5. Constitutional Review in a Strong State: The Case of Singapore

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Abstract

This paper examines how Singapore's courts have navigated their role in constitutional adjudication within the context of a strong state. Singapore's courts have generally adopted an attitude tending toward deference to the political branches in constitutional adjudication, which stems from the common law conception of judicial power and their position as actors within a dominant party democracy. Courts, however, have nevertheless consistently sought to uphold and entrench their judicial independence. Moreover, they have developed and applied doctrines of public law for at least three purposes: to ensure that representative democracy remains the basis of legitimate power in Singapore; to maintain the principle of legality alongside due deference as a limit on all exercises of power; and to structure harmonious and deliberative political discourse in society. In doing so, Singapore's courts have defended and defined a clear role for themselves as constitutional adjudicators, suited to Singapore's legal and political context.

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I. INTRODUCTION

The exercise of the judicial power in public law adjudication – namely, adjudication on disputes involving constitutional or administrative law issues – is perhaps the most important, yet most contentious, aspect of every legal system. To find that ideal conception of the judicial role and power, courts engaging in public law adjudication must balance between different ideals – between formalism and substantivism, universalism and contextualism, judicial courage and deference – to find a solution that works for their society. Further, since societies are ever-changing, and since public law must adapt to such changes, the court's quest in this regard is a never-ending one.

This paper examines judicial review in Singapore, in particular how Singapore courts have navigated their role in adjudicating the constitutionality of legislative and executive actions within the context of a strong state. Although Singapore was a British colony and inherited a Westminster form of parliamentary government upon independence, it did not adopt the United Kingdom's doctrine of parliamentary supremacy. Instead, the Constitution of the Republic of Singapore[1] (the "Constitution") proclaims that the Constitution is the supreme law of the land. It goes further to proclaim that any law inconsistent with the Constitution shall be void to the extent of the inconsistency. This doctrine of constitutional supremacy hews closer to the American model of constitutional review asserted by the Supreme Court in *Marbury v. Madison*,[2] which in more recent times has been called a "judicial supremacy" model.[3] However, despite the possible textual support for such assertive judicial review powers, the Singapore courts have tended to take a more cautious approach towards judicial review. The Singapore courts have only struck down a law once for being unconstitutional, though this was later overturned on appeal to the highest court of the land.[4] Cases involving judicial review of executive and administrative action have had more success, with several applicants succeeding in obtaining judicial review remedies. Nonetheless, as studies have shown, the rate of success in these cases has not been particularly high.[5] Notably, the judicial review of executive and administrative acts is often carried out based on administrative law principles derived from the common law, though they may at times be mixed with constitutional claims.

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[1] (1999 Rev Ed).

[2] *Marbury v. Madison* 5 US 137 (1803).

[3] Stephen Gardbaum, 'Reassessing the new Commonwealth Model of Constitutionalism' (2010) 8:2 *International Journal of Constitutional Law* 167 at 171.

[4] See *Taw Cheng Kong v. Public Prosecutor* [1998] 1 SLR(R) 78 (HC), *cf Public Prosecutor v. Taw Cheng Kong* [1998] 2 SLR(R) 489 (CA).

[5] See Lynette J Chua & Stacia L Haynie, "Judicial Review of Executive Power in the Singaporean Context, 1965–2012" (2016) 4:1 *Journal of Law and Courts* 43. In this article, the authors studied cases from 1965-2012 and concluded that "[o]ut of the 87 decisions in the High Court, 33% succeeded against the government, meaning that the court ruled at least partially in favor of the applicant, whereas 12 out of the 31 decisions, 39% in the Court of Appeal succeeded." The authors further observed that "These are substantial figures in the Singaporean context given the dearth of successful constitutional challenges and the criticisms in law and courts literature."

It is difficult to assess comprehensively why the rate of success for judicial review in Singapore has been low. One cannot discount the possibility that some of these are unmeritorious cases. At the same time, other factors such as a judicial philosophy that tends towards deference to the political branches could be in play. Such deference to the political branches stems partly from a strong adherence to the common law conception of judicial power *vis-à-vis* the other branches of government. Strategic reasons may also come to play especially in the context of a dominant party state like in Singapore where the policy space that judges have to manoeuvre is limited. This deference can be further disaggregated: there is stronger deference to parliament and a slightly weaker deference to the executive. This scheme of deference fits closely with the common law approach to judicial review. While in Singapore judicial review is asserted as part of judicial power, a tradition that traces back to the American tradition of judicial review, this remains constrained by the legal system's English roots where parliament and parliamentary intent tends to be given preeminent status.

Part I examines the different models of public law adjudication within common law jurisdictions. Part II provides a brief overview of Singapore's judicial system. It examines the underlying structure and features that ensures judicial power and judicial independence, within the context of a supreme Constitution. Part III then explains how Singapore's courts have asserted judicial power in public law adjudication, to define and limit exercises of legislative and executive powers, and to structure political discourse, in Singapore.

II. THREE MODELS OF JUDICIAL REVIEW IN THE COMMON LAW

The first model of constitutional review is one of a subordinate court exercising powers to ensure legality of governmental action. This is the model traditionally associated with the courts in the United Kingdom which work within a long history of parliamentary supremacy, which is "deeply rooted in Britain's cultural and legal tradition."[6] Under this model, judicial review is highly limited and there is no review of legislative acts for legality. Traditionally, courts in the UK employ common law principles to supervise the acts of inferior tribunals and the executive. This *ultra vires* doctrine had long been premised upon the narrative of the courts upholding parliamentary intent. As Ariel Bendor and Zeev Segal observe, "[j]udicial activism at large arguably requires a condition-sine-qua-non, i.e., convincing judges of their authority and responsibility to rebut governmental decisions without harming their impartial status."[7] Until recently, UK courts have been reluctant "to intervene in matters that fall into the "no-man's land" of law and politics, e.g., issues dealing with political questions, which might be due to their perception of their limited role in the legal system."[8] The courts could and

[6] Ariel L Bendor & Zeev Segal, "Constitutionalism and Trust in Britain: An Ancient Constitutional Culture, a New Judicial Review Model" (2002) 17:4 American U. Int'l Law Review 683.

[7] *Ibid* at 704.

[8] *Ibid*.

have however sought to advance rights-protection through interpretation. In more recent times, the UK Supreme Court has been arguably even more assertive in supervising the legality of executive action,[9] but this still occurs within the context of upholding parliamentary supremacy. Furthermore, even those who have sought to argue for a stronger basis of judicial review have done so within the confines of upholding parliamentary supremacy. For instance, Mark Elliott's proposal for a modified *ultra vires* principle still relies on parliamentary supremacy as the main conceptual device for grounding judicial review. He posits that courts give effect to Parliament's general intention that, when it creates decision-making powers, it only intends to grant such powers as are consistent with the rule of law.[10] Such proposals and recent developments constitutionalize judicial review, such that the UK model could be considered 'constitutional', albeit in a very limited sense.

A second model of judicial review is commonly associated with the United States' Supreme Court, which could be called the "judicial supremacy" model. While parliamentary supremacy "prioritizes the democratic decision-making claims of the political branches at the expense of at least potentially inadequate protection of rights", in contrast, "judicial supremacy prioritizes the protection of rights ... in a way that grants too much power to the judiciary at the expense of democratic decision making."[11] In this judicial supremacy model, there is a justiciable bill of rights upheld by the Supreme Court as a fetter on legislative and executive power.

A third model is the Commonwealth model of constitutionalism, which could be positioned between the model of judicial supremacy and judicial subordination. The Commonwealth model posits the following features: a legalized bill or charter of rights; some form of enhanced judicial power to enforce those rights by assessing legislation for consistency; and a formal legislative power to have the final word on what the law of the land is by ordinary majority vote.[12] This is a model that better describes the current position in the UK where after the United Kingdom's *Human Rights Act* came into force on 8 October 2000, courts were empowered to review legislative acts for compatibility with the relevant human rights but did not have the power to strike them down. The thinking behind this model is that it draws an intermediate balance between two models: parliamentary supremacy, on the one hand, and judicial supremacy, on the other. Stephen Gardbaum argues that the model provides a better balance between two "foundational values", namely "the recognition and effective protection of certain fundamental or human rights and (b) a proper distribution of power between courts and the elected branches of government, including appropriate limits on both."[13]

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[9] See e.g. *R (on the application of Miller) (Appellant) v. The Prime Minister (Respondent)* [2019] UKSC 41.

[10] See Mark Elliott, *The Constitutional Foundations of Judicial Review* (Hart Publishing, 2001).

[11] Gardbaum, *supra* note 3 at 171.

[12] *Ibid* at 171; see also Stephen Gardbaum, 'The New Commonwealth Model of Constitutionalism', (2001) 49 *American Journal of Comparative Law* 707.

[13] Gardbaum, *supra* note 3 at 171.

Notably, different models may apply to describe the institutional design of constitutional review but not the actual practice of constitutional review in a particular country. Singapore arguably sits uneasily between the commonwealth constitutional model and the parliamentary supremacy model, even though its institutional structure could even be said to have been modelled after the American model of judicial supremacy.

Another important observation is that these models were derived from constitutional systems with general courts having the power to review the constitutionality or legality of governmental actions. None of the courts within these common law systems are specialist constitutional courts, which may be staffed by non-legally trained officials, and which hear only constitutional matters.[14] This has great significance since judges in a generalist court, like the Supreme Court of Singapore, need to have more expansive expertise and their case load involves a greater range of issues. Thus, while the legitimacy of generalist courts may be impacted by their constitutional review decisions, this is not necessarily the case. In contrast, the legitimacy of constitutional courts squarely hinges upon their constitutional review decisions.

In the next section, we will examine the constitutional structure of the courts before going on to examine recent cases demonstrating the cautious and somewhat more deferential approach that the Singapore courts have taken in constitutional cases.

III. SINGAPORE'S COURTS AND JUDICIAL REVIEW

As mentioned, constitutional review in Singapore is exercised by generalist judges in a generalist court, which is staffed by legally-trained Judges which adjudicate on all civil and criminal matters. The Supreme Court is made up of the High Court, which hears all substantive public law disputes at first instance; and the Court of Appeal, which exercises appellate jurisdiction over the decisions of the High Court, and which is the highest court of Singapore. Only the Supreme Court can exercise the power of judicial review – although there other courts in Singapore which are subordinate to the Supreme Court (such as the State Courts), Article 93 vests the judicial power only in the Supreme Court, and only the Supreme Court has the power to grant orders sought by applicants in judicial review proceedings.[15] But within the Supreme Court, the power of judicial review is not "centralised" within a specific tribunal or coram. Rather, it is "decentralised",[16] meaning that any Judge sitting on the High Court can judicially review any law or executive act, and find it unconstitutional or illegal, with all such decisions being finally appealable to the Court of Appeal.

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[14] Alec Stone Sweet, "Constitutions, rights, and judicial power" in Daniele Caramani ed, *Comparative Politics* (Oxford University Press, 2017) at 159-160.

[15] *Supreme Court of Judicature Act* (Cap 322, 2007 Rev Ed) s 18(2) and 29A, read with the First Schedule. By contrast, Singapore's State Courts lack the power of judicial review (*State Courts Act* (Cap 321, 2007 Rev Ed) s 19(3)(b)), and cannot hear substantive constitutional challenges (*Chan Hiang Leng Colin v. Public Prosecutor* [1994] 3 SLR(R) 209 (CA) at [11] and [32]).

[16] For a discussion of "centralised" vs "decentralised review", see Stone Sweet, *supra* note 14 at 159-160.

Article 4 of the Constitution states that all legislation inconsistent with the Constitution shall, to the extent of that inconsistency, be void. The power of constitutional review is not explicitly provided for in the Constitution, but has been asserted and affirmed by the courts.[17] For instance, in *Chan Hiang Leng Colin v. Public Prosecutor*, one of the earliest constitutional review cases, the then Chief Justice Yong Pung How, sitting as the High Court, stated that:

> "The court has the power and duty to ensure that the provisions of the Constitution are observed. 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."[18]

Furthermore, in *Nagaenthran a/l K Dharmalingam v. Public Prosecutor*, the Court of Appeal stated:

> "In a constitutional system of governance such as Singapore's, the courts are ordinarily vested with the power to adjudicate upon all disputes. … [J]udicial review forms a part of this power to adjudicate, and concerns that area of law where the courts review the legality of government actions: … In the normal course of events, all controversies, whether of fact or of law, are resolved by the courts. This work is done in accordance with the applicable rules of adjectival and substantive law, and it is the function of the courts to determine what the facts are and also to apply the relevant rules of substantive law to those facts. Judicial review concerns an area of law in which the courts review the lawfulness of acts undertaken by other branches of the government."[19]

The courts have also affirmed their co-equal status with the other branches of government,[20] such that constitutional review is seen as a "core aspect" of their judicial power[21] and part of their judicial function under a scheme of separation of powers in Singapore.

Singapore's Supreme Court generally only carries out "concrete", *a posteriori* judicial review, based on actual cases or controversies brought before it by individual applicants who have *locus standi* to do so;[22] it generally will not perform "abstract" review of hypothetical scenarios, and will not review

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[17] *Law Society of Singapore v. Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [149] (HC); *Yong Vui Kong v. Public Prosecutor* [2011] 2 SLR 1189 at [84]-[85] (CA).

[18] *Chan Hiang Leng Colin*, *supra* note 15 at [50] (HC).

[19] *Nagaenthran a/l K Dharmalingam v. Public Prosecutor* [2019] 2 SLR 216 at [46] (CA).

[20] *Tan Seet Eng v. Attorney-General* [2016] 1 SLR 779 at [90] (CA).

[21] *Nagaenthran*, *supra* note 19 at [71].

[22] This generally requires the applicant to either have had his personal rights violated (*Tan Eng Hong v. Attorney-General* [2012] 4 SLR 476 at [115] (CA)); have suffered "special damage" by virtue of a public right being violated (*Vellama d/o Marie Muthu v. Attorney-General* [2013] 4 SLR 1 at [33] (CA)); or be able to show that a "very grave and serious breach…of legality" has occurred (*Jeyaretnam Kenneth Andrew v. Attorney-General* [2014] 1 SLR 345 at [62] (CA)).

legislation or executive acts *a priori*.[23] The only exception to this rule involves the President's power under Article 100 of the Constitution to seek an advisory opinion on "any question as to the effect of any provision of [the] Constitution which has arisen or appears to him likely to arise". If this Article is invoked (though it rarely is),[24] an *ad hoc* Constitutional Tribunal consisting of 3 Judges of the Supreme Court will be constituted to issue an advisory opinion on the hypothetical constitutional question posed to it by the President.

Judicial independence is key to the proper assertion of the judicial power, because it helps ensure that judges are not disincentivised from checking exercises of legislative and executive power, and adjudicating disputes between people and the State.[25] The Constitution contains express safeguards for judicial independence including setting out clear rules for judicial appointment, security of tenure and remuneration.[26] Supreme Court judges are appointed by the President on the advice of the Prime Minister, who must consult with the Chief Justice on the issue. Judges have security of tenure and remuneration up until the age of 65 – they can only be removed by a counsel of their peers, and only on grounds of misbehaviour or inability. However, such measures to ensure judicial independence are not extended to all judges. Lower court judges, namely the District Judges of the State Courts, do not enjoy such protection.[27] Neither do Judicial Commissioners and Senior Judges – people qualified to be Judges of the Supreme Court who are on *de facto* probation before being confirmed as Judges;[28] and people who were once, but have since retired from being, Judges of the Supreme Court,[29] respectively – although they also sit on the Supreme Court.

The judicial power and function in Singapore rests upon a scheme of separation of powers, which has been recognized by the courts as being part of the Constitution's basic structure. In *Mohammad Faizal bin Sabtu v. Public Prosecutor*, Chan Sek Keong CJ noted that under "[t]he Singapore Constitution…the sovereign power of the State is distributed among three organs of state, *viz,* the Legislature, the Executive and the Judiciary", and that "[t]he principle of separation of powers…is therefore part of the *basic structure of the Singapore Constitution*".[30] This idea that a Constitution has a "basic structure" which stands above and beyond its text derives from the Indian Supreme Court decision of *Kesavananda Bharati v State of Kerala*.[31] In this case, the court held that amendments to the Constitution which are procedurally-proper but which derogate from the Constitution's essential

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[23] For a discussion of "concrete" vs "abstract, and *a posteriori* vs *a priori* review, see Stone Sweet, *supra* note 14 at 160.

[24] Article 100 has only ever been invoked once, in *Constitutional Reference No 1 of 1995* [1995] 1 SLR(R) 803.

[25] Chan Sek Keong, "Securing and Maintaining Judicial Independence" [2010] 22 *Singapore Academy of Law Journal* 229 at [3].

[26] See Constitution Art 95.

[27] See Michael Hor, "The Independence of the Criminal Justice System in Singapore" [2002] SJLS 497 at 504.

[28] Constitution Art 95(4)(a); Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Singapore: Academy Publishing, 2012) [Thio, *Treatise*] at 02.114.

[29] Constitution Art 95(4)(b).

[30] *Mohammad Faizal bin Sabtu v. Public Prosecutor* [2012] 4 SLR 947 at [11] (HC) (emphasis added)

[31] *Kesavananda Bharati v. State of Kerala* AIR 1973 SC 1461 (Indian SC).

features (or the "identity" of the Constitution itself) would be unconstitutional and invalid. This basic structure doctrine has been hugely influential in constitutional courts across the world,[32] although the Singapore courts have yet to conclusively embrace the doctrine.[33] As Jaclyn Neo points out, while Singapore courts have agreed that it is a legal fact that Singapore's Constitution has a basic structure, they have yet to determine what legal doctrine would follow from that legal fact.[34]

IV. JUDICIAL REVIEW IN A STRONG STATE IN SINGAPORE

Judicial review has to be contextualized. Courts do not operate in a vacuum but within specific political conditions. Tom Ginsburg has argued that "political and institutional structure…are the keys to understanding the development of judicial review…the extent of political diffusion determines how successful courts can be in asserting the power [of judicial review]".[35] Accordingly, where there is a concentration of political power like in Singapore, there will presumably be less space for courts as there is generally less division in the policy space. Singapore's ruling party, the People's Action Party (the "PAP"), has won every general elections and formed the government since Singapore's independence in 1965. In other words, it has been in power for almost 60 years. During this time, it has dominated politics in Singapore, without a strong opposition in place. The PAP has never had less than 90% of the seats in Parliament.[36] This has critical constitutional implications. Under Article 5 of the Constitution, Parliament need only achieve a two-thirds majority of votes to amend "the provisions of [the] Constitution".[37] The Singapore Parliament can exercise (and has in practice exercised) the power to amend the Constitution on a frequent basis. Thus, Singapore has been called "fundamentally undemocratic"[38] and "competitively authoritarian",[39] and served as Mark Tushnet's primary example for "authoritarian constitutionalism", which he describes as a model where "liberal freedoms are protected at an intermediate level, and elections are reasonable free and fair."[40]

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[32] See Yaniv Roznai, *Unconstitutional Constitutional Amendments* (Oxford University Press, 2017) at 39-70.

[33] See *Yong Vui Kong v. Public Prosecutor* [2015] 2 SLR 1129 at [69] (CA); *Ravi s/o Madasamy v. Attorney-General* [2017] 5 SLR 489 at [65]-[66] (HC).

[34] Jaclyn L Neo, "Towards a "Thin" Basic Structure Doctrine in Singapore", *I-CONnect Blog* (17 Jan 2018), available at: http://www.iconnectblog.com/2018/1/towards-a-thin-basic-structure-doctrine-in-singapore-i-connect-column/

[35] Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge University Press, 2003) at 19.

[36] Although the PAP has garnered as little as 60% of the popular vote in some elections, Singapore's electoral system operates on a first-past-the-post system, which, together with the Group Representative Constituency system (see *infra* note 57 and accompanying text), creates a "winner takes all" situation whereunder a political party which garners more than 50% of votes in a constituency wins all (3-6) of the seats therein (see Thio, *Treatise*, *supra* note 28 at 02.083 and 03.012).

[37] The only express limits on Constitutional amendments are those found in Articles 6-8 of the Constitution, concerning control over the Singapore Armed Forces and the Singapore Police Force.

[38] Sebastian Reyes, "Singapore's Stubborn Authoritarianism", *Harvard Political Review* (29 Sep 2015), available at http://harvardpolitics.com/world/singapores-stubborn-authoritarianism/

[39] Steven Levitsky & Lucan A Way, "The Rise of Competitive Authoritarianism" (2002) 13:2 *Journal of Democracy* 51 at 52.

[40] Mark Tushnet, "Authoritarian Constitutionalism" (2015) 100 Cornell Law Review 391 at 396.

Thus, as Yap Po Jen observes, a system like Singapore, which has a dominant party within the legislature and with such powers of the legislature in relation to constitutional and statutory amendment, may stultify attempts by courts to play a more active constitutional role through judicial review.[41] This is compounded by a deferential philosophy that could at least be said to partially stem from the courts' common law roots. This is reflected for instance in how the courts insist that they should not assess the merits of legislative or executive acts,[42] that they lack institutional competence to consider polycentric matters or evaluate socio-economic policy,[43] and that they should encourage "good government through the political process and public avenues rather than redress bad government through the [judicial process]".[44]

Indeed, Jack Lee points out in a 2015 article that there really have been only three cases in which the courts disagreed with the government's interpretation of the Constitution.[45] The first is *Chng Suan Tze v. Minister for Home Affairs*, a 1988 judgment where the Court of Appeal decided that, contrary to the government's assertion, it had the power to objectively review the exercise of ministerial discretion to detain persons without trial under the Internal Security Act.[46] The second case was decided in 1998 where the High Court ruled in *Taw Cheng Kong v. Public Prosecutor* that the provision in the Prevention of Corruption Act which extended extra-territorial reach to citizens of Singapore taking bribes overseas violated the equal protection clause (Article 12(1)).[47] This was however overturned by the Court of Appeal.[48] The last occasion he mentions was in 2013, when the Court of Appeal held in *Vellama d/o Marie Muthu v. Attorney-General* that the government's assertion that the Prime Minister had absolute discretion whether and when to call for by-elections where a casual vacancy had arisen in a single-member constituency was incorrect. The Court interpreted Article 49 of the Constitution, which states that where a seat "has become vacant for any reason other than a dissolution of Parliament, the vacancy shall be filled by election" to mean that the Prime Minister must call for a by-election although he has a wide remit to determine the appropriate time for the by-election to take place.[49] Another important case where the court disagreed with the government, which was decided after Lee's article was published is the case of *Tan Seet Eng v. Attorney-General*.[50]

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[41] Po Jen Yap, *Courts and Democracies in Asia* (Cambridge University Press, 2017) at 19-20.

[42] *Tan Seet Eng*, *supra* note 20 at [91]-[93].

[43] *Ibid.*

[44] *Jeyaretnam Kenneth Andrew*, *supra* note 22 at [48] and [50].

[45] Jack Tsen-Ta Lee, "Foreign Precedents in Constitutional Adjudication by the Supreme Court of Singapore, 1963–2013" (2015) 24:2 *Washington International Law Journal* 253 at 261.

[46] *Chng Suan Tze v. Minister for Home Affairs* [1988] 2 SLR(R) 525 (CA).

[47] *Taw Cheng Kong HC*, *supra* note 4.

[48] *Taw Cheng Kong CA*, *ibid*.

[49] *Vellama*, *supra* note 22 at [54]-[82] (CA).

[50] *Tan Seet Eng*, *supra* note 20 at [95] and [97].

In this case, the Court of Appeal invalidated preventive detention orders issued by the government on the basis that they did not fall within the scope of the empowering legislation.

These cases nevertheless demonstrate the potential for judicial review to place constitutional limits on political power. The Singapore model appears to be grounded in a view that judicial review should be exercised only in extreme cases. This may be reflected for instance in a 2016 speech where Chief Justice Sundaresh Menon stated that "[j]udicial review is the sharp edge that keeps government action within the form and substance of the law".[51] However, a significant activity that could be missed if one only looks at outcomes is the continuing normativization of constitutional law in Singapore. This refers to the phenomenon where beyond the specific findings in the case, there are many more cases where the courts have developed jurisprudential doctrines that would serve to imbue constitutional review with more normative depth.[52]

In this regard, Singapore's courts have provided a strong legal basis in the way they conceptualized their role within the constitution. First, law defines the *basis* of all legislative and executive power in Singapore. Thereunder, courts maintain and affirm Singapore's commitment to "representative democracy" as its fundamental governing principle. Second, law defines the *limits* of power in Singapore. Here, notwithstanding the due deference they accord to the elected branches of government, courts apply the principle of "legality" as a hard limit on all exercises of legislative and executive power in Singapore. Third, law can *structure* political discourse in society without defining its content. Here, courts use "balancing" as a tool to ensure harmonious and deliberative political discourse in society.

1. Representative Democracy and the Basis of Power

The first role of law in public law adjudication in Singapore is the protection of representative democracy. At the heart of representative democracy is the citizen's right to vote. Without such a right, citizens simply cannot be sure that their government represents them in any meaningful sense. In the case of *Vellama d/o Marie Muthu v. Attorney-General*,[53] the centrality of representative democracy and the right to vote to Singapore's system of government came to the fore. At issue there was whether, upon the resignation of an MP from a Single-Member Constituency, the Prime Minister had an obligation to call a by-election to fill that seat. Article 49 of the Constitution states that vacant parliamentary seats "shall be filled by election in the manner provided by...any law relating to Parliamentary elections". This provision was the outcome of a previous constitutional amendment in 1963, which removed express wording requiring such a by-election to be called within three months

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[51] Sundaresh Menon, "The Rule of Law: The Path to Exceptionalism" (2016) 28 *Singapore Academy of Law Journal* 413 at [30].

[52] See Jaclyn Neo, "Unwritten Constitutional Norms: Finding the Singapore Constitution", *Singapore Law Gazette* (May 2019), available at: https://lawgazette.com.sg/feature/unwritten-constitutional-norms-finding-the-singapore-constitution/.

[53] *Vellama*, *supra* note 22.

of the vacancy of that seat. During the 1963 debates leading up to that constitutional amendment, the Government had clearly contemplated that the removal of such express wording would free the Government of the day from any obligation to hold by-elections for such vacant seats.[54] The Court of Appeal in *Vellama* held that in a Westminster system, citizens had a right to be represented. This in turn meant that the Prime Minister had a duty to call for a by-election when seats in Single-Member Constituencies fell vacant, within a "reasonable time" of such vacancy.[55] Within this affirmation of representative democracy is an implied a right to vote. Indeed, in a later case of *Yong Vui Kong v. Public Prosecutor*,[56] the Court of Appeal recognized that if there was a basic structure to the Singapore Constitution, the right to vote could possibly form part of that basic structure.

The impact of this reasoning in *Vellama* concerning the right to be represented, however, has arguably been narrowed in *Wong Souk Yee v. Attorney-General*, which involved facts similar to *Vellama*, save that the parliamentary seat vacated was one in a Group Representation Constituency ("GRC"). The GRC scheme was introduced in 1988, which requires certain (in, fact, the majority of) electoral constituencies to elect their MPs in groups of 3-6 rather than as individuals, and requires each such group to contain an MP from a racial minority group.[57] The case arose when a minority MP resigned her seat to contest in the presidential elections. The Court of Appeal held that the Prime Minister had no duty to call for a by-election when "one or more of [the members of a GRC] has vacated his or her seat"[58] because the statute only provided for a by-election when all members of the GRC had vacated their seats. Yet, while this latter decision may be criticised on other grounds,[59] it is important for our purposes that the Court there was prepared to decide on the basis that, in principle, "the right to representation forms part of the basic structure of the Constitution".[60]

2. Principle of Legality

The principle of legality has been developed as a basis of judicial review in Singapore, although its content remains rather limited.[61] The principle of legality as understood in Singapore stems from a paragraph in the Court of Appeal's decision in *Chng Suan Tze v. Minister of Home Affairs*, that "all power has legal limits".[62] This means first that all exercises of governmental power must be subject to "limits", which means that "subjective or unfettered discretion" cannot exist. Secondly, these limits

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[54] *Ibid* at [61]-[72].

[55] *Ibid* at [80]-[85].

[56] *Yong Vui Kong*, *supra* note 33 at [69]-[70].

[57] Constitution Art 39A.

[58] *Wong Souk Yee v. Attorney-General* [2019] 1 SLR 1223 at [78] (CA).

[59] Namely, that it neglects the Group Representation Constituency system's purpose of maintain racial representation in Parliament.

[60] *Wong Souk Yee*, *supra* note 58 at [78].

[61] See Jaclyn L Neo, "All Power Has Legal Limits: The Principle of Legality as a Constitutional Principle of Judicial Review" (2017) 29 *Singapore Academy of Law Journal* 667.

[62] *Chng Suan Tze*, *supra* note 46 at [86].

are "legal", meaning that "the *courts* should be able to examine the exercise of discretionary power".[63] Today, in Singapore, the notion that there must be some legal limits on the legislative and executive power, enforceable by courts, is well-established. In the context of the executive power, the principle of legality comports clear limits. For instance, in *James Raj s/o Arokiasamy v. Public Prosecutor*, the Court of Appeal held that although an accused person's right to counsel could be delayed for a "reasonable time" by the police for the sake of expeditious and efficient police investigations, such a delay would be unconstitutional if it unreasonably hindered the accused person's "undoubted right to legal representation".[64]

In Singapore administrative law, the principle of legality also imposes the limits of illegality, irrationality and procedural impropriety on executive powers. Those three grounds of administrative law judicial review apply uniformly, regardless of the subject-matter expertise or institutional competence of the executive decision-maker in question: in *Chng Suan Tze*, the Court of Appeal affirmed that, while "[t]hose responsible for national security are the sole judges of what action is necessary in the interests of national security", "the normal judicial review principles of 'illegality, irrationality or procedural impropriety'" were always available;[65] and subsequently, in *Tan Seet Eng v. Attorney-General*, the Court of Appeal affirmed that those three grounds of judicial review were always available to the court, "even for matters falling within the category of 'high policy'", and that when enforcing those grounds of judicial review, "the question of deference to the Executive's discretion simply does not arise".[66] Likewise, those three grounds of judicial review will also apply to all executive decision-makers regardless of their constitutional authority: in *Nagaenthran a/l K Dharmalingam v. Public Prosecutor*, the Court of Appeal held that the "rule of law" entailed that any executive decision-making power, constitutional or otherwise, should always be subject to review on grounds of illegality, irrationality and procedural impropriety – and further, that any legislation which might purport to exclude such grounds of judicial review would be unconstitutional and invalid.[67]

3. "Balancing" and the Structure of Political Discourse

The third important development in public law adjudication in Singapore is the structuring of political discourse in society. Courts have on occasion invoked the idea of "balancing" when determining whether legislative and executive power has been exercised constitutionally. In *Review Publishing v. Lee Hsien Loong*, the Court of Appeal hypothesized *obiter* how it might address the question of whether the tort of defamation should recognise a defence of *Reynolds* privilege (i.e. a

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[63] *Ibid* (emphasis added).

[64] *James Raj s/o Arokiasamy v. Public Prosecutor* [2014] 3 SLR 750 at [31] and [39] (CA).

[65] *Chng*, *supra* note 46 at [89] and [119].

[66] *Tan Seet Eng*, *supra* note 20 at [99] and [106].

[67] *Nagaenthran*, *supra* note 21 at [51] and [69]-[74].

defence in defamation suits for defendants who can show that their statements meet a standard of "responsible journalism"), which turned on the extent to which Article 14(2) preferred freedom of speech over the protection of reputation. The Court would have to "strik[e] [a] *balance* between freedom of expression and protection of reputation" by making "a value judgment which depends upon local political and social conditions".[68] Whether and how this balance should be struck would be a fact-specific inquiry, involving how Singapore's "political, social and cultural values", the public policy on the "media's role in society" and Singapore's "political culture" stood at the given time.[69] Thus, the court used "balancing" as a metaphor to suggest that law had to remain socially-legitimate and contextual, and reactive to continued political discourse on the matter.[70]

The use of "balancing" tests in constitutional rights adjudication, however, is not without controversy, because courts who use such tests are sometimes seen as deciding contentious political debates and ruling on the merits of legislative or executive acts – as compared to simply upholding "representative democracy" or the "principle of legality", which are now fairly uncontroversial norms of constitutionalism in Singapore. For this reason, the use of "balancing" tests has often been criticised as undemocratic and invocative of the judiciary's "counter-majoritarian difficulty". These critics, in turn, argue that such political and policy-laden issues should be left firmly to the democratic process for resolution. [71]

However, such criticism may not hold much water against the balancing tests used by Singapore's courts, which have been used not determine political debates in the abstract and remove civil society's ability to resolve those debates itself, but rather to ensure that the law takes a calibrated approach to the facts of each case before the court, and remains reactive in general to Singapore's evolving socio-political culture. Through balancing, courts can confine clashes between rights and public policy to the particular facts of individual cases and resolve them for the purposes of that case only: one value outweighs the other, but plural value systems are still recognised, since on different facts the other value might triumph instead. Thusly, the court "demonstrates respect for the dignity of the disputing parties",[72] and "keeps everyone in the game, thereby enhancing its legitimacy".[73] Moreover, courts carrying out "balancing" help "identify and thoughtfully explicate the policy concerns implicated with clarity and purpose" through its reasoning process, and can identify issues which the government or

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[68] *Review Publishing v. Lee Hsien Loong* [2010] 1 SLR 52 at [270]-[271] (CA) (emphasis added).

[69] *Ibid* at [272]-[285].

[70] For a discussion of how it did this, see Thio Li-ann, "Between Apology and Apogee, Autochthony: the 'Rule of Law' Beyond the Rules of Law in Singapore" (2012) *Singapore Journal of Legal Studies* 269 at 290-294.

[71] See Jaclyn L Neo, "Balancing act: The balancing metaphor as deference and dialogue in constitutional adjudication" in Jaclyn L Neo ed., *Constitutional Interpretation in Singapore: Theory and Practice* (Singapore: Routledge, 2016) [Neo, "Balancing"] at 96 for a summary of these critiques.

[72] Sundaresh Menon, "Taming The Unruly Horse: The Treatment Of Public Policy Arguments In The Courts" (Speech given at the High Court of Sabah and Sarawak, Kota Kinabalu, 19 Feb 2019) at [57].

[73] Neo, "Balancing", *supra* note 71 at 95.

civil society may want to deliberate further and determine more conclusively, thereby "enlarg[ing] the space for democratic debate and civic participation, and enrich[ing] the public life of the country".[74] So understood, the use of balancing does not allow courts to decide on the merit of the content of legislative or executive acts, but merely to resolve disputes in a way that structures harmonious and deliberative political discourse on pertinent issues.

CONCLUSION

A society's public law cannot be abstract and unchanging, but must accord with the fundamental values and practices of that society as it evolves over time. The role of the court, therefore, is to develop and apply public law in this manner.[75] Singapore's courts have done this by, first, upholding and entrenching their independence; and second, by using their judicial power to ensure that representative democracy remains the basis of all legitimate exercises of power in Singapore, to maintain the principle of legality alongside due deference as a limit on all exercises of power, and to structure harmonious and deliberative political discourse in society. As the Court of Appeal noted in *Tan Seet Eng v. Attorney-General*, such "judicial modesty must go hand in hand with judicial courage" to enforce the law, for "while it is one thing to say that the court must not substitute its view as to the way in which [legislative or executive power] should be exercised, it is quite another to say that the…exercise of [such power] may not be scrutinised by the court at all."[76] Thus, the notion of judicial "deference" within Singapore public law adjudication must be understood with some nuance. Singapore's courts will always accord "weak" or "minimal" deference to legislative or executive acts:[77] they will not assess those acts based on their merits,[78] and will place the burden of proving the unconstitutionality and legality of those acts on applicants raising such challenges.[79] However, Singapore's courts are reluctant to accord "strong" or "substantial" deference – in the sense of abstaining, in total or in significant part, from adjudicating upon legislative or executive acts at all[80] – if doing so would go against the "principle of legality", which has been called a "basic principle in constitutional and administrative judicial review" in Singapore.[81]

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[74] Menon, *supra* note 72 at [57]-[59]; see also Neo, "Balancing", *ibid* at 96-97.

[75] See Thio Li-ann, "Principled pragmatism and the 'third wave' of communitarian judicial review in Singapore" in Jaclyn L Neo ed., *Constitutional Interpretation in Singapore: Theory and Practice* (Singapore: Routledge, 2016) for an overview of how Singapore's courts have done this over time.

[76] *Tan Seet Eng*, *supra* note 20 at [95] and [97].

[77] See Alison L Young, "In Defence of Due Deference" (2009) 72:4 *Modern Law Review* 554 at 562-563; Aileen Kavanagh, "Defending deference in public law and constitutional theory" (2010) 126 *Law Quarterly Review* 222 at 228; Neo, "Balancing", *supra* note 71 at 89-90.

[78] *Tan Seet Eng*, *supra* note 20 at [91]-[93].

[79] *Lim Meng Suang v. Attorney-General* [2013] 3 SLR 118 at [104] (CA).

[80] Young, *supra* note 77 at 560-562; Kavanagh, note 77 at 228; Neo, "Balancing", *supra* note 71 at 89-90.

[81] Chan Sek Keong, "Judicial Review – From Angst to Empathy" [2010] 22 *Singapore Academy of Law Journal* 469 at [8].