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ARTICLE

The Unmeritorious 'Legality'/'Merits' Distinction in Singapore Administrative Law

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Abstract

The Singapore courts often state that judicial review of executive decision-making ought only to involve an inquiry into the 'legality' of a decision or the 'decision-making process', and not the 'decision itself' or its 'merits' – let us call this the 'Distinction'. This article argues that the Distinction should be expunged from Singapore law. The Distinction has its roots in English case law which aimed to prevent the courts from arbitrarily substituting their decision for the executive's by reason of mere disagreement. But Singapore case law has gone further and treated the Distinction as a general principle applicable to all of administrative law. However, the Distinction is too vague for this purpose (as seen from Singapore cases which have interpreted the distinction inconsistently). It is conceptually problematic, incompatible with the practicalities of judicial review (particularly substantive review as recognized in Singapore law), and has occasionally been paid lip service but not followed in substance. The Distinction cannot form a coherent principle to guide the courts and ought to be replaced by a more nuanced application of constitutional principles relevant to determining the appropriate scope of review. Whatever these principles may be, and however they are to be balanced, the Distinction can be but an over-inclusive rough approximation of them which hampers the development of the law.

Keywords: Administrative Law; Judicial Review; Singapore

The 'Distinction' defined

This article aims to unpack and critique the following assertion often made by the Singapore courts: that judicial review of executive decision-making only involves (and should only involve) an inquiry into the 'legality' of an executive decision or the 'decision-making process', and not the 'decision itself'[1] or the 'merits' of the decision. Let us call this proposition the 'Distinction'.

Two quotations will suffice to illustrate the Distinction:

> Two important distinctions have played a role in explaining the court's limited role in judicial review. First, the distinction between a review and an appeal is important. It has been emphasized that the role of the court in judicial review is not the same as the role of an appellate court… Second, and inextricably linked to the first distinction, is the distinction between a review of the decision-making process, as opposed to of the merits of the decision. In judicial review, the supervisory jurisdiction of the court has traditionally been thought to be confined to 'the review of the decision-making process, but not to review the decision itself'…[2]

[1] *Lines International Holding (S) Pte Ltd v Singapore Tourist Promotion Board* [1997] SGHC 6, [1997] 1 SLR(R) 52 para 56.
[2] *SGB Starkstrom Pte Ltd v Commissioner for Labour* [2016] SGCA 27, [2016] 3 SLR 598 para 56 (emphasis in original).

and

> It can never be overstated that judicial review is concerned with the legality of the [respondent's] decision and not with the merits of the decision itself. In *Chief Constable of North Wales Police v Evans* [1982] 3 All ER 141, Lord Brightman reiterated at 154 that judicial review 'is concerned not with the decision, but with the decision-making process…'[3]

It must be noted that these passages appear to conflate three distinctions: (a) 'process' versus 'merits'; (b) 'process' versus 'decision itself'; (c) 'legality' versus 'merits'. One might argue that these distinctions are different and ought to be treated differently; in doing so, one would face the difficulty that the precise meaning and scope of each of these words are not at all clear. Nonetheless, such issues need not detain us. This article focuses on the Singapore courts' invocation of these distinctions, and the Singapore courts treat them as identical, so the term 'Distinction' will be used to refer to all of them.

The Singapore courts have invoked the Distinction numerous times[4] for various purposes. For example, the courts have used the Distinction to justify restricting the available grounds of review, expressing scepticism toward proportionality review[5] on the grounds that it would involve the courts straying into reviewing the 'merits' of a decision. The courts have also used the language of the Distinction to justify and legitimize judicial review on other grounds. In *ACC v Comptroller of Income Tax*, the High Court took pains to explain that the question of whether the decision-maker had acted 'procedurally *ultra vires* the statute' was a matter of legality, not 'merits'.[6] In 2016, the Court of Appeal clearly stated that whether the doctrine of substantive legitimate expectations should be recognized in Singapore will depend on whether doing so would infringe on the Distinction:

> [The doctrine's] applicability in Singapore will raise many nuanced questions that remain to be determined should the appropriate case come before us.
>
> Some of these issues include the following:
>
> (a) Would the doctrine of substantive legitimate expectations require the courts to review the substantive merits of executive action as opposed to questions of process and of legality and jurisdiction?
> (b) If so, can this be reconciled with the doctrine of separation of powers where the judiciary would be engaging in reviewing the merits of a given executive action? […][7]

The Distinction in Singapore has recently attracted academic commentary. For example, in 2011, Professor Thio Li-ann described the 'binar[y] … between "legality" and "merits"' as 'wafer-thin … which may mean it is more useful to think in terms of a spectrum or degrees, rather than the elusive search for bright lines'.[8] In 2017, Associate Professor Jaclyn Neo, in the course of observing

[3] *Borissik Svetlana v Urban Redevelopment Authority* [2009] SGHC 154, [2009] 4 SLR(R) 92 para 42.

[4] *Lines* (n 1) [56]; *Wong Keng Leong Rayney v Law Society of Singapore* [2006] SGHC 179, [2006] 4 SLR(R) 934 para 79; *Lim Mey Lee Susan v Singapore Medical Council* [2011] SGHC 133, [2011] 4 SLR 156 para 6; *SGB Starkstrom* (n 2) para 56; *ACC v Comptroller of Income Tax* [2009] SGHC 211, [2010] 1 SLR 273 para 21; *Loh Der Ming Andrew v Law Society of Singapore* [2017] SGHC 256, [2018] 3 SLR 837 para 82; *Borissik* (n 3) para 42; *Re Shankar Alan s/o Anant Kulkarni* [2006] SGHC 194, [2007] 1 SLR(R) 85 para 34; *Mohan Singh v Attorney-General* [1987] SGHC 31, [1987] SLR(R) 428 (HC) para 30; *Re Mohamed Saleem Ismail* [1987] SGHC 27, [1987] SLR(R) 380 para 9; *Chee Siok Chin v Minister for Home Affairs* [2005] SGHC 216, [2006] 1 SLR(R) 582 para 93.

[5] *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] SGCA 7, [1996] 1 SLR(R) 294 paras 38, 44.

[6] *ACC* (n 4) para 22.

[7] *SGB Starkstrom* (n 2) paras 60–61.

[8] Thio Li-ann, 'The Theory and Practice of Judicial Review of Administrative Action in Singapore: Trends and Perspectives', in Yeo Tiong Min, Hans Tjio & Tang Hang Wu (gen eds), *SAL [Singapore Academy of Law] Conference 2011: Developments in Singapore Law between 2006 and 2010 – Trends and Perspectives* (Academy Publishing 2011) [56].

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that 'the principle of legality has yet to fully expand the scope and standard of review over executive discretion',[9] noted that there is at least one case in which the Distinction has caused the 'scope and standard of review [to] remai[n] limited'.[10] Assistant Professor Swati Jhaveri, in 2019, tackled the Distinction in more detail, describing it as a 'truism'[11] which is 'unstable'[12] and 'difficult to draw',[13] suggesting that the courts should 'mov[e] the focus away from' it (and other distinctions in administrative law).[14] This article aims to contribute to these developments by advocating an abolition in Singapore law of the Distinction insofar as it has become a slogan rather than a clear statement of principle.

In her paper, Assistant Professor Jhaveri pointed out that '[i]t would be disruptive to abruptly depart from existing doctrine'.[15] This was said in the context of discussing the Distinction alongside the prevailing taxonomy of grounds of judicial review into irrationality, illegality, and procedural impropriety.[16] This author agrees that this taxonomy should not be discarded outright, and that any departure from prevailing 'constitutional principles on the appropriate scope of review'[17] (such as the 'rule of law', the 'separation of powers and the need for checks and balances on the executive's powers',[18] and 'respecting the authority of democratically delegated power-holders'[19]) should not take place abruptly. However, Assistant Professor Jhaveri did not identify the Distinction as being one of these 'constitutional principles', but a concept which purports to embody a 'balance' between them.[20] She went on to propose other methods by which these principles may be balanced that 'd[o] not rely on the unstable dichotomy of legality/merits'.[21]

Regardless of whether Assistant Professor Jhaveri's proposals are adopted, the broader point to be drawn from her paper is that when discussing the Distinction, we ought to bear in mind that it is but a means to the end of balancing various constitutional principles. Preserving the Distinction is not an end in itself. That being so, it is submitted that while the principles that the Distinction aims to represent should not be 'abruptly depart[ed] from', Singapore law is free to discard the Distinction outright.

This article argues that the Distinction should be unseated from its place in Singapore administrative law. While the Singapore courts have cited the Distinction as a justification for its decisions in various cases, what was really at work in these cases was the 'constitutional principles' that Assistant Professor Jhaveri describes. It is not the intention of this article to go into detail on what these principles are or how they are to be balanced. Rather, the point is this: the Distinction can at most serve as shorthand for a certain understanding of these principles, but it has failed to serve this function. Instead, it has become a slogan whose meaning is opaque.

Worse, the Distinction fails to reflect the reality of judicial decision-making in administrative law cases. According to the Distinction, a court may not scrutinize the 'merits' of the respondent's

[9]Jaclyn Neo, '"All Power has Legal Limits": The Principle of Legality as a Constitutional Principle of Judicial Review' (2017) 29 Singapore Academy of Law Journal 667 [53]. By 'the principle of legality', Associate Professor Neo refers to the statement in *Chng Suan Tze v Minister for Home Affairs* [1988] SGCA 16, [1988] 2 SLR(R) 525 para 86 ('*Chng Suan Tze*'"): '… the notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power.'

[10]Neo, ibid [20] and [22], commenting on *Yong Vui Kong v Attorney-General* [2011] SGCA 9, [2011] 2 SLR 1189.

[11]Swati Jhaveri, 'Revisiting Taxonomies and Truisms in Administrative Law in Singapore' [2019] Singapore Journal of Legal Studies 351, 352.

[12]ibid 353.

[13]ibid 356.

[14]ibid 375.

[15]ibid 374.

[16]*Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 (UKHL) 410D ('*GCHQ*').

[17]Jhaveri (n 11) 353.

[18]ibid 354.

[19]ibid 362.

[20]ibid 355.

[21]ibid 376; see also 375 ('none of the proposals above … requires … a reliance on the legality/merits dichotomy').

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decision or the 'decision itself.' This article argues, to the contrary, that there is nothing wrong with the court doing so. In fact, in several cases, the Singapore courts have done so.

For these reasons, the Distinction ought to be expunged from Singapore law, and our discourse on judicial review in Singapore ought to focus on the more concrete principles that the Distinctions tries (but fails) to reflect.

One might ask: if the Distinction is so problematic, why was it ever created? Part II will address that by exploring the history of the Distinction in English case law. We will see that the Distinction was intended to be no more than a constraint on the application of natural justice as a ground of judicial review, rather than some central organising principle that has pride of place in administrative law. Part III will explore how Singapore case law came to stretch and distort the Distinction beyond its original meaning, turning it into an amorphous slogan whose meaning is ambiguous. Part IV will critique the Singapore courts' application of the Distinction from a conceptual point of view, arguing, inter alia, that it is incompatible with other established areas of the law on judicial review, and that it is premised on various false dichotomies. Part V will then explore a line of Singaporean cases in which the Distinction is simply not followed. Parts VI and VII will conclude with some notes on what ought to replace the Distinction in Singapore law.

The Distinction properly understood: English case law

Our study of the Distinction must begin with the decision of the House of Lords in *Chief Constable of the North Wales Police v Evans* ('*Evans*').[22] Lord Brightman's judgment in *Evans* introduced the Distinction between the 'decision itself' and the 'decision-making process',[23] and between the 'manner in which the decision was reached' and the 'merits of the … decision'.[24] The Singapore courts have cited *Evans* repeatedly as authority for the Distinction.[25] It will now be seen that Lord Brightman, in invoking the Distinction, never intended to lay down a general principle that undergirds all judicial review.

In *Evans*, a police officer, Michael John Evans, had been dismissed pursuant to regulation 16 of the Police Regulations 1971, which provided that:

> [During] his period of probation in the force the services of a constable may be dispensed with at any time if the chief officer of police considers that he is not fitted, physically or mentally, to perform the duties of his office, or that he is not likely to become an efficient or well conducted constable.[26]

The House of Lords held that there were two problems with the decision to dismiss. First, the Chief Constable had committed an error of law: he had wrongly thought that the Regulations gave him the 'absolute discretion' to dismiss Evans.[27] Second, the Chief Constable had not put his proposed reasons for dismissal to Evans, thereby breaching the rules of natural justice.[28]

[22] *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155 (UKHL).

[23] *Evans (UKHL)* (n 22) 1174G.

[24] ibid 1174G–1175A.

[25] One may trace the importation of the Distinction into Singapore law to as early as 1982, albeit somewhat speculatively. The first time a Singapore courts appears to have explicitly invoked the Distinction was in the 1982 Court of Appeal case of *Abdul Raub v Attorney-General* [1982] SGCA 14, [1981–1982] SLR(R) 625 para 8: 'The remedy of judicial review was concerned not with the decision [on] which review was sought but with the decision-making process.' While the Court of Appeal did not cite any authority for this point, one may speculate that the Court of Appeal took inspiration from the House of Lords decision in *Evans*, handed down less than two months before the decision in *Abdul Raub*.

[26] *Evans (UKHL)* (n 22) 1170H–1171A.

[27] ibid 1161C.

[28] ibid 1164H–1165A.

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There was nothing new about this: error of law and procedural impropriety were certainly established grounds of judicial review. Why, then, did the House of Lords have occasion to discuss the Distinction at all?

The answer lies in the judgment of the Court of Appeal. Lord Denning MR, in his leading judgment in the Court of Appeal, said that the problem was that the dismissal had not been 'fair and reasonable':[29] 'I do not think the conduct of the constable … was so heinous as to warrant the ruin of his career'.[30] In the House of Lords, Lord Brightman disapproved of this notion that the dismissal had to be, in the court's view, 'fair and reasonable': 'If that statement of the law passed into authority without comment, it would … transform, and wrongly transform, the remedy of judicial review.'[31]

Lord Brightman's concerns were well-founded. Lord Denning MR provided no legal criteria to guide the court in its assessment of what is 'fair and reasonable'. The only factors weighing in Lord Denning MR's mind appear to have been the 'heinous[ness]' of Evans's conduct and the consequences for Evans (*viz* the 'ruin of his career').[32] Lord Denning's approach foreclosed the possibility that there could have been a good reason to fire Evans for the sake of the public interest. Such a judicial approach wrongly assumes that only those two factors were relevant to the decision as to whether or not to dismiss Evans, is devoid of any legal reasoning, and amounts to a bare assertion that poor Evans should not have been fired.

It is in this light that we must see the following dictum by Lord Brightman, which referred directly to the Distinction:

> Judicial review is concerned, not with the decision, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will in my view, under the guise of preventing the abuse of power, be itself guilty of usurping power.[33]

As we will now see, this dictum was not meant to be an articulation of a general principle underlying judicial review. Rather, it was drawn for a much narrower purpose, namely, to confine the operation of judicial review on the ground of a breach of the rules of natural justice and ensure that the courts would not, in the name of 'natural justice', substitute their decisions for the executive's for no reason other than bare disagreement not supported by legal principle – as Lord Denning had done. Lord Brightman, in alluding to the Distinction, had not intended to say anything about judicial review on other grounds.

In support of the Distinction, Lord Brightman cited a throwaway remark in Lord Evershed's dissenting judgment in *Ridge v Baldwin* ('*Ridge*'),[34] another case involving the dismissal of a police officer. In *Ridge*, the majority held that the authority responsible for dismissing the police officer were bound to act in accordance with the rules of natural justice. However, Lord Evershed expressed doubt as to whether the 'principles of natural justice' are to be 'invo[ked] … whenever anyone is discharged from some office'. While he 'express[ed] no concluded opinion of [his] own',[35] he did offer the view that the application of the rules of natural justice might:

> involve a danger of usurpation of power on the part of the courts and under the pretext of having regard to the principles of natural justice to invoke what may often be in truth little more than sentiment; and upon occasions when the courts, though having necessarily far

[29] *R v Chief Constable of the North Wales Police, ex parte Evans* (EWCA, 21 December 1981) (accessible through Lexis Advance at [1981] Lexis Citation 1551).
[30] *Evans (EWCA)* (n 29).
[31] *Evans (UKHL)* (n 22) 1174G.
[32] *Evans (EWCA)* (n 29).
[33] *Evans (UKHL)* (n 22) 1173F.
[34] *Ridge v Baldwin* [1964] AC 40 (UKHL).
[35] ibid 97.

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> less knowledge of all the relevant circumstances, may be inclined to think that, had the decision rested with them, they would have decided differently from the body in question. Yet I do observe again that *it is not the decision as such which is liable to review; it is only the circumstances in which the decision was reached*, and particularly in such a case as the present the need for giving to the party dismissed an opportunity for putting his case…[36]

Like Lord Brightman in *Evans*, Lord Evershed in *Ridge* was anxious to prevent the court's interfering with the respondent's discretion for no reason other than a mere disagreement by the court with the respondent's decision. *A fortiori* when the court's opinion was based, as Lord Evershed put it, on 'little more than sentiment'.[37]

It can thus be seen that the Distinction was created for the specific purpose of making clear that judicial review on the grounds of a breach of natural justice was limited to examining the decision-making process and not the decision itself. This may sound too obvious to be worth mentioning, for the law of natural justice is, by definition, the law of procedural fairness. To understand Lord Brightman's concern, it is necessary to examine Lord Denning MR's judgment more closely. Lord Denning MR began by considering the respondent's claim that 'the rules of natural justice have no application to the exercise of his discretion'.[38] He then disagreed, citing *Ridge v Baldwin*, which was then the leading case on natural justice. According to *Ridge*, in a situation involving 'dismissal from an office where there must be something against a man to warrant his dismissal',[39] 'an officer cannot lawfully be dismissed without first telling him what is alleged against him and hearing his defence or explanation.'[40] It was in this context that Lord Denning MR added: 'I go further. Not only must he be given a fair hearing, but the decision itself must be *fair and reasonable*.'[41]

This approach would have expanded the rules of natural justice beyond procedural fairness toward a vague, unspecified notion of substantive 'fair[ness] and reasonable[ness]'. It was this attempted expansion that Lord Brightman had aimed to prevent through the drawing of the Distinction. Lord Brightman had not intended to do anything more than that.

One might argue that Lord Brightman had intended to go further, describing the Distinction as a general statement of the 'proper purpose of the remedy of judicial review'[42] which was necessary to prevent the 'transform[ation] … [of] the remedy of judicial review'.[43] However, to focus solely on this remark would be to ignore the crucial passage that followed it:

> [Lord Denning's statement] implies that the court sits in judgment not only on the correctness of the decision-making process but also on the correctness of the decision itself. In his printed case counsel for the appellant made this submission:
>
> "Where Parliament has entrusted to an administrative authority the duty of making a decision which affects the rights of an individual, the court's supervisory function on a judicial review of that decision is limited. The court cannot be expected to possess knowledge of the reasons of policy which lie behind the administrative decision nor is it desirable that evidence should be called before the court of the implications of such policy. It follows that the court ought not to

[36]ibid 96 (emphasis added).
[37]ibid 96.
[38]*Evans (EWCA)* (n 29).
[39]*Ridge* (n 34) 65.
[40]ibid 66.
[41]*Evans (EWCA)* (n 29) (emphasis added).
[42]*Evans (UKHL)* (n 22) 1173D.
[43]ibid 1174G.

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> attempt to weigh the merits of the particular decision but should confine its function to a consideration of the manner in which the decision was reached."
>
> When the *sole issue* raised on an application for judicial review is whether the rules of natural justice have been observed, these propositions are unexceptionable. *Other considerations arise* when an administrative decision is attacked on the ground that it is vitiated by self-misdirection, by taking account of irrelevant or neglecting to take account of relevant factors, or is so manifestly unreasonable that no reasonable authority, entrusted with the power in question, could reasonably have made such a decision: see the well known judgment of Lord Greene MR in *Associated Provincial Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223.[44]

In this passage, Lord Brightman invoked the Distinction, but directed it toward Lord Denning MR's attempted expansion of the rules of natural justice in a manner that would have entitled the court to replace a lawful decision with its own merely because that decision was not 'correct in the eyes of the court'. This would explain why Lord Brightman focused on the idea of the 'decision-making process': he was seeking to make the (obvious) point that the rules of natural justice are, by definition, procedural rules about how decisions are to be made. It is regrettable that Lord Brightman did not make clearer that this was all he was saying. Neither did he identify the '[o]ther considerations' delimiting the scope of judicial review on grounds other than natural justice. This created the risk that courts would subsequently draw from Lord Brightman's judgment nothing but a sweeping statement in the form an injunction against the courts concerning themselves with 'the decision' or 'the merits' of the decision.

Such a sweeping statement would only hold true if the only way for a court to examine the substance of 'the decision' were Lord Denning MR's way. But what Lord Brightman and the other Lords did not comment on was the judgment of Shaw LJ in the Court of Appeal, which attempted to examine the substance of the decision but in a principled manner. Shaw LJ reasoned as follows. First, he recited the legal test for whether a constable could have been dismissed, namely (in his words), whether 'the appellant was not physically or mentally suited to perform the duties of his office or that he was not likely to become an efficient or well conducted constable'.[45] Second, he considered that the 'materials upon which … the decision of the Chief Constable was based were meagre indeed'. Third, evaluating the 'materials' vis-à-vis the law, he stated that 'a chief officer of police, acting reasonably, could not on the materials which were before the Chief Constable of North Wales' have concluded that the legal test was met.[46]

Unlike Lord Denning MR, Shaw LJ was not saying that he merely disagreed with the dismissal decision. He acknowledged that the discretion to dismiss was subject to legal limits before holding that those particular legal limits had been transgressed. This was review of the substance of the decision and not merely the process by which it had been made. But it was not the sort of unprincipled reasoning which the House of Lords had been anxious to avoid. Shaw LJ's approach would, at first glance, have fallen foul of the Distinction; but this could well have been justified by the '[o]ther considerations' to which Lord Brightman referred.

Unfortunately, it is easy for such possibilities to be lost if one takes Lord Brightman's remarks out of context, focusing only on the Distinction but not on the statement that '[o]ther considerations' could come into play when the ground of judicial review concerned something other than natural justice. Lord Brightman meant the Distinction to be a principle limited to the ground of natural justice, but courts have subsequently cited the Distinction as an unqualified principle undergirding all judicial review.

[44] ibid 1174G–1175B (emphasis added).
[45] *Evans (EWCA)* (n 29).
[46] ibid.

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The problem is that the Distinction (when viewed in isolation from its context) is cast in very broad, ambiguous language that makes it unsuitable as a principle. Let us now demonstrate this by cataloguing the uses to which the Singapore courts have put the Distinction.[47] In the following discussion, the term 'Distinction' will be used to refer to the Distinction as a purported central principle of administrative law generally, rather than the Distinction as it was originally intended (*viz* a principle of the law of natural justice).

The Distinction in Singapore law

Citations of Evans *in Singapore Case Law*

We will begin by examining Singapore cases which have cited *Evans*. Broadly speaking, there are two sorts of use to which the Singapore courts have put *Evans*. The first (which will be referred to as the 'thin' sense) is treating *Evans* as a general warning against judicial arbitrariness. The second ('thick' sense) is treating *Evans* as a bar to judicial consideration of certain matters in dealing with applications for judicial review. We will see that, while Singapore cases have appealed to the Distinction in *Evans* as a guiding principle, these very cases only illustrate that the Distinction is incapable of serving as one.

The 'thin' use of Evans*: a check against potential judicial arbitrariness*

In *Borissik Svetlana v Urban Redevelopment Authority* ('*Borissik*'), the applicant sought judicial review of the Urban Redevelopment Authority's rejection of her application for permission to redevelop her property. Just as Lord Denning MR in *Evans* had sought to expand the doctrine of natural justice in an unprincipled manner, the applicant had, according to the High Court, sought to do the same with the doctrine of irrationality. While she had submitted that the respondent's definition suffered from 'irrationality', '[a]ll that the applicant could offer as evidence of "irrationality" was that [her proposed] redevelopment plans were not approved by the [respondent]'.[48] In other words, the applicant merely disagreed with the decision. It was in response to this that the High Court cited *Evans*.

Evans, in this instance, was used as a warning against judicial decision-making with no basis other than a bare assertion. As in *Evans*, the Distinction was used to bar the court from interfering with the respondent's decision when the applicant had no substantial arguments against the decision apart from mere disagreement.

At first glance, this appears useful, if somewhat unnecessary: one may wonder why any court would need to appeal to any case authority for the proposition that courts do not make decisions unsupported by reasoning of any sort. But the fact that the Singapore court chose *Evans* as this authority illustrates the risk underlying the use of the Distinction for purposes beyond those for which it was originally conceived. As we have seen, the Distinction was meant to limit review on the grounds of natural justice, preventing the courts from 'attempt[ing] to weigh the merits of the particular decision' when natural justice was the ground of review. But the House of Lords had explicitly said that '[o]ther considerations arise when an administrative decision is attacked on the ground that it … is [*Wednesbury*] unreasonable'.[49] Surely the High Court in *Borissik*, had it wished to rely on *Evans*, ought at least to have engaged with what these '[o]ther considerations' may have been. Instead, by citing *Evans* in the manner it did, the High Court showed that *Evans* had been transformed from a case defining the boundaries of review on the grounds of natural justice into a slogan about judicial review generally.

[47]The Singapore courts have cited *Evans* in no fewer than six cases: *De Souza Kevin Desmond v Minister for Home Affairs* [1988] SGHC 46, [1988] 1 SLR(R) 464 para 19; *Re Dow Jones Publishing (Asia) Inc's Application* [1988] SGHC 41, [1988] 1 SLR(R) 418 paras 21–22; *Borissik* (n 3) para 42; *Mohan Singh* (n 4); *Mohamed Saleem Ismail* (n 4); *Shankar Alan* (n 4).

[48]*Borissik* (n 3) para 42.

[49]*Evans (UKHL)* (n 22) 1175A.

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The 'thick' use of Evans

The trouble with slogans is that they are distinguished by their rhetorical impact rather than by their precision of language. This has two results. First, the meaning of a slogan can morph over time. Second, a slogan risks being used to suggest that something is obvious or self-evident without necessarily explaining why it is. These issues become all the more problematic when that 'something' purports to be a rule restricting what the courts can do in the course of judicial review.

Evans as a bar to judicial examination of the evidence before the respondent?.

Take, for example, *Re Shankar Alan s/o Anant Kulkarni* ('*Shankar Alan*'), in which the High Court stated that 'in judicial review proceedings, the court is concerned not with the merits of the decision but rather with its legality on administrative law grounds'.[50] In so holding, the High Court agreed with counsel for the respondent, who had cited *Evans*.[51]

One might read the High Court's statement as simply the 'thin' use of *Evans* to assert that a certain ground of judicial review, as defined in law, must be made out before a court can intervene in executive decision-making. However, the High Court treated *Evans* not just as saying this, but rather as saying something about what grounds of judicial review were available. Later in the judgment, the High Court, invoking the same language of 'merits', said that it could not 'ventur[e] improperly into the merits' by proceeding to 'sift through the evidence and evaluate whether or not the [respondent] was correct to arrive at [its] conclusion'.[52] In other words, the High Court would ask whether the respondent solicitors' disciplinary committee had 'directed itself to the right inquiry', but refused to inquire into 'whether on the evidence presented the charges against the applicant had been made out beyond a reasonable doubt'.[53] So the Distinction was treated as a rule barring a court from examining the evidence that had been before the respondent.

One might think that this notion naturally follows from the Distinction as the House of Lords in *Evans* conceived it. However, as we have seen, the House of Lords did not engage with the judgment of Shaw LJ in the Court of Appeal in *Evans*, which did examine the evidence before the respondent in order to determine whether that evidence justified the respondent's decision. Therefore, the implication in *Shankar Alan* that any examination of evidence by a decision-maker is part of the 'merits' of the decision, and so unreviewable by the court, is open to question.

Another problem arising from the transformation of *Evans* into a slogan is that the courts have not applied it consistently. We can see this by contrasting *Shankar Alan* with another High Court case, *Mohan Singh v Attorney-General* ('*Mohan Singh*'), which demonstrates an approach much closer to Shaw LJ's in *Evans*. In *Mohan Singh*, the Minister for Home Affairs had declared, pursuant to Article 134(3) of the Constitution, that the plaintiff was no longer a citizen of Singapore – by travelling on an Indian passport, he had 'voluntarily claimed and exercised any rights available to him under the law of [various countries including India], being rights not available to other Commonwealth citizens'.[54] The High Court held as follows:

> The second ground upon which the plaintiff relies to support his assertion that the Minister for Home Affairs had exceeded his jurisdiction … is the contention that the Government had no basis to be 'satisfied' that the plaintiff had voluntarily claimed and exercised the rights of an Indian citizen not available to other Commonwealth citizens. This is plainly a bald assertion manifestly at variance with the facts established by the evidence in this case which were available before the Minister for Home Affairs.

[50] *Shankar Alan* (n 4) para 34, citing *Re Singh Kalpanath* [1992] SGHC 64, [1992] 1 SLR(R) 595 para 26.
[51] ibid para 30.
[52] ibid para 39.
[53] ibid para 39.
[54] Constitution of the Republic of Singapore, art 134(3) (quoted in *Mohan Singh* (n 4) para 20).

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> The scope of judicial review does not extend to this court purporting to act in an appellate capacity and assessing the sufficiency of the evidence before the Minister for Home Affairs. He had acted within his jurisdiction and it is plainly not for this court to substitute its views on what should be the effect of the evidence before him. It repays reciting what Lord Brightman said in *Chief Constable of the North Wales Police v Evans*…[55]

This passage is somewhat confusing. On the one hand, the High Court stated that it was not entitled to 'asses[s] the sufficiency of the evidence before the Minister for Home Affairs'. On the other hand, that is exactly what the High Court did – how else could it have stated that the plaintiff's assertion was 'at variance with the facts established with the evidence'? Earlier in the judgment, the High Court itself examined evidence purportedly showing that the plaintiff was 'compelled to obtain the Indian passport in order to travel to Singapore to stake his claim to citizenship here', such that he had not voluntarily travelled on his Indian passport.[56] The court had also considered evidence to the contrary, and reached the following conclusion: 'Having heard [the plaintiff], I do not believe him. By obtaining and travelling on his Indian passport, the plaintiff had voluntarily claimed and exercised the rights of a citizen of India.'[57] In effect, the court had, through the examination of evidence, independently inquired into and answered the very question that was before the Minister.[58]

There are two possible ways to make sense of this. First, that the High Court in *Mohan Singh* had meant to abandon the Distinction – but this cannot be, given that *Mohan Singh* explicitly cited *Evans*. This leaves us with the second possibility, which is that the High Court in *Mohan Singh* had sought to uphold the Distinction, but or it had, unlike the High Court in *Shankar Alan*, considered the evaluation of evidence and the drawing of conclusions therefrom to be part of the 'decision-making process', and therefore reviewable by the court.

The two cases show how the Distinction, with its language of 'process', 'merits', and 'decision itself', had turned into a conclusory catch-phrase instead of a principle with precise content. In the two cases, the court cited the same dicta from *Evans*, yet ended up applying different – if not diametrically opposite – approaches. The High Court in *Mohan Singh* appears to have reviewed the Minister's decision for its substantive correctness, and yet suggested that doing so did not infringe on the Distinction. Ironically, the High Court in *Shankar Alan* cited *Mohan Singh*[59] for the Distinction, and on that basis refused to examine the correctness of the respondent's decision.

Evans as a bar to judicial inquiry into the weight assigned by the respondent to various factors? Yet another case further highlights the lack of clarity in the Distinction as applied in Singapore law. In *Re Mohamed Saleem Ismail*,[60] the Distinction was invoked in a 'thick' sense, but (depending on one's reading of the case) may have been cited as authority for a different proposition than in *Shankar Alan* and *Mohan Singh*. The applicant was a Singapore citizen who was married to a non-Singaporean. The Controller of Immigration had decided not to grant a social visit pass to the applicant's wife, effectively shutting her out from Singapore and separating her from her husband. One of the applicant's grounds for judicial review (the 'first ground')[61] was that 'the

[55] *Mohan Singh* (n 4) paras 29–30 (emphasis added).

[56] ibid para 3.

[57] ibid para 11.

[58] It cannot be said that the High Court's reason for doing so was that that question was a question of precedent fact. The constitutional provision in question (reproduced ibid para 20) read 'If the Government is satisfied that any citizen of Singapore … has … voluntarily claimed and exercised any rights available to him under the law of … any other country…' – so the precedent fact requirement was simply the Government being satisfied.

[59] *Shankar Alan* (n 4) para 39.

[60] *Mohamed Saleem Ismail* (n 4).

[61] The 'second ground' was, in essence, that statute required that a person who was not been pronounced a member of the 'prohibited classes' of immigrants or an 'undesirable immigrant' was automatically entitled to a social visit pass.

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Controller of Immigration had totally failed to consider or had insufficiently considered the special circumstances',[62] namely, 'the fact of his marriage, the birth of their daughter, the pain of separation and his feeling that he was discriminated against'.[63] In response to this, the High Court concluded:

> On the facts bearing on the first ground, I cannot say at all that the applicant has made good the first ground such that there should be judicial review on the principles I have set out.[64]

These 'principles' were as follows:

> 7. […] in the exercise of the High Court's supervisory jurisdiction over inferior tribunals including administrative officers exercising judicial or quasi-judicial functions under a statute or subsidiary legislation the High Court is supervising and not reviewing; the High Court in its supervisory capacity cannot substitute its own views for those of the tribunal or officer which or who had been statutorily entrusted to make the decision… […]
>
> 9. The scope of judicial review is put in another way by Abdoolcader SCJ in *Tanjong Jaga Sdn Bhd v Minister of Labour and Manpower* [1987] 1 MLJ 124 at 127I:
>
> "It is of considerable significance to bear in mind that judicial review is of the hearing and not of the decision. The House of Lords firmly restated this principle in *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155 in holding that judicial review is concerned not with the decision but with the decision-making process, and that unless that restriction on the power of the court is observed the court will, under the guise of preventing the abuse of power, be itself guilty of usurping power…"[65]

This passage is confusing.[66] The court's reasoning is elliptical, for it does not explain why the applicant had not 'made good' the alleged ground for review. There are at least two ways to understand this passage. First, the court's reasoning was similar to that in *Mohan Singh*: the court had reviewed the evidence – the 'facts bearing on the first ground' – and concluded that the respondent's decision was correct. Second, the court's reasoning was that the Minister's decision was unimpeachable because 'the Controller of Immigration had taken all the matters referred to into consideration before he refused any extension of the stay'. Once it had been shown that the respondent had taken into account all relevant considerations, the court could not inquire into what significance the respondent chose to attach to those considerations.[67] The point, for present purposes, is that it is simply unclear what role the Distinction played in the High Court's reasoning.

Conclusion on Evans *in Singapore law*

We have examined the history of the Distinction to understand the true principle to which the courts wished to give effect, namely, that the courts may not, in the name of 'natural justice', arbitrarily substitute their decision for the respondent's by reason of mere disagreement. Various Singaporean cases have, however, seen the Distinction as standing for something else. Unfortunately, it is not clear how exactly the Distinction affects what the court is and is not able to do in the course of judicial review. In other words, the Distinction in *Evans* is of little use in guiding the courts for the simple reason that

[62] *Mohamed Saleem Ismail* (n 4) para 3.
[63] ibid para 7.
[64] ibid para 10.
[65] ibid paras 7, 9.
[66] For example, paragraph 7 strangely suggests that judicial review does not involve 'reviewing'.
[67] See discussion below, under the sub-heading '"Merits" as weight'.

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the courts do not have a clear sense of what the Distinction means. This, in turn, has been made possible by the sloganistic nature of the Distinction.

The Distinction Reasserted in SGB Starkstrom

In the 2015 case of *Tan Seet Eng v Attorney-General* ('*Tan Seet Eng*'), there was a hint of the Singapore courts pulling back from the Distinction – in particular, by recognising that it simply cannot sit well with the existence of substantive review as it is understood to exist in Singapore. The Court of Appeal, describing *Wednesbury* review, said: 'A decision may be legal in the sense that it is within the legislative scheme, but nevertheless impugned for being substantively unlawful…';[68] and remarked that irrationality review, compared to illegality review, involves a 'more substantive enquiry which seeks to ascertain the range of legally possible answers' and 'looks at the decision that was made and asks if the decision made is one which, though falling within that range, is so absurd that no reasonable decision-maker could have come to it'.[69]

We will shortly have more to say on what this means. For now, the point to be made is that, in the 2016 case of *SGB Starkstrom Pte Ltd v Commissioner for Labour* ('*SGB Starkstrom*'), the Court of Appeal, composed of the same three judges, cited a number of cases – including *Tan Seet Eng* – and, in extensive obiter dicta, drew from them the proposition that judicial review involves 'the review of the decision-making process' and concerns 'the manner in which the power is exercised', but not the 'merits of the decision' or the 'decision itself'.[70]

There is a contradiction between these two dicta. *Tan Seet Eng* speaks of reviewing a decision on 'substantive' grounds to determine whether it is 'substantively unlawful'. How then can this not be a review of, as *SGB Starkstrom* put it, the 'decision itself'?

The answer is that the Court of Appeal in *SGB Starkstrom* appears to have misread the distinction drawn in *Tan Seet Eng*. *Tan Seet Eng* did not say that the court is not concerned with the 'decision itself'. Rather, what *Tan Seet Eng* said was that the court may not arbitrarily replace the executive's decision with its own. The passage from *Tan Seet Eng* cited in *SGB Starkstrom*, in full, is as follows:

> Where the Executive is acting within the ambit of the powers that have been vested in it by Parliament, then the court's concern is not with *whether it agrees with the way in which the powers have been exercised*. To suggest otherwise is to displace the choice that has been made by Parliament as to which branch of the government is to be entrusted with the powers in question. The court's role in judicial review which engages the *manner in which the power is exercised* will then be limited to such things as *illegality, irrationality, and procedural impropriety*. This perspective is premised on a proper understanding of the role of the respective branches of government – especially, in this context, the Executive and the Judiciary – in a democracy where the Constitution reigns supreme.[71]

The distinction here was not between process and 'merits', nor between process and the 'decision itself', nor between 'manner' and 'merits'. Rather, it was between the court's arbitrarily replacing the executive's decision with its own premised on nothing more than whether the court happens to 'agre[e] with the way in which the powers have been exercised',[72] and the judicial assessment of an executive decision in a principled manner which takes into account a 'proper understanding of the role of the respective branches of government'.[73] This is similar to what we have identified

[68] *Tan Seet Eng v Attorney-General* [2015] SGHC 59, [2016] 1 SLR 779 para 80.
[69] ibid [80] (emphasis added).
[70] *SGB Starkstrom* (n 2) para 56 (emphasis in original).
[71] *Tan Seet Eng* (n 68) para 99 (emphasis added).
[72] ibid para 99.
[73] ibid para 99.

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as the true purpose of the Distinction in *Evans*, and is perfectly consistent with Lord Brightman's judgment properly understood.

To put the point another way, consider the distinction drawn by Garreth Wong:

> … it is imperative to distinguish, on the one hand, judicial review which *considers* the merits of the decision to the extent to which their assessment is necessary to determine its legality, and on the other hand, judicial intervention which *makes* the decision for the public body by a substitution of judgment or assessment of facts to that put forward by the administration. The former is an entirely legitimate exercise of control and one that is already practiced to some extent in the *Wednesbury* unreasonableness ground of review – it is impossible for a court to determine whether a decision was so unreasonable that no reasonable authority properly informed could have decided thus, unless the same court also gave some consideration to the substantive merits of the case.[74]

Tan Seet Eng appears to have said that the court may not substitute its decision for the executive's for reasons relating to the merits of the decision. *SGB Starkstrom*, by contrast, appears to have ruled out the court's even considering the merits of the executive's decision.

In assessing this turn in the law, one is hampered by the fact that the concept of 'merits' is not 'susceptible to an uncontroversial and objective definition that we can all agree on instantaneously'.[75] In Singapore, the lack of definitional clarity is evident from the following pair of examples. In *Ho Paul v Singapore Medical Council*, a three-judge High Court stated that the court can, as an exception, 'revie[w] the merits of a lower tribunal's decision … where the tribunal has failed to direct itself to the right inquiry'.[76] On the other hand, in *Leong Kum Fatt v Attorney-General*, the High Court suggested (and the Court of Appeal did not deny)[77] that 'direct[ing] itself to the right inquiry' was a matter of the 'decision-making process, that is the hearing, and not the decision itself'.[78] In other words, the very same ground of review has been variously defined as both going to the 'merits' of a decision and not. Indeed, an Australian court has held that 'merits' effectively means nothing but 'that diminishing field left after permissible judicial review';[79] this would make the distinction between 'merits' and non-'merits' merely circular.

That said, as far as Singapore law is concerned, it would appear that the word 'merits' is most commonly used to refer to a court examining the substance of a decision. We can infer this from at least three sets of dicta from the Singapore courts. First, in *SGB Starkstrom*, the Court of Appeal appears to have equated 'the merits of the decision' with 'the decision itself'.[80] Second, the courts have said that the 'merits' of a decision are the concern of appeals rather than applications for judicial review,[81] and that one defining characteristic of an appeal is that 'an appellate court may in limited circumstances evaluate the substantive merits of the decision arrived at by the tribunal'.[82] Third, as we have seen, the High Court in *Shankar Alan* held that it would not 'sift through

[74]Garreth Wong, 'Towards the nutcracker principle: reconsidering the objections to proportionality' [2000] Public Law 92, 102. See further Paul Craig, 'The Nature of Reasonableness Review' (2013) 66 Current Legal Problems 131, 140–142, on possible confusion over the term 'substitution'.

[75]Jhaveri (n 11) 355. See also Mark Aronson, Matthew Groves, & Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (6th edn, Thomson Reuters 2016) 263 for a list of judicial authorities to this effect. Note, in particular, *R (Lord Carlile of Berriew) v Secretary of State for the Home Department* [2014] UKSC 60, [2015] AC 945 para 60; and *Greyhound Racing Authority (NSW) v Bragg* [2003] NSWCA 388.

[76]*Ho Paul v Singapore Medical Council* [2008] SGHC 9; [2008] 2 SLR(R) 780 (HC) para 9.

[77]*Leong Kum Fatt v AG* [1985] SGCA 6; [1985–1986] SLR(R) 165.

[78]*Leong Kum Fatt v AG* [1984] SGHC 9; [1983–1984] SLR(R) 357 para 13.

[79]*Greyhound Racing Authority* (n 75) para 46.

[80]*SGB Starkstrom* (n 2) para 56 (emphasis in original omitted).

[81]ibid.

[82]*Rayney Wong* (n 4) para 79.

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the evidence and evaluate whether or not the [respondent] was correct to arrive at that conclusion' because '[t]hat would clearly be a case of the supervising court straying beyond its proper remit and venturing improperly into the merits'.[83] Not only would the High Court not substitute its decision for the respondent's, it would not even consider its substance.

One might argue that, in invoking the Distinction, the Court of Appeal in *SGB Starkstrom* did not mean to rule out all judicial examination of the substance of a decision. Indeed, on the most charitable reading, *SGB Starkstrom* is equivocal on the meaning of 'merits'. In a short passage at the end of the judgment (after all the dicta just discussed), the Court of Appeal used the phrase 'merits review' to refer to the act of ordering that an executive body not resile from a promise that created a substantive legitimate expectation on the part of the applicant. One could therefore conclude that 'merits' was, in this passage, used to refer to judicial substitution of its decision for the executive's.[84] Yet the fact remains that, on at least one reading of *SGB Starkstrom*, in judicial review, the courts are not entitled even to examine the substance of the decision being reviewed. Indeed, there have been at least three subsequent cases containing dicta espousing this latter view, stating that the courts may not even 'examin[e] … the substantive merits of the decision itself'[85] or entertain submissions that 'take issue with the substantive merits of the decision',[86] and that 'a court can only examine the *legality* of the [Public Prosecutor's] determination, as opposed to its merits'.[87]

This view is problematic for three reasons. First, it does not sit well with the practicalities of other areas of the law on judicial review. Second, the Distinction is incompatible with substantive review for irrationality, which is an established part of Singapore law.[88] Third, neither 'merits' nor 'decision itself' is necessarily opposed to 'legality' or 'process'.

Conceptual problems with the Distinction as applied in Singapore law

Incoherence with the Practicalities of Judicial Review

First, the idea that judicial review has nothing to do with the substance of an executive decision simply does not cohere with the practicalities of judicial review. Practically speaking, nobody would ever challenge a decision purely because of dissatisfaction with how it has been made. Such a challenge, even if framed as such, is in reality intended as a means to the end of having the ultimate outcome changed.[89] Moreover, the courts recognize this: two examples will demonstrate that it is not true that the courts are only concerned with the decision-making process but not the decision itself.

The first is the law on natural justice. If judicial review were about the decision-making process and not the decision itself, one would think that one could commence judicial review proceedings by reason only that the decision-making process has been flawed, without reference to the substance of the decision. Yet the law is that, even if one can show that one has been denied a fair hearing in relation to certain matters:

[83] *Shankar Alan* (n 4) para 39.

[84] That said, even this reading is not unproblematic. In the case of upholding a promise that created a substantive legitimate expectation, the court would not be substituting *its* decision for the executive's; it would merely be substituting *the executive's* former decision from the executive's subsequent one.

[85] *AXY v Comptroller of Income Tax* [2018] SGCA 23, [2018] 1 SLR 1069 para 46.

[86] *CBB v Law Society of Singapore* [2019] SGHC 293 para 65.

[87] *Pannir Selvam a/l Pranthaman v Attorney-General* [2020] SGHC 80 para 53 (emphasis in original). This case involved an application for judicial review of a decision by the Public Prosecutor.

[88] *Tan Seet Eng* (n 68) para 80.

[89] See, for example, the (dissenting) judgment of Bokhary PJ in the Hong Kong case of *Ng Siu Tung v The Director of Immigration* [2002] HKCFA 6, (2002) 5 HKCFAR 1 para 337: even if one claims to be entitled to have a legitimate expectation of being heard enforced, 'even then the ultimate objective would still be substantive. An opportunity to be heard is only a means of attaining that objective…'

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> if a hearing on those matters will not change the ultimate outcome of the case (*ie*, if the aggrieved party will still lose the case even if he is given a hearing on the matters on which he was not heard), then the hearing would be in vain and an exercise in futility. In such a situation, the court would be entitled to exercise its discretion not to grant the aggrieved party a hearing on the matters on which he was not heard…[90]

In other words, the reason why the court might correct an error in the decision-making process is that such an error may have tainted the decision itself. It is therefore, in one sense, not true that the courts are not competent to perform, or do not aim to perform, 'review of the decision itself'.[91] At most, it can be said that the courts review the decision itself by means of reviewing the decision-making process; but the courts are not at all blind to the decision itself.

The second example lies in the law on standing, which requires that a person may not apply for judicial review unless he has had a right personal to him 'infringed' and/or has 'suffered special damage as a result of the public act being challenged';[92] it is not enough that such a right has merely been engaged and/or there has been a risk that such damage will eventuate. Again, at the standing stage, the law focuses on the impact of the decision and its substance, not on the way in which the decision was reached.

A case in point is *Vellama d/o Marie Muthu v Attorney-General*. In that case, a vacancy in Parliament had arisen because an MP had resigned from his seat. The applicant sought to challenge the Prime Minister's omission to exercise his discretion to call a by-election in order to fill the vacancy. The High Court granted her standing evidently on the basis that, inter alia, she was not 'represented by an MP whom she had an opportunity of choosing'.[93] Her substantive application was unsuccessful in the High Court.[94] By the time it came to the Court of Appeal, she had had no more standing because the Prime Minister had, by then, already called a by-election.[95] In other words, to have standing – a right to bring the challenge – she had to demonstrate dissatisfaction with the decision itself and its effects, not dissatisfaction with the legality of the decision or the way in which it had been made.[96]

A case seemingly holding to the contrary is *Manjit Singh s/o Kirpal Singh v Attorney-General*, in which the Court of Appeal said that 'the amenability of particular decisions or types of decisions to judicial review does not hinge on whether an applicant has in fact suffered harm'.[97] But, in context, the court's point was merely this: the fact that the exercise of a power 'may not' (meaning 'might not') 'necessarily lead to actual prejudice being suffered by the [applicant]'[98] does not mean that judicial review can never be available. The court did not go so far as to say that, even if the applicant has suffered no harm, judicial review still must be available.

[90] *Management Corporation Strata Title Plan No 301 v Lee Tat Development Pte Ltd* [2010] SGCA 39, [2011] 1 SLR 998 para 59.

[91] *Lines* (n 1) para 56.

[92] *Tan Eng Hong v Attorney-General* [2012] SGCA 45, [2012] 4 SLR 476 para 69.

[93] *Vellama d/o Marie Muthu v Attorney-General* [2012] SGHC 74, [2012] 2 SLR 1033 para 29 read with para 8.

[94] *Vellama d/o Marie Muthu v Attorney-General* [2012] SGHC 155, [2012] 4 SLR 698.

[95] *Vellama d/o Marie Muthu v Attorney-General* [2013] SGCA 39, [2013] 4 SLR 1 para 37.

[96] I am grateful to an anonymous reviewer for the point that, in *Vellama* and various other cases, the courts have dismissed an application for judicial review for want of standing and yet proceeded to issue extensive dicta on the merits of the case (*Vellama* is particularly noteworthy in this regard, since the dicta effectively meant that the applicant would have succeeded on the merits had she had standing). Nonetheless, the existence of such dicta is not guaranteed; the courts remain entitled to dismiss an application for want of standing without saying anything at all about its merits (though see Benjamin Joshua Ong, 'Standing Up for Your Rights: A Review of the Law of Standing in Judicial Review in Singapore' [2019] Singapore Journal of Legal Studies 316). Moreover, even if such *dicta* are issued, the law considers the applicant as having failed (which we see from the fact that the applicant may be required to pay the respondent's costs).

[97] *Manjit Singh s/o Kirpal Singh v Attorney-General* [2013] SGCA 22, [2013] 2 SLR 844 para 53.

[98] ibid para 53 (emphasis added).

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Incompatibility with Substantive Review

A greater conceptual problem with claiming that judicial review is not about the 'decision itself' or about the 'merits' of the decision is that the law of judicial review does explicitly allow for review of the decision itself, in the form of substantive review for irrationality. This sort of review is typified by the English case of *Associated Provincial Picture Houses v Wednesbury Corporation* ('*Wednesbury*'),[99] a case which the Singapore courts have quoted from and applied numerous times.[100]

Wednesbury is well known for its definition of what is often known as '*Wednesbury* unreasonableness'. A modern definition of '*Wednesbury* unreasonableness', which for present purposes will be used interchangeably with 'irrationality', is that in the speech of Lord Diplock in *Council of Civil Service Unions v Minister for the Civil Service* ('*GCHQ*'): 'a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it'.[101]

A word needs to be said about the notion of 'logic' and 'moral standards', which are two different matters. We are not presently concerned with the review of a decision on the ground that it is tainted by illogicality, in the sense of a logically fallacious mode of reasoning from premises to conclusions. That would simply be a review of the decision-making process. Rather, we will use the word 'irrationality' to refer to judicial review on substantive grounds, such as grounds relating to 'moral standards'.

While it is not clear what 'moral standards' refers to, it is clear is that a statement that a decision falls short of 'moral standards' must be a statement about the substance of the decision itself and not the way in which it has been made. How, then, can one both recognize Wednesbury as good law, and claim that judicial review does not concern the decision itself or the merits of the decision?

Various writers have made this point:

> [*Wednesbury* review] has always authorised full-blown substantive review of the merits of the substantive decision, albeit on an ostensibly restricted basis.[102]

and

> [A] consideration of the merits or substance is inevitable in any review for unreasonableness. Given the undisputed existence of this ground of review, Lord Brightman's dictum [in *Evans*], and any other assertion that a Court of review never concerned itself with the merits or policy of a decision, have always been a little misleading.[103]

and

> [I]t is impossible for a court to determine whether a decision was so unreasonable that no reasonable authority properly informed could have decided thus, unless the same court also gave some consideration to the substantive merits of the case.[104]

[99] *Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223 (EWCA) 230.

[100] See, for example, *Lines* (n 1) para 78; *Chee Siok Chin* (n 4) paras 94, 105; *Tan Seet Eng* (n 68) paras 77–81; *Colin Chan (CA)* (n 5) para 39, para 44; *Vijaya Kumar s/o Rajendran v Attorney-General* [2015] SGHC 244 paras 42 and 48; *Chng Suan Tze v Minister for Home Affairs* (n 9) para 119; *Mir Hassan bin Abdul Rahman v Attorney-General* [2008] SGHC 147, [2009] 1 SLR(R) 134 para 21.

[101] *GCHQ* (n 16) 410G.

[102] John Caldwell, 'Judicial review: Review of the merits?' [1995] New Zealand Law Journal 343, 343.

[103] Paul Daly, '*Wednesbury*'s reason and structure' [2011] Public Law 238, 258.

[104] Wong (n 74) 102.

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These views are supported by *Wednesbury* itself, which specifically endorsed judicial inquiry into the substance of a decision independent of inquiry into the way in which the decision was made. In *Wednesbury*, Lord Greene MR, writing for a unanimous Court of Appeal, described the judgment of the High Court of England and Wales in *Harman v Butt* ('*Harman*')[105] as 'unassailable'.[106] The facts of *Harman* were nearly identical to those in *Wednesbury*. In *Harman*, the High Court upheld the licensing condition that children under the age of 16 not be allowed into cinemas on Sundays. The High Court began by stating that the court ought to defer to the respondent's judgment as to what conditions were reasonable:

> The cases show that the courts ought not lightly to declare conditions unreasonable when the licensing authority, to whom the power of imposing conditions has been given, has after much thought and argument come to the conclusion that they are reasonable and proper. The [licensing] justices know the neighbourhood and the people who inhabit it. They know far more about their wishes and habits than any court can know, and they know the relevant circumstances.[107]

Yet the High Court went on to uphold the condition for the following reasons:

> I am entitled to assume that there were and are in the borough a number of people who believe in the observance of Sunday and want their children to grow up with a reverence for Sunday and to go to church and Sunday-schools and who do not want them to substitute for these duties attendance at an exhibition of films, particularly of films chosen for members of the forces and not because of their suitability for children. There may also be those who want their children on Sunday to get into the open air as much as possible and to attend the exercises of scouts and other training corps instead of spending several hours in an atmosphere hazy with tobacco smoke.[108]

In other words, immediately after sounding a warning against excessive judicial inquiry into the merits of the decision, the High Court went on to inquire into whether the decision was a meritorious one, taking it upon itself to judge the effect of the decision on 'reverence for Sunday' and the relative merits of 'open air' and 'tobacco smoke'. This underscores the notion that *Wednesbury* goes against the Distinction by sanctioning judicial inquiry into the decision itself.

One may argue that this passage was merely a judicial statement that the respondent local authority had had a reason to impose the condition that it did, and not a judicial endorsement of that condition as being a good one. Yet the following passages are hard to read as anything other than the court stating its assessment that the condition was a substantively good one:

> Can any one doubt that it is for the good of children under the age of sixteen to keep out of cinematograph theatres on Sundays? I, certainly, have no doubt about it. […]
>
> There are other considerations. Sunday audiences at this cinema consist almost entirely of men of the forces. The environment is not one suitable for girls under the age of sixteen. I cannot shut my eyes to the distressing facts with which no judge of assize nor any magistrate can fail to be familiar.[109]

[105] *Harman v Butt* [1944] KB 491 (EWHC).
[106] *Wednesbury* (n 99) 231.
[107] *Harman* (n 105) 500.
[108] ibid 500.
[109] ibid 500–501.

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Another way of attempting to reconcile the Distinction with this line of thinking is to say that *Harman*, and therefore *Wednesbury*, did not endorse review of the substance or 'merits' of a decision, but instead merely laid down a rule of statutory construction: a decision that is *Wednesbury* unreasonable is merely *ultra vires* because, on the proper construction of the statute, the discretion conferred by the Legislature on the decision-maker does not include the power to reach such a decision. After all, one definition of *Wednesbury* unreasonableness provided in *Wednesbury* is 'something so absurd that no sensible person could ever dream that it lay within the powers of the authority'.[110] In a similar vein, one may seek to argue that the crux of *Wednesbury* unreasonableness is 'abuse, or misuse, of power',[111] which is a problem with the power-holder's process of reasoning (*viz* that that process is motivated by improper ends) rather than the outcome.

But such explanations have now been rejected by the House of Lords in *GCHQ*, which termed this ground of review 'irrationality' and said that it may now 'stand upon its own feet' instead of being considered a 'mistake of law'[112] (ie, *ultra vires* the discretion-conferring statute). Despite past instances of confusing use of terminology,[113] the Singapore courts, too, do not think that 'irrational' is just shorthand for '*ultra vires*'.[114] Instead, as we have seen, the Court of Appeal in *Tan Seet Eng* stated that an irrational decision is one that, though *intra vires* (ie, falling within the 'range of legally possible answers'), is nonetheless one which is 'substantively unlawful'.[115]

The point may be put another way. It would be question-begging to suggest that *Wednesbury* review, though it involves examining a 'decision itself', is acceptable so long as it is done only for the purpose of ensuring that the decision is 'within the powers of the authority'.[116] This is because judicial review is always, by definition, an exercise in declaring the legal limits to the powers of an authority.[117] The question remains: when a decision is labelled 'irrational' or '*Wednesbury* unreasonable', what exactly is it about the decision that takes it outside the permitted legal limits?[118] The answer, as we have seen, is: some qualities possessed by the decision that have to do with its content (and not whether it falls within the 'range of legally possible answers' delimited by the statute,[119] or the process by which it has been made). The use of the language of *Wednesbury* unreasonableness cannot cloak the plain fact that the courts, in performing rationality review, would be deciding whether or not to quash a decision for reasons relating to the decision itself and not the way in which it has been made.

[110] *Wednesbury* (n 99) 229 (emphasis added).

[111] *R v Secretary of State for the Home Department, ex parte Brind* [1991] 1 AC 696 (UKHL) 765E.

[112] *GCHQ* (n 16) 410H–411A.

[113] Daniel Tan, 'An Analysis of Substantive Review in Singaporean Administrative Law' (2013) 25 Singapore Academy of Law Journal 296 paras 33–44.

[114] In *Deepak Sharma v Law Society of Singapore* [2016] SGHC 105, [2016] 4 SLR 192 para 138 and *Attorney-General v Venice-Simplon Orient Express Inc Ltd* [1995] SGCA 28, [1995] 1 SLR(R) 533 para 10, *GCHQ* was cited for the proposition just stated.

[115] *Tan Seet Eng* (n 68) para 80.

[116] *Wednesbury* (n 99) 229.

[117] *Tan Seet Eng* (n 68) para 1; *Attorney-General (NSW) v Quin* [1990] HCA 21, (1990) 170 CLR 1, 35–36 (Brennan J): 'The duty and jurisdiction of the court to review administrative action do not go beyond the declaration and enforcing of the law which determines the limits and governs the exercise of the repository's power.' There may be debates about what the source of these limits is (viz whether the limits are a matter of implied legislative intention or a creation of the common law (see, for example, Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart Publishing 2001), and, in the Singapore context, Kenny Chng, 'The Theoretical Foundations of Judicial Review in Singapore' [2019] Singapore Journal of Legal Studies 294), but this does not change the courts' role in enforcing those limits.

[118] Jeffrey Jowell and Anthony Lester, 'Beyond *Wednesbury*: substantive principles of administrative law' [1987] Public Law 368, 371–372 (emphasis in original): 'The incantation of the word "unreasonable" simply does not provide sufficient justification for judicial intervention. Intellectual honesty requires a further and better explanation as to why the act is unreasonable.'

[119] *Tan Seet Eng* (n 68) para 80.

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This is the sense in which the Singapore courts have conceived of *Wednesbury* unreasonableness. This was not always so. According to Mr Daniel Tan, the Singapore courts used to conflate irrationality with illegality, such that one may question 'whether there is any *true* substantive review in Singapore administrative law'[120] as '[i]rrationality has become … a mere slogan to add to a finding of illegality'.[121] If this were so, then there would be a case for saying that the Distinction is unobjectionable in Singapore.

There are two responses. First, there are various cases, not discussed by Mr Tan, in which the courts have expressed willingness to quash decisions for reasons relating to their substance (even if the courts did not say that that was what they were doing). Second, in response to Mr Tan's article, the Court of Appeal has now noted in *Tan Seet Eng* that 'the doctrines of illegality and irrationality might have been conflated somewhat',[122] and emphatically asserted that review for substantive irrationality does exist in Singapore: a 'decision may be legal in the sense that it is within the legislative scheme, but nevertheless impugned for being substantively unlawful' because it, though falling within a 'range of legally possible answers', is 'so absurd that *no reasonable decision-maker could have come to it*'.[123]

There is no running away from the fact that, even as the Singapore courts often state that judicial review does not involve the 'merits' of a decision or the 'decision itself', they have made pronouncements to the contrary by endorsing substantive review for irrationality. Of course, the scope of such review may be limited; but the very availability of such review puts paid to the Distinction.

One might next ask: is it possible to escape this problem by defining 'merits' in a manner such that rationality review does not involve review of an executive decision's 'merits'? The difficulty in evaluating this argument is that the concept of 'merits' is so ill-defined[124] that there could be a theoretically limitless range of possible definitions of 'merits'. Nonetheless, it will be useful to consider two judicially endorsed definitions of 'merits'.

'Merits' as weight

First, in *Tesco Stores Ltd v Secretary of State for the Environment*, Lord Hoffmann said that the distinction between the 'legality of the decision-making process' and the 'merits of the decision' tracked the 'distinction between whether something is a material consideration [for the respondent] and the weight which it should be given [by the respondent]'.[125]

However, this distinction is conceptually untenable for the reasons pointed out by Professor Paul Craig, namely, that it is irreconcilable with the nature of rationality review.[126] In other words, if Lord Hoffmann's definition of 'merits' is correct, then *Wednesbury* review must involve a review of the merits of the decision under review; either the Distinction is wrong, or *Wednesbury* must be expunged from the law.

Professor Craig reasons as follows. An assessment of the 'weight and balance' which the decision-maker has accorded to various considerations is 'central to the very determination of reasonableness review'.[127] This is because unreasonableness is, by definition, a label applied to decisions which have been made on the basis of (only) relevant considerations (and for proper purposes).[128] Therefore, he suggests, what can reasonableness review be about except the weight accorded to these considerations?[129]

[120]Tan (n 113) para 59; see also para 61.
[121]ibid para 60.
[122]*Tan Seet Eng* (n 68) para 77.
[123]ibid para 80 (emphasis in original).
[124]See the sources cited at n 75 above.
[125]*Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 (UKHL) 780H; see also James Goodwin, 'The last defence of *Wednesbury*' [2012] Public Law 445, 449, 453–454, and 459.
[126]Craig (n 74).
[127]ibid 135.
[128]ibid 136.
[129]If it were not, then 'substantive reasonableness review would not exist': Craig (n 74) 149.

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A careful reading of *Wednesbury* itself bears out this view. *Wednesbury* discussed the hypothetical example given by Warrington LJ in *Short v Poole Corporation* of an education authority deciding to 'dismiss a teacher because she had red hair, or for some equally frivolous and foolish reason'.[130] According to Warrington LJ, such a decision would be unlawful because, 'though performed in good faith and without the taint of corruption, [it] was so clearly founded on alien and irrelevant grounds as to be outside the authority conferred upon the body'.[131] However, in *Wednesbury*, Lord Greene MR's explanation of this hypothetical decision was as follows:

> That is unreasonable in one sense. In another sense it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another.[132]

What does the phrase 'in one sense' in the first sentence of this extract refer to? It is not 'taking into consideration extraneous matters', for that is 'another sense'. It cannot refer to taking a decision which is forbidden by the terms of the statute, for, in the hypothetical example, the statute provided that teachers held office 'during the pleasure of the Authority'.[133] Nor is there anything in the hypothetical situation to suggest procedural impropriety (eg, denying the teacher an opportunity to be heard). The only conclusion must be that 'unreasonable in one sense' refers to unreasonableness by virtue of the substance of the decision itself. As Professor Craig might phrase it, the unreasonableness lies in giving undue weight to the teacher's 'physical characteristics'.[134] Yet the assessment of the weight given to such a factor is precisely what, according to the definition of 'merits' now being considered, the court may not do.

The upshot is that one cannot claim both that the courts may not enquire into the 'merits' of the decision under review and, as *Tan Seet Eng* says, that the courts have the power to perform substantive review from Wednesbury unreasonableness.

'Process/merits' as 'appeal/review'

Another judicial approach has been to define 'merits' by reference to a purported distinction between 'appeal' and 'review', and to say that an incursion into the 'merits' of a decision is defined as one which involves the courts conducting what is in substance an 'appeal'.[135]

On its face, this would sound wholly circular. We are told that the courts must not examine the merits of a decision, lest they end up conducting an appeal instead of review. But 'merits' is defined as nothing more than what the courts are not allowed to examine when conducting review instead of an appeal. The way out of the circularity must therefore be to examine the defining characteristics of an appeal.

A defining feature of an appellate process is that the appellate tribunal may re-make the decision which the first-instance tribunal was to make. To paraphrase Professor Peter Cane, this may be broken down into two parts.[136] First, the appellate tribunal may direct its mind toward the very same questions which the first-instance tribunal had to answer. By contrast, review must, by definition, take place on limited grounds. Second, an appellate tribunal may substitute

[130] *Short v Poole Corporation* [1926] 1 Ch 66 (EWCA) 91.

[131] ibid 91.

[132] *Wednesbury* (n 99) 229.

[133] *Short* (n 130) 82.

[134] See Paul Craig, 'Proportionality, Rationality and Review' [2010] New Zealand Law Review 265, 278; Craig (n 74) 140 (fn 35). Professor Craig's point is a slightly different one, namely, that the same example can be analyzed either as one involving irrelevant considerations having been taken into account ('the natural colour of a person's hair could never be a relevant consideration in hiring or firing a teacher') or one which is irrational in that, although 'physical characteristics could be relevant in hiring or dismissing a teacher', undue weight has been given to such physical characteristics.

[135] *Brind* (n 111) 758A; *Rayney Wong* (n 4) para 79; *SGB Starkstrom* (n 2) para 56.

[136] Peter Cane, *Administrative Law* (5th edn, Oxford University Press 2011) 248–249.

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its decision for the first-instance tribunal's, whereas a reviewing court may only, at most, quash the distinction under review.

Neither of these points suffices to render 'review' or 'merits', a useful conceptual category.

Firstly, it is true that a review is not a re-assessment of all the questions which it was the first-instance tribunal's job to answer. For example, the first-instance tribunal's job may be to determine, in response to a certain question, what decision would be 'right' and what would be 'wrong'. As Professor Cane says, 'an appeal … may succeed provided the decision under appeal is "wrong". By contrast, he says, the question for a reviewing court is whether the decision is illegal, not whether it is wrong.[137] However, while the court may not ask itself whether the decision was 'wrong' *per se*, asking whether a decision is illegal may entail asking whether it is 'wrong' (as defined by reference to a certain standard) if – as will shortly be explored – there is a rule that decisions which are 'wrong' according to this standard are illegal.

Secondly, it is true that the court may not substitute its decision for that of the body under review, and for good reasons: it is that body, and not the court, that has been entrusted with the power (and duty) to make the decision. But, as we have seen, it is entirely possible for a court to '*conside*[*r*] the merits of [a] decision' without '*mak*[*ing*] the decision for the public body by a substitution of judgment or assessment of facts to that put forward by the administration'.[138]

The Legality-Merits/Legality-Decision Dichotomies are False Ones

This leaves us to examine whether the Distinction may be saved by focusing not on the 'decision itself' or on 'merits', but instead on 'legality'. This opposition is problematic for the following simple reason. A decision can be illegal because it is 'unmeritorious', provided that there is a rule of law to this effect. Such a rule may take the following form:

> [R] It is unlawful for an executive decision-maker to make an unmeritorious decision.

Or, to put it a bit less abstractly:

> [R*] It is unlawful for an executive decision-maker to make a decision with attributes A, B, C, or a decision whose substance is D, E, F…

It is therefore a mistake of taxonomy to think that 'legality' on the one hand and 'merits' or the 'decision itself' on the other exist side-by-side as alternative categories. Supervision of decision-making power can conceivably take place by reference to standards which make reference to the meritoriousness of the decision (in other words, the court may supervise the exercise of power to ensure that it is in line with [R*]), and thereby involve an examination of the merits of the decision while still not amounting to the exercise of appellate jurisdiction.

Alternatively, one may say that the purpose of drawing the distinction between 'legality' and 'merits' is not to assert that the two are separate categories, but rather to make the substantive claim that a rule such as [R*] (or, indeed, any rule in the form of [R]) should not exist. In other words, that there ought not to be a rule of law according to which the legality of a decision depends on its merits. The short answer to this is that such a rule already exists in the form of review for *Wednesbury* unreasonableness.[139]

[137] ibid 249.

[138] Wong (n 74) 102 (emphasis in original). Here, 'substitution' evidently refers to 'the reviewing court … decid[ing] the case de novo as if it has been the primary decision-maker': Craig (n 74) 141; see 140–142 for commentary on possible confusion over the term 'substitution'.

[139] Indeed, Jhaveri (n 11) 357 adds that even rules cast in terms of 'error of law' can 'blu[r] the divide between legality and merits', in that such rules can in effect require that 'the decision-maker [not] reac[h] the 'wrong' decision under the statute'.

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Neither is the Distinction saved by the substitution of the word 'legality' with 'process'. First, as we have seen, one is sometimes only allowed to challenge a decision-making process for reasons relating to the substance of the decision.[140] Second, any matter which may be described as going to the 'merits' of a decision may equally be described as going to the decision-making process: for example, it may well be said that the act of ascribing weight to various material considerations, though sometimes said to go to the merits of a decision, is itself part of the decision-making process.

There is another, more general, point to be made. 'Legality' itself is not a useful concept for defining the scope of judicial review. This is because judicial review itself is, by definition, a process by which 'the courts review the lawfulness of acts undertaken by other branches of the government'.[141] Therefore, if one asserts that judicial review does not involve 'merits'/the 'decision itself', one adds nothing by asserting that judicial review is about the 'legality' of a decision instead.

It is true that there are cases suggesting that the idea that the courts are to test the 'legality' of state action not only means that the courts are to enforce the legal limits to powers, but also says something about what those particular limits must be.[142] In other words, one may think that these cases show that 'legality' has some substantive content, as opposed to meaning nothing more than simply 'not merits'. In truth, however, these cases do no more than hold that the court's role is not merely a 'clerical' one,[143] for that would allow 'arbitrary' exercise of executive power.[144] Beyond this thin proposition, the question remains unanswered: why should 'legality' not be defined by reference to the 'merits' of a decision or the 'decision itself'? Whatever the answer to that question is, it must be something more than a sloganistic recitation of the Distinction.

Singapore case law undermining the Distinction

The need for such an answer is even more pressing given that there is a line of case law in which the Distinction, in the sense in which the Singapore courts have articulated it, has simply not been followed. Notwithstanding their repeated citations of *Evans*, a careful examination of the case law shows that the Singapore courts have often examined the substance of decisions in judicial review cases in far more detail than the Distinction as ostensibly espoused in Singapore would allow. The courts have scrutinized the evidence that was available to the decision-maker, and, in some cases, quashed decisions on the ground that they are incorrect the light of the evidence, provided that sufficient evidence of such incorrectness is before it.

The Old Position

This was not always the case. In *Jacob v Attorney-General*,[145] the applicant, a public servant, had been dismissed following a finding by a committee of inquiry that he had neglected his duties

[140]See section IV.A above.

[141]*Tan Seet Eng* (n 68) para 47.

[142]Neo (n 9) paras 33–37 points out that *Tan Seet Eng* (n 68) cited the 'principle of legality' as grounds not only for justifying judicial review at all, but also for setting the standard of review at a certain level. In so doing, *Tan Seet Eng* followed *Chng Suan Tze* (n 9). I am grateful to an anonymous reviewer for this point.

[143]*Tan Seet Eng* (n 68) para 97. An example of a 'clerical' role would be the court merely 'verifying … that the paperwork was in order' and, in a case where a Minister had the power to order that a person be detained in certain circumstances laid down by statute, verifying that the detention order 'included at least a bare recitation by or on behalf of the Minister that formally complied with the statutory formula': ibid. One case in which a decision was held unlawful on 'clerical' grounds is *Chng Suan Tze* (n 9): a statute provided that a person may be detained 'if the President is satisfied' that it was necessary to do so to prevent him from acting in a manner prejudicial to national security; the Court of Appeal ordered that several detainees be freed because there was no admissible evidence that the President was so satisfied (see paras 29–41).

[144]*Chng Suan Tze* (n 9) para 82.

[145]*Jacob v Attorney-General* [1970] SGHC 7, [1968–1970] SLR(R) 694.

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and acted in a grossly insubordinate manner.[146] He alleged, *inter alia*, that '[t]here was no basis upon which any reasonable person or body of persons could come to the conclusion that [he] was guilty of the allegations made against him'.[147] The High Court swiftly rejected this submission:

> it has been said on many occasions by the courts in England – and the law on this point is the same here as in England – that the High Court in the exercise of its supervisory jurisdiction over inferior tribunals will not interfere merely on the ground of insufficiency of evidence.[148]

Forays into the Evidence: Review of Exercises of Discretionary Fact-finding Powers

However, the case law subsequently saw the courts become more willing to examine the substance of decisions from the point of view of the decision-maker, considering the evidence available to the decision-maker. In *Chang Song Liang v Attorney-General* ('*Chang Song Liang*'),[149] the applicants, who were police officers, sought to challenge their punishments for voluntarily causing hurt to a suspect named Peck Han Choo. The High Court held as follows:

> At the trial Mr Jeyaretnam, counsel for the plaintiffs, did not press the claim that the finding of the committee was wholly arbitrary and capricious. A great deal of evidence was presented to the committee and it is plain from a perusal of that evidence that this claim is unfounded. Peck Han Choo gave evidence before the committee implicating all the three plaintiffs and the majority of the committee accepted his evidence and rejected the evidence of the plaintiffs.[150]

This passage suggests two reasons why the conclusion that the applicants were guilty was not 'wholly arbitrary and capricious'. The first is that the committee had taken into account the evidence both for and against the conclusion – the decision-making process was sound. Second, it appears that the High Court had 'perus[ed]' the evidence and found that the conclusion was in line with the evidence – the substance of the decision was sound. This second reason suggests that the High Court had examined the evidence that had been before the respondent in order to test the correctness of the respondent's decision.

This second reason is even more prominent in *Wong Kim Sang v Attorney-General* ('*Wong Kim Sang*'),[151] another case involving disciplinary action against public servants. The High Court cited *Jacob* for the proposition that the court's 'supervisory function is to see that it makes the authorized inquiry according to natural justice and arrives at a decision whether right or wrong.'[152]

At first glance, this would appear to confine the court's role to examining the decision-making process only. However, the High Court added a caveat (not unlike Lord Denning's approach in *Evans*): its definition of 'natural justice' included the question of whether the respondent's decision was one 'that is open to a reasonable person to make'.[153] So while the High Court alluded to the Distinction, it quietly opened the door to review on grounds relating to the substance of the decision.

This may be illustrated by the following. The applicants had alleged that 'there was no sufficient evidence to support [one of the] charge[s]' because one of the witnesses against them, Lee Boon

[146]ibid para 2.
[147]ibid para 10(b).
[148]ibid para 11.
[149]*Chang Song Liang v Attorney-General* [1980] SGHC 2, [1971–1980] SLR(R) 379.
[150]ibid para 11.
[151]*Wong Kim Sang v Attorney-General* [1982] SGHC 1, [1981–1982] SLR(R) 295.
[152]ibid para 34, citing *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147 (UKHL) 195.
[153]ibid para 34(b).

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Keng, 'was an untruthful witness … and his whole testimony should be disregarded'.[154] Rather than refusing to examine the substance of this allegation, the High Court said:

> I have carefully examined the records here and if Lee Boon Keng's evidence is totally disregarded I cannot still say it was not open to the PSC on the rest of the evidence placed before them to find both the plaintiffs guilty on the charge.[155]

Two points stand out. First, unlike in *Jacob*, the High Court in *Wong Kim Sang* examined the evidence to determine its sufficiency to found the decision. In other words, the High Court was in principle willing to (to use a phrase from *Jacob*) 'interfere merely on the ground of insufficiency of evidence'. Second, in order to hold as it did, the High Court must have considered, and implicitly made a finding on, the weight to be attached to various pieces of evidence. It must have held that (a) Lee Boon Keng's evidence was of limited weight, in that it was not decisive in leading to the conclusion that the applicants were guilty; and that (b) the other evidence was of sufficient weight to reach this conclusion.

It is clear, therefore, that the High Court did inquire into the substance of the decision by asking whether the decision could be said to be right or wrong in the light of the evidence on which it was purportedly based. If the High Court had been examining only the decision-making process, it would have considered only how the respondent treated the evidence, without going further and itself perusing and evaluating the evidence.

This is seen even more starkly in *Re Fong Thin Choo* ('*Fong Thin Choo*').[156] In that case, a company had taken some cigarettes from a warehouse in Singapore to be loaded onto a ship for export. There was a factual dispute as to whether the cigarettes had really been loaded onto the ship: the company insisted that they had been, but the vessel's agents claimed that they had not, and the cigarettes had not been listed on the ship's manifest.[157] The Director-General of Customs and Excise ('DG') came to the conclusion that they had not been, and so sought to recover duty from the company pursuant to a statute which read as follows:

> The owner of any goods removed under the provisions of this regulation or his agent shall, if so required by the proper officer of customs, produce evidence that such goods have been exported or reexported and shall pay the customs duty leviable on any part of such goods –
>
> (a) not accounted for to the satisfaction of the proper officer of customs; or
> (b) if they are found to have been illegally re-landed in Singapore.[158]

The High Court found in favour of the company. It held that the DG had 'a discretionary power to assess and evaluate all the evidence and decide whether such evidence is sufficient or otherwise to prove that goods have indeed been exported',[159] but that the DG could only go on to levy customs duty if he had 'establish[ed] the fact of non-export'.[160] In other words, although the statute provided that the DG could levy customs duty if the goods had not been 'accounted for to [his] satisfaction', the High Court held that the DG's 'satisfaction' was 'not to be measured in terms of reasonableness but in terms of justification on the evidence'.[161] In other words, it held that a jurisdictional

[154]ibid para 35.
[155]ibid para 36.
[156]*Re Fong Thin Choo* [1991] SGHC 54, [1991] 1 SLR(R) 774 (HC).
[157]ibid paras 4–7.
[158]ibid para 22, quoting the Customs Regulations 1979 (GN No S 261/1979), reg 12(6).
[159]ibid para 25.
[160]ibid para 33.
[161]ibid para 33.

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precondition for the customs authority to levy customs duty was that '[t]he DG must establish the fact of non-export before the exporter becomes liable for customs duty'.[162]

There is nothing unique about this: it simply amounts to saying that an exercise of executive power is lawful only if the preconditions for the exercise of power have been made out. What is striking is the High Court's alternative analysis on the assumption that the question whether the goods had not been exported was not a question of precedent fact.[163] On that analysis, the High Court nonetheless engaged in a fine-grained analysis of the evidence[164] and concluded that the DG had erred in giving undue weight to certain pieces of evidence: he had 'preferred the evidence which tended to prove non-export to evidence which tended to prove the contrary, without an investigation of the latter evidence.'[165] Not only had this failure to investigate resulted in a denial of a fair hearing to the company;[166] it was, according to the High Court, motivated by a 'misdirection as to the law' because the DG had 'misdirected himself on the nature and effect of the evidence required under [the statute] to prove the export of the goods'.[167]

It is true that the High Court claimed that it was 'not suggesting for one moment that the applicants' evidence is true or should be believed and that the evidence of the DG is untrue or should not be believed'.[168] Nonetheless, it is clear that the High Court examined and analyzed the evidence at a granular level. Moreover, while the High Court described the respondent as having failed to give the company a fair hearing, it said that the result of this was that the respondent had 'placed undue weight'[169] on some evidence – a matter that one would think went to the 'merits' of the DG's decision.[170]

Fong Thin Choo therefore flies in the face of the Distinction. It clearly shows that the dichotomy between 'legality' on the one hand and 'merits' or 'decision itself' on the other is a false one, for the High Court in effect held that the requirement of legality demanded that the decision itself be correct.[171] *Fong Thin Choo* also demonstrates the court's willingness to inquire into the weight to be accorded to various pieces of evidence, which, according to the Distinction, is not permissible.[172]

Though cases following *Fong Thin Choo* do not uniformly suggest that the court accepted that it had had such far-reaching powers,[173] one of them, *Ng Hock Guan v Attorney-General* ('*Ng Hock Guan*'),[174] shows the courts going even further than in *Fong Thin Choo* in impugning a decision on the grounds of its substance. Ng, a police officer, applied for judicial review of his dismissal following a disciplinary hearing by the 'Authorized Officer'. Ng had allegedly assaulted several suspects by slapping them.[175] The High Court granted his application on the ground that the Authorized Officer had, in dismissing Ng's witnesses' evidence, engaged in 'mere speculation' because of a

[162]ibid para 33.

[163]ibid para 35.

[164]ibid paras 36–48. Jhaveri (n 11) 365 describes this as a 'fairly involved review' that was in substance 'similar to the nature of review carried out with precedent fact review, hemming closely to the merits of decision-making'.

[165]*Fong Thin Choo* (n 156) para 51.

[166]ibid para 54.

[167]ibid para 54 (emphasis removed).

[168]ibid para 53.

[169]ibid para 53.

[170]*Tesco Stores* (n 125) 780H.

[171]In fact, the High Court (n 156) went so far as to suggest that the decision must be correct *as of the time of the hearing*, and not merely that it must have been correct at the time it was made. We see this from the fact that the High Court made its decision 'assuming that the court is not entitled to have regard to the applicants' evidence produced after December 1988' (which was the time the respondent made its decision) (at para 51), and remarked that 'the applicants have *now* produced ample evidence of export which has never been investigated by [the DG]' (at para 50; emphasis added).

[172]*Tesco Stores* (n 125) 780H.

[173]See *Re Yap Lack Tee George* [1991] SGHC 96, [1991] 2 SLR(R) 203 paras 19–20; *Kamal Jit Singh v Minister for Home Affairs* [1992] SGCA 72, [1992] 3 SLR(R) 352 para 33.

[174]*Ng Hock Guan v Attorney-General* [2003] SGHC 284, [2004] 1 SLR(R) 415.

[175]ibid paras 14–15.

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'prejudicial view'.[176] This may appear to be nothing more than the familiar principle of natural justice. But the High Court had reached this conclusion following a close examination of the evidence which was available to the Authorized Officer, an example of which is as follows.

Ng had called four colleagues (one of whom was called Sergeant Chan) as witnesses in his defence. The disciplinary officer dismissed the colleagues' testimony: 'I have to treat the testimonies of the police witnesses with caution as they will naturally try to help or cover their colleagues'.[177] The High Court held that this view was 'irrational and one which no rational and fair-minded arbiter properly directing himself would have made'.[178] The High Court drew this conclusion after having reviewed the colleagues' evidence in considerable detail.[179] For example, the High Court said this about Sergeant Chan's evidence:

> The other point of the State Counsel was that Sgt Chan might have been at a different place when the slapping of the three complainants took place … In my view, it was idle to speculate. They were all in the immediate vicinity. If the slapping had taken place, it was fair to say that Sgt Chan would have known about it…[180]

The Court of Appeal upheld the High Court's decision.[181] Anxious to preserve a semblance of the Distinction, it explained that the High Court's references to the evidence were only 'made essentially to show the extent to which the preconceived prejudicial notion of the authorized officer … had affected or coloured the way in which the authorized officer viewed their evidence', and that the High Court judge was not 'attempting to substitute his own findings of fact for those of the authorized officer'.[182] Nonetheless, it is clear that the High Court allowed Ng's application because the Authorized Officer's decision had, quite simply, been incorrect. While both courts had sought to clothe their decision in language reminiscent of that of procedural unfairness, this was a rather thin veil. If the basis for the decision had been that Ng had not been fairly heard, surely the remedy would have been simply to order a re-hearing. Yet the High Court went further and ordered that Ng be reinstated with back pay,[183] and the Court of Appeal affirmed this.

Beyond the Evidence: Review of Exercises of Discretionary Powers Pertaining to the Application of Policies

All the cases we have examined so far involve situations in which the respondent had to exercise its discretion to make findings of fact, as opposed to a value judgment or a discretionary decision as to a policy. One can understand why the courts ought to be able to examine the substance of the former type of decision: the courts are perfectly familiar with tasks such as evaluating and weighing pieces of evidence and drawing conclusions as to a sequence of events. But the case law shows a judicial willingness to inquire into the substance of policy decisions too.

In *Tan Gek Neo Jessie v Minister for Finance* ('*Jessie Tan*'), the High Court not only examined the evidence available, but also quashed a decision because of its substantive implications. The applicant sought judicial review of the decision of the Registrar of Companies to, using power created by the Business Registration Act, order her to change her trading name from 'JC Penney Collections' on the ground that it 'so nearly resemble[d] the name of any corporation or the name under which

[176]ibid paras 79–80.
[177]ibid 61.
[178]ibid para 64.
[179]ibid para 63: 'I have summarized with care the relevant evidence given by each of them.'
[180]ibid para 35.
[181]*Attorney-General v Ng Hock Guan* [2004] SGCA 21, [2004] 3 SLR(R) 253.
[182]ibid para 38.
[183]ibid para 7.

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another person carries on business as to be calculated to mislead'.[184] This trading name was similar to the name of an American department store company, JC Penney Company Inc, which had the word 'Penneys' as a Singapore-registered trademark.

The High Court quashed the Registrar's order on three grounds. First, there was 'hardly any evidence' that the applicant's trading name had been 'calculated to mislead'.[185] Second, there was also no evidence to support the Registrar's view that the applicant had had the 'ulterior motive of riding on the reputation of [a] foreign corporation/owner of trade marks'.[186] These two grounds involved an examination of the evidence available, which is similar to what the courts did in the cases described above. The third ground is the most striking. The High Court noted that, JC Penney Company Inc had never used 'Penney' as a trade mark, and had in fact allowed it to expire. Moreover, the applicant had never used 'JC Penney' or 'Penneys' as a trade mark.[187] So far, so conventional: this is merely a question of failure to take into account relevant considerations. But the High Court continued:

> If, however, she did use both or either of the trade marks in relation to her goods after September 1983, it seems to me that the American corporation as the proprietor of the trade marks could not maintain an action against her for infringement of trade marks. Nor could the proprietor of these trade marks maintain an action against her for passing off.… It seems to me, therefore, that to direct the applicant to change her business name on the basis that it so nearly resembles the name of the proprietor of these two trade marks, in effect, gives to the proprietor more than what the laws on infringement of trade marks and passing off would provide.[188]

The High Court did not state that, as a matter of law, the scope of the Registrar's legal power to order a business to change its name was restricted by the level of protection of a name afforded by the law of trade marks and passing off. The High Court's reasons for quashing the Registrar's decision related chiefly to the lack of evidence supporting it and to its substantive effects. If the cases described above are not clear enough instances of the courts' examining the 'merits' of the decision made, surely this case is.

The High Court went even further in *Lines International Holding (S) Pte Ltd v Singapore Tourist Promotion Board* ('*Lines International*').[189] The Port of Singapore Authority ('PSA') had instituted a policy with the aim of curbing gambling and maintaining the image of Singapore's port: if more than 30% of a cruise operator's cruises were 'cruises to nowhere', that operator's vessels would not be allowed to berth in Singapore. In holding that the policy was not *Wednesbury* unreasonable, the High Court reasoned as follows. First, it took notice of the method by which the PSA had arrived at the figure of 30 per cent, which was known as the 'call basis'.[190] Second, it considered the applicant's argument to the contrary, namely, that the ratio ought to be calculated based on the 'daily basis'.[191] Third, it considered the PSA's response, which explained why the policy, if it

[184] *Tan Gek Neo Jessie v Minister for Finance* [1991] SGHC 1, [1991] 1 SLR(R) 1 para 13.
[185] ibid para 23.
[186] ibid para 25 read with para 24.
[187] ibid para 19.
[188] ibid para 19.
[189] *Lines* (n 1).
[190] ibid para 84. On this basis, the figure of 30% corresponded to a ratio of two destination cruises to one 'cruise to nowhere' per week.
[191] ibid para 85. This basis involved considering the ratio of the number of days spent by a ship on destination cruises to the number of days spent by that same ship on 'cruises to nowhere'.

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were based on the 'daily basis', would be open to abuse.[192] Finally, having considered all this, the court concluded: 'In my judgment PSA's reasons do stand up to scrutiny.'[193]

The High Court did not stop at saying that the PSA's policy was not irrational. It went further by considering the possible arguments against the merits of the PSA's policy. Only after having done so did it conclude that the PSA had had viable reasons for formulating the policy it did and rejecting a possible alternative. In other words, while the High Court did not go into great detail, it did make clear that its reasoning process involved weighing up the merits and demerits of the policy in question before concluding that it was not irrational. All this was despite the High Court's statement that 'judicial review is confined to a review of the decision-making process and does not extend to a review of the decision itself.'[194]

The way forward

What may explain the courts' approaches in these cases? The answer is that the Singapore courts have, even as they have paid lip service to the Distinction, seen fit to breach it by inquiring into the correctness of the decision itself (or, if one prefers, the 'merits' of that decision). In some cases, the courts have even quashed a decision for reasons relating to its 'merits'. One who seeks to uphold the Distinction must therefore either argue that the courts' approach in all of these cases was wrong or define the Distinction in more precise terms that explains why these cases do not violate the Distinction. If one does not do either, what, then, is the way forward for Singapore law?

On a preliminary note, let us recall Assistant Professor Jhaveri's observation that the Distinction purports to reflect various constitutional principles – such as

> the rule of law and the concomitant principle of legality (which embodies the idea that all power has legal limits); the separation of powers and the need for checks and balances on the executive's powers; 'red' versus 'green light' approaches to judicial review; the need to promote 'good administration'; the theory of jurisdiction and the importance of ensuring the executive remains within statutory boundaries; and the need to give effect to the constitutional principles inherent in the basic structure of the Constitution (such as the separation of powers)[195]

– and the 'balance'[196] between them. All these principles are contestable. But whatever they mean, the Distinction is over-inclusive because it prescriptively fixes the balance instead of recognizing that the 'various principles … are constantly in tension'[197] and their application is fact-sensitive. Consider the Court of Appeal's statement in *SGB Starkstrom* that the Distinction is justified on the grounds of 'a proper understanding of the role of … the Executive and the Judiciary' under the 'constitutional doctrine of separation of powers'; the 'need to uphold *Parliament's intention* (as expressed in statute) to vest certain powers in the *Executive*'; and 'the pragmatic concern about *institutional competence*'.[198] But in a case where review of the 'merits' of a decision (however defined) does not infringe on the Executive's proper role; merely involves quashing a decision which, by virtue of its lack of its merit, falls outside the scope of the Executive's power; and does not take the Judiciary into an area which it is not institutionally competent to adjudicate, why should the court refuse to intervene?

[192]ibid para 85.
[193]ibid para 85.
[194]ibid para 56.
[195]Jhaveri (n 11) 354 (internal footnotes omitted).
[196]ibid.
[197]ibid.
[198]*SGB Starkstrom* (n 2) para 58 (emphasis in original).

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Take, for example, the issue of the courts' institutional competence. This cannot be a justification for the Distinction, because the courts are often institutionally competent – if not the experts *par excellence* – to inquire into the merits of an executive decision to the extent that that involves weighing up various pieces of competing evidence in fact-finding exercises (which was precisely what the courts did in *Ng Hock Guan*). The same may be said of certain matters of policy: for example (as in *Jessie Tan*), how to prevent one legal regime (the Business Registration Act) from stultifying another (the law of trade marks and passing off).

Or consider *Lines International*, in which the applicants lost because the evidence showed at most that the applicants' proposed policy was viable, but not necessarily that it would better achieve the statutory purposes than the respondents' proposal would. The point was not that the court was disabled by constitutional principles from examining the merits of the respondents' policy. To the contrary, the steps taken by the court in examining the substance of the policy – the construction of statutes and the evaluation of evidence – were manifestly within the courts' constitutional role.

Assistant Professor Jhaveri recognizes this point when she proposes altering the available grounds of judicial review,

> moving the focus away from categories – such as … legality/merits – to make decisions on whether or not the court will review. Rather, review is [to be] presumed to be permissible, with the courts determining the appropriate standard of review.[199]

She also proposes greater reliance on declarations rather than other forms of remedy in judicial review cases – specifically, declarations that declare what sort of decisions would or would not be lawful, but 'preserving some freedom of choice for the executive in the implementation of the terms of the declaratory relief.'[200]

This author respectfully agrees with these proposals in principle. One might contend that such proposals are incomplete, in that they do not comprehensively set out a clear proposal for how the courts may 'determin[e] the appropriate standard of review'. But neither does the Distinction. What is clear is that the Distinction, in the absolute bright-line form in which the Singapore courts have framed it, risks being used to summarily end any conversation about the standard of review in cases that involve the 'merits' of a decision. This is despite the fact that, as we have seen, the Singapore courts have performed judicial review on grounds relating to the 'merits' of decisions. While this paper cannot solve this problem, it has sought to argue at least that the law would lose nothing by jettisoning the Distinction, which is a potential obstacle to finding a solution.

That said, some preliminary notes may be made. Instead of stating that they can never quash a decision for reasons pertaining to its substance, the courts ought to be open to quashing (or declaring unlawful) an executive decision if the court, having regard to its institutional limitations and the limitations of the evidence before it, is well-placed to judge that the substance of the decision is clearly unmeritorious. To do this, the courts need to focus on developing at least two sets of rules to guide them when engaging in substantive review: (a) standards by which the substance of executive action may be judged;[201] (b) rules setting down the threshold of evidence required for the court to conclude that an executive decision has fallen short of those standards.

[199]Jhaveri (n 11) 375.

[200]ibid 376.

[201]Several possibilities are set out in the following sources. Jeffrey Jowell has gleaned various criteria for substantive review from the case law, such as a 'lack of reasoning' and an '[u]nduly [o]nerous or [o]ppresive' consequence: Jeffrey Jowell, 'Proportionality and Unreasonableness: Neither Merger nor Takeover' in Hanna Wilberg & Mark Elliott (eds), *The Scope and Intensity of Substantive Review: Traversing Taggart's Rainbow* (Hart Publishing 2015) 49–53. Similarly, Paul Daly has identified various '"indicia' of unreasonableness' shown by decisions which the courts have quashed for being unreasonable, such as 'illogicality' and 'disproportionality': Paul Daly, 'Wednesbury's reason and structure' [2011] Public Law 238. James McLachlan, too, goes further in considering that neither the 'concepts of justiciability … insubstantial error and self-restraint'

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There are at least two Court of Appeal cases that provide us with a glimpse of how the courts may go about such development. The first is *Tan Seet Eng*. We have seen that, in that case, the court hinted that judicial review for irrationality involves an examination of the merits of an executive decision. Let us now consider the treatment in *Tan Seet Eng* of *Chan Hiang Leng Colin v Public Prosecutor* ('*Colin Chan v PP*').[202] In *Colin Chan v PP*, the High Court stated that '[t]his court was not here to review the merits of the decision'.[203] But in *Tan Seet Eng*, the Court of Appeal quietly re-interpreted these words to mean that the courts would 'undertak[e] a less intense standard of review' in *some* matters, such as those 'concerning national security'.[204] The Court of Appeal thus paved the way for possible arguments that a court *can* enquire into the 'merits' of a decision provided that it does so in a 'less intense' manner when the decision involves national security. In other words, the subject-matter of the decision is one factor influencing to what extent the court will be prepared to strike down executive action on substantive grounds.

A similar line of thinking may be seen in *Nagaenthran a/l K Dharmalingam v Public Prosecutor*.[205] That case involved a statutory regime under which a drug trafficker, who might ordinarily be sentenced to death, is eligible to be sentenced to imprisonment if two conditions are met: first, the offender's involvement in the offence is limited to performing certain acts (such as transporting drugs);[206] second, 'the Public Prosecutor certifies to any court that, in his determination, the person has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities within or outside Singapore' (for short, to 'issue a Certificate').[207] The applicant sought judicial review of the Public Prosecutor's decision not to issue a Certificate on grounds, *inter alia*, that the Public Prosecutor had failed to take into account relevant considerations. The Public Prosecutor argued that this was not possible because of section 33B(4) of the Misuse of Drugs Act ousted judicial review save on the grounds of 'bad faith', 'malice', and unconstitutionality.[208] Section 33B(4) provides:

> The determination of whether or not any person has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities shall be at the sole discretion of the Public Prosecutor and no action or proceeding shall lie against the Public Prosecutor in relation to any such determination unless it is proved to the court that the determination was done in bad faith or with malice.

The Court of Appeal held that section 33B(4) merely immunized the Public Prosecutor from suit (presumably, for a tort such as negligence);[209] it did not 'exclud[e] the usual grounds of judicial review … on the basis of which the court may examine the *legality* of the [Public Prosecutor's] determination, as opposed to its *merits*.'[210] In other words, a court performing judicial review could not examine the 'merits' of the Public Prosecutor's decision.

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nor the 'concept of reasonableness' suffice to provide an account of the proper scope of judicial review; he calls for the 'formulation of substantive principles of review which delimit the scope of review' (James McLachlan, 'Substantive Fairness: Elephantine Review or a Guiding Concept?' (1991) 2 Public Law Review 12, 21–22), such as consistency, proportionality, and non-arbitrariness (James McLachlan, 'Substantive Fairness: Elephantine Review or a Guiding Concept? Part II' (1991) 2 Public Law Review 109). Even if these principles are themselves open-ended and/or vague, surely they are more concrete than a bare appeal to the notion that a decision must be 'reasonable' or 'rational'.

[202]See *Tan Seet Eng* (n 68) para 95.

[203]*Chan Hiang Leng Colin v Public Prosecutor* [1994] 3 SLR(R) 209 (HC) para 68.

[204]*Tan Seet Eng* (n 68) para 95.

[205][2019] 2 SLR 216 (CA).

[206]Misuse of Drugs Act (Cap 185, 2008 Rev Ed), s 33B(2)(a).

[207]ibid s 33B(2)(b).

[208]*Nagaenthran* (n 205) para 43.

[209]ibid para 67. For commentary, see Kenny Chng, 'Reconsidering ouster clauses in Singapore administrative law' (2020) 136 Law Quarterly Review 40.

[210]ibid para 51 (emphasis in original).

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However, the court went on to remark that it made sense for section 33B(4) to immunized the Public Prosecutor from suit save on the grounds of bad faith, malice, or unconstitutionality because 'the merits of [the Public Prosecutor's] determination… is not [an issue] that is capable of being adjudicated upon by a court of law'.[211] This, in turn, was because there are no 'manageable judicial standards'[212] by which the court may assess the substance of the Public Prosecutor's decision, given that doing so would

> likely entail the weighing of considerations and trade-offs that are outside our institutional competence, which, in the final analysis, is directed to the resolution of particular controversies. In essence, the courts are simply ill-equipped and ill-placed to undertake such an inquiry.[213]

In saying this, the court did not stop at saying that it could not adjudicate on the 'merits' of executive decisions generally; rather, the court explained why, given its nature and constitutional role and the Public Prosecutor's expertise, a court could not adjudicate on the 'merits' of *this* particular type of executive decision.

This is similar to how the courts ought, as Assistant Professor Jhaveri put it, to 'determin[e] the appropriate standard of review':[214] with sensitivity to the particular nature of the decision in question, the constitutional separation of powers, and the relative competence of the executive and the courts to address it, having regard to factors such as the subject-matter of the decision and its polycentricity. If this is what the courts are doing, the courts can simply say so; a reference to the Distinction or the use of the word 'merits' adds nothing.

Unfortunately, the developments in *Nagaenthran* are obscured by the fact that the Court of Appeal articulated them in the context of discussing suits against the Public Prosecutor, not applications for judicial review. Post-*Nagaenthran*, there has been at least one Court of Appeal case that cited the Distinction;[215] at least one High Court case that treated the Distinction as a means to reject summarily certain arguments made by the applicant;[216] and another High Court case which drew from *Nagaenthran* the proposition that 'a court can only examine the legality of the [Public Prosecutor's] determination, as opposed to its merits'[217] without considering the nuances just identified. So it may well be that, for all the subtle developments in *Tan Seet Eng* and *Nagaenthran*, the courts need to go further and outrightly reject the Distinction as an organising principle of judicial review, failing which the Distinction and its attendant problems may continue to hinder the principled development of Singapore administrative law by acting as a slogan that papers over nuanced constitutional complexities.

Conclusion

This article has argued that the Distinction should be expunged from Singapore law because it cannot form a coherent principle to guide the courts; nor does it explain the reasoning of the Singapore courts in numerous cases. The Distinction can be but an over-inclusive rough approximation of certain constitutional principles and how they are to be balanced. Our response ought to be to focus directly on those principles, rather than to seek the neat bright line that the Distinction purports to provide but which turns out, on closer inspection, to be dim and blurry.

[211] ibid para 59.
[212] ibid para 60.
[213] ibid para 58.
[214] Jhaveri (n 11) 375.
[215] *AXY* (n 85) paras 46, 78. Note the view of Jhaveri, ibid, that this case displays a 'burgeoning version of [review for] errors of fact' (375) that is in substance 'a review squarely of the merits of the executive's decision' (367).
[216] *CBB* (n 86) para 65.
[217] *Pannir Selvam* (n 87) para 53 (emphasis in original).

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As Singapore law faces questions as to the future direction of administrative law, such as whether and how new grounds of judicial review ought to be developed,[218] the Distinction must not be allowed to act as an epithet which may be used either summarily to dismiss or elliptically to lend a ring of credibility to a decision. Ironically, the vagueness of the Distinction, coupled with the risk that it becomes a mere conclusory label instead of a reasoned argument, goes against the very purpose for which the Distinction was conceived in the first place – namely, to ensure that judicial decision-making takes place in a clearly principled manner. This being so, the Singapore courts ought to recognize explicitly that the Distinction must be but a disservice to the understanding and development of the law.

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[218]See generally Jhaveri (n 11).

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