitation on its breadth. Section 9A(4)(a) of the Interpretation Act exhorts judges to be mindful of the desirability of persons being able to rely on the ordinary meaning conveyed by the text of a provision taking into account its context and the purpose or object underlying the written law.⁷⁷ It is submitted that the word “personal” does not change the meaning of “liberty”; the liberties possessed by individuals can be “personal” without having a physical effect on their bodies. It does not help, and indeed it is wrong, to constrain a broad expression by selecting one particular meaning out of a number of equally plausible meanings and apply that meaning alone as the correct interpretation. In *McCulloch v Maryland*,⁷⁸ Marshall CJ commented that:

Such is the character of human language, that no word conveys to the mind, in all situations, one single definite idea; and

⁷⁶ *Supra*, n 73 at 35 col 1A-E. See also the *dicta* in the earlier case, *PP v Tengku Mahmood Iskandar* [1973] 1 MLJ 128 at 129, not referred to in *Loh Wai Kong*: “That fundamental right [Art 5(1)] implies that no person is punishable or can be lawfully made to suffer *in body* except for a distinct breach of law proved in a court of law” (emphasis added).

⁷⁷ See *Tan Un Tian v PP* [1994] 3 SLR 33 at 45H (HC): “In arguing for a purposive approach to interpretation, one must also bear in mind the policy considerations so clearly stated in s 9A(4) of the Interpretation Act, namely, the desirability of the public being able to rely on the ordinary meaning conveyed by the statutory provision and the need to avoid prolonged and wasteful litigation.”

⁷⁸ (1819) 17 US (4 Wheat) 316 at 414-15.

nothing is more common than to use words in a figurative sense. Almost all compositions contain words, which taken in their rigorous sense, would convey a meaning different from that which is obviously intended. It is essential to just construction that many words which import something excessive, should be understood in a more mitigated sense – in that sense which common usage justifies. ... [In the interpretation of a word] the subject, the context, the intention of the person using them, are all to be taken into view.

No doubt the sub-sections of Art 9 of the Singapore Constitution deal with physical detention, but as Lord Diplock pointed out in *Ong Ah Chuan v PP*,⁷⁹ the Constitution should not be treated as ordinary legislation but “as *sui generis*, calling for principles of interpretation of its own, suitable to its character... without necessary acceptance of all the presumptions that are relevant to legislation of private law.” Article 9(1) is pitched at a high level of generality; its sub-sections should be read as specific applications of the rights of life and personal liberty considered vital enough to be explicitly articulated in the Constitution. It is neither stretching nor perverting the language of the Constitution⁸⁰ to interpret “personal liberty” in this manner.

The legislative history of Art 21 of the Indian Constitution shows that the word “personal” was added before “liberty” to avoid a construction so wide as to include the freedoms dealt with in what is now Art 19.⁸¹ But can we safely assume that the intent

⁷⁹ *Supra*, n 17 at 70 col 2D.

⁸⁰ Courts are “not at liberty to stretch or pervert the language of the Constitution in the interest of any legal or constitutional theory or even for the purposes of supplying omissions or correcting supposed errors”: *Merdeka University v Government of Malaysia* [1981] 2 MLJ 356 at 360.

⁸¹ HM Seervai, *Constitutional Law of India: A Critical Commentary* (3rd ed, 1983), vol 1 at 692 para 11.4; *Gopalan, supra*, n 75 at 37 para 12 *per* Kania CJ, at 53 para 58 *per* Fazl AH J, at 70 para 105 *per* Patanjali Sastri J, at 97 para 178 *per* Mukherjea J, and at 110 para 219 *per* Das J.

of our Constitution's drafters towards Art 9(1) was the same as that of their Indian counterparts? Even if we can, given the near-identical wording between Art 9(1) and India's Art 21, the only implication we can draw is that "personal liberty" possessed by all *persons* in Singapore does not include the liberties reserved to *citizens* under Art 14. Singapore's Art 14 roughly corresponds to Art 19(1) as the sub-sections of Art 19(1) encompass, *inter alia*, rights to freedom of speech and expression, to assemble peacefully without arms, and to form associations or unions. There is no suggestion that "personal liberty" is limited to freedom from physical restraint, as was suggested by *Loh Wai Kong*.⁸²

The Reid Commission report, though, seems to support the view that it was the framers' original intention to limit Art 9(1) in the *Loh Wai Kong* sense: "We recommend (art 5) [Singapore's Art 9] provisions against detention without legal authority of a magistrate..." However, the Commission went on: "We also recommend (art 8) [Art 12] provisions against discrimination by law on the ground of religion, race, descent, or place of birth, and discrimination on these grounds by any Government or public authority in making appointments or contracts or permitting

82 See *Gopalan, ibid* at 110 para 219 *per* Das J: "[T]he Constitution as finally passed has in Art 21 used the words 'personal liberty' which have a definite connotation in law which I have explained. It does not mean only liberty of the person but it means liberty or the rights attached to the person (*jus personarum*)." Earlier, at 108 para 214, he stated that *jus personarum* included the right to life; the right not to have one's body touched, violated, arrested or imprisoned; the right not to be injured or maimed except under authority of law; and "varieties of other rights which are also attributes of the freedom of the person", some of which are so important and fundamental that they are regarded and valued as separate and independent rights apart from the freedom of the person. Fazl Ali J at 53 para 58 took a more extreme position: "Personal liberty and personal freedom, in spite of the use of the word 'personal', are, as we find in several books, sometimes used in a wide sense and embrace freedom of speech, freedom of association, *etc.* These rights are some of the most valuable phases or elements of liberty and they do not cease to be so by the addition of the word 'personal'."

entry to any educational institutions, or granting financial aid in respect of pupils or students (art 12) [Art 16].⁸³ Drawing a parallel between Art 9 and Art 12 shows the true meaning of the Commission's statements. While Art 12(1) guarantees equality before the law and equal protection of the law to all, Art 12(2) provides that there shall be no discrimination against Singapore citizens on the ground only of religion, race, descent or place of birth for certain specified purposes. If the intent of the Constitution's framers towards Art 12(1) is to be found in the Reid Commission report, the effect of Art 12(1) would merely be to prevent discrimination against citizens on the grounds stipulated in Art 12(2) and no others. There is no warrant in law or policy for such a restrictive reading: Art 12(1) has been applied to forms of discrimination not enunciated expressly in Art 12(2). Furthermore, to interpret Arts 9(1) and 12(1) in this way would deprive them of all useful purpose. Parliament cannot be taken to have enacted meaningless provisions in the Constitution. It is far more likely that the Reid Commission was simply summarising salient elements of the fundamental liberties in the Constitution and not attempting in any way to lay down their scope.

United States case law establishes that individuals may be deprived of liberty by being deprived of freedom of action by personal restraint as well as by having their freedom of choice and action limited by legislation which makes it impossible or illegal for them to engage in certain types of activity.⁸⁴ In *Munn v Illinois*⁸⁵ the court pronounced:

⁸³ Federation of Malaya Constitutional Commission 1956-57 Report, ch IX ("Fundamental Rights"), para 162. See Tan, Yeo & Lee, *supra*, n 2 at 743.

⁸⁴ John E Nowak & Ronald D Rotunda, *Constitutional Law* (4th ed, 1991) at 496 §13.4.

⁸⁵ (1877) 94 US 113 *per* Field and Strong JJ (dissenting). This definition of "liberty" has been applied in India by *Kharak Singh v State of Uttar Pradesh* (1963) AIR SC 1295 at 1301 para 15, 1302 para 17; *Satwant Singh v Assistant Passport Officer, New Delhi* (1967) AIR SC 1836 at 1844 para 28; and

By the term “liberty” ... something more is meant than mere freedom from physical restraint or the bounds of a prison. It means freedom to go where one may choose, and to act in such a manner, not inconsistent with the equal rights of others, as his judgment may dictate for the promotion of his happiness; that is, to pursue such callings and avocations as may be most suitable to develop his capacities, and give to them their highest enjoyment.

Our courts should not fetter themselves prematurely by a limited reading of “personal liberty” but should adopt this generous view, developing the concept using the time-honoured common law incremental approach.⁸⁶

Our interpretation of “personal liberty” is supported by decisions of the Supreme Court of India which decisively rejected the narrow definition in *Gopalan’s* case. It was held in *RC Cooper v Union of India (The Bank Nationalisation Case)*⁸⁷ and *Maneka Gandhi v Union of India*⁸⁸ that India’s Art 21 represents a general

Sunil Batra v Delhi Administration (1975) AIR SC 1675 at 1731 para 226. A similarly wide definition of liberty was applied in *Meyer v Nebraska* (1923) 262 US 390. The majority judgment in *Munn* by Waite CJ did not expound on the meaning of liberty, but simply held that the State may regulate an individual’s use of his property if regulation is necessary for the public good. On the facts, it was constitutional for the State to regulate the fees payable to individuals who had a monopoly on elevators used for storing grain.

Note that the United States Supreme Court has held that not all areas of human activity can be called “liberty”. In *Board of Regents v Roth* (1972) 408 US 564 the applicant, hired to teach at a state-run university for one year, was informed without explanation that he would not be rehired. The university was acting completely within its legal rights. The court held that it would stretch the concept of liberty too far to suggest that a person is deprived of “liberty” when he simply is not rehired by the state but remains as free as before to seek other employment.

⁸⁶ Tribe & Dorf, *supra*, n 54 at 63.

⁸⁷ [1970] AIR SC 564.

⁸⁸ [1978] AIR SC 597.

statement of the right to personal liberty while Art 19(1) contains specific attributes of personal liberty. Said Bhagwati J in the latter case: “The expression ‘personal liberty’ in Article 21 is of the widest amplitude and it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights and given additional protection under Article 19.”⁸⁹

B. “*Save in Accordance with Law*” and
*Substantive Natural Justice*⁹⁰

Article 9(1) ends with the phrase “save in accordance with law”. For a time this was taken to mean that so long as the legislature validly enacted a law, this law could derogate freely from life or personal liberty. This approach was typified by such cases as *Comptroller-General of Inland Revenue v NP*⁹¹ and *Arumugam Pillai v Government of Malaysia*.⁹² The Public Prosecutor in *Ong Ah Chuan*⁹³ attempted the same argument, contending that since

⁸⁹ *Ibid* at 622 per Bhagwati J writing for Untwalia and Murtaza Fazal Ali JJ, and himself. Bhagwati J disapproved the majority’s definition of “personal liberty” in *Gopalan*, stating that there was no definite pronouncement on it in that case since the point was not in issue.

⁹⁰ Tan, Yeo & Lee, *supra*, n 2 at 439-41.

⁹¹ [1973] 1 MLJ 165 at 166 (HC).

⁹² [1975] 2 MLJ 29 (FC, Malaysia). *NP* and *Arumugam Pillai* involved Art 13(1) of the Malaysian Federal Constitution (not in the Singapore Constitution): “No person shall be deprived of property *save in accordance with law*.” Both cases applied *Tinsa Maw Naing v Commissioner of Police, Rangoon* [1950] Burma LR 17 which interpreted s 16 of the Burmese Constitution: “No citizen shall be deprived of his personal liberty... *save in accordance with law*.” This case held that “law” meant the “will of the legislature enacted in due form, provided that such enactment is within the competence of the legislature.”

⁹³ *Supra*, n 17 at 70 col 2F-H.

“written law” is defined in Art 2(1) of the Constitution to mean “this Constitution and all Acts and Ordinances and subsidiary legislation for the time being in force in Singapore”, and “law” is defined as including written law, the requirements of the Constitution are satisfied if deprivation of life or liberty is carried out in accordance with a provision contained in any Act passed by Parliament, however arbitrary or contrary to the fundamental rules of natural justice it might be.

This argument was flatly rejected by the Privy Council as begging the question. “Written law” includes Acts passed by Parliament only to the extent that they are “in force” in Singapore, and Art 4 provides that any law enacted by the legislature after the commencement of the Constitution which is inconsistent with it is void to the extent of the inconsistency. Therefore use of the word “law” in Arts 9(1) and 12(1) does not relieve the court of its duty to determine the constitutionality of the written law.

Instead, *Ong Ah Chuan* and its sister case *Haw Tua Tau v PP*⁹⁴ established that in a Westminster constitution, particularly in the part dealing with fundamental liberties, references to “law” must refer to a system of law incorporating fundamental rules of natural justice.⁹⁵ In those cases the judges were referring to rules of natural justice which ensure procedural fairness. This is the sense in which natural justice has always been understood in Singapore. But might natural justice not have a substantive aspect as well? This would entitle courts to examine whether it is appropriate for the legislature to deprive individuals of certain aspects of their personal liberty, and the manner in which such deprivation is achieved.

94 [1981] 2 MLJ 49 (PC on appeal from Singapore).

95 *Ong Ah Chuan, supra*, n 17 at 71 col 1B; *Haw Tua Tau, ibid* at 50 col 11-col 2A. Affirmed in *Chin Siew Noi v PP*, Criminal Case 6/1990, 26 February 1993 (HC).

Harding⁹⁶ rejects the idea of “substantive natural justice”. He asserts that the only meaning of natural justice known to the common law is the idea of fair procedure, and that “this is the only sense which is clear enough to permit natural justice to function properly as a constitutional concept.” Natural justice can only operate in a substantive manner in the sense that the substance of an Act has no meaning without procedure: “the medium is the message”.⁹⁷ Harding supports this by reference to Art 12(1). Lord Diplock in *Ong Ah Chuan* extended natural justice to Art 12(1), which is designed to prevent substantively discriminatory legislation. Harding feels this shows it could not have been the Privy Council’s intent to apply natural justice in a substantive sense, since this would mean that the court can strike down a provision for inconsistency with “natural justice” even if it satisfies the rational nexus test. He concludes that “Lord Diplock has not fully appreciated the sweeping potential of his linkage of equality with natural justice, and intended to refer to Article 12(1) only by way of comparing its usage of the word law.”⁹⁸

Harding’s arguments are impressive but not watertight. It is well-established in equal protection jurisprudence that courts may declare a provision unconstitutional even though it passes the rational nexus test if its object is inherently bad.⁹⁹ In *Bidi Supply Co v Union of India*¹⁰⁰ Bose J held that:

... one can conceive of classifications ... that will have direct and reasonable relation to the object sought to be achieved and yet which are bad because ... the object itself is not to be

96 AJ Harding, “Natural Justice and the Constitution” (1981) 23 Mal LR 226.

97 *Ibid* at 230.

98 *Ibid* at 235.

99 Huang-Thio Su Mien, “Equal Protection and Rational Classification” [1963] *Public Law* 412 at 422, 440. See also the cases cited at 422-29.

100 [1956] AIR SC 479 at 486 para 18.

allowed on the ground that it offends Article 14 [Singapore's Art 12(1)]. In such a case the object itself must be struck down and not the mere classification which after all, is only a means of attaining the end desired.

If the court can strike down a law under Art 12(1) because its very object is unreasonable and oppressive, there is no reason why the court should not possess a similar power under Art 9(1).

It is true that at common law natural justice has always been a procedural concept, but in the United States it has gained a substantive component through the "due process" doctrine. The doctrine permits a court to strike down legislation under the 5th and 14th Amendments of the United States Constitution that speak only of *process* (or procedure) due to the individual although the court disagrees with its *substance*, because some types of law-making are taken to go beyond any proper sphere of governmental activity and are incompatible with democratic government and individual liberty. The premise is that life, liberty or property was taken away without due process or by an unconstitutional process because the Constitution never granted the government the ability to pass such a law.¹⁰¹

There is a line of Malaysian cases holding that local courts have no power to determine if legal provisions substantively comply with the constitutional guarantee of life or personal liberty.¹⁰² In *PP v Datuk Harun bin Haji Idris*,¹⁰³ Abdoolcader J remarked:

¹⁰¹ Nowak & Rotunda, *supra*, n 84 at 340.

¹⁰² *Attorney-General, Malaysia v Chiow Thiam Guan* [1983] 1 MLJ 51 (HC, Kuala Lumpur); *PP v Lau Kee Hoo* [1983] 1 MLJ 157 (FC); *PP v Yee Kim Seng* [1983] 1 MLJ 252 (HC, Ipoh); *Che Ani bim Itam v PP* [1984] 1 MLJ 113 (FC).

¹⁰³ [1976] 2 MLJ 116 (HC, Kuala Lumpur). LA Sheridan & Harry E Groves, *The Constitution of Malaysia* (4th ed, 1987) at 44, state that Art 5(1) of the Malaysian Federal Constitution (Singapore's Art 9(1)) "does not import the American concept of due process; it merely makes the acts described unconstitutional if done unlawfully." See also Harry E Groves,

The due process clause and the doctrines of eminent domain and police power are American constitutional concepts and have no place, in my view, in our Constitution just as they have none in the Indian Constitution, as the concepts of these doctrines are in fact expressly provided for in these Constitutions. For example, the American doctrine of eminent domain is in fact embodied in the provisions of Art 13 of our Constitution [the right to property].¹⁰⁴

And recently, the Singapore Court of Appeal in *Jabar v PP*,¹⁰⁵

“Due Process of Law – A Comparative Study” (1961) 45 Marquette LR 256 at 267-71 who discusses three elements of the United States legal system which make due process necessary there.

¹⁰⁴ *Re Tan Boon Liat* [1977] 2 MLJ 108 at 111 col 1G-H (FC, Malaysia) noted the difference in wording between Art 21 of the Indian Constitution and Art 5(1) of the Federal Constitution, then continued, “The expression ‘save in accordance with law’ does not necessarily mean ‘without due process of law’ as is understood in India by virtue of the words used in its Constitution.” It is submitted the Federal Court was referring to procedural and not substantive due process. The court was probably making the same point as Suffian FJ in *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129 at 148 col 1E-H (FC, Malaysia), who felt that the difference between Art 21 of the Indian Constitution and Art 5(1) of the Federal Constitutional law is that Indian Supreme Court takes a stricter attitude towards compliance with procedure since Art 21 speaks specifically of “procedure established by law” while Art 5(1) mentions only “law”.

¹⁰⁵ [1995] 1 SLR 617 at 631B. The appellant claimed it was unconstitutional to carry out the death sentence on him as he had been on death row for more than five years. The court dismissed the appeal on the basis that once a sentence is passed and the judicial process is concluded, the court’s jurisdiction ends and it has no power to order that a sentence of death be stayed or commuted to life imprisonment. Such power lies exclusively within the President’s competence under s 8 of the Republic of Singapore Independence Act (No 9 of 1965, 1985 Rev Ed). Besides, the delay in execution was due to his solicitors’ failure to file clemency petitions expeditiously and the appellant’s own desire to appeal to the Privy Council: *ibid* at 631I-632D.

See also the *obiter* comment in *Ong Ah Chuan*: “It was not suggested on behalf of the appellants that capital punishment is unconstitutional

apparently harking back to pre-Ortg *Ah Chuan* days, made the following *obiter* statement:

[A]rt 9(1) is different from art 21 in India. Any law which provides for the deprivation of a person's life or personal liberty, is valid and binding so long as it is validly passed by Parliament. The court is not concerned with whether it is also fair, just and reasonable as well.

But the rejection of substantive due process in Singapore need not worry us. We do not need it. The evolution of due process from a procedural to a substantive concept merely reminds us that the law is flexible enough to adapt to changing circumstances. Although the legislative history of Art 21 of the Indian Constitution suggests that its wording was chosen specifically to exclude the application of the American due process doctrine in India,¹⁰⁶ recent cases have begun to apply a parallel doctrine under the Indian Constitution. For instance, the Indian Supreme Court

per se. Such an argument is foreclosed by the recognition in Art 9(1) of the Constitution that a person may be deprived of life "in accordance with law"... Whether there should be capital punishment in Singapore and, if so, for what offences are questions for the legislature of Singapore."': *supra*, n 17 at 71-72.

¹⁰⁶ The draft originally passed by the Indian Constituent Assembly provided that "No person shall be deprived of his life or personal liberty without due process of law." But, as a result of a discussion between the Constitutional Adviser, Sir BN Rao, and Frankfurter J of the United States Supreme Court, the Drafting Committee suggested *inter alia* that the words be changed to "except according to procedure established by law". According to Frankfurter J, the original intention of the framers of the American Constitution was to use due process as a procedural safeguard, and it was undemocratic to allow the court to strike down government policies on the basis that they were substantively unconstitutional: Seervai, *supra*, n 81 at 692-93 para 11.4; *Constitutional Law of India* (M Hidayatullah ed, 1984) vol 1 at 493-94; *AK Gopalan v State of Madras*, *supra*, n 75 at 38-39 paras 17-19 *per* Kania CJ, at 56-57 paras 67-68 *per* Fazl Ali J, at 72-73 paras 108-11 *per* Patanjali Sastri J, at 97 para 178 *per* Mukherjea J and at 115-20 paras 29-40 *per* Das J.

invalidated a substantive provision – s 303 of the Indian Penal Code providing for the mandatory death sentence for murder committed by a life convict – in *Mithu v State of Punjab*.¹⁰⁷ Similarly, our courts can always recognise that a new independent doctrine of “substantive natural justice” has developed. Article 9(1) of our Constitution speaks only of “law” which includes natural justice. No mental gymnastics are required to construe natural justice as possessing a substantive component as well as a procedural one. Some support may be gleaned from *Haw Tua Tau*. There, the Privy Council backtracked from its position in *Ong Ah Chuan* that “law” in the Constitution includes rules of natural justice that “formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution”,¹⁰⁸ recognising that rules of natural justice change with the times, though it spoke in terms of procedural fairness.¹⁰⁹ It could be argued that natural justice should be considered as having gained a substantive aspect “in the light of the part it plays in the complete judicial process”. Mere similarity to the American doctrine should not deter us from pursuing an analogous doctrine that makes sense. TKK Iyer recognises that there is an “obvious parallel” between due process and the fundamental principles of natural justice, but considers it “misleading” and “inappropriate” to seek a comparison:

There is no doubt that [judicial review] would cover both the substantive and procedural provisions of the impugned law. As far as Article 9(1) is concerned there is no room for making this distinction with a view to restricting judicial review to the procedural provisions only... The point is that Article 9(1) connotes a judicial inquiry – judicial review – into the “fairness”

¹⁰⁷ (1983) AIR SC 473. For other cases see Mahendra P Singh, *VN Shukla's Constitution of India* (9th ed, 1994) at 172-74.

¹⁰⁸ *Supra*, n 17 at 71 col 1B.

¹⁰⁹ *Supra*, n 94 at 53.

of the law tested against certain principles regarded as fundamental to the legal system in theory and in practice. One need not cloud this proposition by comparisons that advance one no further forward. Judicial review is judicial review under whatever name.¹¹⁰

There are policy reasons why substantive natural justice should claim its place in our Constitution. Firstly, to interpret Art 9(1) as permitting Parliament to enact any provision that derogates from an individual's personal liberty no matter how arbitrary or oppressive as long as procedural natural justice is observed, drains it of all content. It is often said that if the people disagree with such a law, the constitutional way to have it changed is through the ballot box. This is an unconvincing argument. A government's success or failure ought not ride on a few of its many policies. It is unwise to vote out a government that is doing a good job in most areas simply because some of its policies are unpopular, and the electorate knows this. The problem is compounded if the electorate perceives no credible alternative to the incumbent government. Allocating competence to the court to test the constitutionality of written law eases the problem by allowing the reappraisal and fine-tuning of specific policies.

Secondly, we must recall that judicial review is mandated by the framework of the Constitution, which was passed by the people through their elected representatives in Parliament.¹¹¹ Although the invalidation of legislation has been criticized as a judicial encroachment into the legislature's sphere, substantive natural justice would merely be a full exercise of the judiciary's proper constitutional role.

Harding asserts that the idea of substantive natural justice is too vague to be properly applied as a constitutional concept.

¹¹⁰ TKK Iyer, "Article 9(1) and 'Fundamental Principles of Natural Justice' in the Constitution of Singapore" (1981) 23 Mal LR 213 at 224-25.

¹¹¹ See Part I of this article, *supra*.

This need not be so. Indian cases apply a reasonableness test to determine if procedure under Art 21 is constitutional. This is the familiar rational nexus test applied to equal protection cases under Art 14 (Singapore's Art 12(1)). In *Maneka Gandhi*¹¹² it was held that the principle of reasonableness pervades Art 14 like a "brooding omnipresence", and procedure contemplated by Art 21 must answer to the test of reasonableness in order to conform with Art 14. Procedure under scrutiny must be "right and just and fair" and not "arbitrary, fanciful or oppressive". This test has been applied in Malaysia by *Che Ani bin Itam*.¹¹³ It is submitted that the same test can be applied to determine if legislation is substantively constitutional.¹¹⁴ Courts would consider if any

112 *Supra*, n 88 at 624 per Bhagwati J, writing for Untwalia and Fazal AH JJ, and himself. See also *Cooper, supra*, n 87; *Sunil Batra, supra*, n 85 at 1732 para 228.

113 In *Che Ani bin Itam, supra*, n 102, the issue was whether life imprisonment under a properly-enacted statute is constitutional. Raja Azlan Shah LP, applying *Ong Ah Chuan*, agreed with the Privy Council that "law" in Art 5(1) includes fundamental rules of natural justice and found that the statute was not "arbitrary, fanciful or oppressive". This echoed one of his earlier cases, *Tengku Mahmood Iskandar, supra*, n 76, in which he observed, *obiter*. "That fundamental right [Art 5(1)] implies that no person is punishable or can be lawfully made to suffer in body except for a distinct breach of law proved in a court of law. All this reduces to the minimum the possibility of arbitrariness and oppression." See also KV Padmanabha Rau, *Federal Constitution of Malaysia – A Commentary* (1986) at 35-36, who remarks that Raja Azlan Shah LP "pitched on the more accurate approach by bringing in the test of arbitrariness or oppression."

114 Mohd Ariff Yusof, "Saving 'Save in Accordance With Law': A Critique of *Kulasingham v Commissioner of Lands, Federal Territory*" (1982) 9 JMCL 155 at 166: "Arguably, even 'substantive due process' can be safely incorporated into Articles 5(1) and 13(1) of the Constitution of Malaysia, even if American examples are discarded. If procedure can be tested against standards of 'fairness' and 'reasonableness', there seems no rational reason why these ought not apply with respect to legislative content as well. Far from unleashing a tide of judicial activism, a judicious use of 'substantive due process' can afford a meaningful role for 'save in accordance with law'."

derogation from a plaintiff's personal liberty bears a reasonable relation to the purpose sought to be achieved by the government through the legislation. *State of Madras v KG Row*¹¹⁵ provides useful guidelines for the test:

It is important... to bear in mind that the test of reasonableness whenever prescribed, should be applied to each individual statute impugned, and no abstract standard, or general pattern of reasonableness can be laid down as applicable to all cases. The nature of the right alleged to have been infringed, the underlying purpose of the restrictions imposed, the extent and urgency of the evil sought to be remedied thereby, the disproportion of the imposition, the prevailing conditions at the time, should all enter into the judicial verdict.

It is further submitted that where a law derogates from the personal liberty of "suspect classes", a higher level of scrutiny of the law is justified to determine if it is constitutional. In the United States, a group of persons generally qualifies as a suspect class if it satisfies all or most of the following criteria: (1) a history of discrimination and stigma or opprobrium; (2) the presence of incorrect stereotypes perpetuated by the impugned law; (3) the immutability of the defining trait of the group; and (4) the fact that the group is a discrete and insular minority.¹¹⁶ Heightened scrutiny of legislation where suspect classes are involved is well-established in the United States and has been accepted by the Malaysian Supreme Court in *Malaysian Bar v Government of Malaysia*¹¹⁷ and *Government of Malaysia v VR Menon*.¹¹⁸ If

¹¹⁵ [1952] AIR SC 196 at 200.

¹¹⁶ See generally, Note, "Quasi-Suspect Classes and Proof of Discriminatory Intent: A New Model" (1981) 90 Yale LJ 912 at 917-19; Harris M Miller II, "An Argument for the Application of Equal Protection Heightened Scrutiny to Classifications Based on Homosexuality" (1984) 57 S Cal LR 797 at 809-16; Note, "The Constitutional Status of Sexual Orientation: Homosexuality as a Suspect Classification" (1985) 98 Harv L Rev 1285 at 1299-1305.

¹¹⁷ [1987] 2 MLJ 165.

heightened scrutiny is applicable, derogation from the individual's personal liberty cannot simply have a rational nexus with the law's goal. The derogation must be "necessary to the accomplishment"¹¹⁹ of a "compelling state interest".¹²⁰ While absolute necessity is not required, the court will require a close relationship or "tight fit" between the derogation and promotion of the compelling governmental objective of the statute.¹²¹ Heightened scrutiny ensures that the fundamental liberties of vulnerable members of society are not impinged upon.

Some criticise moderate textualism for leaving too much space to manoeuvre in. There is a valid fear that substantive natural justice may become a way for judges to enter the political arena and invalidate laws on the basis of their own subjective opinions and agendas. But constitutional interpretation is not a mathematical formula. Judges are human beings, and necessarily bring to constitutional interpretation their knowledge, experiences and feelings. Indeed, we are enriched by the insights given by judges into difficult issues facing society, appointed as they are for their wisdom, experience and discernment. As the *VG Row* case points out:¹²²

In evaluating such elusive factors and forming their own conception of what is reasonable in all the circumstances of a given case, it is inevitable that the social philosophy and the scale of values of the Judges participating in the decision should play an important part, and the limit to their interference with legislative judgment in such cases can only be dictated by their sense of responsibility and self-restraint and the sobering reflection

118 [1990] 1 MLJ 277.

119 *Cf McLaughlin v Florida* (1964) 379 US 184 at 192.

120 *Cf Plyler v Doe* (1982) 457 US 202 at 217.

121 *Cf Nowak & Rotunda, supra*, n 84 at 575 § 14.3.

122 *Supra*, n 115.

that the Constitution is meant not only for people of their way of thinking but for all, and that the majority of the educated representatives of the people have, in authorising the imposition of the restrictions, considered them to be reasonable.

To ensure that our judges possess this “sense of responsibility and self-restraint”, Art 95 of the Constitution lays a heavy burden on the President, Prime Minister and Chief Justice. The appointment process is one of the most significant safeguards against a runaway judiciary. By choosing objective and impartial people as judges, Singapore can avoid unleashing a tide of rampant activism.

In any case, there is no reason to suppose that if Singapore judges began examining legislation substantively under Art 9(1) they would exercise their power in an uncontrolled manner. In *PP v Mazlan bin Maidun*,¹²³ the Court of Criminal Appeal held that an accused person does not have a constitutional right to be informed of his privilege against self-incrimination since it is not a fundamental rule of natural justice under Art 9(1). “To say that the right of silence is a constitutional right would be to elevate an evidential rule to constitutional status despite its having been given no explicit expression in the Constitution. Such an elevation requires in the interpretation of Art 9(1) a degree of adventurous extrapolation which we do not consider justified.”¹²⁴ This approach is excessively cautious, but it shows that our judges are not likely to embark on a frolic of invalidating legislation without very good reasons.

Applying moderate textualism, how should *Loh Wai Kong* have been interpreted by the Supreme Court of Malaysia? It is submitted that the court should have recognised a right to freedom of movement as an aspect of personal liberty in Art 9(1), but

¹²³ [1993] 1 SLR 512. The decision is criticised in Michael Hor, “The Privilege Against Self-incrimination and Fairness to the Accused: *PP v Mazlan bin Maidun*” [1993] SJLS 35.

¹²⁴ *Ibid* at 516D.

found that it was reasonable for this right to be restricted by law in this case. The defendant had criminal charges pending against him, so it was eminently rational for the government to prevent him from fleeing the jurisdiction by refusing to issue him a passport.¹²⁵

IV. CONCLUSION

1995 marks the 30th anniversary of the fundamental liberties' existence in our Constitution. But today a large stumbling block lies in the way of a broader interpretation of the fundamental liberties in our Constitution: individual rights have never been more unpopular. This is due in large part to the government's reluctance to promote them for fear of overwhelming societal interests. In the recent White Paper entitled *Shared Values*,¹²⁶ the government stated:

A major difference between Asian and Western values is the balance each strikes between the individual and the community. The difference is not so stark as black and white, but one of degree. On the whole, Asian societies emphasise the interests

¹²⁵ *Loh Wai Kong*, although technically not binding on Singapore courts, is nevertheless extremely persuasive because Malaysia's Art 5(1) and our Art 9(1) are identical. *Chen Hsin Hsiang v Guardian Royal Exchange Assurance* [1994] 2 SLR 92 at 98E, suggests that s 9A(1) of the Interpretation Act is not to be used to depart from what would otherwise have been regarded as binding authority: "Section 9A(1) was enacted to assist in the interpretation of statutes; it was not enacted to change the law as it existed at the date that provision was passed." It is submitted that this cannot be right. If examination of the purpose or object of a statute reveals that it has been inaccurately construed in the past, surely the court should depart from its previous decision either under the *per incuriam* principle or, in the case of the Court of Appeal, under its inherent power to overrule itself.

¹²⁶ Cmd 1 of 1991, at 5 paras 24, 26. For an interesting criticism of the White Paper, see Yash Ghai, "Asian Perspectives on Human Rights" (1993) 23 HKLJ 342.

of the community, while Western societies stress the rights of the individual. ... Singapore is an Asian society. It has always weighted group interests more heavily than individual ones.

Emphasizing the group over the individual is not in itself objectionable. It merely means that Singapore has chosen to strike a different balance. But there is supposed to be a *balance* of interests, not the suppression of one in favour of the other. The Canadian case *R v Morgentaler*¹²⁷ reminds us that “[a]n individual is not a totally independent entity disconnected from the society in which he or she lives. Neither, however, is the individual a mere cog in an impersonal machine in which his or her values, goals and aspirations are subordinated to those of the collectivity. The individual is a bit of both.”

The Constitution strives towards this ideal. It balances the clamour of the majority against the individual’s small voice. When executive and legislative power unjustifiably encroaches on fundamental liberties, it is curtailed by the courts through judicial review. At the same time, the Constitution limits judicial competence by allowing executive and legislative action to derogate from fundamental liberties in specified circumstances. By maintaining this tension we achieve the Constitution’s objectives. It is, therefore, crucial that the judiciary not unduly fetter itself through narrow interpretations of the Constitution. This is illustrated by Art 9(1). The courts should embrace moderate textualism; they should interpret “personal liberty” as widely as the words suggest and rediscover their power to test the substantive content of written law against this Article.

Asserts the White Paper: “The concept of government by honourable men... who have a duty to do right for the people, and who have the trust and respect of the population, fits us better than the Western idea that a government should be given as limited powers as possible, and should always be treated with

¹²⁷ [1988] 1 SCR 30 (SC, Canada).

suspicion unless proven otherwise.”¹²⁸ Yet the principle of limited government is what underlies our Constitution. And rightly so, it is submitted, for the Constitution is designed to work in bad times as well as good. Government by honourable men and women should always be our aim. But in times of turmoil our fundamental liberties might be all that stand between us as individuals and the tyranny of a future government gone wrong.

APPENDIX

Extrinsic Materials Relating to the Fundamental Liberties in the Singapore Constitution

A. Great Britain

Colonial Office, *Constitutional Proposals for the Federation of Malaya* (Cmnd 210, June 1957) at 18-20 paras 53-61. Also published by the Malaysian Government Printer. Reprinted in Kevin Tan, Yeo Tiong Min & Lee Kiat Seng, *Constitutional Law in Malaysia and Singapore* (1991) 762 at 769-70 (Appendix B).

[A White Paper describing the more important changes in the recommendations of the Reid Constitutional Commission. Pages 3-4 paras 1-5 trace discussions following the issue of the Reid Commission Report.

Concerning fundamental liberties, p 18 para 53 states: “It has been agreed that the Federal Constitution should define and guarantee certain fundamental rights, and it is proposed to accept the principles recommended by the Commission for inclusion in Part II of the Federal Constitution although there have been some changes in drafting.”]

B. Malaya and Malaysia

Straits-Chinese British Association, *Memorandum Submitted*

¹²⁸ *Supra*, n 126 at 8 para 41.

by the Straits-Chinese British Association, Penang, to the Reid Constitutional Commission (4 July 1956) at 6-10 pts 8-9.

[Petition for recognition of fundamental liberties and safeguards for minorities for legislation and executive action: right to petition Constitutional Head of State; freedom of religion; freedom of speech, assembly and association; educational, social, economic and political justice and equality; and equal rights to education. This document is of tangential interest only. However, it shows the concerns of a segment of the population towards fundamental liberties in the Constitution.]

Malaya Constitutional Commission, *Report of the Federation of Malaya Constitutional Commission* (11 February 1957) (Chairman: Lord James Scott Cumberland Reid) ch IX at 70-76 paras 161-76. Reprinted in Tan, Yeo & Lee, *supra*, 708 at 742-46 (Appendix A) with the appendices omitted.

Appendix I: List of those who submitted memoranda

Appendix II: The draft constitution of the Federation of Malaya

Appendix III: The draft constitution of the State of Malacca

Appendix IV: The draft constitution of the State of Penang

Official Report of the Second Legislative Council of the Federation of Malaya for the Period (Second Session) October, 1956 to August, 1957 (1958). Available in the Singapore and Malaysia Collection of the National University of Singapore Central Library, call number J615.5 MLCD; and in the National Library on microfilm numbers 6388 and 6389.

cols 2837-2928 (10 July 1957)

cols 2939-3030 (11 July 1957)

cols 3091-92 (14 August 1957)

[Debates on the Reid Constitutional Commission report. Most of the debates centred around equality and equal protection of the laws with reference to the special position of the Malays; the

right to freedom of religion and Islam as the official religion in Malaysia; the supremacy clause (Art 4) and the original rule of law clause dropped from the final draft of the Constitution; and reasonable restrictions on the fundamental liberties.]

col 3124 (14 August 1957)

cols 3135-79 (15 August 1957)

[The First Reading of the Federal Constitution Bill 1957 was on 14 August 1957. The Second Reading and debates on the Bill were held on 15 August 1957. The Bill was then sent into committee, read a third time, and passed: cols 3178-79.]

Minutes of the Second Legislative Council of the Federation of Malaya With Council Papers for the Period (Second Session) November, 1956 to August, 1957 (1958), available in the Singapore and Malaysia Collection of the National University of Singapore Central Library, call number J615.5 MLCM.

pp A97-A99

pp A105-A106

pp A119

pp A125-A126

[A convenient list of the Members of the Legislative Council who spoke during the debates on the report of the Reid Constitutional Commission and the Federal Constitution Bill 1957, and minutes of procedural aspects of the debates.]

C. Singapore

Report of the Constitutional Commission 1966 (27 August 1966) (Chairman: Wee Chong Jin CJ) ch II at 5-12 paras 20-45. Reprinted in Tan, Yeo & Lee, *supra*, 794 at 796-800 (Appendix D).

Singapore Parliamentary Debates Official Report 1966-67 vol 25
cols 1051-58 (21 December 1966)
cols 1258-63 (14 March 1967)

cols 1276-1326 (15 March 1967)

cols 1329-86 (16 March 1967)

cols 1389-1440 (17 March 1967)

[Parliamentary debates on the Constitutional Commission 1966. Most of the debates centred around the right to property, the need for a Parliamentary ombudsman, and the proposed Council of State (now the Presidential Council of Minority Rights).

Concerning fundamental liberties, Parliament accepted the Commission's recommendations to retain in the Constitution these fundamental liberties derived from the Malaysian Constitution: the right to life and personal liberty; prohibition of slavery and forced labour; retrospective criminal laws and repeated trials; equality of all persons; prohibitions of banishment and freedom of movement; freedom of speech, assembly and association; and freedom of religion.

Parliament also approved the right of the individual not to be subject to torture; the right to elect a government of one's own choice; and the right to apply to court for enforcement of fundamental rights and liberties. To date these rights have not been included in the Constitution. Parliament rejected inclusion of a right to property: see cols 1053-54 and 1440.]