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COMMERCIAL JUDICIAL REVIEW IN SINGAPORE: STRATEGIC OR SPONTANEOUS?

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This article examines the increasing use of judicial review under administrative law by corporate entities in Singapore to protect or even to assert strategic business interests. When used effectively, commercial judicial review can be a powerful tool. It considers why such a trend has arisen and the implications for public law litigation. The backdrop of the *Attorney-General (Additional Functions) Act* is also considered. The article argues that judicial review is increasingly an important consideration for companies seeking to protect their interests against what they regard as unfair or unlawful government or regulatory actions. It suggests that private sector entities in embracing public law litigation would also do well to also support administrative law values such as legality, fairness, and accountability.

I. INTRODUCTION

Singapore has an omnipresent administrative state.[1] Government ministries and statutory boards are staffed by a well-qualified professional bureaucracy with an ethos of rational, scientific management.[2] Effectiveness, efficiency, and incorruptibility are the hallmarks of public administration in Singapore.[3] Public bodies and officials in the executive branch of the government routinely exercise discretionary

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1 As of July 2020, there are 16 government ministries, including the Prime Minister's Office, and 65 statutory boards. Information collated from the Singapore Government Directory, online: <www.sgdi.gov.sg>.

2 NC Saxena, *Virtuous Cycles: The Singapore Public Service and National Development* (New York: United Nations Development Programme, 2011). On the extensive reforms within Singapore judiciary in the 1990s to early 2000s, see Waleed Haider Malik, *Judiciary-led reforms in Singapore: Framework, Strategies, and Lessons* (Washington, DC: World Bank, 2007).

3 See *eg*, Neo Boon Siong and Geraldine Chen, *Dynamic Governance: Embedding Culture, Capabilities and Change in Singapore* (Singapore: World Scientific, 2007); Ho Khai Leong, *Shared Responsibilities, Unshared Power: The Politics of Policy-Making in Singapore* (Singapore: Eastern Universities Press, 2003); Chua Mui Hoong (with additional interviews by Ken Kwek), *Pioneers Once More: The Singapore Public Service, 1959-2009* (Singapore: Straits Times Press and Public Service Division, 2010); Loke Hoe Yeong, ed, *Speaking Truth to Power: Singapore's Pioneer Public Servants* (Singapore: World Scientific Publishing, 2020); Zhang Zhibin, ed, *Dynamics of the Singapore Success Story: Insights by*

power in the implementation of various laws and government policies. The might of the administrative state and the subtle tension between executive fiat and judicial reason and supervision is ultimately managed and kept on an even keel by administrative law.

In exercising their public functions and statutory powers, the rule of law requires that public authorities do not cross the line of legality when exercising the discretionary powers granted to them by law. In administrative law, prior to reviewing an impugned administrative action, a court typically considers its institutional competence to deal with the particular issue, shows restraint where its competence is limited and affords the political branches the requisite "margin of appreciation" for their administrative actions.[4] Despite a tentative start, judicial review of administrative actions is very much part of the legal landscape in Singapore today.

Regardless of whether the judicial review applicant is an individual or an organisation, Singapore courts recognise that the role of judicial review in administrative law is ensuring that the executive does not act beyond the scope of its powers. There is little, if any, distinction drawn between how the courts approach judicial review where the applicant is an individual or a corporate entity. This underscores the *raison dêtre* of judicial review: "that all powers have *legal* limits, and that there must be 'recourse to determine whether, how, and in what circumstances those limits [have] been exceeded"'.[5] When one thinks of judicial review in Singapore, one is often reminded of an individual who alleges that the executive branch of the government had conducted itself in an unlawful manner, breaching a legal standard in the implementation of a legislation or a policy.[6] This may result in the applicant's rights, especially constitutional rights, being breached.[7] Less well known is commercial judicial review.[8]

Ngiam Tong Dow (Singapore: Cengage Learning Asia, 2011); Simon S C Tay, ed, *A Mandarin and the Making of Public Policy: Reflections of Ngiam Tong Dow* (Singapore: NUS Press, 2006).

4 See the principles and approach set out by Menon CJ in *SGB Starkstrom Pte Ltd v Commissioner of Labour* [2016] 3 SLR 598 (CA) at paras 55-58 [*SGB Starkstrom*].

5 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 (CA) at para 1 [*Tan Seet Eng*]. The specific responsibility of pronouncing on the legality of government actions, and hence ensuring legal accountability, falls on the Judiciary: *Tan Seet Eng* at paras 90, 97.

6 In *Tan Seet Eng, ibid*, the Court of Appeal re-affirmed that the court's role in judicial review should be limited to the "usual ambit of judicial review", namely, "illegality, irrationality and procedural impropriety". These traditional grounds of review define the test for the lawfulness of an exercise of administrative discretion: at paras 63, 99.

7 See *eg*, *Tan Seet Eng*, *ibid* (unlawful detention under the *Criminal Law (Temporary Provisions) Act* (Cap 67, 2000 Rev Ed Sing)); *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 (CA) (legal limits of prosecutorial discretion); *Vijaya Kumar s/o Rajendran v Attorney-General* [2015] SGHC 244 (HC) (permit conditions in respect of the Thaipusam procession in breach of art 15 of the *Constitution of the Republic of Singapore* (1999 Rev Ed) [*Singapore Constitution*] guaranteeing freedom of religion); *Yong Vui Kong v AG* [2011] 2 SLR 1189 (CA) (whether the court can review the President's clemency power); *Kay Swee Pin v Singapore Island Country Club* [2008] 2 SLR 802 (CA) (whether rules of natural justice prevailed when a recreation club expelled a member); *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 (CA) [*Chng Suan Tze*] (legality of a preventive detention order on national security grounds under the *Internal Security Act* (Cap 143, 1985 Rev Ed Sing).

8 For a novel historical account that judicial review in the United States of America arose from a longstanding English corporate practice under which a corporation's ordinances were reviewed for repugnancy to the laws of England, see Mary Sarah Bilder, "The Corporate Origins of Judicial Review" (2006) 116 Yale LJ 502. Bilder argues that the colonial American practice of bounded legislation under a repugnancy standard is causally responsible for the existence of American judicial review. The Framers of

In this article, commercial judicial review broadly refers to a commercial entity seeking judicial review under administrative law of a regulatory or governmental decision, with the ostensible purpose of protecting its business interests, especially where the decision challenged is commercial in substance and/or in a business regulatory context. In general, the jurisprudence of commercial judicial review in Singapore is no different from non-commercial judicial review. Indeed, commercial judicial review is regarded as an organic subset of judicial review. Yet, commercial judicial review in Singapore is worthy of closer consideration.

Over the past decade, it would appear, anecdotally at least, that companies are increasingly using judicial review to protect or even assert strategic business interests. The commercial bar also has a better understanding of the role of public law in regulatory matters as they advise and guide their clients on the regulatory requirements and the circumstances under which they can be challenged. It is not unusual for companies to seek review of official decisions on the traditional grounds of illegality, irrationality and procedural unfairness.[9] It is also quite common for business entities to use judicial review as a last-ditch effort to attain a certain commercial objective, even if the legal basis for the proposed remedy is lacking or weak.[10]

When used appropriately and effectively, commercial judicial review can be a powerful tool for companies to protect their rights and interests against an overreach of executive power. For example, let's say the Duck Tours company in trying to obtain approval from the authorities to have its amphibious vehicles ply the roads as part of the city tour it offered to tourists was denied on the basis that such a vehicle was dangerous on the roads and to other road-users. Furthermore, the relevant authorities refused to hear representations from the company.[11] The company can perhaps challenge the authorities' decision broadly on the ground of illegality and procedural impropriety.

On the other hand, if Duck Tours' unhappiness stemmed from having to deal with seven different government agencies and endless bureaucratic red tape in securing the relevant permits, then judicial review is of hardly any efficacy in reducing the time taken. "[A]ny remedy given by the courts would have been a comparatively blunt tool, as it would not have addressed the underlying root problem of bureaucratic red tape, but merely a specific symptom: in this case, Duck Tours' difficulty in obtaining a licence in a timely manner".[12] Further, "bad feeling and ill-will would have been generated on all sides, which is the last thing a fledging company like Duck Tours would have wanted".

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the American constitution, it is claimed, had in their minds a "corporate analogy" in devising a system of checks and balances.

9 In Singapore, the established grounds for judicial review were first set out in *Chng Suan Tze*, *supra* note 7 at para 119. Singapore courts have consistently adopted the seminal United Kingdom case of *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL) at 410 [*Council of Civil Service Unions*], where the House of Lords identified illegality, irrationality, and procedural impropriety as the three well-established broad headings under which a claim for judicial review of administrative action may be made. The grounds of commercial judicial review are no different from that of judicial review not involving commercial entities.

10 See discussion of selected cases in this article.

11 This illustration is adapted from the illustration given by Chan Sek Keong in his article, "Judicial Review—From Angst to Empathy" (2010) 22 Sing Acad LJ 469 at paras 38, 39.

12 *Ibid* at para 38.

Regardless, judicial review is seen as another arrow in the quiver that can be used to protect (a figurative shield) or to promote commercial interests (a figurative sword), broadly conceived. Arguably, administrative law values such as lawfulness, fairness, rationality, due process, fair hearing, have a role to play in the commercial realm and can improve decision-making and regulation. This speaks to a system of accountability in government decision-making. It is worth noting that these values are important for the private sector as they are for the public sector. Specifically, they can aid the development of good corporate governance.[13]

As with any (non-commercial) party aggrieved by the decision or action of a public body, commercial entities will likely first consider whether they can challenge the correctness of the decision or action. This would be by appealing against the decision using the appellate route provided by the legislation in question or in common law. Alternatively, and increasingly better appreciated by legal advisors especially when it is difficult to mount a challenge on the merits of the case, an aggrieved party may dispute the decision or action on the traditional grounds of judicial review in administrative law *viz* illegality, procedural impropriety, or irrationality. In invoking the supervisory jurisdiction of the court in judicial review, the court is asked to engage in "the review of the decision-making process, but not to review the decision itself"[14]; in other words, it reviews "the manner in which the power is exercised".[15] This is congruent with the rule of law, which requires discretionary power to be controlled or regulated. As Peter Cane notes, "Central to the concept of making decisions and rules is choice or 'discretion'…The essence of discretion is choice; the antithesis of discretion is duty. The idea of 'decision-making' implies an element of choice: duty does away with the need to make decisions".[16]

Singapore courts have not shied away from assessing whether an impugned action or decision meets the requirements of "just administrative action". To reiterate, there is latent impetus for commercial judicial review since Singapore courts subscribe to "the notion [that] a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power".[17]

Yet, it is also necessary to temper the seeming exuberance in some quarters for commercial judicial review in dealing with executive decisions and actions that a commercial entity may disagree with. In this regard, Singapore courts are also mindful of the imperative of judicial deference. Judicial restraint recognises the regulator's expertise and institutional autonomy, and the demands of administrative efficiency require the courts to not interfere with regulatory policies and their implementation without a sound legal basis. Hence, it is not surprising that, typically, the Singapore courts calibrate the appropriate deference when faced with a judicial review challenge premised on irrationality (or proportionality) and/or substantive legitimate expectations since they tread close to questioning the merits of an executive decision.

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13 For an early discussion of this, see Jeffrey Barnes, "Is Administrative Law the Corporate Future?" (1993) 21 ABLR 66.

14 *Re Dow Jones Publishing (Asia) Inc's Application* [1988] 1 SLR(R) 418 (HC) at para 20.

15 *Tan Seet Eng*, *supra* note 5 at para 99.

16 Peter Cane, *Administrative Law*, 4th ed (Oxford: Oxford University Press, 2004) at 185.

17 Wee Chong Jin CJ in *Chng Suan Tze*, *supra* note 7 at para 86. Arts 4 and 93 of the *Singapore Constitution*, *supra* note 7. are commonly cited to support the judiciary in engaging in judicial review.

Notwithstanding the judiciary's reluctance to engage in substantive review, recent domestic jurisprudence also points to judges carefully scrutinizing an executive decision or action, including the evidential substratum, especially if it relates to a punitive measure being imposed.[18] In such a situation, a less deferential posture is adopted.[19] In order to protect corporate entities from capricious and arbitrary executive action, the court has to robustly assess the legality of the impugned decision.

No Singapore commercial judicial review case thus far involved decisions that concerned the operation of markets, systemic unfairness, which would have put the issue of intensity of judicial review to the fore. In the economic sphere, regulators increasingly have to keep pace with developments in the industries and markets they regulate while reducing the burdens imposed on those they regulate. This imperative to regulate in an even-handed manner requires the recognition of the complexity and international character of today's economy. This makes commercial judicial review even more challenging given that the relational boundary between judicial and executive decision-making is one fraught with complexity. The co-equal branches of government negotiate the inherent constitutional tension between the administrative state's democratic legitimacy and the judiciary's role in public law to control the use of public power.[20] *De Smith's Judicial Review* puts it aptly:

> 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 is one of the most complex in all of public law and goes to the heart of the principle of the separation of powers. 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]

This article proceeds as follows: in Part II, the tentative beginning of commercial judicial review in Singapore is sketched against the backdrop of the salient themes in the judicial approach to such cases. How applicants have sought to use commercial judicial review to advance or in a rear-guard attempt to protect their commercial interests is also considered in several cases. Part III considers the trend of the growing use of judicial review and the implications for public law litigation. In particular, the significance of the *Attorney-General (Additional Functions) Act*,[22] which enables enhanced legal representation and support for statutory boards

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18 *Tan Seet Eng*, *supra* note 5, is exemplary of this approach. *Re Fong Thin Choo* [1991] 1 SLR(R) 774 (HC) [*Re Fong Thin Choo*] was an early, if rare, example.

19 *Cf* Jaime Arancibia, "The Intensity of Judicial Review in the Commercial Context: Deference and Proportionality," in Christopher Forsyth, Mark Elliott, Swati Jhaveri, Anne Scully-Hill, and Mark Ramsden, eds, *Effective Judicial Review: A Cornerstone of Good Governance* (Oxford: Oxford University Press, 2010), 287-299.

20 Lord Diplock, "Judicial Control of Government" [1979] MLJ cxl; Jonathan Sumption QC, "Judicial and Political Decision-making: The Uncertain Boundary" [2011] JR 301.

21 Lord Woolf *et al*, *De Smith's Judicial Review*, 8th ed (London: Sweet & Maxwell, 2018) at para 11-004.

22 (Cap 16A, 2017 Rev Ed Sing).

by the Attorney-General's Chambers, is highlighted.[23] Part IV outlines the future of regulatory action in the commercial realm and how judicial review might adapt to the growing complexity. Initial thoughts are offered on the optimal intensity of review by the courts in the light of putative executive interpretations of the law and the need to properly balance the executive's interpretative autonomy with curial supervision of the use of discretionary power. Part V concludes.

II. Setting the Context

Within the regulatory realm, regulators are often empowered by the parent legislation to have delegated law-making power. Moreover, regulatory agencies may engage in interpreting the statutes (primary and subsidiary) that they administer. There is no doubt in Singapore of the growing complexity and interdependence of business, government, and society.[24] Thus, a typical starting point for analysis is that the executive is generally considered as having more expertise in matters relating to governance, public policy, and in regulatory matters.[25] Any delegation of power by the legislature to the executive is to be observed and given effect to.

For instance, the Economic Development Board ("EDB") is tasked by Parliament, *inter alia*, to develop and grow the Singapore economy through inward investment promotion policies and plans, and promotional incentives and strategies.[26] With its mission to "create sustainable economic growth, with vibrant business and good job opportunities for Singapore," the EDB is the authority on "strategies that enhance Singapore's position as a global centre for business, innovation, and talent".[27] Its capacity, capability, and competence in the area of Singapore's economic development renders the EDB the domain expert, the go-to public authority on such matters. The courts do not possess such expertise and experience in economic development and related economic matters. In a climate of evolving economic complexity in a maturing economy, the law in this and related economic areas is likely to develop from and increasingly rely on jurisprudential principles as much as on specific regulations or general rules and policy directives. Put simply, the scale, growth, variety,

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[23] *Ibid*.

[24] The COVID-19 global pandemic has demonstrated the significant linkages and mutual impact of the business, government, society have on each other. Jobs and livelihoods are at stake. For instance, to deal with the COVID-19 pandemic and the economic challenges caused by the initial supply shock (*eg*, lockdowns and curtailment of economic activity) and the subsequent demand shock (lack of demand due to uncertain economic prospects and higher under- and un-employment), the Singapore Government in four separate Budgets within 100 days between end February and early June 2020 set aside SGD93 billion specifically for COVID-19 counter-measures, which included drawing about SGD52 billion from past reserves.

[25] In this regard, consider the role of the legislature in prescribing the statutory framework. It is not only the highest law-making body but also the primary political forum for regular and robust debates. It is also well placed and accountable to determine which policy options and laws are in society's best interests. See discussion in Eugene KB Tan, "The Legislature" in Gary Chan Kok Yew & Jack Tsen-Ta Lee, eds, *The Legal System of Singapore: Institutions, Principles and Practices* (Singapore: LexisNexis, 2015) 123.

[26] See the *Economic Development Board Act* (Cap 85, 2012 Rev Ed Sing). The EDB is a statutory board under the Ministry of Trade and Industry.

[27] Quotes taken from the EDB's website, online: <https://www.edb.gov.sg/en/about-edb/who-we-are.html>.

and complexity of government in a modern Singapore, a city-state so dependent on trade and investment, have resulted in significant regulation of the commercial realm. In turn, this entails the imperative of the courts to maintain a supervisory role over the legality of routine and market-changing decisions and policies.

Democratic accountability certainly features prominently in making a determination on issues of societal importance. This is also aligned with the democratic intent which necessitates determining which governmental branch is empowered by the law to execute a specific task. In commercial matters, the issue of fundamental liberties is not brought to bear as Part IV of the *Singapore Constitution* is concerned with the fundamental liberties of Singapore citizens and natural persons in Singapore. Instead, the statutory regime governing the exercise of the public power and discretion is the focal point in the judicial inquiry. As Attorney-General VK Rajah (as he then was) noted, "[t]he statutory framework is crucial because it is the anchor point for gauging the legality of governmental action in any given situation.

The statutory framework is also a disciplining force, because neither the executive nor the court can stray outside its boundaries. This allows for greater certainty and predictability".[28] In a similar vein, Sedley J in *ex parte Dixon* remarked that "[p]ublic law is not at base about rights, even though abuses of power may and often do invade private rights; it is about wrongs—that is to say misuses of public power".[29]

In 2010, then Chan Sek Keong CJ noted, extra-judicially, that the Judiciary plays a "supporting role by articulating clear rules and principles by which the Government may abide by and conform to the rule of law".[30] He asked whether a perspective that views "the courts being locked in an adversarial or combative relationship with the Executive and functioning as a check on administrative power" was appropriate for Singapore.[31] For Chan CJ, courts do not serve as the "first line of defence against administrative abuse of powers".[32] Instead, they serve a facilitative function in developing good administrative practices even as it adjudicates in judicial review applications.

This attitude of a collaborative approach towards governance stems from the premise that good governance also requires each branch to check itself (intra-branch), in addition to a robust set of systemic checks and balances (inter-branch). Again, Chan CJ put it well, "[j]udicial review deals with bad governance but not bad government. General elections deal with bad government".[33]

While judicial review is usually conceived as an end in itself, it should also be a means to an end. In dealing with unlawful governmental action, judicial review can and should encourage good administrative practices and governance such that the Government, through upholding high standards of public administration and policy, can better abide by the rule of law. To be sure, the above observations pertain to judicial review in general. Nevertheless, they are significant for commercial judicial

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28 VK Rajah, "Judicial Review—Politics, Policy and the Separation of Powers" (Guest lecture delivered at the Singapore Management University Constitutional and Administrative Law course, 24 March 2016), at para 26.

29 *R v Somerset County and ARC Southern Limited ex parte Dixon* [1997] JPL 1030 (EWHC).

30 Chan, *supra* note 11 at 480.

31 *Ibid.*

32 *Ibid.*

33 *Ibid* at para 6. Further, at para 29, Chan added: "[i]n other words, seek good government through the political process and public avenues rather than redress bad government through the courts".

review for the affirmation and assurance of the rule of law and of accountability requirements of the entities exercising public functions in the commercial arena. The private sector has recourse to administrative law to regulate its relationship with the public sector. This "blurring" of what is "public" and "private" and the growing trend of public functions and services being increasingly contracted out to private entities mean that such actions are potentially within the scope of administrative law.

The slow but steady growth in popularity of commercial judicial review should not come as a surprise. In tandem with the vast administrative state, the executive carries out many regulatory roles and functions in various spheres of Singaporean life, including in the commercial realm. Furthermore, there are also entities which are not usually regarded as public bodies that may be tasked by legislation to carry out public functions. The Singapore Exchange (SGX) is one such example. Commercial judicial review is increasingly appreciated for enabling an aggrieved applicant in the commercial sphere to seek remedies that are well-known in the non-commercial sphere.[34] Judicial review enables the reviewing court to examine both procedural and, in limited situations, substantive aspects of governmental decision-making. This is a powerful check on governmental functions in the commercial sphere. Hence, a commercial entity has the full range of private law remedies, including contract and tort law, and can also avail itself to public law remedies, where appropriate.

A. *Commercial Judicial Review's Tentative Start*

The early cases of commercial judicial review tended to revolve around issues of illegality. Singapore case law on judicial review point to two broad categories of illegality: The first category is concerned with whether the public authority was empowered to make the impugned decision, while the second category relates to a situation where the public authority was properly empowered, but there is a question as to whether it properly exercised its discretion in making the decision. It is in the latter category of illegality that arguably provides more scope for a party to challenge the public authority. In this regard, even if the public authority is empowered to make a decision, the law often imposes limits on the extent of the decision-making and rule-making powers.

The cases briefly noted in this section are treated as cases of "commercial judicial review"—they involved commercial entities (who may not be the applicants but the matter involved the applicants who had direct relationships with these entities) that sought to protect their business interests from what they argued to be unlawful interpretation and/or misapplication of the law.

It is in commercial judicial review cases that the Singapore courts have nudged the development of administrative law domestically by ensuring that public authorities comply with the requirements of the law in the applicable statutory framework. Even before the enigmatic case of *Anisminic Ltd v Foreign Compensation Commission*,[35]

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[34] They include prohibiting orders (to stop a public body from doing something it ought not to do), mandatory orders (to make a public body do something it has a duty to do), quashing orders (to set aside a public body's decision) whether on grounds of illegality, irrationality, or procedural impropriety, and declarations (to have the court declare the legal position on a specific matter).

[35] [1969] 2 AC 147 (HL). It is not the intent and it is beyond the scope of this article to examine jurisdictional and non-jurisdictional errors of law.

courts could quash a non-jurisdictional error of law where it is an error on the face of the record. A decision can be judicially reviewed if a mistake of law was revealed on a perusal of the record of the proceedings. In *Re Application by Yee Yut Ee*,[36] the applicant, a company director, challenged an order of the Industrial Arbitration Court ("IAC") which had made him personally liable for paying the retrenchment benefits of the company's employees. The High Court quashed the order, holding that it was patently illegal as this was not authorised by law. The court also held that directors were not liable for their companies' debts unless there was proof of fraud, breach of warranty of authority, or other exceptional circumstances. It ruled that nothing in the Industrial Relations Act, which established the IAC, changed this. Even though the Act contained an ouster clause, the clause did not prevent the High Court from intervening when the IAC committed an error of law which had caused it to act without jurisdiction.

Likewise, a court has the power to review a decision by a public authority if it was unsupported by evidence, or if the evidence was not reasonably capable of supporting the decision.[37] This principle was followed by the High Court in *Re Fong Thin Choo*.[38] This case concerned regulation 12(6) of the *Customs Regulations 1979* which stated that a customs officer could require the owner (or his agent) of goods to produce evidence that the goods in question had been exported or re-exported, and if the goods were not accounted for to the customs officer's satisfaction or were found to have been illegally re-landed in Singapore, the owner was liable to pay customs duty on them.

Chan Sek Keong J (as he then was) observed that reg 12(6) was a precedent fact provision: that the customs officer exercising his power to require the owner to pay customs duty must establish that the goods in question were not exported. In turn, this required the court to determine whether the customs officer's decision was justified by the evidence, and not merely whether there was some evidence on which he could have reasonably arrived at his decision. However, the court did not dispose of the case on the basis of whether the precedent fact had been established since both parties in the case agreed to proceed on the basis that this was not a precedent fact scenario.

Re Fong Thin Choo signifies the importance of a public authority being on side with the statutory regime under which discretionary power is sought to be exercised. Public authorities must ensure that they do possess the requisite legal authority to act and to do so in the manner required by the legislation. While this is not a novel point of law where administrative illegality is concerned, the case demonstrates that public authorities can sometimes elide the two broad categories of illegality: (1) whether the public authority was empowered to make a decision, and (2) where the public authority was properly empowered, did it properly exercise its discretion in making the impugned decision? More importantly, *Re Fong Thin Choo* established that it is well within the institutional capacity of the court in requiring adequate justification of decisions, especially where it concerns the imposition of a customs duty and where the statutory framework so requires it.

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36 [1977-1978] SLR(R) 490 (HC).

37 See *Secretary of State for Education and Science v Tameside Metropolitan Borough Council* [1977] AC 1014 (HL) where the House of Lords held that a public authority's decision may be judicially reviewed if it is unsupported by evidence or has been based on incorrect facts.

38 *Re Fong Thin Choo*, *supra* note 18.

This approach was highlighted in the recent case of *AXY v Comptroller of Income Tax*[39] where the courts scrutinised whether the legal requirements were met before the discretionary power was exercised. The appellants sought to overturn the High Court's decision in refusing leave to commence judicial review proceedings in respect of the Comptroller's decision on the grounds of illegality and irrationality. The Court of Appeal dismissed the appeal against Comptroller's decision on an exchange of information request from Korea's national tax authority, National Tax Service of the Republic of Korea ("NTS") pursuant to the *Convention between the Republic of Singapore and the Republic of Korea for the Avoidance of Double Taxation and the Prevention of Fiscal Evasion with respect to Taxes on Income*, 6 November 1979, (entered into force 13 February 1981) as amended by the Protocol signed on 24 May 2010 ("the Convention").[40]

At the material time, the NTS was conducting criminal tax investigations into the affairs of five individuals: the first, second and fourth appellants, and two officials of a group of companies owned by the first appellant. The NTS suspected that these five individuals as well as the 51 nominee companies incorporated by the first appellant had Singapore bank accounts that were being used to conceal unreported income and evade taxes. On the basis of this suspicion, the NTS submitted an exchange of information ("EOI") request to the Comptroller on 23 September 2013 ("the Request") for Singapore bank account information and documents relating to these five individuals and 51 companies for the period from 1 January 2003 onwards.

The Comptroller evaluated the Request in accordance with s 105D and the Eighth Schedule of the *ITA*, which required an EOI request to contain specific information and statements by the Requesting State's tax authority. Several rounds of communications between the Comptroller and the NTS ensued, with the Comptroller seeking clarification on various aspects of the Request and the NTS providing further information and documents in response. After due consideration of the Request, the Comptroller acceded to the Request and issued production notices against three Singapore banks on 21 and 27 January 2014. The production notices were issued on a confidential basis, and the appellants were not aware of either the Request or these notices until after the notices were issued.

The High Court dismissed the application as the appellants had not made out an arguable case of reasonable suspicion in favour of granting them the remedies sought. It found that the Comptroller had properly directed his mind to the foreseeable relevance of the information sought by the NTS. It had also appropriately clarified matters with the latter. It further ruled that the objections raised by the appellants pertaining to time bar under Korean law and their disputed tax residency in Korea were irrelevant to the Comptroller's decision on the Request as they concerned matters of foreign law.

In dismissing the appeal against the High Court's decision, the Court of Appeal also clarified principles applicable to EOI regime under the Income Tax Act. The purpose of the EOI regime was to facilitate the exchange of foreseeably relevant information between tax administrations to the widest possible extent. In assessing

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[39] [2018] 1 SLR 1069 (CA). I treat this case as involving commercial judicial review on the basis that it relates broadly to the applicants' commercial interests.

[40] The Convention is incorporated into Singapore's domestic legislation via s 105D of the *Income Tax Act* (Cap 134, 2014 Rev Ed Sing) [*ITA*].

an EOI request, the Comptroller had to be satisfied, unless he otherwise permitted, that the information specified in the Eighth Schedule had been provided by the foreign tax authority as required by s 105D(2) of the *ITA*. The standard for assessing an EOI request was whether the information requested by the foreign tax authority was foreseeably relevant for carrying out the tax treaty concerned or enforcing the Requesting State's domestic tax laws. This standard was not substantively altered by the statutory amendments made in 2013 to the EOI regime.

The apex court noted that EOI regime's statutory framework provided the Comptroller a wide degree of discretion. The Comptroller could not, however, act uncritically or unthinkingly in processing an EOI request. If there were doubts as to whether the Eighth Schedule requirements had been satisfied and/or whether the information sought was foreseeably relevant, he had to clarify these doubts with the foreign tax authority. The apex court also found that the Comptroller had compiled with the Inland Revenue Authority of Singapore's internal procedures for processing EOI requests and had properly satisfied himself that the Request complied with the *ITA* and the Convention. This included the Request being reviewed by an EOI review committee, and the Comptroller had sought specific clarifications from the NTS to understand the relevance of the requested information to the latter's tax investigations. The Comptroller had made the decision to accede to the Request based on the totality of all the information and material provided to him by the NTS over the course of several months from September 2013 to January 2014.

It would appear that the applicants had no ground to stand on in challenging the Comptroller on the merits of the decision taken and so pressed the case for a review of the decision-making process. However, merely alleging a defective decision-making process was clearly not enough to establish that the Comptroller had acted unlawfully. There is the need to factually demonstrate that the public authority had not complied with the statutory framework. Arguably, the applicants resorted to judicial review as a last-ditch attempt to halt the tax investigation.

B. *Formulating Policies and Guidelines: Whole-of-Government Approach*

Commercial judicial review cases also highlight the imperative for public authorities not to fetter their discretion. The fettering of discretion is strongly manifested, for example, through a rigid application of a policy, even where the policy was designed to structure the exercise of the decision-maker's discretion in the first place. However, it is legitimate for public authorities to formulate policies and guidelines that are "legally relevant to the exercise of their powers, consistent with the purpose of the enabling legislation, and not arbitrary, capricious or unjust".[41] Often, these policies and guidelines enable the public authorities to engage in consistent decision-making by having like cases treated in like manner. This also entails that public authorities must readily depart from their policies and guidelines when necessary.

Another form of a public authority fettering its discretion occurs when the public authority, as the holder of a specified statutory discretion, unlawfully delegates

[41] See *Halsbury's Laws of England*, vol 1, *Administrative Law* (London: Butterworths, 2001) (4th reissue) at para 32. For a local authority, see *Registrar of Vehicles v Komoco Motors Pte Ltd* [2008] 3 SLR 340 (CA) [*Komoco Motors*].

that authority to another entity. In either case, the court examines whether the public authority is cognisant of the purpose of statutory discretion: that the autonomy granted to the executive by the legislature is to decide what should be done in any given situation in order to fulfil the purpose of the enabling legislation.[42] In not doing so, the public authority would not have kept an open mind in exercising a statutory discretion, which runs afoul of administrative fairness. In this set of cases, the applicants, which are commercial entities, felt hard done by the decisions of the authorities which obviously affected their business in terms of revenue or profits. In other words, the decisions made had a negative impact on the business.

Lines International Holding (S) Pte Ltd v Singapore Tourist Promotion Board[43] underscores the legal proposition that the adoption of a general policy by a body exercising an administrative discretion is prima facie valid, subject to the policy not being Wednesbury unreasonable. This means that the adopted policy must not so outrageous in its defiance of logic or accepted moral standards that no sensible person who applied his or her mind to the matter could have arrived at such a view. The public body does not fetter its discretion when it is prepared to hear out individual cases or to deal with exceptional cases.

In this case, the applicant was a cruise operator which challenged the adoption by the then Singapore Tourist Promotion Board (STPB) and the Port of Singapore Authority (PSA) of a general policy, in the form of non-statutory guidelines, regulating cruises-to-nowhere (CNWs).[44] The guidelines were made known to cruise operators at a meeting. One guideline was that berths might not be allocated for CNWs if the operators had scheduled more than 30 per cent of their cruises as CNWs over a three-month period. The plaintiff argued that the PSA's power to control the use of its berths had to be exercised through subsidiary legislation.

The High Court held that the PSA had the discretion to decide which vessels could use the limited number berths. It then considered whether the PSA had fettered its discretion in enforcing the guidelines. Justice Judith Prakash held that as the PSA had the legal authority over berths for vessels, it could not abdicate its responsibility by taking orders from other statutory boards unless it was under a legal duty to do so. This required the PSA to decide exercising its own discretion, and taking into account relevant facts or evidence. This included receiving inputs such as advice, recommendations, relevant information from relevant stakeholders including the STPB, the Gambling Suppression Branch of the Criminal Investigation Department. The court found that the PSA did appropriately consider all relevant evidence and facts, that it was willing to consider exceptions, and it did not apply the guidelines in an inflexible manner. As such, the court did not find that the PSA had fettered its discretion. The court also recognised that different public authorities may and do

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42 Several recent legislation have a specific provision stating the purposes of the legislation in question. See *eg*, s 5 of the *Protection from Online Falsehoods and Manipulation Act 2019* (No. 18 of 2019); s 3 of the *Active Mobility Act 2017* (No. 3 of 2017); s 3 of the *Deep Seabed Mining Act 2015* (No. 6 of 2015); s 4 of the *Early Childhood Development Centres Act 2017* (No. 19 of 2017); s 4 of the *Organised Crime Act 2015* (No. 26 of 2015); s 3 of the *Precious Stones and Precious Metals (Prevention of Money Laundering and Terrorism Financing) Act 2019* (No. 7 of 2019); s 4 of *Shared Mobility Enterprises (Control and Licensing) Act 2020* (No. 8 of 2020).

43 [1997] 1 SLR(R) 52 (HC) [*Lines International*].

44 Such cruises were understood to be for gambling purposes which took place once the cruise ships entered international waters.

work together on issues of mutual concern and could do so without acting unlawfully individually or jointly.

While Singapore courts are careful not to second-guess public policy and grant the executive branch significant latitude in crafting and implementing policies, the courts will also ensure that any substantial discretionary power is properly exercised. A useful illustration in this regard are decisions made in the furtherance of land use, in particular the national policy of discouraging land hoarding in Singapore applied by various public authorities.[45] Such a policy and decisions made in pursuant thereof have been challenged under the irrationality ground of judicial review.

In this line of cases, the courts have adopted the judicial stance that such a policy is neither irrational nor unknown to property developers. As the Court of Appeal noted in *City Developments Ltd v Chief Assessor*, "[s]uch a policy is premised on a very common-sensical notion (and which is in the public interest) of discouraging as well as preventing land hoarding in land-scarce Singapore".[46] Further, this line of cases also demonstrates the courts' sensitivity to the national concern of the scarcity of land and how it matters in public law litigation in Singapore. In addition, the courts demonstrate that policy- and decision-making in certain contexts must seek to balance the needs of the community with the interests of the individual or corporate entity.[47]

This was amply demonstrated in *Teng Fuh Holdings Pte Ltd v Collector of Land Revenue*.[48] The facts are pertinent insofar as they establish why the plaintiff was so determined to obtain leave to apply for a quashing order and mandatory order. The plaintiff, an established company with considerable experience in property transactions, was until 26 February 1983, the owner of the land and property thereon situated at Mukim 25 Lots 498, 348 and 350 at 20–22 Geylang Road. The land was gazetted for acquisition under section 5 of the Land Acquisition Act and the declaration to this effect was published in the Government Gazette in February 1983. Compensation was awarded to the plaintiff based on the market value of the land as at 30 November 1973. The plaintiff continued in occupation of the land as a licensee in the following 22 years before challenging the acquisition, arguing that the land had "been left in substantially its original physical condition and has been licensed for the Applicants' occupation and use". The plaintiff was also prepared to return the compensation in return for the land. It also alleged ultra vires conduct as well as bad faith on the part of the defendant in the land acquisition.

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45 See also Elgin Toh & David Ee, *Rule of Law and Urban Development* (Singapore: Centre for Liveable Cities, 2019), online: Centre for Liveable Cities ("CLC") <https://www.clc.gov.sg/docs/default-source/urban-systems-studies/uss-rule-of-law-and-urban-development.pdf>.

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

47 The People's Action Party ("PAP") government of independent Singapore made a conscious decision to exclude the constitutional right to property when Parliament promulgated the *Singapore Constitution* in December 1965. The Constitution Commission of 1966 also agreed with this stance, recognising that Singapore was then only a small island of 225 square miles, and that more land would be required for public purposes as the population increased. As founding Prime Minister Lee Kuan Yew stated when moving the *Constitution (Amendment) Bill*, "…once we spell out that no law shall provide for the compulsory acquisition or use of property without adequate compensation, we open the door for litigation and ultimately for adjudication by the Court on what is or is not adequate compensation": see *Parliamentary Debates Singapore: Official Report*, vol 24 at col 435 (22 December 1965).

48 [2006] 3 SLR 507 (HC) [*Teng Fuh Holdings* (HC)], affirmed by the Court of Appeal in [2007] 2 SLR 568 [*Teng Fuh Holdings* (CA)].

However, as the trial court observed, the plaintiff failed to mention in the application that the market value of the land at the time of the proceedings was far in excess of the original compensation it had received. Andrew Phang J (as he then was) noted:

> However, does that mean that s 5(3) of the Act [the *Land Acquisition Act* (Cap 152, 1985 Rev Ed)] cannot be questioned in any court? This is not an implausible proposition, having regard to the nature and policy of the Act itself. However, bad faith, particularly in the governmental context, does not sit easily in any (and, especially, the modern-day) context. In my view, and viewing the matter from the particular perspective of land acquisition in the Singapore context, it is imperative that a balance be found in the tension between ensuring that the purposes of the Act and the ensuing public benefit are achieved on the one hand and ensuring that there is no abuse of power on the other. In this regard, it is important to note that the Act was promulgated not only for the public benefit but also because land is an extremely scarce and therefore valuable resource in the Singapore context. These are in fact inextricably related reasons. This being the case, it is clear why much more latitude and flexibility is given to governmental authorities. As a corollary, it is not the task of the courts to sit as makers of policy. This would in fact be the very antithesis of what the courts ought to do. But latitude and flexibility stops where abuse of power begins. Such abuse of power is most commonly equated with the concept of bad faith. At this point, the courts must—and will—step in. But, in the nature of both the concept itself, such abuse of power will not be assumed (let alone be found) at the slightest drop of a hat. It is a serious allegation. There must be proof. In proceedings such as these, there must be sufficient evidence, produced in its appropriate context, that establishes that a "prima facie case of reasonable suspicion" of bad faith exists.[49]

C. *Husbanding Scarce National Resources Optimally and Balancing Competing Interests*

Similarly, in *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority*, the applicant, a property developer, challenged the Government on the amount it owed the Government for a mixed-use site in Kallang.[50] This commercial judicial review concerned a dispute over the difference in the differential premium payable of about $30 million. The applicant had leased from the state adjoining plots of land. In 2011, the applicant sought the permission of the Singapore Land Authority ("SLA") for the change of use of the land for the purposes of redevelopment. As was the case for state land, the leases provided that the land could only be used for the purposes specified in the leases. If the state (as lessor) decided to permit the change of use for the land, such as lifting of title restrictions, the lessee would have to pay a differential premium, in respect of the change of use. This premium seeks to account for the enhanced value of the land as a result of the permitted change of use of the land.

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[49] *Teng Fuh Holdings* (HC), *supra* note 48 at para 36.

[50] *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 (HC) [*Chiu Teng @ Kallang*].

The applicant had calculated the differential premium ("DP") payable for two adjacent plots to be about S$11 million. It had used for its calculation a table containing a "snapshot of rates" based on past prices. But the SLA calculated the premium based on a spot valuation—an assessment of the land's value at the given time. Accordingly, SLA calculated the premium payable to be in excess of $40 million. General guidance on the determination of DPs was provided in SLA circulars and on the SLA website, which referenced the Development Charge Table of Rates (the "DC Table") as being the basis for the computation differential premiums. SLA's assessment of the DP payable, however, was not based on the DC Table. The SLA had informed the applicant in November 2011 that a DP "equal to 100% of the enhancement to land value as assessed by the Chief Valuer will be levied for the lifting of title restrictions".

In February 2013, the SLA informed the applicant that the SLA's computation of the DP payable for lifting of the title restrictions was S$41,183,989. The applicant sought clarification on how the DPs were calculated. The SLA stated that the DP was "assessed by the Chief Valuer based on 100% enhancement in land value for the lifting of title restrictions". It further explained that "this case is different from conventional leasehold sites because [the Land was] formerly directly alienated to the former owner instead of through competitive tender".

Clearly, the difference in DP computed by the applicant and the SLA was significant—to the tune of almost S$31 million, or three times what the applicant had deemed it was liable for. The applicant applied to the High Court for leave to seek judicial review on the basis that the decision-making process was flawed in law. It sought (a) a quashing order against the SLA's decision to assess the DP payable for the lifting of title restrictions at S$41,183,989 "without reference to the Development Charge Table of Rates", and (b) a mandatory order directing the SLA to assess the DP payable in accordance with the DC Table.

In this case, the applicant did not appeal against the SLA's assessment of the DP quantum payable.[51] It could not fault SLA's computation based on the spot valuation. Instead, they sought to challenge *how* SLA had assessed the DP payable. The applicant proffered the argument that the DP should be calculated based on the DC Table rather than on the spot valuation. It argued that it was irrational and unreasonable for SLA to assess the DP via a spot valuation instead of relying on the DC Table. Furthermore, SLA's decision had deprived the applicant of its legitimate expectation that the DP would be assessed in accordance with the DC Table. As the applicant failed to show irrationality on the part of the SLA or to establish that a legitimate expectation had arisen on the facts of the case, the court dismissed its application for judicial review on these grounds.

This case is notable for Justice Tay Yong Kwang's acceptance of the doctrine of substantive legitimate expectations as a distinct head of judicial review in Singapore's

[51] Both the DP and the DC enable the state to reap the enhancement in land value arising from a higher value land use or an increase in intensity of land usage. For a summary of the key similarities and differences between the DP and DC, see Appendix B of Mayers Ng & Choy Chan Pong, *Land Framework of Singapore: Building a Sound Land Administration and Management System* (Singapore: Centre for Liveable Cities, 2018), online: CLC <https://www.clc.gov.sg/docs/default-source/urban-systems-studies/uss-land-framework-of-singapore.pdf>.

administrative law.[52] The spirited attempt with which it sought to hold a public authority accountable in situations where it may have created legitimate expectations of a substantive kind (rather than a procedural one) is admirable. But this attempt to hold public authorities accountable also demonstrates that the more intrusive the nature of scrutinizing an administrative decision is, the more it would involve the courts reviewing the merits of executive action.

Unsurprisingly, in *SGB Starkstrom v Commissioner for Labour*, the Court of Appeal, in *obiter*, noted that courts lack the institutional capacity to review the merits of executive action. It would also risk blurring the separation of powers.[53] The court further observed that the central question was not whether the substantive legitimate expectations of individuals deserve protection. Instead, the issue was whether the executive or the judiciary ought to balance an individual's legitimate expectation against a countervailing public interest. Of refreshing note is the court offering the view that the approach need not be a binary one of (a) recognising a judicial power to enforce substantive legitimate expectations; and (b) holding that a public body could entirely disregard its clear representation. It opined that a suitable approach might lie in the range of possible measures between the two extremes. For example, a public authority could be required to confirm that it had considered the representation by an individual in coming to its conclusion that the public interest justified defeating any legitimate expectation. Alternatively, the court could require the public authority to furnish its reasons for defeating any legitimate expectation, which could then be assessed on the traditional grounds of irrationality, illegality, and procedural impropriety.

This case highlights that commercial judicial review, as a subset of judicial review, is at its core also a function of socio-political attitudes of the community and that the courts are equally concerned about administrative justice for an individual vis-à-vis a corporate entity and the executive. *SGB Starkstrom* suggests that the commercial realm cannot be excluded from the larger society of which is an integral part of. In extra-judicial remarks referencing the case, Chief Justice Sundaresh Menon opined that the rule of law cannot be divorced from "cultural substratum" on which Singaporean public law is built *viz* an emphasis on communitarian over individualist values. Communitarian values such as dialogue, tolerance, and placing the community above self, matter immensely.[54] Notwithstanding this emphasis on the communitarian ethos, the court's role is abidingly the "last line of defence" against any arbitrary exercise of power by the executive that is to the detriment of a private

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[52] See also Chen Zhida, "Substantive Legitimate Expectation in Singapore Administrative Law" (2014) 26 Sing Acad LJ 237; Swati Jhaveri, "The Doctrine of Substantive Legitimate Expectations: The Significance of *ChiuTeng@Kallang Pte Ltd v Singapore Land Authority*" [2016] PL 1; Swati Jhaveri, "Contrasting Responses to the 'Coughlan Moment': Legitimate Expectations in Hong Kong and Singapore" in Mathew Groves & Greg Weeks, eds, *Legitimate Expectations in the Common Law World* (Oxford: Hart Publishing, 2017) at 267.

[53] *SGB Starkstrom, supra* note 4 at paras 42, 55-63. See also Kenny Chng, "An Uncertain Future for Substantive Legitimate Expectations in Singapore: *SGB Starkstrom Pte Ltd v Commissioner of Labour* [2018] 3 SLR 598" [2018] PL 192; Swati Jhaveri, "Localising Administrative Law in Singapore: Embracing Inter-branch Equality" (2017) 29 Sing Acad LJ 828. To be clear, the Singapore Court of Appeal did not definitively affirm or reject the doctrine of substantive legitimate expectations although it also made clear its reservations.

[54] See generally, Sundaresh Menon, "The Rule of Law: The Path to Exceptionalism" (2016) 28 Sing Acad LJ 413.

individual. "Judicial review is the sharp edge that keeps government action within the form and substance of the law".[55]

D. *Recognising the Subtleties and Complexities of Executive Power*

Most, if not all, judicial review cases in Singapore, including commercial judicial review ones, are brought against the executive exercising public functions and powers. In *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd*,[56] the growing trend of private bodies performing public functions was clear—just as a public body can act in more than one capacity.[57] The apparent hybrid nature of the functions performed by decision-making bodies, such as the Singapore Exchange Securities Trading Ltd, means that the actions can have public law and/or private law dimensions. This reminds us of Sir John Donaldson MR's call for the courts to "recognise the realities of executive power" which can take many different forms whether it is the "subtlety and sometimes complexity of the way in which it [the power] can be exerted".[58] As *Yeap* demonstrates, while the executive power often can be located to a specific source, often with statutory underpinning, there is the need to consider the nature of a power exercised to determine if public law applies to the body exercising the power. Commercial judicial review was sought in this case in an attempt to negate a decision that could have adverse consequences on the applicant in seeking or continuing appointments as a company director.

The applicant, Yeap Wai Kong ("Yeap"), was a non-executive independent director of China Sky Fibre Chemical Ltd ("the company"), a company incorporated in the Cayman Islands and listed on the Singapore Exchange ("SGX"). He was also a member of the company's audit committee. In April 2011, the SGX required the company to furnish certain information after noticing discrepancies in its financial statements. This information remained withheld from the SGX despite repeated requests. On 23 August 2011, SGX sent a "show cause" letter to the company and its board of directors stating that the company was in breach of the Listing Rules due to non-disclosure of information.[59] The letter indicated SGX's intention to issue a public reprimand and invited the company to show cause why relevant disciplinary actions should not be taken against it. This was followed by a document directive from the SGX requiring the company to deliver specific documents to the SGX. The SGX subsequently also ordered a special auditor to be appointed by the company but both

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55 *Ibid* at para 30.

56 *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 (HC) [*Yeap*].

57 Not all actions of statutory bodies are subject to judicial review. The court will have to examine whether a statutory body is, on the facts, performing a public duty pursuant to its statutory functions or acting in a capacity as a private party, such as an employer or party to a contract: *Public Service Commission v Lai Swee Lin Linda* [2001] 1 SLR(R) 133 (CA) followed in *UDL Marine (Singapore) Pte Ltd v Jurong Town Corp* [2011] 3 SLR 94 (HC). The court will examine the source of power with respect to the impugned transaction. If this is statutory, the decision is amenable to judicial review.

58 *R v Panel on Take-overs and Mergers; ex p. Datafin plc* [1987] 1 QB 815 at 838, 839 (EWCA).

59 Made by the SGX itself, the Listing Rules are not statutory in nature. They are subject to any requirements that are prescribed by the Monetary Authority of Singapore ("MAS") under the *Securities and Futures Act* (Cap 289, 2006 Rev Ed Sing) [*SFA*]. Any contravention of the SGX's Listing Rules does not result in the imposition of a fine on a listed company. However, SGX may punish in other ways such as through reprimanding a person or de-listing a company.

directions were also not complied with. On 16 December 2011, the SGX publicly reprimanded all the directors of the company, including Yeap. Yeap then applied for and was granted leave to apply for a quashing order to overturn the SGX's public reprimand. Yeap argued that he was not accorded a fair and proper hearing by the SGX and that the "show cause" letter was not addressed to him as an individual company director.

The legal issues the case addressed were whether the SGX reprimand was susceptible to judicial review, and whether Yeap had been accorded a fair hearing as required by the rules of natural justice. On whether the SGX is amenable to judicial review in respect of the reprimands it issues, Justice Philip Pillai at the High Court applied the "nature of power" test. Under the test, the court could consider the factors such as the extent to which the decision-making body has been interwoven into a system of governmental regulation; whether there is and the extent to which there is any statutory recognition or underpinning of the body or the function in question; and the nature of the function. Thus, where the nature of the power the body exercises involves public law functions, or the exercise of its functions have public law consequences, then it may be sufficient to make the body susceptible to judicial review.

A closer analysis of the case indicates that the nature of power test, while more nuanced, also complemented the source of power test. There was statutory underpinning for the SGX's powers. In operating a securities market, the SGX was required, under section 16 of the *Securities and Futures Act*,[60] to comply with the legal requirements under the Act. Section 25 of the *SFA* also provided a statutory enforcement process whereby the SGX's rules may be enforced or effected further by a court order. The SGX's powers to publicly reprimand directors of listed companies for non-compliance with its Listing Manual stemmed from r 720(4) of the Listing Manual, which was properly enacted and approved by the regulator, the MAS, which was also responsible for the *SFA*. The MAS was also empowered by the *SFA* to directly intervene in the regulatory affairs of the SGX, adding to the weight of the argument of the "public" nature of some of the regulatory functions of the SGX.

In *Yeap*, judicial review offered preferred outcomes should the applicant succeed. Assuming that Yeap could not challenge the correctness of SGX's decision to reprimand him, judicial review could perhaps provide him with a way out of his legal predicament.[61] The SGX's public reprimand clearly had the potential to severely

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60 *SFA*, *ibid*.

61 On the likely fruitless option of pursuing a private law remedy, see case note by Adrian Loo and Kung Hui Shan, "Judicial Review of SGX-ST's Public Reprimand Powers" (2012) 24 Sing Acad LJ 566 at paras 41, 42: "Given the outcome in *Yeap Wai Kong*, one might be tempted to ask: did Yeap take the "wrong" tactical step from the onset? Should Yeap have pursued private law remedies against the SGX-ST in relation to the SGX-ST Reprimand instead of resorting to public law? It is, however, respectfully submitted that the public law route was probably taken deliberately. A judicial review application sidesteps the issue of whether the SGX-ST Reprimand was justified on the facts of the case since the court would generally only be concerned with the decision-making process (and not the merits). For example, if the SGX-ST had instead been sued for defamation in relation to the SGX-ST Reprimand, the claim would likely have been met with (at least) the formidable defence of justification (truth) and qualified privilege. In addressing these defences, the court would then have been required look into the merits of the positions taken by the respective parties leading up to the SGX-ST Reprimand. Furthermore, there being no suggestion by Yeap of bad faith or malice on the part of the SGX-ST in issuing the SGX-ST Reprimand, it is unlikely that the claim in defamation would have succeeded at the end of the day."

impact Yeap as a company director given the reputational implications following the reprimand. It may well be that the facts were not in Yeap's favour and so a legal challenge on the facts was doomed to failure *ab initio*. For some litigants, judicial review is not so much a measure of last resort but more a measure of desperation. It can be perceived as a last-ditch attempt to salvage an unenviable situation on a technicality.

In Yeap's case, this was done by asserting that the SGX did not accord him a fair hearing required under the rules of natural justice. In other words, assuming that the decision to reprimand Yeap was correct, were there alternative means to negate or nullify the decision? By trying to challenge how the SGX did not ensure procedural probity before issuing the reprimand, Yeap was perhaps only delaying the inevitable, especially if the SGX was justified in issuing the reprimand in the first place and there were no procedural defects in the SGX issuing the public reprimand in question. Yeap's case could be fundamentally flawed or unmeritorious to begin with. But it does point to how bodies or entities carrying a public function have to pay attention to not just getting the decision "right" on its merits but also how they arrive at their decision to avoid a successful judicial review challenge.

E. *Applicants to Embrace Administrative Law Principles and Values*

Applicants may seek judicial review in a last-ditch attempt to resolve their legal woes as was vividly demonstrated in *Axis Law Corp v Intellectual Property Office of Singapore*.[62] Such attempts could amount to "nothing more than a disguised appeal on the merits of the decision".[63] In this case, the plaintiff, Axis Law Corporation, sought leave to commence judicial review proceedings against the Intellectual Property Office of Singapore ("IPOS"), a statutory board under the Ministry of Law. The plaintiff had a trademark dispute with the registered proprietor, Axis Intellectual Capital Pte Ltd. The plaintiff had sought to amend its statement of grounds as part of its application to revoke the trademark "AXIS". The plaintiff sought not only to elaborate on the existing grounds but also to add a new ground for the invalidation action as well as to add a new ground for revocation. The Registrar denied the plaintiff's application. The plaintiff then sought leave for judicial review to quash the Registrar's decision as well as a mandatory order to enable the plaintiff to amend its statement of grounds.

The courts are certainly aware that attempts at judicial review could be a disguised effort to reopen a matter or to re-litigate on the merits of the decision. Often, applicants seek to leverage on judicial review in a vain attempt to strategically protect their commercial interests which they may not be able to do so through a private law action and its remedies. Such an action may also seek to exculpate the applicant vis-à-vis the protection of a commercial interest or right. In this case, the claim that the Registrar had failed to take into account relevant considerations was "completely unsupported by the facts". The use of relevant terminology in judicial review for the

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62 *Axis Law Corp v Intellectual Property Office of Singapore* [2016] 4 SLR 554 (HC).

63 *Ibid* at para 74.

heads of illegality review such as "relevant/irrelevant considerations", fettering of discretion, and "error of law on the face of the record" did not change the substance of the applicant's submissions which, as Justice Tay Yong Kwang observed in the case, "was to invite the court to examine the merits or correctness of the Registrar's decision and to substitute its own judgment for that of the Registrar".

In any case, the Registrar did consider all the seven factors listed in the non-exhaustive Circular which sets out a list of non-exhaustive factors that have to be considered in deciding whether to grant leave for amendments sought after the close of pleading, and this was indicated in her reasoning. It was also open to the plaintiff to institute fresh proceedings against the trademark, which the plaintiff had argued was an irrelevant consideration but failed to explain why. The High Court found that this factor to be a relevant consideration in balancing the public interest in rule compliance and ensuring each case was properly adjudicated according to its merits.

This brief overview of a sample of early and more recent cases show the incremental sophistication in the applicant's use of judicial review in the last three decades. It has progressed beyond mere challenges of public authorities allegedly acting ultra vires. Scrutinising the decision-making processes of public authorities, that is how a decision was made, remains the mainstay. It is trite that judicial review in administrative law is not concerned with the merits of a decision made by a public authority. Instead, it seeks to ensure that a decision is made lawfully. However, this does not mean every error of law infringing a legal rule in the decision-making would necessarily deprive the decision of its legal effect. In that sense, judicial review is not a segue by which applicants can attempt to have a court micro-manage the decision-making process of a public authority. The courts are also mindful that public resources should be deployed in a judicious manner and that judicial review is not a "back door" to what would effectively be an appellate process. To put it somewhat bluntly, judicial review cannot be the proverbial second bite at the cherry.

To be clear, this does not imply that the courts will not grant access to those negatively impacted by unlawful administrative action and where they have no other means of seeking effective redress. Granted that this is exceptional, the importance of the access principle is aligned to the requirement of fairness under the rule of law. The cases do illustrate the imperative in commercial judicial review for applicants to similarly embrace administrative law values and principles, the alleged non-observance by a public authority being the driver for their seeking judicial review. This is where judicial review functions as a shield and helps ensure that the values of rule of law, fairness, rationality, transparency, efficiency, good administration and control of abuse of power are prominent even in the commercial realm. These systemic values apply regardless of whether it is the public or private realm. For now, this embrace of commercial judicial review and the values that underpin it appear piecemeal. Chan CJ's extra-curial advice is helpful for lawyers in commercial judicial review: "that the courts have a mission to do what is right in law and not an agenda to cover up what is wrong in law... But lawyers should also learn their law first and use some common sense about what the real substance of the dispute is. What kind of justice are your clients seeking—substantive justice, procedural justice or merely technical justice?"[64]

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[64] Chan, *supra* note 11 at 484.

In this Part, several commercial judicial review cases highlight how various applicants sought to use judicial review in administrative law in the quest for a decision in their favour. It will be seen that in the weak cases, applicants do not go far and did not succeed even in securing leave from the court to proceed with judicial review. The growing use of judicial review has elicited a response from the government, which this article now turns to.

III. Responding to the Growing Use of Judicial Review

A. *Shaping the Development of an Autochthonous Administrative Law*

Given the increased use of judicial review, including corporate entities, the official response is perhaps not surprising. The nascent stage of administrative law jurisprudence highlights the need for stakeholders (especially the courts, the public sector, litigants) to mould and shape its development and jurisprudence in a manner that is appropriate for the commercial realm and to promote economic activity. This is particularly so in the Singaporean context where the green-light approach is the preferred judicial posture in judicial review in administrative law.

In 2010, Chan Sek Keong CJ noted, extra-judicially, that the judiciary played a "supporting role by articulating clear rules and principles by which the Government may abide by and conform to the rule of law".[65] He asked whether a perspective that viewed "the courts being locked in an adversarial or combative relationship with the Executive and functioning as a check on administrative power" was appropriate for Singapore.[66] For Chan CJ, courts do not serve as the "first line of defence against administrative abuse of powers".[67] Instead, they serve a facilitative function in developing good administrative practices even as it adjudicates in judicial review applications.

This attitude of a collaborative approach towards governance stems from the premise that good governance also requires each branch to check itself (intra-branch), in addition to a robust set of systemic checks and balances (inter-branch). As Chan CJ put it, "Judicial review deals with bad governance but not bad government. General elections deal with bad government".[68]

Secondly, while judicial review is an end in itself, it should also be a means to an end. In dealing with unlawful governmental action, judicial review can and should encourage good administrative practices and good governance such that the government through its upholding high standards of public administration and policy can better abide by the rule of law. The true nature of the court's role in judicial review

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65 *Ibid* at 480. A very recent example is the application of the principle in *Carltona Ltd v Commissioners of Works* [1943] 2 All ER 560 (EWCA) [*Carltona*] in *Asia Development Pte Ltd v Attorney-General* [2020] 1 SLR 866 (CA). The *Carltona* principle provides that a power in a statute which is required to be exercised by a minister may, in appropriate situations, be exercised on behalf of the Minister by a duly authorised official in the relevant Ministry. The principle is a sensible and pragmatic one. It makes the business of government practicable.

66 *Ibid*.

67 *Ibid*.

68 *Ibid* at para 6. Further, at para 29, Chan adds, "In other words, seek good government through the political process and public avenues rather than redress bad government through the courts".

in Singapore was considered in *Jeyaretnam Kenneth Andrew v Attorney-General*.[69] In this case, the Court of Appeal made the first judicial cognizance of the "red-light" and "green-light" approaches in public law.[70] In the red-light approach, courts are "locked in an adversarial or combative relationship with the Executive and functioning as a check on administrative power".[71] In contrast, the green-light approach conceives of the courts' adjudicatory role in public law as one where "public administration is not principally about stopping bad administrative practices but encouraging good ones".[72]

However, this binary categorisation of the curial role in judicial review risks being misleading. A court, in executing its constitutional function, is not going to act differently from any other court where the administrative action complained of is unlawful or unconstitutional or when a legislative provision is unconstitutional. The argument here is that judicial review is an integral part of the rule of law in Singapore, but how it is utilised and to what ends is more nuanced than the routine characterisation of judicial review of checking the power of the executive.

In tandem with a citizenry more assertive of their rights and interests, judicial review of administrative action in Singapore has the makings of a "growth industry". There are at more than 60 statutory boards in Singapore covering a gamut of areas in every aspect of life ranging from public housing (HDB), public libraries (NLB), retirement funds (CPF), civil aviation (CAAS), institutions of higher learning (the polytechnics and the Institute of Technical Education), the administration of Muslim law (MUIS), casino and other gaming operations (CRA), national examinations (SEAB), sports (SportSG), traditional Chinese medicine (TCM Board), taxation (IRAS) and more.

At his first opening of the Legal Year in January 2015, then Attorney-General VK Rajah noted the cultural change in recent years of "the increase in civil litigation between the public and the state in administrative and constitutional law issues". He attributed the development, in part, to "the rise of an educated class with more awareness of their civil and constitutional rights". The Attorney-General added that this was "not a negative development as judicial review is the hallmark of the judicial enforcement of the rule of law, in relations between the state and its people".[73]

B. *Developing Public Law Within a Coherent Analytical Framework*

It was against this backdrop that Parliament passed the *Attorney-General (Additional Functions) Bill* in August 2014. In essence, this law enables selected statutory boards to avail themselves of the Attorney-General's advice and representation in judicial review actions brought against them. Previously, all statutory boards had to rely on their in-house legal departments, or seek legal professional legal advice from law

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69 [2014] 1 SLR 345 (CA) [*Jeyaretnam Kenneth Andrew*].

70 This traffic lights metaphor is taken from Carol Harlow & Richard Rawlings, *Law and Administration*, 3^{d} ed (Cambridge: Cambridge University Press, 2009) at 22-48. In *Jeyaretnam Kenneth Andrew, supra* note 69, the Court of Appeal did not appear to differentiate between judicial review in administrative law and constitutional law.

71 Chan, *supra* note 11 at para 29.

72 *Jeyaretnam Kenneth Andrew, supra* note 69 at paras 48, 49.

73 Speech by VK Rajah, then Attorney-General (5 January 2015) at the opening of the legal year 2015.

firms, especially for contentious matters. The Attorney-General already provides his views to the various Ministries in cases which involve public law issues that could have implications across the public sector or on the development of the law. The significant growth in judicial review actions against the Government had prompted this legislation. It also signals the Government's appreciation of the imperative to ensure that Singapore's administrative law jurisprudence is coherently developed and properly contextualized to local needs and circumstances. Thus far, pre-1977 English administrative law has heavily influenced our administrative law jurisprudence.[74]

At the Second Reading of the Bill in August 2014, then Senior Minister of State ("SMS") for Law Indranee Rajah noted that:

> [I]f the AG is conferred the power to represent statutory boards in legal proceedings under appropriate circumstances, this will: a) first, ensure that the conduct of litigation is aligned across the Government and statutory boards; and b) second, foster the development of public law principles within a coherent analytical framework.[75]

Initially, two statutory boards were brought under the *Attorney-General (Additional Functions) Act*: the MAS and the SLA. This came as no surprise. MAS is Singapore's *de facto* central bank and plays a vital role in Singapore's financial hub ambitions, including regulating financial institutions. Likewise, the SLA manages land-scarce Singapore's land bank enabling optimal land usage for Singapore's various needs.

SMS Indranee Rajah stated that the main criterion to bring a statutory board under the said Act was the statutory public functions that the statutory board performed. She said that the law "will eventually cover statutory boards which perform core or sensitive functions". In 2015, for example, the Public Utilities Board ("PUB") and, oddly enough, the National Parks Board ("NParks") were brought under the law.[76] In May 2017, a few months before the presidential election, the Presidential

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[74] Major reforms in 1977 paved the way for a revised procedure in UK's Order 53 of the *Rules of the Supreme Court* ("*RSC*"). The procedural mechanisms put in place in 1977, and revised in 1980, have had to be applied in the context of wide ranging changes in the scope of judicial review, both in terms of the substantive grounds for review and the numbers of applications for judicial review brought before the courts. See also *Vellama d/o Marie Muthu v Attorney-General* [2012] 4 SLR 698 (HC) at paras 28, 40. Notwithstanding the imminent departure of the UK from the EU, EU law has had a profound impact on the development of the law on judicial review. The UK Supreme Court has recently emphasised the continuing role and importance of common law principles and approaches even in situations where European law also applies: see eg *Osborn v Parole Board* [2014] AC 1115 at para 57 (UKSC) (Lord Reed) and *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591 at paras 97, 98 (Lord Mance) and para 110 (Lord Sumption).

[75] See *Parliamentary Debates Singapore: Official Report,* vol 92, no col no assigned (5 August 2014); available online at < https://sprs.parl.gov.sg/search/sprs3topic?reportid=bill-104>.

[76] NParks is tasked with planning, developing and managing our parks and greenery in Singapore. While it plays a key role in developing our "city in a garden", its inclusion as a scheduled statutory board is counter-intuitive. Most would not regard NParks as performing core or sensitive functions. It may well be that potential legal challenges against NParks over the use of Hong Lim Park had resulted in NParks' inclusion under the said law. See NParks' website for media statements on "Return Our CPF" protest event on 27 September 2014, online: NParks <https://www.nparks.gov.sg/news/2014/10/media-statements-on-hong-lim-park>.

Elections Committee was added.[77] In December 2018, the Accounting and Corporate Regulatory Authority ("ACRA") was added to the Schedule. Currently, there are 24 statutory bodies in the Schedule, with a good representation of public bodies that are associated with the economic and commercial sectors.[78] In a judicial review application involving a statutory board that is not listed in the Schedule to the Act, the AG may still intervene in the public interest, but in doing so, the AG does not represent the defendant statutory board or protect the interests of the statutory board.[79]

Why is there the need for such a legislation? Private-sector lawyers acting for the statutory boards operate under quite a different set of incentives and performance indicators from the Attorney-General's Chambers. While there may not be a "win at all costs" mindset, lawyers from the Bar may lack an intimate appreciation and nuanced understanding of the public interest and what it entails. This is not surprising since they are not schooled in the Public Service and may not adequately appreciate how judicial review cases they are handling can have an impact beyond the cases themselves. Second, with each statutory board defending itself, there is the risk of it not being mindful of the larger picture. A whole-of-Government approach and perspective to judicial review and the development of administrative law jurisprudence may be lacking.

Broadly speaking, administrative law principles do not just specifically apply to a Ministry or a statutory board; they potentially apply to all bodies (even private ones) exercising public functions. A concession on an administrative law principle might not appear to be too onerous for a statutory board in a particular case but it may be an entirely different proposition altogether to another or the public sector at large. There may be a perverse situation in which one statutory board may unwittingly concede a legal point that could have far-reaching implications for the public sector as a whole.

Third, as Singapore develops its administrative law jurisprudence, they must be developed in a robust and coherent manner, and in sync with her system of governance and constitutional order and ethos. In serving the public, regulatory frameworks and regimes should adhere to certain core public law principles such as multiracialism, meritocracy, and the balancing of individual rights vis-à-vis communitarian interests and values. With the apex Court of Appeal according curial recognition to the green-light approach in judicial review and the Attorney-General's Chambers paying greater attention to judicial review, the stage is set for the judicial review to take on greater prominence in Singapore's overall governance framework.

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77 *Attorney-General (Additional Functions) Act (Amendment of Schedule) Order 2017*, made on 25 May 2017.

78 The full list as of August 2020: Building and Construction Authority ("BCA"), Casino Regulatory Authority of Singapore ("CRA"), Central Provident Fund Board ("CPF"), Civil Aviation Authority of Singapore ("CAAS"), Energy Market Authority of Singapore ("EMA"), Health Sciences Authority ("HSA"), Housing and Development Board ("HDB"), Info-communications Media Development Authority ("IMDA"), Inland Revenue Authority of Singapore ("IRAS"), Intellectual Property Office of Singapore ("IPOS"), Land Transport Authority of Singapore ("LTA"), Maritime and Port Authority of Singapore ("MPA"), MAS, National Environment Agency ("NEA"), National Heritage Board ("NHB"), NParks, Presidential Elections Committee ("PEC"), Public Transport Council ("PTC"), Public Utilities Board ("PUB"), SLA, SkillsFuture Singapore Agency ("SSG"), Urban Redevelopment Authority ("URA"), Singapore Food Agency ("SFA"), Accounting and Corporate Regulatory Authority ("ACRA").

79 See *Parliamentary Debates Singapore: Official Report,* vol 92, no col no assigned (5 August 2014); available online at <https://sprs.parl.gov.sg/search/sprs3topic?reportid=bill-104>.

IV. The Future of Regulatory Action in the Commercial Realm[80]

In judicial review, the steadfast focus of the courts in each case is on the true nature of the question raised for adjudication, requiring varying intensities of review, rather than a uniform intensity. The appropriate level of deference to interpretations of the law by the primary decision-makers takes into account not only the statutory framework but to discern the need for more interpretive autonomy for the executive, especially where the legislation possesses a significant technical profile. In the commercial realm, a polycentric decision[81]—such as those involving allocation of finite resources among competing claims or needs,[82] regulation and pricing of land use,[83] coordination of government policy across several agencies[84]—engages the executive's institutional competence on matters of public policy and the public interest while interrogating the proper degree of curial deference. In such instances, the courts will likely carve a greater reliance on jurisprudential principles, rather than general rules, delegated law-making, or ad hoc legal commands, in the quest for appropriate supervisory oversight of legality.

In public law, context matters in courts' calibration of the appropriate intensity of review of an impugned decision. In practice, the application of the traditional grounds of judicial review varies substantially depending on the subject matter, the rights and interests at stake, and the public function under review. In theory, in matters where the court has little expertise and the legislature has tasked decision-making to a particular entity, a low level of curial scrutiny might apply. Consider, for instance, a commercial entity challenging the decision of a specialist regulatory or licensing body. Courts will often give a wide berth to regulators with specialist knowledge and expertise acting within the powers conferred by statute, including the weight to be put on relevant factors. In other words, between the legislature and the judiciary, executive agencies are being interposed in complex regulation. This brings to bear the scope of discretionary power, the supervisory role of the courts, the rationality of administrative law, and the power (and limitations) of judicial review.

Furthermore, when we consider the future of commercial regulation, which will involve technical matters of growing complexity, commercial judicial review may be impacted more than non-commercial judicial review. Where decision-makers have to juggle and balance competing and perhaps even conflicting pressures, legal and non-legal, courts invariably accord a margin of appreciation to the decision-makers,

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80 This Part builds on my earlier discussion in Eugene KB Tan, "Curial Deference in Singapore Public Law: Autochthonous Evolution to Buttress Good Governance and the Rule of Law" (2017) 29 Sing Acad LJ 800.

81 Lord Diplock described polycentric decisions as those that require "competing policy considerations" involving "a balancing exercise" that judges are not equipped to perform: see *Council of Civil Service Unions*, *supra* note 9 at 411. Such decisions often involve stakeholders who may not be represented in the judicial review proceedings.

82 See *eg Lines International*, *supra* note 43. One conception of resource allocation is the managerial privilege and responsibility to make normative judgment calls on how the risks, benefits, trade-offs, and harms should be distributed. This also speaks to the socio-political and moral significance of resource allocation.

83 See *eg Chiu Teng @ Kallang*, *supra* note 50 and *Teng Fuh Holdings* (HC), *supra* note 48, affirmed in *Teng Fuh Holdings* (CA), *supra* note 48.

84 *City Developments, supra* note 46; *Komoco Motors*, *supra* note 41.

particularly the latitude to decide how to balance the various demands. Decisions, for example, on public procurement and public choice allocations are polycentric in nature.[85] In other words, regulation is a high-stakes enterprise accompanied by much public pressure for "regulatory excellence". Commercial regulators are expected to protect the public from harms associated with economic activity and technological change without compromising economic growth or efficiency.

In the commercial judicial review cases discussed above, the courts gave little weight to commercial and economic factors, which were often the primary concern of the applicants and motivated them to challenge the decisions of the public authorities. Taken together, the cases outlined in this article indicate that in determining what was fair in those contexts, there was no need for the courts to consider the wider public interests balanced against the rights and interests of the applicant. In essence, from the perspective of commercial litigants, the courts may appear to have exerted a lower degree of scrutiny in commercial judicial review cases. But it is likely that the applicants' cases were weak to begin with, and that significant weight will be accorded to relevant economic and financial considerations in the right case.

A. *Whither Executive Interpretations of the Law*

As the administrative state encounters regulatory frameworks that are growing in complexity, it is conceivable that the legislature will entrust interpretations of law to administrative decision-makers. Consider the technical complexities of regulating cryptocurrencies, artificial intelligence, blockchain technology and the like where governments have resorted to "regulatory sandboxes" to help them develop regulatory frameworks for fast-evolving, disruptive technologies and business models that have the potential to reshape economies and industries. Such experimentation in a controlled environment with novel regulatory/policy tools to mitigate uncertainty allows the regulator to assess the impact of the new technology/solution before deciding on the appropriate regulatory adjustments. This enables the putative technology regime to be dynamic and responsive, and can promote innovation for both the regulator and the regulated.

Hence, the capacity of the courts to adjudicate on whether the requirements of "just administrative action" have been met in any case may not be all that abundantly clear. This applies whether one looks at it in terms of institutional competence or democratic legitimacy. Attorney-General VK Rajah (as he then was) had flagged the issue of the standard of review that should be applied to interpretations of law as Singapore's judicial review landscape develops.[86] Should there be a bifurcated approach towards administrative decision-makers' interpretations of law that is recognised in Canada and the United States? A bifurcated approach refers to the correctness standard and the reasonableness standard. The current English and Singaporean approach, in reviewing interpretations of law, is that there can only be one correct interpretation

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[85] See Diane Coyle, *Markets, State, and People: Economics for Public Policy* (Princeton, NJ: Princeton University Press, 2020) for an examination of the interplay between individual and collective choices in the allocation of resources in society for economically-efficient outcomes while comporting with society's sense of fairness and equity.

[86] Rajah, *supra* note 28.

(the correctness standard).[87] Judges are constitutionally responsible for ensuring that any exercise of state power is carried out within legal limits.[88]

On the other hand, under the reasonableness standard, a reviewing court enquires into "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".[89] This is pertinent especially where the question of law at issue relates to the interpretation of the administrative decision-maker's home statute or a statute closely connected to its function. In addition, the reasonableness standard applies where the question of law also raises issues of fact, discretion or policy, or involves inextricably intertwined legal and factual issues.[90] This may reduce the role of review of legality in such a scenario. Yet, leaving legal interpretation to an administrative official seems to go against our longstanding understanding of the law-policy distinction as well as the court's ability to determine the extent of a decision maker's jurisdiction as conferred by legislation.

This position could be supported on the grounds of institutional competence and democratic legitimacy, the usual basis for curial deference.[91] In the former, an administrative decision-maker "could be more familiar with the purposes of its constitutive statute and its underlying policies and principles than a reviewing court. It may also possess special expertise that makes it well suited to interpret legislative provisions that turn on technical or economic considerations. If so, Parliament could have

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87 *Pearlman v Keepers of Harrow School* [1979] QB 56 (CA) at 70 per Lord Denning. But the UK position is also evolving in light of the tribunal system put in place by the *Tribunals, Courts and Enforcement Act 2007* (UK), c 15, creating a two-tier system of administrative adjudication comprising specialised tribunals and the courts. The UK Supreme Court in *R (Cart) v Upper Tribunal* [2011] 1 AC 663 held that even though some tribunal decisions can be judicially reviewed, the courts would only do so where some important point of principle or practice is involved, or that there was some other compelling reason for the court to undertake judicial review. See also Paul Daly, "Deference on Questions of Law" (2011) 74 MLR 694: Daly argues that the general presumption that the resolution of questions of law is a matter for the courts should be jettisoned especially where the legislature had intended to delegate the resolution of many questions of law to administrators and where courts lack institutional competence to resolve those questions of law.

88 See the insightful analysis in Swati Jhaveri, "Revisiting Taxonomies and Truisms in Administrative Law in Singapore" [2019] SJLS 351 where she discusses the continued utility of the truism that courts should only review the legality and not the merits of executive decision-making. It also argues for an approach organised around varying the nature and intensity of review to delineate the scope and boundaries of judicial review.

89 *Dunsmuir v New Brunswick* [2008] 1 SCR 190 (SCC) at para 47. But see *Canada (Minister of Citizenship and Immigration) v Vavilov* 2019 SCC 65 [*Vavilov*].

90 *Smith v Alliance Pipeline* [2011] 1 SCR 160 (SCC) at para 26. A similar approach is found in the influential United States Supreme Court decision of *Chevron USA, Inc v National Resources Defense Council* (1984) 467 US 837 (USSC) [*Chevron*]. Rajah AG summarised the *Chevron* approach as such:

> At the first stage, the court considers whether Congress has addressed the interpretive problem at issue. If so, the court will apply a correctness standard to implement Congress's intent. If not, the court will proceed to the second stage to determine whether the administrative decision-maker's interpretation is reasonable. If it is, the court must defer to that interpretation.

91 Institutional competence revolves around questions of which branch (judiciary or executive) is better placed due to set boundaries on a particular area of decision-making, due to their relative expertise and experience. Democratic legitimacy is concerned with the assigned role and function within the constitutional framework of powers.

intended for the administrative decision-maker to interpret the legislation".[92] This is particularly the case where the executive agency has superior fact-finding resources and abilities, functional expertise, and coordinative competency with regard to the legal issue in question. To be clear, this justification is grounded more on pragmatic considerations rather than possessing constitutional force.

With regard to democratic legitimacy, the process of statutory interpretation may often require a selection from reasonable alternatives by reference to policy considerations and/or the use of political judgment. Courts will not only have to consider the content of the applicable law but also the question of determining who has the authority to determine that content. Given that legislatures often enact laws with open-textured language, it is arguable that the judiciary should defer to *de novo* administrative interpretation and discretion because the courts are less accountable to the electorate and ill-suited to resolve polycentric issues.

In this connection, Rajah AG highlighted a significant disadvantage of using a blanket standard of review was that the distinctions between questions of law, fact, inferences of fact, and application may not be so clear. Furthermore, when a court characterises an issue as a question of law (which requires the application of the correctness standard of review), "any further analysis as to the extent of the power delegated by Parliament to an administrative decision-maker, as well as considerations of institutional competence and democratic legitimacy, are stymied".[93] Recognising more than one standard of review would require judges to consider the balance between rule of law requirements, institutional competence and democratic legitimacy in deciding whether to defer to an administrative interpretation and "to articulate why they have chosen to apply one standard instead of another".[94]

A movement from a "culture of authority" to a "culture of justification" is better aligned with interpretative autonomy for the executive.[95] This is crucial especially when the court is assessing whether a given interpretation of a statute by the executive was reasonable. More specifically, it accords with the rule of law and the legality principle. Nonetheless, a cornerstone of judicial review remains relevant—that the body exercising a public function must act in the public interest rather than for private purpose or profit. In other words, can it be said that in allowing or deferring to reasonable administrative interpretations to stand, judges are giving effect to the constitutional separation of powers and Parliament's intent as manifested in the statutory scheme of the legislation in question? If so, this may include the executive agency being empowered to resolve any ambiguity in the statute. On the other hand, a more enlightened approach could be the reviewing court according due weight and attention to the executive's interpretation of a statute on account of the latter's expertise, experience, and specialist domain knowledge. This will enrich and enlighten the interpretive process.

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92 Rajah, *supra* note 28 at para 41 [footnotes omitted]. See also Jeffrey Jowell, "What Decisions Should Judges Not Take?" in Mads Andenas & Duncan Fairgrieve, eds, *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Oxford: Oxford University Press, 2009).

93 Rajah, *supra* note 28 at para 44.

94 *Ibid*.

95 See also David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in Michael Taggart, ed, *The Province of Administrative Law* (Oxford: Hart, 1997).

The role of the courts then vis-à-vis a question of law is whether the executive has acted *intra vires* and whether its resolution of the legal ambiguity is reasonable. Considering the growing administrative state, characterised by flexible, reflexive executive rulemaking having to adapt to rapidly changing circumstances being increasingly the rule rather than the exception, our conception and understanding of judicial deference must take into account the reality of broad delegation of discretionary power to the executive. That there is one "correct" meaning of a statute in fulfilling its statutory purpose may increasingly become untenable in law and in policy.

Looking at how technical and esoteric subsidiary legislation can be, often involving the allocation of finite resources, and the polycentric considerations that administrative decision-makers in the commercial realm need to take into account, judicial rule-making and deference will have to evolve innovatively (and this is where foreign approaches can be fruitfully considered). Furthermore, in an age of technological disruption, we can expect public service agencies to embrace, in frequency and in scale, intelligent and self-learning technologies, advanced analytics, and predictive modelling to aid them in policy making and in the decision-making process.[96] How they will impact on the courts' and executive's institutional competence is something that has to be given careful thought, not least by legislators and judges themselves.

B. *Regulating the Executive's Interpretative Autonomy*

To be clear, any move towards interpretive autonomy in the realm of executive decision-making and its implementation, however, cannot result in their being insulated from judicial review. As Rajah AG had observed: "judicial deference to administrative interpretation should not be equated to judicial abstention. Even when deference is warranted, the court still plays a significant role because the question of law is simply recast as an inquiry into whether the administrative decision-maker's interpretation is reasonable".[97] Curial deference will continue to play a key part in the court's review of a specialised statutory scheme (including its functions and legislative clarity) and the criterion for the divide between substitution of judgment and reasonableness review. Any claims of specialised knowledge or expertise by the executive must be rigorously tested. Moreover, any argument for curial deference in such instances cannot be based on a rigid application of categorical considerations such as institutional capacities, authoritative procedures or legislative mandates. Otherwise, that might only encourage arbitrary and capricious use of executive power. This persistent relevance of curial deference, as a result of the complexity of regulation, is in and of itself a salutary reminder of its importance as an organising jurisprudential principle.

Arguably, insights of such an approach giving the executive regulated interpretative autonomy were evident in *SGB Starkstrom Pte Ltd v Commissioner for Labour*.[98]

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[96] See also Yee-Fui Ng *et al*, "Revitalising Public Law in a Technological Era: Rights, Transparency and Administrative Justice" (2020) 43(3) UNSW LJ 1041, online: UNSW LJ <http://www.unswlawjournal.unsw.edu.au/wp-content/uploads/2020/09/11-NG-ET-AL.pdf>.

[97] Rajah, *supra* note 28 at para 40.

[98] *SGB Starkstrom*, *supra* note 4.

This was a case which raised, *inter alia*, judicial review of administrative action premised on the frustration of a substantive legitimate expectation. The Court of Appeal was aware that should it enforce an individual's legitimate expectation, that could amount to overruling the executive on the merits of the case. What was significant was the Court of Appeal creatively recognising that it need not approach the issue in a binary fashion of either recognising substantive legitimate expectation or not recognising the doctrine.[99] Instead, as the court observed, there could be "intermediate points" such as requiring the authority to confirm that it had considered the relevant expectation, requiring the decision-maker to disclose its reasons for overriding that expectation, and subjecting those reasons to the traditional grounds of judicial review.

This approach of granting optimal autonomy to the executive but yet ensuring that the executive power and discretion are properly engaged and constrained may well be the future as public authorities make more complex decisions in a rapidly evolving commercial sector.[100] This putative development of administrative law in new directions amid increasing complexity and scale of the modern regulatory state bears a close watch. How soon such a legal development would arise in Singapore is any one's guess. When it does, the focus of judicial inquiry would be on the interpretive weight to put on an executive agency's conclusion on an issue of law and what test of review would be applied in such an instance. Such a development is one the courts will encounter in the fullness of time, and the need for an even more sophisticated and nuanced approach to judicial review and a rich corpus of administrative law will come to the fore. The rule of law will require that.

V. Conclusion

Commercial judicial review, in the main, functions no differently from other judicial review applications. At one level, this points to the same analytical framework applying to Singapore's administrative law jurisprudence. At another level, that commercial judicial review cannot be singled out for being *sui generis* does beg the question of whether a one-size-fits-all approach will work well for different spheres of human endeavours. As this article has attempted to show, commercial judicial review in Singapore draws from the well-spring of administrative law jurisprudence while also organically enriching it. Instead of commercial judicial review being a subset of judicial review in general, might its future development result in it being approached and analysed differently to better account for the specific concerns and considerations of the commercial realm given the rapid and complex changes? Whether there will be the emergence of distinct principles of law on commercial judicial review remains to be seen.

Further, the increased regulation of industry, trade and commerce has led to increased interactions among business, government, and society at the interface of law, regulation, and policy. Not surprisingly, there are more legal challenges

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[99] Whether substantive legitimate expectation should be recognised as a distinct ground of review need not detain us here. See also discussion above in Part II *supra*.

[100] But as the Canadian Supreme Court alluded to in *Vavilov*, *supra* note 89, courts in appropriate cases should not presume that specialist administrators know what they are doing when interpreting statutes even as they acknowledge those who do.

brought by commercial entities challenging legislation itself and also the decisions of public authorities, regulatory authorities and other bodies exercising a public function. Commercial judicial review will grow in importance as a potential remedy for business entities to protect their interests against unfair or unlawful government or regulatory actions. It remains to be seen whether in the Singapore context, the courts will interfere to protect mere economic interests.

To ensure that the court's supervisory jurisdiction over legality in the commercial realm remains relevant, the commercial judicial review cases in Singapore point to the judiciary's careful attempt to balance first-order, content-rich rules of administrative justice while also developing jurisprudential principles on just administrative action at a higher level of generality.

As the engine of rule of law, judicial review enables individuals and corporate entities to challenge and to restrain constitutional infringements and unlawful actions by the government. This includes laws promulgated by Parliament, from routine administrative actions such as the issuance of licences and permits in which the decision-making process is challenged for unlawfulness, to major policies that can infringe a person's fundamental liberties guaranteed by the constitution or affect market sentiments and expectations.

In Singapore, judicial review in commercial cases is a growth area, quantitatively and qualitatively. While there are benefits and pitfalls in using judicial review as an alternative to pursuing an action in private law, most crucially, it can provide assurance that public authorities act lawfully when exercising their statutory discretion in their domain areas. At the same time, applicants using judicial review should endeavour to manifest the administrative law values in their legal challenge and not play fast and loose with judicial review for a commercial advantage. Much as judicial review undergirds a system of accountability in government decision-making, administrative law values, such as lawfulness, fairness, rationality, due process, fair hearing, are equally important for the private sector as they are for the public sector. As with the public sector, such values have a role to play in the commercial realm and can improve decision-making and regulation, including spurring good corporate governance.

Commercial entities seeking judicial review must be motivated by the very same values and principles that they claim the public authority should adhere to. Too often, judicial review was attempted despite it being unsuitable to resolve some issues as this article has shown. Even as judicial review is the "sharp edge that keeps government action within the form and substance of the law,"[101] it is robust enough to ensure that parties seeking judicial review maintain the integrity of the check and balance mechanism. In the final analysis, judicial review and a robust rule of law in the commercial realm is a boon. This state of affairs is conducive for Singapore's determined aspirations to be a business hub, and more importantly, for the advancement of the rule of law in Singapore.

[101] Menon, *supra* note 54 at para 30.