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Citation

DAM, Shubhankar. Presidential Pardon in Singapore: A Comment on Yong Vui Kong v AG. (2013). *Common Law World Review*. 42, (1), 48-60.

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Presidential Pardon in Singapore: A Comment on Yong Vui Kong v Attorney-General

Shubhankar Dam*

Abstract: This paper critically analyses the decision of the Singapore Court of Appeal in *Yong Vui Kong v Attorney-General* in relation to presidential pardon. Two questions were central to the case. First, is the President bound by the decision of the Cabinet in pardon-related matters? Secondly, are decisions regarding pardon—whether made by the Cabinet or President—subject to judicial review? In relation to the first question, the Court based its reasoning on Singapore’s political system being a Westminster-inspired model and, therefore, that the President generally undertakes the same functions as the British monarch. However, this paper identifies the unique features of Singapore’s presidency, and argues that the British model does not act as an adequate starting point with regard to the issue of discretion. With regard to the second question, the Court of Appeal held that decisions on pardons are subject to judicial review not on their merits, but only in relation to procedural inadequacies. The paper, however, suggests that the Court’s conclusions are inconsistent: either decisions to grant or refuse pardons can be reviewed on their merits, or the suggested grounds of review must be revised.

Keywords: Singapore, President, pardon, discretion, judicial review

I. Introduction

Singapore’s President may grant pardons, reprieves, respites and remissions under Article 22P of the Constitution of the Republic of Singapore (hereinafter ‘Singapore Constitution’). In doing so, must the President necessarily act on the advice of the Cabinet, or does he or she have discretion in deciding the matter? If so, is that discretion subject to judicial review? The Court of Appeal in the Republic of Singapore was confronted with these questions in *Yong Vui Kong v Attorney-General* (*Pardon Case*).¹ In November 2008, Yong Vui Kong,

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1 [2011] SGCA 9.

a Malaysian teenager, was found guilty of trafficking just under 50 grams of diamorphine into Singapore and sentenced to death by hanging.² Subsequently, Yong petitioned President S.R. Nathan for clemency; this was refused. Four days before the execution was to be carried out, he filed another appeal, arguing that the provision under the drugs law that mandatorily imposes the death penalty was unconstitutional. In *Yong Vui Kong v Public Prosecutor* ('*Death Penalty Case*'),³ Yong's argument on this issue was rejected. Prior to the ruling in the *Death Penalty Case*, Minister of Law K. Shanmugam publicly stated that the death penalty was justified in the case on grounds of public safety;⁴ sparing the accused from the death penalty, the Minister claimed, would encourage drug barons to use vulnerable traffickers as mules.⁵ It was against the backdrop of such comments made by the Minister of Law that Yong argued before the High Court, and later the Court of Appeal, in the *Pardon Case*, that pardon decisions must be made independently by the President and that such decisions are subject to judicial review.

II. Elected President and Discretionary Powers

Article 22P of the Singapore Constitution states that 'The President, as occasion shall arise, *may*, on the advice of the Cabinet, grant a pardon'.⁶ Relying on the word 'may', counsel for Yong, M. Ravi, argued that the President has authority to make an independent decision on a mercy petition and is not bound by the advice of the Cabinet.

Article 21 of the Singapore Constitution—which extensively lists the powers of the President—does four things. First, on one extreme, is the general rule that unless otherwise provided for, a President must act on the advice of the Cabinet.⁷ Secondly, on the other extreme, are matters on which the President has personal discretion. Article 21(2) lists eight such specific matters and a final open-ended one: the President has personal discretion in performing 'any other function' authorized by the Singapore Constitution. Between these extremes of complete dependence and independence lie two 'consultative' requirements. Under Article 21(3), the President *must* consult the Council of Presidential Advisers before performing functions

2 *Public Prosecutor v Yong Vui Kong* [2009] SGHC 4. The defendant was convicted under the provisions of the Misuse of Drugs Act 1973, cap. 185 (2008 rev. edn), which imposes the mandatory death penalty for certain categories of offences.

3 [2010] 3 *Singapore Law Reports*.

4 Zakir Hussain, 'Tough stance on serious crimes saves lives: Minister', *The Straits Times*, 10 May 2010.

5 See *Yong Vui Kong*, n. 1 above at 5.

6 Singapore Constitution (1999 reprint), Article 22P (emphasis added).

7 Singapore Constitution, Article 21(1).

specifically provided for.⁸ Finally, under Article 21(4), the Council may be consulted in performing some of the independent functions provided for in Article 21(2). The President, in other words, has both dependent and independent powers. While dependent powers, by definition, must be exercised in accordance with the Cabinet's advice, the independent powers are of two kinds. The first kind involves matters where the President must act without Cabinet (or other) advice. The second kind refers to matters which are initially decided by the Cabinet but require the President's independent approval. This latter kind of independent (approving) power falls into two further categories: matters on which the President must consult with the Council, and matters on which the Council may be consulted.

In relation to the power to grant pardons, Yong argued that the open-ended Article 21(2) (i) ('The President may act in his discretion in the performance of . . . any other function') read together with Article 22P ('The President . . . may, on the advice of the Cabinet, grant a pardon') suggests that the President is not bound by the Cabinet's advice in such matters. While the Cabinet is authorized to take a call, the President is not bound by such advice. Andrew Phang and V.K. Rajah JJ rejected this argument on the grounds that the power to grant pardons was simply of the 'dependent' variety. They based their decision on the wording of Article 22P, its legislative history, relevant case law and the nature of Singapore's presidency. In the opinion of the author, however, these interpretative limbs, both individually and collectively, point to the opposite conclusion.

For example, interpreting 'on the advice of the Cabinet' in Article 22P(1) in the light of the words 'act in accordance with the advice of the Cabinet' in Article 21(1), the judges concluded that the President has no discretion under the former provision.⁹ However, a comparison of the two provisions would suggest otherwise. Article 21(1) requires the President to act '*in accordance with*' the advice of the Cabinet. The *Concise Oxford English Dictionary* states that to act '*in accordance with*' something is to act '*in a manner conforming with*'.¹⁰ This implies that in exercising power under Article 21(1), the President must act in conformity with the advice of the Cabinet: he or she must do as the Cabinet wishes. Article 22P, however, requires that the President may act '*on the advice of the Cabinet*'. Given the distinct phrasology, 'on' in Article 22P can only function as a preposition, and refer to the time at which the President must act. He or she may act on the

8 This Council is a constitutional body under Article 37B of the Singapore Constitution. It comprises six members, of whom two are appointed by the President, two are appointed by the Prime Minister, while the Chief Justice and the Chairman of the Public Service Commission appoint one member each.

9 See *Yong Vui Kong*, n. 1 above at 157.

10 *Concise Oxford English Dictionary*, 12th edn (Oxford University Press: Oxford, 2011).

advice of the Cabinet, that is, on receiving advice from the Cabinet. The judges, therefore, were correct to compare the two provisions—Article 21(1) and Article 22P—but were mistaken in concluding that they mean the same thing. Clearly, they do not: Article 21(1) refers to the manner in which discretion must be exercised; Article 22P refers to the point in time when it may be exercised.

The judges also claimed that the word ‘may’ in Article 22P does not ‘connote a personal discretion . . . to reject the advice of the Cabinet’.¹¹ Such a conclusion would render the Cabinet’s advice ‘pointless’.¹² The logic here is hard to follow. As previously stated, the President must consult the Council of Presidential Advisers on several matters listed in Article 21(3). Such consultation is not rendered pointless merely because the President may reject the Council’s advice, any more than decisions of the High Court are rendered pointless because the Court of Appeal may overturn them. Thus, the advice of the Cabinet does not become pointless merely because the President has the power to act in a contrary way. Simply put, in pardon-related matters the Cabinet and the President have a *shared* role. The Cabinet decides at the first instance, and the President reconsiders the issue in the light of the former’s advice.

Andrew Phang and V.K. Rajah JJ also summoned a large body of historical materials to make the case against presidential discretion. Their principal emphasis was on the Republic of Singapore Independence Act 1965 (RSIA),¹³ and, in particular, s. 8 thereof (a provision that is textually identical to Article 22P). When the RSIA was debated in Parliament, the then Prime Minister, Lee Kuan Yew, commented that the provision ‘invests the power of pardon [i]n the President *who will exercise it in accordance with the advice of the Cabinet*’.¹⁴ To the judges, Lee’s comments suggested ‘that Art 22P excludes any role for the President’s personal discretion’.¹⁵ The argument may be rephrased thus: Article 22P is a verbatim reproduction of RSIA, s. 8. While debating this latter provision, Lee stated that decisions regarding pardons will actually be made by the Cabinet. The power in Article 22P must, therefore, be understood similarly. The author believes that this argument is also mistaken. Important as they are, Prime Minister Lee’s words in Parliament are not—and cannot be—dispositive of what a constitutional provision means. While Singapore’s Interpretation Act 1965,¹⁶ s. 9A authorizes courts to consider,

11 See *Yong Vui Kong*, n. 1 above at 157.

12 *Ibid.*

13 Act 9 of 1965.

14 See *Yong Vui Kong*, n. 1 above at 172 (emphasis in the original).

15 *Ibid.*

16 Act 10 of 1965 (rev. edn 2002).

among other things, 'relevant material in any official record of debates in Parliament', this reasoning does not take into account the context of the written law.¹⁷

Today, Singapore's constitutional arrangement is significantly different from the one in existence when Prime Minister Lee commented on RSIA in 1965. At that time, because Singapore had a typical Westminster system with a titular head of state and a powerful head of government, Presidents (or the equivalent) followed the instructions of Cabinets. However, since 1991, the President is far from being titular: the presidency is now a nationally and directly *elected* office with constitutionally guaranteed powers.¹⁸ The President has, as previously mentioned, a range of independent functions, and more importantly, a degree of electoral legitimacy, which could not have been claimed back in 1965. Presidential independence may have been democracy-usurping back then; it is potentially democracy-enabling today. Moreover, with the new and enhanced role of the President, it is now possible to identify the precise limits of presidential powers. Article 22P and RSIA, s. 8 are textually similar, but it is the context that sets them apart. While the lengthy historical explorations make for interesting reading, they are entirely irrelevant to the question at hand. The judges, the author contends, erred in deciding to base their reasoning on a historical analysis.

The judges reviewed the White Papers produced in the years leading up to the elected presidency, noting the list of discretionary powers mentioned therein; however, in doing so they overlooked the very provision which made their argument untenable. A 1988 White Paper, for example, claimed that the President's discretionary powers were meant to enable him or her to '[protect] the Republic's financial assets, and [preserve] the integrity of the public services'.¹⁹ A later one expanded on this by listing seven specific matters on which the President was to have independent authority. The power to grant pardons was, however, 'conspicuously absent from [this] list of personal discretionary powers'.²⁰ This absence led the judges to the conclusion that the President has no discretion in pardon matters. It is important to note that Andrew Phang and V.K. Rajah JJ at this point were relying on the White Papers, but ignoring Article 21(2). This latter provision lists nine matters on which the President has discretion,

17 For commentary on s. 9A, see Brady Coleman Jr, 'Effect of Section 9A of the Interpretation Act on Statutory Interpretation in Singapore' (2000) 40 *Singapore Journal of Legal Studies* 152.

18 Singapore Constitution, Article 17(2). Prior to 1991, presidents were indirectly elected by Parliament. See Kevin Tan and Peng Er Lam, *Managing Political Change in Singapore: The Elected Presidency* (Routledge: Singapore, 1997).

19 Constitutional Amendments to Safeguard the Financial Assets and the Integrity of the Public Services, Cmd 10 of 1988.

20 See Constitutional Amendments to Safeguard the Financial Assets and the Integrity of Public Services: The Constitution of the Republic of Singapore (Amendment No. 3) Bill, Cmd 11 of 1990.

including a final open-ended one under which he or she may perform ‘any other function’ authorized by the Singapore Constitution. White Papers are preparatory materials, and though important, cannot act as a substitute for constitutional provisions. It is also worth emphasizing that, contrary to the judges’ claim, not all discretionary functions of the President relate to ‘protecting Singapore’s financial assets or preserving the integrity of the public services’.²¹ The appointment of the Prime Minister and matters relating to emergencies and detentions under extraordinary legislation are obvious examples.²² Indeed, there is nothing in Article 21 to suggest that the President’s discretionary jurisdiction pertains exclusively to Singapore’s finances or public services. To impose such a requirement is to amend the presidency, not interpret it.

Foreign precedents, especially Indian ones, were the last limb of the argument that led the Court of Appeal to conclude that the President has no discretion in pardon matters. In *Maru Ram v Union of India*,²³ the Indian Supreme Court, in assessing pardon provisions, held that ‘the President and the Governor, be they ever so high in textual terminology, are but functional euphemisms promptly acting on and only on the advice of the Council of Ministers’.²⁴ This proposition, the Court of Appeal claimed, is ‘elementary constitutional law that any student of the subject must know’ and equally applicable to Singapore.²⁵ The matter, however, is hardly free from doubt. It is not clear that the Indian decisions were themselves correct, and even if they were, India’s muddled constitutional praxis is hardly a guide worthy of import. In India, principles, politics and precedents coalesce in seemingly incongruous and contradictory ways in order to make the system work. One example, in the context of pardon power, suffices to make the point. There is, as we have seen, clear dicta that pardon-related decisions are in practice made by the Council of Ministers. And yet, as recently as June 2011, India’s Home Minister, P.C. Chidambaram, was emphatic—when responding to questions about the perceived delay on the mercy petition of Afzal Guru, who had been convicted of attacking India’s Parliament House in December 2001²⁶—that such decisions are the prerogative of the President.²⁷ Objecting to the idea that such decisions be made in a time-bound manner, Chidambaram said: ‘I cannot give a time frame. My duty is to

21 See *Public Prosecutor v Yong Vui Kong*, n. 2 above at 179.

22 Singapore Constitution, Article 21(1)(g).

23 AIR [1980] SC 2147.

24 See *Yong Vui Kong*, n. 1 above at 61 (emphasis in the original).

25 See *ibid.* at 177.

26 Anon, ‘Govt says it’s waiting for President’s decision on Afzal Guru’, NDTV News, 13 December 2011, available at: <http://www.ndtv.com/article/india/govt-says-its-waiting-for-presidents-decision-on-afzal-guru-157709> (accessed 8 June 2012).

27 Anon, ‘Prez to decide on Afzal Guru’s mercy plea’, *Indian Express*, 2 July 2011, available at: <http://www.indianexpress.com/videos/national/6/prez-to-decide-on-afzal-gurus-mercy-plea/5193> (accessed 8 June 2012).

resubmit cases and it is for the President to take a decision'.²⁸ These uncontested comments are, in many ways, representative of how India works: there is law, and then there is practice. While reasons for this law–practice split are complicated, in the context of pardons, they are easily explained. Guru's mercy petition became 'political' in India. There are those who wish to see the death penalty promptly carried out.²⁹ To some, the Cabinet's refusal to make a prompt recommendation is part of a political conspiracy to endear itself to some of India's religious minorities. Then there are those—terrorist organizations specifically—who have threatened to unleash violence if Guru is executed. Either way, a decision on Guru's mercy petition may be costly. Kicking the pardon-can to the President, therefore, is one way of insulating the Cabinet from any fall-out. The President is largely seen as a non-partisan authority, and unsavoury criticism is unlikely no matter which way the axe falls.

None the less, the Court of Appeal's uncritical reliance on Indian precedents is a pleasant departure from its usual practice of making comparative references only to explain why such precedents are *inapplicable* to the 'local context'.³⁰ The *Death Penalty Case* is a classic example. In 2010, the constitutionality of the mandatory death penalty in Singapore was challenged on the ground that international consensus overwhelmingly pointed to the conclusion that such provisions are both cruel and unconstitutional. However, the Court of Appeal rejected that argument on the grounds that Singapore's constitutional provisions were 'different'.³¹ And yet, when the Court of Appeal encountered a presidency that was genuinely unique—a classic local-context-is-different case—it paid no heed to those differences except for some perfunctory references.

What makes Singapore's presidency different is that—contrary to arrangements that are common in many Westminster systems—the President neither inherits the role nor is appointed.³² Rather, the President is directly elected by a national vote. Indeed, the President is the *only* nationally elected office and, therefore, has a kind of superior legitimacy. The President can speak on behalf of 'the people' in a way

28 Anon, 'Report on Afzal Guru case not yet sent to President: Chidambaram', *Jagran Post*, 1 June 2011, available at: <http://post.jagran.com/Report-on-Afzal-Guru-case-not-yet-sent-to-President-Chidambaram-1306940872> (accessed 8 June 2012).

29 Anon, 'BJP presses for Afzal Guru's hanging', *Times of India*, 28 May 2011, available at: http://articles.timesofindia.indiatimes.com/2011-05-28/india/29594437_1_mercy-petitions-afzal-guru-review-petition (accessed 8 June 2012).

30 See Arun Thiruvengadam, 'Comparative law and constitutional interpretation: Insights From Constitutional Theory' in Thio Li-ann and Kevin YL Tan (eds), *Evolution of a Revolution: Forty years of the Singapore Constitution* (Routledge: London, 2009) 113.

31 [2010] 3 *Singapore Law Reports*. Jack Tsen-Ta Lee, 'The Mandatory Death Penalty and a Sparsely Worded Constitution' (2011) 127 *LQR* 192.

32 Wan Wai Yee, 'Recent Changes to the Westminster System of Government and Government Accountability' (1994) 15 *Singapore Law Review* 297.

that no other official or appointee is able to. Furthermore, the discretionary powers of the President are specially protected and cannot be amended 'by Parliament unless it has also been supported at a national referendum by not less than two-thirds of the total number of votes cast' by qualified electors.³³ In addition, the Singapore Constitution establishes a range of independent powers for the President; contrary to other Westminster systems, the powers of Singapore's President are not a matter of convention. Taken together, these features reveal a significant departure from the Westminster system.³⁴ The *Pardon Case*, in many respects, related to how local variations affect the conventional view about the power to grant pardons. By relying on Westminster axioms and ignoring the local context, the Court of Appeal avoided the principal question at hand. This perhaps explains the ease with which the 'no discretion' conclusion was reached. A mere syllogism was sufficient to reach it: in Westminster-inspired systems, the power to grant pardons is exercised by the Cabinet or the relevant Ministers; Singapore is a Westminster system, therefore only the Cabinet can exercise such power. The syllogism is neat and simple. It is also incorrect.

III. Presidential Pardons and the Review of Discretionary Power

In addition to the matter of presidential discretion, questions relating to judicial review were also addressed in the *Pardon Case*. Article 22P of the Singapore Constitution provides for two kinds of pardons. The first kind applies only to accomplices. The President may grant a pardon to 'any *accomplice* in any offence who gives information which leads to the conviction of the principal offender'.³⁵ This provision, in other words, may be invoked only where the accomplice provides information, and the information subsequently leads to the conviction of the principal offender. The second kind of pardon applies to any convicted person. The President may grant this 'to any offender convicted of any offence in any court in Singapore'.³⁶ The provision, however, lays out a specific procedure for cases involving the death penalty. Article 22P(2) requires that judges involved at the trial and appellate stages of the relevant proceedings make a report to the President, which the President should then forward to the Attorney-General for his or her opinion. That opinion, along with other reports, is then sent to the Cabinet in order that it 'may advise

33 Singapore Constitution, Article 5A. This provision, though written into the Constitution in 1991, has not yet been brought into effect. See Constitutional Reference No. 1 of 1995 [1995] 1 *Singapore Law Reports* 803.

34 On Westminster models, see Andrew Harding, 'The "Westminster Model" Constitution Overseas: Transplantation, Adaptation and Development in Commonwealth States' (2004) 4 *Oxford University Commonwealth Law Journal* 143.

35 Singapore Constitution, Article 22P(1)(a) (emphasis added).

36 Singapore Constitution, Article 22P(1)(b).

the President on the exercise of the power conferred on him'.³⁷ Relying on these provisions and applicable precedents, the appellant argued that pardon-related discretion in Singapore—whether exercised by the President or the Cabinet—is subject to judicial review.

After a lengthy examination of precedents from commonwealth jurisdictions—including the United Kingdom,³⁸ the Caribbean States,³⁹ Canada,⁴⁰ Australia,⁴¹ New Zealand,⁴² India,⁴³ Hong Kong⁴⁴ and Malaysia⁴⁵—Chief Justice Chan Sek Keong rejected the argument, stating that the 'doctrine of separation of powers' and 'established administrative law principles' means that the power to grant pardons 'is not justiciable *on the merits*'.⁴⁶ Assuming 'that the clemency power is exercised in accordance with law', the merits of any particular clemency decision will fall outside the purview of the courts.⁴⁷ Singapore courts, in other words, will not decide whether a clemency decision is 'wise or foolish, harsh or kind', nor will they 'substitute their own decision for the clemency decision made by the President simply because they disagree with the President's view on the matter'.⁴⁸ The exclusion of judicial review here, however, did not imply that clemency power in the constitutional context was 'beyond any legal constraints or restraints'.⁴⁹ CJ Chan pointed out three limits on the exercise of such power; two of these were drawn from precedents. In *Law Society of Singapore v Tan Guat Neo Phyllis*,⁵⁰ it was held that the discretionary power to prosecute under the Singapore Constitution was not absolute. The court stated that such prosecutorial discretion is subject to judicial review 'if it is exercised in bad faith for an extraneous purpose' or if 'its exercise contravenes constitutional protections and rights . . . ([including among other things] . . . the equal protection of law under Art 12 of the Constitution)'.⁵¹ CJ Chan held that these grounds are equally applicable to the review of pardon

37 Singapore Constitution, Article 22P(2) (emphasis added).

38 *Council of Civil Service Unions and Others v Minister for the Civil Service* [1985] AC 374.

39 *Neville Lewis v Attorney General of Jamaica and another* [2001] 2 AC 50; *Thomas Reckley v Minister of Public Safety and Immigration and Others (No 2)* [1996] AC 527.

40 *William Colin Thatcher v The Attorney General of Canada and Others* [1997] 1 FC 289.

41 *Eastman v ACT* (2008) 227 FLR 262.

42 *Burt v Governor-General* [1992] 3 NZLR 672.

43 *Maru Ram v Union of India* (1981) 1 SCC 107.

44 *Ch'ng Poh v The Chief Executive of the Hong Kong Special Administrative Region*, HCAL 182/2002.

45 *Juraimi bin Husin v Pardons Board, State of Pahang & Ors* [2002] 4 *The Malayan Law Journal* 529.

46 See *Yong Vui Kong*, n. 1 above at 75 (emphasis in the original).

47 *Ibid.*

48 *Ibid.*

49 *Ibid.* at 76.

50 [2008] 2 *Singapore Law Reports* (R) 239.

51 *Ibid.* at 149.

power.⁵² However, he also added a third ground, drawn from the elaborate procedure on death penalty cases in Article 22P itself. He stated that the procedure ‘necessarily implies . . . a constitutional duty on the part of the Cabinet to consider those materials impartially and in good faith’.⁵³ Therefore, where ‘conclusive evidence is produced . . . to show that the Cabinet never met to consider the offender’s case at all, or . . . merely tossed a coin . . . the Cabinet would have acted in breach of Art 22P(2)’.⁵⁴

This overall position on judicial review of pardons, the author argues, is internally inconsistent and, legally speaking, untenable. First, as CJ Chan himself acknowledged, Article 22P makes a distinction between death penalty and non-death penalty cases. Unlike the latter, an elaborate procedure is spelt out for the former—one that led him to hold that the Cabinet has a ‘constitutional duty’ to consider materials impartially and in good faith. Were this correct, it would follow that no such duty exists in *non*-death penalty cases. After all, there is no procedure mentioned for such cases. Therefore, if the Cabinet flips a coin to decide the fate of a convict sentenced to life imprisonment, CJ Chan’s reasoning suggests that no wrong can be alleged. Surely, such an outcome is inconsistent with any meaningful understanding of the rule of law that judges aspire to uphold.⁵⁵ Secondly, CJ Chan concedes that the grant of—or the refusal to grant—pardons may be reviewed on three grounds. It may be challenged on the ground of illegality. Under Article 22P(1)(a), the President may pardon an accomplice if his information ‘leads to the conviction of the principal offender’. If pardoned under this provision, a victim of the crime, for example, may argue that the pardon is illegal because the constitutional requirement was not satisfied: information provided by the accomplice did not lead to the conviction of the principal offender. It would then be for the President to explain why the pardon should not be invalidated. A pardon may also be challenged on the ground that the decision was based on extraneous reasons; for example, if the President pardoned a convict on the ground that he or she had generously contributed to the political party to which members of the Cabinet belonged. Thirdly, CJ Chan says that a pardon may be challenged on the ground that ‘its exercise contravenes constitutional protection and rights’. Let us assume that information provided by two accomplices leads to the conviction of the principal offenders. While both accomplices apply for a pardon, only one is granted it. The President, for example, may choose to selectively grant it because one is a teenager and therefore deserves a second chance. If the unsuccessful applicant challenged this on the ground that it infringed his or her right to equal protection of the law,

52 See *Yong Vui Kong*, n. 1 above at 80.

53 *Ibid.* at 82.

54 *Ibid.* at 83.

55 *Ibid.*

the court would have to assess whether the President's reasons satisfy the test of equality under the Singapore Constitution.⁵⁶ However, if both accomplices are teenagers, the courts will invariably be drawn into considering the decision on its merits in order to identify why only one was pardoned. The point of reference here is not the validity of the overall policy—regarding, say, discrimination based on age—but the *particular* facts that distinguish the two teenagers. This demonstrates that—contrary to the assertion made by CJ Chan—excluding the merits of a clemency decision cannot be consistently achieved. If, as CJ Chan says, violation of constitutional protections and rights is a valid ground on which to challenge a pardon then, by definition, there will be situations that require the courts to adjudicate as to whether a decision was 'wise or foolish, harsh or kind'.⁵⁷ Both positions cannot exist concurrently: either pardons are reviewable on their merits, or constitutional rights are not a ground on which to challenge such decisions. CJ Chan's conclusion that the applicant does not have a right of disclosure seriously undermines his earlier finding that the power to grant pardons is subject to judicial review. The appellant argued that he was entitled to the materials that the Cabinet had relied upon in making its decision. CJ Chan rejected that argument, concluding that the Privy Council's decision in *Neville Lewis v Attorney General of Jamaica and another*⁵⁸ was irrelevant to the 'local context'⁵⁹ because Article 22P does not confer a right to petition for clemency and, therefore, there is no corresponding right to disclosure of materials.⁶⁰ He stated that, until the contrary is shown, courts must proceed on the basis of 'presumptive legality', i.e. that everything has been done in conformity with the law.⁶¹

In summary, CJ Chan's three findings were that: the power to grant a pardon is subject to judicial review on limited grounds; a convicted individual who is applying for a pardon has no right to disclosure of materials, the basis on which the decision is made, and where conclusive evidence is adduced to show that the Cabinet never met to consider the offender's case, or merely tossed a coin, a court will invalidate such a decision.⁶² If the first and second of these are correct then, by definition, the last is *legally* impossible. Clearly, 'conclusive evidence' that the Cabinet never met, or merely tossed a coin, can

56 Singapore Constitution, Article 12(1).

57 See *Yong Vui Kong*, n. 1 above at 75.

58 [2001] 2 AC 50.

59 See *Yong Vui Kong*, n. 1 above at 134.

60 *Ibid.* at 135. Note that a little over a year ago, he held a contrary view. See *Yong Vui Kong v Public Prosecutor* [2010] 2 *Singapore Law Review* 192 para. 23 ('Seeking clemency is not only a natural thing for a condemned prisoner to do but also, in the present case, a constitutional right given to any convicted person under Art 22P of the Constitution.').

61 See *Yong Vui Kong*, n. 1 above at 139.

62 *Ibid.* at 83.

only come from those present in Cabinet meetings. In the past, Cabinet Ministers and parliamentary secretaries were constitutionally required to take an oath affirming not to 'directly or indirectly reveal the business or proceedings of the Cabinet or the nature or contents of any document communicated' to the person concerned except 'with the authority of the Cabinet and to such extent as may be required for the good management of the affairs of Singapore'.⁶³ This, however, was abolished in 2007.⁶⁴ It would, though, be a mistake to presume therefore that Cabinet Ministers are authorized to reveal the contents of Cabinet proceedings. While the constitutional oath no longer exists, under the Official Secrets Act 1985 it remains an offence for a person to reveal, directly or indirectly, any information 'to which he has had access, owing to his position as a person who holds or has held office under the Government'.⁶⁵ This is clearly applicable with respect to Cabinet Ministers. Thus, were a Minister to reveal that a decision was taken on the basis of a coin toss, he or she would be in breach of the law. Indeed, because of this legislation, an application for judicial review on the ground that the decision relating to a pardon was influenced by extraneous considerations will *necessarily* require an unlawful act on the part of one or more current or former Ministers. It is in this sense that CJ Chan's proposed standard cannot be legally achieved. Options are limited at this point: either the findings must be revised, or the *Pardon Case* must be interpreted to have impliedly read down relevant provisions of the Official Secrets Act 1985. The corollary of this is that the Act should now be deemed only to protect information about the *lawful* conduct of Ministers. Consequently, any disclosure of unlawful conduct will not constitute an offence. If so, the *Pardon Case* is indeed a momentous one: for the first time, legislation of the Singapore Parliament may have been impliedly invalidated by the Court of Appeal.

IV. Conclusion

In the *Pardon Case*, the judges failed to correctly analyse the two issues in question. The issue of discretion was fundamentally about Singapore's presidency and the ways in which it departs from the Westminster model. Instead of uncovering the institutional possibilities of the new presidency, the judges interpreted it restrictively by reading in certain Westminster axioms. Similarly, the Court's analysis of the issue of judicial review is inconsistent and falls under its own

63 Singapore Constitution, First Schedule §§4 & 4A (now repealed).

64 See Constitution of the Republic of Singapore (Amendment) Act 2007 (31 of 2007) §10.

65 Cap. 213 (rev. edn 1985) §5. *Public Prosecutor v Bridges Christopher* [1998] 1 *Singapore Law Review* 162 (CA). For commentary, see Chan Wing Cheong, 'Section 5 of the Official Secrets Act: *Bridges* and Beyond' (1998) 38 *Singapore Journal of Legal Studies* 260.

weight. CJ Chan proposed standards of review that are, in effect, legally impossible; either they must be revised, or they must be re-interpreted in a way that would bring about a momentous change in Singapore. The ultimate saving grace of the decision, however, may lie in the fact that most of its findings are *obiter* in nature. Strictly speaking, five of the six issues raised in the case did not call for a lengthy analysis, because the appellant, the judges said, had failed to meet the threshold of relief under the relevant legal rules. Yong requested a ‘declaration’ that the discretion to finally grant or reject his petition for clemency lay with the President. The Court of Appeal, however, held that it had ‘no power to grant [the particular] relief’,⁶⁶ for such declaratory reliefs were impermissible under the relevant rules governing the proceedings.⁶⁷ With the relief sought for having been declared as being unavailable, all remaining issues were only of academic interest. Indeed, the matter could have been disposed of in one paragraph—precisely the amount of space that CJ Chan needed to deal with the relief argument.⁶⁸ For reasons best known to them, the judges gave us the benefit of their analysis; however, for the reasons stated in this paper, the merit of that analysis is not readily clear.

66 See *Yong Vui Kong*, n. 1 above at 25 (emphasis in the original).

67 *Ibid.* See Order 53 of the Rules of Court (cap. 322, R. 5, 2006 rev. edn).

68 See *Yong Vui Kong*, n. 1 above at 25.