

## THE THEORETICAL FOUNDATIONS OF JUDICIAL REVIEW IN SINGAPORE

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The theoretical foundation of judicial review of administrative action has been the subject of fierce debate among English scholars, which is also the source jurisdiction of much of public law in Singapore. In contrast, there is comparatively little attention paid to the question of the particular theoretical foundations of judicial review in Singapore. Indeed, there is an inclination in Singapore case law and academia towards importing English theories of judicial review. Accordingly, this paper aims to contribute to the formulation of a proper theoretical foundation for judicial review in Singapore. It argues that with a proper understanding of the competing English theories of judicial review, it will be apparent that they are not readily transplantable to Singapore. As such, a unique theory of judicial review stands to be formulated in Singapore. A proper articulation of judicial review theory can have significant consequences for judicial review doctrine; this paper uses case law relating to ouster clauses to exemplify this point.

### I. INTRODUCTION

In recent decades, eminent scholars of constitutional law in England have engaged in a lively debate over the theoretical foundations of judicial review of administrative action. While the debate can be characterised as having reached an impasse, and indeed has been criticised as inconclusive and irrelevant,<sup>1</sup> an important outcome of this debate is that each position and its implications has been articulated with great clarity, bringing the key constitutional issues to the fore and structuring further debate on these issues as case law develops.<sup>2</sup> A different situation, no less problematic for

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<sup>1</sup> TRS Allan, "The Constitutional Foundations of Judicial Review: Conceptual Conundrum or Interpretative Inquiry?" (2002) 61(1) CLJ 87 at 88, 89 [Allan, "Constitutional Foundations"].

<sup>2</sup> For example, the discussion of the recent United Kingdom ("UK") Supreme Court decision in *R (on the application of Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22 [*Privacy International*] is likely to be structured by the terms of the debate over judicial review theory—insofar as Lord Carnwath relied upon the principle of the rule of law as the fundamental justification for his approach to ouster clauses.

the resolution of the theoretical foundations of judicial review, obtains in Singapore. In contrast to England, however, there is comparatively little attention paid to the question of the theoretical foundations of judicial review in Singapore.

Nevertheless, it is suggested that it is important to pay attention to the theoretical foundations of judicial review. One should not lose sight of the important point that underlying the question of judicial review's theoretical foundation is the crucial issue of its legitimacy, which can have significant consequences for the proper scope of judicial review as a matter of doctrine.<sup>3</sup> In the UK, the courts' usage of judicial review expanded significantly in the second half of the 20<sup>th</sup> century as a reaction to the expansion of the administrative state and the reduced ability of the legislature to keep the executive in check.<sup>4</sup> In response to these historical developments, judges developed more robust principles of judicial review to hold the increasingly powerful executive to account.<sup>5</sup> However, the overarching principle of separation of powers continues to pose a problem for a more muscular assertion of the judicial role—if Parliament, as the supreme legislative body, has conferred upon the executive a discretion to exercise certain powers in furtherance of Parliament's objectives, what business does the unelected judiciary have in interfering with the executive's exercise of such powers?<sup>6</sup> This issue is further compounded by the fact that the executive can often be involved in polycentric policy decision-making, which lies beyond the judiciary's expertise. Thus, heightened judicial intervention in the actions of the executive branch needs to be legitimised by reference to a justificatory theory that can provide meaningful boundaries to the exercise of such power while allowing for adequate control of the executive.<sup>7</sup> Indeed, the courts' powers, being derived from the rule of law, must be delimited by the requirements of the rule of law itself.<sup>8</sup>

This paper aims to resolve these questions and contribute to the formulation of a proper theoretical foundation for judicial review in Singapore. To that end, this paper will first survey the debate in the UK between competing theories of judicial review, with a view towards evaluating the relevance of this debate for the formulation of a suitable theory of judicial review in Singapore. Such an evaluation is particularly important, given the interest of local judges and academics in the application of such theories. This paper will then discuss the position of the Singapore courts on this issue and take steps towards articulating a theory of judicial review which better fits the Singapore context.<sup>9</sup>

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<sup>3</sup> *Ibid* at para 91.

<sup>4</sup> Mark Elliott, *The Constitutional Foundations of Judicial Review* (North America: Hart Publishing, 2001) at 2 [Elliott, *Foundations*].

<sup>5</sup> *Ibid* at 480.

<sup>6</sup> Christopher Forsyth & Linda Whittle, "Judicial Creativity and Judicial Legitimacy in Administrative Law" (2002) 8 *Canterbury Law Review* 453 at 454.

<sup>7</sup> Elliott, *Foundations*, *supra* note 4 at 2, 3, 11.

<sup>8</sup> *Ibid* at 17.

<sup>9</sup> For the avoidance of doubt, while judicial review in Singapore can also proceed against legislation on constitutional grounds, the focus of this paper will be on the judicial review of administrative action. This is because the theories of judicial review discussed in this paper were formulated in the English context and thus relate solely to judicial review of administrative action.

## II. THEORIES OF JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

As a means of obtaining greater insight for the formulation of a proper theory of judicial review in Singapore, the contending theories of judicial review that have been proffered in England and the debates that these theories have engendered will be considered as a starting point.

A preliminary issue that should be addressed at this point is this: in view of the fact that the contending theories of judicial review in England have been formulated within a different constitutional context—as will become clear in the subsequent discussion—why should these debates be relevant for a study of judicial review in Singapore? The first reason is that it has indeed been suggested in the academic sphere that the modified *ultra vires* theory, one of the contending theories in England, which will be discussed subsequently, can be an appropriate justificatory theory for judicial review in Singapore, albeit with the appropriate modifications.<sup>10</sup> Further, as will be described later in this paper, some judges in Singapore have implicitly drawn upon these theories as the theoretical foundation for their reasoning.<sup>11</sup> Yet, the importation of these theories into the Singapore context by judges and academics to date has not paid significant attention to the differing constitutional context in England—specifically, the centrality of parliamentary supremacy—which has played a foundational role in the formulation of these theories. Accordingly, a review of the theories of judicial review which have been proffered in England, with a view to assessing their suitability for the Singapore context, can serve as a useful launching pad for the analysis in this paper.

Second, discussions of judicial review theory in Singapore have thus far overlooked the fundamental question of how the practice of judicial review is justifiable at all. Indeed, discussions of judicial review theory in the Singapore context often revolve around the red and green light theories of judicial review, and these theories have received judicial recognition by the Singapore Court of Appeal.<sup>12</sup> Stated briefly, the red light theory suggests that the judiciary should serve as an active check against abuses of executive power, and consequently justifies more intense scrutiny of executive action through judicial review, while the green light theory is premised on trust in the executive, and counsels an approach to judicial review focused on setting norms of good administration. However, these theories provide an incomplete theoretical justification for the practice of judicial review. Indeed, the red and green light theories are focused on the inter-institutional dynamic that the practice

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<sup>10</sup> Thio Li-ann, “The Theory and Practice of Judicial Review of Administrative Action in Singapore: Trends and Perspectives” in Yeo Tiong Min, Hans Tjio & Tang Hang Wu, eds, *SAL Conference 2011: Developments in Singapore Law 2006-2010—Trends and Perspectives* (Singapore: Singapore Academy of Law, 2011) 714 at paras 90, 91.

<sup>11</sup> *Cheng Vincent v Minister of Home Affairs* [1990] 1 SLR (R) 38 (HC) [*Cheng Vincent*]; *Re Application by Yee Yut Yee* [1977-1978] SLR (R) 490 (HC) [*Yee Yut Yee*].

<sup>12</sup> Chan Sek Keong, “Judicial Review—From Angst to Empathy” (2010) 22 Sing Ac LJ 469 at paras 29-30; *Jeyaretnam Kenneth Andrew v AG* [2014] 1 SLR 345 at paras 48-50 (CA); Swati Jhaveri, “Localising Administrative Law in Singapore: Embracing Inter-branch Equality” (2017) 29 Sing Ac LJ 828 at para 6. See the last reference for a compelling analysis of the status of the theories in Singapore administrative law and how these theories suggest potential trajectories for development of Singapore law.

of judicial review ought to reflect. But these theories take the practice of judicial review as a given, and do not directly address the higher-order question of how (and whether) the practice of judicial review is justified at all within the constitutional framework. Put another way, the red and green light theories are primarily focused on the *scope* of review, as opposed to the justifiability of the practice of review *per se*. The latter question is the fundamental concern of the contending theories of judicial review in England, making a study of these theories a useful starting point for the analysis of the same issue in the Singapore context.

With the background thus set, we move to a consideration of the contending theories of judicial review in England, with a view towards evaluating their applicability in the Singapore context. There are three main contending theories which proffer a theoretical justification for judicial review of administrative action in England: the traditional *ultra vires* theory, the modified *ultra vires* theory, and the common law theory. Stated in this order, the three theories express a decreasing degree of reference to parliamentary intention as a justification for judicial review. Each theory will be discussed in turn.

#### A. Traditional Ultra Vires Theory

The traditional *ultra vires* theory legitimises judicial review by positing a direct relation between parliamentary intention and judicial review of executive action. On this view, when a judge reviews executive action, a judge is simply enforcing the express or implied limits which Parliament had attached to the specific grant of such power to the executive.<sup>13</sup> As such, the grounds of judicial review utilised by judges to review executive action are simply expressions of Parliament's direct intention—Parliament could not have intended the executive to contravene the rules of natural justice, or act irrationally, and so on. An important advantage of this theory is that it is able to “reconcile the supervisory jurisdiction with the doctrine of parliamentary supremacy”.<sup>14</sup>

This theory is closely linked to Professor Albert Venn Dicey's model of constitutional law. Since Parliament is supreme within Britain's constitutional model, the Diceyan view is that judges are empowered to ensure that the executive does not act *ultra vires* Parliament's grant of power to them—and nothing more.<sup>15</sup> In other words, in exercising powers of judicial review, the judiciary is in fact *safeguarding* Parliament's supremacy. Thus, the crucial inquiry judges should pay heed to is the will of Parliament—in exercising judicial review, “judges merely find and implement that will”.<sup>16</sup> The traditional *ultra vires* theory accordingly legitimises judicial review within a constitutional framework which also accepts the doctrine of parliamentary supremacy.<sup>17</sup>

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<sup>13</sup> Elliott, *Foundations*, *supra* note 4 at 3, 23.

<sup>14</sup> *Ibid* at 3.

<sup>15</sup> Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution* (London: Macmillan & Co Ltd, 1902); Lori Ringhand, “Fig Leaves, Fairy Tales, and Constitutional Foundations: Debating Judicial Review in Britain” (2005) 43 *Colum J Transnat'l L* 865 at 874.

<sup>16</sup> Ringhand, *ibid* at 874.

<sup>17</sup> Elliott, *Foundations*, *supra* note 4 at 10, 11.

It is suggested that this theory can be ruled out in short order as a possible theoretical justification for judicial review in Singapore. Indeed, even in England, there is an almost unanimous consensus among public law scholars that the traditional *ultra vires* theory is problematic. Focusing first on the problems of this theory in the English context, the traditional *ultra vires* theory does not fit well with how judicial review doctrine has been developed by judges in England. New grounds of judicial review introduced by judges, such as the doctrine of substantive legitimate expectations,<sup>18</sup> strain the explanatory power of the traditional *ultra vires* theory. This doctrine can be seen as an expression of Parliament's will only if one is willing to take a very broad and permissive interpretation of what Parliament has intended—it is indeed difficult to see the judicial power to give effect to a plaintiff's substantive legitimate expectations over a decision otherwise legitimately made by an administrative body as an extension of Parliament's will, whether implicit or explicit.<sup>19</sup>

Second, the scope of judicial review in England has expanded beyond the explanatory power of the traditional *ultra vires* theory. Judicial review has been extended to non-statutory bodies exercising public law duties,<sup>20</sup> and also to non-statutory powers.<sup>21</sup> This development presents serious difficulties for the traditional *ultra vires* theory—if judicial review is to be justified solely by reference to Parliament's intent, how can the courts assert a supervisory jurisdiction over powers *not* granted by Parliament?<sup>22</sup> In addition, judges have expanded the notion of jurisdictional error in law to carve out scope for judicial review even where the power-granting legislation in question explicitly ousts judicial review. In a line of cases commencing from *Anisminic Ltd v Foreign Compensation Commission*,<sup>23</sup> the courts have held that all errors of law take an administrative body out of jurisdiction, thus making any administrative act flowing from such errors subject to judicial review despite the existence of a legislative ouster clause.<sup>24</sup> The usage of such reasoning to justify judicial intervention is in direct tension with Parliament's intention as evinced by the legislative ouster clause, and is difficult to justify by reference to the traditional *ultra vires* theory.<sup>25</sup> Indeed, the difficulties involved in reconciling the courts' approach to ouster clauses with the traditional *ultra vires* theory have been exacerbated even further by the UK Supreme Court decision in *R (on the application of Privacy International) v Investigatory Powers Tribunal*, where Lord Carnwath relied on the rule of law and the principle of legality to assert a robust presumption against a legislative ouster of the High Court's supervisory jurisdiction.<sup>26</sup>

<sup>18</sup> For example, see *R v North and East Devon Health Authority, ex p Coughlan* [2000] 2 WLR 622 (CA).

<sup>19</sup> Mark Elliott, "Judicial Power and the United Kingdom's Changing Constitution" (2017) 36 UQLJ 273 at 279 [Elliott, "Judicial Power"].

<sup>20</sup> *R v Panel on Takeovers and Mergers ex p Datafin plc* [1987] 1 QB 815 (CA); Justin Leslie, "Vindicating Common Law Constitutionalism" [2010] 30 LS 301 at 305.

<sup>21</sup> See *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374 (HL); Elliott, *Foundations*, *supra* note 4 at 5, 8, 27; Elliott, "Judicial Power", *supra* note 19 at 276.

<sup>22</sup> Elliott, *Foundations*, *supra* note 4 at 27. In relation to this problem, Associate Professor Farrah Ahmed's "The Delegation Theory of Judicial Review" (delivered at the Public Law Conference 2018, Melbourne Law School, 13 July 2018) [unpublished] proffers a fascinating and unique solution.

<sup>23</sup> [1969] 2 AC 147 (HL) [*Anisminic*].

<sup>24</sup> See also *R (Evans) v AG (Campaign for Freedom of Information intervening)* [2015] 2 WLR 813 (SC).

<sup>25</sup> Elliott, "Judicial Power", *supra* note 19 at 279, 280.

<sup>26</sup> *Privacy International*, *supra* note 2 at para 99.

Third, the nature of reasoning that judges use in judicial review cases does not cohere well with the traditional *ultra vires* theory. Judges in the UK have been increasingly willing to refer to substantive rule of law principles to justify striking down executive action.<sup>27</sup> For example, in *R (Daly) v Secretary of State for the Home Department*,<sup>28</sup> Lord Bingham justified the exercise of judicial review by reference to orthodox application of common law principles.<sup>29</sup> In the same case, Lord Cooke held that “some rights are inherent and fundamental to democratic civilised society”.<sup>30</sup> Further, in *R v Secretary of State for the Home Department, Exp Brind*,<sup>31</sup> Lord Bridge held that the court had the power to review executive acts which violated fundamental human rights, *even* if Parliament had on the face of the legislation granted unlimited discretion to the executive.<sup>32</sup> Notably, Lord Steyn in *R (Jackson) v AG*<sup>33</sup> held that the power of judicial review is potentially a constitutional fundamental which even a sovereign Parliament cannot abolish.<sup>34</sup> Such reasoning fits with the traditional *ultra vires* theory only if one accepts a rather stretched conception of what Parliament must have specifically intended, which ultimately has the effect of casting in great doubt the utility of a reference to Parliament’s intent at all.

The difficulties of rationalising the traditional *ultra vires* theory with developments in judicial review reflect deeper theoretical problems with the theory. Mark Elliott identified one of these problems as “passive artificiality”.<sup>35</sup> In essence, it is “extremely implausible” to assert that the sophisticated norms of good administration which judges have developed as principles guiding judicial review are direct derivations from the legislative silence of Parliament.<sup>36</sup> Elliott pointed out that the traditional *ultra vires* theory also suffers from the problem of “active artificiality”.<sup>37</sup> In essence, the traditional *ultra vires* theory is hard-pressed to explain how judges have carved out scope for judicial review despite Parliament’s *active* prohibition of such review where ouster clauses are concerned.<sup>38</sup> A final theoretical problem with the traditional *ultra vires* theory is its normative emptiness—it does not provide normative guidance to judges as to *how* to decide when an executive decision has been made *ultra vires*, which has the effect of according judges an almost unbounded discretion in formulating concrete principles of judicial review.<sup>39</sup>

In the face of all these problems, the key advantage proffered in favour of the traditional *ultra vires* theory within the English context is that it coheres well with a constitutional order shaped by the principle of parliamentary supremacy.<sup>40</sup> However,

<sup>27</sup> Elliott, “Judicial Power”, *supra* note 19 at 277; Mark Elliott & Robert Thomas, *Public Law*, 3d ed (Oxford: Oxford University Press, 2017) at 74.

<sup>28</sup> [2001] 2 AC 532 (HL).

<sup>29</sup> *Ibid* at 542.

<sup>30</sup> *Ibid* at 548.

<sup>31</sup> [1991] 1 AC 696 (HL).

<sup>32</sup> *Ibid* at 748. See also Ringhand, *supra* note 15 at 876.

<sup>33</sup> [2006] 1 AC 262 (HL).

<sup>34</sup> *Ibid* at 302, 303.

<sup>35</sup> Elliott, *Foundations*, *supra* note 4 at 27.

<sup>36</sup> *Ibid* at 27-29.

<sup>37</sup> *Ibid* at 28.

<sup>38</sup> *Ibid*.

<sup>39</sup> *Ibid* at 34, 35; D J Galligan, “Judicial Review and the Textbook Writers” (1982) 2 OJLS 257 at 264; Paul Craig, “Ultra Vires and the Foundations of Judicial Review” (1998) 57 CLJ 63 at 66, 67.

<sup>40</sup> Elliott, *Foundations*, *supra* note 4 at 24.

within the Singapore context, this key advantage morphs into yet another problem with the theory. As the description of this theory should have made abundantly clear, the central concern of this theory is to preserve the doctrine of parliamentary supremacy. Yet, Singapore adheres not to the doctrine of parliamentary supremacy, but instead to a doctrine of constitutional supremacy. The supremacy of the *Constitution* over ordinary legislation is enshrined in Article 4 of the Singapore *Constitution*,<sup>41</sup> and the Singapore Court of Appeal has affirmed that laws and government action inconsistent with the *Constitution* are invalid to the extent of their inconsistency.<sup>42</sup>

One may nevertheless argue that Singapore is less of a constitutional supremacy than one may think, in view of the fact that the Singapore courts have accorded a significant degree of attention to parliamentary intent in constitutional interpretation. For example, in *Tan Cheng Bock v AG*,<sup>43</sup> the Singapore Court of Appeal, as it sought to lay down a set of authoritative principles to guide constitutional interpretation in Singapore, provided that the *Constitution* should be interpreted in a purposive manner—in other words, the intent and will of Parliament should be given effect.<sup>44</sup> This may be argued to suggest that Parliament, and not the *Constitution*, is in truth the real supreme legal authority in Singapore. One may draw further support for this proposition from Jaclyn Neo's and Yvonne Lee's argument that features of Singapore's constitutional regime may indeed resemble that of a *de facto* parliamentary supremacy.<sup>45</sup> Neo and Lee raised the *de facto* flexibility of Singapore's written constitution and the weakness of the courts as a restraint on executive and legislative powers, *inter alia*, as examples of features of Singapore's constitutional regime that cohere well with a jurisdiction where Parliament is supreme.<sup>46</sup>

However, even though the Singapore courts have placed a heavy emphasis on parliamentary intent in constitutional and statutory interpretation, this does not mean that Singapore is a *de jure* parliamentary supremacy. A distinction can be drawn between parliamentary supremacy and parliamentary primacy. In the former situation, Parliament is the supreme authority in the constitutional regime—accordingly, the judiciary cannot impose legal limits on Parliament's authority, and the judiciary's power of judicial review has to be derived in some form from Parliament's mandate. Such a situation would be fundamentally incongruent with the idea of a written constitution serving as the highest law of the land, to which all branches of government—including Parliament—are subject. The latter situation, on the other hand, is quite consistent with the existence of a written constitution serving as the ultimate source of legal authority. It is not inconsistent with the idea of a constitutional supremacy for Parliament's intent to be an important, even decisive, consideration in constitutional interpretation. Parliament's intent may be a *de facto* primary

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<sup>41</sup> *Constitution of the Republic of Singapore* (2016 Rev Ed) [*Constitution*].

<sup>42</sup> See *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 at paras 14, 15 (HC) [*Mohammad Faizal*]. See also *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] SGCA 37 at paras 71-74 [*Nagaenthran (CA)*].

<sup>43</sup> [2017] 2 SLR 850 (CA) [*Tan Cheng Bock*].

<sup>44</sup> *Ibid* at para 35.

<sup>45</sup> Jaclyn Ling-Chien Neo and Yvonne CL Lee, "Constitutional Supremacy: Still a Little Dicey?" in Thio Li-ann and Kevin Tan, eds, *Evolution of a Revolution: Forty Years of the Singapore Constitution* (London: Routledge-Cavendish, 2009) 153 at 155, 156.

<sup>46</sup> *Ibid* at 165-175.

recourse in constitutional interpretation, but this does not detract from the *de jure* supremacy of the written constitution, and certainly does not result in a *de jure* parliamentary supremacy. Indeed, even in *Tan Cheng Bock*, the Court of Appeal took the view that Parliament's intent and will should generally be discerned from the *text* of the *Constitution*. The Court of Appeal emphasised that "primacy should be accorded to the text of the provision and its statutory context over any extraneous material".<sup>47</sup> Parliament's intent thus only has salience to the extent that it relates to the *Constitution*—cementing the idea that it is the *Constitution* that is supreme in Singapore, and not Parliament. Further, the primacy that the Singapore courts have accorded to the *Constitution's* text and Parliament's intent in this regard reflects a judicial concern to maintain a proper separation of powers,<sup>48</sup> and thus should *not* be interpreted as an acknowledgment of Parliament's *de jure* supremacy. Accordingly, to the extent that the traditional *ultra vires* theory is premised on a *de jure* parliamentary supremacy, it is unsuitable for Singapore—a jurisdiction more accurately described as a system of parliamentary primacy rather than parliamentary supremacy.

#### B. Modified Ultra Vires Theory

Scholars in England have formulated the modified *ultra vires* theory as a response to the shortcomings of the traditional *ultra vires* theory.<sup>49</sup> Put simply, the modified *ultra vires* theory legitimises judicial review through a more *indirect* connection between parliamentary intention and judicial review. On this view, Parliament, in conferring discretionary power to the executive, should be presumed to have *generally* intended that such power be constrained by the rule of law.<sup>50</sup> This presumption is one that courts are constitutionally entitled to make, given that the rule of law is a foundational principle of the constitutional order.<sup>51</sup> As such, it is the courts' role and within the courts' power to work this general intention of Parliament out into specific legal principles.<sup>52</sup> Parliamentary intent, abstracted in such a manner, becomes a "deeply malleable concept".<sup>53</sup>

The key difference between the modified *ultra vires* theory and the traditional *ultra vires* theory is the degree of reference to Parliament's intention—the traditional *ultra vires* theory proposes that judicial review is justified by Parliament's express or implied will in each *specific* grant of power to the executive, while the modified *ultra vires* theory proposes that judicial review is justified by Parliament's *general* intent that the executive must abide by the rule of law in exercising the powers granted to it. The courts' role in the scheme of judicial review is accordingly different. The traditional *ultra vires* theory envisions that courts are merely discovering what Parliament's intent is. The modified *ultra vires* theory envisions instead that courts

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<sup>47</sup> *Tan Cheng Bock*, *supra* note 43 at para 43.

<sup>48</sup> See, as an example of such judicial sentiments, *Lim Meng Suang v AG* [2015] 1 SLR 26 at para 77 (CA).

<sup>49</sup> Forsyth & Whittle, *supra* note 6 at 461.

<sup>50</sup> *Ibid*; Elliott, *Foundations*, *supra* note 4 at 110.

<sup>51</sup> Elliott, *Foundations*, *ibid* at 109.

<sup>52</sup> *Ibid* at 110; Elliott & Thomas, *supra* note 27 at 491.

<sup>53</sup> Ringhand, *supra* note 15 at 890.



have an active role in discerning the principles of rule of law that Parliament must have intended the executive to be constrained by.<sup>54</sup>

The modified *ultra vires* theory posits a more indirect reference to parliamentary intention as the justification for judicial review, as opposed to the traditional *ultra vires* theory, and is thus seemingly further removed from the doctrine of parliamentary supremacy than the traditional *ultra vires* theory. On its face, therefore, the modified *ultra vires* theory may appear to be a more suitable theory of judicial review for Singapore than the theory in its traditional form. Indeed, it is worth noting that the modified *ultra vires* theory recognises that it is the rule of law which justifies the practice of judicial review. As Elliott, one of the chief proponents of the modified *ultra vires* theory, states, “it is central to the modified *ultra vires* principle that the constitutional order embodies a number of key values which collectively may be termed the rule of law”.<sup>55</sup>

However, if one looks closely at the foundations of the theory, one will notice that the theory is just as similarly premised upon the bedrock principle of parliamentary supremacy. Indeed, the crucial contribution of the modified *ultra vires* has been described as its ability to posit a framework which can provide a justifiable relationship between the rule of law and its application in the practice of judicial review, *within* the context of parliamentary supremacy.<sup>56</sup> The key advantage of the modified *ultra vires* theory, within the English context, is that it can tap on the main advantage of the traditional *ultra vires* theory—coherence with a constitutional context shaped by the doctrine of parliamentary supremacy<sup>57</sup>—and *yet* is able to provide a conceptual connection between parliamentary supremacy and the practice of judicial review that can meaningfully account for the way judges have developed judicial review doctrine. In other words, it offers a theory that retains important conceptual limits on judicial power, and yet grants judges the flexibility to develop specific principles of judicial review.<sup>58</sup> It thus appears to offer the best of both the common law theory (discussed further below) and the traditional *ultra vires* theory—it affirms that rule of law norms are the ultimate normative foundation for judicial review, thus justifying the judicial development of specific principles of good administration in judicial review, and yet safeguards the doctrine of parliamentary supremacy through a reformulation of the conceptual linkage between parliamentary intent and judicial review. Stated thus, it becomes readily apparent that even this modified form of the *ultra vires* theory is still intended to give full effect to the principle of parliamentary supremacy, a foundational constitutional doctrine in England.

Indeed, it is instructive to observe that it is the modified *ultra vires* theory’s *retention* of a conceptual linkage between parliamentary intent and judicial review that has been attacked as its key weakness. The modified *ultra vires* theory localises the rule of law norms applicable to judicial review in Parliament’s general intent. One criticism that has been made of this conceptual move is that this results in the theory striking an uneasy tension between the rule of law and the doctrine of parliamentary

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<sup>54</sup> *Ibid* at 889.

<sup>55</sup> Elliott, *Foundations*, *supra* note 4 at 115.

<sup>56</sup> *Ibid*.

<sup>57</sup> Ringhand, *supra* note 15 at 886.

<sup>58</sup> Sir Philip Sales, “Rationality, Proportionality and the Development of the Law” (2013) 129 LQR 223 at 228.

supremacy—if Parliament *must* have intended that the *judiciary* interpret legislative grants of power as contoured by the rule of law, then is Parliament or the rule of law truly supreme in the constitutional framework?<sup>59</sup> Modified *ultra vires* theorists will be pressed to accept that Parliament is indeed supreme and abides by the rule of law as it wills—thus illustrating the centrality of parliamentary supremacy as a non-negotiable principle around which the theory is built.

With the modified *ultra vires* theory thus described, can this theory be a suitable theory of judicial review for Singapore? Indeed, as mentioned earlier, there have been suggestions in the academic sphere that the modified *ultra vires* theory should be the proper justification for judicial review in Singapore. Thio Li-ann, a leading public law scholar in Singapore, has argued that the modified *ultra vires* theory propounded by Elliott should be the proper theoretical justification for judicial review in Singapore.<sup>60</sup> While acknowledging that the modified *ultra vires* theory was nevertheless developed in an English setting, “where Parliament is supreme”, Thio argues that the theory provides a useful “middle ground perspective”, which, “modified with Singapore characteristics”, can provide a firm theoretical foundation for judicial review in Singapore.<sup>61</sup>

With the greatest respect, there are a couple of issues with this argument. First, Thio’s description of the modified *ultra vires* theory appears to be inconsistent with the modified *ultra vires* theory itself. She described the modified *ultra vires* theory as a theory which “qualifies the English norm of parliamentary supremacy”.<sup>62</sup> However, on a proper understanding of the modified *ultra vires* theory, it is in fact still intended to give *full* effect to the doctrine of parliamentary supremacy. Modified *ultra vires* theorists *criticise* common law theorists—a theory we will turn to shortly—for abrogating the doctrine of parliamentary supremacy. Indeed, Thio’s description of the modified *ultra vires* theory being justified by “a vision of the common law as a constitutional law in the sense of containing higher order norms”,<sup>63</sup> which consequently “qualifies the English norm of parliamentary supremacy”, sounds very much like a description of the common law theory.

Second, with a proper understanding of the modified *ultra vires* theory as locating rule of law norms ultimately in Parliament’s intent, the adoption of the modified *ultra vires* theory in Singapore would stand in uneasy tension with Singapore’s constitutional framework. In Singapore, the *Constitution* is the highest law of the land—and Parliament itself is subject to constitutional restraints. Since it would be problematic to adopt in Singapore a theory of judicial review which in substance gives full effect to the English doctrine of parliamentary supremacy, it would be peculiar to adopt the modified *ultra vires* theory as the foundation of judicial review in Singapore, once one realises that the modified *ultra vires* theory in truth upholds the principle of parliamentary supremacy to the same degree as the traditional *ultra vires* theory.

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<sup>59</sup> John Chu, “One Controversy, Two Jurisdictions: A Comparative Evaluation of the Ultra Vires and Common Law Theories of Judicial Review” (2009) 14 *Jurid Rev* 347 at 349.

<sup>60</sup> Thio, *supra* note 10.

<sup>61</sup> *Ibid* at paras 90, 91.

<sup>62</sup> *Ibid* at para 90.

<sup>63</sup> *Ibid*.

### C. Common Law Theory

It has been argued thus far that the *ultra vires* theory, in either the traditional or modified form, is inappropriate as the foundation for judicial review in the Singapore context. This leaves us to consider the final contending theory proffering a theoretical justification for judicial review of administrative action in England—the common law theory. The common law theory legitimises judicial review by positing that when judges review the decisions of administrative bodies, they do so by reference to fundamental rule of law norms which reside in the common law and which restrain all exercises of public power, even that of Parliament itself.<sup>64</sup> On this view, the justification for judicial review is delinked from parliamentary intention and placed directly in the common law.<sup>65</sup> The common law theory thus addresses the perceived main weakness of the modified *ultra vires* theory by relocating the rule of law principles which justify judicial review *away* from parliamentary intent.<sup>66</sup>

The common law theory lends itself to a robust assertion of judicial power in judicial review. According to this theory, it is *judges* who hold the primary responsibility for safeguarding rule of law in a constitutional democracy.<sup>67</sup> While common law theorists, as with modified *ultra vires* theorists, believe that the normative foundation of judicial review ultimately rests in the rule of law, they sever the justificatory link between parliamentary intention and judicial review—with the outcome being that judicial review is justified not by reference to what Parliament must be presumed to have intended, but by reference to rule of law principles directly.<sup>68</sup>

Advocates of this theory often argue that the common law is a *superior* repository of rule of law principles, as compared to parliamentary intent—an idea that has been described as “common law exceptionalism”.<sup>69</sup> In their view, judges are in a better position than Parliament to safeguard these rule of law principles, since common law reasoning by its nature allows for detached and carefully-considered moral judgments, independent of the partisan and power politics of Parliament.<sup>70</sup> Indeed, Allan described the ordinary process of common law decision-making as the “exemplar” of public reason, best suited to safeguard the highest standards of moral debate.<sup>71</sup> Paul Craig has also mounted a historical argument in favour of the common law theory: that as a matter of history, the common law was always perceived as the foundation of judicial review,<sup>72</sup> and that there is a deep tradition of aversion to governments being perceived as above the common law.<sup>73</sup> Common law theorists have also argued that the common law theory accounts better for the way that judicial review doctrine

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<sup>64</sup> Elliott & Thomas, *supra* note 27 at 488.

<sup>65</sup> *Ibid* at 492.

<sup>66</sup> Chu, *supra* note 59 at 352.

<sup>67</sup> Thomas Poole, “Back to the Future? Unearthing the Theory of Common Law Constitutionalism” [2003] 23(3) OJLS 435 at 450, 451 [Poole, “Back to the Future”].

<sup>68</sup> *Ibid* at 452.

<sup>69</sup> *Ibid* at 442.

<sup>70</sup> *Ibid* at 441; Thomas Poole, “Questioning Common Law Constitutionalism” (2005) 25 LS 142 at 152.

<sup>71</sup> TRS Allan, *Constitutional Justice: A Liberal Theory of the Rule of Law* (Oxford: Clarendon Press, 2003) at 290; Poole, “Back to the Future”, *supra* note 67 at 443, 444.

<sup>72</sup> Craig, *supra* note 39 at 79; Ringhand, *supra* note 15 at 884.

<sup>73</sup> Mark D Walters, “Public Law and Ordinary Legal Method: Revisiting Dicey’s Approach to *Droit Administratif*” (2016) UTLJ 53 at 61.

has developed—that developments in judicial review doctrine point towards judicial cognisance of the supremacy of rule of law, and accordingly that parliamentary supremacy is not as absolute and unqualified as traditionally suggested.<sup>74</sup>

Within England, the attribute that is the common law theory's key advantage, in the eyes of its proponents, is seen as its critical weakness by its detractors—its location of the normative foundation of judicial review *apart* from parliamentary intent. Most crucially, scholars have argued that the common law theory is a heterodox contravention of the doctrine of parliamentary supremacy, a long-held and cherished principle in England.<sup>75</sup> If judges can apply common law principles to circumscribe executive powers granted by Parliament, then Parliament is in fact subordinate to the common law. Some common law theorists have accordingly recognised that their theory necessarily requires qualifications to be made to the hitherto absolute principle of parliamentary supremacy.<sup>76</sup> However, modified *ultra vires* theorists argue that this is deeply problematic, since it is clear as a matter of empirical fact that Parliament indeed enjoys unlimited legislative competence.<sup>77</sup>

To better evaluate the applicability of the common law theory for the Singapore context, it will be helpful to first articulate precisely the crux of the difference between each of the contending theories of judicial review we have surveyed. It should be readily apparent that the common law theory is diametrically opposed to the traditional *ultra vires* theory. While the traditional *ultra vires* theory posits a close and direct connection between judicial review and parliamentary intent, the common law theory delinks the justification for judicial review from parliamentary intent entirely, in favour of a direct linkage between judicial review and the rule of law. The modified *ultra vires* theory, on the other hand, occupies the middle ground between both positions—it posits that judicial review retains an indirect connection with parliamentary intent, and that it is through this indirect connection that judges apply rule of law principles in their practice of judicial review. In other words, the modified *ultra vires* theory posits an indirect connection with *both* parliamentary intent and rule of law.

Accordingly, the crux of the disagreement between the common law theory and the modified *ultra vires* theory is over the proper locus of these rule of law norms within the constitutional framework. Put another way, while they agree as to the *nature* of the norms which should guide judicial review—rule of law norms—they disagree as to the proper location of these norms within the constitutional framework. The modified *ultra vires* theory holds that these rule of law norms are to be found as necessary implications of parliamentary intent, giving judges the authority to articulate specific norms of good administration to properly execute Parliament's general intent. On this view, the conceptual locus of these rule of law norms rests ultimately in parliamentary intent. In contrast, the common law theory holds that these rule of law norms are antecedent norms overarching the entire legal system. Parliament itself is also bound by these norms. On this view, the locus of these rule

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<sup>74</sup> Richard S Kay, "Judicial Policy-Making and the Peculiar Function of Law" (2007) 26 UQLJ 237 at 244; Leslie, *supra* note 20 at 308.

<sup>75</sup> Forsyth & Whittle, *supra* note 6 at 455; Leslie, *supra* note 20 at 307.

<sup>76</sup> Allan, "Constitutional Foundations", *supra* note 1 at 89.

<sup>77</sup> Elliott, *Foundations*, *supra* note 4 at 72, 73.

of law norms is placed *outside* of legislative intent—they are higher-order norms which undergird the entire enterprise of law.

Thus understood, the common law theory proffers a relatively more appropriate justificatory theory of judicial review in Singapore, as compared to the other two theories, insofar as it rests on a qualification of the principle of parliamentary supremacy. Yet, care should be taken in affirming its wholesale relevance to Singapore. The theory takes the position that these rule of law norms reside in the common law, which is understandable in the context of England, which possesses no written constitution serving as its fundamental law. The same situation, however, does not obtain in Singapore. While judicial review in Singapore can similarly be grounded in rule of law norms, there *does* exist in Singapore a clear higher law within which these norms can be located—Singapore’s written constitution. The implications of this proposition, put briefly at this point, are that a unique theory of judicial review, anchored in the Singapore *Constitution*, stands to be formulated to justify judicial review of administrative action in Singapore, and that this can have significant consequences for judicial review doctrine, including but not limited to the legal approach to legislative ouster clauses. These implications will be discussed in more detail later.

### III. THE SINGAPORE COURTS ON JUDICIAL REVIEW THEORY

The preceding section has evaluated the applicability of the contending theories of judicial review in England to the Singapore context at the level of theory. In this section, we will turn to consider whether Singapore case law offers any insights on the proper theoretical justification of judicial review in Singapore.

One can find some support for the *ultra vires* theory in Singapore case law. In *Cheng Vincent v Minister of Home Affairs*, the High Court was faced with the argument that the executive’s exercise of detention powers in the case at hand amounted to an error of law causing the executive acts to fall outside the ambit of the jurisdiction accorded to it by the *Internal Security Act*,<sup>78</sup> thus rendering the ouster clause in the *ISA* ineffective in excluding judicial review.<sup>79</sup> This argument relied heavily on the principle set out by the House of Lords in *Anisminic Ltd v Foreign Compensation Commission*.<sup>80</sup> Lai Kew Chai J, in dealing with this argument, held that the *Anisminic* principle was “quite incontrovertible”.<sup>81</sup> 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.”<sup>82</sup>

While Lai J ultimately found that the *Anisminic* principle was inapplicable to the case at hand, his justification for the *Anisminic* principle is noteworthy for our present purposes. He justified the *Anisminic* principle on the basis that “Parliament itself would have contemplated or condoned” a court of law examining where an executive authority has exceeded its jurisdiction.<sup>83</sup> Insofar as this is a reference to Parliament’s

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<sup>78</sup> *Internal Security Act* (Cap 143, 1985 Rev Ed Sing) [*ISA*].

<sup>79</sup> *Cheng Vincent*, *supra* note 11 at para 25.

<sup>80</sup> *Supra* note 23.

<sup>81</sup> *Cheng Vincent*, *supra* note 11 at para 26.

<sup>82</sup> *Ibid.*

<sup>83</sup> *Ibid.*

intent as a justificatory foundation for the *Anisminic* principle, this proposition is on all fours with the *ultra vires* theory of judicial review. This is made even clearer when one has regard to Lai J's inclusion of an executive authority's "constitutional mandate" in this justificatory principle—which suggests that *even* constitutional judicial review of executive action is conceptually linked to Parliament's intent.

A justificatory link between the *Anisminic* principle and Parliament's intent is echoed in early Singapore case law as well. In *Yee Yut Yee*, Choor Singh J justified the *Anisminic* principle by holding that "Parliament could not have intended a tribunal of limited jurisdiction to be permitted to exceed its authority without the possibility of direct correction by a superior court".<sup>84</sup> Where there is a defect in the jurisdiction of an inferior tribunal, the courts are thus justified in intervening even in the face of the existence of an ouster clause.<sup>85</sup> Similarly, such a reference to Parliament's intent as a justification for judicial review is a conceptual linkage on all fours with the *ultra vires* theory of judicial review.

However, Singapore case law on administrative law is also replete with references to the rule of law as the justification for judicial review. The starting point for a discussion of the rule of law in Singapore public law should begin with *Chng Suan Tze v Minister for Home Affairs*,<sup>86</sup> where Wee Chong Jin CJ in the Court of Appeal famously held:

[T]he notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power. If therefore the Executive in exercising its discretion under an Act of Parliament has exceeded the four corners within which Parliament has decided it can exercise its discretion, such an exercise of discretion would be *ultra vires* the Act and a court of law must be able to hold it to be so.<sup>87</sup>

It is worth noting that while the Court of Appeal in *Chng Suan Tze* made reference to the rule of law as a foundational justification for judicial review, it is apparent from the above-cited paragraph that the Court of Appeal's conception of the rule of law was still very much tied to parliamentary intent.<sup>88</sup> Indeed, the concept of the "rule of law", as set out in *Chng Suan Tze*, appeared to be synonymous with the *ultra vires* theory.

Further, such references to the rule of law, without more, are inconclusive of the prevailing judicial review theory in Singapore. At most, such references can be taken as a rejection of the *traditional ultra vires* theory in Singapore. They would be perfectly consonant with the modified *ultra vires* theory. Indeed, the modified *ultra vires* theory, as described earlier, is intended to reconcile the doctrine of parliamentary supremacy with the usage of rule of law considerations in judicial review. Accordingly, the modified *ultra vires* theory accounts easily for the usage of rule of law considerations as normative justifications in judicial review.

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<sup>84</sup> *Yee Yut Yee*, *supra* note 11 at para 20.

<sup>85</sup> *Ibid* at para 30.

<sup>86</sup> [1988] 2 SLR (R) 525 (CA) [*Chng Suan Tze*].

<sup>87</sup> *Ibid* at para 86.

<sup>88</sup> Jaclyn L Neo, "All Power Has Legal Limits: The Principle of Legality as a Constitutional Principle of Judicial Review" (2017) 29 Sing Ac LJ 667 at 671, 672 [Neo, "Legal Limits"].

Nevertheless, subsequent developments in case law provide sufficient material to allow one to come to a firmer landing on the courts' view as to the prevailing theory of judicial review in Singapore. The Singapore courts have taken a broader reading of the famous paragraph in *Chng Suan Tze*, and several decisions make explicit the idea that judicial review in Singapore is fundamentally based on the *Constitution*, as the ultimate repository of rule of law norms.<sup>89</sup> In other words, these cases suggest that judicial review in Singapore is based on rule of law norms *not* located within Parliament's intent—thus signalling a clear departure from the modified *ultra vires* theory. Trite as it may be, the Singapore courts have affirmed the idea that the *Constitution* is supreme in the Singapore legal order. In *Mohammad Faizal bin Sabtu v Public Prosecutor*, the High Court recognised that Singapore's constitutional order is necessarily distinct from England's, in view of the English acceptance of the doctrine of parliamentary supremacy. In contrast to England, Singapore's Westminster model is based on the supremacy of Singapore's *Constitution*, with Parliament itself being subject to the *Constitution*'s requirements.<sup>90</sup>

Accordingly, since the *Constitution* is supreme in the Singapore legal system, the Singapore courts have recognised that judicial review is *justified* not by reference to Parliament's intent, but by the *Constitution*. In *Chan Hiang Leng Colin v Public Prosecutor*,<sup>91</sup> the High Court held that “the court also has a duty to declare invalid any exercise of power, legislative and executive, which exceeds the limits of the power conferred by the *Constitution*, or which contravenes any prohibition which the *Constitution* provides”.<sup>92</sup> This statement makes plain that the fundamental theoretical justification for judicial review in Singapore is not Parliament's general intent, as the modified *ultra vires* theory would suggest—instead, it rests in the *Constitution*, and Parliament itself is subject to the *Constitution*.

This idea has been carried forward in Singapore law in a significant line of decisions to justify judicial review of a variety of executive exercises of power. The High Court in *Law Society of Singapore v Tan Guat Neo Phyllis*<sup>93</sup> applied the *Chng Suan Tze* principle to justify judicial review of prosecutorial discretion on the grounds of bad faith and unconstitutionality, holding that “all legal powers, even a constitutional power, have legal limits”.<sup>94</sup> In a similar vein, the Court of Appeal in *Ramalingam Ravinthran v AG*<sup>95</sup> held that the prosecutorial power must be used “not for its own sake, but for the greater good of society, *ie*, to maintain law and order as well as to uphold the rule of law. . . the Attorney-General's final decision will be constrained by what the public interest requires.”<sup>96</sup> This suggests that even constitutional powers—here, the prosecutorial discretion—are subject to antecedent rule of law norms which are the true basis of judicial review.<sup>97</sup> As this reasoning envisions the rule of law

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<sup>89</sup> *Ibid* at 687, 688.

<sup>90</sup> *Mohammad Faizal*, *supra* note 42 at paras 14, 15.

<sup>91</sup> [1994] 3 SLR (R) 209 (HC).

<sup>92</sup> *Ibid* at para 50.

<sup>93</sup> [2008] 2 SLR (R) 239 (HC) [*Phyllis Tan*].

<sup>94</sup> *Ibid* at para 149.

<sup>95</sup> [2012] 2 SLR 49 (CA) [*Ramalingam*].

<sup>96</sup> *Ibid* at para 53.

<sup>97</sup> It should be noted that the Court of Appeal in *Ramalingam*, *ibid*, ultimately accorded a significant degree of deference to the Public Prosecutor's exercise of prosecutorial discretion, because of its finding that the presumption of constitutionality ought to apply to the prosecutorial discretion as well (see para 72).

as an *external* restraint upon constitutional power, and would presumably extend to Parliament's constitutional power of law-making, such a proposition would be inconsistent with the modified *ultra vires* theory, and indeed reflects a broader interpretation of the rule of law going beyond the *ultra vires* theory. The Court of Appeal in *Yong Vui Kong v AG*<sup>98</sup> cited the proposition in *Phyllis Tan* with approval, applying it to justify judicial review of the clemency power on the grounds of bad faith or unconstitutionality.<sup>99</sup> In *Muhammad Ridzuan bin Mohd Ali v AG*,<sup>100</sup> in the context of judicial review of prosecutorial discretion, the Court of Appeal again affirmed the proposition that the *Constitution* is the fundamental justification for judicial review in Singapore.<sup>101</sup> This principle was invoked recently by the High Court in *Nagaenthran a/l K Dharmalingam v AG*<sup>102</sup> to justify judicial review of the Public Prosecutor's noncertification determination under section 33B(2)(b) of the *Misuse of Drugs Act*<sup>103</sup> on the ground of unconstitutionality.<sup>104</sup>

In addition to this line of decisions, two more cases are worthy of mention here. In *Tan Seet Eng v AG*,<sup>105</sup> the Court of Appeal was asked to review an order of detention made under the *Criminal Law (Temporary Provisions) Act*<sup>106</sup> for match-fixing activities on administrative law grounds. Notably, the very first paragraph of the decision invoked the rule of law as the ultimate justification for judicial review, and declared that "the ultimate responsibility for maintaining a system which abides by the rule of law lies with the Judiciary".<sup>107</sup> Sundaresh Menon CJ justified this statement later in the judgment by reference to Article 93 of the *Constitution*, "which vests the judicial power in the courts".<sup>108</sup> This is a significant indication that the courts view the *Constitution* as the locus of rule of law principles as applied in judicial review in Singapore.

Finally, in *Kho Jabing v Public Prosecutor*,<sup>109</sup> the Court of Appeal held that the fundamental rules of natural justice referred to by the Privy Council in *Ong Ah Chuan v Public Prosecutor*<sup>110</sup> are "universal rules which apply at all times and cannot be abrogated, even by Parliament".<sup>111</sup> Such a statement would be anathema to a modified *ultra vires* theorist, who would view Parliament as the ultimate locus of rule of law principles, not itself subject to any higher order.

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This does not detract in principle from the Court of Appeal's holding that the prosecutorial discretion was subject to the rule of law principle that all power has legal limits, which is the main point being emphasised here.

<sup>98</sup> [2011] 2 SLR 1189 (CA).

<sup>99</sup> *Ibid* at para 80.

<sup>100</sup> [2015] 5 SLR 1222 (CA).

<sup>101</sup> *Ibid* at para 35.

<sup>102</sup> *Nagaenthran a/l K Dharmalingam v AG* [2018] SGHC 112 [*Nagaenthran (HC)*].

<sup>103</sup> *Misuse of Drugs Act* (Cap 185, 2008 Rev Ed Sing) [*MDA*].

<sup>104</sup> *Nagaenthran (HC)*, *supra* note 102 at para 58. However, the Court of Appeal in *Nagaenthran (CA)*, *supra* note 42, used a different reasoning to arrive at the same conclusion, suggesting that s 33B(4) of the *MDA* was in truth an immunity clause, not an ouster clause (see para 51).

<sup>105</sup> [2016] 1 SLR 779 (CA) [*Tan Seet Eng*].

<sup>106</sup> *Criminal Law (Temporary Provisions) Act* (Cap 67, 2000 Rev Ed Sing).

<sup>107</sup> *Tan Seet Eng*, *supra* note 105 at para 1.

<sup>108</sup> *Ibid* at para 98.

<sup>109</sup> [2016] 3 SLR 135 (CA) [*Kho Jabing*].

<sup>110</sup> [1979-1980] SLR(R) 710 at para 26 (PC).

<sup>111</sup> *Kho Jabing*, *supra* note 109 at para 109.



Accordingly, it is clear from the preceding review of cases that the Singapore courts have considered the *Constitution* to be the locus of rule of law principles which ultimately justify the exercise of judicial review in Singapore. Indeed, such reference to the *Constitution* has not been limited to the review of legislation on grounds of constitutionality—even where the courts have applied administrative law grounds to review various exercises of executive power, the courts have nevertheless rationalised such review by reference to the *Constitution*.<sup>112</sup> Further, such reference to the *Constitution* has been made not only with respect to the review of constitutional executive powers, such as the prosecutorial discretion, but *also* with respect to executive powers exercised under ordinary legislation.<sup>113</sup>

Beyond judicial decisions, there is significant extra-judicial support for the idea that the *Constitution*, and not Parliament, is the ultimate locus of rule of law principles as applied in judicial review in Singapore. In his Bernstein Lecture at Duke University, Menon CJ argued that the power of judicial review is ultimately based on the rule of law. These rule of law principles, instead of being located in Parliament, as the *ultra vires* theory would suggest, are located in the *Constitution*. Accordingly, “the legality of every exercise of power is ultimately referable to the *Constitution*.”<sup>114</sup> This is a clear indication that in his view, the foundational theoretical basis of judicial review in Singapore is *not* to be found in the *ultra vires* theory, whether in the traditional or modified form.

#### IV. FORMULATING A THEORY OF JUDICIAL REVIEW FOR SINGAPORE

This is an appropriate juncture to take stock of the discussion thus far. We have observed that there have been academic suggestions in support of the modified *ultra vires* theory in Singapore, and that there may be some judicial authority in favour of the traditional *ultra vires* theory. Yet, the weight of authority, both judicial and extra-judicial, leans heavily in favour of rule of law principles expressed in the *Constitution* as the foundational rationale for judicial review—not Parliament’s intent, whether directly or indirectly construed, even though Parliament’s intent may be consistently invoked as an important consideration in the *exercise* of judicial review.

At the conceptual level, this must surely be right. The *ultra vires* theory, in either the traditional or modified form, is not applicable in Singapore. A similar argument has been made in the Hong Kong context—the existence of a written constitution in Hong Kong means that there is no requirement for “any *ultra vires* doctrine to rationalise judicial review under the Diceyan Parliamentary sovereignty”.<sup>115</sup> Indeed, the usage of *ultra vires* terminology by the Singapore courts does not mean an affirmation of the *ultra vires theory* as a justification for judicial review—one should be careful to maintain a distinction between the *ultra vires doctrine* and the *ultra*

<sup>112</sup> For example, see *Phyllis Tan*, *supra* note 93 at para 149, *Tan Seet Eng*, *supra* note 105 at para 98, and *Nagaenthiran (CA)*, *supra* note 42 at para 74.

<sup>113</sup> For example, see *Tan Seet Eng*, *supra* note 105 as well as *SGB Starkstrom Pte Ltd v Commissioner of Labour* [2016] 3 SLR 598 at para 58 (CA) [*Starkstrom*].

<sup>114</sup> Sundaresh Menon CJ, “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 Journal of Comparative & International Law* 277 at para 40.

<sup>115</sup> *Chu*, *supra* note 59 at 353.

*vires theory* of judicial review. There is a distinction between referring to legislative intent to determine the scope of power validly conferred on executive bodies as a matter of judicial review doctrine, and a reference to legislative intent as the ultimate justification for judicial review, as the *ultra vires theory* would hold. Acceptance of the former proposition does not necessitate an acceptance of the latter. A reference to legislative intent at the level of doctrine can be explained as a requirement of rule of law, which would be consonant with the rule of law enshrined in the *Constitution* as the ultimate justification for judicial review in Singapore.

The Court of Appeal decision in *Starkstrom Pte Ltd v Commissioner of Labour*<sup>116</sup> illustrates this point clearly. In that case, the Court of Appeal sought to distil the fundamental principles underlying judicial review in Singapore. The court made reference to the principle that judicial review is justified by the foundational backdrop of the *Constitution* in Singapore.<sup>117</sup> At the same time, the court held that this *entails* that judges must have due regard to “Parliament’s intention (as expressed in statute) to vest certain powers in the *Executive*”.<sup>118</sup> This is an apt illustration of how a concern with Parliament’s intent does not necessarily mean that Parliament’s intent is the normative foundation of judicial review—a concern with Parliament’s intent in judicial review doctrine can be equally justified on the basis of rule of law principles embodied in the *Constitution*.

What, then, is the proper way forward for foregrounding and consolidating discussions of the theoretical foundations of judicial review by courts, practitioners and academics in Singapore? As a starting point, we should recognise that as a constitutional democracy, the theoretical justification for judicial review in Singapore cannot be based on a doctrine intended to give full effect to the doctrine of parliamentary supremacy. Indeed, in Singapore, judicial review should be justified by reference to the *Constitution* as the highest law of the land—to which Parliament itself is also subject. Such a theory of judicial review is necessarily distinct from *both* the modified *ultra vires* theory and the common law theory. These theories are united in affirming that judicial review is fundamentally justified by reference to the rule of law. But while these theories would place the proper locus of these rule of law principles undergirding judicial review in Parliament’s general intent and the common law respectively, a Singaporean theory of judicial review would place these principles in the written constitution.

It might be argued that one possibility for a Singaporean theory of judicial review would be to adopt a bifurcation between judicial review on administrative law and constitutional law grounds, such that the former would be considered an exercise of the court’s common law jurisdiction while the latter would be an exercise of the court’s constitutional jurisdiction.<sup>119</sup> It should be borne in mind, however, that the question sought to be addressed here is *not* the legal source of the rules applied in judicial review—if so, the answer with respect to judicial review on administrative law grounds would undoubtedly be the common law. Instead, the question sought to be addressed here goes toward the *justification* of the entire practice of judicial review

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<sup>116</sup> *Supra* note 113.

<sup>117</sup> *Ibid* at para 58.

<sup>118</sup> *Ibid*.

<sup>119</sup> As is the case in Hong Kong—see Richard Gordon QC & Johnny Mok SC, *Judicial Review in Hong Kong*, 2d ed (Singapore: LexisNexis, 2014) at paras 6.02, 6.03.

at a higher conceptual level. More specifically, and informed by our understanding of the debate over judicial review in the UK, the question is about the proper locus of the justificatory rule of law principles applied in judicial review. It is instructive to observe that each contending theory of judicial review in the UK has sought to place this locus in what each theory conceives to be the highest legal authority, whether it is Parliament's intent or the common law. As such, it stands to reason that in Singapore, where the highest legal authority is the written constitution, the *Constitution* should be the key locus of rule of law norms applied in judicial review for *both* judicial review on administrative law and constitutional law grounds.

With the starting point thus appropriately articulated, one can then begin to formulate with greater precision the proper theory of judicial review in Singapore. If judicial review in Singapore is justified by rule of law principles not located in Parliament's intent or in the common law, but in the *Constitution*, a question arises—where exactly in the *Constitution* are these norms located? There are two possibilities. First, Article 93 of the Singapore *Constitution* can be interpreted as a warrant for the judiciary to draw upon rule of law principles in their exercise of judicial review. Indeed, insofar as the judicial power can be exercised in legal disputes and by reference to law, if we perceive 'law' as encompassing rule of law principles more generally, then judicial review drawing upon rule of law principles can be justified on the basis of Article 93. There is some authority in support of this proposition. As highlighted earlier, Menon CJ in *Tan Seet Eng* held that by virtue of Article 93, the judiciary was vested with constitutional authority to uphold the rule of law through its exercise of judicial review.<sup>120</sup> In addition, Chan Sek Keong CJ (as he then was) in an extra-judicial capacity suggested that Article 93 could justify the courts' approach to ouster clauses—Article 93 vests judicial power in the courts, and ouster clauses which seek to oust the supervisory jurisdiction of the courts are accordingly ineffective.<sup>121</sup> This suggestion has received judicial approval—the Court of Appeal in *Nagaenthran (CA)* suggested, albeit in *obiter*, that legislative ouster clauses are potentially unconstitutional contraventions of Article 93.<sup>122</sup> This argument, while not explicitly about the theoretical foundation of judicial review, does implicitly suggest that it is Article 93 that is the concrete constitutional linchpin for judicial review in Singapore. It might be noted that this approach, insofar as it rests on an assertion of the judicial power to uphold the rule of law, is indeed conceptually similar to the common law theory discussed earlier—however, a crucial difference remains the anchoring of this assertion of judicial power in the *Constitution*, as opposed to the common law in general.

A second and related possibility is to view rule of law ideals as implicit in the concept of constitutionalism itself. Accordingly, even if the text of the *Constitution* itself does not make reference to the rule of law norms which justify judicial review, one could argue that the very existence of a written constitution presupposes a backdrop of rule of law principles of which the constitution is a concrete manifestation. These rule of law principles can thus be validly drawn upon by the judiciary in its exercise of judicial review, to the extent that the judiciary is conferred judicial power over legal disputes by the constitution. One might argue that, to the contrary, having

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<sup>120</sup> *Tan Seet Eng*, *supra* note 105 at para 98.

<sup>121</sup> Chan, *supra* note 12 at para 19.

<sup>122</sup> *Nagaenthran (CA)*, *supra* note 42 at para 74.

a written constitution means that there is no place for rule of law norms subsisting beyond what is expressly enshrined in the text of the *Constitution*, or that such norms must be moulded solely by reference to the text of the *Constitution* rather than by judges through the exercise of their ‘judicial power’. Indeed, at first glance, it might seem that in jurisdictions with written constitutions, the idea of antecedent rule of law norms should become irrelevant or be confined by the text of the *Constitution*. In response, it is useful to have regard to Luc B Tremblay’s argument that antecedent rule of law norms remain crucial in such jurisdictions, since such norms are required to supply legitimacy for the written constitution.<sup>123</sup> Tremblay further argued that the exercise of constitutional interpretation “requires the acceptance or the existence of a set of antecedent norms specifying the features particular constitutional interpretations must possess in order to be recognized by the courts as binding”.<sup>124</sup> In a similar vein, Lon Fuller suggested that even in jurisdictions with written constitutions, making the constitution work requires a prior general acceptance of certain moral principles—in his words, “no written constitution can be self-executing”.<sup>125</sup> As such, an argument may be made that implicit in the idea of constitutionalism is the existence of a foundational backdrop of rule of law principles, and judges may validly draw upon these principles in their exercise of judicial review.

Having suggested some possibilities as to the proper locus of these rule of law norms in Singapore’s constitutional framework, we finally come to an unavoidable question—what is the substantive content of these rule of law norms? Neo has noted that discerning the substantive content of the rule of law is a difficult task, in view of the concept’s inherent ambiguity.<sup>126</sup> There is no escaping the fact that discerning the specific requirements of the rule of law will be a challenging task. However, one should not be tempted by the difficulty of this task to shy away from it altogether. First of all, notwithstanding the difficulty of *answering* such questions, there is great value in the courts recognising that these are indeed the right *questions* to be asking. Clarity as to the proper inquiry that the courts should be undertaking with respect to judicial review is a crucial first step to arriving at normatively justifiable answers. Second, if one is careful not to infuse the concept of rule of law with substantive (and contentious) moral judgments, one may find that there is perhaps more consensus over the content of fundamental rule of law principles than one may have initially surmised.

Achieving greater clarity about the proper theory of judicial review in Singapore presents important implications for judicial review doctrine. For example, if we locate in the *Constitution* the proper locus of justificatory rule of law norms applied in judicial review, this can influence significantly the Singapore courts’ approach to legislative ouster clauses. The traditional justification for the courts not giving effect to ouster clauses and proceeding with judicial review nonetheless is based on the *Anisminic* principle referenced earlier—to recapitulate, executive decisions based upon errors of law are susceptible to judicial review notwithstanding the existence of

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<sup>123</sup> Luc B Tremblay, “General Legitimacy of Judicial Review and the Fundamental Basis of Constitutional Law” (2003) 23(4) OJLS 525 at 552.

<sup>124</sup> *Ibid.*

<sup>125</sup> Lon L Fuller, “Positivism and Fidelity to Law: A Reply to Professor Hart” (1957) 71 Harv L Rev 630 at 642.

<sup>126</sup> Neo, “Legal Limits”, *supra* note 88 at 688.

a legislative provision ousting judicial review of such executive acts. This is because such decisions fall out of the terms of the power-granting legislation, rendering the ouster clause in question ineffective against such decisions.

It should be readily apparent that the *Anisminic* principle was developed by judges seeking to carve out some scope for judicial review and seeking to justify such review within the context of a jurisdiction affirming the doctrine of parliamentary supremacy. In such a context, 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 as well. But in Singapore, where there is no equivalent doctrine of parliamentary supremacy, the *Anisminic* principle is in truth not strictly necessary to justify the judicial approach to ouster clauses. In fact, adhering to the *Anisminic* justification for the judicial approach to ouster clauses has led to implicit judicial affirmation of the *ultra vires* theory in Singapore,<sup>127</sup> which sits uneasily with Singapore's framework of constitutional democracy.<sup>128</sup>

A better conceptual justification for the judicial approach to ouster clauses may be found in the *Constitution*, as the proper locus of rule of law principles applied in judicial review. Indeed, the *Constitution* itself may provide a justification for the courts to disregard ouster clauses where a strict application of the ouster clause would impermissibly offend the rule of law by ousting judicial power conferred on the judiciary by Article 93 in a manner that would permit unchecked executive discretion.<sup>129</sup> Articulating this as the true basis for the judicial approach to ouster clauses in Singapore would encourage the courts to develop substantive principles, drawing upon rule of law considerations, that would guide judges more definitively in their consideration of when an ouster clause should be deemed ineffective, instead of the present rather formalistic approach to ouster clauses encouraged by the *Anisminic* principle.

Notably, the Court of Appeal in *Nagaenthran (CA)* has already taken steps in this direction. In that case, the Court of Appeal was presented with the argument that section 33B(4) of the *MDA* precluded judicial review of the Public Prosecutor's decision not to grant a certificate of substantive assistance to the accused person.<sup>130</sup> While the Court of Appeal ultimately decided the matter by characterising section 33B(4) as an immunity clause, *not* an ouster clause, the Court of Appeal suggested that 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",<sup>131</sup> and that any purported ouster clause ran the risk of violating both Article 93 of the Singapore *Constitution* and the principle of separation of powers.<sup>132</sup> This reasoning rests the judicial approach to ouster clauses squarely on the *Constitution*, as the proper locus of rule of law principles applied in judicial review. While the Court of Appeal has not yet articulated the precise import of this new conceptual basis for the judicial approach to ouster clauses on ouster clause doctrine, this

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<sup>127</sup> See *Cheng Vincent*, *supra* note 11 and *Yee Yut Yee*, *supra* note 11, discussed earlier.

<sup>128</sup> See Jaelyn L Neo, "Autonomy, Deference and Control: Judicial Doctrine of Separation of Powers in Singapore" (2018) 5 J Intl & Comp L 461 at 479.

<sup>129</sup> Neo, "Legal Limits", *supra* note 88 at 684, 685.

<sup>130</sup> *Nagaenthran (CA)*, *supra* note 42 at para 43.

<sup>131</sup> *Ibid* at para 71.

<sup>132</sup> *Ibid* at para 74.

decision does open the doorway to the formulation of more substantive doctrine for ouster clause analysis.

The judicial approach to ouster clauses is merely one example of how judicial review doctrine in Singapore can be reconceptualised in the wake of greater clarity as to the proper justification for judicial review in Singapore. Indeed, at a broader level, one could even go further to revisit the traditional taxonomy of judicial review doctrine. The Singapore courts have considered an adherence to the traditional grounds of judicial review—illegality, irrationality, and procedural impropriety—as an expression of the legality-merits distinction.<sup>133</sup> In other words, limiting judicial review to these traditional grounds ensures that judicial review is about *legality*, instead of crossing over into impermissible merits review. However, such reasoning can be criticised as rather formalistic and perhaps even circular—after all, such reasoning entails a prior assumption as to the substantive content of “legality”. If the proper justification for judicial review in Singapore is ultimately based in rule of law norms in the *Constitution*, this provides an impetus for the courts to engage more deeply with the substantive *reasons* for and against the recognition of additional grounds of review, instead of relying on formalistic reasoning that is potentially tautologous and circular.

## V. CONCLUSION

This paper has examined the key contending theories of judicial review in England, and has pointed out that the fundamental disagreement between the modified *ultra vires* theory and the common law theory relates to the proper locus of rule of law principles as applied in judicial review. The modified *ultra vires* theory proposes that these principles are properly situated in Parliament’s general intent, while the common law theory proposes that such principles are antecedent norms undergirding the entire constitutional structure, to which Parliament is also subject.

This paper has also observed that there has been an inclination towards importing English theories of judicial review into Singapore. However, this paper has argued that with a proper understanding of the competing theories of judicial review in England, it will be readily apparent that this debate is not readily transplantable to the Singapore context. As such, a unique theory of judicial review stands to be formulated in Singapore. This paper has further argued that the Singapore *Constitution* should be the proper locus of rule of law principles applied in judicial review, through either Article 93 or a general implication from the concept of constitutionalism. A proper articulation of judicial review theory in Singapore can have significant consequences for judicial review doctrine; this paper has suggested, for example, that the judicial approach to ouster clauses is significantly impacted by one’s view of the prevailing theory of judicial review.

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<sup>133</sup> *Starkstrom*, *supra* note 113 at paras 55-63; *Tan Seet Eng*, *supra* note 105 at paras 90-106.