Constitutional Interpretation in Singapore—Theory and Practice BY JACLYN L **NEO**, ed [London: Routledge, 2017. xxiii + 385 pp. Hardcover: £95]

Jaclyn Neo's edited volume *Constitutional Interpretation in Singapore—Theory and Practice* is nicely situated at the confluence of two themes that are *du jour* in the constitutional law discourse: the methodological turn towards more empiricism and an academic infatuation with determining the proper role of courts within the system.

One approach that has gained currency, notably among US scholars, takes the form of large-N studies. These dissect copious amounts of quantitative data pertaining to most if not all of the world's constitutional regimes with a view to uncovering global trends. On the other end of the methodological spectrum, there is a growing corpus of detailed accounts devoted to a single constitutional system and Neo's book, dedicated to a close examination of judicial interpretation of the *Constitution of the Republic of Singapore* (1999 Rev Ed) [*Constitution*], falls squarely within this category. Even though such micro-studies do not tend to be explicitly comparative in design, their value for the global community of constitutional scholars can be considerable. This is in particular the case when the object of study is a State that does not otherwise commonly feature in monographs or casebooks: studying the experience in Asian jurisdictions facilitates "comparative engagement of constitutional laws and processes beyond [the] dominant understandings of constitutionalism forged by developments in the West" (Wen-Chen Chang *et al*, *Constitutionalism in Asia—Cases and Materials* (2014) at p 6). This extends to reflecting on the enduring appropriateness of convenient, broad-brush labels to pigeonhole a particular country. Thus, Singapore has been presented as the archetype of "authoritarian constitutionalism" (see recently, Mark Tushnet, "Authoritarian Constitutionalism" (2015) 100 Cornell L Rev 391), but as Neo notes in her introduction, "this has arguably started to change" (at p 4).

In fact, the main assertion of the book is that Singapore's constitutional law has entered a new stage of development that is driven not by political actors formally changing the country's blueprint, but by the interpretation that its courts (will) ascribe

to constitutional rules and principles. This corroborates the findings of a 2011 comparative study that did not include the Southeast Asian experience, but nevertheless concluded that courts "[a]lmost everywhere" can be an important catalyst of constitutional change (Dawn Oliver & Carlo Fusaro, eds, *How Constitutions Change—A Comparative Study* (2011) at p 415).

The book is divided into three parts, not including the Introduction. The first of these, "Theoretical Frameworks", focuses on the doctrines and perspectives that (may) shape the judiciary's approach to constitutional interpretation. In Chapter 1, the Honourable Attorney-General V K Rajah SC extolls the virtues of fidelity to the text of the *Constitution* and the principles that undergird it. This, he argues, duly respects the supremacy attributed to that document and is in keeping with the separation of powers. Chapter 2, by Andrew J Harding, engages with the question of whether the 'basic features doctrine', holding that certain parts of a nation's constitution are unamendable, presently applies in Singapore. He insists that the applicability of this doctrine in a given legal order must be determined by examining salient contextual factors and that the conditions surrounding the historical birth of the Singapore text have not created a basis for accepting this doctrine today. The theme of the enduring relevance of historical events is reprised in Chapter 3, where Kevin Y L Tan puts forward the argument that the courts' interpretative approach to constitutional provisions still bears the imprint of the Westminster model, as elaborated by the Privy Council in the 1960s and 1970s. The particular structural form of Westminster constitutions, with the principle of separation of powers at its core, can be considered as laying down a 'basic structure'. Such a basic structure matrix, he explains, is useful as an interpretative device, but would only constrain Parliament's amendment power "insofar as it destroys the structure of the Constitution" (at p 70). In Chapter 4, Thio Li-ann turns the focus squarely to the manner in which the local courts have engaged with constitutional rules and principles since independence. She identifies three waves of approaches and suggests that the current one can be accurately described by the moniker "principled pragmatism". This sees the courts seeking to strike an assiduous balance between judicial urges to intervene to uphold constitutional principles and pragmatic considerations to calibrate the intensity of review. Chapter 5, by Yap Po Jen, examines the use of originalism and textualism in constitutional judgments. He concludes that their ubiquitous presence can be explained by a judicial desire to use those interpretative approaches as fig leaves to preserve the courts' legitimacy when taking what are in effect strategic decisions not to challenge the political establishment.

The chapters in the book's second part, "Interrogating Assumptions", investigate the use and evolution of techniques for judicial decision-making. Jack Tsen-Ta Lee's Chapter 6 contains a plea to rethink the role of the presumption of constitutionality, which currently imposes a substantial onus on claimants seeking to challenge legislative or executive actions. His preference is for the presumption to be treated "as a technique for reading down potentially unconstitutional statutes, and as a reminder that claimants must discharge their ordinary evidential burden" (at p 151), although he adds that one should not expect any imminent changes in this direction. Chapter 7 by Neo herself offers a skilful account of the promise that judicial balancing holds as an interpretative canon to accommodate a greater role for the courts in vindicating constitutional rights. As she notes, the use of balancing can enhance the

quality of reasoning and prompt judges to recalibrate the weight ascribed to rights as opposed to governmental interests. In a similar vein, Swati Jhaveri in Chapter 8 deftly explores the trajectory of the fundamental rules of natural justice in constitutional litigation and outlines how some of recent interpretations of this concept could be used as seeds to develop "some form of proportionality-type reasoning... for evaluating [the] limitations on [constitutional] rights" (at p 189). The last chapter in this part, by David Tan, addresses a notorious aspect of substantive constitutional law: defamation suits involving political public figures. He considers that it would be opportune for the courts to expand the protection granted to free speech and adduces autochthonous arguments derived from neo-Confucianist philosophy in support. In an interesting turn of events since the volume went to press, a new *Administration of Justice* (*Protection*) *Bill* (No 23 of 2016, Sing) was introduced in Parliament in July 2016 to provide a statutory, as opposed to common law, grounding for the law of contempt of court. Tan's chapter provides a timely and thoughtful framework for analysing this legislative proposal and formulating suggestions as to how the judiciary may wish to approach the new provisions if and when passed into law.

Part three of the book, "Rethinking Boundaries", consists of chapters that invite the reader to question the conventional manner in which one approaches constitutional interpretation. In Chapter 10, Goh Yihan advocates a unified approach to the different species of legal documents: contracts, statutes and the *Constitution*. While not all might be comfortable with thinking of the constitution as akin to a statute, the text of the Singapore version has several features quite reminiscent of statutes, and that set it apart from many other constitutions. Quite striking are the first two articles, setting out respectively how the *Constitution* should be cited and containing a list of definitions—something more typically seen in statutes than in constitutions, whose first articles tend to specify the character of the State, the source of sovereignty or a fundamental right. In Chapters 11 and 12, Eugene K B Tan and Arun K Thiruvengadam tackle a contemporary classic in constitutional interpretation: the use of foreign precedents. Tan opines that the Singapore courts cannot, and should not, avoid a more robust engagement with foreign cases. At the same time, though, he underscores the importance of the domestic context in determining the role that foreign decisions should play in fleshing out constitutional provisions. Thiruvengadam's account is more sombre in tone: he observes that the practice of the Singapore courts continues to evidence resistance to participation in a global judicial dialogue-through-case-law, in what he clearly considers a regrettable state of affairs. In a variation on the theme of foreign precedents, Chapter 13 by Victor V Ramraj focuses attention on global transformations that may require constitutional interpreters to rethink contemporary orthodoxies: the resurgence of transnational corporate power and the rise of transnational private regulation. This will be no easy feat, but he argues that since "Singapore's unique trajectory provides the perfect laboratory for this kind of fundamental legal rethinking" (at p 342), its scholars are particularly well-placed to take the lead in this regard. Finally, Chapter 14 is structured as a dialogue between Michael W Dowdle and Kevin Y L Tan on the normative question of the nature of Singapore's *Constitution*. The salience of political elements in the country's constitutional environment leads Dowdle to favour political constitutionalism as the preferred concept to understand constitutional evolutions, whereas Tan insists that living under a constitutional supremacy means that Singapore's *Constitution* is, in the end, a legal one.

This overview shows that the book features several of the usual suspects in constitutional interpretation at play in the Singapore context. For the domestic reader, this is a welcome reminder that Singapore's approach is not wholly unique but fits, to a lesser or greater extent, a more general mould. For the foreign reader, it is a welcome dose of familiarity that makes the Singapore approach to constitutional interpretation more accessible and potentially also more interesting. Yet, the volume duly acknowledges the relevance of domestic conditions and influences in understanding how general interpretative frameworks and techniques play out in a given jurisdiction. Despite the optimism that the Singapore courts are becoming more self-assured in donning the mantle of constitutional guardian, there is a recognition that judicial attitudes towards determinations made by Parliament and the executive are still characterised by a considerable level of deference. The reason for that constraint is primarily located in the nature of the country's political landscape, with the People's Action Party having held a supermajority of seats in the legislature since independence and a vision of the government as composed of "honourable men... who have the trust and respect of the population" (Sing, "White Paper on Shared Values", Cmd 1 of 1991) that must not be unnecessarily hindered in its policy-making. Against this political backdrop, it would have been illuminating to study more closely how non-judicial actors in Singapore engage with the *Constitution*.

The role that legislative and executive actors play, or ought to play, in establishing the meaning of a country's constitution too often escapes the limelight. This is regrettable notably when it comes to issues that the courts consider to be non-justiciable or where they only apply a very light-touch review. The inclusion of chapters considering how Parliament examines whether a proposal for a new bill passes constitutional muster or how the president determines the meaning of the constitutional provisions governing his powers and prerogatives would have provided a more holistic account of the contemporary reality of constitutional interpretation in Singapore.

Doing so would also have nicely tied in with notions of dialogue, mentioned for instance by Neo in her chapter. Dialogic thinking is rapidly becoming ubiquitous in much of the scholarly literature on the role of courts in relation to the constitution, particularly in other Commonwealth jurisdictions. And, in a related vein, it would have been fascinating if an account of public discourses on constitutional issues had been added to the book. This is all the more so since an increasingly alert civil society can, at least in part, be credited with the turn towards a more vibrant constitutional debate, both within and outside the courts.

Even when retaining the court-centric focus that the book explicitly adopts, there would be room for further contextual analysis. As Thio explains in her chapter, the waves of constitutional interpretative approaches more or less correspond to the tenure of Singapore's chief justices, with the appointment of former Chief Justice Chan Sek Keong in 2006 ushering in a proverbial "sea change" in that "public law jurisprudence began to focus more on the intrinsic value of norms" (at p 83). This draws attention to the background and personality of the individuals who populate the bench and the role played by those rendering assistance in the preparation of constitutional judgments, notably the Justices' Law Clerks (*cf* Artemus Ward & David L Weiden, *Sorcerers' Apprentices—100 Years of Law Clerks at the United States Supreme Court* (2006). Such elements too would seem to have explanatory power in accounting for a court's self-perception of its role within the wider constitutional system.

These points, however, are not intended to be read as detracting from the quality of the volume as it stands. Rather, they are in keeping with its deliberately open ending, which rightfully signals that constitutional guardianship is an ongoing enterprise and deserving of permanent reflection. A former judge of the German *Bundesverfassungsgericht* once said, "A constitution is a nation's autobiography" (Wolfgang Hoffmann-Riem, "Constitutional Court Judges' Roundtable: Comparative Constitutionalism in Practice" (2005) 4 International Journal of Constitutional Law 556 at 558). *Constitutional Interpretation in Singapore—Theory and Practice*, capably curated by Neo, is a stimulating collection of views by leading voices on how judges presently do and in the future could flesh out Singapore's autobiography. There is every reason to hope that it will not only serve to further animate the scholarly discourse on this topic, but also stimulate the protagonists of this book and their interlocutors in their engagement with the country's most fundamental text.

MAARTJE **DE VISSER**
Associate Professor
School of Law, Singapore Management University