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**Headline: When the courts have to rule on government decisions**

## **When the courts have to rule on government decisions**



In 2016, the Court of Appeal ruled that the Government's detention of alleged international football match-fixing kingpin Dan Tan Seet Eng did not fall within the scope of the law. The author notes that the case signified that there were limits on the executive's power to detain without trial.

In a landmark decision last month, the full bench of the United Kingdom Supreme Court unanimously held that Prime Minister Boris Johnson's move to prorogue (or suspend) Parliament for five weeks prior to the UK's scheduled departure from the European Union was "unlawful, void and without legal effect".

The judgement has been praised for boosting democratic legitimacy in public decision-making by affirming the UK Parliament's right to hold the executive accountable for its decisions and actions. But it has also been criticised in some political quarters by critics who said that the courts were staging a "constitutional coup" and usurping the functions of the political branches of government.

A similar legal ruling on the executive's discretionary power was most recently handed down in Singapore in 2016 involving alleged international football match-fixing kingpin Tan Seet Eng, better known as Dan Tan.

That case showed that all legal power has legal limits, and that the constitutional role of the courts is to declare what the law is (and not what it ought to be).

Tan had been detained without trial under section 30 of the Criminal Law (Temporary Provisions) Act (CLTPA) for allegedly recruiting runners in Singapore, directing agents and runners from Singapore to assist in match-fixing activities as well as financing and directing match-fixing activities overseas.

Tan appealed to the Court of Appeal after an unsuccessful judicial review of his detention in the High Court.

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Both his and the UK case required the court to consider similar issues. The first was whether the issue before them was justiciable — that is, one that a court of law could properly

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consider and adjudicate on. Secondly, if the matter was justiciable, did the Government act unlawfully in doing what they did?

Generally, courts recognise areas of executive decision-making that are immune from judicial review (non-justiciable). They include matters of “high policy” such as the dissolution of Parliament, the conduct of foreign affairs, and issues of national security.

The judicial inclination tended towards deference to the executive when the decision being reviewed was policy-laden or security-based, areas where the executive was expressly delegated with such powers by Parliament and possessed the requisite competence.

However, this does not mean that such issues are entirely non-justiciable. Tan’s case required that Singapore courts avoid a strict categorisation of what is justiciable and what is not. The mere label of “high policy” or “political issue” was insufficient to constitute a bar to judicial review of the decision.

This constitutional principle can be traced to a seminal case in 1988 involving those who had been detained under the Internal Security Act for allegedly being part of what the Government called a Marxist plot aimed at overthrowing it.

Then Chief Justice Wee Chong Jin asserted that unfettered executive discretion was contrary to the rule of law and that it was justiciable and subject to an objective judicial review.

This principle was applied in Tan’s case.

Having determined that Tan’s case was reviewable, the court proceeded to consider the second question of whether the Government acted in accordance with the requirements of the law as spelt out in the CLTPA in detaining Tan.

The court found that the grounds provided by the executive in Tan’s detention order did not fall within the limits or scope of the CLTPA.

The detention order also did not show that Tan’s alleged criminal activities could affect public safety, peace and good order in Singapore.

As such, the Court of Appeal ordered the release of Tan.

Tan’s case signified that there are limits on the executive’s power to detain without trial. The court would examine whether the minister had properly invoked the power vested in him by Parliament, and if not, then the detention could not be upheld and the detainee would be released.

This requirement of stringent standards of procedural probity having to be adhered to in the executive’s decision-making process underscores the court’s recognition that public interest and order have to be balanced against the protection of individual liberty, guaranteed by the Singapore Constitution.

In both the Tan and the UK cases, the message from the courts was clear: Judicial deference notwithstanding, the judiciary will not shy away from limiting the boundaries of

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executive discretion where it is necessary to do so such as when a fundamental constitutional principle or fundamental liberties are at stake.

A claim of unfettered power will be looked upon with utmost judicial scrutiny.

After the judgement was handed down in Tan's case, the Ministry of Home Affairs unilaterally reviewed the detention orders of three other detainees and revoked them.

This response was commendable as it demonstrated the executive recognising the role and value of judicial review in the furtherance of rule of law.

As Chief Justice Sudaresh Menon noted extra-judicially: "The robustness of a nation's rule of law framework depends greatly on how the other branches view the judiciary and whether it in turn is able and willing to act honestly, competently and independently."

In turn, the courts have to respect the lawful prerogatives of the other branches. Although Tan was subsequently re-detained, he did not bring a further legal challenge to his detention. It suggests that the Government had complied with the law and exercised its power lawfully in the second detention order.

In 2018, the Government amended the CLPTA to narrow its scope and to indicate the list of offences under its ambit, including unlicensed moneylending, drug trafficking, kidnapping, and organised crime.

Arguably, this was a response to the Court of Appeal's decision but this amendment to the law does not affect judicial review as the principal means of ensuring that any government action under CLTPA is within the limits of the law.

Permitting unbridled discretion on the part of the executive will invariably result in derogation from the fundamental liberties guaranteed by the Constitution and the rule of law. This would not be aligned with the foundation of constitutional supremacy in Singapore's system of government.

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