Source: *The Straits Times,* pA44-A45
Date: 30 May 2015

Attorney-General V. K. Rajah emphasised fidelity to the text and critiqued non-textual approaches in his speech on Thursday at a conference, "Judging the Constitution: The Theory and Practice of Constitutional Interpretation in Singapore", organised by the National University of Singapore.

Interpreting the Constitution

The Supreme Court (left) and Parliament House (right). Singapore has a Constitution that is indisputably supreme in law and in fact. It shares features with others: parliamentary democracy and Cabinet government in the Westminster mould, the rule of law, the separation of powers and an independent judiciary. ST FILE PHOTO

OUR Constitution did not have a storied birth. There were no grand speeches by founding fathers at constitutional conventions. We came into nationhood suddenly, and needed a working Constitution in short order. This was supplied by the Republic of Singapore Independence Act, which was passed shortly after Independence and backdated to Aug 9, 1965.

The Act provided for the 1963 State Constitution and certain provisions of the Federal Constitution of Malaysia to continue in force, and made some additional provisions. Amendments were made as we found our feet as a nation, one of the more significant being the creation of the Presidential Council for Minority Rights as a result of the recommendations of the Wee Chong Jin Commission. The result was a patchwork Constitution.

In 1970, Prime Minister Lee Kuan Yew felt that this "mess" had to be "polished up" and asked the British FCO (Foreign and Commonwealth Office) for a complete redraft. Mr Lee thought the draft provided by the British was a first-rate job, but rejected it after further reflection. He preferred to retain the constitutional arrangements that had worked for Singapore, than to pursue some unworkable perfection. In the end, the different pieces of our Constitution were consolidated and published as a single document, the Constitution of the Republic of Singapore.

The origins of our Constitution have led some to assert that Singapore operates under a system of parliamentary supremacy. Whatever the theoretical niceties, we have today a Constitution that is indisputably supreme in law and in fact. It shares many features with other Constitutions: parliamentary democracy and Cabinet government in the Westminster mould, the rule of law, the separation of powers, an independent judiciary, and a Bill of Rights. Its interpretation is the province of the judiciary. The body of constitutional case law is still small but surely increasing.

Apart from litigated cases, legal advisers and legislative drafters in my chambers handle on a daily basis many matters that engage the Constitution and its attendant principles. Their advice on constitutional matters is taken seriously by government officials and proposals have been significantly changed as a result. To my officers, interpreting the Constitution is not a rarefied exercise.

Fidelity to the text

HOW should the Constitution be interpreted? Much has been said. Much more will no doubt be said during this conference, and I am sure we will hear the word "autochthonous" used quite liberally.

I want to start by going back to basics and stating the obvious: The interpretation of the Constitution must be faithful to the constitutional text. In a way, this is a truism: How can one claim to interpret a text without being faithful to it? But there are also higher principles involved. Underlying the notion of written law is a belief in the power of the written word: That words have meaning, that words are important, and that words can bind. This is all the more so for a written Constitution that is the supreme law of the land – its words are meant to bind the State and secure the rights of the people. Fidelity to the idea of a written Constitution must mean fidelity to its text.

What does fidelity to the constitutional text require? In the first place, it requires that, where constitutional provisions are clear, they must be given effect to. And many of our constitutional provisions are clear enough that little is required by way of interpretation. Article 9(4) is a good example. It provides that a person cannot be detained beyond 48 hours without being produced before a magistrate, and cannot be detained further without the authority of the magistrate. This is the essence of the writ of habeas corpus. There is little that is doubtful in this provision; it does not make for long judgments or academic musings. But it is this absolute clarity that makes the provision a bulwark of personal liberty. It is the same clarity that secures regular general elections, the independence of the judiciary, and the very sanctity of the Constitution, among other things.

But fidelity to the constitutional text does not stop at giving effect to the literal meaning of the text. Sometimes, value judgments have to be made in interpreting and applying the Constitution.

This is because the Constitution is not drawn like tax or criminal statutes, which are intended to have meanings that cleave to the text. Some constitutional provisions, most significantly the fundamental liberties, are broadly framed, and intentionally so. Concepts like equal protection and free speech may have a clear general meaning, but their application to specific facts requires exposition and value judgments.

There are also implied concepts and principles in the Constitution. Some degree of implication is unavoidable in any written document, and especially so in a document with a scope as wide as the Constitution. In fact, many important concepts in the Constitution are implied. For instance, the principle of separation of powers is nowhere stated in the Constitution, but is everywhere implied in the system of government that it prescribes. Value judgments are needed to identify this and other propositions that are reflected in or assumed by the express provisions of the Constitution, and without which the express provisions would be meaningless or unworkable.

I would make a short detour here and briefly mention constitutional conventions. These are not rules of law and are not enforceable by the courts. But they are essential to a complete understanding of how the Constitution works in practice, which may be very different from how the legal rules are framed. One would, for instance, have a very mistaken view of the British Constitution if one did not appreciate the convention that the sovereign acts on the advice of the government of the day. Singapore has imported some conventions from the United Kingdom, such as the practice of the House of Commons, which is relevant where the Standing Orders of our Parliament are silent. We have also evolved our own conventions – for instance, it is the Government's practice to consult the President before introducing constitutional amendments that affect the President's discretionary powers, and to state the President's views when the amendments are debated in Parliament. The written Principles agreed between the President and the Government in the area of protection of reserves is another example of a constitutional convention. One constitutional scholar refers to it as "the clearest example of soft constitutional law as it relates to institutionalised interaction". As we mature as a polity, the development of constitutional conventions is likely to become a rich area for study.

As is evident from my earlier observations, a literal approach is not always sufficient in interpreting the Constitution and understanding how it works in practice. In the context of constitutional interpretation, there will be cases where judges are called upon to look beyond the plain words and exercise a degree of value judgment. I think we can be frank and acknowledge that the process involves a degree of judicial lawmaking, occurring in the interstices of the written law, in the fashion of Dworkin's Judge Hercules. The power of the court in such cases is significant: Short of a constitutional amendment, the interpretations they lay down are final, and what they hold to be within the domain of the Constitution is thereby removed from the ordinary processes of democracy.

Conspicuous fidelity to the constitutional text is therefore even more important in such cases, where the judge is by necessity required to go beyond the plain words. A failure to justify each decision by reference to the constitutional text taints the courts with the suspicion of preferring their personal views under the guise of interpreting the Constitution, asserting judicial supremacy under the guise of upholding constitutional supremacy.

In practical terms, fidelity to the text in such cases means that judges must reach their decisions guided only by considerations that flow from the text and the structure of the Constitution, and the principles that undergird the text and the Constitution. These principles must be rooted in the law, untainted by extra-legal considerations that are more appropriate for the political arena, in order that judges can fulfil their role as neutral and independent arbiters. Some of the more general considerations are well known. The Privy Council has said that the fundamental liberties must be given a generous interpretation that avoids the austerity of tabulated legalism. There is also the consideration that the Constitution is founded on the separation of powers and its provisions are to be interpreted accordingly.

Sometimes, the constitutional text leads inexorably to one interpretation, even though it is not explicit. For example, if you read Article 4 and Article 93 together, there can be no doubt that the courts have the power to strike down unconstitutional laws. Another example is the right to vote. The Constitution does not in terms create such a right. But if there were no such right, the system of parliamentary democracy established under Part VI, and the requirement for general elections in Articles 65 and 66, would be no better than a mockery. My predecessors as attorney-general have therefore advised, and the Government has accepted in Parliament, that there is in principle an implied constitutional right to vote.

In other cases, the process of interpretation may be more involved, and judges may have to decide between reasonable alternatives. But this is an exercise that a judge is well-equipped to handle, using the usual tools of judicial reasoning. There will of course be debates – not least by those in this audience – on whether the judge in a given case reached the best possible interpretation of the text, and that is fine and healthy. But so long as the judge is guided by proper textual considerations, properly articulated, the interpretation that he reaches will be a legitimate one, even though another judge might legitimately reach a different conclusion.

In reaching their conclusions, it is critical that judges articulate their reasoning. The legitimacy and strength of unelected judges lie in a consistent and visible adherence to the law and to legal method. Every decision must be capable of justification with reference to legal rules, principles and precedents. A failure to give proper reasons undermines the legitimacy of the judicial process.

The guarantee of equal protection in Article 12(1) illustrates some of the points I just made. The broad language of the clause has lent itself to much litigation. In Taw Cheng Kong's case, the Court of Appeal disagreed with the High Court on the strength of the nexus between the purpose of a law and the classification adopted by the law that is required under the reasonable classification test. In Lim Meng Suang's case, the Court of Appeal was presented with wide-ranging arguments for interpreting Article 12(1). After extensive analysis, the court confirmed that the established reasonable classification test was applicable, albeit with some interesting glosses the practical implications of which remain to be seen.

The judges in each of these decisions took somewhat different views on what Article 12(1) required. Constitutional scholars may prefer one of these decisions over the other, or argue for yet other interpretations. But each of these decisions can be said to be legitimate interpretations, because they were guided by considerations that flowed from the text Article 12 and the Constitution. As discussed in Lim Meng Suang, some of these considerations include: The principle that the fundamental liberties ought to be generously construed, the countervailing principle that judges should avoid open-ended tests that in effect placed them in the position of policymakers (which is a principle founded on the separation of powers in our Constitution), and the specific consideration that Article 12(2) had specifically laid down a closed list of grounds on which discrimination was prohibited.

This very brief summary of Article 12 case law also illustrates how there is room for judicial interpretations of the Constitution to change and evolve in response to changing social and national circumstances, and yet remain legitimate and faithful to the text. But such evolution is ultimately constrained by the constitutional text. If the constitutional text does not change, there is necessarily an outer limit to its scope. A fixed constitutional text cannot have an ever-expanding meaning.

I should also say that, while the Constitution must be ultimately interpreted within its four walls, the process does not require us to bury our heads in the sand. The Constitution shares many basic ideas with other written Constitutions, even though its architecture and the precise wording of specific provisions may differ. It is therefore helpful to look at how the courts in other countries have interpreted their Constitutions. For instance, the Kable principle in Australia holds that you cannot confer a function on the courts that is incompatible with their constitutional character as independent repositories of judicial power. The principle obviously has resonance in the context of our Article 93. Our Court of Appeal has recognised in Lim Meng Suang that foreign cases are however decided in the context of their unique social, political and legal circumstances. The Court has therefore cautioned that an expansive constitutional right to life and liberty should be approached with circumspection.

Even where we ultimately decide to differ from other jurisdictions, consideration of comparative jurisprudence imposes a salutary discipline on the quality of our judicial reasoning. On this point I am of course preaching to the choir – the judgments of our courts on constitutional law regularly discuss foreign case law, and woe betide the counsel who is not prepared to address the court on relevant foreign case law. State counsel, for their part, regularly consider relevant comparative law in giving advice on constitutional issues. I have also asked for regular digests of international developments to be shared within my chambers, not least because these are sometimes bellwethers for constitutional issues that may arise in Singapore.

Non-textual approaches

I NOW wish to deprecate what may politely be called non-textual approaches to interpreting the Constitution. Their premise is this: There are some laws or policies that are so deplorable that there must be some constitutional remedy, even if the most anxious consideration of the constitutional text, in the light of all that I have said earlier, points to none.

It is clear to me that such approaches are neither lawful nor legitimate. I have mentioned earlier that fidelity to the text does not preclude arguments about the best interpretation of the text, and sometimes these arguments can be very difficult. But there is an important distinction to be made between an interpretive exercise where there is a bona fide commitment to be guided only by textual considerations, and one that is overtly or covertly motivated by outcomes that a judge wants to achieve. If judges go beyond textual considerations in interpreting the Constitution, they are really repudiating the Constitution and constitutional supremacy and substituting their personal views. In doing so they would be undermining the legitimacy of the courts as impartial tribunals guided only by the law. They would also be usurping the province of the democratically elected branches, and ultimately diluting every citizen's democratic choice.

Some argue that it is comforting that judges stand ready to provide a remedy in extreme cases. To me, there is nothing comforting about judges who are willing to bend or ignore the law. And in matters outside the law, why should judges purport to know better than the rest of us?

Here it is helpful to compare the Due Process Clause of the US Constitution, Article 21 of the Indian Constitution, and Article 9(1) of our own Constitution. At first blush these are similarly worded provisions but there are significant differences in drafting and in how each provision has been interpreted, and these illustrate some of the points I just made.

In the United States, the Due Process Clause prohibits the deprivation of "liberty... without due process of law". The US courts have created various substantive rights under the doctrine of "substantive due process". This included the economic liberties created in the Lochner era, which have since been repudiated. Today, the liberties recognised under the Due Process Clause include "personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education". There is no clear basis in the US Constitution for these rights, and the US courts have not articulated any clear framework for how these un-enumerated rights are identified and defined. It is difficult to resist the conclusion that these rights are entirely a judicial creation.

The difficulties with the Due Process Clause and its jurisprudence were known even in the late 1940s when the Indian Constitution was drafted. The drafters of the Indian Constitution deliberately drafted Article 21 of the Indian Constitution to avoid importing substantive due process jurisprudence. The ambit of Article 21 was confined to "personal liberty", as opposed to liberty generally. And personal liberty could be deprived by "procedure established by law". Yet the Indian courts have gone ahead and created numerous substantive rights under Article 21. To me, this is a clear instance of judicial creativity.

Our Article 9(1) is derived from the Indian Article 21. In the context of Article 9 as a whole it is obvious that the clause is concerned only with unlawful executions and unlawful detentions. Our courts have firmly and quite rightly refused repeated invitations to read the clause to include the freedom of contract and notions of sexual autonomy. In Yong Vui Kong's case, the Court of Appeal specifically declined to follow the activist approach of the Indian courts and tests which "hinge on the court's view of the reasonableness of the law in question, and requires the court to intrude into the legislative sphere of Parliament as well as engage in policymaking".

To be sure, there are matters that some of us hope can be placed under constitutional protection, with all its attendant implications. But this is an argument for constitutional change and is not relevant to constitutional interpretation. In interpreting the Constitution, we must be guided by what the text is, not what we hope for it to be. To venture beyond the text of the Constitution and enunciate a meaning that reflects what the law should be is to disrespect the principle of separation of powers: This is an exercise that violates rather than upholds the Constitution.

By way of illustration I want to briefly touch on a fairly recent discussion on whether there is a basic structure to the Constitution that cannot be amended. To me the issue is fairly straightforward. The Constitution has made it very plain and specific provisions stipulate how its various provisions may be amended. Even fundamental provisions can be amended by the prescribed processes although entrenched provisions require a national referendum. There is therefore no question of any provision of the Constitution, however fundamental, being immune from amendment. There may be valid arguments for amending the Constitution to make this the case, but those arguments have no bearing on what the law is today.

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Source: *The Straits Times,* pA44-A45
Date: 30 May 2015

The Constitution: A continuous process of refinement

FROM PAGE A44

Health and vitality

IN CONCLUDING, I want to place constitutional interpretation in context, using an example from the United States. Constitutional lawyers rightly celebrate Brown versus Board of Education, where the Supreme Court led by Chief Justice Earl Warren in 1954 emphatically struck down segregation in schools. But it is sobering to also remember that racial integration was viscerally opposed in many parts of America and was not fully achieved until many years later. In 1957, President Eisenhower had to send in the army to escort black children to school in Little Rock, Arkansas.

The US experience with desegregation is salutary. The role of judges in faithfully interpreting and applying the Constitution is important and indispensable. But judges alone cannot secure the health and vitality of the Constitution. The judiciary must be supported in its role by the other branches of government, who must see it as their duty to abide by the Constitution and to give effect to judicial interpretations of the Constitution. The Constitution itself recognises this in a small but significant way: In addition to the Judges of the Supreme Court, the President and the Members of Parliament all swear an oath to preserve, protect and defend the Constitution.

Beyond the organs of State, the strength of the Constitution ultimately depends on its acceptance by the people: by you and me and our fellow citizens. Here I want to quote from a parliamentary speech made by Prime Minister Lee Kuan Yew in 1984:

"From my experience, Constitutions have to be custom-made, tailored to suit the peculiarities of the person wearing the suit. Perhaps, like shoes, the older they are, the better they fit. Stretch them, soften them, resole them, repair them. They are always better than a brand new pair of shoes.

"Our people have got used to and understand the present system. It takes a long time... Any fundamental change takes a long time. But most important of all, the Constitution works. Many countries have tried and gone through several Constitutions since independence... They have not brought stability or legitimacy. I believe it is better to stretch and ease an old shoe when we know that the different shape and fit of a younger generation requires a change."

There is wisdom in those words. Despite its humble and patchwork beginnings, the Constitution devised by then Prime Minister Lee and his colleagues have served us well for the past 50 years. As we look ahead, each succeeding generation must decide for itself if the Constitution continues to reflect its aspirations and our national conditions, and have the strength of conviction and the boldness of spirit to make any necessary change. It is through this continuous process of refinement, stretching and easing that we work out our constitutional salvation.