JUDICIAL REVIEW – FROM ANGST TO EMPATHY

A Lecture to Singapore Management University Second Year Law Students

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1 I would like to thank Professor Furmston for inviting me to deliver this lecture on how public law works in practice to law students taking the constitutional and administrative law course.

2 My initial idea was to talk to you about the separation of powers and the basic structure of government as constitutional doctrines and their prospective role, if any, in limiting the scope of the amendment power in the Constitution.[1] For example, does the amendment power allow Parliament with the requisite majority to amend the Constitution to abolish the courts or do away with the judicial power that is currently vested in the Supreme Court? This is a fundamental issue which has arisen in India and Malaysia. In Singapore, it arose in a series of cases involving the Internal Security Act[2] in the late 1980s, beginning with *Chng Suan Tze v Minister for Home Affairs*[3] ("*Chng Suan Tze*"). Those cases are a good illustration of how constitutional norms and principles are applied in real life in the context of prevailing political and social conditions. But I decided that my talk would be of greater interest to you if I were to speak on some aspects of public law chosen by you. So I had a discussion with your law teachers and got the impression that some of you have a sense of unease about the dormant state of judicial review in Singapore and also, more surprisingly, the notion that the courts might have something to do with it. This is the angst that I am referring to in the title of my lecture. The empathy part will be mentioned later.

3 I wondered how it was possible for second-year law students who have never argued a case on judicial review to have acquired such

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1 Constitution of the Republic of Singapore (1999 Rev Ed).

2 Cap 143, 1985 Rev Ed.

3 [1988] 2 SLR(R) 525.

an impression. So, I asked to see the course syllabus. I must say that it is an excellent syllabus, but when I saw the extensive references to local academic writings on constitutionalism and the rule of law in Singapore, I began to see the light. Academic articles, especially critiques, on decided cases may be good for academics and for teaching purposes, but they are not always helpful to judges in deciding concrete cases for a variety of reasons. All of you will be aware of Holmes' *dictum* that general propositions do not decide specific cases.[4] Courts do not decide cases in a vacuum; instead, they decide cases on the basis of the facts and the arguments put to them. The way the law is applied in practice to particular cases is not always consonant with how it should work in theory, if you only go by the general principles. This divergence gives the academic plenty of material to critique the decisions and expound to students where they think the courts have gone wrong. But you should be aware, and keep in mind when you begin practising as a lawyer, that the academic's view may be one of many, and even then, only an outsider's perspective.

4 Let me illustrate how academic speculation, whilst beneficial for academic and teaching purposes, may have little practical use. There is a question posed in your syllabus on Art 100 of the Constitution.[5] This Article provides that the President may refer to a tribunal consisting of not less than three judges for its opinion any question as to the effect of any provision of the Constitution which has arisen or appears to him likely to arise. The question posed in your syllabus is: "What are the *implications* of the fact that the tribunal is able to render advisory opinions, that is, opinions based on *hypothetical cases* and not actual disputes?" [emphasis added] Well, we all know that courts do not normally decide hypothetical cases. But why should Art 100 imply anything apart from what it says? The fact of the matter is that Art 100 was specifically introduced in 1994 to enable a dispute between the Government and the then incumbent President, concerning the scope of the President's discretionary powers specifically vested in him under the Constitution to be resolved by non-adversarial proceedings.[6] The dispute arose in relation to a proposed constitutional amendment which, in the President's view, would curtail the discretionary powers vested in him as an elected President. The Government's position was that there was no curtailment. As the dispute involved a question of constitutional interpretation and had to be settled in a non-adversarial manner, the Government had to find a mechanism to do it. As Art 13 of

4 See *Lochner v New York* (1905) 198 US 45 at 76.

5 Constitution of the Republic of Singapore (1999 Rev Ed).

6 For more information about Art 100 of the Constitution of the Republic of Singapore (1999 Rev Ed), see Chan Sek Keong, "Working Out the Presidency: No Passage of Rights" [1996] Sing JLS 1 at 13.

the Malaysian Constitution, which is a federal constitution,[7] provided a suitable model, it was enacted, with appropriate modifications, as part of our Constitution. In a federal state, it is normal to provide in the Constitution the mechanism of a constitutional court or tribunal to settle any constitutional dispute between the federal and the state governments by means of an advisory opinion. Such disputes cannot, of course, occur in a unitary state. However, in Singapore, the dispute occurred because of Singapore's unique constitutional set up. Article 100 was enacted for the purpose of resolving actual and potential disputes of a similar nature between constitutional organs, and not to obtain advisory opinions on hypothetical cases from the courts. There are no other implications in relation to Art 100 that I can see.

5 Let me now return to the topics which were suggested to me to consider. One such question in your curriculum is: "What is the role of the Supreme Court of Singapore in a one-party dominant political system?" I find this question rather odd, because the answer should be obvious. The constitutional role of the Judiciary remains unchanged regardless of whether the political system is dominated by one political party, that is, to resolve any justiciable disputes between the state and its citizens according to the law. But the question suggests that the court may or should have a different role in a situation where there is only one political party. This suggestion carries its own implications.

6 The next question asked of me is how judicial review of administrative actions can *meaningfully* contribute to good governance? Again, this seems an odd question to ask. Why "meaningfully"? All judicial review proceedings, whatever the outcome, are meaningful to the parties involved, and also to the public. Lessons can be learnt by all, especially by public authorities when they are on the losing side. The Singapore bureaucracy seeks excellence in performing its public duties and functions, if not perfection, and so it is most likely that there will be a post-mortem on what went wrong to ensure that such errors will not be repeated. Many years ago, British civil servants were all given a pamphlet to read – it was titled "The Judge Over Your Shoulders". No Ministry or public authority would want to be brought to court on allegations that it has breached the law or been guilty of poor administrative governance. But the rule of law requires the court to determine whether any public authority has crossed the line of legality. The Government prides itself on practising good governance as well as providing good government. "Good governance", in my lexicon, refers to the institutional rules of procedure and decision-making processes of administrative bodies in implementing government policies in accordance with the law, while "good government" refers to pursuing good policies in building a modern successful society, and not in

7 See Art 130 of Malaysia's Federal Constitution.

turning it into an economically or socially failed state. Judicial review deals with bad governance but not bad government. General elections deal with bad government.

7 What I want to do now is to give you a broader perspective of public governance than that which you may find in law journals or even the reported cases. Judicial review is the means by which legal rights are protected and good governance enforced. It is, in Law LJ's words in a recent case, the "principal engine of the rule of law".[8] It is really about promoting good governance in public administration by striking down unlawful administrative decisions. In England, judicial review is confined largely to executive acts. In Singapore, it includes reviewing legislative acts for unconstitutionality, in view of the doctrine of constitutional supremacy under the Constitution. Under our legal system, every individual has legal rights derived from the Constitution, primary and subsidiary legislation and the common law. The basic principle is that any person is free to do what he likes subject only to the law. But a modern complex society, like Singapore, is highly regulated by a mass of laws and regulations to promote social and economic development and an orderly society. In this connection, I will refer you to our famous U-turn rule. In Singapore, the law is that a motorist may not lawfully execute a U-turn unless he sees a U-turn sign on the road. This is contrary to the common law, which says that you may make a U-turn unless the law says "No U-turn". It has been suggested that this inversion of freedom of action means that in Singapore, no one can do anything unless it is permitted by the State. Of course, this is entirely incorrect. But, why did the authorities reverse the common law rule? Ask yourself whether this is an example of the Government regulating simply for its own sake or whether it fulfils a social function more efficiently, *ie* it is a form of good governance in spite of its apparent curtailment of freedom of action. Can one apply for judicial review to reverse the rule on the ground that it is unconstitutional or unreasonable? Will the courts accord you *locus standi*?

8 The basic principle in constitutional and administrative judicial review is the principle of legality. In *Chng Suan Tze*,[9] the Court of Appeal famously held that all power given by law has legal limits and that the rule of law demands that the courts should be able to examine the exercise of discretionary power.

9 The principle of legality is based on the rule of law. It requires the Government to act in accordance with the law. An Act of Parliament must conform to the Constitution;[10] an executive action must also

8 *R (Cart) v Upper Tribunal* [2010] 2 WLR 1012; [2010] 1 All ER 908 at [34].
9 *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86].
10 Constitution of the Republic of Singapore (1999 Rev Ed).

conform to both the written law and the common law principles of natural justice.

10 The basic principles governing the exercise of discretionary powers are illegality (or *ultra vires*), procedural unfairness and irrationality. These principles were developed by the English courts to check executive abuses or illegal actions in the exercise of discretionary powers. Our courts apply the same principles because we inherited the same system of law. Other principles such as legitimate expectations and proportionality have also been developed as grounds for judicial review in England, where there is a strong culture of challenging executive decisions in the courts. De Smith's book on judicial review is one of many in the UK written on this topic and it has gone through numerous editions and impressions.[11] Its latest edition spans a thousand pages. In Singapore, all we have are a couple of textbooks on constitutional law and administrative law. The Singapore Academy of Law has published three volumes of five-year reviews of developments in Singapore law – 1990–1995, 1996–2000 and 2001–2005 – but I could not find anything on constitutional law or administrative law in any of them. It is as if the editors were embarrassed by the subject or the lack of material on it. Perhaps, the SMU lecturers can start the ball rolling by contributing a chapter towards the next volume.

11 Last year, Mr Michael Hwang SC, President of the Law Society, spoke on "Apathy and Independence".[12] He recounted an incident in the 1970s concerning a friend of his who had wanted to open a Japanese restaurant with karaoke facilities, but was denied a licence under the Public Entertainments Act.[13] Mr Hwang lamented the fact that he did not have the courage to seek judicial review for his friend. He wanted the Bar to be more proactive in taking on judicial review cases to overcome the perceived apathy of the Bar. This is admirable. But then, in a throwaway line, he said: "[I wonder] what support I would have received from the courts had I shown the courage at that time?" What do you think he was trying to say about an event that did not happen more than 30 years ago?

12 Nevertheless, the fact that the President of the Law Society sent forth a message that the Bar should be more proactive in commencing judicial review proceedings must mean that he has faith in the courts and that judicial review proceedings are a good sign that the legal system

11 Woolf, Jowell & Le Sueur, *De Smith's Judicial Review* (London: Sweet & Maxwell, 6th Ed, 2007).

12 "Apathy and Independence", speech delivered by the President of the Law Society at the Edu-Dine dinner on 14 August 2009, available at <http://www.lawgazette.com.sg/2009-9/president.htm> (accessed 1 July 2010).

13 Public Entertainments and Meetings Act (Cap 257, 1970 Rev Ed).

and the operation of the rule of law remain functional. This optimism provides a strong contrast to the pessimism, or perhaps even cynicism, displayed by some naysayers. I think we should look at the facts rather than indulge in Chinese whispers about the allegedly poor state of judicial review in Singapore. The facts, if established, will also dispel the other myth that the courts have contributed to the lack of an active judicial review culture in Singapore.

13 In so doing, I hope to get you thinking about some important questions, such as how judicial review of administrative actions contributes to good governance in a rule-based society. It also enables the courts to build up a public law jurisprudence that is appropriate to our circumstances. Courts have no agendas. They only have a mission, which is to administer justice according to law.[14] If an aggrieved person has suffered a genuine justiciable wrong at the hands of a public authority, he will get his remedy in court. If his case is dismissed, one ought not to view the outcome as signifying anything more than the fact that he had a bad case in law. Judicial review is not about judging the merits of the administrative act or decision, but about how it was arrived at by the exercise of one's discretionary powers under the law. It is about compliance with the law, a fair hearing process and rationality in decision-making.

14 There is a principle in logic and scientific inquiry called Occam's Razor which posits that the simplest explanation that fits the facts is preferred to a more complicated one. The cynics wish to explain the state of judicial review with the notion that the courts ignore wrongful executive acts because the Judiciary is submissive to the Executive, and so aggrieved applicants are denied their rights. Why would the courts want to do that, and what is the basis of this perception? A simpler explanation would be that judicial review applications, like all other disputes in court, are decided on their legal merits. An application succeeds where the Executive is wrong and the application fails where the applicant is wrong. We can determine the facts by looking at the reported cases. Of the 79 judicial review cases which have been reported in the law reports since 1957 (and which concerned a large variety of grievances), 22 applicants (or 27.8%) succeeded in obtaining the reliefs they had sought. This is a relatively good percentage of success which is not consistent with the notion that there exists a judicial partiality to protect the mistakes of public authorities at the expense of the public. Rather, it is more consistent with the rather obvious explanation that the party with the stronger case on the law and the facts prevailed. You are invited to analyse the issues

14 "The Role of the Judge and Becoming a Judge", speech delivered by M Gleeson CJ at the National Judicial Orientation Programme on 16 August 1998, available at <http://www.hcourt.gov.au/speeches/cj/cj_njop.htm> (accessed 1 July 2010).

and the decisions of the courts to reach your own conclusions. The full list of these cases is set out in Annex A below.[15]

15 Let me add two other considerations to this explanation. The first is that in cases where applicants are not successful in obtaining rights or privileges under the law, *eg*, a hawker's or taxi driver's licence, the unsuccessful applicants may be unhappy and resentful, but may have no particular inclination to seek judicial review for a variety of reasons. One reason may be that a successful judicial review application does not necessarily result in his obtaining those rights or privileges. But, if existing rights are taken away, *eg*, where a licence to carry on a business or trade is revoked, there will be greater incentive to seek judicial review, because a successful application will result in the restoration of the licence. Check the judicial review cases and see if this is true. If so, then fewer judicial review cases in this area may mean that fewer rights have been wrongfully taken away, indicating good governance. The second reason is that in Singapore, the Ministries, statutory boards and public authorities have a practice of seeking the advice of the Attorney-General on the legality of their actions before implementing policies, making decisions or taking actions which may affect private rights. They act only when the green light is given. The Attorney-General's Chambers has a lot of institutional knowledge and expertise in such matters, certainly more than individual lawyers in private practice. With a centralised advisory body advising the Government, fewer wrong decisions are made, and fewer decisions are vulnerable to judicial review on the grounds of illegality, procedural impropriety or breach of natural justice. In such an environment, you would expect fewer judicial review cases in court. Such a result is due to how the Government organises its legal work. It has nothing to do with the supposed negative attitude of the courts to judicial review. This is another simpler explanation for the relatively low volume of judicial review in Singapore.

16 So, the true answer to any concern you may have about the state of administrative law in Singapore is not the negative attitude of the courts towards judicial review. Rather, there are countervailing factors which I have outlined that militate against success in such proceedings. Turning now to some specific administrative law topics, there have been some interesting developments in English jurisprudence. One question which some academics have asked is whether we should import these developments. In *R v Lord President of the Privy Council, ex parte Page*[16] ("*Ex parte Page*"), the House of Lords, addressing the issue of error of law, affirmed that *Anisminic Ltd v Foreign Compensation Commission*[17] ("*Anisminic*") had abolished the distinction between "jurisdictional"

15 This list was collated after the lecture was given.

16 [1993] AC 682.

17 [1969] 2 AC 147.

and "non-jurisdictional" errors of law. In England, therefore, any decision made by an administrative decision-maker that is tainted by an error of law can be quashed, even in the face of an ouster clause, *ie* a clause in the empowering statute that states that a wrong decision by the decision-maker shall not be quashed or called into question in any court.

17 In *Anisminic*,[18] the House of Lords held that an administrative decision that was tainted by an error of law was a non-decision, with the result that the ouster clause was held inapplicable to the non-decision, thus allowing the judge to decide that the decision-maker had failed to make a decision, and must therefore start again. It is a very sophisticated judicial technique which shows the creativity of English judges in redressing what they consider to be unjust administrative actions. I understand that in Singapore, some academics may take the view that our courts still maintain the distinction between jurisdictional and non-jurisdictional errors of law, as exemplified by Warren Khoo J's decision in *Stansfield Business International Pte Ltd v Minister for Manpower* ("*Stansfield*").[19] In that case, Warren Khoo J cited the controversial Privy Council case of *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union*[20] ("*Fire Bricks*") to disapply the ouster clause to an error of law in that case. The judge also cited *Anisminic* as a "broad principle" and did not seem to see any difference between *Anisminic* and *Fire Bricks*.[21] I would observe that, strictly speaking, what Warren Khoo J said about *Anisminic* was *obiter dicta* because his decision was based on a breach of natural justice and not the doctrine of error of law.

18 Be that as it may, I have been asked to give my views on whether we should follow English law and abolish the distinction between jurisdictional and non-jurisdictional errors of law. In *R (Cart) v Upper Tribunal*[22] ("*Upper Tribunal*"), a recent decision of the Divisional Court, Lord Justice Laws said that it is now established that *Anisminic*[23] has "abolished (for most purposes) the distinction between errors of law within and without jurisdiction, ushering in the modern constitutional rule that any error of law by a public decision-maker is beyond its discretion".[24] This has led to the belief that all errors of law, whether jurisdictional or non-jurisdictional, are amenable to judicial review. This may be misleading, in spite of *Ex parte Page*,[25] since Parliament is

18 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.
19 [1999] 2 SLR(R) 866.
20 [1981] AC 363.
21 [1999] 2 SLR(R) 866 at [21].
22 [2010] 2 WLR 1012; [2010] 1 All ER 908.
23 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.
24 [2010] 2 WLR 1012; [2010] 1 All ER 908 at [32].
25 *R v Lord President of the Privy Council, ex parte Page* [1993] AC 682.

supreme in the UK, and it is not apparent to me that it is legitimate for English courts to apply *Anisminic* where judicial review for errors of law has been removed "by the most clear and explicit words" in a statute.[26]

19 What about Singapore? The answer may not lie in English principles of administrative law, but in Art 93 of our Constitution.[27] I do not wish to suggest an answer but will provide an academic argument (on which I express no view), *viz*, that an ouster clause may be inconsistent with Art 93 of the Constitution, which vests the judicial power of Singapore in the Supreme Court. If this argument is correct (and it has not been tested in a court of law), it would follow that the supervisory jurisdiction of the courts cannot be ousted, and therefore there is no need for our courts to draw the distinction between jurisdictional and non-jurisdictional errors of law. As I said earlier, I express no opinion on this issue, but this should be a good examination question. You can see that adopting the analysis in *Anisminic* would adroitly bypass this thorny issue.

20 Another point I wish to make is the necessity of placing decided cases in their proper context. One example is a recent High Court case dealing with the doctrine of legitimate expectations. As you may be aware, there have been recent developments in the case law of the UK to the effect that, in appropriate circumstances, a legitimate expectation created by the promise, policy or practice of an administrative body can be substantively enforced by ordering the administrative body to adhere to that promise, policy or practice.

21 In *Borissik Svetlana v Urban Redevelopment Authority*,[28] the applicant applied for judicial review of the URA's decision to reject her proposal for redevelopment of her semi-detached house. One of her arguments was that she had a legitimate expectation that her proposal would be approved. What she was in effect seeking, therefore, was substantive protection of her legitimate expectation. The High Court held that the applicant had not satisfied one of the conditions for the creation of a legitimate expectation, namely, that she could not point to any promise made to her by a person with actual or ostensible authority to justify the legitimate expectation she claimed.

22 Now, I leave as an open question, and invite you to consider, how this case should be read. Did the judge implicitly accept that legitimate expectations could be substantively enforced? Or was he merely saying that the applicant could not even establish a legitimate

26 See *R (Cart) v Upper Tribunal* [2010] 2 WLR 1012; [2010] 1 All ER 908 at [31] and the authorities cited.

27 Constitution of the Republic of Singapore (1999 Rev Ed).

28 [2009] 4 SLR(R) 92.

expectation? My point is simply that, to use a phrase often attributed to Sigmund Freud, "sometimes a cigar is just a cigar" – we should not read too much into judgments and in doing so convince ourselves of things that are not there.

23 My provisional observation on whether the doctrine of legitimate expectation should be regarded as a substantive right, in addition to being a procedural right, is that as a substantive right it would be analogous to the doctrine of promissory estoppel in private law. Apart from the problems associated with this doctrine of promissory estoppel ever since Denning J resurrected it in *Central London Property Trust Ltd v High Trees House Ltd*,[29] different considerations may apply in public law. It is true that Lord Hoffmann in *R (Reprotech Ltd) v East Sussex CC*[30] has said that public law has already absorbed whatever is useful from the moral values which underlie the private law concept of estoppel and that the time has come for the concept of a legitimate expectation to stand upon its own two feet. Still, there is good reason for judges in Singapore to tread carefully, stepping gingerly on each stone in crossing the river.

24 The cases on the doctrine of apparent bias are another such example of cases that should not be read out of context. The Court of Appeal, in *Tang Liang Hong v Lee Kuan Yew*,[31] did not express an opinion as to what the applicable test for apparent bias was. However, one common reading of this case is that the Court of Appeal applied the more stringent test of real likelihood or real danger of bias, based on the court's reasoning in dismissing the allegations of apparent bias. I will speak more about this topic later,[32] but here will only observe how it is important that we do not extrapolate too much from a neutral judgment to distil the court's preference for one doctrine over another.

25 Another example of this is the famous Jehovah's Witness case of *Chan Hiang Leng Colin v Minister for Information and the Arts*,[33] where, it is said, the Court of Appeal rejected the test of proportionality as a ground or standard of judicial review. The Court of Appeal, however, was careful to say only that it was "not well established" and "questionable" whether proportionality existed as an independent ground for judicial review or was simply a facet of irrationality.[34] The court did not foreclose the possibility of adopting the principle of proportionality in an appropriate case. Care should be taken, therefore,

29 [1947] 1 KB 130.
30 [2003] 1 WLR 348 at [32]–[35].
31 [1997] 3 SLR(R) 576.
32 See para 42 of this article.
33 [1996] 1 SLR(R) 294.
34 [1996] 1 SLR(R) 294 at [38].

not to give the judgment a stronger effect or meaning than was intended by the court.

26 One other point I wish to make, which often goes unnoticed by academics, has to do with the quality of the arguments presented to the courts. As many of you may appear as advocates in our courts, it is important for you to learn early in your career why certain arguments are successful and why some are not. Let me give you an example. In *Dow Jones Publishing Co (Asia) Inc v AG*[35] ("*Dow Jones Publishing*"), the Minister for Communications and Information, acting under s 16 of the Newspaper and Printing Presses Act,[36] reduced the circulation of the Asian Wall Street Journal from 5,000 to 400 copies a day. Dow Jones sought to quash the decision of the Minister, and one of its arguments was that limiting the circulation to 400 copies a day was a breach of the principle of proportionality.

27 As I observed in the judgment I delivered, counsel for the applicant had not suggested what would have been a proper restriction, assuming the doctrine of proportionality applied. Instead of 400 copies, would 500 copies have been proportionate? 750? 1,000? An argument from proportionality on the facts of this case, therefore, faced an uphill struggle. As an aside, it has been pointed out that the doctrine of proportionality in administrative law is also problematic in that it takes the court into merits adjudication, which is not the function of judicial review. To claim, however, as some do, that the outcome of the *Dow Jones Publishing* case[37] necessarily demonstrates judicial apathy to the principle of proportionality is to miss the point that the way judges deal with difficult doctrinal issues is a function of how cases are presented and argued.

28 Judicial review is also a function of socio-political attitudes in the particular community, which brings me to my last point. 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.

35 [1989] 1 SLR(R) 637.
36 Cap 206, 1985 Rev Ed.
37 *Dow Jones Publishing Co (Asia) Inc v AG* [1989] 1 SLR(R) 637.

29 This idea of the courts being locked in an adversarial or combative relationship with the Executive and functioning as a check on administrative power is what Harlow and Rawlings, in their book, *Law and Administration*,[38] label the "red-light" view of administrative law. 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 what Harlow and Rawlings call 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. In other words, seek good government through the political process and public avenues rather than redress bad government through the courts. On a green-light approach, the courts play a supporting role by articulating clear rules and principles by which the Government may abide by and conform to the rule of law.

30 Consequently, red-light and green-light perspectives may also help to explain and rebut the perception that Singapore does not have a robust tradition of challenging administrative decisions, and that this is an undesirable state of affairs. It is for you to decide, however, what sort of perspective you prefer, and what perspective is right for Singapore. Let me now come back to *Anisminic*[39] to illustrate the difference between these two theoretical perspectives.

31 The *Anisminic* case[40] is both useful and troublesome. On the one hand, it allows a court that is minded to take a red-light view to say that any administrative decision that is wrong is merely a "purported" decision, and therefore can be set aside if it is seen to be unjust and unreasonable to the aggrieved applicant. In this way, judicial review cannot easily be ousted by legislation and the court can review all administrative decisions, even if Parliament never intended such a thing. On the other hand, a court, if it chooses not to follow the *Anisminic* logic, will find that its jurisdiction can always be ousted by Parliament, which may not be conducive to good administration, even on a green-light view.

38 Cambridge: Cambridge University Press, 3rd Ed, 2009.
39 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.
40 *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

32 Another example where this red- and green-light perspective may come into play is in the doctrine of *locus standi*. In the UK, the courts have applied a uniform "sufficient interest" test for standing ever since the seminal decision in *R v Inland Revenue Commissioners, ex parte National Federation of Self-Employed and Small Businesses*.[41] This represented a sea-change from the previous rules, where the test for *locus standi* differed depending on what remedy the applicant was seeking. The effect of the "sufficient interest" test was therefore to loosen the test of *locus standi* by making the court consider the question based on the merits of the complaint, rather than the applicant's relationship to the illegality complained of.[42]

33 In the UK, public-spirited citizens and public interest groups have managed, applying the "sufficient interest" test, to effectively challenge executive decisions despite not having a direct interest in the outcome, which in turn exposes the Executive to greater judicial scrutiny. In Singapore, although the courts appear to have accepted the same "sufficient interest" test to determine whether leave for judicial review should be granted, that is not, in my view, also to say that our courts will apply the test with the same rigour as the UK courts. The competing tensions are between allowing too many unmeritorious cases to be fought, which could seriously curtail the efficiency of the Executive in practising good governance, and allowing meritorious cases to be brought to the courts without being hindered by too many technicalities.

34 How wide the test for *locus standi* should be is also influenced by the red- and green-light debate. In the UK, the availability of legal aid makes it easier to challenge the Government on policy issues, contributing to the robust state of judicial review litigation there. This is another reason why the volume of judicial review litigation in Singapore may be relatively low. This is, again, an issue of balancing private rights and public interests. With less judicial review applications to defend, the Government is, at least, spared the need to divert resources away from its primary job of governing the country in order to defend such actions. Under a green-light approach, the courts can play their role in promoting the public interest by applying a more discriminating test of *locus standi* to balance the rights of the individual and the rights of the state in the implementation of sound policies in a lawful manner. An early example where such tensions between these two approaches arose may be cited. In 1986, the Malaysian Government decided to privatise the North-South Highway and United Engineers was the successful bidder. Mr Lim Kit Siang brought an action against United Engineers and the Malaysian Government, seeking a declaration that the proposed

41 [1982] 1 AC 617.

42 Wade & Forsyth, *Administrative Law* (Oxford University Press, 10th Ed, 2009).

contract of privatisation was null and void and an injunction to restrain United Engineers from contracting with the Malaysian Government. While Mr Lim succeeded at the Penang High Court, he failed in the Supreme Court where his action against all the defendants was struck out on various grounds, including that he did not have *locus standi* to sustain the claim, whether as an opposition politician, a frequent road and highway user or as a taxpayer.[43]

35 Let me give you a more recent example which may further illustrate this debate. Some of you may be familiar with a very recent decision of the English Divisional Court on the legality of the UK Government's proposal to build a third runway at London Heathrow Airport (see *The Queen, on the application of the London Borough of Hillingdon v Secretary of State for Transport*).[44] That case was brought by a coalition of local councils, residents and environmental groups who were arguing against the proposal to build a third runway. The claimants contested the proposal on three grounds: first, that the proposal failed to take into account later developments in climate change policy; second, that the proposal was not economically justifiable; and third, that the proposal did not adequately consider the impact on public transportation to Heathrow. In respect of the first two grounds, the Divisional Court recognised that the claimants raised legitimate concerns, but refused to quash the proposal on those grounds as they would be subject to further consultation under the law. On the third ground, the Divisional Court agreed that the Government had not adequately considered the issue of public transportation, but did not think that a quashing order was appropriate on the facts, as the matter could be remedied by the Secretary of State giving an appropriate undertaking to consider this issue in due course.

36 Leaving aside the economic and social implications of this decision, it seems to me that this case does, in fact, indicate a green-light view, contrary to the impression conveyed by the media of a victory against the UK government. The court did not reject the proposal outright, but, instead, considered how the deficiencies could be cured or considered in time to come. One could even say that the Divisional Court was giving the UK government legal guidance as to what the material considerations were. It would appear, therefore, that the court saw itself, not as being in opposition to, but in support of, the UK government's function and role.

37 What would be the result if, in Singapore, a group of persons sought judicial review against the Government's decision to build a third runway at Changi International Airport on similar grounds? At the

43 *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12.
44 [2010] EWHC 626.

heart of this debate between the red- and green-light perspectives is the issue of the trust that we place in the Government. While we are fortunate to have in place a strong working system of checks and balances, at the same time, it is likely that there will always be cases where administrative hurdles make life more difficult than necessary for the public.

38 One such example was the experience of the Duck Tours company in trying to obtain approval from the authorities to allow its amphibious vehicles to ply the roads. Duck Tours had to deal with seven different government agencies and faced endless bureaucratic red tape. It took Duck Tours nearly two years to obtain its licence. This was a case where responsibility was assigned to too many agencies, each being concerned only with its individual role rather than their collective performance. But the Government learnt fast and set up an inter-Ministry Pro-Enterprise Panel to remove red tape and reduce administrative inefficiencies in public administration.

39 If Duck Tours had sought judicial review, any remedy given by the courts would have been a comparatively blunt tool, as it would not have addressed the underlying root problem of bureaucratic red tape, but merely a specific symptom: in this case, Duck Tours' difficulty in obtaining a licence in a timely manner. Further, bad feeling and ill-will would have been generated on all sides, which is the last thing a fledging company like Duck Tours would have wanted. A red-light solution, therefore, would have been undesirable not only for Duck Tours, but for public administration as a whole.

40 The question of public administration, and of trust in the integrity of institutions of government, also applies to the Judiciary. It is of utmost importance that the public continues to trust and believe that the Judiciary is and will remain fair and even-handed. Justice must be seen to be done.

41 These notions also dictate the need for the rule against apparent bias, which operates to prevent adjudicators from hearing cases where there is a reasonable suspicion of bias from the viewpoint of the public. Looking at it from this perspective, it may not make sense for the courts to consider the issue of apparent bias from the viewpoint of a person who is better informed than the ordinary person on the street. It is, after all, the trust and confidence of the man on the street that the courts must gain, and the test for apparent bias must take this into account to ensure that public confidence in the Judiciary remains unshaken. On the other hand, where the allegation of apparent bias is made by a lawyer (a professional man) against a court or a tribunal, as in *Re Singh*

Kalpanath,[45] it may be argued that the better viewpoint is that of the legal profession or the professional class, and not that of the layman. Should the courts apply a "one size fits all" test to determine allegations of bias? I leave this for you and your professors to discuss. Perhaps, this could be another examination question.

42 I would like to conclude by affirming that the courts have a mission to do what is right in law and not an agenda to cover up what is wrong in law. The legal profession and academics should have no cause to be pessimistic or sceptical about the role of the courts in promoting good governance through judicial review. But lawyers should also learn their law first and use some common sense about what the real substance of the dispute is. What kind of justice are your clients seeking – substantive justice, procedural justice or merely technical justice? A good illustration of this point can be found in the case of *Registrar of Vehicles v Komoco Motors Pte Ltd*.[46] In that case, the Court of Appeal observed that the rules of natural justice are not set in stone. The case involved the right to be heard, and the facts showed that Komoco Motors had foregone opportunities to be heard by one public authority and also by the courts. Despite that, Komoco Motors pleaded that it had

45 [1992] 1 SLR(R) 595.

46 [2008] 3 SLR(R) 340. By way of background, an importer of vehicles is subject to two taxes. The first is an excise duty that is calculated using a vehicle's Open Market Value ("OMV"). The Singapore Customs ("Customs") is responsible for determining a vehicle's OMV and, correspondingly, the excise duty to be imposed. The importer must also pay an Additional Registration Fee ("ARF") to the Registrar of Vehicles ("Registrar"), and the ARF is also calculated using a vehicle's OMV. Since 1968, the Registrar adopted the practice of computing the ARF payable based on the OMV determined by Customs. No importer had ever challenged or protested against the Registrar's practice.

In 2001, Customs conducted an audit on the vehicles imported by Komoco Motors Pte Ltd ("Komoco") over a period of four years and determined that it had under-declared the vehicles' OMV. Eventually, the offence was compounded when Komoco paid for the shortfall in excise duty. Customs also informed the Registrar about Komoco's under-declaration of the vehicles' OMV. Subsequently, the Registrar wrote to Komoco to demand for payment of the shortfall in ARF payments. Komoco sought judicial review of the Registrar's decision, arguing that the Registrar had fettered her discretion or abrogated her power to determine the vehicles' OMV by adopting Custom's assessment of the same. The High Court judge agreed with Komoco and upheld the application.

However, the Court of Appeal allowed the appeal, taking the position that the Registrar, by adhering to the administrative practice of following Custom's determination of the vehicle's OMV, had not fettered her discretion or abrogated her powers. As a matter of substantive justice, the relevant legislation conferred on the Registrar broad powers to determine the vehicle's OMV, including the discretion to adopt Custom's determination. The rules of natural justice ought not be applied so rigidly where there was an open, transparent and efficient statutory scheme which Komoco had accepted. There could be no injustice to Komoco since it had foregone two earlier opportunities to contest the OMV determined by Customs. Good governance in public administration depends on both efficiency and procedural fairness. The ARF scheme, together with the administrative practice, fulfils this standard.

the same right to be heard before another public authority dealing with substantially the same issue. The court was not sympathetic to this approach.

43 It is easy to compare our administrative law tradition to that of the UK, and say that, in comparison, we are way behind the UK in administrative law. To me, this is not necessarily a vice but may be a virtue.

44 The role of the courts is to give litigants their rights, but at the same time the courts should play a supporting role in promoting good governance by articulating clear rules and principles by which the Government can conform to the rule of law. As an institution of the State, it is the duty of the Judiciary to work for the common good in dispensing justice. This is where empathy is called for rather than angst or worse, cynicism, about the judicial process. You may not be convinced by what I have said so far, but I hope I have succeeded in getting you to reconsider any misconception you may have of the state of judicial review in Singapore and to rethink its future prospects.

ANNEX A[47]

Cases where relief sought by the applicant was granted

S/No	Case Name
1	*Re Chua Bak Heng* [1957] MLJ 247
2	*Re Bukit Sembawang Rubber Co Ltd* [1961] MLJ 269
3	*Phang Moh Shin v Commissioner of Police* [1965–1967] SLR(R) 666
4	*C v Comptroller of Income Tax* [1965–1967] SLR(R) 626

47 See para 14 of this article.

5	*Attorney-General v Ling How Doong* [1968–1970] SLR(R) 375
6	*Lim Hock Siew v Minister of Interior and Defence* [1965–1967] SLR(R) 802
7	*Re San Development Co's Application* [1971–1973] SLR(R) 203
8	*Aziz bin Abdul Rahman v Attorney-General* [1979–1980] SLR(R) 55
9	*Daud bin Salleh v Superintendent, Sembawang Drug Rehabilitation Centre* [1979–1980] SLR(R) 747
10	*Re application by Ramakrishnan Chakara Padayachi* [1981–1982] SLR(R) 238
11	*Lau Seng Poh v Controller of Immigration* [1985–1986] SLR(R) 180
12	*Re application of Leo Boh Boey* [1985–1986] SLR(R) 434
13	*Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525
14	*Re Letter of Request from the Court of New South Wales for the Prosecution of Peter Bazos (Deposition Proceedings)* [1989] 1 SLR(R) 563
15	*Tan Gek Neo Jessie v Minister for Finance* [1991] 1 SLR(R) 1
16	*Re Fong Thin Choo* [1991] 1 SLR(R) 774
17	*De Souza Lionel Jerome v Attorney-General* [1992] 3 SLR(R) 552
18	*Attorney-General v Venice-Simplon Orient Express Inc Ltd* [1995] 1 SLR(R) 533
19	*Stansfield Business International Pte Ltd v Minister for Manpower (formerly known as Minister for Labour)* [1999] 2 SLR(R) 866
20	*Attorney-General v Ng Hock Guan* [2004] 3 SLR(R) 253
21	*Pang Chen Suan v Commissioner for Labour* [2008] 3 SLR(R) 648
22	*Mir Hassan bin Abdul Rahman v Attorney-General* [2009] 1 SLR(R) 134

Cases where the relief sought by the applicant was not granted

S/No	Case Name
1	*Re Ong Eng Guan* [1959] MLJ 92
2	*Re M A Majid's Application* [1960] MLJ 275
3	*Re Lee Yew Seng* [1960] MLJ 37
4	*Re Ong Yew Teck* [1960] MLJ 67
5	*Re Chua Ho Ann* [1963] MLJ 193
6	*Chok Kok Thong v Minister for Home Affairs* [1963] MLJ 232
7	*Amalgamated Union of Public Employees v Permanent Secretary (Health)* [1965] 2 MLJ 209
8	*Vasudevan Pillai v City Council of Singapore* [1968–1970] SLR(R) 100
9	*Wong Keng Sam v Pritam Singh Brar* [1968–1970] SLR(R) 221
10	*Jacob v Attorney-General* [1968–1970] SLR(R) 694
11	*Lee Mau Seng v Minister for Home Affairs* [1971–1973] SLR(R) 135
12	*Sithambaran v Attorney-General* [1971–1973] SLR(R) 481
13	*Wee Toon Lip v Minister for Home Affairs* [1971–1973] SLR(R) 350
14	*Lau Lek Eng v Minister for Home Affairs* [1971–1973] SLR(R) 346
15	*Mohamed Yusoff bin Samadi v Attorney-General* [1974–1976] SLR(R) 105
16	*Velayutham M v Port of Singapore Authority* [1974–1976] SLR(R) 307
17	*Re an application by Nassim N H E* [1974–1976] SLR(R) 684
18	*Public Prosecutor v Pillay M M* [1977–1978] SLR(R) 45
19	*Chief Assessor v Howe Yoon Chong* [1977–1978] SLR(R) 601
20	*Chang Song Liang v Attorney-General* [1979–1980] SLR(R) 379

21	*Attorney-General v Lee Keng Kee* [1981–1982] SLR(R) 460
22	*Subramaniam s/o Marie v Superintendent, Selarang Park Drug Rehabilitation Centre* [1981–1982] SLR(R) 30
23	*United Engineers Ltd v Collector of Land Revenue* [1981–1982] SLR(R) 540
24	*Wong Kim Sang v Attorney-General* [1981–1982] SLR(R) 295
25	*Abdul Raub v Attorney-General* [1981–1982] SLR(R) 625
26	*Leong Kum Fatt v Attorney-General* [1985–1986] SLR(R) 165
27	*Abdul Wahab bin Sulaiman v Commandant, Tanglin Detention Barracks* [1985–1986] SLR(R) 7
28	*Heng Kai Kok v Attorney-General* [1985–1986] SLR(R) 922
29	*Re Mohamed Saleem Ismail* [1987] SLR(R) 380
30	*Mohan Singh v Attorney-General* [1987] SLR(R) 428
31	*Dow Jones Publishing Company (Asia) Inc v Attorney-General* [1989] 1 SLR(R) 637
32	*Re Tai Choi Yu* [1987] SLR(R) 660
33	*Teo Soh Lung v Minister for Home Affairs* [1990] 1 SLR(R) 347
34	*Re Siah Mooi Guat* [1988] 2 SLR(R) 165
35	*Jeyaretnam Joshua Benjamin v Attorney-General* [1988] 2 SLR(R) 571
36	*Basco Enterprises (Pte Ltd) v Soh Siong Wai* [1989] 2 SLR(R) 526
37	*Vincent Cheng v Minister for Home Affairs* [1990] 1 SLR(R) 38
38	*Jeyaretnam Joshua Benjamin v Attorney-General* [1990] 1 SLR(R) 590
39	*Re Yap Lack Tee George* [1991] 2 SLR(R) 203
40	*Kamal Jit Singh v Minister for Home Affairs* [1992] 3 SLR(R) 352
41	*Chan Hiang Leng Colin v Public Prosecutor* [1994] 3 SLR(R) 209

42	*Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR(R) 294
43	*Shamm bin Sulong v Minister for Home Affairs* [1996] 2 SLR(R) 350
44	*Lines Int'l Holding v Singapore Tourist Promotion Board* [1997] 1 SLR(R) 52
45	*Public Service Commission v Lai Swee Lin Linda* [2001] 1 SLR(R) 133
46	*Kang Ngah Wei v Commander of Traffic Police* [2002] 1 SLR(R) 14
47	*Chua Ah Beng v Commissioner for Labour* [2002] 2 SLR(R) 945
48	*Tan Eng Chye v Director of Prisons* [2004] 4 SLR(R) 521
49	*Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582
50	*Aspinden Holdings Ltd v Chief Assessor* [2006] 4 SLR(R) 521
51	*Teng Fuh Holdings Pte Ltd v Collector of Land Revenue* [2007] 2 SLR(R) 568
52	*Registrar of Vehicles v Komoco Motors Pte Ltd* [2008] 3 SLR(R) 340
53	*Re Wong Sin Yee* [2007] 4 SLR(R) 676
54	*Ng Swee Lang v Sassoon Samuel Bernard* [2008] 2 SLR(R) 597
55	*City Developments v Chief Assessor* [2008] 4 SLR(R) 150
56	*Ung Yoke Hooi v Attorney-General* [2009] 3 SLR(R) 307
57	*Borissik Svetlana v Urban Redevelopment Authority* [2009] 4 SLR(R) 92