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STANDING UP FOR YOUR RIGHTS: A REVIEW OF THE LAW OF STANDING IN JUDICIAL REVIEW IN SINGAPORE

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There are two types of rules on standing to apply for judicial review of legislation or executive action on constitutional grounds. 'Interest-based' rules grant standing to a person who can demonstrate a 'sufficient interest' in the subject matter of the application. 'Rights-based' rules require the applicant to identify a specific constitutional right vested in him that has allegedly been violated. Singapore's standing rules are now rights-based. Rights-based standing rules are distinctively advantageous as they provide a forum for the courts to develop the content of constitutional rights as part of the standing inquiry; such development is not always possible at later stages of the litigation process. Unfortunately, this benefit of rights-based standing rules is obscured because Singapore's standing rules are overly complicated and not doctrinally consistent. This paper argues for a simplification of the present standing rules to fully realise the benefit of rights-based standing rules. While the paper focuses on judicial review on constitutional grounds, it concludes with observations on how standing rules may be similarly clarified in the field of administrative law and without abandoning the rights-based framework.

I. INTRODUCTION

When does one have standing to apply for judicial review of legislation or executive action on constitutional grounds? There are debates to be had between whether judicial review exists to protect "individuals' personal rights and interests" or to protect the "public interest".[1] This paper is not concerned with such debates, and will take at its highest the Singapore courts' following the former model[2] and considering that one can only obtain standing when one has personally been affected. Rather, this paper is concerned with the question of what "personal rights and interests" Singapore's law of standing recognises. In other words, what precisely does an individual need to show to obtain personal standing?

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1 Mark Elliott & Jason Varuhas, *Administrative Law: Text and Materials*, 5th ed (Oxford: Oxford University Press, 2017) at 546, distinguish between these views, which they respectively call the "rights based" and "public interest" models of judicial review. Support for the latter may be drawn from *R v Somerset County Council, ex parte Dixon* [1998] Env LR 111 (EWHC) at 121.

2 *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345 at paras 54, 55 read with para 62 (CA) [*Jeyaretnam*].

Singapore law has provided two possible answers to this question:

(a) The Singapore courts once took the view that one had standing if one had a "'sufficient interest' in the subject matter of the application".[3] It was not necessary for the applicant to have suffered the violation of "any special personal right".[4] For short, let us call rules along these lines '**interest-based standing rules**'.

(b) But the law has now changed. It is not enough to allege that the state has committed a wrong in which one has an 'interest'. Instead, the applicant must go further and show that the state's conduct has arguably violated an identifiable constitutional right. Let us call such rules '**rights-based standing rules**'.

The Singapore courts have justified rights-based standing rules on the ground that judicial review, like any adversarial litigation,[5] involves "one party claiming a right against another party, to protect or enforce the right... or... to settle a dispute between [the parties] as to the existence or nature of the right claimed".[6] Therefore, the Singapore courts have never granted standing to an applicant *qua* surrogate for another, spokesperson for a group, or citizen;[7] only *personal* standing is recognised. In order to gain standing, any applicant for judicial review must clearly identify a right vested in *him* that has allegedly been violated; it is not enough merely to assert in vague terms that his 'interests' are engaged. The law of standing is intimately tied up with questions relating to the content and extent of constitutional rights.

This paper will explore this aspect of the law of standing. It will study rights-based standing rules in Singapore, chronicle their development, and explain their implications. Section II will compare rights-based with interest-based standing rules and make the point that, compared to interest-based standing rules, rights-based standing rules are beneficial because they allow the courts to develop the content of constitutional rights as part of the standing inquiry, hence providing specific guidance to future would-be litigants. Such development is not always possible at later stages of the litigation process for reasons that will be discussed below. Section III chronicles the development of this feature of rights-based standing rules, and Section IV demonstrates it in action in Singapore case law.

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3 *Chan Hiang Leng Colin v Minister for Information and the Arts* [1995] 2 SLR (R) 627 at para 8 (HC) [*Colin Chan (HC)*].

4 *Ibid* at para 11 (read with para 13), citing H W R Wade, *Administrative Law*, 4th ed (Oxford: Clarendon Press, 1977) at 544.

5 *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 at para 34 (CA) [*Vellama (CA)*].

6 *Gouriet v Union of Post Office Workers* [1978] AC 435 at 501D, E (HL) [*Gouriet*], cited in *Vellama (CA)*, *ibid* at para 35.

7 These are the categories of "representative standing" identified by Peter Cane, *Administrative Law*, 5th ed (Oxford: Oxford University Press, 2011) at 285-288 (using the labels "surrogate standing, associational standing, and citizen standing" respectively). *Cf* Swati Jhaveri, "Advancing Constitutional Justice in Singapore: Enhancing Access and standing in Judicial Review Cases" [2017] Sing JLS 53 at 54 [*Jhaveri*], which argues that the courts have created "some scope" for "developing a... circumscribed form of [representative] standing"; but the learned author's argument is only that certain Singapore cases may still be analysed as having the *effect* of allowing public interest standing.

However, as Sections V and VI will argue, Singapore's particular conceptualisation of rights-based standing rules undermines this benefit. The problem lies in the over-complicated distinctions between 'private rights', 'public rights', and 'special damage', which are unnecessary, confusing, and without legal basis. The law on standing in Singapore is presently as follows:

(a) First, the applicant has standing if he has suffered the violation of a "right personal to the applicant".[8]
(b) Second, the applicant has standing if he has suffered the violation of a "public right" which has caused him "special damage".[9]
(c) Third, the applicant has standing if he has not suffered the violation of a "right" of any sort, but if the state has breached a "public dut[y]" (not being a duty correlative to a right)[10] and the breach has taken place "in such an egregious manner that the courts are satisfied that it would be in the public interest to hear [the application for judicial review]".[11]

Instead, this paper concludes that, if judicial review is to focus, as it does, on protecting "individuals' personal rights and interests",[12] there ought only to be one rule on standing: an applicant has standing if he has suffered the violation of a right vested in him. The simplification of the law on standing in this manner will allow the benefits of rights-based standing rules to be reaped more effectively.

II. Two Types of Standing Rules

Let us begin by studying the case of *Chan Hiang Leng Colin v Minister for Information and the Arts*,[13] which neatly illustrates the difference between interest-based and rights-based standing rules. In *Colin Chan*, the Minister for Information and the Arts had made an Order prohibiting the "importation, sale, or distribution" of publications by the International Bible Students Association ("IBSA", which the High Court described as "a Jehovah's Witnesses organisation").[14] The rationale was that the Jehovah's Witnesses refused to perform military service, as is compulsory for male Singapore citizens. The applicants challenged the Order on the ground that it allegedly contravened their freedom of religion.[15]

The High Court described the law on standing in terms of *interests*, not *rights*. It held that the applicant had to have a "sufficient" interest, and that "the sufficiency of the applicant's interest had to be judged in relation to the subject matter of his application".[16] In this case, three facts led to the conclusion that the applicants had

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8 Tan *Eng Hong v Attorney-General* [2012] 4 SLR 476 at paras 78-80 (CA) [*Tan Eng Hong (CA)*].
9 *Ibid* at para 69; *Vellama (CA)*, *supra* note 5 at paras 31 and 33.
10 *Jeyaretnam*, *supra* note 2 at para 51 [emphasis removed].
11 *Ibid* at para 62.
12 *Supra* note 1 and accompanying text.
13 [1995] 2 SLR (R) 627 (HC) [*Colin Chan (HC)*]; [1996] 1 SLR (R) 294 (CA) [*Colin Chan (CA)*] [collectively, *Colin Chan*].
14 *Colin Chan (HC)*, *ibid* at para 1.
15 *Constitution of the Republic of Singapore* (1999 Rev Ed), Art 15(1) [*Constitution*].
16 *Colin Chan (HC)*, *supra* note 13 at para 13.

a 'sufficient interest':

(a) First, the applicants were "minister[s] of the Jehovah's Witnesses and wished to have access to the materials published by the IBSA. . . in order to increase [their] knowledge and that of others of what [they] believed was the 'Word of God"';[17] the order made this impossible.
(b) Second, the applicants were facing prosecution for violating the minister's order.[18]
(c) Third, the order "affected their ability to have access to materials relating to their religion", and "the freedom to practise one's religion is. . . one of a Singapore citizen's constitutional rights".[19]

This meant that the standing requirement was very easy to fulfil indeed. For the High Court, the applicants did not need to show that their constitutional right to religious freedom had been *violated*. Therefore, no issue arose as to whether (for example) it was still possible for the applicants to exercise their rights to practise their religion even without access to the banned materials. The first point, in particular, suggests that even a "wish" to view the banned materials—short of a *right* to do so—would suffice.

On its face, this is a good thing. After all, one might say, the High Court avoided being bogged down in the preliminary issue of standing, and allowed the parties to move on swiftly to discuss the substance of the case. The High Court made it abundantly clear that the plaintiffs had standing.

But *why* precisely did they have standing? The three reasons provided by the High Court give little guidance to a would-be litigant in a similar position. Would the plaintiffs still have had standing if they had merely been devotees rather than religious leaders? Would a mere assertion that the banned materials related to the "Word of God" suffice? The High Court concluded that the executive's actions were not unconstitutional; but if the conclusion had been otherwise, then exactly *whose* constitutional rights would have been violated? The High Court's approach to standing leaves these questions unanswered.

The Court of Appeal's approach to standing was quite different. Of the three facts which the High Court had identified, the Court of Appeal focused only on the third, and held that *this* was what gave the applicants standing:[20]

> Their right to challenge Order 405/1994. . . arises from every citizen's right to profess, practise and propagate his religious beliefs. . . a citizen does. . . have a constitutional right to profess, practise and propagate his religion, and it is alleged that the publications by IBSA are essential for him to carry out these activities.[21]

What is noteworthy is that the Court of Appeal subtly transformed the question of standing from a question about the applicants' *interests* to a question about the

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17 *Ibid* at para 15.
18 *Ibid*.
19 *Ibid* at para 17.
20 *Colin Chan (CA)*, *supra* note 13, rejected the first analysis at para 13 and the second at para 19.
21 *Ibid* at paras 14, 15.

applicants' *rights*. There were two consequences of this move. First, the Court of Appeal made clear precisely *why* the applicants had standing, and hence *who else* might have standing. The Court of Appeal stressed that the applicants had standing because, and only because, of their constitutional right to freedom of religion. In other words, the Court of Appeal made clear that not only ministers of the religion, but anybody *professing* the religion (or seeking to practise and propagate it) would have standing.

In this way, the Court of Appeal was in a position to elaborate on the scope of the applicants' rights. First, the Court of Appeal made clear that the right to freedom of religion does not extend only to a right not to be prosecuted under legislation that violates the freedom of religion, but also a right not to fear prosecution in the first place. The Court explicitly rejected the proposition that only those who were "facing prosecution for being in possession of prohibited publications"[22] contrary to the Order would have standing to challenge the Order:

> A citizen should not have to wait until he is prosecuted before he may assert his constitutional rights.[23]

In other words, the scope of the right was such that the right had arguably been *prima facie* violated even before prosecution.

Second, the Court of Appeal made a statement about what kinds of actions are protected by the right to freedom of religion, namely, only those that are "essential" to the religion are protected:

> It is the appellants' own case that the publications of IBSA are essential for the appellants in the profession, practice and propagation of their faith (*had it been otherwise, there would be no question of Art 15 being involved and the appellants would have no* locus standi).[24]

The Court of Appeal, thanks to its focus on *rights* at the standing stage, found an opportunity to answer the question of what religious publications were *prima facie* protected by the *Constitution*. If not for this, it would have been unclear to any applicant in similar circumstances in the future whether (and when) he would have standing. This can be appreciated by imagining how a would-be litigant would have made sense of the Court of Appeal's conclusions if the Court of Appeal had not made the remarks it did about standing. According to the Court of Appeal, the plaintiffs lost because the Order was justifiable on the ground of national security, and matters relating to national security were non-justiciable.[25] Having said this, the Court of

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22 *Ibid* at para 19.

23 *Ibid* at para 13.

24 *Ibid* [emphasis added].

25 *Ibid* at paras 35, 44, and 46. For completeness, it must be stated that the correctness of the Court's reasoning is open to question to the extent that it considers that the relevant Constitutional provisions, properly interpreted, allow the state to derogate from the right to freedom of religion on the ground of national security. Article 15(4) of the *Constitution* provides that the freedom of religion "does not authorise any act contrary to any general law relating to public order, public health or morality". The Court of Appeal held that "public order" includes national security (at para 36), but this is open to question: Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Singapore: Academy Publishing, 2012) at 907, 908.

Appeal did not delve (and did not need to delve) further into the question of whether the applicant had established a *prima facie* violation of the right in the first place. Therefore, only the statements on standing would have been of assistance to any person seeking to find out the limits to his right to freedom of religion in cases not involving national security.

In short, the Court of Appeal's approach to standing in *Colin Chan* demonstrates how the standing inquiry may be used as a staging ground to clarify the content of constitutional rights, and hence to make the court's decision of more use in guiding potential future litigants.

III. The Development of Rights-Based Standing Rules

A. *Rights-Based Standing Rules Cemented in Singapore Law*

But even after the Court of Appeal's decision in *Colin Chan*, it was not immediately apparent that rights-based standing rules were here to stay. One might well have rationalised *Colin Chan* as a case espousing interest-based standing rules. One might have thought that the law was still that one needed an *interest* to obtain standing, and a constitutional right was one type—but one among several—of interest. After all, the Court of Appeal did use the phrase "sufficient interest" in its discussion of standing.[26]

It was the 2011 case of *Tan Eng Hong v Attorney-General*[27] that clearly and emphatically cemented rights-based standing rules in Singapore. According to *Tan Eng Hong*, for one to have standing, one had to identify a legal *right* that had been engaged, and then show a *prima facie* case that right had been violated.

Tan Eng Hong involved a challenge to section 377A of the *Penal Code*,[28] which criminalises "any act of gross indecency" between two male persons. The applicant was a male who had been caught performing a sexual act in a public toilet. He contended that section 377A was unconstitutional (because, *inter alia*, it criminalised "male but not female homosexual intercourse"),[29] and sought a declaration to that effect. After he did so, the Public Prosecutor amended the charge to one of "do[ing] any obscene act in any public place", contrary to section 294(a) of the *Penal Code*.

Despite the amendment of the charge, the High Court held that the Article 12 right to equal treatment had arguably been violated either by the mere existence of section 377A or by the "spectre of future prosecution".[30] Therefore, he had standing to make his claim. His claim was struck out, not because he had no standing, but instead because, according to the High Court, there was no "real controversy" or question to be adjudicated—the "spectre of future prosecution" was merely a spectre, and the courts generally do not adjudicate on "merely hypothetical" facts.[31]

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26 *Ibid* at para 20.

27 [2011] 3 SLR 320 (HC) [*Tan Eng Hong (HC)*]; *Tan Eng Hong (CA)*, *supra* note 8 [collectively, *Tan Eng Hong*].

28 Cap 224, 2008 Rev Ed, s 377A.

29 And therefore, it allegedly violated the guarantee of equality in Article 12 of the *Constitution*: *Tan Eng Hong (HC)*, *supra* note 27 at para 16.

30 *Tan Eng Hong (HC)*, *supra* note 27 at paras 18-20.

31 *Ibid* at para 25.

The High Court did not make entirely clear how the mere existence of a statute can lead to the conclusion that one's constitutional right has been infringed on. Nor did her Honour go into detail about what kind of "spectre of future prosecution" is needed for the applicant to have standing. But these details need not detain us, for, as will be seen, the Court of Appeal eventually clarified them. What is important, for present purposes, is that the High Court's test for standing clearly focused on constitutional *rights* and not "interests". Unlike in *Colin Chan*, the High Court explicitly recognised that the standing rules were to be rights-based. As authority for such an approach, the High Court cited the judgment of the majority of the Malaysian Supreme Court in *Government of Malaysia v Lim Kit Siang*:

> [T]o possess locus standi, a plaintiff must show that he has a private right that has been infringed. If a public right is involved, he must show that he has suffered a peculiar damage as a result of the alleged public act and that he has a genuine private interest to protect or further.[32]

On appeal, the Court of Appeal accepted the *Lim Kit Siang* test.[33] In so doing, it confirmed that the law on standing had now become rights-based. This paper's study of *Colin Chan* has demonstrated the potential benefits of rights-based standing rules. Now, Singapore law had become set to reap those benefits. In Sections IV and V, we will explore whether these benefits have actually been realised. First, however, it is worth exploring how and why rights-based standing rules came to be established in the first place.

B. *The Origin of Rights-Based Standing Rules*

Why was the move to rights-based standing rules so emphatic in *Tan Eng Hong*, but not in *Colin Chan*? The answer lies in the legal anachronism that there were different rules governing standing to apply for judicial review depending on what remedy one sought. It used to be the case that one did not speak of standing *to apply for judicial review*, but rather standing *to apply for a writ of* certiorari, standing *to apply for a declaration*, *etc*. Indeed, the interest-based standing rules which the High Court described in *Colin Chan* were said to be rules relating to "*locus standi* to apply for *certiorari*".[34] The Court of Appeal's decision in *Colin Chan*, too, spoke of "*locus standi*. . . in an application for leave to issue *certiorari* proceedings."[35] Similarly, the rights-based standing rules which the High Court described in *Tan Eng Hong* were said to be "requirements for the granting of declaratory relief".[36]

It was not until the Court of Appeal's decision in *Tan Eng Hong* that the new rights-based standing rules were extended to applications for judicial review *generally*. This

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[32] *Ibid* at para 8, citing *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12 at 27 (FC) [*Lim Kit Siang*].

[33] *Tan Eng Hong (CA)*, *supra* note 8 at para 69.

[34] *Colin Chan (HC)*, *supra* note 13 at para 8.

[35] *Colin Chan (CA)*, *supra* note 13 at para 19.

[36] *Tan Eng Hong (HC)*, *supra* note 27 at para 6.

was initially not clear,[37] but the Court of Appeal later put it beyond doubt that the new rules applied "throughout... all the different remedies".[38]

Accordingly, an understanding of Singapore's rights-based standing rules must begin with an understanding of older case law on standing when seeking declaratory relief generally. This complicates matters somewhat, because much of this case law is from the realm of private law and had nothing to do with judicial review or constitutional rights at all. Nonetheless, a foray into the history of rights-based standing rules will prove to illuminate both the benefits of rights-based standing rules generally as well as the problems created by Singapore's particular set of rights-based standing rules.

Let us begin with the 2005 Court of Appeal case of *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd*,[39] to which both courts in *Tan Eng Hong* referred as authority for rights-based standing rules. This paper will trace how this case, which is a case on the entitlement to apply for declarations generally, came to be transplanted into Singapore's constitutional law.

In *Karaha Bodas*, a company called KBC had obtained an arbitral award against another company, Pertamina. KBC sought to enforce this award by garnishing a debt which Petral owed to Pertamina. Petral (which was a subsidiary of Pertamina) had paid a sum of US$36 million to one of its subsidiaries, PES, instead. KBC therefore sought, among other things, a declaration that sum of money, though in the hands of PES, was "held... on trust for or on behalf of or... controlled by [Petral]".[40]

The Court of Appeal held that KBC had no standing to apply for this declaration. According to the Court of Appeal, a declaration would only be granted if, *inter alia*, the declaration sought would "relate to a right which is personal to the applicant and which is enforceable against an adverse party to the litigation".[41] Otherwise, the applicant would be held not to have standing. On the facts, KBC had no standing to apply for the declaration it sought because KBC could not show that it had a right to the money:

> [I]t did not follow that if Petral had not transferred the [money] to PES, the whole of that sum would have been channelled towards trading activities with Pertamina. Even more so, it did not follow that Petral would eventually owe Pertamina the same amount...[42]

More generally: "a plaintiff should not be able to commence proceedings seeking a declaration that A owed money to B, when the plaintiff was neither A nor B."[43]

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37 The Court of Appeal in *Tan Eng Hong* did not explicitly state this point; it fell to be inferred from the "substance and thrust" of the decision: Tham Lijing, "*Locus Standi* in Judicial Review: Two Roads Diverge in a Singapore Wood" Singapore Law Gazette (Feb 2013) at 16.

38 *Jeyaretnam*, *supra* note 2 at para 45.

39 [2006] 1 SLR (R) 112 (CA) [*Karaha Bodas*].

40 *Ibid* at para 6.

41 *Ibid* at para 16, summarised in *Tan Eng Hong (CA)*, *supra* note 8 at para 72(c).

42 *Karaha Bodas*, *ibid* at para 18.

43 *Ibid*.

Why did this principle exist? The answer lies in the very concept of a declaration. The starting point is that "in every case where a plaintiff claims relief against a defendant, his claim must be founded on a reasonable cause of action".[44] KBC had no cause of action.[45] Therefore, KBC had to attempt to found its application on O 15 r 16 of the Rules of Court, which creates an exception to the requirement for a subsisting cause of action.[46] O 15 r 16 exists in order to address situations in which one's legal right has not yet been infringed, but *will be* or *would be* infringed; or situations in which one does not yet have a legal right, but *will* acquire a legal right "in the future conditionally on the happening of an event".[47]

It has always been the law that courts vindicate legal rights by granting remedies for their violation. All that O 15 r 16 does is to allow the court to grant a remedy in respect of a *future* violation of a legal right.[48] In other words, if one *would be* able to obtain relief *in future*, O 15 r 16 serves to allow one to obtain declaratory relief *now*. But therein lies a potential for abuse: a plaintiff could attempt to make use of O 15 r 16 in order to obtain a declaration completely unrelated to their rights.[49] For example, in *Karaha Bodas* itself, the plaintiff attempted to obtain a declaration regarding the sum of money, but the plaintiff had no right to that money.[50] Rules on standing to apply for declarations exist because they are necessary to prevent this possibility.

C. *Transplantation of Rights-Based Standing Rules to the Law on Judicial Review*

Thus, the rules on standing to apply for a declaration in private law were rights-based standing rules. The High Court in *Tan Eng Hong* saw these rules, not as rules on declarations *in private law*, but rather as rules on declarations *generally*. Before the Court of Appeal, counsel proceeded on the basis that these rules applied,[51] and the Court of Appeal did not disagree.

That said, the *Karaha Bodas* rules requiring that the applicant have a subsisting "right" could not be transplanted without some modification. In *Karaha Bodas*, the "right" in question was the (alleged) right to a specific sum of money, namely, the sum of US$36 million. This was an alleged property right which, by definition, vests in only a legal or beneficial owner of property. By contrast, in cases where the challenge is to a law of general application, the *Karaha Bodas* framework simply does not work. *Karaha Bodas* asks whether the applicant *has* a right.[52] *Everybody*

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44 *Ibid* at para 13.

45 *Ibid* at para 12.

46 *Ibid* at para 13.

47 *Gouriet*, *supra* note 7 at 501E.

48 *Ibid* at 501E-G.

49 See the discussion in *Tan Holdings Pte Ltd v Prosperity Steel (Asia) Co Ltd* [2012] 1 SLR 80 at paras 64-68 (HC).

50 *Karaha Bodas*, *supra* note 39 at para 20: "KBC had no money claim *vis-à-vis* Petral, much less PES, to the US$36m. . .".

51 *Tan Eng Hong (CA)*, *supra* note 8 at paras 66 and 68.

52 *Karaha Bodas*, *supra* note 39 at para 15: ". . . in order to have the necessary standing, the plaintiff must be asserting the recognition of a 'right' that is personal to him."

has constitutional rights; that would appear to mean that *everybody* has standing at any time to challenge any legislation. A standing rule that gave everybody standing would be pointless.

In *Tan Eng Hong*, the Court of Appeal's solution to this problem was to subtly modify *Karaha Bodas* by requiring that the applicant show, not only that he *had* a right, but also that this right had (arguably) been *violated*.[53]

IV. Rights-Based Standing Rules in Action

But that would run into a second problem. What exactly constitutes a violation of a constitutional right? Does a mere prohibition of some conduct by an unconstitutional law violate one's constitutional rights? Or does the violation only take place when one is prosecuted? In other words, does having (say) the right to personal liberty entail a right to live free from the fear of this right being infringed in future?

As the study of *Colin Chan* has shown, rights-based standing rules prompt the court to confront these questions squarely. The courts do so on a conceptual level at an early stage, before condescending into the detailed facts. In determining whether it is arguable that some state action has violated the applicant's rights, the courts use the standing stage as an opportunity to issue a preliminary ruling on whether that state action *could* possibly amount to a violation of the applicant's rights. In so doing, the courts use the standing stage to elaborate on the content and extent of rights. By contrast, under interest-based standing rules, there is no guarantee that the courts would go into such detail.

Therefore, under rights-based standing rules, the role of the standing inquiry is not merely to filter out *frivolously made* claims, to ensure that "the court's processes must not be allowed to be abused by those with improper collateral motives",[54] or to ensure that the applicant is not merely a "busybod[y]" with no "genuine dispute".[55] It also serves as a filter to keep out claims that are *legally unsustainable*. In other words, the standing inquiry has become a preliminary means for the court to determine the content of the applicant's rights, if any. Three cases will illustrate this.

A. *Tan Eng Hong*

The first is *Tan Eng Hong* itself. There were at least three ways in which Tan's rights had arguably been violated:

(a) First, his right to personal liberty *had* allegedly been violated when he was arrested on the basis of the section 377A charge, for "an accused person has a right not to be detained under an unconstitutional law".[56]

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53 *Tan Eng Hong (CA)*, *supra* note 8 at para 73.

54 *Ibid* at para 70.

55 *Tan Eng Hong (HC)*, *supra* note 27 at para 69.

56 *Ibid* at para 122. Article 9 provides: "No person shall be deprived of his life or personal liberty save in accordance with law". A statute which is "inconsistent with [the] Constitution shall, to the extent of the inconsistency be void" (Article 4); such an unconstitutional statute is therefore not "law" within the meaning of Article 9: *Ong Ah Chuan v Public Prosecutor* [1979-1980] SLR (R) 710 at para 25 (PC).

(b) Second, because section 377A "specifically target[ed]"[57] a group of which he was a member, the very existence of the law was a *present* violation of his constitutional rights.[58]

(c) Third, he faced a "real and credible threat of prosecution" under section 377A in the *future*.[59]

The first point is straightforward: it is obvious that being arrested other than in accordance with the law is a deprivation of personal liberty. But the second and third warrant closer scrutiny.

As for the third point, it is not immediately clear how the fact of being prosecuted *ipso facto* violates one's constitutional rights. A prosecution does not necessarily result in the deprivation of one's personal liberty: it is always possible that one is prosecuted without being arrested. According to the Court of Appeal, there is a "right not to be prosecuted under an unconstitutional law".[60] The *Constitution* does not explicitly set out such a right. Neither does the case of *Ramalingam*, to which the Court of Appeal in *Tan Eng Hong* referred for this proposition. What *Ramalingam* says is that "a prosecution in breach of constitutionally-protected rights would be unconstitutional".[61] But it does not immediately follow that there is a right not to be prosecuted. It could simply be that such a prosecution must necessarily fail.[62]

Therefore, in saying that Tan had standing because he faced a "real and credible threat of prosecution",[63] what the Court of Appeal was really doing was expounding on the *scope* of Tan's constitutional rights—namely, by explaining that the rights in Articles 9 and 12 of the *Constitution* entail rights *not to be prosecuted at all* (as opposed to, say, rights *not to be successfully prosecuted*).

The second point, too, is not immediately obvious. In the first place, it was not clear how section 377A "specifically targets" people such as Tan. The Court of Appeal held that Tan had standing because (a) section 377A "specifically targets sexually-active male homosexuals",[64] (b) "Tan professes to be a member of the targeted group".[65] But the logical link is not clear. Section 377A, on its face, targets the act of male-male sexual intercourse, even if not performed by "sexually-active male homosexuals".[66] So the Court of Appeal implicitly laid down the following

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57 *Ibid* at para 126.

58 *Ibid* at para 93 read with para 126.

59 *Ibid* at para 178 read with paras 179-183.

60 *Ibid* at para 175, citing *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at para 17 (CA) [*Ramalingam*].

61 *Ramalingam*, *ibid* at para 17.

62 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR (R) 239 at para 145 (HC), citing *Public Prosecutor v Norzian bin Bintat* [1995] 3 SLR (R) 105 at para 49 (HC).

63 *Tan Eng Hong (CA)*, *supra* note 8 at para 178 read with paras 179-183.

64 *Ibid* at para 126.

65 *Ibid*.

66 The statute reads: "Any male person who. . . commits. . . any act of gross indecency with another male person, shall be punished. . . " The Court of Appeal went so far as to suggest (though, it is respectfully submitted, wrongly) that a male victim of sexual assault by another man may himself be guilty of the offence defined in s 377A: *ibid* at para 184. For commentary, see Benjamin Joshua Ong, "New Approaches to the Constitutional Guarantee of Equality Before the Law" (2016) 28 Sing Ac LJ 320 at para 8.

principles: one's constitutional right to equality under Article 12 extends to protection even against an *ostensibly* neutral legislative provision. (This development contrasts with the previous case law on Article 12, which dealt only with legislative provisions that *overtly* treated different groups differently.)[67]

The scope of *this* idea, in turn, appears to be qualified. According to the Court of Appeal, the "very existence of. . . an unconstitutional law in the statute books"[68] does not necessarily give a person standing, even if that law targets a group of which that person is a member. What more is needed for a person to have standing? The Court of Appeal said no more than that it "depends on what exactly that law provides".[69]

By creating, *ex nihilo*, the idea of a right not to be prosecuted under an unconstitutional statute, 'specific targeting' which was not apparent on the face of the statute, and violation of rights through the 'very existence' of a statute, the Court of Appeal had been quietly, at the standing stage, developing the jurisprudence on the scope and content of Article 12 rights.

Would the court have done this if interest-based instead of rights-based standing rules had applied? The answer would appear to be no, as can be seen from an examination of the Court of Appeal's determination of the case on its substantive merits.[70] In its analysis of standing, the Court of Appeal mentioned two points: the significance of being prosecuted or facing the threat of prosecution and 'specific targeting' of homosexuals. The Court mentioned these points only at the standing stage; these points played no role in the decision on the merits.[71] This suggests that, had interest-based standing rules applied, these two points would have received no attention from the Court at all. So it was only thanks to rights-based standing rules that these issues were ventilated (and *guaranteed* to be ventilated).

B. *Madan Mohan Singh*

Another case in which the court developed the content of constitutional rights at the standing stage was the 2015 case of *Madan Mohan Singh v Attorney-General*.[72] In that case, the applicant conducted Sikh religious counselling in prisons as a volunteer. The Singapore Prison Service had a policy according to which, if an inmate professed to be a Sikh but had shorn hair or a shorn beard at the time he entered the prison, that inmate would not subsequently be allowed to have his hair or beard grow long. The applicant encouraged inmates to challenge this policy, leading the Singapore

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67 *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 at para 109 (CA), cited in *Tan Eng Hong (CA)*, *supra* note 8 at para 124; *Nguyen Tuong Van v Public Prosecutor* [2005] 1 SLR (R) 103 at para 70 (CA) [*Nguyen Tuong Van*], cited in *Tan Eng Hong (HC)*, *supra* note 27 at para 16; *Kok Hoong Tan Dennis v Public Prosecutor* [1996] 3 SLR (R) 570 (HC), cited in *Nguyen Tuong Van* at para 70; *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR (R) 489 (CA).

68 *Tan Eng Hong (CA)*, *supra* note 8 at para 94.

69 *Ibid*.

70 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 (CA) [*Lim Meng Suang*].

71 Instead, the Court of Appeal merely found that the purpose of s 377A was to extend existing laws prohibiting "gross indecency" to cover acts "committed between males": *ibid* at para 134.

72 [2015] 2 SLR 1085 (HC) [*Madan Mohan Singh*].

Prison Service to cancel his volunteer pass.[73] The applicant sought to challenge this policy[74] on grounds including, *inter alia*, that it violated his right under Article 15 of the *Constitution* to propagate his religion.[75] The High Court held that he had no standing for two reasons:

(a) First, there was no link between his constitutional rights and the relief he sought. What stopped him from propagating his religion was the cancellation of his volunteer pass, not the hair-grooming policy. So quashing the policy could do nothing to vindicate his constitutional rights.[76]
(b) Second (and more importantly for present purposes), the right to religious propagation did not extend to the right to "demand access into prison to propagate [one's] religion",[77] because "[p]rison inmates suffer a temporary exclusion from society"[78] and "any active or persistent encouragement by volunteer religious counsellors to shorn Sikh inmates to keep their hair and beard unshorn posed a serious threat to the discipline, security, safety and order in prisons".[79]

The first reason is unremarkable; all it means is that the applicant's rights were not even engaged. The second reason, on the other hand, is more interesting. It is essentially that his constitutional rights were not violated *because of the content of the rights in question*. In substance, it amounts to a pronouncement that, taking the applicant's case at its highest, his claim was bound to fail *on the merits*.

Now, suppose that the standing rules had been interest-based. In that case, the court could simply have stated that he lacked standing for want of a sufficient interest, and said nothing about the substantive issue. In other words, it is rights-based standing rules that prompted the court to seize the opportunity to pronounce on the content of the applicant's constitutional rights. Under interest-based standing rules, the court could well have omitted to make these useful pronouncements.

C. *Conclusion*

The upshot is that one must recognise that, now, the standing stage is no longer a filter set up to ensure that "the court's processes must not be allowed to be abused by those with improper collateral motives",[80] or that the applicant is not merely a "busybod[y]" with no "genuine dispute".[81] Instead, the standing stage plays another role. While one requires standing to argue that one's rights have been *violated*, the

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73 *Ibid* at paras 12 and 14.
74 *Ibid* at paras 30 and 32.
75 *Ibid* at para 38.
76 *Ibid* at para 39.
77 *Ibid* at para 41.
78 *Ibid* at para 40.
79 *Ibid* at para 53.
80 *Tan Eng Hong (CA)*, *supra* note 8 at para 70.
81 *Tan Eng Hong (HC)*, *supra* note 27 at para 69.

question of whether one's rights are *engaged in the first place* is dealt with *both* during *and* after the standing inquiry. In *Tan Eng Hong*, the issue of whether section 377A of the Penal Code violated Tan's constitutional rights was dealt with substantively at a separate hearing, but the issue of exactly what constitutional right was at stake (was it a right not to be arrested, or not to be prosecuted, or not to fear arrest or prosecution, *etc*?) was dealt with at the standing stage. Similarly, in *Madan Mohan Singh*, the High Court's ruling on standing was, in substance, a preliminary ruling on the scope of the right to freedom of religious propagation.

Such pronouncements are particularly valuable given the landscape of judicial review in Singapore, in which there are precious few cases[82] involving applications for judicial review on constitutional grounds (other than cases in which the applicant wishes to challenge directly his arrest, charge, conviction, sentence, disciplinary action, or detention).[83] The number of opportunities for the content of constitutional rights to be developed is already small.[84] It would decrease even further if, in every case in which the court dismissed the application on the ground that the applicant had no standing,[85] the court said nothing about the content of rights.

It is certainly *possible* that, in cases where the application was dismissed for want of standing, the courts may have made the same pronouncements under interest-based standing rules. But this is only a possibility and not guaranteed. The problem is that interest-based standing rules are vague, because they provide no conception of what an 'interest' is. It is therefore possible that a court may baldly assert that the applicant has no sufficient interest without going into detail. The case law provides no clear definition of 'sufficient interest'. The High Court's judgment in *Colin Chan*, for instance, says no more than that "[a]nybody can apply for [*certiorari*]", and will be given standing either if "there had been an abuse of power which inconvenienced [him]" or if the court decides to grant standing "*ex debito justitiae*".[86]

By contrast, the law *does* provide some concrete idea of what a 'right' is. This is not to say that the idea of a 'right' is not contested. But at least the law tells us that a 'right' is something which the law will enforce.[87] In the constitutional context, a

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82 The more prominent of these cases include: *Attorney-General v Cold Storage (Singapore) Pte Ltd* [1977-1978] SLR (R) 586 (CA); *Howe Yoon Chong v Chief Assessor* [1979-1980] SLR (R) 594 (PC); *Dow Jones Publishing Co (Asia) Inc v Attorney-General* [1989] 1 SLR (R) 637 (CA); *Colin Chan*; *Nappalli Peter Williams v Institute of Technical Education* [1999] 2 SLR (R) 529 (CA); *Lo Pui Sang v Mamata Kapildev Dave* [2008] 4 SLR (R) 754 (HC); *Tan Eng Hong*; *Chan Kin Foo v City Developments Ltd* [2013] 2 SLR 895 (HC); *Vellama*; *Jeyaretnam*; *Lim Meng Suang*; *Ten Leu Jiun Jeanne-Marie v National University of Singapore* [2015] 1 SLR 708 (HC), [2015] 5 SLR 438 (CA); *Tan Cheng Bock v Attorney-General* [2017] 5 SLR 424 (HC), [2017] 2 SLR 850 (CA); and *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 (HC) [*Ravi*].

83 In such cases, it is obvious that the applicant has standing, because the object of challenge is an action taken by the state specifically and directly against that applicant only.

84 While the frequency of constitutional cases has increased over the last few years, it has remained small compared to other areas of law.

85 In five of the 14 cases just listed (at note 82), at least one court had dismissed the application on the ground that the applicant had no standing.

86 *Colin Chan (HC)*, *supra* note 13 at para 11, citing H W R Wade, *Administrative Law*, 4th ed (Oxford: Clarendon Press, 1977) at 544, which in turn cited *R v Thames Magistrates Court, ex parte Greenbaum* (1957) 55 LGR 129 at 135 (EWCA).

87 *Gouriet*, *supra* note 6 at 501D, E, cited in *Karaha Bodas*, *supra* note 39 at para 15.

'right' is something protected in the sense that:

> It is the duty of the court to uphold and preserve those rights, and to impugn any Act of Parliament or any course of executive action which injures, detracts from or infringes those rights.[88]

The reason why interest-based standing rules are so vague is that they are motivated merely by the desire to shut out applications by "busybod[ies]" who "desire. . . to interfere in other people's affairs".[89] By contrast, under rights-based standing rules, the term 'standing' refers not only to the preliminary issue of whether the applicant is the right person with the right motives for bringing the claim, but also whether that person has legal rights at stake. Therefore, the standing enquiry serves both as a means to shut out plainly legally unsustainable cases and a staging ground for the court to adjudicate and pronounce on legal issues concerning what constitutional rights the applicant enjoys.

V. Complications in Singapore's Rights-Based Standing Rules: The Distinction Between 'Public Rights' and 'Private Rights'

Unfortunately, these developments are undermined by certain incoherent and inconsistent aspects of the case law—most notably, the introduction of a distinction between 'public' and 'private' rights. As mentioned in the introduction to this paper, the courts have said that one has standing not only if one has suffered the violation of a "right personal to the applicant",[90] but also:

(a) if he has suffered the violation of a "public right" which has caused him "special damage";[91] or
(b) if he has not suffered the violation of a "right" of any sort, but if the state has breached a "public dut[y]" (not being a duty correlative to a right)[92] and the breach has taken place "in such an egregious manner that the courts are satisfied that it would be in the public interest to hear [the application for judicial review]".[93]

One may be forgiven for thinking these rules confusing, as the case law is not clear on what they mean. An example is as follows. At one point in *Tan Eng Hong*, the Court of Appeal stated that, to have standing, the applicant must show a "violation of a right personal to the applicant".[94] At another, the Court of Appeal suggested that the applicant could also show that he had "suffered special damage" as a result

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88 *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR (R) 78 at para 14 (HC).
89 *R v Inland Revenue Commissioners, ex parte National Federation of Self-employed and Small Businesses Ltd* [1982] AC 617 at 646B, C (UKHL).
90 *Tan Eng Hong (CA)*, *supra* note 9 at paras 78-80.
91 *Ibid* at para 69; *Vellama (CA)*, *supra* note 5 at paras 31 and 33.
92 *Jeyaretnam*, *supra* note 2 at para 51 [emphasis removed].
93 *Ibid* at para 62.
94 *Tan Eng Hong (CA)*, *supra* note 8 at para 79.

of a violation of a "public right",[95] which, by definition, is *not* a right personal to the applicant. This paper will now examine this contradiction, and conclude that the public right/private right distinction is not only confusing but also unnecessary and has no basis in case law.

A. *The Distinction is of Questionable Utility*

The only way to resolve the contradiction in *Tan Eng Hong* just mentioned is that what must be unique to the applicant is not the *right*, but the *violation* and the damage flowing therefrom. But if this is so, why bother classifying the right as being 'public' or 'private'? As this paper has observed, the court has free rein, at the standing stage, to define what rights an applicant has and does not have (as in *Tan Eng Hong*) and whether these rights have been violated (as in *Madan Mohan Singh*). Therefore, instead of saying that a 'public right' has been violated but the applicant has suffered no special damage, why not just say that no right has been violated at all?

There are cases where the distinction appears to serve some function. In *Ravi*,[96] the court deployed the distinction to shut out a "somewhat flippant"[97] claim. In that case, the applicant sought to challenge the law setting out who qualified to stand for election as President. (The specific grounds of challenge need not detain us.) On the question of standing, the High Court found that the applicant was "attempting to assert a public right which he shared in common with other citizens", namely, an "equal right to stand for elections".[98] He therefore had no standing, since he had suffered no "special damage"[99] and there had been no "breach of sufficient gravity"[100] of a public duty.

The claim may indeed have been "flippant", or, at least, "not entirely clear".[101] This may be a good reason for it to have been summarily dismissed. But the High Court's reasoning in dismissing it *for want of standing* is not clear. It is puzzling why the High Court saw the "equal right to stand for elections" as a "public right". If the applicant were correct, each citizen would have the "equal right to stand for public office".[102] But why would that not be a "private right" vesting in *each* individual? The High Court could easily have reached the conclusion that the applicant had no standing by holding that the right at stake was a 'private right', but that it had not been (actually or arguably) violated. Why did the High Court choose to invoke the language of 'public rights' instead?

The answer may appear to be that the applicant, for some reason, had conceded that he was not seeking to vindicate a private right. The High Court noted that the applicant "did not seriously dispute" that "he was neither directly nor personally affected by" the law being challenged, since he "did not presently have any interest

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95 *Ibid* at para 69.
96 *Supra* note 82.
97 *Ibid* at para 52.
98 *Ibid* at para 49.
99 *Ibid* at para 49.
100 *Ibid* at para 51.
101 *Ibid* at para 54.
102 *Ibid* at para 24(a).

in standing for the upcoming presidential election".[103] But surely that ought to have been irrelevant. If he had a right which had been wrongfully taken away from him, surely the fact that he did not wish to exercise this right ought to be irrelevant. This is particularly since he did claim that he "might later change his mind" and stand in the upcoming election.[104] If the reason why the High Court rejected this claim was that it was made in a "somewhat flippant"[105] manner, the High Court could simply have said so explicitly without invoking the language of "public rights". It is clear that the court has the power to refuse leave to apply for judicial review if there is not even "a point which might, on further consideration, turn out to be an arguable case in favour of granting to the applicant the relief claimed".[106] The High Court could simply have dismissed the application on *this* ground, even while conceding that the applicant did have standing.

B. *The Distinction Lacks Legal Basis*

Having cast doubt on the utility of the distinction between 'public rights' and 'private rights', the next point is that the distinction is not founded in the case law.

As noted above, the authority cited by the courts for this distinction was the judgment of Salleh Abas LP in *Lim Kit Siang*,[107] which in turn relied on the English cases of *Boyce v Paddington Borough Council*[108] and *Gouriet*.[109] This paper will now argue that:

(a) *Lim Kit Siang* and *Gouriet* are shaky authority for the 'public right'/'private right' distinction, as this distinction was merely *obiter* in these cases.
(b) That leaves *Boyce*. *Boyce* was a case which had nothing to do with public law; it concerned the tort of public nuisance. And an analysis of the case law on public nuisance will show that there is, in substance, no distinction between the violation of a 'public right' that occasions 'special damage' on the one hand and the violation of a 'private right' on the other.

1. *Lim Kit Siang*

In *Lim Kit Siang*, a politician sought an injunction to restrain a company ("UEM") from entering into a contract to build a highway for the Government of Malaysia, which had allegedly been entered into in breach of anti-corruption legislation. By a majority, the Federal Court struck out the claim. Its reasons included:

(a) The applicant had no cause of action against the company.[110] The applicant sought to enforce legislation which criminalised corruption; but the law

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[103] *Ibid* at para 52.
[104] *Ibid*.
[105] *Ibid*.
[106] *Public Service Commission v Lai Swee Lin Linda* [2001] 1 SLR (R) 133 at para 22 (CA); see also *Jeyaretnam*, *supra* note 2 at para 5(b).
[107] *Lim Kit Siang*, *supra* note 32.
[108] [1903] 1 Ch 109 (EWHC) [*Boyce*].
[109] *Supra* note 6.
[110] *Lim Kit Siang*, *supra* note 32 at 18F (left column) to 19C (right column) and 41E, F (right column).

is that "no private individual can bring an action to enforce the criminal law".[111]

(b) Second, the applicant sought an injunction against the company, but this would amount in substance to an injunction against the Government—which the law forbade.[112]

These reasons would have been sufficient to dispose of the case. What is confusing is the following third reason, namely, that the applicant had no standing. According to the majority of the Federal Court, in order to "protect [the] judicial process from abuse by busybodies, cranks and other mischief-makers by insisting that a plaintiff should have a special interest in the proceedings which he institutes",[113] the law is as set out in *Boyce*:

> A plaintiff can sue without joining the Attorney General in two cases: first, where the interference with the public right is such as that some private right of his is at the same time interfered with (e.g. where an obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway); and, secondly, where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right.[114]

But in holding that the applicant fell into neither of these categories,[115] the majority gave no account of what a "private right" or a "public right" is, nor what "busybodies, cranks and other mischief-makers" are. Salleh Abas LP's explanation as to why the applicant had no standing was that his application was "politically motivated" and aimed to "influence political decisions", which should be done through "Parliament and the electorate" rather than through the courts.[116] But this explanation has nothing to do with "rights"; it simply amounts to a finding that the application was brought for a collateral purpose.[117]

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[111] *Ibid* at 32F-H (left column). *Quaere* whether a private individual may also initiate a private prosecution without the Attorney-General's fiat.

[112] *Government Proceedings Ordinance 1956* (Ord No 58 of 1956), s 29(1)(a).

[113] *Ibid* at 20B, C (right column).

[114] *Boyce*, *supra* note 108 at 114, cited *ibid* at 21G-I (right column).

[115] *Ibid* at 25C (right column). This is surprising because there was a previous case in which the applicant obtained standing merely because he was a politician and a taxpayer. In *Lim Cho Hock v Government of the State of Perak* [1980] 2 MLJ 148, the applicant was a "Member of Parliament for the parliamentary constituency of Ipoh as well as a member of the Perak State Legislative Assembly for the constituency of Kepayang and a ratepayer within the area of the Ipoh municipality. He challenged the legality of the appointment of the Menteri Besar, Perak as President of the Ipoh Municipal Council": *Lim Kit Siang*, *supra* note 32 at 24B (right column). According to the High Court, he had standing to seek these declarations simply "as a ratepayer": *Lim Kit Siang*, *supra* note 32 at 24C (right column). Strangely, in *Lim Kit Siang* at 24G (right column), Salleh Abas LP *approved* of this decision, stating that it "can be justified on the basis that, the plaintiff had a genuine private interest to be furthered and protected". But it is not at all clear what this interest was.

[116] *Lim Kit Siang*, *supra* note 32 at 25A-D (left column).

[117] This is similar to the view of the High Court in *Ravi*, *supra* note 82 at para 52 ("attempting to misuse the court as a platform for political point-scoring").

The upshot is that everything said in *Lim Kit Siang* about the distinction between 'private' and 'public' rights was *obiter*[118] because nothing in *Lim Kit Siang* turned on that distinction. The *ratio* of the case is simply that the applicant had *no rights at all*, and his application amounted to an abuse of process.

2. *Gouriet*

The 'private right'/'public right' distinction was also merely *obiter* in *Gouriet*, which is the House of Lords case cited by the Malaysian Supreme Court in *Lim Kit Siang*. In that case, the Union of Post Office Workers (the "Union") had resolved to call on its members not to deliver mail to South Africa for a week.[119] The applicant, Gouriet, alleged that this would amount to abetment of the criminal offence of "wilfully detain[ing] or delay[ing]" mail.[120] Gouriet sought an injunction against the Union's proposed direction to its members.

Lord Wilberforce discussed the distinction between 'private' and 'public' rights. In short, he said that the distinction turned on *whom* the right was vested in:

> [T]he rights of the public are vested in the Crown, and the Attorney-General enforces them as an officer of the Crown... no private person has the right of representing the public in the assertion of public rights.[121]

The exception was if the private person in question had "special interest".[122]

However, the seemingly neat distinction is muddied by the following passage from Lord Wilberforce's judgment:

> More than in any other field of public rights, the decision to be taken before embarking on a claim for injunctive relief, involving as it does the interests of the public over a broad horizon, is a decision which the Attorney-General alone is suited to make... [Such] decisions are of the type to attract political criticism and controversy... they are outside the range of discretionary problems which the courts can resolve.[123]

In saying this, Lord Wilberforce had, confusingly, conflated two ideas:

(a) the notion of a legal right "vested in the Crown", *ie* vested in the public as a whole, and vindicated through the courts by the Attorney-General; and
(b) the notion of a matters in which, because the subject-matter was non-justiciable, *nobody* had a legal right, the Attorney-General had complete discretion, and the courts had no role to play.

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[118] The dissenting judges in *Lim Kit Siang*, Seah SCJ and Abdoolcader SCJ, considered that *Boyce* ought not to be followed at all.
[119] *Gouriet*, *supra* note 7 at 473A.
[120] *Ibid* at 474F.
[121] *Ibid* at 477E, F.
[122] *Ibid* at 482C.
[123] *Ibid* at 482E.

The true reason why Gouriet failed had nothing to do with the former, and everything to do with the latter. His application failed, not because the rights at stake were vested in the Crown and not in him personally, but rather that there were no legal rights, private or public, at stake at all. There was no legal right to the use of postal services.[124] Further, Gouriet had no right to sue the Union in tort because of a statutory immunity provision.[125] Therefore, all that Gouriet could point to was a general "interest... in seeing that the law is observed";[126] but even if such an "interest" existed, it was doubtful whether it had been violated, for it was doubtful whether the Union had committed any criminal offence at all.[127] Even if the Union had committed an offence, the Attorney-General had the discretion to apply "for the aid of the civil courts to be invoked in support of the criminal law";[128] this discretion was not subject to judicial review,[129] and therefore neither Gouriet nor the public at large had any legal rights exigible against the Attorney-General.

At the risk of belabouring the point, Gouriet failed not for want of standing to sue to vindicate a public right, but because there was *no right at stake at all*. That explains why Gouriet would have failed even if he had suffered any special damage.[130] Now, let us suppose that the Union had not enjoyed statutory immunity from suit, and Gouriet had suffered some damage particular to himself. In that case, he would have been entitled to apply for relief against the Union. But this would *not* be because he would have suffered sufficient "special damage" to give him standing to vindicate a *public* right. Rather, it is because the damage he suffered would amount to the violation of a *private* right in tort against the Union.[131]

In short, *Gouriet*, like *Lim Kit Siang*, sheds no light on what a 'public right' is or what 'special damage' is. All it says is that a public right is a right "vested in the Crown".[132] The immediate question is: if a 'public right', by definition, does not vest in the applicant, then why should the applicant *ever* have standing to enforce it, even if he has suffered damage from the violation of that right?

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[124] *Ibid* at 476F. One might say that there is a 'right' in the lay sense to use postal services. But this is not a *legal* right; and, as Lord Diplock put it, "[t]he only kinds of rights with which courts of justice are concerned are legal rights": *ibid* at 501D.

[125] *Ibid* at 475G.

[126] *Ibid* at 476B.

[127] *Ibid* at 475D (per Lord Wilberforce) and 498C (per Lord Diplock).

[128] *Ibid* at 491D.

[129] *Ibid* at 487G, H. See also 512C (per Lord Edmund-Davies): "... it is *not* the law that every criminal act must lead to a prosecution... and, even if it were, the Attorney-General is unquestionably entitled to halt prosecutions... In other words, it is ultimately a matter for his unfettered discretion."

[130] *Ibid* at 492G.

[131] *Ibid* at 499G-500C (per Lord Diplock):

> In modern statutes whose object is to protect the health or welfare of a section of the public by prohibiting conduct of a particular kind, it is not infrequently the case that the prohibited conduct is made both a criminal offence and a civil wrong for which a remedy in private law is available to any individual member of that section of the public who has suffered damage as a result of it. So it creates a private right to be protected from loss or damage caused by the prohibited conduct. For the protection of the private right created by such a statute a court of civil jurisdiction has jurisdiction to grant to the person entitled to the private right, *but to none other*, an injunction to restrain a threatened breach of it by the defendant.

[132] *Ibid* at 477E, F (per Lord Wilberforce).

3. *Boyce* and Older Cases

To answer this question, one must examine a series of cases involving the law on public nuisance, beginning with the decision of the High Court of England and Wales in *Boyce*, which the House of Lords in *Gouriet* cited with approval.[133] This study will lead to the conclusion that the 'public right'/'private right' distinction holds no water.

Boyce concerned the owner of a block of flats overlooking a disused burial ground. He sought an injunction against the respondent's construction of a hoarding which would block natural light from reaching the windows of the flats.[134] The High Court held that the owner was entitled to sue in his own right, without joining the Attorney-General as plaintiff. This is because he was suing in respect of either an "alleged private right", *viz* the right to light; or an interference with "a public right to have the space maintained as open and without the erection of a hoarding", which caused him to "sustai[n] special damage".[135] According to the High Court, a "public right" meant a "right the plaintiff is entitled to as a member of the public. . . a right which he enjoys as one of the public, or which any member of the public enjoys in common with himself".[136]

The High Court said nothing to justify the distinction between 'public' and 'private' rights. Instead, the High Court cited a line of cases dating from as early as 1681.[137] An examination of these cases will reveal the flimsiness of the 'public'/'private' distinction.

These cases all involve public nuisance, which, by definition, affects a large class of the general public.[138] In the earliest of these cases, *Hart*,[139] the defendant had blocked a public road, forcing the plaintiff to use a "longer and more difficult way"[140] to get to his property. The court began by expressing the concern that "every one who had occasion to go this way might have his action, which the law will not suffer for the multiplicity".[141] However, the plaintiff ultimately succeeded because he "had particular damage, for the labour and pains he was forced to take with his cattle and servants".[142]

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133 *Ibid* at 513F (per Lord Edmund-Davies). Neither the Court of Appeal nor the House of Lords in *Boyce* had occasion to comment on Buckley J's remarks on standing because, by the time the *Boyce* case reached the Court of Appeal, the Attorney-General had been added as a plaintiff: see *Boyce v Paddington Borough Council* [1903] 2 Ch 556 at 561 (CA).

134 *Boyce*, *supra* note 108 at 113.

135 *Ibid*.

136 *Ibid* at 114.

137 *Hart v Basset* (1681) 84 ER 1194 [*Hart*], cited *ibid* at 114.

138 A public nuisance is a "misdemeanou[r]. . . committed 'to the common nuisance of the king's liege subjects"': J H Baker, *An Introduction to English Legal History*, 4th ed (London: Butterworths, 2002) [Baker] at 433, citing *R v Hayward* (1589) Cro Eliz 148. In more modern terms, "any nuisance is 'public' which materially affects the reasonable comfort and convenience of life of a class of Her Majesty's subjects"; there must be a "sufficient number of persons to constitute a class of the public": *Attorney-General v PYA Quarries Ltd* [1957] 2 QB 169 at 184 (CA).

139 *Supra* note 137.

140 *Ibid* at 1194.

141 *Ibid* at 1195.

142 *Ibid*.

Why was this the law? The point was not sympathy for the defendant. The law never shied away from imposing liability, even crushing liability, on a defendant who had caused extensive damage to many people, even if the defendant would thereby be "undone and impoverished for ever".[143] According to the courts, "if men will multiply injuries, actions must be multiplied too, for every man that is injured ought to have his recompense;"[144] "[a] right is none the less a right, or a wrong any less a wrong, because millions of people have a similar right or may suffer a similar wrong."[145]

The real concern of the law was not to cut down the number of plaintiffs, but rather to ensure that one could only sue if one had suffered damage known to the law. According to Fridman, this required that the plaintiff suffered "financial loss or. . . proprietary disadvantage", and not "mere inconvenience".[146] In other words, the reason why one could not sue in respect of inconvenience suffered by the public was not that the inconvenience was suffered *by all of the public*, but rather that mere inconvenience *was not, in the eyes of the law, harm at all*.

Let us recall *Hart*, in which the plaintiff evidently had standing because he had undergone "labour and pains".[147] But that did not mean that just about anybody who had undergone "labour and pains" would have standing to sue the defendant. Rather, the real reason why the plaintiff had standing to sue for public nuisance was that he had suffered *pecuniary* loss. He was a farmer who was in the midst of transporting his harvested crops, some of which he had to pay as rent for his farm.[148] If not for his "labour and pains", the crops would be damaged and he would be liable to his landlord.[149] By contrast, in *Winterbottom v Lord Derby*[150] (which also involved a blocked road), the plaintiff had no standing, because all he had suffered was the inability to exercise his "habit of using [the road] either for the purpose of taking a walk, or of going to see friends at Prestwich, or otherwise for pleasure or profit".[151]

In other words—and this is the crux of the problem with the 'private right'/'public right' distinction—the reasons why a person could sue in respect of public nuisance if he had suffered special damage was *not* that the special damage gave him standing

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143 *Beaulieu v Finglam* (1401) YB Pas 2 Hen IV, fo 18, pl 6, translated in Sir John Baker, *Baker and Milsom: Sources of English Legal History: Private Law to 1750*, 2nd ed (Oxford: Oxford University Press, 2010) at 610-611. Another translation may be found in David J Seipp, "Medieval English Legal History: An Index and Paraphrase of Printed Year Book Reports, 1268-1535", Seipp Number 1401.034, online: Boston University School of Law <https://www.bu.edu/phpbin/lawyearbooks/display.php?id=15517>.

144 *Ashby v White* (1703) 92 ER 126 at 137. See also *Wiles v Social Security Commissioner* [2010] EWCA Civ 258 at para 83 (per Sedley LJ); *Gibb v Maidstone & Tunbridge Wells NHS Trust* [2010] IRLR 786 at para 52 (EWCA) (per Sedley LJ); *Charles Terence Estates Ltd v Cornwall Council* [2013] 1 WLR 466 at para 52 (EWCA) (per Etherton LJ).

145 *Gouriet*, *supra* note 7 at 483H.

146 G H L Fridman, "The Definition of Particular Damage in Nuisance" (1952) 2 University of Western Australia Annual Law Review 490 at 503.

147 *Hart*, *supra* note 137 at 1195.

148 This is what is meant by the statement that the plaintiff was a "farmer of tithes": *Winterbottom v Lord Derby* (1867) LR 2 Exch 316 at 321 (HL) [*Winterbottom*].

149 *Ibid.*

150 *Ibid.*

151 *Ibid* at 321.

to vindicate a public right. Rather, it was that the special damage showed that he had suffered the violation of a *private* right.[152]

This explains why "the courts have interpreted the rule about particular damage to mean financial loss or. . . proprietary disadvantage".[153] The reason for this is not that the courts wished to single out these types of damage for compensation. Instead, the reason is that the courts wished to single out certain rights—namely, private rights vesting in the plaintiff—to protect, and that these types of damage often signalled a violation of such rights. "[P]roprietary disadvantage" is, by definition, a violation of a private right in property. "[F]inancial loss" is, more often than not, either the consequence of the violation of a property right, or dealt with through what one would now call the tort of negligence. By contrast, mere inconvenience could never be the result of the violation of a private right.[154] The focus was always on whether or not the plaintiff had a private right at stake.

Further support for this view may be drawn from more recent cases. In the 1876 case of *Lyon v Fishmongers' Co*,[155] the Fishmongers' Company was about to build an embankment which would have prevented access by water to Lyon's Wharf. This was purportedly pursuant to a statutory power to, with the permission of the Conservators of the Thames, "make any. . . embankment. . . or other work. . . into the body of the [Thames]".[156] However, there was a statutory exception preserving "any right, claim, privilege. . . to which any owner or occupier of any lands. . . on the banks of the river. . . are now by law entitled".[157] Lyon (the owner of Lyon's Wharf) sought an injunction against the construction of the embankment, claiming that it would violate a right to which he was entitled.

The Solicitor-General, on behalf of the Fishmongers' Company, argued that Lyon's application had to fail because the right he was attempting to vindicate was "[t]he right of free navigation [which] was one [Lyon] enjoyed in common with the rest of the world, and which could not form the ground for a private action".[158]

The House of Lords rejected this submission. In doing so, it did not say that he was entitled to the injunction because he had "suffer[ed] a particular damage from a public nuisance".[159] Rather, Lyon was entitled to the injunction because he had suffered the violation of a *private* right, which was *separate and distinct* from the

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[152] It might, to be sure, be such a violation of a *private* right also amounted to a *public* wrong—in other words, a crime. But the fact remains that one sues in respect of the tort, not the crime. It was not true that "any criminal nuisance which causes special damage is actionable in tort": Baker, *supra* note 138 at 434-435. This is why Baker takes the view that the cases where the plaintiff was found to have suffered "special damage" "seem rather to belong to the genus of negligence actions": Baker, *supra* note 138 at 435. See also F H Newark, 'The Boundaries of Nuisance' (1949) 65 LQR 480; but *cf In re Corby Group Litigation* [2009] QB 335 (EWCA).

[153] Fridman, *supra* note 146 at 503. But *cf* G Kodilinye, "Public nuisance and particular damage in the modern law" (1986) 6 LS 182.

[154] In tort law, there is no private right not to be inconvenienced. If there is a public right not to be inconvenienced, it is irrelevant, for public rights are the concern of criminal law and not tort law: J W Neyers, "Reconceptualising the Tort of Public Nuisance" (2017) 76 CLJ 87 at 93, 94.

[155] *Lyon v Fishmongers' Co* (1876) LR 1 HL 662 [*Lyon*].

[156] *Ibid* at 663, citing the *Thames Conservancy Act*, *1857* (UK), s 53.

[157] *Lyon*, *ibid* at 663, fn 1, citing the *Thames Conservancy Act 1857*, s 179.

[158] *Lyon*, *ibid* at 668.

[159] *Ibid* at 679.

public right of navigation:

> Unquestionably the owner of a wharf on the river bank has, like every other subject of the realm, the right of navigating the river as one of the public. This, however, is not. . . a right which, *per se*, he enjoys in a manner different from any other member of the public. But when this right of navigation is connected with an exclusive access to and from a particular wharf, it assumes a very different character. It ceases to be a right held in common with the rest of the public. . . and it becomes a form of enjoyment of the land. . . the disturbance of which may be vindicated in damages by an action, or restrained by an injunction. . . [160]

Lord Cairns acknowledged that this could be potentially confusing because the same event can constitute both an infringement of a public right (for which there is *no* right of action) and an infringement of a private right (for which there is). He explained this point by referring to the judgment of Page-Wood VC in *Attorney-General v Conservators of the Thames*,[161] which in turn discussed the case of *Rose v Groves*[162] as follows:

> The Plaintiff, an innkeeper on the banks of a navigable river, complained that the access of the public to his house was obstructed by timber which the Defendant had placed in the river; and it would be the height of absurdity to say, that a private right is not interfered with, when a man who has been accustomed to enter his house from a highway finds his door made impassable, so that he no longer has access to his house from the public highway. *This would equally be a private injury to him, whether the right of the public to pass and repass along the highway were or were not at the same time interfered with. . .* In *Rose v Groves* Chief Justice Tindal put the case *distinctly upon the footing of an infringement of a private right. . .* [163]

In *Thames Conservators*, Page-Wood VC added:

> [T]hough it is easy to suggest metaphysical difficulties when an attempt is made to define the private as distinguished from the public right, or to explain how the one could be infringed without at the same time interfering with the other, this does not alter the character of the right.[164]

Page-Wood VC said that the private right to walk from one's own land onto a road was "something quite different" from the public right to walk on a road. He did *not* say that the exercise of the right to walk from one's own land onto a road was an exercise of the public right to walk on the road generally. In other words (and at risk of belabouring the point), the reason why one could sue to vindicate a 'public right' when one had suffered special damage was simply that, in such a case, one would

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[160] *Ibid* at 671, 672 (Lord Cairns).
[161] (1862) 71 ER 1 [*Thames Conservators*].
[162] *Rose v Groves* (1843) 134 ER 705 (CtCP).
[163] *Thames Conservators*, *supra* note 161 at 14, 15, cited in *Lyon*, *supra* note 155 at 675, 676 [emphasis added].
[164] *Thames Conservators*, *supra* note 161 at 15 [emphasis added].

have suffered a violation of one's *private* right. There is simply no support in the case law for a separate idea of standing to vindicate a 'public right'.

C. *The Distinction Operates in a Confusing Manner in Singapore Law*

To summarise the discussion so far: *Tan Eng Hong* has modified the law on standing such that it focuses on 'rights'. However, it has introduced a distinction between 'public' and 'private' rights, accompanied by the requirement of 'special damage' in the case of 'public' rights. This paper has argued that this distinction finds no support in the public law cases which purportedly support it, namely *Gouriet* and *Lim Kit Siang*. Neither does it find any support in the law of the tort of public nuisance, from which *Gouriet* and *Lim Kit Siang* took inspiration. As the case law does not disclose any basis of precedent or legal principle for the distinction between 'public' and 'private' rights, this distinction ought to be viewed with suspicion. Instead, the sole question ought to be whether the applicant has (arguably) suffered a violation of a right or not.

This paper will now examine various Singapore cases and show that the search for 'special damage' resulting from the violation of a 'public right' is misleading, because it gives the impression that the aim of standing is to cut down the number of applicants in respect of any one wrong. This is not the aim of standing; nor does it need to be, for the courts can stem the potential flow of complainants through well-established procedures such as consolidation of actions[165] and doctrines similar to *res judicata*.[166] One might retort that the law on standing seeks to cut down the number of applicants who are "busybodies" who seek to "abuse. . . the legal process".[167] But abuse of process can be an *independent* ground for denying leave to apply for judicial review. Preventing abuse need not be a function of the law of *standing*.

1. *Vellama*

The confusion over 'public rights' and 'special damage' may be seen in *Vellama d/o Marie Muthu v Attorney-General*.[168] In that case, the sole Member of Parliament for a constituency had vacated his seat. The applicant, Vellama, sought a declaration that the Prime Minister did not have unfettered discretion to decide when to call a by-election to fill the vacancy, as well as a mandatory order that the Prime Minister call a by-election to fill the vacancy. The High Court granted Vellama leave to make the application. Shortly after that, the by-election which she sought was held.[169] The High Court subsequently dismissed her application on the merits.[170] When Vellama appealed, the Court of Appeal began by asking whether Vellama *still* had standing.[171]

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165 *Rules of Court* (Cap 322, R 5, 2014 Rev Ed), O 4, r 1.

166 See, for example, *Kho Jabing v Public Prosecutor* [2016] 3 SLR 135 (CA). For a case applying this principle in the context of judicial review, see *Abdul Kahar bin Othman v Public Prosecutor* [2018] 2 SLR 1394 (CA).

167 *Jeyaretnam*, *supra* note 2 at para 34.

168 [2012] 2 SLR 1033 (HC) [*Vellama (HC)*]; *Vellama (CA)* [collectively, *Vellama*].

169 *Vellama (HC)*, *ibid* at para 10.

170 *Ibid*.

171 *Vellama (CA)*, *supra* note 5 at para 12.

The Court of Appeal's approach in *Vellama* is at odds with the same Court's approach in *Tan Eng Hong*. As this paper has argued, the Court of Appeal in *Tan Eng Hong* held that, if section 377A of the *Penal Code* were unconstitutional, then Tan would still have standing to challenge its constitutionality even though he was not prosecuted under section 377A. One reason for this was that his rights would still have been violated in respect of the period of detention he had already undergone.[172] Similarly, if the previous failure to hold a by-election had been a breach of Vellama's rights, surely it ought not to matter that her rights were *no longer* being breached: this is nothing to the argument that she has standing because her rights *had been* breached in the past.

Instead, the Court of Appeal in *Vellama* stated that Vellama had no standing because the "factual substratum which gave rise to the institution of the proceeding had collapsed".[173] In order to explain this approach, the Court of Appeal invoked the distinction between 'private' and 'public' rights. Three issues arise.

First, the Court of Appeal's definitions of 'private right' and 'public right' are unclear. The Court stated that:

(a) a public right is "*shared in common* with other citizens";[174]
(b) a public right is "held and vindicated by public authorities";[175] and
(c) a public right "arise[s] from public duties which are owed to the general class of affected persons as a whole".[176]

These statements contradict one another. The first statement suggests that a public right is something vested in *individuals*. The third statement states that the state bears a duty owed to a "general class of. . . persons as a whole": in other words, a public right vests in a *group*. The second statement suggests either that a public right is "held. . . by", *ie* vested in, *the state*; or that a public right is "vindicated by" the state, which leads to the strange result that a public right is something enforced by the state against itself.

Second, the Court of Appeal's conclusions as to the content of the rights at stake does not withstand scrutiny. The Court of Appeal said that Vellama had originally filed her application "in her personal capacity as a directly affected voter of an unrepresented constituency".[177] However,

> After the by-election in Hougang SMC was held on 26 May 2012, the facts underpinning the Appellant's application were rendered moot. As such, when Summons No 2639 of 2012 was filed, the Appellant could only assert a public right arising under Art 49, rendering her no different from any other citizen interested in the proper construction of Art 49. Yet. . . in order to seek declaratory relief for a public right, something more than just being a member of the general body of

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172 *Tan Eng Hong (CA)*, *supra* note 8 at para 122.
173 *Vellama (CA)*, *supra* note 5 at para 23.
174 *Ibid* at para 33 [emphasis in original].
175 *Ibid* at para 28, citing *Tan Eng Hong (CA)*, *supra* note 8 at para 69.
176 *Vellama (CA)*, *ibid* at para 33.
177 *Ibid* at para 37.

> citizens, to whom the Prime Minister's duties under Art 49 are collectively owed, would be required: the Appellant must show proof of 'special damage'.[178]

The Court of Appeal then went on to observe that Vellama had suffered no "special damage" which was "quantitatively greater" or "qualitatively different" from that suffered by other members of the public.[179]

As Swati Jhaveri points out, the Court of Appeal elided the issue of what the 'public right' in question was in the first place; as a result, there was "little scope of argument for the applicant on the special damage requirement."[180] Indeed, on closer examination, it is not at all clear what "public right" was at stake at all. The Court of Appeal said that Vellama's "interest [was] no more than a general desire to have Art 49 interpreted by the court".[181] But, applying the Court of Appeal's definitions of "public right", can there really be a public right to have a law interpreted? The answer must be no. If there were such a public right, then there would be two possibilities:

(a) First, this right could be "held and vindicated by public authorities".[182] But that cannot be so, for the law simply does not allow a public authority to apply to court for an abstract advisory opinion.
(b) Second, this right could arise from "public duties"[183] owed to the public. But that would mean that the public authority's duty was to provide an interpretation of the law, which is in truth the exclusive function of the courts.

What about *private* rights? As noted above, the Court of Appeal did not consider the possibility that Vellama might have standing to vindicate a *past* breach of her *private* right to representation. *Vellama* sought to distinguish *Tan Eng Hong* on the ground that, in that case, "[a]nother similar act of [Tan's] in the future could very well attract a prosecution under [section] 377A. Thus, so long as [section] 377A remains on the statute book, it could not be said that the personal rights of the applicant in *Tan Eng Hong* would not be affected."[184] But if Vellama first had standing to vindicate some private right, why should this same logic not apply?

The Court of Appeal's answer appears to be that Vellama should not have been granted standing at all, because there was never violation of any private right of hers:

> [W]e entertain considerable doubt as to whether there was indeed a violation of a personal right when the Prime Minister had earlier clearly expressed an intention to call a by-election along with an assurance that all relevant circumstances would be taken into consideration.[185]

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178 *Ibid* at para 38.
179 *Ibid* at para 40, citing Peter Cane, "The Function of Standing Rules in Administrative Law" [1980] PL 303 at 313, 314.
180 Jhaveri, *supra* note 7 at 68.
181 *Vellama (CA)*, *supra* note 5 at para 43.
182 *Ibid* at para 28, citing *Tan Eng Hong (CA)*, *supra* note 8 at para 69.
183 *Vellama (CA)*, *ibid* at para 33.
184 *Ibid* at para 26.
185 *Ibid* at para 37.

This is a much clearer reason why the Court dismissed the application, and, at last, an indication of exactly what right was at stake and the scope of that right. The point, in essence, is that Vellama (like everyone) had a right to parliamentary representation,[186] but this right had not been violated because it extends only to prohibiting *prolonged* or *entrenched* lack of representation.[187]

As has been argued, a benefit of rights-based standing rules is that they prompt courts to issue such statements, which expound on the precise content of rights. Such a statement was all the more valuable in *Vellama*, given that the right to representation is an *unwritten* constitutional norm; there is no authoritative source other than judicial pronouncements that may shed light on it.[188] Unfortunately, the Court of Appeal's useful statement on this right was heavily obscured by the Court's digression into the distinction between 'private' and 'public' rights.

Moreover, the statement leaves various issues unaddressed. Jhaveri's analysis prompts one to consider questions such as the following: Is the right to representation engaged (a) when an applicant is not represented by an MP, or (b) only when there is some specific issue (such as personal financial need) on which the applicant seeks assistance?[189] Had the Court of Appeal not been bogged down in distinguishing between 'private' and 'public' rights, it may well have had the occasion to answer such questions as part of its task of pinning down precisely what rights were at stake.

The third problem arises from the Court of Appeal's remark that the requirement of "special damage" was a "safeguard against essentially political issues, which should be more appropriately ventilated elsewhere, being camouflaged as legal questions".[190] The problem is that the Court of Appeal, in so holding, conflated the issue of abuse of process with the issue of whether one has a legal right. The two are conceptually different. Abuse of process ought to be seen as an *independent* ground for refusing leave to apply for judicial review. Indeed, one can conceivably act with the motive of misusing the court's process even though one truly does have a legal right at stake.[191]

2. *Jeyaretnam*

Matters were confused even more in *Jeyaretnam*.[192] In that case, Jeyaretnam alleged that the Government and/or the Monetary Authority of Singapore had, contrary to

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[186] *Ibid* at para 85 [emphasis added]:

> If a vacancy is left unfilled for an unnecessarily prolonged period that would raise a serious risk of disenfranchising the residents of that constituency. There is thus a need to balance the *rights of the voters in a Parliamentary system of government* and the discretion vested in the Prime Minister to decide when to call for by-elections to fill a vacancy.

[187] *Ibid* at para 85 [emphasis added]: "If a vacancy is left unfilled *for an unnecessarily prolonged period* that would raise a serious risk of disenfranchising the residents of that constituency."

[188] I am grateful to Swati Jhaveri for this point.

[189] Jhaveri, *supra* note 7 at para 68.

[190] *Ibid* at para 33.

[191] The case law sometimes refers to this situation as one in which the applicant has no "real interest in bringing the action": *Tan Eng Hong (CA)*, *supra* note 8 at para 83.

[192] *Supra* note 2.

Article 144 of the *Constitution*, given a loan to the International Monetary Fund without Parliamentary and Presidential approval. (According to the Court of Appeal, this contention was wrong in law: Parliamentary and Presidential approval are only needed for *borrowing* by the Government, not for *lending*.)[193] The Court of Appeal held that Jeyaretnam had no standing because

> he is unable to assert any rights—private or public—to the alleged breach of duty, because there is none to be had: his claim is brought in the *public interest*.[194]

Let us put aside the confusing suggestion that the "public interest" is antithetical to the existence of rights.[195] If the applicant had no rights at stake in this case, why could the same not be said of *Vellama*? According to the Court of Appeal in *Jeyaretnam*, the answer was that Vellama enjoyed a "public right, as a voter of a constituency which was then without an MP, to seek a declaration on the proper construction of Art 49 of the Constitution."[196] But if the content of her right was to have the law interpreted, could the same not be said about Jeyaretnam, who sought a pronouncement on the effect of Article 144? The distinction between 'no public right' and 'public right, but no special damage' appears quite thin indeed.

D. *Conclusion on the 'Public Rights'/'Private Rights' Distinction*

For all these reasons, the distinction between a 'private right' and a 'public right' is untenable, and ought to be abandoned. This distinction aims to prevent a misuse of the court's process or to allow the courts to decline to answer polycentric political questions; but these issues are conceptually separate from the issue of standing. The standing inquiry ought simply to ask: has the applicant arguably suffered a violation of a right vested in him or not?

For example, the issue in *Vellama* ought to have been: did Vellama (and other persons) have a right to have laws interpreted? The answer may well have been yes or no. The answer might have been expressed in terms of, say, a 'right to legal certainty', or a 'right to the rule of law', or something else. But the Court of Appeal provided no answer at all: because of the 'public rights'/'private rights' distinction, the Court simply made a blanket pronouncement that Vellama had suffered no special damage and hence could not complain about the violation of a public right, hence sweeping under the carpet the issue of exactly what that right is.[197] It is not the aim of this article to tackle the question of how the rights at stake in *Vellama* should be characterised and articulated. The point is simply that this question needs an answer, which right-based standing rules would have led the courts to provide if not for the confusion created by *Vellama*.

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193 *Ibid* at para 11.

194 *Ibid* at para 51 [emphasis in original].

195 Benjamin Joshua Ong, "Public law theory and judicial review in Singapore" Singapore Law Watch Commentary, Issue 1/Dec 2013 at 5, 6.

196 *Jeyaretnam*, *supra* note 2 at para 51.

197 Jhaveri, *supra* note 7 at 68.

VI. "Public Duties Without Correlative Rights": An Exception to Rights-Based Standing Rules?

The alternative would be to abandon rights-based standing rules in favour of interest-based ones. According to the Court of Appeal in *Jeyaretnam*, there is a class of case in which this is to be done. This category of cases concerns "the breach of public duties which do not generate correlative public or private rights".[198] According to the Court of Appeal, because of the court's role as the "guardian of the rule of law, it would be unthinkable that citizens would have no recourse for bringing claims against unlawful conduct by public bodies where there has been an obvious and flagrant disregard for the law".[199] Therefore, said the Court:

> *Public duties without correlative rights*
> [. . .] We have already noted that, in so far as public rights are concerned. . . 'where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right' the plaintiff would have the standing to ask for judicial review in respect of that interference. In this regard, it seems to us that "special damage" might also possibly encompass those rare and exceptional situations where a public body has breached its public duties in such an egregious manner that the courts are satisfied that it would be in the public interest to hear it.[200]

There are three problems with this.

First, the heading refers to situations in which there are no "rights". The Court of Appeal then purports to expand the definition of "special damage" which arises "from [an] interference with [a] public *right*" [emphasis added]. In other words, not only (as in *Vellama*) is there no explanation of what exactly the right is; it is not even clear whether a right exists at all.

Second, suppose that no right exists. This would lead to the strange result that an individual who has suffered the breach of a public right with no 'special damage' can *never* have standing, while an individual *can* have standing despite having suffered the breach of *no right at all*. This flies in the face of the notion articulated by the Court of Appeal that public law litigation, like all litigation, exists only in order to vindicate rights of one sort or another.[201]

Third, the Court is trying to prevent a situation in which an instance of unlawfulness goes uncorrected because nobody has standing. But if this is so, why should the law distinguish between "egregious" and non-"egregious" illegal acts, and only guard against the former but not the latter? Why should the law knowingly tolerate some illegality?[202]

On closer examination, the reason for the confusion is that the Court of Appeal was concerned to shut out applications for judicial review which are bound to fail on

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198 *Jeyaretnam*, *supra* note 2 at para 51, citing *Vellama (HC)*, *supra* note 168 at para 36 [emphasis removed].
199 *Jeyaretnam*, *ibid* at para 60.
200 *Ibid* at para 62 [emphasis in original].
201 *Vellama (CA)*, *supra* note 5 at paras 34, 35.
202 Jhaveri, *supra* note 180 at 74.

the merits, and not to shut out meritorious applications where the magnitude of the unlawfulness is small. This is evident from two other extracts from the judgment.

First, the Court of Appeal said that the illegal act in question had to be "very grave and serious" because:

> Judicial review is not the recourse for petty claims against breaches of just any public body or servant; a low-level government officer's failure to execute his duties fully would obviously not fall in the same category as a Cabinet Minister's abuse of his wide-ranging powers.[203]

This is correct, but it is already taken into account by areas of the law other than standing. Statutes typically impose legal duties on Ministers, not low-level government officers. Very often, decisions of the latter will not be amenable to judicial review at all.[204] Applications for judicial review should be thrown out on *that* ground, not on the ground that the applicant has no standing.

Second, the Court said:

> [I]f neither of the two *Boyce* exceptions is applicable, this court should not engage in questions relating to the exercise of *management* powers by public bodies. . . At this point, we refer once again to the facts of the present appeal. The Appellant's case, as explained above, fails for a sheer lack of merit. . . essentially much of the Appellant's case *alluded* to the fact that such an act was not only risky, but also of dubious utility to Singapore. In so far as an applicant's intention in bringing judicial review proceedings against public bodies for certain acts or omissions is to ask the court to rule on the *merits* of these acts or omissions. . . this is not a role that the courts should, in any event, undertake.

The problem is that according to the Singapore courts, judicial review, by definition, is review of the legality of the state's action and *never* of its "merits".[205] Therefore, if no ground of judicial review is made out, the application must fail whether or not "neither of the two *Boyce* exceptions is applicable". The real reason why the application must fail has nothing to do with the law on standing, and everything to do with the court's power to throw out a case which is "groundless or hopeless"[206] because there is not even an "arguable" or "*prima facie* case of reasonable suspicion"[207] in favour of the applicant's success. If one insists on expressing the point in terms of standing, the point is that because nobody has a legal right that state action be *meritorious* (as opposed to *lawful*), nobody can have standing because nobody's rights are stake at all. It is no answer to say that one has suffered "special damage", for, *ex hypothesi*, that would be merely *damnum sine iniuria*.

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[203] *Ibid*.

[204] The decisions of low-level officers may often be "non-decision making" duties: *Tan Eng Chye v Director of Prisons* [2004] 4 SLR (R) 521 at para 8 (HC).

[205] *Wong Keng Leong Rayney v Law Society of Singapore* [2006] 4 SLR (R) 934 at para 79 (HC); *Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR (R) 92 at para 42 (HC); *SGB Starkstrom Pte Ltd v Commissioner for Labour* [2016] 3 SLR 598 at para 56 (CA).

[206] *Public Service Commission v Lai Swee Lin Linda* [2011] 1 SLR (R) 133 at para 23 (CA).

[207] *Ibid* at para 21, citing *Colin Chan (CA)*, *supra* note 14 at para 25.

What, then, if the state owes a legal duty and has breached it? One would think that the usual rights-based standing rules can simply apply: "'duty' and 'right' are correlative terms. When a right is invaded, a duty is violated, and *vice versa*.[208] But the Court of Appeal has remarked that there is a "breakdown in this Hohfeldian duty-rights correlation. . . in the realm of public law", since:

> judicial review 'involves a much less direct and immediate linkage between the litigant's remedy and the public authority's wrongdoing: for judicial review protects the individuals' interests only *via* the intervening agency of the grounds of review which, as we have seen constitute general principles constraining public authorities, as well as being subject to the discretionary denial of remedies'.[209]

But there is no such breakdown. All Bamforth's view means is that if the grounds of judicial review are (say) unconstitutionality, illegality, irrationality, and procedural impropriety, then one has the right that state action be not unconstitutional, not illegal, not irrational, and not procedurally improper. This is *not* the same as saying that *no* rights at all are at stake.

It might be that, in a given case, only some persons have arguably suffered the violation of a right exigible against the state. If *everybody* has suffered the violation of such a right, then the starting point must be that *everybody* has standing. There is nothing wrong with this: as the Court of Appeal itself acknowledged, "[a] right is none the less a right, or a wrong any less a wrong, because millions of people have a similar right or may suffer a similar wrong."[210] According to the Court of Appeal, this state of affairs is nonetheless undesirable because

> 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. Action by a public authority could very well be impeded every step of the way. The burden of having to bear costs may not be a sufficient deterrence.[211]

This last sentence is telling. Only an unsuccessful applicant is made to pay the respondent's costs. Therefore, what is to be "deterre[d]" is not applications for judicial review, but *frivolous*, *vexatious*, or *patently unmeritorious* applications for judicial review. The epithet "busybod[y]" is misleading and obscures the fact that sometimes "the busybody has a good and important legal point",[212] in which case he ought not to be termed a busybody at all because, *ex hypothesi*, he has a legal right at stake. The real problem is the "gadfl[y]"—one whose aim is (merely) to annoy. But what ought

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[208] *Jeyaretnam*, *supra* note 2 at para 52, citing W N Hohfeld, "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning" (1913) 23 Yale LJ 16 at 31, which in turn cited *Lake Shore & M S R Co v Kurtz* (1894) 37 NE 303 at 304.

[209] *Jeyaretnam*, *ibid* at para 53, citing Nicholas Bamforth, "Hohfeldian Rights and Public Law" in Matthew H Kramer, ed. *Rights, Wrongs, and Responsibilities* (Basingstoke: Palgrave Macmillan, 2001) at 11.

[210] *Gouriet*, *supra* note 7 at 483H, cited in *Vellama (CA)*, *supra* note 5 at para 32.

[211] *Vellama (CA)*, *ibid* at para 33.

[212] Konrad Schiemann, "Locus standi" [1990] PL 342 at 351.

to shut out such an applicant is not the law of standing, but other doctrines such as abuse of process[213] and the court's power to refuse leave to apply for judicial review in the event that the application is bound to fail.[214] Seen in this light, the exception to the law of standing in "those rare and exceptional situations where a public body has breached its public duties in. . . an egregious manner"[215] is not only incoherent, but also unnecessary.

VII. Conclusion

This paper has identified the benefits of rights-based standing rules, critiqued Singapore's particular rights-based standing rules, and argued that there ought only to be one rule on standing: **an applicant has standing if he has suffered the violation of a right vested in him**. There are, to be sure, many conversations to be had about what rights each person has and how they are best characterised. So, too, are there conversations to be had about requirements for leave to apply for judicial review other than the standing requirement. But an overly complex and doctrinally unclear law on standing must not be allowed to impede these conversations from taking place.

Let us conclude by returning to a distinction mentioned at the beginning of this paper. Suppose that the law wishes to move toward the view that judicial review exists not primarily to vindicate individual rights, but rather to serve some broader notion of the public interest. This was precisely what the Court of Appeal sought to do in *Jeyaretnam* in "exceptional instances of very grave and serious breaches of legality":[216] it would be an affront to the rule of law if, in such circumstances, nobody had standing.[217] The Court of Appeal's response was to consider that no right was engaged in such circumstances, but to carve out an exception to the general rule that one must allege the violation of a right in order to have standing. But we have seen how confusing and unclear the results can be.

A better way to accommodate such cases is to work within rights-based standing rules, not to seek to create exceptions to them in the name of the 'public interest'. The argument is as follows. Even if the public interest *itself* is the justification for allowing an application for judicial review to be heard, judicial review can have the *effect* of serving the public interest.[218] Indeed, as Swati Jhaveri observes, despite Singapore law's ostensible antipathy to public interest standing, the *effect* of allowing public interest standing[219] may be achieved under rights-based standing rules through an expansive conception of a 'right'.[220]

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213 See text accompanying nn 167 and 191 above.

214 See text accompanying nn 106 and 207 above.

215 *Jeyaretnam*, *supra* note 2 at para 62.

216 *Ibid*.

217 *Ibid* at para 60.

218 *In Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at para 90 (CA) [*Tan Seet Eng (CA)*], the Court of Appeal said that the purpose of judicial review is to "pronounc[e] on the legality of government actions"; there was no reference to the protection of *individuals*.

219 Jhaveri, *supra* note 7 at 62.

220 *Ibid* at 70, 71.

Hence, under rights-based standing rules, if an applicant who claims to be a representative of another wishes to persuade the court to broaden the range of persons who have standing to challenge some state action, then his best tactic is to argue not that the court ought to grant standing to the representative *despite* the representative's rights not being engaged, but rather to argue that the representative's constitutional rights *are* engaged. The law could, for instance, recognise the idea of a right—perhaps one vesting in only a limited class of individuals—to have a law interpreted (which was alluded to in *Vellama*).

Unfortunately, the rules on standing in Singapore have become overly complicated, impeding the possibility of such developments. It is hoped that this paper has demonstrated the benefits that rights-based standing rules can bring, and shown that these benefits may be much better reaped by reforming the standing rules that Singapore has now.

VIII. Coda: Rights-Based Standing Rules and Administrative Law

This paper has focused on cases involving alleged violations of constitutional rights. What about cases involving administrative law only? The difficulty is that, in the first place, the Singapore courts have not clearly stated the law on standing in cases involving administrative law but not constitutional rights. The courts have rarely need to because, in many such cases, there was no dispute about the applicants' standing because the executive action only affected specific individual persons, and those persons were the applicants.[221]

But what about cases involving judicial review of administrative action that applies to a wide class of persons, such as administrative guidelines and policies?[222] Would the proposed reforms to the law on standing have anything to contribute? One might be tempted to say no for the following reason. Rights-based standing rules are predicated on the idea that judicial review exists to vindicate rights. But a prevailing view is that administrative law exists only to ensure the legality of executive action, independent of the implications for individuals' rights.[223]

Of course, this view can be challenged. There is no reason why the Singapore courts might not characterise administrative law in terms of rights vested in legal subjects. After all, the law already speaks of the 'right to a fair hearing' and a "decision which will affect the rights of individuals".[224] Why not a 'right to a proper

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[221] See, for example, *Per Ah Seng Robin v Housing and Development Board* [2015] 2 SLR 19 at para 22 (HC); *Re Nalpon, Zero Geraldo Mario* [2018] 2 SLR 1378 at para 20 (CA); *AXY v Comptroller of Income Tax* [2018] 1 SLR 1069 at para 34 (CA); *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at para 36.

[222] *See*, for example, *Lines International Holding (S) Pte Ltd v Singapore Tourist Promotion Board* [1997] 1 SLR (R) 52 (HC), although no issue of standing was raised in that case.

[223] I am grateful to Swati Jhaveri for this point. See *Attorney-General (NSW) v Quin* (1990) 170 CLR 1 at 35, 36 (HCA). Even in *Tan Seet Eng (CA)*, *supra* note 218, which concerned an application for *habeas corpus*, the Court of Appeal defined "[j]udicial review" as "an area of law in which the courts review the lawfulness of acts undertaken by other branches of the government", with no specific reference to the fact that the applicant's right to personal liberty was at stake.

[224] *Lloyd v McMahon* [1987] AC 625 at 702, 703 (UKHL), cited in *Dow Jones Publishing Co (Asia) Inc v Attorney-General* [1989] 1 SLR (R) 637 at para 56 (CA).

inquiry',[225] a 'right to have relevant evidence taken into account',[226] and a 'right to be treated rationally'? This paper does not purport to answer the question of whether administrative law in Singapore should go down this path; the point to be made now is simply that rights-based standing rules—whether or not the proposed reforms are made—should prompt us to consider this question carefully.

[225] See, for example, *Re Fong Thin Choo* [1991] 1 SLR (R) 774 at para 57 (HC).
[226] See, for example, *Tan Gek Neo Jessie v Minister for Finance* [1991] 1 SLR (R) 1 at para 19 (HC).