Published on e-First 8 July 2020

1. ADMINISTRATIVE AND CONSTITUTIONAL LAW

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I. Introduction

1.1 The major public law cases in 2019 related to constitutional law developments, as the administrative law cases primarily affirmed established approaches. What was notable was the characterisation of s 33B(4) of the Misuse of Drugs Act[1] ("MDA") not as an ouster clause but as a statutory immunity clause in *Nagaenthran a/l K Dharmalingam v Public Prosecutor*[2] ("*Nagaenthran*"). The major constitutional issue revolved around the question of whether by-elections must be called when a member of a group representation constituency vacates her seat, and whether there was an implied right to representation which was part of the "basic structure", discussed in *Wong Souk Yee v Attorney-General*[3] ("*Wong*"). The applicability of statutory canons of construction to constitutional interpretation was also discussed in *Wong* and Arts 12 and 14 of the Constitution of the Republic of Singapore[4] ("the Constitution") were fundamental liberties at issue in 2019 cases.

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I. Precedent fact review

1.2 The Court of Appeal in *Nagaenthran* found that the powers of the Public Prosecutor ("PP") under s 33B(2) of the MDA did not require an objective precedent fact to be established before it could be exercised; judicial review does lie where a precedent fact is required, following *Khawaja v Secretary of State for the Home Department*[5] as cited in *Chng Suan Tze v Ministry for Home Affairs*.[6] Section 33(2)(*b*) of the MDA reads:

1 Cap 185, 2008 Rev Ed.
2 [2019] 2 SLR 216.
3 [2019] 1 SLR 1223.
4 1999 Reprint.
5 [1984] AC 74.
6 [1988] 2 SLR(R) 525 at [110].

> … the Public Prosecutor certifies to any court that, *in his determination*, the person *has substantively assisted the Central Narcotics Bureau* in disrupting drug trafficking activities within or outside Singapore[.] [emphasis added]

1.3 The Court of Appeal found that the words "in his determination" demonstrated that Parliament's intent was for the PP to be the decision-maker, in deciding whether an offender had provided substantive assistance to the CNB in disrupting drug trafficking activities. Section 33B(4) of the MDA provided that the PP's determination under s 33B(2)(*b*) should be at the PP's sole discretion.[7] The PP under s 33B(2)(*b*) was to make a "determination" which was "not a matter of the exercise of executive of executive discretion";[8] once the determination is made, the PP was bound to issue the certificate. What fell within the PP's discretion was the "sorts of inquiries and information he would need" in coming to his determination under s 33B(2)(*b*).[9]

1.4 It stated, *obiter*, that Parliament's decision to entrust the PP with discretion over such matters and to make such determinations did not violate the Art 93 judicial power clause, given the "lack of manageable judicial standards"[10] in assessing whether substantive assistance had been rendered; the s 33B(2)(*b*) determination did not "constitute something" falling properly within "the exercise of a core judicial function to begin with".[11] It appears that when the subject-matter would attract the application of the principle of non-justiciability or the "political questions" doctrine,[12] this is treated as evidence that Parliament did not intend the courts to intrude into such matters, usually because it is something that courts should not address as a matter of institutional competence or propriety. This factor is relevant to the process of ascertaining whether a power is conditioned on a precedent fact, which courts may review, or whether, because a decision involves non-justiciable political issues, courts should refrain from reviewing or should apply a limited form of review.

II. Statutory immunity clauses and ouster clauses

1.5 Under s 33B(2)(*b*) of the MDA, the Public Prosecutor may issue a certificate of substantive assistance if he, upon inquiry, determines that an offender, who is a courier, has provided substantive assistance

7 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [86].
8 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [84].
9 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [86].
10 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [86].
11 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [86].
12 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [62]–[63].

in disrupting drug trafficking activities in general, whether within or without Singapore. Courts then have the discretion to sentence to life imprisonment a person convicted of a drug trafficking offence that would ordinarily attract the imposition of the mandatory death penalty. This was introduced in 2012, while the appellant, Nagaenthran, had been charged on 22 April 2009 and later convicted for importing drugs under s 7 of the MDA. He sought leave to commence judicial review proceedings to challenge the PP's decision not to issue such certificate. In *Nagaenthran*,[13] the issue was whether s 33B(4) of the MDA ousted the jurisdiction of the court to review the legality of the PP's non-certification decision. The subsection reads:

> The determination of whether or not any person has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities shall be at the sole discretion of the Public Prosecutor and no action or proceeding shall lie against the Public Prosecutor in relation to any such determination unless it is proved to the court that the determination was done in bad faith or with malice.

1.6 One of the issues raised was whether s 33B(4) of the MDA precluded judicial review of the PP's non-certification decision under s 33B(2) on grounds other than bad faith and malice. Following *Muhammad Ridzuan bin Mohd Ali v Attorney-General*[14] ("*Mohd Ridzuan v AG*"), it was accepted that s 33B(4) did not preclude challenging the PP's determination where this contravened constitutional protection and rights.[15]

1.7 The Court of Appeal distinguished between an ouster clause, which excluded the jurisdiction of the court to deal with a matter, and clauses that immunised parties from suit.[16] An example of a statutory immunity clause would be s 68(2) of the Subordinate Courts Act[17] ("SCA"). The court in *South East Enterprise (Singapore) Pte Ltd v Hean Nerng Holdings Pte Ltd*[18] found that this protected a bailiff from excessive seizure claims unless the bailiff had knowingly acted in excess of his authority. Section 68(2) provides that a subordinate court officer charged with the duty of executing any mandatory process of the subordinate court shall not be sued for the execution of said duty unless he knowingly acted in excess of the authority conferred upon him by that process.

13 See para 1.1 above.
14 [2015] 5 SLR 1222 at [35].
15 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [43].
16 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [47].
17 Cap 321, 1999 Rev Ed.
18 [2013] 2 SLR 908.

1.8 So too, s 14(1) of the Government Proceedings Act[19] ("GPA") provides immunity to a member of the Singapore Armed Forces ("SAF") from liability in tort for causing death or personal injury to another SAF member, provided certain conditions are fulfilled, and provided the act or omission is connected with the execution of his duties as an SAF member. The reason for this immunity granted to SAF members was to ensure "they would not be burdened by the prospect of legal action when training, and ultimately to safeguard the effectiveness of the SAF's training as well as its operations",[20] as the High Court observed at *Estate of Lee Rui Feng Dominique Sarron, deceased v Najib Hanuk bin Muhammad Jalal*.[21]

1.9 Statutory immunity clauses, which may be variously worded, do not oust the jurisdiction of the court but rather, "protect an identified class of persons from suit under certain conditions".[22] Nothing in s 68(2) of the SCA or s 14(1) of the GPA "purports to exclude the jurisdiction of the courts to deal with any class of matters". The Court of Appeal delved into the policy reasons why Parliament might grant public officials such as prosecutors immunity from suit,[23] borrowing from the Kuala Lumpur High Court decision of *Rosli bin Dahlan v Tan Sri Abdul Gani bin Patail*,[24] which cited the Canadian decision of *Henry v British Columbia (Attorney General)*.[25] Three policy reasons were identified.

1.10 First, immunity would encourage "public trust in the fairness and impartiality" of those exercising discretion in relation to criminal prosecutions.

1.11 Second, the threat of personal liability for tortious conduct would have a "chilling effect on the prosecutor's exercise of discretion".

1.12 Third, permitting civil suits against prosecutors would invite "a flood of litigation" which would "deflect a prosecutor's energies" from discharging public duties and may facilitate unmeritorious claims which may threaten prosecutorial independence.[26] However, it is also important to ensure private individuals subject to malicious prosecution are not denied a remedy.

19 Cap 121, 1985 Rev Ed.
20 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [47].
21 [2016] 4 SLR 438 at [51].
22 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [48].
23 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [49].
24 [2014] 11 MLJ 481.
25 2012 BCSC 1401 at [20].
26 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [49].

1.13 A "balance" is struck by providing a broad but not absolute immunity, such as requiring good faith in the exercise of that public officer's powers.

1.14 Statutory immunity clauses are "exceptional" in precluding claims from being brought against certain classes of persons under prescribed conditions, who would otherwise be subject to some form of liability.[27] They commonly seek to "protect persons carrying out public functions" to ensure that the discharge of such functions are not hindered. Further, immunity usually does not apply where a "misuse or abuse" of public functions is involved or where the proper ambit of the functions of a public office is exceeded.[28] Thus in *Rosli*,[29] prosecutorial immunity did not protect claims for "malicious, deliberate or injurious wrongdoing".[30]

1.15 The Court of Appeal found that s 33B(4) was not an ouster clause as it did not purport to preclude the jurisdiction of the courts to review the legality of the PP's determination under s 33B(2)(*b*) of the MDA; rather, it sought to "immunise the PP from suit save on the stated grounds". As such, one aggrieved with the PP's decision not to award a substantive assistance certification could bring judicial proceedings only on ground of bad faith, malice and unconstitutionality. It underscored that the immunities would not extend to instances where a public official abused or exceeded the functions of their office.[31]

1.16 In addition, the Court of Appeal held that nothing in s 33B(2)(*b*) excluded the usual grounds of judicial review, illegality, irrationality and procedural impropriety on the basis of which the court could examine the legality but not the merits of the PP's determination.[32] It distinguished between the court's sentencing discretion under s 33B(1)(*a*), which requires the satisfaction of two *conditions* – a finding of fact to the effect the offender in question is a courier and, under s 33B(2)(*b*) the existence of a certificate of substantive assistance issued by the PP – from the "specific *inquiry*" [emphasis in original] needed to determine whether the two conditions have been met in any given case.[33]

1.17 Aside from being a courier, the offender must have provided substantive assistance which resulted in specified outcome, that is,

27 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [50].
28 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [50].
29 See para 1.9 above.
30 *Rosli bin Dahlan v Tan Sri Abdul Gani bin Patail* [2014] 11 MLJ 481 at [98].
31 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [51].
32 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [51].
33 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [55].

disrupting drug trafficking activities in Singapore or elsewhere.[34] Section 33B(4) was directed to the inquiry, the process by which the PP's arrived at his decision, rather than the question of whether the condition under s 33B(2) was fulfilled (whether the offender had substantively assisted in disrupting drug trafficking activities). In relation to the PP's determination that the offender had substantively assisted the Central Narcotics Board ("CNB") in disrupting drug trafficking activities, s 33B(4) provides that this shall be made solely by the PP and that no action shall lie against the PP in respect of such determination unless proven to the court that it was done in bad faith or malice.

1.18 There was a "stark difference" between the inquiry under s 33B(2)(*b*) (whether the offender had provided substantive assistance to the CNB to disrupt drug trafficking activities) and that under s 33B(2)(*a*), which relates to whether the person convicted had proven his involvement in the offence was limited to transporting, sending or delivering the drug, for example. The latter was "a narrow question of fact suitable for judicial determination" but not the former, which went beyond the issue of safeguarding confidential information, inadmissible evidence and CNB operational details which might jeopardise the CNB's effectiveness if published.[35] The former also involved "a wide ranging assessment" going beyond "our geographical boundaries" which would very likely "entail the weighing of considerations and trade-offs that are outside our institutional competence".[36]

1.19 Whether the offender had substantively assisted in disrupting drug trafficking activities is pitched at a "level of abstraction" such that courts are "ill-equipped and ill-placed" to undertake such inquiry, in the absence of "manageable judicial standards"[37] in the form of "clear legal standards against which facts can be analysed and found, and rights and obligations be ascertained".[38] Assessing whether an offender had provided substantive assistance in disrupting drug trafficking activities in general, inside or outside Singapore "raises issues that simply cannot be resolved by a court of law using the methods, tools or standards that are properly at its disposal".[39] That the inquiry under s 33B(2)(*b*) of the MDA was one the courts were incapable of addressing because of "operational facets" was also supported by the relevant legislative debates.[40]

34 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [55].
35 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [57].
36 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [58].
37 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [58].
38 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [59].
39 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [65].
40 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [66].

1.20 The Court of Appeal held that the effect of s 33B(4) was "to vest the responsibility for making the relevant inquiry under s 33B(2)(*b*) in the PP, and then to immunise the PP from suit in respect of such a determination save as narrowly excepted",[41] which was "entirely logical" as Parliament intended that the PP solely determine the s 33B(2)(*b*) inquiry. The broad immunity was granted because, without this, the aggrieved offender could challenge the PP's non-certification determination, which may force the court into the "unviable position" of determining an issue it is "inherently not capable of determining".[42]

1.21 The exceptions to this immunity in s 33B(4) served as safeguards as abuse to ensure the PP operated the system with integrity. The exceptions, resting on malice and bad faith did not go to the merits of the PP's determination but were directed "at the limited question" of the PP's propriety of conduct, which gave rise to "the sort of issue that the court would be well placed to address".[43] Thus, s 33B(4) did not oust the court's jurisdiction over the legality of executive action.[44]

1.22 While finding that s 33B(4) was an statutory immunity clause which operated as a jurisdiction bar rather than an ouster clause, the Court of Appeal did observe that judicial review as a "core aspect" of judicial power "would not ordinarily be capable of being excluded by ordinary legislation such as the MDA", following from "Singapore's system of constitutional governance" based on constitutional supremacy and the separation of powers principle.[45]

1.23 If, for example, the PP considered irrelevant materials and if s 33B(4) was viewed as ousting judicial review, "s 33B(4) would be constitutionally suspect for being in violation of Article 93 of the Singapore Constitution as well as the principle of the separation of powers".[46] It appears then the Court of Appeal is of the opinion that despite the wording of s 33B(4) which explicitly lists malice and bad faith as a basis for challenging the PP's discretion, since s 33B(4) does not oust the court's power to review the legality of the PP's s 33B(2) determination, other grounds of review such as irrelevant considerations would also

41 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [67].
42 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [67].
43 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [67].
44 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [68].
45 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [71]–[72].
46 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [74].

be available.[47] This is consonant with a similar observation in *Mohd Ridzuan v AG*,[48] referenced by the Court of Appeal in *Nagaenthran*.[49]

III. Excessive judicial interference

1.24 One of the issues raised in *Chung Wan v Public Prosecutor*[50] was whether excessive judicial interference had occurred, as it was alleged that the District Judge had interrupted the Defence's cross-examination.

1.25 Following the guidelines in *BOI v BOJ*,[51] Aedit Abdullah J found that the District Judge's interjections at trial "did not cross the threshold for excessive judicial interference".[52] The notes of evidence revealed that while the District Judge's questioning was lengthy at points, it sought "only to clarify answers given by the witnesses or to expedite matters"; further, the District Judge had given the appellant's counsel the opportunity to return to his line of questioning and had treated the Prosecution similarly, in interrupting the Prosecution's cross-examination of the appellant, and pointing out that the Prosecution had mischaracterised the evidence given.[53] Findings of excessive judicial interference would be rare and required an "egregious" situation.[54]

IV. *Carltona* doctrine

1.26 The principle in *Carltona Ltd v Commissioners of Works*[55] was affirmed by the High Court in *Re Asian Development Pte Ltd*.[56] This holds that the acts of government department officials are synonymous with the actions of the minister in charge of that ministry.

1.27 Here, it was held that a reference to powers conferred on a Minister, under the Stamp Duties Act[57] in this case, could be exercised by ministry officials. While it was not reasonable to expect the Minister to consider each application on the merits, the Minister had to take

47 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [74].
48 See para 1.6 above, at [43].
49 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [69].
50 [2019] 5 SLR 858.
51 [2018] 2 SLR 1156 at [107]–[113].
52 *Chung Wan v Public Prosecutor* [2019] 5 SLR 858 at [54].
53 *Chung Wan v Public Prosecutor* [2019] 5 SLR 858 at [54].
54 *Mohammed Ali bin Johari v Public Prosecutor* [2008] 4 SLR(R) 1058 at [117], cited in *Chung Wan v Public Prosecutor* [2019] 5 SLR 858 at [53].
55 [1943] 2 All ER 560.
56 [2020] 3 SLR 713 at [13].
57 Cap 312, 2006 Rev Ed.

the responsibility of the acts of his officers in discharging such duties.[58] Here, the Chief Tax Policy Officer had the power to decide whether to grant an extension of time to the applicant to develop and sell property, as an additional buyer's stamp duty was payable if the deadline for the development and sale of the property was not met.

V. Judicial review and unnecessary delay in disciplinary proceedings

1.28 The case of *Lee Pheng Lip Ian v Singapore Medical Council*[59] was concerned with disciplinary proceedings under the Medical Registration Act.[60]

1.29 The Ministry of Health ("MOH") had sent a letter on 3 April 2013 to the plaintiff, a registered medical practitioner, expressing its concern that his clinic, Integrated Medical Clinic, licensed to him under the Private Hospitals and Medical Clinics Act[61] ("PHMCA"), was offering some "non-mainstream services" which allegedly contravened certain subsidiary legislation under the PHMCA.

1.30 MOH on 31 July 2013 sent a letter to the Singapore Medical Council communicating this concern. A series of correspondence between these actors ensued. The MOH later decided on 11 March 2015 not to renew the plaintiff's clinic licence upon its expiry on 16 March 2015 on the basis of non-compliance with PHMCA licensing requirements in prescribing non-mainstream treatments. The plaintiff appealed and on 24 April 2017, the Minister decided to allow the appeal and directed the clinic licence be renewed for six months provided that MOH guidelines on the provision of non-evidence-based medicine was strictly complied with. The plaintiff did not restart his clinic.

1.31 The Singapore Medical Council on 14 February 2014 made a complaint ("the Complaint") against the plaintiff to the chairman of the Complaints Panel ("CP"), pursuant to s 39(3)(*a*) of the Medical Registration Act. This was laid before a complaints committee ("CC"), which, under s 42(1), was to complete its inquiry "not later than 3 months" after the complaint was laid before it. In conducting its inquiry into the Complaint, the CC applied to the chairman of the CP for 13 extensions of time ("EOTs") to complete its inquiry, which were granted to the CC under s 42(2). This provides that the CC may apply for an extension

58 *Re Asian Development Pte Ltd* [2020] 3 SLR 713 at [14].
59 [2019] SGHC 51.
60 Cap 174, 2004 Rev Ed.
61 Cap 248, 1999 Rev Ed.

"due to the complexity of the matter or serious difficulties encountered by the CC in conducting its inquiry". Of the 13 applications, eight were made after its extended deadline to complete its enquiry. The chairman granted all EOT requests and the inquiry was completed on 12 February 2018, where it was determined that a formal inquiry to be conducted by a disciplinary tribunal ("DT") was necessary.

1.32 The plaintiff argued that s 42(2) was mandatory with respect to the reasons why the EOT was applied for and granted. He argued that the CC's inquiry into the complaint was *ultra vires* because some of the EOTs did not satisfy the precedent facts stipulated in s 42(2) and that the CP chair had acted unlawfully or irrationally in repeatedly granting EOTs to the CC. The plaintiff further submitted he had suffered substantial prejudice because of the non-compliance with s 42(2) and the inordinate delay in the prosecution of disciplinary proceedings from matters arising in September 2009, which amounted to an abuse of process or breach of natural justice at common law. It was thus irrational for the CC to order that an inquiry be made into the Complaint by a DT.

1.33 The defendants argued that s 42(2) was a directory provision and that it would be premature for the plaintiff to apply for leave to quash the CC's order for a DT to conduct an inquiry as the CC's order "was not an ultimate decision or action with substantive legal consequences".[62]

1.34 Woo Bih Li J noted that the Medical Registration Act did not "stipulate a long-stop date" by which a CC had to complete its inquiry and that Parliament had explicitly considered this suggestion and rejected it during parliamentary debates.[63] This was distinct from statutes regulating other professions like s 86(3) of the Legal Profession Act.[64] Although Woo J accepted that the intent behind ss 42(1) and 42(2) was for the expeditious completion of inquiries, this did not mean a CC's failure to seek an EOT before its deadline entailed the "disproportionate consequence" that the CC could no longer continue its inquiry.[65] This might mean that a registered medical practitioner who was the subject of inquiry would escape "liability on a technicality".[66]

1.35 The plaintiff argued that if a CC did not comply with s 42(2) because of the inadequacy of its reasons for applying for an EOT, this necessarily invalidated the CC's application for an EOT. Further,

62 *Lee Pheng Lip Ian v Singapore Medical Council* [2019] SGHC 51 at [47].
63 *Lee Pheng Lip Ian v Singapore Medical Council* [2019] SGHC 51 at [57].
64 Cap 161, 2009 Rev Ed.
65 *Lee Pheng Lip Ian v Singapore Medical Council* [2019] SGHC 51 at [59].
66 *Lee Pheng Lip Ian v Singapore Medical Council* [2019] SGHC 51 at [56].

applying for multiple EOTs would thwart the s 42(2) purpose of ensuring expeditious conclusion of its inquiry into a complaint by causing undue delay, against the public interest.[67]

1.36 On this assumption that an application for an EOT for inadequate reasons would be invalidated, Woo J noted if a medical practitioner challenged the reasons for which the CC applied for an EOT, "much time and effort" would be expended by all in raising "lengthy arguments" as to whether "the reasons met the statutory requirements".[68] Further, even if the reasons for applying for an EOT could not withstand scrutiny, "what purpose would it serve to interpret s 42(2) to mean that the application for the EOT was invalid?"[69] The process could be repeated, were the complaint to be laid before a new CC and if no complaint could be laid afresh before a new CC, the complainant would escape liability on a technicality.[70]

1.37 Woo J noted the observation that unnecessary delay in disciplinary cases was deplorable but did occur and, absent bad faith, one should not resort to judicial review "where no real abuse or breach of natural justice can be shown".[71]

1.38 Woo J noted that at any one time, each CC could be inquiring into discrete complaints against more than one medical practitioner, that CC members were volunteers who did not work full-time on the CC and who carried other responsibilities.[72] It would thus "not be surprising" that each CC would have to seek "at least an EOT to complete its inquiry".[73] The reasons for requesting EOTs would likely also be for reasons other than the complexity of the matter or serious difficulties encountered in conducting the inquiry, such as the difficulty in co-ordinating suitable dates to meet together.[74]

1.39 While this was unsatisfactory, it would be "an even more unsatisfactory situation" to invalidate a CC's application for an EOT because of inadequate reasons, as the CC inquiry process "will become

67 *Lee Pheng Lip Ian v Singapore Medical Council* [2019] SGHC 51 at [70].
68 *Lee Pheng Lip Ian v Singapore Medical Council* [2019] SGHC 51 at [68].
69 *Lee Pheng Lip Ian v Singapore Medical Council* [2019] SGHC 51 at [69].
70 *Lee Pheng Lip Ian v Singapore Medical Council* [2019] SGHC 51 at [69].
71 *Lee Pheng Lip Ian v Singapore Medical Council* [2019] SGHC 51 at [73], citing May LJ in *R v Chief Constable of the Merseyside Police, ex parte Calveley* [1986] 1 QB 424, cited with approval by the Court of Appeal in *Tan Tiang Hin Jerry v Singapore Medical Council* [2000] 1 SLR(R) 553 at [50].
72 *Lee Pheng Lip Ian v Singapore Medical Council* [2019] SGHC 51 at [70].
73 *Lee Pheng Lip Ian v Singapore Medical Council* [2019] SGHC 51 at [74].
74 *Lee Pheng Lip Ian v Singapore Medical Council* [2019] SGHC 51 at [75].

unworkable in reality".[75] Endless challenges would be mounted before new CCs, for example. On balance and in the absence of clear words, Woo J held that Parliament did not intend for inadequate reasons in applying for an EOT to invalidate the CC's application for an EOT. Section 42(2) requirements were meant to encourage expeditious conclusions of an inquiry by the CC but "not to frustrate the entire process".[76]

1.40 Thus, applications for EOTs or grants of EOTs under s 42(2) "cannot be challenged on the grounds of illegality and irrationality", or under the precedent fact principle of review.[77]

VI. Judicial review and discovery

1.41 One of the issues raised in *Pannir Selvam a/l Pranthaman v Attorney-General*[78] was whether discovery may be allowed in judicial review proceedings. In this immediate case, this concerned the clemency process regulated under Art 22P, with the interrogatories sought by the applicant being directed at the President's Office, Attorney-General ("AG") and Cabinet.

1.42 Section 34(1) of the GPA provides that where the Government is party to any civil proceedings, it may be required by the court to make discovery of documents. In the present case, the government was not yet party to civil proceedings, as leave for judicial review was yet to be granted.[79] An application for leave for a mandatory, prohibiting or quashing order must be made by *ex parte* originating summons and served on the AG's Chamber under O 53 rr 1(2) and 1(3) of the Rules of Court[80] ("ROC"). This is to allow the AG to ascertain if his participation as the guardian of the public interest is warranted.

1.43 As the Court of Appeal noted in *Deepak Sharma v Law Society of Singapore*,[81] the AG at this stage is only considered a nominal party in the judicial review application, with his appearance being a matter of his discretion.[82] The Government does not become a party to civil proceedings once an application for leave is filed; the Government,

75 *Lee Pheng Lip Ian v Singapore Medical Council* [2019] SGHC 51 at [77].
76 *Lee Pheng Lip Ian v Singapore Medical Council* [2019] SGHC 51 at [81].
77 *Lee Pheng Lip Ian v Singapore Medical Council* [2019] SGHC 51 at [83].
78 [2020] 3 SLR 796.
79 *Pannir Selvam a/l Pranthaman v Attorney-General* [2020] 3 SLR 796 at [22].
80 Cap 322, R 5, 2014 Rev Ed.
81 [2017] 2 SLR 672 at [31] and [34].
82 *Pannir Selvam a/l Pranthaman v Attorney-General* [2020] 3 SLR 796 at [25].

represented by the AG, remains a nominal party at the leave stage.[83] The court rejected the applicant's argument that the court possessed inherent jurisdiction to order the disclosure of document to prevent injustice; at any rate, it was inappropriate for the court to exercise inherent powers where there was an existing statute covering the situation.[84]

1.44 Both parties agreed the process of discovery under O 24 of the ROC was available in judicial review proceedings,[85] although the scope for discovery was "more restricted" than in typical civil proceedings. This was because applications for judicial review "typically only raise issues of law" rather than issues of facts, rendering "the disclosure of documents unnecessary".[86] This observation by Lord Bingham in *Tweed v Parades Commission for Northern Ireland*[87] was affirmed by Phillip Pillai J in *Susan Lim v Singapore Medical Council*.[88] It was observed too that after leave for judicial review is granted, courts in foreign cases have been presumptively more willing to grant discovery application rising from "the duty of candour on the part of the government" which arises only once leave for judicial review proceedings have been granted.[89] See Kee Oon J held that the proper stage for an application for discovery to be made is only after leave is granted,[90] given that the leave stage operates to sift out groundless and unmeritorious applications.

VII. Exhaustion of alternative remedies

1.45 In general, a person seeking judicial review of a public body's decision must first exhaust all alternative remedies before seeking judicial review: *Borissik Svetlana v Urban Redevelopment Authority*.[91]

1.46 In *Agilah a/p Ramasamy v Commissioner for Labour*,[92] the applicant had been injured in a workplace accident and made a compensation claim under the Work Injury Compensation Act[93] ("WICA"). She applied for leave to commence judicial review proceedings as the Commissioner

83 *Pannir Selvam a/l Pranthaman v Attorney-General* [2020] 3 SLR 796 at [27].
84 *Pannir Selvam a/l Pranthaman v Attorney-General* [2020] 3 SLR 796 at [33], as affirmed by the Court of Appeal in *Re Nalpon Zero* [2013] 3 SLR 258 at [39].
85 *Pannir Selvam a/l Pranthaman v Attorney-General* [2020] 3 SLR 796 at [37].
86 *Pannir Selvam a/l Pranthaman v Attorney-General* [2020] 3 SLR 796 at [38].
87 [2007] 1 AC 650 at [2].
88 [2011] 4 SLR 147 at [7].
89 *Pannir Selvam a/l Pranthaman v Attorney-General* [2020] 3 SLR 796 at [44].
90 *Pannir Selvam a/l Pranthaman v Attorney-General* [2020] 3 SLR 796 at [54].
91 [2009] 4 SLR(R) 92 at [25].
92 [2019] 4 SLR 972.
93 Cap 354, 2009 Rev Ed.

of Labour ("the Commissioner") had refused to take into account an objection to a notice of assessment of compensation due to her.

1.47 The Commissioner through an administrative lapse did not send the notice of assessment of compensation to the applicant's solicitors of record but sent it to her previous employer, Pan Asia on 16 January 2017. She received it when she later went back to work on 1 March 2017 and only passed it to her solicitors a month later and so, her objection was submitted out of time, falling outside the specified 14-day period under s 25(1) of the WICA. Since no objections were received by 30 January 2017, Pan Asia's insurer, MSIG, issued the compensation cheque which was received by Pan Asia on 14 February 2017. On 1 March 2017, the applicant was handed a notice of assessment and letter specifying a time frame for objections that had expired by the time she received the documents. No indications were given to the applicant and MSIG that the initial timelines for objections would be shifted to accommodate the applicant's absence from work from January to 1 March 2017.

1.48 Aedit Abdullah J held that the Commissioner's administrative errors meant that the notice was not effected on 1 March 2017; at the earliest, the notice was effected on 18 April 2017 when the applicant handed the notice to her solicitors. As her objection was submitted on the same day and was properly raised, the notice had yet to crystallised into a binding, non-appealable order by virtue of s 24(3). An appeal could thus be brought against the assistant commissioner's decision not to consider the applicant's objection dated 18 April 2017. As such, the applicant had not exhausted her alternative remedies in the form of the right to appeal under s 29(1); the application for leave to commence judicial review proceedings was therefore dismissed.

CONSTITUTIONAL LAW

I. Constitutional interpretation: General principles

1.49 The High Court in *Tan Liang Joo John v Attorney-General*[94] ("*Tan Liang Joo John*") cautioned that in interpreting constitutional provisions, care should be taken to ensure that the court not project a meaning onto words "that distorts those very words". This is because statutory and constitutional provisions "are not living documents, to be altered or mutated according to the fashion of the times". This would ignore the constitutional mechanisms and safeguards for amending the Constitution

94 [2019] SGHC 263.

and disregard "the division of power between the three branches of the government".[95]

1.50 While Part IV fundamental rights are to be afforded a generous interpretation, following *Ong Ah Chuan v Public Prosecutor*,[96] the High Court in *Tan Liang Joo John* stated that the right to stand for election as a Member of Parliament ("MP"), not being a Part IV enumerated fundamental right, "cannot be subject to the same interpretive approach afforded to fundamental liberties under Part IV of the Constitution".[97] It noted that this was the approach adopted in relation to "the right to stand for election to the Presidency" in *Tan Cheng Bock v Attorney-General*[98] ("*Tan Cheng Bock*").

II. Interpreting Article 45(1)(*e*)

1.51 The court in *Tan Liang Joo John* applied the three-step approach to constitutional interpretation enunciated in *Tan Cheng Bock*[99] in reading Art 45(1)(*e*) of the Constitution ("conviction of an offence by a court of law in Singapore"): this concerns disqualifications applying to MPs. It found that the term "offence" encompassed convictions for criminal contempt, which was "quasi-criminal" in nature, following *Li Shengwu v Attorney-General*.[100]

1.52 It was argued that the references to a free pardon and conviction in Art 45(1)(*e*) meant that Art 45(1)(*e*) only referred to criminal offences, which alone could be the subject of a free pardon.[101] However, the High Court held that Art 22P of the Constitution, which deals with the constitutional power to pardon, was not to be read narrowly, as there was nothing in it which would curtail the application of the presidential power of pardon to apply to offences, including criminal contempt. The plain words did not "expressly exclude contempt, whether civil or criminal".[102] Reading the constitution as a whole, the Attorney-General's powers under Art 35(8) to institute, conduct or discontinue proceedings for any offence covered contempt of court, meaning that the word "offence" in Art 35(8) included criminal contempt.[103] While statutes used

95 *Tan Liang Joo John v Attorney-General* [2019] SGHC 263 at [48].
96 *Ong Ah Chuan v Public Prosecutor* [1979–1980] SLR(R) 710.
97 *Tan Liang Joo John v Attorney-General* [2019] SGHC 263 at [66].
98 [2017] 5 SLR 424 at [41]–[43].
99 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [37], [38] and [54c].
100 [2019] 1 SLR 1081 at [123].
101 *Tan Liang Joo John v Attorney-General* [2019] SGHC 263 at [25].
102 *Tan Liang Joo John v Attorney-General* [2019] SGHC 263 at [27].
103 *Tan Liang Joo John v Attorney-General* [2019] SGHC 263 at [36].

the term "offence" to refer to criminal offences, Aedit Abdullah J held that the general usage of the term "offence" in statutes did not "[control] its meaning in the Constitution", since the immediate issue was whether the term "offence" could extend to a "quasi-criminal matter".[104] Further, there did not appear to be "other similar quasi-criminal offences" under Singapore law.

III. Basic structure: Implied right to representation?

1.53 One of the arguments raised in *Wong Souk Yee v Attorney-General*[105] ("*Wong*") was that the implied right to representation in Parliament was part of the "basic structure" of the Constitution, which included "the right to be represented by the full slate of elected Members returned at each general election". The appellant argued that a single vacant seat in a group representation constituency ("GRC") created a state of affairs which violated the Constitution requiring rectification to ensure all seats in a GRC were filled until Parliament was dissolved.[106]

1.54 The Court of Appeal noted it had not made a conclusive determination in *Yong Vui Kong v Public Prosecutor*[107] ("*Yong*") whether the Indian basic features doctrine set out in *Kesavananda Bharati v State of Kerala*[108] was part of Singapore law or if so, what its effect might be.[109] It provided the guideline in *Yong* that for a feature to be basic, it had to be "something fundamental and essential to the political system".[110]

1.55 The prohibition against torture was found not to be such a feature in *Yong*, though not much reasoning was given on this point. Nonetheless, the Court of Appeal in *Wong* concluded that the right as framed by the appellant would "not form part of that basic structure".[111] Even if the right to representation is part of the basic structure, it "does not follow that there is a particular form of representation" considered fundamental and essential to the Westminster model of government which cannot be departed from.[112] In other words, Parliament was free to amend the Westminster model system, which was part of Singapore's colonial legacy with respect to the system of parliamentary representation. Notably, this

104 *Tan Liang Joo John v Attorney-General* [2019] SGHC 263 at [37].
105 [2019] 1 SLR 1223.
106 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [76].
107 [2015] 2 SLR 1129.
108 AIR 1973 SC 1461.
109 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [77].
110 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [71]–[72].
111 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [78].
112 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [78].

is varied, and can range from first past the post single-member ward systems to multi-member constituencies and proportional representation in other common law jurisdictions.

1.56 The Court of Appeal found that there was "nothing in principle" preventing Parliament from constructing a GRC scheme in a way the "GRC was left to be represented by less than its full complement of Members" in the event one seat in a GRC is vacated. Thus, it was unnecessary to fully consider the basic structure doctrine for the purposes of the instant case. In other words, the Court of Appeal was not adverse to recognising this doctrine (by effectively demonstrating how it would apply), but pointed out that a principle could be realised through a plurality of mechanisms and, where this was the case, choosing one over the other would not fall afoul of the doctrine.

IV. By-elections: Group representation constituencies and Articles 39A and 49(1)

1.57 The issue in *Wong*[113] was whether a by-election had to be called after a member of a GRC resigned from her seat. Mdm Halimah Yacob had stepped down from her seat as an MP for Marsiling-Yew Tee GRC ("MYTGRC") on 7 August 2017 to contest the presidential elections, which she won by default.

1.58 The GRC scheme was introduced in 1988 to create multi-member constituencies, with the ostensible purpose, set out in Art 39A(1) of ensuring the representation in Parliament of members of Malay, Indian and other minority communities, by requiring one member of a team to be from the stipulated minority. Mdm Halimah was the ethnic minority in MYTGRC. Wong, a resident of MYTGRC, as well as an opposition politician, sought leave to apply for (a) a mandatory order requiring all three remaining members of the GRC to vacate their seats; (b) a declaratory order that s 24(2A) of the Parliamentary Elections Act[114] ("PEA") be read in a way which required all remaining GRC members to vacate their seats when one vacates her seat, or, in the alternative, when the person vacating the seat was the GRC's minority member; and (c) a declaratory order that s 24(2A) of the PEA was inconsistent with Art 49(1) of the Constitution and therefore void.

1.59 The Court of Appeal had held with respect to Single Member Constituencies ("SMCs") in *Vellama d/o Marie Muthu v Attorney-*

113 See para 1.53 above.
114 Cap 218, 2011 Rev Ed.

General[115] that the Prime Minister was under a duty to call a by-election to fill vacancies of elected Members, within a reasonable time, there being no stipulated time period. The question was whether a similar duty lay with regard to by-elections from GRC wards. This turned on a proper interpretation of Art 49(1) which reads:

> 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.

1.60 The proper interpretation of Art 49(1) was to be "approached in the context of the introduction of the GRC scheme".[116] The Court of Appeal noted at the time of Art 49's enactment as Art 33, all electoral divisions were SMCs. The GRC scheme was not introduced until 23 years after Art 49 was enacted, with no amendments made to Art 49, which had then only applied to SMCs.[117]

1.61 What was not in contest was the possibility of holding a by-election for a single GRC seat without first compelling the remaining GRC members to vacate their seat. The respondent framed the issue in terms of needing to find a "legal basis to compel" the remaining members of MYTGRC to vacate their seat, to call for by-elections in respect of the GRC as a whole, given the mandatory order sought.[118]

1.62 The Appellant argued that the reference to "election" in Art 49(1) meant a by-election for all GRC seats, given the absence of any mechanism for contesting a single seat in a GRC in any relevant law.[119] Rejecting the argument that the ordinary meaning of Art 49(1) was clear, the court held that the meaning of Art 49(1) was "ambiguous" in relation to "whether and how it applies to GRCs".[120] A purposive approach, as applied in *Tan Cheng Bock*,[121] was advocated, and the ordinary meaning of the words of a provision started at "what those words were understood to mean at the time the provision was enacted": *Public Prosecutor v ASR*.[122] Therefore, the words "seat of a Member" in Art 49(1) would only refer to SMC seats.[123] As the "central focus" of all interpretive questions is s 9A of the

115 [2013] 4 SLR 1.
116 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [3].
117 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [5].
118 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [19].
119 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [25].
120 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [27].
121 See para 1.50 above.
122 [2019] 1 SLR 941 at [77]–[79].
123 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [30].

Interpretation Act[124] ("IA"), which requires an interpretation to give effect to the intent and will of Parliament, the enquiry was not whether words could logically apply to new concepts but whether Parliament expressed an intent that the provisions "should encompass the new concepts".[125]

1.63 The Court of Appeal found that on reading Art 49(1) in the context of other constitutional provisions, especially Arts 39A and 46, there was no clear intent that Art 49(1) was meant to apply to GRC seats. However, the words used within Art 49(1) were "wide enough" to include GRC seats as the only point of differentiation was between "seat of a Member" and "not being a non-constituency Member".[126] However, Art 49(1) appeared to refer to vacancy in a particular seat, while Art 39A indicated that GRC elections had to be held "on a basis of a group". No constitutional provision expressly provided that the seat of other members in the same GRC had to be vacated; further, Art 46 which dealt with the tenure of parliamentarians did not speak to this situation.[127]

1.64 The Court of Appeal stated the Constitution was "conspicuously silent"[128] and contained no provision compelling other Members of the affected GRC to vacate their seat in this scenario, which was a "precondition" for the conduct of any GRC by-election.[129] To underscore the ambiguity of Art 49(1), the Court of Appeal noted that Art 49(1) provided that the filling of a seat by election should be "in the manner provided by or under any law relating to Parliamentary elections for the time being in force". The PEA does not require that by-elections be held under s 24(2A) so long as not all the GRC seats have been vacated. Effectively, this means that a five-member GRC might at some stage be run by one MP should the other four vacate their seats, which goes contrary to the rationale of increasing the sizes of GRCs because more MPs are needed to service the ever-growing populations of GRCs.

1.65 The appellant argued that there was a "legislative oversight"[130] in so far as Parliament did intend that a by-election would be called in a GRC if all GRC members had vacated their seats, as reflected in s 24(2A) of the PEA, but Parliament had not amended Art 49(1) in a way that would permit this result.[131] The Court of Appeal observed that this

124 Cap 1, 2002 Rev Ed.
125 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [32].
126 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [34].
127 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [40].
128 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [43].
129 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [43].
130 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [46].
131 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [46].

supported the view that Art 49(1) was "ambiguous on its face",[132] such that it was permissible to reference extraneous materials not to confirm but to ascertain the true meaning of Art 49(1) and how this related to GRCs.[133]

1.66 In examining parliamentary debates in relation to the constitutional amendment and amendment to the PEA, the Court of Appeal found parliamentary intention to be "abundantly clear",[134] in so far as Parliament never intended that a single vacancy in a GRC would trigger the duty to call a by-election. Then Deputy Prime Minister Goh Chok Tong had stated that the "two Bills should be read together" "in the manner provided by or under any law relating to Parliamentary elections for the time being in force".[135] The constitutional and statutory amendments were meant to operate as a "single package of changes that would effect the implementation of the GRC scheme".[136] Deputy Prime Minister Goh stated during the debate that GRCs were meant to "ensure a multi-racial Parliament, not a multi-racial team in the constituency".[137] The reason was to avoid the scenario where one MP could hold his team mates "to ransom". If all the other team members resigned, the "duly elected" one should remain.

1.67 It was acknowledged that this was an imperfect trade-off and the court noted the "crucial" point that Parliament had specifically weighed these considerations in crafting the GRC scheme, and preferred to have no obligation to call a by-election in a GRC ward in the event one GRC member vacated his seat, as this was "preferable to the alternative", the possibility of one GRC member holding his teammates to ransom.[138]

1.68 The Court of Appeal noted that the extraneous material was clear on the intended outcome in the situation but "it [was] unclear as to how Parliament thought it would *effect this outcome*" [emphasis in original]. The court thought that this gave rise to three possibilities, none of which were clearly supported by parliamentary material:[139] first, that Parliament inadvertently omitted to amend the Constitution to reflect its intention not to hold by-elections so long as not all GRC members had vacated their seats; second and third, that the language of Art 49(A) or 39A

132 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [47].
133 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [48].
134 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [49].
135 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [50].
136 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [51].
137 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [52]. See *Singapore Parliamentary Debates, Official Report* (12 January 1988) vol 50 at cols 334–335.
138 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [53].
139 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [54]–[55].

incorporated the necessary reference to the express language of s 24(2A) of the PEA.[140]

1.69 In deciding whether to give a rectifying or updating construction to effectively read Art 49(1) as "[w]henever the seat of a Member in a single member constituency, or the seats of all Members in a group representation constituency", the Court of Appeal noted that these methods of construction were designed to interpret statutes. A rectifying construction would entail adding or substituting words to give effect to the manifest intention of Parliament, which flowed from the need to correct obvious drafting errors.[141] An updating construction is premised not on a drafting error but on the assumption that Parliament intended that courts adopt a construction which "continuously updates the wording of a statute so as to allow for its application to circumstances as they change after the time the statute was initially framed".[142] It noted that constitutional provisions were "designed to be more deeply entrenched and are generally regarded as fundamental in nature", such that applying such statutory interpretive methods may be inconsistent with "the nature of constitutional provisions".[143] The court recalled its observation that constitutional amendments to reflecting changing social mores fell more properly within the remit of legislative powers under Art 5(2).[144] The Court of Appeal decided that it was not necessary to consider whether a rectifying or updating construction could apply to constitutional provisions, as it was not considered appropriate in the instant case.[145]

1.70 A rectifying construction was inappropriate as it failed the requirement that there had to be "sufficient certainty" that (a) any additional words would have been what the draftsman would have inserted but for inadvertence; and (b) Parliament would have approved such words. While Parliament's intent was clear (no by-election need be called in the event of a vacancy arising in a GRC ward seat), it was "far from clear how Parliament thought it would effect this result" and indeed, "unclear whether Parliament wanted to amend the language of the Constitution at all". The "entrenched and fundamental nature" of the Constitution was also a factor causing the court to hesitate to apply a rectifying construction.[146]

140 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [56].
141 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [63].
142 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [63].
143 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [64].
144 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [92].
145 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [65].
146 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [67].

1.71 In relation to an updating construction, the key issue is where, when the amendment to a first statute gives rise to ambiguity in the interpretation or application of the related second statute, such a construction "would entail a substantive change to the operation of the second statute that it would be best left to the Legislature to effect the change" or whether the change would appropriately be "imported into the second statute by way of an updating construction".[147] It would be a "significant substantive change" to read Art 49(1) as a provision which differentiated between GRCs and SMCs as to when by-elections must be called.[148]

1.72 Having rejected the appropriateness of both rectifying and updating constructions, the Court of Appeal considered the two remaining interpretations which did not require adjusting the language of Art 49(1). First, it rejected the appellant's interpretation as it would lead to a result which Parliament had expressly intended to avoid when implementing the GRC scheme, as it would compel all remaining GRC members to vacate their seat in the event of one of the team vacating his seat. This was "antithetical" to the purposive approach required by s 9A(1) of the IA.[149] Then, it accepted the respondent's interpretation despite being "not ideal",[150] in that it left the Constitution silent on filling in vacant GRC seats.[151]

1.73 Nonetheless, the Court of Appeal identified "three points" to bear in mind. The first focused on the judicial role which was constrained by the language of the text, rejecting any role in the judicial fashioning of "the ideal formulations" of the words in Art 49(1). It was constrained to look at the "range of permissible interpretations" and choose the one best according with the "underlying purpose" of Art 49(1). Second, the reality was that when Art 49(1) was enacted in 1965, the only type of members the drafters would have in mind would have been SMC members, as GRCs did not come into existence until 1988. Last, just because the Constitution was silent in relation to how to fill vacancies in the GRC, it did not necessarily mean "that all the seats in a GRC [could] be left vacant without an obligation on the part of the Government to call a by-election in the GRC".[152]

1.74 The Court of Appeal noted it was at least "arguable" that an implied right to representation might be invoked to fill this gap in the

147 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [68].
148 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [69].
149 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [71].
150 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [72].
151 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [72].
152 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [72].

Constitution, though it was preferable that Parliament dealt with this issue by an express constitutional amendment. Rather than circumventing parliamentary intent or imposing one where the extraneous material did not provide support for, the court thus adopted a "dialogical" approach in pointing to a lacuna and addressing an issue better suited to fall with the province of Parliament to make provision for. Thus, it concluded that the reference to "seat of a Member" in Art 49(1) referred only to the seat of an SMC member.[153]

1.75 The Court of Appeal also rejected the appellant's argument that reading Arts 39A and 49(1) together, the purpose of Art 39A (to ensure minority legislative representation) would be thwarted if the minority member of a GRC vacated his or her seat and this was not filled by another minority member.

1.76 It pointed out that this specific risk had been debated in Parliament when they were amending the Constitution and PEA, and that it was "an acceptable trade-off", in the interest of preventing one GRC member from holding the others to hostage.[154] The appellant's interpretation would lead to the removal of a risk Parliament had expressly agreed to adopt and "such a reversal of the policy choice" made by Parliament "strikes at the heart of the concern behind judicial legislation, and would result in [the court] overstepping [its] constitutional role".

1.77 The court would not "debate the best policy to enshrine minority representation in Parliament", especially when Parliament "ha[d] already chosen a particular model for this".[155] In other words, where parliamentary intention is clear, that is determinative, the court will not find any constitutional standards to regulate what Parliament may do, as conceivably, a purposive reading of Art 39A with Art 49(1) could locate the purpose of ensuring a certain level of minority representation in the House, though the Constitution itself does not specify any numerical criterion for how many minorities Parliament must have at any given time other than when elections are being contested. The Court of Appeal appears not to be willing to countenance the abstract possibility that there might never be a duty to call by-elections in a GRC, even where all, or perhaps most, of the seats in a GRC were vacant. For example, Singapore currently has 16 GRCs from which 76 parliamentary seats out of 89 elective seats are drawn. Conceivably, if 16 GRCs find themselves bereft of all but one MP, we could theoretically have a Parliament with only 29 MPs (16 from GRCs, the rest from the 13 SMCs). It is easy to see

153 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [73].
154 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [75].
155 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [75].

how this could undermine the principle of democratic representation, no matter how unlikely the scenario.

1.78 The court nonetheless did not find anything in Art 39(1)(*a*) to suggest the need to call by-elections, as it was a provision which did not deal with by-elections at all, but was "descriptive of the composition of Parliament".[156]

1.79 Notably, the Court of Appeal decided that no order as to costs should be made before the Court of Appeal and High Court, accepting that "where a serious question of constitutional law is raised", the court had the discretion to depart from usual costs rules. It rejected the decision in *Vellama d/o Marie Muthu v Attorney-General*,[157] which had stated a broader rule that where "public law issues of general importance" were raised and where the applicant was not seeking to protect a private interest, the usual cost orders in litigation should be departed from.[158]

V. Article 12 – Equal protection of the law

1.80 In *Public Prosecutor v ASR*,[159] the 14-year-old respondent – with a low IQ of 61 and mental age of between eight and ten – pleaded guilty to one count of aggravated rape and two counts of sexual assault by penetration, and was sentenced by the High Court to reformative training. On appeal, the Prosecution argued that the respondent's intellectual disability made him unsuitable for reformative training, contending instead that a 15–18-year term of imprisonment and a minimum of 15 strokes of the cane was called for.

1.81 The constitutionality of s 83 of the Penal Code[160] ("PC") was challenged. This provides a defence for criminal liability for any child "above 7 years of age and under 12" who was insufficiently mature to understand the consequences of his offending conduct at the time of such conduct. The issue was whether "age" in s 83 referred only to chronological age, or could include mental age.

1.82 The Prosecution held that s 83 of the PC was consistent with Art 12(1) of the Constitution because it employed a differentia, chronological age, which bore a rational relation to the legislative object. The respondent argued s 83 ought to be read "purposively" to

156 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [82].
157 [2013] 1 SLR 797.
158 *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 at [90]–[91].
159 See para 1.62 above.
160 Cap 224, 2008 Rev Ed.

apply to offenders whose mental age was between seven and 12 even if their chronological age was above or below 12.[161] It would allegedly be discriminatory to not extend the protection of the s 83 statutory defence to offenders over the chronological age of 12, who "might nonetheless be of insufficient maturity of understanding as a result of their mental age".[162]

1.83 In determining the meaning of "age" in s 83, the three-step framework for purposive interpretation set out in *Attorney-General v Ting Choon Meng*[163] was adopted. This requires the court:[164]

> … first, to ascertain the possible interpretations of the text in question; second, to ascertain the legislative purpose of the statute; and third, to compare the possible interpretations of the text against the ascertained legislative purpose.

1.84 The Court of Appeal noted that words in a statute are to be given their ordinary meaning, that is "what they were understood to mean at the time they were adopted by the Legislature". This is the sole objective basis to construe the framers' intent of the meaning of the legislative text.[165] In this context, this meant that the court should begin by considering what the word "age" in s 83 was understood to mean when the PC was adopted in 1872.[166] At that time, there was no concept of "mental age", which was a concept first articulated in 1905.[167] As the only other meaning of "age" at that time would mean "a period of history", such as the Elizabethan age, there was no ambiguity in the meaning of "age" which must mean chronological age.[168]

1.85 However, when the court is considering new phenomena which did not exist at the time a statute was enacted, it had to consider whether the ordinary meaning of the provision could "logically extend to new phenomena".[169]

1.86 While "age" refers to a measure of time, how long a person has lived since birth, "mental age" refers to a measurement of a person's cognitive ability determined by a mathematical formula.[170] As such, both

161 *Public Prosecutor v ASR* [2019] 1 SLR 941 at [34].
162 *Public Prosecutor v ASR* [2019] 1 SLR 941 at [34].
163 [2017] 1 SLR 373 at [59].
164 *Public Prosecutor v ASR* [2019] 1 SLR 941 at [75].
165 *Public Prosecutor v ASR* [2019] 1 SLR 941 at [77].
166 *Public Prosecutor v ASR* [2019] 1 SLR 941 at [79].
167 *Public Prosecutor v ASR* [2019] 1 SLR 941 at [79].
168 *Public Prosecutor v ASR* [2019] 1 SLR 941 at [79].
169 *Public Prosecutor v ASR* [2019] 1 SLR 941 at [81].
170 *Public Prosecutor v ASR* [2019] 1 SLR 941 at [81].

concepts were "qualitatively different"; thus, "age" in s 83 did not include mental age.

1.87 The impugned differentia in the present case was chronological age, in relation to the characteristic of being "above 7 years of age and under 12". Section 83 was allegedly unconstitutional and inconsistent with Art 12(1) for failing to take into account the mentally challenged.[171] The Court of Appeal held that the purpose of s 83 was broader than the respondent's contention that it was "to excuse apparent culpability by taking into account the maturity of the offender". In referring to parliamentary debates, the Court of Appeal noted that s 83's purpose was:[172]

> … partly to excuse young children from criminal liability because they are likely to have very low culpability for their offending acts in view of their incomplete intellectual development, and also partly to protect them from the harshness of the criminal justice system.

1.88 The Court of Appeal considered that the chronological age range of 7–12 was "plainly a reasonable criterion" for delineating to whom protection under s 83 of the PC would apply. This was a "meaningful proxy" because the younger a person is, the less mature he is likely to be".[173] The reasonable classification test does not require the criterion to be "perfect nor accurate"; thus, s 83 was considered consistent with Art 12(1), as well as Art 9(1), as the enquiry into whether an alleged law was "so arbitrary and absurd" so as not to constitute "law" under Art 9(1) involved an inquiry no different from that under Art 12(1).[174]

VI. Article 14 – Right to assembly

1.89 In *Wham Kwok Han Jolovan v Public Prosecutor*,[175] the appellant was convicted for organising a public assembly on 26 November 2016 entitled "Civil Disobedience and Social Movements" without a permit, which was an offence under s 16(1)(*a*) of the Public Order Act[176] ("POA").

1.90 The constitutionality of s 16(1)(*a*) of the POA was challenged as violating Art 14(1)(*b*) of the Constitution, which protects the rights of

171 *Public Prosecutor v ASR* [2019] 1 SLR 941 at [87].
172 *Public Prosecutor v ASR* [2019] 1 SLR 941 at [88].
173 *Public Prosecutor v ASR* [2019] 1 SLR 941 at [88].
174 *Public Prosecutor v ASR* [2019] 1 SLR 941 at [89].
175 [2019] SGHC 251.
176 Cap 257A, 2012 Rev Ed.

all citizens to "assemble peaceably and without arms". This is unarguably "not an absolute right".[177]

1.91 The event in question involved non-Singapore citizens and so did not fall within the Public Order (Exempt Assemblies and Processions) Order 2009.[178] It fell within the definition under s 2(1) of the POA of "public assembly" as members of the public were invited to attend, which satisfied the "public" element.[179] It was also an "assembly", which s 2(1)(*b*) of the POA defined as a gathering or meeting which could include a lecture, debate or talk for the purpose of publicising "a cause or campaign". The court found that the advocacy of civil disobedience to bring about social change was itself a cause, noting that the event was not "just a neutral academic discussion" about civil disobedience.[180]

1.92 The Commissioner of Police may grant a conditional or unconditional permit on any of the grounds listed under s 7(2). The High Court rejected the appellant's submission that s 16(1)(*a*) of the POA contravened Art 14 as any person organising a public assembly without a permit committed an offence, even if the Commissioner's refusal to grant a permit might be inconsistent with s 7 and therefore invalid.[181]

1.93 Chua Lee Ming J rejected this submission as it rested on the assumption that "a person who disagrees with the Commissioner's decision is entitled to disregard and defy it, instead of challenging it in Court in accordance with the law".[182] Until the Commissioner's decision, made pursuant to a statutory power, was quashed by the court, it "should be obeyed".[183] It was for the court alone, vested with judicial power under Art 93, to decide whether the Commissioner's decision was invalid; such "vigilante conduct" where a person took the law "into his own hands" was not to be condoned.[184]

1.94 The appellant further argued that if the court found the decision not to grant a permit to be unlawful and quashed it, the applicant would have to make a fresh application to the Commissioner for a permit; if the Commissioner in bad faith ignored the court's decision and refused to grant the permit on the same reasons the court found to be unlawful, the

177 *Wham Kwok Han Jolovan v Public Prosecutor* [2019] SGHC 251 at [18].
178 S 486/2009.
179 *Wham Kwok Han Jolovan v Public Prosecutor* [2019] SGHC 251 at [32].
180 *Wham Kwok Han Jolovan v Public Prosecutor* [2019] SGHC 251 at [44].
181 *Wham Kwok Han Jolovan v Public Prosecutor* [2019] SGHC 251 at [23].
182 *Wham Kwok Han Jolovan v Public Prosecutor* [2019] SGHC 251 at [25].
183 *Wham Kwok Han Jolovan v Public Prosecutor* [2019] SGHC 251 at [25].
184 *Wham Kwok Han Jolovan v Public Prosecutor* [2019] SGHC 251 at [25].

applicant would have to challenge this refusal again in court, a process that could go on indefinitely, yielding no "practical remedy".[185]

1.95 The High Court held that the appellant's suggestion that the Commissioner or relevant authority may act "in bad faith" in disregarding the court's decision "[was] wholly speculative and unsubstantiated". Such assumption of bad faith would lead to the "absurd result" that any law requiring a permit or licence before an activity was carried out could be struck down "simply by arguing that the power to grant the permit or licence may be exercised in bad faith".[186] Instead, the court should assume the Commissioner would act in good faith and not ignore the court's decision.[187]

1.96 Chua J noted in *Ramalingam Ravinthran v Attorney-General*[188] that a presumption of legality operated in relation to acts of high officials of state, and this was applied in relation to a decision the AG had made. In the immediate case, the appellant's submission related to a decision the AG "[might] make". Chua J noted that "there is a stronger case for the presumption that high officials of state will, consistent with the rule of law, act in accordance with the law".[189] Thus, s 16(1)(*a*) of the POA, which made it an offence to organise a public assembly without a permit, was not found to be unconstitutional.

185 *Wham Kwok Han Jolovan v Public Prosecutor* [2019] SGHC 251 at [26].
186 *Wham Kwok Han Jolovan v Public Prosecutor* [2019] SGHC 251 at [28].
187 *Wham Kwok Han Jolovan v Public Prosecutor* [2019] SGHC 251 at [27].
188 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49.
189 *Wham Kwok Han Jolovan v Public Prosecutor* [2019] SGHC 251 at [29].