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INTRODUCTION: CONTEMPORARY ISSUES IN PUBLIC LAW—THEORY, DOCTRINE AND PRACTICE

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I. OVERVIEW OF SPECIAL SYMPOSIUM

This is the second part of the special symposium section of the *Singapore Journal of Legal Studies*; the first was published in September 2019. The two symposia issues bring together a collection of papers that look at contemporary issues relating to public law and litigation in Singapore. Despite the flourishing of research in the area in the recent decade, there are a number of areas of public law that remain under-explored. As highlighted in the Introduction to the September 2019 symposium section, not only has there been an increase in the number of applications for judicial review, there has also been an increasing diversity in the issues mooted in courts in recent years. Since the last symposium issue was published, applicants have continued to bring important public law issues to court. The courts have had to consider the effect of ouster clauses in legislation,[1] whether and when courts can adopt a rectifying construction of legislation,[2] the constitutionality of holding general elections in 2020 during the coronavirus pandemic implicating once more the 'right to vote' in the courts,[3] the constitutionality of the mode of carrying out the death penalty,[4] challenges of correction directions issued pursuant to the new *Protection from Online Falsehoods and Manipulation Act 2019*[5] and further challenges to section 377A of the *Penal Code*.[6] The courts have also recently looked at applying a proportionality-style of analysis to the review of the constitutionality of legislation.[7]

All of the papers arise from a workshop held in January 2019 that brought together academics and practitioners (from both the public and private sector). This workshop was convened by Kevin Tan and me and was generously supported by the Centre for Asian Legal Studies at the Faculty of Law of the National University of Singapore.

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* Guest Editor.

1 *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 (CA) [*Nagaenthran* (CA)].

2 *Kardachi, Jason Aleksander v Attorney-General* [2020] SGCA 92.

3 *Daniel De Costa Augustin v Attorney-General* [2020] 2 SLR 621 (CA).

4 *Gobi a/l Avedian v Attorney-General* [2020] SGCA 77.

5 *Singapore Democratic Party v Attorney-General* [2020] SGHC 25; *The Online Citizen Pte Ltd v Attorney-General* [2020] SGHC 36.

6 *Ong Ming Johnson v Attorney-General* [2020] SGHC 63.

7 *Wham Kwok Han Jolovan v Public Prosecutor* [2020] SGCA 111.

The workshop attracted a large audience of approximately 70 practitioners, government officials and members of academia. This provided a solid forum for discussing the draft papers. The previous and current symposium issue have been curated to include papers that address: (a) questions of access to judicial review and/or procedural issues relating to the conduct of judicial review proceedings and (b) issues relating to the theoretical foundations and/or substantive doctrine utilised by judges to adjudicate these disputes. In this way, each symposium issue addresses both the procedural and substantive aspects (broadly speaking) of public law litigation.

II. Papers in This Volume

The special symposium section for this issue of the *Singapore Journal of Legal Studies* contains four papers. The first paper by Jack Tsen-Ta Lee seeks to add to the existing conversation on the complex rules on standing in public law cases.[8] Jack's paper starts with a recognition of the status quo in rationale behind standing rules. Namely, the balancing between two competing interests: encouraging citizens in actively enforcing the law and discouraging meddlesome interlopers invoking the jurisdiction of the courts in matters in which they are not concerned. The paper argues that–in striking this balance–if standing rules err on the side of being excessively restrictive, there is a risk that certain forms of governmental action may be, *de facto*, immunised from judicial scrutiny. This article argues that recasting the standing rules to focus on an applicant's suitability to bring a claim and whether the claim is sustainable on its merits accords better with the courts' role as a check on the political branches of government and their duty to uphold the rule of law.

The second paper, by Thio Li-ann, also deals with what may be considered a preliminary issue in judicial review cases–the question of the impact of ouster clauses. As with the issue of standing, the court's decision on the issue determines whether or not it has jurisdiction to adjudicate a particular application for judicial review. Privative or ouster clauses are found across the common law world. These clauses exclude or restrict the scope of judicial review of the executive's acts or decisions under that statute. Ousters may be full or partial. The latter may impose a strict time limit for the commencement of proceedings or restrict the grounds on which decisions may be challenged. The former seek to exclude all judicial review. Irrespective of form, these clauses bring into tension a number of constitutional principles: the need for courts to respect parliamentary intention, the separation of powers (the judiciary and the executive should have their domains respected) and rule of law concerns that require that all public power is held to account and that the aggrieved have a proper remedy for challenging decisions of public bodies. Courts across the common law world have adopted varying approaches to resolve this tension. They may recognise the ouster of judicial review, respecting the intention of the legislature. Alternatively, such clauses may be disregarded on the basis that they are an unconstitutional interference with judicial power or not sufficiently respectful of the rule of law and access to justice. Finally, courts have also sought to (re)interpret ouster clauses in a way that

[8] Benjamin Joshua Ong, "Standing Up for Your Rights: A Review of the Law of Standing in Judicial Review in Singapore" [2019] Sing JLS 316 at 330-344; Swati Jhaveri, "Advancing Constitutional Justice in Singapore: Enhancing Access and Standing in Judicial Review Cases" [2017] Sing JLS 53 at 74.

allows for some judicial review on traditional administrative law grounds of review: namely, illegality, irrationality and procedural impropriety. Li-ann's paper considers the reception of ouster clauses in Singapore. The paper recognises that in Singapore the courts have adopted a range of approaches for tackling ouster clauses. This includes deciding on the constitutionality of such clauses,[9] or deciding on the impact of such clauses on the scope of judicial review[10] and more recently by recharacterising the relevant statutory provision not as an ouster clause but as a statutory immunity clause.[11] The paper reacts to the fact that the Singapore courts have not adopted a uniform, definitive approach to determine the effectiveness of an ouster clause and considers possible approaches to the issue. It posits that Singapore judges can–unlike the courts in England, which are bound by rules of parliamentary sovereignty–evolve higher order legal and constitutional principles to control the political branches. Li-ann's paper contemplates the possibility that courts will utilise constitutional norms to shape how ouster clauses may be interpreted, whether upheld or read down. The paper comparatively examines the case law of other common law jurisdictions to identify what factors may go into this balance, postulating that the factors which may shape Singapore law on ouster clauses would include a preference for those that advance some form of political constitutionalism which advocates restrained judicial review and prioritises an efficient governing process.

The remaining two papers consider the utility and role of judicial review with respect to certain groups of actors: commercial entities and metanational private organisations. Calvin Liang's seeks to challenge the orthodox view of the reach of judicial review with respect to the latter. Typically, judicial review is seen as a public law remedy utilised to review the exercise of public power by public authorities. This paper, however, seeks to go to the foundation of the basis of judicial review and, in particular, the fact that at its core, judicial review embodies the courts' duty to protect individuals from the effects of 'dominant power'. The paper argues that judicial review should extend to all those places where dominant power resides. While, historically, such power resided predominantly with the state, this power is now found to reside with metanational private organisations–like Facebook–that disrupt the state's monopoly of power. This relocation of dominant power will challenge orthodox doctrines of judicial review–primarily the public-private divide that is currently utilised to delineate which kind of institution and what kinds of questions relating to those institutions are amenable to judicial review.[12] The paper argues that there is a need to reinvestigate how judicial review principles were developed to control dominant state-based power and how these principles need to be adapted to regulate the new power structures found in private organisations.

The final paper by Eugene Tan examines the increasing use of judicial review and administrative law by corporate entities in Singapore to protect and assert business interests. The paper proposes that 'commercial judicial review' can be an effective tool to this end when used effectively. The paper considers the reasons behind this rise

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

10 *Ibid*.

11 *Nagaenthran* (CA), *supra* note 1. See also Kenny Chng, "Reconsidering Ouster Clauses in Singapore Administrative Law" (2020) 136 Law Q Rev 40 at 40-45.

12 *R v Panel on Take-overs and Mergers, Ex parte Datafin Plc* [1987] 2 WLR 699 (CA); *Yeap Wai Kong v Singapore Exchange Securities Trading Ltd* [2012] 3 SLR 565 (HC).

in public law litigation, including a growing awareness within the legal community of the role of public law in regulatory matters. The article argues that judicial review is increasingly an important consideration for companies seeking to protect their interests against what they regard as unfair or unlawful government or regulatory actions. It suggests that in embracing public law litigation, private sector entities would do well to also support administrative law values such as legality, fairness, and accountability.

III. Conclusion

The papers that form part of this and the September 2019 issue are an important advance on understandings of jurisprudence on a range of topics relating to public law and litigation in Singapore. The hope is that they will trigger further conversations on these and other underexplored areas of public law, especially, for example, procedural issues relating to the rules of evidence and costs orders in judicial review cases.

The issues of evidence and the actual procedural issues relating to the conduct of judicial review proceedings are likely to be issues of increasing importance as there is a rise in the use of technology. As observed by Chief Justice Menon, "the day of reckoning can no longer be put off, because dramatic [technological] developments will force us to rethink entire areas of practice".[13] This is very much a live issue in other common law jurisdictions where administrative law cases are moving to being adjudicated online.[14] The use of technology in dispute resolution has been an especially live issue during the coronavirus pandemic. However, the implications of technology for public law go beyond the issue of how cases will be resolved, due to the increasing use of technology in carrying out the work of the state.[15] This will prompt the question of the utility of public law litigation and principles as a means for resolving governance and accountability questions with the government's use of technology.[16] As the complexity of governance increases with the increasing use of algorithms, artificial intelligence and technology in the work of the government, the issue of administrative 'justice' and accountability mechanisms will need to shift to match this complexity.[17]

The cases that come through the courts in the future will be an important context in which the law relating to these questions can be tested and further developed. The hope is that this work can then be an important source material with the potential for real impact on the development of public law in Singapore.

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[13] Sunderesh Menon, "Response by Chief Justice Sundaresh Menon" (Opening of the Legal Year 2017, 9 January 2017), online: Supreme Court Singapore <https://www.supremecourt.gov.sg/Data/Editor/Documents/Opening%20of%20the%20Legal%20Year%20Speech%20(Final).pdf> at para 15.

[14] Joe Tomlinson, *Justice in the Digital State: Assessing the Next Revolution in Administrative Justice* (Bristol: Policy Press, 2019).

[15] Michele Finck, "Automated Decision-Making and Administrative Law" in Peter Cane *et al*, eds. *The Oxford Handbook of Comparative Administrative Law* (Oxford University Press, 2020).

[16] Sunderesh Menon, "Executive Power: Rethinking the Modalities of Control" (Annual Bernstein Lecture in Comparative Law delivered at Duke University School of Law, 1 November 2018), (2019) 29 Duke J Comp & Intl L 277 (2019).

[17] Sundaresh Menon, "Technology and the Changing Face of Justice" (Speech delivered at the Negotiation and Conflict Management Group ADR Conference 2019, 14 November 2019). A slightly amended version of the speech is published in the *Journal of International Arbitration*: (2020) 37:2 J Intl Arb 167.