CURIAL DEFERENCE IN SINGAPORE PUBLIC LAW

Autochthonous Evolution to Buttress Good Governance and the Rule of Law

Central to the separation of powers and the rule of law, judicial review empowers the courts to examine the exercise of discretionary power. While there is no general doctrine of deference, judicial review in Singapore emphasises the green-light approach in facilitating good governance, and is sensitive to the political, socio-cultural and economic context. However, the jurisprudence also indicates a nuanced and robust approach to better regulate the decision-makers' latitude. A categorical approach towards justiciability is eschewed, and judicial scrutiny adopts varying intensities of review, taking into account the rights of the individual *vis-à-vis* the fair and just protection of governmental autonomy.

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> Discretion, like the hole in a doughnut, does not exist except as an area left open by a surrounding belt of restriction … It always makes sense to ask, 'Discretion under which standards?' or 'Discretion as to which authority?'[1]

I. Introduction

1 In judicial review, courts encounter and often recognise their own limits – whether stemming from the concerns of institutional competence, the delegation of powers and the lack of a democratic mandate. As such, courts endeavour to accord the appropriate level of deference to the findings, value judgments and decisions of the decision-makers and rule-makers – be it the Legislature or the Executive. In administrative law, a court has to assess its institutional competence to deal with a particular issue, and show restraint where its competence is limited and afford the political branches the requisite

1 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1992) at p 31.

"margin of appreciation" for their administrative actions. In constitutional law, although the focus is on ensuring that constitutional rights are given effect to, judicial deference is demonstrated in the strong presumption of constitutionality accorded to legislation enacted by the Legislature.

2 Unsurprisingly, curial deference is a crucial aspect of the separation of powers, which itself is fundamental to the rule of law. Deference embraces "a range of judicial techniques which have the effect of increasing decision-makers' latitude".[2] These include concepts like justiciability and intensity of review. But deference is, of course, laden with tension given the competing, if not conflicting, considerations. They include the imperative to protect the rights of an individual, especially the fundamental liberties guaranteed under the Singapore Constitution,[3] and to afford the Government sufficient latitude to exercise its earned democratic mandate to further governmental objectives without unnecessary interference from the courts. Lord Hoffman said it well when he noted that deference with "its overtones of servility, or perhaps gracious concession, are appropriate to describe what is happening".[4]

3 Whether it is in the realm of constitutional law or administrative law, the bottom line in judicial review is that "the 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".[5] The Legislature and Executive do not possess the unfettered power or discretion to legislate and to make policy and exercise executive powers in any manner they like. Governmental powers cannot run afoul of the constitution, as the supreme law of the land, and legislation.

4 Hence, it is not a question whether there should be curial deference. Instead, the more prominent questions revolve around when and how much the courts ought to defer to primary decision-makers. Too much deference by the Judiciary to the political branches could result in individual rights being ridden roughshod over. Too little

2 Mark Elliot, "Proportionality and Deference: The Importance of a Structured Approach" in *Effective Judicial Review: A Cornerstone of Good Governance* (Christopher Forsyth *et al* eds) (Oxford University Press, 2010) at p 268.

3 Constitution of the Republic of Singapore (1999 Reprint).

4 *R (Pro-Life Alliance) v British Broadcasting Corp* [2004] 1 AC 185 at [76].

5 Wee Chong Jin CJ in *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86]. Article 93 of the Constitution is commonly cited to support the Judiciary's power of judicial review.

deference, on the other hand, could result in the courts overreaching, potentially generating constitutional chaos.[6]

5 In either case, notwithstanding the Judiciary's lack of accountability to the popular will, the Judiciary could be abdicating its fundamental constitutional duty. Ultimately, the thoughtful recognition and principled application of deference do not undermine the Judiciary's legitimacy and authority. Instead, such institutional humility is a cornerstone of rights adjudication and enhances the Judiciary's role as a counter-majoritarian check in a constitutional system of government. This sensitivity is central to justiciability and the intensity of review as manifestations of responsible curial deference.

6 This article examines the evolution of judicial deference in Singapore. For much of Singapore's independent history, Singapore courts did not substantively engage with the issue of deference until about a decade ago. While there is yet to be a general doctrine of deference in Singapore, the contours of the courts' broad approach to deference can be discerned, which tends towards erring on the side of prudence and caution in the fair and just protection of governmental autonomy. Does this mean that rights protection is compromised or even sacrificed at the altar of governmental autonomy? This need not be the inevitable outcome where the separation of powers is assiduously observed and the purpose and objective of judicial review is alive to the political, socio-cultural, and economic context and realities. How judicial review is practised should also reflect the socio-political culture, norms and values of the community.[7] As such, not to consider the social-political setting of Singapore and any changes to it might result in an inadequate understanding of the Judiciary's approach towards judicial review.

7 This article, which focuses on judicial review in administrative law, proceeds as follows. In part II, the contours of curial deference in Singapore are outlined. Curial deference is largely similar in tenor to other common law jurisdictions although recent jurisprudence point to a nascent autochthonous development. Where judicial review in Singapore differs is its emphasis on the green-light approach in

6 For the view that judicial review may not effectively serve to further redistributive politics or abet the diffusion of power, see Ran Hirschl, *Towards Juristocracy: The Origins and Consequences of the New Constitutionalism* (Harvard University Press, 2007).

7 Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 at 479; see also Thio Li-ann, "The Theory and Practice of Judicial Review of Administrative Action in Singapore: Trends and Perspectives" in *SAL Conference 2011: Developments in Singapore Law between 2006 and 2010: Trends and Perspectives* (Yeo Tiong Min, Hans Tjio & Tang Hang Wu gen eds) at para 20.

facilitating good governance. Parts III and IV respectively examine justiciability and the intensity of review, the related "engines" of judicial review that involve calibrating the appropriate level of curial deference. The jurisprudence is evolving towards a nuanced and robust approach in which a categorical approach towards justiciability is eschewed. Instead, the focus of the courts is on the true nature of the question raised for adjudication. Similarly, judicial scrutiny of governmental action adopts varying intensities of review, rather than a uniform intensity, more consciously taking into account the rights of the individual *vis-à-vis* the interests of the Government. The issue of the standard of review reflecting the appropriate level of deference to interpretations of the law by primary decision-makers is considered in part V. Any movement towards granting the Executive more interpretive autonomy will have to balance the inherent polycentric nature of such matters, and the courts' institutional competence and democratic legitimacy against the role of the courts in Singapore's system of constitutional government, especially given the sharp edge that judicial review potentially is. Part VI concludes.

II. Overview of deference

8 Curial deference and judicial independence are intimately connected. The independence of the courts empowers them to determine when and how to defer to the competence of the other branches of government. In a 2010 article, Chan Sek Keong CJ (as his Honour then was) described the role of the Judiciary in a democracy and the centrality of judicial independence in its execution of its constitutional duties as such:[8]

> In a democracy with a form of representative government (based on the doctrine of separation of powers), the Judiciary is one of three arms of government, co-equal in status, and vested with the power, among others, to check the Legislature and the Executive in their exercise of powers vested in them by law and the constitution of the State … The Judiciary acts as an impartial referee to decide what conduct is permissible or not permissible under applicable rules of conduct, whether the rules have been infringed or not infringed, and to provide the remedies for such infringements. To fulfill these functions, the Judiciary has to be independent of the other two arms of government. A Judiciary that is not independent would not be able to fulfill such a role, and would provide a weak foundation for democracy and its associated attribute (i.e., the rule of law) to flourish. Conversely, the Judiciary requires the existence of the rule of law for continuous independence. There cannot be the rule of law without an

8 Chan Sek Keong, "Securing and Maintaining the Independence of the Court in Judicial Proceedings" (2010) 22 SAcLJ 229 at para 3.

> independent Judiciary, and *vice versa*, but with both, there will be security, law and order, and stability, which are requisites for progress and the protection of political and civil rights.

As Lord Hoffman observed, "[i]ndependence makes the court more suited to deciding some kinds of questions and being elected makes the legislature more suited to deciding others".[9] How decision-making powers are allocated is often spelt out in a constitution, legislation, and/or based on conventions, and subjected to principles of law.

9 The Singapore courts have consistently acknowledged the doctrine of curial deference, even if in giving effect to it bore different emphasis in different periods since independence. The Court of Appeal recently had the opportunity to consider the doctrine in *Tan Seet Eng v Attorney-General*[10] ("*Tan Seet Eng*"), where the apex court captured very well the Judiciary's attitude and approach towards curial deference. Put broadly, the court stated that deference was a flexible doctrine, which was not antithetical to the court reviewing executive action. This entails the court assessing its institutional competence to deal with a particular issue, and to show restraint where its competence is limited.

10 Like in other common law jurisdictions, the basis of the doctrine in Singapore can be justified on grounds of institutional competence and democratic intent. Institutional competence revolves around questions of which branch is best placed due to its expertise and experience, its role and function in the constitutional framework of powers. Thus, the Executive has more expertise in matters relating to governance and public policy. Comprising primarily of elected legislators, the Legislature is not only the highest law-making body; it is also the primary political forum for regular and robust debates.[11] As such, it is well-placed to determine which policy options are in society's best interests, especially on contentious and divisive issues of the day, and to be held accountable for the choices made (or not made).

11 Democratic accountability certainly features prominently in making such a determination in issues of societal importance. This is also aligned with the democratic intent: which branch is empowered by

9 *R (Pro-Life Alliance) v British Broadcasting Corp* [2004] 1 AC 185 at [76].

10 [2016] 1 SLR 779, especially at [90]–[106]. A more detailed discussion of the case follows.

11 See this author's discussion in Eugene K B Tan, "The Legislature" in *The Legal System of Singapore: Institutions, Principles and Practices* (Gary Chan Kok Yew & Jack Tsen-Ta Lee eds) (LexisNexis, 2015) at pp 123–153.

the constitution to execute a specific governmental function. As Attorney-General V K Rajah (as he then was) noted:[12]

> The statutory framework is crucial because it is the anchor point for gauging the legality of governmental action in any given situation. The statutory framework is also a disciplining force, because neither the executive nor the court can stray outside its boundaries. This allows for greater certainty and predictability.

12 In Singapore's context, the doctrine of curial deference also has to be contextualised against the "cultural substratum" that emphasises "communitarian over individualist values", including "notions such as dialogue, tolerance, compromise and placing the community above self".[13] These values "have modulated the court's approach in ensuring that the rule of law rules"[14] and is heavily influenced by the courts playing a supporting role in good governance.[15]

A. Deference and the green-light approach

13 In 2010, then Chan CJ noted, extrajudicially, that the Judiciary plays a "supporting role by articulating clear rules and principles by which the Government may abide by and conform to the rule of law".[16] He asked whether a perspective that views "the courts being locked in an adversarial or combative relationship with the Executive and functioning as a check on administrative power" was appropriate for Singapore.[17] For Chan CJ, courts do not serve as the "first line of defence against administrative abuse of powers".[18] Instead, they serve a facilitative function in developing good administrative practices even as it adjudicates in judicial review applications.

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12 V K Rajah, Senior Counsel, "Judicial Review – Politics, Policy and the Separation of Powers", guest lecture at the Singapore Management University Constitutional and Administrative Law course (24 March 2016) at para 26.

13 Sundaresh Menon, "The Rule of Law: The Path to Exceptionalism" (2016) 28 SAcLJ 413 at para 24.

14 Sundaresh Menon, "The Rule of Law: The Path to Exceptionalism" (2016) 28 SAcLJ 413 at para 24.

15 See also this author's discussion on Singapore's communitarian approach to constitutional law in "Law and Values in Governance: The Singapore Way" (2000) 30 HKLJ 91 and in "Autochthonous Constitutional Design in Post-Colonial Singapore: Intimations of Confucianism and the Leviathan in Entrenching Dominant Government" (2013) 4 *Yonsei Law Journal* 273.

16 Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 at 480, para 29.

17 Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 at 480, para 29.

18 Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 at 480, para 29.

14 This attitude of a collaborative approach towards governance stems from the premise that good governance also requires each branch to check itself (intra-branch), in addition to a robust set of systemic checks and balances (inter-branch). Again, Chan CJ put it well, "[j]udicial review deals with bad governance but not bad government. General elections deal with bad government".[19] Secondly, while judicial review is an end in itself, it should also be a means to an end. In dealing with unlawful governmental action, judicial review can and should encourage good administrative practices and governance such that the Government, through upholding high standards of public administration and policy, can better abide by the rule of law.

15 The curial reply to Chan CJ's question on the true nature of the court's role in judicial review in Singapore was given in *Jeyaretnam Kenneth Andrew v Attorney-General*,[20] where the Court of Appeal made the first judicial cognisance of the "red-light" and "green-light" approaches in public law.[21] In the red-light approach, courts are "locked in an adversarial or combative relationship with the Executive and functioning as a check on administrative power".[22] In contrast, the green-light approach conceives of the courts' adjudicatory role in public law as one where "public administration is not principally about stopping bad administrative practices but encouraging good ones".[23]

16 However, this binary categorisation of the curial role in judicial review runs the risk of being simplistic, if not misleading. A court motivated by a green-light approach is not going to act differently from any other court where the administrative action complained of is unlawful or unconstitutional or when a legislative provision is unconstitutional. Thus, the Court of Appeal in *Tan Seet Eng* noted the Judiciary's "specific responsibility" as one of "pronouncing on the legality of government actions".[24]

19 Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 at para 6. Further, at para 29, Chan added: "[i]n other words, seek good government through the political process and public avenues rather than redress bad government through the courts".

20 [2014] 1 SLR 345.

21 This traffic lights metaphor is taken from Carol Harlow & Richard Rawlings, *Law and Administration* (Cambridge University Press, 3rd Ed, 2009) at pp 22–48. In *Jeyaretnam Kenneth Andrew v Attorney-General*, the Court of Appeal did not appear to differentiate between judicial review in administrative law and constitutional law.

22 Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 at para 29.

23 *Jeyaretnam Kenneth Andrew v Attorney-General* [2014] 1 SLR 345 at [48]–[49].

24 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [90].

17 *Tan Seet Eng* affirms the green-light approach even though the court found against the Government and set aside the Minister's detention order under the Criminal Law (Temporary Provisions) Act[25] ("CLTPA"). The Court of Appeal adopted a more restrictive reading of the Executive's scope of power and utilised a more intensive scrutiny of the Executive's decision. Much as the apex court's interpretation of the relevant law in question reined in the Minister's power to detain, it did not intrude into the merits of the case by not making a determination whether the applicant was a threat to public order in Singapore. Instead, the court was very much focused on whether there were deficiencies in the grounds stated in the detention order.

18 This approach advocates and promotes a higher standard of public administration while simultaneously discouraging executive complacency and overreach. This is consistent with the green-light approach of encouraging better administration by requiring that the Government give complete reasons for any detention, rather than the Judiciary being primarily concerned with checking the Government's power to detain under the CLTPA.

19 Notwithstanding the less deferential judicial posture, the case did not point to antagonistic relations between the Judiciary and the political branches of government. Individual rights were accorded due recognition and administrative autonomy was not undermined. The facilitative effect can be observed in the re-arrest order that was issued to Tan Seet Eng about a week after his release. The new detention order corrected the deficiencies in its predecessor and also specified the extent of the alleged match-fixing activities within Singapore.[26]

20 The green-light approach resonates with and is consistent with the duty and responsibility of the Confucian *junzi* ("君子"), where it is presumed that the people in government are honourable men and women who carry themselves with a high level of moral probity.[27] What drives this dual approach (ensuring legality and promoting good governance) to judicial review as Sundaresh Menon CJ put it, is:[28]

> [T]he belief that a court which is respected by the other branches of government can effectively shape the debate and ensure the legality of government actions by setting out its concerns openly and potentially obviating a binary clash between the Judiciary and the Executive.

25 Cap 67, 2000 Rev Ed.

26 Ministry of Home Affairs, "MHA Statement on Detention of Dan Tan Seet Eng" (5 December 2015) https://www.mha.gov.sg/Newsroom/press-releases/Pages/MHA-Statement-on-Detention-of-Dan-Tan-Seet-Eng.aspx (accessed 18 May 2017).

27 See Singapore, *Shared Values* (White Paper, Cm 1, 1991) at para 41.

28 Sundaresh Menon, "The Rule of Law: The Path to Exceptionalism" (2016) 28 SAcLJ 413 at para 29.

With this judicial attitude in mind, the Singapore courts have manifested and given effect to appropriate curial deference through the application of concepts of justiciability and, more recently, varying intensities of review.

III. Justiciability

21 Justiciability is concerned with whether a court has the jurisdiction to look into the matter.[29] Scrutiny, on the other hand, is concerned with the intensity of review in a judicial review. The decision whether a matter is justiciable and the level of scrutiny to adopt in any case pivots on the degree of curial deference.[30] Generally, courts recognise provinces of executive decision-making that are immune from judicial review.[31] They include matters of "high policy" such as the dissolution of Parliament, the conduct of foreign affairs, and issues of national security.[32] However, this does not mean that such issues are entirely non-justiciable. Rather, the court's approach was limited to objectively determining whether there was evidence that the decision made was, for example, based on considerations of national security.[33] The default position was one of greater deference when the decision being reviewed was policy-laden or security-based.[34]

22 Hence, in *Re Wong Sin Yee*,[35] which involved a judicial review of the decision to detain under the CLTPA, the High Court emphasised that the judicial process was "unsuitable for reaching decisions on national security," and this extended to questions on "public safety, peace and good order" under the CLTPA.[36] Relying on the Minister's satisfaction that Wong was such a threat, the court held that it was in no position to find that the Minister's exercise of discretion was irrational in the *Wednesbury* sense.[37] Instead of inquiring into the grounds of detention to determine whether the detention order showed how the applicant's acts had prejudiced the "public safety, peace and good order" of Singapore, the court was primarily focused on whether there was

29 *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 at [91].
30 Aileen Kavanagh, "Defending Deference in Public Law and Constitutional Theory" (2010) 126 *Law Quarterly Review* 222 at 241.
31 *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 at [95].
32 *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 at [96].
33 *Chan Hiang Leng Colin v Minister for Information and the Arts* [1996] 1 SLR(R) 304 at [30].
34 *R v Minister of Defence, ex parte Smith* [1996] 1 QB 517, *per* Sir Thomas Bingham at 556.
35 [2007] 4 SLR(R) 676.
36 *Re Wong Sin Yee* [2007] 4 SLR(R) 676 at [46].
37 On *Wednesbury* irrationality, see *Associated Provincial Picture Houses Ltd v Wednesbury Corp* [1948] 1 KB 223.

evidence of the ministerial satisfaction but not the basis of the satisfaction.[38] The light-touch review adopted corresponded to a greater degree of deference where policy-laden decisions were concerned.[39]

23 A nuanced and more rigorous approach was taken in *Lee Hsien Loong v Review Publishing Co Ltd*[40] ("*Review Publishing*"). One of the issues was whether an international treaty between Singapore and the People's Republic of China applied in the Hong Kong Special Administrative Region. Menon JC (as his Honour then was) stated the general principle that issues of "high policy" and interpretation of international treaties, which have been expressly delegated to the Executive, are generally "immune from judicial review".[41]

24 However, in an important caveat, judicial intervention is required in situations where the "courts are able to isolate a pure question of law from what may generally appear to be a non-justiciable area".[42] A rigid "hands-off" approach where the courts refrained from reviewing decisions once they were found to be "high policy" was rejected. Menon JC also provided the following guiding principles on justiciability:

> (a) Justiciability depends on the subject matter in question, not on the source of the power.
>
> (b) Due to their lack of institutional capacity, courts should refrain from reviewing cases that involve balancing of "various competing policy considerations".
>
> (c) Courts should refrain from decisions which may potentially embarrass or fetter discretion of other branches of government.
>
> (d) When deciding on justiciability, courts have to consider their constitutional legitimacy in reviewing that decision.

25 In *Tan Seet Eng*, the court affirmed *Review Publishing* by not assuming "a highly rigid and categorical approach" in determining whether a matter was justiciable. It also emphasised that the mere label of "high policy" was insufficient to constitute a bar to judicial review of the decision. Similarly, in *Yong Vui Kong v Attorney-General*, had the issue in question been one on the procedure of the clemency process,

38 The applicant had asserted that s 30 of the Criminal Law (Temporary Provisions) Act (Cap 67, 2000 Rev Ed) did not apply to criminal activities *outside* Singapore.
39 Andrew Le Seur, "The Rise and Ruin of Unreasonableness" (2005) 10 JR 32 at 39.
40 [2007] 2 SLR(R) 453.
41 *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 at [95]–[97].
42 *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 at [98].

then it would have been found to be justiciable (but whether clemency was correctly granted or denied was not justiciable).[43]

26 In short, the Singapore courts eschew a strict categorisation of what is justiciable and what is not is. A subject-matter area, *prima facie* non-justiciable, could still be justiciable depending on the legal issue raised.[44] To reiterate, Menon CJ in *Tan Seet Eng* put it as such: "the degree and extent of scrutiny that is applied by a court engaged in judicial review will be sensitive to *the true nature of the question raised*" [emphasis added].[45] In *Review Publishing*, Menon JC found that the issue in question was reviewable since it was not concerned with whether the Executive had the power to sign the treaty (which is non-reviewable) but the legal effect of the already-concluded treaty.[46]

27 In the above cases, although the statements of principles on the question of justiciability are important and nuanced, they did not break new ground. They can be traced to the seminal case of *Chng Suan Tze v Minister for Home Affairs*,[47] which concerned detention orders under s 8(1)(*a*) of the Internal Security Act[48] ("ISA"). In *Chng Suan Tze*, then Wee Chong Jin CJ asserted that unfettered discretion was contrary to the rule of law, and the starting point in any judicial inquiry was that of the inherent justiciability of executive decisions unless rendered unjusticiable according to commonly accepted principles.[49] Citing the leading House of Lords case of *Council of Civil Service Unions v Minister for the Civil Service*,[50] Wee CJ stated that where a decision fell under the umbrella of national security or other commonly accepted non-justiciable areas, they did not necessarily constitute an absolute bar to judicial review. Rather, justiciability can be used to isolate certain decisions from further scrutiny in the event of judicial review.[51]

28 Furthermore, the Court of Appeal declined to use the subjective test applied in *Lee Mau Seng v Minister for Home Affairs*[52] and instead opted for the objective test for reviews of exercise of discretion.[53] A subjective inquiry would practically render the court being "bound to accept whatever was put before it".[54] Earlier in the judgment, on the

43 *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 at [63].
44 *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 at [98].
45 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [105].
46 *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 at [100].
47 *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525.
48 Cap 143, 1985 Rev Ed.
49 *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86].
50 [1985] AC 374.
51 *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [94].
52 [1971–1973] SLR(R) 135.
53 *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [55].
54 *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [55].

question of the sufficiency of evidence needed to prove the President's satisfaction under s 8(1) of the ISA, the court stressed its authority to "determine whether the matters relied on by the Executive in the exercise of discretion can be said to fall within the scope of s 8 of the ISA". On an objective inquiry, the appeal was granted as the respondents had not proven the President's satisfaction. Even in the event that certain elements of a decision were non-reviewable, the court would not take a hands-off approach to the decision, but would instead scrutinise whether the decision was made according to the procedures and boundaries set by the law.

29 Soon after the judgment in *Chng Suan Tze* was handed down, Parliament legislatively overruled the decision by promptly amending the Constitution and the ISA,[55] reinstating the law prior to *Chng Suan Tze*. Did the response of the political branches to *Chng Suan Tze* contribute to the perception that the courts tended to adopt a more deferential approach in delimiting the scope of executive power post-*Chng Suan Tze*?

30 Adopting a literal approach in the statutory interpretation on the scope of the executive power, the courts appeared contented to refer almost exclusively to the express limits provided for in the enabling statute. In *Chan Hiang Leng Colin v Public Prosecutor*[56] ("*Chan Hiang Leng Colin*") in relation to the boundaries of ministerial discretion under s 3(1) of the Undesirable Publications Act,[57] a literal interpretation of the provision "confers a discretion on the Minister to order the prohibition of a publication if he is of the opinion that the importation, sale or circulation of that publication would be contrary to public interest". Although the ambit of the provision was noticeably broad, no attempt was made to consider what the appropriate confines of the scope of ministerial power were, such as the nature of publications intended to fall within the ambit of the Act.

31 In *Re Wong Sin Yee*,[58] discussed earlier, the applicant was alleged to have trafficked drugs from Malaysia to Taiwan and China. He was detained under the CLTPA. As to whether there was illegality in the applicant's detention, the court stated that:[59]

> [T]he Minister had asserted that the applicant had been involved in criminal activities and that it was in the interests of public safety, peace and good order that he be detained. As for whether the alleged

55 Constitution of the Republic of Singapore (Amendment) Act 1989 (Act 1 of 1989).
56 *Chan Hiang Leng Colin v Public Prosecutor* [1994] 3 SLR(R) 209.
57 Cap 338, 1985 Rev Ed.
58 [2007] 4 SLR(R) 676.
59 *Re Wong Sin Yee* [2007] 4 SLR(R) 676 at [46].

> activities endangered public safety, peace and good order, it was pointed out by … *Chng Suan Tze* … '[i]t hardly needs any emphasis that the judicial process is unsuitable for reaching decisions on national security'. The same … applies to questions of public safety, peace and good order …

Although the applicant's alleged criminal activities took place abroad, the court did not address the question of whether the alleged activities did indeed endanger public safety, peace and good order in Singapore. The court treated the boundaries of ministerial discretion afforded by s 30(*a*) of the CLTPA to be broad: The Minister of Home Affairs, with the Public Prosecutor's consent, is permitted to detain, without trial, a person who is "associated with activities of a criminal nature … in the interests of public safety, peace and good order". Like in *Chan Hiang Leng Colin*, no attempt was made to consider the appropriate confines of ministerial power in the statutory provision in question.

32 This contrasts with the recent decision of the Court of Appeal in *Tan Seet Eng*, which also concerned s 30 of the CLTPA. The applicant was the alleged leader of a global match-fixing syndicate. The grounds of detention alleged that he had recruited runners in Singapore, directed agents and runners from Singapore to assist in match-fixing activities, and financed and directed match-fixing activities overseas.[60] He applied for an order to review his detention on the grounds of illegality, irrationality and procedural impropriety. The application was dismissed at first instance by the High Court.[61]

33 Upon appeal, the apex court quashed the detention order. It found that the written grounds of detention did not fall within the scope of s 30 of the CLTPA as there was nothing in the detention order that indicated that the applicant's activities posed a threat to public safety, peace and good order *within* Singapore.[62] Therefore, the Minister had acted beyond the scope of his powers in detaining the applicant.[63]

34 *Tan Seet Eng* demonstrated a robust and less deferential approach in the court's reviewing the exercise of a draconian discretionary power. For instance, and in contrast to *Re Wong Sin Yee*, the court closely scrutinised the grounds of detention put forward by the Minister. Second, it rejected the submission that there was no limit on the types of criminal activities that the CLTPA could cover.[64] Instead, the Court of Appeal confined the law to "activities of a criminal nature" that

60 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [8].
61 *Tan Seet Eng v Attorney-General* [2015] 2 SLR 453 at [31]–[35].
62 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [146]–[147].
63 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [148].
64 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [133]–[134].

involved the use of violence or the threat of reprisals to prevent witnesses from testifying, such that the normal criminal process is rendered inadequate,[65] were of a sufficiently serious nature,[66] and harm is caused to the peace, safety and order *within* Singapore.[67] It also rejected the contention that the Minister possessed the discretionary power to widen the scope of the CLTPA even without a parliamentary mandate.[68]

35 The court's interpretation was derived from a careful analysis of the parliamentary debates on the CLTPA, which Parliament has to renew every five years.[69] By identifying these unifying characteristics of the types of criminal activities that the CLTPA covered, the court was unambiguously defining the scope of ministerial discretion under the CLTPA. In adopting a narrower interpretation than would have been required on a plain reading of s 30 of the CLTPA, the court was effectively imposing fetters on ministerial discretion to ensure that it kept to the legal limits of the power to detain without trial under the CLTPA.

36 In its supervisory role, and fully cognisant of the distinction between review and appeal, Menon CJ also emphasised that the court was not to look into the evidential sufficiency of the factual allegations justifying the detention,[70] and that only the reasons given in the grounds of detention could be used to justify the detention.[71] This points to the court's requirement of stringent standards of procedural probity to be adhered to in the Executive's decision-making process. This narrow interpretation of the legislative provision, accompanied by a more intensive scrutiny of the exercise of "potentially draconian power" vested in the Executive by the CLTPA, highlights the court recognising that the public interest in public safety, peace and good order in Singapore had to be balanced against the protection of individual liberty. The court observed the interests of public safety, peace and order envisaged "a wide spectrum of scenarios", including "relatively minor offences".[72] Permitting unbridled discretion on the part of the Executive could have potentially undesirable consequences for individual rights and the rule of law.

65 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [117].
66 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [119].
67 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [120].
68 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [133]–[134].
69 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [107]–[128].
70 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [64], [128] and [147].
71 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [130]–[131] and [147].
72 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [74].

37 The rule of law does not require decision-makers to be deprived of all discretion; only that discretion must not be unconstrained so as to be potentially arbitrary. The Court of Appeal in *Tan Seet Eng* demonstrated that the courts are prepared, in appropriate cases, to render narrow interpretations of broadly worded statutes. The High Court's decision in *Tan Seet Eng* reflected the prior position where it noted that s 30 of the CLTPA did not specify any particular category of criminal activity, and concluded that the provision did not restrict its scope to any specific type of criminal activity.[73] In contrast, the Court of Appeal's approach of a restrictive interpretation points towards the Judiciary's will to impose limits on draconian statutes.

38 The apex court's judgment had the hallmarks of a judicial dialogue with the political branches. Menon CJ had prefaced the court's analysis of the CLTPA with deliberate emphases on the court's power to "pronounce authoritatively and conclusively on the meaning of the Constitution and all other laws",[74] including the scope of discretion conferred by legislation.[75] The message was clear: Curial deference notwithstanding the Judiciary will not shy away from interpreting the boundaries of executive discretion restrictively where appropriate, such as when a person's liberty, guaranteed under Art 9 of the Constitution, is at stake.

39 Even then, the court consciously avoided engaging in a merits review into whether the evidence provided by the Minister to establish that Tan Seet Eng was a threat under the CLTPA was true, but instead approached it from a simple *ultra vires* perspective. That is, whether the grounds for the applicant's detention brought the appellant within the limits of the CLTPA. This framed the subject matter as an issue of procedure, and not one of determining what "public order, peace and security" or "high policy" required. Thus, it was a justiciable issue as it fell within the ground of illegality.[76]

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73 *Tan Seet Eng v Attorney-General* [2015] 2 SLR 453 at [31]–[35].

74 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [90].

75 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [97]–[98] and [134]. In making no fewer than eight such references in the judgment, including in the opening paragraph, the Court of Appeal was highlighting the court's exclusive responsibility to ensure that state power is exercised within the prescribed legal limits.

76 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [128]. The court's adoption of the "traditional test", rather than the "probable cause test", underscores a less deferential approach. Under the probable cause test, which the Court of Appeal applied in *Kamal Jit Singh v Minister for Home Affairs* [1992] 3 SLR(R) 352, the Executive is only obliged to demonstrate compliance with the Criminal Law (Temporary Provisions) Act (Cap 67, 2000 Rev Ed)'s procedural requirements. The applicant bears the burden of showing probable cause that his detention was unlawful. In contrast, under the traditional test, the court "closely scrutinizes the

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40 *Tan Seet Eng* also preserves the principles laid out in *Review Publishing* on the courts refraining from engaging in a review on matters due to a lack of institutional capacity. The court turned only to the grounds of detention raised in the detention order by the Minister and not the actual evidence itself.[77] Given the dynamic interplay between deference and justiciability, a strict categorisation of what is justiciable and what is not would suggest the courts being over-deferential. While there are commonly accepted areas that are *prima facie* not justiciable, the courts need to embark on a further enquiry to determine what is the true nature of the question raised.

41 *Review Publishing* and *Tan Seet Eng* clarify that even within traditional categories of non-justiciable issues, questions of "legality" could arise.[78] But where the question raised involves "issues of policy or security or … polycentric political considerations", the court lacks the institutional competence to review them.[79] Deference has to be accorded to the decision-maker in full measure in such an instance. Thus, in preventive detention cases involving the ISA or CLTPA, even as the courts will require the Executive to show that the detention is indeed based on national security or public peace, security and good order, "the evidentiary basis for the detention is not scrutinised by the courts".[80] Whether a decision concerning a "high policy" area is justiciable depends on whether there are reviewable elements, which can be isolated from other "non-reviewable" elements in that particular decision.

42 Having examined the issue of non-justiciability, which involves the insulation of some, if not all, elements of an executive decision from judicial review, it is appropriate to examine how the court's approach with regard to the intensity of review of a decision that is being impugned accords with curial deference.

IV. Judicial scrutiny and varying intensities of review

43 At times, the Judiciary's constitutional role as a counter-majoritarian check on the exercise of power by the elected government

grounds put forward by the Minister" within "the usual ambit of judicial review, namely, illegality, irrationality and procedural impropriety": see *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [63] and [66].

77 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [131].

78 *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 at [98]. Then Menon JC illustrated it as such: "where what appears to raise a question of international law in fact bears on the application of domestic law, that is something the courts may well find justiciable".

79 [2016] 1 SLR 779 at [92].

80 [2016] 1 SLR 779 at [128].

may conflict with its lack of expertise to adjudicate on certain matters of public policy.[81] Ultimately, the requisite intensity of review (and its corresponding degree of deference) is context-dependent and sensitive to the true nature of the question raised.

44 In *Tan Seet Eng*, the Court of Appeal clarified that, as the context requires, different intensities of review are to be adopted in judicial review. That curial deference is not a static concept having a one-size-fits-all approach is another valuable theme from *Tan Seet Eng*. Menon CJ contrasted deference, where the court varied the intensity of scrutiny, with unjusticiability, where the court would completely refuse to review.[82]

45 Intensity of review and degree of deference are two sides of the same coin. Where a greater intensity of review is adopted, that correspondingly means a lesser degree of deference is accorded. A calibrated approach, applying varying intensities of review depending on the subject matter at hand, is the watchword. We can conceive of intensity of review as being akin to a sliding scale in which determining where a subject matter in question lies on the spectrum entails a balancing exercise.[83]

46 On the other hand, if the question raised is justiciable, the courts will have to calibrate the appropriate level of deference as it scrutinises the administrative action sought to be impugned. This judicial enquiry process entails that the court consider its institutional competence in order to determine the correct level of scrutiny. This is where deference plays a prominent role. There are two facets to the executive action/decision – "legality" and the "merits" – where the matter is justiciable. In judicial review in administrative law, the court's supervisory role requires that it regards the "merits" of a decision as effectively non-justiciable. This is the court's manifesting deference to the institutional competence of the decision-maker as well as the institutional mandate entrusted to the Executive by the Legislature.[84]

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81 Chan Sek Keong, "Securing and Maintaining the Independence of the Court in Judicial Proceedings" (2010) 22 SAcLJ 229 at [3]; Trevor R S Allan, "Human Rights and Judicial Review: A Critique of 'Due Deference'" (2006) 65(3) *The Cambridge Law Journal* 671 at 695.

82 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [105]; Aileen Kavanagh, "Defending Deference in Public Law and Constitutional Theory" (2010) 126 *Law Quarterly Review* 222 at p 241.

83 Paul Craig, "Proportionality, Rationality and Review" [2010] *New Zealand Law Review* 265 at 287.

84 In *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [97], the court emphasised the important distinction between the legality and merits of a decision:

> [W]hile it is one thing to say that the court must not substitute its view as to the way in which the discretion that is vested in the Minister should be

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47 In contrast, where the "legality" of an administrative decision is in question, the issue centres more on the appropriate level of deference to be given to the Executive. As courts are not suited nor empowered to adjudicate on polycentric matters, courts have accorded greater latitude to the Executive and how the decision-maker went about making the decision.[85] The application of a varied intensity of review is very much aligned with the level of deference accorded to the primary decision-maker; the two are not antithetical.[86]

48 *Tan Seet Eng* marks a nuanced shift in the Judiciary's approach in reviewing polycentric decisions.[87] The Court of Appeal rejected a blanket rule preventing scrutiny and held that even matters of "high policy" were open to judicial review.[88] This coheres with *Review Publishing*, where the court held that "the intensity of judicial review will depend upon the context in which the issue arises and upon common sense".[89] However, the court also clarified that this did not mean that it would engage in a merits view; judicial deference was to be applied flexibly in varying degrees depending on the context.[90] Compared to *Re Wong Sin Yee*, this higher level of scrutiny is located within the context of the traditional tests of illegality, irrationality and impropriety.[91]

49 Limited institutional competence logically warrants a greater degree of judicial deference. This means that even though a matter was justiciable, a greater degree of deference was likely to be exercised in reviewing such matters. It is apposite to note that polycentricity is a matter of degree, as Lon Fuller himself had conceded,[92] and that many issues the courts face are polycentric in nature, such as tax law.[93] This

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> exercised, it is quite another to say that the Minister's exercise of discretion may not be scrutinised by the court at all …

85 *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 at [85].

86 Aileen Kavanagh, "Defending Deference in Public Law and Constitutional Theory" (2010) 126 *Law Quarterly Review* 222 at 241.

87 Lon Fuller had likened a polycentric problem to a spider's web:

> A pull on one strand will distribute tensions throughout the web as a whole. Doubling the original pull will, in all likelihood, not simply double each of the resulting tensions but rather create a different complicated pattern [especially] if the double pull caused one or more of the weaker strands to snap …

See Fuller's "The Forms and Limits of Adjudication" (1978–1979) 92 Harv L Rev 353.

88 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [106].

89 *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 at [98].

90 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [105]; see also Aileen Kavanagh, "Defending Deference in Public Law and Constitutional Theory" (2010) 126 *Law Quarterly Review* 222 at 241.

91 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [128].

92 Lon Fuller, "The Forms and Limits of Adjudication" (1978–1979) 92 Harv L Rev 353 at 397.

93 See, *eg*, Jeff A King, "The Pervasiveness of Polycentricity" [2008] *Public Law* 101.

reminds us that polycentricity, when invoked, requires a careful consideration as to the degree of curial restraint required, rather than a default position that polycentric questions are excluded from adjudication. In this regard, it is helpful to recognise that polycentricity pertains to issues rather than areas of law, warranting against a categorical approach in a court's intensity of review.

50 In *Tan Seet Eng*, the court had examined the Minister's grounds for detaining the applicant[94] and explained why they were insufficient to bring the applicant's detention within the ambit of the CLTPA.[95] The CLTPA applied to specified criminal activities having a prejudicial effect on the "public safety, peace and good order" *of Singapore*.[96] Activities not amounting to threats in Singapore simply did not pass legal muster. *Tan Seet Eng* suggests that mere compliance with procedural requirements set out in the plain reading of the CLTPA is insufficient for a detention to be found lawful. The detention order further had to be consistent with the *raison d'être* of the CLTPA: The Minister had the responsibility of ensuring that the grounds of detention and the facts produced justified the need for detention under the CLTPA.

51 The court stated that it was "incumbent on the Minister to state all the grounds relied on as justifying the detention",[97] and that it was not the role of the courts to "fill in any gaps in the narrative of the facts by surmise or supposition".[98] This signifies a more exacting standard requiring the nexus between the grounds of decision and the scope of power to be made explicitly by the decision-maker. Applying the above principles to the facts, the court found that there was no suggestion that the activities harmed public safety and order in Singapore or that witnesses were being intimidated from testifying.[99] The court was not persuaded by the mere conceivability that other activities behind match-fixing could have had an impact on public security in Singapore.[100] Hence, the court held that the appellant's detention was unlawful for being beyond the scope of the Minister's power.[101] In so doing, the court had unequivocally dispelled any notion that its function was confined to a mere clerical verification of procedural compliance, and pre-empted intimations that the Judiciary was overreaching its constitutional role by scrutinising the grounds of decision.

94 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [131].
95 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [147].
96 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [137].
97 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [130].
98 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [131] and [147].
99 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [146].
100 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [147].
101 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [148].

52 A significant feature of *Tan Seet Eng* in the protection of fundamental liberties was the court's consideration of the consequences of the detention order on the liberty of the individual.[102] To sufficiently affirm the rights of the individual, the courts will have to calibrate downwards the degree of judicial deference afforded to the decision-maker and apply an upward calibration of the intensity of review.[103] This will often be manifested in the rigour of the questions the courts pose to the decision-makers.[104] Thus, in *Tan Seet Eng*, the court's scrutiny went beyond determining whether the authorities strictly complied with the statutory procedure, but also "implied" requirements within. In this regard, the court considered, *inter alia*, (a) whether the Minister had set down "all grounds relied on as justifying the detention"[105] and (b) what type of serious crimes that Parliament had intended for the CLTPA to cover.[106]

53 The less deferential approach in the appropriate cases suggest that the court will not be easily satisfied by cursory answers to questions that point to a lack of exacting regard and attention to what the exercise of discretionary power requires. In pre-*Tan Seet Eng* cases, the courts tended to work from the presupposition that administrative discretion sought to be impugned was *intra vires*, before proceeding to examine if there is any patent indication that the decision-maker had exceeded his power.[107] Again, this increased demand for the court's satisfaction resulting from an application of a varied intensity of review seeks to balance the rights of the individual and the interests of the Government.

54 *Tan Seet Eng* demonstrates that curial deference is a flexible doctrine and that it is not antithetical to judicial scrutiny of executive action, even those typically regarded as being unjusticiable. This dynamic and nuanced conception of deference requires a court to assess its institutional competence to deal with a particular issue; where its

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102 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [96].

103 Past cases involving the legality of the detention orders under the Criminal Law (Temporary Provisions) Act (Cap 67, 2000 Rev Ed) did not appear to explicitly consider the implications of detention orders on individuals. See, *eg*, *Re Wong Sin Yee* [2007] 4 SLR(R) 676, *Shamm bin Sulong v Minister for Home Affairs* [1996] 2 SLR(R) 350 and *Kamal Jit Singh v Minister for Home Affairs* [1992] 3 SLR(R) 352.

104 Mark Elliot, "Proportionality and Deference: The Importance of a Structured Approach" in *Effective Judicial Review: A Cornerstone of Good Governance* (Christopher Forsyth *et al* eds) (Oxford University Press, 2010) at p 269.

105 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [131].

106 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [147].

107 *Cf Tan Seet Eng v Attorney-General* [2016] 1 SLR 779, the Court of Appeal subjected the written grounds of detention to rigorous scrutiny to determine if the decision-maker had acted within his scope of discretion in the first place. This divergence in approach is arguably subtle but important.

competence is limited, the court is to exercise the requisite level restraint.

V. Judicial deference on interpretations of law – A new standard of review?

55 As justiciability and judicial scrutiny are similar doctrines, there will be some areas of overlap.[108] It is trite that the relationship and the boundary between judicial and political decision-making is one fraught with complexity as the co-equal branches of government negotiate the inherent constitutional tension between the administrative state's democratic legitimacy and the Judiciary's role in public law to control public power.[109] *De Smith's Judicial Review* put it aptly:[110]

> The question of the appropriate measure of deference, respect, restraint, latitude or discretionary area of judgment (to use some of the terms variously employed) which the courts should grant the primary decision-maker is one of the most complex in all of public law and goes to the heart of the principle of the separation of powers. This is because there is often a fine line between assessment of the *merits* of the decision (evaluation of fact and policy) and the assessment of whether the principles of 'just administrative action' have been met. The former questions are normally matters for the primary decision-maker, but the latter are within the appropriate capacity of the courts to decide. [emphasis in original]

56 As the administrative state encounters regulatory frameworks that are growing in complexity, there will be more occasions in which the Legislature would entrust interpretations of law to administrative decision-makers. Thus, the capacity of the courts to adjudicate on whether the principles of "just administrative action" have been met may not be all that abundantly clear whether one looks at it in terms of institutional competence or democratic legitimacy.

57 Then Attorney-General Rajah had flagged the issue of the standard of review that should be applied to interpretations of law as Singapore's judicial review landscape develops and matures.[111] In essence, the issue here is whether there should be a bifurcated approach

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108 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [105].

109 Lord Diplock, "Judicial Control of Government" [1979] MLJ cxl; Jonathan Sumption QC, "Judicial and Political Decision-making: The Uncertain Boundary" [2011] JR 301.

110 Lord Woolf *et al*, *De Smith's Judicial Review* (Sweet & Maxwell, 6th Ed, 2007) at para 11-004.

111 V K Rajah, Senior Counsel, "Judicial Review – Politics, Policy and the Separation of Powers", guest lecture at the Singapore Management University Constitutional and Administrative Law course (24 March 2016).

(*viz*, the correctness standard and the reasonableness standard) towards administrative decision-makers' interpretations of law that is recognised in Canada and the US. The current English and Singaporean approach towards reviewing interpretations of law is that there can only be one correct interpretation (the correctness standard) on the basis that judges are constitutionally responsible for ensuring that any exercise of state power is carried out within legal limits.[112]

58 On the other hand, under the reasonableness standard, a reviewing court enquires into "the existence of justification, transparency and intelligibility within the decision-making process" and "whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law".[113] In particular, the question of law at issue relates to the interpretation of the administrative decision-maker's home statute or a statute closely connected to its function. In addition, the reasonableness standard applies where the question of law also raises issues of fact, discretion or policy, or involves inextricably intertwined legal and factual issues.[114]

59 As Rajah AG noted, leaving legal interpretation to an administrative official seem to go against our long-standing understanding of the law and policy distinction as well as the court's ability to determine the extent of a decision-maker's jurisdiction as conferred by legislation. He further observed that "judicial deference to administrative interpretation should not be equated to judicial

112 *Pearlman v Keepers of Harrow School* [1979] QB 56 at 70, *per* Lord Denning. But the UK position is also evolving in light of the tribunal system put in place by the UK's Tribunals, Courts and Enforcement Act 2007 (c 15), creating a two-tier system of administrative adjudication comprising specialised tribunals and the courts. The UK Supreme Court in *R (Cart) v Upper Tribunal* [2012] 1 AC 663 held that even though some tribunal decisions can be judicially reviewed, the courts would only do so where some important point of principle or practice is involved, or that there was some other compelling reason for the court to undertake judicial review. See also Paul Daly, "Deference on Questions of Law" (2011) 74 *The Modern Law Review* 694. Daly argued that the general presumption that the resolution of questions of law is a matter for the courts should be jettisoned especially where the Legislature had intended to delegate the resolution of many questions of law to administrators and where courts lack institutional competence to resolve those questions of law.

113 *Dunsmuir v New Brunswick* [2008] 1 SCR 190 at [47].

114 *Smith v Alliance Pipeline* [2011] 1 SCR 160 at [26]. A similar approach is found in the influential US Supreme Court decision of *Chevron USA Inc v National Resources Defence Council* 467 US 837 (1984) ("*Chevron*"). Attorney-General V K Rajah summarised the *Chevron* approach as such:

> At the first stage, the court considers whether Congress has addressed the interpretive problem at issue. If so, the court will apply a correctness standard to implement Congress's intent. If not, the court will proceed to the second stage to determine whether the administrative decision-maker's interpretation is reasonable. If it is, the court must defer to that interpretation.

abstention. Even when deference is warranted, the court still plays a significant role because the question of law is simply recast as an inquiry into whether the administrative decision-maker's interpretation is reasonable".[115] He argued that this position could be supported on the grounds of institutional competence and democratic legitimacy, the usual basis for curial deference. In the former, an administrative decision-maker:[116]

> [C]ould be more familiar with the purposes of its constitutive statute and its underlying policies and principles than a reviewing court. It may also possess special expertise that makes it well suited to interpret legislative provisions that turn on technical or economic considerations. If so, Parliament could have intended for the administrative decision-maker to interpret the legislation. [references omitted]

This is particularly the case where the executive agency has superior fact-finding resources and abilities, functional expertise and coordinative competency with regard to the legal issue in question. To be clear, this justification is grounded more on pragmatic considerations rather than it possessing constitutional force.

60 For the consideration of democratic legitimacy, the process of statutory interpretation may often require a selection from reasonable alternatives by reference to policy considerations, or require the use of political judgment. Given that legislatures often enact laws with open-textured language, it is arguable that the Judiciary should defer to administrative interpretation because it is less accountable to the electorate and the judicial process ill-suited to resolve polycentric issues. In *Chevron USA Inc v National Resources Defence Council*, Stevens J reiterated this democratic argument:[117]

> Judges are not experts in the field, and are not part of either political branch of the Government. Courts must, in some cases, reconcile competing political interests, but not on the basis of the judges' personal policy preferences. In contrast, an agency to which Congress has delegated policymaking responsibilities may, within the limits of that delegation, properly rely upon the incumbent administration's views of wise policy to inform its judgments. While agencies are not

115 V K Rajah, Attorney-General of Singapore, "Judicial Review – Politics, Policy and the Separation of Powers", guest lecture at the Singapore Management University Constitutional and Administrative Law course (24 March 2016) at para 40.

116 V K Rajah, Attorney-General of Singapore, "Judicial Review – Politics, Policy and the Separation of Powers", guest lecture at the Singapore Management University Constitutional and Administrative Law course (24 March 2016) at para 41; see also Jeffrey Jowell, "What Decisions Should Judges Not Take?" in *Tom Bingham and the Transformation of the Law: A Liber Amicorum* (Mads Andenas & Duncan Fairgrieve eds) (Oxford University Press, 2009).

117 467 US 837 at 865–866 (1984).

> directly accountable to the people, the Chief Executive is, and it is entirely appropriate for this political branch of the Government to make such policy choices -- resolving the competing interests which Congress itself either inadvertently did not resolve, or intentionally left to be resolved by the agency charged with the administration of the statute in light of everyday realities.

61 Rajah AG highlighted a significant disadvantage of using a blanket standard of review: the distinctions between questions of law, fact, inferences of fact and application may not be so clear. Furthermore, when a court characterises an issue as a question of law (which requires the application of the correctness standard of review), "any further analysis as to the extent of the power delegated by Parliament to an administrative decision-maker, as well as considerations of institutional competence and democratic legitimacy, are stymied".[118] Recognising more than one standard of review would require judges "to consider the balance between rule of law requirements, institutional competence and democratic legitimacy in deciding whether to defer to an administrative interpretation and "to articulate why they have chosen to apply one standard instead of another".[119]

62 More to the point, in allowing or deferring to reasonable administrative interpretations to stand, judges are giving effect to the constitutional separation of powers and Parliament's intent as manifested in the statutory scheme of the legislation in question, often enabling the executive agency to resolve any ambiguity in the statute. The role of the courts then, *vis-à-vis* the question of law, is whether the Executive has acted *intra vires* and its resolution of the legal ambiguity is reasonable.

63 Considering the growing administrative state, characterised by flexible, reflexive executive rulemaking having to adapt to rapidly changing circumstances being increasingly the rule rather than the exception, our conception and understanding of judicial deference must

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118 V K Rajah, Senior Counsel, "Judicial Review – Politics, Policy and the Separation of Powers", guest lecture at the Singapore Management University Constitutional and Administrative Law course (24 March 2016) at para 44.

119 V K Rajah, Senior Counsel, "Judicial Review – Politics, Policy and the Separation of Powers", guest lecture at the Singapore Management University Constitutional and Administrative Law course (24 March 2016) at para 44. This is also aligned with what Etienne Mureinik had described as the movement from a "culture of authority" to a "culture of justification": see Etienne Mureinik, "A Bridge to Where? Introducing the Interim Bill of Rights" (1994) 10 *South African Journal on Human Rights* 31; see also David Dyzenhaus, "The Politics of Deference: Judicial Review and Democracy" in *The Province of Administrative Law* (Michael Taggart ed) (Oxford University Press, 1997).

take into account the reality of broad delegation of discretionary power to the Executive.

64 That there is one "correct" meaning of a statute in fulfilling its statutory purpose is also fast becoming untenable in law and in policy. Looking at how technical and esoteric subsidiary legislation can be, often involving the allocation of finite resources, and the polycentric considerations that administrative decision-makers need to take into account, judicial deference will have to evolve innovatively and this is where foreign approaches can be fruitfully considered. Furthermore, in an age of technological disruption, we can expect public service agencies to embrace intelligent and self-learning technologies, advanced analytics and predictive modelling to aid them in policymaking and in the decision-making process.

65 This move towards interpretive autonomy in the realm of executive decision-making and its implementation, however, cannot result in their being insulated from the vicissitudes of judicial review. Curial deference will continue to play a key part in the court's review of a specialised statutory scheme (including its functions and legislative clarity) and the criterion for the divide between substitution of judgment and reasonableness review. Any claims of specialised knowledge or expertise must be rigorously tested.

66 Moreover, any argument for curial deference in such instances cannot be based on a rigid application of categorical considerations such as institutional capacities, authoritative procedures or legislative mandates. Trevor R S Allan reminds us to be sceptical of the demands for curial deference, especially in the application and enforcement of rights. He cautioned against elevating deference to "the status of an independent doctrinal requirement" since that confuses analysis by requiring judges to "surrender their independence of judgment in the face of superior expertise, or superior democratic authority, or the inexorable demands of an unambiguous text". Hence, surrendering curial judgment is inconsistent with the rigorous scrutiny of governmental action that the protection of human rights requires.[120] Ultimately, the litmus test of any doctrine of curial deference has to uphold the supremacy of reason and not sacrifice it to mere expediency, premised exclusively on a set of general criteria that is made out to be determinative and conclusive.

67 How soon such a legal development would arise in Singapore is anyone's guess. When it does, it remains an open question how much

120 Trevor R S Allan, "Human Rights and Judicial Review: A Critique of 'Due Deference'" (2006) 65 *The Cambridge Law Journal* 671 at 694.

interpretive weight the Singapore courts will put on an executive agency's conclusion on an issue of law and what test of review would be applied in such an instance. But what is clear is that such a development is one the courts will encounter in the fullness of time, and the need for an even more sophisticated and nuanced curial deference will come to the fore. The rule of law will require that.

VI. Conclusion

> [C]onfrontation [between the Judiciary and the Executive] may be inevitable and then, the Judiciary must stand firm as the last line of defence. Judicial review is the sharp edge that keeps government action within the form and substance of the law …[121]

68 In *Taking Rights Seriously*, Ronald Dworkin drew the well-known dichotomy between principle and policy.[122] Principle interrogates moral rights against the State; policy engages choice-sensitive, utilitarian considerations for and of the public good. The former is for the courts, and the latter is for the Legislature to determine. Bright-line distinctions between what is policy and what is principle are sometimes not easily drawn. This is why curial deference is very much the "operating system" of judicial review.[123]

69 Justiciability, intensity of review and the standard of review are the engines of deference. Curial deference is bad when it is either excessive or inadequate. But it is altogether a different thing when deference is accorded in due measure. After all, curial deference recognises the court's finite and fallible nature.

70 What is often not appreciated is that the deference regime is not confined to the Judiciary alone. Deference by the Executive and Legislature, not just deference by the Judiciary, is also critical in any constitutional system of government. For deference to promote good governance requires the acknowledgement that each branch of the Government has different and unique institutional competencies, democratic authority, and legitimacy.

71 In a sense, there is a hierarchy which brings with it clear power differentials. But this hierarchy operates within a context – hierarchy is domain specific. In questions of law, the hierarchy is one where the

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121 Sundaresh Menon, "The Rule of Law: The Path to Exceptionalism" (2016) 28 SAcLJ 413 at para 30.

122 Ronald Dworkin, *Taking Rights Seriously* (Harvard University Press, 1992).

123 In computing, the operating system, or "OS", is the program that controls and manages the hardware and other software such as apps on a computer, laptop, smartphone, smartwatch, *etc*.

Judiciary is at the top. In matters of government and politics, the Executive and the Legislature will be pegged above the Judiciary in such areas of human endeavour. This hierarchy can enhance democracy itself. But hierarchies are not cast in stone; they evolve in response to the changing human condition and circumstance. A thriving hierarchy is one that is responsive to and allows for changes over time in order to avoid situations of inadequate or unjust accumulations of power. On the other hand, there is a need to avoid "hierarchical drift" in which a branch of government, especially the political branches, wields disproportionate legal power enabling them to extend their power beyond a specific legitimate domain to other illegitimate domains.[124]

72 The late US Supreme Court Antonin Scalia J had described curial deference as "the mealy-mouthed word" that does "not necessarily meaning anything more than considering those views with attentiveness and profound respect, before we reject them".[125] In contrast, Singapore courts have been accused of being overly deferential to the political branches of government.[126]

73 However, with *Tan Seet Eng*, the apex court signals a subtle shift towards a more assertive approach to judicial review that is better aligned with the foundation of constitutional supremacy in our system of government. The political branches have also responded admirably (rather than defensively), recognising the value of judicial review in the furtherance of rule of law and their deference to curial wisdom on the legality of governmental actions.

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124 This brief reflection on hierarchies in the exercise of governmental power was sparked by the views in Stephen C Angle *et al*, "In Defence of Hierarchy" *Aeon* (22 March 2017) <https://aeon.co/essays/hierarchies-have-a-place-even-in-societies-built-on-equality> (accessed 23 March 2017).

125 Antonin Scalia, "Judicial Deference to Administrative Interpretations of Law" (1989) 3 Duke LJ 511 at 514. In one study, the deference regime of the US Supreme Court was found to be theoretically complex and unpredictable in practice: see William N Eskridge Jr & Lauren E Baer, "The Continuum of Deference: Supreme Court Treatment of Agency Statutory Interpretations from *Chevron* to *Hamdan*" (2008) 96 Geo LJ 1083. *Cf* the view that judges have not lost their "cloak of neutrality" even where they refuse to defer to an administrator's expertise: Andrew Osorio & Rosemary O'Leary, "The Impact of Courts on Public Management: New Insights from the Legal Literature" (2017) 49 *Administration & Society* 658.

126 *Cf* Thio Li-ann & David Chong Gek Sian SC, "The Chan Court and Constitutional Adjudication – 'A Sea Change into Something Rich and Strange?'" in *The Law in His Hands: A Tribute to Chief Justice Chan Sek Keong* (Chao Hick Tin, Andrew Phang Boon Leong, V K Rajah & Yeo Tiong Min eds) (Academy Publishing, 2012). On the waxing and waning developments in Singapore public law, see *Evolution of a Revolution: Forty Years of the Singapore Constitution* (Li-ann Thio & Kevin Y L Tan eds) (Routledge, 2009) and *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2017).

74 Following the Court of Appeal's ruling in *Tan Seet Eng*, the Ministry of Home Affairs reviewed the detention orders of three other detainees and revoked them.[127] Menon CJ noted this development extrajudicially:[128]

> The commitment of the Executive to comply with and abide by the law as pronounced by the judiciary is critical to the rule of law and good governance. The release of the three other detainees apparently did not rest on any application they had made but on the Minister's review of the position in the light of our decision. In the final analysis, the robustness of a nation's rule of law framework depends greatly on how the other branches view the judiciary and whether it in turn is able and willing to act honestly, competently and independently.

75 Judicial review in Singapore is well on its way to developing its own autochthonous jurisprudence, one that has the elements of convergence with other common law jurisdictions but also divergence to ensure that the law serves the needs of a rapidly changing Singapore, and not bound by the strictures of doctrinal dogmatism. Within the growing corpus of jurisprudence on judicial review, the bottom line for any doctrine of deference – whether general or inchoate – is the *sine qua non* of upholding curial judgment and reasoning grounded in principle and policy. This buttresses the role of the courts in protecting the individual from unfettered public power.

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127 Ministry of Home Affairs, "MHA Statement on Three Members of Match-fixing Syndicate Released from Detention and Placed on Police Supervision Orders" (18 January 2016) <https://www.mha.gov.sg/Newsroom/press-releases/Pages/MHA-Statement-on-Three-Members-of-Matchfixing-Syndicate-Released-from-Detention-and-Placed-on-Police-Supervision-Orders.aspx> (accessed 14 September 2017).

128 Sundaresh Menon, "The Rule of Law: The Path to Exceptionalism" (2016) 28 SAcLJ 413 at para 35.