Singapore Journal of Legal Studies
[2020] 367–391

# A PLACE TO STAND TO MOVE THE EARTH: STANDING AND THE RULE OF LAW

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It has been said that rules relating to standing (*locus standi*) in public law try to resolve the conflict between the "desirability of encouraging people to participate actively in the enforcement of the law" and the "undesirability of encouraging meddlesome interlopers invoking the jurisdiction of the courts in matters in which they are not concerned". Nonetheless, standing rules that are excessively restrictive may result in certain forms of governmental action being virtually immune from judicial scrutiny. This article argues that recasting the standing rules to focus on an applicant's suitability to bring a claim and whether the claim is sustainable on its merits accords better with the courts' role as a check on the political branches of government and their duty to uphold the rule of law.

## I. INTRODUCTION

The rules relating to standing, or *locus standi*, in public law are said to exist for the purpose of resolving the conflict between "the desirability of encouraging people to participate actively in the enforcement of law, and the undesirability of encouraging meddlesome interlopers invoking the jurisdiction of the courts in matters in which they are not concerned".[1] In England and Wales, there has been a tendency over several decades for courts to shift from emphasizing the latter towards the former. The trend in Singapore up to the 2010s was similar, whereupon the courts made a marked shift towards a more restrictive stance. This article begins in Part II by taking a historical perspective, looking at the evolution of standing rules in England and Singapore applicable to quashing and prohibiting orders, mandatory orders and declarations.

Part III then examines the current test for standing established by the Court of Appeal in a trilogy of cases decided between 2012 and 2014, noting in particular the Court's move to apply the more stringent standing test that had hitherto been applied only to declarations to prerogative orders as well. Some difficulties that the test gives rise to are also identified. Finally, Part IV considers the justifications highlighted by

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1 Harry Woolf *et al.*, "Claimants, Interested Parties and Interveners" in Harry Woolf *et al.*, *De Smith's Judicial Review*, 7th ed (London: Sweet & Maxwell, 2015) at 66–67, para 2-002.

the Court for its stricter approach, but argues that recasting the standing rules to focus on an applicant's suitability to bring a claim and whether the claim is sustainable on its merits accords better with the courts' role as a check on the political branches of government and their duty to uphold the rule of law.

## II. The Evolution of Standing Rules

### A. *Remedies Available in Public Law Cases*

The applicable rules of standing used to vary depending on the remedy sought. In England and Wales prior to 1977, when some action or decision of a public authority—including the act of promulgating subsidiary legislation—was challenged in the courts by way of judicial review for being in breach of administrative law rules (and, in the case of subsidiary legislation, also for incompatibility with the parent Act), the aggrieved person could either apply to the Chancery Division of the High Court for the equitable remedy of a declaration or injunction, or to a divisional court of the Queen's Bench Division for one of the prerogative writs—namely, a writ of *certiorari*, *habeas corpus ad subjiciendum*, *mandamus*, prohibition, or *quo warranto*. In Singapore, with effect from 1 January 2006 the first four writs referred to in the preceding sentence, now called "prerogative orders", were respectively renamed the quashing order, order for review of detention, mandatory order, and prohibiting order; the writ of *quo warranto* was omitted from the list.[2] Our discussion will focus on the declaration, mandatory order, prohibiting order, and quashing order. By virtue of the *Government Proceedings Act* injunctions are not available as a remedy against the Government, though a court may grant a declaration instead,[3] or issue a mandatory or prohibiting order where appropriate.

Judicial review of executive action on the basis of alleged incompatibility with the terms of a written constitution is unknown in England but clearly available in Singapore,[4] and it has been assumed by the courts that prerogative orders may be

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2 *Supreme Court of Judicature Act* (Cap 322, 2007 Rev Ed Sing), 1st Schedule, para 1 [*SCJA*], as amended by the *Statutes (Miscellaneous Amendments) (No 2) Act 2005* (No 42 of 2005, Sing), s 6 read with the 4th Schedule. See also the *Interpretation Act* (Cap 1, 2002 Rev Ed Sing), s 41B ("Renaming of prerogative orders or writs"), inserted by the *Statutes (Miscellaneous Amendments) (No 2) Act 2005* (No 45 of 2005, Sing), s 2.

3 *Government Proceedings Act* (Cap 121, 1985 Rev Ed Sing), s 27(1)(a): "In any civil proceedings by or against the Government the court shall, subject to the provisions of this Act, have power to make all such orders as it has power to make in proceedings between private persons, and otherwise to give such appropriate relief as the case may require: Provided that — (a) where in any proceedings against the Government any such relief is sought as might in proceedings between private persons be granted by way of injunction or specific performance, the court shall not grant an injunction or make an order for specific performance, but may in lieu thereof make an order declaratory of the rights of the parties" [*Government Proceedings Act*]. The term *civil proceedings* is defined in s 2(2) of the Act to include "proceedings for judicial review".

4 See, for example, *Chan Hiang Leng Colin v Public Prosecutor* [1994] 3 SLR(R) 209 at para 50 (HC): "The court has the power and duty to ensure that the provisions of the Constitution are observed. The court also has a duty to declare invalid any exercise of power, legislative and *executive*, which exceeds the limits of the power conferred by the Constitution, or which contravenes any prohibition which the Constitution provides." [emphasis added]

granted in such cases.[5] Where provisions of primary legislation are concerned, there have been no local attempts to impugn the process by which Parliament has enacted the legislation as being out of line with administrative law rules, for example, if irrelevant considerations were taken into account by legislators. Cases from the United Kingdom ("UK") suggest that legal challenges of this sort are impermissible. In *Edinburgh and Dalkeith Railway Company v Wauchope*,[6] Lord Campbell expressed surprise that an Act could be "held inoperative by a Court of Justice because the forms prescribed by the two Houses to be observed in the passing of a bill have not been exactly followed",[7] saying:

> All that a Court of Justice can do is to look to the Parliamentary roll: if from that it should appear that a bill has passed both Houses and received the Royal assent, no Court of Justice can inquire into the mode in which it was introduced into Parliament, nor into what was done previous to its introduction, or what passed in Parliament during its progress in its various stages through both Houses.[8]

More recently, in *Prebble v Television New Zealand*,[9] the Privy Council stated: "So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges".[10] Whether these cases apply in the light of Singapore's written constitution will require consideration by the court when the matter arises. In the meantime, it appears that in such cases the only (or at least primary) remedy[11] available may be a declaration that the statutory provision is unconstitutional and, consequently, void and of no legal effect on its terms rather than upon some lack of compliance by Parliament with administrative law rules during its enactment.[12]

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5 The High Court has power to issue prerogative orders "to any person or authority [. . .] for the enforcement of any right conferred by any written law or for any other purpose": *SCJA*, *supra* note 2, 1st Schedule, para 1. In *Vellama d/o Marie Muthu v Attorney-General* [2012] 2 SLR 1033 (HC), [2012] 4 SLR 698 (HC), and [2013] 4 SLR 1 (CA) [*Vellama*], neither the High Court nor Court of Appeal took objection *per se* to the claimant's application for a mandatory order requiring the Prime Minister to advise the President to issue a writ of election for a by-election to be held, on the ground that the Prime Minister had allegedly misconstrued Art 49(1) of the *Constitution of the Republic of Singapore* (1999 Rev Ed) [*Constitution*]. The remedy was ultimately not granted as the Court of Appeal found that the claimant lacked standing. Among other reasons, the by-election had already been held by the time the appeal was heard.

6 (1842) 8 ER 279 (HL) [*Edinburgh*], cited in *British Railways Board v Pickin* [1974] AC 765 at 786-787 (HL) (Lord Reid) and at 790-791 (Lord Morris of Borth-y-Gest) (HL).

7 *Ibid* at 284.

8 *Ibid* at 285.

9 [1995] AC 321 (PC, on appeal from New Zealand) [*Prebble*].

10 *Ibid* at 332.

11 The applicability in Singapore of remedies that have been granted in other jurisdictions such as an order giving temporary validity to an unconstitutional statutory provision (*Re Manitoba Language Rights* [1985] 1 SCR 721 (SCC) or a declaration that a provision is incompatible with a constitutional text not amounting to an invalidation of the provision (for instance, similar to one issued pursuant to the *Human Rights Act 1998* (c 42) (UK), s 4) is beyond the scope of this article.

12 *Quaere*, though, whether cases such as *Edinburgh*, *supra* note 6 and *Prebble*, *supra* note 9 stand for the proposition that the Singapore courts are powerless to set aside primary legislation not enacted according to the procedure set out in the *Constitution* or in the *Standing Orders of Parliament*—for instance, if

This article assumes that the same standing test applies to administrative and constitutional law claims. Somewhat surprisingly, the courts have not established the point conclusively because the major cases articulating standing rules have all been constitutional law ones, though there is at least one administrative law case—*Cheong Chun Yin v Attorney-General*[13]—where the current standing test was applied without much discussion of it. There does not seem to be any compelling reason for the courts to apply different tests to the two strands of claims.

### B. *Standing Rules before 2012: Towards Liberalization*

From the 19th century up to the 2010s, there was a dearth of local reported cases addressing the issue of the standing requirements for various remedies in public law matters. However, such cases as exist broadly indicate that the Singapore courts tracked the developments that took place in England, include the increasing liberalization of the standing rules.

#### 1. *Prerogative orders*

As mentioned previously, the mandatory, prohibiting and quashing orders, together with the order for review of detention, are known as prerogative orders.[14] They were termed 'prerogative' as originally the Crown and no one else could seek them from the court. However, by the end of the 16th century it was common for the courts to allow ordinary subjects of the Crown aggrieved by allegedly unlawful acts on the part of public authorities to apply for prerogative writs in the Crown's name without having to obtain permission;[15] "[t]he Crown lent its legal prerogatives to its subjects in order that they might collaborate to ensure good and lawful government".[16]

##### (a) Prohibiting and Quashing Orders

Since in England applications for prerogative orders are brought in the Crown's name, and the Crown is deemed to always have standing to act against public authorities, including its own ministers, who have failed to comply with the law, the standing requirements for prohibiting and quashing orders (formerly the writs of prohibition and *certiorari*) have long been fairly liberal.[17] Referring to *certiorari*, in *R v Thames Magistrates' Court, ex parte Greenbaum*[18] Parker LJ said:

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a bill has only undergone two instead of the requisite three readings, or has been voted upon despite objection having been taken to the lack of a quorum in the House (*Constitution*, *supra* note 5, art 56).

13 [2014] 3 SLR 1141 at paras 15-16, 28-34 (HC).

14 A term retained in the *SCJA*, *supra* note 2, 1st Schedule, para 1.

15 Hence the practice of naming the Crown as the applicant in such cases using the Latin words *Regina* (Queen) or *Rex* (King), often abbreviated to *R*, for example, *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd*, *infra* note 68.

16 William Wade & Christopher Forsyth, "Prerogative Remedies" in William Wade & Christopher Forsyth, *Administrative Law*, 11th ed (Oxford: Oxford University Press, 2014) at 500.

17 William Wade & Christopher Forsyth, "Restriction of Remedies" in William Wade & Christopher Forsyth, *Administrative Law*, 10th ed (Oxford: Oxford University Press, 2010), 582 at 585-586 [Wade & Forsyth, "Restriction of Remedies"].

18 (1957) 55 LGR 129 (CA) [*Greenbaum*].

> Anybody can apply for it—a member of the public who has been inconvenienced, or a particular party or person who has a particular grievance of his own. If the application is made by what for convenience one may call a stranger, the remedy is purely discretionary. Where, however, it is made by a person who has a particular grievance of his own whether as a party or otherwise, then the remedy lies *ex debito justitiae*.[19]

In other words, when a person is the subject of an executive act or decision, that person has standing to apply for a prohibiting or quashing order *ex debito justitiae* (as of right).[20] Where the applicant is someone who is not the direct subject of such an act or decision but is nonetheless inconvenienced by it in some way—a "stranger"—the court has a discretion whether to regard him or her as having standing.

That this liberal position on standing applied in Singapore was confirmed by the High Court in *Chan Hiang Leng Colin v Minister for Information and the Arts*.[21] The Minister had issued an order under the *Undesirable Publications Act*[22] banning the importation, sale and distributions of materials published by the International Bible Students Association ("IBSA"), an organization associated with Jehovah's Witnesses. The applicants, who were Jehovah's Witnesses, sought a *certiorari* (among other things) to quash the order on the grounds that it was *ultra vires* the Act and also violated various provisions of the *Constitution*.[23] The Attorney-General, representing the Minister, argued that only officeholders of the IBSA had *locus standi* to challenge the order, and that since the applicants were neither officeholders nor members of the Association they lacked standing.[24]

The High Court cited with approval the passage from *Greenbaum* quoted earlier,[25] and also the following passage by Lord Denning MR from *R v Greater London Council, ex parte Blackburn*:

> I regard it as a matter of high constitutional principle that if there is good ground for supposing that a government department or a public authority is transgressing the law, or is about to transgress it, in a way which offends or injures thousands of Her Majesty's subjects, then anyone of those offended or injured can draw it to the attention of the courts of law and seek to have the law enforced and the courts in their discretion can grant whatever remedy is appropriate.[26]

In *Blackburn*, the Court of Appeal of England and Wales found that the applicants, a husband and wife, possessed sufficient standing to challenge the alleged failure of

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19 *Ibid* at 135.

20 The court retains discretion to deny the remedy in appropriate cases, such as if there has been an undue delay on the part of the applicant in seeking the remedy: Wade & Forsyth, "Restriction of Remedies", *supra* note 17 at 586.

21 [1995] 2 SLR(R) 627 (HC) [*Chan Hiang Leng Colin* (HC)].

22 Cap 338, 1985 Rev Ed Sing (now 1998 Rev Ed Sing).

23 See *Chan Hiang Leng Colin* (HC), *supra* note 21 at paras 1-3.

24 *Ibid* at para 14.

25 *Greenbaum, supra* note 18 at 135. The High Court cited a passage from H R W Wade, *Administrative Law*, 4th ed (Oxford: Clarendon Press, 1979) at 544 in which the quotation from *Greenbaum* was quoted: *Chan Hiang Leng Colin* (HC), *ibid* at para 11.

26 [1976] 1 WLR 550 at 559 (CA) [*Blackburn*], cited in *Chan Hiang Leng Colin* (HC), *ibid* at para 12.

the Greater London Council to properly censor films which the applicants regarded as obscene—they were British citizens who lived within the Council's jurisdiction, the wife was a ratepayer, and they had children who might be adversely affected by watching pornographic films.[27] Speaking of the husband, Lord Denning MR said: "If he has no sufficient interest, no other citizen has."[28]

Having thus established "it was relatively easy to establish the standing necessary to ask for an order of *certiorari*. [. . .] It was sufficient that there had been an abuse of power which inconvenienced someone",[29] the High Court in *Chan Hiang Leng Colin* determined that the applicants had standing in the case. The Minister's order had impinged on their ability to access materials relevant to their religion, and they had a constitutional right to practise their religion guaranteed by Article 15(1) of the *Constitution*.[30] Moreover, the applicants were facing criminal prosecutions for possessing IBSA materials banned by the order. The Court held it was "unarguable" that a person in their position "had such an interest in the legality of the order [. . .] as to imbue him with the necessary standing to challenge the order. Not only would he be directly affected by the order but there would be a clear relationship between his interest and the nature of the remedy he sought."[31]

When the case was appealed to the Court of Appeal,[32] that Court largely agreed with the High Court. It also cited with approval the passage from *Blackburn* by Lord Denning,[33] and held that the fact that the applicants were complaining of a violation of their rights under Article 15 of the *Constitution* was sufficient to give them standing:[34] "If a citizen does not have sufficient interest to see that his constitutional rights are not violated, then it is hard to see who has."[35] However the Court also said, rather cryptically, that it was unable to agree with the High Court:

> [. . .] that the fact that the appellants were facing prosecution for being in possession of prohibited publications under the Undesirable Publications Act also gives them *locus standi*. We think that this is an irrelevant consideration in an application for leave to issue *certiorari* proceedings.[36]

The reasoning here is somewhat hard to follow, because a person subject to criminal proceedings brought on the strength of an allegedly unlawful order by a public authority would appear to be a prime example of someone who has a particular grievance against that authority. In a subsequent case, *Tan Eng Hong v Attorney-General*,[37] the Court of Appeal took the above passage to mean that since the applicants already

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27 *Blackburn*, *ibid* at 558-559 (Lord Denning MR) and at 564 (Stephenson LJ).
28 *Ibid* at 559.
29 *Chan Hiang Leng Colin* (HC), *supra* note 21 at para 12.
30 *Ibid* at para 17.
31 *Ibid* at paras 15-16.
32 *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR(R) 294 (CA) [*Chan Hiang Leng Colin* (CA)]. See also *Comptroller of Income Tax v ACC* [2010] 2 SLR 1189 (CA).
33 *Chan Hiang Leng Colin* (CA), *ibid* at para 10.
34 *Ibid* at paras 13-15.
35 *Ibid* at para 14.
36 *Ibid* at para 19.
37 [2012] 4 SLR 476 (CA) [*Tan Eng Hong*].

possessed standing by virtue of the alleged violation of their constitutional rights, it was irrelevant whether criminal proceedings had been taken against them.[38] Put another way, the High Court did not mean to say that a criminal prosecution can never be relied on as a basis for standing; rather, "a prosecution under an allegedly unconstitutional law should not be a necessary requirement for standing in an action to declare that law unconstitutional".[39]

Moreover, the Court of Appeal noted that if a person has been arrested or detained for a supposed breach of an unconstitutional law, this would amount to a violation of his or her right to personal liberty guaranteed by Article 9(1) of the *Constitution*. Thus, the person could also claim standing to challenge the allegedly unconstitutional law on the basis of a potential breach of Article 9(1).[40] The parallel between this scenario and the situation in *Chan Hiang Leng Colin* is unmistakable.

What we see from the Singapore cases described above is that while they involved applicants who were found to have standing to apply for quashing orders because they were directly affected by the actions of public authorities, the courts nonetheless took the view that, as in England, a potentially broad range of persons should be accorded standing. While in cases involving prohibiting orders the courts have not had to consider whether the applicants had standing,[41] the High Court's views on standing in *Chan Hiang Leng Colin* were clearly directed at both prohibiting and quashing orders.[42]

(b) Mandatory Orders

It would be fair to assume that the standing test applying to mandatory orders should be no different from that applicable to prohibiting and quashing orders. However, in England, the case of *R v The Guardians of the Lewisham Union*[43] led to a line of restrictive decisions holding that an applicant is only entitled to a *mandamus* if he or she has a "legal specific right to ask for the interference of the Court".[44] Later, a gloss was added that the test was "far more stringent" than the test applying to quashing orders,[45] though it appears that the courts never clearly articulated a reason for the divergence.[46]

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38 *Ibid* at para 89.

39 *Ibid.*

40 *Ibid* at para 122.

41 Examples of such cases include *Che Him v Robertson* (1808–1884) [1859] 1 Ky 131 (Straits Settlements SC); *In the Matter of an Application for a Writ of Prohibition and in the Matter of the Singapore Improvement Ordinance (1927)* [1935] SSLR 420, SC (Straits Settlements); *Estate and Trust Agencies (1927), Ltd v Singapore Improvement Trust* [1937] AC 898 (PC on appeal from Singapore); and *Re Fong Thin Choo* [1991] 1 SLR(R) 774 (HC).

42 *Chan Hiang Leng Colin* (HC), *supra* note 21 at paras 11-13.

43 [1897] 1 QB 498 (Div Ct) [*Lewisham Union*].

44 *Ibid* at 500 (Wright J); see also at 501 (Bruce J) (using the same expression "legal specific right").

45 *R v Hereford Corporation, ex parte Harrower* [1970] 1 WLR 1424 at 1428 (HC); and see also *R v Russell, ex parte Beaverbrook Newspapers Ltd* [1969] 1 QB 342 at 348 (HC) ("So far as certiorari is concerned, the matter is really perfectly clear. They are certainly a person aggrieved so as to be able to make this application. So far as mandamus is concerned, the test may well be stricter, [. . .]").

46 Wade & Forsyth, "Restriction of Remedies", *supra* note 17 at 588.

On the other hand, there were cases that continued to adopt a broader approach to standing. These required only that the applicant show a "sufficient interest".[47] Sometimes it was said that an applicant needed to establish a "special interest" greater than that of other members of the public;[48] nonetheless, the courts did not require proof of much interest to establish standing. For example, in *R v Cotham*,[49] the vicar of a parish and some of his parishioners were held to "clearly" have sufficient interest in seeking a *mandamus* directing licensing justices to conduct a hearing to determine whether a licence to sell beer at premises within the parish had been legally transferred from one person to another.[50]

Locally, the broader approach was adopted in the *Straits Steamship Co, Ltd v Owen*,[51] though on the facts of the case even the narrower approach would probably have been satisfied.[52] In this case, the claimant sought sanction from the Harbour Master to prefer a criminal charge against the owner of a steamship called the *Kim Kean Aun* for not being manned with a full complement of properly certified officers as required by a merchant shipping ordinance. However, the Harbour Master declined to accede to the request. Upon the question of whether the claimant had sufficient interest to apply for a *mandamus* against the Harbour Master, the Straits Settlements Court of Appeal cited the *Cotham*[53] test of a "sufficient specific interest" and, disagreeing that the claimant was no better than a common informer, expressed the view that he was in a much stronger position than the applicant in that case.[54] In fact the claimant was "peculiarly interested" in the proper exercise of the Harbour Master's discretion,[55] and had a "special interest"[56] in seeking a *mandamus* since it was alleging that the *Kim Kean Aun* posed a navigational danger to, and was also competing unfairly with, the claimant's own ships.

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47 *R v Manchester Corporation* [1911] 1 KB 560 at 563 (Div Ct) (Lord Alverstone CJ) [*Manchester Corporation*]; see also Huang Su Mien, "Judicial Review of Administrative Action by the Prerogative Orders" (1960) 2(1) U Malaya L Rev 64 at 67 (an applicant who can prove a "sufficient legal interest" in the performance of some legal duty can enforce it by *mandamus*).

48 *Manchester Corporation*, *ibid* at 563-564 (Pickford J).

49 [1898] 1 QB 802 (Div Ct) [*Cotham*].

50 *Ibid* at 804.

51 [1932] MLJ 167 (Straits Settlements CA) [*Straits Steamship Co*].

52 See also *Mundell v Mellor* [1929] SSLR 152 (Straits Settlements SC), where the applicant would probably have been found to have standing on either approach. Following a fatal accident in a soap factory, a partner of a firm of consulting engineers having charge of the factory was summoned to testify at an inquiry convened to investigate the incident pursuant to an ordinance. The partner sought to have his advocate attend with him, but the latter was refused a right of audience. The advocate then applied for *mandamus*. The Supreme Court of the Straits Settlements held that the partner had *locus standi* before the inquiry at common law since "he was summoned before the tribunal to be examined touching matters with regard to which it was of the utmost consequence to him what view the tribunal might take of his conduct in relation thereto" (*id* at 158)—under the relevant ordinance, an engineer involved in causing a fatal accident might be prohibited from being in charge of machinery, and an engineer or driver might have his certificate of competency suspended or cancelled. In the circumstances, the partner had a right to appoint an advocate to speak for him.

53 *Cotham*, *supra* note 49.

54 *Straits Steamship Co*, *supra* note 51 at 170. The Chief Justice also noted that in *Manchester Corporation*, *supra* note 47, the applicants were held to have had a "sufficient interest", and concluded that on the facts it was "undeniable" that the claimant's "special interest" was "definitely established": *Cotham*, *ibid.*

55 *Straits Steamship Co*, *ibid* at 171 (Thorne Ag CJ).

56 *Ibid* at 171 and at 174 (Terrell J).

In England, the move away from the *Lewisham* line of cases continued. For instance, in *R v Commissioner of Police of the Metropolis, ex parte Blackburn (No 3)*,[57] two members of the public, a husband and wife, alleged that the Metropolitan Police Commissioner had not properly enforced the law relating to the publication and sale of pornography, and sought a *mandamus* to compel him to do so. While the Court of Appeal decided that the writ should not issue because it was not for the courts to interfere with how the police carried out their duties, it took no objection to the applicants' standing. Lord Denning MR even remarked that Mr Blackburn, who appeared in person, "has served a useful purpose in drawing the matter to our attention".[58]

With effect from 11 January 1978, Order 53 of the *UK Rules of the Supreme Court 1965*[59] was amended;[60] rule 3(1) now provided that "[n]o application for judicial review shall be made unless the leave of the Court has been obtained in accordance with this rule", while rule 3(5) stated: "The Court shall not grant leave unless it considers that the applicant has a sufficient interest in the matter to which the application relates." In *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses Ltd* ("*IRC*"),[61] a majority of the House of Lords affirmed that Lewisham was no longer good law—Lord Scarman termed it "heresy" and a "deplorable decision"[62]—and that the common locus standi test of a "sufficient interest" applied, whether a prerogative order, declaration or injunction was sought.

As to what constituted a "sufficient interest", it was neither a direct financial or legal interest nor the "legal specific interest" required by the now-discredited *Lewisham* case. On the other hand, a "mere busybody" did not have sufficient interest.[63] Three of the five judges of the House of Lords felt it was necessary for the statute empowering the public authority to either expressly or impliedly give the applicant the right to complain that the authority had acted unlawfully, for the applicant to have a sufficient interest in seeking judicial review.[64] Lord Diplock took the broadest stance, saying:

> It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by outdated technical rules of locus standi from bringing the matter to the

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57 *R v Metropolitan Police Commissioner, ex parte Blackburn (No 3)* [1973] QB 241 (CA) [*Blackburn (No 3)*]. In an earlier case brought by the same applicant, *R v Metropolitan Police Commissioner, ex parte Blackburn* [1968] 2 QB 118, the Court of Appeal left open the question of whether he had sufficient standing to seek a *mandamus* against the Police Commissioner for failing to enforce a gaming law (at 137 (Lord Denning MR), and at 145 (Salmon LJ)); Edmund-Davies LJ opined that "[i]t may be that a private citizen, such as the applicant, having no special or peculiar interest in the due discharge of the duty under consideration, has himself no legal right to enforce it" (at 149).

58 *Blackburn (No 3)*, *ibid* at 254.

59 1965 III, p 4995 (UK) [*UK Rules of the Supreme Court 1965*].

60 By *The Rules of the Supreme Court (Amendment No 3) 1977* (SI 1977 No 1955 (L 30), UK), r 5.

61 [1982] AC 617 (HL) [*IRC*].

62 *Ibid* at 653.

63 *Ibid* at 646 (Lord Fraser of Tullybelton) and at 653 (Lord Scarman).

64 *Ibid* at 631 (Lord Wilberforce), 646 (Lord Fraser) and at 662-663 (Lord Roskill).

> attention of the court to vindicate the rule of law and get the unlawful conduct stopped.[65]

It is also significant that four of the judges affirmed that standing should be assessed in the light of the legal and factual context of the case, and not abstractly.[66] If, considering this context, the applicant can make out a *prima facie* case of reasonable suspicion that the public authority has acted unlawfully, the applicant should be regarded as having standing.[67] This point has been emphasized in subsequent cases. For instance, in *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd*,[68] the Divisional Court stated that "the merits of the challenge are an important, if not dominant, factor when considering standing".[69]

Developments in Singapore mirrored those in England. In *Re Lim Chor Pee, ex parte Law Society of Singapore*,[70] the Court of Appeal followed the *IRC* case and held that the standing test for a *mandamus* was no longer that stated in *Lewisham*, but was simply the presence of a "sufficient interest".[71] We have already encountered *Chan Hiang Leng Colin*,[72] a *certiorari* case. There, the High Court noted that unlike Order 53 of the *UK Rules of the Supreme Court 1965*,[73] Order 53 of Singapore's *Rules of the Supreme Court*[74] made no mention of a "sufficient interest". Thus, the Court should look to the legal position existing before the change in the UK Rules.[75]

Nonetheless, the High Court recognized the *IRC* case established that at common law English courts had already treated the standing test for a *mandamus* as the same as the test applying to writs of *certiorari* and prohibition[76]— "[i]t was sufficient that there had been an abuse of power which inconvenienced someone".[77] The Court also found helpful Lord Scarman's observation in the *IRC* case to the effect that "the sufficiency of the applicant's interest had to be judged in relation to the subject matter of his application".[78] This point was reiterated by the Court of Appeal when the matter came before it.[79]

### 2. *Declarations*

The lack of Singapore cases seeking declarations that public authorities had acted unlawfully makes it difficult to draw definitive conclusions about the strictness of

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65 *Ibid* at 644.
66 *Ibid* at 630 (Lord Wilberforce) and at 656 (Lord Roskill).
67 *Ibid* at 643 (Lord Diplock) and at 653 (Lord Scarman).
68 [1995] 1 WLR 386 (Div Ct) [*World Development Movement*].
69 *Ibid* at 395.
70 [1985–1986] SLR(R) 998 (CA) [*Lim Chor Pee*].
71 *Ibid* at para 43-45.
72 *Chan Hiang Leng Colin* (HC), *supra* note 21.
73 *UK Rules of the Supreme Court 1965*, *supra* note 59.
74 *Rules of the Supreme Court* (Cap 322, R 5, 1990 Rev Ed Sing), now the *Rules of Court* (Cap 322, R 5, 2014 Rev Ed Sing) [*Rules of Court*].
75 *Chan Hiang Leng Colin* (HC), *supra* note 21 at para 10.
76 *Ibid* at para 11-13.
77 *Ibid* at para 12.
78 *Ibid* at para 13.
79 *Chan Hiang Leng Colin* (CA), *supra* note 32 at para 11-12.

the standing requirements for the remedy in public law cases. The English *locus classicus* is *Gouriet v Attorney-General* ("*Gouriet*"),[80] in which the plaintiff sought, among other things, declarations that postal worker unions were breaching certain statutes by calling on their members to refuse to handle mail and messages between England and South Africa in order to protest the practice of apartheid in the latter country. The plaintiff would not have suffered any loss due to the strike action, and asserted only that he had an interest, shared by all members of the public, in seeing that the law was adhered to.[81] Lord Wilberforce said:

> [T]here is no support in authority for the proposition that declaratory relief can be granted unless the plaintiff, in proper proceedings, in which there is a dispute between the plaintiff and the defendant concerning their legal respective rights or liabilities either asserts a legal right which is denied or threatened, or claims immunity from some claim of the defendant against him or claims that the defendant is infringing or threatens to infringe some public right so as to inflict special damage on the plaintiff.[82]

(Special damage is damage "over and above that sustained by the public at large".[83]) A similar conclusion was reached by the other House of Lords judges.[84]

Another passage from *Gouriet* by Lord Diplock was cited with approval in *Singapore Airlines Limited v Inland Revenue Authority of Singapore*;[85] part of it reads: "[T]he jurisdiction of the court is not to declare the law generally or to give advisory opinions; *it is confined to declaring contested legal rights*, subsisting or future, of the parties represented in the litigation before it and not those of anyone else."[86] The plaintiff, which was administering a provident fund ("SIA fund") for its employees, sought a declaration from the Singapore High Court that if it wound up the SIA fund and transferred the moneys in employees' accounts in the fund to corresponding employees' accounts in the government-operated Central Provident Fund, this would not amount to premature withdrawals from the SIA fund which would disentitle its employees from enjoying income tax exemptions on the moneys.

The Court found that the plaintiff lacked standing for the declaration, as it was the plaintiff's employees who were liable to pay any income tax. If employees disputed the imposition of any tax, they should bring the matter before the Income Tax Board of Review as provided for in the *Income Tax Act*.[87] Although Order 15, Rule 16 of the *Rules of Court*[88] provides that "the Court may make binding declarations of right whether or not any consequential relief is or could be claimed", this did not mean that "all and sundry" could seek declarations; rather, such an order "can be sought

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80 [1978] AC 435 (HL) [*Gouriet*].
81 *Ibid* at 476.
82 *Ibid* at 483.
83 *Ibid* at 506.
84 *Ibid* at 494-495 (Viscount Dilhorne), at 501 (Lord Diplock), at 515 (Lord Edmund-Davies) and at 522-523 (Lord Fraser of Tullybelton).
85 [1999] 2 SLR(R) 1097 (HC) [*Singapore Airlines*]. An appeal against this judgment was dismissed by the Court of Appeal without reasons being given.
86 *IRC*, *supra* note 61 at 501 (emphasis added), quoted in *Singapore Airlines*, *ibid* at para 27.
87 Cap 134, 1996 Rev Ed Sing, now the 2014 Rev Ed Sing.
88 *Rules of Court*, *supra* note 74.

only by persons who have a right to enforce against a defendant or by persons who say that he himself is not liable".[89]

*Gouriet* was applied again, this time by the Singapore Court of Appeal, in *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd*.[90] The case's importance will become evident shortly. The issue relevant to our discussion was whether the plaintiff could obtain a declaration that a Singapore company, PES, held a sum of about US$36 million it had received from Petral, its parent company, on trust for Petral. Petral was a subsidiary of the defendant against whom the plaintiff had secured an arbitration award, and the plaintiff had obtained a garnishee order against Petral for debts due from Petral to the defendant. The plaintiff suspected that Petral had transferred the money to PES to evade the garnishee order.

The Court of Appeal noted that, among other things, "the plaintiff must have *locus standi* to bring the suit and there must be a real controversy for the court to resolve".[91] As regards *locus standi*, the Court stated that for the plaintiff to possess the necessary standing to obtain a declaration, "the plaintiff must be asserting the recognition of a 'right' that is personal to him".[92] On the facts, the plaintiff had failed to establish either of these elements.

The Court recognized that the English Court of Appeal had taken a more flexible approach to standing in *Re S (Hospital Patient: Court's Jurisdiction)* ("*Re S*").[93] Millett LJ had expressed the view that "[p]rovided that the legal right in question is contested by the parties, however, and that each of them would be affected by the determination of the issue, I do not consider that the court should be astute to impose the further requirement that the legal right in question should be claimed by either of the parties to be a right which is vested in itself".[94] However, the Singapore Court felt there was "no compelling reason" to depart from *Gouriet*.[95] A key reason was that Order 15, Rule 16 of the *Rules of Court* refers to the court making declarations "of right" while Part 40.20 of the *UK Civil Procedure Rules 1998*,[96] which had replaced the provision of the *UK Rules of the Supreme Court 1965* equivalent to the Singapore provision, lacks this term. Thus, while some commentators had taken the view that *Re S* is more consonant with Part 40.20, this reasoning was inapplicable to Singapore.[97]

Up to the 2000s, therefore, while the local standing rule for prerogative orders generally tracked the English position, it appears that applicants who sought declarations needed to possess some personal legal right rather than merely a sufficient interest in order to establish standing. While the English rule had changed in 1978, with the amended Order 53 of the *UK Rules of the Supreme Court 1965* applying a

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89 *Singapore Airlines*, *supra* note 85 at para 23.

90 [2006] 1 SLR(R) 112 at paras 13 and 15 (CA) [*Karaha Bodas*].

91 *Ibid* at para 14.

92 *Ibid* at para 15.

93 [1996] Fam 1 (CA).

94 *Ibid* at 22.

95 *Karaha Bodas*, *supra* note 90 at para 25.

96 *The Civil Procedure Rules 1998*, SI 1998/3132 as amended by *The Civil Procedure (Amendment) Rules 2001*, SI 2001/256, Part 40.20: "The court may make binding declarations whether or not any other remedy is claimed."

97 *Karaha Bodas*, *supra* note 90 at paras 24-25.

uniform "sufficient interest" test to prerogative orders and declarations, in Singapore, Order 15, Rule 16 of the *Rules of Court* continues to refer to "declarations of right".

However, it is notable that in none of the cases discussed above was the remedy sought in the nature of a declaration that a public authority was or would be acting unlawfully. In *Gouriet* and *Karaha Bodas* the declarations respectively concerned trade unions and private companies. Although in *Singapore Airlines* the defendants were both government agencies, the plaintiff was simply seeking the High Court's interpretation of a provision in the Income Tax Act. In the *IRC* case members of the House of Lords took pains to point out that *Gouriet*, as a case not involving any exercise of governmental powers, was irrelevant to the standing test applicable to prerogative orders, particularly after Order 53 of the *UK Rules of the Supreme Court 1965* made the declaration a remedy available in public law cases.[98] The view has been taken that *Gouriet* "ought to be confined to its peculiar subject matter, which is the use of civil proceedings for the purpose of enforcing the criminal law. This is a highly abnormal procedure and there may be good reasons for allowing only the Attorney-General to employ it."[99]

One might therefore ask if the courts would have extended to declarations the standing test applying to prerogative if they had been presented with a typical public law claim. In that context, the word "*right*" in Order 15, Rule 16 of the *Rules of Court*, might have been construed as referring to a general right to see that a public authority complies with the law, rather than a personal legal right.

## III. The Current Standing Rule

### A. *The Standing Rule Unified in an Unexpected Direction*

The present-day standing rule in public law was laid down by the Singapore Court of Appeal in the 2010s in a trilogy of cases: *Tan Eng Hong v Attorney-General*,[100] *Vellama d/o Marie Muthu v Attorney-General*[101] and *Jeyaretnam Kenneth Andrew v Attorney-General*.[102] In the last case, the Court summarized the law as follows:[103]

(i) A public duty must have been breached—arguably, this relates to the concept of amenability and is not, strictly speaking, part of the standing test.
(ii) The applicant will be found to have standing if the public duty generates correlative private rights or public rights.
(iii) The applicant will not be found to have standing if the public duty generates neither correlative private rights or public rights, except in the rare case

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98 *IRC*, *supra* note 61 at 639 (Lord Diplock), at 649 (Lord Scarman) and at 657-658 (Lord Roskill). Both Lord Diplock and Lord Roskill noted in particular that in *Gouriet*, *supra* note 80 at 482-483, Lord Wilberforce had recognized that the courts allow applicants "liberal access under a generous conception of locus standi" when seeking prerogative orders against public authorities.

99 William Wade & Christopher Forsyth, "Ordinary Remedies" in William Wade & Christopher Forsyth, *Administrative Law*, 11th ed (Oxford: Oxford University Press, 2014) at 495.

100 *Tan Eng Hong*, *supra* note 37.

101 *Vellama*, *supra* note 5.

102 [2014] 1 SLR 345 (CA) [*Jeyaretnam*].

103 *Jeyaretnam* at para 64.

> where the breach of public duty is regarded by the court as of sufficient gravity that it would be in the public interest for the case to be heard.

Another Court of Appeal decision is pertinent: *Eng Foong Ho v Attorney-General*.[104] The members of a Buddhist association who worshipped at a temple sought a declaration that the compulsory acquisition of the land on which the temple stood violated their constitutional right to equality, because nearby lands belonging to a Christian church and a Hindu organization were not similarly acquired. The Attorney-General argued that since the applicants had sought a declaration instead of a prerogative order, they had to satisfy a stricter test for *locus standi*.

The Court's response was: "This argument has no merit whatsoever. [. . .] In our view, it does not matter what procedure the appellants have used. The substantive elements of *locus standi* cannot change in the context of the constitutional protection of fundamental rights."[105] It found that the applicants did possess the necessary standing to bring the case. The Court's statement was, it is submitted, somewhat bemusing as cases prior to *Eng Foong Ho* (not referred to in the judgment) had determined that the tests for standing for declarations and prerogative orders were different. One possible reading is that the Court meant the standing test for declarations should now be regarded as the same as that for prerogative orders, effectively rejecting the *Karaha Bodas* approach.

This was not, though, the conclusion subsequently drawn by the Court in *Tan Eng Hong*. It said that *Eng Foong Ho* had intended "to unify the threshold of *locus standi* for cases brought under O 15 r 16 and cases brought under O 53 r 1",[106] and by this it meant that applicants have to "demonstrate a violation of or an injury to their personal rights in order to be granted standing".[107] Thus, the Court moved in an unexpected direction, extending the stricter *Gouriet* and *Karaha Bodas* standing test for declarations to prerogative orders, rather than applying the more liberal test for prerogative orders established in the *IRC* and *Chan Hiang Leng Colin* cases to declarations. The Court did not then articulate policy reasons for taking this stance, though it did so in *Vellama* and *Jeyaretnam* which we will examine below.

The Court set out the *Karaha Bodas* standing requirements for an applicant seeking a declaration as follows:[108]

> (a) the applicant must have a "real interest" in bringing the action [. . .];
> (b) there must be a "real controversy" between the parties to the action for the court to resolve [. . .]; and
> (c) the declaration must relate to a right which is personal to the applicant and which is enforceable against an adverse party to the litigation [. . .].

The separation of real interest (limb (a)) from a violation of a personal right (limb (c)) seems unwarranted. In the context of *Tan Eng Hong*—in which the constitutionality

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104 [2009] 2 SLR(R) 542 (CA) [*Eng Foong Ho*].
105 *Ibid* at para 18.
106 *Tan Eng Hong*, *supra* note 37 at para 76.
107 *Ibid* at para 78.
108 *Ibid* at para 72.

of section 377A of the *Penal Code*,[109] which criminalizes public or private sexual acts between male persons, was challenged on the ground that, among other things, it infringes the right to equality guaranteed by Article 12(1) of the *Constitution*—the Court commented that citizens have a sufficient interest in ensuring their constitutional rights are not violated.[110] On the other hand, if a law provides that only persons of a particular race are prohibited from taking public buses, then only persons of that race would have suffered a violation of their Article 12 right and would have standing to challenge the law.[111] This is readily understandable, but if the concept of a real interest thus means no more than the enjoyment of an abstract legal right in constitutional or administrative law, then limb (a) adds nothing substantive. It appears that only limb (c) is a necessary part of the test.

As for the limb (b), the Court of Appeal said that "the absence of a real controversy does not invariably deprive the court of its jurisdiction, and the court may exercise its discretion to hear hypothetical issues in appropriate cases".[112] It is submitted the articulation of a real controversy requirement as part of the standing test creates a difficulty. On the facts of *Tan Eng Hong*, the Court said the applicant had a real interest in bringing the claim and that his personal rights had been violated as he had been arrested, investigated, detained and charged under an allegedly unconstitutional *Penal Code* provision. Moreover, though the Prosecution had decided not to proceed with that charge, the appellant faced a real and credible threat of prosecution under section 377A in the future.[113] The Court relied on the same facts to show there was a real controversy to be decided,[114] noting:[115]

> [W]e are of the view that it can logically be said that where there is a real *legal* interest in a case being heard, there is a real controversy to be determined. [. . .] 'Legal' interest is used here in contradistinction to a mere socio-political interest, and may be said to arise where there is a novel question of law for determination, [. . .] [emphasis in original]

Is there ever likely to be a situation where a real controversy is absent when there are facts showing that an applicant has a real legal interest in bringing a claim and that the applicant's rights have arguably been violated? If not, what is the point of the real controversy limb of the test?

### B. *Distinguishing between Private and Public Rights*

In *Tan Eng Hong*, the Court of Appeal cited the Malaysian Supreme Court in *Government of Malaysia v Lim Kit Siang*,[116] where a declaration and an injunction were

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109 Cap 224, 2008 Rev Ed Sing.

110 *Tan Eng Hong*, *supra* note 37 at para 83. Strictly speaking, the *Constitution* guarantees some fundamental liberties to citizens only, and others to all persons; *eg*, Art 12(1) states: "All *persons* are equal before the law and entitled to the equal protection of the law." [emphasis added]

111 *Tan Eng Hong*, *ibid* at para 93.

112 *Ibid* at para 137.

113 *Ibid* at at paras 148-184.

114 *Ibid* at para 186.

115 *Ibid* at para 143.

116 [1988] 2 MLJ 12 at 27 (Malaysia SC).

sought, for the proposition that if an applicant claims a "public right" has been infringed, "the applicant must show that he had suffered special damage as a result of the public act being challenged and that he had a genuine private interest to protect or further". The Court of Appeal explained that "a public right is one which is held and vindicated by public authorities, whereas a private right is one which is held and vindicated by a private individual".[117]

This can be understood by reference to *Gouriet*, where the House of Lords held that where a public wrong has been committed, only the Attorney-General had standing to sue on the public's behalf, though he or she might permit an applicant to bring a case in the Attorney-General's name on a relator action.[118] Otherwise, a claim might only be brought in the applicant's own name if the interference to the public right caused the applicant to suffer special damage.[119] This distinction between public and private rights and its impact on standing was maintained in *Vellama*,[120] the Court of Appeal explaining that a public right is one the applicant "enjoys as one of the public, or which any member of the public enjoys in common with" the applicant.[121]

Benjamin Joshua Ong has explained in a masterly survey of the relevant cases various problems with the distinction between public and private rights, and it is redundant for them to be repeated here.[122] However, the following points may be observed. It is somewhat unclear whether a public right must be enjoyed by every single member of the public in the jurisdiction or may be enjoyed only by a segment of the public, as the Court also said:

> Public rights are shared in common because they arise from public duties which are owed to the *general class of affected persons* as a whole. [. . .] As public rights are shared with the public in common, an applicant cannot have standing unless he has suffered some 'special damage' which distinguishes his claim from those of *other potential litigants in the same class*. [emphasis added][123]

The passage seems to imply that a right can be a public right if only shared by a segment of the public. If that is the case, then distinguishing between cases involving private rights and public rights becomes subtle to the point of impracticality. This is because the Court also recognized that when "the alleged interference with the public interest [. . .] affects an applicant's private right, the court will recognise the applicant's standing to seek relief. This is so regardless of the existence of identical private rights held by other potential litigants in the same class as the applicant".[124] As Lord Wilberforce put it in *Gouriet*: "A right is none the less a right, or a wrong

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117 *Tan Eng Hong*, *supra* note 37 at para 69.

118 *Gouriet*, *supra* note 80 at 494 (Viscount Dilhorne).

119 *Ibid* at 518 (Lord Fraser), citing *Boyce v Paddington Borough Council* [1903] 1 Ch 109 (HC). See also *Gouriet*, *ibid* at 483-484 (Lord Wilberforce), at 502 (Lord Diplock) and at 506, 515 (Lord Edmund-Davies).

120 *Vellama*, *supra* note 5 at paras 29-36 and 92.

121 *Ibid* at para 29, citing *Boyce*, *supra* note 119 at 113-114.

122 See Benjamin Joshua Ong, "Standing Up for Your Rights: A Review of the Law of Standing in Judicial Review in Singapore" [2019] SJLS 316 at 330-344 [Benjamin Ong].

123 *Vellama*, *supra* note 5 at para 33.

124 *Ibid* at para 32.

any less a wrong, because millions of people have a similar right or may suffer a similar wrong".[125]

One can appreciate the logic of this. A private right does not cease to be one just because it may be asserted by persons other than the applicant. Every person affected by a law banning people of a particular race from taking public buses has had a private right—the constitutional right to equality—affected, and should have standing to challenge that law by way of judicial review, even if there are millions of people of that race.

Consider the facts of *Vellama*. Following a casual vacancy arising in Parliament through the constituency where the applicant was a registered voter, the applicant sought a mandatory order directing the Prime Minister to advise the President to issue a writ of election to hold a by-election, and a declaration as to the proper interpretation of Article 49 of the *Constitution* which deals with the filling of causal vacancies. She did not proceed with this application because a by-election was duly held before the matter was heard by the High Court on the merits.[126]

However, following the by-election, the applicant took out a second application, this time only asking for a declaration that Article 49 obliged the Prime Minister to call a by-election.[127] The Court of Appeal held that where this application was concerned, the applicant "could assert a *public* right arising under Art 49, rendering her no different from any other citizen interested in the proper construction of Art 49".[128] Apart from doubt about whether there can be a public right to have a law interpreted (Ong thinks not),[129] since only citizens (and not Singapore residents who are non-citizens) are entitled to vote, the Court's characterization of the applicant's right as public affirms the understanding that a public right can be asserted by only a segment of the public. Yet, it can also be said the applicant was in fact asserting a *private right* held simultaneously by other voters, and it did not make a difference that millions of fellow voters were equally entitled to assert that right. Thus, distinguishing between a private and a public right is not straightforward.

The Court went on to say that Ms Vellama did not have standing as she could not prove any special damage, as she had "no more than a general desire to have Art 49 interpreted by the court" which was insufficient.[130] For special damage to exist, there must either be "damage to the interest common to all members of the public but quantitatively greater than that suffered by other members of the public, or damage qualitatively different from that suffered by the public, that is, damage to some interest not shared by the public generally".[131] However, special damage:

> [. . .] does not mean a mere intellectual or emotional concern. A person is not interested within the meaning of the rule, unless he is likely to gain some advantage, other than the satisfaction of righting a wrong, upholding a principle or winning a contest, if his action succeeds or to suffer some disadvantage, other than a sense

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125 *Gouriet*, *supra* note 80 at 483, quoted in *Vellama*, *ibid*.
126 *Vellama*, *ibid* at paras 1-6.
127 *Ibid*.
128 *Ibid* at para 38.
129 Benjamin Ong, *supra* note 122 at 342.
130 *Vellama*, *supra* note 5 at para 43.
131 *Vellama*, *ibid* at para 40, citing Peter Cane, "The Function of Standing Rules in Administrative Law" [1980] Pub L 303 at 313-314.

> of grievance or a debt for costs, if his action fails. A belief, however strongly felt, that the law generally, or a particular law, should be observed, or that conduct of a particular kind should be prevented, does not suffice to give its possessor *locus standi*. [emphasis in original][132]

Yet, the Court's view in *Vellama* seems inconsistent with *Tan Eng Hong*. It will be recalled that in the latter case the Court found that although Mr Tan was no longer facing a charge under section 377A of the Penal Code, he possessed standing to challenge the constitutionality of that provision as he had previously been subject to the criminal process on the basis of such a charge, and in any case there existed a real and credible threat that he might be prosecuted under the provision again in the future.[133] By the same token, it might be said that Ms Vellama had standing because she had been deprived of parliamentary representation in the past,[134] and unless the law concerning the filling of casual vacancies in Parliament was clarified there was a real and credible possibility that she might find herself in the same position in the future.

The boundaries of what amounts to special damage remain unexplored. It seems clear that the damage need not be pecuniary,[135] but what other actions amount to gaining an advantage or suffering a disadvantage as a result of a public authority's decision? Does a person who regularly goes birdwatching or takes walks in a public park suffer adequate disadvantage if an authority decides that the park should make way for a housing development?

Moreover, the special damage an applicant needs to prove seems to closely resemble the *Tan Eng Hong* requirement that the applicant prove a violation of a personal right. The main difference between the two scenarios is that in one case it is said that the breach of a public duty affects a private right, while in the other affects a public right. However, if what the applicant needs to establish is essentially the same in both scenarios, one may ask whether there is much point distinguishing between them.

### C. *No Private or Public Rights Involved?*

In *Jeyaretnam*, the last of the trilogy of cases, the Court of Appeal introduced the concept of a breach of public duty which generates neither correlative private rights nor public rights. In such a scenario, subject to a limited exception discussed below, no individual has any standing to challenge the breach in court.[136] In the case, the applicant claimed that the Government and/or the Monetary Authority of Singapore had acted unlawfully by offering to the International Monetary Fund a contingent loan without first seeking a parliamentary resolution and the President's concurrence,

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[132] *Australia Conservation Foundation Inc v Commonwealth* (1980) 146 CLR 493 at 530-531 (Aust HC) [*Australia Convervation Foundation*], cited in *Vellama*, *ibid* at para 42.

[133] *Tan Eng Hong*, *supra* note 37 at paras 148-184.

[134] Benjamin Ong, *supra* note 122 at 341.

[135] *Australia Conservation Foundation*, *supra* note 132 at 527 ("references to 'special damage' cannot be limited to actual pecuniary loss [. . .]"), cited in *Vellama*, *supra* note 5 at para 41.

[136] *Jeyaretnam*, *supra* note 102 at para 65.

which he claimed were required by Article 144 of the *Constitution*. The Court ultimately held that Article 144 did not require this procedure to be followed in the circumstances. It also found that the applicant was "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*" [emphasis in original].[137]

Could it not be said, though, the applicant was in fact asserting a public right, in common with every other taxpayer or voter, to see that the Government had complied with the obligations imposed on it by Article 144 of the *Constitution*? This would make *Jeyaretnam* indistinguishable from *Vellama*, and the issue would be whether the applicant was able to show special damage. The question thus arises whether there is much utility in saying that some breaches of public duty affect neither private nor public rights.[138]

The Court opined that even in the situation where neither private nor public rights were involved, the concept of "special damage" mentioned in *Vellama* "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". However, "this is a very narrow avenue which concerns only extremely exceptional instances of very grave and serious breaches of legality", for example, a Cabinet minister's abuse of powers as contrasted with a "low-level government officer's failure to execute his duties fully" which would not fall into the egregious breach of duty category.[139]

The egregious breach exception is not easy to square with the description of special damage in *Vellama* as some advantage gained or disadvantage suffered by the applicant. Confusion exists because according to *Vellama* an applicant must prove special damage to establish standing where a breach of public duty has affected a public right, whereas in *Jeyaretnam* the Court said the exception applies where the breach of duty does not affect either private or public rights. In addition, it is unclear if the exception can come into play where an applicant's public right has been affected but special damage cannot be proved. Perhaps it is better to regard the exception as independent from, and not based on, the concept of special damage. Nonetheless, the establishment of the exception, though narrow, is welcome as it confirms there is an avenue for the courts to deal with grave breaches of law by public authorities under the current standing test.

## IV. Recasting the Standing Rules

### A. *Distinguishing Standing from Abuse of Process and Justiciability*

It remains to be considered why the courts shifted from the more flexible standing test adopted in the *Lim Chor Pee* and *Chan Hiang Leng Colin* cases to the stricter test in the *Tan Eng Hong*, *Vellama* and *Jeyaretnam* cases, and in particular extending the stricter test applying to declarations to prerogative orders, instead of *vice versa*.

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137 *Ibid* at para 51.

138 See also Benjamin Ong, *supra* note 122 at 344 ("The distinction between 'no public right' and 'public right, but no special damage' appears quite thin indeed").

139 Benjamin Ong, *ibid* at 370.

In *Vellama* the Court of Appeal described the rationale underlying the standing test adopted as follows:

> Taken collectively, these rules on standing espouse an ethos of judicial review focused on vindicating personal rights and interests through adjudication rather than determining public policy through exposition. Matters of public policy are the proper remit of the Executive, and decoupling judicial review from the fundamental precepts of adversarial litigation would leave the courts vulnerable to being misused as a platform for political point-scoring.[140]

The Court went on in *Jeyaretnam* to explain its reluctance to adopt a more liberal standing test by stating its preference for a green-light conception of public law, that is, one that encourages the use of the political process to promote good governance rather than the judicial process to redress bad governance.[141] It noted in particular that a red-light conception—where the courts act as a strong check on the executive[142]—might lead to vexatious claims disrupting the functioning of government agencies.[143] Moreover, echoing *Vellama*, the Court preferred the view that it should be:

> [. . .] concerned only with the individual's rights and interests, and not matters of public policy, which rightfully remains in the remit of proper political process. In this vein, judicial review finds its place as an avenue for parties to bring claims of *legality* to the courts, and not for the purposes of challenging the very *merits* of a policy decision.[144]

It is indisputable that standing rules exist to strike a balance "between ensuring access to the courts and preserving judicial resources".[145] However, fears of a flood of vexatious claims are most likely overblown. If claims are indeed frivolous and vexatious, the court has sufficient tools, including the powers of striking out and awarding costs, to dismiss such claims.[146] This should not be conflated with standing.[147]

Perhaps the Court's references to 'public policy' should be understood as underlining the point it made subsequently in *Tan Seet Eng v Attorney-General*,[148] that "courts and judges are not the best-equipped to scrutinise decisions which are laden with issues of policy or security or which call for polycentric political considerations. Courts and judges are concerned rather with justice and legality in the particular cases

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140 *Vellama*, *supra* note 5 at para 34.

141 *Jeyaretnam*, *supra* note 102 at para 48, citing Chan Sek Keong, "Judicial Review—From Angst to Empathy: A Lecture to Singapore Management University Second Year Law Students" (2010) 22 SAcLJ 469 at para 29.

142 *Jeyaretnam*, *ibid* at para 49.

143 *Ibid* at para 55.

144 *Ibid* at para 56.

145 *Canadian Council of Churches v Canada (Minister of Employment and Immigration)* [1992] 1 SCR 236 at 252 (SCC) [*Canadian Council of Churches*], cited in *Attorney-General of Canada v Downtown Eastside Sex Workers United Against Violence Society* [2012] 2 SCR 524 at para 23 (SCC) [*Downtown Eastside*].

146 *Downtown Eastside*, *ibid* at para 28.

147 Benjamin Ong, *supra* note 122 at 343 (noting that abuse of process is conceptually different from whether an applicant has a legal right that justifies a recognition of standing).

148 [2016] 1 SLR 779 (CA) [*Tan Seet Eng*].

that come before them."[149] If so, it would arguably be preferable for these sorts of policy-laden executive decisions to be screened out using a separate doctrine of justiciability, such as that applied in *Lee Hsien Loong v Review Publishing Co Ltd*,[150] rather than overburdening the standing test.

It also remains clear from *Jeyaretnam*, *Tan Seet Eng* and *Lee Hsien Loong* that the courts have a duty to examine substantive allegations that public authorities have not acted according to what the law requires. Indeed, adherence to the rule of law as a fundamental constitutional principle requires this. *Jeyaretnam* emphasized that judicial review is an avenue for bringing claims of legality to court,[151] while in *Tan Seet Eng* the Court held that the rule of law, and Article 93 of the *Constitution* which vests judicial power in the courts, imply that it is for the courts to decide the boundaries of a jurisdiction or power vested in the executive, and whether the executive has acted within the ambit of that jurisdiction or power.[152] And even when a case generally appears to involve a non-justiciable subject, it was pointed out in *Lee Hsien Loong* that the court may deal with any "pure question of law" which can be isolated.[153]

Administrative or political processes are not an ample substitute for judicial review in these situations. As Lord Diplock put it in the *IRC* case:

> It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge.[154]

Thus, while it is the constitutional function of the legislature and executive to formulate and implement policies, if in the formulation process the requirements of the *Constitution*[155] have not been followed, or a particular policy has adverse legal implications when it is implemented, it is well within the courts' constitutional function to look into the matter. It would be undesirable if standing rules are so restrictive that certain forms of governmental action become virtually immune from judicial scrutiny.[156]

### B. *Standing as Suitability and Sustainability*

What role, then, should standing play? Ong has argued that the law of standing should move away from being "interest-based" (that is, based on a test of sufficient interest)

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149 *Tan Seet Eng*, *ibid* at para 93.
150 [2007] 2 SLR(R) 453 at paras 95-98 (HC) [*Lee Hsien Loong*].
151 *Jeyaretnam*, *supra* note 102 at para 56.
152 *Tan Seet Eng*, *supra* note 148 at para 98.
153 *Lee Hsien Loong*, *supra* note 150 at para 98.
154 *IRC*, *supra* note 61 at 644, quoted with approval in *Chng Suan Tze v Minister for Home Affairs* at [1988] 2 SLR(R) 525 at para 86 (CA).
155 *Constitution*, *supra* note 5.
156 See *Downtown Eastside*, *supra* note 145 at para 31.

to one that is "rights-based" —the sole test should be that "an applicant has standing if he has suffered the violation of a right vested in him".[157] In his view, an interest-based test is vague as there is no clear conception in the case law of what amounts to a sufficient interest; it is "motivated merely by the desire to shut out applications by 'busybod[ies]' who 'desire... to interfere in other people's affairs"'.[158] On the other hand, if a court focuses on whether a legal right of the applicant is at stake, "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".[159]

It is submitted that the sufficient interest test which had been applied in *Chan Hiang Leng Colin* and *Lim Chor Pee*, while admittedly imprecise, had been on the right trajectory before it was supplanted by the current standing rule. The sufficient interest test should thus be refined into one for determining, firstly, the suitability of the applicant to bring the claim; and, secondly, the sustainability of the claim—whether the claim has some merits or whether there are important legal issues requiring clarification by the courts.

This is where courts in England and Canada have arrived at. In the *World Development Movement* case the Divisional Court of England and Wales emphasized that the dominant factor in determining whether an applicant has standing is the merits of the case. The Court will consider the nature of the alleged breach of duty by the authority and the importance of vindicating the rule of law; and, additionally, whether there is any responsible challenger apart from the applicant, and whether the applicant has a prominent role in giving advice, guidance and assistance concerning the subject matter of the case.[160]

In similar vein, in *Attorney-General of Canada v Downtown Eastside Sex Workers United Against Violence Society*,[161] the Supreme Court of Canada affirmed that the standing test requires three factors to be considered: "whether the case raises a serious justiciable issue, whether the party bringing the action has a real stake or a genuine interest in its outcome and whether, having regard to a number of factors, the proposed suit is a reasonable and effective means to bring the case to court".[162] The factors are to be "assessed and weighed cumulatively, in light of the underlying purposes of limiting standing and applied in a flexible and generous manner that best serves those underlying purposes",[163] and "[a]ll of the other relevant considerations being equal, a plaintiff with standing as of right will generally be preferred".[164]

Under a test of this nature, a person whose personal right is alleged to have been violated by the action of a public authority will clearly have standing to challenge the action through judicial review. But even where no personal right of the applicant has been violated—for example, where a non-governmental organization seeks to bring a case as a representative for someone else—the applicant may be recognized to have

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157 Benjamin Ong, *supra* note 122 at 348.
158 *Ibid* at 329-330.
159 *Ibid* at 330, quoting *IRC*, *supra* note 61 at 646.
160 *World Development Movement*, *supra* note 68 at 392-396.
161 *Downtown Eastside*, *supra* note 145.
162 *Ibid* at para 2, citing *Canadian Council of Churches*, *supra* note 145 at 253.
163 *Downtown Eastside*, *ibid* at para 20.
164 *Ibid* at para 37.

standing where it is regarded as an appropriate party to have carriage of the case and there may be important legal issues desirable for the courts to resolve. The latter is amply demonstrated by the *Vellama* and *Jeyaretnam* cases, where although the applicants were found to lack standing, the Court of Appeal found it desirable to set out the proper interpretation of Articles 49 and 144 of the *Constitution* respectively.

It is arguably preferable to explicitly treat an applicant bringing a representative claim as having sufficient interest to do so in suitable cases, rather than, as Ong suggests, to argue within a rights-based standing test that the representative's *own* rights are engaged, perhaps by recognizing "the idea of a right—perhaps one vesting in only a limited class of individuals—to have a law interpreted",[165] which seems a bit of a stretch.

A standing test more flexible than the current one should be adopted because, apart from recognizing applicants' standing to seek judicial review, there are limited alternative means for legal wrongs committed by public authorities to be redressed. As we have seen from *Gouriet*, the Attorney-General, as the protector of the public interest, is regarded as always possessing standing to bring claims against authorities in the public interest. But due to certain factors in the Singapore legal system, it is hard to see how this would work effectively. The Attorney-General also acts as the Government's legal adviser, and defends the Government when judicial review claims are brought. Thus, the Attorney-General arguably cannot both bring a claim in the public interest as well as defend it (even if different personnel are involved) without being in a position of conflict of interest,[166] particularly if the Attorney-General has previously rendered advice to the authority concerning the impugned action.[167]

An alternative would be for the Attorney-General to allow a party to bring judicial review proceedings in his name by way of a relator action. That way, the party would have to appear in person or (more preferably) engage lawyers personally,[168] while the Attorney-General would act on the Government's behalf. However, it seems unlikely that the Attorney-General would accede to a relator action if he disagreed with the merits of the party's claim, even if a court might possibly reach a different conclusion.

If the Attorney-General did agree to a relator action, there would exist a minor procedural quirk with the naming of the suit. The *Government Proceedings Act* provides that the relevant Minister may publish a list specifying Government departments which are "authorised departments" for the purposes of the Act.[169] Section 19(3) states:

> Civil proceedings against the Government shall be instituted against the appropriate authorised Government department, or, if none of the authorised Government

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165 Benjamin Ong, *supra* note 122 at 349.

166 A point recognized in the Malaysian context in *Lim Kit Siang*, *supra* note 116 at 45 (Abdoolcader SCJ, dissenting).

167 Tham Lijing, "Casting the Relator Action", *Singapore Law Gazette* (September 2014), online: Singapore Law Gazette <https://v1.lawgazette.com.sg/2014-09/1126.htm>.

168 A court might well be justified in declining to recognize the standing of a party opting to act in person if it feels that relevant legal arguments will not be properly put before the court due to the lack of legal representation.

169 *Government Proceedings Act, supra* note 3, s 19(1).

> departments is appropriate or the person instituting the proceedings has any reasonable doubt whether any and if so which of those departments is appropriate, against the Attorney-General.

Since no list of authorized Government departments has been issued to date, all civil proceedings (which includes judicial review proceedings)[170] have to be brought against the Attorney-General, leading to the anomalous situation that a suit might end up being entitled "*Attorney-General v Attorney-General*". This may be avoided if a list of authorized Government departments is issued as described above.

Due to the conceptual and practical difficulties highlighted above, the current law on standing in Singapore seems unduly limiting and also challenging to apply. It is submitted the standing test can be recast according to the following broad framework. An applicant will have standing if the following requirements are satisfied:

(i) The applicant is a suitable party to bring the case. This can be demonstrated by the applicant either (1) establishing the alleged violation of a personal right (in the sense of either a constitutional right, or a right to insist that a public authority comply with relevant administrative law rules); or (2) that it is appropriate for the applicant to bring the case on behalf of another party because it possesses particular experience and expertise in the subject-matter of the case, and there is no other more suitable party reasonably able to do so.

(ii) In addition, there are merits to the case, or some important legal issues that call for clarification by the court—in other words, the case is not completely hopeless.

In effect, the above framework might be said to build on the egregious breach exception recognized in *Jeyaretnam*, while observing it is unnecessary to restrict the situations where an applicant unable to demonstrate a *prima facie* infringement of a personal right is deemed to have standing only to cases where egregious breaches of the law have occurred: "if good governance is taken seriously then any form of unlawful conduct is egregious".[171] The framework takes inspiration from the standing tests applicable in other jurisdictions such as England and Canada which may be relied on as models for developing principles to determine when there is a public interest in the case being heard.

One might well ask, though, whether it is necessary to recast the standing test along the lines of the above framework if the courts are willing, as some cases suggest,[172] to discuss the merits of judicial review challenges in *obiter dicta* even when an applicant is held not to have standing. Aside from the desirability of improving the current test by making it less confusing to apply and providing greater guidance as to who will qualify as having standing, it is of course entirely up to a court whether

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[170] *Ibid*, s 2(2) (definition of "civil proceedings").

[171] Swati Jhaveri, "Advancing Constitutional Justice in Singapore: Enhancing Access and Standing in Judicial Review Cases" [2017] SJLS 53 at 74.

[172] See, for example, *Vellama*, *supra* note 37; *Jeyaretnam*, *supra* note 5; *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489 (HC); *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 (CA); and *Daniel De Costa Augustin v Attorney-General* [2020] SGCA 60.

it wishes to comment on legal issues in *obiter dicta*. In contrast, an applicant with standing is entitled to a judgment on the merits of the claim. Thus, broader standing rules provide more assurance that legal issues will be addressed by the court. Rather than having the court dwell mainly on whether the applicant is a mere busybody or if the claim is justiciable, focusing its mind on the suitability of the applicant and the sustainability of the claim also warrants that these important issues will be substantially dealt with. Archimedes, when describing the operation of a lever, is said to have declaimed: "Give me a place to stand, and I shall move the earth." In this spirit, is submitted that standing rules should be sufficiently accommodating for appropriate applicants to bring to the courts' attention instances of substantive non-compliance with the law by public authorities, thus enabling the courts to clarify and, if necessary, develop the law in profound ways.