

Updating and rectifying the Constitution: *Wong Souk Yee v Attorney-General*

I. Introduction

1 The High Court in the recent matter of *Wong Souk Yee v Attorney-General*¹ introduced techniques of statutory interpretation heretofore absent from Singapore constitutional law. In interpreting Article 49(1) of the Constitution of the Republic of Singapore² (“**the Constitution**”), Chua Lee Ming J (“**Chua J**”), faced with a seemingly conflicting provision in s 24(2A) of the Parliamentary Elections Act³ (“**PEA**”), had recourse to an updating construction and a rectifying construction of Article 49(1). This case note briefly analyses the judgment and explores some fundamental issues arising from employing these two methods of statutory interpretation on constitutional provisions.

II. Summary of facts

2 Madam Halimah Yacob, a Member of Parliament (“MP”) of the Marsiling-Yew Tee Group Representation Constituency (“GRC”), had resigned her seat in Parliament to stand as a candidate in the 2017 Presidential Election, leaving three remaining MPs to represent the GRC in her absence.⁴

3 Under Article 49(1) of the Constitution, when an MP’s seat becomes vacant for any reason other than a dissolution of Parliament, the vacancy must be filled by election.⁵ However, s 24(2A) of the PEA⁶ states that in the case of a GRC,⁷ no election to fill any vacancy can be called unless all the MPs for that GRC have vacated their seats in Parliament.

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¹ *Wong Souk Yee v Attorney-General* [2018] SGHC 80 (“*Wong Souk Yee*”).

² Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint) Art 49(1).

³ Parliamentary Elections Act (Cap 218, 2011 Rev Ed) s 24(2A).

⁴ *Supra* n 1, at [1]–[2].

⁵ *Supra* n 2.

⁶ *Supra* n 3.

⁷ As opposed to a Single Member Constituency (“SMC”).

4 The Applicant, who was a voter in the Marsiling-Yew Tee GRC and also a resident of Madam Halimah’s former ward, argued that for s 24(2A) of the PEA⁸ to be consistent with the Constitution, the former should be interpreted as requiring all remaining MPs of a GRC to vacate their seats when one or more MPs of the GRC vacate their seats.⁹ This argument was rejected by Chua J, who held that the words “the seat of a Member” in Article 49(1)¹⁰ must be interpreted to mean “the seats of all the Members” in the case of a GRC via an updating construction,¹¹ or by adding language similar to that in s 24(2A) of the PEA¹² to Article 49(1) via a rectifying construction.¹³

III. Analysis

A. *Updating construction*

5 An updating construction is based on the “presumption that the Legislature intends the court to apply to an ongoing statute a construction that continuously updates its wording to allow for changes since the statute was initially framed”.¹⁴ It can apply between two statutes or to provisions within the same piece of legislation.¹⁵ Although not addressed in the judgment, it is likely that the presence of Article 4,¹⁶ which asserts the supremacy of the Constitution, would rebut such a presumption where the conflict is between the Constitution and an ordinary Act.¹⁷

6 A three-stage analytical framework is used in determining whether an updating construction should be applied:¹⁸

a) First, the court ascertains the nature of the amendment effected in the first statute.

⁸ *Supra* n 3.

⁹ *Supra* n 2.

¹⁰ *Ibid.*

¹¹ *Supra* n 1, at [38].

¹² *Supra* n 3.

¹³ *Supra* n 1, at [41].

¹⁴ *Comptroller of Income Tax v MT* [2006] 3 SLR(R) 688 at [44], cited in *Wong Souk Yee, supra* n 1, at [28].

¹⁵ *Supra* n 1, at [30].

¹⁶ *Supra* n 2, Art 4.

¹⁷ See *Wong Souk Yee, supra* n 1, at [43].

¹⁸ *Id.*, at [29] and [33].

- b) Second, the court considers whether the amendment to the first statute gives rise to any ambiguity or uncertainty in the interpretation and application of the second statute as it stands, by reason of which, or for some other reason, there is potentially a need to apply an updating construction to the second statute. If the answer is in the negative, the inquiry should end there. If, however, the answer is in the affirmative, the court moves to the third stage.
- c) Finally, it considers whether in the circumstances an updating construction ought to be applied and, if so, how. The court will have regard to the objects of the second statute, how it has hitherto been applied, how the draftsman has chosen to frame the linkage between the two, and whether an updating construction would entail such a substantive change to its operation that it would be best left to the Legislature.

7 Whilst the first and second stages are relatively straightforward, the third stage is more contentious in application. The court is required to consider “whether an updating construction would entail such a substantive change to [the provision’s] operation that it would be best left to the Legislature”.¹⁹

8 Chua J’s judgment seemed to suggest that as long as the amendment “gives effect to the intent and will of the Legislature”, the third stage will be satisfied.²⁰ However, it is possible that even though the proposed change gives effect to the intention of Parliament, it may nonetheless be such a substantive change that its details ought to be worked out by the Legislature. This may cover, for example, complex financial provisions where the court lacks the requisite institutional competence to deal with. It is thus respectfully submitted that Chua J should have explained why the change did not entail such a substantive change to the operation of Art 49(1) so as to better justify the court’s decision for applying updating construction. However, since this is the first time that Art 49(1) is applied in a GRC situation, it could be said that there was no

¹⁹ *Id*, at [29].

²⁰ *Id*, [36].

“change” in terms of the operation of Art 49(1). Chua J is thus justified to that extent of not addressing this issue in the present judgment.

B. Rectifying construction

9 A rectifying construction is based on the presumption “that the Legislature intends the court to apply a construction which rectifies any error in the drafting of a statute where it is required in order to give effect to the Legislature’s intention”.²¹ There are three conditions that need to be satisfied before a rectifying construction can be applied.²²

10 First, it is possible to determine the mischief that Parliament sought to remedy with the Act, from a consideration of the provisions of the Act read as a whole.

11 Second, it is apparent that the draftsman and Parliament had inadvertently overlooked, and so omitted to deal with, “the eventuality that is required to be dealt with so that the purpose of the Act can be achieved”.

12 Third, it is possible to state with certainty what the additional words would be that the draftsman would have inserted, and that Parliament would have approved had their attention been drawn to the omission.

13 With respect to the third requirement, Chua J held that “it is clear that if Parliament’s attention had been drawn to the omission, it would have approved the addition in Article 49(1) of language similar to that in s 24(2A) of the PEA”.²³ It is submitted that this holding could be problematic – while an ordinary majority of all Members of Parliament is needed to pass an ordinary Act, a two-thirds majority is required for amendments to the Constitution.²⁴ Thus, the mere passing of an ordinary Act would not ipso facto mean that Parliament would have approved a corresponding Constitutional amendment.

²¹ *Id.*, at [39].

²² *Id.*, at [40].

²³ *Id.*, at [41].

²⁴ *Supra* n 2, Art 5(2).

- 14 It is thus submitted that the court should not have held, without further elaboration, that Parliament would have approved of the amendment to Article 49(1). It is understandable that given the make-up of the Singapore Parliament, Parliament's approval would likely have been obtained for an amendment to Article 49(1)²⁵ based on s 24(2A) of the PEA.²⁶ Nonetheless, it is not difficult to imagine a situation where no dominant political party in Parliament holds more than two-thirds of the total number of seats, thus rendering the passing of a constitutional amendment more challenging. The court's role is not that of a political analyst and it cannot be assumed that the Singapore Parliament will always be able to pass a constitutional amendment that aligns with related provisions in an ordinary Act.
- 15 Therefore, it is submitted that in determining whether Parliament would have approved of a constitutional amendment, the courts should, at the bare minimum, look to the number of MPs who voted in favour of the ordinary Act. If the number is for instance a bare majority, more explanation would be needed as to why Parliament "would have approved" the corresponding constitutional amendment.

IV. Conclusion

- 16 Whilst it may be important to give the Constitution a purposive interpretation that gives effect to the intent and will of Parliament, it is submitted that the court should not lose sight of the fundamental characteristics of the Constitution which separates it from ordinary legislation. In applying techniques of statutory interpretation where the Constitution is concerned, regard must be had, in particular, to the requisite majority needed to pass constitutional amendments. For instance, in the context of a rectifying construction, the intention of Parliament must be analysed with reference to the quantum of approval received, as this gives effect to Article 5 of the Constitution. As long as the need to apply a more nuanced approach is observed, there is no objection

²⁵ *Supra* n 2, Art 49(1).

²⁶ *Supra* n 2.

per se to applying the purposive interpretation techniques as discussed in this case note where the Constitution and an ordinary Act are concerned.