

AUTONOMY, DEFERENCE AND CONTROL: JUDICIAL DOCTRINE AND FACETS OF SEPARATION OF POWERS IN SINGAPORE

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Abstract: This article examines judicial engagement with the idea of separation of powers in Singapore. It identifies and analyses three judicial doctrines that are explicitly justified by the courts as being underpinned by the separation of powers. These are the doctrine of the exclusivity of judicial power, the doctrine of the presumption of constitutionality and the doctrine of judicial review. In analysing these doctrines and how the courts have employed the separation of powers to justify them, this article points to differing conceptions of separation, namely separation as autonomy of the different branches of government, separation as deference to the political branches and separation as judicial control of the other branches of government.

Keywords: *judicial power; judicial review; deference; autonomy; separation of powers; constitutionalism; parliamentary supremacy; constitutional supremacy*

I. Introduction

While the separation of powers has been judicially declared in Singapore to be “fundamental and essential” to its political system¹ and part of its basic structure,² there has yet to be a close examination of what judges mean when they refer to the separation of powers. In particular, what a commitment to separation of powers requires in terms of constitutional doctrine is not always clear. This article seeks to address this gap by examining how the separation of powers has been explicitly discussed and propounded upon in constitutional law cases in Singapore. To be sure, there are many views of what a theory of separation of powers requires and many dimensions to the requirements of separation. An article seeking to examine and critique the mechanics of separation of powers may furthermore take on different institutional perspectives and subject matters. Being aware of the multiplicity of

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1 *Yong Vui Kong v Public Prosecutor* [2015] 2 SLR 1129, [71] (CA).

2 *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947, [11] (HC); *Yong Vui Kong v Public Prosecutor*, *Ibid.*; *Ravi s/o Madasamy v Attorney-General* [2017] 5 SLR 489, [66] (HC).

views and approaches, and due to the limitations of space, this article focuses on only one aspect, albeit an important one, which is judicial engagement with the idea of separation of powers in Singapore.

Specifically, I identify and analyse three distinctive judicial doctrines that have been explicitly stated to be underpinned by the separation of powers. These are the doctrine of the exclusivity of judicial power, the doctrine of the presumption of constitutionality and the doctrine of judicial review. In analysing these doctrines and how the courts have employed the separation of powers to justify them, this article points to differing conceptions of separation, namely separation as *autonomy* of the different branches of government, separation as *deference* to the political branches and separation as judicial *control* of the other branches of government. On the first, the doctrine of the exclusivity of judicial power posits that judicial power is exclusive and cannot be transferred to or intruded upon by other branches of government. Any legislative or executive incursion into judicial power would be unconstitutional. This doctrine invokes the idea of separation of powers as demanding the preservation of *autonomy* among the three branches of government, especially that of the judiciary from the political branches. A second doctrine that has been underpinned by the separation of powers is the presumption of constitutionality. This suggests that there are good institutional reasons for deferring to the other branches of government and, as the courts in Singapore have held, to officials exercising discretion. The separation of powers is invoked to justify such deference on the basis that power-holders under scrutiny are performing functions that have been lawfully entrusted to them. The third doctrine is that of judicial review whereby separation of powers is understood as performing a broader objective of limiting and controlling power. The judiciary, as the interpreter of law and the enforcer of the constitution, plays an important role in reviewing the legality of actions undertaken by the political branches. Thus, judicial review is seen as a legitimate outworking of the separation of powers.

In Section II, I elaborate upon the three conceptions of separation of powers. In Section III, I will briefly provide the context against which to understand judicial treatment of the separation of powers in Singapore. Section IV contains an analysis of various cases in Singapore, which points to the three different understandings of the separation of powers. Section V contextualises the approaches within Singapore's constitutional context shaped by intersecting constitutional traditions and a culture of trust. Section VI concludes. At this point, I should clarify that I do not attempt to periodise the approaches, although others have identified broadly different phases representing shifts in judicial philosophy in Singapore.³ At the very least, the judiciary under the leadership of the third and fourth (current) Chief Justices appears to have been more open to judicial review cases and have engaged

3 For example, 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* (Oxford: Routledge, 2017).

more closely with the question of what separation of powers requires.⁴ Nonetheless, there is no clear trajectory one way or another on how separation of powers is to be understood in Singapore and it is not the aim of this article to map out any such trajectory. This article aims instead to differentiate various understandings of the separation of powers and how these illuminate judicial doctrine in Singapore.

II. Three Facets of Separation

The separation of powers is an integral part of constitutional theory though its meaning and requirements are sometimes assumed rather than explained. It is today commonly understood as referring to the sharing or division of sovereign power among three constitutional organs — the legislature, the executive and the judiciary.⁵ This tripartite conception is attributed to Montesquieu who identified these three sorts of power, which he says exists in every government, in his book *The Spirit of the Laws*.⁶ In Montesquieu's archetypical model, the separation of legislative, executive and judicial powers is necessary because "there can be no liberty" when the legislative and executive powers are united or if the judicial power is not separated from either.⁷ This manner of separating powers differs from the Lockean proposal; specifically, Locke was concerned with preventing the concentration of *law-making powers* in a single institution.⁸

Indeed, the separation of powers is a flexible idea that can house many different claims about the appropriate relationships among the different branches of government. There is not so much one way of separating powers as different forms of separating different powers. There can also be different conceptions of the separation of powers, which in turn affect constitutional doctrine in different ways. Here, I identify three different conceptions of the separation of powers — autonomy, deference and control — which I will explain with some detail before engaging in a close examination of case jurisprudence in Singapore.

A. Autonomy and the separation of powers

Separation of powers as autonomy focuses on the division of functions whereby each branch has a "corresponding identifiable function" and is confined to the

4 Not only has there been an increase in civil litigation involving administrative and constitutional law issues in the past 10 years but there has also been a shift in attitude whereby judicial review is seen as an ordinary part of judicial process and public engagement, rather than as an exceptional activity to be frowned upon. See Jaclyn L Neo, "Introduction: Judging the Singapore Constitution" in Jaclyn L Neo (ed), *Constitutional Interpretation in Singapore: Theory and Practice* (Oxford: Routledge, 2017) pp.3–5.

5 *Mohammad Faizal bin Sabtu v Public Prosecutor* (n.2).

6 Baron de Montesquieu, *The Spirit of the Laws* (Thomas Nugent (tr)) (Michigan: Haffner Press, 1949) p.151.

7 *Ibid.*

8 John Locke, *Two Treatises of Government* (London: Black Swan, 1690) pp.174, 201.

exercise of its own functions.⁹ No branch is allowed to encroach on the functions of other branches. Furthermore, personnel in the three branches are to be kept separate and distinct, with no individual allowed membership in more than one branch at any point in time.¹⁰ The controlling idea is that there is a prohibition of intermixture of functions whether in terms of institutions, functions or personnel. There is mutually respected autonomy.

The emphasis on the *autonomy* of different branches of government from one another serves to ensure that no single institution can exercise absolute powers within the government. However, the problem is that this conception tends to presume an essentialist conception of the different powers whereby one is able to determine with relative ease what activities would fall within which type of powers. This is not always the case. The boundaries among the three functions and powers are less clear than is often assumed. In today's highly complex state, it is difficult to identify any "one-to-one correlation between function and branch".¹¹ This is particularly since, in practice, certain complex activities could encompass multiple types of functions. Furthermore, certain activities could be validly characterised as falling within more than one governmental function. There is nothing natural about the boundaries between the different branches of government. Beyond the core activities of law-making, law-enforcing and adjudication that are already currently associated with the work of existing institutions, there are areas of overlap that can be said to fall within the functions of different branches of government. For instance, the question of whether a law violates the constitutional guarantee of freedom of speech may fall within both the legislative and judicial functions. It is legislative insofar as the legislature needs to determine for itself if the law is necessary for whatever public interest it has in mind. Furthermore, in a rights-conscious constitutional landscape, the legislature should also make its own assessment as to whether the law falls within the legitimate exceptions under the constitution. However, it is also a judicial matter and subject to the review of the courts insofar as they have been tasked with the duty of interpreting and upholding a supreme constitution. The judiciary needs to determine from a legal perspective whether the law falls within the permissible limits prescribed under the Constitution. The courts may apply a range of interpretive doctrines and theories, but the determination of constitutionality falls ultimately within their judicial function.

⁹ *Ibid.*

¹⁰ MJC Vile, *Constitutionalism and the Separation of Powers* (Indianapolis: Liberty Fund, 1998 reprint) p.14.

¹¹ See further, Aileen Kavanagh, "The Constitutional Separation of Powers" in David Dyzenhaus and Malcolm Thorburn (eds), *Philosophical Foundations of Constitutional Law* (Oxford: Oxford University Press, 2015) pp.221, 225. Kavanagh calls this "separation as confinement" view.

B. *Deference and the separation of powers*

In comparison, separation as deference posits that the judiciary should defer to the political branches in realisation of the separation of powers. *Deference* refers to the idea that acts of the decision-maker should command respect because of the differentiation of functions and institutions. The *deference* conception of the separation of powers is premised upon three interrelated claims concerning the legitimacy (or non-legitimacy) of judicial review: the first is the *functional* claim that there are certain functions or competences that fall within the scope of other branches of government and are not within judicial power; the second is an *expertise* claim, which is that the other branches of government are institutionally more competent in making certain decisions; and the third is a *democracy* claim, which is that the other branches of government are more authoritative because they have a democratic mandate to the people. These claims are often used interchangeably to justify judicial deference to the political branches.

Various arguments could be made to problematise these claims. For instance, it is not always easy to determine where the boundaries of functions and expertise should lie. While it is often presented as a way of respecting the boundaries between judicial power and the other powers, whether legislative or executive, the question of whether these boundaries have been transgressed depends largely on how the issue is framed. An issue can be framed as one of social policy and therefore outside judicial function and expertise, and also as one of constitutional interpretation and consequently within judicial function and expertise. As has been observed there is not always a bright line between judicial and political decision-making, or for that matter a bright line between law and policy.¹²

Furthermore, it is important to note that there is no fixed understanding of deference and that deference could exist on a spectrum as judges assign varying weight to the judgments of the other branches. One differentiate between strong and weak deference or, as Kavanagh puts it, minimal and substantial deference.¹³ In this regard, minimal deference is defined as “judicial attribution of some presumptive weight to decisions taken by an elected body, but it is not a strong presumption”.¹⁴ In comparison, substantial deference is only warranted in cases where the judges themselves suffer from particular institutional shortcomings — that is, where they have less institutional competence or legitimacy (or both) to decide the particular issue than Parliament or the executive.¹⁵ Deference can also be differentiated in terms of posture, by distinguishing the two forms of deference as *submission* and deference as *respect*. Deference as submission arises when judges

12 Jonathan Sumption, “Judicial and Political Decision Making: The Uncertain Boundary” (2011) 16(4) *Judicial Review* 301.

13 Kavanagh, “The Constitutional Separation of Powers” (n.11) p.228.

14 *Ibid.*, p.227.

15 *Ibid.*, p.228.

suspend their own judgment in favour of the judgment of another constitutional actor — typically another branch of government.¹⁶ In comparison, deference is seen as a form of “respect” when “courts give weight to the opinion of the legislature but do not automatically accept that the decision of the legislature is correct”.¹⁷ On this view, courts reach their own conclusion as to the constitutionality of a legislation while giving due weight to legislative choices.¹⁸

Nonetheless, judicial deference occurs when the judiciary has functional capacity or role in reviewing governmental action, but determines that it *should not*. It has been suggested that according deference to the political branches is a “constitutional imperative” arising from the separation of powers,¹⁹ though critics disagree. At the least, Allan argues against a distinctive doctrine of judicial deference.²⁰ As he explains, such a doctrine:

“... is empty if it purports to implement a separation powers between the courts and other branches of government; separation is independently secured by the proper application legal principles defining the scope of individual rights or the of public powers. A doctrine of deference is pernicious if, forsaking the separation of powers, correctly conceived, it permits abdication of judicial responsibility in favour of reliance good faith or good sense or special expertise of public officials, whose judgments about the implications of rights in specific may well be wrong.”²¹

To be clear, Allan is not suggesting that there is no such thing as division of competence and that judges need to ensure that they act within their scope of competence. He acknowledges that there is division of competence between the legal and political branches and that the courts “must cede to Parliament and government an appropriate sphere of decision-making autonomy, protected from judicial interference.”²² Allan’s key critique is that talk of deference short-circuits

16 See generally Paul Horwitz, “Three Faces of Deference” (2008) 83(3) Notre Dame L Rev 1061. To be sure, Horwitz does not differentiate between strong and weak senses of deference.

17 Alison L Young, “Deference, Dialogue, and the Search for Legitimacy” (2010) 30(4) OJLS 815, 817–818. This distinction between deference as submission and deference as respect is drawn from Dyzenhaus’ work, see David Dyzenhaus, “The Politics of Deference: Judicial Review and Democracy” in M Taggard (ed), *The Province of Administrative Law* (Oxford: Hart Publishing, 1997) pp.186, 279.

18 In the United Kingdom, this idea of deference as respect underlies the doctrine of due deference. See Alison L Young, “In Defence of Due Deference” (2009) 72 MLR 554, 559.

19 Tom Zwart, “Deference Owed under the Separation of Powers” in John Morison, Kieran McEvoy and Gordon Anthony (eds), *Judges, Transition, and Human Rights* (Oxford: Oxford University Press, 2007) pp.73, 89.

20 TRS Allan, “Human Rights and Judicial Review: A Critique of ‘Due Deference’” (2006) 65(3) Cambridge Law Journal 671, 675.

21 *Ibid.*

22 *Ibid.*, p.676.

judicial analysis on the constitutionality or legality of a particular action by the political branches.²³ When separation of powers and its subsidiary claims of institutional function or competence, superior expertise of the other branches of government, or their democratic legitimacy are invoked, it is sometimes more of an *assertion* of, rather than *justification* for, judicial non-intervention.²⁴

C. *Judicial control and the separation of powers*

In contrast, the *control* conception of the separation of powers goes beyond separation to emphasise inter-branch checks. It hews closer to accounts of the separation of powers that treat it as a way to limit governmental power and as essential to constitutionalism.²⁵ Scholars have challenged the idea that the mere division of power is sufficient to ensure liberty from arbitrary exercise of power, arguing instead that it is the presence of checks and balances that prevents actors from overreach.²⁶ In this regard, checks and balances are seen as part of the separation of powers, rather than distinct from it.²⁷ This is because for the apportionment of powers to be effective in preventing tyranny and limiting power, the constitution should also ensure that actors and branches of government are not able to conclusively and unilaterally determine the reach of their own powers. At the very least, therefore, the *control* conception of separation of powers requires that the judiciary be in a position to determine the boundaries of power and, within a supreme constitution, exercise judicial power to ensure that government action conforms with constitutional requirements.

Thus, the focus on control emphasises the separation of powers as enabling a scheme of checks and balances under which each person or body of persons wielding distinctive powers plays a crucial role in checking against others and maintaining a balance of power. As James Madison puts it in *Federalist No 51*, there have to be “necessary constitutional means, and personal motives, to resist encroachments of the others” where “[a]mbition must be made to counteract ambition”.²⁸ On this conception, the separation of powers has been seen as essentially connected with constitutionalism and limited government. Friedrich also makes this connection where he argues that “dividing power provides a system of effective restraints

²³ *Ibid.*

²⁴ *Ibid.*

²⁵ Carl J Friedrich, *Limited Government: A Comparison* (Englewood, New Jersey: Prentice Hall, 1974) p.13.

²⁶ Laurence Claus, “Montesquieu’s Mistakes and the True Meaning of Separation”, (2005) 25(3) *Oxford Journal of Legal Studies* 419.

²⁷ In other words, as Kavanagh puts it, “we need to combine separation with supervision”: See Kavanagh, “The Constitutional Separation of Powers” (n.11) p.233.

²⁸ James Madison and Alexander Hamilton, “The Structure of the Government Must Furnish the Proper Checks and Balances between the Different Departments” *The New York Packet* (8 February 1788) (*Federalist No 51*).

upon governmental action”.²⁹ According to this line of reasoning, the separation of powers is more than just *autonomy* of differentiated powers; it entails mutual *control* among those powers.

III. Separation of Powers in Singapore

The application of the separation of powers doctrine to constitutions that follow the British “Westminster” parliamentary model has always been thought to be somewhat limited because of the concentration of law-making power in a single parliamentary institution, as well as in the fusion of the executive with the legislative body. In this regard, the British model tends to be contrasted with the American one, where there is not only a clear separation of powers between three different branches of government but also a division of law-making authority among democratically elected branches in the latter.³⁰ However, despite the apparently weak foundations of the separation of powers in Westminster-style constitutions, a doctrine of separation of powers has emerged within these constitutional systems. Judges in these post-British colonial jurisdictions have invoked separation of powers as a foundational feature of Westminster constitutions and in the process developed it as an interpretive doctrine.³¹

That the Singapore Constitution is built on a scheme of separation of powers is clear from the text and structure of the Constitution itself. The Singapore Constitution vests legislative power in the President and the Parliament under art.38.³² Meanwhile, executive power is vested in the President, whose power is exercisable subject to the advice of Cabinet or in his own discretion under limited circumstances prescribed under art.23 of the Constitution.³³ Further, art.93 of the Constitution vests judicial power in a Supreme Court as well as such subordinate courts as may be provided by any written law.

Following the Westminster design, there is partial fusion of the executive and the legislature in Singapore. Cabinet members are also Members of Parliament and are invariably chosen from the political party with a Parliamentary majority. One significant modification to the Westminster scheme has been to the presidency. The Singapore President is now an elected official with more discretionary powers over matters involving fiscal prudence, key civil service appointments and some

29 See Friedrich, *Limited Government: A Comparison* (n.25) p.13.

30 For a close examination of the differences between the two, see Bruce Ackerman, “The New Separation of Powers” (2000) 113(3) HLR 633. Ackerman identifies a model he calls “constrained parliamentarianism” that marries the Westminster model of the Prime Minister and his Cabinet needing to retain the confidence of the majority of the legislature but where Parliament’s legislative powers are limited by a written constitution, a bill of rights and a supreme court.

31 See generally Kevin Tan, “Into the Matrix: Interpreting the Westminster Model Constitution” in Jaclyn L Neo (ed), *Constitutional Interpretation in Singapore: Theory and Practice* (Oxford: Routledge, 2017) p.50.

32 In the Constitution of the Republic of Singapore (1999 Reprint) (Singapore Constitution).

33 *Ibid.*

rights-related decisions. This bifurcates the executive by endowing the President with an independent source of legitimacy and power, and creates an additional check on Parliament and the executive. A full examination of the impact of the presidency is not the focus of this article but suffice to say that the efficacy of this institutional check has been limited in practice.³⁴

Thus far, it can be said that there has not been a full realisation of the scheme of separation of powers in Singapore, and this is not solely because of the limitations of the Westminster design. Even within the Westminster scheme of government, the separation of powers has been effective in limiting power because there is strong political accountability arising from competitive politics. Political checks and balances, as well as legal ones, depend on there being relative independence and counteracting interests within the government. For instance, the doctrine of collective responsibility relies on a robust Parliament which will take Cabinet to account. However, political constitutionalism has been significantly limited in scope and effect in the context of Singapore's dominant party, semi-competitive system where there has not been a political changeover in government since independence in 1965. The Peoples' Action Party (PAP) overwhelmingly controls Parliament, with its members consistently occupying more than 90 per cent of the elected seats. To illustrate, the ruling PAP won 83 out of 89 parliamentary seats in the last general elections in 2015.³⁵

Thus, legislative and executive separation as a way to counteract concentration of power is less effective than would be the case in a competitive electoral democracy with turnover among two or more political parties. With respect to the doctrine of collective responsibility, for instance, while the Singapore Parliament does call for ministerial responses to issues, the lack of an effective opposition and strong party discipline often means that the degree of legislative control is less robust than it could be. Moreover, the convention of imposing party discipline through the party whip further limits the efficacy of the backbenchers in keeping Cabinet in check. Accordingly, the judicial development of the doctrine of separation of powers in Singapore has to be understood within this context of a dominant party state.³⁶

34 See chapter on "Amendments to the Elected Presidency Scheme 1991–2008" in Thio Li-ann (ed), *Singapore Chronicles: Presidency* (Singapore: IPS and Straits Times Press, 2015) pp.32–44; see also Jaclyn Neo, 'The New Constitutional Amendment Bill: Changes to the Role and Functions of the Council of Presidential Advisors' *Singapore Public Law Blog* (7 November 2016), available at <https://singaporepubliclaw.com/2016/11/07/the-new-constitutional-amendment-bill-changes-to-the-role-and-functions-of-the-council-of-presidential-advisors/> (visited 28 August 2018).

35 Sumiko Tan, "GE2015: PAP Vote Share Increases to 69.9%, Party Wins 83 out of 89 Seats Including WP-Held Punggol East" *The Straits Times* (12 September 2015), available at <https://www.straitstimes.com/politics/ge2015-pap-vote-share-increases-to-699-party-wins-83-of-89-seats-including-wp-held-punggol> (visited 11 August 2018).

36 Scholars have argued that judiciaries in dominant party states tend to have less policy space to manoeuvre and will have to carefully couch their judicial decisions to prevent political backlash. See, eg, Tom Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (Cambridge: Cambridge University Press, 2003); Po Jen Yap, *Constitutional Dialogue in Common Law Asia* (Oxford: Oxford University Press, 2015).

IV. Judicial Doctrines and the Separation of Powers in Singapore

In this section, I examine a range of cases and judicial doctrines developed by the Singapore court and suggest that they reflect the different understandings of the separation of powers discussed above.

A. *Exclusivity of judicial power and the autonomy of the branches of government*

The exclusivity of judicial power as a constitutional doctrine was developed by the Privy Council. In *Hinds v R*,³⁷ for instance, the Privy Council partially upheld a constitutional challenge to legislation that sought to create new courts to try gun-related cases. The Committee agreed with the applicants that the law interfered with judicial power. It held that judicial power is distinctive and exclusive, and must be protected from legislative and executive intrusion. It held further that judicial power can only “be vested in persons appointed to hold judicial office in the manner and on the terms laid down in the Chapter dealing with the judicature, even though this is not expressly stated in the Constitution”.³⁸ Lord Diplock, in this case, articulated the idea of a Westminster model of the Constitution³⁹ whereby it is to be “taken for granted that the basic principle of separation of powers will apply to the exercise of their respective functions by these three organs of government” — that is, the legislature, the executive and the judicature.⁴⁰ The Privy Council accordingly invalidated parts of a statute which sought to endow jurisdiction that would ordinarily be exercised by the higher judiciary in newly established statutory courts that would be presided over by those without the same level of constitutional protections to ensure their independence. In attempting to grant these powers to a separate and lower Tribunal, the Gun Court Act was deemed to have interfered with judicial power.⁴¹ Thus, as *Hinds* demonstrates, a claim for autonomy of different branches of government can have doctrinal implications and could be important to insure against encroachment of the judicial function by the other branches of government. It is also significant that the Privy Council in *Hinds* reasoned that protecting judicial power is intertwined with the protection of individual liberties within the constitutional system.

This doctrine of exclusivity of judicial power was adopted by the Singapore High Court in *Mohammad Faizal bin Sabtu v Public Prosecutor*.⁴² At issue was whether a sentencing regime set out by the legislature, which

37 [1977] AC 195 (PC).

38 *Ibid.*, 213. See also *Liyanage v R* [1967] 1 AC 259, 287–288c.

39 *Hinds v R* (n.37), 212.

40 *Ibid.*

41 *Ibid.*, 516 (Lord Diplock).

42 *Mohammad Faizal bin Sabtu v Public Prosecutor* (n.2).

requires the Court to impose a mandatory minimum sentence is an “impermissible legislative intrusion into the judicial power” and therefore violates the principle of the separation of powers. The Court’s careful examination of the nature of judicial power and the separation of powers is worthy of close attention for two reasons. First, there was recognition that the constitution is more than just the text and that there may be principles underlying the constitution that also form part of the constitution. This is important since the separation of powers is not expressly referred to in the constitution but is clearly a principle that is “embodied” in the Singapore constitution. This departs from earlier jurisprudence which took a strictly textualist approach which assumed that what is not expressly written into the text of the constitution cannot form part of the constitution.⁴³ Second, the Court in *Mohammad Faizal bin Sabtu* delved into the meaning of judicial power and asserted its “exclusiveness”.⁴⁴ According to the Court, the constitution vests judicial power “exclusively” in the Supreme Court and the subordinate courts. Further, the Court explains that the Supreme Court’s judicial power is a *constitutional* power that is “co-equal” to legislative and executive powers. This supports the Court’s adoption of the doctrine that impermissible legislative or executive intrusions into judicial power would be unconstitutional. The Court argued that there has to be “total separation” between judicial power, on the one hand, and the legislative and executive powers, on the other. Thus, while the autonomy of the different branches of government from others is important in separation of powers, the autonomy of the judicial branch from the other two branches is given especial importance within this doctrine.

Mohammad Faizal bin Sabtu v Public Prosecutor however highlights a particular difficulty with this doctrine, which is the need to define the scope of judicial power, or for that matter any power, in order to determine if there has been unlawful intrusion. The Court acknowledged the definitional difficulties regarding the term “judicial power”, not least because any definition or classification would not be exhaustive or precise.⁴⁵ It proposed an explanation of judicial function which it states could have broad judicial consensus. The Court explained:

“In essence, the judicial function is premised on the existence of a controversy either between a State and one or more of its subjects, or between two or more subjects of a State. The judicial function entails the courts making a finding on the facts as they stand, applying the relevant law to those facts and determining the rights and obligations of the parties concerned for the purposes of governing their relationship for the future.”⁴⁶

43 For example, *Rajeevan Edakalavan v Public Prosecutor* [1998] 1 SLR (R) 10.

44 *Ibid.*, [16]–[17].

45 *Ibid.*, [27]–[28].

46 *Ibid.*, [27].

After an extensive examination of the nature of judicial power and a historical exegesis into the nature of legislative power to prescribe sentences, the Court concluded that the sentencing regime was not unconstitutional as the power to prescribe punishments for offences is part of the legislative power and not judicial power.⁴⁷ The judicial function, the Court held, is to inflict legislatively prescribed punishments on offenders in accordance with the discretionary power provided under the law.⁴⁸ Written laws of general application prescribing punishment for an offence did not trespass into judicial power.⁴⁹ Thus, the Court concluded that it is neither a violation of the separation of powers nor an intrusion into judicial power for Parliament to impose a mandatory minimum sentence for certain offences.⁵⁰

The Court's conclusion that "the principle of separation of powers has no application to the sentencing function because in constitutional theory, it is a function delegated by the legislative branch to the judicial branch"⁵¹ may suggest that the legislature can prescribe any sentencing framework without infringing upon judicial power. This is however not the case. Even though it decided against the petitioner, the Court did identify three scenarios in which there could be unconstitutional intrusions into judicial power. The first are cases involving legislation enabling the executive to "actually select the sentence to be imposed in a particular case *after* the accused person was convicted by a court of law". The second are cases involving legislation enabling the executive to make administrative decisions directly related to the charges brought and which impacts the actual sentence eventually imposed by a court of law. The case that the Court gave as an example involved a law which allowed the prosecutor to choose which court to prosecute the accused in for the same offence, which in turn would result in very different punishments.⁵² The third are cases involving legislation enabling the executive to make administrative decisions not directly related to any charges brought at the time of those decision but which had an impact on the actual sentence eventually imposed by a court of law.⁵³ The example provided involved a law compelling the court to impose control orders on individuals upon a finding that they were members of organisations declared by the Executive to be a risk to public safety and order. The Court held that this amounted to disguising an executive decision as a judicial decision since the control orders are mandated notwithstanding that the members of those organisations were not convicted of any offence by any court of law.⁵⁴

47 *Ibid.*, [45].

48 *Ibid.*

49 *Ibid.*

50 In *Amazi bin Hawasi v Public Prosecutor* [2012] 4 SLR 981, the High Court similarly held that it is not unconstitutional for Parliament to legislatively prescribe conditions which, upon being satisfied, will trigger the application of minimum enhanced punishments.

51 *Mohammad Faizal bin Sabtu v Public Prosecutor* (n.2), [64].

52 *Mohammed Muktar Ali v R* [1992] 2 AC 93.

53 *Mohammad Faizal bin Sabtu v Public Prosecutor* (n.2), [51].

54 *State of South Australia v Totani* (2010) 242 CLR 1.

In addition, in a subsequent case, *Prabakaran a/l Srivijayan v Public Prosecutor*,⁵⁵ the Court of Appeal further moderated any suggestion in *Mohammad Faizal bin Sabtu v Public Prosecutor* that sentencing is always within the exclusive province of the legislature. Instead, it adopted the position that the sentencing function is not “the exclusive constitutional province of any one Branch”⁵⁶ and could therefore fall within the functions of any branch. In this case, the Court of Appeal upheld a legislative framework which allowed the courts to exercise discretion to impose a life sentence, instead of a death penalty, for convicted drug traffickers, if certain conditions were met. One such condition is the presence of a certificate of substantive assistance issued by the Public Prosecutor on account of the accused having substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities within or outside Singapore. The certificate is therefore a “condition-precedent” to the judicial exercise of sentencing powers.⁵⁷ It was argued that the certificate requirement intruded into judicial power as it enables the executive to directly or indirectly select the sentence to be imposed.⁵⁸ The defendant’s submission was that “it is a legislative prescription for the exercise of judicial power to be conditional upon the exercise of executive power.”⁵⁹ The Court dismissed the challenge, holding that the Court retains the ultimate discretion on sentencing and therefore the independence and impartiality of the courts are not affected.⁶⁰ The Court further justified the legislative scheme on the basis that the Public Prosecutor is best placed to make an assessment of substantive assistance as he works closely with law enforcement agencies and there may be confidential information to be taken into account.⁶¹ In comparison, it would not be appropriate or even possible for the judiciary to determine these matters according to the court.⁶² There was also no breach of the separation of powers as the Public Prosecutor’s discretion is not tailored to the punishment it thinks should be imposed. Rather, it is circumscribed to the limited question of whether the prescribed criterion — that the offender has substantively assisted — has been satisfied.⁶³

These cases affirm, albeit narrowly, a doctrine of the separation of powers which preserves the integrity of the judicial function from legislative and executive intrusion.⁶⁴ Interestingly, the High Court appears to limit the scope of this doctrine in the 2018 case of *Nagaenthiran a/l K Dharmalingam v Attorney-General* although a closer examination suggests a more nuanced position.⁶⁵ The High Court upheld

55 [2017] 1 SLR 173 (CA).

56 *Ibid.*, [79].

57 *Ibid.*, [73].

58 *Ibid.*, [63].

59 *Ibid.*, [2].

60 *Ibid.*, [77].

61 *Ibid.*, [52]–[53].

62 *Ibid.*, [67].

63 *Ibid.*, [76].

64 The Court labelled this the “integrity principle”. *Mohammad Faizal bin Sabtu v Public Prosecutor* (n.2), [56].

65 [2018] SGHC 112.

a partial ouster clause, which limited judicial review of the Public Prosecutor's determination of whether to issue a certificate of substantive assistance, which as mentioned above, could lead to a life imprisonment sentence rather than a death penalty for drug trafficking. Under the statutory provision, the Public Prosecutor's decision could only be challenged on grounds of bad faith and malice.⁶⁶ However, following the earlier Court of Appeal decision in *Prabakaran a/l Srivijayan v Public Prosecutor*, the High Court also affirmed that the Public Prosecutor's decision could be challenged on constitutional grounds. In other words, the statutory provision does not oust judicial review on constitutional grounds.

The High Court's judgment in *Nagaenthran a/l K Dharmalingam v Attorney-General* could therefore be analysed as upholding the separation of powers as the autonomy of judicial power, insofar as it preserves a wide scope of judicial review. This is especially since the Court further held that if an administrative decision was tainted by a jurisdictional error of law, it would be considered a nullity and the ouster clause would be ineffective in ousting the jurisdiction of the courts. This significantly expands the scope of review to possibly include further substantive grounds of review under administrative law principles. That said, it is curious that the Court's decision in *Nagaenthran* nonetheless adopted a deferential tone towards the legislature. These were the exact words of the High Court:

“[I]n evaluating the constitutionality of an ouster clause, the judiciary, in recognition of its *limited* role in judicial review by dint of the constitutional doctrine of the separation of powers, ought to *defer* to the intention of the legislature in the vesting of certain powers in the executive and respect the relative institutional competence of the executive in respect of decisions that concern issues that judges are ill-equipped to adjudicate”.⁶⁷

The Court determined that excluding from the province of judicial power certain non-justiciable matters was “in fact *an exemplar* of the separation of powers principle in action”.⁶⁸ Insofar as these passages in the judgment show a clear deference to legislative capacity to determine the boundaries of judicial power, this would be contrary to the *autonomy* claim of the separation of powers. However, as mentioned above, the overall position adopted by the Court essentially denudes the ouster clause of any real effect. The actual approach effectively upholds the idea of separation of powers as autonomy, notwithstanding the deferential tone that the Court struck at other points in this case.

⁶⁶ The provision reads: “The determination of whether or not any person has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities shall be at the sole discretion of the Public Prosecutor and no action or proceeding shall lie against the Public Prosecutor in relation to any such determination unless it is proved to the court that the determination was done in bad faith or with malice.”

⁶⁷ *Nagaenthran a/l K Dharmalingam v Attorney-General* (n.65), [88] (emphasis added).

⁶⁸ *Ibid.*, [97] (emphasis added).

B. The presumption of constitutionality and judicial deference to the legislature and the executive

A judicial doctrine that could be explained as being underpinned by the understanding of separation of powers as deference in Singapore is the presumption of constitutionality or legality. The presumption of constitutionality has been said to be “intimately tied to the idea of separation of powers”.⁶⁹ Adopted from the jurisprudence of the Supreme Court of India, the presumption posits that it is for the person challenging the law or act to adduce material or factual evidence to show that there has been a violation of the constitution. The cases show that the presumption is often justified on claims of functional division, superior expertise and democratic legitimacy. For instance, in *Lee Keng Guan v Public Prosecutor*,⁷⁰ one of the first few cases to adopt the presumption, the Court of Appeal embraced the reasoning that “it must be presumed that the legislature understands and correctly appreciates the need of its own people”, thus alluding to Parliament’s superior expertise and democratic legitimacy. While the Court in *Lee Keng Guan* did not formulate its discussion of the presumption explicitly by reference to the theory of separation of powers, it seems to have been influenced by an underlying commitment to separation of powers as deference.

This is even clearer in a more recent case where the Court directly connected the presumption of constitutionality to separation of powers. In *Ramalingam Ravinthran v Attorney-General*, the Court of Appeal held that “the courts should presume that the Attorney-General’s prosecutorial decisions are constitutional or lawful until they are shown to be otherwise”.⁷¹ This, it reasoned, stems from the separation of powers doctrine, whereby the co-equal status of the executive and judicial powers meant that courts are “not to interfere with the exercise of the prosecutorial discretion unless it has been exercised unlawfully”.⁷² In this case, the applicant challenged the Attorney-General’s decision to file different charges against him and his accomplice who was involved in the same criminal enterprise. He argued that the exercise of prosecutorial discretion was contrary to the guarantee of equal protection under art.12(1) of the Constitution.

The challenge was dismissed on the basis that the guarantee of equal protection merely required the prosecution to give unbiased consideration to all potential defendants and not take into account any irrelevant considerations.⁷³ Instead, the Court held that the prosecution was entitled and obliged to take into account many factors in exercising its prosecutorial discretion, and this could result in justifiable differential treatment of different accused persons. The Court applied the presumption of constitutionality, which meant that it was the applicant who

⁶⁹ *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118, [110] (HC).

⁷⁰ [1977–1978] SLR(R) 78, [19].

⁷¹ [2012] 2 SLR 49, [44] (CA).

⁷² *Ibid.*

⁷³ *Ibid.*, [24].

bore the evidential burden to show that the decision was made unlawfully. It stated that “the courts should presume that the Attorney-General’s prosecutorial decisions are constitutional or lawful until they are shown to be otherwise”.⁷⁴ Regard was given to the Attorney-General’s status as a constitutional office. As the Court put it, “[i]n view of his high office, the courts should proceed on the basis that when the Attorney-General initiates a prosecution against an offender (regardless of whether he was acting alone or in concert with other offenders), the Attorney-General does so in accordance with the law”.⁷⁵

The idea of separation of powers as deference is further evidenced in the expansion of the presumption of constitutionality to the exercise of statutory powers in *Muhammad Ridzuan bin Mohd Ali v Attorney-General*.⁷⁶ This case also concerned a constitutional challenge of the Public Prosecutor’s decision not to grant a certificate of substantive assistance. The Court of Appeal held generally that “decisions of constitutional office holders and other officials are presumed to be made in conformity with the law”.⁷⁷ This is not only limited to the exercise of constitutional powers but also to the exercise of statutory powers. According to the Court, this presumption applies as a matter of the separation of powers. This means that a person who challenges an executive decision and alleges a breach of fundamental liberties or other grounds of review bears the burden of establishing a *prima facie* case of reasonable suspicion of that breach. This, the Court held, is because “decisions of constitutional office holders and other officials are presumed to be made in conformity with the law”.⁷⁸

As Lee has observed, the presumption of constitutionality or legality “tips the scales very much in the Government’s favour”.⁷⁹ This is because the applicant would have to obtain cogent evidence that the government has acted unconstitutionally and such information would be difficult to obtain, especially in the context of Singapore where there is no freedom of information legislation granting such access. The government is not required to produce evidence to justify its action. The presumption of constitutionality goes against the culture of justification, which posits that governments should be required to provide substantive justification for their actions and links legitimacy of power to the government’s capacity to justify its actions.⁸⁰

⁷⁴ *Ibid.*, [44].

⁷⁵ *Ibid.*

⁷⁶ [2015] 5 SLR 1222 (CA).

⁷⁷ *Ibid.*, [36].

⁷⁸ *Ibid.*, [36].

⁷⁹ For an examination of the presumption of constitutionality in Singapore, see generally Jack Tsen-Ta Lee, “Rethinking the Presumption of Constitutionality” in Jaclyn L Neo, *Constitutional Interpretation in Singapore: Theory and Practice* (Oxford: Routledge, 2017) p.141.

⁸⁰ The presumption of constitutionality is instead premised on the culture of authority, whereby the legitimacy and legality of government action is based on the fact that the actor is authorised to act. See Moshe Cohen-Eliya and Iddo Porat, “Proportionality and the Culture of Justification” (2011) 59(2) *American Journal of Comparative Law* 463, 474–476.

One may also see the manifestation of the presumption of legality or constitutionality in the Singapore courts' recent embrace of the green-light theory (as opposed to red-light approach) towards administrative and constitutional law. Under this green-light approach, borrowed from Harlow and Rawlings' work in the context of administrative law in the United Kingdom, 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".⁸¹ Indeed, green-light theorists of administrative law saw courts as obstacles to progress and the control that they exercise as "unrepresentative and undemocratic".⁸² They prefer democratic or political forms of accountability.⁸³ In contrast, red-light theorists focus on judicial control of governmental power and protection of individual liberty. While the courts do not articulate it as such, a green-light approach tends to presume that the political branches have acted legally and that any unlawful action would have been caught by the internal processes as Parliament and the Executive upholds high standards of public administration and policy. Interestingly, while the green-light/red-light framework was developed in the context of English administrative law, the framework appears to have been problematically extended to constitutional review in Singapore.⁸⁴

C. *Judicial review and judicial control of government*

The doctrine of judicial review as being underpinned by the idea of separation of control can be discerned in the seminal case of *Tan Seet Eng v Attorney-General*.⁸⁵ The case contains echoes of the United States case of *Marbury v Madison* with its pronouncements about judicial duty to interpret and uphold the Constitution. The case involved an order for review of detention without trial under the Criminal Law (Temporary Provisions) Act⁸⁶ (CLTPA). The detainees were allegedly part of a global match-fixing syndicate that had operated from various places, including in Singapore. Under the CLTPA, the Minister for Home Affairs is empowered to detain persons without trial for being threats to public peace, safety and good order. There are several passages in the judgment that strongly asserts the role of the judiciary in pronouncing legality of government actions as part of the rule of law and as a co-equal branch of government. The Court of Appeal began its judgment on a high note, declaring that "[t]he rule of law is the bedrock on which our society was founded and on which it has thrived" and that "[j]udges are entrusted with the task of ensuring that any exercise of state power is done within legal limits."⁸⁷

81 Chan Sek Keong, "Judicial Review — From Angst to Empathy" (2010) 22 SAcLJ 469, [29].

82 Carol Harlow and Richard Rawlings, *Law and Administration* (Cambridge: Cambridge University Press, 3rd ed., 2009) para.37.

83 *Ibid.*, para.38.

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

85 [2016] 1 SLR 779 (CA).

86 Cap.67, 2000 Rev Ed.

87 *Tan Seet Eng v Attorney-General* (n.85), [1].

This is said to follow from the separation of functions and powers among the different branches of government, whereby “each branch of government has separate and distinct responsibilities.” Nonetheless, within this scheme of separation, the judiciary is said to have “the responsibility for the adjudication of controversies which carries with it the power to pronounce authoritatively and conclusively on the meaning of the Constitution and all other laws”.⁸⁸ Indeed, in a rare move, the Court invalidated the detention orders and ordered the release of the detainees.

To be clear, this is a cautious extension, if any, of the judicial position. As the Court of Appeal also warned, to hold that the judiciary has “the specific responsibility for pronouncing on the legality of government actions”, does not mean that the judiciary is “in an exalted or superior position relative to the other branches of the government.”⁸⁹ In this regard, co-equality can also mean staying within the boundaries of each branch’s functions and powers. Furthermore, the cautious logic of judicial self-restraint permeates the rest of the judgment where the Court repeatedly cautioned that the judicial role is limited. As it stated:

“Judicial review concerned an area of law where the courts reviewed the lawfulness of actions taken by the other branches of government. Where those acts related to the exercise of powers vested in those other branches, the court had to approach the matter with due regard to the fact that the primary responsibility for the exercise of the power had been vested elsewhere.”⁹⁰

The scope and standard of review adopted remain narrow as the Court did not engage with constitutional issues of the right to life and liberty.⁹¹ Indeed, the Court of Appeal held that the court’s role in judicial review over the exercise of discretionary power is limited to the usual grounds of review developed under administrative law, namely, illegality, irrationality and procedural impropriety.⁹² The Court also emphasised that it did not have the power to review the truth of the allegations of fact or its sufficiency as this is within the proper scope of the executive’s powers.⁹³

Nonetheless, it should be observed that the Court did also emphasise that where discretionary power has been exercised unlawfully, the question of deference “simply does not arise.”⁹⁴ In its ultimate analysis, the Court’s *ratio* was that the grounds stated in the detention order did not fall within the scope of the CLTPA.

⁸⁸ *Ibid.*, [90].

⁸⁹ *Ibid.*

⁹⁰ *Ibid.*, [47].

⁹¹ Granted, this could also be because the applicant only relied on administrative law grounds rather than on constitutional law arguments.

⁹² *Tan Seet Eng v Attorney-General* (n.85), [99].

⁹³ *Ibid.*, [128]–[129].

⁹⁴ *Ibid.*, [106].

While the statute itself does not specifically refer to the locality of the threats, the Court nonetheless held that “the *raison d’être* of the CLTPA is the protection of public safety, peace and good order *in Singapore*”.⁹⁵ Consequently, as “the grounds given for the detention set out few connections with Singapore”,⁹⁶ the Court of Appeal held that the order was unlawful for being outside the scope of the CLTPA.

Tan Seet Eng v Attorney-General follows a case decided almost 20 years ago. *Chng Suan Tze v Minister for Home Affairs*⁹⁷ was the first time the Court of Appeal invalidated detention orders issued by the government, though under a different statute. In this case, the Court of Appeal famously made the following pronouncement:

“[T]he notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power.”

Chng Suan Tze v Minister for Home Affairs may be seen as initiating a more robust role for the judiciary in reviewing the actions of the political branches. The Court there held that the determination of whether the decision-maker has exceeded the boundaries of his jurisdiction under a statute is “a question solely for the courts to decide”, and that where an exercise of discretion is *ultra vires* the statutory provision, “a court of law must be able to hold it to be so.”⁹⁸ Furthermore, the Court stated that it is “no answer to refer to accountability to Parliament as an alternative safeguard.”⁹⁹ It is important to note that in this case, the Court took into consideration constitutional rights in its reasoning. For instance, it accepted that detention without trial under the Internal Security Act (ISA) could not be left to the purely subjective determination of the decision-maker as arbitrary detention would be contrary to the constitutional guarantee of the right to equal protection.¹⁰⁰

Tan Seet Eng v Attorney-General reaffirms the idea of separation of powers as control. For instance, the Court there stated that it is a matter for the courts to decide what the boundaries of the jurisdiction or power that is vested in the executive are and whether the executive has acted within the ambit of that jurisdiction or power, and that “the courts, in the final analysis, are the arbiters of the lawfulness of actions including government actions.”¹⁰¹ However, for all its assertion of co-equality of the judicial branch, *Tan Seet Eng* could be criticised for addressing the legality of executive action primarily from the perspective of administrative law principles developed in English common law, and in the context of a supreme

⁹⁵ *Ibid.*, [140] (emphasis added).

⁹⁶ *Ibid.*, [146].

⁹⁷ [1988] 2 SLR(R) 525 (CA).

⁹⁸ *Ibid.*, [86].

⁹⁹ *Ibid.*

¹⁰⁰ *Ibid.*, [82].

¹⁰¹ *Tan Seet Eng v Attorney-General* (n.85), [98].

Parliament. However, there needs to be a careful rethinking of the suitability of wholesale adoption of administrative law principles and theories without modifying them to the context of Singapore's supreme constitution. This is especially since the courts in Singapore, as in both *Chng Suan Tze v Minister for Home Affairs* and *Tan Seet Eng*, have embraced the idea of co-equality of the three branches of government and the principle of legality as a foundational basis for judicial review.¹⁰²

V. Separation of Powers and the Constitutional Context

A. *Intersecting constitutional traditions*

These different understandings of separation of powers doctrine may be said to emerge from the intersection of two constitutional traditions on which the Singapore constitution is based — American constitutional supremacy and British parliamentary supremacy.¹⁰³ The *deference* conception of the separation of powers can be said to more closely accord with the common law approach to “constitutional” law, which is shaped by supremacy of parliament. Indeed, parliamentary intent tends to be given preeminent status within this common law approach. In contrast, the judicial *control* conception of separation of powers realises an ideal of constitutionalism that is more commonly associated with American jurisprudence of constitutional supremacy and, more recently, judicial supremacy.

In comparison to the two, the autonomy conception of the separation of powers, as developed around the doctrine of judicial power, occupies a fascinating middle ground between deference and control. It may also be seen as the conception that seeks most to reconcile judicial review and constitutional supremacy on the one hand, with the common law ethos of parliamentary sovereignty on the other. Following the Privy Council approach, mutual autonomy has supported the doctrine of exclusivity of judicial power, which protects the domain of judicial power.

The political contexts in which these different conceptions have been developed are important. This may account for why judicial deference is sometimes not only the preferred way of conceptualising the separation of powers but also expressly referred to even when courts do adopt autonomy or control. This was the case, for instance, in *Nagaenthran a/l K Dharmalingam v Attorney-General* (as discussed above) where the Court stated that there is a “need for suitable judicial deference” to the executive and the legislature.¹⁰⁴ This could be a way to assure the political branches that there would not be judicial overreach.

102 Jaclyn L Neo, “‘All Power Has Legal Limits’: The Principle of Legality as a Constitutional Principle of Judicial Review” (2017) 29 SAcLJ 667.

103 For a discussion along this theme in Australia, see Peter Gerangelos, “Separation of Powers in the Australia Constitution: Themes and Reflections” (2017) 29 SAcLJ 903.

104 *Nagaenthran a/l K Dharmalingam v Attorney-General* (n.65), [88].

Such a conciliatory approach can be particularly important in the context of the dominant party state in Singapore, as any perceived judicial overreach may be subject to political backlash.¹⁰⁵ The government's response to the 1989 case of *Chng Suan Tze v Minister for Home Affairs* (discussed above) demonstrates this possibility. After the Court of Appeal invalidated the executive orders, the relevant executive authority re-issued the detention orders and proceeded to detain the same persons shortly after they were released. Parliament then amended the constitution and the relevant law to oust judicial review of any future detention orders, except to ensure compliance with procedure. The next time the Court of Appeal invalidated executive orders to detain persons without trial was 27 years later in the 2016 case of *Tan Seet Eng v Attorney-General*. One could nonetheless argue that there are some tentative signs of change in constitutional culture, at least within the political branches *vis-a-vis* their relationship with the judicial branch. This is because there was notably no similar political backlash to *Tan Seet Eng*, unlike in *Chng Suan Tze*. On the contrary, the government revised its detention orders to comply with the Court of Appeal's interpretation of the law and even released other detainees on the basis of that interpretation.

B. Culture of trust

A preference for a deferential approach may also be attributable to a constitutional culture that tends to emphasise trust in the government. Indeed, the presumption of constitutionality entails implicit trust in the power-holders, rather than a requirement that they justify their exercise of power. Instead of a culture of justification, the presumption gives power-holders a strong benefit of the doubt. This is arguably further aggravated in the context of Singapore because decision-makers are not generally required to disclose reasons for their decisions.¹⁰⁶

This culture of trust may be attributable to two overlapping and mutually reinforcing sources: the constitutional ethos of trust common to the Westminster model where Parliament is supreme¹⁰⁷ and the supposedly "Confucianist" idea of government by honourable men deserving of trust. On the former, while the Singapore Constitution formally adopts the doctrine of a supreme constitution, its constitutional ethos remains influenced by parliamentary sovereignty,¹⁰⁸ which is "deeply rooted in Britain's cultural and legal tradition."¹⁰⁹ Since parliamentary

105 Yap, *Constitutional Dialogue in Common Law Asia* (n.36).

106 For example, *Mohammad Ridzuan bin Mohd Ali v Attorney-General* (n.76), [36].

107 Jaclyn L Neo and Yvonne CL Lee, "Constitutional Supremacy: Still a Little Dicey" in Li-ann Thio and Kevin YL Tan, *Evolution of a Revolution: Forty Years of the Singapore Constitution* (London and New York: Routledge, 2009) pp.153, 156.

108 *Ibid.*

109 Ariel L Bendor and Zeev Segal, "Constitutionalism and Trust in Britain: An Ancient Constitutional Culture, a New Judicial Review Model" (2002) 17(4) *Am U Int'l L Rev* 683, 705. For a defence of the doctrine of parliamentary sovereignty, see Jeffrey Goldsworthy, *The Sovereign of Parliament: History and Philosophy* (Oxford: Oxford University Press, 2010).

sovereignty or supremacy, broadly speaking, means that legislative power is unlimited,¹¹⁰ this fosters a constitutional culture that places greater trust in government than perhaps in a constitutional supremacy like the United States. Indeed, Bendor and Segal have argued that the British constitutional culture and tradition is such that “the people neither practice, nor have a prevailing ethos of distrust for their government”.¹¹¹

This is not to say that there is blind trust in the government, but merely that the prevailing constitutional ethos is not characterised by deep distrust of the government. This culture of trust versus distrust naturally influences how judicial function is viewed in these countries. While judicial supremacy is now an established, though contested, part of constitutional law and culture in the United States, judicial power is viewed with much more circumspect in Britain and many of its common-law progenies. In general, therefore, Bendor and Segal argue that British courts are reluctant to intervene in matters that fall into “the ‘no-man’s land of law and politics, e.g., issues dealing with political questions,” because of the self-perception of their limited role in the legal system.¹¹² This perspective is manifest in judicial philosophy, even though it is not so easy to draw a bright line between law and politics, especially where constitutional matters are concerned.¹¹³

Furthermore, in Singapore, this culture of trust in the political branches is reinforced by an asserted Confucianist ideology of government based on trust. For instance, a government White Paper states that “[t]he concept of government by honourable men ‘君子’ (*junzi*), who have a duty to do right for the people, and who have the trust and respect of the population, fits us better than the Western idea that a government should be given as limited powers as possible, and should always be treated with suspicion unless proven otherwise.”¹¹⁴ This idea of implicit trust in the political system could be said to have influenced judicial reasoning as evidenced by the preference for deference and, at times, autonomy.¹¹⁵

A strong culture of trust would naturally limit the separation of powers as a doctrine of judicial control (and balance) over the other branches of government. This is because robust control would be seen as unnecessary or even illegitimate. This goes beyond the counter-majoritarian difficulty that occurs when judges (allegedly) act contrary to majority will as expressed through representative

110 See Goldsworthy, *The Sovereign of Parliament: History and Philosophy*, (n.109) p.1.

111 See Bendor and Segal, “Constitutionalism and Trust in Britain” (n.109) p.686.

112 *Ibid.*, p.704.

113 Sumption, “Judicial and Political Decision Making” (n.12). See *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 (on courts not being “mini-legislatures”).

114 Singapore Parliament, *Shared Values White Paper* (Cmd 1 of 1991), para.41. See also Li-ann Thio, “Beyond the Four Walls in an Age of Transnational Judicial Conversations Civil Liberties, Rights Theories, and Constitutional Adjudication in Malaysia and Singapore” (2006) 19 Colum J Asian L 428.

115 See also *Review Publishing Co Ltd v Lee Hsien Loong* [2010] 1 SLR 52, [285] (CA), where the Court of Appeal stated that Singapore’s “political culture places a heavy emphasis on honesty and integrity in public discourse on matters of public interest, especially those matters which concern the governance of the country”.

institutions when they exercise judicial review powers to nullify actions of the elected executives or legislators.¹¹⁶ If the political branches are viewed as being composed of honourable men who are to be trusted, judicial attempts to control and limit their powers may be seen as unduly hampering the work of “good” men/women.

VI. Conclusion

It is clear that there are many facets to the separation of powers. In this article, I have discerned and discussed three understandings of the separation of powers and suggest how they underpin different judicial doctrines in Singapore. How the judges continue to engage with and shape their preferred doctrine of the separation of powers will be an important factor in future development of judicial review. At the very least, the recent claims of co-equality of the judiciary could help to overcome one impediment rooted in the culture of trust, which tends to result in strong judicial deference to the political branches. In particular, understanding separation of powers as autonomy and control, in my view, better realises the role of the judiciary as a co-equal branch. There is a need to overcome a claim arising from the prevailing constitutional culture of trust that judicial review is illegitimate “activism”. This of course requires “a condition-sine-qua-non, [that is], convincing judges of their authority and responsibility to rebut governmental decisions without harming their impartial status.”¹¹⁷ Indeed, while law is not and cannot be a substitute for politics,¹¹⁸ it is a necessary feature of constitutionalism in the context of a supreme constitution. It bears emphasising, as Tom Ginsburg has, that “[j]udicial review may be countermajoritarian but is not counterdemocratic.”¹¹⁹

116 Alexander Bickel, *The Least Dangerous Branch: The Supreme Court at the Bar of Politics* (New Haven: Yale University Press, 1962).

117 See Bendor and Segal, “Constitutionalism and Trust in Britain” (n.109) p.704.

118 JAG Griffiths, “The Political Constitution” (1979) 42(1) MLR 1.

119 See Ginsburg, *Judicial Review in New Democracies: Constitutional Courts in Asian Cases* (n.36) p.31.