LOCALISING ADMINISTRATIVE LAW IN SINGAPORE

Embracing Inter-branch Equality

This article considers two main ways in which Singapore courts have localised administrative law, departing from its English law roots. First, it will look at differences in the balance struck by courts between themselves and the Executive in the review of administrative action. Traditional analyses of administrative law in common law jurisdictions tend to rationalise a particular hierarchy between courts and the Executive based on factors like the relative institutional expertise of the institutions and the relative political and democratic credentials of the two branches. This article argues for a third possible analysis for Singapore: one that is premised not on the supremacy of either branch but, instead, on the idea of co-equality. Secondly, the article will look at how this co-equality is manifested in the court's approach to reviewing the substantive aspects of administrative decision-making. Through this analysis of the localisation of Singapore administrative law, the article ultimately seeks to contribute to a richer and more robust understanding of "common law" administrative law systems.

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I. Introduction

1 As with other common law jurisdictions, administrative law in Singapore has its foundations in the English common law. However, it has generally not tracked developments in English administrative law. This article will consider two main departures.

2 First, it will look at differences in the balance struck by courts between themselves and the Executive in the review of administrative action. While, in Singapore, the courts have referenced constitutional principles like the "rule of law" and "separation of powers", in common with English courts, the operation of these principles has been

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influenced significantly by the local political environment.[1] In the English context, these constitutional principles are confronted with the idea of parliamentary supremacy, another fundamental precept of English constitutional law, with judges taking contrasting positions on the relationship between the various principles. On some occasions, courts have emphasised that the rule of law operates as a ceiling against any assertion that judicial review is restricted on the basis of parliamentary supremacy. However, there are also examples of cases where the courts have held that parliamentary supremacy trumps other constitutional principles to restrict judicial review.[2] In Singapore, parliamentary supremacy is not a part of the formal constitutional framework.[3] However, there has still been a debate over which constitutional norms take primacy in the context of judicial review.[4]

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1 Singapore's indigenous rule of law has been the subject of extensive academic discussion: see Sundaresh Menon, "The Rule of Law: The Path to Exceptionalism" (2016) 28 SAcLJ 413; Thio Li-Ann, "Rule of Law within a Non-Liberal 'Communitarian' Democracy: The Singapore Experience" in *Asian Discourses of Rule of Law: Theories and Implementation of Rule of Law in Twelve Asian countries, France and the US* (Randall Peerenboom ed) (Routledge, 2004) ch 6; Chan Sek Keong, "The Courts and the 'Rule of Law' in Singapore" [2012] Sing JLS 209; Thio Li-Ann, "Between Apology and Apogee, Autochthony: The 'Rule of Law' beyond the Rules of Law in Singapore" [2012] Sing JLS 269; Jack Tsen-Ta Lee, "Shall the Twain Never Meet? Competing Narratives and Discourses of the Rule of Law in Singapore" [2012] Sing JLS 298; and K Shanmugam, "The Rule of Law in Singapore" [2012] Sing JLS 357.

2 See Paul Craig, "Ultra Vires and the Foundations of Judicial Review" and Mark Elliott, "The Ultra Vires Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law" in *Judicial Review and the Constitution* (Christopher Forsyth ed) (Hart Publishing, 2000) for a discussion of the interaction between the rule of law and parliamentary supremacy in English cases. For a recent example of how the two constitutional principles interact see: *R (Unison) v Lord Chancellor* [2017] UKSC 51.

3 The system is formally based on the idea of constitutional supremacy. Article 4 of the Constitution of the Republic of Singapore (1999 Reprint) states: "[t]his Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void". Constitutional amendments generally require a two-thirds majority in Parliament. This majority has been possible given the presence of a dominant single political party in Parliament since Singapore's independence. This has led some scholars to characterise Singapore's system as a *de jure* constitutional supremacy with a *de facto* parliamentary supremacy (see, *eg*, Jaclyn Neo & Yvonne C L Lee, "Constitutional Supremacy: Still a Little Dicey" in *Evolution of a Revolution: Forty Years of the Singapore Constitution* (Thio Li-Ann & Kevin Y L Tan eds) (Routledge, 2010)).

4 See also Thio Li-ann, "The Theory and Practice of Judicial Review of Administrative Action in Singapore" in *SAL Conference 2011 – Developments in Singapore Law between 2006 and 2010: Trends and Perspectives* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu gen eds) (Singapore Academy of Law, 2011) at p 727 on the competition between all the different facets of the separation of powers and rule of law.

Therefore, "the notion of a subjective or unfettered discretion [being] contrary to the rule of law"[5] has competed with varying concepts of the separation of powers: the latter manifesting itself through the exercise of judicial deference,[6] the identification of non-justiciable areas of review[7] and the extension of a presumption of legality to executive action.[8] The discussion in section II will highlight how this competition has been resolved over time by the courts in Singapore. It will demonstrate how the courts have chosen to articulate different equilibrium points between the courts and the Executive, with the most recent one being premised on the idea of the co-equality of both branches versus the supremacy of either, the latter being more characteristic of the ongoing debate in the English context.

3 Secondly, the article will look at how this idea of co-equality is apparent in recent developments in judicial review of the more substantive aspects of administrative decision-making (such as the "reasonableness" of an executive decision). It is in this context that the constitutional tussle between courts and the Executive can be the most acute. Therefore, a consideration of the court's approach to substantive review in any jurisdiction is highly indicative of the size of the role of the Judiciary in the overall accountability and governance machinery of a state. The issue is also relevant when looking at how administrative law doctrine has taken a more indigenous development route. Substantive review of executive decision-making has been the subject of the most significant advancements in the English context, largely influenced by European jurisprudence both prior to and after the enactment of the Human Rights Act. Relative to those developments, and in the absence of any equivalent regional or local political mandate to develop the law in this direction, the courts in Singapore have for a long time maintained a conservative approach to substantive review of executive decision-making,[9] preferring instead to rely on the traditional grounds of review derived from Lord Diplock's now famous exposition in

5 *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86].

6 Daniel Tan, "An Analysis of Substantive Review in Singaporean Administrative Law" (2013) 25 SAcLJ 296 at paras 62–70.

7 *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 at [90].

8 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [43]–[44]. A similar point was made by the Court of Appeal in *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 at [139].

9 Although the rights-based context of a case can be seen to provide an imperative in some contexts for departing from conservative positions within judicial review. *Eg*, in *Manjit Singh s/o Kirpal Singh v Attorney-General* [2013] 4 SLR 483, the Court of Appeal observed that it may be willing to depart from the long-standing default position, of there being no duty on the Executive to give reasons for its decision, where the applicant's rights may have been affected.

Council of Civil Service Unions v Minister for the Civil Service,[10] namely: illegality, irrationality and procedural impropriety. This article looks at recent extensions in the area of substantive review. In particular, it will look at the recent recognition of a localised version of the doctrine of substantive legitimate expectations,[11] evidence of the use of varying standards of review within irrationality review[12] and the recent embryonic use of "balancing" or proportionality-type analyses in reviewing the legality of executive action.[13] The analysis will highlight how the developments here have been much more gradual and incremental than in the English context.

4 Through this analysis of the localisation of Singapore administrative law, this article ultimately seeks to contribute to a richer and more robust understanding of "common law" administrative law systems. Traditionally, analyses of administrative law in common law jurisdictions tend to rationalise a particular hierarchy between courts and the Executive depending on an evaluation of factors like the relative institutional expertise of the institutions, political legitimacy of either and/or the democratic (or otherwise) credentials of the two branches.[14] This article argues for a third possible analysis: one that is premised not on the supremacy of either branch but, instead, on the idea of co-equality and balance between the two branches.

II. Evolving attitudes towards judicial review of administrative action

5 Singapore is administratively complex with the work of the State carried out by a multitude of government ministries, government corporations and statutory boards that regulate almost all aspects of life: from healthcare, education and housing to environmental planning, trade and business development and transport infrastructure.[15] Given the "largeness" of the administrative state, scholars have argued that there are one of two responses open to the Judiciary in checking the executive branch through judicial review.

10 *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 WLR 1174 at 1196, *per* Lord Diplock.

11 *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047.

12 *Tan Seet Eng v Attorney-General* [2015] 2 SLR 453; *Vijaya Kumar s/o Rajendran v Attorney-General* [2015] SGHC 244.

13 *Vijaya Kumar s/o Rajendran v Attorney-General* [2015] SGHC 244.

14 See Carol Harlow & Richard Rawlings, *Law and Administration* (Cambridge University Press, 3rd Ed, 2009) ch 1 and at pp 22–31.

15 See Jolene Lin, "The Judicialization of Governance: The Case of Singapore" in *Administrative Law and Governance in Asia* (Tom Ginsburg & Albert Chen eds) (Routledge, 2009) at p 287 and Jon S T Quah, *Public Administration Singapore Style* (Emerald Group Publishing, 2010) ch 11.

6 One is a "green-light" approach based on trust in the Executive and its internal mechanisms for ensuring good governance and accountability. Alternatively, the Judiciary may be "red light" in response to such a concentration of power and subject the exercise of executive power to more intense scrutiny.[16] This could be especially so in a Westminster-style system where the Executive is drawn from the elected members of Parliament and the latter, therefore, potentially becomes a relatively blunter tool of *independent* accountability. This may be mitigated, to some extent, in a bicameral parliamentary system like the English parliamentary system.

7 This has been the prompt for a predominantly red-light approach to expansions in the grounds of judicial review in the English context.[17] This could be due to the early influence of Albert Venn Dicey on English public law. Dicey viewed discretionary power, with its inherent potential for abuse, as intrinsically contrary to the rule of law and, therefore, something to be kept firmly in check.[18] It could be argued that a similar "red light" approach should be adopted in Singapore. It has a unicameral and dominant party-membership-based legislature, where the latter has been constituted by a strong majority from a single political party since Singapore's independence, leading scholars to query the capacity of the Legislature to act as an effective check.[19] However, in Singapore, there have been a number of

16 See generally Carol Harlow & Richard Rawlings, *Law and Administration* (Cambridge University Press, 3rd Ed, 2009) ch 1 and at pp 22–31 on the red/green-light metaphor. The bifurcation between red and green has been criticised, with some arguing for blended "amber" light analyses of administrative justice systems: see, *eg*, Leigh Hancher & Matthias Ruete, "Reviews: Forever Amber" (1985) 48 *Modern Law Review* 236.

17 It may be an oversimplification to characterise the approach to judicial review in English law in such a broad brush unitary sense. There will, of course, be judges on different points of the red–green-light spectrum. However, the point being made here is that, relative to Singapore, the English system can be characterised as significantly "redder" in its approach to judicial review for the reasons mentioned.

18 See Albert Venn Dicey, *An Introduction to the Study of the Law of the Constitution* (Macmillan, 10th Ed, 1970) ch 12 on the demands of the rule of law when it comes to power – the thrust of which is the need for limits on discretionary power; see also Lord Diplock, "Judicial Control of Government" [1979] MLJ cxl at cxlii:

> Although in a constitution which follows the Westminster Model the doctrine of the separation of powers between legislative and executive is replaced by the doctrine of supremacy of the legislature, it is crucial to this type of constitution that the judicial branch of government should have exclusive power to interpret all written law once it has been made …

19 See Chan Heng Chee, *The Politics of One Party Dominance: PAP at Grassroots* (Singapore University Press, 1976) and Thio Li-ann, "Law and the Administrative State" in *The Singapore Legal System* (Kevin Y L Tan ed) (Singapore University Press, 1999) at p 3; "Choosing Representatives – Singapore Does It Her Way" in *The People's Representatives: Electoral Systems in the Asia-Pacific Region* (Graham Hassall & Cheryl Saunders eds) (Allen & Unwin, 1997) at pp 38–58.

justifications offered for maintaining a green-light approach, notwithstanding Singapore's Westminster political system. The former Chief Justice, Chan Sek Keong, observed:[20]

> Judicial review is … a function of socio-political attitudes in the particular community … In the UK, there is a strong perception that the traditional institutional remedies for correcting executive excesses, such as ministerial responsibility, parliamentary oversight committees and public inquiries, have proven ineffective, while the burgeoning welfare system has meant greater state intrusion and interference with individual fundamental liberties. It was to safeguard these rights and liberties that the courts in the UK stepped into the constitutional vacuum and developed a strong body of administrative law principles, through which citizens could take steps to challenge and put a stop to unlawful government action …
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> … I would like you to consider whether this is the right perspective for Singapore to adopt. There are, of course, pros and cons in such matters, depending on one's views on the social and legal values we should espouse and how society should be governed. One argument would be that … the 'green-light' approach is more appropriate for Singapore. This approach sees public administration not as a necessary evil but a positive attribute, and the objective of administrative law as not (primarily) to stop bad administrative practices but to encourage good ones. 'Green-light' views of administrative law do not see the courts as the first line of defence against administrative abuses of power: instead, control can and should come internally from Parliament and the Executive itself in upholding high standards of public administration and policy …

8 This green-light approach is justified on the basis of a trust in the legitimacy of the state on a number of fronts. First, it is said to be grounded in a perceived performance-based legitimacy given that the State is seen to act prophylactically in checking issues of legality prior to making decisions. Former Chief Justice Chan observed how government bodies in Singapore frequently consult the Attorney-General's Chambers for advice and accordingly, the courts should exercise a light touch in carrying out any judicial review.[21] Secondly, there is a reliance on the Government's emphasis on governing "honourably" to justify less involved judicial review:[22]

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20 Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 at 470–480; see also *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345 at [48]–[50] and Sundaresh Menon, "The Rule of Law: The Path to Exceptionalism" (2016) 28 SAcLJ 413 at paras 24–25.

21 Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 at para 15.

22 See Singapore, *Shared Values* (White Paper, Cm 1, 1991) at para 41; see also Goh Chok Tong, "Increasing Public Trust in Leaders of a Harmonious Society", speech at the Singapore-China Forum on Leadership (16 April 2010).

> The concept of government by honourable men … who have a duty to do right for the people, and who have the trust and respect of the population fits us better than the Western idea that a government should be given as limited powers as possible, and should always be treated with suspicion unless proven otherwise …

Finally, a further explanation provided by some scholars for retaining a green-light approach is that the administrative state in Singapore was created primarily for the purpose of advancing a benevolent collective national goal of economic success for all citizens and at a critical time in Singapore's history on the sudden expulsion of the latter from the Federation of Malaysia, rather than as a way of appropriating power as may be the Diceyan suspicion elsewhere.[23]

9 However, the view that the courts maintain such a completely green-light approach may be an oversimplification in light of some of the more recent pronouncements by the courts on their role in reviewing executive action.[24] The recent assertion of the stronger role discussed in this section does not equate with the predominantly[25] red-light approach in the English context borne out of a distrust of power,[26] but is also a departure from a green-light approach. The court's role is not premised on distrust but on the idea of co-equality and balance between the two branches. This is evident most recently in the Court of Appeal's approach to judicial review in *Tan Seet Eng v Attorney-General*[27] ("*Tan Seet Eng*").

10 The applicant in the case was challenging his detention under s 30 of the Criminal Law (Temporary Provisions) Act[28] ("CLTPA"). Under this section, the Minister for Home Affairs (with the consent of

23 Jolene Lin, "The Judicialization of Governance: The Case of Singapore" in *Administrative Law and Governance in Asia* (Tom Ginsburg & Albert Chen eds) (Routledge, 2009) at pp 288–289.

24 Some scholars have observed how the case of *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345 is a recognition of the green-light approach in administrative law in Singapore: see Wong Huiwen Denise & Makoto Hong, "Raising the Bar: Amending the Threshold for Leave in Judicial Review Proceedings" (2016) 28 SAcLJ 527 at para 37 and Makoto Hong Chung, "Shaping a Common Law Duty to Give Reasons in Singapore: Of Fairness, Regulatory Paradoxes and Proportionate Remedies" (2016) 28 SAcLJ 24 at para 38. This definitely holds true in the specific context of that case, namely, the issue of public-interest-based standing in judicial review. This article argues that the comments in that case need to be considered against other more recent pronouncements on the role of the courts outside of the specific context of the issue of standing.

25 See para 7, at n 17, above.

26 On this, see Peter Cane, *Controlling Administrative Power: An Historical Comparison* (Cambridge University Press, 2016) at pp 161 and 167.

27 [2016] 1 SLR 779.

28 Cap 67, 2000 Rev Ed.

the Public Prosecutor) can detain a person without trial if they are suspected of being involved in activities of a criminal nature and if this is necessary in the interests of "public safety, peace and good order". The applicant sought to challenge his detention under s 30. Preventative detention is permitted under legislation other than the CLTPA. The most prominent is detention under the Internal Security Act[29] ("ISA"). Judicial review of such detention orders has been a problematic area of review. In the late 1980s, there had been a number of detentions under the ISA, which had been the subject of review in the courts. In the famous case of *Chng Suan Tze v Minister of Home Affairs*[30] ("*Chng Suan Tze*"), the Court of Appeal held that such detentions were subject to judicial review on the usual grounds of review.[31] This judgment was quickly followed by a number of statutory and constitutional amendments, significantly restricting judicial review under the ISA to narrow technical grounds.[32]

11 One of the issues for the Court of Appeal in *Tan Seet Eng* was whether the approach in *Chng Suan Tze* to reviewing such detention orders continued to be "good law" outside of the ISA context, given the amendments that followed that case. The Court of Appeal answered this in the affirmative.[33] The foundation for this was the rule of law:[34]

> The rule of law is the bedrock on which our society was founded and on which it has thrived … one of its core ideas is the notion that the power of the State is vested in the various arms of government and that such power is subject to legal limits. But it would be meaningless to speak of power being limited were there no recourse to determine whether, how, and in what circumstances those limits had been exceeded. Under our system of government, which is based on the

29 Cap 143, 1985 Rev Ed.

30 *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525.

31 This is based on the grounds set out in *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 WLR 1174 at 1196, *per* Lord Diplock (namely, illegality, irrationality and procedural impropriety).

32 Constitutional challenges to these ouster-clause-type amendments to the Internal Security Act (Cap 143, 1985 Rev Ed) were unsuccessful: *Teo Soh Lung v Minister for Home Affairs* [1989] 1 SLR(R) 461 (HC); [1990] 1 SLR(R) 347 (CA). It is possible that the court may review its position on the constitutionality of ouster clauses: see *Per Ah Seng Robin v Housing and Development Board* [2016] 1 SLR 1020 at [65]; see also Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 at para 19 on the "academic" possibility of such an argument. *Cf* views expressed by the former Chief Justice in "The Courts and the 'Rule of Law' in Singapore" [2012] Sing JLS 209 at 223–224.

33 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [67]–[76]. This differs from the courts' position in earlier cases under the Criminal Law (Temporary Provisions) Act (Cap 67, 2000 Rev Ed): see, most notably, *Re Wong Sin Yee* [2007] 4 SLR(R) 676.

34 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [1] and [90], *per* Sundaresh Menon CJ.

> Westminster model, that task falls upon the Judiciary. Judges are entrusted with the task of ensuring that any exercise of state power is done within legal limit …
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> …
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> We began … by observing that the specific responsibility for pronouncing on the legality of government actions falls on the Judiciary … *To hold that this is so is not to place the Judiciary in an exalted or superior position relative to the other branches of the government. On the contrary, the Judiciary is one of three coequal branches of government. But though the branches of government are coequal, this is so only in the sense that none is superior to any other while all are subject to the Constitution* … [emphasis added]

12 The above quote builds in both the rule of law and the separation of powers in setting out the role of the courts as co-equal with versus superior to the Executive. This idea of co-equality is not new. However, until *Tan Seet Eng*, it was used to rationalise judicial deference. This is apparent from *Ramalingam Ravinthran v Attorney-General*[35] ("*Ramalingam*"). The applicant here challenged the Attorney-General's decision (as Public Prosecutor) to charge him and his co-accused with different charges under the Misuse of Drugs Act[36] in connection with the same criminal enterprise. The applicant's charge carried the mandatory death penalty. The applicant argued that this infringed Art 12 (on equality) of the Constitution.[37] In deciding on the standard of review to adopt when reviewing the exercise of prosecutorial discretion for compatibility with Art 12, the court observed that:[38]

> [P]rosecutorial power is a constitutional power vested in the Attorney-General pursuant to Art 35(8) of the Constitution. *It is constitutionally equal in status to the judicial power set out in Art 93 … In view of the co-equal status of the two aforesaid constitutional powers, the separation of powers doctrine requires the courts not to interfere with the exercise of the prosecutorial discretion unless it has been exercised unlawfully* … the acts of high officials of state should be accorded a presumption of legality or regularity, especially where such acts are carried out in the exercise of constitutional powers … [emphasis added]

The implication of this analysis was to significantly *restrict* the scope of judicial review. With the presumption of legality, courts would only assess whether the decision was based on an unbiased consideration of "relevant" considerations (defined broadly to include the willingness of

35 [2012] 2 SLR 49.
36 Cap 185, 2001 Rev Ed.
37 Constitution of the Republic of Singapore (1999 Reprint).
38 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [43]–[44]. A similar point was made by the Court of Appeal in *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 at [139].

one offender to testify against others and "other policy factors").[39] The grounds of judicial review were thus circumscribed and did not include the full range of the usual grounds of judicial review: namely, irrationality or natural justice (at least not in the terms of the judgment).

13 This can be compared with the approach in *Tan Seet Eng*, where co-equality was used to rationalise judicial review on the usual grounds of review.[40] It could be argued that as *Tan Seet Eng* involved judicial review of an exercise of executive power under *statute* and not the exercise of a *constitutional* power, as was the case in *Ramalingam*, the Court of Appeal felt more comfortable proceeding on the basis of the usual grounds of judicial review. However, it is important to bear in mind that *Tan Seet Eng* involved the exercise of a statutory power of preventative detention involving considerations of national security: an area typically characterised by a deferential posture on the part of the courts. Therefore, this is still a more expansive vision of co-equality than *Ramalingam* when taking into account not just the source of the power but the subject matter of the decision. The caution in *Tan Seet Eng*, as a result of the subject matter, came not in the way the Court of Appeal conceptualised co-equality (which was more "red light" in nature than earlier pronouncements on co-equality). Instead, it was apparent in the Court of Appeal's approach to conceptualising the contours of its co-equal role and the boundaries of the court's review in the area.[41] The observations on the imperatives of the rule of law and role of courts have to be read against other components of the judgment. While acknowledging a role for the courts on the basis of the normal grounds of judicial review, the precise scope of the role set out in *Tan Seet Eng* was a complex one embodying significant give-and-take between the Judiciary and Executive. Chief Justice Sundaresh Menon observed how the review would need to balance the dual presence of issues of public order and security (traditionally areas where the Executive is accorded deference) and the significant deprivation of the liberty of an individual (an area where the courts will need to intervene to ascertain the legality of the detention).[42] This balance manifested in several ways.

14 First, in the court's choice of the grounds of review it would use to assess the legality of the detention. The court rejected both the lowest

39 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [43]–[44]. A similar point was made by the Court of Appeal in *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 at [139].

40 *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 WLR 1174 at 1196, *per* Lord Diplock (namely, illegality, irrationality and procedural impropriety).

41 This can be compared to the stronger red-light approach to reviewing preventative detention in the English context: *A v Secretary of State for the Home Department* [2005] 2 AC 68.

42 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [47], [92] and [96].

and highest degrees of scrutiny proposed by the respondent and applicant respectively. Therefore, it would not restrict itself to the light touch review currently utilised for preventative detention under the ISA. This is a "subjective" test where the court just assesses whether the Minister subjectively believed he had the power and that he was acting within the scope of that power (which could be proved through the inclusion of short recitals in a detention order rendering any review potentially vacuous). The Court of Appeal also, however, rejected the applicant's submission that the Minister's decision to detain could only be exercised where there was sufficient evidence for the detention and that, in these circumstances, the "precedent fact doctrine" applied to permit the court to review the sufficiency of such evidence on a balance of probabilities.[43] The Court of Appeal held that whether the power in question is a "precedent fact" and subject to such review is a question of statutory construction.[44] In construing s 30 of the CLTPA, the Court of Appeal reached the view that such review was not applicable.[45] This interpretation turned on the fact that Parliament had conferred power on the Minister to make a detention order if "he is satisfied" implying a complex expertise and experience-based judgment that it would be judicial overreaching to review. Instead of either of these approaches, the court's review would be based on the usual grounds of judicial review to satisfy the requirements of the rule of law noted above.[46]

15 Secondly, the balance struck was apparent in the way the court carried out this review. The applicant focused primarily on "illegality" as his ground of review. This involved interpreting the provisions of the CLTPA to ascertain the scope of the power that had been delegated by Parliament to the Executive. Here, the Court of Appeal, echoing the views of the Court of Appeal in *Chng Suan Tze*, observed that this question was "centrally" one for the Judiciary.[47] In carrying out the interpretation of the requisite provisions of the CLTPA (primarily the

43 The court relied on *R v Secretary of State for the Home Department, ex parte Khawaja* [1984] AC 74 at 97, 99 and 108.

44 Again, the court relied on the Court of Appeal's approach in *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525.

45 The only possible "precedent fact" was the provision of consent by the public prosecutor to any detention, which was not in dispute: *Tan Seet Eng v Attorney-General* [2015] 2 SLR 453 at [55].

46 *Tan Seet Eng v Attorney-General* [2015] 2 SLR 453 at [63]. The approach to the interpretation of the operative words – "he is satisfied" – differs from the position taken in England in *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997, where similar language was not taken to mean complete deference to the view of the Minister: at 1030C–1030D and 1033G–1034A, *per* Lord Reid.

47 *Tan Seet Eng v Attorney-General* [2015] 2 SLR 453 at [134] (*cf Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525, where the Court of Appeal held that the boundaries of the decision-maker's jurisdiction as conferred by an Act of Parliament is a question "solely" for the courts).

question of what was "necessary … in the interests of public safety, peace and good order" under s 30 of the CLTPA), the Court of Appeal paid close attention to parliamentary debates at the enactment and subsequent renewal of the CLTPA by the Legislature. However, it did not just defer to the interpretation provided by the Attorney-General, but undertook its own interpretation of parliamentary debates.[48] This ultimately determined the outcome of the case that the grounds for detention were not demonstrably compliant with s 30 of the CLTPA.[49] In the court's view, the CLTPA must be interpreted to apply only to "offences of sufficient seriousness"[50] and for activities that have a prejudicial effect on the public safety, peace and good order *of Singapore*[51] and the applicant's global match-fixing activities did not appear to conform to this interpretation. Consequently, the Court of Appeal quashed the detention order.

16 The court's stepping into this stronger role under the CLTPA (compared to the ISA) could not be said to have upset the balance between the two branches. There was still a significant amount of decisional space left to the Executive, as is apparent from the Government's actions following *Tan Seet Eng*. Soon after the decision, the Ministry of Home Affairs issued a statement which stated that the "[ministry] respects and accepts the Court of Appeal's judgment". It further stated that the ministry had sought to reissue detention orders with the consent of the Public Prosecutor which would comply with the Court of Appeal's decision in *Tan Seet Eng*. In particular, the ministry stated that the orders will set out the impact of the applicant's match-fixing activities "on public safety, peace and good order within Singapore" as per the Court of Appeal's interpretation of s 30 of the CLTPA.[52] The applicant was rearrested less than a week later and the

48 This contrasts with the court's approach to statutory interpretation in the context of constitutional judicial review where they defer to the interpretation offered by the Attorney-General as to the purpose of a statute (according it a presumption of constitutionality albeit to varying degrees): *Taw Cheng Kong v Public Prosecutor* [1988] 1 SLR 943 (HC); [1998] 2 SLR 410 (CA); *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 (HC); [2015] 1 SLR 26 (CA). The court's more involved approach to statutory interpretation in *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 can also be contrasted with the approaches taken elsewhere: see, *eg*, the more conservative approach to judicial interpretation of statute in the English context (largely driven by parliamentary supremacy): *R v Monopolies and Mergers Commission, ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23; *R (British Broadcasting Corp) v Information Tribunal* [2007] 1 WLR 2583; *R (Cart) v Upper Tribunal* [2012] 1 AC 663; *Eba v Advocate General for Scotland* [2012] 1 AC 710; *R (Jones) v First-tier Tribunal* [2013] 2 AC 48.

49 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [146].

50 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [135].

51 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [137].

52 Ministry of Home Affairs, "MHA Statement on Detention of Dan Tan Seet Eng" (5 December 2015).

detention order was not challenged.[53] In addition, the Ministry of Home Affairs released a further three detainees under the CLTPA on the basis that they had reviewed the detention orders of those persons following the judgment and come to the view that they also needed to be revoked. Once released, these detainees were not rearrested under fresh detention orders, but instead subject to the lesser restraint of a police supervision order.[54] The balanced approach taken to review in *Tan Seet Eng* meant that the "binary clash"[55] that was apparent post-*Chng Suan Tze* was avoided with the court's input and Government's response to that input being more collaborative versus combative in nature.

17 The boundaries of this co-equality will evolve as the courts re-engage with the political branches in other areas that were typically subject to deference and a green-light approach.[56] The article now turns to look at how the courts could be said to have manifested this co-equal role more recently in the context of "substantive review".

III. Developing substantive grounds of judicial review

18 The grounds of judicial review in Singapore are based on Lord Diplock's now famous exposition in *Council of Civil Service Unions v Minister for the Civil Service*: illegality, irrationality and procedural impropriety.[57] Procedural impropriety and illegality are more readily accepted as uncontroversial grounds of judicial review, as they involve reviewing a decision-making process and the boundaries of statutory power (an exercise tethered to statutory interpretation). Irrationality is considered more problematic as it involves reviewing the reasonableness of a decision and, therefore, raises the spectre of judicial overreaching most acutely.

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53 "Alleged Match-fixer Dan Tan Re-Arrested" *The Straits Times* (1 December 2015).

54 Ministry of Home Affairs, "MHA Statement on Three Members of Match-fixing Syndicate Released from Detention and Placed on Police Supervision Orders" (18 January 2016).

55 See Sundaresh Menon, "The Rule of Law: The Path to Exceptionalism" (2016) 28 SAcLJ 413 at paras 29 and 35 on the advantages of avoiding such binary clashes between the two branches.

56 Previously, the courts had indicated that there are areas of high policy that may be entirely non-justiciable (*eg*, *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453). This was modified in *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [106], where the Court of Appeal held that "even for matters falling within the category of 'high policy', the courts can inquire into whether decisions are made within the scope of the relevant legal power duty and arrived at in a legal manner", so such areas are not entirely non-justiciable but subject to deference and a calibrated review instead: at [105].

57 *Council of Civil Service Unions v Minister for the Civil Service* [1984] 3 WLR 1174 at 1196, *per* Lord Diplock.

19 Generally, substantive review in Singapore has developed less extensively than elsewhere in the common law world, including closer to home – in Hong Kong[58] and Malaysia.[59] In Singapore, the courts have maintained a stricter distinction between reviewing the "legality" and "merits" of a decision.[60] For this reason, substantive review had been confined to review on the basis of just "irrationality" for a significant period of time. Irrationality has been used sparingly and with a high threshold for an applicant to overcome.[61] The courts also rejected proportionality as a ground for judicial review.[62] In response to earlier calls for developing substantive review, the courts and political branches regularly expressed concern over the adoption of newer English law principles of administrative law in the area.[63] This remained the status quo until recently. The discussion that follows discusses recent incremental advances in the area of substantive review.[64] It will demonstrate how these advances have been home-grown to suit

58 See Swati Jhaveri, Michael Ramsden & Anne Scully-Hill, Administrative Law in Hong Kong (LexisNexis, 2nd Ed, 2013), chs 9–12 and *Hysan Development Co Ltd v Town Planning Board* (2016) 19 HKCFAR 372.

59 See Sudha Pillay, "The Emerging Doctrine of Substantive Fairness – A Permissible Challenge to the Exercise of Administrative Discretion?" (2001) 3 MLJ 1 at 1.

60 See *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345 at [56].

61 See, *eg*, *Manjit Singh s/o Kirpal Singh v Attorney-General* [2013] 4 SLR 483 at [7] and *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [125].

62 See, *eg*, *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR (R) 294 at [38]–[47] and *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [108]–[121].

63 *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR 582 at [86]–[87], rejecting the European influenced idea of proportionality; see also statements by the Minister of Home Affairs in Parliament (*Singapore Parliamentary Debates, Official Report* (25 January 1989) vol 52 at col 468 (Prof S Jayakumar, The Minister for Law and Minister for Home Affairs)) in introducing amendments to the Constitution of the Republic of Singapore (1999 Reprint) and the Internal Security Act following the court's decision in *Chng Suan Tze v Minister of Home Affairs* [1989] 1 MLJ 69 ("*Chng*"). The Minister for Home Affairs expressed concern over the negative impact of English cases (which have, in turn, been heavily influenced by European jurisprudence) on the court in *Chng*. There was therefore a need to retract the law back to its original Singapore-specific routes. See also Judicial Commissioner Andrew Phang (as his Honour then was) on the importance of being more careful about English law imports in favour of "developing an autochthonous or indigenous legal system sensitive to the needs and mores of the society of which it is a part": *Tang Kin Hwa v Traditional Chinese Medicine Practitioner's Board* [2005] 4 SLR(R) 604 at [27]. See also an earlier piece by Andrew Phang Boon Leong J while a senior lecturer at the Faculty of Law, National University of Singapore: "Of Generality and Specificity – A Suggested Approach toward the Development of an Autochthonous Singapore Legal System" (1989) 1 SAcLJ 68; *cf* Christine Chinkin, "Abuse of Discretion in Singapore and Malaysia" in *The Common Law in Singapore and Malaysia* (Andrew Harding ed) (Butterworths, 1985) at p 269.

64 *Cf* Daniel Tan, "An Analysis of Substantive Review in Singaporean Administrative Law" (2013) 25 SAcLJ 296, which discussed the underdeveloped status of

(*cont'd on the next page*)

Singapore's particular conditions and without reliance on the way in which the principles have developed in English law. In contrast to the red-light roots of such extensions of review in English law, the substantive grounds of review developed by the courts here can be said to allow stronger review but also *facilitate* the mode and manner in which the Executive does its business by building in decisional space for the Executive within the constraints of the ground of review. This mirrors the idea of co-equality in *Tan Seet Eng*.

20 This section considers three such "indigenous" developments with substantive review: the recognition of the doctrine of substantive legitimate expectations, changes in the use of irrationality as a ground of judicial review and the introduction of *aspects* of balancing or proportionality analysis in judicial review.

A. Developing grounds of judicial review: Acceptance of the doctrine of substantive legitimate expectations

21 The High Court's decision in *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority*[65] ("*Chiu Teng*") to recognise the doctrine of substantive legitimate expectations is significant. Prior to *Chiu Teng*, the courts were reluctant to recognise the doctrine, with little discussion on the reasons for this in the cases.[66] In *Chiu Teng*, a property developer challenged the Singapore Land Authority's ("the Authority") mode of calculating premiums charged where a developer applies to lift development restrictions on plots of land. In planning the development of the particular plot of land in question, the developer had acted in

substantive review in Singapore. Tan's article predates the key developments relating to substantive review discussed in this paper.

65 [2014] 1 SLR 1047; see also Swati Jhaveri, "The Doctrine of Substantive Legitimate Expectations: the Significance of *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority*" [2016] *Public Law* 1; "Contrasting Responses to the '*Coughlan* Moment': Legitimate Expectations in Hong Kong and Singapore" in *Legitimate Expectations in the Common Law World* (Matthew Groves & Greg Weeks eds) (Hart Publishing, 2017) ch 12; Charles Tay, "Substantive Legitimate Expectations: The Singapore Reception" (2014) 26 SAcLJ 609; and Zhida Chen, "Substantive Legitimate Expectations in Singapore Administrative Law" (2014) 26 SAcLJ 237. The Singapore Court of Appeal has yet to definitively affirm or reject the doctrine. They stopped short of doing so in the recent case of *SGB Starkstrom Pte Ltd v Commissioner for Labour* [2016] 3 SLR 598. This was on the basis that the issue did not arise in the case, although the Court of Appeal ended its judgment flagging issues that may cause the courts to pause and reflect on the recognition of the doctrine in Singapore: at [42] and [55]–[63], *per* Sundaresh Menon CJ.

66 Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 at 478. See, *eg*, *Re Siah Mooi Guat* [1988] 2 SLR(R) 165, *Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR(R) 92 and *UDL Marine (Singapore) Pte Ltd v Jurong Town Corp* [2011] 3 SLR 94; *cf Abdul Nasir bin Amer Hamsah v Public Prosecutor* [1997] 2 SLR(R) 842.

reliance on information available in the Authority's circulars and on the website. This information indicated that premiums could be assessed on the basis of average historical valuations of land in the area (this compared to, for example, a current spot or market valuation). The latter was in fact the mode eventually used by the Authority which resulted in a significantly higher premium valuation than the developer had expected. The developer challenged this on the basis that it, *inter alia*, breached their expectation on the mode of calculation.

22 In recognising the doctrine of legitimate expectations, the court rejected the argument that this would offend the separation of powers:[67]

> The upholding of legitimate expectations is eminently within the powers of the judiciary … in deciding whether a legitimate expectation ought to be upheld, the court must remember that there are concerns and interests larger than the private expectation of an individual … If there is a public interest which overrides the expectation, then the expectation ought not to be given effect to. In this way, I believe the judiciary can fulfil its constitutional role [to verify not only that the powers asserted accord with the substantive law created by Parliament but also that the manner in which they are exercised confirms with the standards of fairness which Parliament must have intended] without arrogating to itself the unconstitutional position of being a super-legislature or a super-executive.

Thus, in expounding the court's role in the area, the judge, while extending review into this new area, was also cautious to build in a sense of balance in the approach to be taken in upholding expectations. Even if an applicant can establish a "legitimate" expectation (on the basis of a clear representation from a public body and reasonable reliance on that representation), the court will not enforce it if the public authority can show an overriding public interest to depart from it.[68]

23 The issue was, however, how to strike a balance between the two, the expectation and the public interest, and the court's role in doing this. In English law, the courts have utilised a number of approaches. Previously, they would piggyback on irrationality review (the expectation would be upheld if it would be "irrational" for a public body to depart from it). This was, however, ultimately rejected on the basis that such a test would cause the public authority to be a "judge in its own cause, for a decision to prioritise a policy change over legitimate expectations will almost always be rational from where the authority

67 *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [113].

68 *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [119].

stands, even if objectively it is arbitrary or unfair".[69] Instead, there was a preference in some cases for the use of a more structured proportionality-based test, where the public body can only depart from an expectation if they are pursuing a "legitimate" purpose and where the departure is "necessary" or the "least restrictive" means of achieving that purpose.[70] The burden of proving legitimacy of purpose and necessity of the departure from the expectation was on the public body, with the court playing an active role in reviewing both issues.[71]

24 Neither approach was adopted in *Chiu Teng*. Instead, the court engaged in a more open textured balancing exercise, relying on the statutory framework for the Authority's decision:[72]

> As the SLA has rightfully pointed out, it is under a statutory duty to 'optimise land resources' … and to 'have regard to efficiency and economy and to the social, industrial and commercial and economic needs of Singapore' in the carrying out of its functions … Its statutory duty would encompass getting the best returns for the State when it deals with State land. This would in turn benefit the public at large. It is therefore unacceptable in the circumstances here to argue that the State's finances would not suffer as much as the applicant's if the SLA were to make an exception for this case and not apply its unpublished policy relating to directly-alienated State land to the Land here. The overriding public interest must therefore prevail over the financial interests of a commercial enterprise like the applicant in this case.

25 The court's "balancing" here was brief: restricted to just one paragraph. It may, therefore, be argued that this does not exemplify "co-equality": with the court taking instead a muted role. However, there are a number of alternative explanations that, nonetheless, reinforce the idea of co-equality. Firstly, the applicant had a weak expectation on the facts[73] which could, therefore, be more easily outweighed by the public interest in question. Secondly, the applicant was a corporate entity and

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69 *R v North & East Devon Health Authority, ex parte Coughlan* [2000] 2 WLR 622 ("*Coughlan*") at [66]. This used to be the approach prior to *Coughlan* (see, *eg*, *R v Home Secretary, ex parte Hargreaves* [1997] 1 WLR 906).

70 See *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [69]; see also Janina Boughey, "Proportionality and Legitimate Expectations" in *Legitimate Expectations in the Common Law World* (Matthew Groves & Greg Weeks eds) (Hart Publishing 2017) ch 6 for a discussion of the relationship between proportionality and legitimate expectations.

71 See *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [69].

72 *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [130]. See also Paul Craig, *Administrative Law* (Sweet & Maxwell, 8th Ed, 2016) at pp 703–707.

73 The court had felt that reliance on circulars and information on the Authority's website was not reasonable in the circumstances *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [120] and [125]–[129].

the impact on it was financial, rather than an individual who suffered some impact on their liberty or fundamental rights, which could potentially have triggered a stronger degree of scrutiny on the part of the courts.[74] Finally, in the planning context of the case, the individual interest of a particular applicant is balanced against a communitarian public interest in land development[75] and where the necessarily polycentric nature of decisions means stronger judicial deference to reassess the presumptive weight attached to such a broader communitarian interest in the Singapore context.[76] In this way, it may be premature to do a definitive analysis of the manifestation (or otherwise) of co-equality at this early stage of the development of this ground of review. It will be important for the courts in Singapore, however, to continue to provide more guidance as the doctrine evolves on how the operation of the doctrine and, in particular, the final balancing between the public or national interest and the expectation. For example, what criteria shift the balance in favour of either the applicant or the respondent or determine the weight to be ascribed to either's interest? Does the degree of scrutiny by the courts vary according to the strength or weakness of the expectation, the factual context of the case (liberty versus financial impact) and the nature of the public interest on the side of the public body? These are precisely the nature of issues left open by the Court of Appeal in *SGB Starkstrom Pte Ltd v Commissioner for Labour*.[77] These issues were important considerations in light of the "difficulties inherent in accepting the doctrine of legitimate expectations in Singapore" and given that the doctrine "would represent a significant departure from our current understanding of the scope and limits of judicial review".[78] It is clear, therefore, that should a case arise in the future, the Court of Appeal is minded to revisit the manner in which the balance is struck between the Judiciary and Executive in relation to the doctrine. It will be necessary to re-evaluate then whether the approach will be one that embodies co-equality or skews the balance in favour of either the Judiciary or the Executive in the context of the doctrine's operation in Singapore.

74 On this, see paras 29–35 on such enhanced scrutiny in cases involving rights.

75 See, *eg*, Singapore, *Shared Values* (White Paper, Cm 1, 1991) at paras 11 and 22–29 and Thio Li-ann, "Law and the Administrative State" in *The Singapore Legal System* (Kevin Y L Tan ed) (Singapore University Press, 1999) at p 14; see also Sundaresh Menon, "The Rule of Law: The Path to Exceptionalism" (2016) 28 SAcLJ 413 at para 24 on the "comfortable" co-existence of the rule of law with the "cultural substratum [of] communitarian over individualist values".

76 *R (Alconbury) v Environment Secretary* [2001] 2 WLR 1389]; [2001] 2 All ER 929; see also *Lee Hsien Loong v Review Publishing* [2007] 2 SLR 453 at [98(b)].

77 [2016] 3 SLR 598 at [55]–[63].

78 *SGB Starkstrom Pte Ltd v Commissioner for Labour* [2016] 3 SLR 598 at [59] and [60].

26 The court's relatively muted role in balancing the expectation and the public interest also needs to be considered in the context of the remedies the court said it was prepared to utilise in enforcing a valid expectation in the absence of any overriding public interest. On this, the court followed the high-watermark decision on substantive legitimate expectations in England: *R v North & East Devon Health Authority, ex parte Coughlan*[79] ("*Coughlan*"). In *Coughlan*, the Court of Appeal quashed the public authority's decision on the basis that it ran contrary to a legitimate expectation. The scope of the quashing order effectively gave substantive effect to that expectation, with the authority bound to honour it. The High Court in *Chiu Teng* was prepared to follow this approach. This remedial response can be compared with later qualifications, most notably in *R (Bibi) v Newham London Borough Council (No.1)*[80] ("*Bibi*"). There, the court held that a declaration of substantive benefit would inappropriately encroach upon executive power. Accordingly, the expectation was "enforced" via a mandatory order but only as a relevant consideration, requiring the Executive to make a fresh decision taking into due consideration the applicant's expectation as a "relevant consideration" and, where the fresh decision is to depart from the expectation, to provide reasons to the applicant.[81] The court further held in *Bibi* that there was a strong presumption in favour of giving effect to the expectation when the matter was reconsidered by the local authority.[82] This approach was felt to better balance the role of the courts and that of the Executive.

27 As the doctrine of substantive legitimate expectations evolves in Singapore, it will be important for the courts to review how to "enforce" such expectations in a way that better mirrors the idea of co-equality and balance. Writing extrajudicially, Menon CJ has indicated that, in an appropriate case in the future, the court may revisit whether to adopt any of these alternative remedial approaches, including "enforcing" the expectation as a relevant consideration.[83] One possible solution is to calibrate the remedy according to, for example, the strength of the applicant's expectation (whether it is based on an individualised representation or assurance to the applicant or a broader circular issued to a group, of which the applicant is a member) or the factual context of the case (liberty versus financial impact on the applicant). Where the expectation is weak or the impact on the applicant less severe, the courts may utilise the *Bibi* approach. Conversely, the situation may mandate

79 *R v North & East Devon Health Authority, ex parte Coughlan* [2000] 2 WLR 622.
80 *R (Bibi) v Newham London Borough Council (No 1)* [2002] 1 WLR 237.
81 This was the approach preferred in *R (Bibi) v Newham London Borough Council (No 1)* [2002] 1 WLR 237.
82 *R (Bibi) v Newham London Borough Council (No 1)* [2002] 1 WLR 237 at [58]–[59].
83 Sundaresh Menon, "The Rule of Law: The Path to Exceptionalism" (2016) 28 SAcLJ 413 at paras 26–29.

substantively enforcing the expectation where the applicant has a strong one or the impact on an applicant's liberty is high.

28 The analysis shows how, while a potentially strong "red-light" ground of substantive review, the balance and sense of co-equality between the courts and the Executive can be struck using different components of the doctrine of substantive legitimate expectations as crafted in Singapore: firstly, in the degree of scrutiny used to balance between the applicant's expectation and the relevant public interest in issue in a case; and secondly, in the range of remedies the courts develop to "enforce" the expectation.

B. Developing irrationality as a ground of judicial review

29 Given the concerns with judicial overreaching, courts have maintained a high threshold for irrationality review. Courts take steps to legitimise this review on the basis of parliamentary intention: such highly irrational decisions would need to be struck down by courts as they would necessarily be in excess of power conferred by Parliament.[84]

30 Courts elsewhere have modified the original threshold to intensify review in cases where they feel there is a need for a more "anxious scrutiny".[85] This has not been the case in Singapore which maintained the original high threshold in most cases.[86] A survey of these cases show that a majority of them involved decisions in the area of immigration, tax and land planning policy. It could be said from this

84 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223 at 228–229, *per* Lord Greene MR.

85 Most notably, cases involving alleged infringements of *common law* fundamental rights (these cases largely predate the Human Rights Act, which provides for the adjudication of alleged rights infringement on the basis of the proportionality test). See, *eg*, *R v Secretary of State for the Home Department, ex parte Brind* [1991] 2 WLR 588; [1991] 1 All ER 720 and *R v Ministry of Defence, ex parte Smith* [1996] QB 517; see also Sir John Laws, "*Wednesbury*" in *The Golden Metwand and the Crooked Cord* (Christopher Forsyth & Ivan Hare eds) (Oxford University Press, 1998) for a discussion of these variable standards of review and Swati Jhaveri, Michael Ramsden & Anne Scully-Hill, *Administrative Law in Hong Kong* (LexisNexis, 2nd Ed, 2013) ch 9 for a discussion on similar developments in Hong Kong.

86 *Re Siah Mooi Guat* [1988] 1 SLR(R) 165; *City Developments Ltd v Chief Assessor* [2008] 4 SLR(R) 150; *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [64] and [66]; see also Daniel Tan, "An Analysis of Substantive Review in Singaporean Administrative Law" (2013) 25 SAcLJ 296 at para 60: Tan observed how (as of 2010) there had only been two successful applications for judicial review on the basis of irrationality and this is only where the applicant had also been successful in pleading illegality as a ground of review: *Attorney-General v Venice-Simplon Orient Express Inc Ltd* [1995] 1 SLR(R) 533; *Mir Hassan bin Abdul Rahman v Attorney-General* [2009] 1 SLR(R) 134.

that the approach in Singapore is in fact consistent with the English approach where such decisions would also be subject to the original high deferential threshold.[87] However, what is of interest is that there are nascent indicators of the courts here starting to vary their standard of review outside of these traditionally deferential areas of review, but in a different way to the English courts. This is most apparent in the recent case of *Vijaya Kumar s/o Rajendran*[88] ("*Vijaya*").

31 In *Vijaya*, the applicants (members of the Hindu community) participated in an annual religious procession. The applicants argued that the use of music from a particular type of drum was a critical aspect of the religious practice of the procession and, therefore, any prohibition of this infringed their constitutional freedom of religion. A partial ban had been imposed on "public order" grounds, broadly defined, to include the maintenance of public tranquillity or peace. In addition to the various constitutional grounds of challenge,[89] the applicants sought to challenge the rationality of the ban.

32 The irrationality challenge dovetailed, to some extent, with the applicant's reliance on "illegality" as a ground of review. There, the applicants alleged that the respondent had taken into account the existence of a religious element in the use of the instruments and the increased risk of public order by virtue of that and that these amounted to irrelevant considerations (an aspect of illegality review). What is of greater interest is the argument the applicants made outside of this – the standalone use of irrationality to argue that the music ban did not meet the threshold set in *Wednesbury*.[90] On this, the court concluded:[91]

> The imposition of the condition on the playing of music instruments during the Thaipusam procession was clearly linked to legitimate public order considerations. The police had assessed that the music restriction was required based on ground observations and past lessons that crowd buildup, disrupted traffic flows and conflicts among individuals (*ie*, matters consequential to the playing of musical instruments along the course of a religious foot procession) could lead to public disorder among different groups, given Singapore's history of racial riots and its multireligious makeup. This risk could not be said

87 See, *eg*, comments to this effect by the House of Lords in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd* [1998] 3 WLR 1260; [1999] 1 All ER 129.

88 *Vijaya Kumar s/o Rajendran* [2015] SGHC 244. There were earlier indicators that the courts may be prepared to utilise a sliding scale of review with different degrees of scrutiny but this did not take off: *Re Fong Thin Choo* [1992] 1 SLR(R) 774 at [30] (following *R v Secretary of State for the Home Department, ex parte Khawaja* [1984] 1 AC 74 at 105D, *per* Lord Wilberforce).

89 See discussion in paras 36–39 on proportionality.

90 *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.

91 *Vijaya Kumar s/o Rajendran* [2015] SGHC 244 at [49].

> to be unreal. Therefore, the decision could hardly be said to be so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

What is apparent here is that in assessing irrationality, the court was mindful of the different anatomical parts of the Executive's decision to ban instruments, including the public order considerations that motivated the ban as well as the "necessity" of the ban. On the latter, it noted the information on which it was based (on which it relied on the police's "ground observations" – therefore, exercising deference here). These are arguably aspects of the more structured proportionality-type inquiry that we see elsewhere, albeit reviewed under the rubric of irrationality.[92] The co-equality comes in the form of the court checking that the Executive asked the right questions when making the decision, but not scrutinising the factual evidence on which it is based.

33 This potentially more searching irrationality review still differs from the "anxious scrutiny" threshold used in the English context. Prior to the enactment of the Human Rights Act (which authorises the judicial use of proportionality in cases involving rights), the courts had been prepared to modify the irrationality threshold in reviewing possible infringements of rights recognised at common law.[93] There, the courts look at whether the decision is "reasonable" (versus "so unreasonable") with the burden for that being on the *respondent*. The English courts have set a different "equilibrium" point: by lowering the threshold and reversing the burden onto the respondent, the courts have asserted a much stronger "red-light" role for themselves in cases involving fundamental rights and liberties.[94]

34 An interesting open question is whether the courts are likely to continue the kind of review seen in *Vijaya* and, if so, what the triggers

92 The court's role here will be assisted by any advance made on the duty to give reasons at common law. Such a duty would provide an applicant with a more elaborate foundation on which to raise a rationality challenge. On this, see Makoto Hong Chung, "Shaping a Common Law Duty to Give Reasons in Singapore: Of Fairness, Regulatory Paradoxes and Proportionate Remedies" (2016) 28 SAcLJ 24 for a proposal on how to develop such a duty in a way that is consistent with "green-light" approaches to judicial review; see also Farrah Ahmed & Adam Perry, "Expertise, Deference, and Giving Reasons" [2012] *Public Law* 221.

93 *R v Secretary of State for the Home Department, ex parte Brind* [1991] 2 WLR 588.

94 It is interesting to note that the applicant was still unsuccessful in *R v Ministry of Defence, ex parte Smith* [1996] QB 517: this led to an appeal to the European Court of Human Rights where the applicant won. The European court noted that even such a heightened irrationality review was not an adequate protection of rights. Proportionality was a more appropriate standard of review: *Smith v United Kingdom* (2000) 29 EHRR 493.

for it are likely to be. An obvious context would be where the liberty or rights of an applicant are implicated in a case. Where such cases have arisen in Singapore, however, the liberty context needed to be balanced against a public order or security context. The question is which context prevails and sets the degree of review the courts will utilise. In this respect, there are interesting points of difference between earlier and more recent cases. In earlier cases like *Chee Siok Chin v Minister for Home Affairs*, the court noted the liberty context of the case but was cautious about putting too much premium on this in determining the appropriate degree of review: The court observed:[95]

> While the clarion call for unfettered individual rights is almost irresistibly seductive, it cannot, however, be gainsaid that individual rights do not exist in a vacuum. Permitting unfettered individual rights in a process that is value-neutral is not the rule of law. Indeed, that form of governance could be described as the antithesis of the rule of law – a society premised on individualism and self-interest.

35 This can be contrasted with the more recent approach in *Tan Seet Eng*,[96] where the court was more nuanced in its balancing of the two competing interests. This indicates how the courts are continuing to feel their way through the idea of co-equality and how to (re)strike balances between themselves and the Executive. In doing so, it will be important for the courts to list the precise factors that are utilised to determine the degree of scrutiny. A number of these factors are already apparent from the cases, most notably, the impact on the applicant, the institutional limits of the Judiciary when compared to the expertise and democratic legitimacy of the Executive; as well as the sensitive nature of the Executive's decision in the security context. It is these vehicles for balance and co-equality that will inform the further development of the court's irrationality review following on from *Vijaya*.

C. Developing grounds of judicial review: Proportionality

36 The courts have rejected proportionality as a ground of judicial review on multiple occasions, largely on the basis that it is not suitable for the jurisdiction, being a construct of European jurisprudence.[97] When pushed, the courts have sometimes held that any proportionality review could, at most, be done via irrationality as a ground of review.[98]

95 *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [52].

96 See discussion at paras 13–15.

97 See, *eg*, *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [108]–[121], *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR (R) 294 at [38]–[47] and *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 at [87].

98 See, *eg*, *Dow Jones Publishing Co (Asia) Inc v Attorney-General* [1989] 1 SLR(R) 637 at [60].

However, even this idea of subsuming any such analysis within irrationality has met with some judicial pushback.[99]

37 Notwithstanding these early negative pronouncements, the former Chief Justice Chan recognised that they did not foreclose the possibility of its recognition at some future point in time.[100] Thio Li-ann also recognises that proportionality may not necessarily be entirely foreign to Singapore as suggested by judges concerned with the foreign roots of the concept:[101]

> [T]here are also views that proportionality is a dormant common law concept, dating back to the Magna Carta. So too, there are of course a variety of democratic societies, whether liberal, socialist or communitarian and to that extent, it is conceivable that an autochthonous Singapore test of proportionality may be crafted to protect important interests embodied in both rights and the common good, without a slavish adoption of rightist liberalism …

38 The discussion in sections IIIA and IIIB above[102] identify a number of different vehicles for an embryonic development of the judicial use of aspects of the proportionality inquiry, if not full-blown proportionality. With the doctrine of substantive legitimate expectations, the final balancing between the expectation and any competing public interest could evolve to be more structured (as recommended above),[103] even if not in the same vein as proportionality. With irrationality review, the discussion highlights how the courts have started to consider proportionality-type questions under the purview of irrationality, albeit as secondary reviewers (the courts check whether the right questions were asked and answered by the Executive). These examples highlight, at the very least, the beginning of the intellectual exercise that sits behind proportionality review – that of balancing the public interest and the applicant's interest in reaching a decision.[104]

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99 *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR(R) 294 at [46].

100 Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 at para 25.

101 Thio Li-ann, "The Theory and Practice of Judicial Review of Administrative Action in Singapore" in *SAL Conference 2011 – Developments in Singapore Law between 2006 and 2010: Trends and Perspectives* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu gen eds) (Singapore Academy of Law, 2011) at p 749.

102 See paras 21–28 and 29–35.

103 See para 25.

104 On the development of proportionality or balancing-type adjudication in the context of constitutional judicial review, see David Tan's article in this issue: "Walking the Tightrope between Legality and Legitimacy: Taking Rights Balancing Seriously" (2017) 29 SAcLJ 743, Jaclyn L Neo, "Balancing Act: The Balancing Metaphor as Deference and Dialogue in Constitutional Adjudication" and Swati Jhaveri, "The Broader Case for Developing the Content of Fundamental Rules of Natural Justice under Article 9 of the Constitution: A Place for Proportionality?" in

(*cont'd on the next page*)

39 Singapore will, therefore, have its own journey with proportionality-based review. There is no external impetus as exists in English law from the European context.[105] Instead, as the discussion above shows,[106] there are more likely to be micro-adjustments via existing grounds of review, instead, to introduce elements of proportionality type review. Going forward, the courts will need to clarify how the various balances are struck in the context of any proportionality-type inquiry and the degree of scrutiny the courts will utilise in striking this balance as already discussed.[107] On this, as Thio noted that while in the Singapore context "the trade-off between fairness and efficiency is clear … the legitimacy of a system cannot lie exclusively in its efficiency".[108] The discussion[109] on the more nuanced approach to these questions of balance within the context of irrationality review is instructive of how the co-equality of the branches may develop going forward.

IV. Conclusion

40 The indigenous developments discussed in this article need to be considered against the backdrop of developments more broadly within administrative law. First, they need to be considered against tandem developments generally in the area of access to judicial review where there have been incremental extensions to the rules on standing and the opening up of the possibility that courts may review the validity

Constitutional Interpretation in Singapore: Theory and Practice (Jaclyn L Neo ed) (Routledge, 2016) at pp 159 and 188 respectively and Jack Tsen-Ta Lee, "According to the Spirit and not to the Letter: Proportionality and the Singapore Constitution" (2014) 8 *Vienna Journal on International Constitutional Law* 276.

105 Although this influence is starting to spread outside of rights-based cases to domestic administrative law more broadly: *R (Alconbury) v Secretary of State for Environment, Transport and the Regions* [2001] 2 WLR 1389 at [51], *per* Lord Slynn; *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363; *The Association of British Civilian Internees – Far Eastern Region v Secretary of State for Defence* [2003] QB 1397; *Bank Mellat v Her Majesty's Treasury (No 2)* [2014] AC 700; *Keyu v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 69.

106 See paras 21–28 and 29–35.

107 See paras 21–28 and 29–35; see also Daniel Tan, "An Analysis of Substantive Review in Singaporean Administrative Law" (2013) 25 SAcLJ 296 at paras 61 and 70.

108 Thio Li-ann, "The Theory and Practice of Judicial Review of Administrative Action in Singapore" in *SAL Conference 2011 – Developments in Singapore Law between 2006 and 2010: Trends and Perspectives* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu gen eds) (Singapore Academy of Law, 2011) at p 722; *cf Registrar of Vehicles v Komoco Motors Pte Ltd* [2008] 3 SLR(R) 375 at [70] on the primacy of efficiency in public administration.

109 See para 44.

of ouster clauses in legislation.[110] This gradual increase in access dovetails with an increase in the number of judicial review cases in recent years.[111] This increase has been cautiously welcomed as demonstrating "an increase in public consciousness *vis-à-vis* the reviewability of decisions made by public authorities and the checking function played by the courts against executive excess".[112] This enhanced access will ultimately allow for a consistent but managed stream of cases to further nudge the courts into advancing on and clarifying the scope of the developments discussed in this article within the parameters of the co-equality framework.

41 Secondly, and more importantly, the developments need to be evaluated against the backdrop of "green-light" developments in Singapore and the enhancement of the Executive's own mechanisms for redress and achieving greater accountability, transparency and good governance. There have been changes in that area, again gradual and incremental. For example, there have been measured extensions to participation in governance issues. A prominent example is the recent Constitutional Commission set up in 2016 to look into amendments

110 For a discussion on enhancing access to judicial review, see Swati Jhaveri, "Advancing Constitutional Justice in Singapore: Enhancing Access and Standing in Judicial Review Cases" [2017] Sing JLS 53 and the discussion in *Per Ah Seng Robin v Housing and Development Board* [2016] 1 SLR 1020 at [65] on the effectiveness of legislative ouster clauses which seek to oust courts. These developments in the area of access can be contrasted with views expressed on retaining a high standard of access to judicial review: Wong Huiwen Denise & Makoto Hong, "Raising the Bar: Amending the Threshold for Leave in Judicial Review Proceedings" (2016) 28 SAcLJ 527.

111 See Lynette J Chua & Stacie L Haynie, "Judicial Review of Executive Power in the Singaporean Context, 1965–2012" (2016) 4(1) *Journal of Law and Courts* 43.

112 Wong Huiwen Denise & Makoto Hong, "Raising the Bar: Amending the Threshold for Leave in Judicial Review Proceedings" (2016) 28 SAcLJ 527 at para 1. A concrete example of this raised consciousness can be seen in the contrasting approaches taken to challenging loans made by the Government to foreign entities. When this was done in 1997 during the Asian financial crisis, opposition politician Joshua B Jeyaretnam sought to challenge this via a constitutional tribunal under Art 100 of the Constitution of the Republic of Singapore: see motion by Jeyaretnam under "Rescue and Assistance Package for Indonesia" in *Singapore Parliamentary Debates, Official Report* (19 November 1997), vol 67 at col 1811 (Mr Jeyaretnam, Non-constituency Member of Parliament and Dr Richard Hu Tsu Tau, Minister for Finance). Subsequently, in 2010, when the Government made a loan to the IMF, another opposition politician, Kenneth Andrew Jeyaretnam (son of Jeyaretnam) challenged this via judicial review (*Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345). In both instances, the individuals were challenging the making of a loan without parliamentary and presidential approval, an issue which involved an interpretation of Art 144(1) of the Constitution. However, different institutional fora were utilised for the challenge.

into the office of the elected president.[113] These green-light developments are far from extensive and there is much that needs to be and can be done to further enhance public and judicial confidence and trust in the internal checks on governance, transparency and accountability.[114] For example, there is a notable absence of an Ombudsman or developed administrative tribunals system – mechanisms that are common aspects of developed common law administrative law systems.[115] In addition, the efficacy of mechanisms like the doctrine of ministerial responsibility embodied in the Constitution[116] is capped by the strong one-party majority in Parliament. The latter could be enhanced by a more politically diverse Parliament.[117] The courts will need to be mindful of this and respond accordingly by either further enlarging their role or contracting it in tandem with such developments. This flexibility is possible through the court's inclusion of various balancing and justificatory outlets within the newly developed grounds.[118]

42 The "localised" developments discussed in this article are not seismic but subtle advances on the traditional outlook to judicial review. Scholars and practitioners advocating a more red-light approach are

113 See the Elected Presidency website <https://www.gov.sg/microsites/elected-presidency/constitutional-commission/about-the-constitutional-commission> (accessed 8 May 2017).

114 See, *eg*, in the area of financial management by government bodies and agencies, the need for enhanced accountability has been the subject of extensive discussion recently as a result of, *inter alia*, the report of the auditor-general on financial lapses in the annual audit of several government agencies: (*Report of the Auditor-General for the Financial Year 2016/17* (4 July 2017). On the need to enhance and clarify the role of the auditor-general, see Preston Wong, "Watchman, Watchdog, Warden and What More? The Constitutional Role and Autochthony of the Singapore Auditor-General" (2016) 28 SAcLJ 552.

115 See Peter Cane, Administrative Tribunals and Adjudication (Hart Publishing, 2009) for a comparative study of tribunals systems elsewhere in the common law world. The setting up of an Ombudsman was recommended as early as 1966 by the Wee Chong Jin Commission on Constitutional Reform. The Government of the day recognised the logic of the recommendation but stated that it was not an opportune moment for this to be done.

116 As embodied in Art 24(2) of the Constitution of the Republic of Singapore (1999 Reprint): "[s]ubject to the provisions of this Constitution, the Cabinet shall have the general direction and control of the Government and shall be collectively responsible to Parliament".

117 The seeds of which may be apparent post-2011 (what Thio Li-Ann referred to as the "post-deferential, re-politicised Singapore emerging after the 2011 General Elections" and the observance of a culture of apology in the public sector): see Thio Li-Ann, "Between Apology and Apogee, Autochthony: The 'Rule of Law' beyond the Rules of Law in Singapore" [2012] Sing JLS 269 at 274 and 284–285.

118 This balanced role for the courts has been proposed by others as suitable in the context of constitutional judicial review as well: see Thio Li-Ann, "Between Apology and Apogee, Autochthony: The 'Rule of Law' beyond the Rules of Law in Singapore" [2012] Sing JLS 269 at 278 and 282–287.

unlikely to be satisfied with the extent of the developments. However, in considering three possible advances in the area of substantive review, the article highlights how these are consistent with the idea of balance and sense of co-equality advocated in *Tan Seet Eng* and the advantages of maintaining such a balanced system of review. Allowing decisional space for the Executive allows different branches involved in advancing good governance to work co-operatively rather than combatively. The article, however, also highlights avenues for the further steady development of these grounds, again in a way that is consistent with the idea of co-equality and balance between the institutions. These are important advances that will help the courts to consolidate their co-equal status within the governance and accountability machinery of Singapore.