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 developments in 2010 lay in the field of constitutional law where there were significant cases relating to the constitutional interpretation of Part IV liberties of the Constitution of the Republic of Singapore (1999 Rev Ed) ("Constitution") and, specifically, the inter-relationship between customary human rights law and domestic law with particular respect to the hierarchy of legal norms and the method of reception of international law into the municipal context in *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 ("*Yong Vui Kong v PP*"). The Court of Appeal addressed the issue of the constitutionality of the mandatory death penalty where "original intent" featured as a major constraint on the invocation of international law to create a new right or to afford an expansive construction to an existing right. In a related case, the issue of the reviewability of clemency powers under Art 22P was considered, with the court taking an explicitly comparativist approach which has become a welcome feature characterising decisions rendered in the past few years, a departure from the cursory treatment of international and comparative-law-based arguments associated with decisions from the last decade of the 20th century. The High Court also clarified in *Yong Vui Kong v Attorney-General* [2011] 1 SLR 1 ("*Yong Vui Kong v AG*") that the pardoning power under Art 22P of the Constitution is non-justiciable, exempt from the province of judicial power. Other than this, the cases in 2010 pertaining to constitutional law issues focused primarily on Art 14 of the Constitution, which protects the freedom of speech and assembly; these freedoms are subject to legislative restrictions which Parliament considers "necessary or expedient" (Arts 14(2)(*a*) and 14(2)(*b*) of the Constitution) to serve eight stipulated grounds, including that of the offence of contempt of court. Notably, the High Court in *Attorney-General v Shadrake Alan* [2010] SGHC 327 ("*Shadrake Alan*") explicitly departed from the previous test of "inherent tendency" in cases relating to the common law offence of scandalising the court, in affirming the apparently stricter test of "real risk". Quentin Loh J opined that these tests did not really differ from each other as both required a contextualised reading of the relevant competing interests, though he nevertheless found reasons to prefer the more stringently framed "real

risk" test. It remains to be seen which test the Court of Appeal will endorse.

1.2 With respect to administrative law, the most notable feature was the flexibility the courts have adopted towards the issue of remedies. In Singapore, prerogative remedies, *ie*, *certiorari*, *mandamus* and prohibition, may be applied for under O 53 of the Rules of Court, whereas remedies like declarations and injunctions must be sought through originating summons. In other jurisdictions, all these remedies may be sought for under a common procedure, *eg*, the "application for judicial review" in the English context. It may be time for local reform in relation to this though the flexibility of the courts in not being bogged down by technicalities or an excessive procedural formalism goes some way to ameliorate this. In contrast, previous decisions indicate that proceeding by writ rather than under O 53 constitute a "hazardous path", that is, public law remedies are not available under writ proceedings: *Seah Hong Say v Housing and Development Board* [1992] 3 SLR(R) 497.

ADMINISTRATIVE LAW

The purpose test

1.3 In implementing a statute, the courts apply a "purpose" based test in seeking an interpretation which best effectuates the purpose of the statute. This matter arose in the case of *Huang Danmin v Traditional Chinese Medicine Practitioners Board* [2010] 3 SLR 1108 ("*Huang Danmin*"), with respect to the issue of whether an Act (Traditional Chinese Medicine Practitioners Act (Cap 333A, 2001 Rev Ed) ("TCM Act")) regulating the activity of traditional Chinese medicine should be given extraterritorial effect.

1.4 The Traditional Chinese Medicine Practitioners Board ("the Board") cancelled the licence of the appellant, a Singapore-registered traditional Chinese medicine practitioner, after considering the findings of an investigation committee composed of mostly experienced TCM practitioners. This included the finding that the appellant performed improper treatment – which had taken place at his Johor clinic – on the relevant patient such that he was guilty of professional misconduct under s 19(1)(*i*) of the Traditional Chinese Medicine Practitioners Act (Cap 333A, 2001 Rev Ed). The issue was whether the Board could consider the appellant's treatment, administered outside Singapore at the Johor clinic, for the purposes of determining whether he was guilty of professional misconduct.

1.5 The High Court favoured the view that s 9A(1) of the Interpretation Act (Cap 1, 2002 Rev Ed) required that statutes be read in a purposive manner. The clear purpose of the Act was "to ensure the safety and well being of patients by ensuring a minimum standard of professionalism among the TCM practitioners": *Huang Danmin* at [23]. An Ethical Code and Ethical Guidelines for TCMP (January 2006) was meant to provide guidance of what the Board considers the minimal standards attending the discharge of the professional duties and responsibilities of TCM practitioners "in the practice of TCM in Singapore."

1.6 A central issue was whether to give extraterritorial effect to the TCM Act, with Tay Yong Kwang J addressing the question of whether a presumption against extraterritoriality in the application of domestic legislation to acts conducted in a foreign state should be applied. He noted that, given the complexity of reality, it was more accurate to eschew a binary analysis in terms of laws with and without extraterritorial effect. Rather, it was "probably more accurate to speak of degrees of extraterritoriality than to think of extraterritoriality as a discrete category": *Huang Danmin* at [20]. Tay J noted that, in construing a statute purposively, if a court decided a statute ought to be interpreted as having extraterritorial effect in a particular situation, "it should also highlight the legally significant factors that form the basis for its decision": *Huang Danmin* at [24]. In addition, in so far as the presumption against extraterritoriality "is based on a hypothetical legislative concern about the problems that extraterritorial effect may create", it should follow that lesser concerns should accompany laws with lesser extraterritorial effect.

1.7 The cases surveyed identified two primacy concerns: one based on principle and the other, on practical considerations. First, extraterritorial laws may infringe upon the jurisdictional sovereignty of other states and impair the practice of comity among nations; second, the problem of enforcement: *Parno v SC Marine Pte Ltd* [1999] 3 SLR(R) 377; *R v Secretary of State for Work and Pensions* [2002] 3 All ER 994. Notably, where the party in question has "substantial links to the domestic jurisdiction" (*Huang Danmin* at [27]), in terms of citizenship or property holdings, "enforcement is more likely to be more successful". For example, if the issue pertained to the cancellation of a licence for the carrying out of a regulated activity within the municipal sphere, there is "certainty of successful enforcement for obvious reasons": *Huang Danmin* at [27]. Aside from these two considerations, whether a statute should be interpreted as having extraterritorial effect "depends on the extent to which its purpose would be served by such an interpretation": *Huang Danmin* at [31].

1.8 On the facts, to withhold extraterritorial effect of the TCM Act (above, para 1.4) would undermine its underlying purpose as it would open the door to allowing TCM practitioners in Singapore to conduct unsafe and unauthorised treatments on their patients with impunity by providing a "ready mechanism" in the form of simply crossing the Causeway and performing treatments abroad. This was "a loophole that cannot be accepted": *Huang Danmin* at [33]. Interpreting s 19(1)(*i*) of the TCM Act to encompass all acts of professional misconduct "regardless of where those acts were committed" was the best way to give effect to the Act and "does not result in an overreaching effect": *Huang Danmin* at [36]. This is because it was easy to give effect to the TCM Act through cancelling licences to practice in Singapore, while not affecting practice abroad. Considerations of comity were met in so far as foreign jurisdictions remained at liberty to regulate the type of treatments performed within their territory: *Huang Danmin* at [38]. Drawing an analogy with "nationality-based jurisdiction", the basis for regulating and cancelling licences applied to TCM practitioners conducting themselves as Singapore-registered TCM practitioners.

Courts as appellate bodies defer to the expertise of disciplinary bodies

1.9 The appellant in *Huang Danmin* argued that the Board had erred in concluding that his treatment did not constitute established TCM practice. The TCM Act also did not provide that failure to adhere to established TCM practices in itself amounted to professional misconduct, and whether this was the case in a concrete dispute turned on general legal principles as well as particular TCM norms.

1.10 Tay J considered that the Ethical Code and Ethical Guidelines for TCMP (January 2006) stated at s 4.1.1(*e*) that TCM practitioners were not to use unorthodox treatment or treatment tarnishing the reputation of the TCM profession. A failure to use appropriate and generally accepted methods would breach the Ethical Code and possibly amounted to professional negligence or misconduct: *Huang Danmin* at [45].

1.11 Tay J approved of the approach adopted in *Gobinathan Devathasan v Singapore Medical Council* [2010] 2 SLR 926 ("*Devathasan*") in relation to the burden of proof that a medical practice was not one generally accepted by the medical profession as it "strikes a proper balance between the promotion of scientific progress in medicine and the protection of the patient's well being": *Huang Danmin* at [49]. The Medical Council was to bear the burden of showing it was not a generally accepted practice according to some factors gleaned from expert testimony: *Huang Danmin* at [46]. If this was discharged, the evidentiary burden then shifted to the doctor to show the treatment would do some good and no harm to the patient: *Huang Danmin*

at [48]. Tay J imported this approach to cases involving TCM practice, but not wholesale in so far as the factors that informed whether a medical practice was an accepted one were not considered wholly appropriate to TCM practice. While medical advances were subject to clinical trials and documented in medical journals, TCM practices were "often developed through experience and shared through more informal settings": *Huang Danmin* at [47]. On the facts of the case, the relevant TCM practices were found not to be established practice and to constitute an act of professional misconduct. Notably, the court affirmed that an appellate court hearing an appeal from a decision of a disciplinary board should "afford some measure of deference to it" (*Huang Danmin* at [57]), given the specialist knowledge of the members of the disciplinary board, most of whom were experienced TCM practitioners in this case. The Court of Appeal in *Low Cze Hong v Singapore Medical Council* [2008] 3 SLR(R) 612 ("*Low Cze Hong*") had endorsed the view of certain English decisions, that findings of disciplinary bodies were not to be displaced "unless it can be shown that something was clearly wrong either (i) in the conduct of the trial or (ii) in the legal principles applied or (iii) unless it can be shown that the findings of the committee were sufficiently out of tune with the evidence to indicate with reasonable certainty that the evidence had been misread", citing Lord Hailsham in *Julius Libman v General Medical Council* [1972] AC 217 at 221: *Huang Danmin* at [57]. Disciplinary bodies with expert knowledge of the seriousness of an act were better positioned than a court to know what kinds of measures were needed to deal with it. Tay J characterised the current Singapore position as being "to give a measure of deference to the decisions reached by a disciplinary committee but not in a way that will effectively render nugatory the appellate powers granted to the court under respective statutes": *Huang Danmin* at [59]. On sentencing matters, appellate courts are unlikely to overturn a sentence in the absence of misapprehended facts, a misdirection as to the facts or if the sentence is out of line with precedents: *Huang Danmin* at [60]. Given the gravity of the acts in the present case, where the appellant had acted in a manner which disregarded the patient's safety and administered treatment with no beneficial effect, Tay J found the cancellation of the appellant's registration to be an "appropriate sanction": *Huang Danmin* at [62].

Administrative law remedies and O 53

1.12 Administrative law remedies are in their nature discretionary; thus, the award of a mandatory order must be to compel the performance of a public duty rather than to facilitate investigations for a plaintiff's civil claim: *Anwar Siraj v Attorney-General* [2010] SGHC 36 ("*Anwar Siraj*").

1.13 The High Court in *Yip Kok Seng v Traditional Chinese Medicine Practitioners Board* [2010] 4 SLR 990 ("*Yip Kok Seng*") devoted some attention to an important preliminary point which related to the proper route for seeking public law remedies. The case concerned the issue of whether an acupuncturist, against whom a complaint was lodged before the Traditional Chinese Medical Practitioners Board established under the TCM Act (above, para 1.4), should have applied for a declaration or for *certiorari* under O 53 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed).

1.14 Unlike other Commonwealth jurisdictions such as England and Malaysia, in Singapore, a "bifurcated regime" (*Yip Kok Seng* at [16]) for obtaining remedies is maintained. This provides that, under O 53 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), only prerogative remedies may be sought, not remedies like declarations or injunctions for which the appropriate route would be by originating summons. Leave must be granted to proceed with an application for judicial review – which is a procedural hurdle affording some protection to a public body, as is the limitation of time requirement – which does not apply to actions for other remedies. Declaratory relief is unavailable under O 53 and must be sought by way of normal originating process. The court noted that this was "uncertain and cumbersome" and that reform might be warranted: *Yip Kok Seng* at [17]–[19]. The uncertainties include the question of whether processes like discovery, which is advantageous to litigants, are available to applications made under O 53.

1.15 The Singapore approach comports with the pre-1977 English equivalent (O 53 of the Rules of the Supreme Court 1965 (SI 1965/1776) (UK)). This was amended in 1977 to abolish O 53, which was replaced with one general process termed the "application for judicial review" ("AJR") which empowers the court to award not only prerogative remedies but also damages, injunctions and declarations. Similar reforms have been made in Malaysia, Canada and New Zealand: *Yip Kok Seng* at [18]. As such, the *ratio* in the English case of *O'Reilly v Mackman* [1983] 2 AC 237 was not applicable, as that was based on the unified AJR procedure, the relevant point being that it would be an abuse of process for the plaintiff to seek redress by ordinary action to remedy a complaint that a public authority had infringed his public law rights: *Yip Kok Seng* at [20]. Woo Bih Li J took note of various English and Malaysia authorities which held that the remedies of certiorari and declaration were concurrent, rather than mutually exclusive: *Yip Kok Seng* at [22]–[24]. He highlighted a comment by Peh Swee Chin FCJ in *Teh Guan Teik v Inspector General of Police* [1998] 3 MLJ 137 at 150 which pointed out the "very efficient" nature of a declaration as a claim by a citizen against a public authority. Since it lacked coercive force, government bodies did not "feel the threat of such force" and, if granted, the aggrieved citizen could disregard the order of a public authority

with impunity: *Yip Kok Seng* at [24]. Woo J noted that the wording of O 15 r 16 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), which was similar to O 25 r 5 of the Rules of the Supreme Court 1883 (UK) and O 15 r 16 of the Rules of the High Court 1980 (PU(A) 50/1980) (M'sia) justified adopting an "expansive approach" towards declaratory relief: *Yip Kok Seng* at [25]. Order 15 r 16 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) reads: "No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right *whether or not any consequential relief is or could be claimed*" [emphasis added]. On a "plain reading", Woo J noted that just because *certiorari* could be granted, this in itself was no ground for refusing declaratory relief, given the likelihood of both these remedies overlapping: *Yip Kok Seng* at [25]. Drawing from H W R Wade & C F Forsyth, *Administrative Law* (Oxford, 10th Ed, 2009) at pp 480–481 (*Yip Kok Seng* at [25]), Woo J discussed the history of the remedy and its utility in enabling a party to discover his legal position, thereby opening the way for resort to other remedies to give effect to it. On the facts of the case, Woo J decided that declaration was an appropriate remedy and that it was unnecessary to proceed by way of O 53 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) to obtain *certiorari* and be subject to the requirement of leave, non-discovery and time limits.

1.16 The acupuncturist's complaint was that the relevant Board had acted *ultra vires* the statute by undertaking an investigation in relation to his alleged molestation of a client in the course of a healing session, which fell without the ambit of traditional Chinese medicine: *Yip Kok Seng* at [30]. If this argument succeeded, *certiorari* would have been unnecessary as a declaration that the Board's decision was made *ultra vires* would have rendered that decision void, leaving nothing for a quashing order to apply to: *Yip Kok Seng* at [30].

Flexibility

1.17 That distinct procedures apply for the application of remedies to address administrative decisions means that counsel may actually apply for the wrong remedy, depending on the nature of the decision, as happened in *Comptroller of Income Tax v ACC* [2010] 2 SLR 1189 ("*ACC*"). Nonetheless, the court has displayed a certain flexibility in this respect where the wrong remedy has been applied for. In this case, the respondent had wrongfully applied under O 53 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) for a quashing order, in relation to the Comptroller's determination – which the respondent disputed – that the respondent was liable to account for withholding tax requirements under s 45 of the Income Tax Act (Cap 132, 2008 Rev Ed) ("ITA"). This determination was contained in a 6 February 2009 letter. Under s 89 of the ITA, the Comptroller may commence proceedings to recover tax

amounts allegedly payable. Under protest, the respondent paid the amount of withholding tax the Comptroller had determined.

1.18 Both parties treated this letter as though it was a final determination, capable of being quashed, even though the Comptroller lacked statutory powers under s 4(3) of the ITA to make binding determinations of law; this merely stated the responsibility of the Comptroller to assess and collect tax and to pay such amounts into the Consolidated Fund: *ACC* at [30]. Section 45 of the ITA did not authorise the Comptroller to make unilateral determinations of an individual's liability for withholding tax. Further, if the Comptroller took the s 89 ITA route, it was "the court alone" which could make a determination of law.

1.19 Although the Comptroller did not so argue, the Court of Appeal considered that the real question was whether there was any basis for the respondent's application for leave to apply for a quashing order: *ACC* at [15]. As the letter had no legal effect, there was nothing for the court to quash. Thus, a quashing order was an inappropriate remedy as this operates to deprive a decision or determination of legal effect: *ACC* at [16].

1.20 The court was fortified in its conclusion by its review of English and Australian authorities (*ACC* at [16]–[17]), which supported the view that a decision could be quashed even if it lacked direct legal effect provided it was a step in a process which could eventuate in the alteration of rights, interests or liabilities: *Ainsworth v Criminal Justice Commission* (1993) 175 CLR 563 (*ACC* at [17]–[18]). A "mere opinion" would not fall within the category of decisions to which quashing orders applied, that is decisions having "some actual or ostensible legal effect, whether direct or indirect": *ACC* at [21]. The Court of Appeal held that the 6 February 2009 letter was merely an expression of the Comptroller's opinion, lacking ostensible legal effect on the respondent: *ACC* at [28]. Section 89(4) of the ITA precluded a challenge towards the quantum of tax payable but did not speak to disputing liability to pay tax: *ACC* at [28].

1.21 However, as a pure question of law was involved and as both parties had treated the letter as though it had binding legal effect, the Court of Appeal decided "in the interests of procedural convenience and efficiency" (*ACC* at [32]) to proceed as if the letter contained a determination susceptible to judicial review. To require the respondent to recommence proceedings for a declaration would be "to take an overly legalistic view of what procedural justice requires": *ACC* at [33].

Natural justice – Excessive judicial interference

1.22 The High Court in *Tang Kheok Hwa Rosemary v Jaldhi Overseas Pte Ltd* [2010] SGHC 25 applied the rule articulated by the Court of Appeal in *Mohammed Ali bin Johari v Public Prosecutor* [2008] 4 SLR(R) 1058 at [164] that the doctrine proscribing judicial interference was one that had to be applied sparingly, only in the "most egregious cases" to prevent this becoming a "stock argument that is invoked by parties as a matter of course". On the facts of the case, the assistant registrar had asked questions of the witnesses during the proceedings; however, Lee Seiu Kin J found that these were mainly clarificatory in nature; even if "many of the questions could have been better put", it did not amount to an egregious case able to support the conclusion that there had been excessive judicial interference.

Exhaustion of remedies

1.23 The Comptroller in *ACC* (above, para 1.17) argued that the respondent, before applying for leave for a quashing order, should have first sought ministerial exemption or remission for tax under ss 13(4) and 92(2) of the ITA (above, para 1.17): *ACC* at [13]. The Court of Appeal held that ss 13(4) and 92(2) of the ITA did not provide for alternative remedies that the respondent should have first exhausted (following *Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR(R) 92 at [25]); rather, they were in nature discretionary powers. As there were no remedies to exhaust, the respondent did not abuse the process by bringing judicial review proceedings.

CONSTITUTIONAL LAW

Interpretive method

1.24 Singapore courts in addressing public law issues regularly draw from a broader interpretative palette, in terms of referencing transnational legal sources in the form of international human rights law and comparative public law, while marking out a distinctive path, pursuant to the declared goal of "developing an autochthonous or indigenous legal system sensitive to the needs and mores of the society of which it is a part": Andrew Phang JA in *Tang Kin Hwa v Traditional Chinese Medicine Practitioners Board* [2005] 4 SLR(R) 604 at [27].

Interpretive method: Human rights, comparative law and original intent

1.25 The specific issue in *Yong Vui Kong v PP* (above, para 1.1) was whether the mandatory death penalty ("MDP") was constitutional, with specific reference to various provisions of the Misuse of Drugs Act (Cap 185, 2001 Rev Ed) ("MDA").

1.26 The argument forwarded by counsel for the appellant, M Ravi, was that previous decisions which have rejected the challenge to the constitutionality of the MDP on the basis of Arts 9(1) and 12 of the Constitution of the Republic of Singapore (1985 Rev Ed), as in *Ong Ah Chuan v Public Prosecutor* [1981] AC 648 ("*Ong Ah Chuan*"), were "wrongly decided at the relevant time" (*Yong Vui Kong v PP* at [5]) such that the apex court should depart from them. Article 9 expressly sanctions the death penalty in so far as it authorises the deprivation of life "in accordance with law". Thus, three arguments were raised in the present case, two based on the alleged illegality of the MDP and one on equality grounds. It was argued that the MDP prescribed by the MDA was inhuman punishment and not law for the purposes of Art 9(1), violating the right to life contained therein; in addition, MDP legislation contravened customary human rights law as the MDP contravenes the prohibition against cruel punishment, and that customary international law ("CIL") was included in the Art 9 expression of "law". Lastly, the differentia adopted in the MDA to determine the applicability of the MDP was alleged to be arbitrary. On the last point, the Court of Appeal endorsed previous decisions which found that the 15 grams differentia, the threshold for attracting the MDP under the MDA, was not arbitrary but bore a rational relation to the social object of the MDA, observing that the quantity of addictive drugs trafficked was "broadly proportionate" to the drug dealer's scale of operations and harm posed to society: *Yong Vui Kong v PP* at [111]. The issue of whether the current regime was an effective deterrent to drug traffickers was also beyond judicial purview: *Yong Vui Kong v PP* at [117]. While it could be argued that there was insufficient evidence that the MDP had effective deterrent effect, equally, the court noted that "it can equally be said that there is insufficient evidence that the MDP does not have such a deterrent effect": *Yong Vui Kong v PP* at [118]. Surveys and statistical studies on the issue in one country could not be determinative in relation to another country and the question of deterrent effect was one of policy that fell within the province of Parliament, not the courts: *Yong Vui Kong v PP* at [118].

Customary international law and domestic courts

1.27 The Court of Appeal in *Yong Vui Kong v PP* carefully examined the inter-relationship between customary human rights law and

domestic law, clarifying the manner of reception of the former as well as its hierarchical rank within the latter. It stated that the reference to "custom or usage" in Art 2 of the Constitution of the Republic of Singapore (1985 Rev Ed), which defines "law", did not include CIL (above, para 1.26) as this referred to local customs and usages which already existed as part of Singapore law: *Yong Vui Kong v PP* at [12].

1.28 The Court of Appeal demonstrated a deftness with public international law in its treatment of the argument that there was a CIL norm prohibiting the MDP (above, para 1.25) as a form of inhuman punishment, and that the CIL norm was "law" for the purposes of Art 9(1) of the Constitution of the Republic of Singapore (1985 Rev Ed) such that the MDP was unconstitutional. That rests on two assumptions: that the CIL norm is part of Singapore law and that it is of higher rank than a statute, that is, it would be "cloaked with constitutional status" so as to render the MDP in the MDA (above, para 1.25) void for inconsistency according to Art 4: *Yong Vui Kong v PP* at [88].

1.29 CIL is formed by state practice which is general, consistent and of sufficient duration, and the component of *opinio juris*, the belief of a state that it was bound by a norm because it bore a legal quality. What was at issue was whether sufficient consensus existed as evidence of the existence of such a CIL norm, which is a difficult issue given the lack of quantitative criteria in evaluating generality and the phenomenon (not canvassed in *Yong Vui Kong v PP*) of the persistent objector who opts out of an emerging non-peremptory CIL norm which has crystallised and assumed juridical status.

1.30 The appellant had argued that the diminishing number of states retaining MDP for drug-related offences, with Mr Ravi offering that 14 states retained the MDP for such offences (*Yong Vui Kong v PP* at [43]), evidenced a CIL norm prohibiting the MDP as inhuman punishment. The Attorney-General numbered 31 states as still retaining the MDP for drug-related and other serious offences. This itself showed a lack of international consensus, given that CIL requires that a practice be widespread and representative, towards the proposition that MDP constituted inhuman punishment. The issue of persistent objection might also be relevant. The Attorney-General characterised the later cases as "a change in the Privy Council's attitude towards the MDP" rather than international consensus in the absence of which, there was no applicable CIL norm.

1.31 In relation to the argument that the CIL prohibition against inhuman treatment applied, the Court of Appeal held that the CIL prohibition did not, in terms of substantive content, include the MDP. Citing Roger Hood and Carolyn Hoyle, *The Death Penalty: A Worldwide*

Perspective (Oxford University Press, 4th Ed, 2008), the Court of Appeal noted that the authors had concluded that "[b]y the end of 2006, the number [of death penalties for dangerous drug offences] was at least 31": *Yong Vui Kong v PP* at [95]. The Court of Appeal also noted that Indian state practice was inconclusive as subsequent to the *Mithu* case (*Mithu v State of Punjab* (1983) 2 SCC 277, 1983 SCC (Cri) 405, AIR 1983 SC 473) cited by the appellant, India had adopted statutes which provide for the MDP: *Yong Vui Kong v PP* at [96]. Leaving aside *de facto* abolitionist states and India, the Court of Appeal concluded that "although the majority of States in the international community do not impose the MDP for drug-trafficking, this does not make the prohibition against the MDP a rule of CIL" as this was "not equivalent to extensive and virtually uniform practice by all states" needed for a rule to attain CIL status: *Yong Vui Kong v PP* at [96].

1.32 In terms of the inter-relationship between international customary law and domestic law, the Court of Appeal read the Attorney-General as accepting the proposition that the word "law" in Art 9(1) of the Constitution of the Republic of Singapore (1985 Rev Ed) could encompass a CIL norm provided this had "already been recognised and applied by a domestic court as part of Singapore law": *Yong Vui Kong v PP* at [44]. In other words, it was not self-executing and did not automatically apply in the sense of becoming "law" for Art 9(1) purposes, *ie*, Singapore law by operation of the common law or constitutional provision itself: *Yong Vui Kong v PP* at [87].The Court of Appeal confirmed that a CIL norm was not part of Singapore law "unless and until it has been applied as or definitively declared to be part of domestic law by a domestic court": *Yong Vui Kong v PP* at [91].

1.33 In terms of rank, the Court of Appeal noted that generally in other common law jurisdictions, CIL was incorporated into domestic law by the common law provided it was not inconsistent with existing statutes or judicial declarations of the apex court, as was the position in *Chung Chi Cheung v R* [1939] AC 160 ("*Chung*"), a proposition previously accepted in *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR(R) 103 ("*Nguyen*") at [94]. Following *Chung,* the Court of Appeal stated that, for the CIL to be part of domestic law, it must "first be accepted and adopted as part of our domestic law" – that is, the Singapore court would first need to determine whether the relevant CIL rule was consistent with statute and judicial precedent "and either declare that rule to be part of Singapore law or apply it as part of our law", without which act the CIL rule would be "merely floating in the air": *Yong Vui Kong v PP* at [90]. This reflects a dualist conception of the inter-relationship between CIL and domestic law. However, the judicial reception of a CIL rule would be to incorporate it through the common law, which is subordinate to statute law, noting that Art 2(1) of the Constitution of the Republic of Singapore (1985 Rev Ed) defines "law"

to include the common law only "in so far as it is in operation in Singapore". Since various Singapore statutes imposed the MDP, the court rejected the argument that CIL was "law" for purposes of Art 9(1) and "cannot treat the alleged CIL rule prohibiting inhuman punishment as having been incorporated into Singapore law": *Yong Vui Kong v PP* at [91]. As the Government had "deliberated on but consciously rejected" the suggestion by the 1966 Wee Commission to constitutionally incorporate an inhuman punishment prohibition, a CIL rule prohibiting such punishment in general, and the MDP specifically, "cannot now be treated as 'law' for the purposes of Art 9(1)": *Yong Vui Kong v PP* at [92].

Customary human rights law and the Singapore court

1.34 In response to the argument that the moral bases of human rights should be read into the Constitution, such as Art 5 of the Universal Declaration of Human Rights (10 December 1948), GA Res 217A (III), UN Doc A/810 ("UDHR") which prohibits torture or inhuman punishment, the Court of Appeal held that, in principle, the Constitution should not be construed in a manner inconsistent with Singapore's international legal obligations, though there were "inherent limits" to this: *Yong Vui Kong v PP* at [59].

1.35 Two limits to the incorporation of human rights law were identified in the form of the constitutional text and constitutional history: *Yong Vui Kong v PP* at [59]. Eschewing a creative approach towards interpretation and rejecting judicial legislation, the Court of Appeal stated that Parliament would have to enact new human rights laws, as the drafters of the UDHR had hoped for or amend the Constitution to provide for rights not expressly incorporated thereto, in order for the courts "to give full effect to international human rights norms." It would be inappropriate "to legislate new rights into the Singapore Constitution under the guise of interpreting existing constitutional provisions": *Yong Vui Kong v PP* at [59]. This would seem to preclude the finding of unenumerated substantive rights, despite political statements to the effect that there is an implied constitutional right to vote: see Thio Li-ann, "Westminster Constitutions and Implied Fundamental Rights: Excavating an Implicit Constitutional Right to Vote" [2009] 2 Sing JLS 406.

Primacy of original intent and the deliberate exclusion of a prohibition against inhuman punishment clause

1.36 With respect to a putative right against inhuman punishment, the Court of Appeal amassed reasoning which indicated that the exclusion of an "inhuman punishment" clause was deliberate and not

unconscious or made in the absence of knowledge of such clauses. In examining constitutional history and the origins of various Commonwealth constitutions, it drew a distinction between two types of British colonies, pointing out "it is a little known legal fact that the ECHR [European Convention on Human Rights]" applied to Singapore and the Federation of Malaya in 1953 by virtue of the United Kingdom's declaration under Art 63 of the European Convention on Human Rights (4 November 1950), 213 UNTS 221 ("ECHR"), as well as to other former British colonies like Belize and other Caribbean countries. While the latter modelled their constitutions after the ECHR to include a prohibition against inhuman punishment, this was not the case with respect to Singapore and the Malayan Federation: *Yong Vui Kong v PP* at [61].

1.37 Singapore's Part IV chapter on fundamental liberties derived from Part II of the Malaysian Federation Constitution 1957 and, as such, the Court of Appeal examined its drafting history. In 1957, the Reid Constitutional Commission made no reference to an "inhuman punishment" clause. Given that the ECHR contained such prohibition pre-dating the Malaysian Independence constitution, its omission from the 1957 Constitution "was clearly not due to ignorance or oversight on the part of the Reid Commission": *Yong Vui Kong v PP* at [62]. Nor was it included in the Constitution of Malaysia (1963).

1.38 The ECHR applied to Singapore from 1953 and ceased applying when it became part of the Federation of Malaysia in 1963; the MDP (above, para 1.25) was not abolished by the UK government during the period when the ECHR applied to it: *Yong Vui Kong v PP* at [84]. The MDP also survived the 1963 Malaysian Constitution and Singapore Independence Constitution of 1965: *Yong Vui Kong v PP* at [84]. When Singapore became an independent republic after peacefully seceding from Malaysia in 1965, its independence Constitution was cobbled, *inter alia*, from selected provisions in the Malaysian constitution grafted into its state constitution, with further modifications. Given this constitutional history, the Singapore Constitution "unlike many other Commonwealth constitutions, is not modelled after the ECHR" and has no "inhuman punishment" clause. This weakened the contention that such a clause should be read into the Singapore Constitution.

1.39 A second, more compelling reason drawn from the specificities of Singapore constitutional history was that the 1966 Singapore constitutional commission had expressly discussed and recommended the adoption of an express prohibition against inhuman punishment in the Constitution, which was "ultimately rejected" by the government, though the reason for this rejection are obscure: *Yong Vui Kong v PP* at [64] and [71]. Citing academic scholarship (*Evolution of a Revolution: Forty Years of the Singapore Constitution* (Li-ann Thio & Kevin

Y L Tan eds) (Routledge-Cavendish, 2009)), the Court of Appeal note that the 1966 Wee Commission had considered the constitutions of some 40 different British colonies, dominions, independent states as well as non-Commonwealth constitutions and "went out of its way" to recommend a prohibition against torture/inhuman punishment clause: *Yong Vui Kong v PP* [2010] 3 SLR 489 at [64]. There was clearly no ignorance about the existence of these sorts of clauses. The Commission proposed a new Art 13(1) which read "No person shall be subjected to torture or to inhuman or degrading punishment or other treat", a formulation which draws heavily from Art 5 of the UDHR (above, para 1.34), and indeed, Art 3 of the ECHR (above, para 1.36) and s 7 of the Constitution of Belize (Laws of Belize, c 4): *Yong Vui Kong v PP* at [66]. However, because the proposed Art 13 is not part of the Singapore Constitution, Privy Council decisions dealing with similar clauses were not presently relevant.

1.40 Thus, the government's rejection of Art 13 and its non-inclusion in the Singapore Constitution "forecloses" the argument that the court could read Art 9(1) to incorporate a prohibition against inhuman punishment: *Yong Vui Kong v PP* at [72]. It was a reasonable assumption that the Wee Commission considered that Art 9 and the proposed Art 13 dealt with different subject-matter; otherwise "Art 9(1) would have been redundant": *Yong Vui Kong v PP* at [72]. Thus, the rejection of the proposed Art 13 made it "impossible" for the appellant to rely on the Privy Council cases dealing with express constitutional prohibitions against inhuman punishment to challenge the constitutionality of the MPD. Given the historical context in which the right was "decisively rejected" by the Government in 1969, it was not legitimate for the court to read into Art 9(1) a prohibition against inhuman punishment.

1.41 While it is unclear why the government decided not to elevate such prohibition into a constitutional right (neither did the court require any explanation of this), the fact is there was no such clause and the court refused to expand the content of Art 9(1) through a generous construction to include this right. In other words, human rights law would not be drawn upon as a source to declare non-textual rights, in opposition to other constitutions which had modelled their bill of rights on human rights treaties.

Constitutionality of the mandatory death penalty: Art 9(1) challenge

1.42 The appellant made various arguments to construe "law" in Art 9(1) of the Constitution of the Republic of Singapore (1985 Rev Ed) in an expansive manner to include a prohibition against inhuman treatment, drawing from foreign decisions.

1.43 In interpreting "law" in Art 9(1), the Court of Appeal carefully reviewed past Singapore decisions to set out the legal backdrop to the current case. It noted that the Privy Council in *Ong Ah Chuan* (above, para 1.26) at 670 noted that "law" referred to a system of law that did not flout the fundamental rules of natural justice though as the Court of Appeal noted, no further guidance was provided with respect to what kind of legislation the Privy Council thought did not qualify as "law": *Yong Vui Kong v PP* (above, para 1.1) at [16].

1.44 The Court of Appeal took the opportunity to make an aside in stating its opinion that Yong Pung How CJ's statement in *Jabar bin Kadermastan v Public Prosecutor* [1995] 1 SLR(R) 326 ("*Jabar*") to the effect that the court was not concerned with whether a law validly passed by Parliament was "also fair, just and reasonable as well" did not conflict with how the Privy Council interpreted "law" in *Ong Ah Chuan* (above, para 1.26) at 670–671. The issue in *Jabar* related to the death row phenomenon, that is, a prolonged delay in carrying out the MDP (above, para 1.25) rather than the MDP itself, which was "why this court held that the question of the relevant MDP legislation was fair, just and reasonable was not relevant." It made a welcome clarification that "Yong CJ's statement should be read in this context, and not as a definitive interpretation of the term "law" in Art 9(1)": *Yong Vui Kong v PP* at [19]. In other words, it was not a challenge against legislation, but against executive action. This was supported by the further point that the Court of Appeal in *Nguyen* (above, para 1.33), with Yong CJ presiding, had affirmed the Privy Council's interpretation of "law": *Yong Vui Kong v PP* at [19].

Comparative law and the meaning of "law" in Art 9

The irrelevance of cases from jurisdictions with Constitutions prohibiting inhuman punishment

Reading a prohibition of "inhuman punishment" into "law" in Art 9(1)

1.45 The MDP allegedly violated Art 9(1) as being an inhuman punishment because it removed judicial sentencing discretion, thereby treating every person not as an individual but "as members of a faceless, undifferentiated mass": per Stewart J in *Woodson et al v North Carolina* 428 US 280 (1976) ("*Woodson*"). If the MDP was inhuman, it would violate the right to life in Art 9(1).

1.46 In *Nguyen* (above, para 1.33) itself, the Court of Appeal had examined a series of Commonwealth decisions from the Caribbean where the MDP had been found to constitute inhuman punishment; the relevant ones were distinguished from the Singapore context as

Singapore did not have an express constitutional prohibition against inhuman punishment and a different constitutional history: *Yong Vui Kong v PP* (above, para 1.1) at [29]. The Court of Appeal highlighted an aspect of the Privy Council decision of *Bowe v R* [2006] 1 WLR 1623 ("*Bowe*") from the Bahamas, that a point for distinguishing *Ong Ah Chuan* (above, para 1.26) from *Bowe* was that the Singapore Constitution did not contain an express clause prohibiting torture or inhuman punishment: *Yong Vui Kong v PP* at [30].

1.47 A long list of Privy Council decisions (listed in *Yong Vui Kong v PP* at [34]) as well as authorities from US, India, Uganda, and Malawi which were heard after *Ong Ah Chuan* were cited in support of the argument that the MDA was not "law" under Art 9(1) as it constituted inhuman punishment, with further reference to the opinions of two human rights law experts (*Yong Vui Kong v PP* at [40]), whose opinions were non-binding and at best, a "subsidiary means for determining the existence or otherwise of rules of CIL": *Yong Vui Kong v PP* at [97]–[98]. The MDP was inhuman because it "dehumanises the offender" by preventing the trial judge from considering mitigating circumstances peculiar to the instance case.

1.48 The Court of Appeal discussed three cases from Belize, America and India. Essentially, these cases supported the proposition that given the different and final quality of the death penalty as distinct from imprisonment, the principle of humanity required individualised sentencing. In the US Supreme Court decision of *Woodson* (above, para 1.45), Stewart J did not say that the possibility of error in imposing the death sentence rendered it inhuman; that could be imputed to the want of judicial discretion in sentencing and the exclusion of the offender's character, record and individual case circumstances: *Yong Vui Kong v PP* at [38]. In response, the Attorney-General argued that *Ong Ah Chuan* and *Nguyen* (above, para 1.33) remained good law and that the Privy Council's post-*Ong Ah Chuan/Nguyen* cases should not be followed "because the Privy Council does not dictate human rights standards for the rest of humanity": *Yong Vui Kong v PP* at [42].

1.49 The Court of Appeal found significant the point that all the appellant's MDP cases pertained to murder rather than drug-trafficking offences. It referenced the observation of Lord Diplock in *Ong Ah Chuan* at 674 to the effect that while crimes like murder could entail a broad range of moral blameworthiness, from premeditated murder to heat of passion crimes, this was less likely with respect to coldly calculative large scale drug-trafficking offences where "considerable variation in moral blameworthiness" was "more theoretical than real": *Yong Vui Kong v PP* at [48]. The Court of Appeal held that it fell to Parliament as a matter of policy to decide the appropriate threshold of culpability which attracted the MDP, being "a matter of policy": *Yong*

Vui Kong v PP at [49]. It noted the possibility that even if MDP for murder was inhuman punishment, it was not necessarily so for drug-trafficking, while stating that "this argument has been foreclosed by constitutional developments in Singapore": *Yong Vui Kong v PP* at [49]. The thrust of the appellant's argument was not that Art 9(1) expressly prohibited inhuman punishment as this would require the court to effectively "legislate those words into Art 9(1)" (*Yong Vui Kong v PP* at [52]) but that it excluded legislation providing for inhuman punishment; in other words, Art 9(1) should be generally construed in this manner to give effect to changed human values: *Yong Vui Kong v PP* at [52].

1.50 In distinguishing the foreign cases, the Court of Appeal pointed out that they dealt with Constitutions which had clauses expressly prohibiting cruel and inhuman punishment and thus, these cases did not directly speak to what "law" in Art 9(1) meant but rather, what constituted an inhuman punishment: *Yong Vui Kong v PP* at [50].

Fundamental rules of natural justice versus *Indian test of fair, just and reasonable procedure*

1.51 The Court of Appeal rejected the application of Indian jurisprudence towards the equivalent clause – this being Art 21 of the Indian Constitution which provides: "No person shall be deprived of his life or personal liberty except according to procedure established by law." Such procedure must be "fair, just and reasonable procedure established by valid law": *Mithu* (above, para 1.31) at [6]. *Mithu* did not concern the issue in *Yong Vui Kong v PP* – whether MDP was inhuman punishment – but the question of whether the relevant section of the Indian Penal Code was "fair, just and reasonable" in removing sentencing discretion from the judge. Article 9 Constitution of the Republic of Singapore (1985 Rev Ed) differs from the Indian Art 21 by conditioning deprivation of life to be "in accordance with law", which the Court of Appeal accepted could include both substantive and procedural law: *Yong Vui Kong v PP* at [80]. The Privy Council in *Ong Ah Chuan* (above, para 1.26) had not accepted the "fair, just and reasonable procedure" test, which the Court of Appeal considered "too vague a test of constitutionality" as it hinged on the judicial view of the "reasonableness" of the relevant law: *Yong Vui Kong v PP* at [80]. This would violate the separation of powers in requiring the court "to intrude in the legislative sphere of Parliament as well as engage in policy making": *Yong Vui Kong v PP* at [80]. The test was that the law must comport with "fundamental rules of natural justice". Thus, there was nothing in Art 9(1) which prevented Parliament from enacting MDP, with the Court of Appeal declining to follow the Indian approach of construing Art 21 expansively: *Yong Vui Kong v PP* at [82].

Conclusion on interpretive method

1.52 There is little risk of a juristocracy emerging in Singapore as the concept of separation of powers the courts operate on recognises that the creation of new rights or the expansive construction of existing rights to effectively create new rights falls to the province of Parliament. When constitutional history indicates that a particular right was deliberatively rejected, "any changes in CIL and any foreign constitutional or judicial developments" in relation to a particular issue "will have no effect on the scope of Art 9(1)." Changes to the MDP had to be brought about by Parliament "and not by the courts under the guise of constitutional interpretation": *Yong Vui Kong v PP* at [122].

Justiciability of clemency powers

1.53 The issue of whether high prerogative powers, specifically, the clemency power which is constitutionally entrenched in Art 22P, is subject to judicial review was the focus of the High Court decision in *Yong Vui Kong v AG* (above, para 1.1). This raised a question of public importance which had not been the subject of previous judicial pronouncement in Singapore.

1.54 In essence, what was being sought was a permanent stay of execution for convicted drug-trafficker, Yong Vui Kong, who had received the mandatory death sentence under the MDA (above, para 1.25) in November 2008. He petitioned for clemency on 11 August 2009, which the President rejected on 20 November 2009, just four days before sentence was to be carried out. The Court of Appeal granted Yong leave to appeal against sentence and a stay of execution which was heard in March 2010.

1.55 Before judgment was delivered on 14 May 2010, the Law Minister K Shanmugam was reported as responding to a question raised at a community dialogue session as to whether the government's policy on the death penalty on drug offences would be changed because of Yong's case. The Minister stated "Yong Vui Kong is young. But if we say "We let you go", what is the signal we are sending?" and "We are sending a signal to all the drug barons out there: Just make sure you choose a victim who is young, or a mother of a young child, and use them as the people to carry the drugs into Singapore": *Yong Vui Kong v AG* (above, para 1.1) at [7]. The media subsequently reported that counsel M Ravi stated his client's fate had been "poisoned by biasedness": *Yong Vui Kong v AG* at [7].

1.56 The Court of Appeal in *Yong Vui Kong v PP* (above, para 1.1) held that the mandatory death sentence was not unconstitutional and

that it was not necessary to consider the submission of counsel M Ravi on the effect of the President's power to grant clemency under Art 22P on the mandatory death penalty. On 9 July 2010, the Law Ministry issued a press release to clarify that the Minister was commenting on government policy, rather than any case before the courts, and whether youth or other personal factors were relevant factors in this respect: *Yong Vui Kong v AG* at [8].

1.57 Even though claims for declaratory relief does not avail under O 53 (of the Constitution of the Republic of Singapore (1985 Rev Ed)) proceedings (it must be sought by way of writ or originating summons), Steven Chong J decided not to be detained by procedural considerations and considered the case on its merits, given the "gravity of the issues raised".

1.58 Chong J categorised the claimed reliefs into three categories based on common premises: (a) first, that the discretion to grant pardons was personal to the President, not the Cabinet, under Art 22P and was justiciable; (b) that the pardoning power could be challenged on grounds of apparent bias; and (c) that Yong had a right to see the materials before the relevant decision-makers, that is, Cabinet or the President, as an independent substantive right or a corollary of the right to make representations before these bodies with respect to the exercise of Art 22P powers: *Yong Vui Kong v AG* at [10].

1.59 Article 22P(1)(*b*) provides that "[t]he President, as occasion shall arise, may, on the advice of the Cabinet, grant to any offender convicted of any offence in any court in Singapore, a pardon". It is silent as to its reviewability and hence, Chong J adopted an explicitly comparative approach in considering various Commonwealth decisions on pardoning powers, including England, the birthplace of the "prerogative of mercy".

No review: England, New Zealand, Australia, Malaysia

1.60 Chong J reviewed cases from England, New Zealand, Australia and Malaysia which essentially held that the prerogative of mercy was non-reviewable.

1.61 Originally, the prerogative of mercy was the personal power of the Crown, as it was the Crown's peace that was considered to be violated where a public offence had been committed. Further, its function was to temper the harshness of the law in the Middle Ages: *R v Home Secretary; Ex p Bentley* [1994] QB 349 ("*Ex p Bentley*"). With the maturation of the English legal system, and increased recourse to appellate courts in criminal cases, the prerogative of mercy diminished in importance. Further, with the constitutional shift from an absolute

monarchy to a constitutional monarchy, the monarch by constitutional convention acts on the advice of the Cabinet: *Yong Vui Kong v AG* (above, para 1.1) at [25]–[26]. English courts have resisted reviewing the prerogative of mercy on the basis of its subject-matter. As Denning MR noted in *Ex p Bentley* at 360, the principal State Secretaries exercise this power and advise the Queen "with the greatest conscience and good care", assuming "full responsibility" for the manner of its exercise. The House of Lords in *Council of Civil Service Unions v Minister for Civil Service* [1985] 1 AC 374 ("*CCSU*") while holding in principle that prerogative powers could be reviewed, were hesitant to extend this to the prerogative of mercy, given its nature and subject matter, as it involved policy considerations and not "the kind of evidence that is admissible under the judicial procedure", which entailed "a balancing exercise which judges by their upbringing and experience are ill-qualified to perform": Lord Diplock in *CCSU* at 411. It was thus "not amenable to the judicial process": Lord Roskill in *CCSU* at 418.

1.62 Chong J referenced *De Smith's Judicial Review* (Sweet & Maxwell, 6th Ed, 2007), which identified three sorts of decisions that courts have considered they lacked institutional competence to review. First, matters relating to preference which lack an objective standard; second, in matters requiring expertise that judges do not possess and lastly, polycentric matters featuring prominently in matters involving resource allocation: *Yong Vui Kong v AG* at [29]. Without identifying which category the prerogative of mercy might fall into, Chong J concluded that in England, the pardoning power was not justiciable, as the Home Secretary enjoyed absolute discretion under the principle of responsible government. This is consonant with the English understanding of the separation of powers under the Westminster model of government.

1.63 Similarly, the New Zealand courts currently see "no pressing reason" to alter the current position by extending judicial review to the exercise of pardoning powers of the Governor-General, while recognising this power had become an important constitutional safeguard within the criminal justice system against mistake. While the Court of Appeal in *Burt v Governor-General* [1992] 3 NZLR 672 at 683 recognised the general role of the court "to extend the scope of the common law review if justice so requires," the existence of various safeguards against miscarriage of justice meant that there was no perceived need at present for the courts to review pardoning powers: *Yong Vui Kong v AG* at [33]–[34]. The Australian position is similar, as stated in *Horwitz v Connor* (1908) 6 CLR 38. Further, the Australian Capital Territory Court of Appeal in *Eastman v Australian Capital Territory* [2008] ACTCA 7 cautioned against the view express in *Burt v Governor-General* to the effect that pardoning power had become part of the criminal justice system as "adopting such an interventionist view"

would be a departure from the "received views" on the separation of powers which had emerged over the past 300 years: *Yong Vui Kong v AG* at [38].

1.64 Chong J noted that the Malaysian cases would be "both essential and helpful" since Art 22P originated from Art 42 of the Malaysian Federal Constitution: *Yong Vui Kong v AG* at [39]. The relevant cases characterised the pardoning power as an executive act which took into account public policy considerations in exercising the power: *Sim Kie Chon v Superintendent of Pudu Prison* [1985] 2 MLJ 385; *Public Prosecutor v Lim Hiang Seoh* [1979] 2 MLJ 170. Further, the Supreme Court in *Superintendent of Pudu Prison v Sim Kie Chon* [1986] 1 MLJ 494 held that natural justice rules did not apply to the clemency process as this would effectively "be countenancing the respondent's participation in the exercise of an executive and prerogative power and virtually reactivating a concluded trial". This was more recently affirmed by the Federal Court in *Juraimi bin Husin v Pardons Board, State of Pahang* [2002] 4 MLJ 529: *Yong Vui Kong v AG* at [44].

Caribbean change: The influence of a regional human rights treaty in importing procedural safeguards into the clemency process

1.65 The position in the Caribbean has recently departed from English practice at common law, which considered pardoning powers to be an act of pure discretion; neither was it previously a practice for any information obtained by the Home Secretary, such as a judge's report, to be disclosed to a condemned man: *de Freitas v Benny* [1976] AC 239 at 247–248. This was confirmed in *Thomas Reckley v Minister of Public Safety and Immigration (No 2)* [1996] 1 AC 527 ("*Reckley No 2*") where Lord Goff highlighted the creation of an advisory committee by the Bahamas Constitution, composed of a minister, the AG and people nominated by the Governor-General, as putting in place adequate safeguards such that there was no need for the courts to supervise the Minister's exercise of discretion.

1.66 However, in 2001, the Privy Council in *Neville Lewis v Attorney-General of Jamaica* [2001] 2 AC 50 ("*Neville Lewis*"), over the dissenting judgment of Lord Hoffmann, committed a volte-face where Lord Slynn, delivering the majority judgment, said the reasoning in *Reckley No 2* should be departed from. He considered there were "compelling reasons" why a body considering a petition for mercy should be required to receive representation from a condemned man, that is, be subject to rules of natural justice. An opportunity to be heard was this man's "last chance" and would enable him to put material before a body, to correct mistakes or false statements, or even, for the courts to investigate an arbitrary or perverse opinion of the Jamaican Privy Council. While the role of the Advisory Committee in *Reckley No 2* was

considered important in protecting the condemned person, the Privy Council did not consider this a conclusive reason for excluding judicial review because it could be composed of persons who had an unconscious bias or there might be an inadvertent gross breach of fairness. Rooting his argument in common law, Lord Slynn (*Neville Lewis* at 78) said that the common law could be used to supplement the Constitution, finding a common law duty to consider representations by a convicted person, that is, to require a person or group of persons exercising pardoning power to consider materials other than a judge's report.

1.67 In coming to this decision, the influence of regional human rights law in shaping the common law was evident, as the Privy Council appeared heavily influenced by Jamaica's ratification of the Inter-American Convention on Human Rights in August 1978. Article 4(6) provides that anyone subject to a death sentence "shall have the right to apply for … pardon". Given this right, Lord Slynn observed that as the death penalty was automatic in capital cases, it was important that a petition for mercy be conducted in a "fair and proper way" (*Neville Lewis* at 78–79), given that the sentencing judge has no discretion despite the fact "the circumstances in which murders are committed vary greatly": *Neville Lewis* at 78–79. Even independent of international human rights treaties, Lord Slynn noted that the death penalty could be dispensed with by dint of the clemency process to provide a just result according to the particular case facts. Aside from this, as Jamaica had ratified the relevant treaty, it was an established interpretative principle that domestic legislation should, as far as possible, conform to a state's treaty obligations: *Matadeen v Pointu* [1999] 1 AC 98 at 114G–114H. The Inter-American Court in its Advisory Opinion OC-3/83 (Restrictions to the Death Penalty), 8 September 1983, at para 55 identified three limitations to states which had not abolished the death penalty – in terms of the gravity of the crime this could apply to, the observance of procedural requirements and certain traits of the defendant – from which Lord Slynn concluded that, apart from the issue of their justiciability, treaty obligations were "a pointer to indicate that the prerogative of mercy should be exercised by procedures which are fair and proper and to that end are subject to judicial review" (*Neville Lewis* at 78–79): *Yong Vui Kong v AG* (above, para 1.1) at [50].

India – Limited review of pardoning powers

1.68 The Indian Supreme Court has considered the possibility that courts would have to consider the suitability of the judicial review of clemency powers "in an extreme situation": *G Krishta Goud v State of Andhra Pradesh* [1976] 2 SCR 73 at 77. It gave as an example the hypothetical case where there was clear evidence of "absolute, arbitrary, law-unto-oneself *mala fide* execution of public power" in the face of

which "the Supreme Court may not be silent or impotent" such as where a President commutes the penalty of convicts belonging to a community acting out of communal frenzy, while refusing commutation for convicts outside that community.

1.69 While acknowledging that constitutional pardoning powers exercised by the President and state governors originated from the English prerogative of mercy, the Supreme Court in *Maru Ram v Union of India* 1981 (1) SCC 107 at 145 noted that this is where their similarities ended. It proceeded on the assumption that all public powers could not be arbitrarily exercised: *Yong Vui Kong v AG* (above, para 1.1) at [57]. It noted that while the content of the constitutional pardoning power was the same as the English prerogative of mercy, "its source and its strength and therefore its functional features and accountability are different": *Yong Vui Kong v AG* at [55]. Since pardoning power had a constitutional source, it was like all public powers subject to judicial review but on limited grounds, such as that of bad faith, fair and equal execution and arbitrariness, which axioms "are valid in our constitutional order". That is, there may be review of the decision-making process but not its merits. Chong J noted that the Indian cases did not consider relevant foreign decisions and seemed motivated by the desire to curb the capricious exercise of pardoning power.

1.70 The Indian Supreme Court in *Maru Ram v Union of India* 1981 (1) SCC 107 underscored at 149 that, on finding a frequent misuse of the power, the court "may have to investigate the discrimination". Chong J concluded that the Indian situation was one "hugely affected by local government politics" and the Supreme Court's reaction to extend judicial review in order to curb abuses, "to limit the grounds on which the powers can be exercised". Quoting from the Supreme Court decision of *Epuru Sudhakar v Government of Andhra Pradesh* (2006) 8 SCC 161 at 169–170, *amicus curiae* Sol Sorabjee had recommended that in light of the frequent grand of pardons in India's current political scenario, it would be appropriate for the court "to lay down guidelines so that there is no scope for making a grievance about the alleged misuse of power".

Article 22P and judicial review to ensure procedural compliance

1.71 While acknowledging that all power had legal limits and that "the rule of law demands that the courts should be able to examine the exercise of discretionary power" (*Chng Suan Tze v Minister of Home Affairs* [1988] 2 SLR(R) 525 at [86]), Chong J pointed out that this did not speak to "the legal limits of a particular power" which had to be examined on a case by case basis, drawing from the relevant constitutional or statutory framework: *Yong Vui Kong v AG* (above, para 1.1) at [62]. With respect to Art 22P, a judicial remedy would lie if

the process set out thereunder was not followed, such as where a judge does not send his report to the Attorney-General or the Cabinet fails to advise the President. Judicial review would lie for procedural irregularities, but this would only be to require the transmission of the relevant report and did not extend to a right for the individual to have access to reports before the relevant bodies. Chong J advocated caution in engaging upon analysis which "moves beyond the plain wording of Art 22P" or implying legal limits to pardoning powers to avoid straying into "illegitimate legislation": *Yong Vui Kong v AG* at [63]. In other words, a literal reading of the text was advocated, to ensure "the power cannot derogate from its nature as evinced from its expressed aspects": *Yong Vui Kong v AG* at [63].

1.72 From his reading of Art 22P, Chong J stated that the terms of the pardoning power "precisely describe the old English practice" where the sovereign exercised the prerogative of mercy on advice of the Cabinet; in addition, advice is taken from stipulated public officials, namely, the Attorney-General and courts. On the face of the text, there were no words "delimiting the substantive grounds" regulating the exercise of Art 22P: *Yong Vui Kong v AG* at [64]. While the Singapore Constitution had located pardoning power from the realm of prerogative powers to that of law, it was clear that a "very wide" discretion was retained for its exercise: *Yong Vui Kong v AG* at [64]. Chong J was fortified in his conclusions by his review of foreign decisions, noting that only Indian and Jamaican courts allowed for the possibility of substantive judicial review with respect to exercises of pardoning power, where gross abuses of power were evident, as in India, or where human rights treaties shaped the belief that the clemency process tempered problems associated with the mandatory death penalty. Such situations did not apply in the Singapore context: *Yong Vui Kong v AG* at [64]–[65].

1.73 Thus, the conclusion was that it was the Cabinet and not the President which exercised pardoning powers, reading Art 22P with Art 21(1). The President did not enjoy personal discretion with respect to this power, nor did the savings clause in Art 21(2)(*i*), which reads that the President may act in his discretion with respect to "any other function the performance of which the President is authorised by this Constitution to act in his discretion" provide a basis for the argument. Article 22P expressly conditions the President's role in the pardoning process as one which rests on following the advice of Cabinet. Second, the allegation of apparent bias as a facet of natural justice was intended to apply to judicial or quasi-judicial bodies, for the purpose of ensuring that public confidence in the administration of justice was maintained by actual and perceptual justice. Conversely, the executive was not so bound and the abuse of executive action would be accountable at the ballot box, as in Singapore's variant of the Westminster system, "the

leaders of the Executive are chosen from the elected ranks of Parliament and … are accountable to the electorate at the ballot box": *Yong Vui Kong v AG* at [76]. The electorate would evaluate the decisions of the Executive, and it was unnecessary "for the court to interpose in this dynamic" that the Executive act in an unbiased fashion, from the perspective of the hypothetical fair-minded person. It is worth noting that electoral accountability is a weak and blunt check in the current Singapore context, given the nature of the dominant party state and the fact that the Republic has yet to experience political turnover since Independence. This may make the check of the ballot box more fanciful than real at present, though political contexts are not immutable. In observing that Art 22P power begins "when the judicial process has ended", Chong J distanced his decision from the trends in certain foreign jurisdiction to view or treat the clemency process as part of the judicial administration of justice, or at least to impute a quasi-judicial quality to the process. Article 22P did not provide substantive criteria to regulate the exercise of the discretion which could be exercised "on wide ranging grounds of policy": *Yong Vui Kong v AG* at [78]. Owing to the lack of judicial standards, Chong J opined that "it might well be impossible to articulate a justiciable conception of proper behaviour against which any exercise or non-exercise of the power can be said to be apparently biased": *Yong Vui Kong v AG* at [78].

1.74 With respect to the point about predetermination, Chong J recognised that generally, holders of public power must not fetter their discretion. The Cabinet has to "subjectively consider the materials" Art 22P prescribed, that is, have actually considered the matter, not delegated elsewhere or not exercised its discretion; that said, Chong J noted that there are no objective criteria on which to base review; even if substantive review availed, there was nothing "objectionable or irrational" about the policy against drug-trafficking articulated by the Minister, alluding to the standard of *Wednesbury* unreasonableness recognised as a ground of administrative review. The basis for seeking clemency was Yong's youth/age and notably, the Cabinet had advised the President to reject the petition six months before Minister Shanmugam made his statement: *Yong Vui Kong v AG* at [80]. The second petition would rest on essentially the same grounds, thus precluding predetermination on the facts. It could not be inferred from the Minister's statement, reiterating extant government policy, that the Cabinet will not subjectively consider Yong's second petition: *Yong Vui Kong v AG* at [80].

1.75 Finally, Yong had no substantive right to see materials before the Cabinet, as opposed to seeking discovery of these materials. Chong J distinguished the decision in *Neville Lewis* (above, para 1.66) asserting that the Privy Council had failed to distinguish between a substantive right to information and discovery of relevant evidence so the court can

investigate allegations of arbitrary process, where it would be arguable that discovery 'should lie as of right and as a matter of procedure": *Yong Vui Kong v AG* at [82]. That is, access to evidence flows from breach of an independent right. On the facts, there was no breach of any other right and so the sole possible juristic basis for a right to information "is that such a right is a corollary to a larger duty to act judicially in coming to a decision": *Yong Vui Kong v AG* at [82]. Since pardoning power is an executive power, no duty to act judicially applied. Further, Chong J found support for his analysis with respect to the character of pardoning power, in the framing of the "highly private process" under Art 22P, by which "the relevant materials ultimately come before the Cabinet", noting that in terms of sequence, the court reports were first prepared and the courts themselves had no access to the Attorney-General's opinion or the Cabinet's advice. The text determined the boundary between executive/judicial power.

1.76 In sum, judicial review only lies with respect to non-compliance with the requirements of Art 22P read narrowly. No non-textual standards of fairness, whether procedural or substantive, apply. In the absence of a textual right to make representations, drawing strength from the decision in *Reckley No 2* (above, para 1.65), a condemned man may make representations which the relevant decision-makers may have regard to, but no right to insist that these representations be considered.

Article 14 (freedom of speech and assembly)

1.77 Restrictions on Art 14 imposed by two statutes, the Public Entertainments and Meetings Act (Cap 257, 2001 Rev Ed) ("PEMA") and the Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Rev Ed) were challenged in various cases, raising issues of state regulation of political freedoms. The courts have yet to develop a robust scheme of evaluating Acts of Parliament which restrict fundamental liberties in terms of an adjudicatory approaches which balance competing liberties and their limits in a manner which optimises these competing considerations rather than merely pay lip-service to "balancing" without actually undertaking any sustained evaluation of the constitutionality of an Act or action pursuant to it.

1.78 In *Public Prosecutor v Chee Soon Juan* [2010] SGDC 298 ("*Chee Soon Juan*"), what was at stake was not the constitutionality of PEMA which the High Court had previously affirmed, but the policy and exercise of discretion under PEMA.

1.79 The case itself concerned two opposition politicians who were charged under s 19(1)(*a*) of the PEMA for acts committed in April 2006. This Act provides that it is an offence for any person who "provides or

assists in providing any public entertainment" without a licence. As defined in the PEMA Schedule, "public entertainment" was then capaciously defined to encompass not only acts of singing, dancing, but also "any lecture, talk, address, debate or discussion in any place to which the public or any class of the public has access whether gratuitously or otherwise" under s 19(1)(*m*). This limb has since been deleted by Act 15/2009, which came into effect on 9 October 2009.

1.80 The parties in question had set up tables, placed a banner bearing the name of the Singapore Democratic Party and distributed flyers at a neighbourhood centre in Bangkit Road, which was a place to which the public had access. One of them, Yap, spoke into a microphone, as was observed by some police officers who were present in response to a call by an unidentified member of the public. After Yap was administered a warning for delivering a speech without a licence (*Chee Soon Juan* at [12]), he responded that he was selling newsletters for which he had a publication licence and was not providing public entertainment in the form of an "address." He had modelled his sales pitch after the activities of "a person offering items for sale", such as a person selling pots and pans at a neighbourhood centre or a bank soliciting credit card applications: *Chee Soon Juan* at [19]. He asserted that he was not delivering a speech, in the absence of a stage or rostrum, captive audience or planned content. He had done so purposefully in order to avoid infringing PEMA: *Chee Soon Juan* at [19]. Chee argued that any words he uttered were merely to further the sales of the publications to raise fund for the SDP's election expenses, while accepting that the contents of the publication itself amounted to "campaigning": *Chee Soon Juan* at [21]. He further argued that as a speech is normally planned, and as no such plans existed, his words did not amount to a "speech": *Chee Soon Juan* at [21].

1.81 District Judge Jill Tan Li Ching noted that the law on s 19(1)(*a*) of the PEMA was "settled" (*Chee Soon Juan* at [22]) and that the statutory meaning of "public entertainment" was wider than its ordinary meaning, to be determined by its "form and content" rather than nature or purpose: *Chee Soon Juan* at [22]. The offence was one of strict liability: *Chee Soon Juan* at [24]). In other words, the "trappings of formality", duration of the speech, size of the audience and whether a speech had been planned in advance was not determinative on whether a speech constituted an address within the terms of PEMA: *Chee Soon Juan* at [34]. Following the High Court's holding in *Jeyaretnam Joshua Benjamin v Public Prosecutor* [1989] 2 SLR(R) 419 at [11], [14] and [15], an activity to fall within the ambit of PEMA had to be "directed at the public; in the sense of procuring their involvement whether actively or passively": *Chee Soon Juan v Public Prosecutor* [2003] 2 SLR(R) 445 at [13]. On the facts of the case, District Judge Tan found that members of the public were involved in the activity as they responded to what was

said by buying the publication and stopping to listen: *Chee Soon Juan* at [38]. In addition, the words spoken by Yap and Chee went beyond attempts to encourage the purchase of publications but also sought "to engage their listeners on matters such as discontent with the government and the importance of voting": *Chee Soon Juan* at [38]. Yap had referred to persons "in white shirts and white trousers" who "suck our blood to pay their salaries", which went beyond what District Judge Tan considered "mere 'sales talk'": *Chee Soon Juan* at [42]. In totality, such words constituted an "address" within the terms of PEMA.

1.82 Yap also stated that he did not apply for a public entertainments licence "as he knew he would not be granted one": *Chee Soon Juan* at [20]. Presumably, this related to knowledge of a police policy not to grant licences for outdoor activities of all political parties, stemming from a statement by the Senior Minister of State for Home Affairs in Parliament in 2008: *Chee Soon Juan* at [29]. To Chee's argument that this policy was unconstitutional, District Judge Tan noted that this was "a non-starter" as the "mere existence" of a policy could not in itself be unconstitutional, that is, it had to be expressed in subsidiary legislation or applied in a particular case before it raised an issue the courts could take cognisance of: *Chee Soon Juan* at [31]. As neither Yap nor Chee had applied for a licence under PEMA, there was no instance of the exercise of police discretion which fell to judicial examination, though the non-issue of a licence was justiciable. District Judge Tan further observed that the policy was not unreasonable as it was not a blanket ban in so far as it did not apply to indoor activities (*Chee Soon Juan* at [31]); this observation reflects a cursory balancing of competing interests, a matter which was not strictly at issue.

1.83 The scope of the freedom of assembly was at issue in the case of *Public Prosecutor v Chong Kai Xiong* [2010] 3 SLR 355 ("*Chong*"), where the High Court addressed the issue of whether r 5 of the Miscellaneous Offences (Public Order and Nuisance) (Assemblies and Processions) Rules (Cap 184, R 1, 2000 Rev Ed) ("the Rules") was violated on the facts in a manner which largely "de-constitutionalised" the issue. Rule 5 provides that "[a]ny person who participates in any assembly or procession in any public road, public place or place of public resort shall, if he knows or ought reasonably to have known that the assembly or procession is held without a permit, or in contravention of any term or condition of a permit, be guilty of an offence and shall be liable on conviction to a fine not exceeding $1,000." The High Court overturned the finding by the trial judge that r 5 had not been breached on the basis that the activity in question did not constitute a "procession" within the meaning of the Rules or its parent Act.

1.84 Here, one of the respondents made a bare assertion rather than "a reasoned argument" (*Chong* at [13]) to the effect that the Rules were

ultra vires the Constitution. Choo Han Teck J was content to observe that "constitutional rights never create unbridled rights because the rule of law requires protection of the law to be extended to all and civil liberties cannot be very civil if in exercising them one disturbs the peace others enjoy": *Chong* at [13]. This is a truism and it is hoped that there will be future occasion for the judiciary to address this issue and to articulate criteria by which one may assess when government restrictions on fundamental liberties is permissible and when it is legitimate. In *Chong*, Choo J observed cursorily that the Minister "had not assigned himself unfettered rules in drawing limits to the right of assembly and procession" as he stated that the "extent and boundaries" as set out in rr 2 and 5 of the Rules set out "fair and adequate" limits: *Chong* at [13]. Another unargued assertion was made to the effect that the police "had already resolved never to issue a permit". If this has been argued and proven on the facts, it might be an instance of administrative malfeasance in so far as it entailed a fettering of discretion; however, this issue did not arise in the present case as this argument was not raised by the respondents.

1.85 The District Court had, by reference to dictionary definitions of "procession" held that, on the facts, the activity in question did not constitute a procession. This related to a gathering of people at Hong Lim Corner on 16 September 2007, five of whom wore T-shirts with the slogans "Democracy Now" and "Freedom Now" who were joined by various people during the course of the activity, which took the group to various places including Parliament House, the Istana front, ending at Queenstown Remand Centre. Clearly, five persons at least were involved, the activity took place in public and its motive was to commemorate the first anniversary of the protest against the World Bank and IMF on 16 September 2006. It was so advertised on the website of the Singapore Democratic Party. What was a matter of contention was whether the "walk", which was at times disrupted by toilet breaks, constituted a "procession" for the purpose of the Rules.

1.86 Choo J differed from the finding by the trial judge that the activity did not constitute a procession, with the trial judge focussing on the finding that "the group did not attract any significant attention of the public while walking" (*Chong* at [7]) and that they did not carry the usual placards or banners that accompany a protest march. In addition, the trial judge found that the walk itself did not disrupt traffic and "proceeded without a sustained formation": *Chong* at [8]. The trial judge was influenced by two primary factors. First, the manner of conducting the "walk" – which entailed walking off the street and observing pedestrian signal controls. He considered that as this was not formal or structured, it did not constitute a "procession" for the purposes of r 5 of the Rules. Second, the walk itself was not disruptive,

that is, did not contravene public order and thus, r 5 had not been breached.

1.87 However, Choo J in characterising the issue of what constituted a procession under r 5 of the Rules as "a question of mixed fact and law" (*Chong* at [12]), laid emphasis on different factors on a consideration of "the totality of ascertained facts": *Chong* at [12]. First, he took a broader approach towards defining "procession". Choo J found that r 5 did not necessitate that a procession be a formal one and that dictionary definitions of "procession" as well as foreign case law were not helpful, noting the reluctance of other courts to define "procession": *Chong* at [12]. In the Singapore context, what was highly significant was that the relevant statute and their implementing rules specifically enumerated the relevant number of people which rendered a gathering of people a "procession": *Chong* at [9]. This provided a numerical threshold of five which had to be satisfied on the facts.

1.88 In addition, he found that it was unnecessary that the group march "in a fixed and structured formation" noting that the impression of a "organised, orderly and structured formation" differed according to whether five or 100 people were involved. Second, r 5 of the Rules could be breached even if no public disorder was caused. This was because r 5 was an "anticipatory" or "pre-emptive" rule. As such, it was not necessary to prove actual disruption or nuisance "whether by way of attracting the attention of members of the public or impeding pedestrian or vehicular flow." Whether or not a procession would or would not cause public disorder was a "risk factor" (*Chong* at [12]) which the police were to take into account when assessing whether or not to issue a permit. The type of assembly or procession which would fall within the ambit of r 5 were those "designed to attract public attention to a cause as may give rise to a public disturbance or nuisance", underscoring that "political or popular causes" were more likely to fall within this category. Thus, the subjective intent of the organisers of a procession was paramount, and the test was "whether the organisers and participants intended to attract public attention, not whether they had succeeded or not": *Chong* at [11]. Choo J found that, on the facts, the procession and the "degree of planning" that went into it made it "precisely a matter for the police to decide whether a permit should be issued or not": *Chong* at [11]. Here, the procession was for a political purpose and the respondents knew about the requirement of obtaining a permit: *Chong* at [11].

1.89 Furthermore, even if it was a "trouble-free" procession, this was still "a risk factor" for the police to consider in evaluating applications for a permit. Thus, even if the organisers planned to hold a peaceful procession, the police still had to decide whether this would give rise to public disorder since such processions could turn violent not because of the actions of the participants, but the reactions of spectators, that is,

the crowds gathering to observe the event: *Chong* at [11]. That is, public disorder could be caused either by the participants in the procession or by spectators and the police had to assess the risks, bearing in mind the circumstances of the particular case. In particular, Choo J observed that given the degree of planning "already in place" (internet posting advertising the event, the selected use of T shirts with messages, the route chosen and pamphlets distributed), this was an occasion where a permit ought to have been sought, which Choo J distinguished from the merits of the question whether a permit would be given: *Chong* at [11]. The organisers and participants could only assume that no permit was necessary "at their own risk": *Chong* at [11]. In other words, as this was a planned procession, involving more than five people in a public place, r 5 of the Rules was breached as the respondents knew of the need for a permit yet proceeded with the procession without one.

1.90 Essentially, this reduces the constitutional right to assembly to a licence to be granted by the police in their discretion, after assessing public order considerations. While no right is "unbridled" (*Chong* at [13]), the issue is whether judicial review is a sufficient check on the exercise of this discretion, that is, whether there are clear factors the police have to take into account in evaluating public disorder threats and whether these are challengeable. It would appear that administrative review is available although no such challenges were mounted in this case.

Contempt of court

1.91 Fourteen passages in self-described British journalist Alan Shadrake's book, *Once a Jolly Hangman: Singapore Justice in the Dock* (Petaling Jaya, Malaysia: Strategic Information and Research Development Centre, 2010) were the subject of contempt of court proceedings in *Shadrake Alan* (above, para 1.1). The relevant passages were said to scandalise the judiciary on various grounds, including allegations of bias against the weak, poor or less educated and that the courts were a tool used by the ruling People's Action Party to muzzle political dissent.

1.92 In a thorough judgment, Quentin Loh J reviewed the existing law on contempt of court which was contained in nine reported High Court decisions spanning from 1967 to 2009, the latest being the decisions of *AG v Hertzberg Daniel* [2009] 1 SLR(R) 1103 ("*Hertzberg*") and *AG v Tan Liang Joo John* [2009] 2 SLR(R) 1132 ("*Tan Liang Joo*"). In concluding that the Singapore authorities were not settled on the issue of what degree of risk an allegedly contemptuous statement had to have, Loh J restated the common law test as being that of requiring a "real risk" rather than "inherent tendency" that the expression in question would erode public confidence in the administration of justice.

1.93 An argument asserting that the Art 14 free speech guarantee mandated the adoption of the "real risk" test was given short shrift as it was not accompanied by "properly focused argument" such that Loh J declined "to enter into constitutional exposition": *Shadrake Alan* at [58]. He noted that there was no argument that scandalising the court was itself unconstitutional, noting that most cases held that the "real risk" test, together with the defence of fair criticism, was a "reasonable limit" on freedom of speech, nodding to the need to strike "some kind of balance" between free speech and contempt, with a minimal requirement being that "neither can be defined in such a way that renders the other otiose": *Shadrake Alan* at [57].

1.94 Considerable effort was expended in canvassing leading decisions from the United Kingdom, New Zealand, Australia and Hong Kong (*Shadrake Alan* at [7]–[10]) to underscore the point that the purpose of contempt laws were designed to serve the public interest by preserving public confidence in impartial courts, integral to social stability and the survival of a civilised community. Emphatically, contempt laws were not designed to protect the "personal dignity and sensibilities of judges", applying only to the judge *qua* judge rather than in his personal capacity: *Shadrake Alan* at [12]. Loh J observed that the courts and public shared a "symbiotic" relationship predicated on the public's "active interest and trust in the administration of justice", such that *sans* public confidence "the laws administered by the courts cease to embody the collective will of the community; the force of law gives way to the law of force": *Shadrake Alan* at [16]. He observed that judges did not claim "infallibility", echoing (*Shadrake Alan* at [17]) the Chief Justice's extra-judicial observation that there are "learned judges and less learned judges" (quoting from Chan Sek Keong CJ, "Securing and Maintaining the Independence of the Court in Judicial Proceedings" (2010) 22 SAcLJ 229 at 244, para 30). Neither did judges entertain the "naïve conceit that confidence in the courts was to be maintained by sanctioning those who criticise the courts", correctly observing that "unmerited punishment results in derision and resentment": *Shadrake Alan* at [18]. He considered that public confidence in the courts ultimately resided in judges acting impartially and upholding their constitutional oath to discharge the functions of their office without fear or favour. Nonetheless, as Singapore judges followed the British practice of demonstrating restraint in response to criticism, the offence of scandalising the judiciary had the utility of providing the Attorney-General in his capacity as guardian of the public interest with the method "to bring to task those who make dishonest, unwarranted or baseless attacks" which would impair confidence in the judiciary "if left unchecked": *Shadrake Alan* at [19]. Nonetheless, the need to achieve a balance was recognised in so far as the offence was to be "exercised scrupulously" to avoid "unduly restricting public discussion on the administration of justice": *Shadrake Alan* at [19]. Criticism was to be

directed at judgments, rather than "the denigration of judges": see CJ Chan, "Securing and Maintaining the Independence of the Court in Judicial Proceedings" (2010) 22 SAcLJ 229 at 240, para 21).

1.95 In reviewing both local and foreign cases, Loh J concluded that the Singapore authorities were neither clear nor settled, such that recourse had to be had to "first principles and policy considerations" to decide what the test should be. He identified at least three possible approaches. Firstly, the acceptance of the "real risk" test by Singh J in *Re Application of Lau Swee Soong; Lau Swee Soong v Goh Keng Swee* [1965–1967] SLR(R) 748 which approved *R v Duffy; Ex p Nash* [1960] 2 QB 188 (*Shadrake Alan* at [42]), but which was rejected in *AG v Wain* [1991] 1 SLR(R) 85 ("*Wain*"). Second, the reliance in some cases such as *Wain* and *Tan Liang Joo* (above, para 1.92) on *R v Gray* [1900] 2 QB 36 which *Badry v Director of Public Prosecutions* [1983] 2 AC 297 ("*Badry*") interpreted as requiring the consideration of the potential effect of the impugned publications in the circumstances in which it was published. Last, the test of "inherent tendency", adopted in *Wain*, which required a consideration of the "potential effect" of the publication or "the circumstances that obtained at the time of the impugned publication", as noted in *Tan Liang Joo*: *Shadrake Alan* at [42].

1.96 Loh J traced back the origins of the "real risk" test to the 1960 English decision of *R v Duffy; Ex p Nash* [1960] 2 QB 188 (*Shadrake Alan* at [24]), as distinct from a "remote possibility"; the former test was affirmed by Lord Reid in *Attorney-General v Times Newspaper* [1974] 1 AC 273 at 298–299, who stated that if there was a "serious risk" that an article would influence the decision of a court, "some action might be necessary": *Shadrake Alan* at [25]. Thus, the gravity of the risk was a relevant factor for the court to consider in exercising its discretion whether to inflict punishment for contempt. From this, Loh J drew out the importance of "context" in determining "the effect of the publication" (*Shadrake Alan* at [25]) such that what might scandalise the court in one jurisdiction would have a dissimilar effect in England. In support of this, Loh J drew attention to the Privy Council appeal from Mauritius in *Badry* where the Privy Council considered the Mauritian Supreme Court better positioned to understand the meaning of several publications having "knowledge of the conditions local to Mauritius and the nuances of the Creole expressions". Thus, in assessing whether a publication was "calculated to bring a judge of a court into contempt or to lower his authority", as formulated by Lord Russell CJ in *R v Gray* [1900] 2 QB 36 at 40, the "actual or potential effect of the words" had to be examined "in light of the conditions and context in which they were uttered". The Mauritian test for contempt is also that of requiring a "real risk" (*Ahnee v Director of Public Prosecutions* [1999] 2 AC 294 at 306): *Shadrake Alan* at [29].

1.97 Loh J, in examining the content of the "real risk" test, referred to various commonwealth approaches under which "real risk" was contrasted with "a remote possibility" (New Zealand: *S-G v Radio Avon Ltd* [1978] 1 NZLR 225 at 234), and where it entailed "a good chance as opposed to a mere possibility" (Hong Kong: *Secretary for Justice v Oriental Press Group Ltd* [1998] 2 HKC 627 at [55]). The Hong Kong Court of First Instance also identified various factors in assessing the gravity of the risk, including the nature of the act, language used, whether the publication targeted a specific decision or the judiciary in general; in addition, it departed from the Canadian approach in *R v Kopyto* (1988) 47 DLR (4th) 213 at 263 which considered the effect of the criticism on the "hypothetical reasonable man"; instead, the test was pegged to the "irrational man", that is, whether confidence in the administration of justice was undermined "in the eyes of the person who does not address issues rationally". The Hong Kong court phrased the requirements of the real risk test thus: "was there a real risk that the acts complained of would undermine confidence in the due administration of justice in the minds of at least some of the persons who were likely to become aware of the publication or the acts complained of?" Further, Australian courts, while being careful not to use contempt powers to "assuage the hurt feelings of judges", had to be cognisant of the new reality of dealing with organised campaigns against judicial integrity, fuelled by "the means of mass communications provided by desktop publishing and the Internet." Eames J in *R v Hoser and Kotabi Pty Ltd* [2001] VSC 443 at [55] noted that judges "should not be so anxious to demonstrate their robustness and lofty disregard for trenchant criticism that they fail to recognise that a concerted campaign against the integrity of the courts", even if it employed "patently absurd arguments" could "damage the reputation of the courts" if left unanswered.

1.98 The "inherent tendency" test was first articulated in Singapore by Sinnathuray J in *Wain* (above, para 1.95) at [54] in a passage (quoted below) which was subsequently relied upon. This passage was considered by Loh J to be "unhappily worded" (*Shadrake Alan* at [33]) as it had caused confusion and had later "developed a life of its own" (*Shadrake Alan* at [34]) through its subsequent judicial endorsement:

> [I]t is not a requirement of our law, as was submitted by Mr Robertson, that in contempt proceedings it must be proved that the publication constitutes a real risk of prejudicing the administration of justice. *In my judgment, it is sufficient to prove that the words complained of have the inherent tendency to interfere with the administration of justice.* But, of course, this must be proved beyond a reasonable doubt. [emphasis added]

1.99 Loh J identified two points of disquiet, while observing that Sinnathuray J cannot have meant either of these things. First, the

passage referred to the wrong specie of contempt, that is, *sub judice* contempt which is concerned with interference in the administration of justice, whereas scandalising the court addressed issues of public confidence in the judiciary. Second, the use of "inherent tendency" seemed to confine the court to examining the words used in the impugned publication alone. Loh J doubted that *Wain* (above, para 1.95) was authority for this proposition (*Shadrake Alan* at [36]), which had been applied in *Hertzberg* (above, para 1.92) in relation to what such words would convey to "an average reasonable reader" in relation to alleged judicial wrongdoing: *Shadrake Alan* at [38].

1.100 The court in *Hertzberg* had identified what it considered to be two advantages of the "inherent tendency" test, that is, that it did not require detailed proof that public confidence in the administration of justice was really impaired and that it allowed the courts to step in pre-emptively before the damage is caused, citing from the Australian Law Reform Commission's Report No 35, "Contempt" (Australian Government Publishing Service: Canberra, 1987). This same report at para 431, as Loh J discussed at *Shadrake Alan* at [39], had been critical of the vagueness of the inherent tendency test, as it left unclear "how substantial the tendency must be", which had to be more than "a remote possibility of harm" but "somewhat less than a 'real risk'". Loh J stated that the report's view that an inherent tendency was somewhat less substantial than a real risk was unsupported by case law (*Shadrake Alan* at [39]) such that it was unclear why the court in *Hertzberg* rejected the "real risk" test; Loh J also considered that the articles in question in *Hertzberg* would have satisfied the "real risk" test, further underscoring the view that there was no significant difference between the "inherent tendency" and "real risk" tests as both engaged a contextual approach towards all case circumstances. So too, the concerns concerning the need for proof or the ability to take action before the harm occurs could, Loh J considered, be met by "a test which includes the potential and not merely the actual effect of the impugned conduct": *Shadrake Alan* at [47]. He also felt led to comment on a hypothetical raised in *Hertzberg* concerning drunken rants at a dinner party concerning judicial bias, observing that it would be an "overzealous judiciary" which would consider such rants as undermining public confidence in the administration of justice, where no one takes the rants seriously: *Shadrake Alan* at [47]. This gives some credit to the discernment of the hearers and the lack of effect of such conduct on their confidence in the judiciary, and is to be welcomed.

1.101 Even if the "inherent tendency" test was applied by Judith Prakash J in *Tan Liang Joo* (above, para 1.92) at [12], context remained relevant; an act would have an "inherent tendency" if it conveyed to the average reasonable reader an allegation of impropriety in the exercise of judicial function (*Shadrake Alan* at [41]), understood against the

circumstances "obtained at the time of the act or words". Although Prakash J references paragraphs [61]–[64] of *Wain* as authority for this proposition, those paragraphs, as Loh J observed, "contained no such words": *Shadrake Alan* at [41]. According to Loh J, both Sinnathuray J in *Wain*, by referring to the context of the impugned publication, and Prakash J in *Tan Liang Joo*, by noting the wearing of kangaroo court T-shirts in the vicinity of the Supreme Court, incorporated a consideration of context in assessing whether the relevant expressions scandalised the court: *Shadrake Alan* at [41].

1.102 Loh J noted that Sinnathuray J had in fact adopted a contextual approach in assessing the potential effect of the criticism and in considering various factors besides the words in the publication, including the nature of the newspaper as a financial paper; its international reputation; its authorship by the president of a major American organisation and the fact that the impugned decision was at that time subject to saturation coverage in the local media. However, a third point found that Sinnathuray J was "plainly wrong" (*Shadrake Alan* at [33]) in drawing a distinction between pre- and post-1981 English authorities, on the basis that post-1981 cases were not applicable in Singapore, as they were based on the Contempt of Court Act (c 49) (UK), which Act did not in fact regulate the common law offence of scandalising the court.

1.103 In delimiting the rationale of contempt, Loh J rejected the view that conduct "which has no actual or potential adverse effect" on public confidence in the judiciary (*Shadrake Alan* at [44]) could provide a ground for intervention. In other words, there must be some evidence of a harmful effect on public confidence; it cannot be purely speculative. Loh J in discussing the policy considerations approved of two factors which had been highlighted in previous decisions. First, Loh J found relevant the fact that Singapore judges were triers of both fact and law, which could be accommodated in considering the effect of the impugned conduct: *Shadrake Alan* at [45]. Second, he accepted that the small size of Singapore was a relevant factor in reflecting a greater need for the offence of scandalising the court, as he argued mathematically, *ceteris paribus*, the same conduct would have a greater actual or potential effect "in a jurisdiction with a smaller bench, a smaller population and a smaller land area": *Shadrake Alan* at [46]. This had been considered a relevant factor in Mauritius as well as Hong Kong in *Wong Yeung Ng v The Secretary for Justice* [1999] 3 HKC 143, where the "real risk" standard was applied, while the court noted (at [55]) the relevance of size, in so far as communication with the population was easy, open judicial proceedings were widely publicised and many judges were known by name because of this reporting: *Shadrake Alan* at [46]. At base, the policy considerations for scandalising the court required a test "which is based on the potential adverse effect of the impugned

conduct, as assessed in the circumstances": *Shadrake Alan* at [48]. What passes the threshold of "potential" is not self-evident but Loh J said that this could not be "remote or fanciful" as the law "does not concern itself with trifles": *Shadrake Alan* at [48].

1.104 While doubting that there was a "significant difference" (*Shadrake Alan* at [49]) between the "real risk" and "inherent tendency" test, and that cases applying the latter test would have satisfied the former (*Shadrake Alan* at [51]), Loh J preferred the "real risk" formulation, in justifying contempt laws which derogate from free speech guarantees, even while underscoring that the "inherent tendency" test required assessing the effect of the impugned publication in the context in which it was made. This is because the "inherent tendency" test had given rise to misunderstanding and controversy as its literal meaning had obscured "the fact that a contextual analysis is actually required": *Shadrake Alan* at [50]. This is because the word "inherent" was commonly understood to refer to something intrinsic, precluding a consideration of extrinsic factors. At times too, the test had appeared to capture publications which had no potential effect on the public confidence in the administration of justice. Thus, the "real risk" test better conveyed to laymen and lawyers "what the law is concerned with".

1.105 Loh J in clarifying the nature of the "real risk" test identified four relevant factors, to assist in delimiting its contours. First, the gravity of the risk. A real risk was more than a *de minimis* "remote or fanciful risk" and less than a "serious or grave risk"; it "must have substance, but need not be substantial": *Shadrake Alan* at [51]. It was unnecessary to show an actual undermining of public confidence but clearly, a bare allegation or baseless speculation did not sufficiently justify the restraint on speech. Second, there had to be some evidential basis in assessing real risk, which was to be assessed as an "objective question of fact" (*Shadrake Alan* at [52]) bearing in mind factors such as the author, nature of the publication, scope of its dissemination and other local conditions. While this acknowledges that remote risks should not be protected as this would too severely restrict free speech, a contextual test lacks determinacy as it depends much on case circumstances.

1.106 In terms of applying the "real risk" test to the instant case, Loh J highlighted the "important consideration" that Singapore was "a small, crowded multiracial and multi-religious nation where information travels rapidly" and where social tensions could rapidly escalate: *Shadrake Alan* at [52]. Drawing from the cases examined, Loh J identified four factors relevant to the context. First, whether the hearers or receivers of the publications were to be treated as the average reasonable person or someone "less rational" was not fixed as "the appropriate reference point depends on the facts of the case": *Shadrake*

Alan at [52]. Second, with an eye to practical realities, the court was to consider what would happen if the impugned publication was left unchecked. Third, the degree of authority or creditibility the author or publication has or claims to possess; and last, the fact that Singapore judges tried both questions of fact and law: *Shadrake Alan* at [52].

1.107 The third factor with respect to the nature of the real risk test was the potential effect of the publication on public confidence in the administration of justice; the judge's own attitude towards an allegedly contemptuous publication, is irrelevant, whether the judge takes a more liberal attitude towards the publication or is personally outraged by it: *Shadrake Alan* at [53]. Fourth, the requirement for real risk while wide, was "not illusory": *Shadrake Alan* at [54]. This excluded the application of contempt laws from publications which did not pose the slightest risk to the public confidence: *Shadrake Alan* at [54]. Notably, Loh J did not directly comment on the point raised by counsel for Shadrake, M Ravi, in urging that the "real risk" test be adopted, as Singapore society was now "more mature and more educated": *Shadrake Alan* at [3]. One might note that the Privy Council had, in the 19th century decision of *McLeod v St Aubyn* [1899] AC 549 at 561 observed – it turns out inaccurately – that contempt of court was increasingly redundant though there was utility in retaining it "in small colonies, consisting principally of coloured populations" as it may be "absolutely necessary to preserve in such a community the dignity of and respect for the Court." The implication is that courts required greater protection from criticism with respect to an uneducated population which lacked discernment.

Defences to scandalising the court as an aspect of balancing

1.108 Loh J recognised that contempt laws represented "a significant restriction of free speech", and that the common law defence of fair criticism represented a limit on this restriction, as judges were "to suffer the scrutiny and respectful, even though outspoken, comments of ordinary men": Lord Atkin in *Ambard v AG of Trinidad and Tobago* [1936] 1 AC 322 ("*Ambard*") at 335. He noted that "even at common law" (*Ambard* at [59]), protecting public confidence in the administration of justice had to be balanced against free speech. A defence against allegedly contemptuous speech reveals the nature of the balance between free speech and preserving public confidence in the administration of justice.

1.109 Under Singapore law, the only defence to the offence of scandalising the court is that of fair criticism, that is, criticism is fair where accompanied by "reasonable argument": Lord Russell CJ in *R v Gray* [1900] 2 QB 36 at 40. There is no defence of "justification" or "fair comment", such as that available under defamation law, with the reasons

being well-rehearsed in *Chee Soon Juan* (above, para 1.78) at [45]–[48] and *Hertzberg* (above, para 1.92)at [23], as Loh J noted in *Shadrake Alan* at [60]. He reviewed decisions from Australia and Mauritius (*Shadrake Alan* at [63]–[66]) which considered that the mere imputation of improper judicial motives was not itself contemptuous; these contemplated the possibility that the truth of a statement concerning judicial impropriety which served the public benefit – even if its effect would be to deprive a judge of public confidence – would be entitled to legal protection if it was a fair comment: *Shadrake Alan* at [63].

1.110 In addition, the UK Committee on Contempt of Court which Lord Philimore chaired considered in its Report (Cmnd 5794) (HMSO, 1997) that justification should be a defence where a statement served the public benefit. Truth alone should not be a defence, as an irresponsible publication concerning "some damaging episode from a judge's past" could be "calculated to cast doubt upon his rightness to try a particular case or class of cases": *Shadrake Alan* at [66]. In addition to truth, the publication had to be shown to serve the public benefit with the proviso that one who believes in judicial impartiality or corruption should take steps to submit the issue to the proper authority with the power to remove judicial officers.

1.111 In evaluating the competing policy considerations, Loh J considered that a true statement of fact would not be regarded as contemptuous as it served the public interest "that judicial impropriety should be brought to light". He considered an application for committal an inappropriate venue to try allegations of judicial impartiality and noted that justification as a defence "would allow *mala fide* defendants a further and public forum to repeat their contempt" (*Shadrake Alan* at [67]) with the possibility that they might "engage in vexatious and abusive attempts to subpoena witnesses or obtain discovery in order to justify their contempt after the fact". Thus, the requirement of public benefit to render justification a defence to contempt, as suggested by the Phillimore Committee and Australian cases of *R v Nicholls* (1911) 12 CLR 280 and *Nationwide News Proprietary Ltd v Wills* (1992) 177 CLR 1, did not in Loh J's estimation, sufficiently address the possibility of such abuse. In addition, he rejected the suggestion made in *Chee Soon Juan* (above, para 1.78) that "all discussions of judicial wrongdoing must be directed to the Prime Minister or the Chief Justice", as the public "must be able to debate judicial conduct without seising the removal mechanism in Art 98(3)" as frequently resorting to this "cannot be healthy for the independence of the judiciary": *Shadrake Alan* at [68].

1.112 With respect to fair comment, he highlighted the different qualifications to free speech posed by defamation laws, which sought to balance free speech concerning matters of public importance with the

private interests of defamed persons in their reputation, as opposed to contempt laws, which balanced speech against maintaining public confidence in the administration of justice, to protect courts from the impairment of their authority: *Shadrake Alan* at [69]. He thus refused, in the light of the differing rationales, despite noting "some functional similarity" between fair comment and fair criticism, to import the defence of fair comment into the law of contempt wholesale: *Shadrake Alan* at [69].

Elaborating on the nature of the defence of fair criticism

1.113 Fair criticism was an available defence to contempt in Singapore, and following the non-exhaustive list of relevant factors articulated by Prakash J in *Tan Liang Joo* (above, para 1.92), this had to be made in good faith, a respectful manner, and be supported by argument and evidence. It was also relevant to consider how the alleged criticism was made, whether it was "temperate and dispassionate" which facilitated rational debate, or whether the language employed was "outrageous and abusive", from whence "an intention to vilify the court" could be "easily inferred": *Tan Liang Joo* at [15]–[20]. Loh J noted the differing approaches towards the view that criticism directed at the impartiality of the courts or which imputed improper motives to judges could never be fair criticism (*Hertzberg* above, para 1.92) and Prakash J's view that one should not be 'so complacent as to assume that judges and courts are infallible or impervious to human sentiment" (*Tan Liang Joo* at [22]), such that this restriction against critical speech was "overly restrictive of legitimate criticism": *Tan Liang Joo* at [23].

1.114 In a nutshell, the fair criticism defence had two limbs: a critic had to have a rational basis in the criticism made and a genuine belief in its truth. In elaborating upon the defence of fair criticism, Loh J identified four considerations. First, the allegation had to have an objective basis, to allow one to evaluate the merits of the criticism. This was pegged at the level of the need to show "some rational basis" for the criticisms made (*Shadrake Alan* at [72]); there was no need to show proof of the criticism. The more serious the allegation, the more cogent the arguments and facts cited in support of it must be, that is, an increase in the cogency of the rational basis was required, given the greater risk of harming public confidence in the administration of justice. The seriousness of the allegations would turn on the authority the critic purported to have and the content of the allegation, the most serious of which would relate to impugning judicial impartiality, "the core of judicial duty": *Shadrake Alan* at [72].

1.115 Second, the criticism had to be made in good faith, with the speaker having a genuine belief in the truth of the criticism, as opposed to disbelief or reckless disregard of the truth, as such criticism served no

public interest. The critic had to be aware of the rational basis cited in defence of the criticism at the time it was made, which 'substantially obviates the need for justification as a defence": *Shadrake Alan* at [74]. Bad faith was evidenced where a publication presented "a selective, distorted or patently false view of the facts" such that it went "beyond wrong-headedness and evinces a reckless disregard of the truth, or even outright dishonesty": *Shadrake Alan* at [73].

1.116 Third, criticism had to be respectful but as this applied to all, it was not reasonable "to expect every person to adopt the refined language of scholarly discourse or court address": *Shadrake Alan* at [75].

1.117 Fourth, Loh J expressed agreement with the "tentative view" in *Tan Liang Joo* (above, para 1.92) that there is no substantive limit to the type of criticism made against courts subject to the other three requirements being satisfied. Even if criticism is directed against judicial partiality and corruption, Loh J recognised a "powerful public interest" in "exposing and rooting out impropriety and corruption" by those holding public office: *Shadrake Alan* at [76]. In conclusion, he noted that "the public and constitutional interest in ensuring public confidence" in the administration of justice was given "robust protection" in the Singapore context: *Shadrake Alan* at [77]. This was not considered to be an "excessive restriction" in the freedom of speech particularly since the ingredients of the fair criticism defence "are in their nature matters within the knowledge of the defendant" who was thus "not unduly burdened" in exercising his right to free speech. This was considered an "adequate balance" between free speech and the "countervailing constitutional interest" in ensuring public confidence in the administration of justice "does not falter as a result of scandalous publications": *Shadrake Alan* at [77]. What is worth noting is that while the constitutional status of the enumerated right of free speech did not figure into the judicial endorsement of the real risk test, as this was cast as a common law interest, Loh J underscored the *constitutional* status of the public interest in preserving public confidence in the judiciary, presumably inferred from the constitutional recognition of contempt of court as a basis for derogating from Art 14 rights. In a postscript, Loh J felt led to underscore that the judiciary had no interest in stifling debate on the death penalty, which it recognised to be the "ultimate punishment" (*Shadrake Alan* at [139]), affirming the constitutional duty "to protect every citizen's right to engage in such debate": *Shadrake Alan* at [139].

1.118 On the facts of the case, after analysing the 14 statements, Loh J found 11 of the statements to be contemptuous in lacking a rational basis in terms of evidence and that Shadrake had been shown to have reckless disregard for the truth at the relevant time. Relevant factors included his reliance on secondary material in the form of a criminal

autobiography which did not support the propositions he made. Despite claims in the book, Shadrake failed to provide any evidence of his investigations of legal files and archives dating back to 1963 while interviewing abolitionists and lawyers (*Shadrake Alan* at [86]); his affidavit indicated primary reliance on the autobiography of a local criminal lawyer, Subhas Anandan: *Shadrake Alan* at [86]. The relevant publication failed to critically compare case law to set in perspective whether various sentences imposed were out of the ordinary way so as to indicate favouritism or bias. There was also a tendency to distort facts and make bare assertions, while holding himself out to be an investigative journalist: *Shadrake Alan* at [131]. Cumulatively, while Shadrake's assertions could not "withstand forensic analysis", a casual reader who did not scrutinise the allegations made in the book might well believe his claims, giving rise to "more than a remote possibility" (*Shadrake Alan* at [136]) that if left unchecked, members of the public might lose confidence in the administration of justice. Shadrake's failure to make amends, after being invited to do so, and his intention to repeat his contempt eventuated in a punishment of six weeks' imprisonment and $20,000 fine: *Shadrake Alan*.