1. ADMINISTRATIVE AND CONSTITUTIONAL LAW

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Introduction

1.1 In the field of administrative law, the cases dealt with judicial review on both substantive and procedural grounds. Notably, proportionality was rejected as an applicable ground of judicial review and in relation to the rule against bias, there was some scholarly judicial exploration of the competing tests of bias, offered as a guide to the future development of the law by the highest court of the land.

1.2 A varied range of issues were addressed in the constitutional law cases decided in 2005, pertaining to the Art 9(3) right to counsel and the scope of freedom of expression and assembly under Art 14 of the Constitution of the Republic of Singapore (1999 Rev Ed). In this regard, the constitutionality of the Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Rev Ed), which regulates assemblies and public processes, was discussed. A landmark case brought under the Sedition Act (Cap 290, 1985 Rev Ed) saw the conviction, fine and imprisonment of two accused persons for posting racist comments on the Internet. In the context of Singapore, content-laden proscriptions of speech were upheld where these served public order interests, particularly in relation to the preservation of racial and religious harmony. There were also significant statements considering the weight of foreign case law in Singapore courts, with the continued rejection of case law which was oriented towards the expansion of rights.

ADMINISTRATIVE LAW

Judicial review

1.3 A core justification for the exercise of judicial review is to ensure that statutory bodies act within the confines of their allocated powers, given that such bodies do not possess inherent jurisdiction. In other words, an exercise of power must be shown to be expressly authorised.

Misconstruing the scope of statutory power

1.4 In two cases relating to the Singapore Medical Council ("SMC"), orders of costs made against practitioners found guilty of professional misconduct were found to have exceeded the statutory ambit of conferred powers. Under s 45(4) of the Medical Registration Act (Cap 174, 2004 Rev Ed) ("MRA"), the Disciplinary Committee ("DC") constituted under the MRA to serve as a fact-finding tribunal is tasked with determining wrongdoing and to punish those found guilty of wrongdoing. It is empowered under s 45(4) of the MRA to require a registered medical practitioner ("RMP") to pay "such sums as it thinks fit in respect of costs and expenses". An RMP has a right of appeal under s 46(7) of the MRA, even if this relates only to costs, and to challenge a decision of the DC before a High Court of three judges as the final decision-making body, sitting as an appellate tribunal.

1.5 In *Lim Teng Ee Joyce v Singapore Medical Council* [2005] 3 SLR 709, the High Court found that an order of the DC that the appellant should pay the full costs of a three-day hearing was incorrect and contrary to principle. Three charges of professional misconduct had been made against the appellant, a dermatologist. The first two, which she pleaded guilty to, were that of improperly delegating to her nurse the administration of laser treatment for facial acne. The last one related to the improper management of the treatment of her patient through the prescription of laser treatment. The majority of the three-day hearing was spent on this latter charge, which the DC had acquitted the appellant of.

1.6 The High Court rejected the argument of the SMC that it had "unfettered discretion" to order costs under s 45(4) of the MRA (at [15]), bearing in mind that while the appellant was not guilty of the third charge, she had committed "errors of judgment" and kept less than ideal records of her case notes (at [20] and [25]). The High Court held that the power under s 45(4) to order costs was not to be read in isolation but against the relevant statutory backdrop, specifically, s 45(1). This indicated that the powers set out in s 45(2) could be exercised by the DC where the RMP was found guilty of professional misconduct or specified infractions. It affirmed (at [15]) the seminal Court of Appeal decision in *Chng Suan Tze v Minister of Home Affairs* [1988] SLR 132 at 156, [86] to the effect that "[t]he notion of a completely subjective or unfettered discretion is contrary to the rule of law". The High Court stated (*ibid*) that it would be "inconsistent with principle" and "contrary to the notion of fairness" for the DC to punish the RMP with having to pay the SMC full costs, where the RMP was exonerated of the

charges preferred against her. Thus, an appellate tribunal is entitled to interfere with a costs order where it is manifestly wrong or was exercised on wrong principles (at [16]). In apportioning costs and holding that the appellant should only bear one-third of the costs and expenses incurred by the SMC, the High Court was fortified by reference (at [22], [23] and [24]) to the decisions of the New Brunswick Court of Appeal in *Hasan v College of Physicians and Surgeons of New Brunswick* (1994) 152 NBR (2d) 230, the Court of Appeal of New South Wales in *Ohn v Walton* (1995) 36 NSWLR 77 and the Administrative Court of the Queen's Bench Division in *Gage v General Chiropractic Council* [2004] EWHC 2762. The appellant was not asking for an indemnification of costs but only that the costs incurred by the SMC in relation to the unsubstantiated charge should not be wholly borne by her (at [26]). Following the Australian decision of *Beard v Wilde* (1985) 41 SASR 226, the insufficiency of notes taken did not relate to the charge of unprofessional conduct and thus could not be a relevant factor or by itself constitute a special reason to affect the order of costs. In taking into account and expressing disapproval of the bad note-keeping on the part of the RMP when making the costs order, the SMC had effectively taken into account an irrelevant or extraneous consideration and acted *ultra vires*.

1.7 Similarly, the DC under the MRA committed an error of law in misconstruing the scope of its statutory powers to order costs. In *Shorvon Simon v Singapore Medical Council* [2006] 1 SLR 182, the Court of Appeal allowed an appeal against the decision of the High Court judge. This related to a direction by the DC that the appellant, who was found guilty of professional misconduct, should pay costs, some of which were incurred not before the DC but at an earlier stage of the disciplinary proceedings conducted before the Complaints Committee ("CC"). The Court of Appeal agreed with the High Court that disciplinary proceedings constitute a "hybrid category" (at [16]) and it could not be assumed beforehand that such proceedings were "relaxed and casual as opposed to the formality and rigour of court proceedings" (at [17]). Nevertheless, it found that the statutory power to direct payment of costs was exceeded, observing that the power to impose costs was "neither a subjective nor an unfettered statutory licence to make arbitrary orders of costs and/or expenses" (at [25]).

1.8 The terms of the power to order costs were to be construed strictly, given that such power had a punitive dimension, and in accordance with its statutory formulation. Section 45(4) of the MRA conditions the power of the DC to order an offending practitioner to pay the Medical Council "such sums as it thinks fit in respect of … and incidental to any proceedings before the [DC]". The Court of Appeal found that it would be "conferring undue

elasticity" to the statutory term "incidental", whose ordinary meaning was "accompanying" or "attendant", to stretch it "to embrace the work done earlier for the purposes of the CC enquiry" (at [26]). What had to be shown was a "direct and apparently immediate nexus to the relevant proceedings" (at [28]), which was not available on the facts. As the earlier stages of the disciplinary proceedings were "disparate", the DC could not in the absence of express authorisation "recover by a side wind costs incurred" prior to the DC stage, under cover of the term "incidental" (at [29]). To do so would be to commit an illegality in misconstruing the scope of statutory powers.

Substantive grounds of review

1.9 A challenge before a Valuation Review Board that a decision of the Chief Assessor under the Property Tax Act (Cap 254, 2005 Rev Ed) to amalgamate tax accounts so as to deny the appellant the benefit of remissions was "unreasonable, arbitrary and irrational" was rejected in *Aspinden Holdings Ltd v Chief Assessor* [2005] SGVRB 2 at [103]. This was because the contention rested on "bare speculation at best" (at [100]) and failed to rebut the presumption of regularity of official acts. Thus, imputations of improper motive must have an evidential basis to succeed, as bare assertions will not suffice.

1.10 In *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR 582 ("*Chee Siok Chin*"), the issue was whether a police officer had exceeded his power under the Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Rev Ed) ("MOA") in ordering a group of four peaceful protestors to disperse on the basis that they had allegedly committed a public nuisance. V K Rajah J noted that Parliament had conferred upon the police discretion which had to be exercised to advance legislative policies; the exercise of such discretion could be reviewed on the *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 ("the *GCHQ* case") grounds of review. The relevant power here was that under s 40 of the MOA to arrest without warrant, which involved a deprivation of a person's constitutional right to liberty.

Rejecting proportionality as a ground of review

1.11 Rajah J in *Chee Siok Chin* expressly rejected proportionality as a ground of review, stating that this had never been part of the common law nor Singapore law (at [87]). He stressed that judicial review was confined only to the decision-making process and not the merits of the case, noting academic commentary that the test of proportionality might involve the

substitution of a court's own judgment for that of the proper authority (*ibid*).

Reasonableness test

1.12 Rajah J in *Chee Siok Chin* examined whether the police power to arrest without warrant breached any of the accepted grounds of review, noting that such a discretionary power could not be exercised "mechanically nor automatically" (at [103]). To justify the exercise of such power, there had to be a "factual substratum" which could be said to be "reasonable" (*ibid*). Section 40 of the MOA provides that the police officer must have "reasonable grounds for suspicion" that a MOA provision has been offended, and that "the existence of the grounds for suspicion is a matter of fact" which is reviewable (at [105]).

1.13 In applying the *Wednesbury* reasonableness test after its seminal formulation in *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223, Rajah J noted (at [95]) that the test did not mean there was a "single inevitable approach or determination" regarding any matter. Unreasonableness in this context meant a decision which was outrageous in its defiance of logic and propriety such that "it can be plainly seen that no reasonable person would or could come to that decision" (at [94]). He noted that reasonableness allowed for a range of decisions as "decision makers can in good faith arrive at quite different decisions based on the same facts: there is an inherent measure of latitude in assessing reasonableness" (at [95]).

1.14 Rajah J, in evaluating the reasonableness of the police officer in exercising his executive discretion which disrupted the peaceful protest, took a close look at the facts of the case. He noted that when the police arrived at the scene, a crowd, including journalists, had gathered round the applicants, although there was no hint or suggestion of violence or any threatened breach of peace (at [120]). Rajah J said (*ibid*) that the "most striking feature" of the protest was the words on the T-shirts worn by the protestors or the placards they raised, which linked the "CPF" (Central Provident Fund) with the "NKF" (National Kidney Foundation). Reference was also made to the "GIC" (Government of Singapore Investment Corporation Pte Ltd), the "National Reserves" and a clarion call for "Transparency" and "Accountability" as well as "a suggestion that Singaporeans were for some inexplicable reason unable to withdraw their CPF 'life savings' when they needed it" (*ibid*). In objectively evaluating the factual evidence, Rajah J stated that the message conveyed by the T-shirts and placards showed the protestors

were "neither affably nor gently raising queries" (at [121]). Rather, it was an attempt to undermine the integrity of public institutions like the CPF Board, the GIC and HDB by alleging impropriety on the part of persons responsible for managing the finances of these institutions. This was a "conscious and calculated effort to disparage" these institutions and their management (*ibid*). In taking a close contextual approach, Rajah J took judicial notice of the political implications that "any attempt to link the institutions to the NKF at that point of time, 11 August 2005 … would be tantamount to an insinuation of mismanagement and financial impropriety" (*ibid*). This was because of the negative publicity surrounding fiscal mismanagement by the NKF. Thus, to link the CPF with the NKF would be to "tarnish them with financial impropriety and sully their standing and integrity" (*ibid*). This went beyond an allegation of impropriety but was "a patent attempt to scandalise the institutions and their management by association" (*ibid*). Rajah J went so far as to say that the contents of the T-shirts and placards were "*prima facie* more incendiary than an ordinary affray or a localised breach of peace" such that it amounted to a "grave attack" on the financial integrity of key public institutions (at [131]).

1.15 Going beyond the issue of whether the words were defamatory, the issue here was whether the words were *prima facie* insulting or abusive within the meaning of s 13A or 13B of the MOA. Rajah J held (at [123]) that it was a "plain, common-sense impression and conclusion" that a police officer at the scene would conclude that the words the protestors used were "insulting" or "abusive" in relation to those managing the relevant institutions. It was also reasonable to conclude that the "protest" was intended to harass them, especially the CPF Board, since the protest was staged outside its principal premises (*ibid*). The MOA did not provide a statutory definition of harassment and thus Rajah J said it should be given a common-sense meaning in the sense of producing "discomfort", "unease" and/or "distress" (at [124]). Harassment was not merely repetitive but prolonged conduct. On the facts, Rajah J found (*ibid*) that the protestors were positioned for a "prolonged period" and would have continued in the absence of intervention; thus, it did amount to harassment. Thus, the police officer in question had "ample grounds" (at [126]) based on an objective test of reasonableness to conclude the protestors had contravened the MOA and was thus found to be acting well within the scope of his discretion. Thus, Rajah J found that since the police had not acted arbitrarily, the applicants' complaints were legally unsustainable and the proceedings were frivolous, vexatious and/or an abuse of process (at [128]).

Natural justice and non-material errors not affecting the final determination

1.16 The requirements of natural justice, which relate to the common law standards of procedural fairness, or the duty to act fairly, apply to all bodies charged with a duty to act in a judicial or quasi-judicial capacity, such as arbitration tribunals. What procedural fairness requires is not fixed in advance but turns on the nature of the adjudicating body and the gravity of the interests at stake, and is thus heavily conditioned by the facts of the case.

1.17 In *PT Asuransi Jasa Indonesia (Persero) v Dexia Bank SA* [2006] 1 SLR 197, Judith Prakash J found that the contention that natural justice had been breached as the applicant was not given an opportunity to present its case fully, contrary to the principle of *audi alteram partem*, lacked a substantive basis. An arbitral tribunal determined a preliminary hearing on the basis of written submissions without conducting an oral hearing, which the applicant challenged as breaching natural justice in relation to the right to be heard. However, both parties had failed to file any submissions before the stipulated date for an oral hearing made after a preliminary meeting, such that the intended hearing could not take place. Subsequent directions concerning the filing of submissions did not direct an oral hearing, which neither party requested. Prakash J held it was not reasonable to assume that the tribunal, after the original date set for an oral hearing was long past, would consider an oral hearing to be of assistance given the changed circumstances. On the evidence, the learned judge found the applicant had been accorded a full opportunity to present its case on the jurisdictional issue and there was no evidence to make the tribunal in question wonder whether the applicant had fully appreciated the case against it, buttressed by the fact that the applicant had copies of all the respondent's submissions and thus full access to the case against it. The applicant was thus not entitled to complain of not being given a chance to orally address any concerns the tribunal might have had after reading the written submissions of both parties.

1.18 Furthermore, Prakash J found that not all errors committed in the decision-making process, including breaches of natural justice, have the effect of vitiating the decision. This is consonant with the seminal House of Lords decision of *Regina v Hull University Visitor, ex parte Page* [1993] AC 682 where Lord Browne-Wilkinson noted (at 701–702) that in principle, the High Court may review any error of law made by administrative tribunals or inferior courts in reaching its decision, to ensure such powers were exercised on the "correct legal basis" (at 701) in accordance with "the

general law of the land" (at 702). However, for the decision to be vitiated, what must be shown is a "relevant error of law" which is "an error in the actual making of the decision which affected the decision itself" (*ibid*). Thus immaterial or non-relevant errors will not affect the decision.

1.19 Prakash J found in relation to a particular point, which neither party raised concerning the applicant's purported non-participation in the previous arbitration, that even if there was a breach of natural justice in so far as the tribunal did not inform the applicant that this was a relevant point in issue, such a breach, which was not determinative of its final conclusion, did not prejudice the applicant (at [50]).

Rule against bias

1.20 The rule against bias, which embodies the concept of objectivity and impartiality, is a fundamental pillar of natural justice. As Andrew Phang Boon Leong JC (as he then was) noted in *Tang Kin Hwa v Traditional Chinese Medicine Practitioners Board* [2005] 4 SLR 604 ("*Tang Kin Hwa*") at [11], a system is "only as good as the persons who administer it" such that in the absence of impartiality, "respect for the law will be forfeit", eroding public confidence in the legal system such that "all that is noble and fine and which undergirds the law will be tarnished and destroyed". He approvingly cited (*ibid*) Lord Denning MR's observance in the English Court of Appeal decision of *Metropolitan Properties Co (FGC) Ltd v Lannon* [1969] 1 QB 577 at 599:

> Justice must be rooted in confidence: and confidence is destroyed when right-minded people go away thinking: 'The judge was biased'.

Thus, the importance of both actual and perceptual justice is underscored.

1.21 Allegations of apparent bias as a breach of natural justice arises in various cases. The test for bias varies, turning on two main issues: the perception of the relevant party, which could be the "reasonable man" or the court, and the standard of proof to be applied in terms of likelihood of bias. There are various formulations of the latter, including the "reasonable suspicion", "real likelihood of danger" and "real danger of bias" tests. In contrast with the test for actual bias, truth of an imputation of bias need not be proved, so some degree of speculation is involved.

1.22 In *Tang Kin Hwa*, Phang JC noted (at [23]) that there is some uncertainty surrounding the test of apparent bias in Singapore which was acknowledged by the Court of Appeal in *Tang Liang Hong v Lee Kuan Yew*

[1998] 1 SLR 97 ("*Tang Liang Hong*"). Furthermore, there are Singapore cases which appear to use these two tests interchangeably. The Court of Appeal in *Tang Liang Hong* pegged the test of apparent bias on the part of a tribunal hearing a matter as being whether a reasonable and fair-minded person sitting in court and knowing all the relevant facts had a reasonable suspicion that a fair trial for the litigant was not possible, following *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 2 SLR 310 at 338, [83] and *De Souza Lionel Jerome v AG* [1993] 1 SLR 882. Notably, it also stated that had the more stringent test of the court asking itself whether there was a "real danger" of bias been applied, it would not have been satisfied. This test is associated with the House of Lords decision of *Regina v Gough* [1993] AC 646 ("*R v Gough*"). Nevertheless, the Court of Appeal in *Tang Liang Hong* held (at [48]) that it was immaterial for the purposes of the present appeal which of the two tests were applied, focusing instead on the need to establish the relevant factual basis on which the allegation of bias rested. The Court of Appeal stated that claims of apparent bias against a judge must have a factual basis which was substantially true and accurate as a bare allegation of bias would not suffice. This test seems to place more emphasis on the veracity of the allegation rather than on the public interest consideration of public confidence that justice must not only be done but be seen to be done. It was applied in *Jagir Singh Touwana v PP* [2005] SGHC 36 at [24] where the appellant alleged that the trial judge was "prosecution-minded" and had pre-judged the issue of illegal parking by stating at the pre-trial conference: "If it is not parking then what is it?". Yong Pung How CJ found this claim to be frivolous and that it failed to meet the high threshold required for an argument of bias to succeed. He concluded that the claim of bias was "wholly unsubstantiated", noting that "it was [clear] from the Notes of Evidence and the trial judge's Grounds of Decision that [the decision rested on] logical reasoning and a detailed examination of evidence given by both parties", such that a reasonable person would not suspect that a fair trial for the appellant had not taken place (at [26]).

1.23 In *Wee Soon Kim Anthony v UBS AG* [2006] SGHC 18, while not finding apparent bias on the facts, the learned judge did not directly disagree or speak to the formulation by the plaintiff's counsel that the test of bias was a claim resting on evidence that gives rise to "a reasonable suspicion of a personal animosity to the extent that there exists a real danger of apparent bias resulting in a fair and balanced judgment not being possible" (at [10]). This seems to meld both the "reasonable suspicion" test adopted in *Tang Liang Hong* with the "real danger of bias" test commonly associated with the House of Lords decision of *R v Gough* which the Court of Appeal also applied in *Tang Liang Hong*.

1.24 Phang JC in *Tang Kin Hwa* (*supra* para 1.20) examined the two primary tests for bias, noting there has been "no small disagreement across the Commonwealth as to which test should prevail" (at [15]). The more stringent test is that of the "real likelihood of bias" while the other is couched in terms of proving a "reasonable suspicion of bias" test. He stated that following *Tang Liang Hong* (*supra* para 1.22), the present Singapore position in respect of apparent bias was the "reasonable suspicion of bias" test but what the Court of Appeal in *Tang Liang Hong* left open was the question of whether the more stringent "reasonable likelihood of bias" test ought to supersede the "reasonable suspicion" test (at [18]). He also noted there were Singapore decisions which treated both tests as interchangeable or not substantively different: *Re Singh Kalpanath* [1992] 2 SLR 639 and *Re the Medical Registration Act (Cap 174)* [1994] 1 SLR 176. Phang JC noted (at [19]) that parties to the present proceedings accepted that the correct principles to be applied were found in *Re Singh Kalpanath* but in fact, this particular case embodied both tests. On the facts of *Tang Kin Hwa,* Phang JC noted that for purposes of the present case, it was "immaterial" (at [20]) which of the two tests were adopted. He noted that if these tests had led to different results, applied to the present facts, "a choice would clearly have had to have been made between them unless some form of synthesis between the two tests could have been achieved" (at [19]).

1.25 *Tang Kin Hwa* concerned a decision of the statutorily established Traditional Chinese Medicine Practitioners Board to suspend the registration of an acupuncturist for two years.

1.26 Although it was "unnecessary" on the facts to set forth a definitive view, Phang JC articulated four reasons for mapping out the "legal topography across Commonwealth jurisdictions" (at [20]). The "real danger of bias" test, associated with *R v Gough* (*supra* para 1.22) had been criticised in various Commonwealth jurisdictions like Australia, while it has been endorsed in jurisdictions like Malaysia and New Zealand (at [29]). Phang JC noted that the difficulty with *R v Gough* did not relate so much to local conditions or suitability such as the needs of society and its mores, but resided in "the context of logic and reasoning" (*ibid*). *R v Gough* had been criticised for placing undue emphasis on the court's perception of the facts, in so far as Lord Goff of Chieveley in *R v Gough* had rejected the "reasonable man" test in stating that the court personifies the reasonable man (at [26]). This placed "inadequate emphasis on the *public* perception" [emphasis in original] (at [29]) – see the Australian High Court decision of *Webb v The Queen* (1994) 181 CLR 41.

1.27 The principles enunciated in *R v Gough* have since been modified, with the House of Lords acknowledging criticisms of it in the later decision of *Porter v Magill* [2002] 2 AC 357 at [100] ("*Porter*"). There, Lord Hope of Craighead adopted the Court of Appeal's approach in *In re Medicaments and Related Classes of Goods (No 2)* [2001] 1 WLR 700 ("*Re Medicaments*") at [59] and [85], which took Strasbourg jurisprudence into account. A "modest adjustment" of the test in *R v Gough* suggested by Lord Philips of Worth Matravers MR in *Re Medicaments* would entail the court to first ascertain all the circumstances bearing on the allegation that the judge was biased. It must then ask "whether those circumstances would lead a fair-minded and informal observer to conclude that there was a real possibility, or a real danger, the two being the same, that the tribunal was biased" (*Re Medicaments* at [85], *Porter* at [102] and *Tang Kin Hwa* at [30]). Lord Hope advocated the adoption of this approach, but wanted the reference to "a real danger" deleted as it served no purpose and was not referred to in Strasbourg jurisprudence (*Porter* at [103]). Thus, the question was "whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased" (*Porter* at [103] and *Tang Kin Hwa* at [31]). Phang JC in *Tang Kin Hwa* at [33] concluded that the modified English position was that the "more stringent test still stands" but this was phrased in terms of a "real possibility" of bias, noting that there was "no apparent difference in substance" amongst "reasonable suspicion of bias", "real likelihood of bias" and "a real possibility" of bias.

1.28 As far as Singapore was concerned, Phang JC raised the question whether it would be possible to argue there was no (even conceptual) difference between the tests of "reasonable suspicion" and "real likelihood" of bias (at [34]), with there being some case law indirectly supporting this proposition, albeit sans detailed argument. Both tests were premised on an "objective" basis (at [36]). He noted (at [37]) that the concern with the "real likelihood of bias" test mentioned by Deane J in *Webb v The Queen* (*supra* para 1.26, at 72) was that it addressed actual bias rather than the appearance of bias. This would be resolved by the treatment of the matter by Leggatt J in the English High Court decision of *Cook International Inc v BV Handelmaatschappij Jean Delvaux* [1985] 2 Lloyd's Rep 225 where he stated that the contrast was between the reasonable suspicion of bias and the appearance of a real likelihood of bias (*Tang Kin Hwa* at [37]).

1.29 Phang JC embarked upon a thorough approach of various jurisdictions in respect of the test of apparent bias, even though on the facts of the immediate case, allegations of bias were found to be without basis

regardless of which test was applied (at [46]). The specific allegations of bias were set out in Appendix A of the judgment.

1.30 In discussing the degree of proof of bias required, Phang JC identified the "common substance of both tests" as being "whether or not there was a perception on the part of a reasonable person that there would be a real likelihood of bias" (at [39]). He underscored that the concept of "likelihood" entails "possibility", in contrast with the more stringent standard of proof resting on "probability". He then asserted that this was merely another way of saying there was a "reasonable suspicion" on the part of the concerned person. While the test of "reasonable suspicion" was less stringent, "this lower standard is reflected in the concept of 'possibility' (or 'likelihood') instead of 'probability'" (*ibid*). On this basis, Phang JC offered his view that there was no substantive difference between the tests of "reasonable suspicion" and "real likelihood". In this context, he cautioned against "gratuitous semantic confusion" (*ibid*) and urged the need, where form and substance were dissonant, to focus on substance and to not be unduly distracted by form (at [43]).

1.31 Phang JC further clarified (at [40]) that the two tests could not be "exemplified in any way by a contrast between *perspectives*" [emphasis in original], especially in relation to that of the court and the public. As a matter of practical reality, the court in ascertaining the perspective of the public would have to personify the public and this was best viewed as "*integral parts of a holistic process*" [emphasis in original] (*ibid*). Phang JC, however, stressed that the court could not "replace" the reasonable man and to that extent "it [was] wrong to state that the public perception will either be ignored or otherwise receive inadequate emphasis" (*ibid*). He expressed approval for the formulation of the test by the English Court of Appeal in *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] QB 451 at [17] where the English Court of Appeal observed that overwhelmingly, the application of the two tests eventuated in the same result and stated:

> *Provided that the court, personifying the reasonable man*, takes an approach which is based on broad common sense, *without inappropriate reliance on special knowledge, the minutiae of court procedure or other matters outside the ken of the ordinary reasonably well informed member of the public*, there should be no risk that the courts will not ensure both that justice is done and that it is perceived by the public to be done" [emphasis added by Phang JC].

This approach would in Phang JC's view (at [40]) meet the concerns expressed by Deane J in *Webb v The Queen* (*supra* para 1.26, at [73]) that the

"real likelihood of bias" test required "a detailed knowledge of the law or knowledge of the character or ability of the members of the relevant court".

1.32 Furthermore, the hope expressed was that the outline here proffered would be a future guide to a court having to deal squarely with this issue. Phang JC offered a tentative view that there was no conflict between the two tests in any event (at [21]–[25]) but also noted that the question of which test should prevail in Singapore remained undecided and that it was apt that the highest court of the land should express a definitive view (at [45]).

CONSTITUTIONAL LAW

Article 9: Right to counsel – reticence towards finding associated unenumerated rights

1.33 An important issue in the construction of the Pt IV constitutional liberties in the Constitution of the Republic of Singapore (1999 Rev Ed) is whether the enumerated rights contained therein are exhaustive or declaratory. If the latter, one might argue that a Constitution not only declares enumerated rights but preserves pre-existing rights in the common law: see *Noel Riley v Attorney-General of Jamaica* [1983] 1 AC 719. The case of *Sun Hongyu v PP* [2005] 2 SLR 750 ("*Sun Hongyu*") sheds further insights into this matter.

1.34 Although the High Court in *Teo Soh Lung v Minister for Home Affairs* [1989] SLR 499 at 514, [47] rejected the "basic features" doctrine as articulated by the Indian Supreme Court in *Kesavananda Bharati v The State of Kerala* AIR 1973 SC 1461, which finds there are implied substantive limits on the legislative power to amend the Constitution (which could extend to basic rights), the door is not closed to finding unenumerated rights in Pt IV for various reasons. Firstly, there appears to be recognition that certain rights may be implied from the nature of the system of parliamentary democracy established by the Constitution. This is evident from a statement made in 2001 during parliamentary debates by the Home Affairs Minister Mr Wong Kan Seng as follows (*Singapore Parliamentary Debates, Official Report* (16 May 2001) vol 73 at col 1726):

> While the Constitution does not contain an expressed declaration of the right to vote, I have been advised by the Attorney General, even before today, that the right to vote at parliamentary and presidential elections is implied within the structure of our Constitution. We have a parliamentary form of government. The Constitution provides for a regular General Election to make up a Parliament, and establishes representative democracy in

> Singapore. So the right to vote is fundamental to a representative democracy, which we are, and that is why we have the Parliamentary Elections Act to give effect to this right.

This is not an authoritative pronouncement and it remains open to argument, whether the right to vote in Singapore is an implied constitutional right or merely a statutory right. Notably, the Supreme Court of New South Wales in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 found that the Australian Constitution, which does not have a bill of rights, nevertheless contained an implied freedom of communication on matters of government and politics, as this was an indispensable incident of the system of representative government established by the Constitution. This implied freedom was not an individual right but rather, a limit on legislative and executive power.

1.35 Secondly, it is open to the courts in their capacity of guardians of individual liberties to develop the jurisprudence along the trajectory of finding associated rights implied within existing constitutional rights, which make effective an enumerated textual right. The approach of expanding upon the content of an existing right to render it effective may be distinguished from the more controversial phenomenon of the judicial creation of new rights, particularly those of a morally controversial character which would open it to accusations of entering the political thicket. Certain Malaysian judges have advocated reviewing fundamental liberties not pedantically but "prismatically", to discern implied rights from textual rights in order to ensure that citizens enjoy "the full benefit and value" of these rights: *Palm Oil Research and Development Board Malaysia v Premium Vegetable Oils Sdn Bhd* [2005] 3 MLJ 97 at [42] (Federal Court).

1.36 Thirdly, this approach could build upon the recognition in the seminal Privy Council case of *Ong Ah Chuan v PP* [1980–1981] SLR 48 (at 62, [26]) that the meaning of the word "law" in a Constitution founded on the Westminster Model, in particular, the fundamental rights chapter:

> … refer[s] to a system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation in Singapore at the commencement of the Constitution. It would have been taken for granted by the makers of the Constitution that the 'law' to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be misuse of language to speak of law as something which affords 'protection' for the individual in the enjoyment of his

> fundamental liberties, and the purported entrenchment (by art 5) of arts 9(1) and 12(1) would be little better than a mockery.

1.37 Thus, the court should evaluate any legal rights, whether contained in the constitutional text or a statute, against "fundamental rules of natural justice" which are values internal to a legal system predicated on fairness; although natural justice is inherent to the common law, in the context of Singapore, these common law principles have been constitutionalised. It is apt to recall the famed observation of Byles J in *Cooper v The Wandsworth Board of Works* (1863) 14 CB NS 180 at 194; 143 ER 414 at 420 "that, although there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature". Thus it is incumbent upon the court to ensure that posited legal reforms conform to fundamental principles of natural justice.

1.38 However, the High Court in *Sun Hongyu* (*supra* para 1.33) adopted a strict textualist approach similar to that employed by Yong Pung How CJ in *PP v Mazlan bin Maidun* [1993] 1 SLR 512 at 516, [15] ("*Mazlan*") in refusing to find that an accused person had a constitutional right to be informed that he was entitled to refrain from making self-incriminatory statements. Yong CJ held that "the right of silence has never been regarded as subsumed under the principles of natural justice" so as to inform the understanding of "law" in Art 9(1) of the Constitution which prohibits the deprivation of life and liberty save in accordance with law. He held (*ibid*) that:

> To say that the right of silence is a constitutional right would be to elevate an evidential rule to constitutional status despite its having been given no explicit expression in the Constitution. Such an elevation requires in the interpretation of art 9(1) a degree of adventurous extrapolation which we do not consider justified.

It may be observed that Yong CJ engaged in a form of "adventurous extrapolation" in *Chan Hiang Leng Colin v PP* [1994] 3 SLR 662 at 684, [64] in declaring an unwritten statist principle, that is, "the sovereignty, integrity and unity" of Singapore, to be the "paramount mandate" of the Constitution. The issue in question in *Sun Hongyu* was whether the petitioner, who had been convicted and sentenced under s 36 of the Immigration Act (Cap 133, 1997 Rev Ed) for one charge of an unlawful return to Singapore, was deprived of her "fundamental right" to contact her family and friends. She asserted that her Art 9(3) constitutional rights had been violated as she had not been allowed to call her family and friends after her arrest, which meant that she was deprived of her "fundamental right" to consult them as to the

legal consequences of her actions; this in turn prevented her from knowing about her right to counsel, thereby violating Art 9(3) of the Constitution (at [33]). This provides that: "Where a person is arrested, he shall be informed as soon as may be of the grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice."

1.39 Yong CJ summarily disposed of this argument in finding these complaints were "totally groundless" (at [34]). He stated that Art 9(3) merely protected the right to legal representation but "there is no further right for the accused to be informed of his right to counsel" (*ibid*). He cited with approval two cases in which he had delivered the court's judgment, *Mazlan* and *Rajeevan Edakalavan v PP* [1998] 1 SLR 815 ("*Rajeevan*"). In *Rajeevan,* Yong CJ stated that Art 9(3) did not provide a right to be informed of one's right to counsel, waving away criticism that "to deprive one of the right to be informed will effectively amount to a negation of the right to counsel itself" (at [21]). He declared that "practical experiences in our judicial system bear testimony to the fact that such a conclusion is wholly speculative and unwarranted", finding that constitutional safeguards and the criminal procedure process "ensure that the rights of the accused are adequately protected" (*ibid*). He further declared in *Sun Hongyu* (at [34]) that by "logical extension", the accused could not have a right to "contact third parties to discover and enquire into his right to counsel" nor was there a fundamental right for an accused person to contact family and friends to enquire into the legal consequences.

1.40 The implications of this stream of cases, of which *Sun Hongyu* is the latest, is that the courts maintain a concerted resistance towards finding unenumerated rights to bolster existing individual due process rights. This effectively reduces the prospect of a more robust form of judicial review towards the protection of Pt IV rights. Indeed this is further underscored in the statement by Yong CJ in *Rajeevan* (at [21]) that any broadening of the rights of the accused "should be addressed in the political and legislative arena", that is, the people should, through the ballot box, ensure that they elect representatives who pass just laws. He further declared (*ibid*) that "[t]he judiciary is in no position to determine if a particular piece of legislation is fair or reasonable as what is fair or reasonable is very subjective". This seems to be a judicial cession of its role to protect fundamental liberties, manifested in Yong CJ's statement in *Rajeevan* that "[t]he sensitive issues surrounding the scope of fundamental liberties should be raised through our representatives in parliament who are the ones chosen by us to address our concerns" (*ibid*). This statement is perhaps more suitable for a country where parliament is supreme, unlike one like Singapore where the Constitution is

the supreme law of the land, which the Judiciary is charged with safeguarding, to the extent that judicial power includes the power to strike down unconstitutional legislation: *Taw Cheng Kong v PP* [1998] 1 SLR 943.

Mandatory death penalty – affirming its constitutionality

1.41 The Court of Appeal in *Chew Seow Leng v PP* [2005] SGCA 11 (at [39]–[40]) affirmed the decision of the Court of Appeal in *Nguyen Tuong Van v PP* [2005] 1 SLR 103 on the constitutionality of the mandatory death penalty. It rejected the appellant's counsel's suggestion to send the Cabinet a "memorandum of concern" (at [40]) to consider an alternative sentence of life imprisonment, bearing in mind that no evidence had been presented to the effect that social abhorrence towards drug trafficking, as reflected in the Misuse of Drugs Act (Cap 185, 2001 Rev Ed), had changed on this issue. Indeed, the appropriate forum to argue a changed social attitude towards drug offences would be before Parliament, having regard to the separation of powers. This would be an appropriate matter for Parliament to address as it involved a morally controversial issue, as opposed to the scenario in *Rajeevan* and *Sun Hongyu* (see paras 1.39–1.40 above) which do not involve the creation of a novel right or controversial social legislation, but the identification of subsidiary rights which serve to enhance the efficacy of a recognised textual right.

Article 14: Freedom of speech

1.42 The constitutional freedom of speech is heavily qualified and may be subjected to restrictions deemed to be necessary and expedient in the interest of any of eight stipulated grounds in Art 14, such as defamation, contempt of court and public order.

Sedition

1.43 Speech which threatens social harmony in multi-racial, multi-religious Singapore is viewed as a serious public order threat and is restricted and punished, with a view to underscoring the message that racial and religious harmony is fragile. Given the volatile sentiment such speech may provoke, Parliament in 1989 enacted the Maintenance of Religious Harmony Act (Cap 167A, 2001 Rev Ed) which empowers the Minister to impose non-justiciable restraining orders on religious leaders, for example, those who stir up ill will between groups, among others. One reason for ousting the jurisdiction of the court to review such ministerial orders was the fear that

public court settings could further inflame incensed passions and provoke social instability.

1.44 Nevertheless, the publicity of an open trial was purposefully chosen in relation to various remarks made on the Internet which were considered inflammatory in relation to racial and religious sensitivities. These racist remarks were made in response to a letter published on 14 July 2005 in *The Straits Times* where a Muslim woman asked taxi drivers whether they allowed uncaged animals to be transported in their cabs. She expressed her concern, which had a religious basis, that the seats could be dirtied by dog saliva or their paws.

1.45 Consequently, in a seminal case in September 2005, Nicholas Lim Yew, 25, ("Lim") and Benjamin Koh Song Huat, 27, ("Koh") were charged with offences under s 4(1)(*a*) of the Sedition Act (Cap 290, 1985 Rev Ed) for speech with a "seditious tendency" as defined under s 3(1)(*e*) of the Sedition Act, which entails a tendency "to promote feelings of ill-will and hostility between different races or classes of the population of Singapore". In *PP v Koh Song Huat Benjamin* [2005] SGDC 272, which was a judgment of the District Court dated 7 October 2005, Koh was charged with posting anti-Malay and anti-Muslim remarks on his web log while Lim posted similar remarks on the general discussion forum of a website. They pleaded guilty and received landmark jail sentences: Lim was fined $5,000 and imprisoned for one day while Koh was sentenced to one month's imprisonment. Both were reportedly the first people since 1966 to be jailed under the Sedition Act. In a separate case, a third blogger, teenager Gan Huai Shi, was given probation rather than jailed ("Third racist blogger sentenced to 24 months supervised probation" (23 November 2005) available online at <http://www.channelnewsasia.com/stories/singaporelocalnews/view/180127/1/.html>).

1.46 Snr District Judge Richard Magnus noted that while such cases under s 4(1)(*a*) of the Sedition Act were "rare", sentences of "general deterrence" would be imposed upon conviction (at [5]). The learned judge underscored that the sentences imposed turned on the particular facts and that the court "[would] not hesitate to impose appropriate salutary and stiffer sentences in future cases" (at [17]). The medium of the message, the Internet, also came under close scrutiny.

1.47 Snr District Judge Magnus offered three main reasons for this sentencing approach and the imposition of custodial sentences, noting that "[r]acial and religious hostility feeds on itself" (at [6]). First, the s 4(1)(*a*)

offence was *mala per se* given "the especial sensitivity of racial and religious issues in our multi-cultural society" (*ibid*). Reference was made both to events in Singapore's early history, such as the Maria Hertogh incident in the 1950s, the July and September 1964 race riots, as well as the contemporary social setting and "the current domestic and international security climate" (*ibid*). Given the vulnerability of Singapore to social disorder caused by racial or religious tensions, the judge clearly intended that the sentence serve an educative function, noting that "[y]oung Singaporeans" might have "short memories that race and religion are sensitive issues" and that "callous and reckless remarks" in whatever forum, including the medium of the Internet with its "ubiquitous reach", possess the potential to "cause social disorder" (at [7]). The judge took pains to underscore that while the "virtual reality of cyberspace" was "generally unrefereed", one could not "hide behind the anonymity of cyberspace" to "pen diatribes against another race or religion" (at [8]). The premium that the Singapore government accords to maintaining racial and religious harmony is reflected in the decision which considers the contours of the scope of freedom of expression. The judge noted that the right to propagate opinions on the Internet was not an "unfettered right" as it had to be balanced by "the right of another's freedom from offence, and tampered by wider public interest considerations" (*ibid*). He held that apart from legal duties, it was "appropriate social behaviour" that Singaporeans "respect the other races in view of our multi-racial society" (*ibid*). The basic ground rules for all was not to say or do anything "which might incite the people and plunge the country into racial strife and violence" (*ibid*). He characterised the Sedition Act as a statutory delineation of this "redline", nothing that the harm of racist seditious speech extended not only to "one racial group but to the very fabric of society" (*ibid*).

1.48 In considering the level of blameworthiness in the sentencing process, the court noted that there were mitigating factors, such as the early containment of the remarks, the tendering of written apologies and the removal of the offending material from public access (at [10]). Nevertheless, the words posted on Koh's blog were considered "particularly vile" (at [11]), parodying the *halal* logo and placing it next to a pig's head and comparing Islam to Satanism. Such remarks provoked a "widespread and virulent response", sparking the exchange of racial slurs between Chinese and Malays, which was an aggravating factor (*ibid*). The high premium placed on public order, in relation to racial and religious harmony, is clearly evident in the reasoning behind these decisions which adopt a hardline approach for crossing the "redline" which Snr District Judge Magnus spoke of. The choice to deploy the Sedition Act and the strong deterrent sentences send a message

to the public that racist speech is seditious, does not merit legal protection, and indeed, will attract heavy sanction.

Contempt of court – meaning of "court"

1.49 The issue of the scope of the offence of contempt of court arose in *AG v Chee Soon Juan* [2006] 2 SLR 650 where the respondent allegedly committed contempt on two counts: firstly, contempt *ex facie curiae* (in the face of the court) during a bankruptcy petition before an assistant registrar on 10 February 2006. Secondly, by scandalising the judiciary for reading out a statement ("the bankruptcy statement") during this hearing which alleged the Singapore judiciary was biased, unfair, and acted at the instance of the Government in cases involving opposition politicians, resulting in grave injustices. He further insinuated that the Government controlled judges and removed them from the Bench where the judges were perceived to be lenient towards opposition politicians.

1.50 Lai Siu Chiu J held that the offence of contempt of court applied both to proceedings in chambers and before an open court for acts of contempt in the face of a court, noting that "[t]he interest in the administration of justice is equally strong in ensuring the expeditious disposal of both categories of hearing" (at [10]). As the duties of an assistant registrar were derived and indistinguishable from those of a High Court judge in chambers (at [12]), the assistant registrar was held to perform the same judicial functions as a judge in chambers and thus an assistant registrar in chambers had the "equivalent stature of being a 'court'" (at [13]). Lai J rejected the contention that the respondent did not manifest conduct amounting to contempt as the assistant registrar did not find his conduct to be "disruptive of proceedings" (at [15]) in respectfully reading out the bankruptcy statement, and in refusing to answer the question whether he admitted the debts. Lai J found that in refusing to answer the questions posed by the assistant registrar and in reading out the statement "the Respondent displayed a defiance that was aimed at interfering with the authority and proper functioning of the court, and at impairing the public's respect and confidence in the Judiciary" (at [17]).

Defamation – quantum

1.51 Defamation is one of the stipulated grounds for proscribing free speech and the law on defamation, as articulated in the leading case of *Jeyaretnam Joshua Benjamin v Lee Kuan Yew* [1992] 2 SLR 310 (see also para 1.22 above), which, in discounting the "public figure" doctrine, accords

equal protection of reputation to politicians and private persons alike. This discounts the democratic rationale underlying the importance of free speech, that free and robust debate is necessary for informed citizens to make choices in a democratic society, and this includes speech which might be injurious to the reputation of politicians. The public figure doctrine is predicated on requiring politicians to be more tolerant of criticism, given the public interest in this. As L P Thean JA expressed it in *Tang Liang Hong v Lee Kuan Yew* [1998] 1 SLR 97 at [118]:

> Any argument which calls for a reduction or moderation of damages purely on the basis that the successful plaintiff is a politician, say a minister, or that the case has a political flavour is untenable and wrong. To accept such a contention is to allow a person more latitude to make defamatory remarks of such personality and to escape with lesser consequences for the defamation he committed. Such a result, if permitted, would be in violation of art 12(1) of our Constitution …

1.52 However, while the courts accord politicians or public figures equal protection in terms of their reputational interests, *vis-à-vis* the private citizen, when it comes to calculating damages, the "high standing" of certain politicians or public office holders have yielded aggravated damages. In *Goh Chok Tong v Chee Soon Juan (No 2)* [2005] 1 SLR 573, the standing of the parties was one of the factors considered in the quantification of damages as the case involved the Prime Minister of a country and the disposal of a large sum of national funds. Further, the speaker was the Secretary-General of an opposition political party and both were "prominent public figures" such that the "public perception of their integrity" would affect their effectiveness and standing as they possessed "the capacity to damage the reputations of those they speak ill of" (at [42]). Thus, the Singapore version of the "public figure doctrine" goes not to protecting free speech but to a higher quantification of damages. This means that politicians or public office holders enjoy as much protection as private persons with respect to critical speech injurious to their reputation, while receiving higher damages than a private person, which is positive discrimination in their favour. Excessively high damages awarded for libel can further "chill" free speech but it appears that in the current law of defamation involving public figures, reputation is prized above the democratic rationale underlying free speech.

Article 14: Freedom of assembly and association

1.53 Two cases in 2005 implicated the right under Art 14(1)(*b*) of the Constitution of citizens to assemble peaceably and without arms. However, this is subject to restrictions that Parliament considers necessary or expedient

"in the interest of the security of Singapore or any part thereof … [or] public order". Under s 141 of the Penal Code (Cap 224, 1985 Rev Ed), an assembly of five or more persons is designated an "unlawful assembly" if the common object of the persons composing that assembly is:

> (*a*) to overawe by criminal force, or show of criminal force, the Legislative or Executive Government, or any public servant in the exercise of the lawful power of such public servant;
>
> (*b*) to resist the execution of any law, or of any legal process;
>
> (*c*) to commit any mischief or criminal trespass, or other offence;
>
> (*d*) by means of criminal force, or show of criminal force, to any person, to take or obtain possession of any property, or to deprive any person of the enjoyment of a right of way, or of the use of water or other incorporeal right of which he is in possession or enjoyment, or to enforce any right or supposed right; or
>
> (*e*) by means of criminal force, or show of criminal force, to compel any person to do what he is not legally bound to do, or to omit to do what he is legally entitled to do.

1.54 The holding of assemblies is governed by other laws such as the requirement of a permit for holding assemblies under r 5 of the Miscellaneous Offences (Public Order and Nuisance) (Assemblies and Processions) Rules (Cap 184, R 1, 2000 Rev Ed) ("the MO Rules") read with s 5(1) of the Miscellaneous Offences (Public Order and Nuisance) Act (Cap 184, 1997 Rev Ed) ("MOA") which empowers the Minister to grant permits for holding assemblies in public places and for keeping order. Rule 5 of the MO Rules makes it an offence for a person to participate in an assembly in a public place if he knew or ought reasonably to have known that the assembly was held without a permit or in contravention of a condition of a permit.

1.55 The case of *Ng Chye Huay v PP* [2006] 1 SLR 157 dealt with a situation involving more than five people who were engaged in a variety of activities at the Esplanade Park, including meditating, standing and distributing flyers and VCDs. Yong Pung How CJ agreed with the trial judge that the group shared a sufficient *esprit de corps* such that even if they were engaged in varied activities, it sufficed if they could be "identified as a collective entity" with a "common purpose", which in this case was to "clarify the truth and share their faith with the public" (at [49] and [50]). Rule 2(1) of the MO Rules state that the Rules apply to any assembly or procession of five or more persons in a public road or place which is intended to

demonstrate support for or opposition to the views or actions of any persons, to publicise a cause or campaign or to mark or commemorate any event. The appellants were Falungong practitioners who were charged with participating in an unlawful assembly without a permit under r 5 of the MO Rules read with s 5(1) of the MOA and with possession of uncertified VCDs under s 21(1)(*i*) of the Films Act (Cap 107, 1998 Rev Ed). On appeal, various constitutional law arguments were raised, dismissed by Yong CJ as being "unpersuasive" (at [45]), who declared he was "utterly unimpressed" (at [44]) by them.

1.56 There were two allegations of discrimination raised, in violation of the Art 12 equality clause. While affirming the approach set out by Mohamed Azmi SCJ in *Malaysian Bar v Government of Malaysia* [1987] 2 MLJ 165, which Yong CJ had approvingly applied in *PP v Taw Cheng Kong* [1998] 2 SLR 410, he found that the issue of discrimination did not arise on the facts.

1.57 The first allegation pertained to a subordinate legislation in the form of the police's standard operating procedure ("SOP"). Yong CJ held that the SOP did not specifically target the Falungong but was addressed towards illegal assembles involving more than five people in general and thus was not discriminatory. In conjunction with this allegation, it had been argued that the MO Rules as subsidiary legislation were unconstitutional "as the issuance of permits was left in the absolute discretionary and arbitrary will of the police", which Yong CJ found was "without merit" (at [37]). He held (at [39]) that licensing schemes were "an integral and necessary part of the Government's ability to efficiently regulate public behaviour" and while there was no appeal process, the police could nonetheless be challenged by an application for judicial review.

1.58 The second allegation pertained to the discriminatory application of the MO Rules, as it was alleged that other groups assembling without a permit were not subject to the investigation and arrest by the police similar to that experienced by the Falungong who were specifically targeted. Displaying a trust in the expertise of the police and a keen eye for practicalities, Yong CJ (at [41]) stated that the police were "well entitled to investigate" those assemblies which they in their discretion determined were "especially likely to cause trouble". This practice was not unconstitutional but "carried out wholly in furtherance of the relevant provisions" of the MOA and the MO Rules which was "to promote public order by allowing for better control over public gatherings" (*ibid*). On examining the facts of the case, Yong CJ stated the police were "correct to use their discretion to investigate,

arrest and charge" the appellants because unlike participants of *tai chi* or yoga gatherings, they were "surrounded by provocative displays, actively distributing flyers and talking to passers-by" (at [42]). Hence, their cause was "controversial" and the police had "good reason" to decide that the "potential for mischief was alive" (*ibid*). In so stating, the court appears to be evaluating the basis for police action and providing some form of judicial oversight.

1.59 In relation to the argument that the Art 14 freedom of expression had been violated because the Board of Film Censors possessed absolute discretion to issue certification for VCDs before these could be lawfully possessed and distributed, Yong CJ pointed out that Art 14 rights were qualified, not absolute. This is an unexceptional statement. He further stated his agreement with the trial judge that there was nothing to prevent the accused persons from applying for permits and certificates (at [44]). The issue as to whether a licensing scheme which vested absolute discretion in a licensing officer was constitutional was not fully argued even though on principle, as Chan Sek Keong J (as he was then) rightly noted in *Jeyaretnam JB v PP* [1989] SLR 978 (at 987, [27]):

> If the discretion vested in the licensing officer under the Act were absolute and untrammelled, there might be a case for arguing that the licensing scheme is unconstitutional, as then the licensing officer would have been vested with arbitrary power to deprive a citizen of his constitutional right to freedom of speech and expression contrary to the objects of art 14(2)...

1.60 The case of *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR 582 ("*Chee Siok Chin*") provides insight into the judicial construction of Pt IV liberties and is notable for failing to accord liberties a generous interpretation, suitable to give individuals the full measure of the liberties referred to, as advocated by the Privy Council in *Ong Ah Chuan v PP* (*supra* para 1.36, at 61, [23]). Instead, the judgment manifested deference to the legislature and gave a broad berth to Parliament to determine what it considered appropriate restrictions to Pt IV liberties. This case is significant for the approach it adopts towards construing fundamental liberties as well as its attitude towards foreign constitutional cases.

1.61 This politically sensitive case involved the staging of a "peaceful protest" by four political activists outside the Central Provident Fund building on 11 August 2005. They stood silently, wearing T-shirts with the inscribed words "National Reserves", "HDB GIC", "Be Transparent Now" and "NKF CPF". One of the protestors held a placard reading "Singaporeans spend on HDB; whole earnings on CPF; life savings – but cannot withdraw when they need" while another held up a transparency sheet with the word

"Accountability" written in Chinese. The protestors fielded reporters' questions and handed out press statements. Several police cars and riot police armed with shields, batons and helmets arrived and stationed themselves a few feet away from the protestors, together with some 20 uniformed policemen observing the silent protest. A senior police officer ordered the protestors to disperse and when questioned, said the basis for this request was a telephone call complaining they were creating a public nuisance and stated that the legal basis for the order was that the offence was one of public nuisance under the MOA. After recording their identity card particulars, the police asked the protestors to hand over their T-shirts, apparently for investigatory purposes. It is undisputed that no force was used during this proceeding nor was it suggested that there was any potential violence that might lead to a breach of the peace.

1.62 These actions of the police ordering the dispersal and seizing the items were challenged as unconstitutional and/or unlawful by the applicants who sought a declaration that the respondents, the Minister for Home Affairs and the Commissioner of Police, acted unlawfully and in an unconstitutional manner in ordering the dispersal and seizing the items. The Attorney-General, who sought a striking-out order, filed an affidavit featuring website downloads from the Singapore Democratic Party ("SDP"), contending that the court proceedings "constitute[d] political theatre engineered and stage-managed by the SDP and the applicants" (at [7]).

1.63 V K Rajah J did not adhere to formalities in being forgiving of procedural irregularities, in so far as the applicants wrongly commenced their action for a declaration by way of originating motion when the correct procedure was that of an originating summons: "court rules are designed essentially to facilitate workflow and not to impede legitimate legal grievances" (at [20]). Furthermore, the respondent should have been the Attorney-General rather than the Minister for Home Affairs and the Commissioner of Police. In style, the judgment, which was infused with colourful high rhetoric in parts, was not dismissive of fundamental liberties as other cases have been; in substance though, the scope of judicial review over Pt IV liberties remains limited, with public order exceptions construed broadly. The decision is instructive too for its treatment of foreign case law and identification of factors which undermine the persuasive quality of rights-expanding decisions from foreign jurisdictions. Rajah J also affirmed the "four walls" doctrine articulated in the Malaysian case of *The Government of the State of Kelantan v The Government of the Federation of Malaya and Tunku Abdul Rahman Putra Al-Haj* [1963] MLJ 355 at 358 which stated that the constitution was "primarily to be interpreted within its own four walls

and not in the light of analogies drawn from other countries" (at [132]). In so doing, he underscored the importance of "local conditions" in the interpretive process.

1.64 Rather strangely, the judge treated seriously the constitutional issues raised, finding that these were justiciable and not abstract issues, assuming the allegations of rights violations were borne out (at [109]). He noted initially (at [2]) that in the "ultimate analysis", the "overarching issue is what the Constitution … considers 'necessary or expedient'" in balancing individual rights against wider public interests. However, after a lengthy discussion, the chief issue was treated as an administrative law challenge concerning whether the police officer in question in exercising a statutory duty acted arbitrarily and exceeded his powers (at [57]). Rajah J did preface his treatment of constitutional issues, including the constitutional right of assembly, with the statement that he was addressing these issues for "the sake of completeness" and "out of deference to counsel's industry" (at [3]). Nevertheless, the judge struck out the applicants' claim on the basis that it disclosed no legitimate legal grievance against the relevant authority. In concluding, Rajah J noted the claim was "inescapably flawed by its own legal and factual inadequacies and fallacies which the applicants can neither redeem nor repair", such that it was "doomed to fail" (at [130]). He noted that the applicants had "persistently attempted to elevate the present proceedings to a 'constitutional motion' to protect the public right of assembly" (at [131]) but concluded that the proceedings raised "no momentous constitutional issues", being "an adroit attempt to conjure an illusory right elevated on improbable legal stilts" (at [135]). Their allegations were based on a "fundamental misapprehension of their rights" (at [134]).

Constitutional issues addressed

Article 12

1.65 The chief constitutional issues discussed in *Chee Siok Chin* pertained to the Art 12 equality clause and Art 14 which relates to the right of free speech and assembly. The Art 12 issue was dismissed summarily, and stemmed from a complaint by counsel that the police displayed a "discriminatory attitude" in granting permits for assemblies (at [114]). Rajah J categorically rejected this argument as a "baseless contention", as it completely lacked a factual basis (*ibid*). Bare assertions of violation of constitutional rights do not make out a constitutional claim and there was no standing in this case given the absence of evidence that any permit had been applied for on the facts (*ibid*). Thus, the judge concluded that the applicants

in alleging discrimination were "only clutching at illusory straws" as well as "conjuring vapid abstractions" (at [115]).

Article 14

Constitutionality of the Minor Offences Act

1.66 The principle issue related to the scope of the freedom to assembly under Art 14(2) of the Constitution. Even though Rajah J noted that counsel for the applicants had clarified that challenging the legitimacy of the MOA was not the central thrust of his "constitutional argument" (at [57]), this issue was canvassed at length.

1.67 Rajah J framed the issue as a balancing exercise, in ascertaining what the Singapore Constitution considered, in the words of Art 14, "necessary or expedient" in striking "the balance between the exercise of certain individual rights on the one hand and the perceived wider public interest on the other hand" (at [2]). He noted, unexceptionally, that Art 14 rights were not absolute but circumscribed by the limits articulated in Art 14(2). The MOA, whose constitutionality was challenged, numbered amongst the legislative instruments which restrict freedom of speech and assembly.

1.68 In analysing the constitutionality of the MOA, a limited form of review was applied; the judicial reasoning focused on the truism that rights are not absolute and that while "the clarion call for unfettered individual rights is almost irresistibly seductive" (at [52]), individual rights "do not exist in a vacuum", and permitting "unfettered individual rights" was a "form of governance that could be described as the antithesis of the rule of law – a society premised on individualism and self-interest" (*ibid*). After making these prefatory statements, Rajah J proceeded to the meat of his analysis. He first observed that the right of assembly "can never be absolute" and could be subordinated to the "public convenience and good order for the protection of the general welfare whenever it is 'necessary and expedient'" (at [53]). He stated there was "nothing inherently wrong or unreasonable" in the requirement of seeking permission from the relevant authorities before holding a public meeting or assembly, which he viewed as a "facilitative arrangement" (*ibid*). He then noted that Art 14 was formulated so as not to confer "absolute or immutable rights" as it could be restricted to serve the wider interests of public order so they do not "impinge or affect the rights of others" (at [54]). Emphasis was placed on the point that the constitutional framework deemed it "crucial and necessary" to authorise "the imposition of restrictions in the wider and larger interests of the community and country"

(*ibid*). He then concluded by holding that the MOA fell within the scope of the derogation clauses set out in Art 14 in so far as its purpose was to ensure good order in public places, as Parliament had deemed "necessary and expedient". Reference was made to the Act's short and long title and the relevant parliamentary debates (at [55]). Thus, the constitutionality of the MOA could not be challenged.

1.69 Rajah J in adopting a "comparative approach" noted (at [5]) that while there was legislation from foreign jurisdictions which had "broad and apparent similarities" with the applicable statutory regime, these were not "persuasive" nor did they exert "logical force". Before concluding that the MOA was "necessary and expedient" within the terms of Art 14, he examined the Indian approach where the analogous right to freedom of expression was qualified by allowing the enactment of reasonable restrictions, in the interests of public order (at [45]). Thus, the Indian courts had the express power to determine that a statutory restriction on freedom of expression was invalid for not being a reasonable restriction (at [46]). He noted (at [47]) that despite this greater power, Indian courts had "exercised considerable self-restraint" in constitutional review, quoting from H M Seervai, *Constitutional Law of India* (N M Tripathi Private Ltd, 3rd Ed, 1983) vol 1 at p 482 that a court is "not a second or revising Chamber from the decision of the Legislature" such that laws should only be declared invalid in the "clearest case", in emphasising the need for "judicial self-restraint and extreme caution" (at [48]) in determining when legislation is unconstitutional in unreasonably restricting a constitutional right. Rajah J seemed to make references to Indian decisions only to underscore how much more restraint should be demonstrated by Singapore courts under Singapore's distinct constitutional scheme where the formulation of the derogation clause in terms of "necessary or expedient" conferred upon Parliament "an extremely wide discretionary power"; consequently, Parliament was permitted "a multifarious and multifaceted approach" towards achieving any Art 14(2) purpose (at [49]). The judicial role in Singapore was narrowly confined to the "sole task" of ascertaining whether an impugned law fell within the purview of a "permissible restriction", as there could be "no questioning of whether the legislation is 'reasonable'" (*ibid*). The role of the court was merely to ensure that a "nexus between the object of the impugned law and one of the permissible subjects stipulated in Art 14(2)" existed (*ibid*). The Government only needed to satisfy the court that there was a "factual basis" upon which Parliament considered it "necessary or expedient" to enact restrictive legislation. The factual basis might be informed by reference to "the impugned Act, relevant parliamentary material as well as contemporary speeches and documents", and following *Constitutional Reference No 1 of*

1995 [1995] 2 SLR 201 and s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed), Rajah J advocated a "generous and not pedantic interpretation" while affirming that the presumption of legislative constitutionality was not one to be lightly displaced (*ibid*).

1.70 In construing Art 14, Rajah J paid great attention to the precise textual formulation, noting that legislative power to limit Art 14 on the stipulated grounds was delineated by "in the interest of public order" rather than the narrower "maintenance of public order" (at [50]). Thus, Parliament had a "wider legislative remit" which enabled it to take a "prophylactic approach" to maintaining public order. The former formulation was broader in so far as it extended to "laws that are not purely designed or crafted for the immediate or direct maintenance of public order" (*ibid*). The judge cited Mahendra P Singh, *V N Shukla's Constitution of India* (Eastern Book Company, 9th Ed, 1996) at p 113, where the author defined "public order" as synonymous with public peace, safety and tranquillity, signifying an "absence of disorder [involving] breaches of local significance", as opposed to national upheavals affecting state security. Public order is thus localised, in contradistinction to national security, another rights limitation. Rajah J made reference to the genealogy of Art 14 dating back to the *Report of the Federation of Malaya Constitutional Commission 1957* (G A Smith, 1957), which declared that freedom of expression should be subject to restriction in the interests of, *inter alia*, security and public order. He characterised(at [52]) as a "delicate balancing exercise" the "tension" between balancing individual rights against competing interest of security or public order, as this involved "several imponderables" and "factors such as societal values, pluralism, prevailing social and economic considerations as well as the common good of the community", that is, the balance had to be struck contextually, bearing in mind that public policy considerations were "exceedingly complex and multifaceted".

Ambit of the right to assembly

1.71 The MOA clearly seeks to regulate the constitutional right to assembly; s 40 provides for the power of arrest without warrant where a police officer in his view considered that a person was acting in a manner which offended any MOA provisions (at [88]). Indeed, the protestors in *Chee Siok Chin* were not charged with any MOA offence then or subsequently and state counsel was at best "ambivalent" in not being prepared to give a commitment at trial that any criminal prosecution was in the offing (at [113]).

1.72 On the facts of the case, the power of arrest was not exercised as the protestors dispersed upon being requested to do so. The offences apparently committed by the protestors, as told to them by the police officer asking them to disperse, related to the s 13 offence of nuisance under the MOA. Rajah J identified the statutory basis of the police's power to seize an article as stemming from s 40(2) of the MOA which had to be "concerning by or for which" an offence had been committed (at [106]).

1.73 Counsel for the applicants argued that Art 14 read with s 5 of the MOA, which only regulates the "assembly of five or more persons", expressly permits groups of four or less to conduct peaceful protests not resulting in a breach of peace or public disorder (at [107]). This argument is premised on construing Art 14 as conferring a liberty to act, except where expressly restricted (at [57]). State counsel argued that the matter was not justiciable and that the police had acted reasonably (at [58]).

1.74 Delving into the history of the MOA, Rajah J noted that it dealt primarily with assemblies and processions and that the 1989 amendments enhanced penalties for organisers of illegal assemblies or processions as well as created a new offence of participation in such processions. During parliamentary debates, the Minister moving the Bill explained that police needed to regulate such assemblies and processions as "we live in a densely populated country" and it was important to maintain order, prevent congestion and annoyance caused by such assemblies (at [60]). In 1996, three further offences were created, with the one most pertinent to this case being the use of indecent, threatening, abusive or insulting words or behaviour which caused fear, harassment, alarm or distress to another person: s 13(*f*) of the MOA. Previously, an offence would only be contravened if it was likely to lead to a breach of the peace. Rajah J in reading the ministerial statements held that this was considered unsatisfactory and "an ineffective instrument of public control" in so far as it did not reach nuisances that harassed, alarmed or insulted without the threat of actual or potential violence (at [61]). He noted that ss 13A, B, C and D of the MOA were designed to address this gap and that ss 13A and 13B drew "substantial inspiration" from and were largely modelled on ss 4A and 5 of the English Public Order Act 1986 (c 64) (at [62]). Their intent was to expand the ambit of public offences and to widen the net to "criminalising acts of nuisance and inappropriate behaviour" (*ibid*). Section 13A deals with the use of threatening words or visible representations by a person in a public or private place with intent to cause harassment, alarm or distress to another person and s 13B deals with a person in a public or private place using threatening words, behaviour or visible representation within the hearing or sight of any person likely to

cause harassment, alarm or distress. The judge took care to note that these amendments did not disregard the Art 14 freedom of assembly and free speech rights, in so far as "reasonable conduct" was a defence (*ibid*).

1.75 Rajah J also noted that s 2 of the Interpretation Act defined a "person" as including corporate bodies unless there was something in the subject or context which would be inconsistent with such construction. Making references to certain English cases, he held there was nothing in the MOA to preclude "any person" at the receiving end of abusive words or behaviour from being a corporate entity. He noted that while terms like "harassment", "distress" and "alarm" could "arguably" be said to refer to personal feelings, which corporate bodies as legal fictions cannot suffer, "it ought to be emphasised that such bodies are also run in reality by persons" (at [63]). He concluded that persons such as directors of a corporate entity who were "the controlling minds and directing will of a corporate entity" (at [65]) were liable to suffer distress flowing from "improper acts or comments" targeted at the entities for which they were responsible, and therefore needed to be protected: (at [66]). He held that the s 2 Interpretation Act definition of "person" embraced this category (*ibid*) and thus the MOA offences of nuisance where directed against those responsible for running a corporate or unincorporated body could be viewed as harassment or causing alarm or distress of such persons, particularly where allegations of financial impropriety was involved (at [67]). He made reference (at [68]) to the recent legal development in the form of the English law of defamation in relation to local government bodies where, in *Derbyshire Country Council v Times Newspaper Ltd* [1993] AC 534 ("*Derbyshire*"), the House of Lords held that the local authority did not have a governing reputation which could be defamed. Nevertheless, Rajah J underscored that the decision itself did not affect the right of individual officers of such bodies to sue for defamation if a statement could be interpreted as referring to that individual (*ibid*). Furthermore, he approvingly quoted (at [69]) the observations of Mahoney JA in the Australian case of *Ballina Shire Council v Ringland* (1994) 33 NSWLR 680 which questioned whether the correct balance was struck in relation to the trade off between free speech and reputation in *Derbyshire,* noting that the House of Lords decision was informed by the peculiar circumstances faced by England. While not wanting to reach a conclusion on this matter in this case, Rajah J took pains (*ibid*) to express his endorsement of Mahoney JA's observation that "the correctness of the present balance and of the alternatives to withdrawal of the law of defamation from public authorities requires closer examination".

1.76 This seems to depart from the invitation opened by S Rajendran J in *Goh Chok Tong v Jeyaretnam Joshua Benjamin* [1998] 1 SLR 547 at [26] as to whether the law on defamation warranted revisiting, in the light of *Derbyshire*. Although this case may have been influenced by the rights-based approach the European Convention for the Protection of Human Rights and Fundamental Freedoms (1953) (Cmd 8969) ("ECHR") required of the UK as signatory to the treaty, Lord Keith of Kinkel characterised the decision as based on common law. Following past Singapore cases, this would make *Derbyshire* a persuasive authority, for the proposition that it was of "highest public importance that a government body should be open to uninhibited public criticism" (*Goh Chok Tong v Jeyaretnam Joshua Benjamin* at [26]); this possibly extended to public officers. Rajendran J, in deferring to precedent, noted that "[a]lthough this raises the question whether Singapore law (being premised on English common law) should follow suit, that is a question for the Court of Appeal" (*ibid*). Nevertheless, Rajah J preferred the view that the "abrupt change" in the English law of defamation was "not a development of the common law but rather a change of the law of a legislative rather than a judicial character" (*Chee Siok Chin* at [69]).

1.77 In interpreting ss 13A and 13B, Rajah J drew "[i]nstructive assistance" (at [70]) from English cases on public law, before the ECHR influence had waxed strong, in citing *Cozens v Brutus* [1973] AC 854 at 862. There, Lord Reid stipulated the limits beyond which distasteful or unmannerly speech or behaviour was permitted: it was not to be abusive, insulting or threatening. Lord Reid stated that these limits were "easily recognisable by the ordinary man" and that "*free speech is not impaired by ruling them out*" [emphasis in original] (*ibid*). As "[n]uisance is the Proteus of public order" and could assume "an infinite variety of forms", it should be given a "common-sense approach" in construction (*Chee Siok Chin* at [71]). Rajah J was careful to distinguish between s 5 of the English Public Order Act 1936 (c 6) ("POA") which the court considered in *Cozens v Brutus*, and ss 13A and 13B of the MOA. The former only rendered offensive conduct which was threatening, abusive or insulting behaviour "whereby a breach of peace was likely to occasioned" (at [74]). As Viscount Dilhorne in *Cozens v Brutus* observed at 865, this would exclude annoying behaviour which was not threatening, abusive or insulting. However, ss 13A and 13B were not predicated on the requirement that the inappropriate behaviour led to or was likely to lead to a breach of the peace or public disorder since "[t]hreatened violence" was not needed to ground a conviction (at [75]). Rajah J said it was "as plain as a pikestaff that Parliament intended through these nuanced provisions to proscribe conduct falling within the statutory ambit regardless of whether those engaging in inappropriate conduct intended that disorder

should ensue" (*ibid*). This meant that s 13B of the MOA embraced as an offence those abuses and insults which were not intended to constitute threats, abuses or insults. Thus the subjective perception of such conduct was irrelevant as the conduct was to be assessed on an objective basis. In this process, Rajah J advocated "[c]aution" in noting that issues of "acute factual inquiry coupled with the deliberate calibration of conduct" (at [77]) were involved. He acknowledged the delicacy of drawing "[i]mprecise lines" between "boisterous and abusive conduct", between freedom of expression and abusive conduct, and between free assembly and harassment (*ibid*).

1.78 While recognising in principle that a certain degree of protection must be accorded to free speech and assembly, Rajah J added that there was clearly "a point where legitimate conduct may cross the *Rubicon* and become harassment" [emphasis in original]; as such, a contextual approach was needed which would always be a "matter of degree" turning on the "actual concatenation of circumstances" (*ibid*).

1.79 Rajah J acknowledged that English statutory progenitors of ss 13A and 13B, namely ss 4 and 5 of the POA, were "sometimes restrictively interpreted" (at [78]). This was in line with the rights-expansive approach towards construction fuelled by common law constitutionalism and the influence of the ECHR. He identified three reasons for this: first, a change in the English legislative scheme, bearing in mind the coming into force of statutes like the Human Rights Act 1998 (c 42); second, a change in judicial attitudes in this area of law owing to the influence of the European Court of Human Rights and the European Court of Justice; and third, certain judicial approaches that had restrictively construed the application of the 1986 POA owing to its preceding White Paper. With respect to the latter, Rajah J agreed (at [79]) with the views of Keene J expressed in *Chambers and Edwards v The Director of Public Prosecutions* [1995] Crim LR 896 where the judge found that it was of little value to look at the preceding White Paper particularly where the Bill itself underwent significant changes en route to becoming a statute. While it appeared from various Hansard extracts that the function of s 5 of the 1986 POA was to protect the weak and vulnerable, Keene J held that it did not indicate that any "sense of insecurity" was intended before the commission of an offence under s 5 and further, it did not follow that others were not entitled to its protection (at [80]). Fortified by this, Rajah J emphasised there was "no reason whatsoever to read ss 13A and 13B of the MOA restrictively" (at [81]), noting that Parliament was free to adopt more restrictive language. Rajah J said that statutory words were ordinarily to be given their natural meaning but while noting that "it may be faintly argued" from parliamentary debates that ss 13A and 13B only contemplated the

protection of a "narrow protected class", Rajah J found this view incorrect (*ibid*). Instead, the word "person" should be expansively construed in the light of s 2 of the Interpretation Act (*ibid*).

1.80 Rajah J did not find helpful post-1973 cases cited by counsel like *Hammond v Department of Public Prosecutions* [2004] EWHC 69 (Admin) ("*Hammond*") which was mounted to ground an argument that there was a right to demonstrate in a public area, although the demonstration in question provoked hostility from some individuals in a crowd of 30–40 people (at [83]). He underscored (at [84]) that England had in the past decade undergone a "distinct and decisive legislative and judicial transformation" especially on "the resolution and/or adjudication of public order issues" after *Cozens v Brutus*. This had to be acknowledged before "any reliance whatsoever is placed on some of the more recent English decisions on public order issues" (*ibid*). This is because the more recent English decisions on public order issues" applied "legal and political considerations" which "cannot extend to Singapore" (at [5]). He noted that "the infiltration of European law into English law has significantly reshaped English legal contours in this particular area" (*ibid*).

1.81 The central shift in the English approach was the prioritisation of freedoms such as that of expression in *Hammond* which is both a conventional right and one recognised in the Human Rights Act 1998 which also required primary and subsidiary legislation to be construed in such a manner as to be compatible with Convention rights. Thus, this meant that restrictions on rights must, to be construed compatibly with the ECHR, be prescribed by law and be "necessary in a democratic society" (at [85]).

1.82 Rajah J underscored (at [86]) the "very different" terms and tenor of Art 10(2) of the ECHR as compared to Art 14 of the Singapore Constitution. The former required that restrictions be only those which were "necessary in a democratic society" as opposed to the Art 14 formulation of "necessary or expedient" from Parliament's perspective. The English approach thus fettered Parliament to a greater extent by requiring conformity with democratic criteria rather than mere expediency. Rajah J noted (*ibid*) that the European Court of Human Rights had interpreted "necessary in a democratic society" "very generously" so as to "impose common legal precepts and standards within the European Union". Within Europe, Rajah J observed, different European Union members could only differ in terms of practices, standards and rights, within a "narrow band of acceptable practices" or what is known as the margin of appreciation doctrine (*ibid*). He also expressly rejected the notion of proportionality as a criterion for assessing the appropriate balance

between freedom of expression and public order, noting this was a "continental European jurisprudential concept imported into English law by virtue of the UK's treaty obligations" (at [87]). This erected another "fundamental difference" between English and Singapore law as the continental approach empowered a court "to examine whether legislative interference with individual rights corresponds with a pressing social need; whether it is proportionate to its legitimate aim and whether the reasons to justify the statutory interference are relevant and sufficient" (*ibid*). Simply put, this is the principle that the punishment must fit the crime or, within the context of administrative law, administrative measures must not be "more drastic than is necessary for attaining the desired result", citing W Wade & C Forsyth, *Administrative Law* (Oxford University Press, 9th Ed, 2004) at 366. The principle of proportionality is one applied by the European Court of Human Rights and considered in Britain under the auspices of the Human Rights Act. Furthermore, Rajah J noted (at [87]) the observations of P P Craig, *Administrative Law* (Sweet & Maxwell, 5th Ed, 2003) at 617–638 to the effect that proportionality is a "more exacting requirement" than reasonableness and requires the court in some cases to substitute its own judgment for that of the proper authority. Thus, the notion of proportionality had never been a part of the English common law in relation to the judicial review of the exercise of legislative and administrative power. Rajah J underscored "[n]or has it ever been part of Singapore law" (at [87]). In *Kang Ngah Wei v Commander of Traffic Police* [2002] 1 SLR 213, "proportionality arguments" appear to have been subsumed as a factor in considering whether the test of *Wednesbury* unreasonableness (see *Associated Provincial Picture Houses, Limited v Wednesbury Corporation* [1948] 1 KB 223) was satisfied, rather than an independent ground of review. Indeed, the Court of Appeal in *Chng Suan Tze v Minister of Home Affairs* [1988] SLR 132 at 164, [121]) observed that the principle of proportionality had not been established as a separate ground for judicial review, and could be subsumed under the head of "irrationality" such that if a decision "on the evidence is so disproportionate as to breach this principle, then in our view, such a decision could be said to be irrational in that no reasonable authority could have come to such a decision". Rajah J's decision continues to demonstrate a reticence towards exploring or developing proportionality as a head of review or constitutional principle.

1.83 Notably, Rajah J underscored how the applicants had not bothered to present any further affidavit evidence, which would be privileged and public, despite the fact that this presented an opportunity for them to present whatever "skullduggery or chicanery" prevailing in these institutions to the public's attention (at [131]). Rajah J rejected any notion that the

Constitution protects an "unfettered right to undermine the legitimacy of public institutions without being held accountable for the consequences of their conduct"; this is because such an open-ended right would "undermine the very existence of public governance which in turn depends on public confidence in institutional integrity" (*ibid*). He also noted the "total lack of a factual basis" in the supporting affidavit with respect to supporting the allegations against the public institutions in question, which might meet the defence of reasonable conduct (at [137]). Had the applicants found evidence of disturbing impropriety, they could have disclosed it in their affidavits and this would have been legally privileged and ultimately have been placed "under the scrutiny of the court as well as before the bar of public opinion" (*ibid*). Thus, Rajah J stated the protest went beyond "the legitimate cut and thrust of politics and criticism" (*ibid*) and the protestors, having proceeded with "neither sagacity nor prudence", would not be rewarded "with the imprimatur of legitimacy by the court" (*ibid*). Without concluding that any offence had been committed under the MOA, the proceedings were struck out.

Foreign constitutional cases in local courts

1.84 Rajah J in *Chee Siok Chin* (*supra* para 1.60) stressed particularities in so far as he declared that different countries had "differing thresholds" for "acceptable public conduct", such as in relation to "the protection of public institutions and figures from abrasive or insulting conduct" (at [132]). He warned against "blindly or slavishly" applying standards from other countries "without a proper appreciation of the context in another", as he was not of the view that there were "clearly established immutable universal standards" (*ibid*). He stated that the "margins of appreciation" for public conduct varied between countries "as do their respective cultural, historical and political evolutions as well as circumstances"; in particular, standards of public order and conduct reflected "greatly varying value judgments as to what may be acceptable in different and diverse societies" (*ibid*). Thus, the court was to be guided not by "abstract notions of permissible conduct" but by the "manifest intent and purport" of the Constitution and domestic legislation (*ibid*).

1.85 As it is, the judicial approach towards the reputation of politicians or public institutions, as manifest in the law on defamation or contempt of court, is biased in favour of protecting public reputation and downplays the important role that freedom of expression plays in sustaining a democratic society where robust and free debates help citizens make informed choices.

1.86 Having established the importance of particularities or local conditions, Rajah J proceeded to underscore the paramountcy of the integrity of public institutions which he characterised as "an integral part of the foundation that grounds Singapore" (at [133]). Thus, undermining confidence in these institutions "can hardly be described as a 'peaceful protest'" as public governance in Singapore has been equated with integrity; thus to "spuriously cast doubt" would be to undermine both "a hard-won national dignity and a reputable international identity" (*ibid*). Article 14 did not allow groups of four or less *carte blanche* to question the integrity of public institutions; rather criticism could be voiced "if they have a veritable factual or other legitimate basis to do so" provided this was within the legal parameters – "[p]ublic conduct cannot be transmuted at will into public nuisances" (at [134]).

Prioritising public order over rights

1.87 Rajah J, in prioritising public reputation over the importance of political speech, declared that the Singapore Parliament "has through legislation placed a premium on public order, accountability and personal responsibility" (at [135]). He stressed that free speech was not impeded by ruling out conduct which was threatening, abusive or insulting; he affirmed that "in every democratic society those who hold office must remain open to criticism" but this criticism had to be based on "some factual or other legitimate basis" as disseminating false or inaccurate information "can harm and threaten public order" (*ibid*). He affirmed that all persons had a "general right" to be protected from insults, abuse or harassment and those who intruded upon such right had to be held accountable for their conduct as "[c]ontempt for the rights of others constitutes the foundation for public nuisance" (at [136]). In focusing on the potential harm caused by free speech, Rajah J noted that freedom of expression "when left unchecked may reach a point where protest, criticism and expression culminate in nuisance or something even more serious" (*ibid*).

Article 15 and the definition of religion

1.88 There is no constitutional definition of "religion" although the Court of Appeal in *Nappalli Peter Williams v Institute of Technical Education* [1999] 2 SLR 569 adopted a strict definition in excluding ideologies which do not evince a belief in God. It would appear that the definition of "religion" includes the element of self-identification as a religion. Yong CJ in *Ng Chye Huay v PP* (*supra* para 1.55) rejected any argument based on Art 15, which protects the right of everyone to profess, practice and propagate his religion.

This was because adherents of the Falungong declare "they are not a religion, but merely practitioners or a specific form of *qigong*" (at [34]). It is unclear whether this was a submission of counsel for the appellants or whether the judge took notice of this finding from other sources, although the latter seems probable in so far as Yong CJ refused to entertain the Art 15 arguments from the outset. Indeed, Yong CJ in considering the sentences meted out by the trial judge rejected counsel's argument that the appellants "had a deep-seated religious belief that led them to champion a cause against persecution" (at [73]). It would appear that the group displayed certain practices which may be classified as religious in nature, as Yong CJ referred to the "Falungong faith" in noting that it was part of a "demonstration" of this faith "to meditate and carry out their exercises in public" (at [50]). If indeed Falungong practitioners do not consider themselves to be adherents to a religion, the lack of self-identification as a religion would appear to be determinative in answering the threshold question of whether the protection of Art 15 may be invoked. Notably, expert evidence was heard before the Ontario Human Rights Commission to the effect that Falungong would be characterised as a new religious movement by western scholars of religion, presumably applying objective criteria to this effect: *Ontario Human Rights Commission v Daiming Huang* 2006 HRTO 1 (Human Rights Tribunal of Ontario). This is illustrative of divergent approaches towards the complex issue of defining "religion".