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THE *OBITER* IN *NAGAENTHRAN*

Marcus **Teo**[*]

In *Nagaenthran*, the Court of Appeal reasoned in *obiter* that legislation ousting judicial review on grounds of illegality, irrationality, or procedural impropriety will ordinarily be unconstitutional. The precise logic employed here is unclear. Four interpretations have been offered, but they either do not reflect the court's actual remarks, or complicate other aspects of administrative law doctrine. This article offers a fifth interpretation, which largely avoids these difficulties. Ouster clauses are ordinarily unconstitutional because they usually extend power-conferring provisions beyond the purposes Parliament intended them to serve.

I. Introduction

In *Nagaenthran a/l K Dharmalingam v Public Prosecutor* ("*Nagaenthran*"),[1] the Court of Appeal was asked to declare a legislative provision unconstitutional for ousting the court's power of judicial review over certain executive decisions. In lengthy *obiter* comments, the court reasoned that that provision would have been "constitutionally suspect" if it did indeed purport to oust judicial review on grounds of "illegality, irrationality and procedural impropriety"[2] (hereafter, the "Traditional Grounds").[3] This was because legislation ousting any of those three "usual grounds of judicial review" will "ordinarily" be unconstitutional.[4]

The *obiter* in *Nagaenthran* is a staple of administrative law syllabi in Singapore today. Here, I aim to dissect those *obiter* remarks, and figure out how we may best understand them. Readers may wonder: why? Why focus on non-binding *obiter* rather than actual rulings? The answer, as anyone familiar with Singapore public law will know, is that to ignore *obiter* here is to miss the wood for the trees.[5] It is

[*] Assistant Professor, Faculty of Law, National University of Singapore. Thanks to Farrah Ahmed, Liz Fisher, Edward Lui, Jaclyn Neo, Kevin Tan and the anonymous reviewer for helpful comments, and to Brandon Mah for valuable research assistance. Earlier incarnations of this piece were presented at conferences and workshops in Hong Kong University, Academia Sinica and NUS in December 2024 and January 2025. The usual caveats apply.

1 *Nagaenthran a/l K Dharmalingam v Public Prosecutor and another appeal* [2019] 2 SLR 216 (CA) [*Nagaenthran* (CA)]. For avoidance of doubt, references in the main text to "*Nagaenthran*" are to the Court of Appeal's decision unless explicitly stated otherwise.

2 *Ibid* at [51] and [74].

3 Adopting a phrase used by the Court of Appeal in *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779 (CA) [*Tan Seet Eng*] at [44] ("the usual judicial review principles of illegality, irrationality and procedural impropriety … which we refer to as 'the Traditional Test'").

4 *Nagaenthran* (CA), *supra* note 1 at [71].

5 For a similar view, see Benjamin Joshua Ong, "Constitutional obiter dicta on male-male sex and fundamental rights in Singapore" (2025) Common Law World Review (forthcoming).

in *obiter* that courts have affirmed the objective standard in reviewing preventive detentions,[6] recognised the right to vote,[7] broadened standing rules,[8] strengthened Art 12(1)'s reasonable classification test,[9] doubted the doctrine of substantive legitimate expectations,[10] and kept the existence of the basic structure doctrine an open question.[11] Indeed, there is reason to think that the *obiter* remarks in *Nagaenthran* are particularly important. They were strongly worded,[12] and have since been taken quite seriously by courts[13] and commentators,[14] probably because they broadly reflect a view on ouster clauses that judges[15] and academics[16] had endorsed for decades prior. There seems little doubt that they will define the Judiciary's approach toward ouster clauses in the future.

But if the *obiter* in *Nagaenthran* is broadly accepted as a correct statement of the law, why spend an entire article interpreting it? The key word here is "broadly". While commentators have generally endorsed the Court of Appeal's *obiter* remarks, these remarks have been interpreted in four ways, reflecting four different views on why legislative provisions ousting the Traditional Grounds are ordinarily unconstitutional. On the first, what is constitutionally protected is simply the court's supervisory jurisdiction over executive acts. On the second, the scope and standard of

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6 *Chng Suan Tze v Minister for Home Affairs and others and other appeals* [1988] 2 SLR(R) 525 (CA) at [55]–[86].

7 *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 (CA) [*Vellama*] at [78]–[85].

8 *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345 (CA) at [62]–[63].

9 *Tan Seng Kee v Attorney-General and other appeals* [2022] 1 SLR 1347 (CA) [*Tan Seng Kee*] at [300]–[329].

10 *SGB Starkstrom Pte Ltd v Commissioner for Labour* [2016] 3 SLR 598 (CA) [*Starkstrom*] at [55]–[63].

11 *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129 (CA) [*Yong Vui Kong* (2015)] at [68]–[72]; *Wong Souk Yee v Attorney-General* [2019] 1 SLR 1223 (CA) at [76]–[78]; *Daniel De Costa Augustin v Attorney-General* [2020] 2 SLR 621 (CA) [*Daniel De Costa Augustin*] at [10]–[11].

12 See the text excerpted in Section II below.

13 *Shanmugam Manohar v Attorney-General and another* [2021] 3 SLR 600 (HC) at [113]–[116]; *Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah & Ors and other appeals* [2021] 2 MLJ 822 (FC, M'sia) at [187]–[192].

14 See, *eg*, Kenny Chng, "Reconsidering ouster clauses in Singapore administrative law" (2020) 136(1) LQR 40 [Chng, "Reconsidering ouster clauses"] at 43; Kenny Chng, "Microcontextual considerations in ouster clause analysis: A comparative study of parallel trends in the United Kingdom and Singapore" (2022) 20(3) Intl J Const L 1257 [Chng, "Microtextual considerations"] at 1266–1267; Thio Li-ann, "Ousting Ouster Clauses: the Ins and Outs of the Principles Regulating the Scope of Judicial Review in Singapore" [2020] Sing JLS 392 [Thio, "Ousting Ouster Clauses"]; Trevor TW Wan, "Unshackling from Shadows of the *Anisminic* Orthodoxy: Reconceptualising Approaches to Ouster Clauses in Hong Kong" (2024) 19(2) Asian J Comp L 369 [Wan, "Unshackling from Shadows"] at 387–388.

15 *Re Application by Yee Yut Ee* [1977–1978] SLR(R) 490 (HC) at [18], [31]; *Stansfield Business International Pte Ltd v Minister for Manpower (formerly known as Minister for Labour)* [1999] 2 SLR(R) 866 (HC) at [21]–[22]; *Per Ah Seng Robin and another v Housing Development Board and another* [2016] 1 SLR 1020 (CA) at [63]–[67]. Chan Sek Keong CJ (as he then was) also famously floated this view in "Judicial Review – From Angst to Empathy" (2010) 22 Sing Ac LJ 469 [Chan, "Judicial Review"] at 477.

16 See, *eg*, Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Singapore: Academy Publishing, 2012) [Thio, *Treatise*] at [10.218]; Kevin YL Tan, *The Constitution of Singapore: A Contextual Analysis* (Oxford: Hart Publishing, 2015) [Tan, *Constitution*] at 175–177; Jaclyn L Neo, "'All Power has Legal Limits': The Principle of Legality as a Constitutional Principle of Judicial Review" (2017) 29 Sing Ac LJ 667 [Neo, "All Power has Legal Limits"] at 684–685; Benjamin Joshua Ong, "The constitutionality of ouster clauses: *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112" (2019) 19(1) OUCLJ 157 [Ong, "Constitutionality of ouster clauses"].

constitutionally protected review varies under a multifactorial test assessing comparative institutional competence. On the third, the Traditional Grounds are viewed as being "housed" under the Fundamental Rights provisions in the Constitution.[17] On the fourth, the Traditional Grounds themselves are viewed as unwritten norms of the Constitution. And problematically, all four of these interpretations face difficulties. The first and second interpretations cannot really explain the court's remarks, in that they cannot demonstrate why legislative provisions ousting review on (any and only) the Traditional Grounds should ordinarily be unconstitutional. The third and fourth interpretations, by contrast, have untoward consequences for other aspects of administrative law doctrine, in that they challenge the existence of remedial discretion in administrative law and the unavailability of the doctrine of legitimate expectations as a general ground of review. If the *obiter* remarks in *Nagaenthran* are to define the law on ouster clauses going forward – as most expect it to – we should ideally have a satisfactory interpretation of them that we can generally agree on.

This article thus seeks to develop the best interpretation of the *obiter* in *Nagaenthran*, that legislation ousting judicial review of executive acts on the Traditional Grounds will ordinarily be unconstitutional. Section II recounts *Nagaenthran*, and sets out the court's *obiter* remarks in detail. Sections III to VI explain why the four interpretations of those *obiter* remarks face the difficulties mentioned above. Section VII forwards a fifth interpretation. Clauses ousting the Traditional Grounds are ordinarily unconstitutional because they usually extend legislative provisions which confer power on the Executive beyond the purpose Parliament intended them to serve. This is because Parliament generally intends that legal powers be exercised for limited purposes, that discretionary powers be exercised using rational judgment, and that adjudicative powers be exercised fairly and independently.

II. *Nagaenthran*

If an accused person is convicted of the offence of trafficking in controlled drugs under s 5 of the Misuse of Drugs Act 1973[18] ("MDA"), and if the drugs he is found to have trafficked in are Class A drugs above a certain quantity, he will be subject to the mandatory sentence of death.[19] However, under s 33B(2)(*b*) of the MDA, the Public Prosecutor ("PP") may issue the accused a Certificate of Substantial Assistance ("the Certificate"), if the PP is satisfied that the accused had "substantively assisted the Central Narcotics Bureau ("CNB") in disrupting drug trafficking activities within or outside Singapore".[20] The effect of this Certificate is to give the trial judge a discretion to sentence the accused to life imprisonment and caning, rather than death.[21]

The applicant in *Nagaenthran* had been convicted of trafficking in a quantity of Class A drugs large enough to subject him to the mandatory sentence of death. He

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17 *Ie*, Constitution of the Republic of Singapore (2020 Rev Ed) [Constitution].
18 Misuse of Drugs Act 1973 (2020 Rev Ed) [MDA].
19 *Ibid* at s 33 and Second Schedule.
20 *Ibid* at s 33B(2)(*b*).
21 *Ibid* at s 33B(1)(*a*).

had also been refused the Certificate. The applicant challenged the PP's decision not to issue the Certificate, on grounds that the PP had failed to consider a relevant factor – namely, information the applicant gave in his contemporaneous statements when he was arrested – in determining whether the applicant had substantially assisted the CNB. In response, the PP argued that he had considered that information in making his decision to refuse the Certificate, but that in any case, s 33B(4) of the MDA precluded judicial review of that decision, save on grounds of "bad faith" or "malice". Section 33B(4) states that:

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

The High Court rejected the application. Chan Seng Onn J held that s 33B(4) was a "constitutionally valid ouster clause", because it only purported to oust judicial review of a "non-justiciable determination".[22] The general approach courts should adopt, to determining the justiciability of decisions, and thus the constitutionally of ouster clauses shielding them from review, was as follows:

> [T]he judiciary, in recognition of its limited role in judicial review by dint of the constitutional doctrine of the separation of powers, ought to defer to the intention of the legislature in the vesting of certain powers in the executive and respect the relative institutional competence of the executive in respect of decisions that concern issues that judges are ill-equipped to adjudicate.[23]

Under this approach, s 33B(4) was constitutional for two reasons. First, the PP's decision under s 33B(2)(*b*) involved "a holistic inquiry premised on a panoply of extra-legal factors, including in particular the operational considerations of the CNB in the disruption of drug trafficking activities".[24] Courts are "ill-equipped to consider" these.[25] Second, s 33B(4) was "not a complete ouster clause, but a mere partial ouster clause", since it preserved review on grounds of bad faith or malice.[26] It therefore struck a "reasonable balance".[27]

However, Chan J then reasoned that even constitutional ouster clauses could not shield decisions from being reviewed for "jurisdictional errors of law". Singapore law recognised the "very sophisticated judicial technique to circumvent [ouster] clauses … laid down in the seminal decision of *Anisminic*",[28] *ie*, that decisions tainted by jurisdictional errors were nullities that ouster clauses could not cover.[29]

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22 *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 [*Nagaenthran* (HC)] at [82].
23 *Ibid* at [88].
24 *Ibid* at [94].
25 *Ibid*.
26 *Ibid* at [98].
27 *Ibid*.
28 *Ibid* at [100]–[102].
29 *Ibid* at [107].

Yet, "a critical difficulty that arises in the application of the principle in *Anisminic* … is [its] true scope".[30] Earlier decisions "d[id] not offer instructive guidance" on what jurisdictional and non-jurisdictional errors were.[31] Nevertheless, Chan J accepted *arguendo* the applicant's argument that all the Traditional Grounds targeted jurisdictional errors, such that none were excluded by s 33B(4). He then dismissed the applicant's challenge on the basis that the applicant could not show that the PP had failed to consider any relevant factors or had acted irrationally.[32]

The Court of Appeal dismissed the applicant's appeal, but on different grounds. The *ratio* of its decision rested on two points. First, s 33B(4) did not purport to limit the court's power to review the PP's decision to issue the Certificate at all. Rather, s 33B(4) was an immunity clause, which had the effect of "immunis[ing] the PP from suit [*ie*, a civil claim in tort] in respect of such a determination" save when it was made in bad faith or with malice.[33] It was "entirely logical for Parliament to proceed in this way".[34] If courts had to apply private law[35] causes of action to determine the legal liability of the PP for its decisions, that "would likely entail the weighing of considerations and trade-offs that are outside [the Judiciary's] institutional competence",[36] and so there would be "a lack of manageable judicial standards against which a court would be able to arrive at a decision".[37] The upshot was that s 33B(4) "d[id] not in any way oust the court's power of judicial review over the legality of executive actions, including those of the PP".[38]

Second, however, the applicant could not establish that the PP had failed to consider the applicant's contemporaneous statements.[39] Nor could the applicant argue that the court should review the PP's view that the applicant had not substantively assisted the CNB *de novo*, since the fact of substantial assistance was not a precedent fact.[40] The applicant's challenge was thus dismissed on those grounds.

Nevertheless, in *obiter*, the Court of Appeal addressed the PP's alternative argument, that s 33B(4) – if it were indeed an ouster clause – validly precluded judicial review of the PP's decision. The Court of Appeal's remarks here differed markedly from Chan J's reasoning at first instance. As these are our main focus, it is worth reproducing them at some length:

> The [PP] contends that [s 33B(4)] is an ouster clause. We disagree. On its face, s 33B(4) does not purport to exclude the jurisdiction of the courts to supervise the legality of the PP's determination under s 33B(2)(*b*) of the MDA … nothing in s 33B(2)(*b*) excludes the usual grounds of judicial review, such as illegality,

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30 *Ibid* at [105].
31 *Ibid* at [120].
32 *Ibid* at [125]–[145].
33 *Nagaenthran* (CA), *supra* note 1 at [67].
34 *Ibid*.
35 *Ibid* at [61]–[65], citing *Buttes Gas and Oil Co and another v Hammer and another* (No. 3) [1982] AC 888 (HL, UK) (defamation claim and counterclaim in unlawful means conspiracy) and *Carnduff v Rock and another* [2001] 1 WLR 1786 (CA, Eng) (contract claim).
36 *Ibid* at [58].
37 *Ibid* at [60].
38 *Ibid* at [68].
39 *Ibid* at [77]–[81].
40 *Ibid* at [82]–[86].

> irrationality and procedural impropriety … on the basis of which the court may examine the legality of the PP's determination, as opposed to its *merits* …
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> [W]e observe that the court's power of judicial review, which is a core aspect of the judicial power and function, would not ordinarily be capable of being excluded by ordinary legislation such as the MDA … the judicial function is premised on the existence of a controversy either between a State and one or more of its subjects, or between two or more subjects of a State ... [and] entails the courts making a finding on the facts as they stand, applying the relevant law to those facts and determining the rights and obligations of the parties concerned for the purposes of governing their relationship for the future. It follows from the nature of the judicial function, as well as the fact that the State's judicial power is vested in the Supreme Court under Art 93 of the Singapore Constitution, that 'there will (or should) be few, if any, legal disputes between the State and the people from which the judicial power is excluded' … In particular, any society that prides itself in being governed by the rule of law, as our society does, must hold steadfastly to the principle that '[a]ll power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power' …
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> The point is not purely theoretical. In the course of the arguments, we invited [the PP] to clarify whether he maintained that the court would be powerless to act if it could be shown that the PP had considered matters that were irrelevant. His response that he did maintain that position, was simply untenable, as we told him. If the [PP's] submission on the effect of s 33B(4) were accepted, then to the extent that this ousted the court's power of judicial review, s 33B(4) would be constitutionally suspect for being in violation of Art 93 of the Singapore Constitution as well as the principle of the separation of powers … That said, the point really is moot, since we have already held that s 33B(4) of the MDA does not have this effect of ousting the power of the courts to review the *legality* as opposed to the *merits* of the PP's determination under s 33B(2)(*b*).[41]

From these *obiter* remarks, three propositions surface.

First, the court considered that it had the power and duty to review the "legality" of executive acts. Review of "legality", in turn, was understood as review on the Traditional Grounds: illegality, irrationality and procedural propriety. The Court of Appeal has adopted an identical definition of "legality" review in other recent judgments. In *Tan Seet Eng v Attorney-General*, the court held that "the courts, in the final analysis, are the arbiters of the lawfulness of actions including government actions", and that their "role in judicial review" is "limited to such things as illegality, irrationality, and procedural impropriety".[42] Likewise, in *SGB Starkstrom Pte Ltd v Commissioner for Labour*, the court said that "the established grounds of judicial review" are "illegality, irrationality and procedural impropriety", and that "these three heads of review define the test for the lawfulness of an exercise of administrative discretion."[43]

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41 *Ibid* at [51], [69]–[74].

42 *Tan Seet Eng*, *supra* note 3 at [98]–[99].

43 *Starkstrom*, *supra* note 10 at [57].

Second, the court reasoned that legislative provisions ousting judicial review of the "legality" of executive acts, as defined above, will "ordinarily" be unconstitutional. Conversely, these provisions will be constitutional only in *extraordinary* cases. This suggests a relatively categorical approach to ouster clauses.[44] This categorical reading also emerges from the Court of Appeal's firm though implicit[45] rejection of Chan J's reasoning in the High Court. Recall that Chan J had reasoned that ouster clauses would be constitutional if they respected the "relative institutional competence of the executive" in certain matters,[46] and then upheld s 33B(4) on grounds that it struck a "reasonable balance".[47] The Court of Appeal, by contrast, said nothing about the need for any sort of "balance" to be struck. There was no question here of the court's institutional competence to carry out judicial review.[48] And crucially, the Court of Appeal's conclusion on s 33B(4), assuming that it was an ouster clause, was the exact opposite of Chan J's. The notion that that section could oust the Traditional Grounds was "simply untenable".[49]

Third, the court reasoned that the above two propositions are the product of two constitutional principles. They follow from the fact that "the separation of powers" and Art 93 of the Constitution vest the "judicial power" in the Judiciary. In particular, there is something inherent in the "nature of the judicial function" that courts should have the power and the duty to apply the Traditional Grounds. The above two propositions also derive from the principle of the "rule of law", in particular, 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".

This much seems clear from the Court of Appeal's *obiter* remarks in *Nagaenthran*. Yet, much else remains uncertain. As we shall now see, four different interpretations of these remarks have been put forth in the academic literature. None of them are free from difficulties.

III. The Supervisory Jurisdiction Interpretation

Let us start with:

> **The Supervisory Jurisdiction Interpretation**
> Legislative provisions ousting the Traditional Grounds are ordinarily unconstitutional because the High Court's supervisory jurisdiction over executive acts is constitutionally protected[50]

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44 See Wan, "Unshackling from Shadows", *supra* note 14 at 337.

45 *Cf ibid* at 388.

46 *Nagaenthran* (HC), *supra* note 22 at [88].

47 *Ibid* at [98].

48 See also *Tan Seet Eng*, *supra* note 3 at [106] ("even for matters falling within the category of 'high policy', the courts can inquire into whether decisions are made within the scope of the relevant legal power or duty and arrived at in a legal manner … [i]n such circumstances, the question of deference to the Executive's discretion simply does not arise").

49 *Nagaenthran* (CA), *supra* note 1 at [74].

50 See, *eg*, Chan, "Judicial Review", *supra* note 15 at 477; Tan, *Constitution*, *supra* note 16 at 177; Thio, *Treatise*, *supra* note 16 at [10.218].

The logic of this interpretation goes as follows. Article 93 and the separation of powers, by vesting the Judiciary with judicial power, also necessarily vest the High Court with supervisory jurisdiction. It is in the exercise of this supervisory jurisdiction that the High Court upholds the "rule of law" by "examining the exercise of discretionary power" and keeping it within its "legal limits".[51] And so, since legislative provisions ousting review on the Traditional Grounds also oust the Judiciary's supervisory jurisdiction, they must be unconstitutional.

This interpretation of the *obiter* in *Nagaenthran* reflects a view which Chan Sek Keong CJ mooted in an extra-judicial speech:

> [A]n ouster clause may be inconsistent with Art 93 of the Constitution, which vests the judicial power of Singapore in the Supreme Court. If this argument is correct, it would follow that the *supervisory jurisdiction* of the courts cannot be ousted, and therefore there is no need for our courts to draw the distinction between jurisdictional and non-jurisdictional errors of law.[52]

This view also features in leading texts on Singapore constitutional and administrative law, such as Kevin Tan's monograph[53] and Thio Li-ann's treatise[54] on the Constitution, as well as their casebook on constitutional and administrative law in Singapore.[55]

However, this interpretation of the *obiter* in *Nagaenthran* is empty. It may be accepted that Art 93 and the separation of powers will render legislation ousting the High Court's supervisory jurisdiction unconstitutional. Importantly, though, this does not say anything about the *content* of that supervisory jurisdiction. A further premise is needed, to explain why the court's supervisory jurisdiction is coterminous with review on the Traditional Grounds, such that legislation that ousts review on (any and only) the Traditional Grounds will ordinarily be unconstitutional.

Three attempts may be made to make the concept of the High Court's supervisory jurisdiction more determinate, and a fourth attempt may be made to defend the Supervisory Jurisdiction Interpretation without making that concept more determinate. None of these prove successful.

First, it might be said that "supervisory jurisdiction" is a "term of art",[56] which has always referred to the Traditional Grounds. However, this argument is likely to be historically inaccurate. In stating the Traditional Grounds in *Council of Civil Service Unions v Minister for the Civil Service* ("the *GCHQ* case"),[57] Lord Diplock's goal was not to distil and affirm long-established legal principles. Instead, he only meant to describe the modern state of the law,[58] and emphasised that his judgment

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51 *Nagaenthran* (CA), *supra* note 1 at [73].

52 Chan, "Judicial Review", *supra* note 15 at 477.

53 Tan, *Constitution*, *supra* note 16 at 177.

54 Thio, *Treatise*, *supra* note 16 at [10.218].

55 Kevin YL Tan & Thio Li-ann, *Constitutional and Administrative Law in Singapore: Cases, Material and Commentary*, 4th ed (Singapore: Academy Publishing, 2021) at 1221–1223.

56 *Haron bin Mundir v Singapore Amateur Athletic Association* [1991] 2 SLR(R) 494 (HC) [*Haron*] at [19].

57 *Council of Civil Service Unions and others v Minister for the Civil Service* [1985] 1 AC 374 (HL, UK).

58 *Ibid* at 410 ("Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three

should not obscure the "further development on a case by case basis" of "further grounds".[59] In any case, the fact that the law might have historically contained a particular proposition (for example, "the supervisory jurisdiction of the High Court of England and Wales long encapsulated the Traditional Grounds") is not itself a conclusive justification for that proposition.[60] At best, it is only one reason to support that proposition, and it should bear little weight when the proposition is sought to be justified in a legal context radically different from where it originated (for example, "the supervisory jurisdiction of the Singapore High Court, which is constitutionally protected under a written Constitution and cannot be altered by legislation, must also encapsulate the Traditional Grounds").[61]

Second, it might be pointed out that the High Court's supervisory jurisdiction is distinct from its appellate jurisdiction, and as such, its content differs from the latter's. However, this does not get us very far. It is true that the two forms of jurisdiction are probably mutually exclusive.[62] However, they are obviously not collectively exhaustive. There are many things which the High Court can do which does not involve the exercise of appellate jurisdiction and which also does not involve the exercise of supervisory jurisdiction.

Third, it might be said that the High Court's supervisory jurisdiction involves only a review of the "legality"[63] rather than the "merits" of executive decisions.[64] But this, too, does not tell us why the supervisory jurisdiction's content should be coterminous with the Traditional Grounds. The reason why the court's supervisory jurisdiction covers the Traditional Grounds is not that the Traditional Grounds define or exhaust the idea of "legality" review. Rather, it is because "legality" review involves the review of executive acts on the grounds of legal rules applicable to determine the validity of such decisions, and because the Traditional Grounds are such legal rules. Yet, this does not foreclose the possibility of other applicable legal rules. As Benjamin Joshua Ong had noted, the notion that courts must carry out "legality" review generally only tells us that "courts are to enforce the legal limits to powers", not that those legal limits have any "substantive content".[65]

Finally, it might be argued that what is constitutionally protected is not any particular definition of the High Court's supervisory jurisdiction, but the court's "competence" to determine for itself the width of that supervisory jurisdiction.[66] This argument, however, goes too far. As the Court of Appeal held in *Citiwall Safety*

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heads the grounds upon which administrative action is subject to control by judicial review.").

59 *Ibid*.

60 J.W.F. Allison, "History to Understand, and History to Reform, English Public Law" (2013) 72(3) CLJ 526 at 549-552 (referencing Maitland's contrast of "the lawyer's logic of authority with the historian's logic of evidence").

61 *Ibid* at 553-554.

62 See *Haron*, *supra* note 56 at [18].

63 See *Tan Seet Eng*, *supra* note 3 at [67] ("the general concept of judicial review … in broad terms refers to the supervisory jurisdiction of the High Court to ensure that those holding Executive powers act lawfully and within the scope of their powers").

64 See *Ng Chye Huey and another v Public Prosecutor* [2007] 2 SLR(R) 106 (CA) at [46] ("supervision generally is confined to questions not touching the merits of the case").

65 Benjamin Joshua Ong, "The Unmeritorious 'Legality'/'Merits' Distinction in Singapore Administrative Law" (2021) 16 Asian J Comp Law 1 [Ong, "Legality/Merits"] at 22.

66 Thanks to Kevin Tan for challenging me with this.

Glass Pte Ltd v Mansource Interior Pte Ltd, "the High Court's supervisory jurisdiction is part of its original jurisdiction",[67] *ie*, it is "subsumed under the High Court's original civil jurisdiction".[68] Yet, if the court's supervisory jurisdiction has no particular definition, it would seem that *any* aspect of the court's original civil jurisdiction might potentially fall within the supervisory jurisdiction, and thus be incapable of being excluded by statute. But of course, this is not so. Parliament clearly can exclude aspects of the court's ordinary civil jurisdiction other than the Traditional Grounds. For example, Parliament may immunise the Executive from tortious liability; that was the *ratio* of *Nagaenthran*. So, if the court's supervisory jurisdiction covers not all aspects of its original civil jurisdiction but only some aspects thereof (like its power to apply the Traditional Grounds), the question remains: what is the further premise that establishes that (all and only) the Traditional Grounds constitute the court's supervisory jurisdiction?

IV. The Institutional Competence Interpretation

The Supervisory Jurisdiction Interpretation is thus in need of a further premise. The next interpretation of the *obiter* in *Nagaenthran* purports to supply that premise. This is:

> **The Institutional Competence Interpretation**
> Legislative provisions ousting the Traditional Grounds are ordinarily unconstitutional because the High Court has a constitutional duty to review executive decisions, with the scope of review being calibrated on a multifactorial analysis of the Judiciary's and the Executive's relative institutional competence on the decision's subject-matter[69]

The logic here goes as follows. The separation of powers and Art 93 both vest the Judiciary with "judicial power", which involves reviewing the "legality" of executive decisions, but what "legality" requires is determined by a multifactorial analysis focused on the question of relative institutional competence.

Jaclyn Neo expressed this view in an article written before *Nagaenthran*. Neo wrote that the "principle of legality"[70] is a "constitutional principle" that comports a "strong presumption of reviewability" of executive acts and a "strong presumption against ouster clauses".[71] However, the principle of legality does not itself "provid[e] any substantive rule of law norms by which to evaluate the legality and constitutionality of power".[72] So when would the "strong presumption against ouster clauses"

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67 *Citiwall Safety Glass Pte Ltd v Mansource Interior Pte Ltd* [2015] 1 SLR 797 (CA) at [64].

68 *Ibid* at [79].

69 Neo, "All Power has Legal Limits", *supra* note 16 at 683–684; Chng, "Microcontextual considerations", *supra* note 14 at 1272–1277; Thio, "Ousting Ouster Clauses", *supra* note 14 at 419–420.

70 By which she refers to the principle 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"; see Neo, "All Power has Legal Limits", *supra* note 16 at 667–669.

71 *Ibid* at 683–684.

72 *Ibid* at 670.

be rebutted? Neo's response appears to be that "institutional and substantive" considerations, especially the "respective institutional expertise" of the courts and the Executive, should determine when the presumption is rebutted.[73]

Other commentators, writing post-*Nagaenthran*, interpreted the court's *obiter* remarks in a similar manner. Kenny Chng, for example, read *Nagaenthran* as demonstrating that judicial review in Singapore is justified on the basis of "rule of law principles … located in the Constitution".[74] However, identifying the "substantive content of these rule of law norms" remains a "difficult task".[75] Later, Chng argued that courts' decisions to uphold ouster clauses or not depend on several "microcontextual considerations". These include the "nature of the subject matter" (with clauses shielding decisions on more polycentric matters of national security more likely being upheld) and the extent to which the clause purports to oust judicial review (with partial ousters being more likely upheld than full ousters).[76]

In her own writing, Thio Li-ann has adopted a similar position:

> [T]he current position [after *Nagaenthran*] is that ouster clauses are not automatically invalidated … 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 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.[77]

Unlike the Supervisory Jurisdiction Interpretation, the Institutional Competence Interpretation is not empty. However, it faces another difficulty: it is implausible.

In particular, the Institutional Competence Interpretation struggles to explain why the Court of Appeal in *Nagaenthran* phrased its *obiter* remarks – that legislative provisions ousting any of the Traditional Grounds should ordinarily be unconstitutional – in relatively categorical language. Multifactorial tests are, by their nature, highly context specific. It thus seems unlikely that a court which calibrates the scope of constitutionally protected review using a multifactorial institutional analysis will "ordinarily" conclude that review on (all and only) the Traditional Grounds should be constitutionally protected. Instead, one would logically expect the scope of constitutionally protected review to vary on a case by case basis,[78] giving rise to a "sliding scale"[79] of review. That the Court of Appeal in *Nagaenthran* seemed to prefer a rather categorical approach instead – leaving the impression, as

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[73] *Ibid* at 683–684.

[74] Kenny Chng, "The Theoretical Foundations of Judicial Review in Singapore" [2019] Sing JLS 294 [Chng, "Theoretical Foundations"] at 310.

[75] *Ibid* at 313.

[76] Chng, "Microcontextual considerations", *supra* note 14 at 1272–1277.

[77] Thio, "Ousting Ouster Clauses", *supra* note 14 at 419–420.

[78] Hasan Dindjer, "What Makes an Administrative Decision Unreasonable?" (2021) 84(2) Mod L Rev 265 at 289-293; Marcus Teo, "Administrative expertise and *Wednesbury* unreasonableness" [2025] Pub L 355 [Teo, "Administrative expertise"] at 363.

[79] See Andrew Le Seuer, "The Rise and Ruin of Unreasonableness?" [2005] Judicial Rev 32 at 40.

Chng puts it, that "the future of ouster clauses in Singapore has become very bleak indeed"[80] – suggests that context-specificity was not its foremost concern.

This difficulty, moreover, cannot be sidestepped by focusing on the fact that, in *Nagaenthran*, the Court of Appeal said that clauses ousting the Traditional Grounds would "ordinarily" be – but, extraordinarily, will *not* be – unconstitutional. This only raises the question: what will the extraordinary case look like? To both Chng and Thio, the subject-matter of the challenged decision and the width of the relevant ouster clause should be relevant factors in determining the constitutionality of such clauses.[81] As a result, the exceptional case would involve a partial ouster clause shielding a decision on matters outside the Judiciary's expertise; that should be constitutional.[82] But *Nagaenthran* itself suggests otherwise. Recall that the Court of Appeal described the PP's decision to issue a Certificate of Substantial Assistance as being "outside [the Judiciary's] institutional competence".[83] Recall also that, if s 33B(4) were indeed an ouster clause, it would be a partial one, since it does not purport to shield the PP's decisions taken "in bad faith or with malice". *Nagaenthran*, then, *should* have been the extraordinary case; s 33B(4) should have been constitutional. Indeed, that was precisely what Chan J, applying a multifactorial test assessing "relative institutional competence", concluded in the High Court.[84] Yet, to the Court of Appeal, that conclusion was "simply untenable".[85]

There is another reason why the Institutional Competence Interpretation seems implausible. It has been argued that multifactorial tests compromise legal certainty.[86] And while certainty may not be of paramount importance in public law,[87] there is something self-defeating about an interpretation of *Nagaenthran*, in particular, that endorses an uncertain test. After all, one likely motivation for academic enthusiasm for the *obiter* in *Nagaenthran* is that the approach to ouster clauses laid out there avoids reliance on the "jurisdictional error of law" reasoning in *Anisminic*.[88] That, in turn, was seen as undesirable because a workable definition of "jurisdictional errors" has long proven elusive.[89] In other words, *Nagaenthran*'s chief virtue was thought to be that it avoided the uncertainty that *Anisminic* created. It would be ironic if the test the Court of Appeal replaced *Anisminic* with proves equally uncertain.

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80 Chng, "Reconsidering ouster clauses", *supra* note 14 at 43.

81 Neo does not say as much on the precise content of the applicable multi-factorial test.

82 See text accompanying *supra* notes 78–79.

83 *Nagaenthran* (CA), *supra* note 1 at [58].

84 *Nagaenthran* (HC), *supra* note 22 at [88].

85 *Nagaenthran* (CA), *supra* note 1 at [74].

86 See, *eg*, Jason NE Varuhas, "Taxonomy and Public Law" in Mark Elliott, Jason NE Varuhas and Shona Wilson Stark, *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Oxford: Hart Publishing, 2018) at 51–56; Philip Sales and Frederick Wilmot-Smith, "Justice for Foxes" (2022) 138(4) Law Q Rev 583 at 590–591.

87 Alison L Young, "Public Law Cases and the Common Law: A Unique Relationship?" in Elizabeth Fisher, Jeff King and Alison L Young eds, *The Foundations and Future of Public Law: Essays in Honour of Paul Craig* (Oxford: Oxford University Press, 2020) at 99–100. See also Chng, "Theoretical Foundations", *supra* note 74 at 313.

88 Anecdotally, this author can attest to this being an actual motivation shared by several commentators.

89 See text accompanying *supra* notes 30–31.

V. The Fundamental Rights Interpretation

A plausible interpretation of the *obiter* in *Nagaenthran* must therefore involve a relatively hard-edged constitutional rule which preserves (all and only) the Traditional Grounds. This leads us to:

> **The Fundamental Rights Interpretation**
> Legislative provisions ousting the Traditional Grounds are ordinarily unconstitutional because the Traditional Grounds are legal tests derived from the Fundamental Rights provisions of the Constitution and applicable to executive decisions[90]

The logic of this interpretation would go as follows. Article 93 and the separation of powers vest the Judiciary with "judicial power", which involves reviewing the "legality" of executive acts under applicable rules of law. Since the Fundamental Rights provisions constitute applicable rules of law, courts must enforce those provisions to review executive acts and any legislation that purports to shield those acts from review.

In his case-note on the High Court's judgment in *Nagaenthran*, Benjamin Joshua Ong adopted a view to this effect:

> One might think that the express words of a statute such as section 33B(4) ought to trump such common-law principles [*ie*, traditional common-law administrative law principles such as those in *GCHQ*]. But that is not so, for these common-law principles are constitutional principles. They are but elaborations of Article 12(1) of the Constitution, which … demands that the exercise of executive powers be subject to judicial review, for the arbitrary exercise of power is repugnant to Article 12(1) … traditional common-law judicial review principles represent a set of judicial review principles which the Court of Appeal has approved as passing constitutional muster, such that a truncation of these principles … may well fall short of the standards which Article 12 demands of judicial review.[91]

The Fundamental Rights Interpretation has a lot going for it. The first two out of three of the Traditional Grounds – illegality and irrationality – are probably reproduced under Art 12(1). After all, Art 12(1)'s reasonable classification test would require a challenged executive decision's purpose to match its differentia. And so, it seems that a decision taken for improper purposes, without consideration of relevant factors or with consideration of irrelevant factors (which are defined in relation to the power-conferring provision's purpose), or which is irrational (*ie*, without any relation between means and ends), will fall foul of the reasonable classification test, because such decisions are by definition decisions detached from their purposes.[92]

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[90] Ong, "Constitutionality of ouster clauses", *supra* note 16 at 163–164.

[91] *Ibid*.

[92] See *Syed Suhail bin Syed Zin v Attorney-General* [2021] 1 SLR 809 (CA) at [61]. See also Kenny Chng, "A reconsideration of equal protection and executive action in Singapore" (2021) 21(2) OUCLJ 295 at 303. I have argued to the contrary, but may stand to be corrected: see Marcus Teo, "Refining Reasonable Classification" [2023] Sing JLS 83 [Teo, "Refining Reasonable Classification"] at 101-102.

There are, however, two difficulties with the Fundamental Rights Interpretation.

First, the Fundamental Rights Interpretation still cannot completely support the court's *obiter* remarks in *Nagaenthran*. This is because it is hard to see how the third of the Traditional Grounds – procedural impropriety – is reproduced under Art 12(1) or the other Fundamental Rights provisions. Admittedly, some aspects of the administrative law rules of natural justice, like the rule against actual bias, overlap with proper purposes review and so can be "housed" under Art 12(1).[93] But many other aspects of procedural review – like the rule against apparent bias, the right to a fair trial, or the duty to give reasons – cannot be explained in this way, because Art 12(1) contains no procedural protections.[94] By contrast, the only Fundamental Right provision which clearly reproduces procedural review is Art 9(1), that "[n]o person shall be deprived of his life or personal liberty save in accordance with law", including the "fundamental rules of natural justice", which have the same content as the administrative law rules of natural justice.[95] Yet, Art 9(1) only applies to executive acts which amount to deprivations of "life or personal liberty" – which courts have defined narrowly as referring to executions, incarcerations and the use of force[96] – and not all executive acts which infringe other legal rights or interests.[97] It therefore seems that no Fundamental Right provision "constitutionalises" the third Traditional Ground.

Second, the Fundamental Rights Interpretation would eliminate remedial discretion in administrative law. The orthodox common law position is that courts possess a discretion concerning the remedies available for breaches of the Traditional Grounds. In particular, courts may choose to delay or even completely deny a quashing order, when "treating the decision as legally non-existent may be inconsistent with legal certainty or with the public interest in orderly administration … result[ing] in administrative chaos, or expos[ing] innocent third parties to legal liabilities".[98] In 2021, the Rules of Court were amended to reflect this. Order 24, r. 6(5)(*d*) now expressly states that, in judicial review applications, "the Court may order that … a Mandatory Order ... or Quashing Order be made to take effect or to be complied with immediately *or by a certain time*" [emphasis added].[99] Courts also

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93 Since a decision taken for biased reasons is, by definition, also one taken for improper purposes.

94 See *Tan Eng Hong v Attorney-General* [2013] 4 SLR 1059 (HC) at [26]–[29] (the word "law", as used in "equal before the law" and "equal protection of the law", does not refer to the fundamental rules of natural justice).

95 See *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 (CA) at [105].

96 *Yong Vui Kong* (2015), *supra* note 11 at [22(c)].

97 This objection is still not overcome even if we accept, for argument's sake, that all the other Fundamental Rights provisions also contained procedural protections for applicants challenging executive acts impinging on their substantive content. There would then be a constitutional basis for procedural review of executive acts enslaving people (Art 10), banishing citizens or restricting movement (Art 13), limiting speech (Art 14), limiting religious practice and propagation (Art 15), and discriminating against citizens on grounds of religion, race, descent or place of birth (Arts 12(2) and 16) – but not for executive acts affecting any other interests (like property rights or licences to engage in certain professions). Thanks to the reviewer for raising this.

98 *R (Majera (formerly SM (Rwanda))) v Secretary of State for the Home Department (Bail for Immigration Detainees intervening)* [2022] AC 461 (SC, UK) at [31]. See also *R (Imam) v Croydon London Borough Council* [2025] AC 335 (SC, UK) at [41]–[42].

99 Rules of Court 2021 at O. 24, r. 6(5)(*d*).

seem to be exercising their discretion to deny quashing orders when they apply the "principle of necessity", which shields the decision of an apparently-biased statutory decision-maker from being quashed where "no other person or tribunal competent to decide the matter is available".[100] Here, courts acknowledge that a breach of the rule against apparent bias *has* occurred, but that concerns of good administration suggest that a legal remedy for that breach should be withheld.[101]

However, according to the Fundamental Rights Interpretation, the Traditional Grounds are merely tests applicable to executive acts under the Fundamental Rights provisions in the Constitution. This would mean that judicial review under the Traditional Grounds simply becomes constitutional review (of executive acts). It would then follow that the remedies available for breaches of the Traditional Grounds must now be the same as the remedies available for breaches of rules found in the Constitution. And in that regard, Art 4, which "establishes the supremacy of the Constitution",[102] states that:

> This Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution *shall*, to the extent of the inconsistency, *be void*.[103] [emphasis added]

In *Prabagaran a/l Srivijayan v Public Prosecutor*,[104] the Court of Appeal confirmed that Art 4 voids legislation declared unconstitutional with immediate effect. "Void" is used here in a slightly metaphorical sense – unconstitutional legislation only loses legal effect when declared unconstitutional[105] – but the metaphor is nevertheless a strong one, for once legislation is declared unconstitutional, courts must "*disregard* [it] as if it was *never enacted*."[106] The court also confirmed that Art 4 mandates voidness as the only remedial response for unconstitutional legislation.[107] Since the court's "remedial powers" are "expressly provided for" under Art 4, the further "implication" of additional powers is impossible.[108]

Importantly, in *Muhammad Ridzuan bin Mohd Ali v Attorney-General*,[109] the Court of Appeal held that Art 4 has the same effect on unconstitutional *executive acts* as it does on unconstitutional legislation. *Ridzuan* involved an Art 12(1)

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[100] *Sim Yong Teng v Singapore Swimming Club* [2016] 2 SLR 489 (CA) at [65].

[101] See C F Forsyth and I J Ghosh, *Wade & Forsyth's Administrative Law*, 12th ed (Oxford: Oxford University Press, 2023) at 379 ("Natural justice then has to give way to necessity; for otherwise there is no means of deciding and the machinery of justice or administration will break down").

[102] *Prabagaran a/l Srivijayan v Public Prosecutor and other matters* [2017] 1 SLR 173 (CA) [*Prabagaran*] at [33].

[103] Constitution of the Republic of Singapore (2020 Rev Ed), Art 4.

[104] *Prabagaran*, *supra* note 102.

[105] See *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 (CA) at [107] ("laws declared by Parliament … remain valid unless and until they are declared void").

[106] *Prabagaran*, *supra* note 102 at [15], emphasis added. *Cf* the court's discretion to delay the granting of leave to institute judicial review proceedings: see *Vellama*, *supra* note 7 at [88].

[107] At least, for legislation passed after the Constitution's commencement; *cf* Art 162.

[108] *Prabagaran*, *supra* note 102 at [49]–[50].

[109] *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] 5 SLR 1222 (CA).

challenge to the constitutionality of the PP's decision not to issue a Certificate of Substantial Assistance. There, the court reasoned that:

> In Singapore, the Constitution is supreme and all governmental powers are ultimately derived from and circumscribed by the Constitution … Therefore, all *executive acts* must be constitutional and the court is conferred the power to declare *void* any *executive act* that contravenes the provisions of the Constitution.[110]

Yet, if the Traditional Grounds are manifestations of the Fundamental Rights provisions, and if any executive act declared unconstitutional under those provisions is immediately voided, then any executive act which contravenes the Traditional Grounds must also be immediately voided. Remedial discretion in administrative law would be no more.

VI. The Unwritten Norm Interpretation

Perhaps the solution to the problems raised by the Fundamental Rights Interpretation is to untether the Traditional Grounds from the Fundamental Rights provisions. This leads us to:

> **The Unwritten Norm Interpretation**
> Legislative provisions ousting the Traditional Grounds are ordinarily unconstitutional because the Constitution contains an unwritten norm stating that "no executive act can contravene the Traditional Grounds"[111]

The logic here is similar to that of the previous interpretation. Article 93 and the separation of powers vest the Judiciary with "judicial power", which involves reviewing the "legality" of executive acts under applicable rules of law. Since unwritten constitutional norms are also applicable rules of law, courts must enforce those provisions against executive acts, and against any legislation that purports to shield those acts from review.

This Unwritten Norm Interpretation closely resembles another position Ong took in his case-note on the High Court's decision in *Nagaenthran*:

> '[U]nconstitutionality' … is broader than simple non-compliance with the terms of constitutional provisions … there are constitutional norms other than those explicitly stated in the Constitution which constrain executive (and, it would stand to reason, legislative) power … [which] includes … such things as bad faith, arbitrariness, failure to direct one's mind to a pertinent issue [including "tak[ing] into account irrelevant considerations"], and bias.[112]

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[110] *Ibid* at [35].
[111] Ong, "Constitutionality of ouster clauses", *supra* note 16 at 176–177.
[112] *Ibid*.

Since it asserts that the Traditional Grounds are constitutional norms in their own right, this interpretation avoids at least one of the difficulties associated with the Fundamental Rights Interpretation. It cannot be incomplete, because it is designed to match the precise width of the Court of Appeal's *obiter* remarks in *Nagaenthran*.

However, the Unwritten Norm Interpretation faces problems too. For starters, it may still eliminate remedial discretion in administrative law. As Chan Sek Keong CJ reasoned in *Mohammad Faizal bin Sabtu v Public Prosecutor*:

> It should be noted that Art 4 of the Singapore Constitution states that any law inconsistent with "this Constitution", as opposed to any law inconsistent with "any provision of this Constitution", is void. The specific form of words used in Art 4 reinforces the principle that the Singapore parliament may not enact a law, and the Singapore government may not do an act, which is inconsistent with [a] principle … embodied in the Singapore Constitution.[113]

Thus, even if the Traditional Grounds are unwritten constitutional norms, Art 4 will still dictate the remedial consequences of their breach. And as mentioned above, Art 4 provides only one remedial response for unconstitutional executive acts: they are void.

Another difficulty with the Unwritten Norm Interpretation is that it is overinclusive. It cannot explain why *only* the Traditional Grounds, and no other grounds of judicial review, should be viewed as unwritten constitutional norms. Unlike written norms, which derive their existence from text, unwritten norms must be justified on constitutional values and principles[114] or inferred from the basic structure of the Constitution.[115] There is a constitutional value that appears to justify the Traditional Grounds. This is the "rule of law", understood in a thicker sense as requiring adherence to the (purpose and intent of the) law and prohibiting the abuse of power. This, indeed, is what the Court of Appeal in *Nagaenthran* seemed to have in mind, where, just before it stated that legislation ousting the Traditional Grounds would ordinarily be unconstitutional, it professed to "hold steadfastly to the principle that '[a]ll power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power'".[116]

However, in the view of the Court of Appeal itself, there is a fourth ground of review which can also be justified on the "rule of law". This is the doctrine of legitimate expectations, which holds executive decision-makers to clear promises they make to applicants which rely on them, unless the decision-maker can justify departure on an "overriding national or public interest".[117] The normal remedy would be an order to quash a decision taken by the Executive which contravenes its promise,

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113 *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 (HC) [*Mohammad Faizal bin Sabtu*] at [15].

114 *Eg*, the right to vote rests is implied from electoral democracy (see *Daniel De Costa Augustin*, *supra* note 11 at [9]).

115 *Eg*, the separation of powers is inferred from the constitutional provisions distributing the legislative, executive and judicial powers (see *Mohammad Faizal bin Sabtu, supra* note 113 at [11]).

116 *Nagaenthran* (CA), *supra* note 1 at [73].

117 *Chiu Teng @ Kallang Pte Ltd v Singapore Land Authority* [2014] 1 SLR 1047 (HC) at [119].

or to mandate a decision not taken by the Executive which it promised to make.[118] In *Tan Seng Kee v Attorney-General*,[119] the Court of Appeal reasoned that preventing the Executive from resiling from clear representations would help prevent the Executive from subjecting representees to "legal uncertainties" which are "fundamentally antithetical to the rule of law".[120] "[I]t is a fundamental tenet of the rule of law that the law must be capable of guiding the conduct of those that it binds".[121]

Despite this, it seems pretty clear that courts (generally) consider the doctrine of legitimate expectations objectionable and will not (generally) adopt it as part of Singapore law, let alone classify it an unwritten constitutional norm. In *Starkstrom*, the Court of Appeal reasoned *obiter* that the doctrine might "require the courts to review the substantive merits of executive action", which would "redefine" the "separation of powers".[122] And while in *Tan Seng Kee* the Court of Appeal acknowledged that "extremely limited" recognition could be given to the doctrine in the "exceptional circumstances" of the case before it – involving a parallel representation made by the Government in Parliament that the Attorney-General would abide by his own public representation not to prosecute then-s 377A of the Penal Code[123] – the court emphasised that the same facts "will hardly, if ever, manifest themselves in other contexts", and that it was not "import[ing] the doctrine into Singapore law in any wider context".[124] Yet, if the Traditional Grounds are viewed as unwritten constitutional norms because they are manifestations of the "rule of law", why is the doctrine of legitimate expectations, which (the Court of Appeal itself has said) is also justified on the rule of law, not given that same status?

A possible response, raised in *Starkstrom*, is that the doctrine of legitimate expectations would require courts to assess the "merits" of executive acts rather than just their "legality". Yet, as Ong has observed, this distinction between the "legality" of challenged acts and their "merits" is almost entirely devoid of content.[125] The distinction cannot mean that courts should never examine the substance of a decision, for if so, even irrationality review amounts to an assessment of the "merits".[126] Instead, the legality-merits distinction is nothing more than a mere prohibition against "judicial substitution of judgment, whereby the court imposes what it believes to be the correct result" on the Executive, *ie*, by quashing a challenged decision simply because the court did not think that it was the best decision

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118 See *ibid* at [1], [37].

119 *Tan Seng Kee*, *supra* note 9.

120 *Ibid* at [152].

121 *Ibid* at [109]. The Court of Appeal, in citing a Razian account of the rule of law as the doctrine's justification, finds itself in good company: see, *eg*, Paul Craig and Soren Schonberg, "Substantive legitimate expectations after *Coughlan*" [2000] Pub L 684 at 696–697; Philip Sales and Karen Steyn, "Legitimate expectations in English public law: an analysis" [2004] Pub L 564 at 569–570; Farrah Ahmed and Adam Perry, "The Coherence of the Doctrine of Legitimate Expectations" (2014) 73(1) Cambridge LJ 61 at 80.

122 *Starkstrom*, *supra* note 10 at [61].

123 *Tan Seng Kee*, *supra* note 9 at [133]–[134].

124 *Ibid* at [140].

125 Ong, "Legality/Merits", *supra* note 65. See also Swati Jhaveri, "Revisiting Taxonomies and Truisms in Administrative Law in Singapore" [2019] Sing JLS 351.

126 Ong, "Legality/Merits", *supra* note 65 at 16–19.

possible.[127] Short of that, "[s]upervision of decision-making power can conceivably take place by reference to standards which make reference to the meritoriousness of the decision, and thereby involve an examination of the merits of the decision while still not amounting to the exercise of appellate jurisdiction."[128]

Thus, the only question is whether there is a positive reason why a putative ground of review, which does assesses the merits of executive decisions, should be applied.[129] According to the Court of Appeal in *Tan Seng Kee*, there *is* a positive reason for courts to apply the doctrine of legitimate expectations, which is the same reason that justifies the Traditional Grounds: the rule of law. Neither would enforcing a legitimate expectation require the judicial substitution of judgment. The court would require the Executive to make a particular decision because the Executive represented that it would, not because (the judge thought that) the decision was substantively correct or ideal.[130]

The main problem with the Unwritten Norm Interpretation, then, is that it justifies more than the court's *obiter* remarks in *Nagaenthran*. If the Traditional Grounds are unwritten constitutional norms because they can be justified on the rule of law, and if (as the Court of Appeal itself remarked in *Tan Seng Kee*) the doctrine of legitimate expectations can also be so justified, then that latter doctrine should also be an unwritten constitutional norm. But there is no doubt that courts would resist that latter conclusion.

VII. The Reasonable Classification Interpretation

I have demonstrated that each of the above four interpretations of the *obiter* in *Nagaenthran* face difficulties. I now provide a fifth interpretation. This is:

> **The Reasonable Classification Interpretation**
> Legislative provisions ousting the Traditional Grounds are ordinarily unconstitutional because they usually extend power-conferring provisions beyond the purpose Parliament intended them to serve, contrary to Art 12(1)'s reasonable classification test

The logic of this interpretation goes as follows. Article 93 and the separation of powers vest the Judiciary with "judicial power", which involves reviewing the "legality" of power-conferring provisions under applicable rules of law. Article 12(1) is one such constitutional provision, and ouster clauses will ordinarily violate it.

This Reasonable Classification Interpretation is novel. It does bear some resemblance to the Fundamental Rights Interpretation as articulated by Ong, in that they both ultimately turn on Art 12(1). But there is a crucial difference. The Reasonable Classification Interpretation is not committed to the view that the Traditional

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127 Paul Craig, "Reasonableness, Proportionality and General Grounds of Judicial Review: A Response" (2021) 2 Keele L Rev 1 at 4.

128 Ong, "Legality/Merits", *supra* note 65 at 21.

129 *Ibid*.

130 *Ibid* at 14.

Grounds *themselves* are, in Ong's words, "but elaborations of Article 12(1)".[131] For reasons I will elaborate on below, the Traditional Grounds only reflect inferences of Parliament's intent in enacting certain power-conferring provisions. Instead, the Reasonable Classification Interpretation only asserts that Art 12(1) would ordinarily render *legislation* that ousts review on the Traditional Grounds unconstitutional.

A. *Justification*

The Reasonable Classification Interpretation is supported by three logical inferences which courts can draw, about what Parliament generally intends when it enacts certain kinds of power-conferring provisions.

As a preliminary, note that I am speaking here of *inferences*, not presumptions.[132] Inferences are not legal rules, and thus need not be justified on the basis of precedent or constitutional principle. Rather, inferences are simply *logical* conclusions which courts can draw in the ordinary process of fact-finding, given the establishment of certain other factual propositions. My argument is that once Parliament has exacted certain types of power-conferring provisions, courts may logically draw certain inferences about the purposes those provisions were intended to serve, which involve the application of (all and only) the Traditional Grounds. This admittedly conflicts with a common view, that it seems implausible that Parliament intends the development of grounds of review, reflective of norms of good administration, when it confers decision-making power.[133] Yet, it is incorrect to assume that the Traditional Grounds can only be justified on the basis of principles of good administration. As I will show, there are at least three inferences that can naturally be drawn, about the purposes that Parliament naturally intends certain power-conferring provisions to serve, which can support the Traditional Grounds.[134]

First, Parliament generally intends that *legal powers* should be exercised for *limited purposes*. Indeed, it might be theoretically impossible for Parliament, exercising legislative power,[135] to create an unlimited legal power. If it could, the power-holder would not be Parliament's agent but its equal.[136] For our purposes, though, we only need accept that when Parliament grants a power for a purpose, it usually intends that it be used for that purpose, and not for other purposes. And if Parliament generally intends to confer only limited legal powers, any legislative provision that pur-

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131 Ong, "Constitutionality of ouster clauses", *supra* note 16 at 163.

132 For a discussion of the diffence, see Marcus Teo, "The Inference of Similarity" (2025) 84(1) Cambridge LJ 143 at 145-149; Ho Hock Lai, "Revisiting the Constitutionality of Presumptions in the Misuse of Drugs Act 1973" in Ho Hock Lai and Kelvin F.K. Low eds, *A Gentleman of the Law – Essays in Memory of Professor Tan Yock Lin* (Singapore: Academy Publishing, forthcoming).

133 See Mark Elliott, *The Constitutional Foundations of Judicial Review* (Oxford: Hart Publishing, 2001) at 28–30.

134 For a similar argument, see Farrah Ahmed, "The Delegation Theory of Judicial Review" (2021) 84(4) Mod L Rev 772 at 784–787 (arguing that the Traditional Grounds flow simply "from the idea that delegates [*ie*, the Executive] should abide by their mandate", and that they should "give concrete form to the general or abstract purposes of the delegator" [*ie*, Parliament]).

135 As distinct from the power of constitutional amendment.

136 *R (Privacy International) v Investigatory Powers Tribunal* [2020] AC 491 (SC, UK) at [208], *per* Lord Sumption, calling this a "conceptual rather than normative" limit on Parliament's legislative power.

ports to prevent those powers from being legally limited (*ie*, by excluding illegality review) must be *prima facie* inconsistent with Parliament's intent.

Second, Parliament generally intends that *discretionary powers* (a subset of legal powers) should be exercised using *rational judgment*. As HLA Hart has noted, a discretionary power is not a power to choose on the basis of "personal immediate whim or desire … [d]iscretion is after all the name of an intellectual virtue: it is a near-synonym for practical wisdom or sagacity or prudence; it is the power of discerning or distinguishing what in various fields is appropriate to be done".[137] This helps us understand why principals (like Parliament) delegate discretion to agents (like the Executive). Discretion is granted when a principal has some vague goal in mind, but lacks the time, resources, experience or expertise needed to make concrete decisions.[138] And the agent, in being granted discretion, must "weigh and choose between or make some compromise between competing interests and thus render more determinate [his principal's] initial aim",[139] exercising "wisdom or deliberation" in doing so.[140] In short, Parliament, in conferring discretionary decision-making power, is not only expecting the Executive to make decisions. Parliamant intends also that the Executive actually apply its mind in making those discretionary decisions.[141] Obviously, this intention would be flouted if the Executive exercised its power irrationally. And so, any legislative provision that purports to prevent discretionary powers from being reviewed on grounds of irrationality must be *prima facie* inconsistent with Parliament's intent.

Third, Parliament generally intends that *adjudicative powers* (another subset of legal powers) should be exercised *fairly* (*ie*, ensuring a fair hearing) and *independently*. Adjudicators (*eg*, administrative tribunals) are third-party decision-makers which reassess the decisions of initial executive decision-makers. These adjudicators are inserted into the Executive's decision-making process when Parliament thinks it insufficient to leave the entire decision-making process to the initial decision-maker. The defining feature of the adjudicative function is thus that it "provides the opportunity for a hearing before a neutral third party",[142] this being central to its legitimacy.[143] After all, if the adjudicator were not independent from the initial decision-maker, and did not offer the affected party an additional right to be heard, there would be no need for the adjudicator at all – the whole decision-making process could be left to the initial decision-maker. Thus, Parliament, in conferring adjudicative powers on administrative tribunals, usually intends that

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137 H.L.A. Hart, "Discretion" (2013) 127(2) Harv L Rev 652 [Hart, "Discretion"] at 656.

138 *Ibid* at 661-663. See also Joseph Heath, *The Machinery of Government: Public Administration and the Liberal State* (Oxford: Oxford University Press, 2020) at 266–268.

139 Hart, "Discretion", *supra* note 137 at 663.

140 *Ibid* at 657–658.

141 For an exploration of this point, see Teo, "Administrative expertise", *supra* note 78 at 363–372.

142 Peter Cane, *Administrative Tribunals and Adjudication* (Oxford: Hart Publishing, 2009) at 11. See also Robert Thomas, *Administrative Justice and Asylum Appeals: A Study of Tribunal Adjudication* (Oxford: Hart Publishing, 2011) at 9.

143 See Sundaresh Menon, *The Role of Tribunals in the Delivery of Justice: Charting a Course for the Future*, speech delivered at the Inaugural Tribunals Conference, Singapore (26 April 2022) at [10], [30] ("To maintain public confidence", administrative tribunals must be "independent and capable of providing a fair and impartial process", by providing "an avenue … to seek redress and remedy or for the enforcement of regulatory standards in accordance with the requirements of due process.").

these tribunals should operate fairly and independently; that is their whole purpose. And so, any legislative provision that purports to prevent adjudicative powers from adhering to the rules of natural justice (*ie*, the right to be heard and the rule against bias) must be *prima facie* inconsistent with Parliament's intent.

The Reasonable Classification Interpretation is the cumulative product of these three inferences about Parliament's intent and Art 12(1). Courts may, in general, infer that Parliament intends that (1) legal powers should be exercised for limited purposes; (2) discretionary powers should be exercised with rational judgment; and (3) adjudicative powers should be exercised fairly and independently. It follows that legislative provisions ousting the Traditional Grounds will usually extend the scope of those powers beyond the purpose that Parliament intended them to serve. This, in turn, would cause those powers to be overinclusive *vis-à-vis* their purpose, contrary to Art 12(1)'s reasonable classification test.

B. *Exception*

An objection to the Reasonable Classification Interpretation may be raised. Surely, if legal, discretionary, or adjudicative powers are coupled with ouster clauses, this suggests that Parliament did *not* intend those powers to be exercised for limited purposes, with rational judgment, or fairly and independently, respectively? It is a hornbook principle of statutory interpretation that Parliament's purpose for a statutory provision refers to its intention *in enacting* that particular provision, so Parliament's intent must be inferred first and foremost from the statutory text.[144] Since, in this instance, the statutory text includes the ouster clause, should the proper inference not be that Parliament intended these powers to be exercised without their corresponding restraints? And if so, how can legislative provisions creating those unrestrained powers (*ie*, ouster clauses) be said to contravene Art 12(1)?

The flaw in this objection is that it assumes that the established method of ascertaining Parliament's intent for the purposes of *statutory interpretation* is the same method which courts should use when applying the *reasonable classification test*. That assumption is incorrect, as is clear from *Tan Seng Kee*.[145] There, the Court of Appeal considered "the hypothetical example of a law banning all women from driving", and concluded that it "would likely fail the 'reasonable classification' test … because the differentia bears no rational relation to any conceivable object of that law under the second limb of the test".[146] What is important is the court's subsequent reasoning, where it responded to a possible objection to its conclusion:

> As against this, it might be argued that a law banning all women from driving might not necessarily fail the second limb … if the object of that law is precisely to ban all women from driving, there would be a complete coincidence between the gender-based differentia embodied in and the object of that law. The rebuttal to this argument lies in framing the object of a law that is challenged under

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144 Johan Steyn, "*Pepper v Hart*; A Re-examination" (2001) 21(1) Oxford J Leg Stud 59 at 60.

145 For a fuller discussion, see Teo, "Refining Reasonable Classification", *supra* note 92 at 95–97.

146 *Tan Seng Kee*, *supra* note 9 at [319].

> Art 12 at the appropriate level of generality … framing a ban on all women from driving as the very object of a law would be tantamount to saying that the object of that law is to introduce the differentia that it embodies – which is circular in reasoning. Put another way, the level of generality at which the object of a law is pitched would effectively be determined by the differentia embodied in that law, and there would necessarily be a perfect relation between the differentia and the object of that law … [if courts are] averse to the application of the "reasonable classification" test in any manner that renders it purely formalistic, it would be impermissible … to frame the object of a law banning all women from driving as precisely that – to ban all women from driving.[147]

Thus, under the reasonable classification test, courts cannot conclude that Parliament intended to frame legislative purposes to reproduce the scope of the legislation itself. That would render the reasonable classification test "circular". Instead, Parliament's intent in that context must be derived from something *other* than the text of the challenged provision.

How then should courts determine legislative purposes when applying the reasonable classification test? One option would be for courts to make logical inferences about what Parliament probably intended when passing legislation, like the three logical inferences about legislative intent I have set out above. Thus, as mentioned, because ouster clauses expand the scope of powers beyond Parliament's inferred intent, they will ordinarily fall foul of Art 12(1).

Ordinarily, but not always. There is another source of legislative purpose: *parliamentary debates*. For this, we can return to *Tan Seng Kee*. As mentioned, that case concerned a challenge to the now-repealed s 377A, which criminalised the act of male-male homosexual sex, on grounds that it violated the reasonable classification test. The Court of Appeal dismissed the challenge on grounds that the applicants lacked *locus standi* to bring it. In *obiter*, however, the court said:

> The present appeals likewise illustrate how casting the legislative object of a statutory provision differently may well yield different results under the "reasonable classification" test. If one were to frame the legislative object of s 377A as the expression of societal disapproval of male-male sex acts, as [the AG] asserts, there would necessarily be a perfect coincidence between the differentia embodied in and the legislative object of s 377A. On the other hand, if one were to cast the legislative object of s 377A more broadly as the expression of societal disapproval of homosexual conduct in general or the safeguarding of public morality generally, that would strengthen the case that s 377A falls afoul of the "reasonable classification" test. In this setting, s 377A would appear to be under-inclusive because it does not criminalise female-female homosexual conduct … The framing of the legislative object of a statutory provision could, of course, cut both ways. For example, if [the applicants] had been able to argue successfully in their respective appeals that the legislative object of s 377A is targeted specifically at male prostitution only, they might have succeeded in showing that as s 377A applies

[147] *Ibid* at [320].

> to categories outside the narrow category just mentioned (namely, male prostitution), it is over-inclusive and, hence, unconstitutional under Art 12.[148]

We saw earlier that the court rejected the first possible legislative object of s 377A (disapproval of male-male sex acts only) as being "circular".[149] The court had also rejected the third possible legislative object (the prohibition of male prostitution) because the applicants had not proven that the "legislative extraneous material" concerning s 377A showed that Singapore's colonial Parliament had intended the section to serve that purpose.[150] By elimination, that left the second possible legislative object (the expression of societal disapproval of homosexual conduct), which was that which the Government expressed s 377A as having, when that section was debated in Parliament in 2008, but where no vote was taken to retain or repeal it.[151]

Thus, when there is parliamentary debate on a particular provision's purpose, courts applying the Art 12(1) reasonable classification test will view that as strong evidence of Parliament's intended purpose. And so, if Parliament enacts an ouster clause, and the Government in tabling the relevant bill or amendment *explicitly states in Parliament* that it is intended to oust the Traditional Grounds, then that ouster clause will not fall foul of Art 12(1).

C. *Evaluation*

In sum, on the Reasonable Classification Interpretation of the *obiter* in *Nagaenthran*, legislative provisions ousting the Traditional Grounds will ordinarily be unconstitutional under Art 12(1)'s reasonable classification test, because courts may generally draw the three inferences about Parliament's intent highlighted above, and because ouster clauses expand the scope of those powers beyond those inferred purposes. However, courts should not draw those three inferences about Parliament's intent if the Government, in legislative debates on the bill enacting the relevant ouster clause, expressly takes the position that the relevant power should be immune from one or more of the Traditional Grounds. In that extraordinary situation, the ouster clause will be constitutional.

The Reasonable Classification Interpretation is preferable to the other four covered above.

Unlike the Supervisory Jurisdiction and Institutional Competence Interpretations, it actually supports the Court of Appeal's remarks in *Nagaenthan* to a significant degree. Because the Reasonable Classification Interpretation turns on the interplay between the three inferences of Parliament's intent and the reasonable classification test, it mostly explains why legislation ousting any of the Traditional Grounds, and only those grounds, will be ordinarily be unconstitutional.

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148 *Ibid* at [324].

149 *Ibid.*

150 *Ibid* at [181]–[210].

151 To be fair, the Court of Appeal did not explicitly say that this was the purpose Parliament should be taken to have intended s 377A to serve.

Unlike the Fundamental Rights and Unwritten Norm Interpretations, the Reasonable Classification Interpretation does not eliminate remedial discretion in administrative law. On this interpretation, the Traditional Grounds are not manifestations of Art 12(1) or unwritten constitutional norms, but inferences of Parliament's intent in enacting certain power-conferring provisions. As a result, executive acts which breach the Traditional Grounds are not unconstitutional, only administratively unlawful. This means that Art 4 does not determine the remedial consequences for their breach. However, an ouster clause will typically be unconstitutional under Art 12(1), because it extends the scope of power-conferring provisions beyond Parliament's inferred intent. The ouster clause, then, must be declared void under Art 4.

Unlike the Unwritten Norm Interpretation, the Reasonable Classification Interpretation does not suggest that the doctrine of legitimate expectations should also be an unwritten constitutional norm. Unlike the Traditional Grounds, no inference of legislative intent can be drawn to support the doctrine of legitimate expectations. It would seem counterintuitive for courts to infer that Parliament intended to confer discretionary powers on the Executive, but to also allow the Executive to bind itself to its promises on how it would exercise that power.[152]

Finally, though, I concede that the Reasonable Classification Interpretation is not perfect. It still suffers from the flaw shared by the first three interpretations, because it cannot *completely* explain the Court of Appeal's remarks in *Nagaenthran*. Like the Fundamental Rights Interpretation, the Reasonable Classification Interpretation can explain why clauses ousting illegality and irrationality review are unconstitutional. And unlike the Fundamental Rights Interpretation, the Reasonable Classification Interpretation can also explain why clauses ousting procedural review of decisions made by administrative tribunals and other executive adjudicatory authorities are unconstitutional.

However, there is one aspect of procedural review which does not overlap with illegality and irrationality review, and which also applies to decision-makers other than adjudicators: the duty to give reasons. Moreover, it would not seem logical or intuitive for courts to generally infer that Parliament intends that non-adjudicative powers should be exercised in a manner that is procedurally fair. And so, the Reasonable Classification Interpretation cannot explain why legislative provisions shielding *non-adjudicative powers* from the *duty to give reasons* should be unconstitutional.

But perfect should not be made the enemy of good. Unless Singapore courts wish to disregard the *obiter* in *Nagaenthran* in future cases concerning ouster clauses, the Reasonable Classification Interpretation is, I submit, the best way forward. And we should not exaggerate the importance of a free-standing duty to give reasons. As some have observed, judicial review on grounds of illegality or irrationality can operate in a manner that requires the Government to provide reasons for challenged decisions once the applicant establishes a *prima facie* face of illegality or irrationality, *ie*, by raising "indicia of unreasonableness".[153] And if irrationality cannot be ousted, so too should this parasitic reason-giving duty be immune from ouster.

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[152] See Chng, "Theoretical Foundations", *supra* note 74 at 298.

[153] See, *eg*, Paul Daly, "*Wednesbury's* reason and structure" [2011] Pub L 238 at 247–250.

VIII. Conclusion

In *Nagaenthran*, the Court of Appeal stated, *obiter*, that legislative provisions ousting the Traditional Grounds of review will ordinarily be unconstitutional. Four interpretations of those *obiter* remarks may be gleaned from the literature preceding and post-dating *Nagaenthran*, but the first and second interpretations cannot support the court's actual remarks, while the third and fourth interpretations complicate other aspects of administrative law doctrine. This article proffers a fifth interpretation. Legislative provisions ousting the Traditional Grounds are ordinarily unconstitutional under Art 12(1)'s reasonable classification test. This is because such ouster clauses usually extend power-conferring provisions beyond the purposes Parliament intended them to serve: that legal powers be exercised for limited purposes, that discretionary powers be exercised using rational judgment, and that adjudicative powers be exercised fairly and impartially. Exceptionally, however, an ouster clause may be constitutional under Art 12(1) when the Government explicitly takes the position in parliamentary debates that the purpose of that provision is indeed to oust judicial review on the Traditional Grounds.