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OF VARIABLE STANDARDS OF SCRUTINY AND LEGITIMATE LEGAL EXPECTATIONS: ARTICLE 12(1) AND THE JUDICIAL REVIEW OF EXECUTIVE ACTION

Thio Li-Ann*

The Court of Appeal in *Syed Suhail v AG* (2020) recently clarified in 2020 that the 'intentional and arbitrary discrimination test' was an example of how article 12(1), the equality guarantee, could be breached in relation to executive action, but was not itself the threshold test for breach, as it was considered not to accord sufficient protection where fundamental liberties are concerned. A two-limb approach was articulated, to assess the permissibility of differential treatment which first asked whether A and B were similarly situated and if so, whether legitimate reasons exist to justify this. It was underscored that the constitutional test in this respect not be conflated with ordinary administrative law grounds of challenge, such as relevancy or rationality review. This article focuses on two key questions: firstly, whether a distinctively constitutionally based ground for challenging executive action which contravenes article 12(1) has been developed and if not, whether traditional judicial review principles, understood as importing variable degrees of scrutiny depending on the nature of the power and gravity of interest implicated, may provide the degree of 'searching scrutiny' required for fundamental rights cases. Secondly, it explores the idea of 'legitimate legal expectations' generated by article 12(1), introduced by the court, as distinct from substantive legitimate expectations. It draws on developments in English public law, such as the principle of consistency and 'most anxious scrutiny' where rights are concerned, and reflects on how these ideas might add to the normative storehouse of public law governance in Singapore.

I. Introduction

There has been some uncertainty as to the applicable test, in relation to the judicial review of executive action under Article 12(1) of the *Constitution of the Republic of Singapore*.[1] This provides that "All persons are equal before the law and entitled to the equal protection of the law".

* Provost Chair Professor, Faculty of Law, National University of Singapore.

[1] 1999 Rev Ed Sing [*Constitution*].

The established test with respect to challenges to the constitutionality of legislation under Article 12(1) is the reasonable classification test, which has in some cases been applied to executive action.[2] This requires that legislative classification be based on an intelligible differentia which is "not purely arbitrary but bears a reasonable relation to the social object of the law".[3] This functions as a "threshold legal test", incorporating a limited degree of legitimacy which would invalidate a statute which was "so legally illogical and/or incoherent that it would… be repugnant to any idea of legal equality…"[4] This deferential standard of review is informed by co-equality and the separation of powers principle,[5] precluding courts from functioning as "mini-legislatures"[6] by infusing the normative but 'empty' ideal of equality[7] with subjective value preferences to evaluate the legitimacy of legislation.

However, the test more frequently associated with Article 12(1) challenges against executive action is the "deliberate and arbitrary discrimination"[8] or "intentional and arbitrary discrimination"[9] test. There have been judicial and academic concerns that this test fails to sufficiently protect Article 12(1) interests, given the greater difficulty of meeting this test, compared to demonstrating the unreasonableness of a legislative classification.[10] Karthigesu JA in *Taw Cheng Kong v PP* observed that the test of arbitrariness, importing the lack of any rationality, "pitch[ed] the threshold too low",[11] as such "minimal scrutiny" did not accord constitutional liberties full effect through a generous interpretation.[12] Further, it was "unclear" whether "intentional and arbitrary discrimination" was "*a* test, rather than *the* only test"[13] for Article 12 cases.

In a successful application for leave for judicial review in the 2020 decision of *Syed Suhail bin Syed Zin v AG,*[14] the Court of Appeal clarified that the '"intentional and arbitrary discrimination test" was an example of how Article 12(1)

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2 *Mohamed Emran bin Mohamed Ali v PP* [2008] 4 SLR (R) 411 at paras 26, 30 (HC). The High Court found an intelligible differentia between entrapped drug traffickers and undercover state agents. Only the former was prosecuted, there being a "perfectly rational nexus" between the entrapment operations and containing the drug trade.

3 *Ong Ah Chuan v PP* [1979–1980] SLR(R) 710 at para 37 (PC) (*per* Lord Diplock) [*Ong Ah Chuan*], cited by the Court of Appeal in *PP v Taw Cheng Kong* [1998] 2 SLR(R) 489 at para 54 [*Taw (CA)*] and *Lim Meng Suang v AG* [2015] 1 SLR 26 at para 57 [*LMS (CA)*]; see Thio Su Mien, "Equal Protection and Rational Classification" [1963] PL 412, cited in *Lim Meng Suang v AG* [2013] 3 SLR 118 at para 40 (HC) [*LMS (HC)*].

4 *LMS (CA), supra* note 3 at para 62. See Jaclyn L Neo, "Equal Protection and the Reasonable Classification Test in Singapore: After Lim Meng Suang v AG" [2016] Sing JLS 95.

5 *Tan Seet Eng v AG* [2016] 1 SLR 779 at para 90 [*Tan Seet Eng*].

6 *LMS (CA), supra* note 3 at paras 70, 77, 82 and 84.

7 Peter Westen, "The Empty Idea of Equality" (1982) 95:3 Harv L Rev 537, cited at *LMS (CA), supra* note 3 at para 61.

8 *Howe Yoon Chong v Chief Assessor of Singapore* [1979–1980] SLR (R) 594 at para 13 (PC) [Howe Yoon Chong (1979–1980)].

9 *Howe Yoon Chong v Chief Assessor* [1990] 1 SLR (R) 78 at para 29 (PC) [*Howe Yoon Chong (1990)*]. This test was referenced in *Eng Foong Ho v AG* [2009] 2 SLR (R) 542 at para 30 (HC) [Eng Foong Ho].

10 *LMS (CA), supra* note 3 at paras 82–86.

11 *Taw Cheng Kong v PP* [1998] 1 SLR (R) 78 at para 67(HC).

12 *Ong Ah Chuan, supra* note 3 at para 23 (*per* Lord Diplock).

13 Thio Li-ann, A Treatise on Singapore Constitutional Law (Singapore: Academy Publishing, 2012) at 13–117 [emphasis in original].

14 [2021] 1 SLR 809 [*Syed Suhail (Leave)*].

could be breached, but was not itself the threshold test for breach. Consolidating approaches in prior cases, a two-limbs approach was articulated to assess the permissibility of differential treatment. This involved first asking whether A and B were equally situated and if so, ascertaining whether legitimate reasons for differential treatment existed. To some extent, as Chng observes, this 2020 formulation brought into "closer alignment" what Article 12(1) requires, regarding both legislation and executive action.[15] This two-step test was subsequently applied by the High Court in *Syed Suhail bin Syed Zin v AG,*[16] noting that the general principle that "like should be compared with alike" applied to both legislation and executive action, that the "proper test" would "turn on the specific application" of the general principle.[17]

Insofar as the 2020 formulation supports an enhanced level of review, that the "court had to be searching in its scrutiny"[18] where fundamental rights are concerned, this is welcomed. While rejecting a tiered scrutiny approach, it builds on judicial solicitude to apply 'careful scrutiny' where executive action affects constitutional rights. This recognises the importance of constitutional rights as part of the supreme law, as distinct from the less intense judicial scrutiny accorded administrative law cases not involving constitutional norms,[19] while situating this against the process of balancing rights against competing public law interests.

This reflects the contemporary judicial disposition to take the constitution seriously in shaping the landscape of public law governance, evident in recent judicial pronouncements clarifying what the 'presumption of constitutionality' entails[20] and efforts to delineate a more structured form of judicial inquiry, without acceding to the normative liberal agenda and methodology of proportionality review.[21]

The Court of Appeal in *Syed Suhail (Leave)* stressed the importance of distinguishing between administrative and constitutional law grounds in challenging executive action which treats individuals arbitrarily. Ordinary *administrative* law

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15 Kenny Chng, "A Reconsideration of Equal Protection and Executive Action in Singapore" [2021] OUCLJ 1 at 6.

16 [2021] SGHC 31 [*Syed Suhail (2021)*]. The court rejected the respondent's argument that the test to apply was the "deliberate and arbitrary discrimination" test at para 29. On appeal, the case was dismissed: Selina Lum, "Apex court dismisses drug trafficker's challenge against scheduling of his execution" *The Straits Times* (10 Aug 2021), online: The Straits Times <https://www.straitstimes.com/singapore/courts-crime/apex-court-dismisses-inmates-challenge-against-scheduling-of-executions>.

17 *Syed Suhail (2021)*, *ibid* at para 32.

18 *Syed Suhail (Leave), supra* note 14 at para 63.

19 A parallel common law development is evident in the flexible application of greater judicial scrutiny for fundamental rights cases: *Kennedy v Charity Commission* [2014] 2 WLR 808 at paras 51–55 (UKSC) [*Kennedy*].

20 *Saravanan Chandaram v PP* [2020] 2 SLR 95 at para 154 (CA) [*Saravanan*]; *Jolovan Wham v PP* [2020] SGCA 111 at paras 26–28 [*Jolovan Wham*]. This understanding of the presumption of constitutionality relates to both legislation and executive acts.

21 Proportionality review requires the adoption of the least restrictive method in constraining fundamental rights. A structured '3-step' approach was devised in *Jolovan Wham*, *ibid* at paras 29–33 to address whether a law impermissibly derogated from a constitutional right. The Singapore High Court rejected proportionality review, as being over-intrusive: *Chee Siok Chin v MHA* [2006] 1 SLR (R) 582 at para 87 [*Chee Siok Chin*]. See Marcus Teo, "A Case for Proportionality Review in Singaporean Constitutional Adjudication" [2021] Sing JLS 174.

grounds, such as relevancy or rationality review,[22] should not be conflated with the grounds for challenging action which is "impermissibly discriminatory in nature",[23] falling within the Article 12(1) *constitutional* guarantee. Otherwise, Article 12(1) would be rendered "nugatory" in relation to executive action, if it was only vulnerable to ordinary administrative review grounds like irrationality, which a "deliberate and arbitrary" test would appear to attract. In rejecting the conception of "rationality" associated with the "deliberate and arbitrary" test, the Court of Appeal presumably favoured a more flexible test of reasonableness in ascertaining whether differential treatment is "reasonable".[24]

This article focuses on two key questions relating to Article 12(1) jurisprudence and executive action in the implementation of policies. First, has a distinctive constitutionally based ground for challenging executive action which contravenes Article 12(1) been developed? If not, can the traditional judicial review principles be mustered to afford sufficiently robust review where constitutional rights are concerned, bearing in mind the variability of scrutiny that attends developing common law standards of rationality and proportionality review?[25] Second, the Court of Appeal introduced the apparently novel conception of constitutionally derived "**legitimate legal expectations**" ("LLE"). This was distinguished from the administrative law principle of substantive legitimate expectations ("SLE"). This idea, together with cognate normative concepts, warrants exploration.

Part II examines the developing judicial approaches towards challenges to executive action implicating Article 12(1). Close attention is paid to the context-dependent 2020 formulation in *Syed Suhail (Leave)*, which eschews the rigidity of tiered scrutiny approaches[26] and the associated criticism of a judicially constructed interests hierarchy based on preferred values. It examines how the burden of proof in Article 12(1) challenges is discharged. It considers how the two-step test was applied in *Syed Suhail (2021),* where the relevant persons were found not to be equally situated. In *obiter* observations, the High Court explored how the legitimate reasons hurdle might not be cleared. It considers whether the court has evolved distinctive tests for assessing the reasonableness of differential treatment for similarly situated persons, where constitutional rights are involved. Without endorsing proportionality review, has the court developed a form of reasonableness more intensive than *Wednesbury*[27] or rationality review? In this respect, it is instructive to consider English common law developments, where the gravity of the interest attracted "most anxious scrutiny", rooted in *R v Secretary of State for the Home Department, ex parte Bugdaycay*.[28]

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22 *Syed Suhail (Leave)*, *supra* note 14 at para 57.

23 *Ibid.* The prohibition against discrimination is non-absolute, as differentiation may be permissible.

24 *Ibid* at para 61.

25 See *eg* Julian Rivers, "Proportionality and Variable Intensity of Review" (2006) 65:1 Cambridge LJ 174.

26 In the context of art 12(1) challenges to the constitutionality of legislation: *LMS (HC), supra* note 3 at para 113; *Tan Eng Hong v AG* [2013] 4 SLR 1059 at paras 113–116 (HC).

27 *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 (CA) [*Wednesbury*].

28 [1987] AC 514 at 531 (HL). See also *WM (Democratic Republic of Congo) v Secretary of State for the Home Department* [2006] EWCA Civ 1495; Paul Craig, "Judicial Review and Anxious Scrutiny: Foundations, Evolution and Application" [2015] PL 60.

Part III engages the idea of "LLE", whether this has any constitutional antecedents, whether it is distinct from SLE and/or drinks from the same normative stream. It considers how constitutional and administrative expectations might arise, whether through general policy or individualised promises, and how it might relate to other administrative norms, like the non-fettering of discretion. In particular, it explores how LLEs may generate or relate to what might possibly be a distinctive constitutionally grounded test in assessing the reasonableness of reasons at stage two of the *Syed Suhail (Leave)* test in the application of policies, such as through a principle of consistency, which has yet to receive extensive attention in Singapore public law. It draws from contemporary English administrative law discourse on whether such principle is freestanding or an aspect of rationality review, as a prelude to considering whether this principle should be developed and how it might be conceptualized in Singapore law. It could be a new ground of review drawn from Article 12(1) and/or the common law, or subsumed as an aspect of an existing *GCHQ* ground of review.[29] It considers what LLE might add to the normative storehouse of public law governance. Part IV concludes with observations about how the developments in *Syed Suhail (Leave)* may affect Article 12(1) challenges against the constitutionality of legislation, bearing in mind the judicial antipathy towards "judicial legislation" where courts may overstep their "constitutional role"[30] by overriding the policy choices of the political branches. Similar separation of powers related concerns affecting the role of courts are also evident in reservations that proportionality review and SLE[31] entail intruding into case merits. This raises the issue of whether these doctrinal values can be accommodated within the existing public law framework, or require a new pathway trod by realigned constitutional principles.

II. Intensities of Judicial Scrutiny: Greater than *Wednesbury*, Less than Proportionality Review?

The Court of Appeal in *Syed Suhail (Leave)* associated the "deliberate and arbitrary discrimination" test with attracting no more than ordinary standards of administrative review. Indeed, the executive decision-maker is further protected, insofar as irrational discrimination which is "merely reckless or negligent" would not contravene Article 12(1).[32] This was too low a standard to vindicate Article 12(1)'s promise "of securing for every person the equal protection of the law",[33] especially where life and liberty, constitutionally guaranteed by Article 9, were at stake.

The test for assessing impermissibly discriminatory acts should not be conflated with that of "irrationality… taking into account irrelevant considerations or disregarding relevant ones".[34] These correspond to the well-established *GCHQ* 'irratio-

[29] This refers to Lord Diplock's tripartite description of judicial review grounds (illegality, irrationality and procedural impropriety) in *CCSU v Minister for the Civil Service* [1985] AC 374 (HL) [*GCHQ*].

[30] *Wong Souk Yee v AG* [2019] 1 SLR 1223 at para 75 (CA).

[31] *Starkstrom v Commissioner for Labour* [2016] 3 SLR 598 at paras 61, 62 (CA) [*Starkstrom*].

[32] *Syed Suhail (Leave), supra* note 14 at para 57.

[33] *Ibid.*

[34] *Ibid.*

nality' and 'illegality' grounds of review. The Court of Appeal underscored that in reviewing the implementation of executive policy, the Article 12 test should not be pegged at the level of ordinary administrative law review.

Notably, there have been various formulations of and variable intensities in applying the *Wednesbury* 'unreasonableness' test;[35] the 'pure' *Wednesbury* test is best captured by Lord Greene MR's description of a decision "so unreasonable that no reasonable authority could ever come to it".[36] Lord Diplock described an irrational decision as "so outrageous in its defiance of logic or of accepted moral standards" no sensible person applying his mind could arrive at it.[37] Presumably, this is the standard the Court of Appeal had in mind, which is a high threshold to clear, although irrationality review should not be seen as monolithic. It is noteworthy that *Wednesbury* unreasonableness was also not considered an appropriate legal standard for Article 12(1) challenges to legislation.[38] The High Court also declined to endorse a proportionality-based approach, whether free-standing or as part of the reasonable classification test, which would entail assessing the legitimacy of legislative purpose[39] and the more demanding evaluation of whether the decision-maker has struck a "fair balance"[40] between rights and competing social objectives. One may infer that the hunt is for a standard of "searching scrutiny",[41] where fundamental interests are involved, which is more intensive than *Wednesbury* unreasonableness, but less intrusive than proportionality review.

A. *The Case Law Prior to Syed Suhail (Leave)*

Article 12(1) is rooted in "the wider doctrine of the rule of law"[42] dating back to the Magna Carta;[43] this underscores the principle of objective review, as unreviewable discretion would be arbitrary and inconsistent with Article 12, as if a statutory provision did not "restrict a discretion to any purpose".[44] In *Chng Suan Tze v Minister for Home Affairs*, the Court of Appeal referenced Lord Diplock's observations in *Ong Ah Chuan*[45] that detention power under the *Internal Security Act*[46] could only

[35] Jeffrey Jowell & Anthony Lester QC, "Beyond Wednesbury: substantive principles of administrative law" [1988] 14 Commw L Bull 858.

[36] *Wednesbury, supra* note 27 at 230.

[37] *GCHQ, supra* note 29 at 410G-H.

[38] *LMS (CA), supra* note 3 at para 86.

[39] *Ong Ming Johnson v AG* [2020] SGHC 63 at para 216.

[40] *Huang v Secretary of State for the Home Department* [2007] UKHL 11 at para 19 [*Huang*].

[41] *Syed Suhail (Leave), supra* note 14 at para 63.

[42] *Taw* (CA), *supra* note 3 at para 52.

[43] *Ibid.*

[44] *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at para 82 (CA) [*Chng Suan Tze*].

[45] *Ong Ah Chuan, supra* note 3 at para 37. The Privy Council noted the "social evil" the *Misuse of Drugs Act* (Cap 185, 2008 Rev Ed Sing) sought to prevent was "broadly proportional" to the quantity of addictive drugs in the illicit market, there being "nothing unreasonable" about the legislature's view that an illicit dealer operating near the apex of the distributive pyramid required "a stronger deterrent" than more low-level distributors. It was for Parliament to decide questions of social policy. Further, "no plausible reason" was advanced showing the dividing line of 15g and above for heroin trafficking offences attracting the mandatory death penalty was "purely arbitrary": *ibid* at para 38.

[46] (Cap 143, 1985 Rev Ed Sing).

SJLS A0148

be exercised for specific purposes bearing "a reasonable relation to the object of the law".[47] This test co-existed with the "deliberate and arbitrary test", where "arbitrary" connoted "the lack of rationality",[48] as declared in *PP v Ang Soon Huat,*[49] which itself relied on the similarly named 1980 and 1990 Privy Council decisions of *Howe Yoon Chong v Chief Assessor,*[50] the source of the formulation.

The *Howe* cases dealt with determining property charges for tax purposes. This focused on the need for practical rather than absolute equality; only inequalities "due to inadvertence or inefficiency" rising to "a very substantial scale" would breach the equal protection clause. The Privy Council in 1990 noted inequalities from applying "a reasonable administrative policy" did not amount to "deliberate and arbitrary discrimination"; discrepancies in the valuation list were caused by circumstances such as inflation, rather than "any intentional violation of the essential principle of practical uniformity".[51]

The Court of Appeal in *Syed Suhail (Leave)* underscored that while the Privy Council stated that 'intentional systematic under-valuation', borrowed from the American *Sioux City Bridge Co v Dakota County* formulation,[52] would breach Article 12(1), this did not arise in the present case and "something less might perhaps suffice".[53] The formulation applied in *Howe* was not to be understood as a general test, though it may be appropriate for economic matters and bureaucratic administration, where the immediate concern is with "efficient public administration" and "the practical impossibility of achieving a more equal outcome".[54] The variability of scrutiny is contextual, turning on the subject-matter and gravity of interests involved.

It took pains to show that while the "deliberate and arbitrary" test was invoked in later cases like *Eng Foong Ho,*[55] the court applied a "significantly more robust approach"[56] to assess whether a "normatively defective process of treatment" violated Article 12. Assuming the law was constitutional, the test was "whether there is a reasonable nexus between the state action and the objective to be achieved by the law".[57] Rather than a finding of no reasons, the court found that "valid planning considerations"[58] justified the land acquisition decision. In other words, there were reasonable reasons.

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[47] *Chng Suan Tze, supra* note 44 at para 82.
[48] This was referenced by Phang JA in *Eng Foong Ho, supra* note 9.
[49] [1990] 2 SLR (R) 246 (HC).
[50] *Howe Yoon Chong* (*1990)*, *supra* note 9. The Privy Council cited its earlier decision involving the same parties: *Howe Yoon Chong (1979-1980)*, *supra* note 8.
[51] *Howe Yoon Chong (1990)*, *ibid* at para 18.
[52] 260 US Reports 441 (1923).
[53] *Howe Yoon Chong (1979–1980)*, *supra* note 8 at para 13, cited in *Syed Suhail (Leave), supra* note 14 at para 54.
[54] *Syed Suhail (Leave)*, *ibid* at para 55.
[55] *Supra* note 9.
[56] *Syed Suhail (Leave)*, *supra* note 14 at para 59.
[57] *Eng Foong Ho, supra* note 9 at para 25.
[58] *Syed Suhail (Leave)*, *supra* note 14 at para 59, citing *Eng Foong Ho*, *ibid* at paras 32–37.

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B. *Syed Suhail and the 2020 Formulation of a Two Step Approach*

It is instructive to review the case facts in *Syed Suhail (Leave),* where the nature of the executive power and gravity of interests informed how judicial scrutiny was calibrated.

1. *Syed Suhail (Leave): Article 12(1), the Prison Service and the Scheduling of Executions*

The state was faced with the unusual situation of having multiple executions arising for scheduling simultaneously. Differential treatment was necessary, as executions could not be scheduled on the same date. The issue was whether executive discretion in scheduling the executions of death row prisoners whose clemency petitions had been denied was susceptible to judicial review, and what conformity with Article 12(1) would require.

Pending a judicial challenge to an allegedly unlawful execution method, which was dismissed on 13 August 2020,[59] the appellant's original date of execution (7 February 2020) was stayed, as all executions were suspended between February and August 2020. Suhail, a Singaporean, sought leave to apply for a prohibiting order against the Singapore Prison Service ("SPS")[60] on two grounds, one of which implicates equal protection under the law under Article 12(1).[61] This related to scheduling Suhail's execution ahead of other prisoners similarly awaiting capital punishment, who received their death sentences prior to Suhail.

The appellant submitted that the order of execution, *ceteris paribus*, should follow the sequence in which prisoners received their death sentence; this was not statutorily required.

One Malaysian prisoner, Datchinamurthy (15 April 2015) who was sentenced to death earlier than Suhail (2 December 2015), had not been scheduled for execution before Suhail's execution date on 18 September 2020. Disregarding the sequence arguably deprived Suhail of a right to fair trial and additional time during which new evidence might be adduced to support reopening his conviction. In addition, he was scheduled ahead of other prisoners solely on the basis of his nationality.[62]

On appeal against the High Court's dismissal of the leave application, a Ministry of Home Affairs ("MHA") affidavit was filed, containing a non-exhaustive list of

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59 *Gobi a/l Avedian v AG* [2020] 2 SLR 883 (CA) [*Gobi*].

60 While a quashing order against the Cabinet's decision to schedule executions might be more appropriate, a prohibiting order could be issued against an unlawful administrative act not flowing from the SPS's exercise of discretion: *Syed Suhail (Leave), supra* note 14 at paras 29–31; *Syed Suhail (2021)*, *supra* note 16 at para 19.

61 Leave to apply for judicial review was refused in relation to the argument involving clemency power under art 22P: *Syed Suhail (Leave), ibid* at paras 34–42.

62 *Ibid* at para 23. The High Court in *Syed Suhail (2021), supra* note 16 at para 66 noted no evidence was produced that Covid-19 restrictions were considered in scheduling executions, which would likely expedite the execution of Singaporean prisoners. If so, this would "in effect amount to discrimination on the basis of nationality." Furthermore, art 12(2) would not apply to the nationality argument as it refers only to "citizens". It sufficed for the applicant to rely on art 12(1) to allege discrimination in relation to non-Singaporeans on death row: *ibid* at para 71.

"supervening factors based on policy considerations" considered in scheduling executions after clemency was denied: the key factor, *ceteris paribus,* was scheduling executions in the order death sentences were imposed.[63]

In addition, what became pertinent before the High Court judicial review application was "the determination of any other court proceedings affecting the prisoner or requiring his involvement".[64] The affidavit stated that the appellant was the first to be sentenced to death, "as compared to all other offenders in the same position as he was (*ie* offenders whose legal and clemency processes had been completed…)".[65] The Court of Appeal in seeking "further analytical clarity" between Article 12(1) and scheduling executions framed the issue by raising three questions:

(a) Does a prisoner awaiting capital punishment have a legitimate legal expectation that the date on which his sentence is to be carried out will not result in his being treated differently as compared to other prisoners who are similarly situated? ("Question 1")
(b) Does the answer to Question 1 differ if prisoners who are Singaporean are treated differently from those who are not Singaporean? ("Question 2")
(c) In respect of Questions 1 and 2, are there considerations that could justify differential treatment for the purposes of Art 12 of the *Constitution*? ("Question 3")[66]

2. *Applicable Legal Principles*

As one of a state's "gravest discretionary powers",[67] the power of scheduling executions was considered reviewable. Given that the fundamental right to life and liberty was affected "to the gravest degree", more searching[68] or careful scrutiny[69] beyond ordinary administrative review grounds was appropriate. Further, more robust review was warranted where executive action was directed at the "determination of an individual case", as distinct from a case involving "an administrative policy of broad application".[70] The former relates to vindicating rights by enforcing a legal duty to respect Part IV rights, as distinct from correcting a public wrong, as a facet of responsible administration. Standing rules also reflect the view that judicial review primarily serves to protect individual rights, rather than to exposit and determine public policy.[71] This degree of scrutiny is applied both to how executive

63 *Syed Suhail (Leave), supra* note 14 at paras 18, 22 & 70.
64 *Ibid* at para 18.
65 *Ibid* at para 20.
66 *Ibid* at para 14.
67 *Ibid* at para 48.
68 *Ibid* at para 63.
69 *Syed Suhail (2021), supra* note 16 at para 33. In relation to art 12(1) and legislation, Singapore courts have intimated that "careful scrutiny" would be applied to questions of discrimination where "factors like race or religion" concerning Part IV liberties are involved: *LMS (HC), supra* note 3 at para 113. The court noted that capital cases deserve "the most anxious and searching scrutiny" in *Kho Jabing v PP* [2016] 3 SLR 135 at para 50 (CA) [*Kho Jabing*].
70 *Syed Suhail (Leave), supra* note 14 at para 58.
71 *Vellama d/o Marie Muthu v AG* [2013] 4 SLR 1 at paras 33, 34 (CA).

SJLS A0148

power is exercised, and whether the applicant has rebutted the presumption of constitutionality by discharging his evidential burden.[72]

This is reminiscent of the heightened 'most anxious scrutiny' standard applied in English cases involving fundamental rights heard prior to the *Human Rights Act 1998*,[73] which is a more rigorous if imprecise substantive review standard than *Wednesbury* unreasonableness. As descriptive terms like "searching"[74] do no analytical work and are not conducive to doctrinal precision, the question is whether the courts have developed guidelines able to indicate when judicial intervention or restraint is warranted, on what grounds, in determining what is required of the court and primary decision-maker.

The Court of Appeal sought to clearly identify the importance of the interests death row prisoners possessed, even after losing their right to life under Article 9(1), upon termination of the criminal process; they still enjoyed other legal rights such as equal protection under the law.[75] In part to debunk the argument that prisoners' lives were "legally forfeit", the Court of Appeal described this interest as a "legitimate legal expectation" that said prisoner would not "face differential treatment" in the scheduling of his execution. This necessitates identifying the "appropriate baseline" for equal treatment.[76] The two-limb inquiry into whether executive action violated Article 12(1) first involved determining whether the relevant persons were equally situated and then ascertaining whether there were "legitimate reasons" based on objective grounds to justify any differential treatment. It stated that the notion of being equally situated would serve as "an analytical tool used to isolate the purported rationale for differential treatment, so that its legitimacy may then be assessed properly".[77] This is not to say that no value judgments are involved when the court first assesses whether A and B are equally situated in relation to the conferred power's purposes. Normative judgment is involved in deciding the baseline against which to assess the justifiability of departures.

The first hurdle is cleared where the applicant satisfies his evidentiary burden. The exercise of executive discretion may be directly impugned or inferred from objective facts showing a *prima facie* breach of the relevant legal standard. In *Muhammad Ridzuan bin Mohd Ali v AG,*[78] only one of two co-offenders were awarded a certificate of substantive assistance by the Public Prosecutor under section 33B(2), *Misuse of Drugs Act* ("*MDA*").[79] It sufficed for the challenger to highlight circumstances raising a *prima facie* case of reasonable suspicion that the relevant standard was breached, such as where both co-offenders were similarly involved in a drug syndicate, and most importantly, had provided practically the

[72] *Syed Suhail (Leave), supra* note 14 at para 57.

[73] C 42, which came into force in October 2000.

[74] Similar descriptive terms include American 'hard look' scrutiny against arbitrary, capricious decision-making: *Motor Vehicles Manufacturers Association v State Farm Mutual Automobile Insurance* (1983) 463 US 29 at 43.

[75] Under art 12, as provided by the Court of Appeal in *Yong Vui Kong (Clemency) v AG* [2011] 2 SLR 1189 [*Yong Vui Kong*], referenced in *Syed Suhail (Leave), supra* note 14 at para 48.

[76] *Syed Suhail (Leave), supra* note 14 at para 50.

[77] *Ibid* at para 62.

[78] [2015] SGCA 53 [*Muhammad Ridzuan*].

[79] (Cap 185, 2008 Rev Ed Sing).

A0148.indd 104 06-29-22 11:36:03

SJLS A0148

same information to the Central Narcotics Bureau. These factors raise the question why only one co-offender received the certificate, and suspicions of arbitrary decision-making.

The evidentiary burden then shifts to the decision-maker to show "legitimate reasons" for the differential treatment, to make this "proper".[80] This confirms the approach adopted in previous Article 12(1) cases challenging exercises prosecutorial discretion.[81] The presumption of constitutionality that applies to primary legislation also applies to executive acts,[82] operating as a "starting point" that executive action "will not presumptively be treated as suspect".[83] It is overcome when the appellant satisfies the evidentiary burden.

The Court of Appeal identified three "readily available standards" to evaluate the reasonableness of differential treatment.[84] First, the need for a "sufficient rational relation" between the differentiating executive action and the object of the power-conferring legislation. This resembles the 'reasonable classification' test as applied to legislation, requiring a "rational relation" between the statutory differentia and the legislative purpose and object.[85] This test does not impugn the legitimacy of the legislative object, except in very limited fashion, where a deficient nexus exists between differentia and object, failing requirements of logic and/or coherence. This test itself provides no legal standards for assessing the legitimacy of the statutory object.[86] With respect to executive action, the requirement of a "sufficient rational relation" assumes the constitutionality of legislation: this focuses on the efficacy of the differentiating measure and whether it sufficiently implements the legislative purpose. Where no statutory power is involved and the decision-maker has structured discretion by adopting a policy, the "object for which the power was conferred" will be discerned from the general statutory regime, as in *Lines International*.[87] This test does not assess the weight the decision-maker ascribes to relevant factors or the balance struck between them, but considers whether the reasoning, as a matter of internal logic, is sustainable in being rationally connected to the intended aim.

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80 *Syed Suhail (Leave), supra* note 14 at para 61.

81 *Muhammad Ridzuan, supra* note 78 at para 52; *Ramalingam Ravinthran v AG* [2012] 2 SLR 49 (CA) at paras 65, 70–71 [*Ramalingam Ravinthran*].

82 A stronger presumption of constitutionality or legality applies in relation to the acts of officials holding constitutional office: *ibid* at paras 46, 47.

83 *Syed Suhail (Leave), supra* note 14 at para 63, citing *Saravanan, supra* note 20 at para 154 and *Jolovan Wham, supra* note 20 at paras 26–28. See also *Shri Ram Krishna Dalmia v Shri Justice SR Tendolkar* (1958) AIR 538 where the Indian Supreme Court held that while legislative good faith was presumed, if nothing in law or the surrounding circumstances on which a classification may be reasonably based was brought to judicial attention, "the presumption of constitutionality cannot be carried to the extent of always holding that there must be some undisclosed and unknown reasons for subjecting certain individuals or corporations to hostile or discriminating legislation".

84 *Syed Suhail (Leave), ibid* at para 63.

85 *LMS (CA), supra* note 3 at paras 76–86, 153.

86 *Ibid* at 61, 62, 84 and 85.

87 *Lines International Holding (S) Pte Ltd v Singapore Tourist Promotion Board* [1997] 2 SLR 584 at paras 59–61, 73, 80 (HC) [*Lines International*]. The Port of Singapore Authority's statutory duties extended beyond promoting the use of the port but encompassed "wider considerations" such as promoting desirable businesses, where it could consider the views of other government bodies.

A0148.indd 105 06-29-22 11:36:03

While noting that what 'equality before the law' requires may differ regarding legislation and executive action, the Court of Appeal in *Ramalingam Ravinthran v AG*[88] endorsed the view that the general principle under Article 12(1) that "like should be compared with like" applied to "all acts of state, whether legislative or executive".[89]

The other two standards are the presence of "irrelevant considerations" and the application of "inconsistent standards or policies without good reason".[90] While the first falls squarely within the *GCHQ* heading of administrative 'illegality',[91] it is unclear whether the principle of consistency is a free-standing principle or part of the *GCHQ* ground of 'irrationality'. If the latter, is it grounded in the common law or constitution, as part of the "standards of fairness"[92] that the LLE generated by Article 12(1) sustains? This is explored in Part III.

C. *Applying the Test: Syed Suhail 2020 and 2021*

1. *Sequencing of Executions Argument*

The Court of Appeal granted leave to apply for judicial review on the basis of the stage 2 assessment of "legitimate reasons": the "apparent inconsistency" on the face of the record between the MHA's affidavit and the known facts regarding scheduling executions. This rested on the assumption that Suhail and Datchinamurthy, who had received an earlier death sentence, were prima facie equally situated.

Chng considers that the requirement of being "equally situated" played "a rather insignificant role"[93] in the Court of Appeal's analysis, which was mostly oriented towards articulating what equal treatment required in scheduling executions. This question is preceded by that of who falls within a particular class, *ie*, delineating the category of "equally situated" persons. This is not self-evident, as it could encompass all death row prisoners convicted of drug offences, or all such prisoners whose clemency petitions have been rejected, for example.

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88 *Ramalingam Ravinthran, supra* note 81 at para 20.

89 *Ibid,* at para 61. In discussing *Ong Ah Chuan v PP*, *supra* note 3 at para 63, it noted that while legislation was concerned with equal legal guilt, the exercise of prosecutorial power encompassed a wider range of considerations, such as moral blameworthiness, operational considerations and compassion. The applicable test for art 12(1) in the context of penal legislation did not apply to the exercise of executive discretion: *Syed Suhail (2021), supra* note 16 at para 48.

90 *Syed Suhail (Leave)*, *supra* note 14 at para 61.

91 "Illegality" requires a decision-maker to "understand correctly the law that regulates his decision-making power" and to "give effect to it": *GCHQ*, *supra* note 29 at 410 F (*per* Lord Diplock). A relevant consideration is primarily derived from the power-conferring statute, although it may be drawn from other non-statutory factors such as fairness, personal hardship and the general public interest: *City Development Limited v Chief Assessor* [2008] 4 SLR (R) 150 at para 17 (CA). Relevant considerations may be found in policy guidelines: *Axis Law Corp v IPOS* [2016] 4 SLR 554 (HC).

92 *Syed Suhail (Leave)*, *supra* note 14 at para 64.

93 Chng, *supra,* note 15 at 8.

SJLS A0148

The Court of Appeal settled on prisoners being equally situated once "denied clemency",[94] and "before their executions have been scheduled",[95] considering this "framing is only sensible" as it would otherwise be "difficult to make any meaningful comparison between prisoners". This is because individual case circumstances determine the time needed for trial, appeal and clemency to ensure each prisoner's case is fully heard on its merits. There was no absolute rule that prisoners sentenced to death first, be executed first.[96] Further, death row prisoners with further pending recourse or relevant proceedings would not be equally situated with those who did not, making it inappropriate to proceed with scheduling their executions.[97]

Searching scrutiny in this context entailed appreciating the nature of the relevant interest and examining the basis of factors informing the decision-making process. Article 12(1) prohibits "impermissible differential treatment" by a public authority regardless of whether the persons involved had any freestanding legal right to certain treatment.[98] While someone may not have a right to a substantive assistance certificate under section 33B(2) *MDA*, Article 12(1) provides that he not be denied this certificate if someone else equally situated receives one.

The legal expectation to fair treatment[99] under Article 12(1) had to be based on something concrete, not "entirely speculative",[100] such as the "mere hope" that a later execution date would provide extra time for possibly finding evidence to reopen a conviction. It was grounded in the appellant's "concrete interest" not to have his death sentence implement on a date decided "without due regard to his constitutional rights".[101]

The MHA affidavit non-exhaustively listed those "supervening factors based on policy considerations"[102] to be considering in scheduling executions for multiple cases. The prisoners had a LLE under Article 12(1) to equal treatment in how their executions were scheduled; the Court of Appeal accepted the state's position on what equal treatment entailed in this context, considering it a "rational baseline"[103] that executions be presumptively scheduled following the order a prisoner was sentenced to death.[104] It was "only reasonable" to "minimize any further anguish" to a condemned prisoner, and "it is reasonable" to take the position that anguish mounts from the date the death sentence was passed. As such, it would be reasonable to schedule executions in a sequence which "minimises the total time spent of death

94 *Syed Suhail (Leave), supra* note 14 at para 64.

95 *Ibid* at para 66.

96 *Ibid* at para 65.

97 *Ibid* at para 67.

98 *Ibid* at para 49.

99 *Syed Suhail (Leave)*, *supra* note 14 at para 68.

100 *Syed Suhail (2021)*, *supra* note 16 at para 42. The High Court noted that the principle of finality applied fully to Suhail's case as his argument that the sequence of scheduling would deprive him of time to adduce new evidence to reopen his case was "entirely speculative". Further, Suhail had already unsuccessfully attempted to reopen his case on the merits.

101 *Syed Suhail (Leave)*, *supra* note 14 at para 68.

102 *Ibid* at para 18.

103 *Ibid* at paras 70–72.

104 *Ibid* at para 72.

A0148.indd 107 06-29-22 11:36:03

row for each prisoner".[105] The MHA affidavit clarified this was the basis on which Suhail's execution was scheduled. The Court of Appeal made no determinative conclusion of what might constitute legitimate reasons justifying a departure from this baseline: provided it was lawfully exercised, some flexibility in scheduling executions, a statutory function, was desirable.[106] This affirms the value of institutional autonomy and the separation of powers.

The state was to apply the indicated criteria for scheduling executions "consistently",[107] unless legitimate reasons justified departure from this baseline. This may be characterised as a principle of consistency, to be explored below. The Court of Appeal found that Suhail succeeded in raising a prima facie case of reasonable suspicion that the state treated him differently from Datchinamurthy by scheduling Suhail's execution first.[108] Thus, the leave bar was cleared by the presence of an "apparent inconsistency" between MHA's assertions on how executions were scheduled, and the known facts.[109]

However, the High Court in hearing the application for judicial review found that while the prisoners "belonged to a generic group of prisoners awaiting capital punishment",[110] Suhail was not equally situated in relation to two drug traffickers who were sentenced before him: Datchinamurthy, a non-Singaporean, and one Masoud, a Singaporean[111] had not had their execution dates fixed when Suhail received his. Not all supervening factors based on policy considerations in Dachinamurthy and Masoud's cases had been resolved, there being a "real likelihood"[112] their cases could be reopened on the merits,[113] depending on court proceedings to which they were not litigants. Unlike Suhail, their cases involved questions relating to the wilful blindness doctrine and section 18(2) *MDA* and the presumption of knowledge. Following *Gobi a/l Avedian v PP*[114] both had a "realistic expectation" their cases would be reviewed in relation to these issues,[115] and their convictions potentially reopened. This constituted a "clear differentiating factor" in relation to Suhail's case, as the amount of time the AGC would take for their cases and for the legal process to run its course turned on individual circumstances.[116] Thus, Suhail's LLE not to face differential treatment in relation to other equally situated persons was not violated,[117] given the "objective facts"

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[105] *Ibid* at para 71.
[106] *Ibid* at para 72.
[107] *Ibid* at para 73.
[108] *Ibid* at para 75.
[109] *Ibid* at para 76.
[110] *Syed Suhail (2021), supra*, note 16 at para 58. No evidence was adduced to discharge the evidential burden to shift this to the state to justify differentiation in treatment: *ibid* at para 59.
[111] Masoud's case was first brought up before the High Court: *ibid*, at para 28.
[112] *Ibid* at para 38. While the case dealt with s 18(1), *MDA*, s 18(2) might be implicated: *ibid* at paras 36, 37.
[113] *Ibid,* at para 35. The High Court at para 40 noted that the prospect of further legal proceedings shifted the balance towards preventing error, rather than seeking repose in capital punishment cases, citing *Kho Jabing, supra* note 69 at paras 49, 50.
[114] *Gobi, supra* note 59; cited at *Syed Suhail (2021)*, *supra* note 16 at para 26.
[115] *Syed Suhail (2021), ibid* at para 38.
[116] *Ibid* at para 35.
[117] *Ibid* at para 44.

disclosing an "indisputable difference" in their cases.[118] The High Court noted for Datchinamurty and Masoud, the legal process was still at the forefront of their cases, so the balance tilted towards preventing error rather than the finality principle.[119]As Suhail did not have any potential further recourse when his execution was scheduled, the finality principle "applied with full force" to him.[120] Justice would be perverted by repeated applications based on speculative arguments, until a desired outcome was attained.[121]

There was thus no inconsistency in relation to the scheduling of Suhail's execution with respect to Masoud and Dachinamurthy. Suhail's application in relation to impermissible discriminatory treatment failed on the first limb of the two-stage test, though the High Court found there was sufficient evidence in the MHA official's affidavit to clear the second limb.[122]

'Searching scrutiny' entailed a close examination of the MHA identified factors, as applied to the facts. Unlike the Court of Appeal in *Syed Suhail (Leave),* the High Court's determination that Suhail was not equally situated with the other death row prisoners was based on assessing all the relevant evidence presented, including why Datchinamurthy was not scheduled for execution.[123] In accepting the reasonableness of the factors influencing scheduling decisions, the Court of Appeal was not applying a "pure" *Wednesbury* test, but rather, examining the "reasonableness" of the guidelines, to ensure they fall within "the range of legally possible answers".[124] While it was "only reasonable"[125] to minimise prisoner anguish by minimising their time on death row, this appeal to common sense is oriented towards deferring to the executive as primary decision-maker.

2. *Article 12(1) and Nationality—An Illegitimate Reason*

In *obiter* observations, the High Court in *Syed Suhail (2021)* accepted that if nationality influenced the exercise of state power[126] in scheduling executions to "enable the law to take its course",[127] it would not constitute a legitimate reason justifying differential treatment. This is because it bore "no rational relation" to the declared purpose of minimising time spent on death row.[128] It did not figure among the MHA affidavit's five identified factors, including sequencing execution

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[118] *Ibid* at para 45.

[119] *Ibid* at para 39, discussing *Kho Jabing, supra* note 69 at paras 49, 50.

[120] *Syed Suhail (2021), supra* note 16 at para 42.

[121] *Syed Suhail bin Syed Zin v PP* [2020] SGCA 101 at paras 1, 14. This was a criminal review application.

[122] *Syed Suhail (2021), supra* note 16 at para 44.

[123] The Court of Appeal declined the AGC's application to file a second affidavit to explain this, considering it inappropriate to protract the process: *Syed Suhail (Leave)*, *supra* note 14 at paras 78, 79.

[124] *Tan Seet Eng*, *supra* note 5 at para 80.

[125] *Syed Suhail (Leave)*, *supra* note 14 at para 71.

[126] Art 22P, *Constitution, supra* note 1 and s 313, *Criminal Procedure Code* (Cap 68, 2012 Rev Ed Sing). This is detailed in *Syed Suhail (Leave), supra* note 14 at para 3.

[127] *Syed Suhail (2021), supra,* note 16 at para 62.

[128] *Syed Suhail (Leave), supra* note 14 at para 71. No evidence was adduced that any equally situated non-Singaporeans were differently treated.

according to when sentences were imposed.[129] It would be akin to an irrelevant consideration.

The MHA affidavit clarified that nationality was not considered in scheduling executions nor had this factor halted executions.[130] It did not explicitly state scheduling executions had not been affected by COVID-19 restrictions. Assuming these restrictions made it harder to arrange access to family members of foreign prisoners, as the MHA had no control over foreign travel regulations,[131] or to repatriate mortal remains abroad,[132] this could precipitate differentiated treatment: the execution of foreign prisoners would be put on hold, while that of Singaporean prisoners "would more likely be expedited".[133] In assessing "impermissible discriminatory treatment", the indirect effect of a law or policy was considered.

Nonetheless, policies may be altered to meet changing circumstances. The High Court kept open the door to arguing that pandemic exigencies may furnish the basis for differential treatment, considering the need for fair treatment and operational concerns. Whether this could clear the legitimate reasons hurdle depended on further information about how COVID-19 restrictions affected scheduling. In assessing what fair treatment requires, would it be relevant to consider whether it was impossible or just difficult for family members to travel to Singapore, or whether relatives had declined MHA arrangements for travel?[134] This turns on context, though the courts will likely be deferential where the decision-maker provides good or adequate reasons justifying differential treatment, considering the wider range of factors the executive must manage. The courts must negotiate the need to guard against fettering discretion and allowing policy shifts, and the importance of acting consistently with law or declared policy and how this relates to LLE. To this we now turn.

III. LLE and the Principle of Consistency as Bolsters to Searching Scrutiny?

The idea of "legitimate legal expectations" was apparently invoked to underscore the importance of the "legally significant interest"[135] death row prisoners have under Article 12(1), to not be treated differently from other similarly situated prisoners where scheduling executions are concerned. This executive power must be exercised legally, and not contravene Article 9(1), *ie* deprivation of life in accordance with the law.[136] Beyond underscoring an important interest, does this constitutionally grounded expectation give rise to a new ground of review, anchored by Article 12, or is it better conceptualized as an aspect of existing grounds of review, but with

[129] *Syed Suhail (2021)*, *supra* note 16 at para 25; *Syed Suhail (Leave), supra* note 14 at para 18.
[130] *Syed Suhail (2021)*, *ibid* at para 64.
[131] *Ibid* at para 66.
[132] *Ibid* at para 62.
[133] *Ibid* at para 66.
[134] Suhail's Malaysian uncle declined to visit him: *ibid* at para 65.
[135] *Syed Suhail (Leave)*, *supra* note 14 at para 50.
[136] *Ibid* at para 47.

the effect of 'supercharging' it to require more robust review where constitutional norms are implicated?

The idea of LLE suggests a right to equal treatment, of similarly situated persons to be treated consistently, following an articulated policy. The idea of 'equal treatment' itself does not supply objective rational justifications for why a particular substantive conception of equality is valued, which engages social policy. Where the government articulates the factors it will consider in sequencing executions, the expectation is this policy will be followed. This comes into play at the second limb of the *Syed Suhail (Leave)* test, playing no role in the first limb inquiry of identifying the "appropriate baseline for equal treatment".[137] Legitimate reasons justifying differentiation will be absent where "inconsistent standards or policies" are applied "without good reason".[138]

Whether the principle of consistency has given rise to, or should be treated as an independent ground of review, or whether it is an aspect of rationality review or SLE has been the subject of debate in English public law, in association with the need for more muscular review to protect fundamental interests. In Singapore, the sought for standard of review is presumably more rigorous than 'pure' *Wednesbury* review, but less than proportionality analysis, which has been subsumed under rationality review.[139] Notably, neither rationality nor proportionality review are monolithic and may be moderated by deference considerations or elevated by the need to protect fundamental rights. The former maps to what in the English context has been called 'Super *Wednesbury*'[140] while the latter, to 'sub *Wednesbury*' review. Should Singapore courts be minded not to recognize a new ground of review, arguably, the call for searching scrutiny to sufficiently vindicate Article 12(1) LLE could develop along similar lines to sub-*Wednesbury* or 'most anxious scrutiny' review.

LLE is distinct from the cognate administrative law concept of SLE which "had no relevance" in *Syed Suhail (Leave)*.[141] Nonetheless, they may overlap and drink from the same normative pool. It is worth examining how LLE may converge with or differ from administrative law legitimate expectations. At common law, the principle of consistency, which is closely related to equal treatment, is not an absolute value, as good reasons justify departures from policy. If the principle of consistency gives effect to an LLE by requiring a decision-maker not to renege from a promise or policy, this could constitute an "illegitimate intrusion by the courts".[142] Courts in applying a multi-factorial approach would have to balance consistency against other

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[137] *Ibid* at para 50.

[138] *Ibid.*

[139] *Chng Suang Tze*, *supra* note 44 at para 121.

[140] This less intense review standard is applied where democratically legitimate decision-makers are considered better suited to handle polycentric matters involving macroeconomic or political judgment, than non-expert judges, raising the threshold for triggering judicial intervention: *R (Rotherham MBC) v Secretary of State for Business, Innovation & Skills* [2014] EWHC 232 (Admin) at para 68 (*per* Stewart J). Sir Thomas Bingham MR noted in *R v Ministry of Defence, ex p Smith* [1996] 1 QB 517 at 556 (EWCA) [*Smith*] that "even greater caution than normal" was needed in applying the rationality test, which was "sufficiently flexible to cover all situations", to decisions of "a policy-laden, esoteric or security-based nature".

[141] *Syed Suhail (Leave)*, *supra* note 14 at para 51.

[142] Karen Steyn, "Consistency - a Principle of Public Law" (1997) 2:1 Jud Rev 22 at 23 [Steyn].

principles like non-fettering discretion and administrative autonomy to alter policy in the public interest.

A. *Exploring "Expectations"*

1. *Legitimate Expectations at Administrative Law*

Public law expectations, a type of "non-legal rule"[143] enjoying some legal protection, relate to the expectation that discretionary power will be exercised in a certain way, save in exceptional circumstances. These may be generated by a specific promise, a consistent practice or policy.

Procedural legitimate expectations[144] are recognised in Singapore administrative law;[145] these do not interfere with case merits, in seeking to secure procedural fairness through hearing or consultation rights. Substantive legitimate expectations may give rise to procedural or substantive protections; these seek to "bind public authorities to representations" they make, which affected citizens who detrimentally relied upon them.[146] It impacts questions of legitimacy,[147] as a claim to a favourable decision conferring a substantive benefit.

The primary English authority on SLE is *R v North and East Devon Health Authority, Ex p Coughlan.*[148] The SLE here satisfied narrowly crafted conditions: the health authority gave an express assurance which was relied upon by a specific group of people, not an innominate class.[149] Coughlan, a tetraplegic, and seven severely disabled persons were assured that if they moved from their residential hospital to the Mardon House care facility, it would be their "home for life". The subsequent decision to close down the House was so unfair, amounting "to an

[143] Farrah Ahmed & Adam Perry, "The Coherence of the Doctrine of Legitimate Expectations" (2014) 73:1 Cambridge LJ 61 at 62).

[144] Legitimate expectations include expectations which go beyond enforceable legal rights, provided they have "some reasonable basis": *AG of Hong Kong v Ng Yuen Shiu* [1993] 2 WLR 735 at 740F (PC). Here, a deportation order was quashed as the government did not keep its promise to grant illegal immigrants a hearing. In *R v Brent LBC v ex p Gunning* [1985] 84 LGR 168 (QB), a local education authority's failure to abide by its practice of consulting parents before changing educational arrangements was unlawful. Expectations of prior consultation may be overridden by national security considerations: *GCHQ, supra* note 29 at 301H–402C (*per* Lord Fraser).

[145] *Re Siah Mooi Guat* [1988] 2 SLR (R) 165 (HC) [*Siah*].

[146] *Starkstrom*, *supra* note 31 at para 41.

[147] Richard Clayton, "Legitimate Expectations, Policy and the Principle of Consistency" (2003) 62:1 Cambridge LJ 93 at 95.

[148] [2001] QB 213 (EWCA) [*Coughlan*].

[149] *Ibid* at para 59. However, the court in *Ng Siu Tong v Dir of Immigration* [2002] HKCU 13 (HKFCA) found that 1000 claimants could make a successful legitimate expectation claim, based on the Legal Aid Board's pro forma reply stating that claimants could rely on a test case before the court, rather than bringing individual claims. It is unclear whether a SLE would apply appropriately where a government body represents that it has adopted a non-proactive policy towards enforcing, say, public health regulations, but would investigate complaints received, as there is no determinate category of persons who could be seen to rely on the policy.

abuse of power",[150] which includes "reneging without adequate justification, by an otherwise lawful decision, on a lawful promise or practice adopted towards a limited number of individuals."[151] The authority's decision not to honour its promise was equivalent "to a breach of contract in private law",[152] and the court found the authority's decision was wrong in failing to weight the public and private interests "correctly".[153] Considering that the health authority would only face financial consequences, that broad policy questions were not involved[154] and that the decision violated Coughlan's right to a home under Article 8, *European Convention on Human Rights*,[155] the court found no "overriding public interest" to justify breaking the promise.[156]

SLE as a highly intrusive standard of review was considered appropriate to secure fairness for individuals, and is directed against individualised injustices. Rationality review, in either of its two modern incarnations,[157] was not the appropriate test, as the health authority's decision could be rational, as "reasonable people" may "hold differing opinions"[158] on preferred courses of action. While irrational decisions are unlawful, the issue in *Coughlan* involved "two lawful exercises of power"[159] in the form of the promise and policy change. SLE as a "failure of substantive fairness"[160] qualifies "the intrinsic rationality of policy choices".[161]

An SLE is not an absolute value, as a public authority would not be acting unlawfully where adherence to a promise breaches a public law duty.[162] While policy changes may be unfair to individuals, they implicate the interests of other sectors of the public, which may not be represented before the court. Further, the court will only give effect to a legitimate expectation "within the statutory context in which it has arisen";[163] its role is to ask whether applying a policy to an individual who was led to expect something different was "a just exercise of power";[164] if not, to recognise an exception to that new policy.

While *Coughlan* was itself based on a specific promise known by its recipients, the Court of Appeal recognised that legitimate expectations could arise from "other

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150 *Coughlan, supra* note 148 at para 67.

151 *Ibid* at para 69, citing *Ex P Preston* [1985] AC 835 (HL) [*Preston*].

152 *Coughlan, supra* note 148 at para 86.

153 *Ibid* at para 89.

154 *Ibid* at para 88.

155 *Ibid* at paras 90–93; *European Convention for the Protection of Human Rights and Fundamental Freedoms,* 4 November 1950, ETS No 005. This would soon apply via the *Human Rights Act 1998*, *supra* note 73.

156 *Ibid* at para 58.

157 *Ibid* at para 65. This could be "the barely known decision which simply defies comprehension" or "a decision which can be seen to have proceeded by flawed logic."

158 *Secretary of State for Education and Science v Tameside Metropolitan BC* [1977] AC 1014 at 1064 (HL).

159 *Coughlan*, *supra* note 148 at para 66. It noted that in such situations "a bare rationality test would constitute the public authority judge in its own cause".

160 *Ibid* at para 76.

161 *Ibid* at para 71.

162 *Ibid* at para 86.

163 *Ibid* at para 82.

164 *Ibid.*

conduct",[165] such as an extant policy[166] or practice.[167] While policies may generate legitimate expectations of their consistent application,[168] English courts recognise this can be "strained" where a claimant is only aware of a policy after an adverse determination is made under it.[169]

While some support the proposition that legitimate expectations may be generated by policies unknown to the claimant at the relevant time,[170] others have questioned whether general policy induced expectations should be hived off from the SLE doctrine, and treated as a matter of "good administration"[171] in public bodies acting consistently with official policy, independent of a claimant's state of mind. Such a principle of consistency would be a distinction without a difference in relation to SLE when the individual knows of this policy; the distinction becomes starker where an individual has no specific knowledge of a policy, which is not relied upon. Pursuant to good governance, what then would a principle of consistency require?

2. *Policy Induced Expectations: SLE or a Principle of Consistency?*

While promise-making incurs an obligation of promise-keeping as a facet of morality, making a policy in itself may be "a reason for an action, but it does not create an obligation".[172] Should the legitimate expectations doctrine legally require a public body to follow its policies or continue a practice in the absence of reliance, or is this better treated as a duty to act consistently in the absence of good reasons not to?

The justification for protecting policy-induced expectations by requiring consistent adherence must reside in more general principles of good administration, guarding against the dangers of *ad hoc* decision-making processes. Equal treatment and the principle of consistency[173] would operate independent of a claimant's state

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[165] *Ibid* at para 56.

[166] *Ibid* at paras 65, 82.

[167] *Ibid* at para 69.

[168] *R (Saadi) v Secretary of State for the Home Department* [2001] EWCA Civ 1512 at para 7.

[169] *Mandalia v Secretary of State for the Home Department* [2015] UKSC 59 at para 29 [*Mandalia*]. This would be sidestepped if reliance is pegged not only on actual knowledge and reliance, but on what a person is entitled to expect, in terms of a public authority maintaining fidelity to its policy: see Mark Elliot, "Mandalia v Home Secretary [2015] UKSC 59: Legitimate expectations and the consistent application of policy" *Public Law for Everyone* (14 Oct 2015), online: Public law for Everyone <https://publiclawforeveryone.com/2015/10/14/mandalia-v-home-secretary-2015-uksc-59-legitimate-expectations-and-the-consistent-application-of-policy/>.

[170] *R (Rashid) v Home Secretary* [2005] EWCA Civ 744.

[171] *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 at para 68 (*per* Laws LJ) [*Nadarajah*].

[172] Ahmed & Perry, *supra* note 143 at 76.

[173] One may argue that equal treatment is concerned with identical treatment, while consistency relates to A and B sharing a same trait. If all members in a class are entitled to cake, they are treated consistently by being given cake, regardless of portion size: Samuel Ley, "Consistency and Conceptual Confusion", *UK Constitutional Law Association* (3 July 2020), online: UK Constitutional Law Association <https://ukconstitutionallaw.org/2020/07/03/samuel-ley-consistency-and-conceptual-confusion/>.

of mind, as it may be unfair to treat similarly situated persons differently based on whether they knew about a policy.[174]

The House of Lords tentatively confirmed the principle of consistency in *Re Preston,*[175] stating that fairness required officials to follow their rules in like cases and not to breach their representations. The principle would operate to accord real weight to the policy, while appreciating decisional autonomy to change policies. Departures from consistency raise normative concerns, addressed by assessing whether this departure is justified, such as ensuring it does not contravene *Wednesbury* unreasonableness[176] and is based on relevant considerations.

Sir John Laws noted that apart from the *Human Rights Act 1998*, the common law would deploy *Wednesbury* unreasonableness to strike down executive decisions based on naked discrimination without objective justification.[177] The duty to treat people in an equal manner can be found in cases dating back to 1898, such as *Kruse v Johnson,*[178] where Lord Russell CJ linked the "partial and unequal" operation of statutory rules to unreasonableness. In this sense, consistency has always been a sub-set of rationality. As Stark noted, equality, the opposite of discrimination, "is a component of rationality review, and equality demands consistency".[179] A thwarted expectation that a past practice will be repeated in similar circumstances is experienced as discrimination.[180] Commitments dismissed as non-credible[181] erode trust[182] between governors and governed.[183]

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174 Some consider that a legitimate expectation cannot arise in the absence of knowledge of it, as its purpose is "to honour the dashed hopes of people who have planned their lives by placing trust in government statements or practices." Mark Elliot, "Legitimate Expectation, Consistency and Abuse of Power: The Rashid case" [2005] 10:2 Jud Rev 281 at 283 [Elliot, "Legitimate Expectation"].

175 *Preston, supra* note 151; Jowell & Lester, *supra,* note 35 at 865.

176 *Lines International, supra* note 87 at paras 77, 78.; Clayton, *supra* note 147 at 105.

177 Sir John Laws, "Wednesbury", in Christopher Forsyth & Ivan Hare, eds, *The Golden Metwand and the Crooked Cord: Essays in Honour of Sir William Wade QC* (New York: Oxford University Press, 1998) 186 at 192.

178 [1898] 2 QB 91 (Divisional Court).

179 Shona Wilson Stark, "Non-fettering, Legitimate Expectations and Consistency of Policy: Separate Compartments or Single Principle?" in Jason NE Varuhas and Shona Wilson Stark, eds, *The Frontiers of Public Law* (Oxford, UK: Hart Publishing, 2020) 443 at 460.

180 Daphne Barak-Erez, The Doctrine of Legitimate Expectations and the Distinction between Reliance and Expectation Interests (2005) 11:4 Eur PL 583 at 589**.**

181 Alexander Brown, *A Theory of Legitimate Expectations for Public Administration* (Oxford, UK: Oxford University Press, 2017) at 155.

182 Those "who have placed their trust in the promises of officials, should not find, when that trust is betrayed, that the law can give no remedy": Christopher Forsyth, "Wednesbury Protection of Substantive Legitimate Expectations" (1997) PL 375 at 375. It may be argued that one can have an expectation without trusting it will happen: Joe Tomlinson, "The Problem with the Trust Conception of the Doctrine of Legitimate Expectations in Administrative Law" *UK Constitutional Law Association* (22 July 2016), online: UK Constitutional Law Association <https://ukconstitutionallaw.org/2016/07/22/joe-tomlinson-the-problem-with-the-trust-conception-of-the-doctrine-of-legitimate-expectations-in-administrative-law/>.

183 *North Wiltshire District Council v Secretary of State for the Environment* (1993) 65 P&C 137 at para 23 (CA) (*per* Mann LJ): A decision-maker may choose not to treat like cases alike provided he gave "regard to the importance of consistency" and provided "reasons for departure from the previous decision". If the present case is distinguishable from an earlier decision, "it usually will lack materiality by reference to consistency…"

The Privy Council in *Matadeen v Pointu*[184] described the principle of treating like cases alike and different cases differently as "a general axiom of rational behaviour". Courts in holding an administrative act irrational have invoked the principle of equality before the law, requiring that people be uniformly treated "unless there is some valid reason to treat them differently". However, as what constitutes a 'valid reason' engages social policy, it does not follow that equality of treatment "should necessarily be a justiciable issue".[185] The "real problem" in deciding how to apply the equal treatment principle lies in demarcating the boundaries between the courts and the political branches, to guard against judicial intrusion into the legislative domain.

Courts generally expect decision-makers to adhere to what they say they will do, unless good reasons to deviate exist.[186] There is less risk of the judicial usurpation of the decision-maker's role where an administrator is ordered to follow its own policy.[187] Lord Carnwath noted that equal treatment has not been viewed as a distinctive administrative law ground of review, and the related idea of consistency was described as "a generally desirable" objective, but "not an absolute rule".[188] If decision-makers acted in a "broadly consistent manner" with a declared policy, then "reasonable hopes will not be disappointed".[189] Consistency is only desirable when two cases are materially similar.

An alternative view is to apprehend consistency not as part of common law rationality review, but as a constitutional principle informed by a commitment to legal equality.[190] Inconsistency may give rise to a demand for constitutional justification, but does not independently render an administrative policy unlawful; that policy may be unlawful in the sense of being irrational or disproportionate, by being "discriminatory in some respect that is incapable of objective justification".[191] Where inconsistency evidences irrationality, the decision-maker bears the onus to establish rationality by showing the decision rests on adequate justification, though the difficulty is finding the criteria for assessing rationality.

There are English cases treating the principle of consistency as a free-standing[192] ground of review, albeit one related to legitimate expectations, as Lord Wilson noted in *Mandalia v Secretary of State for the Home Department.*[193] The requirement that

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[184] [1998] UKPC 9.

[185] *Ibid* at para 9 (*per* Lord Hoffmann).

[186] *Chiu Teng v Singapore Land Authority* [2014] 1 SLR 1047 at para 112 (HC) (*per* Tay J) [*Chiu Teng*] observed that if private individuals were expected to fulfill their promises, "why should a public authority be permitted to renege on its promises or ignore representations made by it?"

[187] Yoav Dotan, "Why Administrators Should be Bound by Their Policies" (1997) 17:1 OJLS 23 at 29.

[188] *R (Gallaher Group Ltd) v Competition and Markets Authority* [2018] UKSC 25 at para 24 (*per* Lord Carnwath) [*Gallaher*].

[189] *R (O'Brien) v Independent Assessor* [2007] 2 AC 312 at para 30 (HL) (*per* Lord Bingham).

[190] *Gallaher, supra* note 188 at para 50 (*per* Lord Sumption). He cautioned against "unnecessarily" multiplying public law categories.

[191] *Bank Mellat v HM Treasury (No 2)* [2014] AC 700 at para 25 (UKSC) (*per* Lord Neuberger) [*Bank Mellat*].

[192] Lord Dyson observed that the principle that policy must be consistently applied is "not in doubt": *R (Lumba) v Secretary of State for the Home Department* [2011] UKSC 12 at para 26.

[193] *Mandalia, supra* note 169 at para 29.

public authorities should generally honour a promise or practice representing "how it proposes to act in a given area" has been characterised as a good administration requirement, grounded in fairness, "by which public bodies ought to deal straightforwardly and consistently with the public".[194] While policies help individuals plan their lives within stable conditions, this is hampered if policies are changed too frequently. Thus, the principle of consistency, rooted in the values of legal certainty,[195] has to be balanced against principles of non-fettering discretion and the interests in efficient decision-making.[196] Non-fettering may be seen as a constant duty to consider making exceptions to a policy, as a matter of justified inconsistency.[197] If a fundamental right is involved, the courts are likely to adopt a more protective approach to vindicate individualized justice; where a large number of applicants are subject to a general policy which impacts the broader public, efficiency may require a more rigid policy and judicial intervention may unacceptably intrude into executive powers.

Inconsistency as an indicator of arbitrariness is itself ambiguous. If inconsistency is an independent ground of review, reviewing both the policy process and the decision itself, then the law must provide guidance for when inconsistency results in unlawfulness. This triggers the fear that consistency invites the judicial assessment of a decision's political merits, without connection to any constitutional principle.[198]

Some favour disaggregating promise-based and policy-induced legitimate expectations and housing the latter under a principle of consistency and equal treatment; the belief is this would facilitate the development of a "doctrinal superstructure" around the principle, as happened for legitimate expectations.[199] Rather than collapsing consistency into rationality review, the values underlying consistency would not be obfuscated, but illumined.

3. *SLE and Singapore Administrative Law*

SLEs have not been accepted as an independent ground of review in Singapore;[200] they are "controversial" in invoking "competing tensions" over the "need to check against inconsistent treatment" and the "undesirable effects of excessively fettering administrative discretion".[201] The Court of Appeal in *Starkstrom v Commissioner*

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194 *Nadarajah, supra* note 171.

195 The equal treatment principle is a well-established EU law principle: Case C-510/11, *Kone OYJ v European Commission* [2014] 4 CMLR 10 (ECJ) at para 97. The close connection between the principles of consistency and legitimate expectations under EU law is recognised: Steyn, *supra* note 142, both arguably based on the principle of non-reneging from a policy: Stark, *supra* note 179 at 455.

196 *R v Port of London Authority, ex p Kynoch* [1919] 1 KB 176 (EWCA); *Registrar of Vehicles v Komoco Motors Pte Ltd* [2008] 3 SLR (R) 340 (CA).

197 Stark, *supra* note 179 at 449.

198 Michael Foran, "Equality Before the Law: A Substantive Constitutional Principle" (2020) 2 PL 287.

199 Mark Elliot, "Consistency as a free-standing principle of administrative?" *Public Law for Everyone* (15 June 2018), online: Public law for Everyone <https://publiclawforeveryone.com/2018/06/15/the-supreme-courts-judgment-in-gallaher-consistency-as-a-free-standing-principle-of-administrative-law/>.

200 The High Court advocated treating SLE as an independent ground: *Chiu Teng, supra* note 186.

201 *UDL Marine (Singapore) Pte Ltd v JTC* [2011] 3 SLR 94 at paras 65, 66 (HC).

for Labour[202] recognised that accepting the SLE doctrine would constitute a "significant departure" from extant understandings of the role of judicial review and the separation of powers doctrine.[203] Further, in providing the substantive benefit contended for, SLE intrudes into the case merits;[204] critics argue that its rationale based on fairness and abuse of power is indeterminate and vulnerable to moral intuitions rather than a sound theoretical basis.

Legitimate expectations lacking the force of a legal right[205] have been judicially recognised in relation to other liberties like Article 11 and the *nullum* principle,[206] extrapolating from their administrative law origins. The Court of Appeal found that since "the fundamental matter of a person's liberty for the rest of his life"[207] was at stake, the reliance interests of individuals arranging their affairs based on long practice that 'life' meant twenty years imprisonment, warranted protection; the new understanding would apply prospectively,[208] as retrospective changes to the law or how it is interpreted may frustrate these legitimate expectations.[209]

B. *Singapore and Legitimate Legal Expectations*

The idea of constitutionally grounded LLE was introduced to ensure that interests underlying liberties like Article 12 received protection through more robust review transcending ordinary judicial review principles. In *Syed Suhail (Leave)*, the issue was whether Suhail had a LLE not to be differently treated compared to similarly situated persons in scheduling executions. This resembles the English public law principle of consistency and equal treatment, albeit this principle in Singapore would have constitutional anchorage.

The principle of consistency and equal treatment may be conceptualized either as a free-standing principle or independent ground of review; it may derive from a constitutional norm, or as part of *Wednesbury* unreasonableness, apprehended not as monolithic but as encompassing variable standards of scrutiny, which is heightened where fundamental rights are concerned. Notably, administrative rules of natural justice have been elevated to constitutional status in the Singapore context.[210]

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202 *Starkstrom, supra* note 31.

203 *Ibid* at para 59.

204 C F Forsyth argues that the courts do not deal with the merits or the wisdom of the exercise of discretion; instead, where the substantive protection of legitimate expectations is aroused, it requires simply that "the body that aroused that expectation should fulfill that expectation.": C F Forsyth, "The Provenance and Protection of Legitimate Expectations" (1988) 47:2 Cambridge LJ 238 at 241.

205 *Abdul Nasir bin Amer Hamsah v PP* [1997] 2 SLR (R) 842 at para 55 (CA) [*Nasir*]. See *Tee Soon Kay v AG* [2007] 3 SLR (R) 133 at para 47 (CA).

206 In *PP v Manogaran s/o R Ramu* [1996] 3 SLR (R) 390 at para 81 (CA), the courts recognised that an individual has "a legitimate expectation that his actions are legal unless the law has expressly and clearly criminalized those actions."

207 *Nasir, supra* note 205 at para 56.

208 *Ibid* at para 51.

209 *PP v Hue An Li* [2014] 4 SLR 661 at para 109 (HC).

210 *Ong Ah Chuan, supra* note 3. While conceptually distinct and operating at different levels of the legal order, the content of these rules may overlap: *Yong Vui Kong, supra* note 75 at paras 99, 103–105.

In *Syed Suhail (Leave)*, LLEs would be violated if standards and policies are applied inconsistently between equally situated persons, without good reason.[211] This is distinct from promise-based SLEs which apply in quasi-contractual settings, and is more akin to policy-generated SLEs. Claimants who invoke policy-based SLEs may or may not know about this policy. In *Lines International*, a validly adopted general policy must be made known to the affected persons.[212] It is unclear whether the policy of sequencing execution was publicly known, although counsel knew about it, in raising it before the court.

If reliance is predicated on knowledge of a policy, this may lead to distinguishing and disadvantaging prisoners who were unawares. This could be side-stepped if the issue was framed in terms of a principle of consistency and equal treatment generated by LLE. This may draw from a related but distinct normative pool from that of administrative legitimate expectations, which seeks to protect reliance interests, inspired by estoppel principles[213] as well as more open-ended appeals to preventing the 'abuse of power'. LLE are protected to safeguard the trust of the governed that their governors will act in the manner they represented they intended to act. If trust is not sustained, "officials will not be believed and the Government becomes a choice between chaos and coercion".[214]

The duty of consistency and equal treatment, where envisaged as a ground of review independent of legitimate expectations in English public law, sets its face against arbitrariness in a refusal to apply an applicable policy to a given individual's advantage.[215] This promotes good administration. Disaggregating legitimate expectation and consistency of policy requirements would "put the knowledge requirement controversy to bed".[216]

This can be repurposed within the Singapore constitutional context as a principle influencing the standard of review where an LLE is concerned, rooted in the rationale of securing fundamental public law values like individual equality and communitarian concerns like fostering reciprocal governor-governed trust. The concern with individual dignity and equality is reflected in the Court of Appeal's guidance emphasising the importance of protecting fundamental rights, especially where the decision was taken "on an individual rather than a broad-brush basis".[217] Even if equal treatment is rooted in Article 12, neither equalization nor consistency are absolute values. For example, if a public authority mistakenly makes an excessive award, this need not be repeated in the interests of equal treatment and consistency. Further, wide-ranging social considerations may moderate the principle of consistency. The court in *Coughlan* noted that a promise made to a category of individuals with the same interest, involving no "macro-political" issues of policy, was more

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[211] *Syed Suhail (Leave), supra* note 14 at para 61.

[212] *Lines International, supra* note 87 at para 78.

[213] The court noted that claims for estoppel and SLE may involve "similar issues" such as representation and detrimental reliance: *Tan Liang Joo John v AG* [2019] SGHC 263 at paras 63, 65.

[214] *Mehmood (Legitimate Expectation)* [2014] UKUT 469 (IAC) at paras 13–16 (*per* McCloskey J) quoting Wade & Forsyth, *Administrative Law,* 10th Ed (New York: Oxford University Press, 2009) at 447.

[215] Elliot, "Legitimate Expectation", *supra* note 174 at para 25.

[216] Stark, *supra* note 179 at 468.

[217] *Syed Suhail (Leave), supra* note 14 at para 61.

likely "to be considered as having binding effect"[218] than a promise "made generally or to a diverse class"[219] whose members have conflicting interests. While fairness in relation to SLE must include "fairness of outcome",[220] which goes to case merits, the LLE focuses on how discretion is exercised, to ensure the right to a certain manner of treatment is realised. Since the state had listed the factors influencing scheduling, it was "incumbent on the State to apply these criteria consistently",[221] to ensure a claimant enjoys "fair treatment" under Article 12(1).[222] However, inconsistent action would be lawful where there are "legitimate reasons that weigh in a different direction" from the "stated baseline".[223]

1. *A More Robust Standard of Scrutiny that Administrative Review? Within and Beyond GCHQ*

The "common law principle of equality" in England has been identified as nothing more than "a particular application of the ordinary requirement of rationality imposed on public authorities", which challenges inconsistent decisions on traditional grounds of relevancy or rationality.[224] In Singapore, the principle of consistency and equal treatment stemming from LLE may not only inform those standards of administrative review, but also, as a general constitutional principle, call for a more rigorous scrutiny of reasons for departing from a policy and frustrating expectations. In the context of LLE as discussed in *Syed Suhail (Leave),* this principle would be an enforceable standard, by dint of the articulated applicable policy guidelines. This is distinct from the more open-ended idea of treating individual cases consistently, in the absence of any policy.

The standard of scrutiny would presumably be more muscular than traditional rationality review, which considers whether the decision "is within the range of rational balances that might be struck".[225] A well-reasoned decision may still be unlawful if it disproportionately impacts rights. Proportionality review in English administrative law may require the court to ascertain whether the decision-maker struck a "fair balance"[226] to ensure rights are restricted no greater than objectively necessary to secure a legitimate legislative object. Rationality review generally considers that balance falls primarily to the decision-maker.

What might constitute adequate reasons to justify the differentiated treatment of similarly situated persons depends on the burden of justification placed on the decision-maker, and any judicial deference that might be accorded. In relation to English proportionality review, once it is argued that a government measure violates

[218] *Nadarajah, supra* note 171 at para 69.
[219] *Coughlan, supra* note 148 at para 71.
[220] *Ibid.*
[221] *Ibid* at para 73.
[222] *Ibid* at para 68.
[223] *Syed Suhail (Leave), supra* note 14 at para 73.
[224] *Gallaher, supra* note 188 at para 50.
[225] *R (Daly) v Secretary of State for the Home Department* [2001] 2 AC 532 at paras 27, 28 (HL) (*per* Lord Steyn).
[226] *Huang, supra* note 40.

a fundamental right, the government bears the burden of demonstrating the measure is proportionate to the object sought. This flows from a liberal presumption of liberty that requires any restraint to be justified. In contrast, where the more deferential *Wednesbury* unreasonableness standard is invoked, the claimant must show the challenged decision is unreasonable. Once reasons are provided, courts in deferring to the decision-maker tend not to dig deeper into whether countervailing factors exist, reflecting the historical reluctance to intervene in case merits, except at the margins.[227]

In applying the two-limb *Syed Suhail (Leave)* test, the evidentiary burden first rests on the applicant to demonstrate *prima facie* reasonable suspicion of breach of the relevant standard, that is, to show that relevant persons are equally situated. This reflects a presumption of constitutionality where the alleged acts are not presumptively treated as suspect.[228] Searching scrutiny of decisions involving constitutional rights, also applies in ascertaining whether the evidential burden has been discharged, overcoming the presumption of constitutionality. When discharged, the burden shifts to the executive to show "whether the differential treatment was reasonable".[229] This may reflect a communitarian values orientation which typically weights competing interests underlying the restraint of rights more heavily, including the Confucian ideal of "government by honourable men" who presumptively enjoy the people's trusting respect.[230]

A principle of consistency stemming from an LLE rooted in Article 12 may satisfy the Court of Appeal's insistence that the test for impermissibly discriminatory acts not be conflated with ordinary judicial review principles,[231] in serving 'searching scrutiny'. Arguably, this can be done either by conceptualising the principle of consistency as a new judicial review ground, or by recognising broader readings of existing grounds, "animated by multiple underlying principles".[232]

The Court of Appeal has shown reticence towards recognising new judicial review grounds,[233] in subsuming proportionality under rationality review,[234] and in suggesting that SLE related concerns could be accommodated within the traditional *GCHQ* framework as mandatory relevant considerations[235] or an obligatory duty to give reasons for reneging on a promise or departing from policy,[236] as an aspect of illegality and procedural impropriety, respectively.[237] In giving expression to public law values, there are more methods that a stark binary between merits review and no

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[227] Laws, *supra* note 177 at 186.

[228] *Syed Suhail (Leave), supra* note 14 at para 63. See s 103, *Evidence Act* (Cap 97, 1997 Rev Ed Sing).

[229] *Ibid* at paras 60, 61.

[230] Parliament of Singapore, *White Paper, Shared Values* (Paper Cmd No 1 of 1991). This is reflected in awarding higher defamation damages to government leaders, given their moral authority, higher social standing and public service: *Lim Eng Hock Peter v Lin Jian Wei* [2010] 4 SLR 357 at paras 12, 13 (CA).

[231] *Syed Suhail (Leave), supra* note 14 at para 57.

[232] Stark, *supra* note 179 at 452.

[233] *Tan Seet Eng, supra* note 5 at paras 63, 99.

[234] *Chng Suan Tze, supra* note 44 at para 121.

[235] *Coughlan, supra* note 148 at para 57. The public authority would only be required to consider and give appropriate weight to its previous policy, which decision could be reviewed on *Wednesbury* grounds.

[236] Makoto Cheng Hong, "Shaping a Common Law Duty to Give Reasons in Singapore: Of Fairness, Regulatory Paradoxes and Proportionate Remedies" (2016) 28:1 Sing Ac LJ 24.

[237] *Starkstrom, supra* note 31 at para 63.

review at all.[238] Adherence to the traditional review grounds which address "justice and legality" in particular cases, rather than polycentric policy questions[239] may alleviate fears of cultivating an intrusive judicial review which applies a 'correctness' standard with courts substituting the decision-maker's judgment with their own. That SLEs would require "a more searching scrutiny of executive action"[240] beyond the traditional *GCHQ* framework, resonates with the implications of what LLEs may import. While the former is concerned with quasi-contractual reliance interests, LLEs may be understood as a site where the duties of non-reneging and principle of consistency are negotiated, independent of the claimant's knowledge of the policy.

2. *Principle of Consistency and Searching Scrutiny within the GCHQ Framework*

The principle of consistency requires decision-makers to generally follow their articulated policies or adhere to long-standing practices. Inconsistent action may be remedied through a duty to give reasons, which promotes transparency and accountability, and enables an aggrieved person to assess whether to challenge a decision. An absence or paucity of reasons may point to irrationality, while reason-giving assists in ascertaining whether a decision falls within a range of permissible reasonable outcomes.

There is no general common law duty to give reasons under Singapore law,[241] or for that matter, English administrative law.[242] While reasonableness does not require reasons to be stated,[243] arguably, where LLE are involved, the law could be developed to require reasons to be stated, to fully vindicate Article 12 values.

If a principle of consistency is subsumed into a context-sensitive rationality review, this may alleviate concerns about unduly fettering discretion or over-reaching review.[244] Concerns that "pure" *Wednesbury* review would not adequately protect fundamental rights may be mollified by conclusively discarding the notion that *Wednesbury* unreasonableness entails a uniform application of irrationality[245]

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[238] *Ibid*.

[239] *Ibid* at para 58(c).

[240] *Ibid* at para 62.

[241] *Siah, supra* note 145 at para 34.

[242] Lord Mustill noted that a duty to give reasons may be appropriately implied: *R v Home Secretary, ex parte Doody* [1994] 1 AC 531 at 564E–F (HL). See *Dover District Council v CPRE Kent* [2017] UKSC 79 at paras 51, 57 and Joanna Bell, "Reason-Giving in Administrative Law: Where Are We and Why Have the Courts Not Embraced the General Common Law Duty to Give Reasons?" (2019) 82:6 MLR 983.

[243] *Chee Siok Chin, supra* note 21 at para 93, citing Wade & Forsyth, *Administrative Law,* 9th ed (New York: Oxford University Press, 2004) at 365.

[244] *Wednesbury* unreasonableness insulates against judicial intrusion into the merits by asking whether a decision is "extremely unreasonable" rather than if it is "ordinarily unreasonable": Jowell & Lester, *supra* note 35 at 861. However, "unreasonableness" is an amorphous concept and can be used to guise judicial value judgments.

[245] Lord Mance in *Kennedy, supra* note 19 at para 51 noted that "the common law no longer insists on the uniform application of irrationality" once thought applicable under the Wednesbury principle, which

requiring "something overwhelming"[246] to prove a decision is "absurd" or involves "perverse" behaviour,[247] where a decision-maker "takes leave of his senses",[248] making a decision by fortune-telling or coin tossing.

Instead, it accommodates variable degrees of judicial scrutiny in determining the defensible range of possible outcomes. This is evident in the "most anxious scrutiny" or sub-*Wednesbury* line of cases in the English experience, where a more exacting standard of review is applied, as where the right to life is involved.[249] Judicial intervention is triggered where a decision goes "beyond the range of responses open to a reasonable decision-maker".[250] In delimiting this margin of appreciation, the human rights context "is important", such that the greater the interference with the right, the more the court requires by way of justification, to be satisfied the decision was reasonable.[251] This standard has been described as expanding the scope of rationality review, "so as to incorporate at common law significant elements of the principle of proportionality".[252] Its application involves "considerations of weight and balance"[253] in deciding what weight to assign the primary decision-maker's view and how to calibrate the intensity of scrutiny, considering the moderating considerations of institutional competence and constitutional legitimacy. Rationality review may function like proportionality review[254] where the court assesses so narrow a range of rational decisions, as to determine the outcome.[255]

If *Wednesbury* unreasonableness is appreciated as a flexible ground where the organising idea is whether a decision falls within a range of reasonable outcomes,

was, as Lord Sumption noted in *Pham v Secretary of State for the Home Department* [2015] 1 WLR 1591 at para 109 (SC) [*Pham*], "virtually unattainable".

246 *Wednesbury, supra* note 27 at 230.

247 *Pulhofer v Hillingdon LBC* [1986] AC 484 (HL).

248 *R v Secretary of State for the Environment, ex p* Nottinghamshire CC [1986] AC 240 (HL) (*per* Lord Scarman).

249 *Wednesbury, supra* note 27 at 531 (*per* Lord Bridge).

250 *Smith, supra* note 140 at 554.

251 *Ibid* at 554 (*per* Sir Thomas Bingham MR). Lord Sumption in *Pham, supra* note 245 at para 106 described the approach in *Smith* as "in substance a proportionality test" but rather than the court deciding whether a decision was proportionate, it asked "whether a rational minister could think that it was".

252 *Pham, supra* note 245 at para 105 (*per* Lord Sumption), noting that differentiating between less and more important rights and interference of greater or lesser degree is "essentially the same problem as the one to which proportionality analysis is directed".

253 *Pham, ibid* at para 106 (*per* Lord Reed).

254 Proportionality review is not monolithic, with the intensity of review calibrated by the right involved, nature of interference and justification for it: *Bank Mellat, supra* note 191 at paras 69–72. The emergence of proportionality review as a common law ground of review in cases without a European dimension was arguably explicitly recognised in *Pham, supra* note 245 where Lord Mance at paras 96–98 observed that the intensity of review was not determined by the test structure but how much judicial restraint accompanied its application.

255 Paul Craig in "The Nature of Reasonableness Review" (2013) 66 CLP 131 argued that rationality review can function like proportionality review where fundamental rights are concerned; the difference between both standards under the *Human Rights Act 1998* was "one of degree rather than kind": Mark Elliott, "The Human Rights Act 1998 and Standard of Substantive Review" [2001] 60:2 Cambridge LJ 301 at 308, 313. Lord Kerr in *R (on the application of Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2015] UKSC 19 at para 271 noted that the difference between these standards was not as "stark as it is sometimes portrayed." Without conflating the two standards of review, it was recognised that both can produce the same outcome, even with differing onus: *R v Chief Constable of Sussex ex p International Trader's Ferry Ltd* [1999] 2 AC 318 at 439 (HL) (*per* Lord Slynn).

this could support a 'sliding scale' substantive review approach, providing an umbrella under which LLE and consistency can shelter.

3. *Principle of Consistency and Searching Scrutiny beyond the GCHQ Framework*

If LLE is viewed as giving rise to the principle of consistency as an independent ground of review[256] sustaining searching scrutiny, an account of how to ascertain whether a legal expectation is legitimate, and when consistency requires judicial intervention or permits inaction would need to be developed. This may give rise not only to a duty to give reasons, but a duty to give *good* or adequate reasons, where policy is departed from. Concerns that this may be too intrusive a standard, veering towards *Coughlan* style correctness review, may be moderated: where reasons for departure are not considered good enough or legitimate, the court will apply deferential review at the stage of justification of differentiated treatment, or require the public authority to apply the policy it authored, minimising the risk of the judicial imposition of its own "original solution".[257]

By allowing the principle of consistency to stand on its own legs, it would be disassociated from *Wednesbury*'s cloak which may shelter "prejudices or policy considerations".[258] If subsumed under *Wednesbury*, this would further bloat the amorphous standard which has been described as a category of "the things that must not be done" in the vein of gut-instinct adjudication: aside from the famed dismissal of a red-haired teacher, Lord Greene MR stated a decision could be unreasonable for taking into account "extraneous considerations", or being done "in bad faith",[259] falling short of good administrative practices or standards of probity.

Detached from *Wednesbury*, the need to identify the precise norms underlying the principle of consistency may lend clarity to the values it upholds and guide the decision-maker on when to honour its undertakings and policies—consistency serves as "the enemy not only of caprice but of rigidity".[260] This may encourage care in formulating policies, which are now "a major source of people's expectations of how government will treat them", warranting "appropriate forms of judicial oversight,[261] as policies in staving off arbitrariness must generally be applied consistently. Decision-makers may be moved to set out in detail when exceptions may be made, *ie* to indicate when the policy may legitimately be inconsistently applied.

[256] Sedley J bypassed *Wednesbury, supra* note 27 in noting that "the legal principle of consistency … creates a presumption that [a decision-maker] will follow his own policy": *R v Secretary of State for the Home Department, ex parte Urmaza* [1996] COD 479 (HC); Stephen Sedley, *Ashes and Sparks: Essays on Law and Justice* (Cambridge, UK: Cambridge University Press, 2011) at 257 [Sedley]. See Stark, *supra* note 179 at 460.

[257] Dotan, *supra* note 187 at 29.

[258] Jowell & Lester, *supra* note 35 at 861.

[259] *Wednesbury, supra* note 27 at 531.

[260] Sedley, *supra* note 256 at 257. For example, to clarify when a policy becomes sufficiently established to render deviations from to fall foul of the principle of consistency: Mark Elliott, "A 'Principle' of Consistency? The Doctrinal Configuration of the Law of Judicial Review" (2018) 77:3 Cambridge LJ 444 at 446, 447.

[261] Sedley, *supra* note 256 at 259.

SJLS A0148

There is some similarity between legitimate expectations and a principle of consistency, insofar as the freedom of the decision-maker to change policy is preserved, while a remedy is provided for those most harshly affected.[262] They serve different functions as legitimate expectations are grounded on the precept that the decision maker should "stand by its word"[263] which is relied upon, while consistency relates more to encouraging good administration, by preventing public authorities from deciding similar cases differently.

As a ground of review, an allegedly inconsistent decision would either be valid or invalid. However, if the principle of consistency and equal treatment rooted in Article 12 is apprehended as a constitutional principle or standard, its alleged violation raises questions of lawfulness, without necessarily indicating the decision is unlawful. As a principle rather than an enforceable rule or ground of review, weight can be attributed to it, in engaging the constitutional demand to justify departures from policy. This is then balanced against other principles and interests, such as democratic accountability and the separation of powers. Whether there are legitimate reasons for inconsistent treatment goes beyond an inquiry into rationality; a decision-maker may find it perfectly rational to subjugate individual interests to policy considerations, but that would let it act as a judge in its own cause. Judicial control here requires asking what fairness requires in the case circumstances; while this is an imprecise standard which needs fleshing out, it has the virtues of mitigating asymmetries of power between the individual and state, requiring generally that public authorities should live up to policies they issue, unless there is a justifiable reason not to.

IV. Conclusion

In clarifying that the 'intentional and arbitrary' test for executive action which violates Article 12 was illustrative, but not exhaustive of the grounds of challenge, the Court of Appeal in *Syed Suhail (Leave)* demonstrated its concern that Part IV liberties be sufficiently safeguarded,[264] given their "higher legal order"[265] status under Article 4.

The call for 'more searching scrutiny' then what traditional principles of administrative legality afford, reflects a judicial commitment to contextualism, where the degree of scrutiny and the weight accorded the views of the primary decision-maker varies with the case circumstances. With respect to Article 12(1) challenges to executive action, equality of treatment of those similarly situated is not an absolute value,

[262] Stark, *supra* note 179 at 457.

[263] Jason Ne Varuhas, "In Search of a Doctrine: Mapping the Law of Legitimate Expectations" in Matthew Groves and Greg Weeks, eds, *Legitimate Expectations in the Common Law World* (Oxford, UK: Hart Publishing, 2017) 17 at 40.

[264] More recently, the courts appear to be applying a 'reasonableness' test in rights adjudication: *Vijaya Kumar v PP* [2015] SGHC 244, which is a shift away from applying statist trumps: *Colin Chan v PP* [1994] 3 SLR 662 at 684F–G (HC). Constitutional rights must not be eviscerated by literal approaches where the court simply accepts Parliament's view that legislative restrictions are necessary: *Jolovan Wham, supra* note 20 at para 22.

[265] *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52 at para 264 (CA).

A0148.indd 125 06-29-22 11:36:04

as differentiated treatment supported by "legitimate reasons" is justifiable. The reasonableness of such treatment is not pegged at the too low standard of lacking any rationality. One standard for assessing the legitimacy of differentiated treatment in terms of whether it bears a "sufficient rational relation" to the object for which the power was conferred, resembles the reasonable classification applicable to Article 12(1) challenges to legislation. This does not go to the legitimacy of the legislative object but the efficacy of the method chosen to advance that object, to ensure against a "clear disconnect".[266] To some extent, this brings about a "remarkable harmonization" of Article 12 jurisprudence for challenges against legislation and executive action.[267] The 'reasonable classification' test is a deferential standard of review, where courts refrain from resorting to a scale of subjective values to determine whether a legislative purpose is legitimate. It is unlikely that the *Syed Suhail (Leave)* test for executive action will impact the test for Article 12 and the constitutionality of legislation, in the sense of providing legal standards for ascertaining the legitimacy of a statutory object, as the second limb of the test assumes the legitimacy of the statutory or policy basis for finding persons equally or unequally situated.

Differentiated treatment implemented through a policy will fail the "legitimate reasons" limb of the test if it is based on "plainly irrelevant considerations" or stems from the inconsistent application of standards and policies sans good reasons.[268] Relevancy falls squarely within the *GCHQ* ground of 'illegality',[269] whereas it remains an open question how to conceptualise the principle of consistency. It is argued that the Court of Appeal's concern not to conflate the Article 12 test for impermissible discrimination with the traditional grounds of judicial review at administrative law may be satisfied either by conceptualising consistency as an independent principle or a facet of rationality review. The latter approach must be accompanied with the clear appreciation of the "important mismatch" between "the language of *Wednesbur*y and its application in practice", spawning the misleading impression that irrationality is a monolithic standard which cannot minister to "the pressing nature of potential claims of fundamental rights."[270] The 'pure' *Wednesbury* test[271] would be too weak a standard of review where fundamental rights are concerned. As discussed, irrationality may be seen as a single principle of reasonableness, rooted in the soul of the common law,[272] which is of variable application; thus, rationality review may be intensified where individual rights or the equal treatment principle is at stake, vindicating respect for persons as rational agents living within society.

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[266] *LMS (CA)*, *supra* note 3 at para 68.

[267] Chng, *supra* note 15 at 6, 9.

[268] *Syed Suhail (Leave), supra* note 14 at para 61.

[269] The Court of Appeal recognised illegality and irrationality as "separate though overlapping heads of review": *Tan Seet Eng, supra* note 5 at para 80.

[270] Laws, *supra* note 177 at 187.

[271] In *Mir Hassan bin Abdul Rahman v AG* [2009] 1 SLR (R) 134 (HC), fixing a hearing after a deadline's expiry was considered a futile, irrational exercise.

[272] *Dr Bonham's Case,* (1610) 8 Co. Rep 107 (where common law standards of common right and reason would adjudge a statute to be void). In *ex p Sim Soo Koon* (1915) 13 SSLR 57 (Supreme Court), Earnshaw CJ noted discretion had "to be done according to the rules of reason and justice…" and not be "arbitrary, vague and fanciful."

SJLS A0148

With respect to consistency as a criterion for assessing the reasonableness of treating two equally situated persons differently, negotiating the values underlying the principle of non-reneging and non-fettering of discretion reflects the administrative realities that policies may require modifications to meet changing circumstances. This involves balancing constitutional principles of separation of powers, democracy, the rule of law, as well as considerations of efficient and effective governance.

Insofar as consistency and the other standards for assessing whether legitimate reasons exist for treating equally situated persons differently highlight the importance of justifications for such divergence, they promote transparency and intelligibility in the decision-making process. This supports a "green-light" approach towards administrative law, where courts articulate "clear rules and principles" which in providing guidance to executive or administrative authorities, bolster rule of law virtues.[273]

[273] Chan Sek Keong, "Judicial Review- From Angst to Empathy" (2010) 22 Sing Ac LJ 469 at para 29.

A0148.indd 127 06-29-22 11:36:04