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Protecting Human Rights: The Approach of the Singapore Courts

Jack Tsen-Ta *Lee*¹

The Constitution is the supreme law of Singapore, but have the courts unnecessarily limited their role of upholding the Constitution? This article is based on a speech delivered at an event at the Conrad Centennial Singapore on 4 December 2014 entitled *The Role of the Judiciary in the Promotion and Protection of Human Rights* organized by the Delegation of the European Union to Singapore to commemorate Human Rights Day.

THE SINGAPORE COURTS have been taking an approach that is very deferential to the political branches of the government – the executive and the legislature. This doesn't mean that they are deliberately biased in favour of these branches, for example because they have been induced to do so. It means that there is a judicial attitude of giving the political branches much leeway, assuming that action taken by the executive or legislation passed by Parliament is constitutional unless such acts are completely absurd or arbitrary.

This extremely high standard stems from the courts' view of their role in the constitutional system. I would like to suggest that this view means that the courts have limited their role of upholding the Constitution² unnecessarily.

The Constitution is the supreme law of Singapore. Therefore, any ordinary laws passed by Parliament and actions taken by the executive which are inconsistent with the Constitution are void. It is well established that it is the duty of the courts – the judiciary – to determine whether executive or legislative action is constitutional when people bring constitutional challenges before the courts.

Part IV of the Constitution contains the fundamental liberties, including:

- the rights to life and personal liberty (Article 9(1));
- the rights to equality before the law and equal protection of the law (Article 12(1));
- the right to freedom of speech and expression (Article 14(1)(a)); and
- the right to profess, practise and propagate one's religion (Article 15(1)).

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² Constitution of the Republic of Singapore (1985 Revised Edition, 1999 Reprint).

However, the constitutional text is not the only source of constitutional law. The text is often broadly expressed – note, for example, the concepts of personal liberty and equality. Thus, the Constitution needs to be interpreted to determine what it means and how it applies to different scenarios. Rulings of the courts on this are a vital source of constitutional law.

Deferential approach

It is submitted the courts are currently taking an approach which is highly deferential to the political branches. This is reflected in the ways set out below.

- **Presumption of constitutionality.** The courts will presume that executive or legislative action is constitutional, and it is for the person challenging the action to adduce “material or factual evidence to show that it was enacted arbitrarily or had operated arbitrarily”.³ It is not enough for the applicant to point out ways in which the action is unconstitutional.

This places a very heavy burden on the applicant. It is highly unlikely that there will be direct evidence that the executive intended to create a policy or that Parliament intended to pass a law that violates people’s rights. Clearly Cabinet ministers and MPs are not going to state this openly. Furthermore, how is an applicant going to prove that a policy or law operates unconstitutionally? Does he or she have to spend money to conduct a statistically significant survey of the population?

In any case, is it right to assume that when government policies and laws are drawn up, the political branches would inevitably have examined whether they are in line with the Constitution?

This may be contrasted with the Hong Kong position – once the applicant establishes a prima facie case that there has been unconstitutional action, it is for the Government to show that the action was in fact constitutional.⁴

- **Narrow interpretations of the Constitution.** On occasion, the courts have also interpreted the Constitution very narrowly. Here are two examples.

Article 9(3) of the Constitution says that “[w]here a person is arrested, he... shall be allowed to consult and be defended by a legal practitioner of his choice”. In a 1998 case called *Rajeevan Edakalavan v Public Prosecutor*,⁵ the High Court held that there is no duty on the police to inform an arrested person that he is entitled to consult a lawyer. The Court said that it could not read such words into the Constitution, and that Parliament should amend the Constitution if it felt that arrested persons should have this right. The issue was considered in Parliament in 2010 when the Criminal Procedure Code⁶ was re-

³ *Public Prosecutor v Taw Cheng Kong* [1998] SGCA 37, [1998] 2 SLR(R) [Singapore Law Reports (Reissue)] 489 at p 514, para 80, Court of Appeal (Singapore) ([archived](#) on 13 April 2009).

⁴ See, for example, *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335, Court of Final Appeal (Hong Kong).

⁵ [1998] ICHRL 1, [1998] 1 SLR(R) 10, High Court (Singapore).

⁶ Now the Criminal Procedure Code (Chapter 68, 2012 Revised Edition).

viewed, but the Law Minister said that the Government did not intend to change the position.

Arguably, the Court could have read the right to be told of one's right to counsel as an ancillary right that gives proper effect to the primary right. By taking a narrow interpretation of Article 9(3), the result is that arrested persons who are not knowledgeable about their rights are at a disadvantage to people who are better educated.

More recently, in the case of *Lim Meng Suang v Attorney-General* (2014)⁷ involving section 377A of the Penal Code,⁸ the Court of Appeal held that the right to personal liberty in Article 9(1) only gives one the right not to be unlawfully locked up. It does not give one the freedom to choose how one should act or to live one's life. It is a pity that the Court did not consider cases from other jurisdictions which have taken a broader view of the concept of liberty. I hope that the Court will reconsider this point if the issue arises in the future.

On the other hand, there are indications that the courts may be willing to take a less rigid approach to interpreting the Constitution. In *Yong Vui Kong v Public Prosecutor* (2010),⁹ the Court of Appeal said that 'laws' which are absurd or arbitrary do not deserve to be called laws, and are therefore a violation of Article 9(1). This is very interesting because there is nothing in Article 9(1) which actually states this. However, it is likely that this principle will only be applied in exceptional circumstances.

- **Unwillingness to assess whether acts are reasonable or proportional.** Finally, the courts have been resistant to assessing whether government actions or laws are reasonable or proportional. This was evident from the *Lim Meng Suang* case. One of the reasons why the appellants failed to convince the Court of Appeal that section 377A of the Penal Code violates equality rights was that the Court said it should not independently assess whether it was appropriate for Parliament to enact section 377A as this would be trespassing on Parliament's job.

Part of the problem is how the Constitution is drafted. For example, Article 14(1)(a) says that Singapore citizens have the right to freedom of speech and expression, but Article 14(2)(a) says that Parliament may by law restrict this right on a number of grounds such as public order, morality and protection of reputation. In a 2006 case, *Chee Siok Chin v Minister for Home Affairs*,¹⁰ the High Court said that since Article 14(2)(a) does not expressly state that restrictions on free speech have to be reasonable (unlike, for example, the Indian Constitution), it is not for the Court to assess whether the restriction is appropriate or not.

One difficulty with this approach is that it seems to entitle Parliament to enact laws which restrict free speech too excessively. For example, if Parliament de-

⁷ [2015] 1 SLR 26, Court of Appeal (Singapore).

⁸ Chapter 224, 2008 Revised Edition.

⁹ [2010] SGCA 20, [2010] 3 SLR 489, Court of Appeal (Singapore).

¹⁰ [2005] SGHC 216, [2006] 1 SLR(R) 582, High Court (Singapore).

cided tomorrow that the politicians' reputations are so vital that all defences to defamation such as truth and fair comment should be abolished where statements referring to politicians are concerned, it could be argued that this is constitutional since it is a restriction imposed in the interest of protecting reputation, and the courts are not supposed to consider if the restriction is reasonable or proportional. I'm not saying Parliament is likely to pass such a law, but if the way in which the courts interpret the Constitution can lead to a result like this, I think there is a problem.

In my view, a better approach would be to accept that it is part and parcel of constitutional interpretation for the courts to assess whether restrictions on rights are proportional. In fact, only laws that restrict rights as little as is reasonably possible (the European approach) should be regarded as constitutional.¹¹ A similar approach has been taken by the Malaysian courts – they have read the concept of reasonableness into their version of Article 14, which is worded identically to Singapore's provision.¹²

Rethinking the judiciary's role

As a result of adopting this deferential stance towards constitutional interpretation, the courts have drastically limited their role. It almost seems that unless the executive or legislature goes bonkers in creating a policy or a law, it will not be considered to be unconstitutional.

It seems the courts have adopted this stance because they do not think it is appropriate for them to make decisions on 'controversial' issues. This was particularly evident from the recent *Lim Meng Suang* case, where the Court of Appeal made it clear that it wanted to separate 'law' from 'politics' and declined to consider what it considered to be 'extra-legal' arguments.

However, I think it is unrealistic to try and separate 'law' and 'politics' in this way. Interpretation of fundamental liberties is inherently 'political' in nature. For example, by ruling in *Lim Meng Suang* that section 377A is constitutional, the Court was arguably taking a political position on the matter.

Sometimes, the concept of separation of powers is relied on to take the position that there are some actions by the political branches that the court cannot and should not interfere with. However, the separation of powers cannot mean that each branch operates within its own bubble and that its actions cannot be questioned by anyone. That would lead to tyranny.

Rather, separation of powers includes the concept of checks and balances. Each branch, to a greater or lesser degree, is subject to oversight by the other branches. In the Westminster style system that Singapore adopted from the United Kingdom, because of the overlap of membership of the executive and the legislature, the legislature only checks the executive weakly. (For example, MPs can ask ministers to account to the public by asking them questions in Parliament.) Thus, the judiciary has the crucial role of ensuring that the acts of the political branches are in line with the Constitution. The court is a co-equal and not a subordinate branch of gov-

¹¹ See, for example, Jack Tsen-Ta Lee, "[According to the Spirit and not to the Letter: Proportionality and the Singapore Constitution](#)" (2014) 8(3) *Vienna Journal on International Constitutional Law* 276.

¹² *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] MYCA 71, [2006] 6 MLJ [Malaya Law Journal] 213, Court of Appeal (Malaysia), approved in *Sivarasa Rasiah v Badan Peguam Malaysia* [2009] MYFC 80, [2010] 2 MLJ 333, Federal Court (Malaysia).

ernment. If it acts too deferentially, then arguably there is an insufficient check in place.

I would therefore like to see the judiciary rethinking its role in the constitutional system to better promote and protect human rights. It should recognize that it has the important responsibility of independently checking that the political branches have not infringed the law and the Constitution, and not accept too easily that the political branches have got the balance right, or decline to even consider the matter.

One can see constitutional interpretation as a conversation or dialogue between the political branches and the courts.

- The political branches begin the dialogue by introducing a policy or enacting a law.
- If someone is aggrieved by the action, he or she can challenge its constitutionality before the courts. It is then for the courts to reply to the political branches by deciding if the action is constitutional or not.
- The ball then goes back to the political branches. They can accept the courts' ruling. Or they can seek to overturn it by way of a constitutional amendment (if the issue is important enough, and if the governing party has sufficient support in Parliament to get the amendment passed).

In this way, the courts' rulings stimulate a public discussion on issue, and there is a dialogue between the branches of government which serves to ventilate the issues in the hope of achieving an equilibrium. This will not work well if the dialogue is one-sided.

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