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AUTOCHTHONY AND CONFORMITY IN SINGAPORE ADMINISTRATIVE LAW

Administrative law is a field of law in which sensitivity to local context, institutional peculiarities and socio-political values are critical to its functionalism within the modern administrative state. The key question which this article seeks to answer is: to what extent have the Singapore courts developed an autochthonous administrative law jurisprudence to date *vis-à-vis* the English courts? The answer, it is found, lies in the engagement of English jurisprudence on two important aspects of administrative review – the scope of review and doctrine of substantive legitimate expectations – as well as the development of unique features in the Singapore administrative review landscape.

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I. Introduction

1 More than a decade ago, Chan Sek Keong CJ advanced a decidedly bold vision for the autochthonous development of Singapore law in an extrajudicial lecture. His vision articulated the steps that the Judiciary would have to take in order to develop such body of local law, as follows:[2]

> Our ultimate objective is to build up a large body of local jurisprudence, so that local decisions can be cited first instead of English decisions. … However, building up a body of local jurisprudence in a small jurisdiction is an immense task that requires a sustained intellectual effort by the courts. It would be easy for our courts simply to continue to apply English decisions; in contrast, it would require a much greater effort to decide when and explain why they should not apply.

2 Such an ambition to develop an autochthonous jurisprudence may be thought of as part of a search for and assertion of national

1 The author is grateful to Professor Thio Li-ann for her helpful comments on earlier versions of this article.

2 Chief Justice Chan Sek Keong, opening address at the Singapore Academy of Law Conference 2011: Developments in Singapore Law 2006–2010 (24 February 2011) at para 6.

jurisprudential identity. A sense of inevitability tags this ambition – from as early as 1976, former Dean of the Faculty of Law at the National University of Singapore Professor Bartholomew observed that it would only be a "question of time" before Singapore builds up an "autochthonous legal system".[3] An autochthonous legal system, as Professor Bartholomew termed, would conceivably include an autochthonous body of administrative legal rules.

3 Administrative law is a unique field of law in so far as sensitivity to local context, local institutional peculiarities and socio-political values are critical to its functionalism within the modern administrative state. Absent such sensitivity, the legal rules and principles that concern the checking or control of governmental activity of foreign import would sit oddly in an administrative environment where the business of politics and government are carried out differently.[4] In developing autochthonous legal principles and rules, the challenge which falls on the Judiciary might be framed as not departing from received English or Commonwealth jurisprudence for its own sake, but, as Chan CJ observed, articulating good reasons for departing from and innovating as to localised judicial doctrines and devices where necessary.

4 The questions which this article seeks to answer are as follows: to what extent has Singapore developed an autochthonous administrative law jurisprudence to date? Have the Singaporean courts mostly conformed with and relied on judicial techniques developed in England and other Commonwealth jurisdictions, or have they attempted to localise administrative law jurisprudence? What features are unique to Singaporean administrative legal practice, and to what extent is an independent theory of review necessary?

5 This article proffers an answer in three parts. Parts II and III consider two facets of administrative review to assess the extent to which Singapore has been autochthonous in her legal developments, and to elucidate the factors accounting for her divergence from or conformity with English or other Commonwealth jurisdictions. Part IV examines

3 See further Singapore Law Review Editorial Board, "In Conversation: Prof Geoffrey Wilson Bartholomew" (1985) 6 Sing L Rev 56, wherein Professor Bartholomew explains that "autochthonous" is the Greek equivalent of the Latin "indigenous". It means "of the land" and something that is not imported. See also *Re Millar Gavin James QC* [2007] 3 SLR(R) 349 at [23]; *Tang Kin Hwa v Traditional Chinese Medicine Practitioners Board* [2005] 4 SLR(R) 604 at [27]; *CHS CPO GmbH v Vikas Goel* [2005] 3 SLR (R) 202 at [87]; *Joseph Mathew v Singh Chiranjeev* [2010] 1 SLR 338 at [58]; and *Chee Siok Chin v Ministry of Home Affairs* [2006] 1 SLR(R) 582 at [132].

4 Peter Cane, *An Introduction to Administrative Law* (Clarendon Press, 3rd Ed, 1996) at p 5.

the administrative law landscape in Singapore and clarifies the features which are unique to the practice of administrative review, resulting from the constitutional context, sociopolitical backdrop and hitherto judicial practice in Singapore. Part V concludes by suggesting that, given the formative stage of jurisprudential development in Singapore, further autochthonous developments in administrative review will continue to be moderated primarily by an independent theory of review and judicial self-perceptions in the judicial review setting.

II. The public/private divide and scope of review

6 To examine whether Singapore has diverged from or converged with the UK in the doctrinal development of administrative review, the scope of judicial review must first be considered. The scope of judicial review refers to the circumstances under which a court is permitted to intervene in administrative decisions. Specifically, it determines the trio of actors, decisions and powers which are amenable to review. Within the law of judicial review, it is generally accepted that power may be characterised as "public" or "private", and that judicial review is only available for "public" powers.[5] In this vein, the so-called public/private divide operates to determine the scope of review of a supervisory court and, by extension, the "legitimate regulatory reach of public law".[6]

7 Generally speaking, the Singapore courts have been pragmatic in adopting principles devised in England to determine when a power is sufficiently "public" and would legitimately warrant judicial intervention.[7] The Singapore courts have also adopted the principle in relation to the disciplinary tribunals of social clubs that, where a club expels a member, the court may intervene on procedural grounds to ensure that the rules of natural justice have been complied with.[8] Nevertheless, there is a strain of autochthony in how the Singapore courts apply these principles to fit the Singapore context, as will be elaborated below.

A. Varied adoption of the principle in R v Panel on Take-overs and Mergers*, ex parte* Datafin *in Singapore*

8 It is helpful to begin with the orthodox conception of judicial review, to demonstrate how legal conceptions of the public/private

5 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [4].
6 Peter Cane, *An Introduction to Administrative Law* (Clarendon Press, 3rd Ed, 1996) at p 18.
7 See, for example, *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 and *UDL Marine (Singapore) Pte Ltd v Jurong Town Corp* [2011] 3 SLR 94.
8 See for example, *Lee v Showmen's Guild of Great Britain* [1952] 2 QB 329.

distinction shift accordingly with the governance landscape. On the traditional English account of judicial review, public power was limited to that which was derived from statute.[9] Therefore, courts could only check and control statutory bodies. This account reflected an *ultra vires* conception of judicial review where judges merely enforce parliamentary intent.[10] Beyond the theoretical dimension, this account was also tailored to a governance climate where the "public" and "private" categories could be satisfactorily determined on a statutory/non-statutory or institutional/non-institutional basis. The idea, then, was that public law would regulate activities determined by Parliament or an institutional authority (in this case, the Legislature).

9 The governance landscape has since moved towards one where the state is no longer monist. The challenge this posed was whether courts have jurisdiction to control the activities of bodies not empowered by statute, but nevertheless exercise regulatory power over individuals. In *R v Panel on Take-overs and Mergers, ex parte Datafin plc*[11] ("*Datafin*"), the Court of Appeal considered this question and developed the principle that regard may be had to the *nature* of the power, independent of the power's source.

(1) The principle in R v Panel on Take-overs and Mergers, ex parte Datafin

10 *Datafin* concerned the judicial review of a decision by the City Panel on Takeovers and Mergers. The Panel was the non-statutory body responsible for developing the City Code on Takeovers and Mergers, and served to adjudicate on alleged breaches of the Code and to issue remedial action where appropriate. The Court of Appeal held that the Panel's decision was subject to review, and, as expressed by Sir Donaldson MR, the broad trigger factors "[may] be described as a public element, which can take different forms".[12] More specifically, there were three main grounds upon which their Lordships justified intervention, which illustrates the differing conceptions of the public/private distinction.[13]

9 See, for example, *R v Electricity Commissioners, ex parte London Electricity Joint Committee Co* [1924] 1 KR 171.

10 See generally, Paul Craig, "*Ultra Vires* and the Foundations of Judicial Review" (1998) 57 CLJ 63.

11 [1987] QB 815.

12 *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815 at 838.

13 These conceptions were conceived by Professor Cane in his chapter "Accountability and the Public/Private Distinction" in *Public Law in a Multi-Layered Constitution* (Nicholas Bamforth & Peter Leyland eds) (Hart Publishing, 2003) at p 258.

11 First, judicial intervention was justified on the ground that the Panel performed its duties under the shadow of "statutory powers exercised by the Department of Trade and Industry and the Bank of England"[14] and under statutes such as the Prevention of Fraud (Investment) Act 1958 and the Banking Act 1979.[15] Thus, Sir Donaldson MR described the panel as receiving "invisible" legal support. The conception of the public/private distinction is more in adherence to a statutory/non-statutory one, as their Lordships were in effect inviting the presence of Parliament through inference. Put in another way, the consideration here is whether and to what extent there is statutory recognition, and/or underpinning or peripheral legislative support. One characteristic of this conception of the public/private distinction is that it does not explain what the nature of a public function is; it merely applies the distinction in a descriptive and dispositive way.

12 Second, their Lordships considered that there had been an "implied devolution of power",[16] in the sense that if the Panel had not existed, some equivalent body would have been established and performed the same administrative function.[17] This conception of the public/private distinction is an institutional/non-institutional one, in the sense that it defines "public" by whether the body performs a governmental function.

13 Finally, intervention was justified on the "immense power *de facto* by devising, promulgating, amending and interpreting the City Code on Take-overs and Mergers"[18] which the Panel wielded. These powers were further backed by sanctions issued by other statutory bodies, capable of altering the legal rights of citizens.[19] In a similar vein, their Lordships considered that the Panel "[oversaw] and [regulated] a very important function of the United Kingdom financial market".[20] The crux of this reasoning considers a power to be "public" where it performs public functions affecting a wide scope of individuals, thus shifting the conception of "public" to a functionalist version of the public/private distinction.

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14 *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815 at 838.
15 *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815 at 838.
16 *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815 at 838.
17 *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815 at 826, *per* Sir Donaldson MR: "The unspoken assumption, which I do not doubt is a reality, is that the department of Trade and Industry or, as the case may be, the Stock Exchange or other appropriate body would in fact exercise statutory powers or contractual powers to penalise the transgressors."
18 *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815 at 826.
19 *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815 at 838 and 846.
20 *R v Panel on Take-overs and Mergers, ex parte Datafin plc* [1987] QB 815 at 824.

(a) The Singapore application of the principle in *R v Panel on Take-overs and Mergers, ex parte Datafin*

14 In *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd*[21] ("*Yeap Wai Kong*"), the High Court considered whether the defendant's decision to issue a reprimand could be subject to judicial review. It held that the defendant's decision was indeed a public function and therefore susceptible to review.

15 In applying the principles derived from *Datafin* (the "Nature Test"), Philip Pillai J reasoned that "public policy is increasingly effected not only by government and statutory bodies but also through self-regulating entities"[22] and thus the Nature Test displayed the "vitality of the common law in upholding the rule of law by adjusting to meet changing public governance landscapes".[23] In so reasoning, the court affirmed its constitutional role as not only to enforce the intention of Parliament but more broadly to ensure that bodies with regulatory power over individuals act in accordance with the law and are accountable to the law. From this perspective, the review jurisdiction of the court in *Yeap Wai Kong* may be said to stem from an implicit principle of legality, differing from that in *Datafin*.

16 The High Court provided three reasons for finding that the defendant's decision was a public function. First, the defendant was largely interwoven into the legislative and regulatory matrix in so far as it is a "listed exchange and frontline regulator"[24] as well as an approved exchange under the Securities and Futures Act[25] ("SFA"). Second, the reprimand function pursuant to Rule 720(4) of the SGX-ST Listing Manual had statutory underpinnings, pursuant to s 23 of the SFA. Finally, the reprimand carried a public function because it could have "adverse business reputational implications, implications on their continued service on board committees and directorships of other listed companies and other professional and financial services licence implications".[26]

17 The first two reasons adhere more to a statutory/non-statutory conception of the public/private distinction, as they rely on some shadow of statutory underpinning or peripheral statutory penetration to justify judicial intervention. The third reason is more in keeping with a functionalist conception of the public/private distinction. This is how

21 [2012] 3 SLR 565.
22 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [8].
23 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [16].
24 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [20].
25 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [21].
26 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [27].

the decision in *Yeap Wai Kong* differentiates itself from the decision in *Datafin*, as it adds the aforementioned third layer of complexity to the notion of the public/private divide. Notably, the High Court considered severe "reputational implications" as a sufficient public element, which is quite reflective of the socio-legal climate in Singapore where reputation is highly prized. This is as opposed to the Court of Appeal in *Datafin* which sought to tie the idea of public functions to the capacity to alter the legal rights of citizens.

III. The doctrine of substantive legitimate expectations

18 Next, we examine the reception of the doctrine of substantive legitimate expectations at the High Court level in *Chiu Teng@Kallang Pte Ltd v Singapore Land Authority*[27] ("*Chiu Teng*") and subsequent developments in the form of *obiter* remarks by the Court of Appeal in *Starkstrom Pte Ltd v Commissioner for Labour*[28] ("*Starkstrom*"), which together present an interesting case of autochthony in Singapore administrative law.[29]

19 There are three reasons for this. First, the doctrine devised by the High Court diverges substantially from how substantive legitimate expectations has developed in England, in *R v North and East Devon Health Authority, ex parte Coughlan*[30] ("*Coughlan*") and post-*Coughlan*, and in the broader common law world. Second, the fashioning of the doctrine itself in *Chiu Teng* demonstrates a Singaporean brand of caution and incrementalism in the creation of a new head of review. Finally, post-*Chiu Teng*, the Court of Appeal has made a number of powerful observations questioning the desirability of recognising the doctrine under Singapore law which, although targeted specifically at the judicial enforcement of substantive legitimate expectations, were pitched in

27 [2014] 1 SLR 1047.

28 [2016] 3 SLR 598 at [34]–[63].

29 A more recent case, *Tan Seng Kee v Attorney-General* [2022] 1 SLR 1347, also considers the adoption of the doctrine of substantive legitimate expectations at the Court of Appeal level. See Kenny Chng, "An innovative invocation of substantive legitimate expectations in Singapore" *Administrative Law in the Common Law World* (October 2022) <https://adminlawblogorg.wordpress.com/2022/10/18/kenny-chng-an-innovative-invocation-of-substantive-legitimate-expectations-in-singapore/> (accessed on 9 February 2023), for further comments on how this case has caused autochthonous development of the doctrine in respect of the need for "clear, unambiguous and unqualified" representation, the scope of the purported expectation, as well as the legal effect of this expectation. It is this author's view that this case, however, did not significantly delineate the scope of the doctrine in the Singapore courts, but was, as the abovementioned blog post suggests, an account of a creative use of the doctrine in constitutional litigation.

30 [2001] QB 213.

broader terms and revealing of how the apex court views its relationship with a basic architecture of judicial review in Singapore.

20 The following analysis will draw some conclusions on how this might implicate an autochthonous development of the doctrine of substantive legitimate expectations moving forward.[31]

A. *Background on the doctrine in Singapore:* Chiu Teng@Kallang Pte Ltd v Singapore Land Authority *and* Starkstrom Pte Ltd v Commissioner for Labour

21 In Singapore, it was the High Court in *Chiu Teng* which first suggested that the doctrine of substantive legitimate expectations ought to be welcomed as an independent ground of review.[32] This was a landmark development, because the Singapore courts had hitherto sought to maintain a strict distinction between legality and merits[33] as well as a high threshold for irrationality review,[34] giving strong effect to the constitutional principle of separation of powers. As the doctrine of substantive legitimate expectation necessarily involves an inquiry into the outcome of administrative decision-making, rather than simply the procedure,[35] its recognition meant introducing a far more intrusive form of review than the Singapore courts had been comfortable with.

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31 Outside the scope of this discussion are questions regarding the technical aspects of the doctrine, such as: (a) interpreting representations; (b) determining the appropriate class of applicants; and (c) enforcement and appropriate remedies. See further, Swati Jhaveri, "Contrasting Responses to the '*Coughlan* moment'" in *Legitimate Expectations in the Common Law World* (Matthew Groves & Greg Weeks eds) (Hart Publishing, 2019) at p 267 and Charles Tay, "Substantive Legitimate Expectations: The Singapore Reception" (2014) 26 SAcLJ 609.

32 Prior to *Chiu Teng@Kallang Pte Ltd v Singapore Land Authority*, three Singapore courts had discussed the possibility of recognising the doctrine of substantive legitimate expectations but did not provide conclusive answers. See *UDL Marine (Singapore) Pte Ltd v Jurong Town Corp* [2011] 3 SLR 94 at [66]; *Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR(R) 92 at [49]; and *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 9 at [185]. In particular, Lai Siu Chiu J in *UDL Marine (Singapore) Pte Ltd v Jurong Town Corp* cast doubt on whether the substantive form of legitimate expectations is part of Singapore law.

33 See, for example, *Jeyaretnam Kenneth Andrew v Attorney-General* [2013] 1 SLR 619 at [56]; *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [3]; *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 at [96]–[98]; and *Yong Vui Kong v Attorney-General* [2011] 1 SLR 1. This is also evident in the high threshold for *Wednesbury* unreasonableness review which the Singapore courts have maintained.

34 See, for example, *Manjit Singh s/o Kirpal Singh v Attorney-General* [2013] 4 SLR 483 at [7]; *Chee Siok Chin v Ministry of Home Affairs* [2006] 1 SLR(R) 582 at [125].

35 See further, Matthew Groves, "Substantive Legitimate Expectations in Australian Administrative Law" (2008) 32 *Melbourne University Law Review* 470 at 471.

22 The High Court fashioned the following doctrinal requirements (the "*Chiu Teng* formulation"):[36]

> (a) An unequivocal and unqualified statement or representation made by a public authority, or someone with ostensible public authority, to the applicant or class of persons to which the applicant clearly belongs.[37]
>
> (b) Reasonable, detrimental reliance on the part of the applicant on the statement or representation. In particular, the applicant must not have: (i) known that the statement or representation was made in error and chose to capitalise on the error; nor (ii) suspected that the statement or representation was made in error and chose not to seek clarification when he could have done so; nor (iii) failed to make enquiries where there was reason and opportunity to do so.
>
> (c) Even if the above requirements are met, the court will not enforce the expectation if (i) the public authority can show an overriding national or public interest which justifies the frustration of the applicant's expectation; or, if giving effect to the statement or representation would (ii) be in breach of the law or state's international obligations or (iii) infringe the rights of a member of the public.

As *Chiu Teng* was a High Court decision, neither the doctrine nor the *Chiu Teng* formulation have been embedded in Singapore law.[38] This was emphasised by the Court of Appeal in *Starkstrom* which had occasion to comment on the doctrine, without deciding whether it would form part of Singapore law.[39]

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36 *Chiu Teng@Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [119]; this is a restated and thus slightly condensed version of the requirements laid down by the High Court.

37 The High Court further clarified: (a) where the statement is open to more than one natural interpretation, the interpretation applied by the public authority will be accepted; and (b) the statement or representation is capable of being qualified by disclaimer or non-reliance clauses; see *Chiu Teng@Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [119(a)(i)] and [119(a)(ii)].

38 The court in *Chiu Teng@Kallang Pte Ltd v Singapore Land Authority* found in favour of the respondent. The applicant property developer had applied to invoke the doctrine against the Singapore Land Authority ("SLA") to act in accordance with purported representations about how the SLA would calculate the differential premium payable for state leases. The High Court found, *inter alia*, that the applicant did not have a reasonable expectation; see *Chiu Teng@Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [129].

39 *Starkstrom Pte Ltd v Commissioner for Labour* [2014] 1 SLR 1047 at [41].

23 The Court of Appeal had a number of reservations about the reception of the doctrine in Singapore law, in the form which had been proposed by the High Court in *Chiu Teng*. First, the doctrine would breach traditional distinctions between review/appeal and legality/merits.[40] Second, the introduction of a more intrusive head of substantive review would potentially alter the "understanding of the role of the courts in undertaking judicial review of administrative actions" and cause a redefinition in the approach towards a separation of powers.[41] Finally, there are a range of measures between substantive enforcement of a legitimate expectation and allowing public authorities to freely change their position.[42] For example, a duty on the part of the public authority to confirm that it had considered the representation in concluding that the public interest justifies defeating any legitimate expectation, and to give reasons for such an assessment which could be assessed within the traditional grounds of review.[43]

24 In light of these comments by the Court of Appeal, the future of the doctrine of substantive legitimate expectations and the form in which it would be recognised is vague at best.[44] Thus, the following discussion proposes to assess only the doctrinal aspect of the *Chiu Teng* formulation,[45] which arguably strikes at the heart of the doctrine fashioned by the High Court; that is, the protection of reliance interests.

B. Protecting reliance interests

25 A unique feature of the *Chiu Teng* formulation is how it engrafts principles from the private law doctrine of estoppel onto the doctrine of legitimate expectations.[46] This is manifest in its requirement that an applicant must have reasonably and detrimentally relied on the

40 *Starkstrom Pte Ltd v Commissioner for Labour* [2014] 1 SLR 1047 at [59].
41 *Starkstrom Pte Ltd v Commissioner for Labour* [2014] 1 SLR 1047 at [59].
42 *Starkstrom Pte Ltd v Commissioner for Labour* [2014] 1 SLR 1047 at [63].
43 *Starkstrom Pte Ltd v Commissioner for Labour* [2014] 1 SLR 1047 at [63].
44 See further, Kenneth Chng, "An Uncertain Future for Substantive Legitimate Expectations in Singapore: *SGB Starkstrom Pte Ltd v Commissioner of Labour* [2016] 3 SLR 598" (2018) PL 192.
45 It is acknowledged that there are a number of doctrinal aspects worth discussing, including but not limited to the nature of the enforcement of the expectation, the final balancing test between the private expectation and public interest, the standard of review to decide whether or not the public body was justified in departing from the policy, among other more technical issues like the class of persons involved and interpretation of representations. See further, Swati Jhaveri, "Contrasting Responses to the '*Coughlan* moment'" in *Legitimate Expectations in the Common Law World* (Matthew Groves & Greg Weeks eds) (Hart Publishing, 2019) at pp 278–292.
46 See further, Charles Tay, "Substantive Legitimate Expectations: The Singapore Reception" (2014) 26 SAcLJ 609 at 676.

representation. This represents a departure from the English position, which does not consider reliance as a legal requirement, and is instead more closely aligned with the Canadian position that only permits substantive relief under the private law of estoppel. This section will first consider the variation of the doctrine as well as normative justifications for it put forward by other common law courts, before making two observations about the *Chiu Teng* formulation.

(1) Contrasting perspectives from England, Canada and Australia

26 In England, the doctrine of substantive legitimate expectations as introduced in the landmark case of *Coughlan* was founded upon the notion of an "abuse of power".[47] Lord Woolf was building upon a judicial desire to protect "*unfairness* in the purported exercise of a power can be such that it is an abuse or excess of power"[48] [emphasis added]. Since *Coughlan*, a fresh line of cases (which the High Court in *Chiu Teng* did not consider) which has further cemented the contours of the doctrine in English law have repeatedly emphasised the normative justification of the doctrine as "ensur[ing] the principle of good administration".[49]

27 These normative backbones are important, because they explain why the English courts have rejected estoppel principles as legal conditions precedent for the operation of the doctrine of substantive legitimate expectations.[50] The rejection stems from the recognition of a fundamental difference between the objectives of public and private law. The English courts view public officials as being required to honour their undertakings and respect legal certainty, irrespective of whether the loss has been incurred by the individual concerned.[51]

28 As a result, the English courts "[hold Government] to its word irrespective of whether the applicant has been relying specifically on it".[52] Reliance on the part of the applicant is "not essential" because "consistency of treatment and equality are at stake in such cases, and

47 *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at [57].
48 *R v Inland Revenue Commissioners, ex parte Preston* [1985] AC 835 at [67], *per* Lord Scarman.
49 *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [68].
50 The principal case is *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607 at [31]. An earlier rejection was briefly articulated in *R (Reprotech (Pebsham) Ltd) v East Sussex County Council* [2003] 1 WLR 348 (this case was cited in *Chiu Teng@Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [79]).
51 See also, *De Smith's Judicial Review* (Sweet & Maxwell, 7th Ed, 2013) at p 683.
52 *R v Secretary of State for Education and Employment, ex parte Bebgie* [2000] 1 WLR 1115 at 1133, *per* Sedley LJ.

these values should be protected irrespective of whether there has been any reliance as such".[53]

29 In practice, this has not led to an overly broad granting of relief to large swathes of applicants, as the English courts continue to consider true reliance on the misrepresentation and a detriment suffered as relevant in determining whether it would be unfair to allow the authority not to honour such an expectation.[54] Thus, in *R v Begbie*,[55] the court did not grant relief for the legitimate expectation claimed, in part because the applicant parent had neither shown a true reliance on the representation that her child had been offered a place at an independent school under a state-funded assisted places scheme, nor a detriment suffered specially in consequence of it.

30 Differing from the English and Singapore positions, Australia neither recognises the doctrine of estoppel in the public law setting,[56] nor the doctrine of substantive legitimate expectations.[57] The key reason is a strong adherence to the separation of powers. As expressed by Gummow J in *Minister for Immigration and Ethnic Affairs v Kurtovic*,[58] "in a case of discretion, there is a duty under the statute to exercise a free and unhindered discretion … the point is that the legislature intends the discretion to be exercised on the basis of a proper understanding of what is required by the statute, and that the repository of the discretion is not to be held to a decision which mistakes or forecloses that understanding".[59] This statement clearly reflects that the High Court of Australia views its constitutional role as merely verifying that the manner in which Parliament has exercised its discretion conforms with standards of fairness that Parliament must have intended.

31 Finally, the position in Canada is that substantive relief in the public law context is available under the doctrine of estoppel if a right

53 *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607, citing P P Craig, *Administrative Law* (Sweet & Maxwell, 4th Ed, 2003) at p 619. See also *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [68]; and *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755 at [30].

54 *R (Bibi) v Newham London Borough Council* [2001] EWCA Civ 607 at [30].

55 *R v Secretary of State Education and Employment, ex parte Begbie* [2002] 3 WLR 115 at 1126.

56 *Annetts v McCann* [1990] 97 ALR 177 at 184.

57 *Re Minister for Immigration and Multicultural Affairs; ex parte Lam* (2003) 72 ALD 613 at [69].

58 (1990) 21 FCR 193.

59 *Minister for Immigration and Ethnic Affairs v Kurtovic* (1990) 21 FCR 193 at 210.

under the Canadian Charter of Rights and Freedom is challenged.[60] In this case, an applicant must prove knowledge, reliance and detriment.[61] However, the general doctrine of legitimate expectations only exists in procedural form to grant procedural relief.[62] The Canadian position thus most closely aligns with the *Chiu Teng* formulation in substance.

(2) Implications for the formulation in Chiu Teng@Kallang Pte Ltd v Singapore Land Authority

32 The protection of reliance interests lends two observations about the *Chiu Teng* formulation. First, it is clear from a comparison with English jurisprudence that introducing a legal requirement of reasonable and detrimental reliance pitches the *Chiu Teng* formulation at a significantly higher benchmark than the doctrine as expressed in *Coughlan*. This reliance would not be easily borne out in practice. Indeed, in *Chiu Teng*, the High Court found that the applicant property developer could not have reasonably relied on the published circulars, as the applicant was an experienced property developer who must have understood the significance of a land return clause in the lease and that there had been market reports of another property developer paying an enhanced differential premium.[63] The key point is that the court reserves itself a significant amount of latitude in assessing the "reasonableness" of the requirement, thereby limiting the scope of the formulation.

33 Second, the protection of reliance interests demonstrates that the High Court had in mind a more contractual model of protecting private expectations against public authorities. This is also reflected in the brief normative explanation given by the court for welcoming the doctrine in Singapore:[64]

> If private individuals are expected to fulfil what they have promised, why should a public authority be permitted to renege on its promises or ignore representations made by it? If an individual or a corporation makes plans in reliance on existing publicised representations made by a public authority, there appears no reason in principle why such reliance should not be protected.

60 *Mount Sinai Hospital Centre v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281 at [26]; *Agraira v Canada (Minister of Public Safety and Emergency Preparedness)* [2013] 2 SCR 559 at [27].

61 See further, Charles Tay, "Substantive Legitimate Expectations: The Singapore Reception" (2014) 26 SAcLJ 609 at 632.

62 *Mount Sinai Hospital Centre v Quebec (Minister of Health and Social Services)* [2001] 2 SCR 281 at [97].

63 *Chiu Teng@Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [129].

64 *Chiu Teng@Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [112].

Thus, on a higher normative plane, it could be argued that the High Court sought to base this doctrine more strongly upon a reliance theory, which only protects individuals from being harmed by representations they rely on,[65] as opposed to a rule of law theory, which emphasises the necessity of legal certainty for individuals to lead autonomous lives.[66] The latter is more characteristic of the English jurisprudence, whereas the former is now more characteristic of the Singaporean landscape.

C. Finding a middle path between abstraction and the concrete review ground

34 The second point of autochthony of the *Chiu Teng* formulation relates to style rather than doctrinal content. Although the High Court drew inspiration from the high-level normative abstractions of "abuse of power" and "unfairness" in the English cases it cited,[67] and affirmed the powers of the Judiciary in upholding substantive legitimate expectations,[68] it was ultimately wary to only permit substantive relief "subject to certain safeguards" so that the doctrine would "operate effectively and fairly in Singapore without the court overstepping its judicial role".[69]

35 Thus, the *Chiu Teng* formulation underscores a Singaporean form of cautious incrementalism in formulating a new head of review. It was an unequivocal attempt to find middle ground between high-level abstractions (which would require the courts to weigh in on potentially contestable value preferences in administrative decision making) and a concrete ground of review, resulting in a fairly constrained doctrine.[70] This is as opposed to English judges who welcome their role as guardians of responsible administration and "insist" on the "objective standard of public decision making" that "where a public authority has given a

65 Søren Schønberg, *Legitimate Expectations in Administrative Law* (Oxford University Press, 2001) at p 9.

66 Søren Schønberg, *Legitimate Expectations in Administrative Law* (Oxford University Press, 2001) at p 13.

67 *Chiu Teng@Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [81].

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

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

70 This echoes remarks made by Chan CJ in 2010, wherein he cautioned that "there is good reason for judges in Singapore to tread carefully, stepping gingerly on each stone in crossing the river" where the recognition of substantive legitimate expectations were concerned. See further Tom Poole, "Between the Devil and the Deep Blue Sea: Administrative Law in an Age of Rights" in *Administrative Law in a Changing State: Essays in Honour of Mark Aronson* (Linda Pearson, Carol Harlow & Michael Taggard eds) (Hart Publishing, 2008), wherein Professor Poole characterised and contrasted the incrementalist and rule-bound approach adopted in Australian administrative law (the "devil") with the broad-standard and normativist approach adopted in English administrative law (the "deep blue sea").

plain assurance, it should be held to it".[71] In this way, the English courts demonstrate more comfort with the high-level abstractions that provide broader grounds for review, whereas the Singapore courts are cautious in their permission of review based on these abstractions.

D. A dialogue between the courts: Adherence to old constructs

36 Finally, there is autochthony in the distinct manner in which the courts here discussed, grappled with and came to terms with a plausible formulation for a public law doctrine of legitimate expectations. The reaction of the Court of Appeal in *Starkstrom* in contrast with Tay Yong Kwang J's comments about the "judiciary [fulfilling] its constitutional role without arrogating itself to the unconstitutional principle of being a super-legislature or a super-executive" reflects a particular dissonance amongst the Singapore courts (in particular, between the High Court and the Court of Appeal) about the purpose of judicial review in Singapore and the constitutional remit of the courts.[72]

37 The reservations raised by the Court of Appeal, as earlier canvassed, may be categorised into two domains. The first domain concerns upholding principles which justify a traditional account of judicial review, which the court identified as: the separation of powers, giving effect to parliamentary intent, and avoiding matters which fall outside the Judiciary's institutional competence.[73] The second domain concerns fears of breaching principles which themselves constitute the traditional account of judicial review, of which the court identified two which are inextricably linked: the legality/merits and appeal/review distinction.[74] It is clear how these two domains of concern relate to each other in a feedback loop, as the breaching of one inevitably alters the structure of the other.

38 What might be gleaned from these reservations in so far as Singaporean autochthony in administrative legal development or thought is concerned is that the Court of Appeal continues to adhere tightly to the basic model of judicial review that was formulated in pre-Europe England, which emphasised these traditional distinctions, in particular the legality/merits divide. The legality/merits distinction is premised on the *ultra vires* conception of review, as it limits the judicial role to interpreting legislation that delineates the scope of power of a public body and coming to a conclusion about the legality of the governmental acts.

71 *R (Bhatt Murphy) v Independent Assessor* [2008] EWCA Civ 755 at [30].
72 *Chiu Teng@Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 at [113].
73 *Starkstrom Pte Ltd v Commissioner for Labour* [2014] 1 SLR 1047 at [58].
74 *Starkstrom Pte Ltd v Commissioner for Labour* [2014] 1 SLR 1047 at [56] and [61].

However, in light of the discussion in Part III which argued that the *ultra vires* debates and theories of review therein do not accurately capture the true bases of review in Singapore, it might be an appropriate time for the Singapore courts to reconsider whether old constructs like the legality/merits distinction are practically sustainable and normatively useful in achieving the correct balance of constitutional values in substantive review in Singapore.

39 By contrast, the English courts have abandoned these old formalisms. Speaking in the context of the judicial enforcement of substantive expectations, Laws LJ said: "the root principle of judicial review was the enforcement of the principles of good administration, principles which drew no distinction whatsoever between procedure and substance".[75]

40 As a final point, it is significant that the Court of Appeal has left the resolution of these issues to an appropriate future case. The Court of Appeal was cognisant that the recognition of this doctrine would mean a "significant departure" from what orthodoxy is, in terms of the scope and limits of judicial review, in Singapore.[76] Thus, its desire to decide on the particular nuances of fact and circumstance of the next case that arises is arguably another Singaporean brand of judicial wisdom which again prioritises incrementalism and discipline in not over-stretching doctrine.

IV. Unique features of judicial review in Singapore

41 As alluded to in the introduction, the nature and content of administrative law is best understood against the socio-politico-legal context within which the law operates.[77] The adjudication of administrative review in Singapore bears unique characteristics which differs from the UK; this Part will examine these traits to demonstrate how and why the Singapore courts have diverged from or conformed with English jurisprudence.

A. A supreme and written Constitution

42 Singapore has a written Constitution, which declares that it is the supreme law of the land.[78] In the context of the judicial review of

75 *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [69].
76 *Starkstrom Pte Ltd v Commissioner for Labour* [2014] 1 SLR 1047 at [59].
77 P P Craig, *Public Law and Democracy in the United Kingdom and United States of America* (Clarendon Press, 1990) at p 1.
78 Constitution of the Republic of Singapore (2020 Rev Ed) Art 4.

administrative actions,[79] the function of Singapore's supreme and written Constitution is arguably different in how it sets out the governmental framework, demarcates jurisdictional boundaries,[80] and supplies a set of unwritten norms which lay the normative foundations for judicial review in Singapore.

43 The purpose of this section is not to enter into a comprehensive discussion about the constitutional dimensions of judicial review in Singapore *vis-à-vis* the UK, but to appraise the different normative principles at play in constitutional supremacy as opposed to parliamentary sovereignty. This is done with a view to drawing a preliminary conclusion on whether Singapore administrative law can benefit from theories of review developed in the English context, or should develop autochthonous justifications for review.

(1) Constitutional principles and judicial review in Singapore

44 The weight of authority in Singapore firmly establishes judicial review upon the rule of law.[81] In this regard, the statement of principle in *Chng Suan Tze v Ministry of Home Affairs*[82] remains the leading articulation of the notion that "[a]ll power has legal limits and the rule of law demands that courts should be able to examine the exercise of discretionary power"[83] (the "*Chng* principle"). This view was recently reinforced by Sundaresh Menon CJ in an extrajudicial lecture, wherein he expressed that the *Chng* principle supplies the "juridical basis and normative philosophy" for judicial review in Singapore.[84] Menon CJ further observed that the "legality of every exercise of power is ultimately

79 In the context of constitutional review, Singapore courts assume judicial power for striking down unconstitutional legislature by virtue of Articles 4 and 93 of the Constitution of the Republic of Singapore. See *Chan Hiang Leng Colin v Public Prosecutor* [1994] 3 SLR 662 at [50], *per* Yong Pung How CJ: "The court also has a duty to declare invalid any exercise of power, legislative and executive, which exceeds the limits of the power conferred by the Constitution."

80 Constitution of the Republic of Singapore (2020 Rev Ed) Arts 23, 38 and 93.

81 See, for example, *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239; *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189; *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222; *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112; and *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779. See further Jaclyn L Neo, "'All Power Has Legal Limits': The Principle of Legality as a Constitutional Principle of Judicial Review" (2017) 29 SAcLJ 667.

82 [1988] 2 SLR(R) 525.

83 This is notwithstanding the fact that reviewability in the context of the Internal Security Act 1960 (2020 Rev Ed) has been significantly narrowed, due to legislative amendments after *Chng Suan Tze v Ministry of Home Affairs* which restricted the available grounds of judicial review.

84 Sundaresh Menon, "Executive Power: Rethinking the Modalities of Control", lecture at the Annual Bernstein Lecture in Comparative Law (1 November 2018) at para 40.

referable to the Constitution",[85] suggesting the *locus* of the norm to be the Constitution as opposed to other sources, like the common law or a general intention by Parliament.[86]

45 At the level of constitutional theory, such an establishment of judicial review on the rule of law in Singapore coheres with and is justified on the basis of her constitutional supremacy.

46 However, in practice, there is a more complex relationship between the "rule of law" and other considerations which the Singapore courts accord weight to in administrative review. This was briefly elaborated on in *Starkstrom*, wherein the Court of Appeal said that the traditional account of judicial review was premised on "at least three justificatory principles": (a) the separation of powers; (b) the need to uphold Parliamentary intent to vest certain powers in the Executive; and (c) the need to consider the institutional competence of the courts *vis-à-vis* other branches of government.[87] Further, in practice, the clash between these principles, which inevitably force the courts to prioritise one over another,[88] comes most prominently to the fore when considering whether and to what extent an ouster clause is capable of effectively ousting judicial review.

47 There are a number of local cases which contrarily suggest that it is parliamentary intent, not the Constitution, which dictates the bounds of judicial intervention. For example, in *Re Yee Yut Ee*,[89] the High Court held that the ouster clause was ineffective because the Industrial Arbitration Court had exceeded its jurisdiction under the Industrial Relations Act and grounded its reasoning not on Art 93 or the principle of legality, but that "Parliament could not have intended a tribunal of limited jurisdiction to exceed its authority without the possibility of direct correction by a superior court".[90] It may be gathered from the contrasting case law that, although the high constitutional principle of "rule of law" appears to have the ascendancy in grounding judicial review in Singapore as a matter of more recent case authority, there are inconsistencies in

85 Sundaresh Menon, "Executive Power: Rethinking the Modalities of Control", lecture at the Annual Bernstein Lecture in Comparative Law (1 November 2018) at para 40.

86 These are in reference to the common law theory of review and modified *ultra vires* theory of review respectively. These theories will be briefly elaborated on in the next sub-section entitled "Constitutional backdrop and judicial review theories in the UK".

87 *Starkstrom Pte Ltd v Commissioner for Labour* [2014] 1 SLR 1047 at [58].

88 See further, Jaclyn L Neo, "'All Power Has Legal Limits': The Principle of Legality as a Constitutional Principle of Judicial Review" (2017) 29 SAcLJ 667 at 670.

89 [1977–78] SLR(R) 490.

90 *Re Yee Yut Ee* [1977–78] SLR(R) 490 at [20].

jurisprudence as well as clashes in principle which leaves more theorising to be done by courts and scholars on the relative weight they should carry in the context of different facts and circumstances.

(2) Constitutional backdrop and judicial review theories in the UK

48 In the UK, by contrast, the enthusiasm for establishing judicial review upon the rule of law did not until more recently find favour with the courts.[91] This is broadly owed to its character as a form of parliamentary sovereignty. A brief account of the development of various justifications for review in the UK follows. The judicial review of administrative action in England was traditionally justified in the enforcement of legislative intent, conceptually known as the *ultra vires* doctrine. This was a consequence of England's unwritten constitutionalism and doctrine of parliamentary sovereignty. Thus, following Diceyan tradition, the will of Parliament must prevail.[92] As Professors Wade and Forsyth observed:[93]

> Having no written constitution on which he can fall back, the judge must in every case be able to demonstrate that he is carrying out the will of Parliament as expressed in the statute conferring the power. … The only way in which he can do this, in the absence of an express provision, is by finding an implied term or condition in the Act, violation of which then entails the condemnation of *ultra vires*.

49 However, the gradual expansion of the scope and substantive grounds of judicial review beginning in the 1970s shifted courts and commentators away from this bare conception of *ultra vires* as the sole or primary justification of judicial review.[94] During that time, the

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91 See also Mark Aronson, "The Growth of Substantive Review" in *Public Law Adjudication in Common Law Systems* (John Bell *et al* eds) (Hart Publishing, 2016) at p 125.

92 The classic formulation of parliamentary sovereignty is found in Professor AV Dicey's influential text on British constitutionalism: "The principle of Parliamentary sovereignty means neither more nor less than this, namely, that Parliament thus defined has, under the English constitution, the right to make or unmake any law whatever; and, further, that no person or body is recognised by the law of England as having a right to override or set aside the legislation of Parliament." See AV Dicey, *Introduction to the Study of the Law of the Constitution* (Palgrave MacMillan, 8th Ed, 1982) at pp 3–4.

93 William Wade & Christopher Forsyth, *Administrative Law* (Oxford University Press, 7th Ed, 1994) at pp 41 and 44, as cited in 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 738.

94 See further, Christopher Forsyth, "Of Fig Leaves and Fairy Tales: The *Ultra Vires* Doctrine, the Sovereignty of Parliament and Judicial Review" (1996) 55 CLJ 122; Paul Craig, "*Ultra Vires* and the Foundations of Judicial Review" (1998) 57 CLJ 63;
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scope of review broadened to encompass the review of prerogative powers[95] and *de facto* powers.[96] Further, the heads of substantive review were crystallised *per* Lord Diplock:[97] illegality, irrationality (or *Wednesbury* unreasonableness[98]) and procedural impropriety. Both these developments made it increasingly clear to judges and scholars that judicial review was shifting away from enforcing the will of Parliament through statutory interpretation.[99]

50 These developments left in its wake a conundrum over the proper foundations of judicial review in the UK, which will be briefly stated here for the purposes of assessing the suitability of these debates in the Singapore context. The three theories which dominated legal discourse were: the *ultra vires* theory, the modified *ultra vires* theory and common law theory.[100] The modified *ultra vires* theory, developed by Professor Elliot, seeks to ground the juridical basis for judicial review in the enforcement of a scope of power *generally* intended by Parliament.[101] Thus, the difference between the two *ultra vires*-based models is in the nature of legislative intent they claim to involve: specific (*ultra vires*) as opposed to general (modified *ultra vires*). The modified *ultra vires* theory thus concedes that parliamentary intention could be an indirect or abstract one.[102]

51 In contrast, the common law theory of review posits that the principles developed within judicial review are part of a common law enterprise in which the judges fashion and apply what they deem to be appropriate standards of legality to govern conduct of administrative

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Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart Publishing, 2001); and TRS Allan, "The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?" (2002) 61(1) CLJ 87.

95 See, for example, *R v Criminal Injuries Compensation Board, ex parte Lain* [1967] 2 QB 864.

96 See, for example, *R v Panel on Take-overs and Mergers, ex parte Datafin Plc* [1987] 2 WLR 699.

97 *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 at 410–411.

98 Coined from the seminal decision of *Associate Provincial Picture Houses Ltd v Wednesbury Corp* [1985] AC 374 at 410–411.

99 *Wednesbury* unreasonableness is frequently regarded as a judicial reaction to the silence of the statute, whereas procedural impropriety relies on implied standards of natural justice.

100 See Paul Craig, "Competing Models of Judicial Review" [1999] PL 428.

101 See Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart Publishing, 2001) Glossary, at pp xxx and xxxi.

102 TRS Allan, "The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?" (2002) 61(1) CLJ 87 at 99.

agencies.[103] On this view, the various grounds of review are "judicial creations", owing "neither their existence nor their acceptance to the will of the legislature".[104]

52 The English judges have since moved on from these constricting theories of review in their application of doctrine. Today, regardless of the various theories championed by scholars, it is clear that many English judges justify the scope and depth of their administrative intervention on broader principles and larger abstractions. These include: "good administration",[105] "abuse of power",[106] "unfairness"[107] and the rule of law.[108] For example, in holding that neither ouster clauses in the Tribunal, Courts and Enforcement Act 2007 nor Special Immigration Appeals Commission Act 1997 were effective, Laws LJ said:[109]

> The sense of the rule of law with which we are concerned rests in this principle, that *statute law has to be mediated by an authoritative judicial source*, independent both of the legislature which made the statute, the executive government which (in the usual case) procured its making, and the public body by which the statute is administered. … This is not a denial of legislative sovereignty, but an affirmation of it. … *The requirement of an authoritative judicial source for the interpretation of law means that Parliament's statutes are always effective.* [emphasis added]

This excerpt serves to illustrate the point that courts in the UK have moved past an absolute and formal conception of parliamentary sovereignty.[110] It is for this reason that Professor Allan criticises both the modified *ultra*

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103 TRS Allan, "The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?" (2002) 61(1) CLJ 87 at 96.

104 Sir John Laws, "Law and Democracy" (1995) PL 72 at 79.

105 *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [67]–[68]; *R (Lumba) v Secretary of State for the Home Department* [2012] 1 AC 245 at 344–345.

106 *R v Secretary of State for Education, ex parte Begbie* [2000] 1 WLR 1115 at 1129.

107 *R v North and East Devon Health Authority, ex parte Coughlan* [2001] QB 213 at 245; *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs (No 2)* [2009] AC 453 at 513.

108 *R (Cart) v Upper Tribunal* [2012] UKSC 28 at [30].

109 *R (Cart) v Upper Tribunal* [2011] QB 120 at [36] and [38].

110 See also, *R (Jackson) v Attorney General* [2005] UKHL 56 at [103], *per* Lord Steyn:

> The classic account given by Dicey of the doctrine of the supremacy of Parliament, pure and absolute as it was, can now be seen to be out of place in the modern United Kingdom. Nevertheless, the supremacy of Parliament is still the general principle of our constitution. It is a construct of the common law. The judges created this principle. If that is so, it is not unthinkable that circumstances could arise where the courts may have to qualify a principle established on a different hypothesis of constitutionalism. In exceptional circumstances involving an attempt to abolish judicial review or the ordinary role of the courts, the Appellate Committee of the House of Lords or a new Supreme Court may have to consider whether this is a constitutional

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vires and common law theories as "for all practical purposes illusory … [because] their different ways of expressing similar conclusions reflect their mutual attachment to a formal principle of parliamentary sovereignty and conceals the true complexity of the relations between courts and Parliament".[111]

(3) The need for an independent theory of review in Singapore

53 One could argue that the *ultra vires* debates and theories proffered in relation to UK administrative law are not fully suited to the Singapore constitutional context for two reasons.

54 First, both the modified *ultra vires* and common law theories seek to reconcile judicial review within parliamentary sovereignty. In so doing, the modified *ultra vires* theory affirms British constitutional orthodoxy that judicial review should be viewed as being made pursuant to "a constitutional warrant granted by Parliament",[112] while the common law theory rejects the formalism of a supreme parliament. Both these assumptions are incompatible with a constitutional supremacy.

55 Second, both the modified *ultra vires* and common law theories are united in their common recognition of the normative importance of the rule of law in preserving against arbitrary power, but ultimately locate the rule of law in either a general intent of Parliament to legislate consistently with the rule of law (howsoever defined) or the common law respectively. This does not suit the Singapore context, where the rule of law is founded in the text of her written Constitution or in unwritten constitutional norms flowing from it.

56 Thus, from this preliminary analysis, the theoretical conundrum for judicial review in Singapore appears to lie with how conceptual reasoning (in the sense of the *ultra vires* concept of referencing legislative intent) and normative reasoning (in the sense of constitutional principles like the rule of law and separation of powers) may be integrated, while affirming that legality is ultimately referable to the Constitution. This is

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fundamental which even a sovereign Parliament acting at the behest of a complaisant House of Commons cannot abolish.

See further, Christopher Forsyth, "The definition of Parliament after Jackson: Can the life of Parliament be extended under the Parliament Acts 1911 and 1949?" (2011) 9(1) *International Journal of Constitutional Law* 132.

111 TRS Allan, "The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?" (2002) 61(1) CLJ 87 at 105.

112 Mark Elliott, "The *Ultra Vires* Doctrine in a Constitutional Setting: Still the Central Principle of Administrative Law" (1999) 58(1) CLJ 129 at 131.

not a novel point.[113] Although this article is not the appropriate forum for offering a way forward, it has sought to demonstrate that this theoretical "conundrum" forms part of Singapore's autochthonous development of administrative law.

B. Judicial affiliation with a "green-light" approach to judicial review

57 Another distinguishing feature of the Singapore administrative review landscape is the Judiciary's more recent, express affiliation with a "green-light" approach to judicial review. This theorising by the Judiciary about the nature of its role and relationship with the Executive, is a noteworthy example of the localisation of administrative law as it departs from how most English judges traditionally and currently explain their role in the context of judicial review.

(1) Background on red or green-light theories

58 The red or green-light theories of judicial review are at their heart concerned with characterising the proper role of the courts and of administrative law *vis-à-vis* the Executive and the Legislature.[114]

59 "Green-light" theorists are inclined towards the checking of executive and legislative power through non-legal and democratic processes.[115] Administrative law is thus viewed as facilitative of political gains made by the administrative state. The purpose of administrative law adjudication is less of stopping administrative malpractice but more of "contribut[ing] to good decision-making",[116] for example, through clear pronouncements of factors which decision-makers must take into account when making administrative decisions. This approach stems from high trust in the administrative state and internal checks conducted by the Government. By contrast, "red-light" theorists favour administrative

113 Professor Thio has in 2011 suggested that "a modified *ultra vires* theory in tandem with the constitutional principle of the rule of law is useful in theorising administrative review in Singapore": 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 715.

114 Peter Cane, "Theory and Values in Public Law" in *Law and Administration in Europe: Essays in Honour of Carol Harlow* (Paul Craig & Richard Rawlings eds) (Oxford University Press, 1st Ed, 2003) at p 14.

115 Carol Harlow & Richard Rawlings, *Law and Administration* (Law in Context, 4th Ed, 2021) at p 37.

116 Thio Li-ann, "Law and the Administrative State" in *The Singapore Legal System* (Kevin YL Tan ed) (Singapore University Press, 1999) at p 162.

law as an instrument to protect individual liberties against a potentially overreaching administrative state.[117] Their starting point is the suspicion of whether the bureaucratic state can provide socially desirable outcomes. Thus, administrative law is primarily concerned with controlling excess or arbitrary power.

60 While useful as a broad-brush characterisation of the role of courts within the administrative state, the red or green-light theories should be viewed more as a matter of degree. As Professor Cane has argued, a complete account of the "relationship between public law and public power, whether descriptive or normative, would consider the role of law in both facilitating and constraining the exercise of power, and in furthering public purposes and protecting individual interests".[118] This perspective opens the doorway to a more nuanced discussion about the extent to which Singapore courts behave in a "green-light" fashion, if at all, which will be briefly engaged later in this article.

(2) Judicial attitudes towards administrative review in Singapore

61 The "green-light" approach has been endorsed in a number of judicial and extrajudicial statements.[119] It was Chan CJ who first offered to justify judicial attitudes to judicial review in Singapore on a "green-light" approach.[120] He noted, extrajudicially, that judicial review is "a function of socio-political attitudes in the particular community" and that Singapore should be wary of following what might be characterised as a "red-light" approach in the UK.[121]

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117 Carol Harlow & Richard Rawlings, *Law and Administration* (Law in Context, 4th Ed, 2021) at p 24.

118 Peter Cane, "Theory and Values in Public Law" in *Law and Administration in Europe: Essays in Honour of Carol Harlow* (Paul Craig & Richard Rawlings eds) (Oxford University Press, 1st Ed, 2003) at p 10. Professor Cane further notes that the potential oversimplification of the dichotomy has also been acknowledged by Professors Harlow and Rawlings, as well as by the addition of "amber-light" scholars to the ranks of green and red-light theorists.

119 Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469; Sundaresh Menon, "Executive Power: Rethinking the Modalities of Control", lecture at the Annual Bernstein Lecture in Comparative Law (1 November 2018) at para 44; *Jeyaretnam Kenneth Andrew v Attorney-General* [2013] 1 SLR 619; *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112.

120 Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 at 470.

121 Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 at 470. Specifically, Chan CJ noted:

> 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

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62 These statements have been further endorsed in two contexts. First, in the Court of Appeal decision of *Jeyaretnam Kenneth Andrew v Attorney-General*[122] in the context of deliberating standing rules. The court cautioned against a "red-light" view of public law, which might encourage a general free-standing public interest standing, stating that: "[t]he recognition that members of the public do not have the right *per se* to call upon the courts to review every decision made by public bodies is not only undergirded by the *obvious pragmatism of minimising disruptiveness* caused by vexatious claims to the functioning of those bodies" [latter emphasis added].[123] Second, in the High Court decision of *Nagaenthran a/l K Dharmalingam v Attorney-General*,[124] where the court used the "green-light" approach to judicial review to hypothetically posit the view that the *Anisminic* principle should not apply in the context of Singapore administrative law. The argument was that to recognise that all errors of law were jurisdictional errors of law and therefore reviewable by the court (in spite of a relevant ouster clause) would be inconsistent with the "green-light" approach, which the court regarded as the "most accurate reflection of the socio-political attitude in the existing Singapore milieu".[125]

> intrusion and interference with individual fundamental liberties. … [T]he 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 … I would like you to consider whether this is the right perspective for Singapore to adopt. … 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.* … [C]ontrol can and should come internally from Parliament and the executive itself in upholding high standards of public administration and policy … [emphasis added]

Notably, Professor Jhaveri points out that it may be an oversimplification to characterise all English judges in such a "broad brush unitary sense" of being "red-light" in their approach to judicial review, as judges inevitably fall on different points of the red or green-light spectrum; see Swati Jhaveri, "Contrasting Responses to the '*Coughlan* moment'" in *Legitimate Expectations in the Common Law World* (Matthew Groves & Greg Weeks eds) (Hart Publishing, 2019) at p 832, fn 17.

122 [2013] 1 SLR 619 at [48]–[50]. For a deeper discussion on this judgement and more broadly standing rules in Singapore, see Swati Jhaveri, "Advancing Constitutional Justice in Singapore: Enhancing Access and Standing in Judicial Review Cases" (2017) SJLS 53.

123 *Jeyaretnam Kenneth Andrew v Attorney-General* [2013] 1 SLR 619 at [55].

124 [2018] SGHC 112.

125 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 at [123].

C. Primacy to efficiency tempered by fairness

63 A third feature which characterises Singaporean administrative review is the primacy to which the courts accord values of efficient government and polycentrism in decision-making. However, a number of cases suggest a tempering of this approach with a competing judicial impulse to ensure that administrative decisions are made fairly and in the public interest.

(1) Judicial slant towards facilitating administrative efficiency and polycentric government

64 *Registrar of Vehicles v Komoco Motors Pte Ltd*[126] ("*Komoco Motors*") is instructive. In this case, the Registrar of Vehicles had relied on a formula provided by the Singapore Customs to compute the Additional Registration Fee ("ARF") payable for vehicles imported into Singapore. Komoco argued that this amounted to a fettering of the Registrar's discretion, and there had been a breach of natural justice in the Registrar's refusal to grant a hearing on the issue.[127]

65 The Court of Appeal rejected both arguments on two grounds. Firstly, the court reasoned that "the goal of efficiency in public administration would not be advanced" by granting Komoco a hearing before the Registrar when Komoco had forgone a right to be heard by the High Court under s 22B(5) of the Customs Act.[128] Secondly, the court considered that "in the eyes of the law, the Government is an indivisible entity when discharging its executive functions and powers".[129] Thus, the computation of the ARF payable should not be re-opened by the Registrar (which operates under the Land Transport Authority ("LTA")) when it had already been determined by a separate administrative agency, the Singapore Customs. Further, it would cause "confusion [and] damage to public administration" as well as a "loss in public confidence in the exercise of discretionary powers by public authorities" if the LTA and Customs came to different conclusions about the payable ARF.[130]

66 These reasons provided by the Court of Appeal reveal a patent concern for facilitating the efficient workings of government.

126 *Registrar of Vehicles v Komoco Motors Pte Ltd* [2008] 3 SLR(R) 340.
127 Cap 70, 2004 Rev Ed.
128 *Registrar of Vehicles v Komoco Motors Pte Ltd* [2008] 3 SLR(R) 340 at [70].
129 *Registrar of Vehicles v Komoco Motors Pte Ltd* [2008] 3 SLR(R) 340 at [70].
130 *Registrar of Vehicles v Komoco Motors Pte Ltd* [2008] 3 SLR(R) 340 at [71].

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67 One might further argue that *Komoco Motors* demonstrates how the Singapore courts are more susceptible to breaching the traditional Dworkinian principle/policy divide, where the efficiency or polycentricism of public administration is at stake. The principle/policy divide separates the legality of administrative action on one hand (principle) and matters of policy (efficiency) on the other.[131] On this divide, the court's jurisdiction should be defined in terms of the rights and interests of the applicant for review.[132] Put in another way, the court should determine not what the broader public interest demands, but whether, in acting to further the public interest, the authority has treated the applicant fairly. *Komoco Motors* is a case where the courts went beyond a strict determination of the legality of the Registrar's decision to consider matters of principle. To be sure, however, the outcome might not have differed had the court not given weight to matters of efficient public administration, seeing as there were a number of procedural safeguards available which Komoco simply failed to adopt.

(2) Tempering efficiency with fairness

68 However, it would be inaccurate to characterise the Singapore courts as shrinking from the responsibility of ensuring fairness to the applicant every time efficient or polycentric governance is involved.

69 *City Developments Ltd v Chief Assessor*[133] ("*City Developments*") demonstrates how the Singapore courts balance the apparent duality of facilitating polycentric government and ensuring fairness to the applicant. The Court of Appeal held that it was not irrational for the Chief Assessor to consider the policy of discouraging land hoarding when exercising its discretion under s 2(3) of the Property Tax Act.[134] The court provided two reasons. First, it was reasonable for the Chief Assessor to consider this policy even though it was primarily a

131 TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press, 1993) at p 183. Notably, the Court of Appeal in *Jeyaretnam Kenneth Andrew v Attorney-General* [2013] 1 SLR 619 has affirmed the Dworkinian policy/principle divide, although speaking in the context of standing rules, at p xxx: "We see much value in maintaining the Dworkinian policy/principle divide here; this finds. Expression in the courts being concerned only with the individual's rights and interests, and not matters of public policy, which rightfully remain in the remit of political process."

132 TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Clarendon Press, 1993) at p 184.

133 *City Developments Ltd v Chief Assessor* [2008] 4 SLR(R) 150.

134 Cap 254, 1997 Rev Ed.

consideration of the Chief Planner,[135] as it is "expected that government agencies … adopt an integrated … approach towards the formulation as well as the implementation of government policies".[136] Second, this policy consideration was a "legitimate public interest" in land-scarce Singapore,[137] thus reasonable for consideration.

70 Importantly, the Court observed that "decision-maker[s] will be required to have regard to the general public interest",[138] suggesting that it remains within the province of the Judiciary to assess whether the discretionary power has been exercised in the public interest. In this way, the Singapore courts recognise the need for efficient and fair administration.[139] The facilitation of indivisible and efficient government machinery does not necessarily equate to a strong "judicial deference" which gives full authority to the government body to make decisions about the public interest.[140]

71 Even where the government body has been statutorily granted greater latitude in decision-making, the Singapore courts affirm that intervention would be justified to sanction "abuse of power" or "bad faith".[141] Thus, in *Teng Fuh Holdings v Collector of Land Revenue* ("*Teng Fuh Holdings*"), Andrew Phang J held that land acquired pursuant to s 5(1) of the Land Acquisition Act[142] could be examined for abuse of power, notwithstanding s 5(3) of the same Act which states that notifications issued by the government body are final and conclusive.

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135 The Chief Assessor is of the Inland Revenue Authority of Singapore, while the Chief Planner is of the Urban Redevelopment Authority, both of which are statutory boards in Singapore.

136 *City Developments Ltd v Chief Assessor* [2008] 4 SLR(R) 150 at [17].

137 *City Developments Ltd v Chief Assessor* [2008] 4 SLR(R) 150 at [11] and [17].

138 *City Developments Ltd v Chief Assessor* [2008] 4 SLR(R) 150 at [17].

139 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 722.

140 TRS Allan, "Judicial Deference and Judicial Review: Legal Doctrine and Legal Theory" (2011) 127 LQ Rev 96. See also *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [105], where the Court of Appeal affirmed a passage from Aileen Kavanagh, "Defending Deference in Public Law and Constitutional Theory" (2010) 126 LQR 222 at 241: "There are degrees of deference and establishing the appropriate degree is a matter of balancing all the relevant factors in the individual case. Rather than being a blanket rule preventing scrutiny, deference maintains some flexibility by requiring the courts to assess their institutional competence to deal with a particular issue, and to show restraint to the extent that their competence is limited."

141 *Teng Fuh Holdings v Collector of Land Revenue* [2006] 3 SLR(R) 507 at [36].

142 Cap 152, 1985 Rev Ed.

72 In sum, although the Singapore courts prioritise administrative efficiency,[143] there is judicial motivation to temper this with values like fairness and protection of the public interest. Returning to the red or green-light metaphor, *City Developments* and *Teng Fuh Holdings* are cases which demonstrate more of an inclination towards "amber-light" by the Singapore courts, as the courts take up the mantle of ensuring administrative accountability rather than sweepingly affirming administrative autonomy.

D. Rejection of principles influenced by Europeanisation

73 Finally, the Singapore courts have made a considered effort to adopt a culturally-relativistic approach to developing the content of Singapore administrative law.[144] Thus, the Singapore courts reject the applicability of administrative law principles developed by English courts in response to pressures from the European Court of Human Rights or Europeanisation in general.[145] Specifically, the courts consider proportionality unsuitable as a ground for review,[146] at least the particular conception of proportionality which originated in German legal tradition and was later adopted by the Court of Justice of the European Union.[147]

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143 See also Thio Li-ann, "In Search of the Singapore Constitution" in *Evolution of a Revolution: Forty Years of the Singapore Constitution* (Thio Li-ann & Kevin YL Tan eds) (Routledge, 1st Ed, 2009) at p 388. Writing in respect of constitutional review cases like *Chan Hiang Leng Colin v Public Prosecutor* [1994] 3 SLR 662, Professor Thio described the "the leading interpretive theory [of the Singapore courts as prioritising] statist imperatives over civil liberties, with this 'communitarianism' justified by reference to local culture".

144 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 718.

145 See further, *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 at [4]:

> The foundations of Singapore law on judicial review are the common law principles as they have developed in England prior to the influence and impact of the European Union law, the latter having no application to Singapore. Accordingly, it is necessary for this court to return to the pre-1972 bedrock. Judicial review principles, and to apply those principles to the present case. In considering post-1972 judicial review decisions in England, care has to be taken to extract only those common law principles where these principles have not morphed into English law judicial review principles as a result of European Union law, such as the European Convention on Human Rights which was incorporated into English law by the 1998 UK Human Rights Act.

146 *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]; *Chee Siok Chin v Ministry of Home Affairs* [2006] 1 SLR(R) 582 at [87].

147 In *Chee Siok Chin v Ministry of Home Affairs* [2006] 1 SLR(R) 582, VK Rajah J reasoned that the principle had never been part of the common law in relation to

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V. Conclusion

74 This article has examined the competing judicial impulses of autochthony and conformity in Singapore administrative law from a value-neutral perspective. In so doing, it seeks to impress the view that the autochthonous development of Singapore law generally, or of judicial review in Singapore specifically, ought not to be an end in itself. Instead, administrative legal rules ought to develop in tandem with the needs of the administrative state and body politic, as adjudged by unelected judges providing for review of administrative decisions.

75 The two focus areas studied in Parts II and III demonstrate that judicial choices to adopt, reject or modify judicial techniques developed by English or other Commonwealth courts are ultimately a function of judicial self-perceptions both within a judicial review context and informed by what the Judiciary perceives to be the needs of Singapore society. Where self-perceptions are concerned, the Judiciary is weighing in on its own role as guardians of good administration or impartial arbiters of parliamentary intent, and this tension is most acutely expressed in the red or green-light approach as adopted by the Singapore courts. A primary concern for the Judiciary in Singapore appears to be its own legitimacy; this is most evident in the context of pushing the boundaries of substantive review where the doctrine of substantive legitimate expectations is concerned.

76 Given the preference for a cautious and incrementalist approach to judicial review, it may be expected that growth in judicial review or a change in the sense of its mission to protect the public interest will need to first begin from not the level of normative theory, but a change in the Judiciary's role in the adjudication of judicial review.

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judicial review, nor part of Singapore law. By contrast, Professor Thio has suggested that there may be a latent concept of proportionality within the common law, rooted in the Magna Carta, and therefore the rejection of the European concept of proportionality does not foreclose the possibility of developing an autochthonous Singapore test of proportionality; see 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.