1. ADMINISTRATIVE AND CONSTITUTIONAL LAW

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Introduction

1.1 In the field of public law, the major developments in 2012 lay in the field of constitutional law where there were significant cases relating to the scope of judicial review over the exercise of constitutional powers by the executive for which a limited review model was adopted, over *locus standi* for constitutional law cases and the concept of "constitutional violations", and whether sentencing power was part of judicial power under Art 93 of the Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) ("Constitution"). Other issues involved the scope of Art 144 in relation to the giving of loans by the Government and whether this engaged presidential and parliamentary oversight, judicial review over exercises of clemency power, whether there was a judicial role in controlling the exercise of executive discretion under Art 49 of the Constitution which relates to the calling of by-elections, where the emphasis on history or original intent was a determinative factor in constitutional construction. The meaning of "law" under Art 9 and whether it could accommodate a principle of proportionality and the inter-relationship between Arts 4 and 162 was also judicially considered.

1.2 With respect to administrative law, the cases were mainly run-of-the-mill decisions. Judicial review was held to extend to non-statutory bodies applying the approach in *R v Panel on Take-overs and Mergers; Ex parte Datafin plc* [1987] QB 815 ("*Datafin*") and ministerial or administrative acts which did not by nature involve any discretion were not subject to challenges of bias. The law on declaratory relief arising out of the 2011 amendments to O 53 of the Rules of Court (Cap 322, R 5, 2006 Rev Ed) ("RoC") was clarified.

ADMINISTRATIVE LAW

Scope of judicial review: High Court and ministerial decisions

1.3 Judicial review is the procedure by which the High Court reviews the judicial and quasi-judicial functions of inferior courts and tribunals. When judicial review for a quashing order against a decision

of the Chief Justice was sought in *Re Manjit Singh s/o Kirpal Singh* [2012] 4 SLR 81, the High Court held that this was inappropriate.

1.4 The relevant decision was that of appointing the President of a Disciplinary Tribunal ("DT") under the Legal Profession Act (Cap 161, 2009 Rev Ed) ("LPA"). Applications under O 53 of the RoC were an inappropriate remedy against the High Court or Court of Appeal. Resort should be had to statutory appeal where available. If a High Court set aside the decision of another High Court, this would not be via O 53 but by an originating summons. Thus, where the Chief Justice made an order in his judicial capacity, it was not subject to judicial review.

1.5 Indeed, the Chief Justice in this instance was exercising an act that was "administrative" or "ministerial" in nature which was also not subject to review (at [6]). A ministerial duty or administrative function was one that did not involve the exercise of any discretion or judgment, as the Court of Appeal noted in *Lim Mey Lee Susan v Singapore Medical Council* [2012] 1 SLR 701 ("*Lim Mey Lee Susan*") at [46]–[48]. In addition, the scheme of the LPA as Parliament envisaged provides that there shall be no judicial review of anything the DT did, unless otherwise stipulated under s 91A of the LPA. This did not include the appointment of the DT President.

Bias and professional disciplinary committees

1.6 In *Lim Mey Lee Susan*, a medical doctor was brought before a disciplinary committee ("DC") of the Singapore Medical Council ("SMC") for overcharging a patient from Brunei and making false representations in invoices rendered to the patient. The proceedings before this first DC were terminated when the appellant contended that it had prejudged her submission of no case to answer. A second DC was appointed after the SMC sought the approval by e-mail of the SMC members to revoke the appointment of the first DC and appoint the second DC to continue disciplinary proceedings against the appellant. It stated that SMC members would be deemed to agree to this measure if they did not respond by a stipulated date. The appellant appealed the High Court's dismissal. The Court of Appeal found (at [29]) that the SMC had a statutory duty under the Medical Registration Act (Cap 174, 2004 Rev Ed) ("MRA") to appoint another DC after the first one recused itself and held that it had done so in accordance with the law. It was proper for the SMC to decide how to secure the approval of a majority of SMC members, as it did via a series of e-mails.

1.7 No bias could arise in relation to the appointment of the DC as the SMC has no discretion in the matter once it receives a complaint

against a registered medical practitioner under s 39(1). In this instance, the SMC "merely acts as a conduit" and therefore no issue of bias can arise with respect to the SMC discharging its statutory duties. These duties are "ministerial or administrative in nature" which means they do not involve "the exercise of any discretion or judgment" (at [47]). This also applies to its function in appointing a DC upon receiving a complaints committee's order that a formal inquiry into a complaint should be held by a DC (at [46]).

1.8 The only discretion the SMC has in this case was in selecting DC members. The appellant alleged (at [48]) that the appointment of the second DC was tainted by apparent bias, not because the second DC composed biased adjudicators, but because of the allegation that the person in charge of composing the second DC, Prof Satku, Director of Medical Services ("DMS"), may have caused the SMC to appoint a second DC composed of persons in whom there was a "reasonable suspicion" that they would or might be biased against the appellant. Prof Satku, who was then involved in both Ministry of Health, Singapore's preliminary investigation into the complaint and the subsequent appointment of the second DC, did not instigate the Permanent Secretary of Ministry of Health, Brunei, ("MOHB") to lodge the complaint against the appellant and also did not divert MOHB's complaint about the appellant's fees away from civil resolution of the dispute to resolution by the disciplinary process (at [43]–[44]). The only issue was whether Prof Satku had caused the SMC to appoint to the second DC members who might reasonably be suspected to be biased against the appellant (at [48]). However, neither the DMS nor SMC had any role to play in the disciplinary proceedings before the second DC so any allegation of bias should have been directed at the members of the second DC, which was the ultimate authority on the question of professional misconduct, subject to any appellate procedure, *ie*, the decision-maker with respect to the merits of the complaint.

Non-statutory bodies and susceptibility to judicial review

1.9 The question of whether the Singapore Exchange Securities Trading Ltd's ("SGX-ST") public reprimand of a director of a company listed on SGX-ST was a public function and thus susceptible to judicial review arose in *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 ("*Yeap Wai Kong*"). The applicant, a non-executive director of China Sky Fibre Chemical Limited, applied for leave to quash this reprimand on the basis that it was conducted in breach of natural justice. Philip Pillai J held that a full and fair hearing had been accorded the applicant on the facts.

1.10 What was of greater interest was the determination of whether SGX-ST was exercising a "public" function so as to be amenable to judicial review, as judicial review does not avail the enforcement of private law rights. Instead, judicial review is the means by which the courts enforce the rule of law; its principles are a "Court-struck balance, faithful to both vigilance and restraint" (quoting (at [5]) Michael Fordham, *Judicial Review Handbook* (John Wiley & Sons Ltd, 2nd Ed, 1997) at p 172).

1.11 Pillai J took note (at [6]) in the approach to determining the scope of judicial review of the shift in English case law from the "source" of power to the "nature of power" test to "take into account the changing public governance landscape". He discussed the seminal English decision of *Datafin* which considerably expanded the supervisory empire of the courts by extending judicial review not only to statutory bodies or bodies created by prerogative powers, but also bodies like the London Panel on Take-Overs which operated the City Code on Take-overs and Mergers ("the Panel"). This body *de facto* exercised "what can only be characterised as powers in the nature of public law powers": *Datafin* at 828, *per* Sir John Donaldson MR. The Take-over Panel operated without "visible means of legal support" (*Datafin* at 824), oversaw a very important part of the UK financial market and had neither statutory, prerogative or common law powers; neither was it in a contractual relationship with those in the financial market (*Datafin* at 825). It wielded enormous power as it was the author of the City Code, investigated alleged breaches of it and threaten sanctions which lacked a legally enforceable base: *Yeap Wai Kong* at [10]–[11].

1.12 As Pillai J noted (at [9]), "In the modern era, public policy is increasingly effected not only by government and statutory bodies but also through self-regulating entities in sectors where the domain nature and complexity of the sector requires front-line expertise coupled with back-line regulators to regulate the relevant sector". He pointed out (at [12]) that Sir John Donaldson MR in *Datafin* was "mindful that financial markets required speed and certainty of decisions" such that the decisions of the Panel in *Datafin* should be treated as valid and binding until set aside: *Datafin* at 840. Nonetheless, judicial review has expanded, as an exercise in "upholding the rule of law by adjusting to meet changing public governance landscapes" (at [16]). This shifts the function of judicial review from ensuring public bodies act within their public powers to a more general idea of preventing the "abuse of power", whatever its source, provided it has a public element.

1.13 Pillai J also took note (at [13], quoting *Datafin* at 847) of the spectrum of bodies susceptible to judicial review, with statutory sources

and contractual/consensual private decision-making at two ends and an in-between area where:

> … it is helpful to look not just at the source of the power but at the nature of the power. If the body in question is exercising public law functions, or if the exercise of its functions have public law consequences, then that maybe sufficient to bring the body within the reach of judicial review. It may be said that to refer to 'public law' in this context is to beg the question. But I do not think it does. The essential distinction, which runs through all the cases to which we referred, is between a domestic or private tribunal on the one hand and a body of persons who are under some public duty on the other.

1.14 Thus, the modern approach to judicial review is to consider whether exercising a power involves a "public element, which can take many different forms, and the exclusion from jurisdiction of bodies whose sole source of power is a consensual submission to its jurisdiction" (Clive Lewis, *Judicial Remedies in Public Law* (Sweet & Maxwell, 4th Ed, 2009) at para 2-003): at [15]. It is recognised that non-statutory bodies may exercise public functions and may, if certain factors are present, be subject to judicial review. These may include "the nature of the function, the extent to which there is any statutory recognition or underpinning of the body or the function in question and the extent to which the body has been interwoven into a system of governmental regulation" [emphasis added by the High Court omitted]. Pillai J applied these three main factors to SGX-ST, which is not a statutory body (at [18]) but a company incorporated under the Companies Act (Cap 50, 2006 Rev Ed). SGX-ST operates a securities market and is held by the Singapore Exchange Ltd, an approved holding company of SGX-ST as well as the Singapore Exchange Derivatives Trading Ltd, under s 81U of the Securities and Futures Act (Cap 289, 2006 Rev Ed) ("SFA"). It describes itself as a "Self regulatory organisation" (at [20]).

1.15 First, Pillai J considered the legislative and regulatory matrix within which SGX-ST operated. The Monetary Authority of Singapore ("MAS") is the primary statutory regulator of the securities and future market under the SFA. The SGX-ST is interwoven into the SFA: s 16(1)(*c*) provides that an approved exchange such as SGX-ST in discharging its duties is to have particular regard to the interests of the investing public and is not to act in a manner contrary to the public interest. It is to maintain business and listing rules (s 16(1)(*e*)) for a fair and transparent market and to enforce compliance with these rules (s 16(1)(*f*)). The MAS may direct amendments to these rules or otherwise give its approval. Section 24 provides that these business rules shall be deemed to operate as a binding contract between the exchange and each member, and between members (at [21]). There is provision for statutory enforcement under s 25 by which its business

or listing rules may be enforced by a court order issued to the company in question. Among other powers, the MAS under s 46 of the SFA may issue directions to SGX-ST on pain of criminal offence on non-compliance.

1.16 Second, Pillai J considered the statutory underpinning of SGX-ST reprimand function in relation to its role to ensure a fair, transparent market which requires the timely disclosure of material information. Two methods are adopted:

> (a) requiring listed companies to comply with the Listing Manual (at [23]): When a listed company defaults on these continuing disclosure obligations, SGX-ST Listing Manual Chapter 13 provides for trading halts, suspensions and delisting (at [23]). The Exchange may delist an issuer by removal from its official list if it fails to comply with its listing rules; and
>
> (b) the power to publicly reprimand executive and non-executive directors of listed companies for non-compliance with the Listing Manual, as contained in SGX-ST's Listing Manual, part IV "Equity Securities – Other Obligations" (at [24]): This is contained in Rule 720 which was properly enacted and approved by MAS in accordance with s 23 of the SFA.

1.17 Third, he considered (at [25]) the nature of the reprimand function by a front-line securities regulator which "carries financial and business implications". Pillai J described the possible effect of a public reprimand thus (at [27]): "SGX-ST's public reprimand of a listed company's directors accordingly may potentially impact a director domestically and internationally in several ways, depending on his background. These include: adverse business reputational implications, implications on their continued service on board committees and directorships of other listed companies and other professional and financial services licence implications."

1.18 In conclusion, Pillai J characterised the reprimand power (at [28]) as a "public function within the Nature Test" and thus subject to judicial review for minimum compliance with the standards of "legality, rationality and procedural propriety".

Remedies: Declaratory relief

1.19 Philip Pillai J clarified the regime in relation to declarations in the case of *Vellama d/o Marie Muthu v Attorney-General* [2012] 4 SLR 698 ("*Vellama v AG*") (at [18]), as the case foregrounded the question of "how declarations function specifically within the current O 53". He described declarations as a "unique form of relief" in that it is "a judicial

pronouncement on a state of affairs and does not require execution" (at [24]). It cannot be enforced against the defendant (*The Declaratory Judgment* (Woolf & Woolf eds) (Sweet & Maxwell, 45th Ed, 2011) at p 1): at [24].

1.20 Pillai J set out the constitutional (Art 93) and statutory (ss 3 and 18(2), First Sched of the Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed)) framework of judicial review in Singapore. He noted that the power to grant declarations had its roots in equity while the power to grant prerogative orders inhered in common law courts. Order 15 r 16 of the RoC provides: "*No action* or other proceeding *shall be open to objection on the ground that a merely declaratory judgment or order is sought* thereby, and the Court may make binding declarations of right whether or not any consequential relief is or could be claimed" [emphasis added by the High Court]. This restates the power of the High Court to grant declarations which is located in Art 93 of the Constitution (at [23]). The grant of a declaration is at the court's discretion (at [26]).

1.21 The Court of Appeal in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR(R) 112 ("*Karaha Bodas*") at [14] has set out the requirements that must be satisfied before declaratory relief is given:

> (a) the court must have the jurisdiction and power to award the remedy;
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> (b) the matter must be justiciable in the court;
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> (c) as *a declaration is a discretionary remedy*, it must be justified by the circumstances of the case;
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> (d) the plaintiff must have *locus standi* to bring the suit and there must be a real controversy for the court to resolve;
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> (e) any person whose interests might be affected by the declaration should be before the court; and
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> (f) *there must be some ambiguity or uncertainty about the issue in respect of which the declaration is asked for so that the court's determination would have the effect of laying such doubts to rest.*
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> [emphasis added]

1.22 After the English O 53 r 1 was reformed in 1977 (Rules of the Supreme Court 1977 (UK) (SI 1977 No 1955)), an application for a declaration could be made in an application for judicial review and the court would grant this if it was "just and convenient" to do so, considering all circumstances.

1.23 Applications for *certiorari*, *mandamus* and prohibition are made under O 53 of the RoC and require the leave of the court. Prior to an

amendment to O 53 which took effect on 1 May 2011, an applicant could not seek declaratory relief in O 53 proceedings. Order 53 was amended to allow applicants to obtain additional "relevant relief" (*Vellama v AG* at [31]) and to empower the court to grant declarations under O 53 proceedings in conjunction with prerogative orders.

1.24 The question arose as to whether the court could grant standalone declarations in an O 53 application for mandamus, which included declarations; that is, whether the declaration has now been elevated to the same level as a prerogative order under O 53, on an isolated reading of O 53 r 7(1).

1.25 This arose out of an application for a mandatory order and declaration in relation to the vacating of the Hougang Single Member Constituency ("SMC") caused by the expulsion of incumbent Yaw from the Worker's Party. In March 2012, Vellama d/o Marie Muthu, a resident of Hougang SMC, sought a declaration that the Prime Minister did not have unfettered discretion in deciding whether to call for by-elections and a mandatory order enjoining the Prime Minister to advise the President to issue a writ of election under Art 49(1) of the Constitution and s 24(1) of the Parliamentary Elections Act (Cap 218, 2011 Rev Ed), within such reasonable time as to be judicially determined: *Vellama v AG* at [8].

1.26 The application for a mandatory order was abandoned on 16 July 2012 after the Prime Minister made a statement in Parliament on 9 March 2012 that he intended to call a by-election in Hougang but had yet to determine its timing. Eventually, the writ of election for Hougang SMC was served on 9 May 2012 and the by-elections concluded on 26 May 2012.

1.27 Order 53 r 1(1) states that the principal application "may include an application for a declaration", provided that leave to make the principal application has been granted in accordance with O 53. Order 53 r 7(1) contemplates that the court may make "a Mandatory Order, Prohibiting Order, Quashing Order or declaration". Where leave is granted to apply for a prerogative writ, the application for the order "and any included application for a declaration" must under O 53 r 2 be made by summons to a court in the originating summons in which leave was obtained. While leave is required for prerogative orders, it is not under the post-2011 O 53, where an applicant seeks to include an application for a declaration in the principal application (*Vellama v AG* at [32]):

> The language of O 53 rr 1 and 2 is clear that the amendment did not have the effect of elevating declarations to the same level as the principal application. Otherwise, leave, which is required for the prerogative order, would also have been required for such included declaration.

1.28 Thus, a declaration is "contingent upon the prerogative order and cannot be granted independent of the principal application under O 53": *Vellama v AG* at [33]. Read in full context, the phrase "or declaration [in O 53] means a declaration that is appended to and contingent upon a prerogative order": *Vellama v AG* at [33]. If the prerogative order fails, the applicant is free to seek a declaration under O 15 r 16, which does not require leave but must satisfy the criteria set out in *Karaha Bodas* (above, para 1.21). An applicant under the current RoC can apply for prerogative writs under O 53 and standalone declarations under O 15 r 16 and, assuming conditions allow, may apply to consolidate both proceedings under O 4 r 1 of the RoC: *Vellama v AG* at [36].

CONSTITUTIONAL LAW

Judicial review: Power to call by-elections and Article 26(2)(*b*)

1.29 The calling of by-elections can be a highly politicised issue and the question arises as to whether courts have a role in controlling executive discretion in this respect when the relevant legal regime does not stipulate a time period for the holding of by-elections.

1.30 The question of whether, when a vacancy arises in Parliament, a by-election must be called to fill an elected Member's seat, arose in the case of *Vellama v AG*. A member of the Workers' Party, Yaw Shin Leong, had been expelled from his political party and pursuant to Art 26(2)(*b*), his seat in Hougang SMC became vacant as he ceased to be a member of the political party for which he stood in general elections.

1.31 The governing provision is Art 49 of the Constitution and the substantive issue raised was whether the expression "shall be filled by election" meant that the Prime Minister was obliged to advise the President to issue a writ of election to fill the vacancy of an elected Member of Parliament. A resident of Hougang, Vellama d/o Marie Muthu on 12 March 2012 sought declarations to the effect that the Prime Minister did not have unfettered discretion to decide whether to announce by-elections in Hougang SMC and further, should do so within three months or a reasonable time period as determined by the court. The issue became moot when the President, on the advice of the Prime Minister, issued a writ of election for Hougang SMC on 9 May 2012, which was conducted on 26 May 2012.

1.32 The learned judge, Pillai J, adopted a closely contextualised reading of Art 49(1), drawing liberally from constitutional history and referencing academic writings to discern parliamentary intent on this matter. He stressed (at [53]) that constitutional expressions were not to

be taken out of context or read in isolation as the supreme law of the nation "is not to be approached or read loosely or superficially". The starting point was the constitutional text itself, and where this is ambiguous, recourse was to be had to extrinsic sources as an interpretive aid, such as history or the framer's intentions. Pillai J set out the "well-settled" method of constitutional interpretation, emphasising (at [52]) that constitutions should be "construed in the light of its context and circumstances". He approved the statement in *Moses Hinds v The Queen* [1977] AC 195 ("*Hinds*") at 211–212 to the effect that constitutions should not be construed like ordinary legislation and that Westminster-based constitutions were drafted "by persons nurtured in the tradition of that branch of the common law of England that is concerned with public law and familiar in particular with the basic concept of separation of legislative, executive and judicial power as it had been developed in the unwritten constitution of the United Kingdom".

1.33 The issue turned on whether the reference to "election" in Art 49 referred to an *event* that had to take place, as opposed to a *method* by which a vacancy was to be filled (election, as opposed to a non-elective selection process). Pillai J examined this first on the basis of the text before situating it within the wider context of Pt VI and the even broader context of the entire Constitution (at [54]). He noted (at [55] and [56]) that there was neither constitutional nor statutory definition of the term "by-election" as the relevant provisions referred only to general elections which took place after Parliament was dissolved. He contrasted Arts 49 and 66 (at [57]):

Filling of vacancies	**General elections**
49.—(1) Whenever the seat of a *Member*, not being a Non-constituency Member, has become vacant for any reason other than a dissolution of Parliament, the vacancy *shall be filled by election* in the manner provided by or under any law relating to Parliamentary elections for the time being in force. [emphasis added by the High Court]	**66.** There *shall be a general election* at such time, *within 3 months* after every dissolution of Parliament, as the President *shall*, by Proclamation in the Gazette, appoint. [emphasis added by the High Court]

1.34 While Art 66 mandated a general election within a specified time period after dissolution, Art 49(1) stated that vacancy "shall be filled by election" rather than "shall be filled by an election" (at [58]). While the reference to "shall" in Art 66 connoted a mandatory

obligation, its presence in Art 49(1) was ambiguous, depending on whether the reference to "election" was to the holding of an event or describing the process or method of election (at [59]–[61]).

1.35 In the context of Pt VI (The Legislature), Pillai J noted that three types of Members of Parliament were distinguished: Elected, Non-constituency and Nominated Members. Article 39 provided for different mechanisms by which these Member seats were to be filled upon dissolution. Elected Member seats were filled by general elections; Nominated Members were chosen by a select committee while Non-constituency Members were chosen by a unique mechanism contained in s 52 of the Parliamentary Elections Act. This only applies to candidates from the party not forming the Government. From a reading of Pt VI (its logical structure and its different processes for filling in each type of Member vacancies), it was clear that Nominated Members could only be appointed, Non-constituency Members were declared elected according to the terms of the Parliamentary Elections Act and Elected Member vacancies were to be filled only by election (at [80]). Therefore, the phrase "shall be filled by election" refers to a process rather than the event of election.

1.36 In terms of constitutional history, it was clear that when Singapore seceded from Malaysia, Parliament expressly took out the three-month requirement introduced in the Singapore State Constitution in 1963 when it became part of the Malayan Federation. Pillai J traced the constitutional sources of every precursor to Art 49(1) leading to its current form, starting with the Singapore Colony Order in Council 1946 (Statutory Rules and Orders 1946 No 462) ([81]–[83]). The historical narrative indicated that the expression "shall be filled by election" placed it beyond doubt that it meant a process, not event.

1.37 In particular, the Singapore Colony Order in Council, 1955 (SI 1955 No 187) ("the 1955 Order") replaced the Legislative Council with a Legislative Assembly for which there was to be 25 members (at [94]). Pillai J considered "crucial" the exact wording of s 51 of the 1955 Order as "it brings into clear light the meaning of Art 49(1) of the Constitution", being the "original source" of Art 49(1) (at [96]).

1955 Order	The current Constitution
Filling of vacancies **51.**—(1) Whenever the seat of a Nominated Member of the Assembly becomes vacant, the vacancy *shall be filled by appointment by the Governor* in accordance with the provisions of this Order.	**Filling of vacancies** [No equivalent provision]

(2) Whenever the seat of an Elected Member of the Assembly becomes vacant, the vacancy *shall be filled by election* in accordance with the provisions of this Order. [emphasis added by the High Court]	**49.**—(1) Whenever the seat of a Member, not being a non-constituency Member, has become vacant for any reason other than a dissolution of Parliament, the vacancy *shall be filled by election* in the manner provided by or under any law relating to Parliamentary elections for the time being in force. [emphasis added by the High Court]

1.38 Both s 51(2) of the 1955 Order and the current Art 49(1) contain the phrase "shall be filled by election". In the context of the 1955 Order, this phrase was contrasted with the provision providing that the vacancy of a seat for a Nominated Member should be filled "by appointment", which meant that "by election" meant a process and not an event and the word "shall" in ss 51(1) and 51(2) of the 1955 Order mandated the process of filling the seat (at [97]).

1.39 Pillai J traced the process by which the distinction between processes of appointment and election in the 1955 Order became obscured with subsequent developments. Singapore did away with Nominated Members in the Singapore (Constitution) Order in Council, 1958 (SI 1958 No 1956) ("the 1958 Order") as it moved towards self-government. Section 44 of the 1958 Order retained the phrase "shall be filled by election" in relation to the vacancy of a seat of a Member within a fully elected Legislative Assembly (at [100]). Its meaning did not change (at [101]). When Singapore became part of the Malaysian Federation, the Sabah, Sarawak and Singapore (State Constitutions) Order in Council (SI 1963 No 1493) ("the 1963 State Constitution") was significantly amended to include a new clause on the filling of vacancies to comply with the federal regime:

> **Filling of vacancies**
>
> **33.** Whenever the seat of a Member has become vacant for any reason other than a dissolution, the vacancy shall *within three months from the date on which it was established that there is a vacancy* be filled by election in the manner provided by or under any law for the time being in force in the State.
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> [emphasis added by the High Court]

1.40 This clause was subsequently deleted upon independence. Pillai J (at [108]) referenced a statement of the then Prime Minister

from the *Singapore Parliamentary Debates, Official Report* (22 December 1965) vol 24 at col 432 (Lee Kwan Yew, Prime Minister):

> **Article 7** revokes a clause which was introduced into the State Constitution of Singapore when it entered Malaysia. *Members in this House will know that there was no such injunction of holding a by-election within three months in our previous Constitution.* We resisted this particular condition being imposed upon the State Constitution at the time we entered Malaysia, but our representations were not accepted because Malaysia insisted on uniformity of our laws with the other States in the Federation and with the Federal Constitution itself. *Since we are no longer a part of the Federal whole, for reasons which we find valid and valuable as a result of our own experience of elections and of government in Singapore, we have decided that this limitation should no longer apply.* [emphasis added by the High Court]

1.41 Parliament on the same day amended the Constitution to delete the words "within three months from the date on which it was established that there is a vacancy" retrospective to 9 August 1965, or Independence Day (at [109]). This was a reversion to the language of s 51(2) of the 1955 Order, which remains unchanged today as Art 49(1), which governs the vacancies of Elected Members' seats (at [110]). Pillai J concluded (at [114]) that the "grand sweep of successive colonial constitutions from 1946 to the current constitution shows that since 1955, the expression 'shall be filled by election' continuously and consistently meant a process and not an event". The only aberrant period was the brief period when Singapore was part of Malaysia and had to provide for by-elections to be held within a certain time.

1.42 From this analysis, Pillai J concluded that the constitution did not require that by-elections be called within a prescribed time period. He rejected the argument that the purposive approach advocated in s 9A of the Interpretation Act (Cap 1, 2002 Rev Ed) as well as the s 52 "reasonable time" requirement meant that the discretion to call a by-election had to be within a judicially defined "reasonable time". He noted too (at [117]) that this regime reflected an inter-play of the constitutional principles of the rule of law, which demands accountability through judicial review, and the separation of power, whose accent could be on institutional autonomy.

Article 144 and loan giving

1.43 The constitutionality of a contingent loan of US$4bn by the MAS to the International Monetary Fund was challenged in *Jeyaretnam Kenneth Andrew v Attorney-General* [2013] 1 SLR 619 ("*Jeyaretnam v AG*"). The applicant sought leave to apply for prerogative orders and declaration against the Singapore government or MAS, claiming that the loan contravened Art 144 of the Constitution. The applicant

considered that according to his reading of Art 144, the loan had to be approved by Parliament and the President. The Government argued that the loan fell without the ambit of Art 144.

1.44 Tan Lee Meng J held that Art 144 did not apply to the giving of loans (which incurs a credit), but only to the raising of loans (which incurs a financial liability). The application of leave was dismissed because there was no *prima face* case of reasonable suspicion which would favour the granting of the remedies sought. Article 144 reads:

> **Restriction on loans, guarantees, *etc.***
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> **144.**—(1) No *guarantee or loan* shall be *given or raised* by the Government —
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> (*a*) except under the authority of any resolution of Parliament with which the President concurs;
>
> (*b*) under the authority of any law to which this paragraph applies unless the President concurs with the giving or raising of such guarantee or loan; or
>
> (*c*) except under the authority of any other written law.
>
> [emphasis added]

1.45 The applicant argued that Art 144(1) should be accorded a literal reading whereupon "no loan shall be given or raised by the Government" *sans* the approval of Parliament and the President. In contrast, the respondent, for the Government, argued that it should be read purposively to reflect parliamentary intention such that "given" related to "guarantee" and "raised" related to "loan"; thus, giving a loan fell without Art 144(1). Tan J rejected the argument of the applicant that different approaches should be taken towards interpreting fundamental rights (a purposive interpretation) and interpreting institutional powers as in the instant case concerning the accountability of the Executive to the Legislature. This was not to be countenanced "because s 9A(1) of the Interpretation Act provides that 'an interpretation that would promote the *purpose or object underlying the written law* (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object'" [emphasis added by the High Court] (at [10]). The constitutional tribunal in *Constitutional Reference No 1 of 1995* [1995] 1 SLR(R) 803 had stated (at [48]) that it would be wrong to interpret the constitution literally where this failed to give effect to the will and intent of Parliament, citing cases such as *Adnan bin Kadir v Public Prosecutor* [2013] 1 SLR 276 which affirmed that courts were to consider not only the letter but the purpose of the law (at [11]).

1.46 Tan J identified various grounds in his judgment to fortify his conclusion that a purposive reading of Art 144 yielded the clear answer

that this provision was only engaged when the Government raised a loan but not when it gave a loan.

1.47 First, he considered (at [13]) the drafting history and examined the textual formulation of Art 144 in the constitutional amendment bill, the final version adopted by the constitution and the explanatory notes to the bill. This demonstrated the correlation of certain words to each other. The proposed Art 144(1) in the Bill was worded thus (at [14]):

> No *debt, guarantee or loan* shall be incurred, given or raised by the Government … [emphasis added by the High Court]

1.48 A different order was used in the explanatory statement: *Jeyaretnam v AG* at [15]. Article 144 intended:

> (*a*) to provide that no *loan, debt or guarantee* may be raised, incurred or given by the Government except with the concurrence of the President or under the authority of law. [emphasis added by the High Court]

1.49 In both cases, the word "raised" was correlated to loan, "incurred" to debt and "given" to guarantee (at [16]). Tan J concluded (at [16]): "If it was intended that both the words 'given' and 'raised' in Art 144(1) were to apply to 'loan', there would have been no need to rearrange the order of the words 'given' and 'raised' in the way it was done in the Explanatory Statement." This linkage was further confirmed by the final exclusion of "debt" from Art 144(1) and the deletion of "incurred" (at [17]).

1.50 Second, Tan J said Art 144 had to be considered in the context of the contemporaneous creation of the institution of the elected presidency, which came into force in 1991. This amendment made the office an elective one vested with powers to safeguard financial reserves, among others. He cited an opinion of the Attorney-General delivered in 1998 which stated that giving loans fell without Art 144(1), which captured transactions that increased the financial liability of the Government or drained its past reserves. Such cases were subject to the scrutiny of Parliament and the President. However, giving a loan created an asset for the Government and liability for the borrower. Against the context of the role of the President in safeguarding financial reserves, giving a loan did not create the mischief Art 144 was designed to deal with (at [19]). Tan J further opined (at [20]–[22]) that the Attorney-General's opinion, which the Government endorsed, was supported by the 1988 and 1990 white papers in relation to the presidency; notably, the second white paper while referring to raising loans did not refer to giving loans. This view was supported by the terms of Art 144(2) which refers to the presidential power to withhold discretion to certain bills concerning the giving of guarantees or raising of loans by the Government where this drew down on past reserves. It did not mention

the giving of loans (at [23]). This was further buttressed by the terms of s 15 of the Financial Procedure Act (Cap 109, 2012 Rev Ed) which was enacted on 28 June 1991 after Art 144 was passed by Parliament on 3 January 1991. Section 15, while referring to the raising of loans which had to be raised "in accordance with Article 144 of the Constitution", did not refer to the giving of loans; this demonstrated parliamentary intent to exclude giving loans from the ambit of Art 144(1) (at [26]). A similar finding was made in relation to the Bretton Woods Agreements Act (Cap 27, 2012 Rev Ed).

1.51 Third, Tan J found (at [30]–[32]) that the *reddendo singular singulis* principle applied so as to place loans given by the Government outside the scope of Art 144.

Judicial review of exercises of clemency power

1.52 The issue of the meaning of "life imprisonment" arose in *Mathavakannan s/o Kalimuthu v Attorney-General* [2012] 2 SLR 537 ("*Mathavakannan v AG*"). The plaintiff, who was convicted for murder committed on 26 May 1996, was sentenced to death but on 28 April 1998 had his sentence commuted to one of life imprisonment by then President Ong Teng Cheong, acting on the advice of Cabinet. While the clemency power regime was constitutionalised under Art 22P on 1 July 1999, President Ong was acting under the pre-existing regime in exercising power granted by s 238 of the Criminal Procedure Code (Cap 68, 1985 Rev Ed) read with s 8 of the Republic of Singapore Independence Act (Act 9 of 1965, 1985 Rev Ed) ("RSIA"). Under the terms of s 8(1) RSIA, the President may "grant to any offender convicted of any offence in any court in Singapore, a pardon, free or subject to lawful conditions, or any reprieve or respite, either indefinite or for such period as the President may think fit, of the execution of any sentence pronounced on such offender". This allows the President to commute a capital sentence to an imprisonment term of any period.

1.53 Up to the delivery of the Court of Appeal decision in *Abdul Nasir bin Amer Hamsah v Public Prosecutor* [1997] 2 SLR(R) 842 ("*Abdul Nasir v PP*") on 20 August 1997, there was a practice that "life imprisonment" meant imprisonment for a 20-year term. In *Abdul Nasir v PP*, the court held that despite this practice and the definition of "life" under s 45 of the Penal Code (Cap 224, 1985 Rev Ed), the term "life imprisonment" ought to be accorded its ordinary and natural meaning which is imprisonment for the duration of the prisoner's natural life: *Mathavakannan v AG* at [14]. However, given Art 11 (prohibition against retrospective increases in punishment) and the recognition of legitimate expectations, this holding was only to apply prospectively: *Mathavakannan v AG* at [15].

1.54 While the court would not review the merits of an exercise of clemency power and President Ong's commutation decision, the High Court held that it was within the judicial province to interpret the commutation decision an executive order: *Mathavakannan v AG* at [23]. Lee Seiu Kin J drew from the finding of the Court of Appeal in *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 ("*Yong Vui Kong v AG*") that non-compliance with procedural safeguards in exercising clemency power was reviewable to conclude that "the logically prior step before a court is able to judicially review whether the requisite procedural safeguards have been complied with *vis-à-vis* the exercise of clemency power will probably involve an interpretation of the clemency order itself": *Mathavakannan v AG* at [23].

1.55 There was ambiguity in the instant cases as to whether the commutation of the capital sentence into "life imprisonment" entailed a 20-year imprisonment term under the pre-*Abdul Nasir v PP* regime, or that it meant imprisonment for the term of a natural life. While finding the arguments for the two possible interpretations "finely balanced" Lee J noted that the defendant had not produced any evidence as to what President Ong had meant by "life imprisonment". Lee J concluded that it was "inconceivable" given the significant changes to the law at the date of the *Abdul Nasir v PP* decision that the legal advisors to President Ong and the Cabinet "would not have recommended expressing the commutation order in clearer terms if it was intended for the Plaintiff to be imprisoned for the rest of his natural life": *Mathavakannan v AG* at [26]. This was so given that the changes to the practice of how "life imprisonment" was to be interpreted was then relatively recent, made only eight months prior to President Ong's order. Further, as a matter of fairness to the individual, particularly since there were "serious implications" on the plaintiff's liberty, penal statutes were subject to the principle of strict construction in favour of the accused, as had been applied in *Public Prosecutor v Low Kok Heng* [2007] 4 SLR(R) 183: *Mathavakannan v AG* at [27]. Consequently, "life imprisonment" in the instant case was to be for a 20-year imprisonment term: *Mathavakannan v AG* at [28].

Judicial review of prosecutorial discretion

1.56 Article 35(8) of the Constitution states: "The Attorney-General shall have power, exercisable at his discretion, to institute, conduct or discontinue any proceedings for any offence." This executive power is constitutionally equal in status to the judicial power set out in Art 93.

1.57 The issue of whether prosecutorial discretion is subject to judicial review arose for consideration in the cases of *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 ("*Ramalingam Ravinthran v AG*"),

Quek Hock Lye v Public Prosecutor [2012] 2 SLR 1012 ("*Quek Hock Lye v PP*") and *Chan Heng Kong v Public Prosecutor* [2012] SGCA 18 ("*Chan Heng Kong v PP*"). In the earlier decision of *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239, the Court of Three Judges had observed (at [144]) that the Public Prosecutor and the court should not interfere with each other's functions "subject only to the constitutional power of the court to prevent the prosecutorial power from being exercised unconstitutionally", in deference to the principle of constitutional supremacy and the separation of powers.

Principles regulating decisions to charge offenders engaged in the same criminal enterprise differently

1.58 The issue addressed in these cases was whether two or more persons involved in the same criminal enterprise had to be charged with the same offence, or whether the Attorney-General had discretion in this respect; if so, what principles were available to regulate this discretion? In *Ramalingam Ravinthran v AG*, what was at issue was the decision to charge two persons involved in the same criminal act of drug-trafficking with different offences of unequal gravity under the Misuse of Drugs Act (Cap 185, 2001 Rev Ed), turning on the quantities of the controlled drug trafficked. Sundar was charged with a lesser quantity than Ramalingam, who was charged with a quantity which, if he was found guilty of trafficking, would attract the mandatory death penalty ("MDP"). Ramalingam filed a criminal motion alleging, *inter alia*, a misuse of prosecutorial discretion owing to the decision to charge Sundar with a non-capital offence and himself with a capital offence despite both arising from the same criminal enterprise. This, it was contended, violated the equal protection guarantee under Art 12 of the Constitution. He sought the amendment of the capital charge against him to a non-capital charge with punishment commensurate to what Sundar had received.

1.59 Despite procedural difficulties, the court decided to hear the motion as it raised a "novel" question of law in relation to the "potential tension" between the exercise of Arts 35(8) and 12 (at [18]). It reviewed various Singapore and Malaysian cases but found (at [42]) that none of them, despite containing relevant "general principles", had "legal reasoning" which could be directly applied to the facts of the instant case and as such, the substantive issues raised were to be addressed on the basis of "first principles". The case of *Ong Ah Chuan v Public Prosecutor* [1979–1980] SLR(R) 710 ("*Ong Ah Chuan v PP*") was not considered relevant to the question of the constitutionality of the exercise of executive power as it concerned the constitutionality of legislation. The Court of Appeal did note the general principles laid down by the Privy Council in the Malaysian case of *Teh Cheng Poh v Public Prosecutor* [1979] 1 MLJ 50 ("*Teh Cheng Poh v PP*") to the effect

that what the equality clause required in the exercise of prosecutorial discretion was that the Public Prosecutor not consider irrelevant considerations and that he be unbiased with respect to all offenders in criminal cases. It noted (at [24]) the wide array of relevant factors that could be taken into account, including "the available evidence, public interest considerations, the personal circumstances of the offender, the offender's degree of culpability, *etc*. Where these factors apply differently to different offenders, this would justify differential treatment between them". It accepted (at [25]) that bare allegations of misuse of prosecutorial powers did not suffice but it was open to the challenger to produce evidence that the Public Prosecutor had been biased or had considered irrelevant considerations to show an infringement of the equality clause. It accepted (at [26]) that within the local context, *Teh Cheng Poh v PP* stood for the principle that the Attorney-General "may not exercise his prosecutorial power under Art 35(8) of the Constitution in breach of Art 12(1)", or for any other Pt IV liberty, and that the offender alleging such breach bore the burden to produce evidence to support this allegation.

1.60 However, the Court of Appeal was critical (at [36] and [41]) of the uncritical application of *Teh Cheng Poh v PP* to the Singapore decisions of *Sim Min Teck v Public Prosecutor* [1987] SLR(R) 65 ("*Sim Min Teck v PP*") and *Thiruselvam s/o Nagaratnam v Public Prosecutor* [2001] 1 SLR(R) 362 ("*Thiruselvam v PP*") as *Teh Cheng Poh v PP* did not concern two offenders involved in the same criminal enterprise, but one offender, and the decision of the Public Prosecutor to decide which of two statutory regimes to charge the offender under for a firearms offence. *Sim Min Teck v PP* and *Thiruselvem v PP* were concerned with the differential treatment of two offenders committing the same criminal act together. *Ceteris paribus*, the Court of Appeal stated (at [24]) that "like cases must be treated alike with respect to all offenders involved in the same criminal conduct". It rejected a reading of these cases as importing a "wide discretion", without more, with respect to Art 35(8), subject to no constitutional constraint. For example, if two offenders were equally culpable with respect to the same offence, it would be "contrary to any notion of justice that … a less culpable offender should be charged with a more serious offence (and subjected to a more serious punishment) than a more culpable offender" particularly where one offence was capital and the other, non-capital (at [37]). To do so would be "*prima facie* either arbitrary or biased and therefore contrary to Art 1(1)" (at [37]). Differentiated charging of two offenders involved in the same criminal enterprise would be justified on the basis of greater culpability (of a drug supplier compared to a drug courier) and causing greater harm to the public welfare. It clarified (at [41]) on this review of the authorities that it was not the law that "no exercise of the prosecutorial discretion could possibly breach Art 12(1) because of the width of that discretion". If so, "the prosecutorial

discretion would override the fundamental liberties conferred by Pt IV of the Constitution. This outcome is not acceptable because an exercise of an executive decision-making power, even one with a constitutional status, cannot be allowed to override a fundamental liberty enshrined in the Constitution".

1.61 Following the principle of *omnia praesumuntur rite esse acta* (all things are presumed to have been done rightly and regularly) as applied to holders of all high constitutional office, as declared in *Yong Vui Kong v AG* (above, para 1.54) at [139], the courts in the instant case should apply a presumption of constitutionality in relation to the prosecutorial power, and proceed on the basis that "the Attorney-General's prosecutorial decisions are constitutional or lawful until they are shown to be otherwise" (at [44]). The Court of Appeal stressed (at [46]) that this presumption of legality or regularity "should not be regarded as the courts deferring to the Prosecution". It appeared fortified by its reference to the US position (at [49]), where prosecutorial power only has a statutory basis where the Federal courts have, on the basis of the separation of powers, endorsed the principle of judicial non-interference with prosecutorial discretion. While a prosecutor's discretion remained subject to constitutional constraints, a criminal defendant was to produce clear evidence that the prosecutor had not, for example, violated equal protection. It noted that the US Supreme Court in *United States v Christopher Lee Armstrong* 517 US 456 at 464–465 (1996) considered significant the issue of institutional competence, noting (at [50]) that certain factors which a prosecutor might take into account were not susceptible to judicial supervision, such as "the prosecution's general deterrence value, the Government's enforcement priorities, and the case's relationship to the Government's overall enforcement plan".

1.62 Nonetheless, following the rule of law, every exercise of prosecutorial discretion, whether in respect of one or two offenders engaged in the same criminal enterprise, is subject to legal limits and judicial review, following the principle in *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [87]. In both cases, unlawful discrimination which would contravene Art 12(1) may be challenged, where like is not treated alike. However, in considering the myriad of relevant factors with respect to two persons involved in the same criminal enterprise, the Court of Appeal acknowledged (at [52]) that different prosecutions could be justified where appropriate, such as different personal circumstances or the willingness of one to testify against the other, and "other policy factors". The prosecutorial decisions of the Attorney-General as the custodian of prosecutorial powers are constrained by the requirements of public interest, which does not require that "every offender must be prosecuted, or that an offender

must be prosecuted for the most serious possible offence available in the statute book" (at [53]).

1.63 The court considered that the manner in which Art 12 operated in the legislative domain differed from how it should be applied in the prosecutorial domain. With respect to the former (following the *Ong Ah Chuan v PP* precedent at [39]), a legislative classification was not concerned with equal moral blameworthiness but "similar legal guilt" (at [62]). The prosecutor has a wider palette of considerations to evaluate, "including whether there is sufficient evidence against a particular offender, whether the offender is willing to co-operate with the law enforcement authorities in providing intelligence, whether one offender is willing to testify against his co-offenders, and so on – up to and including the possibility of showing some degree of compassion in certain cases" (at [63]).

1.64 On the facts of the instant case, the Court of Appeal noted (at [65]) that the Prosecution had in formulating the charges used a "somewhat artificial" method in specifying the drug quantity involved in terms of being "not less than" a certain quantity, as the relevant law correlates quantity to different sentencing scales. Where the Prosecutor reduces the quantity of drugs specified in the charge against one offender, this had the effect of charging that offender differently from his co-offender. The court held (at [65]) that this fell within the limits of prosecutorial discretion "provided that such a decision is made for legitimate reasons", as the common law had permitted this, and Art 35(8) had incorporated that position. As the applicant had failed to provide *prima facie* evidence to the contrary, flowing from the presumption of constitutionality, the inference would be that the Prosecutor's decision was based on relevant considerations and that there was no infringement of Art 12. The court stated its opinion (at [77]), *obiter*, that the Prosecutor was not obliged to give reasons for his decision given "the nature and width of the prosecutorial discretion". Furthermore, it considered that the fact that Sundar was willing and did act as prosecution witness against the applicant before the High Court was a legitimate factor to consider in deciding to prosecute Sundar with a non-capital offence, following *Sim Min Teck v PP* and *Thiruselvam v PP*.

1.65 This limited model of review was affirmed in *Quek Hock Lye v PP*, where the Attorney-General preferred a less serious charge against one of two parties to a criminal conspiracy to traffic drugs. The type of charge the Attorney-General prefers against an offender will necessarily impact the range of sentences a court could impose. Where the Attorney-General charges one offender with an offence attracting the MDP and the other with a lesser offence, the impact of prosecutorial choice is heightened but nonetheless, the Court of Appeal held (at [28] and [31]) that this did not constitute a usurpation of judicial power.

This is because prosecutorial discretion is an executive function and the court is confined not to preferring charges against an accused brought before it, but to exercise its judicial power in relation to the charge(s) the Public Prosecutor prefers (at [28]). Articles 35(8) and 93 were distinct powers and were to be "construed harmoniously with neither being subordinate to the other" (at [29]).

1.66 The Court of Appeal found (at [23]) that the mere fact these members would be subject to divergent consequences owing to charges carrying different sentences did not *per se* found a successful Art 12(1) challenge. This was "but a consequence of the broader constitutionally vested discretion in the Public Prosecutor in preferring charges against accused persons", who would be acting legally provided "legitimate reasons" could be shown for preferring separate charges in relation to co-offenders, by exercising discretion to prefer a charge based on a lower quantum of the same seized drugs (at [24]). The question was thus not whether the Attorney-General had the power to prefer a lesser charge to one of two offenders, but whether he had legitimate reasons in so doing. It added (at [29]) that it was "the very essence of prosecutorial discretion that due weight is given to all relevant circumstances or considerations prior to the formulation of a charge". In this process, the Attorney-General was not confined to preferring charges on the basis of legal guilt alone.

1.67 The court noted that Quek Hock Lye ("Quek"), unlike Winai Phutthaphan ("Winai"), the other offender, was the brains behind the operation, indicating different levels of culpability, and also pointed out that Winai was willing to testify against Quek, which was a legitimate reason for preferring different charges.

1.68 The holding in *Ramalingam Ravinthran v AG* (above, para 1.57) was affirmed in *Chan Heng Kong v PP* at [40], where an allegation that Art 12 was violated as the Public Prosecutor had charged one offender with a capital and the other with a non-capital offence out of the same events was dismissed as the challenger was unable to prove that prosecutorial discretion had been based on irrelevant considerations. Similarly, it was argued in *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872 that the Public Prosecutor had abused his prosecutorial discretion in so far as he had discontinued prosecution against one Chia Choon Leng ("Chia"), who, as a more culpable drug supplier, had allegedly instigated Yong Vui Kong ("Yong"), a "mule", to traffic drugs, while Yong was charged with drug trafficking and received a death sentence. The Prosecution had originally charged Chia as a co-offender in the criminal enterprise with three capital charges, such that this was not a case where no charges or only non-capital charges had been levied against Chia (at [33]).

Discretion to discontinue prosecution

1.69 The Court of Appeal held (at [22]) that on the evidence, the Prosecution did have a valid reason to seek the "discontinuance not amounting to an acquittal" ("DNAQ") which covered all 26 charges against Chia, after reconsidering the evidence against Chia and on the basis that the DNAQ was not an acquittal, such that Chia was not immunised from future possible prosecution. Article 35(8) empowers the Attorney-General to discontinue any prosecution at his discretion, and the *Ramalingam Ravinthran v AG* principle applied both to decisions to prosecute or to discontinue prosecution (at [28]). The Prosecution also has the discretion to decide who to call as witness to support its case (at [30]). As such, it was not possible to infer any discrimination against Yong contrary to Art 12 from the Prosecution's decision to apply for a DNAQ (at [25], [32] and [33]). Applying the presumption of legality following *Ramalingam Ravinthran v AG*, as an application of the separation of powers (at [17]), the Court of Appeal found (at [27]) that in the absence of arbitrary or discriminatory conduct by the Attorney-General in the present case, the court would presume the legality of the Attorney-General's decision to seek the DNAQ because it did not believe it had sufficient evidence to prove Chia was guilty of the 26 charges. This included presuming the Attorney-General had considered all relevant factors in coming to his decision (at [28]). Furthermore, the Attorney-General was not obliged to give reasons for his prosecutorial discretion in prosecuting an offender for any offence (at [17]). In a case where several offenders were involved in the same criminal enterprise, the Prosecution could consider various factors in deciding which offenders' cases were alike and should be treated alike. What Art 12 required was that any differential treatment of such offenders "must be justifiable by reference to relevant differences between the offenders" (at [17]).

1.70 The court held (at [27] and [28]) that the mere discontinuance of 26 charges against Chia was not in itself discriminatory or an arbitrary abuse of prosecutorial discretion, especially since the DNAQ did not amount to an acquittal. Further, there was no evidence beyond bare assertion that the Attorney-General had taken into account irrelevant considerations or that the prosecutors bore *animus* or bias against Yong (at [39]). As Chia had been detained under the Criminal Law (Temporary Provisions) Act (Cap 67, 2000 Rev Ed), this affirmed the view that the prosecution did not believe it had sufficient evidence to convict Chia, while having reason to believe Chia was involved in drug-trafficking activities in Singapore. In other words, it refuted the assertion that the Attorney-General decided to be lenient with Chia (at [38]). The court noted that counsel had not provided "a single coherent reason as to why the AG would have wanted to discriminate against Yong if he had a bigger fish to fry" (at [50]).

1.71 The court noted (at [39]) that the Attorney-General "has the responsibility to protect the integrity of the prosecutorial process, which is vital to public confidence in our criminal justice system and the rule of law" and to exercise this impartially. This would extend to only prosecuting a person where there is sufficient evidence. Nonetheless, even if the Attorney-General had made an error in discontinuing the 26 charges against Chia, this would not constitute bias or apparent bias. It was open to the Attorney-General to reopen the case against Chia and prosecute him in relation to any or all of the 26 discontinued charges, in the event of such mistake (at [39]).

1.72 Even if the Attorney-General's decision to prosecute Yong for a capital offence was in breach of Art 12(1) of the Constitution, the court had no power to set aside his conviction for that offence simply on the basis of such a breach. There was "absolutely no legal basis" for the court to reopen its decision regarding Yong's conviction of the capital offence he was charged with (at [48]), nor had any fresh evidence been produced to show a miscarriage of justice (at [51]). Even if Art 12 had been breached, the court would only be able to make a declaratory order to this effect, leaving it up to the Attorney-General "to decide what kind of action he should take to remedy the unequal position between Yong and Chia in order to comply with Art 12(1)" (at [51]).

1.73 If the public prosecutor is able by law to select what punishment should apply to individual members within the same class of offenders, this would constitute an executive intrusion into judicial power. A constitutional question along these lines was argued before the Court of Appeal in *Dinesh Pillai a/l K Raja Retnam v Public Prosecutor* [2012] 4 SLR 772. Here, the applicant was convicted for a drug offence under s 7 which was punishable with death under s 33 read with the Second Schedule of the Misuse of Drugs Act (Cap 185, 2008 Rev Ed) ("MDA"). The question was whether s 33 read with s 53 of the MDA was unconstitutional as it arguably allowed the Prosecution to select the exact punishment to be inflicted upon an individual member of a class of offenders with the same legal guilt.

1.74 Section 53 of the MDA confers jurisdiction upon the Subordinate Courts to try drug trafficking offences. It provides that District Courts shall have "power to impose the full penalty or punishment in respect of any offence provided by this Act except the punishment of death". The argument was that s 53 had the effect of allowing the Public Prosecutor to determine what punishment the court would impose on the offender because if he brought a capital charge before the Subordinate Courts, this would mean that the offender would not suffer the death sentence if found guilty. Conversely, if the choice was to try the offender before the High Court, this would mean that if found guilty, the Public Prosecutor would be effectively determining that he be sentenced to death (at [14]).

This would, it was argued, be an executive intrusion into judicial power so as to infringe the separation of powers principle. The Privy Council decision of *Mohammed Muktar Ali v The Queen* [1992] 2 AC 93 ("*Mohammed Muktar Ali*") was cited in support, this being a case where the executive branch had been able to select the sentence of each individual offender, thereby usurping an exclusive judicial function and infringing the separation of powers principle (at [14]).

1.75 Affirming that the Public Prosecutor is "the sole decider as to the merits of a prosecution" (at [24]), the Court of Appeal dismissed the application and found that *Mohammed Muktar Ali* did not apply. This is because the purpose of s 53 was not to give the Public Prosecutor the option of reducing a capital drug offence to a non-capital charge by bringing it before the District Court rather than the High Court; rather, s 53 vested in Subordinate Courts sentencing powers beyond their normal sentencing powers under the Criminal Procedure Code 2010 (Act 15 of 2010) with respect to non-capital drug offences (at [23]). This was therefore not a case where the Public Prosecutor as part of the executive branch could select the punishment to be inflicted upon the offender by choosing the venue of trial.

Character and scope of sentencing power and the separation of powers

1.76 The question of whether "sentencing power" fell within the scope of judicial power arose in *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 ("*Mohammad Faizal v PP*"). Article 93 of the Constitution confers judicial power in "a Supreme Court and in such subordinate courts as may be provided by any written law". The petitioner, who had two previous Drug Rehabilitation Centre ("DRC") admissions, was charged under s 33A(1)(*a*) of the MDA which provides for a mandatory minimum sentence ("MMS") to be applied to repeat offenders, and pleaded guilty. Leave was obtained to state a question of law for determination by the High Court: whether ss 33A(1)(*a*), 33A(1)(*d*) and/or 33A(1)(*e*) of the MDA violated the separation of powers in requiring the imposition of a MMS. In so doing, it was alleged that this would effectively constitute a legislative usurpation of the judicial function of discretionary sentencing, in the form of a legislative direction (at [7]).

1.77 A "fundamental issue of constitutional law" was raised as to whether s 33A of the MDA constituted a legislative intrusion into judicial power so as to violate the principle of the separation of powers. Chan Sek Keong CJ noted (at [11]) that the Constitution was "based on the Westminster model of constitutional government" where sovereignty was divided between the three organs of state, citing Privy Council decisions like *Hinds* (at [12]). Singapore had two distinguishing features compared to the UK Westminster model. First, in relation to espousing

constitutional rather than parliamentary supremacy, Singapore courts had enhanced judicial power which extended to declaring inconsistency with the Constitution as void (at [14]). He affirmed (at [11]) that the "principle of separation of powers, whether conceived as a sharing or a division of sovereign power between these three organs of state, is therefore part of the basic structure of the Singapore Constitution". It was unclear whether the learned CJ was adopting the idea of "basic features" as propounded by the Indian Supreme Court decision of *Kesavananda v State of Kerala* AIR 1973 SC 1461, a judicial innovation which elevated certain essential features of the Indian Constitution beyond the reach of a special legislative power to amend the Constitution. This had been rejected by the High Court in *Teo Soh Lung v Minister for Home Affairs* [1989] 1 SLR(R) 461 at [47] as not applying in the Singapore context. Nonetheless, it appears that Chan CJ appreciated that the Constitution read in its entirety had a specific character; embedded within it were specific principles which restrained the exercise of legislative and executive powers, such that these branches could not enact a law or perform an act "which is inconsistent with the principle of separation of powers to the extent to which that principle is embodied in the Singapore Constitution" (at [15]).

1.78 Second, the source of judicial power in Singapore was rooted in Art 93 of the Constitution rather than the common law or statute, as was the case with UK courts. The Constitution provided for two sources of power, which vested judicial power exclusively in the Supreme Court and any written law, in relation to Subordinate Courts. The provisions in Pt VIII relating to tenure, mode of appointment, *etc*, were provisions designed to secure the exclusivity of judicial power and judicial independence (at [17]).

1.79 From this, it was clear that the Supreme Court wielded a constitutional power co-equal with the legislative and executive powers, following the terms of the Constitution itself (at [16]). The wording of Art 93 was such that it was clear that judicial power was exclusively vested in the Supreme Court and Subordinate Courts, rather than any non-court entity. A court was not a malleable concept but was "at common law, an entity with certain characteristics" (at [17]).

1.80 As judicial power was exclusive to the courts, the question was then whether sentencing power constituted judicial power, such that the imposition of a MMS would be a legislative usurpation of judicial power. The learned CJ first embarked upon an examination of the meaning of "judicial power", which is not constitutionally defined, noting that the "total separation" in the exercise of judicial power in relation to legislative and executive powers is based on the "rule of law" (at [19]). After discussing various cases from Australia, UK, US and other Commonwealth jurisdictions, Chan CJ concluded (at [27]) that

there was "a reasonably clear judicial consensus" on the nature of the judicial function as derived from case law, as involving the courts in "making a finding on the facts as they stand, applying the relevant law to those facts and determining the rights and obligations of the parties concerned for the purposes of governing their relationship for the future".

1.81 Chan CJ considered the more specific question of whether imposing punishment on offenders fell within the ambit of judicial power. A value judgment was involved in classifying whether the exercise of a power was in nature a legislative, executive or judicial power, while affirming that common law courts have accepted that "the punishment of offenders is part of the judicial power" (at [29]). He examined the treatment of judicial power in various Malaysian and Australian cases (at [29]–[35]) and noted that legal scholarship indicated little historical and doctrinal support for the proposition that sentencing power was an exclusive judicial power (at [36]) or "inherently judicial task" (at [62]). In fact, it appears that historically, the judicial role was merely to announce the punishment provided for in the law; thus, the delegation by the Legislature to the courts of a wide judicial discretion for sentencing, at least in the English context, was a relatively recent modern legislative development (at [38]–[40]). In addition, all capital sentences were mandated at common law. What was imported into the British colonies was the practice of the UK in the 19th century in relation to criminal legislation. This was characterised by "minutely-detailed offences tailored to address a myriad of fact situations importing different degrees of culpability, coupled with legislatively prescribed fixed or maximum and minimum sentences for each offence" (at [38]).

1.82 As such, the sentencing power "was neither inherent nor integral to the judicial function", as it fell to the Legislature to determine the "measure and range of punishments" for specific offences (at [40]). This was also reflected in the practice in the United States: *Ex parte United States* 242 US 27 (1916); *Mistretta v United States* 488 US 361 (1989) (at [40]–[41]). Chan CJ concluded (at [43]) that Parliament had the power to prescribe penalties for various offences which involved policy considerations beyond judicial competence. It fell within the purview of Parliament to both define criminal offences and prescribe penalties for such offences to be inflicted on persons found guilty of that offence by an independent court of law: *Hinds* at 225–227. Furthermore, within the context of the Singapore constitutional order, this was implicit in Art 9(1) which provides that deprivation of life or personal property should be "in accordance with law" (at [44]). Thus, "no written law of general application prescribing any kind of punishment for an offence, whether such punishment be mandatory or discretionary and whether it be fixed or within a prescribed range, can trespass onto the

judicial power" (at [45]). In short, the judicial role in imposing punishment is "always subject to the power of the Legislature to prescribe the applicable punishments". As sentencing power is derived from legislation, there is no intrusion into judicial power where Parliament prescribes a set of factors for the courts to consider in sentencing offenders (at [49]). As the sentencing function was delegated by the legislative to judicial branch, no separation of powers issue was involved. That courts had held the sentencing power for a long time "reflects more the functional efficiency of this constitutional arrangement" (at [64]). While controversial, Chan CJ observed that non-judges like medical practitioners, social workers, penologists or psychologists could conceivably perform the function of imposing criminal penalties, which involved an exercise of discretion in order to be fair and just in particular cases (at [63]).

1.83 While it is a legislative power to prescribe punishment for offences, it is a judicial act to impose the penalty upon conviction for an offence as legislatively prescribed, even if this entails the imposition of a MMS. As such, the prescription of a MMS did not constitute a legislative invasion into the judicial power or function, nor did any other sort of mandatory penalty: discussing *Palling v Corfield* (1970) 123 CLR 52 at 58–59 (at [34]). This was also consonant with the Court of Appeal decision in *Chew Seow Leng v Public Prosecutor* [2005] SGCA 11 at [40], where Lai Kew Chai J affirmed that any alterations to the mandatory death penalty under the MDA (2001 Rev Ed) should be handled by Parliament, which could address changing social attitudes towards drug offences. Chan CJ considered (at [51]) three types of cases extant from Commonwealth case law where the courts held that legislation gave the Executive powers which trespassed into the sentencing function of the courts. None of these were found applicable to the present case. This involved: (a) cases where the Executive could select punishment for an accused person post-conviction; (b) laws empowering the Executive to take action having an actual impact on the sentence a court would impose through administrative decisions affecting the charges brought against an accused person; and (c) legislation which enabled the Executive to make administrative decisions which did not affect the charges to be brought against the accused but which impacted the sentence a court of law imposed, but whose decision limited or removed judicial sentencing discretion (at [51]).

1.84 On the facts of the case, s 33A of the MDA which identified factors triggering an enhanced minimum punishment was not unconstitutional, not differing from s 33 of the MDA which prescribes the mandatory death penalty for specified drug offences.

1.85 *Mohammad Faizal v PP* (above, para 1.76) was upheld in *Amazi bin Hawasi v Public Prosecutor* [2012] 4 SLR 981 which involved

s 33A(5)(*a*) of the MDA. The MDA (1997 Rev Ed) ("1997 MDA") was amended in 1998 to provide long-term imprisonment and caning for hardcore drug addicts. Under s 33A(1) of the 1997 MDA, a minimum enhanced punishment of five years' imprisonment and three strokes of the cane was to be imposed when the offender had at least two previous convictions for the consumption of a specified drug under s 33A(1)(*b*) of the MDA (at [4]). The issue was the constitutionality of a deeming provision under s 33A(5)(*a*) of the MDA whereby previous convictions for the consumption of a controlled drug were treated as convictions for the consumption of a specified drug, which triggered the imposition of a mandatory minimum sentence under s 33A(1) of the MDA. The petitioner argued that this violated the principle of separation of powers embodied in the Constitution, as the MDA deeming provision constituted a "specific direction" (at [10]) to the court to treat convictions for controlled drugs as convictions for specified drugs, so interfering with prior court decisions and intruding upon the judicial power. Chan Sek Keong CJ rejected this argument as the MDA deeming provisions merely required that previous convictions and DRC admissions for drug consumption be treated as aggravating factors to attract the enhanced punishment regime in s 33A of the MDA. Following the companion grounds of decision in *Mohammad Faizal v PP*, Chan CJ affirmed (at [17]) that the Constitution does not prohibit Parliament from legislating certain conditions which, if triggered, would lead to the application of minimum enhanced punishments. The deeming provisions do not alter the character or earlier executive or judicial orders or the legal rights consequent upon such orders, and only apply to prospective convictions. As such, s 33A(5)(*a*) does not contravene the separation of powers principle.

Article 9 – Substantive principles in relation to "law"

1.86 One of the questions raised in *Mohammad Faizal v PP* was whether the prescribed MMS under ss 33A(1)(i) and 33A(1)(ii) violated Art 9 of the Constitution. This provides that no one is to be deprived of personal liberty "save in accordance with law"; arguably, as the petitioner was effectively a first-time offender (having had two DRC admissions), the MMS was disproportionate and arbitrary (at [7]). The petitioner invoked the principle of proportionality as applied in the South African Constitutional Court decision of *S v Dodo* 2001 (5) BCLR 423 (CC) ("*S v Dodo*"). The legislature was not to require the courts to impose sentences which were inconsistent with the constitutional bill of rights, and further, the court said (*S v Dodo* 2001 at [26]) that "it can be stated as a matter of principle, that the legislature ought not to oblige the judiciary to impose a punishment which is wholly lacking in proportionality to the crime. … This would be inimical to the rule of law and the constitutional State".

1.87 The High Court had previously rejected the European principle of proportionality as a method of judicial review in *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [87], stating that "the notion of proportionality has never been part of the common law in relation to the judicial review of the exercise of a legislative and/or an administrative power or discretion. Nor has it ever been part of Singapore law". Chan CJ affirmed (at [60]) that the principle of proportionality as a principle of law did not apply to the legislative power to prescribe punishments, as this would render all mandatory punishments, minimum or maximum, unconstitutional "as they can never be proportionate to the culpability of the offender in each and every case". The issue of whether the Legislature should not require courts to apply sentences wholly lacking in proportionality to the crime was "a matter of legislative policy and not of judicial power" (at [60]), though the principle of proportionality should apply as a general sentencing policy, subject to other overriding policy considerations, such as the deterrent objective. As such, the MMS under s 33A of the MDA was not found to be inconsistent with Art 9 of the Constitution (at [61]).

Whether an enhanced penalties regime for repeat offenders contravened Article 11(1)

1.88 Article 11(1) of the Constitution provides protection against retrospective criminal laws and repeated trials. It states that "*no person shall suffer greater punishment for an offence than was prescribed by law at the time it was committed*" [emphasis added].

1.89 One of the arguments raised in *Ho Sheng Yu Garreth v Public Prosecutor* [2012] 2 SLR 375 was that the appellant had been wrongfully treated as a repeat offender so as to contravene Art 11(1). The appellant's convictions under s 8(1)(*b*) of the Moneylenders Act (Cap 188, 1985 Rev Ed) ("1985 Act") were treated as prior convictions for the purposes of the Moneylenders Act (Cap 188, 2010 Rev Ed) ("2010 Act"). The 1985 Act was repealed in 2008 and re-enacted, eventually becoming the 2010 Act. The appellant was convicted for various offences in 2008 under the 1985 Act but these offences did not constitute offences under the 2010 Act. It was argued that the word "offence" under s 14(1)(*b*)(ii) of the 2010 Act referred to an offence under s 14(1) of the 2010 Act and not s 8(1)(*b*) of the repealed 1985 Act. As a consequence of treating the appellant as a repeat offender on the basis of his 2008 convictions under the now repealed 1985 Act, the appellant received a more severe punishment.

1.90 V K Rajah JA held that Art 11(1) of the Constitution was not engaged on the facts of the case. He noted (at [109]) that the rationale

behind Art 11(1) was to ensure that no one may be punished more severely for an offence than was legally provided for when the offence was committed. Criminal laws, to have deterrent effect and to be able to guide human behaviour, had to be known before the act was committed as imposing "more severe penalties would also achieve nothing in the way of general deterrence by then".

1.91 Rajah JA opined (at [110]) that Art 11(1) could "arguably be engaged" if one conceptualised enhanced penalties for subsequent offences as constituting punishment for the first offence. He rejected this conception (at [110]). His reasoning was that the fact that a second or subsequent offence was a repeat offence made it an offence of an aggravated nature, attracting more severe punishment (at [111]). Enhanced penalties for repeat offenders were to punish the offender for committing the offence again, rather than to punish him for the first offence. The enhanced penalty regime for repeat offenders under the 2010 Act was in force at the time when the appellant committed a second offence, such that Art 11(1) was not engaged as the appellant would have known of this new regime and could have avoided the penalties by not committing the present offences (at [112]).

Locus standi: Standing in constitutional law cases

1.92 Judicial review is a discretionary remedy. In applications for prerogative orders under O 53 of the RoC, the leave of the court is required. To obtain leave, the court must be satisfied that the subject matter of the complaint is susceptible to judicial review, that the material before the court discloses a *prima facie* case of reasonable suspicion in favour of granting a remedy to the applicant and lastly, that the applicant has sufficient interest in the matter.

1.93 Tan Lee Meng J in *Jeyaretnam v AG* (see above, para 1.43) discussed, *obiter*, the requirements of *locus standi* in cases where a constitutional issue is concerned. He noted (at [39]) that in Singapore, the threshold for *locus standi* was the same whether a case was brought under O 15 r 16 or O 53 r 1 of the RoC, following the Court of Appeal decision in *Eng Foong Ho v Attorney-General* [2009] 2 SLR(R) 542 ("*Eng Foong Ho v AG*") and *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 ("*Tan Eng Hong v AG*") (at [99]). The test, as laid down by the Court of Appeal for O 15 r 16 actions for a declaration in *Karaha Bodas* (above, para 1.21) at [15] and [19], which did not involve a constitutional right, was threefold:

(a) the applicant must have a "real interest" in bringing the action;

(b) there must be a "real controversy" between the parties to the action for the court to resolve; and

(c) the remedy sought must relate to a right which is personal to the applicant and enforceable against an adverse party to the litigation.

Public right *versus* private right

1.94 The requirements for whether an applicant has a "sufficient interest" to warrant leave being granted for judicial review depends on whether it is a public right or a private right. The Court of Appeal in *Tan Eng Hong v AG* at [69] distinguished between a public right, which is held and vindicated by public authorities, and a private right, which a private individual vindicates. Despite being a matter of public law, "a constitutional right is a private right as it is held and can be vindicated by individuals on their own behalf" (at [69]). It considered whether the test for standing as laid down in *Karaha Bodas* was different from that applicable to cases involving constitutional rights, or whether a lower threshold applied for constitutional challenges (at [74]).

1.95 An example of a private right were cases where fundamental liberties were affected, such as Art 12 in relation to *Eng Foong Ho v AG* and Art 15, in relation to *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR(R) 294 ("*Colin Chan*"). The High Court decision of *Vellama d/o Marie Muthu v AG* [2012] 2 SLR 1033 was concerned with a public right, that is, the observance of Art 49(1) of the Constitution which relates to by-elections. The issue of *locus standi* itself was not discussed in *Vellama d/o Marie Muthu v AG* [2012] 2 SLR 1033 as it was not in dispute. In *Jeyaretnam v AG* itself, what was at stake was a public rather than a private right, in relation to the interpretation of Art 144 of the Constitution (at [47]). As the applicant was unable to show he had suffered special damage because of the challenged public act, he would be found not to have any standing (at [48]).

1.96 Tan Lee Meng J in *Jeyaretnam v AG* took note of the more liberal English standing rules and the Malaysian test as established in *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 ("*Lim Kit Siang*"). A Member of Parliament sought a declaration that a letter of intent issued by the Malaysian government given to a company in relation to the construction of the North-South Highway was invalid, among others. The majority held that Lim lacked *locus standi* because he had not shown that a private right of his had been infringed or that he had suffered special damage because of the public act which was being challenged.

1.97 Tun Salleh Abas LP approved the decision of Buckley J in the English case of *Boyce v Paddington Borough Council* [1903] 1 Ch 109 at 114. This identified two instances where a plaintiff could sue in a public law case without joining the Attorney-General: first, where an interference with a public right also affects his private right and second, where no private right is involved, the plaintiff in respect of his public right has suffered special damage peculiar to himself from interference with the public right (at [44]). Tan J noted (at [45]) that the Court of Appeal in *Tan Eng Hong v AG* (at [69]) had referred to *Lim Kit Siang* "without any disapproval", stating that where a public right was involved, the applicant had to show he suffered a special damage because of the challenged public act and that he had a genuine private interest to protect or further. Tan J opined (at [45]) that this approach suggested that "the *locus standi* threshold in Singapore is unlikely to be lowered to dispense with the requirement that an applicant who seeks to enforce a public right must have been personally affected by the decision being challenged". In other words, Singapore is unlikely to develop standing rules along the lines of an *actio popularis* (where a member of the public brings an action in the interests of public order, not on the basis of suffering any particular or special damage).

1.98 One of the issues vexing standing rules in Singapore is whether the mere fact of citizenship in itself satisfied the standing requirements for constitutional challenges. This flowed from what the Court of Appeal in *Tan Eng Hong v AG*, as noted by Tan J (at [47]), considered an over-extensive reading of the decision on standing in *Colin Chan* (above, para 1.95). This was to the effect that "applicants in constitutional cases need not demonstrate a violation of or an injury to their personal rights in order to be granted standing", a reading which the Court of Appeal rejected: *Tan Eng Hong v AG* at [78].

1.99 The Court of Appeal found that *Colin Chan* stood for the proposition that "any citizen can complain to the court if there is a violation of … his constitutional rights": *Colin Chan* at [13]. Constitutional rights are personal to each citizen by dint of citizenship and not membership in some society (*Tan Eng Hong v AG* at [81]), such that "every violation of constitutional rights is a violation of personal rights" [emphasis in original omitted]: *Tan Eng Hong v AG* at [80]. Thus, the Court of Appeal in *Tan Eng Hong v AG* found that the cases of *Colin Chan* and *Eng Foong Ho v AG* "do speak with one voice": *Tan Eng Hong v AG* at [81]. *Colin Chan* was concerned with the banning of publications by the Jehovah Witnesses' printing arm. It was not to be taken "as laying down the proposition that membership of the group targeted by the allegedly unconstitutional law or ministerial order is irrelevant": *Tan Eng Hong v AG* at [81]. Rather, it demonstrated that membership was not necessary to show the existence of a personal right (which arises from citizenship), although group membership was relevant to

ascertaining whether that right was violated: *Tan Eng Hong v AG* at [81]. This was also the case in *Eng Foong Ho v AG*, where the applicants had Art 12 rights by dint of citizenship, while their membership in the Buddhist association was the vehicle through which to demonstrate the arguable violation of that right as affected by the compulsory acquisition of temple property. A Buddhist non-member of the said association would not have had sufficient standing to mount a challenge: *Tan Eng Hong v AG* at [81].

1.100 The Court of Appeal in *Tan Eng Hong v AG* thus clarified that in an application for leave under O 53 of the RoC in relation to a private right, it was necessary for the applicant to have a personal interest and to demonstrate a violation of his own constitutional rights, to gain standing (at [82]). It stated (at [93]) as follows:

> Every citizen has constitutional rights, but not every citizen's constitutional rights will be affected by an unconstitutional law in the same way. For example, if there is a law which provides that it is an offence for any person of a particular race to take public buses, this law would clearly violate Art 12. It is uncontroversial that such a law would affect the Art 12 rights of a person belonging to that race in a way that would not apply to the Art 12 rights of a person of another race. This does not detract from the fact that constitutional rights, including Art 12 rights, are personal to all citizens. However, the mere holding of a constitutional right is insufficient to found standing to challenge an unconstitutional law; there must also be a violation of the constitutional right. In this fictitious scenario, the only persons who will have standing to bring a constitutional challenge against the unconstitutional law for inconsistency with Art 12 will be citizens who belong to the race that has been singled out as only their Art 12 rights will have been violated. Persons of other races will not have suffered violations of their Art 12 rights and will thus have no standing to bring a constitutional challenge in this scenario.

1.101 This would seem to pin standing rules on the understanding that one must be directly or personally affected to bring a constitutional challenge, as opposed to a rule which would construe "public interest" more broadly to include a citizen's concern to live in a polity where the constitutional order is respected.

1.102 Nonetheless, the court clarified that the test for *locus standi* for constitutional challenges was that laid down in *Karaha Bodas*, not a more lax reading drawn wrongly from *Colin Chan*.

"Real interest"

1.103 As constitutional rights are important, a citizen will have a *prima facie* sufficient interest to ensure that these are not violated, pursuant to *Colin Chan*, as stated by the Court of Appeal in *Tan Eng*

Hong v AG (at [83]). The very fact that constitutional liberties are at stake does not in and of itself establish sufficient interest which still needs to be shown, but this is "*prima facie* made out once there is a violation of a constitutional right" (at [83]). Thus, in constitutional cases, "the crux of the standing requirement" is the need to show "a violation of a constitutional right" (at [84]).

1.104 The Court of Appeal adopted a broad reading of constitutional right violation to go beyond the case of a subsisting prosecution under an allegedly unconstitutional law, to encompass two further scenarios.

What constitutes a constitutional right violation?

1.105 The Court of Appeal in *Tan Eng Hong v AG* held (at [89]) that a prosecution under an allegedly unconstitutional law was not a necessary requirement for standing in an action to declare a law unconstitutional, extending the principle in *Colin Chan* that a prosecution under an allegedly unconstitutional ministerial order is not a necessary requirement for standing in an action to declare that ministerial order unconstitutional.

1.106 It found (at [91]) that constitutional rights could be violated not only when a person was prosecuted under an allegedly unconstitutional law, but also when such person was arrested, detained or charged under that allegedly unconstitutional law.

1.107 The Court of Appeal considered counsel's two submissions about how a constitutional right could be violated without a prosecution under an allegedly unconstitutional law: first, the suggestion that a constitutional right may be violated by the very existence of an allegedly unconstitutional law in the statute books and second, by a threat of future prosecution under an allegedly unconstitutional law (at [92]).

1.108 On the first point, the Court of Appeal noted (at [93]) that while every citizen had constitutional rights "not every citizen's constitutional rights will be affected by an unconstitutional law in the same way". It gave this example:

> For example, if there is a law which provides that it is an offence for any person of a particular race to take public buses, this law would clearly violate Art 12. It is uncontroversial that such a law would affect the Art 12 rights of a person belonging to that race in a way that would not apply to the Art 12 rights of a person of another race. This does *not* detract from the fact that constitutional rights, including Art 12 rights, are personal to *all* citizens. However, the mere holding of a constitutional right is insufficient to found standing to challenge an unconstitutional law; there must also be a *violation* of the constitutional right. In this fictitious scenario, the only persons who

> will have standing to bring a constitutional challenge against the unconstitutional law for inconsistency with Art 12 will be citizens who belong to the race that has been singled out as only their Art 12 rights will have been violated. Persons of other races will not have suffered violations of their Art 12 rights and will thus have no standing to bring a constitutional challenge in this scenario. [emphasis in original]

1.109 In other words, members of all ethnic groups had an Art 12 right, but only members of ethnic group X, assuming this was targeted by the law which made it an offence for X members to take public buses, would have their personal rights affected and so have standing to challenge the law. This flows from the conceptualisation of Art 12 as a personal right, as opposed to one that safeguards multi-racialism, an integral part of the public good in which all citizens have a right. So conceptualised, there could be a public right in upholding multi-racialism as safeguarded by a particular reading of Art 12, in tandem with other provisions which expressly prohibit discrimination on grounds of race (Art 12(2)) or enjoining the Government to care for racial and religious minorities, as constitutionally recognised categories.

1.110 The Court of Appeal noted (at [94]) of the fictitious scenario that it would be easier for an applicant who wishes to challenge an allegedly unconstitutional law "where the law specifically targets a group and the applicant is a member of that group".

1.111 However, the Court of Appeal did not consider that a relevant factor in identifying a "targeted group" may be whether that group is recognised by law or whether there is an express constitutional or statutory norm prohibiting discrimination on the basis of the trait by which that group is identified. One of Tan's arguments was that s 377A specifically targeted "practising male homosexuals" (at [90]). This assumes that "homosexuals" are a recognisable social group which warrants legal protection or is protected by a norm prohibiting discrimination on the basis of sexual orientation, which finds no legal expression in Singapore law. Furthermore, s 377A may be read as not targeting male homosexuals where homosexuality is a form of personal identity, but at targeting a certain type of sexual conduct which may be performed by males who identify as heterosexual or bisexual. The implicit assumption in Tan's claim is that "practising male homosexuals" are a legally recognised group with certain rights, and that the law targets this group, as opposed to a certain type of conduct whose perpetrators may transcend this legally putative group.

1.112 The Court of Appeal opined (at [94]) that whether the mere existence of an allegedly unconstitutional law sufficed to show violations of constitutional rights depended on "what exactly the law provides". While the proposition was "conceivable", the Court of Appeal hastened to add (at [94]) that this would be "an extraordinary case", without

precedent. It considered decisions from Australia, Hong Kong and Europe, and from this gleaned various factors these courts have taken into consideration in deciding upon questions of standing: for example, concern that an applicant would have to break the law and be prosecuted in order to have standing, or whether there were sufficient alternative remedies, and whether these had been exhausted (at [97]–[99]). The Court of Appeal also disagreed with the High Court's view (at [103]) that the Art 100 tribunal procedure was an adequate alternative remedy. It had been treated as a factor considered to not warrant the need to relax standing requirements in Singapore. Instead, the Court of Appeal found there was no adequate alternative remedy in the present case such that standing requirements should be relaxed (at [104]–[105]).

1.113 The Court of Appeal stated it would be a "rare case" where a person's constitutional rights would be violated "without more" by the "very presence of an allegedly unconstitutional law" in the statute books (at [106]). However, in such rare cases, this would not entail answering abstract legal questions as a person's rights would in this case be violated. It also found "over-stated" the Attorney-General's argument that a finding of rights violations by dint of an allegedly unconstitutional law in the statute books would found standing, enabling the challenge of potentially every piece of legislation before the courts. This would give rise to the need for "a judicial *imprimatur* of validity before it is enforced". The court said that Singapore "has adopted the model of parliamentary sovereignty and has inherited the common law tradition of positivism" such that laws declared by Parliament are valid by virtue of their enactment; thus, there was "no necessity for a judicial pronouncement on the validity of legislation … before legislation is accepted as being valid" (at [107]). It also considered the "floodgates" argument "an undue overstatement" (at [108]). The court said (at [109]) it was aware that granting applicants greater access to justice in a constitutional challenge by lowering standing requirements must not be at the expense of restricting access to justice for others, perhaps through a "deluge" of constitutional challenges which will delay justice for others. Considering the need for "a balance", the court refused to lay down a general rule that the mere existence of an allegedly unconstitutional law in the statute books sufficed to demonstrate a violation of an applicant's constitutional rights (at [109]). It preferred a "case by case approach" (at [109]), with an eye to ensuring that lax standing rules did not unduly curtail executive efficiency in practising good governance. It rejected the argument "conclusively" that "a subsisting prosecution under an allegedly unconstitutional law must be demonstrated in every case before a violation of constitutional rights can be shown" (at [110]). It said that "the effects of a law can be felt without a prosecution", such that a violation of a right could be shown "in the absence of subsisting prosecution" (at [110]).

1.114 The second issue was whether there was a need for a real and credible threat of prosecution under an allegedly unconstitutional law. The Court of Appeal noted (at [112]) that the High Court judge accepted that the spectre of "future prosecution" sufficed to find an arguable violation of Tan's constitutional rights, as accepted in Australian and Hong Kong decisions. The Court of Appeal accepted (at [112]) that a violation of constitutional rights would be shown by "a threat of future prosecution under an allegedly unconstitutional law, where the threat is real and credible and not merely fanciful".

1.115 It went further to state (at [113]) that "there is a right not to be prosecuted under an unconstitutional law". Persons acting in a way contrary to an allegedly unconstitutional law were in "the unenviable position" of waiting to see whether they would be prosecuted, and such "waiting and uncertainty in itself can be said to be a form of suffering". Of course, if the law is constitutional, this waiting and uncertainty could be seen to be a form of effective deterrence.

1.116 The court noted (at [180]) that ministerial statements that s 377A would not be proactively enforced did not mean it would not be enforced, that government policy was susceptible to change (at [182]) and that this policy did not fetter prosecutorial discretion (at [181]). The fact that stern warnings had been issued to adult males participating in private consensual sexual acts "suggests that there is not just a mere spectre of prosecutions under that provision" (at [183]).

1.117 The court wanted to "acknowledge" in its current form that s 377A "affects the lives of a not insignificant portion of our community in a very real and intimate way. Such persons might plausibly assert that the continued existence of s 377A in our statute books causes them to be unapprehended felons in the privacy of their homes" (at [184]). The court was also concerned that an "unwanted effect" of s 377A would be to "make criminals out of victims", such as where a man raped by another man may not report this to the police for fear of being subject to a s 377A charge, as it is silent on consent (at [184]). The court made no comment on the positive or wanted effects of s 377A, such as upholding heterosexuality as the social norm.

1.118 The judicial reasoning appears to almost assume that there is an unenumerated "right to privacy" which protects consensual homosexual sodomy. One could easily argue that were the MDA unconstitutional, it would similarly affect a significant part of the community in a very real and intimate way and that taking or trading drugs in the privacy of their homes would cause drug-takers and pushers to be unapprehended felons, perhaps interfering with an unenumerated right to privacy to take recreational drugs. Thus, the constitutionality of the MDA would also be of real public interest, as the Court of Appeal stated in relation to

s 377A. Criminal laws are meant to affect behaviour, in public or in private, and so the real issue is the constitutionality of a particular criminal law, whether it served a legitimate purpose, whether any classification it drew was reasonable or whether it directly contravened a recognised constitutional right.

"Real controversy"

1.119 The Court of Appeal in *Tan Eng Hong v AG* recounted (at [132]) that the need for a "real controversy" was to avoid the court having to decide abstract, hypothetical or academic questions, rather than real disputes. Without a real dispute, there would be no finality or *res judicata* (at [132]).

1.120 It clarified (at [137]) that the requirement of a "real controversy" was something that lay within the discretion of the court rather than its jurisdiction (at [115]). In other words, it could hear a matter even in the absence of a real controversy (at [136]), as there may be other factors in favour of a case being heard. This might entail the court performing something akin to abstract review or hearing "hypothetical issues in appropriate cases" as a function of its discretion (at [137]). Such a case may involve a question of constitutional law, which is of general importance.

1.121 This view is adopted by English and Hong Kong courts as well (at [139]–[140]), but not the US courts, where the need for a real controversy goes to jurisdiction (at [141]). While the terms of judicial power in the US Constitution refer to "cases" and "controversies" (s 2, Art III), under Art 93 of the Constitution, there is no express reference to controversies in relation to judicial power (at [142]). The Court of Appeal thus rejected the US approach stating that courts "should be slow to read in jurisdictional requirements which limit the sphere of their judicial power as such requirements restrict access to justice" (at [142]). Where a declaration would be "of value to the parties or to the public", the court might grant such relief. It did not see this as an exception to the "real controversy" requirement as where there is "a real legal interest" in hearing a case, there is a real controversy to be determined (at [143]). That is, declarations may be given where the public interest is implicated and declarations which determine a controversy between the parties are *res judicata* (at [17]). The court distinguished a "legal" interest from a "mere socio-political interest", which arises where "there is a novel question of law for determination", as in the present case (at [143]). It said (at [143]) a court would be "well placed to determine legal questions but not socio-political questions" as its role as guardian of the Constitution was to ensure "the Constitution is upheld inviolate".

When should a court exercise its discretion and hear a case without a real controversy, ie, *no* lis *between the parties* inter se*?*

1.122 In identifying the factors which would move the court to exercise its discretion to hear a case in the absence of a *lis inter partes*, the key factor was that it would be in the public interest for the court to hear an academic or hypothetical issue (at [145]).

1.123 On the facts of *Tan Eng Hong v AG*, a "real controversy" was present as a *lis* was constituted in two ways: Tan's arrest and charge under s 377A and the real, credible threat of prosecution under s 377A. The facts warrant some attention.

1.124 The case involved the arrest of one Tan Eng Hong for engaging in oral sex with another male person; he was originally charged under s 377A of the Penal Code (Cap 224, 2008 Rev Ed) with the commission of an act of gross indecency with another male person. His charge was later substituted for one under s 294(*a*) of the Penal Code for the commission of an obscene act in a public place, to which he pleaded guilty. The issue of prosecutorial discretion did not arise in this case (at [167] and [171]).

1.125 In examining the legislative history of s 377A, the Court of Appeal considered legislative developments in England and India (at [23]–[26]). Section 377A of the Penal Code (Cap 20, 1936 Rev Ed) was "a calculated move to criminalise private sexual conduct between males" (at [28]). In 2007, s 377 was repealed so as to decriminalise any sexual act, including oral and anal sex, between a consenting heterosexual couple (16 years of age and above) when done in private (at [31]). Section 377 (Unnatural offences) read:

> **377.** Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animals, shall be punished with imprisonment for life, or with imprisonment for a term which may extend to 10 years, and shall also be liable to a fine.

1.126 The court noted (at [31]) that in introducing the Penal Code Amendment, the then Senior Minister of State for Home Affairs explained that the Penal Code was being updated to reflect social values (see *Singapore Parliamentary Debates, Official Report* (22 October 2007) vol 83 at cols 2198–2200 (Ho Peng Kee, Senior Minister of State for Home Affairs):

> As the [1985] Penal Code reflects social norms and values, deleting section 377 is the right thing to do as Singaporeans by and large do not find oral and anal sex between two consenting male and female [persons] in private offensive or unacceptable. This is clear from the public reaction to the case of [*Annis bin Abdullah v Public Prosecutor* [2003] SGDC 290] in [2003] and confirmed through the feedback

> received in the course of this Penal Code review consultation. [emphasis added by the Court of Appeal omitted]

1.127 In addition, other offences previously covered under the old s 377 were now included in more specific provisions, *eg*, incest (s 376G) and bestiality (s 377B). The court deduced (at [32]) that the repeal of s 377 was because of its perceived over-breadth in criminalising consensual heterosexual oral and anal sex in private, given that s 377 was gender-neutral and an all-embracing provision concerning "unnatural offences". The current s 377A (Outrages on decency) reads:

> **377A.** Any *male person* who, in *public or private*, commits, or abets the commission of, or procures or attempts to procure the commission by any *male person of, any act of gross indecency with another male person*, shall be punished with imprisonment for a term which may extend to 2 years. [emphasis added by the Court of Appeal]

1.128 Tan brought an application under O 15 r 16 of the RoC seeking a declaration to the effect that s 377A of the Penal Code was unconstitutional because it was inconsistent with Arts 9, 12 and 14 of the Constitution and therefore void by virtue of Art 4. In other words, he was impugning the constitutionality of a law rather than an exercise of executive discretion; prosecutions brought under unconstitutional laws would also be unconstitutional (at [171]).

1.129 The High Court upheld the decision of the assistant registrar to strike out this application pursuant to O 18 r 19 of the RoC on the ground that it disclosed no reasonable cause of action, was frivolous or vexatious and/or was an abuse of the process of the court. It did so on the basis that there was no real controversy left as Tan had already been convicted of the s 294(*a*) charge. While there were specific facts involving specific parties, the judge found the facts "merely hypothetical", even while finding that Tan had *locus standi* to bring the application as it was arguable on the facts that Tan's constitutional rights under Art 12 had been violated (at [126]). The judge found that the case raised many novel constitutional questions that warranted detailed treatment. Tan appealed against the judge's decision.

1.130 The appeal did not deal with the substantive issue of whether s 377A was constitutional but only with the question of whether the application was correctly struck out under O 18 r 19 of the RoC (at [3]).

1.131 The Court of Appeal disagreed with the trial judge's decision that there was no real controversy to be adjudicated, in light of her findings that there was an arguable case that Tan's rights might be violated and that his case was not completely without merit (at [15]). It noted (at [15]) that on the trial judge's view a matter remained within the realm of the "merely hypothetical" even if brought by a person with

locus standi, where "(a) a real controversy refers solely to a real controversy *on the facts*; and (b) a real controversy of *law*, even one which possibly has merit" [emphasis in original].

1.132 The Court of Appeal disagreed with the trial judge's conclusion that there was no real controversy as subsisting facts were necessary for a judgment to be *res judicata*. It considered this undesirable as otherwise "it would never be possible to seek a declaratory order on the law" (at [16]). It considered that there was "much value in having judicial determinations in appropriate cases on debatable points of law of public interest, not just for the benefit of the parties concerned, but also (and primarily) for the benefit of the public" (at [16]). It linked its reasoning to the function of the rule of law in giving people guidance on how to behave such that "it is thus essential that principles of law are correctly and authoritatively decided", particularly where the point of law to be clarified is "one of high constitutional importance" (at [16]).

1.133 The Court of Appeal disagreed with the trial judge's conclusion that Tan's claim lacked practical value, noting that a declaration determined a controversy between the parties which bound both parties, such that it was *res judicata* as a result of the grant of a declaration (at [17]). In an appeal against a striking out order, what Tan had to show was "an arguable case" on the facts and law (at [21]).

1.134 The Court of Appeal found that the free speech clause (Art 14) (at [130]) and the personal liberty clause (Art 9) were not involved on the facts of the case. It affirmed the narrow reading of Art 9 on the basis that it referred only to "the personal liberty of the person against unlawful incarceration or detention" as stated in *Lo Pui Sang v Mamata Kapildev Dave* [2008] 4 SLR(R) 754 at [6]. In other words, it refused to construe "personal liberty" as broadly as it has been interpreted in other jurisdictions where judges have been criticised for infusing their subjective preferences or politics into open-textured clauses like "personal liberty", to include, for example, extensive privacy rights. However, while Tan's Art 9(1) rights were not engaged by the existence of s 377A in the statute books, the Court of Appeal found (at [122]) that this might be implicated in so far as Tan was purportedly arrested and detained under s 377A, on the assumption it was a potentially unconstitutional law. The right to personal liberty even narrowly construed included "a right not to be detained under an unconstitutional law" (at [122]). This was a possibility in so far as the court held the view (at [122]) that s 377A "is arguably unconstitutional for inconsistency with Art 12". It said (at [152]) that:

> … 'law' under Art 9(1) cannot be interpreted as encompassing an unconstitutional law [as it would be] absurd to read Art 9(1) as sanctioning unconstitutional deprivations of personal liberty as to do so would be to render the protection offered by Art 9(1) nugatory, …

> a 'misuse of language to speak of law as something [giving the individual protection of] his fundamental liberties' …

1.135 Therefore, if s 377A is inconsistent with Art 12, Art 9(1) would be violated by his arrest and detention under s 377A (at [153]). That Tan was eventually charged with a s 294(*a*) charge cannot negate "the crucial historical fact" (at [153]) of his detention, investigation and charge under s 377A.

1.136 Even if Tan could have been lawfully detained under s 294(*a*) of the Penal Code, whose constitutionality could not be impeached, this in itself did not change the fact that the actual detention under s 377A was arguably lawful, assuming s 377A was unconstitutional (at [163]). At the point of his detention under s 377A, there was thus a *lis* (at [163]).

1.137 On applying the Art 12 reasonable classification test to s 377A, the High Court judge had found (at [125]) that it was based on "an intelligible differentia (it applies to sexually-active male homosexuals)". She found it arguable that it failed the second limb as "there was no obvious social objective that could be furthered by criminalising male but not female homosexual intercourse". Section 377A excludes "both male-female and female-female acts" and specifically targets "sexually-active male homosexuals"; Tan "professes to be a member of the targeted group", which was not disputed (at [126]). The Court of Appeal accepted on the facts that Tan's rights had been arguably violated by the mere existence of s 377A in the statute books, being a member of its "target group", and that there was "a real and credible threat of prosecution under s 377A". It emphasised that it was not deciding on the constitutionality of s 377A *vis-à-vis* Art 12 which goes to the merits of the case, but whether "it [was] arguably so" (at [127] and [187]) which sufficed for the present appeal of whether to strike out the application. The arguable issues to be decided on the merits were whether s 377A violated Art 12 in terms of (a) whether the classification is founded on an intelligible differentia; and (b) whether the differentia bears a rational relation to the object sought to be achieved by s 377A (at [185]).

1.138 The Court of Appeal concluded (at [186]) by stating that its finding of a real controversy removed the anomalous situation where an applicant with standing with respect to an alleged constitutional rights violation "will be allowed to vindicate his rights before the courts. The principle of access to justice calls for nothing less".

Articles 4 and 162

1.139 The question of the inter-relationship of Arts 4 (Supremacy clause) and 162 (transitional provisions) arose in *Tan Eng Hong v AG*.

The Court of Appeal advocated a purposive approach towards reading Arts 4 and 162, pursuant to s 9A read with s 2 of the Interpretation Act.

1.140 The Court of Appeal noted (at [57]) that while no case had yet arisen as to whether existed laws could be voided under the Art 4 supremacy clause, there had been various cases under Art 162 where the courts have by construction modified existing laws to bring them into conformity with the Constitution. Article 162 provides that laws should be read in conformity with the Constitution *as far as this is possible*, though the court thought the same broad reading adopted in Malaysia should also apply in Singapore, given the lack of material difference in the phraseology of the clauses (at [58]).

1.141 The court examined the conflicting Malaysian cases with respect to the equivalent provision and found they could not support the Attorney-General's argument that existing laws can never be voided under Art 4 (at [55]). They agreed with *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] MLJ 169 and *Assa Singh v Mentri Besar, Johore* [1969] 2 MLJ 30 in so far as the cases held "that where modification of unconstitutional existing laws must be carried out, this is only in so far as modification is possible" (at [55]). This stopped short of addressing whether the courts could void the unconstitutional existing law under Art 4 in the event modification was not possible. The Court of Appeal also noted various Malaysian commentaries on Art 162, to the effect that "inconsistent existing laws must give way to the Constitution [of Malaysia] even where an Article or the Constitution [of Malaysia] was expressed to be 'subject to existing laws'": see Dato Vohrah, Philip Koh & Peter Ling, *Sheridan & Groves: The Constitution of Malaysia* (Malayan Law Journal, 5th Ed, 2004) at [56].

1.142 It considered (at [59]) that where construing a modification into an unconstitutional law was impossible, the court was to uphold the supremacy of the constitution, such that "the offending legislation will be struck down under Art 162 read harmoniously with Art 4". Article 4 allowed the severance of the unconstitutional part of the law, while retaining the remaining part of the law in the statute books. Thus, "[t]o the extent that any law does not conform to and cannot be reconciled with the Constitution through a process of construction, it is void" [emphasis in original omitted]. Therefore, under Art 4 of the Constitution, the courts have the power to void laws pre-dating the Constitution for inconsistency with the Constitution. In principle, constitutional supremacy should be independent of *when* legislation was enacted (at [60]). Articles 4 and 162 were construed as sharing "this overarching aim of upholding the supremacy of the Constitution" through two different but not conflicting methods (at [61]).

1.143 Article 162 was found in the transitional section and did not itself provide for the voiding of unconstitutional laws (at [61]). Its purpose was to ensure the continuity of existing laws in order to "(a) prevent *lacunas* in the law from arising as a result of the doctrine of implied repeal; and (b) eliminate the need to re-enact the entire *corpus* of existing laws when Singapore became an independent republic" (at [61]). Article 162 thus preserved existing laws and provided for the upholding of constitutional supremacy "by stipulating that all laws (including existing laws) shall be construed in conformity with the Constitution". The idea of voiding law does not fall within its ambit (at [61]), but this can take place under Art 4 which applies to unconstitutional laws which pre-date and post-date the constitution (at [62]). The unconstitutional law will only survive as long as the Legislature and Judiciary do not take measures to bring the law in line with the Constitution (at [62]). The supremacy clause was necessary, in the words of the *Report of the Constitutional Commission* (27 August 1966) (Chairman: Wee Chong Jin CJ), to provide "meaningful" protection of fundamental rights and to ensure "effective safeguards against the abuse of majority power" (at [63]). From the parliamentary debates (*Singapore Parliamentary Debates, Official Report* (15 March 1967) vol 25 at col 1305), the Court of Appeal took note of the fact that nothing was said as to whether unconstitutional existing laws could be declared invalid; if they could not, this would be an exception to the supremacy of the constitution and "one would expect such an important point to have been debated specifically in Parliament" (at [63]).

1.144 The upshot is that "a petitioner may rely on Art 4 to challenge legislation pre-dating the constitution" (at [64]).