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Constraint or Restraint? Singapore's Constitution at 50

Jack Tsen-Ta *Lee*[*]

The Singapore Constitution, together with the nation, turns 50 in 2015. This chapter focuses on the Constitution's intended role as a constraint on the exercise of power of the political branches of the government – the executive and the legislature. The judiciary has the responsibility to ensure that the political branches act in accordance with the Constitution, including the fundamental liberties guaranteed to individuals therein. Yet only a handful of applications for judicial review have had some measure of success. In other cases, the courts have shown great restraint in striking down governmental action and legislation as unconstitutional. I explore why there seems to be such reluctance by the judiciary to play a fuller part in assessing whether the political branches have traversed the limits set by the Constitution. The courts appear to have a very modest conception of their role, rather than vindicating individual rights, they seem to find it more appropriate to defer to the prior policy choices of the political branches.

[Page 14→]

THE SINGAPORE CONSTITUTION,[1] together with the nation, turns 50 in 2015. Since independence in 1965, we have seen substantive alterations to the constitutional structure of government which have transformed it beyond the classic Westminster-style system. These include the introduction of non-constituency members of parliament (NCMPs) in 1984,[2] the institution of group representation constituencies (GRCs) and nominated members of parliament (NMPs) in 1988 and 1990 respectively,[3] and the establishment in 1991 of a president directly elected by the people with powers to oversee the nation's past reserves and changes to key appointment holders.[4]

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1 *Constitution of the Republic of Singapore* (1985 Rev. Ed., 1999 Reprint) (henceforth, 'Singapore Constitution'). The text of the Constitution and other legislation may be viewed on the Internet at Singapore Statutes Online *http://statutes.agc.gov.sg*.

2 By the Constitution of the Republic of Singapore (Amendment) Act 1984 (No. 16 of 1984) and the Parliamentary Elections (Amendment) Act 1984 (No. 22 of 1984).

3 Group Representation Constituencies (GRCs) were introduced by the Constitution of the Republic of Singapore (Amendment) Act 1988 (No. 9 of 1988) and the Parliamentary Elections (Amendment) Act 1988 (No. 10 of 1988); and NMPs by the Constitution of the Republic of Singapore (Amendment) Act 1990 (No. 11 of 1990).

4 Introduced by the Constitution of the Republic of Singapore (Amendment) 1991 (No. 5 of 1991).

This chapter, however, focuses on the Constitution's intended role as a constraint on the exercise of power of the political branches of the government – the executive and the legislature. The executive is made up of the president and the cabinet;[5] it is the latter which governs the nation on a day-to-day basis, the president having only formal functions coupled with a limited protective role over the matters mentioned above. As with a number of other Westminster-style legal systems, the cabinet also sets the law-making agenda of the parliament, the main institution in the legislature.[6] The judiciary has the responsibility to ensure that the political branches act in accordance with the Constitution, including the fundamental liberties guaranteed to individuals therein. Yet only a handful of applications for judicial review – the jurisdiction assumed by the court upon a person applying to test the constitutionality of laws or executive decisions[7] – have had some measure of success. In other cases, the courts have shown great restraint in striking down governmental action and legislation as unconstitutional.

In this essay, I explore why this may be the case – why there seems to be such reluctance by the judiciary, a branch of the government co-equal to the executive and legislature, to play a fuller part in assessing whether the political branches have traversed the limits set by the Constitution. The courts appear to have a very **[16→]** modest conception of their role: rather than vindicating individual rights, they seem to find it more appropriate to defer to the prior policy choices of the political branches.

What is the Constitution?

First, we must identify what we mean by 'the Constitution'. Simply explained, a constitution is the fundamental law of a nation. It forms – 'constitutes' – the nation by identifying its organs of state and how they are established; by setting out rules on the functioning of government; and, often, by stating the fundamental values upon which the nation is based, which the government cannot contravene. Where an ordinary law infringes a constitution, it is the latter that prevails. Hence, as Article 4 of the Singapore Constitution itself puts it, the Constitution 'is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void'.[8] Indeed, although the way Article 4 is worded suggests otherwise, in a 2012 case the Court of Appeal, Singapore's highest court, held that laws enacted *before* the Constitution's commencement on 9 August 1965 are also void and of no effect if inconsistent with the Constitution.[9]

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5 Singapore Constitution, Art. 23.

6 The legislature is made up of the president and the parliament, though again the president plays a minor role in the law-making process.

7 There are, in fact, two types of judicial review: constitutional judicial review and judicial review pursuant to administrative law. The latter type requires a court to determine whether an act or decision of a public authority violates rules of administrative law that have been established over time by the courts, such as the rule that irrelevant considerations must not be taken into account, or that the authority has a duty to act fairly. For an overview of administrative law, see Thio Li-ann, 'Law and the Administrative State', in *The Singapore Legal System*, ed. Kevin Y. L. Tan, 2nd edition (Singapore: Singapore University Press, 1999), 160–229; and Kevin Y. L. Tan, *An Introduction to Singapore's Constitution*, 3rd edition (Singapore: Talisman, 2014), 132–46.

8 Singapore Constitution, Art. 162, which is set out in the text accompanying note 32 below.

9 *Tan Eng Hong v. Attorney-General* [2012] 4 S.L.R. [*Singapore Law Reports*] 476, 506, para. 59, Court of Appeal ('C.A.') (Singapore).

The concept that a constitution is supreme law is one thing, but the question of who is to police breaches of the constitution is another. The idea of the political branches of government and their laws being subject to the superior principles set down in a written constitution and enforced by the courts has proved to be popular and has spread round the world. In 2012, the Court of Appeal affirmed that the Republic's legal system 'is based on the supremacy of the Singapore Constitution, with the result that the Singapore courts may declare an Act of the Singapore parliament invalid for inconsistency with the Singapore Constitution and, hence, null and void'.[10]

It would be a mistake to think that a court can always determine whether an ordinary law is constitutional simply by reading the text of the Constitution. The text is the starting point, but may be phrased in such broad terms that it requires interpretation by the court to establish what it means and how it applies to the situation at hand. The bill of rights in Part IV of the Singapore Constitution is a prime example of this. Article 9(1) of the bill of rights says that '[n]o person shall be deprived of his life or personal liberty save in accordance with law', while under Article 12(1) '[a]ll persons are equal before the law and entitled to the equal protection of the law'. What, for example, do *personal liberty* and *equal protection of the law* entail? Despite the wording of Article 12(1), is the government entitled to treat different groups of people unequally if it has a good reason for doing so? The answers to questions of this sort are not immediately evident from the text itself. In fact, the deliberate use of such vague language suggests that the Constitution's framers intended to leave it to the courts to decide the meaning of the text and how it should apply to real-life scenarios.[11] To do so, the courts examine official **[17→]** reports of parliamentary debates to try and ascertain parliament's intention in phrasing the text in a particular way, past judgments that have precedential value, cases from other jurisdictions discussing similar issues, and other relevant materials. Therefore, judgments of the courts explaining the Constitution's meaning are a crucial source of constitutional law, part of the constitution of Singapore (with a small *c*) without which the 'big *C*' Constitution – the 130-page statute entitled *Reprint of the Constitution of the Republic of Singapore* from the government's authorized agent – cannot fully be understood.[12]

I submit that the open-textured nature of some constitutional provisions means the process of giving effect to them cannot be a purely mechanical reading process but is to an extent a creative one. In the face of a taciturn text drafted in general terms, the courts will sometimes be called upon to craft and apply legal doctrines which appropriately balance protection of individual rights on the one hand, and other public interests that militate towards restricting such rights on the other. It is vital to recognize this as a legitimate judicial function, which ought not to be condemned as a usurpation of the political branches' law-making role.

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[10] *Mohammad Faizal bin Sabtu v. Public Prosecutor* [2012] 4 S.L.R. 947, 958, para. 14, C.A. (Singapore). Unconstitutional exercises of power by the Government are also liable to be struck down by the courts: *Chan Hiang Leng Colin v. Public Prosecutor* [1994] 3 S.L.R.(R.) [*Singapore Law Reports* (*Reissue*)] 209, 231, para. 50, High Court ('H.C.') (Singapore).

[11] See, for example, Jack Tsen-Ta Lee, 'The Text through Time', *Statute Law Review* 31 (2010): 232 and 236.

[12] On the distinction between 'small *c*' and 'big *C*' constitutions, see Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Singapore: Academy Publishing, 2012), 65–66, paras. 01.171–173.

The courts' deferential approach to constitutional interpretation

Despite the Singapore courts' own affirmation that they stand as the guardians of the Constitution against encroachment by the executive and legislature, judgments over the decades indicate that the courts generally adopt a deferential posture towards the policy choices of the political branches. This is shown in a number of ways, and what follows is an examination of three manifestations of deference: the tendency of the courts to accept the government's viewpoint on matters, the adoption of narrow interpretations of the Constitution, and the reluctance to consider the proportionality or reasonableness of legislation which restricts constitutional rights. Nevertheless, deference can appear in other ways, such as when a judge presumes that legislation is constitutional unless this is proven otherwise to a stringent standard,[13] or holds that a constitutional claim is not justiciable as it involves a subject such as national security that is deemed to be exclusively within the government's province.[14]

(a) *Acceptance of the government's viewpoint*

From the late 1970s into the 2000s, defamation suits were successfully brought by cabinet ministers, including the prime mMinister, and People's Action Party (PAP) members of parliament against opposition politicians like J. B. Jeyaretnam, Tang Liang Hong and Chee Soon Juan, as well as newspapers and news magazines.[15] While the suits were not brought by the government but by the plaintiffs in their personal capacities, it is not easy for laypersons to appreciate the distinction since the legal actions were essentially commenced to vindicate the plaintiffs' political reputations. Indeed, the courts awarded larger amounts of damages to plaintiffs holding higher political office.[16] In some of these cases, such as *Jeyaretnam Joshua* **[18→]** *Benjamin v. Lee Kuan Yew* (1992),[17] the courts did not accept the argument that the right to freedom of speech and expression guaranteed by Article 14(1)(a) of the Constitution[18] should result in greater protection for speech directed at public figures, on the ground that politicians were entitled like anyone else to protect their reputations.[19]

It has been suggested that the success of ministers and PAP MPs in defamation cases is a symptom of the lack of judicial independence in Singapore.[20] However,

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13 See, for example, *Public Prosecutor v. Taw Cheng Kong* [1998] 2 S.L.R.(R.) 489, 509, para. 60, C.A. (Singapore) ('[T]here is a strong presumption of constitutional validity...'); and *Lim Meng Suang v. Attorney-General* (2014) [2015] 1 S.L.R. 26, 31, para. 4, C.A. (Singapore) ('[T]here is a presumption of constitutionality inasmuch as a court will not lightly find a statute or any provision(s) thereof... unconstitutional...').

14 Compare *Lee Hsien Loong v. Review Publishing Co. Ltd.* [2007] 2 S.L.R.(R.) 453, 484–491, paras. 81–98, H.C. (Singapore).

15 Jack Tsen-Ta Lee, 'Shall the Twain Never Meet? Competing Narratives and Discourses of the Rule of Law in Singapore', *Singapore Journal of Legal Studies* (2012): 313–318.

16 Tey Tsun Hang, 'Inducing a Constructive Press in Singapore: Responsibility over Freedom', *Australian Journal of Asian Law* 10 (2008): 216–217; Thio Li-ann, 'The Virtual and the Real: Article 14, Political Speech and the Calibrated Management of Deliberative Democracy in Singapore', *Singapore Journal of Legal Studies* (2008): 32, especially note 74.

17 [1992] 1 S.L.R.(R.) 791, C.A. (Singapore).

18 Singapore Constitution, Art. 14(1)(a), reads: '[E]very citizen of Singapore has the right to freedom of speech and expression'.

19 *Jeyaretnam* (see note 17), 818, para. 62; see also Thio, 'The Virtual and the Real', 32.

20 For instance, see Nancy Batterman & Eric Schwerz, *Silencing All Critics: Human Rights Violations in Singapore* (New York: Asia Watch Committee, 1989); Beatrice S. Frank *et al.*, *The Decline in the*

direct evidence of executive influence over the judiciary is lacking. Another plausible explanation is the deferential stance adopted by the courts towards the acts and decisions of the executive and legislative branches of government, which is particularly noticeable where constitutional adjudication is concerned.

In the *Jeyaretnam* case, for instance, the Court of Appeal took a strictly traditional view of defamation law. Defamation is a common-law tort, a non-criminal wrong the principles of which have been largely laid down by the courts over the years.[21] Prime Minister Lee Kuan Yew had brought the case over remarks made by opposition politician J. B. Jeyaretnam at a political rally during the 1988 general election. Jeyaretnam's lawyer argued that, in the light of the protection given to free speech and expression by Article 14(1)(a) of the Constitution, defamation law needed to be modified by the court to provide a defence for making statements critical of public officials, since in a democracy it is in the public interest for citizens to speak freely on political matters.[22] Reliance was placed on *New York Times Co. v. Sullivan* (1964)[23] in which the United States Supreme Court held that, in view of the guarantees of freedom of speech and of the press in the First Amendment to the Constitution,[24] criticism of politicians or public officers relating to their official conduct or the performance of their duties is only defamatory if it is proved that the persons making the statements did so maliciously. Furthermore, in *Lingens v. Austria* (1986),[25] the European Court of Human Rights expressed the view that Article 10 of the European Convention on Human Rights[26] gives greater leeway to people to make 'value judgments' about politicians on political issues, compared to factual statements.[27]

However, the Court of Appeal said these two cases were inapplicable to Singapore. For one thing, Article 14 of the Constitution is worded differently from the U.S.'s First Amendment and Article 10 of the European Convention. The relevant portions of Article 14(2)(a) state:

> Parliament may by law impose ... on the rights conferred by clause (1)(a), ... restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence ... .

Reading the provision literally, the Court took the opinion that not only may parliament restrict the right to free speech to provide against defamation, but also Article 14(2)(a) empowers parliament to limit free speech to a greater extent than

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Rule of Law in Singapore and Malaysia: A Report of the Committee on International Human Rights of the Association of the Bar of the City of New York (New York: Association of the Bar of the City of New York, 1990); Francis T. Seow, *To Catch a Tartar: A Dissident in Lee Kuan Yew's Prison* (New Haven, CT: Yale Center for International and Area Studies, 1994); Ross Worthington, 'Between Hermes and Themis: An Empirical Study of the Contemporary Judiciary in Singapore', *Journal of Law and Society* 28 (2001): 490 (criticized in *Attorney-General v. Chee Soon Juan* [2006] 2 S.L.R.(R.) 650, 665, para. 50, H.C. (Singapore)); Francis T. Seow, *Beyond Suspicion?: The Singapore Judiciary* (New Haven, CT: Yale University Southeast Asia Studies, 2006).

21 Some of the principles have been legislatively altered by the Defamation Act (Chapter 75, 2014 revised edition).

22 *Jeyaretnam* (see note 17), 810, para. 43.

23 376 U.S. 254 (1964), Sup. Ct (U.S.).

24 The relevant portion of the First Amendment to the U.S. Constitution states: 'Congress shall make no law ... abridging the freedom of speech, or of the press'.

25 (1986) 8 E.H.R.R. [*European Human Rights Reports*] 407, European Court of Human Rights.

26 Article 10(1) of the European Convention states in part: 'Everyone has the right to freedom of expression. This right shall include freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers. ...'

27 *Jeyaretnam* (see note 17), 809–815, paras. 43–55.

Article 10(2) of the European Convention. The latter entitles state parties to the Convention to subject free expression to 'such formalities, conditions, restrictions **[19→]** or penalties *as are prescribed by law and are necessary in a democratic society*, ... for the protection of the reputation or rights of others', whereas the emphasized phrase does not appear in Article 14(2).[28]

This ruling has far-reaching implications. It may mean that the courts will not find a statute to violate Article 14(1) so long as parliament has enacted it for one of the purposes set out in Article 14(2), regardless of how disproportionate or unnecessary it is. Under such an approach, even a law abolishing all defences for alleged defamation against a government minister – including the truth of the statement – would pass constitutional muster. As we shall see later, the Singapore courts have not always taken such a literal approach. It is certainly not unheard of for a court to uphold the spirit of a constitutional provision rather than its strict letter, particularly since the bill of rights in Part IV of the Constitution should be given 'a generous interpretation ... suitable to give to individuals the full measure of the [fundamental liberties] referred to'.[29] Across the Causeway, for instance, the Malaysian Court of Appeal has treated Article 10(2)(b) of the Federal Constitution, which is worded identically to Singapore's Article 14(2)(b),[30] as mandating that the Parliament may only impose reasonable and proportionate restrictions on the right in question.[31]

In addition, the Court of Appeal in *Jeyaretnam* examined Article 162 of the Constitution, a transitional provision which ensures that laws which existed before Singapore's independence on 9 August 1965 continue to apply to the republic:

> Subject to this Article, all existing laws shall continue in force on and after the commencement of this Constitution and all laws which have not been brought into force by the date of the commencement of this Constitution may, subject as aforesaid, be brought into force on or after its commencement, but *all such laws shall, subject to this Article, be construed as from the commencement of this Constitution with such modifications, adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution*.

The latter half of the provision, italicized above, arguably reinforces the fact that the Constitution is supreme law, and that inconsistent pre-commencement laws must yield to it. Surprisingly, the Court held that, since Article 162 provides for the continued application of pre-commencement laws, the constitutional right to freedom of speech is subject to the common-law tort of defamation rather than the other way around.[32] The position taken by the Court therefore seems to disregard the clear wording of Article 162, and to reverse the usual hierarchy of legal norms according to which constitutional principles are superior to common law rules.

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28 Ibid., pp. 815–816, para. 56.

29 *Ong Ah Chuan v. Public Prosecutor* [1979–1980] S.L.R.(R.) 710, 721, para. 23, Privy Council (on appeal from Singapore).

30 Art. 14 of the Singapore Constitution was imported from the Federal Constitution of Malaysia by the Republic of Singapore Independence Act 1965 (No. 9 of 1965, 1985 Rev. Ed.), s. 6(1), when Singapore became independent in 1965.

31 *Dr Mohd Nasir bin Hashim v. Menteri Dalam Negeri Malaysia* [2006] 6 M.L.J. [*Malayan Law Journal*] 213, 219–220, paras. 7–9, C.A. (Malaysia); approved in *Sivarasa Rasiah v. Badan Peguam Malaysia* [2010] 2 M.L.J. 333, 340, para. 5, Fed. Ct (Malaysia).

32 *Jeyaretnam* (see note 17), 816, para. 59, citing the earlier decision *Jeyaretnam Joshua Benjamin v. Lee Kuan Yew* [1990] 1 S.L.R.(R.) 337, 338–339, para. 5, C.A. (Singapore).

In any case, the Court felt that defamation law as it stands does not require any modification to bring it in line with the Constitution,[33] since the reputations of public officials deserve legal protection as much as the reputations of ordinary people. To support this point it cited three precedents: a nineteenth-century case from the U.K.[34] and two Canadian cases dating to the mid-twentieth century.[35] Regrettably, it did not explain clearly why these cases, which were all decided **[20→]** before human rights principles became legally enforceable in domestic law in those countries, should be relied upon in the face of Article 14(1)(a).

Conspicuous in the *Jeyaretnam* case is the Court of Appeal's stress on the need to protect politicians' reputations by sticking to a traditional conception of the tort of defamation, with virtually no discussion of the value of free speech in a representative democracy and how that might require defamation law to be rebalanced. The Court's deferential stance is illustrated by its endorsement of the following passage mentioned in a footnote in the 8th edition (1981) of *Gatley on Libel and Slander*,[36] which the Court pointed out had been cited approvingly in 1960 by the Supreme Court of Canada in *The Globe and Mail Ltd. v. Boland*.[37] The author of *Gatley* had expressed doubt about the *New York Times v. Sullivan* principle, saying:

> It is, however, submitted that so wide an extension of the privilege would do the public more harm than good. It would tend to deter sensitive and honourable men from seeking public positions of trust and responsibility, and leave them open to others who have no respect for their reputation.

This comment was omitted in the 9th edition (1998) of *Gatley*,[38] suggesting that the new editors of the work no longer regarded it as an apt justification. When the Court of Appeal revisited the issue in *Review Publishing Co. Ltd. v. Lee Hsien Loong* (2009),[39] it did not reconsider this point, and appeared to hew to its earlier view in *Jeyaretnam* that there exists a public interest in protecting politicians' reputations which demands that no allowances be made for promoting free speech. Prime Minister Lee Hsien Loong and Minister Mentor Lee Kuan Yew had sued the publisher of the *Far Eastern Economic Review* for allegedly defamatory statements in an article. The Court found it did not have to determine whether the constitutional right to free speech required defamation law to be modified to include a 'responsible journalism' defence since Article 14(1)(a) only guarantees the fundamental liberty to Singaporean citizens. Nonetheless, it outlined some considerations it deemed relevant if the courts had to

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33 Ibid., 816, para. 57.

34 *Campbell v. Spottiswoode* (1863) 32 L.J. Q.B. [*Law Journal Reports, Queen's Bench, New Series*] 185, 200, High Court (Queen's Bench Division) (England & Wales), cited in *Jeyaretnam*, ibid., 818–819, para. 62.

35 *Tucker v. Douglas* [1950] 2 D.L.R. [*Dominion Law Reports*] 827, 840, C.A. (Saskatchewan, Canada), and *The Globe and Mail Ltd. v. Boland* [1960] S.C.R. [*Supreme Court Reports*] 203, 208, Sup. Ct (Canada), respectively cited in *Jeyaretnam*, ibid., 818–819, para. 62, and 819–820, para. 65.

36 Philip Lewis, 'Qualified Privilege: Duty and Interest' in *Gatley on Libel and Slander*, eighth edition (London: Sweet & Maxwell, 1981), 206, para. 488, note 65, cited in *Jeyaretnam*, ibid., 819, para. 64.

37 Lewis, 'Qualified Privilege', 208, cited in *Boland* (see note 35), note 69: see *Jeyaretnam*, ibid., 819–820, para. 65.

38 'Qualified Privilege at Common Law' in *Gatley on Libel and Slander*, ed. Patrick Milmo and W. V. H. Rogers, ninth edition (London: Sweet & Maxwell, 1998), 353–354, paras. 14.32–33.

39 [2010] 1 S.L.R. 52, C.A. (Singapore).

consider a future case brought by a citizen.[40] Among these were the fact that in Singapore the media is not regarded as a watchdog of the public interest,[41] and that[42]

> [i]n Singapore, there is no place in our political culture for making false defamatory statements which damage the reputation of a person (especially a holder of public office) for the purposes of scoring political points. Our political culture places a heavy emphasis on honesty and integrity in public discourse on matters of public interest, especially those matters which concern the governance of the country.

Though of course the Court was not expressing any concluded view on the matter, it is striking that these 'particularly pertinent'[43] points were justified solely by reference to speeches by members of the government in parliament or made to the press without any mention of other viewpoints from, say, academics and civil **[21→]** society groups. This seems to underline the courts' solicitude for the government's narrative on such issues.

(b) *Narrow interpretations of the Constitution*

The courts' tendency to demonstrate deference to the political branches continued to manifest itself in the 1990s and the early 2000s through rather narrow and literal interpretations of the Constitution.[44] In *Rajeevan Edakalavan v. Public Prosecutor* (1998),[45] the issue confronting the High Court was whether the Constitution requires an arrested person to be informed of his or her right to counsel. Article 9(3) of the Constitution states that '[w]here a person is arrested, he ... shall be allowed to consult and be defended by a legal practitioner of his choice'. Because the provision does not expressly address the issue, this was sufficient for the Court to decline to infer an ancillary right into the constitutional text to give full effect to Article 9(3).[46] The Court reasoned that this was not its role:[47]

> Any proposition to broaden the scope of the rights accorded to the accused should be addressed in the political and legislative arena. The Judiciary, whose duty is to ensure that the intention of Parliament as reflected in the Constitution and other legislation is adhered to, is an inappropriate forum. The Members of Parliament are freely elected by the people of Singapore. They represent the interests of the constituency who entrust them to act fairly, justly and reasonably. The right lies in the people to determine if any law passed by Parliament goes against the principles of justice or otherwise. This right, the people exercise through the ballot box. The Judiciary is in no position to determine if a particular piece of legislation is fair or reasonable as what is fair or reasonable is very subjective. If anybody has the right to decide, it is the people of Singapore. The

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40 Ibid., 175, para. 267. One such opportunity arose in *Lee Hsien Loong v. Roy Ngerng Yi Ling* [2014] SGHC 230, H.C. (Singapore), but the defendant arguably pitched his case too high, effectively contending that the entire law of defamation should be annulled by the court as a violation of his right to free speech. This argument was dismissed by the High Court on the strength of previous decisions such as *Jeyaretnam* (see note 17) and *Review Publishing* (ibid.): see *Lee Hsien Loong*, ibid., paras. 13–25.

41 Ibid., 179–180, para. 277.

42 Ibid., 183, para. 285.

43 Ibid., 177, para. 272.

44 See also Jaclyn Ling-Chien Neo and Yvonne C. L. Lee, 'Constitutional Supremacy: Still a Little Dicey?', in *Evolution of a Revolution: Forty Years of the Singapore Constitution*, ed. Li-ann Thio and Kevin Y. L. Tan (London and New York: Routledge-Cavendish, 2009), 175, 179–181.

45 [1998] 1 S.L.R.(R.) 10, H.C. (Singapore).

46 Ibid., 17–18, para. 19.

47 Ibid., 19, para. 21.

> sensitive issues surrounding the scope of fundamental liberties should be raised through our representatives in Parliament who are the ones chosen by us to address our concerns. This is especially so with regards to matters which concern our well-being in society, of which fundamental liberties are a part.

It is submitted that the Court's approach towards interpreting Article 9(3) was unduly rigid, and the judgment has the undesirable consequence of placing arrested persons who are less schooled at a disadvantage compared to those who know their legal rights. For one thing, there is a common-law rule of evidence that arrested persons enjoy a privilege against self-incrimination or 'right to remain silent'.[48] This has been incorporated into section 22(3) of the Criminal Procedure Code,[49] which provides that a person who is questioned by the police as part of an investigation 'need not say anything that might expose him to a criminal charge, penalty or forfeiture'. One way in which such persons might learn of the rule's existence is if they were informed of it by their lawyers, but as a result of the *Rajeevan* case they may not realize at all that they are entitled to seek legal advice. The potential **[22→]** unfairness is compounded by the Court of Appeal's 2006 ruling that the Code itself also places no positive obligation on the police to inform arrested persons that they may decline to answer questions which may elicit potentially incriminating answers.[50]

Rajeevan may be contrasted with an earlier decision, *Jasbir Singh v. Public Prosecutor* (1994).[51] In this case, the appellant had been arrested by the Central Narcotics Bureau for an alleged drug offence and had only been allowed to see his lawyer two weeks later. He argued that he should have been permitted to consult a lawyer immediately upon his arrest, and in any case before a statement was recorded from him. The Court of Appeal disagreed, holding that he only needed to be accorded his constitutional right to counsel within a reasonable time after arrest,[52] as this would strike a proper balance 'between the arrested person's right to legal advice and the duty of the police to protect the public by carrying out effective investigations'.[53] Article 9(3) of the Constitution does not explicitly state the conclusion reached, and might fairly be read to mean that the right to see a lawyer must be vindicated at the time of arrest. Yet, instead of using the more literal *Rajeevan* approach, in this case the Court found it appropriate to infer an extrinsic principle into the constitutional text. The Court's arrival at a conclusion that facilitates law enforcement investigations therefore illustrates again its deferential stance towards the executive branch.

The decision arguably rests on the dubious assumption that investigations will not be 'effective' unless arrested persons are prevented from seeking legal advice and thus discovering that they actually have a legal right not to incriminate themselves.[54] This assumption was given short shrift by the Law Reform Commission of Australia in a 1975 interim report on criminal investigation,[55] because it did not think that lawyers

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48 *Riedel-de Haen AG v. Liew Keng Pang* [1989] 1 S.L.R.(R.) 417, 422, para. 12, H.C. (Singapore); *Public Prosecutor v. Mazlan bin Maidun* [1992] 3 S.L.R.(R.) 968, 973–975, paras. 13–19, C.A. (Singapore).

49 Cap. 68, 2012 Rev. Ed.

50 *Lim Thian Lai v. Public Prosecutor* [2006] 1 S.L.R.(R.) 319, 326–328, paras. 17–18, C.A. (Singapore).

51 [1994] 1 S.L.R.(R.) 782, C.A. (Singapore).

52 Ibid., 798–800, paras. 44–49, citing *Lee Mau Seng v. Minister for Home Affairs* [1971–1973] S.L.R.(R.) 135, 143, para. 12, H.C. (Singapore).

53 Ibid., p. 799, para. 46.

54 Michael Hor, 'The Right to Consult a Lawyer on Arrest – Part 2', *CLASNews* 4 (1989): 8–9.

55 Law Reform Commission (Australia), *Criminal Investigation: An Interim Report* (Report No. 2) (Canberra: Australian Government Publishing Service, 1975).

will always advise arrested persons to remain silent. In any case, even if lawyers do so, the practice only places ignorant suspects in the same position as suspects who are aware of their right to silence.[56] The reasoning in *Jasbir Singh* also seems to assume that there exists a high risk that lawyers will pervert the course of justice on behalf of their clients.

To date, the Government has not seen fit to alter the law as laid down in the judgments referred to above. In 2010 an extensively revised Criminal Procedure Code was tabled for debate in Parliament. The minister for law said the government would not be amending the Code to require people to be given immediate access to their lawyers upon arrest as '[a]t least, in some cases, the advice given would be "don't cooperate with the Police". ... So, is that in public interest?'[57] In any case, a 'recent police study' showed that 90% of arrested persons are released within 48 hours, and there is in place a monitoring system which ensures that investigations are completed expeditiously so people are not remanded unnecessarily.[58] I interject here to note that it is probably in the remaining 10% of cases where prompt access to a lawyer would be most needed. Ultimately, the Minister expressed the view that the current law 'strikes a balance between the rights of the accused and the public interest in ensuring thorough and objective investigations'.[59] As for the fact that arrested persons have no right to be informed of their right to remain silent, he simply said, 'We do not intend to change this position.'[60]

[23→] The reasons given for the legislative disinclination to reform criminal procedure were tacitly accepted by the Court of Appeal in *James Raj s/o Arokiasamy v. Public Prosecutor* (2014).[61] Given that parliament had opted not to change the law, the Court might have reconsidered whether the time had now come for it to give stronger protection to an arrested person's constitutional right to consult a lawyer. Instead, it reaffirmed its 20-year-old decision in *Jasbir Singh* that the police may deny a person this right for a reasonable period while criminal investigations are underway. Taken together, these Article 9(3) cases underline the fact that the courts found it appropriate to defer to the government's view that permitting people immediate access to lawyers upon arrest would impede criminal investigations. In *Rajeevan* this was achieved by reading the constitutional provision narrowly and literally, whereas in *Jasbir Singh* and *James Raj* the Court of Appeal implied into the provision the unwritten requirement of reasonable time.

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56 Ibid., para. 107. See also *R. v. Lemsatef* [1977] 1 W.L.R. [*Weekly Law Reports*] 812, 816–817, in which the Court of Appeal of England and Wales, interpreting the Judges' Rules (Practice Note (Judge's Rules) [1964] 1 W.L.R. 152), said that 'it is not a good reason for refusing to allow a suspect, under arrest or detention to see his solicitor, that he has not yet made any oral or written admission'.

57 K. Shanmugam (minister for law), speech during the Second Reading of the Criminal Procedure Bill, *Singapore Parliamentary Debates, Official Report* (19 May 2010), vol. 87, cols 559–560.

58 Ibid., col. 559.

59 Ibid.

60 Ibid., col. 558.

61 [2014] 3 S.L.R. 750, 758–760, paras. 29–36, C.A. (Singapore).

(c) *No consideration of proportionality or reasonableness*

One last example of judicial deference suffices. The case of *Chee Siok Chin v. Minister for Home Affairs* (2006)[62] arose from a protest by four people outside the Central Provident Fund Building on 11 August 2005. They were asked to leave by a police officer because they were allegedly causing a public nuisance. Subsequently, three of the protesters applied to the High Court for a declaration that, among other things, their rights to freedom of speech and freedom of assembly guaranteed by Articles 14(1)(a) and (b) of the Constitution had been infringed. In the course of the legal proceedings, the Attorney-General said that the police officer had been justified in requesting the protesters to move away by section 13A or 13B of the Miscellaneous Offences (Public Order and Nuisance) Act,[63] which make it an offence to cause harassment, alarm or distress to anyone.[64] The Court considered if those provisions of the Act were constitutional.

The Court noted Article 14(2) stated that parliament can impose 'restrictions' on the rights to free speech and assembly if it considers that it is 'necessary or expedient in the interest of' various public interests, including public order. It contrasted this provision with Article 19(3) of the Indian Constitution:

> Nothing in sub-clause (b) of the said clause [which guarantees freedom of assembly] shall affect the operation of any existing law in so far as it imposes, or prevents the State from making any law imposing, in the interests of the sovereignty and integrity of India or public order, *reasonable restrictions* on the exercise of the right conferred by the said sub-clause. [My emphasis.]

To the judge, the absence of the word *reasonable* from Singapore's Article 14(2) meant it is not for the Court to assess whether a particular limitation imposed by parliament on free speech and assembly is reasonable or proportionate. The limitation merely needs to fall within one of the permitted grounds mentioned in Article 14(2) such as public order.

[24→] Of course, it is also necessary for the Court to ensure that the limitation is 'necessary or expedient in the interest of' public order. However, this is not a difficult threshold to overcome since the Court held that the phrase *necessary or expedient* confers on Parliament 'an extremely wide discretionary power and remit that permits a multifarious and multifaceted approach towards achieving any of the purposes specified in Art 14(2) of the Constitution'. A 'generous and not pedantic interpretation should be adopted' when deciding if the limitation is imposed in the interest of any of the specified purposes, and '[t]he presumption of legislative constitutionality will not be lightly displaced'.[65] Moreover, since Article 14(2) refers to a limitation being 'in the interest of' rather than for 'the maintenance of' public order, the Court took the view that '[t]his is a much wider legislative remit that allows Parliament to take a prophylactic approach in the maintenance of public order. This necessarily will include laws that are not purely designed or crafted for the immediate or direct maintenance

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62 [2006] 1 S.L.R.(R.) 582, H.C. (Singapore). For a more detailed analysis of this case, see Jack Tsen-Ta Lee, 'According to the Spirit and Not to the Letter: Proportionality and the Singapore Constitution', *Vienna Journal on International Constitutional Law* 8 (2014): 276.

63 Cap. 184, 1997 Rev. Ed. These provisions have been repealed and replaced by the Protection from Harassment Act 2014 (No. 27 of 2014; now Cap. 256A, 2015 Rev. Ed.), ss. 3 and 4.

64 *Chee Siok Chin* (see note 62), 605, para. 59.

65 Ibid., 602–603, para. 49.

of public order.'[66] This interpretive approach seems strange to the eyes of constitutional lawyers used to restrictions on fundamental liberties being strictly interpreted in favour of people arguing against them, rather than generously interpreted in favour of the political branches. The Court of Appeal made this point in *Chng Suan Tze v. Minister for Home Affairs* (1988),[67] holding that since certain sections of the Internal Security Act (ISA)[68] are exceptions to the fundamental liberties guaranteed by Articles 9, 13 and 14 of the Constitution,[69] they 'should therefore be narrowly construed so as to derogate as little as possible from such fundamental liberties'.[70]

Instead of inferring into Article 14(2) the need to assess the reasonableness and proportionality of restrictions on free speech and assembly, which would provide stronger protection for these rights,[71] it is clear that in *Chee Siok Chin* the High Court once again adopted a deferential approach towards constitutional interpretation. It noted that '[f]rom time to time, for the common welfare and good, individual interests have to be subordinated to the wider community's interests.'[72] Unsurprisingly, it concluded that the Act in question had been enacted to preserve public order and was thus a restriction upon the rights to free speech and assembly that Parliament was entitled to impose.

Why the Deference?

(a) *Reversal of a significant judgment*

Ascertaining the reasons for the courts' deferential approach towards constitutional interpretation is far from straightforward. According to some commentators, the courts were chastened by the government's vehement disapproval of *Chng Suan Tze*[73] – which has been termed 'perhaps the single most important constitutional decision in the history of the nation'[74] – and the swift reversal of that case through constitutional and legislative amendments in 1989.[75] A number of people who had

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66 Ibid., p. 603, para. 50.

67 [1988] 2 S.L.R.(R.) 525, C.A. (Singapore).

68 Cap. 143, 1985 Rev. Ed.

69 Singapore Constitution, Art. 149(1), before it was amended in 1989: see the text accompanying notes 82–85 below.

70 *Chng Suan Tze* (see note 67), 551, para. 79, citing *Liew Sai Wah v. Public Prosecutor* [1968–1970] S.L.R.(R.) 8, p. 11, paras. 11–2, P.C. (on appeal from Singapore), and *Ong Ah Chuan* (see note 29), 721, para. 23.

71 Lee, 'According to the Spirit' (see note 62), 300–303.

72 *Chee Siok Chin* (see note 62), 604, para. 53.

73 See, for example, Michael Hor, 'Law and Terror: Singapore Stories and Malaysian Dilemmas', in *Global Anti-terrorism Law and Policy*, ed. Victor V. Ramraj, Michael Hor and Kent Roach (Cambridge: Cambridge University Press, 2005), 285–286 (noting that following the 1989 amendments to the Constitution and ISA, in *Teo Soh Lung v. Minister for Home Affairs* [1990] 1 S.L.R.(R.) 347, C.A. (Singapore) ('*Teo Soh Lung* (C.A.)'), the Court of Appeal beat a 'distinct retreat from the lofty constitutional sentiments of the earlier decision. ... It did seem very much like a strategy of running away to live and fight another day.'). See also Arun K. Thiruvengadam, 'Comparative Law and Constitutional Interpretation in Singapore: Insights from Constitutional Theory', in *Evolution of a Revolution: Forty Years of the Singapore Constitution*, ed. Li-ann Thio and Kevin Y. L. Tan (London and New York: Routledge-Cavendish, 2009), 114–152.

74 Hor, 'Law and Terror', ibid., 281.

75 For a more detailed account of this incident, see Lee, 'Shall the Twain Never Meet?' (see note 15), 307–313.

been detained without trial under the ISA for participation in what is referred to as the 'Marxist conspiracy' challenged the legality of their detentions all the way to **[25→]** the Court of Appeal. Unexpectedly, they succeeded in convincing the Court to release them on a technicality – the detention orders were invalid as the government had not provided sufficient evidence that the president was satisfied that detaining them was necessary to prevent them from acting in a manner prejudicial to national security.[76] The Court went on to make important statements which were *obiter dicta* – not strictly required for the outcome of the case. Disapproving of earlier case authority,[77] it held that the president possessed an objective rather than a subjective discretion under the ISA, which had to be exercised on the cabinet's advice. Hence, the courts had a duty to determine whether the discretion had been properly exercised, and could not simply take the government's word on the matter.[78]

In arriving at this conclusion the Court of Appeal found, among other things, that the subjective test violated the Constitution. This test would lead to arbitrariness – while some people might be detained for sound reasons, others might not be – and this infringed Article 12(1) of the Constitution which guarantees to all persons the right to equality before the law and equal protection of the law. Moreover, because the test blocked the courts from assessing decisions made under the ISA, it contravened Article 93 which vests judicial power in the courts. The Court commented:[79]

> [I]f the discretion is not subject to review by a court of law, then, in our judgment, that discretion would be in actual fact as arbitrary as if the provisions themselves do not restrict the discretion to any purpose and to suggest otherwise would in our view be naive.

On the other hand, the objective test was consistent with both of the constitutional provisions.[80]

The detainees were released pursuant to the Court of Appeal's ruling, but their freedom was short-lived. Upon leaving the detention centre, they were served with fresh detention orders that no longer suffered from the technical problem which had affected the earlier ones.[81] The detainees petitioned the court again, but within days the government had introduced bills into parliament seeking to amend the Constitution and the ISA. The bills were debated in parliament just shy of six weeks later on 25 January 1989 and passed the same day on the strength of the PAP's parliamentary majority. The constitutional amendments took effect on 27 January and the ISA amendments on 30 January 1989.[82] They reinstated the subjective test for the

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76 *Chng Suan Tze* (see note 67), 538–542, paras. 31–42.

77 *Lee Mau Seng* (see note 52).

78 *Chng Suan Tze* (see note 67), 549, para. 70, and 569, para. 139(f).

79 Ibid., 552, para. 82.

80 Ibid., 554, para. 86.

81 The experience of one of the detainees is set out in *Teo Soh Lung v. Minister for Home Affairs* [1989] 1 S.L.R.(R.) 461, 465, para. 4, H.C. (Singapore) ('*Teo Soh Lung* (H.C.)'), and her personal recollection of the events in Teo Soh Lung, *Beyond the Blue Gate: Recollections of a Political Prisoner* (Petaling Jaya, Selangor, Malaysia: Strategic Information and Research Development Centre, 2010), 184–189.

82 The amendments were effected through the Constitution of the Republic of Singapore (Amendment) Act 1989 (No. 1 of 1989) (an amendment to Art. 94(3) dealing with the appointment of judges was deemed to have come into effect on 19 November 1971), and the Internal Security (Amendment) Act 1989 (No. 2 of 1989).

exercise of discretion under the ISA;[83] made it impossible to challenge detentions on the ground of incompatibility with Articles 12 and 93;[84] and operated retrospectively,[85] which meant that they applied to the detainees' applications that were pending before the courts. Subsequent court judgments confirmed that the amendments were effective in immunizing ISA detentions from judicial challenge.[86]

It is impossible to state with certainty whether Parliament's nullification of *Chng Suan Tze* has any lingering effect on the courts, but at the very least the incident **[26→]** must make judges aware that constitutional rulings disfavoured by the Government can be reversed without much difficulty. The PAP has formed the government since 1959, and has maintained large majorities of the seats in Parliament in successive decades. As at the time of writing it held 79 out of 87, or almost 91 per cent, of the elected seats.[87] A system of strong party discipline exists, enforced by a constitutional stipulation to the effect that if members of parliament were elected on a particular political party's ticket, they lose their seats if they cease to be members of, or are expelled or resign from, that party.[88] Thus, disgruntled MPs are deterred from 'crossing the floor' to join opposition parties or become independents. This ability to ensure that its MPs toe the party line means the PAP has a firm grasp of parliament's legislative agenda, including amending most parts of the Constitution [89] without difficulty as the party possesses much more than the two-thirds majority of all the elected MPs needed to vote for such changes.[90]

(b) *The judicial appointment process, and the emphasis on communitarian interests, consensus, and strong government*

The deference shown by the courts may also have something to do with the process for appointing judges. No independent judicial appointments panel is involved; rather, following the old British tradition (since altered),[91] the prime minister nominates a

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83 ISA (see note 68), s. 8B(1).

84 Singapore Constitution, Arts 149(1) and (3). At the time *Chng Suan Tze* was decided by the Court of Appeal, Art. 149(1) already prevented ISA detentions from being challenged under Arts 9, 13 and 14.

85 ISA (see note 68), s. 8D; Singapore Constitution, ibid., Art. 149(3).

86 *Teo Soh Lung* (H.C.) (see note 81); *Cheng Vincent v. Minister for Home Affairs* [1990] 1 S.L.R.(R.) 38, H.C. (Singapore); *Teo Soh Lung* (C.A.) (see note 73).

87 The PAP held 80 out of the 87 elected seats until the death of former Prime Minister Lee Kuan Yew on 23 March 2015. The remaining seven elected seats are held by members of the Workers' Party of Singapore. Of the non-elected seats, two are currently occupied by non-constituency members of parliament (NCMPs), and nine by nominated members of parliament (NMPs).

88 Singapore Constitution, Art. 46(2)(b).

89 Singapore's sovereignty as an independent nation cannot be surrendered or transferred, nor control over her armed forces or police force relinquished, except with the support of not less than two-thirds of the electorate expressed at a national referendum: Singapore Constitution, Art. 6. The same procedure must be followed to amend Pt III of the Constitution in which this provision appears: ibid., Art. 8.

90 Save for Pt III of the Constitution, Articles of the Constitution can be amended if supported on the Second and Third Readings of a constitutional amendment bill by the votes of not less than two-thirds of all the elected MPs: Singapore Constitution, Art. 5(2). NCMPs and NMPs may not vote, among other things, to amend the Constitution, though they are permitted to take part in the parliamentary debates: ibid., Art. 39(2)(a).

91 Constitutional Reform Act 2005 (chapter 4) (U.K.), especially Pts 3–5. For commentary, see Kate Malleson, 'Creating a Judicial Appointments Commission: Which Model Works Best?', *Public Law*

candidate for the post of chief justice to the president. Since the establishment of the elected presidency, though, the president has exercised personal discretion to veto the nomination if he thinks fit.[92] The president must consult the Council of Presidential Advisers before reaching a decision,[93] and if he decides to exercise his veto contrary to the Council's recommendation, parliament may override the veto on a vote of not less than two-thirds of the total number of elected MPs.[94] A similar procedure applies for the appointment of other Supreme Court judges, except that the prime minister is required to consult the chief justice before nominating candidates to the president.[95] So far, no president has seen any need to exercise a veto. As judicial appointments are thus driven by the government, we would expect it to nominate candidates who share its belief in the importance of strong government and who are generally willing to give it the benefit of doubt.[96]

Over the years, the government has had a tendency to downplay of the importance of individual rights and valorize communitarian interests. Its assertion that constitutional niceties cannot be allowed to hinder it from acting in what it perceives to be the nation's best interests may have had a somewhat inhibitive effect on the courts.

In the *Shared Values* white paper issued by the government in 1991[97] it identified 'Nation before community and society above self' as one of the five values that should form the basis for developing shared values among Singaporeans,[98] and commented:[99]

> **[27→]** Singapore is an Asian society. It has always weighted group interests more heavily than individual ones. This balance has strengthened social cohesion, and enabled Singaporeans to pull together to surmount difficult challenges collectively, more successfully than other societies. An emphasis on the community has been a key survival value for Singapore. We should preserve and strengthen it.

Another core value was 'Consensus instead of contention',[100] and of this the white paper said that

> [r]esolving issues through consensus instead of contention complements the idea of putting society before self. It means accommodating different views of the way the society should develop, and working hard to develop a consensus on particular courses of action which have majority but not unanimous support, in order to bring as many people on board as possible.[101]

It was not suggested that people should thereby refrain from insisting on their individual rights, and indeed the Government noted that

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(2004): 102–121; Diana Woodhouse, 'The Constitutional Reform Act 2005 – Defending Judicial Independence the English Way', *International Journal of Constitutional Law* 5 (2007): 153–165.

92 Singapore Constitution, Arts 22(1)(a) and 95(1).

93 Ibid., Art. 21(3).

94 Ibid., Art. 22(2).

95 Ibid., Art. 95(2).

96 Lee, 'According to the Spirit' (see note 62), 282.

97 *Shared Values* (Cmd 1 of 1991).

98 Ibid., 10, para. 52.

99 Ibid., 5, para. 26.

100 Ibid., 10, para. 52.

101 Ibid., 4, para. 14.

> [w]hile stressing communitarianism, we must remember that in Singapore society the individual also has rights which should be respected, and not lightly encroached upon. The Shared Values should make it clear that we are seeking a balance between the community and the individual, not promoting one to the exclusion of the other.

Thus, 'Regard and community support for the individual' was made another core value.[102] However, the emphasis on consensus-seeking may have had the effect of discouraging the vindication of individual freedoms and rights against acts and decisions of the Government, especially in the light of the assertion that:[103]

> The concept of government by honourable men '君子' (*junzi*), 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 suspicion unless proven otherwise.

This Confucian concept tends towards being antithetical to judicial review as it calls on people and the courts to assume that the government is acting rightly and should be given the benefit of the doubt. The statement also implies that it is in Singapore's interest to have a strong government that is generally free to pursue policies unfettered by constitutional restrictions. Indeed, one scholar has noted in *Chee Siok Chin* the High Court's apparent elevation of 'non-constitutional interests'[104] such as the 'general right to be protected from insults, abuse or harassment' over the rights to free speech and assembly guaranteed by Article 14, on the ground that '[c]ontempt for the rights of others constitutes the foundation for public **[28→]** nuisance'.[105] In effect, the government's policy of maintaining public order through the Miscellaneous Offences (Public Order and Nuisance) Act was given greater weight than Article 14. There is a risk that the provision has become a mere 'defeasible interest … which can be overcome by other non-constitutional interests, leaving a right devoid of meaningful content and ineffective in restraining state power'.[106]

The upshot of the judiciary's deferential stance is that since 1965 the courts have only disagreed with the government's reading of the Constitution on three occasions. The first of these was *Chng Suan Tze*, and we have already seen how the judgment's effect was legislatively reversed. In a 1998 case, *Taw Cheng Kong v. Public Prosecutor*,[107] the appellant succeeded in convincing the High Court that a provision of the Prevention of Corruption Act[108] violated his right to equal protection, but the ruling was overturned by the Court of Appeal upon a criminal reference brought by the public prosecutor.[109] Finally, in *Vellama d/o Marie Muthu v. Attorney-General* (2013),[110] the Court of Appeal held that the prime minister, by stating he was not legally obliged to hold a by-election in a single member constituency in which a parliamentary vacancy had arisen, had incorrectly interpreted Article 49(1) of the

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102 Ibid., 6, para. 30.

103 Ibid., 8, para. 41.

104 Li-ann Thio, 'Protecting Rights', in *Evolution of a Revolution: Forty Years of the Singapore Constitution*, ed. Li-ann Thio and Kevin Y. L. Tan (London and New York: Routledge-Cavendish, 2009), 228.

105 *Chee Siok Chin* (see note 62), 632, para. 136.

106 Thio, 'Protecting Rights' (see note 104), 227–228.

107 [1998] 1 S.L.R.(R.) 78, H.C. (Singapore).

108 Cap. 241, 1993 Rev. Ed.

109 See note 13.

110 [2013] 4 S.L.R. 1, C.A. (Singapore).

Constitution.[111] Despite these remarks being made on an *obiter* basis, the judgment was a triumph for the applicant, though somewhat dampened by the fact that, according to the Court, the prime minister only has to hold a by-election within a reasonable period as the Article lays down no timeframe for the event.[112] Furthermore, whether a reasonable period has elapsed since a parliamentary seat has fallen vacant 'is in the nature of such a fact sensitive discretion that judicial intervention would only be warranted in exceptional cases'.[113] The discretion remains firmly in the prime minister's grasp.

Over the years, there have no doubt been constitutional claims that lacked merit and were rightly dismissed. However, the overall lack of success of such cases lends, it is submitted, some credence to the conclusion that it is the courts' deferential methodology that has resulted in the Constitution not significantly constraining acts and decisions by the government.

Constraint or Restraint?

There are indications the judiciary may be beginning to change its mindset, but the signals are mixed. In *Yong Vui Kong v. Public Prosecutor* (2010),[114] the Court of Appeal suggested, again on an *obiter* basis, that it could strike down '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' for non-compliance with Article 9(1) of the Constitution,[115] even though the provision does not explicitly state that the Court may so act. The Court took a similarly non-literal and purposive approach in *Tan Eng Hong v. Attorney-General* (2012) when, as mentioned previously, it interpreted Article 4 of the Constitution to empower the courts to invalidate legislation enacted before 9 August 1965 that is inconsistent with the constitutional text, even though the plain words of Article 4 imply otherwise.[116]

[29→] On the other hand, in *Lim Meng Suang v Attorney-General* (2014),[117] the Court of Appeal applied a constricted interpretation of Article 12 of the Constitution to conclude that section 377A of the Penal Code,[118] which criminalizes both public and private sexual activity between men, does not intrude upon the rights to equality and equal protection. In essence, unless there is an arbitrary or irrational relation between the class of people claiming discrimination by a law and the objective of the law, the Court regards the law as constitutional.[119] Arbitrariness being a very high standard to reach, the test greatly favours the government. Moreover, the Court said it ought not to examine whether the statutory object was itself legitimate,[120] for

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111 Singapore Constitution, Art. 49(1), states: 'Whenever the seat of a Member, not being a non-constituency Member, has become vacant for any reason other than a dissolution of Parliament, the vacancy shall be filled by election in the manner provided by or under any law relating to Parliamentary elections for the time being in force.'

112 Ibid., 35–36, paras. 83–84.

113 Ibid., 37, para. 85.

114 [2010] 3 S.L.R. 489, C.A. (Singapore).

115 Ibid., 500, paras. 16–17.

116 See note 9, 506, para. 59.

117 See note 13.

118 Cap. 224, 2008 Rev. Ed.

119 *Lim Meng Suang* (see note 13), at 51, para. 68.

120 Ibid., 56–57, paras. 82–83.

instance, if it was appropriate for the government to criminalize conduct simply because it regarded the conduct as immoral. On the facts, the Court said there was not only a rational but a '*complete coincidence*' between the group of men targeted by section 377A and the government's aim of suppressing undesirable sexual conduct among males.[121] Characterizing many of the appellants' arguments (such as the absence of harm) as 'extra-legal' and 'appropriate to a *legislative* debate' but 'wholly beyond the remit of the court' and thus irrelevant to the constitutional challenge at hand,[122] the Court said that if it did not stick to what it termed 'legal principles':[123]

> the court will necessarily be sucked into and thereby descend into the *political* arena, which would in turn undermine (or even destroy) the very role which constitutes the *raison d'être* for the court's existence in the first place – namely, to furnish an *independent, neutral and objective* forum for deciding, on the basis of objective legal rules and principles, (*inter alia*) what rights parties have in a given situation.

One must have sympathy for the difficulties the Court faced as it tackled the controversial issues raised by the case. Nonetheless, it seems slightly unrealistic for the Court to have tried to draw a bright line between law and politics. Constitutional adjudication, especially adjudication over fundamental liberties, is inherently and often inescapably political. Yet, by making decisions that have political consequences it is submitted the courts are not acting outside their remit but checking that the political branches have correctly construed the Constitution, properly engaging them in a conversation over what the Constitution should mean for society today. The cabinet and parliament may accept a court ruling that is adverse to their understanding of the Constitution; if they do not, they are entitled to seek a constitutional amendment to reverse the ruling's effect. There is no warrant for the courts to be concerned about their judgments being legislatively overturned. This dialogic process would stimulate public discussion of the matter, and culminate in a democratic decision in parliament as to whether the nation's basic law requires revision.[124]

The judiciary, as a co-equal branch of government with the executive and legislature, has a duty to scrutinize the actions of the political branches for compliance with the Constitution. Since independence, though, there is evidence that it has not significantly constrained the political branches. Rather, it has acted with **[30→]** restraint – perhaps to an unwarranted degree – by, among other things, readily accepting the government's viewpoints on matters, narrow interpretations of the constitutional text, and declining to assess the reasonableness of executive decisions and statutory provisions. It remains to be seen whether the courts will eventually reconceive their role as the Constitution's protectors and as a check and balance on the exercise of political power.

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121 Ibid., 82, para. 153 (original emphasis).

122 Ibid., 33, para. 8 (original emphasis).

123 Ibid., 32, paras. 6–7 (original emphasis).

124 On the concept of constitutional dialogue, see Jack Tsen-Ta Lee, 'Fundamental Constitutional Concepts and the Roles of the Branches of Government', in *The Legal System of Singapore: Institutions, Principles and Practices*, ed. Gary Chan Kok Yew and Jack Tsen-Ta Lee (Singapore: LexisNexis, 2015), 76–84, paras. 2.54–62. See also Po Jen Yap, 'Defending Dialogue', *Public Law* (2012): 527–546.