1. ADMINISTRATIVE AND CONSTITUTIONAL LAW

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Introduction

1.1 Most of the major developments in the field of public law in 2009 related to constitutional law, with the administrative law cases applying existing tests to specific fact situations.

1.2 Most of the constitutional cases heard in 2009 revolved around Art 14 of the Constitution of the Republic of Singapore (1999 Rev Ed), which relates to freedom of speech and of assembly. Article 14(2)(*a*) empowers Parliament to enact restrictions considered "necessary or expedient" in the interest of the security of Singapore or public order, or to provide against contempt of court, defamation or incitement to any offence. The cases involved the Sedition Act (Cap 290, 1985 Rev Ed), the Undesirable Publications Act (Cap 338, 1998 Rev Ed) and the law on contempt of court and political libel. In particular, the Court of Appeal in *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 undertook an exhaustive and intensive review of developments in other common law jurisdictions with respect to qualified privilege as a defence to defamation, particularly, the *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 privilege and responsible journalism. In affirming the judicial role in developing the common law in this area, the court both acknowledged that Parliament had the "final say" over the appropriate balance between free speech and reputation, and also invited the provision of evidence to demonstrate the inappropriateness of such balance with respect to the existing law. The court canvassed the rationales underlying speech and reputation, which bodes well for the evolution of a more sophisticated free speech jurisprudence, and proffered a fourfold categorisation of "rights" and their "weights" in the balancing process, which solidifies the trend towards correcting under-theorised areas of free speech law. Similarly, in *AG v Tan Liang Joo John* [2009] 2 SLR(R) 1132, Judith Prakash J expounded upon the rationale for allowing fair, temperate criticism of the Judiciary, as a method of promoting dialogue and positive reform. This goes some way towards articulating a theory of the importance of free speech in a democratic society.

1.3 In relation to equality jurisprudence, it was affirmed in *Shafeeg bin Salim Talib v Fatimah bte Abud bin Talin* [2009] 3 SLR(R) 439

that while Art 12 of the Constitution of the Republic of Singapore (1999 Rev Ed) provided that general laws applied to all persons in Singapore, this was constitutionally departed from where primary or secondary legislation made provision for regulating personal law, as in the case of the Administration of Muslim Law Act (Cap 3, 2009 Rev Ed). Other miscellaneous issues included the affirmation that courts could not interfere with the prosecutorial discretion of the Attorney-General by requiring them to proceed with charges which have been stood down: *PP v Lim Being Tai* [2009] SGDC 448; as well as the principle of judicial independence that judges are mindful to uphold their oath of office in adjudicating and not to succumb to fear that they are disagreeing with the views of senior judges who assess their performance: *Goh Kah Heng v PP* [2009] 3 SLR(R) 409. Here, the High Court noted that the test of a "reasonable apprehension" of the envisaged fear was not based on "the possibility of the rare and remote case" (at [5]).

ADMINISTRATIVE LAW

Exhaustion of remedies

1.4 The issue of the inappropriateness of seeking certain remedies and of the need to first exhaust other available remedies came to the fore in *Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR(R) 92. The applicant was granted leave under O 53 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) for a mandatory order to quash a planning decision made by the Urban Redevelopment Authority ("URA") which rejected an application in relation to their redevelopment plan to demolish a semi-detached house and to replace it with a detached bungalow. The High Court affirmed that damages and declaratory orders could not be sought under the terms of O 53: *Ung Yoke Hooi v AG* [2008] SGHC 139.

1.5 The reason given by the URA was that the plan was not in compliance with all the relevant URA guidelines, which are informal standards. The house in question satisfied the requirement that the minimum plot size and width of a detached house be 400m^2 and 10m. This was stated in a 1991 press release, not a URA guideline as such; these requirements were affirmed in a URA circular issued to professional institutes in 1996. The URA guidelines were revised in 2002 with further restrictions on the redevelopment of semi-detached houses, as stated in a circular of 25 July 2002, which was incorporated into the Development Control Parameters for Residential Development. This is available on the URA website. This provided that a semi-detached house could not be converted into a detached house unless the house to which it was attached, and the house to be detached, both stood on at least

400m^2 of land. This was a requirement which would not be satisfied were the applicant's plan to be approved.

1.6 The applicant purchased the relevant house in 2007, which was a semi-detached house. On 19 November 2007, the architect applied for planning permission to redevelop the house. The URA advised the applicant's architect on 13 December 2007 that this proposal deviated from the guidelines and invited the architect to submit a revised proposal for a semi-detached house within six months; thereafter, the proposal would be deemed withdrawn. On 9 April 2008, the appellant's counsel requested the URA to review its decision and received a reply on 21 April 2008, stating, *inter alia*, that the 2002 URA circular required that the breakaway adjoining semi-detached house must also stand on a plot size of 400 m^2, a condition which was not met in the immediate case. The URA extended invitations to the applicant to discuss the issue further but she was adamant and appealed to her Member of Parliament. In the absence of a revised proposal, the redevelopment proposal was treated as withdrawn on 13 June 2008. On 19 August 2008, the URA told the applicant's counsel that his client could rebuild the existing semi-detached house in a certain manner but the applicant instead applied for judicial review of the URA's decision.

1.7 Section 22 of the Planning Act (Cap 322, 1998 Rev Ed) provides that where written permission has been applied for and refused or conditionally granted under s 13, "the applicant who is aggrieved by that decision may appeal to the Minister against that decision". The applicant did not avail herself of this procedure within the stipulated time lines. In this respect, the High Court noted that the URA had "rightly argued" (*Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR(R) 92 at [28]) that it was improper for the applicant to circumvent the judicial review process, and set out the "modern approach" towards such provisions as laid out in De Smith's *Judicial Review* (Sweet & Maxwell, 6th Ed, 2007) at para 4-051 as follows:

> In situations where the jurisdiction of the courts is ousted or limited, the courts now take account not [of] the concept of jurisdictional error, but a number of practical matters. These include the need in the circumstances for legal certainty and the need for finality on which the affected person may rely; the degree of expertise of the decision-making body; the esoteric nature of the traditions or legal provisions decided by the decision-making body; and the extent to which interrelated questions of law, fact and degree are best decided by the body which hears the evidence at first hand, rather than the courts on judicial review. In particular, account will be taken as to whether there has been previous appropriate opportunity for the claimant to challenge the relevant decision. The House of Lords considered whether the validity of a decision by the Secretary of State for Social Security on the question of a maintenance assessment under the Child Support Act 1995 could be challenged in a magistrates' court.

> Section 33(4) of the Act provides that 'the court … shall not question the maintenance assessment'. It was held that since the Secretary of State's decision could be challenged by way of appeal to an appeal tribunal, the scheme 'provided an effective means' to challenge the Secretary of State's decision: 'Given the existence of this statutory right of review and appeal, it would be surprising and undesirable if the magistrate's court were to have parallel jurisdiction to adjudicate upon the same question.' In other cases where challenge to the courts is precluded but challenge to an appropriate tribunal is provided, the courts have upheld the preclusive clause on the ground that the statutory scheme provides 'proportionate and adequate protection to the rights of the litigant'.

1.8 The High Court held that the applicant had "no proper reason" (*Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR(R) 92 at [29]) not to appeal to the Minister who was empowered to grant her the remedies she sought. This was, in other words, not an ineffective remedy. Provisions such as the ouster clause in s 22(7) of the Planning Act (Cap 322, 1998 Rev Ed) revealed the intention of Parliament that "the courts should not interfere with issues of planning permission as these involve interrelated considerations of fact, law, degree and policy, which are better dealt with by an appeal procedure to the Minister" (at [29]). That is, this non-judicial remedy was best suited to address the issue at hand. Further, there was no evidence that the applicant would not get a fair hearing, given her fear that the Chief Executive Officer of the URA was the Deputy Secretary of Special Duties who advised the Minister and might be biased. There was no evidence that the Minister might be personally biased, as opposed to any of his advisers (at [29], following *Re Wong Sin Yee* [2007] 4 SLR(R) 676). The applicant's view that she was unwilling to avail herself of the appeal to the Minister because the Minister's decision was final and not to be questioned in a court of law was "not a valid reason". On a consideration of these factors, the conclusion was that the application for judicial review was to be dismissed because the applicant had failed to exhaust her remedies before coming to court (at [30]).

1.9 Tan Lee Meng J also opined that the application for judicial review itself did not rest on solid grounds in that the URA decision was not illegal, procedurally improper or contrary to *Wednesbury* unreasonableness (*Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223). There was no breach in procedural propriety as the applicant had been given ample opportunity to air his views for the due consideration of the URA. In fact, the URA gave reasons for rejecting the application, provided the applicant an opportunity to make a resubmission within six months and provided guidelines on the amendments needed in order for development planning to be approved. The applicant was also invited to discuss the

matter with URA officers (*Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR(R) 92 at [32]).

1.10 In the exercise of judicial review, the court does not purport to "act in an appellate capacity" and assess the sufficiency of evidence before the relevant Minister: *Mohan Singh v AG* [1987] SLR(R) 428. The URA decision was challenged on various constitutional and administrative law grounds, all of which failed. First, there was no breach of the Art 12 equal protection guarantee (Constitution of the Republic of Singapore (1999 Rev Ed) as the 2002 guidelines on the redevelopment of semi-detached houses into detached houses applied to everyone and was based on an intelligible differentia of requiring that the plot size of the adjoining semi-detached house be at least 400m^2. In addition, the classificatory basis bore a rational nexus to the objectives of the Planning Act (Cap 322, 1998 Rev Ed) (*Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR(R) 92 at [35]). The other instances of housing units in the vicinity being allowed to be redeveloped into detached houses were "clearly distinguishable" (at [36]) as the attached semi-detached house was more than 400m^2.

1.11 The allegation that the URA had acted in bad faith failed to meet the requirement that there must be "sufficient evidence" establishing a "*prima facie* case of reasonable suspicion of bad faith", beyond a "mere suspicion": *Teng Fuh Holdings Pte Ltd v Collector of Land Revenue* [2007] 2 SLR(R) 568 (*Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR(R) 92 at [33]). Nor was there evidence that the URA had taken extraneous considerations into account, which would have been illegal in terms of an incorrect understanding by the decision-maker of the law regulating his powers, following Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374. Nor did the URA fall foul of the requirements that in formulating discretionary policies, they fettered their discretion, contrary to the conditions set out by Judith Prakash J in *Lines International Holding (S) Pte Ltd v Singapore Tourist Promotion Board* [1997] 1 SLR(R) 52 at [78], as approved by the Court of Appeal in *City Developments Ltd v Chief Assessor* [2008] 4 SLR(R) 150.

1.12 The High Court affirmed that the concept of legitimate expectations had been adopted in *Re Siah Mooi Guat* [1988] 2 SLR(R) 165 but none could be made out on the facts of the immediate case. This was described thus by Lord Fraser in *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 401 (*Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR(R) 92 at [47]):

> [E]ven where a person claiming some benefit or privilege has no legal right to it, as a matter of private law, he may have a legitimate expectation of receiving the benefit or privilege, and if so, the courts will protect his expectation by judicial review as a matter of public law.

> … Legitimate, or reasonable, expectation may arise either from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.

In addition, the authors of De Smith's *Judicial Review* (Sweet & Maxwell, 6th Ed, 2007) have identified four conditions governing the creation of a legitimate expectation which must be (i) clear, unambiguous and devoid of relevant qualification; (ii) induced by the conduct of the decision-maker; (iii) made by a person with actual or ostensible authority; and (iv) applicable to the applicants, who belong to the class of persons to whom the representation is reasonably expected to apply (*Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR(R) 92 at [49]). On the facts of this case, there was neither a promise made to the applicant by a URA officer with actual or ostensible authority nor a course of conduct by them which would create a legitimate expectation that her redevelopment plans would obtain URA approval. Furthermore, pre-2002 guidelines could not be relied upon, since the applicant had bought her property in 2007 and was subject to the 2002 guidelines which were available on the URA website. This is because public bodies are entitled to change their policies and the judicial task is "not to impede executive activity but to reconcile its continuing need to initiate or respond to change with the legitimate interests or expectations of citizens or strangers who have relied, and have been justified in relying, on a current policy or an extant promise": *Regina v North and East Devon Health Authority, Ex parte Coughlan* [2001] QB 213 at [65], *per* Lord Woolf MR (*Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR(R) 92 at [52]).

Natural justice

1.13 In considering whether a decision-maker has acted in a manner contrary to natural justice, a holistic approach was taken by the High Court in *Lim Choo Suan Elizabeth v Goh Kok Hwa Richard* [2009] 4 SLR(R) 193. This related to a hearing before a Strata Titles Board where minority subsidiary proprietors were appealing against a decision to approve the collective sale of a condominium. During the hearing, the President of the Board had allegedly acted in a biased fashion by making excessive interruptions and adverse, sarcastic comments while witnesses were being examined; counsel for the minority argued, *inter alia*, that such behaviour indicated the President had pre-determined the issue before considering its merits. Woo Bih Li J, applying the test of reasonable suspicion of bias, found that although the President had made sarcastic remarks and ought to have expressed his views in a "less colourful manner" (at [200]), on examining the evidence as a whole and "bearing in mind the qualitative impact of his remarks and interruptions", he had not acted in a biased

manner. A reasonable-minded person present at the hearings would not have considered it an unfair trial as the President's conduct was "not so egregious" as to merit sending the dispute back to another differently constituted Strata Titles Board (at [203]). That is, injustice was not perceived to have been done. This underscores the highly contextualised nature of assessing what constitutes a fair hearing.

Non-compliance with statutory procedure

1.14 In *Ung Yoke Hooi v AG* [2009] 3 SLR(R) 307, the Court of Appeal found that the High Court had made an erroneous finding in holding that the non-compliance by the Corrupt Practices Investigation Bureau ("CPIB") with s 392(1) of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) to report the seizure of the appellant's accounts "forthwith" to the Magistrate's Court did not constitute a procedural impropriety. The appellant's bank accounts had been seized in connection with the investigation of a suspected commission of an offence. The appellant applied for a mandatory order directing the CPIB to release the accounts as the seizures were asserted to be illegal and an abuse of process. The High Court judge decided on the basis that the appellant had not suffered prejudice or hardship as he did not need to use the funds in the seized accounts during the relevant time period.

1.15 However, the Court of Appeal considered that the failure to report "forthwith" was "not a procedural impropriety in the administrative law sense" and thus the issue of hardship was irrelevant (*Ung Yoke Hooi v AG* [2009] 3 SLR(R) 307 at [24]). The consequence of non-compliance with the statutory requirement was that the police were in wrongful control and custody of the seized property "from the time it was reasonable to have reported the seizure until the time the report was actually made" (at [24]). However, once the seizures were reported to the Magistrate's Court, even if this was late, the Magistrate's Court then took cognisance of the report, and legal control and custody of the seized property passed to its control under s 392 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) ("CPC"). Since the Magistrate's Court was in control of the property as of 8 February 2007, the High Court had no power to grant a mandatory order directing the CPIB to unfreeze the accounts which were not under the control and custody of the CPIB (at [36]). Had the non-compliance with the statutory requirements not been merely a delay in the reporting but a failure to report, judicial review with respect to the CPIB would be available as the CPIB would be in wrongful control or custody of the seized property from the time it failed to comply with s 392(1) of the CPC (at [27]). Had the appellant applied for judicial review during the time period when the CPIB had not yet reported the seizure to the Magistrate's Court, leave would have been granted to set aside the seizures (at [27]).

CONSTITUTIONAL LAW

Article 12 and administrative action

1.16 The issue of unequal treatment arose in relation to a decision by the Collector of Land Revenue under the powers of the Land Acquisition Act (Cap 152, 1985 Rev Ed) to gazette property on which the Jin Long Si Temple was sited in *Eng Foong Ho v AG* [2009] 2 SLR(R) 542. Two other religious properties, the Ramakrishna Mission and Bartley Christian Church, were not gazetted.

1.17 The appellants were devotees of the temple and filed an application for a declaration that the acquisition of the temple was contrary to Art 12 of the Constitution of the Republic of Singapore (1999 Rev Ed). The trial judge had held, *inter alia*, that Art 12 had not been breached.

1.18 On appeal, Andrew Phang JA held that the appellants did have *locus standi* as devotees of the temple, even if they were not trustees. He rejected the argument that the appellants had to satisfy a higher standard of *locus standi* as they had applied pursuant to O 15 r 16 rather than O 53 r 1 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed), noting that "the substantive elements of *locus standi* cannot change in the context of the constitutional protection of fundamental rights" (*Eng Foong Ho v AG* [2009] 2 SLR(R) 542 at [18]). Neither would delay in instituting proceedings always be a relevant factor in asserting constitutional rights, unless the State had been irreparably prejudiced (at [20]).

1.19 The argument that Art 12 of the Constitution of the Republic of Singapore (1999 Rev Ed) had been violated was based on the assertion that the worshippers of the mission and church had been treated differently from those of the temple, even though they "were all members of the same class" (*Eng Foong Ho v AG* [2009] 2 SLR(R) 542 at [23]), that is, "adherents or believers in a religious faith" (at [24]). Further, it was pointed out that all three religious institutions were located in a predominantly residential area in close proximity to an MRT station, these factors further delineating them as members of the same class (at [23]). The argument appeared to be that since all religious groups should be equally treated, as Art 12 requires, then if the property of one is compulsorily acquired by law in an area where the other groups have properties, all should be similarly treated. Instead, the mission and church had been favourably treated by the authorities, as both would enjoy having an MRT station at their doorsteps, while the temple property was compulsorily acquired, all being situated in the same area.

1.20 The Court of Appeal read this argument not to mean a claim for absolute equality among religious groups, that is, for equality of result, but rather, that the inequality in result flowed from a normatively defective process of treatment that violated Art 12 of the Constitution of the Republic of Singapore (1999 Rev Ed) (*Eng Foong Ho v AG* [2009] 2 SLR(R) 542 at [25]).

1.21 The well-established test was "whether there is a reasonable nexus between the state action and the objective to be achieved by the law", assuming, as conceded, that the law itself does not violate Art 12 of the Constitution of the Republic of Singapore (1999 Rev Ed) (*Eng Foong Ho v AG* [2009] 2 SLR(R) 542 at [25]). The issue here was thus not the constitutionality of the Land Acquisition Act (Cap 152, 1985 Rev Ed) but whether the powers it conferred had been exercised in a manner consistent with Art 12. The answer would lie in "the reasons" for expropriating the temple and not those of the mission and church, which would indicate whether the appellants as members of the temple had been discriminated against (at [25]). The relevant test was set out in *Ong Ah Chuan v PP* [1979–1980] SLR(R) 710 which basically requires like to be treated alike. The test for whether legislation satisfies this test rests on the principle of reasonable classification of laws, following *PP v Taw Cheng Kong* [1998] 2 SLR(R) 489, which was not presently at issue (*Eng Foong Ho v AG* [2009] 2 SLR(R) 542 at [26]–[27]).

1.22 A constitutional law may be unconstitutional in its application. The issue here was the constitutionality of the Collector's decision to acquire the temple property but not those of the mission and church (*Eng Foong Ho v AG* [2009] 2 SLR(R) 542 at [28]). In *Howe Yoon Chong v Chief Assessor* [1979–1980] SLR(R) 594 at [13], where the Privy Council considered various US cases, the supremacy of the Constitution was affirmed such that it prevailed over both legislation "or any administrative practice inconsistent with it". However, what needed to be shown to violate the equal protection clause was "the existence of inequalities due to inadvertence or inefficiency" which were "on a very substantial scale" (*Eng Foong Ho v AG* [2009] 2 SLR(R) 542 at [28]). An intentional systematic undervaluation of property would breach Art 12(1) of the Constitution of the Republic of Singapore (1999 Rev Ed) though something less might suffice. In *Howe Yoon Chong v Chief Assessor* [1990] 1 SLR(R) 78 at [13]–[18], after considering various US authorities, Lord Keith of Kinkel observed that the equal protection clause of the US Fourteenth Amendment was meant "to secure every person within the State's jurisdiction against intentional and arbitrary discrimination", whether effected by express statutory provision or its improper execution: *Sunday Lake Iron Co v Township of Wakefield* 247 US 350 (1918) at 352 (*Eng Foong Ho v AG* [2009] 2 SLR(R) 542 at [29]). While "intentional systematic undervaluation" by state officials of taxable property would contravene

equal protection, the Supreme Court found that "mere errors of judgment" by officials would not suffice to support a claim of discrimination. Something more was needed amounting to "an intentional violation of the essential principle of practical uniformity". The Privy Council in *Howe Yoon Chong v Chief Assessor* [1990] 1 SLR(R) 78 at [17] noted that absolute equality in the field of valuating property tax was not attainable and that inequalities flowing from a "reasonable administrative policy" did not amount to deliberate and arbitrary discrimination. On the facts of the case, the exercise by the Chief Assessor of powers under the Property Tax Act of 1961 was not deliberate and arbitrary discrimination such as to infringe Art 12(1) of the Constitution of the Republic of Singapore (1980 Reprint), as the "extent to which practical equality was capable of being achieved, in an inflationary environment, depended on the extent of the resources available to the Chief Assessor" (at [18]). It was circumstances such as the level of inflation and passage of time rather than intentional violation of the essential principle of practical uniformity which led to disparities in valuation and thus Art 12(1) was not infringed.

1.23 Phang JA noted that executive acts could be unconstitutional "if it amounts to intentional and arbitrary discrimination" (*Eng Foong Ho v AG* [2009] 2 SLR(R) 542 at [30]). He cited Chan Sek Keong J's observation in *PP v Ang Soon Huat* [1990] 2 SLR(R) 246 at [23] that the Privy Council in *Howe Yoon Chong v Chief Assessor* [1990] 1 SLR(R) 78 held that "the equal protection clause [in Art 12] is contravened if there is deliberate and arbitrary discrimination against a particular person. Arbitrariness implies the lack of any rationality". On the case facts, the appellants argued that the application of the Land Acquisition Act (Cap 152, 1985 Rev Ed) to them and not the owners of the mission and church violated Art 12 of the Constitution of the Republic of Singapore (1999 Rev Ed) (*Eng Foong Ho v AG* [2009] 2 SLR(R) 542 at [31]). Phang JA noted that there was no allegation of arbitrary action, that it was conceded that the acquisition was done in good faith, and as such, "it is not clear where the discrimination lies other than in the consequential fact that the properties of the Mission and the Church were not acquired but that of the Temple was" (at [31]). It may be inferred that bad faith might be evidence of arbitrariness so as to render a decision made in this manner a discriminatory one which violated Art 12. Here, the Court of Appeal considered evidence which indicated that the decision to acquire the land was based "solely on planning considerations" and not on special considerations relating to different religious groups (at [35]). The court accepted evidence that the acquisition would facilitate the optimisation of land use around new MRT stations, as was government policy (at [32]). While the temple site could be amalgamated with state land, the evidence was that the church site did not provide any reasonable opportunity for amalgamation as there was no adjoining state land immediately surrounding the church.

As for the mission, at the time of the acquisition, its buildings were under study for conservation and were eventually so gazetted (at [34]). As such, the evidence did not indicate an absence of rationality or bad faith, and thus, Art 12 was not violated.

1.24 It is unclear whether Phang JA was pegging the Art 12 test for executive acts to that of requiring "intentional and arbitrary discrimination", with arbitrariness implying the absence of "*any* rationality" (*Eng Foong Ho v AG* [2009] 2 SLR(R) 542 at [30]), or whether this was *a* test, rather than *the* only test, for proving that an executive act was in violation of Art 12 of the Constitution of the Republic of Singapore (1999 Rev Ed). If this was the sole test for executive acts, the need to prove the absence of rationality in relation to discriminatory executive acts may be a harder one for a plaintiff to satisfy than the unreasonableness of a legislative classification, as the reasonable classification test requires that the classification be based on an intelligible differentia which bears a rational nexus to the object of the law. There can be a range of rational or reasonable options to that end whereas it would be very difficult to prove the "lack of any rationality" in order to successfully impugn an executive act under Art 12. The better view would be that the test of "intentional and arbitrary discrimination" is only *a* test that can be applied to executive acts and that executive acts may also be successfully challenged as violating Art 12 where these fail the reasonable classification test.

1.25 It is clear from the case law that there is a strong presumption of the constitutional validity of written law, which places the onus on one challenging the law to show that a statutory provision or the exercise of power under it is "arbitrary and unsupportable": *Johari bin Kanadi v PP* [2008] 3 SLR(R) 422. The Court of Appeal in *PP v Taw Cheng Kong* [1998] 2 SLR(R) 489 at [58] noted that this presumption stemmed from the wide powers of classification given to legislatures, approving the test laid down by Mohamed Azmi SCJ in *Malaysian Bar v Government of Malaysia* [1987] 2 MLJ 165 at 170 ("*Malaysian Bar*"). Thus, one who assailed a legal classification had to show it did not rest on any reasonable basis but was essentially arbitrary (Salleh Abas LP in *Malaysian Bar* at pp 166–167, citing *Lindsley v National Carbonic Gas Co* (1911) 220 US 61 at 76–79, 55 L Ed 369). These statements were applied to legislation, not executive action, and the equal protection test is satisfied where the classification was based on intelligible differentia which bore a rational relation or nexus to the legislative object.

1.26 However, in *Mohamed Emran bin Mohamed Ali v PP* [2008] 4 SLR(R) 411 at [26], the High Court observed: "The Court of Appeal in *Taw Cheng Kong* also stated that the prohibition of unequal protection is not absolute and that a differentiating law or *executive act* which satisfies the classification test would not be considered to be in contravention of

Art 12." The test of "intelligible and rational differentia" was then applied to the Public Prosecutor's decision to prosecute entrapped drug traffickers but not state *agents provocateur*. Thus, there was a clear intelligible differentia between these two classes of persons (at [30]) and a "perfectly rational nexus" between entrapment operations and the social objective of containing the drug trade (at [30]).

1.27 It would appear that both the more onerous test of "intentional and arbitrary discrimination" as well as that of "reasonable classification" may apply to executive acts which are challenged as violating Art 12 of the Constitution of the Republic of Singapore (1999 Rev Ed), but it would be useful for this point to be judicially clarified.

Article 14: Free speech and religious sensibilities

1.28 A married couple was jointly charged with various counts under the Sedition Act (Cap 290, 1985 Rev Ed) and the Undesirable Publications Act (Cap 338, 1998 Rev Ed) for being in possession of and distributing religious tracts in the mail. In so doing, they had targeted recipients by associating names with probable faith affiliations, given that "in a multi-racial society like Singapore, a name can reveal a person's race and possibly religion, *eg* a person with an English name could either be European or Eurasian and possibly Christian or a person with a Malay name could probably be Muslim", according to District Judge Neighbour in *PP v Ong Kian Cheong* [2009] SGDC 163.

1.29 Here, religious tracts in cartoon form from Chick Publications were found to have a seditious tendency to promote feelings of ill-will and hostility between Christians and Muslims in Singapore. This was an offence punishable under s 4(1)(*c*) of the Sedition Act (Cap 290, 1985 Rev Ed) read with s 3(1)(*e*), in conjunction with s 34 of the Penal Code (Cap 224, 2008 Rev Ed). In addition, the publications were found to be objectionable within the terms of the Undesirable Publications Act (Cap 338, 1998 Rev Ed) in dealing with religious matters in a manner likely to cause feelings of enmity, hatred, ill will or hostility between Christians and Muslims, which was an offence punishable under s 12(*c*) of the Undesirable Publications Act. The couple had sent "The Little Bride" and "Who is Allah?" to one Irwan bin Ariffin and Isa bin Rafee. Under the Undesirable Publications Act, they were jointly charged with distributing "The Little Bride" to one Farhati bte Ahmad in contravention of s 12(*c*) and s 4(1)(*b*) of the Undesirable Publications Act, read with s 34 of the Penal Code. Both accused admitted to distributing the publications to the public.

1.30 In relation to the Sedition Act (Cap 290, 1985 Rev Ed) offences, in giving evidence, Isa bin Rafee pointed out ten segments in the publication which denigrated Islam, and stated it was offensive and could provoke or incite racial hatred (*PP v Ong Kian Cheong* [2009] SGDC 163 at [10]). Staff Sergeant Irwan bin Ariff testified that he received "The Little Bride" in his letterbox, read the publication and lodged a police report as the publication was offensive to him in condemning Islam, and because he felt the publication could incite religious tension between Muslims and Christians. All these publications were found in the possession of both accused persons after the police raided their flat and arrested them on 30 January 2008.

1.31 In relation to offences under the Undesirable Publications Act (Cap 338, 1998 Rev Ed), Farhati bte Ahmad gave evidence that she received the publication "The Little Bride" in the mail addressed to her; she lodged a police report as she felt the publication denigrated Islam and thought too that a Christian group sent it to her as the tract promoted Christianity. She was "angry" on reading the publication and said if this fell into wrong hands, "feelings of ill-will and hostility could be directed by Muslims against Christians". The District Judge noted that she, "acting rationally", reported the matter to the police for investigation (*PP v Ong Kian Cheong* [2009] SGDC 163 at [13]) The relevant Controller under the Undesirable Publications Act found the publication objectionable in denigrating Islam and could cause feelings of hostility between different religious groups (at [15]). Other publications denigrated Catholicism and were likely to cause ill will or hostility between Muslims and Christians and between Protestant Christians and Catholics (at [16]).

1.32 In defence, the accused persons, in buying religious tracts in bulk and depositing these into the letterboxes of residents in public housing estates, felt they were "preaching the word of God and spreading Christianity by 'tracting'" (*PP v Ong Kian Cheong* [2009] SGDC 163 at [29]). This is in fact an exercise of the Art 15(1) right to religious propagation or religious free speech, which was not discussed in the judgment. Article 15(1) of the Constitution of the Republic of Singapore (1999 Rev Ed) is of course subject to general law regulating public order, health and morality under Art 15(4).

1.33 It was contended that s 3(1)(*e*) of the Sedition Act (Cap 290, 1985 Rev Ed) was so "widely framed" as it assumed that "all instances of promotion of ill-will and hostility between different classes necessarily has a direct tendency to promote the use of unlawful means by and on members of the public" (*PP v Ong Kian Cheong* [2009] SGDC 163 at [45]). Raising a constitutional argument, it was asserted that this statutory provision "ought to conform with Art 14(2) of the Singapore Constitution", the free speech guarantee, to read in the additional words

"productive of public disturbance or disorder" or "with the effect of producing public disorder". In other words, an offence under s 4(1)(*c*) of the Sedition Act read with s 3(1)(*e*) is designed to protect the public against attack on public order. Therefore, for a publication to have a seditious tendency, it must expressly or implicitly incite public disorder by encouraging unlawful action. This is presumably because any derogation from free speech must be authorised by one of the eight stipulated grounds in Art 14(2) of the Constitution of the Republic of Singapore (1999 Rev Ed), the relevant one here being that of "public order". It was also argued that "both the accused by primarily distributing the publications have not contravened the SA because the publication privately distributed had no direct effect on public order" (at [45]).

1.34 This point about the need for the Sedition Act (Cap 290, 1985 Rev Ed) to conform with constitutional standards was not expressly dealt with, which is regrettable. Instead, legislative intent as embodied in the Sedition Act was considered determinative. Thus, the District Court rejected the argument that the Sedition Act had to be read in light of the common law which provided that seditious libel had to be founded on "an intention to incite violence or create public disturbances or disorder against the sovereign or the institutions of government" (*PP v Ong Kian Cheong* [2009] SGDC 163 at [46]). Instead, s 3(1)(*e*) of the Sedition Act should be literally construed as Parliament could have, if such was its intent, included an additional requirement for a seditious tendency to be directed against the maintenance of government (at [47]). Section 3(1)(*e*) defines "seditious tendency" broadly to encompass not just exciting disaffection against the Government or the administration of justice but the promotion of "feelings of ill-will and hostility between different races or classes of the population of Singapore". The District Judge also rejected the argument that the tracts had been randomly sent as while "a name does not reveal a person's religion but in our multi-racial society, it would give rise to an inference of a person's religious beliefs. Both the accused have admitted in their statements to the police that they would send a tract entitled 'Who is Allah?' to a person they thought was a Muslim …", given that most Muslims were Malays in the Singapore context (at [48]).

1.35 That is, the harm the Sedition Act (Cap 290, 1985 Rev Ed) was designed to prevent had not eventuated. The defence in s 6(2) of the Sedition Act was also invoked, to the effect that the accused did not know or had no reason to believe the relevant publication distributed had a seditious tendency, given that these were available in various bookstores (*PP v Ong Kian Cheong* [2009] SGDC 163 at [45]). On this point, s 3(3) of the Sedition Act provides that the intentions of the accused persons are deemed to be irrelevant. The District Judge on the evidence rejected the claim to s 6(2) on the basis that even if such

publications were sold to the public, any "reasonable person" in reading the tract which "level a pointed attack by one religion on another" (at [59]) would not doubt it had a seditious tendency. This was buttressed by the evidence of Irwan, Isa and Farharti, all Muslims, who said they were "angry" after reading the tracts which "they felt had been sent by Christians to convert them" (at [59]). As the accused were "educated and intelligent people" (at [61]) who were "fervent Protestant" (at [63]) evangelists, they had not proved "by virtue of their mere denials" that "they did not know the publications had a seditious tendency" (at [64]).

1.36 The District Court also accepted expert evidence to the effect that the relevant publications were objectionable under the terms of the Undesirable Publications Act (Cap 338, 1998 Rev Ed), for dealing with race or religious matters in such manner that the availability of the publication was likely to cause feelings of enmity, hatred, ill-will or hostility between different racial or religious groups (*PP v Ong Kian Cheong* [2009] SGDC 163 at [54]). The expert witness SAD Mardeei, a Controller under the Undesirable Publications Act, explained that in assessing whether a publication was objectionable, attention had to be given to the whole context and the impact of the medium (comic tracts have greater impact than books on impressionable minds as these state outright conclusions rather than leave it to the reader to make up their own minds, in SAD Mardeei's opinion). On this basis, SAD Mardeei stated that the contents of four books, "God Is Not Great", "Da Vinci Code"," End of Faith" and "The God Delusion" (at [56]), which invited the reader to draw conclusions on religious matters, were not objectionable.

1.37 The District Judge in imposing custodial sentences minimised mitigating factors, such as the fact that the distributed tracts "did not cause public disorder" (*PP v Ong Kian Cheong* [2009] SGDC 163 at [68]), which distinguished it from *PP v Koh Song Huat Benjamin* [2005] SGDC 272 where an online posting sparked a widespread and virulent response, attracting custodial sentences as opposed to a fine (*PP v Ong Kian Cheong* [2009] SGDC 163 at [71]). In addition, there had been no malice in distributing the publications and apologies had been rendered to the recipients of the tracts, particularly since the recipients had not become "hostile or formed any ill-will or fostered any hatred for Christians" (at [70]). The District Judge emphasised that "the offences upon which they are found guilty and convicted are serious ones in that they have the capacity to undermine and erode the delicate fabric of racial and religious harmony in Singapore" as reflected in the prescribed punishments which "reflects the serious view that Parliament takes of such offences" (at [76]). In effect, these offences are akin to strict liability offences as their gravity rests on their nature, not on whether the feared harm actually is caused. He underscored that the

relevant publications were "offensive for religious content" and also had the tendency "to promote feelings of ill-will or hostility between different races or classes of the population particularly, between Muslims and Christians in Singapore because the tracts were sent to Muslims resulting in a complaint responsibly made to the police to investigate the matter" (at [77]). In addition, various tracts also denigrated the Roman Catholic church and other faiths. Since the offences "affect the very foundation of our society, public policy dictates" the application of the principle of deterrence in sentencing (at [77]). This minimises or ignores the factor that there are constitutional guarantees of free speech and religious free speech or propagation in Arts 14 and 15 of the Constitution of the Republic of Singapore (1999 Rev Ed) which should exert some force in the sentencing process, as a mitigating factor, but did not appear to.

1.38 The District Judge stated (*PP v Ong Kian Cheong* [2009] SGDC 163 at [79]): "Religion is a sensitive issue. A person is free to choose his religion and to practice it." Indeed, this is a constitutional right. Furthermore, he observed that it was "foreseeable that the faithful have desires to profess and spread their faith. Besides worship, some Christians might even see evangelism as their paramount Christian duty. The distribution of tracts and Christian literature is done in good faith to inform unbelievers in the hope of stirring up interest to accept Christianity and be converted" (at [80]). This too is constitutionally protected. District Judge Neighbour appears to treat religious propagation as a free speech right, in referencing the case of *PP v Koh Song Huat Benjamin* [2005] SGDC 272 where the court stated that "the right to propagate an opinion cannot be an unfettered right", which is an unexceptional statement, with respect to the accepted view that free speech is not an absolute liberty (*PP v Ong Kian Cheong* [2009] SGDC 163 at [80]). He extended the reasoning in *PP v Koh Song Huat Benjamin* to "insensitive and denigrating remarks about religion or religious beliefs", displaying an instrumentalist bent in noting (at [81]) that: "In our multi-racial and multi-religious society, distributing tracts with callous, denigratory, offensive and insensitive statements on religion with aspersions on race do have a tendency to cause social unrest thereby jeopardizing racial and religious harmony." This prioritises keeping the peace over arguments for protecting free speech, such as the arguments for truth or democracy. Indeed, the low test for permissible restriction, of speech having a "tendency" (as opposed to a reasonable likelihood or clear and present danger, *etc*) to cause a negative social harm, erodes the substance of free speech rights and subordinates this to expansively construed public order considerations.

1.39 While recognising that the accused were distributing seditious and offensive tracts "to spread their faith" (*PP v Ong Kian Cheong* [2009] SGDC 163 at [83]), there was no judicial recognition that the right to

religious propagation is a constitutionally protected right, albeit subject to restrictions. The District Judge also noted that as Singapore citizens, the accused could not "claim to be ignorant of the sensitivity of race and religion in our multi-racial and multi-religious society" (at [82]). He added that "common sense dictates that religious fervour to spread the faith, in our society, must be constrained by sensitivity, tolerance and mutual respect for another's faith and religious beliefs" (at [82]). These are commonsensical rules of prudence. He went on to state that (at [82]): "Both the accused by distributing the seditious and objectionable tracts to Muslims and to the general public clearly reflected their intolerance, insensitivity and ignorance of delicate issues concerning race and religion in our multi-racial and multi religious society." While it is true that many would hold that the accused acted insensitively and naively in relation to the delicacy of race and religion issues in plural Singapore, it is puzzling why the District Judge labelled their actions as "intolerant", unless exercising the constitutional right of religious propagation or of free speech is itself considered intolerant, as such exercises of free speech might well involve views that recipients disagree with or are angered by. If tolerance is self-restraint or forbearance in the face of disagreement, acting *tolerantly* is a term more appropriately related to the actions or restraint of those who hear or receive views they do not like, rather than to the speaker, who might be rightly characterised as acting *insensitively* or with ignorance with respect to how fragile race-religion issues are in this small island. In a give and take situation, speakers should aspire to the sensitive communication of their views, while hearers should strive to demonstrate forbearance in the true spirit of tolerance when faced with a disliked, even vehemently disagreed with, view. While maintaining public order and racial and religious harmony are important public values, so is the importance of free speech and not chilling free speech, and a just accommodation must be negotiated so that *both* interests may be optimalised.

Consistency with constitution: Article 14(2) public order

1.40 The free speech guarantee under Art 14 of the Constitution of the Republic of Singapore (1999 Rev Ed) provides for eight grounds of permissible derogation, including public order and public morality. The Sedition Act (Cap 290, 1985 Rev Ed) presumably comes under "public order" and it was argued in *PP v Ong Kian Cheong* [2009] SGDC 163 that the acts of the accused charged with possessing and distributing tracts with seditious tendencies did not disrupt public order.

What is sedition?

1.41 The District Judge rejected the contention that the Sedition Act (Cap 290, 1985 Rev Ed) created offences of libel against the Government, and as such, in the absence of showing that public order or the maintenance of Government was endangered, the accused ought to be acquitted. They further argued that s 3(1)(*e*) of the Sedition Act was drafted so widely in assuming "all instances of promotion of ill-will and hostility between different classes necessarily has a direct tendency to promote the use of unlawful means by and on members of the public" (*PP v Ong Kian Cheong* [2009] SGDC 163 at [45]). It was argued that this s 3(1)(*e*) had to conform with the Art 14 free speech constitutional guarantee by reading it as if "it contained the additional words 'productive of public disturbance or disorder' or 'with the effect of producing public disorder'". That is, s 4(1)(*c*) offences read with s 3(1)(*e*) of the Sedition Act were designed "to protect the public against attack on public order" (at [45]). Thus, for a publication to have seditious tendency, it must "expressly or implicitly incite public disorder by encouraging unlawful action" (at [45]). It was argued that privately distributed publications did not contravene the Sedition Act as it had "no direct effect on public order". As the tracts were available from Singapore bookstores, the second accused who bought them had "no means to believe or suspect" they had a seditious tendency; the first accused only mailed the tracts and argued he had no knowledge of its contents. Both claimed the defence provided by s 6(2) of the Sedition Act.

Article 14 and political defamation

1.42 The Court of Appeal in *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 considered whether developments in relation to defences to defamation were part of the law of qualified privilege in Singapore, or whether they should be adopted as part of the Singapore common law (at [172]). Unlike Belinda Ang J in *Lee Hsien Loong v Singapore Democratic Party* [2007] 1 SLR(R) 675, the Court of Appeal did not dismiss the possibility that the *Reynolds* privilege, as laid down by the House of Lords in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, might apply to the Singapore context and set out, *obiter*, its thoughts on what a future court might have to consider, should this question arise in a subsequent case.

1.43 The case revolved around an article published in the *Far Eastern Economic Review* ("Singapore's 'Martyr,' Chee Soon Juan", was published in the July/August 2006 issue (Vol 169 No 6) at pp 24–27, in conjunction with an interview with opposition politician Dr Chee Soon Juan, the Secretary-General of the Singapore Democratic Party.

Reference was made to the National Kidney Foundation ("NKF") saga involving the financial mismanagement of the NKF, implicating, among others, its former Chief Executive T T Durai. The implication was that Singapore was similarly misgoverned, as the NKF saga had become synonymous with corrupt financial mismanagement. The suit was brought by Prime Minister Lee Hsien Loong and Minister Mentor Lee Kuan Yew. In this decision running over 130 pages, an exhaustive study of competing approaches in other common law countries towards issues of freedom of speech and defamation was undertaken, including an examination of the *Reynolds* defence of qualified privilege, as articulated by the English House of Lords in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127.

1.44 A heavily contextualist tone was set insofar as the court was conscious that "striking the balance" (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [268]) between freedom of expression and the protection of reputation required the making of a "value judgment" (at [271]). In turn, this would be shaped by local political and social conditions, continuing the particularist trajectory extant in public law cases.

1.45 Chan CJ, delivering the judgment, reviewed the defence of qualified privilege, as it has developed in other jurisdictions where, in general, the balance had shifted in favour of free speech over reputational interests (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [200] and [214]). Citing Lord Nicholls in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 193–195, he noted that the categories of qualified privilege were not closed as these were "applications, in particular circumstances, of the underlying principle of public policy" (at [176]). The Court of Appeal rejected any argument which asserted that the *Reynolds* privilege was always part of the Singapore common law, based on the declaratory theory of law, but went on to consider its merits (at [236]). In rejecting the declaratory theory which recognises the common law as an immutable unchanging body of doctrine which judges discover more accurately, it rejected the argument that the common law, which would have always incorporated the *Reynolds* test, would have been adjusted at the point where the Constitution came into force in order to be consistent with it.

1.46 The Court of Appeal considered "erroneous" (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [239]) the premise that the declaratory theory, which had "no place in modern jurisprudence" (at [248]) was a common law principle. It was unable to "explain the evolution of common law principles that are based on policy considerations which change over time", the defence of qualified privilege being "a paradigm of such a common law principle" whose content was informed by a "contemporary" consideration of the

requirements of common convenience and welfare (at [243]). Further, the *Reynolds* defence could not have existed from time immemorial, since it was based on Art 10 of the European Convention of Human Rights and the UK Human Rights Act (at [244]). This had "collectively elevated freedom of speech from being merely a common law right" to one having a "higher legal order foundation" (*Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 208, *per* Lord Steyn). That is, the *Reynolds* privilege was a product of legislative development in the UK, rather than common law evolution.

1.47 Further, *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 was decided after the date of commencement of the Application of English Law Act 1993 which provided that the English common law before the cut-off date of 12 November 1993, subject to necessary modifications, would continue to be part of Singapore law after the commencement of that Act (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [239] and [247]). After that date, "the common law of Singapore would be the common law as declared and developed by our courts" (at [247]). In addition, this argument was not open to the appellants to plead insofar as it rested on the principle of constitutional supremacy (the courts lack power to abolish the *Reynolds* privilege which conforms with the constitutional free speech guarantee) as they were not Singapore citizens who alone were entitled to constitutional guarantees of free speech. The appellants only enjoyed free speech as a common law right (at [239], [254] and [257]). At present, the common law right to free speech was not found to include the *Reynolds* privilege, "unless this court decides to adopt it as part of our law" (at [257]).

1.48 The Court of Appeal also rejected the argument that Art 105(1) of the 1963 State Constitution was an "adjustment" provision (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [249]). Article 105(1) (currently Art 162 of the Constitution of the Republic of Singapore (1999 Rev Ed)) states:

> **105**. (1) Subject to the provisions of this Article and to any provision made on or after Malaysia Day [*ie*, 16 September 1963] by or under Federal law or State law, all existing laws shall continue in force on and after the coming into operation of this Constitution and all laws which have not been brought into force by the coming into operation of this Constitution may, subject as aforesaid, be brought into force on or after its coming into operation, but all such laws shall, subject to the provisions of this Article, be construed as from the coming into operation of this Constitution *with such modifications, adaptations, qualifications and exceptions as may be necessary* to bring them into conformity with this Constitution and the Malaysia Act [*ie*, the Malaysia Act 1963 (No 26 of 1963) (M'sia), which was the statute providing for (*inter alia*) Singapore to become part of Malaysia].

1.49 Rather than this provision requiring all existing law as of 16 September 1963, including the common law of defamation, to be adjusted to the Constitution, the Court of Appeal stated that Art 105(1) was a "law-enacting provision" which had the effect of expressly restricting the scope of free speech enshrined in Art 10(1)(*a*) of the 1963 Federal Constitution by providing for the continuation of the existing law of defamation (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [250]). Thus, the contention that Parliament did not enact laws restricting free speech "is simply wrong" (at [250]).

1.50 Singapore law does not recognise a general category of qualified privilege at common law for media defendants. The prevailing test is that there has to be a duty to communicate and an interest in receiving such information on the part of the public; this duty has been held to exist on "special facts", which was an onerous test and would be satisfied only in "extreme cases" where there was a great urgency in communicating a warning or the informational source was so reliable as to justify the publication of a suspicion or speculation: *Aaron Anne Joseph v Cheong Yip Seng* [1996] 1 SLR(R) 258; *Chen Cheng v Central Christian Church* [1998] 3 SLR(R) 236.

1.51 The Court of Appeal found that the *Reynolds* test was not one that developed solely on the basis of the common law; the balance it struck between the "two competing interests or right, *viz*, freedom of speech and protection of reputation" was such as to change the English law on qualified privilege (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [184]). The *Reynolds* test flowed from the judicial recognition "of the need in the public interest, for a particular recipient to receive frank and uninhibited communication of particular information from a particular source. That is the end [which] the law is concerned to attain" (at [176]). Rather than finding a generic or subject-matter category qualified privilege for information relating to the public interest, for political speech/information or a media privilege, such as had developed in Australia (see *Lange v ABC* (1997) 145 ALR 96), the *Reynolds* test requires a consideration of all the circumstances in evaluating whether an occasion was privileged. The pre-*Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 test which required the media to satisfy the duty-interest test meant that greater weight was given to protecting reputation than to the media's role in communicating matters of general interest to the public (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [184]).

1.52 As the categories of qualified privilege are not closed, its application in cases is but an application in particular circumstances of the underlying principle of public policy, as noted by Lord Nicholls in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 194 ("*Reynolds*"). This resided in the "common convenience and welfare of society" (citing

Parke B in *Toogood v Spyring* (1834) 1 C M & R 181 at 193; 149 ER 1044 at 1050 in *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [179]) which would depend on "the political, social and cultural values" of the day. Thus, "[s]ociety develops politically, socially and culturally, and the common law develops in tandem with such changes within the permissible limits of its own structure of fundamental norms and principles" (at [179]). The circumstances were to be viewed "with today's eyes" (*Reynolds,* at 195) (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [179]). Thus, it fell to the courts to determine as a question of policy, in accordance with any relevant constitutional or legislative provision, such as the Constitution of the Republic of Singapore (1999 Rev Ed), whether the qualified privilege defence applied in a particular case (at [179]).

1.53 Thus, the *Reynolds* (HL) test, based as it was on free speech under Art 10 of the European Convention of Human Rights and the UK Human Rights Act (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [190]), had the effect of "liberalising" the defence of qualified privilege for, *inter alia*, the media, provided certain conditions were satisfied (at [184]). In essence, this privilege is available to the defendant only if the publication of the defamatory material in question satisfies the test of "responsible journalism" laid down by Lord Nicholls in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 204–205 (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [184]). Lord Nicholls provided a non-exhaustive list of ten factors to be considered in applying the responsible journalism test. The Court of Appeal set out these factors (at [192]), noting that the test "looks not only at the efforts made to investigate properly and objectively the information published, but also at whether an opportunity was afforded to the plaintiff to tell his side of the story to the public in relation to the offensive allegations that the defendant intended to publish of him" (at [194]). Subsequently, in *Jameel v Wall Street Journal Europe Sprl* [2007] 1 AC 359, it was clarified that these ten factors were not meant to operate as separate requirements which all had to be individually satisfied, which the Court of Appeal referenced (at [201]–[203]). The Court of Appeal noted that the core *Reynolds* factor was identified in *Jameel v Wall Street Journal Europe Sprl* as giving the plaintiff the opportunity to tell his version of the story, which promoted the need to verify the accuracy of defamatory material, which was served by allowing the plaintiff to make his comments pre-publication (at [203]). Notably, in indicating that they did not consider the appellants to have satisfied the responsible journalism test on the facts of the immediate case, the Court of Appeal stated that the argument that the respondents had been given a right of reply after publication was a "non-starter" in the circumstances of the case and would, if not, undermine the test completely (at [258]).

1.54 Despite disagreeing as to whether the *Reynolds* privilege was a development from the traditional form of privilege or an entirely new jurisprudential creature, their Lordships in *Jameel (Mohammed) v Wall Street Journal Europe Sprl* [2007] 1 AC 359 were agreed on the point that political speech in itself did not constitute a separate subject-matter category of qualified privilege (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [204]). The defence of neutral reportage has also been considered to be a form of the *Reynolds* privilege, applicable where a newspaper "neutrally" reports upon a matter of public interest, following the English Court of Appeal in *Al-Fagih v HH Saudi Research & Marketing (UK) Ltd* [2002] EMLR 13 (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [208]). The neutral reportage test parted company from the *Reynolds* test insofar as there was "no need to take steps to ensure the accuracy of the published information": *Roberts v Gable* [2008] QB 502 at [61], *per* Ward LJ (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [210]–[211]).

1.55 The Court of Appeal underscored that the impetus for the *Reynolds* test was not merely a product of the common law *simpliciter*, but of the commitment of UK courts to develop the common law "in a manner consistent with Article 10 of the European Convention", citing Lord Nicholls in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 200 (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [196] and [198]). Thus, English courts would take into account relevant decisions of the European Court of Human Rights, such that to justify a curtailing of freedom of expression, a "compelling countervailing consideration" must be established, as must "the means employed" be "proportionate to the end sought to be achieved" (*Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 200, *per* Lord Nicholls) (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [196]). Lord Steyn in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 207–208 had characterised free expression as "a right based on a constitutional or higher legal order foundation", presumably, higher than common law residual liberties which became "a lower order legal right in England" post-*Reynolds v Times Newspapers Ltd* (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [199]). Thus, free expression is "the rule and regulation of speech is the exception requiring justification" (*Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 207–208, *per* Lord Steyn) (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [197]). This sort of reasoning is typical where the scope of a constitutional guarantee of free expression is being determined against competing interests and should not be alien to the adjudicatory process in Singapore. Notably, in previous cases such as that of *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [85]–[86], the High Court has rejected English cases influenced by the jurisprudence of the European Court, noting the fundamental differences existing between English and Singapore law. In short, it

appears the Singapore courts are reluctant to adopt rights-expansive decisions as a model to emulate in the development of local rights jurisprudence. The upshot is the English law on defamation now accords greater weight to the Convention right of free speech as compared with the protection of reputation (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [199]).

1.56 The Court of Appeal also closely reviewed developments in other countries, including Australia and New Zealand, which have developed their own model to protect political speech as a subject-matter category of qualified privilege (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [218] and [221]). The approaches in Canada, Hong Kong, Malaysia and certain Caribbean jurisdictions were also canvassed (at [230]–[234]). This reflects a distinct shift in the structuring of judicial decisions, which now read in parts like law review articles, in their extensive treatment of foreign developments beyond the four walls of the Singapore constitutional text.

1.57 After concluding that the *Reynolds* test was not currently part of the Singapore common law, the Court of Appeal considered the second proposition that it should be adopted. The appellants made five arguments in support (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [259]).

1.58 First, the *Reynolds* privilege was not an outgrowth of the human rights jurisprudence of England or Europe. This was rejected, as the *Reynolds* privilege was not a "natural common law development" but one brought about by a European human rights treaty and an incorporating Act (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [261]). It was a product of the liberalising intention to elevate the importance of free speech, to require that restrictions to it be demonstrated to be necessary in a democratic society. The Court of Appeal noted that since the *Reynolds* privilege was not a purely common law development, the basis for adopting it in Singapore would have to be by way of Art 14(1)(*a*) of the Constitution of the Republic of Singapore (1999 Rev Ed) which is likewise "a right based on a constitutional or higher legal order foundation" (*Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 208, *per* Lord Steyn). However, the appellants as non-citizens could not make this argument (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [264]). It leaves the door open for a Singapore citizen to make this argument, which would analogise the English developments of human rights "uplifting" a common law free speech liberty, with a similar uplift taking place within the Singapore legal order where free speech has been constitutionalised. This shines the spotlight on the question: what does it mean for a liberty to be accorded constitutional status? What is the difference between a constitutional right to free speech and a common law liberty of free

speech? The Court of Appeal's comments were not designed to be exhaustive and related specifically to the "specific context of publication of matters of public interest, especially matters concerning public figures and political issues" (at [268]). What was underscored was the distinction between citizen and non-citizen, as "the makers of our Constitution did not think it proper or wise to confer constitutional free speech on non-citizens, who have no stake in our country" (at [268]).

1.59 Second, Art 14(1)(*a*) of the Constitution of the Republic of Singapore (1999 Rev Ed) guaranteed free speech and if this was not given effect through recognising the *Reynolds* privilege as part of Singapore law, this would "diminish Singapore's democratic credentials and make a mockery of Art 14(1)(*a*)" (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [259]). The Court of Appeal noted that in "jurisprudential theory", free speech as set out in Art 14 was "of a higher legal order" than the Convention right of free speech in England, as the Singapore Constitution is the supreme law of the land, as declared by Art 4. This is correct, as Parliament continues to be supreme in England. In considering the rationale underlying *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127, the Court of Appeal identified the key question as whether, concerning publications on public interest matters, *Reynolds v Times Newspapers Ltd* ought to apply such that constitutional free speech become the rule, and restrictions on this right, the exception. This was not a "live issue" as the appellants were non-citizens but the Court of Appeal considered it "desirable" to "outline some of the considerations that may be relevant for our courts should they be called on to determine this question in future" (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [267]). Noting that free speech was a fundamental constitutionally guaranteed liberty, the issue was: should our courts shift the existing balance between constitutional free speech and protection of reputation in favour of the former where the publication of matters of public interest is concerned? (at [267]). If the answer was affirmative, how then should the balance be shifted?

1.60 Third, the Government had accepted the need for greater political accountability and transparency. As evidence, reference was made to steps taken to encourage democratic participation in the political affairs of Singapore by increasing the number of Non-Constituency Members of Parliament, institutionalising the Nominated Member of Parliament scheme and amending the Films Act (Cap 107, 1998 Rev Ed) by removing the blanket ban on party political films. It was urged that "the courts should follow suit by adopting the *Reynolds* privilege". Fourth, the privilege served the "modern convenience and welfare of Singapore society" as matters of governance were of interest to readers in Singapore and beyond, given its place in the world and as a regional centre for business and tourism. Last, given that leading Commonwealth courts acknowledged the *Reynolds* privilege,

Singapore's refusal to recognise it "could well lead foreign courts to refuse to enforce Singapore libel judgments, because they would be reached on a basis that is antipathetic to free speech as protected by the common law elsewhere. This would hardly be in the interest of defamed Singaporeans" (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [259], the appellant's fifth argument).

1.61 The Court of Appeal highlighted two salient points for a court to consider in the future, where it was faced with how to strike the balance between constitutional free speech and reputational interests (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [269]). First, while recognising that the courts have a role in developing the common law of defamation to serve the common convenience and welfare of society in a manner consonant with "Singapore's prevailing political, social and cultural values", it was also guided by the formulation of Art 14(2)(*a*) of the Constitution of the Republic of Singapore (1999 Rev Ed) which provides that Parliament has "the final say on how the balance between constitutional free speech and protection of reputation should be struck" (at [270]). One might observe that this turns on whether the court takes the route of declaring and applying fundamental common law/constitutional values as a means of regulating statutes which constitute ordinary law. Second, a "value judgment" is required in striking the balance, drawing on local political and social conditions. This nod to local conditions is also recognised in other commonwealth jurisdictions, *eg*, *Lange v Atkinson* [2000] 1 NZLR 257 at 261 (PC) (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [271]).

1.62 The Court of Appeal, in seeking to influence future trajectories of judicial reasoning, offered three questions for a future court to consider (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [271]).

> (a) How should our courts go about deciding whether constitutional free speech should prevail over protection of reputation, and, if so, the extent to which the former should take precedence over the latter? (In this regard, the point which was mentioned in the preceding paragraph is relevant as well.)
>
> (b) How are our courts to determine which are the "local political and social conditions" (*Lange v Atkinson* [2000] 1 NZLR 257 at 261 (PC)) that can tell them whether or not Singaporeans should have greater latitude to exercise constitutional free speech and less legal protection for their reputations?
>
> (c) What kind of evidence should our courts take into account in making a value judgment on this issue? (*eg*, do they need the equivalent of a Brandeis brief to assist them in making an informed decision on the issue?)

1.63 It then proceeded to offer four considerations which it considered "particularly pertinent to how the key question may be answered by our courts" (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [272]) and elaborated upon them.

1.64 First: "The balance in Singapore between constitutional free speech and protection of reputation has remained unchanged since it was struck on 16 September 1963 when freedom of speech became a constitutional right here." (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [272]) Second, the common law of defamation has been held to have struck the appropriate balance between free speech and reputational interests all along. Thus, unlike the *Reynolds* privilege which was the product of a recent legislatively driven liberalising intent in the UK, the balance struck in Singapore has been long-standing and the courts "consistently held that our common law of defamation is not incompatible with constitutional free speech even though it is a restriction on the latter". This suggests that the courts considered that the balance struck on 16 September 1963 continued to be appropriate in prevailing circumstances in Singapore today. Nonetheless, it recognised that this might not in fact be accurate, such that those seeking change "must produce evidence of a change in our political, social and cultural values in order to satisfy the court that change is necessary so as to provide greater protection against the existing law of defamation for defendants where the publication of matters of public interest is concerned" (at [273]). Thus, local political conditions may have changed since the inception of the nation and the courts could, if provided with an evidentiary basis, keep in step with such changes. In the future, a court would have to consider whether the evidence of political liberalisation, provided by the appellant in relation to the amendments to the Films Act (Cap 107, 1998 Rev Ed) and the composition of Parliament constituted "sufficient evidence" of changes in political, social and cultural values, so as to support applying the *Reynolds* rationale to a Singapore generated qualified privilege for publications on matters of public interest. One may observe that this may be an incipient recognition of the importance of political speech in a democratic setting, as the courts develop a more sophisticated free speech jurisprudence.

1.65 Third, the role of the media in Singapore is distinct from that in Britain where the legislative policy as embodied in s 12 of the UK Human Rights Act seeks to ensure more protection to media freedom, in recognition of its vital functions as "a bloodhound as well as a watchdog" (*Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 205, *per* Lord Nicholls) (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [275]). In contrast, Singapore does not have a law directing courts to pay "special regard", where journalistic materials are concerned, to the extent to which the materials published would be in

the public interest (at [277]). Citing ministerial statements (at [277]), the court noted that the role of the media in Singapore was confined to "reporting the news and giving its views on matters of public interest fairly and accurately" (at [277]). That is, the media is not a watchdog and "there is no room in our political context for the media to engage in investigative journalism which carries with it a political agenda" (at [272]). Thus, the Singapore political context "militates *against* applying the *Reynolds* rationale to extend the scope of the traditional qualified privilege defence where the publication of matters of public interest is concerned" [emphasis in original] (at [278]).

1.66 Fourth, a heavy emphasis is placed on honesty and integrity in public discourse by the local political culture on matters of public interest, particularly those pertaining to the governance of Singapore. The Court of Appeal noted that false defamatory statements did not attract qualified privilege as these lacked political, social and cultural value (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [279]). Lord Nicholls in *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 201 had explained that protecting reputation was conducive to "the public good". The Court of Appeal further noted that the US free speech jurisprudence insofar as it is centred on the "marketplace of ideas rationale" as a basis for tolerating defamation which would allow great latitude for free speech, has not been accepted in England, Australia, New Zealand or other Commonwealth states "as a sufficient legal basis" for allowing the publication of defamatory views (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [280]). It concluded that the competition of ideas could facilitate scientific knowledge and applied to statements addressing "ideas or beliefs which cannot or have yet to be proved with scientific certainty to be either true or false such as the superiority of socialism to capitalism" (at [282]). In such areas, there was value in the competition of ideas "to sieve out the idea or belief which society deems to be 'true'" (*ie*, the most accurate or the most rational), which had social value. However, it was "questionable whether the marketplace of ideas rationale is applicable to false statements" as these are inaccurate and lack social value as "there is no interest in being misinformed" (*Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 at 238, *per* Lord Hobhouse of Woodborough) (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [283]). This applies where the false statement is defamatory as reputation is an important facet of individual dignity and informs democratic decision-making and social well-being (at [283]). Lord Hobhouse's views that "there is no human right to disseminate information that is not true. No public interest is served by publishing or communicating misinformation" were affirmed as resonant with the local context (at [285]). The Court of Appeal took note of a Ministerial reply to a parliamentary question to the effect that given the high standard of truth and honesty in politics, where the integrity of Singapore leaders or key institutions were questioned, these

leaders "will not hesitate to clear their names and protect these institutions through due process of law" (Professor S Jayakumar, *Singapore Parliamentary Debates, Official Report* (20 April 1998) vol 68 at cols 1973–1974).

1.67 Further guidance was given to address the situation where a Singapore court decided that the *Reynolds* privilege applied to give greater latitude to free speech over reputational interest, in relation to publications of public interest. In striking a "new balance", it was useful to consider the approach of other common law jurisdictions in this respect. In so doing, the Court of Appeal proffered a fourfold categorisation of rights, characterising Art 14(2)(*a*) of the Constitution of the Republic of Singapore (1999 Rev Ed) as a "subsidiary right" structured to expressly allow Parliament to impose restraints on constitutional free speech (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [286]). In addition, there were "fundamental rights", "preferred rights" and, for the sake of completeness, the idea of "co-equal rights".

1.68 A "preferential right" gives preference to free speech over protection of reputation. Under the *Reynolds* test, free speech takes precedence if the test of responsible journalism is satisfied. Under the *Lange v Australian Broadcasting Corp* (1997) 145 ALR 96 test, free speech is preferred if the speech relates to government and political matters and the defendant publisher's conduct in publishing the statement is reasonable within the terms of s 22 of the New South Wales Defamation Act (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [287]). A "fundamental right" approach, akin to the Dworkinian idea of a right as a trump was exemplified by the *New York Times v Sullivan* 376 US 254 (1964) privilege, which the Court of Appeal had expressly rejected in *JB Jeyaretnam v Lee Kuan Yew* [1992] 1 SLR(R) 791 (free speech is protected unless the stringent test of "actual malice" is proved) (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [288]). In the "co-equal" rights scenario, free speech competes against reputation, conceptualised as a competing right, such as an aspect of privacy under Art 8 of the European Convention, such that the former does not automatically prevail over the latter. The English Court of Appeal decision of *Galloway v Telegraph Group Ltd* [2006] EMLR 11 was cited as an example (at [289]).

1.69 The Court of Appeal concluded its intensive and extensive review of defamation law by identifying three practical difficulties associated with the *Reynolds* privilege and responsible journalism test which is still developing (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [290]). First, the problem of applying the test to the Internet given its universal reach and "potentially limitless audience". This could lead to "potentially greater harm" to the plaintiff's reputation

(at [292]). Second, Internet published information would be accessible to some to whom it would have no public interest, which entails "less reasons" to allow publication of defamatory material. This may militate against the *Reynolds* privilege test, given its publication to persons lacking any interest in receiving the information (at [292]). Second, while *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 was predicated on the idea that the Convention right of free speech assumed precedence over reputational interests, there was a "discernible incipient recognition" in England that the two rights "may in fact be *co-equal* rights" [emphasis in original] (at [293]). Should the House of Lords accept this view, this would affect how the *Reynolds* privilege would evolve. Third, *Reynolds* had moved defamation law "in the direction of the law of negligence in that the concept of reasonable care permeates the 'responsible journalism' test" (at [294]). The degree of care required of a defendant journalist would be "necessarily imprecise" as this depended on the facts of the case (at [294]). As it would entail greater subjectivity in judicial decisions and greater variability in courts applying the test, this would increase uncertainty and might enhance the chilling effect. It was for this reason the New Zealand Court of Appeal rejected the *Reynolds* privilege in *Lange v Atkinson* [2000] 3 NZLR 385 (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [295]).

1.70 The Court of Appeal also noted that the responsible journalism test might make malice irrelevant as a means of defeating qualified privilege as well as render other defences like fair comment and justification "redundant" insofar as "responsible journalism" might be an easier test for a defendant to satisfy. The danger might arise that this will spawn more cases of *irresponsible* journalism being passed off as responsible journalism in the *Reynolds v Times Newspapers Ltd* [2001] 2 AC 127 sense (*Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at [296]). Further, should the *Reynolds* privilege be applied in Singapore, the new balance to be struck "does not necessarily entail excusing or immunising the defendant from liability where the conditions for giving constitutional free speech precedence over protection of reputation are satisfied" (at [297]). For example, the underlying rationale could be vindicated by adjusting damages quantum and calibrating this "in proportion to the degree of care which the defendant has taken (or failed to take)" in ensuring accuracy. This possessed the merit of "deterring irresponsible journalism" (at [297]).

Article 14 and freedom of assembly

1.71 The freedom of assembly is a qualified right under the regime established by the Miscellaneous Offences (Public Order and Nuisance) (Prohibition of Assemblies and Processions – Parliament and Supreme Court) Order (Cap 184, O 1, 2004 Rev Ed) (repealed on 9 October

2009). The accused in *PP v Govinda Rajan s/o Surian* [2009] SGDC 170 participated in an assembly and procession when he ought reasonably to have known these were being held without the required permit, as their application for one had been rejected and they decided to proceed with the protest against price increases. A fine was imposed and has been appealed against.

1.72 The case of *PP v Chong Kai Xiong* [2009] SGDC 380 concerned the definition of "procession" under r 5 of the Miscellaneous Offences (Public Order and Nuisance) (Assemblies and Processions) Rules (Cap 184, R 1, 2000 Rev Ed) (repealed on 9 October 2009). On 16 September 2007, the police observed a group of people who had gathered at the Speakers Corner and wore similar white T-shirts with the words "Democracy Now" and "Freedom Now" on the front and back respectively. They were observed walking to various places including the vicinity of Parliament House, the front of the Istana and ending at the Queenstown Remand Prison ("QRP"). They were charged and later acquitted of the offence of participating in a procession without a valid permit.

1.73 The five elements of the charge were that (a) the defendants had participated in a procession; (b) this procession took place in a public place; (c) this procession consisted of five or more persons; (d) this procession intended to commemorate an event; and (e) the defendants ought reasonably to have known that the procession was held without a permit. Elements (b) and (e) were not in dispute and District Judge John Ng found that the event commemorated the first anniversary of the World Bank-IMF protest held on 16 September 2006.

1.74 Two of the issues raised in defence were that the Miscellaneous Offences (Public Order and Nuisance) (Assemblies and Processions) Rules (Cap 184, R 1, 2000 Rev Ed) (repealed on 9 October 2009) were unconstitutional, such that the defendants were not bound to obey them and that there was no procession. District Judge Ng found (*PP v Chong Kai Xiong* [2009] SGDC 380 at [17]) that there was no basis for attacking the constitutionality of the legislation as the issue of the constitutionality of the Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Rev Ed) and the Rules had been decided in the case of *Ng Chye Huay v PP* [2006] 1 SLR(R) 157. It was held there that the Rules were not discriminatory and that the licensing and permit schemes under the Rules were a "necessary part of the Government's ability to efficiently regulate public behaviour". An aggrieved individual could challenge a police decision under the Rules by way of judicial review, in the absence of statutory appeal.

1.75 District Judge Ng accepted the argument that no "procession", which was not defined in the Miscellaneous Offences (Public Order and

Nuisance) Act (Cap 184, 1997 Rev Ed) or the Miscellaneous Offences (Public Order and Nuisance) (Assemblies and Processions) Rules (Cap 184, R 1, 2000 Rev Ed) (repealed on 9 October 2009) (which merely state the Rules shall apply to a procession of five or more persons in any public road, public place or place of public resort), had taken place. He rejected the "simplistic interpretation" of the word "procession" as proffered by the Prosecution, which was that "so long as a group of 5 or more people walked from one point to another point in a public place to commemorate an event, the people in that group had participated in a procession for the purposes of the Act and the Rules" (*PP v Chong Kai Xiong* [2009] SGDC 380 at [24]). On the facts, what was clear was that a group of people walked along a certain route using pavements, walking in pairs, at times singly in a casual manner, making *ad hoc* stops for distributing pamphlets and toilet breaks (at [25]). He noted that other than a few of the group wearing similar T shirts, the group itself "did not attract any significant attention of the public while walking" as they did not carry banners or placards as is usually associated with a protest. District Judge Ng did not go so far as to require that there must be a "fixed formation" for there to be a procession or that the people involved "must have shouted slogans, carried placards and exhibited banners" (at [26]). Further, the walk did not disrupt pedestrian movement or the flow of vehicular traffic, traffic signals were obeyed and the group "did not move *en masse* onto the streets in any shape or form" (at [27]).

1.76 Thus, District Judge Ng concluded (*PP v Chong Kai Xiong* [2009] SGDC 380 at [28]) on the available evidence that no procession had taken place:

> It was a group of people walking purposefully in a public place from one point to another but on this occasion it never amounted to a procession. There has to be a distinction drawn between walking in a group from one point to another, even if it was to commemorate an event, and being part of a procession. The intention of commemorating an event alone cannot transform what is essentially a walk into a procession. In other words, the *mens rea* cannot make up for what is lacking in the *actus reus*.

Further, in reasoning from the legislative purpose of the Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Rev Ed) or the Miscellaneous Offences (Public Order and Nuisance) (Assemblies and Processions) Rules (Cap 184, R 1, 2000 Rev Ed) (repealed on 9 October 2009), which dealt with offences against public order and nuisance, District Judge Ng noted that the walk did not inconvenience the public or traffic flow or otherwise disturb public peace (at [29]). The Prosecution has lodged an appeal against the acquittals.

Article 14 and contempt of court

1.77 In *AG v Tan Liang Joo John* [2009] 2 SLR(R) 1132, Judith Prakash J reiterated the established test governing the law on free speech and contempt of court, in particular, scandalising the court, which requires only that the claimant prove beyond reasonable doubt that the words or act complained of had the "inherent tendency" to interfere with the administration of justice, rather than satisfying the more stringent test of showing a "real risk" of prejudicing the administration of justice. This follows the case of *AG v Wain Barry J* [1991] 1 SLR(R) 85, recently affirmed in *AG v Herzberg* [2009] 1 SLR(R) 1103. Intent is relevant only at the stage of sentencing (*AG v Tan Liang Joo John* [2009] 2 SLR(R) 1132 at [13]). She discussed the rationale underlying the law and the available defences.

1.78 The relevant act related to the wearing by the three respondents of kangaroo T-shirts within and in the vicinity of the Supreme Court on 26 May 2008 which was hearing a defamation suit against maverick opposition politician Chee Soon Juan, brought by Minister Mentor Lee Kuan Yew and Prime Minister Lee Hsien Loong. The first respondent raised the defence of fair criticism and self-expression; the second respondent said the T-shirt was capable of various meanings and that he had no intention of scandalising the court. In mitigation, the third respondent argued he had not intended for the image of the T-Shirt to be widely broadcast in Singapore, which had happened through the mass media, and that Singaporeans were sufficiently civilised and educated people so as to be able to form their opinions.

1.79 An act or statement has an "inherent tendency" if "it would convey to an average reasonable reader or viewer allegations of bias, lack of impartiality, impropriety or any wrongdoing concerning a judge in the exercise of his judicial function" (*AG v Tan Liang Joo John* [2009] 2 SLR(R) 1132 at [12]), given the circumstances at the time of its occurrence.

1.80 Speech which is critical of the administration of justice is not contemptuous provided "fair criticism" may be shown (*AG v Tan Liang Joo John* [2009] 2 SLR(R) 1132 at [14]). Lord Atkin's reasoning in *Ambard v AG of Trinidad and Tobago* [1936] 1 All ER 322 at 709 was to the effect that criticism of the judiciary which is undertaken without "imputing improper motives to those taking part in the administration of justice" in the genuine exercise of a right of criticism rather than acting out of "malice" or in an attempt to impair the administration of justice, falls within the right of fair criticism.

Defence of fair criticism

1.81 With respect to the limits to "the right of fair criticism", Prakash J noted that motive and manner of criticism was relevant insofar as the criticism is to be "made in good faith and must also be respectful" (*AG v Tan Liang Joo John* [2009] 2 SLR(R) 1132 at [15]). She identified various factors relevant to evaluating the *bona fides* in making a critical statement.

Reasonable basis

1.82 A "relevant factor" is "the extent to which the allegedly fair criticism is supported by argument and evidence" (*AG v Tan Liang Joo John* [2009] 2 SLR(R) 1132 at [16]). In the absence of "some reason or basis for the criticism", this would amount to "an unsupported attack on the court". Fair criticism could not be found only, as Grose J noted in *R v White* (1808) 1 Camp 359n, in "only declamation and invective" in the absence of "reasoning or discussion". Thus, an article censuring a judge and jury was contemptuous because it was written "not with a view to elucidate the truth, but to injure the characters of the individuals and to bring into hatred and contempt the administration of justice in the country" (at [16]). Thus, criticism based on "reasonable argument or expostulation" with respect to any judicial act which was "contrary to law or the public good", would not be contemptuous: Lord Russell of Killowen CJ, *R v Grey* [1900] 2 QB 36 at 40 (*AG v Tan Liang Joo John* [2009] 2 SLR(R) 1132 at [17]).

Temperate

1.83 The manner in which the criticism is made is also relevant as this must "generally be expressed in a temperate and dispassionate manner", as "an intention to vilify the courts is easily inferred where outrageous and abusive language is used" (citing Nigel Lowe & Brenda Sufrin, *Barrie & Lowe, The Law of Contempt* (Butterworths, 3rd Ed, 1996)) (*AG v Tan Liang Joo John* [2009] 2 SLR(R) 1132 at [18]). Criticism must, thus, be made in a respectful manner, adhering to "the limits of reasonable courtesy and good faith" (Salmon LJ in *R v Commissioner of Police of the Metropolis ex p Blackburn (No 2)* [1968] 2 WLR 1204 at 1207). Further, it must not be directed at "the personal character of a judge or to the impartiality of a judge or court" (Halsbury Laws of England Vol 9(I) (Butterworths, 4th Ed Reissue, 1998) at para 433) (*AG v Tan Liang Joo John* [2009] 2 SLR(R) 1132 at [18]).

1.84 Prakash J underscored the rationale for the right of fair criticism and its limits in referencing an understanding of free speech as a means that serves the end of democratic debate and truth.

Importantly, she noted that "temperate balanced criticism allows for rational debate about the issues raised and thus may even contribute to the improvement and strengthening of the administration of justice" (*AG v Tan Liang Joo John* [2009] 2 SLR(R) 1132 at [19]). Conversely, "scurrilous and preposterous attacks … are likely to have the opposite effect" (at [19]), as such statements are not conducive to reasoned answer.

1.85 The relevant list of factors a judge may take into account when evaluating whether an act or statement is contemptuous is "not closed" and the court will consider all the circumstances which "in its view go towards showing bad faith" (*AG v Tan Liang Joo John* [2009] 2 SLR(R) 1132 at [20]). In addition to good faith and temperate criticism, the court may also consider other factors such as the party's attitude in court and the number of instances of contemning conduct.

Impugning bias

1.86 With respect to the "more contentious" limit on the right to criticism, Prakash J noted that it appeared from English authorities that "the act or words in question must not impute improper motives to nor impugn the integrity, propriety and impartiality of judges or the courts" (*AG v Tan Liang Joo John* [2009] 2 SLR(R) 1132 at [21]). The reason for this is that as the judicial function revolves around the making of impartial judgments, allegations of partiality "are treated seriously because they tend to undermine confidence in the basic function of a judge" (Nigel Lowe & Brenda Sufrin, *Barrie & Lowe, The Law of Contempt* (Butterworths, 3rd Ed, 1996) at pp 350–351) (*AG v Tan Liang Joo John* [2009] 2 SLR(R) 1132 at [21]). Refreshingly, Prakash J stated (at [22]): "We ought not to be so complacent as to assume that judges and courts are infallible or impervious to human sentiment." Given this truth, while it was important "to maintain public confidence in the administration of justice", this was not an absolute value but one that had to be "balanced against the public interest in rooting out bias and impropriety where it in fact occurs" (at [22]). The learned judge stated that the "fear of baseless imputations of bias or impropriety" was "unfounded" as judicial account could be taken of factors such as the existence of evidence informing the allegation in evaluating the requirement of *bona fides*. Thus, this second limit on fair criticism was "unnecessary" and "potentially overly restrictive of legitimate criticism" (at [23]). This is a clear judicial statement which acknowledges the legitimate role critical speech has to play in the workings of the judicial process in a democracy and is to be welcomed.

1.87 On the facts of the case, the wearing of the T-shirt was found to be contemptuous given such factors as the place and time where it was worn, such that Prakash J concluded that a "reasonable viewer would

apprehend that it was a reference to the expression 'kangaroo court' and intended to cast aspersions on the way in which the assessment of damages hearing was being conducted in particular and the Singapore justice system in general" (*AG v Tan Liang Joo John* [2009] 2 SLR(R) 1132 at [24]). Powerful and evocative images had as much "inherent power" as a written article to shake public confidence in the public system (at [28]). No satisfactory explanation was offered as to why the relevant respondent wore a T-shirt depicting a dressed wallaby. No reasons were given to make the case for fair criticism, and wearing the T-shirt in the vicinity of the court "amounted to a deliberate and provocative attack on the court" which fell beyond "the realm of fair and reasoned criticism" (at [25]). The acts of wearing the kangaroo T-shirt within the vicinity of the court, communicating to an average member of the public the respondents' conviction that the Singapore courts are "kangaroo courts", inciting others to wear the T-shirt and posting photographs of the respondents wearing the T-shirt on a political party website was found to be contemptuous. No apology was proffered in court and in the absence of mitigating factors, a custodial sentence was deemed appropriate (at [45]).

Article 12 and the Administration of Muslim Law Act

1.88 The High Court in *Shafeeg bin Salim Talib v Fatimah bte Abud bin Talib* [2009] 3 SLR(R) 439 affirmed that the general law on joint tenancy applied to the case at hand, such that the relevant property of the deceased did not fall to be distributed in accordance with s 112(1) of the Administration of Muslim Law Act (Cap 3, 2009 Rev Ed). This was because the deceased's interest in the property did not form part of the estate susceptible to regulation by Muslim personal law, but on death, passed to the first defendant, his wife, by right of survivorship. The first defendant, the wife of the deceased, who was a Muslim and of Turkish Yemeni Arab descent, had become registered as the sole proprietor of the property, and by way of gift, transferred the property to herself and her two children, the second and third defendants, who were not Muslims. Under Muslim law, the children would be excluded as beneficiaries under the inheritance certificate issued by the *Syariah* court for the deceased's estate. The other beneficiaries of the deceased's estate were unaware of this transfer.

1.89 On request from the plaintiffs under s 32(1) of the Administration of Muslim Law Act (Cap 3, 2009 Rev Ed), the administrators of the estate of the deceased, the legal committee of the Majlis Ugama Islam ruled that the estate was considered matrimonial property (*harta sepencarian*) as the deceased and his wife had jointly owned it and therefore half of the estate would be considered

inheritance and susceptible to distribution following Islamic inheritance law.

1.90 Lee Seiu Kin J in the High Court held that whether the half of the property was part of the estate was not a question of Muslim law and therefore fell outside the purview of the legal committee of the Majlis Ugama Islam (*Shafeeg bin Salim Talib v Fatimah bte Abud bin Talib* [2009] 3 SLR(R) 439 at [21]). He would thus not invoke s 32(7) of the Administration of Muslim Law Act (Cap 3, 2009 Rev Ed) which allowed a court to request the Majlis for an opinion on any Muslim law question, as there was none to be decided on the facts of the case.

1.91 There was nothing in any law suggesting that the common law right of survivorship in a joint tenancy did not apply to Muslims (*Shafeeg bin Salim Talib v Fatimah bte Abud bin Talib* [2009] 3 SLR(R) 439 at [27]). Article 12 of the Constitution of the Republic of Singapore (1999 Rev Ed) requires the equal application of the laws of Singapore to all persons, except only where primary or secondary legislation regulated personal law. In the absence of specific legislative provisions "carving out special rights or obligations for certain groups of people", the laws of Singapore applied equally to everyone, this being the "essence" of the principle of equality enshrined in the Constitution (at [14]).