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The Limits of Liberty: The Crime of Male Same-sex Conduct and the Rights to Life and Personal Liberty in Singapore

Lim Meng Suang v Attorney-General [2015] 1 SLR 26

Jack Tsen-Ta Lee*

In *Lim Meng Suang v Attorney-General* (2014), the Singapore Court of Appeal held that s 377A of the Penal Code, which criminalises acts of “gross indecency” between men whether occurring in public or private, does not infringe either the rights to equality and equal protection guaranteed by Art 12(1), or the rights to life and personal liberty guaranteed by Art 9(1) of the Constitution. This article examines the analyses of the latter provision by the Court of Appeal in *Lim Meng Suang*, and by the High Court in *Tan Eng Hong v Attorney-General* (2013) which was one of the two cases brought before the Court of Appeal. It is submitted the courts interpreted Art 9(1) narrowly due to the belief that it is not their role to subject government policies to rigorous constitutional scrutiny for compliance with fundamental liberties, particularly where such policies are seen as dealing with socially controversial issues. However, the time is ripe for the Court to discover afresh its role as a co-equal branch of the government.

1. Introduction

THE SINGAPORE Court of Appeal’s judgment in *Lim Meng Suang v Attorney-General*¹ that s 377A of the Penal Code,² which criminalises acts of “gross indecency” between men whether occurring in public or private, is constitutional. This came as no great surprise to public lawyers. It is in line with a number of other decisions demonstrating the general diffidence of the courts towards constitutional adjudication of government policy.

The saga began with the arrest of two men for engaging in oral sex in a public toilet cubicle of a shopping centre in March 2010. They were both charged with having contravened s 377A, which reads:

Outrages on decency

Any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross

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¹ *Lim Meng Suang and another v Attorney-General and another appeal and another matter* [2015] 1 SLR 26 (CA) [*Lim Meng Suang*].

² Cap 224, 2008 Rev Ed.

indecently with another male person, shall be punished with imprisonment for a term which may extend to 2 years.

This prompted one of the men, Tan Eng Hong, to launch a challenge against the s for, among other things, infringing Articles 9(1) and 12(1) of the Constitution.³ Art 12(1) states that “[a]ll persons are equal before the law and entitled to the equal protection of the law”, while Art 9(1) guarantees the rights to life and personal liberty. As this paper focuses on the latter provision, we will examine its actual wording in due course. Tan’s application was initially struck out by the High Court for lack of standing,⁴ but in August 2012 this decision was overturned on appeal.⁵ This paved the way for a hearing of the substantive issues by the High Court the following year.

In the meantime, in the wake of Tan’s success before the Court of Appeal, a gay couple, Lim Meng Suang and Kenneth Chee Mun-Leon, commenced a separate constitutional challenge to s 377A. This case, which was heard in February 2013 before Tan’s substantive hearing, was argued on the basis that s 377A was inconsistent with Art 12(1) of the Constitution. On 9 April 2013, Justice Quentin Loh issued a judgment rejecting that contention.⁶ The same judge dealt with Tan’s application in March, and also dismissed it in a judgment dated 2 October 2013 entitled *Tan Eng Hong v Attorney-General*.⁷ Lim, Chee and Tan subsequently brought their respective cases to a joint hearing before the Court of Appeal, which upheld the constitutionality of s 377A in its judgment of 28 October 2014.⁸

As I have previously considered the courts’ treatment of Art 12(1),⁹ in this article I turn to an examination of how Art 9(1) was analysed by the High Court in *Tan Eng Hong* and by the Court of Appeal in *Lim Meng Suang*. *Yong Vui Kong v Public Prosecutor* [*Yong Vui Kong* (2015)],¹⁰ a more recent Court of Appeal judgment on the constitutionality of the penal sentence of caning, sheds further light on this issue. It is my thesis that the courts have interpreted Art 9(1) narrowly due to the belief that it is not their role to subject government policies to rigorous constitutional scrutiny for compliance with fundamental liberties, particularly where such policies are seen as dealing with socially controversial issues. I submit that this conception of the courts’ constitutional responsibility may require re-examination.

2. Article 9(1) of the Constitution

Article 9 of the Constitution protects the rights to life and personal liberty in the following terms:

9.— (1) No person shall be deprived of his life or personal liberty save in accordance with law.

(2) Where a complaint is made to the High Court or any Judge thereof that a person is being unlawfully detained, the Court shall inquire into the complaint and, unless

³ Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Rep) [Constitution].

⁴ *Tan Eng Hong v Attorney-General* [2011] 3 SLR 320 (HC).

⁵ *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 (CA) [*Tan Eng Hong* (CA, standing)].

⁶ *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 (HC) [*Lim Meng Suang* (HC)].

⁷ *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 (HC) [*Tan Eng Hong*].

⁸ *Lim Meng Suang* (n 1 above).

⁹ Jack Tsen-Ta Lee, “Equality and Singapore’s First Constitutional Challenges to the Criminalization of Male Homosexual Conduct” (2015) 16 *Asia-Pacific J on Hum Rts and the L* 150.

¹⁰ [2015] 2 SLR 1129 (CA) [*Yong Vui Kong* (2015)].

satisfied that the detention is lawful, shall order him to be produced before the Court and release him.

(3) Where a person is arrested, he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.

(4) Where a person is arrested and not released, he shall, without unreasonable delay, and in any case within 48 hours (excluding the time of any necessary journey), be produced before a Magistrate, in person or by way of video-conferencing link (or other similar technology) in accordance with law, and shall not be further detained in custody without the Magistrate's authority.

(5) Clauses (3) and (4) shall not apply to an enemy alien or to any person arrested for contempt of Parliament pursuant to a warrant issued under the hand of the Speaker.

(6) Nothing in this Art shall invalidate any law —

(a) in force before the commencement of this Constitution which authorises the arrest and detention of any person in the interests of public safety, peace and good order; or

(b) relating to the misuse of drugs or intoxicating substances which authorises the arrest and detention of any person for the purpose of treatment and rehabilitation,

by reason of such law being inconsistent with clauses (3) and (4), and, in particular, nothing in this Art shall affect the validity or operation of any such law before 10th March 1978.

We will focus on Art 9(1) as this was the provision relied on by the applicants in the *Tan Eng Hong* and *Lim Meng Suang* cases, but will have occasion to examine whether Arts 9(2) to 9(4) ought to influence the interpretation of Art 9(1).

A plain reading of Art 9(1) suggests that a person seeking to rely on it must establish two things. First, the impugned executive action or legislation must deprive the person of either “life” or “personal liberty”. As neither of the terms is defined by the Constitution, some judicial explication of their meanings is required. Secondly, the person must show that the deprivation of life or personal liberty has not been achieved “in accordance with law”. This raises the issue of what “law” means in this context.

(a) The Meaning of Life and Personal Liberty

The meaning and scope of the terms “life” and “personal liberty” were not dealt with by the High Court in either the *Lim Meng Suang* or *Tan Eng Hong* cases. Instead, the matter was substantively considered for the first time by the Court of Appeal when counsel for Lim Meng Suang and Kenneth Chee raised a fresh argument: that s 377A infringes Art 9(1) because the phrase “life or personal liberty” in the latter, read purposively, protects a “limited right of privacy”, that is, “a right of personal autonomy allowing a person to enjoy and express affection and love towards another human being”.¹¹

The Court of Appeal disagreed on three grounds. I begin by examining the first and third ground, and then return to the second ground. The first was that “established Singapore jurisprudence” holds that “personal liberty” refers only to the “the personal

¹¹ *Lim Meng Suang* (n 1 above), p 39, para 30.

liberty of a person from unlawful incarceration or detention”. As such, although the Singapore courts had not yet authoritatively interpreted the word “life”, “it should be interpreted narrowly in accordance with the jurisprudence on ‘personal liberty’ and Art 9’s context and structure”.¹² The Court referred to its own prior decision in *Tan Eng Hong* on standing,¹³ in which it had rejected counsel’s argument that Art 9(1) “must extend to all those faculties by which life is enjoyed”, including “privacy, human dignity, individual autonomy and the human need for an intimate personal sphere”.¹⁴ In that case it had cited a statement in the High Court judgment *Lo Pui Sang v Mamata Kapildev Dave*¹⁵ that “the phrase ‘personal liberty’ ... has always been understood to refer only to the personal liberty of the person against unlawful incarceration or detention”.¹⁶

Lo Pui Sang is a puzzling case. Contrary to what the High Court suggested, it was in fact the first case in Singapore that had expressed a view on the meaning of “personal liberty” in Art 9(1). No authority was cited for adopting a narrow interpretation of the term. While mentioning that counsel had relied on decisions of the United States Supreme Court,¹⁷ the Court discussed none of them. This suggests the Court did not find these decisions applicable, but no clear explanation why was forthcoming. US cases have interpreted the term “liberty” in the Fifth and Fourteenth Amendments to the US Constitution¹⁸ broadly. For instance, in *Meyer v Nebraska*¹⁹ the Supreme Court said that the word “liberty”:²⁰

... denotes not merely freedom from bodily restraint but also the right of the individual to contract, to engage in any of the common occupations of life, to acquire useful knowledge, to marry, establish a home and bring up children, to worship God according to the dictates of his own conscience, and generally to enjoy those privileges long recognized at common law as essential to the orderly pursuit of happiness by free men.

Closer to home, in *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah*,²¹ the Malaysian Court of Appeal gave Art 5(1) of the Federal Constitution of Malaysia – which is identical to Art 9(1) of the Singapore Constitution²² – a broad construction,

¹² *Ibid*, p 43, para 45.

¹³ *Tan Eng Hong* (CA, standing) (n 5 above).

¹⁴ *Ibid*, pp 524–525, para 14.

¹⁵ [2008] 4 SLR(R) 754 (HC) (Art 9(1) does not protect a personal liberty to contract). The case was reversed on appeal in *Ng Eng Ghee v Mamata Kapildev Dave* [2009] 3 SLR(R) 109 (CA) but, as was noted in *Tan Eng Hong* (CA, standing), *ibid*, the Court of Appeal did not refer to the Art 9(1) point.

¹⁶ *Lo Pui Sang*, *ibid*, p 760, para 6.

¹⁷ *Ibid*.

¹⁸ The relevant parts of the Fifth Amendment state: “No person shall ... be deprived of life, liberty, or property, without due process of law ...”, while the Fourteenth Amendment, s 1, states: “No State shall ... deprive any person of life, liberty, or property, without due process of law ...”.

¹⁹ 262 US 390 (1923).

²⁰ *Meyer*, *ibid*, p 399. See also *Munn v Illinois* 94 US 113, 142 (1877) (“By the term ‘liberty,’ as used in the provision [the Fourteenth Amendment], 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 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.”); *Allgeyer v Louisiana* 165 US 578, 589 (1897).

²¹ [1998] 3 MLJ 289 (CA, Malaysia).

²² Article 9(1) of the Singapore Constitution was adopted from Art 5(1) of the Malaysian Constitution when Singapore became an independent republic: see the Republic of Singapore Independence Act 1965 (No 9 of 1965, 1985 Rev Ed), s 6(1).

holding that it includes the liberty of a person to apply to court for judicial review.²³ While Malaysia's highest court, the Federal Court, disagreed with the Court of Appeal on this issue,²⁴ in the later case of *Lee Kwan Woh v Public Prosecutor*²⁵ the Federal Court also interpreted "personal liberty" generously, expressing the opinion that the concept "includes other rights" such as the right to "cross the frontiers in order to enter or leave the country when one so desires".²⁶

In similar vein, the US Supreme Court in *Munn v Illinois*²⁷ commented thus on the meaning of "life" in the Fourteenth Amendment:²⁸

By the term "life," as here used, something more is meant than mere animal existence. The inhibition against its deprivation extends to all those limbs and faculties by which life is enjoyed. The provision equally prohibits the mutilation of the body by the amputation of an arm or leg, or the putting out of an eye, or the destruction of any other organ of the body through which the soul communicates with the outer world. The deprivation not only of life, *but of whatever God has given to everyone with life for its growth and enjoyment*, is prohibited by the provision in question if its efficacy be not frittered away by judicial decision.

Munn was cited with approval by the Malaysian Court of Appeal in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan*,²⁹ the Court concluding that "life" in Art 5(1) of the Constitution of Malaysia "does not refer to mere existence" but "incorporates all those facets that are an integral part of life itself and those matters which go to form the quality of life", including "the right to seek and be engaged in lawful and gainful employment and to receive those benefits that our society has to offer to its members", "the right to live in a reasonably healthy and pollution free environment", and "the right to continue in public service subject to removal for good cause by resort to a fair procedure".³⁰ The Federal Court adopted this broad interpretation of "life" in *Lee Kwan Woh*.³¹

At this point, it is appropriate to consider the third reason cited by the Singapore Court of Appeal for reading "personal liberty" narrowly. The Court traced Art 9(1) genealogically, through Art 5(1) of the Malaysian Constitution, back to Art 21 of the Constitution of India which is similar but not identical to the former provision. It states: "No person shall be deprived of his life or personal liberty except according to procedure established by law." The Court inferred that the Indian Constitution's framers had "consciously rejected the wider US formulation 'without due process of law' in the Fifth and Fourteenth Amendments to the US Constitution".³² Since

²³ *Sugumar Balakrishnan* (n 21 above), p 308.

²⁴ See *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72 (FC, Malaysia).

²⁵ [2009] 5 MLJ 301 (FC, Malaysia).

²⁶ *Ibid*, p 314, para 14, citing *Government of Malaysia v Loh Wai Kong* [1978] 2 MLJ 175, 178 (HC, Malaysia).

²⁷ *Munn* (n 19 above).

²⁸ *Ibid*, p 142 (emphasis added).

²⁹ [1996] 1 MLJ 261, 287 (CA, Malaysia).

³⁰ *Ibid*, p 288.

³¹ *Lee Kwan Woh* (n 25 above), p 314, para 14.

³² *Lim Meng Suang* (n 1 above), p 44, para 47. Members of the Constituent Assembly of India were aware that the Constitution's Drafting Committee had chosen the phrase "according to procedure established by law" in Art 21 (then draft Art 15) to avoid the courts having to assess whether statutes were substantively fair, just and reasonable. A number of them supported an amendment to substitute the phrase "without due process of law": "Article 15", *Constituent Assembly Debates, Official Report* (6 December 1948) (New Delhi: Lok Sabha Secretariat, 2003), vol VII, pp 850–857. It would appear that the objections melted away after the Chairman of the Drafting Committee, Dr B R Ambedkar, explained to the Assembly that it was "a case where a man has to sail between

provisions similar to Articles 9(3) and 9(4) of the Singapore Constitution, which give arrested persons the rights to be informed of the grounds of arrest, to be represented by legal counsel, and to be produced before a magistrate within 48 hours of arrest, had been included in Art 22 of the Indian Constitution, in its opinion Art 21 therefore focuses on unlawful detention. The Court saw no indication that the framers “intended to impute an expansive meaning into the phrase ‘life or personal liberty’”.³³

However, we cannot overlook the fact that the Supreme Court of India does not treat the scope of “life or personal liberty” as limited in the manner just described. For instance, in *Samatha v State of Andhra Pradesh*³⁴ it regarded the right to life as embracing a “right to live with human dignity”, which includes “all those rights and aspects of life which would go to make a man’s life complete and worth living”.³⁵ In *Kharak Singh v State of Uttar Pradesh*,³⁶ the Court felt unable to hold that the term “personal liberty” was intended to mean nothing more than “freedom from arrest and detention, from false imprisonment or wrongful confinement”. Rather, “personal liberty” is:³⁷

... a compendious term to include within itself all the varieties of rights which go to make up the “personal liberties” of man other than those dealt with in the several clauses of Art. 19(1). In other words, while Art. 19(1) deals with particular species or attributes of that freedom, “personal liberty” in Art. 21 takes in and comprises the residue.

Put another way, since Art 19 of the Indian Constitution confers on citizens specific rights to free speech, assembly, association and movement; the right to reside in any part of India; and the right to practise any profession or carry on any occupation, trade or business, “personal liberty” in Art 21 refers to all other forms of personal liberty.

The Singapore Court of Appeal downplayed the expansive approach taken by the Supreme Court of India, saying that “[t]his approach must be understood in the context of India’s social and economic conditions”.³⁸ With respect, the Court of Appeal’s rather cursory attempt to distinguish a rich vein of Indian jurisprudence weakens the argument that Art 21 is correctly understood as only addressing unlawful detention, and that its descendant, Art 9(1) of the Singapore Constitution, must therefore be given that interpretation.

The Court’s second reason for its restrictive interpretation of Art 9(1) has been partly alluded to in the discussion of its third reason: that since Articles 9(2) to 9(4)³⁹

Charybdis and Scylla”, a difficult choice between guarding against a legislature “making laws which may abrogate or violate what we regard as certain fundamental principles affecting the life and liberty of an individual”, and trusting judges to determine the constitutionality of laws “by dint of their own individual conscience or their bias or their prejudices”: B R Ambedkar, “Article 15”, *Constituent Assembly Debates, Official Report* (13 December 1948), *ibid*, pp 1000–1001.

³³ *Lim Meng Suang, ibid*, p 44, para 47.

³⁴ AIR 1997 SC 3297, (1997) Supp 2 SCR 305 (SC, India).

³⁵ *Ibid*, Supp 2 SCR 305, 396.

³⁶ AIR 1963 SC 1295, (1964) 1 SCR 332 (SC, India). See also *Satwant Singh Sawhney v D Ramarathnam, Assistant Passport Officer* AIR 1967 SC 1836, (1967) 2 SCR 525 (SC, India); *Maneka Gandhi v Union of India* AIR 1978 SC 597, (1978) 2 SCR 621 (SC, India) (in both cases, the Court held that the right to personal liberty includes the right to travel abroad); *R Rajagopal v State of Tamil Nadu* AIR 1995 SC 264, (1994) 6 SCC 632 (SC, India) (the right to personal liberty includes the right to privacy, which extends to oneself and one’s family, and to matters such as marriage, procreation, motherhood, childbearing and education, among others).

³⁷ *Kharak Singh, ibid*, AIR 1963 SC 1295, 1302; (1964) 1 SCR 332, 347.

³⁸ *Lim Meng Suang* (n 1 above), p 44, para 48.

³⁹ Article 9(2) of the Constitution states: “Where a complaint is made to the High Court or any Judge thereof that a person is being unlawfully detained, the Court shall inquire into the complaint and,

guarantee certain procedural safeguards in relation to arrest and detention, while Articles 9(5) and 9(6) set out exceptions to these safeguards, these provisions condition the scope of Art 9(1) which thus “refers only to a person’s freedom from an unlawful deprivation of life and unlawful detention or incarceration”.⁴⁰

This reading of Art 9(1), though, tends to disregard the rule that a constitution on the Westminster model should not be interpreted like an Act of Parliament but as “*sui generis*, calling for principles of interpretation of its own, suitable to its character”,⁴¹ and that the fundamental liberties in the Singapore Constitution should be given a “generous interpretation” so as to give individuals the full measure of the liberties referred to.⁴² Another, arguably preferable, reading is that Art 9(1) lays down a general principle which is specifically applied to arrested persons by the other clauses of Art 9, which are not intended to circumscribe the scope of clause (1). A comparison between Arts 9 and 12 can be drawn. Article 12(1) states that “[a]ll persons are equal before the law and entitled to the equal protection of the law”, while Art 12(2) prohibits discrimination against Singapore citizens on the ground only of religion, race, descent or place of birth in certain enumerated situations.⁴³ Nonetheless, it was not suggested in *Lim Meng Suang* that Art 12(2) should determine Art 12(1)’s scope such that the latter applies only to citizens, or that it only invalidates executive or legislative acts which discriminate upon one of the four the proscribed grounds indicated in Art 12(2).⁴⁴

Constitutional provisions should generally be accorded a presumption in favour of generous interpretation. As Justice Richard O’Connor put it in *Jumbunna Coal Mine NL v Victorian Coal Miners’ Association*,⁴⁵ “where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should ... always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose”. This is because constitutional provisions are frequently expressed in broad and general terms as they are “intended to apply to the varying conditions which the development of our community must involve”.⁴⁶

As the courts cannot accurately predict what issues are likely to be brought before them for resolution in the future, as a matter of prudence they ought not to interpret constitutional provisions in unduly narrow ways, for this may fetter their discretion. This is arguably what happened in *Yong Vui Kong* (2015),⁴⁷ decided some

unless satisfied that the detention is lawful, shall order him to be produced before the Court and release him.” Articles 9(3) and 9(4) were described in the text accompanying n 33 above.

⁴⁰ *Lim Meng Suang* (n 1 above), pp 43–44, para 46.

⁴¹ *Ong Ah Chuan v Public Prosecutor* [1979–1980] SLR(R) 710, 721, para 23, [1981] AC 648, 670 (PC on appeal from Singapore), citing *Minister of Home Affairs v Fisher* [1980] AC 319, 329 (PC on appeal from Bermuda).

⁴² *Ong Ah Chuan*, *ibid.*

⁴³ Article 12(2) of the Constitution states: “Except as expressly authorised by this Constitution, there shall be no discrimination against citizens of Singapore on the ground only of religion, race, descent or place of birth in any law or in the appointment to any office or employment under a public authority or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.”

⁴⁴ See also Jack Lee Tsen-Ta, “Rediscovering the Constitution” (1995) 16 *Sing L Rev* 157, 190–192.

⁴⁵ (1908) 6 CLR 309 (HC, Australia).

⁴⁶ *Ibid*, pp 367–368. Although the judge was speaking about the construction of words in the Australian Constitution which confer a power on the Commonwealth Parliament, it is submitted that the comments apply to other types of constitutional provisions as well, including those protecting fundamental liberties.

⁴⁷ *Yong Vui Kong* (2015) (n 10 above).

four months after *Lim Meng Suang*. The case involved a constitutional challenge against caning as a punishment for certain criminal offences in Singapore, including the drug trafficking offence which the appellant had been convicted of. He submitted, among other things, that the caning punishment violated Art 9(1) of the Constitution in two ways: it constituted torture; and since he would have to be physically restrained while the punishment was imposed, this was a deprivation of his right to personal liberty.⁴⁸ In response, the Public Prosecutor denied that caning amounted to torture, and also argued that deprivation of personal liberty in Art 9(1) refers only to unlawful incarceration or detention, in line with the Court of Appeal's pronouncements in *Lim Meng Suang*.⁴⁹

The case thus required the Court to reconsider the meaning of "life or personal liberty". The Court delved into history again, tracing Art 9(1) *via* Art 5(1) of the Malaysian Constitution to Art 21 of the Indian Constitution, and this time further back to the due process clauses in the Fifth and Fourteenth Amendments to the US Constitution, which were themselves rooted in Clause 39 of the 1215 version of Magna Carta:⁵⁰

No free man shall be seized or imprisoned, or stripped of his rights or possessions, or outlawed or exiled, or deprived of his standing in any way, nor will we proceed with force against him, or send others to do so, except by the lawful judgment of his equals or by the law of the land.

This was quite apt, of course, as 2015 marked the 800th anniversary of Magna Carta's sealing by King John at Runnymede. The Court said that Clause 39 extended beyond unlawful incarceration to the unlawful seizure of property and unlawful use of force. It noted that William Blackstone, in his *Commentaries*, had regarded the "rights" of the English people as including a "right of personal security" which meant "a person's legal and uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation".⁵¹ In particular:⁵²

Besides those limbs and members that may be necessary to man, in order to defend himself or annoy his enemy, *the rest of his person or body is also entitled by the same natural right to security from the corporal insults of menaces, assaults, beating, and wounding; though such insults amount not to destruction of life or member.*

⁴⁸ *Ibid*, p 1136, para 6(a); and p 1138, para 13.

⁴⁹ *Ibid*, p 1138, para 13. The Public Prosecutor also submitted the physical restraint that caning required was not the primary object of the punishment but incidental to its administration, and so should not be regarded as a deprivation of personal liberty under Art 9(1).

⁵⁰ The Court cited an English translation of Clause 39 of the 1215 Magna Carta on the [British Library's website](http://www.bl.uk/magna-carta/articles/magna-carta-english-translation), available at <http://www.bl.uk/magna-carta/articles/magna-carta-english-translation> (visited 10 February 2015; [archived](https://web.archive.org/web/20150906192804/http://www.bl.uk/magna-carta/articles/magna-carta-english-translation) at <https://web.archive.org/web/20150906192804/http://www.bl.uk/magna-carta/articles/magna-carta-english-translation>): *Yong Vui Kong* (2015), *ibid*, p 1139, para 16. In Magna Carta 1297 (25 Edw I, c 9), the version of Magna Carta that was entered into the statute book, the corresponding provision is Clause 29, which reads: "No Freeman shall be taken or imprisoned, or be disseised of his Freehold, or Liberties, or free Customs, or be outlawed, or exiled, or any other wise destroyed; nor will We not pass upon him, nor condemn him [a variant reading from the *Statutes of the Realm* is 'deal with him'], but by lawful judgment of his Peers, or by the Law of the Land. We will sell to no man, we will not deny or defer to any man either Justice or Right."

⁵¹ William Blackstone, *Commentaries on the Law of England. Book the First*. (Oxford: Clarendon Press, 1765), p 125, cited in *Yong Vui Kong* (2015), *ibid*, p 1140, para 18.

⁵² Blackstone, *ibid*, p 130, cited in *Yong Vui Kong* (2015), *ibid* (original emphasis).

Finding that this understanding of life and liberty had not been altered when the essence of Clause 39 was distilled into the constitutions of the US, India, Malaysia and Singapore, the Court reinterpreted Art 9(1) of the Singapore Constitution as not merely protecting against arbitrary execution or incarceration, but also prohibiting “the unlawful use of force against a person, including by way of amputations, mutilations, assaults, beatings, woundings, etc”, which, according to Blackstone, was a deprivation of “life”. Thus, the caning sentence proposed to be carried out on the appellant would potentially infringe Art 9(1) unless it was “in accordance with law”. However, the ambit of Art 9 does not extend to rights protected by other provisions of the Constitution, such as Art 10 which prohibits slavery and forced labour, and Art 13 which guarantees citizens the rights not to be banished from Singapore and to have freedom of movement and residence within Singapore without unnecessary curtailment; or to potential rights, such as the right to property, that were considered by Parliament and excluded.⁵³

If the Court of Appeal had not defined “life” and “personal liberty” so restrictively in *Lim Meng Suang*, it would have been unnecessary for those terms to be reinterpreted more broadly in *Yong Vui Kong* (2015). It is submitted the Court acted correctly in doing so, though it remains to be seen whether the Court will be inclined to extend the meaning of the terms beyond freedom from unlawful detention and bodily harm. Clause 39 of Magna Carta, relied upon approvingly by the Court, has been understood by some commentators to protect a wide range of rights and liberties. Although William Sharp McKechnie suggested that the “liberties” referred to originally covered “feudal jurisdictions, immunities, and privileges of various sorts”,⁵⁴ Edward Coke in his *Institutes of the Laws of England* saw the term as extending beyond franchises and privileges granted by the king to his subjects. He gave the following example:⁵⁵

[T]he company of the merchant tailors of England, having power by their charter to make ordinances, made an ordinance, that every brother of the same society should put the one half of his clothes to be dressed by some clothworker free of the same company, upon pain to forfeit x. s. &c. and it was adjudged that this ordinance was against law, because it was against the liberty of the subject, for every subject hath freedom to put his clothes to be dressed by whom he will ...

Richard Thomson interpreted “liberties” as including “the natural freedom possessed by the subjects of England”,⁵⁶ and, as was noted in *Yong Vui Kong* (2015), Blackstone himself saw the rights possessed by a free man as including “uninterrupted enjoyment of his life, his limbs, his body, his health, and his reputation”, and a right of free movement.⁵⁷

In *Lim Meng Suang*, the Court of Appeal concluded its analysis of the meaning of “life or personal liberty” in Art 9(1) by commenting that Lim and Chee’s counsel had

⁵³ *Yong Vui Kong* (2015), *ibid*, p 1142, paras 22–23.

⁵⁴ William Sharp McKechnie, *Magna Carta: A Commentary on the Great Charter of King John: With an Historical Introduction* (2nd ed) (Glasgow: James Maclehose and Sons, 1914), p 384.

⁵⁵ Edward Coke, *The Second Part of the Institutes of the Lawes of England: Containing the Exposition of Many Ancient, and Other Statutes* (London: Printed by M[iles] Flesher and R[obert] Young for E[phraim] D[awson], R[ichard] M[eighen], W[illiam] L[ee] and D[aniel] P[akeman], 1642), republished as *The Second Part of the Institutes of the Laws of England: Containing the Exposition of Many Ancient and Other Statutes* (London: W Clarke and Sons, 1817), p 47 (emphasis added).

⁵⁶ Richard Thomson, *An Historical Essay on the Magna Charta of King John* (London: J Major and R Jennings, 1829), p 227.

⁵⁷ Blackstone (n 51 above), p 130, cited in *Yong Vui Kong* (2015) (n 10 above), p 1140, para 18.

conceded that “the *private* law relating to privacy was a *developing* one”. Thus, it was clear that the appellants “cannot obtain by the (constitutional) backdoor what they cannot obtain by the (private law) front door”, and that “such a right ought... to be developed by way of the *private* law on privacy instead”.⁵⁸ It is not immediately obvious why the development of constitutional law should necessarily be constrained by private law. The courts have independent duties to interpret the Constitution and to develop the common law, and there is no imperative connection between the two tasks. The meaning of Art 9(1) does not change just because the courts recognise a tort of privacy – it is trite that since the Constitution is the supreme law of Singapore,⁵⁹ it cannot be altered either by ordinary statutes or by common law rules. Conversely, there is no reason why the courts should not interpret Art 9(1) to protect a right to privacy, regardless of the present state of private law.

The Court then expressed what appears to be its key reason for interpreting Art 9(1) narrowly:⁶⁰

[W]e also observe that the right claimed by Lim and Chee, although of an apparently limited nature, is, in point of fact, not only vague and general, but also contains within itself (contradictorily) the seeds of an *unlimited* right. Put simply, such a right could be interpreted to encompass as well as legalise all manner of subjective expressions of love and affection, which could (in turn) embody content that may be wholly unacceptable from the perspective of broader societal policy.

The Court emphasised that matters of social policy were outside its remit, and ought to be dealt with by Parliament. If judges adopted legal rules and interpretations of the Constitution that allowed them to pronounce on such matters, in the Court’s view they would be acting as a “mini-legislature” – a point it made eight times in the judgment – and thus violate the separation of powers principle.⁶¹

I will consider in due course the appropriate role of the courts in adjudicating cases involving social policy. For now, as I have pointed out above, it is submitted the Court of Appeal should have taken the opportunity to fully assess the meanings of these terms with reference to relevant decisions from other jurisdictions. The Court’s adoption of unduly limited understandings of “life” and “personal liberty” arguably goes against the presumption that the Constitution should be interpreted generously. In fact, by employing terms with such a high level of abstraction in the constitutional text without providing any definitions, Parliament may be seen as intending that the courts should develop the scope of the concepts to deal with situations it could not have foreseen. While a concern exists that this would tempt judges to “conjure rights ... pursuant to their subjective political preferences”,⁶² it is submitted the disquiet may be addressed by applying a suitable legal test weighing various public interests to determine whether the deprivation of life or personal liberty, broadly understood, is “in accordance with law”. It is to this issue that we now turn.

⁵⁸ *Lim Meng Suang* (n 1 above), p 44, para 49 (original emphasis).

⁵⁹ Constitution, Arts 4 and 162.

⁶⁰ *Lim Meng Suang* (n 1 above), pp 44–45, para 49 (original emphasis).

⁶¹ *Ibid*, p 94, para 189. For the Court’s other warnings about becoming a “mini-legislature”, see *ibid*, p 52, para 70; p 54, para 77; p 56, para 82; p 57, para 84; p 61, para 93; p 65, para 101; and p 88, para 173.

⁶² Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Singapore: Academy Publishing, 2012), p 641, para 12.008, and see generally pp 635–644, paras 12.003–12.012.

(b) The Meaning of Save in Accordance with Law

Formal and Procedural Models of Due Process

An applicant seeking to have an executive act or a piece of legislation invalidated for inconsistency with Art 9(1) of the Constitution must not only show that the act or legislation deprives him or her of “life or personal liberty”, but also that the deprivation is not “in accordance with law”. This, in turn, depends on how the courts interpret the word “law”. As Victor Ramraj has pointed out, the courts of various jurisdictions have taken different approaches to what can generally be termed the due process clauses of their respective constitutions, which are broadly analogous to each other.⁶³ We will focus on the approaches adopted by the Singapore courts, particularly in *Tan Eng Hong* and *Lim Meng Suang*.

One approach is what Ramraj terms the “formal model”, which only requires that life or personal liberty be taken away by an ordinary law validly enacted by the legislature to be constitutional.⁶⁴ Statements in some judgments seem to support this model’s application in Singapore. For instance, Ramraj cited *Jabar bin Kadermasthan v Public Prosecutor*,⁶⁵ which raised the question of whether it is constitutional to carry out a sentence of capital punishment on a convicted person who has remained on death row for a number of years. The Court of Appeal stated: “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.”⁶⁶

More recently, in *Lo Pui Sang* the High Court took the view that judgments of the US Supreme Court are unhelpful in interpreting Art 9(1) because of differences in wording between that provision and corresponding provisions of the United States Bill of Rights.⁶⁷ As an example, the judge compared Art 9(1) with s 1 of the Fourteenth Amendment which, it may be recalled, reads in part: “... nor shall any State deprive any person of life, liberty, or property, without due process of law”. Noting that the Singapore Constitution contains no reference to “due process of law”, the Court said that Art 9(1) expressly permits the deprivation of personal liberty if such deprivation is “in accordance with law”, and that phrase “must mean law passed by Parliament”.⁶⁸

The formal model provides scant protection for the rights to life and personal liberty. While it ensures that there is rule *by* law, in the sense that these rights cannot be abrogated unless state agents are duly empowered to do so by properly enacted and publicly promulgated legislation,⁶⁹ such legislation may not satisfy conceptions of the rule *of* law that require compliance with substantive notions of fairness.⁷⁰ Indeed, this model was rejected in 1980 in *Ong Ah Chuan v Public Prosecutor*⁷¹ by the Privy Council when it was Singapore’s final appellate court, a rejection recognised by the High Court in *Tan Eng Hong*.⁷² The Public Prosecutor had argued that since “law” is

⁶³ Victor V[ridar] Ramraj, “Four Models of Due Process” (2004) 2 *Int’l J Const L* 492.

⁶⁴ *Ibid*, p 493.

⁶⁵ [1995] 1 SLR(R) 326 (HC).

⁶⁶ *Ibid*, p 343, para 52: see Ramraj (n 63 above), pp 496–497.

⁶⁷ *Ibid*.

⁶⁸ *Lo Pui Sang* (n 15 above), p 760, para 6.

⁶⁹ Ramraj (n 63 above), p 497.

⁷⁰ See, for example, Jack Tsen-Ta Lee, “Shall the Twain Never Meet? Competing Narratives and Discourses of the Rule of Law in Singapore” [2012] *Sing J Legal Studies* 298, 305–306.

⁷¹ *Ong Ah Chuan* (n 41 above).

⁷² *Tan Eng Hong* (n 7 above), pp 1069–1070, paras 24–25; and p 1072, para 30.

defined by Art 2(1) of the Constitution as including “written law ... which is in operation in Singapore”, and the same provision states that “written law” includes “all Acts and Ordinances ... for the time being in force in Singapore”, deprivation of life or liberty was constitutional if effected pursuant to an Act of Parliament. To the Privy Council, this argument involved “the logical fallacy of *petitio principii*” – it begged the question since unconstitutional statutory provisions would not in fact be “in force”.⁷³ In its view, the concept of “law” refers “to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution”.⁷⁴ The apparent temporal limitation on the application of such rules was lifted in a judgment the following year, *Haw Tua Tau v Public Prosecutor*,⁷⁵ the Privy Council stating that “what may properly be regarded by lawyers as rules of natural justice change with the times”.⁷⁶

Ramraj notes that what the Privy Council had in mind was a “procedural model” of due process,⁷⁷ one that “demands that the court go beyond a mere assessment of formal validity and inquire into ... procedural fairness”.⁷⁸ Indeed, in *Yong Vui Kong v Public Prosecutor* [*Yong Vui Kong* (2010)],⁷⁹ a judgment delivered after Ramraj’s article was published, the Court of Appeal clarified that the statement in *Jabar* should not be taken as a definitive interpretation of “law” in Art 9(1), and pointed out that the *Ong Ah Chuan* stance was approved by the Court in *Nguyen Tuong Van v Public Prosecutor*.⁸⁰ In another judgment from the *Yong Vui Kong* line of cases, *Yong Vui Kong v Attorney-General* [*Yong Vui Kong* (2011)],⁸¹ the Court of Appeal reaffirmed the correctness of *Ong Ah Chuan*. It went on to hold that fundamental rules of natural justice are procedural in nature as they are “the same in nature and function” as administrative law rules of natural justice. The only difference between them is that “they operate at different levels of our legal order, one to invalidate legislation on the ground of unconstitutionality, and the other to invalidate administrative decisions on the ground of administrative law principles”.⁸²

A Substantive Model?

Yet, there are indications that the Court has gone beyond viewing Art 9(1) as providing merely procedural protection, to what Ramraj calls the “substantive model” of due process. Under this model, “the limits imposed on the state are not merely procedural but are also substantive ... [The courts] will also ask whether the deprivation of life or liberty is justified by the degree of moral blameworthiness of the defendant.”⁸³ The key decision is *Yong Vui Kong* (2010), though it is slightly self-contradictory. On the one hand, the Court of Appeal seemed to reaffirm the procedural model. Examining *Mithu*

⁷³ *Ong Ah Chuan* (n 41 above), pp 721–722, paras 24–25.

⁷⁴ *Ibid*, p 722, para 26.

⁷⁵ [1981–1982] SLR(R) 133 (PC on appeal from Singapore), cited in *Tan Eng Hong* (n 7 above), p 1073, para 32.

⁷⁶ *Ibid*, p 144, para 26.

⁷⁷ Ramraj (n 63 above), pp 497–498.

⁷⁸ *Ibid*, p 497.

⁷⁹ [2010] 3 SLR 489 (CA) [*Yong Vui Kong* (2010)].

⁸⁰ [2005] 1 SLR(R) 103, 125, para 82 (CA): see *Yong Vui Kong* (2010), *ibid*, pp 500–501, paras 17–19.

⁸¹ [2011] 2 SLR 1189 (CA) [*Yong Vui Kong* (2011)].

⁸² *Ibid*, p 1243, para 105. See generally *ibid*, pp 1240–1244, paras 99–107.

⁸³ Ramraj (n 63 above), p 502.

v State of Punjab,⁸⁴ the Court declined to adopt for Art 9(1) the test applied therein to Art 21 of the Indian Constitution⁸⁵ by the Supreme Court of India, which requires legal procedures to be “fair, just and reasonable”, and not “fanciful, oppressive or arbitrary”.⁸⁶ This was “too vague a test of constitutionality”; it “hinges on the court’s view of the reasonableness of the law in question, and requires the court to intrude into the legislative sphere of Parliament as well as engage in policy making”.⁸⁷

On the other hand, the Court was impressed by certain statements made by Lord Diplock during oral arguments in *Ong Ah Chuan*. His Lordship had asked whether the Public Prosecutor was contending that an Act of Parliament was justified by Art 9(1) “however unfair or absurd or oppressive it may be”. When counsel for the Public Prosecutor said it was unnecessary to rely on that argument, Lord Diplock responded that the court could not accept that as “they will have to deal with the point. They are not disposed to find that article 9(1) justifies all legislation whatever its nature.”⁸⁸ The Court of Appeal concluded from this exchange that the Privy Council had accepted that some types of statutes do not qualify as “law” under Art 9(1). Among such statutes, the Court suggested colourable legislation, that is, purported statutes that are “in effect directed at securing the conviction of particular known individuals”; and “legislation of so absurd or arbitrary a nature that it could not possibly have been contemplated by our constitutional framers as being ‘law’ when they crafted the constitutional provisions protecting fundamental liberties”,⁸⁹ for instance, a statute authorising the use of torture.⁹⁰ The Court of Appeal thus accepted that in some cases it has a duty under Art 9(1) to ensure that legislation complies with due process in a substantive sense.

A submission along these lines was made in the *Tan Eng Hong* and *Lim Meng Suang* cases. In *Tan Eng Hong*, one of the applicant’s arguments was that s 377A is “absurd and entirely arbitrary” and thus “contrary to the fundamental rules of natural justice” since it penalises men with a same-sex orientation, which is “a natural and immutable attribute”.⁹¹ The High Court, noting that *Yong Vui Kong* (2010) was a binding precedent, agreed that “in order for a law to pass muster under the fundamental rules of natural justice, it must not be arbitrary or absurd”.⁹² However, since it had determined for the purpose of Art 12(1) that the legislature had enacted s 377A as it had “deemed the prevalence of grossly indecent acts between males – whether in public or in private – a regrettable state of affairs that was not desirable”, the provision could not be said to be arbitrary.⁹³ Furthermore, the Court held the applicant had not made out the argument that the provision was absurd for targeting a natural and immutable attribute because the latter assertion had not been established on a balance of probabilities, such was the inconclusive nature of the relevant medical and scientific evidence.⁹⁴

⁸⁴ AIR 1983 SC 473, (1983) 2 SCR 690 (SC, India).

⁸⁵ The text of Art 21 of the Indian Constitution was set out above in the section entitled “The Meaning of *Life and Personal Liberty*”.

⁸⁶ *Mithu* (n 84 above), (1983) 2 SCR 690 at 698, citing, among other cases, *Maneka Gandhi* (n 36 above), (1978) 2 SCR 621 at 658.

⁸⁷ *Yong Vui Kong* (2010) (n 79 above), p 527, para 80.

⁸⁸ *Ong Ah Chuan* (n 41 above), [1981] AC 648 at 659 (the oral arguments are not reported in the SLR(R) version of the judgment).

⁸⁹ *Yong Vui Kong* (2010) (n 79 above), p 500, para 16.

⁹⁰ *Ibid*, p 524–525, para 75.

⁹¹ *Tan Eng Hong* (n 7 above), p 1068, para 22.

⁹² *Ibid*, p 1074, para 37.

⁹³ *Ibid*, p 1076, para 40.

⁹⁴ *Ibid*, p 1083, paras 63–64.

Both the applicant and the High Court proceeded on the basis that Art 9(1)'s prohibition of absurd or arbitrary legislation is tied in some way to the concept of fundamental rules of natural justice. The argument might be put thus: natural justice has both procedural and substantive aspects to it, just as there are procedural and substantive aspects of due process in the United States.⁹⁵ However, this point was not canvassed in *Tan Eng Hong* and it is contrary to the Court of Appeal's view in *Yong Vui Kong* (2011) that the fundamental rules are procedural in nature. In *Yong Vui Kong* (2015) the Court regarded as a "mistake" the suggestion that fundamental rules of natural justice contain substantive rights, and rejected the appellant's submission that a prohibition against torture could be given constitutional effect as an aspect of such fundamental rules.⁹⁶

Indeed, when Tan Eng Hong appealed the High Court's judgment to the Court of Appeal in the *Lim Meng Suang* case, he reiterated that s 377A was either absurd or arbitrary but no longer referred to fundamental rules of natural justice.⁹⁷ The Court of Appeal essentially affirmed its earlier pronouncement in *Yong Vui Kong* (2010), but disagreed with Tan's submissions. It held the applicant's assertion that s 377A was arbitrary because it signalled societal disapproval of grossly indecent acts between males was "without any legal substantiation whatsoever". As for the argument that s 377A was absurd "because it criminalised a minority of citizens based on a core aspect of their identity which was either unchangeable or suppressible only at a great personal cost", since it closely resembled Lim and Chee's argument that "personal liberty" in Art 9(1) includes a limited right to privacy and personal autonomy, the rejection of that argument meant that Tan's argument should also be rejected. Like the High Court, in view of the conflicting scientific evidence, the Court of Appeal felt unable to reach a definitive view on the immutability of sexual orientation.⁹⁸

Given the Court of Appeal's recognition that Art 9(1) obliges it to invalidate substantially unjust laws, is the pitching of the standard at absurdity or arbitrariness appropriate? That standard bears more than a passing resemblance to the administrative law irrationality or *Wednesbury* unreasonableness standard.⁹⁹ Yet, in *Lim Meng Suang*, the Court did not regard this as an appropriate standard where a challenge to the constitutionality of a statute was concerned.¹⁰⁰

I have submitted elsewhere that the Court's application of the same standard to Art 12(1) of the Constitution unduly limits its ability to protect the right to equality, and that a proportionality analysis would be more apposite.¹⁰¹ In *Lim Meng Suang*, the Court of Appeal held that a differentiating measure prescribed by legislation will be consistent with Art 12(1) only if: (a) the classification is founded on an intelligible differentia; and (b) the differentia bears a rational relation to the object sought to be achieved by the law in question.¹⁰² Expounding on the standard to be applied to limb (b) of this rational classification test, the High Court indicated that the touchstone is

⁹⁵ For an early discussion of this possibility, see Lee, "Rediscovering the Constitution" (n 44 above), pp 195–206.

⁹⁶ *Yong Vui Kong* (2015) (n 10 above), pp 1155–1157 paras 61–64.

⁹⁷ *Lim Meng Suang* (n 1 above), p 40, para 34.

⁹⁸ *Ibid*, p 45, paras 52–53.

⁹⁹ *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223, 229 (CA); *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, 410 (HL). The latter case was cited with approval in *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525, 563, para 119 (CA).

¹⁰⁰ *Lim Meng Suang* (n 1 above), p 57, para 86.

¹⁰¹ Lee, "Equality" (n 9 above), pp 184–185.

¹⁰² *Lim Meng Suang* (n 1 above), p 48, para 60.

whether the classification is arbitrary.¹⁰³ In addition, it will be presumed that the legislation is constitutional,¹⁰⁴ and it is for the applicant to adduce “compelling or cogent material or factual evidence”¹⁰⁵ showing that the legislation “was enacted arbitrarily or had operated arbitrarily”.¹⁰⁶

In contrast, a proportionality analysis would require the courts to consider whether the impugned statutory provision pursues a legitimate aim, whether there is a rational relation between this legitimate aim and the provision, and whether the provision limits rights no more than is necessary to accomplish the aim.¹⁰⁷ The High Court has, however, on two occasions rejected a proportionality analysis when considering the rights to freedom of speech and assembly respectively guaranteed by Arts 14(1)(a) and 14(1)(b) of the Constitution. Art 14(2) provides that Parliament may impose on those rights restrictions as it considers “necessary or expedient” in the interest of various specified grounds such as national security and public order.¹⁰⁸ When deciding if a certain British case should be followed in assessing the impact of Art 14 rights on the interpretation of particular statutory provisions, in *Chee Siok Chin v Minister for Home Affairs*¹⁰⁹ the Court said that proportionality was:¹¹⁰

... very much a continental European jurisprudential concept imported into English law by virtue of the UK’s treaty obligations. ... Needless to say, the notion of proportionality has never been part of the common law in relation to the judicial review of the exercise of a legislative and/or an administrative power or discretion. Nor has it ever been part of Singapore law.

Subsequently, in *Chee Soon Juan v Public Prosecutor*,¹¹¹ the High Court was invited to consider the Canadian case *Vancouver (City) v Zhang*¹¹² when determining whether the requirement imposed by the Public Entertainments and Meetings Act¹¹³ to obtain a licence before making a public address infringed the appellants’ freedom of expression. Noting that s 1 of the Canadian Charter permits only legislative restrictions that minimally impair rights and freedoms,¹¹⁴ the Court implicitly concluded that a proportionality approach could not be taken in Singapore as “[u]nlike the position in

¹⁰³ *Lim Meng Suang* (HC) (n 6 above), pp 166–167, para 113; see Lee, “Equality” (n 9 above), pp 170–173.

¹⁰⁴ *Lim Meng Suang* (n 1 above), p 31, para 4.

¹⁰⁵ *Lim Meng Suang* (HC) (n 6 above), p 162, para 101.

¹⁰⁶ *Ibid*, p 164, para 105, citing *Public Prosecutor v Taw Cheng Kong* [1988] 2 SLR(R) 489, 514, para 80 (CA); see Lee, “Equality” (n 9 above), pp 179–183.

¹⁰⁷ Compare *Secretary for Justice v Yau Yuk Lung* (2007) 10 HKCFAR 335, 349, para 20 (CFA, Hong Kong), discussed in Lee, *ibid*, pp 177–179.

¹⁰⁸ Based on how Art 14(2)(a) of the Constitution is worded, it would appear that the legislature may restrict the right to free speech on some grounds without the limitations being “necessary or expedient” – the relevant parts of the Article state: “Parliament may by law impose... restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence”.

¹⁰⁹ [2006] 1 SLR(R) 582 (HC).

¹¹⁰ *Ibid*, p 616, para 87.

¹¹¹ [2011] 2 SLR 940 (HC).

¹¹² [2010] BCCA 450 (CA, BC, Canada).

¹¹³ Cap 257, 2011 Rev Ed.

¹¹⁴ *Chee Soon Juan* (n 111 above), p 946, para 9, citing *R v Oakes* [1986] 1 SCR 103 (SC, Canada). s 1 of the Charter states: “The *Canadian Charter of Rights and Freedoms* guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.”

Canada, there is no requirement in Singapore for such restrictions to meet the minimal impairment requirement”.¹¹⁵

Nonetheless, it is arguable that the High Court’s comments in *Chee Siok Chin* were *obiter*,¹¹⁶ and in any case the Court of Appeal has yet to rule authoritatively on the relevance of a proportionality analysis in constitutional adjudication. As proportionality has become widely accepted as the predominant standard for the protection of human rights,¹¹⁷ I venture that it should also be adopted as the legal test for determining the proper balance to be struck between the rights to life and liberty guaranteed by Art 9(1) and other public interests pursued by Parliament in enacting laws impinging on these rights. It does not seem likely, though, that the courts will take up a proportionality approach towards either liberty or equality rights unless they fundamentally reassess their role in judicial review.

3. The Courts’ Role in Constitutional Review

The adoption by the Singapore courts of a proportionality analysis would require them to delve into why the framers of the Constitution chose to regard a particular right set out therein as fundamental, as well as to consider whether Parliament has provided sufficiently convincing reasons why the right should be restricted. The latter exercise would also require the courts to examine applicants’ counterarguments as to why the restrictive legislation fails to achieve its objects, or has a disproportionate impact on rights.

In *Lim Meng Suang*, the Court of Appeal indicated that it would not subject laws to such a level of scrutiny. Holding that s 377A of the Penal Code is not so absurd as to fail to constitute a “law” under Art 9(1) of the Constitution because it criminalises people based on an aspect of their identity that is arguably unchangeable, the Court said the immutability or otherwise of sexual orientation was “precisely one of the *extra-legal* arguments that is *not* within the remit of this court”.¹¹⁸ Subsequently, when considering if s 377A infringed Art 12(1) of the Constitution, the Court had to assess whether a rational relation exists between the characteristics used to define the class of persons impacted by the section, and the object of the section. Again, whether sexual orientation is an immutable trait¹¹⁹ was one of a number of “extra-legal arguments” raised by the appellants which the Court felt were “not arguments that may be appropriately considered by the court and are thus *legally irrelevant*. Put simply, the court is *not the appropriate forum* in which to canvass such arguments; the appropriate forum in this regard is, instead, *the Legislature*.”¹²⁰ These arguments also included the safeguarding of health,¹²¹ and whether it was constitutionally permissible for Parliament to declare illegal same-sex conduct between men on the basis that it was regarded by a majority in society as immoral without establishing that it caused harm.¹²² As regards the latter, the Court noted it was open to the appellants to show

¹¹⁵ *Chee Soon Juan*, *ibid*, pp 946–947, para 9.

¹¹⁶ Jack Tsen-Ta Lee, “According to the Spirit and not to the Letter: Proportionality and the Singapore Constitution” (2014) 8(3) *Vienna J Int’l Const L* 276, 285.

¹¹⁷ Alec Stone Sweet and Jud Mathews, “Proportionality Balancing and Global Constitutionalism” (2008) *Colum J Transnat’l L* 72, 72–73. See generally Lee, “According to the Spirit”, *ibid*.

¹¹⁸ *Lim Meng Suang* (n 1 above), p 45, para 53 (original emphasis).

¹¹⁹ *Ibid*, p 89, para 176.

¹²⁰ *Ibid*, p 83, para 156 (original emphasis).

¹²¹ *Ibid*, p 89, para 177.

¹²² *Ibid*, pp 84–88, paras 162–174.

that “the prevailing societal morality is wrong as it deprives them of their freedom”. However, they would “need to bring to bear a great number of *extra-legal arguments*, which... are uniquely within the purview of *the Legislature*”. These might include, for example, empirical data in the form of surveys “*which this court is not equipped to assess*”.¹²³

In *Yong Vui Kong* (2015), the appellant argued that statutes prescribing caning as a punishment are so irrational or arbitrary that they do not constitute “law” because there was no evidence that the penalty acted as either a specific or general deterrent. Predictably, the Court evinced reluctance to undertake a full examination of the argument, merely stating that it was “plainly without merit” because “it is not the role of the courts to pass judgment on whether a particular type of sentence prescribed by Parliament is justified as a matter of deterrence or otherwise”.¹²⁴

One way courts could try and avoid substantively scrutinising legislation would be to adhere to a strictly procedural model of due process. However, it has been said that the conceptual distinction between procedure and substance is anything but clear. In the Supreme Court of Canada judgment *Re BC Motor Act*,¹²⁵ the provision of the Canadian Charter of Rights and Freedoms at issue was s 7, which states: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” Justice Bertha Wilson expressed “grave doubts that the dichotomy between substance and procedure which may have served a purpose in other areas of the law... should be imported into s 7 of the *Charter*. In many instances the line between substance and procedure is a very narrow one.”¹²⁶ For example, she noted that while a rebuttable presumption of fact can be regarded as procedural in nature because it allocates the burden of proof, it is also substantive as it protects an accused person’s right to be treated as innocent until proved otherwise.¹²⁷

The House of Lords has also ruled in a different context that a distinction between procedure and substance cannot sensibly be maintained. In *Boddington v British Transport Police*,¹²⁸ the question posed was whether a byelaw’s validity can be raised as a defence in criminal proceedings brought for infringement of the byelaw. Previous case law had held the answer to be “yes” if the byelaw was on invalid on its face or patently unreasonable (“substantive invalidity”), but “no” if the byelaw was created through a defective procedure (“procedural invalidity”).¹²⁹ The Lord Chancellor, Lord Irvine of Lairg, said the distinction was contrary to *Anisminic Ltd v Foreign Compensation Commission*,¹³⁰ which had established that “there was just a single category of errors of law, all of which rendered a decision ultra vires. No distinction is to be drawn between a patent (or substantive) error of law or a latent (or procedural) error of law.”¹³¹ Besides, “the distinction between orders which are ‘substantively’ invalid and orders which are ‘procedurally’ invalid is not a practical distinction which is capable of being maintained in a principled way across the broad range of administrative action.”¹³²

¹²³ *Ibid*, p 88, para 173 (original emphasis).

¹²⁴ *Yong Vui Kong* (2015) (n 10 above), pp 1171–1172 paras 100–101.

¹²⁵ [1985] 2 SCR 486 (SC, Canada).

¹²⁶ *Ibid*, p 531. See also *ibid*, pp 498–499 (Lamer J).

¹²⁷ *Ibid*, pp 531–532.

¹²⁸ [1999] 2 AC 143 (HL).

¹²⁹ *Bugg v Director of Public Prosecutions* [1993] QB 473 (Div Ct). See *Boddington, ibid*, p 157.

¹³⁰ [1969] 2 AC 147 (HL).

¹³¹ *Boddington* (n 128 above), p 158.

¹³² *Ibid*, p 159. See also *ibid*, pp 170–171 (Lord Steyn).

Furthermore, even if it were possible to differentiate clearly between procedure and substance, Ramraj has pointed out that there is no normative basis for such a distinction. He asks: “Why should the law be more concerned with fair legal procedures than with moral culpability?” Indeed, by developing common law principles of criminal liability such as the *mens rea* doctrine, courts have essentially asserted that it is within their power and expertise to decide substantive “questions of moral innocence”.¹³³

In any case, the procedural model bird has flown the coop. The Singapore Court of Appeal has unambiguously accepted that it does have a responsibility under Art 9(1) to declare substantially unjust laws void. Yet, if it is inappropriate for the courts to examine so-called “extra-legal arguments”, how are they to ascertain whether laws are in fact absurd or arbitrary? Moreover, if the procedure–substance distinction is illusory, attempts to draw a bright line between rights-limiting laws that are absurd or arbitrary, and those which simply fail to achieve legitimate aims or do so in a manner that disproportionately impacts on rights, suffer from the same objection. To apply Art 9(1) in a principled manner, the courts should determine whether laws have deprived people of life or personal liberty in a disproportionate manner, avoiding the artificial strictures of merely testing for procedural failures on the one hand, and substantive absurdity or arbitrariness on the other.

This would require the courts to reconceptualise their role, to see it as their duty in judicial review cases to ensure that the political branches of government have struck an appropriate balance between protecting fundamental liberties and pursuing other public interests. This ought not to be seen as an incursion into the executive and legislative domains, but as fulfilling the check and balance contemplated by the existence of a bill of rights in the Constitution and the separation of powers doctrine. As Eric Barendt has explained:¹³⁴

[T]he separation of powers should not be explained in terms of a strict distribution of functions between the three branches of government, but in terms of a network of rules and principles which ensure that power is not concentrated in the hands of one branch.

As it cannot be assumed that the political branches are perfect, judicial review exists as a mechanism for errors to be corrected. The courts provide an independent, expert perspective on whether constitutional principles have been complied with. In turn, the political branches act as a check on the judiciary: if they feel strongly that a constitutional ruling is undesirable, they can seek to reverse it by way of a constitutional amendment.

To summarise, in *Lim Meng Suang* the Court of Appeal found that s 377A did not violate Art 9(1) of the Constitution, first by giving the concepts of “life” and “personal liberty” a narrow interpretation that excluded the protection of personal autonomy and privacy. It then affirmed that, in considering whether a statutory provision had deprived an individual of life or personal liberty “in accordance with law”, a substantively unjust provision could not properly be described as a “law” and would thus be inconsistent with Art 9(1). However, the Court adopted a high standard of absurdity or arbitrariness, and declined to consider what it termed “extra-legal arguments” proffered by the appellants to explain why s 377A was oppressive and unfair to them. The Court thus showed that it sees itself as responsible for dealing with the most egregious breaches of the Constitution – perhaps quite unlikely to take place these days – but preferring to defer to the political branches on matters seen as socially

¹³³ Ramraj (n 63 above), p 508.

¹³⁴ Eric Barendt, “Separation of Powers and Constitutional Government” [1995] *Pub L* 599, 608–609.

controversial. I submit, though, that “life” and “personal liberty” should be interpreted generously as befits their status as constitutional concepts, and that the Court should adopt a proportionality analysis to determine whether Parliament has legitimately restricted the rights guaranteed by Art 9(1). The time is ripe for the Court to discover afresh its role as a co-equal branch of the government.
