

OUSTING OUSTER CLAUSES: THE INS AND OUTS OF THE PRINCIPLES REGULATING THE SCOPE OF JUDICIAL REVIEW IN SINGAPORE

THIO LI-ANN*

How a court responds to an ouster clause or other attempts to curb its jurisdiction, which seeks to exclude or limit judicial review over a public law dispute, is a reflection of the judicial perception of its role within a specific constitutional order. Article 4 of the Singapore Constitution declares the supremacy of constitutional law over all other forms of law—whether statutory, common law or customary in origin. The courts have judicially declared various unwritten constitutional principles which are of particular relevance to the question of the scope of judicial review, particularly, the separation of powers and the rule of law. With comparative references where illuminating, this article examines the scope of judicial review in Singapore administrative law, in the face of legislative intent that it be partially truncated or wholly excluded, with a view to identifying and evaluating the factors that have been judicially considered relevant in ascertaining the legitimacy of an ouster clause, including the Article 93 judicial power clauses and the inter-play of other constitutional principles.

I. INTRODUCTION: LEGISLATIVE INTERVENTION IN THE REALM OF JUDICIAL REVIEW

The law on ouster clauses, which shapes the scope of judicial review, may be seen as “a theatre of legislative-judicial engagement,”¹ revealing how institutional actors view their role within a constitutional order, and the nature of administrative law within that polity. Courts have traditionally been hostile towards statutory attempts to exclude or restrict their supervisory jurisdiction, a facet of their general and inherent powers of adjudication, over jurisdictional excesses. Ouster clauses raise questions about the rule of law and role of judicial review in enforcing legal limits where public power is exercised, and how much weight to accord parliamentary intent in

* Ph.D. (Cambridge); LL.M. (Harvard), B.A. Hons (Oxford), Barrister (GI), Provost Chair Professor, Faculty of Law, National University of Singapore. My thanks to the anonymous reviewers for their insightful comments.

¹ Mark Elliot, “Through the looking glass? Ouster Clauses, Statutory Interpretation and the British Constitution” (2004) University of Cambridge Faculty of Law Legal Studies Research Paper Series, Paper No 4 at 6.

determining the effectiveness of such clauses which may be variously framed² and labelled as “privative, preclusive, limitation or exclusion clauses”.³

In ‘ousting’ statutory ouster clauses by denying them complete or partial effectiveness, two main trajectories may be taken, one evasive, one direct. The first may be called the ‘common law approach’ based on the *Anisminic v Foreign Compensation Commission*⁴ framework which erects a strong interpretive presumption against ouster clauses, while keeping the door open to the possibility that such clauses may be effective if formulated in clear enough language.

The *Anisminic* framework essentially holds that the commission of a jurisdictional error of law renders a determination not ‘real’, but ‘purported’, which is a legal nullity to which an ouster clause cannot apply.⁵ In applying this evasive interpretive technique, the identification of the scope of the category of ‘jurisdictional error’ becomes central, as distinct from non-jurisdictional errors of law which are not reviewable. In policing the boundaries of legislative grants of power, Singapore courts have applied the expansive understanding of ‘jurisdictional error’ ushered in by *Anisminic*: this refers not only to the “narrow and original sense”⁶ of ‘jurisdiction’ which pertains to whether an administrative actor has the legal power to act in the first place, such as whether a precedent fact exists; it also encompasses errors relating to how this conferred discretion is exercised, whether procedural fairness is observed or relevant considerations ignored, for example. These wider jurisdictional errors have been organised by Lord Diplock into the well-known *GCHQ*⁷ headings of ‘illegality, irrationality and procedural impropriety’, which Singapore courts have adopted.⁸ Unlike English courts, Singapore courts have not made any definitive assessment about whether the divide between jurisdictional/non-jurisdictional legal errors still exists.⁹ Neither have they delved into the elusive concept of ‘jurisdiction’ and how to operationalise the esoteric jurisdictional/non-jurisdictional error distinction. There is no case where a non-jurisdictional legal error has been identified, though there are cases where the court held that in principle, ouster clauses could be circumvented where a decision is “tainted by a jurisdictional error of law.”¹⁰

The *Anisminic* framework was developed in the context of English administrative law where parliamentary sovereignty is the foundational constitutional principle. The rationale for judicial intervention rested on the *ultra vires* doctrine, which relates judicial power to effectuating the will of Parliament, through which “all public power”

² Eg, it may provide that a ministerial decision on appeal is “final and conclusive” (*Poisons Act* (Cap 234, 1999 Rev Ed Sing), s 10(6); *Employment Act* (Cap 91, 2009 Rev Ed Sing), s 14(5), as repealed by *Employment (Amendment) Act*, No 55 of 2018, s 3c) or a decision “shall not be called in question in any court” (*Maintenance of Religious Harmony Act* (Cap 167A, 2001 Rev Ed Sing), s 18). Ouster clauses may limit the grounds of review or available remedies (*Industrial Relations Act* (Cap 136, 2004 Rev Ed Sing), s 46).

³ *Per Ah Seng Robin v Housing and Development Board* [2015] SGCA 62 at para 63 [*Robin Per*].

⁴ [1969] 2 AC 147 (UKHL) [*Anisminic*].

⁵ *Ibid* at 170A-F per Lord Reid, 199G per Lord Pearce.

⁶ *Ibid* at 171B-F per Lord Reid.

⁷ *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 (UKHL) at 410-411 per Lord Diplock [*GCHQ*].

⁸ *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 (CA) at para 119 [*Chng*].

⁹ *R v Lord President of the Privy Council, ex parte Page* [1993] 1 AC 682 (UKHL).

¹⁰ *Nagaenthran v AG* [2018] SGHC 112 (HC) at para 69 [*Nagaenthran HC*].

is channeled, after the Diceyan vision of unitary democracy.¹¹ The appropriateness of importing this into the Singapore context where the Constitution is supreme may be raised, as well as questions about whether a modified *ultra vires* doctrine drawing normative content from constitutional principles or a wholly indigenised rationale for judicial review should be developed.¹²

There has been extra-judicial opinion that in relation to ouster clauses, “the answer may not lie in English principles of administrative law.”¹³ This points to the second possible trajectory for addressing ouster clauses beyond the *Anisminic* legal framework in asking: are ouster clauses constitutional? This engages constitutional provisions and principles, paying careful attention to the constitutional roles of the lawmaker and interpreter of the law. Further, the context of the specific statutory regime and pragmatic realities warrant consideration. This opens the way for an evaluative approach starting from fundamental principles, while accommodating pragmatic considerations which implicate issues of institutional competence and legitimacy, as well as efficiency and legal certainty. The judicial acceptance of ‘time limit’ clauses which preclude judicial review of a specific category of decisions after a specified period may be seen to accommodate the limited availability of judicial challenge with the need for finality.¹⁴

In Singapore, judicial notice has been taken of arguments that ouster clauses “may be regarded as incompatible with the rule of law” or a violation of Article 93, the judicial power clause, in “seeking to take away the judicial power of the court where its supervisory jurisdiction is concerned.”¹⁵ Further, unwritten constitutional principles relating to the rule of law and separation of powers are regularly invoked in recent cases concerning the scope of judicial review and ouster clauses. While the ‘constitutionalisation’ of administrative law in this respect has certainly begun, the courts have not yet fully expounded upon the legal ramifications of conceptually grounding judicial review (and the approach towards ouster clauses) on the constitutional principle of the rule of law that “All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power.”¹⁶ What, for example, does the rule of law require, for an ouster clause not to be constitutionally inoffensive? This bears elaboration, given the rule of law’s paradoxical quality in sometimes siding with the state in the name of effective governance and sometimes limiting state power, such as through protecting basic rights.¹⁷ How

¹¹ P Craig, *Administrative Law*, 4th ed (London: Sweet & Maxwell, 1999) at 4-7.

¹² Thio Li-ann, “The Theory and Practice of Judicial Review of Administrative Action in Singapore: Trends and Perspectives” in Yeo Tiong Min, Hans Tjio & Tang Hang Wu, eds. *SAL Conference 2011: Developments in Singapore Law between 2006 and 2010—Trends and Perspectives* (Singapore: Singapore Academy of Law, 2011) 714.

¹³ Chan Sek Keong, “Judicial Review—From Angst to Empathy” (2010) 22 *Sing Ac LJ* 469 at para 19 [Chan, “Judicial Review”].

¹⁴ Eg, the 6 weeks’ time limit clause in *Smith v East Elloe Rural District Council* [1956] AC 736 (UKHL). The High Court stated that whether a clause was a time limited ouster clause was “one of statutory interpretation” in *Law Society of Singapore v Yeo Khirn Hai Alvin* [2020] SGHC 3 at paras 114-118 (although s 9A of the Legal Profession Act (Cap 161, 2009 Rev Ed Sing) was not a time limit clause). See also *R v Secretary of State for the Environment, ex parte Ostler* [1977] QB 122 (EWCA).

¹⁵ *Robin Per*, *supra* note 3 at para 65.

¹⁶ *Chng*, *supra* note 8 at para 86.

¹⁷ Michel Rosenfeld, “The Rule of Law and the Legitimacy of Constitutional Democracy” (2001) 74 *So Cal LR* 1307 at 1309.

does the rule of law interact with the separation of powers, where the local emphasis is on the co-equality of judicial, legislative and executive power?¹⁸

When the constitutionality of an ouster clause is challenged, various possible options are open to courts. Constitutional norms as part of a higher law may ‘trump’ a statutory ouster clause, rendering it automatically invalid. To some, this categorical approach may be the only approach that vindicates constitutional supremacy as declared by Article 4, where constitutional norms and principles exert peremptory effect in relation to ordinary legislation. This goes to the normative question of whether the legislature has the capacity to oust the supervisory jurisdiction of the High Court to control the decisions of inferior courts or administrative agencies with limited statutory jurisdiction.¹⁹ In other words, the scope of legislative power must be exercised in accordance with constitutional principles like the rule of law, as judicially ascertained and applied.

To others, this may be too stark and combative an option. Indeed, Lord Sumpton in *R (Privacy International) v Investigatory Powers Tribunal*²⁰ described this as the “more radical form” of an argument challenging the constitutionality of an ouster clause. The “less radical form” does not deal with legislative capacity but legislative intent: it operates at a conceptual level and asserts that judicial review, as the procedural embodiment of the rule of law, is compatible with parliamentary sovereignty. This is because effective legislation needs “a supreme interpretative and enforcing authority” which by its nature “resides in courts of law.”²¹ In other words, an ouster clause cannot co-exist with a statute conferring limited jurisdiction on the relevant administrative actor, as Parliament intends that legal limits be enforced.

The Singapore High Court has approached the challenged constitutionality of an ouster clause in terms of whether it strikes an appropriate ‘balance’, most recently in *Nagaenthran v AG*,²² although the Court of Appeal subsequently did not apply or refer to this approach in *Nagaenthran v Public Prosecutor*.²³ Instead, it surprisingly characterised the relevant statutory provision not as an ouster clause, as the High Court had done (as had the Court of Appeal in earlier cases),²⁴ but as a statutory immunity clause.²⁵ What is clear is that the Singapore courts have not adopted a

¹⁸ *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 (HC) at para 16 [*Faizal*]; see Swati Jhaveri, “Localising Administrative Law in Singapore” (2017) 20 Sing Ac LJ 828.

¹⁹ Supervisory jurisdiction does not apply over High Court Judges: *Marplan Pte Ltd v AG* [2013] 3 SLR 201 (HC) at paras 24-28.

²⁰ [2020] AC 491 (UKHL) [*Privacy UKHL*] at para 208.

²¹ *Ibid.*

²² *Nagaenthran HC*, *supra* note 10 at para 93, adopting *Tey Tsun Hang v AG* [2015] 1 SLR 856 (HC) at para 45 [*Tey*].

²³ [2019] 2 SLR 216 (CA) [*Nagaenthran CA*].

²⁴ *Muhammad Ridzuan bin Mohd Ali v AG* [2015] 5 SLR 1222 (CA) at para 76 [*Ridzuan*]; *Prabakaran v Public Prosecutor* [2016] 1 SLR 173 (CA) at paras 98-99 [*Prabakaran*], although there was no live issue in relation to the question of ouster.

²⁵ See Kenny Chng, “Reconsidering Ouster Clauses in Singapore Administrative Law” (2020) 136 LQR 40, who noted at 45 that with respect to non-certification decisions by the Public Prosecutor under s 33B(4) of the *Misuse of Drugs Act* (Cap 185, 2008 Rev Ed Sing), “it is difficult to imagine that the appropriate remedy an affected party might wish to obtain is anything other than to challenge the *decision*, rather than to obtain some form of personal compensation from the Public Prosecutor.”

uniform, authoritative approach to determine the effectiveness of an ouster clause. What remains unclear is whether the *Anisminic* framework will continue to be the test applied to ouster clauses, or whether *Anisminic* will be jettisoned in favour of developing a test drawing from constitutional principles.

While the argument before an English court that a supreme Parliament cannot legislate contrary to the rule of law as a judicially articulated higher law may entail “a mountain to climb,”²⁶ in Singapore no such obstacle exists. The Singapore Parliament is not supreme and its power to legislate by a simple majority vote is constrained by legal limits; it falls to the judiciary to interpret all written law, including the constitution, and to declare the unwritten common law. Singapore judges should be less coy than their English counterparts in developing higher legal order principles to control the political branches, as Article 4 would appear to invite this. While Singapore courts are unlikely to nakedly strike down an unconstitutional statutory ouster clause, by treating Article 93 as some kind of trump, recourse to constitutional norms is likely to shape how ouster clauses may be interpreted, whether upheld or read down. Judicial review might be calibrated by seeking an “appropriate balance”²⁷ between fidelity to the inferred intention of Parliament and constitutional principles like the rule of law and separation of powers; this may pave the way for an approach based on principled pragmatism.

To that end, it may be useful to comparatively examine other common law jurisdictions to identify what factors may go into this balance, but with the caveat that foreign cases are decided under a particular jurisdiction’s distinct constitutional arrangements, such as federal states or supreme parliaments. Even though the common law is the “basic law of Singapore” and the “foundation of its legal system,”²⁸ judicial caution urges “care” in extracting “only those common law principles” which have not “morphed into English law judicial principles as a result of European Union law.”²⁹ There has been a concerted judicial turn towards establishing “the doctrinal basis for the powers and responsibilities” of government branches on “autochthonous constitutional grounds, informed by our national circumstances.”³⁰ Factors which may shape Singapore law on ouster clauses would include a predilection favouring political constitutionalism, a declared affinity for the ‘green light theory’ which advocates restrained judicial review and prioritises an efficient governing process. The courts have also displayed a reticence towards ‘Europeanised’ English administrative law where according increased normative weight to human rights has translated into heightened degrees of judicial scrutiny, such as a rights-driven proportionality review;³¹ more pertinently Article 6 (right to a fair trial) and Article 13 (right to an effective remedy) of the European Convention of Human Rights may be factors influencing the preservation of judicial review and access to courts in determining civil rights, in the face of an ouster clause.³²

²⁶ *Privacy UKHL*, *supra* note 20 at para 209 per Lord Sumption.

²⁷ *Ibid* at para 130 per Lord Carnwath JSC.

²⁸ *Cheong Seok Leng v PP* [1988] SLR 565 (HC) at 578F.

²⁹ *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 (HC) at para 4.

³⁰ *Comptroller of Income Tax v ARW (Attorney-General, intervener)* [2017] SGHC 180 at para 35.

³¹ *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 (HC) at paras 86-88.

³² *Golder v UK* (1975) 1 EHRR 524 at paras 34-36.

Part II examines the milestone case of *Anisminic* and its progeny and the contemporary treatment of ‘jurisdictional error’. Given that the conceptual basis between jurisdictional and non-jurisdictional legal errors remains obscure, it considers whether and how courts have moved beyond the *Anisminic* legal framework; it broadly sketches out two extreme positions courts may adopt, and the broad middle ground which favours a non-categorical, contextual approach in reading ouster clauses. It examines Singapore administrative law to identify how constitutionally authorised and ordinary ouster clauses are treated, what factors the courts have considered relevant in their judicial reasoning, and whether English case law retains utility.

Part III considers how challenges to the constitutionality of ouster clause may be framed and addressed. It takes the “good examination question”³³ posed by former Chief Justice Chan Sek Keong as its launching pad, to wit, whether an ouster clause is *per se* inconsistent with Article 93, such that the supervisory jurisdiction of the courts cannot be ousted. Alternatively, one might construe ouster clauses as a signal for deferential review, rather than ‘no review’. It considers the test of ‘reasonable balance’ and cognate concepts such as the doctrine of justiciability and judicial deference, which Singapore courts have invoked in discussing the effectiveness of ouster clauses, but which can operate in the absence of such clauses. The unifying link seems to reside in the attempt to articulate the content of the separation of powers doctrine within the broader constitutional framework. The section concludes with reflections on the vision of public law extrapolated from how courts treat attempts to exclude judicial review and what insight this provides in relation to the nature of the constitution, practice of constitutionalism and background political philosophy underpinning the Singapore theory of administrative law.

II. THE *ANISMINIC* LEGACY AND BEYOND: JUDICIAL REVIEW AND OUSTER CLAUSES IN SINGAPORE

A. *Courts and Ouster Clauses: Two ‘Extreme’ Approaches*

Courts may adopt two extreme positions in giving full effect or denying any effect to ouster clauses. First, through a literalist interpretation, demonstrating fidelity to parliamentary intent, following the Diceyan account of absolute parliamentary supremacy. This nurtures the fear of unfettered discretion and is today discredited on the basis that statutes lack “literal meaning”, because statutory interpretation “is always a matter of legal and constitutional argument.”³⁴ This draws upon legal values extracted from the constitution, statute and common law, which inform the normative content of various presumptions informing statutory construction.

Second, courts may be viewed as demonstrating outright judicial ‘disobedience’ towards parliamentary intent, by interpretatively denuding an ouster clause of all content and effect. However, the situation is more complex as a legislative instrument can contain two paradoxical expressions of parliamentary intent that need

³³ Chan, “Judicial Review”, *supra* note 13 at para 19.

³⁴ TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (UK: Oxford University Press, 2001) at 203.

reconciliation: in provisions that delimit (and limit) allotted power, and preclusive provisions denying courts the authority to determine if statutory power has been exceeded. Added to this mix, is the intent of the constitutional framers and of common law norms, as judicially declared, such as the presumption that Parliament cannot have intended to confer unfettered discretion on an administrative actor without any means of enforcing limits on power.³⁵

Rather than disobedience to parliamentary intent, courts engage in the enterprise of prioritising between parliamentary intentions and incorporating references to fundamental principles. English courts may exceptionally have to consider whether legislative attempts to abolish judicial review may breach a “constitutional fundamental” which cannot be abolished.³⁶ Wade considered such efforts would constitute abuse of legislative power, not in the “legal sense” but in a “distinct constitutional sense,”³⁷ consonant with the view that the Diceyan parliamentary sovereignty is “out of place in the modern United Kingdom” and should be seen as a judicially created “construct of the common law”.³⁸ The judicial role here would rest on a “deeper constitutional logic than the crude absolute of statutory omnipotence”;³⁹ this logic resides in principles like the rule of law,⁴⁰ access to justice, protecting fundamental rights⁴¹ and dual sovereignty, which envisages Parliament and the courts in “a working relationship between two constitutional sovereignties.”⁴² Fordham argues that an ouster clause “would trespass on the duality, separation and mutual respect” between Parliament and the courts and that judicial review in disregard of an ouster clause involved the judicial fulfillment of its constitutional role of controlling government by “restoring the proper division of labour reflected in the separation of powers”.⁴³ Thus, the need under the rule of law for courts to authoritatively and consistently interpret statute law to ensure the effectiveness of legislation may be apprehended not as a revolt against, but affirmation of parliamentary sovereignty. Through judicial review, courts play a role “in defining the limits of Parliament’s legislative sovereignty”⁴⁴ which is recast as a common law principle, susceptible to evolutionary development.⁴⁵

³⁵ *Padfield v Minister of Agriculture, Fisheries and Food* [1968] AC 997 at 1030B-D per Lord Reid.

³⁶ *R (Jackson) v Attorney General* [2006] 1 AC 262 at para 102 per Lord Steyn [*Jackson*].

³⁷ HRW Wade, *Constitutional Fundamentals*, (London: Steven & Sons, 1980) at 66 [*Wade*].

³⁸ *Jackson*, *supra* note 36 at para 102 per Lord Steyn.

³⁹ *Wade*, *supra* note 37 at 68.

⁴⁰ Lord Denning in *R v Medical Appeal Tribunal, ex parte Gilmore* [1957] 1 QB 574 at 586 stated “if tribunals were at liberty to exceed their jurisdiction without any check by the courts, the rule of law would be at an end.” Lady Hale in *Jackson* noted at para 159 that the court would suspiciously view “any attempt to subvert the rule of law by removing governmental action affecting the rights of the individual from all judicial scrutiny,” while noting that the constraints on Parliament “are political and diplomatic rather than constitutional.”

⁴¹ Lord Reed in *R (Unison) v Lord Chancellor* [2017] 3 WLR 409 at para 66 noted the “constitutional right of access to the courts is inherent in the rule of law.”

⁴² *In re F* [2001] Fam 38 at 56D per Sedley LJ; *X Ltd v Morgan-Gampian Ltd* [1991] 1 AC 1 at 48E per Lord Bridge.

⁴³ UK, Select Committee on Constitutional Affairs, *Further Evidence submitted by the Refugee Legal Centre in response to questions from the Committee (AIA 24C)* (8 Jan 2004) Annex A, at para 16, online: UK Parliament <<https://publications.parliament.uk/pa/cm200304/cmselect/cmconst/211/211we66.htm>>.

⁴⁴ *Jackson*, *supra* note 36 at para 107 per Lord Hope.

⁴⁵ Mark Elliot, “United Kingdom: Parliamentary sovereignty under pressure” (2004) 2(3) *ICON* 545 at 551.

Thus, the constitutional legality of statutory ouster clauses may be challenged where these are seen to violate written constitutional norms or principles in the unwritten British common law constitution.⁴⁶ legislative intent is subject to a ‘higher law’ towards which courts declare fidelity. However, as this may be seen as a judicial initiative to create “a higher source of law than statute, namely their own decisions”,⁴⁷ this may elicit charges of juristocratic over-reaching and precipitate a constitutional crisis.⁴⁸ Between these two approaches is the broad middle ground where, instead of appealing to absolutist principles, the hazier business of balancing principle and counter-principle takes place.

B. *Anisimnic and its Progeny: From Presumptions and Intent to Questions of Capacity*

The case of *Anisimnic* is well-known for evading ouster clauses through sophisticated interpretative techniques, focusing on the construction of parliamentary intent. These interpretive presumptions served various constitutional principles which were kept in the background. For example, ouster clauses were to be strictly construed: where a clause was “reasonably capable of having two meanings”,⁴⁹ the one preserving judicial review should be adopted.⁵⁰ This common law presumption reflects the importance of an independent judiciary to the advancement of constitutionalism. It is buttressed by various rule of law grounded presumptions. If Parliament creates a tribunal whose “field within which it operates is marked out and limited”,⁵¹ it must intend for these limits to be enforced, to avoid the “absurd situation”⁵² of the tribunal enjoying unlimited power to enlarge its allotted powers by misconstruing its statutory mandate. Without judicial review, otherwise limited tribunals would become “autocratic”⁵³ as insulated “legal islands.”⁵⁴

In *Anisimnic*, section 4(4) of the *Foreign Compensation Act 1950* was read down from its literal meaning: it provided that Foreign Compensation Commission determinations “shall not be called in question in any court of law,”⁵⁵ but the House of Lords held that this only applied to *real* not *purported* determinations, which lack

⁴⁶ TRS Allan, *The Sovereignty of Law: Freedom Constitution and Common Law* (UK: Oxford University Press, 2013); *R (A) v Director of Establishments of the Security Service* [2009] EWCA Civ 24 at para 22 per Laws LJ. This harks back to Lord Coke’s observation in *Dr Bonham’s Case* (1610) 8 Co Rep 106b, 646 at 652 that courts will adjudge as void an Act of Parliament which “is against common right and reason or repugnant or impossible to be performed...”.

⁴⁷ *Privacy UKHL*, *supra* note 20 at para 209 per Lord Sumption.

⁴⁸ Hon JB Thomas AM, “Judges who play politics: Two current judicial issues” (2003) 77(3) Aust LJ 173.

⁴⁹ *Anisimnic*, *supra* note 4 at 170C-D per Lord Reid.

⁵⁰ In *Privacy UKHL*, *supra* note 20 at para 182, Lord Sumption noted in his dissent that the reasons for strict construction “may be more or less powerful, depending on the nature of the decision and the decision-maker” as judicial bodies are likely to have broader interpretative power than administrative tribunals.

⁵¹ *Anisimnic*, *supra* note 4 at 207D per Lord Wilberforce.

⁵² *Ibid* at 194F per Lord Pearce.

⁵³ *R v Shoreditch Assessment Committee*, *ex parte Morgan* [1910] 2 KB 859 at 880 per Farwell LJ.

⁵⁴ *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWHC 114 (Admin) at para 49 per Leggatt J [*Privacy EWHC*].

⁵⁵ *Foreign Compensation Act 1950*, c 12, s 4(4) (repealed by *Statute Law (Repeals) Act 1989*, c 43, s 1(1)).

legal existence. Wade described such reasoning as “devious”, in reading “imaginary restrictions” into preclusive clauses.⁵⁶

Purported determinations are tainted by jurisdictional errors, which courts may review. Prior to *Anisminic*, only ‘errors going to jurisdiction’ were jurisdictional errors, such as where a tribunal acts without jurisdiction because a condition precedent is not present. Exceptionally, the only reviewable error of law within jurisdiction was an error on the face of the record.⁵⁷ This gave great weight to administrative autonomy.

Anisminic extended the supervisory empire of the courts by vastly expanding the category of ‘jurisdictional errors’ to include ‘errors of law within jurisdiction’ besides patent errors, which are made “in the course of the inquiry”, where administrative actors have jurisdiction but abuse their power so as to exceed jurisdiction. Lord Reid gave a non-exhaustive list of what these might be, such as bad faith, natural justice, ignoring relevant considerations, misconstruing statutory provisions giving it power to act,⁵⁸ though he did not include “a simple error of law or a misconstruction of the statute.”⁵⁹ For Lord Wilberforce, the error had to be “something beyond a simple error of law”; it had to take the tribunal outside its statutorily derived “permitted field.”⁶⁰

Given the wider range of ‘jurisdictional errors’ that may be enlisted to argue a determination is purported, it raises the question whether the pre *Anisminic* jurisdictional/non-jurisdictional error distinction still exists, since the former is fatal to the effectiveness of most ouster clauses. The Law Lords in *Anisminic* did not go so far as to hold that all legal errors are jurisdictional. Most of them indicated that an ouster clause can protect some errors from judicial oversight.⁶¹ Lord Reid noted that if none of the listed legal errors were committed, a tribunal was “as much entitled to decide that question wrongly as it is to decide it rightly.”⁶²

It appeared possible to argue that Parliament can enact an effective ouster clause through crafting the perfect linguistic formula through using the “most clear and explicit words,”⁶³ as “Parliament must squarely confront what it is doing and accept the political cost,”⁶⁴ given the risks of insulating legal error from judicial scrutiny. Lord Wilberforce considered it theoretically possible for Parliament to create a tribunal “which has full and autonomous powers to fix its own area of operation”, although this has “so far, not been done in this country.”⁶⁵ In *Anisminic*’s “early twenty-first century’s counterpart,” Lord Sumption observed in *R (Privacy International) v Investigatory Powers Tribunal*, that a “sufficiently clear and all-embracing”

⁵⁶ Wade, *supra* note 37 at 78.

⁵⁷ *R v Northumberland Compensation Appeal Tribunal*, ex parte *Shaw* [1952] 1 KB 338.

⁵⁸ *Anisminic*, *supra* note 4 at 171B-E.

⁵⁹ *Privacy UKHL*, *supra* note 20 at para 48 per Lord Carnswath.

⁶⁰ *Ibid* at para 50 per Lord Carnswath, citing Lord Wilberforce in *Anisminic*, *supra* note 4 at 207D.

⁶¹ See eg, *Anisminic*, *supra* note 4 at 171C-E per Lord Reid.

⁶² *Ibid* at 171E.

⁶³ *R (Gilmore) v Medical Appeal Tribunal* [1957] 1 QB 574 (EWCA) at 583 per Denning LJ. This dates back to *Smith, Lluellyn v Comrs of Sewers* (1669) 1 Mod 44. See also Lord Griffiths, *R v Hull University Visitor*, ex parte *Page* [1993] AC 682 (UKHL) at 693H-694A.

⁶⁴ *R (Simms) v Secretary of State for the Home Department* [2000] 2 AC 115 (UKHL) at 131E per Lord Hoffmann, noting that “Fundamental rights cannot be overridden by general or ambiguous words.”

⁶⁵ *Anisminic*, *supra* note 4 at 207F-G.

ouster clause might demonstrate Parliament's intent to give effect to this, but "it would be a strange thing for Parliament to intend" and although "conceptually possible, it has never been done."⁶⁶

The conceptual basis for distinguishing between jurisdictional/non-jurisdictional errors was left conceptually obscure after *Anisminic*; this distinction was "fraught with difficulty."⁶⁷ Peiris argued that factors like the nature of the power exercised, subject-matter and tribunal expertise have been resorted to in deciding whether an error of law was jurisdictional; indeed, courts have "treated the degree of gravity of the error" as decisive, jettisoning "theoretical consistency and metaphysical absolutes."⁶⁸

Today, the jurisdictional/non-jurisdictional legal error distinction is for all intents and purposes gone⁶⁹ under contemporary English administrative law, though its utility has been elsewhere affirmed.⁷⁰ It was criticised as being "ultimately based upon foundations of sand" as courts insist all administrative action should be "simply, lawful, whether or not jurisdictionally lawful."⁷¹ The starting point now is that all errors of law are reviewable, essentially equating errors of law with jurisdictional excesses. This avoids the need to engage the difficulties of the distinction, as 'jurisdiction' is discarded as the organising principle of administrative law, though the 'modern' approach has its own difficulties.⁷²

While muted in *Anisminic*, overt appeals to constitutional principles are today foregrounded in English administrative law.⁷³ Discarding the "fig leaf" of the *ultra vires* theory where judicial power seeks to effectuate parliamentary will, judicial review is overtly grounded in "certain fundamental requirements of the rule of law,"⁷⁴ and the presumption that Parliament did not intend to preclude review of unlawful decisions.⁷⁵

⁶⁶ *Privacy UKHL*, *supra* note 20 at para 210.

⁶⁷ P Craig, *Administrative Law*, 8th ed (Sweet & Maxwell, 2016) at para 16-001 [*Craig*].

⁶⁸ GL Peiris, "Jurisdictional Review and Judicial Policy: The Evolving Mosaic" [1987] 103 LQR 66 at 69 [*Peiris*]. Identifying an error as 'jurisdictional' is functionally done, "used to validate review when review is felt to be necessary": Louis L Jaffe, "Judicial Review: Constitutional and Jurisdictional Fact" (1957) 70(6) Harv L Rev 953 at 963.

⁶⁹ *R v Hull University Visitor*, *ex parte Page* [1993] AC 682 (UKHL) at 702B-C per Lord Browne-Wilkinson; *R (Cart) v Upper Tribunal* [2012] 1 AC 663 (UKSC) at para 18 per Lady Hale.

⁷⁰ *Kirk v Industrial Relations Commission* (2010) 239 CLR 531 (HCA) at paras 101-102.

⁷¹ Lord Woolf *et al*, eds, *De Smith's Judicial Review*, 8th ed (London: Sweet & Maxwell, 2018) at para 4-054.

⁷² This modern approach is based on two assumptions: "that reviewing courts should substitute judgement on all such legal issues (i.e. errors of law) and that this is the only way to maintain control over the organs of the administrative state." Craig, *supra* note 67 at 16-001.

⁷³ Lord Steyn, *The Constitutionalisation of Public Law* (UK: The Constitution Unit, 1999), online: The Constitution Unit <<http://www.gbv.de/dms/spk/sbb/toc/345904966.pdf>>.

⁷⁴ *Privacy UKHL*, *supra* note 20 at paras 122-123 per Lord Carnswath.

⁷⁵ Sir John Laws argued that *ultra vires* was a "fig leaf" which was very important in *Anisminic*, *supra* note 4. It enabled courts to intervene in decisions "without an assertion of judicial power which too nakedly confronts" the executive or other public bodies. This fig leaf "produced the historical irony" that *Anisminic*, which emphasised nullity, "erected the legal milestone which pointed towards a public law jurisprudence in which the concept of voidness and the *ultra vires* doctrine have become redundant." Sir John Laws, "Illegality: The Problem of Jurisdiction", in M Supperstone and J Goudie, eds, *Judicial Review*, 2nd ed (London: Butterworths, 1997) at paras 4.1-4.43.

The centrality of constitutional principles to English public law discourse is illustrated by the vociferous objections against an unsuccessful attempt to enact the “mother of all ouster clauses”,⁷⁶ clause 11 of the *Asylum and Immigration (Treatment of Claimants etc) Bill*.⁷⁷ Essentially, this sought to oust purported determinations. It was described as unprecedented and “perhaps the most extreme form of ouster clause promoted by government in modern times.”⁷⁸ Lord Woolf stated that clause 11 fundamentally contravened the rule of law and would be “inconsistent with the spirit of mutual respect” between different government arms; it would “bring the judiciary, executive and the legislature into conflict”⁷⁹ as it was important as a matter of constitutional principle to retain some degree of higher judicial oversight over executive and lower tribunal decisions. This called into question whether Parliament was constrained by constitutional principles like the rule of law and lacked the capacity to create a judge-proof ouster clause.

English courts appear to refuse to allow technical or literal legislative language to trump constitutional principles and individual rights, although the weightage accorded to principles like the rule of law and what it might require may be disputed. In vindicating the rule of law, courts are recognised as intervening to correct errors of law by ensuring that decision-makers act within their allotted powers, rationally and follow fair procedure.⁸⁰ This paves the way towards a more contextual approach that asks in any case what a constitutionally necessary degree of judicial review might be, bearing in mind the rarity of effective ouster clauses. This necessitates identifying and weighting the factors that enter this equation, whether they favour administrative autonomy or judicial accountability. The judgements of various courts culminating in the 4:3 decision of the Supreme Court in *R (Privacy International) v Investigatory Powers Tribunal*,⁸¹ which overruled the Divisional Court and Court of Appeal decisions in *R (Privacy International) v Foreign and Commonwealth Secretary*,⁸² are instructive in this respect, given the differing views on what the rule of law required.

Until the Supreme Court decision, the clause in question, section 67(8) of the *Regulation of Investigatory Powers Act 2000* (“RIPA”), was described as a rare instance

⁷⁶ Jeffrey Jowell, “Immigration Wars” *The Guardian* (1 March 2004) online: The Guardian <<https://www.theguardian.com/world/2004/mar/02/law.immigration>>.

⁷⁷ This provided that no court had any supervisory or other jurisdiction in relation to Immigration Tribunal determinations: courts were prevented “from entertaining proceedings to determine whether a purported determination, decision or action of the Tribunal was a nullity by reason of (i) lack of jurisdiction, (ii) irregularity, (iii) error of law, (iv) reach of natural justice or (v) any other matter. . .” It stipulated decisions which were reviewable, and that the court could consider whether a Tribunal member had acted in bad faith. Bill 5, *Asylum and Immigration (Treatment of Claimants, etc) Bill*, 2003-2004 sess, 2003, online: UK Parliament <<https://publications.parliament.uk/pa/cm200304/cmbills/005/2004005.pdf>>. See Richard Rawlings, “Review Revenge and Retreat” (2005) 68(3) *Mod L Rev* 378 at 382-383, 401-405.

⁷⁸ *Privacy UKHL*, *supra* note 20 at para 101 per Lord Carnwath JSC.

⁷⁹ Lord Woolf, “The Rule of Law and a Change in the Constitution” (2004) 63(2) *CLJ* 317 at 323-329.

⁸⁰ *R (Alconbury Depts Ltd) v SS for the Environment Transport and the Regions* [2001] *UKHL* 23 at para 73 per Lord Hoffman.

⁸¹ *Privacy UKHL*, *supra* note 20.

⁸² *Privacy EWHC*, *supra* note 54: the case stemmed from the IPT’s 2016 decision that the government could issue sweeping ‘general warrants’ to engage in computer hacking without judicial approval or reasonable grounds for suspicion, as opposed to more specific warrants.

of a successful outer clause.⁸³ This provided that “determinations, awards, orders and other decisions of the Tribunal (including decisions as to whether they have jurisdiction) shall not be subject to appeal or be liable to be provided questioned in any court.”⁸⁴ Interpretation goes beyond comparing similar linguistic formulae in different statutes as “the context might be entirely different.”⁸⁵

The availability of an alternative mechanism of external control to consider complaints against the intelligence services was a key issue in deciding whether the ouster clause was effective, whether Parliament could entrust independent review to tribunals free from any possible exercise of supervisory jurisdiction by ordinary courts.

Under RIPA, the Investigatory Powers Tribunal (“IPT”) was created as part of a special regime to consider complaints against the intelligence services, without the publicity associated with judicial review processes. The Supreme Court minority considered that the words of section 67(8), and its parenthesis,⁸⁶ were clear enough to oust jurisdiction, while Sales LJ in the Court of Appeal considered that judicial review of the IPT would subvert parliament’s purpose.⁸⁷ Lord Sumption found that the rule of law was “sufficiently vindicated” by the IPT’s judicial character which “acts like a court”, given its highly legally qualified composition⁸⁸ and mandate to apply judicial review principles on the same basis as the High Court would.⁸⁹ Compared to the tribunal in *Anisminic* which sought to enforce individual rights, the IPT was distinguished as it was concerned with supervisory jurisdiction over a public authority, such that some considered the need for judicial review far less clear.⁹⁰ While Lord Sumption considered IPT as a mechanism for accountability adequate, and that section 67(8) was clear enough to oust decisions tainted by manifest substantive errors or “any kind of merits review”, he considered it would not apply to procedural failings.⁹¹ He considered an “all or nothing view” of the section as

⁸³ Paul Daly, “Ousting the Jurisdiction of the Courts: R (Privacy International) v Investigatory Powers Tribunal [2017] EWHC 114 (Admin)” (6 February 2017), online: Administrative Law Matters <<https://www.administrativelawmatters.com/blog/2017/02/06/ousting-the-jurisdiction-of-the-courts-r-privacy-international-v-investigatory-powers-tribunal-2017-ewhc-114-admin/>>.

⁸⁴ *Regulation of Investigatory Powers Act 2000*, c 23, s 67(8).

⁸⁵ *Privacy EWHC*, *supra* note 54 at para 40.

⁸⁶ Lord Sumption in *Privacy UKHL*, *supra* note 20 at para 201, expressed a view Lord Wilson shared, at paras 224-225, that the parliamentary draftsman included the parenthesis in s 67(8) to address challenges as to whether the IPT had jurisdiction, expressly to address the *Anisminic* judgement.

⁸⁷ *R v Investigatory Powers Tribunal* [2018] 1 WLR 2572 (UKCA) [*Privacy UKCA*] at paras 43-44.

⁸⁸ On the IPT’s composition, see The Investigatory Powers Tribunal, *How the Tribunal Works*, online: The Investigatory Powers Tribunal <<https://www.ipt-uk.com/content.asp?id=11>>. There is currently no domestic route of appeal or review against the Tribunal’s decision as the Secretary of State has not exercised his power to provide an appeal procedure, though Tribunal rulings may be challenged before the European Court of Human Rights.

⁸⁹ *Privacy UKHL*, *supra* note 20 at para 172 per Lord Sumption. Notably, Laws LJ found that the Upper Tribunal as an “authoritative, impartial and independent judicial source” for interpreting the relevant statute was not amenable to judicial review as it was the “alter ego of the High Court” exercising an equivalent judicial review power: *Cart (R on the application of) v Child Maintenance Enforcement Commission* [2009] EWHC 3052 (Admin) at para 94. It therefore satisfies “the material principle of the rule of law.” Sedley LJ disagreed with the view and considered that the Upper Tribunal “is not an avatar of the High Court” and was not meant to be “courts of co-ordinate jurisdiction”: *Cart, R (on the application of) v The Upper Tribunal & Ors* [2010] EWCA Civ 859 at paras 19-20.

⁹⁰ *Privacy EWHC*, *supra* note 54 at paras 41-42 per Sir Brian Leveson P.

⁹¹ *Privacy UKHL*, *supra* note 20 at para 205 per Lord Sumption.

“wrong in principle”; the legislation had to be analysed to “ascertain the breadth of interpretative power” conferred on the court.⁹² From this perspective, while a total ouster clause is “repugnant to the Constitution,” a statute conferring jurisdiction to a judicial body with similar standing to that of the High Court⁹³ but which “operates subject to special procedures apt for the subject matter in hand”, such as security matters, “may well be constitutionally inoffensive.”⁹⁴ Such a statute may be viewed not as *ousting* High Court jurisdiction but simply *allocating* that judicial scrutiny to a tribunal.⁹⁵

Conversely, the majority judgement held that the requirements of the rule of law leaned towards denying effect to section 67(8), such that the IPT was subject to judicial review. Lord Carnswath stated that clearer wording was needed to oust judicial review, such as including a reference to ‘purported’ determination.⁹⁶ To avoid the IPT becoming a “legal island”, the “consistent application of the rule of law” required the High Court “in appropriate cases” as “constitutional guardian of the rule of law”⁹⁷ to ensure specialist tribunals applied the general law of the land. Lord Carnswath was satisfied that the High Court Administrative Division could adopt sufficient protection to safeguard sensitive information.⁹⁸ The IPT’s special status could justify restricting grant of leave for judicial review but “not for excluding it altogether.”⁹⁹

Thus, invoking the ‘rule of law’ does not conclude but commences the analysis. Regardless of the statutory words used, Lord Carnswath considered there was a “strong case” that the court should “determine the extent to which such a clause should be upheld” and “the level of scrutiny required by the rule of law,”¹⁰⁰ considering the subject-matter and statutory context. The Supreme Court may be seen to have recalibrated the balance in favour of the rule of law and separation of powers, diluting the weight accorded parliamentary intent.

The scope of judicial review should be “no more than proportionate and necessary for the maintaining of the rule of law,”¹⁰¹ finding an “appropriate balance” between respect for parliamentary intent and the rule of law.¹⁰² This proposition that it falls to the courts and not Parliament “to determine the limits set by the rule of law to the power to exclude review”¹⁰³ rests not on “elusive” concepts of jurisdiction or *ultra vires*, but was grounded on “a natural application of the constitutional principle

⁹² *Ibid* at para 205 per Lord Sumption.

⁹³ The IPT was described as a judicial body of like standing and authority to the High Court: *R(A) v Director of Establishments of the Security Service* [2010] 2 AC 1 at para 22 per Laws LJ. Sales LJ said it could be fairly inferred that Parliament trusted the IPT “to make sensible decisions” on security issues and arising questions of law, given its high standard of independence and judicial expertise: *Privacy (UKCA)*, *supra* note 87 at para 38.

⁹⁴ *R (A) v Director of Establishments of the Security Service* [2009] EWCA Civ 24 at para 22 per Laws LJ.

⁹⁵ *R(A) v Director of Establishments of the Security Service* [2010] 2 AC 1 at para 23 per Lord Brown JSC.

⁹⁶ *Privacy UKHL*, *supra* note 20 at para 111.

⁹⁷ *Ibid* at para 139 per Lord Carnswath JSC. See Leggatt J in *Privacy EWHC*, *supra* note 54 at para 49.

⁹⁸ *Privacy UKHL*, *supra* note 20 at para 112.

⁹⁹ *Ibid* at para 126 per Lord Carnswath JSC.

¹⁰⁰ *Ibid* at para 144.

¹⁰¹ *R (Cart) v Upper Tribunal* [2012] 1 AC 663 (UKSC) at para 122 per Lord Dyson [*R (Cart)*].

¹⁰² *Privacy UKHL*, *supra* note 20 at para 130 per Lord Carnswath JSC.

¹⁰³ *Ibid* at para 131.

of the rule of law and as an essential counterpart to the power of Parliament to make law.”¹⁰⁴ This more flexible approach towards the constitutional relationship of Parliament and the courts, in Lord Carnswath’s view, paved the way for a “pragmatic and principled”¹⁰⁵ approach in determining the effect of ouster clauses.

C. Judicial Review and Ouster Clauses in Singapore

When examining ouster clauses in Singapore, it is important to distinguish between statutory ouster clauses and constitutionally authorised ouster clauses, enacted pursuant to Articles 58 and 149 respectively as these are treated differently.

With respect to the latter, their validity has not been challenged, and they have been summarily upheld. With respect to the former, the courts have adopted the *Anisminic* framework (or at least have not jettisoned it completely) and the *GCHQ* grounds of review as developed by English courts “because we inherited the same system of law.”¹⁰⁶

Singapore administrative law today also overtly engages constitutional principles in considering the validity and efficacy of ouster clauses. Before the rule of law was judicially declared to be a foundational principle after independence, early cases dating back to 1915 imported in rule of law values through the English common law. For example, in *ex parte Sim Soon Koon*¹⁰⁷ Earnshaw J noted the court was obliged to provide legal remedies to redress public wrongs, applied the rule against bias and the fair hearing rule, the requirement that discretion be subject to “the rules of reason and justice”, and the principle derived from de Bracton’s *De Legibus et Consuetudinibus Angliae* (1256) that “the King (licensing board) ought not to be subject to an individual but to God and the Law,” that there was a higher law beyond the political state.

It may be useful to examine foreign common law jurisprudence in relation to ouster clauses, where the concept and language of higher order or constitutional rights,¹⁰⁸ the separation of powers and rule of law are widely accepted. These factors may need to undergo a process of judicial ‘reconciliation’ to give effect to the whole legislative instrument¹⁰⁹ and the moderating “interplay”¹¹⁰ between principles like

¹⁰⁴ *Ibid* at para 132 per Lord Carnswath JSC. By not defining the ‘rule of law’ in Part 1 of *Constitutional Reform Act 2005*, c 4 which established the UK Supreme Court, Lord Bingham suggested that this ‘constitutional statute’ left it to the court to determine its content and limits: Lord Carnswath JSC, *ibid* at para 121.

¹⁰⁵ *Ibid* at para 131.

¹⁰⁶ Chan, “Judicial Review”, *supra* note 13 at para 10.

¹⁰⁷ [1915] 13 SSLR 57.

¹⁰⁸ The Court of Appeal in *Review Publishing v Lee Hsien Loong* [2010] 1 SLR 52 at para 264 cited Lord Steyn in *Reynolds v Times Newspaper Ltd* [2001] 2 AC 127 (UKHL) at 208, finding UK rights jurisprudence a useful analogue to Singapore constitutional rights, but not one to be taken wholesale.

¹⁰⁹ See the discussion of the 3-stage test in *R v Hickman, ex parte Fox and Clinton* (1945) 70 CLR 598 (HCA) at 615-617, as read by the Australian High Court in *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476. See Simon Young, “Privative Clauses: Politics, Legality and the Constitutional Dimension” in Matthew Groves, ed. *Modern Administrative Law in Australia: Concepts and Context* (UK: Cambridge University Press, 2014) at 276-298.

¹¹⁰ *Vellama d/o Marie Muthu v AG* [2012] 4 SLR 698 (HC) at para 117.

the separation of powers¹¹¹ and rule of law. However, their content and normative weight will differ according to local particularities, such as liberal or communitarian readings of liberties or the degree of trust placed on public officials. In particular, any appeal to constitutional principles in England operates within the framework of parliamentary sovereignty¹¹² which, while read down from an absolutist conception, remains the “paramount principle”¹¹³ of the English Constitution. This may affect the weight judicially accorded to parliamentary intention, which remains an important, albeit not determinative factor. That government in Singapore operates within “a democracy where the Constitution reigns supreme”¹¹⁴ may be a factor in favour of constraining parliamentary power.

It is interesting to note that the journey towards a more limited concept of law-making has started in the UK, such as through exempting ‘constitutional statutes’ from implied repeal: Sir John Laws thus described the British system as standing “at an intermediate stage between parliamentary supremacy and constitutional supremacy.”¹¹⁵ The same might be said of the Singapore system: although it has a controlled constitution which in general can only be amended by a two-thirds parliamentary majority, the constitution is readily amendable as the ruling PAP controls 83 of 93 elective parliamentary seats. The power of parliament is also augmented by constitutional provisions which permit the enactment of laws which are valid even if they derogate from specific constitutional liberties and are inconsistent with the judicial power clause, which we now examine.

1. Constitutionally authorised ouster clauses: Article 93 and Article 149

While Article 93 of the Constitution exclusively vests judicial power in the Supreme Court, ‘judicial power’ itself is undefined though judicial review is accepted as a “core aspect” of it.¹¹⁶ The power to review the legality of government action, not its merits, is also associated with the common law supervisory jurisdiction superior courts exercise over inferior courts.¹¹⁷

However, justified by considerations of necessity, Article 149(3) provides that “nothing in Article 93 shall invalidate any law enacted pursuant to this clause,” relating to anti-subversion legislation such as the *Internal Security Act* (“ISA”) which

¹¹¹ While noting Singapore’s constitutional arrangements were “not identical” with the UK, Singapore courts noted that the Westminster model had in common the division of powers between the “same trinity of constitutional organs”, finding English principles relating to treaty-making and domestic incorporation of international law “equally applicable here”: *The Sahand and other applications* [2011] SGHC 27 at para 33. See also Lord Steyn, *R v Secretary of State for the Home Department*, ex parte *Anderson* [2002] UKHL 46 at para 39 [*Anderson*].

¹¹² “. . . that laws enacted by the Crown in Parliament are the supreme form of law in our legal system” to which all must comply: *R (on the application of Miller) (Appellant) v The Prime Minister* [2019] UKSC 41 at para 41. Constitutional principles reside in “statutory rules” and are “developed by the common law” at para 40.

¹¹³ *Anderson*, supra note 111 at para 39 per Lord Steyn.

¹¹⁴ *Tan Seet Eng v AG* [2016] 1 SLR 779 (CA) [*Tan Seet Eng*] at para 99.

¹¹⁵ *International Transport Roth GmbH v Secretary of State for the Home Department* [2002] EWCA Civ 158 at para 71.

¹¹⁶ *Nagaenthran CA*, supra note 23 at para 71.

¹¹⁷ The First Schedule, Supreme Court of Judicature Act (Cap 322, 2007 Rev Ed Sing), provides for prerogative orders.

authorises preventive detention. In 1989, Parliament legislatively overruled the seminal Court of Appeal decision of *Chng Suan Tze v Minister for Home Affairs*¹¹⁸ which overturned the precedent of *Lee Mau Seng v Minister of Home Affairs*¹¹⁹ which applied a subjective test precluding review of the minister's power to issue detention orders under section 8 of the ISA. The court in *Chng* held that unfettered discretion was "contrary to the rule of law" as "all power has legal limits" and the rule of law required that courts "should be able to examine the exercise of discretionary power."¹²⁰ It was for the courts solely to decide questions relating to the boundaries of statutory powers, applying the *GCHQ* grounds of review. In the absence of an ouster clause for section 8 decisions, the objective test was considered to be consistent with Articles 9(2) and 93 of the Constitution.¹²¹ While the executive determined what national security required, a "mere assertion" would not suffice: the test is evidential¹²² and the courts were to ascertain if a decision was in fact based on national security considerations. The courts have traditionally been deferential towards the executive in security matters, which translates into "a less intense standard of review."¹²³

The relevant detention orders were quashed on a technicality; this was apparently received as an egregious challenge to executive power. However, *Chng* was not an interventionist decision but one based on principle as well as judicial self-restraint expressed through the doctrine of non-justiciability, as where courts demonstrate the "common sense limitation"¹²⁴ when they hold national security considerations "outweigh the duty of fairness."¹²⁵ This flows from considerations of institutional competence and propriety, given that national security is "par excellence a non-justiciable question."¹²⁶ While 'justiciability' is sometimes used inter-changeably with reviewability, the doctrine of non-justiciability speaks to the limited capabilities of the court and asks whether judicial review is appropriate, as opposed to available.

After *Chng*, Parliament expeditiously amended Article 149 to authorise amendments to the ISA which truncated judicial review of ISA orders. Section 8B(2) provides there "shall be no judicial review in any court of any act done or decision made. . . save in regard to any question relating to compliance with any procedural requirements" of the Act. Whether this could be circumvented¹²⁷ or whether such an ouster clause was contrary to the rule of law was subsequently side-stepped, by a formalistic reading of the rule of law as the positive law Parliament enacted to

¹¹⁸ *Chng, supra* note 8.

¹¹⁹ [1971-1973] SLR(R) 135 (HC).

¹²⁰ *Chng, supra* note 8 at para 86. Art 9(2) embodies the writ of habeas corpus.

¹²¹ *Ibid* at para 79.

¹²² *Ibid* at paras 91-93.

¹²³ *Tan Seet Eng, supra* note 114 at para 95.

¹²⁴ *GCHQ, supra* note 7 at 407A per Lord Scarman.

¹²⁵ *Ibid* at 402C per Lord Fraser.

¹²⁶ *Ibid* at 412F per Lord Diplock.

¹²⁷ The issue of whether section 8B(2) precluded review where a detention order was issued for a purpose other than national security, such as for 'red hair' reasons did not arise on the facts and the Court of Appeal declined to address this. By noting that the test for judicial review was the subjective approach espoused in *Lee Mau Seng*, the Court of Appeal apparently affirmed the view that bad faith was not available as a ground of review: *Teo Soh Lung v Minister for Home Affairs* [1990] 1 SLR(R) 347 (CA) at paras 24-26.

govern judicial review.¹²⁸ This demonstrates the malleability of the ‘rule of law’, invoked both as a constraint on and expression of power.

Nonetheless, outside of limited review under the ISA, the Court of Appeal in *Yong Vui Kong v AG*¹²⁹ stated that Parliament had “left untouched the full amplitude” of the *Chng* principle, implicitly endorsing it. Thus, all legal powers, whether statutory or constitutional in origin, are legally finite and subject to the traditional grounds of judicial review.¹³⁰

It may also be noted that the Singapore Constitution contains several ‘conclusive evidence’ clauses,¹³¹ where the text commits a matter to the resolution of a co-equal government branch. The courts, for reasons of polycentric complex considerations or technical expertise beyond the judicial ken, will presumably not intervene in these matters, in respecting the separation of powers.

2. Statutory ouster clauses: Article 93 and Article 58

This section considers how statutory ouster clauses, enacted by a simple parliamentary majority under Article 58, have been treated on the basis of administrative law precepts as well as constitutional law norms.

(a) Administrative Legality and Ouster Clauses

Singapore courts have viewed ouster clauses with “circumspection” and have “declined to give effect to them on several occasions,”¹³² while admitting the possibility of effective ouster clauses provided “clear words to that effect”¹³³ are used, pointing to the continuing importance of parliamentary intent.

The High Court in *Nagaenthran v AG*¹³⁴ observed that the judicial technique of circumventing ouster clauses by holding purported determinations “tainted by a jurisdictional error of law” to be legal nullities “has long been incorporated as a feature of our local administrative law jurisprudence,” and that there was “no compelling reason not to adopt this principle now.”¹³⁵ It remains to be ascertained from case law what has been accepted as a ‘jurisdictional error of law’, as no Singapore court has explicitly retired the jurisdictional/non-jurisdictional distinction.

The rationale in *Anisminic* that parliament intended a tribunal with limited jurisdiction should be subject to “correction by a superior court”¹³⁶ as the public interest

¹²⁸ *Teo Soh Lung v Minister for Home Affairs* [1989] 1 SLR(R) 461 (HC) at para 48.

¹²⁹ [2011] 2 SLR 1189 [*Yong Vui Kong v AG*] at para 79.

¹³⁰ See *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 (HC) at para 149 [*Phyllis Tan*]. Prosecutorial discretion under Art 35(8) of the Constitution was under review here.

¹³¹ Arts 22B, 78(8), 142 and 151A(2).

¹³² *Robin Per*, *supra* note 3 at para 64.

¹³³ *Re Raffles Town Club* [2008] 2 SLR(R) 1101 (HC) at para 5. Former Chief Justice Chan Sek Keong in Chan, “Judicial Review”, *supra* note 13 at para 18 opined that the view that all errors of law are amenable to judicial review “may be misleading” given that parliament is supreme in the UK such that it may be illegitimate to apply *Anisminic* where a statute has removed judicial review for errors of law by clear and explicit words.

¹³⁴ *Nagaenthran HC*, *supra* note 10 at para 112.

¹³⁵ *Ibid* at para 112.

¹³⁶ *Re Application by Yee Yut Yee* [1977-1978] SLR(R) 490 (HC) [*Yee Yut Ee*] at para 20.

was not served if such tribunals were to be ultimate arbiters on questions of law,¹³⁷ was affirmed in 1977 in *Re Application by Yee Yut Ee*.¹³⁸ Although the immediate issue was that an ouster clause could not preclude review of patent errors, which was the pre *Anisminic* position, Choor Singh J noted the expanded definition of ‘jurisdictional error’ after *Anisminic* to include both a lack or excess of jurisdiction. Judicial review extended to both the “area of the inferior jurisdiction” and “the observance of the law in the course of its exercise.”¹³⁹ Certiorari would apply, for example, for fraud or natural justice violations.

Subsequently, ouster clauses were held to be ineffective where there were breaches of natural justice in *Stansfield Business International Pte Ltd v Minister for Manpower*¹⁴⁰ and bad faith, in *Teng Fuh Holdings Pte Ltd v Collector of Land Revenue*.¹⁴¹ This concerned a ‘conclusive evidence’ clause under section 5(3), Land Acquisition Act¹⁴², in relation to a notification that land to be acquired was needed for a specific purpose. Phang J noted that section 5(3) was “clear”¹⁴³ and consistent with the statutory purpose that the “relevant government authority” was best positioned to decide if land was needed for a section 5(1) purpose, given land scarcity. However, while the government was to be accorded “more latitude and flexibility”,¹⁴⁴ discretion was not unlimited and ended “where abuse of power begins”¹⁴⁵ as this undermines the rule of law ideal: a balance between these two factors had to be found, which speaks not of non-intervention but cautious intervention and the need to respect the autonomy and expertise of decision-makers.¹⁴⁶ Finding a balance goes beyond construing parliamentary intent, given the emphasis on the judicial role in applying external common law standards to ensure that justice, fairness and morality are achieved.¹⁴⁷

The High Court in *Borissik Svetlana v Urban Redevelopment Authority*¹⁴⁸ favoured the “modern approach” towards ouster clauses, as stated in *De Smith’s Judicial Review*:¹⁴⁹ rather than considering jurisdictional errors, the court will consider “a number of practical matters.”¹⁵⁰ The applicant here failed to obtain planning permission and had not utilised her section 22(7) *Planning Act* right of appeal to the Minister whose decisions “shall not be challenged or questioned in any court of law.”¹⁵¹ Leave for review was declined, given the failure to exhaust the statutory remedy of appeal to a public official. Tan J construed the ouster clause as indicating

¹³⁷ *Ibid* at para 26, quoting Romer LJ in *R v Medical Appeal Tribunal, ex parte Gilmore* [1957] 1 QB 574 (EWCA) at 586 with approval.

¹³⁸ *Yee Yut Ee, supra* note 136.

¹³⁹ *Ibid* at paras 20-21, citing *R v Nat Bell Liquors Ltd* [1922] 2 AC 128 (UKPC) at 156.

¹⁴⁰ [1999] 2 SLR(R) 866 (HC) at para 21 [*Stansfield*].

¹⁴¹ [2006] 3 SLR(R) 507 (HC) [*Teng*]. The Court of Appeal in *Eng Foong Ho v AG* [2009] 2 SLR(R) 542 at para 39 affirmed that despite section 5(3), an acquisition decision could be challenged for bad faith.

¹⁴² *Land Acquisition Act* (Cap 152, 1985 Rev Ed Sing), s 5(3).

¹⁴³ *Teng, supra* note 141 at para 30.

¹⁴⁴ *Ibid* at para 36.

¹⁴⁵ *Ibid*.

¹⁴⁶ *Ibid* at para 5.

¹⁴⁷ *Ibid*.

¹⁴⁸ [2009] SLR (R) 92 (HC) [*Borissik*].

¹⁴⁹ Woolf, Jowell & Le Sueur, eds, *De Smith’s Judicial Review*, 6th ed (London: Sweet & Maxwell, 2007) at para 4-051, quoted *ibid* at para 28.

¹⁵⁰ *Borissik, supra* note 148 at para 28.

¹⁵¹ *Planning Act* (Cap 232, 1998 Rev Ed Sing), s 22(7).

parliament's intent that courts "should not interfere with issues of planning permission, as these involve interrelated considerations of fact, law, degree and policy. . . better dealt with by an appeal procedure to the Minister."¹⁵² The ability to challenge a decision before an appropriate non-judicial body was one of the 'practical matters' to consider, as a way of channeling rather than ousting review,¹⁵³ together with the need for legal certainty, finality and respecting expertise. Thus, an ouster clause may indicate that alternative remedies provided by Parliament to protect litigants' rights should not be circumvented, to ensure these were not bypassed. It may signal to the courts to adopt a standard of deferential review or to treat the matter as non-judicial, given the polycentric factors involved in planning decisions; the judge did not seem to read in a blanket rejection of judicial review, insofar as he continued, *obiter*, to apply the grounds of review he thought available, finding the decision was not made for extraneous purposes, nor contrary to *Wednesbury* unreasonableness.¹⁵⁴ In some cases, in the face of ouster clauses, the courts have applied *GCHQ* grounds of review to 'justiciable' issues on "the assumption"¹⁵⁵ review is not barred, which may support the view that ouster clauses are presumptively ineffective.

This contextualised approach continues to co-exist with the *Anisminic* framework; indeed, the perpetuation of the category of non-judicial error¹⁵⁶ was inferred when the High Court in *Stansfield*¹⁵⁷ referenced the Privy Council decision of *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union*.¹⁵⁸ Here, the Privy Council relied on Geoffrey Lane LJ's dissent in *Pearlman v Keepers and Governors of Harrow School* where he considered that judicial review only lay if the error made was in excess of jurisdiction "as opposed to merely making an error of law",¹⁵⁹ and that the error of law in question was not a jurisdictional error.¹⁶⁰ However, *Fire Bricks* may be read as confined to its unique, "unusual"¹⁶¹ statutory scheme: section 29(3)(a) of the *Industrial Relations Planning*

¹⁵² *Borissik*, *supra* note 148 at para 29.

¹⁵³ Clifford J in *H v Refugee and Protection Officer* [2018] NZCA 188 at para 43 noted that an ouster clause's effect depended not just on the type of error but "on the availability and appropriateness of alternative mechanisms for challenging the decision in question."

¹⁵⁴ *Borissik*, *supra* note 148 at paras 42-45.

¹⁵⁵ *Robin Per*, *supra* note 3 at para 67.

¹⁵⁶ "But if the inferior tribunal has merely made an error of law which does not affect its jurisdiction, and if its decision is not a nullity for some reason such as breach of the rules of natural justice, then the ouster will be effective." *South East Asia Fire Bricks Sdn Bhd v Non-Metallic Mineral Products Manufacturing Employees Union* [1981] AC 363 (UKPC) at 370 [*Fire Bricks*]. The High Court stated in *Mohan Singh v AG* [1987] SLR(R) 428 at para 32 that it was "vital to bear in mind the distinction between those errors of law that give rise to an excess of jurisdiction and those who do not."

¹⁵⁷ *Stansfield*, *supra* note 140 at para 21. Extra-judicially, Chan Sek Keong in Chan, "Judicial Review", *supra* note 13 at paras 17-18 has opined that these statements about *Anisminic* in *Stansfield* were *obiter*.

¹⁵⁸ *Fire Bricks*, *supra* note 156. Malaysian courts have criticised the "rather controversial" case of *Fire Bricks* and stated it was no longer good law in *MPPP v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1. In *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* [1995] 2 MLJ 317, the court endorsed the view that the jurisdictional/non-judicial error was practically abolished, approving Lord Diplock's speech in *Re Racal Communications* [1981] AC 374 at 382-383 and Lord Browne-Wilkinson in *Page v Hull University Visitor* [1993] AC 682 (UKHL) at 701-702. See Chan J's discussion on this point in *Nagaenthran HC*, *supra* note 10 at para 122.

¹⁵⁹ [1979] 1 All ER 365 (EWCA) at 375B per Lane LJ [*Pearlman*].

¹⁶⁰ *Ibid* at 376.

¹⁶¹ *Fire Bricks*, *supra* note 158 at 373D-E.

Act 1967 provided an Industrial Court award should be “final and conclusive” and not “called into question in any court of law.”¹⁶² However, section 53A authorised the Industrial Court to refer any question of law for the AG’s opinion, effectively binding the industrial court to make an award not inconsistent with that opinion. It would appear inconsistent with Parliament’s intent to exclude certiorari, to allow the High Court to quash a patent error relating to an Industrial Court award giving effect to the AG’s opinion.¹⁶³ Further, the functions of the industrial court were “not purely judicial,”¹⁶⁴ as it had to consider the public interest: section 27(4) directed the Industrial Court to consider an award’s financial implications on the economy, while section 27(5) provided the Court should act after “equity, good conscience and the substantial merits of the case without regard to technicalities and legal form.” Courts should respect the legislative allocation of responsibility to a non-judicial body to address such politicised, polycentric issues.

The consideration of arguments about the ineffectiveness of ouster clauses based on the *Anisminic* framework and constitutional principles is evident in cases involving section 33B(4), *Misuse of Drugs Act* (“MDA”), which has spawned many challenges to its scope and validity, since it was introduced in 2012.¹⁶⁵ It reads:

[T]he 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 Public Prosecutor’s non-certification decisions have been judicially challenged, with respect to whether the available grounds of review extend beyond the two enumerated grounds of bad faith or malice. The courts have expressed differing views and left this an “open question” in *Muhammad Ridzuan bin Mohd Ali v AG* where the Court of Appeal noted that a challenge based on procedural impropriety “may not even take off the ground.”¹⁶⁶ The one ground of review not specifically referenced in section 33B(4) which the Law Minister had recognised, and which the Court of Appeal affirmed, was that of challenging the Public Prosecutor’s exercise of discretion on grounds of unconstitutionality, which “flows from the doctrine of constitutional supremacy.”¹⁶⁷ Apart from that, Parliament had clearly intended to limit review and “did not see a need for a more extensive scope of judicial review” given the “inbuilt self-check mechanism in the s 33B regime.”¹⁶⁸ The court noted the Law Minister’s second reading speech, which identified “significant institutional incentives” for the Public Prosecutor to exercise his discretion consistently, to

¹⁶² *Industrial Relations Act 1967* (Malaysia), (Act No 35 of 1967), s 29(3).

¹⁶³ See *Peiris*, *supra* note 68 at 83.

¹⁶⁴ *Fire Bricks*, *supra* note 158 at 373F.

¹⁶⁵ (Cap 185, 2008 Rev Ed Sing). Under this regime, if a courier involved in a drug offence which attracted capital punishment is given a certificate of substantive assistance for giving information to undermine the drug trade, his sentence is reduced to life imprisonment with caning.

¹⁶⁶ *Ridzuan*, *supra* note 24 at para 76.

¹⁶⁷ *Ibid* at para 35.

¹⁶⁸ *Ibid* at para 76.

“operate the system with integrity,”¹⁶⁹ to make it work by encouraging future cooperation from couriers. The High Court in *Nagaenthran a/l Dharmalingam v AG*¹⁷⁰ also found that Parliament’s intent to “narrowly” circumscribe review was clear but nonetheless, stated section 33B(4) could “in principle” be “circumvented”¹⁷¹ where a jurisdictional error of law tainted the Public Prosecutor’s decision, applying the *Anisminic* framework. Chan J for various reasons considered the literalist construction of section 33B(4) in *Cheong Chun Yin v AG*¹⁷² unpersuasive. While noting various English authorities¹⁷³ which read *Anisminic* as having “completely obliterated” the jurisdictional/non-jurisdictional error distinction, the High Court declined to come to a “firm conclusion”¹⁷⁴ on this point because it was not argued, and academic literature had raised “myriad complexities. . . in this regard.”¹⁷⁵ It pragmatically proceeded to apply this distinction, by trying to identify whether there were any jurisdictional errors on the facts which would render a decision “purported”,¹⁷⁶ rather than attempting to find non-jurisdictional errors.

Faced with various challenges which failed on the facts, based on grounds like relevant considerations and irrationality, the High Court seemed to consider that only precedent fact review “indisputably” involved a jurisdictional error of law,¹⁷⁷ which may seem to retreat to the narrow view of ‘jurisdiction’ entertained in *Fire Bricks*. The facts did not support contentions of illegality based on relevant considerations and precedent fact.

Given how it construed section 33B(4) as a statutory immunity clause, the Court of Appeal in *Nagaenthran v Public Prosecutor*¹⁷⁸ did not find it necessary to reach a “final decision” on the submission that the scope of judicial review was “ultimately a matter of construing the legislative intent.”¹⁷⁹ For arguments’ sake, the Court of Appeal, *obiter*, referred to its observation in *Ridzuan*¹⁸⁰ that it would be “unsatisfactory” and “intuitively. . . inconceivable” if an aggrieved person was left without judicial remedy where the Public Prosecutor considered irrelevant considerations in making his section 33B(2)(b) determination, which are ordinarily available grounds of review not listed in section 33B(4).¹⁸¹ This observation seemed “especially

¹⁶⁹ *Parliamentary Debates Singapore: Official Report*, vol 89 (14 Nov 2012), cited at *Ridzuan*, *supra* note 24 at para 76.

¹⁷⁰ *Nagaenthran HC*, *supra* note 10.

¹⁷¹ *Ibid* at para 69.

¹⁷² [2014] 3 SLR 1114 (HC) at paras 28, 31. The High Court in *Nagaenthran HC*, *supra* note 10 at para 116 pointed out the judge in *Cheong* did not engage with the authorities and propositions raised in *Yee Yut Ee* and *Stansfield*. Parliamentary debates supported the view of a recognised need “to adopt the principle of circumventing ouster clauses by construing administrative decisions” as nullities where tainted by jurisdictional errors of law, insofar as allowing other grounds of review would help the substantive assistance regime to work in a predictable and consistent manner.

¹⁷³ This includes *R v Lord President of the Privy Council*, *ex parte Page* [1993] AC 682 (UKHL); *R (Cart)*, *supra* note 101.

¹⁷⁴ *Nagaenthran HC*, *supra* note 10 at para 107.

¹⁷⁵ *Ibid*.

¹⁷⁶ *Ibid* at para 112.

¹⁷⁷ *Ibid* at paras 106, 109, 124.

¹⁷⁸ *Nagaenthran CA*, *supra* note 23.

¹⁷⁹ *Ibid* at para 71.

¹⁸⁰ *Ridzuan*, *supra* note 24 at para 72; *Nagaenthran CA*, *supra* note 23 at para 69.

¹⁸¹ *Nagaenthran CA*, *ibid*.

compelling” particularly where the accused’s life was at stake,¹⁸² opining it would be “simply untenable” that the court would be powerless to act if the Public Prosecutor considered irrelevant matters.¹⁸³ Parliamentary intent in scoping down the available grounds of review, while important, is not determinative and the weight to be attributed to it may be diluted where fundamental rights or other constitutional norms are involved.

Thus, Singapore courts reject literal construction and operate on the practical assumption that all errors of law are jurisdictional, without concluding this is the case; the *Anisminic* framework is applied, modified by constitutional considerations and statutory context in assessing the effectiveness of ouster clauses.

III. OUSTER CLAUSES & SINGAPORE PUBLIC LAW – REFLECTIONS AND CONCLUDING OBSERVATIONS

A. *Constitutionality of Ouster Clauses*

Key to apprehending the role and effect of ouster clauses within Singapore public law is a proper understanding of the role of the “trinity of constitutional organs”¹⁸⁴ which share sovereign power, similar to the original UK Westminster model, with modifications, operating within “a democracy where the Constitution reigns supreme.”¹⁸⁵

The scope of legislative power vested in Parliament under Article 38 and whether it has the capacity under Article 58 to enact a valid ouster clause by ordinary law comes to the fore where the constitutionality of an ouster clause is challenged. No Singapore court has expressed the view that an ouster clause is categorically unconstitutional by dint of Article 93, by virtue of which the Supreme Court “has jurisdiction to adjudicate on every legal dispute on a subject matter in respect of which Parliament has conferred jurisdiction on it” including constitutional disputes. Where the written constitution is based on the separation of powers doctrine, where judicial power is vested in an independent judiciary, “there will (or should) be few, if any, legal disputes between the State and the people from which the judicial power is excluded.”¹⁸⁶ This does not preclude the possibility of an effective ouster clause, as it is “not wrong *per se* to oust the jurisdiction of the court”¹⁸⁷ in the manner statutorily specified, as Loh J stated in *Tey Tsun Hang v AG*,¹⁸⁸ as noted in *Nagaenthran HC*.¹⁸⁹ Two central ideas which implicate the interaction of constitutional principles emerging from the case law which merit unpacking is that an ouster clause is valid if it embodies a “reasonable balance”¹⁹⁰ and that ouster clauses do not apply to non-justiciable issues.

¹⁸² *Ibid* at para 70.

¹⁸³ *Ibid* at para 74.

¹⁸⁴ *Faizal*, *supra* note 18 at para 11.

¹⁸⁵ *Tan Seet Eng*, *supra* note 114 at para 99.

¹⁸⁶ *Yong Vui Kong v AG*, *supra* note 129 at para 31.

¹⁸⁷ *Nagaenthran HC*, *supra* note 10, at para 92.

¹⁸⁸ *Tey*, *supra* note 22 at paras 39, 44-45.

¹⁸⁹ *Nagaenthran HC*, *supra* note 10 at para 92.

¹⁹⁰ *Tey*, *supra* note 188 at para 45.

1. Reasonable balance

Applying a ‘reasonable balance’ test as articulated by Loh J in *Tey and* applied by Chan J in *Nagaenthran HC*,¹⁹¹ is opposed to the contention that ouster clauses by dint of Article 93 are automatically unconstitutional. This calls for a contextual approach, turning on factors like the field of regulation and the scope of the ouster clause. Ascertaining reasonableness would encompass a consideration of a range of factors, including constitutional norms.

In *Tey*, section 39A of the *Immigration Act*¹⁹² was a partial ouster providing there be “no judicial review in any court” except where statutory procedure is not followed. A total ouster clause would not be seen as reasonable, as the court noted that the clause did not purpose to oust review “in relation to all matters under the Act.”¹⁹³ Unfettered discretion is contrary to the rule of law and some legal accountability, if minimal, was preserved. Loh J while observing that section 22(7) of the *Planning Act* in *Borissik* purported to oust the court’s jurisdiction “in a similar fashion” as section 39A, noted the different subject-matter, relating to land development, and referenced a Malaysian immigration case. Section 59A of the Malaysian Immigration Act 1959 was “similarly worded” to section 39A, and the Malaysian Parliament clearly intended to confine review to procedural non-compliance.¹⁹⁴ That another country adopted a similar approach in the same field of immigration law may be seen to support the reasonableness of the Singapore approach. As in *Borissik*, the fact *Tey* had not exhausted his statutory right to appeal to the Minister appears to be significant in upholding the validity of section 39A; it was not a “valid reason”¹⁹⁵ to refuse to exhaust statutory remedies because of a finality clause governing the appeal procedure.

Loh J considered that Parliament’s intent when introducing section 39A in 1993 was clear, as evident from the Home Affairs Minister’s second reading speech. The purpose was to ensure the merits of an immigration decision could not be reviewed, to avoid the scenario where courts may frustrate government decisions to expel aliens, if aliens brought legal action to claim a right to stay.¹⁹⁶ Pragmatic considerations also informed the conclusion that the balance was reasonable, as there were many “good and self-evident reasons”¹⁹⁷ why certain matters were best left to the executive arm, rather than ill-equipped courts in “matters relating to national policy,” such as land planning, defence or immigration. Section 39A was effective, such that allegations of breaches of natural justice (standards drawn from the common law) or of unreasonableness lay “in the realm that is indeed precluded by s39A.”¹⁹⁸ A

¹⁹¹ *Nagaenthran HC*, *supra* note 10 at paras 92, 98 where Chan J noted section 33B(4) was not a complete ouster clause. See Benjamin Joshua Ong, “The constitutionality of ouster clauses: *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112” [2019] 19 OJCLJ 157.

¹⁹² *Immigration Act* (Cap 133, 2008 Rev Ed Sing), s 39A.

¹⁹³ *Tey*, *supra* note 22 at para 45.

¹⁹⁴ See *Immigration Act 1959* (Malaysia), (Act No 63 of 1959), s 59A; *Pihak Berkuasa Negeri Saba v Sugumar Balakrishnan* [2002] 3 MLJ 72 (CA), discussed at *Tey*, *ibid*, at paras 42-43.

¹⁹⁵ *Tey*, *ibid* at para 41.

¹⁹⁶ *Ibid* at para 44, citing *Parliamentary Debates Singapore: Official Report*, vol 61 at cols 916-917 (10 Nov 1993).

¹⁹⁷ *Ibid* at para 44.

¹⁹⁸ *Ibid* at para 46.

contextual approach which pays attention to the regulatory subject-matter is thus applied in determining the constitutionality of a partial ouster clause. If the ouster clause strikes a reasonable balance, it is upheld. Chan J in *Nagaenthran HC* found section 33B(4) of the MDA to embody a ‘reasonable balance’¹⁹⁹ such that it validly ousted the court’s jurisdiction to review non-certification determinations on grounds like irrationality which fell outside the stipulated limited grounds of bad faith and malice. Like Loh J found in *Tey*, a constitutional ouster clause effectively limited judicial review to its stipulated grounds. However, Chan J was also of the view that the common law *Anisminic* framework could allow ouster clauses to be circumvented and review to proceed on grounds not listed in a statutory ouster clause, although such arguments failed on the facts.²⁰⁰

Various key constitutional concepts have been identified as underlying this process of finding a reasonable balance, which are further explored below.

2. *Constitutional principles, the boundaries of institutional power and non-justiciable matters*

Chan J in *Nagaenthran HC* stated that an ouster clause would be constitutionally valid “as long as the determination that the ouster clause seeks to exclude from the province of judicial power is non-justiciable.”²⁰¹ That is, ouster clauses do not apply to justiciable determinations, but are effective in respect of non-justiciable matters, where judicial power is not wrongfully curtailed pursuant to section 33B(4) of the MDA. Rather than a jurisdictional/non-jurisdictional divide, we are left to grapple with a justiciable/non-justiciable dichotomy, to assess whether an ouster clause has appropriately circumscribed judicial review.

The core idea of justiciability is concerned with “which issues are susceptible to being the subject of legal norms or of adjudication by the courts.”²⁰² In other words, what legitimately falls within the judicial province, seeking to achieve “justice and legality”²⁰³ in particular cases. Harris distinguished between primary justiciability (susceptibility to judicial review) and secondary justiciability (which grounds of review are available).²⁰⁴ In the first sense, ‘justiciability’ is used as a synonym for reviewability. Non-justiciability can mean that something cannot be reviewed, which is a question of incapacity or competence, or it may mean that the courts can, but will not, review a matter for reasons of institutional propriety, considering the appropriateness of the judicial method and subject matter at hand. This refers to judicial self-restraint and bears some affinity with the American ‘political questions’ doctrine. A non-justiciable matter may also generate a lower level or intensity of judicial scrutiny, not its entire absence.

Ascertaining what is ‘justiciable’ involves delimiting the boundaries of public power. The High Court in *Nagaenthran* stated that in finding that a determination

¹⁹⁹ *Nagaenthran HC*, *supra* note 10 at para 98.

²⁰⁰ *Ibid* at paras 100-117.

²⁰¹ *Ibid* at para 82.

²⁰² Ariel L Bendor, “Are there any limits to justiciability? The jurisprudential and constitutional controversy in light of the Israeli and American experience” [1997] 7(2) *Indiana Int’l & Comp L Rev* 311 at 312.

²⁰³ *Tan Seet Eng*, *supra* note 114 at para 93.

²⁰⁴ BV Harris, “Judicial Review, Justiciability and the Prerogative of Mercy” (2003) 62(3) *Camb LJ* 631 at 644.

made in the exercise of statutory function is non-justiciable, the court is in fact exercising judicial power under Article 93 in “acknowledging the legitimate curtailment of judicial power by the legislature pursuant to Art 38.”²⁰⁵ Thus, enacting an ouster clause in respect of a non-justiciable determination “would not infringe Art 93, the principle of separation of powers or the rule of law.”²⁰⁶

However, if a matter is non-justiciable, why would an ouster clause be needed, since judicial review would be inappropriate or exceed judicial power? If one was concerned with the doctrine of non-justiciability or judicial self-restraint, where courts decline to review as when they feel ill-equipped to tackle disputes with politicised, polycentric dimensions, enacting an ouster clause imposes an external restraint on courts, evincing a distrust in judicial sensibilities. The Court of Appeal in *Robin Per* noted that in relation to non-justiciable matters, “ouster clauses merely declare accepted existing limits on judicial review,”²⁰⁷ which may seem to be redundant other than to indicate the legitimacy of curtailing judicial scrutiny.

Much then turns on identifying the existing limits on judicial review, which in turn seem to be constituted by the ambiguous term of justiciability.

An example of an “eminently justiciable” issue is the question of whether the Minister, in the context of public housing law, acted illegally in deciding to compulsorily acquire a flat because it breached the statutory condition that flats were not to be subject to an illegal sublet in *Robin Per*. The traditional *GCHQ* grounds were here applied, to find there was objective evidence the flat had been sublet without prior permission, so the Minister had not acted illegally. It was also not irrational to consider the fact the relevant family was not in continuous occupation of the Flat, as this supported the evidence of an illegal sublet.

An example of a “clearly non-justiciable” decision, as the Court of Appeal noted on multiple occasions,²⁰⁸ is the Public Prosecutor’s discretion under section 33B(2)(b) of the MDA to issue a certificate of substantive assistance for evidence which helped disrupt the drug trade.²⁰⁹ The matter is non-justiciable because of the nature of the inquiry, which courts are ill-equipped to address, given the absence of “manageable judicial standards”²¹⁰ and the “panoply of extra-legal factors”²¹¹ which inform a “holistic inquiry,”²¹² including the Central Narcotics Board’s operational concerns and the need to preserve confidentiality of operational information. Parliamentary debates also indicated that Parliament thought the Public Prosecutor was most suited²¹³ to decide whether substantive assistance had been rendered, given the independent nature of the office, close cooperation with law enforcement agencies, and familiarity with operational concerns. The High Court in *Nagaenthran* concluded it was “clearly appropriate” for judicial review of the Public Prosecutor’s section 33B(2)(b) determination “to be circumscribed in the manner as reflected

²⁰⁵ *Nagaenthran HC*, *supra* note 10 at para 82.

²⁰⁶ *Ibid.*

²⁰⁷ *Robin Per*, *supra* note 3 at para 65, citing Hilaire Barnett, *Understanding Public Law* (UK: Routledge-Cavendish, 2009) at 194.

²⁰⁸ *Ridzuan*, *supra* note 24 at para 66; *Prabakaran*, *supra* note 24 at paras 52, 78, 80.

²⁰⁹ *Nagaenthran HC*, *supra* note 10 at para 94.

²¹⁰ *Nagaenthran CA*, *supra* note 23 at para 86.

²¹¹ *Nagaenthran HC*, *supra* note 10 at para 94.

²¹² *Ibid.*

²¹³ *Ibid* at para 95.

under s 33B(4).”²¹⁴ Non-justiciability here entailed institutional competence or the ill-suitedness of the judicial method to the inquiry.

To ascertain which legal disputes fall without the province of Article 93 judicial power, Chan J advocated drawing guidance from observations made about justiciability in *Lee Hsien Loong v Review Publishing*.²¹⁵ As a starting point, Chan J argued that to properly apply Article 93, a dogmatic assertion that *all* legal disputes between state and citizen must be adjudicated by courts should be rejected. Instead, *most* legal disputes should be subject to judicial review, save for those matters “intrinsically incapable of submission to jurisdiction”.²¹⁶ Justiciability in this sense refers to competence, illustrated by the example that judicial review should not apply to questions of nuclear armaments policy, as this involved “an infinity of considerations” beyond the province of the court to assess, which were “military and diplomatic, technical, psychological and moral.”²¹⁷ Competence relates to the unsuitability of the judicial method, its standards and tools of judicial process, to undertake the intricate balancing of complex, polycentric policy considerations, given the “limited training”²¹⁸ and experience of judges, and their limited access to relevant materials. Subject matter in this respect is important and where the executive possesses the best materials to resolve an issue, its view should be “highly persuasive, if not decisive.”²¹⁹ Justiciability can also relate to matters of inter-institutional comity, as where a court is competent to adjudicate but judicial involvement would hinder or embarrass another government branch, as in the realm of foreign relations. Restraint here serves the mutual respect between government branches. Lastly, there are “certain questions” in relation to which there is “no expectation that an unelected judiciary will play any role”, as there are areas of prerogative power entrusted to the elected Executive and Legislature who are ultimately accountable to the electorate.²²⁰

These factors address the common question of where responsibility for making public decisions should reside, whether it is constitutionally appropriate for courts to determine a certain matter. In times past, certain sets of issues were categorised as political questions, as was Lord Roskill’s approach in *GCHQ*, where he itemised powers like treaty-making, parliamentary dissolution and the defence of the realm as matters courts should not determine.²²¹ Insofar as the non-justiciability doctrine is understood to assert an automatic immunity from judicial review, it blurs the limits of what appropriate judicial intervention should constitute in any one case. However, this categorical approach is no longer fashionable; Menon JC in *Review Publishing* advocated a more nuanced approach based on context and common sense.²²² Even in ‘high policy’ areas, judicial intervention may ensue where courts are able to isolate a pure question of law from what appears to be a non-justiciable area.²²³ This

²¹⁴ *Nagaenthran HC*, *supra* note 10 at para 96.

²¹⁵ [2007] 2 SLR(R) 453 (HC) [*Review Publishing*].

²¹⁶ *Nagaenthran HC*, *supra* note 10 at para 85.

²¹⁷ *Ibid* at para 84, discussing *Chandler v Director of Public Prosecutions* [1964] AC 763.

²¹⁸ *Review Publishing*, *supra* note 215 at para 98.

²¹⁹ *Ibid*.

²²⁰ *Ibid*.

²²¹ *GCHQ*, *supra* note 7 at 418A-C.

²²² *Review Publishing*, *supra* note 215 at para 98.

²²³ *Ibid* at paras 95-98.

reflects how the Singapore separation of powers doctrine is “interpreted and applied sensibly,”²²⁴ allowing for variable intensities of review.

Whether an issue is justiciable or non-justiciable overlaps with the related question of judicial deference as “somewhat connected” issues, as the Court of Appeal recognised in *Tan Seet Eng v AG*: while ‘justiciability’ was something “inherently unreviewable,” ‘judicial deference’ does not preclude judicial review, relating to what the appropriate degree of deference is, which involves “balancing all the relevant factors in the individual case.”²²⁵ Thus, in *Yong Vui Kong v AG*, judicial review did not avail over whether to grant a pardon, but did in ensuring compliance with the Article 22P clemency procedure.²²⁶ Depending on the subject matter and policy content of a decision and its distance from “ordinary judicial experience”, the court should be “more hesitant” in finding it “irrational,”²²⁷ though it may be more ready to find procedural unfairness. The intensity of review is reflected in the grounds available for review, the subject-matter and whether any fundamental rights are involved, which might heighten the intensity of review.²²⁸

In Singapore, whether a determination is non-justiciable involves a consideration of what Article 93, separation of powers or the rule of law requires in any case, the three grounds on which the constitutionality of section 33B(4) of the MDA were challenged in *Nagaenthran HC*.²²⁹ Chan J advanced a test advocating “due deference”²³⁰ to the legislature in upholding the constitutionality of the ouster clause, underscoring the presumption of constitutionality of a statute.²³¹ He drew from three principles judicially identified in another context in *SGB Starkstrom Pte Ltd v Commissioner for Labour*.²³²

The first related to the constitutional doctrine of the separation of powers, elsewhere recognised as part of the “basic structure”²³³ of the Constitution; judicial power which is “derived directly” from Article 93 is “co-equal in constitutional status”²³⁴ with legislative and executive power. Such a scheme would seem to preclude parliamentary supremacy or juristocracy, which speaks of hierarchy rather than co-equality. However, Chan J called for “suitable judicial deference”²³⁵ to the legislature, in recognition of the “limited role in judicial review by dint of the constitutional doctrine of the separation of powers.”²³⁶ The doctrine itself can justify both judicial deference to the executive out of respect for institutional autonomy, as well

²²⁴ *Ibid* at para 98.

²²⁵ *Tan Seet Eng*, *supra* note 114 at para 105, citing Aileen Kavanagh, “Defending deference in public law and constitutional theory” (2010) 126 LQR 222 at 241.

²²⁶ *Yong Vui Kong v AG*, *supra* note 129, at para 85.

²²⁷ *Tan Seet Eng*, *supra* note 114 at para 92, quoting Sir Thomas Bingham MR in *R v Secretary of State for Defence*, *ex parte Smith* [1996] QB 517 (EWCA) at 556.

²²⁸ *Eg* the ‘most anxious scrutiny’ standard in *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514 (UKHL) at 531.

²²⁹ *Nagaenthran HC*, *supra* note 10 at paras 74-75.

²³⁰ *Ibid* at para 88.

²³¹ *Ibid* at para 79, citing *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 (CA) at paras 60, 79-80.

²³² [2016] 3 SLR 598 (CA) [*Starkstrom*]. The issue in question related to substantive legitimate expectations.

²³³ *Faizal*, *supra* note 18 at para 11.

²³⁴ *Ibid* at para 16.

²³⁵ *Nagaenthran HC*, *supra* note 10 at para 88.

²³⁶ *Ibid*.

as robust review to enforce the boundaries of executive power. The judicial choice in relation to accountability mechanisms here seems to favour political over legal constitutionalism. This is evident in judicial statements that given the co-equality of government powers, “in all cases of judicial review, the court should exercise restraint.”²³⁷ Chan J described section 33B(4) not as a contravention of Article 93 or the separation of powers, but “an exemplar of the separation of powers principle in action.”²³⁸ Neither was the rule of law breached, as “limited judicial review”²³⁹ was provided for under section 33B(4), such that the Public Prosecutor did not enjoy absolute discretion. This is framed generally, so it remains unclear what level of scrutiny the rule of law would require in any case.

The next two principles relate to the need to uphold Parliament’s intent where it chooses to vest certain powers in the Executive and concerns about institutional competence that courts are not best equipped to address “issues of policy or security or which call for polycentric political considerations,”²⁴⁰ in which case the courts should “respect the relative institutional competence of the executive.”²⁴¹

The identification and elaboration of the content of these background constitutional principles and pragmatic considerations is instructive, though it is less clear how to weigh them against each other in the balancing process, which awaits future judicial guidance.

B. Article 93, the Rule of Law and Ouster Clauses: Where does the Answer Lie?

When questioned whether Singapore courts should follow the English example of abolishing the jurisdictional/non-jurisdictional error distinction, a former Chief Justice extra-judicially opined that as Parliament was supreme in the UK, it was “not apparent” that courts could apply *Anisminic* in the sense of treating all errors of law as jurisdictional, in the face of “the most clear and explicit words” in a statute.²⁴² In Singapore, the Constitution is supreme and rather than making esoteric jurisdictional/non-jurisdictional errors distinctions, it has been argued that an ouster clause may be inconsistent with Article 93 and if so, “the supervisory jurisdiction of our courts cannot be ousted.”²⁴³ This is as much a statement on the scope of judicial power as it is on legislative power.

It appears that the current position is that ouster clauses are not automatically invalidated; to strike down the clause as unconstitutional would be confrontational and put Parliament and the courts on a “collision course.”²⁴⁴ Instead, in seeking a ‘reasonable balance,’ the courts read ouster clauses to reconcile them with other public law values through a multi-factorial approach, to calibrate variable intensities

²³⁷ *Review Publishing*, *supra* note 215 at para 98.

²³⁸ *Nagaenthran (HC)*, *supra* note 10 at para 97.

²³⁹ *Ibid.*

²⁴⁰ *Starkstrom*, *supra* note 232 at para 58, discussed in *Nagaenthran HC*, *supra* note 10 at para 87.

²⁴¹ *Nagaenthran HC*, *supra* note 10 at para 88.

²⁴² Chan, “Judicial Review”, *supra* note 13 at para 19.

²⁴³ *Ibid.*

²⁴⁴ Michael Fordham, “Common Law Illegality of Ousting Judicial Review” (2004) 8(1) JR 86 at 93.

of review. Relevant factors include the type and width of ouster clauses, the subject-matter, nature of the error, whether alternative remedies exist, the multiple interests or degree of expertise involved in the decision-making process which make the adjudicatory method unsuitable, for example. An implied constitutional right to a judicial remedy, as part of the content of the rule of law, may be a factor towards holding an ouster clause ineffective, although the Singapore courts have yet to recognise such a right.²⁴⁵

It remains within the scope of legislative power, which is limited by the constitution, to enact an effective ouster clause. However, together with the *Anisminic* framework, courts are equipped with the tools to read down and effectively denude the effect of ‘valid’ ouster clauses, which must strike an appropriate or reasonable balance.

In this regard, sustained judicial attention has been paid to constitutional principles and the nature of the judicial function. The Court of Appeal in *Nagaenthran v Public Prosecutor*, in characterising section 33B(4) of the MDA as a statutory immunity clause²⁴⁶ which did not oust judicial review of the legality (not the merits) of the Public Prosecutor’s section 33B(2)(b) determinations,²⁴⁷ was denied a platform to develop the law on ouster clauses, though it made relevant *obiter* observations. Much effort was spent explaining the policy behind immunity clauses, such as to insulate public officials from personal suits to ensure they are not hindered from independently discharging public functions. Immunity under section 33B(4) was not absolute; a ‘balance’ was sought in providing individuals subject to malicious prosecution or bad faith a remedy through a civil suit.²⁴⁸ The inquiry under section 33B(2)(b), whether the offender had rendered substantive assistance which helped disrupt drug trafficking activities within or outside Singapore, is one courts are “ill-equipped and ill-placed” to undertake, given the lack of “manageable judicial standards”; similar considerations of institutional competence are engaged in ascertaining what is or is not justiciable. Without “clear legal standards” against which facts can be found and analysed, and rights and duties ascertained, the judicial process cannot function.²⁴⁹ Reference was made to the English doctrine of non-justiciability as articulated by

²⁴⁵ It may be difficult to find such an implied right, given the reasoning in *Yong Vui Kong v Public Prosecutor* [2010] 3 SLR 489 (CA) at para 72, that since a prohibition against torture and inhuman punishment was recommended by the 1966 Wee constitutional commission but not adopted, this foreclosed an argument that the Art 9(1) clause safeguarding life and personal liberty incorporated a prohibition against inhuman punishment. The Wee Commission also recommended a right to vote and a right to go to court to enforce fundamental liberties clauses, but these were not adopted. Nonetheless, the Court of Appeal in *Yong Vui Kong v AG* [2015] 2 SLR 1129 (CA) at paras 69-71 suggested that the right to vote, which the commission recommended, could be part of the constitution’s basic structure, in the sense of being essential to the political system. The High Court in *Tan Liang Joo John v AG* [2019] SGHC 263 at para 66 clarified that the Court of Appeal in *Vellama v AG* [2013] 4 SLR 1 (CA) had not recognised a fundamental right to vote, although it discussed its philosophical underpinnings. In *Daniel de Costa Augustin v AG* [2020] SGCA 60, the Court of Appeal rejected the idea of unenumerated rights, but found that the right to vote, which had a textual basis, was a constitutional right construed or implied from “the reference to elections contained in Art 66 and 39(1)” at para 9.

²⁴⁶ *Nagaenthran CA*, *supra* note 23 at para 47.

²⁴⁷ *Ibid* at paras 51, 74.

²⁴⁸ *Nagaenthran CA*, *supra* note 23 at para 49.

²⁴⁹ *Ibid* at para 59.

Lord Wilberforce in *Buttes Gas and Oil Co v Hammer*,²⁵⁰ where he stated that the court would be in “judicial no-man’s land” if asked to review the transactions of foreign sovereign states which were not governed by law, but “power politics.” In dealing with similar issues in relation to the act of state doctrine, the United States’ Fifth Circuit Court of Appeals in *Underhill v Hernandez*²⁵¹ found that judges should abstain from deciding a dispute because an issue was politicised, not because they were incapable of deciding questions of international law.

Thus, the issues were non-justiciable because they were political and would involve judicial intrusion into the executive province, contrary to the separation of powers. The Court of Appeal noted this posture transcends judicial self-restraint in going to the heart of the “inherent limitations of litigation and the judicial process;” it operates not as a principle of discretion but of law, rooted in the nature of the judicial function.²⁵² The non-justiciability of the inquiry was a justification for conferring partial immunity on the Public Prosecutor under section 33B(4), supported by parliamentary intent.²⁵³

In speaking, *obiter*, to the validity and effectiveness of ouster clauses, the Court of Appeal drew a direct link between Singapore’s system of constitutional governance and a supreme constitution, and the exceptional nature of an ouster clause. Judicial review, as “a core aspect of judicial power and function,” would not “ordinarily be capable of being excluded by ordinary legislation.”²⁵⁴ Referring to the rule of law and separation of powers, the Court of Appeal said that an argument that section 33B(4) rendered courts powerless to act where the Public Prosecutor had considered irrelevant matters would be “constitutionally suspect” for violating Article 93 and the separation of powers, though this was moot on the facts.²⁵⁵ The ground of ‘irrelevant consideration’ is categorised under the *GCHQ* head of illegality which requires a decision-maker to “understand correctly the law that regulates the decision-making power and must give effect to it”, which is “par excellence a justiciable question” for judges to decide.²⁵⁶ Relevancy is ascertained by reference to the empowering statute and formal and informal guidelines which structure statutory discretion.²⁵⁷ It may be that the courts will not take a uniform approach towards all errors of law. Take for example, ‘irrationality’ or *Wednesbury* unreasonableness,²⁵⁸ a common law test which relates to decisions “so outrageous in defiance of logic or of accepted moral standards;” although the mantra is that judicial review is about the decision-making process rather than its merits, here, the legality/merits dichotomy becomes wafer thin as value judgements are engaged in constructing the legally possible range of

²⁵⁰ [1988] AC 888 (UKHL), discussed in *Nagaenthran CA*, *supra* note 23 at paras 61-63.

²⁵¹ (1897) 168 US 250, discussed in *Nagaenthran CA*, *supra* note 23 at para 63.

²⁵² *Nagaenthran CA*, *supra* note 23 at 62-63.

²⁵³ *Ibid* at para 67.

²⁵⁴ *Ibid* at para 71.

²⁵⁵ *Ibid* at para 74.

²⁵⁶ *GCHQ*, *supra* note 7 at 410F per Lord Diplock. In *Axis Law Corp v Intellectual Property Office of Singapore* [2016] 4 SLR 554 (HC) at paras 58 and 68 [*Axis Law Corp*], the court treated errors based on ‘illegality’ and ‘irrationality’ separately.

²⁵⁷ In *Axis Law Corp*, *ibid*, at paras 24-26 and 60, the Registrar referred to the Trade Marks Act (Cap 332, 2005 Rev Ed Sing), the Trade Marks Rules (Cap 332, R1, 2008 Rev Ed Sing) and HMG Circular 2/2010 in deciding whether to grant leave for amendments after close of pleadings.

²⁵⁸ *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] KB 223 (EWCA).

answers outside of which a decision would be so absurd no reasonable decision-maker could arrive at it. *Wednesbury* unreasonableness was not mentioned in the list of reviewable errors within jurisdiction offered by the Law Lords in *Anisminic*.²⁵⁹

The more intrusive a ground of review is, the more reticent a court might be towards finding an error ‘constitutionally suspect’, in deference to institutional autonomy, and the more likely it may hold an ouster clause effective. Alternatively, a court may treat all recognised grounds of review equally, rather than gradating them in terms of gravity. A value judgement is involved in either case.

In other jurisdictions, the possibility of effective ouster clauses seem to be precluded where a constitution expressly prohibits a legislative body from enacting statutory ouster clauses.²⁶⁰ Other factors which may diminish the likelihood of an effective ouster clause may include an explicit right to a judicial remedy,²⁶¹ or an implicit affirmation that judicial review is part of a constitutional ‘basic structure’²⁶² which cannot be constitutionally amended. In Australia, there is a constitutionally entrenched minimum of judicial review which affects the effectiveness of a privative clauses enacted by the Federal Parliament, which cannot statutorily oust the High Court’s original jurisdiction to review administrative action under section 75(v) of the Australian Constitution;²⁶³ it would be beyond legislative capacity to authorise an administrative tribunal to conclusively determine the limits of its own jurisdiction “because this would involve an exercise of judicial power”.²⁶⁴ However, the “precise contours of this guaranteed minimum remains unclear.”²⁶⁵

In Singapore, it may be possible to argue from Article 93 and from constitutional principles that there is a minimum standard of judicial review which cannot be legislatively abrogated. The Supreme Court as a superior court does not owe its powers to Parliament as their “general and inherent powers of adjudication” are associated with the concept of the High Court. Like the powers of legislation, these

²⁵⁹ Leggatt J in *Privacy EWHC*, *supra* note 54 at para 61 noted that since the IPT applied judicial review principles in its proceedings, it did not make sense to challenge a tribunal decision on grounds of irrationality, “to apply a test of irrationality on top of an irrationality test” though this was less compelling in relation to errors of procedural irregularity or statutory interpretation.

²⁶⁰ Eg Section 4(8) of the 1979 Constitution of the Federal Republic of Nigeria, although constitutional ouster clauses may be authorised: see Abdulfatai O Sambo & Abdulkadir B Abdulkadir, “Ouster Clauses, Judicial Review and Good Governance: An Expository Study of the Experience in Nigeria and Malaysia” (2012) 5(9) *OIDA International Journal of Sustainable Development* 98 at 102.

²⁶¹ Germany, *Basic Law for the Federal Republic of Germany*, 23 May 1949, Art 19(4) provides: “Should any person’s rights be violated by public authority, he may have recourse to the courts.”

²⁶² *Kesavananda Bharati v State of Kerala* AIR 1973 SC 1461 at 1590 (“The exclusion by Legislature, including a State Legislature, of even that limited judicial review strikes at the basic structure of the Constitution”). This was adopted by the Malaysian Federal Court in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak* [2018] 1 MLJ 545 at paras 48, 90 where the judicial power of the civil courts was held to be part of the basic structure of the constitution which cannot be abrogated or removed. Singapore courts have discussed the idea of basic structure but have not gone so far as to proclaim such features are immutable, as distinct from being important parts of the internal constitutional architecture: *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 (CA) at para 71.

²⁶³ Section 75(v) of the Federal Australian Constitution provides: “the High Court has original jurisdiction to hear cases relating to ‘all matters in which . . . a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth.’”

²⁶⁴ *Plaintiff S157/2002 v Commonwealth of Australia* (2003) 211 CLR 476 (HCA) at paras 8-9.

²⁶⁵ Peter Cane, *Controlling Administrative Power: An Historical Comparison* (UK: Cambridge University Press, 2016) at 498.

common law powers developed “through historical evolution and adjustment.”²⁶⁶ To be a Supreme Court, an entity must possess, aside from appellate jurisdiction, certain characteristics like being primarily a court of unlimited civil jurisdiction, which tries the most serious criminal offences with commensurate sentencing powers, and has supervisory jurisdiction over inferior court proceedings.²⁶⁷ This core jurisdiction is essential to their character as superior courts and they retain this character only insofar as it invested “with a power to maintain its authority and to prevent its process being obstructed and abused.”²⁶⁸ Privative clauses excluding supervisory jurisdiction of superior courts²⁶⁹ have been held unconstitutional in Canada as they impinge on the “core jurisdiction of the Superior Courts by denying access to the powers traditionally exercised by those courts.”²⁷⁰

The English position asks what the rule of law requires in a case, whether the ‘constitutional pull’ it exerts justifies reading a statute counter-textually to preserve judicial jurisdiction and individual access to courts to pursue rights claims. In Singapore this would have to be read within an interpretive matrix framed by separation of co-equal powers, presumptions of legality, the rule of law and arguments drawing from representative democracy, which may favour enforcing ouster clauses on the basis that Parliament is in a more legitimate position to enact legal constraints than the court is to review decisions. This all goes into the equation of what a ‘reasonable balance’ constitutes and the content and scope of judicial and legislative power.

Full review may not be compatible with separation of powers values, but precluding review may prevent courts from fulfilling their role in the constitutional checks and balances scheme. So, it becomes a question of accommodating parliamentary intent, constitutional principles and judge-developed common law values, of asking when it would be constitutionally offensive to find that a statutory ouster clause has displaced constitutional principles, which themselves supply meaning to enacted words. The constitution is not treated as having peremptory status despite its supremacy clause; constitutional principles after all do not act in isolation but moderate each other. Rather than a written text, the written constitution may be viewed as a set of interacting constitutional principles which inter-relate in a continuing interpretive project, and which together form a sort of governing higher law.

In *Jeyaretnam Kenneth Andrew v AG*²⁷¹ the Court of Appeal in the context of discussing rules on standing thought it “unthinkable” that citizens may lack recourse to bring “claims against unlawful conduct by public bodies where there has been an obvious and flagrant disregard for the law.” Where constitutional rights are involved in administrative law disputes, this may be a ground for challenging the applicability of an ouster clause, without necessarily involving heightened review.²⁷² More intense review may be triggered, and a greater tendency to treat a decision as purported may be evident where an illegality is exceptionally grave; *some* effect is given

²⁶⁶ William Wade, “*The Basis of Legal Sovereignty*” (1955) 13(2) Camb LJ 172.

²⁶⁷ *Hinds v The Queen* [1977] AC 195 (UKPC) at 221C.

²⁶⁸ IH Jacob, “The inherent jurisdiction of the Court” (1970) 23(1) Curr LP 23 at 27.

²⁶⁹ *Crevier v AG (Quebec) et al* [1981] 2 SCR 220.

²⁷⁰ *Trial Lawyers Association of British Columbia v British Columbia (AG)* [2014] 3 SCR 31 at paras 33-34.

²⁷¹ [2014] 1 SLR 345 at para 60 [*Jeyaretnam*].

²⁷² In *Vijaya Kumar v AG* [2015] SGHC 244, the conventional *Wednesbury* unreasonableness test was applied in a case implicating constitutional rights.

to an ouster clause in restricting judicial review to cases of “manifest defect of jurisdiction.”²⁷³

C. Judicial Review and Ouster Clauses: What Light Lies Ahead?

In relation to ouster clauses, Singapore courts are clearly doing more than enforcing the will of parliament; while squarely rejecting merits review, they also have rejected the narrow equation of judicial review with clerically verifying compliance with statutory criteria,²⁷⁴ refusing to be limited to a “servile mechanical role” in seeking literal meanings.²⁷⁵

Between the two extremes of automatic invalidation and literalism lies a broad third space where an ouster clause may be found to be constitutionally suspect, or evaded by interpretive technique, where weight has to be accorded to words in the statutory text, as well as non-textual considerations, including the normative pull of constitutional principles which may suffice to displace statutory intent to oust jurisdiction. As Craig notes, in going beyond textual analysis to ascertain the scope of judicial review, the critical question is “whose relative opinion on the relevant question should be held to be authoritative;” this will be based on a value judgement “the precise content of which will not necessarily be always the same.”²⁷⁶

Constitutional and legal realities are engaged as it is appreciated that Parliament does not legislate in a vacuum, that judicial review delimits the boundaries of legislative power.²⁷⁷ Courts regularly invoke constitutional principles, implicating deeper questions of constitutional philosophy. This is distinctively localised, as where the separation of powers focuses more on the ‘autonomy’ of political institutions, rather than the need for robust legal checks. From this, one may discern the contours of the mixture of legal and political constitutionalism in Singapore.

As the guardian of the rule of law to which judicial power is a natural corollary, courts are the ultimate arbiter of the lawfulness of state action, being the means where each arm of government is “prevented from acting beyond its constitutional powers.”²⁷⁸ While appreciating this, the judicial self-perception of their role aligns with what Harlow and Rawlings²⁷⁹ have termed the “green light theory”,²⁸⁰ which the High Court in *Nagaenthran* described as “the most accurate reflection of the sociopolitical attitude in the existing Singapore milieu.”²⁸¹ This is distinct from the ‘red light theory’ where the courts are locked in adversarial combat with the executive as competitors, and are more interventionist in seeking to stop bad administrative

²⁷³ *Mak Sik Kwong v Minister of Home Affairs, Malaysia (No 2)* [1975] 2 MLJ 175.

²⁷⁴ *Tan Seet Eng*, *supra* note 114 at para 97.

²⁷⁵ Philip A Joseph, “The Demise of Ultra Vires—A Reply to Christopher Forsyth and Linda Whittle” (2002) 8 *Canta LR* 463 at 473.

²⁷⁶ Craig, *supra* note 67 at 16-016.

²⁷⁷ The ultra vires theory which grounds judicial review as the enforcement of parliamentary intent has been criticised as a fig leaf: Sir John Laws, “Law and Democracy” (1995) *Pub L* 72 at 79.

²⁷⁸ *Phyllis Tan*, *supra* note 130 at para 143.

²⁷⁹ C Harlow and R Rawlings, *Law and Administration* (London: Weidenfeld & Nicolson, 1984).

²⁸⁰ This was discussed extra-judicially by Chan Sek Keong at Chan, “Judicial Review”, *supra* note 13 at paras 29-30 and later discussed in *Jeyaretnam*, *supra* note 271 at paras 48-50.

²⁸¹ *Nagaenthran HC*, *supra* note 10 at para 123.

practices through the check of judicial review, which can spawn a legalistic, rights-based, merits intrusive form of control. The ‘green light theory’ sees the courts and executive as partners in a collaborative enterprise of promoting good administrative practices “through the political process and public avenues.”²⁸² Green light proponents seek to minimise the role of unrepresentative courts and prioritise political forms of accountability; law is seen more as a vehicle to facilitate governance than a control mechanism, and the preference is for specialist bodies to act as adjudicators in certain fields of administration, to implement policies consistently.

Chan J in *Nagaenthran HC* considered that if it was decided that all errors of law were jurisdictional, all errors of law could be construed as nullities, which would facilitate judicial review of administrative actions tainted by all legal errors “even when a relevant ouster clause has been enacted.”²⁸³ He considered this to be inconsistent with the green light approach, presumably because if there are more types of reviewable errors, this will translate into more judicial review challenges and greater resort to the courts to review all administrative decisions, since judicial review “cannot easily be ousted by legislation.”²⁸⁴ This in turn may generate judicial activism and over-reaching. The courts are the frontline check against abuse of power in the red light view, while they play a supportive role under the green light view, “by articulating clear rules and principles by which the Government may abide by and conform to the rule of law.”²⁸⁵ The green light view does not really shed any specific light on how to calibrate intensities of review, as it addresses a general attitude towards the judicial role in solving public law disputes and generally views political institutions as an adequate form of control. This is distinct from Lord Diplock’s observation,²⁸⁶ approved by the Court of Appeal in *Chng*, that administrative officers are accountable to Parliament for what they do “as regards efficiency and policy” while they are responsible to a court “for the lawfulness of what they do.” Thus, when it comes to executive discretion, “it is no answer to refer to accountability to Parliament as an alternative safeguard.”²⁸⁷

Perhaps the Singapore approach towards ouster clauses, and indeed towards judicial review, is better captured by the ‘amber light’ approach, a zone characterised by a perennial debate over whether to be assertive or demure. The amber light approach, like the green light one, positively views state power and values efficient, effective administration against which judicial review should be balanced. Nonetheless, it appreciates the value of accountability and access to justice by aggrieved citizens, without necessarily adopting an aggressive, rights-driven review; in Singapore, there is evidence of a shift towards a more communitarian rather than statist authoritarian form of review where rights are concerned.²⁸⁸

²⁸² Chan, “Judicial Review”, *supra* note 13 at paras 29-31.

²⁸³ *Nagaenthran HC*, *supra* note 10 at para 123.

²⁸⁴ Chan, “Judicial Review”, *supra* note 13 at para 31.

²⁸⁵ *Ibid* at para 29.

²⁸⁶ *Inland Revenue Commissioners v National Federation of Self-Employed and Small Businesses Ltd* [1982] AC 617 (UKHL) at 644F-G.

²⁸⁷ *Chng*, *supra* note 8 at para 86.

²⁸⁸ Li-ann Thio, “Principled Pragmatism and the ‘Third Wave’ of Communitarian Judicial Review in Singapore” in Jaclyn L Neo, ed. *Constitutional Interpretation in Singapore: Theory and Practice* (UK: Routledge, 2018) at 75-116.

Thus, through an amber lens, the courts and judicial review have an important role in developing administrative principles and procedures to “supplement the democratic, political controls over those who exercise state power.”²⁸⁹ An optimal balance is sought between internal controls and external political and legal controls. So too, we see in the approach of Singapore courts towards ouster clauses, this same constructive tension between competing constitutional pulls to give and deny effect to privative clauses.

²⁸⁹ L Boule, B Harris & C Hoexter, *Constitutional and Administrative Law: Basic Principles*, 19th ed (Cape Town: Juta, 1989) at 80-83.