"ALL POWER HAS LEGAL LIMITS"

The Principle of Legality as a Constitutional Principle of Judicial Review

The now familiar passage in *Chng Suan Tze v Minister for Home Affairs* asserting that all power has legal limits has been declared to be a principle of legality that functions as a "basic principle" in constitutional and administrative judicial review. This article provides a close examination of case jurisprudence in Singapore to determine exactly how this passage has influenced the development of this area of law. Specifically, it argues that while the principle of legality has been used to justify and expand reviewability of both statutory and constitutional executive powers, there is scope to develop the principle to further extend the scope of reviewability as well as to justify a more robust approach to judicial review in Singapore.

Jaclyn L **NEO***
LLB (National University of Singapore), LLM (Yale), JSD (Yale); Assistant Professor, Faculty of Law, National University of Singapore.

I. Introduction

> In our view, 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.[1]

1 The Singapore Court of Appeal made this now familiar passage in the seminal 1988 case of *Chng Suan Tze v Minister for Home Affairs*[2] ("*Chng*"). The case concerned the legality of a preventive detention order on national security grounds under the Internal Security Act[3] ("ISA"). The court overturned established precedent to hold that the President's and ministerial discretion is justiciable and subject to an

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1 *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86].

2 [1988] 2 SLR(R) 525.

3 Cap 143, 1985 Rev Ed.

objective standard of review.[4] In doing so, the court rejected its earlier position that the standard for review is a subjective one, whereby all that is required is evidence that the detaining authority was subjectively satisfied that there were grounds for detention.[5] While the specific aspect of *Chng* concerning the standard of review was legislatively overruled, with Parliament passing a constitutional as well as statutory amendment to "restore" the subjective test, these pronouncements of principle in *Chng* have endured. Indeed, in the 2011 case of *Yong Vui Kong v Attorney-General*[6] (hereafter "*Yong Vui Kong*"), then Chief Justice Chan Sek Keong affirmed that the principles enunciated in *Chng* were fully alive. He observed that although Parliament amended the Constitution[7] and the ISA to restrict the courts' supervisory jurisdiction over national security decisions made under the ISA, it "left untouched the full amplitude of the *Chng Suan Tze* principle".[8] This, it was posited, must mean that Parliament "implicitly endorsed" them.[9]

2 Whatever Parliament's intentions were, the ideas articulated in *Chng* have indeed been increasingly invoked by the courts in constitutional and administrative law cases in recent times. In fact, then Chan Sek Keong CJ declared in a 2010 extrajudicial speech that the "principle of legality", which is the phrase he uses to encapsulate the ideas articulated in *Chng*, is a "basic principle in constitutional and administrative judicial review".[10]

3 It must be made clear here that the principle of legality that Chan CJ refers to differs in form from the principle of legality that has developed in other common law jurisdictions. In the UK and Australia, for example, the principle of legality commonly refers to an interpretive rule requiring parliament to use clear words expressing its intention to overthrow fundamental principles, infringe rights or depart from the general system of law.[11] As Lord Hoffman noted in *R v Secretary of State*

4 *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [88]–[92]. Note, however, that the court cautioned that where national security is implicated, the courts will subject the decision to less intense scrutiny. Thus, objective review is limited to determining whether the decision was in fact based on national security considerations.

5 *Lee Mau Seng v Minister for Home Affairs* [1971–1973] SLR(R) 135.

6 [2011] 2 SLR 1189.

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

8 *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 at [79].

9 *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 at [79]; see also *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [112].

10 The former Chan Sek Keong CJ identified this principle of legality as the basic principle in constitutional and administrative judicial review: Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 at para 8.

11 Dan Meagher, "The Common Law Principle of Legality in the Age of Rights" (2011) 35 *Melbourne University Law Review* 449 at 477.

for the Home Department, ex parte Simms, "[f]undamental rights cannot be overridden by general or ambiguous words".[12] In Australia, the common law principle of legality is used primarily to protect fundamental rights and freedoms and has been said to be "constitutional" in character.[13] The principle of legality has become "an independent common law principle that is central to the proper functioning of [Australia's] constitutional system of democratic government and the maintenance of the rule of law",[14] through a collection of rebuttal interpretive presumptions.[15] Nonetheless, in so far as the principle of legality is an expression of a broader commitment to the rule of law, the Singapore variant could be said to share genealogical roots with its English and Australian counterparts. After all, as the former Chan CJ explains in the Singapore context, "the principle of legality is based on the rule of law".[16]

4 At this stage, it is proper to observe that what has now been called the principle of legality is composed of a broad statement that "[a]ll power has legal limits",[17] but with two specific enunciations of how such legal limits could be imposed. The first is that the rule of law abjures "the notion of a subjective or unfettered discretion",[18] which is a clear reference to the exercise of discretionary powers. The second is that "the rule of law demands that the courts should be able to examine the exercise of discretionary power",[19] which locates the power of controlling the boundaries of legality in the Judiciary. These are important to understand since saying that all power has legal limits does not tell us specifically *what* those limits are, *who* determines the boundaries of those limits, and *what consequences* follow from transgression of those limits.

12 *R v Secretary of State for the Home Department* [2000] 2 AC 115 at 131.

13 Robert French, former Chief Justice of Australia, "Protecting Human Rights without a Bill of Rights", speech delivered at the John Marshall Law School, Chicago (26 January 2010) at p 34 <http://www.hcourt.gov.au/assets/publications/speeches/current-justices/frenchcj/frenchcj26jan10.pdf> (accessed 23 August 2017).

14 Dan Meagher, "The Principle of Legality as Clear Statement Rule: Significance and Problems" (2014) 36 *Sydney Law Review* 413 at 418; see also Brendan Lim, "The Normativity of the Principle of Legality" (2013) 37 *Melbourne University Law Review* 372.

15 James Spigelman, "The Principle of Legality and the Clear Statement Principle" (2005) 79 *Australian Law Journal* 769; Dan Meagher, "The Common Law Principle of Legality in the Age of Rights" (2011) 35 *Melbourne University Law Review* 449 at 477.

16 Chan Sek Keong, "Judicial Review – From Angst to Empathy" (2010) 22 SAcLJ 469 at [9].

17 *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86].

18 *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86].

19 *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86].

5 Exactly how this principle of legality functions as a "basic principle" in constitutional and administrative judicial review merits closer examination. In what ways has this principle advanced judicial review in Singapore? Does it merit the proclaimed status as a "basic principle" in constitutional and administrative law? Or, has it thus far been limited in its impact? These are some questions that have yet to be subject to sustained analysis.[20] This article seeks to fill some of this gap.

6 Examining the cases in which the *Chng* passage has been invoked, the present author argues that the main contribution of the principle of legality could be understood as advancing a presumption of reviewability[21] of the exercise of discretionary powers on the part of the Executive. This presumption applies to discretionary powers that are derived from statute as well as from the constitution. This could be seen as an extension of the rule of law claims beyond the principle's original remit within *Chng*, which was concerned only with the justiciability of a statutory power. This elevates the principle to constitutional status.

7 Beyond this, the principle of legality, however, has had limited impact on constitutional and administrative jurisprudence in Singapore. Indeed, the cases show that while the principle of legality was frequently asserted to reinforce the court's judicial review powers, including over review of legislation, the principle did not further assist the court in providing any substantive rule of law norms by which to evaluate the legality and constitutionality of power. The author argues that more could be done normatively with this principle. In this regard, the author identifies three tentative ways in which the principle could be further developed as a "basic principle" of constitutional and administrative law.

8 Section II briefly examines the case of *Chng* to provide the context for the passage that has now been encapsulated as a principle of legality. Section III examines how the principle of legality has been used to justify reviewability or justiciability of executive discretion. Section IV conceptualises the principle as a constitutional principle.

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20 There are of course many articles that have referred to the pronouncement in *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 in their analysis of Singapore constitutional or administrative law but none have provided a sustained look at how it has impacted this area of law in Singapore. See, *eg*, Daniel Tan, "An Analysis of Substantial Review in Singapore Administrative Law" (2013) 25 SAcLJ 296; Gordon Silverstein, "Globalisation and the Rule of Law: 'A Machine that Runs of Itself?'" (2003) 1(3) *International Journal of Constitutional Law* 427; Jason Lee & Ng Bin Hong, "All Powers Have Their Limits: A Guide to Rationalizing the Legality of Government Actions" *Singapore Law Watch Commentary* (February 2016) Issue 1.

21 The author uses the terms "reviewability" and "justiciability" interchangeably in this article.

Section V argues for the strengthening of the principle to further expand the scope of and basis for judicial review in Singapore.

II. *Chng* and principle(s) of legality

9 To fully appreciate the significance of the passage articulating the principle of legality, a little background to *Chng* is apposite. The case was concerned with the legality of a preventive detention order issued by the Minister of Hone Affairs on national security grounds. The detainees had been accused of "being involved in a Marxist conspiracy to subvert and destabilise the country to establish a Marxist state".[22] They had applied unsuccessfully to the High Court for leave to issue writs of *habeas corpus* and appealed to the Court of Appeal. There was established precedent that detention orders made on national security grounds were non-justiciable and that the courts merely need to be shown that the issuing authority was subjectively satisfied that there were grounds for detention.[23] The Court of Appeal, however, stunningly chose to overturn precedent[24] and ruled that the subjective discretion test would "no longer be good law".[25]

10 While the court supported its decision by referring to persuasive developments in other common law jurisdictions, it is its pronouncement of the famous passage that was most revealing of its normative judicial philosophy. Here, there are still echoes of parliamentary intent and *ultra vires* as the court also stated immediately after the famous passage that if the Executive exercised its discretion conferred under an Act of Parliament outside the "four corners within which *Parliament decided* it could exercise its discretion" [emphasis added],[26] that exercise of discretion would be "*ultra vires* the Act" and "a court of law must be able to hold it to be so".[27] Nonetheless, there is a clear pivoting towards constitutional norms, rather than parliamentary intent, as the foundation for judicial review. This is further manifest in the court's observation that the objective test was more consistent with constitutional requirements, specifically constitutional rights. As the court put it, the relevant sections in the ISA are "exceptions" to

22 *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [2]; see also "16 held in Security Scoop", *The Straits Times* (22 May 1987); "Marxist Plot Uncovered", *The Straits Times* (27 May 1987) at p 1.

23 *Lee Mau Seng v Minister for Home Affairs* [1971–1973] SLR(R) 135.

24 *Karam Singh v Menteri Hal Ehwal Dalam Negeri (Minister of Home Affairs), Malaysia* [1969] 2 MLJ 129, followed in *Lee Mau Seng v Minister for Home Affairs* [1971–1973] SLR(R) 135.

25 *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [56].

26 *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86].

27 *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86].

fundamental rights guaranteed under the Constitution[28] and, therefore, should be "narrowly construed so as to derogate as little as possible from such fundamental rights".[29]

11 The actual legal approach to reviewing preventive detention order post-*Chng* is subject to some discussion because while rejecting the subjective test in favour of the objective test, the Court of Appeal also suggested that "a court may still be precluded from reviewing that exercise of discretion on the ground that the decision was made on considerations of national security".[30] This may suggest that national security decisions are non-justiciable. Nonetheless, Thio Li-ann suggests that one way to reconcile these positions is to frame the issue "in terms of degrees and intensities of review".[31] As such, non-justiciability in this context merely requires a less intense standard of review, rather than precluding review entirely.[32] This less intense standard requires that the court examine "whether the decision was in fact based on grounds of national security".[33]

12 Ultimately, however, it bears emphasising that the Court of Appeal's *ratio* for striking down the detention orders was narrowly based on the lack of evidence of the President's satisfaction.[34] Nonetheless, the articulation of an objective review over preventive detention orders under the ISA provoked a legislative response. Parliament passed a constitutional amendment to allow for a statutory amendment to the ISA to supposedly restore the subjective review test. A new s 8B(1) now states that "the law governing the judicial review of any decision made

28 Specifically, the court referred to Arts 9, 13 and 14 of the Constitution of the Republic of Singapore (1999 Reprint).

29 *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [79].

30 *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [88].

31 Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2012) at p 267.

32 Another way to conceptualise this is to see non-justiciability here as not precluding judicial inquiry entirely, but as merely presumptively restraining review. Rayner Thwaites made a distinction between preclusive non-justiciability and presumptive non-justiciability. In the former, non-justiciability is "a barrier to further judicial inquiry" and in the latter, certain subject matters are only *prima facie* non-justiciable and this non-justiciability can be overridden or rebutted: Rayner Thwaites, "The Changing Landscape of Non-Justiciability", (2016) 1 *New Zealand Law Review* 31 at 36–37.

33 *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [88]. This is also the interpretation adopted by the Court of Appeal in *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [95], affirming Thio Li-ann, "The Theory and Practice of Judicial Review of Administrative Action in Singapore" in *SAL Conference 2011: Developments in Singapore Law between 2006 and 2010 – Trends and Perspectives* (Yeo Tiong Min *et al* gen eds) (Academy Publishing, 2011) at para 31.

34 *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [31].

or act done" under the Act "shall be the same as was applicable and declared in Singapore on the 13th day of July 1971". This date is significant as it is the date that the Court of Appeal handed down its judgment in the case of *Lee Mau Seng v Minister for Home Affairs*,[35] in which the subjective test was adopted for ISA detentions. Despite this legislative pushback, the passage in *Chng* continued to be invoked in subsequent constitutional and administrative law cases. The following section examines some of these cases.

III. Principle of legality and reviewability of executive powers

13 The cases will show that where the principle of legality is invoked, it is used to justify reviewability of statutory powers and constitutional powers.[36] However, its impact is limited because the standard and scope of review imposed tend to be limited. With respect to statutory powers, the principle of legality paves the way for judicial review on grounds of illegality, irrationality and procedural impropriety, or what is now commonly known as the *GCHQ* grounds.[37] However, where constitutional powers are concerned, the principle of legality justifies extending justiciability over various powers, but on narrower grounds such as *mala fide* and collateral purpose.

A. Judicial review of statutory executive powers on GCHQ *grounds*

(1) Ministerial power under the Newspaper and Printing Presses Act[38] *("NPPA")*

14 The principle of legality enunciated in *Chng* was first employed in the case of *Dow Jones Publishing Co (Asia) Inc v Attorney-General*[39] to justify subjecting ministerial discretion to declare a foreign newspaper to be "engaging in the domestic politics of Singapore" and thereby limit its circulation to judicial review.[40] In this case, the Asian Wall Street Journal ("AWSJ") challenged the Minister for Communications and

35 [1971–1973] SLR(R) 135.

36 While Singapore courts accept, as in the UK, that justiciability depends not on the source of decision-making power but on the subject matter in question (see *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 at [98]), the author has divided the analysis according to statutory and constitutional power merely to denote their status in the scheme of powers. It is by no means to suggest that justiciability is determined by the source of power.

37 *Council of the Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

38 Cap 206, 1985 Rev Ed.

39 *Dow Jones Publishing Co (Asia) Inc v Attorney-General* [1989] 1 SLR(R) 637.

40 *Dow Jones Publishing Co (Asia) Inc v Attorney-General* [1989] 1 SLR(R) 637 at [27].

Information's power under s 16 of the NPPA. The section empowers the Minister to restrict ASWJ's circulation from 5,000 copies to 400 copies a day. The Government resisted judicial review, arguing that there are certain established categories of cases where the exercise of executive discretionary powers is *not* subject to review except on grounds of bad faith or perversity.

15 The Court of Appeal rejected this argument, stating instead that ministerial discretion under the NPPA is subject to judicial review on substantive *GCHQ* grounds, which includes illegality.[41] This means that the Minister must act within the scope of the statute when he exercises his power to declare a foreign newspaper. The Court of Appeal distinguished reviewability from scope of review. It accepted that there may be cases where the scope of review may be more restricted where a particular subject matter is implicated, such as national security or international relations. However, this does not mean that they are not justiciable, but that the scope and intensity of review may be constrained. What is interesting is that the court referred to *Chng* to support its position. It stated:[42]

> As this court has said in *Chng Suan Tze* … All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power. If therefore the Executive in exercising its discretion under an Act of Parliament has exceeded the four corners within which Parliament has decided it can exercise its discretion, such an exercise of discretion would be *ultra vires* the Act and a court of law must be able to hold it to be so …

16 Nonetheless, despite affirming justiciability of the Minister's decision, the court applied a presumption of legality, stating that the decision should be presumed legal unless proven otherwise.[43] In its decision, the court invoked the maxim, "*omnia praesumuntur rite esse acta*", that is, things are to be presumed to have been done correctly. On the facts, the court found that the articles published by AWSJ were concerned with or touched upon the "domestic politics of Singapore", adopting a broad definition of the term.[44] Applying the *GCHQ* grounds

41 *Dow Jones Publishing Co (Asia) Inc v Attorney-General* [1989] 1 SLR(R) 637 at [27] and [30]; see also *Chiu Teng Enterprises Pte Ltd v Attorney-General* [2011] SGHC 77, where an assistant registrar agreed that the principle of legality meant that courts can review the legality of a determination of public interest under s 126(1) of the Evidence Act (Cap 97, 1997 Rev Ed) on usual administrative law grounds. This is despite the seemingly subjective phrasing of the provision, which states, "[n]o public officer shall be compelled to disclose communications made to him in official confidence when *he considers* that the public interest would suffer by the disclosure" [emphasis added].

42 *Dow Jones Publishing Co (Asia) Inc v Attorney-General* [1989] 1 SLR(R) 637 at [27].

43 *Dow Jones Publishing Co (Asia) Inc v Attorney-General* [1989] 1 SLR(R) 637 at [19].

44 *Dow Jones Publishing Co (Asia) Inc v Attorney-General* [1989] 1 SLR(R) 637 at [49].

of review, the court further held that there was no misdirection as to the facts or the law, neither was it shown that the Minister had taken into account irrelevant facts, or that his conclusion was so absurd that no reasonable or sensible person could have come to the same conclusion.[45] Thus, the principle of legality opened the door to reviewability but did not substantiate or expand the scope or standard of review.

(1) Chief Justice's power to appoint under the Legal Profession Act[46] *("LPA")*

17 Similarly, in *Manjit Singh s/o Kirpal Singh v Attorney-General*,[47] the principle of legality was a basis for justifying subjecting the exercise of the Chief Justice's statutory power to appoint members of a disciplinary tribunal under the LPA to judicial review. Under s 90 of the LPA, the Chief Justice is empowered to appoint one or more disciplinary tribunals and may at any time revoke the appointment, remove any member and/or fill any vacancy in the tribunal. After an initial inquiry into a complaint against the appellant lawyers, the Law Society of Singapore requested the Chief Justice to appoint members to a disciplinary tribunal to investigate the complaint. The Chief Justice acceded to the appellants' first request to replace the President of the disciplinary tribunal but rejected their second request to dismiss the second appointed President. The appellants filed for judicial review.

18 A key issue was whether the Chief Justice's powers to appoint members of a tribunal were amenable to judicial review. The court held that while the statute restricts judicial review "in any court of any act done or decision made by the Disciplinary Tribunal", this does not apply to the Chief Justice's powers under s 90 of the LPA. It also rejected the argument that the Chief Justice's power is not reviewable because this would delay the disciplinary proceedings.[48] Instead, it relied on common law precedent, as well as the passage in *Chng* to justify reviewability. As the court put it:[49]

> It may well be that the possibility to mount such a challenge would in reality be limited. But that is not to say that such a challenge is not available. *All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power …* [emphasis added]

45 *Dow Jones Publishing Co (Asia) Inc v Attorney-General* [1989] 1 SLR(R) 637 at [49].
46 Cap 161, 2009 Rev. Ed.
47 *Manjit Singh s/o Kirpal Singh v Attorney-General* [2013] 2 SLR 844 at [52].
48 *Manjit Singh s/o Kirpal Singh v Attorney-General* [2013] 2 SLR 844 at [60].
49 *Manjit Singh s/o Kirpal Singh v Attorney-General* [2013] 2 SLR 844 at [52].

To bolster its position, the court further declared that there is a public interest in ensuring that statutory powers are exercised lawfully, which is "the very object of judicial review".[50]

19 However, reviewability is only the first step, albeit an important one. The court proceeded to review the Chief Justice's exercise of discretion on the usual grounds developed under administrative law. It concluded that there was no breach of natural justice,[51] neither was there any illegality as the Chief Justice did not act outside of his jurisdiction or unlawfully fettered his own discretion.[52]

B. Judicial review of constitutionally endowed executive powers

20 The two cases thus far show that the principle of legality is invoked to extend reviewability but not to strengthen the standard of review or broaden its scope. Its doctrinal significance is also ambivalent when applied to cases involving constitutionally endowed powers. On the one hand, the principle of legality is normatively weighty as it justifies extending reviewability to constitutional powers, thus raising its status to a *constitutional* and not merely administrative law principle. This is because within the hierarchy of norms, constitutional powers could be said to be subject only to constitutional principles and limits. Specifically, in Singapore, the principle of legality has been used to justify justiciability of the president's clemency powers, the attorney-general's prosecutorial discretion as well as the prime minister's discretion to call for by-elections. On the other hand, the scope and standard of review has remained limited. Three cases will be examined in turn.

(1) Clemency powers

21 In *Yong Vui Kong*, Chan CJ (with whom the other two appeal judges agreed) invoked the principle of legality to support his opinion that the clemency power provided in the Constitution[53] is justiciable. He observed that while the clemency power is a legal power of an extraordinary character, it is not an "extra-legal" power beyond legal constraints or restraints.[54] It is a constitutional power vested in the Executive and is therefore subject to legal limits. Pursuant to the principle of legality, courts must have the power to review the exercise of clemency power to ensure that it is not "abused" in the sense of being

50 *Manjit Singh s/o Kirpal Singh v Attorney-General* [2013] 2 SLR 844 at [60].
51 *Manjit Singh s/o Kirpal Singh v Attorney-General* [2013] 2 SLR 844 at [73]–[82].
52 *Manjit Singh s/o Kirpal Singh v Attorney-General* [2013] 2 SLR 844 at [91]–[93].
53 Constitution of the Republic of Singapore (1999 Reprint) Art 22P.
54 *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 at [74] and [76].

exercised in bad faith for an extraneous purpose or exercised in a way that contravenes constitutional protections and rights.[55] Furthermore, the court must be able to ensure that the requirements of Art 22P is complied with; examples provided include situations where there would be a constitutional breach; or there is conclusive evidence to show that the Cabinet never met to consider the offender's case at all, or that it did not consider the material required to be placed before it and merely tossed a coin to determine what advice to give to the President.[56] Under those circumstances, the court must be able to intervene to correct a breach of Art 22P lest the rule of law be rendered nugatory.[57] This, the Chief Justice argued, is also consistent with the protection of life and liberty under Art 9 of the Constitution.

22 Beyond reviewability, however, the court fell back on the merits-legality distinction, and stated that the merits of the clemency decision is not reviewable. This supposedly accords with the separation of powers doctrine. What this means, according to the court, is that the courts cannot review whether a clemency decision is "wise or foolish, harsh or kind" and cannot substitute their own decision for the President's simply because they disagree with his view on the matter.[58] The principle of legality therefore ensures that the exercise of discretion can be reviewed. While the scope of review is said to be limited to bad faith or extraneous purpose, reviewability also ensures that challenges can be made on constitutional grounds.

(2) Prosecutorial powers

23 The principle of legality has also been used to justify extending judicial review to the attorney-general's prosecutorial powers. This was first addressed by a court of three judges in *Law Society of Singapore v Tan Guat Neo Phyllis*[59] ("*Phyllis Tan*"). There, the court stated:[60]

> The discretionary power to prosecute under the Constitution is not absolute. It must be exercised in good faith for the purpose [for which] it is intended, *ie*, to convict and punish offenders, and not for an extraneous purpose. As the Court of Appeal said in *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86], all legal powers, even a constitutional power, have legal limits. The notion of a subjective or unfettered discretion is contrary to the rule of law …

55 The former Chan Sek Keong CJ adopted the position in *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239.
56 *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 at [82].
57 *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 at [82].
58 *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189 at [75].
59 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239.
60 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [149].

24 Consequently, the court identified two situations where the exercise of prosecutorial discretion would be subject to judicial review:[61]

> [F]irst, where the prosecutorial power is abused, *ie*, where it is exercised in bad faith for an extraneous purpose, and second, where its exercise contravenes constitutional protections and rights (for example, a discriminatory prosecution which results in an accused being deprived of his right to equality under the law and the equal protection of the law under Art 12 of the Constitution) …

25 These pronouncements in *Phyllis Tan* are *dicta*. Nonetheless, they have been endorsed by the Court of Appeal in *Ramalingam Ravinthran v Attorney-General*[62] ("*Ramalingam*"). There, the court stated that even though the prosecutorial power is a constitutional power under Art 35(8) of the Constitution, it is "not immune to judicial correction where it has been exercised arbitrarily or in breach of constitutionally-protected rights".[63] Indeed, while the court may apply a presumption that prosecutorial power has been properly exercised, this does not preclude the court's review powers to ensure legality. Invoking *Chng*, the court stated: "[a]s a requirement of the rule of law, all legal powers are subject to limits … An inherent limitation on the prosecutorial power is that it may not be exercised arbitrarily, and may only be used for the purpose for which it was granted and not for any extraneous purpose".[64]

26 The principle of legality thus underpins the court's decision that prosecutorial discretion is justiciable and provides a plausible basis for the court's observation that the Attorney-General's exercise of his discretionary powers is subject to certain substantive limits, namely, to uphold the public interest in maintaining law and order.[65] This is in addition to the constitutional limit that the prosecutorial discretion must be exercised in accordance with constitutional rights. Speaking on the challenge on the basis of equal protection under Art 12(1) of the Constitution, the court observed that the provision requires the Attorney-General "to give unbiased consideration to every offender and to avoid taking into account any irrelevant consideration".[66] However, like in *Yong Vui Kong*, the scope and standard of review remains limited.

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61 *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 at [149].
62 [2012] 2 SLR 49.
63 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [53], further affirmed by the Court of Appeal in *Yong Vui Kong v Public Prosecutor* [2012] 2 SLR 872.
64 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [51].
65 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [53].
66 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [51].

(3) Prime Minister's discretion to call for by-elections

27 Another important case where the principle of legality has been used to justify reviewability is the case of *Vellama d/o Marie Muthu v Attorney-General*.[67] Here, the court held that the Prime Minister's discretion under the Constitution to call for by-elections to fill casual vacancies in a single-member constituency ("SMC") is justiciable. This case arose from a political fallout within the opposition party when one of its parliamentarians was expelled.[68] According to anti-hopping laws encapsulated in Art 46(2)(*b*) of the Constitution, expulsion from the party under whose banner one stood for election would result in the seat falling vacant.[69]

28 Three weeks after the vacancy arose, the Prime Minister stated in Parliament that while he intended to call for by-elections, he had not decided when to do so. He explained that he would "take into account all relevant factors including the well-being of Hougang residents, issues on the national agenda, as well as the international backdrop which affects our prosperity and security".[70] In his speech, the Prime Minister appeared to assert that he had absolute discretion when to call elections:[71]

> The timing of the by-election is at the discretion of the Prime Minister. The Prime Minister is not obliged to call a by-election within any fixed time frame. This absence of any stipulated time frame is the result of a deliberate decision by Parliament to confer on the Prime Minister the discretion to decide when to fill a Parliament vacancy.

29 The applicant, a resident of the relevant SMC, filed a suit seeking a declaration that the Prime Minister does not have unfettered discretion *whether* and *when* to announce by-elections, and that he must

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

68 Rachel Chan, "Yaw: I Won't Appeal Expulsion', *AsiaOne My Paper Singapore* (23 February 2012).

69 Article 46(2)(*a*) of the Constitution of the Republic of Singapore (1999 Reprint) states: "[t]he seat of a Member of Parliament shall become vacant … if he ceases to be a member of, or is expelled or resigns from, the political party for which he stood in the election".

70 Prime Minister's Office Singapore, "Transcript of Prime Minister Lee Hsien Loong's Reply in Parliament on Calling a By-election in Hougang SMC" (9 March 2012) http://www.pmo.gov.sg/mediacentre/transcript-prime-minister-lee-hsien-loongs-reply-parliament-calling-election-hougang-smc (accessed 12 December 2016).

71 Prime Minister's Office Singapore, "Transcript of Prime Minister Lee Hsien Loong's Reply in Parliament on Calling a By-election in Hougang SMC" (9 March 2012) http://www.pmo.gov.sg/mediacentre/transcript-prime-minister-lee-hsien-loongs-reply-parliament-calling-election-hougang-smc (accessed 12 December 2016).

call a by-election "within three months" or within "reasonable time". The applicant also sought a mandatory order to require the Prime Minister to call for a by-election within three months or within reasonable time.[72]

30 The issue turned on the meaning of Art 49 of the Constitution, which states: "[w]henever the seat of a Member … has become vacant for any reason other than a dissolution of Parliament, the vacancy *shall be filled* by election in the manner provided by or under any law relating to Parliamentary elections for the time in force" [emphasis added].[73] On its reading of Art 49, the High Court decided that there was no obligation on the part of the Prime Minister to call for by-elections.[74] Neither was there a "prescribed time within which such elections must be called".[75]

31 The Court of Appeal disagreed, concluding that Art 49 requires the calling of an election to fill a casual vacancy and that the Prime Minister does not have "an unfettered discretion" whether to call for an election.[76] It held that the Prime Minister's discretion is "not unconditional"[77] and he is constitutionally obliged to call for an election "within a reasonable time".[78] Accordingly, it would not be constitutional for the Prime Minister to declare that he will not be calling an election to fill a vacancy unless at that point in time he intends to seek dissolution of Parliament (thus obviating the need for a by-election).[79] Furthermore, even if the circumstances are such that the Prime Minister is justified in not calling for an election immediately to fill the vacancy, he remains under an obligation to "review the circumstances from time to time and call for election to fill the vacancy if and when the circumstances have changed".[80]

32 Invoking the principle of legality, the court reiterated that it is "a basic proposition of the rule of law that all discretionary power is subject to legal limits".[81] This served to justify subjecting the Prime Minister's discretion as to whether and when to fill a casual vacancy to

72 It should be noted that while the matter was pending, the Prime Minister called for an election rendering the case largely moot.

73 Note that this issue focused on single member constituencies since s 24(2A) of the Parliamentary Elections Act (Cap 218, 2011 Rev Ed) provides that no writ of election shall be issued to fill a group-representation-constituency vacancy "unless all the Members for that constituency have vacated their seats".

74 *Vellama d/o Marie Muthu v Attorney-General* [2012] 4 SLR 698 at [115].

75 *Vellama d/o Marie Muthu v Attorney-General* [2012] 4 SLR 698 at [115].

76 *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 at [92].

77 *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 at [87].

78 *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 at [92].

79 *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 at [87].

80 *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 at [87].

81 *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86].

judicial review. The court was, however, careful to emphasise that it is only concerned with the outermost limits of the proper exercise of discretionary powers. Indeed, the court conceded that the Prime Minister has "a substantial measure of discretion" with respect to the timing of the election[82] and "is entitled to take into account all relevant circumstances".[83] The court observed that it is a "fact-sensitive discretion" and that "judicial intervention would only be warranted in exceptional cases".[84] Notably, the scope and standard of review were even more limited in this case.

C. Enhancing standard of review

33 Thus far, the cases discuss show that the principle of legality has been important in justifying reviewability but not so much the standard or scope of review. However, at least in preventive detention cases, the principle has been impactful in raising the standard of review from a subjective standard to an objective one.

34 The subjective standard was advocated in the case of *Chng* and again in the more recent case of *Tan Seet Eng v Attorney-General and another matter* ("*Tan Seet Eng*").[85] Unlike in *Chng* which concerned preventive detention under the ISA, *Tan Seet Eng* involved a detention order under the Criminal Law (Temporary Provisions) Act[86] ("CLTPA"). Section 30 of the CLTPA empowers the Minister for Home Affairs to detain without trial for a period of not more than a year a person who has been associated with activities of a criminal nature if the Minister considers it "necessary in the interests of public safety, peace and good order".

35 *Tan Seet Eng* is one of the most significant decisions affirming the principle of legality. It can be viewed as a mirror image of *Chng* in that the impugned power also entailed preventive detention albeit under a different statute. The detainee had been arrested and subsequently detained under the CLTPA for allegedly being involved in global football match-fixing activities. The written grounds of detention stated that between 2009 and 2013, he had been "the leader and financer of a global football match-fixing syndicate operating from Singapore, which fixed football matches in many parts of the world".[87]

82 *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 at [87].
83 *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 at [92].
84 *Vellama d/o Marie Muthu v Attorney-General* [2013] 4 SLR 1 at [85].
85 [2016] 1 SLR 779.
86 Cap 67, 2000 Rev Ed.
87 *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779 at [8].

36 In ordering the detainee's release, the Court of Appeal held that it had the power to enquire into whether the Minister did in fact have the power to act and whether there is a reasonable basis for thinking that he was so acting.[88] In its view, the principle of legality supports the objective, rather than the subjective, standard of review.[89] In contrast, a purely subjective enquiry would essentially allow for arbitrary detention in contravention to Art 12(1) of the Constitution.[90] This is because a purely subjective analysis would, in practical terms, result in the court being bound to accept whatever was put before it.[91]

37 Despite employing the principle of legality to justify an objective standard of review, the court, however, continued to uphold the legality-merit distinction, which arguably limits some if its impact. This is reflected in how the scope of review falls back on usual administrative law grounds of illegality, irrationality, procedural impropriety and bad faith. Objective reviewability has yet to fully open the door to constitutional standards and scope of review. Vindicating the principle of legality as a constitutional principle requires a broader application of constitutional norms (including constitutional rights) to both statutorily derived and constitutionally endowed executive discretion.

IV. Principle of legality as a presumption of reviewability

38 The discussion in the previous section shows that the principle of legality has provided useful normative force for extending reviewability, not just over statutory powers but also over constitutionally endowed powers. This, the author argues, should be conceptualised as a general presumption of reviewability over all discretionary powers. Despite its limited impact on the standards and bases of review, discussed later, this should, nonetheless, be seen as significant in light of existing jurisprudence. There is at the moment no clearly articulated presumption in favour of reviewability whether by the courts or statutorily.[92]

39 The presumption of reviewability is, furthermore, significant when juxtaposed against the doctrine of justiciability (or rather

88 *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779 at [56].
89 *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779 at [97]–[98].
90 *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779 at [60].
91 *Tan Seet Eng v Attorney-General and another matter* [2016] 1 SLR 779 at [61].
92 *Cf* in America, s 701(1) of the Administrative Procedure Act 5 USC (2012) provides that administrative action is generally subject to judicial review unless excluded by statute. See however critique of this presumption here: Nicholas Bagley, "The Puzzling Presumption of Reviewability" (2014) 127(5) *Harvard Law Review* 1285.

non-justiciability). The doctrine posits that there are certain types of cases involving subject matters that are unsuited for adjudication and thereby fall outside the purview of judicial review.[93] Several theoretical justifications have been proffered for non-justiciability, though institutional and substantive perspectives tend to dominate.[94] In Singapore, justiciability has been said to be premised on the constitutional doctrine of the separation of powers and relatedly on respective institutional expertise.[95] It has been observed that matters involving government policy as well as decisions that involve "intricate balancing of various competing policy considerations" may be unsuitable for judicial oversight. Judges are said to be "ill-equipped" to determine those matters because of "their limited training, experience and access to materials, the courts should shy away from reviewing its merits".[96]

40 Indeed, the courts' view that the Judiciary should abstain from making judicial pronouncements that "could embarrass some other branch of government or tie its hands in the conduct of affairs traditionally regarded as falling within its purview" reflect a significant degree of self-restraint.[97] However, non-justiciability could be criticised because it could result in the courts "abandon[ing] their ordinary function of ensuring legality" of certain governmental action and this often leaves the "protection of the rights of those affected to the operations of the political process, which may or may not in time provide a remedy".[98]

41 The presumption of reviewability could offer a strong countervailing force against non-justiciability. As a foundational constitutional principle, it would impose an obligation on judges to favour review. In fact, the author would argue that there should be a *strong* presumption of reviewability. Ensuring that discretionary powers are subject to judicial review is crucial to guard against arbitrary power. A strong commitment to the principle of legality is important to ensure that the Executive does not "effectively become a power unto itself".[99] While some later formulations of this principle of legality appear to

93 Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2012) at p 539.

94 For further discussion on the rationales for justiciability from procedural, institutional or substantive perspectives, see Dominic McGoldrick, "The Boundaries of Justiciability" (2010) 59(4) ICLQ 981 at 985.

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

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

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

98 Trevor Allan, "Human Rights and Judicial Review: A Critique of 'Due Deference'" (2006) 65(3) *The Cambridge Law Journal* 671 at 671.

99 Thio Li-ann, "The Constitutional Framework of Powers" in *The Singapore Legal System* (Kevin Tan ed) (NUS Press, 1999) at p 94.

qualify it to apply only to "legal power", rather than simply "power", as having legal limits,[100] this should not weaken the presumption of reviewability. This is especially since one could argue that the boundaries between legal and political power are not so clear-cut.

42 While the presumption remains rebuttable, by conceptualising the principle of legality as founding such a presumption would tip the balance in favour of constitutional rule of law. This ensures the burden of excluding judicial review is squarely on those opposing reviewability. A robust constitutionally based presumption should impose a strong burden on the part of those seeking to exclude review. This would strengthen judicial power, such as in placing important limits on legislative power to oust judicial review (discussed below).

V. Whither the principle of legality?

43 Besides founding a strong presumption of reviewability, the normative substance of the principle of legality could be further developed to realise its status as a "basic principle" of constitutional and administrative law. Here, the author suggests three areas of development. These could be developed disjunctively but cumulatively form a collection of interpretive rules that connect with constitutional norms and have constitutional status.

A. Ouster clauses and judicial power

44 First, the principle of legality could be invoked to further buttress a strong presumption against ouster clauses. As the Court of Appeal recently observed, the question as to whether ouster clauses will be given effect in Singapore remains an open one. In *Per Ah Seng Robin v Housing and Development Board*,[101] the Court of Appeal had to consider whether a finality clause in the Housing and Development Act[102] could insulate a decision by the Housing and Development Board to compulsorily acquire a flat for violating a condition in the law for public housing from judicial review. While the court did not decide on whether the finality clause was effective (since the relevant party did not rely on it) the court, nonetheless, observed that ouster clauses may be

100 See, *eg*, *Law Society of Singapore v Tan Guat Neo Phyllis* [2008] 2 SLR(R) 239 and *Yong Vui Kong v Attorney-General* [2011] 2 SLR 1189.

101 [2016] 1 SLR 1020.

102 Cap 129, 2004 Rev Ed. Section 56(6) of the Act states: "[a]ny appeal by any owner or interested person aggrieved by the decision of the Board shall be made to the Minister within 28 days after the date of service of such decision on the owner or interested person and the decision of the Minister shall be final and not open to review or challenge on any ground whatsoever".

regarded as "incompatible with the rule of law" as it is within the court's purview to declare the legal limits of discretionary powers.[103]

45 Extending the principle of legality to limit the effect of ouster clauses would be a robust application of the principle. Furthermore, it connects the principle of legality to the protection of judicial power vested under Art 93 of the Constitution. Ouster clauses undermine the courts' judicial power, and arguably the separation of powers.[104]

B. Weak presumption of constitutionality or legality

46 Secondly, the principle of legality should be treated as a strong countervailing norm against the presumption of legality or constitutionality. This presumption has been articulated in several cases including in *Ramalingam*. There, the Court of Appeal opined that courts must give due regard to the constitutional status of the Attorney-General by presuming that he acts in the public interest as the Public Prosecutor and in accordance with the law. This, according to the Court of Appeal, is an application of an "established principle that the acts of high officials of state should be accorded a presumption of legality or regularity".[105] While this presumption applies to all officials, it is stronger when a constitutionally conferred power is implicated.[106]

47 There is a need to consider the intersecting effect of and the proper balance between the presumption of reviewability (underpinned by the principle of legality) and the presumption of legality or constitutionality. Recognising the principle of legality as a constitutional principle would mean that a weak, rather than strong, presumption of constitutionality is more appropriate.[107] This is necessary to ensure that the balance does not tilt too heavily in favour of governmental power. A strong presumption of constitutionality would militate against the principle of legality since it accords too much deference to the other branches of government and may result in insulating unlawful acts from judicial scrutiny.[108] In contrast, a weak presumption of constitutionality

103 *Per Ah Seng Robin v Housing and Development Board* [2016] 1 SLR 1020 at [65].
104 *Per Ah Seng Robin v Housing and Development Board* [2016] 1 SLR 1020 at [66].
105 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [46].
106 *Ramalingam Ravinthran v Attorney-General* [2012] 2 SLR 49 at [47].
107 A strong presumption of constitutionality was articulated by the Court of Appeal in the case of *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489. This should be contrasted with the judgment at the High Court which only referred to a presumption of constitutionality without the modifier 'strong': *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR 943.
108 For a discussion on the presumption of constitutionality, see Jack Tsen-Ta Lee, "Rethinking the Presumption of Constitutionality" in *Constitutional Interpretation in Singapore: Theory and Practice* (Jaclyn L Neo ed) (Routledge, 2017) at p 139.

would allow for a moderate degree of deference to the other branches of government, in accordance with the separation of powers, while allowing for proper judicial scrutiny where appropriate. This would be more apposite in a constitutional order strongly committed to the rule of law.

C. Rule of statutory interpretation

48 Lastly, the principle of legality could be developed more concretely as an interpretive rule of statutory construction. This, arguably, was its effect in *Lim Teng Ee Joyce v Singapore Medical Council*,[109] where the court rejected the argument that a disciplinary committee ("DC") convened under the Medical Registration Act[110] ("MDA") has unfettered discretion to order costs against a medical practitioner. The DC had ordered that a doctor who had pled guilty to two charges and acquitted of a third charge pay for all the costs incidental to the disciplinary proceedings. This was despite the fact that much of the time spent in the three-day hearing was on the third charge, of which she was acquitted. The appellant appealed to the court of three judges in respect only to the costs order.

49 The court allowed the appeal in part, replacing the costs order with an order that the appellant bear only one-third of the costs and expenses incurred in relation to the entire proceedings.[111] The issue turned on the interpretation of the then s 45(4) of the MRA under which a DC may, in pursuance of its powers of punishment, order the registered medical practitioner to pay the SMC "such sums as it thinks fit in respect of costs and expenses of and incidental to any [inquiry]".

50 The court held that the statute does not confer unfettered discretion to the DC but that it must exercise its power relating to costs within the framework of the statutory powers to prescribe punishment to persons found guilty of professional wrong-doing or other misconduct. Invoking the *Chng* principle, the court thus concluded that it would be "inconsistent with principle" and "contrary to the notion of fairness" if a DC can punish a registered medical practitioner with having to pay the costs of the SMC if he is exonerated from the charges preferred against him.

51 As the court stated, "[t]here is no justification for punishing a person with having to pay costs if he is acquitted of the charge".[112] This is

109 [2005] 3 SLR(R) 709.
110 Cap 174, 2014 Rev Ed.
111 *Lim Teng Ee Joyce v Singapore Medical Council* [2005] 3 SLR(R) 709 at [28].
112 *Lim Teng Ee Joyce v Singapore Medical Council* [2005] 3 SLR(R) 709 at [15].

especially since it is an established rule on costs that it should always follow the event unless the circumstances of the case warrant some other order.[113] Here, the principle of legality is used to support a statutory interpretation in favour of limiting discretion. This could be further developed into a general interpretive rule.

VI. Conclusion

52 The deployment and development of the principle of legality resonates with the view that judges in Singapore understand the need to demarcate the outer limits of power. Asserting judicial power to review both executive and legislative powers to uphold legality and constitutionality is important from the perspective of judicial power and constitutional supremacy. It has been observed that a more assertive approach to reviewability, whereby judges find a greater number of issues and powers justiciable, has been linked to a stronger judicial commitment to ensuring democratic accountability, the rule of law, fundamental human rights as well as an embrace of ideas of constitutional supremacy.[114]

53 Nonetheless, as the discussion above shows, the principle of legality has yet to fully expand the scope and standard of review over executive discretion. Neither is there evidence that it has effectively bolstered judicial review of legislation.[115] This is not to say that it could not develop into robust constitutional principle. That it has constitutional status is affirmed judicially in several cases where it was invoked to reinforce judicial power and the supremacy of the constitution. For instance, in *Lim Meng Suang v Attorney-General*,[116] the High Court observed that "it is the Constitution, and not Parliament, that is supreme in our legal system" and that courts serve as "guardians who ensure that the rule of law and all that it entails is observed and prevails".[117] Even more robustly, the Court of Appeal stated in *Tan Seet*

113 *Lim Teng Ee Joyce v Singapore Medical Council* [2005] 3 SLR(R) 709 at [17].

114 See, *eg*, discussion in Dominic McGoldrick, "The Boundaries of Justiciability" (2010) 59 ICLQ 981 at 1015–1016.

115 The Singapore courts have the distinction of having never struck down legislation for being unconstitutional. The only time the High Court struck down a law was in *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR 943 and the Court of Appeal overturned that on appeal (*Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489). This is not meant to suggest that one court was more courageous than the other but that differing judicial philosophy towards constitutional law and the separation of powers could have influenced the respective court's approach to the legal question at hand. *Cf* Chan Sek Keong, "The Courts and the 'Rule of Law' in Singapore" [2012] Sing JLS 209 at 219.

116 [2013] 3 SLR 118.

117 *Lim Meng Suang v Attorney-General* [2013] 3 SLR 118 at [112].

Eng v Attorney-General[118] ("*Tan Seet Eng*") that one of the core ideas of the rule of law is that "the power of the State is vested in the various arms of government and that such power is subject to legal limits".[119] These pronouncements have to be understood against a constitutional culture that had till recently been more aligned with judicial deference to parliamentary sovereignty, rather than constitutional supremacy.[120]

54 There are of course inherent difficulties with founding constitutional and administrative justice on a principle that is ultimately premised upon the rule of law. The ambiguity and ambivalent content of the rule of law has been widely debated, with Jeremy Waldron arguing at some point that the term is essentially contested.[121] Nonetheless, its ambiguity can also be important in allowing incremental development of constitutional and administrative law. By invoking a rule of law principle, without infusing it with substantive norms of human rights or fundamental rights,[122] the courts speak to a shared foundational norm with the political branches. Beyond the baseline rejection of arbitrary power, the rule of law, and relatedly the principle of legality could be a useful conceptual receptacle to incrementally develop constitutional and administrative law in accordance with local conditions.[123]

55 Lastly, the importance of the principle of legality in upholding the doctrine of separation of powers within a supreme constitution is crucial as it reinforces judicial power. Legality not only demarcates judicial competence, but also counters any tendencies towards strong judicial deference. Indeed, as the Court of Appeal emphasised in *Tan Seet Eng*, where legality is at issue, "the question of deference to the

118 *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779.

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

120 See Jaclyn Ling-Chien Neo & Yvonne CL Lee, "Constitutional Supremacy: Still a Little Dicey?" in *Evolution of a Revolution: Forty Years of the Singapore Constitution* (Thio Li-ann & Kevin Y L Tan eds) (Routledge, 2008) at p 153.

121 Jeremy Waldron has even called it an "essentially contested" idea: Jeremy Waldron, "Is the Rule of Law an Essentially Contested Concept (in Florida)?" (2002) 21 *Law and Philosophy* 137.

122 The author is fully aware that the rule of law is frequently intertwined with human rights or fundamental rights but Singapore has tended to embrace a thinner conception of the rule of law. See, *eg*, Sundaresh Menon, "The Rule of Law: The Path to Exceptionalism" (2016) 28 SAcLJ 413 and K Shanmugam, "The Rule of Law in Singapore" [2012] Sing JLS 357; see also Li-ann Thio, "*Lex Rex* or *Rex Lex*? Competing Conceptions of the Rule of Law in Singapore" (2002–2003) 20 *UCLA Pacific Basin Law Journal* 1.

123 This is clear in the Malaysian case that could have inspired the passage in *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525. In that case, Chief Justice of Malaysia Raja Azlan Shah stated that an unfettered discretion is a "contradiction in terms" and that "[e]very legal power must have legal limits, otherwise there is dictatorship": *Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135.

Executive's discretion simply does not arise".[124] The court's emphasis on the co-equal status of the Judiciary is furthermore important when understood in light of Singapore's strong political culture. The principle of legality could be an important way for the Judiciary to negotiate and maintain a significant policy space[125] to ensure the availability and robustness of judicial review. The proposals suggested above are merely some non-exhaustive ways in which constitutional legality and supremacy, as well as robust notions of judicial power, could be reinforced in upholding the principle of legality.

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

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