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ARTICLE

Conceptualising A Role for The Common Law in Environmental Protection in Singapore

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Abstract
In Singapore, the key institutions driving environmental protection are the legislature and the executive. The judiciary's role in environmental protection has thus far been relatively minor. By drawing upon environmental law theory and comparative analysis of other common law jurisdictions, this article explores avenues through which the common law can be engaged more meaningfully to further environmental protection in Singapore. A conceptualisation of environmental law as directed at furthering the rule of law by promoting carefully-considered and participatory environmental governance will be suggested as a fruitful way forward for thinking about the role of the common law in environmental protection. Drawing upon this theory, as well as the experience of other common law jurisdictions, the article proposes a set of concrete steps by which greater common law engagement with environmental protection in Singapore can be achieved.

COMMON LAW ENVIRONMENTAL LAW IN SINGAPORE

Environmental protection is a defining issue of our time. All around the world, the law has risen to the occasion to contribute to this cause, leading to the development of a vibrant body of environmental law jurisprudence at both domestic and international levels.

Singapore has also been influenced by such developments. Indeed, as a city-state situated on a tiny Southeast Asian island, environmental law has played a crucial role in structuring Singapore's pursuit of a balance between economic development and the conservation of the precious few natural resources that Singapore can call its own. Notably, in Singapore, the cause of environmental protection is primarily perceived as the domain of the legislative and executive branches. Pollution control, environmental conservation, and wildlife preservation, inter alia, are regulated through a plethora of statutes and regulations.[1] The Singapore courts' engagement with environmental protection is at present rather negligible. One might have thought that Singapore's complex network of environmental regulation would be fertile ground for the generation of a robust body of jurisprudence regulating powers granted under such regulations. However, this has not proven to be the case.[2] While the regular doctrines of administrative law remain applicable to the exercises of such power, there has been no adaptation or extension of these doctrines in Singapore to better serve the context of environmental protection, unlike in other common law jurisdictions. A similar lack of considered engagement with environmental protection obtains in private law.[3]

[1]See Joseph Chun & Lye Lin Heng, *Environmental Law in Singapore* (Academy Publishing 2019) for reference.
[2]There have been no judicial review cases on environmental decisions in Singapore – Chun & Lye (n 1) 196.
[3]See, for example, the decision in *Lim Sor Choo v Sato Kogyo* [2006] SGDC 212, where the district judge dealt with a claim under the tort of private nuisance for noise pollution by granting a significant degree of latitude to the defendant in question.

To provide a specific example, the Singapore government regularly seeks public feedback through public consultation exercises, feedback mechanisms, and engagement sessions with various stakeholders in relation to matters concerning the environment – a recent example is the public consultation exercise recently held by the National Climate Change Secretariat to seek public feedback on Singapore's long-term emissions control strategy.[4] Yet, while such exercises are laudable, there is at present no legal duty to conduct public consultations and there are no legal principles specifying the manner by which such consultations must be conducted.[5] Therefore, how public consultations are performed and whether they are indeed performed at all depends entirely on the discretion of the relevant executive agencies. Similarly, there is presently no legal duty mandating the conduct of environmental impact assessments (EIA), much less a set of legal requirements for the proper conduct of such assessments[6] – a fact consistently lamented by commentators on environmental law in Singapore.[7] The Singapore government does indeed perform EIAs voluntarily, but these are conducted on an ad hoc basis and in the absence of any external supervision of the process of these assessments.[8] This has resulted in significant inconsistency in the quality of EIA administration and governance,[9] as well as inconsistency in the inclusion of public participation in the EIA process.[10]

One may wonder why then the Singapore courts have thus far not taken on a more substantive role in the arena of environmental governance. It is suggested that there are two main reasons for this. The first is relatively straightforward – the framework of common law doctrine provides limited avenues for environmental litigation, and indeed presents significant obstacles in this regard in Singapore.[11] The second reason relates to Singapore's socio-legal context and the perceived institutional role of the courts within this context. The Singapore courts have taken a restrained view of their institutional role. Indeed, they have indicated that their preferred conception of their role, vis-à-vis the other institutions of government, is a 'green-light' one – on this view, it is not the role of the courts to aggressively check exercises of power by the other branches of government, but rather to play a facilitative and collaborative role in the pursuit of good governance in Singapore.[12] In a similar vein, the Singapore courts have a deep-seated inclination towards deference to the other branches of government in areas perceived to be beyond their traditional area of competence. They have expressed great reluctance to engage with issues they consider to be political or moral in nature, or which involve polycentric considerations, considering these issues to be beyond their institutional expertise and suggesting that the other branches of government are the more appropriate fora for the resolution of such matters.[13] As such, given the scientific and technical

[4]National Climate Change Secretariat, Strategy Group (NCCS), 'Public Consultation on Developing Singapore's Long-Term Low Emissions Strategy' (16 Jul 2019) <https://www.reach.gov.sg/participate/public-consultation/national-climate-change-secretariat/public-consultation-on-developing-singapores-long-term-low-emissions-strategy> accessed 14 Jul 2020.

[5]The government can reject feedback without giving reasons; see Koh Kheng Lian, 'Book Review: Environmental Law in Singapore' (2020) 32 Singapore Academy of Law Journal 335, 338.

[6]Chun & Lye (n 1) 56–57; Lin Heng Lye, 'A Fine City in A Garden—Environmental Law and Governance in Singapore' (2008) Singapore Journal of Legal Studies 68, 109.

[7]Chun & Lye (n 1) 85–89; Lye (n 6) 110.

[8]Lye (n 6) 111.

[9]Chun & Lye (n 1) 58–60, 74–82.

[10]Chun & Lye (n 1) 63–64.

[11]This will be elaborated in Sections II.B. and IV.B.

[12]See *Jeyaretnam Kenneth Andrew v Attorney General* [2014] 1 SLR 345 paras 48–50, Chan Sek Keong, 'Judicial Review – From Angst to Empathy: A Lecture to Singapore Management University Second Year Law Students (2010) 22 Singapore Academy of Law Journal 469, para 37.

[13]See, for example, *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26, 32–24, 60–61, where the Singapore Court of Appeal declined to consider 'extra-legal' arguments and considered that it is for Parliament, and not courts, to consider whether it is necessary to add to constitutionally impermissible categories of discrimination. See also *SGB Starkstrom Pte*

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nature of environmental governance, it is not unexpected that the Singapore judiciary has been reticent in this regard.

This article seeks to address each of these issues to propose a path for greater common law engagement with environmental governance in Singapore. Indeed, while it is undeniable that statutory and regulatory frameworks are of principal importance in environmental protection, this does not mean that the common law consequently has no role to play. By drawing upon environmental law theory and comparative analysis of the experience of other common law jurisdictions in this regard, this article explores avenues through which the common law can be engaged more meaningfully to further environmental protection in Singapore, in a manner that will take into account and fit Singapore's socio-legal context.

The article begins with an overview of the difficulties that must be grappled with in conceptualising the role that law – and specifically, the common law – can play in environmental protection. A conceptualisation of environmental law as directed at furthering the rule of law by promoting carefully-considered and participatory environmental governance will be suggested as a fruitful way forward for thinking about the role of the common law in environmental protection, especially in Singapore. The article then performs a comparative analysis of the nature of the common law's involvement with environmental protection around the world, and will highlight that much of the common law's contribution to safeguarding our environment fits with such a conceptualisation of environmental law. Finally, the article turns to apply these insights to Singapore, and drawing upon the experience of other common law jurisdictions, proposes a set of concrete steps that can be taken to chart a path for greater common law engagement with environmental protection in Singapore.

CONCEPTUALISING ENVIRONMENTAL LAW

Challenges in Conceptualising Environmental Law

Before charting a path for the common law to play a more meaningful role in environmental protection in Singapore, it is useful to first clarify what environmental law is about and what its normative foundations are.

The challenges of defining environmental law have already been well-rehearsed in the literature.[14] On one hand, it is clear that environmental law has emerged as a serious scholarly discipline in its own right.[15] Scholars have argued that environmental law possesses a conceptual unity which merits specific analysis and attention. For example, Bell and others argue that environmental law has emerged as a distinct legal discipline, possessing 'a set of principles and concepts that can be said to exist across the range of subjects covered'[16] – examples include the polluter pays principle, the precautionary principle, and the preventive principle. Further, in addition to this unity at the level of principle, they point out that there is general consensus around 'a core grouping of topics that might comprise substantive environmental laws', contributing to the coherence of environmental law as a distinct discipline.[17] Fisher and others propose a different approach to conceptualising environmental law as a distinct scholarly discipline – their approach is methodological in nature, seeking to provide a series of steps to structure inquiry into environmental law issues in order to

Ltd v Commissioner for Labour [2016] 3 SLR 598 paras 34–63, for an indication of the Singapore Court of Appeal's reluctance to engage in matters perceived to be beyond the judiciary's institutional expertise.

[14]See, for example, Chun & Lye (n 1) 1–14. See also Elizabeth Fisher et al, 'Maturity and Methodology: Starting a Debate about Environmental Law Scholarship' (2009) 21 Journal of Environmental Law 213 for a candid examination of the difficulties involved in developing environmental law scholarship as a body of legal scholarship.

[15]Louis J Kotze, 'The Conceptual Contours of Environmental Constitutionalism' (2015) 21 Widener Law Review 187, 189, 199.

[16]Stuart Bell et al, *Environmental Law* (9th edn, Oxford University Press 2017) 5.

[17]ibid 5.

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highlight the 'scope of knowledge and understanding that an environmental lawyer needs to understand, apply, and evaluate environmental law'.[18]

Yet, on the other hand, it can also be said that environmental law as a scholarly discipline remains conceptually unstable.[19] It does not fit easily into existing categories of law – indeed, it straddles the realms of both private and public law.[20] It lacks the conceptual unity of legal rules that characterises areas of law such as contract law.[21] The unity of environmental law as a body of jurisprudence lies in its objective, which means that it is in constant danger of being assimilated into other constituent areas of law – for instance, as a specific domain of tort law or administrative law.[22]

These issues relate to the relationship between environmental law and existing legal domains. However, there are yet more fundamental conceptual difficulties that environmental law has to grapple with. Indeed, whether law coheres at all with the goal of environmental protection is an area of concern. Law is traditionally anthropocentric – some of its most fundamental goals are to prevent harm to persons and safeguard human rights and property. However, environmental law, to the extent that it suggests that the environment has intrinsic value and is thus worthy of protection for that reason alone, even independent of its value to human beings, fits uneasily with this traditional conception of law.[23] Indeed, environmental law has been described as a 'radical break with the Western legal tradition'.[24]

Challenges with Common Law Engagement With Environmental Law

More specific to our purposes, beyond these theoretical problems with conceptualizing the role of law in environmental protection, the role of the *common law* in this regard raises an additional set of difficulties.

The common law faces both systemic and doctrinal challenges as a means of advancing environmental law. Beginning with the systemic challenges, it is the very nature of the common law to develop gradually on an ad hoc basis, making it less ideal as a source of systematic norms capable of swiftly dealing with the complex challenges that environmental harm poses.[25] The adversarial nature of common law adjudication also means that it is much less well-equipped to canvass the wide range of data required for judges to make prudent decisions in a field touching upon rapidly developing science and where they lack specific expertise.[26] Further, as a matter of the hierarchy of legal norms, common law causes of action are in constant danger of being displaced by legislation. For example, in the UK, the viability of the common law tort of nuisance as a remedy in the face of a planning permission granted in accordance with the relevant planning regulations was a matter of

[18]Elizabeth Fisher, Bettina Lange & Eloise Scotford, *Environmental Law: Text, Cases, and Materials* (Oxford University Press 2013) 18.

[19]Ole Pendersen, 'Modest Pragmatic Lessons for a Diverse and Incoherent Environmental Law' (2013) 33 Oxford Journal of Legal Studies 103, 104; Harry Woolf, 'Are the Judiciary Environmentally Myopic'(1992) 4 Journal of Environmental Law 1, 2.

[20]Woolf (n 19) 2.

[21]Andrew Waite, 'The Quest for Environmental Law Equilibrium' (2005) 7 Environmental Law Review 34, 34.

[22]A Dan Tarlock, 'Is There a There There in Environmental Law' (2004) 19 Journal of Land Use & Environmental Law 213, 230.

[23]Tarlock, 'Is There a There There in Environmental Law' (n 22) 224–225; A Dan Tarlock, 'The Future of Environmental Rule of Law Litigation' (2002) 19 Pace Environmental Law Review 575, 586–587.

[24]Tarlock, 'The Future of Environmental Rule of Law Litigation' (n 22) 235.

[25]Alexandra B Klass, 'Modern Public Trust Principles: Recognizing Rights and Integrating Standards' (2006) 82 Notre Dame Law Review 699, 713.

[26]ibid 713.

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some uncertainty,[27] before the Supreme Court's affirmation of the tort's continued relevance in such circumstances in *Coventry v Lawrence*.[28]

Beyond these systemic constraints, as a matter of legal doctrine, there are also well-known problems with using the common law as a means of substantive environmental protection. Considering tort law, for example, proof of causation in tort claims relating to environmental harms is 'notoriously problematic'.[29] Indeed, where the relevant claim is that the emission of a particular pollutant has led to physical harm, the claimant often faces an uphill battle in proving a causal link between the relevant emission and the harm suffered.[30] More fundamentally, private law causes of action do not fit well with the purpose of environmental law – such causes of action were designed to vindicate specific personal rights and interests, while environmental law ultimately seeks to protect the public from more generalised harm.[31] Further, such causes of action are primarily compensatory in nature, and are unable to compel positive action to safeguard the environment.[32]

In view of these limitations of private law, one might have thought that public law would provide a more promising avenue of securing environmental safeguards through the common law. However, the existing structure of public law at common law also poses significant challenges in this regard. First of all, judicial review orthodoxy provides that judges exercising judicial review should not enter into the merits of executive decision-making, and must be concerned only with the legality of the decision-making process. This serves as an inherent limit on the extent to which judges will be willing to rigorously scrutinize executive decisions on the basis of environmental concerns.[33] Further, there is an even more fundamental difficulty with squaring environmental protection with common law public law: both domains appear to have fundamentally opposing objectives. Public law is traditionally focused on restraining the exercise of government power, while environmental law often aims to *encourage* the exercise of such power in support of the cause of environmental protection.[34]

Across both private and public law, an underlying reason for the common law's reluctance to engage too actively in the realm of environmental protection is the heavy policy dimension of environmental governance. Decisions relating to environmental protection tend to involve complex issues of resource allocation which may be perceived as more properly dealt with in the realm of politics.[35] Environmental disputes tend to be polycentric, involve contentious normative judgments, and depend heavily on rapidly developing science.[36] It should be no surprise then that common law judges have been reluctant to intervene too readily in such a domain. Thus, in relation to tort law, the heavy policy component of environmental protection has inclined judges towards the position that such protection is best achieved through other means, leading them to disallow common law

[27]*Hunter v Canary Wharf Ltd* [1997] AC 655; Stephen Tromans QC, 'Planning and environmental law – uneasy bedfellows?' (2012) 13 Journal of Planning and Environment Law 73.

[28]*Coventry v Lawrence* [2014] UKSC 13.

[29]Maria Lee, 'Tort, Regulation and Environmental Liability' (2002) 22 Legal Studies 33, 37.

[30]ibid 37–38.

[31]Woolf (n 19) 4; Lee (n 29) 40; Chun & Lye (n 1) 277.

[32]Dustin W Klaudt, 'Can Canada's "Living Tree" Constitution and Lessons from Foreign Climate Litigation Seed Climate Justice and Remedy Climate Change?' (2018) 31 Journal of Environmental Law and Practice 185, 230–231; Chun & Lye (n 1) 259.

[33]Lynn Hagger, 'Current Environmental Enforcement Issues: Some International Developments and Their Implications for the UK' (2000) 2 Environmental Law Review 23, 28–29; Ceri Warnock, 'Environmental adjudication: mapping the spectrum and identifying the fulcrum' (2017) Public Law 643, 655.

[34]Heather McLeod-Kilmurray, 'Stichting Greenpeace and Environmental Public Interest Standing before the Community Judicature: Some Lessons from the Federal Court of Canada' (1998–1999) 1 Cambridge Yearbook of European Legal Studies 269, 286; Nupur Chowdhury, 'From Judicial Activism to Adventurism – The Godavarman Case in the Supreme Court of India' (2014) 17 Asia Pacific Journal of Environmental Law 177, 183.

[35]Warnock (n 33) 645–646.

[36]Maia Perraudeau, 'Back to the future: Brexit, EIA and the challenge of environmental judicial review' (2019) 21 Environmental Law Review 6, 11; Warnock (n 33) 646.

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causes of action where they have been pre-empted by existing statutory measures[37] and decline invitations to extend existing common law doctrines to cover claims based on environmental damage.[38] Similarly, for this reason, courts performing judicial review have expressed concern as to the appropriateness of intrusive judicial scrutiny of executive decisions relating to such matters, and have preferred to adopt permissive standards of review.[39]

Environmental activists and scholars have laboured hard at addressing these issues, in their efforts to encourage more meaningful common law engagement with environmental governance. Climate change litigation is a prominent example of such efforts – environmental interest groups, especially in the US, have brought a series of high profile common law tort suits based on harms wrought by climate change.[40] Scholars have proposed that tort law is a valuable repository of common law principles capable of addressing the problem of climate change.[41] For example, Weaver and Kysar have argued that tort law's generality, majoritarian nature, and the persistence of its norms lead to it being a useful resource as a response to the catastrophe of climate change.[42] In a similar vein, Ewing and Kysar have argued that common law tort adjudication can play a valuable role in improving environmental governance by providing a forum for the articulation of moral norms, as well as prodding other branches of government into action by highlighting the social consequences of their lack of action.[43]

Nevertheless, the point remains that the common law faces deep systemic challenges in playing a more significant role in environmental protection. Indeed, despite the efforts of environmental interest groups to get common law courts to engage more meaningfully with climate change issues, judges have persistently dismissed such claims on the ground of non-justiciability.[44] Deep-seated judicial attitudes will take years, if not decades, to change. The approach of the Hong Kong courts is instructive in this regard. In *Clean Air Foundation v Hong Kong Special Administrative Region*, the Hong Kong Court of First Instance in a significant move recognized that it was prima facie arguable that the constitutional right to life and the right to health enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR) placed a positive duty upon the Hong Kong government to combat air pollution.[45] Yet, the application for leave to commence judicial review failed, on the basis that the disagreement between the parties ultimately rested on the *best* way to combat air pollution. The precise means by which the government should combat air pollution was an issue for the 'political process', not the courts.[46] A similar attitude was also taken by the Hong Kong Court of Appeal in *Chu Yee Wah v Director of Environmental Protection*.[47] The

[37]See, for example, *In re Deepwater Horizon* 745 F (3d) 157, 2014 AMC 2600 (5th Cir 2014).

[38]See, for example, *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264; *Transco v Stockport MBC* [2004] 2 AC 1.

[39]See, for example, *R (Alconbury Developments Ltd) v Secretary of State for the Environment, Transport and the Regions* [2001] 2 All ER 929.

[40]See, for a summarised description of these cases, Benjamin Ewing & Douglas A Kysar, 'Prods and Pleas: Limited Government in an Era of Unlimited Harm' (2011) 121 Yale Law Journal 350, 367.

[41]See, for example, David A Grossman, 'Warming Up to a Not-So-Radical Idea: Tort-Based Climate Change Litigation' (2003) 28 Columbia Journal of Environmental Law 1; Thomas W Merrill, 'Global Warming as a Public Nuisance' (2005) 39 Columbia Journal of Environmental Law 293.

[42]R Henry Weaver & Douglas A Kysar, 'Courting Disaster: Climate Change and the Adjudication of Catastrophe' (2017) 93 Notre Dame Law Review 295, 312

[43]Ewing & Kysar (n 40) 356, 375.

[44]Weaver & Kysar (n 42) 322.

[45]*Clean Air Foundation v Hong Kong Special Administrative Region* [2007] HKCFI 757 para 17; Heather R Croshaw, 'The Right to Health and Right to Life: Positive Obligations for Controlling Air Pollution in Hong Kong in Clean Air Foundation v. HKSAR' (2014) 15 Vermont Journal of Environmental Law 450, 476.

[46]*Clean Air Foundation v Hong Kong Special Administrative Region* [2007] HKCFI 757 para 43; Rohan Price & John Kong Shan Ho, 'Air Pollution in Hong Kong: The Failure of Judicial Review and the Slight Promise of Recent Cases' [2011] Singapore Journal of Legal Studies 394, 397–398.

[47]*Chu Yee Wah v Director of Environmental Protection* [2011] HKCA 217 paras 116–118; Tromans QC (n 27) 1315.

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reasoning of the Hong Kong courts illustrates the quandary faced by common law judges in environmental litigation. Even if judges may be sympathetic to the pressing concerns of environmental harm, they are often reluctant to subject executive decisions to high levels of scrutiny for fear of venturing into matters beyond their institutional competence. The Hong Kong courts are not alone in this regard – the courts in the UK,[48] Canada,[49] and New Zealand[50] have evinced similar attitudes in relation to environmental litigation.

Environmental Law in Furtherance of Public Justification

We have seen that the prospect of advancing meaningful common law engagement with environmental protection faces many challenges. In the face of these systemic and doctrinal limitations of the common law in relation to environmental protection, it is unsurprising that several jurisdictions have moved on from the common law as a driver of environmental regulation.[51] However, it may yet be possible to conceive of a meaningful role for the common law to play in support of environmental protection. Indeed, the model of environmental law offered by Jocelyn Stacey provides a useful manner of conceptualising environmental protection and the role that the common law can play in it, in a manner that can also rationalize the relationship between environmental protection and the law more generally.[52]

Stacey argues that 'environmental issues constitute an ongoing emergency', to the extent that it is challenging to forecast environmental catastrophes reliably and develop responses to them.[53] Accordingly, any legal regulation of environmental issues faces squarely the challenge that the controversial legal theorist Carl Schmitt posed to the possibility of legal constraint in times of emergency – Schmitt argued that the exercise of executive power in times of extreme emergency are necessarily external to the law and thus not subject to legal constraint.[54] Thinking about the role of environmental law within this context, Stacey conceptualizes it as a means of securing the rule of law even in such circumstances. By defining the rule of law as comprising a requirement of public justification, environmental law can play a crucial role in furthering the rule of law in such circumstances by promoting reasoned and participatory decision-making[55] – ultimately, furthering the rule of law as the rule of right reason.[56] On this view, even 'an administrative state with extensive discretionary powers can also comply with the rule of law by ensuring that when those delegated powers are implemented they are publicly justified'.[57]

[48]See, for example, *R (on the application of Buckinghamshire CC) v Secretary of State for Transport* [2014] UKSC 3; Gita Parihar, 'An environment for change: using law to protect the planet' [2014] Journal of Planning & Environment Law 31.

[49]See, for example, *Ontario Power Generation Inc. v Greenpeace Canada* 2015 FCA 186 para 130; *Agraira v Canada (Public Safety and Emergency Preparedness)* 2013 SCC 36; *Greenpeace Canada v Canada (AG)* 2014 FC 463; Jason MacLean & Chris Tollefson, 'Climate-Proofing Judicial Review after Paris: Judicial Competence, Capacity, and Courage' (2018) 31 Journal of Environmental Law and Practice 245, 248–249.

[50]Warnock (n 33) 662.

[51]Patrick McAuslan, 'The Role of Courts and Other Judicial Type Bodies in Environmental Management' (1991) 3 Journal of Environmental Law 195, 198.

[52]Jocelyn Stacey, 'The Environmental Emergency and the Legality of Discretion in Environmental Law' (2016) 52 Osgoode Hall Law Journal 985; Jocelyn Stacey, 'The Promise of the Rule of (Environmental) Law: A Reply to Pardy's Unbearable Licence' (2016) 53 Osgoode Hall Law Journal 681.

[53]Stacey, 'The Promise of the Rule of (Environmental) Law' (n 52) 684–685. See also Weaver & Kysar (n 42) for further support of the idea that environmental issues indeed present an ongoing emergency.

[54]Carl Schmitt, *Political Theology: Four Chapters on the Concept of Sovereignty* (George Schwab tr, MIT Press 1985).

[55]Stacey, 'The Promise of the Rule of (Environmental) Law' (n 52) 690–691.

[56]Cicero, *On the Commonwealth and On the Laws* (James Zetzel tr, Cambridge University Press 1999) III.33. See also TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford University Press 2003) 2–13.

[57]Stacey, 'The Promise of the Rule of (Environmental) Law' (n 52) 691.

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This is a very useful conceptualisation of environmental law. On this view, the executive is justified in exercising broad powers to deal robustly with environmental issues. At the same time, this theory offers a framework for thinking about what environmental law is principally about – the role of environmental law then is to accept this power *but* to ensure that the exercise of such power adheres to the rule of law by satisfying the requirements of public justification. This framework thus justifies both executive power *and* judicial intervention through the common law in support of environmental protection, reconceived as being primarily about promoting the rule of law by facilitating reasoned and participatory decision-making. This provides a fruitful way forward for thinking about how common law engagement with environmental protection can be reframed. Instead of fixating on how the common law can be developed to restrict exercises of power that may cause environmental harm, the conceptualization Stacey offers suggests that the common law can be usefully conceived as a means of promoting thoughtful, well-considered, and rational environmental governance, thus furthering the requirements of the rule of law in this domain.

Conceptualizing environmental law in this manner helps to resolve many of the above-mentioned issues that the common law faces in engaging with environmental protection, and would significantly improve the prospects of developing deeper common law engagement with environmental protection. Indeed, many of the conceptual difficulties highlighted earlier with common law engagement in environmental protection stem from a conception of environmental law as primarily directed at achieving substantive outcomes in environmental protection. Further, conceptualizing environmental law as primarily procedural in nature, focused on improving the process of decision-making, will help environmental law fit better with the judicial sensibilities of common law judges[58] – sensibilities which are particularly salient in Singapore, as was highlighted earlier. Indeed, common law judges have expressed reluctance to intervene in matters perceived to be beyond judicial expertise – of which environmental policy is a prime example.[59] This mode of conceptualizing environmental law therefore promises to be a useful heuristic for thinking about the role of the common law in environmental protection – insofar as the common law is 'the exemplar of public reason',[60] the common law is eminently suitable as a means of furthering a public-justification conception of the rule of law.

Such an approach to environmental law also coheres with a significant current of discourse suggesting that a procedural conception of environmental law is a desirable way ahead for the development of environmental law. Indeed, Stacey's conceptualization of environmental law coheres well with Ewing's and Kysar's argument that common law judges can further environmental governance through the mechanism of 'prods and pleas'[61] – in other words, common law adjudication, with its emphasis on reasoned debate and rational justification, can be a useful means of 'prodding' and 'pleading' other institutions of government to take action for the purposes of environmental protection, while ensuring that the judiciary remains within the proper bounds of its institutional authority.[62] Scholars have also pointed out that procedural protections can be just as effective as substantive ones – the distinction between procedure and substance is not a bright-line one, and procedural protections are well capable of shaping the substantive outcomes of decisions.[63] Further, conceptualizing environmental law predominantly in procedural terms would accommodate the fact that the science of environmental protection is rapidly evolving, making the

[58]Anna Lund, 'Canadian Approaches to America's Public Trust Doctrine: Classic Trusts, Fiduciary Duties & Substantive Review' (2012) 23 Journal of Environmental Law and Practice 135, 168–169; Ole W Pedersen, 'A bill of rights, environmental rights and the UK constitution' (2011) Public Law 577, 584–585.

[59]See, for example, *Secretary of State for Environment, Food and Rural Affairs v Downs* [2008] EWHC 2666 (Admin); Pedersen (n 58) 583; Lund (n 58) 168–169.

[60]John Rawls, *Political Liberalism* (Columbia University Press 1996) 231.

[61]Ewing & Kysar (n 40) 364–366, 420

[62]Ewing & Kysar (n 40) 411.

[63]Lund (n 58) 169.

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formulation of hard and substantive rules a challenging affair.[64] A procedural conception of environmental law as 'a set of rational processes',[65] facilitating the making of reasoned and science-based decisions, thus presents a fruitful way forward for the development of environmental law – especially at the common law level. Indeed, as Lord Carnwath of the UK Supreme Court has written, 'the courts cannot dictate policy … but the courts can ensure that the policy is rational and coherent, and consistent with the scientific evidence, and that firm policy commitments are honoured.'[66]

COMMON LAW AND ENVIRONMENTAL PROTECTION AROUND THE WORLD

Having surveyed the challenges of achieving greater common law engagement with environmental protection, and having highlighted a conceptualization of environmental law that would help pave the way in this regard, this section will turn to survey the means by which common law judges around the world have furthered the imperative of safeguarding our environment.

The common law has been of great value in achieving environmental protection around the world. As the Supreme Court of Canada noted in *British Columbia v Canadian Forest Products Ltd* ('*Canfor*'), 'there is no reason to neglect the potential of the common law, if developed in a principled and incremental fashion, to assist in the realization of the fundamental value of environmental protection'.[67] This section will describe the legal doctrines by which common law judges have furthered the cause of environmental protection, and will highlight that an important part of the common law's involvement with this cause has been in the procedural realm.

Substantive Protections Through the Common Law

Around the world, the common law has been invoked to provide substantive environmental protection – in other words, protection focused on achieving specific outcomes in environmental governance, as opposed to improving the *process* of environmental decision-making. As a matter of legal doctrine, one way that the common law has achieved such protection has been through private law causes of action.[68]

Tort law is a central pillar of such protection. Indeed, as a historical matter, tort law played a crucial role in environmental litigation in the UK.[69] For example, the common law tort of nuisance, in both its public and private forms, has been invoked throughout the common law world to compensate claimants for intrusions upon their interests caused by air, water, or noise pollution, inter alia.[70] In the UK, some of the earliest interactions of the common law with environmental protection stemmed from private law actions in nuisance against pollution,[71] while in Canada, common law actions in nuisance remain an important means of securing protection from environmental polluters, in addition to statutory environmental rights.[72] The tort of negligence has proven to be another useful private law cause of action in this regard. Indeed, negligence claims have been brought for environmental damage ranging from fires, water usage, and the release of dangerous

[64]Tarlock (n 22) 239–240.
[65]Tarlock (n 22).
[66]Lord Carnwath, 'Environmental law in a global society' (2015) 3 Journal of Planning & Environment Law 269, 278.
[67]*British Columbia v Canadian Forest Products Ltd* 2004 SCC 38 para 155.
[68]Chun & Lye (n 1) 211.
[69]Lee (n 29) 37; David Grinlinton, 'The Continuing Relevance of Common Law Property Rights and Remedies in Addressing Environmental Challenges' (2017) 62 McGill Law Journal 633, 654.
[70]Andrew Gage, 'Public Rights and the Lost Principle of Statutory Interpretation' (2005) 15 Journal of Environmental Law and Practice 107, 111; Grinlinton (n 69) 656–657.
[71]McAuslan (n 51) 198; see for example *St Helen's Smelting Co v Tipping* (1985) 11 HLC 642.
[72]Jerry V DeMarco, 'The Supreme Court of Canada's Recognition of Fundamental Environmental Values: What Could Be Next in Canadian Environmental Law?' (2007) 17 Journal of Environmental Law and Practice 159, 178–179.

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substances.[73] Other useful private law causes of action in relation to environmental damage include trespass to land,[74] the rule in *Rylands v Fletcher*,[75] and the doctrine of waste.[76]

In addition to private law causes of action, another mode through which common law judges have provided substantive protections for the environment is through the exercise of constitutional interpretation to imply environmental rights into these instruments. Indeed, to the extent that common law judges are empowered to authoritatively interpret the constitution in their respective jurisdictions, they are capable of reading in environmental rights into their constitutions. Rights created by judges in this manner are capable of being exercised against government authorities to secure substantive outcomes. Numerous examples exist of common law judges utilising such means to effect substantive environmental protection. For example, in *Leghari v Federation of Pakistan*, the High Court of Lahore held that the right to life included 'the right to a healthy and clean environment', and ordered the national authorities to implement a variety of measures to deal with climate change – these measures included, inter alia, the set-up of a Climate Change Commission to monitor the government's efforts in this regard.[77] The active role that the Indian Supreme Court has taken to read environmental rights into the Indian Constitution, including, inter alia, the right to access clean drinking water and the right to clean air, is another potent example of substantive environmental protection through this mode.[78]

Procedural Protections Through The Common Law

The common law has made great strides in achieving substantive environmental protection. However, while these advances in environmental protection through the common law are indeed laudable, securing environmental protection at common law through such substantive means attracts most strongly the concerns, highlighted in the preceding sections, of judicial activism and contravention of the separation of powers.[79] Such an approach to environmental protection at common law stands a remote chance of being adopted in a jurisdiction traditionally sensitive to such concerns – such as Singapore.

Fortunately, a survey of how common law jurisdictions around the world have engaged with the issue of environmental protection reveals that much of the common law's engagement with environmental law has been more procedural in nature, directed at improving the process of decision-making. This section will highlight some of the key procedural means by which the common law has furthered the cause of safeguarding the environment.

Procedural fairness; public consultation

Across the common law world, the concept of procedural fairness has been enlisted in service of environmental protection. Indeed, in conjunction with the opening up of environmental regulatory processes in terms of the openness of information dissemination and the decision-making process,[80] common law courts have become increasingly willing to involve themselves with questions

[73]See, for example, *Wilson & Horton Ltd v AG* [1997] 2 NZLR 513, 519–524; *Streets Ice Cream Pty Ltd v Australian Asbestos Installations Pty Ltd* [1967] 1 NSWR 50, 52.

[74]Trespass is especially fruitful in the US; see for example *Martin v Reynolds Metals Company*, 342 P (2d) 790, 793–794; Grinlinton (n 69) 654–655.

[75]*Rylands v Fletcher* (1866) LR 1 Ex 265, 279–280; *Cambridge Water Co v Eastern Counties Leather Plc* [1994] 2 AC 264, 305.

[76]Grinlinton (n 69) 660.

[77]*Leghari v Pakistan* (August 31, 2015), Lahore WP No 25501/2015 No 1 (HC Green Bench, Pakistan). See also the Supreme Court of Pakistan decision in *Shehla Zia v WAPDA* PLD 1994 SC 693.

[78]*Virender Gaur v State of Haryana* (1995) 2 SCC 577, 580-581; *A P Pollution Control Board v Prof M V Nayadu* 1994 (3) SCC 1; *Ishwar Singh v State of Haryana* AIR 1996 P H 30; Chowdhury (n 34) 182.

[79]See also James R May & Erin Daly, 'Vindicating Environmental Rights Worldwide' (2009) Oregon Review of International Law 365, 366–367.

[80]McAuslan (n 51) 202.

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of procedural fairness in environmental governance. By implying robust requirements of procedural fairness into existing statutory procedures, common law requirements of procedural fairness can be extended to the field of environmental decision-making.[81]

For example, in the UK, the House of Lords in *Berkeley v Secretary of State for the Environment, Transport and the Regions* underscored the importance of public participation rights, notwithstanding the fact that such procedural engagement might not necessarily influence the substantive outcome of a decision-making process.[82] Such extension of the right to procedural fairness in the environmental law context can be prompted by a jurisdiction's international law obligations. In *R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry* ('*Greenpeace*'), Justice Sullivan, bearing in mind the UK's international law obligations in this regard, affirmed the importance of ensuring proper public consultations in the process of environmental policy-making.[83] As these cases indicate, ensuring participatory decision-making has become a particularly salient component of the requirements of procedural fairness in the context of environmental law. Indeed, ensuring that decisions impacting upon the environment have been made pursuant to proper public participation in the decision-making process has become a key feature of environmental litigation in common law jurisdictions such as the UK[84] and New Zealand.[85]

Litigation revolving around EIAs provides a prominent example of how common law courts have involved themselves in the realm of environmental decision-making. EIAs have become an important component of environmental protection around the world.[86] Crucially, they seek to advance the quality of the decision-making *process*[87] – indeed, the obligation to conduct EIAs requires decision-makers to be properly informed about the potential environmental impact of their planned activities, but does not regulate the ultimate outcome of these decisions.[88]

Judges around the common law world have had the opportunity to supervise the conduct of EIAs. Legislation imposing requirements upon decision-makers to conduct EIAs often contain provisions allowing suits to be brought for inadequate conduct of EIAs – the Hong Kong *Environmental Impact Assessment Ordinance*, for example, allows individuals or interest groups to challenge faulty or inadequate EIAs in court.[89] Such litigation has opened the door for the courts to play an instrumental role in the articulation of EIA obligations. For example, in the US, common law judges have sought to define what an adequate EIA requires, in turn shaping the types of information agencies and regulators are obliged to consider.[90] The UK House of Lords has suggested that EIAs must ensure 'inclusive and democratic' procedures.[91] In Australia, judges have reviewed the adequacy of EIAs by reference to environmental law principles such as the principle of intergenerational equity and the precautionary principle, invalidating decisions to accept EIAs on the basis that the decision-makers had a duty to take into account such principles as well.[92]

[81]Gage (n 70) 130.

[82]*Berkeley v Secretary of State for the Environment, Transport and the Regions (No. 1)* [2001] 2 AC 603.

[83]*R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin) para 49; Pedersen (n 58).

[84]*Walton v Scottish Ministers* [2012] UKSC 44; *R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin).

[85]*Westfield New Zealand Ltd v North Shore City Council* [2005] NZSC 17.

[86]Neil Craik, 'The duty to cooperate in the customary law of environmental impact assessment' (2020) 69 International and Comparative Law Quarterly 239, 239, 243–244; A Dan Tarlock, 'Multi-Stakeholder Involvement in the Hong Kong Environmental Assessment Process' (1999) 7 Asia Pacific Law Review 177, 178.

[87]Craik (n 86) 241.

[88]Tarlock (n 86) 179.

[89]Environmental Impact Assessment Ordinance (1998) (Cap 499) (Hong Kong); Croshaw (n 45) 473.

[90]Tarlock (n 86) 187.

[91]*Berkeley* v *Secretary of State for the Environment and Others* [2001] 2 AC 603, 615; Perraudeau (n 36) 18.

[92]*Gray v The Minister for Planning, Director-General of the Department of Planning and Centennial Hunter Pty Ltd* [2006] NSWLEC 720; Anna Rose, 'Gray v Minister for Planning: The Rising Tide, of Climate Change Litigation in Australia' (2007) 29 Sydney Law Review 725, 728.

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Relevant considerations

Another mode through which common law judges have furthered environmental protection is through the usage of the doctrine of relevant considerations in administrative law. In brief, this doctrine allows judges to review exercises of executive power on the basis of whether relevant considerations had been taken into account in the decision-making process.[93] What these 'relevant considerations' are rests mainly on judicial interpretation of the requirements of the power-conferring legislation.

It was through this doctrine that common law environmental law in the US had its beginnings. Indeed, in a landmark moment in environmental litigation, the US Second Circuit Court of Appeals in *Scenic Hudson Preservation Conference v Federal Power Commission* held that the relevant regulatory statute placed upon the Federal Power Commission a positive duty to consider environmental values and the possibility of environmental harm in its plans to build a pumped-storage power plant – a duty which the commission had failed to discharge.[94] This, put another way, was a declaration that the relevant decision-maker had failed to take into account relevant considerations in the decision-making process. In Canada, environmental activists in Canada have succeeded in getting the courts to order decision-makers in construction projects to reconsider their decisions to properly take into account scientific evidence of greenhouse gas emissions.[95]

Public trust doctrine

The public trust doctrine has emerged to become one of the most important features of environmental protection through the common law. Put simply, the public trust doctrine provides that certain natural resources are held by the state in trust for the benefit of the public for present and future generations.[96] Accordingly, the state has a legal duty to safeguard these resources under the doctrine.[97] The content of this legal duty has evolved over time.[98] Taking its development in the US as an example, the doctrine has proved capable of imposing a variety of obligations upon executive decision-makers in relation to decisions impacting trust resources – for example, courts have invoked the doctrine to place a duty on decision-makers to take reasonable steps to safeguard public trust resources, to guarantee public access to such resources, and to safeguard such resources from being sold for private usage.[99] The scope of resources subject to the protection of the public trust doctrine has also evolved with time. For example, while the doctrine traditionally protected only navigable and tidal waters, as well as the land submerged under such waters and the resources contained therein, the doctrine has been judicially extended by state courts around the US to all recreational waters, wildlife preserves, and state parks.[100]

The doctrine has featured in case law around the common law world. Courts in the US, in particular, have applied the doctrine in various states across the US with great effect – indeed, the public trust doctrine is synonymous with common law environmental protection in the US.[101] The

[93]See, for reference, *R v Somerset County Council, ex parte Fewings* [1995] 1 WLR 1037; *R v Secretary of State for the Home Department, ex parte Venables* [1998] AC 407.

[94]*Scenic Hudson Preservation Conference v Federal Power Commission*, 354 F.2d 608 (2d Cir 1965).

[95]Klaudt (n 32) 196–197.

[96]Klass (n 25) 702.

[97]See, for example, *National Audubon Society v Superior Court* 33 Cal.3d 419 (1983); Sarah Jackson, Oliver M Brandes & Randy Christensen, 'Lessons from an Ancient Concept: How the Public Trust Doctrine Will Meet Obligations to Protect the Environment and the Public Interest in Canadian Water Management and Governance in the 21st Century' (2012) 23 Journal of Environmental Law and Practice 175, 178–179.

[98]Jackson, Brandes & Christensen (n 97) 179–180.

[99]See, for example, *National Audubon Society v Superior Court* 33 Cal.3d 419 (1983).

[100]Lund (n 58) 142–143.

[101]Jackson, Brandes & Christensen (n 97) 187; Klass (n 25) 701–702, 707–708.

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doctrine has also been adopted in India,[102] and the Supreme Court of Canada explicitly discussed the public trust doctrine in *Canfor*, a strong signal that the doctrine is a viable way ahead for the development of common law environmental law in Canada.[103]

For present purposes, the key point to note is that while the public trust doctrine is often perceived as an example of common law judicial activism in support of environmental protection, this might not accurately reflect the restrained manner in which the doctrine has been actually applied by common law judges. Indeed, many of the obligations that the public trust doctrine impose upon decision-makers are procedural in nature – for example, judges have invoked the doctrine to require decision-makers to notify members of the public where decisions concerning public trust resources are being made and to provide opportunities for public consultations in relation to such decisions.[104] Even in the US, it has been noted that the manner in which the doctrine has been applied has been 'procedurally-focused', to ensure that decisions relating to trust resources are made openly and in an accountable manner with due consideration of the public interest and alternatives to development.[105] Courts in the US have only invalidated executive decisions on the basis of the doctrine in cases of egregious abuse, thus reflecting a judicial attitude of 'deference to legislative determinations of the public interest'.[106] Accordingly, an acceptance of the doctrine does not necessarily entail judicial activism.

Normative influence on other branches of government

Finally, in addition to the common law's ability to enforce rights and impose obligations in support of environmental protection, the common law has also proved capable of furthering environmental protection in another sense. Through the usage of rhetoric and the careful elaboration of the imperative of safeguarding our environment, common law judges have exerted a normative influence on the decision-making processes of other branches of government. For example, the Supreme Court of Canada's decision in *Friends of Oldman River v Canada (Minister of Transport)*[107] influenced the Canadian federal government's subsequent decision to enact a federal environmental assessment law, and its decision in *R v Hydro Quebec*[108] played a similar role in encouraging legislative amendments to the *Canadian Environmental Protection Act*.[109] More broadly, the Canadian courts' consistent affirmations of the importance of environmental protection have played a major role in cementing the value of safeguarding the environment as a 'fundamental value in Canadian society'.[110] These contributions of the common law to environmental protection are well worth noting – indeed, they cohere well with the conceptualisation of environmental law as directed at furthering the rule of law by shaping public discourse and promoting reasoned decision-making in environmental governance.

THE SINGAPORE COURTS AND ENVIRONMENTAL PROTECTION

Thus far, it has been observed that environmental law can be usefully conceptualized as a body of law concerned with furthering the rule of law, defined by the requirements of public justification, in

[102]*MC Mehta v Kamal Nath and others* (13 December 1996), [1996] INSC 1608; Jackson, Brandes & Christensen (n 97) 187–188.

[103]*British Columbia v Canadian Forest Products Ltd* 2004 SCC 38 para 81.

[104]See, for example, *In re Water Use Permit Applications* 9 P.3d 409 (Hawaii, 2000).

[105]Lund (n 58) 153.

[106]Lund (n 58) 152–153.

[107][1992] 1 SCR 3.

[108][1997] 3 SCR 213.

[109]Chris Tollefson, 'Advancing an Agenda? A Reflection on Recent Developments in Canadian Public Interest Environmental Litigation' (2002) 51 University of New Brunswick Law Journal 175.

[110]DeMarco (n 72) 163.

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the domain of decision-making concerning the environmental emergency. Through a survey of common law jurisprudence around the world, it has also been observed that the common law provides several possibilities for judicial engagement with environmental protection in line with such a conceptualization of environmental law.

These observations are particularly relevant as we turn in this section to chart a roadmap for deeper common law involvement with environmental protection in Singapore. A crucial obstacle to greater common law engagement with environmental protection in Singapore is the Singapore courts' well-documented inclination of avoiding undue intrusion into the domain of executive decision-making and their reluctance to get involved in matters perceived to be political, polycentric in nature, or simply beyond the scope of judicial expertise.[111] Yet, drawing on the discussion above, it is possible for common law engagement with environmental law to be carried out in a manner that can address these concerns. If one conceptualizes environmental law as a means of furthering the rule of law and promoting rational decision-making, and considers that common law involvement with environmental protection need not necessarily be seen as synonymous with judicial activism and is well capable of being framed in terms that will be palatable to common law judges concerned about adhering to the separation of powers, this opens up a promising path for the common law in Singapore to evolve in a direction more responsive to environmental concerns.

The rest of this article proposes several modes through which the common law in Singapore can be developed to make a more meaningful contribution to the cause of protecting the environment, and addresses a key obstacle in Singapore jurisprudence against advances in this regard – the law on standing.

Charting A Path for Common Law Environmental Protection in Singapore

As was highlighted in the introductory section, common law involvement with environmental protection in Singapore is more or less a blank slate, and there is considerable room for the common law to take on a larger role in this regard in Singapore. Further, the common law *should* be explored as a meaningful way of advancing environmental law – the common law is uniquely suited to further the rule of law in environmental protection as conceptualized above, and is well-placed to serve as a complement to other sources of law in environmental law. Indeed, the Singapore courts have acknowledged the value of judicial review as a mechanism for setting norms of good administration in a dialogic relationship with other branches of government, as evinced by their acceptance of the 'green-light' theory of judicial review.[112] If a common law approach to environmental protection is framed in a manner directed at ensuring good governance in decisions relating to the environment, it would be justifiable by the Singapore courts' own lights. As such, the possibility of a deeper involvement of the common law with environmental law in Singapore is worthy of serious consideration.

By drawing upon the experience of other common law jurisdictions, the following sub-sections will seek to chart a roadmap by which the common law can evolve to become more responsive to environmental protection in Singapore. In line with the procedural conception of environmental law that this article has argued for, the focus of these suggestions is on the arena of public law – indeed, public law provides a fitting canvas for the procedural focus argued in this article to be a viable way forward for common law engagement with environmental protection.

Duty of public consultation

In order to plug the gap in Singapore environmental law relating to the lack of a legal duty to conduct public consultations, as well as the lack of specificity as to the content of such consultations if

[111]See, for example, *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239; *Lim Meng Suang v Attorney General* [2015] 1 SLR 26; *SGB Starkstrom Pte Ltd v Commissioner for Labour* [2016] 3 SLR 598.

[112]*Jeyaretnam Kenneth Andrew v AG* [2014] 1 SLR 345 paras 48–50.

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they are so conducted, developing a common law duty of public consultation ought to be explored in Singapore. Imposing a common law duty upon decision-makers to perform EIAs has scant prospects for success – indeed, such a duty would be an impossibility even in the UK.[113] Nevertheless, taking reference from the duty to consult in UK administrative law, a common law doctrine of public consultation can be formulated in a manner that would stop short of imposing a duty to conduct EIAs, yet nevertheless meaningfully further the goal of environmental protection.

Commencing with an overview of how such a duty has been developed in other common law jurisdictions, the first issue that must be considered in relation to the development of a common law duty of public consultation is when such a duty would arise. In the UK, such a duty can arise at common law in three ways, all of which are closely connected to common law procedural fairness.[114] First, procedural fairness can give rise to a duty to consult through the concept of legitimate expectations. For such a duty to arise on this basis, the public authority in question must have made a clear, unambiguous, and unqualified representation that consultations would indeed be conducted.[115] Such representations can be communicated through promises, policies, or established practices.[116] Second, given the overarching concern of the doctrine of procedural fairness to achieve fairness in executive decision-making, where a failure to consult would lead to conspicuous unfairness, the courts can impose a duty to consult even in the absence of a legitimate expectation.[117] Third, where decision-makers have commenced a consultation process, whether or not they were required to do so by law, an obligation to conduct the consultation *fairly* would arise.[118]

It should be noted that the courts in the UK have set a high threshold for the imposition of such a duty. Indeed, Justice Schiemann in *R v Shropshire Health Authority ex p Duffus* suggested that courts ought to exercise great caution in compelling consultations, since doing so might detrimentally affect good administration – authorities might be forced to perform endless consultations, hampering their ability to make any decisions.[119]

The second issue relating to the development of a common law duty of public consultation is what the content of such a duty is. In *R v Brent London Borough Council, ex p Gunning*[120] ('*Gunning*'), Justice Hodgson articulated a set of principles governing the content of such a duty. These principles provide that consultations have to meet the following requirements: consultations have to be undertaken at a formative stage in the planning process; authorities have to provide sufficient reasons for proposals to facilitate informed public engagement with the proposals; adequate time has to be given for the consultation process; and the end product of consultation has to be carefully considered in the taking of the ultimate decision.[121] These principles have since been endorsed by the Court of Appeal[122] and the Supreme Court.[123] The UK Supreme Court in *R (Moseley) v Haringey London Borough Council* has affirmed that these requirements apply to all

[113]*R (Devon Wildlife Trust) v Teignbridge DC* [2015] EWHC 2159 (Admin) para 98.

[114]Jason NE Varuhas, 'Judicial review at the crossroads' (2015) 74(2) The Cambridge Law Journal 215, 216.

[115]See *R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 para 68; *R (Tinn) v Secretary of State for Transport* [2006] EWHC 193.

[116]*R (Nadarajah) v Secretary of State for the Home Department* [2005] EWCA Civ 1363 para 68.

[117]*R (Moseley) v Haringey London Borough Council* [2014] 1 WLR 3947 para 23; *R (Luton BC) v Secretary of State for Education* [2011] EWHC 217 (Admin); *R (Hollow) v Surrey County Council* [2019] EWHC 618 (Admin) para 77.

[118]See *R (Moseley) v Haringey London Borough Council* [2014] 1 WLR 3947 para 35; *R (Niazi) v Secretary of State for the Home Department* [2007] EWCA Civ 1495; Varuhas (n 114) 216. This idea has been affirmed in Hong Kong as well – see, for example, *PCCW-HKT Telephone Ltd v Telecommunications Authority* [2008] 2 HKLRD 282 para 12.

[119]*R v Shropshire Health Authority ex p Duffus* [1990] 1 Med LR 119; [1990] COD 131; Carl Makin, 'Consultations and the law: on shaky foundations?' (2019) 22 Journal of Housing Law 111, 116–117.

[120]*R v Brent London Borough Council, ex p Gunning* (1985) 84 LGR 168, 189.

[121]*R v Brent London Borough Council, ex p Gunning* (1985) 84 LGR 168, 189; *R (Kebbell Developments Ltd) v Leeds City Council* [2018] EWCA Civ 450 para 63.

[122]*R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 para 108.

[123]*R (Moseley) v Haringey London Borough Council* [2014] 1 WLR 3947.

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consultations, no matter how a duty to consult had arisen or even in the absence of a legal duty to consult.[124] These principles have also been applied in Hong Kong.[125]

In relation to the content of the duty, the courts in the UK have also set a very high threshold that must be met for a consultation to fall short of the legal requirements – indeed, something must have gone 'clearly and radically wrong' for a consultation to be found unlawful.[126] It has been observed that the courts have accorded decision-makers wide discretion in how consultations are carried out,[127] and that the relevant standard that the courts have applied to determine whether a duty to consult had been breached is akin to the *Wednesbury* unreasonableness standard.[128] *Greenpeace* provides an instructive example of a consultation that went so wrong that even this high threshold was met – in this case, the alleged consultation paper contained so little information as to provide no prospect of informed responses, information provided was 'seriously misleading', and any substantive information was provided only after the consultation period had ended.[129]

The final issue relevant to the development of a duty of public consultation is the remedy that should be granted for breaches of this duty. In the UK, a breach of the duty to conduct consultations properly usually leads to the invalidation of the planning permission granted pursuant to the consultation process.[130] In some circumstances, however, courts have found that a breach of the duty to consult does not necessarily render unlawful a decision taken subsequent to the consultation – where a consultation has been rendered moot by supervening events, and where it would result in significant delay and costs to affected parties, courts have exercised their discretion against quashing such decisions.[131]

We can draw several useful lessons from this overview of the duty to consult in UK administrative law, as we consider the common law development of such a duty in Singapore law as a means of securing procedural environmental protection. The first point to note in this regard is that such a duty to consult displays promise as a possible evolution of judicial review doctrine in Singapore. Indeed, the invocation of the doctrine in the UK has been highly sensitive to the concerns of undue judicial intrusion in matters beyond judicial competence – concerns which have great salience with the Singapore courts – resulting in a high standard for such a duty to be imposed and a high standard of review for the duty to be considered breached. As a result, in the limited and restrained form that the doctrine has been developed in the UK, it stands a good chance of being acceptable to the Singapore courts.

As for the possible shape that the doctrine could take in Singapore law, it can be framed as a requirement of procedural fairness. While the doctrine of legitimate expectations is underdeveloped in Singapore,[132] and the idea that a duty to consult may arise in circumstances of conspicuous unfairness might be considered too ambiguous by the Singapore courts, a fruitful manner in

[124] *R (Moseley) v Haringey London Borough Council* [2014] 1 WLR 3947.

[125] *Lam Yuet Mei v Permanent Secretary for Education and Manpower* [2004] 3 HKLRD 524; Ho Cheuk-Yuet, 'Judicial Review of Public Consultation in Hong Kong: The Case for Fixing an "Underdeveloped" Jurisprudential Area' (2019) 49 Hong Kong Law Journal 459, 472.

[126] *R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin) para 63; *R (on the application of Hillingdon LBC) v Secretary of State for Transport* [2010] EWHC 626 (Admin) para 68.

[127] *Bard Campaign v Secretary of State for Communities and Local Government* [2009] EWHC 308 (Admin); *R (Milton Keynes Council) v Secretary of State for Communities and Local Government* [2011] EWHC 1060 (Admin); Jenny Wigley, 'Changing times: the importance of proper consultation' (2011) 11 Journal of Planning & Environment Law 1447, 1453–1454.

[128] Makin (n 119) 113.

[129] *R (on the application of Greenpeace Ltd) v Secretary of State for Trade and Industry* [2007] EWHC 311 (Admin) paras 116–117.

[130] *R (Friends of Hethel Ltd) v South Norfolk DC* [2010] EWCA Civ 894.

[131] *R (on the application of Guiney) v Greenwich LBC* [2008] EWHC 2012 (Admin); *R (Edwards) v Environment Agency (No 2)* [2008] UKHL 22 para 65; Wigley (n 127) 1448.

[132] See *SGB Starkstrom Pte Ltd v Commissioner for Labour* [2016] 3 SLR 598 paras 34–63, for an indication of the Singapore courts' reluctance to accept the substantive legitimate expectations doctrine. Since a duty to consult would be

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which the doctrine can be framed for the best chances of acceptance by the Singapore courts would be to cast the doctrine as specifying the requirements of fair consultations once a consultation has been embarked upon. This is useful in the environmental protection context – as mentioned earlier, the Singapore government has performed public consultations in relation to decisions which have the potential to impact the environment – a notable example being the public consultation relating to the construction of the Cross Island Line, a subway line planned to cut through one of Singapore's main natural reserves.[133] Accordingly, while the Singapore courts may be wary of imposing a duty to consult *ex nihilo* upon environmental decision-makers, a possible manner for the courts to make a meaningful contribution nevertheless in environmental protection would be to provide a set of basic legal requirements that a consultation process must abide by once it has been embarked upon. This duty to consult fairly does not need to be overly onerous – the *Gunning* principles could be adopted to specify the content of the duty, and the high standard of review which has been adopted in the UK can similarly be adopted in Singapore. Framed as such, such a duty to consult would be a modest but effective mode by which the common law can be more meaningfully engaged with environmental protection in Singapore, ensuring a minimum threshold of quality in consultations embarked upon.

Relevant considerations

A second means by which the common law could make a meaningful contribution to environmental protection in Singapore is through the relevant considerations doctrine in administrative law. Indeed, as was highlighted earlier, the relevant considerations doctrine has been utilised to great effect in other common law jurisdictions for the purposes of environmental law.

The doctrine of relevant considerations is already an established feature in Singapore administrative law.[134] Admittedly, a not insignificant extension of the doctrine would be required for it to play a role in environmental protection. In view of the fact that the doctrine is anchored in statutory interpretation,[135] judges would have to be willing to read into statutes an implied duty on decision-makers to take the environmental impact of a decision into consideration in the process of decision-making.

Yet, it is suggested that such a duty can be framed to cohere well with the inclination of the Singapore courts towards deference in matters perceived to be beyond the judicial remit. One way that this could be done would be to set the standard for discharging this legal duty at a relatively low level. For example, drawing inspiration from the Hong Kong court's approach in *Clean Air Foundation v Hong Kong Special Administrative Region*,[136] as long as the decision-maker in question is able to show that the environmental impact of a decision had indeed been taken into account as a relevant consideration, the duty would be considered discharged. The weight to be accorded to this consideration would be left to the discretion of the decision-maker. Further, it could be emphasized that by framing this duty as part of the relevant considerations doctrine, the attendant remedy would simply be for the decision-maker in question to re-consider its decision by taking into account the relevant consideration which the court requires – a procedural remedy which would limit the scope of judicial intrusion into the merits of decision-making.

Articulating the duty along these lines would ensure that the court's involvement with environmental issues would remain procedural, which would mean therefore that it stands a reasonable

more conceptually related to a procedural legitimate expectation, a rejection of a duty to consult arising from a legitimate expectation might not necessarily be a foregone conclusion in Singapore.

[133]Audrey Tan, 'Government, nature groups hope to continue discussions on Cross Island Line' *The Straits Times* (7 Dec 2019) <https://www.straitstimes.com/singapore/environment/cross-island-line-govt-nature-groups-hope-to-continue-talks> accessed 13 Jul 2021.

[134]See, for example, *CBB v Law Society of Singapore* [2019] SGHC 293.

[135]See, for example, *R v Somerset County Council, ex parte Fewings* [1995] 1 WLR 1037, 1049–1050 (Simon Brown LJ, dissenting).

[136]*Clean Air Foundation v Hong Kong Special Administrative Region* [2007] HKCFI 757.

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chance of being accepted by the Singapore courts. Even in such a limited form, however, the existence of a duty to take environmental impacts into account as a relevant consideration will still be a meaningful development of the common law to further environmental protection. Indeed, such a development would be a welcome advance from a starting point where there is presently no legal duty at all to consider the environmental impact of a policy decision. In addition, setting in place such a duty as a matter of law through the common law can have an important norm-setting function – as highlighted earlier, the common law has played a crucial role in environmental protection in other common law jurisdictions by exerting a normative influence on other branches of government by way of its rhetoric.

Public trust doctrine

A further possibility worth considering as a means of common law development to engage environmental protection more meaningfully in Singapore is to accept a form of the public trust doctrine. Indeed, leaving aside the rhetoric of judicial activism associated with the doctrine, the public trust doctrine has actually been applied in a procedural and restrained manner by courts in other common law jurisdictions, as was highlighted earlier. As such, a rejection of the public trust doctrine in Singapore is not a foregone conclusion. Indeed, as noted by Chun and Lye, 'the existence of public rights over the foreshore and seabed has been explicitly acknowledged in legislation'[137] – therefore, the concept underlying the public trust doctrine is not entirely alien to Singapore law.

By way of operationalisation, the public trust doctrine could be allied with the above-mentioned duty of decision-makers to take relevant considerations into account. While the relevant considerations doctrine, adapted accordingly, would impose a duty on decision-makers to take environmental impacts into account as an implied obligation on the basis of statutory interpretation, the public trust doctrine in Singapore could impose a similar duty on the basis of the subject matter of the relevant decision – for example, where a decision concerns natural resources which the court considers to be held on trust by the government for existing and future generations of the public. The decision of the Land Transport Authority (LTA) in Singapore to build a subway line under the Central Catchment Nature Reserve (CCNR) would be an example of such a decision – should the courts hold that the CCNR is indeed a public trust resource, a legal duty to take into account the environmental impact of the decision would arise. While the LTA did indeed take into account such considerations in its extensive deliberations over the issue, the existence of such a common law doctrine would serve as a safeguard to ensure that such practices are continued in future.

Further, framed as a doctrine directed primarily at securing procedural environmental protection, the public trust doctrine could also go beyond requiring relevant considerations to be taken into account. Indeed, such a doctrine could also impose legal duties of public notification or consultation on executive authorities – thereby buttressing the duty of public consultation suggested earlier. While the duty of public consultation suggested above would be tied to the requirements of procedural fairness, tying a duty to consult to a public trust doctrine would cause the duty to *also* be triggered where decisions are made in relation to public trust resources. The remedy granted for a breach of the public trust doctrine would depend on the specific obligation that has been breached, and the remedy could be aligned to the remedies suggested above for a breach of the duty to consult or a failure to take into account relevant considerations.

An Important Obstacle – Standing

The preceding section has sought to suggest several routes through which the common law can be developed in Singapore to engage more meaningfully with environmental protection. Yet, insofar as

[137]Chun & Lye (n 1) 179.

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we are concerned with environmental protection through the common law, an important obstacle that must be addressed in this regard is the issue of standing.

Indeed, even if one limits common law engagement with environmental law to the procedural dimension, standing remains an issue. The fact that environmental harms are generalized and often not directed at specific persons coheres uneasily with the standing rules in Singapore administrative law – applicants are generally required to have a personal and specific interest in the application in question.[138] While the Singapore Court of Appeal has acknowledged that standing may be granted if a breach of a public duty is so egregious that it will be in the public interest for a judicial review application to proceed, the court emphasized in the same breath that such situations will be very exceptional in nature.[139] No applicant in Singapore has yet succeeded on this basis of standing.

As such, the law on standing presents a significant obstacle to any effort to pursue environmental protection through the common law in Singapore.[140] While a full consideration of this issue would warrant a separate paper on its own, some thoughts as to how the issue of standing can be addressed will be offered here.

The justifications for maintaining relatively restricted rules on standing which would exclude public interest litigants revolve around a similar set of issues across the common law world. One concern, explicitly articulated by the Singapore Court of Appeal in *Jeyaretnam Kenneth Andrew v Attorney General*, relates to the need to prevent the judicial process from being overwhelmed by public interest litigation.[141] Indeed, the fear that courts will be flooded by such claims is probably one of the most common arguments raised in favour of more restrictive standing rules.[142] Another argument for narrower standing rules rests on the idea that litigants with personal interests in the matter will have the strongest incentives to make good arguments, improving the quality of common law adjudication.[143] Finally, an oft-raised viewpoint is that where issues of public interest are concerned, the courts are not in the best position to interfere as a matter of the proper separation of powers, and courts should therefore not grant standing to litigants asserting a mere generalized public interest.[144]

However, these concerns are not insurmountable. Taking each argument in turn, empirical studies in the UK and Australia – which have accepted the possibility of public interest standing – have indicated that there has been no explosion of judicial review applications following the recognition of such a basis of standing,[145] dampening the force of the floodgates argument. The argument based on the incentives of making good arguments is surely questionable in view of the evidence of professional environmental advocacy by public interest groups in common law jurisdictions around the world. As for the argument from the separation of powers, the underlying concern could be the institutional competence of judges to adjudicate polycentric policy-laden issues. If so, such a concern can be addressed effectively by limiting carefully the *manner* through which judges engage environmental protection through the common law – for example, by conducting review of such decisions primarily on a procedural basis and carefully limiting the standard of review – which is precisely what has been suggested in this article.

[138]*Tan Eng Hong v AG* [2012] 4 SLR 476; *Vellama d/o Merie Muthu v AG* [2013] SGCA 39.

[139]*Jeyaretnam Kenneth Andrew v AG* [2014] 1 SLR 345 paras 62–63.

[140]Chun & Lye (n 1) 185.

[141]*Jeyaretnam Kenneth Andrew v AG* [2014] 1 SLR 345 paras 62–63, Claude Martin, 'Interlocutory Injunctions and the Environment: Comparing the Law Between Quebec and the Other Provinces' (2004) 13 Journal of Environmental Law and Practice 359, 366.

[142]Andrew Macintosh, Heather Roberts & Amy Constable, 'An Empirical Evaluation of Environmental Citizen Suits Under the Environment Protection and Biodiversity Conservation Act 1999 (Cth)' (2017) 39 Sydney Law Review 85, 87.

[143]McLeod-Kilmurray (n 34) 286.

[144]Martin (n 141) 366; Jeffrey T Hammons, 'Public Interest Standing and Judicial Review of Environmental Matters: A Comparative Approach' (2016) 41 Columbia Journal of Environmental Law 515, 546.

[145]Hammons (n 144) 543–544; Macintosh, Roberts & Constable (n 142) 109–110.

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Accordingly, the prospect of a broader scope of public interest standing for environmental advocacy in Singapore law ought to be seriously considered. A wide variety of common law jurisdictions – such as Canada, the UK, and Australia – have already accepted standing on such a basis.[146] Indeed, thinking from first principles, the law of standing ultimately reflects normative judgments about the kinds of harm which should be cognizable for the purposes of judicial review.[147] Insofar as the existing structure of the law of standing emphasizes personal interests in an application for judicial review, this could be said to reflect a normative judgment that the law has made regarding the importance of individual harm over generalized harm, reflecting a 'private law' model of the law of standing.[148] Once one is aware of this fact, it becomes clear that the priority of personal harm in the law of standing is not necessarily a foregone conclusion. If the law comes to recognize the normative value of protecting against generalized harms such as environmental damage for the sake of the common good,[149] and the importance of judicial review as a means of securing such protection – as this article has sought to argue – it would be normatively justifiable to adjust the framework of the law of standing to take such harms into account as well.

CONCLUSION

The central argument in this article has been directed at carving out a path for deeper common law engagement with environmental protection in Singapore. To that end, the article has argued that a useful conceptualization of environmental law perceives environmental law as principally directed at furthering the rule of law in the environmental emergency by promoting reasoned and participatory decision-making. This conceptualization of environmental law fits well with the procedural dimension of common law environmental law protections as they have developed around the common law world. This presents a fruitful way forward for common law engagement with environmental protection in Singapore, in view of the judicial inclination in Singapore towards restraint and deference to the other branches of government. The article has proposed a roadmap by which the common law in Singapore can be developed to provide meaningful support to the cause of environmental protection, and has addressed a key challenge in this regard: the law of standing.

It should be emphasized that the proposals in this article do not represent *all* that the common law can do in service of environmental protection. Indeed, what this paper seeks to do is to propose an opening – put another way, to chart a roadmap for the first steps which can be taken. These first steps have been carefully limited, but can nevertheless be a fruitful and meaningful start in support of a worthy goal. It is hoped that this article will pave the way for further efforts in this regard.

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[146]For the UK position, see *Walton v Scottish Ministers* [2012] UKSC 44; Jason NE Varuhas, 'Judicial review: standing and remedies' (2013) 72 The Cambridge Law Journal 243, 244; Hammons (n 144) 521–522. For the position in Canada, see *Minister of Finance of Canada v Finlay* [1986] 2 SCR 607; Tollefson (n 109) 183. For the position in Australia, see *North Coast Environment Council v Minister of Resources* [1994] FCA 1556.

[147]Cass R Sunstein, 'What's Standing after Lujan? Of Citizen Suits, "Injuries," and Article III' (1992) 91 Michigan Law Review 163, 188–189.

[148]Varuhas (n 114) 215.

[149]Varuhas (n 114) 215.

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