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Form and Substance in Singapore Constitutional and Administrative Law

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Abstract
While Atiyah's and Summers' concepts of form and substance in the context of constitutional law are often associated with constitutional interpretation, they can also be fruitfully applied to other areas of constitutional and administrative law. The intent of this paper is to apply the concepts of form and substance to Singapore constitutional and administrative law to illustrate that beyond constitutional interpretation, formalism is an apt description for several key areas of constitutional and administrative law doctrine and reasoning in Singapore, even to the extent of being formalistic. This article will argue that formalism in legal reasoning obtains in several important constitutional and administrative law doctrines in Singapore – specifically in the grounds of judicial review, ouster clause doctrine, and the rules on standing. This article will also evaluate the implications of these findings for the development of constitutional and administrative law in Singapore.

I. FORM AND SUBSTANCE BEYOND CONSTITUTIONAL INTERPRETATION

Patrick S Atiyah's and Robert S Summers' *Form and Substance in Anglo-American Law*[1] is a model of robust and compelling comparative legal analysis. Indeed, their careful articulation of the concepts of 'form' and 'substance' contributed a set of immensely useful descriptive concepts which have subsequently been drawn upon by legal scholars around the world in a variety of legal domains.

This article proposes to study constitutional and administrative law in Singapore through the lenses of these concepts in order to discern fruitful avenues for the development of Singapore constitutional and administrative law. Form and substance in

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1. Patrick S Atiyah & Robert S Summers, *Form and Substance in Anglo-American Law: A Comparative Study of Legal Reasoning, Legal Theory, and Legal Institutions* (Oxford University Press 1991).

the context of constitutional law is often associated with constitutional interpretation, especially in view of the prominence of self-avowed formalists in constitutional interpretation in the US. Indeed, formalism in constitutional interpretation in Singapore is a ground that has been well-traversed by legal scholars. However, the concepts of form and substance are relevant beyond constitutional interpretation, and they can be fruitfully applied to other areas of constitutional and administrative law as well. Accordingly, this article intends to apply Atiyah's and Summers' concepts of form and substance to Singapore constitutional and administrative law to illustrate that, beyond constitutional interpretation in Singapore, formalism is also an apt description for several key areas of Singapore constitutional and administrative law doctrine and reasoning, even to the extent of being formalistic.

To that end, this paper will proceed in three parts. Following this introduction, Part II will describe Atiyah's and Summers' concepts of form and substance and substantiate the normative implications of their ideas. Part III will argue that formalism in legal reasoning obtains in several key constitutional and administrative law doctrines in Singapore – specifically in the grounds of judicial review, ouster clause doctrine, and the rules on standing. The final Part will evaluate the implications of these findings for the development of constitutional and administrative law in Singapore.

II. THE CONCEPTS OF FORM AND SUBSTANCE

Atiyah and Summers, in their celebrated work *Form and Substance in Anglo-American Law*, applied the concepts of form and substance as descriptors of legal systems – indeed, their ultimate thesis was that the English legal system was more formal while the American legal system was more substantive. Form and substance, in the context of legal systems, captures the difference between a vision of law as 'a system of rules', and law as 'an outward expression of the community's sense of justice'.[2]

Form and substance are powerful descriptive concepts that can describe the structure of governing institutions,[3] the criteria of legal validity as a matter of the prevailing legal theory of a regime,[4] and systems of precedent.[5] But it was the concepts of form and substance in relation to legal reasoning that formed the building blocks of Atiyah's and Summers' argument. Atiyah and Summers described a substantive reason as 'a moral, economic, political, institutional or other social

2. Atiyah & Summers (n 1) 5; David F Partlett, 'The Common Law As Cricket' (1990) 43 Vanderbilt Law Review 1401, 1410.

3. Robert S Summers, 'The Formal Character of Law' (1992) 51 Cambridge Law Journal 242, 258.

4. Robert S Summers, 'On Analyzing and Characterizing the General Style of a Legal System as Formal or as Substantive' (1992) 23 Rechtstheorie 27, 28; viewed through this lens, form and substance bear close links with legal positivism and non-positivism respectively as theories of legal validity. See Brendan O'Leary, 'What Should Public Lawyers Do' (1992) 12 Oxford Journal of Legal Studies 404, 408.

5. Atiyah & Summers (n 1) 9; Summers (n 4) 30; see also Summers (n 3) 253; see also Stephen J Hammer, 'Retroactivity and Restraint: An Anglo-American Comparison' (2018) 41 Harvard Journal of Law and Public Policy 409, 435.

consideration'.[6] There are two basic types of substantive reasons – goal reasons and rightness reasons. Goal reasons derive their justificatory force by reference to the extent to which the decision or rule that it supports leads to beneficial social effects; for example, the facilitation of democracy.[7] Rightness reasons, on the other hand, derive their justificatory force by reference to the extent to which a decision or rule accords with a 'socio-moral norm of rightness'.[8]

A formal reason is 'a legally authoritative reason on which judges and others are empowered or required to base a decision or action, and such a reason usually excludes from consideration, overrides, or at least diminishes the weight of any countervailing substantive reason arising at the point of decision or action'.[9] Formal reasons are predominantly concerned with issues of source or validity, and are concomitantly less concerned with issues of rightness or goals. In other words, a reason would be formal to the extent that it is based on whether the relevant rule or decision to be relied upon is promulgated by a competent authority and in accordance with the correct legal processes, and *not* the rightness or effectiveness of the rule or decision.[10]

Atiyah and Summers identified four different aspects of formal legal reasoning. Authoritative formality, which can also be described as validity formality, is concerned with whether the relevant rule originates from a duly authorized and competent lawgiver.[11] Reasoning is thus authoritatively formal to the extent that legal validity is determined by the *source* of the legal rule. Content formality is similarly a matter of degree, and is determined by the degree to which a relevant legal rule is shaped by fiat, as opposed to relevant reasons of substance, and also the extent to which the rule is 'underinclusive or overinclusive in relation to its objectives'.[12] Using traffic rules as an example, a rule mandating that all vehicles shall keep to the left has high content formality, while a rule requiring drivers to maintain reasonable care has low content formality.[13] Interpretive formality describes the extent to which interpretations of legal rules focus 'on literal meanings of words, or on the narrow confines of normative conduct or other phenomena to be interpreted'.[14] In contrast, interpretations become more substantive to the extent that they involve a search for 'underlying purposes and rationales which are implicit in the text or which can be ascertained from other sources', or even 'substantive reasons drawn from other, non-legal sources', such as a judge's 'background political morality'.[15] Finally, mandatory

6. Atiyah & Summers (n 1) 1; Luke R Nottage, 'Form and Substance in US, English, New Zealand and Japanese Law: A Framework for Better Comparisons of Developments in the Law of Unfair Contracts' (1996) 26 Victoria University of Wellington Law Review 247, 251.
7. Atiyah & Summers (n 1) 6; JC Froneman, 'Legal Reasoning and Legal Culture: Our Vision of Law' (2005) 16 Stellenbosch Law Review 3, 6.
8. Atiyah & Summers (n 1) 6.
9. ibid 2; Nottage (n 6) 251; Neil Duxbury, 'Struggling with Legal Theory' (1993) 43 University of Toronto Law Journal 889, 897.
10. Froneman (n 7) 6.
11. Atiyah & Summers (n 1) 7, 12, 42; Partlett (n 2) 1410–1411.
12. Atiyah & Summers (n 1) 13–14.
13. Partlett (n 2) 1411.
14. Atiyah & Summers (n 1) 14–15; Summers (n 4) 29–30; Summers (n 3) 253–254.
15. Atiyah & Summers (n 1) 14–15; Partlett (n 2) 1411; Summers (n 4) 30; Summers (n 3) 254.

formality describes the degree to which 'a formal reason excludes from consideration some contrary substantive reasons'.[16] A reason has a high degree of mandatory formality to the extent that it makes impermissible arguments based on rightness, changes in context, or other substantive considerations.[17] For example, a rule prohibiting all vehicles in a park *simpliciter* has high mandatory formality, while a rule prohibiting all vehicles in a park, subject to an exception for public welfare, has a lower degree of mandatory formality.

Atiyah's and Summers' project is primarily descriptive in ambition. Nevertheless, their work also contains a normative aspect and one can discern normative implications from it. First, one aspect of Atiyah's and Summers' work that goes beyond description is their elaboration of the distinction between formal and 'formalistic' reasoning, and between substantive and 'substantivistic' reasoning.[18] In Atiyah's and Summers' conception, 'formalism' is utilized as a non-pejorative, neutral label for certain species of legal reasoning. Yet, they recognized that such reasoning can degenerate into a type of legal reasoning deserving of a pejorative label, and used the term 'formalistic' to describe such reasoning. Formal reasoning degenerates into formalistic reasoning when, for example, a judge ignores gaps in the law and applies the law in a manner as if it truly generates formal reasons to dispose of the issue at hand.[19] Formal reasoning can also degenerate into formalistic reasoning when judges do not recognize the arbitrariness of a rule, and thereby adhere to it even when doing so would not be justifiable even by reference to substantive reasons generally justifying the usage of formal reasons, such as certainty and consistency.[20] A crucial problem with such formalistic reasoning is that it cloaks the substantive judgements that are the true drivers of decisions in a manner that prevents them from receiving due scrutiny, reducing the transparency of the decision-making process.[21] Atiyah and Summers pointed out that it would be erroneous as well to go too far in the opposite direction – one might degenerate into 'substantivistic' reasoning, for example, by ignoring the clear text of a statute and performing statutory interpretation based on specious accounts of legislative purpose to further one's view of the requirements of justice.[22]

Second, it is important to note that Atiyah and Summers acknowledge the necessity of formalism in any legal system. Indeed, while the concepts of form and substance illustrate important conceptual differences between species of legal reasoning, they do not represent hermetically-isolated categories of legal reasoning. Formal reasons are not entirely divorced from substantive reasons – they usually incorporate or reflect substantive reasons.[23] At a broader level, formal reasoning in itself is incapable of

16. Atiyah & Summers (n 1) 16–17; Partlett (n 2) 1412.
17. Atiyah & Summers (n 1) 8.
18. Partlett (n 2) 1412–1413.
19. Atiyah & Summers (n 1) 28.
20. Atiyah & Summers (n 1) 28.
21. Froneman (n 7) 5, 10.
22. Atiyah & Summers (n 1) 30.
23. ibid 2.

justifying its use in specific instances – it rests on what Atiyah and Summers call 'second-level policies', which are substantive criteria justifying the usage of formal reasoning; for example, the values of certainty or consistency, promoting the finality of legal decision-making, cost-effectiveness, and minimized risk of error.[24] On the flipside, substantive reasons 'cannot be in the law without acquiring a minimal formal element', and just as they shape the law, they may be influenced by the law as well.[25]

The point to be emphasized here is that there are strong substantive justifications for the usage of formal reasoning. In a similar vein, Christopher Forsyth has pointed out that all legal systems 'must have a considerable degree of formalism' for the purposes of efficiency and maintaining fair treatment.[26] Accordingly, the formality of legal rules is a necessary component of legal orders – 'all basic types of legal phenomena necessarily exhibit some degree of formality'.[27] This extends also to the realm of constitutional law, a domain of law that is closely related to substantive considerations implicating political and moral legitimacy.[28] Indeed, Jason Varuhas has made a powerful argument in favour of paying greater attention to formal taxonomic analysis in public law doctrine for the purposes of attaining deeper insight into the law, furthering the ideal of the rule of law, and enhancing the legitimacy of judicial decision-making[29] – in other words, there are important substantive justifications underlying the value of rigorous formal analysis in public law. As such, any prescriptions for the way ahead must be tempered by the realization that formal reasoning is a necessary component of any legal system, and that there can be no total exclusion of formal reasoning if the legal system is indeed to remain a legal one at all.[30] A bare normative prescription in reaction to a diagnosis of excessive formalism which simply proposes more substantive reasoning would not adequately capture these complexities – a more nuanced normative proposal might suggest that a proper balance between formal and substantive reasoning has to be contextualized to different areas of public law, or that formal reasoning is justified to the extent that the substantive justifications for the usage of formal reasoning continue to obtain in a specific context. These normative implications of Atiyah's and Summers' ideas will be returned to later in this paper.

24. Froneman (n 7) 7; Atiyah & Summers (n 1) 24–26.
25. Atiyah & Summers (n 1) 6.
26. Christopher Forsyth, 'Showing the Fly the Way out of the Flybottle: The Value of Formalism and Conceptual Reasoning in Administrative Law' (2007) 66 Cambridge Law Journal 325, 329–331.
27. Summers (n 3) 246–247.
28. Partlett (n 2) 1416.
29. Jason NE Varuhas, 'Taxonomy and Public Law', in Mark Elliott, Jason NE Varuhas & Shona Wilson Stark (eds), *The Unity of Public Law? Doctrinal, Theoretical and Comparative Perspectives* (Hart Publishing 2018) ch 3.
30. Even robust exhortations of more substantive reasoning admit that there cannot be total exclusion of formal reasoning. See eg Geo Quinot, 'Substantive Reasoning in Administrative-Law Adjudication' (2010) 3 Constitutional Court Review 111, 116.

III. FORM AND SUBSTANCE IN CONSTITUTIONAL AND ADMINISTRATIVE LAW IN SINGAPORE

This section will apply Atiyah's and Summers' concepts of form and substance in legal reasoning to constitutional and administrative law in Singapore. It should be noted that the focus of this section will not be on constitutional interpretation, for significant attention has already been paid to the issue of formalism in the context of constitutional interpretation in Singapore.[31] Indeed, form and substance are useful not merely as accounts of constitutional interpretation, but as concepts through which we can understand legal reasoning more broadly. Yet, the applicability of form and substance to other aspects of constitutional and administrative law in Singapore has been the focus of much less attention compared to the well-traversed ground of constitutional interpretation. Accordingly, the focus of this section will be on Singapore's constitutional and administrative legal doctrine and reasoning more generally as areas of law which have not thus far been, but ought to be, examined more carefully through the lenses of form and substance.

The central argument of this paper is that several aspects of Singapore constitutional and administrative law doctrine and reasoning display a high degree of formalism, even to the extent of being formalistic. Three important areas of Singapore constitutional and administrative law will be discussed in turn.

A. *Grounds of Judicial Review – The Legality-Merits Distinction*

It is a trite principle of Singapore administrative law that the permissible grounds of judicial review of administrative action are illegality, irrationality, and procedural impropriety, following the position laid down by the landmark House of Lords decision in *Council of Civil Service Unions v Minister for the Civil Service*.[32] In a series of cases, the Singapore courts have illustrated an inclination against expanding the grounds of judicial review beyond these three traditional grounds, despite developments in English administrative law since then. Indeed, the Singapore courts have often relied on the legality-merits distinction, characterized as a foundational principle of administrative law in Singapore, as a concept to set the boundaries of judicial review and to reject the expansion of grounds of review. This section will argue that in their reliance upon this principle to achieve this end, the Singapore

31. Swati Jhaveri, 'Reflecting on Constitutional Change in Singapore: The Role of the Executive, Legislature, and Judiciary', in Jaclyn L Neo & Swati Jhaveri (eds), *Constitutional Change in Singapore: Reforming the Elected Presidency* (Routledge 2019) ch 9, 236; Yap Po Jen, 'Uncovering Originalism and Textualism in Singapore', in Jaclyn L Neo (ed), *Constitutional Interpretation in Singapore: Theory and Practice* (Routledge 2017) 119–120; Yap Po Jen, 'Constitutionalising Capital Crimes: Judicial Virtue or Originalism Sin' [2011] Singapore Journal of Legal Studies 281, 284; Yvonne Tew, 'Originalism at Home and Abroad' (2014) 52 Columbia Journal of Transnational Law 780, 820–821; Yvonne Tew, 'Comparative Originalism in Constitutional Interpretation in Asia' (2017) 29 Singapore Academy of Law Journal 719, 730; Jaclyn Neo & Yvonne CL Lee, 'Constitutional supremacy: Still A Little Dicey?', in Thio Li-ann & Kevin Tan (eds), *Evolution of a Revolution: Forty Years of the Singapore Constitution* (Routledge 2014) 179–180.

32. *Council of Civil Service Unions v Minister for the Civil Service* [1985] 1 AC 374 (HL).

courts have applied the legality-merits distinction with a high degree of content formality.[33]

The legality-merits distinction is a key principle of Singapore administrative law. Indeed, the Singapore Court of Appeal in *SGB Starkstrom Pte Ltd v Commissioner for Labour*[34] ('*SGB Starkstrom*') affirmed the legality-merits distinction as a critical linchpin in Singapore's judicial review jurisprudence, describing it as a restriction of the review jurisdiction to the decision-making process and the manner in which the decision was made, and not to the decision itself.[35] Accordingly, the legality-merits distinction has been relied upon as a rationale to limit the expansion of grounds of judicial review in Singapore. Several cases demonstrate that the manner in which the legality-merits distinction was invoked for this end evinced a high degree of content formality – put another way, the distinction was applied as a rule established by fiat, with little regard to the substantive considerations underlying the rule.

This tendency can be detected relatively early on in Singapore's public law jurisprudence. In *Lee Mau Seng v Minister for Home Affairs*[36] ('*Lee Mau Seng*') the applicant was detained under the *Internal Security Act* ('ISA') for his activities in relation to a newspaper sympathetic to Chinese Communist concerns. He challenged his detention, inter alia, on the basis that his detention order was made in bad faith and was thus unlawful. The High Court held that the proper approach to judicial review of ISA detentions was a subjective one – put another way, as long as the government could establish that the President, acting in accordance with the advice of Cabinet, was *subjectively* satisfied with the sufficiency of the considerations for detention, there could be no 'judicial enquiry into the sufficiency of the grounds to justify the detention'.[37] In specific relation to the applicant's argument that his detention was carried out in bad faith and thus unlawful, the High Court held that review on the ground of bad faith was not permissible in the context because such review would entail the court being able to 'substitute its own judgment' for that of the President acting in accordance with the advice of the Cabinet.[38]

Thus, in *Lee Mau Seng*, review on the ground of bad faith was precluded on the basis that such review would amount to entering into the merits of the government's decision, and this was impermissible as a contravention of the legality-merits distinction. Such reasoning is an illustration of a highly formal application of the legality-merits distinction. It is based on unarticulated assumptions about what 'legality' and 'merits' mean. The court simply assumed that review on the grounds of bad faith would fall into the category of 'merits' review. But the boundary between 'legality' and 'merits' was not articulated at all, precisely when *how* one drew this boundary would have been dispositive of the question at hand. Indeed, this should be made

33. See Swati Jhaveri, 'Revisiting Taxonomies and Truisms in Administrative Law in Singapore' [2019] Singapore Journal of Legal Studies 351 for an insightful discussion of how the legality-merits distinction is an inadequate heuristic device for determining the proper scope of judicial review.
34. *SGB Starkstrom Pte Ltd v Commissioner for Labour* [2016] 3 SLR 598 (CA).
35. ibid para 56.
36. *Lee Mau Seng v Minister for Home Affairs* [1971–1973] SLR(R) 135 (HC).
37. ibid paras 53–55.
38. ibid paras 58–60.

clear when one observes that it is certainly not a given that review on the ground of bad faith is 'merits' review – the Singapore courts themselves have noted, in other contexts, that review on the ground of bad faith was within the realm of 'legality' review.[39] In short, the court's reasoning amounted to an *assertion* that the legality-merits distinction would be contravened by review on the ground of bad faith. Stated in terms relevant for present purposes, the High Court applied the legality-merits distinction in a very formal manner, almost akin to a rule, in a way that precluded elaboration on or engagement with the substantive considerations underlying the distinction.

A more recent example of such formal usage of the legality-merits distinction can be found in the Court of Appeal decision of *SGB Starkstrom*.[40] In this case, a challenge was mounted against the Commissioner of Labour's decisions in relation to compensation claims for workplace injuries. The Commissioner of Labour had approved the statutory compensation claim, but reversed her initial decision after the original applicant pointed out that he had in fact lacked standing for the first claim. SGB Starkstrom Pte Ltd, faced with potentially higher liability for workplace injuries through a common law claim, argued that it had a substantive legitimate expectation that the statutory compensation claim was valid in view of the Commissioner's first decision.

These arguments presented the Court of Appeal with the opportunity to discuss the applicability of the doctrine of substantive legitimate expectations as a ground of judicial review in Singapore. On this issue, the Court of Appeal first noted that the doctrine of substantive legitimate expectations could have no application to this case, whether or not the doctrine was a part of Singapore law, given that there had been no relevant promise or representation of future behaviour upon which the doctrine could operate.[41] Nevertheless, the Court of Appeal went on to consider whether the doctrine could be accepted into Singapore law. While refraining from expressing a definitive pronouncement on the issue, the Court of Appeal displayed considerable reluctance to accept the doctrine of substantive legitimate expectations as a ground of judicial review in Singapore.

It is worth paying some close attention to its reasoning in this regard. The Court of Appeal first identified the legality-merits distinction as a foundational principle in judicial review in Singapore.[42] It articulated three justificatory principles for this distinction – first, the 'constitutional doctrine of separation of powers' required the judiciary to review only the legality of administrative action; second, doing so would give effect to Parliament's intention to 'vest certain powers in the Executive'; and third, the courts lacked institutional competence to scrutinize executive decisions on the merits.[43] The Court of Appeal went on to conclude that accepting the doctrine

39. See eg *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 (CA); *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 (CA). *Wong Keng Leong Rayney v Law Society of Singapore* [2006] 4 SLR(R) 934 (HC) provides another example.

40. [2016] 3 SLR 598 (CA).

41. ibid paras 41–54.

42. ibid para 56.

43. ibid para 58.

of substantive legitimate expectations would cohere uneasily with this foundational principle of judicial review in Singapore, since it would entail 'a more searching scrutiny of executive action' beyond the presently-accepted paradigm of judicial review, and would require the court to balance between public and private interests in a manner that would exceed its institutional competence and contravene the separation of powers.[44]

This reasoning, it will be argued, once again illustrates a formal usage of the legality-merits distinction. This may appear puzzling at first glance – after all, the Court of Appeal did proffer in this case substantive justifications for the legality-merits distinction as a foundational principle of judicial review. However, the purportedly substantive justifications for the legality-merits distinction still rested on rather formal reasoning. At its core, the Court of Appeal's argument was essentially that the legality-merits distinction is justified on the principle of separation of powers because the doctrine of separation of powers requires courts to stay within the realm of legality. But how exactly would this argument justify an adherence to the traditional grounds of judicial review, unless one has already come to a prior conclusion that 'legality' is defined by an adherence to the traditional grounds of judicial review? The point will perhaps be made clearer when one observes that the separation of powers doctrine in itself is not logically related to an adherence to the traditional grounds of judicial review – it is entirely possible to affirm the doctrine of separation of powers and at the same time accept expanded grounds of judicial review, as the judicial review regimes in the UK and Hong Kong illustrate.[45] In sum, it may be said that the Court of Appeal's reasoning in this regard came close to being tautologous – an adherence to the three grounds of judicial review ensures that the courts remain within legality review as opposed to merits review, because legality review is about an adherence to the three traditional grounds of review. The legality-merits distinction was relied upon in a highly formal manner to exclude other grounds of judicial review, leading one to wonder about the extent to which the legality-merits distinction was doing the real work in the Court of Appeal's reasoning, and whether more could be done to substantiate the concepts of 'legality' and 'merits'.

Examining the Singapore courts' usage of the legality-merits distinction in relation to its rejection of the doctrine of proportionality sheds further light on the formal nature of the courts' reasoning. The legality-merits distinction has been relied upon to reject the doctrine of proportionality as a ground of judicial review in Singapore. The Singapore courts have repeatedly held that the doctrine of proportionality would entail merits review and is for that reason incompatible with judicial review orthodoxy in Singapore. For example, in *Chan Hiang Leng Colin v Minister for Information and the Arts*,[46] in the context of a discussion of the applicability of proportionality as a ground of judicial review in Singapore, the Court of Appeal held that

44. ibid paras 59–62.

45. See eg the acceptance of the doctrine of substantive legitimate expectations in *R v North and East Devon Health Authority, ex p Coughlan* [2001] QB 213 and *Ng Siu Tung v Director of Immigration* [2002] 1 HKLRD 561 (Court of Final Appeal, Hong Kong SAR).

46. *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR(R) 294 (CA).

'to apply any higher test than the *Wednesbury* test would necessarily involve the court in a decision on the merits'.[47] Similarly, in *Chee Siok Chin v Minister for Home Affairs*,[48] the High Court rejected proportionality as a ground of judicial review in Singapore on the basis that it would require the court 'to substitute its own judgment for that of the proper authority'.[49]

These cases suggest that in the Singapore courts' view, 'merits' review is defined by the courts' substitution of its decision for that of the original decision-maker. One may at first glance perceive this as a useful substantiation of the formal concept of 'merits'. However, it is suggested that such reasoning still belies a high degree of formalism. Indeed, how exactly the doctrine of proportionality would amount to the court substituting its decision for that of the proper authority remained unsubstantiated. Yet, it is crucial to articulate what exactly impermissible substitution of a decision entails, in order to be able to test putative grounds of judicial review to determine whether any boundaries have been crossed – especially since there are different ways of expressing what 'substitution' is, which can lead to starkly different conclusions on the issue.[50] Does impermissible substitution involve requiring the decision-maker to exercise public power in a specific way, directed by the court? By this standard, then proportionality – and substantive legitimate expectations – would not be problematic and should accordingly be accepted as grounds of judicial review. Or does impermissible substitution involve the courts evaluating decisions against certain substantive norms of acceptable decision-making parameters, and quashing the decisions if these norms are breached? Proportionality and substantive legitimate expectations would indeed fall foul of this standard and would be justifiably excluded as grounds of judicial review on this basis – but by the same standard, so should irrationality, one of the three traditionally accepted grounds of judicial review that the Singapore courts have invoked as a marker of 'legality'.

The discussion above is intended to illustrate the high degree of content formality with which the legality-merits distinction has been applied by the Singapore courts to reject various grounds of judicial review. It should be clarified at this point, however, that this is not to say that the Singapore courts' rejection of these grounds of review is therefore problematic as a normative matter. Indeed, the conclusions that the Singapore courts have reached may be perfectly justifiable. The point sought to be made here is simply that the legality-merits distinction has played a rather formal role in the Singapore courts' reasoning in this regard.

B. *Ouster Clauses*

Moving beyond the grounds of judicial review, one can observe a similar degree of formalism in the Singapore courts' approach to ouster clauses. Where there is an

47. ibid paras 38, 44.
48. *Chee Siok Chin v Minister for Home Affairs* [2006] 1 SLR(R) 582 (HC).
49. ibid para 87.
50. See eg *R v Home Secretary ex p Daly* [2001] 2 AC 532 (Lord Steyn); *R (Keyu) v Secretary of State for Foreign and Commonwealth Affairs* [2016] AC 1355, 1408–1411 (Lord Kerr).

ouster clause in the relevant statutory framework which purports to oust judicial review of the decision in question, the Singapore courts have traditionally adopted a legal approach substantially based on the House of Lords' decision in *Anisminic Ltd v Foreign Compensation Commission*[51] ('*Anisminic*'). Stated briefly, the *Anisminic* approach provides that if an error of law has been made in the course of the relevant decision, that error of law would take the decision-maker out of jurisdiction and make the decision a nullity, such that the ouster clause would be inapplicable to the purported decision, rendering it susceptible to judicial review despite the presence of the ouster clause. Crucially, the *Anisminic* decision obviated the distinction between jurisdictional and non-jurisdictional errors of law by providing that *all* errors of law would take a decision-maker out of jurisdiction for the purposes of ouster clause analysis.[52]

This reasoning has been applied in Singapore as well. In *Cheng Vincent v Minister of Home Affairs and others*[53] ('*Cheng Vincent*'), the High Court was faced with the argument that the executive's exercise of detention powers amounted to an error of law causing the executive's acts to fall outside the ambit of the jurisdiction accorded by the ISA, thus rendering the ouster clause in the ISA ineffective in excluding judicial review. Lai Kew Chai J, in dealing with this argument, held that the *Anisminic* principle is 'quite incontrovertible'.[54] This was because 'a court of law must be able to see where a tribunal or an executive authority has exceeded its constitutional or legislative mandate, which Parliament itself would have contemplated or condoned, and order the appropriate relief.'[55] Also, one can observe in the High Court decision in *Stansfield Business International v Minister for Manpower*[56] the adoption of an understanding of error of law largely in line with that taken in *Anisminic*. Indeed, the High Court adopted such a wide understanding of errors of law in this case that it was in substance an acceptance of the crucial linchpin of the reasoning in *Anisminic* – that *all* errors of law would take a decision-making body out of jurisdiction.

But the *Anisminic* approach reflects a high degree of formal reasoning. The outcome of an *Anisminic* analysis is that an ouster clause is rendered effectively inapplicable, allowing judicial review of the relevant decision to proceed. This outcome is triggered by a finding that an error of law was made in the course of reaching the relevant decision. It is worth noting that the cause and the effect of *Anisminic* reasoning are analytically related in a rather formal sense. There is little substantive linkage between the finding of an error of law and the effect that an ouster clause is rendered inapplicable. In other words, the condition for the substantive effect of *Anisminic* reasoning to be triggered does not require any substantive consideration of why the

51. *Anisminic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.
52. Especially as clarified by the House of Lords in *O'Reilly v Mackman* [1983] 2 AC 237, 279 (Lord Diplock); *R v Hull University Visitor ex p Page* [1993] AC 682, 701–702 (Lord Browne Wilkinson).
53. *Cheng Vincent v Minister of Home Affairs and others* [1990] 1 SLR(R) 38 (HC).
54. ibid para 26.
55. ibid.
56. *Stansfield Business International v Minister for Manpower* [1999] 2 SLR(R) 866 (HC).

courts are justified in circumventing the specific ouster clause at hand. Indeed, Lord Carnwath, in the recent landmark UK Supreme Court reconsideration of the law on ouster clauses, *R (on the application of Privacy International) v Investigatory Powers Tribunal and others*[57] ('*Privacy International*'), described *Anisminic* analysis as 'highly artificial'.[58]

This high degree of formalism in *Anisminic* reasoning should be unsurprising when one observes that the normative justification of this doctrine is also based on reasoning that is highly formal. The *Anisminic* reasoning is closely related to the ultra vires theory of judicial review, which provides that judicial review is justified only to the extent that a conceptual link can be drawn between the review being conducted and Parliament's specific intention.[59] This is a theory of judicial review that has been characterized as highly formal – the theory provides scant guidance as to the substantive content of justificatory parliamentary intent, and has accordingly been described as primarily concerned with the applicability of formal labels.[60] The *Anisminic* principle was developed by judges seeking to carve out some scope for judicial review and seeking to justify such review within the framework of such a theory. Applying this theory, it is crucial that judges exercising judicial review over and against the explicit intent of Parliament are able to justify such review by reference to Parliament's intent. Notably, this conceptual justification was drawn upon by the High Court in *Cheng Vincent*. The High Court justified the *Anisminic* principle on the basis that 'Parliament itself would have contemplated or condoned'[61] a court of law examining where an executive authority has exceeded its jurisdiction. Insofar as this was a reference to Parliament's intent as a justificatory foundation for the *Anisminic* principle, this proposition was on all fours with the ultra vires theory of judicial review. One might wonder why the Singapore High Court drew upon such a justification when Singapore does not adhere to the doctrine of parliamentary supremacy. In any case, the important point for present purposes is that there is a high degree of formalism in the Singapore courts' approach to ouster clauses on two levels – at the level of legal doctrine and the normative justifications for legal doctrine.

Recent developments in Singapore administrative law may be interpreted as suggesting a recognition of this formalism and a desire to forge a new path. The Singapore Court of Appeal in *Nagaenthran a/l K Dharmalingam v Attorney-General*[62] ('*Nagaenthran*') was faced with the argument that section 33B(4) of the

57. *R (on the application of Privacy International) v Investigatory Powers Tribunal and others* [2019] UKSC 22.

58. ibid paras 128–129.

59. See Kenny Chng, 'The Theoretical Foundations of Judicial Review in Singapore' [2019] Singapore Journal of Legal Studies 294, 297–303.

60. See David Dyzenhaus, 'Formalism's Hollow Victory' [2002] New Zealand Law Review 525; TRS Allan, 'The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry' (2002) 61 Cambridge Law Journal 87; David Dyzenhaus, 'Constituting the Rule of Law: Fundamental Values in Administrative Law' (2002) 27 Queen's Law Journal 445.

61. *Cheng Vincent v Minister of Home Affairs and others* [1990] 1 SLR(R) 38 (HC) para 26.

62. *Nagaenthran a/l K Dharmalingam v Attorney-General* [2019] 2 SLR 216 (CA).

Singapore *Misuse of Drugs Act*[63] ousted judicial review of the Public Prosecutor's decision not to issue certificates of substantive assistance to an accused person. Following amendments made to the Singapore legal regime against drug trafficking, the issuance of such a certificate is a condition for the courts to be able to exercise its discretion *not* to sentence an accused person with the death penalty, which would otherwise apply mandatorily.[64] The High Court characterized the clause as an ouster clause, and concluded that while the ouster clause was constitutionally valid, it would not exclude review on *jurisdictional* errors of law, which if found would render the ouster clause inapplicable.[65] The High Court suggested that grounds of review such as irrelevant considerations and irrationality relate to errors of law which were not jurisdictional, while the absence of a precedent fact could amount to a jurisdictional error[66] – without explaining how such a distinction should be drawn. While the High Court ultimately proceeded on the assumption that all errors of law are jurisdictional errors of law, its comments in this regard portended a potential revival of the distinction between non-jurisdictional and jurisdictional errors of law in the context of ouster clauses – a distinction which, absent substantiation as to what precisely makes an error of law a jurisdictional one, would have heightened the degree of formalism in Singapore's legal doctrine on ouster clauses.

The Court of Appeal, remarkably, adopted a very different mode of analysis.[67] The Court of Appeal sidestepped a direct engagement with ouster clause doctrine by characterizing section 33B(4) as an immunity clause. It held that 'the effect of s 33B(4) is to vest the responsibility for making the relevant inquiry under s 33B(2)(b) in the PP and then to immunise the PP from suit in respect of such a determination save as narrowly excepted'.[68] Accordingly, given this characterization of the provision, section 33B(4) was not an ouster clause, and did not have to be analysed through the *Anisminic* framework which the High Court had relied upon. Nevertheless, the Singapore Court of Appeal ventured to 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', given 'Singapore's system of constitutional governance, where the Singapore Constitution is the supreme law of the land'.[69] The Court of Appeal suggested that a provision that purports to oust judicial review would run the risk of violating both Article 93 of the *Constitution of the Republic of Singapore 1965* and the principle of separation of powers.[70]

A possible interpretation of the Court of Appeal's observations on the relationship between the judicial power and ouster clauses is that, while made in obiter, they

63. Misuse of Drugs Act (Cap 185, 2008 Rev Ed) s 33B(4).
64. Misuse of Drugs Act (Cap 185, 2008 Rev Ed) s 33B(1), 33B(2).
65. *Nagaenthran a/l K Dharmalingam v Attorney-General* [2018] SGHC 112 para 43.
66. ibid para 108.
67. The Court of Appeal's mode of analysis was remarkably similar to Lord Carnwath's approach to the same issue in *R (on the application of Privacy International) v Investigatory Powers Tribunal and others* [2019] UKSC 22.
68. *Nagaenthran a/l K Dharmalingam v Attorney-General* [2019] 2 SLR 216 (CA) para 67.
69. ibid para 71.
70. ibid para 74.

indicate a desire to develop a new conceptual basis for the legal approach to ouster clauses that is much more substantive than the *Anisminic* approach, and represent a potential judicial intent to forge a different path from the formalism prevailing thus far in Singapore's law on ouster clauses.[71] Yet, the Court of Appeal's use of the distinction between immunity and ouster clauses to resolve the case might be perceived as potentially re-introducing another species of formal reasoning in ouster clause analysis. As a result, while the door has been cracked open for the introduction of a more substantive approach to ouster clause analysis in Singapore, it remains to be seen whether this possibility will be capitalized upon when the issue of the proper doctrinal approach to ouster clauses arises squarely for decision in future.

C. *Standing*

The general structure of the law on *locus standi* in Singapore provides another pertinent example of a high degree of formalism – specifically, mandatory formality – especially in contrast to the position in English law. While the Singapore courts have tempered this high degree of mandatory formality by allowing for the incorporation of substantive reasoning in certain circumstances, the Singapore courts' emphasis on the extremely exceptional nature of such situations reduces the impact of this exception on the overall high degree of mandatory formality in Singapore's law on standing.

The Singapore courts' approach to standing law was elaborated over a series of three landmark judicial review cases. In *Tan Eng Hong v Attorney-General*[72] ('*Tan Eng Hong*'), the Court of Appeal had to decide whether the applicant had the requisite standing to mount a constitutional challenge to section 377A of the *Penal Code*,[73] a provision which criminalizes male homosexual acts. Its task was made more complicated by the fact that the applicant's charge under section 377A of the Penal Code had been withdrawn and replaced with another charge, thus raising the question as to whether the applicant had the standing to mount a constitutional challenge against a law which was no longer being applied to him.

In the course of answering this question, the Court held that for an applicant to possess the requisite locus standi, a core requirement, inter alia, is that the applicant must have suffered a violation of a personal right.[74] While a personal right would include constitutional rights, it was necessary for the applicant to be able to demonstrate a violation of his constitutional rights before standing would be granted.[75] Indeed, the Court of Appeal clarified that 'the mere holding of a constitutional right is insufficient to found standing to challenge an unconstitutional law; there

71. For a more in-depth discussion of the implications of this decision, see Kenny Chng, 'Reconsidering Ouster Clauses in Singapore Administrative Law' (2020) 136 Law Quarterly Review 40.

72. *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 (CA).

73. Penal Code (Cap 224, 2008 Rev Ed) s 377A.

74. The other requirements are that the applicant must have a real interest in bringing the action, and there must be a real controversy between the parties – see *Tan Eng Hong* [2012] 4 SLR 476 (CA) para 72.

75. ibid para 82.

must also be a *violation* of the constitutional right.'[76] This requirement was intended to prevent '"mere busybodies" from being granted standing to launch unmeritorious constitutional challenges'.[77]

The Court of Appeal ultimately decided that the applicant in question *did* have the requisite standing, in view of the fact that he had been arrested under a law that was at least arguably unconstitutional, thus engaging his Article 9 rights by depriving him of his personal liberty in a manner that was potentially not in accordance with law.[78] For present purposes, the important point to note is that the Court of Appeal's articulation of the requirements for locus standi evinced a high degree of mandatory formality. Substantive considerations going towards whether the applicant had *sufficient interest* for the application have no place in this legal framework[79] – the focus instead would be on a formal inquiry as to whether a personal right can be said to have been violated.

Formal reasoning in a similar vein featured once again in the second of the trio of landmark cases, *Vellama d/o Marie Muthu v Attorney-General*[80] ('*Vellama*'). The Court of Appeal in *Vellama* elaborated upon an area of standing doctrine that had not been discussed in detail in *Tan Eng Hong* – where the applicant's *personal* right had not been interfered with, in what situation can standing be founded upon a *public* right shared in common with other citizens? This issue arose in the context of a challenge brought by a resident against the Prime Minister's delay in holding a by-election for her constituency. After the application for judicial review had been made, the Prime Minister indeed called for a by-election for her constituency, and a replacement Member of Parliament was duly elected to represent her constituency. As such, Vellama could no longer claim that her right to be represented had been affected, and she had to rest her claim to standing on some other basis.[81]

The Court of Appeal explained that public rights are rights shared in common with other citizens because 'they arise from public duties which are owed to the general class of affected persons as a whole'.[82] Such public rights could give rise to standing only if the applicant could illustrate that he had suffered 'some 'special damage' which distinguishes his claim from those of other potential litigants in the same class'.[83] In a similar vein to *Tan Eng Hong*, the Court of Appeal justified this requirement on the ground that if there was no requirement for such special damage, 'it is likely that the courts will be inundated by a multiplicity of actions, some raised by mere busybodies and social gadflies, to the detriment of good public administration'.[84] On the facts,

76. ibid para 93 (emphasis in original).
77. ibid para 82.
78. ibid para 122.
79. As is the position in English law – see, for example, *IRC v National Federation of Self-employed and Small Businesses Ltd* (on appeal from *R v Inland Revenue Commissioners, ex parte National Federation of Self-employed and Small Businesses Ltd*) [1982] AC 617 (HL).
80. *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 (CA).
81. ibid para 27.
82. ibid para 33.
83. ibid.
84. ibid.

the Court of Appeal held that the applicant had not suffered any special damage – she had not suffered any damage or demonstrated any special interest of hers which had been affected, and her interest was simply that of 'a general desire to have Art 49 interpreted by the court'.[85] Thus, Vellama could not satisfy the requirements of public right standing.

In the wake of both *Tan Eng Hong* and *Vellama*, a structure of standing law evincing a high degree of mandatory formality emerged. Whether one has *locus standi* for judicial review would be determined by a legal analysis revolving around formal legal concepts such as 'personal right' and 'special damage'. This approach forms a sharp contrast with the current approach to the law on standing in the UK, which is based on the concept of 'sufficient interest' and is relatively more sensitive to substantive considerations.[86]

Nevertheless, it must be noted that notwithstanding the high degree of formality in the structure of the law on standing, the Singapore courts have been sensitive to the undesirable consequences of overly-rigid formality and have allowed some room for substantive considerations.[87] In the third of the trio of landmark cases, the Court of Appeal provided an exception to the highly formal structure laid down in the first two cases. In *Jeyaretnam Kenneth Andrew v Attorney-General*[88] ('*Kenneth Jeyaretnam*'), the applicant sought to challenge the Singapore government's decision to make a contingent loan to the International Monetary Fund, on the basis that this loan had not been subject to the requisite constitutional procedures before it was granted. The crucial issue in this case was whether the applicant had the requisite standing for this judicial review challenge. The applicant argued that the principle that an applicant must prove that he had a personal right, set down in *Tan Eng Hong*, was incorrect as a matter of law, and that the court should have broad discretion to accord standing in public law matters.

The Court of Appeal took the opportunity to set out a comprehensive account of Singapore standing law. As a starting point, the Court recognized that the substance of standing rules is closely related to democratic theory and broader theories of administrative law. The greater the extent that one accepts the view that judicial review is fundamentally about checking abuses of executive power – redressing 'bad government through the courts'[89] – the more persuasive the case for laxer rules of standing becomes. However, the Court of Appeal was more inclined to the view, proposed in an extra-judicial capacity by then-Chief Justice Chan Sek

85. ibid para 43.

86. *IRC v National Federation of Self-employed and Small Businesses Ltd* (on appeal from *R v Inland Revenue Commissioners, ex parte National Federation of Self-employed and Small Businesses Ltd*) [1982] AC 617 (HL).

87. One can see some evidence of this in *Tan Eng Hong* itself. The Court of Appeal refrained from setting out a general rule that the existence of an unconstitutional law in itself would suffice to demonstrate a violation of an applicant's constitutional rights, for fear that lax standing rules would hamper the executive's governing efficiency. Accordingly, the Court preferred that each case be decided on its facts, rather than in accordance with such a rigid formal rule: see *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 (CA) para 109.

88. *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345 (CA).

89. ibid para 48.

Keong,[90] that judicial review was an inappropriate tool for 'solving symptoms of systemic bureaucratic problems', and should be better viewed as a means of encouraging good administration rather than stopping bad government.[91] In addition to these background theories, the Court of Appeal highlighted that the legality-merits distinction was an important component in the contextual backdrop within which standing rules should be analysed. The Court of Appeal reiterated that in accordance with this principle, judicial review was concerned with allowing parties to bring claims of legality before the courts, but not with allowing parties to challenge the merits of policy decisions.[92]

Applying these principles to the facts at hand, the Court of Appeal held that the applicant's case was fundamentally premised on the argument that the government's loan was of 'dubious utility' to Singapore.[93] In the Court of Appeal's view, this was essentially an invitation for the court to rule on the merits of the government's decision, which went beyond the court's constitutional function.[94] The Court went on to acknowledge the importance of allowing litigants to bring public law claims before the courts to stop unlawful conduct and uphold the rule of law. However, the Court held that this imperative did not extend to allowing *all* forms of unlawful conduct to be reviewed by the courts – the gravity of the breach and the statutory scheme underlying the relevant decision would have to be considered.[95] In the present case, the Court of Appeal found that the legal framework surrounding the grant of such loans by the government surely did not envision challenges via the judicial review mechanism, in view of the 'entirely political' nature of such issues.[96] Accordingly, the Court of Appeal held that the applicant did not have the requisite *locus standi* to bring the claim.

As a matter of the legal framework of standing law in Singapore, the decision in *Kenneth Jeyaretnam* acknowledged that beyond the personal right and public right categories of standing, elaborated upon in *Tan Eng Hong* and *Vellama* respectively, an applicant could potentially have *locus standi* where a public duty was breached and the breach was 'of sufficient gravity that it would be in the public interest for the courts to hear the case'.[97] The Court of Appeal emphasized, however, that such situations would be highly exceptional and 'rare' – a logical consequence of the Court of Appeal's preferred theory of administrative law.[98] In the present case, the applicant decisively failed to meet these requirements, since he was not even able to prove a breach of a public duty.[99]

90. Chan Sek Keong, 'Judicial Review – From Angst to Empathy' (2010) 22 Singapore Academy of Law Journal 469.
91. ibid paras 49–50.
92. ibid para 56.
93. ibid para 59.
94. ibid.
95. ibid para 61.
96. ibid.
97. ibid para 64.
98. ibid.
99. ibid para 65.

In the wake of *Kenneth Jeyaretnam*'s clarification of Singapore's standing law, the high degree of mandatory formality in the framework of Singapore's standing law was attenuated by the Court of Appeal's recognition of public interest standing. However, the Court of Appeal's emphasis on the exceptional nature of this category of standing cases preserved the overall high degree of mandatory formality in Singapore's standing law framework. Indeed, while the reasoning utilized by the Court of Appeal in *Kenneth Jeyaretnam* may appear to indicate a move towards a more substantive approach to standing doctrine, it bears emphasis that the Court of Appeal was careful to situate such reasoning within the existing, highly formal framework of the law on standing, and also to explicitly disavow an overall substantive approach towards standing. Another plausible characterization of *Kenneth Jeyaretnam*'s development of the law on standing law in Singapore is that the Court of Appeal has evinced a willingness to engage substantive reasoning even as it ostensibly works within the framework of formal doctrine – in other words, its development of formal doctrine in this case was motivated essentially by substantive reasoning.

In addition to the significance of this decision as a development of the law on standing in Singapore, the Court of Appeal's decision in *Kenneth Jeyaretnam* was also interesting in relation to its usage of the legality-merits distinction. The legality-merits distinction was invoked to provide contextual backdrop for the court's decision on the issue of standing. However, it is worth noting that the decision that the court reached on the issue of standing was based on grounds rather conceptually distinct from the legality-merits distinction. Indeed, the Court of Appeal could have concluded its discussion of the standing issue as soon as it found that the application at hand was effectively a challenge to the merits of the government's decision. But the court went on to elaborate that not all unlawful decisions should be challenged through judicial review, and that one has to have regard to the statutory context and the gravity of the breach of public duty. This elaboration is difficult to justify by reference to the legality-merits distinction in itself – the very idea of the legality-merits distinction is that as long as an issue relates to the legality of the decision-making process rather than its merits, it falls within the purview of judicial review. This perhaps provides an illustration of the vagueness of the concepts of 'legality' and 'merits', and the rather formal nature of the legality-merits distinction, absent sufficient substantiation. While the legality-merits distinction was invoked in the Court of Appeal's reasoning, the court's conclusion had a lot more to do with its substantive reasoning in relation to legislative intent and the nature of the issue being brought before the court, than the legality-merits distinction in itself.

IV. WAY AHEAD AND CONCLUSION

Part III has illustrated that there is a high degree of formalism in Singapore constitutional and administrative law. What then ought to be the way ahead for the development of Singapore law in this regard? As highlighted earlier in this article, it is suggested that a bare exhortation of more substantive reasoning as a normative prescription is too simplistic. Such a prescription does not adequately reflect the fact that

the two types of reasoning are not hermetically-sealed categories of reasons – formal reasoning is *necessary* in any legal system and can be justified on the basis of substantive reasons.

Indeed, formal reasoning in law can be perceived as a virtue. In this vein, Forsyth made a powerful argument that a formal approach to law buttresses the rule of law by ensuring the certainty and predictability of the exercises of power.[100] Should substantive considerations feature in every legal decision-making process, every decision would be open to debate on a substantive level with detrimental consequences for the certainty and finality of the law.[101] Further, formal reasoning in law preserves more fully the vision of law as objective and neutral, a body of decision-making rules comfortably isolated from contentious political and moral debates.[102]

When, then, does formal reasoning become a vice rather than a virtue? Atiyah and Summers offer a useful conceptual device directed at answering this question – their distinction between formal and 'formalistic' reasoning, described earlier in this paper. This distinction can be applied to obtain normative guidance for constitutional and administrative legal doctrine in Singapore. Given that this article has identified several aspects of Singapore's constitutional and administrative legal doctrine and reasoning which display a high degree of formalism, the relevant question is the extent to which these can be characterized as formalistic in nature. In this regard, it is suggested that the Singapore courts' reasoning in relation to standing law, while evincing a high degree of formalism, has not degenerated into the form of legal reasoning that Atiyah and Summers would have labelled as 'formalistic'. Indeed, while the framework of Singapore standing law remains highly formal, the courts have expressed due recognition of the dangers of excessive rigidity in the law on standing, and have somewhat attenuated the formalism of the prevailing standing framework accordingly by introducing substantive elements into standing doctrine and showing a willingness to take substantive considerations into account in the application of standing doctrine.[103]

However, the Singapore courts' reasoning in relation to the legality-merits distinction as a foundational principle of judicial review, and also in relation to prevailing ouster clause doctrine, is potentially deserving of the label 'formalistic'. In these domains, formal concepts have been deployed in a manner which obscured substantive reasoning, when the substantive reasons were in truth the key driving forces leading the courts to their conclusions. Indeed, as described earlier, the legality-merits distinction has been drawn upon as a formal reason for excluding grounds of judicial review in a manner that begged the question as to what exactly 'legality' and 'merits' are as a matter of substance. The fact that the usage of the legality-merits distinction inevitably requires resort to underlying substantive considerations to flesh out these formal concepts, whether these considerations are expressly articulated or not, was

100. Forsyth (n 26) 334.
101. ibid 336.
102. Froneman (n 7) 7.
103. See eg *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 (CA) para 109.

quite tellingly illustrated by the reasoning in *Kenneth Jeyaretnam*.[104] Indeed, as mentioned in Part III, the court's conclusion on the decisions which can be challenged through judicial review relied more on substantive reasoning invoking legislative intent and the nature of the subject matter, than on the legality-merits distinction. Without a careful substantiation as to what the substance of the legality-merits distinction is, and given that the distinction has been often raised as a fundamental justification for the grounds of judicial review, there arises a risk that judicial reasoning about the proper boundaries of judicial review will display a certain lack of clarity.

As for ouster clauses, the formal concept of an error of law, applied as the key determinant of the efficacy of an ouster clause, neglects important issues of substance that ought to be taken into account in any decision to override an express legislative ouster clause – for example, the nature of the issue at hand, the purpose of the overall statutory framework, the relative competence of the court in relation to the issue at hand, and the legitimacy of the court's interference in such decisions. While such considerations are in all likelihood already being taken into account as underlying reasons for decision in ouster clause cases, it will be useful for the purposes of transparency and enhancing the quality of decision-making for these considerations to be brought into the open and articulated more expressly as a matter of legal doctrine.

In view of this diagnosis of formalistic reasoning, what then ought to be the proper way forward for the development of these aspects of Singapore constitutional and administrative legal reasoning? One possibility would be to reshape existing formalistic doctrine to reflect explicitly more substantive reasoning. Indeed, clarity and candour in certain areas of legal doctrine can be improved through a recognition that an unreflective and excessive usage of formal legal concepts can obscure the substantive considerations that are doing the real work in decision-making.[105] Should these substantive considerations remain obscured from scrutiny, the danger arises that such considerations will be given insufficient weight in judicial reasoning.

It is suggested that in specific relation to ouster clause doctrine, a move towards a more substantive approach as a matter of legal doctrine would be well-advised. Indeed, while Lord Carnwath in *Privacy International* propounded a new conceptual basis for the legal approach to ouster clauses and proceeded to deal squarely with the implications of his arguments for ouster clause doctrine, the Court of Appeal in *Nagaenthran* refrained from engaging ouster clause doctrine directly. Should an opportunity arise in future for the Court of Appeal to reconsider ouster clause doctrine, Lord Carnwath's reasoning may provide some useful guidance in this regard. His Lordship held that the court ought in every case 'to determine the extent to which such a clause should be upheld, having regard to its purpose and statutory context, and the nature and importance of the legal issue in question; and to determine the level of scrutiny required by the rule of law', having regard to whether a purported ouster clause has provided 'a sufficient and proportionate' level of protection of the

104. See the discussion of *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345 (CA) in Part III.C above.

105. Froneman (n 7) 19–20.

rule of law.[106] In addition to giving greater weight to important issues of substance that ought to be central in a legal analysis of ouster clauses, such an approach would also give better expression to the fundamental constitutional rule of law basis of judicial review in Singapore, as opposed to adhering to a formalistic doctrine intended to give full effect to the principle of parliamentary supremacy, a principle not accepted in Singapore law.[107]

A second possible way forward would centre around paying more attention to the substantive justifications for formal doctrine. This prescription recognizes that the usage of formal reasoning is not wrong in itself, but such reasoning must remain justifiable by reference to substantive considerations. On this view, the substantive justifications for formal doctrine should be carefully reflected upon and clearly articulated, in order to determine if the existing usage of formal doctrine accurately reflects these reasons.

It is suggested that this prescription represents a good way forward for the legality-merits distinction in Singapore law. It is worth noting that this prescription does not necessitate a wholesale revision or rejection of the legality-merits distinction. Indeed, should the substantive content of 'legality' and 'merits' for the purposes of the boundaries of judicial review be more fully fleshed out, there would be nothing problematic about retaining the distinction in itself. What this proposition would require, however, is the disavowal of tautologous reasoning – for example, that 'legality' is about adhering to the traditional grounds of judicial review because the traditional grounds of judicial review make up the content of 'legality'. A possible means of substantiating this distinction would be to articulate precisely what exactly impermissible 'merits' review entails – for example, whether it refers to the review of a decision on the basis that it contravenes certain substantive norms of acceptable decision-making parameters, whether it refers to the substitution of the court's decision for that of the decision-maker to the extent that the decision-maker will be required to exercise public power in a manner specified by the court, or something else entirely. Clarity in this regard will promote clearer rationalizations and justifications of the existing grounds of judicial review, which will in turn allow for more considered analysis regarding potential developments in the grounds of judicial review.

Overall, as one ponders the appropriate way ahead for the development of constitutional and administrative law reasoning in Singapore, a decision on the proper balance that ought to be struck between the necessity of formalism in legal reasoning and the avoidance of formalistic reasoning has to be contextualized to specific areas of doctrine. The preceding discussion illustrates that a bare exhortation of increased substantive reasoning across the board is too simplistic as a normative prescription, and that different normative prescriptions may be more appropriate for different areas of

106. *R (on the application of Privacy International) v Investigatory Powers Tribunal and others* [2019] UKSC 22 paras 133, 144.

107. See Jaclyn L Neo, 'All Power Has Legal Limits: The Principle of Legality as a Constitutional Principle of Judicial Review' (2017) 29 Singapore Academy of Law Journal 667, 684–685. It should be noted that Lord Carnwath's reasoning, especially his emphasis on the supremacy of the rule of law, is likely to be deeply controversial in the UK, given its longstanding adoption of the doctrine of parliamentary supremacy. Nevertheless, his reasoning is entirely apt for Singapore's constitutional context.

doctrine. Indeed, taking the law on standing and ouster clause doctrine as examples, one may justifiably take the view that a greater degree of formalism is more justified in the former as compared to the latter. The second-level policies – substantive considerations that justify formal reasoning in general, such as certainty and consistency – apply with greater force to the law on standing, which serves as a crucial procedural threshold for all judicial review applications. In contrast, these second-level policies may apply with less force to ouster clause doctrine, especially when the usage of overly formal reasoning might risk obscuring the real reasons for decision or losing sight of the relevant first-level substantive considerations.

In sum, this paper has sought to illustrate that Atiyah's and Summers' concepts of form and substance can shed considerable light on Singapore constitutional and administrative law in several important domains of law, beyond the well-documented field of constitutional interpretation. These concepts provide useful lenses through which one can discern trajectories for the development of constitutional and administrative jurisprudence in Singapore. It is hoped that the suggestions ventured herein will go some way towards the development of a more robust public law jurisprudence in Singapore.