A MATTER OF INTERPRETATION: *WONG SOUK YEE* REVISITED AT THE COURT OF APPEAL

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I. INTRODUCTION

In an earlier piece for this publication,[1] I had noted the Singapore High Court's reliance on canons of statutory interpretation normally designed for *ordinary* legislation, for the purpose of interpreting provisions belonging to the *Constitution of the Republic of Singapore*[2] in its decision in *Wong Souk Yee v Attorney-General*.[3] I considered that the recourse to such interpretative tools under the banner of the so-called "purposive approach"[4] towards constitutional interpretation carried with it the latent risk of the judiciary straying, in effect, into the arena of judicial legislation, and had expressed the hope that such a methodology be further clarified by the Court of Appeal.[5]

The Court of Appeal has since delivered its judgment on the matter in *Wong Souk Yee v Attorney-General*.[6] Although the judgment largely upheld the original decision of the lower court in *Wong Souk Yee (HC)*, there are certain aspects of the Court of Appeal's decision that arguably present rather intriguing, if not troubling, implications for constitutional law in Singapore and which, accordingly, necessitate further discussion and scrutiny. This article endeavours to go some way towards meeting that need.

II. BACKGROUND

In *Wong Souk Yee (HC)*, the Appellant had applied for a mandatory order requiring that the Members of Parliament ("MPs") for the Marsiling-Yew Tee Group Representation Constituency ("GRC") vacate their seats and that the Prime Minister advise the President to issue a writ of election for the Marsiling-Yew Tee GRC.[7] Her application was predicated on the basis that a vacancy had

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[1] Benjamin Low, "Leaving an Empty Seat: *Wong Souk Yee*'s answer to By-Elections in a Group Representation Constituency" (30 May 2018), *Singapore Law Review: Juris Illuminae*, online: <http://www.singaporelawreview.com/juris-illuminae-entries/2018/leaving-an-empty-seat-wong-souk-yees-answer-to-by-elections-in-a-group-representation-constituency> [Low, "Leaving an Empty Seat"].

[2] *Constitution of the Republic of Singapore* (1999 Rev Ed) [*Singapore Constitution*].

[3] [2018] SGHC 80 [*Wong Souk Yee (HC)*].

[4] The "purposive approach" here refers to a method of constitutional interpretation, that is to say, it is the interpretation of the provisions of the Singapore Constitution in a manner that "would promote the purpose or object underlying the written law": see *Interpretation Act* (Cap 1, 2002 Rev Ed Sing), s 9A; see also the decision of *Tan Cheng Bock v Attorney-General*, [2017] 2 SLR 850 (CA) [*Tan Cheng Bock*] at para 54.

[5] Low, "Leaving an Empty Seat", *supra* note 1.

[6] [2019] 1 SLR 1223 (CA) [*Wong Souk Yee (CA)*].

[7] *Wong Souk Yee (HC)*, *supra* note 3 at para 3.

arisen in the Marsiling-Yew Tee GRC after one of its MPs, Madam Halimah Yacob, vacated her seat in Parliament on 7 August 2017 to contest in the 2017 Presidential Election.[8] Since Madam Halimah's departure, the Marsiling-Yew Tee GRC continued to be represented by its three remaining MPs from the ruling People's Action Party. The Appellant submitted that the occasion of such a vacancy was sufficient to trigger the by-elections mechanism in Article 49(1) of the *Singapore Constitution*.[9]

The Appellant also applied, in the alternative, for a declaratory order that section 24(2A) of the *Parliamentary Elections Act*[10] be interpreted as requiring all the MPs of a GRC to vacate their seats (i) when one or more MPs of the GRC vacate their seats; or (ii) in the alternative, when the only MP in the GRC who belongs to a minority community vacates his or her seat.[11] On the flip side, if such an interpretation was not possible, the Appellant further sought a declaratory order that s 24(2A) be declared void for inconsistency with the *Singapore Constitution* as per Article 4 read with Article 49.[12]

The High Court rejected the Appellant's claim chiefly on the basis that her application for mandatory orders was grounded on a legal improbability.[13] In short, the Court below held that there was no express provision in the *Singapore Constitution* justifying or permitting the 'mandated' vacation by the remaining MPs of the Marsiling-Yew Tee GRC of their seats in the event of a single vacancy arising in the constituency.[14] Although the *Singapore Constitution* does provide for several grounds on which an MP's seat may be vacated,[15] there was nothing in these grounds that pointed to the vacation of seats by the remaining MPs of a GRC in the event a vacancy first arose in any one of the seats.[16] This, in the judgment of Chua Lee Ming J, presented the single most significant legal hurdle in the Appellant's case which she could surmount, and which sufficed to doom her application. Nor was the Appellant able to succeed in her alternative case for declaratory orders.[17]

At the same time, while Chua Lee Ming J found that the Appellant could not successfully make out her case for the mandatory and declaratory orders, the learned Judge was prepared to accept the Respondent Attorney-General's contention that Article 49(1) could be interpreted to mean that a by-election in a GRC could only be held if all MPs vacated their seats mid-term[18] or, alternatively, that

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[8] *Ibid* at para 2.
[9] *Singapore Constitution*, *supra* note 2, art 49(1).
[10] *Parliamentary Elections Act* (Cap 218, 2011 Rev Ed Sing), s 24(2A) [*PEA*].
[11] *Wong Souk Yee (HC)*, *supra* note 3 at para 4.
[12] *Ibid*.
[13] *Ibid* at paras 22-26.
[14] *Ibid* at para 26.
[15] *Singapore Constitution*, *supra* note 2, art 46(2).
[16] As the High Court so correctly identified: see *Wong Souk Yee (HC)*, *supra* note 3 at para 24.
[17] *Wong Souk Yee (HC)*, *supra* note 3 at paras 58-60.
[18] *Ibid* at paras 38, 41, and 44.

Article 49(1) applied only to Single-Member Constituencies ("SMC") and not GRCs.[19] Crucially, the High Court accepted the Attorney-General's reasoning that either an updating or rectifying or even a strained construction could be applied to Article 49(1) so as to fully accommodate Parliament's intent when it sought to introduce the GRC scheme in 1988.[20] On that basis, the High Court found in favour the Respondent Attorney-General and dismissed the Applicant's case. The Appellant duly appealed to the Court of Appeal.

III. THE COURT OF APPEAL'S DECISION

Both parties appealed largely on the same grounds that they had raised earlier in the High Court below.[21] The Appellant however also took the opportunity to address the Attorney-General's submissions concerning the applicability of an updating and/or rectifying construction to the *Singapore Constitution*, contending that such rules of statutory interpretation "would entail the court overstepping its constitutional role"[22] and thus had no basis in the province of *constitutional* interpretation. There was an additional issue for the Court of Appeal's consideration concerning the matter of costs[23] which we will not go into for the purposes of this article. Suffice to say, our concern is chiefly with the primary substantive issues that the Court of Appeal had to grapple with, namely the proper interpretation of Article 49(1) *vis-à-vis* the GRC scheme and the means by which this proper interpretation ought to be reached.

A. The Ambiguity of Article 49(1) and the Will of Parliament

From the outset, the Court of Appeal recognised that the meaning of Article 49(1) of the *Singapore Constitution* had become ambiguous vis-à-vis the mechanism of by-elections for a GRC, as opposed to an SMC.[24] Article 49(1) in its present incarnation reads as such:

> **49.**—(1) Whenever the seat of a Member, not being a non-constituency Member, has become vacant for any reason other than a dissolution of Parliament, the vacancy shall be filled by election in the manner provided by or under any law relating to Parliamentary elections for the time being in force.

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[19] *Ibid* at para 45. More importantly, although the High Court ultimately opted for the Attorney-General's first interpretation of art 49(1) as the correct interpretation of that provision, it was prepared to accept that the Attorney-General's second interpretation was a possible interpretation of art 49(1) as well, rather than rejecting it outright.

[20] *Ibid* at paras 27-43.

[21] *Wong Souk Yee (CA)*, *supra* note 6 at para 16.

[22] *Ibid* at para 17.

[23] *Ibid* at para 21 and paras 88-96.

[24] *Ibid* at para 27.

As the Court of Appeal observed, and as has been well-documented elsewhere, Article 49(1) preceded the introduction of GRCs in 1988 and was clearly applicable to SMCs.[25] Furthermore, it was also decided by the Court of Appeal in its earlier decision of *Vellama d/o Marie Muthu v Attorney-General*[26] that Article 49(1) imposed a duty on the Prime Minister to call a by-election "to fill casual vacancies of elected MPs which may arise from time to time"[27] in the event of such vacancies arising in an SMC. All well and good, but could this interpretation of Article 49(1) extend to GRCs as well?[28] The Court of Appeal in *Wong Souk Yee (CA)* further noted that such an interpretation was possible on the one hand[29] and yet, on the other, noted that the express wording of Article 49(1) "presupposes the existence of a *vacancy in a particular seat* before a by- election has to be called for that seat"[30] which, when read together with the proviso in Article 39A of the *Singapore Constitution* that elections to a GRC could only be conducted "on the basis of a group",[31] suggested that "a by-election in a GRC can only be conducted if all the Members representing that GRC have vacated their seats".[32] So while it appeared to be fairly undisputed that by-elections for a GRC have to be held on a group basis, which in turn is only possible in a situation involving the vacating by *all* MPs of a GRC of their seats, this still left unaddressed the pertinent issue as to what ought to be the proper procedure in a situation involving the vacating of one or more seats by one or more MPs,[33] short of a complete vacating of all seats by all MPs of a GRC.

Here the Court of Appeal found itself to be in a dilemma. The Court rightly observed that nothing in the texts of Articles 49 and 39A, nor in Article 46 for that matter, was capable of supporting the proposition that the remaining MPs of a GRC had to vacate their seats in the event one or more MPs vacated their seats in the first place.[34] By contrast, there was an express provision in s 24(2A) of the *PEA* which made clear that no writ for an election to a GRC could be issued unless all MPs in that GRC had vacated their seats.[35] In short, there was something of a "legislative oversight"[36] concerning

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[25] *Ibid* at para 28.
[26] [2013] 4 SLR 1 (CA) [*Vellama*].
[27] *Ibid* at para 82.
[28] Interestingly, the Court of Appeal in *Vellama* merely stated rather obliquely that the general duty imposed by art 49(1) on the Prime Minister "will only apply to a SMC as there is a special provision where a vacancy arises in a GRC" which seems to suggest that this duty does not apply where a vacancy arises in a GRC: see *Vellama*, *ibid*.
[29] *Wong Souk Yee (CA)*, *supra* note 6 at para 34.
[30] *Ibid* at para 35.
[31] *Singapore Constitution*, *supra* note 2 at art 39A.
[32] *Wong Souk Yee (CA)*, *supra* note 6 at para 37.
[33] Thus, to borrow the original factual matrix of *Wong Souk Yee (HC)*, even if additional MPs besides Madam Halimah vacated their seats in the Marsiling-Yew Tee GRC, this would not be considered a complete vacating of all seats in the GRC as long as at least one MP remained to occupy one seat in Marsiling-Yew Tee GRC.
[34] *Wong Souk Yee (CA)*, *supra* note 6 at paras 38-39.
[35] *Ibid* at para 44.
[36] *Ibid* at paras 46-47.

the implementation of the GRC scheme so as to make the meaning of Article 49(1) ambiguous where vacancies in a GRC arose. The Court thus considered it necessary to have recourse to extraneous material for the purpose of ascertaining Parliament's intention regarding the operation of the GRC scheme in order to arrive at a purposive interpretation of Article 49.[37]

What then did Parliament intend in the event of a single vacancy arising in a GRC? In this it was clear, and remains so to this day, that Parliament expressly intended that by-elections would only be called for a GRC in the event that all MPs of that constituency vacated their seats and not in the event one or more MPs vacated their seats.[38] And yet, despite this evident clarity in the will and intent of the Legislature, the extraneous material, in the Court's opinion, fell short of clarifying "how Parliament thought it would *effect this outcome* [*of permitting by-elections in a GRC only upon the vacating of all seats by all MPs*]"[39] given that the extraneous material had the effect of creating three distinct possibilities as to how Parliament intended to effect such an outcome, namely that (i) Parliament intended to amend Article 49(1) to reflect its intention concerning GRC by-elections but omitted to do so; (ii) Parliament intended for Article 39A to be the operative provision regulating all matters pertaining to GRCs, including the filling of vacancies, and that Article 39A contained sufficient reference to s 24(2A) *PEA* to achieve its desired outcome; or (iii) Parliament intended that Article 49(1) would apply to GRCs but the wording in that provision was sufficiently broad to include references to s 24(2A) *PEA* so as to render an express amendment unnecessary.[40] This ultimately served to compound the Court of Appeal's difficulty in ascertaining the proper interpretation of Article 49(1) in the context of by-elections for a GRC.

B. The Proper Interpretation of Article 49(1) and the Role of Updating and Rectifying Constructions

The Court of Appeal next considered three possible interpretations of Article 49(1) vis-à-vis vacancies in a GRC, based on the submissions of the Appellant and the Attorney-General, which were that:

> (a) the vacancy arising in a GRC, as and when it arises, shall be filled by a by-election for all the seats in the GRC ("the Appellant's Interpretation");
> (b) the vacancy in a GRC shall only be filled by a by-election if and when all the seats in the GRC have been vacated ("the Respondent's First Interpretation"); or

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[37] *Ibid* at para 48.
[38] *Ibid* at paras 49-53; see also *Parliamentary Debates Singapore: Official Report*, vol 50 at cols 334–335 (12 January 1988) (Deputy Prime Minister Goh Chok Tong).
[39] *Wong Souk Yee (CA)*, *supra* note 6 at para 54 [additions added].
[40] *Ibid.*

(c) the "seat of a Member" in Art 49(1) refers only to the seat of a Member of an SMC, and Art 49(1) does not apply to seats in a GRC at all ("the Respondent's Second Interpretation").[41]

The Court of Appeal rejected the Appellant's Interpretation as being contrary to the will and intent of Parliament and thus incompatible with the purposive approach in interpreting Article 49(1).[42] As for the Respondent's First Interpretation, which the Respondent submitted could be achieved by way of either an updating or rectifying construction, the Court held that neither of these two canons of statutory interpretation was appropriate to the present case before it and thus declined to accept the Respondent's First Interpretation.[43]

Having rejected the Respondent's First Interpretation, and by extension, the High Court's preferred interpretation of Article 49(1),[44] the Court of Appeal opted instead to adopt the Respondent's Second Interpretation.[45] The Court justified its holding for several reasons, such as the textual limitations arising from the express words of Article 49(1) itself as well as the fact that Article 49(1) was first enacted when Singapore's electoral divisions consisted only of SMCs and the GRC scheme had yet to come into existence.[46]

The problematic implication of this decision is that the Respondent's Second Interpretation effectively denudes the GRC by-elections mechanism of any constitutional basis on which it may stand. If Article 49(1), being the only provision in the *Singapore Constitution* that deals with the filling of vacancies in parliamentary seats by way of by-election, is limited in scope to SMCs only, that means, in effect, that Singapore's constitutional scheme recognises only the permissibility of by-elections for SMCs and not so for GRCs.[47]

In turn, this arguably creates the worrisome inference that any attempt by Parliament to establish a separate by-elections scheme for a different type of constituency such as the GRC must necessarily fall *outside* of the ambit of the *Singapore Constitution*.[48] If the *Singapore Constitution* does not recognise the holding of by-elections in a GRC, and in the absence of any other constitutional provision authorising

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[41] *Ibid* at para 58.
[42] *Ibid* at para 71.
[43] *Ibid* at paras 65-69.
[44] *Wong Souk Yee (HC)*, *supra* note 3 at paras 27-44.
[45] *Wong Souk Yee (CA)*, *supra* note 6 at paras 72-73.
[46] *Ibid*.
[47] Thus, while the by-elections mechanism for SMCs derives its fundamental constitutional validity from the justifying proviso in art 49(1) of the *Singapore Constitution*, the by-elections mechanism for GRCs cannot likewise claim constitutional validity by the same art 49(1).
[48] Assuming we follow the Court of Appeal's own reasoning that art 49(1) only applies to SMCs and not to GRCS, or any other types of constituencies for that matter, to its logical conclusion.

or enabling the enactment of a separate by-elections mechanism to fill vacancies arising in a GRC,[49] this can only mean that s 24(2A) *PEA* is for all intents and purposes inconsistent with the terms of the *Singapore Constitution*.[50] It would seem that in trying to remedy the ambiguity concerning Article 49(1)'s relation with vacancies in a GRC, the Court of Appeal might have perhaps inadvertently called into question the very legitimacy of the GRC scheme itself.[51]

C. The Role of Updating and Rectifying Constructions in Constitutional Interpretation

At this point, some words may also be said about the Court of Appeal's observations regarding the appropriateness of applying either an updating or rectifying construction to the interpretation of the *Singapore Constitution*. It was evident that the Court of Appeal had reservations about the applicability of these canons of statutory interpretation in the context of constitutional interpretation, given the unique nature of constitutional provisions as opposed to ordinary statutory provisions. As the Court pithily observed, the provisions of a constitution "are designed to be more deeply entrenched and are generally regarded as fundamental in nature, and there may be a concern that applying such tools of statutory interpretation may not be consistent with the nature of constitutional provisions".[52]

The Court of Appeal was cognisant, and arguably correctly so, in recognising that simply importing such canons of statutory interpretation, which have the practical effect of introducing substantive changes into the constitutional provisions, could potentially distort the constitutional schema while establishing potentially undesirable knock-on effects. After all, a constitution is generally meant to serve as a supreme or paramount law that supersedes all other laws subsisting in a legal system.[53] In line with this element of *paramountcy*, constitutions have often—although this is not always necessarily the case—been designed with a certain degree of rigidity in mind by rendering their amendment subject to more cumbersome procedures and requirements as compared to ordinary statutes, with the understanding that the provisions of a constitution are not meant to be easily amended.[54] At the heart

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[49] This becomes evident when one takes a cursory look at the remaining provisions of the *Singapore Constitution*.
[50] If s 24(2A) *PEA* is inconsistent with the terms of the *Singapore Constitution*, then it must *ipso facto* be void by virtue of art 4 of the *Singapore Constitution*: see *Singapore Constitution*, *supra* note 2 at art 4; see also *Taw Cheng Kong v Public Prosecutor*, [1998] 1 SLR(R) 78 (HC) at paras 14-15 for an enunciation of the principle of constitutional supremacy.
[51] The Court of Appeal appears to have recognised the problematic implications of its own decision when it referred to the Respondent's Second Interpretation as "not ideal" and expressed its hope that the *Singapore Constitution* be amended to rectify this legal quandary: see *Wong Souk Yee (CA)*, *supra* note 6 at para 72. However, to date, more than a year has elapsed since the decision of the Court and the hoped-for amendment to art 49(1) has not yet materialized.
[52] *Ibid* at para 64.
[53] For an exposition of the general principles of constitutional supremacy, see Kevin Tan & Thio Li-anne, *Constitutional Law in Malaysia and Singapore*, 3rd ed (Singapore: LexisNexis, 2010) at 102–103 and 106.
[54] *Ibid*; see also Jutta Limbach, "The Concept of the Supremacy of the Constitution" (2001) 64:1 Mod L Rev 1 at 2–3.

of the matter, there is something principally incongruent with attempting to apply a rule of statutory interpretation, such as a rectifying construction which "involves the addition or substitution of words to give effect to Parliament's manifest intentions",[55] to a fundamental law that is supposed to be amended or altered only in accordance with the special amendment procedure that the constitution sets out for itself.[56]

Unfortunately however, the Court of Appeal tentatively declined to make any express finding as to whether an updating or rectifying construction could be applied to a constitutional provision,[57] notwithstanding its earlier observations on the unsuitability of relying on these rules of statutory interpretation and its conclusion that the two canons were not appropriate in the present case.[58] This leaves open the possibility that similar arguments may yet arise in the future, given the Court's refusal to expressly rule on this particular issue.[59] It would have been far better if the Court of Appeal had simply rejected completely the applicability of either an updating or rectifying construction to the *Singapore Constitution* from the outset, thereby clarifying the proper scope and operability of rules of statutory interpretation in the context of constitutional interpretation. This sadly, has not been done.

IV. CONCLUSION

The Court of Appeal, as we have seen, ultimately upheld the High Court's decision by dismissing the Appellant's appeal although it did diverge significantly from the High Court insofar as the proper interpretation of Article 49(1) of the *Singapore Constitution* was concerned. The failure of the Appellant's appeal ought not to come as a surprise to anyone, given that the main thrust of the Appellant's case was hampered by the critical absence of any provision in the *Singapore Constitution* capable of buttressing her claim for mandatory orders seeking the vacating of the seats of the remaining MPs of Marsiling-Yew Tee GRC. Nor was the Appellant's case assisted by the presence of a clear Parliamentary intention that militated against her interpretation of the GRC by-elections mechanism.

Unfortunately, by rejecting the High Court's interpretation of Article 49(1) in favour of its own interpretation of that proviso, the Court of Appeal appears to have inadvertently opened up several cans of worms with rather problematic implications for the development of constitutional law in

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[55] *Wong Souk Yee (CA)*, *supra* note 5 at para 63.

[56] There has already been criticism levelled at such a mode of constitutional interpretation as potentially turning courts in Singapore into "mini-legislatures": see Po Jen Yap & Benjamin Joshua Ong, "Judicial Rectification of the Constitution: Can Singapore Courts Be Mini-Legislatures" (2018) 48:2 Hong Kong LJ 389 at 395–398; see also my own comments in Low, "Leaving an Empty Seat", *supra* note 1.

[57] *Wong Souk Yee (CA)*, *supra* note 5 at para 65.

[58] *Ibid* at para 65.

[59] At this point, we may ask ourselves: If the Court of Appeal was evidently uncomfortable with the use of updating and rectifying constructions as part of the process of constitutional interpretation, why then hold back from expressly rejecting their applicability?

Singapore. The applicability of canons and rules of statutory interpretation in the context of constitutional interpretation remains tainted by uncertainty and ambiguity while the constitutional basis for the existence of the GRC by-elections mechanism contained in s 24(2A) *PEA* appears to have been called into question in light of the Court of Appeal's decision that Article 49(1) does not extend to GRCs.[60] It remains to be seen whether Parliament or a future court may be able to provide more definitive solutions capable of remedying this legal quandary.

[60] I had earlier suggested, in a separate piece, that a far more elegant solution for the Court of Appeal would have been to simply accept that s 24(2A) *PEA* had the effect of implicitly amending the provisions of the *Singapore Constitution*. Such an argument would have obviated any lingering doubt as to the constitutional validity of s 24(2A) *PEA* and the by-elections mechanism for GRCs as a whole: see Benjamin Low, "Full Powers and the Constitutional Doctrine of Implied Amendments" (2019) Sing JLS 390 at 413–414.