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HOUGANG BY-ELECTION CASE

What court decision on by-election reveals

JACK LEE TSEN-TA

The Court of Appeal's judgment of July 5 in Vellama Marie Muthu vs Attorney-General — popularly known as the Hougang by-election case — shows that the Court sees its role as policing the margins rather than involving itself in the heart of politics.

The decision came as a surprise to those used to a judicial stance that is fairly deferential towards the Government. It is one of only a handful of cases in which the courts have not accepted the Government's interpretation of the Constitution.

In this context, deference does not imply any bias in favour of the Government. Rather, it suggests it is appropriate for judges to assume that the Government is better placed than they are to make certain types of decisions, such as those involving national security or complex policy issues. Courts in various Commonwealth jurisdictions have accepted this principle.

It may be that a court should not be too quick to act deferentially when a person asserts that his or her fundamental liberties have been infringed, but that is a discussion for another day.

The applicant, Madam Vellama, a Hougang resident, complained of not having an MP to assist with her problems when it initially appeared that the Prime Minister might not call a by-election. She did not claim that any of the fundamental liberties guaranteed to her by the Constitution had been infringed.

Rather, the Hougang by-election case centred around the correct interpretation of Article 49(1) of the Constitution, which states: "Whenever the seat of a Member, not being a non-constituency Member, has become vacant for any reason other than a dissolution of Parliament [a 'casual vacancy'], 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."

● Jack Lee Tsen-Ta is an assistant professor of law who teaches and researches administrative and constitutional law at the Singapore Management University. While he was consulted on a pro bono basis by counsel for the applicants in both the Vellama and Jeyaretnam cases, the views expressed here are his own.

FINAL ARBITER

Since the 1980s, the Government has asserted that this provision confers on it the discretion not to hold a by-election at all after a parliamentary seat falls vacant. The Court held that this interpretation was incorrect.

● CONTINUED ON PAGE 18

What court decision on by-election reveals

● CONTINUED FROM PAGE 16

In reaching this result, the Court reinforced the fact that it alone — and not the Government or Parliament — is the final arbiter of the Constitution's meaning.

The High Court had held that the phrase "shall be filled by election" meant only that a casual vacancy had to be filled by means of an election, not that the Government was actually bound to hold a by-election.

Disagreeing, the Court of Appeal said the phrase meant both that the vacancy had to be filled, and it had to be filled through an election. However, it would not be necessary to call a by-election if a dissolution of Parliament was imminent.

The Court emphasised two things.

First, the rule of law requires all discretionary power to be subject to legal limits, which makes it doubtful that the Constitution confers unfettered discretion on the Government to decide whether or not to call a by-election.

Secondly, since an MP is the "voice of his constituents", they would be left without proper parliamentary representation if a casual vacancy is left unfilled for an unnecessarily long time.

FAIR AMOUNT OF LEEWAY

However, on balance, the Court did accord significant deference towards the Government. It noted that whether a by-election should be held is "a polycentric matter that would involve considerations which go well beyond mere practicality".

For instance, it might be appropriate to delay a poll if the country is hit by SARS or haze.

Therefore, since the matter is so "fact-sensitive", it will only be in "exceptional cases" that the judges will find that the Government has unreasonably delayed the calling of by-elections. The Prime Minister has a fair amount of leeway in making such decisions.

Furthermore, although the Court ruled in Madam Vellama's favour on the substantive issue, it actually dismissed her appeal on the ground that she lacked standing to have the case heard.

By the time the matter came before the Court of Appeal, the Hougang by-election had already taken place. Thus, she no longer had any personal interest in the issue raised. The fact that it might become relevant again in the future was not enough to establish that she had sufficient interest in the matter at this time.

> A contrary decision would mean that actions of the Government which do not directly affect an individual's personal interests will be incapable of being challenged before the courts by ordinary citizens, even though they possibly infringe the Constitution.

If the applicant possessed standing in the present scenario, the Court reasoned, this would lead to the courts being flooded with legal actions brought by "mere busybodies and social gadflies, to the detriment of good public administration".

Thus, the Court was reluctant to set a precedent that would potentially require the Government to defend more court cases, diverting time and resources away from the day-to-day governance of the nation.

Whether a more liberal approach towards standing would indeed have this consequence remains an open question.

In any case, the Court's ruling at this point makes it harder for applicants to raise constitutional issues for the courts' consideration if the factual basis for the issues has dissipated, even though resolving the issues would provide guidance to the Government and the public.

ANOTHER CASE AWAITING JUDGMENT

Significantly, the Court stated it was not expressing any view on whether its remarks on standing were relevant to "applications founded purely on the breach of public duties which do not generate correlative public or private rights".

This seems to point to the case brought late last year by opposition politician Kenneth Jeyaretnam, who alleged that the Government had contravened the Constitution when it offered a contingent loan of US$4 billion to the International Monetary Fund without first seeking the approval of Parliament and the President.

Unlike Madam Vellama, Mr Jeyaretnam had at no time asserted that the transaction had affected any direct personal right or interest of his. Rather, he had brought the case on behalf of all citizens who wished to ensure that the Government acts lawfully.

That matter was heard by the Court of Appeal in April, and we are still awaiting its judgment. The Court may possibly decide that Mr Jeyaretnam did have standing to bring his case as he did so for different reasons than Madam Vellama.

A contrary decision would mean that actions of the Government which do not directly affect an individual's personal interests will be incapable of being challenged before the courts by ordinary citizens, even though they might possibly infringe the Constitution.

Such matters will then have to be resolved in the political, rather than judicial, arena.

If the Hougang by-election judgment is anything to go by, this is precisely the Court of Appeal's view.