

SUPREME COURT OF SINGAPORE

Media summary

Bernstein Lecture in Comparative Law, Duke University School of Law.

On 1 November 2018, the Honourable Chief Justice Sundaresh Menon delivered the Annual Bernstein Lecture in Comparative Law at the Duke University School of Law.

In his lecture, entitled “*Executive Power: Rethinking the Modalities of Control*”, the Chief Justice noted that all countries have the difficult task of striking an appropriate balance between affording governments the ability to act swiftly and decisively in the public interest and providing for adequate safeguards against governmental excess. He argued that there was no one model that was correct for all times and places, since how that balance was struck would depend greatly on the fears, hopes and aspirations of the designers of any given constitution (at [3]).

In the first part of his lecture, Chief Justice Menon provided a historical overview of the control of executive power as it had developed in the United States and Singapore to explain how each country had developed a different model of control in response to their own unique historical circumstances.

- a. The American system was deliberately designed to produce friction and conflict, for its premise was that it was only by the push and pull of opposing forces that power could be held in check. The Founding Fathers of the United States contemplated that this might produce gridlock, but accepted this as the price that had to be paid for what they saw as the greater danger of the accumulation of power (at [8] and [9]).
- b. The Singapore model grew out of the exigencies of Separation, and the prime directive was, and still is, the “continuance of good and orderly government”. As a small and resource-poor country, Singapore has survived, and even thrived, because we have succeeded in harnessing all the resources of the nation towards the goal of securing its well-being, and so conflicts between the branches were to be avoided wherever possible (at [13] and [14]).

However, Chief Justice Menon noted that this did not mean that the Singapore Constitution was unconcerned about the accumulation of power. Instead, it constrained its exercise in two main ways. The first is through a system of intra-branch controls; the second is through a system of “checks and balances”, most prominently, the mechanism of judicial review (at [18]).

In the second part of his lecture, Chief Justice Menon discussed intra-branch controls. He explained that the Singapore Constitution diffused power *within* the executive branch by distributing it to different offices, each of which enjoys a measure of autonomy from the Cabinet (at [19] and [20]).

- a. The first example he gave was that of the Attorney-General, who was constitutionally vested with full power to decide all matters concerning the institution, conduct, and termination of prosecutions. This differed from the United States, where federal prosecutors did not derive their power from an independent constitutional grant, and it

was an open question whether it would be illegal for the Presidency to interfere with the prosecutorial process (at [21], [23], [24] and [25]).

- b. The second was the Elected Presidency, which was granted powers to check the Government's management of two key strategic national assets, namely, the nation's accumulated financial reserves and the public service. He explained that the Elected Presidency was not meant to change Singapore's fundamental structure of parliamentary democracy, but to augment it by introducing a further mechanism of control that was tailored to Singapore's vulnerabilities (at [29], [33] and [35]).

Elaborating, Chief Justice Menon said that each of these offices represented a different modality of intra-branch control. The independent prosecutorial office of the Attorney-General illustrated the value of fragmenting power and withdrawing certain executive functions from political contestation. The Elected President illustrated how power might be shared between institutions within the branch so as to produce sufficient friction and supervision without engendering a sense of rivalry. From these examples, Chief Justice Menon suggested that there was a need to develop an expanded taxonomy of executive power, and that it was each polity to consider whether, and if so, which, executive functions should be devolved to autonomous offices (at [37] and [38]).

In the third part of his lecture, Chief Justice Menon discussed judicial review in Singapore, which he described as the "sharp edge that keeps government action within the limits of the law". He explained that the philosophy of judicial review in Singapore was informed by the "principle of legality", which provided that "all legal power has legal limits", and meant that the constitutional role of the courts was simply to declare what the law is, and not what it ought to be. He also explained that this meant that the courts had to respect the prerogatives of the other branches, as they are equal partners in the common project to promote efficient administration and good and proper governance (at [39], [41], and [43]).

Chief Justice Menon explained that there were several reasons for adopting a restrained approach to the exercise of judicial power. First, he explained that this was mandated by the rule of law and the Constitution. Second, he noted that the courts are not especially well placed to answer polycentric questions of policy, and that when courts do so, they effectively remove these questions from the realm of democratic decision, with all the advantages that it proffers. Third, he argued that judicial review is most effective when the Judiciary secures the respect of the other branches through honest, competent, and independent judgment that is respectful of the constitutional prerogatives of the other branches. In such a climate, the Executive will voluntarily review its policies and adjust its conduct in the light of the guidance given, even without the need for a formal challenge (at [50], [54], and [61]).

In closing, Chief Justice Menon reiterated the point that the Singapore model, like that of the American, was the unique product of its own historical circumstances. However, he stressed the importance of transcontinental constitutional dialogue as a way for the community of those bound to uphold the rule of law to stand together for the values of fairness, respect and diversity especially when faced with the noise of division, exclusion and suspicion (at [67]).