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### The Belitung Shipwreck and Bukit Brown Cemetery: Legal Aspects

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The Cost and Value of Heritage in Singapore:  
The Belitung Shipwreck and Bukit Brown Cemetery

## The Belitung Shipwreck and Bukit Brown Cemetery: Legal Aspects

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Saturday, 14 April 2012

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## Outline

- Belitung shipwreck.
- Bukit Brown Cemetery.

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### Contrasts:

International law *v* domestic law

Legal considerations *v* ethical considerations

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## *The Belitung Shipwreck*



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## Issues

- **Legality** –
  - Is this a matter of domestic law or international law?
  - Was the recovery of the Tang Treasure from the Belitung shipwreck carried out lawfully?
- **Ethics** – even if it was, is there an ethical case for saying that the Tang Treasure should have been left *in situ*, or salvaged in a different manner?

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### Belitung Shipwreck – Legality

- The Belitung shipwreck was within Indonesian territorial waters, so Indonesian law applied.
- In accordance with Indonesian law, the Indonesian government engaged Seabed Explorations to carry out the underwater excavation of the Tang Treasure from the wreck.
- Prominent critic Elizabeth Bartman, President of the Archaeological Institute of America, admits that the excavation was “technically ‘legal’”.

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### Belitung Shipwreck – Legality

- What about international law?
- UNESCO Convention on the Protection of the Underwater Cultural Heritage – adopted by the UNESCO General Conference in 2001, but came into force in January 2009 after 20 states acceded to it.
- Excavation of the Belitung shipwreck was carried out over two seasons in 1998 and 1999, before the Convention came into force.
- Indonesia, Singapore and the United States have not acceded to the Convention, so its principles are not binding on these countries in international law.

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### Belitung Shipwreck – Legality

- Key general principles of the UNESCO Convention:
  - **Rule 1:** *In situ* preservation to be considered as first option.
  - **Rule 2:** “The commercial exploitation of underwater cultural heritage for trade or speculation or its irretrievable dispersal is fundamentally incompatible with the protection and proper management of underwater cultural heritage. Underwater cultural heritage shall not be traded, sold, bought or bartered as commercial goods.”

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### Belitung Shipwreck – Legality

- UNESCO Convention (continued):
  - **Rule 2** does not prevent the provision of professional archaeological services.
- Complaints about the Belitung shipwreck excavation – Convention principles were infringed *in spirit*, even though they do not apply in fact.
  - No *in situ* preservation.
  - Commercial arrangement for sale of the Tang Treasure, which was eventually bought by Singapore.
  - Allegation that excavation not carried out properly.

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### Belitung Shipwreck – Ethics

- Counter-arguments – excavation was ethical:
  - *In situ* preservation impractical due to risk of looting.
  - Sale of the Tang Treasure helped to fund the excavation. Salvor sold collection as a complete set rather than break it up.
  - Excavation was carried out according to archaeological principles, and information was properly recorded.
- Any ethical problem for Tang Treasure to be exhibited to the public or made available for research? Does it encourage ‘treasure hunting’?

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### Bukit Brown Cemetery



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### Issues

- **Domestic law issue** – can *judicial review* be brought against the Ministry of National Development to prevent it from building a road through Bukit Brown Cemetery?
- This is an **administrative law** matter – the law relating to how one sues the Government when it acts unlawfully.
- Possible remedies – a *quashing order* to cancel the original decision, and a *mandatory order* to require the Government to reconsider its decision, applying the correct legal principles.

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### Issues

- **Standing** – does anyone have *sufficient interest* to bring a case against the Government?
- **Grounds of judicial review** – has the Government acted unlawfully in deciding that a road should be built through Bukit Brown Cemetery?



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### Standing


- Conflict between “desirability of encouraging people to participate actively in the enforcement of the law”...
- ... and “undesirability of encouraging meddlesome interlopers invoking the jurisdiction of the courts in matters in which they are not concerned”

– *De Smith’s Judicial Review* (6<sup>th</sup> ed, 2007)

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### Standing

- Test for standing for a quashing or mandatory order – does the applicant have **sufficient interest** to apply for judicial review?
- Will the Singapore courts take a **narrow or broad approach** towards standing?



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### Standing – Narrow Approach

- ***Ex parte Rose Theatre Trust*** (1990, UK)
- Remains of Rose Theatre found when a Central London site was being developed. Most of Christopher Marlowe’s plays and two of William Shakespeare’s plays were first staged here.
- A group of “persons of undoubted expertise and distinction” in archaeology, theatre, literature, *etc*, as well as residents and their local MP came together to form the Rose Theatre Trust Co.

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### Standing – Narrow Approach

- ***Ex parte Rose Theatre Trust*** (1990, UK)
- The company asked the Environment Secretary to declare the theatre as an ancient monument to protect it, but he declined.
- The company then applied to the court for judicial review of the Environment Secretary’s decision not to list the theatre.



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### Standing – Narrow Approach

- ***Ex parte Rose Theatre Trust*** (1990, UK)
  - A direct financial or legal interest in a matter is not needed to have standing.
  - But the statute must expressly or impliedly give the applicant a ***greater right or expectation than any other citizen*** to have a decision taken lawfully, for example, if applicant has a statutory right to have the decision-maker perform a duty. If not, applicant does not have standing.
  - Merely asserting an interest does not give one an interest.

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### Standing – Narrow Approach

- ***Ex parte Rose Theatre Trust*** (1990, UK)
  - Fact that many people join together and assert an interest doesn't create a sufficient interest if the individuals themselves don't have an interest.
  - One also can't obtain sufficient interest by writing to the decision-maker, even if a reasoned reply is given.

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### Standing – Narrow Approach

- ***Ex parte Rose Theatre Trust*** (1990, UK)
  - It's true that if a particular individual or group is not given standing, certain administrative decisions will go unchallenged.
  - But the law doesn't require the courts to be there for every individual interested in litigating the legality of an administrative decision. The UK Parliament could have given such a wide right of access to people, but did not.

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### Standing – Broad Approach

- However, *ex parte Rose Theatre Trust* is no longer good law in the UK, and is treated as an exceptional case by some commentators.
- ***Broad approach*** – eg, ***ex parte World Development Movement*** (1995, UK)



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### Standing – Broad Approach

- ***Ex parte World Development Movement*** (1995, UK) – an applicant will have sufficient interest to apply for judicial review if:
  - It is important to vindicate the ***rule of law***.
  - The issue raised is important. The ***merits of the challenge are an important, if not the dominant, factor when considering the standing issue***. The real question is whether the applicant can show some substantial default or abuse, not whether personal rights or interests are involved.

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### Standing – Broad Approach

- ***Ex parte World Development Movement*** (1995, UK)
  - There is likely to be an absence of any other responsible challenger. (For example, neither the government or any citizen of a foreign country denied aid would be, in practical terms, likely to bring a challenge.)
  - The applicant plays a prominent role in giving advice, guidance and assistance with regard to the matter.

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### Standing in Singapore?

- Test is fairly liberal – unnecessary to have a “particular grievance arising out of the order complained about”. It is “sufficient that there had been an abuse of power which inconvenienced someone”: *Chan Hiang Leng Colin v MITA* (1995, HC, S’pore).



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### Standing in Singapore?

- The Court of Appeal in *Chan Hiang Leng Colin v MITA* (1996) approved the following passage from *R v Greater London Council, ex parte Blackburn* (1976):

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.

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## Standing in Singapore

- **Conclusion** – an individual or an organization (such as the Singapore Heritage Society?) might have sufficient standing to apply for judicial review of the decision to build the road.
- Are there **grounds** on which the decision can be challenged in administrative law?

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## Grounds of Judicial Review

- Public authorities:
  - must take into account relevant considerations;
  - must not take into account irrelevant considerations;
  - must not make a decision on the basis of errors as to material facts; and
  - must not make a decision that is “so outrageous in the defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it” (*Wednesbury* unreasonableness).

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## Grounds of Judicial Review

- **Conclusion** – it will probably be very difficult to show that the MND has breached any grounds of judicial review.
- Any evidence that MND failed to take into account relevant considerations, or decided on the basis of incorrect facts?
- Was the decision so irrational that no sensible person could have arrived at it?

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## Grounds of Judicial Review

- High Court’s role is merely to ensure that public authorities have followed the correct legal principles.
- Not the Court’s job to check that the public authority has made the ‘right’ decision.
- Football analogy – Court is like the referee in a football match.



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