# 1. ADMINISTRATIVE AND CONSTITUTIONAL LAW

**THIO** Li-ann
*BA (Oxford) (Hons), LLM (Harvard Law School), PhD (Cambridge);*
*Barrister (Gray's Inn, UK);*
*Professor, Faculty of Law, National University of Singapore.*

## Introduction

1.1 In the field of public law, the major 2011 developments lie in the field of constitutional law, particularly with respect to a confirmed shift in the approach towards balancing free speech and public confidence in the administration of justice with respect to the contempt of "scandalising the court" from the "inherent tendency" test to the more stringently framed "real risk" test. There were significant cases affirming the rule of law in requiring executive action to conform to principles of constitutional legality in the field of clemency powers and prosecutorial discretion. The issue of the correct test for *locus standi* where constitutional rights are concerned also arose.

1.2 In the field of administrative law, the cases in the main applied existing tests. The Rules of Court (Amendment) Rules 2011 (S 75/2011) were amended to permit declarations to be sought, under certain conditions, under O 53 applications.

## ADMINISTRATIVE LAW

### Leave and remedies

1.3 Until 1 May 2011, as noted in *UDL Marine (Singapore) Pte Ltd v Jurong Town Corp* [2011] SGHC 2 at [26] (decision of 3 January 2011) ("*UDL Marine 1*"), Singapore had a "bifurcated regime for obtaining remedies in an administrative law action" under which prerogative remedies could be sought under O 53, but a declaration could only be obtained under a normal originating summons process. Under the current O 53(1), an application for a mandatory, prohibiting or quashing order "may include an application for a declaration", but this shall not be granted "unless leave to make the principal application has been granted in accordance with this Rule".

1.4 In *UDL Marine (Singapore) Pte Ltd v Jurong Town Corp* [2011] 3 SLR 94 ("*UDL Marine 2*") the court has the discretion to determine if a delayed application for a quashing and mandatory order should be dismissed. If an applicant is able to adequately account for the delay,

leave could still be granted: *UDL Marine 2* at [42]. In general too, the test to be applied by a court facing an application for leave under O 53 r 1 of the Rules of Court is pegged at ascertaining whether the material before it reveals "a *prima facie* case of reasonable suspicion" that the applicant would obtain the remedies sought, as articulated in *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR(R) 294 at [25] ("*Colin Chan*"). Lai Siu Chiu J in *UDL Marine 2* noted that the court had in recent times "gone further than the *Colin Chan* Test" in considering an application for judicial review on the merits whilst hearing the leave application, but this had been with respect to cases not facing factual disputes as in *Yong Vui Kong v Attorney-General* [2011] 1 SLR 1 at [30], where fully canvassed pure questions of law were involved. This was also the approach adopted by the High Court in *Ramalingam v Ravinthran* [2011] 4 SLR 196 at [5].

**Susceptibility to judicial review**

1.5 The High Court in *UDL Marine 2* at [32] confirmed that it was appropriate at the leave stage to consider if the decision of a statutory body was amenable to judicial review, following the Court of Appeal decision of *Public Service Commission v Lai Swee Lin Linda* [2001] 1 SLR(R) 133 at [24] ("*Linda Lai*"). Not all actions of statutory bodies are subject to judicial review; the court will examine whether a statutory body is, on the facts, performing a public duty pursuant to its statutory mandate or acting in a capacity also available to a private party, *eg*, as an employer or party to a contract.

1.6 Pursuant to this, the court will examine the source of power with respect to the particular transaction in question. If this is statutory, the "source of power" test indicates that the decision will be subject to judicial review: *UDL Marine 2* at [48]. This is not the sole test, as indicated in *R v Panel on Take-Overs and Mergers; Ex parte Datafin plc* [1987] QB 815 ("*Datafin*") where the "nature of power" test was applied to find that an unincorporated association without a statutory source of power was subject to judicial review because of the "public law" nature of its functions in the regulation of take-overs and mergers, which had public law consequences: *UDL Marine 2* at [49]. In other words, it was applied in *Datafin* to extend the reach of judicial review to bodies whose source of power was neither statutory nor prerogative in origins. Lai J stated that the "nature test" requires the court to consider whether the relevant decision involved an exercise of "public law functions": *UDL Marine 2* at [49]. As applied in *Linda Lai*, the "nature test" was not applied to extend the supervisory jurisdiction of the court, but rather to contract it, insofar as a statutory body was found not to be subject to judicial review because its decision-making was "private in nature": *UDL Marine 2* at [49]. That is, the Public Service Commission in *Linda*

*Lai* was acting not pursuant to its public duties but in a pure master-servant context: *UDL Marine* at [49].

1.7 In summary, Lai J stated that "two tests may be applied to determine whether a decision is susceptible to judicial review": not the source of power of the actor in general, but the source of power in making the impugned decision. If this is based on statute or subsidiary legislation, judicial review lies. In addition, the "nature test" requires the court to consider if the decision involves an exercise of public law functions and if so, this decision is susceptible to judicial review: *UDL Marine 2* at [50]. If a statutory body (general source of power) is exercising statutory functions (specific source of power), it would be susceptible to judicial review and the "nature test" would appear to be superfluous. However, if a non-statutory body exercises a power which could be described as a public law function independent of statutory or common law powers, it may, following *Datafin*, be subject to judicial review. This would be an extension of the supervisory empire of the courts. However, *Datafin*, as applied in *Linda Lai* and *UDL Marine 2* is applied in a manner to contract judicial review by characterising the act of a public body as a private act, thus immunising it from review.

1.8 On the facts of this case, the High Court applied the "source of power" test in relation to the specific decision made by the Jurong Town Corporation ("JTC"), a statutory body, and found it was not subject to judicial review. This related to the refusal of the JTC as a landlord to renew a lease to the tenant, UDL Marine. If one were looking at the source of JTC power, this would derive from a statute and be subject to review. However, the learned judge in applying what she described as "the source test" examined the source of the particular power involved, that is, leasing power, and found that since the Jurong Town Council Act (Cap 150, 1998 Rev Ed) did not provide detailed criteria to guide leasing decisions, this entailed an exercise of private contractual rights (*UDL Marine 2* at [56]), not subject to review. That is, the learned judge examined not the source of JTC power (statute), but the source of the particular power exercised to give effect to a particular transaction. The learned judge also applied the "nature test" in concluding that JTC in making lease-related agreements "was not doing something a private individual would not be capable of doing". Just because a landlord factored in non-commercial considerations did not mean it was exercising a public law function as these again were considerations open to a private landlord to take in making leasing agreements: *UDL Marine 2* at [57] and [60].

## Legitimate expectations

1.9 After determining that the dispute with the JTC was not a public law matter and hence not subject to judicial review on both "the Source Test and the Nature Test" (*UDL Marine 2* at [61]), Lai J opined, *obiter*, on possible grounds of review. These included the accepted ground of irrationality. Lai J considered the law of legitimate expectations, observing that this could be used in at least two contexts. The first related to procedural fairness such that "it would be a ground for judicial review if the applicant was deprived of a legitimate expectation without providing him with a fair hearing": *UDL Marine 2* at [65]. With respect, this is a little confusing as a legitimate expectation is not tantamount to a fair hearing nor a synonym for it. One might have a legitimate expectation to, for example, be heard where a promise of a hearing is made or where this was the past practice of the decision making and the denial of such a hearing would be a denial of a legitimate expectation which the court may enforce.

1.10 The second understanding of legitimate expectations "extends beyond according the applicant a fair hearing". Presumably, this refers to substantive legitimate expectations which extend beyond a promised procedure or an expectation that a certain procedure will be followed. Lai J, referring to the statements of Lord Woolf *et al*, in *De Smith's Judicial Review* (Sweet & Maxwell, 6th Ed, 2007) (*UDL Marine 2* at [65]), said this was "controversial" because of "competing tensions", entailing a need to "check against inconsistent treatment which must be balanced against the undesirable effects of excessively fettering administrative discretion". Lai J expressed "some doubt" that the second understanding of legitimate expectations was "part of our law" (*UDL Marine 2* at [66]), but took no decision on this as it was not in issue.

## Fettering

1.11 In *Chee Soon Juan v Public Prosecutor* [2011] 3 SLR 50 at [40], the High Court held that it was legal for the police to have a general policy which classified political activities as a class as being a greater threat to public order than commercial activities, provided that this policy did not fetter their discretion. That is, that they remained willing to consider the facts of each case.

## Judicial review of the medical profession

1.12 With respect to disciplinary proceedings in relation to the medical profession, Phillip Pillai J in *Lim Mey Lee Susan v Singapore Medical Council* [2011] 4 SLR 156 ("*Lim Mey Lee*") noted that the responsibility to determine medical ethics did not rest on the courts but

on the Singapore Medical Council under the terms of the scheme established by Parliament under the Medical Registration Act ("MRA") (Cap 174, 2004 Rev Ed): *Lim Mey Lee* at [4].

1.13 The courts in judicial review proceedings play a supervisory role in ensuring fair procedure and the legality of the decision making process and are not to intrude in the merits of the case. This statutory scheme is a reflection of the nature of the medical profession, the intimacy and potential for exploitation of the doctor-patient relationship, the need to protect the public from incompetence and to ensure public confidence in the medical profession and to provide sufficient procedural safeguard to protect the medical practitioner whose reputation is at stake: *Lim Mey Lee* at [5]. Under the MRA, Parliament provided that the investigation, findings and sanctions for a breach of medical ethics would be made by the relevant complaints and disciplinary committee. Parenthetically, Pillai J noted that while Singapore law on judicial review has "English common law foundations", more recent English treatises on the subject had "no application" in Singapore insofar as English law had been "shaped by European Union treaty and legislative obligations": *Lim Mey Lee* at [16].

1.14 In essence, the issue concerned the alleged overcharging by Dr Susan Lim of her Brunei patient, in respect of which 94 charges were made. An official from the Singapore Ministry of Health ("MOHS") referred the complaint to the Singapore Medical Council ("SMC") for investigation. After consideration, the Complaints Committee ordered that the Disciplinary Committee conduct a formal inquiry, following the statutory regime. The First Disciplinary Committee ("1st DC") commenced hearing and without completing it, eventually excused itself on the basis of the allegation that it had prejudged the applicant's submission of no case to answer. The SMC revoked the appointment of the 1st DC and decided to appoint a Second Disciplinary Committee ("2nd DC").

1.15 What was the "novel" (*Lim Mey Lee* at [19]), subject of challenge was the decision by the SMC to appoint the 2nd DC on grounds of illegality under the MRA and actual or apparent bias on the part of the SMC. No challenge was directed either towards the 1st DC's hearing or excusing of itself, nor the 2nd DC's hearing, which had halted owing to this court application: *Lim Mey Lee* at [18]. The applicant sought an order to quash the SMC's decision to refer the complaint to the 2nd DC on grounds of illegality or bias and a prohibiting order against the SMC proceeding to appoint any further disciplinary committee on grounds of *Wednesbury* irrationality: *Lim Mey Lee* at [21]. As the learned judge correctly pointed out, a quashing order would not prevent the SMC from re-taking its decision on the same matter whilst a prohibiting order would mean that no further committees could be

appointed to inquire into this same complaint against the applicant: *Lim Mey Lee* at [20].

1.16 Pillai J confirmed that administrative decisions, whether or not they involved the exercise of discretion, were subject to tests of legality and the duty to act fairly, whose content varied with the context: *Lim Mey Lee* at [25].

1.17 Under s 42(5) of the MRA, the SMC is obliged to appoint a disciplinary committee where a complaints committee has ordered a formal inquiry. Where the SMC revoked the appointment of an entire disciplinary committee, it would be unlawful to appoint a second disciplinary committee if the first one had issued its findings and decisions, as this would violate the principle of double jeopardy which applied to disciplinary proceedings: *Lim Mey Lee* at [32]. On the facts of this case, the 1st DC had not yet made a finding when the SMC decided to revoke the appointment of all its members. Therefore, the process was not yet concluded and was lacking the disciplinary committee's findings and decision such that the order of the complaints committee still stood. Therefore, the power to appoint a disciplinary committee under s 41(3) of the MRA "is not spent": *Lim Mey Lee* at [38]. On the facts, the SMC acted within the time limits set forth in the MRA so there was no non-compliance with the statutory scheme in this respect. Neither did the statutory scheme require a fresh complaints committee to order a formal inquiry given the first order on record and the fact that such a requirement would serve "no practical purpose": *Lim Mey Lee* at [45]. Pillai J did not accept that there was a need for the SMC to meet physically, as opposed to taking a decision by e-mail, with respect to the decision to appoint the 2nd DC, which reflects an appreciation of the autonomy of the decision-maker to set its own procedure and working methods: *Lim Mey Lee* at [46]. The challenge based on grounds of illegality, thus, failed.

1.18 Counsel for the applicant also alleged that the SMC had contravened the rule against actual and the appearance of bias, which is a rule designed to protect confidence in the impartiality of a tribunal. Whilst arguing that the SMC's decision to refer the complaint to the 2nd DC should be quashed because it was "tainted by actual bias", the applicant did not allege actual bias on the part of anyone: *Lim Mey Lee* at [49]. This argument failed for want of evidence.

1.19 On the basis of circumstantial evidence, the applicant argued that there was a reasonable apprehension of bias. The test for this is objective, rather than "the subjective sensitivity, fears or suspicions of the person affected": *Lim Mey Lee* at [52]. Pillai J described it as "whether there were circumstances which would give rise to a reasonable suspicion or apprehension in a fair-minded reasonable person with

knowledge of the relevant facts that the tribunal was biased": *Lim Mey Lee* at [52]. It is also important to identify who is the relevant decision-maker, in applying the rule against bias. Here, the SMC was not the fact-finding or decision making body as its role under the statutory framework was, after a complaint has been referred to the complaints committee which issues an order for a formal inquiry, to appoint a disciplinary committee to investigate the complaint, as required by s 41(3) of the MRA. No discretion operates here with respect to referring a complaint to a disciplinary committee. Pillai J considered a range of facts which the applicant suggested gave rise to bias and found no bias on the facts. For example, despite the multiple statutory roles of the Director of Medical Service ("DMS") and his administrative function in relation to MOHS investigations as well as his membership of the SMC, no bias arose provided he was not a member of the complaints or disciplinary committees hearing the same complaint: *Lim Mey Lee* at [59]. There was nothing on record to show that the DMS personally lobbied other SMC members to refer the complaint to the 2nd DC: *Lim Mey Lee* at [61]. Given that the SMC decision under s 41(3) was not a fact-finding decision, among other factors, there were no facts upon whose basis a reasonable person might form a reasonable apprehension of bias on the part of the whole SMC: *Lim Mey Lee* at [62]. Pillai J concluded that each circumstance raised by the application were "weightless and insubstantial spins which do not bear scrutiny in court": *Lim Mey Lee* at [72].

1.20 As the function of the SMC was only to refer a complaint to a disciplinary committee and as the SMC was not a fact-finding body, arguments of *Wednesbury* unreasonableness did not arise: *Lim Mey Lee* at [100]. The Court of Appeal in *Lim Mey Lee Susan v Singapore Medical Council* [2012] 1 SLR 701 ("*Lim Mey Lee (CA)*") upheld the High Court decision to the effect that the appointment of the 2nd DC accorded with the MRA: *Lim Mey Lee (CA)* at [25]. It confirmed that the SMC continued to bear the statutory duty to continue disciplinary proceedings as long as the complaints committee order "remained alive": *Lim Mey Lee (CA)* at [28]. It also rejected the appellant's complaint that there was no consultative decision-making process with respect to the revocation of the 1st DC as the SMC lacked discretion in this manner, as its duties were described as "ministerial" or administrative in nature: *Lim Mey Lee (CA)* at [46]. In seeking to impute bias, the Court of Appeal found that the appellant "attacked the wrong target": *Lim Mey Lee (CA)* at [46]. The SMC had no role in the disciplinary proceedings before the 2nd DC and it was towards them that any allegation of bias, or other grounds for judicial review, should be directed: *Lim Mey Lee (CA)* at [48].

1.21 Whilst the approval of a majority of SMC members was a formal procedural requirement (*Lim Mey Lee (CA)* at [28]), how this

was obtained "was entirely a matter for the SMC to determine": *Lim Mey Lee (CA)* at [29]. Whilst the justice of the common law will stand in for an omission of the legislature, the courts will be hesitant to imply additional norms of procedural fairness where Parliament has enacted a detailed regime and where Parliament charges a profession with the task of self-regulation.

## CONSTITUTIONAL LAW

### Judicial review and contempt of court

1.22 The Court of Appeal in *Shadrake Alan v Attorney-General* [2011] 3 SLR 778 ("*Shadrake*") upheld the decision of Quentin Loh J and confirmed that the test for liability for contempt of court was that of a "real risk" that the impugned publication would impair confidence in the administration of justice, rather than the inherent tendency test which had been articulated in *Attorney-General v Wain* [1991] 1 SLR(R) 85 ("*Wain*") and defended more recently in *Attorney-General v Hertzberg* [2009] 1 SLR(R) 650. It noted that this test was the predominant test in Commonwealth jurisdictions: *Shadrake* at [40].

1.23 The law on contempt of court was "one of balance", insofar as Art 14 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) guaranteed free speech, but also expressly provided for derogation on the basis of contempt of court laws. Free speech was not to be "unduly" infringed, neither was it absolute in scope, "for its untrammelled abuse would be a negation of the right itself": *Shadrake* at [17]. The Court of Appeal reiterated that the rationale for contempt was not to protect the dignity of judges, but served the public good; therefore speech which scandalised the courts was in the nature of "a public injury rather than a private tort": *Shadrake* at [21]. As far as the "real risk" test was concerned, the Court of Appeal expressed wariness at the "possible ambiguity" (*Shadrake* at [28]), that could arise from the High Court's description of what "real risk" constituted, as the test for establishing the *actus reus* of contempt. Loh J had elaborated on what "real risk" required in stating that it was not to be "equated with a serious or grave risk", but had to be "something more than a *de minimis*, remote, or fanciful risk": *Shadrake* at [27]. In addition, this would include a "small likelihood" of risk which the Canadian Court of Appeal had held was less than a "real risk": *R v Kopyto* (1988) 47 DLR (4th) 213 discussed in *Shadrake* at [28]. The Court of Appeal referred to the "great strength" of the "real risk" test as being its "practical robustness" which did not require further elaboration, warning of the "very real danger of semantic analysis trumping practical factual considerations": *Shadrake* at [29].

1.24 The Court of Appeal also rejected attempts to introduce the United States "clear and present danger" test under the guise of the "real risk" test, both concepts having different meanings. The former was more stringent and would encompass the latter: *Shadrake* at [39]. In the American case of *Bridges v State of California* 314 US 252 (1941), the "clear and present danger" test was applied, flowing from the "unique culture" as well as "constitutional position" based on the First Amendment: *Shadrake* at [41]. Aside from a "seemingly solitary and divided Canadian decision" in *R v Kopyto* (*Shadrake* at [41] and [43]), it did not apply in any other Commonwealth country. It observed that there did not seem to be a contempt of scandalising the court in the United States, where critical speech directed at the courts "no matter how unrestrained" made after a decision had been rendered was considered to be constitutionally protected speech: *Shadrake* at [41]. This reflects the "paramountcy" of free speech in the US flowing from its "unique cultural as well as constitutional heritage": *Shadrake* at [41]. In contrast with the First Amendment, Art 14 of the Constitution of the Republic of Singapore accorded "far more attention" to the issue of balance between free speech and its abuse. The Court of Appeal noted that the paramountcy accorded to free speech in the United States was not necessarily an approach worth emulating, as it could result in the abuse of the right to free speech and its consequent negation. This was "no mere parochial rhetoric", but "premised on logic and commonsense": *Shadrake* at [41]. In addition, decisions from Hong Kong and South Africa, which were discussed, also did not adopt the clear and present danger test, which did not represent the law in Singapore: *Shadrake* at [46]–[49].

1.25 In reviewing the "inherent tendency" test against the "real risk" test, the Court of Appeal noted that these two tests had been treated as being in contradistinction with each other, but added that a "holistic" reading of *Wain* suggested the judge did not intend to divorce this test "from its actual or potential impact on public confidence in the administration of justice": *Shadrake* at [56]. The law on contempt did not operate in "a hermetically sealed environment". The Court of Appeal expressed the view that the judge in *Wain* did apply the law to the facts, as it would be "contrary to both logic as well as commonsense" for the inherent tendency test to be stated at a "purely abstract or theoretical level" detached from the particular facts of the case in "the vital sphere of application": *Shadrake* at [56]. The courts which had applied the inherent tendency test, in the Court of Appeal's view, had not ignored the case facts and as such, the "apparent distinction" between the inherent tendency and real risk test was a "legal red herring": *Shadrake* at [56]. Nonetheless, the test of "real risk" was to be preferred having the virtue of avoiding controversy and misunderstanding "by conveying precisely the legal test to layperson and lawyer alike": *Shadrake* at [57].

1.26 The Court of Appeal considered as neutral two factors raised by the High Court which were relevant factors in forming the context within which the "real risk" test would be applied. First, the size of Singapore, given that in an internet age, information could be quickly disseminated "even in a geographically large jurisdiction". Second, the fact that judges in Singapore were triers of both law and fact: *Shadrake* at [31]. The Court of Appeal rejected the High Court's view that the "public" might include less than reasonable people, as the court was to treat the "public" as comprising "the average reasonable person" in making an "objective decision" whether the relevant statement would undermine confidence in the administration of justice, in reference to the "average reasonable person": *Shadrake* at [32]. The concept of the public was not to differ according to the facts, even if the factual context framed the inquiry. What was underscored was the importance of the "precise facts and context" rather than abstract examples: *Shadrake* at [35].

**Fair criticism**

1.27 Although the characterisation of the concept of fair criticism was not canvassed fully in the present case, the Court of Appeal stated its preference that "fair criticism", which the High Court had characterised as a defence, was better seen as "going towards liability rather than as an independent defence": *Shadrake* at [7]. In reviewing various English and Commonwealth decisions, it appears that fair criticism was discussed in the context of liability rather than as an independent defence: *Shadrake* at [61]–[62]. In addition, the major academic works on the subject as well as law commission reports from England and Australia "shed little light" on the subject: *Shadrake* at [70]. Whilst the Indian legislative regime purported to deal with this issue, it failed to lend clarity to the matter. Therefore, the Court of Appeal concluded that there is "potential ambiguity" regarding the precise role and operation of the concept of fair criticism in Commonwealth countries: *Shadrake* at [77].

1.28 The practical difference is that if fair criticism was an aspect of liability, the party relying on it would have to bear the evidential burden, while the respondent would bear the legal burden of proving beyond a reasonable doubt that the impugned statement did not constitute a fair criticism and posed a real risk to the maintenance of public confidence in the administration of justice. If it was a defence, the contemnor would bear the legal burden of proving, on the balance of probabilities, that the impugned statement constituted fair criticism: *Shadrake* at [78].

1.29 Neither the Constitution of the Republic of Singapore nor statute provided guidance on whether fair criticism was a defence or integral to liability. Given the ambiguity in Commonwealth laws, the

Court of Appeal thought the issue was "more properly addressed by Parliament": *Shadrake* at [79]. Nonetheless, the Court of Appeal also affirmed the helpfulness of the guidelines proposed by Judith Prakash J in *Attorney-General v Tan Liang Joo John* [2009] 2 SLR(R) 1132, which were applicable whether the fair criticism concept was a defence or went toward liability for contempt of court: *Shadrake* at [81]. These factors included the presence of a supporting base of argument and evidence, as to whether the criticism was temperate or abusive in the manner of communication, as temperate and balanced criticism facilitated rational debate and was more likely to elicit a reasoned answer than abusive attacks. Additionally, temperate and balanced criticism could facilitate improvements in the administration of justice. The court could consider various factors to ascertain the presence of bad faith from an open list, including the number of times of contemning conduct or the party's attitude in court: *Shadrake* at [81].

1.30 The Court of Appeal rejected two arguments raised by the respondents. It firstly disagreed that there was a substantive limit on criticism of the courts insofar as statements questioning judicial impartiality could never constitute fair criticism. Such a limit would "overly limit the ambit of fair criticism" (*Shadrake* at [84]), as almost all criticisms would make allegations against judicial impartiality or integrity, which would make the concept of fair criticism "nugatory": *Shadrake* at [84]. Therefore, impugning judicial impartiality *per se* was not contemptuous, as was borne out by various Commonwealth decisions: *Shadrake* at [84]. It also rejected the view that allegations made outside formal avenues like the courts or the Art 98(3) of the Constitution of the Republic of Singapore judicial removal mechanism could never be fair criticism: *Shadrake* at [83]. Indeed, it agreed with the High Court that the public should be able to discuss judicial wrongdoing without resort to the Art 98(3) removal mechanism: *Shadrake* at [85].

**Judicial review of executive powers: Prosecutorial discretion**

1.31 Under Art 35(8) of the Constitution of the Republic of Singapore, the Attorney-General is vested with the power to institute, continue or discontinue proceedings for any offence. The High Court in *Ramalingam Ravinthran v Attorney-General* [2011] 4 SLR 196 ("*Ramalingham*") (for the sake of completeness), considered the substantive challenge to the exercise of prosecutorial discretion where two persons, including the plaintiff, originally faced capital charges for drug possession. The charge against one person was later reduced to a non-capital charge to which he pleaded guilty. The appropriate remedy sought should not have been a prohibition and mandatory order against

the Prisons Director and Attorney-General respectively, but a motion to re-open the case: *Ramalingham* at [11].

1.32 The plaintiff relied on Arts 9 and 12(1) of the Constitution of the Republic of Singapore in arguing that the preferring of a capital charge against him was contrary to Art 9(1) which relates to the deprivation of life and liberty "in accordance with law". He asserted that contrary to Art 12(1), to prefer capital charges against him, but not the other person denied his right to equality and equal protection under the law, and was an irrational decision: *Ramalingham* at [14].

1.33 Following the decision of *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [145], Tan Lee Meng J stated that the Attorney-General's discretion under Art 35(8), against which Art 12 must be read, was unfettered as to when and how his prosecutorial powers were exercised, "except for unconstitutionality": *Ramalingham* at [16]. Judicial review would arise in two instances: where bad faith is involved or where an extraneous purpose is considered, and where such discretion contravenes a constitutional right, such as the Art 12(1) equal protection of the law guarantee: *Ramalingham* at [18]. With respect to precedents where two criminals involved in the same crime are charged with different offences, Tan J (*Ramalingham* at [20]), took note of Wee Chong Jin CJ's endorsement in *Sim Min Teck v Public Prosecutor* [1987] SLR(R) 65 of Lord Diplock's following statement in *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 at 56:

> There are many factors which a prosecuting authority may properly take into account in exercising its discretion as to whether to charge a person at all, or, where the information available to it discloses the ingredients of a greater as well as a lesser offence, as to whether to charge the accused with the greater or the lesser. The existence of those factors to which the prosecuting authority may properly have regard and the relative weight to be attached to each of them may vary enormously between one case and another. All that equality before the law requires, is that the cases of all potential defendants to criminal charges shall be given unbiased consideration by the prosecuting authority and that decisions whether or not to prosecute in a particular case for a particular offence should not be dictated by some irrelevant consideration.

1.34 This wide discretion of the Prosecutor was confirmed in *Thiruselvam s/o Nagaratnam v Public Prosecutor* [2001] 1 SLR(R) 362 at [32]. In identifying the "good reasons" why courts should defer to the prosecutorial discretion of the Attorney-General except in cases of unconstitutionality, Tan J cited (*Ramalingham* at [17]) the United States Supreme Court decision of *US v Christopher Lee Armstrong* 517 US 456 (1996):

> Judicial deference to the decisions of these executive officers rests in part on an assessment of the relative competence of prosecutors and courts. Such factors as the strength of the case, the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan are not readily susceptible to the kind of analysis the courts are competent to undertake.

## Clemency powers

1.35 Pardoning power is based on public good considerations, designed to correct injustices. Its origins lie in the prerogative of mercy in England. In the Singapore context, this power has constitutional status, as embodied in Art 22P. Clause (1) of Art 22P provides that "[t]he President, as occasion shall arise, may, on the advice of the Cabinet" grant a pardon to someone convicted of an offence before a Singapore court. Where the death sentence is concerned, the procedure to be followed is this:

> [T]he President shall cause the reports which are made to him by the Judge who tried the case and the Chief Justice or other presiding Judge of the appellate court to be forwarded to the Attorney-General with instructions that, after the Attorney-General has given his opinion thereon, the reports shall be sent, together with the Attorney-General's opinion, to the Cabinet so that the Cabinet may advise the President on the exercise of the power conferred on him by clause (1).

1.36 The role of the courts with respect to the clemency process was raised before the Court of Appeal in *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 ("*Yong Vui Kong*"). For the first time, the Court of Appeal considered whether the exercise of clemency power under Art 22P of the Constitution of the Republic of Singapore was subject to judicial review. It confirmed, through a careful tracing of the origins of this power to the Republic of Singapore Independence Act (Act 9 of 1965) (*Yong Vui Kong* at [169]–[171]), that the President had no personal discretion in relation to the decision of whether to grant clemency as this power falls to the Cabinet. The President, as Head of State under a constitution based on the Westminster model, such as Singapore's, was a ceremonial head of state and unless expressly stipulated, the British convention that the Head of State act on the advice of the Cabinet is codified in Art 21(1) of the Constitution of the Republic of Singapore.

1.37 The court reviewed decisions concerning the prerogative of mercy from England and other common law jurisdictions "which have a legal heritage similar to ours": *Yong Vui Kong* at [36]. It noted developments in England where prerogative powers like the prerogative of mercy could be reviewable if exercised based on "an error of law … or

based on arbitrary and/or extraneous considerations" (*Yong Vui Kong* at [44]), though judicial review in this instance did not extend to the merits of the decision: *R v Secretary of State for the Home Department; Ex parte Bentley* [1994] QB 349. Similarly, owing to the influence of international human rights obligations, the legal position in the Caribbean states has changed. Originally, the exercise of clemency powers was not thought justiciable, as even the constitutional duty to consult an advisory committee, but not to follow their recommendation buttressed the argument that the government maintained personal discretion in this matter: *Yong Vui Kong* at [51] (discussing *Thomas Reckley v Minister of Public Safety and Immigration (No 2)* [1996] AC 527). The position was changed in *Neville Lewis v Attorney-General of Jamaica* [2001] 2 AC 50 ("*Neville Lewis*"), owing to Jamaica's international human rights obligations which required fair and proper procedure in death sentence cases. This entailed giving the offender sufficient notice of the date when his case would be considered by the Jamaican Privy Council ("JPC") so that his legal advisors could prepare representations. The offender was to be given a copy and not merely the gist of all the documents available to the JPC and if any international human rights body reports were available, the JPC was to consider these: *Neville Lewis* at [55].

1.38 In the context of Singapore, clemency powers are not *per se* non-justiciable. Whilst the merits of the case are non-reviewable (*Yong Vui Kong* at [76]), clemency power was not considered to be an "extra-legal" power in the sense of "being a power beyond any legal constraints or restraints": *Yong Vui Kong* at [76]. What was applicable was the rule of law based principle of review articulated by the Court of Appeal in *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [33], to which a slight gloss was added to the effect that "all legal powers … have legal limits" (*Yong Vui Kong* at [78]), as such, the rule of law demands that "the courts should be able to examine the exercise of discretionary power": *Yong Vui Kong* at [78]. As a constitutional power, it was subject to the supervisory jurisdiction of the courts "if it is exercised beyond its legal limits (*ie*, *ultra vires* the enabling law) or if it is exercised *mala fide* (*ie*, for an extraneous purpose): *Yong Vui Kong* at [77]. In addition, following from the decision of *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 which concerned the review of prosecutorial discretion, review would lie where an exercise of discretionary power contravened a constitutional right: *Yong Vui Kong* at [80]. Judicial review would also lie where there was non-compliance with constitutionally prescribed procedure, which was also in agreement with Art 9(1) of the Constitution of the Republic of Singapore which requires that the deprivation of life must be "in accordance with law"; procedure is part of law. This does not entail an enforcement of an Art 9(1) right to life as that has been taken away from the criminal accused, but rather, includes the Art 22P clemency process

as part of "law" or the legal regime governing pardons. Indeed, the grant of clemency effectively restores to an offender in a death sentence case his life: *Yong Vui Kong* at [85].

1.39 In addition to bad faith, contravention of constitutional rights and non-compliance with procedural requirements, exercises of clemency power are also subject to rules of natural justice. Originally developed by judges as part of the fundamental principles at common law which formed part of the *corpus* of administrative law, these have been elevated to having constitutional status within the Singapore context, following the Privy Council decision in *Ong Ah Chuan v Public Prosecutor* [1979–1980] SLR(R) 710. This means that they "can only be abrogated or amended by a constitutional amendment under Art 5 of the Singapore Constitution" (*Yong Vui Kong* at [104]), as opposed to ordinary legislation. Whilst drawing a "conceptual distinction" between constitutional and common law rules of natural justice (*Yong Vui Kong* at [105]), Chan Sek Keong CJ clarified that he was not implying that these two categories constituted "different rules" as they were of "the same in nature and function", although they operated at "different levels of our legal order": *Yong Vui Kong* at [105]. In principle, it was accepted that administrative law rules of natural rules in relation to the rule against bias did apply to the clemency process subject to not being inconsistent with the terms of Art 22P: *Yong Vui Kong* at [108].

1.40 Of the two pillars of natural justice, Chan CJ applied the rule against bias to the ministerial statement relating to government policy and the death penalty, where no concession was made to the factor of relative youth, but not the fair hearing rule. The rule against bias applied to the decision of the "ultimate authority" on whether to grant clemency to the offender, that is, the President, who acts on the advice of the Cabinet: *Yong Vui Kong* at [110]–[111]. Chan CJ accepted it was "not beyond the realms of possibility for the President or one or more members of the Cabinet to be placed in a position of conflict of interest" in relation to the clemency decision, such as where the President or cabinet members was related to the offender by blood or kinship ties. However, the onus falls on the one asserting bias to prove it: *Yong Vui Kong* at [112]. The rule of fair hearing did not apply to the clemency process for two main reasons. First, it has never applied to the clemency power historically in Singapore, both when it was a common law prerogative power and a constitutional one. Second, Art 22P does not provide a right to be heard during the clemency process. In death penalty cases, Art 22P automatically requires various materials to be considered by the Cabinet in good faith and impartially before advising the President on the exercise of clemency powers: *Yong Vui Kong* at [114] Neither does Art 22P provide an individual right to clemency petition (*Yong Vui Kong* at [135]), as it might in other jurisdictions or where a human rights instruments providing such right applied, as in the case of

Art 4 of the American Convention on Human Rights in *Neville Lewis*: *Yong Vui Kong* at [131]. Nonetheless, Chan CJ noted that it was "established procedure" in death sentence cases for the Prisons Department to ask the offender to file a clemency petition within three months of conviction or sentence which the Cabinet "will no doubt consider": *Yong Vui Kong* at [114]. This may give rise to a legitimate expectation, which was not at issue in this present case.

1.41 Chan CJ found that the facts did not bear out a case of a "reasonable suspicion" of bias because of predetermined judgment, given "four difficulties": *Yong Vui Kong* at [119]. First, the Law Minister's statements, as reported in the press, merely articulated the government's policy of adopting a tough approach towards serious drug trafficking which attracts the mandatory death penalty. Second, a minister making a public statement of government policy should not be treated as though he was a judicial officer in applying the rule against bias. That is, the "duty of fairness" which the bias rule imposes on a minister "must by virtue of the Minister's position, be less onerous than the corresponding duty of fairness incumbent on a judge or a tribunal exercising a quasi-judicial function": *Yong Vui Kong* at [124]. Third, the statement of the Law Minister could not be attributed to the other 20 members of the Cabinet, as "each Minister can only speak for himself": *Yong Vui Kong* at [126]. Lastly, it would be absurd to accept that if one cabinet minister articulated the government's policy on the death penalty, the entire Cabinet would be disqualified from advising the President which would effectively require the sentence to be commuted: *Yong Vui Kong* at [127].

1.42 As a matter of principle, Chan CJ noted that the presumption of legality (*omnia praesumuntur rite esse acta*), that all things are presumed to have been done rightly and regularly, *ie*, in conformity with the law, should apply in matters of bias. This flowed from the "high constitutional offices" of the individuals involved in the Art 22P process, including the trial judge, Attorney-General, the Cabinet members and the President. Rejecting the contrary presumption in *Neville Lewis*, it was not justified for the court to proceed on the basis of "fanciful hypotheses" that the trial judge would write "biased or inaccurate reports", that the Attorney-General would give "a spiteful opinion" or that the Cabinet or President would be "unconsciously prejudiced" against the offender or fail to give his case "full and fair consideration": *Yong Vui Kong* at [125]. This presumption of legality, based on the trust of high constitutional officers, was consonant with the opinion expressed by Fazal Ali J in *Maru Ram v Union of India* (1981) 1 SCC 107 at [94] to the effect that where a post is vested "in a very high authority", the presumption was that this authority "would act properly and carefully after an objective consideration of all the aspects of the matter", as Andrew Phang Boon Leong JA and V K Rajah JA had noted in their

joint judgment: *Yong Vui Kong* at [194]. Given the nature of the appeal, no costs were ordered.

## International law and the Singapore constitution

1.43 The High Court in *The Sahand* [2011] 2 SLR 1093 ("*The Sahand*") confirmed that treaties are not self-executing. This flows from a dualist model which treats international and municipal law as distinct systems of law. International treaties must be expressly incorporated through legislation to have effect within the domestic legal order, which is a position that follows English practice (with necessary modifications as Singapore is a republic rather than a constitutional monarchy). The court approved of the statement in *J H Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418 at 500:

> [A]s a matter of the constitutional law of the United Kingdom, the Royal Prerogative, whilst it embraces the making of treaties, does not extend to altering the law or conferring rights upon individuals or depriving individuals of rights which they enjoy in domestic law without the intervention of Parliament. Treaties, as it is sometimes expressed, are not self-executing. Quite simply, a treaty is not part of English law unless and until it has been incorporated into the law by legislation. So far as individuals are concerned, it is *res inter alios acta* from which they cannot derive rights and by which they cannot be deprived of rights or subjected to obligations; and it is outside the purview of the court not only because it is made in the conduct of foreign relations, which are a prerogative of the Crown, but also because, as a source of rights and obligations, it is irrelevant.

1.44 Quentin Loh J observed that the English approach was based on preventing the Crown through its treaty-making powers from altering domestic law "without the authority of Parliament": *The Parliament Belge* (1879) 4 PD 129 at 154–155. This was considered applicable to Singapore as legislative power is vested in the Legislature as Art 38 of the Constitution of the Republic of Singapore provides (*The Sahand* at [33]):

> It would be contrary to Art 38 to hold that treaties concluded by the Executive on behalf of Singapore are directly incorporated into Singapore law, because this would, in effect, confer upon the Executive the power to legislate through its power to make treaties. Accordingly, in order for a treaty to be implemented in Singapore law, its provisions must be enacted by the Legislature or by the Executive pursuant to authority delegated by the Legislature. In so far as a treaty is not implemented by primary or subsidiary legislation, it does not create independent rights, obligations, powers, or duties: at [33].

1.45 As such, it would be inconsistent for the court to give direct effect to Singapore's treaty obligations, where these are not implemented

through legislation. International law is not a source of constitutional legal obligations, though Loh J stressed "the courts will always strive to give effect to Singapore's international obligations within the strictures of our Constitution and laws": *The Sahand* at [33]. Loh J noted that it was permissible under ss 9A(2) and 9A(3) of the Interpretation Act (Cap 1, 2002 Rev Ed) to use international law to interpret primary or subsidiary legislation as extrinsic materials which could be considered if they assisted in ascertaining the meaning of the provisions.

**Judicial review and Article 14**

1.46 The High Court in *Chee Soon Juan v Public Prosecutor* [2011] 2 SLR 940 ("*Chee Soon Juan 1*") addressed the question of the legality of arresting the plaintiffs, who were convicted under s 19(1)(*a*) of the Public Entertainments and Meetings Act ("PEMA") (Cap 257, 2001 Rev Ed) for speaking in public without a licence. Section 19(2)(*m*) defines public entertainment broadly to include any "lecture, talk, address, debate or discussion … in any place to which the public or any class of the public has access whether gratuitously"; (this provision has since been deleted by s 49(3) of the Public Order Act 2009 (Act 15 of 2009), with effect from 9 October 2009). On the evidence, the High Court held that the relevant speeches went beyond a mere sales pitch, as the plaintiffs were in fact making addresses to the public on matters of social concern, in a way designed to highlight the shortcomings of the government and to advance their own party political agenda: *Chee Soon Juan 1* at [54]. While the plaintiffs did ask the public to buy copies of their magazine, "The New Democrat", the speeches frequently resembled "a political rally": *Chee Soon Juan 1* at [54].

1.47 The question of whether the PEMA was constitutional was raised, insofar as it was argued that it violated the Art 14 free speech guarantee. This had been upheld previously in *Chee Soon Juan v Public Prosecutor* [2003] 2 SLR(R) 445 on the basis that Art 14 rights were not absolute and that Art 14(2)(*a*) permitted the enactment of PEMA: *Chee Soon Juan 1* at [6]. The High Court found irrelevant the Canadian case of *Vancouver (City) v Zhang* [2010] BCCA 450 based on the Canadian Charter of Rights and Freedom Part 1 of the Constitution Act 1982, whose free speech guarantee allows only "such reasonable limits prescribed by law" within a "free and democratic society". This imported a test of "minimal impairment requirement": *Chee Soon Juan 1* at [9]. No such requirement exists in Singapore, where the position is "quite different": *Chee Soon Juan 1* at [9]. Art 14 is "expressly made subject to the right of Parliament" (*Chee Soon Juan 1* at [9]), to adopt restrictions considered "necessary or expedient" in the interests of security or public order, even if there was an element of "proportionality" in the judicial reasoning referring to the extent of a ban on political billboards. In

*Vancouver (City) v Zhang*, the relevant by-law imposed a total ban on the use of billboards for political expression; in the immediate case, there was no evidence of a complete ban as the PEMA licensing scheme itself "would negate the existence of such a complete ban". In other words, the Singapore scheme was not as drastic a restriction as the one in Vancouver: *Chee Soon Juan 1* at [10].

1.48 It is worth noting that Singapore and Malaysian courts have adopted divergent approaches in construing Art 14/Art 10 respectively. For example, the Malaysian Federal Court in *Sivarasa Rasiah v Badan Peguam Malaysia* [2010] 2 MLJ 333 at 340 required restrictions on Art 10 rights of speech, assembly and association to be "reasonable", so as to "qualify the width of the proviso", despite the textual absence of the term as well as constitutional history which indicated that the qualifier "reasonable" was deliberately omitted in formulating the right.

**Public assembly**

1.49 The plaintiffs in *Chee Soon Juan v Public Prosecutor* [2011] 3 SLR 50 ("*Chee Soon Juan 2*") were charged under r 5 of the Miscellaneous Offences (Public Order and Nuisance) (Assemblies and Processions) Rules (Cap 184, R 1, 2000 Rev Ed) ("MOR") for participating in an assembly in a public place without a permit as they knew or reasonably should have known about the permit requirement, in distributing flyers in the vicinity of Raffles City Shopping Centre on 10 September 2006. They had not applied for one.

1.50 Rule 5 was "a pre-emptive rule that left the assessment of risks to the permit issuer": *Public Prosecutor v Chong Kai Xiong* [2010] 3 SLR 355 at [10]–[11], cited in *Chee Soon Juan 2* at [19]. The purpose of the MOR was "to ensure the maintenance of public order and to prevent congestion and annoyance caused by assemblies and processions held by *all kinds of groups and organisations*": *Chee Soon Juan 2* at [4]. Rule 2(1)(*a*) defines an assembly or procession as any assembly of more than five persons in any public place whose intent is "to demonstrate support for or opposition to the views or actions of any person": *Chee Soon Juan 2* at [6] This provision does not distinguish between commercial, social or political activities. Following the decision in *Ng Chye Huay v Public Prosecutor* [2006] 1 SLR(R) 157 at [47]–[49] and [52], an "assembly" is "comprised of a group of persons gathered together as a collective entity with a common purpose even if the members of the group may be engaged in different activities".

1.51 The High Court held there was no need that the police should have a reasonable apprehension of an "imminent" breach of public order before the plaintiffs could be charged for a r 5 MOR offence. The

purpose of the activity test was applied, such that the form of the activity was irrelevant (distributing flyers); what mattered was the fact that the plaintiffs had gathered to distribute flyers for the purpose of conveying support or opposition for the views or actions of a person, within r 2(1)(*a*) MOR, *via* the medium of flyers, without a permit. Therefore, it was not comparable to the distribution of flyers to promote a tuition centre: *Chee Soon Juan 2* at [20].

**Judicial review and Article 12**

1.52 Although the argument was raised in *Chee Soon Juan 1* that Art 12 was violated insofar as there was a policy which banned the issuance of licences for political parties to make speeches, Art 12 could not apply as the plaintiffs had not in fact applied for a licence to make an address within the terms of the PEMA regime: *Chee Soon Juan 1* at [14].

1.53 In *Chee Soon Juan 2*, it was argued that the plaintiffs' right to equality under Art 12 was violated because of the decision of the police to take action against them for distributing flyers in a public place to promote a view about a person (the Government) without a permit, in contravention of the MOR. The plaintiffs had argued that they had been discriminated against, as the police did not take action against the commercial distribution of flyers, but did against them because they were involved in political activities: *Chee Soon Juan 2* at [39]. Woo Bih Li J held on constitutional law grounds that even if there was a general policy which determined that political activities as a class posed a greater threat to public order than commercial activities (*Chee Soon Juan 2* at [40]), this would form a "rational basis for differential treatment", consistent with Art 12(1) which requires that only those within the same class not be treated in an unalike manner: *Chee Soon Juan 2* at [40]. Further, there was no evidence to support the allegation that the police had discriminated against the Singapore Democratic Party (to which the plaintiffs were members) as opposed to other opposition parties: *Chee Soon Juan 2* at [41].

1.54 In *Yap Keng Ho v Public Prosecutor* [2011] 3 SLR 66 ("*Yap Keng Ho*"), Art 12 was allegedly violated because, while the Singapore Democratic Party were not allowed to conduct a procession, the National Trade Union Congress and Consumer Association of Singapore had conducted marches in 1998 and in 2007/2008 respectively: *Yap Keng Ho* at [18]. However, insufficient facts were pleaded to prove unlawful discrimination, and it was unclear whether a permit had been applied for, or not, with the police not taking action: *Yap Keng Ho* at [19]–[21].

### *Locus standi* and constitutional rights

1.55 The issue as to the matter of *locus standi* for the alleged violation of a constitutional right arose in *Tan Eng Hong v Attorney-General* [2011] 3 SLR 320 ("*Tan Eng Hong*"). Tan had been charged with violating s 377A of the Penal Code (Cap 224, 2008 Rev Ed) which criminalises homosexual sodomy. The charge was later amended to one under s 294(*a*) of the Penal Code to which Tan pleaded guilty. The Attorney-General applied to strike out Tan's constitutional challenge to s 377A pursuant to O 18 r 19 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) which the assistant registrar ("AR") granted and against which Tan appealed.

1.56 The issue of *locus standi* arose in the context of discussing whether the AR in striking out the originating summons had done so on one of four grounds stipulated in O 18 r 19 of the Rules of Court, of which two grounds were relevant. First, if the pleadings disclose no reasonable cause of action. This applies where an aggrieved party is unable to establish *locus standi*, which allows an action without legal basis to be struck out: *Tan Eng Hong* at [5], citing *Abdul Razak Ahmad v Majlis Bandaraya Johor Bahru* [1995] 2 MLJ 287.

1.57 Second, where the pleadings are scandalous, frivolous or vexatious such that a court cannot grant declaratory relief, as it would have "no practical value": *Tan Eng Hong* at [6]. One of the requirements for the grant of the discretionary remedy of declaratory relief is that the plaintiff must have *locus standi* to bring the suit and there must be a real controversy for the court to resolve. In other words, it cannot relate to an abstract or hypothetical question: *Tan Eng Hong* at [6], citing *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112 at [14].

1.58 The High Court dismissed Tan's appeal on the basis that he had failed to prove that there was a real controversy in issue, as the charge had been withdrawn.

1.59 Tan argued that Arts 9, 12 and 14 of the Constitution of the Republic of Singapore were implicated by s 377A of the Penal Code and asserted that where constitutional liberties are at stake, *locus standi* was established by showing sufficient rather than substantial interest: *Tan Eng Hong* at [9]. Lai Siu Chiu J held that Art 9(1) which concerns "personal liberty" was not implicated, as it did not mean "a citizen has the liberty to lead his life as he pleases": *Tan Eng Hong* at [15]. No written submissions were made with respect to Art 14: *Tan Eng Hong* at [17]. Lai J opined that s 377A might implicate an Art 12(1) issue because although s 377A "is founded on an intelligible differentia (because it applies to sexually-active male homosexuals), it is arguable

that there is no social objective that can be furthered by criminalising male but not female homosexual intercourse": *Tan Eng Hong* at [16]. As such, the test of standing in *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR(R) 294 ("*Colin Chan*") should apply.

1.60 Tan's counsel referenced *Colin Chan*. M Karthigesu JA had stated in the case (*Colin Chan* at [14]), that "if a citizen does not have sufficient interest to see that his constitutional rights are not violated, then it is hard to see who has".

1.61 Lai J questioned whether Karthigesu JA's "passing reference" to "sufficient interest" in *Colin Chan* entailed the articulation of a test akin to its English counterpart: *Tan Eng Hong* at [10]. The learned judge considered that an academic reading of *Colin Chan* ought not to be followed insofar as it was cited as support for the proposition that Karthigesu JA was laying down a new and more lax test of standing for constitutional rights. The relevant passage from p 551 of Kevin Tan & Thio Li-ann's *Constitutional Law in Malaysia and Singapore* (Singapore: Butterworths Asia, 2nd Ed, 1997) ("Tan and Thio") casebook was "[w]here constitutionally-guaranteed liberties are at stake, *locus standi* is established without the need to show sufficiency of interest", which appeared before reference was made to *Colin Chan*.

1.62 A "more defensible interpretation" was that Karthigesu JA was "simply treating constitutional rights as being vested in every citizen" as opposed to articulating a new, specific and more lax test of standing applicable to constitutional rights: *Tan Eng Hong* at [11]. It is unclear what such a self-evident statement would add to the analysis, beyond supporting the view that the fleeting reference to "sufficient interest" in *Colin Chan* was a colloquial descriptor, rather than an attempt to adopt or apply a legal test.

1.63 Her Honour suggested that rather than articulating a new, more lax standing test for constitutional rights, "he simply preferred applying the 'substantial interest' test instead of the 'special damage' test that is used for public rights and had ruled that the former was satisfied in *Colin Chan*": *Tan Eng Hong* at [11]. This statement is a little confusing because Karthigesu JA never referred to the terms "substantial interest" in *Colin Chan*; the terminology he used was "sufficient interest". Assuming this is what Lai J meant, Karthigesu JA was then applying the "special damage" test. Presumably, the source of this test was derived from the referenced Malaysian Supreme Court decision of *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 where the majority followed the 1903 English decision of *Boyce v Paddington Borough Council* [1903] 1 Ch 109 ("*Boyce*"): discussed in *Tan Eng Hong* at [8]. Under this test, the plaintiff must show that his private right has been

infringed. Where a public right is involved, the plaintiff must show "he has suffered a peculiar damage as a result of the alleged public act and that he has a genuine private interest to protect or further": *Tan Eng Hong* at [8]. That is, damage suffered over and above everyone else.

1.64 However, this is only one school of thought in Malaysia and the other one focuses on whether the public act "affects the plaintiff's interests substantially or whether the plaintiff has some genuine interest in having his legal position declared": *Tan Sri Haji Othman Saat v Mohamed bin Ismail* [1982] MLJ 177, *per* Abdoolcader SCJ. Furthermore, *Boyce* was concerned only with a private law action, whereas Craig points out, standing and merit are not separated, as opposed to a situation where the government allegedly infringes a fundamental liberty: Paul Craig, *Administrative Law* (Sweet & Maxwell, 5th Ed, 2003) at p 720, stating that it is a *non-sequitur* to infer that the same test in a private law decision should apply generally within public law.

1.65 Lai J stated that "[i]n so far as the test of Tan and Thio may be taken as saying being a citizen in itself gives one *locus standi*, this should be rejected": *Tan Eng Hong* at [12]. She considered that *Colin Chan* should be interpreted as merely to say that "to satisfy the substantial interest" test, a putative litigant had to allege a violation of his constitutional rights. Her Honour was concerned that constitutional rights not be treated as "mere rhetoric for a low *locus standi* test of citizenship to apply": *Tan Eng Hong* at [12]–[13] In other words, her Honour rejected the equation: "constitutional right = sufficient interest = *locus standi*" presumably for all citizens, which is what her Honour's reading of Tan and Thio seems to imply, *ie*, that the very existence of a violation of a constitutional right categorically satisfies the "sufficient interest" test.

1.66 This could mean that when a constitutional right is violated, the directly affected citizen satisfies the "sufficient interest" test ("narrow reading"), but not other citizens who are not directly affected ("broad reading").

1.67 At the heart of Lai J's analysis was a fear that an over-lax standing rule would open the floodgates to busybodies, stating that "to allow people to challenge an allegedly unconstitutional law simply because they are citizens is undesirable for various reasons". Her Honour identified two reasons. First, priority should be given to parties with a "genuine dispute" and second, a sufficient robust threshold will keep the courts out of adjudicating politically motivated litigation, where no private rights are affected. Political decisions should be influenced through political channels like Parliament: *Tan Eng Hong* at [12]. The bottom line was that constitutional rights were not "mere rhetoric" for a low *locus standi* test based on citizenship to apply: *Tan*

*Eng Hong* at [12]. *Colin Chan* should be taken as saying that a putative litigant has to allege the violation of his constitutional rights to satisfy the "substantial interest" test, that is, only a directly affected citizen would have *locus standi* in the event his constitutional right was breached: *Tan Eng Hong* at [13].

1.68 However, the learned judge in rejecting the "liberal" reading of standing advanced in Tan and Thio, appears to be articulating an even more liberal view of standing by diluting the "case and controversy" requirement, which carries concerns of opening the floodgates to unmeritorious actions proffering some form of constitutional argument or opinion in *Tan Eng Hong*, in at least two ways, which emerges in the learned judge's discussion on whether Tan had suffered an injury or violation of his constitutional rights: *Tan Eng Hong* at [18].

1.69 Lai J opined that Tan had standing as she thought there were "two ways" Tan's rights under Art 12 "may arguably have been violated" (*Tan Eng Hong* at [19]), bringing into play the *Colin Chan* test. In so doing, she swept away the argument that there was no controversy or case at hand, as the charges under s 377A of the Penal Code had been dropped ("the act of prosecution itself can be a violation of one's constitutional rights"), and replaced by another, because "it does not follow that a violation cannot occur without a prosecution": *Tan Eng Hong* at [18]. She referenced Karthigesu JA who stated in *Colin Chan* at [13]: "[a] citizen should not have to wait until he is prosecuted before he may assert his constitutional rights".

1.70 It should be noted at this stage, that whether there is a requirement of a *lis* or "case or controversy", is correlated with the breadth of standing rules, and Lai J has vigorously expressed her concern about opening "floodgates" by relaxing standing rules.

1.71 First, Tan's rights could be violated insofar as "the presence of an unconstitutional law on the statute books may suffice": *Tan Eng Hong* at [19]. Second, "the spectre of future prosecution" was the second way Tan's rights "could be said to have been infringed": *Tan Eng Hong* at [20]. She found that Tan had *locus standi*, having satisfied the "substantial interest" test, even if Tan's claim could be struck out on other grounds: *Tan Eng Hong* at [21].

1.72 On closer analysis, Lai J's expansive reading of what constitutes an injury or violation of constitutional rights must require liberal standing rules to increase the range of persons with standing, which broadens if not flings open the floodgates. To challenge what might be an unconstitutional law on the statute books is to engage in abstract rather than concrete review, as no one is directly affected by a law which is not being implemented. There is no personal interest at stake and the

only rationale must be to enforce the constitutional order as a citizen, after the public interest model of standing. Therefore, theoretically, any citizen who thinks a law is unconstitutional has *locus standi* to challenge it. So, even if a person thinks the Internal Security Act (Cap 143, 1985 Rev Ed) ("ISA") is unconstitutional, but is himself not subject to a detention order, that person would have the standing to challenge the ISA. If, for example, Citizen A is of the opinion that a statute which prohibits the downloading of pornography from the internet is unconstitutional for violating free speech rights, the existence of that statute violates A's Art 14 rights and he suffers a constitutional injury. It follows that broad standing rules must then avail to allow the statute to be challenged on grounds of alleged unconstitutionality, as no one is especially aggrieved and every one may potentially be aggrieved. Any aggrieved person should be able to bring a challenge, whether that persons wants to indulge in pornography or is a free speech rightist.

1.73 If A raises the "spectre" of future prosecution argument to attempt to establish a constitutional injury, this argument is not autonomous or free-standing, but parasitic on the assumption that the law on the books in question is in fact an unconstitutional law such that Citizen A fears having an unconstitutional law imposed on him in the future. The problem is this: what if the law is in fact constitutional such that there is no injury caused in its existence and possible application? Under the Penal Code, for example, people should fear future prosecution if they commit criminal acts as one objective of such a code is to deter the commission of crimes, through the fear of future prosecution. The bottom line is Lai J's reasoning would logically require a broadening of standing rules, to allow a greater range of applicants *locus standi* to challenge laws which have not been applied to them (no special damage), that is, anyone who is of the opinion that a law is unconstitutional and, assuming this is so, anyone who is afraid he will be prosecuted under an unconstitutional law. This would effectively be laying down a new, more relaxed, standing test for cases involving putative constitutional violations by broadening the notion of constitutional violation and thereby, the range of potential aggrieved persons. This replicates the same "floodgates" concerns that Lai J was solicitous about, in relation to avoiding a situation where "mere busybodies" were able to claim standing and bring constitutional challenges: *Tan Eng Hong* at [12].