5-2019

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Citation

ONG, Benjamin Joshua. The constitutionality of ouster clauses: Nagaenthran a/l K Dharmalingam v Attorney-General [2018] SGHC 112. (2019). *Oxford University Commonwealth Law Journal*. 19, (1), 157-178.

Available at: https://ink.library.smu.edu.sg/sol_research/2915

The Version of Record of this manuscript has been published and is available in the Oxford University Commonwealth Law Journal, vol 19 (2019), pages 157-178:
http://www.tandfonline.com/10.1080/14729342.2019.1610303

The constitutionality of ouster clauses

Nagaenthran a/l K Dharmalingam v Attorney-General [2018] SGHC 112

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Section 33B(4) of Singapore's Misuse of Drugs Act purportedly partly ousts judicial review of the Public Prosecutor's determination of whether a drug trafficker has substantively assisted the anti-drug enforcement agency. This paper argues that Singapore's High Court erred in holding this provision constitutionally valid. Ouster clauses are unconstitutional vis-à-vis Articles 12(1) and 93 of the Constitution; the High Court's view does not accord with the law on non-justiciability and is premised on a flawed theory of legislative intention. It is no answer that judicial power is subject to a 'balance' which renders a *partial* ouster clause constitutionally valid. The High Court's view that section 33B(4) ousts review for non-jurisdictional errors of law is incompatible with Article 93, and is not justified by the 'green-light' theory. The effect of these problems is tempered by a potentially wider definition of unconstitutionality as a ground of review than the High Court considered.

1 Introduction

In *Nagaenthran a/l K Dharmalingam v Attorney-General* (*Nagaenthran*),[1] the High Court had to confront two important questions about ouster clauses in Singapore. The first was the issue of the extent to which the reasoning in the well-known case of *Anisminic Ltd v Foreign Compensation Commission* (the *Anisminic* principle)[2] applies. The second was whether ouster clauses are in conflict with Article 93 of the Constitution of the Republic of Singapore (the Constitution),[3] which vests judicial power (exclusively) in the courts.[4] An added twist was that

* Assistant Professor of Law, Singapore Management University; benjaminjong@smu.edu.sg. I am grateful to an anonymous reviewer for helpful comments received on a previous version of this paper, and particularly for prompting me to discuss issues relating common-law constitutionalism, Article 149(3) of the Constitution and section 8B of the Internal Security Act, and the 'co-equality' theory. However, all errors and omissions remain my own.

1 [2018] SGHC 112 (High Court of Singapore).

2 [1969] 2 AC 147 (UK House of Lords (UKHL)). This case involved a statute which provided that '[t]he determination by the [Foreign Compensation Commission] of any application made to them under this Act shall not be called in question in any court of law'. The House of Lords held that this statute did not preclude judicial review of a determination which was allegedly tainted by an error of law which brought the Commission out of its jurisdiction, for such a tainted determination was not a 'determination' within the meaning of the statute.

3 The Constitution 1999, reprint of 1985 rev edn.

4 The Singapore Court of Appeal (SGCA) noted this question in passing in *Per Ah Seng Robin v Housing and Development Board* [2015] SGCA 62 [65]. The question had first been asked by Thio Li-ann, *A Treatise on*

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the ouster clause in question, rather than purporting to oust the courts' powers of judicial review entirely, purported to restrict the grounds on which one may apply for judicial review. This note aims to critically examine the High Court's reasoning.

2 Background

Previously, under Singapore's Misuse of Drugs Act (the Act),[5] a person who imported drugs above a certain threshold quantity would face a mandatory death sentence.[6] In 2012, the Act was amended to create the following exception:[7] if two conditions were made out, such a person could be sentenced to life imprisonment and caning instead of death. The first was that the offender's involvement in the offence was limited to performing certain tasks, such as transporting the drugs (as opposed to, say, playing a more active role in the management of the drug trafficking syndicate).[8] The second condition was that 'the Public Prosecutor certifies to any court that, in his determination, the person has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities within or outside Singapore'[9] (hereafter, to issue a Certificate).

Mr Nagaenthran a/l K Dharmalingam had been convicted of importing heroin. Though he satisfied the first condition just mentioned, he was sentenced to death as the Public Prosecutor refused to issue him with a Certificate. He had tried but failed to challenge the constitutionality of the requirement for a Certificate and the law that it was for the Public Prosecutor, acting in his discretion, to decide whether or not to issue a Certificate.[10] In *Nagaenthran*, he applied for judicial review of the Public Prosecutor's exercise of discretion

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Singapore Constitutional Law (Academy Publishing 2012) para [10.218] and Chan Sek Keong, 'Judicial Review—From Angst to Empathy' (2010) 22 Singapore Academy of Law Journal 469, 477.

5 Misuse of Drugs Act 2008, rev edn.

6 ibid, s 33 read with the Second sch.

7 ibid, s 33B(1)(a) read with s 33B(2). For completeness, the Act also created another exception (which is not discussed here) which pertains to drug traffickers who suffered from various types of abnormality of mind: see s 33B(1)(b) read with s 33B(3).

8 ibid, s 33B(2)(a).

9 ibid, s 33B(2)(b).

10 Nagaenthran was one of the applicants in *Prabagaran a/l Srivijayan v Public Prosecutor* [2016] SGCA 67. For commentary on this case, see Benjamin Joshua Ong, 'The Doctrine of Severability in Constitutional Review: A Perspective from Singapore' (2019) 40 Statute Law Review (forthcoming).

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on the grounds of failure to take into account relevant considerations, absence of a precedent fact, and irrationality.[11] The immediate obstacle he faced was section 33B(4) of the Act, which, on its face, ousted judicial review on these grounds. Section 33B(4) provides 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.

Nagaenthran sought to argue that the ouster clause was (a) unconstitutional; and (b) ineffective because of the *Anisminic* principle.

The High Court found that, regardless of the effect of section 33B(4), Nagaenthran had not succeeded in raising even a *prima facie* case that any of the alleged grounds of judicial review had been made out.[12] Hence, the High Court refused to grant leave to apply for judicial review. Nonetheless, the High Court also responded to some of Nagaenthran's submissions on section 33B(4). The High Court held that the ouster clause was constitutionally valid;[13] but that, because of the *Anisminic* principle, the ouster clause did not prevent judicial review on the ground that the Public Prosecutor had made a jurisdictional error of law.[14] However, the High Court declined to express a conclusive view on whether all errors of law are jurisdictional errors of law,[15] although it expressed an inclination toward the view that some errors of law are non-jurisdictional.[16]

We will now examine each of these issues in turn.

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11 *Nagaenthran* (n 1) [30].

12 ibid [147].

13 ibid [43].

14 ibid [117].

15 ibid [119].

16 ibid [123].

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3 The (un)constitutionality of ouster clauses

Nagaenthran's argument that section 33B(4) was unconstitutional was founded on Article 93 of the Constitution, which provides that:

> The judicial power of Singapore shall be vested in a Supreme Court[17] and in such subordinate courts as may be provided by any written law for the time being in force.

The High Court stated that this provision had not been violated because the Public Prosecutor's discretion as to whether or not to issue a Certificate was non-justiciable:[18] in other words, it was a 'matte[r] in respect of which the judiciary is not properly able to exercise its judicial power over'.[19] In support of this view, the High Court made two points. As we will see, neither is defensible. The true position ought to be that ouster clauses generally, including section 33B(4), are unconstitutional because they are in conflict with Article 93 of the Constitution. Further, it is no answer to argue that, because section 33B(4) is only a 'partial' ouster clause that allows for *some* grounds of judicial review, it can be justified on the ground that its conflict with Article 93 represents a 'reasonable balance'.

3.1 The institutional competence of the Public Prosecutor

First, the High Court said that the question of whether a Certificate ought to be issued was non-justiciable. This was relevant for the following reason: if a matter is non-justiciable, then judicial review would not be possible *anyway* whether or not the ouster clause existed—the ouster clause would add nothing to the law, but instead 'merely declare accepted existing limits on judicial review'.[20] The problem is that this simply does not accord with the law in Singapore on non-justiciability, according to which judicial review is possible even in situations involving subject-matter which is said to be non-justiciable. The High Court took 'non-justiciable' to mean that something *should not be reviewed at all*. However, in Singapore, 'non-justiciability'

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17 The Supreme Court consists of the High Court and the Court of Appeal: Supreme Court of Judicature Act 2007, rev edn, s 3. Applications for judicial review are made to the High Court in the first instance; an appeal then lies to the Court of Appeal.

18 *Nagaenthran* (n 1) [93].

19 ibid [86].

20 ibid [78] citing *Per Ah Seng Robin* (n 4) [65], which in turn cites Hilaire Barnett, *Understanding Public Law* (Routledge-Cavendish 2009) 194.

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means at most that the courts, *while having the power to review, should decline* to exercise this power, or should perform review *less intensively*.

The High Court stated that 'the Public Prosecutor… possess[es] the unique qualities that render that office most suited to conduct the assessment under s 33B(2)(b)'.[21] This is unobjectionable insofar as it means that the courts may not conduct that assessment in the place of the Public Prosecutor and substitute their conclusion for the Public Prosecutor's. However, it does not follow that the Public Prosecutor's exercise of discretion is *totally* unreviewable. It is true that the Public Prosecutor possesses specialised knowledge in the field of how to disrupt drug trafficking activities and the 'operational considerations' of the Central Narcotics Bureau (Singapore's drug enforcement agency).[22] But the Singapore courts have recognised that '[t]here may… be situations where the courts are able to isolate a pure question of law from what may generally appear [to] be a non-justiciable area'.[23]

For example, the Court of Appeal has stated, in *Tan Seet Eng v Attorney-General* (*Tan Seet Eng*), that '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'.[24] ('[H]igh policy' referred to such issues as 'the recognition of foreign governments, boundary disputes, sovereign immunity and the deployment of troops overseas'.)[25] This explains why, in a previous case concerning national security, the Court of Appeal stated that 'matters of national security are not justiciable', and yet proceeded to perform judicial review on the ground of irrationality.[26]

If the courts are constitutionally competent to engage in review even in the field of such weighty affairs of state, surely they must be well-suited to engage in review in the field of

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21 *Nagaenthran* (n 1) [96].

22 *Muhammad Ridzuan bin Mohd Ali v Attorney-General* [2015] SGCA 53 [56] read with [66] cited in *Nagaenthran* (n 1) [94].

23 *Lee Hsien Loong v Review Publishing Co Ltd* [2007] SGHC 24 [98].

24 [2015] SGCA 59 [106].

25 *Lee Hsien Loong* (n 23) [100] quoted in *Tan Seet Eng* (n 24) [102].

26 *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] SGCA 7 [44]–[45].

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criminal acts such as drug trafficking. It does not matter whether this field is properly labelled 'non-justiciable'. It must not be forgotten that, notwithstanding the Public Prosecutor's area of specialised skill and knowledge, the courts possess their own specialised skill in the area of supervising the executive by reference to such standards as procedural fairness and the taking into account of relevant considerations.[27] The High Court's reasoning only supports the point that the courts are not competent to overrule the Public Prosecutor on the merits. It does not follow that the courts ought not to engage in any form of judicial review at all save to the limited extent explicitly provided for by statute.

3.2 Ouster clauses, common-law constitutional principles, and the (ir)relevance of legislative intent

The second point which the High Court made is that the court 'ought to defer to the intention of the legislature in the vesting of certain powers in the executive'.[28] It will now be argued that this is based on the questionable assumption that judicial review is only available to the extent that the Legislature[29] allows it to be.

The High Court cited the Court of Appeal case of *Yong Vui Kong v Attorney-General* (*Yong Vui Kong*)[30], which stated that:

> Where Singapore is concerned, I am of the view that by virtue of the judicial power vested in the Supreme Court under Art 93 of the Singapore Constitution, 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 any constitutional dispute between the State and an individual. In any modern State whose fundamental law is a written Constitution based on the doctrine of separation of powers (*ie*, where the judicial power is vested in an

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27 Of course, the *weight* to be accorded to those considerations is a matter for the executive decision-maker to decide (provided that that decision is not *Wednesbury* unreasonable): *Tesco Stores Ltd v Secretary of State for the Environment* [1995] 1 WLR 759 (UKHL) 764H.

28 *Nagaenthran* (n 1) [88].

29 The Legislature of Singapore consists of a unicameral Westminster-style Parliament and the President; as the Constitution, art 58(1), provides, 'the power of the Legislature to make laws [is] exercised by Bills passed by Parliament and assented to by the President'. In this paper, 'Legislature' and 'Parliament' will be used interchangeably.

30 *Yong Vui Kong v Attorney-General* [2011] SGCA 9 (CA).

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> 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*.[31]

The High Court focused on the word 'few', holding that 'there are ultimately some legal disputes between the State and the people that should properly be *excluded* from the province of judicial power'.[32] This might well be true to the extent that some matters are 'intrinsically incapable of submission to an adjudication'[33]—this simply means, as stated above, that the courts may not overrule the Public Prosecutor on the merits as regards such matters. However, the extract above unfortunately gives the impression that it is *the Legislature* which, through ordinary legislation, *dictates* what these matters are. The High Court appears to have thought so, stating that the Legislature, through section 33B(4), 'exclude[d] from the province of judicial power the review of the legality of the Public Prosecutor's determination'.[34]

How can it be that the Legislature can, by ordinary legislation, choose to include or 'exclud[e]' certain matters 'from the province of judicial power'?[35] Article 93 of the Constitution vests 'judicial power' exclusively in the courts. Therefore, surely, if anybody is to have the power to define 'judicial power', it must be the framers of the Constitution at the time the Constitution was drafted, and not the Legislature at any time by way of ordinary legislation. Therefore, the assumption underlying the High Court's decision is that the phrase 'judicial power' in the Constitution refers only to such power as is from time to time conferred on the Judiciary by the Legislature. This would mean that the only reason why judicial review is ever possible is that the Legislature allows it to be possible, and that the Legislature's intention to allow judicial review is *constitutive of* judicial power. One may certainly question whether adopting such a theory in Singapore would leave Article 93 of the Constitution with much meaningful content at all.[36] Such a view, taken to its logical conclusion, would instead

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31 ibid [31] (Chan Sek Keong CJ, with whom Andrew Phang Boon Leong and V K Rajah JJA agreed at [188]) (emphasis as added by the High Court in *Nagaenthran* (n 1) [83]).

32 *Nagaenthran* (n 1) [84] (emphasis in original).

33 *Nagaenthran* (n 1) [85] citing *Yong Vui Kong* (n 30) [31], which in turn cites Melville Fuller Weston, 'Political Questions' (1924–1925) 38 Harvard Law Review 296, 299.

34 *Nagaenthran* (n 1) [81].

35 ibid.

36 See generally Thio Li-ann, 'The Theory and Practice of Judicial Review of Administrative Action in Singapore: Trends and Perspectives' in Yeo Tiong Min, Hans Tjio and Tang Hang Wu (eds), *SAL Conference*

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leave the courts to stand idly by in the face of an unlawful executive action: this cannot be correct.

In any event, such a view is excluded by the decision of the Court of Appeal in *Yong Vui Kong* itself. In declaring that the exercise of the executive's constitutional power of clemency is reviewable on various grounds,[37] the Court of Appeal relied *not* on *legislative* intention that such review be possible, but instead on several common-law principles, namely: that 'all legal powers, even a constitutional power, have legal limits';[38] that powers must not be exercised other than for certain intended purposes;[39] and the common-law tradition of natural justice.[40] Since legislative intention that judicial review be possible is not the reason why judicial review is possible, surely legislative intention to oust or truncate judicial review ought also to be irrelevant.

One might think that the express words of a statute such as section 33B(4) ought to trump such common-law principles. 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 provides: 'All persons are equal before the law and entitled to the equal protection of the law.' This, according to the Court of Appeal in *Chng Suan Tze v Minister for Home Affairs*, demands that the exercise of executive powers be subject to judicial review, for the arbitrary exercise of power is repugnant to Article 12(1):

> [T]he submission by counsel… is that… if the discretion in ss 8 and 10 of the [Internal Security Act] is subjective, that would allow arbitrary detention which would result in inconsistency with Art 12(1). We accept this argument. We would also note, however, that the provisions in ss 8 and 10 are not arbitrary in themselves… *Nevertheless, if the discretion is not subject to review by a court of law, then, in our judgment, that discretion would be in actual fact as*

2011: Developments in Singapore Law between 2006 and 2010 – Trends and Perspectives (Academy Publishing 2011) <www.academia.edu/935298/The_Theory_and_Practice_of_Judicial_Review_of_Administrative_Action_in_Singapore_Trends_and_Perspectives> accessed 1 August 2018, especially at [87]–[91].

37 Namely, that the exercise of the clemency power had taken place 'beyond its legal limits (*ie*, *ultra vires* the enabling law)'; '*mala fide* (*ie*, for an extraneous purpose)'; in a manner that 'contravenes constitutional protections and rights'; or in a biased manner: *Yong Vui Kong* (n 30) [77] and [111].

38 *Yong Vui Kong* (n 30) [80] citing *Law Society of Singapore v Tan Guat Neo Phyllis* [2007] SGHC 207 [149].

39 *Yong Vui Kong* (n 30) [80] citing *Tan Guat Neo Phyllis* (n 38) [149].

40 *Yong Vui Kong* (n 30) [108] and [111] read with [87]–[88].

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> *arbitrary as if the provisions themselves do not restrict the discretion to any purpose and to suggest otherwise would in our view be naive.*[41]

On these grounds, the Court of Appeal rejected the view that a statutory executive power to detain a person was validly exercised as long as the executive authority was subjectively satisfied of the necessity of detention, 'so as to exclude a judicial inquiry into the sufficiency of the grounds to justify the detention'.[42] *A fortiori*, section 33B(4), which *explicitly* excludes judicial review on several well-established grounds, must be unconstitutional.

In *Chng Suan Tze*, the Court of Appeal went on to hold that the discretion in question was reviewable in accordance with traditional common-law administrative law principles such as those in *Padfield v Minister of Agriculture, Fisheries and Food*,[43] *Associated Provincial Picture Houses Limited v Wednesbury Corporation*,[44] and *Council of Civil Service Unions v Minister for the Civil Service*.[45] In so holding, the Court of Appeal was simply recognising that the grounds of judicial review contained therein serve to prevent the arbitrary exercise of executive power, which the Constitution, by virtue of Article 12(1), demands. The High Court, with respect, ought to have engaged closely with this clear authority for the proposition that 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 (such as that purportedly effected by section 33B(4)) may well fall short of the standards which Article 12 demands of judicial review. (This is not to mention the potential for the *further* development of judicial review principles which *also* seek to uphold Article 12(1) by preventing arbitrary decision-making.)

3.3 Ouster clauses and judicial power

Seen in this light, the High Court's treatment of the legislative intention behind section 33B(4) is not defensible. What the High Court said was that:

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41 *Chng Suan Tze v Minister for Home Affairs* [1988] SGCA 16 [82] (emphasis added).

42 *Karam Singh v Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs) Malaysia* [1969] 2 MLJ 129 (Federal Court of Malaysia) 150 cited in *Chng Suan Tze* (n 41) [52].

43 [1968] AC 997 (UKHL) cited in *Chng Suan Tze* (n 41) [86].

44 [1948] 1 KB 223 (Court of Appeal of England and Wales (EWCA)) cited in *Chng Suan Tze* (n 41) [119].

45 [1985] AC 374 (UKHL) cited in *Chng Suan Tze* (n 41) [119].

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> [The] 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.[46]

The problem with this is that the High Court did not state explicitly: competence to do *what*? On closer examination, it becomes clear that the High Court had conflated two things: the legislature's intention as to what the limits to executive power are; and the legislature's intention as to the courts' power to police those limits. With respect, this conflation is incorrect. It is certainly true that the Legislature, being the conferrer of executive powers through legislation, may choose to make those limits very wide. In practical terms, the wider the limits, the rarer will be the case in which the power-holder is held to have transgressed them. But the Legislature may not go further and provide that the courts may not even direct their minds to whether or not the limits have been transgressed. A statute to that effect, including a statute like s 33B(4) which purports to oust the court's jurisdiction to perform judicial review on some grounds, is an unconstitutional deprivation of the courts' judicial power, contrary to Article 93 of the Constitution. It is therefore 'void' by virtue of Article 4 of the Constitution.[47] As Gleeson CJ put it in the Australian case of *Plaintiff S157/2002 v Commonwealth of Australia*:

> Parliament may create, and define, the duty, or the power, or the jurisdiction, and determine the content of the law to be obeyed. But it cannot deprive this Court of its constitutional jurisdiction to enforce the law so enacted.[48]

There are at least two possible ways to reach this conclusion.

First, to be a superior court of unlimited jurisdiction (such as the High Court) exercising judicial power *is* to determine and pronounce upon the limits of executive bodies' powers. Support for this definition of judicial power may be drawn from the following passage from *Tan Seet Eng*:

> 'The rule of law is the bedrock on which our society was founded and on which it has thrived. The term, the rule of law, is not one that admits of a fixed or precise definition. However, one of its core ideas is the notion that the power of the State is vested in the various arms of

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46 *Nagaenthran* (n 1) [88] (emphasis added).

47 '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.'

48 *Plaintiff S157/2002 v Commonwealth of Australia* [2003] HCA 2 (High Court of Australia) [5].

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> government and that such power is subject to legal limits. But it would be meaningless to speak of power being limited were there no recourse to determine whether, how, and in what circumstances those limits had been exceeded. Under our system of government, which is based on the Westminster model, that task falls upon the Judiciary. Judges are entrusted with the task of ensuring that any exercise of state power is done within legal limits.' [49]

To the extent that the High Court is unable to perform this task, the High Court has had its judicial power truncated. Again, it must be stressed that this is not an encroachment on the Public Prosecutor's proper sphere of authority. All it means is that, however wide are the limits to his power, the courts must ensure that the he does not transgress those limits.

Second, if a 'non-judicial tribunal or other non-judicial decision-making authority' can 'determine conclusively the limits of its own jurisdiction', that tribunal thereby, in effect, exercises judicial power.[50] As the Supreme Court of Canada put it, there is 'nothing that is more the hallmark of a superior court than the vesting of power in a provincial statutory tribunal to determine the limits of its jurisdiction without appeal or other review.'[51] To accord such power to the Public Prosecutor (or to any other executive authority) is contrary to the proper reading of Article 93, which is that judicial power vests *exclusively* in the courts.[52]

3.4 An unpalatable alternative

Might one say, to the contrary, that s 33B(4) is constitutionally valid because it does not really *oust or truncate the court's role*, but is instead simply a means by which the Legislature has *delimited the Public Prosecutor's power*? In other words, can s 33B(4) be said to be merely the means through which the Legislature has, as Gleeson CJ in *Plaintiff S157/2002* put it, 'create[d], and define[d], the… power, or the jurisdiction [of the Public Prosecutor], and determine[d] the content of the law to be obeyed'?[53]

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49 *Tan Seet Eng* (n 24) [1].

50 *Plaintiff S157/2002* (n 48) [73] (Gaudron, McHugh, Gummow, Kirby, and Hayne JJ). Similarly, the Supreme Court of Canada held in *Crevier v Attorney-General (Quebec)* [1981] 2 SCR 220, 238 that 'It cannot be left to a provincial statutory tribunal, in the face of s 96 [of the British North America Act], to determine the limits of its own jurisdiction without appeal or review.' (The said s 96 provides: 'The Governor General shall appoint the Judges of the Superior, District, and County Courts in each Province, except those of the Courts of Probate in Nova Scotia and New Brunswick.')

51 *Crevier* (n 50) 237.

52 *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] SGHC 163 [17].

53 *Plaintiff S157/2002* (n 48) [5] (Gleeson CJ).

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The answer must be no. If the answer were yes, it would follow that the Legislature has chosen to set the boundaries of the Public Prosecutor's power in such a manner as to permit him to reach a determination which is procedurally improper, fails to take into account relevant considerations or which takes into account irrelevant considerations, is irrational, or is otherwise *ultra vires* the scope of the enabling statute. Moreover, the Legislature must have been free to choose to allow the Public Prosecutor to act in bad faith and/or maliciously if it wished to; it is only by the Legislature's generosity that the Public Prosecutor is forbidden from so acting. As pernicious as this would sound, this is the implication of the following passage from the High Court's judgment in *Nagaenthran*:

> [A]nother reason why s 33B(4) of the MDA should be considered constitutionally valid is that, even though the Public Prosecutor's determination under s 33B(2)(b) is one that is non-justiciable, Parliament has notably still *elected* to provide for limited review of the Public Prosecutor's determination on the grounds of bad faith and malice. In other words, s 33B(4) is not a complete ouster clause, but a mere partial ouster clause. It thus appears fair, in the circumstances, to find that Parliament has in fact *legislated to provide* [a] "reasonable balance…"[54]

For the reasons stated above, it is submitted that the true reason why the Public Prosecutor's exercise of discretion ought to be held to be reviewable on the grounds of bad faith and malice is *not* that Parliament has chosen to allow such review to take place, but simply that: (a) these are established justiciable legal limits to the exercise of executive power; (b) the courts, in the exercise of judicial power, must enforce these limits. There is no reason why this logic ought not to apply to *other* established legal limits, such as that executive power must not be exercised in breach of natural justice, on the basis of irrelevant considerations, or in a *Wednesbury* unreasonable manner.

3.5 Ouster clauses and the rule of law: a historical view

In fact, the Legislature has tacitly *agreed* with the view that ouster clauses are unconstitutional, as may be seen from its behaviour vis-à-vis the Internal Security Act. In *Chng Suan Tze*, the Court of Appeal reviewed (and quashed) the applicants' detention under the Internal Security Act, pointing out that there was 'no ouster clause' in the Act.[55] Subsequently, the Legislature

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54 *Nagaenthran* (n 1) [98] (emphasis added).

55 *Chng Suan Tze* (n 41) [86].

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added an ouster clause to the Internal Security Act.[56] At the same time, the Legislature, in the exercise of its constituent power, enacted Article 149(3) of the Constitution, which specifically provided that the ouster clause contained in emergency and anti-subversion legislation (including the Internal Security Act) is to be immunised from challenge under Article 93.[57]

It is telling that the Legislature saw the need to go to such lengths to immunise an ouster clause from challenge under Article 93, which must evince a view on the part of the Legislature that an ouster clause is otherwise a *prima facie* violation of Article 93. In so doing, the Legislature 'implicitly endorsed' the *general* principle[58] 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'.[59] These views were held by the Legislature *qua* constituent assembly, and must therefore trump subsequent views held by the Legislature in the course of passing ordinary legislation such as section 33B(4).

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56 The Internal Security Act 1985, rev edn, s 8B states that, save for 'any question relating to compliance with any procedural requirement of this Act', 'the law governing the judicial review of any decision made or act done in pursuance of any power conferred upon the President or the Minister by the provisions of this Act shall be the same as was applicable and declared in Singapore on the 13th day of July 1971; and no part of the law before, on or after that date of any other country in the Commonwealth relating to judicial review shall apply'. According to the Court of Appeal in *Teo Soh Lung v Minister for Home Affairs* [1990] SGCA 5, the law which 'was applicable and declared in Singapore on the 13th day of July 1971' refers to the statement in *Lee Mau Seng v Minister for Home Affairs* [1971] SGHC 10 (HC) [54]–[55] that the power of preventive detention is to be 'exercised on the sole responsibility of the highest executive body, ie the President acting in accordance with the advice of the Cabinet, whose discretion is final' and is not subject to a 'a judicial enquiry into the sufficiency of the grounds to justify the detention.'.

57 The Constitution, art 149 relates to legislation which 'recites that action has been taken or threatened by any substantial body of persons, whether inside or outside Singapore – (a) to cause, or to cause a substantial number of citizens to fear, organised violence against persons or property; (b) to excite disaffection against the President or the Government; (c) to promote feelings of ill-will and hostility between different races or other classes of the population likely to cause violence; (d) to procure the alteration, otherwise than by lawful means, of anything by law established; or (e) which is prejudicial to the security of Singapore'. The Internal Security Act 1985 is such legislation. Under art 149(3), '[i]f… any question arises in any court as to the validity of any decision made or act done in pursuance of any power conferred upon the President or the Minister' by such legislation, 'such question shall be determined in accordance with the provisions of any law as may be enacted by Parliament for this purpose; and nothing in Article 93 shall invalidate' such a provision. The 'provision' in question is s 8B of the Internal Security Act 1985.

58 *Yong Vui Kong* (n 30) [79].

59 *Chng Suan Tze* (n 41) [86].

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Moreover, even then, the Court of Appeal explicitly declined to hold that the ouster clause in the Internal Security Act, while purporting to exclude a 'judicial enquiry into the sufficiency of the grounds to justify the detention',[60] necessarily excludes the power of judicial review in a case where 'a person is detained for reasons which have nothing to do with national security'[61]—such as by reason only of having 'red hair'[62] (a classic example of *Wednesbury* irrationality).[63]

In short, the intention of the Legislature *qua* framer of the Constitution is as follows. First, ousting judicial review is incompatible with Article 93 of the Constitution. Second, this cannot be overcome by anything short of an explicit constitutional provision to the contrary. The courts have added that even in the presence of such a constitutional provision, even what appears at first glance to be a statutory provision completely ousting judicial review may not be treated as such. It is regrettable that the High Court in *Nagaenthran* did not engage thoroughly with these points. Instead, the High Court stated that:

> '[T]he applicant's objection that s 33B(4) is in contravention of the rule of law also lacks any merit, given that it has been amply demonstrated that s 33B(4) in fact imposes appropriate limits on the discretion of the Public Prosecutor in issuing certificates of substantive assistance by allowing for limited judicial review, such that it cannot be said that the Public Prosecutor has unfettered discretion in this regard.[64]

This passage gives insufficient weight to the importance of judicial review in upholding the rule of law and the centrality of judicial review to judicial power. Its only response is to point to the fact that judicial review is at least possible on *some* grounds. Taken to its extreme, this reasoning would turn constitutional supremacy on its head. Its effect is that, instead of the constitutional principle of the rule of law giving rise to a reluctance (both legislative and judicial) to truncate judicial review, [65] it is ordinary legislation which dictates the content and

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60 *Lee Mau Seng* (n 56) [54].

61 *Teo Soh Lung* (n 56) [26].

62 ibid [25] read with [15].

63 *Wednesbury Corporation* (n 44) discussing *Short v Poole Corporation* [1926] Ch 66 (EWCA) 90–91.

64 *Nagaenthran* (n 1) [97].

65 *Chng Suan Tze* (n 41) [86].

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extent of the rule of law. This risks paving the way for a tokenistic version of the rule of law which is satisfied as long as there is *some* legal limit, however small, on executive power.

3.6 Ouster clauses are not saved by the idea of a 'reasonable balance' of judicial power

Let us next consider the argument that this risk did not eventuate in *Nagaenthran* because, to the extent that section 33B(4) has ousted judicial power, such ousting is justifiable as it has struck a 'reasonable balance' by preserving judicial review on certain grounds.[66]

The immediately apparent point is that the court did not explain exactly *what* a 'reasonable balance' might entail. The High Court did not provide any explanation for stating *why* the 'balance' was 'reasonable',[67] other than that, as we have observed, *some* ground of judicial review (however small) was available. That would mean that any 'partial' ouster clause would *ipso facto* be constitutional, however large the inroad it makes into judicial power.

There is a more fundamental point. It is, with respect, not clear why a 'balance' ought to be relevant at all. It might have been relevant if the applicable legal framework had been one of persons' *right* to judicial review. This may be illustrated by jurisprudence from New Zealand. In some cases, ouster clauses were challenged on the basis of section 27(2) of the New Zealand Bill of Rights Act 1990 (NZBORA), which provides that:

> Every person whose rights, obligations, or interests protected or recognised by law have been affected by a determination of any tribunal or other public authority has the right to apply, in accordance with law, for judicial review of that determination.

Accordingly, access to judicial review is subject to the usual concepts relevant to the adjudication of rights claims, such as proportionality analysis of statutory limitations to the right.

For example, in *Mangawhai Ratepayers and Residents Association Inc v Kaipara District Council*, Miller J (albeit in the minority of the New Zealand Court of Appeal) would have 'defer[red] to Parliament on the question of justification' by according Parliament a

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66 *Nagaenthran* (n 1) [98].

67 Lee Zhe Xu, 'When is an Ouster Clause Ousted?' *Singapore Law Blog* (6 July 2018) <www.singaporelawblog.sg/blog/article/214> accessed 6 October 2018.

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'substantial margin of appreciation',[68] and so held that the ouster clause was 'proportional to the legislative objective' and therefore a 'reasonable and demonstrably justified' limit on the right.[69] So, too, would the New Zealand Court of Appeal in *AFFCO New Zealand Limited v Employment Court*, had it held that the right in section 27(2) had *prima facie* been infringed.[70]

It is in *that* context that the concept of 'balancing' is appropriate, for rights, by their nature, stand to be balanced. But the Singapore Constitution does not take the approach of making judicial review a *right*. Rather, it speaks of *authority* to engage of judicial review through Article 93: 'The judicial power of Singapore shall be vested in a Supreme Court and in such subordinate courts as may be provided by any written law for the time being in force.' There is no mention of any balancing, any truncation of judicial power, or any transfer of judicial power to other bodies;[71] nor can there be, for the Constitution confers judicial power on the courts in *absolute* terms. Therefore, the High Court erred in using the concept of 'balancing' of restrictions on judicial power or transfers of judicial power to other bodies to justify the existence of section 33B(4) and render it constitutional.

Neither is the concept of 'balancing' warranted by the nascent doctrine of 'co-equality', to which the High Court had referred in passing.[72] On Swati Jhaveri's account, according to the principle of 'co-equality' there is scope for 'significant give-and-take between the Judiciary

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68 [2015] NZCA 612 (New Zealand Court of Appeal) [100] (Miller J).

69 *Mangawhai Ratepayers and Residents Association* (n 68) [110]–[111] (Miller J).

70 [2017] NZCA 123. The Court of Appeal held that s 27(2) of the NZBORA had not been breached. But it suggested that this was because '[t]he right to apply for judicial review under s 27(2) [of the NZBORA] is expressed to be a right exercisable only "in accordance with law"', and the statute had conferred judicial review jurisdiction only on the Court of Appeal, which, being a 'creature of statute', 'has no inherent jurisdiction and unlike the High Court it does not have a general supervisory jurisdiction to review the decisions of public bodies': [35]. This suggests that s 27(2) may *prima facie* have been breached if the statute in question had not provided that the application for judicial review 'must be made to… the Court of Appeal': [20]. (On a side note, the Court of Appeal's reasoning is open to question as it does not address the compliance with s 27(2) of the statute's requirement that judicial review applications be made only to the Court of Appeal and not to the High Court.)

71 To the contrary, judicial power is vested *exclusively* in the courts: *Mohammad Faizal bin Sabtu* (n 52) [17].

72 *Nagaenthran* (n 1) [60] and [89(d)].

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and Executive'.[73] According to Jhaveri, the doctrine of 'co-equality' guides the court in striking a 'balance between the two branches'[74] by exercising judicial review with appropriate intensity while still leaving a 'significant amount of decisional space… to the Executive',[75] instead of placing either branch above the other in a 'hierarchy'.[76] This might explain why the court may choose to *attenuate* the intensity of the application of each ground of judicial review. This would simply be a recognition of the inherent limitations of the judicial role. For example, it would inherently be difficult for the courts to conclude that there is sufficient evidence that the Public Prosecutor has given insufficient weight to relevant considerations. This is because the Judiciary, unlike the Executive, lacks the competence to determine what weight is to be given to various considerations in maintaining the fight against the drugs are. It is in *this* sense that the Judiciary is to seek a 'balance'.

But it does not follow that the 'co-equality' theory must necessarily lean in favour of the Executive. According to the High Court, the 'co-equal status of the prosecutorial power and the judicial power' justified the application of the maxim '*omnia praesumuntur rite esse acta* (*ie*, all things are presumed to have been done rightly and regularly until the contrary is shown)'.[77] But this in and of itself tells us little, for the question is precisely what it will take for the 'contrary [to be] shown'. It is true that, for example, it may take a great deal to convince the courts that the executive's decision has been irrational, for the Executive is, to put it bluntly, the 'expert' in that regard. But is the court not the specialist *par excellence* in, say, what constitutes a fair hearing? In this regard, as Jhaveri points out, co-equality is a principle that may operate not only to '*restrict* the scope of judicial review',[78] but also to justify the court 'stepping into a *stronger* role'.[79] To the contrary, the High Court's decision uses the concept of a 'reasonable balance' only to *weaken* the court's role, and does not even consider situations in which the 'reasonable balance' ought to weigh in favour of *more intense* review.

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73 Swati Jhaveri, 'Localising Administrative Law in Singapore: Embracing Inter-branch Equality' (2017) 29 Singapore Academy of Law Journal 828, 837.

74 ibid 839.

75 ibid 839.

76 ibid 831.

77 *Nagaenthran* (n 1) [61].

78 Jhaveri (n 73) 836.

79 Jhaveri (n 73) 839 (emphasis added).

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Instead, the High Court's decision uses the concept of a 'reasonable balance' to justify the courts' completely *disabling* themselves from quashing a decision tainted by irrationality, irrelevant considerations, etc.—*even if these grounds have been clearly made out*. Far from recognising the 'co-equality' of branches, this effectively places the Executive in an *exalted* status over the Judiciary, as the Executive would be able to escape scrutiny in respect of even *demonstrably* unlawful action. It is one thing to claim that 'co-equality' requires that the 'acts of high officials of state [including the Public Prosecutor] should be accorded a presumption of legality or regularity'.[80] But it is quite another to claim that, even in the event that this presumption (however strong it may be) has been successfully rebutted, the courts may nonetheless do nothing. The point of co-equality is that, even as the Executive has its role, the 'specific responsibility for pronouncing on the legality of government actions falls on the Judiciary'.[81] Upholding an ouster clause—even a 'partial' ouster clause—would, contrary to the rule of law, disable the Judiciary from 'pronouncing on the legality of government actions' even in the event that the said actions are *manifestly* unlawful. Given this, it can be no answer to argue that the Legislature has, by an act of grace, nonetheless allowed the Judiciary to perform its role in respect of just *some* types of unlawfulness.

3.7 Conclusion on the constitutionality of section 33B(4)

For all these reasons, the High Court's reasoning that section 33B(4) is compatible with Article 93 of the Constitution cannot be supported. The High Court concluded that 's 33B(4) is in fact an exemplar of the separation of powers principle in action.'[82] This is certainly true in one sense: it prevents the courts from intruding into the sphere of the Public Prosecutor's sphere of executive power. However, in its focus on this point, the High Court neglected to engage carefully with other facts of the separation of powers, such as the need to prevent the Legislature from withholding judicial power from the courts as and when it sees fit.

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80 *Ramalingam Ravinthran v Attorney-General* [2012] SGCA 2 [46] cited in *Nagaenthran* (n 1) [60].

81 *Tan Seet Eng* (n 24) [90].

82 *Nagaenthran* (n 1) [97].

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4 The *Anisminic* principle

After discussing the constitutionality of section 33B(4), the High Court then discussed the *Anisminic* principle and stated that:

> '[A]n administrative determination that has been tainted by a jurisdictional error of law should indeed be considered a nullity, with the effect that an ouster clause is ineffective in ousting the jurisdiction of the courts in reviewing the determination on the basis of that particular error of law.[83]

4.1 The Anisminic principle vis-à-vis the constitutional point

Given its decision on the constitutional point, one might wonder why the High Court considered the *Anisminic* issue at all. As we have seen, the High Court held that the Legislature had effectively 'exclude[d] from the province of judicial power the review of the legality of the Public Prosecutor's determination regarding whether to issue a certificate of substantive assistance',[84] and that this exclusion was for good reasons. If the High Court had been so concerned to uphold the will of Parliament as regards the courts' power to review the Public Prosecutor's determination, how could it then be that the courts may underhandedly undermine that same Parliamentary will by reference to the common-law doctrine in *Anisminic*?

In other words, the High Court, by considering the *Anisminic* issue after the constitutional issue, effectively proceeded on the basis that both Article 93 of the Constitution and the *Anisminic* doctrine are alternative reasons, of equal standing, to disapply what is ostensibly an ouster clause. With respect, this approach is conceptually mistaken. Constitutional supremacy demands that the common law, including the common law relating to the *Anisminic* issue, must *itself* be tested for its constitutionality.

Because of the High Court's considering the *Anisminic* issue in isolation from the constitutional issue, the discussion of the scope of the *Anisminic* principle was deprived of an important dimension. The High Court, in asking 'whether all errors of law should be considered jurisdictional errors of law which would cause administrative determinations tainted by them

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83 ibid [117].

84 ibid [81].

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to be considered nullities',[85] unfortunately did not consider whether the answer might lie in Article 93 of the Constitution.

Article 93 arguably demands that *all* errors of law be considered jurisdictional errors of law. This is for the following reason. According to Article 93 of the Constitution, the courts (and only the courts) have judicial power. Judicial power must include the power to state the law authoritatively: 'the Judiciary has the responsibility for the adjudication of controversies which carries with it the power to pronounce authoritatively and conclusively on the meaning of the Constitution and all other laws'.[86] Therefore, there can be no such thing as an error of law which the executive has the jurisdiction to commit, for that would amount in effect either to allowing the executive to state the law authoritatively—in other words, to exercise judicial power—or to allowing the executive to get away with breaking the law.[87] On this latter point, it is useful to refer to the remarks of Lord Griffiths in *Page*:

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85 ibid [118].

86 *Tan Seet Eng* (n 24) [90]. See also *Marbury v Madison* 5 US (1 Cranch) 137 (1803) (US Supreme Court) 137: 'It is emphatically the duty of the Judicial Department to say what the law is. Those who apply the rule to particular cases must, of necessity, expound and interpret the rule.'

87 Support for this view may also be drawn from *(Cart) v Upper Tribunal* [2011] UKSC 28 [111], where Lord Dyson agreed with *de Smith's Judicial Review* (6th edn, 2007) [4-046] that '[t]he distinction between jurisdictional and non-jurisdictional error is ultimately based on foundations of sand. Much of the super-structure had already crumbled. What remains is likely quickly to fall away as the courts rightly insist that all administrative actions should be simply, lawful, whether or not jurisdictionally lawful.' Signs of such 'crumbling' may be seen in *O'Reilly v Mackman* [1983] 2 AC 237 (UKHL) 278E (Lord Diplock); *R v Lord President of the Privy Council, ex parte Page* [1993] AC 682 (UKHL) 701F (Lord Browne-Wilkinson); *Cart* (n 87) [33] (Lady Hale). Cases seemingly to the contrary such as *Page* (n 87) and *R (Privacy International) v Investigatory Powers Tribunal* [2017] EWCA Civ 1868 (EWCA), which suggest that there are bodies whose decisions are not reviewable on the grounds of error of law, may not only be distinguished on the ground that the UK has no equivalent of Article 93 of Singapore's Constitution, but may also be explained on the basis that these bodies are in reality exercising judicial and not executive power: see Robert Craig, 'The Fall-out from *Evans*: Positioning *Roszkowski* and *Privacy International* in a Post-*Evans* Constitutional Landscape (Part 2)' *UK Constitutional Law Blog* (11 December 2017) <www.ukconstitutionallaw.org/2017/12/11/robert-craig-the-fall-out-from-evans-positioning-roszkowski-and-privacy-international-in-a-post-evans-constitutional-landscape-part-2/> accessed 30 July 2018. See also Paul Daly, 'Thinking Again About Ouster Clauses: *R (Privacy International) v Foreign and Commonwealth Secretary* [2017] EWCA Civ 1868' *Administrative Law Matters* (10 January 2018) <www.administrativelawmatters.com/blog/2018/01/10/thinking-again-about-ouster-clauses-r-privacy-international-v-foreign-and-commonwealth-secretary-2017-ewca-civ-1868/> accessed 30 July 2018; Thomas Fairclough, '*Privacy International*: Constitutional Substance over Semantics in Reading Ouster Clauses' *UK Constitutional Law Blog* (4 December 2017)

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> The purpose [of judicial review] is to ensure that those bodies that are susceptible to judicial review have carried out their public duties in the way it was intended they should. In the case of bodies other than courts, in so far as they are required to apply the law they are required to apply the law correctly. If they apply the law incorrectly they have not performed their duty correctly… [88]

4.2 The scope of the Anisminic principle: the High Court's reference to the 'green-light' theory of administrative law

The High Court in *Nagaenthran* did not engage with this point. To some extent, the reason for this is that the High Court did not have the benefit of counsel's submissions on this matter.[89] Nonetheless, the High Court offered the following preliminary remark:

> [A] situation where *any* administrative decision, when tainted by an error of law, can easily be construed as a nullity would not appear to be aligned with the "green-light" approach towards administrative law, which is presently the most accurate reflection of the socio-political attitude in the existing Singapore milieu. [90]

A reader not familiar with the Singapore jurisdiction may be puzzled by a judicial reference to Harlow and Rawlings's 'green-light' (and 'red-light') models.[91] Singapore may well be the only common-law jurisdiction whose courts have not only cited these models, but also endorsed one of them. The models were brought to prominence in the Singaporean literature by then-Chief Justice Chan Sek Keong, who in a 2012 lecture defined the '"green-light" approach' as one which 'sees public administration not as a necessary evil but a positive attribute, and the objective of administrative law as not (primarily) to stop bad administrative practices but to encourage good ones', and suggested that such an approach is 'more appropriate for Singapore'.[92] This notion found its way into the case law: in a 2013 case, the Court of Appeal quoted this lecture and suggested that the 'green-light' model explains the

<www.ukconstitutionallaw.org/2017/12/04/thomas-fairclough-privacy-international-constitutional-substance-over-semantics-in-reading-ouster-clauses/> accessed 30 July 2018.

88 *Page* (n 87) 693B.

89 *Nagaenthran* (n 1) [119].

90 ibid [123].

91 See Carol Harlow and Richard Rawlings, *Law and Administration* (3rd edn, Cambridge University Press 2009) ch 1.

92 Chan (n 4) 480.

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Singapore courts' restrictive approach toward *locus standi*.[93] In this manner, a descriptive model started to be treated as a prescriptive theory.[94]

In *Nagaenthran*, the High Court *explicitly* relied on the 'green-light' model as a possible justification for holding that not all errors of law are jurisdictional. With respect, such a view is a distortion of the 'green-light' model, and should be rejected. As Eugene K B Tan points out,

> [A] binary categorisation of the curial role in judicial review [as either 'red-light' or 'green-light'] runs the risk of being simplistic, if not misleading. A court motivated by a green-light approach is not going to act differently from any other court where the administrative action complained of is unlawful or unconstitutional or when a legislative provision is unconstitutional.[95]

Similarly, as Lee Zhe Xu puts it,

> [The 'green-light' model] only requires that judicial review not be decoupled from the fundamental precepts of adversarial litigation (see *Jeyaretnam Kenneth* at [47]–[48]),[96] i.e. that the rules of standing should not be unduly loosened and that judicial review should focus on vindicating individual rights, not matters of public policy (see *Jeyaretnam Kenneth* at [55]–[56]). It does not require that the courts continue to hold back even when some irregularity in the decision-making process has been proven, which is what *Nagaenthran* appears to suggest.[97]

Chief Justice Chan himself recognised this point in his lecture:

> [A] court, if it chooses not to follow the *Anisminic* logic, will find that its jurisdiction can always be ousted by Parliament, which may not be conducive to good administration, even on a green-light view.[98]

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93 *Jeyaretnam Kenneth Andrew v Attorney-General* [2013] SGCA 56 [47]–[50].

94 For discussion, see Benjamin Joshua Ong, 'Public law theory and judicial review in Singapore' (2013) December(1) Singapore Law Watch Commentary 1 <ink.library.smu.edu.sg/sol_research/2451/> accessed 1 March 2019.

95 Eugene K B Tan, 'Curial Deference in Singapore Public Law: Autochthonous Evolution to Buttress Good Governance and the Rule of Law' (2017) 29 Singapore Academy of Law Journal 800, 806. See also Chen Zhida, 'The Nature of Judicial Review in Singapore' (2013) 31 Singapore Law Review 79, 97: 'Notwithstanding the green-light theory of administrative law, the judicial review of the exercise of discretionary power must remain within the domain of the Judiciary, unless specifically excluded by the Constitution.'

96 This is a reference to *Jeyaretnam* (n 93).

97 Lee (n 67).

98 Chan (n 4) 480.

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In other words, the 'green-light' model is not a licence for the courts to stand idly by in the face of an error of law—which is the area in which the courts must, by virtue of their institutional competence and constitutional authority, have the last word. The 'green-light' model, even if it may be taken to be prescriptive rather than descriptive, at most advocates a greater level of deference to the executive in considering the question of whether the executive has committed an error of law.[99] It cannot warrant a judicial refusal to consider that question in the first place.

Indeed, one might well say that the role of the courts in the 'green-light' model, which the High Court said was to 'hel[p] to articulate clear rules and principles which the government may abide by and conform to',[100] would be *better* served if the ouster clause were not effective, for then the court would be in a position to articulate guidance on matter such as the various considerations which are relevant and irrelevant to the executive's exercise of discretionary power and the norms of procedural fairness to which the executive ought to adhere.

5 Broadening the scope of judicial review on the ground of unconstitutionality

We have argued that the High Court erred in deciding as it did on the ouster clause. However, even if the critical comments above were to be rejected, the scope of judicial review of the Public Prosecutor's discretion ought yet to be broader than it was suggested in *Nagaenthran* to be. The High Court accepted that section 33B(4) allows judicial review on the grounds of bad faith, malice, and unconstitutionality.[101] As for this last ground of review, the applicant claimed that the Public Prosecutor had acted unconstitutionally due to non-compliance with the constitutional provisions creating the rights to life and to equality before the law.[102] However, an examination of the case law reveals a definition of 'unconstitutionality' which is broader than simple non-compliance with the terms of constitutional provisions.

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99 Chen (n 95) 93ff. Note also the author's argument at 97: 'Notwithstanding the green-light theory of administrative law, the judicial review of the exercise of discretionary power must remain within the domain of the Judiciary, unless specifically excluded by the Constitution.'

100 *Nagaenthran* (n 1) [123].

101 ibid [2] citing *Muhammad Ridzuan bin Mohd Ali* (n 22) [35]. Although unconstitutionality is not one of the grounds of review mentioned explicitly in s 33B(4), '[t]his ground of review flows from the doctrine of constitutional supremacy': *Muhammad Ridzuan bin Mohd Ali* (n 22) [35].

102 *Nagaenthran* (n 1) [59] referring to Articles 9(1) and 12(1) of the Constitution.

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In the 2008 case of *Tan Guat Neo Phyllis*, the High Court stated that the courts have the power to 'prevent the prosecutorial power from being exercised unconstitutionally'.[103] However, the High Court went on to define 'unconstitutional exercise of prosecutorial power'[104] to include not only 'contraven[ing] constitutional rights', but also the use of prosecutorial power 'in bad faith for an extraneous purpose'.[105] This subtle move is of crucial importance because it tacitly recognised that there are constitutional norms other than those explicitly stated in the Constitution which constrain executive (and, it would stand to reason, legislative) power.

It is important to note that this was not a simple application of the classic administrative-law grounds of review of 'bad faith'[106] or 'improper purposes'.[107] The Court of Appeal did not take the view that exercises of prosecutorial discretion are, like any exercises of executive discretion, reviewable on the traditional administrative law grounds. Instead, it treated prosecutorial discretion as being subject to a different, *sui generis*, set of grounds of review: 'except for unconstitutionality, the Attorney-General has an unfettered discretion as to when and how he exercises his prosecutorial powers'.[108] Therefore, the only way to make sense of the grounds of appeal recognised in that case was that the Court of Appeal had elevated these administrative-law norms to constitutional status, and so broadened the definition of 'unconstitutionality'.

Subsequently, in *Yong Vui Kong*, the Court of Appeal held that the exercise of the clemency power was reviewable 'on the same legal basis' as that stated in *Phyllis Tan* in

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103 *Tan Guat Neo Phyllis* (n 38) [146]. It should be noted that the High Court was constituted by three judges instead of the usual one, which gives this case especial precedential value as a three-judge High Court is a 'de facto Court of Appeal': *Chew Eng Han v Public Prosecutor* [2017] SGCA 60 [47] (emphasis in original omitted).

104 *Tan Guat Neo Phyllis* (n 38) [148].

105 ibid.

106 See eg *Teng Fuh Holdings Pte Ltd v Collector of Land Revenue* [2007] SGCA 14 [38].

107 See eg *Public Prosecutor v Pillay M M* [1977] SGHC 7; *Chng Suan Tze* (n 41) [86].

108 *Tan Guat Neo Phyllis* (n 38) [145].

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relation to the prosecutorial power.[109] The Court of Appeal went on to make several more statements:

1 Because the clemency process in death penalty cases required that various materials be placed before the Cabinet,[110] there is a 'constitutional duty on the Cabinet's part to consider those materials impartially and in good faith before it advises the President on the exercise of the clemency power',[111] breach of which would render the decision unlawful.[112]
2 The making of clemency decisions is subject to the 'administrative law rules of natural justice' (save to the extent that they were inconsistent with the terms of the Constitutional provisions governing the exercise of clemency power).[113]
3 The Cabinet was not entitled to decide the question of clemency by 'merely toss[ing] a coin', nor by 'never me[eting] to consider the offender's case at all'.[114]

Again, the only way to make sense of all these remarks is to conclude that the definition of unconstitutionality includes not only violation of constitutional rights, but also such things as bad faith, arbitrariness, failure to direct one's mind to a pertinent issue,[115] and bias.

The Singapore courts have not yet explicitly recognised what subtly took place in these cases, namely, that they expanded the definition of unconstitutionality in the manner described above to include violations of norms other than those *explicitly* enumerated in the Constitution. The High Court's decision in *Nagaenthran* did not have occasion to engage with this point either, evidently because the applicant did not raise it. It is hoped that this point will be taken up in future: the expanded definition of unconstitutionality could potentially mean that, even if ouster clauses are constitutionally valid and are held to effectively oust judicial review of errors

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109 *Yong Vui Kong* (n 30) [80].

110 The Constitution, art 22P(2).

111 *Yong Vui Kong* (n 30) [82].

112 ibid [83].

113 ibid [108].

114 ibid [83].

115 On a related note, the Court of Appeal has also held that 'tak[ing] into account irrelevant considerations' is a violation of the guarantee of equality before the law under Article 12(1) of the Constitution: *Ramalingam* (n 80) [23].

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of law within jurisdiction, there could still be various unwritten constitutional norms providing minimum standards to which all exercises of executive power must adhere.

6 Conclusion

We have analysed the High Court's reasoning in *Nagaenthran* and identified several problems with it, which, if left unchecked, may have the effect of undermining the fundamental principle of constitutional supremacy as well as the constitutional role of the Judiciary. We have presented arguments to the effect that the High Court ought to have held that ouster clauses are unconstitutional under Singapore law and, in particular, cannot be allowed to grant executive decision-makers a licence to commit non-jurisdictional errors of law. Finally, we have argued that the effect of these problems is tempered by the potential for a wider definition of unconstitutionality as a ground of review than was canvassed before the High Court. It is respectfully hoped that the Singapore courts may address all of these issues more robustly in future.