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## City Harvest case and the separation of powers

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# City Harvest case and the separation of powers

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By Goh Yihan

## **Verdict provides important example of how the courts and Parliament play different roles in Singapore's legal system**

The Court of Appeal last week upheld the reduced sentences passed in the City Harvest Church (CHC) case.

Six former church leaders were charged with having conspired to commit the aggravated offence of criminal breach of trust (CBT) as an "agent" under Section 409 of the Penal Code.

Departing from the earlier interpretation that had stood for the past 40 years, the court decided that Section 409 applied only to professional agents, which the former church leaders were not. The charges were reduced to Section 406, which provided for shorter terms of imprisonment.

This decision has triggered a review of our CBT laws. It is clear that Section 409, which was enacted some 150 years ago, is no longer adequate to deal with the CBT cases in the 21st century.

So, the Attorney-General's Chambers has stated that it will work with the relevant ministries on appropriate reform.

Earlier this week, the Minister for Law, Mr K. Shanmugam, reiterated the Government's intention to amend the law together, with other wide-ranging amendments to the Penal Code. Even the Court of Appeal itself acknowledged that such a reform is long overdue.

However, why couldn't the court have reformed the law itself, instead of leaving it to Parliament?

## **DIFFERENT ROLES**

The answer is that the courts are separate from Parliament. Each exercises a different power.

As the Court of Appeal explained in a 2014 case, the courts cannot exercise legislative power - that is, the power to enact legislation - because they do not have the mandate to do so. The mandate to promulgate laws belongs to the duly elected Members of Parliament. So, the courts have declined to reform existing legislation, even when it is clear that such laws are outdated.

For example, the Court of Appeal decided in 2009 that an illegitimate child could not claim support under the Inheritance (Family Provision) Act. This Act introduced English law as it stood in 1938.

The court reasoned that when Parliament passed the Act in 1966, there was no indication that it disagreed with the prevailing English law, which denied support to illegitimate children. The court had to give effect to Parliament's intention even as it urged for reform.

Another example is when the High Court in 2005 dealt with the presumption of death under Section 110 of the Evidence Act. The applicant urged that her estranged father be presumed dead as he had been uncontactable for years.

The court dismissed the application as the applicant could not satisfy the requirement that her father had not been heard of by those who were not estranged from him. The court commented that Section 110, being enacted over 100 years ago, was in need of reform. It may be unfair to place the burden on estranged family members to show that someone else, who should have heard about the missing person, did not.

It is for good reasons that the courts do not exercise legislative powers.

For one, legislation is usually wide-ranging in scope and effect. Courts, which deal only with the cases before them, may not be well equipped to carry out such wide-ranging reforms.

Furthermore, whereas Parliament has the resources to consult with various stakeholders on the effect of legislation, the courts cannot do so as they are constrained to resolving the immediate dispute between the parties before them.

The courts are also not accountable to the electorate in the same way that Parliament is.

## **DIFFERENT INTERPRETATIONS**

More importantly, it would affect the courts' legitimacy if they were to exercise legislative power, and compromise their role to administer the rule of law objectively.

It is therefore entirely legitimate for the Court of Appeal in the CHC case to leave the reform of Section 409 to Parliament. In not exercising the legislative power, all it could do - and did - was to interpret the law according to the prevailing intention of Parliament, as discerned from materials at the time of Section 409's enactment.

However, this is not to say that the courts do not develop the law.

Instead of legislative power, the courts exercise judicial power. By this, the courts are tasked with interpreting legislation. The courts are here concerned with giving effect to Parliament's intent at the time the legislation was enacted. Thus, developments after the legislation was enacted are generally irrelevant.

In the CHC case, it was argued by the prosecution before the High Court that since Parliament had left Section 409 untouched until now, it must have agreed with the courts' earlier interpretation that stood for over 40 years.

A majority of the High Court in the CHC case dismissed this fact as irrelevant. The Court of Appeal did not disagree with the High Court's conclusion. Indeed, it would be speculative to rely on inaction by Parliament as indicative of any overt intention.

Through interpreting legislation, the courts may sometimes advance the law. This was such in the CHC case, where a majority of the High Court and the Court of Appeal departed from the earlier interpretation of Section 409 that originated in a High Court decision some 40 years ago.

It is noteworthy that the proper interpretation of Section 409 had come before the Court of Appeal for the first time in the CHC case. It never had the opportunity to examine the meaning of Section 409 in detail before.

Being the highest court of the land, the Court of Appeal is duty-bound to give its view on the proper interpretation of Section 409. It is in this context, and after a thorough analysis that included references to the relevant legal principles, historical material and foreign case law, that the Court of Appeal disagreed with the earlier interpretation of Section 409 that had stood for over 40 years.

## **COMMON LAW**

Indeed, courts sometimes do depart from longstanding legal positions. The Court of Appeal has the power to depart from even its own decisions, as its 1994 Practice Statement on Judicial Precedent spells out.

The courts may disagree as to what Parliament's intention is, but that does not hide the fact that they are ultimately concerned with giving effect to Parliament's intention, and not with reforming the law.

The courts also advance the law by developing the "common law". The common law, so-called because it was "common" to all of England in the past, is made by judges based on precedent.

By this process, judges develop the common law one case at a time, building on earlier cases to advance legal principles. An example is the development of the "tort of harassment" in a 2001 High Court case. The court acknowledged that the existing common law did not cater for harassing conduct outside of a person's residence. So, the court developed the common law to include a new tort of harassment, which covered wider harassing conduct.

However, the common law can be superseded by Parliament. Such was the case when Parliament enacted the Protection from Harassment Act in 2014, which codified the tort of harassment.

The CHC case may have highlighted the inadequacy of our CBT laws, but it also provides an important example of how the legislative and judicial powers are separate under our system. It is a demonstration of how our system, founded on the separation of powers, works in practice.

*The writer is dean of the School of Law at the Singapore Management University.*