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Rethinking the Presumption of Constitutionality

Jack Tsen-Ta *Lee*[1]

Singapore courts apply a 'strong presumption of constitutional validity' when considering whether legislative or executive action infringes the Constitution. They have also stated that the related doctrine of *omnia praesumuntur rite esse acta* – all things are presumed to have been done rightly – should be applied to the acts of persons holding high constitutional office such as the President, the Attorney-General, Cabinet members, and judges. The presumption of constitutionality casts a heavy onus on an applicant for judicial review to make arguments or adduce evidence sufficient to require the government to justify the constitutionality of the action. This chapter traces the origin of the presumption and examines whether its application in constitutional cases is justified.

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LEGAL CASES ARE often won or lost on the burden of proof, and constitutional claims are no exception. In Singapore, what makes such claims particularly difficult to succeed in is a doctrine called the presumption of constitutionality. The doctrine surfaced in a 1977 case, *Lee Keng Guan v Public Prosecutor*,[2] involving Article 12(1) of the Constitution[3] which guarantees to all persons the rights to equality before the law and the equal protection of the law. Since then it has been consistently adverted to by the courts, and while it remains closely associated with equality jurisprudence, the courts have made it clear that it applies to all constitutional claims. In addition, another rule expressed in the Latin maxim *omnia praesumuntur rite esse acta* – all things are presumed to have been done rightly – has been regarded as justifying the application of the presumption to acts and decisions of government officials.

In judicial review proceedings, the overall legal burden of establishing the case undoubtedly lies on the claimant. In the United Kingdom and certain other jurisdictions, he or she must raise a prima facie case that the Government has acted unlawfully, whereupon it is for the Government to discharge its evidential burden by

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2 [1977–1978] SLR(R) 78 (Singapore Court of Appeal [Sing CA]) [19].

3 Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ('Singapore Constitution').

proving the contrary. However, in Singapore, the presumption of constitutionality, as it has been explained by the courts, has the effect of imposing an additional and substantial onus on the claimant to produce material or factual evidence to justify the claim before the court will require the Government to respond substantively to it. At the same time, the court assumes the existence of any plausible facts pointing towards the constitutionality of the executive or legislative act being challenged, without requiring the Government to adduce any supporting evidence. In this chapter, I consider whether imposing this onus on claimants is justified.

I. The Presumption of Constitutionality in Singapore

The presumption of constitutionality was first applied in Singapore in cases involving Article 12(1) of the Constitution,[4] which guarantees rights to equality before the law and the equal protection of the law. It was adopted from *Shri Ram Krishna Dalmia v Shri Justice S R Tendolkar*,[5] a decision of the Supreme Court of India interpreting Article 14 of the Indian Constitution[6] which is similar in all **[140→]** material respects to Article 12. The following statement from *Shri Ram Krishna Dalmia*[7] was approved by two cases of the Singapore Court of Appeal, *Lee Keng Guan*[8] (referred to earlier) and *Public Prosecutor v Taw Cheng Kong*:[9]

> [T]here is always a presumption in favour of the constitutionality of an enactment and this burden is upon him who attacks it to show that there has been a clear transgression...

In *Taw Cheng Kong*, the Court of Appeal characterised the presumption as a "strong presumption of constitutional validity",[10] even though the adjective *strong* does not appear in the Indian judgment. It neither explained what it regarded as the difference between a strong and an ordinary presumption, nor why a strong presumption applied in that case instead of an ordinary one. The subsequent case of *Lim Meng Suang v Attorney-General*[11] may shed some light on the matter, although the Court of Appeal did not say it was explaining its statement in *Taw Cheng Kong*. The Court noted that the strength of the presumption is not monolithic, but may vary according to the circumstances of each case.[12] The presumption does not, for instance, apply as strongly to laws pre-dating the commencement of the independent Republic of Singapore's Constitution on 9 August 1965 because many of such laws

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4 ibid Art 12(1), which states, 'All persons are equal before the law and entitled to the equal protection of the law.'

5 AIR 1958 SC 538, [1959] SCR 279 (India Supreme Court [India SC]).

6 Constitution of India, 1950 Art 14 states, 'The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.'

7 *Shri Ram Krishna Dalmia* (n 5) 297.

8 *Lee Keng Guan* (n 2).

9 [1998] 2 SLR(R) 489 (Sing CA) [79] ('*Taw Cheng Kong* (CA)'). *Taw Cheng Kong* (CA) has been cited in *Ng Chye Huay v Public Prosecutor* [2006] 1 SLR(R) 157 (Singapore High Court [Sing HC]) [37]; *Johari bin Kanadi v Public Prosecutor* [2008] 3 SLR(R) 422 (Sing HC) [10]; *Ramalingam Ravinthran v Public Prosecutor* [2012] 2 SLR 49 (Sing CA) [43]–[44]; *Chan Kin Foo v City Developments Ltd* [2013] 2 SLR 895 (Sing HC) [23]; *Lim Meng Suang and another v Attorney-General* [2013] 3 SLR 118 (Sing HC) [103] ('*Lim Meng Suang* (HC)'); *Lim Meng Suang and another v Attorney-General* [2015] 1 SLR 26 (Sing CA) [4] ('*Lim Meng Suang* (CA)').

10 *Taw Cheng Kong* (CA) (n 9) [60].

11 *Lim Meng Suang* (CA) (n 9).

12 ibid [107]–[108].

were formulated in the absence of a constitutional bill of rights.[13] On the other hand, the presumption is said to apply with full force to post-independence laws as these were 'promulgated in the context of, *inter alia*, an elected legislature which, it can be assumed, would have fully considered all views before enacting the (post-Independence) laws concerned'.[14] This would include section 37(1) of the Prevention of Corruption Act,[15] the constitutionality of which was questioned in *Taw Cheng Kong* because it was introduced in 1966.[16] In any event, it is clear that the presumption extends to all constitutional challenges and not only to those in which Article 12(1) is invoked,[17] although it is in such cases that the rule has been most fully described.

Closely allied to the presumption of constitutionality is the principle expressed in the maxim *omnia praesumuntur rite esse acta*, which was translated in *Yong Vui Kong v Attorney-General*[18] as 'all things are presumed to have been done rightly and regularly, *ie*, in conformity with the law'.[19] In *Ramalingam Ravinthran v Public Prosecutor*,[20] the Court of Appeal applied the principle to prosecutorial decisions, by virtue of the constitutional standing of the office of the Attorney-General who is the Public Prosecutor.[21] In the light of this, it concluded that a presumption of constitutionality applies to prosecutorial decisions.[22] The Court noted that the presumption also applies to the decisions of administrative officials without constitutional standing because the *omnia praesumuntur* principle is applicable to them as well. However, the presumption does not operate as strongly.[23]

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13 In *Lim Meng Suang* (CA) (n 9), the Court of Appeal indicated it felt that a weaker presumption should apply to all pre-independence laws (that is, those enacted before 9 August 1965). However, it would be more accurate to regard the relevant date as 16 September 1963 when Singapore became a state of the Federation of Malaysia because it was with effect from that date that the fundamental liberties contained in the Federal Constitution were extended to Singapore.

14 ibid [107].

15 Cap 241, 1993 Rev Ed.

16 As the Prevention of Corruption (Amendment) Act 1966 (No 10 of 1966) s 31A.

17 See eg *Chan Hiang Leng Colin v Public Prosecutor* [1994] 3 SLR(R) 209 (Sing HC) [56] (Art 15 – right to freedom of religion); *Kok Hoong Tan Dennis v Public Prosecutor* [1996] 3 SLR(R) 570 (Sing HC) [34] (freedom of religion); *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 (Sing HC) [49] (Art 14 – rights to freedom of speech and assembly).

18 [2011] 2 SLR 1189 (Sing CA).

19 ibid [139].

20 *Ramalingam* (n 9). The case was applied in *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872 (Sing CA) [28].

21 Singapore Constitution (n 3) Art 35(8): 'The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence.'

22 *Ramalingam* (n 9) [44]–[46], citing *Yong Vui Kong* (n 18) [139]. See also *Akar v Attorney-General of Sierra Leone* [1970] AC 853 (Privy Council (PC)) 868 (constitutional amendment bill assumed to have been properly passed by the legislature in the absence of contrary evidence); *Re Section 22 of the Mutual Assistance in Criminal Matters Act* [2009] 1 SLR(R) 283 (Sing CA) [19] (principle applies to an exercise of discretion by the Attorney-General to apply for a court order that a bank should produce material concerning one of its clients at the request of a foreign country, pursuant to the Mutual Assistance in Criminal Matters Act (Cap 190A, 2001 Rev Ed)).

23 *Ramalingam* (n 9) [47], citing *Howe Yoon Chong v Chief Assessor* (n 30) [13], which in turn cited *Sunday Lake Iron Co v Township of Wakefield* 247 US 350, 352 (1918) ('The good faith of such officers and the validity of their actions are presumed; when assailed, the burden of proof is upon the complaining party.') See also *R v Inland Revenue Commissioners, ex parte T C Coombs & Co* [1989] STC 520 (CA) 534, cited on appeal in [1991] 2 AC 283 (HL) 299–300, which was distinguished in *Gibbs v Rea* [1998] AC 786 (PC) 798; *Dow Jones Publishing Co (Asia) Inc v Attorney-General* [1989] 1 SLR(R) 637 (Sing CA) [19] (principle applies to Minister for Communications and Information declaring a foreign newspaper to have engaged in the domestic politics of Singapore pursuant to the Newspaper and Printing Presses Act (Cap 206, 1985 Rev Ed)

The presumption has the following effects. The court '*prima facie* leans in favour of constitutionality and supports the impugned legislation if it is reasonable to do so', and 'it is for the party who attacks the validity of a piece of **[141→]** legislation to place relevant materials and evidence before the court'.[24] In *Taw Cheng Kong*, the Court of Appeal elaborated on the issue in these terms:[25]

> [U]nless the law is *plainly arbitrary* on its face, postulating examples of arbitrariness would ordinarily not be helpful in rebutting the presumption of constitutionality. This is because another court or person can well postulate an equal number if not more examples to show that the law did not operate arbitrarily. If postulating examples of arbitrariness can always by themselves be sufficient for purposes of rebuttal, then it will hardly be giving effect to the presumption that Parliament knows best for its people, that its laws are directed at problems made manifest by experience, and hence its differentiation is based on adequate grounds. Therefore, *to discharge the burden of rebutting the presumption, it will usually be necessary for the person challenging the law to adduce some material or factual evidence to show that it was enacted arbitrarily or had operated arbitrarily*. Otherwise, there will be no practical difference between the presumption and the ordinary burden of proof on the person asserting unconstitutionality.

The presumption of constitutionality tips the scales very much in the Government's favour. If an applicant claims, for example, that a legislative provision infringes one of the fundamental liberties in the Constitution and 'if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed' by the court.[26] In other words, the Government may simply submit to the court at least one plausible reason for the impugned law or executive action, and the court will assume it is true. The Government is relieved of the need to produce evidence to justify the constitutionality of the law or action. Only where there are no credible justifications will the court decline to make any inferences. In the context of the constitutional protection of equality, it has been said that[27]

> if there is nothing on the face of the law or the surrounding circumstances brought to the notice of the court on which the [legislative] classification may reasonably be regarded as based, the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation.

In contrast to the foregoing, to overcome the presumption and require the Government to discharge its evidential burden of proving the constitutionality of the

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s 16, now the Newspaper and Printing Press Act (Cap 206, 2002 Rev Ed) s 24); *Aspinden Holdings Ltd v Chief Assessor* [2006] 3 SLR(R) 99 (Sing HC) [52], [57] (Chief Assessor exercising powers under the Property Tax Act (Cap 254, 2005 Rev Ed)).

24 *Lim Meng Suang* (HC) (n 9) [104], citing *Public Prosecutor v Su Liang Yu* [1976] 2 MLJ 128 (Malaysia High Court (Malaysian High Court [Malaysia HC]) 131, which was also cited in *Taw Cheng Kong* (CA) (n 9) [60].

25 *Taw Cheng Kong* (CA) (n 9) [80] (emphasis added), cited in *Lim Meng Suang* (HC) (n 9) [105].

26 *Lindsley v Natural Carbonic Gas Co* 220 US 61, 78 (1911), cited in *Malaysian Bar v Government of Malaysia* [1987] 2 MLJ 165 (Malaysia Supreme Court [Malaysia SC]) 166–67, and in *Taw Cheng Kong* (CA) (n 9) [57].

27 *Shri Ram Krishna Dalmia* (n 5) 297–98, cited in *Lee Keng Guan* (n 2) [19], and in *Lim Meng Suang* (HC) (n 9) [107].

provision in question, it is not enough that the applicant is able to posit examples of how the provision operates unjustly. Instead, he or she must adduce material or factual evidence that is compelling or cogent which demonstrates that the provision was enacted arbitrarily or operated arbitrarily.[28] The standard is pitched at arbitrariness,[29] with the consequence that laws and executive actions **[142→]** are subjected to a mere rationality test. A legislative provision is not unconstitutional unless it is arbitrary or irrational.[30]

It is difficult to see what evidence applicants can find to show arbitrary enactment of a provision. Given how unlikely it is that legislators will admit openly in Parliament that they intend to discriminate against a certain class of people, applicants will have to rely on statements having only circumstantial effect. The court would probably deem such inferences too speculative to rebut the presumption.

As for arbitrary operation, in *Lim Meng Suang and another v Attorney-General*[31] the High Court held out the United States Supreme Court decision *Yick Wo v Hopkins*[32] as a 'good example'[33] of an appellant having brought cogent material and factual evidence before the court to establish that certain municipal authorities in San Francisco had discriminated against him in the implementation of a fire-safety regulation in violation of the Fourteenth Amendment.[34] The regulation stipulated that the authorities' consent was required to operate a laundry in a building not constructed of brick or stone. The appellant's petition to the court had alleged that he and 200 other Chinese persons who were not United States citizens had been denied consent to continue operating their laundries in wooden buildings, which they had done for over twenty years. Yet, all the requests (save one) made by persons who were not Chinese had been granted. Moreover, while the appellant and more than 150 of his countrymen had been arrested for continuing to operate their businesses without the requisite consent, none of the laundrymen in the same position who were not Chinese citizens had been detained. These asserted facts were admitted to by the respondent, the sheriff of the city and county of San Francisco under whose custody the appellant had been placed.[35]

If the Singapore Government declines to stipulate to facts as the respondent in *Yick Wo* did, it appears that an applicant may have to incur the potentially substantial expense of arranging for statistically significant surveys to be conducted

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28 *Lim Meng Suang* (HC) (n 9) [101], [105].

29 The point was emphasised in *Lim Meng Suang* (HC) (n 9) [113] by the citation of a series of cases including *Ong Ah Chuan v Public Prosecutor* [1979–1980] SLR(R) 710 (PC) [37] (art 12 is not infringed '[p]rovided that the factor which the Legislature adopts as constituting the dissimilarity in circumstances *is not purely arbitrary* but bears a reasonable relation to the social object of the law'); *Kedar Nath Bajoria Hari Ram Vaid v State of West Bengal* AIR 1953 SC 404, [1954] SCR 30 (India SC) 38 ('the legislative classification *must not be arbitrary*'); and *Chiranjit Lal v Union of India* AIR 1951 SC 41, [1950] SCR 869 (India SC) 911–12 ('the classification [prescribed] *should never be arbitrary*') (all emphasis added).

30 In *Eng Foong Ho v Attorney-General* [2009] 2 SLR(R) 542 (Sing CA) [30], the Court of Appeal said, 'An executive act may be unconstitutional if it amounts to intentional and arbitrary discrimination' (citing *Public Prosecutor v Ang Soon Huat* [1990] 2 SLR(R) 246 (Sing HC) [23], which in turn cited *Howe Yoon Chong v Chief Assessor* [1990] 1 SLR(R) 78 (PC) [17]), and noted that '[a]rbitrariness implies the lack of any rationality' (citing *Ang Soon Huat*).

31 *Lim Meng Suang* (HC) (n 9).

32 118 US 356 (1886).

33 *Lim Meng Suang* (HC) (n 9) [106].

34 US Const amend XIV § 1. Section 1 of the 14th Amendment to the United States Constitution states, in part: '... nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws'.

35 *Yick Wo* (n 32) 359.

in order to have cogent evidence to adduce. What is more, it could prove somewhat easier to obtain evidence of unconstitutional *implementation* of a law (as was the case in *Yick Wo*) than evidence that a law is intrinsically unconstitutional. This is because the latter is more readily proved through reasoned arguments. If the adduction of 'material or factual evidence' is a prerequisite to applicants displacing a presumption of constitutionality in a situation of this sort, it is not immediately clear what sort of evidence they should compile to demonstrate this.

II. Justifications and Criticisms

A. *Deference to the Legislature*

Since the presumption of constitutionality was adopted by the Singapore courts from Indian case law, an examination of the origin of the presumption in that jurisdiction is apposite. A 1950 Indian case, *Chiranjit Lal v Union of India*,[36] **[143→]** justified the presumption's existence by relying upon the following sentence from the decision of the United States Supreme Court in *Middleton v Texas Power and Light Company*:[37]

> It must be presumed that a Legislature understands and correctly appreciates the needs of its own people, that its laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds.

It is submitted that the courts' reliance on *Middleton* to justify the presumption is misplaced. This judgment was delivered in 1919, before a major shift in US constitutional law was wrought in 1938 by Justice Harlan Stone's Footnote Four of the *Carolene Products* case.[38] In this famous footnote, Justice Stone suggested that the courts should apply a stricter standard of scrutiny where the government has classified persons in a way that offends fundamental rights in the Constitution (such as those set out in the first ten Amendments) or where such a classification results from'prejudice against discrete and insular minorities'.[39] Singapore cases have not examined decisions subsequent to *Carolene Products* such as *Heller v Doe*,[40] in which the US Supreme Court made clear that in equal protection analyses, a statutory classification is only accorded a strong presumption of validity if it neither involves fundamental rights nor proceeds 'along suspect lines'.[41]

This rosy view of the legislature is not the only justification the Singapore courts have relied on. In *Lim Meng Suang*, the High Court regarded the presumption as 'intimately tied to the idea of separation of powers'.[42] The doctrine of justiciability

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36 *Chiranjit Lal* (n 29).

37 249 US 152, 157 (1919), cited in *Chiranjit Lal* (n 29) 913. The same sentence was cited in *Lim Meng Suang* (HC) (n 9) [103].

38 304 US 144, 152, n 4 (1938).

39 ibid.

40 509 US 312 (1993).

41 ibid 319, citing *City of New Orleans v Dukes* 427 US 297, 303 (1976) (rational basis review does not authorise the judiciary to 'sit as a superlegislature to judge the wisdom or desirability of legislative policy determinations made in areas *that neither affect fundamental rights nor proceed along suspect lines*' [emphasis added]).

42 *Lim Meng Suang* (HC) (n 9) [110].

is likewise based on the separation of powers, and in this context it was said in *Lee Hsien Loong v Review Publishing*[43] that the intensity of judicial review must take into account 'the simple fact that there are certain questions in respect of which there can be no expectation that an unelected judiciary will play any role'.[44] Therefore, the Court held that 'where issues of social morality are concerned', it should adopt an approach 'tilted in favour of persons who are elected and entrusted with the task of representing the people's interests and will'.[45]

In the Singapore context, therefore, the presumption of constitutionality seems to be justified by the fact that Parliament has considered the matter and regards the legislation in question as constitutional. The same rationalisation would appear to apply to the *omnia praesumuntur* principle – that government officials have made an assessment of the constitutionality of their actions and decisions. Where legislation is concerned, particularly where 'issues of social morality' are dealt with, this opinion is accorded significant weight due to the legislature's democratic credentials. The implication is that the legislature is accountable to the people for its decisions. The Supreme Court of Ireland has justified the application of a presumption of constitutionality in a similar way. In *Pigs Marketing Board v Donnelly*,[46] for example, it was said:[47]

> **[144→]** When the Court has to consider the constitutionality of a law it must, in the first place, be accepted as an axiom that a law passed by the Oireachtas [the legislature of Ireland], the elected representatives of the people, is presumed to be constitutional unless and until the contrary is established.

We should, therefore, examine whether courts are right in making the above assumptions. In the first instance, where the legislation in question was enacted before any legally enforceable bill of rights applied to Singapore, it is hard to see how the legislature can be regarded as having considered the 'constitutionality' of the legislation. For instance, when section 377A was introduced into the Penal Code in 1938,[48] the Attorney-General of the Straits Settlements said only that the provision was necessary to align the local law with English criminal law in order to enable stronger action to be taken against acts of 'gross indecency' between men, which were regarded as undesirable.[49] Unless a counterfactual and speculative analysis of these facts surrounding the legislation's enactment is embarked upon, it cannot honestly be said that the Legislative Assembly took any account of whether section 377A intruded excessively into the private lives of men to whom the provision might apply, or discriminated against them. Although in *Lim Meng Suang* the Court of Appeal took the view that a presumption of constitutionality would still apply, albeit less strongly,[50] it is submitted the better view is that no presumption ought to apply at all.

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43 [2007] 2 SLR(R) 453 (Sing HC).

44 ibid [98], citing *R (on the application of Marchiori) v Environment Agency* [2002] EWCA Civ 3 (CA) [39].

45 *Lim Meng Suang* (HC) (n 9) [110].

46 [1939] IR 413 (Ireland Supreme Court [Ireland SC]).

47 ibid 424.

48 Through the Penal Code (Amendment) Ordinance 1938 (No 12 of 1938) (Straits Settlements).

49 Proceedings of the Legislative Council of the Straits Settlements (13 June 1938) B49 (C G Howell (Attorney-General), speech during the Second Reading of the Penal Code (Amendment) Bill), cited in *Lim Meng Suang* (CA) (n 9) [119].

50 See nn 12–14 and the accompanying text. Curiously, in *Lim Meng Suang* (CA) (n 9) the Court of Appeal did not explicitly say how the presumption applied to the facts of the case.

As for legislation enacted after a bill of rights applied to Singapore, it should be asked whether it is in fact sufficiently scrutinised for constitutionality as it makes its way through Parliament. There are few formal requirements, unlike in the United Kingdom where section 19 of the Human Rights Act 1998[51] obliges a Minister of the Crown in charge of a bill in either House of Parliament, before the Second Reading of the bill, to either make a 'statement of compatibility', that is, one to the effect that in his view the provisions of the bill are compatible with the rights protected by the Act, or to declare that the Government wishes the House to proceed with the bill even though he is unable to make such a statement. This procedure requires the Government to direct its mind towards considering if the bill is compliant with human rights. In addition, a permanent Joint Committee on Human Rights comprising members of both Houses exists, and one of its main functions is to scrutinise parliamentary bills for conformity with the Act.[52]

Although this parliamentary safeguard does not exist in Singapore, Part VII of the Constitution requires all bills that are given a final reading and passed by Parliament (apart from some exceptions) to be sent to the Presidential Council for Minority Rights before being presented to the President for assent.[53] The Council examines the legislation and must draw attention to any 'differentiating measure',[54] namely,[55]

> any measure which is, or is likely in its practical application to be, disadvantageous to persons of any racial or religious community and not equally disadvantageous to persons of other such communities, either directly by **[145→]** prejudicing persons of that community or indirectly by giving advantage to persons of another community.

If the Council renders an adverse report in respect of a bill, Parliament may either amend the bill and resubmit it to the Council for further consideration, or proceed to present the bill to the President for assent after a motion for that purpose has been passed by the affirmative vote of not less than two-thirds of the total membership of Parliament.[56] It is clear that the Council's remit is narrow. It ensures that legislation does not disadvantage racial or religious communities, arguably in line with the rights to equality and freedom of religion, and to non-discrimination in respect of education, respectively guaranteed by Articles 12, 15 and 16 of the Constitution. The Council has no role to ensure that laws comply with other fundamental liberties in Part IV of the Constitution, such as the prohibition against deprivation of life or personal liberty save in accordance with law, and the rights to free speech and assembly.[57] To date, no adverse report has been rendered by the Council.[58]

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51 1998 c 42 (UK).

52 See, for example, Alison L Young, 'Deference, Dialogue and the Search for Legitimacy' (2010) 30(4) Oxford Journal of Legal Studies 815, 824.

53 Singapore Constitution (n 3) art 76(1). Subsidiary legislation must also be sent to the Council by the minister promulgating it within 14 days of publication: ibid Art 80(1).

54 ibid Art 77.

55 ibid Art 68.

56 ibid Art 78(6)(c). A similar procedure applies to subsidiary legislation, save that if Parliament wishes to confirm such legislation in the face of an adverse report, a resolution passed with a simple majority suffices: ibid Art 80(4)(b).

57 ibid Arts 9, 14.

58 For further commentary and criticism on the Presidential Council for Minority Rights, see Thio Su Mien, '[The Presidential Council:] Paper I' (1969) 1 Singapore Law Review 1; David S Marshall, '[The Presidential Council:] Paper II' (1969) 1 Singapore Law Review 9; Francis Khoo Kah Siang, '[The Presidential Council:] Paper III' (1969) 1 Singapore Law Review 14.

Another means that might be employed to test the constitutionality of a bill is the advisory opinion procedure established by Article 100 of the Constitution. The President may refer to a tribunal, consisting of no less than three judges of the Supreme Court, for its opinion any question on the effect of any provision of the Constitution that has arisen or that appears likely to arise.[59] This includes asking the tribunal to rule on the constitutionality of a bill, and if the bill is found to be constitutional no court has the jurisdiction to question the validity of the law resulting from the passing of the bill.[60] However, the procedure is fairly limited. The President can only refer a question to the Constitution of the Republic of Singapore Tribunal if he is advised by the Cabinet to do so; he lacks personal discretion in this regard.[61] Thus, if the Government takes the view that legislation it has initiated is constitutional, it seems unlikely it will advise the President to trigger the advisory opinion procedure. Furthermore, former Chief Justice Chan Sek Keong has taken the extra-judicial view that Article 100 was enacted as a means to resolve disputes between constitutional organs rather than to enable individuals to obtain court rulings on constitutional issues,[62] although it has to be said that a plain reading of the provision does not contain any such limitation. On 29 January 1999, the President's principal private secretary, responding to the opposition politician and lawyer J B Jeyaretnam's request that the question of the constitutionality of an Act his client had been charged under be referred to the Constitutional Tribunal, said that the advisory opinion procedure should be invoked only 'when there is no other forum available to a person who claims that his constitutional rights have been infringed to have such claim tested'.[63] This must no doubt be taken as the Government's view. As at the time of writing the procedure had only been used once, in 1995.[64] In the circumstances, the Constitutional Tribunal cannot really be regarded as a routine and dependable means of ensuring the constitutionality of legislation.

Apart from these concerns about the legal framework, it may be asked whether there is in fact a practice of examining the constitutionality of bills in **[146→]** Parliament. On a number of occasions, the Government has consulted the Attorney-General on constitutional matters and disclosed in Parliament the opinion expressed. For example, this was done on 14 January 1998 to explain why Article 144 of the Constitution[65] did not require the President's concurrence to a loan made by the Singapore Government to the Government of Indonesia.[66] Subsequently, the

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59 Singapore Constitution (n 3) Art 100(1).

60 ibid Art 100(4).

61 *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 (Sing CA) [103].

62 Chan Sek Keong, 'Judicial Review – From Angst to Empathy: A Lecture to Singapore Management University Second Year Law Students' (2010) 22 Singapore Academy of Law Journal 469, [4], cited in *Tan Eng Hong*, ibid. See also Singapore Parliamentary Debates, Official Report (25 August 1994) vol 63, cols 428–32 (Lee Hsien Loong (Deputy Prime Minister), speech during the Second Reading of the Constitution of the Republic of Singapore (Amendment No 2) Bill).

63 'Constitutional Tribunal Plea Rejected' *The Straits Times* (Singapore, 30 January 1999) 54.

64 *Constitutional Reference No 1 of 1995* [1995] 1 SLR(R) 803 (Constitutional Tribunal).

65 Singapore Constitution (n 3) art 144(1) states:

> No guarantee or loan shall be given or raised by the Government — (a) except under the authority of any resolution of Parliament with which the President concurs; (b) under the authority of any law to which this paragraph applies unless the President concurs with the giving or raising of such guarantee or loan; or (c) except under the authority of any other written law.

66 Singapore Parliamentary Debates, Official Report (14 January 1998) vol 68, cols 82–86 (Ho Peng Kee (Minister of State for Law and Home Affairs), 'Respect for the Judiciary'). The Attorney-

Attorney-General's opinion that the right to vote is to be implied into the Constitution was endorsed in Parliament by the Government on 16 May 2001 and again on 13 February 2009.[67] However, none of these incidents related to the constitutionality of a bill, and it is unclear whether the Attorney-General is consistently asked for his views on this type of issue. Even if he is, Hansard appears to indicate that the Government does not regularly inform MPs of the Attorney-General's opinions so that they can be discussed in Parliament.

There have been instances when fundamental liberties were mentioned in the House during the Second Readings of bills. The rights to freedom of expression, assembly and movement[68] were raised in Parliament during the legislative lead-up to the Public Order Act[69] which, among other things, refined the regulation of cause-related assemblies and processions through the issuance of permits, and granted new powers to the police to order people to 'move on' from a particular place, and to seize films or pictures taken of law enforcement activities. Non-constituency Member of Parliament (NCMP) Sylvia Lim and Nominated Members of Parliament (NMPs) Siew Kum Hong and Thio Li-ann argued that provisions in the bill did not necessarily strike an appropriate balance between public order and the fundamental liberties in question,[70] whereas Second Minister for Home Affairs K Shanmugam and other Members of Parliament (MPs) of the ruling People's Action Party (PAP) took the opposing view.[71] In contrast, while the right to freedom of religion was mentioned by a number of parliamentarians during debates on the bill that led to the Maintenance of Religious Harmony Act,[72] the constitutionality of the bills in question was not debated in detail. The Government asserted the necessity of imposing restrictions on rights, and this was largely unquestioned by a number of PAP MPs.[73]

Arguably, therefore, the extent to which the constitutionality of bills is legislatively examined is inconsistent. Assuming that the Government does in fact

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General's opinion of 12 January 1998 addressed to S Jayakumar, the Minister for Law, is reproduced at cols 133–36; parts of it were quoted by the High Court in *Jeyaretnam Kenneth Andrew v Attorney-General* [2013] 1 SLR 619 (Sing HC) [19].

67 Singapore Parliamentary Debates, Official Report (16 May 2001) vol 73, col 1726 (Wong Kan Seng (Minister for Home Affairs and Leader of the House), 'Is Voting a Privilege or a Right?'); Singapore Parliamentary Debates, Official Report (13 February 2009) vol 85, col 3158 (K Shanmugam (Minister for Law), 'Head R – Ministry of Law').

68 Singapore Constitution (n 3) art 13(2):

> Subject to any law relating to the security of Singapore or any part thereof, public order, public health or the punishment of offenders, every citizen of Singapore has the right to move freely throughout Singapore and to reside in any part thereof.

69 No 15 of 2009, now Cap 257A, 2012 Rev Ed.

70 See, for instance, Singapore Parliamentary Debates, Official Report (13 April 2009) vol 85, cols 3684–85 (Sylvia Lim (Non-constituency Member of Parliament), speech during the Second Reading of the Public Order Bill); ibid cols 3696–99, 3768 (Siew Kum Hong (Nominated Member of Parliament)); ibid cols 3711–25 (Thio Li-ann (NMP)).

71 ibid cols 3658–62, 3747–58, 3662, 3766, 3768–69 (K Shanmugam (Second Minister for Home Affairs)); ibid cols 3682–83 (Alvin Yeo (Hong Kah)); ibid cols 3738–39 (Sin Boon Ann (Tampines)).

72 No 26 of 1990, now Cap 167A, 2001 Rev Ed.

73 Singapore Parliamentary Debates, Official Report (22 February 1990) vol 54, cols 1048, 1050 (S Jayakumar (Minister for Home Affairs), speech during the Second Reading of the Maintenance of Religious Harmony Bill); and see the remarks by Tay Eng Soon (Senior Minister of State for Education): ibid col 1061, Wong Kan Seng (Minister for Foreign Affairs and Community Development): ibid col 1089, Tan Cheng Bock (Ayer Rajah): ibid col 1124, and S Dhanabalan (Minister for National Development) speaking on 23 February 1990: ibid col 1168.

assert in Parliament that a particular bill is constitutional, given the large majority of parliamentary seats held by the PAP[74] and its strong enforcement of the party whip system, it seems unlikely that most MPs (being PAP backbenchers) would disagree with the Government's view. Conversely, it is doubtful that opposition MPs, NCMPs and NMPs would be able to convince the Government that a bill needs to be altered since their votes are not needed for the enactment of bills.[75]

Parliament's nature as a democratic institution does not by itself justify a presumption of constitutionality. It is jarring for critics to argue that Singapore's system of strong constitutional review, under which the courts are empowered to strike down laws incompatible with the Constitution, is somehow undemocratic when it was established through a democratic process. Moreover, a richer **[147→]** conception of representative democracy goes beyond majority rule to comprehend due respect for the fundamental rights of minorities,[76] which the courts must protect through judicial review. The court process can also be regarded as democratic in its own right, since it involves a hearing (usually public) before an impartial judge at which all parties are able to present their respective cases.[77] Eventually, if the court decides to declare the law in question unconstitutional, this stimulates a constitutional dialogue between the judiciary and the political branches of government, in the course of which the latter will have to decide whether to accept the court's judgment or seek to overturn it through a constitutional amendment. Members of the public are free to participate in the dialogue. With the benefit of a reasoned court judgment and statements from politicians both in and outside Parliament, they can 'examine and criticise the human rights compatibility of legislation, as well as the desirability of a continuing restraint over legislation in order to protect human rights'.[78] Through public discussion, engagement with MPs and, ultimately, their electoral votes, they are in a position to help to shape the political branches' decision on the matter.

Brian Foley argues in the Irish context that it is appropriate for the courts to demonstrate deference to Parliament's views in some circumstances. However, Alison Young analyses Foley's view of deference as involving respect for the legislature rather than submission to it. The difference is that a court should not meekly accept that the legislature has correctly decided that a law is constitutional. Instead, it must come to its own decision on the matter, but may give weight to the legislature's views.[79] This factor therefore militates against the application of a presumption of constitutionality.

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74 As of 23 May 2015 when Lee Kuan Yew, the founding Prime Minister of independent Singapore, died, the PAP held 79 of the 87 elected seats in Parliament.

75 Compare Brian Foley, 'Democracy, Deference and the Presumption of Constitutionality' in *Deference and the Presumption of Constitutionality* (Institute of Public Administration, Dublin 2008) 242, 245 (citing Michael Gallagher, 'Parliament' in John Coakley and Michael Gallagher (eds), *Politics in the Republic of Ireland* (4th edn, Routledge in association with PSAI Press 2005) 211, 219: 'Ultimately the government sees its plans approved by parliament pretty much as a matter of course. There is no feeling that the opposition's views need to be taken into account or that its agreement is required for the passage of legislation.').

76 Paul C Weiler, 'Rights and Judges in a Democracy: A New Canadian Version' (1984) 18 University of Michigan Journal of Law Reform 51, 67–8.

77 ibid 66.

78 Young (n 52) 830. Further on constitutional dialogue, see Jaclyn L Neo, 'Balancing Act: The Balancing Metaphor as Deference and Dialogue in Constitutional Adjudication', Chapter 7 of this book.

79 ibid 817–818, citing Foley, 'The Constitutional Context and Nature of Deference' in *Deference and the Presumption of Constitutionality* (n 75) 6–10.

Secondly, Foley says that deference should be applied 'non-spatially' and not 'spatially'. A spatial approach means that the court defers to Parliament when a matter falls within a specified category, such as national security. This takes a rigid view of the separation of powers and may, for example, assume there is a clear divide between policy and law, only matters involving the latter being suitable for judicial determination. The presumption of constitutionality is problematic because it takes a spatial approach towards deference.[80] When a court does so it overlooks the fact that the separation of powers doctrine is best understood not as requiring a strict distribution of functions between the three branches of government, but rather as 'a network of rules and principles which ensure that power is not concentrated in the hands of one branch'.[81] Thus, checks and balances between the branches *inter se*, and in particular the subjection of acts of the political branches to judicial review by the judicial branch, must be regarded as integral to the doctrine. In contrast, if deference is applied non-spatially, the court does not presuppose a rigid divide between law and policy, and 'defer[s] only when required according to the specific interests of national security raised in the precise question before the court'.[82]

Thus, irrespective of whether Parliament has indeed given serious thought to a bill's constitutionality, it is submitted that the courts have a responsibility to independently ascertain whether the legislators have determined the issue correctly. If a court concludes too readily that the political branches have acted **[148→]** lawfully or that a matter is simply not justiciable, there is a danger that judicial review will become a blunted tool and fundamental liberties will be insufficiently protected.

The Canadian experience is instructive. A presumption of proportionality applies in constitutional cases where the issue is whether a law must be invalidated because the power to enact it lay with the federal legislature rather than the provincial legislature or vice versa.[83] The effect of the presumption in such cases is moderated by the fact that, according to the Constitution, if one level of government has no power to act, the other level does.[84] Conversely, the presumption has been held to be inapt in cases involving the Canadian Charter. In *Manitoba (AG) v Metropolitan Stores Ltd*,[85] the Supreme Court of Canada stated that 'the innovative and evolutive nature of the *Canadian Charter of Rights and Freedoms* conflicts with the idea that a legislative provision can be presumed to be consistent with the *Charter*'.[86] Similarly, the application of legally enforceable fundamental liberties to Singapore when it became a state of Malaysia in 1963, and their inclusion in the Singapore Constitution upon the nation's full independence in 1965, indicate a deliberate departure from the assumption that individual rights are adequately protected by the legislature. Instead, the courts were given the weighty responsibility

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80 Foley, 'Deference, Rights, Policy and Spatial Distinctions' in *Deference and the Presumption of Constitutionality*, ibid 173–209; see also Young (n 52) 818–19.

81 Eric Barendt, 'Separation of Powers and Constitutional Government' [1995] Public Law 599, 608–9.

82 Young (n 52) 819.

83 See eg *Re Anti-Inflation Act* [1976] 2 SCR 373 (Supreme Court of Canada [Canada SC]) 423 (party seeking to uphold the law need only provide 'a rational basis for the legislation which it is attributing to the head of power invoked in this case in support of its validity'). According to Peter W Hogg, *Constitutional Law of Canada* (5th edn, Thomson Carswell, Ontario 2007) 813–814, § 60.2(f), this creates a presumption of constitutionality that is exceedingly difficult to overcome.

84 Hogg (n 83) 120, § 38.5.

85 [1987] 1 SCR 110 (Canada SC).

86 ibid 122. See also Hogg (n 83) 120, § 38.5; Hogg (n 83) 813–14, § 60.2(f).

of scrutinising executive and legislative acts for compliance with constitutional principles.

In *Operation Dismantle v The Queen*,[87] the Supreme Court of Canada drew a distinction between a court pronouncing on the wisdom of the executive's exercise of its defence powers which it considers inappropriate, and determining if an executive act violated the rights of citizens. In the latter case, 'it is not only appropriate that we answer the question; it is our obligation under the *Charter* to do so'.[88] This, it is submitted, is the correct approach, since the Singapore High Court itself in *Lim Meng Suang* affirmed that[89]

> [i]t is both the duty and the constitutional role of our courts to ensure that Parliament does not contravene the rights enshrined in the Constitution for it is the Constitution, and not Parliament, that is supreme in our legal system. Our courts are the guardians who ensure that the rule of law and all that it entails is observed and prevails.

B. *The Presumption of Constitutionality as a Canon of Construction*

The Supreme Court of Canada pointed out in the *Metropolitan Stores* case that the term *presumption of constitutionality* can also signify a 'rule of construction under which an impugned statute ought to be construed, whenever possible, in such a way as to make it conform to the Constitution'.[90] Indeed, this appears to be the common law understanding of the presumption. In *Attorney-General of the Gambia v Jobe*,[91] the Privy Council said the presumption of constitutionality[92]

> ... is but a particular application of the canon of construction embodied in the Latin maxim magis est ut res valeat quam pereat which is an aid to the **[149→]** resolution of any ambiguities or obscurities in the actual words used in any document that is manifestly intended by its makers to create legal rights or obligations. ... Where, as in the instant case, omissions by the draftsman of the law to state in express words what, from the subject matter of the law and the legal nature of the processes or institutions with which it deals, can be inferred to have been Parliament's intention, a court charged with the judicial duty of giving effect to Parliament's intention, as that intention has been stated in the law that Parliament has passed, ought to construe the law as incorporating, by necessary implication, words which would give effect to such inferred intention, wherever to do so does not contradict the words actually set out in the law itself and to fail to do so would defeat Parliament's intention by depriving the law of all legal effect.

In other words, the presumption does not impose on the challenger of a law any particularly burdensome evidential onus, but is in line with 'the elementary rule of legal procedure according to which "the one who asserts must prove", with the consequence that "the onus of establishing that legislation violates the Constitution

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87 [1985] 1 SCR 441 (Canada SC).

88 That is, the Canadian Charter of Rights and Freedoms: ibid 472.

89 See *Lim Meng Suang* (HC) (n 9) [112], and the cases cited therein.

90 *Metropolitan Stores* (n 85) 125.

91 [1984] AC 689 (PC).

92 ibid 702, cited in *Hector v Attorney-General of Antigua and Barbuda* [1990] 2 AC 312 (PC) 319; *De Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 (PC) 77–8.

undeniably lies with those who oppose the legislation"', which the Supreme Court in *Metropolitan Stores* regarded as another way in which the presumption of constitutionality may be understood.[93]

Cases applying the *omnia praesumuntur* rule are to like effect. The Court of Appeal of England and Wales commented in *Knight v Harris*:[94]

> The maxim expresses an inference which may reasonably be drawn when an intention to do some formal act is established; when the evidence is consistent with that intention having been carried into effect in a proper way; but when the actual observance of all due formalities can only be inferred as a matter of probability. The maxim is not wanted where such observance is proved, nor has it any place where such observance is disproved. The maxim only comes into operation where there is no proof one way or the other; but where it is more probable that what was intended to be done was done as it ought to have been done to render it valid; rather than that it was done in some other manner which would defeat the intention proved to exist, and would render what is proved to have been done of no effect.

The rule applies to legislation as much as to acts and decisions,[95] but the courts of the United Kingdom have treated it having no greater effect than affirming the general duty of the applicant to establish a *prima facie* case of unlawfulness,[96] whereupon the Government must discharge its own evidential burden of establishing that the impugned legislation or action was in fact lawful.[97] Indeed, in *Buxton v Jayne*[98] the Court of Appeal declined to apply the rule at all '[i]n a matter which touches the liberty of the subject',[99] and this position was also taken by the House of Lords in *R v*

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93 *Metropolitan Stores* (n 85) 124–25, citing Dale Gibson, *The Law of the Charter: General Principles* (Carswell, Toronto 1986), 56, 58.

94 (1890) LR 15 PD 170 (CA) 179–180, cited in *Re Estate of Bercovitz* [1962] 1 WLR 321 (CA) 327 (rule not applied to execution of a will as there was insufficient evidence of compliance with formalities).

95 For instance, *Pillai v Mudanayake* [1953] AC 514 (PC) 528–29 (Acts of Parliament); *McEldowney v Forde* [1971] AC 632 (HL) 655 (subsidiary legislation); *F Hoffmann-la Roche & Co AG v Secretary of State for Trade and Industry* [1975] AC 295 (HL) 357–58 (subsidiary legislation).

96 *Inland Revenue Commissioners v Rossminster Ltd* [1980] AC 952 (HL) 1006–7:

> When taking so many documents as were taken in this case [from the respondents by the Inland Revenue], mistakes may occur and some documents be taken that should not have been. But the fact that they should not have been does not, in my opinion, justify the conclusion that the other documents taken were not taken after adequate examination and in the belief that they might be required in evidence. *Omnia praesumuntur rite esse acta*. If the respondents... assert that following a lawful entry, documents and things were seized and removed when there was no right to take them, the onus, in my opinion, lies on them to establish a prima facie case of that...

See also *McEldowney* (n 95) 661; *Standard Commercial Property Securities Ltd v Glasgow City Council* 2007 SC (HL) 33 [74].

97 Compare Clive Lewis, *Judicial Remedies in Public Law* (4th edn, Sweet & Maxwell 2009) 394 [9-115]:

> The burden is on the claimant to establish that a ground for review exists [*R v Reigate Justices, ex parte Curl* [1991] COD 66 (Div Ct)]. ... [O]nce the claimant has established a ground for review, the burden is on the defendant to show some adequate reason why the court should exercise its discretion and refuse a remedy.

98 [1960] 1 WLR 783 (CA).

99 ibid 794 (person admitted to mental hospital against her will).

Secretary of State for the Home Department, ex parte Khawaja,[100] Lord Scarman noting that[101]

> **[150→]** in cases where the exercise of executive discretion interferes with liberty or property rights... the burden of justifying the legality of the decision [is] upon the executive. Once the applicant has shown a prima facie case, this is the law.

Since constitutional claims in Singapore are manifestly akin to cases where a claimant alleges that such rights have been infringed, I would submit that the presumption of constitutionality should be reinterpreted in line with the cases described above.

The decision of the Hong Kong Court of Final Appeal in *Secretary for Justice v Yau Yuk Lung*,[102] also an equality case, takes what I believe to be the correct approach. The court did not apply a Singapore-style presumption of constitutionality; instead, in conjunction with adopting a proportionality analysis,[103] it held:[104]

> *The burden is on the Government* to satisfy the court that the justification test is satisfied. Where one is concerned with differential treatment based on grounds such as race, sex or sexual orientation, the court will *scrutinize with intensity* whether the difference in treatment is justified [my emphasis].

It was for this reason that the Hong Kong Court of Appeal had, in an earlier case, rejected the argument that the courts should apply a concept akin to the presumption of constitutionality – the margin of appreciation – in favour of the legislature whenever the constitutionality of legislation was challenged.[105]

III. Concluding Thoughts

The presumption of constitutionality, and the concomitant *omnia praesumuntur rite esse acta* rule, are tools that have been used by the courts in constitutional cases to maintain a fairly deferential stance towards the political branches of the government. Such deference stems from the courts' modest conception of their role in judicial review, which can also be discerned from cases narrowing the scope of standing and declining to subject administrative and legislative action to rigorous scrutiny, among

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[100] [1984] AC 74 (HL). See also Lewis (n 97) [12-014]–[12-015]; William Wade and Christopher Forsyth, *Administrative Law* (10th edn, Oxford University Press 2009) 248–49.

[101] *Khawaja* (n 100) 112. See also *Eleko v Government of Nigeria* [1931] AC 662 (PC) 670, cited in *Khawaja* (n 100) 110–111:

> In accordance with British jurisprudence no member of the executive can interfere with the liberty or property of a British subject except on the condition that he can support the legality of his action before a court of justice. And it is the tradition of British justice that judges should not shrink from deciding such issues in the face of the executive.

[102] (2007) 10 HKCFAR 335 (Hong Kong Court of Final Appeal [Hong Kong CA]).

[103] On proportionality analysis in constitutional interpretation, see Jack Tsen-Ta Lee, 'According to the Spirit and Not to the Letter: Proportionality and the Singapore Constitution' (2014) 8(3) Vienna Journal on International Constitutional Law 276; and Swati Jhaveri, 'The Broader Case for Developing the Content of Fundamental Rules of Natural Justice under Article 9 of the Constitution: A Placeholder for Proportionality-type Adjudication?', Chapter 8 of the book.

[104] *Yau Yuk Lung* (n 102) [21], citing *Ghaidan v Godin-Mendoza* [2004] 2 AC 557 (HL) 568.

[105] *Leung v Secretary of Justice* [2006] 4 HKLRD 211 (Hong Kong CA) [52]–[53].

others. As regards the former, in *Jeyaretnam Kenneth Andrew v Attorney-General*[106] the Court of Appeal expressed a preference for a 'green-light' rather than a 'red-light' view of judicial review – that is, 'seek good government through the political process and public avenues rather than redress bad government through the courts'.[107] The Court said that judicial review should be concerned with individual rights rather than public policy, and appeared to import into constitutional adjudication the administrative law concept that[108]

> judicial review finds its place as an avenue for parties to bring claims of *legality* to the courts, and not for the purposes of challenging the very *merits* of a policy decision. Extensive judicial intervention in the administrative process is by no means the only avenue by which good governance can be **[151→]** ensured. Some regulatory functions can be better performed by other institutions or organs of state.

Ultimately, it held that the appellant's status as a citizen and taxpayer did not clothe him with sufficient standing to challenge the Government's alleged failure to comply with the Constitution by seeking the concurrence of the President before offering a contingent loan of US$4 billion to the International Monetary Fund – no personal right of his, nor any public rights, had been infringed.[109]

In *Lim Meng Suang v Attorney-General*,[110] the Court of Appeal dismissed claims that section 377A of the Penal Code,[111] which criminalises acts of 'gross indecency' between male persons whether occurring in public or private, violated the guarantee of equality before the law and equal protection of the law in Article 12(1) of the Constitution. It reached this result by affirming that it would only subject the correlation between statutory classifications and objectives to a mere rationality test,[112] and commented that 'the requisite rational relation will – more often than not – be found' because 'there is *no* need for *a perfect* relation or "*complete* coincidence" [emphasis added] between the differentia in question and the purpose and object of the statute concerned'.[113] The Court declined to assess whether the object of the statutory provision itself was illegitimate, as doing so would, in its view,[114]

> *be to confer on the court a licence to usurp the legislative function in the course of becoming (or at least acting like) a 'mini-legislature'. ...* The *courts*... have *no* such power – *nor ought they to have such power*.

Thus, submissions such as whether it is appropriate for a majority in society to impose its moral views on a minority to the detriment of their individual rights[115]

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106 [2014] 1 SLR 345 (Sing CA).
107 ibid [48], citing Chan Sek Keong, 'Judicial Review – From Angst to Empathy: A Lecture to Singapore Management University Second Year Law Students' (2010) 22 Singapore Academy of Law Journal 469, [29].
108 ibid [56] (emphasis in original).
109 ibid [65]. The Court also held that there was no case on the merits, as the appellant's interpretation of the relevant provision of the Constitution (n 3) art 144, was wrong: ibid [10]–[28].
110 *Lim Meng Suang* (CA) (n 9).
111 Cap 224, 2008 Rev Ed.
112 *Lim Meng Suang* (CA) (n 9) [61]–[71].
113 ibid [68], citing *Lim Meng Suang* (HC) (n 9) [98].
114 ibid [82] (emphasis in original).
115 ibid [162]–[174].

were regarded as 'extra-legal arguments... *which this court is not equipped to assess*' [emphasis in original].[116]

This hesitance to engage in robust judicial review goes a long way towards explaining why the courts, following the Indian example, adopted a form of the presumption of constitutionality qualitatively different from its original common law incarnation as a canon of construction which does not impose a significant evidential burden on claimants. I have attempted to show that the presumption makes unwarranted assumptions about the extent to which issues of constitutionality are examined by Parliament, and the undemocratic nature of judicial review. At any rate, even if legislators have given considered thought to whether a bill is consistent with fundamental liberties in the Constitution, the judiciary has a legal duty to ensure they have done so correctly. I argue that the presumption is better treated as a technique for reading down potentially unconstitutional statutes, and as a reminder that claimants must discharge their ordinary evidential burden of raising a *prima facie* claim against the Government. Unfortunately, it does not seem likely that the courts will do so until there is a fundamental mindset change concerning their role in the constitutional order.

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[116] ibid [173]. For commentary on this case, see Jack Tsen-Ta Lee, 'Equality and Singapore's First Constitutional Challenges to the Criminalization of Male Homosexual Conduct' (2015) 16(1–2) Asia-Pacific Journal on Human Rights and the Law 150; Jaclyn L Neo, 'Equal Protection and the Reasonable Classification Test in Singapore: After *Lim Meng Suang v Attorney-General*' [2016] Singapore Journal of Legal Studies 95; and Benjamin Joshua Ong, 'New Approaches to the Constitutional Guarantee of Equality before the Law: *Lim Meng Suang v Attorney-General*; *Tan Eng Hong v Attorney-General*' (2016) 28 Singapore Academy of Law Journal 320.

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