

**AN ARTICULATE SILENCE:
THE INTERPRETATION AND
CONSTRUCTION OF TACITURN
BILLS OF RIGHTS**

by

JACK TSEN-TA LEE

A thesis submitted to
the University of Birmingham
for the degree of
DOCTOR OF PHILOSOPHY

Birmingham Law School
College of Arts and Law
University of Birmingham
June 2011

UNIVERSITY OF
BIRMINGHAM

University of Birmingham Research Archive

e-theses repository

This unpublished thesis/dissertation is copyright of the author and/or third parties. The intellectual property rights of the author or third parties in respect of this work are as defined by The Copyright Designs and Patents Act 1988 or as modified by any successor legislation.

Any use made of information contained in this thesis/dissertation must be in accordance with that legislation and must be properly acknowledged. Further distribution or reproduction in any format is prohibited without the permission of the copyright holder.

© 2011 Jack Tsen-Ta Lee

Jack Tsen-Ta Lee
School of Law, Singapore Management University
60 Stamford Road, #04-11, Singapore 178900
Tel +65.6828.1949 • Fax +65.6828.0805
E-mail jacklee@smu.edu.sg
Website <http://www.law.smu.edu.sg>

This dissertation is gratefully dedicated to my PhD supervisor

Dr Elizabeth A Wicks,

without whose advice and guidance
this work would not have come to fruition;

and to my parents,

Ann and Song Chong Lee,

who always believed in me.



ACKNOWLEDGEMENTS

I am most grateful to the Birmingham Law School and the University of Birmingham for supporting the writing of this dissertation by providing a partial scholarship and an appointment as a visiting lecturer during the 2005–2006 academic year, and a full scholarship in the form of a postgraduate teaching assistantship between September 2006 and August 2008.

The faculty and staff of the Birmingham Law School, my PhD classmates, and the people I came to know at Jarratt Hall and in Selly Oak, particularly the congregants of St Stephen's and St Wulstan's, Selly Park, befriended and supported me, and made my three-year sojourn in Birmingham thoroughly delightful and enriching. I thank you all.

ABSTRACT

Taciturn bills of rights and constitutions – texts that express concepts at high levels of abstraction or which do not provide much guidance in other ways – pose challenges for courts responsible for determining their meaning and applying them. This dissertation aims to identify the approach that might be taken by courts in Commonwealth jurisdictions with written constitutions. It argues that the starting point is the legislative intention underlying the text, and that the preferred conception of such an intention is moderate originalism. This requires ascertainment of the meaning the legislators imbued the text with through their choice of words at the time the constitution was enacted, but which recognizes that parts of the text may be interpreted dynamically where language connoting abstract moral principles has been employed.

The dissertation distinguishes constitutional interpretation from constitutional construction. Interpretation involves identifying the semantic content of a constitutional text, and to do so courts should consider the linguistic, purposive and applicative meanings of terms and provisions. Where interpreting the text does not yield any useful or complete legal rule, the court must engage in construction by applying legal principles and techniques such as the presumption in favour of generosity, the use of constitutional implications, and a proportionality analysis. Thus, any constitutional ‘silence’ is in fact not so silent after all, as it may be given voice by the court.

TABLE OF CONTENTS

TABLE OF CASES	v
TABLE OF LEGISLATION	xiii
TABLE OF ABBREVIATIONS	xvii
INTRODUCTION	1
CHAPTER ONE	
Interpreting Bills of Rights: The Value of a Comparative Approach	7
I. CONCERN BASED ON THE TEXT: THE 'FOUR WALLS' DOCTRINE	9
A. GENEALOGICAL INTERPRETATION	15
B. DIALOGICAL INTERPRETATION	18
II. CONCERN BASED ON NATIONAL IDENTITY	23
III. CONCERN FOR DIFFERING CONDITIONS	34
IV. PRACTICAL CONCERNS	39
THE VALUE OF A COMPARATIVE APPROACH	43
CHAPTER TWO	
Collaboration through Confrontation: The Roles of the Branches of Government in Interpreting Bills of Rights	51
I. FUNDAMENTAL CONCEPTS	54
A. THE DOCTRINE OF THE SEPARATION OF POWERS	54
B. THE RULE OF LAW, CONSTITUTIONALISM AND THE STATUS OF BILLS OF RIGHTS AS LAW	60
1. <i>The Rule of Law</i>	60
2. <i>Constitutionalism and the Status of Bills of Rights as Law</i>	62
3. <i>The Independent Duty of the Branches of Government to Interpret a Bill of Rights</i>	66
II. A SINGLE AUTHORITATIVE INTERPRETER?	72
A. INTERPRETIVE AND JUDGMENT SUPREMACY DISTINGUISHED	72
1. <i>The Judiciary as Ultimate Interpreter: An Examination of the Judicial Role</i>	75
2. <i>Departmentalism and the Rule of Law</i>	79
B. THE COUNTER-MAJORITARIAN DIFFICULTY	85
1. <i>The Elusive 'Majority Will', and Executive and Legislative Action</i>	85
2. <i>An Unelected Judiciary – Problem or Protector?</i>	89
III. THE RELATIONSHIP BETWEEN THE BRANCHES OF GOVERNMENT	93
CONCLUSION	103
CHAPTER THREE	
The Dangerous Doctrine of Deference	105
I. DOCTRINES OF LIMITATION IN ADMINISTRATIVE LAW: NON-JUSTICIABILITY AND DEFERENCE	108
A. NON-JUSTICIABILITY	109

B. DEFERENCE	116
II. DEFERENCE AND BILLS OF RIGHTS.....	121
A. THE APPLICATION OF DOCTRINES OF DEFERENCE TO BILLS OF RIGHTS	121
1. <i>Deference in the Context of Proportionality Analysis</i>	122
2. <i>Implicit Deference? The Case of Singapore</i>	132
B. PRACTICAL DIFFICULTIES WITH HOW DOCTRINES OF DEFERENCE ARE APPLIED ..	136
III. JUSTIFICATIONS FOR DEFERENCE.....	141
A. SEPARATION OF POWERS	142
B. ACCOUNTABILITY AND INSTITUTIONAL COMPETENCE	145
III. REDEFINING DEFERENCE.....	153
CONCLUSION.....	157

CHAPTER FOUR

Interpretive Approaches: The Nature of the Judicial Task.....159

I. THE TEXT AT ITS INCEPTION: LEGISLATIVE INTENTION	161
A. THE MEANING OF LEGISLATIVE INTENTION	161
1. <i>Legislative Intention and Legal Meaning: Originalism, and Expressed and Unexpressed Intent</i>	166
(1) <i>Actual and Counterfactual Intentions</i>	168
(2) <i>Original Meaning</i>	173
B. MODERATE ORIGINALISM.....	176
II. THE TEXT THROUGH TIME: FIXED AND DYNAMIC MEANING.....	179
CONCLUSION.....	188

CHAPTER FIVE

Fidelity to Origins: Text, Context and Application in Constitutional Interpretation 191

I. LEGISLATIVE INTENTION AND THE MEANING OF <i>MEANING</i>	194
II. DETERMINING MEANING	199
A. LINGUISTIC MEANING	200
1. <i>Semantic Meaning: The Natural and Ordinary Meaning of Terms</i>	200
2. <i>Pragmatic Meaning</i>	204
(1) <i>Text and Context</i>	206
(a) <i>The Paucity of Literalism</i>	206
(b) <i>Purposive Meaning</i>	211
(2) <i>Terms of Art</i>	221
(3) <i>Implications and Stipulations</i>	226
B. APPLICATIVE MEANING	226
III. MEANING – FIXED OR CHANGING?.....	227
A. SEMANTIC OPPORTUNISM.....	229
B. THE CONNOTATION–DENOTATION DISTINCTION	231
1. <i>Connotation and Clause Meaning</i>	232
2. <i>Denotation and Applicative Meaning</i>	235
3. <i>Applying a Connotation–Denotation Analysis</i>	240
(1) <i>Establishing Connotation</i>	240
(2) <i>Determining Denotation</i>	248
CONCLUSION.....	254

CHAPTER SIX

When the Text Runs Out: The Role of the Court in Constitutional Construction.... 259

I. THE PRESUMPTION IN FAVOUR OF GENEROSITY RE-EXAMINED	261
II. TEXTUAL VAGUENESS AND CONSTITUTIONAL IMPLICATIONS	265
A. AMBIGUITY AND VAGUENESS	265

B. CONSTITUTIONAL IMPLICATIONS.....	267
1. <i>Implications from Text and Structure</i>	269
2. <i>Implications from Common Law Rules and Principles</i>	276
3. <i>The Limits of Constitutional Implications</i>	290
III. PROPORTIONALITY	295
A. DIFFICULTIES WITH PROPORTIONALITY.....	297
1. <i>Incommensurability</i>	298
2. <i>Devaluation of Rights</i>	304
B. PROPORTIONALITY AND TACITURN CONSTITUTIONS	307
CONCLUSION	310
 CONCLUSION	 315
 BIBLIOGRAPHY	 321

TABLE OF CASES

Australia

- Adelaide Co of Jehovah's Witnesses Inc v Commonwealth* (1943) 67 CLR 116, HC
- Amalgamated Society of Engineers v Adelaide Steamship Co Ltd* (1920) 28 CLR 129, HC
- Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1, HC
- Attorney-General for Australia v The Queen* [1957] AC 288, PC (on appeal from Australia)
- Attorney-General (NSW) v Brewery Employés' Union of New South Wales* (1908) 6 CLR 469, HC
- Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106, HC
- Australian National Airways Ltd v The Commonwealth* (1945) 71 CLR 29, HC
- Bermingham v Corrective Services Commission of New South Wales* (1988) 15 NSWLR 292
- Cheatle v R* (1993) 177 CLR 541, HC
- Cheng v R* (2000) 203 CLR 248, HC
- Church of the New Faith v Commissioner for Pay-Roll Tax* (1983) 154 CLR 120, HC
- Coco v The Queen* (1994) 179 CLR 427, HC
- Colina, ex parte Torney, Re* (1999) 200 CLR 386, HC
- Commissioner of Taxation (Cth) v ANZ Banking Group Ltd* (1977) 143 CLR 499, HC
- Commonwealth v Tasmania* (1983) 158 CLR 1, HC
- Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399, HC
- Eastman v R* (2000) 203 CLR 1, HC
- Favelle Mort Ltd v Murray* (1976) 133 CLR 580, HC
- Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 429, HC
- Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, HC
- James v The Commonwealth* (1936) 55 CLR 1, HC
- Jumbunna Coal Mine NL v Victorian Coal Miners' Association* (1908) 6 CLR 309, HC
- Kartinyeri v Commonwealth* (1998) 195 CLR 337, HC
- King v Jones* (1972) 128 CLR 221, HC
- Koowarta v Bjelke-Petersen* (1982) 153 CLR 168, HC
- Kruger v Commonwealth* (1997) 190 CLR 1, HC
- Lake Macquarie Shire Council v Aberdare County Council* (1970) 123 CLR 327, HC
- Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, HC
- Lansell v Lansell* (1964) 110 CLR 353, HC
- Leeth v Commonwealth* (1991) 174 CLR 455, HC
- McCrea v Minister for Customs & Justice* (2004) 212 ALR 297, FC (single judge); (2005) 223 ALR 552, 145 FCR 269, FC (full ct)
- McCrea v Minister for Customs and Justice of the Commonwealth* [2005] HCATrans 761, HC
- McGinty v Western Australia* (1996) 186 CLR 140, HC
- Mills v Meeking* (1990) 169 CLR 214, HC
- Mulholland v Australian Electoral Commission* (2004) 220 CLR 181, HC
- Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513, HC
- Patterson, ex parte Taylor, Re* (2001) 207 CLR 391, HC
- Pochi v Macphee* (1982) 151 CLR 101, HC
- R v Federal Court of Australia, ex parte WA National Football League* (1979) 143 CLR 190, HC
- R v Public Vehicles Licensing Appeal Tribunal (Tas), ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207, HC
- Sargood Bros v Commonwealth* (1910) 11 CLR 258, HC
- Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28, HC
- Singh v Commonwealth* [2004] HCA 43, (2004) 222 CLR 322, HC
- Street v Queensland Bar Association* (1989) 168 CLR 461, HC
- Sue v Hill* (1999) 199 CLR 462, HC
- Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104, HC
- Union Steamship Co of Australia Pty Ltd v King* (1988) 166 CLR 1, HC
- Victoria v Commonwealth* (1971) 122 CLR 353, HC
- Wakim, ex parte McNally, Re* (1999) 198 CLR 511, HC

Canada

Aleksic v Canada (Prime Minister) (2002) 215 DLR (4th) 720, Superior Ct of Justice (Div Ct) (Ont)

Black v Canada (Prime Minister) (2001) 199 DLR (4th) 228, CA (Ont)

British Columbia Development Corp v Friedman (Ombudsman) and Attorney General for British Columbia [1984] 2 SCR 447, SC

Canada (Attorney General) v Mossop [1993] 1 SCR 554, SC

Canadian National Railway Co v Canada (Human Rights Commission) [1987] 1 SCR 1114, SC

Canadian Odeon Theatres Ltd v Saskatchewan Human Rights Commission and Huck [1985] 3 WWR 717, CA (Sask)

Chaoulli v Quebec (Attorney General) [2005] 1 SCR 791, SC

Chiasson v R (2003) 226 DLR (4th) 351, FCA (Can)

Chromiak v The Queen [1980] 1 SCR 471, SC

Copello v Canada (Minister of Foreign Affairs) (2001) 39 Admin LR (3rd) 89, FC (Trial Div)

Corbiere v Canada (Minister of Indian & Northern Affairs) [1999] 2 SCR 203, SC

Delisle c Canada (Sous-procureur general) [1999] 2 RCS 989, SC

Edwards v R [1930] AC 124, PC (on appeal from Canada)

Eldridge v British Columbia (Attorney General) [1977] 3 SCR 624, SC

Ganis v Canada (Minister of Justice) (2006) 216 CCC (3d) 337, CA (BC)

Greenshield v The Queen [1958] SCR 216, SC

Hunter v Southam Inc [1984] 2 SCR 145, SC

Irwin Toy Ltd v Quebec (Attorney General) [1989] 1 SCR 927, SC

Libman v Quebec (Attorney General) [1997] 3 SCR 659, SC

M v H [1999] 2 SCR 3, SC

McBratney v McBratney (1919) 59 SCR 550, SC

McKinney v University of Guelph [1990] 3 SCR 229, 76 DLR (4th) 545, SC

Morguard Properties Ltd v City of Winnipeg (1983) 3 DLR (4th) 1, SC

New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly) [1993] 1 SCR 319, SC

Ontario v C P Ltd [1995] 2 SCR 1028, SC

Operation Dismantle Inc v R [1985] 1 SCR 441, SC

Provincial Court Judges Association (Manitoba) v Manitoba (Minister of Justice) (sub nom Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island) [1997] 3 SCR 3, SC

R v Beaugard [1986] 2 SCR 56, SC

R v Big M Drug Mart Ltd [1985] 1 SCR 295, SC

R v Butler [1992] 1 SCR 452, SC

R v Chaulk [1990] 3 SCR 1303, SC

R v Downey [1992] 2 SCR 10, SC

R v Edward Books and Art Ltd [1986] 2 SCR 713, SC

R v Laba (sub nom R v Johnson) [1994] 3 SCR 965, SC

R v McCraw [1991] 3 SCR 72, SC

R v McIntosh [1995] 1 SCR 686, SC

R v Multiform Mfg Co (1990) 79 CR (3d) 390, SC

R v Oakes [1986] 1 SCR 103, SC

R v Seaboyer [1991] 2 SCR 577, 83 DLR (4th) 193, SC

R v Therens [1985] 1 SCR 613, SC

R in right of New Brunswick v Estabrooks Pontiac Buick Ltd (1982) 44 NBR (2d) 201, CA (New Brunswick)

Reference re Language Rights under s. 23 of Manitoba Act, 1870 and s. 133 of Constitution Act, 1867 [1985] 1 SCR 721, SC

Reference re Secession of Quebec [1998] 2 SCR 217, SC

Reference re s 94(2) of the Motor Vehicle Act (British Columbia) [1985] 2 SCR 486, SC

RJR-MacDonald Inc v Canada [1995] 3 SCR 199, SC

Thomson Newspapers Co v Canada (1995) 24 OR (3d) 109

Thomson Newspapers Co v Canada (Attorney General) [1988] 1 SCR 877, SC

Tucker v Douglas [1950] 2 DLR 827, CA (Saskatchewan)

United States v Burns [2001] 1 SCR 283, SC

Vancouver Island Peace Society v Canada (1993) 19 Admin LR (2d) 91, FC (Trial Div)

Vriend v Alberta [1998] 1 SCR 493, SC

Zurich Insurance Co v Ontario (Human Rights Commission) [1992] 2 SCR 321, SC

European Court of Human Rights

Chahal v United Kingdom (1996) 23 EHRR 413

Dudgeon v United Kingdom (1981) 4 EHRR 149

Handyside v United Kingdom (1976) 1 EHRR 737
Hilal v United Kingdom (2001) 33 EHRR 2
Lingens v Austria (1986) 8 EHRR 407
Lustig-Prean & Beckett v United Kingdom (1999) 29 EHRR 548
Pretty v United Kingdom (2002) 35 EHRR 1
Smith & Grady v United Kingdom (2000) 29 EHRR 493
Smith & Grady v United Kingdom (Art 41) (2001) 31 EHRR 24
Soering v United Kingdom (1989) 11 EHRR 439
Young, James & Webster v United Kingdom (1981) 4 EHRR 38

India

A K Gopalan v State of Madras AIR 1950 SC 27, SC
Chiranjit Lal v Union of India AIR 1951 SC 41, SC
Kesavananda Bharati v State of Kerala AIR 1973 SC 1461, SC
Shri Ram Krishna Dalmia v Shri Justice S R Tendolkar AIR 1958 SC 538, [1959] SCR 279, SC

Ireland

Boland v An Taoiseach [1974] IR 338, SC
Comerford v Minister for Education [1997] 2 ILRM 134
Crotty v An Taoiseach [1987] IR 713, SC
DB v Minister for Justice [1999] 1 IR 29, HC
Enright v Ireland [2003] 2 IR 321, HC
O'Donoghue v Minister for Health [1996] 2 IR 20, HC

Malaysia

Che Ani bin Itam v Public Prosecutor [1984] 1 MLJ 113, FC
Datuk Haji bin Harun Idris v Public Prosecutor [1977] 2 MLJ 155, FC
Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia [2006] 6 MLJ 213, CA
Government of Malaysia v Loh Wai Kong [1979] 2 MLJ 33, FC
Government of the State of Kelantan v Government of the Federation of Malaya [1963] MLJ 355, HC
Harmenderpall Singh a/l Jagara Singh v Public Prosecutor [2005] 2 MLJ 542, HC (Johor Bahru)

Hong Leong Equipment Sdn Bhd v Liew Fook Chuan [1996] 1 MLJ 481, CA
Lee Kwan Woh v Public Prosecutor [2009] 5 MLJ 301, FC
Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187, FC
Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan [1997] 2 MLJ 361, FC
Phang Chin Hock v Public Prosecutor [1980] 1 MLJ 70, FC
Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan [2002] 3 MLJ 72, FC
Public Prosecutor v Ooi Kee Saik [1971] 2 MLJ 108, HC
Public Prosecutor v Ottavio Quattrocchi [2003] 1 MLJ 225, HC
Public Prosecutor v Pung Chen Choon [1994] 1 MLJ 566, SC
R Rama Chandran v The Industrial Court of Malaysia [1997] 1 MLJ 145, FC
S Kulasingham v Commissioner of Lands, Federal Territory [1982] 1 MLJ 204
Sivarasa Rasiah v Badan Peguam Malaysia [2006] 1 MLJ 727, CA
Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah [1998] 3 MLJ 298, CA
Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan [1996] 1 MLJ 261, CA
Tennet v Kaka Singh Dhaliwal (Secretary of the Malayan Racing Association) [2007] 3 MLJ 67, HC (Kuala Lumpur)

New Zealand

Fraser v State Services Commission [1984] 1 NZLR 116, CA
New Zealand Drivers' Association v New Zealand Road Carriers [1982] 1 NZLR 374, CA
Taylor v New Zealand Poultry Board [1984] 1 NZLR 394, CA
Westco Lagan Ltd v AG [2001] 1 NZLR 40, HC

Singapore

Attorney-General v Lingle [1995] 1 SLR(R) 199, HC
Attorney-General v Shadrake [2011] 2 SLR 445, HC
Attorney-General v Wain [1991] 1 SLR(R) 85, HC
Chan Hiang Leng Colin v Public Prosecutor [1994] 3 SLR(R) 209, HC

Chee Siok Chin v Minister for Home Affairs [2006] 1 SLR(R) 582, HC
Cheng Vincent v Minister for Home Affairs [1990] 1 SLR(R) 38, HC
Chng Suan Tze v Minister for Home Affairs [1988] 2 SLR(R) 525, CA
Constitutional Reference No 1 of 1995 [1995] 1 SLR(R) 803, Const Tribunal
Dow Jones Publishing Co (Asia) Inc v Attorney-General [1989] 1 SLR(R) 637, CA
Forward Food Management Pte Ltd v Public Prosecutor [2002] 1 SLR(R) 443, HC
Haw Tua Tau v Public Prosecutor [1982] AC 136, [1981–1982] SLR(R) 133, PC (on appeal from Singapore)
How William Glen, Re [1994] 2 SLR(R) 357, HC
Jasbir Singh v Public Prosecutor [1994] 1 SLR(R) 782, CA
JD Ltd v Comptroller of Income Tax [2006] 1 SLR(R) 484, CA
Jeyaretnam Joshua Benjamin v Lee Kuan Yew [1992] 1 SLR(R) 791, CA
Jusri bin Mohamed Hussain v Public Prosecutor [1996] 2 SLR(R) 706, HC
Kok Hoong Tan Dennis v Public Prosecutor [1996] 3 SLR(R) 570, HC
Lee Kuan Yew v Jeyaretnam Joshua Benjamin [1990] 1 SLR(R) 709, HC
Lim Teng Ee Joyce v Singapore Medical Council [2005] 3 SLR(R) 709, HC
Lo Pui Sang v Mamata Kapildev Dave [2008] 4 SLR(R) 754, HC
Nappalli v Institute of Technical Education [1998] SGHC 351, HC
Nappalli v Institute of Technical Education [1999] 2 SLR(R) 529, CA
Nguyen Tuong Van v Public Prosecutor [2005] 1 SLR(R) 103, CA
Ong Ah Chuan v Public Prosecutor [1981] AC 648, [1979–1980] SLR(R) 710, PC (on appeal from Singapore)
Ong Jane Rebecca v Lim Lie Hoa [2008] 3 SLR(R) 189, HC
Pan-United Marine Ltd v Chief Assessor [2008] 3 SLR(R) 569, CA
Planmarine AG v Maritime and Port Authority of Singapore [1999] 1 SLR(R) 669, CA
Public Prosecutor v Low Kok Heng [2007] 4 SLR(R) 183, HC
Public Prosecutor v McCrea Michael [2006] 3 SLR(R) 677, HC
Public Prosecutor v Mazlan bin Maidun [1992] 3 SLR(R) 968, CA
Public Prosecutor v Taw Cheng Kong [1998] 2 SLR(R) 489, CA

Rajeevan Edakalavan v Public Prosecutor [1998] 1 SLR(R) 10, HC
Review Publishing Co Ltd v Lee Hsien Loong [2010] 1 SLR 52, CA
“Seaway”, The [2005] 1 SLR(R) 435, CA
Sun Hongyu v Public Prosecutor [2005] 2 SLR(R) 750, HC
Taw Cheng Kong v Public Prosecutor [1998] 1 SLR(R) 78, HC
Teo Soh Lung v Minister for Home Affairs [1989] 1 SLR(R) 461, HC; [1990] 1 SLR(R) 347, CA
Trustees of the Kheng Chiu Tin Hou Kong and Burial Ground v Collector of Land Revenue [1992] 1 SLR(R) 117, CA
Yong Vui Kong v Public Prosecutor [2010] 3 SLR 489, CA

South Africa

Mohamed v President of the Republic of South Africa 2001 (3) SA 893, Const Ct
State v Makwanyane 1995 (3) SA 391, Const Ct

United Kingdom

Associated Picture Houses Ltd v Wednesbury Corporation [1948] 1 KB 223
Attorney-General v Carlton Bank [1899] 2 QB 158
Attorney-General v De Keyser’s Royal Hotel Ltd [1920] AC 508, HL
Attorney-General v Edison Telephone Company of London (Limited) (1880–1881) LR 6 QBD 244, Ex D
Attorney-General v Observer Ltd (also known as *Attorney-General v Guardian Newspapers Ltd*) [1990] 1 AC 109, HL
Attorney-General v Winstanley (1831) 2 Dow & Cl 302, 6 ER 740, HL
Attorney-General of New Zealand v Ortiz [1982] QB 349
Becke v Smith (1836) 2 M & W 191, 150 ER 724
Benson (Inspector of Taxes) v Yarm Arm Club Ltd [1979] 1 WLR 347, CA
Black-Clawson International v Papierwerke Waldhof-Aschaffenburg AG [1975] AC 591, HL
Blackwell v England (1857) 8 El & Bl 541, 120 ER 202
Brooks v Brooks [1996] AC 375, HL
Brown v Stott (Procurator Fiscal, Dunfermline) [2003] 1 AC 681, PC (on appeal from Scotland)

- C and another (minors) (parent: residence order), Re* [1994] Fam 1
- Calvin's Case* (1608) 7 Co Rep 1a, 77 ER 377
- Cassell & Co Ltd v Broome* [1972] AC 1027, HL
- Chandler v Director of Public Prosecutions* [1964] AC 763, HL
- Close v Steel Co of Wales Ltd* [1962] AC 367, HL
- Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374, HL
- Dr Bonham's Case* (1610) 8 Co Rep 113b, 77 ER 646, Ct of Common Pleas
- Exxon Corporation v Exxon Insurance Consultants International Ltd* [1981] 1 WLR 624, Ch D
- Fisher v Bell* [1961] 1 QB 394
- Fitzpatrick v Sterling Housing Association* [1998] Ch 304; [2001] 1 AC 27, HL
- Football Association Premier League Ltd v Panini UK Ltd* [2004] 1 WLR 1147, CA
- Fothergill v Monarch Airlines Ltd* [1981] AC 251, HL
- Ghaidan v Godin-Mendoza* [2004] 2 AC 557, HL
- Grey v Pearson* (1857) 6 HL Cas 61, 10 ER 1216, QB
- Hardwick Game Farm v Suffolk Agricultural and Poultry Producers Association Ltd* [1966] 1 WLR 287, CA
- Heydon's Case* (1584) 3 Co Rep 7a, 76 ER 637
- Hyde v Hyde* (1866) LR 1 P & D 130
- Inco Europe Ltd v First Choice Distribution* [2000] 1 WLR 586, HL
- International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728, CA
- Jones v Wrotham Park Settled Estates* [1980] AC 74, HL
- Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, HL
- Kerr v Kennedy* [1942] 1 KB 409
- McC (a minor), Re* [1985] AC 528, HL
- Marchiori v Environment Agency* [2002] EWCA Civ 3, [2002] Eu LR 225, CA
- Merkur Island Shipping Corporation v Laughton* [1983] 2 AC 570, HL
- Midland Railway Co v Robinson* (1889) LR 15 App Cas 19, HL
- Osborne v Rowlett* (1880) 13 Ch D 774
- Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48, CA
- R v Bouch* [1983] QB 246, CA
- R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864
- R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326, HL
- R v Ireland* [1997] QB 114, CA
- R v Jones (Margaret)* [2007] 1 AC 136, HL
- R v Lord Chancellor, ex parte Witham* [1998] 1 QB 575
- R v Ministry of Defence, ex parte Smith* [1996] QB 517, HL
- R v Peters* (1886) LR 16 QBD 636
- R v Secretary of State for the Environment, ex parte Hammersmith and Fulham London Borough Council* [1991] 1 AC 521, HL
- R v Secretary of State for the Environment, ex parte Nottinghamshire County Council* [1986] AC 240, HL
- R v Secretary of State for the Environment, ex parte Spath Holme Ltd* [2001] 2 AC 349, HL
- R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] QB 811, CA
- R v Secretary of State for the Home Department, ex parte Bentley* [1994] QB 439, Div Ct
- R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696, HL
- R v Secretary of State for the Home Department, ex parte Bugdaycay* [1987] AC 514, HL
- R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513, HL
- R v Secretary of State for the Home Department, ex parte Pierson* [1998] AC 539, HL
- R v Secretary of State for the Home Department, ex parte Simms* [2000] 2 AC 115, HL
- R v Secretary of State for the Home Department, ex parte Venables and Thompson* [1998] AC 407, HL
- R v Slaton* (1881) 8 QBD 267
- R v Westminster City Council, ex parte A* (1997) 9 Admin LR 504
- R v Z* [2005] 2 AC 645, HL
- R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295, HL
- R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2007] EMLR 6, QBD (Admin Ct)
- R (Confederation of Passenger Transport UK) v Humber Bridge Board* [2004] QB 310, CA
- R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532, HL
- R (Farrakhan) v Secretary of State for the Home Department* [2002] QB 1391, CA

R (Gentle) v Prime Minister [2007] QB 689, CA; [2008] 1 AC 1356, HL
R (Jackson) v Attorney-General [2006] 1 AC 262, HL
R (Mahmood) v Secretary of State for the Home Department [2001] 1 WLR 840, CA
R (Pretty) v Director of Public Prosecutions [2002] 1 AC 800, HL
R (ProLife Alliance) v British Broadcasting Corporation [2004] 1 AC 185, HL
R (on the application of Thomson et al) v Minister of State for Children [2005] FCR 603, QBD (Admin Ct)
Royal College of Nursing of the United Kingdom v Department of Health and Social Security [1981] AC 800, HL
Salkeld v Johnson (1848) 2 Exch 256, 154 ER 487
Secretary of State for Foreign and Commonwealth Affairs v The Queen (on the application of Bancoult) [2007] EWCA Civ 498, (2007) 151 SJLB 707, CA
Secretary of State for the Home Department v Rehman [2003] 1 AC 153, HL
Selvey v DPP [1970] AC 304, HL
Sirros v Moore [1975] QB 118
Stepney Election Petition, Isaacson v Durant, In re (1886) 17 QBD 54
Stock v Frank Jones (Tipton) Ltd [1978] 1 WLR 231, HL
Stowel v Lord Zouch (1569) 1 Plowd 353, 75 ER 536
Sussex Peerage case (1844) 11 Cl & Fin 85, 8 ER 1034, HL
Sutherland Publishing Co Ltd v Caxton Publishing Co Ltd [1938] Ch 174
Thoburn v Sunderland City Council [2003] QB 151
Tuck & Sons v Priester (1887) LR 19 QBD 629
Victor Chandler International v Customs and Excise Commissioners [2000] 1 WLR 1296, CA
Wheeler v Leicester City Council [1985] AC 1054, HL
Wilson v First County Trust Ltd (No 2) [2004] 1 AC 816, HL

Privy Council

Adegbenro v Akintola [1963] AC 614, PC (on appeal from Nigeria)
Attorney-General for Australia v The Queen [1957] AC 288, PC (on appeal from Australia)
Attorney-General of the Gambia v Momodou Jobe [1984] AC 689, PC (on appeal from the Gambia)

Brown v Stott (Procurator Fiscal, Dunfermline) [2003] 1 AC 681, PC (on appeal from Scotland)
De Frietas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing [1999] 1 AC 69, PC (on appeal from Antigua and Barbuda)
Director of Public Prosecutions of Jamaica v Mollison [2003] 2 AC 411, PC (on appeal from Jamaica)
Edwards v R [1930] AC 124, PC (on appeal from Canada)
Griffith v The Queen [2005] 2 AC 235, PC (on appeal from Barbados)
Haw Tua Tau v Public Prosecutor [1982] AC 136, [1981–1982] SLR(R) 133, PC (on appeal from Singapore)
Hinds v The Queen [1977] AC 195, PC (on appeal from Jamaica)
Lewis v Attorney-General of Jamaica [2001] 2 AC 50, PC (on appeal from Jamaica)
Liyanage v The Queen [1967] 1 AC 259, PC (on appeal from Ceylon)
Minister of Home Affairs v Fisher [1980] AC 319, PC (on appeal from Bermuda)
Mohammed Muktar Ali v The Queen [1992] 2 AC 93, PC (on appeal from Mauritius)
Mohit v Deputy Public Prosecutor of Mauritius [2006] 1 WLR 3343, PC (on appeal from Mauritius)
Ong Ah Chuan v Public Prosecutor [1981] AC 648, [1979–1980] SLR(R) 710, PC (on appeal from Singapore)
Reckley v Minister of Public Safety and Immigration (No 2) [1996] AC 527, PC (on appeal from the Bahamas)
Reyes v The Queen [2002] 2 AC 235, PC (on appeal from Belize)
Vasquez v R [1994] 1 WLR 1304, PC (on appeal from Belize)

United States of America

Board of County Commissioners v Umbehr 518 US 668 (1996)
Brown v Board of Education 347 US 483 (1957)
City of Boerne v Flores 521 US 507 (1997)
Cooper v Aaron 358 US 1 (1958)
Dickerson v United States 530 US 428 (2000), SC
Illinois Elections Board v Socialist Workers Party 440 US 173 (1979), SC
Jacobellis v Ohio 378 US 184 (1964), SC
Kennedy v Mendoza-Martinez 372 US 144 (1962), SC
M'Culloch v Maryland 17 US 316 (1819), SC

Marbury v Madison (1803) 5 US (1 Cranch) 137, SC

Minor v Happersett 88 US 162 (1874), SC

New York Times Co v Sullivan 376 US 254 (1964), SC

People v Fisher 50 Hun 552, 3 NY Supp 786 (1889)

PGA Tour, Inc v Martin 532 US 661 (2001), SC

Printz v United States 521 US 898 (1997), SC

Roper v Simmons 543 US 551 (2005), SC

Rutan v Republican Party 497 US 62 (1990), SC

South Carolina v United States 199 US 437 (1905), SC

Southern Railway Co v Greene 216 US 400 (1910), SC

Stanford v Kentucky 492 US 361 (1989), SC

Thompson v Oklahoma 487 US 815 (1988), SC

Trop v Dulles 356 US 86 (1958), SC

United States v Carolene Products Co 304 US 144 (1938), SC

United States v Lopez 514 US 549 (1995), SC

United States v New York Times Co 444 F 2d 544 (2nd Cir, 1971)

United States v Wong Kim Ark 169 US 649 (1898), SC

Wilkerson v Utah 99 US 130 (1879), SC

Zimbabwe

Nyambirai v National Social Security Authority [1996] 1 LRC 64

TABLE OF LEGISLATION

Australia

Commonwealth of Australia Constitution Act
1900 (63 & 64 Vict, c 12) (UK)
s 1
ss 51(xviii), (xix), (xxi), (xxvi)
s 61
s 71
s 72
s 128
Acts Interpretation Act 1901 (No 2 of 1901)
(Cth)
s 15AA
s 15AB
Judiciary Act 1903 (No 6 of 1903) (Cth)
Trade Marks Act 1905 (No 20 of 1905) (Cth)
Interpretation of Legislation Act 1984 (No
10096 of 1984) (Vic)

Canada

Constitution Act 1867 (30 & 31 Vict, c 3 (UK);
reprinted in RSC 1985, App II, No 5)
Canadian Bill of Rights (SC 1960, c 44)
Criminal Code (RSC 1970, c C-34)
Lord's Day Act (RSC 1970, c L-13)
Canadian Charter of Rights and Freedoms (Pt
I of the Constitution Act, 1982 (Can),
which is Sch B of the Canada Act 1982 (c 11)
(UK))
Preamble
s 1
s 2
ss 7–15
ss 33
Constitution Act, 1982 (Can) (Sch B of the
Canada Act 1982 (c 11) (UK))
s 52(2)

Europe

European Convention on Human Rights
Art 2(1)
Art 3
Art 8(1)
Art 11(1)
Art 14

India

Constitution of India
Art 14(1)
Art 19(3)

Ireland

Sex Offenders Act 2001
s 7(2)
Constitution of Ireland (Nov 2004 ed; enacted
by the People 1 Jul 1937)
Art 26.1.1°
Arts 26, 26.3.1°
Art 35.4.1°
Art 38.1
Art 45

Malaysia

Federal Constitution of Malaysia
Art 5(1)
Arts 13(1), (2)

New Zealand

Constitution Act 1986 (1986 No 114)
s 23
s 24
New Zealand Bill of Rights Act 1990 (1990 No
109)

Singapore

Republic of Singapore Independence Act 1965
(No 9 of 1965)
ss 6(1), (3)
[Constitution (Amendment) Bill 1969 (No B
5/1969)]
Internal Security Act (Cap 143, 1985 Rev Ed)
s 8(1)
Constitution of the Republic of Singapore
(Amendment) Act 1989 (No 1 of 1989)
Internal Security Act (Amendment) Act 1989
(No 2 of 1989)
Judicial Committee (Repeal) Act 1994 (No 2 of
1994)

Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Rev Ed)
 Constitution of the Republic of Singapore (1999 Reprint)
 Art 2(1)
 Art 4
 Arts 5(2), (2A)
 Art 9(1)
 Art 10(2)
 Art 11
 Arts 12(1)–(2)
 Art 13
 Arts 14(1), (2)
 Arts 15(1), (4)
 Art 16(1)
 Art 20(3)
 Art 23(1)
 Art 24
 Art 25(1)
 Art 38
 Art 58(1)
 Art 61
 Art 65(4)
 Art 66
 Art 68
 Art 76(1)
 Art 77
 Art 78(6)(c)
 Arts 80(1), (4)(b)
 Art 93
 Art 95(1)
 Art 97
 Art 98(1), (3)–(5)
 Arts 100(1), (4)
 Art 149
 Art 162
 1st Sch, Forms 1–3, 6
 Interpretation Act (Cap 1, 2002 Rev Ed)
 s 9A
 Penal Code (Cap 224, 2008 Rev Ed)
 s 300(a)
 s 377A

South Africa

Constitution of the Republic of South Africa 1993 (Act 200 of 1993)
 s 33(1)
 s 35(1)
 Constitution of the Republic of South Africa 1996 (Act 108 of 1996)
 s 1(c)
 s 2
 s 7(2)
 s 9(1)
 s 12(1)(e)
 s 39

s 43
 s 48
 s 62(6)
 s 85
 s 87
 s 91(1)
 s 95
 s 107
 s 165(1)
 s 167(5)
 s 174(8)
 ss 176(1), (3)
 s 177
 Sch 2
 Sch 6, item 2(1)(b)
 Proclamation No R 6, 1997

United Kingdom

Bill of Rights 1689 (1 W & M, c 2)
 s 10
 Offences Against the Person Act 1861 (24 & 25 Vict, c 100)
 s 47
 Constitution Act 1867 (30 & 31 Vict, c 3 (UK))
 Commonwealth of Australia Constitution Act 1900 (63 & 64 Vict, c 12)
 Increase of Rent and Mortgage Interest (Restrictions) Act 1920 (10 & 11 Geo V, c 17)
 Malaysia Act 1963 (1963 c 35)
 Rent Act 1977 (1977 c 42)
 Sch 1, para 3(1)
 Betting and Gaming Duties Act 1981 (1981 c 63)
 s 9(1)(b)
 Copyright, Designs and Patents Act 1988 (1988 c 48)
 s 31(1)
 Children Act 1989 (1989 c 41)
 s 10(4)(a)
 Human Rights Act 1998 (1998 c 42)
 s 3
 s 4
 s 10
 s 19
 Human Rights Act 1998 (Commencement No 1) Order 1998 (SI 1998 No 2882 (C 71))
 Human Rights Act 1998 (Commencement No 2) Order 2000 (SI 2000 No 1851 (C 47))
 Constitutional Reform Act 2005 (2005 c 4)
 ss 7(1), (4)
 s 15
 s 23
 s 18
 s 40
 s 137(3)
 Sch 4
 Sch 6

Explanatory notes

United States of America

Constitution of the United States of America

Art I, s 1

Art II, s 1

Art III, ss 1, 2

Art V

Art VI

Art IX, s 1

5th Amdt

8th Amdt

14th Amdt, s 1

Brady Handgun Violence Prevention Act 1993

(Pub L No 103-159, 107 Stat 1536 (30

November 1993), codified at 18 USC §§

921 and 922)

TABLE OF ABBREVIATIONS

AC ... Law Reports, Appeal Cases (UK)

Admin LR ... *Administrative Law Reports*
(Can)

ALR ... *Australian Law Reports*

Am J Juris ... *American Journal of*
Jurisprudence

Am U L Rev ... *American University Law*
Review

Art ... Article

B U L Rev ... Boston University Law **Review**

Brook L Rev ... *Brooklyn Law Review*

c ... chapter number of a statute

Calif L Rev ... *California Law Review*

Cam LJ ... *Cambridge Law Journal*

Can B Rev ... *Canadian Bar Review*

Can J L & Juris ... *Canadian Journal of Law*
and Jurisprudence

Cardozo L Rev ... *Cardozo Law Review*

CCC ... *Canadian Criminal Cases*

Ch, Ch D ... *Law Reports, Chancery Division*
(UK)

CLR ... *Commonwealth Law Reports*
(Australia)

Colum J Transnat'l L ... *Columbia Journal of*
Transnational Law

Colum L Rev ... *Columbia Law Review*

Const Ct ... *Constitutional Court*

Const Tribunal ... *Constitution of the Republic*
of Singapore Tribunal

Cornell L Rev ... *Cornell Law Review*

CR ... *Criminal Reports* (Can)

Div Ct ... Divisional Court (UK)

EHRLR ... European Human Rights **Law Review**

EHRR ... *European Human Rights Reports*

E L Rev ... *European Law Review*

Eu LR ... *European Law Reports*

Ex D ... *Exchequer Division* (UK)

F ... Federal Reporter (US)

Fam ... *Law Reports, Family Division* (UK)

FC ... *Federal Court*

FCA ... *Federal Court of Appeal* (Can)

FCR ... *Family Court Reports* (UK), *Federal*
Court Reports (Australia)

Fed L Rev ... *Federal Law Review* (Australia)

Geo LJ ... Georgetown Law Journal

Harv JL & Pub Pol'y ... Harvard Journal **of Law and Public Policy**

Harv J Leg ... *Harvard Journal of Legislation*

Harv L Rev ... *Harvard Law Review*

HC ... *High Court*

HKJL ... *Hong Kong Law Journal*

ILRM ... Irish Law Reports Monthly

Int'l J Const L ... *International Journal of*
Constitutional Law

Ind LJ ... *Indiana Law Journal*

Iowa L Rev ... *Iowa Law Review*

IR ... *Irish Reports*

KB ... *Law Reports, King's Bench Division* (UK)

J App Prac & Process ... Journal of **Appellate Practice and Process**

JR ... *Judicial Review*

L & Ethics of Hum Rts ... Law and **Ethics of Human Rights**

LQR ... *Law Quarterly Review*

LRC ... *Law Reports of the Commonwealth*

Melb U L Rev ... Melbourne University **Law Review**

Mich L Rev ... *Michigan Law Review*

MLJ ... *Malayan Law Journal*

MLR ... *Modern Law Review*

Nat'l J Const Law ... National Journal of **Constitutional Law**

NBR ... *New Brunswick Reports*

NSWLR ... *New South Wales Law Reports*

Nw U L Rev ... *Northwestern University Law*
Review

NYU L Rev ... *New York University Law*
Review

NZLR ... *New Zealand Law Reports*

OJLS ... Oxford Journal of Legal Studies

Ont ... *Ontario*

OR ... *Ontario Reports*

Osgoode Hall LJ ... *Osgoode Hall Law Journal*

Ottawa L Rev ... *Ottawa Law Review*

Oxford U C'wealth LJ ... *Oxford University*
Commonwealth Law Journal

Pt ... Part

Pub L ... *Public Law*

Pub L Rev ... *Public Law Review*

QB ... *Law Reports, Queen's Bench Division (UK)*

QBD ... *Queen's Bench Division (UK)*

RCS ... *Supreme Court Reports (Can; French version)*

Rev Ed ... *Revised Edition*

s, ss ... *section(s)*

S Cal L Rev ... *Southern California Law Review*

St Louis U LJ ... *St Louis University Law Journal*

SC ... *Supreme Court*

SCR ... *Supreme Court Reports (Canada)*

Sing J Int'l Comp L ... *Singapore Journal of International and Comparative Law*

Sing J Legal Studies ... *Singapore Journal of Legal Studies*

Sing L Rev ... *Singapore Law Review*

SJLB ... *Solicitors' Journal LawBrief*

SLR(R) ... *Singapore Law Reports (Reissue)*

Stat L Rev ... *Statute Law Review*

Sing YB Int'l L ... *Singapore Year Book of International Law*

Syd L Rev ... *Sydney Law Review*

Tex Int'l LJ ... *Texas International Law Journal*

Tex L Rev ... *Texas Law Review*

UCLA L Rev ... *University of California, Los Angeles Law Review*

U Chi L Rev ... *University of Chicago Law Review*

U Ill L Rev ... *University of Illinois Law Review*

U Mich JL Reform ... *University of Michigan Journal of Law Reform*

U Pa J Const L ... *University of Pennsylvania Journal of Constitutional Law*

U Pa L Rev ... *University of Pennsylvania Law Review*

U Toronto LJ ... *University of Toronto Law Journal*

Va L Rev ... *Virginia Law Review*

WLR ... *Weekly Law Reports*

WWR ... *Western Weekly Reports*

Yale LJ ... *Yale Law Journal*

INTRODUCTION

WHEN FORMER COLONIES of the British Empire gained their independence, most of them maintained a political system based on the Westminster model. There are naturally differences in such systems between Commonwealth nations. Some – often the larger ones such as Australia, Canada and Malaysia – have a federal system, while the political systems of smaller ones like New Zealand and Singapore are unitary. Some nations have a bicameral parliament, others possess a legislature with a single chamber. Notwithstanding these variances, as in the United Kingdom there is usually an overlap between the membership of the executive and the legislature. The prime minister and members of the cabinet are drawn from among the persons elected to parliament. Other ubiquitous features are the organization of members of parliament (MPs) into political parties, which ensure their members support the executive's policies through the use of party whips and disciplinary sanctions; and the appointment as prime minister of a person commanding the confidence of a majority of MPs. Laws enacted by the parliament are usually initiated by the executive.

However, one distinct break made with the United Kingdom in a large number of Commonwealth nations was the adoption of a written constitution, frequently incorporating a bill of rights. The implication is that the legislature is not sovereign in the British sense, since the judiciary has a legal duty to exercise United States-style judicial review and declare legislation that is inconsistent with the constitution to be

void and of no effect. Again, the power that a legislature possesses under such a written constitution varies from jurisdiction to jurisdiction, depending on factors such as the manner in which each constitution is drafted, the attitude taken by the court towards its role in constitutional adjudication, and – probably – political considerations. The Canadian Charter of Rights and Freedoms,¹ for instance, provides in section 1 that the rights and freedoms set out in the Charter are “subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”, which implies that rights and freedoms may be limited by laws enacted by the Parliament of Canada provided that the conditions specified in the section are respected. The Charter impresses on Canadian courts the responsibility of determining whether legislation is reasonable and justifiable in a free and democratic society. The reach of section 33 of the Charter is further – it empowers Parliament or a provincial legislature to expressly declare legislation to be operational despite inconsistency with certain Charter provisions.²

The Canadian position may be compared with the situation in Singapore and Malaysia, the constitutions of which are worded similarly due to their shared legal history.³ Many of the provisions of the bills of rights of these two nations’ constitutions are subject to legislative restrictions that may be imposed on specified

¹ Pt I of the Constitution Act, 1982, which is Sch B of the Canada Act 1982 (c 11) (UK).

² Namely, ss 2 and 7–15 of the Charter. Such a declaration ceases to have effect five years after coming into force, or on such earlier date as may be specified in the declaration, but may be extended: ss 33(3)–(5). On the use of the override procedure, see Peter W Hogg, *Constitutional Law of Canada* (5th ed) (Scarborough, Ont: Thomson/Carswell, 2007), vol 2, at 165–167, [39.2].

³ The fundamental liberties in Pt II of the Federal Constitution of Malaysia extended to Singapore when the latter became a state of Malaysia in 1963. In 1965, when Singapore left the Federation of Malaysia and became an independent republic, its Parliament enacted the Republic of Singapore Independence Act 1965 (No 9 of 1965, 1985 Rev Ed), s 6(1) of which stated that the provisions of the Malaysian Constitution, apart from certain exceptions, “shall continue in force in Singapore subject to such modifications, adaptations and qualifications and exceptions as may be necessary to bring them into conformity with the independent status of Singapore upon separation from Malaysia”. These include most of the fundamental liberties in the Malaysian Constitution, which are now in Pt IV of the Constitution of the Republic of Singapore (1999 Reprint).

grounds. For example, Article 14(1)(b) of the Singapore Constitution (*in pari materia* with Article 10(1)(b) of the Malaysian Constitution) states that “all citizens of Singapore have the right to assemble peaceably and without arms”. However, this is expressly subject to Article 14(2)(b) (Malaysia’s Article 10(2)(b)), which states that “Parliament may by law impose... on the rights conferred by clause (1)(b), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof or public order...”. This provision may be termed sparsely worded as it does not expressly mention that the restrictions imposed by Parliament on the right of assembly must be reasonable or justifiable in a democratic society. The phraseology led the High Court of Singapore to hold in a 2005 case that

... there can be no questioning of whether the legislation is “reasonable”. The court’s sole task, when a constitutional challenge is advanced, is to ascertain whether an impugned law is within the purview of any of the permissible restrictions. ... All that needs to be established is a nexus between the object of the impugned law and one of the permissible subjects stipulated in Art 14(2) of the Constitution.⁴

The Court took the view that the use of the phrase *necessary or expedient* in the Constitution “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”.⁵ On the other hand, one year later a different approach was taken by the Malaysian Court of Appeal to Article 10(2), the Court stating that it was necessary to read the word *reasonable* into the sub-clauses of that Article⁶ as the court “must not permit restrictions upon the rights conferred by art 10 that render those rights illusory”.⁷ Thus, the Malaysian Parliament may only abridge the right to freedom of assembly in a proportionate

⁴ *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at 602, [49].

⁵ *Id.*

⁶ *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213 at 220, [9].

⁷ *Id.* at 220, [11].

manner and to the extent that the restrictions are reasonably necessary.⁸ The fact that the Singaporean and Malaysian courts have taken divergent approaches to essentially the same constitutional text is intriguing. It raises the issue of the approach that courts in Commonwealth jurisdictions with sparsely worded constitutions and bills of rights should take when called upon to interpret such texts, which this dissertation seeks to examine.

Chapter One⁹ of the dissertation justifies the methodology employed, explaining why referring to foreign jurisprudence is appropriate when determining what meaning should be given to constitutional provisions and how they should be applied. Chapter Two goes on to examine the roles played by the three branches of government – executive, legislature and judiciary – as regards interpreting bills of rights, and seeks to rationalize why it is correct to regard the judiciary as the ‘ultimate interpreter’. In connection with this, Chapter Three looks at the doctrine of deference and the extent to which it should be applied by courts towards the political branches of government in judicial review involving bills of rights.

The next three chapters attempt to identify the approach that Commonwealth courts may take towards determining the meaning of constitutional texts and applying them to specific scenarios. Chapter Four considers the concept of legislative intention, and argues that it requires a moderately originalist stance to be taken towards constitutional interpretation. The chapter also explains why moderate originalism permits judges to apply a dynamic interpretation to the meaning of the text in appropriate circumstances. These themes are expanded upon in Chapter Five,

⁸ *Id* at 220–221, [11].

⁹ An earlier version of this chapter was published as Jack Tsen-Ta Lee, “Interpreting Bills of Rights: The Value of a Comparative Approach”, (2007) 5 *In’t J Const L* 122–152.

which proposes a way of analysing how the ‘meaning’ of a certain constitutional term or provision should be understood and determined, relating it to the concepts of legislative intention and taking a purposive approach to interpretation. It also elaborates on how judges may interpret texts dynamically by employing the distinction between the connotation and denotation of terms, an approach applied by Australian courts.¹⁰ Finally, Chapter Six introduces constitutional construction, the idea that a court must apply legal principles external to the text when the semantic meaning of the text fails to provide sufficient guidance as to how a provision should be applied to a particular scenario. The chapter also discusses why a proportionality analysis is appropriate when determining whether a constitutional right is legitimately restricted by legislation.

Overall, this dissertation submits that the judiciary should not be begrudged its responsibility of interpreting constitutional and bill of rights texts with a proper degree of flexibility in order to maximize the rights guaranteed to people.

¹⁰ Portions of this chapter have been published as Jack Tsen-Ta Lee, “The Text Through Time” (2010) 31 Stat L Rev 217–237.

CHAPTER ONE

Interpreting Bills of Rights: The Value of a Comparative Approach

The reception of foreign legal institutions is not a matter of nationality, but of usefulness and need. No one bothers to fetch a thing from afar when he has one as good or better at home, but only a fool would refuse quinine just because it didn't grow in his back garden.¹

— RUDOLF VON JHERING, 1818–1892

I. CONCERN BASED ON THE TEXT: THE 'FOUR WALLS' DOCTRINE.....	9
A. GENEALOGICAL INTERPRETATION.....	15
B. DIALOGICAL INTERPRETATION.....	18
II. CONCERN BASED ON NATIONAL IDENTITY	23
III. CONCERN FOR DIFFERING CONDITIONS.....	34
IV. PRACTICAL CONCERNS	39
V. THE VALUE OF A COMPARATIVE APPROACH	43

IT IS GENERALLY FAIR TO SAY THAT it is a widespread practice for courts in common-law jurisdictions to refer in their judgments to legal material from other jurisdictions, particularly those with which they share a similar heritage. Yet, on closer examination, this assertion turns out to be rather an overstatement. It is no doubt true in so far as traditional common-law subjects such as contract and tort law are concerned, but less so for constitutional and human rights law. In fact, in certain jurisdictions, among them Malaysia, Singapore and the United States of America,

¹ Rudolf von Jhering, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, Part I (9th ed) (Basel: B Schwabe, 1955) at 8f, cited in Konrad Zweigert & Hein Kötz, *Introduction to Comparative Law* (3rd rev ed) (Oxford: Clarendon Press, 1998) (translated from the German by Tony Weir) at 17.

some quarters are decidedly sceptical about the legitimacy of consulting comparative materials in relation to the latter areas of law. In a speech given at the University of Chicago Law School in November 2005, the United States Attorney General Alberto Gonzales expressed concern over what he saw as the “growing tendency” by judges to interpret the Constitution by reference to foreign law, which might “undermine the long tradition of reverence that Americans have for the supreme law of the land”.²

This scepticism is rather curious, for it appears to be useful for a court to refer to foreign legal material – including cases, legislation and academic writings – for a number of reasons. For instance, a court may use comparative material to shed light on the effect that should be given to the text of a bill of rights in its own jurisdiction, especially where the point has not arisen in the local context or it is contended that previous interpretations are flawed. The use may be fairly superficial; for instance, the experiences of foreign jurisdictions, as indicative of certain international trends or trends among established democratic nations, may be cited to support or disavow a particular approach taken by the court. Alternatively, a court may identify a doctrine of foreign law and apply it in expressing the meaning of the text of a domestic bill of rights, with suitable modifications if necessary. In addition, a court may find foreign law of value not for its substantive content but for the general approach taken to the interpretive enterprise. This may enable it to better understand and explain its approach to interpreting its own bill of rights.

² Alberto R Gonzales, Attorney General, “Prepared Remarks”, address at the University of Chicago Law School (9 November 2005) <<http://www.law.uchicago.edu/files/Attorney-General-Foreign-Law-Speech>> at 2. The transcript of the speech is also available from the website of the Office of the Attorney General, United States Department of Justice at <http://www.usdoj.gov/ag/speeches/2005/ag_speech_0511092.html> (both websites accessed 22 January 2006).

This chapter examines why the use of comparative material for these purposes has been criticized as illegitimate. Specifically, four main concerns are dealt with. The first is one based on the texts of bills of rights. Under this heading we will consider whether a court is justified in declining to consider comparative material on the ground that the text of a foreign bill of rights differs from that of the domestic charter. This concern has particularly held sway in the Commonwealth republics of Malaysia and Singapore. On the other hand, in the United States the principal concern appears to be that since a bill of rights reflects the identity and values of the nation, it is inappropriate to look to the experience of other countries. We will examine that concern, as well as two other concerns based on varying domestic conditions in different jurisdictions and the practicality of referring to foreign law. It is concluded that there are, in fact, sound justifications for courts taking a comparative approach to the interpretation of bills of rights.

I. CONCERN BASED ON THE TEXT: THE 'FOUR WALLS' DOCTRINE

In 1963, the Chief Justice of the Federation of Malaya stated in *Government of the State of Kelantan v Government of the Federation of Malaya* that the Malayan Federal Constitution was “primarily to be interpreted within its own four walls and not in light of the analogies drawn from other countries such as Great Britain, the United States of America or Australia”.³ This statement appeared in a short judgment delivered on the eve of the coming into force of the Malaysia Act 1963 (UK)⁴ which, as the history books tell us, resulted in the merger of the Federation of Malaya and the British colonies of North Borneo (Sabah), Sarawak and Singapore to

³ [1963] MLJ 355 at 358, HC (Malaysia).

⁴ 1963 c 35.

form a new Federation of Malaysia and, thus, the independence of the colonies from Great Britain. The case was the result of an attempt by the State of Kelantan, then a member of the Federation of Malaya, to block the merger and thus the formation of Malaysia.

In these circumstances of urgency, Thomson CJ can perhaps be forgiven for neither describing the analogies from foreign jurisdictions that he declined to apply to the Malayan Constitution, nor explaining clearly what he meant by an interpretation within the four walls of a constitution. However, in support of his statement, he referred to *Adegbenro v Akintola*,⁵ a judgment of the Judicial Committee of the Privy Council on appeal from the Supreme Court of Nigeria which had been rendered less than three months earlier. There, Viscount Radcliffe, delivering their Lordships' judgment, said:⁶

[T]he Constitution of Western Nigeria is now contained in a written instrument in which it has been sought to formulate with precision the powers and duties of the various agencies that it holds in balance. That instrument now stands in its own right; and, while it may well be useful on occasions to draw on British practice or doctrine in interpreting a doubtful phrase whose origin can be traced or to study decisions on the Constitutions of Australia or the United States where federal issues are involved, it is in the end the wording of the Constitution itself that is to be interpreted and applied, and this wording can never be overridden by the extraneous principles of other Constitutions which are not explicitly incorporated in the formulae that have been chosen as the frame of this Constitution.

If Thomas CJ's statement was to be understood in the light of *Adegbenro v Akintola*, then *Government of the State of Kelantan* stands for the proposition that foreign principles of law should not be applied if they cannot be accommodated by the constitutional text. The rule ensures that the text is not ignored.

⁵ [1963] AC 614, PC (on appeal from Nigeria).

⁶ *Id* at 631–632.

Although the ‘four walls’ theory or doctrine (as it has been termed by academics)⁷ has been applied repeatedly by the courts of Malaysia⁸ and Singapore, it does not appear to have been understood in the manner suggested above. As regards Singapore, the doctrine was reiterated by the Privy Council almost 20 years after *Government of the State of Kelantan in Ong Ah Chuan v Public Prosecutor*,⁹ a decision on appeal from Singapore rendered when the Privy Council was still the Republic’s court of final resort. In that case it was submitted on the appellant’s behalf that a rebuttable presumption created by the Misuse of Drugs Act 1973 conflicted with the ‘presumption of innocence’ which was a fundamental human right protected by Articles 9(1) and 12(1) of the Singapore Constitution.¹⁰ Article 9(1) prohibits the deprivation of life or personal liberty save in accordance with law, while Article 12(1) guarantees all persons equality before the law and equal protection of the law. Lord Diplock, in delivering the judgment of the court that dismissed the appeal, expressed the view that the two Articles differed considerably in their language from the corresponding provisions of the Indian Constitution in that the former were much less detailed. Articles 9(1) and 12(1) differed even more widely from the Bill of Rights in the United States Constitution. Thus:

[i]n view of these differences their Lordships are of opinion that decisions of Indian Courts on Pt III of the Indian Constitution should be approached with

⁷ Thio Li-ann, “The Secular Trumps the Sacred: Constitutional Issues Arising from *Colin Chan v Public Prosecutor*” (1995) 16 Sing L Rev 26 at 62; Thio Li-ann, “Recent Constitutional Developments: Of Shadows and Whips, Race, Rifts and Rights, Terror and *Tudungs*, Women and Wrongs” [2002] Sing J Legal Studies 328 at 347; Victor V Ramraj, “Comparative Constitutional Law in Singapore” (2002) 6 Sing J Int’l Comp L 302; Thio Li-ann, “‘Pragmatism and Realism Do Not Mean Abdication’: A Critical and Empirical Inquiry into Singapore’s Engagement with International Human Rights Law” (2004) 8 Sing YB Int’l L 41 at 59.

⁸ *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187, FC (Malaysia); *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70, FC (Malaysia); *Public Prosecutor v Pung Chen Choon* [1994] 1 MLJ 566, SC (Malaysia). See also *Public Prosecutor v Ooi Kee Saik* [1971] 2 MLJ 108, HC (Malaysia).

⁹ [1981] AC 648, [1979–1980] SLR(R) 710, PC (on appeal from Singapore).

¹⁰ Constitution of the Republic of Singapore (1999 Reprint).

caution as guides to the interpretation of individual articles in Pt IV of the Singapore Constitution; and that decisions of the Supreme Court of the United States on that country's Bill of Rights, whose phraseology is now nearly two hundred years old, are of little help in construing provisions of the Constitution of Singapore or other modern Commonwealth constitutions which follow broadly the Westminster model.¹¹

Following this lead, the four walls doctrine has been applied in various Singapore cases. In *Attorney-General v Wain (No 1)*¹² the respondents, who were facing an action for contempt by scandalizing the court after the publication of a news article in the *Asian Wall Street Journal*, sought to rely on decisions from Canada and other Commonwealth jurisdictions discussing freedom of speech. The judge held that the Canadian decisions were not useful authorities "for they are decisions based on the Canadian Charter of Rights and Freedoms which has no parallel in Singapore".¹³ As regards the cases from other parts of the Commonwealth, the judge said that:

though they make interesting reading, I find that so many of them turn on their own facts. As is to be expected, the judges in making their decisions in those cases were concerned with the social, political, industrial and other economic conditions prevailing in their respective societies at the particular time. It is therefore difficult to reconcile or to rationalize the many different and conflicting views expressed by the judges in their decision-making process. At best the cases only serve as illustrations of the application of the law of contempt in those countries.¹⁴

In *Jeyaretnam Joshua Benjamin v Lee Kuan Yew*,¹⁵ a defamation case, the appellant invited the court to consider provisions in bills of rights guaranteeing freedom of speech in jurisdictions such as Canada, India and the United States of America, as well as Article 10 of the European Convention on Human Rights. He submitted that Article 14(1) of the Singapore Constitution, which protects freedom of

¹¹ [1981] AC at 669, [1979–1980] SLR at 721, [22].

¹² [1991] 1 SLR(R) 85, HC (Singapore).

¹³ *Id* at 96, [35].

¹⁴ *Id* at 96, [36].

¹⁵ [1992] 1 SLR(R) 791, CA (Singapore).

speech and expression, required defamation law to be modified such that the defence of qualified privilege attached to the publication of statements defamatory of public officials or candidates for a public office relating to their official conduct or the performance of their public duties made by those who had an honest and legitimate interest in the matter to those who had a corresponding and legitimate interest, whether as electors or as citizens potentially affected by the conduct of public officials. Two leading cases – the decision of the United States Supreme Court in *New York Times Co v Sullivan*¹⁶ and that of the European Court of Human Rights in *Lingens v Austria*¹⁷ – were heavily relied upon. The Court of Appeal declined to consider this submission, holding that the terms of Article 14 differed materially from the First and Fourteenth Amendments of the United States Constitution and from Article 10 of the European Convention on Human Rights.¹⁸

Singapore courts continued to apply the four walls doctrine even after appeals to the Privy Council were completely abolished with effect from 8 April 1994¹⁹ and the Court of Appeal became Singapore's final appellate court. *Chan Hiang Leng Colin v Public Prosecutor*²⁰ concerned orders by the Minister for Home Affairs banning as undesirable all publications of the Watch Tower Bible and Tract Society, which produced materials for Jehovah's Witnesses. The case involved a challenge to the validity of these orders on the ground that they were contrary to the freedom of religion protected by Article 15 of the Singapore Constitution. In response to an

¹⁶ 376 US 254 (1964).

¹⁷ (1986) 8 EHRR 407.

¹⁸ Above, n 15 at 815–816, [56].

¹⁹ With the enactment of the Judicial Committee (Repeal) Act 1994 (No 2 of 1994) (Singapore).

²⁰ [1994] 3 SLR(R) 209, HC (Singapore).

argument by the appellants' counsel based on the First Amendment to the United States Constitution, Yong Pung How CJ referred to the four walls doctrine and said:²¹

There is a fundamental difference between the right to freedom of religion under the First Amendment to the United States Constitution and art 15. The American provision consists of an 'establishment clause' which proscribes any preference for a particular religion (Congress shall make no law respecting an establishment of religion) and a 'free exercise clause' which is based on the principle of governmental non-interference with religion (Congress shall make no law prohibiting the free exercise thereof). Significantly, the Singapore Constitution does not prohibit the 'establishment' of any religion. The social conditions in Singapore are, of course, markedly different from those in the United States. On this basis alone, I am not influenced by the various views as enunciated in the American cases cited to me but instead must restrict my analysis of the issues here with reference to the local context.

Chan Hiang Leng Colin's invocation of the doctrine was followed in the unreported High Court decision of *Peter Williams Nappalli v Institute of Technical Education*,²² in which a teacher was dismissed for refusing on religious grounds to take the National Pledge or sing the National Anthem. One of the issues considered was the effect of the constitutional guarantee of freedom of religion on his contractual obligations. Referring to *Chan Hiang Leng Colin*, Tan Lee Meng J affirmed the four walls doctrine and noted that there were "differences between the American position and the Singapore Constitution and that social conditions in Singapore are markedly different from those in the United States".²³ On appeal, the doctrine was once again cited with approval by the Court of Appeal.²⁴

Two features of the above decisions warrant mention. First, there is a tendency for foreign case law to be dismissed as irrelevant under the rubric of the four walls doctrine on the basis of differences in wording between the foreign bill of

²¹ *Id* at 231–232, [53].

²² [1998] SGHC 351 at [40]–[42], HC. The four walls doctrine was also cited with approval in *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR(R) 78 at 107–108, [78], HC (Singapore).

²³ *Nappalli*, *id* at [42].

²⁴ *Nappalli Peter Williams v Institute of Technical Education* [1999] 2 SLR(R) 529 at 535, [19], CA (Singapore).

rights and the domestic constitution. Second, this dismissal is often buttressed by a declaration that the foreign law is inapplicable locally because conditions (economic, political, social or otherwise) in the two jurisdictions differ. If, as has been submitted,²⁵ the four walls doctrine is essentially directed at preventing the constitutional text from being disregarded, the second feature is arguably an objection to foreign law that stands apart from the four walls doctrine. The point will therefore be considered in Part III of this chapter, while the rest of this section will examine the first feature.

A. GENEALOGICAL INTERPRETATION

The four walls doctrine may be applied without much difficulty where the text speaks unambiguously. In *Adegbenro v Akintola*²⁶ for instance, the main issue arising was whether the Governor of the Western Region of Nigeria was entitled to dismiss the respondent as Premier following the receipt of a letter signed by 66 out of the 124 members of the House of Assembly stating that they no longer supported the Premier, without any vote adverse to the respondent in the House. The Governor had purported to act pursuant to section 33 of the Constitution of Western Nigeria which read: “(10) ... the Ministers of the Government of the Region shall hold office during the Governor’s pleasure: Provided that — (a) the Governor shall not remove the Premier from office unless it appears to him that the Premier no longer commands the support of a majority of the members of the House of Assembly...” One of the arguments advanced by the respondent was that the Nigerian Constitutions were modelled on the constitutional doctrines of the United Kingdom, and, since the

²⁵ Above, nn 5–8 and the accompanying text.

²⁶ Above, n 5.

British Sovereign would not be regarded as acting with constitutional propriety in dismissing a Prime Minister from office without an adverse vote in the House of Commons, so the Governor in Western Nigeria had to be similarly treated as precluded from exercising his power of removal in the absence of a vote of the same kind. The Privy Council declined to accept the argument, finding, *inter alia*, nothing in the general scheme or in specific provisions of the Constitution which stated that the Governor was legally precluded from forming his opinion upon the basis of anything but votes formally given on the floor of the House.

On the other hand, as bills of rights often embody broad statements of principle, it is arguably inaccurate to declare that foreign law can shed no light on the text. For example, as we have seen, Article 9(1) of the Singapore Constitution provides that “[n]o person shall be deprived of his *life* or *personal liberty* save in accordance with law”. The due process clauses of the Fifth and Fourteenth Amendments to the United States Constitutions state that no person shall be deprived of “*life, liberty, or property, without due process of law*”. Despite the differences in wording, can it be said that American cases on the due process clauses are of no help at all in elucidating the meaning of the terms “life” and “personal liberty” in the Singapore Constitution? A court would naturally have to satisfy itself that any foreign legal principles referred to are consonant with domestic constitutional doctrine, but with that caveat in mind it is reasonable to say that a mere difference in the phrasing of domestic and foreign bills of rights should not of itself disqualify foreign principles of law from being considered in the interpretation of the domestic bills of rights. In fact, Victor Ramraj terms the four walls doctrine “legal rhetoric” and observes that it is routinely disregarded by the Singapore courts

in practice.²⁷ Using vocabulary developed by Sunit Choudhry,²⁸ Ramraj notes that Singapore courts have used foreign case law in “genealogical interpretations” of the Constitution. This mode of interpretation holds that relationships of genealogy and history that tie constitutions together offer sufficient justification for the importation and application of entire areas of constitutional doctrine.²⁹

In Singapore, for instance, it is common for courts to refer to Malaysian and Indian case law when interpreting the Constitution; the fundamental liberties in the Singapore Constitution were inherited from the Malaysian Constitution, and the Malaysian Constitution was itself inspired by the Indian Constitution.³⁰ As an example, it was held in *Kok Hoong Tan Dennis v Public Prosecutor*³¹ that a legislative provision does not violate Article 12(1) of the Singapore Constitution, which provides that “[a]ll persons are equal before the law and entitled to the equal protection of the law”, if it passes the ‘rational nexus’ test. This test requires the classification employed by the provision to be founded on an intelligible differentia which distinguishes persons that are grouped together from others left out of the group, and the differentia to have a rational relation to the object sought to be achieved by the law in question; in other words, there must be a nexus between the basis of classification and the object of the law in question.³² The rational nexus test was adopted from the decision of the Malaysian Federal Court of Criminal Appeal in *Datuk Haji bin Harun Idris v Public Prosecutor*,³³ which itself followed the Indian

²⁷ Ramraj, above, n 7 at 309–310.

²⁸ Sujit Choudhry, “Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation” (1999) 74 Ind LJ 819.

²⁹ Choudhry, *id* at 838.

³⁰ Ramraj, above, n 7 at 311–313.

³¹ [1996] 3 SLR(R) 570, HC.

³² *Id* at 578–579, [34].

³³ [1977] 2 MLJ 155, FC (Malaysia).

Supreme Court case of *Shri Ram Krishna Dalmia v Shri Justice S R Tendolkar*.³⁴ It is to be noted that the wording of Article 12(1) of the Singapore Constitution differs slightly from Article 14(1) of the Indian Constitution, which is phrased negatively: “The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.” The minor variations in phraseology have not deterred the Singapore courts from adopting a useful interpretive approach from other jurisdictions.

A genealogical interpretation appears to assume that if a local bill of rights was modelled upon a foreign bill of rights, the legislature must have intended foreign legal doctrines to be applicable to the local context as well. However, unless there is some evidence pointing to this conclusion such as reports of legislative debates, it is submitted that the assumption may not be justifiable. Rather, what a court should be asking itself is whether the *concepts* embodied in the text of a foreign bill of rights and the *meanings* that have been ascribed to the text are able to elucidate the content of corresponding provisions in the local bill of rights.

B. DIALOGICAL INTERPRETATION

The four walls doctrine has also not deterred Singapore courts from considering, both favourably and unfavourably, cases from jurisdictions other than Malaysia and India. In *Peter Williams Nappalli* before the High Court,³⁵ the judge, having referred to the doctrine with approval, went on to use foreign cases to buttress his argument, citing two American cases, a Sri Lankan case and an English case. On appeal, the Court of Appeal again invoked the four walls doctrine, then proceeded to consider

³⁴ AIR 1958 SC 538, [1959] SCR 279 at 296–297, SC (India).

³⁵ Above, n 22.

Australian, Philippine, American, English and Canadian cases.³⁶ Indeed, it appears that the four walls doctrine is sometimes used as a device to reject certain lines of foreign authority while accepting others.

Ramraj points out³⁷ that this an eclectic use of foreign case law is what Choudhry calls a “dialogical interpretation” of a bill of rights.³⁸ A court taking such an interpretive approach engages in dialogue with comparative jurisprudence in order to better understand its own constitutional system and jurisprudence.³⁹ The court examines comparative case law and doctrine, not primarily to gain an accurate picture of the state of the law in the other jurisdiction, but rather to identify the assumptions that lie underneath it. The comparative jurisprudence serves as an “interpretive foil”: in the process of asking why foreign courts have reasoned a certain way, a court will surely ask itself why it reasons the way it does.⁴⁰ Having identified the assumptions underlying the foreign law and its own law, the court is then faced with a set of interpretive choices. In cases of constitutional difference, if the court rejects foreign assumptions and affirms its own, the exercise has nonetheless heightened its awareness and understanding of constitutional difference which, in turn, will shape and guide constitutional interpretation. Conversely, in cases of constitutional similarity, if the similarity identified is embraced, dialogical interpretation grounds the legitimacy of importing comparative jurisprudence and applying it as law.⁴¹

³⁶ *Id* at 536–539, [23]–[33].

³⁷ Ramraj, above, n 7 at 313–317.

³⁸ Choudhry, above, n 28 at 836.

³⁹ *Id.*

⁴⁰ *Id* at 857.

⁴¹ *Id* at 858.

On the other hand, a court may reject shared assumptions in the foreign law and the law of its own jurisdiction and stake out a new interpretive approach proceeding from radically different premises, or determine cases of apparent constitutional difference to be unfounded. Thus, the process of dialogical interpretation “can lead the court to fundamentally re-assess its previous judgments, and to use comparative jurisprudence as a means to initiate radical legal change”.⁴² Foreign constitutional jurisprudence is often considered by Singapore courts dialogically, only to be ultimately rejected.⁴³ On the other hand, older lines of foreign authority that would not now be referred to in their own jurisdictions have been followed in preference to modern jurisprudence. In *Jeyaretnam Joshua Benjamin v Lee Kuan Yew*,⁴⁴ the Canadian case *Tucker v Douglas*⁴⁵ was approved. As this case was decided before the Canadian Charter of Rights and Freedoms came into force on 17 April 1982, the court did not have to balance the public interest in protecting a person’s reputation against a constitutional guarantee of free speech.⁴⁶ Similarly, in *Chan Hiang Leng Colin*,⁴⁷ the Singapore High Court, after invoking the four walls doctrine, referred with approval to *Adelaide Co of Jehovah’s Witnesses Inc v Commonwealth*,⁴⁸ an Australian case decided during World War II.⁴⁹ Ramraj admits it might be argued that such a selective use of foreign constitutional cases is objectionable because the local court is employing these cases in support of its own position by taking them out of their legal and historical context. However, he says

⁴² *Id.*

⁴³ Ramraj, above, n 7 at 314.

⁴⁴ Above, n 15.

⁴⁵ [1950] 2 DLR 827, CA (Saskatchewan, Canada).

⁴⁶ Thio Li-ann, “An ‘i’ for an ‘I’? Singapore’s Communitarian Model of Constitutional Adjudication” (1997) 27 HKLJ 152 at 183.

⁴⁷ Above, n 20.

⁴⁸ (1943) 67 CLR 116, HC (Australia).

⁴⁹ Ramraj, above, n 7 at 315.

this misses the point: the dialogical approach merely uses comparative case law “instrumentally, as a means to stimulate constitutional self-reflection”,⁵⁰ and does not purport to make normative claims based on the cases.⁵¹

There is certainly something to be said for judges using foreign material as a source of inspiration when considering how bill of rights jurisprudence should be developed, and this is a point that I return to later in this chapter.⁵² Further, a key advantage of a dialogical approach is that it is unnecessary for the court to acquire a deeper understanding of the workings of a borrowed foreign legal doctrine and the role that it plays in the legal system from which it is derived. However, while in theory it is possible for a judge’s reference to comparative material to be solely for instrumental purposes, in many cases it will be hard to imagine that the judge is not really preferring one line of authority to another. For a judge to act in this way would be undesirable, particularly if he neither articulates why obsolete legal principles are being applied, nor provides convincing reasons why modern lines of authority have been rejected. A judgment that uses dialogical interpretation thus risks appearing to be arbitrary and illogical.

In summary, it has been suggested that the four walls doctrine does not mandate a wholesale rejection of comparative constitutional material because jurisdictions such as Singapore and Malaysia, which have repeatedly affirmed the doctrine, have nonetheless made use of foreign law in genealogical and dialogical interpretations of their respective Constitutions, and these are legitimate interpretive approaches. In

⁵⁰ Choudhry, above, n 28 at 892.

⁵¹ Ramraj, above, n 7 at 315–316.

⁵² See the discussion on cross-fertilization below at the text accompanying nn 104–105.

this connection, it is interesting to note that the Privy Council no longer takes the narrow interpretive approach that it applied in *Ong Ah Chuan*.⁵³ The issue raised in *Reyes v The Queen*,⁵⁴ an appeal from Belize, was whether a mandatory death sentence imposed upon the appellant was constitutional. In holding that it was not, apart from its own past decisions and those of the courts of Belize, the Privy Council referred to cases from Australia, Canada, the European Court of Human Rights, Guyana, Jamaica, India, the Inter-American Commission on Human Rights, Mauritius, South Africa, the United Kingdom and the United States of America.

However, both genealogical and dialogical interpretation suffer from weaknesses. Genealogical interpretation is legitimate provided there exists sufficient evidence that when the legislature adopted the words of a foreign bill of rights into a local statute it intended also to import the meanings given to those words through foreign judicial interpretation. Otherwise a more sensible approach is for the local court to assess whether comparative material, whether or not originating from an 'ancestral' bill of rights, is capable of illuminating the meaning of the local bill of rights text. Dialogical interpretation appears to be notionally acceptable, but judgments that refer to foreign cases out of context may come across as irrational. It is submitted that the four walls doctrine should be properly understood as a rule aimed at ensuring that a foreign legal principle is not applied when it cannot be validly accommodated by the text of a bill of rights. The doctrine therefore does not altogether exclude the use of comparative constitutional material. If this view is accepted, the difficulties with the genealogical and dialogical interpretations discussed above do not undermine the point.

⁵³ Above, n 9.

⁵⁴ [2002] 2 AC 235, PC (on appeal from Belize).

II. CONCERN BASED ON NATIONAL IDENTITY

Scepticism has also been expressed regarding the use of comparative constitutional material on the basis of what Mark Tushnet calls “expressivism”, the idea that constitutions help constitute the nation, to varying degrees in different nations, offering to each nation’s people a way of understanding themselves as political beings.⁵⁵ Because a constitution is seen as embodying the commitments that define a national identity, this is said to speak against constitutional borrowing.⁵⁶

This was one of the main points made by US Attorney General in his address at the University of Chicago Law School. Mr Gonzales noted that the US Constitution was built upon the consent of the governed. When the Supreme Court held a law to be unconstitutional, it was vindicating the will of a sovereign people embodied in the written Constitution against the temporary expression of popular will manifested in the particular actions of a legislature. He therefore questioned how the standards of anyone other than the people of the US could legitimately be relevant to determining the will of the American people.⁵⁷

The position is also exemplified by the views of Associate Justice Antonin Scalia in several United States Supreme Court decisions handed down in the past two decades. In Scalia J’s dissent in *Thompson v Oklahoma*⁵⁸ as well as in a judgment on behalf of the majority in *Stanford v Kentucky*,⁵⁹ both cases dealing with the constitutionality of executing felons who were young adolescents at the time the

⁵⁵ Mark Tushnet, “The Possibilities of Comparative Constitutional Law” (1999) 108 Yale LJ 1225 at 1228.

⁵⁶ Seth F Kreimer, “Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing” (1999) 1 U Pa J Const L 640 at 648–649.

⁵⁷ Gonzales, above, n 2 at 19.

⁵⁸ 487 US 815 (1988).

⁵⁹ 492 US 361 (1989).

crimes were committed,⁶⁰ he objected emphatically to even the most formulaic references to legal rules in other Western democracies.⁶¹

The majority in *Thompson* held that executing a person less than 16 years of age at the time of the offence offended civilized standards of decency. It noted that this conclusion was consistent with the views of, *inter alia*, “other nations that share our Anglo-American heritage, and by leading members of the Western European community”.⁶² The same stance was taken in Brennan J’s dissenting judgment in *Stanford*.⁶³ Scalia J expressed his disagreement with this approach in footnotes to his judgments in the two cases,⁶⁴ calling it:

totally inappropriate as a means of establishing the fundamental beliefs of this Nation. ... We must never forget that it is a Constitution for the United States of America that we are expounding. The practices of other nations, particularly democracies, can be relevant to determining whether a practice uniform among our people is not merely a historical accident, but rather so “implicit in the context of ordered liberty” that it occupies a place not merely in our mores but, text permitting, in our Constitution as well. But where there is not first a settled consensus among our own people, the views of other nations, however enlightened the Justices of this Court may think them to be, cannot be imposed upon Americans through the Constitution.⁶⁵

The 1997 case of *Printz v United States*⁶⁶ involved the federal Brady Handgun Violence Prevention Act, the provisions of which required the Attorney-General to

⁶⁰ In *Thompson v Oklahoma*, above, n 58, the Supreme Court held that statutes that permitted the imposition of capital punishment on a person under the age of 16 at the time when the offence was committed violated the Eighth and Fourteenth Amendments of the Constitution. *Stanford v Kentucky*, above, n 59, decided that such punishment was permissible if a person was over the age of 15 but under 18 at the relevant time. The latter decision was abrogated in *Roper v Simmons* 543 US 551 (2005): below, n 70, and the accompanying text.

⁶¹ Lorraine E Weinrib, “Constitutional Conceptions and Constitutional Comparativism” in Vicki C Jackson & Mark Tushnet (eds), *Defining the Field of Comparative Constitutional Law* (Westport, Conn; London: Praeger, 2002), 3 at 5.

⁶² *Thompson*, above, n 58 at 830–831, pointing out that the United Kingdom, New Zealand and the Soviet Union did not permit the execution of juveniles; that the death penalty had been abolished entirely in Australia (except for New South Wales), West Germany, France, Portugal, the Netherlands and all Scandinavian countries; and that it was available only for exceptional crimes such as treason in Canada, Italy, Spain, Switzerland and in New South Wales in Australia.

⁶³ *Stanford*, above, n 59 at 389. Brennan J’s dissent was joined by Marshall, Blackmun and Stevens JJ.

⁶⁴ *Thompson*, above, n 58 at 868 n 4; *Stanford*, above, n 59 at 369 n 1.

⁶⁵ *Thompson* and *Stanford*, *id.*

⁶⁶ 521 US 898 (1997).

establish a national system for instantly checking the backgrounds of prospective handgun purchasers, and to command the chief law enforcement officer of each local jurisdiction to conduct such checks and perform related tasks on an interim basis until the national system became operative. The petitioners, who were the chief law enforcement officers for counties in Montana and Arizona, challenged the constitutionality of the interim provisions on the ground that congressional action could not compel state officers to execute federal laws. This submission was accepted by a plurality of the Supreme Court.

In a dissenting opinion, Breyer J found support for his opposing view in the fact that the United States was not the only nation that sought to reconcile the practical need for a central authority with the democratic virtues of more local control. He noted that the federal systems of Switzerland, Germany, and the European Union all provided that constituent states, not federal bureaucracies, would implement many of the laws, rules, regulations, or decrees enacted by the central 'federal' body.⁶⁷ He remarked:

Of course, we are interpreting our own Constitution, not those of other nations, and there may be relevant political and structural differences between their systems and our own. ... But their experience may nonetheless cast an empirical light on the consequences of different solutions to a common legal problem...⁶⁸

Unconvinced, Scalia J, writing the plurality opinion, responded that “such comparative analysis [is] inappropriate to the task of interpreting a constitution, though it was of course quite relevant to the task of writing one. ... The fact is that our

⁶⁷ *Printz, id* at 976 (Stevens J joining).

⁶⁸ *Id* at 977.

federalism is not Europe's. It is 'the unique contribution of the Framers to political science and political theory.'"⁶⁹

The Supreme Court returned to the constitutionality of imposing capital punishment on juveniles in *Roper v Simmons*.⁷⁰ It will be recalled that *Stanford v Kentucky*⁷¹ had held that such punishment was permissible if a person was over the age of 15 but under 18 at the time of committing the offence. This time, however, a majority of the Court found that standards of decency had evolved since *Stanford*; therefore, the Eighth and Fourteenth Amendments of the Constitution now forbade the imposition of the death penalty on offenders who were under the age of 18 at the relevant time. For the majority, the fact that the death penalty was disproportionate for juvenile offenders was confirmed by a stark reality: that the United States was the only country in the world that continued to give official sanction to the juvenile death penalty. This reality did not provide a definitive answer, though, for the task of interpreting the Eighth Amendment's prohibition of "cruel and unusual punishments" remained the responsibility of the Court. However, the Court had on previous occasions referred to the laws of other countries and to international authorities as instructive for its interpretation of the Eighth Amendment. The United Kingdom's experience was of particular relevance in light of the historic ties between the two countries and the Eighth Amendment's origins in the English Declaration of Rights of 1689 which provided: "[E]xcessive Bail ought not to be required nor excessive Fines imposed; nor cruel and unusual Punishments inflicted."⁷² The majority concluded: "It does not lessen our fidelity to the Constitution or our pride in

⁶⁹ *Id* at 921 n 11, citing *United States v Lopez* 514 US 549 at 575 (1995).

⁷⁰ Above, n 60.

⁷¹ Above, n 59.

⁷² 1 W & M, c 2, s 10: *Roper*, above, n 60 at 577.

its origins to acknowledge that the express affirmation of certain fundamental rights by other nations and peoples simply underscores the centrality of those same rights within our own heritage of freedom.”⁷³

O’Connor J echoed these sentiments in her dissenting opinion:

[T]his Nation’s evolving understanding of human dignity certainly is neither wholly isolated from, nor inherently at odds with, the values prevailing in other countries. On the contrary, we should not be surprised to find congruence between domestic and international values, especially where the international community has reached clear agreement – expressed in international law or in the domestic laws of individual countries – that a particular form of punishment is inconsistent with fundamental human rights. At least, the existence of an international consensus of this nature can serve to confirm the reasonableness of a consonant and genuine American consensus.⁷⁴

Not surprisingly, Scalia J took exception to the reference to foreign and international legal materials. In his opinion, the majority’s basic premise – that American law should conform to the laws of the rest of the world – ought to be rejected out of hand. He noted that in many significant respects the laws of most other countries differed from American law. This included not only explicit provisions of the Constitution, but even many interpretations of the Constitution prescribed by the Supreme Court itself.⁷⁵ The Court had to either profess its willingness to reconsider all these matters in light of the views of foreigners, or else it

⁷³ *Roper, id* at 578.

⁷⁴ *Id* at 605. However, as she did not believe that a genuine national consensus against the juvenile death penalty had yet developed, and because she did not believe that the majority’s moral proportionality argument justified a categorical, age-based constitutional rule, she was of the view that the international consensus described by the majority could not be regarded as confirmation of the Court’s decision: *id* at 604.

⁷⁵ *Id* at 624. Scalia J found the majority’s particular reliance on the laws of the United Kingdom “perhaps the most indefensible part of its opinion”. Taking a characteristically originalist viewpoint, he said it was true that the United States shared a common history with the United Kingdom, and that the Court often consulted English sources when asked to discern the meaning of a constitutional text written against the backdrop of 18th-century English law and legal thought. If the majority had applied that approach, it would have found that the “cruel and unusual punishments” provision of the English Declaration of Rights was originally meant to describe those punishments that were not authorized by common law or statute, but that were nonetheless administered by the Crown or the Crown’s judges. Under that reasoning, the death penalty for under-18 offenders would have easily survived the present challenge: *id* at 626–627.

ought to cease putting forth foreigners' views as part of the reasoned basis of its decisions. "To invoke alien law when it agrees with one's own thinking, and ignore it otherwise, is not reasoned decisionmaking, but sophistry."⁷⁶ In his view the majority had relied on foreign sources, not to underscore the Court's "fidelity" to the Constitution, its "pride in its origins" and its "own [American] heritage", but to set aside the centuries-old American practice – one still engaged in by a large majority of the states – of letting a jury decide whether, in the particular case, youth should be the basis for withholding the death penalty.⁷⁷

It needs to be appreciated that in determining whether a particular form of punishment is "cruel and unusual" under the Eighth Amendment of the United States Constitution, the Supreme Court has stated that it must consider whether there is a national consensus that laws allowing such punishment contravene modern standards of decency in the country.⁷⁸ This may explain to some extent why Scalia J vehemently opposed references to foreign and international laws in the juvenile death penalty cases: he believed that foreign laws could have no bearing on the beliefs and practices of the United States.⁷⁹ But this does not explain his parochialism and opposition to comparative material in *Printz*, which was not an Eighth Amendment case.

⁷⁶ *Id* at 627. See also *id* at 628: "... I do not believe that approval by 'other nations and peoples' should buttress our commitment to American principles any more than (what should logically follow) disapproval by 'other nations and peoples' should weaken that commitment." Eclecticism towards foreign law may not be objectionable if one appreciates the distinction between legal transplants and cross-fertilization; this point is discussed in Part III, below.

⁷⁷ *Id* at 628.

⁷⁸ *Id* at 608–609 *per* Scalia J (dissenting), citing *Trop v Dulles* 356 US 86 at 101, 78 S Ct 590 (1958).

⁷⁹ Vicki Jackson, however, notes that foreign and international law have been referred to in interpreting the Eighth Amendment since the 19th century: Jackson, "Constitutional Comparisons: Convergence, Resistance, Engagement" (2005) 119 Harv L Rev 109 at 109, citing *Wilkerson v Utah* 99 US 130 at 134 (1879) (sentence of death by shooting in the Utah Territory constitutional, partly because "[c]orresponding rules [that] prevail in other countries" supported the practice); see also the cases cited *id* at n 4.

Tushnet⁸⁰ is of the view that expressivism and the use of comparative constitutional material are not inconsistent, because judges of wide learning – whether in comparative constitutional law, in the classics of literature, in economics, or in many other fields – may see things about their own society that judges with a narrower vision miss. Having seen their society from this broader perspective, such judges might then use standard methods of constitutional interpretation such as reliance on text, structure, history or democratic theory to reach results that their colleagues would not have reached. Hence, comparative constitutional law operates in the way that a general liberal education does. If judges are entitled to rely on what they take from great works of literature as they interpret the Constitution, they should be entitled to rely on comparative constitutional law as well.⁸¹

More importantly, expressivism does not preclude the existence of constitutional norms that transcend national boundaries. In fact, it is apt to see domestic bills of rights as embodying such universally-shared norms. Lorraine Weinrib believes a nation-centric approach to constitutional interpretation to be incorrect. She sees in the rights-protecting instruments adopted in the aftermath of World War II a shared constitutional conception that, by design, transcends the history, cultural heritage and social mores of any particular nation-state. The shared conceptual foundation of these instruments is to secure democratic government, the

⁸⁰ Tushnet, above, n 55.

⁸¹ *Id* at 1236–1237. See also Jackson, above, n 79 at 116–117 (if more than one interpretation of the Constitution is plausible from domestic legal sources, approaches taken in other countries may provide helpful empirical information in deciding what interpretation will work best; further, comparisons can shed light on the distinctive functioning of the domestic legal system); Ruth Bader Ginsburg, Associate Justice of the US Supreme Court, “‘A Decent Respect of the Opinions of [Human]kind’: The Value of a Comparative Perspective in Constitutional Adjudication” (2005) 64(3) *Cam LJ* 575 at 580 and 584 (foreign opinions not authoritative, but “add to the store of knowledge relevant to the solution of trying questions”, and since judges are free to consult other forms of legal commentary such as restatements of law, treatises and law reviews, there should be no objection to them considering the analysis of a question contained in a foreign case as well).

rule of law, and protection for equal human dignity. They require all states to treat each person over whom they hold power as an end, not a means, and to respect his or her full and equal humanity and opportunity for self-fulfilment.⁸² Therefore, she advocates that a constitution should not be interpreted to prioritize national consensus, but rather in the light of the shared conceptual foundation. Naturally, this approach embraces the use of comparative material.

Weinrib's view fits in with Choudhry's "universalist interpretation" of a constitution. The latter, however, does not identify any specific shared conceptual foundations. As Ramraj explains, a universalist interpretation involves an assumption that there exist constitutional norms which transcend jurisdictions; thus, the interpretation and articulation of these norms by one particular constitutional court can be drawn on by any other constitutional court.⁸³ It is very difficult to argue that there is no intersection of constitutional values across jurisdictions at all, and a minimal intersection is enough to justify the claim that a universalist approach to comparative constitutional jurisprudence is at least sometimes warranted. Once it is acknowledged that there are at least some constitutional norms that transcend jurisdictions, this justifies a court in looking to foreign constitutional cases for assistance in understanding them.⁸⁴ In addition, if the potential existence of transcendent constitutional norms is accepted, a court is justified in looking to

⁸² Weinrib, above, n 61 at 15. See also Jackson, above, n 79 at 118 (individual rights embedded in national constitutions have 'universal' aspects, and foreign or international legal sources may illuminate these 'supra-positive' dimensions of constitutional rights, as when constitutional text or doctrine requires contemporary judgments about a quality of action or freedom, such as the 'reasonableness' of a search or the 'cruelty' of a punishment).

⁸³ Ramraj, above, n 7 at 304.

⁸⁴ *Id* at 325–326.

comparative material to search for them, whether or not such norms are ultimately uncovered.⁸⁵

Although expressivism and universalism are not mutually inconsistent, they appear to pull in opposite directions. However, it is submitted that a balance between them can be struck. This is well illustrated by jurisprudence of the South African Constitutional Court. On 27 April 1994, the interim Constitution⁸⁶ of post-apartheid South Africa, which enshrined a non-racial, multiparty democracy based on respect for universal rights, came into force. Section 35(1) of chapter 3 of the interim Constitution stated: “In interpreting the provisions of this Chapter a court of law shall promote the values which underlie an open and democratic society based on freedom and equality and shall, where applicable, have regard to public international law applicable to the protection of the rights entrenched in this Chapter, and may have regard to comparable foreign case law.”⁸⁷

Thereafter, following extensive discussions and public consultations by the Constitutional Assembly, the Constitution of the Republic of South Africa 1996⁸⁸ was adopted and took effect⁸⁹ on 4 February 1997. Section 39 of chapter 2 of the Constitution is in terms similar to section 35(1) of the interim Constitution. It reads:

When interpreting the Bill of Rights, a court, tribunal or forum —

- (a) must promote the values that underlie an open and democratic society based on human dignity, equality and freedom;
- (b) must consider international law; and

⁸⁵ *Id* at 329.

⁸⁶ Constitution of the Republic of South Africa 1993 (Act 200 of 1993).

⁸⁷ Hoyt Webb, “The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law” (1998) 1 U Pa J Const L 205 at 206–207.

⁸⁸ Act 108 of 1996.

⁸⁹ Except for one provision relating to the election of chairpersons to municipal councils: Proclamation No R 6, 1997.

(c) may consider foreign law.⁹⁰

Hoyt Webb has theorized that South African courts, tribunals and fora, which includes the Constitutional Court, were specifically enjoined to consider international law and permitted to consider foreign law when interpreting the Constitution's bill of rights because:

reference to external jurisprudence from "open and democratic" societies offered an appropriate method for assuring the public that the "Fundamental Rights" described in the [interim and final] Constitutions would be reasonably protected from future interpretational mischief or bigotry.

...

Given the uniquely terrible history of apartheid under which South Africa's legal and administrative systems were established to enforce and maintain the segregation, marginalization and minimization of the majority of South Africans of color, the framers of the IC [interim Constitution] wisely ensured that the standards applied to the construction of the post-apartheid legal system were not drawn from the same well, but from purer waters.⁹¹

The operation of section 35(1) of the interim Constitution is exemplified by the decision of the Constitutional Court in *State v Makwanyane*,⁹² which abolished the death penalty in South Africa. For instance, at several points in the lengthy decision, international and foreign comparative jurisprudence was examined. Nonetheless, the Court was careful to underline the fact that foreign legal principles should not be applied blindly. As the then Chief Justice Arthur Chaskalson, who delivered the leading judgment, put it: "Although we are told by section 35(1) that we 'may' have regard to foreign case law, it is important to appreciate that this will not necessarily offer a safe guide to the interpretation of Chapter 3 of our Constitution."⁹³

For instance, in assessing whether the death penalty violated section 11(2) of the interim Constitution, which provided that "[n]o person shall be subject to torture

⁹⁰ Webb, above, n 87 at 206–207.

⁹¹ *Id* at 208 and 219.

⁹² 1995 (3) SA 391, Const Ct (S Africa).

⁹³ *Id* at 414.

of any kind, whether physical, mental or emotional, nor shall any person be subject to cruel, inhuman or degrading treatment or punishment”, Chaskalson CJ considered cases on the Eighth and Fourteenth Amendments to the United States Constitution which prohibit the imposition of cruel and unusual punishments. He noted that because this Constitution contemplates the existence of capital punishment,⁹⁴ the Supreme Court of the United States had taken the position that capital punishment *per se* was not unconstitutional but the penalty could be arbitrary in certain circumstances and thus unconstitutional. Difficulties with this approach experienced in the United States persuaded him that South Africa should not follow the same route.⁹⁵ Further, the different language used in the interim Constitution and the United States Constitution merited that each Constitution receive a different analysis.⁹⁶ Nonetheless, elements of the United States Supreme Court’s analysis of the issues, especially as they related to the impropriety of arbitrariness and inequality in the imposition of the punishment, were informative to the analysis of relevant provisions of the interim Constitution.⁹⁷ In the end, Chaskalson CJ was satisfied that in the context of the interim Constitution the death penalty was cruel, inhuman and degrading punishment and thus violated section 11(2).⁹⁸

In *Makwanyane*, therefore, one of the main issues faced by the South African Constitutional Court required it to consider, among other things, what cruel,

⁹⁴ The Fifth Amendment states that “[n]o person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury...” and “nor shall any person... be deprived of life, liberty or property, without due process of law.”

⁹⁵ *Makwanyane*, above, n 92 at 422.

⁹⁶ Unlike the South African interim Constitution, the United States Constitution does not have a limitations clause, thus forcing courts to find limits to constitutional rights through a narrow interpretation of the rights themselves: *Makwanyane*, *id* at 435. On the limitations clause in the South African interim Constitution, see below, nn 108-112, and the accompanying text.

⁹⁷ *Id* at 417–421. See Webb, above, n 87 at 238–240.

⁹⁸ *Makwanyane*, *id* at 433–434.

inhuman and degrading punishment is. This consideration may be regarded as a transcendental constitutional norm that the Court elucidated by examining comparative legal material. Aware that its decision had to be consonant with the terms of the Constitution, it did not apply foreign or international legal principles unthinkingly but used them to inform the constitutional law of South Africa and, eventually, developed its own legal principles. It is submitted that, in this way, the Court demonstrated how expressivism and universalism may be successfully balanced.

To recapitulate, accepting an expressivist view of a constitution or a bill of rights does not require a judge to refrain from referring to comparative material, for such material may in fact assist him to better understand the national identity of his country. More significantly, a domestic bill of rights is appropriately viewed as encapsulating transcendental constitutional norms. That being the case, it should be permissible to use comparative material to seek out such norms, and if they are identified, to comprehend them. In referring to comparative material, judges must be alive to ensuring that such material is consistent with the text of the domestic bill of rights.

III. CONCERN FOR DIFFERING CONDITIONS

We have seen that Singapore courts have on a number of occasions declined to consider comparative legal material on the basis that social or other conditions in Singapore and the foreign country differ. Unfortunately, there is often no explanation in the cases as to exactly how the conditions are different or why such differences are relevant. As Thio Li-ann has pointed out: “This perfunctory [waving] away of foreign cases on the basis of ‘we’re different’ is undesirable. A focused elaboration of the

different social conditions of these countries would aid in assessing their relevance to the matter at hand.”⁹⁹

Nonetheless, the underlying concern is valid. A key reason for referring to comparative material is a perception that there may be a certain constitutional doctrine or mode of analysis originating from a foreign jurisdiction that is suitable for domestic application. However, the comparative material may, in fact, not be appropriate if conditions between the domestic and foreign jurisdictions differ to the extent that a particular foreign doctrine might operate unpredictably or detrimentally. Seth Kreimer cautions that there may be a “problem of translation”: borrowing a foreign concept “yields no guarantee, or even likelihood, that the concept will mean the same thing to our courts that it does to its originators, or that the results reached in the [foreign] context will mirror the results the doctrine yields in its home arena, even if we were certain that those results were to be emulated.”¹⁰⁰ It is also risky to predict the way in which a legal doctrine will function in a new legal environment based on the way it functioned in its old one.¹⁰¹

Admittedly it is hard, if at all possible, to accurately predict how a foreign legal doctrine will fare if applied to the domestic context. However, our concern over comparability on the ground of differing conditions may be assuaged by considering a distinction drawn by John Bell between legal transplants and cross-fertilization.¹⁰² Transplants involve the transposition of a doctrine from one legal system to

⁹⁹ Thio, “An ‘i’ for an ‘I’?”, above, n 46 at 176, quoted in Ramraj, above, n 7 at 331.

¹⁰⁰ Kreimer, above, n 56 at 646–647.

¹⁰¹ *Id* at 642.

¹⁰² John Bell, “Mechanisms for Cross-Fertilisation of Administrative Law in Europe” in Jack Beatson & Takis Tridimas (eds), *New Directions in European Public Law* (Oxford: Hart Publishing, 1998) at 147.

another.¹⁰³ There are doubts about the effectiveness of this process; about whether a foreign doctrine grafted on to a domestic legal system will take if it is incompatible with domestic circumstances.¹⁰⁴ On the other hand:

[c]ross-fertilisation implies a different, more indirect process. It implies that an external stimulus promotes an evolution within the receiving legal system. The evolution involves an internal adaptation by the receiving legal system in its own way. The new development is a distinctive but organic product of that system rather than a bolt-on.¹⁰⁵

Alan Watson has expressed the opinion that if what is sought in a foreign system is an *idea* that can be transformed into part of the law of one's own country, a systematic knowledge of the law or political structure of a donor system is not necessary.¹⁰⁶ In the same vein, the significance of differing social and other conditions between the foreign and domestic jurisdictions may be downplayed. Therefore, concerns regarding the operation of foreign legal doctrines in the domestic context may be addressed if such doctrines are not seen as potential material for wholesale transplantation, but rather for inspiring indigenous development in the domestic law.

In the South African Constitutional Court's decision of *Makwanyane*,¹⁰⁷ consideration was given to whether the limitations clause in section 33 of the interim Constitution¹⁰⁸ would operate to uphold the validity of the death penalty which had

¹⁰³ *Id* at 147–148.

¹⁰⁴ See, *eg*, Alan Watson, "Legal Transplants and Law Reform" (1976) 92 LQR 79 at 81: "Without hesitation one can accept the proposition that a foreign legal rule will not easily be borrowed successfully if it does not fit into the domestic political context. The word 'political' is used... with a rather wide meaning, with reference not only to the structure of government and governmental institutions but also to powerful organised groups..."

¹⁰⁵ Bell, above, n 102 at 147–148.

¹⁰⁶ Watson, above, n 104 at 79.

¹⁰⁷ Above, n 92.

¹⁰⁸ Section 33(1) states: "The rights entrenched in this Chapter may be limited by law of general application, provided that such limitation —

a. shall be permissible only to the extent that it is —
i. reasonable; and

been found to violate the Constitution as being cruel, inhuman and degrading punishment. The Constitutional Court examined the interpretive techniques of the Supreme Court of Canada, the German Federal Constitutional Court and the European Court of Human Rights, finding that limitations analysis typically consists of some form of a balancing test by which the courts review the means and ends of the offending legislation.¹⁰⁹ However, due to textual differences between the interim Constitution on the one hand and the Canadian Charter of Rights and Freedoms and the Basic Law of the Federal Republic of Germany on the other, the Court decided against directly adopting the tests used in those jurisdictions.¹¹⁰

As for the proportionality test used by the European Court of Human Rights, Chaskalson CJ found it an unsafe guide to the interpretation of section 33 because the European Court is obliged to accommodate the sovereignty of its member states through the “margin of appreciation” doctrine, under which national authorities are allowed by the European Court more discretion to contravene rights in areas concerning morals and social policy and less discretion where a law seeks to limit a right fundamental to democratic society or interferes with intimate aspects of private life. The South African Constitutional Court was under no such constraint.¹¹¹ The Chief Justice then proceeded to articulate a new test, one that involved the weighing up of competing values, and ultimately an assessment based on proportionality that

-
- ii. justifiable in an open and democratic society based on freedom and equality; and
 - b. shall not negate the essential content of the right in question, and provided further that any limitation to —
 - (aa) a right entrenched in section 10, 11, 12, 14 (1), 21, 25 or 30 (1) (d) or (e) or (2); or
 - (bb) a right entrenched in section 15, 16, 17, 18, 23 or 24, in so far as such right relates to free and fair political activity, shall, in addition to being reasonable as required in paragraph (a) (i), also be necessary.”

¹⁰⁹ *Makwanyane*, above, n 92 at 436–439.

¹¹⁰ *Id* at 438–439.

¹¹¹ *Id*.

required a consideration of the reasonableness and necessity for the limitation of constitutional rights.¹¹²

Besides the use of comparative material for purposes of legal cross-fertilization, there is a point that follows from our consideration of transcendent constitutional norms. Ramraj indicates that the existence of local, empirical (for instance, social, economic or historical) conditions that affect the application of a general norm does not in itself present a challenge to comparative constitutional methodology or the universalist approach to foreign constitutional cases, if one accepts that at least some constitutional norms are transcendent.¹¹³ In his view, whatever the peculiarities of the local conditions, the courts are nevertheless free and, he would argue, duty-bound, to look elsewhere in search of transcendent constitutional principles to be applied in a particular case. In doing so, they might well realize that not all local conditions are as peculiar as they initially seem to be.¹¹⁴

In other words, the existence of differing social and other conditions in the domestic jurisdiction and foreign jurisdictions does not impair the use of comparative material for the purpose of seeking out transcendent constitutional norms. Once a particular norm is identified, if the local empirical conditions are so different that they warrant a departure from the common normative standard, then a duty lies on the court to show clearly what these conditions are and why they justify the departure.¹¹⁵ Alternatively, it is justifiable to refer to comparative material eclectically in legal cross-fertilization, using it as a catalyst to promote an evolution of legal principles within the domestic legal system.

¹¹² *Id* at 436. See Webb, above, n 87 at 241–243.

¹¹³ Ramraj, above, n 7 at 329–331.

¹¹⁴ *Id* at 331–332.

¹¹⁵ *Id* at 331.

IV. PRACTICAL CONCERNS

In addition to the concerns over principle that we have seen thus far, the consideration of foreign law in the interpretation of bills of rights can raise practical concerns. These were referred to by the US Attorney General in his November 2005 speech. Mr Gonzales noted that the use of comparative legal materials presents “a problem of selection and at least the appearance of capriciousness”.¹¹⁶ In his view, if it is accepted that foreign law can properly be used in construing the Constitution, at a minimum it should be done in a way that comprehensively examines all relevant international sources. However, it may be impossible for even the most conscientious judge or lawyer to avoid being selective, or at least arbitrary, in the use of foreign law.¹¹⁷ Further, even assuming that the necessary sources of foreign law can be gathered and translated, it would be an even greater task to understand and evaluate them fully.¹¹⁸

Jeremy Waldron would disagree with Gonzales and, by means of his theory for the citation of foreign law in the interpretation of the US Constitution, push the boundaries a little further. In Waldron’s opinion, it is open to judges to have regard to the “*ius gentium*” – the law of nations – in a broad sense, which he defines as a set of legal principles that has established itself as a sort of consensus among judges, jurists, and lawmakers around the world,¹¹⁹ “a body of law purporting to represent what various domestic legal systems share in the way of common answers to

¹¹⁶ Gonzales, above, n 2 at 10.

¹¹⁷ *Id.*

¹¹⁸ *Id.* at 11–12. See also Ernest A Young, “Foreign Law and the Denominator Problem” (2005) 119 Harv L Rev 148 at 165–166 (decision costs (time, effort, and expense involved in deciding cases in a particular way) and error costs (likelihood of making mistakes by pursuing a particular method) seem likely to be high for American courts dealing with foreign materials, given language and cultural barriers and most American lawyers’ lack of training in comparative analysis).

¹¹⁹ Jeremy Waldron, “Foreign Law and the Modern *Ius Gentium*” (2005) 119 Harv L Rev 129 at 132.

common problems”.¹²⁰ He draws an analogy with the world of medical science. If a new disease or epidemic appeared within the US, it would be ridiculous to say that to address the problem one should only turn to American science. On the contrary, US scientists would want to look abroad to see what scientific conclusions and strategies had emerged, had been tested, and had been mutually validated in the public health practices of other countries. Similarly, a constitutional law problem such as that posed by *Roper v Simmons*¹²¹ should be treated as one where the experiences of other legal systems in grappling with, untangling and resolving rival rights and claims are relevant.¹²²

Waldron stresses that under his theory, the appeal to foreign law is not a piecemeal practice, which he regards as open to being discredited.¹²³ Rather, the *ius gentium* represents a consensus similar to that in science, which is not merely an accumulation of authorities but a “dense network of checking and rechecking results, experimental duplication, credentialing, mutual elaboration, and building on one another’s work”.¹²⁴ And since scientists are expected to consider findings they have reason to trust and not look to the work of suspect or disreputable laboratories, a *ius gentium* inquiry may similarly restrict itself to consensus among “civilized” or “freedom-loving” countries.¹²⁵

It is respectfully submitted that in the first place Gonzales overstated the problem. The realities of legal and judicial practice mean that a selective approach to foreign legal materials is inevitable, but selectivity need not mean that the endeavour

¹²⁰ *Id* at 133.

¹²¹ Above, n 70.

¹²² Waldron, above, n 119 at 144.

¹²³ *Id*.

¹²⁴ *Id* at 145.

¹²⁵ *Id*.

is entirely arbitrary. There is nothing wrong with lawyers and judges using skills and discernment honed by experience to select foreign laws that are likely to prove more useful to the interpretive enterprise. Factors relevant to the selection process might include, for instance, whether a foreign legal system and the domestic system share similar values such as a respect for democracy, and a concern for the rule of law and the protection of individuals' fundamental liberties;¹²⁶ the degree of similarity between the issues faced by the two systems; and whether sufficient foreign legal materials are available in a language that the judge and the parties appearing before him are able to work with. It is to be expected that the foreign jurisdictions more likely to be chosen are those the courts of which have had more experience dealing with complex constitutional issues, rather than distant lands the laws of which are largely unknown.

Waldron's *ius gentium* theory limits the foreign laws that judges may consider to those that reflect a harmony of opinion among like-minded nations. Where such consensus can be found courts would certainly do well to take it into account. However, it is submitted that the discretion of judges should not be unduly restricted in this manner. As we have seen in Part III, there is value in a cross-fertilization of ideas, in judges gaining insights from other nations' laws and using them to stimulate home-grown development in their own legal systems. To elaborate on Waldron's public health analogy, it is advisable for scientists not to close their eyes to advances in other countries that have yet to be taken up generally by the medical community.

¹²⁶ See, *eg*, Jackson, above, n 79 at 125–126 (“[P]ractices of countries with commitments to human rights, democracy, and the rule of law roughly comparable to ours [the US] are likely to have more positive persuasive value as to the empirical consequences of doctrinal rules, the legitimate justifications for government action, or the implications of basic constitutional commitments”).

By being part of the scientific vanguard rather than merely followers, they may find themselves playing a significant role in creating a new consensus.

According judges a broad discretion to consider foreign laws may open them to the charge that the interpretive enterprise becomes, as Young puts it, “profoundly manipulable”.¹²⁷ The fear appears to be that the range of comparative legal materials is so vast that if judges hunt around diligently enough they will be able to find support for whatever personal predilections they have. However, the objection rests on the assumption that there exists a precedent for every point of view under the sun – an assumption which, arguably, has not been proved. Besides, the onus would be on the judge to give sufficient reasons justifying why he is relying on a particular authority and why it should be accorded more weight than other local and foreign authorities that take a different point of view.

Difficulties that judges and lawyers may have understanding comparative legal materials should not be exaggerated. As Young admits, the law engages virtually the full range of human activity, which means that courts must inevitably dabble in a wide range of disciplines in which they may lack training or expertise, for example, science and engineering in patent cases, and psychology in criminal cases. What may reasonably be insisted upon is that judges should be considerably more careful, articulate and thorough when they cite foreign law.¹²⁸

¹²⁷ Young, above, n 118 at 167. See also Gonzales, above, n 2 at 12: “[I]t cannot be expected that the laws of all sovereign nations – or, perhaps, even all the courts of a single nation – will agree on a disputed point of constitutional law. The decisionmaker will then be left somehow to choose among them. And this, of course, may lead to...judicial activism, or unrestrained judicial discretion...”

¹²⁸ *Id* at 166.

V. THE VALUE OF A COMPARATIVE APPROACH

In this chapter we examined four concerns that have been raised against the use of comparative material to interpret bills of rights. The first concern is that the text of a bill of rights may be overridden if foreign legal principles are applied in the local context. The four walls doctrine reflects this concern. However, the doctrine makes little sense if all it says is that foreign material is irrelevant because it is not based on the local bill of rights. Many courts, including the Singapore and Malaysian courts, reject this flawed reasoning: this is borne out by the fact that these courts often refer to foreign material in interpreting domestic bills of rights, for instance, where the material originates from a legal system linked to the domestic system by ties of genealogy and history (a genealogical interpretation), or where it helps judges to better understand and express the assumptions behind their own reasoning (dialogical interpretation). Rather than treating the four walls doctrine as a general injunction against the use of comparative constitutional material, it is submitted that the doctrine should be understood as a rule aimed at ensuring that a foreign legal principle is not applied when it cannot be validly accommodated by the text of a bill of rights. That being the case, the touchstone of whether comparative material should be considered is whether it is useful in explicating the local bill of rights text.

The second concern raised against referring to foreign jurisprudence is that since a constitution or bill of rights can be seen as embodying the commitments that define a national identity, that identity should be shaped by reference only to home-grown beliefs and traditions. We saw, though, that accepting such a view of a bill of rights does not require a judge to eschew foreign law because such comparative material may in fact help to recognize and shape the national identity of the country.

Of greater significance is the fact that domestic bills of rights are best seen as incorporating universal or transcendental norms – they are, in a sense, specific applications of general principles. This being the case, comparative material enables such transcendent norms shared by different bills of rights to be sought and understood.

Thirdly, we looked at the concern that comparative bill of rights material may be irrelevant to a domestic legal system because local conditions, social or otherwise, differ from conditions in foreign jurisdictions. The problem is minimized if we see foreign law as facilitating the organic development of domestic law, rather than as self-contained solutions to be transplanted into the domestic legal system. Further, the existence of transcendent constitutional norms necessarily implies that comparative material may be referred to. If a court takes the view that local empirical conditions justify departing from a transcendent norm, then the onus lies upon it to explain why this is the case rather than to shun foreign law altogether.

Finally, we looked at some practical concerns, namely, that selective references to foreign law are necessarily arbitrary, and that judges and lawyers are ill equipped to properly understand and evaluate comparative legal materials. Given the nature of legal practice today selectivity may be a necessary evil, but to characterize the endeavour as capricious when skill and discernment are applied to the selection process is hardly right. In addition, the appraisal of foreign legal materials is arguably no more difficult than coming to grips with other areas of human experience of which courts and counsel have no specialist knowledge.

In examining common criticisms of taking a comparative approach to interpreting bills of rights, the discussion in this chapter has hinted at some of the benefits of such an approach. I propose to highlight two of them. The first is that a

judge who has encountered a novel constitutional problem in his jurisdiction need not slash his own way through the undergrowth. By referring to foreign material, he can gain valuable insights into how other jurisdictions have framed the issues and the solutions they have developed.

Enright v Ireland,¹²⁹ a decision of the High Court of the Republic of Ireland, is a case in point. The plaintiff had been convicted of sexual offences in 1993. Prior to his release from prison, the Sex Offenders Act 2001 of Ireland came into force. This statute obliged persons coming within the Act to notify the *garda* authorities of their release from prison within seven days of such release; to furnish their name, date of birth and home address; and to comply with other continuing obligations with respect to their whereabouts. The plaintiff sought declarations that various provisions of the Act were unconstitutional, particularly section 7(2) which made the Act applicable to persons convicted before the commencement of the relevant parts of the Act where at the commencement the persons were still serving sentence.

The novel issue facing Finlay Geoghegan J was whether the provisions of the Act in question contravened Article 38.1 of the Constitution of Ireland,¹³⁰ which states: “No person shall be tried on any criminal charge save in due course of law.” In dealing with this issue, two questions had to be answered: first, whether the Article included the right only to be punished for a crime in accordance with the law which existed at the date of the commission of the crime, and second, whether the impugned provisions of the Sex Offenders Act amounted to a criminal penalty.

¹²⁹ [2003] 2 IR 321, HC (Ireland).

¹³⁰ November 2004 edition (enacted by the People 1 July 1937; in operation as from 29 December 1937).

As regards the first question, Geoghegan J examined various cases from the United States and concluded that Article 38.1 did indeed prohibit *ex post facto* criminal laws, particularly laws that attempted to subject persons to punishments greater than those that existed at the time of their offences. She said:

This conclusion I consider to be supported ... by the long standing view of the courts in the United States that the prohibition against *ex post facto* laws includes a prohibition against a law which increases the penalty after the date of commission of the offence. The unswerving acceptance of such a principle which has long historical origins supports the view that this is a long recognised and established right in relation to criminal trials in the common law world.¹³¹

The judge turned again to United States cases to determine the second question regarding the meaning of a 'penalty', because she was of the view that there were strong similarities between the principles applied by US courts in considering certain matters to be penalties for the purposes of the prohibition against *ex post facto* laws, and the principles according to which Irish courts had determined whether certain sanctions formed part of the penalty or primary punishment for the offence to be taken into account when determining whether an offence was or was not a minor offence.¹³² Applying the United States Supreme Court decision of *Kennedy v Mendoza-Martinez*,¹³³ the judge held that the Sex Offenders Act was not punitive in nature, and hence upheld its constitutionality.

The case therefore demonstrates how a court may benefit from the experience of a foreign jurisdiction by applying what has been learnt to a novel issue that has arisen locally. However, the four walls doctrine and the South African experience indicate that a judge need not adopt the foreign legal principles wholesale – indeed, it would be wrong for him to do so without closely examining whether these

¹³¹ *Enright v Ireland*, above, n 129 at 331.

¹³² *Id* at 334.

¹³³ 372 US 144 (1962), SC (USA).

principles are suited to the text of the local bill of rights. In this regard, it is helpful to bear in mind certain considerations that John Allison has identified if cross-fertilization from one jurisdiction to another is not to degenerate into hazardous transplantation:

- i. The doctrinal ramifications – how legal rules and doctrines might adapt to the external impetus and whether or how they might still fulfil the functions we require them to fulfil.
- ii. How the internal adaptation might be justified in the legal and political theory or theories underpinning the legal system.
- iii. How domestic judicial (and, one might add, governmental and social) institutions and procedures might cope with the proposed doctrinal adaptation.¹³⁴

Another benefit of a comparative approach is that it ensures that important judgments concerning the fundamental liberties of individuals are made with an eye on evolving national and international standards. We have seen how the Constitution of South Africa requires the courts of the Republic to have regard to international and foreign laws specifically for the purpose of ensuring that the fundamental rights in the Constitution are shielded against distortion by an oppressive future government.

Judges should also take into account foreign legal developments if it is acknowledged that domestic bills of rights embody transcendental norms. A South African case, *Mohamed v President of the Republic of South Africa*,¹³⁵ illustrates this

¹³⁴ John W F Allison, “Transplantation and Cross-Fertilisation” in Jack Beatson & Takis Tridimas (eds), *New Directions in European Public Law* (Oxford: Hart Publishing, 1998), 169 at 175–176.

¹³⁵ 2001 (3) SA 893, Const Ct (S Africa).

point. The applicant in this case was alleged to have been involved in the bombing of the United States Embassy in Dar es Salaam, Tanzania, in August 1998. He was indicted in the United States and had a warrant of arrest issued against him by the Federal District Court on various charges. Having been identified in South Africa by the United States Federal Bureau of Investigation, he was arrested by members of the South African Alien Control Unit operating in conjunction with the United States officials. He was then handed over to these officials who transported him to the United States where he was now standing trial on capital charges. The applicant brought an action alleging that his handing-over to United States authorities had infringed his constitutional rights – the rights to life, to dignity and not to be subjected to cruel, inhuman or degrading punishment – since no prior undertaking had been obtained by South Africa from the United States that the death penalty, which had been found to be unconstitutional in South Africa,¹³⁶ would not be imposed or carried out.

The Constitutional Court studied a decision of the Supreme Court of Canada which held that to send a person to a State where he would be subjected to capital punishment without assurances that this penalty would not be imposed on him unjustifiably violated principles of fundamental justice.¹³⁷ It also looked at European Court of Human Rights cases establishing that to expel or extradite a person to a State when there are substantial grounds for believing that he is in danger of being subjected to torture or to inhuman or degrading treatment or punishment there

¹³⁶ By *State v Makwanyane*, above, n 92.

¹³⁷ *United States v Burns* [2001] 1 SCR 283, SC (Can): see *Mohamed*, above, n 135 at 913, [46]–[47].

violates the European Convention on Human Rights.¹³⁸ The South African court concluded that these cases were consistent with the weight that the Constitution gave to the spirit, purport and objects of the Bill of Rights and the positive obligation that it imposed on the State to “protect, promote and fulfil the rights in the Bill of Rights”.¹³⁹ It therefore agreed with the applicant that his removal to the US had violated the Constitution, and granted various declarations sought by him.

It is submitted that in *Mohamed's* case what the South African Constitutional Court in effect did was to identify a transcendental norm prohibiting a person from being sent to another State where it is likely that he will be subjected to torture or to cruel, inhuman or degrading punishment or treatment. As this norm was embodied in the Constitution, the Court was justified in considering the implications that foreign courts had ascribed to the norm.

This is not to say that a domestic court may never decline to follow interpretations of transcendental norms prevailing in foreign jurisdictions. However, the fact that it is proposing to depart from the practices of other democratic nations should give it pause to consider why the laws of other nations have developed in those ways, and what are the material differences between those nations and the court's own jurisdiction that require a different approach to be taken.

Appropriately, this brings us back to the quotation by Rudolf von Jhering cited at the start of this chapter. To extend the analogy, imagine the judge as a herbalist seeking a cure for a constitutional ailment. To increase the chances of finding the right treatment for his patient, the sensible herbalist will gather a

¹³⁸ *Soering v United Kingdom* (1989) 11 EHRR 439; *Chahal v United Kingdom* (1996) 23 EHRR 413; *Hilal v United Kingdom* (2001) 33 EHRR 2: see *Mohamed*, *id* at 916–917, [56]–[58].

¹³⁹ South African Constitution, above, n 88, s 7(2): see *Mohamed*, above, n 135 at 58.

selection of herbs from a variety of locations. Naturally, it is only prudent for him to scrutinize all the plants to determine whether or not there are any noxious weeds among them. However, once he has ascertained that a plant can indeed provide an efficacious cure, he would be foolish to reject it to his patient's detriment merely if it had not been found in his own garden.

The methodology outlined here sets the tone for the following chapters. With judicious reference to cases and academic writings from common law jurisdictions, they will examine the roles performed by the branches of government as regards a bill of rights text, the degree of deference appropriately shown by the judiciary to the policy choices of the executive and legislature, and approaches that should be taken towards the interpretation and construction of bills of rights.

CHAPTER TWO

Collaboration through Confrontation: The Roles of the Branches of Government in Interpreting Bills of Rights

Courts do not merely decide cases. They speak, by word and example, as teachers. One should not underestimate the salutary effects of this approach on the legal culture of a society, manifesting that in government none are omnipotent and that the last word belongs to the least dangerous branch.¹

— THOMAS M FRANCK

I. FUNDAMENTAL CONCEPTS	54
A. THE DOCTRINE OF THE SEPARATION OF POWERS	54
B. THE RULE OF LAW, CONSTITUTIONALISM AND THE STATUS OF BILLS OF RIGHTS AS LAW.....	60
1. The Rule of Law	60
2. Constitutionalism and the Status of Bills of Rights as Law	62
3. The Independent Duty of the Branches of Government to Interpret a Bill of Rights.....	66
II. A SINGLE AUTHORITATIVE INTERPRETER?	72
A. INTERPRETIVE AND JUDGMENT SUPREMACY DISTINGUISHED.....	72
1. The Judiciary as Ultimate Interpreter: An Examination of the Judicial Role	75
2. Departmentalism and the Rule of Law.....	79
B. THE COUNTER-MAJORITARIAN DIFFICULTY	85
1. The Elusive 'Majority Will', and Executive and Legislative Action	85
2. An Unelected Judiciary – Problem or Protector?	89
III. THE RELATIONSHIP BETWEEN THE BRANCHES OF GOVERNMENT	93
CONCLUSION	103

¹ Thomas M Franck, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* (Princeton, NJ; Oxford: Princeton University Press, 1992) at 125.

IT IS A TRUISM that in a State with a Westminster-style constitutional system,² each branch of the government – executive, legislature and judiciary – is impressed with a duty to uphold the nation’s constitution. The functionaries of each branch are elected or appointed to their offices and carry out their tasks in accordance with the rules laid down therein, and with the law of the land in general. This is the essence of the rule of law.

In the constitutions of certain jurisdictions the matter is placed beyond doubt. The Singapore Constitution,³ for instance, requires the President, each Member of Parliament (MP), the Chief Justice and each Supreme Court Judge and Judicial Commissioner to make a solemn oath or affirmation to “preserve, protect and defend the Constitution of the Republic of Singapore”.⁴ Similar provisions appear in the South African Constitution.⁵

Where the branches of government have an independent duty to uphold the constitution, and the constitution either embodies a bill of rights or the bill of rights of the State has the standing of basic law,⁶ this suggests that each branch must determine for itself the meaning of the rights therein when exercising its powers.

² That is, a system having a constitution which has its origin in an Act of the British Imperial Parliament at Westminster or in an Order in Council: *Hinds v The Queen* [1977] AC 195 at 212, PC (on appeal from Jamaica).

³ Constitution of the Republic of Singapore (1999 Reprint).

⁴ As to the President, see the Singapore Constitution, *id*, Art 20(3) and the 1st Sch, Form 1; as to Members of Parliament, see Art 61 and the 1st Sch, Forms 2 and 3; as to the Chief Justice, Supreme Court Judges and Judicial Commissioners, see Art 97 and the 1st Sch, Form 6.

⁵ The texts of the oaths are set out in Sch 2 of the Constitution of the Republic of South Africa 1996 (assented to on 16 December 1996, commenced on 4 February 1997); the President (s 87) is required to “obey, observe, uphold and maintain the Constitution”; Ministers and Deputy Ministers (s 95), members of the National Assembly (s 48), permanent delegates to the National Council of Provinces (s 62(6)) and members of provincial legislatures (s 107) to “obey, respect and uphold the Constitution”; and judicial officers (s 174(8)) to “uphold and protect the Constitution and the human rights entrenched in it”.

⁶ A bill of rights, by its very nature, may have the status of basic law even if it is only contained in an ordinary Act of Parliament: see the text accompanying nn 52–58, below.

Absent any specific provision in the constitution,⁷ this raises the issue of whether the determination of the meaning of a fundamental right by any particular branch of government ought to be binding on the other branches. In other words, should a pronouncement as to the content of a bill of rights by any particular branch be authoritative? This is a vital issue, for the roles played by the branches in determining the meaning and content of rights are inextricably linked to a proper understanding of the approaches that ought to be taken to the interpretive enterprise.

Part I of this chapter examines certain fundamental concepts, namely, the doctrine of the separation of powers, the rule of law, constitutionalism, the status of bills of rights as enforceable law, and the independent duty of the branches of government to interpret a bill of rights. This lays the groundwork for a discussion of the central question in Part II: whether one branch should have final say over the other branches as to the meaning of fundamental rights. The orthodox view provides an affirmative response to that question, and identifies that branch to be the judiciary. This view is to be contrasted with the intriguing argument held by a number of US commentators that no particular branch of government should be entitled to insist on the other branches accepting its interpretation of the constitution. The conclusion of the discussion is that the orthodox view accords better with rule of law principles. A common objection to the judiciary being the ultimate interpreter of a bill of rights is then considered – the ‘counter-majoritarian difficulty’, which claims that judicial review of governmental action is undemocratic and should therefore be severely limited. It is submitted that the problem is not as intractable as it appears.

⁷ See, *eg*, the South African Constitution, *id*, s 167(5): “The Constitutional Court makes the final decision whether an Act of Parliament, a provincial Act or conduct of the President is constitutional, and must confirm any order of invalidity made by the Supreme Court of Appeal, a High Court, or a court of similar status, before that order has any force.”

Finally, in Part III, the concept of a constitutional conversation or dialogue is proposed as a practical model for the relationship between the branches of government as regards interpreting a bill of rights.

I. FUNDAMENTAL CONCEPTS

The issue of what roles the branches of government should play in interpreting a bill of rights depends on the interplay between certain fundamental concepts relating to the constitutional structure of a jurisdiction: the separation of powers, the rule of law, constitutionalism and the status of bills of rights as law, and the independent duty of the branches of government to interpret the constitution. An examination of these foundational concepts will enable us to establish yardsticks against which the issue of whether one of the branches of government should be the authoritative interpreter of a bill of rights may be measured.

A. THE DOCTRINE OF THE SEPARATION OF POWERS

In *Hinds v The Queen*⁸ Lord Diplock, delivering the majority judgment of the Judicial Committee of the Privy Council, noted that Westminster-style constitutions

were negotiated as well as drafted by persons nurtured in the tradition of that branch of the common law of England that is concerned with public law and familiar in particular with the basic concept of separation of legislative, executive and judicial power as it had been developed in the unwritten constitution of the United Kingdom.⁹

The familiar tripartite separation of governmental powers is commonly traced to the 1748 work *L'Esprit des Lois* (*The Spirit of the Laws*) by Charles Louis de Secondat, Baron de La Brède et de Montesquieu, based on his own understanding of

⁸ Above, n 2.

⁹ *Id* at 212.

the 18th-century English constitution. Montesquieu was certainly not the first to have analyzed government according to its functions. John Locke had done so earlier, and indeed Montesquieu restated Locke's division of functions as the legislative power and the executive power, the latter being subdivided into the executive power in matters pertaining to the law of nations, and the executive power in matters pertaining to civil right, which he termed the power of judging.¹⁰ However, having thus defined governmental powers, Montesquieu went on to restate them as the powers "of making the laws, ... of executing public resolutions, and... of judging the crimes or the disputes of individuals",¹¹ and it was this restatement that he used thereafter. The identification and placement of the power of judging on the same analytical level as the legislative and executive powers was, as Melvin Richter put it, a "great and lasting innovation".¹²

Montesquieu's concern was to preserve what he termed "political liberty", "that tranquillity of spirit which comes from the opinion each one has of his security, and in order for him to have this liberty the government must be such that one citizen cannot fear another citizen".¹³ He viewed political liberty as being present only when power is not abused, and since power is likely to be abused if reposed in

¹⁰ Montesquieu; Anne M Cohler, Basia Carolyn Miller & Harold Samuel Stone (transl & eds), *The Spirit of the Laws* (Cambridge: Cambridge University Press, 1989), book 11, ch 6, at 156–157: "In each state there are three sorts of powers: legislative power, executive power over the things depending on the right of nations, and executive power over the things depending on civil right. By the first, the prince or magistrate makes laws for a time or for always and corrects or abrogates those that have been made. By the second, he makes peace or war, sends or receives embassies, establishes security, and prevents invasions. By the third, he punishes crimes or judges disputes between individuals. The last will be called the power of judging, and the former simply the executive power of the state." This definition of executive power does not correspond exactly with how it is understood in modern states. See Melvin Richter, *The Political Theory of Montesquieu* (Cambridge: Cambridge University Press, 1977) at 90.

¹¹ Montesquieu, *id*, ch 6 at 157.

¹² Richter, above, n 10 at 90.

¹³ Montesquieu, above, n 10, ch 6 at 157. Earlier, in ch 3 at 155, Montesquieu commented: "Liberty is the right to do everything the laws permit; and if one citizen could do what they forbid, he would no longer have liberty because the others would likewise have this same power."

the hands of one man, “power must check power by the arrangement of things”.¹⁴ In an oft-quoted passage, he wrote:

When legislative power is united with executive power in a single person or in a single body of the magistracy, there is no liberty, because one can fear that the same monarch or senate that makes tyrannical laws will execute them tyrannically.

Nor is there liberty if the power of judging is not separate from legislative power and from executive power. If it were joined to legislative power, the power over the life and liberty of the citizens would be arbitrary, for the judge would be the legislator. If it were joined to executive power, the judge could have the force of an oppressor.

All would be lost if the same man or the same body of principal men... exercised these three powers: that of making the laws, that of executing public resolutions, and that of judging the crimes or the disputes of the individuals.¹⁵

In the opinion of Montesquieu, therefore, the way to secure the liberty of the individual is to ensure that governmental powers are separated and balanced against each other. This statement of principle has been interpreted in two main ways. The first understands Montesquieu as asserting that for constitutional liberty to exist there must be a complete separation of agencies, functions and persons.¹⁶ The governmental systems of certain Continental European nations are structured in this way. Thus in France, for instance, cases involving the government, other public authorities and the administration generally are dealt with by a system of administrative courts and not the ordinary civil and criminal court system (*l'ordre judiciaire*),¹⁷ while the enforcement of constitutional provisions is handled by the *Conseil constitutionnel* (often translated as the ‘Constitutional Court’).¹⁸

¹⁴ *Id*, ch 4 at 155.

¹⁵ *Id*, ch 6 at 157.

¹⁶ Richter, above, n 10 at 91–92.

¹⁷ Catherine Elliott, Catherine Vernon & Eric Jeanpierre, *French Legal System* (2nd ed) (Harlow, Essex: Pearson Education, 2006) at 84–85.

¹⁸ *Id* at 130 and 135–139.

The second interpretation, which is prevalent in common-law countries and thus more relevant for our purposes, holds that the separation of powers doctrine merely advocates the prevention of tyranny by the conferment of too much power on any one person or body, and the check of one power by another. In the words of Eric Barendt, “[T]he separation of powers should not be explained in terms of a strict distribution of functions between the three branches of government, but in terms of a network of rules and principles which ensure that power is not concentrated in the hands of one branch.”¹⁹

The separation of powers doctrine is given effect in Westminster-style constitutions by the establishment of organs of government with functions that are generally distinct. Often, there is an explicit vesting of power or authority. The South African Constitution, for instance, vests the “legislative authority” of the national sphere of government in Parliament, of the provincial sphere of government in provincial legislatures, and of the local sphere of government in Municipal Councils;²⁰ “executive authority” in the President, who exercises it together with the other members of the Cabinet;²¹ and “judicial authority” in the courts.²² However,

¹⁹ Eric Barendt, “Separation of Powers and Constitutional Government” [1995] Pub L 599 at 608–609; See also Barendt, *id* at 601 and 606; Richter, above, n 10 at 92–93; O Hood Phillips, Paul Jackson & Patricia Leopold, *O Hood Phillips & Jackson: Constitutional and Administrative Law* (8th ed) (London: Sweet & Maxwell, 2001) at [1-017].

²⁰ South African Constitution, above, n 5, s 43.

²¹ *Id*, s 85. The Cabinet consists of the President, as head of the Cabinet, a Deputy President and Ministers: s 91(1).

²² *Id*, s 165(1). Compare the Australian Constitution (Commonwealth of Australia Constitution Act 1900 (63 & 64 Vict, c 12) (UK)), which vests “executive power” of the Commonwealth of Australia in the Queen, which is exercisable by the Governor-General as Her Majesty’s representative (s 61); “legislative power” in the Federal Parliament consisting of the Queen, a Senate and a House of Representatives (s 1); and “judicial power” in the High Court of Australia, in such other federal courts as the Parliament creates, and in such other courts as it invests with federal jurisdiction (s 71). The Singapore Constitution, above, n 3, vests “executive authority” in the President which shall be exercisable by him or by the Cabinet or any Minister authorized by the Cabinet (Art 23(1); the Legislature may by law confer “executive functions” on other persons: sub-s (2)), “legislative power” in the Legislature (Art 38; the Legislature consists of the President and Parliament: *id*), and “judicial power” in the Supreme Court and subordinate courts set up by written law (Art 93). The US

such express wording is unnecessary. It was held by the Privy Council in *Hinds v The Queen* that

it is well established as a rule of construction applicable to constitutional instruments under which this governmental structure [*ie*, a Westminster-style structure] is adopted that the absence of express words to that effect does not prevent the legislative, the executive and the judicial powers of the new state being exercisable exclusively by the legislature, by the executive and by the judicature respectively.²³

A separation of powers is regarded as evident in a Westminster-style system of government even though there is often a high degree of overlap between the membership of the branches of government, particularly the executive and legislative branches. The British constitutional system is the exemplar of this.²⁴ The Prime Minister and other Ministers in the Cabinet are also MPs.²⁵ Until constitutional reforms in 2005,²⁶ the Lord Chancellor, who is a Cabinet Minister, presided over the House of Lords as Lord Speaker and was head of the judiciary in England and Wales. Among the reforms introduced, which were aimed at establishing a clearer constitutional separation of powers, were the substitution of references in primary legislation to the Lord Chancellor in his capacity as Speaker of the House of Lords with references to the ‘Speaker of the House of Lords’,²⁷ and the ending of the Lord Chancellor’s judicial role.²⁸ The House of Lords’ alternative capacity as the final

Constitution vests “executive Power” in the President (Art II s 1), “legislative Powers” in the Congress of the United States which consists of the Senate and the House of Representatives (Art I s 1), and “judicial Power” in the Supreme Court and in such inferior courts as Congress may ordain and establish (Art III s 1).

²³ *Hinds*, above, n 2 at 212; see also *Liyanage v The Queen* [1967] 1 AC 259 at 286–288, PC (on appeal from Ceylon).

²⁴ O Hood Phillips & Jackson, above, n 19 at [2-020].

²⁵ *Id.*

²⁶ Constitutional Reform Act 2005 (c 4) (UK).

²⁷ The Act, *id.* s 18 and Sch 6. It is a matter for the House of Lords itself to determine any changes to the current arrangements for the office of its Speaker: see the Explanatory Notes to the Act, [12] and [47].

²⁸ The Act precludes the office-holder from holding judicial office: Explanatory Notes to the Act, [10]. By s 7 of the Act, *id.* the Lord Chancellor has ceased to be the President of the Supreme Court of England and Wales (sub-s (4)), which role has been taken on by the Lord Chief Justice (sub-s (1)). Section 15 and Sch 4 of the Act transfer various functions of the Lord Chancellor relating to the

court of appeal has been taken on by the new Supreme Court of the United Kingdom,²⁹ and the right of members of the House of Lords to sit and vote in the Second Chamber for so long as they hold full-time judicial office is restricted.³⁰

Thus, the reforms bring the constitutional position of Great Britain closer to those of many Commonwealth countries such as Singapore.³¹ Nonetheless, the separation of powers doctrine is not given full expression in Westminster-style constitutions. Since Cabinet members and other government ministers are also MPs, the executive plays a major role in setting the legislative agenda. If the party in government has a majority of the seats in Parliament the legislature will not be an effective check on the use of executive power, particularly in the light of the whip system which is designed to ensure that party members attend and vote as the party leadership wishes.³² However, what the 2005 reforms in Britain achieve is the creation of a distinct partition between the executive and legislature on the one hand and the judiciary on the other. It is submitted that this particular functional and structural separation is crucial. In order for members of the political branches of government, particularly elected legislators, to remain in power it is in their interest to mostly pursue courses of action that are supported by the majority of the electorate. The judiciary therefore has the vital role of ensuring that such actions are

judiciary and the courts to Her Majesty The Queen, the Lord Chief Justice and other persons: Explanatory Notes to the Act, [36]–[37].

²⁹ The Act, *id.*, s 23. Section 40 provides that the Supreme Court will have the appellate jurisdiction of the House of Lords.

³⁰ *Id.*, s 137(3). See the Explanatory Notes to the Act, [61]–[62].

³¹ Under the Singapore Constitution, above, n 3, there is overlapping membership of the executive and legislature. The executive authority of the Republic is vested in and exercisable by the President subject to the provisions of the Constitution, or by the Cabinet or any Minister authorized by the Cabinet: Art 23(1). The Cabinet, which consists of the Prime Minister and other Ministers that are appointed from among the Members of Parliament, has the general direction and control of the Government and is collectively responsible to Parliament: Arts 24 and 25(1). The President and Parliament together comprise the Legislature: Art 38.

³² This is the present state of affairs in Singapore. Parliament would, of course, be able to check the executive more effectively if the latter was composed of a minority or coalition government.

constitutional and, above all, do not seriously impair the fundamental liberties of minorities whose voices are less likely to be heeded by the Cabinet and Parliament. The separation of the political and judicial branches also conduces to the judiciary remaining independent from political pressure, allowing it to check more effectively the acts of the Cabinet and Parliament.

B. THE RULE OF LAW, CONSTITUTIONALISM AND THE STATUS OF BILLS OF RIGHTS AS LAW

1. *The Rule of Law*

The point made in the preceding section is buttressed by another fundamental constitutional concept: the rule of law. The concept is regarded as a founding value of many nations – it is declared to be such by Canada³³ and South Africa,³⁴ for instance – but its meaning is highly contested. For present purposes, it suffices to note that there are formal ('thin') and substantive ('thick') conceptions of the rule of law. Thin conceptions of the rule of law are concerned with matters such as the manner in which the law was promulgated (whether it was by a properly-authorized person, in a properly-authorized manner, *etc*), the clarity of the ensuing norm (whether it is sufficiently clear to guide an individual's conduct so as to enable a person to plan his or her life, *etc*), and the temporal dimension of the enacted norm

³³ Preamble to the Canadian Charter of Rights and Freedoms (enacted as Sch B to the Constitution Act 1982): "... Canada is founded upon principles that recognize the supremacy of God and the rule of law". There is no mention of the rule of law in the Preamble to the earlier Constitution Act 1867 (30 & 31 Vict, c 3; reprinted in RSC 1985, App II, No 5) (UK); however, the Preamble states that Canada is to have a "Constitution similar in Principle to that of the United Kingdom", and that phrase was regarded by Supreme Court of Canada in *Reference re Language Rights under s. 23 of Manitoba Act, 1870 and s. 133 of Constitution Act, 1867* [1985] 1 SCR 721 at 750 as containing an implicit recognition of the rule of law: see Peter W Hogg & Cara F Zwibel, "The Rule of Law in the Supreme Court of Canada" (2005) 55 U Toronto LJ 715 at 719–720.

³⁴ South African Constitution, above, n 5, s 1(c): "The Republic of South Africa is one, sovereign, democratic state founded on the following values... Supremacy of the constitution and the rule of law."

(whether it is prospective or retrospective, *etc*). The actual content of the law itself – whether the law is a good law or a bad law – is not of concern.³⁵ Thick conceptions of the rule of law go further. They embody the idea that in order for the rule of law to be upheld, individuals have to be accorded certain substantive rights such as equality and respect for human dignity.³⁶ As some theory of justice is integral to deciding what rights individuals have, this necessitates the articulation of what that theory of justice actually is.³⁷ Consequently, what the ‘rule of law’ really comes to mean is the particular theory of justice being proffered.

Significantly, proponents of thick conceptions of the rule of law accept that the concept has the formal attributes of the thin conceptions.³⁸ What, then, are these attributes? In the view of Peter Hogg and Cara Zwibel, the rule of law has three elements:

(1) [A] body of laws that are publicly available, generally obeyed, and generally enforced; (2) the subjection of government to those laws (constitutionalism); and (3) an independent judiciary and legal profession to resolve disputes about those laws.³⁹

According to the third element listed above, to ensure that the rule of law is upheld the judiciary’s independence from the political branches of government must be preserved. In Westminster-style systems this is often achieved by providing in the constitution for the security of tenure of judges, for instance, that they may not be removed from office before they attain a certain age⁴⁰ or unless certain grounds for

³⁵ Paul P Craig, “Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework” [1997] Pub L 467 at 467.

³⁶ See, *eg*, T R S Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001).

³⁷ Craig, above, n 35 at 480.

³⁸ *Id* at 467.

³⁹ Hogg & Zwibel, above, n 33 at 718.

⁴⁰ See, *eg*, the Australian Constitution, above, n 22, s 72; the Singapore Constitution, above, n 3, Art 98(1). Compare the South African Constitution, above, n 5, s 176(1).

removal are proved and procedures followed;⁴¹ and that judges' remuneration and other terms of office may not be altered to their disadvantage after their appointment.⁴² The common law also provides for judicial immunity in certain circumstances: no judge is liable in damages if acting within jurisdiction, even if doing so maliciously;⁴³ and no judge of a superior court is liable for an act done outside jurisdiction, provided it was done in the honest belief that he was acting within jurisdiction.⁴⁴ Liability only attaches if a judge knowingly acts outside jurisdiction.⁴⁵ In addition, to safeguard the independence of the judiciary, it is arguably necessary to keep the membership of the political and judicial branches of government distinct. This reflects the importance of the separation of powers doctrine.

2. Constitutionalism and the Status of Bills of Rights as Law

Hogg and Zwibel's second element highlights that the concept of constitutionalism is situated within the rule of law. Constitutionalism may be expressed as the notion of a government ruling according to a constitution or constitutional forms which limit its arbitrary power.⁴⁶ It is a corollary of the idea of limited government, a government that is not a law unto itself but which acts in accordance with the laws of the land. As the Supreme Court of Canada put it in the *Quebec Secession Reference*, "the rule of

⁴¹ See, eg, the Australian Constitution, *id*; the New Zealand Constitution (Constitution Act 1986 (1986 No 114) (NZ)), s 23; Singapore Constitution, *id*, Arts 98(3)–(5). Compare the South African Constitution, *id*, s 177.

⁴² See, eg, the Australian Constitution, *id*; the New Zealand Constitution, *id*, s 24; the Singapore Constitution, *id*, Art 98(8). Compare the South African Constitution, *id*, s 176(3).

⁴³ *Sirros v Moore* [1975] QB 118 at 131–133; *Re McC (a minor)* [1985] AC 528 at 540–541, HL.

⁴⁴ *Sirros*, *id* at 134–135; *McC*, *id* at 541, 550.

⁴⁵ *Sirros*, *id* at 136, 149; *McC*, *id* at 540.

⁴⁶ See the definition of the adjective *constitutional* (sense 4b) from *The Oxford English Dictionary* (2nd ed) (Oxford: Oxford University Press, 1989) from *OED Online* at <<http://dictionary.oed.com/cgi/entry/50048135>> (accessed 13 November 2006).

law provides that the law is supreme over the acts of both government and private persons. There is, in short, one law for all.” And further, “the exercise of all public power must find its ultimate source in a legal rule”; in other words, “the relationship between the state and the individual must be regulated by law.”⁴⁷

A constitution is logically prior to, and may be regarded as the source of, ordinary laws, for it is through the agencies and procedures established therein that laws are validly enacted. Moreover, the linking of constitutionalism with the rule of law implies that a written constitution is itself a form of law. Indeed, by definition, it is the basic or supreme law of a jurisdiction. The nature of a constitution as law is often put beyond doubt by the existence of a ‘supremacy clause’. For example, section 52(1) of the Constitution Act 1982 of Canada states:

The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.⁴⁸

So, too, Article VI of the US Constitution: “This Constitution... shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any state to the Contrary notwithstanding.” The Supreme

⁴⁷ *Reference re Secession of Quebec* [1998] 2 SCR 217 at [72].

⁴⁸ See also the South African Constitution, above, n 5, s 2 (“This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled.”). Art 4 of the Singapore Constitution, above, n 3, states: “This Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of the Constitution which is inconsistent with the Constitution shall, to the extent of the inconsistency, be void”, and Art 162 states: “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”. In addition, the word ‘law’ is expressed by Art 2(1) to include “written law”, which is itself defined as meaning, *inter alia*, “this Constitution”.

Court of the United States in the landmark decision of *Marbury v Madison*⁴⁹ declared:

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void. This theory is essentially attached to a written constitution, and is consequently to be considered, by this court, as one of the fundamental principles of our society.⁵⁰

A bill of rights is a list of the fundamental liberties or rights enjoyed by people in a jurisdiction.⁵¹ Such a bill is often incorporated into a written constitution, as in Canada, India, Ireland, Singapore, South Africa and the United States. In other States, bills of rights may be contained in ordinary Acts of Parliament. Thus in New Zealand the bill of rights appears in the New Zealand Bill of Rights Act 1990,⁵² and in the United Kingdom it is embodied in the Human Rights Act 1998.⁵³ Although such statutes are technically not entrenched and may be repealed by the legislature without following any special procedures, they may be regarded as having the status of basic law. For instance, although there are no provisions entrenching the New Zealand Bill of Rights Act, either in the Act itself or in the New Zealand Constitution,⁵⁴ it is regarded as part of the constitutional canon, having been identified as such by the courts and commentators, and in official government publications.⁵⁵ It has been claimed that the Bill of Rights is practically entrenched since implied repeal by subsequent inconsistent enactments is extremely rare and

⁴⁹ (1803) 5 US (1 Cranch) 137.

⁵⁰ *Id* at 177.

⁵¹ This is a generalization, as bills of rights may limit the enjoyment of rights to certain categories of persons. Arts 14(1)(a)–(c) of the Singapore Constitution, above, n 3, for example, restrict the exercise of the right to freedom of speech and expression, the right to assemble peaceably, and the right to form associations to citizens of Singapore.

⁵² 1990 No 109.

⁵³ 1998 c 42.

⁵⁴ Above, n 41.

⁵⁵ Paul Rishworth, *et al*, *The New Zealand Bill of Rights* (Oxford: Oxford University Press, 2003) at 3; see generally *id* at 2–5.

arguably non-existent, and any government intent on repealing or restrictively amending the Act would likely suffer extreme political difficulty and opprobrium.⁵⁶ Similarly, in *Thoburn v Sunderland City Council*⁵⁷ the suggestion (probably *obiter*) was made that in the United Kingdom a distinction should be drawn between ‘ordinary’ statutes and ‘constitutional’ statutes, and that the latter category includes the Human Rights Act 1998. John Laws LJ said that as a constitutional statute, the Human Rights Act is not subject to being *impliedly* repealed by a subsequent incompatible statute, though it can nonetheless be *expressly* derogated from.⁵⁸

Logically, where a bill of rights is incorporated into a written constitution, the fundamental rights therein will also have the status of supreme law. The same may or may not be true of bills of rights set out in ordinary statutes, but the key point is that all such bills have the status of law and may be enforced as such by the courts.⁵⁹ This has important consequences for the interpretation of bills of rights by the branches of government, which will be examined below.

⁵⁶ Rishworth, *id* at 4.

⁵⁷ [2003] QB 151. The case is commented on in Sophie Boyron, “In the Name of European Law: The Metric Martyrs Case” (2002) 27 E L Rev 771; Geoffrey Marshall, “Metric Measures and Martyrdom by Henry VIII Clause” (2002) 118 LQR 493; and James Young & David Campbell, Case Comment, “The Metric Martyrs and the Entrenchment Jurisprudence of Lord Justice Laws” [2002] Pub L 399.

⁵⁸ *Thoburn*, *id* at 186, [62].

⁵⁹ Theoretically, it is possible that a bill of rights might be established purely as a set of ideals which a nation’s government is to aspire to achieve, and thus be made unenforceable in the courts. I have not come across such a creature before. Compare, though, Art 45 of the Constitution of Ireland (November 2004 ed) (enacted by the People 1 July 1937, in operation as from 29 December 1937) which sets out the “directive principles of social policy” that require the State, among other things, to secure that citizens may through their occupations find the means of making reasonable provision for their domestic needs (cl 2(i)); safeguard the economic interests of weaker sections of the community and, where necessary, contribute to the support of the infirm, the widow, the orphan, and the aged (cl 4.1°); and endeavour to ensure that the strength and health of workers and the tender age of children shall not be abused and that citizens shall not be forced by economic necessity to enter avocations unsuited to their sex, age or strength (cl 4.2°). However, the Article commences with the following passage: “The principles of social policy set forth in this Article are intended for the general guidance of the Oireachtas [*ie*, the National Parliament]. The application of those principles in the making of laws shall be the care of the Oireachtas exclusively, and shall not be cognisable by any Court under any of the provisions of this Constitution.”

3. The Independent Duty of the Branches of Government to Interpret a Bill of Rights

In a jurisdiction where the constitution contains a bill of rights and persons appointed to key positions in the various branches of government are obliged to take an oath to uphold the constitution,⁶⁰ it is clear that a legal duty is impressed on each of the separate but co-ordinate branches of government to determine for itself the meaning of the provisions in the bill of rights when exercising its powers. However, it is submitted that even if the bill of rights only has the status of an ordinary statute and no relevant oaths of office are taken, judges are duty-bound to interpret the bill of rights in the context of disputes that have been brought before the courts, Cabinet members and government ministers must construe the bill of rights to ensure that their policies comply with it, and parliamentarians must act in similar fashion when deciding whether to enact a particular Bill into law.

While it is widely accepted that the judiciary has to interpret the bill of rights in fulfilling its constitutional role, it is seldom noted that the executive and legislature likewise need to do so. In fact, the constitutional system may contain explicit safeguards to ensure that members of the political branches of government direct their minds to the issue, and even provide special mechanisms to assist the assessment process. In the United Kingdom, for instance, section 19 of the Human Rights Act 1998⁶¹ requires 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

⁶⁰ See the text accompanying nn 3–5, above.

⁶¹ Above, n 53.

wishes the House to proceed with the Bill even though he is unable to make such a statement. There is also a permanent Joint Committee on Human Rights comprising members of both Houses, a major aspect of the work of which is to scrutinize bills passing through Parliament for conformity with the Act.

Under the Irish Constitution, the President may, after consultation with the Council of State, refer to the Supreme Court certain types of Bills passed or deemed to have been passed by both Houses of the Oireachtas (National Parliament) and presented to him for signature for a decision as to whether such Bills or any specified provisions thereof is or are repugnant to the Constitution.⁶² If the Supreme Court decides that any provision of such a Bill is repugnant to the Constitution, the President is required to decline to sign the Bill.⁶³

In Singapore, the President is also entitled to refer to a tribunal consisting of not less than three judges of the Supreme Court for its opinion any question as to the effect of any provision of the Constitution which has arisen or which appears likely to arise.⁶⁴ Although no court has the jurisdiction to question the opinion of any tribunal or the validity of any law, or any provision therein, the Bill for which has been the subject of a reference to a tribunal by the President,⁶⁵ unlike Ireland the President of Singapore cannot decline to assent to a Bill even if it has been determined to be unconstitutional.

⁶² Irish Constitution, above, n 59, Art 26.1.1°. The procedure does not apply to a Money Bill, a Bill expressed to be a Bill containing a proposal to amend the Constitution, or a Bill the time for the consideration of which has been abridged by Seanad Éireann (the Senate of Ireland, which is the upper house of the Oireachtas): *id*, Art 26.

⁶³ *Id*, Art 26.3.1°.

⁶⁴ Singapore Constitution, above, n 3, Art 100(1). To date, one such question has been referred to a constitutional tribunal: *Constitutional Reference No 1 of 1995* [1995] 1 SLR(R) 803.

⁶⁵ *Id*, Art 100(4).

In addition to the advisory opinion procedure, in Singapore another procedure exists specifically for ensuring that legislation is not disadvantageous to racial or religious communities. This procedure is designed to secure the compliance of legislation with constitutional guarantees of equality before the law and equal protection of the law.⁶⁶ Apart from certain exceptions, all Bills which have been given a final reading and passed by Parliament must be sent to the Presidential Council for Minority Rights before being presented to the President for assent.⁶⁷ Subsidiary legislation must also be sent to the Council by the appropriate Minister within 14 days of publication.⁶⁸ It is the Council's function to examine the legislation and to draw attention to any Bill or subsidiary legislation that, in its opinion, is a "differentiating measure",⁶⁹ namely, "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 prejudicing persons of that community or indirectly by giving advantage to persons of another community".⁷⁰ 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.⁷¹ As regards

⁶⁶ Art 12(1) states: "All persons are equal before the law and entitled to the equal protection of the law." Art 12(2) prohibits discrimination against citizens of Singapore on the ground only of, *inter alia*, religion and race in any law; or in the appointment to any office or employment under a public authority; or in the administration of any law relating to the acquisition, holding or disposition of property or the establishing or carrying on of any trade, business, profession, vocation or employment.

⁶⁷ *Id.*, Art 76(1).

⁶⁸ *Id.*, Art 80(1).

⁶⁹ *Id.*, Art 77.

⁷⁰ *Id.*, Art 68.

⁷¹ *Id.*, Art 78(6)(c).

subsidiary legislation the procedure is similar, except that if Parliament wishes to confirm any such legislation in the face of an adverse report, a resolution passed with a simple majority suffices.⁷²

The statutory provisions described above demonstrate that systems of constitutional government are usually set up in such a way that the executive and legislative branches of government must have regard to the constitution and the bill of rights in the lawmaking process. The political branches may also be required to independently construe the constitutional text in other situations because particular provisions have not yet been the subject of court cases.⁷³ This occurred in *McCrea v Minister for Customs & Justice*,⁷⁴ decided by the Federal Court of Australia. In that case, the Singapore Government had requested the Australian Government for the extradition of a British national alleged to have committed double murder who had fled to Melbourne. Murder is a capital offence in Singapore. Section 22(3)(c)(iii) of the Extradition Act 1988 (Cth) provides in substance that where an offence for which extradition is sought is punishable by penalty of death the eligible person is only to be surrendered if, by virtue of an undertaking given by the extradition country to Australia, the death penalty, if imposed on the person, will not be carried out. To comply with this provision, Singapore sent a diplomatic note to Australia worded along its lines. The Minister for Customs and Justice of the Australian

⁷² *Id.*, Art 80(4)(b).

⁷³ For one reason or another, certain constitutional issues are not likely to make their way into court. In such circumstances, if the executive and legislative branches refrain from interpreting the constitution, it is unlikely that the matters will receive serious treatment, if any at all: Neal Devins & Louis Fisher, "Judicial Exclusivity and Political Instability" (1998) 84 Va L Rev 83 at 102.

⁷⁴ (2004) 212 ALR 297, FC (single judge) (Aust); and (2005) 223 ALR 552, 145 FCR 269, FC (full ct) (Aust). An application for special leave to appeal to the High Court was dismissed: *McCrea v Minister for Customs and Justice of the Commonwealth* [2005] HCATrans 761, HC (Aust), available from the website of the Australasian Legal Information Institute at <<http://www.austlii.org>> (accessed 16 November 2006).

Commonwealth then determined that McCrea should be surrendered to Singapore.⁷⁵ McCrea challenged this decision on the ground that this determination was beyond jurisdiction in that, by reason of section 22(3)(c) of the Act, the Minister's power to determine that he be surrendered was conditional upon the existence of a valid and enforceable undertaking given by Singapore by virtue of which it was objectively established that, if the death penalty was imposed on him, it would not be carried out. The applicant contended that no such undertaking had been given by Singapore and that no such undertaking could be given.⁷⁶ He submitted that this was because under Article 22P of the Singapore Constitution, the President may not act to prevent the death penalty being carried out prior to conviction and also may not act unless certain preconditions have been met. Further, the giving of the undertaking was an unlawful attempt to fetter future executive action, involved an improper interference with the judicial process, and unlawfully attempted to exempt the applicant from the ordinary operation of the law. Consequently, the undertaking was constitutionally invalid and unenforceable under either domestic or international law, and was therefore incapable of satisfying the objective fact required by section 22(3)(c)(iii) that "by virtue of the undertaking... the death penalty will not be carried out".⁷⁷

McCrea's application ultimately failed, a full court of the Federal Court holding that an undertaking given pursuant to section 22(3)(c) does not need to be legally enforceable.⁷⁸ However, the aspect of the case material to our discussion is

⁷⁵ *McCrea*, FC (full ct), *id* at [4]–[8].

⁷⁶ *Id* at [9].

⁷⁷ *McCrea*, FC (single judge), above, n 74 at [15].

⁷⁸ *McCrea*, FC (full ct), above, n 74 at [18]–[20]. The applicant was extradited to Singapore, where he pleaded guilty to two charges of culpable homicide not amounting to murder and one charge of causing the disappearance of evidence with the intention of screening himself from legal punishment. He was sentenced to 24 years' imprisonment: *Public Prosecutor v McCrea Michael*

that the validity of the undertaking provided by Singapore to Australia under Singapore constitutional law was at the relevant time, and is still, an issue that has yet to be determined by the Singapore courts. Thus, in deciding to provide the undertaking to the Australian Government, the Attorney-General's Chambers of Singapore, acting on behalf of the executive branch of the Singapore Government, must necessarily have made its own assessment of the matter.⁷⁹

It can therefore be seen that constitutional systems usually contemplate that the branches of government have an independent duty to interpret the constitution and bill of rights when exercising their powers. Apart from specific provisions that expressly require the constitution to be taken into account, circumstances will arise in which the executive and legislature must determine the meaning of constitutional provisions in the absence of judgments that are on point. However, where such judgments exist, the possibility of a conflict of opinion arises.

In this part of the chapter, we have examined several constitutional concepts. The rule of law and the separation of powers doctrines are regarded as cardinal elements. At its minimum, the rule of law mandates constitutionalism – the subjection of government to a body of clear, publicly-available and regularly-enforced laws. This includes the bill of rights, which has the status of law, that all branches of government have an independent duty to interpret in order to carry out their constitutional responsibilities. On the other hand, according to the separation of powers doctrine, the exercise of power by one branch of government must be

[2006] 3 SLR(R) 677, HC. The sentence was confirmed by the Court of Appeal without reasons being issued: see Chong Chee Kin, "McCrea Fails to Get Jail Term Cut", *The Straits Times* (23 August 2006).

⁷⁹ This was recognized by Kirby J during the hearing of McCrea's application for special leave to appeal to the High Court of Australia, above, n 74: "Presumably the provisions of the law of Singapore were taken into account by the Republic of Singapore in giving the undertaking that it has given."

capable of being checked by one or both of the other branches. In Westminster-style legal systems, where it is the norm to have individuals holding membership of both the executive and legislature, the rule of law also requires that there be a judiciary independent of the political branches to resolve disputes about laws, including the bill of rights.

II. A SINGLE AUTHORITATIVE INTERPRETER?

A. INTERPRETIVE AND JUDGMENT SUPREMACY DISTINGUISHED

We can therefore see that the potential exists for a clash between foundational concepts. The autonomous duty of the branches of government to interpret the bill of rights in the course of their work may result in the branches reaching different conclusions as to the meaning and extent of fundamental liberties. In the event of disagreement, the question is whether interpretations of the bill of rights by an independent judiciary, whose job it is to resolve disputes regarding the law, must be regarded by the executive and legislature as authoritative. Or are the executive and legislature entitled to prefer their own opinions, a concept termed ‘departmentalism’?⁸⁰

The orthodox view is that the judiciary is the ultimate interpreter of the constitution, and thus of any bill of rights embodied in it or having the status of supreme law. This position is exemplified by the case of *Cooper v Aaron*⁸¹ decided by the Supreme Court of the United States. The case merits examination, not least because many of the foundations of constitutional law in common law jurisdictions

⁸⁰ Gary Lawson & Christopher D Moore, “The Executive Power of Constitutional Interpretation” (1996) 81 Iowa L Rev 1267 at 1270; Saikrishna Prakash & John Yoo, “Against Interpretive Supremacy” (2005) 103 Mich L Rev 1539 at 1543–1544.

⁸¹ 358 US 1 (1958).

were laid by the US Constitution and decisions of the Supreme Court thereon. *Cooper v Aaron* was decided in the wake of the milestone decision of *Brown v Board of Education*,⁸² which had held that intentional segregation of school children by race violated the equal protection clause of the Fourteenth Amendment to the US Constitution. To comply with the ruling, the school board in Little Rock, Arkansas, devised a plan to phase out school segregation. However, the governor of the State called out the National Guard, instructing them to bar black children from Central High School, the only school scheduled to be integrated in the first year of the school board's plan. He claimed that he had done so to preserve public order; however, no genuine threat to order was ever shown. Emboldened by this move, angry white crowds surrounded the school, jeered and spat on black children, and blocked their access to the school. The President of the United States had to call in troops to restore order. However, school administrators continued to face serious problems in controlling white students who carried on an organized campaign of harassment against black students.⁸³ The State legislature also took steps to perpetuate racial segregation by, among other things, passing an amendment to the State Constitution commanding the Arkansas General Assembly to oppose "in every Constitutional manner the Un-constitutional desegregation decisions of May 17, 1954 and May 31, 1955 of the United States Supreme Court". Pursuant to this directive, the General Assembly passed various laws, including one relieving school children from compulsory attendance at racially-mixed schools.⁸⁴ Under these volatile

⁸² 347 US 483 (1957).

⁸³ See Daniel A Farber, "The Supreme Court and the Rule of Law: *Cooper v Aaron* Revisited" (1982) U Ill L Rev 387 at 390–396.

⁸⁴ *Cooper v Aaron*, above, n 81 at 8–9.

circumstances, the school board applied to court for a two-and-a-half-year delay in implementing desegregation.

In denying the application and requiring the school board to proceed with desegregation, the Supreme Court noted that the case “necessarily involves a claim by the Governor and Legislature of a State that there is no duty on state officials to obey federal court orders resting on this Court’s considered interpretation of the United States Constitution”.⁸⁵ The Court refuted this claim. Citing Article VI of the US Constitution which makes the Constitution the “supreme Law of the Land” and John Marshall CJ’s declaration in *Marbury v Madison* that “[i]t is emphatically the province and duty of the judicial department to say what the law is”,⁸⁶ it stated:

This decision [*Marbury*] declared the basic principle that the federal judiciary is supreme in the exposition of the law of the Constitution, and that principle has ever since been respected by this Court and the Country as a permanent and indispensable feature of our constitutional system. It follows that the interpretation of the Fourteenth Amendment enunciated by this Court in the *Brown* case is the supreme law of the land.⁸⁷

Conversely, an intriguing line of academic opinion from the United States has carefully distinguished between what may be called ‘interpretive supremacy’ and ‘judgment supremacy’.⁸⁸ According to Saikrishna Prakash and John Yoo, interpretive supremacy is the exclusive power to resolve once and for all a constitution’s

⁸⁵ *Id* at 4.

⁸⁶ Above, n 49 at 177.

⁸⁷ *Cooper v Aaron*, above, n 81 at 18. See also *City of Boerne v Flores* 521 US 507 (1997), concerning the scope of Congress’s enforcement power under the 14th Amdt, s 5. McConnell has called *City of Boerne* “the most judge-centered view of constitutional law since *Cooper v. Aaron*”: Michael W McConnell, “Institutions and Interpretation: A Critique of *City of Boerne v. Flores*” (1997) 111 Harv L Rev 153 at 163.

⁸⁸ See, *eg*, Lawson & Moore, above, n 80; Edward A Hartnett, “A Matter of Judgment, Not a Matter of Opinion” (1999) 74 NYU L Rev 123; Prakash & Yoo, above, n 80. Contrast Farber, above, n 83; Michael Stokes Paulsen, “The Most Dangerous Branch: Executive Power to Say What the Law Is” (1994) 83 Geo LJ 217; Larry Alexander & Frederick Schauer, “On Extrajudicial Constitutional Interpretation” (1997) 110 Harv L Rev 1359. I have adopted terminology used by Prakash & Yoo, *id*.

meaning.⁸⁹ This was what the US Supreme Court asserted for itself in *Cooper v Aaron*. On the other hand, judgment supremacy is the idea that while the judiciary's orders and judgments must be obeyed by the other branches of government, they need not adopt the conclusions about the constitution's meaning underlying the decisions. In fact, a court's ruling is perfectly valid without reasons being given for it, and in the bulk of the caseload of modern courts no grounds are provided for decisions.⁹⁰ Thus, in the view of Prakash and Yoo:

The political branches are free to articulate, advocate, and act upon alternative constitutional understandings. The only thing the political branches cannot do is ignore or thwart the final judgments issued by courts. Hence, members of Congress may pass legislation contrary to the judiciary's constitutional interpretations so long as they do not impede or overturn a particular judgment. Likewise, the President may vigorously and publicly disagree with the Supreme Court's interpretation of some constitutional provision so long as she continues to execute the judiciary's judgments.⁹¹

It follows, therefore, that the actions of the Governor and State legislature of Arkansas in the events leading up to *Cooper v Aaron* were unjustified. Even if they had disagreed with the Supreme Court's interpretation of the equal protection clause of the Fourteenth Amendment to the Constitution in *Brown v Board of Education*, they were under a legal duty to carry out court orders implementing the ruling.

1. The Judiciary as Ultimate Interpreter: An Examination of the Judicial Role

It might be said that for the US Supreme Court in *Cooper v Aaron* to have asserted its own supremacy was self-serving and savoured of circularity. Lawson and Moore have called attention to the fact that if the view of one governmental branch as to its

⁸⁹ Prakash & Yoo, *id* at 1542 and 1550.

⁹⁰ See Hartnett, above, n 88 at 126–127 (“As valuable as opinions may be to legitimize judgments, to give guidance to judges in the future, or to discipline a judge's thinking, they are not necessary to the judicial function of deciding cases and controversies.”).

⁹¹ Prakash & Yoo, above, n 80 at 1550–1551.

own constitutional powers constrains the interpretative powers of the other branches, the first branch effectively gets to act as the judge in its own cause.⁹² The charge would be made out if this branch of government declared its own primacy without any basis. It is submitted, though, that the conclusion reached by the Supreme Court on the extent of its role is justified by the deductions it made from the text of the US Constitution, and that a similar reasoning may be applied to Westminster-style constitutions.

The US Constitution does not declare the Supreme Court to be the authoritative expositor of the Constitution's meaning in so many words. It merely states that judicial power extends to various cases and controversies, including all "Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority".⁹³ This suggests that the essence of judicial power is the determination of disputes between parties by the making of decisions binding on them.

The signal contribution of *Marbury v Madison* to constitutional theory was Marshall CJ's inference from the expression of judicial power in the Constitution that it was the responsibility of the courts to interpret the Constitution. One of the main issues in the case was whether an Act of the legislature repugnant to the Constitution could become the law of the land.⁹⁴ Noting that written constitutions are

⁹² Lawson & Moore, above, n 80 at 1276.

⁹³ US Constitution, Art III s 2: "The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority; – to all Cases affecting Ambassadors, other public ministers and Consuls; – to all Cases of admiralty and maritime Jurisdiction; – to Controversies to which the United States shall be a Party; – to Controversies between two or more States; – between a State and Citizens of another State; – between Citizens of different States; – between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects."

⁹⁴ *Marbury*, above, n 49 at 176.

contemplated as forming the fundamental and paramount law of the nation, Marshall CJ held that an Act repugnant to the constitution had to be void.⁹⁵ And it was clearly the responsibility of the judiciary to make such a determination:

Those who apply the rule to particular cases, must of necessity expound and interpret that rule. If two laws conflict with each other, the courts must decide on the operation of each.

So if a law be in opposition to the constitution; if both the law and the constitution apply to a particular case, so that the court must either decide that case conformably to the law, disregarding the constitution; or conformably to the constitution, disregarding the law; the court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.⁹⁶

Put another way, Marshall CJ's reasoning runs thus. At its heart, judicial power is the constitutionally-sanctioned power to resolve disputes. In the process of doing so, the court must inevitably interpret the laws that apply to the dispute in question. The constitution is law – indeed, the highest law of the land. Therefore, in the event of a dispute touching on the constitutionality of a piece of legislation (or, one might add, executive action), the court is obliged to determine the meaning of the impugned legislation (or the legal basis for the executive action) and, more importantly, the meaning of the relevant provision of the constitution that it is alleged to contravene. In *Marbury* it was *legislation* that the Court declared invalid – the primary means by which the legislature expresses its opinion as to the Constitution's meaning. Thus, from the reasoning employed in that case, the necessary (and, it is submitted, correct) implication is that judiciary's views on the legality of actions of the political branches and the meaning of the Constitution are authoritative over those of the executive and legislature. It was this line of reasoning that enabled the Supreme Court in *Cooper v*

⁹⁵ *Id* at 177.

⁹⁶ *Id* at 177–178.

Aaron to declare that “the federal judiciary is supreme in the exposition of the law of the Constitution”.⁹⁷

This analysis applies with equal force to Westminster-style constitutions. In the High Court of Australia’s decision in *Huddart, Parker & Co Pty Ltd v Moorehead*,⁹⁸ Samuel Griffith CJ said that the words “judicial power” as used in section 71 of the Australian Constitution⁹⁹

mean the power which every sovereign authority must of necessity have to decide controversies between its subjects, or between itself and its subjects, whether the rights relate to life, liberty or property. The exercise of this power does not begin until some tribunal which has power to give a binding and authoritative decision (whether subject to appeal or not) is called upon to take action.¹⁰⁰

The above formula essentially expresses the meaning of judicial power in the same way that the US Constitution does. As this definition was regarded as “classic and widely accepted” by the Privy Council in *Attorney-General for Australia v The Queen*,¹⁰¹ it is fair to regard it as generally applicable to constitutions in Westminster-style systems. From this, it follows that a judge from a nation with such a system of government also has the responsibility to assess executive actions and legislative instruments for compliance with the constitution, and thus the concomitant duty to construe the meaning of the bill of rights in the constitution or having the status of basic law.

⁹⁷ *Cooper v Aaron*, above, n 81 at 18.

⁹⁸ (1909) 8 CLR 330.

⁹⁹ Above, n 22.

¹⁰⁰ *Huddart*, above, n 98 at 357.

¹⁰¹ [1957] AC 288 at 318, PC (on appeal from Aust). In this and later cases, the Privy Council fleshed out other aspects of judicial power: therefore we know that in a criminal case it encompasses the assessment of guilt or innocence and, after a conviction, the appropriate sentence to be imposed (see *Liyanage v The Queen*, above, n 23; *Hinds v The Queen*, above, n 8; *Mohammed Muktar Ali v The Queen* [1992] 2 AC 93, PC (on appeal from Mauritius); *Browne v The Queen* [2000] 1 AC 45, PC (on appeal from St Christopher & Nevis); *Director of Public Prosecutions of Jamaica v Mollison* [2003] 2 AC 411, PC (on appeal from Jamaica); *Griffith v The Queen* [2005] 2 AC 235, PC (on appeal from Barbados); and that it excludes arbitral functions (*Attorney-General for Australia, id.*).

2. Departmentalism and the Rule of Law

Marbury, however, did not have to consider the fact that the political branches of government also have a legal duty to interpret the Constitution. A possible contention, therefore, is that while a court certainly has a duty to construe the meaning of the bill of rights in the context of resolving a dispute brought before it, there is no reason why the executive and legislature should not also articulate their own interpretations of fundamental rights in the course of performing their constitutional functions. The unspoken assumption behind this contention is that there is nothing particularly problematic about official interpretations of the bill of rights laid down by different branches of government that conflict with each other existing simultaneously.

In fact, it has been averred that departmentalism and judgment supremacy reinforce the doctrine of the separation of powers: the notion that power should be dispersed rather than concentrated in a single entity. Hence, departmentalism enables the branches of government to check each other more effectively. Furthermore, if the three branches of government can independently interpret the bill of rights in carrying out their respective functions, this promotes a constitutional dialogue that provides opportunities for the airing of diverse points of view concerning important issues.

What might this mean in practice? We have seen that Prakash and Yoo are of the opinion that the legislature is entitled to pass laws that are contrary to the judiciary's constitutional interpretations so long as they do not impede or overturn particular judgments, and that the executive may publicly disagree with the Supreme

Court's interpretations.¹⁰² This is not especially problematic. However, Lawson and Moore push the envelope, arguing that the best understanding of the role of judgments in the US constitutional scheme is that the President and Congress can go so far as to refuse to enforce a judgment. They caution, though, that such a step must only be taken in extreme circumstances: only for constitutional error, and only when that error is so clear that it is not open to rational question.¹⁰³

How a constitutional system along these lines would be workable is difficult to imagine. It is open to any person adversely affected by executive or legislative action opposed to a judicial understanding of the constitution to apply to a court for a review of the constitutionality of such action. The court would be acting within its sphere if it then struck down the executive action or legislation by applying principles of *stare decisis*¹⁰⁴ and adhering to precedents laid down by superior courts or its own prior decisions. As the US Supreme Court remarked in *City of Boerne v Flores*¹⁰⁵ after having referred to *Marbury v Madison*:

When the Court has interpreted the Constitution, it has acted within the province of the Judicial Branch, which embraces the duty to say what the law is. ... When the political branches of the Government act against the background of a judicial interpretation of the Constitution already issued, it must be understood that in later cases and controversies the Court will treat its precedents with the respect due them under settled principles, including *stare decisis*, and contrary expectations must be disappointed.¹⁰⁶

¹⁰² Prakash & Yoo, above, n 80 at 1550–1551.

¹⁰³ Lawson & Moore, above, n 80 at 1325–1326.

¹⁰⁴ The principle by which a court is bound to follow decisions in former cases: see *Halsbury's Laws of England* (4th ed reissue) (London: Butterworths LexisNexis, 2001), vol 37, [1327] at n 1.

¹⁰⁵ Above, n 87.

¹⁰⁶ *Id* at 536 (citation omitted). *Boerne* was cited by the Supreme Court in *Dickerson v United States* 530 US 428 at 437 (2000), the Court noting that "... Congress may not legislatively supersede our decisions interpreting and applying the Constitution."

Rules regarding *stare decisis* and *ratio decidendi*¹⁰⁷ serve to regulate the decision-making process of the court so that the law may develop in an orderly fashion, and thus provide a degree of certainty upon which persons may rely in conducting their affairs.¹⁰⁸ They say nothing about the influence that judicial understandings of the constitution and bill of rights should have on the other branches of government. However, the application of these rules means that unless the court is convinced otherwise, it will stand to its guns. On the other hand, if the political branches find themselves in profound disagreement with the court's interpretation of the bill of rights and, instead of taking steps to amend it, the executive refuses to enforce the court's judgment or the legislature enacts statutes inconsistent with the judgment, this will lead to an irresolvable face-off between the judiciary and the political branches. It is hard to see how this promotes constitutional dialogue in any meaningful sense.

It must not be overlooked that the judiciary is reliant on the executive to carry out its judgments. Moreover, the judiciary may declare an Act of Parliament to be void for unconstitutionality but is generally powerless¹⁰⁹ to bring ameliorating legislation into effect – this is within the legislature's remit. In the *Federalist No 78*, Alexander Hamilton wrote:

The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The

¹⁰⁷ The reason or principle upon which a question before the court has been decided. It has the force of law and is binding as a precedent: *Osborne v Rowlett* (1880) 13 Ch D 774 at 785; *Close v Steel Co of Wales Ltd* [1962] AC 367, HL; see *Halsbury's Laws of England*, above, n 104 at [1327]; Farber, above, n 83 at 408.

¹⁰⁸ *Practice Statement* [1966] 1 WLR 1234, HL; see *Halsbury's Laws of England*, *id.*

¹⁰⁹ A court may, however, construe legislation in order to preserve its constitutionality, possibly to the extent of reading words into it. This is done to ordinary legislation from time to time: see F A R Bennion, *Statutory Interpretation: A Code* (4th ed) (London: Butterworths, 2002) at 421–438, pt IX ('Filling in the Textual Detail').

judiciary on the contrary has no influence over either the sword or the purse, no direction either of the strength or of the wealth of the society, and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgments.¹¹⁰

Hence, if the political branches are free to dissent from the judiciary's decisions and to refuse to give effect to them, it is hard to see how the latter could fulfil its constitutional role. The element of the rule of law requiring the existence of an independent judiciary to resolve disputes¹¹¹ – which presupposes an effectual judiciary – would be undermined.

The above scenario also creates an unacceptable degree of uncertainty and confusion in the law. Effectively, incongruent meanings will be attributed to particular contested provisions of the constitution depending on which branch of the government one is dealing with. It is submitted that this undercuts another of the elements of the rule of law, namely, that laws are publicly available, generally obeyed and generally enforced. This is because a law that is vague, or incomprehensible for some other reason, is not publicly available in any real sense and cannot easily be obeyed or enforced.¹¹² In *Merkur Island Shipping Corporation v Laughton*, the House of Lords commented: “Absence of clarity is destructive of the rule of law; it is unfair to those who wish to preserve the rule of law; it encourages those who wish to undermine it.”¹¹³

¹¹⁰ ‘Publius’ (Alexander Hamilton), “A View of the Constitution of the Judicial Department, in Relation to the Tenure of Good Behaviour” (28 May 1788) in Alexander Hamilton, James Madison & John Jay, *The Federalist* (J R Pole, ed) (Indianapolis; Cambridge: Hackett Publishing Company, 2005) 411 at 412 (describing the power of the judiciary under the text of the US Constitution of 1787).

¹¹¹ Hogg & Zwibel, above, n 33 at 718.

¹¹² *Id* at 722.

¹¹³ [1983] 2 AC 570 at 612 (criticizing the clarity of drafting of certain statutes). See also the judgment of Sir John Donaldson MR in the Court of Appeal, *id* at 594: “The efficacy and maintenance of the rule of law, which is the foundation of any parliamentary democracy, has at least two prerequisites. First, people must understand that it is in their interests, as well as in that of the

Nonetheless, is there not something in the point that there ought to be residual power reposed in the executive and legislature to disagree with the judiciary's interpretation of the constitution in extraordinary cases? This may be illustrated by a striking hypothetical scenario developed by Michael Stokes Paulsen.¹¹⁴ Suppose, for example, that a case is brought in the United States challenging an exercise of the veto power of the President, and the Supreme Court affirms a permanent injunction against any further use of the veto (perhaps coupled with a permanent injunction against ever seeking reconsideration of the Court's decision). Would the President truly be bound by that judgment? Again, if the Supreme Court issued a permanent injunction against Congress further exercising its law-making power, would Congress be bound? If interpretive supremacy held sway, Congress would not be able to control the Court through impeachments of judges or legislation restricting the Court's jurisdiction, as the Court could simply declare in a further judgment that, upon its interpretation of the Constitution, the Justices were not subject to impeachment and the Court had jurisdiction notwithstanding the content of any congressional statutes. That judgment would be absolutely binding. Thus, by issuing judgments, the courts would be able to take command of all aspects of the government. Lawson and Moore comment: "It seems unlikely that the Constitution creates an unelected Supreme Court which is bound by nothing but its conscience."¹¹⁵

It is unnecessary to resort to departmentalism for a solution, for one exists in most written constitutions. Obviously it is very unlikely that a court would act in such

community as a whole, that they should live their lives in accordance with the rules and all the rules. Second, they must know what those rules are. Both are equally important..."

¹¹⁴ Paulsen, above, n 88 at 284–287.

¹¹⁵ Lawson & Moore, above, n 80 at 1324.

an unrestrained manner, but if one did this would no doubt constitute misconduct justifying the institution of proceedings by the political branches of government for removal of the judges concerned. For instance, section 72(ii) of the Australian Constitution¹¹⁶ states: “The Justices of the High Court and of the other courts created by the Parliament... shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity”. In any case, it is not difficult to conceive of extreme examples unlikely to occur in reality, where the only viable solution is some drastic form of regime change. By the same token, it might be argued in support of interpretive supremacy that the judiciary is a bulwark against a runaway executive or legislature intent on clinging on to power by suppressing fundamental freedoms. Such scenarios takes us out of the realm of law into political science and philosophy.

To sum up, we should not lose faith in interpretive supremacy. It is submitted that it is impracticable to have a system in which the branches of government can rely on conflicting interpretations of the bill of rights, and require persons to suffer the consequences of this divergence of opinion in their dealings with the branches. And although departmentalism and judgment supremacy are claimed to reinforce the doctrine of the separation of powers and promote a constitutional dialogue

¹¹⁶ Above, n 22. See also the Irish Constitution, Art 35.4.1° (“A judge of the Supreme Court or the High Court shall not be removed from office except for stated misbehaviour or incapacity, and then only upon resolutions passed by Dáil Éireann [*i.e.*, the House of Representatives or lower house] and by Seanad Éireann calling for his removal.”); and the Singapore Constitution, Art 98(3) (“If the Prime Minister, or the Chief Justice after consulting the Prime Minister, represents to the President that a Judge of the Supreme Court ought to be removed on the ground of misbehaviour... to properly discharge the functions of his office, the President shall appoint a tribunal... and shall refer that representation to it; and may on the recommendation of the tribunal remove the Judge from office.”).

among the branches of government, it is submitted that these theories ultimately have a tendency to undermine the rule of law.

B. THE COUNTER-MAJORITARIAN DIFFICULTY

Another possible objection to interpretive supremacy exists in the form of the ‘counter-majoritarian difficulty’, regarded by Barry Friedman to be “the central obsession of modern constitutional scholarship”¹¹⁷ in the US. The term, coined by Alexander Bickel,¹¹⁸ may be explained thus: to the extent that popular democracy entails responsiveness to popular will, how do we justify the fact that the judiciary, a branch of government the members of which are unaccountable to the people, has the power to overturn popular decisions?¹¹⁹

It can be seen that the counter-majoritarian difficulty rests upon two assumptions:

- (a) The electoral process is definitive of democracy, or, otherwise put, actions taken by agents of the executive or statutes passed by the legislature are necessarily expressions of popular will.
- (b) An unelected judiciary is politically unaccountable to the people.¹²⁰

1. *The Elusive ‘Majority Will’, and Executive and Legislative Action*

As regards the first assumption, it is too simplistic to say that actions taken by the political branches of government must inevitably be seen as articulations of what the

¹¹⁷ Barry Friedman, “The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy” (1998) 73 NYU L Rev 333 at 334.

¹¹⁸ Alexander M Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis, In: Bobbs-Merrill, 1962) at 16: “The root difficulty is that judicial review is a counter-majoritarian force in our system.”

¹¹⁹ Compare Friedman, “Countermajoritarian Difficulty, Part One”, above, n 117 at 335.

¹²⁰ See Steven L Winter, “An Upside/Down View of the Countermajoritarian Difficulty” (1991) 69 Tex L Rev 1881 at 1920.

majority of the electorate desires. Where the executive is concerned, it is often the actions of its agents – police officers and civil servants that staff government departments, for example – that are alleged to breach constitutional guarantees.¹²¹ As for the legislature, it is arguable that there may be instances where statutes can be regarded as a manifestation of popular will. In particular, this may be the case where legislation is put to a referendum, or where a Parliamentary committee has been convened to examine the proposed legislation and the views of interested members of the public sought and adopted. The latter scenario is a more common feature of Westminster-style systems than the former. However, it is difficult to conclude whether the Act of Parliament that is passed after a Parliamentary committee's scrutiny necessarily embodies the hopes that a majority of the public has for it. In the bulk of cases it is fair to say that the public does not provide any direct input into the legislative process. A legislature often enacts laws that the public has no cognizance of – in fact, even members of the legislature themselves may have no grasp of what a certain law means, and merely follow the lead of the government minister sponsoring the law, the directions of the party whip, and colleagues who are apparently more knowledgeable.¹²²

Further criticisms of the first assumption may be made. Friedman, for instance, doubts the existence of such a creature as the 'majority will'. To him, it is too simplistic to say that people are either for or against a policy. "[M]ajorities come and go as the public engages in debate. At best there is a constantly shifting tide of

¹²¹ Paul C Weiler, "Rights and Judges in a Democracy: A New Canadian Version" (1984) 18 U Mich JL Reform 51 at 66, speaking in the context of the Canadian Charter: "[T]he vast majority of government slots are filled by professional appointees. The actions taken by these officials under the power of their office generate the greatest share of claims subject to judicial scrutiny under a constitutional Charter."

¹²² See Barry Friedman, "Dialogue and Judicial Review" (1993) 91 Mich L Rev 577 at 633.

public opinion. ... [I]n real life, choices arise on a continuum.”¹²³ In any case, a piece of legislation whose constitutionality is challenged before the courts may be one that was enacted some time ago, before the individuals comprising the current polity were even alive. Even if a ‘majority will’ can somehow be accurately identified, is it proper to assume that such legislation is supported by a latter-day majority without any evidence on the matter?

The significance of a vote for a representative in a legislature also deserves examination. The media has speculated that some presidential and congressional elections in the US have been influenced by the views of voters on controversial issues such as a woman’s right to an abortion, equality of treatment for gay persons, and the continued presence of US troops in Iraq. It might be argued that if the President or Congress was subsequently to adopt policies in line with voters’ opinions on those issues, such policies could be said to represent the popular will. However, short of polling every voter for his or her opinions, it is nigh impossible to determine with any degree of precision why voters have chosen particular candidates as their representatives. Rather than choosing, say, a legislator based on the latter’s opinion on a particular issue, it is likely that the average voter makes a decision on a bundle of the legislator’s views on various issues, only some of which the voter agrees with. If the legislator later votes in Congress for legislation that the voter disagrees with, it cannot meaningfully be claimed that the legislation passed represents the majority will.¹²⁴

We are therefore left with the conclusion that just because members of a legislature are elected to their posts by a majority of the voting public, it does not

¹²³ Friedman, “Dialogue and Judicial Review”, above, n 122 at 638–639.

¹²⁴ *Id* at 639–640.

follow that it is apt to characterize all legislation enacted by that legislature as expressions of the popular will. Rather, what we are really talking about is an electoral majority giving its mandate to its chosen representatives in Parliament to decide policies on its behalf by enacting new legislation or supporting existing legislation. Nevertheless, to claim that judicial review of such policies is undemocratic would be countenancing a simplistic and feeble version of democracy. It is submitted that democratic government must be more than just rule based on a majority mandate, heedless of the burden placed on dissenting minorities. It must also encompass appropriate restraints on the legitimate scope of decisions made in the name of the majority that flow from a decent respect for the fundamental rights of the individual,¹²⁵ which are enforced by an independent judiciary.

Furthermore, the nature of the judicial process arguably belies the allegation that it is less democratic than legislative proceedings. When a constitutional dispute is brought before a court it is determined, usually in a public hearing, by a judge who does not have an institutional commitment towards any of the parties, after they have had an opportunity to present their respective cases.¹²⁶

Most importantly, we should question whether 'democracy' ought to be the yardstick by which the appropriateness of judicial review is evaluated. It is too indistinct, too contested a concept. It has also been suggested that democracy should be valued, not as a goal in itself because it is somehow intrinsically good, but because it leads to other things that are good, such as enhanced feelings of civil participation

¹²⁵ Weiler, above, n 121 at 67–68.

¹²⁶ *Id* at 66.

and belonging, or the reinforcement of equality among citizens.¹²⁷ Therefore, simply pointing to the application of a democratic process is insufficient to justify oppressive administrative actions or legislation, as the ultimate aim is not merely the exercise of ‘democracy’ but a society that is more just.¹²⁸

2. An Unelected Judiciary – Problem or Protector?

The second assumption that the counter-majoritarian difficulty rests upon is that an unelected judiciary is not politically accountable to the people, and therefore on this account judicial review is also undemocratic. In Westminster-style jurisdictions judges are generally appointed by the executive and are not elected by the people.¹²⁹ Hence, it is fair to say that that the judiciary is not directly accountable to them. However, it does not follow that it is therefore problematic for the judiciary to assess the actions of the political branches for compliance with the bill of rights. Such an assumption misunderstands the function of the judiciary. The fact that judges are appointed rather than popularly elected frees them from being beholden to the electorate, and thus preserves the independence of the judiciary. We have seen that the latter attribute is one of the elements of the rule of law.¹³⁰ The obvious objection is that judges may be beholden to the politicians who appointed them, which is possibly worse. Apart from the expectation, of course, that judges will act fairly and

¹²⁷ Carissima Mathen, “Dialogue Theory, Judicial Review, and Judicial Supremacy: A Comment on ‘Charter Dialogue Revisited’” (2007) 45 *Osgoode Hall LJ* 125 at 142, citing Ronald Dworkin, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge: Harvard University Press, 2000) at 187.

¹²⁸ Compare Mathen, *id.*, at 142–143.

¹²⁹ Thus in Singapore, for instance, the Chief Justice, the Judges of Appeal and Judges of the High Court are appointed by the President if he, acting in his discretion, concurs with the advice of the Prime Minister: Singapore Constitution, above, n 3, Art 95(1).

¹³⁰ See the text accompanying n 39, above.

impartially in fulfilment of their oath of office,¹³¹ this point is addressed by the fact that the law provides judges with immunity from suit and that constitutions normally safeguard their independence in various ways, including granting them security of tenure.¹³² Hence, in theory at least, unless judges are close to the age of superannuation at the time of their appointment, they will most likely hold office beyond the term of the politicians who recommended their elevation to the bench.¹³³

Vis-à-vis a bill of rights, the duty of an independent judiciary is to ensure that actions taken by the political branches of government do not infringe fundamental rights of persons. This responsibility is of especial importance where the rights of an electoral minority are concerned, as they are less able to influence the political system compared to persons comprising the majority.¹³⁴ Moreover, courts play a crucial role in interpreting fundamental rights so as to insulate enduring values and principles of the community from transient popular sentiment.¹³⁵ Thus the judiciary's lack of direct political accountability is not a flaw in the system but an integral part of the design of Westminster-style constitutions. This is not to say that a legal system is defective where the legislature is regarded as the ultimate bulwark of

¹³¹ For instance, under the Singapore Constitution, above, n 3, Art 97 read with para 6 of the 1st Sch, the Chief Justice, Judges and Judicial Commissioners take an oath to "faithfully discharge [their] judicial duties, and... do right to all manner of people after the laws and usages of the Republic of Singapore *without fear or favour, affection or ill-will to the best of [their] ability...*" (emphasis added).

¹³² As to measures that are usually established to ensure the independence of judges, see the text accompanying nn 40–42, above.

¹³³ This argument would not apply if the same politicians were returned to power for several Parliamentary terms. Thus in jurisdictions where such a state of affairs pertains, this may cast a measure of doubt as to the independence of the judiciary – assuming that the judiciary also ignores its duty of impartiality, which of course it may not.

¹³⁴ For this reason Barry Friedman, in his article "The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five" (2002) 112 Yale LJ 153 at 226, noted that a possible solution to the counter-majoritarian difficulty lay in Justice Harlan Stone's well-known footnote 4 in *United States v Carolene Products Co* 304 US 144 at 152 (1938), where the judge expressed the view that more searching judicial review might be appropriate when specific textual protections were at issue, when legislation interfered with the functioning of the political process and the ability to find redress there, or when the rights of "discrete and insular" minorities were at stake.

¹³⁵ Tom R Hickman, "Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998" [1995] Pub L 306 at 317.

individual rights, as is the case in New Zealand and the United Kingdom where the doctrine of parliamentary sovereignty holds sway. However, it is submitted that where a deliberate decision has been taken to establish a constitutional system with a legally-enforceable written bill of rights, that decision is rendered pointless if judicial review by the courts on the basis of the bill of rights is impugned simply because it is seen as going against actions taken by the people's elected representatives. In fact, the case for judicial review is arguably stronger in a Westminster-style system because there is a greater need for the judiciary to provide a check against the executive and legislature, since strict party discipline enables the governing political party to impose favoured policies with relative ease.¹³⁶

It may be contended that in the preponderance of cases it is not problematic for the judiciary to review legislation for compliance with a bill of rights, but where controversial issues that involve moral judgment are involved, the legislature is more competent to deal with them. It is submitted that this is not necessarily the case. Paul Weiler has opined that while the legislature may avoid taking a stand on difficult moral issues for fear of losing votes, the judiciary is obliged to respond to claims on legal merits. In addition, the fact that judges are not compelled by electoral self-preservation means that instead of simply mirroring existing majority views and prejudices, they can move the law forward to a more enlightened position on controversial subjects.¹³⁷

There remains a lingering fear that if judges are accorded wide latitude when interpreting bill of rights, they will simply read their personal preferences and prejudices into the text. Albie Sachs, a former judge of the Constitutional Court of

¹³⁶ Weiler, above, n 121 at 69.

¹³⁷ *Id* at 71–72.

South Africa, has admitted that when he decided cases, “[m]ixed in with the formal logic there has invariably been an enormous amount of random intuitive searching and a surging element of unruly, free-floating sensibility”.¹³⁸ However, this was not a reason for alarm because the intuitions of judges appointed to final appellate courts are “not based on blind, untutored and highly subjective predilections” but have been “filtered and transmuted into an evolving lexicon of legal principles”.¹³⁹ Furthermore, judges are required to provide reasoned justifications for their decisions, ensuring conformity with the existing legal principles:¹⁴⁰ “A discovery that cannot be justified simply cannot stand. ... [O]ne does not have a free choice between adopting one’s intuitive sense – that intense feeling emerging inside yourself based on a lifetime of experience – and following the process of formal reasoning.”¹⁴¹ Ultimately, as judges are human beings, we must expect them to bring their individual experiences and views to bear on the decisions they make.¹⁴² Indeed, this is a positive aspect of judicial review because judging lies somewhere between applying cold logic and the judge’s personal opinions. According to Sachs there is an “internal dialogue of reason and passion”¹⁴³ – passion referring to the range of emotional and intuitive responses to arguments or facts.¹⁴⁴ This dialogue does not taint the judicial process but is “in

¹³⁸ Albie Sachs, “Tock-Tick: The Working of a Judicial Mind” in *The Strange Alchemy of Life and Law* (Oxford; New York: Oxford University Press, 2009) at 48.

¹³⁹ *Id* at 49.

¹⁴⁰ Compare Weiler, above, n 121 at 71.

¹⁴¹ Sachs, “Tock-Tick”, above, n 138 at 53.

¹⁴² See also J A G Griffiths, “Judicial Creativity” in *The Politics of the Judiciary* (5th ed) (London: Fontana Press, 1997) at 283–284: “[J]udges, like the rest of us, are not all of a piece... they are liable to be swayed by emotional prejudices”.

¹⁴³ Sachs, “Reason and Passion” in *Strange Alchemy*, above, n 138 at 114, citing the views of William J Brennan, Jr, former justice of the United States Supreme Court.

¹⁴⁴ *Id* at 115.

fact central to its vitality, and particularly true in constitutional interpretation”, because the law must reflect human experience.¹⁴⁵

III. THE RELATIONSHIP BETWEEN THE BRANCHES OF GOVERNMENT

How, then, should we regard the relationship between the branches of government where interpretation of a bill of rights is concerned? One concept has gained currency in a number of jurisdictions is that of a constitutional conversation or dialogue. In the Supreme Court of Canada’s decision *Vriend v Alberta*,¹⁴⁶ Iacobucci J expressed the view that the Charter of Rights and Freedoms

has given rise to a more dynamic interaction among the branches of governance. This interaction has been aptly described as a “dialogue” by some... . In reviewing legislative enactments and executive decisions to ensure constitutional validity, the courts speak to the legislative and executive branches. As has been pointed out, most of the legislation held not to pass constitutional muster has been followed by new legislation designed to accomplish similar objectives... . By doing this, the legislature responds to the courts; hence the dialogue among the branches.¹⁴⁷

He saw the value of such a constitutional dialogue as making the branches of government somewhat accountable to each other, which had the effect of enhancing the democratic process.¹⁴⁸ In the United Kingdom context, too, it has been suggested that the principle of “democratic dialogue” is “implicit in the structural features” of the Human Rights Act 1998.¹⁴⁹ Opportunities for dialogue between the courts and the legislature arise when the courts construe legislation compatibly with Convention

¹⁴⁵ *Id* at 114–115.

¹⁴⁶ [1998] 1 SCR 493, SC (Can).

¹⁴⁷ *Id* at [138], citing Peter W Hogg & Allison A Bushell, “The *Charter* Dialogue between Courts and Legislatures (or Perhaps the *Charter of Rights* Isn’t Such a Bad Thing After All)” (1997) 35 Osgoode Hall LJ 75. See also *Corbiere v Canada (Minister of Indian & Northern Affairs)* [1999] 2 SCR 203 at [116] *per* L’Heureux-Dubé J (dissenting) (Gonthier, Iacobucci and Binnie JJ, concurring); Kent Roach, “Constitutional, Remedial, and International Dialogues about Rights: The Canadian Experience” (2005) 40 *Tex Int’l LJ* 537; Kent Roach, “Dialogue or Defiance: Legislative Reversals of Supreme Court Decisions in Canada and the United States” (2006) 4 *Int’l J Const L* 347.

¹⁴⁸ *Vriend, id* at [139].

¹⁴⁹ Richard Clayton, “Judicial Deference and ‘Democratic Dialogue’: The Legitimacy of Judicial Intervention under the Human Rights Act 1998” [2004] *Pub L* 33 at 46.

rights under section 3 of the Act,¹⁵⁰ or find themselves unable to do so and make declarations of incompatibility under section 4, for Parliament may enact fresh legislation that modifies a section 3 interpretation or make remedial orders under section 10¹⁵¹ to amend legislation.¹⁵² In other words, the judiciary on the one hand, and the executive and legislature on the other, are seen as interacting by checking each other's actions and, in the process, determining the appropriateness of administrative or legislative acts and the meaning of the bill of rights.

A constitutional dialogue also has an important effect of promoting participation in determining the policies which should be adopted for the community's benefit. By setting forth interpretations of fundamental rights, the judiciary plays a signalling function, calling on the government, academics and the public at large to focus on issues that are of particular importance to society. This has the effect of stimulating discussion about the issues. Interested persons may petition their representatives in the legislature to adopt one policy or another, to the extent of seeking to alter the legislature's composition by exercising votes during an election.¹⁵³

¹⁵⁰ The Human Rights Act 1998 (UK), above, n 53, s 3(1), states: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights."

¹⁵¹ The Human Rights Act, *id.*, s 10, contains a number of subsections, but its import is conveyed by s 10(2), which reads: "If a Minister of the Crown considers that there are compelling reasons for proceeding under this section, he may by order make such amendments to the legislation as he considers necessary to remove the incompatibility." The procedure for making remedial orders is set out in the Second Schedule to the Act.

¹⁵² Clayton, above, n 149 at 45–46.

¹⁵³ Friedman, "Dialogue and Judicial Review", above, n 122 at 654, 656–657, 668–670. See also Christine Bateup, "The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue" (2006) 71 *Brook L Rev* 1109 at 1158–1159; and Bruce A Ackerman, "The Storrs Lectures: Discovering the Constitution" (1984) 93 *Yale LJ* 1013, where he expressed the view that the function of judicial review is to act as a check on the people's representatives – if the representatives respond to special interests in ways that jeopardize fundamental duties, a judge's duty is to expose them for what they are: *id.* at 1029–1030. By declaring a statute unconstitutional, the court is signalling to the people that their representatives are attempting to legislate in a way that few political movements in history have done with credibility. Thus, the time has come for the people to

In addition, when engaging in dialogue, the judiciary and political branches of government can be said to contribute complementary views on issues because of their institutional natures. A court brings to the table its perspective as to whether the exercise of power by the political branches unjustifiably limits fundamental liberties, since interpreting and defining rights is a central aspect of judicial decision-making and is a task that the judiciary regularly and specifically performs. The executive and legislature, given their access to resources and policy expertise, are able to provide insights into the situations where the pursuit of wider policy objectives might necessitate a restriction of rights. By having regard to each other's perspectives on an issue, the branches of government may modify their own views¹⁵⁴ and eventually achieve a common understanding of what the bill of rights requires.

It may be contended that it is more meaningful to speak of a dialogue in Canada and the United Kingdom because of structural features in their bills of rights that specifically enable the legislatures in those jurisdictions to respond to judgments of the courts. In the Canadian Charter, these structural features are said to include section 33,¹⁵⁵ which entitles Parliament or a legislature to liberate a statute from

decide if they will respond by making the political effort to redefine their collective identity by amending the constitution: *id* at 1050.

¹⁵⁴ Compare Bateup, *id* at 1170–1172, citing Janet L Hiebert, *Charter Conflicts: What is Parliament's Role?* (Montréal; London: McGill-Queen's University Press, 2002) at 50–72; Hiebert, "Parliament and Rights" in *Protecting Human Rights: Instruments and Institutions* (Tom Campbell, Jeffrey Goldsworthy & Adrienne Stone, eds) (Oxford: Oxford University Press, 2003) at 231; Hiebert, "New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance when Interpreting Rights?" (2004) 82 *Tex L Rev* 1963.

¹⁵⁵ Section 33 of the Canadian Charter, above, n 33, states:

- (1) Parliament or the legislature of a province may expressly declare in an Act of the Parliament or of the legislature, as the case may be, that the Act or a provision thereof shall operate notwithstanding a provision included in section 2 or sections 7 to 15 of this Charter.
- (2) An Act or a provision of an Act in respect of which a declaration made under this section is in effect shall have such operation as it would have but for the provision of this Charter referred to in the declaration.
- (3) A declaration made under subsection (1) shall cease to have effect five years after it comes into force or on such earlier dates as may be specified in the declaration.

specified provisions of the Charter for successive five-year periods by expressly declaring that the statute shall apply notwithstanding those provisions; and section 1, which guarantees that the rights and freedoms set out in the Charter are subject only to “such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society”.¹⁵⁶ The UK Human Rights Act preserves the principle of parliamentary sovereignty – a judge may not invalidate legislation that is found to infringe Convention rights, but only make a declaration of incompatibility under section 4. Such a declaration does not affect the validity, continuing operation or enforcement of the relevant legislation and is not binding on the parties to the proceedings in which it is made.¹⁵⁷ It is open to Parliament to decide how it wishes to respond. As indicated above, it may make a remedial order under section 10 of the Act, amend the legislation or enact new legislation in the ordinary way or, indeed, do nothing if it deems fit.

Such explicit structural features are generally lacking in the United States Constitution and Westminster-style constitutions. If, as has been submitted, it ought to be accepted that the courts’ interpretations of the bill of rights should be regarded by the political branches of government as authoritative, it is not open to the

(4) Parliament or the legislature of a province may re-enact a declaration made under subsection (1).

(5) Subsection (3) applies in respect of a re-enactment made under subsection (4).

¹⁵⁶ Hogg & Bushell, above, n 147, at 82–87. The other provisions of the Charter said to promote constitutional dialogue are the rights that are framed in qualified terms – s 7 (right to life, liberty and security of the person, but only if deprivation violates “the principles of fundamental justice”), s 8 (right to be secure against “unreasonable” search and seizure), s 9 (right not to be “arbitrarily” detained or imprisoned) and s 12 (guarantee against “cruel and unusual” punishment) – and equality rights under s 15: Hogg & Bushell, *id* at 87–91. Mathen, above, n 127 at 133–134, highlights the risk that a dialogic analysis of s 1 confuses the burden imposed on the government to justify a *prima facie* infringement with a privilege or power on the legislature’s part to determine when limits on rights are justified. She expresses the view that the government should be restricted to the former role, with some latitude granted in cases where evidence is needed or the decision to be made cuts across the normal lines of debate (such as where the government confronts an issue of competing rights).

¹⁵⁷ Human Rights Act (UK), above, n 53, s 4(6).

legislature to enact statutes inconsistent with such interpretations.¹⁵⁸ Despite this, it is submitted that it remains meaningful to conceive of the relationship between the judiciary and the political branches of government in the terms of a dialogue. In a Westminster-style system the dialogue may, for instance, take the following form:

i. The legislature enacts a statute, which is enforced by the executive. A person who perceives that he is detrimentally affected by the statute may then choose to challenge it in the courts as violative of his fundamental rights.

ii. An application having been made to a court, a judge then assesses the statute against his understanding of the enduring values laid down in the bill of rights, after having considered evidence and submissions tendered by the applicant and the government. He can either dismiss the application and find the statute consistent with the bill of rights, or uphold the application. In the latter case, the judge may construe the statute in a way that complies with the bill of rights, or declare it to be void and strike it down. The matter may work its way through the court hierarchy until a decision is rendered by a final appellate court.

iii. The decision by the highest court in the land does not terminate the dialogue. Following this, the executive and legislature must decide how they wish to react. They may choose not to take any further action, thus accepting the judiciary's view of the matter. Or they may respond by modifying the deprecated statute or by enacting fresh legislation that takes into account the court's concerns, though in so doing it may not override the

¹⁵⁸ Unless the bill of rights is itself amended to provide exceptions for the statutes sought to be enacted: this is discussed at the text accompanying nn 160–161, below.

judgment. People who feel that their fundamental rights are still affected by the new or amended legislation may bring further cases to the court, thus continuing the dialogue between the judiciary and the political branches of government about the values protected by the bill of rights. In the face of legislative activity and new evidence about difficulties encountered in attempting to implement the judgment, it is open to the court to reconsider and adjust – perhaps even overrule – its decision in a subsequent case.¹⁵⁹

iv. Alternatively, if the executive and legislature feel strongly enough about the importance of the statute they may take steps to amend the bill of rights to provide an exception for the statute, thus, in a sense, changing the ground rules. The limiting factor will be how easily the bill of rights can be amended. It would be very difficult, for instance, for the legislature in the United States to take this route, as an amendment to the Constitution requires a proposal by two-thirds of both Houses of Congress or the calling of a convention on the application of two-thirds of all the states, and ratification of the proposal by the legislatures of or conventions in 75% of the states.¹⁶⁰ In comparison, it would be relatively straightforward for the bill of rights to be amended in a jurisdiction such as Singapore which has a unicameral legislature and where the number of Parliamentary seats the Government presently holds exceeds the two-thirds majority of Members of Parliament

¹⁵⁹ Compare Bateup, above, n 153 at 1159.

¹⁶⁰ The relevant portions of the US Constitution, Art V, state: “The Congress, whenever two thirds of both Houses shall deem it necessary, shall propose Amendments to this Constitution, or, on the Application of the Legislatures of two thirds of the several States, shall call a Convention for proposing Amendments, which, in either Case, shall be valid to all Intents and Purposes, as Part of this Constitution, when ratified by the Legislatures of three fourths of the several States, or by Conventions in three fourths thereof, as the one or the other Mode of Ratification may be proposed by the Congress...”

required to amend the Constitution.¹⁶¹ If the political branches do take this step, they can be regarded as putting an end to the constitutional dialogue. Although the courts have to stay silent, it remains open to people disapproving of the action to either petition their Members of Parliament to change the law, or to exercise their votes during an election in order to elect new representatives who will do so.

The cases arising out of the 1987 ‘Marxist conspiracy’ in Singapore demonstrate a dialogue engaged in by the judiciary, executive and legislature. A number of individuals were arrested on the ground that they were allegedly involved in a conspiracy to subvert and destabilize the country to establish a Marxist state, and were detained without trial under the provisions of the Internal Security Act (ISA).¹⁶² Section 8(1) of the ISA provides that the Minister of Home Affairs shall make a detention order “if the President is satisfied with respect to any person that, with a view to preventing that person from acting in any manner prejudicial to the

¹⁶¹ The Singapore Constitution, above, n 3, Art 5(2), states: “A Bill seeking to amend any provision in this Constitution shall not be passed by Parliament unless it has been supported on Second and Third Readings by the votes of not less than two-thirds of the total number of Members thereof.” Art 5(2A), which was introduced in 1991, provides that unless the President, acting in his discretion, otherwise directs the Speaker of Parliament in writing, a Bill seeking to amend, among other things, the fundamental liberties in Part IV of the Constitution shall not be passed by Parliament unless it has been supported at a national referendum by not less than two-thirds of the total number of votes cast by electors; however, this Article has yet to be brought into force. In October 2008, in response to a question by Nominated Member of Parliament Professor Dr Thio Li-ann, the Prime Minister Lee Hsien Loong said that it was the Government’s “clear and stated intention... to refine the scheme and to iron out the issues that can arise in the light of experience, before we bring the entrenchment provisions into operation and entrench the rules. ... While we have delayed entrenching the scheme, we have, over the years, made a practice of consulting the President on any amendment which affects his powers, and informing Parliament of the President's view in the Second Reading speech. With one exception, in practice, the President has supported all the amendments which affected his powers. Over the last two decades, we have fine-tuned and improved the system of the Elected President in many ways. ... If after five years, no further major changes are necessary, we will consider entrenching the provisions concerning the President's custodial powers.”: Lee Hsien Loong (Prime Minister), speech during the Second Reading of the Constitution of the Republic of Singapore (Amendment) Bill, *Singapore Parliamentary Debates, Official Report* (21 October 2008), vol 85, cols 532ff.

¹⁶² Cap 143, 1985 Rev Ed (S'pore).

security of Singapore..., it is necessary to do so". The detainees were released, but rearrested after they made a media statement protesting their innocence. They then applied unsuccessfully to the High Court for writs of *habeas corpus*. However, their appeals were allowed by the Court of Appeal in the case of *Chng Suan Tze v Minister of Home Affairs*.¹⁶³ The Court held that the Government had not discharged its burden of proving that the President had possessed the satisfaction required by section 8(1) of the ISA before the Minister made the detention orders. In addition, it stated, *obiter*, that the President's satisfaction under section 8(1)¹⁶⁴ was reviewable by a court on objective grounds and that a judge was not bound to accept the subjective satisfaction of the President. Among the reasons for this conclusion was the fact that since Article 12 of the Constitution provided that "[a]ll persons are equal before the law and entitled to the equal protection of the law", and that the word "law" included common law principles of natural justice and fairness,¹⁶⁵ Parliament's legislative powers could not be exercised in a manner which authorized or required the exercise of arbitrary power in breach of the fundamental rules of natural justice. Furthermore, Article 93 vested the judicial power of Singapore in the Supreme Court and subordinate courts set up by written law. Thus, section 8 of the ISA was only consistent with Articles 12 and 93 of the Constitution if the powers it conferred did not authorize arbitrary powers of detention and only if the courts could review the exercise of such powers. However, applying a subjective rather than an objective test

¹⁶³ [1988] 2 SLR(R) 525.

¹⁶⁴ The same argument was made in respect of s 10(1) of the ISA, which states: "At any time after an order has been made in respect of any person under section 8(1)(a) the Minister may direct that the operation of such order be suspended subject to the execution of a bond and to such conditions... as the Minister sees fit; and the Minister may revoke any such direction if he is satisfied that the person against whom the order was made has failed to observe any condition so imposed or that it is necessary in the public interest that such direction should be revoked."

¹⁶⁵ *Ong Ah Chuan v Public Prosecutor* [1981] AC 648 at 670, [1979–1980] SLR(R) 710 at 722, [26], PC (on appeal from Singapore).

to section 8 would mean giving the executive arbitrary powers of detention, rendering such powers unconstitutional and void.¹⁶⁶ Although section 8 was not itself arbitrary as it provided for the power of detention only for specific purposes which bore a reasonable relation to the object of the law, since the discretion in section 8 was unreviewable by the courts it was actually as arbitrary as if the provision did not restrict the discretion to any purpose; the Court noted that “to suggest otherwise would in our view be naive”.¹⁶⁷ Article 149(1) of the Constitution, which specifically provided for the enactment of the ISA, immunized the Act from being invalid because of inconsistency with Articles 9 (right to life and personal liberty), 13 (prohibition of banishment and freedom of movement) and 14 (rights to freedom of speech, assembly and association) but not Articles 12 or 93.¹⁶⁸

Following the Court of Appeal’s decision the detainees were released from custody but were immediately rearrested under the ISA. One of the detainees, Teo Soh Lung, applied for *habeas corpus* on 13 December 1988. On 16 December, the Government introduced two Bills in Parliament to amend Article 149 of the Constitution and section 8 of the ISA. The Bills were passed and became law on 26 and 28 January 1989 respectively. The Constitution of the Republic of Singapore (Amendment) Act 1989¹⁶⁹ added Articles 11 (protection against retrospective criminal laws and repeated trials), 12 and 93 to the list of provisions in Article 149 that the ISA was protected against, while the Internal Security (Amendment) Act 1989¹⁷⁰ re-established that a subjective test applied to the executive discretions

¹⁶⁶ *Chng Suan Tze*, above, n 163 at 551, [79].

¹⁶⁷ *Id* at 552, [82].

¹⁶⁸ *Id* at 551, [79].

¹⁶⁹ No 1 of 1989.

¹⁷⁰ No 2 of 1989.

exercised under the ISA. Attempts were made by Teo and another detainee to challenge their detention under the amended laws, but this time the courts held that their jurisdiction in the matter had been effectively ousted.¹⁷¹

Regardless of what one may think of laws authorizing detention without trial, the events of 1987–1989 in Singapore are an illustration of how a constitutional dialogue may unfold. The Court of Appeal found, *inter alia*, that certain provisions of the ISA and executive actions taken under them were unconstitutional. However, the Government, believing those provisions to be necessary for the protection of national security, initiated legislation in Parliament to reverse the effect of the Court's judgment. It went to the extent of amending the Constitution to prevent the ISA from being challenged for inconsistency with, among other provisions, the guarantees of equality and equal protection in the bill of rights and the vesting of judicial power in the courts.

In the course of a constitutional dialogue, the meaning of the fundamental liberties in a bill of rights may change depending on which branch of government has spoken on the issue most recently. Depending on the speed at which the branches act, these changes may even occur within short periods of time. Nonetheless, at any time only one official interpretation of the law prevails. This honours the element of the rule of law that requires the meanings of legal instruments to be clear and comprehensible. All things considered, it is submitted that rather than viewing the judiciary as locked in a constant battle against the executive and legislature, the three branches of government should be regarded as working in collaboration with each

¹⁷¹ See *Teo Soh Lung v Minister of Home Affairs* [1990] 1 SLR(R) 347, CA (S'pore); *Cheng Vincent v Minister of Home Affairs* [1990] 1 SLR(R) 38, HC (S'pore).

other in developing and refining understandings of the bill of rights and fostering their acceptance by the people.¹⁷²

CONCLUSION

This chapter has sought to establish the principle that the three branches of government have an equal and independent duty to interpret the bill of rights in the course of fulfilling their constitutional duties. Nonetheless, the judiciary plays a special role in the system – it is charged with making legally-binding determinations of disputes between parties, including government agencies, and while doing so occasions may arise that require it to provide authoritative interpretations of the meaning of the bill of rights. It is submitted that such interpretations must be obeyed by the executive and legislature, even if they are not parties to the relevant cases. To permit a situation where the branches could hold inconsistent views as to the meaning of the bill of rights and, further, to entitle the political branches to disobey court judgments in certain circumstances, would be to invite anarchy and violate principles of rule of law.

The concept of interpretive supremacy is, however, frequently criticized on the ground of the ‘counter-majoritarian difficulty’, the perception that judicial review of executive and legislative action is undemocratic because the latter are viewed as embodying the majority will, while the judiciary is not directly accountable to the people. However, it is questionable whether executive actions and laws passed by the legislature can really be said to be actuated by a ‘majority will’. To the argument that executive and legislative actions are more democratic because the people have given

¹⁷² Hickman, above, n 135 at 317.

the political branches a electoral mandate to act on their behalf, it is submitted that democracy is more than just majority rule; it calls for solicitude for the fundamental rights of minority groups in the community.

It is submitted that conceptualizing the relationship between the branches of government as a dialogue is useful. By this process, the judiciary on the one hand and the executive and legislature on the other can be regarded as checking each other's actions, and in doing so establishing the meaning of the bill of rights and the forms of administrative and legislative actions that are suitable for the community. Through judicial review, the courts draw attention to issues that are of especial significance, encourages discussion of them by government and the people, and may stimulate direct participation by the people in the adoption or rejection of policies. In the course of a constitutional dialogue, there will no doubt be a measure of confrontation between the judiciary and the political branches of government over how a bill of rights should be interpreted. Nonetheless, the dialogue avoids a stalemate between the branches of government, and should be seen as a collaborative effort that enables the meaning of the bill of rights to be developed and refined.

CHAPTER THREE

The Dangerous Doctrine of Deference

A doctrine of judicial deference is pernicious if... it permits the abdication of judicial responsibility in favour of reliance on the good faith or good sense or special expertise of public officials, whose judgments about the implications of rights in specific cases may well be wrong.¹

— TREVOR R S ALLAN
Professor of Public Law and Jurisprudence,
University of Cambridge; Fellow of Pembroke College

I. DOCTRINES OF LIMITATION IN ADMINISTRATIVE LAW: NON-JUSTICIABILITY AND DEFERENCE	108
A. NON-JUSTICIABILITY.....	109
B. DEFERENCE	116
II. DEFERENCE AND BILLS OF RIGHTS	121
A. THE APPLICATION OF DOCTRINES OF DEFERENCE TO BILLS OF RIGHTS	121
1. Deference in the Context of Proportionality Analysis	122
2. Implicit Deference? The Case of Singapore.....	132
B. PRACTICAL DIFFICULTIES WITH HOW DOCTRINES OF DEFERENCE ARE APPLIED	136
III. JUSTIFICATIONS FOR DEFERENCE.....	141
A. SEPARATION OF POWERS	142
B. ACCOUNTABILITY AND INSTITUTIONAL COMPETENCE	145
IV. REDEFINING DEFERENCE.....	153
CONCLUSION	157

A PROPER APPRECIATION of the scope of judicial interpretation of a bill of rights requires an exploration of its boundaries. This chapter examines if, in the course of interpreting a bill of rights, there are situations in which the judiciary of a nation with a Westminster-style constitution ought to decline to make a decision in preference to a prior choice on the matter made by either of the political branches of

¹ T R S Allan, “Human Rights and Judicial Review: A Critique of ‘Due Deference’” (2006) 65 Cam LJ 671 at 675.

government. Such choices may assume the form of policies adopted by the executive and the actions taken thereon, or statutes and subsidiary legislation enacted by the legislature.

Presently, courts in a number of jurisdictions do apply doctrines that circumscribe their ability to subject administrative decisions and legislation to in-depth scrutiny for compliance with the standards established by bills of rights. In the United Kingdom, for instance, since the entry into force of the Human Rights Act 1998² in 2000³ judges have developed a doctrine of ‘deference’, though it is also variously referred to as the “discretionary area of judgment”,⁴ “latitude”⁵ of review, or “margin of appreciation”⁶ given to the political branches of government, and the “principled distance”⁷ between the court’s adjudication and the decision-maker’s decision. This deference doctrine appears to have been inspired by comparable administrative law doctrines that applied prior to the Human Rights Act, which are

² 1998 c 42.

³ The provisions of the Act apart from s 19 came into force on 2 October 2000: Human Rights Act 1998 (Commencement No 2) Order 2000 (SI 2000 No 1851 (C 47)). Section 19 was brought into force earlier, on 24 November 1998, by the Human Rights Act 1998 (Commencement No 1) Order 1998 (SI 1998 No 2882 (C 71)). This section requires the Minister in charge of a Bill in either House of Parliament, before its Second Reading, to make and publish a written statement to the effect either that in his view the provisions of the Bill are compatible with Convention rights, or that, although he is unable to make such a statement, the government nevertheless wishes the House to proceed with the Bill.

⁴ *R v Director of Public Prosecutions, ex parte Kebilene* [2000] 2 AC 326 at 380, HL, *per* Lord Hope of Craighead; and *Brown v Stott (Procurator Fiscal, Dunfermline)* [2003] 1 AC 681 at 703, PC (on appeal from Scotland), *per* Lord Steyn, employing the terminology of Lord Lester of Herne Hill & David Pannick (gen eds), *Human Rights Law and Practice* (London: Butterworths, 1999) at 73.

⁵ *R (ProLife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185 at 257, [138], HL, *per* Lord Walker of Gestingthorpe, citing Michael Fordham, *Judicial Review Handbook* (3rd ed) (Oxford: Hart Publishing, 2001) at 804–805, [58.2].

⁶ *R (Farrakhan) v Secretary of State for the Home Department* [2002] QB 1391 at 1418, [71], CA, *per* Lord Phillips of Worth Matravers MR; *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport* [2007] EMLR 6 at 194, [111], QBD (Admin Ct), *per* Ouseley J. This is not to be confused with the “margin of appreciation” conceded by the European Court of Human Rights to national systems, which recognizes that the European Convention on Human Rights may vary in its application in different states according to local needs and conditions. This type of margin of appreciation “is not available to the national courts when they are considering Convention issues arising within their own countries”: *ex parte Kebilene*, above, n 4; see also *Brown v Stott*, above, n 4.

⁷ *R (Mahmood) v Secretary of State for the Home Department* [2001] 1 WLR 840 at 855, [33], CA, *per* Laws LJ.

examined in Part I. Part II of the chapter goes on to consider the appropriateness of carrying over concepts from administrative law to the interpretation of the Human Rights Act. It also considers how doctrines of deference apply in Canada and Singapore to immunize certain governmental actions from judicial challenge, and the practical difficulties of applying them in a principled manner.

More significant, though, are the justifications that have been articulated in support of judicial deference. Part III explores the arguments that deference is a consequence of the doctrine of separation of powers, that certain policy decisions should be made by the branches of government directly accountable to the electorate, and that the judiciary should show deference to the political branches when it lacks institutional competence. It is contended that these conceptual foundations for deference doctrines are in fact less stable than they seem.

Finally, Part IV of this chapter submits that whether doctrines of deference should be employed is tied to how the judiciary's role in interpreting the bill of rights is conceptualized. Persons taking the view that the political branches of government are the primary protectors of rights in a State are likely to accord to the judicial branch a more modest role. A doctrine of deference would therefore be important to ensure that the courts do not overstep their mark. On the other hand, one inclined to distrust the political branches and thus to advocate that the judiciary should act boldly when overseeing the use of executive and legislative power would consider it unsound and undesirable for judges to show deference to those branches. Part IV also attempts to explain why requiring courts to limit the scope of judicial review by applying an expansive doctrine of deference ultimately defeats the rationale behind the existence of a legally enforceable bill of rights in a constitutional system.

The conclusion of this chapter is that the doctrine of deference should be jettisoned altogether. Courts should fulfil their constitutional role of ensuring that governmental actions do not contravene guarantees of fundamental liberties, regardless of the nature of such actions. It is submitted that in the course of this assessment courts may, when appropriate, accept the exercise of discretion by the executive or legislature on matters that these branches have greater expertise in. However, the judiciary must continue to be responsible for ensuring the existence of facts upon which the exercise of discretion is premised, and the ultimate decision as to whether the action violates the bill of rights.

I. DOCTRINES OF LIMITATION IN ADMINISTRATIVE LAW: NON-JUSTICIABILITY AND DEFERENCE

Before looking at how doctrines of deference operate in different jurisdictions today and the difficulties that they create, our understanding of them will be illuminated by examining two doctrines of limitation originating from administrative law in the United Kingdom: those of non-justiciability and deference. This Part takes United Kingdom law as its starting point because other Commonwealth jurisdictions such as Canada and Singapore have frequently applied administrative law doctrines developed by the British courts to develop their own bodies of administrative law.

From an analysis of administrative law decisions, in general courts appear to accept decisions made by the political branches of government without scrutinizing them in two instances. First, they may hold that due to the subject matter of the case, it is not amenable to judicial review. This is termed 'non-justiciability'. Cases involving the doctrine of non-justiciability appear not to have been cited in bill of rights cases. However, given the intriguing parallel between the non-justiciability

and deference doctrines, one wonders whether the former has nonetheless influenced the latter. It is therefore instructive to consider the justifications that the courts have given for declining to assess certain exercises of administrative power.

Secondly, assuming that a case clears the justiciability hurdle, the court may, again because of its subject matter, decide that it is nonetheless appropriate to act deferentially when considering if the decision-maker has acted in a ‘*Wednesbury-unreasonable*’ manner. The doctrine of deference employed in this context appears to have directly inspired the application of a similar doctrine to human rights law, particularly in the United Kingdom. Ironically, following the introduction of the Human Rights Act 1998, judges declared that they had to move away from the old model of quashing governmental actions only if a high level of irrationality was established.⁸ The continued application of a doctrine of deference, though, provokes one to question whether this has indeed been the case.

A. NON-JUSTICIABILITY

In Westminster systems, modern discussions of principles of non-justiciability in administrative law inescapably begin with the House of Lords’ 1984 decision *Council of Civil Service Unions v Minister for the Civil Service* (“*CCSU*”),⁹ which concerned the amenability to judicial review of exercises of the royal prerogative. Prior to the case, judicial review as regards prerogative powers was limited to inquiring into whether a particular power existed and, if it did, into its extent.¹⁰ The exercise of the power could not be inquired into. However, beginning with *R v Criminal Injuries*

⁸ See Pt II.A.1 below.

⁹ [1985] AC 374.

¹⁰ *Attorney-General v De Keyser’s Royal Hotel Ltd* [1920] AC 508: see *Council of Civil Service Unions v Minister for the Civil Service* (“*CCSU*”), *id* at 407 *per* Lord Scarman.

*Compensation Board, ex parte Lain*¹¹ it was recognized that judicial review ought not be thus restricted, and this was confirmed by the House of Lords in *CCSU*. Lord Roskill, for instance, could not see any logical reason why a citizen should be deprived of the right to challenge the manner in which a power was exercised simply because the source of the power was the royal prerogative and not a statute – “In either case the act in question is the act of the executive. To talk of that act as the act of the sovereign savours of the archaism of past centuries.”¹² Lord Scarman commented on the new principle in this manner:

... I believe that the law relating to judicial review has now reached the stage where it can be said with confidence that, *if the subject matter in respect of which prerogative power is exercised is justiciable*, that is to say if it is a matter upon which the court can adjudicate, the exercise of the power is subject to review in accordance with the principles developed in respect of the review of the exercise of statutory power. ... Today, therefore, *the controlling factor in determining whether the exercise of prerogative power is subject to judicial review is not its source but its subject matter*.¹³ [Emphasis added.]

Put another way, what is determinative today is not whether the power exercised stems from the royal prerogative, but whether the subject matter of the power is regarded as one inappropriate for the courts to deal with. An exercise of power is justiciable if the subject matter affects an individual’s private law rights or legitimate expectations.¹⁴ This is the position in Canada, the United Kingdom, and countries with the Judicial Committee of the Privy Council as its final court of appeal. Since the *CCSU* case, the courts in these jurisdictions have affirmed the justiciability

¹¹ [1967] 2 QB 864.

¹² *CCSU*, above, n 9 at 417.

¹³ *Id* at 407.

¹⁴ An individual’s legitimate expectations are affected if he is deprived of “some benefit or advantage which either (i) he had in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational grounds for withdrawing it on which he has been given an opportunity to comment; or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn”: *id* at 408 *per* Lord Diplock, cited in *Black v Canada (Prime Minister)* (2001) 199 DLR (4th) 228 at [51], CA (Ont, Can).

of, among other matters,¹⁵ the decision whether to issue a passport to a citizen;¹⁶ the failure to consider the form of a pardon that might be conferred on a convicted person;¹⁷ the discharge of persons from the armed forces on the ground of their sexual orientation;¹⁸ a committee's act of assessing whether convicted persons under sentence of death should be pardoned or have the sentence commuted, without hearing their petitions or providing them with the material before the committee;¹⁹ and a prosecutor's decision to halt a private prosecution by filing a *nolle prosequi*.²⁰

On the other hand, in *CCSU* Lord Diplock identified non-justiciable matters as those involving the application of "government policy":

The reasons for the decision-maker taking one course rather than another do not normally involve questions to which, if disputed, the judicial process is adapted to provide the right answer, by which I mean that the kind of evidence that is admissible under judicial procedures and the way in which it has to be adduced tend to exclude from the attention of the court competing policy considerations which, if the executive discretion is to be wisely exercised, need to be weighed against one another – a balancing exercise which judges by their upbringing and experience are ill-qualified to perform.²¹

In similar vein, the Federal Court of Canada, in examining what constitutes a legislative decision beyond consideration by the court, expressed the view that, at the very least,

¹⁵ See also *R v Secretary of State for the Home Department, ex parte Fire Brigades Union* [1995] 2 AC 513, HL (decision not to bring provisions of Act into force and to implement scheme inconsistent with Act); *R (on the application of Thomson et al) v Minister of State for Children* [2005] FCR 603, QBD (Admin) (decision to impose temporary suspension on intercountry adoptions of children from Cambodia); *Secretary of State for Foreign and Commonwealth Affairs v The Queen (on the application of Bancoult)* [2007] EWCA Civ 498, (2007) 151 SJLB 707, CA (use of prerogative power of colonial governance).

¹⁶ *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte Everett* [1989] QB 811, CA.

¹⁷ *R v Secretary of State for the Home Department, ex parte Bentley* [1994] QB 439, Div Ct.

¹⁸ *R v Ministry of Defence, ex parte Smith* [1996] QB 517, HL.

¹⁹ *Lewis v Attorney-General of Jamaica* [2001] 2 AC 50, PC (on appeal from Jamaica), not following *Reckley v Minister of Public Safety and Immigration (No 2)* [1996] AC 527, PC (on appeal from the Bahamas).

²⁰ *Mohit v Deputy Public Prosecutor of Mauritius* [2006] 1 WLR 3343, PC (on appeal from Mauritius).

²¹ *CCSU*, above, n 9 at 411.

the decision must be discretionary, usually, but not always, general in its application, based on the exercise of judgment after assessing factors of general policy, of public interest and public convenience, morality, politics, economics, international obligations, national defence and security, or social, scientific and technical concerns, that is, issues of policy which lie outside the ambit of typical concerns or methods of the courts.²²

The courts therefore regard as non-justiciable matters which involve a decision requiring the exercise of discretion or judgment, and which necessitates considering policy issues that lie outside the realm of the usual sorts of cases dealt with by the courts. The view is taken that judges are not properly equipped to balance the various policy issues that must be weighed in order to reach the decision. Examples of governmental decision-making that have been held not to be amenable to the judicial process are decisions as to what national security requires,²³ the formulation of criteria for granting a pardon to a convicted person²⁴ and the decision whether or not a pardon should be granted,²⁵ advising the Queen or communicating to her Canada's policy on the conferral of an honour on a Canadian citizen,²⁶ and decisions involving considerations of policy in the areas of defence and foreign affairs.²⁷

²² *Vancouver Island Peace Society v Canada* (1993) 19 Admin LR (2d) 91 at [44], FC (Trial Div) (Can) *per* MacKay J.

²³ *CCSU*, above, n 9.

²⁴ *Ex parte Bentley*, above, n 17.

²⁵ *Lewis v Attorney-General of Jamaica*, above, n 19.

²⁶ *Black v Canada (Prime Minister)*, above, n 14. Contrast *Chiasson v R* (2003) 226 DLR (4th) 351, FCA (Can) (court may judicially review actions of committee acting under regulations in screening applicant for honour as preliminary to decision by Governor-General actually conferring honour).

²⁷ *Chandler v Director of Public Prosecutions* [1964] AC 763, HL (demonstrators charged for attempting to enter airfield as protest against nuclear weapons not entitled to cross-examine prosecution witness or call evidence as to their belief that their acts would benefit State or show that their purpose not prejudicial to safety or interests of State); *Marchiori v Environment Agency* [2002] EWCA Civ 3, [2002] Eu LR 225, CA (authorization to Ministry of Defence contractors to discharge radioactive waste from two nuclear sites); *R v Jones (Margaret)* [2007] 1 AC 136, HL (defendants charged with trespassing and damaging property on military and nuclear sites relying on defence of using reasonable force to attempt to prevent UK's unlawful actions in preparing for, declaring and waging war in Iraq); *R (Gentle) v Prime Minister* [2007] QB 689, CA (decision not to hold inquiry to examine whether UK Government had taken reasonable steps to be satisfied that Iraq invasion lawful under international law). See also *Vancouver Island Peace Society v Canada*, above, n 22 (approval of

Much the same assertions are relied upon to justify the application of doctrines of deference in bill of rights adjudication, and more will be said about this later in the chapter. In the administrative law context, where the judiciary generally seeks not to determine if the decision-maker has arrived at a correct decision but merely to ensure that it has acted lawfully,²⁸ it may well be that some issues should remain non-justiciable. This position may also be justified on other grounds such as the need to preserve the principle of the separation of powers. However, as we have seen in Chapter Two,²⁹ embodied in the separation of powers principle is the notion that the branches of government should act as a check on each other – particularly the judiciary on the executive and legislature. It is also worth noting the argument that if the courts can conceive of common law standards such as extreme bad faith, improper purpose and manifest absurdity against which certain administrative decisions can be reviewed, it is difficult to see why the same is not true for decisions having a strongly discretionary element.³⁰

visits of nuclear-propelled warships and nuclear-carrying vessels belonging to UK and US to Canadian ports); *Copello v Canada (Minister of Foreign Affairs)* (2001) 39 Admin LR (3d) 89, FC (Trial Div) (Can) (declaration of diplomat as *persona non grata*); *Aleksic v Canada (Prime Minister)* (2002) 215 DLR (4th) 720, Superior Ct of Justice (Div Ct) (Ont, Can) (executive decision for nation to participate in bombing of Yugoslavia); *Ganis v Canada (Minister of Justice)* (2006) 216 CCC (3d) 337, CA (BC, Can) (existence of treaty).

²⁸ Lord Donaldson MR used a football analogy: “The role of the judiciary is essentially that of a referee... In the football World Cup, ... the moves made by the players and the tactics employed by the teams are matters entirely for them. The referee is only involved when it appears that some player had acted in breach of the rules. The referee may then stop play and take some remedial action but, tempting though it may be, it is not for him to express any view on the skill of the players or how he would have acted in their position. Still less, following a breach of the rules, does he take over the position of one of the players. So too with the judiciary.” See *R v Secretary of State for the Environment, ex parte Hammersmith and Fulham London Borough Council* [1991] 1 AC 521 at 561, HL.

²⁹ See Part I.A.

³⁰ A[ndrew] P Le Sueur, “Justifying Judicial Caution: Jurisdiction, Justiciability and Policy” in Brigid Hadfield (ed), *Judicial Review: A Thematic Approach* (Dublin: Gill & Macmillan, 1995), 228 at 245–246. Le Sueur writes: “Even in cases involving strongly discretionary ministerial decisions about the allocation of public funds, the court should be prepared to adjudicate on a matter rather than abdicate responsibility by turning it away as non-justiciable. The court retains ample scope for caution and for giving due weight to the principle of parliamentary sovereignty in the way it sets the standards of legality in any given context.” *Id* at 246.

In a legal system with a bill of rights, it is submitted that the court is not required to abstain from substantively examining executive and legislative decisions. Indeed, cases from Canada, the United Kingdom and Ireland support the principle that where fundamental rights are implicated, the political branches may not rely on the doctrine of non-justiciability. In the Canadian Supreme Court decision *Operation Dismantle Inc v R*,³¹ Wilson J, with whom the rest of the judges concurred,³² said:

[I]f the Court were simply being asked to express its opinion on the wisdom of the Executive's exercise of its defence powers in this case, the Court would have to decline. It cannot substitute its opinion for that of the Executive to whom the decision-making power is given by the Constitution. ... However, if what we are being asked to do is to decide whether any particular act of the executive violates the rights of citizens, then it is not only appropriate that we answer the question; it is our obligation under the Charter [of Rights and Freedoms] to do so.³³

Operation Dismantle was cited with approval by the Court of Appeal in the United Kingdom in *R (Gentle) v Prime Minister*.³⁴ Sir Anthony Clarke MR, delivering judgment for the Court, pointed out that “the principle of non-justiciability cannot prevent the courts from giving effect to a Convention right once such a right is shown to exist.”³⁵ In contrast, Laws LJ, a member of a differently-constituted Court of Appeal in *Marchiori v Environment Agency*,³⁶ took the view that *Operation Dismantle* was not applicable since United Kingdom law had no provisions analogous to sections 24 and 32(1)(a) of the Canadian Charter of Rights and Freedoms. With respect, this is an insufficient ground for distinguishing the case. Section 24(1) provides that anyone whose rights or freedoms guaranteed by the

³¹ [1985] 1 SCR 441.

³² *Id* at [38] *per* Dickson J (Estey, McIntyre, Chouinard and Lamer JJ concurring): “I agree in substance with Madame Justice Wilson’s discussion of justiciability and her conclusion that the doctrine is founded upon a concern with the appropriate role of the Courts as the forum for the resolution of different types of disputes.”

³³ *Id* at [64]–[65].

³⁴ *R (Gentle) v Prime Minister*, above, n 27.

³⁵ *Id* at 713, [38]. *Operation Dismantle* was not cited by the House of Lords in *R (Gentle) v Prime Minister* [2008] 1 AC 1356.

³⁶ Above, n 27 at [35].

Charter have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances, which may include declaring legislation to be void. Courts in the United Kingdom are limited to making declarations of incompatibility pursuant to section 4 of the Human Rights Act 1998. As for section 32(1)(a) of the Canadian Charter which makes the Charter applicable to the Parliament and government of Canada in respect of all matters within Parliament's authority, a comparable provision is section 22(5) of the Human Rights Act which states tersely: "This Act binds the Crown." Thus, the Human Rights Act does not apply to Parliament. Nonetheless, it is submitted that these differences are not adequate reasons for UK courts to decline to examine governmental actions for compliance with Convention rights to the fullest extent possible under the Act.

The position taken in *Operation Dismantle* pertains in Ireland, the Constitution of which contains a bill of rights. In *Boland v An Taoiseach*,³⁷ the issue that faced the Supreme Court was whether the Government could be restrained by injunction from signing any agreement in the terms of a communiqué issued following a conference on the status of Northern Ireland. Griffin J expressed the view that if the Government had contravened provisions of the Constitution, it was the "duty and right of the Courts, as guardians of the Constitution, to intervene when called upon to do so".³⁸ The principle was affirmed in *Crotty v An Taoiseach*,³⁹ Finlay CJ stating:

³⁷ [1974] IR 338

³⁸ *Id* at 370–371. See also the less enthusiastic statement of FitzGerald CJ at 362: "[T]he Courts have no power, either express or implied, to supervise or intervene with the exercise by the Government of its executive functions, unless the circumstances are such as to amount to a clear disregard by the Government of the powers and duties conferred upon it by the Constitution."

³⁹ [1987] IR 713, SC (Ir).

This Court has on appeal from the High Court a right and duty to interfere with the activities of the executive in order to protect or secure the constitutional rights of individual litigants where such rights have been or are being invaded by those activities or where activities of the executive threaten an invasion of such rights.⁴⁰

In subsequent cases, the Irish courts have vindicated applicants' personal rights, even though the administrative decisions challenged have involved potentially non-justiciable matters such as the allocation of funding.⁴¹

It is submitted that the separation of powers principle is not violated when judges assess the political branches' actions for compliance with rights guarantees, as the existence of the bill of rights implies that judges have a duty to do so.⁴² In the premises, it is not open to the executive, either for itself or on behalf of the legislature, to submit that a case should be dismissed on the ground that its subject matter is not justiciable. For the court to accept this sort of submission would enable the political branches to shield crucial activities, including those highly likely to imperil fundamental rights, from judicial scrutiny.

B. DEFERENCE

"It is important at the outset," wrote Paul Craig, "to be clear about the limits of judicial intervention over discretion: it is *not* for the courts to *substitute their choice* as to how the discretion ought to have been exercised for that of the administrative authority. ... Decisions as to political and social choice are made by the legislature, or

⁴⁰ *Id* at 773. See also 778 *per* Walsh J: "It is not within the competence of the Government, or indeed of the Oireachtas [National Parliament], to free themselves from the restraints of the Constitution or to transfer their powers to other bodies unless expressly empowered so to do by the Constitution. They are both creatures of the Constitution and are not empowered to act free from the restraints of the Constitution. To the judicial organ of government alone is given the power conclusively to decide if there has been a breach of constitutional restraints."

⁴¹ *O'Donoghue v Minister for Health* [1996] 2 IR 20, HC (State failing to provide free elementary education for physically and mentally disabled child); *DB v Minister for Justice* [1999] 1 IR 29, HC (injunction granted against State to establish secure high-support accommodation for young offenders and children in need). See also *Comerford v Minister for Education* [1997] 2 ILRM 134.

⁴² See Chapter Two, Pts I.A and I.B.2.

by a person assigned the task by the legislature.”⁴³ This statement neatly sums up the prevailing view of courts in the United Kingdom and in other Commonwealth jurisdictions that their traditional role in reviewing administrative actions is supervisory, not appellate.⁴⁴ While a growing realization of the importance of protecting individual rights has, in particular, resulted in aspects of administrative law being modified to some extent, the basic position has not altered, and it is submitted that this mindset has been carried over to judicial analyses under the Human Rights Act 1998.

The change in the way the ‘*Wednesbury* unreasonableness’ test applies is a good example of this. In the well-known case *Associated Picture Houses Ltd v Wednesbury Corporation*,⁴⁵ it was held that if a decision was so unreasonable that no reasonable body could have made it, the court was justified in quashing it. This power was only to be employed in exceptional circumstances: in *Council of Civil Service Unions v Minister for the Civil Service* (the *GCHQ* case),⁴⁶ Lord Diplock said that this form of irrationality would only apply to a “decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question could have arrived at it”;⁴⁷ and in *R v Secretary of State for the Environment, ex parte Nottinghamshire County Council*⁴⁸ Lord Scarman, when invited to examine the detail and consequences of guidance given by the Secretary of State, said *inter alia* that “[s]uch an examination by a court would be

⁴³ P[aul] P Craig, *Administrative Law* (5th ed) (London: Sweet & Maxwell, 2003) at 609 (emphasis in original).

⁴⁴ *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 at 757 *per* Lord Ackner; at 765 *per* Lord Lowry, HL.

⁴⁵ [1948] 1 KB 223 at 233–234.

⁴⁶ [1985] AC 374, HL.

⁴⁷ *Id* at 410.

⁴⁸ [1986] AC 240, HL.

justified only if a prima facie case were to be shown for holding that... the consequences of his [the Secretary of State's] guidance were so absurd that he must have taken leave of his senses."⁴⁹

Furthermore, when deciding whether or not administrative bodies had acted unreasonably, courts demonstrated that they would show a high degree of deference in certain types of cases. In *ex parte Nottinghamshire County Council*, for instance, it was held that in the absence of some exceptional circumstance such as bad faith or improper motive on the part of the Secretary of State it was not appropriate for the courts to review the actions taken by the Secretary of State on the ground of unreasonableness, since the matter was one of public financial administration that was for the political judgment of the Secretary of State and the House of Commons.⁵⁰

As the significance of civil liberties began to be better appreciated, however, the classic *Wednesbury* standard was modified. Thus, Lord Bridge of Harwich expressed the view in *R v Secretary of State for the Home Department, ex parte Bugdaycay* that within the established limitations of the scope of the court's power of judicial review the court was entitled to subject an administrative decision to "the most rigorous examination, to ensure that it is in no way flawed, according to the gravity of the issue which the decision determines".⁵¹ And in *R v Secretary of State for the Home Department, ex parte Brind*⁵² the same judge, when considering whether the Home Secretary could reasonably impose restrictions on broadcasters to

⁴⁹ *Id* at 247.

⁵⁰ *Id* at 247 and 250–251 *per* Lord Scarman. The case was applied in *ex parte Hammersmith and Fulham London Borough Council*, above, n 28 at 595–597, HL, *per* Lord Bridge of Harwich. See also *Chandler v Director of Public Prosecutions*, above, n 27 at 790 and 798; and *Marchiori v Environment Agency*, above, n 27 at [33]–[38] which, while not being *Wednesbury*-unreasonableness cases, express the view that the courts will not intervene in matters dealing directly with the defence of the realm.

⁵¹ [1987] AC 514 at 531, HL. Lord Templeman made similar remarks at 537.

⁵² Above, n 44.

starve terrorist organizations of publicity, said that the court was “perfectly entitled to start from the premise that any restriction of the right to freedom of expression requires to be justified and that nothing less than an important competing public interest will be sufficient to justify it”.⁵³ This was a sea-change: no longer would an administrative decision be assumed to be correct and the applicant required to prove to a high standard that it was unreasonable; rather, where the applicant’s human rights were interfered with by the decision, the starting point was whether the interference could be justified by the administrative authority. The legal position after the two cases referred to above was summarized in the Court of Appeal decision of *R v Ministry of Defence, ex parte Smith*,⁵⁴ in which the Armed Forces’ policy of discharging personnel on the grounds of homosexuality was unsuccessfully challenged as irrational. Sir Thomas Bingham MR stated as follows, adopting the words of counsel for three of the applicants:

The court may not interfere with the exercise of an administrative discretion on substantive grounds save where the court is satisfied that the decision is unreasonable in the sense that it is beyond the range of responses open to a reasonable decision-maker. But in judging whether the decision-maker has exceeded this margin of appreciation the human rights context is important. The more substantial the interference with human rights, the more the court will require by way of justification before it is satisfied that the decision is reasonable in the sense outlined above.⁵⁵

Despite taking bold steps to give prominence to human rights concerns within the administrative law framework, *ex parte Smith* reaffirmed the orthodox position in administrative law that it was for the court to decide only if the decision-maker had acted irrationally, not if it had made the wrong decision. This is not surprising, as *Smith* was decided before the European Convention on Human Rights had been made directly applicable in the domestic law of the United Kingdom through the

⁵³ *Id* at 748–749. Again, see remarks along the same lines by Lord Templeman at 751.

⁵⁴ [1996] QB 517.

⁵⁵ *Id* at 554.

Human Rights Act 1998. Once this had taken place, the courts were required not only to ensure that public authorities acted according to administrative law principles, but that Convention rights were complied with. The latter duty now obliged courts to determine if public authorities had in fact taken the correct, rights-consistent decisions. This difference explains why the European Court of Human Rights, to which the dissatisfied applicants in *Smith* took their case, duly held in *Smith & Grady v United Kingdom*⁵⁶ that, among other things, the State was in breach of Article 13 of the Convention because it had not provided the applicants with an effective remedy in relation to the violation of their right to respect for their private lives guaranteed by Article 8.⁵⁷ In the Court's view, under United Kingdom law the threshold at which the courts could find the policy of the decision-maker in question irrational was placed so high that it effectively excluded any consideration of the question of whether the interference with the applicants' rights answered a pressing social need or was proportionate to the national security and public order aims pursued on the facts.⁵⁸

Hence, in the light of *Smith & Grady*, it was clear to the courts that once the Convention was given effect in domestic law by Parliament, judges would have to conduct inquiries far more extensive than the *Wednesbury* unreasonableness test

⁵⁶ (2000) 29 EHRR 493. See also *Lustig-Prean & Beckett v United Kingdom* (1999) 29 EHRR 548.

⁵⁷ *Id* at [139]. The relevant portions of Art 13 read: "Everyone whose rights and freedoms as set forth in [the] Convention are violated shall have an effective remedy before a national authority..."

⁵⁸ *Id* at [138]. Following *Smith & Grady*, the ban on homosexuals serving in the Armed Forces was lifted, and a new Code of Conduct for the Armed Forces enshrining the rights of homosexuals to fair and equal treatment along with heterosexuals introduced: Tim Butcher & Robert Shrimley, "Gays Invited to Re-enlist as Armed Forces Lift Ban", *The Daily Telegraph* (13 January 2000) <<http://www.telegraph.co.uk/htmlContent.jhtml?html=/archive/2000/01/13/ngay13.html>>. The applicants subsequently each won damages of £19,000 from the British Government for the intrusion into their private lives and compensation for loss of earnings ranging from £40,000 to £94,875: *Smith & Grady v United Kingdom (Art 41)* (2001) 31 EHRR 24; Tim Butcher, "Gays Win Pay-out over Sacking by Forces", *The Daily Telegraph* (19 June 2001) <<http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2000/07/26/nsec326.xml>> (both newspaper articles accessed 11 July 2007).

articulated in *ex parte Smith*. In the following section, we shall see that the courts did recognize this fact. What is unfortunate, it is submitted, is that they continued to have a narrow conception of their role in judicial review.

II. DEFERENCE AND BILLS OF RIGHTS

A. THE APPLICATION OF DOCTRINES OF DEFERENCE TO BILLS OF RIGHTS

It is submitted that the nature of bills of rights demands that they should be interpreted and applied using an approach radically different from the deferential one taken in administrative law generally. Bills of rights make courts responsible for articulating the detailed content of fundamental liberties and testing executive actions and legislation against these standards. It must be rare indeed for a bill of rights to specifically require the judiciary to bow to the policy choices made by the political branches of government – none of the texts considered in this chapter (save possibly one) do so. Nonetheless, the courts of most of these jurisdictions have developed some form of deference doctrine which subjects administrative action or legislation to minimal scrutiny for compliance with bills of rights. Why this may be the case and how convincing the justifications often put forward are is the subject of Part III. In this section, we consider how doctrines of deference operate in various jurisdictions in the context of bill of rights adjudication. It is submitted that instead of providing a structured manner to help judges determine the sorts of matters they should deal with, the doctrines tend to operate in unprincipled and highly subjective ways, increasing rather than minimizing uncertainty.

A survey of deference doctrines applied to bills of rights in a number of jurisdictions shows that they function in different ways. On the one hand, there are jurisdictions such as Canada and the United Kingdom in which deference is applied

within the context of a proportionality test. It is a factor taken into account when deciding whether executive action or legislation has excessively impaired a human right. The adoption of a doctrine of deference in such jurisdictions appears to be influenced by the traditional role of the courts in administrative law. On the other hand, the situation in Singapore presents differently. Although no distinct doctrine of deference as such has been developed by the courts, when certain conditions set out in the Constitution are satisfied, the courts defer to the choices made by Parliament. This may be because of the way the bill of rights is drafted; however, an alternative way of looking at the fundamental liberties in the Singapore Constitution will be suggested.

In spite of this disparity, the rationalizations given for applying deference doctrines in the various jurisdictions tend to be similar. This section goes on to consider their sufficiency.

1. *Deference in the Context of Proportionality Analysis*

Following the entry into force of the Human Rights Act 1998 in the United Kingdom, the House of Lords recognized in *R (Daly) v Secretary of State for the Home Department*⁵⁹ that courts could no longer continue scrutinizing executive and legislative actions to the same standard as under traditional principles of administrative law. Many of the rights in the European Convention on Human Rights may legitimately be abridged by a public authority provide, among other things, that such interference is “necessary in a democratic society” in the interests of certain legitimate aims that are set out in the Convention. For example, Article 8 states:

⁵⁹ [2001] 2 AC 532 at 547, [27], HL.

1. Everyone has the right to respect for his private and family life, his home and his correspondence.
2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is *necessary in a democratic society* in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

[Emphasis added.]

In *Daly* it was held that in determining whether interference with a Convention right is “necessary in a democratic society”, the court must engage in a proportionality analysis. Citing the Privy Council decision of *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*,⁶⁰ Lord Steyn said that the court must ask itself

whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measures designed to meet the legislative objective are rationally connected to it; and (iii) the means used to impair the right or freedom are no more than is necessary to accomplish the objective.⁶¹

Lord Steyn then set out three differences between traditional administrative law grounds of review and proportionality review under the Human Rights Act. First, the doctrine of proportionality may require the reviewing court to assess the balance which the decision-maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, even the heightened scrutiny test developed in *ex parte Smith*⁶² is not necessarily appropriate

⁶⁰ [1999] 1 AC 69, PC (on appeal from Antigua and Barbuda).

⁶¹ *Id* at 80. The proportionality test was also cited in *R (Pretty) v Director of Public Prosecutions* [2002] 1 AC 800 at 844, [93], HL; *R (Farrakhan) v Secretary of State for the Home Department*, above, n 6 at 1416, [64], CA; and *International Transport Roth GmbH v Secretary of State for the Home Department* [2003] QB 728 at 753, [51], *per* Simon Brown LJ, and at 789, [181], *per* Jonathan Parker LJ, CA (Civil Div).

⁶² Above, n 55.

to the protection of human rights.⁶³ Agreeing, Lord Cooke of Thorndon went so far as to say that the day would come when it would be more widely recognized that the *Wednesbury* case⁶⁴ was an unfortunately retrogressive decision in English administrative law, insofar as it suggested that only a very extreme degree of unreasonableness can bring an administrative decision within the legitimate scope of judicial invalidation. He went on: “It may well be... that the law can never be satisfied in any administrative field merely by a finding that the decision under review is not capricious or absurd.”⁶⁵

However, despite this recognition of the judiciary’s new role under the United Kingdom’s bill of rights, the courts appear to cling to familiar conceptions of their role in administrative law. In *Daly*, Lord Steyn was quick to add, without elaboration, that the adoption of proportionality analysis “[did] not mean that there has been a shift to merits review. On the contrary, ... the respective roles of judges and administrators are fundamentally distinct and will remain so”.⁶⁶ And Lord Cooke remarked that “[t]he depth of judicial review and the deference due to administrative discretion vary with the subject matter”.⁶⁷

This was not the first time the British courts had affirmed the continued relevance of a doctrine of deference in Human Rights Act cases. *R v Director of Public Prosecutions, ex parte Kebilene*,⁶⁸ decided in 1999, was the first case to articulate the doctrine in the context of the Human Rights Act 1998, though the Act had not yet come into force. Lord Hope of Craighead expressed the view that:

⁶³ Above, n 59 at 547, [27].

⁶⁴ Above, n 45.

⁶⁵ Above, n 59 at 549, [32].

⁶⁶ *Id* at 548, [28].

⁶⁷ *Id* at 549, [32].

⁶⁸ Above, n 4.

... difficult choices may have to be made by the executive or the legislature between the rights of the individual and the needs of society. In some circumstances it will be appropriate for the courts to recognise that there is an area of judgment within which the judiciary will defer, on democratic grounds, to the considered opinion of the elected body or person whose act or decision is said to be incompatible with the Convention.⁶⁹

In a subsequent case, *R (Farrakhan) v Secretary of State for the Home Department*, it was claimed that the doctrine of deference was a vital aspect in proportionality analysis: “When applying a test of proportionality, the margin of appreciation or discretion accorded to the decision maker is all-important, for it is only by recognising the margin of discretion that the court avoids substituting its own decision for that of the decision maker.”⁷⁰

In deciding whether deference should be shown to the will of Parliament or the executive, the existence or otherwise of a number of factors in the case before the court is considered. These were summarized by Laws LJ in *International Transport Roth GmbH v Secretary of State for the Home Department*⁷¹ in the form of four principles:

- i. Greater deference is to be paid to an Act of Parliament than a decision of the executive or a subordinate measure. This is because in the United Kingdom the legislature is not subordinate to a sovereign text – Parliament and not a written constitution bears the “ultimate mantle of democracy in the state”.⁷²

⁶⁹ *Id* at 381.

⁷⁰ Above, n 61 at 1417, [67], CA, *per* Lord Phillips of Worth Matravers MR. Note also Lord Steyn’s statement in *Daly* that “the intensity of review in a public law case will depend on the subject matter in hand”: above, n 59 at 548, [28], citing Laws LJ in *Mahmood*, above, n 7 at 847, [18], CA (Civil Div).

⁷¹ Above, n 61. The principles were referred to by Lord Walker of Gestingthorpe in *ProLife Alliance*, above, n 5 at 256, [136].

⁷² *International Transport Roth*, *id* at 765, [83].

ii. There is more scope for deference where the Convention requires a balance to be struck, and much less scope where a right is stated in unqualified terms. But even when a right is unqualified, “there is no sharp edge” and what is required may vary according to the context.⁷³

iii. Greater deference may be due when the subject matter is particularly within the constitutional responsibility of the democratic powers. Correspondingly, there should be less deference shown if the matter lies within the constitutional responsibility of the courts. In connection with this, the first duty of government is the defence of the realm, while that of the courts is the maintenance of law.⁷⁴

iv. Greater or lesser deference is due according to whether the subject matter lies more readily within the actual or potential expertise of the democratic powers or the courts. Laws LJ expressed the view that this principle was very closely allied to the third principle and possibly an emanation of it.⁷⁵

As regards the third principle, other matters that have been identified by the courts to fall within the constitutional responsibility of the democratic powers of government include border security and immigration control,⁷⁶ economic policy,⁷⁷ foreign policy,⁷⁸ national security⁷⁹ and public order.⁸⁰ In addition, there has

⁷³ *Id* at 766, [84].

⁷⁴ *Id* at 766, [85].

⁷⁵ *Id* at 767, [87].

⁷⁶ *International Transport Roth*, *id* at 766, [86]; *Farrakhan*, above, n 6 at 1418, [71].

⁷⁷ *Kebilene*, above, n 4 at 381; *Poplar Housing*, above, n 130 at 70.

⁷⁸ *Secretary of State for the Home Department v Rehman* [2003] 1 AC 153 at 193, [50], *per* Lord Hoffmann, HL.

⁷⁹ *Rehman*, *id* at 187, [31], *per* Lord Steyn, and at 192, [50], *per* Lord Hoffmann.

⁸⁰ *Farrakhan*, above, n 6 at 1418, [71].

emerged a rather broad and nebulous category of matters involving “pressing social problem[s]”,⁸¹ “social policy”⁸² or “social and political judgment”.⁸³

What is significant is that in the identification of these principles of deference, cases decided before the Human Rights Act applying traditional administrative law principles were relied on. In setting out his third principle, Laws LJ cited non-justiciability cases such as *Chandler v Deputy Public Prosecutor*⁸⁴ – which was applied in *CCSU*⁸⁵ – and *Marchiori v Environment Agency*⁸⁶ for the proposition that the matters involving the defence of the realm were for the executive and not the judiciary.⁸⁷ Furthermore, the conventional *Wednesbury*-unreasonableness cases *ex parte Nottinghamshire County Council*⁸⁸ and *ex parte Hammersmith and Fulham London Borough Council*⁸⁹ were drawn upon under the heading of the fourth principle for demonstrating much the same point in respect of government decisions in the area of macro-economic policy.⁹⁰ Given the opinions in *Daly*⁹¹ that courts are meant to have broken with the past, it is questionable whether this was an appropriate use of precedent.

The United Kingdom’s proportionality test was formulated on the basis of parallel tests in South Africa and Canada.⁹² It is therefore broadly similar to

⁸¹ *Brown v Stott*, above, n 4 at 711.

⁸² *Kebilene*, above, n 4 at 381.

⁸³ *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport*, above, n 6 at 186, [76].

⁸⁴ Above, n 27.

⁸⁵ Above, n 9.

⁸⁶ Above, n 27.

⁸⁷ *International Transport Roth*, above, n 61 at 766, [85].

⁸⁸ Above, n 48.

⁸⁹ Above, n 50.

⁹⁰ *International Transport Roth*, above, n 61 at 767, [87].

⁹¹ Above, n 59. See the text accompanying nn 59–65 above.

⁹² In *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing*, above, n 60 at 80, applied by *Daly*, above, n 59, the Privy Council cited with approval the

proportionality test applied in the context of section 1 of the Canadian Charter of Rights and Freedoms.⁹³ Section 1 states that the Charter “guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.” According to the Supreme Court of Canada in *R v Oakes*,⁹⁴ for a legal limitation to be thus justified, four elements must exist:

- i. The objective of the measure must be important enough to warrant overriding a Charter right;
- ii. there must a rational connection between the limit on the Charter right and the legislative objective;
- iii. the limit should impair the Charter right as little as possible; and
- iv. there should be an overall balance or proportionality between the benefits of the limit and its deleterious effects.⁹⁵

The first three elements are virtually identical to the elements of the proportionality test applied in the United Kingdom. The heart of the proportionality analysis is the third, ‘least intrusive means’, element. In Canada, it is over this element that most litigation takes place.⁹⁶ However it should not be imagined that limitations on rights fall simply because it is possible to conceive of another measure that may be less intrusive on a protected freedom or right. Rather, some allowance is given to Parliament. In *Libman v Quebec (Attorney General)*,⁹⁷ the Supreme Court

proportionality test articulated in the Zimbabwean case of *Nyambirai v National Social Security Authority* [1996] 1 LRC 64 at 75 which had drawn on South African and on Canadian jurisprudence.

⁹³ Pt I of the Constitution Act 1982 (Can), which was itself enacted as Schedule B to the Canada Act 1982 (c 11) (UK) and came into force on 17 April 1982.

⁹⁴ [1986] 1 SCR 103, SC (Can).

⁹⁵ Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedoms* (3rd ed) (Toronto: Irwin Law, 2005) at 65–66.

⁹⁶ Sharpe & Roach, *id* at 75.

⁹⁷ [1997] 3 SCR 659 at [58].

unanimously adopted the following formulation of the test by McLachlin J (as she then was) in *RJR-MacDonald Inc v Canada*:⁹⁸

The impairment must be “minimal,” that is, the law must be carefully tailored so that the rights are impaired no more than necessary. The tailoring process seldom admits of perfection and the courts must accord some leeway to the legislator. If the law falls within a range of reasonable alternatives, the courts will not find it overbroad merely because they can conceive of an alternative which might better tailor objective to infringement...⁹⁹

When applying the least-intrusive-means test, the standard of judicial review is lowered in at least two situations. First, the Supreme Court has shown a reluctance to closely scrutinize cases involving broad issues of social and economic policy. For instance, in *McKinney v University of Guelph*,¹⁰⁰ the Court held that the imposition of a mandatory retirement age of 65 years contravened the right not to be discriminated against on the ground of age conferred by section 15 of the Charter, but upheld the relevant legislation under section 1. The Court used a light-touch approach, setting out the issue as “whether the government had a reasonable basis, on the evidence tendered, for concluding that the legislation interferes as little as possible with a guaranteed right, given the government’s pressing and substantial objectives”.¹⁰¹ In the more recent decision of *Chaoulli v Quebec (Attorney General)*¹⁰² the Court has shown a greater willingness to subject matters of social and economic policy to stricter analysis. However, the approach taken to judicial deference in that case has been criticized as unprincipled.¹⁰³

The second type of case in which the Supreme Court declines to apply a high standard of judicial review is when the impugned legislation represents an attempt

⁹⁸ [1995] 3 SCR 199, SC (Can).

⁹⁹ *Id* at [160]. See Sharpe & Roach, above, n 95 at 75.

¹⁰⁰ [1990] 3 SCR 229, 76 DLR (4th) 545.

¹⁰¹ *Id*, 76 DLR (4th) at 666. See Sharpe & Roach, above, n 95 at 76–77.

¹⁰² [2005] 1 SCR 791, SC (Can).

¹⁰³ Jeff A King, “Constitutional Rights and Social Welfare: A Comment on the Canadian *Chaoulli* Health Care Decision” (2006) 69 MLR 631 at 638–639.

by the legislature to reconcile competing claims or protect vulnerable groups. In *Irwin Toy Ltd v Quebec (Attorney General)*,¹⁰⁴ a distinction was drawn between situations where “the government is best characterized as the singular antagonist of the individual whose right has been infringed” and those where the government is “mediating between the claims of competing groups”, and trying to strike a balance that will protect the vulnerable while impinging as little as possible upon protected freedoms “without the benefit of absolute certainty concerning how that balance is best struck”.¹⁰⁵ The judges in the majority stated:

If the legislature has made a reasonable assessment as to where the line is most properly drawn, especially if that assessment involves weighing conflicting scientific evidence and allocating scarce resources on this basis, it is not for the court to second guess. That would only be to substitute one estimate for another.¹⁰⁶

Guy Davidov has noted that, over time, another approach to deference has been developed by the Supreme Court of Canada.¹⁰⁷ This approach, which he calls “flexible deference”, incorporates the above two instances where the judicial review standard is lowered into a broader framework. It stems from the dissenting judgment by La Forest J in *RJR-MacDonald* in which the judge suggested that the *Oakes* test should be applied with different levels of deference in different cases.¹⁰⁸ Factors determining the level of deference include the role of the legislature in striking a balance between the interests of competing groups, as distinct from the situation where the legislature is the “singular antagonist” of the individual whose Charter freedoms have been infringed; the vulnerability of the group that the legislature

¹⁰⁴ [1989] 1 SCR 927, SC (Can). See also *R v Butler* [1992] 1 SCR 452, 89 DLR (4th) 449; *Thomson Newspapers Co v Canada* (1995) 24 OR (3d) 109.

¹⁰⁵ *Irwin Toy*, *id* at [80]–[81].

¹⁰⁶ *Id* at [75]. See Sharpe & Roach, above, n 95 at 78–79.

¹⁰⁷ Guy Davidov, “The Paradox of Judicial Deference” (2000–2001) 12 Nat’l J Const Law 133 at 139–140.

¹⁰⁸ Above, n 98 at [63]–[64]. The approach has been applied in subsequent cases such as *Thomson Newspapers Co v Canada (Attorney General)* [1988] 1 SCR 877, SC (Can); *M v H* [1999] 2 SCR 3, SC (Can); and *Delisle c Canada (Sous-procureur général)* [1999] 2 RCS 989, SC (Can).

seeks to protect, and that group's subjective fears and apprehension of harm; the inability to measure scientifically a particular harm in question or the efficaciousness of a remedy; and the low social value of the activity suppressed by the legislation.¹⁰⁹

In *M v H*,¹¹⁰ the Supreme Court emphasized that deference is not a kind of threshold inquiry under section 1 of the Charter. It quoted Cory J in *Vriend v Alberta*:¹¹¹ "The notion of judicial deference to legislative choices should not... be used to completely immunize certain kinds of legislative decisions from Charter scrutiny."¹¹² In the view of the majority in *M v H*, deference is intimately tied up with the nature of the particular claim or evidence at issue. As such, it can only be discussed in relation to such specific claims or evidence and not at the outset of the analysis.¹¹³

There seems to be a general similarity in the use of the doctrine of deference in Canada and the United Kingdom. In both jurisdictions, the doctrine is an element of the proportionality test that is applied when determining whether a limitation on human rights can be justified in a democratic society. Further, whether deference should be shown to the political branches of government depends on the presence or absence of a number of factors. The factors considered in the Canada and the United Kingdom are not all the same, though there is some broad commonality. For example, deference is shown in Canada in cases involving social or economic policy, and in the United Kingdom where the subject matter of the case is regarded as lying within the constitutional responsibility or expertise of the democratic powers, including matters

¹⁰⁹ *Delisle, id* at 1069; see Davidov, above, n 107 at 140.

¹¹⁰ Above, n 108.

¹¹¹ [1998] 1 SCR 493 at [54], SC (Can).

¹¹² *M v H*, above, n 108 at [78].

¹¹³ *Id* at [79].

involving economic policy and requiring social and political judgment. Further, the consideration in Canada of whether the political branches have made a decision in the face of competing claims or to protect vulnerable groups, or the social value of the activity suppressed, can be said to correspond in the United Kingdom to the examination of whether the Convention requires a balance to be struck between competing interests.

2. *Implicit Deference? The Case of Singapore*

The situation in Singapore¹¹⁴ provides an interesting comparison to the jurisdictions that have been discussed thus far. The courts have not articulated any specific doctrine of deference to the political branches of government in so many words. Nonetheless, the way that many constitutional cases are decided indicates that the courts in fact impliedly defer to executive and legislative policy decisions.

This is likely due to the way in which the bill of rights in the Singapore Constitution is drafted – rights are declared, then whittled down by exceptions. Significantly, there is no explicit requirement in the bill of rights for a proportionality analysis to be undertaken. Article 14 of the Constitution is typical:

Freedom of speech, assembly and association

14.—(1) Subject to clauses (2) and (3) —

- (a) every citizen of Singapore has the right to freedom of speech and expression;
- (b) all citizens of Singapore have the right to assemble peaceably and without arms; and
- (c) all citizens of Singapore have the right to form associations.

(2) *Parliament may by law impose —*

¹¹⁴ Malaysia is in a similar position, as the fundamental liberties in the Federal Constitution are *in pari materia* with those set out in the Singapore Constitution.

- (a) on the rights conferred by clause (1)(a), *such restrictions as it considers necessary or expedient* in the interest of the security of Singapore or any part thereof, friendly relations with other countries, public order or morality and restrictions designed to protect the privileges of Parliament or to provide against contempt of court, defamation or incitement to any offence;
- (b) on the right conferred by clause (1)(b), *such restrictions as it considers necessary or expedient* in the interest of the security of Singapore or any part thereof or public order; and
- (c) on the right conferred by clause (1)(c), *such restrictions as it considers necessary or expedient* in the interest of the security of Singapore or any part thereof, public order or morality.

[Emphasis added.]

Where the freedom of speech and expression are concerned, for example, Article 14(2)(a) declares that “Parliament may by law impose... such restrictions as it considers necessary or expedient” in the interest of various matters set out in that provision. There is no reference to limitations on fundamental liberties having to be “necessary in a democratic society” as in the European Convention on Human Rights, or “reasonable” and “demonstrably justified in a free and democratic society” as in Canada.

The result has been that Singapore courts inevitably defer to choices made by the political branches of government so long as they fall within one of the specified matters, without balancing any competing interests involved. This is demonstrated by the Singapore High Court’s decision in *Chee Siok Chin v Minister for Home Affairs*.¹¹⁵ The applicants and another person held what they termed a “peaceful protest”, wearing T-shirts bearing various slogans and holding up placards. The police arrived and asked the protestors to disperse. When asked what the legal basis for the order was, a senior police officer stated that they had potentially committed a public nuisance offence under the Miscellaneous Offences (Public Order and

¹¹⁵ [2006] 1 SLR(R) 582.

Nuisance) Act.¹¹⁶ The protestors complied, handing over their T-shirts and placards to the police. They subsequently commenced proceedings for declarations that the Minister for Home Affairs and the Commissioner of Police had acted in an “unlawful and/or unconstitutional manner”, and contended *inter alia* that they had been exercising their rights to freedom of speech and expression, and freedom of peaceful assembly under Article 14(1) of the Constitution.

The Court found that the applicants had made a “conscious and calculated effort to disparage and cast aspersions” on the integrity and management of certain government institutions whose abbreviations had appeared on their T-shirts by alleging impropriety against the persons responsible for the finances of these bodies. Through the words on the T-shirts and placards they had also called into question the dealings of these institutions with the “National Reserves”, and had insinuated mismanagement and financial impropriety by linking the institutions to the National Kidney Foundation, a charity which, at that time, had been in the news due to inexplicable accounting practices, corporate unaccountability, lack of financial disclosure and questionable management practices.¹¹⁷

As regards the right to free assembly guaranteed by Article 14(2)(a), the Court held that the phrase *necessary or expedient* conferred on Parliament an extremely wide discretionary power and remit that permitted a multifarious and multifaceted approach towards achieving any of the specified purposes specified in Article 14(2) of the Constitution. The Court could not question whether the legislation was reasonable; its sole task was to ascertain whether the impugned law was within the

¹¹⁶ Cap 184, 1997 Rev Ed.

¹¹⁷ Above, n 115 at 626, [121].

purview of any of the permissible restrictions. Furthermore, the presumption of legislative constitutionality would not be lightly displaced.¹¹⁸

Another example is provided by *Chan Hiang Leng Colin v Public Prosecutor*,¹¹⁹ which involved Article 15 of the Constitution. This provision protects every person's "right to profess and practise his religion and to propagate it".¹²⁰ On the other hand, the provision "does not authorise any act contrary to any general law relating to public order, public health or morality". The appellants in *Chan Hiang Leng Colin* were Jehovah's Witnesses, and had been tried and convicted in a subordinate court for possession of publications that had been banned under the Undesirable Publications Act.¹²¹ In the course of the proceedings, the appellants challenged the deregistration of their organization by the Minister for Home Affairs under the Societies Act¹²² as violating their right to freedom of religion. The High Court characterized the matter as a national security issue, as Jehovah's Witnesses refuse to undertake National Service, which is compulsory for Singaporean men.¹²³ It then took the view that

... it was not for this court to substitute its view for the Minister's as to whether the Jehovah's Witnesses constituted a threat to national security. ... This court was not here to review the merits of the decision and conclude that the Jehovah's Witnesses were or were not a threat to public order. From the evidence adduced, it appeared that the Minister was of the view that the continued existence of a group which preached as one of its principal beliefs that military service was forbidden was contrary to public peace, welfare and good order.¹²⁴

The Court equated the concept of public order in Article 15(4) with the notion of "public peace, welfare and good order" in section 24(1)(a) of the Societies Act – the

¹¹⁸ *Id* at 602–603, [49].

¹¹⁹ [1994] 3 SLR(R) 209, HC (S'pore).

¹²⁰ Singapore Constitution, Art 15(1).

¹²¹ Cap 338, 1985 Rev Ed (now 1998 Rev Ed).

¹²² Cap 311, 1985 Rev Ed.

¹²³ *Chan Hiang Leng Colin*, above, n 119 at 235–236, [62]–[66].

¹²⁴ *Id* at 237, [68].

provision under which the Singapore congregation of Jehovah's Witnesses had been deregistered.¹²⁵ In other words, without expounding the constitutional meaning of public order, the Court accepted the submission on the Minister's behalf that the power granted to him by the Societies Act to order the dissolution of any registered society being used for purposes prejudicial to public peace, welfare or good order in Singapore is a law relating to public order that limits the right to freedom of religion.

While the High Courts in *Chee Siok Chin* and *Chan Hiang Leng Colin* did not use the term 'deference' or attempt to develop such a doctrine, unlike in Canada and the United Kingdom, what it did in effect was to interpret Articles 14(2)(a) and 15(4) of the bill of rights in the Singapore Constitution so as to require absolute deference to Parliamentary decisions once a nexus between the object of an impugned law and one of the subjects stipulated in Articles 14(2)(a) or 15(4) has been established.¹²⁶ Although given the wording of the relevant Articles one can see why the Court might have been driven to this conclusion, it will be suggested in Part IV of this chapter that it might have been possible for an approach more consonant with the rationale of a bill of rights to have been taken.

B. PRACTICAL DIFFICULTIES WITH HOW DOCTRINES OF DEFERENCE ARE APPLIED

Our survey of deference doctrines demonstrates that in the jurisdictions considered, courts look for the presence or absence of several factors on the facts of cases to decide whether deference should be shown to decisions made by administrative bodies. However, there are practical difficulties with this approach. First, doctrines of deference are often used to shut out consideration of a dispute brought before the

¹²⁵ *Id.*

¹²⁶ As regards Art 14, see *Chee Siok Chin*, above, n 115 at 603, [49].

court altogether, instead of being employed in the course of determining whether an infringement of human rights is proportional to the importance of the aim sought to be achieved by the infringing action. Secondly, the factors may be so vague that they do not provide much guidance at all. In fact, judges are able to pick and choose the cases that they wish to intervene in, which leads to inconsistency.

As to the first type of difficulty, Richard Edwards¹²⁷ takes the view – correctly, it is submitted – that British courts have often failed to apply the doctrine of deference correctly. He identifies two stages of judicial review under a bill of rights. The first stage focuses on the definition of rights and freedoms,¹²⁸ while the second considers whether such rights are justifiably limited in pursuance of some legitimate governmental aim. As we have noted above, it is in the second stage that the proportionality test and the doctrine of deference usually come into play. However, in some cases what has happened is that deference has been shown by courts at the first stage, with the consequence that applications have been dismissed simply because their subject matter is regarded as being of such a nature as to warrant deference. Thus, the court never considers whether the limitation on rights is lawful.¹²⁹ In *Poplar Housing and Regeneration Community Association Ltd v Donoghue*,¹³⁰ for instance, the issue was whether the act of a housing association set up by a local housing authority in seeking repossession of property let to the defendant, who was determined to have been intentionally homeless, contravened the latter's right to respect for her private and family life and home under Article 8(1) of the European Convention on Human Rights. The Court of Appeal held that when

¹²⁷ Richard A Edwards, "Judicial Deference under the Human Rights Act" (2002) 65 MLR 859.

¹²⁸ *Id* at 868–869.

¹²⁹ *Id* at 868.

¹³⁰ [2002] QB 48, CA.

enacting the legislation governing the matter, Parliament had intended to give preference to the needs of those dependent on social housing as a whole over those in the defendant's position. Since "economic and other implications of any policy in this area [were] extremely complex and far-reaching",¹³¹ the courts had to treat decisions of Parliament as to what was in the public interest with particular deference. In the circumstances, therefore, the applicable legislation was held not to breach Article 8. The result in the case was reached not because the court had found the defendants' rights outweighed by the competing interests of Parliament in enacting the legislation, but simply because the court had identified this as a 'no-go area'. We have seen that the Canadian Supreme Court in *M v H* regarded this as an incorrect approach.¹³²

Even where the doctrine of deference has been applied in the second stage of constitutional review, the proportionality test has not been employed at a level of sophistication that might reasonably have been expected, and the courts have bowed to the policy choices of the political branches without properly considering whether such choices impair rights as little as possible.¹³³ The issue in question in *Brown v Stott (Procurator Fiscal, Dunfermline)*,¹³⁴ a Privy Council case on appeal from Scotland, was whether the privilege against self-incrimination protected by Article 6 of the European Convention was violated by a provision of the Road Traffic Act 1988. This provision made it an offence for a person in charge of a motor vehicle not to provide the police with information as to the identity of the vehicle's driver when the driver was alleged to be guilty of an offence. Though the Privy Council did engage in a

¹³¹ *Id* at 70–71.

¹³² Above, nn 110–113.

¹³³ Edwards, above, n 127 at 871.

¹³⁴ [2003] 1 AC 681, PC (on appeal from Scotland).

proportionality analysis, Edwards feels that the court addressed the issue in a “superficial and attenuated” manner. There was a rather general discussion of the necessity of the relevant provision, and a “somewhat cryptic” reference to balancing the rights of the individual against the wider interests of the community. In addition, the Crown adduced scant evidence to justify the existence of the provision, and none to show why an alternative provision such as a reverse evidential burden would not have been just as effective. Conversely, there were many deferential references to the need to accept Parliament’s policy choices.¹³⁵

Another difficulty with doctrines of deference as they are currently employed is that they rely on the identification of the existence or otherwise of a number of factors. However, these factors have been enunciated by the courts in very expansive, general terms. It may be questioned how much guidance they are in fact able to give to judges to determine when deference should be shown. For instance, in *International Transport Roth*¹³⁶ it will be recalled that the second principle articulated by Laws LJ was that there is more scope for deference where the European Convention requires a balance to be struck, but less scope where a right is stated in unqualified terms. Yet, he stated that even when a right is unqualified, “there is no sharp edge” and what is required may vary according to the context.¹³⁷

Laws LJ’s third and fourth principles were that greater deference may be due when the subject matter of a case is particularly within the constitutional responsibility of the democratic powers,¹³⁸ and when the subject matter lies more

¹³⁵ Edwards, above, n 127 at 870–871.

¹³⁶ Above, n 61.

¹³⁷ *Id* at 766, [84].

¹³⁸ *Id* at 766, [85].

readily within the actual or potential expertise of the democratic powers.¹³⁹ These principles proved to be unhelpful to Lord Walker of Gestingthorpe in *R (ProLife Alliance) v British Broadcasting Corporation*.¹⁴⁰ In this case, the applicant, a political party opposed to abortion, alleged that the BBC's refusal to broadcast a video containing graphic footage of an actual abortion and images of aborted fetuses as a party political broadcast infringed its right to freedom of expression under Article 10(1) of the Convention. Among other reasons, Lord Walker felt that it was disputable that it was the court's role to act as the constitutional guardian of free speech.¹⁴¹ We may surmise that he thus found it hard to decide whether the subject matter of the case was "within the constitutional responsibility of the democratic powers". Moreover, in Lord Walker's view, the principles stated by Laws LJ did not allow, at any rate expressly, for the manner (direct and central, or indirect and peripheral) in which Convention rights were engaged in the case.¹⁴²

It has been alleged that in Canada the doctrine of deference has been used inconsistently, and that the Supreme Court has rarely followed its own formulations of the doctrine.¹⁴³ A prime example of this is the fact that deference has been shown in criminal cases, even though the State is clearly the "single antagonist" of the applicants.¹⁴⁴ On the contrary, in *Eldridge v British Columbia (Attorney General)*,¹⁴⁵ a case involving the funding of sign-language translators in hospitals which one

¹³⁹ *Id* at 767, [87].

¹⁴⁰ Above, n 5.

¹⁴¹ *Id* at 256, [137].

¹⁴² *Id*.

¹⁴³ Davidov, above, n 107 at 148.

¹⁴⁴ See, eg, *R v Chaulk* [1990] 3 SCR 1303 at 1340–1343 SC (Can); *R v Butler*, above, n 104, 89 DLR (4th) at 484–485; *R v Laba (sub nom R v Johnson)* [1994] 3 SCR 965 at 1010, SC (Can); *R v Seaboyer* [1991] 2 SCR 577, 83 DLR (4th) 193 at 248 and 274, SC (Can); *R v Downey* [1992] 2 SCR 10 at 37–38, SC (Can); Davidov, *id*.

¹⁴⁵ [1997] 3 SCR 624, SC (Can).

would have thought was an exemplar of a matter involving the allocation of scarce resources and the balancing of the interests of different groups in society, *La Forest J* concluded that even if deference were shown to the government, it had acted unconstitutionally.¹⁴⁶ In any case, Davidov points out that it is hardly useful for a judge to be told that he should defer when legislation strikes a balance between different groups in society or allocates scarce resources, since that is what all legislation does. Even criminal laws can be regarded as a compromise between the interests of the accused, the victims and society as a whole – and the situations dealt with by Parliament are often much more complicated, such as laws on abortion or pornography.¹⁴⁷

In summary, it is submitted that the application of deference doctrines is often plagued by practical hitches. Sometimes, deference is used like a non-justiciability doctrine, creating zones which courts will not enter. The effect is that the courts then do not give any consideration whatsoever to the vital issue of whether the incursion into human rights can be justified. Furthermore, the factors that have been articulated by courts may generally be too vague to provide much in the way of guidance for determining when deference should be shown. This implies that they are fairly malleable, and may be used to justify particular outcomes that courts wish to reach, with the result that doctrines of deference are unpredictably applied.

III. JUSTIFICATIONS FOR DEFERENCE

Apart from the practical issues considered in the preceding section, it is submitted that the conceptual foundations for doctrines of deference are also shaky. The

¹⁴⁶ Davidov, above, n 107 at 148–149.

¹⁴⁷ *Id* at 151.

adoption of a deferential attitude in certain cases has been justified on a few grounds. One is that deference is a consequence of the doctrine of separation of powers. It is also said that there are certain kinds of policy decisions which are more appropriately made by the democratically-elected branches of government. This justification, when unpacked, can be seen to rest on the grounds that such decisions should be made by the branches of government which are directly accountable to the electorate, and that the judiciary does not have the institutional competence to deal with them. These rationalizations will be examined in turn.

A. SEPARATION OF POWERS

One justification for the judiciary showing deference to the executive and legislature is that by doing so it is giving effect to the doctrine of separation of powers. In *ProLife Alliance* Lord Hoffmann, in the course of explaining why he felt the term ‘deference’ to be inappropriate, commented that “[i]n a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are.”¹⁴⁸ In his view, decision-making powers are allocated among the branches of government according to principles of law, and therefore it is for the courts to rule which branch a decision is within the proper competence of.¹⁴⁹ He thus seemed to adopt a rigid conception of the separation of powers, that is, one that assigns exclusive competence over particular questions to the executive or legislature.

¹⁴⁸ Above, n 5 at 240, [75].

¹⁴⁹ *Id* at 240, [76].

Three points arise from Lord Hoffmann's statement. First, the statement was made with reference to the law of the United Kingdom, where the responsibilities of the branches of government are, in the main, not set out in a written constitution or other written law. Thus there is justification for saying that the court must define these responsibilities. On the other hand, in a Westminster-style system having a written constitution, it is reasonable to assume that the limits of responsibility, if any, are set out in the constitutional text. Indeed, if the text provides that the ultimate decision in a matter lies with either the executive or legislative branch of government, this allocation of responsibility should be respected by the court. That having been said, it must generally be rare for constitutions to explicitly and comprehensively state that either of the political branches is solely responsible for making certain types of decisions. If the constituent assembly or legislature that enacted the constitution has elected against unequivocally giving the final word on an issue to one of the political branches, we should ask whether it is right for the judiciary to do so on its own motion through a doctrine of deference.

The second point arising from Lord Hoffmann's statement is that recognizing the doctrine of deference as a corollary of the separation of powers provides no real guidance to courts in identifying the circumstances in which deference should be shown.¹⁵⁰ As we have seen, in the United Kingdom the courts have moved from identifying foreign policy and national security as matters to be left to the political

¹⁵⁰ "Lord Hoffmann's *dictum* correctly summarises the constitutional position, formally understood; but it cannot be employed, in practice, as a guide to the determination of concrete cases in all their complex particularity": Allan, above, n 1 at 677–678.

branches, to including the rather indeterminate categories of matters concerning “economic policy” and “social and political judgment”.¹⁵¹

Thirdly – and, it is submitted, crucially – both in legal systems with written and unwritten constitutions, to hold that certain executive or legislative decisions are beyond the pale for the judiciary defeats the scheme of checks and balances that the separation of powers doctrine was designed to promote. In *ProLife Alliance* Lord Hoffmann spoke of the need to determine the limits of decision-making power in a society based on the rule of law. This remark can be seen as a reminder of the vital role that courts play in determining whether the exercise of power by the political branches violates the fundamental liberties of persons affected by it. Trevor Allan has pointed out that the adoption of a rigid doctrine of separation of powers weakens judicial review to the point of futility whenever those questions are relevant to the exercise of power.¹⁵² Arguably, Westminster-style constitutions are not intended to embody a rigid separation of powers – it is submitted that the lack of unambiguous textual allocations of responsibilities points to this conclusion. Rather, they establish systems where the exercise of power by a branch of government is to be scrutinized by one or both of the other branches.

Thus, the judiciary must be capable of examining even matters touching on the allocation of resources, which are clearly within the primary responsibility of the political branches, where it is contended that fundamental rights have been infringed without sufficient justification. As Allan puts it, “To dismiss such claims as a matter of discretion, where the allegations were plausible, would be to render the rights in

¹⁵¹ Above, nn 76–83 and the accompanying text.

¹⁵² Allan, above, n 1 at 677.

question non-justiciable – rights without any remedy for infringement.”¹⁵³ If the courts are to play a substantive role in acting as a check on the political branches through judicial review, they cannot shrink from testing the actions of the political branches for compliance with the bill of rights.

B. ACCOUNTABILITY AND INSTITUTIONAL COMPETENCE

Another reason given for the doctrine of deference is that there are certain types of policy decisions more appropriately left to the democratically-elected branches of government. Unpacking this idea, we see that it rests on two grounds. First, it is said that some policy decisions are only properly made by the branches of government that are directly accountable to the electorate. Secondly, the judiciary lacks the institutional competence to deal with disputes arising out of the implementation of such policies.

As regards the first ground, it may be recalled that the first principle stated by Laws LJ in *International Transport Roth* was that more deference should be paid to an Act of Parliament than to a decision of the executive or a piece of subsidiary legislation because the United Kingdom Parliament, and not a written constitution, bears the “ultimate mantle of democracy in the state”.¹⁵⁴ Without commenting on the validity of this principle in the UK context, it may be seen at once that this is not a valid justification for deference in jurisdictions where the legislature is not regarded as sovereign, and where each of the branches of government are equally subject to a written constitution.

¹⁵³ *Id* at 693.

¹⁵⁴ *International Transport Roth*, above, n 61 at 765, [83].

The rationale given by Lord Hoffmann in *Secretary of State for the Home Department v Rehman* is more apposite to Westminster-style legal systems. He noted that decisions on national security matters,

with serious potential results for the community, require a legitimacy which can be conferred only by entrusting them to persons responsible to the community through the democratic process. If the people are to accept the consequences of such decisions, they must be made by persons whom the people have elected and whom they can remove.¹⁵⁵

This argument, in his view, also applied to other types of important decisions: in *ProLife Alliance* his Lordship regarded as a “legal principle” the notion that “majority approval is necessary for a proper decision on policy or allocation of resources”.¹⁵⁶

This notion that courts should leave decisions on contentious matters with a significant potential impact on the community to the political branches of government because they are directly accountable to the electorate, in the sense that they can be voted out of office for having made unpopular choices, is not unique to the United Kingdom. In the Canadian case of *Irwin Toy*, it was stated:

When striking a balance between the claims of competing groups, the choice of means, like the choice of ends, frequently will require an assessment of conflicting scientific evidence and differing justified demands on scarce resources. Democratic institutions are meant to let us all share in the responsibility for these difficult choices. Thus, as courts review the results of the legislature’s deliberations, particularly with respect to the protection of vulnerable groups, they must be mindful of the legislature’s representative function.¹⁵⁷

¹⁵⁵ Above, n 78 at 195, [62].

¹⁵⁶ Above, n 5 at 240, [76]. To similar effect, Lord Hoffmann also noted: “In a democratic country, decisions as to what the general interest requires are made by democratically elected bodies or persons accountable to them. ... [T]here are many decisions which have to be made every day (for example, about the allocation of resources) in which the only fair method of decision is by some person or body accountable to the electorate”: *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2003] 2 AC 295 at 325, [69]–[70], HL. See also *Kebilene*, above, n 4 at 381; *Brown v Stott*, above, n 4 at 703; *Alconbury*, above, n 156 at 322–323, [60], *per* Lord Nolan, and at 345–346, [144], *per* Lord Clyde, HL; *Farrakhan*, above, n 6 at 1418, [74].

¹⁵⁷ Above, n 104 at [80].

In other words, it may be appropriate for the judiciary to accept the decision of “democratic institutions” such as the legislature where this involves making difficult choices between the interests of competing groups in society, since the people are seen to have given their imprimatur for the decision through their elected representatives.

It is submitted, though, that there are problems with the accountability argument. The political branches of government are accountable to the people for all decisions that they make, not simply the ones deemed to have more serious consequences, so it is difficult to see why deference should be shown for certain types of decisions but not others.¹⁵⁸ There also does not seem to be any straightforward way to determine which decisions should be regarded as more serious than others. Labelling ‘serious’ decisions as those involving ‘policy’ or the ‘allocation of resources’ is of no help since all decisions can be thus characterized, except for the most straightforward, purely administrative ones. The so-called dichotomy between principle and policy is false, the true distinction being between policy decisions that are appropriate to a court’s institutional features, competence and legitimacy, and those that are beyond the court’s competence.¹⁵⁹

The accountability argument is subject to more fundamental objections. When the executive and legislative branches exercise power it may be assumed that they have assessed whether such action complies with the bill of rights, or if it does not, that there is sufficient justification for the abridgment of rights. However, it can be

¹⁵⁸ See, *eg*, Lord Justice Dyson, “Some Thoughts on Judicial Deference” [2006] JR 103 at 107, [18].

¹⁵⁹ Aileen Kavanagh, “Deference or Defiance? The Limits of the Judicial role in Constitutional Adjudication” in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge University Press, 2008), 184–216 at 197.

queried why this assessment should be accepted as inherently more valid or legitimate than an evaluation made by the judiciary, particularly when this is the one of the key responsibilities of the judiciary.¹⁶⁰ Furthermore, a deathly blow is struck at the heart of judicial review if it is accepted that courts should defer to difficult executive and legislative decisions because these are backed by a majority of the population, and that it is inappropriate for judges to inquire into such matters because they cannot be voted out of office for unpopular decisions. As we have seen in Chapter Two,¹⁶¹ judicial review relies on the judiciary remaining independent of the political process. Only if judges are shielded from the whims of the majority can they effectively protect the rights of individuals, especially those from minority groups. As Martin Redish put it when discussing the American political question doctrine that plays a similar role to deference in Commonwealth systems:

The basic function of unrepresentative judicial review is to assure that the Constitution restrains majoritarian will. If the majoritarian branches could act as final arbiters of the limits of their own power, there would have been little purpose in imposing supermajoritarian constitutional limitations in the first place. Thus, if a constitutional provision, reasonably interpreted, prohibits an action by one of the political branches, it is unresponsive to argue that the courts should abstain from exercising their review power because of their undemocratic nature.¹⁶²

Besides, it is specious to claim that the people have no opportunity to participate in the judiciary's assessment of governmental action, as compared to the formulation of policy by the executive and legislature. In the context of a trial, the executive's appointed representatives have ample opportunity to proffer reasons to the court on the people's behalf as to why administrative action or a piece of legislation should not

¹⁶⁰ Compare Richard Clayton, "Judicial Deference and 'Democratic Dialogue': The Legitimacy of Judicial Intervention under the Human Rights Act 1998" [2004] Pub L 33 at 40: "[I]t is difficult to understand why the judicial assessment of a breach of a Convention right or proportionality is inherently less valid or legitimate than that initially made by a civil servant."

¹⁶¹ Chapter Two, Pt II.B.2.

¹⁶² Martin H Redish, "Judicial Review and the 'Political Question'" (1984) 79 Nw U L Rev 1031 at 1045–1046.

be regarded as contravening the bill of rights.¹⁶³ It will also be recalled that the relationship between the judiciary and the political branches as regards interpreting the bill of rights may be seen as a dialogue. When a court strikes down a piece of legislation or an administrative act for infringing an individual's rights, this signals to the political branches and the people at large that Parliament or the executive has acted in a way that impacts negatively on cherished freedoms. This focuses the attention of the political branches and the people on the issue. Parliament may accept the court's ruling and adapt its policies in line with it or – depending on the legal system in question – override the ruling through legislation, possibly by amending the bill of rights to provide for exceptions to the rights implicated. The people's elected representatives are active throughout this stage. Members of the community may also show their support for or opposition to a court decision by participating directly in the process – they may petition their Members of Parliament, or vote for or against them in Parliamentary elections.¹⁶⁴

The second basis which is said to underlie why the judiciary should defer to the executive and legislature on democratic principles has been called its lack of 'institutional competence'. In *International Transport Roth*, Laws LJ's fourth principle was that greater or lesser deference is due according to whether the subject matter in question lies more readily within the actual or potential expertise of the democratic powers or the courts. The judge regarded this principle as very closely allied to, and possibly an emanation of, the principle that deference may be due when the subject matter is particularly within the constitutional responsibility of the

¹⁶³ Compare Robert A Schapiro, "Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law" (2000) 85 Cornell L Rev 656 at 699: "[T]he adjudicative process itself may facilitate a fully considered resolution of constitutional disputes."

¹⁶⁴ On the idea of a constitutional dialogue, see Chapter Two, Pt III.

democratic powers.¹⁶⁵ And Auld J, in *R (Animal Defenders International) v Secretary of State for Culture, Media and Sport*, opined that when faced with a complex statutory framework, it was not practicable for the court to say precisely whether Parliament had excessively restricted Convention rights: “The court is not well equipped, in the adversarial process to which it is confined, to assess the practicalities and efficacy of alternative legislative schemes with a different basis or reach.”¹⁶⁶ The justification has also been recognized by commentators. Speaking extra-judicially, John Dyson LJ has termed Laws LJ’s fourth principle as the “relative institutional competence principle”¹⁶⁷ and opined that while a court can acquire knowledge to enable it to decide difficult issues, “it is not the normal function of courts to make such judgments, and they are less-well-equipped... to make them.”¹⁶⁸

Jeffrey Jowell has said:

[I]t is quite appropriate for courts modestly to acknowledge a practical application of their own institutional limitations. There will be occasions where other bodies, whether Parliament, the executive or a non-departmental public body containing specialist expertise, will be better equipped to decide certain questions. The extent and degree of concession of course depends upon context and the right and interests involved.¹⁶⁹

It cannot be denied that the decision-making processes of the judiciary differ from those of the executive and legislature. While the courts in adversarial systems rely on the evidence and submissions presented to them by the parties to disputes, the political branches can appoint committees to gather views and study the implications of proposed policies. In addition, the executive branch has at its disposal officers and staff who specialize in particular fields such as foreign affairs

¹⁶⁵ Above, n 61 at 766, [85], and 767, [87].

¹⁶⁶ Above, n 6 at 164, [10].

¹⁶⁷ Dyson, above, n 158 at 105, [8].

¹⁶⁸ *Id* at 106, [12]–[13].

¹⁶⁹ Jeffrey Jowell, “Judicial Deference: Servility, Civility or Institutional Capacity” [2003] Pub L 592 at 598.

and national security, and are therefore well-placed to make recommendations or decisions concerning such matters. Nonetheless, the ability of judges to grasp complex issues and make decisions upon them, provided they are given sufficient information, ought not to be underestimated. Dyson himself, though supportive of the deference doctrine, pointed out that judges are routinely obliged to acquire sufficient understanding of complex and technical areas which lie well outside their usual expertise and experience in order to resolve disputes.¹⁷⁰

The more important question, therefore, is whether the judiciary should be expected to defer to the executive or legislature because the latter have dedicated machinery in place, so to speak, to generate policy outputs from complicated factual scenarios. It is submitted that the answer is no. It may well be that in an individual case a court will decide that it is sensible to accept the assessment of one of the political branches as to whether a certain state of affairs exists, for instance, as to whether the nation currently faces an imminent and substantial terrorist risk.¹⁷¹ However, if one accepts the legitimacy of judicial review and the need for the judiciary to subject exercises of power by the political branches to scrutiny for compliance with the bill of rights, then it is unsustainable to take the position that there exist matters lying beyond the judiciary's ken that it must not touch at all.¹⁷²

It has been argued that matters of law and matters of policy must be distinguished, the former being the province of judges while the latter the

¹⁷⁰ Dyson, above, n 158 at 105–106, [11].

¹⁷¹ Compare Redish, above, n 162 at 1051: “The pragmatic arguments made against judicial review of a finding of necessity at most establish a varying need for substantive deference, not for the total abdication of judicial authority. The level of the deference will presumably vary, depending on the severity of both the asserted emergency and of the loss of liberty involved.”

¹⁷² *Id.*

responsibility of administrators and legislators.¹⁷³ However, as mentioned earlier, this is a false dichotomy. By its nature, human rights adjudication involves both considerations of policy and law. Determining whether a limitation placed on a fundamental liberty is necessary in a democratic society involves weighing of opposing interests, which inevitably requires the examination of policy matters. It is thus not easy to see how a bright line can be drawn.

The point is well made by Trevor Allan: even an experienced and well-qualified public official, or a body accountable to Parliament or the electorate, can make an error of judgment as regards the balance of private rights and public interest. “Yet a form of deference that deflects attention from the legislative or administrative act in order to evaluate the merits of the actor is ill-suited to the identification of error.”¹⁷⁴ Consequently, the court’s focus should be on the substance of the issues arising instead of the characteristics of the decision-maker or its procedures.¹⁷⁵ Using Jowell’s memorable phrase, the “crunch constitutional question” – whether the political branches could have employed a less restrictive alternative to the action taken, and whether the restriction was necessary in a democratic society – “cannot simply be left to lay expertise or to majority approval”.¹⁷⁶

¹⁷³ For instance, J Peter Mulhern notes that some have argued that courts defer to political judgments of policy but decide legal questions for themselves: Mulhern, “In Defense of the Political Question Doctrine” (1988) 137 U Pa L Rev 97 at 145.

¹⁷⁴ Allan, above, n 1 at 689.

¹⁷⁵ *Id* at 689–691.

¹⁷⁶ Jowell, above, n 169 at 598.

IV. REDEFINING DEFERENCE

Ultimately, the palatability of doctrines of deference depends on one's view as to the proper scope of the judiciary's role in interpreting a bill of rights. There is an inverse relationship between the two. If one regards the political branches of government as the principal protectors of rights in a State and relegates to the judicial branch a more modest task, then arguably a doctrine of deference is important in limiting the courts' reach. On the contrary, deference as presently applied is anathema to one who believes that the judiciary has the key role of ensuring that executive and legislative power is exercised within the confines of the bill of rights.

It is submitted that in a legal system with a bill of rights, the latter position is to be preferred to the former. As we saw in Chapter Two, there are cogent reasons supporting the view that the judiciary should be the ultimate interpreter of the bill of rights. Chief among them is the independent judiciary's responsibility to scrutinize administrative action and legislation for compliance with fundamental liberties, and in particular to safeguard the rights of minorities. Therefore, for courts to limit their own remit through a wide-ranging doctrine of deference would render nugatory in many circumstances the purpose of having a legally-enforceable bill of rights.

Doctrines of deference therefore need to be redefined. I do not mean to say that the views of the political branches are to be routinely ignored, and that judges must always place themselves in the shoes of administrators or legislators and consider afresh how the decision in question should have been made. But the spotlight should be on examining whether there exists sufficient evidence or justification for limiting rights, not whether the matter is one that falls within the territory perceived to belong to the political branches. As Jowell has highlighted, in

certain cases it may be appropriate for the court to rely upon evidence that has been presented by the executive on the ground of its superior intelligence-gathering capacity,¹⁷⁷ subject to the court's power to require further evidence to be adduced where deemed fit. The court may also accept the assessment of an administrator on a matter of judgment (for instance, whether a criminal offence is required for the protection of vulnerable persons), provided that it is supported by convincing evidence. It may be reasonable for the political branches to be shown some latitude when action is taken in rapid response to a grave public emergency of some kind, such as the outbreak of an epidemic or a terrorist attack; or when the potential severity of the harm is great if the restriction is not upheld.¹⁷⁸

This is not deference by the back door. When a court declines to consider a case on the basis of its subject matter, it is effectively applying a doctrine of non-justiciability. However, we have seen in Part I that courts may not hold that a matter is not amenable to judicial review to avoid considering if governmental action has contravened fundamental rights. There is a conceptual difference between a court simply relying on non-justiciability, and accepting the views or judgment of government representatives while examining whether there has been a breach of the bill of rights. In the latter case, the court is taking responsibility – as it should – for deciding if a less restrictive measure could have been applied and whether the restriction was necessary in a democratic society.¹⁷⁹

When engaging in this crucial assessment, the proportionality test applied in Canada and the United Kingdom provides a logical and systematic framework for the

¹⁷⁷ Jowell, above, n 169 at 598. See also Kavanagh, above, n 159 at 196–200.

¹⁷⁸ Davidov, above, n 107 at 161.

¹⁷⁹ Jowell, above, n 169 at 598.

courts. It reminds judges that they must ensure the administrative action or legislation challenged fulfils a sufficiently-important objective. In addition, it underlines the centrality of fundamental rights by requiring the measure taken by the executive or legislature to be narrowly-tailored to fulfil the objective. Therefore, as regards Westminster-style legal systems such as Malaysia and Singapore where the constitutional text is silent on the application of a proportionality analysis, it is submitted that it is appropriate for a court to read such a test into the text. The courts have, on other occasions, fashioned legal tests in order to give meaning to the constitutional text. For example, in interpreting the phrase “equal protection of the law” guaranteed by Article 12(1) of the Singapore Constitution,¹⁸⁰ the courts apply a “rational nexus” test, which requires that the classification employed by the impugned legislation be founded on an intelligible differentia which distinguishes persons grouped together from others left out of the group, and that there exists a rational nexus between the basis of classification and the purpose of the law.¹⁸¹ This test was adopted in the absence of any express indication in the Constitution that it should be applied, and there is no reason why a proportionality test should not similarly be implied into the text.¹⁸² The alternative would be an attenuated bill of rights – individuals would only enjoy rights so long as they had not been yet been

¹⁸⁰ Art 12(1) of the Singapore Constitution reads: “All persons are equal before the law and entitled to the equal protection of the law.”

¹⁸¹ *Kok Hoong Tan Dennis v Public Prosecutor* [1996] 3 SLR(R) 570 at 578–579, [34], HC (S’pore); *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at 506–508, [55]–[59], CA (S’pore).

¹⁸² Compare Michael Hor, Case Note, “The Freedom of Speech and Defamation: *Jeyaretnam Joshua Benjamin v Lee Kuan Yew*” [1992] Sing J Legal Studies 542 at 544–549, particularly 547: “... Art. 14 expresses a basic commitment to the freedom of speech. Parliament is, however, given the power to derogate from this in the interest of the exceptions mentioned. It must be implicit that the power of derogation cannot be so broad as to eclipse the basic commitment to free speech altogether. The Court must have the supervisory duty to see that such derogations do not get out of hand. It has the constitutional role of ensuring that the balance of free speech and, say, the protection of reputation is kept.”

abridged by Parliament. It is contended that such an interpretation creates *de facto* Parliamentary sovereignty, which was arguably not what the Constitution was intended to achieve. This defeats the rationale behind having the bill of rights, which is intended to protect fundamental liberties against unjustified encroachment by the exercise of executive and legislative power.

It may be claimed that certain sensitive matters such as foreign policy and national security should not be dealt with by the court due to the risk of confidential information being revealed. Yet these are the very cases where a high likelihood exists that the fundamental liberties of the individual will be at risk. It is contended that in appropriate cases the concern can be addressed by applying various procedural safeguards, such as the holding of hearings closed to the public; the imposition of non-disclosure orders on the parties, witnesses and legal representatives backed up by the possibility of contempt of court proceedings in the event of breach; the sealing of the record of proceedings; and the making of orders that sensitive information be omitted from reports of the proceedings. In one of the Pentagon Papers cases,¹⁸³ in which the United States government sought an injunction against the *New York Times* to prevent the publication of excerpts from a leaked top-secret report on internal government planning and policy decisions regarding the Vietnam War, the government was required to prepare special briefs for judicial inspection *in camera* to explain what specific harms would flow from publication.¹⁸⁴

¹⁸³ *United States v New York Times Co* 444 F 2d 544 (2nd Cir, 1971).

¹⁸⁴ See Redish, above, n 162 at 1051–1052.

CONCLUSION

The United Kingdom experience suggests that the doctrine of deference, which is not expressly provided for in the Human Rights Act 1998, is a hangover from more limited conceptions of the judicial role in administrative law. We have seen that the doctrine does not provide sufficient guidance to enable courts to determine on a principled basis whether to accept the prior decision of the executive or legislature. More significantly, the justifications presented by judges and commentators for the doctrine's continued existence can be criticized. While deference may be regarded as a corollary of the separation of powers doctrine, this in itself provides no help to a judge to decide when deference should be shown to the political branches. What is more, a Westminster-style constitution containing a bill of rights arguably establishes a legal framework in which the judiciary is responsible for checking that the political branches have not infringed rights guaranteed to the people in exercising their powers.¹⁸⁵

Suffering from similar weaknesses is the argument that there are certain types of decisions – those that are policy-laden, for instance – that ought to be reserved to the political branches because they are accountable to the people. It fails to provide the judiciary with adequate direction as to when to show deference, and generally tends to undermine the concept of judicial review. Finally, the justification for deference that the judiciary lacks institutional competence to determine certain types of cases arguably underrates its capability. The justification also rests on a dubious distinction between matters of law and policy where human rights are concerned, and diverts attention away from the key issue of whether administrative action or

¹⁸⁵ Chapter Two, Pt II.B.2.

legislation complies with the bill of rights to an examination of the characteristics of the decision-maker. It is not denied that where appropriate a judge may accept evidence adduced by the political branches, or an administrative officer's exercise of discretion on a matter of judgment. But in the end, the tasks of ensuring that exercises of governmental power are necessary in a democratic society and restrict fundamental liberties as minimally as possible cannot be delegated.

In the *ProLife Alliance* case,¹⁸⁶ Lord Hoffmann expressed disapproval of the term 'deference' to describe the relationship between the judicial and the other branches of government:

I do not think that its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening. In a society based upon the rule of law and the separation of powers, it is necessary to decide which branch of government has in any particular instance the decision-making power and what the legal limits of that power are. That is a question of law and must therefore be decided by the courts.¹⁸⁷

With respect, it could be said that 'deference' is indeed an honest term to express how doctrines of deference are applied today. Deference is dangerous, for its use is largely unprincipled and tends to encourage courts to abdicate their responsibility of upholding the bill of rights and acting as a check on the political branches of government. It is a doctrine in need of redefinition.

¹⁸⁶ Above, n 5.

¹⁸⁷ *Id* at 240, [75].

CHAPTER FOUR

Interpretive Approaches: The Nature of the Judicial Task

[B]e sure that you go to the author to get at *his* meaning, not to find yours. ... [T]he metal you are in search of being the author's mind or meaning, his words are as the rock which you have to crush and smelt in order to get at it. And your pickaxes are your own care, wit, and learning; your smelting furnace is your own thoughtful soul. Do not hope to get at any good author's meaning without those tools and that fire; often you will need sharpest, finest chiselling, and patientest fusing, before you can gather one grain of the metal.¹

— JOHN RUSKIN (1819–1900)

I. THE TEXT AT ITS INCEPTION: LEGISLATIVE INTENTION	161
A. THE MEANING OF LEGISLATIVE INTENTION	161
1. Legislative Intention and Legal Meaning: Originalism, and Expressed and Unexpressed Intent	166
(1) Actual and Counterfactual Intentions	168
(2) Original Meaning.....	173
B. MODERATE ORIGINALISM.....	176
II. THE TEXT THROUGH TIME: FIXED AND DYNAMIC MEANING	179
CONCLUSION	188

BILLS OF RIGHTS and constitutions are strange creatures. On the one hand, they are legislative in nature, which leads one to suppose that familiar principles of statutory interpretation apply to them. On the other hand, they are special types of statutes, embodying fundamental principles that are intended to set boundaries for other laws and governmental activity. This suggests that different principles should be

¹ John Ruskin, "Lecture I – Sesame: Of Kings' Treasuries" in *Sesame and Lilies: Two Lectures Delivered at Manchester in 1864* (London: Smith, Elder & Co, 1865), 1–118 at 25 and 27–28.

employed when determining the meaning of their provisions and applying them to disputes arising before the courts. In the light of the tension created by the dual nature of constitutional and bills of rights texts, this chapter aims to consider the nature of the judicial task in interpreting such texts, and the general approach that judges should take when doing so.

The role of the court is customarily expressed as implementing the intention of the legislature. In Part I of the chapter, we will explore what it means for a such a collective body to have an intention, and debunk the notion that legislative intent is an illusory concept. We then go on to consider the implications of this for the legal meaning of a statutory text. In particular we compare ‘expressed’ and ‘unexpressed’ intent, that is, whether the judiciary should adhere to what the legislature has set out in the constitutional text, or go on to search for evidence of what the legislature may have subjectively believed the text would achieve. In the light of conclusions about the appropriateness of these forms of intent, this Part assesses four approaches to constitutional interpretation that come under the umbrella of ‘originalism’ – ‘actual intention’, ‘counterfactual intention’, ‘original meaning’, and moderate originalism. It will be shown that moderate originalism has much to commend it.

Part II turns to the issue of whether a constitutional text should be given a meaning that was fixed at the time it was enacted, or one that is dynamic and dependent on present-day needs, values and expectations. Criticisms of the latter approach, which has been termed ‘non-originalism’ and seen as opposed to originalist approaches, are considered, taking into account how the relationship between the legislature and the judiciary as regards statutory interpretation should be conceptualized. It will be submitted that it is the nature of the words and phrases

appearing in the text that determines whether a fixed or dynamic interpretation should be applied.

I. THE TEXT AT ITS INCEPTION: LEGISLATIVE INTENTION

A. THE MEANING OF LEGISLATIVE INTENTION

When a court endeavours to interpret a statutory provision, its goal has long been regarded to be to discover the legislative intention in enacting the text. For reasons that will be explained shortly, this aptly characterizes the court's responsibility. One might, however, take issue with the term 'legislative intention'. In Westminster systems of government, constitutions and bills of rights come into legal existence in a number of ways. First, they may be enacted as statutes by legislatures. Such statutes may have the superior status of basic law, or simply be ordinary legislation subject to amendment and repeal in the usual manner. Secondly, a constitution or a bill of rights may be the product of a constituent assembly specifically convened to create a new fundamental law for the nation, often after some significant change of political regime. Given the limited mandate of such an assembly and its lack of general law-making power, using the adjective 'legislative' to describe the intent it possesses is, strictly speaking, incorrect. Thirdly, a constitution or bill of rights may only become law if it has been approved by a requisite majority of the electorate in a referendum. Conceptually there is no real difference between how a constituent assembly and a legislature can be said to have an 'intention' as regards a text, though the same may not be true for the electorate as a body as it has no ability to alter the wording of the text placed before it for approval. For convenience in this chapter, we will not consider the situation involving the electorate. What is said about a legislature and individual legislators (or Parliament and individual members of Parliament) should

be understood to apply to a constituent assembly and the members of such an assembly.

Francis Bennion calls the ascertainment of Parliamentary intention the “sole object” and “paramount criterion” of statutory interpretation,² and in the Australian High Court decision *Re Wakim, ex parte McNally*,³ Justice Michael McHugh said: “The starting point for a principled interpretation of the Constitution is the search for the intention of its makers.” It is submitted that the determination of Parliamentary intention is a fair description of the judicial role in this respect. This is because Parliament is duty-bound to enact laws for the good of the people, and the courts’ responsibility is to resolve disputes that arise between parties according to the law, including applicable Acts of Parliament. However, this does not advance our understanding of the matter much. The crux of the issue is what the intention of Parliament, or legislative intent, should properly be understood to mean, and what are the appropriate means to identify it.

When we speak of the “intention of Parliament” in enacting a piece of legislation, we are referring to the intention of a collective body. Clearly, this is not the same species of beast as the intention an individual legislator has when he votes for a bill that has been laid before Parliament. At this point, it is necessary to consider why we focus on the intents possessed by legislators rather than on the intent of the drafter of the text, who may be a member of Parliament or a civil servant. It is submitted that the views that constitute legislative intent are not those of a

² F A R (Francis Alan Roscoe) Bennion, *Statutory Interpretation: A Code* (3rd ed) (London: Butterworths, 1997) at 365.

³ (1999) 198 CLR 511 at 551, [40] (footnote omitted).

person or group of persons who have chosen the phraseology of the text, but those whose understanding and acceptance of the text causes it to become law.

As a human being, a legislator has the capacity to appreciate the objects that a proposed statute is designed to achieve, and the power to consciously resolve to fulfil those objects by voting in favour of the statute – or, indeed, vote against it in the hope of preventing its enactment. Therefore, each individual legislator is capable of having a specific understanding of the statute at the time it was passed. Conversely, Parliament – or, more accurately, the segment of Parliament that voted to enact the statute – cannot possess volition in the same manner, for it is an artificial assemblage. It may comprise of legislators, but it is too blithe to conclude that its “intention” is merely an aggregation of the individual intents of those persons. That assumes the legislators shared identical understandings of the statute. It is quite possible, though, that they might have had varying ideas as to what the legislative text would achieve.⁴ In fact, some legislators may have had no specific intent on this issue at all. Their own intents may have been to support the party line, please their constituents, advance their political careers,⁵ or simply, as one commentator has pointed out, to bring the debate to a speedy conclusion so they could go home for dinner.⁶ On the

⁴ “[L]egislatures usually have no determinate collective expectations about many (if any) of the concrete issues posed by their statutes”: William N Eskridge, “The New Textualism” (1990) 37 UCLA L Rev 621 at 642, referencing the views of Max Radin, “Statutory Interpretation” (1930) 43 Harv L Rev 863.

⁵ Aileen Kavanagh, “The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998” [2006] OJLS 179 at 181.

⁶ C Edwin Baker, *Human Liberty and Freedom of Speech* (New York, NY: Oxford University Press, 1989) at 272. See also Stephen Guest, “Interpretation and Commitment in Legal Reasoning” in *Legislation and the Courts* (Michael Freeman, ed) (Aldershot, Hants: Dartmouth, 1997), 133 at 140–141: “He [the legislator] might have voted for the bill without having understood its provisions, his intention in doing so only being to please the whips; or his intention might have been to support the bill solely because his wife had business interests that would be furthered; or, more complicatedly, he may have had the various intentions of pleasing the whips, furthering the business interests of his wife (who is a director of a water authority) and ensuring that the environment would be improved.”

basis of this argument, in a 1930 article,⁷ the legal realist Max Radin concluded that it was unrealistic to talk about such a heterogeneous body having an intent.⁸ This view remains influential today.⁹

However, it has been pointed out – rightly, it is submitted – that it is possible to overcome the argument that legislative intent is fictional. One way is to ascribe the actual intent of one or more legislators to their colleagues. During the process of enactment, a bill is introduced into Parliament by a legislator we may call its promoter. This person is most likely a government minister, but in the case of a private member’s bill may be an ordinary member of Parliament (a backbencher, in the parlance of Westminster-style governments). The promoter, being an individual legislator, will possess an actual intent as regards what the proposed legislation is to achieve. According to Reed Dickerson, it is not unreasonable to conclude that other legislators who subsequently support the legislation, but without having any specific intent towards it, can be regarded as having adopted or acquiesced in the promoter’s actual intent.¹⁰ Apart from being the work of a single promoter, a bill may also be the product of a group of legislators; for instance, a committee of Parliament may have been appointed to inquire into a matter and prepare draft legislation. In this

⁷ Radin, above, n 4.

⁸ Reed Dickerson, “Statutory Interpretation: A Peek into the Mind and Will of the Legislature” (1975) 50 Ind LJ 206 at 207 (referring to Radin’s views, *id*).

⁹ Eskridge, above, n 4 at 642, citing “Comment: Admissibility of Congressional Debates in Statutory Construction by the United States Supreme Court” (1937) 25 Calif L Rev 326 at 335–336; J A Corry, “The Use of Legislative History in the Interpretation of Statutes” (1954) 32 Can B Rev 624 at 626; William Robert Bishin, “The Law Finders: An Essay in Statutory Interpretation” (1965) 38 S Cal L Rev 1 at 14; Ronald Dworkin, “How to Read the Civil Rights Act” in *A Matter of Principle* (Cambridge, Mass: Harvard University Press, 1985) at 316; Michael S Moore, “A Natural Law Theory of Interpretation” (1985) 58 S Cal L Rev 277. See also Daniel Greenberg, “The Nature of Legislative Intention and its Implications for Legislative Drafting” (2006) 27(1) Stat L Rev 15 at 15–16.

¹⁰ Dickerson, above, n 8 at 210–211. See also James M Landis, “A Note on ‘Statutory Interpretation’” (1930) 43 Harv L Rev 886 at 889: “[A] mere expression of assent [by the individual legislator] becomes in reality a concurrence in the expressed views of another. A particular determinate thus becomes the common possession of the majority of the legislature, and as such a real discoverable intent.”

situation, Dickerson states that even though the views of individual committee members on the draft legislation may vary in the details, there is usually a general consensus on its meaning which is sufficient to support the existence of legislative intent. This intent is then capable of being adopted or acquiesced in by other legislators in the manner described above.¹¹ He concludes, “legislative intent is ultimately rooted in individual intents”.¹²

There is a difficulty with the above argument, though. It may be acceptable to regard legislators lacking any proper intent as to the text’s meaning to have acquiesced in the promoter’s actual intent. On the other hand, it is unreasonable to apply the same analysis to legislators who have merely understood the text in a different way from the promoter, particularly those who spoke up against the legislation during the debates, even if they later voted in favour of it. To attribute the promoter’s intent to such legislators would be disregarding the real possibility that members of Parliament can disagree on the specifics of a bill’s meaning and yet concur with enough of its overall thrust to support its enactment. In *Wilson v First County Trust Ltd (No 2)*,¹³ Lord Nicholls of Birkenhead, when considering whether ministerial statements on bills could be attributed to the whole of Parliament, noted:

[D]ifferent members [of Parliament] may well have different reasons, not expressed in the debates, for approving particular statutory provisions. They may have different perceptions of the desirability or likely effect of the legislation.¹⁴

It is submitted that the better way of understanding legislative intent is to hold that it is an adoption by legislators, not of the actual intent of the promoter of a bill, but of

¹¹ *Id* at 211–212.

¹² *Id* at 213.

¹³ [2004] 1 AC 816, HL.

¹⁴ *Id* at 843, [67].

the intent manifested in the text of the bill.¹⁵ In other words, Parliament's intention is "its having decided to pursue a particular course of action in a particular way"¹⁶ which was embodied in the bill under consideration, and is subsequently reflected in the text of the statute.¹⁷

1. Legislative Intention and Legal Meaning: Originalism, and Expressed and Unexpressed Intent

The preceding discussion sought to establish that the intention of Parliament is not an illusory concept, that it is a key aspect of establishing the legal meaning of a statute, and that it is manifested in the statutory text. This has clear implications for judges seeking the appropriate means of identifying legislative intention. There are two main schools of thought. The first holds that legislative intention must be gathered from the actual words in the statute that legislators have jointly agreed to express their understandings in. The second requires the actual intents held by individual legislators to be discerned. This is the distinction drawn by Aileen Kavanagh between what she calls the 'expressed intent' and the 'unexpressed intent' theses. Speaking in the context of constitutional interpretation, she says:

Roughly speaking, the "expressed intent" thesis argues that judges interpreting the Constitution should only defer to those intentions which are manifest or "expressed" in the language of the Constitution itself. According to the "unexpressed intent" thesis, judges are entitled to go behind the constitutional text to find and enforce intentions which accompanied the enactment, but are not apparent on the Constitution's face.¹⁸

¹⁵ Dickerson, above, n 8 at 210–211.

¹⁶ Kavanagh, "Role of Parliamentary Intention", above, n 5 at 182.

¹⁷ *Id.*; Kavanagh added, "These intentions are not fictional; they are determined by a set of rules or conventions, such that the intentions which are expressed in the statutory text (having gone through all the requirements of the legislative process) *are* the intentions of Parliament."

¹⁸ Aileen Kavanagh, "Original Intention, Enacted Text, and Constitutional Interpretation" (2002) 47 *Am J Juris* 255 at 263–264.

It is superficially attractive for judges to try and determine what legislators had in mind when they enacted a piece of legislation, for this appears to be an endeavour to ascertain the ‘truth’. However, this approach is not viable if the intention of Parliament as a whole resides in the legislative text and not in the minds of individual legislators. Proper interpretive approaches are therefore those governed by the expressed intent thesis.

Bearing this in mind, several approaches to interpreting constitutional and bill of rights texts that have been applied by courts or propounded by scholars will now be considered. Interpretive approaches are not binding legal rules laid down by legislatures or courts. On the contrary, they are methods or techniques that aim to guide judges in determining the meaning of statutes. Having identified whether these approaches are based on the expressed or unexpressed intent thesis, it will be suggested that, for the reasons set out below, interpretive approaches founded on unexpressed intent should not be adopted by courts.

The approaches to interpretation to be examined in this part of the chapter are generally regarded as varieties of ‘originalism’. The term *originalism* is contested. In general it connotes the interpretation of a text by determining its original intended meaning¹⁹ but, as with legislative intention, the difficulty lies in what exactly ‘original intended meaning’ means. Academic discourse in the United States speaks of the dichotomy between two forms of originalism: ‘textualism’ and ‘intentionalism’.²⁰ The

¹⁹ Jeremy Kirk, “Constitutional Interpretation and a Theory of Evolutionary Originalism” (1999) 27 Fed L Rev 323 at 324.

²⁰ For use of the term *intentionalism* see, eg, Paul Brest, “The Misconceived Quest for the Original Understanding” (1980) 60 B U L Rev 204; Caleb Nelson, “What is Textualism?” (2005) 91 Va L Rev 348.

term ‘textualism’ is not always used consistently,²¹ but in general it can be understood as an interpretive approach that regards the legislative text as the primary source for determining the intention of Parliament.²² ‘Intentionalism’, on the other hand, advocates that judges identify and enforce what legislators understood themselves to be adopting.²³ The latter term is less than ideal; after all, both textualists and intentionalists are engaged in a quest for the legislative intent, and differ only as to how that intent should be identified. Broadly understood, intentionalism might be seen to embrace any interpretive approach that tries to establish Parliamentary intent. This appears to be Kavanagh’s view, for she sees textualism not as the antithesis of intentionalism, but as a particular instance of it.²⁴

Many judges and academics proclaim themselves to be originalists, but an examination of their views on constitutional interpretation reveals a diversity of approaches. We will examine three of these: ‘actual intention’, ‘counterfactual intention’, and ‘original meaning’ originalism.

(1) *Actual and Counterfactual Intentions*

One type of originalist argues that in order to discover the meaning of a text, it is necessary to inquire into what the legislators who enacted it actually intended, even if this intent was ill expressed in the text.²⁵ Using terminology developed by Kavanagh, we may call this the search for ‘*actual intention*’. Thus, if the question is

²¹ See, eg, Kavanagh, “Original Intention”, above, n 18 at 295, noting that “textualism” is sometimes seen as antithetical to originalism, sometimes as a form of originalism, and sometimes as synonymous with originalism.

²² *Id* at 297.

²³ Nelson, above, n 20 at 351–352, citing Richard S Kay, “Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses” (1988) 82 Nw U L Rev 226 at 232, and Patricia M Wald, “The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988–89 Term of the United States Supreme Court” (1990) 39 Am U L Rev 277 at 301.

²⁴ Kavanagh, “Original Intention”, above, n 21 at 297.

²⁵ Kavanagh, above, n 18 at 266.

whether caning or flogging violates a constitutional prohibition against cruel and unusual punishment,²⁶ a historical examination of the views of the legislators who approved the bill of rights is required. If the framers' 'true intentions' can be discerned – from contemporary records such as reports of legislative debates; and possibly extra-statutory documents such as pamphlets and newspaper articles written by legislators, early commentaries of the text, and diaries and letters – then effect should be given to these intentions, and the text effectively ignored as inadequate or inaccurate.

One difficulty with actual intention originalism is that legislators may not have given any thought at all to this specific question so that there is no requisite intent on the issue. Therefore, another form of originalism asks hypothetically what the legislators would have understood the text to mean if confronted with the issue in the present-day context. Kavanagh refers to this as ascribing to the framers of the constitution a '*counterfactual intention*'.²⁷

It is clear that these two species of originalism, which can be classed as forms of intentionalism, are based on the unexpressed intent thesis. They try to determine how the framers of the text understood it, rather than the meaning of the text itself. The unexpressed intent thesis can be criticized on a number of grounds. First, attempting to establish what was going on in the framers' minds, or what they would have thought if they had been confronted with a particular present-day scenario, is highly conjectural.²⁸ It has been claimed that the framers' actual beliefs and

²⁶ *Eg*, US Constitution, 8th Amdt; South African Constitution, s 12(1)(e).

²⁷ Kavanagh, "Original Intention", above, n 18 at 266.

²⁸ *Id* at 270. See also Daniel A Farber & Suzanna Sherry, *Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations* (Chicago, Ill.; London: University of Chicago Press, 2002) at 16 ("If we are asking what a 'reasonable' reader of the period would find in the document,

intentions may be adequately gleaned from materials relating to a statute's legislative history, including reports of legislative debates and Parliamentary committees, superseded drafts of bills, and differences between the statute and the prior law. Some would even permit the search to be extended to legislators' extra-statutory writings²⁹ such as books, newspaper articles, pamphlets, diaries and letters. As regards the latter point, it is submitted that reference to such writings is highly undesirable. The fact that the views expressed therein have not been considered in an official Parliamentary setting renders them a doubtful guide to the actual intent of a legislator or group of legislators attributable to Parliament as a whole.

Additionally, as was pointed out above,³⁰ the intentions of particular legislators towards a statute are not a reliable guide to Parliamentary intention. This point was recognized in the Canadian Supreme Court's decision *Reference re s 94(2) of the Motor Vehicle Act (British Columbia)*,³¹ which was cited with approval by the Constitutional Court of South Africa in *State v Makwanyane*.³² In the latter case, the Court said:

Our Constitution is also the product of a multiplicity of persons, some of whom took part in the negotiations, and others who as members of Parliament enacted the final draft. The same caution is called for in respect of the comments of individual actors in the process, no matter how prominent a role they might have played.³³

In any case, while sufficient documentary evidence of this sort – legislative and non-legislative – may be available in certain countries such as the United States, other jurisdictions may simply lack such material. What is more, the evidence, where

without limiting ourselves to what various readers did in fact think, then we have cut free from any tether to the historical record and entered the realm of speculation.”)

²⁹ Kavanagh, *id* at 270.

³⁰ Above, n 13 and the accompanying text.

³¹ [1985] 2 SCR 486 at 508–509, [58].

³² 1995 (3) SA 391.

³³ *Id* at 407, [18].

it can be found, may be equivocal. *Printz v United States*³⁴ is an example of this potential ambivalence. The case involved a provision in the Brady Handgun Violence Prevention Act 1993³⁵ that required state police officers to make a reasonable effort to determine whether a proposed gun sale would be illegal.³⁶ In a 5–4 decision of the Supreme Court, this provision was found to be an unconstitutional encroachment on state sovereignty.³⁷ Two of the dissenting judges, Stevens and Souter JJ, relied on historical evidence that suggested that the framers had assumed that state officials would be assigned to carry out federal laws.³⁸ However, Scalia J, who wrote the majority opinion, distinguished this evidence by contending that some of it referred only to the voluntary enforcement of federal laws by the states, while other passages could not be read as an acceptance of the federal government’s right to commandeer state officials to do their bidding.³⁹ Daniel Farber and Suzanna Sherry point out:

[D]ifferent framers expressed different views, and many... changed their views over time. Just like people today, the framers were often vague or conflicted in their thinking. Thus any perusal of the historical record is bound to yield conflicting expressions of intent.⁴⁰

At the end of the day, since the historical evidence is likely to be seen as determinative of what the bill of rights text means, the focus of interpretation shifts away from the text towards the evidence. Given the potential ambiguity of the latter, it is more likely than not that courts will arrive at a false or contrived answer to the question of what the framers intended.⁴¹ It is submitted that legal rules that rest on

³⁴ 521 US 898 (1997).

³⁵ Pub L No 103-159, 107 Stat 1536 (30 November 1993), codified at 18 USC §§ 921 and 922.

³⁶ 18 USC § 922(s)(2).

³⁷ Farber & Sherry, above, n 28 at 32.

³⁸ *Printz*, above, n 34 at 939–976.

³⁹ Farber & Sherry, above, n 28 at 45.

⁴⁰ *Id* at 16.

⁴¹ Kavanagh, “Original Intention”, above, n 18 at 278.

the unexpressed-intent thesis fail to provide judges with sufficient guidance in deciding cases.

There are other cogent reasons for rejecting reliance on unexpressed intent. For one, judges may inadvertently infer into the constitutional text intentions that were insufficient to command majority support in Parliament. In addition, legislators may be led to assume that judges will rectify shortcomings in enactments, which may act as a disincentive for legislators to carry out their duties diligently and responsibly.⁴² More importantly, as a matter of constitutional law, the only way that Parliament can express its will is through the enactment of legislation.⁴³ Trevor Allan sees this as one of the consequences of the rule of law:

It is... a cardinal principle of common law (reflecting the principle of the rule of law) that a statute's authority attaches to its formally enacted text, which must be distinguished from the intentions, desires or purposes of legislators, whether regarded as separate individuals or as a collective body sharing common aims.⁴⁴

The process by which legislation is drafted, publicly debated and voted upon, and ultimately enacted into law possesses significance. It is a safeguard against laws being enacted for improper reasons, as Parliament is openly made accountable for the legislation it has passed. The process also gives lawmakers control over what has been enacted; they know what must formally be done to transform their intentions and opinions into law. But if the courts look behind the enactment and seek to

⁴² *Id* at 277.

⁴³ Dickerson, above, n 8 at 221. Thus, for example, Art 58(1) of the Singapore Constitution states that “the power of the Legislature to make laws shall be exercised by Bills passed by Parliament and assented to by the President”.

⁴⁴ T R S Allan, “Legislative Supremacy and Legislative Intention: Interpretation, Meaning, and Authority” (2004) 63 *Cam LJ* 685 at 687.

enforce intentions perceived to be held by legislators that are not reflected in the text, they undermine this control and subvert the rationale of the enactment process.⁴⁵

Based on the weaknesses of the unexpressed intent thesis set out above, it is submitted that actual and counterfactual intent originalism are not suitable interpretive approaches. In particular, counterfactual intent originalism requires mental calisthenics that may be unreasonable to expect judges to perform. It is not easy to see how a judge would imagine legislators, possibly of a different era, deciding issues concerning technologies that had not existed and controversies that had never arisen in their time.

(2) *Original Meaning*

There is a sophisticated form of originalism that has been developed by Associate Justice Antonin Scalia of the US Supreme Court in cases and extrajudicial writings. Scalia does not propose that courts should seek to ascertain the actual intentions of the constitution's framers, or speculate about their hypothetical intentions. Instead, he counsels that they should look for the "original meaning" of the constitutional text, that is, the way in which the text was originally understood at the time it was enacted.⁴⁶

⁴⁵ Kavanagh, "Original Intention", above, n 18 at 275, adopting the views of Joseph Raz in *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979); and "The Morality of Freedom, Part I" and "Authority, Law and Morality" in *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994). See also Aileen Kavanagh, "Pepper v Hart and Matters of Constitutional Principle" (2005) 121 LQR 98 at 101, noting that an interpretive strategy of construing a statute by reference to what legislators said during debates preceding the passage of the bill into law "subverts the rationale of the legislative process. It allows intentions which were not part of the law, not a source of law, to trump the enacted intentions contained in the authoritative text. ... This undermines Parliament's control over what is enacted into law, as well as their accountability for that law." (Footnotes omitted.)

⁴⁶ *Id* at 280.

On the surface, this approach to interpretation would seem fairly unobjectionable, if not for a troubling aspect that has far-reaching consequences. According to Scalia, long-established traditional practices are the primary determinant of the constitutional text's original meaning, and so cannot themselves be unconstitutional. The consequence is that such practices are immunized against being held unconstitutional.⁴⁷ This is evident, for instance, from Scalia's dissenting judgment in *Rutan v Republican Party*,⁴⁸ in which he disagreed with the majority that the First Amendment right to freedom of speech forbade the government from favouring members of one political party in hiring, promotions, transfers and recalls for government jobs.⁴⁹ He reasoned that this practice, known as patronage hiring, had been traditionally accepted for so long that it should be regarded as consistent with the original meaning of the First Amendment:⁵⁰

The provisions of the Bill of Rights were designed to restrain transient majorities from impairing long-recognized personal liberties. They did not create by implication novel individual rights overturning accepted political norms. Thus, when a practice not expressly prohibited by the text of the Bill of Rights bears the endorsement of a long tradition of open, widespread, and unchallenged use that dates back to the beginning of the Republic, we have no proper basis for striking it down. ... [S]uch a venerable and accepted tradition is not to be laid on the examining table and scrutinized for its conformity to some abstract principle of first-amendment adjudication devised by this Court. To the contrary, such traditions are themselves the stuff out of which the Court's principles are to be formed.⁵¹

Although Scalia emphasizes that the constitutional text is the proper object of the interpretive enterprise, by expressing the view that traditional practices give

⁴⁷ Mark D Greenberg & Harry Litman, "The Meaning of Original Meaning" (1998) 86 Geo LJ 569 at 572.

⁴⁸ 497 US 62 (1990).

⁴⁹ Scalia J's dissenting judgment was joined in full by Rehnquist CJ and Kennedy J, and in part by O'Connor J who did not join the portions discussing the role of tradition.

⁵⁰ David A Strauss, "Tradition, Precedent, and Justice Scalia" (1991) 12 Cardozo L Rev 1699 at 1702–1703.

⁵¹ *Rutan*, above, n 48 at 95–96; quoted in *Board of County Commissioners v Umbehr* 518 US 668 at 687 (1996).

meaning to the text, this gives primacy to extratextual factors which suggests that the unexpressed intent thesis underlies the approach.⁵² Moreover, traditionalism is highly majoritarian. In the absence of a narrowly-defined clause in the text, the executive or legislature can effectively make any practice constitutional just by sustaining it for a time.⁵³ On the other hand, just because a practice has remained unchallenged for an extended period should not imply that it is unquestionably accepted. The practice may be opposed by a minority of the population, which would mean that its members have an uphill task convincing the legislature to overturn it. Factors such as expense, inconvenience, stigma, and a legal culture that frowns upon vindicating civil liberties through the courts also serve to inhibit moves to challenge the status quo.

We may also query whether the framers meant to indefinitely protect practices that were commonplace in their time.⁵⁴ Certainly, no such presumption is appropriate when the constitutional text makes the bill of rights applicable to legislation enacted prior to its coming into force, as the Singapore Constitution⁵⁵ and South African Constitution⁵⁶ do. The use of expansive, open-ended phraseology in preference to a narrower formulation also suggests otherwise. In fact, as early as the

⁵² Kavanagh, "Original Intention", above, n 18 at 282. Farber & Sherry, above, n 28 at 52–53 note: "Interpreting traditions involves many of the same problems as interpreting original intent. We are apt to find ambiguities in the historical record if we look carefully enough."

⁵³ Strauss, above, n 50 at 1708.

⁵⁴ *Id* at 1710.

⁵⁵ The Singapore Constitution, Art 162, states: "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.*" (Emphasis added.)

⁵⁶ Item 2(1)(b) of Sch 6 ("Transitional Arrangements") of the South African Constitution states: "All law that was in force when the new Constitution took effect, continues in force, subject to — ... consistency with the new Constitution."

beginning of the 19th century, Marshall CJ, intoning that “we must never forget that it is a *constitution* we are expounding”, expressed the view in *M’Culloch v Maryland*⁵⁷ that it is for the court to flesh out the full implications of the broad objectives set out in the Constitution:⁵⁸

A constitution, to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and could scarcely be embraced by the human mind. It would, probably, never be understood by the public. *Its nature, therefore, requires, that only its great outlines should be marked, its important objects designated, and the minor ingredients which compose those objects, be deduced from the nature of the objects themselves.*⁵⁹ [Emphasis added.]

B. MODERATE ORIGINALISM

It was argued earlier that interpretive approaches based on expressed intent are to be favoured over those relying on unexpressed intent. In other words, when courts seek to discover the intentions of the framers of a constitutional text, they should only follow those intentions that are manifest or ‘expressed’ in the language of the text.⁶⁰ This is, in fact, the way statutory interpretation in general has traditionally been understood, at least since the 19th century. In the *Sussex Peerage case*,⁶¹ Tindal CJ, speaking for the House of Lords, said that the “only rule” for the construction of Acts of Parliament was that “they should be construed according to the intent of the Parliament which passed the Act”.⁶² In particular, if the text was precise and unambiguous, then all that was necessary was to give the words their natural and ordinary sense: “The words themselves alone do, in such case, best declare the

⁵⁷ 17 US 316 (1819), SC (US).

⁵⁸ *Id* at 407 (original emphasis).

⁵⁹ *Id.*

⁶⁰ Above, n 18, and the accompanying text.

⁶¹ (1844) 11 Cl & Fin 85, 8 ER 1034.

⁶² *Id.*, 11 Cl & Fin at 143, 8 ER at 1057.

intention of the lawgiver.”⁶³ To similar effect was Lord Russell of Killowen CJ’s statement in *Attorney-General v Carlton Bank*:⁶⁴ “The duty of the Court is... to give effect to the intention of the Legislature as that intention is to be gathered from the language employed having regard to the context in connection with which it is employed.” Judges and academics who support this interpretive approach are often called ‘moderate originalists’, in the sense that what it involves is said to be a species of originalism that lies between the more extreme approaches considered above, and non-originalism which we will look at later on.⁶⁵

In the High Court of Australia, McHugh J has shown himself to be a strong advocate of moderate originalism.⁶⁶ Setting out his preferred interpretive approach in a number of cases, he regards the search for the makers’ intention as the starting point for a principled interpretation of the Australian Constitution. In line with the traditional approach towards statutory interpretation, the subjective beliefs, hopes, expectations or mental states of those who made, approved or enacted the Constitution are irrelevant. Intention can only be deduced from the words used in the Constitution, in the historical context in which they were used.⁶⁷ Materials beyond the constitutional text may only be consulted to identify the mischief which was sought to be addressed, or whether terms are to be given any specialized meanings.⁶⁸

⁶³ *Id.*

⁶⁴ [1899] 2 QB 158 at 164.

⁶⁵ Jeffrey Goldsworthy, “Originalism in Constitutional Interpretation” (1997) 25 Fed L Rev 1.

⁶⁶ See, generally, B[rad] M Selway, “Methodologies of Constitutional Interpretation in the High Court of Australia” (2003) 14 Pub L Rev 234 at 244–246.

⁶⁷ *Re Wakim, ex parte McNally* (1999) 198 CLR 511 at 551, [40]; *Eastman v R* (2000) 203 CLR 1 at 45–46, [145]–[147].

⁶⁸ *Cheng v R* (2000) 203 CLR 248 at 292 and 294–295, [129] and [140]–[142].

Moderate originalism requires courts to focus on the constitutional text rather than extratextual materials. Apart from certain exceptions that we will look at in the next part, courts are not to forsake the text simply because legislators appear to have held certain ideas about what the text means or how it should be applied that are not borne out by the words they have chosen. A judicial approach that gives the text primacy is advantageous as it prompts Parliament to express itself clearly in legislation, unless it intends to leave issues of policy or application to the courts.⁶⁹ This, in turn, has the beneficial effect of enabling the ordinary meaning of legislative texts to be relied on in many cases.⁷⁰ Statutes would thus be demystified for lay persons, who are their ultimate audience.

In summary it is submitted that legislative intention should primarily be discerned on the basis of what is manifest in the statutory text, and the interpretive approach that exemplifies this expressed intent thesis is moderate originalism. This is not to say that extrinsic materials such as reports of legislative debates and Parliamentary committee proceedings are irrelevant. The interpreter must, though, be cautious as to the use these materials are put. They may be consulted to corroborate the statutory text,⁷¹ and to try and establish what purpose Parliament sought to achieve by enacting the text. But they should not be used to look for indications of what legislators believed the text to mean.

⁶⁹ Kavanagh, “*Pepper v Hart*”, above, n 45 at 102–103, citing John F Manning, “Textualism as a Non-delegation Doctrine” (1997) 97 Colum L Rev 673 at 708.

⁷⁰ Compare s 9A(4)(a) of the Interpretation Act (Cap 1, 2002 Rev Ed) (S’pore), which states: “In determining whether consideration should be given to any material in accordance with subsection (2) [*ie*, material not forming part of the written law], or in determining the weight to be given to any such material, regard shall be had, in addition to any relevant matters, to... the *desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision* taking into account its context in the written law and the purpose or object underlying the written law...” (Emphasis added.)

⁷¹ Dickerson, above, n 8 at 221.

II. THE TEXT THROUGH TIME: FIXED AND DYNAMIC MEANING

We now turn from our discussion of legislative intention and how it is most appropriately discerned to an equally significant issue: do the words and phrases that Parliament has chosen to express its intent have a meaning that is fixed in time, or one that is dynamic? It is often claimed that one consequence of taking a moderately originalist approach to constitutional interpretation is that the text must be given the meaning that it bore at the time it was enacted. This position is supported by an important rationale underlying constitutions and bills of rights – that it is the judiciary’s duty to protect certain unchanging core values against the views of transient legislative majorities.⁷² Jeffrey Goldsworthy also points out that any argument that the present generation should not be ruled by the “dead hand of the past” is specious, for this amounts to an argument against having a constitution, or indeed any law, at all, as the essence of law is that decisions are governed by norms laid down in the past.⁷³

However, the consequence of adhering to meanings dating back to the promulgation of the text can, especially if the text is of an old vintage, be a result that jars with the present-day needs, values and expectations of the people.⁷⁴ It might be said that the solution lies not in the hands of the judiciary but the legislature – that it is for the legislature to amend the text following legally-prescribed procedures if it feels there exists a situation requiring attention. On the other hand, this may not be

⁷² *Re Wakim*, above, n 67 at 549, [35]: “The function of the judiciary, including the function of this Court, is to give effect to the intention of the makers of the Constitution as evinced by the terms in which they expressed that intention. That necessarily means that decisions, taken almost a century ago by people long dead, bind the people of Australia today even in cases where most people agree that those decisions are out of touch with the present needs of Australian society.” McHugh J also quoted Judge Easterbrook to the effect that a written constitution “is designed to be an anchor in the past”: Frank H Easterbrook, “Abstraction and Authority” (1992) U Chi L Rev 349 at 363.

⁷³ Goldsworthy, “Originalism”, above, n 65 at 27.

⁷⁴ Kirk, “Evolutionary Originalism”, above, n 19 at 357.

so easily achieved, for legislators may be reluctant to pursue a politically-unpopular amendment. Requirements for amending the law may also be practically difficult to fulfil. The United States Constitution, for instance, may only be amended if two-thirds majorities of both Houses of Congress or two-thirds of the states' legislatures propose the amendment, which must then be approved by the legislatures of three-quarters of the states.⁷⁵ In Australia, in general a proposed law to alter the Constitution must be passed by an absolute majority of both the Senate and the House of Representatives,⁷⁶ then put to a referendum in all states and territories. For the amendment to become law, a majority of the electors in a majority of the states, as well as a majority of all the electors voting, are required.⁷⁷ It may therefore be argued that courts should adopt a dynamic interpretation of the text rather than one strictly rooted in the past, in order to maintain public confidence in the judiciary and in the constitution or bill of rights. In addition, it is submitted that regardless of how easy or difficult it is in practice for the text to be altered, the courts' important signalling function in their constitutional dialogue with the political branches of government⁷⁸ requires a bold approach. If judges discover deficiencies in the law, they should endeavour to interpret the text in a manner that rectifies the deficiencies rather than wait for Parliament to act.

In contradistinction to originalism, the view that a statutory text's meaning at any time depends on the concepts, values and purposes of that time rather than those

⁷⁵ US Constitution, Art V.

⁷⁶ If either House of Parliament passes a proposed law to amend the Constitution by an absolute majority but the other House rejects or fails to pass it or passes it with any amendment to which the first-mentioned House will not agree, provided certain procedures are followed the Governor-General may submit the proposed law as last proposed by the first-mentioned House to the electors for approval, either with or without any amendments subsequently agreed to by both Houses: Australian Constitution, s 128.

⁷⁷ Australian Constitution, s 128.

⁷⁸ See Chapter Two, Pt III at 94.

of legislators has been termed ‘non-originalism’.⁷⁹ Goldsworthy identifies two versions of non-originalism. The first, which he has called “contemporary intentionalism”,⁸⁰ holds that the text should be interpreted as if it has just come into force. In other words, to determine the meaning of the text, the court asks itself what intentions the legislature most likely had or what purposes were to be served if the statute had been newly enacted.⁸¹ This question resembles one that is asked in a dubious form of originalism we examined earlier: “counterfactual intention” originalism, in which the court considers how the framers of the text would have applied it to a present-day issue.⁸² Contemporary intentionalism therefore suffers, as counterfactual intention originalism does, from the problem of requiring the court to indulge in a difficult exercise in speculation.

Goldsworthy’s second version of non-originalism, termed “contemporary literalism” by him,⁸³ is one that has been most prominently championed in Australia by Justice Michael Kirby of the High Court. The judge has often disagreed with his colleagues on the bench as to how the Australian Constitution should be interpreted, rejecting the view that their role is to give effect to the intention of the Constitution’s makers according to the terms in which they expressed that intention. Instead, he has opined that once the draft of the Constitution had been settled, approved by popular referendum and enacted into law, the text “took upon itself its own existence

⁷⁹ See, *eg.*, Stephen M Griffin, “Theories of Constitutional Interpretation” in *American Constitutionalism: From Theory to Politics* (Princeton, NJ: Princeton University Press, 1996), 140 at 155 (describing debate in the United States as characterizing theories of constitutional interpretation in terms of dichotomy between originalism and non-originalism); Goldsworthy, “Originalism”, above, n 65 at 35.

⁸⁰ Jeffrey Goldsworthy, “Interpreting the Constitution in its Second Century” (2000) 24 *Melb U L Rev* 677 at 687.

⁸¹ *Id* at 37.

⁸² Above, nn 28–45 and the accompanying text.

⁸³ Goldsworthy, “Constitution in its Second Century”, above, n 80 at 687.

and character as a constitutional charter”.⁸⁴ The framers’ intents are relevant but not conclusive,⁸⁵ as the text has been “set free from the ‘intentions’ of its draftsmen” and must be read “by contemporary Australians... with the eyes of their generation expecting it to fulfil (so far as the words and structure permit) the rapidly changing needs of their times”.⁸⁶ Further, the makers of the Constitution did not intend, nor had the power to require, that their wishes and expectations as to the meaning of the text should control its interpretation.⁸⁷

The effect of this approach is that the meaning of the text is only circumscribed by the current literal meaning of the words used, as determined by their dictionary definitions and the rules of English grammar. Otherwise, it is up to judges to decide how best to interpret the text in the public interest.⁸⁸ To Goldsworthy, this is objectionable as it subverts constitutional amendment procedures and accords too much discretion to judges.⁸⁹ Moreover, it leads to uncertainty in judicial interpretation because reference to what the framers of the text intended by the words they used is often necessary to resolve difficulties created by ambiguity or inconsistency in the text. If the framers’ intentions are disregarded, judges are given excessive leeway in ascribing meaning to the text.⁹⁰

These criticisms levied against contemporary literalism are justified to the extent that they highlight the dangers of untethering the meaning of the text from the

⁸⁴ *Re Wakim*, above, n 3 at 599–600, [186] *per* Kirby J (dissenting).

⁸⁵ *Singh v Commonwealth* [2004] HCA 43 at [248].

⁸⁶ *Re Colina, ex parte Torney* (1999) 200 CLR 386 at 423, [96]. See also *Eastman*, above, n 67 at 80, [242].

⁸⁷ *Re Wakim*, above, n 3 at 600, [186]. See also *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 429 at 522–523, [111]–[112]; Michael Kirby, “Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?” (2000) 24 *Melb U L Rev* 1.

⁸⁸ Goldsworthy, “Originalism”, above, n 65 at 36 and 38.

⁸⁹ *Id* at 38–39.

⁹⁰ Goldsworthy, “Originalism”, *id*; Goldsworthy, “Constitution in its Second Century”, above, n 80 at 688.

legislative intent. Kirby J takes the view that the Constitution's framers had neither intention nor power to insist that what they hoped to achieve through the language they used should be adhered to by the courts. With respect, it is submitted there is no good reason to suppose that when constitutions and bills of rights are interpreted, the normal goal of statutory interpretation – determining Parliament's intention – is to be abandoned entirely. After all, such texts are embodied in written law.

Kirby J has also overstated his case. It is common in Westminster-style constitutions to find that the legislature has used words and phrases embodying concepts at high levels of abstraction. For instance, Article 12(1) of the Singapore Constitution provides that “[a]ll persons are equal before the law and entitled to the equal protection of the law”, and section 7 of the Canadian Charter of Rights and Freedoms states: “Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice.” It is submitted that where the text contains reference to such abstract moral concepts, it should be inferred that Parliament's intention was for the courts to exercise their discretion in giving meaning to these concepts to the best of their ability when applying the concepts to factual situations before them.⁹¹ It is thus unnecessary to take the extreme position that Parliament's intentions towards the text are to be ignored altogether. In the High Court of Australia, McHugh J has stated that the inference is consistent with the idea that since a constitution is intended to provide for the future governance of a nation in the face of new and unforeseen circumstances,⁹² it should generally be given a broad interpretation.⁹³ Under this

⁹¹ *Re Wakim*, above, n 67 at 552, [43]–[44]; *Eastman*, above, n 67 at 50, [154].

⁹² *Re Wakim*, *id* at 550, [39] (citing *McCulloch v Maryland*, above, n 57); *Eastman*, *id* at 43, [136] (citing *Victoria v The Commonwealth* (1971) 122 CLR 353 at 396–397); and 50, [154].

view of Parliamentary intention, the term ‘non-originalism’ is a misnomer, since the judiciary is acting in accordance with the intent manifested in the constitutional text.⁹⁴

Opposed to what he sees as judicial usurpation of the legislature’s role, Goldsworthy proposes that there should at least be a “strong presumption” against interpretations of constitutional concepts that are relative – that change over time. He says this presumption ought to be rebuttable only by clear evidence that the founders had a contrary intention, since the rationale for entrenching basic norms in a constitution is to ensure that their implementation does not vary according to changing values.⁹⁵ However, Goldsworthy writes in the context of the Australian Constitution which, he notes, “contains few abstract moral principles” and “is concerned almost entirely with structures and procedures, rather than with substantive principles”.⁹⁶ It is arguable, therefore, that this presumption is not applicable, or at least not rebutted, when constitutional concepts are expressed in general, expansive terms, and there is no indication in the text of how the concepts were intended to be applied to specific situations. In this scenario, it should be acknowledged that Parliament has left the elucidation of these concepts to the good judgment of the courts. An oft-cited metaphor is one employed by the Privy Council on appeal from Canada in *Edwards v R*⁹⁷ that likens a constitution to “a living tree capable of growth and expansion within its natural limits”, which justifies its

⁹³ *Eastman*, *id* at 42–43, [135].

⁹⁴ See also Robert J Sharpe & Kent Roach, *The Charter of Rights and Freedoms* (3rd ed) (Toronto: Irwin Law, 2005) at 52: “Even if there were concrete evidence to help in determining the original understanding of the right, it would be wrong to fasten on to that meaning without question, for the original drafters themselves in all likelihood considered this to be an inappropriate method of interpretation.”

⁹⁵ Goldsworthy, “Originalism”, above, n 65 at 43.

⁹⁶ *Id* at 22.

⁹⁷ [1930] AC 124.

provisions being given a “large and liberal interpretation”.⁹⁸ This reasoning was affirmed by the Canadian Supreme Court in *Reference re s 94(2) of the Motor Vehicle Act (British Columbia)*, which held that it is undesirable to freeze the meaning of the Charter of Rights and Freedoms at a particular time “with little or no possibility of growth, development and adjustment to changing societal needs”.⁹⁹

Issue must be taken with the view that the courts trespass into Parliament’s domain when they interpret constitutional texts dynamically. We need to recognize that the judiciary has a substantive and not merely a subordinate role to play in statutory interpretation. It is not simply the “faithful agent” of the legislature, limited to carrying out the latter’s bidding according to laws that have been passed. Rather, it is a “co-equal partner” with the legislature in establishing and developing the meaning of legislative texts.¹⁰⁰ This is because legislative intent should be understood as a construct – the judiciary’s abstract conception of an intent that is reasonable to attribute to Parliament based on the text,¹⁰¹ taking into account relevant matters such as the purpose sought to be achieved by statute and applicable rules of interpretation and canons of statutory construction. Perhaps that is the sense in which the words of Chief Justice Edward Coke in the 17th-century English decision

⁹⁸ *Id* at 136–137.

⁹⁹ *Reference re s 94(2) of the Motor Vehicle Act (British Columbia)*, above, n 31 at 509, [60].

¹⁰⁰ Jonathan T Molot, “The Rise and Fall of Textualism” (2006) 106 *Colum L Rev* 1 at 7–23 (describing the tussle in the US from the 18th to 20th centuries between judges being viewed as “faithful agents” and “coequal partners” of Congress).

¹⁰¹ Allan, “Legislative Supremacy”, above, n 44 at 710. See also T R S Allan, “Legislative Supremacy and Legislative Intent: A Reply to Professor Craig” (2004) 24 *OJLS* 563 at 568: “A constructive intent is attributed to the legislature on the basis of the text enacted, interpreted so far as possible in the light of our settled principles of fairness or procedural legality, embodied or summarized in common law doctrine. ... A constructive interpretation makes no claims to reflect the actual wishes or expectations of anyone, as regards the statute’s application to any particular case; but insofar as it respects the statute’s text, purpose (or apparent purpose), and overall regulatory scheme, it embodies the pertinent legislative ‘intention’, properly – coherently – understood.” In similar terms, Stephen Guest speaks of interpretation as a “joint venture between an author (which may be a group) and an interpreter”, and sees it as akin to “‘finishing off’ a work of literature or music by someone other than the composer”: Guest, above, n 6 at 133 and 146.

Dr Bonham's Case – “[W]hen an Act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the Common Law will controul it and adjudge such Act to be void”¹⁰² – should be understood. Put another way, the court strives to avoid attributing an unreasonable legislative intent to an Act.¹⁰³ Since what is relevant is the terms in which legislators have expressed themselves and not their subjective intentions, the present generation of judges may see that provisions of the text have meanings that escaped the legislators’ actual understandings or intentions.¹⁰⁴ In *R v Secretary of State for the Environment, ex parte Spath Holme Ltd*,¹⁰⁵ Lord Nicholls of Birkenhead said:

The task of the court is often said to be to ascertain the intention of Parliament expressed in the language under consideration. This is correct and may be helpful, so long as it is remembered that the “intention of Parliament” is an objective concept, not subjective. *The phrase is a shorthand reference to the intention which the court reasonably imputes to Parliament in respect of the language used.* It is not the subjective intention of the minister or other persons who promoted the legislation. Nor is it the subjective intention of the draftsman, or of individual members or even of a majority of individual members of either House.¹⁰⁶ [Emphasis added.]

This notion of the relationship between the legislature and the judiciary is consistent with what was described in Chapter Two. There, it was argued that in the context of a Westminster-style written constitution, all three branches of government have an equal and independent duty to interpret the constitutional text, including the bill of rights contained in it or otherwise having the status of basic law, when fulfilling their constitutional functions. It was further submitted that the relationship between the political and judicial branches of government is best seen as a dialogue,

¹⁰² (1610) 8 Co Rep 113b at 118a, 77 ER 646 at 652, Ct of Common Pleas.

¹⁰³ Compare Allan, “Interpretation, Meaning, and Authority”, above, n 101 at 709, n 71, commenting on *Dr Bonham's Case* thus: “It could be safely assumed that the authors of statutes made ‘against law and right’ would not truly intend their apparent consequences.”

¹⁰⁴ *Eastman*, above, n 67 at 46, [147].

¹⁰⁵ [2001] 2 AC 349, HL.

¹⁰⁶ *Id* at 395.

in which the branches act collaboratively to develop the meaning of the bill of rights. Therefore, when judges use their discretion to develop the meaning of constitutional provisions, they are not acting extravagantly but carrying out their constitutional role.

We should not reach the conclusion that all words and phrases in a constitutional text require dynamic interpretations. In the first instance, it is for a judge to consider whether or not a word in question connotes an abstract moral concept. If it does not, all that may be needed is to give the word its natural or ordinary meaning, bearing in mind that the constitutional text may also contain by necessary implication all matters that are necessary to the existence and understanding of its provisions.¹⁰⁷ Where a term is ambiguous – that is, it has more than one reasonable meaning – it may be necessary to have regard to the purpose that the text was intended to achieve, to the extent that a strained meaning can be given to the term if a literal reading of it does not give effect to the relevant purpose.¹⁰⁸ The taking of a purposive approach in the context of a constitutional text, as well as the use of dynamic interpretation, will be discussed further in Chapter Five.

To sum up, it is submitted that approaching the interpretation of a constitutional text correctly does not involve choosing between moderate originalism and non-originalism. Depending on the nature of the language used in the statute, it may be appropriate in some cases to understand the text at the time it was enacted, and in other cases for greater discretion to be exercised by the court in giving meaning to the statute.

¹⁰⁷ *Eastman*, *id* at 48, [150]. See also Bennion, who agrees that “the finding of proper implications within the express words of an enactment is a legitimate, indeed necessary, function of the interpreter”: Bennion, *Statutory Interpretation*, above, n 2 at 384, s 173.

¹⁰⁸ *Cheng*, above, n 68 at 291, [126], citing, *inter alia*, *Sutherland Publishing Co Ltd v Caxton Publishing Co Ltd* [1938] Ch 174 at 201.

CONCLUSION

The primary goal of statutory interpretation is correctly seen as the establishment of the legislative intention underlying the statute. Notwithstanding contemporary views from some quarters, it is submitted that legislative intention is not an illusory concept. However, it is not to be regarded as some sort of aggregation of the actual intents of individual legislators, nor the acquiescence by these persons of the intent of the promoter of a bill. Rather, it is best seen as the legislators' adoption of the intent manifested in the text of the bill, and subsequently of the statute when it is enacted. Holding that the intention of Parliament is embodied in the statutory text implies that interpretive approaches relying on an 'unexpressed intent' thesis – namely, that it is necessary to discern what legislators actually understood the statute to mean – are to be rejected. These include the actual intention and counterfactual intention types of originalism, and original meaning originalism insofar as the doctrine requires traditional practices existing when the bill of rights came into force to be immune from challenge. (We will see in Chapter Five that a version of original meaning originalism without this requirement is consistent with moderate originalism.)¹⁰⁹ The unexpressed intent thesis suffers from various problems, including the potential ambivalent nature of extrinsic material and the possibility that legislators' intentions that are not supported by a Parliamentary majority may be read into the constitutional text. Of greater importance, though, is the fact that the unexpressed intent thesis subverts the constitutional principle that Parliament can only express its will through the enactment of legislation.

¹⁰⁹ Chapter Five, Pt II.A.2.

Moderate originalism, on the other hand, is based on an ‘expressed intent’ thesis. It also has advantages over the other forms of originalism, principal among which is its emphasis on discerning legislative intent from the statute. This obviates the need to speculate about what the framers of the text may or may not have actually intended to achieve, and hence minimizes this facet of uncertainty.¹¹⁰ Further, this interpretive approach encourages clarity in legislation.

Moderate originalism’s reliance on an expressed intent thesis is often claimed to require the text to be interpreted as at the time it was enacted. On the other hand, interpreting the text dynamically, with reference to present-day attitudes and values, has been criticized as a judicial usurpation of the legislative role. This is disputable, for the judiciary plays a substantive and not a subordinate role in statutory interpretation. Legal meaning is constructed, not discovered, and both the legislature and the judiciary have something to bring to the table in this process. Whether a fixed or dynamic interpretation should be given to the statutory language depends on whether the words and phrases used connote abstract moral principles. Moderate originalism appreciates that the use of expansive language is a signal by the framers to successive generations of judges that the text should be interpreted flexibly with regard to contemporary situations and values.¹¹¹

¹¹⁰ Goldsworthy, “Originalism”, above, n 65 at 20.

¹¹¹ *Id* at 20–21.

CHAPTER FIVE

Fidelity to Origins: Text, Context and Application in Constitutional Interpretation

[T]he intolerable wrestle / With words and meanings.¹

— T S ELIOT (1888–1965)

I entirely concur in the propriety of resorting to the sense in which the Constitution was accepted and ratified by the nation. In that sense alone it is the legitimate Constitution. And if that be not the guide in expounding it, there can be no security for a consistent and stable, more than for a faithful, exercise of its powers. If the meaning of the text be sought in the changeable meaning of the words composing it, it is evident that the shape and attributes of the Government must partake of the changes to which the words and phrases of all living languages are constantly subject. What a metamorphosis would be produced in the code of law if all its ancient phraseology were to be taken in its modern sense.²

— JAMES MADISON (1751–1836)

I.	LEGISLATIVE INTENTION AND THE MEANING OF <i>MEANING</i>	194
II.	DETERMINING MEANING	199
A.	LINGUISTIC MEANING	200
1.	Semantic Meaning: The Natural and Ordinary Meaning of Terms	200
2.	Pragmatic Meaning	204
(1)	Text and Context	206
(a)	The Paucity of Literalism	206
(b)	Purposive Meaning	211
(2)	Terms of Art	221
(3)	Implications and Stipulations	226
B.	APPLICATIVE MEANING	226
III.	MEANING – FIXED OR CHANGING?	227
A.	SEMANTIC OPPORTUNISM	229
B.	THE CONNOTATION–DENOTATION DISTINCTION	231
1.	Connotation and Clause Meaning	232

¹ T[homas] S[tearns] Elliot, *East Coker* (London: Faber and Faber, 1940), Pt II, republished in *Four Quartets* (New York, NY: Harcourt, Brace and Co, 1943).

² Letter from James Madison to Henry Lee (25 June 1824), reprinted in Gaillard Hunt (ed), *The Writings of James Madison* (New York: Knickerbocker Press, 1910), vol 9 at 191–192, and cited in Randy E Barnett, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, NJ: Princeton University Press, 2004) at 99.

2. Denotation and Applicative Meaning	235
3. Applying a Connotation–Denotation Analysis	240
(1) Establishing Connotation	240
(2) Determining Denotation	248
CONCLUSION	254

IN THE LAST CHAPTER, it was submitted that approaches to interpreting constitutions and bills of rights that are based on the expressed intent thesis are to be preferred over those based on unexpressed intent. Put another way, since the framers of a constitution or bill of rights have expressed their intent through a legally-binding text, a court’s emphasis should be on determining the meaning of the text rather than conjecturing about what the framers actually believed it to mean. For this reason, various forms of originalism were considered and rejected, and moderate originalism suggested to be the most appropriate interpretive approach. Moderate originalism establishes the text as the primary source for determining Parliamentary intention; it is thus a textualist approach to interpretation. Nonetheless, it gives due recognition to the need for dynamic interpretation where the textual language is open-ended. Indeed, the difficulties faced by judges are clearest when they are confronted with language in bills of rights that express broad concepts. What, for instance, constitutes “inhuman or degrading treatment or punishment”?³ Does the right to “life, liberty and security of the person”⁴ require the state to recognize that a terminally-ill individual has a right to have someone assist him to end his life?

The aim of this Chapter and the next is to set out a suggested approach that judges should take in establishing the meaning of a constitutional or bill of rights provision, and how that provision applies to a particular factual matrix. The

³ European Convention on Human Rights, art 3.

⁴ Canadian Charter of Rights and Freedoms, s 7.

arrangement of the chapters takes its lead from an analysis of constitutional meaning by Lawrence Solum. In an article entitled “Semantic Originalism”,⁵ Solum expresses the view that, among other things, constitutional law includes rules with content fixed by the conventional semantic meaning of the words and phrases used in context. The semantic meaning of a constitutional text is fixed at the time of its adoption (the ‘fixation thesis’), and the semantic meaning of the text is the ordinary and conventional public meaning that it would have had to its intended audience when it came into force as law (the ‘clause meaning thesis’).⁶ He uses the term *constitutional interpretation* to describe what happens when a court identifies the semantic content of the text.⁷ Further – and, it is submitted, crucially – Solum distinguishes the semantic content of the text from its legal content. Rules of constitutional law are derived by the court through a process of *constitutional construction*,⁸ which requires judges to transform the semantic meaning of the text into legal rules.⁹ However, semantic content does not fully determine the content of constitutional law, but merely contributes towards it (the ‘contribution thesis’).¹⁰ At this point, other legal criteria may come into play.

⁵ Lawrence B Solum, “Semantic Originalism” (Illinois Public Law and Legal Theory Research Papers Series No 07-24, 22 November 2008) <<http://papers.ssrn.com/abstract=1120244>> (accessed 27 August 2009).

⁶ Solum, *id* at 2.

⁷ *Id* at 68.

⁸ *Id*.

⁹ In another article, Solum notes that the use of the interpretation–construction distinction “is rooted in the common law and traditional legal scholarship, most prominently in contract law. William Leiber employed the distinction in 1837. Corbin relied on the interpretation–construction distinction in his influential 1919 article [Arthur L Corbin, “Conditions in the Law of Contract” (1919) 28 Yale LJ 739], ... and Williston [Samuel Williston & George J Thompson, *A Treatise on the Law of Contracts* (Rev ed) (New York, NY: Baker Voorhis & Co, 1936–1938)] adopted a similar distinction”: Lawrence B Solum, “A Reader’s Guide to Semantic Originalism and a Reply to Professor Griffin” (Illinois Public Law and Legal Theory Research Papers Series No 08-12, 19 June 2008) <<http://papers.ssrn.com/abstract=1130665>> (accessed 24 November 2009) at 15–16.

¹⁰ Solum, “Semantic Originalism”, above, n 5 at 6.

This Chapter proposes how the ‘meaning’ of a certain term or provision should be understood, and how this meaning should be determined. To this end, it examines Solum’s fixation and clause meaning theses, and relates it to the concepts of legislative intention and taking a purposive approach to interpretation. Chapter Six then goes on to look at Solum’s contribution thesis, and considers legal criteria that judges should apply in constructing legal rules in the light of the meaning of the text.¹¹

I. LEGISLATIVE INTENTION AND THE MEANING OF *MEANING*

When a legal dispute that raises constitutional issues is brought before a court, the judge’s task is to determine the bearing, if any, that the constitutional text has on the resolution of the dispute. In doing so, the judge must determine what the constitutional text means. Some competent rule-making body – the members of which we may call the framers of the constitution – drafted the text or had it drafted at its behest, then gave it the force of law by formally adopting it. This body may take diverse forms in different jurisdictions; for instance, it may be a legislature, or a constituent assembly specifically assembled to craft a constitution and bring it into being. For convenience, this chapter will refer to the body as a legislature. Establishing the legislature’s intent as regards the meaning of the text is thus universally regarded as the objective of interpreting the text. Francis Bennion states: “An enactment has the legal meaning taken to be intended by the legislator. In other

¹¹ For reasons of space and on the assumption that the point is relatively uncontroversial, this thesis does not examine Solum’s ‘fidelity thesis’, which holds that since the semantic content of a constitutional text is part of the supreme law of the land, courts are obligated to give effect to it unless there is an overriding moral reason to the contrary: *id* at 8.

words, the legal meaning corresponds to the legislative intention.”¹² It is to be noted that the terms *legislative intention* and *meaning* (including *legal meaning*) require further unpacking to determine their implications.

Despite the fact that legislators have a multitude of distinct intents, we concluded in the previous chapter that one can sensibly speak of the legislature as a whole possessing intent. Reed Dickerson identifies two forms of legislative intent. Actual or subjective intent is the intent that a legislator possesses to enact the text of a statute as he understands it, and this is coupled with an assumption that the typical audience of the statute shares his understanding.¹³ On the other hand, manifest intent is intent that is objectively manifested by the language of the statutory text.¹⁴ While Dickerson prefers to confine the meaning of the term *legislative intent* to actual or subjective intent,¹⁵ to avoid confusion the term *actual intent* will be used to describe this sort of intent. While one might have the impression that what a text means ought to reflect the actual intentions of individual legislators, it was submitted in Chapter Four that the only meaningful way of aggregating these discrete intentions into a single intention of the entire legislature towards the text is to understand it as the legislators’ adoption of the intention manifested in the text of the bill that is subsequently reflected in the statutory text.¹⁶ What is more, the manifest intent of the text may differ from the actual intent.¹⁷ Parliament may, for instance, happen to choose words which do not fully express what it intends to do, or it may not have foreseen that the words can be comprehended in different ways.

¹² F[rancis] A[lan] R[oscoe] Bennion, *Statutory Interpretation: A Code* (5th ed) (London: LexisNexis, 2008) at 469, s 163.

¹³ Reed Dickerson, “Statutory Interpretation: A Peek into the Mind and Will of the Legislature” (1975) 50 Ind LJ 206 at 209.

¹⁴ *Id* at 208.

¹⁵ *Id* at 210.

¹⁶ Chapter Four, Pt I.A.1 at 165–166.

¹⁷ Dickerson, above, n 13 at 218.

Nonetheless, because it is impossible for judges to read the minds of legislators, they cannot but construe a statute as if its manifest intent is the same as the legislators' actual intent.¹⁸ The foregoing reflects the essence of the expressed intent thesis – that discernment of legislative intention should be based primarily on what is evident in the statutory text.

The identification of legislative intention as the manifest intent of the text, and the drawing of the connection between manifest intent and the 'meaning' of the text, are only the first steps of the journey. A key question requiring consideration is: what are the matters that the legislature has an intent towards? The word *meaning* can be understood in different ways. Solum points out that when one speaks about the meaning of a constitutional provision, for example, one could be referring to the factual scenarios that the provision may apply to. For instance, it may be asserted that the right to equal protection of the law *means* – or implies – that an armed forces policy prohibiting women from being employed in combat capacities is unconstitutional.¹⁹ The 'meaning' of a provision could also be a reference to its function or purpose. One could thus talk about the right to equal protection *meaning* the equal treatment of persons to preserve human dignity and promote justice in society.²⁰

Finally, *meaning* can refer to the linguistic or semantic sense of a term or provision.²¹ Strictly speaking, Solum is referring to what linguists would regard as embodied by *semantics* and *pragmatics*, and not semantics alone.²² Semantics concerns the literal meaning of words and the meaning of the way they are

¹⁸ *Id.*

¹⁹ Solum refers to this as the 'applicative sense' of meaning: Solum, above, n 19 at 2.

²⁰ Referred to by Solum as the 'teleological sense' of meaning: *id* at 2–3.

²¹ *Id* at 2.

²² *Id* at 33: "When we seek the meaning of a legal text, characteristically the issues are semantic and pragmatic."

combined,²³ while pragmatics is a study of the additional information taken from the context which is required to understand what a speaker meant in uttering a particular expression.²⁴ The distinction is well illustrated by a famous example formulated by the philosopher Paul Grice, who developed a theory of inferences that hearers draw upon when trying to understand utterances. Suppose A is writing a testimonial for a pupil, X, who is applying for a philosophy teaching position. A writes: “Dear Sir, Mr X’s command of English is excellent, and his attendance at tutorials has been regular. Yours, *etc*”. Semantically, the letter is unambiguous: it asserts that X is fluent in reading and writing in the English language, and that he has not missed any significant number of classes conducted by A. On the other hand, when consideration is given to pragmatics, it is clear that the testimonial in fact speaks negatively about A. In the context, the recipient of the letter would have expected A to comment about matters such as X’s knowledge of philosophy and ability to communicate this effectively to others. The failure to do so sends a tacit but obvious message to the reader that A does not think much about X’s abilities as a philosopher.²⁵ The point to note, which we will consider in more detail below, is that determining the linguistic sense of a term or provision of a law requires consideration of its context. To avoid misconceptions, we will use the terms *semantic meaning* and *pragmatic meaning*, and when referring to these meanings together, the term *linguistic meaning*.²⁶

According to Dickerson, in general legal usage the word *intent* is used to signify the immediate purpose that a statute is supposed to “directly express and

²³ Kate Kearns, *Semantics* (Basingstoke, Hampshire: Macmillan Press, 2000) at 1.

²⁴ *Id* at 254.

²⁵ *Id* at 254 and 256.

²⁶ Bennion refers to this as *grammatical meaning*, defining it as “the meaning it bears when, as a piece of English prose, it is construed according to the rules and usages of grammar, syntax and punctuation, and the accepted linguistic canons of construction”: above, n 12 at 443, s 151.

immediately accomplish”, while *purpose* refers to an “ulterior purpose” that the legislature wishes the statute to accomplish or help to accomplish.²⁷ However, when we speak of the intent of individual legislators and of Parliament as a whole, the intrinsic sense of the concept of intention is ambiguous. Its meaning is more a matter of definition than anything else. Therefore, it might be given the sense that Dickerson ascribes to it, which assigns to the concept of intent the legislature’s immediate purpose. However, it is submitted it is more natural and in keeping with the literal meaning of the word *intention* to regard the text of a constitution as manifesting its framers’ intent with respect to linguistic and applicative meaning. As regards linguistic meaning, there is an intent as to the semantic meaning of the words used, and the purposes that the provisions of the constitution were to achieve. Were it not so, it would be difficult to see why the framers bothered to bring the constitutional text into existence as law at all. It would be as if the legislature had said, “Here’s the constitution, but we didn’t enact it for any particular reason, and you can interpret the words we used any way you wish to.” It seems likely that the framers generally also possess an *actual* intent as to the factual scenarios that the text was intended to deal with. As a matter of common sense it would be highly artificial to hold, for example, that the framers had no intent at all as to the potential applications of the text, and yet possessed intentions concerning the sense of the text and the mischief that it was enacted to address. However, an applicative intent of this nature may not be manifested clearly in the text, especially if the framers have chosen to express themselves in vague terms.²⁸ When enacting a constitutional provision stating that all persons are “equal before the law and entitled to the equal protection of the

²⁷ Dickerson, above, n 13 at 224–225. The legislature’s specific purpose is “coextensive with the legislative intent to effectuate the specific purpose”: *id* at 224.

²⁸ As regards vagueness, see Pt II.A.2(1) below.

law”,²⁹ legislators may have, say, intended to target unwarranted forms of discrimination against disabled persons. However, if they elected not to specifically mandate the equal protection of disabled persons under the law in the text, it may not be possible for a court to discern such a legislative intent from the constitution.

In a nutshell, the opinion proffered in this Part is that when a court seeks to establish the meaning of a constitutional provision by identifying the framers’ intention, it should not be trying to discover what the framers *actually* intended as this intention may not ultimately have been expressed in the text. Instead, the goal must be an intention *manifest* in the text. There is a legislative intention concerning three types of meaning – linguistic, purposive and applicative – and these are all relevant to the court’s task.

II. DETERMINING MEANING

We now move on to consider how the different types of meaning of terms in a constitutional or bill of rights text should be established by courts. Linguistic meaning has what are termed semantic and pragmatic aspects. These are technical concepts developed by language scholars, and doubtless we are not using them here with their precision. Nonetheless, the concepts, despite being understood in an elementary and simplified manner, are helpful in shaping our thoughts about constitutional meaning. For these purposes, we can broadly understand the semantic meaning of a term to mean its grammatical or literal meaning (that is, the meaning obtained from matters such as the term’s dictionary meaning, and the grammar and

²⁹ Constitution of the Republic of Singapore (1999 Reprint), Art. 12(1). *Cf* the Canadian Charter of Rights and Freedoms (Constitution Act 1982 (Can), Pt I), s 15(1) (“Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination...”); South African Constitution 1996, s 9(1) (“Everyone is equal before the law and has the right to equal protection and benefit of the law”); US Constitution, 14th Amdt (“nor shall any State... deny to any person within its jurisdiction the equal protection of the laws”).

punctuation of the sentence and provision that it appears in). Pragmatics refers to contextual aspects of meaning, and I submit that this encompasses purposive meaning. Finally, we will look at how applicative meaning can be discerned.

A. LINGUISTIC MEANING

1. *Semantic Meaning: The Natural and Ordinary Meaning of Terms*

The semantic meaning of a text is its literal meaning without any consideration of the context in which it is uttered. Although it is insufficient to interpret a text purely with regards to its semantic meaning alone, establishing this meaning is nonetheless an essential step in the interpretive enterprise. Where no special meaning has been conferred on a term by prior judicial decisions,³⁰ the general rule is that it should be given what is generally called its natural and ordinary meaning,³¹ that is, it should be ascribed the meaning that a literate layperson would have given to it at the time the text was enacted into law. Francis Bennion, for instance, takes the view that “the standard must be at least that of the ordinary person of good education”³² and cites *Benson (Inspector of Taxes) v Yard Arm Club Ltd*³³ with approval, where it was said

³⁰ As to this, see Part III.A below.

³¹ See, for instance, *Attorney-General v Winstanley* (1831) 2 Dow & Cl 302 at 310, 6 ER 740 at 744, HL (“when we look at the words of an Act of Parliament, which are not applied to any particular science or art, we are to construe them as they are understood in common language”); *Becke v Smith* (1836) 2 M & W 191 at 195, 150 ER 724 at 726, (“It is a very useful rule, in the construction of a statute, to adhere to the ordinary meaning of the words used”); *Grey v Pearson* (1857) 6 HL Cas 61 at 106, 10 ER 1216 at 1234, QB (“in construing... statutes..., the grammatical and ordinary sense of the words is to be adhered to”); *Selvey v DPP* [1970] AC 304 at 339, HL (“The words of the statute must be given their ordinary natural meaning”); *Exxon Corporation v Exxon Insurance Consultants International Ltd* [1981] 1 WLR 624 at 633, Ch D (“On general principles of construction, the words must be treated as having their ordinary English meaning as applied to the subject matter with which they are dealing”); Bennion, above, n 12 at 1182, s 363. See also *Trustees of the Kheng Chiu Tin Hou Kong and Burial Ground v Collector of Land Revenue* [1992] 1 SLR(R) 117 at 124, [16], CA (S’pore) (“If [] the words of the statute are in themselves precise and unambiguous the court must give effect to them according to their natural and ordinary meaning”), citing Peter Benson Maxwell & G[eorge] F[rederick] L[eslie] Bridgman, *Maxwell on the Interpretation of Statutes* (7th ed) (London: Sweet & Maxwell, 1929) at 1–3.

³² Bennion, *id* at 1184, s 363.

³³ [1979] 1 WLR 347, CA.

that a term which not a term of art must be interpreted by a court “as a man who speaks English and understands English accurately but not pedantically”.³⁴

In *Football Association Premier League Ltd v Panini UK Ltd*,³⁵ the court held that in considering whether the inclusion of copyrighted material in an artistic work was “incidental”,³⁶ the question was not answered by, among other things, rushing to dictionaries, searching the Internet for substitute words and expressions, using a non-statutory checklist of possible indicators, looking at earlier legislation or Hansard reports of parliamentary debates preceding the enactment of the legislation in question, or working through a range of hypothetical situations. As *incidental* was an ordinary descriptive English word it was unnecessary for the courts to define it, and “[t]he range of circumstances in which the word ‘incidental’ is commonly used to describe a state of affairs is sufficiently clear to enable the courts to apply it to the ascertainable objective context of the particular infringing act in question”.³⁷ This case suggests that where a statutory term is commonplace and familiar, the court may feel able to determine its linguistic meaning without resorting to extrinsic materials. But it is submitted the decision should not be read as preventing a court faced with less straightforward terms from consulting a broad range of written materials contemporary to the text, including legislation, legislative debates and committee reports, books, dictionaries and newspapers, to establish how the term was ordinarily understood at the time.

Where a term has already been the subject of prior definition in a relevant context by a court, that definition will usually be applied in preference to a dictionary

³⁴ *Id* at 351.

³⁵ [2004] 1 WLR 1147, CA.

³⁶ Copyright, Designs and Patents Act 1988 (c 48) (UK), s 31(1).

³⁷ *Football Association*, above, n 35 at 1158–1159, [39].

definition.³⁸ Otherwise, it is submitted that the senses of the term stated in dictionaries published contemporaneously³⁹ are of especial relevance. “I am quite aware,” said Lord Coleridge CJ in *R v Peters*,⁴⁰ “that dictionaries are not to be taken as authoritative exponents of the meanings of words used in Acts of Parliament, but it is a well-known rule of courts of law that words should be taken to be used in their ordinary sense, and we are therefore sent for instruction to these books.”⁴¹ Comprehensive dictionaries usually attempt to capture all the known linguistic meanings of terms. Though it may be difficult to know what the intended sense is until the context of the provision in which the term appears and the statute as a whole is considered, the dictionary senses of the term at least establish the boundaries of its linguistic meaning. Thus, they act as a limitation on judicial discretion, constraining the court from giving the term a meaning it cannot linguistically bear.

It is to be borne in mind that terms should ultimately be given the meanings that they are understood to have by reasonable persons. These meanings can sometimes trump more precise, ‘technical’ definitions provided by dictionaries.⁴² In

³⁸ *Midland Railway Co v Robinson* (1889) LR 15 App Cas 19 at 34, HL; see also *Kerr v Kennedy* [1942] 1 KB 409 at 413 (“In the absence of any judicial guidance or authority... dictionaries can be consulted”), both cited in Bennion, above, n 12 at 1223, s 376.

³⁹ *Hardwick Game Farm v Suffolk Agricultural and Poultry Producers Association Ltd* [1966] 1 WLR 287 at 324, CA (“I do not think that the ordinary educated Englishman would call pheasants ‘poultry.’ If he consulted the Oxford Dictionary, as it is permissible for the court to do, he would find this view confirmed by the express exclusion of pheasants from the term. Only if he consulted the 1961 edition of an American dictionary [Webster’s] which in view of its date and provenance is inadmissible to construe a United Kingdom Act of Parliament of 1926 would he find any support for the view that pheasants were included in the word ‘poultry.’”); *R v Bouch* [1983] QB 246 at 252, CA. See Bennion, *id.*

⁴⁰ (1886) LR 16 QBD 636, cited in Bennion, *id.* at 1222, s 376.

⁴¹ *Id.* at 641. Examples of Singapore cases in which dictionary definitions of terms were considered include *Dow Jones Publishing Co (Asia) Inc v Attorney-General* [1989] 1 SLR(R) 637, CA; *Ong Jane Rebecca v Lim Lie Hoa* [2008] 3 SLR(R) 189, HC; and *Pan-United Marine Ltd v Chief Assessor* [2008] 3 SLR(R) 569, CA.

⁴² *Forward Food Management Pte Ltd v Public Prosecutor* [2002] 1 SLR(R) 443 at 453–454, [29], HC (Singapore).

Black-Clawson International v Papierwerke Waldhof-Aschaffenburg AG,⁴³ Lord

Diplock noted:

The acceptance of the rule of law as a constitutional principle requires that a citizen, before committing himself to any course of action, should be able to know in advance what are the legal consequences that will flow from it. Where those consequences are regulated by a statute the source of that knowledge is what the statute says. *In construing it the court must give effect to what the words of the statute would be reasonably understood to mean by those whose conduct it regulates.* That any or all of the individual members of the two Houses of Parliament that passed it may have thought the words bore a different meaning cannot affect the matter. Parliament, under our constitution, is sovereign only in respect of what it expresses by the words used in the legislation it has passed.⁴⁴ [Emphasis added.]

In this passage, his Lordship referred to another important point: the weight that should be accorded to Parliament's views as to the meaning of statutory terms. The Canadian case *Reference re Section 94(2) of the Motor Vehicle Act, RSBC 1979, c 288*⁴⁵ sounds a similar salutary note of caution. The constitutional issue raised by this case was whether an absolute liability offence for which imprisonment could be imposed offended principles of fundamental justice and violated the right to liberty under section 7 of the Charter of Rights and Freedoms.⁴⁶ The government sought to rely on the testimony of federal civil servants from the Department of Justice and the federal Minister of Justice given during proceedings of the Special Joint Committee of the Senate and House of Commons on the Constitution, which preceded the enactment of the Charter. The testimony indicated that, in the government's eyes, the term "fundamental justice" in section 7 meant no more than procedural due process.⁴⁷ The Supreme Court, while finding such evidence to be admissible,⁴⁸ held

⁴³ [1975] AC 591, HL.

⁴⁴ *Id* at 638, cited in *Forward Food Management*, above, n 42 at 453–454, [29].

⁴⁵ [1985] 2 SCR 486, SC (Can).

⁴⁶ Section 7 of the Charter reads: "Everyone has the right to life, liberty and security of the person and the right not to be deprived thereof except in accordance with the principles of fundamental justice."

⁴⁷ *Reference re Section 94(2) of the Motor Vehicle Act*, above, n 45 at 504–505, [35]–[37].

⁴⁸ *Id* at 505–507, [38]–[46].

that it should be given minimal weight.⁴⁹ This was for two reasons. First, since the Charter was the product of many individuals who had played major roles in negotiating, drafting and adopting it, legislative intent could not be properly inferred from the comments of a small number of federal civil servants.⁵⁰ Secondly, it was said that

[a]nother danger with casting the interpretation of s. 7 in terms of the comments made by those heard at the Special Joint Committee Proceedings is that, in so doing, the rights, freedoms and values embodied in the *Charter* in effect become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs. ... If the newly planted “living tree” which is the *Charter* is to have the possibility of growth and adjustment over time, care must be taken to ensure that historical materials, such as the Minutes of Proceedings and Evidence of the Special Joint Committee, do not stunt its growth.⁵¹

This position taken in this case accords with the expressed intent thesis. It would be improper for a court to rely on intentions that legislators had left unexpressed in the text, even if they had commented on the matter in Parliament. The constitutional text should be given primacy over such comments.

2. Pragmatic Meaning

Establishing the semantic meaning of a statutory term is not particularly significant without going on to consider the term’s pragmatic meaning. Recall that in order to properly grasp what a speaker meant in uttering a particular expression, it is necessary to gather further information from the context of the utterance. According to *Solum*, subject to certain refinements that we will consider shortly, a court’s task when interpreting a constitutional provision is to establish its ‘clause meaning’; that is, the ordinary and conventional public meaning that the provision would have had

⁴⁹ *Id* at 508–509, [52].

⁵⁰ *Id* at 507–508, [47]–[51].

⁵¹ *Id* at 509, [53].

to its intended audience at the time it became law. For instance, where the United States Constitution is concerned, one would ask: “How would the Constitution of 1789 have been understood by a competent speaker of American English at the time it was adopted?”⁵²

This is essentially the ‘original meaning’ form of originalism that was considered in Chapter Four, but shorn of the dubious proposition that the original public meaning of the constitutional text should be determined with reference to long-established traditional practices.⁵³ It is therefore consistent with moderate originalism, which holds that judges are not to search for legislators’ unexpressed intent – what they themselves understood the statute to mean – but the legislative intent that is manifest in the language of the text.⁵⁴ In the usual case, the text should be interpreted according to the common usage of the language prevailing when it was enacted. Much of the time there will probably be no difference between the ordinary public meaning of the text then and today. However, where such a difference exists and it becomes necessary to determine the text’s former public meaning, evidence such as legislative debates and committee reports, political writings and newspapers of the time can be consulted to gain an insight as to how the text was generally understood.⁵⁵

⁵² Solum, above, n 5 at 51.

⁵³ Chapter Four, Pt I.A.1(2).

⁵⁴ *Id*, Pt I.A.1 at 165–166.

⁵⁵ Solum, above, n 5 at 51.

(1) *Text and Context*(a) *The Paucity of Literalism*

Solum recognizes that his theory of clause meaning requires certain refinements, which he calls “modifications”. The first modification is that the framers of a constitution assume that the text will be interpreted by readers who possess information about the publicly available context in which the text was adopted.⁵⁶

On one view, though, if the meaning of a statutory provision is clear after the employment of textualist techniques such as canons of construction and dictionary definitions of terms,⁵⁷ the court has no business examining contextual matters such as the purpose of the provision.⁵⁸ This has been termed “aggressive textualism”.⁵⁹ Aggressive textualism tends towards literalism, the idea that it is possible to determine the meaning of a text simply by considering how key words have been lexicographically defined, and their grammatical sense within the sentences and statutory provisions in which they appear. This is sometimes what judges mean when they speak of establishing the ‘ordinary meaning’ or the ‘plain meaning’ of texts.⁶⁰ But literalism is a faulty notion as linguists now accept that language is not simply a conduit through which meaning can be perfectly transmitted without distortion from one person to another.⁶¹ This is because language is often inherently vague or indeterminate,⁶² and it is only when the context that the communication takes place

⁵⁶ *Id* at 52–53.

⁵⁷ Jonathan T Molot, “The Rise and Fall of Textualism” (2006) 106 *Colum L Rev* 1 at 44.

⁵⁸ *Id* at 45.

⁵⁹ *Id*.

⁶⁰ Ruth Sullivan, “Statutory Interpretation in the Supreme Court of Canada” (1998–1999) 30 *Ottawa L Rev* 175 at 195–197, citing, *inter alia*, *R v McIntosh* [1995] 1 SCR 686; and *Ontario v C P Ltd* [1995] 2 SCR 1028 at 1050–1051, 1054–1055, *per* Lamer CJ (using “plain meaning” and “literal meaning” interchangeably).

⁶¹ Sullivan, “Statutory Interpretation”, *id* at 203–204.

⁶² G B Simpson & C Burgess, “Implications of Lexical Ambiguity Resolution for Word Recognition and Comprehension” in Steven L Small, Garrison W Cottrell & Michael K Tanenhaus

within is considered that a reader can correctly understand what a writer means.⁶³ This was recognized by Butler-Sloss LJ in *Re C and another (minors) (parent: residence order)*,⁶⁴ in which the English Court of Appeal had to determine if a natural father qualified as a “parent” within the meaning of section 10(4)(a) of the Children Act 1989.⁶⁵ The applicant was seeking a residence order in respect of his child who had already been freed for adoption by court order. Her Ladyship noted that the natural and ordinary meaning of a word changed according to the context in which it was used. Thus, *parent* in a school prospectus encompassed a person who was not a natural parent but had *de facto* parental responsibility over a child, while in a work on genetics it meant a child’s biological parents, including a father who had no connection to the child other than the initial act of fertilization. She held that *parent* in the provision in question did not include a person in the applicant’s position.⁶⁶

The indeterminacy of language is seldom noticed by readers because they subconsciously make assumptions and inferences about the meaning of the text. In many cases this raises no issues as the writer of the text and the readers share beliefs and make assumptions that are the same, or so similar that differences are insignificant. However, disjunctures can occur when readers hold different

(eds), *Lexical Ambiguity Resolution: Perspectives from Psycholinguists, Neuropsychology, and Artificial Intelligence* (San Mateo, Calif: Morgan Kaufmann Publishers, 1988), 271 at 276–277, cited in Sullivan, “Statutory Interpretation”, *id* at 205.

⁶³ See also Molot, above, n 57 at 35, stating that “modern textualists do not, in principle, object to the notion that judges should look to context as well as text”, and citing Frank H Easterbrook, “Text, History, and Structure in Statutory Interpretation” (1994) 17 Harv JL & Pub Pol’y 61 at 64; Jonathan R Siegel, “Textualism and Contextualism in Administrative Law” (1998) 78 B U L Rev 1023 at 1028; and John F Manning, “Constitutional Structure and Statutory Formalism” (1999) 66 U Chi L Rev 685 at 688.

⁶⁴ [1994] Fam 1, referred to in Rupert Cross, John Bell & George Engle, *Statutory Interpretation* (3rd ed) (London: Butterworths, 1995) at 63–64.

⁶⁵ 1989 c 41.

⁶⁶ Above, n 64 at 7.

assumptions from the writer and from each other.⁶⁷ Consider, for example, the guarantee in Article 5(1) of the Federal Constitution of Malaysia that “[n]o person shall be deprived of his life or personal liberty save in accordance with law”.⁶⁸ In the 1979 case *Government of Malaysia v Loh Wai Kong*,⁶⁹ the Federal Court, Malaysia’s highest appellate court, interpreted *personal liberty* to mean only liberty concerning the body of the individual; that is, liberty from physical restraint.⁷⁰ It therefore held that Article 5(1) did not confer on the respondent a fundamental right to leave the country and to travel overseas, or to be issued with a passport. However, almost 20 years later, the Malaysian Court of Appeal in *Sugumar Balakrishnan v Pengarah Imigresen Negri Sabah*⁷¹ decided that the term *personal liberty* was a “dynamic [concept]”⁷² and that one of its “many facets” was the fundamental liberty of free access to independent justice to obtain redress. Thus, in order not to fall afoul of Article 5(1), an ouster clause in a statute had to be read as only immunizing administrative acts and decisions that were not infected by errors of law.⁷³ In reaching this conclusion, the Court of Appeal relied on two of its earlier decisions, *Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan*⁷⁴ and *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan*,⁷⁵ and the Federal Court decision *R Rama Chandran v The Industrial Court of Malaysia*.⁷⁶ These cases had concluded that

⁶⁷ Compare Sullivan, “Statutory Interpretation”, *id* at 206. See also Cross, Bell & Engle, *Statutory Interpretation*, above, n 64 at 32.

⁶⁸ Article 9(1) of the Singapore Constitution is identically worded, having been imported from the Malaysian Constitution.

⁶⁹ [1979] 2 MLJ 33.

⁷⁰ *Id* at 35, applying *A K Gopalan v State of Madras* AIR 1950 SC 27 at 96, SC (India), *per Mukherjee J*. A similar approach was taken in Singapore in *Lo Pui Sang v Mamata Kapildev Dave* [2008] 4 SLR(R) 754, HC, though *Loh Wai Kong* was not cited.

⁷¹ [1998] 3 MLJ 289, CA (Kuala Lumpur, M’sia).

⁷² *Id* at 305.

⁷³ *Id* at 308.

⁷⁴ [1996] 1 MLJ 261, CA (Kuala Lumpur, M’sia).

⁷⁵ [1996] 1 MLJ 481, CA (Kuala Lumpur, M’sia).

⁷⁶ [1997] 1 MLJ 145, FC (Msia).

“life” in Article 5(1) did not mean mere existence – the absence of death – but incorporated “all those facets that are an integral part of life and those matters which go to form the quality of life”, including the right to live in a reasonably healthy and pollution-free environment,⁷⁷ and to seek and be engaged in lawful and gainful employment.⁷⁸ In the Court of Appeal’s view, to adopt an expansive approach to the meaning of *life* but a narrow approach to *personal liberty* would “necessarily produce an incongruous and absurd result”.⁷⁹ However, on appeal the Federal Court disagreed with the Court of Appeal and reinstated the narrow interpretation of *personal liberty* applied in *Loh Wai Kong*.⁸⁰ The Federal Court expressed puzzlement over the Court of Appeal’s failure to consider *Loh Wai Kong* (which was binding on it), and pointed out that although the Court of Appeal had followed the Federal Court’s approach of interpreting Article 5(1) broadly in *R Rama Chandran*, unfortunately that case also failed to have regard to *Loh Wai Kong*.⁸¹

Despite the potential breadth of the concept of personal liberty, the Federal Court in *Loh Wai Kong* and *Sugumar Balakrishnan* felt that the term only had a narrow ambit. On the contrary, a more expansive view of the provision was taken by Court of Appeal in the *Sugumar Balakrishnan* case. It is significant that there was no attempt in any of these cases to consider the publicly available context of Article 5(1), such as the purpose of the Constitution’s framers in introducing the provision, and the law relating to personal liberty at the time when the Constitution came into force.

⁷⁷ *Tan Teck Seng*, above, n 74 at 288.

⁷⁸ *Tan Teck Seng*, *id*; *Hong Leong Equipment*, above, n 75 at 510; *R Rama Chandran*, *id* at 190.

⁷⁹ *Sugumar Balakrishnan*, above, n 71 at 305.

⁸⁰ *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72, FC (M’sia), applied in *Harmenderpall Singh a/l Jagara Singh v Public Prosecutor* [2005] 2 MLJ 542, HC (Johor Bahru, M’sia); *Sivarasa Rasiah v Badan Peguam Malaysia* [2006] 1 MLJ 727, CA (Putrajaya, M’sia); and *Tennet v Kaka Singh Dhaliwal* (Secretary of the Malayan Racing Association) [2007] 3 MLJ 67, HC (Kuala Lumpur, M’sia).

⁸¹ *Id* at 101.

The Malaysian cases show that judges can reach divergent conclusions as to the meaning and scope of a text if they do not decide on the basis of shared assumptions and inferences. It is possible that such differences of opinion might have been reduced if attempts had been made to identify the common, publicly available context of the constitutional provision in question. Nonetheless, it is not suggested that examining the context would definitely have been enabled a full understanding of the scope of the vague term *personal liberty*. Sometimes context will provide only limited guidance, in which case it will be necessary for a judge to engage in constitutional construction to determine the applicable rules of law arising from a provision of a constitution. The distinction between constitutional interpretation and construction will be examined in Chapter Six.

It is submitted that at a minimum the context of a constitutional provision includes the following facts:

- i. The situation prevailing at the time the constitution was enacted, and in particular why it was necessary to bring the constitution into existence.⁸²
- ii. Relevant existing law – both legislation and the common law – in force at the enactment of the constitution that constitutes a backdrop for it. This encompasses legal conventions associated with interpreting constitutions,⁸³ such as relevant common law canons of statutory construction and other interpretive rules and presumptions.

⁸² Solum, above, n 5 at 54. Note, however, that in his 2008 article Solum stated that he would “provide neither the criteria nor an enumeration of the facts that meet the criteria. Rather, the limited purpose of this discussion is to introduce the public context as a modification of the conception of clause meaning”: *id* at 53.

⁸³ Compare Sullivan, “Statutory Interpretation”, above, n 60 at 206.

iii. The entire text of the constitution,⁸⁴ including the manner in which its provisions are organized in relation to each other.

iv. The purpose of the constitution as a whole, and of each of its provisions.⁸⁵

It is reasonable to assume that these are publicly known facts surrounding the coming into force of a constitution, and that their existence is a matter of common knowledge shared by both the framers and interpreters of the text. Therefore, interpreters should be taken to be aware of these matters forming the context within which constitutional terms are to be comprehended.

(b) *Purposive Meaning*

What does taking a purposive approach involve? According to Dickerson, to a statutory text one may attribute “ever-widening purposes” – which we may liken to the ripples of water spreading out from where a pebble has been dropped into a pond – “beginning at the inner extreme with the specific purpose of taking [a particular] action and ending at the outer extreme with the very general purpose of helping to advance the total public good”.⁸⁶ The specific purposes of statutory provisions are probably more helpful for a court’s interpretive task.

A reference to a statute’s ‘purposes’ or the taking of a ‘purposive approach’ to statutory interpretation is effectively a modern reformulation and application of the

⁸⁴ Solum, above, n 5 at 54.

⁸⁵ *Id* at 53.

⁸⁶ Dickerson, above, n 13 at 224. Francis Bennion said to similar effect: “Each enactment has its own limited purpose, to be understood within the larger purpose of the Act containing it – or sometimes within a broader purpose still, when the subject is dealt with by several Acts. Beyond this again is the general purpose of the law as an instrument serving the public welfare.” See Bennion, above, n 12 at 947, s 304, example 304.2 (footnotes omitted).

common law rule in *Heydon's Case*,⁸⁷ which dates to the 16th century or earlier.⁸⁸ This case held that judges are to construe an Act of Parliament to suppress the “mischief and defect” in the common law which the legislation was enacted to address, and to advance the remedy appointed by Parliament.⁸⁹ Note, though, that the modern purposive approach is wider than the holding of *Heydon's Case*. The case presumes that legislation is enacted to address defects in the common law, but of course “mischiefs” may arise from statutes and other forms of law as well.⁹⁰ As the Law Commissions of Scotland and England and Wales highlighted in a joint report of 1969, the case also gives the impression that legislation is only designed to deal with defects in the law, whereas it may be to further positive social purposes.⁹¹

In other words, taking a purposive approach towards interpreting a constitutional provision entails considering the mischief that the provision seeks to remedy, or the beneficial aim it promotes. This encompasses both the particular mischief or benefit and any wider or ulterior purposes, in the sense that the text should be interpreted in a way that also fulfils any broader purposes that the

⁸⁷ (1584) 3 Co Rep 7a, 76 ER 637.

⁸⁸ Ruth Sullivan regards the rule in *Heydon's Case* as an expression of the doctrine of equitable construction that dominated interpretation in 16th-century England. As “every thing which is within the intent of the makers of the Act, although it be not within the letter, is as strongly within the Act as that which is within the letter...” (*Stowel v Lord Zouch* (1569) 1 Plowd 353 at 366, 75 ER 536 at 556), courts could effectively rewrite legislation to promote what they believed to be Parliament’s true intent. However, the doctrine did not survive the rise of Parliamentary sovereignty following the Glorious Revolution. Nonetheless, the rule in *Heydon's Case* survived since knowing the purpose for which words are used helps in understanding their meaning: Sullivan, *Driedger on the Construction of Statutes* (3rd ed) (Toronto: Butterworths, 1994) at 37; cf Sullivan, *Sullivan on the Construction of Statutes* (5th ed) (Markham, Ont: LexisNexis Canada, 2008) at 256–257.

⁸⁹ *Heydon's Case*, *id*, 3 Co Rep at 7b, 76 ER at 638. See also *Salkeld v Johnson* (1848) 2 Exch 256 at 273, 154 ER 487 at 495 *per* Pollock CB (“It is proper also to consider the state of the law which it [the Act of Parliament] proposes or purports to alter, the mischiefs which existed, and which it was intended to remedy, and the nature of the remedy provided...”); *Blackwell v England* (1857) 8 El & Bl 541 at 543–544, 120 ER 202 at 203 *per* Lord Campbell CJ (“The meaning of the words used in a particular Act is to be ascertained by seeing what was the object of the Legislature in that Act, and the means by which that object was to be attained.”); Bennion, above, n 12 at 918–919, s 291.

⁹⁰ Bennion, *id* at 919, s 291.

⁹¹ *The Interpretation of Statutes* (Law Com no 21; Scottish Law Com no 11) (London: HMSO, 1969) at 49, n 177. See Cross, above, n 67 at 17–18.

legislature may have had for the constitution in question. Since the purposes of a provision are the legislature's perception of why the provision was enacted, and they are a facet of the legislative intent towards the provision, it should come as no surprise that these purposes share the characteristics of intention. Therefore, the text of the statute is also the primary source for ascertaining purpose. Given the modern trend against wordy preambles and long statute titles, an explicit statement of purpose – or at least one useful for interpretation – is probably a rarity. Courts will most likely have to discern the purpose from the phraseology of the text and what reading the various provisions of the constitution together reveals about the legislature's aims. There may also be occasion to consider secondary legislative sources, such as superseded and related legislation, the reports of Parliamentary committees tasked to consider law reform, and speeches made in Parliament during debates on the relevant bill. Here, the note of caution that was sounded regarding legislative intention should be heard: the views of a few outspoken legislators should not be assumed to be those of the legislature as a whole without good reason.

The justifications given above for rejecting literalism cast doubt on the desirability of focusing on the literal meaning of the text – that is, a meaning divorced from the context. To do so creates the temptation to conclude that if the semantic meaning of the text is 'clear', there is no need to consider the purpose of the text. Tindal CJ took such a position on behalf of the House of Lords in the *Sussex Peerage* case.⁹² He said:

If the words of the statute are in themselves precise and unambiguous, then no more can be necessary than to expound those words in that natural and ordinary sense. The words themselves alone do, in such case, best declare the intention of the lawgiver. *But if any doubt arises from the terms employed by*

⁹² (1844) 11 Cl & Fin 85, 8 ER 1034.

the legislature, it has always been a safe means of collecting the intention, to call in aid the ground and cause of making the statute...⁹³ [Emphasis added.]

This approach is still taken by judges from time to time.⁹⁴ However, appreciating the multifaceted nature of legislative intention belies the approach, as well as attempts to draw distinctions between the ‘literal construction’ and ‘purposive construction’ of a text.⁹⁵ If linguistic meaning and purposive meaning are both aspects of legislative intention, then one cannot be considered in isolation of the other. For this reason, it is submitted that Brad Selway’s concern that there does not appear to be any criteria to determine whether a statutory provision should be read purposively or not⁹⁶ is illusory. Provisions should always be read purposively. The same conclusion has been reached in jurisdictions where the purposive approach has been placed on a statutory footing, such as sections 15AA and 15AB of the Acts Interpretation Act 1901 (Cth)⁹⁷ of Australia and section 9A of the Interpretation Act⁹⁸ of Singapore which

⁹³ *Id*, 11 Cl & Fin at 143, 8 ER at 1057.

⁹⁴ See, for example, *Re How William Glen* [1994] 2 SLR(R) 357 at 362–363, [16], where the Singapore High Court held: “I am also mindful of s 9A of the Interpretation Act (Cap 1) introduced by Act 11 of 1993. That section does not in any way affect the rule stated by Tindal CJ in the *Sussex Peerage* claim. Accordingly, where the words of the statute are plain and free from ambiguity the courts cannot call in aid the various extrinsic material enumerated in that section. Further, the rule of purposive approach in interpreting a statute comes in only where the words of the statute are ambiguous.” The case was overruled on this point by the Court of Appeal in *Planmarine AG v Maritime and Port Authority of Singapore* [1999] 1 SLR(R) 669. In the Canadian case *R v Multiform Mfg Co* (1990) 79 CR (3d) 390 at 394, SC (Can), Lamer CJ stated: “When the words of a statute are clear and unambiguous, no further step is needed to identify the intention of Parliament. There is no need for further construction when Parliament has clearly expressed its intention in the words it has used in the statute.” See also *R v McCraw* [1991] 3 SCR 72 at 80 *per* Cory J, SC (Can). Sullivan sees such statements as “entirely rhetorical” and made when the court feels that the literal meaning of a statutory provision is appropriate and requires no adjustment: Sullivan, *Driedger on the Construction of Statutes* (3rd ed), above, n 88 at 5; *cf* Sullivan, *Sullivan on the Construction of Statutes* (5th ed), above, n 88 at 19–21.

⁹⁵ Such terminology was used in, *eg*, *Kammings Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850 at 879 *per* Lord Diplock, HL; *A-G of New Zealand v Ortiz* [1982] QB 349 at 361 *per* Staughton J.

⁹⁶ B[rad] M Selway, “Methodologies of Constitutional Interpretation in the High Court of Australia” (2003) 14 Pub L Rev 234 at 246.

⁹⁷ Section 15AA of the Acts Interpretation Act 1901 (No 2, 1901) (Cth), as amended, states: “In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) shall be preferred to a construction that would not promote that purpose or object.”

⁹⁸ Cap 1, 2002 Rev Ed.

was modelled after it. In the Singaporean context, it was held in *Constitutional Reference No 1 of 1995*⁹⁹ that section 9A required a purposive interpretation to be applied to the Constitution (which contains a bill of rights),¹⁰⁰ and that such an approach is applicable whether or not there is any ambiguity in the text.¹⁰¹ Section 9A(2) specifically provides that material not forming part of the written law that is capable of assisting in the ascertainment of the meaning of a provision may be considered “to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law”.¹⁰² This is akin to one category of what Bennion calls a “purposive-and-literal construction” – the court should give effect to the “literal meaning”¹⁰³ of a provision when this is clear and reflects the provision’s purpose.¹⁰⁴

⁹⁹ [1995] 1 SLR(R) 803, Const Tribunal.

¹⁰⁰ *Id* at 814–815, [44]: “It is well established and not disputed by either parties that a purposive interpretation should be adopted in interpreting the Constitution to give effect to the intent and will of Parliament. The principle to be applied is that the words of the Act are to be read in their entire context and in their grammatical and ordinary sense, harmoniously with the scheme of the Act, the object of the Act and the intention of Parliament”. The meaning of this passage is slightly obscured because the Tribunal did not explain what it meant by “the intent and will of Parliament”. The reference to both “the object of the Act” and “the intention of Parliament” suggests that the Tribunal understood the intention of Parliament to mean Parliament’s intent as to the meaning of the Constitution – that is, only one of the two facets of intention identified in this chapter. For the reasons given, it is submitted that this is an incomplete understanding of Parliamentary intention.

¹⁰¹ *Id* at 816, [47]. *Mills v Meeking* (1990) 169 CLR 214, HC (Aust), was cited with approval; this case dealt with s 35(a) of the Interpretation of Legislation Act 1984 (Vic) (No. 10096 of 1984, as amended), which is *in pari materia* with s 15AA of the relevant Australian Commonwealth legislation and Singapore’s s 9A. The principle has been applied in, among other cases, *Planmarine AG v Maritime and Port Authority of Singapore*, above, n 94; *The “Seaway”* [2005] 1 SLR(R) 435, CA; *JD Ltd v Comptroller of Income Tax* [2006] 1 SLR(R) 484, CA; and *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183, HC.

¹⁰² This provision is *in pari materia* with the Acts Interpretation Act 1901 (Cth), s 15AB(1).

¹⁰³ Bennion, above, n 12 at 455, s 156, defines the *literal meaning* of an enactment in relation to the facts of the instant case (taking the enactment in isolation from any other enactment) as, (1) where the enactment is clear (that is, with one grammatical meaning only), the grammatical meaning; (2) where the enactment is ambiguous (that is, grammatically capable of two or more meanings), any of the grammatical meanings; and (3) where the enactment is semantically obscure (that is, without any straightforward grammatical meaning), the grammatical meaning of the corrected version or, where the corrected version is grammatically capable of two or more meanings, any of those meanings. Bennion’s definition of *grammatical meaning* was set out at the text accompanying n 26, above.

¹⁰⁴ *Id* at 951–952, s 305.

How, then, should the purpose of a constitutional provision be taken into account when determining the clause meaning of the provision? Jonathan Molot proposes that since textualism requires the text to be the primary source for determining Parliament's intention, substantial weight should be given to the use of textualist criteria to determine what the text means.¹⁰⁵ Such criteria, it is submitted, take in traditional methods of interpreting statutes such as applying canons of construction. In the course of employing these criteria, a judge should strive to give the text its natural and ordinary meaning. However, as the purpose of the text must always be taken into account, this should not be understood as a mere literal or grammatical meaning divorced from the context. Instead it is, as the authors of *Cross on Statutory Interpretation* put it, "a meaning appropriate in relation to the immediate obvious and unresearched context and purpose in and for which they [the words of a statute] are used".¹⁰⁶ The text should, as far as possible, be construed in the manner that an ordinary person competent in the language of the text would generally understand it.¹⁰⁷ It is eminently reasonable to presume that the legislature intends for statutory provisions to be understood in this way, for the rule of law is promoted; as Lord Simon of Glaisdale stated in *Stock v Frank Jones (Tipton) Ltd*:¹⁰⁸

[I]n a society living under the rule of law citizens are entitled to regulate their conduct according to what a statute has said, rather than by what it was meant to say or by what it would have otherwise said if a newly considered situation had been envisaged...¹⁰⁹

The same sentiment is expressed in Australia's Acts Interpretation Act and Singapore's Interpretation Act. Both of these statutes provide that in determining whether certain extrinsic materials should be consulted when interpreting written

¹⁰⁵ Molot, above, n 57 at 65.

¹⁰⁶ Cross, Bell & Engle, *Statutory Interpretation*, above, n 64 at 32.

¹⁰⁷ *Id* at 28; and see nn 32–34 and the accompanying text, above.

¹⁰⁸ [1978] 1 WLR 231, HL. See Cross, Bell & Engle, *id*.

¹⁰⁹ *Stock v Frank Jones*, *id* at 237.

law, regard shall be had to “the desirability of persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law”.¹¹⁰ If employing textualist criteria leads to the conclusion that a provision has a sole meaning which is consistent with the statutory purpose, this may safely be regarded as its proper meaning.

Conversely, when the sole natural and ordinary meaning of the text is not congruent with the statutory purpose and produces “injustice, absurdity, anomaly or contradiction”,¹¹¹ the judge may adopt a meaning that is less obvious but still supported by the textual phraseology, and which fulfils the purpose of the text and accords with legal policy. Thus, for instance, in the High Court of Australia Justice Michael McHugh has advocated that the constitutional text be interpreted purposively, to the extent that a strained meaning can be given if a literal reading of the text does not give effect to the relevant purpose sought to be achieved.¹¹²

In addition, if textualist criteria are equivocal and suggest that the text is capable of bearing more than one plausible meaning, to break the deadlock the purpose of the statute and policy considerations should be given more weight.¹¹³ However, some courts have pointed out limits to judges’ discretion in this regard,

¹¹⁰ Interpretation Act (S’pore), s 9A(4)(a); s 15AB(3)(a) of the Acts Interpretation Act 1901 (Cth) is identical, except that the word “Act” appears in place of “written law”.

¹¹¹ *Stock v Frank Jones*, above, n 108 at 236.

¹¹² *Cheng v R* (2000) 203 CLR 248 at 291, [126], citing, *inter alia*, *Sutherland Publishing Co Ltd v Caxton Publishing Co Ltd* [1938] Ch 174 at 201. In similar vein, Bennion, above, n 12 at 944, s 304, contends that a court should either follow the literal meaning of the text where this accords with the legislative purpose, or give the text a strained meaning where it does not. See also *McBratney v McBratney* (1919) 59 SCR 550 at 561 *per* Duff CJ, SC (Can): “[W]here you have rival constructions of which the language of the statute is capable you must resort to the object or principle of the statute...; and if one finds there some governing intention or governing principle expressed or plainly implied then the construction which best gives effect to the governing intention or principle ought to prevail against a construction which, though agreeing better with the literal effect of the words of the enactment runs counter to the principle and spirit of it.”

¹¹³ Molot, above, n 57 at 65.

stemming from the need to preserve the constitutional separation of powers principle and hence the distinction between statutory construction and legislation. In *Inco Europe Ltd v First Choice Distribution*¹¹⁴ the House of Lords, citing with approval *Jones v Wrotham Park Settled Estates*,¹¹⁵ held that before applying a purposive approach to add, omit or substitute words in a statutory provision, the court must be “abundantly sure” of (1) the intended purpose of the provision in question; (2) the fact that by inadvertence the draftsman and Parliament had failed to give effect to that purpose in the provision; and, most crucially, (3) the substance of the provision Parliament would have made had the error been noticed, though it need not be sure of the precise words Parliament would have used.¹¹⁶

It is vital to note, though, that the words of a provision can give rise to two kinds of uncertainty. It is submitted that the caution expressed by the House of Lords in the preceding paragraph is relevant to only one of them. Randal Graham distinguishes between ambiguity and vagueness.¹¹⁷ A text is ambiguous when two or more different and specific constructions can be given to it, and the uncertainty in meaning cannot be resolved by looking at the immediate context. Graham gives the following example of an ambiguous statement: “Universities must have dormitories for male and female students.” This could either mean that universities must have co-educational facilities catering to both male and female students, or that there must be living quarters for male students only and separate accommodation for

¹¹⁴ [2000] 1 WLR 586.

¹¹⁵ [1980] AC 74.

¹¹⁶ *Inco Europe*, above, n 114 at 592; *Jones*, *id* at 105–106. The latter case was also applied in *Birmingham v Corrective Services Commission of New South Wales* (1988) 15 NSWLR 292 at 302; *R (Confederation of Passenger Transport UK) v Humber Bridge Board* [2004] QB 310, CA. See also *Miles v Meeking*, above, n 101 in which the same point was made.

¹¹⁷ Randal N Graham, “A Unified Theory of Statutory Interpretation” (2002) 23(2) Stat L Rev 91, citing Reed Dickerson, “The Diseases of Legislative Language” (1964) 1 Harv J Leg 10.

female students.¹¹⁸ It could also mean that universities must provide accommodation for students of both sexes, and that it is immaterial whether such facilities are combined or segregated. In contrast, a text is vague when the language used is so broad that it is capable of a range of meanings that may or may not be consistent with each other.¹¹⁹ Vagueness is often a characteristic of bills of rights, as they contain terms embodying abstract concepts such as “freedom of speech and expression”¹²⁰ and “right to respect for... private and family life”.¹²¹ As ambiguity is usually inadvertent and due to a drafting error,¹²² the cautious approach espoused in *Jones* and *Inco* may be suitable for ambiguous texts. However, it is simply inapt for statutory provisions that are vague. Vagueness cannot be characterized as inadvertence by either the draftsman or the legislature as it is usually deliberate and signals the legislature’s intention to give discretion to the judiciary to develop the meaning of the text.¹²³ Further, as such texts require the judiciary to apply standards rather than rules – to make judgments based on principles or policies¹²⁴ – the legislature intended a judge to use his discretion to reach a just decision, not merely to look for evidence as to how Parliament might have applied the text to a given factual situation. Indeed, the application of purposivism to the broad language of constitutions and bill of rights should not be unduly limited. In *R v Big M Drug Mart Ltd*,¹²⁵ Dickson CJ spoke about interpretation of the Canadian Charter of Rights and Freedoms in these terms:

¹¹⁸ Graham, *id* at 116.

¹¹⁹ *Id* at 118.

¹²⁰ Singapore Constitution, Art 14(1)(a).

¹²¹ Convention for the Protection of Human Rights and Fundamental Freedoms, Art 8(1).

¹²² Graham, above, n 117 at 130–131.

¹²³ *Id* at 121–124.

¹²⁴ Sullivan, *Sullivan on the Construction of Statutes*, above, n 88 at 44.

¹²⁵ [1985] 1 SCR 295, SC (Can).

The meaning of a right or freedom guaranteed by the Charter [is] to be ascertained by an analysis of the *purpose* of such a guarantee; it [is] to be understood, in other words, in light of the interests it was meant to protect.

In my view, this analysis is to be undertaken, and the purpose of the right or freedom in question is to be sought by reference to the character and the larger objects of the Charter itself, to the language chosen to articulate the specific right or freedom, to the historical origins of the concepts enshrined, and where applicable, to the meaning and purpose of the other specific rights and freedoms with which it is associated within the text of the Charter.¹²⁶

He went on to consider the rationale for the inclusion of freedom of conscience and religion in section 2(a) of the Charter, finding that rights associated with freedom of individual conscience are fundamental in the Charter because they are central to basic beliefs about human worth and dignity, and to a free and democratic political system. They are an essential aspect of the political tradition underlying the Charter.¹²⁷ Ultimately, the court held that the Lord's Day Act,¹²⁸ which prohibited retail sales on Sundays, was unconstitutional as its purpose of compelling observance of the Sabbath offended religious freedom.

To sum up the discussion thus far, textualism, properly understood, always requires due consideration to be given to statutory purpose. Establishing the linguistic meaning of a term requires an appreciation of the term's context, which includes the purposive meaning of the term. Assuming the existence of separate and opposing 'literal' and 'purposive constructions' of a text incorrectly implies that it is possible to interpret a text literally without regard to its purpose. The primary source for discerning both semantic meaning and purpose is the statutory text, because accepting moderate originalism as the most appropriate approach to interpreting constitutions and bills of rights involves a rejection of an unexpressed intent thesis in

¹²⁶ *Id* at 344, [117]–[118] (emphasis in original), citing *Hunter v Southam Inc* [1984] 2 SCR 145, SC (Can).

¹²⁷ *Id* at 346, [121] and [123].

¹²⁸ RSC 1970, c L-13.

favour of expressed intent. Nonetheless, a careful use of secondary legislative materials is permissible. In determining the clause meaning of a text, substantial weight should be given to the use of textualist criteria. Courts should strive to give the text its natural or ordinary meaning, understood not as a meaning apart from context but generally the meaning an ordinary person fluent in the language of the text would give to it. This ordinary meaning must be consistent with the purpose of the text. If textualist criteria lead to the conclusion that the text has more than one possible clause meaning, or the purpose of the text is not compatible with a single meaning, then the purpose and policy considerations come to the fore. Such a nuanced approach respects the primacy of the text while ensuring that the context is not overlooked.

(2) Terms of Art

The intended audience of a statute is made up of the inhabitants of a jurisdiction who are subject to its laws. They are assumed to be bound by a statute that has been properly enacted and promulgated by the legislature; a person who contravenes the statute cannot expect to be excused on a plea that he was ignorant of its existence. That having been said, legislation is not always drafted in a manner that is readily understandable by laypersons. Comprehending it properly requires some knowledge of how statutes are generally laid out (for example, how to understand interpretation sections and provisos), applicable canons of construction, whether there are related pieces of legislation that must be read together with the statute in question, the existence of relevant precedents that have interpreted certain provisions, and so on. A more accurate assumption is therefore that legislatures intend statutes to be understood by members of the public with the assistance of legally-trained persons.

These may be lawyers or, if a party appears unrepresented before a court, the role may have to be filled by the judge having charge of the matter. As Lord Diplock put it in *Fothergill v Monarch Airlines Ltd*,¹²⁹ legal certainty “demands that the rules by which the citizen is to be bound should be ascertainable by him (or, more realistically, by a competent lawyer advising him)”.¹³⁰ For this reason, it is necessary to distinguish terms of art, which are terms that have gained distinct legal meanings through usage,¹³¹ and other terms which are to be given their natural and ordinary meaning.

Parliament does not legislate in a vacuum; it will often be the case that prior case law has given a special meaning to a term used in a statutory text. The *prima facie* rule is that the legislature should be regarded as having intended the term to have the established meaning it has gained through judicial pronouncement.¹³² This is Solum’s “second modification” to clause meaning – that a “division of linguistic labor” is to be recognized when terms of art are used in a constitutional text. The linguistic meaning to be attributed to such a term is not that which laypersons would give to it, but the publicly available meaning of the term to members of a relevant group in the community (persons with legal training such as judges, lawyers and law academics) and others who share the group’s understandings.¹³³

¹²⁹ [1981] AC 251, HL.

¹³⁰ *Id* at 279.

¹³¹ In *Brooks v Brooks* [1996] AC 375 at 391, HL, a term of art was defined as a term with “one specific and precise meaning”: see Bennion, above, n 12 at 1200, s 366.

¹³² See, for example, *Attorney-General (NSW) v Brewery Employés’ Union of New South Wales* (1908) 6 CLR 469 at 531, HC (Aust): “Where words have been used which have acquired a legal meaning it will be taken, *prima facie*, that the legislature intended to use them with that meaning unless a contrary intention clearly appears from the context.” See also *R v Slator* (1881) 8 QBD 267 at 272; *Fisher v Bell* [1961] 1 QB 394. However, the legislature may have intended the ordinary or popular meaning of a term: see, for example, *British Columbia Development Corp v Friedman (Ombudsman) and Attorney General for British Columbia* [1984] 2 SCR 447, SC (Can). Applying a purposive approach can help to determine whether an ordinary or legal/technical meaning is intended: Sullivan, *Sullivan on the Construction of Statutes* (5th ed), above, n 88 at 283.

¹³³ Solum, above, n 5 at 55.

That having been said, a court should not take for granted that simply because a term has been judicially interpreted in a particular way in the context of an ordinary statute, this interpretation should be carried over if the same term is subsequently employed by the framers of a bill of rights or constitution, particularly if the interpretation has the effect of cutting down rights. Constitutions and bills of rights are qualitatively different from other statutes. In *Singh v Commonwealth*,¹³⁴ Gleeson CJ held that the Australian Constitution is an instrument of government, expressed in broad and general terms, designed to speak to a future that is in many respects beyond the capacity of the founders to foresee. Changing times and new problems might require the High Court to explore the potential inherent in the meaning of the words, applying established techniques of legal interpretation.¹³⁵ In particular, as a bill of rights exists to secure the fundamental liberties of the people – a matter of utmost legal importance – and it is intended to endure and remain relevant from age to age, this mandates that it be regarded as possessing a special status attracting the application of special interpretive criteria. This was recognized by the Privy Council in *Ong Ah Chuan v Public Prosecutor*,¹³⁶ their Lordships stating that

the way to interpret a constitution on the Westminster model is to treat it not as if it were an Act of Parliament but “as sui generis, calling for principles of interpretation of its own, suitable to its character... without necessary acceptance of all the presumptions that are relevant to legislation of private law.”¹³⁷

¹³⁴ [2004] HCA 43, HC (Aust).

¹³⁵ *Id* at [16] and [18].

¹³⁶ [1981] AC 648, [1979–1980] SLR(R) 710, PC (on appeal from S’pore).

¹³⁷ *Id*, [1981] AC at 669–670, [1979–1980] SLR(R) at 721, [23], citing *Minister of Home Affairs v Fisher* [1980] AC 319 at 329, PC (on appeal from Bermuda). The Judicial Committee of the Privy Council spoke in the context of Westminster-style constitutions, but their remarks are apposite to all written constitutions.

This statement applies in equal measure to bills of rights. Constitutionally, the judiciary plays a qualitatively different role when it is required to uphold constitutional principles and fundamental rights, compared to when it gives effect to an ordinary piece of legislation. The framers of a bill of rights or constitution may spell out the meaning of a term in detail in the text. But in the absence of evidence of this nature, it should not be assumed that simply by employing in the bill of rights or constitution a certain term contained in an ordinary Act of Parliament that has previously been interpreted in a certain way by the courts, the legislature intends to cabin judicial discretion to protect rights.

In the Canadian Supreme Court decision of *R v Therens*,¹³⁸ Le Dain J, with the majority's implicit support,¹³⁹ stated that "the premise that the framers of the *Charter [of Rights and Freedoms]* must be presumed to have intended that the words used by it should be given the meaning which had been given to them by judicial decisions at the time the *Charter* was enacted is not a reliable guide to its interpretation and application".¹⁴⁰ Among other justifications, he noted that the nature of the Charter was such that it had to use general language capable of being developed and adapted by the courts.¹⁴¹ In *Therens*, it was held that the respondent had been "detained" within the

¹³⁸ [1985] 1 SCR 613.

¹³⁹ See *Reference re Section 94(2) of the Motor Vehicle Act*, above, n 45 at 510, [55].

¹⁴⁰ *Therens*, above, n 138 at 638, [48], cited in *Reference re Section 94(2) of the Motor Vehicle Act*, *id.*

¹⁴¹ *Therens, id.* In that case, the issue was whether the judicial definition of the word *detention* in the Canadian Bill of Rights (SC 1960, c 44), an ordinary statute, should be applied to the Charter. Le Dain J also said (less convincingly, it is submitted) that if the Charter's framers had reservations about the meaning that had been given to the word in the Bill of Rights, assuming they had considered it at all, it would be "quite inappropriate, and indeed impracticable", in a constitutional document like the Charter to make detailed qualifications to provide for issues such as that which arose in the case. That process of reconsideration had, "of necessity", to be left to the courts: *Therens, id.* With respect, it is not clear why it would have been wrong or impractical for the Charter's framers to have expressed the rights and freedoms in more detail if they had wished to do so. A further ground that Le Dain J relied on was the fact that in the past the courts had felt some uncertainty or ambivalence in applying the Bill of Rights because the document did not reflect a clear constitutional mandate to make judicial decisions which had

meaning of section 10 of the Charter¹⁴² when he complied with a demand under the Criminal Code¹⁴³ to accompany a police officer to a police station and submitted himself to a breathalyser test. Therefore, he had been entitled to be informed of his right to retain and instruct counsel without delay. It was not determinative that the word *detention* in the Canadian Bill of Rights,¹⁴⁴ an ordinary Act of Parliament, had been interpreted in the earlier decision *Chromiak v The Queen*¹⁴⁵ to mean compulsory restraint by due process of law, with the consequence that a person who was merely required by law to accompany a police officer for a breath test to be taken was not “detained” until he was arrested and charged with having committed an offence.¹⁴⁶ The *Therens* holding was extended in *Reference re Section 94(2) of the Motor Vehicle Act, RSBC 1979, c 288*¹⁴⁷ from prior case law to the views of civil servants as to the meaning of Charter terms that had been expressed during the process of adopting the Charter. As mentioned above, the majority in that case cast doubt on the implication that such views could properly be taken to represent Parliament’s intention on the matter.¹⁴⁸

Thus, in determining the clause meaning of a term in a bill of rights or constitution, a court should consider if the statutory term was a term of art at the time the text was enacted. If so, the general rule is that the term should be interpreted to give effect to the term of art. However, mechanistically reaching such a conclusion should be resisted, especially if applying the general rule has the effect of restricting fundamental liberties.

the effect of limiting or qualifying the traditional sovereignty of parliament. On the other hand, the Charter now gave the courts a clear mandate to do so: *Therens, id* at 638–639, [48].

¹⁴² The provision relevant in the case, s 10(b), states: “Everyone has the right on arrest or detention... to retain and instruct counsel without delay and to be informed of that right...”

¹⁴³ RSC 1970, c C-34.

¹⁴⁴ SC 1960, c 44.

¹⁴⁵ [1980] 1 SCR 471.

¹⁴⁶ *Id* at 478–479.

¹⁴⁷ Above, n 45.

¹⁴⁸ *Id* at 508–509, [51].

(3) *Implications and Stipulations*

Solum's third and fourth modifications of the clause meaning of a constitution can be dealt with fairly briefly at this stage. The third modification is that the publicly accessible meaning of the text may include matters that are to be implied rather than read on the printed page.¹⁴⁹ The issue of constitutional implications will be discussed in Chapter Six.¹⁵⁰ The fourth modification is that terms used in the constitutional text can be given stipulated meanings by the constitution itself.¹⁵¹ For example, section 6 of the Australian Constitution defines the term *Original States* to mean states that were part of the Commonwealth of Australia at its establishment. It may well be that just prior to the Constitution coming into force in 1900, the term would not have been commonly understood as possessing this linguistic meaning.

B. APPLICATIVE MEANING

It was contended earlier that in enacting a constitution, the legislature has an intention regarding the proposed applications of its provisions. To comply with the expressed intention thesis, this intention must be discerned primarily from the text. Statutes sometimes contain illustrations,¹⁵² though this is not the norm; few if any written constitutions have such a feature. The potential cases to which a provision applies may also be clear from the way it is worded, perhaps seen in a particular factual matrix such as a prior court decision that the legislature has expressed doubts about. However, it may not always be possible for a court to identify a provision's

¹⁴⁹ Solum, above, n 5 at 56.

¹⁵⁰ Chapter Six, Pt II.B.

¹⁵¹ Solum, above, n 5 at 57.

¹⁵² For example, the Penal Code (Cap 224, 2008 Rev Ed) (S'pore), s 300(a), states: "Except in the cases hereinafter excepted culpable homicide is murder... if the act by which the death is caused is done with the intention of causing death". Under the heading "Illustrations", para (a) reads: "A shoots Z with the intention of killing him. Z dies in consequence. A commits murder."

applicative meaning. There may be a temptation for a judge to examine Hansard to see if the promoter of the relevant bill or other legislators spoke about the cases that they foresaw the bill applying to. As where it is sought to establish the linguistic meaning of a term,¹⁵³ circumspection must be shown towards legislators' views that are not ultimately reflected in the text.

III. MEANING – FIXED OR CHANGING?

When the text of a constitution or bill of rights is laid down by its framers, they naturally assume that the words and phrases they use will be understood by the interpreters of the text in the manner the framers themselves understand them. This is more likely to be true at the point of the text's enactment and within the next few years, even decades. However, as time passes, "drift" or "slippage" in meaning¹⁵⁴ may occur. A word that had a certain meaning in the past may come to be used in new situations. Section 51(xxi) of the Australian Constitution empowers the Commonwealth Parliament to "make laws for the peace, order, and good government of the Commonwealth with respect to... marriage". In *Re Wakim, ex parte McNally*,¹⁵⁵ Justice Michael McHugh recognized that when the Constitution came into force in 1901, the word *marriage* bore the meaning ascribed to it in 1866 by Lord Penzance in *Hyde v Hyde*¹⁵⁶ – "the voluntary union for life of one man and one woman, to the exclusion of all others".¹⁵⁷ This remains the classic definition of marriage at common law. However, McHugh J noted *obiter dicta* that if the meaning of the word was construed at that level of abstraction today, "it would deny the

¹⁵³ See the text accompanying nn 45–51 and 139–148, above.

¹⁵⁴ Christopher Birch, "The Connotation–Denotation Distinction in Constitutional Interpretation" (2003) 5 J App Prac & Process 445 at 458.

¹⁵⁵ (1999) 198 CLR 511, HC (Aust).

¹⁵⁶ (1866) LR 1 P & D 130.

¹⁵⁷ *Id* at 133.

Parliament of the Commonwealth the power to legislate for same sex marriages, although arguably ‘marriage’ now means, or in the near future may mean, a voluntary union for life between two people to the exclusion of others”.¹⁵⁸ It may be asked whether the courts should recognize such semantic shifts.

Another possibility is that the linguistic meaning of a term may not have altered, but because of changes in attitudes and values there may be disagreement with the text’s framers as to the scenarios that are covered or not covered by the term. The Eighth Amendment to the United States Constitution prohibits, among other things, the infliction of “cruel and unusual punishments”. In 1791, when the Amendment came into force, subjecting juveniles who had committed heinous crimes to the death penalty was regarded as neither cruel nor unusual. Were the views of the Amendment’s framers regarding the application of the term binding on the Supreme Court in 2005? In *Roper v Simmons*¹⁵⁹ a majority of the Court thought not.

The issues arising from the situations detailed above are, first, whether a judge should apply to a term a new meaning that has arisen over time; and second, whether a court is bound to accept the applicative rather than linguistic meaning given to a term by the framers. In his theory of semantic originalism, Solum contends that the linguistic meaning of a constitutional text is fixed at the time it comes into force as law. On the other hand, the theory does not make any assertions about whether purposive meaning is fixed. It was previously argued that when interpretation of a

¹⁵⁸ *Id* at 553, [45]. The *OED Online*, the Internet version of the venerable *Oxford English Dictionary*, defines marriage as “[t]he condition of being a husband or wife; the relation between persons married to each other; matrimony”, and attests this with quotations dating back to the 14th century. However, it adds in a recent note: “The term is now sometimes used with reference to long-term relationships between partners of the same sex”. See “marriage, *n.*” (September 2008 draft revision), *OED Online* (Oxford: Oxford University Press) <<http://dictionary.oed.com/cgi/entry/00302422>> (accessed 25 October 2008).

¹⁵⁹ 543 US 551 (2005).

text is involved, the purpose of a text should be regarded as part of its context. It is submitted that, generally speaking, a text's purpose also ought to be seen as fixed at the time of adoption. The theory does not claim that the applicative meaning remains unchanged over time. In other words, courts temporally removed from the time of adoption of the text are not bound to agree with the text's framers as to the factual scenarios to which the text applies.¹⁶⁰

A. SEMANTIC OPPORTUNISM

The framers of a constitution or a bill of rights are powerless to prevent semantic shifts – changes over time in meanings – in the terms in which they have chosen to express their intention. Where this has occurred, in theory the legislature may amend the law in an attempt to ensure that its understanding of the text is duly conveyed to the judiciary. The legislature may not, however, always be at liberty to so act. It may be unable to garner sufficient support from legislators to have the amending statute passed, or it may be politically inexpedient to propose such changes. It may have more pressing matters to deal with on its legislative agenda, with the consequence that the statute remains unchanged for some years. Where the constitutional or bill of rights text remains unchanged in the face of a slippage in meaning, the judiciary must decide whether, and if so how, the slippage should be taken into account in the interpretation of the text.

One possible approach is for courts to ignore the original meaning of the word or phrase that has undergone a semantic shift, and simply interpret it according to its present meaning. This is essentially the “contemporary literalism” approach

¹⁶⁰ Solum, above, n 5 at 66.

discussed in Chapter Four.¹⁶¹ We noted there that one proponent of this approach is Justice Michael Kirby of the High Court of Australia. He has taken the view that the text of the Australian Constitution, once enacted into law, “took upon itself its own existence and character as a constitutional charter”,¹⁶² and hence has been “set free from the ‘intentions’ of its draftsmen” and must be read “by contemporary Australians... with the eyes of their generation expecting it to fulfil (so far as the words and structure permit) the rapidly changing needs of their times”.¹⁶³ The result is that a judge is not required to give effect to the original meaning of the term in question, so long as the new meaning he gives the term comports with current usage.

This may be a highly convenient way of dealing with semantic shifts. However, it should be questioned whether, without some supporting evidence, it is reasonable to assume the framers of a text intend that the phraseology they have employed be construed in this way. A writer generally uses words in order to express certain meanings and, he hopes, to achieve certain purposes. It is improbable that he intends for his words to have whatever meaning they happen to have at the time in the future when they are read and interpreted. Richard Ekins terms such an approach “semantic opportunism” as it would authorize courts to “frustrate Parliament’s judgment, as communicated in the intended meaning of the statutory language, whenever there is another semantically available meaning which is compatible with the judges’ own moral views”.¹⁶⁴ He continues:

Communication proceeds not on the basis simply of sentence meanings alone but by listeners, or readers, building theories as to what the communicator intended the words to mean. Conventions of language are of course an

¹⁶¹ Chapter Four, Pt II at 181–182.

¹⁶² *Re Wakim*, above, n 155 at 599–600, [186] *per* Kirby J (dissenting).

¹⁶³ *Re Colina, ex parte Torney* (1999) 200 CLR 386 at 423, [96]. See also *Eastman v R* (2000) 203 CLR 1 at 80, [242].

¹⁶⁴ Richard Ekins, “A Critique of Radical Approaches to Rights Consistent Statutory Interpretation” [2003] EHRLR 641 at 648.

important factor in determining meaning, as they outline the available scope of possible intended meanings that a speaker who is familiar with the conventions might wish to use. But interpretation and communication do not stop there. We do not simply choose the most convenient semantically possible sentence meaning. If we are required to obey the person, or institution, that is communicating then we have to ascertain what they meant to say, not what particular semantic meaning we would like their words to bear.¹⁶⁵

Semantic opportunism would cause the meaning of terms to be entirely fortuitous; readers would be able to ascribe to terms meanings not envisaged by writers if it turned out that the terms had altered in sense. For a court to do so would be tantamount to it introducing a principle unsupported by the text.¹⁶⁶ Michael McConnell has said, “The only difference between the unintended meaning and the extratextual principle is verbal happenstance.”¹⁶⁷

B. THE CONNOTATION–DENOTATION DISTINCTION

If semantic opportunism is to be rejected, it is necessary to consider whether there exists a more palatable manner to deal with shifts in linguistic meaning and scenarios over time. It is contended that the distinction, well established in Australian jurisprudence, that is drawn between the ‘connotation’ and ‘denotation’ of a term is of assistance here. These concepts were drawn from the writings of John Stuart Mill (1806–1873),¹⁶⁸ who regarded the connotation of a term as the information that a term conveys, which consists of a bundle of attributes;¹⁶⁹ and the

¹⁶⁵ *Id.* at 648–649. See also Solum, above, n 5 at 3–4.

¹⁶⁶ Michael McConnell, “The Role of Democratic Politics in Transforming Moral Convictions into Law” (1989) 98 Yale LJ 1501 at 1528, cited in Jeffrey Goldsworthy, “Originalism in Constitutional Interpretation” (1997) 25 Fed L Rev 1 at 38.

¹⁶⁷ *Id.*

¹⁶⁸ John Stuart Mill, *A System of Logic, Ratiocinative and Inductive: Being a Connected View of the Principles of Evidence and the Methods of Scientific Investigation* (9th ed) (London: Longmans, 1875) at 31–42: see *Street v Queensland Bar Association* (1989) 168 CLR 461 at 537 *per* Dawson J.

¹⁶⁹ Birch, above, n 154 at 455.

term's denotation as the things that the term is the name of.¹⁷⁰ In Jeffrey Goldsworthy's words, a term's connotation is the criteria that define the term, while its denotation is made up of all the things in the world to which the term refers.¹⁷¹

1. *Connotation and Clause Meaning*

Case law establishes that while the denotation of a term may enlarge as new things falling within the connotation come into existence or become known, the connotation itself remains constant from the time the text was enacted (referred to here as the time of framing).¹⁷² This is arguably justified by the presumption that legislators generally intend to convey a certain essential meaning through the words they choose, and do not desire the words to simply bear whatever meaning they happen to have or can possibly have at the time when they fall to be interpreted. The conclusion would be otherwise if there is cogent textual and secondary evidence that Parliament had in fact intended to empower the court to disregard the meaning a term had when it was first enacted, but in the absence of such evidence it is submitted the presumption is reasonable. In a common law jurisdiction, written laws serve to introduce a degree of rigidity into its jurisprudence. The final appellate court is

¹⁷⁰ Christopher R Green, "Originalism and the Sense–Reference Distinction" (2006) 50 *St Louis U LJ* 555 at 565.

¹⁷¹ Goldsworthy, "Originalism", above, n 166 at 31–32. See also Reed Dickerson, *The Interpretation and Application of Statutes* (Boston, Mass: Little, Brown, 1975) at 128 ("The connotations of words define their meanings, whereas their denotations consist merely of specific instances falling within those meanings."), cited in Sullivan, *Driedger on the Construction of Statutes* (3rd ed), above, n 88 at 142; and *Eastman v R* (2000) 203 CLR 1 at 45, [142], in which McHugh J, quoting Leslie Zines, *The High Court and the Constitution* (4th ed) (Sydney: Butterworths, 1997) at 17, explained that the connotation of a term refers to "those qualities and only those qualities that a thing must have in order to come within the term", while the denotation consists of "those objects or classes that have all the requisite qualities".

¹⁷² *Re Wakim*, above, n 155 at 551–552, [42], citing *R v Commonwealth Conciliation and Arbitration Commission, ex parte Association of Professional Engineers, Australia* (1959) 107 CLR 208 at 267, HC (Aust) ('*Professional Engineers Case*'); *Eastman*, *id* at 43, [137]. See also the Australian High Court decisions *King v Jones* (1972) 128 CLR 221 at 229 *per* Barwick CJ; *Cheatle v R* (1993) 177 CLR 541; *Sue v Hill* (1999) 199 CLR 462. See also Goldsworthy, *id* at 31; Jeffrey Goldsworthy, "Australia: Devotion to Legalism" in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford: Oxford University Press, 2006), 106 at 122.

empowered to overrule the judgments of lower courts, and usually regards itself as entitled to depart from its own previous decisions in appropriate cases.¹⁷³ The court may quite easily reconsider and modify common law principles, but it has restricted discretion as regards legal principles contained in statutes. It may, to a limited extent, interpret statutory provisions differently from previous judgments, but it cannot ignore the text entirely. Thus, major changes to the statute can only be effected by the legislature. This is *a fortiori* true of constitutions and bills of rights contained within them, since written laws as these are often amendable only if more onerous procedures are followed. For instance, a constitutional amendment bill may need to achieve a special majority of legislators' votes or be approved at a national referendum to be passed. This implies that the court should regard the linguistic meaning of a statutory text as the one it had at the time it was adopted by legislators and enacted into law. To hold otherwise would essentially be disregarding the words chosen by the legislature.¹⁷⁴ Justice David Brewer of the US Supreme Court noted in *South Carolina v United States*:¹⁷⁵

The Constitution is a written instrument. As such its meaning does not alter. That which it meant when adopted, it means now. Being a grant of powers to a government, its language is general; and, as changes come in social and political life, it embraces in its grasp all new conditions which are within the scope of the powers in terms conferred. In other words, while the powers granted do not change, they apply from generation to generation to all things to which they are in their nature applicable. This in no manner abridges the fact of its changeless nature and meaning. Those things which are within its

¹⁷³ See, for instance, the Practice Statement (Judicial Precedent) [1966] 1 WLR 1234 (UK) and the Practice Statement (Judicial Precedent) [1994] 2 SLR 689 (S'pore). Lower courts are normally bound by the rules of *stare decisis* to apply the decisions of higher courts in the same judicial hierarchy: see, for example, *Cassell & Co Ltd v Broome* [1972] AC 1027, HL; *Favelle Mort Ltd v Murray* (1976) 133 CLR 580, HC (Aust); *Jusri bin Mohamed Hussain v Public Prosecutor* [1996] 2 SLR(R) 706, HC (S'pore).

¹⁷⁴ Compare Solum, above, n 5 at 3: "Why is constitutional meaning fixed at the time of origination? One common answer to this question focuses on the fact that the constitution is *written* and the notion that the function of a writing is to fix meaning through time."

¹⁷⁵ 199 US 437 (1905).

grants of power, as those grants were understood when made, are still within them; and those things not within them remain still excluded.¹⁷⁶

Another reason for regarding the connotation of a statutory term as fixed at the time of framing has to do with the nature of legislation as a tool for communication across time. By enacting a statute, the legislature is attempting to convey legal rules it has laid down to present and future generations of persons who may be affected by them. In order for this communication to be effective, it follows that the terms used by the legislature in the statute must be understood to have the linguistic meaning that they had at the time of enactment. If the terms could be construed with changed meanings, this would distort the sense of what the legislature was attempting to get across.¹⁷⁷ Thus it was said in *Attorney-General (NSW) v Brewery Employés' Union of New South Wales* that when assessing the scope of the legislative powers of the Commonwealth of Australia Parliament, "it is to the meaning in 1900 that we must look, for the plain reason that the Constitution previously framed in Australia became law in that year, and the framers cannot, of course, have had in their minds meanings which had not then come into existence".¹⁷⁸ And Windeyer J commented in *R v Commonwealth Conciliation and Arbitration Commission, ex parte Association of Professional Engineers, Australia*: "Law is to be accommodated to changing facts. It is not to be changed as language

¹⁷⁶ *Id* at 448, cited in *Brewery Employés' Union*, above, n 132 at 534. See also Barnett, above, n 2 at 105–106: "With a constitution, as with a contract, we look to the meaning established at the time of formation and for the same reason: If either a constitution or a contract is reduced to writing and executed, where it speaks it establishes or 'locks in' a rule of law from that moment forward. Adopting any meaning contrary to the original meaning would be to contradict or change the meaning of the text and thereby to undermine the value of writtenness itself. Writtenness ceases to perform that function if meaning can be changed in the absence of an equally written modification or amendment."

¹⁷⁷ Solum, *id* at 66: "Fixation explains how reliable communication across time is possible. Absent fixation, communication becomes impossible in cases in which the conventional semantic meanings of utterance types happen to change."

¹⁷⁸ *Brewery Employés' Union*, above, n 132 at 521; see also *id* at 501: "The meaning of the terms used in that instrument [the Australian Constitution] must be ascertained by their signification in 1900."

changes.”¹⁷⁹ From the foregoing, an intimate link between connotation and linguistic meaning can be discerned – determining a term’s connotation is fundamentally a search for its clause meaning which remains unaltered over time.¹⁸⁰

There is, however, an exception to the basic rule: a court may legitimately determine that the connotation of a term has ‘changed’ if fresh information shows that certain existing attributes of the term should never have been regarded as part of the connotation; or that the existing attributes do not fully delineate the term and that additional, new attributes must be included. This point is considered below.¹⁸¹

2. Denotation and Applicative Meaning

Disagreement exists over whether the denotation of a term changes over time. Christopher Birch, for instance, maintains that “Mill’s concept simply does not permit the denotation of a general name to change while the connotation remains the same”.¹⁸² On the other hand, Goldsworthy says it is “undeniable that the denotation of a constitutional term can change”,¹⁸³ a position also taken by the Australian courts.¹⁸⁴ The opposing opinions may be one of the reasons why in *Eastman v R*

¹⁷⁹ *Professional Engineers Case*, above, n 172 at 267, HC (Aust).

¹⁸⁰ For this reason, it is respectfully contended that Jeremy Kirk’s “evolutionary originalism” theory is of doubtful merit. Kirk, speaking in the context of the Australian Constitution, has proposed that while judges should be limited to giving effect to original ideas in the text, interpretation should not be fixed according to the strict understanding at the time when the Constitution came into force. Rather the “ultimate test” is “what is it now reasonable, meaningful and appropriate to regard as covered or required by the idea or concept conveyed by the text?”, and it is possible for the original essential meaning of the constitutional term in issue to change: Jeremy Kirk, “Constitutional Interpretation and a Theory of Evolutionary Originalism” (1999) 27 Fed L Rev 323 at 358–359, 360.

¹⁸¹ See Pt III.B.3(1), below.

¹⁸² Birch, above, n 154 at 453.

¹⁸³ Goldsworthy, “Originalism”, above, n 166 at 31.

¹⁸⁴ See the cases mentioned in n 172 above, and compare *Brewery Employés Union*, above, n 132 at 501 *per* Griffith CJ: “The meaning of the terms used in that instrument [the Constitution] must be ascertained by their signification in 1900. ... On the other hand, it must be remembered that with advancing civilization new developments, now unthought of, may arise with respect to many subject matters. So long as those new developments relate to the same subject matter the powers of the Parliament will continue to extend to them. For instance, I cannot doubt that the powers of the legislature as to posts and telegraphs extend to wireless telegraphy and to any future discoveries of a

Kirby J called the connotation–denotation distinction “disputable” and said that he contested it.¹⁸⁵

The disagreement appears to stem from differing understandings of what is meant by the denotation of a term. As indicated above, Birch takes the view that both the connotation and denotation of the term are fixed and unchanging at the time when the term is enacted into law. Taking his cue from Mill, he appears to regard denotation as a *description of the class* of all things to which the term can possibly refer. The scope of the class is determined by the attributes of the term, that is, the term’s connotation. For example, he notes that the word *person*, if used in its general sense in a 1900 text, may denote the class of all beings belonging to the species *Homo sapiens*, whether they existed in the past, present or future.¹⁸⁶ In his eyes, the denotation of the word *person* is the label “all beings belonging to the species *Homo sapiens*”. Therefore, whether one is interpreting the meaning of *person* in 1900 or in the present, the denotation of the word is constant as the description of the class of things answering to the name ‘person’ does not change.

Conversely, those who regard a term’s denotation to be capable of changing over time equate denotation with the *class of things that comprise it*, and not the description of the class itself. Under this view, the denotation widens when things possessing the bundle of attributes that make up the term’s connotation come into existence, even if they did not when the text was enacted and were not contemplated by the text’s framers. Similarly, the denotation shrinks if it is discovered that things which were believed to be within the class should no longer be so regarded because

like kind, although in detail they may be very different from posts and telegraphs and telephones as known in the nineteenth century.”

¹⁸⁵ *Eastman*, above, n 171 at 80–81, [244].

¹⁸⁶ *Birch*, above, n 154 at 452–453.

they lack one or more of the attributes of the class.¹⁸⁷ An example given by McHugh J involves the term *internal carriage* in section 92 of the Australian Constitution. He said that the connotation of the term is any method of inland transport; it is submitted that the corresponding denotation is a group of related elements which are the various means of transportation used within Australia's borders. In 1900, when the Constitution came into force, the term's denotation included transport by horse-drawn carriages and trains, but today it also includes the carriage of goods within Australia by aeroplane.¹⁸⁸ The denotation can therefore be said to have widened, in that the number of elements in the group or class has increased.

Seen thus, there is no significant difference in principle between the opposing views of denotation. Provided semantic opportunism is rejected, there is consensus that the connotation of a term generally does not change over time, but that things having the attributes that form the connotation can come into or go out of existence. The disagreement over denotation arises from some persons focusing on the description of the class of things in question, and others on the class of things itself. While a Millian purist would probably find fault with the way the word *denotation* has been used by the Australian courts, since this is a well established usage it will be employed in the rest of this chapter.

Just as the connotation of a term and its clause meaning are connected, a term's denotation and its applicative meaning are coextensive. Consequently, unlike clause meaning, applicative meaning is not fixed at the time of framing. The potential

¹⁸⁷ For authority that a denotation can contract as well as expand, see *Australian National Airways Ltd v The Commonwealth* (1945) 71 CLR 29 at 81, HC (Aust); *Professional Engineers Case*, above, n 179 at 267; *Lansell v Lansell* (1964) 110 CLR 353 at 366, HC (Aust); *R v Federal Court of Australia, ex parte WA National Football League* (1979) 143 CLR 190 at 233–234, HC (Aust); *Street*, above, n 168 at 532–538; *Theophanous v Herald and Weekly Times Ltd* (1994) 182 CLR 104 at 197, HC (Aust); and *Newcrest Mining (WA) Ltd v The Commonwealth* (1997) 190 CLR 513 at 645–646, HC (Aust), cited in *Kartinyeri v Commonwealth* (1998) 195 CLR 337 at 341, HC (Aust).

¹⁸⁸ *Eastman*, above, n 171 at 45, [143].

scenarios falling within the scope of a constitutional term can change over time, depending on whether they possess the essential attributes of the term. It is contended that there are insufficient grounds for the view that a term's denotation or applicative meaning must always be confined to that which existed at the time of framing or to scenarios that the framers foresaw, since constitutions and bills of rights are intended to set down fundamental principles of law that are assumed to endure for extended periods.¹⁸⁹ For instance, arguing a term such as *forced labour*¹⁹⁰ can only refer to types of forced labour known to the framers is also illogical as it goes against the open-ended nature of the term.¹⁹¹ In her dissenting judgment in *Canada (Attorney General) v Mossop*,¹⁹² Justice Claire L'Heureux-Dubé said that even if Parliament had in mind a specific idea of the scope of a particular term in the Canadian Human Rights Act,¹⁹³

in the absence of a definition in the Act which embodies this scope, concepts of equality and liberty which appear in human rights documents are not bounded by the precise understanding of those who drafted them. Human rights codes are documents that embody fundamental principles, but which permit the understanding and application of these principles to change over time. These codes leave ample scope for interpretation by those charged with that task.¹⁹⁴

As we will see later, whether the denotation of a term is narrow or wide depends on the level of abstraction of the concept that the term embodies.¹⁹⁵

¹⁸⁹ *Cf Marbury v Madison* (1803) 5 US (1 Cranch) 137 at 176, SC (US), where Chief Justice John Marshall said that the exercise of the people's "original right to establish, for their future government, such principles as, in their own opinion, shall most conduce to their own happiness... is a very great exertion; nor can it, nor ought it, to be frequently repeated. The principles, therefore, so established, are deemed fundamental. And as the authority from which they proceed is supreme, and can seldom act, they are designed to be permanent."

¹⁹⁰ Singapore Constitution, Art 10(2): "All forms of forced labour are prohibited, but Parliament may by law provide for compulsory service for national purposes."

¹⁹¹ The conclusion may be different if the word or phrase is a term of art: see nn 217–222 and the accompanying text, below.

¹⁹² [1993] 1 SCR 554, SC (Can).

¹⁹³ SC 1976–77, c 33, as amended by SC 1980–81–82–83, c 143.

¹⁹⁴ *Mossop*, above, n 192 at 621, [110].

¹⁹⁵ See Pt III.B.3(2), below.

According to McHugh J, the connotation–denotation concept is now regarded by philosophers as outdated.¹⁹⁶ However, Christopher Green has pointed out that McHugh J relied on Professor Leslie Zines’ statement in *The High Court and the Constitution* (4th ed, 1997) that “the court has drawn a now outdated philosophical distinction between connotation and denotation”,¹⁹⁷ but that Zines did not elaborate on why he felt the distinction was outdated nor cited any sources.¹⁹⁸ It is submitted that the connotation–denotation distinction continues to be relevant, at least for the purposes of statutory interpretation. Dawson J noted in *Street v Queensland Bar Association*:

[T]he attributes which the words signify will not vary, but as time passes new and different things may be seen to possess those attributes sufficiently to justify the application of the words to them. ... [T]he principle which lies behind it... has never been doubted. It is that the limits within which a constitutional prescription operates do not change, however much changing circumstances may allow it to be applied to new situations.¹⁹⁹

A word or phrase naturally lends itself to a conceptual division between its ‘meaning’ (connotation) and ‘applications’ (denotation) in various contexts.²⁰⁰ We might say, for example, that the meaning or connotation of the word *religion* is the belief in a supernatural Being, Thing or Principle and the acceptance of canons of conduct to give effect to that belief.²⁰¹ The applications or denotation of the word would be the things or scenarios that are signified by the connotation, in this case, faiths such as Buddhism, Christianity and Islam.

¹⁹⁶ *Re Wakim*, above, n 155 at 552, [43].

¹⁹⁷ Zines, *The High Court and the Constitution*, above, n 171 at 17: see Green, above, n 170 at 578.

¹⁹⁸ Green, *id.*

¹⁹⁹ *Street*, above, n 168 at 537–538.

²⁰⁰ See Alexander Reilly, “Reading the Race Power: A Hermeneutic Analysis” (1999) 23 Melb U L Rev 476 at 482, for the use of the terms *meaning* and *applications* to explain the connotation–denotation distinction.

²⁰¹ *Church of the New Faith v Commissioner for Pay-Roll Tax* (1983) 154 CLR 120 at 137, HC (Aust), *per* Mason ACJ and Brennan J.

3. Applying a Connotation–Denotation Analysis

(1) Establishing Connotation

In applying a connotation–denotation analysis to determine whether a term should be given a dynamic interpretation, the first step is to establish the connotation of the term in question. Following Mills’ understanding of connotation, the task at hand is to identify the bundle of attributes constituting the term’s meaning. It is necessary to discern attributes that are central to the meaning of the term, and to put aside those that are not. To try and capture this idea, Australian judges have used a multiplicity of phrases, speaking about identifying a term’s “really essential characteristics”,²⁰² “fundamental conception”,²⁰³ “essential particulars”,²⁰⁴ “essential differentia”,²⁰⁵ “essential feature”²⁰⁶ and “essential meaning”.²⁰⁷ This issue is significant because the selection of an attribute as part of the term’s connotation has a profound impact on the scope of the denotation. For instance, the term *adult person* in section 41 of the Australian Constitution could mean either “person of or over 21 years of age” or “person recognized by law as of mature age”. If the court determines that being at least 21 years of age is an attribute of an adult person within the meaning of section 41, then people aged between 18 and 21 years will not be regarded as such, even if the

²⁰² *Brewery Employés Union*, above, n 132 at 560 *per* Isaacs J, and 535 *per* O’Connor J: “[T]he true line of inquiry is first to ascertain what were the essential characteristics of a ‘trade mark’ in Australia at the time when the Constitution was passed, disregarding all conditions, qualifications, and attributes, which were not of its very nature and essence...”. See also *Grain Pool of Western Australia v Commonwealth* (2000) 202 CLR 479 at 528, [123], HC (Aust) (“really essential characteristics”); *Re Patterson, ex parte Taylor* (2001) 207 CLR 391 at 495, [312], HC (Aust) (“essential characteristics”); and *Shaw v Minister for Immigration and Multicultural Affairs* (2003) 218 CLR 28 at 61, [94], HC (Aust) (“essential character”).

²⁰³ *Id* at 577.

²⁰⁴ *Id* at 581 *per* Isaacs J (dissenting), citing *People v Fisher* 50 Hun 552, 3 NY Supp 786 (1889).

²⁰⁵ *Brewery Employés Union*, *id* at 606.

²⁰⁶ *Cheatle*, above, n 172 at 560, cited in *McGinty v Western Australia* (1996) 186 CLR 140 at 200–201 *per* Toohey J.

²⁰⁷ *McGinty*, *id* at 221 *per* Gaudron J.

general age of majority has been lowered by ordinary legislation from 21 to 18 years.²⁰⁸

The task of identifying the “essential characteristics” of a term has a somewhat metaphysical air to it. The remarks of Justice Antonin Scalia of the United States Supreme Court in *PGA Tour, Inc v Martin*²⁰⁹ may be noted; he said that “to say something is ‘essential’ is ordinarily to say it is necessary to the achievement of a certain object”.²¹⁰ And in the *Brewery Employés’ Union* case, Justice Isaac Alfred Isaacs explained:

To ascertain the really essential characteristics... it is necessary to distinguish what is merely occasional, though frequent, and to strip the expression of everything that is not absolutely fundamental. If we find some attribute universally attaching to the idea in all circumstances, that attribute is probably indispensable; but if any feature, however usual its presence may be, is not invariably existent, ... it cannot, I apprehend, be asserted that the fundamental concept includes the variable feature.²¹¹

Beyond these statements, it is probably futile to try and lay down rigid guidelines for determining when the attributes or characteristics of a term are essential to its meaning. Nevertheless, it is to be borne in mind that the court is embarking on a quest for the term’s meaning, so this brings into play the principles that have been discussed earlier. The broad task at hand is to establish the term’s clause meaning – the ordinary public meaning it would have had when the constitution became law.

This will involve considering the natural and ordinary meaning of the term in context, which in turn necessitates looking at the legislative purpose of the provision that the term appears in. The court should adopt a connotation that best promotes

²⁰⁸ Which is what the Australian High Court decided in *King v Jones*, above, n 184: see Goldsworthy, “Originalism”, above, n 167 at 32.

²⁰⁹ 532 US 661 (2001).

²¹⁰ *Id* at 700.

²¹¹ *Brewery Employés’ Union*, above, n 132 at 560 *per* Isaacs J (dissenting).

this purpose.²¹² It has been suggested by Sullivan that when a question of interpreting the Canadian Charter of Rights and Freedoms arises, courts in that jurisdiction do not regard the original purpose of the Charter as binding. Instead, it is said that they “construct a purpose that is appropriate, having regard to the current social and ideological climate as well as the historical evolution of the Charter”, thus enabling a “progressive approach” to be adopted towards Charter interpretation.²¹³ In support of this, reliance was placed on comments by Justice Antonio Lamer in *Reference re Section 94(2) of the Motor Vehicle Act, RSBC 1979, c 288* relating to interpreting the Charter by reference to comments made by officers of the Executive. He said that “in so doing, the rights, freedoms and values embodied in the *Charter* in effect become frozen in time to the moment of adoption with little or no possibility of growth, development and adjustment to changing societal needs”.²¹⁴ It is submitted that as a reminder that judges should not interpret constitutional terms too narrowly, the Supreme Court’s holding is laudable and consistent with the presumption in favour of generosity.²¹⁵ It is quite another thing, though, to read it as providing justification for a court to ignore the original legislative purpose of a statutory provision and to formulate a new purpose as the basis for interpreting terms in the provision. As was pointed out in *Big M Drug Mart*, legislative purpose “is a function of the intent of those who drafted and enacted the legislation at the time,

²¹² Goldsworthy, “Originalism”, above, n 167 at 32, citing Leslie Zines, “Characterisation of Commonwealth Laws” in H P Lee & George Winterton (eds), *Australian Constitutional Perspectives* (North Ryde, NSW: Law Book Co Ltd, 1992), 33 at 40, 41–42. Geraldine Chin, “Technological Change and the Australian Constitution” (2000) 24 *Melb U L Rev* 609 at 640, argues that the purpose of a statutory provision should be used to determine the essential meaning of a term *in place of* the connotation–denotation distinction. It is submitted that an undesirable consequence of this approach is that a court may be tempted to ignore the clause meaning of a term in order to fulfil the purpose of the provision that it appears within.

²¹³ Sullivan, *Driedger on the Construction of Statutes* (3rd ed), above, n 88 at 48–49. The point no longer seems to appear in the 5th edition of the work (above, n 88).

²¹⁴ Above, n 45 at 509, [53].

²¹⁵ See Chapter Six, Pt I.

and not of any shifting variable”.²¹⁶ Although this was said with reference to an ordinary statute and not the Canadian Charter, there is no reason why the logic should not equally apply to a constitutional document. Moreover, a provision’s purpose is an integral part of the context which should be considered when interpreting the provision. It is to be discerned in the first place from the text itself, and secondarily from other sources such as legislative debates. If the court were to accept fresh explanations of a provision’s purposes from the executive branch, this would provide a novel and unorthodox avenue for the interpretation of the provision to be manipulated without the matter being debated by the legislature. It is contended that the latter is the appropriate method for the legislature to imbue an existing provision with a new purpose. If Parliament has had occasion to reconsider a provision and there is cogent evidence that it has decided to retain it unchanged for fresh purposes, this ought to be taken into account by the court. However, absent such a scenario, even though constitutional provisions should be interpreted liberally since they are intended to remain relevant in changing times and circumstances, this is no warrant for a court to ignore the original legislative purpose and construct a largely fictitious one.

We should not overlook Solum’s modifications to clause meaning. The constitutional text may in fact stipulate the meaning of the term in question (no doubt to the great relief of judges), or there may be implications to be drawn from the text. Where a word or phrase is a term of art, it may be necessary to give it the technical meaning that it has gained at common law. Such a meaning was given by a majority of the High Court of Australia in the *Brewery Employés’ Union* case²¹⁷ to the term *trade marks* in section 51(xviii) of the Australian Constitution, which

²¹⁶ Above, n 125 at 335, [91].

²¹⁷ Above, n 132.

authorizes the Parliament “to make laws for the peace, order, and good government of the Commonwealth with respect to... [c]opyrights, patents of inventions and designs, and trade marks”. The majority examined in detail how the term was understood in legislation and court decisions and by the commercial community at the time the Constitution came into force. In the later decision of *Sue v Hill*,²¹⁸ one of the issues was whether in 1999 the United Kingdom was a “foreign power” for the purposes of section 44(i) of the Australian Constitution, which provides that any person who “is a subject or citizen or entitled to the rights or privileges of a subject or a citizen of a foreign power; ... shall be incapable of being chosen or of sitting as a senator”, though it was certainly not regarded as such at the time the Constitution was framed. Justice Mary Gaudron identified the first question arising as whether the term *foreign power* “bears its ordinary meaning or is used in some special sense which forever excludes the United Kingdom”.²¹⁹ She went on to find that it was not used in a special sense as the Constitution was a foundational document clearly intended to serve the Australian people well into the future. Furthermore, “foreign power” was an abstract concept apt to describe different nation states at different times according to their circumstances.²²⁰ Therefore, since the relationship between Australia and the United Kingdom had evolved over time, at the present it was appropriate to regard the United Kingdom as a foreign power. This is a reminder of the lesson taught by *Therens*:²²¹ where fundamental liberties would be abridged, one must be wary of assigning to a constitutional expression the technical meaning accorded by the courts to a term appearing in ordinary legislation (or, by extension, a

²¹⁸ Above, n 172.

²¹⁹ *Id* at 524, [161].

²²⁰ *Id* at 524–525, [162].

²²¹ Above, n 138.

term defined at common law). As Gaudron J noted in *Sue v Hill*, since a constitution is intended to retain relevance over the *longue durée*, it may not have been the intention of the framers to restrict the potential extent of the document in this manner.²²²

The legislature is not entitled to alter the meaning of a constitutional term by way of ordinary legislation enacted after the time of framing either. It was held in *Brewery Employés' Union* that the Parliament of the Australian Commonwealth was not entitled to enlarge its legislative powers “by calling a matter with which it is not competent to deal by the name of something else which is within its competence”.²²³ It could not, therefore, purport to treat workers’ trade marks defined in the Trade Marks Act 1905 (Cth)²²⁴ as “trade marks” within the meaning of section 51(xviii) of the Constitution, which authorizes the Parliament “to make laws for the peace, order, and good government of the Commonwealth with respect to... [c]opyrights, patents of inventions and designs, and trade marks”. Permitting a legislature to redefine constitutional terms through ordinary legislation amounts to a circumvention of the statutory procedure established for amending a written constitution. Of course, the executive and legislature both have a duty of interpreting the constitution when carrying out their functions, and the courts are entitled to take such interpretations

²²² Cf the comments of Kirby J in *Shaw*, above, n 202 at 59–60, [89]: “[T]he task of this Court is to give meaning to the constitutional word ‘aliens’ not for some other purpose but solely for the purpose of defining the operation of the fundamental law of the Australian nation and people.” Thus, in his Honour’s view, the term *aliens* appeared in the Australian Constitution in a different context from the concept of alienage as expressed in old English common law cases from the times of the Stuart kings (*Calvin’s Case* (1608) 7 Co Rep 1a, 77 ER 377) or the Hanoverian succession (*In re Stepney Election Petition, Isaacson v Durant* (1886) 17 QBD 54 at 59–60), and in United States cases immediately after the American Revolutionary War (*Re Patterson*, above, n 202 at 482, [274], and the US cases referred to therein).

²²³ *Brewery Employés’ Union*, above, n 131 at 501. See also *Pochi v Macphee* (1982) 151 CLR 101 at 109 *per* Gibbs CJ, HC (Aust): “the Parliament cannot, simply by giving its own definition of ‘alien’, expand the power under s 51(xix) [of the Australian Constitution] to include persons who could not possibly answer the description of ‘aliens’ in the ordinary understanding of the word”.

²²⁴ No 20 of 1905.

into account. However, the views of the political branches on this matter are not conclusive. Ultimately it is the courts' responsibility alone to authoritatively determine the meaning of terms.²²⁵

Considering a term's applicative meaning may also assist in the ascertainment of its essential characteristics, to the extent that it is possible to discern potential applications of the term that the constitution's framers had in mind.²²⁶ This is to be distinguished from the practice, said to have been adopted by some courts, of developing the connotation of a term from familiar examples (that is, the elements of the denotation) known at the time when the matter is brought before the court.²²⁷ As a result, the essential meaning of the term is distorted, possibly to achieve a desired result.²²⁸ The practice creates a bootstrapping problem – a term's denotation is determined by its connotation, which is fixed at the time the constitution was enacted into law. However, the connotation would constantly change if modern scenarios are used to determine its essential characteristics. Arguably, the problem can be avoided if modern examples are judiciously considered to see only what light they shed on the essential meaning of the term as it was understood at the time of framing.

Although connotation is supposed to remain unchanged, some judges have stated that the framers of the constitution or earlier judges may not have correctly or fully appreciated the import of the text. In *Re Wakim*, McHugh J noted that

the meanings that we now place on the Constitution may not entirely coincide with the meanings placed on it by those who drafted, approved or enacted that document. ... Experience derived from the events that have occurred

²²⁵ See generally Chapter Two, Pt II.

²²⁶ See nn 152–153 and the accompanying text, above.

²²⁷ Chin, above, n 212 at 632, citing Zines, *The High Court and the Constitution*, above, n 171 at 19; and P[atrick] H[arding] Lane, *Lane's Commentary on the Australian Constitution* (2nd ed) (North Ryde, NSW: LBC Information Services, 1997) at 911–912.

²²⁸ Chin, *id* at 633–634.

since its enactment may enable us to see more in the combination of particular words, phrases or clauses or in the document as a whole than would have occurred to those who participated in the making of the Constitution.²²⁹

The point is fairly taken, since it is unreasonable to assume that the framers and prior interpreters of the text are infallible.²³⁰ McHugh J's view also provides a possible justification for Kirby J's remarks in *Grain Pool of Western Australia v Commonwealth* that "the Court's search has become one for the contemporary meaning of constitutional words, rather than for the meaning which those words held in 1900. ... What constitute such 'really essential characteristics' may grow and expand, or may contract over time",²³¹ which otherwise express his preference for semantic opportunism. However, accepting that courts have the power to redefine connotations from time to time is an acknowledgement that judges exercise significant discretion in this regard. It is submitted this should not be regarded as undesirable as it is simply a feature of Westminster constitutional systems. Judges must not act like amanuenses of the political branches in deciding difficult cases; they are expected, and guaranteed independence, to exercise personal discernment. By conducting themselves in this manner, they fulfil their role in the constitutional

²²⁹ *Re Wakim*, above, n 155 at 553, [46], citing *Victoria v The Commonwealth* (1971) 122 CLR 353 at 396 and *Theophanous*, above, n 187 at 197. See also *McGinty*, above, n 206 at 221 per Gaudron J ("The words... are to be approached on the basis that, although their essential meaning is unchanged, 'their full import and true meaning can often only be appreciated when considered, as the years go on, in relation to the vicissitudes of fact which from time to time emerge'", citing *James v The Commonwealth* (1936) 55 CLR 1 at 43); *Eastman*, above, n 171 at 46, [147], per McHugh J ("[T]he present generation may see that the provisions of the Constitution have a meaning that escaped the actual understandings or intentions of the founders or other persons in 1900").

²³⁰ Goldsworthy notes that unexpected developments can change the understanding of what a word means, revealing that a characteristic previously associated with it was never really essential. He cites the example of the discovery of black swans, which showed that swans need not be white: see Goldsworthy, "Australia: Devotion to Legalism", above, n 172 at 151.

²³¹ *Grain Pool*, above, n 202 at 525, [117], and 530, [129] (footnote omitted). See also Kirby J's opinion in *Re Patterson*, above, n 202 at 495, [311]: "It is entirely consonant with my approach to the interpretation of the Constitution to accept that the meaning of constitutional words vary over time. That meaning is to be ascertained by reference to the essential characteristics of the concept signified by the words, not by searching, as such, for how the framers in 1900 would have read them or intended them to operate."

dialogue that takes place between the judiciary and the political branches of government.²³²

Admittedly, the task of establishing the essential characteristics, and thus the connotation, of a term will sometimes be less than straightforward.²³³ Despite the court's best efforts, there may be insufficient information for it to determine with certainty the attributes by which the framers of the text intended the term's connotation to be constituted. In this case, it is submitted that the court should apply the presumption in favour of generosity and articulate a reasonable connotation that maximizes rights. In addition, it should bear in mind the need for pragmatism and avoid a result that is excessively inconvenient or unworkable.

(2) *Determining Denotation*

The connotation of a term determines its denotation. Having identified the attributes and thus the essential meaning of the term, the court's task is then to determine whether a particular scenario raised by a dispute falls within the essential meaning. In this respect, the ambit or scope of a term's denotation depends on the extent to which the term embodies abstract concepts. Where a term has a broad connotation and expresses one or more concepts at a high level of abstraction, it will have a wider denotation. This makes it more likely that a scenario at hand will come within the denotation of the term. The word *religion* referred to previously is a prime example of such a term. On the other hand, a term narrow in meaning will have a similarly

²³² Chapter Two, Pt III.

²³³ Goldsworthy, for instance, has taken the view that the connotation–denotation distinction “can be very difficult, and perhaps in some cases impossible, to apply”: Goldsworthy, *id.* See also Goldsworthy, “Australia: Devotion to Legalism”, above, n 172 at 151, citing Zines, “Characterisation of Commonwealth Laws”, above, n 212 at 35: “[W]hen a word enacted in 1900 must be applied, many decades later, to circumstances not envisaged by the framers, it is often difficult if not impossible to know what criteria they themselves – if they had envisaged those circumstances – would have regarded as essential for its correct application.”

restricted denotation. It may even be the case that the denotation of the term contains only a single scenario.

It might be argued that denotation, like connotation, is fixed at the time when the term in question is enacted into law. Taking this view would mean, for example, that the denotation of the phrase *cruel and unusual punishment* in the Eighth Amendment to the United States Constitution is limited to those forms of punishment regarded as cruel and unusual when the Amendment came into force in 1791. It is submitted the correctness of the statement depends on the ambit of the term's connotation. A term with a narrow meaning may indeed have a denotation limited to scenarios existing at the time of enactment, and no others. On the other hand, such a conclusion is unwarranted if the framers of the text have chosen to use a term bearing a wide connotation without qualification. In *Re Wakim*, McHugh J noted that many words and phrases of the Australian Constitution "are expressed at such a level of generality that the most sensible conclusion to be drawn from their use in a Constitution is that the makers of the Constitution intended that they should apply to whatever facts and circumstances succeeding generations thought they covered".²³⁴

An example of how the court may find a connotation–denotation analysis useful when deciding if a statutory term is applicable to a novel scenario is provided by *Fitzpatrick v Sterling Housing Association*, though the analysis was not expressly

²³⁴ *Re Wakim*, above, n 155 at 552, [44]. See also Sullivan, *Sullivan on the Construction of Statutes* (5th ed), above, n 88 at 502–503: "A text that is written in general or abstract language invites an organic approach... In so far as an 'organic' approach consists of adapting legislation to evolving conceptions of society and its basic values, it is a normal and appropriate part of interpretation. Courts are bound to respect the meaning of words used by the legislature, but given the plastic character of language, especially the general language typically found in human rights codes, this constraint does not prevent the courts from taking a flexible and adaptive approach."

adverted to.²³⁵ The plaintiff had lived with the protected tenant of a flat in what the House of Lords found to be a stable and permanent homosexual relationship. One of the issues that arose was whether the plaintiff could take over the tenancy of the flat from his partner after the latter's death as "a member of the original tenant's family", pursuant to paragraph 3(1) of Schedule 1 of the Rent Act 1977.²³⁶ Lord Slynn of Hadley noted that the tenancy succession provision had first appeared in the Increase of Rent and Mortgage Interest (Restrictions) Act 1920.²³⁷ Essentially conducting a connotation–denotation analysis, his Lordship therefore stated that the questions to ask were what the characteristics of the term *family* in the 1920 Act (which was not a term of art) were, and whether two same-sex partners could satisfy those characteristics.²³⁸ To identify the characteristics of the term, it was necessary to determine the purpose sought to be achieved by Parliament through the legislation.²³⁹ Lord Nicholls of Birkenhead cited *Royal College of Nursing of the United Kingdom v Department of Health and Social Security* to similar effect:²⁴⁰

²³⁵ [2001] 1 AC 27, HL. See also *Attorney-General v Edison Telephone Company of London (Limited)* (1880–1881) LR 6 QBD 244, Ex D (telephone falling within the definition of *telegraph* in the Telegraph Act 1869 (32 & 33 Vict, c 73) even though the device had not been invented at the time the Act came into force); *Lake Macquarie Shire Council v Aberdare County Council* (1970) 123 CLR 327, HC (Aust) (reference in legislation to powers of council to provide "gas" included supply of liquefied petroleum gas, even though only coal gas available at time when legislation enacted; *per* Barwick CJ at 331: "I can see no reason why, whilst the connotation of the word 'gas' will be fixed, its denotation cannot change with changing technologies."), cited in D C Pearce & R S Geddes, *Statutory Interpretation in Australia* (4th ed) (Sydney: Butterworths, 1996) at 92–93, [4.8]; *R v Ireland* [1997] QB 114, CA (appellant who caused psychological harm to women victims by making repeated telephone calls to them and remaining silent when they answered committed "assault" within meaning of Offences against the Person Act 1861 (24 & 25 Vict, c 100), s 47); and *Victor Chandler International v Customs and Excise Commissioners* [2000] 1 WLR 1296, CA (s 9(1)(b) of Betting and Gaming Duties Act 1981 (c 63), which prohibits issuing, circulation or distribution in the United Kingdom of any advertisement or other document inviting the making of bets, breached if Gibraltar company broadcasts betting odds on teletext in the UK by direct electronic transmission from terminal in Gibraltar).

²³⁶ 1977 c 42 (UK).

²³⁷ 10 & 11 Geo V, c 17; see *Fitzpatrick*, above, n 235 at 40.

²³⁸ *Fitzpatrick*, *id* at 35.

²³⁹ *Id* at 38.

²⁴⁰ [1981] AC 800 at 822 *per* Lord Wilberforce, HL.

A statute must necessarily be interpreted having regard to the state of affairs existing when it was enacted. It is a fair presumption that Parliament's intention was directed at that state of affairs. When circumstances change, a court has to consider whether they fall within the parliamentary intention. They may do so if there can be detected a clear purpose in the legislation which can only be fulfilled if an extension is made. How liberally these principles may be applied must depend upon the nature of the enactment, and the strictness or otherwise of the words in which it was expressed.²⁴¹

Lord Slynn held that the intention in 1920 had not just been for a protected tenant's legal wife but also other members of the family unit occupying the property on the death of the tenant to succeed to the tenancy. In his view, a transient superficial relationship or mere cohabitation by friends for convenience did not amount to a family;²⁴² the hallmarks of the relationship were a degree of mutual interdependence, sharing of lives, caring and love, and commitment and support.²⁴³ Lord Nicholls spoke of the sharing of lives together in a single family unit living in one house;²⁴⁴ while Lord Clyde referred to bonds of love and affection, not of a casual or transitory nature but in relationships which were permanent or at least intended to be so.²⁴⁵ Here, the judges were establishing the attributes of the term which determined its connotation. A majority of the House went on to find that the plaintiff should be regarded as a member of the tenant's family for the purposes of the Act – the relationship between the plaintiff and the tenant thus fell within the denotation of the term *family* in the Act.²⁴⁶

²⁴¹ *Fitzpatrick*, above, n 235 at 45.

²⁴² *Id* at 40.

²⁴³ *Id* at 38.

²⁴⁴ *Id* at 44.

²⁴⁵ *Id* at 51. Lord Clyde added that as a result of the personal attachment, other characteristics followed, such as a readiness to support each other emotionally and financially, to care for and look after the other in times of need, and to provide a companionship in which mutual interests and activities could be shared and enjoyed together. He noted it would be difficult to establish such a bond unless the couple were living together in the same house, and if there was not an active sexual relationship between them or at least the potentiality of such a relationship. While the existence of children were not a necessary element, if the couple had or were caring for children whom they regard as their own this made the family designation more immediately obvious: *id*.

²⁴⁶ In *Fitzpatrick*, the House of Lords held that the plaintiff did not succeed to the tenancy as the "spouse" of the original tenant, even though that term had been statutorily extended to mean persons

In *Fitzpatrick*, Lord Slynn said that another way of approaching the matter was to ask whether the meaning of the term *family* needed to be updated so as to be capable of including persons who today would be regarded as being a member of another's family, whatever the term might have meant in 1920.²⁴⁷ However, he eventually did not rely on this approach. Instead of regarding the meaning of the word *family* as having changed, he was of the opinion it was better to say that the situations capable of falling within the words had changed.²⁴⁸ It is submitted that this view is correct. The "updating construction" approach appears to derive from Bennion, who has stated that there is a common law presumption that Parliament intends the court to apply to an ongoing Act²⁴⁹ "a construction that continuously updates its wording to allow for changes since the Act was initially framed".²⁵⁰ Bennion views the presumption as reflecting the principle that an ongoing Act is to be taken to be "always speaking":²⁵¹ "[I]n its application on any date, the language of the Act, though necessarily embedded in its own time, is nevertheless to be construed in accordance with the need to treat it as current law."²⁵² The careful wording of Bennion's explanation deserves to be noted, and preferred to looser formulations

living with the original tenant "as his or her wife or husband". Following the entry into force of the Human Rights Act 1998 (c 42) ('HRA'), in *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, the House of Lords took a different view, holding that such an interpretation violated the respondent's rights under Arts 8 and 14 of the European Convention. In the view of a majority of their Lordships, s 3 of the HRA, which mandates that legislation be read and given effect in a way compatible with Convention rights so far as is possible, required that the term *spouse* be interpreted to include a same-sex partner.

²⁴⁷ *Id* at 35.

²⁴⁸ *Id* at 39. Lord Clyde, too, expressed the view that what had changed was not the essential meaning of the word *family*, but the precise personal associations to which the concept might now be applied: *id* at 50.

²⁴⁹ According to Bennion, an ongoing Act is an Act intended to develop in meaning with developing circumstances, and is to be distinguished from a fixed-time Act which is intended to be of unchanging effect: Bennion, above, n 12 at 889–890, s 288.

²⁵⁰ *Id* at 890, s 288. Bennion was expressly cited in *R v Westminster City Council, ex parte A* (1997) 9 Admin LR 504 at 509; in *Fitzpatrick*, *id* at 35 and 50; and in *Victor Chandler*, above, n 235 at 1303, paras 27–28, and 1305–1306, [35].

²⁵¹ Citing Lord Thring, *Practical Legislation* (London: John Murray, 1902) at 83: see Bennion, *id* at 891, s 288.

²⁵² Bennion, *id* at 890, s 288.

such as that proposed by D C Pearce and R S Geddes in the Australian context: “[W]ords in an Act are to be interpreted in accordance with their current meaning”.²⁵³ Inasmuch as it may be argued that an updating construction implies the essential meaning of a statutory term changes over time, it is submitted that this is erroneous. Construing the presumption in favour of an updating construction in this manner would promote semantic opportunism, which we have already rejected.

A court may also be confronted by a situation where semantic drift has occurred – the modern meaning of a term is no longer the same as that when it was enacted. This modern meaning can be detected by having regard to, among other things, the term’s present semantic meaning in the context of the legislation it appears in, judicial notice and, where appropriate, the testimony of witnesses. In line with the general principle that a term’s connotation does not change, the court is bound to give effect to the original meaning. This is akin to Bennion’s “box principle”, which he explains as follows:

An Act uses a term T1. The meaning of T1 at the date when the Act is passed indicates that it comprises A, B, C and D. (In other words, T1 is like a box containing those four elements and no others.) By the time the instant case is heard, the meaning of T1 has changed. Now the box contains A, B, E and F, and nothing else. However, another term T2 is now in use. The box which is T2 contains, at the date of the instant case, the elements A, B, C and D (and no others). For the purposes of that case, the Act is to be read as if instead of T1 it used the term T2. (If there was in fact no new term T2, it would be necessary to use instead a form of words which embraced A, B, C and D, and nothing else.)²⁵⁴

The box principle is entirely in line with the connotation–denotation analysis. The elements A, B, C and D in Bennion’s exposition are equivalent to the attributes comprising a term’s connotation, which are regarded as fixed. On the other hand, Pearce and Geddes suggest a different test: “Would the legislature have intended to

²⁵³ Pearce & Geddes, above, n 235 at 91, [4.6].

²⁵⁴ Bennion, above, n 12 at 907, s 288.

include the activity or thing in the expression if it had known about it?”²⁵⁵ With respect, it is submitted that this test is unacceptably speculative. Basically, it requires a counterfactual intention to be imputed to the legislature, a method doubted in Chapter Four.²⁵⁶ The connotation–denotation analysis, reflected in Bennion’s box principle, is to be favoured.

Applying this analysis to the example concerning the interpretation of section 51(xxi) of the Australian Constitution raised by McHugh J in *Re Wakim*,²⁵⁷ if the connotation of the term *marriage* at the time of framing was a voluntary union for life of one man and one woman to the exclusion of all others, this remains unchanged. Hence, these are the essential attributes of the term that will decide its denotation. Even if at the time the issue comes up for decision the word *marriage* has gained a wider meaning in the community, it is submitted that it would be incorrect for the court to depart from the original understanding of the term.²⁵⁸

CONCLUSION

A court will find assistance in interpreting a constitutional term by considering its linguistic, purposive and applicative meanings. It is submitted that when it is sought to establish a term’s linguistic meaning, it is necessary to consider both semantic and

²⁵⁵ Pearce & Geddes, above, n 235 at 94, [4.9].

²⁵⁶ Chapter Four, Pt I.A.1(1).

²⁵⁷ See nn 155–158 and the accompanying text, above.

²⁵⁸ Interpreting the term *marriage* in this way would not necessarily mean that the Australian Commonwealth Parliament has no power to legislate to, say, authorize same-sex unions. By s 51(xxi) of the Australian Constitution, the Parliament is empowered to “make laws... *with respect to...* marriage” [emphasis added]. Arguably, a law authorizing same-sex unions is a law “with respect to” the traditional understanding of marriage because it confers on such unions a status comparable to that of marriage. In *Re Wakim*, above, n 155 at 554, [47], McHugh J said that “the indeterminate nature of the words ‘with respect to’... may result in subjects now falling within the scope of the Commonwealth power although most people in 1901 would have denied that the Commonwealth had power in respect of such subjects”. Thus, because the legal profession now had connections with almost every aspect of trade and commerce, taxation, trading and financial corporations, banking, insurance, copyrights, patents, bankruptcy, insolvency and matrimonial causes, the Commonwealth Parliament might have regulatory powers over the profession that would have been regarded as unthinkable in 1901: *id.*

pragmatic aspects. In most cases, a term's semantic or grammatical meaning is the natural and ordinary meaning that a reasonable person would understand it to have. In Chapter Four, it was stated that textualism can be understood as an interpretive approach that regards the text of a statute as the primary source for determining Parliamentary intention.²⁵⁹ As this understanding is applicable to moderate originalism, that form of originalism is a textualist approach to interpretation. However, the definition, which was crafted to avoid textualism's excesses, does not say that *only* the text may be referred to. Thus, the court may refer to a range of secondary materials, including dictionaries which are useful for setting the outer limits of the term's meaning. However, courts ought not unquestioningly accept the views of legislators on the matter as expressed in Hansard.

Also essential to the interpretive task is the pragmatic meaning of a term. It is necessary to ascertain what Solum calls the term's clause meaning – the ordinary and conventional public meaning that the term would have had *to its intended audience* when it was enacted into law. This necessitates an appreciation of the term's context which, it was argued, includes the purpose of the provision it appears in. In addition, clause meaning is shaped by the use of terms of art, implications and stipulations.

Finally, a term's meaning involves the potential applications that were foreseen by legislators. Although such applications are useful if they can be discerned from the constitutional text, instances of this nature will be uncommon. Courts must proceed with trepidation and not infer applicative meaning from reports of legislative debates where Parliament has decided not to refer explicitly to potential applications in the text.

²⁵⁹ Chapter Four at Pt I.A.1 at 168.

There are compelling reasons why the clause meaning of a constitutional provision should be regarded as fixed as at the time of framing rather than changing. Arguably, when a legislature enacts a statute, its central intent is to create binding legal rules and communicate them to present and future generations of administrators, lawmakers and judges, and the public at large. Thus, barring specific textual and secondary evidence to the contrary, it is unlikely that the framers of a constitution intended to confer on the courts the discretion to completely ignore the message they were trying to convey. If the courts did act in this manner, they would be practising 'semantic opportunism'. Constitutional terms would be subject to reinterpretation only if their linguistic meanings happened to have altered over time. This would make the interpretive process highly fortuitous.

On the other hand, the presumption should be that the applicative meaning of terms and provisions is not frozen as at the time of framing. The potential scope of application of a term depends on whether it embodies abstract concepts or not. If it does not, there is a possibility that the term may indeed apply only to scenarios existing or foreseen at the time of framing. The converse is true when the legislature has chosen to express itself in vague terms and has neither attempted to define them nor indicated their scope. There is every reason to suppose that framers intended to leave it to the court to determine how such terms and provisions should be applied on a case-by-case basis, particularly in view of the fact that constitutions and bills of rights lay down fundamental principles that are supposed to persist for extended periods.

In Australian jurisprudence, the connotation of a term is the unchanging bundle of attributes that constitutes its meaning, while its denotation is the collection of things or scenarios to which the term refers. Hence, the concepts of connotation

and denotation reflect the views expressed above, with connotation corresponding to clause meaning and denotation to applicative meaning. Applying a connotation–denotation analysis is therefore a practical way to determine how a term should be interpreted in the light of a semantic shift in the meaning of the term, or changed circumstances. Ascertaining connotation entails discerning the attributes that are central to the term’s meaning. This is by no means always a straightforward task, and it is probably unrealistic to try and articulate rigid rules for determining whether a particular attribute is an essential characteristic of a term. It should be appreciated that the task of identifying the connotation of a term is basically the ascertainment of the term’s clause meaning. However, where there is a lack of convincing evidence indicating what the framers of the text regarded as the essential meaning of the term, the court should apply a presumption of generosity and articulate a connotation that maximizes rights while trying to avoid impractical results.

The connotation of a term determines the scope of its denotation – the denotation will be wider (that is, more things or scenarios will come within the term’s meaning) when the term expresses abstract concepts. This is line with the view taken in Chapter Four that a moderately originalist approach to the interpretation of constitutions and bills of rights should not require courts to always read the legislative text as it was understood at the time of its enactment. Depending on the language of the text, it may be appropriate for a dynamic interpretation to be adopted.²⁶⁰

The method of interpretation proposed here might be criticized for focusing on the technicalities of how meaning should be attributed to the words and phrases used in the text, rather than encouraging the taking of a broad-brush approach. It is

²⁶⁰ Chapter Four, Pt II.

submitted that we must not overlook the fact that constitutions and bills of rights are statutes, and must generally be treated as such except where their special nature requires otherwise. The method mandates fidelity to the clause meaning of the text at the time of framing, which is consistent with the requirements of moderate originalism. In any case, it is evident that the interpretive method discussed also reposes significant discretion in judges to determine the meaning of constitutional terms. For instance, fresh knowledge or factual scenarios coming to the court's attention since the text was framed may justify a judge in holding that the prior formulation of a term's connotation is inaccurate and should be revised, even though connotation is understood to be constant and unchanging. Furthermore, courts have much leeway in deciding how vague terms appearing in the text should be applied. This should not cause dismay, for it is submitted that this is precisely the responsibility that is envisaged for judges in Westminster-style systems with written constitutions and bills of rights.

CHAPTER SIX

When the Text Runs Out: The Role of the Court in Constitutional Construction

[T]he courts are not charged solely with the adjudication of individual cases. That is, of course, one role. It [judicial independence] is also the context for a second, different and equally important role, namely, as protector of the Constitution and the fundamental values embodied in it – rule of law, fundamental justice, equality, preservation of the democratic process, to name perhaps the most important.¹

— BRIAN DICKSON (1916–1998),
Chief Justice of Canada

I. THE PRESUMPTION IN FAVOUR OF GENEROSITY RE-EXAMINED	261
II. TEXTUAL VAGUENESS AND CONSTITUTIONAL IMPLICATIONS.....	265
A. Ambiguity and Vagueness	265
B. Constitutional Implications.....	267
1. Implications from Text and Structure	269
2. Implications from Common Law Rules and Principles	276
3. The Limits of Constitutional Implications	290
III. PROPORTIONALITY.....	295
A. Difficulties with Proportionality.....	297
1. Incommensurability	298
2. Devaluation of Rights	304
B. Proportionality and Taciturn Constitutions.....	307
CONCLUSION	310

THE PROCESSES OF constitutional interpretation and constitutional construction should be distinguished. Interpretation describes what happens when a court identifies the semantic content of the constitutional text.² Semantic content does not

¹ *R v Beaugard* [1986] 2 SCR 56 at 70, [24], SC (Can).

² Lawrence B Solum, “Semantic Originalism” (Illinois Public Law and Legal Theory Research Papers Series No 07-24, 22 November 2008) <<http://papers.ssrn.com/abstract=1120244>> (accessed 27 August 2009) at 68.

fully determine the content of constitutional law; it merely contributes towards it.³ Rules of constitutional law are derived by the court through a process of construction,⁴ which requires judges to transform the semantic meaning of the text into legal rules. It may be that by interpreting a particular provision, the court is able to establish its ‘clause meaning’ – the ordinary and conventional public meaning that the provision would have had to its intended audience at the time it became law⁵ – and that this meaning enables the court to apply the provision to determine the issue that has come before it. In this case, the court has been able to establish the relevant constitutional law rule to apply to the issue through interpretation alone. In contrast, it must resort to construing the text when it has ‘run out’; in other words, when its clause meaning fails to provide sufficient assistance. For instance, determining the semantic meaning of the sentence “No person shall be deprived of his... personal liberty save in accordance with law”⁶ alone provides little indication as to whether a statute criminalizing the commission in private of an “act of gross indecency” between two male persons⁷ infringes the fundamental liberties of a gay man. Part I of the chapter re-examines the well-established presumption in favour of generosity which, it is submitted, is a basic rule of construction that acts as a tie-breaker in cases when competing considerations are finely balanced. Part II goes on to briefly consider the distinction between ambiguity and vagueness in written law, and argues that vagueness – a common feature of constitutions and bills of rights – is intentional rather than inadvertent. It then attempts to justify why courts may

³ *Id* at 6. Solum refers to this as his “contribution thesis”.

⁴ *Id* at 68.

⁵ *Id* at 51.

⁶ Constitution of the Republic of Singapore (1999 Reprint), Art 9(1).

⁷ Penal Code (Cap 224, 2008 Rev Ed) (Singapore), s 377A: “Any male person who, in public or private, commits, or abets the commission of, or procures or attempts to procure the commission by any male person of, any act of gross indecency with another male person, shall be punished with imprisonment for a term which may extend to 2 years.”

construe vague terms and provisions by drawing implications from the text and structure of the constitution, as well as from fundamental common law rules and principles. It concludes with some thoughts about the limits of constitutional implication and what courts should do about this.

The foregoing assists judges to decide the scope of terms and provisions, but once it is determined that a particular factual scenario is within scope, the rules do not indicate whether the court should find that the applicant's rights have been legitimately restricted. A different form of analysis is required, since there are few fundamental liberties that are absolute. Part III thus proposes that after an activity that a litigant claims he has a constitutional right to engage in is found to fall plausibly within the scope of the right, the court must go on to consider if the government has presented sufficient public interest reasons showing that limitations on the right are reasonable and proportional.

I. THE PRESUMPTION IN FAVOUR OF GENEROSITY RE-EXAMINED

Constitutions and bills of rights differ qualitatively from ordinary statutes. Speaking in the House of Representatives on the bill that would eventually become the Judiciary Act 1903⁸ and create the High Court of Australia, Alfred Deakin (later Prime Minister of Australia) said:

[The] Constitution was drawn, and inevitably so, on large and simple lines, and its provisions were embodied in general language, because it was felt to be an instrument not to be lightly altered, and indeed incapable of being readily altered; and, at the same time, was designed to remain in force for more years than any of us can foretell, and to apply under circumstances probably differing most widely from the expectations now cherished by any of

⁸ Act No 6 of 1903 (Cth).

us. Consequently, drawn as it of necessity was on simple and large lines, it opens an immense field for exact definition and interpretation.⁹

Indicating that it was desirable to view the Constitution's grant of powers to the Australian Commonwealth liberally, O'Connor J, in *Jumbunna Coal Mine NL v Victorian Coal Miners' Association*,¹⁰ stated in similar vein:

[I]t must always be remembered that we are interpreting a Constitution broad and general in its terms, intended to apply to the varying conditions which the development of our community must involve.

For that reason, where the question is whether the Constitution has used an expression in the wider or in the narrower sense, the Court should, in my opinion, always lean to the broader interpretation unless there is something in the context or in the rest of the Constitution to indicate that the narrower interpretation will best carry out its object and purpose.¹¹

These quotations highlight one ground for the presumption in favour of generosity: constitutions and bills of rights (particularly those embedded within constitutions) are designed to be relevant to changing views and circumstances. Therefore, courts should not shrink the scope of such texts through narrow, legalistic interpretations. Thus, the High Court of Australia has stated that the Australian Constitution should not be given a "narrow or pedantic interpretation",¹² but should be construed "with all the generality which the words used admit".¹³

The same conclusion can be derived from the fact that a bill of rights has a special status because it secures individuals' fundamental liberties, the protection of

⁹ Australia, House of Representatives, *Parliamentary Debates* (18 March 1902) at 10965, cited in *Singh v Commonwealth* (2004) 222 CLR 322 at [16], HC (Aust).

¹⁰ (1908) 6 CLR 309.

¹¹ *Id* at 367–368, cited in *Eastman v R* (2000) 203 CLR 1 at 42–43, [135] *per* McHugh J. See also *Victoria v The Commonwealth* (1971) 122 CLR 353 at 396–397 *per* Windeyer J, cited in *Eastman, id* at 43, [136]: "[T]he Constitution is not an ordinary Statute: it is a fundamental law. In any country where the spirit of the common law holds sway the enunciation by courts of constitutional principles based on the interpretation of a written constitution may vary and develop in response to changing circumstances."

¹² *Singh v Commonwealth*, above, n 9 at [53] *per* McHugh J, citing *Australian National Airways Pty Ltd v The Commonwealth* (1945) 71 CLR 29 at 85.

¹³ *Singh v Commonwealth, id* at [155] *per* Gummow, Hayne and Heydon JJ, citing *R v Public Vehicles Licensing Appeal Tribunal (Tas), ex parte Australian National Airways Pty Ltd* (1964) 113 CLR 207 at 225.

which are generally regarded as central to legal systems on the Westminster model. This principle was given expression in *Ong Ah Chuan v Public Prosecutor*,¹⁴ the Privy Council noting that the fundamental liberties in the Singapore Constitution should be given “a generous interpretation avoiding what has been called ‘the austerity of tabulated legalism,’¹⁵ suitable to give to individuals the full measure of the [fundamental liberties] referred to”.¹⁶ In the Canadian Supreme Court decision *Canadian National Railway Co v Canada (Human Rights Commission)*,¹⁷ Dickson CJ said:

I recognize that in the construction of [human rights] legislation the words of the Act must be given their plain meaning, but it is equally important that the rights enunciated be given their full recognition and effect. We should not search for ways and means to minimize those rights and to enfeeble their proper impact.¹⁸

The presumption in favour of generosity may be regarded as a special application of the presumption against the abrogation of rights which applies to legislation generally. Under the latter presumption, courts will not assume that the legislature intends to curtail fundamental freedoms unless it has clearly and unambiguously expressed its intention to do so.¹⁹ Francis Bennion subsumes the

¹⁴ [1981] AC 648, [1979–1980] SLR(R) 710, PC (on appeal from S’pore).

¹⁵ The words in quotation marks, left unattributed by Lord Wilberforce in *Minister of Home Affairs v Fisher* [1980] AC 319 at 328, PC (on appeal from Bermuda), appear to be those of Stanley A de Smith, *The New Commonwealth and its Constitutions* (London: Stevens & Sons, 1964) at 194; see Paul Rishworth *et al*, *The New Zealand Bill of Rights* (South Melbourne, Vic; New York, NY: Oxford University Press, 2003) at 43, n 109.

¹⁶ *Ong Ah Chuan*, above, n 14, [1981] AC at 670, [1979–1980] SLR(R) at 721, [23], citing *Minister of Home Affairs v Fisher*, *id*. See also *Attorney-General of the Gambia v Momodou Jobe* [1984] AC 689 at 700, PC (on appeal from the Gambia) (“A constitution, and in particular that part of it which protects and entrenches fundamental rights and freedoms to which all persons in the state are to be entitled, is to be given a generous and purposive construction.”), which was applied in *Vasquez v R* [1994] 1 WLR 1304 at 1313, PC (on appeal from Belize).

¹⁷ [1987] 1 SCR 1114.

¹⁸ *Id* at 1134. See also *Canadian Odeon Theatres Ltd v Saskatchewan Human Rights Commission and Huck* [1985] 3 WWR 717 at 735, CA (Sask, Can) (“[A] statute which guarantees fundamental rights and freedoms and which prohibits discrimination to ensure the obtainment of human dignity should be given the widest interpretation possible.”)

¹⁹ *Coco v The Queen* (1994) 179 CLR 427 at 437. See also *Sargood Bros v Commonwealth* (1910) 11 CLR 258 at 279, HC (Aust) (“It is a well recognised rule in the interpretation of Statutes that an Act

presumption of generosity under the common law principle against doubtful penalization, under which a person should not be penalized unless the law is clear.²⁰ It is submitted that both the presumptions rest on the centrality of fundamental liberties to individual contentment and fulfilment within society as well as to democracy and the rule of law, the truth of which all branches of government are assumed to accept.²¹ Should Parliament wish to depart from this shared understanding and, say, hedge a fundamental right with exceptions or make it inapplicable in certain situations, it must say so expressly in the statute. The process of inserting into the bill of rights the words needed to effectuate this intention has the potential to trigger political discussion on the matter both within and without the debating chamber – “what these presumptions ensure is that a law that appears to transgress our basic political understandings should be clearly expressed so as to

will never be construed as taking away an existing right unless its language is reasonably capable of no other construction.”); *Commissioner of Taxation (Cth) v ANZ Banking Group Ltd* (1977) 143 CLR 499 at 509, citing *Allen v Thorn Electric Industries Ltd* [1968] 1 QB 487 at 505 (“[A] construction of a statute which interferes with the legal rights of the subject to a lesser extent and produces the less hardship is to be preferred to another, having the opposite effect.”): see D C Pearce & R S Geddes, *Statutory Interpretation in Australia* (4th ed) (Sydney: Butterworths, 1996) at 129, para 5.1, and at 145, [5.22]. The same position pertains in Canada and the United Kingdom: see, eg, *Morguard Properties Ltd v City of Winnipeg* (1983) 3 DLR (4th) 1 at 13, SC (Can) (“[T]he courts require that, in order to adversely affect a citizen’s right, ... the Legislature must do so expressly. ... The resources at hand in the preparation and enactment of legislation are such that a court must be slow to presume oversight or inarticulate intentions when the rights of the citizen are involved.”); and *Wheeler v Leicester City Council* [1985] AC 1054 at 1065, HL (“I do not consider that general words in an act of Parliament can be taken as authorising interference with these basic immunities which are the foundation of our freedom. Parliament (being sovereign) can legislate so as to do so; but it cannot be taken to have conferred such a right on others save by express words.”)

²⁰ F[rancis] A[lan] R[oscoe] Bennion, *Statutory Interpretation: A Code* (5th ed) (London: LexisNexis, 2008) at 825, s 271; and 827, Example 271.1 (“It is because of the principle against doubtful penalisation that the Judicial Committee of the Privy Council [in *Momodou Jobe*, above, n 16] has advised that human rights provisions in constitutions should be construed in favour of the subject.”). At 826, Bennion expresses the view that the principle is an application to statutory interpretation of “the just principle that a person is not to be put in peril upon an ambiguity” (citing *Tuck & Sons v Priester* (1887) LR 19 QBD 629 at 638, CA, which was applied in *R v Z* [2005] 2 AC 645 at 654–655, [16], HL).

²¹ “It is considered appropriate for courts to rely on [common law] norms because the values and aspirations they embody are derived from the intellectual tradition that has fostered western style democracies and economies. ... In so far as common law norms reflect the shared values and aspirations of this tradition, they may be relied on by the legislature in devising legislation and by the courts in interpreting and applying it.”: Ruth Sullivan, *Driedger on the Construction of Statutes* (3rd ed) (Toronto: Butterworths, 1994) at 318.

invite the debate which is the lifeblood of Parliamentary democracy”, as La Forest JA remarked in *R in right of New Brunswick v Estabrooks Pontiac Buick Ltd.*²² The corollary to the presumptions in favour of generosity and against the abrogation of rights is a presumption against exceptions to fundamental freedoms. In *Zurich Insurance Co v Ontario (Human Rights Commission)*,²³ Sopinka J expressed the following opinion:

Human rights legislation... is often the final refuge of the disadvantaged and the disenfranchised. As the last protection of the most vulnerable members of society, exceptions to such legislation should be narrowly construed.²⁴

To sum up, the interpretive criterion favouring a generous reading finds justification in the *raison d'être* of a bill of rights in a legal system. If rights are construed narrowly, there is a risk that such fundamental liberties will be sidelined, thus rendering the bill of rights empty rhetoric. We must not overlook the fact that the criterion is only a presumption that may be displaced by the use of clear words in the statute. But in their absence, as the *Jumbunna Coal Mine* decision²⁵ indicates, the practical implication of the criterion is that courts should come down in favour of expanding rather than contracting rights. In cases where other factors are evenly balanced, the presumption in favour of generosity may well prove to be decisive.

II. TEXTUAL VAGUENESS AND CONSTITUTIONAL IMPLICATIONS

A. AMBIGUITY AND VAGUENESS

Since the framers of a constitution or bill of rights have expressed their intent in the form of a legally-binding text, a court's emphasis should be on determining the meaning of the text rather than conjecturing about what the framers actually

²² (1982) 44 NBR (2d) 201 at 210–211, CA (New Brunswick, Can).

²³ [1992] 2 SCR 321, SC (Can).

²⁴ *Id* at 339.

²⁵ Above, n 10.

believed it to mean. For this reason, it is submitted that moderate originalism is the most appropriate interpretive approach for a court to take. This approach focuses on the text as the primary source for determining Parliamentary intention, but gives due recognition to the need for looking beyond the text when its language is open-ended.²⁶

Therefore, in the first instance, a judge should pay substantial attention to extracting whatever meaning he can from the given text. He or she should strive to give a provision its ‘clause meaning’ – the ordinary and conventional meaning that it was understood to have when it was enacted.²⁷ This involves considering the semantic meaning of the provision in context, including its purpose. However, this approach ceases to be of much assistance where a provision as a whole is vague or contains vague terms. For instance, knowing the clause meaning of a provision such as Article 12(1) of the Singapore Constitution, which states that “[a]ll persons are... entitled to the equal protection of the law”,²⁸ does not get a court very far in deciding whether the right to equal protection is infringed by a statute that prohibits Muslim women from wearing the *niqāb* or full face veil when accessing public services.²⁹

Vagueness should be distinguished from ambiguity. A text can be regarded as ambiguous if two or more different and specific constructions can be given to it, and one cannot dispel its semantic uncertainty by considering the context. On the other

²⁶ Chapter Four, Pt I.B.

²⁷ Solum, above, n 2 at 51. See Chapter Five, Pt II.A.2 at 204–205.

²⁸ Constitution of the Republic of Singapore (1999 Reprint), Art 12(1).

²⁹ See, for example, Lizzy Davies, “French Cross-party Committee to Recommend Partial Ban on Full Veil: Report Given to Parliament Dismisses Outright Ban in Favour of Barring Anyone Using Public Services who Refuses to Uncover Face”, *The Guardian* (25 January 2010) <<http://www.guardian.co.uk/world/2010/jan/25/france-report-veil-burka-ban>> (accessed 9 April 2010, archived at <<http://www.webcitation.org/5oqF7VoXU>>); Michael White, “France, Don’t Ban the Niqab: You Need a Much Better Reason than Personal Discomfort to Outlaw Something in a Free Society”, *The Guardian* (1 February 2010) <<http://www.guardian.co.uk/politics/blog/2010/feb/01/france-dont-ban-niqab-michael-white>> (accessed 9 April 2010, archived at <<http://www.webcitation.org/5oqEsrwXW>>).

hand, a provision is vague when the language used is so broad that it is capable of a range of meanings, some of which may be mutually inconsistent.³⁰ While ambiguity is the product of the drafter's inadvertence, vagueness is frequently intentional³¹ – in *Re Wakim, ex parte McNally*,³² McHugh J observed that many words and phrases of the Australian Constitution “are expressed at such a level of generality that the most sensible conclusion to be drawn from their use in a Constitution is that the makers of the Constitution intended that they should apply to whatever facts and circumstances succeeding generations thought they covered”.³³ The provisions of bills of rights are often vague because they embody abstract concepts.³⁴

B. CONSTITUTIONAL IMPLICATIONS

A challenge commonly faced by judges in constitutional cases is the meaning and scope that should be accorded to vague terms and provisions. A related issue is what a court should do when the text contains no specific provisions that are directly on point. This is when it may become necessary to engage in constitutional construction by drawing reasonable implications from the text and structure of the constitution and, it is submitted, from fundamental common law rules and principles. The publicly accessible meaning of a constitutional text may include matters that are to

³⁰ Randal N Graham, “A Unified Theory of Statutory Interpretation” (2002) 23(2) *Stat L Rev* 91 at 118, citing Reed Dickerson, “The Diseases of Legislative Language” (1964) 1 *Harv J Leg* 10. See also Solum, above, n 2 at 69–72.

³¹ Graham, *id* at 121–124.

³² (1999) 198 CLR 511, HC (Aust).

³³ *Id* at 552, [44]. See also Ruth Sullivan, *Sullivan on the Construction of Statutes* (5th ed) (Markham, Ont: LexisNexis Canada, 2008) at 502–503: “A text that is written in general or abstract language invites an organic approach... In so far as an ‘organic’ approach consists of adapting legislation to evolving conceptions of society and its basic values, it is a normal and appropriate part of interpretation. Courts are bound to respect the meaning of words used by the legislature, but given the plastic character of language, especially the general language typically found in human rights codes, this constraint does not prevent the courts from taking a flexible and adaptive approach.”

³⁴ Chapter Five, Pt II.A.2(1)(b).

be implied rather than read on the printed page.³⁵ There is nothing unusual about this. Judges make constitutional implications as a matter of course when fulfilling their responsibility of determining the meaning of constitutional terms and provisions. Implications are justifiable because the framers of the constitution would have expected its readers and interpreters to construe the text against a backdrop of language usage, historical circumstances, and existing statutory and common law rules and principles. It would have been impossible – or at least highly impractical – for the framers to have, for example, attempted to foresee and write into the text all the linguistic and legal rules and principles that courts might have need to rely upon when interpreting the text. Furthermore, the framers would have regarded this a pointless task, assuming that such matters were obvious to judges. The accuracy of the assumption recedes as times passes, but does not change the fact that when construing the constitutional text a judge should consider what rules and principles were reasonably applicable to the text at the time it came into force, and apply them to draw proper implications from the text. In *M’Culloch v Maryland*,³⁶ Chief Justice John Marshall gave an example of how implications may be made. Article I, section 8, clause 7, of the Constitution of the United States provides: “The Congress shall have Power... To establish Post Offices and post Roads”. Marshall CJ said:

This power is executed by the single act of making the establishment. But from this has been inferred the power and duty of carrying the mail along the post road from one post office to another. And from this implied power has again been inferred the right to punish those who steal letters from the post office, or rob the mail.³⁷

Rather than try to anticipate all the powers required by Congress to establish a postal system, the framers of the US Constitution took the view that it was only necessary to

³⁵ Solum, above, n 2 at 56.

³⁶ 17 US 316 (1819), SC (US), cited in Solum, *id* at 56–57.

³⁷ *McCulloch*, *id* at 417.

authorize the establishment of post offices and post roads, trusting that this was clear enough to empower the legislature to do all things incidental as well.

1. *Implications from Text and Structure*

When determining what implications are appropriately drawn from the text, a court must of course take into account all relevant factors, including the provision in question and related provisions; other parts of the constitution (including, where appropriate, the history of its enactment); and statute law and the common law. The first and second categories of factors are arguably applications to the constitutional realm of the well established principle that a provision must be construed in the light of the statute in which it is found.³⁸ Consideration should be given to the relation between the provision in question and other provisions of the constitution³⁹ and, indeed, provisions in statutes with related subject-matter. Article II, section 1, of the US Constitution states in part that “No Person except a natural born Citizen... shall be eligible to the Office of President”. In the context of Article II, the Constitution as a whole and the circumstances of its drafting and adoption,⁴⁰ and the common law of

³⁸ “The broad general rule for the construction of statutes is that a section or enactment must be construed as a whole, each portion throwing light, if need be, on the rest”: *Greenshield v The Queen* [1958] SCR 216 at 225, SC (Can), cited in Sullivan, above, n 33 at 359; see also Bennion, above, n 20 at 1155–1156, s 355.

³⁹ “[T]he question whether s 122 [of the Australian Constitution] is subject to the freedom of political communication... is one that must be answered by ascertaining the meaning and operation of that provision in its constitutional setting. In particular, its meaning and operation must be ascertained by having regard to the Constitution as a whole.”: *Kruger v Commonwealth* (1997) 190 CLR 1 at 118 *per* Gaudron J.

⁴⁰ It has been suggested that the clause was derived from Art IX, s 1, of a plan of government submitted on 18 June 1787 by Alexander Hamilton to the Philadelphia Convention: “No person shall be eligible to the office of President of the United States unless he be now a Citizen of one of the States, or hereafter be born a Citizen of the United States.”; see Jill A Pryor, “The Natural-born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty” (1988) 97 Yale LJ 881 at 889. The clause may also have come from a letter of 25 July 1787 sent by John Jay to George Washington, the presiding officer of the Convention: “Permit me to hint whether it would not be wise and seasonable to provide a strong check to the admission of Foreigners into the administration of our national Government, and to declare expressly that the Command in Chief of the American army shall not be given to nor devolve on, any but a natural born Citizen.”; see William

England,⁴¹ it is highly implausible that the term *natural born* refers to birth by means of an ordinary delivery as opposed to a Caesarean delivery. Rather, the factors point to the implication that the term refers to some birth-related legal doctrine determining citizenship such as *jus soli* or *jus sanguinis*.⁴²

Implications from the text and structure of the Australian Constitution have enabled Australian courts to infer the existence of certain implied freedoms and rights in the Constitution, despite the charter lacking a comprehensive bill of rights (or, perhaps, for this very reason).⁴³ The High Court clarified in *Lange v Australian Broadcasting Corporation*⁴⁴ that a “freedom of communication on matters of government and politics” can be inferred from the form of “representative and responsible government” that is indicated by various constitutional provisions requiring members of the Senate and House of Representatives to be chosen by the people of the States and the Commonwealth respectively by way of periodic direct elections.⁴⁵ The Court emphasized that since the freedom is an implication from sections of the Constitution, the implication validly extends only so far as is necessary to give effect to those sections. “Under the Constitution, the relevant

Jay, *The Life of John Jay: With Selections from his Correspondence and Miscellaneous Papers* (New York, NY: J & J Harper, 1833), vol II, at 194; Michael Nelson, “Who Vies for President?” in Alexander Heard & Michael Nelson (eds), *Presidential Selection* (Durham, NC: Duke University Press, 1987), 120 at 122–123.

⁴¹ When interpreting the 14th Amdt, s 1 (“All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. ...”), the US Supreme Court referred to English common law in the cases of *Minor v Happersett* 88 US 162 at 167–168 (1874) and *United States v Wong Kim Ark* 169 US 649 at 658 (1898) after noting that the Constitution was silent on the indicia for a *citizen* or *natural born citizen*. The Supreme Court has not yet ruled directly on the meaning of *natural born Citizen* in Art II, s 1.

⁴² The example is from Solum, above, n 2 at 55–56, who treats *natural born Citizen* as a term of art.

⁴³ Scattered throughout the Australian Constitution are a limited number of ‘express rights’ such as the requirement for a jury trial when a Commonwealth offence is tried on indictment (s 80), and the prohibition against the Commonwealth establishing a religion or prohibiting the free exercise of religion (s 116): Adrienne Stone, “Australia’s Constitutional Rights and the Problem of Interpretive Disagreement” (2005) 27 Syd L Rev 29 at 31–32.

⁴⁴ (1997) 189 CLR 520.

⁴⁵ *Id* at 557–562.

question is not, ‘What is required by representative and responsible government?’ It is, ‘What do the terms and structure of the Constitution prohibit, authorise or require?’⁴⁶ Individual judges of the Court have accepted the existence of implied freedoms of association and movement,⁴⁷ and of an implied right to legal equality,⁴⁸ though the latter has been expressly rejected by a majority of the Court.⁴⁹

A number of conclusions on the process of drawing implications from the text and structure of a constitution may be reached from an examination of the Australian and Privy Council cases referred to above. First, while such implications must by definition be ultimately grounded in the constitutional text, they may be indirect. In other words, it is acceptable to draw implications from other implications, so long as they can eventually be traced back to the text. In *Kruger v Commonwealth*,⁵⁰ Justice Mary Gaudron noted it was accepted that the Constitution required freedom of political communication between citizens and their elected representatives, and between citizen and citizen. From this, she concluded that “[f]reedom of political communication depends on human contact and entails at least

⁴⁶ *Id* at 567.

⁴⁷ *Kruger*, above, n 39 at 91–92 *per* Toohey J, 115–121 *per* Gaudron J, and 142 *per* McHugh J (two judges left the point undecided but held that there was no textual or structural foundation in the Constitution to demonstrate that the Commonwealth Parliament’s power under s 122 to legislate for territories was limited by the freedoms: at 45 *per* Brennan CJ, and at 69–70 *per* Dawson J). The implied freedom of association was confirmed to exist in *Mulholland v Australian Electoral Commission* (2004) 220 CLR 181 at 225–226, [113]–[116] *per* McHugh J, at 234, [148] *per* Gummow and Hayne JJ (Heydon J concurring), and at 277–278, [284]–[286] *per* Kirby J.

⁴⁸ *Kruger*, *id* at 94–97 *per* Toohey J, following the minority opinion of Deane J and himself in *Leeth v Commonwealth* (1991) 174 CLR 455 at 485–490.

⁴⁹ *Kruger*, *id* at 44–45 *per* Brennan CJ, at 63–68 *per* Dawson J (McHugh J concurring at 142), and at 153–155 *per* Gummow J. Gaudron J, at 112–114, expressed the view that there is a limited constitutional guarantee of equality before the courts, but no general immunity from discriminatory laws.

⁵⁰ *Id*.

a significant measure of freedom to associate with others. And freedom of association necessarily entails freedom of movement.”⁵¹

Secondly, an implication cannot be made in the face of inconsistent provisions. It is primarily for this reason that the existence of an implied right to legal equality in the Australian Constitution has not been accepted by most judges of the High Court. Justice Daryl Dawson commented in *Kruger* that the Constitution was inconsistent with such a doctrine in many respects. The Commonwealth Parliament, for instance, is empowered by sections 51(xix) and 51(xxvi)⁵² respectively to enact laws discriminating in favour of or against aliens, and benefiting or discriminating against the people of any race. In addition, where the Constitution requires equality, it specifically prohibits discrimination, preference or lack of uniformity.⁵³ Another case in point is the decision of the European Court of Human Rights in *Pretty v United Kingdom*.⁵⁴ The applicant, who suffered from motor neurone disease, submitted that the refusal by the Director of Public Prosecutions to give an undertaking not to prosecute her husband for assisting her to commit suicide infringed, *inter alia*, her right to life under Article 2(1) of the European Convention

⁵¹ *Id* at 115; see also 91 *per* Toohey J (“While the freedom [of association] has many facets, it is an essential ingredient of political communication”) and 142 *per* McHugh J (“The reasons that led to the drawing of the implication of freedom of communication lead me to the conclusion that the Constitution also necessarily implies that ‘the people’ must be free from laws that prevent them from associating with other persons, and from travelling, inside and outside Australia for the purposes of the constitutionally prescribed system of government and referendum procedure”).

⁵² Australian Constitution, ss 51(xix) and 51(xxvi): “The Parliament shall, subject to this Constitution, have power to make laws for the peace, order, and good government of the Commonwealth with respect to... naturalization and aliens [s 51(xix)]; [and] the people of any race for whom it is deemed necessary to make special laws [s 51(xxvi)]”. As regards the particular interpretation of s 51(xxvi) mentioned by Dawson J, see *Commonwealth v Tasmania* (1983) 158 CLR 1 at 273, HC (Aust) (the *Tasmanian Dam Case*); and *Koowarta v Bjelke-Petersen* (1982) 153 CLR 168 at 186, 209, 244 and 261, HC (Aust).

⁵³ *Kruger*, above, n 39 at 64–65.

⁵⁴ (2002) 35 EHRR 1.

on Human Rights.⁵⁵ She argued that the Article protected her right to choose whether or not to go on living and thus, as a corollary, protected her right to die to avoid inevitable suffering and indignity.⁵⁶ The Court considered the wording of Article 2(1), pointing out that it was phrased differently from Article 11(1) which guaranteed the “right to *freedom* of peaceful assembly and to *freedom* of association with others”. Thus, while the freedom of association involved a corresponding right not to be compelled to join an association because “the notion of a freedom implies some measure of choice as to its exercise”, Article 2(1) was silent about the quality of a person’s life or what a person chose to do with his or her life. It could not, without distorting the language, be interpreted as conferring a right to die – “the diametrically opposite right” – or a right to choose death instead of life.⁵⁷

Similarly, it would be improper for the right not to be deprived of property without adequate compensation to be implied from the Singapore Constitution. When Singapore gained independence from Malaysia in 1965, the legislature, requiring a working constitution at short notice, enacted the Republic of Singapore Independence Act 1965⁵⁸ to provide for the continuance in force of the Federal Constitution of Malaysia, including the fundamental liberties therein, subject to certain exceptions.⁵⁹ One of the excepted provisions was Article 13⁶⁰ which protected

⁵⁵ The European Convention, Art 2(1), states in part: “Everyone’s right to life shall be protected by law.”

⁵⁶ *Pretty*, above, n 54 at 27.

⁵⁷ *Id* at 29.

⁵⁸ No 9 of 1965 (1985 Rev Ed).

⁵⁹ The Republic of Singapore Independence Act, s 6(1), states: “The provisions of the Constitution of Malaysia, other than those set out in subsection (3), shall continue in force in Singapore subject to such modifications, adaptations and qualifications and exceptions as may be necessary to bring them into conformity with the independent status of Singapore upon separation from Malaysia.”

⁶⁰ The Malaysian Constitution, Arts 13(1) and (2), state: “No person shall be deprived of property save in accordance with law” and “[n]o law shall provide for the compulsory acquisition or use of property without adequate compensation”.

the right to property.⁶¹ In view of this legislative history demonstrating a clear Parliamentary intention not to adopt a right to property,⁶² any judicial attempt to infer one from the text or structure of the Constitution would be inappropriate.

Thirdly, a distinction has been made between implications made from the text of a constitution and from its structure. In *Australian Capital Television Pty Ltd v Commonwealth*,⁶³ it was said: “In cases where the implication is sought to be derived from the actual terms of the Constitution it may be sufficient that the relevant intention is manifested according to the accepted principles of interpretation. However, where the implication is structural rather than textual it is no doubt correct to say that the term sought to be implied must be logically or practically necessary for

⁶¹ By the Republic of Singapore Independence Act, above, n 58, s 6(3). In Parliament when the enactment of this statute was being debated together with a constitutional amendment, the Prime Minister Lee Kuan Yew explained: “Clause 13 – we have specifically set out to exclude. ... [O]nce we spell out that no law shall provide for the compulsory acquisition or use of property without adequate compensation, we open the door for litigation and ultimately for adjudication by the Court on what is or is not adequate compensation. Last year... we moved a Bill to change the law regarding the acquisition of land in which we laid down that where land was compulsorily acquired for public purpose, no compensation shall be payable to the owner for any appreciation in value of the land which has been brought about by development expenditure of the Government. ... [O]ur Land Acquisition Bill... went to Select Committee and was allowed to lapse because of the doubt as to whether or not it could be said to be in compliance with Article 13... Now the jurisdiction again reverts to this House and it is our intention that the Land Acquisition Bill shall be proceeded with and Article 13 excluded.” Lee Kuan Yew, speech during the Second Reading of the Constitution (Amendment) Bill, *Singapore Parliamentary Debates, Official Report* (22 December 1965), vol 24, cols 435–436.

⁶² Developments after 1965 on the matter are, it is submitted, less clear. In 1966 a Constitutional Commission was appointed by the Government to examine how the rights of racial, linguistic and religious minorities could be adequately safeguarded in the Constitution. In its report (*Report of the Constitutional Commission, 1966* (Chairman: Wee Chong Jin) (Singapore: Government Printer, 1966)), the Commission recommended that a provision along the lines of Article 13 be reintroduced into the Constitution, with clause (2) of the Article reworded thus: “No law shall provide for the compulsory acquisition or use of property *except for a public purpose or a purpose useful or beneficial to the public and except upon just terms.*” The Government initially agreed to such a provision in principle, and only objected to the words “and except upon just terms” at the end of clause (2): E[dmund] W[illiam] Barker (Minister for Law and National Development), “Constitutional Commission Report (Statement by the Minister for Law and National Development)”, *Singapore Parliamentary Debates, Official Report* (21 December 1966), vol 25, cols 1053–1054. However, the provision was eventually dropped without explanation from the Constitution (Amendment) Bill 1969 (No B 5/1969) which amended the Constitution in 1969. No mention was made of the provision during Parliamentary debates on the bill: Second Reading of the Constitution (Amendment) Bill, *Singapore Parliamentary Debates, Official Report* (12 June 1969), vol 29, cols 60–74; Third Reading of the Constitution (Amendment) Bill, *Singapore Parliamentary Debates, Official Report* (23 December 1969), vol 29, cols 276–284.

⁶³ (1992) 177 CLR 106, HC (Aust).

the preservation of the integrity of that structure.”⁶⁴ It is submitted that when ‘structure’ is spoken of in this context, what is meant are the fundamental institutions and fundamental common law principles that collectively undergird the constitutional system, such as the concept of representative democracy or the doctrine of the separation of powers. Such elements of the system are seldom explicitly mentioned in the constitutional text, but may be inferred from express provisions, as was done in *Lange*. A more stringent standard is arguably necessary for implications from structure because the text does not act as much of a constraint on the courts’ discretion.

On the other hand, the fact that the text provides minimal guidance means that once implications have been drawn, it is inevitable that judges will need to look to principles external to the constitutional text and structure to flesh out the consequences of implications in particular cases. It has been pointed out that following the identification of a freedom of political communication in the Australian Constitution, the High Court has had to determine what standard of review to apply to it. Some cases have applied a proportionality analysis, while others a two-tiered review approach.⁶⁵ However, it is difficult for the Court to decide which approach is more appropriate by scrutinizing the constitutional text alone as it provides few insights. Some reference to values underlying the freedom of political communication is necessary in this regard.⁶⁶ This point is taken up again below.

⁶⁴ *Id* at 135 *per* Mason CJ, cited in *McGinty v Western Australia* (1996) 186 CLR 140 at 168–169, HC (Aust); and *Kruger*, above, n 39 at 152.

⁶⁵ Adrienne Stone, “The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication” (1999) 23 *Melb U L Rev* 668 at 675–681.

⁶⁶ *Id* at 698.

2. *Implications from Common Law Rules and Principles*

One source of extratextual principles that courts might wish to look to is the repository of accumulated knowledge we call the common law. When the term is used without a qualifier, what is generally meant is the English common law. However, where Westminster-style jurisdictions are concerned, references to the common law should be taken to refer to the English common law insofar as it continues to apply in the jurisdiction, as well as the jurisdiction's own developing body of judge-made law. Key questions arising are whether referring to common law principles is appropriate when there exists a written constitution, and whether such principles can be regarded as so fundamental in nature that they can override statutes.

In a legal system possessing a written constitution, it is submitted that at least three – and possibly more – types of legal rules and principles (which can be collectively referred to as 'legal criteria') exist in a hierarchy, the criteria higher in the hierarchy overriding inconsistent ones that are lower down. At the bottom are ordinary common law rules and principles, such as those making up the law of contract and tort. Rules set out in statutes are superior to these. At, or perhaps near, the top – the reasons for the qualifying words will be explained shortly – are legal criteria that have been embodied in the constitution. Many constitutions will have a supremacy clause specifically declaring that the provisions of the constitution are supreme law,⁶⁷ though such a clause is arguably redundant since by its nature a

⁶⁷ For example, the Singapore Constitution, Art 4: "This 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."

written constitution is superior and logically prior to other legal criteria. As the US Supreme Court noted in the 19th century in *Marbury v Madison*:⁶⁸

The constitution is either a superior, paramount law, unchangeable by ordinary means, or it is on a level with ordinary legislative acts, and like other acts, is alterable when the legislature shall please to alter it.

If the former part of the alternative be true, then a legislative act contrary to the constitution is not law: if the latter part be true, then written constitutions are absurd attempts, on the part of the people, to limit a power, in its own nature illimitable.

Certainly all those who have framed written constitutions contemplate them as forming the fundamental and paramount law of the nation, and consequently the theory of every such government must be, that an act of the legislature, repugnant to the constitution, is void.⁶⁹

Thus far, what has been said is uncontroversial. However, as mentioned, an important question arising is whether there exist common law legal criteria that are identified by the courts as so basic and crucial as to be capable of overriding inconsistent statutes. If so, such criteria might prove to be helpful in the construction of constitutional provisions. The existence of such criteria raises the issue of where in the hierarchy of legal criteria they lie. Are there criteria superior to ordinary legal rules and principles, but must yield to incompatible statutory and constitutional criteria (I will call these ‘important common law criteria’); and even criteria that restrict even the ability of Parliament to amend statutes and the constitution (‘fundamental common law criteria’)? For present purposes it is only necessary to establish the existence of important common law criteria and what courts may do with them, but some preliminary thoughts on fundamental common law criteria will be given as well.

The relationship between the common law, statute law and written constitutions has been considered in the academic debate concerning the ‘common

⁶⁸ 5 US (1 Cranch) 137 (1803), SC (US).

⁶⁹ *Id* at 177.

law constitution’, the idea that the content of written constitutions is at least partly if not entirely determined by unwritten common law principles.⁷⁰ Stripped to its core, the problem is one of identifying the branch (or branches) of government authorized to declare what the foundational principles of the legal system are. There seem to be two opposing choices. The first is to regard the constitution’s framers and those authorized by its terms to alter the text later on – generally the political branches of government (with or without the participation of the electorate, but certainly with the exclusion of the judiciary) – as the sole institutions authorized to lay down fundamental principles of constitutional law. The courts’ role is simply to apply the provisions enacted in the text.

The second choice is to perceive a written constitution as a specific manifestation of general principles pre-existing in the common law. Trevor Allan, for instance, takes the view that fundamental freedoms such as those relating to property, religion, speech, thought and conscience, precede and therefore restrict governmental power:

[L]iberty rights are absolute constraints on government’s pursuit of the common good. ... [A]ll legitimate authority bows to these rights, suitably characterised, by acknowledging the constraints they necessarily impose on the enactment and execution of positive law. ... If measures that contravene the fundamental freedoms are invalid, as violations of the common will, they cannot impose obligations binding in Law; and it must be open to a court (or indeed any citizen or subject) to draw that conclusion in a particular case.⁷¹

Thus, a court’s power to enforce the rule of law is not derived from a written constitution but from the common law: “Although the familiar codes of rights of modern constitutions strengthen the judicial enforcement of the rule of law, they do

⁷⁰ Jeffrey Goldsworthy, “Unwritten Constitutional Principles” in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge; New York, NY: Cambridge University Press, 2008), 277 at 279.

⁷¹ [Trevor] R S Allan, “In Defence of the Common Law Constitution: Unwritten Rights as Fundamental Law” (2009) 22 Can J L & Juris 187 at 191–192, also available as LSE Law, Society and Economy Working Papers 5/2009 <<http://ssrn.com/abstract=1331375>> (accessed 9 July 2010).

not in themselves delineate the content of Law... [T]he principles are prior to, and independent of, the enacted formulas in which they are contingently expressed. In essence, the written constitutions of liberal democracy summarise the progressive development of the common law.”⁷² Mark Walters describes the interaction between the specific propositions in a written constitution and the general common law principles they presuppose as an “interpretive oscillation”. While the political branches of government may enact specific constitutional rules, the judiciary plays a key role in determining through “inductive ascent” what are the fundamental general principles upon which the particular textual manifestations of these principles are grounded, and then, where required, engineering “a descent back to the level of specifics” by articulating new rules or rights that are consistent with the existing specific provisions and general principles.⁷³

It is submitted that the connection between a written constitution and the common law posited by the second option is generally preferable to the first, that is, a written constitution is better seen as embodying specific manifestations of general principles pre-existing in the common law, rather than pure statutory principles unconnected with the common law that have been imposed by the constitution’s framers. The second option acknowledges that due to the highly abstract nature of constitutional texts, ascertaining their meaning is significantly different from dealing with ordinary statutes. Saying that all which is required of a judge is to ‘apply’ the enacted text is too glib. The expansive character of the text necessitates the judge seeking guidance from sources external to the text, including the common law. Indeed, as indicated previously, the adoption of vague terminology is appropriately

⁷² *Id* at 202.

⁷³ Mark D Walters, “Written Constitutions and Unwritten Constitutionalism” in Huscroft (ed), *Expounding the Constitution*, above, n 70, 245 at 253–254.

seen as a direction from the text's framers that the courts should develop the meaning of the text over time in the course of applying it to various factual scenarios.⁷⁴

Furthermore, the second option is consistent with the principle noted by Lord Browne-Wilkinson in *R v Secretary of State for the Home Department, ex parte Pierson* that "Parliament does not legislate in a vacuum: statutes are drafted on the basis that the ordinary rules and principles of the common law will apply to the express statutory provisions".⁷⁵ Though these remarks were made in respect of ordinary legislation, their transposition to constitutional texts should not be in doubt as such texts are also drafted and enacted against a backdrop of pre-existing statutory and common law rules and principles. Most of these will not be explicitly set out in the written constitution, the natural assumption being that it is unnecessary to do so since it is understood they continue to apply if consistent with the wording of the constitution as seen in the context of its adoption. A majority of the High Court of Australia held in *Amalgamated Society of Engineers v Adelaide Steamship Co Ltd*:⁷⁶ "The one clear line of judicial inquiry as to the meaning of the Constitution must be to read it naturally in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law, and the statute law which preceded it, and then *lucet ipsa per se*."⁷⁷ The choice of

⁷⁴ See the text accompanying nn 31–33 above.

⁷⁵ [1998] AC 539 at 573, HL.

⁷⁶ (1920) 28 CLR 129, HC (Aust).

⁷⁷ *Id* at 152, *per* Knox CJ, Isaacs, Rich and Starke JJ, cited in *Attorney-General (Cth); Ex rel McKinlay v The Commonwealth* (1975) 135 CLR 1 at 17, HC (Aust); and in *Eastman*, above, n 11 at 47–48, [149]. *Lucet ipsa per se* means "it shines with a brilliance of its own", and appears to be a quotation from Cicero: "*Bene praecipunt qui vetant quicquam agere quod dubitas aequum sit iniquum; aequitas enim lucet ipsa per se, dubitatio significat cognitionem injuriae.*" (It is, therefore, an excellent rule that they give who bid us not to do a thing, when there is a doubt whether it be right or wrong; for righteousness shines with a brilliance of its own, but doubt is a sign that we are thinking of a possible wrong.) Marcus Tullius Cicero; Walter Miller (transl), *De Officiis* (Loeb Classical Library; 30) (Cambridge, Mass: Harvard University Press, 1913), bk I, pt 9, at 30. See also *Cheatle v The Queen*

unambiguous contradictory wording must be seen as a reflection of the framers' intent to disapply incompatible legal criteria.

At this point, it becomes necessary to distinguish between ordinary and what we have termed 'important' common law rules and principles. It is submitted that cases dealing with what are called 'principles of constitutional law' in the context of the United Kingdom's unwritten constitution shed light on this issue. The reference here to principles of UK constitutional law denotes common law principles of the same nature as the 'constitutional rights' referred to by Laws LJ in *R v Lord Chancellor, ex parte Witham*.⁷⁸ In that case, his Lordship noted that in the absence of a written constitution that was logically and legally prior to the power of the executive, legislature and judiciary, there was no hierarchy of rights in the common law in the sense that any right was more entrenched by the law than any other. Nonetheless, one could speak of 'constitutional rights' in such a system if "the right in question cannot be abrogated by the state save by specific provision in an Act of Parliament, or by regulations whose vires in main legislation specifically confers the power to abrogate. General words will not suffice."⁷⁹ Such rights are "creatures of the common law" as they are logically prior to the democratic political process and not a consequence of it.⁸⁰

In *ex parte Pierson*,⁸¹ Lord Steyn cited a passage from Cross on *Statutory Interpretation*⁸² to the effect that when interpreting a statute, the courts assume that

(1993) 177 CLR 541 at 552, HC (Aust) ("It is well settled that the interpretation of a constitution such as ours is necessarily influenced by the fact that its provisions are framed in the language of the English common law, and are to be read in the light of the common law's history"); *Theophanous v Herald & Weekly Times Ltd* (1994) 182 CLR 104 at 141–142, HC (Aust).

⁷⁸ [1998] 1 QB 575.

⁷⁹ *Id* at 581.

⁸⁰ *Id*.

⁸¹ Above, n 75.

“long-standing principles of constitutional and administrative law” are taken for granted by Parliament to be applicable. The courts apply these principles in the form of presumptions, such as the presumption that statutory powers must be exercised reasonably. What is important is the recognition by the authors of Cross on *Statutory Interpretation* (and hence the court) of the existence of “fundamental principles governing both civil liberties and the relations between Parliament, the executive and the courts” which “operate at a higher level... as constitutional principles which are not easily displaced by a statutory text”.⁸³ It is manifest that such constitutional principles are qualitatively different from ordinary common law rules.

This succinctly describes the character of important common law criteria which, it is submitted, are functionally equivalent to constitutional principles and rights in the United Kingdom. Where a written constitution exists, the appellation ‘constitutional’ is arguably best reserved for legal criteria either expressly found in the text or necessarily implied from it, so we will continue to use the term *important common law criteria* to refer to common law principles and rules existing in a legal system with a written constitution that are analogous to UK ‘constitutional law principles’. Cases from the United Kingdom suggest that one type of important common law criteria are rules and principles protecting human rights, such as equality under the law,⁸⁴ the freedom of speech,⁸⁵ a right for an offender to be

⁸² Rupert Cross, John Bell & George Engle, *Statutory Interpretation* (3rd ed) (London: Butterworths, 1995) at 165–166. In *ex parte Pierson, id*, Lord Steyn noted that the passage was in all material aspects the same as what Cross wrote in the first edition of the work: Cross, *Statutory Interpretation* (London: Butterworths, 1976) at 142–143. See also *R v Secretary of State for the Home Department, ex parte Simms* at [2000] 2 AC 115 at 130, HL.

⁸³ *Ex parte Pierson, id* at 588.

⁸⁴ *Fitzpatrick v Stirling Housing Association* [1998] Ch 304 at 337 *per* Ward LJ (“... I am entitled to presume that Parliament always intends to conform to the rule of law as a constitutional

treated fairly when the executive determines the minimum term of imprisonment he should serve,⁸⁶ and a right of access to the courts.⁸⁷

Rules and principles necessary to provide a framework for the constitutional order in the jurisdiction comprise another type of fundamental common law criteria. A prime example is the rule of law.⁸⁸ Another is the doctrine of separation of powers. In *Liyanage v The Queen*⁸⁹ the Privy Council held that although the Constitution of Ceylon did not contain any provision expressly vesting judicial power in the courts, it could be inferred that judicial power was not to pass to or be exercisable by the executive or legislative branch of government. First, judicial power had lain in the hands of the judiciary for more than a century prior to the new Constitution coming into force. Secondly, clauses of the Constitution indicated that the political branches of government were not to interfere with the judiciary. The Constitution stated that judges were to be appointed by a Judicial Service Commission, which legislators were barred from being members of; and an attempt to influence any decision of the Commission was a criminal offence. Furthermore, judges could not be removed from office except by the Governor-General on an address of both the Senate and House of

principle and accordingly to respect the constitutional rights of the individual to enjoy equality under the law.”).

⁸⁵ *Attorney General v Observer Ltd* (also known as *Attorney General v Guardian Newspapers Ltd*) [1990] 1 AC 109 at 283–284, HL, cited with approval in *ex parte Simms*, above, n 82 at 125–126 (a prisoner has a fundamental or basic right to seek through oral interviews to persuade a journalist to investigate the safety of his conviction and to publicize the findings in an effort to gain access to justice for the prisoner).

⁸⁶ *Ex parte Pierson*, above, n 75; and *R v Secretary of State for the Home Department, ex parte Venables and Thompson* [1998] AC 407, HL.

⁸⁷ *Ex parte Witham*, above, n 79.

⁸⁸ For example, *Fitzpatrick*, above, n 84 at 337; see also *Reference re Language Rights under s 23 of Manitoba Act, 1870 and s 133 of Constitution Act, 1867* [1985] 1 SCR 721 at 748, [63], SC (Can) (the rule of law “a fundamental principle of our Constitution”); *Reference re Secession of Quebec* [1998] 2 SCR 217 at 240, [32], SC (Can); and compare the Singapore cases *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at 553, [86], CA (S’pore) and *Lim Teng Ee Joyce v Singapore Medical Council* [2005] 3 SLR(R) 709 at 714, [15], HC, where the principle was referred to but nothing expressly said about its fundamental status.

⁸⁹ [1967] 1 AC 259, PC (on appeal from Ceylon).

Representatives.⁹⁰ The reasoning in *Liyanage* was applied by the Privy Council to the Jamaican Constitution in *Hinds v The Queen*,⁹¹ Lord Diplock stating that the new independence constitutions of former British colonies “were evolutionary not revolutionary”. Thus, under these constitutions the executive, legislative and judicial institutions continued to exercise powers of a character similar to those exercised by the corresponding pre-independence institutions they had replaced, and it was to be “taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government”.⁹² In both *Liyanage* and *Hinds*, the Privy Council accepted that the fundamental common law principle of separation of judicial power from the powers exercised by the political branches of government applied on the facts, with the consequence that legislation establishing special courts which effectively deprived the judiciary of aspects of its judicial power was invalid. The principle, while not expressly mentioned in either constitution, was found to have been intended to apply in view of the provisions consistent with it. The two cases also demonstrate that implications drawn from the text and structure of a constitution may sometimes, though not inevitably, lead to the conclusion that important common law criteria must be applied to give proper meaning to the text.

The Supreme Court of Canada delivered a significant judgment in this regard in 1998. In *Reference re Secession of Quebec*,⁹³ the Court noted that while constitutional texts⁹⁴ have a primary place in determining constitutional rules, they

⁹⁰ *Id* at 286–288.

⁹¹ [1977] AC 195, PC (on appeal from Jamaica). *Liyanage*'s case was cited *id* at 213.

⁹² *Id* at 212.

⁹³ Above, n 88.

⁹⁴ Specifically those mentioned in s 52(2) of the Constitution Act 1982 (Sch B to the Canada Act 1982 (1982 c 11) (UK)).

are not exhaustive. The Constitution also “embraces unwritten, as well as written rules”.⁹⁵ It continued:

These supporting principles and rules, which include constitutional conventions and the workings of Parliament, are a necessary part of our Constitution because problems or situations may arise which are not expressly dealt with by the text of the Constitution. In order to endure over time, a constitution must contain a comprehensive set of rules and principles which are capable of providing an exhaustive legal framework for our system of government. Such principles and rules emerge from an understanding of the constitutional text itself, the historical context, and previous judicial interpretations of constitutional meaning.⁹⁶

It was thus acknowledged that where the constitutional text did not by itself provide an explicit answer to an issue arising, the courts could look to basic principles and rules that the courts could infer as existing based on the text seen in historical perspective. Among the “fundamental and organizing principles of the Constitution” identified in the *Secession of Quebec* case were democracy, and constitutionalism and the rule of law.⁹⁷

Given the structural and liberty-protecting character of important common law criteria, it is submitted that courts are likely to find them the foundation upon which constitutional provisions rest, and thus of assistance in construing the meaning of such provisions. In doing so, they effectively elevate the common law criteria to the level of constitutional criteria. In this regard, *Ong Ah Chuan*⁹⁸ is a leading case applicable to Singapore. Article 9(1) of the Constitution, which was referred to earlier, prohibits the deprivation of life or personal liberty “save in

⁹⁵ *Provincial Court Judges Association (Manitoba) v Manitoba (Minister of Justice) (sub nom Reference re Remuneration of Judges of the Provincial Court of Prince Edward Island)* [1997] 3 SCR 3 at [92], SC (Can). See also *New Brunswick Broadcasting Co v Nova Scotia (Speaker of the House of Assembly)* [1993] 1 SCR 319, SC (Can) (Parliamentary privileges part of the fundamental law of the land, and thus constitutional).

⁹⁶ *Secession of Quebec*, above, n 93 at 240, [32].

⁹⁷ *Id.* The Supreme Court also identified as relevant to the question before it the fundamental principles of federalism and respect for minorities (the latter, it is submitted, may be regarded as a principle concerning human rights protection).

⁹⁸ Above, n 14.

accordance with law”; Article 12(1) states: “All persons are equal before the law and entitled to the equal protection of the law”. The Privy Council held:

In a Constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to “law” in such contexts as “in accordance with law”, “equality before the law”, “protection of the law” and the like..., refer to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the “law” to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules.⁹⁹

The Board did not merely interpret provisions of the Singapore Constitution consistently with pre-existing English common law rules of natural justice. It termed these rules “fundamental” and raised them to the status of constitutional principles by inferring their existence from the meaning of the word *law* in Articles 9(1) and 12(1) of the Constitution.

In view of the foregoing, it is submitted that the existence of important common law criteria, which are comparable to constitutional principles and rights in the United Kingdom, is consistent with written constitutions in other parts of the Commonwealth. In addition to such criteria being a source of principles for

⁹⁹ *Id.*, [1981] AC at 670–671, [1979–1980] SLR(R) at 722, [26], applied in *Haw Tua Tau v Public Prosecutor* [1982] AC 136 at 147–148, [1981–1982] SLR(R) 133 at 137, [7], PC (on appeal from S’pore); *S Kulasingam v Commissioner of Lands, Federal Territory* [1982] 1 MLJ 204 at 206 (M’sia); *Che Ani bin Itam v Public Prosecutor* [1984] 1 MLJ 113 at 114–115, FC (M’sia); *Jeyaretnam Joshua Benjamin v Attorney-General* [1987] SLR(R) 472 at 481–482, [39], HC (S’pore); *Public Prosecutor v Mazlan bin Maidun* [1992] 3 SLR(R) 968 at 973, [15], CA (S’pore); *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261 at 282–283, CA (M’sia); *Mohd bin Ahmad v Yang Di Pertua Majlis Daerah Jempol, Negeri Sembilan* [1997] 2 MLJ 361 at 368, FC (M’sia); *Public Prosecutor v Ottavio Quattrocchi* [2003] 1 MLJ 225 at 240–241, HC (M’sia); *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR(R) 103 at 125, [82], CA (S’pore); *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301 at 315, [17], FC (M’sia). In *Haw Tua Tau, id.*, [1982] AC at 154, [1981–1982] SLR(R) at 144, [26], the Court stated that “what may properly be regarded by lawyers as rules of natural justice change with the times”, thus departing from the view expressed in *Ong Ah Chuan* that only fundamental rules of natural justice that were part of the common law of England in operation in Singapore at the commencement of the Constitution could be applied into the term *law* in the Constitution.

construing constitutional provisions, in jurisdictions such as Singapore and Malaysia where certain constitutional rights are expressed only to be enjoyed by citizens,¹⁰⁰ important common law criteria afford to non-citizens an additional measure of protection compared to ordinary common law rules, since the former can only be overridden by unambiguous language in statutes.

Reference was made earlier to the possibility that there may exist another category of ‘fundamental common law criteria’ that prevail over conflicting legislation, and perhaps even constitutional provisions. The existence of such legal principles has been postulated by some Commonwealth courts, though it may be significant there are currently no instances of statutes that have actually been overruled in this manner. In *Taylor v New Zealand Poultry Board*,¹⁰¹ Justice Robin Cooke commented *obiter* that “[s]ome common law rights presumably lie so deep that even Parliament could not override them”, and suggested that it would be beyond Parliament’s lawful powers to compel a person to answer questions using torture.¹⁰² Citing *Taylor* and other New Zealand cases, in *Union Steamship Co of Australia Pty Ltd v King*,¹⁰³ a unanimous decision of the High Court of Australia, the possibility was left open that “the exercise of... legislative power is subject to some

¹⁰⁰ Under the Singapore Constitution, Arts 12(2), 13, 14 and 16(1), only citizens are guaranteed the right not to be discriminated against on the ground only of religion, race, descent or place of birth in the appointment to any office or employment under a public authority, in the administration of specified laws, and in respect of education; the right to freedom of movement within the country and not to be banished; and the rights to freedom of speech and expression, assembly and association.

¹⁰¹ [1984] 1 NZLR 394, CA (NZ).

¹⁰² *Id* at 398. In *Westco Lagan Ltd v AG* [2001] 1 NZLR 40 at [91], HC (NZ), where the possibility of overriding fundamental human rights was concerned McGechan J said: “I leave open, as should be left open in perpetuity, the possibility of extreme situations postulated from time to time by Lord Cooke of Thorndon.” See also *New Zealand Drivers’ Association v New Zealand Road Carriers* [1982] 1 NZLR 374 at 390, CA (NZ); *Fraser v State Services Commission* [1984] 1 NZLR 116 at 121, CA (NZ); Anne Twomey, “Fundamental Common Law Principles as Limitations upon Legislative Power” (2009) 9 Oxford U C’wealth LJ 47 at 49–50. Note also Jeffrey Goldsworthy’s view that judges are justified in disobeying “truly wicked legislation”, though this is “an extraordinary response – a remedy of last resort – that should be reserved for quite exceptional circumstances”: Goldsworthy, above, n 70 at 284.

¹⁰³ (1988) 166 CLR 1, HC (Aust).

restraints by reference to rights deeply rooted in our democratic system of government and the common law”.¹⁰⁴

The Singapore Court of Appeal has also made *obiter* statements apparently recognizing the existence of fundamental common law criteria and their application to the Constitution in its 2010 judgment in *Yong Vui Kong v Public Prosecutor*.¹⁰⁵ Article 9(1) of the Singapore Constitution states: “No person shall be deprived of his life or personal liberty save in accordance with law.” Although in 1969 the Government had decided, contrary to the recommendation of a 1966 constitutional commission,¹⁰⁶ against amending the Constitution to expressly prohibit torture and inhuman treatment, the Court of Appeal held that this did not mean an Act of Parliament which permits torture forms part of ‘law’ for Article 9(1) purposes.¹⁰⁷ The Court pointed out that in *Ong Ah Chuan*,¹⁰⁸ decided by the Privy Council in 1980 when it was still the island nation’s final appellate court, the Board had not been “disposed to find that article 9(1) justifies all legislation whatever its nature”,¹⁰⁹ and this statement might refer to *ad hominem* statutes or “legislation of so absurd or arbitrary a nature that it could not possibly have been contemplated by our constitutional framers as ‘law’ when they crafted the constitutional provisions protecting fundamental liberties”.¹¹⁰

¹⁰⁴ *Id* at 10. In *Durham Holdings Pty Ltd v New South Wales* (2001) 205 CLR 399 at 409–410, [11]–[14], a majority of the High Court (Gaudron, McHugh, Gummow and Hayne JJ) held that the alleged right to “just” or “properly adequate” compensation upon deprivation of property was not a right “deeply rooted” in the *United Steamship* sense as to operate as a restraint upon the legislative power of the New South Wales Parliament.

¹⁰⁵ [2010] 3 SLR 489.

¹⁰⁶ *Report of the Constitutional Commission, 1966* (Chairman: Wee Chong Jin) ([Singapore: Printed by Government Printer], 1966).

¹⁰⁷ *Yong Vui Kong*, above, n 105 at 524–525, [75].

¹⁰⁸ Above, n 14.

¹⁰⁹ *Id*, [1981] AC at 659.

¹¹⁰ *Yong Vui Kong*, above, n 105 at 500, [16]. This view may be contrasted with the position taken by the Privy Council in the earlier decision of *Hinds*, above, n 91 at 214. In that case, the Board noted that the people, acting through their elected representatives in Parliament, were entitled to alter

Indeed, statements of the House of Lords in *R (Jackson) v Attorney-General*¹¹¹ may be consistent with the above stance. While acknowledging that Parliamentary supremacy is “still the *general* principle”¹¹² of the British Constitution, Lord Steyn expressed the view that since the principle is “a construct of the common law ... it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism”. In exceptional circumstances such as an attempt to abolish judicial review or the ordinary role of the courts, it would be necessary for the court to consider if there existed fundamental common law principles that even Parliament could not abolish.¹¹³

A concluded view on this point is beyond the scope of this paper, but I will make some observations. First, if the existence of fundamental common law criteria is accepted, the courts will need to develop some legal test to distinguish them from important common law criteria that remain inferior to statutory and constitutional provisions. This may not be straightforward. One solution may be to dispense with the concept of important common law criteria, and recognize all legal rules and principles concerning basic rights and liberties and the structure of the legal system as fundamental in nature. This would mark a profound shift in the balance of power between the judicial and political branches. Secondly, the rejection by some cases¹¹⁴

constitutional provisions “whether relating to fundamental rights and freedoms or to the structure of government and the allocation to its various organs of legislative, executive or judicial powers”; and if an ordinary law conflicted with an entrenched provision of the Constitution (that is, a provision made more difficult to amend, such as by requiring the votes of a supermajority of the legislature or the approval of the electorate at a referendum), it could be “validly passed only after the Constitution has been amended by the method laid down by it for altering that entrenched provision”.

¹¹¹ [2006] 1 AC 262, HL.

¹¹² *Id* at 302 (original emphasis).

¹¹³ *Id* at 302–303.

¹¹⁴ The basic features doctrine was rejected by the Singapore High Court in *Teo Soh Lung v Minister for Home Affairs* [1989] 1 SLR(R) 461 at 475–479, [33]–[47] (applying the Malaysian Federal Court decision *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70); the point was left

of the notion, first adopted in the Indian decision *Kesavananda Bharati v State of Kerala*,¹¹⁵ that there exist 'basic features' of written constitutions unamendable by legislatures may have to be reconsidered. Lastly, it might be argued that it is quixotic for a court to invalidate statutory and constitutional provisions on the basis of common law criteria, since the political branches of government which have seen fit to enact draconian provisions are unlikely to heed such judgments, and the judiciary lacks the power to force compliance. It is more prudent for the court to leave such matters to the wisdom of the electorate at the ballot box. Such a view may be unduly pessimistic, though – the court's rulings may well jolt an executive and a legislature that have some modicum of residual respect for the rule of law, or feel constrained by political factors, to back down and reverse impugned measures. And even if judicial decisions are ignored by the other branches of government, citizens may be prompted by these independent opinions to demand change from their elected representatives, and may ultimately rely on them at the polls when deciding whether to support the current government or not.

3. *The Limits of Constitutional Implications*

To recapitulate at this point, it is submitted that when a court encounters a vaguely worded constitutional text and does not obtain enough guidance from the linguistic meaning of the terms used, it must resort to construction to derive rules and principles from the text that will enable it to resolve disputes brought before it. In construing the text, a judge may draw implications from the text as well as the structure of the constitutional system established by the text. In addition, because

open on appeal in *Teo Soh Lung v Minister for Home Affairs* [1990] 1 SLR(R) 347 at 367–368, [44], CA.

¹¹⁵ AIR 1973 SC 1461, SC (India).

the text is enacted on the assumption that pre-existing common law criteria that are consistent with it continue to apply, the court is entitled to refer to them to elucidate the meaning of the text. Important and fundamental common law criteria should be distinguished from ordinary common law rules and principles because they form the framework upon which the structure of the constitutional system is built.

There may, however, be a limit to which these techniques will be of assistance. In certain cases, no substantive guidance can be gained from the semantic meaning of a term in the context of the provision in which it appears, or from common law criteria. It is submitted the court will have to endeavour to construct a meaning according to its own best understanding of the text and its objective, illuminated by a consideration of extratextual values justifying the concepts embodied in the text. Assistance can often be gained from judicial analyses of analogous terms and provisions in other jurisdictions. For instance, the Singapore Constitution contains no definition of the term *equal protection of the law* in Article 12(1). In order to apply this provision to concrete cases, the courts have applied a ‘rational nexus test’ – the classification employed by a statute must be founded on an intelligible differentia that bears a rational nexus or relation to the object sought to be achieved by the statute.¹¹⁶ To arrive at this result, the High Court in *Kok Hoong Tan Dennis v Public Prosecutor*¹¹⁷ applied *Datuk Haji Harun bin Haji Idris v Public Prosecutor*,¹¹⁸ a decision of the Federal Court of Malaysia, since Article 12(1) is worded identically

¹¹⁶ *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 at 506–508, [54]–[59], CA (S’pore). See also *Ong Ah Chuan*, above, n 14, [1981] AC at 673–674, [1979–1980] SLR(R) at 725, [35] and [37], cited in *Kok Hoong Tan Dennis v Public Prosecutor* [1996] 3 SLR(R) 570 at 577–578, [32], HC (S’pore).

¹¹⁷ *Kok Hoong Tan Dennis*, *id* at 578–579, [34].

¹¹⁸ [1977] 2 MLJ 155, FC (M’sia).

to Article 8(1) of the Malaysian Constitution.¹¹⁹ The Malaysian case had, in turn, relied on a number of judgments of the Supreme Court of India, including *Chiranjit Lal v Union of India*,¹²⁰ which ultimately derived the rational nexus test from the United States Supreme Court decision *Southern Railway Co v Greene*.¹²¹ Another example is provided by the nascent right to vote which the Singapore Government asserts to be implied from various constitutional provisions, including those mandating regular Parliamentary elections.¹²² While it remains to be seen whether the courts will confirm that such a right may be implied into the text,¹²³ if this is done it will be incumbent on the courts to map out the nature and scope of the right in the face of constitutional provisions that do not provide much assistance. They may have to look beyond the constitutional text and the common law to political science

¹¹⁹ Singapore's Art 12(1) was imported into the Constitution from the Malaysian Constitution by the Republic of Singapore Independence Act, above, n 58, s 6(1), upon the nation's separation from Malaysia in 1965.

¹²⁰ AIR 1951 SC 41, SC (India): see *Datuk Haji Harun bin Haji Idris*, above, n 118 at 159–160 (cited in *Shri Ram Krishna Dalmia v Shri Justice S R Tendolkar* AIR 1958 SC 538, SC (India)) and 166.

¹²¹ 216 US 400 at 412 (1910), SC (US): see, for instance, *Chiranjit Lal*, *id* at 116 *per* Mukherjea J and 119 *per* Das J.

¹²² The Singapore Constitution, Art 65(4), states that “Parliament, unless sooner dissolved, shall continue for 5 years from the date of its first sitting and shall then stand dissolved”, and Art 66 that “[t]here shall be a general election at such time, within 3 months after every dissolution of Parliament, as the President shall, by Proclamation in the *Gazette*, appoint”: see Wong Kan Seng (Minister for Home Affairs), “Is Voting a Privilege or a Right?”, *Singapore Parliamentary Debates, Official Report* (16 May 2001), vol 73, col 1726 (citing the Attorney-General's opinion on the matter); K Shanmugam (Minister for Law), “Head R – Ministry of Law”, *Singapore Parliamentary Debates, Official Report* (13 February 2009), vol 85, cols 3157–3161; Thio Li-ann, “Westminster Constitutions and Implied Fundamental Rights: Excavating an Implicit Constitutional Right to Vote” [2009] *Sing J Legal Studies* 406 at 411–414.

¹²³ In *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR(R) 78 at 102, [56], the High Court expressed the *obiter* view that the right to vote was not a constitutional right but a “privilege[]... enjoyed because the legislature chooses to confer [it]”, and thus merely an “expression[] of policy and political will”. The Singapore courts have shown great reluctance to draw implications from the Constitution. In *Rajeevan Edakalavan v Public Prosecutor* [1998] 1 SLR(R) 10 at 18–19, [21], the High Court declined to hold that there is a constitutional right to be informed of the right to counsel guaranteed by Art 9(3) because the provision is silent on this issue. It stated: “Any proposition to broaden the scope of the rights accorded to the accused should be addressed in the political and legislative arena. ... If anybody has the right to decide, it is the people of Singapore.” See also *Mazlan bin Maidun*, above, n 99 at 973–974, [13]–[15], CA (S'pore); *Sun Hongyu v Public Prosecutor* [2005] 2 SLR(R) 750 at 760, [34], HC (S'pore). If the courts decline to infer a right to vote from the Constitution, then the right will remain legally unenforceable and purely theoretical as the Government has indicated that it is unnecessary for the right to be expressly stated in the Constitution: Shanmugam, “Head R – Ministry of Law”, *id*.

theories about the role played by the franchise in a democratic system. However, as was mentioned in Chapter One,¹²⁴ foreign legal principles – and, it is submitted, theories from other academic disciplines – should not simply be transplanted into the domestic legal system without thought having been given to whether such principles and theories are consonant with existing domestic rules and principles of law, and suited to local circumstances.

Concern has been expressed by Thio Li-ann about the United States Supreme Court giving “apparently limitless reading[s]” of vague terms such as “life, liberty and property” in the Fourteenth Amendment to the US Constitution, as this “portend[s] a debasement of the currency of ‘rights’ insofar as any political claim can be couched as a right, to insulate it from political contestation”.¹²⁵ She suggests that the Australian approach to drawing implications from the text and structure of a constitution is more principled.¹²⁶ Yet, as was pointed out above,¹²⁷ this will not be sufficient in certain situations. The heart of the matter is the courts’ responsibility to divine the meaning of the constitutional text for the purpose of applying it to concrete factual scenarios. The fact that the framers of the text have chosen terms such as *equality* and *liberty* which are highly abstract concepts indicates that they expected the courts to articulate the implications of these concepts in specific cases. It is eminently reasonable to suppose that in fulfilling their responsibility, judges have discretion to consider relevant legal principles and values lying outwith the text.

The foregoing highlights the fact that constitutional construction reposes much discretion in the judiciary. This raises the concern that judges effectively have a

¹²⁴ Chapter One, Pt III at 35–37.

¹²⁵ Thio, above, n 122 at 416–417.

¹²⁶ *Id* at 423.

¹²⁷ See the text accompanying nn 65–66.

free hand in permitting their personal prejudices to influence decisions. To maintain theoretical consistency, it does make sense for courts to articulate a framework of general principles that will guide their decision-making, such as the avowal in Footnote Four of *United States v Carolene Products Company*¹²⁸ of the need to strictly scrutinize legislation restricting the fundamental liberties and political rights of minorities, which was taken up and built upon by subsequent United States Supreme Court cases. However, we have seen that where the constitution's framers have crafted a broadly-worded text, it is reasonable to infer that their intention was to confer substantial discretion upon judges to determine how fundamental liberties should be applied to the circumstances of cases. Furthermore, if courts have a duty to uphold minority interests, we must expect some decisions to be countermajoritarian. This is not overreaching on the judiciary's part; it is simply how the system is designed to work. The judiciary is engaged in a constitutional dialogue with the executive and legislative branches,¹²⁹ at least in jurisdictions where it is not practically impossible for the political branches to seek a constitutional amendment to reverse a court decision they disagree with. By this process, the meaning of the text is worked out and refined over time. Consequently, the exercise of judicial discretion in this regard should not be regarded with suspicion, but as a natural reflection of the co-equal participation by all branches of government in the process

¹²⁸ 304 US 144 (1938), SC (US).

¹²⁹ On constitutional dialogue generally, see Barry Friedman, "Dialogue and Judicial Review" (1993) 91 Mich L Rev 577; Peter W Hogg & Allison A Bushell, "The *Charter* Dialogue between Courts and Legislatures (or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)" (1997) 35 Osgoode Hall LJ 75; Kent Roach, "Constitutional, Remedial, and International Dialogues about Rights: The Canadian Experience" (2005) 40 Tex Int'l LJ 537; Christine Bateup, "The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue" (2006) 71 Brook L Rev 1109.

of establishing constitutional principles and rules. These were points underscored in Chapter Two.¹³⁰

III. PROPORTIONALITY

The foregoing has suggested that when a litigant presents a plausible argument that an activity lies within the “liberty” guaranteed to him by the constitution, the court would be abdicating its responsibility if it declined to consider it because of uncertainty over the meaning of the term. It is submitted that a more fruitful approach would be to accept that the litigant’s constitutional right to liberty protects the activity, and go on to consider if the government has presented sufficient public interest reasons showing that limitations on the right are reasonable and proportional.

Commentators have noted that the application of proportionality analysis in rights adjudication is now widespread, particularly in jurisdictions on the ‘new constitutionalism’ model. Many Commonwealth nations with Westminster-style systems belong to this model of government, the characteristics of which include (1) a written constitution establishing and empowering institutions of government; (2) ultimate power placed in the hands of the people through regular elections or referenda; (3) the subjection of public authority to the constitution; (4) the existence of a bill of rights and a judicial review system ensuring that rights are upheld; and (5) procedures specified in the constitution for its revision.¹³¹ Thus, in *R v Oakes*,¹³² the Supreme Court of Canada held that a proportionality analysis was to be applied when

¹³⁰ Chapter Two, Pt III.

¹³¹ Alec Stone Sweet & Jud Mathews, “Proportionality Balancing and Global Constitutionalism” (2008) 47 *Colum J Transnat’l L* 72 at 84–85.

¹³² [1986] 1 SCR 103, SC (Can). The proportionality analysis has been refined in subsequent cases such as *Irwin Toy Ltd v Quebec (Attorney General)* [1989] 1 SCR 927, SC (Can); and *RJR-MacDonald Inc v Canada* [1995] 3 SCR 199, SC (Can).

determining if a law limiting a right guaranteed by the Canadian Charter of Rights and Freedoms could be upheld under section 1 of the Charter as “reasonable” and “demonstrably justified in a free and democratic society”. Like Charter rights, Articles 8 to 11 of the European Convention on Human Rights are qualified by necessity clauses. For instance, Article 8(1), which protects the right to respect for private and family life, home and correspondence, is subject to Article 8(2) which sanctions the freedom being interfered with by public authorities on a number of specified grounds if the interference “is in accordance with the law and is necessary in a democratic society”. In interpreting these clauses, the European Court of Human Rights has employed a proportionality approach, which is evident in such cases as *Dudgeon v United Kingdom*¹³³ which held that interference with a right cannot be regarded as necessary in a democratic society unless it is proportionate to a legitimate aim pursued by the legal restriction in question.¹³⁴ When the Human Rights Act 1998 (UK) came into force in 2000, providing aggrieved persons with remedies in domestic law for breaches of Convention rights, the House of Lords confirmed that a proportionality analysis would be applied to necessity clauses.¹³⁵

In general, adopting a proportionality approach can be said to be a four-stage process:¹³⁶

- i. First, there is a consideration of whether the government is legally authorized to enact the restrictive measure in question.

¹³³ (1981) 4 EHRR 149, ECHR.

¹³⁴ *Id* at 165, [53], applying *Handyside v United Kingdom* (1976) 1 EHRR 737 at 754, [49], ECHR, and *Young, James & Webster v United Kingdom* (1981) 4 EHRR 38 at 56, [63], ECHR.

¹³⁵ *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at 547, [27], HL, citing *de Freitas v Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69 at 80, PC (on appeal from Antigua and Barbuda).

¹³⁶ Stone Sweet & Mathews, above, n 131 at 75–76.

ii. Secondly, an assessment is carried out as to whether there is a rational relation between the means adopted in the measure and the stated policy objectives of the measure. This is often known as the test of suitability.

iii. Thirdly, the measure must be found to infringe rights as minimally as possible. This is known as the test of necessity.

iv. Finally, there is an examination of whether the benefits of the measure outweigh the costs arising from a curtailment of rights. This is often termed ‘proportionality in the narrow sense’.

As might be imagined, the manner in which proportionality is applied differs from jurisdiction to jurisdiction.¹³⁷ A detailed comparison is beyond the scope of this chapter, which concentrates on some potential difficulties with proportionality and whether the approach is applicable to a Westminster-style bill of rights that does not expressly require courts to balance the costs of limiting fundamental liberties against legislative goals.

A. DIFFICULTIES WITH PROPORTIONALITY

Proportionality and the concept of balancing are intimately related but not coterminous. Balancing has been described as the process of analysing a constitutional issue by identifying the interests implicated by the case and reaching a decision by explicitly or implicitly assigning values to the interests.¹³⁸ A proportionality analysis differs from mere balancing in that the former requires a

¹³⁷ For instance, it has been pointed out that the ECHR does not regard the first stage as part of the proportionality analysis: *id* at 75, n 8. The test applied by the House of Lords in *Daly*, above, n 135, omitted the first and fourth stages, and included before stage 2 a consideration of whether the legislative objective is sufficiently important to justify limiting a fundamental right. Arguably, this consideration can be regarded as part of stage 2 of the four-stage schema set out in the main text.

¹³⁸ T Alexander Aleinikoff, “Constitutional Law in the Age of Balancing” (1987) 96 Yale LJ 943 at 945.

judge to assess whether there is legal authorization for a restrictive measure, and its suitability and necessity. On the other hand, the fourth stage of proportionality analysis clearly involves a balancing exercise. The implication is that problems said to be associated with balancing affect proportionality as well. We will consider the supposed incommensurability of interests, and the possibility that a proportionality approach has the effect of devaluing rights.

1. *Incommensurability*

For two or more things to be compared to each other, it is generally thought necessary that they are commensurable. In other words, they must be capable of being valued with some common yardstick or in some common currency. Commensurability is a key reason why the invention of money was such a groundbreaking innovation. Suppose I grow pineapples while my neighbour Ivy weaves cotton cloth. I would like to obtain fabric, and similarly Ivy would like some of my fruit. It is not impossible for us to agree on how many pineapples a yard of cloth is worth, for that is how bartering works. Nonetheless, if there exists a common currency which makes it possible for us to determine that a pineapple is worth a dollar and one yard of cloth two dollars, then it becomes easy to determine that I must give Ivy two pineapples for every yard of cloth she provides, and that one unit of cloth is more valuable than one unit of pineapples.

It is said that one difficulty with balancing, and hence proportionality, is how to find a common currency with which to value the competing interests that arise in constitutional adjudication. The scale has to be objective and external to the judge, otherwise it may simply reflect his or her personal preferences on the matter. Unfortunately, what often happens in practice is that judges talk in terms of

balancing the costs and benefits of interests at stake, but in reality do not disclose the scale they are using, how the scale is determined, or how the interests are weighted and balanced against each other.¹³⁹ For instance, in *Attorney-General v Wain*¹⁴⁰ the issue arising was whether the offence of scandalizing the court, a species of contempt of court, was a proper restriction upon the freedom of speech and expression guaranteed by Article 14(1)(a) of the Singapore Constitution. The High Court accepted “that this court has duty to uphold the right to freedom of speech and expression, and... that this right must be balanced against the needs of the administration of justice, one of which is to protect the integrity of the courts”. However, without explaining how it was carrying out the balancing exercise, it went on to dismiss the submission that the public interest in protecting the courts’ integrity should prevail only in cases involving dishonest or false criticism and where there existed a real and present danger to the administration of justice.¹⁴¹ The judge also said the “short answer” to the respondents’ reliance on Article 14(1)(a) was Article 14(2)(a), which reads: “Parliament may by law impose... on the rights conferred by clause (1)(a)... restrictions ... to provide against contempt of court...”.¹⁴²

Some of the best legal minds have been brought to bear on this issue, but not without cogent criticism. Robert Alexy focuses on the “concrete weights” of principles, and expresses preference for a “triadic” scale – light, moderate and serious – for measuring the intensity of both a statute’s interference with a constitutional right, and the importance of satisfying a competing non-constitutional principle.¹⁴³ If the

¹³⁹ *Id* at 972–976.

¹⁴⁰ [1991] 1 SLR(R) 85, HC (S’pore).

¹⁴¹ *Id* at 101, [56].

¹⁴² *Id* at 102, [59].

¹⁴³ Robert Alexy (Julian Rivers, transl), *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002) at 402 and 408, n 64, cited in Grégoire C N Webber, “Proportionality, Balancing and the Cult of Constitutional Rights Scholarship” (2010) 23 Can J L & Juris 179 at 182–

interference with a constitutional right is deemed by the judge to be ‘serious’ but the importance of satisfying a competing principle ‘not important’, then the restrictive measure is disproportionate and unconstitutional. Conversely, if the measure interferes with a constitutional right in a ‘moderate’ manner but the necessity of satisfying a competing principle is ‘very important’, the measure is proportionate and constitutional. In a “stalemate situation”¹⁴⁴ where the interference with a constitutional right and the importance of a competing principle are of equal importance, Alexy does not accord the constitutional right any priority but submits that since neither enacting or not enacting the measure violates the proportionality principle, the court should defer to the legislature on the wisdom of the measure.¹⁴⁵ The importance of rights and competing interests should be assessed in relation to the constitution, which provides “a common point of view”.¹⁴⁶ However, Grégoire Webber is not convinced. He points out that unless the constitution provides guidance on how to determine degrees of interference, it is unclear how any recourse to it assists a judge. Furthermore, what is to say that a light interference with a constitutional right is to be regarded as of equal weight to a competing principle of low importance?¹⁴⁷ Alexy’s triadic model therefore does not really assist much in the identification of a common currency with which to balance competing interests.

However, too much is made of the necessity to value interests in terms of a common yardstick. For one thing, different yardsticks may be applicable to the same constitutional issue for different purposes. A court should, for instance, consider if

184. Alexy’s triadic model is based on jurisprudence of the Federal Constitutional Court of Germany: Webber, *id* at 182.

¹⁴⁴ Alexy, *id* at 410–411.

¹⁴⁵ Webber, above, n 143 at 184.

¹⁴⁶ Robert Alexy, “On Balancing and Subsumption: A Structural Comparison” (2003) 16 *Ratio Juris* 433 at 442, cited in Webber, *ibid*.

¹⁴⁷ Webber, *id* at 195.

the interests proffered to it by the parties are accurately or inaccurately expressed, if they are logical or illogical, if they are relevant or irrelevant to the issue, and so on.¹⁴⁸ The crux of the matter, though, is how the court is to assess the relative strengths of the competing interests. Here it is important to recognize that the balancing task involves evaluating moral and political arguments, and thus cannot be carried out with mathematical precision in the way pineapples and cotton can be valued in monetary terms. As Webber puts it:

To weigh or balance reasons may involve an examination of the advantages and disadvantages of available alternatives, but this is not to devise a common scale of evaluation, to assign a value, and to weigh in the technical sense. Rather, in holding the relevant reasons in one's mind, one proceeds according to the reason that is, in one's judgment, the most compelling and – in colloquial terms – one identifies that reason as the “weightier” one.¹⁴⁹

This is a point recognized by David Beatty: “Whether someone's rights have been violated in law is not computed by some utilitarian, mathematical calculation. It is not about adding and subtracting people's preferences. Nor is it a process in which factors are catalogued and quantified and balanced against each other.”¹⁵⁰ Instead, he proposes that judges should focus on the facts of cases¹⁵¹ and “assess the legitimacy of whatever law or regulation or ruling is before them from the perspective of those who reap its greatest benefits and those who stand to lose the most”,¹⁵² such perspectives to be drawn from the parties to the proceedings and not

¹⁴⁸ John Finnis, “Commensuration and Public Reason” in Ruth Chang (ed), *Incommensurability, Incompatibility, and Practical Reason* (Cambridge, Mass: Harvard University Press, 1997) at 217, cited in Webber, *id* at 198.

¹⁴⁹ Webber, *id* at 197.

¹⁵⁰ David M Beatty, *The Ultimate Rule of Law* (New York, NY: Oxford University Press, 2004) at 171.

¹⁵¹ “Facts have a certainty, predictability, and reality about them that allows for more precise measurement and analysis. Factual claims can be tested for how accurately they conform to an independent empirical world, as it actually exists.”: Beatty, *id* at 73.

¹⁵² Beatty, *id* at 160.

the judges' personal views.¹⁵³ The parties' perspectives are to be assessed against objective indicia. Where applicants are concerned, these indicia include how important the impugned governmental action is to their "larger life stories" in contrast to its benefits in others' lives.¹⁵⁴ As for the government, it is relevant to consider whether the rights-limiting measure has been enforced with the same rigour in comparable contexts.¹⁵⁵ By adopting a party-based perspective, Beatty reasons, judges are able to assess issues objectively and neutrally without relying on any particular philosophy or moral vision.¹⁵⁶ Nonetheless, exaggerated claims by parties are justifiably rejected, so courts must assess for themselves how significant the measure is to the parties.¹⁵⁷

Beatty's arguments are not without difficulty. For one thing, he overstates the neutrality of his approach. Some element of subjectivity is inevitably involved when a judge determines when a party's claims should be regarded as overblown, and the importance placed by the parties on the impact a legislative measure has on them. It is unlikely that the parties who benefit least and most from an impugned measure will always happen to be before the court, which means that in order to apply Beatty's approach the court will have to engage in a degree of theorizing rather than merely considering the facts presented by the parties.¹⁵⁸ Despite this, it is submitted Beatty's views support the point that a proportionality analysis simply cannot be treated as a mechanistic act of measuring up costs and benefits.

¹⁵³ *Id* at 116, cited in Vicki C Jackson, "Being Proportional about Proportionality: The Ultimate Rule of Law. By David M Beatty. New York: Oxford University Press. 2004. Pp. 193 + xvii. \$80.00 [review article]" (2004) 21 *Constitutional Commentary* 803 at 811.

¹⁵⁴ Beatty, *id* at 73.

¹⁵⁵ Compare Beatty, *id* at 66–67, cited in Jackson, above, n 153 at 811.

¹⁵⁶ Beatty, *id* at 168.

¹⁵⁷ Beatty, *id* at 160.

¹⁵⁸ Webber, above, n 143 at 188–189; Jackson, above, n 153 at 820–825.

However, does our admission that moral and political arguments are not commensurable in the way apples and oranges are mean that proportionality is a recipe for inconsistencies between cases since judges are essentially to rely on their intuition and personal preferences?¹⁵⁹ Not necessarily so. Over time, as judges applying proportionality analyses draw analogies from past cases and a stock of precedents is built up, it is likely that more “constraining and categorical” rules will emerge.¹⁶⁰ Here is an example. Suppose that Parliament enacts a law making it a crime to protest within a certain distance from Parliament House without a permit, which is scarcely if ever issued. Such a statute usually does not state how much weight a court should give to the competing interests of protecting the safety of legislators and Parliament property on the one hand, and freedom of expression and assembly on the other. Taking a proportionality approach, the court will have to identify the relevant competing interests of the parties and decide which are more important. Let us say the court finds it imperative that people should be free to gather and express political opinions near the seat of the state’s primary policy-making body, and strikes down the law. It would thus have laid down a rule concerning the importance to be given to freedom of expression and assembly in the context of political communication which will be applied in subsequent comparable cases.¹⁶¹

It seems somewhat glib for Beatty to say that “[j]udges who let the facts – and the parties – speak for themselves usually have no problem identifying whose

¹⁵⁹ Jackson, *id* at 836: “Case-by-case application of proportionality analysis, it might be argued, virtually invites ad hoc exercises of the judge’s own intuitions.”

¹⁶⁰ *Id* at 838. Later on the same page, Jackson continues: “... [P]roportionality analysis, if focused on a broader array of facts and institutional contexts, might lead either to the adoption of a more formal rule or a more contextualized standard.”

¹⁶¹ The example is adapted from one provided by Adrienne Stone, “The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication” (1999) 23 *Melb U L Rev* 668 at 702–705.

interests are paramount in any individual case. Judges know just by looking, just by sight, ... even when precise calibrations are hard to provide.”¹⁶² Ultimately judges have to lay all the relevant arguments on the table and decide which ones are weightier – more serious – and so deserve to prevail. This is no easy task, but once we accept that a degree of subjectivity is an unavoidable aspect of judicial reasoning present in many contexts, for example, when deciding whether it is fair, just and reasonable to impose tort liability, and whether punishment fits the crime, the balancing of competing interests in constitutional cases is perhaps not vastly different.

2. Devaluation of Rights

Another difficulty with proportionality is that it is said to devalue rights. This is reflected to some extent in the writings of Alexy and Beatty – for instance, Beatty regards proportionality as “[making] the concept of rights almost irrelevant”¹⁶³ while Alexy regards rights as no more than “prima facie requirements”.¹⁶⁴ Essentially, the problem lies in the ‘cost’ of restricting a right being seen as a mere interest capable of being outweighed by the benefit of an opposing interest which the limiting legislation or administrative decision promotes.¹⁶⁵ Related to this is the criticism that the balancing engaged in by the court is essentially what legislators do before they vote to enact legislation, so there is little reason for the court to depart from the balance

¹⁶² Beatty, above, n 150 at 73, citing *Jacobellis v Ohio* 378 US 184 (1964).

¹⁶³ Beatty, *id* at 160.

¹⁶⁴ Alexy, above, n 143 at 57.

¹⁶⁵ Webber, above, n 143 at 198, who calls this “[doing] violence to the idea of a constitution”. See also Aleinikoff, above, n 138 at 986–987, noting that Ronald Dworkin has argued that “viewing constitutional rights simply as ‘interests’ that may be overcome by other non-constitutional interests does not accord with common understandings of the meaning of a ‘right’”: Aleinikoff, *id* at 987, citing Dworkin, *Taking Rights Seriously* (Cambridge, Mass: Harvard University Press, 1977) at 194 and 269.

already struck by the legislature.¹⁶⁶ Indeed, it has been suggested that proportionality analysis is best regarded as enabling the political branches of government to play a role in determining whether rights should be limited, and therefore courts should adopt a standard that is “relatively deferential to the necessary legislative judgment. ... [T]he question reviewing courts should ask is whether the legislative judgment that the constitutional criteria for an override have been satisfied in the particular context is a reasonable one, and not whether the judges agree with it.”¹⁶⁷ Thus, a court should not judge a limiting measure directly, but “at one remove”,¹⁶⁸ that is, it should consider whether it was reasonable for the legislature to have enacted the measure, and not whether the measure is itself reasonable.¹⁶⁹

It is submitted, though, that when engaging in proportionality analysis in the course of constitutional construction, courts are not simply repeating a task best left to the legislature but fulfilling a crucial, independent function. The presence of a bill of rights implies that courts act as scrutineers, ensuring that proper regard has been given to fundamental rights when the restrictive measure was made. Because of their structural independence from the political branches, they are the appropriate branch of government to vouchsafe rights, particularly those asserted by minorities and unpopular groups.¹⁷⁰ This being the case, when applying a proportionality approach, judges should not be constrained to show deference to the prior choices of the political branches, but ought to carry out a full evaluation of whether the restrictive measure in question infringes rights to an unacceptable extent. With respect, the

¹⁶⁶ Aleinikoff, *id* at 984.

¹⁶⁷ Stephen Gardbaum, “A Democratic Defense of Constitutional Balancing” (2010) 4 L & Ethics of Hum Rts 78 at 99.

¹⁶⁸ *Id* at 103, citing *United States v Lopez* 514 US 549 at 616 (1995) *per* Breyer J (dissenting).

¹⁶⁹ Gardbaum, *id* at 103–104.

¹⁷⁰ Aleinikoff, above, n 138 at 984–986.

suggestion that courts should judge restrictive measures “at one remove” sounds very much like *Wednesbury* unreasonableness, which is not an appropriate standard for rights adjudication.¹⁷¹

To guard against inadvertent devaluation of rights, then, it is submitted that courts must give presumptively stronger weight to the interests sought to be protected by fundamental rights. This can be seen as one of the consequences of the presumption in favour of generosity discussed in Part I. Indeed, the third stage of the proportionality test seeks to achieve this. The test of necessity, by which a restrictive measure must be found to infringe rights as minimally as possible, requires judges to ensure that rights are not outweighed by any measure that may be characterized as ‘reasonable’. However, there is a sound argument that when applying the necessity test courts should not insist that there is only one possible ‘least restrictive’ way of limiting a right, but accord some degree of deference to the executive or legislative body that introduced the measure because “a judge would be unimaginative indeed if he could not come up with something a little less ‘drastic’ or a little less ‘restrictive’ in almost any situation, and thereby enable himself to vote to strike legislation down”.¹⁷² Peter Hogg has expressed the view that permitting such a ‘margin of appreciation’ is required because judges may be “unaware of the practicalities of designing and administering a regulatory regime, and are indifferent to considerations of cost”.¹⁷³ Thus, the stage three test is arguably better expressed as requiring a measure to restrict rights “as little as is *reasonably* possible”.¹⁷⁴ To enable courts to apply the necessity test properly, it is for the parties praying that the

¹⁷¹ See Chapter Three, Pts I.B and II.A.

¹⁷² *Illinois Elections Board v Socialist Workers Party* 440 US 173 (1979), SC (US), at 188–189 per Blackmun J, cited in Peter W Hogg, *Constitutional Law of Canada* (5th ed) (Scarborough, Ont: Thomson Carswell, 2007), vol 2 at 148, § 38.11(b).

¹⁷³ Hogg, *id.*

¹⁷⁴ *R v Edward Books and Art Ltd* [1986] 2 SCR 713 at 772, SC (Can), per Dickson CJ.

restrictive measure should be upheld to adduce evidence showing that any scheme limiting rights less would be administratively unworkable or costly to an unacceptable degree.

By the same token, to resist devaluing rights, when applying the fourth stage of a proportionality analysis – that is, when determining overall whether the benefits of a restrictive measure outweigh the costs of curtailing rights – courts must likewise start from the point that the measure is seeking to limit a fundamental right, which must be vindicated unless substantial contrary reasons have been given. Again, it is submitted that this is a natural consequence of the presumption in favour of generosity.

B. PROPORTIONALITY AND TACITURN CONSTITUTIONS

As we have seen, proportionality analyses have been applied by courts to bills of rights documents such as the Canadian Charter and the European Convention on Human Rights, which permit rights to be restricted only on grounds that are, for instance, “reasonable” and “demonstrably justified in a free and democratic society”.¹⁷⁵ Some constitutions and bills of rights are, however, more taciturn. The Singapore Constitution is an exemplar. Article 14(1)(b) guarantees to citizens “the right to assemble peaceably and without arms”. However, Article 14(2)(b) states:

Parliament may by law impose... on the right conferred by clause (1)(b), such restrictions as it considers necessary or expedient in the interest of the security of Singapore or any part thereof or public order.

In *Chee Siok Chin v Minister for Home Affairs*,¹⁷⁶ the High Court contrasted this provision with Article 19(3) of the Indian Constitution which permits the state to impose “reasonable restrictions” on the right to assemble in the interests of the

¹⁷⁵ Canadian Charter, s 1.

¹⁷⁶ [2006] 1 SLR(R) 582, HC (S'pore).

sovereignty and integrity of India or public order.¹⁷⁷ In view of the absence of an equivalent phrase from the Singapore Constitution, “there can be no questioning of whether the legislation is ‘reasonable’. The court’s sole task, when a constitutional challenge is advanced, is to ascertain whether an impugned law is within the purview of any of the permissible restrictions. ... All that needs to be established is a nexus between the object of the impugned law and one of the permissible subjects stipulated in Art 14(2) of the Constitution.”¹⁷⁸ Further, the Court noted that the phrase *necessary or expedient* conferred 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. ... The presumption of legislative constitutionality will not be lightly displaced”.¹⁷⁹

Does the phraseology of bills of rights along the lines of Singapore’s effectively rule out the application of proportionality? It is submitted there are a number of reasons why the *Chee Siok Chin* approach should not be followed. First, full effect ought to be given to the use of the word *right*. In another Singapore High Court decision, constitutional rights were distinguished from privileges in the following manner:

Constitutional rights are enjoyed because they are constitutional in nature. They are enjoyed as fundamental liberties – not stick-and-carrot privileges. To the extent that the Constitution is supreme, those rights are inalienable. Other privileges such as subsidies... are enjoyed because the Legislature chooses to confer them – these are expressions of policy and political will.¹⁸⁰

If a ‘right’ can be overridden simply by the legislature enacting a restrictive measure, which is essentially what *Chee Siok Chin* suggested, then in reality it is more akin to a privilege than a right. Thus, if something is to be properly characterized as a right,

¹⁷⁷ *Id* at 601, [45].

¹⁷⁸ *Id* at 602–603, [49].

¹⁷⁹ *Id*.

¹⁸⁰ *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR(R) 78 at 102, [56], HC (S’pore).

with the fundamentality and inalienability that entails, the court must surely be capable of assessing whether the right has been legitimately abridged. This is where the proportionality test comes to the fore.

The foregoing is buttressed by the *petitio principii* argument employed by the Privy Council in *Ong Ah Chuan*. It will be recalled that the provision in question was Article 9(1) of the Singapore Constitution, which states: “No person shall be deprived of life or personal liberty save in accordance with law.” The Public Prosecutor had argued that since Article 2(1) defined *written law* as meaning, among other things, “all Acts... for the time being in force in Singapore”, and *law* as including “written law”, so long as a deprivation of life or liberty had been carried out in accordance with an Act passed validly by Parliament, it was constitutional “however arbitrary or contrary to fundamental rules of natural justice the provisions of such Act may be”.¹⁸¹ This submission failed to impress the members of the Board, who found that it begged the question:

Even on the most literalist approach to the construction of the Constitution this argument in their Lordships’ view involves the logical fallacy of *petitio principii*. The definition of “written law” includes provisions of Act passed by the Parliament of Singapore only to the extent that they are “for the time being in force in Singapore”; and Art 4 provides that “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”. So the use of the expression “law” in Arts 9(1) and 12(1) does not, in the event of challenge, relieve the court of its duty to determine whether the provisions of an Act of Parliament passed after 16 September 1963 and relied upon to justify depriving a person of his life or liberty are inconsistent with the Constitution and consequently void.¹⁸²

In similar vein, it is submitted that the statement in Article 14(2)(b) that “Parliament may by *law* impose... restrictions as it considers necessary or expedient” places on

¹⁸¹ *Ong Ah Chuan*, above, [1979–1980] SLR(R) at 721–722, [24], [1981] AC at 670. The Public Prosecutor only conceded one limitation: that the Act of Parliament had to apply equally to all to avoid falling foul of the anti-discriminatory provisions of Art 12(1): *id.*

¹⁸² *Id.*, [1979–1980] SLR(R) at 722, [25], [1981] AC at 670.

courts the responsibility of determining whether the law in question is a reasonable and proportionate restriction on the right to assemble peaceably, and cannot be read as *carte blanche* for Parliament to impose any sort of arbitrary restriction.

Singapore courts have on numerous occasions emphasized the need to balance fundamental rights against competing interests.¹⁸³ The 1991 decision *Wain* was mentioned earlier in this regard.¹⁸⁴ It is submitted that the courts do themselves a disservice if they repeat this mantra, yet fail to adequately examine whether the rights in issue have been justifiably displaced by proportionate measures.

CONCLUSION

This Chapter has attempted to show that when the text of a constitution or a bill of rights ‘runs out’ – that is, when ascertainment of the text’s linguistic or clause meaning does not yield a useful or complete legal rule applicable to an issue that has arisen for resolution – the court must proceed on to constitutional construction. This involves the application of various legal principles and techniques to transform the clause meaning of the text into enforceable rules. We looked first at the presumption in favour of generosity, finding it to be justified by the fundamental nature of constitutional and bill of rights texts and the fact that textual interpretations that are overly restrictive should be avoided since the principles set out in constitutional texts are intended to endure largely unchanged for extended periods and to apply to circumstances not foreseen by their framers. It was submitted that the presumption is useful as a tiebreaker when competing concerns are equally balanced.

¹⁸³ See, for instance, *Lee Kuan Yew v Jeyaretnam Joshua Benjamin* [1990] 1 SLR(R) 709 at 732, [46], HC; *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 1 SLR(R) 791 at 817–818, [61], CA; *Jasbir Singh v Public Prosecutor* [1994] 1 SLR(R) 782 at 799, [46], CA; *Attorney-General v Lingle* [1995] 1 SLR(R) 199 at 203–204, [11], HC; *Chee Siok Chin*, above, n 176 at 619, [96]; *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at 176–179, [267]–[274], CA; and *Attorney-General v Shadrake* [2011] 2 SLR 445 at 474, [56]–[57], HC.

¹⁸⁴ See the text accompanying nn 140–142, above.

Next, there was a consideration of how constitutional implications can aid the articulation of legal rules. As the text is the starting point and focus for all constitutional interpretation and construction, it is appropriate to draw implications from the text itself as well as its structure. Furthermore, where provisions of the text can be construed to rest on the existence of certain common law rules and principles not explicitly set out in the text, the court acts within its powers when it articulates these criteria and draws legal conclusions from them. Courts throughout the Commonwealth have done so on numerous occasions. The cases referred to in the preceding paragraphs give credence, it is submitted, to the suggestion that important common law criteria should be regarded as a category of legal criteria intermediate between ordinary common law criteria and statutory criteria. If a court finds that the constitutional text necessarily requires the application of a particular important common law criterion – whether this relates to basic rights and liberties, or to structural aspects of the legal order such as the rule of law and the separation of powers – it becomes embodied in the text and should then be treated as on par with constitutional principles. A connected issue beyond the scope of this work is whether the court may rely on fundamental common law criteria to invalidate statutory and constitutional provisions.

Finally, it was suggested that where the techniques referred to above do not provide enough help to the court in applying a constitutional provision, it is more fruitful for the court to accept that the activity which an applicant wishes to engage in falls within the scope of a particular right, and to then apply a proportionality analysis to determine whether the government has a legitimate interest in restricting the right. While the manner of application of proportionality differs among jurisdictions, four steps are typically involved: (1) a determination that the

government has legal authority to enact the restrictive measure in question: (2) a suitability test that establishes whether the means adopted in the measure and the policy objectives of the measure are linked by a rational relationship; (3) a necessity test that requires the measure to restrict rights as minimally as is reasonably possible in the circumstances; and (4) a balancing exercise in which the benefits of the restrictive measure are compared against the costs arising from the curtailment of rights. It was submitted that though balancing is criticized because an overarching metric for assigning value to competing interests is lacking, it must be recognized that the moral and political reasoning that constitutional adjudication involves cannot be carried out in a rigid mathematical fashion. In addition, the concern that proportionality leads to a devaluation of rights may be countered by consciously giving stronger weight to rights during the third and fourth stages of the proportionality analysis. This can be regarded as a specific application of the presumption in favour of generosity.

This account of constitutional construction and the enunciation of constitutional rules confers a fair degree of discretion on the courts. Judges are entitled, in proper cases, to identify common law criteria as important and to promote them to the level of constitutional principles such that they prevail over ordinary legislation. Legal criteria found to be fundamental in nature may even be superior to constitutional provisions and purported attempts to amend the constitution. Similarly, judges have leeway in applying proportionality and determining whether a restrictive measure should prevail against a fundamental liberty. It is submitted that this should be regarded as a strength and not a shortcoming of the system of constitutional adjudication in Commonwealth jurisdictions. The discretion accorded to the judiciary enables it to express

independent, considered views on key issues of the day, engaging the political branches of government in a constitutional dialogue.

CONCLUSION

THIS DISSERTATION aims to identify the approach that courts in Commonwealth jurisdictions might take when ascertaining the meanings of terms and provisions of constitutions and bills of rights, in order to apply them to factual scenarios. Particular difficulty is created by taciturn constitutions – texts that express concepts at high levels of abstraction and thus do not provide much guidance to judges. It is submitted that, despite some views to the contrary, the starting point is still correctly regarded as the establishment of the legislative intention underlying the text. This is neither some mystical aggregation of individual legislators’ actual intents nor their acquiescence to the intent of the promoter of the bill that led to the enacted text, but is best regarded as the legislators’ joint adoption of the intent manifested in the text as it is reasonably understood by the courts. Adopting this conception of legislative intention avoids the problems associated with trying to discern what the legislators ‘actually’ understood the text to mean, as well as the fact that reliance on an unexpressed intent undermines the constitutional principle that Parliament can only express its will through the enactment of legislation.¹

The preferred conception may be called moderate originalism. It is a form of originalism as it requires the ascertainment of the meaning the legislators imbued the text with through their choice of words at the time the constitution was enacted. However, the originalism is moderate because it is recognized that parts of the text

¹ Chapter Four.

may be interpreted dynamically where legislators have used language that connotes abstract moral principles. Depending on contemporary situations and values, this may require the court to hold that the text should be interpreted differently from how the legislators who enacted it might have done, or that it should be applied to a certain fact situation in a different manner.²

Constitutional interpretation and constitutional construction are distinct processes. Interpretation involves identifying the semantic content of a constitutional text. However, such content only contributes towards the content of constitutional law and does not fully determine it. At the end of the day, courts derive rules of constitutional law through a process of construction. Where interpretation is concerned, it is submitted that courts should consider the linguistic, purposive and applicative meanings of constitutional terms and provisions. A term's linguistic meaning is composed of semantic and pragmatic aspects. Semantic meaning is most often the natural and ordinary grammatical meaning that a reasonable person would understand a term to possess. As for pragmatic meaning, it has been said that an interpreter's task is to ascertain the 'clause meaning' of a term – the ordinary and conventional public meaning that the term would have had to its intended audience when it came into force as law. This requires an appreciation of the term's context which, in particular, includes the purpose of the provision it appears in. Clause meaning is also shaped by the use of terms of art, implications and stipulations in the text, as well as potential applications of the provision in which the constitutional term appears foreseen by the legislators enacting it.³

² *Id.*

³ Chapter Five.

One vexing issue that judges have to grapple with is how a term should be understood when its conventional meaning has changed over time, or when the court is invited to apply a provision to a scenario not existing in the framers' era. It is submitted that the clause meaning of a term or provision should be regarded as fixed at the time of its framing, since the intent behind the enactment of a statute is to create binding legal rules and communicate them to present and future generations of administrators, lawmakers, judges, and the public at large. Barring specific evidence to the contrary, it is unlikely that the framers intended to confer on judges the discretion to ignore the message they were trying to convey. Conversely, the applicative meaning of terms and provisions is not frozen as at the time of framing, especially where the legislature has expressed itself in terms embodying abstract concepts which are left undefined. The reasonable conclusion is that the framers intended to leave it to the courts to determine how such terms and provisions should be applied on a case-by-case basis.⁴

There will be instances, however, where the text 'runs out' – where ascertaining the clause meaning of the text does not yield any useful or complete legal rule that applies to an issue that has arisen for resolution. It is submitted that the court must then move on from constitutional interpretation to constitutional construction, and transform the clause meaning of the text into enforceable rules by applying various legal principles and techniques. These include the presumption in favour of generosity, which may act as a tiebreaker where competing concerns are equally balanced; and the use of constitutional implications. The latter include implications from the text and its structure, as well as from common law rules and

⁴ *Id.*

principles such as basic rights and liberties, and principles relating to structural aspects of the legal order like the rule of law and separation of powers. Where the liberties in a bill of rights are made expressly subject to restrictions that may be imposed by the legislature, the court has a duty to ascertain whether such restrictions are legitimately imposed. It is submitted that this duty exists even where the bill of rights is taciturn, in that there is no express language requiring the court to assess the reasonableness of the restrictions. The court should fulfil its responsibility in this regard by applying a proportionality analysis.⁵ Thus, any constitutional ‘silence’ is in fact not so silent after all, as it may be given voice by the court.

Whether it is appropriate for the judiciary to be playing the role envisaged above is an issue that continues to excite controversy. It might be argued, for instance, that if a bill of rights simply states that a right may be curtailed through legislation, a judge steps beyond his bounds if he assesses the reasonableness or necessity for such legislation. While the three branches of government have an equal and independent duty to interpret bills of rights and constitutions, it is submitted that the judiciary enjoys interpretive supremacy – only it may issue interpretations of the basic text that the political branches are bound to adhere to. Suggestions that the courts act ‘undemocratically’ are to be rejected, because such arguments undermine the very basis of constitutional judicial review, which requires a judiciary having the independence to decide in the face of majority option where warranted. Moreover, democracy is more than mere majority rule, and must encompass respect for the fundamental rights of minorities.⁶

⁵ Chapter Six.

⁶ Chapter Two.

Because the judiciary has a crucial responsibility to ensure that executive actions and laws are consistent with constitutionally guaranteed rights, courts must be cautious not to apply a doctrine of deference towards the political branches in a manner tantamount to an abdication of their obligation. There is an appropriate sphere within which deference may operate, but it ought not to function as a non-justiciability doctrine that bars judges from even entering upon constitutional issues brought to the courts.⁷

If the political branches disagree with a particular judicial interpretation of the bill of rights, their recourse lies in seeking a constitutional amendment and not in refusing to give effect to the judgment. This will ensure that the issue is debated in Parliament, and is brought to the electorate's attention. The relationship between the judiciary and the political branches is thus best conceptualized as a dialogue, a collaborative effort that enables the meaning of the bill of rights to be developed and refined.⁸

⁷ Chapter Three.

⁸ Above, n 6.

BIBLIOGRAPHY

Articles

- Ackerman, Bruce A, "The Storrs Lectures: Discovering the Constitution" (1984) 93 Yale LJ 1013
- Aleinikoff, T Alexander, "Constitutional Law in the Age of Balancing" (1987) 96 Yale LJ 943
- Alexander, Larry, & Schauer, Frederick, "On Extrajudicial Constitutional Interpretation" (1997) 110 Harv L Rev 1359
- Alexy, Robert, "On Balancing and Subsumption: A Structural Comparison" (2003) 16 Ratio Iuris 433
- Allan, T[revor] R S, "Human Rights and Judicial Review: A Critique of 'Due Deference'" (2006) 65 Cam LJ 671
- _____, "In Defence of the Common Law Constitution: Unwritten Rights as Fundamental Law" (2009) 22 Can J L & Juris 187 at 191–192, also available as LSE Law, Society and Economy Working Papers 5/2009 <<http://ssrn.com/abstract=1331375>> (accessed 9 July 2010)
- _____, "Legislative Supremacy and Legislative Intent: A Reply to Professor Craig" (2004) 24 OJLS 563
- _____, "Legislative Supremacy and Legislative Intention: Interpretation, Meaning, and Authority" (2004) 63 Cam LJ 685
- Barendt, Eric, "Separation of Powers and Constitutional Government" [1995] Pub L 599
- Bateup, Christine, "The Dialogic Promise: Assessing the Normative Potential of Theories of Constitutional Dialogue" (2006) 71 Brook L Rev 1109
- Birch, Christopher, "The Connotation–Denotation Distinction in Constitutional Interpretation" (2003) 5 J App Prac & Process 445
- Bishin, William Robert, "The Law Finders: An Essay in Statutory Interpretation" (1965) 38 S Cal L Rev 1
- Boyron, Sophie, "In the Name of European Law: The Metric Martyrs Case" (2002) 27 E L Rev 771
- Brest, Paul, "The Misconceived Quest for the Original Understanding" (1980) 60 B U L Rev 204
- Chin, Geraldine, "Technological Change and the Australian Constitution" (2000) 24 Melb U L Rev 609
- Choudhry, Sujit, "Globalization in Search of Justification: Toward a Theory of Comparative Constitutional Interpretation" (1999) 74 Ind LJ 819
- Clayton, Richard, "Judicial Deference and 'Democratic Dialogue': The Legitimacy of Judicial Intervention under the Human Rights Act 1998" [2004] Pub L 33
- "Comment: Admissibility of Congressional Debates in Statutory Construction by the United States Supreme Court" (1937) 25 Calif L Rev 326
- Corbin, Arthur L, "Conditions in the Law of Contract" (1919) 28 Yale LJ 739
- Corry, J A, "The Use of Legislative History in the Interpretation of Statutes" (1954) 32 Can B Rev 624
- Craig, Paul P, "Formal and Substantive Conceptions of the Rule of Law: An Analytical Framework" [1997] Pub L 467
- Davidov, Guy, "The Paradox of Judicial Deference" (2000–2001) 12 Nat'l J Const Law 133
- Devins, Neal, & Fisher, Louis, "Judicial Exclusivity and Political Instability" (1998) 84 Va L Rev 83
- Dickerson, Reed, "The Diseases of Legislative Language" (1964) 1 Harv J Leg 10
- _____, "Statutory Interpretation: A Peek into the Mind and Will of the Legislature" (1975) 50 Ind LJ 206
- Dyson, Lord Justice, "Some Thoughts on Judicial Deference" [2006] JR 103
- Easterbrook, Frank H, "Abstraction and Authority" (1992) U Chi L Rev 349
- _____, "Text, History and Structure in Statutory Interpretation" (1994) 17 Harv JL & Pub Pol'y 61
- Edwards, Richard A, "Judicial Deference under the Human Rights Act" (2002) 65 MLR 859
- Ekins, Richard, "A Critique of Radical Approaches to Rights Consistent Statutory Interpretation" [2003] EHRLR 641
- Eskridge, William N, "The New Textualism" (1990) 37 UCLA L Rev 621
- Farber, Daniel A, "The Supreme Court and the Rule of Law: *Cooper v Aaron* Revisited" (1982) U Ill L Rev 387

- Friedman, Barry, "The Birth of an Academic Obsession: The History of the Countermajoritarian Difficulty, Part Five" (2002) 112 Yale LJ 153
- _____, "Dialogue and Judicial Review" (1993) 91 Mich L Rev 577
- _____, "The History of the Countermajoritarian Difficulty, Part One: The Road to Judicial Supremacy" (1998) 73 NYU L Rev 333
- Gardbaum, Stephen, "A Democratic Defense of Constitutional Balancing" (2010) 4 L & Ethics of Hum Rts 78
- Ginsburg, Ruth Bader, "'A Decent Respect of the Opinions of [Human]kind': The Value of a Comparative Perspective in Constitutional Adjudication" (2005) 64(3) Cam LJ 575
- Goldsworthy, Jeffrey, "Interpreting the Constitution in its Second Century" (2000) 24 Melb U L Rev 677
- _____, "Originalism in Constitutional Interpretation" (1997) 25 Fed L Rev 1
- Graham, Randal N, "A Unified Theory of Statutory Interpretation" (2002) 23(2) Stat L Rev 91
- Green, Christopher R, "Originalism and the Sense–Reference Distinction" (2006) 50 St Louis U LJ 555
- Greenberg, Daniel, "The Nature of Legislative Intention and its Implications for Legislative Drafting" (2006) 27(1) Stat L Rev 15
- Greenberg, Mark D, & Litman, Harry, "The Meaning of Original Meaning" (1998) 86 Geo LJ 569
- Hartnett, Edward A, "A Matter of Judgment, Not a Matter of Opinion" (1999) 74 NYU L Rev 123
- Hickman, Tom R, "Constitutional Dialogue, Constitutional Theories and the Human Rights Act 1998" [1995] Pub L 306
- Hiebert, Janet L, "New Constitutional Ideas: Can New Parliamentary Models Resist Judicial Dominance when Interpreting Rights?" (2004) 82 Tex L Rev 1963
- Hor, Michael, Case Note, "The Freedom of Speech and Defamation: *Jeyaretnam Joshua Benjamin v Lee Kuan Yew*" [1992] Sing J Legal Studies 542
- Hogg, Peter W, & Bushell, Allison A, "The *Charter* Dialogue between Courts and Legislatures (or Perhaps the *Charter of Rights* Isn't Such a Bad Thing After All)" (1997) 35 Osgoode Hall LJ 75
- _____, & Zwibel, Cara F, "The Rule of Law in the Supreme Court of Canada" (2005) 55 U Toronto LJ 715
- Jackson, Vicki C, "Being Proportional about Proportionality: The Ultimate Rule of Law, By David M Beatty. New York: Oxford University Press. 2004. Pp. 193 + xvii. \$80.00 [review article]" (2004) 21 Constitutional Commentary 803
- _____, "Constitutional Comparisons: Convergence, Resistance, Engagement" (2005) 119 Harv L Rev 109
- Jowell, Jeffrey, "Judicial Deference: Servility, Civility or Institutional Capacity" [2003] Pub L 592
- Kavanagh, Aileen, "Original Intention, Enacted Text, and Constitutional Interpretation" (2002) 47 Am J Juris 255
- _____, "*Pepper v Hart* and Matters of Constitutional Principle" (2005) 121 LQR 98
- _____, "The Role of Parliamentary Intention in Adjudication under the Human Rights Act 1998" [2006] OJLS 179
- Kay, Richard S, "Adherence to the Original Intentions in Constitutional Adjudication: Three Objections and Responses" (1988) 82 Nw U L Rev 226
- King, Jeff A, "Constitutional Rights and Social Welfare: A Comment on the Canadian *Chaoulli* Health Care Decision" (2006) 69 MLR 631
- Kirby, Michael, "Constitutional Interpretation and Original Intent: A Form of Ancestor Worship?" (2000) 24 Melb U L Rev 1
- Kirk, Jeremy, "Constitutional Interpretation and a Theory of Evolutionary Originalism" (1999) 27 Fed L Rev 323
- Kreimer, Seth F, "Invidious Comparisons: Some Cautionary Remarks on the Process of Constitutional Borrowing" (1999) 1 U Pa J Const L 640
- Landis, James M, "A Note on 'Statutory Interpretation'" (1930) 43 Harv L Rev 886
- Lawson, Gary, & Moore, Christopher D, "The Executive Power of Constitutional Interpretation" (1996) 81 Iowa L Rev 1267
- Lee, Jack Tsen-Ta, "Interpreting Bills of Rights: The Value of a Comparative Approach" (2007) 5 Int'l J Const L 122
- _____, "The Text Through Time" (2010) 31 Stat L Rev 217
- McConnell, Michael W, "Institutions and Interpretation: A Critique of *City of Boerne v Flores*" (1997) 111 Harv L Rev 153

- _____, “The Role of Democratic Politics in Transforming Moral Convictions into Law” (1989) 98 Yale LJ 1501
- Manning, John F, “Constitutional Structure and Statutory Formalism” (1999) 66 U Chi L Rev 685
- _____, “Textualism as a Non-delegation Doctrine” (1997) 97 Columbia L Rev 673
- Marshall, Geoffrey, “Metric Measures and Martyrdom by Henry VIII Clause” (2002) 118 LQR 493
- Mathen, Carissima, “Dialogue Theory, Judicial Review, and Judicial Supremacy: A Comment on ‘Charter Dialogue Revisited’” (2007) 45 Osgoode Hall LJ 125
- Molot, Jonathan T, “The Rise and Fall of Textualism” (2006) 106 Colum L Rev 1
- Moore, Michael S, “A Natural Law Theory of Interpretation” (1985) 58 S Cal L Rev 277
- Mulhern, J Peter, “In Defense of the Political Question Doctrine” (1988) 137 U Pa L Rev 97
- Nelson, Caleb, “What is Textualism?” (2005) 91 Va L Rev 348
- Paulsen, Michael Stokes, “The Most Dangerous Branch: Executive Power to Say What the Law Is” (1994) 83 Geo LJ 217
- Prakash, Saikrishna, & Yoo, John, “Against Interpretive Supremacy” (2005) 103 Mich L Rev 1539
- Pryor, Jill A, “The Natural-born Citizen Clause and Presidential Eligibility: An Approach for Resolving Two Hundred Years of Uncertainty” (1988) 97 Yale LJ 881
- Radin, Max, “Statutory Interpretation” (1930) 43 Harv L Rev 863
- Ramraj, Victor V, “Comparative Constitutional Law in Singapore” (2002) 6 Sing J Int’l Comp L 302
- Redish, Martin H, “Judicial Review and the ‘Political Question’” (1984) 79 Nw U L Rev 1031
- Reilly, Alexander, “Reading the Race Power: A Hermeneutic Analysis” (1999) 23 Melb U L Rev 476
- Roach, Kent, “Constitutional, Remedial, and International Dialogues about Rights: The Canadian Experience” (2005) 40 Tex Int’l LJ 537
- _____, “Dialogue or Defiance: Legislative Reversals of Supreme Court Decisions in Canada and the United States” (2006) 4 Int’l J Const L 347
- Schapiro, Robert A, “Judicial Deference and Interpretive Coordinacy in State and Federal Constitutional Law” (2000) 85 Cornell L Rev 656
- Selway, B[rad] M, “Methodologies of Constitutional Interpretation in the High Court of Australia” (2003) 14 Pub L Rev 234
- Siegel, Jonathan R, “Textualism and Contextualism in Administrative Law” (1998) 78 B U L Rev 1023
- Solum, Lawrence B, “A Reader’s Guide to Semantic Originalism and a Reply to Professor Griffin” (Illinois Public Law and Legal Theory Research Papers Series No 08-12, 19 June 2008) <<http://papers.ssrn.com/abstract=1130665>> (accessed 24 November 2009)
- _____, “Semantic Originalism” (Illinois Public Law and Legal Theory Research Papers Series No 07-24, 22 November 2008) <<http://papers.ssrn.com/abstract=1120244>> (accessed 27 August 2009)
- Stone, Adrienne, “Australia’s Constitutional Rights and the Problem of Interpretive Disagreement” (2005) 27 Syd L Rev 29
- _____, “The Limits of Constitutional Text and Structure: Standards of Review and the Freedom of Political Communication” (1999) 23 Melb U L Rev 668
- Strauss, David A, “Tradition, Precedent, and Justice Scalia” (1991) 12 Cardozo L Rev 1699
- Sullivan, Ruth, “Statutory Interpretation in the Supreme Court of Canada” (1998–1999) 30 Ottawa L Rev 175
- Sweet, Alec Stone, & Mathews, Jud, “Proportionality Balancing and Global Constitutionalism” (2008) 47 Colum J Transnat’l L 72
- Thio, Li-ann, “An ‘i’ for an ‘I’? Singapore’s Communitarian Model of Constitutional Adjudication” (1997) 27 HKLJ 152
- _____, “‘Pragmatism and Realism Do Not Mean Abdication’: A Critical and Empirical Inquiry into Singapore’s Engagement with International Human Rights Law” (2004) 8 Sing YB Int’l L 41
- _____, “Recent Constitutional Developments: Of Shadows and Whips, Race, Rifts and Rights, Terror and *Tudungs*, Women and Wrongs” [2002] Sing J Legal Studies 328
- _____, “The Secular Trumps the Sacred: Constitutional Issues Arising from *Colin Chan v Public Prosecutor*” (1995) 16 Sing L Rev 26
- _____, “Westminster Constitutions and Implied Fundamental Rights: Excavating an Implicit Constitutional Right to Vote” [2009] Sing J Legal Studies 406
- Tushnet, Mark, “The Possibilities of Comparative Constitutional Law” (1999) 108 Yale LJ 1225
- Twomey, Anne, “Fundamental Common Law Principles as Limitations upon Legislative Power” (2009) 9 Oxford U C’wealth LJ 47
- Wald, Patricia M, “The Sizzling Sleeper: The Use of Legislative History in Construing Statutes in the 1988–89 Term of the United States Supreme Court” (1990) 39 Am U L Rev 277

- Waldron, Jeremy, "Foreign Law and the Modern Ius Gentium" (2005) 119 Harv L Rev 129
- Watson, Alan, "Legal Transplants and Law Reform" (1976) 92 LQR 79
- Webb, Hoyt, "The Constitutional Court of South Africa: Rights Interpretation and Comparative Constitutional Law" (1998) 1 U Pa J Const L 205
- Webber, Grégoire C N, "Proportionality, Balancing and the Cult of Constitutional Rights Scholarship" (2010) 23 Can J L & Juris 179
- Weiler, Paul C, "Rights and Judges in a Democracy: A New Canadian Version" (1984) 18 U Mich JL Reform 51
- Winter, Steven L, "An Upside/Down View of the Countermajoritarian Difficulty" (1991) 69 Tex L Rev 1881
- Young, Ernest A, "Foreign Law and the Denominator Problem" (2005) 119 Harv L Rev 148
- Young, James, & Campbell, David, Case Comment, "The Metric Martyrs and the Entrenchment Jurisprudence of Lord Justice Laws" [2002] Pub L 399

Books, Chapters of Books and Monographs

- Alexy, Robert; Rivers, Julian (transl), *A Theory of Constitutional Rights* (Oxford: Oxford University Press, 2002)
- Allan, T[revor] R S, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Oxford University Press, 2001)
- Allison, John W F, "Transplantation and Cross-Fertilisation" in Jack Beatson & Takis Tridimas (eds), *New Directions in European Public Law* (Oxford: Hart Publishing, 1998) at 169
- Baker, C Edwin, *Human Liberty and Freedom of Speech* (New York, NY: Oxford University Press, 1989)
- Barnett, Randy E, *Restoring the Lost Constitution: The Presumption of Liberty* (Princeton, NJ; Oxford: Princeton University Press, 2004)
- Beatty, David M, *The Ultimate Rule of Law* (New York, NY: Oxford University Press, 2004)
- Bell, John, "Mechanisms for Cross-Fertilisation of Administrative Law in Europe" in Jack Beatson & Takis Tridimas (eds), *New Directions in European Public Law* (Oxford: Hart Publishing, 1998) at 147
- Bennion, F[rancis] A[lan] R[oscoe], *Statutory Interpretation: A Code* (3rd ed) (London: Butterworths, 1997)
- _____, *Statutory Interpretation: A Code* (4th ed) (London: Butterworths, 2002)
- _____, *Statutory Interpretation: A Code* (5th ed) (London: LexisNexis, 2008)
- Bickel, Alexander M, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (Indianapolis, In: Bobbs-Merrill, 1962)
- Cicero, Marcus Tullius; Miller, Walter (transl), *De Officiis* (Loeb Classical Library; 30) (Cambridge, Mass: Harvard University Press, 1913), bk I
- Craig, P[aul] P, *Administrative Law* (5th ed) (London: Sweet & Maxwell, 2003)
- Cross, Rupert, *Statutory Interpretation* (London: Butterworths, 1976)
- Cross, Rupert; Bell, John; & Engle, George, *Statutory Interpretation* (3rd ed) (London: Butterworths, 1995)
- De Smith, Stanley A, *The New Commonwealth and its Constitutions* (London: Stevens & Sons, 1964)
- Dickerson, Reed, *The Interpretation and Application of Statutes* (Boston, Mass: Little, Brown, 1975)
- Dworkin, Ronald, "How to Read the Civil Rights Act" in *A Matter of Principle* (Cambridge, Mass: Harvard University Press, 1985) at 316
- _____, *Sovereign Virtue: The Theory and Practice of Equality* (Cambridge, Mass: Harvard University Press, 2000)
- _____, *Taking Rights Seriously* (Cambridge, Mass: Harvard University Press, 1977)
- Elliot, T[homas] S[tearns], *East Coker* (London: Faber and Faber, 1940), Pt II, republished in *Four Quartets* (New York, NY: Harcourt, Brace and Co, 1943)
- Elliott, Catherine; Vernon, Catherine; & Jeanpierre, Eric, *French Legal System* (2nd ed) (Harlow, Essex: Pearson Education, 2006)
- Farber, Daniel A, & Sherry, Suzanna, *Desperately Seeking Certainty: The Misguided Quest for Constitutional Foundations* (Chicago, Ill; London: University of Chicago Press, 2002)
- Finnis, John, "Commensuration and Public Reason" in Ruth Chang (ed), *Incommensurability, Incompatibility, and Practical Reason* (Cambridge, Mass: Harvard University Press, 1997) at 217

- Fordham, Michael, *Judicial Review Handbook* (3rd ed) (Oxford: Hart Publishing, 2001)
- Franck, Thomas M, *Political Questions/Judicial Answers: Does the Rule of Law Apply to Foreign Affairs?* (Princeton, NJ; Oxford: Princeton University Press, 1992)
- Goldsworthy, Jeffrey, "Australia: Devotion to Legalism" in Jeffrey Goldsworthy (ed), *Interpreting Constitutions: A Comparative Study* (Oxford: Oxford University Press, 2006) at 106
- _____, "Unwritten Constitutional Principles" in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge; New York, NY: Cambridge University Press, 2008) at 277
- Griffin, Stephen M, "Theories of Constitutional Interpretation" in *American Constitutionalism: From Theory to Politics* (Princeton, NJ: Princeton University Press, 1996) at 140
- Griffiths, J A G, "Judicial Creativity" in *The Politics of the Judiciary* (5th ed) (London: Fontana Press, 1997)
- Guest, Stephen, "Interpretation and Commitment in Legal Reasoning" in *Legislation and the Courts* (Freeman, Michael, ed) (Aldershot, Hants: Dartmouth, 1997) at 133
- Halsbury's Laws of England* (4th ed reissue) (London: Butterworths LexisNexis, 2001), vol 37
- Hamilton, Alexander ('Publius'), "A View of the Constitution of the Judicial Department, in Relation to the Tenure of Good Behaviour" (28 May 1788) in Hamilton, Alexander; Madison, James; & Jay, John; J R Pole (ed), *The Federalist* (Indianapolis; Cambridge: Hackett Publishing Company, 2005)
- Hiebert, Janet L, *Charter Conflicts: What is Parliament's Role?* (Montreal; London: McGill-Queen's University Press, 2002)
- _____, "Parliament and Rights" in Tom Campbell, Jeffrey Goldsworthy & Adrienne Stone (eds), *Protecting Human Rights: Instruments and Institutions* (Oxford: Oxford University Press, 2003) at 231
- Hogg, Peter W, *Constitutional Law of Canada* (5th ed) (Scarborough, Ont: Thomson/Carswell, 2007)
- Hood Phillips, O, Jackson, Paul, & Leopold, Patricia, *O Hood Phillips & Jackson: Constitutional and Administrative Law* (8th ed) (London: Sweet & Maxwell, 2001)
- Jay, William, *The Life of John Jay: With Selections from his Correspondence and Miscellaneous Papers* (New York, NY; J & J Harper, 1833), vol II
- Jhering, Rudolf von, *Geist des römischen Rechts auf den verschiedenen Stufen seiner Entwicklung*, Part I (9th ed) (Basel: B Schwabe, 1955)
- Kavanagh, Aileen, "Deference or Defiance? The Limits of the Judicial Role in Constitutional Adjudication" in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge: Cambridge University Press, 2008)
- Kearns, Kate, *Semantics* (Basingstoke, Hampshire: Macmillan Press, 2000)
- Lane, P[atrick] H[arding], *Lane's Commentary on the Australian Constitution* (2nd ed) (North Ryde, NSW: LBC Information Services, 1997)
- Le Sueur, A[ndrew] P, "Justifying Judicial Caution: Jurisdiction, Justiciability and Policy" in Brigid Hadfield (ed), *Judicial Review: A Thematic Approach* (Dublin: Gill & Macmillan, 1995) at 228
- Lester, Lord, of Herne Hill, & Pannick, David (gen eds), *Human Rights Law and Practice* (London: Butterworths, 1999)
- Madison, James, letter to Henry Lee (25 June 1824), reprinted in Galliard Hunt (ed), *The Writings of James Madison* (New York, NY: Knickerbocker Press, 1910), vol 9, at 191–192
- Maxwell, Peter Benson, & Bridgman, G[eorge] F[rederick] L[eslie], *Maxwell on the Interpretation of Statutes* (7th ed) (London: Sweet & Maxwell, 1929)
- Mill, John Stuart, *A System of Logic, Ratiocinative and Inductive: Being a Connected View of the Principles of Evidence and the Methods of Scientific Investigation* (9th ed) (London: Longmans, 1875)
- Montesquieu, Baron de; Anne M Cohler, Basia Carolyn Miller & Harold Samuel Stone (transl & eds), *The Spirit of the Laws* (Cambridge: Cambridge University Press, 1989)
- Nelson, Michael, "Who Vies for President?" in Alexander Heard & Michael Nelson (eds), *Presidential Selection* (Durham, NC: Duke University Press, 1987) at 120
- The Oxford English Dictionary* (2nd ed) (Oxford: Oxford University Press, 1989)
- Pearce, D C, & Geddes, R S, *Statutory Interpretation in Australia* (4th ed) (Sydney: Butterworths, 1996)
- Raz, Joseph, "Authority, Law and Morality" and "The Morality of Freedom, Part I" in *Ethics in the Public Domain* (Oxford: Clarendon Press, 1994)
- _____, *The Authority of Law: Essays on Law and Morality* (Oxford: Oxford University Press, 1979)
- Richter, Melvin, *The Political Theory of Montesquieu* (Cambridge: Cambridge University Press, 1977)

- Rishworth, Paul, *et al*, *The New Zealand Bill of Rights* (Oxford: Oxford University Press, 2003)
- Ruskin, John, "Lecture I – Sesame: Of Kings' Treasuries" in *Sesame and Lilies: Two Lectures Delivered at Manchester in 1864* (London: Smith, Elder & Co, 1865) at 1
- Sachs, Albie, "Tock-Tick: The Working of a Judicial Mind" and "Reason and Passion" in *The Strange Alchemy of Life and Law* (Oxford; New York: Oxford University Press, 2009)
- Sharpe, Robert J, & Roach, Kent, *The Charter of Rights and Freedoms* (3rd ed) (Toronto: Irwin Law, 2005)
- Simpson, G B, & Burgess, C, "Implications of Lexical Ambiguity Resolution for Word Recognition and Comprehension" in Steven L Small, Garrison W Cottrell & Michael K Tanenhaus (eds), *Lexical Ambiguity Resolution: Perspectives from Psycholinguists, Neuropsychology, and Artificial Intelligence* (San Mateo, Calif: Morgan Kaufmann Publishers, 1988) at 271
- Sullivan, Ruth, *Driedger on the Construction of Statutes* (3rd ed) (Toronto: Butterworths, 1994)
- _____, *Sullivan on the Construction of Statutes* (5th ed) (Markham, Ont: LexisNexis Canada, 2008)
- Thring, Lord, *Practical Legislation* (London: John Murray, 1902)
- Walters, Mark D, "Written Constitutions and Unwritten Constitutionalism" in Grant Huscroft (ed), *Expounding the Constitution: Essays in Constitutional Theory* (Cambridge; New York, NY: Cambridge University Press, 2008) at 245
- Weinrib, Lorraine E, "Constitutional Conceptions and Constitutional Comparativism" in Vicki C Jackson, & Mark Tushnet (eds), *Defining the Field of Comparative Constitutional Law* (Westport, Conn; London: Praeger, 2002) at 3
- Williston, Samuel, & Thompson, George J, *A Treatise on the Law of Contracts* (Rev ed) (New York, NY: Baker Voorhis & Co, 1936–1938)
- Zines, Leslie, "Characterisation of Commonwealth Laws" in H P Lee & George Winterton (eds), *Australian Constitutional Perspectives* (North Ryde, NSW: Law Book Co Ltd, 1992) at 33
- _____, *The High Court and the Constitution* (4th ed) (Sydney: Butterworths, 1997)
- Zweigert, Konrad, & Kötz, Hein; Tony Weir (trans), *Introduction to Comparative Law* (3rd rev ed) (Oxford: Clarendon Press, 1998)

Other Materials

- Barker, E[dmund] W[illiam], (Minister for Law and National Development of Singapore), "Constitutional Commission Report (Statement by the Minister for Law and National Development)", *Singapore Parliamentary Debates, Official Report* (21 December 1966), vol 25, cols 1053–1054
- Butcher, Tim, & Shrimpsley, Robert, "Gays Invited to Re-enlist as Armed Forces Lift Ban", *The Daily Telegraph* (13 January 2000) <<http://www.telegraph.co.uk/htmlContent.jhtml?html=/archive/2000/01/13/ngay13.html>> (accessed 11 July 2007)
- Butcher, Tim, "Gays Win Pay-out over Sacking by Forces", *The Daily Telegraph* (19 June 2001) <<http://www.telegraph.co.uk/news/main.jhtml?xml=/news/2000/07/26/nsec326.xml>> (accessed 11 July 2007)
- Chong, Chee Kin, "McCrea Fails to Get Jail Term Cut", *The Straits Times* (23 August 2006)
- Davies, Lizzy, "French Cross-party Committee to Recommend Partial Ban on Full Veil: Report Given to Parliament Dismisses Outright Ban in Favour of Barring Anyone Using Public Services who Refuses to Uncover Face", *The Guardian* (25 January 2010) <<http://www.guardian.co.uk/world/2010/jan/25/france-report-veil-burka-ban>> (accessed 9 April 2010, archived at <<http://www.webcitation.org/5oqF7VoXU>>)
- Deakin, Alfred, speech in the House of Representatives (Australia), *Parliamentary Debates* (18 March 1902) at 10965
- Gonzales, Alberto R, Attorney General, "Prepared Remarks", address at the University of Chicago Law School (9 November 2005) <<http://www.law.uchicago.edu/files/Attorney-General-Foreign-Law-Speech>>, transcript also available from the website of the Office of the Attorney General, United States Department of Justice, at <http://www.usdoj.gov/ag/speeches/2005/ag_speech_0511092.html> (both websites accessed 22 January 2006)
- The Interpretation of Statutes* (Law Com no 21; Scottish Law Com no 11) (London: HMSO, 1969)
- Lee, Hsien Loong (Prime Minister of Singapore), speech during the Second Reading of the Constitution of the Republic of Singapore (Amendment) Bill, *Singapore Parliamentary Debates, Official Report* (21 October 2008), vol 85, cols 532ff.

- Lee, Kuan Yew (Prime Minister of Singapore), speech during the Second Reading of the Constitution (Amendment) Bill, *Singapore Parliamentary Debates, Official Report* (22 December 1965), vol 24, cols 435–436
- Practice Statement (Judicial Precedent) [1966] 1 WLR 1234, HL
- Practice Statement (Judicial Precedent) [1994] 2 SLR 689 (S'pore)
- Report of the Constitutional Commission, 1966* (Chairman: Wee Chong Jin) (Singapore: Government Printer, 1966)
- Second Reading of the Constitution (Amendment) Bill, *Singapore Parliamentary Debates, Official Report* (12 June 1969), vol 29, cols 60–74
- Shanmugam, K, (Minister for Law of Singapore), “Head R – Ministry of Law”, *Singapore Parliamentary Debates, Official Report* (13 February 2009), vol 85, cols 3157–3161
- Third Reading of the Constitution (Amendment) Bill, *Singapore Parliamentary Debates, Official Report* (23 December 1969), vol 29, cols 276–284
- White, Michael, “France, Don’t Ban the Niqab: You Need a Much Better Reason than Personal Discomfort to Outlaw Something in a Free Society”, *The Guardian* (1 February 2010) <<http://www.guardian.co.uk/politics/blog/2010/feb/01/france-dont-ban-niqab-michael-white>> (accessed 9 April 2010, archived at <<http://www.webcitation.org/5oqEsrwXW>>)
- Wong, Kan Seng (Minister for Home Affairs of Singapore), “Is Voting a Privilege or a Right?”, *Singapore Parliamentary Debates, Official Report* (16 May 2001), vol 73, col 1726