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

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## When the Text Runs Out

The Role of the Court in Constitutional Construction

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## Introduction

- Highly abstract concepts in bills of rights in Westminster-style legal systems in Asia.
  - No person shall be deprived of “personal liberty save in accordance with law”.
  - Every person is entitled to “equal protection of the law”.
- At some stage the constitutional text ‘runs out’ – it stops providing a court with much guidance on how fundamental liberties should be applied to specific cases.

## Introduction

- Singapore Constitution, Art 9(1): “No person shall be deprived of his... personal liberty save in accordance with law.”
- Semantic meaning of the sentence is quite clear.
- But does knowing this help a judge decide if a statute criminalizing abetment of suicide infringes the right to personal liberty of a terminally-ill person who needs someone to help him end his life which he finds intolerable?

## Introduction

- It is still the court’s duty to figure out what the text means to determine the dispute.
- The judge must engage in *constitutional construction* – the process of articulating rules of constitutional law when attempts to interpret the language of the text yield no further insights.

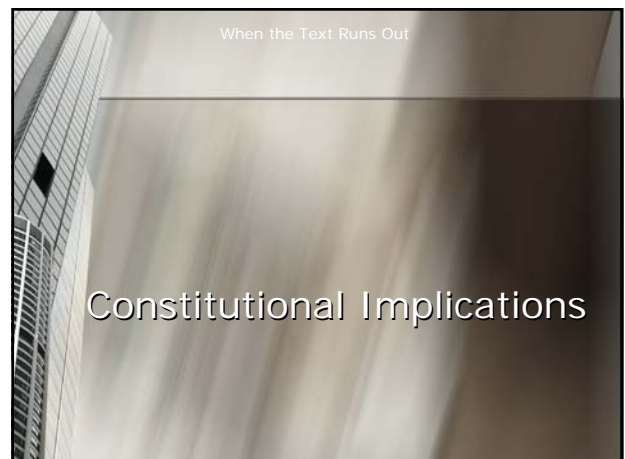
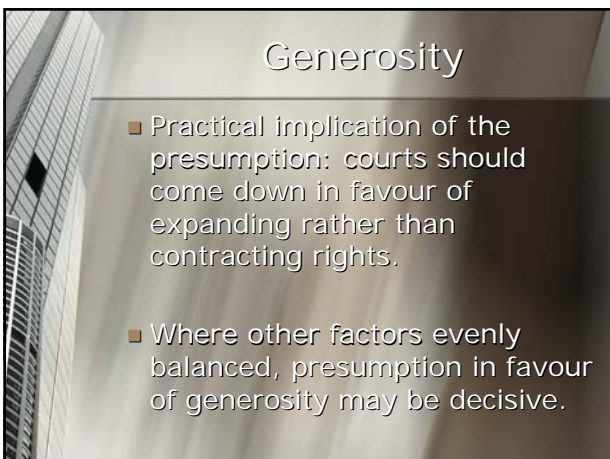
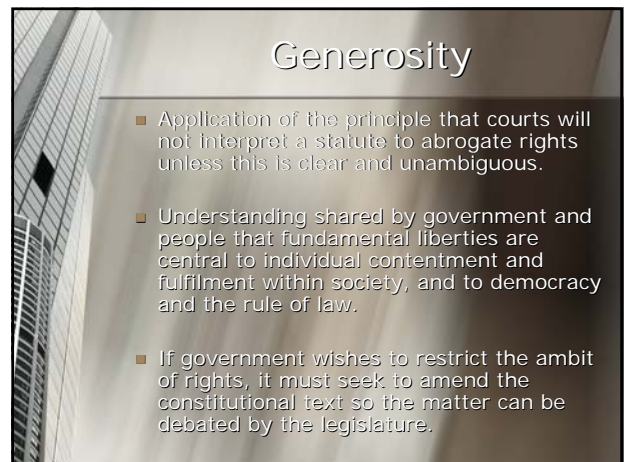
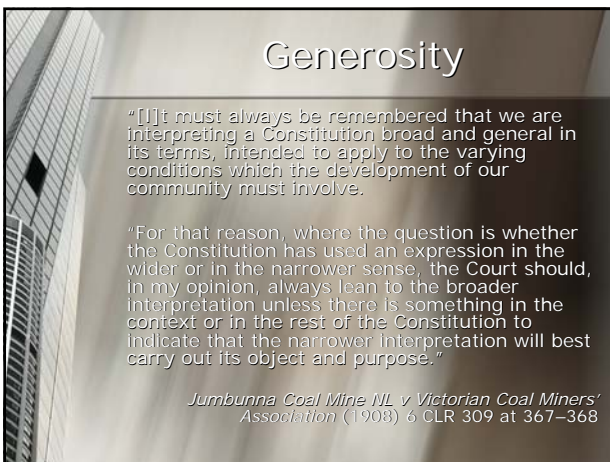
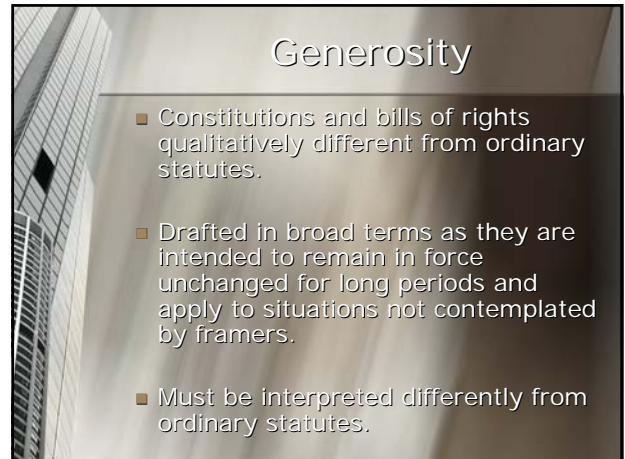
## Introduction

- **Interpretation** – Process of identifying the semantic content of the constitutional text (what it means linguistically). But semantic content does not fully determine the content of constitutional law; it only contributes towards it.
- **Construction** – Process by which judges transform semantic meaning of the text into legal rules. If semantic meaning is clear, little construction is required. But if it is not clear, then court will have to apply legal rules and principles to determine what the relevant constitutional rule is.

## Introduction

Preliminary look at strategies of constitutional construction:

- The presumption of generosity.
- Constitutional implications.
- Proportionality analysis.



## Implications

- Ambiguity v vagueness:
  - **Ambiguity** – Two or more different and specific constructions can be given to the text, and one cannot dispel the semantic uncertainty by considering the context.
  - **Vagueness** – Language of text is so broad that it is capable of a range of meanings, some of which may be mutually inconsistent.

## Implications

- Ambiguity is inadvertent; vagueness is intentional.

Many words and phrases of the Australian Constitution "are expressed at such a level of generality that the most sensible conclusion to be drawn from their use in a Constitution is that the makers of the Constitution intended that they should apply to whatever facts and circumstances succeeding generations thought they covered".

*Re Wakim, ex parte McNally* (1999) 198 CLR 511 at 552, [44], HC (Aust) per McHugh J

## Implications

- Implications from text and structure of the constitution.
- Implications from fundamental common law principles.



## Implications: Text and Structure

- What implications are to be drawn from text? Court must, of course, take into account all relevant factors, including:
  - the provision in question and related provisions; and
  - other parts of the constitution (including the history of its enactment).
- Based on well-established principle that a provision must be construed in the light of the statute in which it is found.

## Implications: Text and Structure

*Liyanao v The Queen* [1967] 1 AC 259, PC (on appeal from Ceylon):

- Ceylon Constitution did not contain any provision expressly vesting judicial power in the courts.
- But it could be inferred that judicial power was not to pass to or be exercisable by the executive or legislative branch of government because:
  - Judicial power in judiciary's hands for more than a century before the new Constitution came into force.
  - Clauses of Constitution indicated that political branches of government were not to interfere with the judiciary. Judges to be appointed by a Judicial Service Commission, which legislators were barred from being members of. Attempt to influence any decision of the Commission was a criminal offence. Judges could not be removed from office except by the Governor-General, on an address of both the Senate and House of Representatives.

## Implications: Text and Structure

- High Court of Australia has implied rights into the Constitution based on its text and structure.
- **Lange v Australian Broadcasting Corporation** (1997) 189 CLR 520 – "Freedom of communication on matters of government and politics" can be inferred from the form of "representative and responsible government" that is indicated by various constitutional provisions requiring members of the Senate and House of Representatives to be chosen by the people of the States and the Commonwealth respectively by way of periodic direct elections.
- Some judges have accepted existence of implied freedoms of association and movement, and implied right to legal equality (the latter has been expressly rejected by a majority of the Court).



## Implications: Text and Structure

Some conclusions:

- Implications must be based on text and structure, but may be indirect.
- If freedom of political communication exists between citizens and elected representatives, and between citizen and citizen, then there must be freedom to associate. And freedom of association necessarily entails freedom of movement.
- No implication in the face of inconsistent provisions.

Most judges of the Australian High Court have rejected existence of implied right to legal equality because Constitution allows Commonwealth Parliament to pass laws discriminating in favour of or against aliens, and benefiting or discriminating against the people of any race.

## Implications: Text and Structure

- More stringent standard for implications from structure than from text?

*Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 at 135:

- Where implication is from the actual terms of the Constitution, it is enough that accepted principles of interpretation suggest an implication should be made.
- However, where the implication is structural, the term to be implied must be logically or practically necessary for the preservation of the integrity of that structure.

Stricter standard is necessary for implications from structure because this text does not really constrain the courts' discretion.

## Implications: Text and Structure

- Once implications drawn, judges will need to look to principles and values external to the text and structure to flesh out consequences of implications in particular cases.

After High Court of Australia identified freedom of political communication in the Constitution, it had to determine what standard of review to apply to it. Some cases applied proportionality analysis, others a two-tiered review approach.

The constitutional text does not indicate which approach is more appropriate. Instead, court must refer to values underlying the freedom of political communication.

## Implications: Common Law

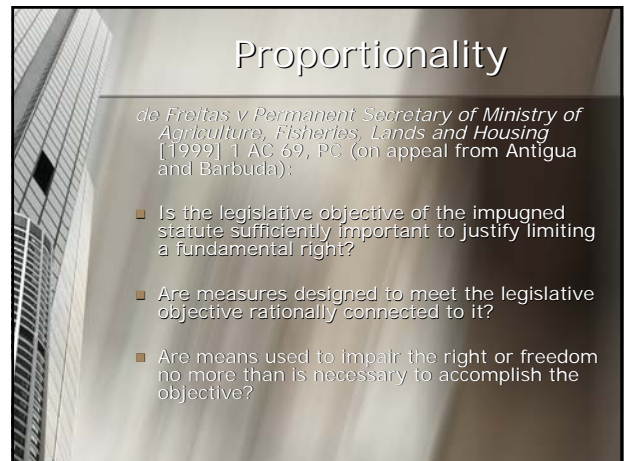
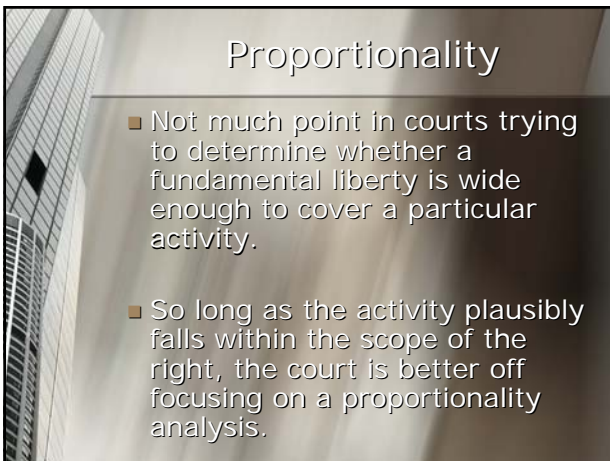
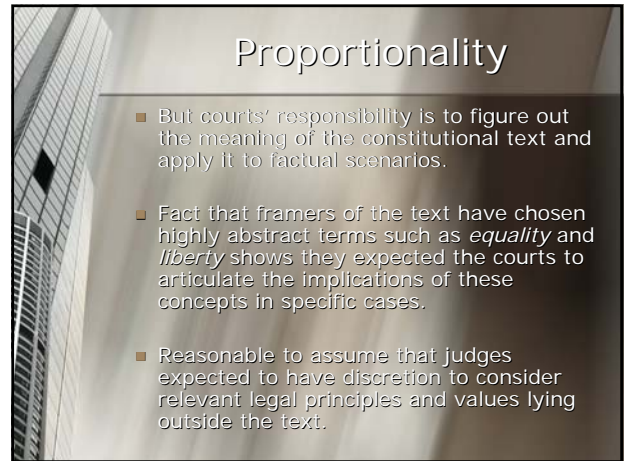
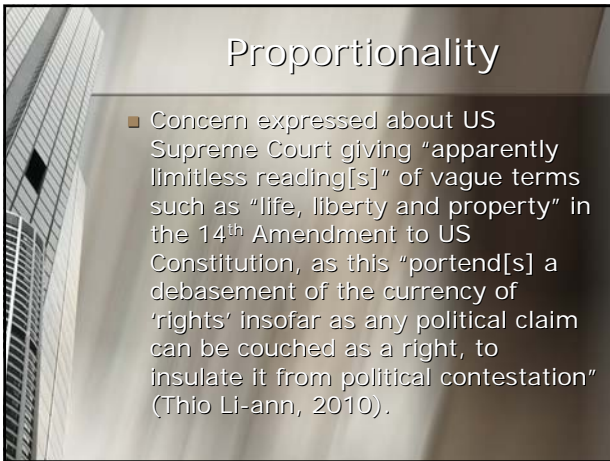
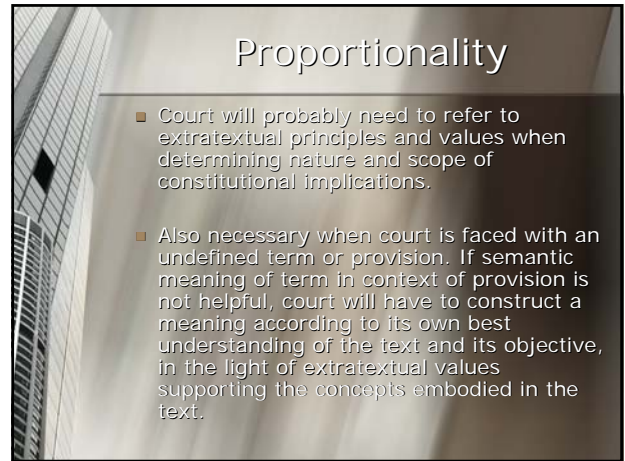
- Parliament does not legislate in a vacuum. Constitution must be read in the light of existing statutory and common law rules.
- Can a court declare that some common law rules are so fundamental that they have constitutional status?

## Implications: Common Law

- *Taylor v New Zealand Poultry Board* [1984] 1 NZLR 394 at 398, CA (NZ) – Cooke J commented *obiter* that “[s]ome common law rights presumably lie so deep that even Parliament could not override them”, and suggested it would be beyond Parliament’s lawful powers to compel a person to answer questions using torture. (Similar suggestions in *R (Jackson) v Attorney General* [2006] 1 AC 262, HL.)
- *Ong Ah Chuan v PP* [1979–1980] SLR(R) 710, PC (on appeal from Singapore) – Law in the Constitution includes fundamental rules of natural justice. Court incorporated common law rules into the constitutional text.

## Implications: Common Law

- Contrast other cases – it is merely presumed that Parliament does not intend to “overthrow fundamental principles, infringe rights, or depart from the general system of law, without expressing its intention with irresistible clearness”: *Jackson* at [159]; *Potter v Minahan* (1908) 7 CLR 277 at 304, HC (Aust).



## Conclusion

When courts are carrying out constitutional construction, they will be guided by:

- ***Presumption of generosity*** – especially important in cases of doubt.
- ***Discretion to draw implications from text, structure and (maybe) common law*** – note the need to consider extratextual principles and values.
- ***Proportionality.***

## Conclusion

Too much discretion to undemocratic judges?

- Idea behind constitutional judicial review – an institution independent of the political branches should decide what fundamental liberties the people (especially minorities) enjoy.
- Democracy not just majority rule. Must recognize minority interests too.
- Judiciary in dialogue with Executive and Legislature.

7<sup>th</sup> AsLI Conference, Kuala Lumpur, 25–26 May 2010

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