

By-elections for single vacancies in GRCs:
Wong Souk Yee v Attorney-General [2019] SGCA 25

I. Executive summary

In Singapore, there are two types of electoral divisions – Single Member Constituencies (“SMCs”) and Group Representation Constituencies (“GRCs”). The number of seats in a GRC varies from 4 to 6 seats. The GRC scheme was introduced in 1988 with the goal of promoting greater minority representation. As such, each GRC must have at least one Member of Parliament (“MP”) from a minority racial group. In *Wong Souk Yee v AG* [2019] SGCA 25, the Court of Appeal (“CA”) addressed the question of whether a by-election for *all* the seats of the GRC is required when only *one* MP vacates his or her seat in the GRC. The CA held that a by-election is not required under such circumstances.

The appellant Dr Wong Souk Yee (“**Dr Wong**”) was a resident of Marsiling-Yew Tee GRC (“**MYT GRC**”) and a member of the Singapore Democratic Party. In the general election held in September 2015, she, along with three other individuals, contested the MYT GRC under the Singapore Democratic Party’s banner. However, a team from the People’s Action Party, including Mdm Halimah Yacob (“**Mdm Halimah**”), eventually won that contest. Mdm Halimah was the only minority community candidate of that team. Then on 7 August 2017, Mdm Halimah resigned her seat as a Member for MYT GRC, to stand for the 2017 Presidential Election. No by-election was called, and MYT GRC continued to be represented by the remaining Members of the People’s Action Party team which won that constituency.

Dr Wong then filed a lawsuit seeking, among other things, a mandatory order that the three remaining Members of the MYT GRC vacate their seats, and that a by-election then be held for the GRC. The High Court (“**HC**”) declined to award such an order.

On appeal, the CA found that the key question was the interpretation of Article 49(1) of the Singapore Constitution (1985 Rev Ed, 1999 Reprint) (the “**Constitution**”). Article 49(1) states, essentially, that a vacant “seat of a Member” shall be filled by election. The CA held that:

- the words “seat of a Member” referred only to the seat of an SMC Member (and not a GRC Member); and
- requiring the remaining Members of a GRC to vacate their seats in such an event was contrary to Parliament’s intention in implementing the GRC scheme. Parliament intended that there would be no requirement to call a by-election where only one Member of a GRC vacated his or her seat, even if such member was from a minority racial group.

As such the CA concluded there was no duty for the Government to call a by-election when only one Member of a GRC vacated his or her seat.

II. Issues on appeal

The GRC scheme was introduced in 1988 through certain amendments to both the Constitution and the Parliamentary Elections Act (Cap 218, 1985 Rev Ed). The key amendment was the insertion of *Article 39A* into the Constitution, which provides for the designation of constituencies as GRCs. *Article 49*, which until then had only ever applied to SMCs, was not amended. The substantive issues on appeal related to these two provisions:¹

¹ The CA also addressed two procedural issues (concerning whether leave for judicial review should have been granted by the HC, and whether the HC erred in ordering costs against Dr Wong). However, that discussion did not affect the substantive issues discussed.

- (a) Whether Article 49(1) mandated that a by-election be called in MYT GRC;
- (b) Whether Article 39A required that a vacancy left by a minority Member of a GRC (other than through the dissolution of Parliament) must be filled by a by-election; and
- (c) Whether Dr Wong was entitled to an order for a by-election to be called in MYT GRC, due to voters' implied right to representation in Parliament.

A. Article 49(1)

The CA held that Article 49(1) did not mandate a by-election in MYT GRC, as the most appropriate interpretation was that the words “seat of a Member” did not apply to seats in a GRC.

Article 49(1) states that a vacant “seat of a Member” shall be filled by election. The CA highlighted the three possible interpretations of this, as raised by the parties:

- (1) the vacancy, *as and when it arises*, shall be filled by a by-election for all the seats in the GRC (“**Interpretation 1**”, by Dr Wong);
- (2) the vacancy shall *only* be filled by a by-election *if and when all* the seats in the GRC have been *vacated* (“**Interpretation 2**”, by the Attorney General (“AG”)); or
- (3) the “seat of a Member” refers only to the seat of a Member of an SMC, and Article 49(1) *does not apply* to seats in a GRC at all (“**Interpretation 3**”, also by the AG).

The CA further noted that when Article 49(1) was enacted, SMCs were the only type of parliamentary constituency that existed.

(a) Principles of interpretation

The CA first stated how Article 49(1) (and other Constitutional provisions) were to be interpreted. The principles of constitutional interpretation required the courts to use the “purposive approach”. This meant that:

- First, the courts must determine the interpretation of a Constitutional provision by looking not only at its *words*, but also its *context* within the Constitution as a whole;
- Second, the courts must determine the *purpose* of both the provision and the part of the Constitution where such provision is placed;
- Third, the courts must *compare* the possible interpretations of the provision (under the first step) against its purpose (under the second step). The court should choose the interpretation which *furtheres the purpose of the text*.
- Finally, the courts must consider if it is necessary to consider *extraneous material* (i.e. material other than the Constitution). Where the meaning of the provision appears *ambiguous* or obscure, external materials could be used to ascertain its meaning.²

Applying the above principles, the CA found that Article 49(1) was indeed ambiguous on its face, in relation to where and how it applied to GRCs. As such, materials other than the Constitution could be used to interpret the meaning of the provision.

(i) Ambiguity

The CA found Article 49(1) to be ambiguous in relation to whether and how it applied to GRCs, especially when read together with Articles 39A and 46 of the Constitution.

First, it acknowledged that the words of Article 49(1) were wide enough to include the seats of

² In general, extraneous (or external) material may only be used to help interpret a provision: (a) where the ordinary meaning of the provision (in light of its context and purpose) is clear, to confirm its ordinary meaning but not to alter such meaning; (b) where the provision appears ambiguous or obscure, to ascertain its meaning; and (c) where the ordinary meaning of the provision (in light of its context and purpose) leads to a result which is manifestly absurd or unreasonable, also to ascertain its meaning.

GRC Members, as the phrase “seat of a Member” did not distinguish between the seats of SMC and GRC members. This suggested that the provision could be intended to apply to seats in a GRC. However, the “vacancy” in Article 49(1) referred only to the vacancy left in “the seat of a Member” – i.e. it presupposed the existence of a vacancy *in a particular seat* before a by-election had to be called for that seat. Article 39A(1)(a) also stated that GRC elections must be held “on the basis of a group.” Read together, Articles 49(1) and 39A(1)(a) suggested that a by-election in a GRC could only be conducted if *all the Members* of that GRC (and not just one Member) had vacated their seats. However, neither Article 49(1) or 39A(1)(a) expressly provided for the other Members of the GRC to also vacate their seats in a situation where only one Member of the GRC vacated his or her seat.

Second, Article 46 exhaustively set out the circumstances in which Members were to vacate their seats, yet *none* of these pertained to the situation where one Member of a GRC vacated his or her seat. Thus it appeared that Article 46, too, did not contemplate that all the seats in a GRC as a whole would be deemed vacant when only one Member vacated his or her seat.

Hence, based on the words of Articles 49, 39A and 46, it was unclear whether Article 49(1) applied to GRCs at all. Although Article 49(1) was phrased in terms that could be wide enough to include the interpretation that a by-election *shall* be called when a single seat in a GRC has been vacated, the Constitution was nonetheless conspicuously silent on this matter, and *did not expressly compel* the other Members of the affected GRC to vacate their seats in such a scenario. But, again, the vacating of all seats was a necessary precondition before a by-election in a GRC could be held. The CA further noted that under Article 49(1) itself, vacancies must be filled by election *according to the law* governing Parliamentary elections at the time. But there was *no* such law in this regard. Indeed, section 24(2A) of the Parliamentary Elections Act (Cap 218, 2011 Rev Ed) (“the PEA”) expressly *prohibits* the holding of a by-election in a GRC so long as not all the GRC seats have been vacated.

On this point, both parties agreed that there was a legislative oversight in the implementation of the GRC scheme, in that Parliament had intended that a by-election would only be called in a GRC if all the Members of the GRC had vacated their seats (as reflected in section 24(2A) of the PEA), but had failed to include a provision in the Constitution to achieve this result. The CA found that this too, strongly militated against a conclusion that the meaning of Article 49(1) was “clear”. If the amendments made to the Constitution to put in place the GRC scheme were insufficient to achieve their intended outcome, then it was likely that the relevant provisions of the Constitution, when read together, would appear ambiguous or unclear.

(ii) Extraneous material

Since Article 49(1) was ambiguous, the CA decided it could rely on external material to ascertain its true meaning as applied to GRCs. Referring to the relevant Parliamentary debates, the CA stated it was clear that Parliament never intended that a single vacancy in a GRC would trigger the obligation to call a by-election. The CA referred to the following debate statements:

“GRCs are meant to ensure a multi-racial Parliament ... We will not want to provide for by-election to replace somebody who has vacated his office [because] ... [i]f you provide for compulsory by-election to fill that vacancy, you are introducing the possibility that one MP can hold the other two to ransom. ... [If two out of three] MPs were to vacate office, the other one who has been duly elected by the people ... should remain.”

Based on the above, the CA noted that in designing the legislative architecture to give effect to the GRC scheme, Parliament intended that there would be *no* requirement to call a by-election

if one or even more than one Member of a GRC were to vacate his or her seat. Instead, a by-election in a GRC would only have to be called if *all* the Members representing that GRC were to vacate their seats. Moreover, Parliament had specifically considered the risk of minority representation being diminished in this situation, and had decided that this risk was an acceptable trade-off, for preventing a Member of a GRC from otherwise being able to hold “the other Members of the team to ransom.”

While it was clear from the Parliamentary debates that Parliament intended that a vacancy in the seat of a GRC Member would not oblige the Government to call a by-election, it was not clear *how* Parliament thought it would effect this result. Parliament could have intended:

- to amend Article 49(1) to reflect its intent that no by-election would be held in a GRC so long as not all the GRC Members had vacated their seats, but failed to do so;
- that Article 39A would be the provision which regulated all matters pertaining to GRCs (including the filling of vacancies). As such, Article 49(1) would not have any application to GRCs at all; or
- that Article 49(1) would apply to GRCs, but thought that the phrase “in the manner provided by or under any law relating to Parliamentary elections” was sufficient.

Based on these options, the CA observed that if there was a reasonable possibility (based on options 2 and 3 above) that Parliament did not intend to amend a provision to put in place the intended outcome, could the courts then read in such an amendment? The CA further noted that interpreting Article 49(1) in the manner provided under option 3 could hypothetically allow a simple majority in Parliament to denude Article 49(1), a constitutional provision, of its effect. It would not be permissible to construe Article 49(1) as if it allowed Parliament, in effect, to act contrary to the limitations on Parliament that were imposed by the Constitution. These observations would affect the CA’s interpretation of Article 49(1).

(b) The proper interpretation of Article 49(1)

Looking at the three possible interpretations initially raised by the parties through the above lens, the CA then concluded that the appropriate interpretation of Article 49(1) was that the words “seat of a Member” referred only to the seat of an SMC Member (**Interpretation 3**, suggested by the AG), i.e. that *the provision did not apply to GRCs at all*. As such, there was no requirement for a by-election to be called in MYT GRC. The CA rejected the other interpretations of Article 49(1), which were: the vacancy, *as and when it arises*, shall be filled by a by-election for all the seats in the GRC (**Interpretation 1**, suggested by Dr Wong); and the vacancy shall *only* be filled by a by-election *if and when all* the seats in the GRC have been vacated (**Interpretation 2**, also suggested by the AG).

The CA first noted that when choosing among competing interpretations of a legislative provision, the court should also use the purposive approach, i.e. use that interpretation which furthered the purpose of the provision. Interpretation 1 involved compelling all the remaining Members of a GRC to vacate their seats in the event of a vacancy in a single seat in the GRC, thereby forcing a by-election to be held. However, this would lead to the one result that Parliament had expressly intended to avoid when it implemented the GRC scheme.

As to Interpretation 2, while this was admittedly the interpretation which was the most closely aligned with Parliament’s intention as to what should occur where there was a single vacant seat in a GRC, this was a “strained” interpretation of Article 49(1). The words “seat of a Member” did not distinguish between the seat of a GRC Member and that of an SMC Member, and hence could not be interpreted to cover both types of seats *while at the same time* mandating different outcomes in the event of a vacancy in the two different types of seats. In order to

arrive at such a meaning, the first portion of Article 49(1) would have to be construed as if it read: “Whenever the seat of a Member in a single member constituency, or the seats of all Members in a group representation constituency ...”.

While such an interpretation could theoretically be achieved through a rectifying construction³ or an updating construction,⁴ both constructions were not appropriate. With regard to a rectifying construction, while it was clear what result Parliament intended to achieve (i.e. that a vacancy in the seat of a GRC Member would not oblige the Government to call a by-election), it was also not (as discussed above) clear *how* Parliament thought it would effect this result. It was thus impossible to be certain which words which would have been inserted and whether Parliament would have approved of the insertion, since it was unclear whether Parliament wanted to amend the language of the Constitution at all.

An updating construction also not appropriate, because it would entail a significant change to the operation of the provision. Article 49(1) would be transformed into a provision which differentiated between GRCs and SMCs as to the circumstances in which a by-election must be called. As it was unclear whether Parliament intended for Article 49(1) to be amended to begin with, effecting such a substantive change through an updating construction (rather than through a legislative amendment by Parliament) could not be justified.

Turning then to Interpretation 3, i.e. that the words “seat of a Member” referred only to the seat of an SMC Member, the CA first noted that this interpretation was not ideal, as it left the Constitution silent on the filling of a vacant seat in a GRC. Nonetheless, it stressed that the court’s role was not to fashion the ideal formulation of Article 49(1). Instead, it had to work with the text as it stood, and pick (from the range of permissible interpretations) the one that best accorded with Article 49(1)’s purpose. Moreover, this also reflected the reality that when Article 49(1) was enacted in its present form in 1965, members of SMCs were the only type of Members that the drafters could have had in mind, as the GRC scheme did not yet exist.

The CA then noted that the fact that an express provision in the Constitution did not exist for the filling of vacancies in a GRC, did not mean that all the seats in a GRC could be left vacant without an obligation by the Government to call a by-election there. Although the CA refrained from expressing a definitive opinion, it noted that this was arguably a gap in the Constitution, and that it would “obviously be more desirable” for this gap to be addressed by an amendment to the Constitution.

B. Article 39A of the Constitution and minority representation

Article 39A provides for the designation of constituencies as GRCs. The CA rejected Dr Wong’s argument that since the stated purpose of the GRC scheme was to ensure the representation in Parliament of minority Members, it would undermine the purpose of Article 39A to give effect to the AG’s proposed interpretations.

Dr Wong claimed that this was because if a minority Member of a GRC vacated his or her seat, minority representation in Parliament would be diminished and go against the purpose of Article 39A if the vacancy was not filled. However, the CA stated that this ignored the fact that

³ A “rectifying construction” for a statute involves the addition or substitution of words in the statute, to give effect to Parliament’s intentions.

⁴ An “updating construction” for a statute is based on the assumption that Parliament intends that the court will apply a construction which continually updates the wording of the statute, so that it can apply to circumstances as they change after the time the statute was initially implemented.

Parliament had considered the risk of minority representation being diminished in this specific situation, as could be seen from the Parliamentary debates. Parliament decided that this risk was an acceptable trade-off, for preventing a GRC Member from otherwise being able to hold the rest of the GRC Members to “ransom”. To accept Dr Wong’s argument here would run contrary to Parliament’s intention. It would import into the GRC scheme a risk that Parliament had explicitly intended to avoid, in exchange for removing a risk that Parliament had explicitly expressed its willingness to accept. The CA noted that such a reversal of the policy choice that Parliament had expressly made would strike “at the heart of the concern behind judicial legislation, and would result in the courts overstepping their constitutional role”. The CA stressed that it was not for the court to debate the best policy to enshrine minority representation in Parliament, much less when Parliament itself had already chosen a particular approach with all its attendant risks.

C. The implied right to representation in Parliament

The CA also rejected Dr Wong’s argument that because voters had a right to representation in Parliament founded on the basic structure of the Constitution, the remaining Members of MYT GRC had to vacate their seats and a by-election then be held. Dr Wong argued that this basic structure included the right to be represented by the full slate of elected Members returned at each general election. The CA observed that Dr Wong’s contention, taken to its logical conclusion, implied that the GRC scheme was inconsistent with the basic structure of the Constitution. Even if the right to representation in Parliament formed part of the basic structure of the Constitution, it did not follow that there was a particular form of representation that was “fundamental and essential” to this model of government, such that it could not be departed from. There was nothing in principle that would prevent Parliament from devising the GRC scheme in such a way that a GRC could be left to be represented by less than its full complement of Members where one or more of them has vacated his or her seat.

The CA also rejected Dr Wong’s reliance on Article 39(1)(a) to substantiate her argument. That provision described the composition of Parliament; it did not deal with either by-elections or how mid-term vacancies were to be filled.

III. Lessons Learnt

It is notable that the CA suggested that the lack of an express provision in the Constitution for the filling of vacancies in a GRC did not mean that all the seats in a GRC could be left vacant without the need to call a by-election. The CA even suggested the desirability of this gap being closed through an amendment to the Constitution. We await Parliament’s response to this suggestion.

Written by: Lee Chuan, JD Graduate (2019), Singapore Management University School of Law.
Edited by: Ong Ee Ing (Senior Lecturer), Singapore Management University School of Law.