

Stories of power: A comparative analysis of judicial normativity in Malaysia, Singapore, and Hong Kong

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Abstract

Robert Cover identifies that when deciding ‘hard cases’ about constitutional rights, judges construct narratives prioritising one normative universe (*nomos*) over others. This essay advances Cover’s claim, arguing that courts’ preferred *nomos* explains a power dynamic that is then weaponised to curtail or strengthen constitutional rights. I illustrate this judicial approach through a comparative analysis of three cases across Malaysia (*Lina Joy v Federal Territory Islamic Council*), Singapore (*Lim Meng Suang v Attorney-General*), and Hong Kong (*Ng Ka Ling v Director of Immigration*). This essay’s dismantling of the normative frames of judicial analysis in such ‘hard cases’ is significant because it illustrates that the court’s findings are not legally irrepressible but deconstructable and disputable. My analysis is unique in focusing on how normatively constructed power relations shape constitutional rights. I conclude by noting that judges should transparently accommodate this inevitable normativity and allow the scope of their intervention to be determined by the facts of the case.

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No set of legal institutions or prescriptions exists apart from the narratives that locate it and give it meaning.
For every constitution there is an epic, for each decalogue a scripture.

—Robert Cover, ‘Nomos and Narrative’

Robert Cover identifies that when deciding ‘hard cases’ about constitutional rights, judges construct narratives prioritising one normative universe (*nomos*) over others.¹ This essay advances Cover’s claim, arguing that courts’ preferred *nomos* frames a certain power dynamic as law that is then weaponised to either curtail or strengthen constitutional rights. I illustrate this judicial approach by comparing three ‘hard cases’ across Singapore, Malaysia, and Hong Kong. ‘Hard cases’ are those in which statute or precedent do not provide clear answers to the questions raised by the case’s specific facts.² In the Singaporean case *Lim Meng Suang v Attorney-General*,³ a *nomos* that envisions the judiciary as extremely deferential justifies a power dynamic in which the court is powerless to challenge parliamentary legislation, thus limiting constitutional rights to ‘equality before the law’.⁴ In the Malaysian case *Lina Joy v Federal Territory Islamic Council*,⁵ the *nomos* of an all-encompassing Islam is prioritised over a voluntarist religious vision, giving Syariah courts the power to determine apostasy. This limits constitutional rights to freedom of religion.⁶ In the Hong Kong Special Administrative Region (‘HKSAR’) case *Ng Ka Ling v Director of Immigration*,⁷ the court’s *nomos* prioritises the HKSAR’s autonomy over mainland authority. This empowers the court to make a constitutional interpretation without reference to the Standing Committee, thus facilitating resistance against

¹ Robert Cover, ‘Nomos and Narrative’ (1983) 97(1) *Harvard Law Review* 4.

² Ronald Dworkin, ‘Hard Cases’ (1975) 88(6) *Harvard Law Review* 1057, 1057, doi.org/10.2307/1340249.

³ *Lim Meng Suang and another v Attorney-General and another appeal and another matter* [2014] SGCA 53 (‘*Lim*’).

⁴ *Constitution of the Republic of Singapore* (Singapore, 2020 revised edition) art 12(1).

⁵ *Lina Joy v the Federal Territory Islamic Council, Government of Malaysia, and the Director General of the National Registration Department* [2007] 3 AMR 693 (‘*Lina*’).

⁶ *Federal Constitution* (Malaysia) art 11.

⁷ *Ng Ka Ling v Director of Immigration* [1999] 2 HKCFAR 4 (‘*Ng Ka Ling*’).

legislative controls over the right to abode.⁸ Comparing these cases supports my argument that while judicial reasoning can be used to different ends, the approach is the same—the court normatively frames a particular power dynamic as an ‘ontological given’⁹ to shape constitutional rights. I conclude by discussing how judges might approach constitutional decision-making amidst a sea of competing *nomos*. I argue that judicial transparency about their preferred normative values is the preferable approach and that the extent of judicial activism (i.e. the scope of their power) should depend upon the facts of the case. Ultimately, my purpose is not to condemn the court’s judgments but to expose them for what they are—deconstructable and disputable rather than legally irrepressible.

A Theoretical framework and methodology

1 Theoretical framework

This essay uses Hart’s positivist theory of law as its theoretical lens. This is perhaps the most salient theory within legal theory for understanding ‘what law is’ and, therefore, why we should and do obey it.¹⁰ For Hart, law only exists when its creation accords with a ‘rule of recognition’ that provides the criteria for legal validity.¹¹ However, the law is ‘open-textured’.¹² Words are imprecise and open to interpretation, whereby while they have a transparent ‘core’ of meaning, around them lies a ‘penumbra’ of uncertainty. Hart suggests that the rule of recognition ‘runs out’ in ‘hard cases’ where the ‘penumbral’ meaning is questioned.¹³ In such cases, he suggests judges exercise discretion to determine the law. In doing so, they ‘make’ new law.¹⁴

Using Hart’s theory, this essay views constitutional provisions as ‘law’ and the narratives that give them shape as ‘normative frames’. In doing so, I situate Hart’s theory within a social context of narratives about power and resistance. Building on Hart, I take up Cover’s argument that judges must elect a singular *nomos* from within competing *nomoi* when exercising discretion. This allows them to decide the law. Constitutions contain provisions fundamental to questions of power, self-identity, and democratic self-understanding.¹⁵ Since these provisions are ‘open-textured’, constitutions become sites of ongoing conflict about meaning and belonging. Consequently, the courts’ normative prioritisation has tangible, often violent¹⁶ consequences for those whose sense of meaning is rejected or who are deemed not to belong. This violence is not an unfortunate reality¹⁷ but an intended consequence of the court’s preference for a specific and usually hegemonic power relation.¹⁸ This focus on power distinguishes this essay from Hart’s and Cover’s theories.

2 Methodology

To expose this violent normativity, I engage in a detailed analysis of three apex court judgments across South-East Asia. These cases have been selected because they are examples of ‘hard cases’—that is, the rules of the national constitutions do not provide a clear answer as to how the case should be decided. The task is rendered more difficult because the values of constitutions are inherently at odds with one another, as in Malaysia and Hong Kong, or are opaque, as in Singapore. The cases are thus illustrative

⁸ *Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* art 24(3).

⁹ Judith Butler, *Frames of War: When is Life Grievable?* (Verso, 2009) 149.

¹⁰ Nigel Simmonds, *Central Issues in Jurisprudence* (Thomson Reuters, 5th ed, 2018).

¹¹ HLA Hart, *The Concept of Law* (Oxford University Press, 1961).

¹² *Ibid.*, 132.

¹³ Robert Yanal, ‘Hart, Dworkin, Judges, and New Law’ (1985) 68(3) *The Monist* 388, 389, doi.org/10.5840/monist198568333.

¹⁴ Hart (n 11).

¹⁵ Paul Blokker, ‘The Imaginary Constitution of Constitutions’ (2017) 3(1) *Social Imaginaries* 167, 171, doi.org/10.5840/si2017318.

¹⁶ Robert Cover, ‘Violence and the Word’ (1986) 95(8) *The Yale Law Journal* 1601, doi.org/10.2307/796468.

¹⁷ As might be argued by Cover (n 1).

¹⁸ As might be suggested by Judith Butler. See Judith Butler, ‘Burning Acts, Injurious Speech’ (1996) *University of Chicago Law School Round Table* 3(1) 199.

of how courts approach decision-making under the conditions of uncertainty that characterise hard cases.

To expose the judicial approach under these conditions, my analysis deconstructs the legal jargon and perambulation that often render judicial decisions inaccessible. In doing so, I essentialise the court's ratio decidendi (rationale for the decision) into a three-step process consistent across the jurisdictions: (1) the court adopts a normative position, (2) that frames a particular power relation as legally irrepressible, (3) which is then used to delimit the scope of certain constitutional rights. This process of deconstruction through comparative judicial analysis is inspired by the work of Cover¹⁹ and Derrida.²⁰ It is used to substantiate my claim that judgments in hard cases are disputable rather than legally irrepressible due to their foundation in normatively justified power relations.

B The cases

1 Lim Meng Suang

This section focuses on the judicial methodology used in *Lim* to determine the consistency of s 377A of the *Penal Code*²¹ with Article 12(1) of the Singaporean Constitution.²² S 377A criminalised acts by males of 'gross indecency with another male person', whether in 'public or private'.²³ Lim Meng Suang and Kenneth Chee, a same-sex couple, applied to the High Court to challenge the constitutionality of this provision on various grounds. The strongest of these grounds was that the provision was inconsistent with Article 12(1) of the Singaporean Constitution, which preserves that 'all persons are equal before the law and entitled to the equal protection of the law'.²⁴ This provision provides general protection against discrimination to complement the specific prevention of discrimination against citizens based on 'religion, race, descent, place of birth or gender' in Article 12(2).²⁵ I argue that the court's ultimate decision to find that the statute was consistent with Article 12(1) rests upon the normative frame of extreme deference to the legislature through which the judiciary imagines itself into powerlessness.

i) The normative position—extreme deference

The determinative normative frame in deciding this issue is the belief that courts should not rule on 'extra-legal'²⁶ (i.e. normative) issues because these belong in the 'political arena'.²⁷ Doing so would undermine the court's 'raison d'être' to furnish an 'independent, neutral and objective forum' for deciding rights.²⁸ Ironically, this position about the extent to which normative issues should be contemplated is, itself, normative. Firstly, this is because the extent of deference is reasonably disagreed upon and evolves across jurisdictions,²⁹ whereby different apex courts consider 'extra-legal' issues to different extents. Even within Singapore, the extent of judicial deference has waxed and waned.³⁰ There is no legal basis for these alternative approaches since judicial deference is only an implied theoretical

¹⁹ Cover (n 1).

²⁰ See, for example, Jacques Derrida, 'Force of Law: The Mystical Foundation of Authority' in Drucilla Cornell, Michel Rosenfeld, and David Gray Carlson (eds), *Deconstruction and the Possibility of Justice* (Routledge, 1992).

²¹ Singapore, cap 224, 2008 rev ed.

²² *Constitution of the Republic of Singapore* (Singapore, 2020 revised edition) art 12(1).

²³ (Singapore, cap 224, 2008 rev ed) s 377A.

²⁴ *Constitution of the Republic of Singapore* (Singapore, 2020 revised edition) art 12(1).

²⁵ *Constitution of the Republic of Singapore* (Singapore, 2020 revised edition) art 12(2).

²⁶ *Lim* (n 3) [6].

²⁷ *Ibid* [7].

²⁸ *Ibid*.

²⁹ Mark Elliot, 'Proportionality and Deference: The Importance of a Structured Approach' in Christopher Forsyth (et al eds) *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford University Press, 2010) 265, 268.

³⁰ See the discussion in Eugene Tan, 'Curial Deference in Singapore Public Law: Autochthonous Evolution to Buttress Good Governance and the Rule of Law' (2017) 29 *Singapore Academy of Law Journal* 800.

underpinning of constitutionalism and is not expressly constitutionally prescribed.³¹ Thus, determining the extent of deference requires choosing between different normative visions of the court's role in constitutional democracy. Secondly, the court's non-consideration of 'extra-legal issues' is normative because determining what is 'extra-legal' requires defining 'law' first. The Singaporean justices are evidently disciples of Dworkin, citing his 'seminal book, *Taking Rights Seriously*'³² and describing the law as composed of 'rules and principles'.³³ However, cursory research reveals this perspective's contentiousness, illustrated by the Dworkin–Hart debate.³⁴ For Dworkin, law contains 'principles' used to resolve hard cases³⁵ rather than simply judicial discretion, as argued by Hart. Extreme deference, seen by Hartians as a discretionally adopted non-legal perspective, might be seen by Dworkinians as a principle. Ostensibly, Dworkin's theory would not support my argument about extreme deference being a normative frame, since principles are laws, not norms.³⁶ However, my argument can be more abstractly reconstructed to address this challenge. The extent of deference hinges upon what one believes 'law' is. To say courts 'should not trespass into extra-legal territory'³⁷ means different things depending on whether one views the law as composed of only rules, or also principles. The Singaporean court might adopt a less deferential approach if they adopted a different theory of law. Answering what is 'law' is a philosophical question not resolvable by reference to legal materials, since that would involve begging the question. Therefore, the court's deferential position is normative since its establishment requires answering various philosophical questions about both the nature of law and the court's role in applying it.

ii) *The power hierarchy—judicial helplessness*

The court's frame of non-intervention on 'extra-legal issues' constructs a power hierarchy in which the legislature is authoritative, and the judiciary is a helpless bystander. This conception of government is an 'imaginal being'—an idyllic form that is not just shaped by imagination but also shapes imagination about, among other things, law.³⁸ The imaginal being constructed in *Lim* is a 'three-armed Leviathan', with each arm of government too short to intervene in the other's 'sphere of jurisdiction'³⁹ unless in exceptional circumstances.⁴⁰ This imaginal being vindicates the court's apologetic tone as they narrate their powerlessness to overturn s 377A. Their parade of 'jurisdictional helplessness'⁴¹ is an 'operation of power'⁴² represented as an 'ontological given';⁴³ a power hierarchy that remains incontestable within the adopted frame. It relies on this frame to survive—if the court was framed as less deferential, then its arm would grow, and it would have sufficient power to overturn s 377A.

iii) *Impact on constitutional rights—inequality before the law*

This power hierarchy leads to the court adopting a non-interventionist test under which s 377A is valid. From their self-spoken subservience, the court states the relevant test for evaluating the consistency of statute with Article 12(1) is the 'reasonable classification test'. Under this test, a discriminatory statute is consistent with Article 12(1) if '1) the classification is founded on an intelligible differentia, and ... 2) that differentia has a rational relation to the [sought] object'.⁴⁴ Notably, the court did not accept the

³¹ Elliot (n 29).

³² *Lim* (n 3) [6].

³³ *Ibid* [7].

³⁴ Yanal (n 13).

³⁵ Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1992).

³⁶ Dworkin (n 35).

³⁷ *Lim* (n 2) [8].

³⁸ Chiara Bottici, *Imaginal Politics: Images Beyond Imagination and the Imaginary* (Columbia University Press, 2014) 96, doi.org/10.7312/bott15778.

³⁹ *Lim* [83].

⁴⁰ *Lim* [n 6]. The court will consider 'extra-legal' considerations by way of a 'very limited brief premised only on what is absolutely necessary to enable the court to apply the relevant legal principles'.

⁴¹ Cover (n 1) 60.

⁴² Butler (n 9) 149.

⁴³ *Ibid*.

⁴⁴ *Lim* (n 3) [58].

appellant's proposition that correctly applying Article 12(1) also entails tests of *legitimacy* or *reasonableness*. Such tests are not unknown to the courts. In Australia, for a statute to abrogate s 92 of the *Constitution*, it must have a legitimate objective.⁴⁵ Reasonableness has been applied across the common law world to check legislative and executive power.⁴⁶ Yet, for fear of 'usurping'⁴⁷ the legislature, the court does not accept these concepts as relevant.

This limited test does 'not fully' give 'effect to the concepts of equality embodied in Article 12(1)',⁴⁸ despite the court's function being to provide a full force to constitutional provisions and the fundamental liberties so in contained.⁴⁹ Equality does not just necessitate rationality of differentiation; it also requires the differentiated class treatment to be appropriate.⁵⁰ In other words, inequality must be both just and rational to be consistent with Article 12(1). For example, executing an entire, isolated village to prevent the spread of disease may be rational. It would likely satisfy the reasonable classification test. However, it is clearly not just—the residents of this town are *unequal* before the law compared to other citizens. This decision would likely be found unreasonable under any formulation of the test as it exists in other common law jurisdictions. Without considerations of justice (given force by tests of legitimacy and reasonableness), equality is 'empty'.⁵¹ Yet the court adopted the reasonable classification test due to their deferential lens. Under this test, s 377A is valid. Under another test, justified by an alternate normative frame and thus a more powerful court, it may not be. The consequences of this decision are violent. The court's normative position perpetuates a hegemonic narrative that exacerbates the vulnerability of an already marginalised LGBTIQ community by severing their constitutional protections.⁵² The Leviathan's second arm watches as the first tears its vulnerable citizens apart.

2 Lina Joy

In *Lina*, the Federal Court questioned whether Article 11 of the Malaysian Constitution, which assures 'every person has the right to profess and practice his religion',⁵³ allowed free conversion out of Islam. This question arose in the context of Lina Joy's request to have the religion on her identification card changed from Muslim to Christian. The National Registrar Department, the body responsible for the administration of such identity cards, required that she provide a document from the Syariah court affirming that she had completed this conversion. Problematically, such a document was unavailable from the Syariah court due to the lack of procedure for conversion out of Islam. Nonetheless, the Federal Court held the decision of the Registrar to be valid. I argue that this finding was grounded in a normatively contentious conception of Islam as 'all-encompassing' that empowered the Syariah courts to control conversion.

i) The normative position—all-encompassing Islam

The court's interpretation of Article 11 hinges on the following position:

Islam is not only a gathering of dogmas and rituals, but it is also a complete way of life including ... laws.⁵⁴

This is a normative frame depicted through a false binary of Islam as either a 'gathering of dogma and rituals' or an all-encompassing 'way of life'. However, there are other ways to view Islam. Islam can be seen as a religion in which an individual is not subject to Islamic laws in the material world, only at

⁴⁵ *Betfair Pty Limited v Western Australia* (2008) 234 CLR 418.

⁴⁶ See generally The Hon Justice MJ Beazley AO, 'Judicial Review & the Shifting Sands of Legal Unreasonableness' (Annual Whitmore Lecture, Council of Australian Tribunals Inc, 2016).

⁴⁷ *Lim* (n 3) [82].

⁴⁸ *Ibid* [88].

⁴⁹ *Ong Ah Chuan v Public Prosecutor* [1981] 1 MLJ 64.

⁵⁰ Seow Hon Tan, 'Between Judicial Oligarchy and Parliamentary Supremacy: Understanding the Court's Dilemma in Constitutional Judicial Review' (2016) (September) *Singapore Journal of Legal Studies* 307, 320, doi.org/10.2139/ssrn.2780732.

⁵¹ *Ibid*.

⁵² As argued by Butler (n 18) in relation to *R.A.V. v St Paul* (1992) 112 S. Ct. 2538.

⁵³ *Federal Constitution* (Malaysia) art 11.

⁵⁴ *Lina* (n 5) [17.2].

Yawm Ad-Din.⁵⁵ Under this theory, faith ‘would be meaningless if induced by force’.⁵⁶ This secular conception of Islam is a different normative lens the court could have adopted. Indeed, it was the frame preferred by dissenting Malanjum J, who emphasised ‘the law in this country is ... secular law’. This conflict in judicial perspectives reflects the constitutional conflict between a state that protects freedom of religion⁵⁷ and for whom ‘Islam is the official religion’.⁵⁸ The conflict between the majority and Malanjum J’s dissent illustrates the inadequacy of positive law constitutional provisions to disentangle this paradox. To do so, the judges must resort to normative beliefs about which frame is preferable. The majority prefers the frame in which Islam is all-encompassing, even if this means sweeping aside religious freedom.

ii) *The power hierarchy—Syariah courts control conversion*

This frame justifies a power hierarchy in which Syariah courts control conversion out of Islam. Due to Fairuz CJ’s framing, he holds that if one ‘professes and practices Islam’, then they must ‘follow Islamic laws which determine ... the way of leaving Islam’.⁵⁹ Syariah courts, not common law courts, determine compliance with these laws.⁶⁰ This was held because the superior court’s jurisdiction can be removed by necessary implication. It is a necessary implication of the Syariah court’s power to adjudicate matters relating to the ‘embracing of Islam’ that they have jurisdiction over apostasy.⁶¹ When Islam is understood as a ‘complete way of life’,⁶² this implication seems obvious. Yet through an alternate frame in which faith cannot be forced, apostasy is not implied by the positive act of ‘embracing’. Hence, this framing of Islam creates a power hierarchy in which the apostate is subject to Syariah court rulings, and the common law courts are ‘powerless bystanders’. Of course, this parade of powerlessness is only a pretence since ‘every denial of jurisdiction on the part of a court is an assertion of the power to determine jurisdiction and thus to constitute a norm’.⁶³ This exercise of power to paradoxically construct a relation of judicial powerlessness reflects that exposed in *Lim*. The Federal Court could have easily spoken themselves into power, rather than out of it, had they adopted an alternative frame.

iii) *Impact on constitutional rights—captivity of religion*

Due to this power relation, the constitutional right to freedom of religion is repressed for Malaysian Muslims. Those desiring conversion out of Islam are rendered powerless, without protection from common law courts, subject as they are to Syariah courts’ incontestable jurisdiction over apostate requests. In most Malaysian states, there is no legal ‘process’ for leaving Islam at all.⁶⁴ In other states, apostasy is criminalised.⁶⁵ The majority mask this reality. Their description implies leaving Islam is feasible so long as it coheres with Islamic laws—laws which, conveniently, may not exist. A practical consequence of the court’s framing is that many Muslims are held captive within their religion. Upon dismantling the frame, we see that the justices engage in a ‘violent mechanism’⁶⁶ through which a class of citizens ‘loses its capacity to ... act autonomously’.⁶⁷

⁵⁵ This position has been argued by Abdullahi Ahmed An-Na’im, *Islam and the Secular State: Negotiating the Future of Shari’a* (Harvard University Press, 2008) among others.

⁵⁶ Joshua Neoh, ‘Islamic State and the Common Law in Malaysia: A Case Study of *Lina Joy*’ (2008) 8(2) *Global Jurist* article 4, 11, doi.org/10.2202/1934-2640.1269, citing Abdullah Yusuf Ali, *The Meaning of the Holy Quran* (Amana Publications, 11th ed, 2004) 106.

⁵⁷ *Federal Constitution* (Malaysia) art 11.

⁵⁸ *Lina* (n 5) [24] quoting Salleh Abas LP in *Che Omar bin Che Soh v Public Prosecutor* [1988] 2 MLJ 55, 57.

⁵⁹ *Lina* (n 5) [17.2].

⁶⁰ *Ibid* [16].

⁶¹ *Ibid* [15.5].

⁶² *Ibid* [17.2].

⁶³ Cover (n 1) 8, footnote 23.

⁶⁴ *Lina* (n 5) [90].

⁶⁵ *Ibid*.

⁶⁶ Cover (n 16) 1615.

⁶⁷ *Ibid*.

3 Ng Ka Ling

In *Ng Ka Ling*, the court held the No 3 Ordinance,⁶⁸ which required certain people claiming permanent resident status to possess a ‘valid travel document ... and certificate of entitlement’,⁶⁹ was inconsistent with the right to abode under Article 24(3) of the *Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China*. The case arose in the context of various applications from individuals whose parents were Hong Kong residents but had themselves resided in Mainland China. They thus qualified for Hong Kong residency under Article 24(3) of the *Basic Law*. The core question was whether they were required to obtain travel documents under the No 3 Ordinance to exercise their right to abode. This case is differentiable from the others because the court protects a constitutional right rather than abrogates one. However, the judicial methodology is the same: normative background beliefs, in this case, the perspective that Hong Kong’s autonomy should be prioritised over mainland authority, justify a power relation that shapes individual rights.

i) The normative position—HKSAR autonomy over mainland authority

The normative position adopted by the court is that HKSAR autonomy should be prioritised over mainland authority, elevating one of the ‘two systems’⁷⁰ envisioned in the *Basic Law* over the other. Under the *Basic Law*, the HKSAR shall have a ‘high degree of autonomy’, including ‘independent judicial power’.⁷¹ However, the Standing Committee (the highest organ of the mainland Chinese government) shall also exercise an array of controls, including traditional judicial functions of constitutional interpretation.⁷² Inevitably, as in Malaysia, where the religious and secular constitutional visions conflict, the two systems collide in ‘hard cases’ where they are required to give shape to law as the constitutional provisions alone cannot. Thus, the court must resort to the approach deployed in *Lina*—using normative preferences to characterise one of these visions as more important in the circumstances. In *Ng Ka Ling*, the collision point arises when interpreting Article 158. This enshrines that the region’s courts shall interpret ‘on their own’ Basic Law provisions within ‘the limits of the autonomy of the region’⁷³ and refer to the Standing Committee questions ‘concerning the relationship between Central Authorities and the region’.⁷⁴ Article 22(4) is referable, and Article 24 is not.⁷⁵ Since Article 22(4) is arguably relevant to interpreting Article 24, the question was whether reference was required. In determining the test for referability, the court foregrounds the importance of preserving their capacity to interpret ‘on their own’ non-excluded Basic Law provisions.⁷⁶ They downplay the simultaneous purpose of preserving mainland Chinese power through the Standing Committee’s coexisting interpretational authority. This preferencing is normatively justified—an approach necessitated by a constitutional structure that includes irreconcilable visions.

ii) The power hierarchy—no referral required

In ‘light of that approach’⁷⁷ to prioritise HKSAR’s autonomy, the court empowers itself such that they are not required to make a referral to the Standing Committee. They find that, when multiple provisions are relevant, the court should only make a referral if the referable provision is predominant.⁷⁸ Which provision is ‘predominate’ is for the court to determine.⁷⁹ In *Ng Ka Ling*, however, there was no ‘predominate’ provision—the constitutionality of the impugned statute requires asking whether

⁶⁸ *Immigration (Amendment) (No 3) Ordinance* (Hong Kong) (1997).

⁶⁹ *Ibid* s 1(2)(c).

⁷⁰ *Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* preamble.

⁷¹ *Ibid* art 2.

⁷² *Ibid* art 158.

⁷³ *Ibid*.

⁷⁴ *Ibid*.

⁷⁵ *Ng Ka Ling* (n 7) [97].

⁷⁶ *Ibid* [101].

⁷⁷ *Ibid* [102].

⁷⁸ *Ibid* [103].

⁷⁹ *Ibid* [90].

Article 22(4) qualifies the right in Article 24(3).⁸⁰ This collapses the neat delineation between the competing jurisdictions since, in this ‘hard case’, the court must use its discretion to decide which body has determinative power. Here, their normative preference for maintaining HKSAR’s autonomy becomes operative. They resolve this issue in their favour,⁸¹ granting themselves the authority to interpret Article 24 and the related excluded provision Article 22(4) without reference to the Standing Committee. Unlike in *Lim* and *Lina*, the court speaks itself into power.

iii) Impact on constitutional rights—bounded bureaucracy

This construction of judicial power facilitates resistance against the delimitation of constitutional rights, dissonant to *Lim* and *Lina*. Unlike the Standing Committee, who would have and later did characterise the Ordinance as a legitimate constraint on Article 24 justified by Article 22(4),⁸² the court declares the Ordinance as ‘unconstitutional to the extent it requires permanent residents ... to hold the one-way permit’.⁸³ They thus strengthen the right to abode for certain citizens by removing bureaucratic constraints. This illustrates that leveraging normative frames to create power relations is not always detrimental to constitutional rights—sometimes, it may strengthen them.

C Discussion: What to do?

So far, I have illustrated the consistent approach of judges across South-East Asia when deciding complex constitutional issues. My analysis has shown that in such cases, judges must inevitably use a set of normative background assumptions to establish their legal position. In *Lim*, this normative position is the belief that judges should be highly deferent to the legislature. In *Lina*, it is a specific vision of Islam as ‘all-encompassing’. In *Ng Ka Ling*, it is the belief that Hong Kong’s judicial autonomy should be prioritised over the mainland’s control. I have argued that these normative positions are not just implicit within the response but crucial to the court’s ultimate decision. They are essential because they are the basis from which the court defines a particular power relation—between the Singaporean Supreme Court and the other two arms of government, the common law courts and the Syariah courts, and the Hong Kong Supreme Court and the mainland government, respectively. These power relations are then used to shape the scope of the rights interpreted by the court in the particular case.

Importantly, my claim is not that this structure of reasoning is problematic. Indeed, the comparative analysis suggests that this reliance on normativity is necessary for constitutional interpretation. When the values of constitutions are inherently at odds with one another, as seen in Malaysia and Hong Kong, or are opaque, as in the case of Singapore, judges must prioritise *nomos* to establish readings of the text capable of determinatively providing a decision on the facts. Meaning does not exist within the vacuum of the constitutional text.⁸⁴ Words must be contextually read to be given force, a context that brings with it a weight of competing *nomos* the court must choose between before coming to their conclusion. If this argument is accepted, the critical question becomes—what should judges do? In the final section of this response, I explore the strengths and weaknesses of the different approaches that courts may take in navigating this normativity. Ultimately, I support those in which the court is transparent about its preferred normative values. The amount of restraint exercised should hinge upon the facts of the case.

1 Transparent restraint

In *Lim Meng Suang*, the court adopts the approach of what I shall call ‘transparent restraint’. I define this approach as one in which the court is clear about its normative assumptions (i.e. transparent), and

⁸⁰ Ibid [107].

⁸¹ Ibid [105].

⁸² *Interpretation by the Standing Committee of the National People’s Congress Regarding Paragraph 4 in Article 22 and Category (3) of Paragraph 2 in Article 24 of the Basic Law of the Hong Kong Special Administrative Region of the People’s Republic of China* (Adopted at the 10th Meeting of the Standing Committee of the Ninth National People’s Congress on 26 June 1999).

⁸³ *Ng Ka Ling* (n 7) [119].

⁸⁴ Hart (n 11).

these normative assumptions justify a relation in which the court has minimal power (i.e. they exercise judicial restraint). The appeal of this approach is twofold. Firstly, in being transparent about their underlying assumptions, critics and supporters can engage in a dialogue around the desirability of these values in the judicial system. By being transparent, the court's reasoning is more persuasive because the grounds for the decision are laid out—deploying the Aristotelian *logos* to convince rational readers of their position. There is also an inherent desirability for clear reasons to be given for decisions. Since constitutional interpretation in 'hard cases' seems to require normative positions, these normative positions should be enunciated as part of the judicial reasoning. Finally, in ensuring that these values are those of judicial restraint, one might argue that this approach improves and supports democratic legitimacy. This is the case if one believes that judges, as an unelected branch of government, should refrain as far as possible from intervening in the 'non-legal sphere'. This is the reason explicitly given for the approach of the Singaporean court in *Lim*.

The weakness of this approach is that sometimes judicial intervention is required to address significant injustice. For example, in the case of *Brown v Board of Education*,⁸⁵ the US Supreme Court intervened to prevent systematic segregation within the schooling system. Such a decision required the consideration of 'extra-legal' materials such as the effect of segregated education upon 'coloured children'.⁸⁶ A philosophy of judicial restraint would likely prevent such a consequential decision from being made, perpetuating the manifest injustice of segregation potentially for decades longer in the American South. Arguably, *Lim* is similar in terms of its importance for protecting the rights of marginalised populations. This protection is not afforded by the approach of transparent restraint to navigating normativity.

2 Opaque activism

The opposite approach to transparent restraint is what I call 'opaque interventionism'. Opaque interventionism describes a judgment in which the court masks its normativity by representing its judgment as entirely legally based (i.e. opaque). However, they simultaneously use that masked normativity to justify a power relation in which a particular court is given extensive control over shaping individual rights (i.e. activist). This approach was deployed by the court in *Lina Joy*, where the court's assumption about the nature of Islam is represented as *obiter dictum* but, upon deconstruction, is fundamental to its decision to empower Syariah courts to restrict Muslim's conversion out of Islam.

This approach is undesirable. In masking their normativity, the court obfuscates the ratio decidendi of their decision, preventing discussion about the justice of the case and the soundness of its logic. This is inherently objectionable from the perspective of procedural justice. It is also ongoingly problematic in a common law system where precedent must be applied to similar cases in the future. Decisions with unclear ratios undermine the effectiveness of this system. Moreover, given the court's activist approach, this normativity has more significant implications than when the court exercises restraint because of the more substantial intervention into people's lives this activism entails. A fundamental principle of the judiciary in common law systems is that when a court actively regulates individual lives, they should have excellent reasons for doing so. If those reasons, which to some extent will inevitably be based on normativity in hard cases, are opaque, then the justice of the system is reduced.

3 Transparent activism

The final approach to navigating this normativity is that which I call 'transparent activism'. A fusion of the previous two approaches, this is the methodology deployed by the court in *Ng Ka Ling*. Judges using this approach are transparent about their normative positions. In *Ng Ka Ling*, the court discusses the different values latent within the *Basic Law*⁸⁷ before prioritising the autonomy of Hong Kong's judiciary in this specific instance. They are activist because they do not defer to the mainland authority's statutory power here and instead choose to empower themselves. The importance of transparency discussed

⁸⁵ 347 US 483 (1954).

⁸⁶ *Ibid* [494], footnote 11.

⁸⁷ *Ng Ka Ling* (n 7) [100]–[104].

above applies here. The weakness of this approach is that, through judicial activism, judges operate like politicians, making decisions about interests that balance competing considerations in a way we intuitively think should be reserved for elected representatives. However, as argued in the case of transparent restraint, this interventionism may be both necessary and desirable in some instances. Ultimately, these competing considerations about the extent of activism suggests that the extent to which the court should empower itself hinges on the facts of the individual case and the values and rights at stake in the circumstances. However, whether they are activist or show restraint, transparency is crucial so that we may understand why they have adopted such an approach.

D Conclusion: Power reigns supreme

I have argued that, in ‘hard cases’ where the court cannot rely on a ‘core’ of constitutional meaning, the court’s preferred *nomos* explains a particular power dynamic used to shape the scope of constitutional rights. Consequently, constitutional decisions in these cases are not legally irrepressible but deconstructable and disputable. When the ‘frame’ is shifted, so is the picture of constitutional rights. I do not condemn this judicial approach. To do so would be akin to shaking one’s fist at the shadows that form as the sun dips its head low in the evening sky. However, in the final section of this paper, I have argued that the courts must be transparent as to the normative frame they are deploying rather than obfuscate it with legal jargon—ensuring that their preferred *nomos* is fully visible so that we understand why, in the case of transparent restraint, a shadow has fallen over individual rights, or why, in the case of transparent activism, that shadow has been removed.

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