User:Smuconlaw/Exclusion of judicial review in Singapore law

From Wikipedia, the free encyclopedia
< User:Smuconlaw

This is a sandbox for an article that is being edited as part of an educational assignment called the SMU Constitutional and Administrative Law Wikipedia project. If you are not a member of the project, please do not edit this article. To contact the project co-ordinator please leave a message at "User talk:Smuconlaw".

Given the courts' supervisory jurisdiction over the exercise of executive power via judicial review, legislatures have sometimes used their legislative authority to exclude judicial review in order to protect the exercise of executive power. Typically, such protection is achieved via the insertion of ouster clauses into an Act of Parliament or by wording powers conferred on decision makers subjectively.

As regards the first method, ouster clauses are generally viewed restrictively by UK courts. The courts there have taken the view that such clauses would in most cases not be effective in ousting the jurisdiction of the courts. However, these cases have noted that there are some exceptions in which judicial review can be successfully ousted. Singapore's position on ouster clauses is ambiguous as it is uncertain whether the distinction between jurisdictional and non-jurisdictional errors of law remains.

Smuconlaw/Exclusion of judicial review in Singapore law

The new Supreme Court Building, Singapore

Courts are often faced with legislative hurdles that were designed to deny or at least restrict the extent courts are allowed to intervene via judicial review. Different approaches were developed in the UK in response to this. However, it is yet uncertain as to whether Singapore will follow suit.

Court Court of Appeal of Singapore

With regard to the second method, subjectively worded powers are similarly viewed restrictively by Singapore courts. The Singapore position is that an objective test applies to the exercise of the discretion conferred by the power; hence the jurisdiction of the courts is not ousted completely. However, the discretion conferred by the Internal Security Act cannot be reviewed by a court due to legislative amendments to the act which mandated a subjective test to be applied to the exercise of the discretion.

Contents

Ouster clauses - Definition/ How do they work

Ouster clauses in judicial review are concerned with whether it is possible to exclude the jurisdiction of the courts by the careful drafting of objectively worded statutory ouster provisions.[2] Ouster clauses would thus serve as a signal to the decision makers that they may operate without fear of intervention by the courts at a later stage.[3] The most common kind of ouster clauses are finality clauses, which are inserted into statutes to indicate that the decision of a particular justice or tribunal cannot be challenged by any court.[4] Although related, finality clauses ought to be differentiated from total ouster clauses as the former affords lesser protection as compared to the latter.[5]

However, as noted by Professor Thio Li-ann, "courts generally loathe ouster clauses as these contradict the rule of law whereby

An example of ouster clauses: The decision of the Presidential Election Committee

Constitution of the Republic of Singapore (1999 Reprint), Art 18(9):

A decision of the Presidential Elections Committee as to whether a candidate for election to the office of President has fulfilled the

judges finally declare the legal limits of power and also as the individual's ultimate recourse to the law is denied. Hence, courts try to construe these strictly to minimise their impact. In so doing, they may be going against the grain of parliamentary will."[6]

> requirement of paragraph (e) or (g)(iv) of Article 19(2) shall be final and shall not be subject to appeal or review in any court.[1]

A related administrative law concept is that of jurisdictional and non-jurisdictional errors of law. Ouster clauses overlap with the issue of jurisdictional errors because of the view that such clauses are effective in preventing judicial review of non-jurisdictional errors but not jurisdictional ones.[7] Traditionally, courts are precluded from interfering with decisions that are within jurisdiction (a non-jurisdictional issue). However, in light of later developments in the law, such a differentiation may no longer be applicable depending on the judicial school of thought employed.[8]

The UK Position

The starting point for analyzing ouster clauses and their effects is the landmark decision in *Anisminic Ltd v. Foreign Compensation Commission and another* (*"Anisminic"*).[9] In that case, the House of Lords in considering the effects of an ouster clause was thought to have abolished the distinction between jurisdictional and non-jurisdictional errors of law. In later cases (below), *Anisminic* was deemed to have implied that any action committed in error by an administrative agency or body would be jurisdictional and hence reviewable by a court of law despite the ouster clause.

Anisminic Ltd v. Foreign Compensation Commission and another

In *Anisminic*, their Lordships were faced with a provision that expressly stated that "the determination by the commission of any application made to them under this act shall not be called in question in any court of law".[10] In his judgment, Lord Reid differentiated between the arguments put forth by both parties. He held that while the respondents argued that the provision clearly denied the court from questioning the determination, the question at hand did not even involve the questioning of the purported determination and instead focused on whether there was in fact a valid determination. As Lord Reid pointed out, "if you seek to show that a determination is a nullity you are not questioning the purported determination – you are maintaining that it does not exist as a determination."[11]

Lord Reid then held that it was a well-established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly – meaning if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court.[12] In his Lordship's opinion, if Parliament had intended to introduce a new kind of ouster clause that would protect such nullities from being questioned, better drafting of the provision would be required.[13]

During the course of his judgment, Lord Reid also took the opportunity to deal with the issue of jurisdictional and non-jurisdictional errors of law. While recognising the traditional understanding that jurisdictional errors of law are null, his Lordship also stated that there are many cases where although the decision maker had jurisdiction, the determination was also a nullity. He then gave a non-exhaustive list on reasons as to why they are invalid. The points are as summarised:

- It may have given its decision in bad faith;
- It may have made a decision which it had no power to make;
- It may have failed in the course of the inquiry to comply with the requirements of

natural justice;
- It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it;
- It may have refused to take into account something which it was required to take into account; or
- It may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account.[14]

However, what is of significance is that his Lordship did not expressly reject the effectiveness of such ouster clauses where the decision is valid. He recongised that "[u]ndoubtedly such a provision [would protect] every determination which is not a nullity".[15] This point was noted by Cane when he wrote that "the ouster clause in question would be effective to prevent the award of a judicial review remedy only if the error of law was within jurisdiction."[16] However, it appears that *Anisminic* had defined the concept of jurisdictional error of law so broadly such as to make redundant the old divide and had "led to the use of the word 'jurisdictional' in a wide sense to cover all errors of law which entailed illegality."[17] The effect of *Anisminic* was to reduce the effect of statutory ouster clauses and to expand the limits of judicial review.[18]

Regina v. Lord President of the Privy Council, ex parte Page

This blurred distinction between the two classifications was discussed and recognised in *Regina v. Lord President of the Privy Council, ex parte Page* (*"Page"*).[19] There their Lordships reviewed the development of general principles of judicial review since *Anisminic* and concluded that the courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully.[20] Lord Browne-Wilkinson in his judgment referred to *O'Reilly v. Mackman*[21] and opined that "the decision in [*Anisminic*] rendered obsolete the distinction between errors of law on the face of the record and other errors of law by extending the doctrine of ultra vires."[22] In doing so, Lord Browne effectively rendered ouster clauses to be ineffective where the decision maker had acted unlawfully. The reason given by his Lordship was "that Parliament had only conferred the decision-making power on the basis that it was to be exercised on the correct legal basis: a misdirection in law in making the decision therefore rendered the decision ultra vires."[23]

R (on the application of Cart) (Appellant) v. The Upper Tribunal

The issue was again revisited in the subsequent cases of *Cart & Ors, R (on the application of) v. The Upper Tribunal & Ors* (EWHC),[24] *Cart, R (on the application of) v. The Upper Tribunal & Ors* (EWCA),[25] *R (on the application of Cart) (Appellant) v. The Upper Tribunal* (UKSC) (*"R (Cart)"*).[26] The Supreme Court in their judgment examined the decisions given by the courts below and discussed the correctness of the views expressed in both courts. In their respective judgments, Baroness Hale and Lord Dyson questioned the use of the "exceptional circumstances" approach as well as the "the Sivasubramaniam model" employed by the two lower courts.[27] The issue arose because these two models appear to return the courts back to its pre-*Anisminic* position. This was aptly summarised by Lord Dyson when he briefly touched on the two approaches taken.[28]

It was in their Lordships' opinion that both approaches were not justified as "the importance of Anisminic is that it showed that a material error of law renders a decision a 'nullity' so that the decision is in principle judicially reviewable."[29] Lord Dyson in his judgment then went on to state that "as a

matter of principle, there is no justification for drawing the line at jurisdictional error."[30] It was in his Lordship's opinion that any restrictions on judicial review would require justification and prima facie, such review should be available to challenge the legality of decisions of public bodies.[31]

The UK Position - Exceptions

The Visitor Exception

General/Domestic Laws and Administrative Tribunals/Courts

Despite the extensiveness of the ruling in *Anisminic*, it appears that there may be instances where the courts will still be bound by the jurisdictional and non-jurisdictional divide.The theoretical discussion of this issue can be found in Cane's work. He noted that there were three views. Some maintained that the distinction between jurisdictional and non-jurisdictional errors of law is still relevant. Others took the view that all errors of law went to jurisdiction. The rest instead took a middle ground approach that allowed for certain exceptions.[32] This middle ground approach was discussed in *Page* when their Lordships dealt with the issue as to whether can the court intervene and review the decision made by the visitor. Lord Browne-Wilkinson in his judgment having considered the impact of *Anisminic* (above), found that there were two reasons why the rule would not apply to visitors.

Firstly, the reason why courts can intervene in normal cases where the decision is considered *ultra vires* is because the law applicable to a decision made by such a body is the general law of the land. The visitor in *Page*'s did not apply the general law of the land but rather a domestic law of which he is the sole arbiter and of which the courts have no cognisance. He therefore "cannot err in law in reaching [his] decision since the general law is not the applicable law."[33]

Secondly, there is a difference between the kinds of tribunal whose decision is being considered for judicial review. This reasoning draws its source from the dissenting judgment of Geoffrey Lane L.J in *Pearlman v. Keepers and Governors of Harrow School* (*"Pearlman"*)[34] Lord Browne-Wilkinson had traced the cases coming after *Pearlman* and it was noted that this dissenting judgment was approved by the Privy Council in *South East Asia Fire Bricks Sdn. Bhd v. Non-Metalic Mineral Products Manufacturing Employees Union and others (Malaysia)* ("*South East Asia Fire Bricks*")[35] and also by a majority in *In re A Company* [1981] A.C. 374[36] In the latter case, Lord Diplock highlighted that the decision in *Anisminic* only applied to administrative bodies or tribunals as there was a presumption that Parliament had not intended such a body to be a final arbiter of questions of law. This can be contrasted with tribunals similar to courts of law where such a presumption would not be present. Instead, the presumption here is that "where Parliament had provided that the decision of an inferior court was final and conclusive the High Court should not be astute to find that the inferior court's decision on a question of law had not been made final and conclusive, thereby excluding the jurisdiction to review it."[37]

Academic Commentary

Both of the views expressed by Lord Browne-Wilkinson were subsequently commented upon by Cane who questioned both grounds.

As regards the first point,he argues that the distinction between domestic law and general law is problematic for two reasons. One, such institutions may actually operate under a statutory framework which may result in a mixed issue of both general and domestic law. As such, the view taken by Lord

Browne-Wilkinson is not as clean as he had described it to be. Two, the actual scope of *Page* has yet to be resolved. There is some uncertainty as to the extent the exception in Page would apply to decision-makers (other than visitors).[38]

For the second point, Cane noted that such an approach was "rejected by a Divisional Court and, apparently, by Lord Diplock himself."[39] As such, the correctness of such a distinction may be questionable. Cane had described Lord Browne-Wilkinson's judgement to have hinted of the continued existence of such an exception.[40]

Exceptions Arising from Policy

No matter the actual status of the above two exceptions, there is still another exception and that can be found in *R(Cart)*'s judgement. Lord Dyson having affirmed the position taken in *Anisminic* (see above), he then qualified his statement by emphasising that "the scope of judicial review should be no more (as well as no less) than is proportionate and necessary for the maintaining of the rule of law."[41] And in *R (Cart)*'s case, it was neither proportionate nor necessary for the maintenance of the rule of law to require unrestricted judicial review.[42] The reason here being that there were substantive policy reasons behind the scheme which precluded the need for the availability of judicial review. The court had found that Parliament had created a system of tribunals that provided ample opportunity for the correction of errors of law in order to avoid the ordinary courts from being overwhelmed by judicial review applications.[43]

Finality Clauses

Another area where a clause would not be effective in ousting the jurisdiction of the court would be those dealing with the finality of the judgement or decision. Such a clause is often termed as a finality clause and was discussed in *R v. Medical Appeal Tribunal, ex p. Gilmore* ("*Gilmore*").[44] Denning LJ there found that it was "well settled that the remedy by certiorari is never to be taken away by any statute except by the most clear and explicit words. The word 'final' is not enough."[45] The effect of such a clause is to make "the decision final on the facts, but not final on the law. Notwithstanding that the decision is by a statute made ['final'], certiorari can still issue for excess of jurisdiction or for error of law on the face of the record."[46] This statement of the law was recognised in the later case of *South East Asia Fire Bricks*.[47]

The Singapore Position

Stansfield Business International Pte Ltd v. Minister for Manpower (formerly known as Minister for Labour)("*Stansfield*")[48] seems to suggest that the Singapore position on ouster clauses is the pre – *Anisminic* position. In other words, Singapore courts appear to retain the distinction between jurisdictional and non-jurisdictional errors of law; an ouster clause is only ineffective where a jurisdictional error of law is concerned.

In *Stansfield*, an employee fired for incompetence accused Stansfied of unfair dismissal under s 14 of the Employment Act.[49] After investigating this claim, the Ministry of Manpower came to the conclusion that the dismissal was made without just cause and recommended payment to the employee.[50] Although s 14(5) of the Employment Act[51] provides that "the decision of the Minister on any representation made under this section shall be final and conclusive and shall not be challenged in any

court", Stansfield appealed against the Minister's decision.

The High Court held that the ouster clause in s 14(5) of the Employment Act was ineffective as there was a breach of the rules of natural justice in the process by which the Minister's decision was reached.[52] In his judgment, Warren L H Khoo J stated that he followed the "broad principle" in *Anisminic*, and that this principle was re-stated in the case of *South East Asia Fire Bricks*.[53] However, he did not clarify what this "broad principle" was. Furthermore, while the judgment in *Stansfield* perceived no difference between *Anisminic* and *South East Asia Fire Bricks*,[54] these two cases stood for different propositions. *Anisminic* was considered to have abolished the distinction between jurisdictional and non-jurisdictional errors of law.[55] In choosing to follow the dissenting judgement of Lane LJ(see above), *South East Asia Fire Bricks* took the position that the distinction was still relevant and found that the decision of the Industrial Court was non-reviewable.[56]

In a lecture to SMU law students,[57] Chief Justice Chan Sek Keong briefly discussed the decision in *Stansfield*. He pointed out that Khoo J's statements on *Anisminic* were *obiter dicta* because the "decision was based on a breach of natural justice and not the doctrine of error of law".[58] Therefore, it is unclear whether *Stansfield* provides a definitive statement of the Singapore position on ouster clauses. Chan CJ also considered an academic argument that an ouster clause may be inconsistent with Art 93 of the Singapore Constitution[59] which vests the judicial power of Singapore in the Supreme Court. Chan CJ stated that if this proposition is answered in the affirmative, it would follow that the supervisory jurisdiction of the courts cannot be ousted, and there would thus be no need for Singapore courts to draw the distinction between jurisdictional and non-jurisdictional errors of law. Nevertheless, he highlighted the fact that he was not expressing an opinion on the issue.[60]

However, the distinction between jurisdictional and non-jurisdictional errors of law was considered and still found to be relevant in the two local cases of *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering and Construction Co Ltd* ("*Chip Hup Hup Kee*")[61] and *Chua Say Eng v Lee Wee Lick Terence* ("*Chua Say Eng*").[62] Both courts had to address the issue of whether they could review the validity of a payment claim, and each court espoused its own preferred legal question. What is significant in these two cases is that the notion of jurisdictional and non-jurisdictional errors of law formed part of the legal reasoning in the judgments. In *Chip Hup Hup Kee*, the court applied an Australian decision that disapproved of the jurisdictional and non-jurisdictional approach and preferred an approach that revolves round an essential precondition test. The latter approach was taken because the former approach was considered to be too broad and so cast too wide a net.[63] This view was subsequently reconsidered by the High Court in *Chua Say Eng*. The court having reviewed that decision,[64] found that the approach taken in *Chip Hup Hup Kee* was still "encompassed within, but narrower than, the scope of 'jurisdictional error'"[65]. In short, the lack of an essential precondition would be treated as a form of jurisdictional error and would allow a court to intervene.

Subjectively Worded Powers: Definition

Subjectively Worded Powers in the ISA

An example of subjectively worded powers: The ISA

Another method of restricting review by the courts has been to cast statutory language in a subjective form.[67] Such a subjectively worded power seems to suggest that the discretion to exercise this power rests entirely with the minister, statutory body or agency,[68]

thus excluding judicial review of this power. An example of this would be to state that the power can be exercised "if the Minister so directs" or "as the Minister thinks fit". However, as mentioned above regarding ouster clauses, courts have traditionally displayed resistance to such clauses. In practice, the normal principles of judicial review set forth in *Council of Civil Service Unions v Minister for the Civil Service* ("the *GCHQ* case")[69] would still apply to subjectively worded powers conferred by a statute or legislation.

Power to order detention

S 8.—(1) If the President is satisfied with respect to any person that, with a view to preventing that person from acting in any manner prejudicial to the security of Singapore or any part thereof or to the maintenance of public order or essential services therein, it is necessary to do so, the Minister shall make an order —

(a) directing that such person be detained for any period not exceeding two years; or (b) for all or any of the following purposes[66]

The Singapore position on subjectively worded powers was stated in the seminal Court of Appeal decision in *Chng Suan Tze v. Minister for Home Affairs* ("*Chng Suan Tze*")[70] in the context of s 8 of the Internal Security Act ("ISA")[71] which conferred such powers upon the President to order detention[72] and for the Minister for Home Affairs to release the detainee.[73] The court held that an objective test applied to the discretion conferred by a subjectively worded power[74] and hence, it was normally challengeable on the *GCHQ* grounds of judicial review.[75] While the statement regarding the applicability of an objective test was made *obiter dicta*, later Singapore decisions have confirmed this as the correct approach.[76] However, the decision in *Chng Suan Tze* was legislatively reversed when Parliament passed bills to amend the Constitution and the ISA. Through the insertions of ss 8A to 8D to the ISA, judicial review was excluded, and s 8B(1) had the effect of restricting the courts to applying a subjective test to the review of subjectively worded powers in the ISA. Nevertheless, this test is only applicable in the context of the ISA. The principle that the correct test in judicial review proceedings is an objective one continues to apply in non-ISA related cases.

Operation of Subjectively Worded Powers in the ISA pre-1989 amendments

Subjective/Objective Test

Whether a subjectively worded power was subject to review by a court is dependent on whether an objective or subjective test applied to the discretion conferred. If an objective test applied, a court of law would be able to review the grounds on which the relevant authority exercised their discretion.[77] If a subjective test applied however, the exercise of discretion would not be open to review by the courts.[78] Since the power to issue a detention order was made to depend on the existence of a state of mind in the detaining authority, it was solely up to the executive to decide whether or not the facts on which the order of detention was to be based on are sufficient or relevant.[79] The court in *Chng Suan Tze* held obiter that an objective test was applicable to the review of the exercise of discretions under ss 8 and 10.[80] The court gave two main reasons for its decision: Firstly, case authorities supporting a subjective test were found to be questionable,[81] and secondly, the notion of a subjective or unfettered discretion was contrary to the rule of law and all powers had legal limits.[82]

Scope of Judicial Review

Since an objective test applied to the review of discretion conferred by ss 8 and 10 of the ISA, the normal judicial review *GCHQ* principles of illegality, irrationality and procedural impropriety would apply to the judicial review of subjectively worded powers.[83] However, in *Chng Suan Tze* the appellants were not required to argue or prove that the exercise of the discretion by the President under s 8 and the Minister under s 10 was invalid on *GCHQ* grounds. Because the respondents did not discharge the initial burden to prove the President's satisfaction, the burden of proof was not shifted to the appellants.[84]

Error of Precedent Fact in Subjectively Worded Powers

In *Chng Suan Tze*, counsel for the appellant had argued that there was an error of precedent fact, a form of illegality under the *GCHQ* heads of review, and that the lower court had erred in not following the House of Lord's decision in *R v. Secretary of State for the Home Department, ex p Khawaja*.[85] A precedent fact is one that must exist before the public authority has power to make a decision, and if it did not that decision was then susceptible to judicial review. Counsel for the appellant's argument was thus that the court's function extended to deciding whether the decision was justified and in accordance with the evidence,[86] and that it had to examine the evidence and consider whether the evidence was sufficient to justify the President's satisfaction that the jurisdictional fact had been made out.[87] The court's decision on this ground was *obiter*, since the appellants were not required to prove that the decision was invalid on *GCHQ* grounds.[88] It held that for the discretions to fall outside the precedent fact category, Parliament had to make its intention to do so in clear and unequivocal words, on a construction of the relevant provisions.[89] On the facts of *Chng Suan Tze*, the court held that the discretions under ss 8 (1) and 10 of the ISA did not fall into the precedent fact category as they had been clearly and unequivocally entrusted to the Executive,[90] and that there were no precedent facts which preceded these discretions. The court also observed that Parliament could not have intended for a court of law to objectively determine whether a detainee was likely to act or continue acting in a manner prejudicial to Singapore, as the judicial process is unsuitable for reaching decisions on national security.[91]

Legislative Intervention in Singapore

On 25 January 1989, the Constitution of the Republic of Singapore (Amendment) Bill and the Internal Security (Amendment) Bill were passed by Parliament. These bills were passed so as to restore the decision of *Lee Mau Seng v. Minister for Home Affairs* ("*Lee Mau Seng*")[92] as the law governing judicial review of the Executive's discretionary powers under the ISA. These Bills became law on 26 January 1989 and 28 January 1989 respectively.[93] Parliament's intention was to reinstate the subjective test laid down by the Singapore High Court in *Lee Mau Seng*, given the Court of Appeal's departure from the subjective test in favour of an objective one in *Chng Suan Tze*.

Rationale Underlying Legislative Intervention

Parliament sought to exclude judicial review by way of the reinstatement of the subjective test because it feared that the courts' application of an objective test would amount to judicial usurpation of the Executive's functions in matters pertaining to national security, which the Judiciary is ill-equipped to deal with.[94] Parliament's stance was that the objective test would empower the courts to substitute their views on the proper exercise of discretionary power conferred under the ISA for that of the Executive in contravention of the separation of powers doctrine.[95] Moreover, the judicial process,

unlike Executive decision-making, was not conducive to a swift response to national security threats. It was said that the courts, unlike the Executive, lacked access to inadmissible evidence relevant to security matters, and judges did not possess the skill and knowledge of the security experts employed by the Executive.[96]

Furthermore, the objective test did not find favour with Parliament because it was an import of the position of the United Kingdom and other Commonwealth jurisdictions.[97] Since the objective test was formulated by foreign judges without consideration of Singapore's local conditions,[98] Parliament was averse to the idea of allowing the objective test to govern the development of Singapore law on matters of national security under the ISA.[99]

While Parliament recognised that the subjective test enhanced the potential for abuse of Executive discretion under the ISA, then Minister for Law, Professor S. Jayakumar, opined that the best safeguard against such abuse of power was not to give courts powers of judicial review. This was because in any case, an unscrupulous government could still tamper with the composition of the courts to impair the judicial check on abuse of power. Instead, the crucial safeguard was said to be the making of wise voting choices by the electorate to put an honest and incorruptible government into power.[100]

Effect of the Legislative Amendments on Subjectively Worded Powers in the ISA

The amendments to the Constitution were made in order to pave the way for other intended amendments targeted at the ISA.[101] Article 149(3) of the Constitution[102] was inserted to enable Parliament to pass legislation governing courts' adjudication over any challenge of the validity of decisions made or acts done by the Executive pursuant to powers conferred by an Act passed under Article 149.[103] Pursuant to Article 149(3), Parliament enacted the Internal Security (Amendment) Bill.[104] New sections were inserted into the ISA. S 8B(1)[105] restored *Lee Mau Seng* as the applicable and declared law governing judicial review under the ISA.[106] S 8B(1) is also subject to s 8B(2),[107] which seeks to oust judicial review in any court of any act done or decision made by the President or the Minister under the ISA, save for that which relates to compliance with any procedural requirement of the ISA governing such acts or decisions. S 8B(2) not only seeks to prevent courts from questioning the soundness of the subjective test but also anticipates the challenge that the law in *Lee Mau Seng* only relates to judicial review of detention orders so that the subjective test will not apply to other acts or decisions by the President or Minister under the ISA.[108]

In addition, the fact that the ISA was amended pursuant to Article 149(3) immunises ss 8B(1) and 8B(2) against the challenge that these provisions are void for contravening Article 93 of the Constitution[109] in purporting to dictate the manner in which judicial power is to be exercised, since it is expressly stated in Article 149(3) that nothing in Article 93 will invalidate any law enacted pursuant to Article 149(3).

Furthermore, the ISA falls within the ambit of the amended Article 149(1);[110] s 8B(1) of the ISA thus has immunity against the operation of Article 12 of the Constitution.[111] These amendments were prompted by the Court of Appeal's remarks in *Chng Suan Tze* that an application of a subjective test to the exercise of executive discretion under ss 8 and 10 of the ISA allows for arbitrary detention, which would be inconsistent with Article 12(1).[112]

Operation of subjectively worded powers in the ISA post-1989 amendments

Teo Soh Lung v. Minister for Home Affairs

In the Singapore High Court,[113] F A Chua J held that ss 8B(1) and 8B(2) of the ISA govern judicial review in the context of the ISA and thus precluded any consideration of the *obiter* remarks of the Court of Appeal in *Chng Suan Tze*.[114] Therefore, applying the subjective test, the respondents' burden of justifying the legality of the applicant's detention was discharged as the respondents produced a valid detention order and evidence of the subjective satisfaction of the President acting on the advice of the Cabinet.[115]

The applicant then appealed to the Singapore Court of Appeal.[116] The Court of Appeal construed s 8B(1) in accordance with the clear legislative intention expressed through the plain wording of the provision. It was held that s 8B(1) reinstates *Lee Mau Seng* as the law governing judicial review of decisions made or acts done pursuant to the Executive's powers under the ISA.[117] In order to determine the law on judicial review of the exercise of executive discretion under the ISA, it is necessary to ascertain the exact decision laid down in *Lee Mau Seng*.[118] However, the Court of Appeal declined to opine on whether the decision in *Lee Mau Seng* meant that a detention order could not be challenged on the basis that it was made for extraneous reasons completely outside the scope of the ISA.[119] This was because the Court of Appeal found that the contention that the court in *Lee Mau Seng* could not be made based on the facts of *Teo Soh Lung v. Minister for Home Affairs*. On the facts of *Teo Soh Lung*, it was not established that Teo was not re-detained in the interests of national security as required by s 8(1) of the ISA[120] but for reasons not contemplated by the provision.[121] Furthermore, the court did not decide whether s 8B(2) of the ISA precludes the court from reviewing a detention order shown to have been made for purposes other than national security, or whether the amendments to s 8 of the ISA are outside the scope of the legislative powers conferred by the amended Article 149 of the Constitution.[122]

Subjectively worded powers outside the ISA

Yong Vui Kong v. Attorney-General ("*Yong Vui Kong*")[123] stands for the proposition that the objective test laid down in *Chng Suan Tze* continues to be the law governing judicial review of the exercise of executive discretion under a subjectively worded statutory provision. In *Yong Vui Kong*, the Court of Appeal opined that the 1989 legislative amendments to the Constitution of the Republic of Singapore and the ISA did not completely reverse *Chng Suan Tze*.[124] The court was of the view that, apart from the restriction of courts' supervisory jurisdiction to reviewing national security decisions made under the ISA for procedural impropriety, Parliament did not disturb the principle[125] laid down in *Chng Suan Tze* that the notion of a subjective or unfettered discretion, *ie*, power without legal limits, is contrary to the rule of law which demands that courts should be able to examine the exercise of discretionary power. Since Parliament did not undermine this principle when it legislatively reversed *Chng Suan Tze*, Parliament was taken to have implicitly endorsed this principle.[126] A corollary of this principle is that any exercise of discretion, including those exercised pursuant to a subjectively worded statutory provision, is subject to judicial review.

Operation of subjectively worded powers in the Criminal Law (Temporary Provisions) Act ("CLTPA")

Power of Minister to make orders

S 30. Whenever the Minister is satisfied with respect to any person, whether the person is at

> large or in custody, that the person has been associated with activities of a criminal nature, the Minister may, with the consent of the Public Prosecutor —
>
> (a) if he is satisfied that it is necessary that the person be detained in the interests of public safety, peace and good order, by order under his hand direct that the person be detained for any period not exceeding 12 months from the date of the order; or
>
> (b) if he is satisfied that it is necessary that the person be subject to the supervision of the police, by order direct that the person be subject to the supervision of the police for any period not exceeding 3 years from the date of the order.[127]

There is authority for the proposition that in judicial review proceedings outside the context of the ISA, an objective test is to be applied to the exercise of executive discretion that is pursuant to a subjectively worded provision. In *Kamal Jit Singh v Minister for Home Affairs and others*,[128] the relevant statutory provision was s 30 of the CLTPA, under which detention can be ordered if the Minister is satisfied in accordance with the requirements in the provision.[129] Notably, the Singapore Court of Appeal suggested that, in light of the decision in *Chng Suan Tze*, the validity of the detention order made by the Minister under s 30 of the CLTPA is dependent on the objective satisfaction of the Minister.[130] Moreover, in *Re Wong Sin Yee*,[131] which also involved judicial review of the applicant's detention under s 30 of the CLTPA, the High Court followed *Chng Suan Tze* in considering the scope of judicial review available on the facts of the case. If the High Court had applied a subjective test to the exercise of the Minister's discretion under s 30, only the subjective satisfaction of the Minister in accordance with the section would have been in issue. However, this was not the case since the High Court, following the decision in *Chng Suan Tze*, held that the absence of the need to establish a jurisdictional or precedent fact meant that the scope of judicial review was strictly limited to the *GCHQ* grounds of judicial review.[132] This is in accordance with the application of an objective test to subjectively worded powers.

Notes

1. ^ Constitution of the Republic of Singapore (1999 Reprint (http://agcvldb4.agc.gov.sg/non_version/cgi-bin/cgi_retrieve.pl?actno=REVED-CONST)), Art. 18(9).
2. ^ Peter Leyland and Gordon Anthony, Textbook on Administrative Law, 6th Addition, Oxford University Press ("Leyland & Anthony"), p. 392.
3. ^ Leyland & Anthony, p. 392.
4. ^ Leyland & Anthony, p. 393.
5. ^ See below: The UK Position - Exceptions: Finality Clauses.
6. ^ Thio Li-ann, "Law and the Administrative State" in Kevin Y[ew] L[ee] Tan (ed), *The Singapore Legal System* (2nd ed) (Singapore: Singapore University Press, 1999), ch 5, at 195.
7. ^ Peter Cane, Administrative Law (4th ed) (Oxford: Oxford University Press, 2004) ("Cane"), p.240-241.
8. ^ Cane, p.240-241.
9. ^ *Anisminic Ltd v. Foreign Compensation Commission and another* [1968] UKHL 6 (http://www.bailii.org/uk/cases/UKHL/1968/6.html) , [1969] 2 AC 147 (17 December 1968), House of Lords (UK).
10. ^ S 4(4) Foreign Compensation Act, 1950.
11. ^ *Anisminic*, p.170.
12. ^ *Anisminic*, p.170.
13. ^ *Anisminic*, p.170.
14. ^ *Anisminic*, p.171.
15. ^ *Anisminic*, p.170.
16. ^ Cane, p.240-241.

17. ^ Cane, p. 240.
18. ^ Cane, p. 241.
19. ^ *Regina v. Lord President of the Privy Council* [1992] UKHL 12 (http://www.bailii.org/uk/cases/UKHL/1992/12.html) , [1993] AC 682, [1993] 3 WLR 1112 (3 December 1992), House of Lords (UK).
20. ^ *Page*, p. 701.
21. ^ *O'Reilly and others (A.P.) (Appellants) v. Mackman and others (Respondents)* [1983] UKHL 1 (http://www.bailii.org/uk/cases/UKHL/1983/1.html) (25 November 1983), House of Lords (UK).
22. ^ *Page*, p. 701.
23. ^ *Page*, p. 701.
24. ^ *Cart & Ors, R (on the application of) v The Upper Tribunal & Ors* [2009] EWHC 3052 (http://www.bailii.org/ew/cases/EWHC/2009/3052.html) , [2010] PTSR 824, [2010] 2 FCR 309, [2009] EWHC 3052 (Admin), [2010] 1 All ER 908, [2010] 2 WLR 1012, [2009] STI 3167, [2010] STC 493, [2010] MHLR 35 (1 December 2009), High Court (England and Wales).
25. ^ *Cart, R (on the application of) v The Upper Tribunal & Ors* [2010] EWCA 859 (http://www.bailii.org/ew/cases/EWCA/2010/859.html) , [2010] EWCA Civ 859, [2011] PTSR 42, [2010] 4 All ER 714, [2010] MHLR 353, [2011] ACD 1, [2011] 2 WLR 36, [2011] QB 120, [2011] 1 QB 120, [2010] NPC 86, [2010] STC 2556, [2010] STI 2272 (23 July 2010), Court of Appeal (England and Wales).
26. ^ "*Regina (Cart) v Upper Tribunal (Public Law Project and another intervening)* [2011] UKSC 28 (http://www.bailii.org/uk/cases/UKSC/2011/28.html) , [2011] PTSR 1053, [2011] UKSC 28, [2011] 3 WLR 107, [2011] STI 1943 (21 June 2011), Supreme Court (UK).
27. ^ *R (Cart)*, p.123-124 and 141 respectively.
28. ^ *R (Cart)*, para. 108.
29. ^ *R (Cart)*, para. 110.
30. ^ *R (Cart)*, para. 110.
31. ^ *R (Cart)*, para. 122.
32. ^ Cane, p.241.
33. ^ *Page*, p. 702.
34. ^ *Pearlman v Keepers and Governors of Harrow School* [1978] EWCA/Civ 5 (http://www.bailii.org/ew/cases/EWCA/Civ/1978/5.html) , [1979] QB 56 (14 July 1978), EWCA Civ.
35. ^ *South East Asia Fire Bricks Sdn. Bhd v Non-Metalic Mineral Products Manufacturing Employees Union and others (Malaysia)* [1980] UKPC 1980_21 (http://www.bailii.org/uk/cases/UKPC/1980/1980_21.html) (24 June 1980), Privy Council.
36. ^ *Racal Communications Ltd, Re* [1980] UKHL 5 (http://www.bailii.org/uk/cases/UKHL/1980/5.html) (3 July 1980), House of Lords (UK).
37. ^ *Page*, p. 703.
38. ^ Cane, p.242.
39. ^ Cane, p. 241.
40. ^ Cane, p.241, see footnote 30.
41. ^ *R (Cart)*, p. 145.
42. ^ *R (Cart)*, p. 145.
43. ^ *R (Cart)*, p. 145 -146.
44. ^ *R v Medical Appeal Tribunal, ex p. Gilmore* [1957] EWCA/Civ 1 (http://www.bailii.org/ew/cases/EWCA/Civ/1957/1.html) , [1957] 2 WLR 498, [1957] 1 QB 574, [1957] 1 All ER 796 (25 February 1957), EWCA Civ.
45. ^ *Gilmore*, p.503.
46. ^ *Gilmore*, p.503.
47. ^ *South East Asia Fire Bricks*, p.369-370.
48. ^ *Stansfield Business International Pte Ltd v. Minister for Manpower (formerly known as Minister for Labour)* [1999] 2 S.L.R. (R.) 866
49. ^ Employment Act (Cap. 91, 2009 Rev. Ed. (http://agcvldb4.agc.gov.sg/non_version/cgi-bin/cgi_retrieve.pl?actno=REVED-91)) ("EA"), s. 14.
50. ^ *Stansfield*, para. 19.
51. ^ EA, s. 14(5).
52. ^ *Stansfield*, para. 34.
53. ^ *Stansfield*, para. 21.
54. ^ *Stansfield*, para. 21 - 22.

55. ^ *Page*, p. 701.
56. ^ *South East Asia Fire Bricks*, p. 370.
57. ^ Chan Sek Keong, "Judicial Review – From Angst to Empathy: A Lecture to Singapore Management University Second Year Law Students" ("*Chan*") (2010) 22 S Ac LJ 469.
58. ^ *Chan*, para. 17.
59. ^ Singapore Constitution, Art. 93.
60. ^ *Chan*, para.19.
61. ^ *Chip Hup Hup Kee Construction Pte Ltd v Ssangyong Engineering and Constrcution Co Ltd* [2010] 1 S.L.R. 658.
62. ^ *Chua Say Eng v Lee Wee Lick Terence* [2011] SGHC 109.
63. ^ *Chua Say Eng*, para. 14.
64. ^ *Chua Say Eng*, para. 14.
65. ^ *Chua Say Eng*, para. 24.
66. ^ Internal Security Act (Cap. 143, 1985 Rev. Ed. (http://agcvldb4.agc.gov.sg/non_version/cgi-bin/cgi_retrieve.pl?actno=REVED-143)) ("ISA"), s. 8(1).
67. ^ Leyland & Anthony, p.403.
68. ^ Leyland & Anthony, p.403.
69. ^ *Council of Civil Service Unions v Minister for the Civil Service* [1983] UKHL 6 (http://www.bailii.org/uk/cases/UKHL/1983/6.html) , [1984] 3 All ER 935, [1983] UKHL 6, [1984] 3 WLR 1174, [1985] ICR 14, [1985] AC 374, [1985] IRLR 28 (22 November 1983), House of Lords (UK).
70. ^ *Chng Suan Tze v. Minister for Home Affairs* [1988] 2 S.L.R.(R.) 525.
71. ^ Internal Security Act (Cap. 145, 1985 Rev. Ed. (http://agcvldb4.agc.gov.sg/non_version/cgi-bin/cgi_retrieve.pl?actno=REVED-145)) ("ISA"), s. 8(1).
72. ^ ISA, s. 8.
73. ^ ISA, s. 10.
74. ^ *Chng Suan Tze*, para. 55.
75. ^ *Chng Suan Tze*, para. 119.
76. ^ See *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 S.L.R.(R.) 239, para. 149 and *Yong Vui Kong v Attorney General* [2011] 2 S.L.R. 1189, para. 79 - 80.
77. ^ *Chng Suan Tze*, para. 47.
78. ^ *Chng Suan Tze*, para. 46.
79. ^ *Karam Singh v Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs) Malaysia* [1969] 2 MLJ 129 at p. 150 - 151.
80. ^ *Chng Suan Tze*, para. 55.
81. ^ *Chng Suan Tze*, para. 56 - 69.
82. ^ *Chng Suan Tze*, para. 86.
83. ^ *Chng Suan Tze*, para. 118.
84. ^ *Chng Suan Tze*, para. 126 - 127.
85. ^ *R v Secretary of State for the Home Department, ex p Khawaja* [1983] UKHL 8 (http://www.bailii.org/uk/cases/UKHL/1983/8.html) , [1983] 2 WLR 321, [1983] 1 All ER 765, [1983] UKHL 8, [1984] 1 AC 74, [1982] Imm AR 139, [1984] AC 74 (10 February 1983), House of Lords (UK).
86. ^ *Chng Suan Tze*, para. 115.
87. ^ *Chng Suan Tze*, para. 106.
88. ^ *Chng Suan Tze*, para. 106 - 119.
89. ^ *Chng Suan Tze*, para. 116.
90. ^ *Chng Suan Tze*, para. 117.
91. ^ *Chng Suan Tze*, para. 118.
92. ^ *Lee Mau Seng v. Minister for Home Affairs* [1971–1973] S.L.R.(R.) 135.
93. ^ *Teo Soh Lung v. Minister for Home Affairs* [1990] 1 S.L.R.(R.) 351, para. 3, (C.A.).
94. ^ Prof. S. Jayakumar (The Minister for Law), "Constitution of the Republic of Singapore (Amendment) Bill (http://160.96.186.106/search/topic.html) ", *Singapore Parliamentary Debates, Official Report* (25 January 1989), vol. 52, col. 469 - 470*ff*.
95. ^ Jayakumar, "Constitution of the Republic of Singapore (Amendment) Bill" (25 January 1989), col. 466.
96. ^ Jayakumar, "Constitution of the Republic of Singapore (Amendment) Bill" (25 January 1989), col. 470 - 471.
97. ^ Jayakumar, "Constitution of the Republic of Singapore (Amendment) Bill" (25 January 1989), col. 466 - 467.
98. ^ Jayakumar, "Constitution of the Republic of Singapore (Amendment) Bill" (25 January 1989), col. 467.
99. ^ Jayakumar, "Constitution of the Republic of Singapore (Amendment) Bill" (25 January 1989), col. 468.
100. ^ Jayakumar, "Constitution of the Republic of Singapore (Amendment) Bill" (25 January 1989), col. 524.

101. ^ Jayakumar, "Constitution of the Republic of Singapore (Amendment) Bill" (25 January 1989), col. 463.
102. ^ Singapore Constitution, Art. 149(3).
103. ^ Jayakumar, "Constitution of the Republic of Singapore (Amendment) Bill" (25 January 1989), col. 473.
104. ^ ISA, preamble.
105. ^ ISA, s. 8B(1).
106. ^ *Teo Soh Lung*, para. 20 - 21, (C.A.).
107. ^ ISA, s. 8B(2).
108. ^ Jayakumar, "Constitution of the Republic of Singapore (Amendment) Bill" (25 January 1989), col. 532.
109. ^ Singapore Constitution, Art. 93.
110. ^ Singapore Constitution, Art. 149(1).
111. ^ Singapore Constitution, Art. 12.
112. ^ *Chng Suan Tze*, para. 82.
113. ^ *Teo Soh Lung v. Minister for Home Affairs* [1989] 1 S.L.R.(R.) 461, (H.C.).
114. ^ *Teo Soh Lung*, para. 13, (H.C.).
115. ^ *Teo Soh Lung*, para. 14, (H.C.).
116. ^ *Teo Soh Lung v. Minister for Home Affairs* [1990] 1 S.L.R.(R.) 347, (C.A.).
117. ^ *Teo Soh Lung*, para. 20 - 21, (C.A.).
118. ^ *Teo Soh Lung*, para. 22, (C.A.).
119. ^ *Teo Soh Lung*, para. 43, (C.A.).
120. ^ ISA, s. 8(1).
121. ^ *Teo Soh Lung*, para. 42, (C.A.).
122. ^ *Teo Soh Lung*, para. 44, (C.A.).
123. ^ *Yong Vui Kong v. Attorney-General* [2011] 2 S.L.R. 1189.
124. ^ *Yong Vui Kong*, para. 79.
125. ^ *Chng Suan Tze*, para. 86.
126. ^ *Yong Vui Kong*, para. 79.
127. ^ Criminal Law (Temporary Provisions) Act (Cap. 67, 2000 Rev. Ed. (http://agcvldb4.agc.gov.sg/non_version/cgi-bin/cgi_retrieve.pl?actno=REVED-67)) ("CLTPA"), s. 30.
128. ^ *Kamal Jit Singh v. Minister for Home Affairs and others* [1992] 3 S.L.R.(R.) 352.
129. ^ *Kamal Jit Singh*, para. 19 - 20.
130. ^ *Kamal Jit Singh*, para. 22.
131. ^ *Re Wong Sin Yee* [2007] 4 S.L.R.(R.) 676.
132. ^ *Re Wong Sin Yee*, para. 12 - 13.

Further reading

Articles and websites

- Lee, Jack (13 August 2011), *Let Presidential Hopefuls Have Their Say* (http://works.bepress.com/jacklee/12/) , http://works.bepress.com/jacklee/12/, retrieved 03 November 2011.

Books

- Cane, Peter, 4th ed. (2004), *Administrative Law*, Oxford University Press.
- Wade, William; Forsyth, Christopher, 9th ed. (2004), *Administrative Law*, New York: Oxford University Press.
- Leyland, Peter; Anthony, Gordon, 6th ed. (2009), *Textbook on Administrative Law*, New York: Oxford University Press.

External links

- Official website of the Parliament of Singapore (http://www.parliament.gov.sg)
- Official website of the Supreme Court of Singapore (http://www.supremecourt.gov.sg)
- Singapore Statutes Online (http://statutes.agc.gov.sg)