Singapore Journal of Legal Studies
[2019] 289–293

INTRODUCTION: CONTEMPORARY ISSUES IN PUBLIC LAW—THEORY, DOCTRINE AND PRACTICE

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I. OVERVIEW OF SPECIAL SYMPOSIUM

The special symposium sections of this and the September 2020 issues of the *Singapore Journal of Legal Studies* bring together a collection of papers that look at contemporary issues relating to public law in Singapore. In addition to looking at issues of theory and doctrine, the symposium will consider issues relating to public law litigation. Public law litigation remains an under-explored area in public law scholarship and one that is ripe for discussion. Not only has there been an increase in the number of applications for judicial review, there has also been an increasing diversity in the issues mooted in courts in recent years. For example, in the recent past, the courts have had to consider a challenge by a member of a particular geographical constituency of the constitutionality of the executive's decision not to call a by-election on the vacation of a parliamentary seat for that constituency; a challenge by a homosexual couple of the constitutionality of a provision of the *Penal Code* (Cap 224, 2008 Rev Ed Sing) restricting homosexual conduct in the absence of any criminal proceedings under the provision against them (with more challenges pertaining to section 377A of the *Penal Code* currently on the docket); a challenge by a member of an opposition political party of the constitutional vires of a loan made by the executive to an international funding body; a challenge by members of the Hindu religion of a ban on the use of musical instruments during an annual religious procession; a challenge by a Sikh prisoners' counsellor of a policy on hair for prisoners that affected members of a particular religion; a challenge by a potential electoral candidate on the absence of a by-election on the vacation of a seat in a group representation constituency; and challenges to the validity of constitutional amendments relating to the elected presidency.

These cases have highlighted a number of issues that will need to be resolved by the courts going forward when it comes the theories, doctrine and procedures used to resolve public law questions. These issues include, the proper role of the courts in checking and enhancing constitutional and administrative governance by the political branches; access to courts (including questions of the threshold and requirement

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for leave; requirements for standing; the role of ouster clauses in legislation); the suitability of existing court processes to manage this stream of litigation (rules on hearings in open courts; the role of discovery and evidence in public law litigation); and the substantive doctrine used by the courts to assess these claims (the scope of judicial review; the range of grounds of judicial review). The collection of papers arising from the workshop will appear in two symposium sections of the *Singapore Journal of Legal Studies*. Each symposium issue has been curated to include papers that address: (a) questions of access to judicial review and/or procedural issues relating to the conduct of judicial review proceedings; and (b) issues relating to the theoretical foundations and/or substantive doctrine utilised by judges to adjudicate these disputes. In this way, each issue addresses both the procedural and substantive aspects (broadly speaking) of public law litigation.

All of the papers arise from a workshop that brought together academics and practitioners (from both the public and private sectors). This workshop was convened by Kevin Tan and myself and was generously supported by the Centre for Asian Legal Studies at the Faculty of Law of the National University of Singapore. The workshop attracted a large audience of approximately 70 practitioners, government officials and members of academia. This provided a solid forum for discussing the draft papers.

II. Papers in this Volume

The special symposium section for the September 2019 issue contains three papers. The first paper by Kenny Chng starts the conversation by looking at an important meta-theme relating to judicial review: what exactly are the theoretical foundations of judicial review in Singapore and how do they impact on the scope of judicial review? The theoretical foundation of judicial review of administrative action has been the subject of fierce debate among scholars elsewhere in the common law world. In contrast, there is comparatively little attention paid to the question of the particular theoretical foundations of judicial review in Singapore. The author argues that, there is an inclination in Singapore case law and academia towards importing English theories of judicial review. This paper aims to contribute to the formulation of a proper theoretical foundation for judicial review in Singapore. It argues that with a proper understanding of the competing English theories of judicial review, it will be apparent that they are not readily transplantable to Singapore. As such, a unique theory of judicial review stands to be formulated in Singapore. A proper articulation of judicial review theory can have significant consequences for judicial review doctrine—this paper suggests, for example, that the approach to ouster clauses is significantly influenced by judicial review theory. The overall ambition of the paper is to push for greater clarity in the theoretical foundations that inform judicial review and the implications theory has for judicial review doctrine. This, in turn, can have an impact on the way that cases are pleaded—relying on clearer theory and doctrine.

From here, the next paper looks at the question of access to judicial review. The paper by Benjamin Ong looks into the rules on standing. Following a careful analysis of the relevant case law, the author concludes that there have been two types of rules on standing to apply for judicial review of legislation or executive action on constitutional grounds. 'Interest-based' rules grant standing to a person who can

demonstrate a 'sufficient interest' in the subject matter of the application. 'Rights-based' rules require the applicant to identify a specific constitutional right vested in him that has allegedly been violated. Singapore's standing rules have recently developed to express a preference for the rights-based approach. This allows the courts to develop the content of constitutional rights as part of the standing inquiry; such development is not always possible at later stages of the litigation process. The author argues, however, that unfortunately this benefit of rights-based standing rules is obscured because Singapore's standing rules are overly complicated and not doctrinally consistent. The author argues for a simplification of the present standing rules, and concludes with observations on how standing rules may be liberalised or applied without abandoning the rights-based framework. Greater clarity of the rules on standing can make the litigation process in public law cases more attuned to the constitutional questions being mooted before the court.

Having considered the broader theme of the foundations of judicial review and access to judicial review, the final paper considers the principles that are utilised by the courts to adjudicate public law issues. Swati Jhaveri's paper focuses on the articulation of the grounds of judicial review utilised in administrative law. It is oft-cited that the grounds of judicial review in administrative law in Singapore are illegality, irrationality and procedural impropriety.[1] The content of these grounds was famously expounded by Lord Diplock in Council for *Civil Service Unions v Minister for the Civil Service* ("the *GCHQ* taxonomy").[2] The boundaries and operation of the above three grounds are said to reinforce one major truism in judicial review: courts can review the legality but not merits of a decision.[3] This distinction is said to best reconcile the constitutional imperative of holding the executive to account (embodied in the principle of legality and rule of law) with the need to respect the separation of powers. Elsewhere the *GCHQ* taxonomy has been criticised for providing no real indication or clarity from the courts on why review is restricted to those grounds only. There is a lack of a coherent explanation for review on the basis of those particular grounds and why they are the optimal mode of maintaining the distinction between legality and merits.[4] As this paper demonstrates, the *GCHQ* taxonomy for organising the grounds of judicial review in administrative law is also likely to be incrementally tested in Singapore through the development of other grounds of judicial review.[5]

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1 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at para 62 (CA).

2 [1985] AC 374 (HL).

3 See, for example, *SGB Starkstrom Pte Ltd v Commissioner for Labour* [2016] 3 SLR 598 at paras 56, 58(a) (CA) [*SGB Starkstrom*]; *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 at paras 75, 76 (CA); and *Tan Seet Eng v Attorney-General*, *supra* note 1 at para 93.

4 TRS Allan, *Law, Liberty and Justice: The Legal Foundations of British Constitutionalism* (Oxford: Clarendon Press, 1994) at 167, 168. In the Singapore context, see Daniel Tan, "An Analysis of Substantive Review in Singaporean Administrative Law" (2013) 25 Sing Ac LJ 296 on the conflation of illegality and irrationality.

5 Indeed, Lord Diplock predicted that the trinity-based taxonomy would evolve, for example, with the development of proportionality. For example, this could occur via the emergence of some form of doctrine of substantive legitimate expectations, on which see: Swati Jhaveri, "The Doctrine of Substantive Legitimate Expectations: the Significance of *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority*" [2016] 1 Public Law 1; Swati Jhaveri, "Contrasting Responses to the 'Coughlan Moment': Legitimate Expectations in Hong Kong and Singapore" in Matthew Groves & Greg Weeks, eds, *Legitimate Expectations in the Common Law World* (Oxford and Portland, Oregon: Hart Publishing, 2017); Charles Tay Kuan Seng, "Substantive Legitimate Expectations: The Singapore Reception" (2014) 26 Sing Ac LJ 609; and Zhida Chen, "Substantive Legitimate Expectations in Singapore Administrative Law: *Chiu*

This paper looks at particular grounds of review that the legality and merits divide is an optimal way of balancing competing constitutional imperatives, which do not fit neatly into these traditional grounds of judicial review nor fully adhere to the legality and merits divide in terms of the nature of the review undertaken by the courts: the doctrine of substantive legitimate expectations; review for errors of fact; review for errors of law. These grounds have been underexplored in terms of their connection to this taxonomy.[6] In looking at the court's approach to review under these grounds of judicial review, the paper predicts the gradual reconfiguration and augmentation of the *GCHQ* taxonomy. And, more fundamentally, it argues that the legality/merits divide will no longer be an optimal way of balancing the various competing constitutional imperatives at play when determining the appropriate scope of judicial review by courts. Rather than rely on such unstable dichotomies, the courts should follow the global trend in striking the balance through varying the use of existing tools of judicial review. The paper proposes two possible ways in which Singapore can do this while maintaining the existing constitutional equilibrium between holding the executive to account and respecting the separation of powers between the executive and judiciary. These include: (a) utilising *existing* grounds of review—including the three discussed in this paper—but creating variable standards of review within those grounds; and (b) through a more intentional and careful consideration of the way in which remedies are deployed in cases.

III. Conclusion

The papers in the second symposium issue to be published in 2020 will build on these discussions. It will feature papers that take further the conversations on access and the role of ouster clauses, and will also consider the rules relating to the conduct of judicial review proceedings and pressures to recalibrate the grounds of judicial review to deal with new areas of executive action that are likely to be reviewed. On the latter the papers will consider new frontiers in the use of administrative law—in, for example, the commercial regulatory context. The papers that form this and the forthcoming special issue in 2020 are an important advance on understandings of jurisprudence on a range of topics relating to public law in Singapore. The hope is

Teng @ Kallang Pte Ltd v Singapore Land Authority [2013] SGHC 262" (2014) 26 Sing Ac LJ 237. The Singapore Court of Appeal has yet to definitively affirm or reject the doctrine. They stopped short of doing so in the recent case of *SGB Starkstrom*, *supra* note 3. This was on the basis that the issue did not arise in the case, although the Court of Appeal ended its judgment flagging issues that may cause the courts to pause and reflect on the recognition of the doctrine in Singapore (*SGB Starkstrom*, *supra* note 3 at paras 42, 55-63 (*per* Sundaresh Menon CJ)). See Kenny Chng "An Uncertain Future for Substantive Legitimate Expectations in Singapore: *SGB Starkstrom Pte Ltd v Commissioner of Labour* [2016] 3 SLR 598" [2018] 2 Public Law 192.

6 There are many ways in which the existing three grounds may test the legality/merits divide as the comment from TRS Allan, *supra* note 4, demonstrates. An obvious candidate for this is irrationality—indeed that is the experience elsewhere. However, in Singapore while there have been developments in the use of irrationality these have been with a clear awareness of the legality/merits divide: Swati Jhaveri, "The Survival of Reasonableness Review: Confirming the Boundaries" (2018) 46:1 Federal Law Review 137; Swati Jhaveri, "Localising Administrative Law in Singapore: Embracing Inter-Branch Equality" (2017) 29 Sing Ac LJ 828. The need to maintain the distinction also explains the hesitation for taking the doctrine of legitimate expectations forward: *SGB Starkstrom*, *supra* note 3 at paras 42, 55-63.

that they will trigger further conversations on these and other underexplored areas of public law such as, for example, the important issues of discovery of evidence and costs orders in judicial review proceedings. The cases that come through the courts in the future will be important context in which the issues explored in these special issues can be tested and further developed. The hope is that this work can then be important source material with the potential for real impact on the development of public law in Singapore.