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ADVANCING CONSTITUTIONAL JUSTICE IN SINGAPORE: ENHANCING ACCESS AND STANDING IN JUDICIAL REVIEW CASES

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The rules on standing in Singapore have traditionally restricted the commencement of judicial review proceedings by anyone other than applicants directly and individually affected by either a legislative provision or executive action: there has been little scope for what is known as 'public interest litigation' (in all its various forms). This had been the landscape of public law adjudication in Singapore until recently. However, in the past five years, the courts have had to consider challenges by applicants in the absence of such a direct interest. Thus far, the discussion on these cases has focused on broader issues of constitutional interpretation and what the cases indicate about constitutionalism in Singapore. There has been little discussion on issues of standing and what this implies about the role of public law adjudication in Singapore. This article will show how, while explicitly rejecting the possibility of public interest litigation, the courts have provided some scope for developing a more circumscribed form of 'representative' standing in serious cases of illegality or unconstitutionality with built-in control features to prevent actions by 'busybodies' and ensure that the court does not become involved in free-standing political debate. It will propose how these developments may evolve over time, particularly, in a way that maintains the controls the courts have introduced thus far.

I. INTRODUCTION

The rules on standing in Singapore have traditionally restricted the commencement of judicial review proceedings to applicants directly and individually affected by either a legislative provision or executive action. There has been little scope for what is known as 'public interest' standing (in all its various forms). This had been the landscape of public law adjudication in Singapore until recently. However, in the past five years, the courts have had to consider constitutional challenges to legislation and executive action by applicants in the absence of an obvious direct interest or individual impact on the applicants. This has included, for example, a challenge by a member of a particular geographical constituency of the constitutionality of the executive's decision not to call a by-election on the vacation of a parliamentary seat for that constituency;[1] a challenge by homosexual couples of the constitutionality of a provision of the *Penal Code*[2] restricting homosexual conduct in the absence

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1 *Vellama d/o Marie Muthu v AG* [2012] 2 SLR 1033 (HC); *Vellama d/o Marie Muthu v AG* [2013] 4 SLR 1 (CA) [*Vellama*].

2 Cap 224, 2008 Rev Ed Sing.

of any criminal proceedings under the provision against them;[3] a challenge by a member of an opposition political party of the constitutional *vires* of a loan made by the executive to an international funding body;[4] a challenge by members of the Hindu religion of a ban on the use of musical instruments during an annual religious procession;[5] and a challenge by a Sikh prisoners' counsellor of a policy on hair that affected members of a particular religion.[6] These cases have put pressure on existing restrictions in the rules on standing in constitutional cases in Singapore.

Thus far, the discussion of these cases has focused on broader issues of constitutional interpretation and what the cases indicate about constitutionalism and the scope of judicial review in Singapore.[7] There has been little discussion on the important issues of standing[8] and, more importantly, what this implies about the role of public law adjudication in Singapore. These recent cases have provided the courts with an opportunity to consider the status and scope of standing rules. This article will evaluate these developments. It will show how, while explicitly rejecting the possibility of general free-standing public interest standing, the courts have provided some scope for developing a more circumscribed form of such standing in constitutional cases generally,[9] where there is an absence of an applicant with a direct and individual interest in the case. This article will discuss the possibility of developing this further while introducing control features into the law to prevent actions by 'busybodies' and ensuring that the court does not become involved in free-standing political debate (a possible risk with a general recognition of public interest standing). It will conclude with what these developments may indicate about the role of public law adjudication in the broader constitutional and administrative law landscape in Singapore: whether it is one that is based on the vindication of personal rights and a litigation model of judicial review or one that looks at the vindication of a broader public interest on issues of constitutionality and a model of judicial review that is also concerned with enhancing good governance.

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3 *Tan Eng Hong v AG* [2011] 3 SLR 320 (HC) [*Tan Eng Hong* (HC)]; *Tan Eng Hong v AG* [2012] 4 SLR 476 (CA) [*Tan Eng Hong* (CA)]; *Lim Meng Suang v AG* [2013] 3 SLR 118 (HC); *Lim Meng Suang v AG* [2015] 1 SLR 26 (CA) [*Lim Meng Suang*].

4 *Jeyaretnam Kenneth Andrew v AG* [2013] 1 SLR 619 (HC); *Jeyaretnam Kenneth Andrew v AG* [2014] 1 SLR 345 (CA) [*Jeyaretnam Kenneth Andrew*].

5 *Vijaya Kumar s/o Rajendran v AG* [2015] SGHC 244 [*Vijaya Kumar*].

6 *Madan Mohan Singh v AG* [2015] 2 SLR 1085 (HC) [*Madan Mohan Singh*].

7 See *eg*, Swati Jhaveri, "The Broader Case for Developing the Content of Fundamental Rules of Natural Justice under Article 9 of the Constitution: A Placeholder for Proportionality-type Adjudication?" in Jaclyn L Neo, ed, *Constitutional Interpretation in Singapore: Theory and Practice* (London: Routledge, 2017) 188; see more generally the discussions in the book where academics discuss possible reasons for a relatively low success rate in courts on constitutional and administrative judicial review matters. These include discussions of the role of the courts as one that highlights deference and that has led judges to eschew any form of public interest standing in judicial review cases; and the literal textual approach to interpretation of the rights that favours anchoring the scope of the rights to the text (for example, "liberty" under article 9 of the *Constitution of the Republic of Singapore* (1999 Rev Ed) [*Constitution*] has been interpreted to mean liberty against unlawful incarceration versus broader notions of autonomy). This article focuses on the issue of access.

8 For a discussion of discrete issues of standing in the constitutional challenges of the criminalisation of homosexual conduct in section 377A of the *Penal Code*, *supra* note 2, see also Shubhankar Dam, "Constitutional Wrongs in Singapore: A Comment on Tan Eng Hong v Attorney-General" (2013) 24:2 Pub L Rev 87; Lynette J Chua, "The Power of Legal Processes and Section 377A of the *Penal Code*: *Tan Eng Hong v. Attorney-General*" [2012] Sing JLS 457.

9 *Jeyaretnam Kenneth Andrew*, *supra* note 4 at para 62 (Chao Han Tick JA).

II. Understanding the Role of Rules on Standing

A. *Rationale for Broader Rules on Standing*

The question of who has standing or '*locus standi*' to commence judicial review proceedings and what kind of interest they need to have has only been the subject of extensive discussion more recently in the courts. Order 53 of the *Rules of Court*[10] in Singapore does not provide any guidance or parameters on the issue. This can be contrasted with other common law jurisdictions. For example, in Hong Kong, order 53 rule 3(7) of *The Rules of the High Court* states that: "The Court shall not grant leave unless it considers that the applicant has a *sufficient interest* in the matter to which the application relates."[11] This mirrors provisions in the United Kingdom ("UK"). In the absence of specific statutory or procedural guidance, it has been open to the courts in Singapore to determine the level of interest needed by an applicant to access the remedy of judicial review.[12] The issue is relatively unproblematic where the applicant is an individual against whom a concrete or individualised decision has been made by a government department (for example, an immigration decision). The question is more problematic outside of such cases, for example, cases where individuals are challenging general policies or legislation of general application or where groups or associations commence judicial review proceedings to represent a collective or public interest. Cane has provided a comprehensive picture of the different categories of standing that may exist in cases like these:

> A representative claimant is one who comes to court not to protect [his] own interests but to represent the interests of other parties not before the court. Three different types of representative standing can usefully be distinguished: surrogate standing, associational standing, and citizen standing. Surrogate standing refers to a situation in which the claimant purports to represent an individual with a personal interest in the claim. Unless there was some good reason why that individual should not make the claim personally (such as the individual's age or mental condition), a court would be unlikely to accord standing to a surrogate. Associational standing refers to a situation in which the claimant purports to represent a group of individuals who have a personal interest in the claim.
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> Citizen (or 'public interest') standing refers to a situation in which the claimant purports to represent 'the public interest' as opposed to the interests of any particular individual(s).
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> . . .
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> There are some good reasons why courts should, in principle, allow associational claims: they may facilitate access to justice by making it easier for groups (especially the poor and unorganized) to invoke the judicial process; and they may promote the efficient conduct of litigation by allowing numerous bilateral disputes, which raise similar issues, to be resolved in one set of proceedings.[13]

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10 Cap 322, R 5, 2014 Rev Ed Sing.

11 Cap 4A, LN 152 of 2008, LN 18 of 2009, HK [emphasis added].

12 The courts have acknowledged the judge-made common law nature of the rules of standing on multiple occasions: *Jeyaretnam Kenneth Andrew*, *supra* note 4 at para 34.

13 Peter Cane, *Administrative Law*, 5th ed (Oxford: Oxford University Press, 2011) at 285, 287 [footnotes omitted].

Cane argues that there are good reasons for allowing all three of the above categories of representative standing. A number of different rationales can be identified for having liberal rules of standing of a certain scope in any of these categories: some are more permissive of access to judicial review than others. Arguments that point towards a more liberal approach to standing include:

(i) The need to vindicate the rule of law and protect the public interest in good administration. Accordingly, what is more important is the need to ensure legality of decision-making and good administration rather than control over the identity of the applicant who may commence proceedings; and
(ii) The need to take a more substantive or merits-based approach to judicial review (in terms of looking at the strength of an applicant's case rather than the applicant's identity which may be a more formalistic or overly technical view based on access to judicial review).

Contrastingly, the rationales pointing towards a more restrictive approach to the rules on standing include:

(i) Concerns to prevent an excessive number of judicial review applications, for example, by anyone seeking to vindicate the rule of law or public interest. It could otherwise lead to defensive decision-making by the government which seeks to make itself immune from judicial review (in view of the large numbers of potential applicants) rather than action based on a genuine concern to improve administration. Related to this is the concern that excessive applications would lead to a harmful diversion of public money into litigation;
(ii) A concern that the focus of judicial review by citizens should be the vindication of their private rights and interests rather than the public interest. The vindication of the latter is the role of public bodies, such as the Attorney-General;
(iii) Applicants need to be those that are particularly suited for commencing judicial review in terms of resources and information about the decision or executive action being challenged. A member of the public challenging a decision not because of some private right or interest affected by a particular policy or decision but a general interest in, for example, vindicating the rule of law and protecting the public interest may not be best-placed to do this; and
(iv) Most importantly in the Singapore context a worry that expanding the rules of standing beyond individuals with a concrete controversy would involve courts engaging in politically motivated litigation or litigation that would force the courts to descend into the political arena to deal with abstract political questions best left to the elected arms of government. Judicial review may end up being a "surrogate political process".[14]

It is clear, that in cases of uncertainty or in novel cases, the judiciary is prepared to look behind the rules and precedent to the above rationales to decide whether or not

[14] *Ibid* at 285.

to permit standing in a particular case as will be apparent in Parts III and IV below. As stated by Schiemann:

> In principle, it would have been helpful to the courts if Parliament had indicated. . . which *desiderata* [*ie* rationales on standing] it regarded as relevant and had given some sort of order of ranking amongst these *desiderata* [rationales on standing]. Parliament has not done so and therefore the matter has been left to the courts.[15]

Craig had also warned against the danger of leaving this to the courts in an earlier edition of his textbook:

> *Locus standi* has given rise to case law which is complex and often conflicting. It will continue to be so until the courts develop a clearer idea as to what they believe the purposes to be served by standing actually are.[16]

B. *Examples of Broader Rules of Standing Elsewhere*

This article will consider the various judicial approaches taken elsewhere before looking at the Singapore approach on standing and what this reveals about the nature of public law adjudication in Singapore. To understand the breadth of the developments in Singapore, it is necessary to briefly consider the scope of standing rules elsewhere: this article briefly looks at the scope of representative standing in the UK and Hong Kong.

In the English context, prior to the landmark decision in *R v Inland Revenue Commissioners*, ex parte *National Federation of Self-Employed and Small Businesses Ltd*,[17] applicants seeking to make use of administrative law remedies needed to show some harm to their private law rights or interests that was separate to a public harm to, for example, the public interest. However, the House of Lords sought to move away from this position in the *IRC* case as is evident from Lord Diplock's comments:

> It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped.[18]

In deciding on when to allow broader representative standing, the courts devised various criteria:

(a) The statutory responsibilities of the applicant (for example, certain organisations may have had a statutory mandate to pursue certain public interests and were commencing judicial review proceedings to pursue that mandate);

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15 Konrad Schiemann, "Locus Standi" [1990] Public Law 342 at 349.
16 PP Craig, *Administrative Law*, 2d ed (London: Sweet & Maxwell, 1989) at 378.
17 [1982] AC 617 (HL) [*IRC*].
18 *Ibid* at 644.

(b) The size and organisational qualities of the applicant and the interests of its constituent members as well as its expertise in the area of policy being challenged;[19]
(c) The absence of alternative potential applicants to defend and support the rule of law and the public interest issue in the case;[20] and
(d) The importance of vindicating the rule of law.[21]

The distinction drawn by Cane above between the three categories of representative standing cases is not explicitly discussed in the case law. However, what is clear is that all three categories of representative standing have been recognised by the courts.[22]

Closer to home, in the Hong Kong context applicants have been successful in bringing public interest challenges. For example, in the case of *Re Chan Kai Wah*[23] the applicant sought leave to judicially review a decision of the Finance Committee of the Legislative Council to approve funding for a major infrastructure project in Hong Kong: a high speed rail link between Hong Kong and Guangzhou. The Court of First Instance did not think that the applicant had sufficient *locus*. He was a resident next to the proposed site of the rail link but conceded that he had no personal or private interest in the outcome of the judicial review and was instead commencing proceedings as an 'ordinary civic-minded person'. The Court of Appeal was willing to acknowledge this was a sufficient basis for standing. The applicant, however, did not obtain leave on the basis that his application lacked merit. It is clear from the cases in Hong Kong that the courts have focused more on the merits of the case than they have on questions of standing and they have not been especially concerned

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19 *R v Secretary of State for Foreign and Commonwealth Affairs*, ex parte *World Development Movement Ltd* [1995] 1 WLR 386 (QB) [*World Development Movement*] (in relation to the applicant's challenge of a funding decision made by the Secretary of State for Foreign and Commonwealth Affairs of a foreign infrastructure project which it successfully argued did not take into account the relevant statutory considerations for the making of such a grant).

20 *Ibid*.

21 *Ibid*; *R v Felixstowe JJ*, ex parte *Leigh* [1987] 1 QB 582 (QB) (involving a challenge by a journalist of the legality of a policy adopted by the judiciary of not revealing the names of magistrates involved in a particular case on grounds of security); *R v Somerset County Council*, ex parte *Dixon* [1998] Environmental LR 111 (QB) (challenge by a local resident and executive committee member of a local council of a decision by the County Council to grant planning permission for the extension of limestone quarry operations which would have an impact on the natural environment—here the court noted that the nature of public interest cases required a broad interpretation of rules on standing to permit individuals to draw attention to misuses of public power in issues relating to the natural environment).

22 There do exist some conservative decisions—see *eg*, an unsuccessful application for judicial review was made in *R v Secretary of State for the Environment*, ex parte *Rose Theatre Trust Co* [1990] 1 QB 504 (QB). Here a group of people formed a company to challenge a decision not to grant monument status to the remains of an old Elizabethan Theatre discovered at a construction site. The effect of the monument status would have been to, in effect, halt development of the site on which the Theatre was located. Schiemann J concluded that the company did not have standing because its members individually had not had standing and did not obtain standing by organising themselves into a company. Accordingly, had the applicants had individual standing or a personal interest in the subject matter, the company they formed would also have standing. However, this remains an exception against a general trend towards recognising representative standing in some form.

23 (26 May 2010), HCAL 40/2010 (HKCFI); *Chan Kai Wah v HKSAR* (15 March 2011), CACV 126/2010 (HKCA).

with restricting standing.[24] A possible explanation for this could be the need to redress the lack of public participation in government decision-making in the Hong Kong context. The lack of wide and regular public participation in the making of decisions or policies by a largely unrepresentative government and the application of strict standing rules would immunise large areas of government activity from accountability or review.

III. Scope of Standing in Singapore: A Starting Point for the Contemporary Position

This Part now turns to look at who can commence proceedings in Singapore and will demonstrate how the Singapore position is much more restricted than that in the UK or Hong Kong (as discussed in Part II). Despite the absence of any explicit threshold for standing in the *Rules of Court*[25] in Singapore, the courts discussed the possibility of proceeding on the basis that in order to apply for a prerogative order (*certiorari*, mandamus or a prohibition order), the applicants would have to show that they had a 'sufficient interest' or 'substantial interest' or 'real interest' in the subject matter of the application (akin to the UK and Hong Kong positions).[26]

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[24] See Swati Jhaveri, Michael Ramsden & Anne Scully-Hill, *Administrative Law in Hong Kong*, 2d ed (Hong Kong: LexisNexis, 2013) ch 4.

[25] *Supra* note 10.

[26] *Tan Eng Hong* (HC), *supra* note 3 at paras 10-13; *Tan Eng Hong* (CA), *supra* note 3 at paras 83, 84—not much turns on the different uses of 'sufficient' or 'substantial'—the focus of the cases has been on how to satisfy the requirement of showing some degree of interest in the case to establish standing. The idea of having different rules of standing for the prerogative remedies versus the private law remedy of a declaration is becoming of less relevance. Indeed, in this case the High Court discussed the idea of unified tests for standing for the various prerogative remedies: *certiorari* and prohibition on the one hand and mandamus on the other (following the lead of the *IRC* case, *supra* note 17): see *Tan Eng Hong* (HC), *ibid* at para 13. The High Court also preferred looking at standing in terms of the merits of the applicant's case—sufficiency of the applicant's interest was to be judged in relation to the subject matter of the application (and the High Court proceeded with its analysis on this basis). The unification of the tests on standing for prerogative remedies and for private law remedies (like declarations) was further confirmed by the Court of Appeal in *Eng Foong Ho v AG* [2009] 2 SLR (R) 542 (CA) [*Eng Foong Ho*] and *Tan Eng Hong* (CA), *ibid* at paras 75-82. The strength of this *ratio* is further augmented by the fact that the amendments to order 53 of the *Rules of Court*, *ibid* now allow the court to award declaratory relief together with the prerogative remedies and there is no longer any need for an applicant to commence two sets of proceedings to obtain this relief. The exception to this is the Court of Appeal's view in *Vellama*, *supra* note 1 where the Court held that the "sufficient" interest test in the UK differed from the 'real interest' test in Singapore for declaratory relief: the former allowed the court much more flexibility and scope for granting leave on the basis of public interest standing: see *ibid* at para 17. This was re-clarified in *Jeyaretnam Kenneth Andrew*, *supra* note 4 at para 43 where the Court of Appeal held that the thrust of *Eng Foong Ho*, *ibid* was to apply the same test for *locus standi* across all the different remedies. The Court did however clarify that the uniform test to be applied in Singapore is the higher threshold of showing violation of a personal right or impact on a personal interest versus the broader "sufficient interest" threshold in the UK which has been used broadly to allow forms of public interest standing. The issue is that all of these cases involved declaratory relief which traditionally follows private law principles of requiring a violation of a personal right: *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd* [2006] 1 SLR (R) 112 (CA) [*Karaha Bodas*]. Thus, it is still open what the court's position on the standing requirement will be outside of this remedial constitutional context. All the cases under discussion in this article involve applications for declaratory relief for which the starting

This was as early as in *Chan Hiang Leng Colin v Minister for Information and the Arts*.[27]

In *Colin Chan*,[28] the applicants—members of the Jehovah's Witnesses—challenged a decision by the respondent to ban materials published by the International Bible Students Association ("IBSA") which is a corporate not-for-profit organisation used by the Jehovah's Witnesses for the production and distribution of religious literature.[29] The applicants applied for a *certiorari* and declaration on the basis that the order by the Minister was, *inter alia*, *ultra vires* the *Constitution*[30] (in particular, articles 12, 14 and 15 dealing with equality, freedom of expression and freedom of religion respectively). Counsel for the respondent argued that the applicants did not have the requisite standing as they were not office holders in the IBSA to whom the order was addressed. At first instance in the High Court, Judith Prakash J rejected this argument: (a) the applicants were ministers of the affected religion and needed to have access to materials published by the IBSA in order to carry out their job; and (b) they were facing prosecution at the time for possessing banned materials in contravention of the Minister's order. While recognising standing to challenge an order not addressed to them, it is clear the Court was basing it on the relatively narrow basis that the applicants were "directly affected by the order [and] there [was] a clear relationship between [their] interest and the nature of the remedy they sought."[31]

What is more interesting is Judith Prakash J's *obiter* observation that she would have been prepared to recognise the standing of the applicants notwithstanding the prosecution on the basis that:

> [The restriction of materials] affected their ability to have access to materials relating to their religion and the freedom to practise one's religion is, subject to certain qualifications. . . one of a Singapore citizen's constitutional rights. In that regard, Lord Denning's remarks [in *R v Greater London Council*, ex parte *Blackburn*[32]] about the ability of a citizen to prevent the transgression of the law by the government or a public authority so as to offend many other citizens were entirely apposite.[33]

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point of the test of standing is the *Karaha Bodas* test and its reliance on the violation of personal rights but there is no reason that the court will not extend the principles to broader constitutional rights context irrespective of the remedy sought by the applicant.

27 [1995] 2 SLR (R) 627 (HC) [*Colin Chan* (HC)]; *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR (R) 294 (CA) [*Colin Chan* (CA)]. For a discussion of the position prior to *Colin Chan* see SM Thio, *Locus Standi and Judicial Review* (Singapore: Singapore University Press, 1971). The article uses *Colin Chan* as a starting point for understanding the contemporary position—this is because the opening for broader standing rules was made possible by the comments in *Colin Chan* and relied on in the cases under discussion in Part IV.

28 *Ibid*.

29 This was on the back of a decision by the government to de-register and ban the Jehovah's Witnesses and its activities on the grounds that its members refused to perform obligatory national service, salute the flag, or swear oaths of allegiance to the state. These were the subject of challenge elsewhere: *Chan Hiang Leng Colin v Public Prosecutor* [1994] 3 SLR (R) 209 (HC).

30 *Supra* note 7.

31 *Colin Chan* (HC), *supra* note 27 at para 16.

32 [1976] 3 All ER 184 at 192 (CA).

33 *Colin Chan* (HC), *supra* note 27 at para 17.

The precise parameters of this principle of having standing, on the basis of being a 'citizen', were not clear from the High Court's decision: for example, was it applicable only to citizens who were "directly affected" or citizens more generally irrespective of any personal impact on their particular exercise of the constitutional right in question? In addition, the applicants in the case were all ministers rather than just members of the Jehovah's Witnesses faith: would the Court's analysis have differed if they were not ministers who were prevented from doing their job?

On appeal, the position of the Court of Appeal on these issues was also not clear. In refuting the arguments of the respondent (that the applicants were members of the deregistered Jehovah's Witnesses and therefore part of an unlawful group) the Court just asserted that:

> [T]he appellants are not challenging [the Order] as members of any group [but]... in their capacity as citizens. What they are trying to do is to invoke their constitutional rights as citizens to profess, practise and to propagate their religion. The question is, therefore, whether they, as citizens, may do so... If a constitutional guarantee is to mean anything, it must mean that any citizen can complain to the courts if there is a violation of it.[34]

The Court of Appeal appeared to draw the line on which citizens could commence proceedings based on whose rights have been violated (therefore, a non-Jehovah's Witness would not be able to commence the same proceedings). In defining what would constitute a 'violation' the Court of Appeal went further than the High Court. First, the Court of Appeal specified that the fact that a violation would affect every other citizen should not undermine a particular citizen's interest in seeing that his constitutional rights are not similarly violated. Secondly, citizens did not need to wait until they are actually prosecuted before they can assert their constitutional rights.[35] Therefore, it was not necessary for the applicants to be members of the IBSA as their right to challenge the Minister's order arose from their position as citizens. The Court of Appeal was also mindful of the fact that if standing was restricted to the IBSA (and its office holders or members) this may lead to a possible lacuna in the law given that the IBSA is not a citizen and therefore not a beneficiary of the constitutional rights in Singapore. This would leave the possible transgression of the *Constitution* unchecked.[36] The logic of *Colin Chan* (CA) would indicate that if the executive was to pass an order banning all and any religious texts then any citizen in Singapore would be able to commence judicial review proceedings to challenge the relevant order. It is not clear whether these implications were considered. The precise boundaries of the position on standing initiated in *Colin Chan* (CA) remained untested until the more recent cases which the following Part will explore.

As the case law in Part IV reveals, while the courts have, in recent cases, been prepared to expand the rules on standing to permit judicial review in novel situations, they have still attempted to anchor any expansion to some personal connection to the case by the applicant (whether in the form of a violation of a personal right or in the form of special damage suffered by the applicant). The courts have also explicitly

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34 *Colin Chan* (CA), *supra* note 27 at paras 9, 13 (M Karthigesu JA).
35 *Ibid* at para 13.
36 *Ibid* at para 15.

rejected any call for free-standing public interest standing. The discussion in Part V will demonstrate how, on one view, the cases could still be considered a form of public interest standing. In each of the cases the applicant in question was not affected in his individual capacity but affected as someone who is a member of a group (accordingly the personal right that has been violated is a constitutional right that is violated in common with others in a group or the special damage suffered by the applicant is, again, in common with others in a defined class or group). Therefore, anyone in that group could have commenced the same judicial review proceedings. This is not therefore free-standing public interest standing. However, as the discussion will highlight, it is a form of representative standing, where the applicant could be seen as a representative of a group's rights or interests.

IV. Scope of Standing in Singapore: Pushing the Boundaries

Three groups of cases will be considered as advances on the position left open in *Colin Chan* (CA). The applicants and the nature of their constitutionality arguments posed different kinds of challenges to the *Colin Chan* (CA) position.

A. Tan Eng Hong *(CA)*[37] *and* Lim Meng Suang:[38] Locus Standi qua *Citizen for Violation of Constitutional Rights*

The applicants in these cases sought to challenge the constitutionality of section 377A of the *Penal Code*[39] (which criminalises sex between mutually consenting adult males) on the basis of article 9 (no deprivation of life and "liberty" save in accordance with the law) and article 12 (equality).[40] In *Tan Eng Hong* (CA), the applicants had been charged under section 377A but the charge was eventually substituted for one under section 294(a) of the *Penal Code* (commission of an obscene act in public). In *Lim Meng Suang* the applicants had not been apprehended or charged under any provision of the *Penal Code*. They were a homosexual couple seeking to challenge section 377A. Their challenge was restricted to article 12 (on equality). In both cases, section 377A was not applied to the applicants: they sought to rely on the possibility of it and/or the mere existence of it (notwithstanding that the Attorney-General had given assurances that homosexual individuals would generally not be prosecuted under section 377A). In this regard, *Lim Meng Suang* went further than the facts of *Colin Chan* (CA) where the ministers of the Jehovah's Witnesses were facing prosecution for possession of the banned materials.[41]

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37 *Supra* note 3.

38 *Supra* note 3.

39 *Supra* note 2.

40 *Constitution*, *supra* note 7.

41 One issue the Court was confronted with was whether the case raised a real controversy for deliberation or whether it was an application to review an abstract, academic or hypothetical question. On this, the Court of Appeal held in *Tan Eng Hong* (CA), *supra* note 3 at para 143 that [emphasis added]:

> *Where the circumstances of a case are such that a declaration will be of value to the parties or to the public, the court may proceed to hear the case and grant declaratory relief even though the facts on which the action is based are theoretical.* We do not necessarily see this as an exception to the 'real controversy' requirement as we are of the view that *it can logically be said that where there is a real*

The first issue the Court had to confront was the precise nature of the test set out in *Colin Chan* (CA). The applicants sought to argue that the Court of Appeal had lowered the threshold for standing in cases involving constitutional rights. The High Court specifically rejected the idea that the Court of Appeal in *Colin Chan* (CA) should be read as holding that the mere fact of citizenship provided an applicant with a sufficient interest to have the necessary *locus standi* to commence judicial review proceedings. Rather M Karthigesu JA's judgment in *Colin Chan* (CA) should be read as treating constitutional rights as vested personally in each citizen and thereby a violation of such a right would provide the citizen with a sufficient interest to commence judicial review proceedings. At the High Court, Lai Siu Chiu J highlighted that a constitutional right may be violated in two ways: by the mere presence of an unconstitutional law on the statute books or by the possibility or by the "spectre" of future prosecution.[42]

In *Tan Eng Hong* (CA), the Court of Appeal also reiterated that *Colin Chan* (CA) does not stand for the proposition that applicants in constitutional cases do not need to show some sort of violation of their personal rights in order to have standing. *Colin Chan* (CA) just stands for the proposition that constitutional rights can be considered a form of personal right for these purposes.[43] As with the High Court, the Court of Appeal held that a violation of constitutional rights is possible in the absence of an actual charge and prosecution under the offending section 377A. Accordingly, a real and credible threat of prosecution[44] or the very existence of an unconstitutional law on the statute books could constitute a violation of an individual's constitutional rights. However, on the latter the Court of Appeal added some clarifications to this: (a) first, this would be in extraordinary or rare cases; (b) secondly, the court may relax the standing requirements in such situations where the only way applicants could establish standing would be to violate the allegedly unconstitutional legislation and force the administration to apply it to them in order for them to have standing and the absence of the availability of alternative remedies would thus be a factor in considering how broadly the court would apply the standing requirements in such cases; and (c) thirdly, in response to the Attorney-General's concerns that if the mere presence of a law in statute books can constitute a violation of rights, then every piece

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legal interest in a case being heard, there is a real controversy to be determined... '*Legal' interest is used here in contradistinction to a mere socio-political interest*, and may be said to *arise where there is a novel question of law for determination*, as in the present case. While a legal interest may suffice to satisfy the 'real controversy' requirement, mere socio-political interest will *not* suffice in itself. The court is well placed to determine legal questions but not socio-political questions. *The court's function is instead to ensure, as the guardian of the Constitution, that the Constitution is upheld inviolate.*

Thus the Court preferred the issue of *locus standi* to resolve concerns over floodgates, justiciability *etc*.

42 *Tan Eng Hong* (HC), *supra* note 3 at paras 19, 20.

43 And in this respect the Court of Appeal disagreed with the view that *Colin Chan* (CA) stands for the proposition that citizenship *per se* is sufficient for standing irrespective of the presence of any violation (*cf* Kevin YL Tan & Thio Li-ann, *Constitutional Law in Malaysia & Singapore*, 3d ed (Singapore: LexisNexis, 2010) at 551 who argue the opposite).

44 On this, the Court of Appeal rejected the Attorney-General's argument that the informal approach of not prosecuting private consensual acts between two adult males and the policy of selective prosecution were sufficient to remove the threat of prosecution: the absence of proactive enforcement was very different from there being a total absence of any enforcement, especially given that such ministerial statements have no formal effect in law and are not permanent but subject to change with ministerial personnel changes: *Tan Eng Hong* (CA), *supra* note 3 at paras 179-182.

of legislation could potentially be challenged, the Court of Appeal highlighted that as Singapore has adopted a system of parliamentary sovereignty and the concomitant presumption of constitutionality,[45] a law is presumed to be valid unless declared void. Notwithstanding these qualifications, the Court of Appeal was prepared to find standing on the basis that the existence of section 377A, *prima facie,* violates the applicants' rights:

> It is uncontroverted that [section] 377A is a law which specifically targets sexually-active male homosexuals. The plain language of [section] 377A excludes both male-female acts and female-female acts. Tan professes to be a member of the targeted group, and the [Attorney-General] has not disputed this claim. Therefore, since we have found that [section] 377A arguably violates the [article] 12(1) rights of its target group, as a member of that group, Tan's rights have arguably been violated by the mere existence of [section] 377A in the statute books. . .[46]

The position was further tested in the subsequent case of *Madan Mohan Singh*.[47] The applicant in the case was a volunteer Sikh counsellor for prisoners in Singapore and sought to challenge a hair grooming policy devised by the Singapore Prison Service ("SPS"). The policy required that Sikh inmates who had unshorn hair at the point of admission into prison be permitted to keep their hair unshorn. However, if a prisoner was admitted with shorn hair he would not be permitted to then maintain unshorn hair. The nomenclature of the policy was subsequently changed from "shorn" and "unshorn" to "practising Sikhs" and "non-practising Sikhs". The applicant sought to engage the SPS on its policy for the benefit of the prisoners. Eventually the conversations broke down[48] and the applicant commenced judicial review proceedings for a quashing order against the labelling of Sikh prisoners as "practising" and "non-practising".[49] The difficulty for the applicant was that he sought declaratory relief to the effect that the applicant's own constitutional right to propagate had been violated by the SPS. He made several arguments to show such a violation: that the policy and the non-renewal of his volunteer pass when he tried to push back against the policy interfered with his duty to the Sikh inmates to provide religious guidance and counselling; that the inmates' right to practise their religion was linked to his own right to propagate his faith; and that the applicant had a close and personal relationship with the inmates which was affected by the policy. The court, unsurprisingly,

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[45] For a discussion of which see Jack Tsen-Ta Lee, "Rethinking the Presumption of Constitutionality" in Neo, *supra* note 7, 139.

[46] *Tan Eng Hong* (CA), *supra* note 3 at para 126 (this was in the context of proceedings to strike out the applicant's claim and was not the final judgment on the constitutionality of section 377A: in subsequent proceedings the applicant was unsuccessful in making this argument—see *Tan Eng Hong v AG* [2013] 4 SLR 1059 (HC)). On the basis of this position of the Court of Appeal, the Attorney-General did not dispute the *locus standi* of the applicants in the subsequent case of *Lim Meng Suang*, *supra* note 3 where the applicants were not arrested, charged or prosecuted in any way under section 377A.

[47] *Supra* note 6.

[48] There were various reasons for this, including, a concern that the applicant was actively encouraging the Sikh inmates to disobey the policy as evidenced by a spike in the number of inmates requesting to keep their hair long during the applicant's tenure as counsellor.

[49] Something the SPS had already abandoned prior to the proceedings.

rejected all of the applicant's arguments.[50] The arguably strongest argument was the one based on the link between the inmates' right to practise and the applicant's right to propagate. On this the court acknowledged that keeping unshorn hair was just one aspect of the Sikh religion and thus any policy on this did not, on its own, restrict the inmates' right to practise their religion and, in any event, the policy did not apply directly to the applicant who was free to practise his own religion as he saw fit; the applicant was aware that any counsel he offered to inmates must be done in accordance with all prison policy (something which he had in fact done for the first ten years of his prison service as a volunteer without complaint); and the applicant's right to propagate is not predicated on the inmates' right to practise what the applicant propagates—he is free to propagate.

This case serves to highlight the limits of *Tan Eng Hong* (CA)'s position on standing. It will be vital for applicants to show a violation of their own personal or constitutional rights. Applicants will not be permitted to commence proceedings in some form of representative capacity for the violation of others' rights. It is this restriction that caused the applicant in *Madan Mohan Singh* to raise slightly awkward arguments to establish the violation of his own constitutional rights: and indeed his strongest argument was one that piggybacked on the violation of the inmates' rights.

A more successful application for judicial review for violation of constitutional rights following *Tan Eng Hong* (CA) was made in *Vijaya Kumar*.[51] The applicants in this case were members of the Hindu community who participated in an annual religious procession in Singapore—the Thaipusam procession. They sought to challenge the implementation of a policy against singing or the use of musical instruments at various points during the procession. The court accepted the standing of the applicants—all of whom were Hindu—either as participants in the procession or as spectators and photographers of the procession. The court rejected arguments against standing made on the basis that the applicants were not themselves holders of the permit to have the procession but mere participants. The court held that the permit holders would *also* have standing but that this did not exclude standing by the applicants as participants and spectators:

> Thaipusam is celebrated by Hindus. People who profess to be adherents of a religion would have the legal standing to challenge decisions affecting what they believe to be the proper practice of that religion. It is open to the authorities in issue to adduce evidence to show that a particular applicant is in fact a charlatan pretending to profess a certain religion for ulterior purposes. However, there was no dispute in the present case that the three applicants are Hindus.[52]

Their identity as Hindus was therefore critical for the judge who was not prepared to recognise standing by any "mere 'concerned citizen' or 'busybody' with no real interest in wanting the procession to be conducted *in accordance with his religious*

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[50] The non-renewal of the applicant's volunteer pass did not violate his right to propagate his religion as the applicant did not have a constitutional right to demand access to prison to propagate his religion and the quashing of the hair grooming policy would not automatically lead to the renewal of his volunteer pass: *Madan Mohan Singh*, *supra* note 6 at paras 39-42.

[51] *Supra* note 5.

[52] *Ibid* at para 23.

beliefs".[53] The need to show a violation of a constitutional right, namely the freedom of religion, was paramount in excluding mere citizens from the scope of applicants who could challenge the restrictions.

From *Tan Eng Hong* (CA), *Madan Mohan Singh* and *Vijaya Kumar*, it is clear that the courts' focus is on the need for a personal right that has been violated. Although it appears to allow broad categories and groups of individuals to commence judicial review proceedings (especially when we consider that the violation of a right can be established by the mere presence of legislation on the statute books), the court still chooses to tether the issue of *locus standi* to some personal connection or impact on the applicant. The true effect of the cases is therefore, not the unmooring of this personal connection, but the expansion of the meaning of 'violation' so that it can be easily established. The article now turns to look at the next expansion of the *Colin Chan* (CA) line of cases: where the applicant is relying not on some personal right but on the violation of a public right.

B. Vellama:[54] Locus Standi qua *Citizen for Violation of a Public Right with Special Damage*

The applicant in *Vellama* was a resident of the Hougang geographical constituency. Its elected Member of Parliament had to resign his position on his expulsion from his political party (a minority and opposition party in Parliament). The applicant commenced judicial review proceedings seeking declaratory relief to clarify the meaning of article 49 of the *Constitution*:[55] she sought to argue that it imposed a constitutional obligation on the Prime Minister to call a by-election on the vacancy of a parliamentary seat. She also applied for the remedy of mandamus to require the Prime Minister to carry out that obligation. The applicant in the case, as a resident of the Hougang constituency, was in a similar position to all other residents. This posed the context in which the court had to consider how far to extend the law on standing given that the applicant in this case was relying not on an express constitutional right (as was the case in *Colin Chan* (CA), *Tan Eng Hong* (CA) and *Lim Meng Suang*) but requiring the court to enforce a constitutional obligation.

In *Vellama*, the applicant's standing only became an issue on appeal. Prior to the hearing of her appeal from the High Court's decision on the correct interpretation of the Prime Minister's obligations under article 49, the Prime Minister had in fact called a by-election. Accordingly, her claim for mandatory relief fell away and she

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53 *Ibid* at para 22 [emphasis added].

54 *Supra* note 1.

55 *Supra* note 7:

> (1) Whenever the seat of a Member, not being a non-constituency Member, has become vacant for any reason other than a dissolution of Parliament, the vacancy shall be filled by election in the manner provided by or under any law relating to Parliamentary elections for the time being in force.
>
> (2) The Legislature may by law provide for—
>
> (a) the vacating of a seat of a non-constituency Member in circumstances other than those specified in [a]rticle 46;
>
> (b) the filling of vacancies of the seats of non-constituency Members where such vacancies are caused otherwise than by a dissolution of Parliament.

was left pursuing her claim for declaratory relief on the proper meaning of article 49. At this point the Attorney-General sought to raise various procedural issues, including the issue of her *locus standi* to pursue declaratory relief once the by-election had been called. In deciding the issue, the Court of Appeal clarified the nature of the applicant's standing prior to and after the by-election. The crucial distinction drawn by the Court of Appeal was on the nature of her interest in the judicial review proceedings before and after the by-election: the precise test to be used to determine standing was determined by reference to whether the applicant was relying on a personal or private right, on the one hand, and a public right, on the other.

The Court of Appeal distinguished *Tan Eng Hong* (CA) from the present case on the basis that, in the former, notwithstanding the fact that the applicant was no longer being prosecuted under section 377A, the presence of the provision on the statute books as well as the real and credible threat of a future prosecution meant that there was still a violation of his personal constitutional rights under article 12 of the *Constitution* on equality. Contrastingly in *Vellama*, while before the by-election the applicant could have asserted that she, as a resident of the constituency, was entitled to vote for a Member of Parliament to represent her and other residents' views, such an entitlement was no longer in danger once the by-election was called: "her interest in [article] 49 can no longer be framed as a private right."[56] The Court went on to recognise that the public continued to have an interest in the issue of how vacancies would be filled and the exact parameters of article 49 in this regard. However, although framed as the interest of the public the Court proceeded to analyse the issue from the perspective that the applicant was now relying on a public 'right' rather than a private 'right'. It is unclear what the public 'right' was beyond a general public interest in the true interpretation of article 49.

The use of a 'public *right*' as the framing concept for discussion was problematic for the applicant given that the Court held that for an applicant to establish standing for declaratory relief on the basis of a violation of a public right, the applicant must show that the violation of the public right has caused some special damage. The Court traced this requirement of 'special damage' back to the law of public nuisance in torts (which had been accepted as relevant in English cases to the issue of standing

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[56] *Supra* note 1 at para 27. The Court of Appeal expressed doubt over whether there would have been a violation of this personal right in light of the fact that the Prime Minister had expressed an intention to call a by-election at the time of her application for judicial review to the High Court: *ibid*, para 37. The Attorney-General however had not disputed standing so the case proceeded. What is interesting to note is that, in making its decision on the substantive issue of the proper meaning of article 49, the Court of Appeal did not base it on a personal 'right to vote' (something which would have been extra-textual and implicit rather than explicit). Instead, the Court of Appeal at para 79 held that article 49 imposed a duty on the Prime Minister to call a by-election on the basis that:

> [T]he form of government... is the Westminster model of government, with the party commanding the majority support in Parliament having the mandate to form the government. The authority of the government emanates from the people... The voters of a constituency are entitled to have a Member representing and speaking for them in Parliament.

There was no mention of a right to vote but rather a right to have a representative. Thus the status of the right to vote was left ambiguous following *Vellama*. The Court of Appeal clarified its status, in *obiter dicta*, in the later case of *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 at para 70 (CA) where it identified the right to vote as an unenumerated constitutional right deriving from the basic structure of the *Constitution* which imports a Westminster style of government.

in public law and public rights' cases). For this the Court had to distinguish between private and public rights. On this:

> [The latter were rights that citizens] shared in common [with other citizens] because they arise from public duties which are owed to the general class of affected persons as a whole. . . are 'held and vindicated by public authorities'. . . As public rights are shared with the public in common, an applicant cannot have standing unless he has suffered some 'special damage' which distinguishes his claim from those of other potential litigants in the same class. . . if [it] were not to be required, it is likely that the courts will be inundated by a multiplicity of actions, some raised by mere busybodies and social gadflies, to the detriment of good public administration. . . This requirement is a safeguard against essentially political issues, which should be more appropriately ventilated elsewhere, being camouflaged as legal questions.[57]

The Court of Appeal went further to define "special damage" as damage to an applicant's personal interests in a direct and practical way over and above that suffered by the general class of persons who are the beneficiaries of the public right but he does not need to be the only person affected. It was unsurprisingly difficult for the applicant to establish special damage given that the nature of the 'public right' was actually the 'public interest' in the interpretation of article 49. The problem is compounded by the fact that the Court of Appeal's analysis of the special damage requirement was restricted to a short paragraph and there was no guidance offered on what it could have been in *Vellama*'s case.

This case highlights that the way in which the public right is identified is going to be critical to the applicant's ability to establish standing. For example, if the Court of Appeal had continued the narrative of the right to vote or entitlement to vote or the public or constituency's right to a representative in Parliament for its constituency, an applicant may have a clearer pathway for establishing special damage to that right. For example, the applicant in *Vellama* had sought to argue at the High Court level that she had been in discussions with the previous Member of Parliament on particular issues that were affecting her and that needed a timely resolution and the vacancy and delay in calling a by-election left her without a timely conduit for the resolution of those issues. In addition, the constituency as a whole could have argued special damage on the basis that during the vacancy it did not have a Member of Parliament voting for it on issues that Parliament had been deliberating. In this way, conceptualising the public 'right' as an interest in the correct interpretation of article 49 left little scope of argument for the applicant on the special damage requirement.

C. Jeyaretnam Kenneth Andrew[58] *(I):* Locus Standi qua *Citizen for Violation of a Public Duty with No Correlative Right*

This case raised a third variation on the standing issue: here the applicant sought to enforce a public duty that had no correlative public or private right. The applicant in

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[57] *Ibid* at para 33.

[58] *Supra* note 4.

the case was a member of an opposition party and sought to challenge a loan made by the Monetary Authority of Singapore to the International Monetary Fund on the basis that it contravened article 144(1) of the *Constitution*[59] (which in the applicant's view required parliamentary and presidential approval). As with *Vellama*, the applicant had no constitutional right that he was relying on to commence the judicial review proceedings. However, one step further than *Vellama*, the applicant had no connection to the case that set him apart from other citizens (such as residency in the Hougang constituency in *Vellama*). Thus this case posed a further challenge for the courts in how far they should extend the position in *Colin Chan* (CA). Interestingly, in the present case the respondent accepted that while there was a real controversy to be resolved, the respondent argued that the applicant lacked standing to commence the proceedings. The Court of Appeal also accepted that as the applicant was not relying on any right (public or private) but had commenced proceedings in the public interest, he had no standing. It would only be prepared to recognise standing in such a situation where the applicant is alleging a serious form of illegality on the part of the executive for which there is no applicant to commence judicial review proceedings. We turn to look at this next.

D. Jeyaretnam Kenneth Andrew[60] *(II): Residual Category of Public Interest Standing for Egregious Illegality*

The Court of Appeal in *Jeyaretnam Kenneth Andrew* was confronted by the fact that the respondent had admitted to there being a real controversy in the case but had resisted the fact that the applicant had standing. Indeed, on the basis of the principles discussed above, no citizen would have had standing in cases involving arguable breaches of public duties without any corresponding right (public or private). Here the Court was prepared to accept a limited form of public interest *locus standi* where there was such a lacuna. This echoes comments made in the Court of Appeal in *Colin Chan* (CA) to the effect that it would be strange if the only persons who could complain of a breach were members of the IBSA: IBSA is neither a citizen nor a beneficiary of the relevant rights relied on by the applicants in *Colin Chan* (CA). This would leave the order of the Minister unchallengeable. However, it is important to note that in *Colin Chan* (CA) the applicants still had to satisfy the court that there had been a violation of their own constitutional rights, which they did. In the present case of *Jeyaretnam Kenneth Andrew* the Court's discussion on such lacunas went further as it was an exception where the applicant could show no such violation. However, rather than recognising a free form of such standing for any form of unlawful conduct, the Court of Appeal held that the seriousness or gravity of the unlawful conduct would be a relevant consideration as would the statutory matrix

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[59] *Supra* note 7:

> No guarantee or loan shall be given or raised by the Government—
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> (a) except under the authority of any resolution of Parliament with which the President concurs;
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> (b) under the authority of any law to which this paragraph applies unless the President concurs with the giving or raising of such guarantee or loan; or
>
> (c) except under the authority of any other written law.

[60] *Supra* note 4.

in which the breach occurred.[61] On the latter the court would look at the intention behind the statutory framework to decide whether it could have been intended that applicants of certain classes could have standing to ask for judicial review of the actions of the executive under that statute. In the present case, article 144 and the alleged breach of it satisfied neither of these conditions for standing on the part of the applicant.

It would have been possible for the Court of Appeal to have further expanded the opening in *Jeyaretnam Kenneth Andrew* on public interest standing. Indeed, a possible counter view of the cases discussed above is that they do go beyond the private rights-based model of judicial review and, in effect, allowed cases which were essentially public interest cases to proceed. This potential for an alternative analysis of the cases is apparent on a closer inspection of the factual matrices of the cases. In *Tan Eng Hong* (CA), the applicants could equally be considered as having some form of representative standing, in the sense Cane discusses,[62] once the prosecution under section 377A of the *Penal Code* was dropped, especially when one considers that the 'violation' of the constitutional right was based on the slightly tenuous basis that the mere presence of legislation on the statute books can constitute such a violation. The true advance in the cases is thus the lowering of the threshold for showing a personal connection to the case: in the case of a violation of constitutional rights it is by the mere presence of legislation and in the case of public rights, via a broad and non-exhaustive definition of special damage. This lowering of the threshold of requirements for showing a personal connection in constitutional rights cases is a progressive development of access to constitutional justice. This is especially when one considers that the applicants in the cases had no or minimal alternative avenues of recourse. The courts' view of the relative advantages of the political process as a more appropriate forum for the debate of the issues in the cases is inapplicable given that the political process may have been inadequate as an *external* check in the cases discussed. For example, in the case of section 377A this had been deliberated in Parliament in 2007 without success from the applicants' perspective and without due consideration of the constitutional baselines that may alter the debate. The pressure on Parliament to revisit the issue may also have been lowered given the policy of selective enforcement of section 377A adopted by the executive. Thus, the applicants were left with the courts as a forum for deliberating the constitutional issues.

E. *Summary of the Current Position*

The focus on the presence of a 'right' (public or private) is obvious in the cases. Thus far, the courts have had the chance to distinguish between public and private rights (as is apparent from the discussion in *Vellama*) and between public duties that have correlative rights and those that do not (as is apparent from the discussion in *Jeyaretnam Kenneth Andrew*). This is all within the context of their view that the application of the *Colin Chan* (CA) test on standing turns on the nature of the rights.

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[61] In addition, in extending the law in this direction the Court of Appeal was explicit about the fact that this should not be taken in any way as making a move towards public interest litigation which has "the risk of it running amok, depending on the whims and fancies of anyone who happens to be a citizen of Singapore": *ibid* at para 62.

[62] See Part II, above.

What is still left unclear is how the courts will identify 'rights' *per se*. For example, what is the status of the 'entitlement to vote' in *Vellama* (an unenumerated right derived from the basic structure of the *Constitution* which imports a Westminster parliamentary style of government)? It is unclear whether an applicant's ability to establish standing will be more problematic in such scenarios than when he is relying on an explicit right in Part IV of the *Constitution* which enumerates the fundamental rights of citizens.

In addition, as highlighted in Part III, the court in *Colin Chan* (CA) took the view that constitutional rights are personal to all citizens: they vest in citizens as individuals rather than groups. This discussion took place in the context of rights set out in Part IV of the *Constitution*. However, there are other parts of the *Constitution* which could be said to establish 'group' rights or, perhaps, public duties which have identifiable beneficiaries. An example of such a provision is article 152 of the *Constitution*[63] which sets out that:

> (1) It shall be the responsibility of the Government constantly to care for the interests of the racial and religious minorities in Singapore.
> (2) The Government shall exercise its functions in such manner as to recognise the special position of the Malays, who are the indigenous people of Singapore, and accordingly it shall be the responsibility of the Government to protect, safeguard, support, foster and promote their political, educational, religious, economic, social and cultural interests and the Malay language.

It is conceivable that a member of the Malay race may seek to challenge decisions purportedly made under article 152. Putting aside issues relating to the possible grounds of review or challenge,[64] the issue of access is worth considering. While it may be problematic to interpret article 152 as giving rise to rights which are personal to each Malay and therefore give each Malay standing under *Tan Eng Hong* (CA), it is possible for such applicants to argue that they satisfy the special damage requirement under *Vellama* in appropriate circumstances.

In this way the precise boundaries of the *Colin Chan* (CA) line of cases discussed in this Part remain unclear and subject to clarification in future cases, especially where the applicant seeks to rely on rights that are not contained in Part IV of the *Constitution*.

V. Future of Public Interest Standing

The discussion in Part IV highlights the courts' resistance to extending access to judicial review beyond a personal context. The applicant in each case had to demonstrate his own connection to the case. The reason behind this resistance is clear from the comments in the cases on the role of public law adjudication in Singapore. The courts preferred a model of judicial review that was tethered to a traditional adjudicative model with applicants vindicating their own rights and interests rather than

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63 *Supra* note 7.

64 For example, article 152 may be read as non-justiciable or aspirational in nature making any constitutional challenge problematic.

one that was tied to a free-standing pursuit of the public interest:

> [T]hese rules on standing espouse an ethos of judicial review focused on vindicating personal rights and interests through adjudication rather than determining public policy through exposition. Matters of public policy are the proper remit of the Executive, and decoupling judicial review from the fundamental precepts of adversarial litigation would leave the courts vulnerable to being misused as a platform for political point-scoring.[65]

> The overall basis for judicial review is very much tied up with democratic theory... and especially the idea of the Government being often perceived as the guardian of 'public interests'[, a role which is for the Attorney-General and not individuals]...
>
> CJ Chan [extra-judicially] expressed plainly his opinion that judicial review is a 'function of socio-political attitude in the particular community'... and espoused a certain 'green-light' approach towards administrative law for Singapore's context. On this view, public administration is not principally about stopping bad administrative practices but encouraging good ones: 'in other words, seek good government through the political process and public avenues rather than redress bad government through the courts'...
>
> This was juxtaposed against the 'red-light approach' taken in the UK where the courts exist in a combative relationship with the Executive, functioning as a check on the latter's administrative powers... CJ Chan noted that the difference in both approaches has manifested in the different doctrines of *locus standi* developed in each jurisdiction... Rather, in terming judicial review as a 'comparatively blunt tool' in solving symptoms of systemic bureaucratic problems, CJ Chan instead advocated the following approach for the courts in Singapore to take...
>
> > Under a green-light approach, the courts can play their role in promoting the public interest by applying *a more discriminating test of locus standi* to balance the rights of the individual and the rights of the state in the implementation of sound policies in a lawful manner...
>
> [P]ublic law has long been perceived as constraining the exercise of public power where such exercise might encroach into an individual's liberties and[/]or his rights (a 'protection of the individual' view), as opposed to a means of ensuring that public bodies act properly in a legal sense, even in the absence of those rights (a 'public interest' view)...
>
> This leads us to note the principal distinction between the classical Diceyan constitution... where decisions are made by a responsible government subject to parliamentary scrutiny, and a more communitarian, civic republican tradition where citizens achieve self-fulfilment through participation in politics and decision-making... which essentially abolishes standing rules as we understand them to be. In the former, judicial review would be available to individuals for the purpose of protecting their own interests in dealings with the state, whereas the latter would necessarily have relaxed rules of standing in order to allow citizens to act in the public interest to contain perceived acts of governmental abuse...

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[65] *Vellama*, *supra* note 1 at para 34.

> [W]e see much value in maintaining the Dworkinian policy/principle divide here; this finds expression in the courts being concerned only with the individual's rights and interests, and not matters of public policy, which rightfully remain[] in the remit of proper political process.[66]

The concern to restrict standing is curious in light of the outcomes in all of the cases that are being considered. The applicant in *Vellama* was able to successfully argue that article 49 imposed a constitutional duty to call a by-election: however, these comments were *obiter* given that the by-election had already been called. In addition, the Court of Appeal held that the obligation under article 49 was coupled with discretion as to the timing of calling a by-election: the Prime Minister could do so within what he considered to be a reasonable time frame and the latter would be reviewable in the courts in only exceptional cases given its polycentric nature.[67] In *Tan Eng Hong* (CA),[68] *Madan Mohan Singh*,[69] *Vijaya Kumar*[70] and *Jeyaretnam Kenneth Andrew*, the applicants failed in their substantive arguments for a variety of reasons: all of which are generalisable to the deferential approach taken by the courts in the specific contexts of the cases and in the broader constitutional framework in Singapore.[71] Accordingly, it is apparent that there are enough mechanisms to implement a green-light approach to judicial review.[72] For this reason, a restrictive approach to standing may not be necessary.

It is thus arguable that a degree of liberalisation of the rules relating to public interest standing is important to further improve access to judicial review as a remedy, especially for issues which may be in a political blind spot (as is the case with the above cases). In certain situations, the individuals affected by a decision may not be equipped to commence proceedings but another individual or association may be able to do so (on the basis of some form of representative standing). In addition, it may be that in certain situations no individual would have a sufficient personal interest to commence proceedings which would allow an illegality to continue or go uncorrected. In such a situation it may be useful to recognise some form of representative standing to allow the correction of any illegality. Ultimately, a gradual liberalisation of the *locus standi* regime could lead to the improvement of the 'democratic' or

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66 *Jeyaretnam Kenneth Andrew*, *supra* note 4 at paras 35, 48, 49, 54-56 [emphasis in original]. See also David Feldman, "Public Interest Litigation and Constitutional Theory in Comparative Perspective" (1992) 55:1 Mod L Rev 44; Peter Cane, "Open Standing and the Role of Courts in a Democratic Society" (1999) 20 Sing L Rev 23; Chan Sek Keong, "The Courts and the 'Rule of Law' in Singapore: A Lecture Delivered at the Rule of Law Symposium" [2012] Sing JLS 209 for a further discussion of these competing views of public law adjudication.

67 *Vellama*, *supra* note 1 at para 85.

68 *Supra* note 3.

69 *Supra* note 6.

70 *Supra* note 5.

71 See the text accompanying note 45 on the emphasis of the constitutional ideas of parliamentary sovereignty and the presumption of constitutionality by the courts in the Singapore context.

72 The author has commented elsewhere on the possibility and desirability of revisiting the constitutional balance between the courts and the elected arms of government: see Swati Jhaveri, "Recent Judicial Comments on the Basic Structure of the Constitution" (20 April 2016), online: Singapore Public Law (blog) <https://singaporepubliclaw.com/2016/04/20/recent-judicial-comments-on-the-basic-structure-of-the-constitution/>. Indeed, as observed in the blog post, this is something that is gradually changing as the courts develop their view of their role in the constitutional setting of Singapore.

'participatory' credentials of courts:

> An accessible justice system is one that is welcoming, transparent and user-friendly. . . and a theory of participatory justice can be generally useful in helping to counter the perception of courts as somehow unrepresentative and undemocratic. If courts are seen to be participatory and responsive, they too can claim a sort of democratic legitimacy, based not on the representativeness of election but on popular participation. . . this may be particularly enticing. . . when trust in the institutions of representative democracy seems to be falling and a new form of popular democracy is in the making, creating demand for direct input into decision-making in every sphere of public life.[73]

An alternative participatory argument for liberalising rules on standing is apparent in Hong Kong (as discussed above): the need to make up for a perceived deficit in the participation of Hong Kong citizens in government and government decision-making.

However, while there are arguments in favour of a liberal regime of standing in such cases, some commentators have argued that there are equally strong reasons in support of a more conservative regime of rules on standing when it comes to public interest challenges. This is especially as there is a concern that public interest challenges may bring courts into the arena of purely political disputes as was forewarned by the courts above. It is clear that, in any event, in considering the development of rules of standing in this area, there is a need for a further elucidation of the principles that guide judicial discretion in the area. This could be in the form of a set of criteria that go beyond those identified in *Jeyaretnam Kenneth Andrew* for standing in cases not involving any violation of a personal right or special damage. For example, the courts could look at the nature of the litigants to see whether they have the resources and expertise to commence certain proceedings.[74] It should also not be necessary to restrict this to just cases of serious or egregious illegality: if good governance is taken seriously then any form of unlawful conduct is egregious. Arguably, the illegality the applicant was trying to establish in *Jeyaretnam Kenneth Andrew* could be considered important: although the applicant was just arguing for compliance of processes, they were parliamentary and presidential approval processes that are constitutionally mandated.

A further issue that may need to be considered is whether this form of standing only kicks in where there is an absence of an alternative applicant with the requisite personal standing to commence proceedings. Elsewhere it has been argued that lacunas are irrelevant. Yap argues that:

> [T]he absence of any particular class to litigate such claims gives support to the argument that the subject matter is committed to the political processes; given

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[73] Carol Harlow, "Public Law and Popular Justice" (2002) 65:1 Mod L Rev 1 at 14. Harlow herself is not a believer of the participatory argument and her approach of having a requirement of special damage for deciding when we should allow public interest litigation would resonate with the Singapore courts.

[74] Cane, *Administrative Law*, *supra* note 13 at 288 and see also discussion on *World Development Movement*, *supra* note 19 at Part II, above. See also Po Jen Yap, "Understanding Public Interest Litigation in Hong Kong" (2008) 37:3 Comm L World Rev 257.

> the potentially myriad claims that may transpire from grievances that are cast upon society as a whole and Parliament's better suited role in addressing such generalized concerns, there is much to be said in favour of courts focusing on concrete and particularized injuries as a rule, and only when an applicant avers an alleged generalized injury of serious public importance should judges intervene so as to prevent the more injurious and widespread public malfeasance from being left unchecked.
>
> Where the grievances are specific to individuals or segments of society, the presence of a concrete, particularized injury adds the essential dimension of specificity to the dispute in that the complainant may present to the court a complete perspective of the adverse consequences flowing from the specific facts undergirding his or her grievance.[75]

What is being proposed is not a free-standing recognition of public interest standing. Rather, any development of the law should be a measured and incremental development in the near future. This could be through the gradual recognition of the additional factors and revisiting of the conclusions in *Jeyaretnam Kenneth Andrew*.

VI. Conclusion

The modest advance on rules on public interest standing proposed in this article will take place in the context of a broader constitutional movement. As already highlighted above, the courts' explanation of their own judicial role in the constitutional setting is undergoing an evolution.[76] In addition to the changes to doctrine used to resolve constitutional disputes, aspects of the issue of access to courts are also undergoing change. For example, the courts have liberalised the approach to the 'real controversy' requirement in constitutional challenges in view of the public interest in clarifying issues of constitutional importance.[77] There are also indications of a change in the approach taken to costs in judicial review cases. Accordingly, in a recent application for judicial review by an activist charged with unlawful assembly, the court discounted the costs payable by the applicant who was unsuccessful in the proceedings.[78] These are welcome changes to the procedural barriers to access.[79]

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75 *Ibid* at 271.

76 See *supra* note 72.

77 See *supra* note 41. The court also rejected the proposed procedural barriers to the applicant in *Vellama*, *supra* note 1, suggested by the Attorney-General to the effect that post the by-election she should no longer be allowed to pursue her application for declaratory relief. The court allowed her to proceed notwithstanding the falling away of her application for a mandatory order once the by-election had been called.

78 *Wham Kwok Han Jolovan v AG* [2016] 1 SLR 1370 (HC) [*Jolovan Wham*]. Although the basis for discounting costs is not explicitly discussed in the case, this is an embryonic start to softening costs-based barriers to judicial review when compared to neighbouring jurisdictions: see Jhaveri, Ramsden & Scully-Hill, *supra* note 24, ch 4. Any advance on the position of costs in *Jolovan Wham* can be contrasted with recent proposed amendments to the *Government Proceedings Act* (Cap 121, 1985 Rev Ed Sing) which remove a cap on the number of government lawyers whose costs may be payable by the other side: see *Statutes (Miscellaneous Amendments) Act 2016* (No 16 of 2016, Sing).

79 These changes should also prompt more careful litigation planning on the part of applicants. For example, where the relevant constitutional issue does affect a large cross-section of the population or

It is left to future cases to appreciate the full impact of the developments of the *Colin Chan* (CA) position as well as the embryonic or residual form of public interest standing proposed in *Jeyaretnam Kenneth Andrew*. The hope is that the courts advance, albeit gradually, on the developments made thus far.

a group (as was the case in *Tan Eng Hong* (CA), *supra* note 3 and *Vellama*, *supra* note 1, for example) it may be useful for members of the group to consider who would be the most effective applicant to commence proceedings. This would have been a useful thought exercise for the applicants in the case of *Madan Mohan Singh*, *supra* note 6: for example, would it have been more useful for an inmate to challenge the SPS hair grooming policy rather than a prison counsellor? This would also require incentivising lawyers to act for the applicant: see Jothie Rajah & Arun K Thiruvengadam, "Of Absences, Masks, and Exceptions: Cause Lawyering in Singapore" (2013) 31:3 Wis Intl LJ 646 for a powerful discussion of lawyering in Singapore.