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1. ADMINISTRATIVE AND CONSTITUTIONAL LAW

THIO Li-ann
BA (Oxford) (Hons), LLM (Harvard Law School), PhD (Cambridge); Barrister (Gray's Inn, UK);
Provost Chair Professor, Faculty of Law, National University of Singapore.

Introduction

1.1 The major developments in public law in 2017 related primarily to constitutional law, while the administrative law cases involved the application of well-established principles or tests.

1.2 The concern to develop constitutional jurisprudence on "autochthonous constitutional grounds, informed by our national considerations" is characteristic of contemporary judicial decisions, as can be seen in *Comptroller of Income Tax v ARW*.[1] The issue there concerned the scope of the Attorney-General's powers and whether the Attorney-General is entitled to intervene in discovery applications to assert public interest privilege. Aedit Abdullah JC (as his Honour then was) said that while reference might be made to English case law in search of analogies, caution should be taken as the assertion of public interest privilege by the English Attorney-General, derived from Crown prerogative, was a concept "not easily transposed into a system with a written constitution".[2] The judicial determination of the boundaries of the various government branches should be based on construing the constitution rather than determining the content of prerogative rights "which arose in a system of government different from our own".[3] Further, while the Attorney-General in England and Wales is a Minister of the Crown, the Singapore Attorney-General is a professional holding a constitutional office, as a member of the executive branch.[4] The scope of the Attorney-General's powers is therefore "controlled and circumscribed by the language and framework of the Constitution"[5] under Art 35 of the Constitution of the Republic of Singapore.[6]

1.3 Three significant cases directed themselves to the new reserved elections provision, Art 19B of the Constitution, to be operationalised

1 [2017] SGHC 180 at [35].
2 *Comptroller of Income Tax v ARW* [2017] SGHC 180 at [34].
3 *Comptroller of Income Tax v ARW* [2017] SGHC 180 at [34].
4 *Comptroller of Income Tax v ARW* [2017] SGHC 180 at [36].
5 *Comptroller of Income Tax v ARW* [2017] SGHC 180 at [37].
6 1999 Reprint.

under Art 164, which were introduced by constitutional amendment in 2016. In these decisions, the courts provided extensive elaboration of what purposive interpretation entailed in reading the Constitution, as well as an interesting albeit *obiter* discussion of the basic structure doctrine, as it may apply to Singapore. Some exposition on free speech theory was also discussed in *Attorney-General v Ting Choon Meng*[7] ("*Ting Choon Meng*").

ADMINISTRATIVE LAW

Standing

1.4 The Court of Appeal in *Deepak Sharma v Law Society of Singapore*[8] ("*Deepak Sharma*") made an observation that the view of the High Court judge on standing was "persuasive" without expressing a conclusive view, as this was unnecessary "in the absence of detailed arguments by the parties".[9] This view was that any person could make a complaint under s 85(1) of the Legal Professions Act[10] ("LPA") based on the wider public interest in maintaining the high standards and good reputation of the legal profession.

Leave

1.5 For leave to be granted under O 53 r 1 of the Rules of Court[11] ("RoC") three requirements must be satisfied: first, the matter must be susceptible to judicial review; second, the plaintiff must have sufficient interest or standing in the matter; and third, the material before the court must disclose an arguable case or a *prima facie* case of reasonable suspicion in favour of granting the public law remedies sought by the plaintiff.

1.6 The plaintiff, Zero Geraldo Mario, made two complaints to The Law Society of Singapore in *Nalpon Zero Geraldo Mario v Law Society of Singapore*[12] ("*Nalpon v Law Society of Singapore*") and *Re Nalpon, Zero Geraldo Mario*[13] ("*Re Nalpon*"). The Law Society appointed a Review Committee in both cases, and in both cases, the complaints were

7 [2017] 1 SLR 373.
8 [2017] 1 SLR 862.
9 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [36].
10 Cap 161, 2009 Rev Ed.
11 Cap 322, R 5, 2014 Rev Ed.
12 [2017] SGHC 206.
13 [2017] SGHC 301.

dismissed. In both cases, the application failed at the leave stage, in that a *prima facie* case of reasonable suspicion was not made out.

1.7 In *Nalpon v Law Society of Singapore*, the then President of the Law Society, Thio Shen Yi, had made a comment, reported in a daily newspaper on a case when a 14-year-old male student who was questioned by the police for molesting a girl killed himself shortly afterwards. In it, he suggested the police should have taken a "less intimidating way" of approaching the investigation. In response, the Law Minister reportedly chided Senior Counsel Thio for practically implying that the student killed himself because of police intimidation, stating that "Mr Thio has a duty to be fair to the police officers".[14] The Law Minister added Mr Thio seemed to make the assertion of intimidation, based on other statements, which are themselves false.

1.8 Among the charges Mr Nalpon brought in his written complaint to the Law Society was that Mr Thio had acted in a manner unbefitting of an advocate and solicitor and as Law Society President in making false statements in the February 2016 Law Gazette on a case under police investigation, contrary to s 67 of the Legal Profession (Professional Conduct) Rules.[15] There were complaints too, concerning statements made to the media. The Review Committee issued a report directing the Council of the Law Society ("Council") to dismiss the complaint;[16] the Law Society received the report and sent a copy to Mr Nalpon on 8 November 2016. Mr Nalpon later sought a quashing order against the decision of the Review Committee. Mr Nalpon filed the originating summons out of time, that is, breaching the three months rule in O 53 r 1(6) of the RoC and did not satisfactorily account for the delay.[17]

1.9 In commenting on the substantive merits of the application, the High Court noted that Mr Nalpon had failed to make a *prima facie* case of reasonable suspicion in favour of granting the public law remedies sought by the plaintiff. While the evidence suggested that Mr Thio had made a wrong statement, there was no evidence that there was a deliberate intent to make a false statement or that Mr Thio had no reasonable ground to believe the statement was true. On the facts, the Review Committee had not made an error of law, shown bias or irrationality.[18]

14 *Nalpon Zero Geraldo Mario v Law Society of Singapore* [2017] SGHC 206 at [12].
15 Cap 161, R 1, 2010 Rev Ed.
16 *Nalpon Zero Geraldo Mario v Law Society of Singapore* [2017] SGHC 206 at [2].
17 *Nalpon Zero Geraldo Mario v Law Society of Singapore* [2017] SGHC 206 at [35].
18 *Nalpon Zero Geraldo Mario v Law Society of Singapore* [2017] SGHC 206 at [60].

1.10 Mr Nalpon made another complaint to the Law Society against three lawyers who were his opposing counsel in a civil suit for conduct unbecoming in the conduct of that suit in *Re Nalpon*. The Review Committee dismissed the complaints on the basis that the information provided by the applicant did not provide any support for his complaints.[19] The "sensible inference" from the Review Committee's decision letter, which was brief, was that it had "properly considered the complaint" of the applicant and "simply found no basis for his grievance".[20]

1.11 The plaintiff argued that the Review Committee had failed to give "due consideration" to his complaint as it was not possible for it to assess all the evidence presented to it "in only seven days (or four working days)".[21] The High Court stated that it was not the Review Committee's role to carry out a "*detailed* examination" [emphasis in original] of the underlying facts as this fell into the remit of the trial judge who heard witnesses and adduced evidence at trial.[22] The Review Committee's decision was not *Wednesbury* unreasonable just because the applicant disagreed with the decision.[23] See Kee Oon J noted that this test did not mean there was "a single inevitable approach or determination" in a given matter, refereeing *Chee Siok Chin v Minister for Home Affairs*.[24] On the facts, there were "reasonable grounds" to support the Review Committee's decision as no finding had yet been made on the key factual contention of whether Innovez had only one project at the material time. The plaintiff had in three of six complaints asserted that the three lawyers sought to mislead the court on this very point.[25] The assistant registrar decided to leave this matter to the trial judge and without a conclusive finding on this factual question, there was no basis to conclude the lawyers had attempted to mislead the court.[26]

Internal remedies rule

1.12 The question whether the Rules of the Singapore Swimming Club ("Club's Rules"), an unincorporated association, must be complied

19 *Re Nalpon, Zero Geraldo Mario* [2017] SGHC 301 at [23].
20 *Re Nalpon, Zero Geraldo Mario* [2017] SGHC 301 at [23].
21 *Re Nalpon, Zero Geraldo Mario* [2017] SGHC 301 at [24].
22 *Re Nalpon, Zero Geraldo Mario* [2017] SGHC 301 at [24].
23 *Re Nalpon, Zero Geraldo Mario* [2017] SGHC 301 at [25].
24 [2006] 1 SLR(R) 582 at [95].
25 *Re Nalpon, Zero Geraldo Mario* [2017] SGHC 301 at [10].
26 *Re Nalpon, Zero Geraldo Mario* [2017] SGHC 301 at [25].

with before judicial proceedings are commenced arose in *Tan Wee Tin v Singapore Swimming Club*.[27]

1.13 The defendant was the Singapore Swimming Club ("SSC") and the plaintiffs were all members of the SSC Management Committee ("MC") at the relevant time. In November 2011, the Court of Appeal found the then President, Freddie Koh, of the MC (May 2008–2009) liable for defamation.

1.14 In December 2011, a series of confidential MC meetings took place reaffirming an indemnity resolution passed by the 2008 MC. By January 2012, the indemnity resolution had been reaffirmed thrice, allowing payments to be made towards Mr Koh's legal expenses. On 4 March 2012, the defendant convened an extraordinary general meeting of members, where it was resolved that Mr Koh would be removed as President of the defendant's MC and for the defendant to stop making further payments towards Mr Koh's legal expenses.[28] On 12 March 2012, Mr Koh commenced proceedings by originating summons against the defendant, seeking declarations that the indemnity resolution was valid and bound the defendant, and that the resolution of 4 March 2012 was void.[29]

1.15 A motion of censure and no confidence was sought at the 27 May 2012 Annual General Meeting ("AGM") by a member of the defendant, in relation to the cheque for $1,021,793.48 made in payment towards Mr Koh's legal expenses. The motion of censure was amended and directed at the first and second plaintiff, and passed at the 2012 AGM. On 18 June 2012, after the new MC was elected, the defendant commenced proceedings to recover the moneys the defendant had paid towards Mr Koh's legal expenses. The Court of Appeal in *Singapore Swimming Club v Koh Sin Chong Freddie*[30] found that the actions of Mr Koh fell outside the scope of the indemnity resolution as he had not acted properly in discharging the duties and responsibilities on behalf of the defendant when he made the defamatory statements.[31]

1.16 Shortly thereafter, a complaint was lodged against members of the 2011 MC where a Mr Poh Pai Chin alleged that the 2011 MC members breached their fiduciary duty to the defendant in affirming the

27 [2017] SGHCR 21.
28 *Tan Wee Tin v Singapore Swimming Club* [2017] SGHCR 21 at [7].
29 *Tan Wee Tin v Singapore Swimming Club* [2017] SGHCR 21 at [8].
30 [2016] 3 SLR 845.
31 *Tan Wee Tin v Singapore Swimming Club* [2017] SGHCR 21 at [16].

indemnity resolution and paying Mr Koh's legal expenses.[32] The complaint was referred to the Disciplinary Panel convened under the Club's Rules and charges brought against each member of the 2011 MC. The Disciplinary Committee decided to expel the plaintiffs on the basis of these charges, effective 28 October 2016. The plaintiffs appealed this decision. The Appeals Board dismissed their claims and the plaintiffs were informed they could further appeal this decision to a meeting of general members within 21 days under r 14(f) of the Club's Rules. The plaintiffs instead sought a declaration that the Disciplinary Committee's decision to expel the plaintiffs were *ultra vires* the Club's Rules or erroneous in law and a breach of natural justice. The issue before the court was whether the originating summons should be stayed in favour of internal appellate process and dispute resolution process stipulated in the Club's Rules.[33]

1.17 Asst Registrar Justin Yeo noted that the nature of the relationship between a club and its members was contractual; there was no local case directly addressing the need to exhaust the internal appellate process as stipulated by club rules, but the courts considered a Malaysian High Court case dealing with this point: *Dato' Hj Talaat bin Hj Husain v Chak Kong Yin*.[34] Here, the defendant was required to abide by club rules procedures to appeal against his expulsion, before this expulsion could be challenged in court.[35]

1.18 The asst registrar also took note of how, in cases where the decisions of public authorities are impugned on natural justice grounds, Singapore courts have "consistently required"[36] that the applicant first exhaust internal remedies before bringing the matter to court.[37] English courts have adopted a similar approach as in *R (Echendu) v School of Law, University of Leeds*.[38] In exceptional cases, the rule that internal remedies must first be exhausted may be departed from, where it would serve no purpose nor provide the applicant with an alternative remedy. An example might be found in *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority*[39] ("*Chiu Teng*"), where the appeal process available assumed that a developer would be dissatisfied with the differential premium payable on the Table of Development Charges ("DC Table"),

32 *Tan Wee Tin v Singapore Swimming Club* [2017] SGHCR 21 at [17].
33 *Tan Wee Tin v Singapore Swimming Club* [2017] SGHCR 21 at [25].
34 [2004] 7 MLJ 295.
35 *Tan Wee Tin v Singapore Swimming Club* [2017] SGHCR 21 at [31].
36 *Tan Wee Tin v Singapore Swimming Club* [2017] SGHCR 21 at [32].
37 See *Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR(R) 92 and *Tey Tsun Hang v Attorney-General* [2015] 1 SLR 856.
38 [2012] EWHC 2080 (Admin) at [33].
39 [2014] 1 SLR 1047.

whereas on the facts of *Chiu Teng*, the disputed differential premium had been determined by the chief valuer and not the DC Table.[40]

1.19 The asst registrar distinguished between the 2012 AGM and disciplinary proceedings which performed different purposes.[41] Further, Bye-Law 19(j), which required a deposit of $15,000 to secure the attendance of the aggrieved party seeking to bring an appeal under r 14(f) of the Club's Rules, was not so unreasonable or onerous to practically preclude bringing an appeal under r 14(f). If "truly onerous", it was then arguable the plaintiffs had no alternative appellate recourse within the Club's Rules.[42] It was not onerous as the sum of $15,000 is refundable if the appealing party stays and attends the entire proceedings.[43] In addition, concerns about whether the plaintiffs would receive a fair hearing before the meeting of general members was a matter that could also be raised subsequently after the completion of the internal appellate process.[44] The plaintiff also could not be permitted to rely on a position he had unilaterally put himself in, in allowing the time for appeal under r 14(f) to lapse so as to argue that such appeal was no longer available to him. Otherwise, any member "may exhaust the internal appellate process by simply refusing to pursue any appeal, and then proceed to bring his grievance directly to court on the basis that he has no alternative remedy.[45] This would "fly in the face of the disciplinary process and appellate mechanism" under the Club's Rules.[46]

1.20 Thus, the asst registrar granted a stay of the originating summons in favour of the internal appellate process provided by r 14(f) of the Club's Rules. The plaintiffs were given 21 days to bring an appeal under r 14(f) and if they were aggrieved with the general members' decision, they could seek further recourse under r 45, which provided for a "sufficiently clear"[47] multi-tiered dispute resolution regime which requires the plaintiffs to first endeavour to resolve the issue by way of mediation, before judicial proceedings.[48]

40 *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [34].
41 *Tan Wee Tin v Singapore Swimming Club* [2017] SGHCR 21 at [43].
42 *Tan Wee Tin v Singapore Swimming Club* [2017] SGHCR 21 at [49].
43 *Tan Wee Tin v Singapore Swimming Club* [2017] SGHCR 21 at [50].
44 *Tan Wee Tin v Singapore Swimming Club* [2017] SGHCR 21 at [53].
45 *Tan Wee Tin v Singapore Swimming Club* [2017] SGHCR 21 at [57].
46 *Tan Wee Tin v Singapore Swimming Club* [2017] SGHCR 21 at [57].
47 *Tan Wee Tin v Singapore Swimming Club* [2017] SGHCR 21 at [67].
48 *Tan Wee Tin v Singapore Swimming Club* [2017] SGHCR 21 at [60].

Error of law

1.21 The Court of Appeal in *Deepak Sharma* heard an appeal against the decision of the High Court not to grant an application for judicial review seeking a quashing order against the decision of the Review Committee constituted under s 85(6) of the LPA. The appellant claimed that the Review Committee had made an error of law in dismissing his complaint made against two lawyers for making grossly excessive claims for party and party costs against the appellant's wife. A disciplinary committee of the Singapore Medical Council ("SMC") had convicted the appellant's wife, Susan Lim, on 94 charges.

1.22 The narrow issue before the Court of Appeal was whether a significant reduction on the taxation of party and party costs could constitute a finding of professional misconduct.[49] SMC's lawyers, WongPartnership LLP ("WP") had filed three Bills of Costs for taxation amounting to a total of $1,007,009.37, which the asst registrar taxed down to a total of $340,000 at a taxation hearing.[50] SMC applied for a review of taxation which was heard before a judge, where WP voluntarily reduced the total sum claimed by $287,009.37 on the basis of giving "a discount of 20% on the time used because of overlap between lawyers" as well as re-getting up for lawyers who later "joined the team".[51] The judge re-adjusted costs to $370,000.[52]

1.23 The Court of Appeal found that the review committee had not made an error of law in stating the conditions for finding misconduct in a matter concerning the claiming of party and party costs. This case did not concern a lawyer overcharging his client for solicitor and client costs, which could amount to professional misconduct.[53] Rather, the issue related to party and party costs which did not involve a "relationship of trust and confidence between solicitor and client".[54] The claim for costs arose in "an *adversarial* context" [emphasis in original][55] and typically, the court will on taxation reduce a party's claim for party and party costs as the opposing party will usually dispute the quantum of costs to be allowed.[56] As such, an excessive claim for costs in this context will generally not in itself constitute professional misconduct by the lawyer concerned. There might be an "*extremely rare*" [emphasis in

49 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [2].
50 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [11]–[12].
51 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [12].
52 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [13].
53 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [39].
54 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [40].
55 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [41].
56 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [41].

original][57] situation such as when the initial claim for party and party costs is "for an astronomical figure" which the court taxes down to "a *tiny fraction*" [emphasis in original][58] of the figure. The Court of Appeal found the High Court's statement of legal principle to be "*thoroughly accurate*" [emphasis in original],[59] to wit that in extreme cases, a lawyer's gross overclaim of party and party costs might in itself constitute professional misconduct, but usually only if such overcharging would be coupled with other forms of misconduct by that lawyer, depending on the precise facts of that case.[60]

1.24 The Court of Appeal underscored that in application for judicial review, it was concerned not with the merits of an actual decision, but the reasoning process. The review committee had stated the same test as that set out by the High Court judge,[61] noting that excessive charging *per se* would not generally constitute professional misconduct absent an improper or a fraudulent claim. An improper claim could include one when the quantum claimed is "*so astronomical as to be so disproportionate and unjustifiable that the making of that claim would itself constitute professional misconduct*" as "*no reasonable lawyer*" [emphasis in original][62] would ever countenance making such claim on behalf of his party. Thus, the review committee did not misstate the relevant legal principle and had not committed an error of law susceptible to judicial review.[63] In other words, there was no illegality. The appellant also argued that the review committee had made an error of law in not taking into account the relevant fact that the Bills of Costs contained a claim for impermissible Duplicated Costs;[64] WP had voluntarily reduced the costs.[65] The Court of Appeal characterised this as a matter of procedural impropriety.[66] They found no evidential basis to think the review committee had failed to consider the appellant's argument concerning WP's acknowledgment made during the taxation review to reduce costs. The appellant conceivably was relying on the review committee's failure to make express reference to this reduction in costs.[67]

57 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [42].
58 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [42].
59 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [44].
60 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [44].
61 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [48].
62 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [47].
63 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [48].
64 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [56].
65 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [56].
66 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [56].
67 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [58].

1.25 The Court of Appeal borrowed from basic natural justice principles applied by arbitral tribunals which provided general guidelines on procedural fairness where it was alleged by a party that the tribunal failed to consider a particular issue.[68] The Court of Appeal identified four principles which, when applied to the instant case, showed that the appellant had not provided a sufficient explanation for alleging the review committee had failed to consider the relevant matter. First, not considering an important issue that was pleaded would breach natural justice as the tribunal "would not have brought its mind to bear on an important aspect of the dispute before it".[69] Second, an inference that the tribunal did not apply its mind to the dispute in breach of natural justice should not be drawn where the facts were consistent with the tribunal having "misunderstood" the aggrieved party's case, where the tribunal was mistaken as to the law, did not deal with a pleaded point because it did not consider it necessary to do so.[70] Third, natural justice is not breached where the tribunal reaches its decision on the argument without articulating its reasoning, or reaches the wrong decision, or fails to understand the argument.[71] Fourth, the central inquiry is whether the decision "reflects the fact that the tribunal had applied its mind to the critical issues and arguments", as the "explicability of a decision" was but one factor in the analysis.[72] The Court of Appeal considered that the appellant's complaint centred on disagreeing with the outcome of the review committee's determination.[73]

1.26 The review committee had in fact determined that no improper claims had been submitted and took explicit note that the fact the Bills of Costs were significantly taxed down did not give rise to an inquiry of professional misconduct, in the absence of other improper or fraudulent claims. Had an improper claim been advanced, it was "perfectly reasonable" to assume the review committee would have pursued the matter.[74]

1.27 If the review committee had directed itself to the "right inquiry" and concluded there was no impropriety, it was "outside the purview of a supervising court to itself sift through the evidence and evaluate whether or not the review committee was correct to arrive at that

68 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [59].
69 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [59(a)]; see also *AKN v ALC* [2015] 3 SLR 488 at [46].
70 *AKN v ALC* [2015] 3 SLR 488 at [46].
71 *ASG v ASH* [2016] 5 SLR 54 at [91].
72 *TMM Division Maritima SA de CV v Pacific Richfield Marine Pte Ltd* [2013] 4 SLR 972 at [89] and [90].
73 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [60].
74 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [61].

conclusion".[75] It was for the review committee to make factual determinations of whether there was substance to the allegation of misconduct, from overcharging or otherwise, and the supervising court was not to "stray beyond its proper remit by venturing improperly into the merits".[76]

Exercise of discretion – Illegality; irrationality

1.28 The exchange of information ("EOI") regime pursuant to Art 25(1) of a bilateral treaty – "Convention between the Republic of Singapore and the Republic of Korea for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income"[77] ("Convention") – seeks to promote global co-operation in fighting tax evasion. The Comptroller of Income Tax is empowered under the terms of s 105D of the Income Tax Act[78] ("ITA"), on receiving a request from a foreign tax authority, to convey information to assist in the administration of that foreign tax authority's treaty with Singapore or its domestic tax law.

1.29 The applicants sought leave for judicial review in *AXY v Comptroller of Income Tax*[79] to challenge as illegal or irrational a decision taken by the Comptroller to issue notices to various Singapore banks to the National Tax Services ("NTS") of the Republic of Korea, which had made a request for information. A request for such information had to comply with the requirements under the Eighth Schedule of the ITA and the Comptroller had to be satisfied it was "foreseeably relevant" to the administration of the Convention or domestic tax laws.[80] The High Court noted that there was a "strong public interest" in allowing taxpayers recourse to judicial review "to ensure the lawful release of their confidential information".[81]

1.30 Judicial review of the Comptroller's decision is available, "measured against the duties and obligations placed on the Comptroller" as codified in the ITA and Convention as incorporated into domestic law by s 105D of the ITA.

75 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [64].
76 *Deepak Sharma v Law Society of Singapore* [2017] 1 SLR 862 at [64].
77 Date of conclusion 6 November 1979, entry into force 13 February 1981, effective date 1 January 1979.
78 Cap 134, 2014 Rev Ed.
79 [2017] SGHC 42.
80 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [14].
81 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [72].

1.31 The applicants failed to establish an arguable *prima facie* case of reasonable suspicion that this decision was illegal or irrational. They had argued that the decision was illegal on several grounds. First, that the Comptroller had failed to make sufficient inquiry into whether the Request complied with the Eighth Schedule of the ITA, which sets out the necessary information to be included in a request for information.[82] The High Court rejected the applicants' argument that the Comptroller was obliged to examine the veracity and bases of the foreign tax authority's statement, as prescribed in the Eighth Schedule. Rather, the Comptroller was entitled to take the NTS statements "at face value" in determining whether the Eighth Schedule requirements were satisfied. The amendments made in 2013 to the ITA were designed to entrust "greater responsibility" to the Comptroller, which would be incongruent if the courts undertook an "even more searching inquiry" into the justification of requests of foreign tax authorities; prior to 2013, the courts took the statement of foreign authorities "at face value".[83] The argument that the Comptroller had a broad duty to "resolve doubts" in statements by foreign tax authorities which facially satisfy the Eighth Schedule requirements was not sustainable as the Comptroller "cannot be obliged in each and every instance to call foreign witnesses and to resolve complex issues of foreign law",[84] nor was it irrational to disregard on-going Korean litigation about the applicants' tax residency.[85]

1.32 While a court exercising judicial review could not require the Comptroller to make further inquiries to test the veracity of a request, the law does not require the Comptroller to "rely solely on the statements provided by foreign authorities";[86] "it remains open to the Comptroller to engage with a foreign tax authority regarding any request for information", which may engage questions of domestic Korean law.[87] The general rule was that the "proper application" of a request state's tax law and the exercise of powers of the requesting authority were "matters of domestic law to be dealt with by domestic courts and authorities of the requesting state".[88]

1.33 Second, s 105D(3) of the ITA permits only the exchange of information which is "foreseeably relevant" to enforcing the Convention or the requesting state's tax laws. This required information which would be "possibly relevant" at the time of the request, and not

82 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [27].
83 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [30].
84 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [31].
85 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [65].
86 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [34].
87 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [34].
88 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [33].

merely speculative.[89] The High Court found in the instant case that the Comptroller had "properly directed its mind to the issue of foreseeable relevance" and clarified, as appropriate, matters with the NTS. In this regard, it noted the need to strike a balance "between the Comptroller's ability to respond to requests for information without undue haste and administrative burden, and the taxpayer's legitimate interest in contesting an allegedly unauthorised release of his personal information".[90]

1.34 Third, the High Court rejected the argument that the Comptroller had erred in law or acted irrationally by relying on the mistaken fact that the applicants were Korean tax residents based on NTS's assertion, which the Korean tax courts and tribunals seized of the matter had not yet so concluded. The Comptroller did not have to take into consideration matters such as the tax residency or liability of persons subject to a request for information, which were questions of Korean domestic law.[91] As things were tentative, the Comptroller was entitled to rely on the NTS's statements.

1.35 The applicants' argument that the Comptroller had acted illegally or irrationally because the Notices mirroring the Request were too broad as "clear, specific and legitimate" also failed. The terms "clear, specific and legitimate" were used in parliamentary discussions and appeared on the Inland Revenue Authority of Singapore's website,[92] but were not an addendum to the Eighth Schedule of the ITA. That is, they did not operate to create "a distinct or specific requirement to bind the Comptroller as a matter of law".[93] On the facts, the Comptroller had sought clarifications and evidence, and there was nothing on the face of the clarified Request that showed any impropriety.[94] Finally, the applicants argued that the Comptroller in issuing the Notices had failed to balance their individual rights to confidentiality and privacy, against the policy of having an efficient EOI regime.[95] The High Court held that Parliament had itself sought to balance the tension between efficiency and invasion, for example, through listing exceptions where a requested state did not have to comply with the request for information. As such, the Comptroller was under no legal duty to conduct such a balance as a "distinct legal requirement" regarding each request for information.[96]

89 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [39]–[41].
90 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [46].
91 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [51].
92 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [56].
93 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [57].
94 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [59].
95 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [60].
96 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [60].

Improper delegation of discretion

1.36 The High Court found there had been no improper delegation of discretion on the facts, even if the Notices issued matched the language of the Request. This was proper if the Comptroller thought it appropriate, and on the facts, the Comptroller had "directed its mind independently", satisfying Art 25 of the Convention and ss 105B and 105F of the ITA. This was evident in that the Comptroller independently analysed the Request, categorised the companies referred to in the Request and made genuine inquiries to NTS by letters; as such, Abdullah JC concluded that the decision to issue the Notices were neither "pre-determined or pre-mature". This was consistent with precedent.[97]

No duty to give reasons

1.37 In its brief decision, the review committee had not given reasons and had failed to explain why the documents and information provided in support of the plaintiff's complaints did not support these complaints.[98] See J in *Re Nalpon* noted there was "no general common duty to give reasons for administrative decisions in Singapore", unless "a decision appears to be aberrant or involves matters of special importance to the applicant such as personal liberty".[99] Neither of these two factors were present in the instant case.

1.38 This was the position of the Court of Appeal in *Manjit Singh s/o Kirpal Singh v Attorney-General*,[100] which followed the approach of the English House of Lords in *Regina v Secretary of State for the Home Department, ex parte Doody*.[101] However, a few months later, the Court of Appeal in *Manjit Singh s/o Kirpal Singh v Attorney-General*[102] noted that whether there was a requirement to furnish reasons was "dependent on the operative statutory context and factual matrix of each case". Section 85(8)(*a*) of the LPA provides that if the review committee unanimously holds that a complaint lacks substance, it shall direct the Council to dismiss the matter and "give the reasons for the dismissal". However, on the facts of *Re Nalpon*, the review committee had given a

97 *AXY v Comptroller of Income Tax* [2017] SGHC 42 at [62] and [63]; see also *Registrar of Vehicles v Komoco Motors Pte Ltd* [2008] 3 SLR 340 at [31] and *Lines International Holding (S) Pte Ltd v Singapore Tourist Promotion Board* [1997] 1 SLR(R) 52 at [98] and [118].

98 *Re Nalpon, Zero Geraldo Mario* [2017] SGHC 301 at [27].

99 *Re Nalpon, Zero Geraldo Mario* [2017] SGHC 301 at [28].

100 [2013] 2 SLR 844 at [85].

101 [1994] 1 AC 531.

102 [2013] 4 SLR 483 at [13].

reason for dismissing the complaint, in that the information and documents provided did not support the applicant's complaint.[103] An assertion for more extensive or better reasons is not in itself a recognised ground for review.[104]

Broad discretion of Public Prosecutor under section 33B of Misuse of Drugs Act[105]

1.39 The Court of Appeal in *Muhammad bin Abdullah v Public Prosecutor*[106] confirmed that with respect to the Public Prosecutor's discretion under s 33B of the Misuse of Drugs Act, operational matters such as whether the information provided is important or likely to bear fruit, were "solely within the purview of the [Public Prosecutor]".[107] As such, the appellant did not have an enforceable right at law to compel the Public Prosecutor to direct the Central Narcotics Bureau to take a further statement at a time of the appellant's choosing. The appellant knew that if he wished to obtain a certificate of substantive assistance under s 33B, he had a duty to give evidence to CNB, which could assist in disrupting drug trafficking activities, and so avoid the death penalty. The appellant had the opportunity to provide information to assist CNB.

1.40 When the Public Prosecutor declines to issue a certification, he is not required to disclose his reasons every time this is challenged, as this could cause information about CNB's *modus operandi* to end up in the "public domain", which could hamper its enforcement capabilities.[108]

CONSTITUTIONAL LAW

Articles 19 and 19B of the Constitution and constitutional interpretation

1.41 The issue of interpreting Art 19B of the Constitution, which provides for reserved elections in relation to the elected presidency, arose in three cases heard in 2017.[109] This provision, which was

103 *Re Nalpon, Zero Geraldo Mario* [2017] SGHC 301 at [29].
104 *Re Nalpon, Zero Geraldo Mario* [2017] SGHC 301 at [29].
105 Cap 185, 2008 Rev Ed.
106 [2017] 1 SLR 427.
107 *Muhammad bin Abdullah v Public Prosecutor* [2017] 1 SLR 427 at [65].
108 *Muhammad bin Abdullah v Public Prosecutor* [2017] 1 SLR 427 at [66].
109 See *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424, *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 and *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489.

introduced by way of a 2016 constitutional amendment, provides the following:

> **19B.**—(1) An election for the office of President is reserved for a community if no person belonging to that community has held the office of President for any of the 5 most recent terms of office of the President.
>
> (2) A person is qualified to be elected as President —
>
> (*a*) in an election reserved for one community under clause (1), only if the person belongs to the community for which the election is reserved and satisfies the requirements in Article 19 …

1.42 This has been described as the "hiatus-triggered model" and the first time this was operationalised was in relation to the 2017 Presidential Election, after the expiry of the six-year term of President Tony Tan, who had been elected in the 2011 presidential election. In November 2016, Prime Minister Lee Hsien Loong stated that the 2017 Presidential Election would be reserved for Malay candidates, on the basis that President Wee Kim Wee would be taken as the first President who exercised the powers of the elected presidency.[110] In 2017, the Presidential Elections Act[111] was amended and its Schedule stipulated that for the purposes of reserved elections, the presidential terms counted should begin with President Wee, who was a member of the Chinese community. President Wee had not been elected to office, as he was elected by Parliament in 1985 to assume office, which was fashioned after the Head of State in a Westminster parliamentary system who wielded ceremonial powers and served as a unifying symbol, being above politics. While the first presidential election was contested in 1993 and won by President Ong Teng Cheong, Parliament had vested President Wee with all the powers, functions and duties imposed upon the presidency by the 1991 constitutional amendment, as embodied in Art 163 today.

1.43 Dr Tan Cheng Bock ("C B Tan") had been a candidate for the 2011 presidential election, with the second highest votes, garnering 34.85% of the national vote compared to Dr Tony Tan, who received 35.20% of the vote, in a four-person race. In March 2016, C B Tan had announced his intention to contest the next presidential election.[112] As C B Tan is a member of the Chinese community, he was precluded from

110 "Next Presidential Election to Be Reserved for Malay Candidates: PM Lee" *Channel NewsAsia* (8 November 2016).

111 See the Presidential Elections (Amendment) Act 2017 (Act 6 of 2017).

112 "Tan Cheng Bock Says He Will Contest Next Presidential Election" *Channel NewsAsia* (11 March 2016).

contesting the 2017 Presidential Election which was reserved for members of the Malay community.

1.44 In *Tan Cheng Bock v Attorney-General*,[113] the plaintiff, C B Tan, sought to contest the question of when to start counting the first of the five most recent terms of office of the President, challenging the legislative stipulation that this should start with Dr Wee Kim Wee, who was elected by Parliament and not popular vote. A purposeful reading of Art 19B(1) supported the understanding that the first presidential term be counted for purposes of determining a reserved election under Art 19B(1) must be of a President elected by citizens.

1.45 As such, the plaintiff sought a declaration that s 22 of the Presidential Elections (Amendment) Act[114] ("PEA") was inconsistent with Arts 19B(1) and/or 164(1)(*a*) of the Constitution and therefore void. Further, the reference to President Wee in the Schedule of s 22 of the PEA, enacted in 2017, was also unconstitutional. Article 164(1)(*a*) requires the Legislature to enact a law which specifies "the first term of office of the President to be counted for the purposes of deciding whether an election is reserved under Article 19B" and it was accepted that it was a question of law whether Parliament had acted constitutionally in specifying President Wee's last term of office was to be counted as the first of the five most recent terms of the office of the President for Art 19B purposes, pursuant to Art 164(1)(*a*). Although the question of standing was not raised, Quentin Loh J was satisfied that the plaintiff would satisfy the requirements of standing, not least given the fact that if his arguments that the count could only start from the first popularly elected President, the 2017 Presidential Election would not be reserved for Malays and C B Tan would very likely be nominated as a candidate for the office of the President.[115]

1.46 The key issue was what a purposive interpretation in reading the Constitution would entail. The plaintiff argued that Parliament's discretion under Art 164 of the Constitution was subject to Art 19B(1), and that it was clear from the language and textual content of Art 19B(1) that the phrase "5 most recent terms" must refer to the five most recent terms of Presidents who have been elected to office by citizens.[116] The defendant argued that Parliament was intended to have "full discretion" in choosing when to start counting the First Term from, drawing from the Report of the 2016 Constitutional Commission,[117] the Government

113 [2017] 5 SLR 424.
114 Act 6 of 2017.
115 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [7].
116 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [31(b)].
117 *Report of the Constitutional Commission 2016* (17 August 2016).

White Paper,[118] Parliamentary Debates[119] and the Explanatory Statement of the 2016 Bill.[120]

1.47 Loh J stated that the purposive approach was "mandatory",[121] taking precedence over common law principles of statutory intention. Courts must interpret the Constitution to give effect to the intent and will of Parliament, citing *Constitutional Reference No 1 of 1995*,[122] and approving the Court of Appeal approach in *Ting Choon Meng*.[123] This involves first reading the words of Arts 19B and 164 of the Constitution and their textual contents (other constitutional provisions). In particular, Loh J noted that the purposive approach may vary with how the legislative purpose of a provision can be formulated. Courts will then only refer to extraneous materials which do not form part of the written law if they can shed light on the meaning of a provision.[124] Where the meaning of the provision is clear, the court may only refer to extraneous materials to confirm this clear meaning, rather than to depart from it, as Sundaresh Menon CJ noted in *Ting Choon Meng*.[125]

1.48 One of the arguments raised by the plaintiff in his written submissions was that the right to stand for election or participate in the presidential election process was a fundamental right which should be "generously interpreted", after the precedent in *Minister of Home Affairs v Fisher*,[126] endorsed by the Privy Council in *Ong Ah Chuan v Public Prosecutor*.[127] As such, restrictions of such fundamental rights should be "narrowly interpreted", especially where "based on ethnicity".[128] While Loh J endorsed the principle of generous construction of Pt IV fundamental liberties, his Honour pointed out that the right to stand for election to the presidency was not found in Pt IV of the Constitution and hence did not apply in the instant case.[129]

118 *Review of Specific Aspects of the Elected Presidency: The Constitution of the Republic of Singapore (Amendment) Bill* (15 September 2016).
119 *Singapore Parliamentary Debates, Official Report* (6 February 2017) vol 94 (Mr Chan Chun Sing, the Minister, Prime Minister's Office).
120 Constitution of the Republic of Singapore (Amendment) Bill (Bill 28 of 2016); *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [33(c)].
121 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [36].
122 [1995] 1 SLR(R) 803 at [44].
123 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [37]; *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373.
124 See s 9A(2) of the Interpretation Act (Cap 1); see also *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [38].
125 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [65] and [93]; *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [39].
126 [1980] AC 319 at 328H.
127 [1979–1980] SLR(R) 710.
128 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [32(b)].
129 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [41].

Loh J pointed out that the right to stand for election under Art 19 of the Constitution, which imposes "stringent expertise and experience" pre-qualifications, is distinct from Pt IV rights as not everyone could meet "qualifying conditions and requirements" to stand for election to the presidency.[130] The "fundamental rights" argument thus failed.

1.49 In interpreting Art 164 of the Constitution, the key issue was whether Parliament was limited only to counting the start of presidential terms from that of the first popularly elected President, President Ong.[131] Loh J stated that on a plain reading of Art 164, he concluded that Art 164(1)(*a*) both imposed a duty on Parliament to specify the First Term, and implicitly conferred power on Parliament to do so.[132] Further, Parliament's power under Art 164(1)(*a*) was not limited to choosing a particular presidential term of office as First Term as the text did not indicate which First Term should be. Instead, Parliament had the power to stipulate what the First Term was, from which the count would be made.[133] The word "if" in Art 164(1)(*b*) indicates that Parliament had a choice whether to count as First Term a presidential term of office which commenced before the appointed date of 1 April 2017, and there was "no limitation in Art 164 on how far back Parliament can go".[134] Parliament was only constrained in so far as it had to make this determination "by law" rather than by resolution, as the function of these terms were "to constrain the form and not the substance of parliamentary action".[135]

1.50 While Art 19B(1) and Art 164(1)(*a*) of the Constitution should be read consistently and in harmony with each other, Loh J noted that if there was an inconsistency, Art 19B should prevail since the purpose of Art 164 is to enable Parliament to implement the model Art 19B provides for.[136] In other words, the question was whether Art 19B fettered Parliament's power under Art 164; Loh J found there was nothing in Art 19B(1) limiting parliament's power under Art 164(1)(*a*) in requiring that the count could only start with a popularly elected President. Some of the key points raised by Loh J was the finding that the term "office of President" in Art 19B(1) did not distinguish between Presidents elected by Parliament and those elected by citizens.[137] Furthermore, Art 19B(3) expressly provided that persons who had exercised the functions of the President under Art 22N (where the office

130 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [43].
131 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [47].
132 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [50].
133 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [51].
134 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [51(c)].
135 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [53].
136 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [52].
137 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [59].

is vacant) or Art 22) (where the President is under a temporary disability) would not be considered to have held the office of President. If Parliament had intended to exclude popularly elected Presidents from being "counted", it could have made its intention clear through express stipulation.[138] Furthermore, Art 2 defines "President" as "the President of Singapore elected under this Constitution" but does not expressly stipulate whether a President is elected by Parliament or citizens.[139] "[This] Constitution" refers not only to the Constitution "as it stands today" but the Constitution "as it stood in the past where the context requires it", otherwise actions taken under past constitutional provisions would not be valid.[140]

1.51 Loh J not only considered extraneous materials as allowed by ss 9A(3)(*b*)–9A(3)(*d*) of the Interpretation Act[141] but also considered materials falling without this such as the 2016 Constitutional Commission Report and the 2016 White Paper, as they "shed light on the object and purposes of the 2016 Act",[142] although neither addressed the question of how the proposed Model would come into effect.[143] In deciding what weight to attribute to extraneous materials, regard would be had to the clarity of the material and whether it directly addressed the very point in dispute between the parties.[144] Neither the 2016 Report nor White Paper compelled adopting any specific starting point for the hiatus-triggered mechanism,[145] while generally confirming that the rationale for the amendments was "to ensure multi-racial representation" in the office of the President, which was consistent with the view that Parliament was not compelled to start counting from the first popularly elected President, the fact being that Singapore had not had a Malay President for a long time.[146] The extraneous material thus supported the view that Parliament under Art 164 of the Constitution was given the "full discretion" to specify the First Term.

1.52 Loh J stated that the legislative purpose of Arts 19B and 164 of the Constitution could be read at three different levels of abstraction.[147] First and most specifically, Parliament intended the model to allow the

138 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [61].
139 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [65(a)].
140 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [65].
141 Cap 1, 2002 Rev Ed.
142 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [71]; "2016 Act" here refers to Constitution of the Republic of Singapore (Amendment) Act 2016 (Act 28 of 2016).
143 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [97].
144 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [73].
145 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [81].
146 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [82].
147 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [85].

specification of President Wee's second term as the First Term. When Prime Minister Lee said, "[we] have taken the Attorney-General's advice" and would start counting terms from President Wee, and that the next election would be reserved only for Malay candidates, no member of parliament ("MP") said the Prime Minister was mistaken that the proposed provision required the Government to legislate on when to count the terms.[148] On 9 November 2016 when the 2016 Act was passed, the MPs knew the 2017 Presidential Election would be a reserved election for Malay candidates, as evident from parliamentary speeches.[149] The reading that the specific intention of Parliament was to choose President Wee's second term as the First Term was thus supported.

1.53 Second and more generally, the intent of Parliament was to ensure that the system "produces Presidents from minority racial communities from time to time". Parliamentary speeches should not be construed as statutory provisions[150] and the key question was to ask what MPs were debating and why.[151] In the present case, the MPs were debating the Model proposed by the 2016 Commission, White Paper and Bill before the House.[152] They were discussing the institution in the context of the "existing scheme of popular elections"[153] though one could not infer from this that they meant that Parliament only intended popularly elected Presidents to be counted for the Model. They were also debating the Model and the concern that members of minority communities may not be elected to the office, contrary to Singapore's "multi-racial ethos".[154] While Art 19B of the Constitution was enacted to ensure Presidents from minority races would be elected from time to time, in 2016, Parliament also considered the independent factor that a span of time had elapsed since Singapore last had a Malay President.[155] Third, and most abstractly, Parliament intended to uphold multi-racialism through the reserved elections scheme. The President's unifying role could not be fulfilled unless that office reflected the "multi-racial character of our country", as was evident from the 2016 Report.[156] The intent behind Art 19B was to ensure that Singapore would have its first Malay President since Encik Yusof bin Ishak, a period of

148 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [89].
149 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [90].
150 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [87].
151 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [87].
152 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [87(a)].
153 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [87(a)].
154 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [87(b)].
155 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [87(b)].
156 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [92].

46 years, if a qualified Malay candidate contested the 2017 Presidential Election.[157]

1.54 Loh J pointed out that Parliament's intention "is a complex of purposes at different levels of abstraction" and a purposive interpretation had to be "true to Parliament's intention as a whole".[158] Ultimately, his Honour had to give effect to Parliament's clear intention in making new law by inserting Art 19B and Art 164 into the Constitution. The legislative purpose of Art 19B – read in the light of the text, textual context and relevant extraneous materials – bore the same meaning and Art 19B did not fetter the power of Parliament in how to specify the First Term. The High Court thus held that the Schedule to the PEA was not unconstitutional.[159]

1.55 These questions were raised on appeal in *Tan Cheng Bock v Attorney-General*,[160] which upheld the High Court decision. In the construction of Arts 19B and 164 of the Constitution, the Court of Appeal affirmed that a purposive interpretation was to be applied, following s 9A of the Interpretation Act,[161] as provided by Art 2(9). This seeks to give effect to parliamentary intent, usually at the time a law was enacted.[162] Purposive interpretation is particularly relevant where "there are two or more possible interpretations of a given legislative provision".[163] The Court of Appeal affirmed the three-step approach adopted in *Ting Choon Meng*:[164] first, to read the text and context; second, to ascertain the legislative purpose; and third, to compare possible interpretations of the text against the statutory purposes or objects.

1.56 In ascertaining the ordinary meaning of words in law, the court was aided by various rules and canons of statutory construction grounded in "logic and common sense",[165] such as the rule that "Parliament shuns tautology and does not legislate in vain", or that Parliament presumably does not intend an unworkable result.[166] Step one was a "fairly uncontroversial" step. The difficulty came with step two, which concerns the formulation of legislative purpose as this could be done at "different levels of generality" which might produce

157 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [92].
158 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [87(b)].
159 *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 at [102].
160 [2017] 2 SLR 850.
161 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [6] and [35].
162 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [36].
163 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [36].
164 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [59].
165 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [38].
166 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [38].

"conflicting interpretations".[167] In this process, a significant distinction existed between the "specific purpose of a provision and the general purpose of a statute", with the presumption being that the specific purpose is consistent with the general purpose, though exceptionally, this may not be the case.[168] While extraneous materials could be referred to, the text of the provision and its statutory context should be given primacy over extraneous material in drawing out the legislative purpose.[169] The main textual sources included the statute's long title, then words of the provision and other statutory provisions.[170]

1.57 In deciding whether to consider extraneous material and how to weigh it, s 9A(4) of the Interpretation Act requires that consideration be given to "the desirability of persons being able to rely on the ordinary meaning conveyed by the text and to the need to avoid prolonging legal proceedings".[171] Such materials will be "considered" only if they are "capable of giving assistance".[172] As set out in *Ting Choon Meng*,[173] there are three situations where extraneous materials as set out under s 9A(2) may be considered:

(a) to confirm the ordinary meaning is the correct one; this facilitates in demonstrating the soundness of an outcome, advancing the rule of law by "assuring the governed that the court is applying the law in keeping with the policy imperatives for which it was enacted";[174]

(b) to ascertain the text's meaning when the provision is ambiguous or obscure; and

(c) to ascertain the text's meaning where the deduced ordinary meaning considered against the legislative purpose "is manifestly absurd or unreasonable".[175] Purposive interpretation is "not an excuse for rewriting a statute"[176] and judicial interpretation is "generally confined to giving the text a meaning that its language can bear".[177]

167 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [39].
168 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [41].
169 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [43].
170 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [44].
171 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [45].
172 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [46].
173 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [65]; *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [47].
174 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [49].
175 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [47].
176 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [50].
177 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [50].

1.58 In construing Art 19B of the Constitution, which contained the expression "office of President" three times,[178] the Court of Appeal noted that this only referred to persons who had held the office of President in their own right, rather than temporarily through disability or vacancy as under Arts 22N(1) and 220(1). Article 19B(3) resolved any ambiguity in pointing out that persons who exercised the functions of the President under Arts 22N(1) and 220(1) were not considered to have held the office.[179] While Art 19B(1) does not seem to distinguish between complete or partial terms of office, Art 19B(6) confirms that "term of office" includes an uncompleted term of office.

1.59 Construing Art 164 of the Constitution, a transitional provision, was also central to the inquiry.[180] Article 164(1)(*a*) requires Parliament to specify the "first term of office" to be counted in order to determine a reserved election under Art 19B. In addition, if any of these terms commenced before the appointed date (1 April 2017), Parliament had to specify the racial community the person holding the term of office belonged to.[181] This displaced any presumption that the First Term should be after the appointed date. In other words, Parliament could choose a term of office that started before or after the appointed date under Art 164. However, the Court of Appeal disagreed with the High Court in so far as the former considered, based on the presumption that Parliament acted rationally, that there was an "implicit limit of five terms" since the earliest possible reserved elections was the 2017 Presidential Election, there would be no purpose in Parliament specifying as the First Term any term before President Wee took office. This would have the same effect as specifying President Wee's last term as the First Term.[182]

1.60 The Court of Appeal found that President Wee did "hold" the office of President, even if the powers of the office were dramatically enhanced in the middle of his last term. Article 163 of the Constitution provided the person, that is, President Wee, holding the office of President prior to 30 November 1991 would continue to hold office with these additional functions, powers and duties. Thus, President Wee was the first President to exercise the enhanced powers of the Elected Presidency, and was empowered to do so as if he had been popularly elected.[183]

178 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [58].
179 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [61].
180 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [64].
181 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [65].
182 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [71(a)].
183 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [72].

1.61 Thus, it was for the appellant to show that the meaning of "has held the office of President" in Art 19B(1) of the Constitution and "the persons who held those terms of office [of the President]" in Art 164(1)(*b*) must be "qualified or limited" by reading "President" as one elected to office under the 1991 Amendment framework.[184] Articles 19B(1) and 164(1)(*b*) do not refer to one elected to office, but one who held the office of President, nor do they indicate the method of election to office.

1.62 The Court of Appeal took note that the material words of Art 2 of the Constitution which defined "President" were "President … elected under this Constitution", which predates both the 1991 and 2016 constitutional amendments which changed the method of electing the President.[185] Article 2 also defined the commencement of *this Constitution* to mean 9 August 1965, which was potentially significant because it suggests "this Constitution" commenced upon Independence, though it has been periodically amended.[186]

1.63 Before Art 17A of the Constitution provided for the popular election of the President, Art 17 provided that Parliament would elect the President. The appellant argued that the reference to "President" in Art 2 must refer to Presidents elected under "this Constitution" as amended in 1991, which would exclude President Wee who was elected under Art 17, which Art 17A replaced. Effectively, in referring to ss 8(3) and 15(2)(*a*) of the Interpretation Act, the appellant argued that the reference in Art 2 to "this Constitution" meant the Constitution "as it stands after the 2016 Amendment".[187] While s 15(2)(*a*) refers to a repealed and re-enacted provision, "this Constitution" refers to an entire Act.[188] As such, s 15(2)(*a*) did not apply.[189]

1.64 Section 8(3) of the Interpretation Act applies unless a "contrary intention appears" with respect to the text and context of the provisions being construed. Article 2 of the Constitution's reference to "this Constitution" would, under s 8(3), be taken to mean the Constitution as amended from time to time by any other Act, here, the 2016 Amendment.[190] Flowing from this, it would be that "has held the office of President" under Art 19B(1) must mean someone holding office under the Constitution as it stood after the 2016 Amendment.[191] "This

184 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [73].
185 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [76].
186 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [78].
187 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [85].
188 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [86].
189 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [86].
190 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [88].
191 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [89].

Constitution" would be the latest version of the amended Constitution. However, the Court of Appeal thought such a construction would do "intolerable violence" to Art 164, which was crucial in reading Art 19B, as this created a serious and glaring contradiction.[192] Further, the appellant argued that the First Term to be counted would be that of President Ong or any person who took office after President Ong. Applying s 8(3) would exclude this interpretation since President Ong and his successors were all elected under "previous iterations" of the Constitution, and not the post-2016 Constitution.[193] Taken to its logical conclusion, Parliament, contrary to Art 164, would not be able to specify as First Term the term of office of any previous President.[194] If the "count" of five terms has to be restarted every time the constitution is amended, this would make Art 19B "unworkable moving forward".[195]

1.65 The Court of Appeal concluded that the words "this Constitution" used in the Art 2 definition of the "President" referred to "the Constitution as it has existed from time to time since it first came into force on Independence".[196] This was both a matter of "common sense" and the fact "this Constitution" in Art 2 specified its date of commencement as 9 August 1965. In other words, the Constitution that commenced in 1965 remains the same Constitution, notwithstanding it has been amended from time to time.[197] As other constitutional provisions like Arts 160 and 162 also refer to the "commencement" of the Constitution, interpreting "this Constitution" in these context to mean the latest iteration would be "illogical and unworkable".[198]

1.66 Hence, the phrase "elected under this Constitution" covered both Presidents elected by Parliament under the previous Art 17(1) of the Constitution, and those elected by Singapore citizens under the present Art 17A.[199] Parliament was free to specify President Wee's last term as the First Term under Art 164 for Art 19B purposes.[200] The Court of Appeal's construction of the legislative objectives of Arts 19B and 164 also confirmed this conclusion.

1.67 The specific purpose of Art 19B of the Constitution was to "ensure periodic representation of all the principal communities of Singapore" through the hiatus-triggered reserved election model, while

192 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [90].
193 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [91].
194 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [91].
195 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [92].
196 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [96].
197 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [96].
198 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [98].
199 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [99].
200 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [101].

Art 164 allowed Parliament to decide when to effect this model through deciding on the First Term to be counted for Art 19B purposes.[201]

1.68 In examining extraneous materials to identify the specific purpose of Art 164, the Court of Appeal considered the 2016 Commission Report and White Paper irrelevant as it did not deal with when the count should start but the concept of the reserved election,[202] and were thus incapable of rendering assistance.[203]

1.69 In considering Parliamentary Debates, the Court of Appeal considered that their construction of the relevant constitutional provisions was "directly confirmed" by the only part of the Parliamentary Debates that directly addressed the specific issue: when the reserved election would take effect and how to count the First Term under Art 164.[204] Statements made about the merits of the reserved election model as a concept were not relevant. Only Prime Minister Lee's statement directly addressed the question of when Parliament intended the count to start; this clearly indicated that Parliament intended to confer upon itself the discretion under Art 164 to specify President Wee's last term as the First Term for counting purposes.[205]

1.70 There was nothing, from a reading of Parliamentary Debates, that stopped Parliament from addressing "the mischief of free, open and unreserved elections having the effect of excluding particular communities" from the presidency[206] through the reserved elections regime; in addition, being mindful that there had not been a Malay president for 46 years, Parliament could give itself discretion under Art 164 to specify President Wee's last term as the First Term so as to ensure the 2017 Presidential Election would be reserved for Malay candidates.[207] Thus, the Court of Appeal also reached the conclusion that extraneous materials confirmed the "purposively-ascertained ordinary meaning" of Arts 19B(1) and 164, such that Parliament had the discretion under Art 164 to specify President Wee's last term as the First Term.

201 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [103]–[104].
202 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [109].
203 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [115].
204 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [119].
205 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [120].
206 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [121].
207 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [121].

Articles 12 and 19B of the Constitution

1.71 The elections regime in relation to the elected presidency as set out in Arts 19 and 19B of the Constitution came under challenge in *Ravi s/o Madasamy v Attorney-General*[208] ("*Ravi s/o Madasamy*"). Two primary arguments were raised by the plaintiff, a former practising lawyer: first, that the Art 19 qualification requirements for presidential candidates were contrary to Art 12 in depriving citizens of the equal right of candidature to stand for the office of the elected presidency; and second, the amendments to the Elected Presidency Scheme ("EPS") in the form of the reserved elections framework brought about in 2016 by Art 19B was also inconsistent with Art 12, in discriminating on the basis of race and thus being contrary Art 12(2) of the Constitution. The plaintiff claimed that "the appointment of the President was made by the Prime Minister on grounds of race" and as such, his challenged was premised on a violation of Art 12.[209] He maintained that Art 19B excluded the possibility of other minorities like the Eurasians, Sikhs and Sri Lankans being considered within the reserved elections framework.[210]

1.72 The plaintiff in his supporting affidavit submitted that the right of an equal citizen before the law included the fundamental right to vote, the right to political participation and to stand for public office, including the presidency. He also argued that the EPS was contrary to the basic structure doctrine "in that it imposes on our fundamental rights as Singapore citizens" and was unconstitutional.[211] He further asserted that the basic features doctrine, which originated from the Indian Supreme Court decision of *Kesavananda v State of Kerala*[212] ("*Kesavananda*") was part of Singapore law and would operate to invalidate any constitutional amendments which violated the "basic structure".[213] The plaintiff argued that non-derogable and fundamentally-guaranteed rights in the Constitution were part of the basic structure and therefore the basic structure doctrine should operate to prevent amendment to these fundamental rights. He included within this the "right to equal protection" under Art 12 of the Constitution, "flowing from which the right to vote and the right to stand for elections ought to be guaranteed as fundamental and inalienable rights for all citizens".[214]

208 [2017] 5 SLR 489.
209 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [35].
210 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [35].
211 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [29].
212 AIR 1973 SC 1461.
213 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [32].
214 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [32].

1.73 See J found that the plaintiff lacked standing,[215] on the basis of not having a personal right violated, specifically, of his Art 12 constitutional rights, applying established law that judicial review in Singapore focuses on "vindicating personal rights and interests through adjudication rather than determining public policy through exposition", citing *Vellama d/o Marie Muthu v Attorney-General*.[216] The plaintiff was attempting to assert a public right shared in common with other citizens, having alluded to an "equal right to stand for elections".[217] He did not show he had suffered any special damage and See J found the plaintiff had not disclosed any breach of a public duty of sufficient gravity to make it in the public interest for the court to hear the case.[218] On this point, See J concluded that the plaintiff was "a mere busybody and a social gadfly" seeking to ventilate political issues in the guise of legal questions.[219]

1.74 Nonetheless, See J decided to set out his views, *obiter*, on the arguments raised, noting that the plaintiff's grounds of challenge lacked clarity to the point of being "both troubling and bizarre", such that the judge took it upon himself to take the plaintiff's case "at its highest".[220] He considered the plaintiff submissions were "long on rhetoric but short on coherence and substantive legal merit", but still took an expository approach towards relatively novel issues.

Articles 12(1) and 19 of the Constitution

1.75 The plaintiff argued that Art 19 of the Constitution, which sets out the qualifications for the office of the presidency had the effect of violating Art 12(1), in depriving citizens of the equal right to stand for public office, specifically, of the Elected Presidency.[221] Article 12(1) provides that "[all] persons are equal before the law and entitled to the equal protection of the law".

1.76 The plaintiff in his skeletal arguments referred to the "equal right to stand for elections regardless of class, status, position of institutional power in society or wealth".[222] Article 19 requires a candidate to have held certain high-ranking public office like Minister,

215 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [43]–[46].
216 [2013] 4 SLR 1; *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [43].
217 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [49].
218 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [50]–[51]; *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345 at [60]
219 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [52].
220 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [53].
221 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [74].
222 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [75].

Attorney-General, Speaker, or the private sector equivalent of being the chief executive of companies with a minimum shareholders' equity of $500m. No authorities were cited for this proposition and See J held that the well-settled reasonable classification test would be satisfied as there was an intelligible differentia (who qualified/did not qualify) which bore a rational relation to the legislative object. The purpose was to fill the office of the presidency with a person of requisite competence, trustworthiness, sound judgment and moral and physical courage to discharge the tasks of his office which may include refusing to authorise draw-downs on past reserves, to the Cabinet's ire.[223] The nature of the office demanded exacting qualifications as set out in Art 19.

Articles 12(2) and19B of the Constitution

1.77 Article 12(2) of the Constitution prohibits discrimination on grounds only of race and other factors, except where the Constitution expressly authorises. Clearly, the plaintiff's claim failed at the outset as Art 19B is one of the provisions which constitutionally authorises departure from the Art 12(2) prohibition.[224] Article 19B(1) introduced the concept of a "reserved election" under which elections for the office of the President are reserved for candidates of a particular community if no person from that community has held the office of President for the most recent terms of office. The term "community" refers to the Chinese, Malay and Indian or other minority communities, as Art 19B(6)(*a*)–19B(6)(*c*) provide. Art 19B was found not to be racially discriminatory, as the Constitution does not require race-neutrality[225] and indeed has provisions which demonstrate this, such as Art 152(1), which enjoins the Government to care for the interests of racial and religious minorities, and the group representation constituency scheme under Art 39A. The court took note of the analysis of the Presidential Council for Minority Rights that the new reserved election framework applied "equally to three racial communities" (Chinese, Malay, Indian/Other) such that no community was advantaged or disadvantaged compared to the other communities.[226]

1.78 As such, there was no discrimination. Further, the purposes of the reserved election framework was to foster multiracialism rather than racial discrimination.[227] The reserved election framework was "minimally intrusive" as open elections remain the default position as

223 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [78].
224 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [83].
225 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [86].
226 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [89]–[90].
227 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [91].

thus can be said to be "appropriately tailored to meet its purpose in a minimally intrusive way".

Basic structure doctrine

1.79 One of the issues raised in *Ravi s/o Madasamy* was whether the elected presidency elections regime under Arts 19 and 19B violated the basic structure of Singapore; this argument assumes first that the Indian basic features doctrine applies in Singapore, such that any constitutional amendment which violates it would be void; there has been no definite judicial statement on this, though there has been lively judicial and extrajudicial discussions on the basic structure doctrine, with Singapore characteristics. Second, that the basic structure offended here was the "right to stand for public office".[228] It was unclear whether this was drawn from Art 12, and whether Art 19 or Art 19B, or both, were challenged for being inconsistent with Art 12.

1.80 See J noted the origins of the Indian basic structure doctrine in the case of *Kesavananda* and its effect, that is, voiding any constitutional amendment, even if it complies with all procedural requirements, where it has violated this basic structure, as judicially identified and declared. In other words, the basic structure doctrine imposes a substantive limit on the legislative power to amend a constitution. In noting its reception in Singapore, See J pointed out that it had been rejected by F A Chua J in *Teo Soh Lung v Minister for Home Affairs*[229] ("*Teo Soh Lung*"), which Lai Kew Chai J concurred with in *Cheng Vincent v Minister for Home Affairs*.[230] There was no Court of Appeal decision which squarely addressed this issue.

1.81 See J then considered various cases which appeared to have touched on the concept of the basic structure, such as where former Chief Justice Chan Sek Keong, sitting as the High Court in *Mohammad Faizal bin Sabtu v Public Prosecutor*[231] ("*Faizal*"), identified the separation of powers as part of the Constitution's "basic structure". His Honour made no reference to any Indian authority in that case, leaving it unclear whether he had in mind the Indian version of the basic structure doctrine, or something else, such as the use of "basic" as meaning something of fundamental importance or integral to a particular legal system, without necessarily importing the consequences

228 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [54].
229 [1989] 1 SLR(R) 461 at [34], [35] and [47]; *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [56].
230 [1990] 1 SLR(R) 38 at [32]; *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [57].
231 [2012] 4 SLR 947 at [11].

of the Indian doctrine which could void a constitutional amendment. His Honour took note[232] of an academic argument by Kevin Y L Tan[233] that Chan CJ's reference to the basic structure doctrine was more limited and distinct from the Indian variant; rather, it related to the "matrix of the Westminster model and is grounded in history, legal precedent and the logic of legal continuity". This was also echoed in another academic article by Andrew J Harding,[234] who was of the view that the basic structure doctrine did not apply to Singapore and that Chan CJ's reference to the basic structure in *Faizal* was not a reference to the Indian doctrine.

1.82 However, the Court of Appeal in *Yong Vui Kong v Public Prosecutor*[235] ("*Yong Vui Kong*") appeared to read Chan CJ's remarks in *Faizal* as referencing the basic structure doctrine; it went on to observe that another possible basic feature as the right to vote, stating that for a feature to be part of the constitutional basic structure, "it must be something fundamental and essential to the political system that is established thereunder".[236] See J also noted some extrajudicial observations by Chan CJ in an article entitled, "The Courts and the Rule of Law"[237] and a *Singapore Law Gazette* article expressing the view that Singapore's Constitution did have a basic structure.[238] Nonetheless, his Honour was of the view that the Court of Appeal decisions which addressed the basic structure did not refer to *Kesavananda* or *Teo Soh Lung* and could not be said "to represent the Court of Appeal's recognition or endorsement of the applicability of the basic structure doctrine in Singapore".[239] His Honour noted that the Court of Appeal in *Yong Vui Kong*[240] appeared to endorse the argument by Calvin Liang and Sarah Shi in the *Singapore Law Gazette* article to the effect that a constitution is a power-limiting tool and concerned with organising power;[241] as such, it was argued that fundamental rights are not part of the basic structure of a constitution as they do not delimit the

232 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [58].
233 Kevin Y L Tan, "Into the Matrix: Interpreting the Westminster Model Constitution" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2017) at pp 69–70.
234 Andrew J Harding, "Does the 'Basic Structure Doctrine' Apply in Singapore's Constitution? An Inquiry into Some Fundamental Constitutional Premises" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2016) at p 32.
235 [2015] 2 SLR 1129 at [69].
236 *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at [71].
237 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [61].
238 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [62].
239 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [62].
240 *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at [71].
241 Calvin Liang & Sarah Shi, "The Constitution of Our Constitution: A Vindication of the Basic Structure Doctrine" (August 2014).

boundaries of government power, relating to the rights of citizens. With respect, it may be observed that fundamental liberties are also a power-limiting mechanism and arguably, Pt IV fundamental liberties should not be ruled out as part of the basic structure of the Constitution.

1.83 See J, in noting critical views against the basic structure doctrine, concluded that "any ostensible support" for the basic structure was for a thin, minimalist version of it.[242] The "thin" conception of the basic structure was a broad restatement "of the truism that the Constitution rests on an overarching principled framework embracing the precepts of the rule of law and the separation of powers".[243] The plaintiff had submitted that these overarching principles "essentially served to inform the interpretation of the Constitution".[244] On the facts, the Arts 19 and 19B amendments could not have offended a "thin" version of the basic structure as it neither curtailed judicial power or impugned the rule of law and separation of powers. The basic structure candidate feature, the "right to stand for public office" would fall without the ambit of the basic structure doctrine as the plaintiff had in contemplation the unqualified right of any citizen to stand for elections to any public office.[245] Applying *Yong Vui Kong*, this was not fundamental or essential to the political system, given that the right to stand for the office of the Presidency could not be so characterised, as the President was not a popularly elected office for the first 28 years of Singapore's existence as an independent nation.[246] In other words, there was no right to stand for office of the President before 1991. Further, many constitutional offices in Singapore were not popularly elected, such as the Attorney-General and Public Service Commission.[247]

1.84 He concluded his observations on the basic structure doctrine by underscoring that Art 5 of the Constitution, which relates to constitutional amendments and which includes the power to repeal constitutional provisions, was broader than that in the Indian Constitution[248] (which does not include repeal). This was appropriate given the "need for a degree of flexibility" in "the context of our unexpected journey into nationhood".[249]

242 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [65]–[66].
243 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [66].
244 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [66].
245 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [69].
246 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [70].
247 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [72].
248 The Constitution of India.
249 *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 at [67].

Article 14 of the Constitution – Freedom of speech

1.85 The question of the scope of freedom of speech was discussed, *obiter*, in the case of *Ting Choon Meng*. This dealt with the narrow question of how to interpret s 15 of the Protection from Harassment Act[250] ("PHA"), which deals with remedies available to "any person" who is the subject of a false statement of fact. Specifically, the issue was whether the Government, as a non-natural person, fell within the ambit of "any person" so as to be able to apply for an order requiring the publisher not to publish or continue to publish that false statement unless the publisher gave such notification as the District Court considered necessary to bring attention to the falsehood and the true facts, if making such an order would be just and equitable.

1.86 The respondent, one Dr Ting, had alleged in a video interview uploaded on a website called "The Online Citizen" that Ministry of Defence ("MINDEF") had conducted a "war of attrition" in legal proceedings against him in a case involving an alleged patent infringement. MINDEF refuted these allegations by way of a statement posted on its Facebook page, stating their falsity. Subsequently, The Online Citizen posted MINDEF's statement in a later article and provided a link to that webpage on the webpage hosting the original article and video. The appellant, representing MINDEF, applied for an order under s 15(2) of the PHA ("s 15 order"). The respondent argued that to read "person" under s 15 to include artificial persons like the Government would infringe his right to free speech under Art 14 of the Constitution.[251]

1.87 Sundaresh Menon CJ in his dissent dealt with the implications of a s 15 order in relation to Art 14 of the Constitution, which guarantees freedom of speech. His Honour disagreed with the majority's finding that "person" under s 15 was confined to natural persons, preferring a plain and ordinary reading of s 15 which he said could include corporate entities, consistent with the definition of persons under s 2 of the Interpretation Act.[252]

1.88 Menon CJ's approach towards reading Art 14 of the Constitution is instructive even if his Honour's observations were made *obiter*, in relation to the process of judicial balancing and how to make this transparent by clearly identifying the factors that go into the balancing process, and the rationale for free speech, as a preventive technique against free speech rightism. His Honour unexceptionally

250 Cap 256A, 2015 Rev Ed.
251 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [10].
252 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [73].

noted that there is "no absolute right to free speech"[253] and observed that a "delicate balancing exercise between the nature of the individual's right to speak and the competing interest in limiting that speech" was required to determine whether restrictions on speech were permissible. Not all speech is of equal weight, and Menon CJ unequivocally stated that false speech, to which s 15(1) of the PHA applied, would not be protected under Art 14(1).[254] Indeed, such false speech "cannot be justified as free speech which should be protected on the basis of any of the theoretical justifications underpinning the liberty of persons in relating to free speech".[255] Indeed, freedom of speech relates to communicating "information, not misinformation", noting that false statements which are misleading are destructive of democratic society, citing Lord Hobhouse in *Reynolds v Times Newspapers Ltd*;[256] communication of misinformation was "of little, if any, value".[257] False speech proven as a matter of fact to be false by a court of law had little to contribute to "the marketplace of ideas or to advances in knowledge for the benefit of society as a whole".[258]

1.89 Thus, the value of free speech is to be evaluated, and will depend on "its nature, how it is used, where it occurs and whether it contains an assertion of fact that has been proven to be a falsehood".[259] Other relevant factors that would go into the balancing process would be the nature of the remedy under s 15, which did not involve damages and did not even "inhibit or prevent free speech at all"[260] as a speaker could continue to say something objectively false provided that he complies with a court direction to draw attention to the falsehood where it was just and equitable to do so, which is a "very limited" remedy.[261] Blanket bans or heavy damages would presumably change the balance as more extensive remedies.

1.90 Even if such false speech enjoyed constitutional protection, Menon CJ considered that s 15 of the PHA would be constitutional as a "necessary or expedient" restriction on free speech to serve public order interests, particularly given the "limited value" that false speech had. In relation to permissible restrictions, case law had construed Art 14 of the Constitution and the words "in the interest of" certain public good to

253 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [109].
254 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [117].
255 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [117].
256 [2001] 2 AC 127 at 238; *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [112].
257 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [113].
258 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [115].
259 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [116].
260 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [111].
261 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [110].

enable Parliament to adopt "prophylactic" approaches to maintain public order,[262] signifying broader legislative discretion to restrict free speech. His Honour gave indications of how public order, as a ground of derogation under Art 14(2) might be construed beyond "the protection of a public physical space from disorder";[263] he noted that in the modern context, digital speech disseminated through "an unregulated Internet sphere" could be a vehicle for the rapid spread of falsehoods, which portends abuse and "could conceivably threaten public order". Thus, there is "no reason why false statements should not be justifiably restricted on the basis of the preservation of public order". Without a deep inquiry into the State's interest in regulating false speech, his Honour found s 15 to be constitutional, on the basis that false speech falls without the protection of Art 14, or that public order considerations, which Art 14(2) allows for, justified the s 15 regime in so far as it implicates the scope of Art 14.[264]

262 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [118].
263 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [119].
264 *Attorney-General v Ting Choon Meng* [2017] 1 SLR 373 at [114] and [120].