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REVISITING TAXONOMIES AND TRUISMS IN ADMINISTRATIVE LAW IN SINGAPORE

SWATI **JHAVERI***

This paper confronts the continued viability of two entrenched features of administrative law in Singapore. First, it argues that the taxonomy for organising the grounds of judicial review (illegality, irrationality and procedural fairness) is likely to be incrementally tested in Singapore through the development of newer grounds of judicial review. This paper looks at three particular grounds of review to exemplify this: review for errors of law; review for errors of fact and the doctrine of substantive legitimate expectations. Secondly, and related to the first, the paper interrogates the continued utility of the 'truism' that courts should only review the 'legality' and not the 'merits' of executive decision-making. It argues that this may 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. Following this critique, the paper provides preliminary thoughts on two modest proposals for how administrative law can move forward to account for the developments that are testing these features of the law. It proposes: (a) a gradual and incremental move away from a taxonomy or categorisation of grounds of review to an approach organised around varying the nature and intensity of review to demarcate the scope and boundaries of judicial review; and (b) a more intentional and careful consideration of the way in which remedies are pleaded by applicants and framed by the courts in their rulings.

I. INTRODUCTION

When expounding the grounds of judicial review in administrative law in Singapore the courts frequently refer to the well-known taxonomy famously expounded by Lord Diplock in *Council for Civil Service Unions v Minister for the Civil Service* ("the *GCHQ* taxonomy"):[1]

> By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. . . By "irrationality" I mean. . . a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. . .

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1 [1985] AC 374 (HL).

> I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision.[2]

These three grounds (illegality, irrationality and procedural impropriety) are said to reinforce a fundamental truism about judicial review: that courts can review the 'legality' but not 'merits' of a decision by the executive.[3] This dichotomy between 'legality' and 'merits' is said to best reconcile competing constitutional imperatives: holding the executive to account (which the judiciary see as mandated by the "principle of legality" and "rule of law")[4] while respecting the separation of the powers between courts and the executive. However, the *GCHQ* taxonomy has increasingly been criticised as providing no real indication or clarity on why review is restricted to those grounds only; the precise boundaries between the different grounds; whether there exists a coherent explanation for review on the basis of these particular grounds; and why they are the optimal way of maintaining the distinction between legality and merits.[5]

This paper confronts two further and more fundamental issues with the *GCHQ* taxonomy. First, it argues that this taxonomy for organising the grounds of judicial review in administrative law is likely to be incrementally tested in Singapore with the development of other grounds of judicial review.[6] Three grounds of review are considered here: review for errors of law, review for errors of fact and the doctrine of substantive legitimate expectations. These do not fit neatly into these traditional grounds of judicial review nor fully adhere to the legality/merits divide in terms of the nature of the review undertaken by the courts.[7] In looking at the court's approach to review under these grounds, the paper predicts the need for the gradual movement away from a reliance on the *GCHQ* taxonomy to organise and set the scope and boundaries of judicial review. Secondly, and more fundamentally, it argues that

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

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

4 *Tan Seet Eng*, *supra* note 2 at paras 1, 90. The paper does not engage in a detailed review of the meaning of these concepts: see Jaclyn L Neo, "'All Power has Legal Limits': The Principle of Legality as a Constitutional Principle of Judicial Review" (2017) 29 Sing Ac LJ 667.

5 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.

6 Indeed, Lord Diplock predicted that the trinity-based taxonomy would evolve, for example, with the development of proportionality and other new grounds: *supra* note 1 at 410D-E.

7 There are many ways in which the existing three grounds may test the legality/merits divide as the comment from Allan, *supra* note 5 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 [Jhaveri, "Survival"]; and Swati Jhaveri, "Localising Administrative Law in Singapore: Embracing Inter-Branch Equality" (2017) 29 Sing Ac LJ 828 [Jhaveri, "Localising"]. The need to maintain the distinction also explains the hesitation for taking the doctrine of legitimate expectations forward: *Starkstrom*, *supra* note 3 at paras 42, 55-63. The paper revisits these points in the following Sections.

the legality/merits divide may 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.

On the second issue, the court's approach to review with the three newer/evolving grounds of judicial review exemplifies the instability of the legality/merits divide as a means of defining and calibrating the court's scope of review. The discussion will demonstrate how these grounds have tested and ultimately disrupted the coherence of the dichotomy. Other jurisdictions have responded to this erosion by abandoning a reliance on the legality/merits divide to delineate the appropriate scope of judicial review.[8] Singapore should likewise consider moving away from this dichotomy and the *GCHQ* taxonomy. However, this paper proposes doing this in a way that would not require an abrupt reversal of a significant body of jurisprudence in Singapore. This is unlikely and, more importantly, would be disruptive of other rule of law values, such as clarity, predictability and certainty of law and legal principles. Thus, the paper makes two more modest proposals for the gradual and incremental reform and redirection of administrative law. The two proposals include: (a) a move away from a taxonomical approach to an approach organised around variable intensities of review to demarcate the scope and boundaries of judicial review; and (b) a more intentional and careful consideration of the way in which remedies are deployed in cases. Both of these proposals are more transparent mechanisms for striking the balance between the various constitutional imperatives (rule of law and accountability, on the one hand, and the separation of powers, on the other). However, for this to happen, greater attention will need to be paid to the issues with the *GCHQ* taxonomy and the legality/merits divide in pleadings by applicants and the terms of any ruling by the courts, as discussed in Section VI.

II. The Building Blocks of Administrative Law in Singapore: Theories, Truisms and Taxonomies

Administrative law in Singapore is constructed from three major building blocks. The first consists of the constitutional principles that legitimise *a* role for the courts in reviewing executive action. The second consists of the implications of these constitutional principles on the appropriate scope of review. The third building block comprises the grounds of judicial review that best realise the 'appropriate scope of review' for courts. This section briefly outlines the content of these building blocks to contextualise the critique that follows of the latter two building blocks. The discussion in the subsequent sections will demonstrate how these two building blocks (*ie* the existing grounds of review and the legality/merits divide) are increasingly coming under pressure, are unstable and, ultimately, unnecessary for maintaining the constitutional foundations of judicial review that make up the first building block of administrative law.

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[8] See Christopher Forsyth, "Modern Threats to English Administrative Law and Implications for its Export" in Swati Jhaveri & Michael Ramsden, eds. *Judicial Review Across the Common Law World: Origins and Adaptations* (Cambridge University Press, forthcoming 2020) for a discussion of this breakdown in the classical taxonomy of the grounds of judicial review.

On the first, there has been an array of constitutional theories and metaphors used to rationalise judicial review of administrative action in Singapore over time.[9] This includes the rule of law and the concomitant principle of legality (which embodies the idea that all power has legal limits);[10] the separation of powers and the need for checks and balances on the executive's powers;[11] 'red' versus 'green light' approaches to judicial review; the need to promote 'good administration';[12] the theory of jurisdiction and the importance of ensuring the executive remains within statutory boundaries;[13] and the need to give effect to the constitutional principles inherent in the basic structure of the Constitution (such as the separation of powers).[14] These various principles—the rule of law and the separation of powers, in particular—are constantly in tension and in need of balancing in the cases to determine the appropriate scope of judicial review by the courts. The balance can be articulated as one between the rule of law, that courts must uphold, and the separation of powers, that courts must respect. How should this balance be struck?

This leads to the second building block of administrative law. Recently, in *Starkstrom*, the Singapore Court of Appeal (the "Court of Appeal") expounded three justificatory principles that exemplify how this balance should be struck:[15]

(a) First, pursuant to the constitutional doctrine of separation of powers, the court's limited role in judicial review is "premised on a proper understanding of the role of the respective branches of government—especially, in this context, the Executive and the Judiciary—in a democracy where the Constitution reigns supreme".[16] In short, the judiciary's task is limited to reviewing the *legality* of administrative action.
(b) Second, and related to that, is the need to uphold Parliament's intention (as expressed in statute) to vest certain powers in the Executive.[17] This realises

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9 For a discussion on the need for clarity in the theoretical foundations of judicial review, see Kenny Chng's contribution to this special symposium issue.

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

11 The 'separation of powers' has long been used as a metaphor for the division of power and for explaining the approach to inter-branch checks and balances within the constitutional framework of Singapore. Indeed, the courts have designated it part of the "basic structure of the Singapore Constitution": *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 at paras 11, 12 (HC) [*Faizal*]. There is significant debate in the literature about whether separation of powers is capable of operationalisation or just a metaphor: see *eg* Edward Rubin, *Beyond Camelot: Rethinking Politics and Law for the Modern State* (Princeton: Princeton University Press, 2007) at 43.

12 The definition of this is largely left to the public bodies: *JD Ltd v Comptroller of Income Tax* [2006] 1 SLR (R) 484 at para 49 (CA).

13 Thio Li-ann, "The Theory and Practice of Judicial Review of Administrative Action in Singapore: Trends and Perspectives" in Yeo Tiong Min, Hans Tjio & Tang Hang Wu, eds. *Developments in Singapore Law 2006-2010: Trends and Perspectives* (Singapore: Academy Publishing, 2011), 714-752 at paras 90, 91; and Sundaresh Menon CJ, "Executive Power: Rethinking the Modalities of Control" (Annual Bernstein Lecture in Comparative Law delivered at Duke University School of Law, 1 November 2018), [2019] 29 Duke Journal of Comparative & International Law 277 at para 40.

14 *Faizal*, *supra* note 11 at paras 11, 12.

15 *Starkstrom*, *supra* note 3 at para 58.

16 *Ibid*, citing *Tan Seet Eng*, *supra* note 2 at para 99.

17 *Starkstrom*, *ibid*, citing *Tan Seet Eng*, *ibid* at paras 64, 99.

the fundamental principle of *legality*—all power has legal limits—embodied in the rule of law.

(c) Finally, there is also the pragmatic concern about *institutional competence*. In *Tan Seet Eng*, we recognised that "courts and judges are not best-equipped to scrutinise decisions which are laden with issues of policy or security or which call for polycentric political considerations. Courts and judges are concerned with justice and legality in the particular cases that come before them".[18] This relates to the first point that, therefore, courts should restrict themselves to reviewing the 'legality' of executive decision making.

According to the Court of Appeal, the various constitutional principles at play can be balanced by drawing a distinction between the legality and merits of a decision. Indeed, irrespective of the constitutional framing device used by the courts over time in Singapore to rationalise judicial review, they have generally relied on the distinction between the legality and the merits of executive decision-making to operationalise the balance between the relevant constitutional principles they are relying on to rationalise judicial review. It is the courts' role to review the 'legality' of executive decision-making and the role of the political branches to control and review the 'merits' of the same. The grounds that make up the *GCHQ* taxonomy are said to best give effect to this distinction.[19]

Various attempts have been made to distinguish between the 'legality' and 'merits' of a decision. This is sometimes done using other dichotomies—judicial *review* versus appeal; reviewing the decision-making *process* versus the *decision* itself; and challenging the statutory limits on executive power versus the political wisdom of a decision made under statute. Laws J (as the then was) explained it in these terms:

> [I]n most cases, the judicial review court is not concerned with the merits of the decision under review. The court does not ask itself the question, "Is this decision right or wrong?" Far less does the judge ask himself whether he himself would have arrived at the decision in question. . . [T]he task of the court, and the judgment at which it arrives, have nothing to do with the question, "Which view is the better one?"[20]

Most commentators, however, agree that the concepts are not susceptible to an uncontroversial and objective definition that we can all agree on instantaneously (in the same way we might when discussing whether an object is 'red'):

> The question of the appropriate measure of deference, respect, restraint, latitude or discretionary area of judgment (to use some of the terms variously employed) which the courts should grant the primary decision-maker under this head of review is one of the most complex in all of public law and goes to the heart of the principle of the separation of powers.

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18 *Starkstrom*, *ibid*, citing *Tan Seet Eng*, *ibid* at para 93.

19 See *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at para 51 (CA) [*Nagaenthran*].

20 *R v Somerset County Council, ex parte Fewings* [1995] 1 All ER 513 at 515 (QBD).

> ***This is because there is often a fine line between assessment of the merits of the decision (evaluation of fact and policy) and the assessment of whether the principles of 'just administrative action' have been met.*** The former questions are normally matters for the primary decision-maker, but the latter are within the appropriate capacity of the courts to decide.[21]

While, this may be an easy distinction to draw in the case of, for example, review on questions of pure procedure (namely, whether an applicant was given a fair hearing by the executive in a particular decision-making context), it is a harder distinction to draw when it comes to other grounds of review: most notably, a review of the irrationality of a decision. However, even at the 'easier' ends of the spectrum the distinction can be difficult to draw. For example, when reviewing the procedure for making a decision, the more prescriptive a court is about the 'correct' procedure to follow, the more it may constrain the eventual decision that can be made by the executive, thus infiltrating into the merits of decision-making.[22] This is indicative of a deeper problem with the dichotomy. Given the amorphous nature of the concepts of 'legality' and 'merits', the ultimate definition utilised in any particular instance may be based on a prior and unarticulated assumption of set of values. For example, where the court is concerned about the concentration of power in the executive, they may be inclined towards taking a broader approach to the definition of 'legality' bringing the case at hand within the remit of the courts.

However the distinction is articulated, there is a belief that the grounds of review give effect to it—the third building block of administrative law. The discussion that follows focuses on three particular grounds to highlight a breakdown of both the second and third building blocks discussed above. The discussion will demonstrate how the grounds behave differently from the existing three grounds. It will further show how the courts have attempted to maintain a distinction between the legality and merits of the executive's decision when carrying out review under these grounds and how, ultimately, these efforts have been unsuccessful.

III. Challenging the Legality/Merits Divide (I): Review for Errors of Law

To understand 'error of law' as a basis for review, it is first necessary to understand 'illegality': the first ground of review within the *GCHQ* taxonomy. Statutory interpretation is the main tool for the operationalisation of 'illegality' as a ground of judicial review. An illegal decision is defined broadly to mean any decision which contravenes or exceeds a decision-maker's statutory powers.[23] The courts have added

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[21] Harry Woolf *et al*, *De Smith's Judicial Review*, 7th ed (Sweet & Maxwell, 2013) at para 11-004 [emphasis added].

[22] See, for example, in the Hong Kong context where the court's, in effect, designed the procedure to be followed by the Secretary of Security when screening applications by asylum seekers to temporarily remain in Hong Kong: *Sakthavel Prabakar v Secretary for Security* [2005] 1 HKLRD 289 (CFA).

[23] SA De Smith *et al*, *De Smith, Woolf & Jowell's Principles of Judicial Review* (Sweet & Maxwell, 1999) at 151; and *R v Secretary of State for Foreign and Commonwealth Affairs, ex parte World Development Movement Ltd* [1995] 1 WLR 386 (QBD).

some structure to this broad definition by developing various categories of 'illegality'. This includes using a statutory power for an improper purpose inconsistent with the statute's purpose, taking account of considerations that are inconsistent with the statutory purpose, fettering of broad statutory powers or discretion and/or the improper delegation of a power to an unintended decision-maker.

This section focuses on an alternative use of illegality-linked terminology: review for 'errors' of law by the executive in the interpretation of statutes that set out the scope of its decision-making power. As the cases discussed in this section show, this is much closer to a review of the merits of the case and, thus, categorically distinct from the other facets of 'illegality' review identified in the preceding paragraph. While not expressed in such terms, the court's review here, in effect, reaches a conclusion on whether the decision-maker has interpreted legislation *wrongly* to give itself a power it did not have.[24] This blurs the divide between legality and merits: the courts are ultimately interested here with whether the decision-maker has reached the 'wrong' decision under the statute. The courts rationalise and reconcile this review with the separation of powers by characterising 'wrong' decisions as ones that are taken outside of the executive's *jurisdiction*. Thus, all courts are doing is policing parliamentary delegations of power to ensure government bodies stay within their powers and do not aggrandise their powers through flawed statutory interpretations.

To better understand review for 'errors of law' and the adequacy of the 'jurisdictional' rationalisation of it by the courts (and, therefore, whether it is indeed a review of the legality and not merits of the decision), we first need to think about the way in which statutory powers granted to government bodies are generally structured. Statutory powers tend to be drafted using variations of the following basic formula: if X conditions exist (the "X factors") then the government body may do Y (the "Y power"). So, before a government can do Y it needs to show that the X conditions or factors which are a precondition to the exercise of Y actually exist.[25] For example, section 5(3) of the *Amusement Rides Safety Act*[26] in Singapore states that:

> (3) **If any installation works [of amusement rides] are being carried out in contravention of [this Act**], the Commissioner [of Amusement Rides Safety] may —
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> (*a*) . . . require the person who is carrying out. . . the installation works to take. . . all such measures as may be specified. . . to secure the cessation of such installation works. . . [27]

Accordingly, the Commissioner of Amusement Rides Safety **may** order the cessation of installation of an amusement park ride (the Y power here), *but only if* the ride was being installed in contravention of the legislation (the X factor here). The underlined portion of section 5(3) thus sets out the condition (or the X factor) on the basis of

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[24] *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (HL) [*Anisminic*].

[25] Paul Craig, *Administrative Law*, 7th ed (Sweet & Maxwell, 2012) at para 16-001.

[26] Cap 6A, 2012 Rev Ed Sing.

[27] *Ibid*, s 5(3) [emphasis added].

which the Commissioner *has the jurisdiction* to exercise its powers (or the Y power). If the X factor was not met, the Commissioner had no jurisdiction to exercise the Y power. The courts therefore characterise their review of the executive's interpretation of statutes as 'jurisdictional' review: review for errors in interpretation that take decision-makers out of their jurisdiction.

'Jurisdictional review' thus characterised involves the review of a decision which appears to have made either an error of law or an error of fact (considered in the following section) in relation to the interpretation or existence of such conditions or X factors. So using the example above, has the Commissioner misinterpreted whether installation works were being carried out in "contravention" of the *Amusement Rides Safety Act* (a legal error) or did the Commissioner make the decision on the basis of flawed or insufficient factual evidence (a factual error)?[28] The idea behind this review is that if the Commissioner has made an error in relation to the X factors then he did not actually have 'jurisdiction' or power to exercise its powers in that particular instance, *ie* it did not have the Y power. It was thus acting '*ultra vires*' (outside of their powers). The court can then quash that decision based on what they consider is the 'correct' interpretation of the statutory provision. This is the focus of jurisdictional review. The question the courts are asking is whether the executive were *correct* in reaching the conclusion that they *can* exercise their discretion. Have they made an error (of law or fact) which takes away that jurisdiction? The remainder of the grounds of review ask a different question: they are not concerned with whether the executive *can* or *cannot* make a *particular* decision—as jurisdictional review is concerned with. Rather, they are concerned with *how* the executive makes decisions: did they take into account all of the relevant considerations; did they adequately take into account the statutory purpose of their power; did they follow the right procedure; did they give the applicant a fair hearing?[29]

How far the courts are successful in maintaining the legality/merits divide, therefore, turns primarily on how convincing the 'jurisdictional' characterisation of this kind of review is. The courts in Singapore have not settled on a single uniform approach on the questions of whether they will review such errors of law and how far they will follow the 'jurisdictional' framing of such review. In England, historically, the courts drew an artificial distinction between jurisdictional and non-jurisdictional errors. The courts were reluctant to intervene in determinations, even if the decision-maker had made an error of law *so long as the decision-maker had not made a mistake about the law such that he consequently went beyond his powers*.[30] Using the example above, if there had been no error made by the decision-maker on whether there was an installation of the general category that the *Amusement Rides Safety Act* applies to (for example, installation works of amusement park rides versus shops in the amusement park), then there had been no error as to jurisdiction (they were acting in the 'right' kind of case within their purview, *ie* investigating installation works on rides). Any subsequent errors (for example, whether there were works being carried out in contravention of the *Amusement Rides Safety Act*) were within the executive's jurisdiction and not reviewable. The review of these errors would be restricted to the

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[28] This is discussed in the following section.

[29] Although, as discussed in Section II above, even with these grounds of review it is not always clear that the legality/merits divide is not being breached. See text accompanying *supra* note 22.

[30] *R v Bolton* (1841) 1 QB 66.

traditional grounds under the *GCHQ* taxonomy; versus by reference to a standard of correctness. This distinction was said to reflect the established view that the courts and the administration respectively have responsibility for their own functions and should not trespass upon each other's jurisdiction. It also represents a judicial recognition of the need to balance the supervisory jurisdiction of the court, implemented through the judicial review process, with the freedom of administrators to exercise the powers given to them by law without fear that the courts will substitute their views for those of the administrator. However, where a decision-maker had gone beyond the scope of his powers, due to an error as to the meaning or extent of his legal powers, the court would be willing to review the decision being challenged for its correctness. Despite the willingness of the courts in England to demonstrate a degree of deference towards the decision-maker in terms of not reviewing errors of law made within his jurisdiction, over time the courts expanded the scope of their supervision. The distinction between 'jurisdictional' and 'non-jurisdictional' errors was unclear and, ultimately, rendered obsolete following the leading case of *Anisminic*.[31] The House of Lords fundamentally collapsed any such distinction: all errors go to jurisdiction and could be reviewed for correctness. Has the executive *correctly* interpreted the relevant statutory provisions?

Discomfort with the nature of this review (done on the basis of 'correctness') may be the cause for the partial retention of the pre-*Anisminic* distinction between jurisdictional and non-jurisdictional errors in Singapore.[32] Some errors are characterised as 'non-jurisdictional', *ie* errors within jurisdiction and others as jurisdictional errors. As highlighted above, the line between the two kinds of errors is notoriously difficult to draw: some commentators have gone as far as to argue that it can be utilised instrumentally depending on whether or not the courts wish to engage in correctness review.[33]

Recent cases exemplify that—irrespective of whether the courts here will ultimately settle on the jurisdictional/non-jurisdictional distinction for delineating review in this area—its review will, in any event, disrupt the distinction between legality and merits. Where the courts *do* decide to embark on reviewing the relevant error of law, the court will replace the executive's interpretation of relevant statutory provisions with their own. The standard of review utilised by the court is one of correctness that involves substituting the executive's judgment with the courts' on the interpretation of statutory provisions. This involves a decision squarely on the merits or content of the executive's decision. This is apparent in *Tan Seet Eng.*

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[31] *Supra* note 24. See critique of the distinction by Lord Sumption in *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22 at para 181. While there were initially some doubts about whether *Anisminic* did indeed render the distinction nugatory (see *South East Asia Firebricks Sdn Bhd v Non-Metallic Mineral Council Products Manufacturers Employees Union* [1981] AC 363 (PC)), this was laid to rest by the House of Lords in *R v Hull University Visitor, ex parte Page* [1993] AC 682.

[32] See, *Re Application by Yee Yut Ee* [1977-1978] SLR (R) 490 (HC); *Stansfield Business International Pte Ltd v Minister for Manpower* [1999] 2 SLR (R) 866 (HC); and *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 (not dealt with by the Court of Appeal in the same case: *Nagaenthran*, *supra* note 19).

[33] See, Paul Daly, "Divergence and Convergence in English and Canadian Administrative Law" in Jhaveri & Ramsden, *supra* note 8.

There, the applicant focused primarily on 'illegality' as his ground of review.[34] This involved interpreting the provisions of the *Criminal Law (Temporary Provisions) Act*[35] to ascertain the scope of the power that had been delegated by Parliament to the Executive. Here, the Court of Appeal, echoing the views of the Court of Appeal in *Chng Suan Tze*, observed that this question was "centrally one for the Judiciary".[36] In carrying out the interpretation of the requisite provisions of the *CLTPA* (primarily the question of what was "necessary. . . in the interests of public safety, peace and good order" under section 30 of the *CLTPA*), the Court of Appeal paid close attention to parliamentary debates at the enactment and subsequent renewal of the *CLTPA* by Parliament. However, it did not just defer to the interpretation provided by the Attorney-General on behalf of the Executive but undertook its own interpretation of parliamentary debates.[37] This ultimately determined the outcome of the case. On the back of this interpretation, it was held that the Executive's grounds for detention were not demonstrably compliant with section 30 of the *CLTPA*.[38] In the Court of Appeal's view, the *CLTPA* must be interpreted to apply only to "offences of sufficient seriousness"[39] and for activities that "have a prejudicial effect on the 'public safety, peace and good order' *of Singapore*"[40] and the applicant's global match-fixing activities did not appear to conform to this interpretation. The Executive's interpretation on which the detention order based, was quashed. It could be argued that the courts—even though reviewing for correctness—do not breach the separation of powers, because they hem closely to parliamentary debates in interpreting provisions. However, parliamentary debates are not always clear and

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34 While not pleaded as a jurisdictional issue, the nature of the court's review on this point in *Tan Seet Eng* is emblematic of the nature of the court's review on jurisdictional errors of law. The issue of jurisdictional review of errors of law arises, largely, in the presence of ouster clauses. The specific issue is whether the existence of some form of ouster or privative clause restricts or excludes judicial review. The court responds to this question by construing the true import of the clause—is the clause to be interpreted in such a manner? This, once again, brings into tension the primacy of parliamentary intention, the separation of powers and the rule of law: see Swati Jhaveri, "Administrative Law in Singapore: Recent Developments and Looking Ahead" *Singapore Law Gazette,* (May 2019), online: Singapore Law Gazette <https://lawgazette.com.sg/feature/administrative-law-in-singapore-recent-developments-and-looking-ahead/>.

35 Cap 67, 2000 Rev Ed Sing [*CLTPA*].

36 *Tan Seet Eng*, *supra* note 2 at para 134 (*cf Chng Suan Tze*, *supra* note 10, where the Court of Appeal held at para 86 that "the boundaries of the decision-maker's jurisdiction as conferred by an Act of Parliament is a question solely for the courts").

37 This contrasts with the court's approach to statutory interpretation in the context of constitutional judicial review where they defer to the interpretation offered by the Attorney-General as to the purpose of a statute (according it a presumption of constitutionality albeit to varying degrees): *Taw Cheng Kong v Public Prosecutor* [1988] 1 SLR (R) 78 (HC); *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR (R) 489 (CA); and *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 (HC), [2015] 1 SLR 26 (CA). The court's more involved approach to statutory interpretation in *Tan Seet Eng*, *supra* note 2 can also be contrasted with the approaches taken elsewhere: see *eg* the more conservative approach to judicial interpretation of statute in the English context (largely driven by parliamentary supremacy): *R v Monopolies and Mergers Commission, ex parte South Yorkshire Transport Ltd* [1993] 1 WLR 23 (HL); *R (British Broadcasting Corp) v Information Tribunal* [2007] 1 WLR 2583 (QBD); *R (Cart) v Upper Tribunal* [2012] 1 AC 663 (SC); *Eba v Advocate General for Scotland* [2012] 1 AC 710 (SC); and *R (Jones) v First-tier Tribunal* [2013] 2 AC 48 (SC).

38 *Tan Seet Eng*, *supra* note 2 at para 146.

39 *Ibid* at para 127.

40 *Ibid* at para 137 [emphasis in original].

unequivocal on the meaning of statutory provisions, as the discussion in the following paragraph demonstrates.

The correctness standard for reviewing statutory interpretation by the executive can shift where legislation is drafted in such a way that it realistically permits more than one reasonable interpretation as to the meaning of a statutory term. In these circumstances, should the courts accept the decision maker's understanding or undertake their own legal interpretation? The courts in Singapore have not yet been confronted with this situation. Other jurisdictions have, and have made differing calls on when to shift review from 'correctness' to other standards, including, for example, assessing the intention versus 'reasonableness' of interpretation. In England, the House of Lords addressed this issue at length in *R v Monopolies and Mergers Commission, ex parte South Yorkshire Transport Ltd*.[41] The House of Lords held there that there can be a "permissible field of judgment" for the decision maker to interpret a relevant statutory provision.[42] For the statute in that case, there were a number of possible meanings that could be assigned to the particular statutory provision. The court could decide where on the "spectrum of possible meanings" the interpretation could be placed.[43] However, this placement (and therefore description of the term) might still be imprecise, and the decision maker would therefore be granted latitude in ascribing the term one of several possible, rational meanings. In such a case, the court is entitled to substitute its opinion for that of the person to whom the decision has been entrusted but only if the decision is so aberrant that it cannot be classed as rational. The argument could have been made in *Tan Seet Eng* that the phraseology of the *CLTPA* was similarly open to a range of meanings.

The court's reasoning in *South Yorkshire Transport* seems to reflect, to a certain extent, the rationale set out in *Chevron USA Inc v National Resources Defense Council*.[44] In *Chevron*, the United States Supreme Court held that courts should refrain from assigning their own interpretation to statutory language. The courts should only take on the task of interpreting a relevant statutory provision if the legislature has expressed a specific intention which has not been adopted by the administrative body. However, if there is no clear legislative answer to the question, then the court should accord greater deference to the administrative body. As in *South Yorkshire Transport*, it ought to consider whether the administrative interpretation is 'permissible' or 'rational', even if it is not the interpretation that the court would have adopted.

Other jurisdictions have hybridised the English and American approaches. In the Canadian context, the court has observed that the correctness standard is generally utilised in four categories of cases: those involving jurisdictional disputes between tribunals, 'true' jurisdictional questions of law (*Anisminic*-style questions), questions of law which are important to the legal system as a whole,[45] and constitutional questions (where it is important to avoid "inconsistent and unauthorized application[s] of

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41 [1993] 1 WLR 23 [*South Yorkshire Transport*].

42 *Ibid* at 33.

43 *Ibid* at 30.

44 467 US 837 (1984) [*Chevron*].

45 This was later defined by some judges as questions which have "significance outside the operation of the statutory scheme under consideration": *Alberta (Information and Privacy Commissioner) v Alberta Teachers' Association* [2011] 3 SCR 654 at para 84.

law" in the interests of justice).[46] If the case does not fall into any of these categories, then the courts will undertake an analysis of a range of factors to help identify the applicable standard of review. This includes the existence of ouster or preclusion clauses (which is a strong indication of reasonableness review);[47] whether the decision is one of fact, discretion or policy (again indicative of reasonableness review);[48] and whether a tribunal or decision-maker is interpreting "its own statute or statutes closely connected to its function, with which it will have particular familiarity" where reasonableness will again generally be used.[49] The court's decision on the applicable standard of review in a particular case would be the outcome of balancing two constitutional imperatives: the rule of law (which calls for accountability) and the democratic principles (of the institutional and political credentials of the executive, which require respecting the authority of democratically delegated power-holders).[50]

The difference between *Chevron*, on the one hand, and the Canadian and English positions, on the other, is that in the latter situations, the courts will still have the first attempt at statutory construction. Only if this interpretation remains imprecise will the administrative body be allowed to apply its own interpretation. In effect, *South Yorkshire Transport* and the Canadian approaches give judges more discretion than *Chevron*, which seeks to afford greater deference to the determinations of administrative bodies. The approaches differ in the extent to which they consider where the primary responsibility for interpretation lies and what should drive interpretation: an expertise-driven interpretation by the agency charged with the implementation of a statute or a legal interpretation by the courts to give effect to parliamentary intention. The Singapore courts have, as discussed above, a preference for the latter approach: the adoption of a correctness approach to give effect to parliamentary intention. While tethered to parliamentary intention to rationalise replacing the executive's interpretation with their own, some have observed that:

> Textual interpretation cannot sensibly be distinguished from the application of common law values: the meaning of statutes cannot be derived in abstraction from the wider common law context in which they are (necessarily) placed. Acts of Parliament are rarely construed so as to permit actions which violate basic moral standards: our convictions about justice rightly, and inevitably, colour our interpretation of the statutory text.[51]

Indeed, in *Tan Seet Eng,* the deprivation of the liberty of the applicant was on the Court of Appeal's mind, even though no constitutional grounds such as Article 9 on liberty[52] were specifically pleaded:

> On one hand, the Legislature has placed the power to impose such detention in the hands of the Executive when this is thought to be mandated by considerations of

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46 *Dunsmuir v New Brunswick* [2008] 1 SCR 190 at paras 50, 58-61.

47 *Ibid* at para 52.

48 *Ibid* at paras 48, 49. The court here proposed the use of deference as a requirement of the law of judicial review in Canada. Deference was defined not as "subservien[ce]" but "respect" for the reasons and views of the decision-maker which are given "due consideration".

49 *Ibid* at paras 54, 55.

50 *Ibid* at para 27.

51 Allan, *supra* note 5 at 167.

52 *Constitution of the Republic of Singapore* (1999 Rev Ed), art 9.

> public order, peace and security. On the other, such detention entails the individual being deprived of his liberty, and it is a matter for the Judiciary to determine whether this has been done lawfully.[53]

The paper picks up on the possibility of introducing variable standards of review for the interpretations of statute by the executive in Section VI below to deal with the various concerns with this form of review.[54] The discussion below has demonstrated that review for errors of law involves a review of the merits and correctness of the executive's interpretation of statute. Attempts to 'legalise' such review by the use of 'jurisdiction' as an organising concept has met with mixed success. Even where courts do refer to parliamentary debates to interpret statutory provisions, there is still a risk of intrusion into the merits: parliamentary debates do not always provide a singular insight meaning to a statutory provision, and, even then can be amenable to interpretation on the basis of unarticulated assumptions and values on the part of the courts.

IV. Challenging the Legality/Merits (II): Review for Errors of Fact

Errors of fact take review even closer to the 'merits' of a decision. The traditional position has been that errors of fact would not be reviewable by the courts, unless the error of fact could be said to bring the decision under challenge within the ambit of one of the three established grounds for review: illegality, irrationality or procedural impropriety. If the error of fact under challenge did not fit into one of these three traditional grounds of review, then a mistake by the decision-maker as to a fact traditionally would not of itself constitute a ground for review, even if injustice occurred as a result. This review would come closest to a review on the merits of a case, hence the reluctance on the part of the judiciary to expand it beyond the *GCHQ* taxonomy. The view was that the executive is best placed to make an assessment of whether there was sufficient evidence to make a decision that would optimally realise the policy objectives of the statute.

Nonetheless, a move away from the traditional position began elsewhere in 1977 with *Secretary of State for Education and Science v Tameside Metropolitan Borough*

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53 *Tan Seet Eng*, *supra* note 2 at para 96. This influenced the court's approach to deciding whether precedent fact review was available on the facts of the case—discussed further in Section V.

54 This will also resolve complex questions on the true scope of ouster clauses. For example, in *Tan Seet Eng*, there was no ouster clause at the time the case was being considered: the court's approach to the illegality challenge by the applicant was similar to what the court used in similar situations like *Anisminic*, namely, what is the correct interpretation of section 30 of the *CLTPA* of the circumstances in which the Minister can issue a detention order. Recent amendments to the *CLPTA* have now introduced an ouster clause. The new section 30(2) reads that: "Every decision of the Minister. . . is final." Minister for Law Minister K Shanmugam confirmed during parliamentary debates on this provision that this ouster clause will not preclude judicial review on the normal grounds under the *GCHQ* taxonomy. This still leaves open the question of whether jurisdictional review for errors of law is available: Second Reading of the *Criminal Law (Temporary Provisions) (Amendment) Bill*, the Minister for Law, Mr K Shanmugam, *Parliamentary Debates Singapore: Official Report*, vol 94 (6 February 2018). If the courts shift to a general reasonableness approach to reviewing statutory interpretation by the executive, this will not be caught by such ouster clauses, permitting review. See *Nagaenthran*, *supra* note 19.

Council[55] in which Scarman LJ held that "misunderstanding or ignorance of an established or relevant fact"[56] would leave a decision open to be judicially reviewed. In Singapore, there are currently three possible approaches to reviewing errors of fact: two established approaches, and one (possibly) burgeoning approach to reviewing errors of fact. All three modes disrupt the legality/merits divide.

First, the courts may review whether the executive had sufficient evidence to establish 'precedent facts' for the exercise of its power. In *Tan Seet Eng*,[57] the Court of Appeal had to consider, *inter alia*, whether 'precedent fact review' was available on the facts of the case. If the statute in question contains a precedent fact—an objective fact (*ie* an X factor using the language from Section III above) that must be established before the relevant discretionary power can be exercised—the court can review the evidence available to ensure it was sufficient to justify the factual conclusion reached on that precedent fact. In the absence of sufficient evidence to support the existence of the precedent fact, the decision-maker does not have jurisdiction to act. The earlier case of *Chng Suan Tze* had held that where there were no reviewable precedent facts, the court could only review the content of the decision on the usual grounds of judicial review.[58]

Whether a discretionary power is in fact based on a precedent fact is a question of construction of the relevant legislation:

> . . . This would entail a construction of the relevant provisions to see if Parliament has expressed an intention in plain and unequivocal words to take these discretions out of the precedent fact category and exclude the precedent fact principle of review. It is, in the final analysis, the construction of the relevant provisions that determines the precise function of the court when reviewing decisions made under these provisions.[59]

The Court of Appeal in both *Chng Suan Tze* and *Tan Seet Eng* concluded that neither section 8(1) of the *Internal Security Act*, nor section 30 of the *CLTPA* contained precedent facts. The President's discretion under section 8(1) of the *Internal Security Act*[60] was not amenable to 'precedent fact review' because it expressly stated that it was for the President to be satisfied that a detention was necessary. In *Tan Seet Eng*, the Court of Appeal decided that section 30 of the *CLTPA* was similar to section 8(1) of the *Internal Security Act*: the power to detain was given to the Minister to detain in the interests of public safety, peace and good order. Even if there is a precedent fact, it is the Public Prosecutor's consent. This was a decision made using the expertise-driven discretion of the Prosecutor (his review of the evidence and facts), as opposed to a precedent fact that can be objectively verified in definitive terms on the basis of evidence. For example, whether there has been an "export" of goods: the question of 'export' is a factual decision that relies less on discretion and more on evidence, whereas, whether someone poses a security risk relies (at least) equally on discretion

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55 [1977] AC 1014 (HL) [*Tameside*].
56 *Ibid* at 1030.
57 *Supra* note 2.
58 *Chng Suan Tze*, *supra* note 10 at para 108, affirmed in *Tan Seet Eng*, *supra* note 2 at para 63.
59 *Tan Seet Eng*, *supra* note 2 at para 54, citing *Chng Suan Tze*, *supra* note 10 at para 116.
60 Cap 143, 1985 Rev Ed Sing.

and evidence (as reviewed by the discretion-holder). Thus, the consent of the Public Prosecutor was not going to be subject to precedent fact review. The Court of Appeal stayed close to the express language of the legislation in determining the nature of decision-making (expert-discretion based or driven by evidence) in arguing that there was no precedent fact review. The former—as a matter of separation of powers—is within the remit of the Executive and subject to review pursuant to the normal grounds under the *GCHQ* taxonomy. The latter can be reviewed for correctness and sufficiency of evidence. Such review is tethered closely—as with errors of law—to the idea of jurisdiction and the intention of Parliament. This raises the same issues as review for errors of law in the previous section. Some factual decisions are adjudicated to be 'precedential' or jurisdictional in nature and others are not. Where it is a 'precedent fact' that relies on evidence and not discretion the courts will assess the merits of the executive's decision—this time by the metric of sufficiency of evidence. Again, the porous categories of 'precedent' and 'non-precedent' facts are amenable to leaks—depending on unarticulated assumptions about whether the court should or should not review.[61]

Where the court concludes there is no precedent fact review, it reviews the factual decision on the basis of rationality review. This is the second approach to reviewing factual decisions by the executive. The best exposition of this is in the case of *Re Fong Thin Choo*.[62] Here, the court was prepared to conclude that the *Customs Regulations*[63] included a condition precedent: whether the Director-General of Customs was satisfied that there was "evidence" to show that dutiable goods had been "exported".[64] However, the applicant did not argue the existence of a precedent fact. The court, therefore, only adjudicated the case on the basis of irrationality: did the Director-General of Customs have evidence which *could* reasonably lead him to conclude there had been an "export"? Interestingly, even though review was restricted to 'reasonableness' and 'rationality' the court undertook a fairly involved review and eventually held in favour of the applicant. The court came to the conclusion that, firstly, there had been a misdirection as to the law, in terms of the nature and effect of the evidence required under the *Customs Regulation*s to prove an "export" of goods.[65] Secondly, there had been a failure in properly investigating the applicant's evidence. For these reasons, the Director-General of Customs could not reasonably have come to the conclusion they did on export.[66] While done under the framework of 'reasonableness' the court's review did assess the adequacy of evidence before the Executive when making its decision. This was therefore, similar to the nature of review carried out with precedent fact review, hemming closely to the merits of decision-making.

The third and emerging approach to reviewing factual decisions is again close to the merits of the executive's decision. This approach was indicated in the recent

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61 For example, in the United Kingdom in the case of *Khera v Secretary of State for Home Department*; *Khawaja v Secretary of State for the Home Department* [1984] AC 74, the House of Lords were persuaded that precedent fact review would be available for decisions that were seemingly reliant on 'discretion' versus evidence.

62 [1991] 1 SLR (R) 774 (HC).

63 Cap 70, Reg 2, 2009 Rev Ed Sing.

64 *Re Fong Thin Choo*, *supra* note 62 at para 25.

65 *Ibid* at paras 23, 54.

66 *Ibid* at paras 54, 57.

case of *AXY v Comptroller of Income Tax*.[67] Here, the applicant challenged the Comptroller of Income Tax's response to an exchange of information request made by the National Tax Service of the Republic of Korea ("NTS"). The NTS was investigating possible tax evasion by the appellants and had sent a request for information to the Comptroller pursuant to article 25(1) of a bilateral treaty: the *Convention for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with Respect to Taxes on Income*, Republic of Singapore and Republic of Korea, 6 November 1979 [*Convention*]. Article 25(1) is incorporated into domestic legislation via section 105D of the *Income Tax Act*.[68] The relevant part of article 25(1) reads that:

> the competent authorities of the Contracting States shall exchange such information as is ***foreseeably relevant*** for carrying out the provisions of this Convention or to the administration or enforcement of the domestic laws concerning taxes of every kind and description imposed on behalf of the Contracting States. . .[69]

There were various communications between the NTS and Comptroller over a period of months—in the course of which the Comptroller sought and obtained clarifications on NTS' request. Following this exchange, the Comptroller exercised his power to issue production notices to three banks in Singapore for the disclosure of banking activities relating to the appellants and related companies. The appellants applied for leave to judicially review the Comptroller's decision. They applied for prohibition orders to stop the disclosure of information to the NTS and a quashing order for the production notices. The appellants challenged the Comptroller's decisions to issue the production notices on the grounds of illegality and irrationality. The focus in this section is on the discussions relating to 'illegality'. On this, the appellants argued that the Comptroller had failed to make sufficient prior inquiries into whether the request complied with the requirements of the *Convention* and, in particular, whether the requested information was "foreseeably relevant". Specifically, the Comptroller had: (i) failed to properly evaluate whether the NTS had pursued all means available within its own jurisdiction to obtain the information; (ii) not ascertained whether the request was "in conformity with the law and administrative practices" of Korea (the appellant disputed their Korean tax residency and argued that the information sought related to periods covered by time bars applicable in Korean law);[70] (iii) breached his duty to ensure that the request from NTS was clear, specific and legitimate and not a fishing expedition for broad and sweeping scope of information spanning more than a decade; and (iv) improperly delegated his decision-making power to the NTS given that he acceded to the request without sufficient inquiry.

The focus here is on the court's approach to (ii). On this argument, the Court of Appeal concluded that the request by the NTS was in conformity with the domestic law and administrative practices of Korea. Specifically, it rejected the argument that there was a factual mistake that "gave rise to unfairness".[71] There was no "mistake" because the fact in question was "contentious and not objectively verifiable".[72] In

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67 [2018] SGCA 23 [*AXY*].

68 Cap 134, 2014 Rev Ed Sing.

69 Art 25(1) of the *Convention* [emphasis added].

70 A requirement set out in para 7 of the Eight Schedule of the *Income Tax Act*, *supra* note 68.

71 *AXY*, *supra* note 67 at para 90.

72 *Ibid* at para 92.

such cases, there can only be a difference of opinion or assessment of the facts versus a 'mistake'. Although not cited in the judgment, the conceptualisation of "mistake of fact" here resonates with that set out in the English case of *E v Secretary of State for the Home Department*.[73] In the *E* case, the court explicitly rejected the characterisation of review for error of fact as part of the other, existing grounds of review (most notably, irrationality) rather than as an independent ground of review in its own right. The court held there that a mistake of fact giving rise to "unfairness" was a separate head of challenge, at least in those statutory contexts where the parties have a shared interest in co-operating to achieve the right result (arguably the case with the exchange of information regime under the relevant treaty). The rationale for extending the courts' jurisdiction to reviewing errors of fact (arguably more squarely concerned with the merits of a decision) was 'fairness'. Incorrect factual conclusions lead to an injustice to the applicant. In extending the law in this direction, the court in *E* was responding to concerns that the applicants had incorrectly invoked the court's appellate jurisdiction to hear appeals on "questions of law" from the Immigration Appeals Tribunal.[74] There were several requirements for this ground of challenge: (a) the "unfairness" in question occurred where there was a mistake as to an existing fact;[75] (b) the fact in question was "uncontentious and objectively verifiable"[76] (echoing the language used by the Court of Appeal in *AXY*);[77] (c) the applicant or his advisers were not responsible for the mistake; and (d) finally the mistake played a material (even if not decisive) role in the tribunal's reasoning. In utilising the nomenclature from *E*, the court in *AXY* obliquely introduced the principles from that case.

As discussed above, prior to *AXY*, 'errors of fact' could only be reviewed for sufficiency of evidence if the fact in question is a "precedent fact";[78] otherwise it is reviewed on the basis of the reasonableness of the decision.[79] This re-conceptualisation of mistake of fact in *AXY* and its interrelationship with precedent fact review and rationality-based review of factual decisions will need to be clarified by the courts in a case where the point is argued more fully.[80] All three however, involve a review squarely of the merits of the executive's decision, albeit to different degrees. The discussion in Section VI picks up from here to show how introducing variable standards of review on questions of fact (differing degrees of rationality review) can meet the constitutional concerns with such review in Singapore, without the need to rely on non-transparent tools ('jurisdictional'/'non-jurisdictional') or the legality/merits dichotomy.

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73 [2004] 2 WLR 1351 (CA) [*E*].

74 *Ibid* at para 37.

75 *Ibid* at para 88.

76 *Ibid* at para 66.

77 *AXY*, *supra* note 67 at para 92.

78 *R v Secretary of State for the Home Department, ex parte Khawaja* [1984] AC 74 (HL). For the position in Singapore, see *Re Fong Thin Choo*, *supra* note 62 at paras 33, 35.

79 *Tan Seet Eng*, *supra* note 2 at [53]. See also *Tameside*, *supra* note 55; and *R v Secretary of State for the Home Department, ex parte Zamir* [1980] AC 930 (HL).

80 Indeed, earlier statements in other cases suggest that the category of review for errors of fact may indeed extend to "material" facts (not just "precedent" facts): *Axis Law Corporation v Intellectual Property Office of Singapore* [2016] 4 SLR 554 at para 64 (HC).

V. Challenging the Legality/Merits Divide (III): The Doctrine of Substantive Legitimate Expectations

The High Court's decision in *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority*[81] was significant in explicitly recognising the possibility of enforcing an applicant's legitimate expectation as to a particular outcome or decision being made by the executive. Prior to *Chiu Teng*, the courts were reluctant to recognise such expectations.[82] Underlying the court's unease appeared to be the fact that the court's enforcement of such an expectation would involve an invasion into the discretionary decision-making space of the executive in violation of the separation of powers.

In *Chiu Teng*, the court, however, rejected this argument—offsetting any such concerns with the positive case for holding the executive to their promises:

> 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 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. The upholding of legitimate expectations is eminently within the powers of the judiciary. . . in deciding whether a legitimate expectation ought to be upheld, the court must remember that there are concerns and interests larger than the private expectation of an individual. . . If there is a public interest which overrides the expectation, then the expectation ought not to be given effect to. In this way, I believe the judiciary can fulfil its constitutional role [to verify not only that the powers asserted accord with the substantive law created by Parliament but also that the manner in which they are exercised confirms with the standards of fairness which Parliament must have intended] without arrogating to itself the unconstitutional position of being a super-legislature or a super-executive.[83]

The court put forward a positive case for why this form of review was required. It was to protect the reliance interest of the applicants and maintain certain standards of fairness that Parliament must have intended be maintained by the government body.

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81 [2014] 1 SLR 1047 [*Chiu Teng*]; see also 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 [Jhaveri, "Doctrine"]; 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) ch 12; 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 Teng @ Kallang Pte Ltd v Singapore Land Authority* [2013] SGHC 262" (2014) 26 Sing Ac LJ 237. The Court of Appeal has yet to definitively affirm or reject the doctrine. They stopped short of doing so in the recent case of *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 (*ibid* at paras 42, 55-63, per Sundaresh Menon CJ).

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

83 *Chiu Teng*, *supra* note 81 at paras 112, 113.

The doctrine is distinct from the grounds under the *GCHQ* taxonomy. It is not motivated by the implementation of textual statutory limits[84] or procedural fairness (given the applicant is holding a substantive expectation), and the final balancing stage makes no reference to reasonableness or rationality as the relevant standard of review. However, in expounding the court's role in the area, the judge was conscious of adhering to the separation of powers.

In developing judicial review in this direction, the court notably did not make explicit use of the legality/merits divide to ringfence the scope of review. Indeed, this would have been difficult to do: enforcing an expectation essentially mandates the executive to honour its 'promise'. Instead, the court operationalised the separation of powers by building in various hurdles for the applicant to succeed. For example, it was going to be difficult for an applicant to establish that they had a 'legitimate' expectation of a certain outcome or decision by the executive. To do this, the applicant needed to show a clear and unequivocal representation from a public body with the authority to make an expectation and that they *reasonably* relied on that representation. In modern day government decision-making, it is unlikely that a government body would make such an unequivocal representation in a way that would leave little room for changing its course of action in the future to pursue a broader public interest.[85] These realities of government decision-making can also affect the court's view of the reasonableness of an applicant's reliance on the government's representation—another requirement for an applicant to establish before the court would enforce an expectation. It is likely that the court would regard any reliance unreasonable in the context of modern day government decision-making.

Even where the applicant could establish a legitimate expectation, the court would not enforce it if the executive could show an overriding public interest that required departing from it.[86] Here the court would strike a balance between the two, the expectation and the public interest. In English law, the courts have utilised a number of approaches to strike this balance. Previously, they would piggyback on irrationality review (the expectation would be upheld only if it would be 'irrational' for a public body to depart from it). This was, however, ultimately rejected on the basis that such a test would cause the public authority to be a "judge in its own cause, for a decision to prioritise a policy change over legitimate expectations will almost always be rational from where the authority stands, even if objectively it is arbitrary or unfair".[87] Instead, there was a preference in some cases for the use of a more structured proportionality-based test, where the public body can only depart from an expectation if they are pursuing a 'legitimate' purpose and where the departure is 'necessary' or the 'least restrictive' means of achieving that purpose.[88] The burden

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84 At best the court was policing standards of fairness that were *implicit* in the relevant statute. However, on this see text accompanying *supra* note 43: where the court implies standards and values into statute, there is a risk that this is not with reference to parliamentary intent but the court's own views.

85 In any event, should it do so, such a representation is challengeable on the basis that it unduly fetters the government body's discretion*: British Oxygen Co Ltd v Minister of Technology* [1971] AC 610 (HL); and *Registrar of Vehicles v Komoco Motors Pte Ltd* [2008] 3 SLR (R) 340 (CA).

86 *Chiu Teng*, *supra* note 81 at para 119.

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

88 See *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [69]; see also Janina Boughey, "Proportionality and Legitimate Expectations" in Groves & Weeks, *supra* note 81 ch 6 for a discussion of the relationship between proportionality and legitimate expectations.

of proving legitimacy of purpose and the necessity of departing from the expectation was on the executive, with the court playing an active role in reviewing both issues.[89] Neither approach was adopted in *Chiu Teng*. Instead, the court engaged in a more open, textured balancing exercise, relying on the statutory framework for the Executive's decision.[90] The court's 'balancing' here was brief: restricted to just one paragraph and the fact that the optimisation of land resources justified charging land premiums at a higher rate than previously stated.[91]

Despite these safeguards against getting involved in the merits of the decision to depart from the expectation, the court is arguably still engaged in an assessment of the same. At the final stage of the inquiry, the court asks whether the government interest justifies overriding the legitimate expectation of the applicant. This will involve, inevitably, ascribing weight or measure to the government interest relative to the expectation. It is unclear from *Chiu Teng* how the court will do this: for example, what criteria shift the balance in favour of either the applicant or the respondent or determine the weight to be ascribed to either's interest? Does the degree of scrutiny by the courts vary according to the strength or weakness of the expectation, the factual context of the case (liberty versus financial impact) and the nature of the public interest on the side of the public body? In the event that the court judges that there is no overriding public interest to justify departing from the legitimate expectation, the executive are left with no choice but to give effect to the expectation. Their decision-making is constrained.

It is this possible encroachment that led the Court of Appeal in the subsequent case of *Starkstrom* to doubt the suitability of the doctrine in Singapore. These comments were *obiter* as the doctrine was not activated in the case.[92] The Court of Appeal, in any event, highlighted the "difficulties inherent in accepting the doctrine of legitimate expectations in Singapore" given that the doctrine "would represent a significant departure from our current understanding of the scope and limits of judicial review": most importantly the distinction between the legality and merits of government decision-making.[93] It is clear, therefore, that should a case arise in the future the Court of Appeal is minded to revisit the manner in which the balance is struck between the judiciary and executive in relation to the doctrine.[94] More importantly, this would be reintroducing the legality/merits dichotomy as the foundation for ringfencing the scope and reach of the doctrine. The Court of Appeal in *Starkstrom* indicated that in the future, any legitimate expectation could be enforced not by requiring the executive to honour it, but rather by requiring the executive to make a fresh decision that takes into account the expectation as a relevant consideration. This seemingly folds this ground back into the *GCHQ* taxonomy—in particular, the ground of illegality. However, there is a fundamental difference between the use of relevant considerations under the *GCHQ* taxonomy and that proposed in *Starkstrom.*

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89 See *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at [69] on the suggestion to use proportionality.

90 *Chiu Teng*, *supra* note 81 at para 130. See also Paul Craig, *Administrative Law*, 8th ed (Sweet & Maxwell, 2016) at 703-707.

91 *Chiu Teng*, *ibid* at para 130.

92 The apparent "representation" was *ultra vires* and, in such circumstances, the court will not even entertain the application of the doctrine: *Starkstrom*, *supra* note 3 at para 47.

93 *Ibid* at paras 59, 60.

94 See *supra* note 81.

In the former, the court examines what are 'relevant' considerations with reference to the statutory parameters of the executive's powers. In the latter, a legitimate expectation is 'relevant' for much more normative considerations (for example, the need for the administration to honour its promises as set out by the judge in *Chiu Teng*). Thus, how the expectation arises and why it is 'relevant' is distinct under the *GCHQ* taxonomy and the *Starkstrom* framework. It is the latter that arguably still takes the enforcement of substantive legitimate expectations closer to a review of the merits of a decision: the executive cannot decide that an expectation (judged to be 'legitimate') is 'irrelevant' and this is by virtue of the court's assessment rather than statutory boundaries. The paper will consider this point further in Section VI—proposing alternative tools for maintaining the appropriate constitutional balance between courts and the executive.

VI. The Way Forward: An Alternative Taxonomy Or Alternative Tools for Reinforcing the Building Blocks of Administrative Law?

The three grounds discussed above are disruptive of the legality/merits divide, despite efforts by the courts to rationalise and explain how they fit within this dichotomy and, additionally do not disrupt accepted constitutional principles. The question that arises is how we fit the above grounds within the existing *GCHQ* taxonomy or demonstrate that they do not disrupt the dichotomy? Do we need to find a way of evolving the above grounds to 'behave' more like the existing grounds in the maintenance of the legality/merits divide? Or do we need to propose an alternative taxonomy? Should we move away from a reliance on the legality/merits dichotomy? Are taxonomies even useful?

Some argue that the question is simply whether or not the court should intervene and, if so, how much it should intervene. A dichotomy is not required for this purpose. This question should be determined by being explicit about and balancing the range of factors that are relevant to determining the court's role. This was implicit in the words of TRS Allan cited above.[95] For this reason, he maintained that "the distinction between appeal and review must be an elastic one, permitting more intensive scrutiny of executive action which threatens basic liberties than might be appropriate in other cases".[96] Others, however, argue that taxonomies are critical to maintain rationality within the law:

> Without good taxonomy and a vigorous taxonomic debate the law loses its rational integrity... All forms of appeal to very broad ideas tend to allow intuition to operate unrestrained by an analysis anchored in authority.[97]

Specifically in the public law context, there is a concern that the absence of categorisation or taxonomy may contribute to the lack of a proper understanding and

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[95] See text accompanying n 5 above.

[96] Allan, *supra* note 5 at 183.

[97] Peter Birks, "Equity in the Modern Law: An Exercise in Taxonomy" (1996) 26 University of Western Australia Law Review 1 at 22.

awareness of the boundaries of the roles of different actors, and also the normative considerations that animate the various grounds of review. In the absence of this understanding, the law cannot develop.[98] There has, however, been a general absence of attention to taxonomies elsewhere in public law post-*GCHQ*. The classical three grounds of judicial review are utilised by courts across the common law world, despite significant underlying movements in the practice of judicial review.[99] In attempting to come up with more accurate explanations of the grounds of review in a changing landscape of judicial review, commentators across the common law world have proposed collapsing and replacing the *GCHQ* taxonomy with alternative ones. This is in recognition of the fact that the distinction between legality and merits is becoming increasingly blurred through the enlarged use of substantive review or other, newer, grounds of judicial review.[100] The table sets out a sample of taxonomies to show this movement in some of the common law systems referenced in case law in Singapore:[101]

United Kingdom	Craig:[102] natural justice (fair hearing; bias); errors of law; errors of fact; failure to exercise discretion (fettering; wrongful delegation); abuse of discretion (which includes review for propriety of purpose and relevancy of considerations; bad faith;[103] breach of the *Human Rights Act 1998* (UK), c 42); rationality and proportionality; legitimate expectations. Elliott and Varuhas:[104] retention of discretion; legitimate expectations; abuse of discretion; bias, impartiality, and independence; procedural fairness; reason giving. Cane:[105] procedural grounds of review (natural justice, bias); grounds related to making decisions and rules (considerations, purposes, fettering of discretion, abrogation of discretion); substantive review (mistakes of law, fact and policy).
Australia	Aronson, Groves & Weeks:[106] errors of law and fact, irrationality (to include irrelevancy of considerations; failure to seek information; fettering of discretion; improper purposes and bad faith); procedural fairness (fair hearing; bias); illegal outcomes and acting without power (wrongful delegation; refusing to act; unauthorised action; unreasonableness; proportionality; legitimate expectations).

98 Jason NE Varuhas, "Taxonomy and Public Law" in Mark Elliott, Jason NE Varuhas & Shona Wilson Stark, eds. *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing, 2018) ch 3; and Forsyth, *supra* note 8.

99 Most recently, for example, by the United Kingdom Supreme Court in *R (on the applications of MM (Lebanon)) v Secretary of State for the Home Department* [2017] UKSC 10.

100 Mark Elliott & Jason NE Varuhas, *Administrative Law: Texts and Materials*, 5th ed (Oxford University Press, 2017) at 7.

101 This is done by looking at the leading texts in the major common law jurisdictions.

Hong Kong	Jhaveri & Ramsden:[107] procedural fairness; bias, independence and impartiality; jurisdictional review of errors of law and fact; illegality (irrelevant considerations, purposes, fettering discretion, wrongful delegation, bad faith), rationality, proportionality, legitimate expectations. Thomson:[108] excess of power, improper purposes/motives; relevance of considerations; insufficient retention of discretion; fettering of discretion; errors of fact and errors of law; legitimate expectations; unreasonableness and irrationality; procedural fairness and impropriety and natural justice.

In Singapore, the *GCHQ* taxonomy and legality/merits dichotomy have been maintained on the basis that it realises certain balance between the courts and the executive. The courts in Singapore have frequently asserted a green light approach to judicial review.[109] This approach is justified on the basis of an assessment of the legitimacy and credentials of the State on a number of fronts. First, it is said to be grounded in a perceived performance-based legitimacy given that the State does act prophylactically in checking issues of legality prior to making decisions. Former Chief Justice Chan Sek Keong observed how government bodies in Singapore frequently consult the Attorney-General's Chambers for advice and accordingly, the courts should exercise a light touch in carrying out any judicial review.[110] Secondly, there is a reliance on the government's emphasis on governing 'honourably' to justify less involved judicial review: "[t]he concept of government by honourable men... who have a duty to do right for the people, and who have the trust and respect of the population fits us better than the Western idea that a government should be given as limited powers as possible, and should always be treated with suspicion unless proven otherwise."[111] Finally, a further explanation provided by some scholars for retaining a green light approach is that the administrative state in Singapore was created primarily for the purpose of advancing a benevolent *collective* national goal of economic success for all citizens and at a critical time in the history of Singapore

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[102] Craig, *supra* note 90.

[103] This is interpreted to overlap with illegality, *ie* taking account of improper purposes and taking account of irrelevant considerations: *Mayor of Westminster v London and North Western Railway Company* [1905] AC 426 (HL); and *Webb v Minister of Housing and Local Government* [1965] 1 WLR 755 (CA).

[104] Elliott & Varuhas, *supra* note 100.

[105] Peter Cane, *Administrative Law*, 5th ed (Oxford University Press, 2010).

[106] Mark Aronson, Matthew Groves & Greg Weeks, *Judicial Review of Administrative Action and Government Liability*, 6th ed (Thomson Reuters, 2017).

[107] Swati Jhaveri & Michael Ramsden, *Hong Kong Administrative Law*, 3rd ed (LexisNexis, forthcoming 2019).

[108] Stephen Thompson, *Administrative Law in Hong Kong* (Cambridge University Press, 2018).

[109] *Jeyaretnam Kenneth Andrew v Attorney-General* [2013] SGCA 56.

[110] Chan, *supra* note 82 at para 15.

[111] See the *Shared Values White Paper* (Cmd 1 of 1991, 2 January 1991) at para 41. See also Goh Chok Tong, "Increasing Public Trust in Leaders of a Harmonious Society" (Speech delivered at the Singapore-China Forum on Leadership, 16 April 2010), online: Singapore Government Media Release <http://www.nas.gov.sg/archivesonline/speeches/view-html?filename=20100423002.htm>.

on the sudden expulsion of the latter from the Federation of Malaysia, rather than as a way of appropriating power as may be the concern elsewhere.[112] There are signs of a shift in the court's green light approach (and the concomitant use of the legality/merits divide).[113]

Until and unless these shifts gain traction (and indeed to prompt a regular evaluation of the above assessment), the paper suggests two possible ways forward for the redirection of the foundations of administrative law in Singapore. These are modest methods of incrementally and gradually adjusting doctrine to evolve judicial review using clearer categories and principles to rationalise the appropriate scope of review. It would be disruptive to abruptly depart from existing doctrine.

First, the three grounds can be re-moulded to use features of the grounds of review that make up the existing *GCHQ* taxonomy. For example, rather than enforce a substantive legitimate expectation via a mandatory order that requires the executive to give effect to it, the courts can instead mandate that the executive view it as a relevant consideration, with the latter determining how much weight ought to be ascribed to it.[114] The question of weight can then be assessed using the reasonableness standard of review—was the relevant consideration, *ie* the legitimate expectation given a reasonable assessment by the executive before it decided to depart from it? With errors of law, the courts can introduce a reasonableness standard—in the same way as *South Yorkshire Transport*—rather than always review for correctness of interpretation by the executive. Whether the courts utilise the correctness or reasonableness standard would be tethered to the language of the specific and relevant provisions of legislation (and whether it is open to multiple possible interpretations). It would also be tied to parliamentary intention—did Parliament intend for a particular phrase to have a single objective meaning, or was the meaning of a phrase to be tied to the factual context of the relevant area of policy and, therefore, a matter of discretion? There are concerns with the courts relinquishing the legal interpretation of statute to the executive.[115] However, to this there are various responses. Ambiguity in legislation is common and necessary, if it is to remain flexible.[116] Parliament sometimes specifically delegates interpretative authority to the executive.[117] And additionally, sometimes phrases in the statute will need to evolve in meaning to deal with new

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[112] Jolene Lin, "The Judicialization of Governance: The Case of Singapore" in Tom Ginsburg & Albert HY Chen, eds. *Administrative Law and Governance in Asia: Comparative Perspectives* (Routledge, 2008) at 288, 289.

[113] Jhaveri, "Localising", *supra* note 7 at paras 29-35 and *Chiu Teng*, *supra* note 81; which did not rely on the legality/merits dichotomy to ringfence review.

[114] The only exception might be where there is the liberty of the applicant at stake: see Jhaveri, "Doctrine", *supra* note 81.

[115] The Honourable Antonin Scalia, "Judicial Deference to Administrative Interpretations of Law" (1989) June (3) Duke LJ 511. See also *Tan Seet Eng supra* note 2 para 90 where the court indicates that interpretation is within the province of the courts.

[116] Jeffrey Barnes, "When 'Plain Language' Legislation is Ambiguous—Sources of Doubt and Lessons for the Plain Language Movement" (2010) 34 Melbourne UL Rev 671.

[117] See, for example, the role of the Community Committee under section 8G of the *Presidential Elections Act* (Cap 240A, 2011 Rev Ed Sing) in determining whether a candidate for a presidential election "belongs to [a certain] community"—this requires legal interpretation and factual assessment of the relevant provision. See, Jack Lee, "From Eligibility to Election: the Mechanics of the Presidential Poll" in Jaclyn L Neo & Swati Jhaveri, *Constitutional Change in Singapore: Reforming the Elected Presidency* (Routledge, forthcoming 2019) at section 7.2.3.

phenomena.[118] The suggestion is not to move in the direction of *Chevron* and adopt a presumptively deferential starting position or to rely exclusively or excessively on reasonableness as an approach to assessing executive interpretations of legislation. Rather it is to utilise multiple approaches to interpretation depending on the context of the statute and the case.[119] With respect to errors of fact, the review could again utilise reasonableness as its general standard of review, for all errors.

The above recommendations are aimed at moving the focus away from categories—such as jurisdictional/non-jurisdictional, precedent/non-precedent, legality/merits—to make decisions on whether or not the court will review. Rather, review is presumed to be permissible, with the courts determining the appropriate standard of review. The collapse of these grounds into reasonableness review may however, lead to largely disappointing results for applicants, given the fairly high threshold of reasonableness review in Singapore. Irrationality has been used sparingly and with a high threshold for an applicant to overcome.[120] It is here that applicants (in pleadings) and the courts will need to do considerably more work in recalibrating and varying the standards of reasonableness review to suit its task across and within these different areas of review: substantive legitimate expectations, errors of law and errors of fact.[121] There is evidence of sliding scales of review emerging in Singapore that can further evolve.[122] The introduction of sliding scales of review will allow the incremental and gradual evolution of review versus more abrupt expansions evident with the doctrine of legitimate expectations and the third burgeoning version of errors of fact in *AXY*. Importantly, none of the proposals above on the utilisation of aspects of the existing *GCHQ* taxonomy requires: (a) a hard-line adherence to any taxonomy; or (b) a reliance on the legality/merits dichotomy. The appropriate intensity of review will turn on the underlying constitutional principles at play, *ie* the first building block of administrative law discussed in Section II above.

The second proposal is for litigants and courts to be more intentional and detailed in their consideration of the applicable remedies in a case. There are five possible remedies available in judicial review cases: a quashing order; a mandatory order, a prohibitory order, an injunctive relief and a declaratory relief. The proposal here is to be more intentional in the use of declaratory relief. Such relief is attractive because it provides the courts with the opportunity to issue authoritative (and possibly strong) views on the way that the government should act in order to be lawful. However, in contrast with the remaining four remedies, declaratory relief is a non-coercive mode of relief.[123] In this way, it leaves the government with a degree of freedom and

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[118] See for example, "automated message system" in the *Electronic Transactions Act* (Cap 88, 2011 Rev Ed Sing): this will need to evolve to cover newer technologies that were envisaged when the act was first passed in 1998; it was last revised in 2010. Whether it is best practice to continually or regularly revise legislation to update it to new contexts or rely on executive discretion is a complex and ongoing debate.

[119] On which there are many comprehensive studies, *ie* as to the factors that should influence the degree and intensity of review by courts: see, for example, most recently, Dean Knight, *Vigilance and Restraint in the Common Law of Judicial Review* (Cambridge University Press, 2018).

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

[121] Elsehwere the author has argued for the incremental introduction of a sliding scale of review: Jhaveri, "Localising", *supra* note 7; see also Swati Jhaveri, "Survival", *supra* note 7.

[122] *Ibid*, Jhaveri, "Localising" at paras 29-35.

[123] Although generally complied with: see *Re M* [1994] 1 AC 377 at 423 (per Lord Woolf) (HL).

discretion on how to act going forward and best realise the declaratory indicators from the courts. Declaratory remedies can, in this way, be a good way of balancing the need to hold the executive to account while respecting the separation of powers, again in a way that does not rely on the unstable dichotomy of legality/merits. Such declaratory relief allows the court to take a robust stance on the questions under review while preserving some freedom of choice for the executive in the implementation of the terms of the declaratory relief. For example, in the case of *Vellama d/o Marie Muthu v Attorney-General*[124] the court—had it issued a declaration[125]—would have stated that the Prime Minister is obligated to call a by-election on a seat in Parliament being vacated *within a reasonable period of time*.[126] The terms of the declaration imposed an obligation; but left a significant degree of discretion with respect to the timing of calling an election. The careful pleading of the grounds and declaratory relief (by applicants) and constitutionally-attuned phrasing of declaratory orders that balances the imperatives of the rule of law and separation of powers (by courts) can thus be a possible way forward: allowing the courts to provide guidance on avoiding errors of law and fact or breaching legitimate expectations, while preserving freedom of choice.

VII. Conclusion

The development and evolution of administrative law principles is likely to be a recurrent theme in cases going forward, especially as more individuals are turning to the courts, demonstrating "an increase in the public consciousness *vis-à-vis* the reviewability of decisions made by public authorities and the checking function played by the courts against executive excess".[127] The continued stream of applications for judicial review on the back of a perceived heightened public consciousness will further nudge the development of the law. As the courts develop the principles of administrative law, there will also be an opportunity to clarify the scope of and interaction between the various constitutional principles that are typically said to inform the advance of judicial review in a particular direction. Indeed, one of the most recent expositions on these principles was in the context of the court's deliberations on whether or not to formalise the recognition of the doctrine of substantive legitimate expectations in Singapore. In *Starkstrom*, while not affirmatively deciding on the future of the doctrine in that case, the Court of Appeal set out the principles that ought to be used to guide judicial review. There are details that will need to be deliberated with the two proposals made in Section VI. However, a sliding scale or intensity of review that can absorb new and existing grounds of review is a flexible and incremental starting point for balancing out these various constitutional imperatives in a way that fits the case at hand, as is a more intentional use of declaratory relief.

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[124] [2013] 4 SLR 1 (CA).

[125] The applicant lacked the necessary standing to seek a standalone declaration in the absence of any other remedies.

[126] As opposed to just wait for the next general election, leaving the seat vacant in the interim.

[127] Denise Wong Huiwen & Makoto Hong Cheng, "Raising the Bar: Amending the Threshold for Leave in Judicial Review Proceedings" (2016) 28 Sing Ac LJ 527 at para 1.