

I. Introduction

In this article, the writer compared the approaches taken by the Singapore Court of Appeal and the Malaysian Federal Court as to the permissibility of courts to imply words into their constitution. While the two cases of *Chee Siok Chin v Minister for Home Affairs*¹ (“Chee”) and *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia*² (“Nasir”) were essentially interpreting what was on paper similar provisions, the holdings were completely dissimilar. The question is why.

The ensuing discussion will attempt to discover the reasons behind the different approaches taken and also explore the extent to which it is permissible for a court to imply terms into a constitutional text.

II. The two approaches

The two cases mentioned above were concerned over whether a court could imply terms into a constitutional text. The arguments were made over Art 14(2)³ and whether the word “reasonable” ought to be read in.⁴ The arguments made in both cases would be briefly summarised below.

A. *Chee’s case*

The Singapore Court of Appeal took a rather strict textualist approach when interpreting Art 14(2)(b) and disallowed the word “reasonable” from being implied.

The court had based its reasoning on the drafting of the provision itself where the word “reasonable” was not expressly used. This can be contrasted with the Indian Constitution

¹ [2006] 1 SLR(R) 582.

² [2006] 6 MLJ 213.

³ Constitution of the Republic of Singapore (1999 Reprint) Art 14(2) and Federal Constitution of Malaysia (2006 Reprint) Art 10(2) being the Malaysian equivalent.

⁴ As in “...such reasonable restrictions as it considers necessary or expedient”.

where its equivalent provision expressly mentions the word “reasonable”.⁵ It held that as long as the provision “can be fairly considered ‘necessary or expedient’ for any of the purposes specified in Art 14(2) of the Constitution”, the impugned legislation would be constitutional. There is no option of reading in the term “reasonable”.⁶

B. Nasir’s case

The Malaysian Federal Court took a completely different approach. It expressly rejected the textualist interpretation when it held that their Constitution “must on no account be given a literal meaning.”⁷

Instead, the court took into consideration the effect Art 8(1) and the principle of substantive proportionality it imported into their Constitution. This proportionality requires that “the legislative or executive response to a state of affairs [not only] be objectively fair, it must also be proportionate to the object sought to be achieved.”⁸

As such, it found that the restrictions under Art 10(2) must be reasonable. It cautioned that “the court must ensure [that the restriction] may not amount to a total prohibition of the basic right so as to nullify or render meaningless the right guaranteed by the Constitution.”⁹

III. The analysis

From the two cases, it is evident that the issue arose because of the need to balance both the claimant’s constitutional rights and the need to avoid the legislative sphere of parliament.¹⁰

⁵ See [2006] 1 SLR(R) 582 at [45] for the excerpt of the relevant Indian Article.

⁶ [2006] 1 SLR(R) 582 at [49].

⁷ [2006] 6 MLJ 213 at [7].

⁸ *Id* at [8].

⁹ [2006] 6 MLJ 213 at [10] quoting *Siva Segara v PP* [1984] 2 MLJ 212.

¹⁰ It is however questionable as to whether the Singapore Court of Appeal did *subjectively* balance these two factors (i.e. comparing of the arguments both for and against the implementation of the restriction). While it did mention the idea of balancing in the subsequent case of *Shadrake Alan v AG* [2011] 3 SLR 778 at [17], it was not used in the above sense. Instead, it was merely recognising that the freedom of speech is not an absolute right and therefore must be “balanced” by the imposition of restrictions.

The courts are presented a conundrum: either appear to act improperly by usurping parliament's legislative power or suffer the trampling of the claimant's constitutional right, a right they swore to protect.

A. Separation of powers

Montesquieu's concept of separation of powers emphasised the need for powers to be split between the three branches of government so as to prevent one branch from accumulating too much power.¹¹ And there lies the problem. With such a drawing of boundaries, the courts may at times feel unable to rule on what they consider to be unsuitable issues and instead may choose to defer to the legislature or the executive. This deference would often provide the simplest answer when discussing the extent courts are permitted to imply words into a constitutional text. If the court were to base their reasoning *only* on this idea of separation of powers, there can simply be little opportunity for a court to imply words into a constitutional text. The *extent permitted* here will be *terribly narrow* and limited to cases where discretion is allowed for in the actual wording of the provision or article.

This whole notion of justiciability was clearly evident in *Chee's* case. There, the court found itself bound by the wording of the Constitution which expressly did not require the restrictions passed by Parliament to be reasonable. Examining the reasons provided for by the court, one can see the reluctance of the court to imply the word "reasonable" into the provision for fear of overstepping this boundary. In the eyes of the court, quoting an Indian judgment, "a Court is not a second or revising Chamber from the decision of the Legislature".¹²

¹¹ Baron de Montesquieu, "The Spirit of Laws" (Kitchener, Batoche Books, 2001) at 173.

¹² [2006] 1 SLR(R) 582 at [47]. This view was again reflected in a later case, where the Court of Appeal reminded itself thrice not to act as "legislators in the guise of interpreters of the Singapore Constitution". See

While both Singapore and Malaysian courts busied themselves with the implication of the word “reasonable”, it is submitted that the courts ought to have directed themselves to the words “as it considers”¹³ Professor Michael Hor in his article correctly noted the impact these words would have.¹⁴ Unlike Art 10 of European Convention on Human Rights which used the objective form of “are necessary”, the Singapore/Malaysian provision adopted a subjective form of “as it considers”. These words would have denied the court from substituting its own opinion for that of the legislature. So even if the court, *objectively*, found the laws passed under Art 14(2) to be unreasonable, it is arguable that it still would have no say in the matter. The court is still subject to Parliament’s *subjective* considerations. The “separation of powers” formulation would still be the be-all and end-all argument in most cases. And for *Chee*’s case, it was.

B. Fundamental Liberties

However, the fact that the text does not expressly include a certain word does not always stand for the proposition that there was an intention to exclude. This was noted in *Constitutional Reference No 1 of 1995*¹⁵ where the Constitutional Tribunal in quoting *Mills v Meeking*¹⁶ affirmed the possibility of courts correcting errors that the draftsman may have inadvertently overlooked. Such a correction would be done via the purposive approach so as to give the provision its intended purpose.¹⁷ If courts were to adopt this purposive approach,

Thio Li-Ann, “‘It is a little known legal fact’: Originalism, Customary Human Rights Law and Constitutional Interpretation”, [2010] Singapore Journal of Legal Studies 558 at 560.

¹³ The Malaysian equivalent being “as it deems”.

¹⁴ Michael Hor, “The Freedom of Speech and Defamation”, [1992] SJLS 542 at 548.

¹⁵ [1995] 1 SLR(R) 803.

¹⁶ (1990) 169 CLR 214.

¹⁷ [1995] 1 SLR(R) 803 at [44]-[47]. Note the difference in the usage of the term “purposive”. Baker, see *infra* n 30, had described the purposive approach to refer a particular social or government policy. The purposive approach used in our sense would refer to the “original intent” as discussed by Baker.

they would generally have a greater *discretion* in implying words as compared to courts applying a textualist approach.¹⁸

Such an exercise was seen in *Nasir*'s case where the "separation of powers" argument was not adopted. Despite having a similar phrase of "as it deems", the court there decided it was appropriate to read in "reasonable".

The Federal Court chose instead to afford greater weight into upholding the fundamental liberties guaranteed by their Constitution. This was evident in their adoption of Lord Nicholls of Birkenhead and Lord Hope of Craighead's dissenting judgment which emphasised the need to give fullness to the rights guaranteed by the Constitution.¹⁹

The choice here can be reasoned on two grounds.

Firstly, the court discussed the notion of substantive proportionality being imported into the Constitution via their Art 8(1) which would require the legislative response to be proportionate to the object sought.²⁰

With respect, the approach adopted by the Federal Court may be questionable. The way the court imputed the need for substantive proportionality was through the Indian case of *Om Kumar v Union of India*²¹. While the writer does not dispute that Art 8(1) (our Art 12(1)) may have imported in the need for substantive proportionality (the doctrine of rational nexus), the Federal Court may have *misapplied* the principle in *Om Kumar*. In that particular case, it was

¹⁸ Note the use of the word "discretion". While a purposive approach does allow a court to imply words into a constitution, *it does not suggest that the courts always be generous in their interpretation*. This "purpose" here can work both ways (strict textualist or generous) and whether a word ought to be implied is dependent on the actual provision and the intended purpose of that provision. The writer further questions the existence of a "generous" approach as a separate method of interpretation. It is submitted that such an approach instead falls under the purposive approach. In cases where a generous interpretation was applied, it was likely because the drafters had originally intended these articles to be read generously.

¹⁹ [2006] 6 MLJ 213 at [5].

²⁰ *Supra*, n 8.

²¹ AIR 2000 SC 3689, 2000 (7) SCALE 524, 2000 Supp 4 SCR 693.

held that the proportionality principle only applied to cases of discrimination and unequal treatment and *not cases dealing with arbitrary abuse of power* (which is what *Nasir*'s case is more akin to).²² It therefore appears that the substantive proportionality doctrine is unique to specific cases and ought not to be applied as a “universal constitutional” reasoning in *Nasir*'s case. The Malaysian approach as regards proportionality is perhaps questionable and ought to be re-examined.²³

The second reason although closely related to the first deserves greater merit. The main driving force of this argument would be that the laws enacted must not be so drastic so as to “nullify or render meaningless the right guaranteed by the Constitution.”²⁴

While it is recognised that Article 14(1) guarantees an individual the right to freedom of speech, assembly and association, it is also recognised that the rule of law demands that such right must be restrained.²⁵ The question then becomes a matter of degree as to the type of restrictions we ought to place on the rights guaranteed by Article 14(1). This is the balancing exercise mentioned earlier. The court is required to consider arguments that are for the protection of these rights as well as arguments that are against the courts intruding into the legislative sphere.

²² *Ibid* at [66] and [67]. For the latter category, the Indian judgment alluded to the test being that of a *Wednesbury* kind. This is would be totally different from the “reasonable” standard the Malaysian court tried to imply. If the Indian position was applicable, the standard would instead be that of a “light touch” review because of the public policy considerations found in Article 10(2) (the Malaysian equivalent of Art 14(2)). This would have gone beyond the reasonable standard and would have required elements of bad faith or improper motive to be shown.

²³ Also see *Yong Vui Kong v PP and another matter* [2010] 3 SLR 489 at [76]-[80]. There the court distinguished the Indian Art 21 from that of our Art 9(1) such that while the Indian courts do require the laws to be “fair, just and reasonable”, such a need is not present in our Constitution. This may have bearing on the applicability of substantive proportionality and the element of reasonableness in Singapore. It was rejected not only because of the uncertainty resulting from a “too vague a test” but also the issue of the court intruding into the legislative sphere and policy making.

²⁴ [2006] 6 MLJ 216 at [10], quoting *Siva Segara v PP*.

²⁵ [2006] 1 SLR(R) 582 at [52].

For Malaysia's case, the need to safeguard an individual's fundamental rights prevailed.²⁶ It would appear that the court was of the opinion that it was never intended by the drafters to allow the restrictions to be so broad as to render the preceding provision meaningless. It had read the restriction narrowly so as to "[confer] rights with the fullness needed to ensure that citizens have the benefit these constitutional guarantees are intended to afford"²⁷.

C. The Balance

Having considered how these two factors affected the two decisions, the subsequent paragraphs will examine how courts are to balance these two conflicting interests. The point where we place our pivot would largely determine the permissibility of our courts to imply words into the Constitution.

As there are multiple ways of picking this pivot point, it is submitted that there is *no fixed answer as to the extent courts are allowed to imply words into a constitution*. There is no reason to suggest that there is one preferred approach and much would depend on the judicial philosophy adopted. This philosophy can have a bearing on our present discussion as it will influence the judiciary's willingness to intervene as was seen in *Nasir's* case. This would necessarily mean that the extent courts are permitted to imply words may also be dependent on their willingness to intervene in the first place; the playing field they are allowed to operate in is in fact determined by them themselves. What judicial philosophy is actually

²⁶ In doing so, the Federal Court may have impliedly suggested that while Art 10(2) restricts Art 10(1), it is in turn restricted by the other as well; the restriction works both ways. This can be contrasted to the "balancing" exercise adopted by the Singapore Court of Appeal where it impliedly suggested that such a restriction would work only in one direction with Art 14(2) restricting Art 14(1).

²⁷ *Supra*, n 18.

adopted would hinge on on the specific circumstances of each country and would be a reflection of that society's legal, social and political cultures.²⁸

A good way to illustrate this difference in terms of legal, social and political culture and how it would affect a court's balancing act would be via the green and red light theory.²⁹

This theory basically differentiates between the levels of scrutiny a court can employ when considering judicial review. Courts can choose to take up a red light approach where they are more than willing to scrutinise every action taken by the government and provide legal obstacles that check on government actions. Alternatively, courts may choose to adopt a green light approach where they play a supportive role supplementing the government. This green and red light approach can be seen in different degrees for the two cases. For Singapore, we took a rather green position affording much deference to Parliament. Malaysia on the other hand adopted a more "amberish" stance with the judiciary being more willing to check on the legislature.

This differing attitude towards the government in terms of legal culture can perhaps be linked to the differing social and political culture of each country. While it was earlier noted that the Singapore courts may have subjectively not balanced the two competing factors discussed

²⁸ Whether such factors influence the law is still unsettled in the academic world. See Jack Tsen-Ta Lee, "Interpreting Bills of Rights: The Value of a Comparative Approach" (2007) 5 *ICON* 122. While the writer acknowledges and accepts many points made by Professor Lee, he respectfully submits that the point regarding courts using the "differing conditions" argument ought to be explored further. It is submitted that it is not a reason reasoned without basis. Such differences can actually be found and may help explain, at least at an academic level, the different approaches taken by different courts. In our case, it would cover the permissibility of courts implying words into a constitutional text.

²⁹ Chan Sek Keong, "Judicial Review – From Angst to Empathy: A Lecture to Singapore Management University Second Year Law Students" (2010) 22 *S Ac LJ* 469. The writer recognises that this theory was discussed with reference to administrative and not constitutional law. Reference was drawn to this theory because judicial deference may also apply to constitutional review cases.

above,³⁰ the outcome would still have been the same had they actually considered it. Deference would still be afforded because of the social-political notion of *junzi*.³¹

If we were to accept that our government is one managed by honourable men who are Madisonian angels,³² then it would be natural for the judiciary to adopt a greener approach and leave much of the decision making process in the hands of the legislature. This deference would translate into a lower level of judicial willingness to imply words since there should not be a need in the first place assuming the government is honourable.

The approach adopted by the Malaysian Judiciary can likewise be attributed in part to the political and social factors unique to that country. Some traces of this can be seen in the recent reports of the Malaysian government repealing their ISA³³. Professor Eugene Tan's article proved to be illuminating as it highlighted the differences between the Singapore and Malaysian government's use of the ISA in relation to their style of governance.

This may explain the difference in terms of willingness of the judiciary to substitute its own decision for that of the legislature by reading in the word "reasonable" into Art 10(2) of their Constitution. Unlike Singapore, the Malaysian government is viewed with distrust and is thought to abuse political power at the expense of the people's liberty as can be seen in their ISA example.³⁴ This distrust and fear may actually have propelled the Malaysian courts to go beyond that of her Singaporean counterpart and to take a more interventionist approach.

³⁰ *Supra*, n 11

³¹ Para 41, Shared Values white paper (Cmd. 1 of 1991). However, in light of recent political developments and the growing recognition for the need to have more political accountability, this whole concept of *junzi* might slowly erode. If so, perhaps this might mark a turning point in our judicial philosophy and a change in our approach.

³² See Thio Li Ann, "In search of the Singapore Constitution" in Li-ann Thio & Kevin Y L Tan (eds), *Evolution of a Revolution: Forty Years of the Singapore Constitution* (Abingdon, Oxford; New York, NY: RoutledgeCurzon, 2009) 323 at 349.

³³ Internal Security Act 1960 (Malaysia).

³⁴ Eugene K B Tan, "Selling Singaporeans on the ISA: More safeguards would help to bolster public confidence and trust", Today Newspaper, 19 September 2011:

As such, it is submitted that perhaps there is no real answer as to the extent courts are permitted to imply words and would depend on the judicial philosophy adopted and specific conditions of each country. This will determine the willingness of the courts to intervene and would affect how courts choose to balance such competing interests.

Where the courts are not hindered by this balancing exercise, they appear to be even willing to imply entire provisions into the Constitution.³⁵ This was seen in *Nappalli Peter Williams v Institute of Technical Education*³⁶ where the Court of Appeal declared that Article 15 was based on ‘accommodative secularism’ despite the principle of ‘secularism’ being not expressly stated in the Constitution.

D. Baker’s continuums

At this juncture, it would be appropriate to consider the schizophrenic nature of Singapore’s approach. While the preceding discussion explained the reasons behind the weak judicial activism in Singapore, what is surprising is the court’s adoption of Lord Diplock’s statement in *Ong Ah Chuan v PP*³⁷. His Lordship there emphasised that “law” included fundamental rules of natural justice.³⁸ This would have suggested a more interventionist approach. Notwithstanding the earlier explanation of differing conditions and its impact on the

In Malaysia, the government's use of the ISA is invariably seen through political lenses with the ISA perceived as a tool used to suppress political dissent and to shore up the ruling coalition's weakening power. The Singapore situation is wholly different - there isn't the mistrust and fear of abuse by the government that characterises the Malaysian situation...

³⁵ Jaclyn Ling-Chien Neo & Yvonne C L Lee, “Constitutional Supremacy: Still a Little Dicey?” in Li-ann Thio & Kevin Y L Tan (eds), *Evolution of a Revolution: Forty Years of the Singapore Constitution* (Abingdon, Oxford; New York, NY: RoutledgeCurzon, 2009) at 153–192, 181.

³⁶ [1999] 2 SLR 569.

³⁷ [1981] AC 648

³⁸ *Ibid* at 670-671

judiciary's willingness to intervene, this contradiction can also be explained using Baker's three continuums.³⁹ The three continuums are:

- i) Is the Constitution just limited to the text or can it go beyond that? ;
- ii) Is the meaning of the text fixed in time or can it evolve?; and
- iii) Is the Constitution to be viewed as a set of rules or a document that radiates aspirations and values?

The position one takes as regards these three continuums would determine the judicial philosophy adopted – A more interventionist judiciary would tend to lean towards the second option of each continuum. It is therefore possible for us to hypothesise that the extent courts are permitted to imply words is also dependent on their overall position on these continuums. For Singapore, while we fulfill the third continuum because of *Ong Ah Chuan*, we may still be lacking in the first two.⁴⁰

E. Amenability

While the foregoing discussion was framed using broader concepts, they too can be understood by examining various constitutional interpretation methodologies⁴¹ and how appropriate they are in each legal system. Due to the different circumstances in each country, the appropriateness varies and hence the methodology of choice will differ. Whether one

³⁹ See Thomas E Baker, "Constitutional Theory in a Nutshell", (2004) 13 Wm & Mary Bill Rts J 57 at 94.

⁴⁰ See Thio Li-Ann, "'It is a little known legal fact': Originalism, Customary Human Rights Law and Constitutional Interpretation", [2010] Singapore Journal of Legal Studies 558 at 560. There, Thio notes that the Court of Appeal in *Yong Vui Kong v PP and other matter* [2010] 3 SLR 489 had expressly rejected the argument of "reading the Constitution as a 'living tree' whose meaning evolves as society evolves".

⁴¹ Although not expressly mentioned in the discussion above, various methods of interpretation have already been alluded to such as the textualist approach (*Chee's case*) and the "original intent"/purposive approach (*Nasir's case*). Much academic ink has already been spilled over this and the writer sees no need to cover these theories again (especially since the theories alone would have little relevance in our present discussion). See Thomas E Baker, "Constitutional Theory in a Nutshell", (2004) 13 Wm & Mary Bill Rts J 57 at 68-105 for a summary of the difference approaches possible when interpreting a constitution.

adopts a strict textualist approach or a purposive approach may be dependent on the ease of passing constitutional amendments. This was raised by Singh QC when he compared the German *Grundgesetz* and American Constitution. In Germany's case, where amending the text is easy, to allow the judiciary to bring about substantial change via interpretation is discouraged as it would diminish the clarity, precision, and predictability of their constitution. The inverse holds true for the Americans with their legislative deadlock making amendments difficult. This emasculation of legislative power compelled the Americans to turn to creative interpretation of the text so as to effect the required amendments.⁴² This would have bearing on our discussion since the ability of courts to imply words into a constitution would then likely be also dependent on the amenability of the text. As can be seen from the preceding sections of III.A and III.B, the approach taken will determine the extent courts are permitted to imply words. If the correlation as proposed by Singh QC is true, then it is arguable that the extent courts are permitted to imply words into a constitution is also dependent on the ease of amending such texts.⁴³

IV. Conclusion

It was recognised that if one were to adopt a strict textualist approach, as a result of the separation of powers, there would likely be little possibility of courts implying words into a constitutional text. On the other hand, if courts were to adopt a purposive approach they would generally have a greater discretion as regards implication of terms. However, such discretion is limited to the actual purpose intended for by the drafters and does not always provide for a generous interpretation; the extent will vary.

⁴² Rabinder Singh QC, "Interpreting Bills of Rights", June 2008 29 Statute L. Rev. 82 at 87.

⁴³ The writer is of the view that this can be reasoned using two possible theories. If we were to take an optimistic view, it is possible to say that there is no need for "creative interpretation" as the shortfalls can be easily repaired via a forthcoming amendment. However the alternative theory, a rather pessimistic one, would be that there is no real motivation for the courts to intervene at all seeing that what legal remedy that can be effected may be easily overruled subsequently by parliament.

Having considered the two approaches, it was emphasised that there is in fact no correct answer as to the extent courts are permitted to imply words into a constitutional text. Much would have to depend on the judicial philosophy and the prevailing social and political culture of country in question.

The article then proceeded to discuss how local conditions in the form of legal, social and political factors will influence this balancing act, in particular the judicial philosophy actually adopted. Reference was made to the green and red light theory where depending on the specific situation of the jurisdiction in question, the zeal for judicial activism will vary. This will have affect the extent courts are willing to imply words into a constitutional text.

Reference was also made by the writer to Baker's three continuums where it was used as the basis of the proposition that the extent courts are permitted to imply words is also dependent on their overall perception of these three continuums.

Another relevant consideration that was discussed was the ease of amendment of the constitutional text in question. The greater the ease, the lesser the likelihood of courts actually implying terms.