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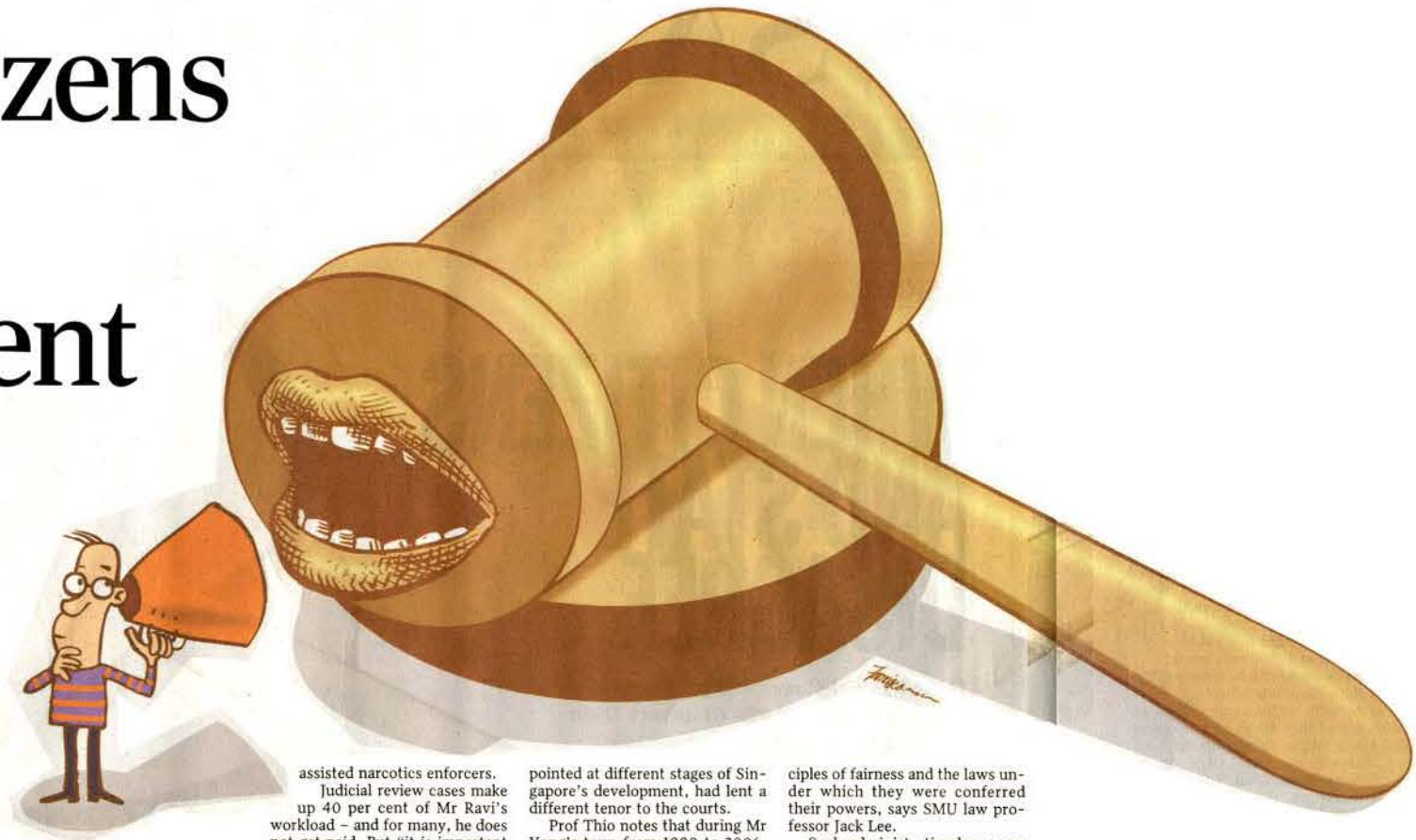

More people seem ready to consider filing judicial reviews about decisions by the public authorities, on issues that range from unfair dismissal to a coroner's call to the Prime Minister's discretion on calling by-elections

By THAM YUEN-C

IF NOT for Senior Counsel Michael Hwang's reticence in challenging the authorities, Singaporeans might have enjoyed karaoke earlier, in 1983.

Then, the only karaoke lounges here were private clubs run by Japanese for Japanese. But a friend of Mr Hwang – Mr Terry Ng – thought they were a great idea and put a karaoke machine in his teppanyaki restaurant Steakery Matsuzaka in Hotel Negara, now the Pan Pacific Orchard.

But the police came knocking, asking him to apply for a public entertainment licence. He did, and the application was denied.

Among the reasons given was that under the licensing rules then, people who went to a public place to be entertained should not be entertaining themselves. Plus Singaporeans should also not indulge in the habit.

Mr Ng appealed to the Home Affairs Minister, and when that failed, he was forced to remove his karaoke machine. Karaoke was finally okayed here in 1986.

Mr Hwang has spoken of his regret in not challenging the decision through a judicial review.

A judicial review is where a law or decision by a public authority – in this case, the police – is reviewed by the courts. Here, it is the High Court. This process is regarded as a check on state and legislative power (see side story).

On why he did not take a stand, the former Law Society president has said: "It takes a certain amount of courage, both on the part of client as well as lawyer, to sue the Government."

Former political detainee Teo Soh Lung echoes this. She and three others were held without trial in 1987 under the Internal Security Act (ISA), accused of being involved in a Marxist conspiracy to overthrow the Government.

They sought a judicial review, and succeeded in overturning the Home Affairs Minister's order to detain them without trial, but were re-arrested (see side bar).

Ms Teo says of that judicial review bid: "It is only when people are driven to desperation that they will go to the court to seek assistance to be freed."

But several years later, the situation has changed, with more turning to the legal process to seek redress. Insight reports on the rise in the number of such suits and what it says about citizens, the judiciary and the Government.

Citizens assert their rights

APPREHENSION over going head to head with the Government is not so evident now.

The number of applications for courts to review decisions or laws that individuals or organisations did not agree with has gone up slightly over the years.

Official statistics, available for only the last five years, show that applications for such reviews have gone from 10 in 2009 to 12 last year. But not all cases go all the way, as those deemed to have no merit are thrown out.

The most recent ones to hit the headlines were lodged by the Faith Community Baptist Church over the Acting Manpower Minister's order for it to compensate a pregnant church employee sacked for committing adultery, and alleged "Anonymous" hacker James Raj Arokiasamy, who asked the courts to declare it unconstitutional that he was not allowed to see his lawyer after his arrest.

The number of judicial review cases the Supreme Court – made up of the High Court and Court of Appeal – has heard grew from 13 in the 1970s to 20 in the 1980s. It then fell to 14 in the 1990s and went up again to 16 in the 2000s.

While official statistics are not available from 2010 onwards, lawyers and legal scholars note that the courts are hearing more such cases compared to before. A check on the electronic legal database found that the courts had issued at least 21 judicial review decisions from 2010 to last year.

These cases reflect citizens' greater understanding of their rights, says Singapore Management University (SMU) law don Eugene Tan, and also more desire to assert those rights.

This has tilted the balance in recent years towards judicial review cases with a constitutional dimension, where those who go to court do so over alleged transgression of their constitutional rights. The Constitution is the highest law of the land.

The other type of judicial review cases are disputes to do with administrative actions or decisions of public servants.

One recent case of individuals petitioning for "rights" to be recognised in a constitutional challenge is that of gay couple Gary Lim and Kenneth Chee. They brought a suit claiming that Section 377A of the Penal Code – which outlaws homosexual acts – violates their rights to equal treatment under Article 12 of the Constitution.

The High Court declared the law constitutional, with Justice Quentin Low ruling "equality before the law and equal protection of the law... does not mean that all persons are to be treated equally, but that all persons in like situations are to be treated alike". The couple are appealing.

This increase in rights awareness comes at a time when more lawyers are also willing to take on such cases.

"The culture is growing that there need be no fear in challenging an agency if there is a feeling of unjustness and unfairness or disproportionality," says Mr Hwang, who has gone on to handle three such cases himself.

Lawyer Tan Chau Yee, who in 2004 represented a cop unfairly dismissed by the police force, affirms this: "I never thought about the fact that I was taking on the Government; it didn't come across that way. And I don't think I was persecuted after that."

One lawyer's name has become synonymous with judicial reviews – Mr M. Ravi, a self-described advocate for human rights. In the past five years, he filed 11 applications, he says.

A high-profile case in which he filed for a judicial review was when he attempted to help condemned drug trafficker Yong Vui Kong delay his execution through a series of court challenges.

Mr Ravi applied for judicial review of clemency proceedings in July 2010, arguing that the President had personal discretion in deciding whether to grant clemency to death-row convicts. The High Court and later the Court of Appeal disagreed.

While these challenges failed, they delayed Yong's execution long enough for him to benefit from changes to Singapore's death penalty laws last year. He became the first condemned drug trafficker to be re-sentenced to life in prison and caning, under the new laws that give judges the discretion not to hang drug couriers who have substantively assisted narcotics enforcers.

Judicial review cases make up 40 per cent of Mr Ravi's workload – and for many, he does not get paid. But "it is important for democracy", he says.

He notes that many lawyers shy away from such cases: "You're pitting (yourself) against the state, which has a huge amount of resources. It's like David and Goliath."

Mr Hwang encourages lawyers to take on such cases, saying they should see it as a way of "overcoming unfair and plainly wrong administrative decisions".

Changing approach

ON THE part of the judiciary – the judges and courts – there is also a rebalancing going on which could have encouraged more to think about judicial reviews.

National University of Singapore (NUS) law professor Thio Li-ann ties this to former chief justice Chan Sek Keong's watch from 2006 to 2012, when the judiciary moved from a model where the interests of the state tended to trump other considerations, to a more "communitarian" model giving more weight to individual rights in the balancing process.

Mr Chan had given a hint of things to come when, during his welcome speech in 2006, he said: "The fair administration of justice must ultimately trump court efficiency and convenience, where the two are in direct conflict."

This was a different approach from previous courts. Constitutional scholars said judgments issued in the 1990s – under the tenure of Mr Chan's predecessor, chief justice Yong Pung How – had tended to put a bigger premium on efficiency, indicating the courts' leanings.

The chief justices, who were appointed at different stages of Singapore's development, had lent a different tenor to the courts.

Prof Thio notes that during Mr Yong's term from 1990 to 2006, the focus was "primarily on considerations of efficiency and clearing the backlog in cases", but during Mr Chan's term, "there was an added concern with intrinsic values like fairness and basic constitutional principles".

"In the past, it would seem that the courts took a simplistic, 'no, cannot review' (approach) over some decisions," she says. "Nowadays, when it comes to certain executive powers, it is clear that the courts will review to some extent."

In their decisions, judges are also more willing to give remarks that are not necessary to reach a decision but illustrate their thinking about how certain laws should be read.

This dialogue "between the state and the judiciary" has meant that written judgments have grown longer.

Before refuting Yong's case on the President's clemency powers, for example, the court undertook an excursion of the law in jurisdictions from Australia to the Caribbean states.

NUS law professor Cheah Wui Ling says judgments are twice as long now at more than 100 pages, compared with the 1990s.

It is the result of courts putting more emphasis on explaining constitutional principles, and could serve as a "useful guide" for those looking to bring future claims, she adds.

Besides clarifying the Constitution, judicial review of administrative decisions can also promote good governance.

These are cases where the courts review the exercise of power by public servants against principles of fairness and the laws under which they were conferred their powers, says SMU law professor Jack Lee.

Such administrative law cases are the bread-and-butter of judicial review, and make up the bulk heard over the years.

A recent challenge was launched by the mother of Dinesh Raman Chinnaiah, a prisoner who was found dead in his cell after being subdued for attacking a guard. The court found that the coroner had not acted "illegally, improperly or irrationally" in ending the inquiry into his cause of death, which had been ascertained in a criminal case against a prison officer.

Over the years, the public authorities have not lost many cases. The Attorney-General's Chambers (AGC) chief counsel David Chong, who heads the civil division, says: "Cases rarely succeed. Many of them were wholly without merit, where the applicants fail even at the leave stage."

The courts grant leave, or permission, for a judicial review case to be heard, taking into consideration factors like whether the case is potentially arguable.

From 1957 to 2009, applicants succeeded in getting a judgment against the public authorities in 22 out of 79 cases.

Government's strict checks

CYNICS may see this as the courts ignoring apparent governmental transgressions, and the judiciary being submissive to the executive, said Mr Chan, the former chief justice, in a 2010 speech on judicial review.

"(But) a simpler explanation would be that judicial review applications, like all other disputes in court, are decided on their legal merits," he said.

Indeed, asked in an interview about how an increase in judicial review cases would affect the Government's work, Law Minister K. Shanmugam said: "As a minister, does it impact me? No. I carry on as per usual, as I have always been aware that legislation and action can be challenged and we have put in a system that seeks to minimise that by making sure that, in the first place, we don't contravene."

He added that the Government has never tried to censor such actions, as "(judicial review) is a right that everyone has".

The Singapore Government's approach is to try its best to ensure it does not fall foul of the law in the first place.

The AGC and the Ministry of Law take care of this. Both agencies comb through all laws before they are passed, to make sure they are constitutional.

Says the AGC: "The consequence of this multiple layer of checks for constitutionality is that legislation has been looked at several times, well before it goes to Parliament – and it is looked at from different angles. This is different from the practice in many other countries."

The decisions and actions of statutory boards, ministries and ministers are also vetted by legal counsel.

Mr Chan, in his 2010 speech, had also said that the administrative actions, by-laws and rules in other countries may not always be cleared through their AGCs, which could explain the larger number of challenges in those countries.

Taken in the context of Singapore's socio-political climate, the growth in judicial review cases could be more a sign of trust in the integrity of the courts, than distrust in the Government. PHOTO: LIM YAOHUI FOR THE STRAITS TIMES

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What is judicial review?

WHAT IS IT?
A review of the acts and decisions of public authorities, by the judiciary – judges and courts of law. In Singapore, this is the High Court and can involve the Court of Appeal.

The court reviews if the acts or decisions are lawful.

The purpose of judicial review is to ensure that public authorities do not overstep or abuse their powers.

WHO IS SUBJECT TO IT?
Decisions of the Government and its agencies – ministries, ministers and statutory boards – can be challenged through this process. In Singapore, private bodies that exercise public law functions, such as the Singapore Exchange, can also be subject to such review.

WHO CAN LAUNCH A REVIEW?
Not just anyone can launch a challenge – a person must have what is termed "standing".

That means they must be personally affected by the decision being challenged and deemed to have a sufficient interest in it.

WHAT HAPPENS DURING A JUDICIAL REVIEW?
The courts have to grant leave for the review to be heard. If leave is not granted – for example, if there are no grounds for review – the case will be thrown out.

Once a review is allowed, the decision can be challenged on three grounds:

1. It was illegal. Such cases are typically those in which the public authority is alleged to have acted beyond the powers granted by the law, or misunderstood the law.

2. It was irrational – the decision is so unreasonable no sensible authority could have arrived at it.

3. Procedural impropriety – a decision is procedurally unfair.

In a judicial review, the court is not concerned with the merits of a decision, but with how a decision was made and whether the right procedures have been followed.

WHAT HAPPENS NEXT?
When a challenge is successful, the courts can stop a decision if it has not been made, or quash it if it has been. They can also compel the public authority to re-do what it did, this time without contravening the laws, or award compensation.

The court can also make a declaration on the legal position of both parties – more common in constitutional challenges.

THAM YUEN-C

Famous cases in judicial review

Chng Suan Tze v Minister for Home Affairs, 1988

This was a landmark case because the courts held that they had the right to check if a government authority has exercised its power correctly, including the government's discretion to hold people without trial under the Internal Security Act. It resulted in a change to the ISA and the Constitution to limit the court's power in reviewing this discretionary power of detention.

■ **The case:** In 1987, several people were detained under the ISA, accused of being part of a Marxist conspiracy to subvert the social and political system.

The ISA provided that the Home Affairs Minister could order them detained without trial if the President was satisfied they were a threat to national security.

Four of those arrested – Chng Suan Tze, Teo Soh Lung, Kevin Desmond de Souza and Wong Souk Yee – turned to the courts which ordered them released on a technicality: there was inadequate proof that the President had given his assent, as some papers were not signed.

However, they were re-arrested after the ministry produced the required documentation.

■ **Famous judgment:** "All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power" – then Chief Justice Wee Chong Jin in the judgment.

■ **What was the effect:** Parliament amended the ISA and the Constitution, stipulating, among other things, that judicial review of the ISA was limited to questions of procedural compliance.

However, the principle from the court – of the judiciary's power to review the exercise of governmental actions – remains current today.

Tan Eng Hong v Attorney-General, 2012

The Court of Appeal ruled that Mr Tan Eng Hong could challenge the constitutionality of Section 377A of the Penal Code, which criminalises sex acts between men, based on an "arguable violation of his constitutional rights". Although this case involved only Mr Tan, this ruling paved the way for future challenges by other gay men against the law.

■ **The case:** Mr Tan was arrested in 2010 for performing fellatio on another man in a public toilet, and was charged under Section 377A.

As part of his defence, his lawyer asked for a judicial review of the law, contending that the charge against his client under Section 377A should be voided, since the law itself was unconstitutional.

A few months after this, the prosecution substituted the charge against Mr Tan with one under Section 294(a) of the Penal Code – committing an obscene act in a public place.

The constitutional challenge against 377A was then struck out.

But his lawyer said the case should be heard as the very existence of the law means gay men face the possible threat of prosecution. The Court of Appeal agreed with him.

The High Court later heard the case, but held that Section 377A was constitutional.

■ **What was the effect:** Following this judgment, gay couple Gary Lim and Kenneth Chee mounted a challenge against Section 377A of the Penal Code, on the premise that their rights were violated as long as the law was around, and even if they were not charged under it.

THAM YUEN-C

The AGC notes that Singapore is also different from other countries because there are institutions, other than the courts, that provide protection for the rule of law here.

Some examples are that of the President, who has oversight over decisions concerning the use of public reserves, and the Presidential Council of Minority Rights that checks all legislation to ensure there is no discrimination against minorities.

"These institutions often act even before the legislation comes into force – so there is a process of prior checking," the AGC says.

In judicial review cases, it is often important to look beyond who won, to what else the court said in its judgments, which signal the courts' views of the laws the Government must comply with.

A paradigm example is the case involving Madam Vellama Marie Muthu, who argued that the Prime Minister had to call a by-election to fill the vacated parliamentary seat in Hougang after her MP was sacked over a scandal in 2012. While her case became moot because a by-election was called while the case was on appeal, the Court of Appeal made it clear in its judgment that the Prime Minister's power to call by-elections was not "unfettered".

Compared with other common law jurisdictions such as Hong Kong and Britain, the courts in Singapore hear significantly fewer judicial review cases.

Yet, there is the niggling question of whether allowing more judicial reviews could unwittingly open the floodgates.

The British government last year introduced reforms that made it harder for judicial review cases to be brought to court, saying that judicial reviews were impeding the work of ministers and slowing down economic growth.

Applications for judicial review in Britain soared from 160 in 1975 to 11,200 in 2011.

But over here, things still seem manageable. In that same year, 2011, against Britain's big numbers, and Hong Kong's 110 applications, there were nine applications for judicial review here.

In Singapore, safeguards also exist against frivolous challenges, say academics, so courts do not get clogged. For example, the courts will allow judicial reviews to be lodged only by those with "standing" – having sufficient interest to challenge the decision or law. In this way, "busybodies" are kept out, says SMU's Prof Tan.

"The courts have been careful to ensure that those given permission to seek judicial review are bona fide parties," he says.

Interest groups and activists, for example, may not be able to mount a challenge if they do not have direct interests.

The Court of Appeal said as much when it threw out a challenge brought by Reform Party chief Kenneth Jeyaretnam, who sought to block a US$4 billion (S$5 billion) loan from the Singapore Government to the International Monetary Fund.

The court had found that he did not have the standing to challenge the decision, as he did not have any public or private rights to protect. Mr Jeyaretnam was also ordered to pay legal costs.

Hitting the losing party in the wallet is another way to prevent challenges that lack merit.

The AGC told Insight it will seek costs where it succeeds in striking out or defeating a claim.

"Defending judicial review applications and constitutional challenges consumes resources and time. Those contemplating pursuing judicial review actions or constitutional challenges must realise that if they lose, they will be expected to pay the Government's legal costs," says Mr Chong.

Positive sign

WITH more judicial review cases, might it become a new norm for people to question the actions of the Government in court?

Mr Ravi certainly thinks so. These days, he gets more inquiries from people wanting him to represent them in such cases compared with a few years ago.

Prof Lee says more people could, indeed, be encouraged to seek judicial review when they see nothing untoward happening to those who do.

With judges providing more explanations in their judgments, individuals will also have a better idea of the limits of governmental powers, says Prof Cheah, adding that it could embolden more to bring actions against the public authorities.

Taken in the context of Singapore's socio-political climate, the growth in such cases could be more a sign of trust in the integrity of the courts, than distrust in the Government.

Judicial review is, after all, a part of a healthy democracy that abides by the rule of law.

"It is an interplay between rule of law and separation of power, autonomy versus accountability," says Prof Thio. "There is always a tension between these two things."

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