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Developments in the law on constitutional and statutory interpretation: Vellama d/o Marie Muthu v AG [2012] SGHC 155; [2013] SGCA 39

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***Vellama d/o Marie Muthu v Attorney-General* [2012] SGHC 155, [2012] 2 SLR 1033; [2013] SGCA 39**

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Summary and digest of holdings

Following the expulsion of Mr Yaw Shin Leong, MP for Hougang Single Member Constituency (SMC), from his party, the applicant in *Vellama d/o Marie Muthu v Attorney-General* [2012] SGHC 155, [2012] 2 SLR 1033 ("*Vellama (HC)*"); [2013] SGCA 39 ("*Vellama (CA)*"), a resident of Hougang SMC, sought a declaration that the Prime Minister did not have unfettered discretion in deciding whether and when to call a by-election to fill the vacant seat in Parliament, given that art 49(1) of the Constitution provides that "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." This note focuses on this substantive issue rather than the procedural issues and issues of *locus standi*, which the courts also discussed at length.

The Court of Appeal, reversing the High Court's decision, held that, when an elected MP's seat is vacated during Parliament's term (a "casual vacancy"), the Prime Minister does not have unfettered discretion as to when to call a by-election, but instead must call one within a "reasonable time" (which is embodied in s 52 of the Interpretation Act: "Where no time is prescribed or allowed within which anything shall be done that thing shall be done with all convenient speed and as often as the prescribed occasion arises.") However, the Prime Minister can take into account "all relevant circumstances"[1] in deciding the time, including "considerations which go well beyond mere practicality", the specifics of which it is "impossible to lay down".[2] Because the discretion is highly fact-sensitive, the courts will only intervene in exceptional cases.[3]

The merits of the decision aside, several interesting points arise from the two courts' different interpretive approaches.

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[1] *Vellama (CA)*, [92].
[2] *Vellama (CA)*, [92].
[3] *Vellama (CA)*, [85].

The High Court's approach

The High Court concluded that the phrase "shall be filled by election" in art 49(1) meant that the seat was to be filled, when it was filled, by the *process* of election (as opposed to the process of appointment), and not that the *event* of an election had to be held. This was based on the structure of the Constitution, which was meant to show that the process for filling casual vacancies differs depending on the type of MP (elected MP, NMP, or NCMP) in question.[4]

More significantly, the High Court held that this view was buttressed by an analysis of the legislative history of art 49(1), starting with its roots in a 1946 Order in Council.[5] In particular, an Order in Council in 1955 dictated that casual vacancies "*shall*" be filled (a) "by appointment" in the case of Nominated Members, or (b) "by election" in the case of Elected Members.[6] Provision (b), from which it was clear that "election" referred to a process rather than an event, was the genesis of the present art 49(1). The subsequent removal of provision (a) did not change the meaning of provision (b). Most significantly for present purposes, the then Prime Minister stated during Parliamentary debates in 1965 that the "injunction of holding a by-election within three months", which had been introduced in 1963 at the insistence of Malaysia, "should no longer apply"; the words "within three months from the date on which it was established that there is a vacancy" were thus deleted.[7]

The Court of Appeal's approach

The Court of Appeal's response to this interpretation may be summarised into two points.

First, the Court held, in response to submissions that the 1963 debates in Parliament on the Constitution had to be read in context, that "subtext, in its inherent nature, is just as capable of amplifying rather than clarifying any latent ambiguity" and that such latent ambiguity may well exist in the phrase "shall be filled by election".[8] In particular, after a further survey of debates in Parliament, the Court of Appeal noted that no ruling party member had ever denied that there was an obligation to call a by-election at *some* point in time, even when there may have been occasion to do so.[9] In short, there was "no consensus" as to the meaning of the phrase "shall be filled by election"[10] despite the Prime Minister's declarations during debates in Parliament.

Second, even if art 49(1) had only mandated that casual vacancies be filled by the process of election and not that the event of an election be held, it did not follow that there was nothing requiring the event to be held or constraining the period within which the event had to be held,[11] even though the time-limit clause had been removed in the past.

In addition, the Court of Appeal suggested that the question engaged the "rights of the voters in a Parliamentary system of government"[12] which had to be "balance[d]" against the Prime Minister's discretion; this is a tantalising hint that the standard of review may well be proportionality- rather than *Wednesbury*-based, although the bar may be high due to the issue's polycentricity. That having been said, it is not proposed to discuss this point here.

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[4] *Vellama (HC)*, [78].
[5] *Vellama (HC)*, [89].
[6] *Vellama (HC)*, [96].
[7] *Vellama (HC)*, [108].
[8] *Vellama (CA)*, [66].
[9] *Vellama (CA)*, [68].
[10] *Vellama (CA)*, [72].
[11] *Vellama (CA)*, [73].
[12] *Vellama (CA)*, [85].

Commentary

The approach to be taken to constitutional interpretation

Neither court explicitly stated the law on constitutional interpretation. Strictly speaking, it would appear that the interpretive approach should be that in s 9A of the Interpretation Act,[13] which art 2(9) of the Constitution provides must apply to constitutional interpretation,[14] and which has been held to override "any common law principle of interpretation".[15] This approach is set out in s 9A(1): "In the interpretation of a provision of a written law, an interpretation that would promote the purpose or object underlying the written law (whether that purpose or object is expressly stated in the written law or not) shall be preferred to an interpretation that would not promote that purpose or object." Moreover, s 9A(2) explicitly allows reference to "any material not forming part of the written law" to be made for this purpose, subject to the twin concerns of "persons being able to rely on the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law" and the "need to avoid prolonging legal or other proceedings without compensating advantage".[16] It would appear that this approach was the one used by the High Court in *Vellama*; this would explain the extensive reference to legislative history.

However, there appears to be another competing approach to interpretation in certain constitutional cases, which the Court of Appeal may have implicitly endorsed: in *Minister of Home Affairs v Fisher*,[17] the Privy Council held that "a constitutional instrument [is to be treated] as *sui generis*, calling for principles of interpretation of its own" because "full recognition and effect" must be given to "fundamental rights and freedoms".[18] That both approaches to interpretation may subsist concurrently in Singapore law is demonstrated in *Taw Cheng Kong*, where the High Court applied s 9A to an ordinary statute[19] while applying the *Fisher* approach to art 12 of the Constitution, which was held not to be "limited by the normal rules and maxims applied to the interpretation of ordinary legislation".[20] In *Vellama*, the Court of Appeal, by suggesting that residents have an "entitle[ment]"[21] or "right"[22] to representation in Parliament, may be seen as embracing the *Fisher* approach.

On the other hand, if this rights-based analysis were the only possible one, the Court of Appeal would likely not have expended so much effort rebutting the High Court's analysis (which was evidently based only on the s9A approach). There are at least two other ways of analysing the Court of Appeal's judgment. First, the Court of Appeal recognised the principle that "[l]egislation rarely pursues a single purpose at all costs... For a court to construe the legislation as though it pursued the purpose to the fullest possible extent may be contrary to the manifest intention of the legislation".[23] Second, s 9A(1) refers to the "purpose or object underlying *the written law*" and not that underlying a "*provision* of a written law" (emphases added);[24] the Court interpreted the scope of art 49(1) with reference to a broad

[13] Cap. 1.
[14] "Subject to this Article, the Interpretation Act (Cap. 1) shall apply for the purpose of interpreting this Constitution and otherwise in relation thereto as it applies for the purpose of interpreting and otherwise in relation to any written law within the meaning of that Act."
[15] *PP v Low Kok Heng* [2007] SGHC 123, [2007] 4 SLR(R) 183, [41].
[16] Section 9A(4) Interpretation Act.
[17] [1980] AC 319, 329.
[18] This was *not* necessarily implicitly overruled by *PP v Low Kok Heng* (*supra* n 16): that case concerned quite another matter, *viz.* whether penal statutes should be construed differently from other statutes.
[19] [1998] SGHC 10, [1998] 1 SLR(R) 78, [38]ff.
[20] *Ibid*, [18]ff. The result was overruled by the Court of Appeal, but the approach to interpretation was not.
[21] *Vellama (CA)*, [79].
[22] *Vellama (CA)*, [85].
[23] *Carr v Western Australia* [2007] HCA 47, (2007) 232 CLR 138, [6]. Cf. *Vellama (CA)*, [76].
[24] R.C. Beckman and A. Phang, "Beyond *Pepper v Hart*: The Legislative Reform of Statutory Interpretation in Singapore" (1994) 15 *Statute Law Review* 69, 83.

purpose of establishing a Westminster-style government complete with a right to representation[25] rather than merely the intention underlying art 49(1) as seen in isolation.

The use of extrinsic materials in interpretation

The Court of Appeal discussed the High Court's use of extrinsic materials at length. Implicit in the Court of Appeal's warning about the need for careful evaluation of "subtext" is a recognition of a certain irony in eschewing a literal approach to interpreting statutes but applying a literal approach in construing extrinsic materials used to interpret statutes, and the criticism that the High Court had taken such an approach. After all, s 9A(2) provides that reference to extrinsic materials is only allowed if it "is capable of assisting in the ascertainment of the meaning of the provision" and s 9A(4) further suggests that the court may have to determine the "weight to be given to any such material".[26]

On the other hand, the Court of Appeal's judgment demonstrated the issue of cost and effort which is hinted at by s 9A(4)(b): in order to evaluate the applicability of the (themselves voluminous) Parliamentary materials which were referred to by the High Court ("*first-order materials*") as purported statements of intention, or at least (in the case of past versions of constitutional provisions) indications of intention, by ministers, effort had to be spent sifting through other Parliamentary materials in the Court of Appeal (hereafter "*second-order materials*") to reveal what was *actually* borne in mind when these statements or indications were made. The need for argument about the applicability of extrinsic materials is exacerbated by the fact that, in the particular case of the Constitution, relevant extrinsic materials are often ones that were not drafted with s 9A(2) in mind. It is likely that Parliament has felt encouraged *after* the passing of s 9A in 1993 to endorse clear statements of legislative intent intending that they the courts refer to them. Extrinsic materials before that may, by contrast, be mere debates of "political contention"[27] rather than statements of purpose adopted by the Legislature.

By contrast, the view in England is that only "clear" ministerial statements of legislative intent may be referred to, failing which the "expense of litigation" would be increased by "long arguments about [the] significance [of other extrinsic materials]".[28] Both courts' judgments in *Vellama* demonstrate that such a concern is not unfounded, particularly when it comes to interpreting the Constitution, for which no single definitive statement of purpose may be identified (as one may be in the case of a modern ordinary statute). It is thus submitted that greater judicial attention to the concerns in s 9A(4), such as an explicit discussion of whether there is "compensating advantage" gained by recourse to extrinsic materials, is warranted.

The fundamental aim of interpretation

The Court of Appeal's approach toward extrinsic materials reveals more fundamental points.

The aim of statutory interpretation is generally thought to be as explained in *Black-Clawson International v Papierwerke Waldhof-Aschaffenburg*: "We often say that we are looking for the intention of Parliament,[29] but that is not quite accurate. We are seeking the meaning of the words which Parliament used. We are seeking not what Parliament meant but the true

[25] *Vellama (CA)*, [79].
[26] Such evaluation of extrinsic materials is not unprecedented. In *Kok Chong Weng v Wiener Robert Lorenz* [2009] SGCA 7, [2009] 2 SLR(R) 709, one ministerial statement was held to have been "not intended as an explanation for the ambit of [the statute in question]".
[27] *Vellama (CA)*, [72].
[28] *Pepper v Hart* [1993] AC 593, 636.
[29] In the Singapore context, see generally *PP v Low Kok Heng* (*supra* n 16), especially [72] ("s 9A(1) of the Interpretation Act... specifically mandates a purposive interpretation of legislation in accordance with the object underlying the legislation, in other words, the intention of Parliament").

meaning of what they said."[30] This was echoed in *dicta* cited in *Tan Boon Yong v Comptroller of Income Tax*.[31]

However, the Court of Appeal's approach in *Vellama* suggests strongly that this is not a complete statement of the law in Singapore. In seeking to determine the mindset of parliamentarians (*e.g.* whether there was "consensus" about the meaning of art 49(1)[32]) by, *inter alia*, drawing inferences from the Prime Minister's responses to questions asked to him in Parliament,[33] the Court of Appeal was seeking to discern the Legislature's *actual* intention. This demonstrated that evaluating the applicability of extrinsic materials which are meant to cast light on "the true meaning of what [the Legislature] said" can itself entail examining exactly "what [the Legislature] meant"; perhaps this is a necessary consequence of the approach in s 9A in the case of words which appear to be statements of legislative intent but are not explicitly marked out as such. It remains an open question whether and when the courts will see recourse to "second-order" Parliamentary material as necessary if they had held that ambiguity has been sufficiently eliminated by recourse to "first-order" material.

Moreover, in searching for "consensus",[34] the Court of Appeal implicitly affirmed that, notwithstanding the explicit permission of reference to ministerial statements by s 9A(3)(c), the search ought to be for the intention of the *Legislature* and not that of individual *legislators* (in particular, Ministers).[35] In other words, the Court of Appeal's approach is based on the idea that "legislative intent" is not merely a fiction or shorthand for ministerial intent. *Quaere* to what extent courts will take this into account in the case of ordinary statutes, and either hold phrases such as "the Minister, and in turn Parliament, had enacted the Act" in *AAG v AAH*[36] to have been slips of the tongue or expose them as being shorthand and unpack them, especially if the rate of dissent in Parliament should increase in future due to changes in the political landscape.

Conclusion

Perhaps the fact that the Court of Appeal ruled on the substantive issue despite having held that the applicant had no *locus standi* (as a by-election was held after the High Court's ruling) suggests that the primary concern of the Court of Appeal was the public interest in the merits of the specific case. Nonetheless, it is hoped that the Court of Appeal's judgment will also pave the way for further exploration of the law on constitutional and statutory interpretation in Singapore, which is perhaps set to become more significant as Singapore has experienced a recent increase in the number of constitutional cases.

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[30] [1975] AC 591, 613.
[31] [1993] 1 SLR(R) 208, citing at [15] *Beswick v Beswick* [1968] AC 58, 73–74 ("... we must deduce [Parliament's] intention from the words of the Act...") and at [18] *Pepper v Hart* [1993] AC 593, 634. The court disapproved of the rule in *Beswick* which prohibited reference to *Hansard*, but not the general idea that the aim is to give effect to legislative intention *as it appears from the statute*.
[32] *Vellama (CA)*, [72].
[33] *Vellama (CA)*, [68]–[70].
[34] *Vellama (CA)* at [72].
[35] See generally A. Kavanagh, "*Pepper v Hart* and matters of constitutional principle" (2005) 120 LQR 98.
[36] [2009] SGCA 56, [13].