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Public law theory and judicial review in Singapore: Jeyaretnam Kenneth Andrew v AG [2013] SGCA 56

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***Jeyaretnam Kenneth Andrew v Attorney-General* [2013] SGCA 56**

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The Court of Appeal affirmed the High Court's ruling that the applicant had no *locus standi* to challenge the compatibility of a loan made by the Government to the International Monetary Fund with Art 144(1) of the Constitution. On the interpretation of Art 144(1), there was no *prima facie* case of reasonable suspicion that such incompatibility existed. Moreover, the applicant did not have sufficient interest in the matter.

Facts and decision

In *Jeyaretnam Kenneth Andrew v Attorney-General* ("*Jeyaretnam*"), the applicant had sought judicial review of a loan by the Government to the International Monetary Fund on the grounds that it allegedly violated Art 144(1) of the Constitution, which provides that "[n]o guarantee or loan shall be given or raised by the Government" without the authority of a resolution of Parliament with the President's concurrence or the authority of written law. The Court of Appeal upheld the High Court's ruling that the applicant had no *locus standi* to do so on the grounds that:

> (a) there was no *prima facie* case of reasonable suspicion: a purposive reading of Art 144(1), in the light of relevant extrinsic materials, showed that it only restricted the *giving of guarantees* and the *raising of loans*, but not the *giving of loans*; and
>
> (b) the applicant did not have sufficient interest in the matter: no "private right" of his had been violated, nor had a "public right" been violated in such a way to cause him "special damage peculiar to himself"[1].

Additionally, on the facts, the Court rejected arguments that the loan was "like a guarantee" or entailed an "implied guarantee".

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[1] *Jeyaretnam*, [62], citing *Boyce v Paddington Borough Council* [1903] 1 Ch 109, 114.

Several notable points emerge; perhaps the most interesting is the Court of Appeal's explicitly endorsing the green-light theory of public law. Such endorsement is seen from the Court's explicit recognition that *locus standi* is a "judge-made" doctrine[2], *i.e.* the Court had the power to change the law on *locus standi*, yet refused to do so.

Introduction: the red-light and green-light theories

Harlow and Rawlings' red-light and green-light models of the relationship between the courts and the executive were summarised by then-Chief Justice Chan Sek Keong as follows: the red-light view sees the courts as "locked in an adversarial or combative relationship with the Executive", while the green-light view "sees public administration not as a necessary evil but a positive attribute" and focuses on "seek[ing] good government through the political process and public avenues rather than redress[ing] bad government[3] through the courts"[4]. To elaborate, the red-light theory is that the courts should take the lead in "control[ling] excesses of state power"[5] because they are well-placed to act as an external check, while the green-light view is that this is not necessarily so – the courts may be seen as "legalistic" or having an "eccentric vision of the 'public interest'"[6] – whereas political checks such as accountability through Parliament and ministerial supervision are often better[7], such that the courts should focus on "permit[ting] the administration to regulate itself"[8].

By tracing the history of the theories, Harlow and Rawlings suggest that they are *descriptive* models. However, in *Jeyaretnam*, the Court not only declared that the green-light theory has been said (in *Vellama d/o Marie Muthu v Attorney-General*[9] ("*Vellama*")) to represent the situation in Singapore[10], but also proceeded on the basis that it *should* prevail. As is argued below, this is evident throughout the Court's reasoning even when the theory was not specifically mentioned. At the same time, if the green-light theory is accorded *prescriptive* weight, then it is necessary to examine exactly what implications it has for the courts' role in Singapore public law; it is hoped that this note will offer some thoughts on this matter.

Interpretation of Art 144(1)

A traditional view is that the objective of the interpretation of written law is to determine the meaning of a provision *as it was enacted*, such that only extrinsic materials dating from the time of enactment or before are relevant. In *Jeyaretnam*, however, an Opinion by the Attorney-General long after Art 144 had been enacted was referred to; it was said by the High

[2] *Jeyaretnam*, [33].
[3] This references CJ Chan's distinction at [6] between "governance", *i.e.* the procedure by which policies are implemented, which is to be controlled by judicial review; and "government", *i.e.* the policies themselves, which are to be controlled by democratic processes.
[4] Chan, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469, [29]
[5] Harlow and Rawlings, *Law and Administration*, 3rd ad (Cambridge University Press, 2009), 23.
[6] Harlow and Rawlings, *Law and Administration*, 2nd ed (Butterworths, 1997), 74; quoted in Beatson, Matthews, and Elliott, *Administrative Law*, 4th ed (Oxford University Press, 2011), 3.
[7] *Supra* n 5, 39ff.
[8] Beatson *et al*, *supra* n 6, 5.
[9] [2013] 4 SLR 1.
[10] *Jeyaretnam*, [48].

Court to have been "endorsed by the Government... and circulated to Members of Parliament"[11] but said by the Court of Appeal to have been "endorsed by Parliament"[12]. In fact, the Opinion was not aimed directly at the motion being debated at the time, which was that "this House regrets that the Executive does not respect the Judiciary as the final arbiter in the application of all laws passed by Parliament"[13]; neither was legislation passed directly in reliance on the Opinion. This means that any endorsement by Parliament must have been by silence or tacit consent.

By referring to the Opinion, the courts put the green-light theory into action by locating legislative intent in the *ongoing* practice or attitude of the Legislature (including tacit endorsement of Executive practice simply by virtue of having received a copy of the Opinion and not expressing disagreement) rather than in the intention at the time when the legislation was made. In other words, Parliament was seen as playing an active role in the development and operation of the law rather than just the making of the law.

The significance of this is seen in that, because of the way in which the case was pleaded, the Court's discussion centred around whether the loan created a "liability" on the part of the Government[14]: the concepts of assets and liabilities are mentioned in the Opinion[15], not Art 144(1). (As an aside: the applicant could have instead chosen to contest the High Court's construction of Art 144(1)[16] rather than how it applied to the loan; this demonstrates that the task of interpretation permeates judicial review proceedings even at the leave stage.)

The validity of the loan

The theme of focusing on Parliament's *ongoing practice* is also seen in the issue of the *application* of Art 144(1). The applicant evidently sought to argue that Art 144(1) was a validity criterion, breach of which made the loan void *ab initio*. The Court, by contrast, stressed that "neither Parliament nor the President had thought fit to question the propriety of the promised loan. If the President was indeed concerned and inclined to veto the commitment, he would have done so."[17] In other words, the Court saw ongoing Parliamentary/Presidential approval as a *condition subsequent* rather than seeing approval at the time the loan was made as a *condition precedent*; the correct remedy would thus be *prospective* rather than *ab initio* annulment. By encouraging Parliamentary debate on whether the loan "should *have* been granted" (emphasis added)[18], the Court thought that any potential problems would stem from the *fact that the loan continued to exist* rather than the *formal steps taken when the loan was made*. Again, this ties in with the green-light theory of encouraging the role of Parliament in monitoring the propriety of *ongoing* administrative action.

[11] [2013] 1 SLR 619, [20].
[12] *Jeyaretnam*, [7(b)].
[13] *Singapore Parliamentary Reports*, vol 68, col 72ff (1998).
[14] *Jeyaretnam*, [19]ff.
[15] Reproduced in [2013] 1 SLR 619, [19(4)-(5)].
[16] For example, it could have been argued that reliance on the AG's opinion was inappropriate.
[17] *Jeyaretnam*, [61].
[18] *Ibid*.

Rights, remedies, and public law theory

The criticism may be made that focusing on what happens *after* the law is enacted allows the Legislature to license *retroactively* behaviour which may have previously been *prima facie* contrary to law. That may be true in some cases, but, by the Court's reasoning, there was no problem in *Jeyaretnam* because the applicant was held to have suffered no loss, having had no relevant right: the matter here concerned "public policy" rather than the "individual's rights and interests"[19].

It may be tempting simply to equate this view with the green-light theory, but it is submitted that it is instead necessary to unpack the phrase "public policy", which may refer to any of the following three points (all of which the Court referenced):

(a) Matters for which the correct remedies are political, not legal.[20]

(b) Matters which give rise to rights held in common with the public, rather than private rights – in the case of the former, one must have suffered "special damage" in order to have *locus standi*.[21]

(c) Matters which are within the discretion of the Legislature and the Executive[22] (in CJ Chan's terms, matters of "government" rather than "governance"[23]).

The requirement of "special damage" (point (b) above) does not mean that there is no legal remedy (point (a) above); it means that it is for the Attorney-General representing the public, rather than the individual, to seek a legal remedy.[24] It is only from the applicant's point of view that the correct step is to pursue the *political* remedy of asking the Attorney-General to seek a *legal* remedy before the courts. This explains why, in *Vellama*, the applicant had no *locus standi* and yet the courts were competent to rule on the merits: the applicant there was trying to vindicate a public right without the Attorney-General's help[25], but it was still a *legal* and not a *political* matter and thus justiciable.

In addition, even in the UK where the *red-light* theory was said to apply[26] (before the Human Rights Act 1998, which paved the way for review of the proportionality of action which *prima facie* infringes human rights, which entails merits review), the courts still drew the distinction in point (c) above between merits and legality review.[27]

In other words, the application may well have failed at the leave stage even if the red-light theory had applied in Singapore. This is because the fact that the application failed the

[19] *Jeyaretnam*, [56].
[20] *Jeyaretnam*, [61].
[21] *Jeyaretnam*, [37].
[22] *Jeyaretnam*, [59].
[23] *Supra* n 3.
[24] *Jeyaretnam*, [35]-[36]; [39].
[25] The applicant was originally asserting the *private* right of seeking advice from an MP, but, by the time the Court of Appeal ruled, an MP had already been elected to replace the one who have been removed, leaving her only with the *public* right of democratic representation *in general*: [2013] 4 SLR 1, [38].
[26] *Jeyaretnam*, [49]; [55].
[27] *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

"reasonable suspicion" test was *purely* a matter of the interpretation of Art 144, to which the green-light theory was relevant *only to the (limited) extent that it informed the process of statutory interpretation*. This demonstrates the limits of the green-light theory: the theory does not, by itself, tell us which kinds of executive conduct are 'wrong' and which are not; it only tells us what ought to be the appropriate legal response to a wrong.

To illustrate this, consider a hypothetical case in which the court holds that there *is* "reasonable suspicion" of a breach of the applicant's public right, and yet denies *locus standi* on the grounds of point (b) above because of the green-light theory. The Court would then, while declining to intervene directly, be exercising a power to *send a strong signal to the Executive* that its conduct *may* be questionable. In other words, while the green-light theory states that the courts' role in controlling administrative action is *limited*, it does not follow that the courts have *no* role or that they necessarily must take a highly deferential stance. In this hypothetical case, the courts would still have played a role in "permit[ting] the administration to regulate itself"[28] by highlighting areas which may need attention.

The nature of the applicant's rights

The Court's choosing to rule on the merits in *Vellama* was *discretionary* – it only did because "[it was] of the opinion that the Judge's views on the procedural and substantive issues need[ed] clarification".[29] Thus, a key issue was the nature of the applicant's rights – the court in *Vellama* could *not* have done so if the applicant had had no right.

It is submitted that it is necessary to distinguish between two senses of "right": *(a)* a primary right, such as the right to be represented in Parliament or a right against discrimination (the "first sense"); and *(b)* the secondary right to seek a remedy in court to enforce a primary right (the "second sense"). The existence of the former is a matter of substantive constitutional law; the existence of the latter is a procedural matter influenced by the choice of red-light or green-light theory. When discussing *Tan Eng Hong v Attorney-General*[30], the Court used the word "right" in the *first* sense ("his private constitutional rights under Articles 9, 12, and 14 of the Constitution"[31]); when discussing *Vellama*, the word was used in the *second* sense ("her public *right... to seek a declaration* on the proper construction of Article 49 of the Constitution" (emphasis added)[32]). Again, the court was competent to rule on the merits in *Vellama* as the applicant *did* have a public right in the *first* sense.

In *Jeyaretnam*, the Court discussed the distinction between public and private rights[33], seemingly taking as a given that the applicant had no private right but rather only a right held in common with the public and "owed to the general class of affected persons as a whole"[34]. But later on, the Court suggested that the applicant was "unable to assert any rights

[28] *Supra* n 8.
[29] [2013] 4 SLR 1, [45].
[30] [2012] 4 SLR 476.
[31] *Jeyaretnam*, [51].
[32] *Ibid*.
[33] *Jeyaretnam*, [29]ff.
[34] *Jeyaretnam*, [47].

– private or public – ... *because* there is none to be had: his claim is brought in the *public interest*" (emphasis added).[35] With respect, the point could have been put more clearly: surely a public right *can* be vindicated for the sake of the public interest, and vindication of a private right can set a precedent which benefits the public interest. In other words, in this latter quotation, by "public interest" the Court was referring to a sense of *general concern* for public administration rather than a specific instance of public *mal*administration, and by "public right" it used the word "right" in the *second* sense, not the first.

What, then, was the underlying public right (in the *first* sense) that was claimed in *Jeyaretnam*? In *Vellama*, the right to representation in Parliament was held to have been implicit in a Westminster-style system.[36] Similarly, in *Jeyaretnam*, the right claimed may have been a general right of citizens to have public funds managed judiciously which is implicit in a parliamentary democracy.

In short: in *Jeyaretnam*, the applicant had no right in the *second* sense because his right in the *first* sense, *while existent*, was not justiciable. It would not be accurate to say that the applicant had "no public right": if that were so, then the court would have held that the applicant had had no complaint at all rather than that he should have taken the complaint to Parliament or the President.[37]

This suggests that a distinction between "public rights" and "private rights" is not all there is: there *may* be some public rights (in the first sense) which *do* yield rights of enforceability in the courts by the public at large (in the second sense). This explains the court's references to the issue of the gravity of the breach of rights,[38] which otherwise one would think goes to the *substantive* stage rather than the *leave* stage. Thus, the Court held that in the case of, say, a "Cabinet Minister's abuse of his wide-ranging powers",[39] a broader section of the public may well be granted *locus standi*.[40] In fact, if the court had interpreted Art 144(1) differently so as to have found differently on the "reasonable suspicion" point, then it may have found differently on the "sufficient interest" point as well.

The green-light approach is thus not necessarily inconsistent with the *dictum* from *R v Somerset County Council, ex p Dixon* that "[p]ublic law is not at base about rights... it is about wrongs... a person or organisation with no particular stake in the issue or the outcome may... wish and be well placed to call the attention of the court to an apparent misuse of public power".[41] The Court suggested that this sees judicial review as a Roman-style *actio popularis* at odds with the green-light theory in Singapore.[42] But *Dixon* also said that "[i]n the majority of cases" it will be necessary to "demonstrate that the applicant is not a mere busybody".[43] Indeed, in Roman law, an *actio popularis* was *not* always open to just anybody:

[35] *Jeyaretnam*, [51].
[36] [2013] 4 SLR 1, [79].
[37] As it did at [61].
[38] *Jeyaretnam*, [61]ff.
[39] *Jeyaretnam*, [62].
[40] *Jeyaretnam*, [64].
[41] [1998] Env LR 111, 121; quoted in *Jeyaretnam*, [54].
[42] *Jeyaretnam*, [54].
[43] *Ibid*, 121.

sometimes special damage was needed[44], or it was only a last resort if nobody with a specific interest sued.[45] Similarly, the Court noted that, because "[t]he gravity of the breach would be a relevant consideration",[46] it *may* be that, *despite* the green-light theory, more people may be granted *locus standi if* other remedies are held unsatisfactory.[47]

Rulings on the merits despite the applicant having no *locus standi*

If the Court was willing to recognise this possibility *explicitly*, then why did the same Court in *Vellama* rule on the merits *despite* holding that the applicant had no *locus standi*, rather than holding that the issue *was* grave enough to warrant granting her *locus standi*? A possible answer is: by then, the applicant's interest was "no more than a general desire to have Art 49 interpreted by the court";[48] thus, the court wished to exercise its discretion to rule on the merits while refusing to label as "grave" a situation where there was no substantial damage to the applicant's interests. Again, this reflects the green-light theory: the court probably wished to promote legal certainty by answering the question, but without being seen to put itself in an "adversarial or combative relationship with the Executive".[49]

Conclusion

The court's linking practice in Singapore to public law theory is to be welcomed. This was not part of a blanket approach of "submiss[ion] to the Executive":[50] the Court not only reinforced the limitations of the courts' proper role, but also highlighted the *positive* role of democratic processes in resolving disputes. Moreover, the green-light theory merely means that political remedies should be *given primacy*, not that that they are the *only* remedies available. Finally, the green-light theory played only a limited role in the ultimate outcome of this case. Indeed, for instance, if it had been successfully argued that the loan had been *Wednesbury* unreasonable or that the applicant had suffered tangible harm (even if not special damage), perhaps the applicant may have been granted standing by the court's discretion or the Attorney-General may have been willing to commence an *ex relatione* action.

[44] *Digest of Justinian*, 43.8.2.2 (trans. Watson, 2009): "For public places serve both public and private uses... and we have as much right to enjoy them as anyone of the people has to prevent their misuse... if any work should be undertaken in a public place *that causes private damage*, suit may be brought..." (emphasis added).
[45] *Ibid*, 47.12.3.pr (trans. Watson, 2009): "Where it be said that a tomb has been violated by someone's evil design... [and] *[i]f there be no such person [who is affected] or if he does not wish to sue*, I will give an action... to anyone who does wish to take action" (emphasis added). See also generally Buckland, *A Text-Book of Roman Law*, 3rd ed (Cambridge University Press, 2007), 694-5.
[46] *Jeyaretnam*, [61].
[47] *Jeyaretnam*, [64].
[48] [2013] 4 SLR 1, [43].
[49] *Supra* n 4, [29].
[50] *Supra* n 4, [14].