Singapore Journal of Legal Studies
[1995] 509 – 557

WORKING OUT THE PRESIDENCY: THE RITES OF PASSAGE

Under Singapore's Westminster derived parliamentary government system, the President as the ceremonial head of state possessed very limited residual discretionary powers. The Constitution, incorporating British convention, requires the President to act in accordance with Cabinet advice. Come 1991, Singapore remained a dominant one party state with untrammeled power reposed in the Cabinet. By constitutional amendment, the presidency was transformed into an elective office vested with certain negatively couched discretionary powers to check the powerful parliamentary executive. This article examines the development of the institution and the major amendments which have taken place pertaining to the elected presidency since its inception. It assesses the extent to which the presidency has effectively "clipped the wings" of the government that created it. In particular, the first constitutional reference heard on March 17, 1995 under the newly created Article 100 tribunal is discussed.

I. Introduction: A Four Year Retrospect

THE introduction of the elected presidency in 1991[1] heralded a significant departure from the Westminster system[2] of constitutional government that had been operating in Singapore since Independence in August 1965. It represented a stark departure from the gentle evolutionary[3] development associated with Westminster influenced constitutions.

This innovative constitutional hybrid, which reflects the influence of presidentialism and parliamentarianism, re-configured the constitutional framework of powers with alacrity, without the matter going to a referendum. Critics[4] have commented on the unseemly haste with which the elected

1 The Elected President provisions were assented to on 18 January 1991 and came into force on 30 November 1991 *via* the Constitution (Amendment) Act No 5 of 1991, except for Art 5(2A).

2 For a description of the Westminster Model of Government, see SA de Smith, *The New Commonwealth and Its Constitutions,* Stevens & Sons (1964) at 77-102.

3 See the judgments of Lord Diplock as well as Viscount Dilhorne and Lord Fraser in *Hinds* v *The Queen* [1977] AC 195 at 216 and 235.

4 See Kevin YL Tan, "The Elected Presidency of Singapore: Constitution of the Republic of Singapore (Amendment) Act 1991", [1991] SJLS at 179-194. He argues that a possible reason for not holding a referendum was that it was by no means certain that, had the issue been put to a referendum, it would have been passed by the requisite two-thirds of the votes cast. This is because, as a rough gauge, in the 1988 General Elections prior to the elected

presidency was introduced via constitutional amendment, particularly since there had been talk of holding a referendum to elicit the people's endorsement of a new mode of governance. It was further evident that the framers of the elected presidency placed great weight on the importance of this institution by formulating a procedure[5] more onerous[6] than that governing general[7] constitutional amendments to regulate amendments to the presidency. Those constitutional provisions dealing with the presidency were hence intended to be very 'rigid', second only to the most rigourous procedure governing the sovereignty of Singapore in Part III of the Constitution which lays down a direct referendum procedure.

What is clear is that, in its pristine form or original condition, the framers of the elected presidency in 1991 did not conceive of the new constitutional creation as a completed entity. It would be fair to say that it was considered a work-in-progress; still under construction. The following statement made in Parliament by Prime Minister Goh Chok Tong seems indicative of the prevailing belief in 1991 that the elected presidency in its original form was substantially completed, with only minor technical and procedural alterations being needed to fine-tune the system:

> We have taken a long time and taken our time to bring the Bill to this stage, deliberately ... Because it will change our familiar system of government, we have moved step by step to take this Bill through Parliament...
>
> ...the changes we are making to our Constitution are novel arrangements, unparalleled elsewhere in the world. They are unique ... Although many minds have worked out the concepts and later translated them into legal provisions, it will not be possible to anticipate every problem at this stage. No matter how thorough we have been, there will be unforeseen problems in actual implementation

presidency coming into being, the ruling PAP government had won only 61% of the votes, a figure falling below the 66% of the votes required to pass a referendum.

5 Art 5(2A) requires that changes to the constitutional provisions it protects be supported by a two thirds parliamentary majority vote and receive two-thirds support at a referendum. The latter requirement can be waived by the President acting in his personal discretion. This provision has yet to be brought into force.

6 It is interesting to note that the desire to entrench the elected presidency provisions even though they are untested seems rather odd in the light of the fact that, despite the recommendations of the 1966 Wee Chong Jin Constitutional Commission, crucial parts of the constitution such as the provisions relating to the Judiciary and the Legislature are still not entrenched.

7 Art 5(2) requires that a constitutional amendment receive a two-thirds parliamentary majority support.

> The Select Committee has quite rightly said that we should give ourselves a grace period for making amendments in the light of actual implementation. Such amendments ought not to be subject to the strict provisions of a referendum set out in new Article 5(2A). Hence new Article 5(2A) should be brought into operation only after this period of adjustments and refinements ... ... But the Select Committee was probably too optimistic in believing that a period of two years would be enough to iron out all the problems ... I suggest we give ourselves at least four years for adjustments, modifications and refinements to be made.[8]

It is to be noted from the outset that this grace period was to allow for the kinks in the system, which would surface in the light of actual implementation, to be ironed out. All amendments to the presidency would be governed by Article 5(2) requiring a two-thirds parliamentary majority, rather than to the more onerous Article 5(2A) procedure, presently not in effect. This brave new provision was not immediately entrenched as the government still wanted room to manouevre in modifying elected presidency provisions. As expressed by the Attorney General:

> The changes to the Constitution were novel. The Government did not know how they would work out or even whether they would work at all ... If adjustments, modifications or refinements to the system were needed to make it work, the Government had the necessary Parliamentary majority to effect them. Premature entrenchment would deprive the Government of the opportunity to test the efficacy of the system and avoid the prospect of a referendum which is bound to be costly, if not divisive at the same time.[9]

From PM Goh's parliamentary speech, clearly, changing the substantive extent of the powers to be conferred on the presidency was not contemplated; instead, the purpose of the grace period, expressed in terms of adjusting, modifying and refining do not contemplate a major overhaul but minor changes to be made to what is already in place. Onerous amendment procedures are not painstakingly framed for half-baked constitutional innovations since such stringent procedure reflect the importance of the provisions they protect.

There is no set time limit within which Article 5(2A) must be brought

[8] Third Reading of the *Constitution of the Republic of Singapore (Amendment No 3) Bill of 1991, Singapore Parliamentary Debates, Official Record,* 3 January 1991, cols 718 and 722.

[9] *Case for the Government*, Constitutional reference No 1 of 1995 at p 14 B-G [on file with author].

into force. Indeed, the need for the first constitutional reference arose because of the "time lag" effect caused by different provisions of the constitution being brought into operation on different dates.

Over the past four years, several amendments have been made to modify presidential powers, all with presidential assent save the subject matter heard under the first constitutional reference. Difficulties have been encountered in working out this novel institution as, to put it mildly, the elected presidency is a complex piece of machinery.

From its inception, it was open to speculation how this institution might develop in our hybrid system of government; a venture into virgin terrain.[10] Had the President the gall to be a de Gaulle, could he assume extra-textual powers, not explicitly conferred by the Constitution, but harnessed by implication?[11] Was there a nebulous gray area concerning the scope and extent of presidential powers? Could the President carve out an activist, novel role for himself, unfettered by the constraints of precedent?[12] It was clear that a gradual, incremental approach would be taken in seeing how the system would work in practice. As stated by President Ong, the first President to go to the ballot, at his swearing-in on 1 September, 1993:

> I look forward to developing a sound working relationship with the Prime Minister and his Government. The purpose of the elected President is to institute judicious checks and balances in our political system, not to create unworkable conflict and gridlock. As we accumulate experience with the new system, we can refine the arrangements and define through practice and precedent, how the elected President will function.[13]

A year later, Deputy Prime Minister Lee acknowledged:

> It is impossible, with a complex and novel piece of legislation like this, to foresee all consequences and implications of the provisions upfront. The three years we have operated the new provisions has

[10] See *Straits Times,* 26 August 1994 at 29, "Elected Presidency-down the road into the unknown".

[11] *Eg*, does the elected president have a free rein in choosing which functions to attend independent of consulting the Prime Minister? Could the President make political speeches within and without Parliament?

[12] *Eg*, springboards for initiatory powers may be found in various constitutional articles: Art 22F which entitles the President to be provided with certain information on his request, Art 62 allows the President to address Parliament and Art 35(7) whereby the President may assign legal duties to the Attorney-General. Furthermore, it may be argued that owing to the innovative nature of the amended presidency, conventions pertaining to the president's exercise of powers may be freshly written on a clean slate.

[13] *Straits Times,* 2 September 1993, at 1, "How I will do my job: President Ong".

> enabled us to understand better how the mechanism operates, where the loopholes and ambiguities are, what is practicable and what needs to be modified in the light of experience. We have discovered that the Elected President mechanism is even more complex than we originally anticipated. It is extremely difficult to balance the Government's need for operationally flexibility with the President's duty to exercise effective oversight. As we operate the mechanism day to day, we are still discovering implications of the provisions which we had not realised.[14]

Certain distinct operational principles have emerged fairly clearly in the four year period since the elected presidency was created, such as the essentially reactive[15] nature of the institution. The passage of time has been a learning experience. However, the complexity of the institution has engendered some unforeseen ramifications, precipitating the creation of the Article 100 tribunal authorised to consider constitutional questions.

This article will firstly examine the noteworthy amendments to presidential powers in the past four years, particularly those pertaining to provisions designed to enhance the president's accountability as well as provisions re-drawing the ambit of presidential discretion. It will then examine the constitutional reference proper. Finally, it will conclude with observations on what we may expect, now that the four-year 'fine-tuning' time period Prime Minister Goh set is coming to an end in 1995.

II. Tailor-Making the Constitution, Stitching the Parliamentary Gap

From my experience, constitutions have to be custom-made, tailored to suit the peculiarities of the person wearing the suit. Perhaps, like shoes, the older they are, the better they fit. Stretch them, soften them, re-sole them, repair them. They are always better than a brand new pair of shoes.

Lee Kuan Yew[16]

[14] *Infra,* note 15, col 421.

[15] *Eg*, certain members of Parliament had suggested that the President should be given the power to refer a dispute over an issue of constitutional interpretation to the newly created tribunal of the Supreme Court as an exercise of personal discretion. The Deputy Prime Minister disagreed with this, stating that this would be tantamount to granting the institution powers of initiation which would not accord with the intention of the framers of the institution that it be a reactive institution. *Singapore Parliamentary Debates, Official Record,* 25 August 1994, col 454-455.

[16] *Singapore Parliamentary Debates, Official Records*, 24 July 1984, col 1735.

It would be appropriate, at this preliminary stage, to briefly sketch out the background behind which the elected presidency was introduced, its *raison d'être* and the underlying philosophy of government so embodied, though this subject has been extensively dealt with elsewhere.[17]

The prime reason the elected presidency was introduced was to check the untrammeled powers of the parliamentary executive, as stated in the first white paper[18] of 1988. Initially, the President was conceived only as a watchdog over financial reserves though this watchdog role was later extended to include a role in preserving civil liberties.[19] The parliamentary executive had acquired untrammeled power primarily because no significant parliamentary opposition exists in Singapore today. A parliamentary minority, charged with scrutinising and censuring the acts of the policy-making parliamentary majority is the predicate upon which the Westminster system of parliamentary government effectively functions. A loyal parliamentary opposition provides the electorate with the choice to elect an alternative government at the next elections, making political turnover a possibility: This is the central check the Westminster system offers in its' contribution to constitutionalism and limited government. In its absence, a parliamentary "gap"[20] has arisen.

The elected presidency may be seen as the latest in a long line of constitutional reforms intended to better effectuate representative democracy *a la Singapour.* The essence of the latter is that the policy-makers be accountable to the people whose lives are directly affected by these policies. Most of the reforms since the dawn of the 'Constitutional renaissance' in 1984[21] represent, in some measure, an attempt to fill the

[17] See Thio Li-ann, "The Elected President and Legal Control of Government: Quis custodiet ipsos custodes" *in Managing Political Change: The Elected Presidency of Singapore,* Tan and Lam eds. [forthcoming]

[18] *Constitutional Amendments to Safeguard Financial Assets and the Integrity of the Public Service* (Cmd 10 of 1988), at paras 5 to 10.

[19] See Art 151(4) which deals with the presidential role over preventive detention orders and Art 22I which is concerned with the issuing of restraining orders under the Maintenance of Religious Harmony Act (Cap 167A).

[20] See Thio Li-ann, "Choosing Representatives: Singapore does it her Way", paper delivered at the Second LAWASIA Conference in Nepal, December 1994, to be published by the Centre for Comparative Constitutional Studies, University of Melbourne (Saunders & Hassall eds).

[21] It is ironical, to say the least, that constitutional reform proceeded apace after 1979 when the procedure for amending the Constitution was restored to the formally 'rigid' requirements of a two-thirds parliamentary majority. Between 1968-1979, the amendment procedure had itself been amended to require merely a simple majority to pass a constitutional amendment bill, like any other ordinary bill. In 1979, then Law Minister EW Barker had stated that this restoration was expedient since "*all consequential amendments that have been necessitated by our constitutional advancement have now been enacted."* See *Singapore Parliamentary*

parliamentary "gap".[22]

These were primarily directed at re-structuring Parliament through the institutionalisation of pluralism, entailing a reconceptualisation of Parliament's functions.[23] Plural voices in the form of the top four Loser Opposition Candidates, a maximum of six Distinguished Citizens and presently, fifteen Minority Representatives have been introduced into Parliament through the creation of the Non Constituency Member of Parliament in 1984, the Group Representative Constituency in 1988 and the Nominated Member of Parliament scheme in 1991. This form of pluralism is naturally limited in nature.[24] It at least represents a formal attempt to render power-holders accountable, to dispel the impression that decision-making is top-down and unilateral, flowing in a manner aloof from the concerns of Everyman. By effecting an internal re-allocation of powers within the executive branch of government,[25] the elected presidency represented an attempt to render the parliamentary executive accountable to another locus of political power.

Debates, Official Record, 20 March 1979, vol 39 (1979-1980), col 295. These had included the creation of the Presidential Council of Minority Rights in 1969, entrenchment of Singapore's sovereignty (1972) *etc*. The proliferation of new constitutional creations post 1979 certainly is discordant *vis à vis* Barker's expressed sentiments. An incidental point to note is that since the ruling People's Action Party (PAP) has consistently been returned to power with a floor of 60% (until recent years, in excess of 66%) of the national vote post Independence, garnering the support of a two-thirds parliamentary majority to amend the Constitution has been a mere formality.

22 Protagonists of the Singapore school of thought who advocate "growth through Confucianism" or "economics first" do not perceive this "gap" as an evil. Conversely, they assert that the exaltation of communitarian interests, as defined by the governors, reflects the culture of Singapore's multi-racial Asian society. Culturally relativistic arguments are employed to dismiss the 'Western' preoccupation with human rights and liberal democracy and the contentiousness the latter entails. Through this cultural lens, an opposition is viewed not as a loyal entity complementing the processes of constitutional government. Instead, it is perceived negatively as an impediment to economic development and social stability. See *eg*, Eric Jones, "Asia's Fate: A Response to the Singapore School ", *The National Interest* (Spring 1994) at 18 and James Walsh, "Asia's Different Drum", *Time*, 14 June 1993, 16.

23 See Thio Li-ann, "The Post Colonial Evolution of the Singapore Legislature: A Case Study" in [1993] SJLS 80.

24 For a comprehensive discussion of these constitutional institutions, see Thio Li-ann, *ibid,* note 23 and *supra,* note 20.

25 Art 23(1) of the Constitution of the Republic of Singapore provides that "the executive authority of Singapore shall be vested in the President and exercisable subject to the provisions of this Constitution by him or by the Cabinet or any Minister authorised by the Cabinet". Art 21(1) lays down the general principle that the President is to act in accordance with the advice of Cabinet in performing his functions except where the Constitution provides otherwise. With the introduction of the elected presidency, the scope of discretionary powers has been expanded: see the list of reactionary powers as provided in Art 21(2)(*a*)-(*i*).

Clearly, the philosophy underlying the elected presidency reflects the cynical and realistic Madisonian distrust of human nature which may be corrupted by power. Madison[26] brilliantly captured the conundrum inhering in what constitutional lawyers refer to as the "problem of power": this is the apparently contradictory need to simultaneously empower and restrain the government. Sufficient empowerment is needed to facilitate the effective performance of the tasks of government, but this must be tempered by the conscious need to restrain government to attenuate the impact of the possible abuse of power. The elected president was introduced as one such restraint on the central power-holders, the very remedy needed to solve the problem of ensuring that no government will squander Singapore's hard-earned savings.[27]

During the Second Reading of the elected presidency bill, Prime Minister Goh in discussing the voluntary self-limitation of government power said:

> Bear in mind that in introducing this Bill, the present Government is in fact clipping its own wings ... I will be the first Prime Minister to be subject to these new checks and safeguards. And I am the one introducing these safeguards ... So long as any government abides by the principles of financial prudence and meritocracy in governing Singapore, this Bill will not have any real effect on it.
>
> The possibility of a weak or bad government ruining Singapore for good is not a theoretical one ... Let us, while we have assets and reserves to safeguard, institutionalise a system of checks and balances, even if it means curtailing our own powers.[28]

However, seen in another way, the elected president could be a manifestation of the principle of trusting one's rulers, by the entrusting of significant powers in the hand of one man. It must not be forgotten that the stringent qualifications for presidential candidates[29] was justified on the basis of the need to have a paragon of virtue and wisdom occupying the presidency and wielding its important custodial powers. This accords with the national ideology or system of [heavily Confucianist] common values, which the present government desires to inculcate in the citizenry. This finds succinct expression in the Shared Values White Paper which was tabled in 1991:

[26] James Madison, *The Federalist No 51* in *The Federalist Papers*, Bantam Classics (1982), Garry Wills ed, at 261-265.

[27] For a critique of the effectiveness of the elected presidency as an institutional check, see Thio Li-ann, *supra,* note 17.

[28] *Singapore Parliamentary Debates, Official Records*, 4 October 1990, cols 462-463 and 467.

[29] Art 19.

> Many Confucian ideals are relevant to Singapore. For example, the importance of human relationships and of placing society above self are key ideas in the Shared Values. The concept of a government by honourable men (*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.[30]

Judicial pronouncements have affirmed that Singapore's Constitution is based on the doctrine of separation of powers, as modified to accommodate the Westminster model of parliamentary government.[31] Predicated upon a Madisonian distrust of human nature, this prescription advocates the polarisation of power in disparate hands to pre-empt or to mitigate possible abuse. This constitutional principle is at variance with the Confucian notion of trusting a government of honourable men. There is no guarantee that men of integrity will always hold the reins of power.

The upshot is that conflicting strains of both modified Confucian and Madisonian thought may be discerned in the cauldron of philosophies informing the crafting of Singapore's constitutional institutions. This is apt to confuse and to create the impression that constitutional reform and practice has been piecemeal rather than pursuant to principle. Fruitful inquiry may be directed towards assessing the extent to which constitutionalism is compatible with Confucianism, particularly of the Singapore variety, since much of constitutional theory rests on distrusting selfish human nature and the need to craft institutions and procedures to contain possible abuses of power.

We should examine the post-inception amendments to the elected presidency from the perspective of the degree to which the president's hand is strengthened or weakened *vis à vis* the parliamentary executive. In so doing, we may ascertain whether the Madisonian or Confucian strain of thought is dominant in Singapore's latest constitutional experiment.

[30] Para 41, Shared Values White Paper (Cmd 1 of 1991). See also Yash Ghai, "Human Rights in Asia", (1993) 23 HKLJ No 3, 342 at 349 to 351.

[31] See Chan Sek Keong J (as he was then) in *Cheong Seok Leng* v *Public Prosecutor* [1988] 2 MLJ 481 at 487F. See also the judgment of Lord Diplock in *Hinds* v *The Queen* [1977] AC 195 where he asserts that the Westminster constitutions were "drafted by persons nurtured in the tradition of that branch of the common law of England that is concerned with public law and familiar in particular with the basic concept of separation of legislative, executive and judicial power as it had been developed in the unwritten constitution of the United Kingdom."

III. Guarding the Guardian: Ensuring Presidential Accountability

The present system works simply because you have got a group of leaders who are absolutely honest and dedicated. But you cannot say this will always be so in the future. Therefore we have to have checks and balances. The Constitution has to be changed to establish some checks.

S Rajaratnam[32]

The scope of the President's "financial" veto extends only to proposed budgets or expenditures which seek to draw on reserves accumulated by the previous government. In the case of statutory boards, it extends to those reserves accumulated by that statutory board prior to the current term of office of the Government. If a government or statutory board want to draw on the reserves, this requires presidential assent.

If the President does not disapprove of a proposed budget which does draw on the nation's reserves, the constitution imposes no duty on him to state his reason for approving such a budget. This creates the unfortunate possibility that a corrupt President could collude with a spendthrift government to deplete the nation's coffers.

To enhance the accountability of the President for decisions undertaken pursuant to his fiscal guardianship, the Constitution was amended[33] to introduce three new articles[34] requiring the President to give reasons justifying his implicit approval of the proposed transactions of a statutory board, the budgets of the relevant government companies and Supply Bills which would draw on reserves.

If the President does not approve the relevant budgets or transactions, this could potentially throw a spanner in the works by bringing the machinery of government to a standstill. This contingency has been provided for by a pragmatic measure. Article 148A(2) provides that where the President withholds his assent to a Supply Bill, the expenditure authorised for any service or purpose for that financial year shall not exceed the total amount appropriated for that service or purpose in the preceding financial year. Life goes on without interruption, pre-empting any sudden withdrawal of essential services provided for in the previous year's budget.

The amendment requiring the President to publish his reasons for not invoking his discretionary veto powers is useful in two ways: first, it renders

[32] Cited in Raj Vasil, *Governing Singapore,* Mandarin Paperbacks (1992) at 218.
[33] Republic of the Constitution of Singapore Amendment (No 17 of 1994) 1994.
[34] Art 22B(7), Art 22D(6) and Art 148A.

the President accountable through the publication of his decision in the *Gazette*, which would serve as evidence of an actual exercise of discretion. It demonstrates that the President has actually directed his mind to the matter. Secondly, it provides the electorate the opportunity to tent the President's given reasoning to the quick. This gives the electorate a base from which to assess the President's performance in discharging his duties and will inform the voter's choice come the next presidential elections. In the long term, it may help to dispel any misgivings[35] concerning the ability of the presidency to be an institution independent of a powerful Cabinet government.

IV. Article 151A and Defence Spending: Shortening the Presidential Arm

When the decision is up before you – and on my desk I have a motto which says 'The buck stops here' – the decision has to be made.

Harry S Truman, former US President[36]

The original impetus for the elected presidency was to establish an additional safeguard over Singapore's financial reserves and to minimise the risk of foolish depletion. As the people's elected representatives, the Prime Minister and his cabinet are rightly entrusted with the lion's share of decision-making power on how to spend the reserves: they hold the 'first key' to the vault containing the nation's wealth. Giving the President the 'second key' to this vault fortifies the protection of this wealth by providing some degree of supervisory check over reserve expenditure. The President's direct election[37] to the highest office in the land confers upon him the moral authority and

[35] Such misgivings might stem from the fact that owing to the very stringent set of pre-selection criteria found in Art 19(2) of the Singapore Constitution, the pool of people eligible for presidential candidature is necessarily rather small (very roughly estimated between 200-400 Singaporeans). The criteria is also such that the small pool of possible candidates is slanted towards those with a pro-establishment perspective, *eg,* former Cabinet Ministers, Chief Justice, Speaker, Attorney General and senior civil servants. Not only must the President be independent in fact, he must also be perceived to be such for the sake of the long term viability of the institution itself. There might be some difficulty in this perception at present since the present President was the former second Deputy Prime Minister who resigned from the latter post in order to qualify for the former. See Kevin Tan and Li-ann Thio's country report on Singapore found in the *Asia-Pacific Constitutional Yearbook 1993,* Saunders and Hassall eds, 191 at 194-200, Centre for Comparative Constitutional Studies, University of Melbourne (1995).

[36] Harry S Truman, Speech at National War College, 19 December 1952, quoted in *The Oxford Dictionary of Modern Quotations*, Tony Augarde ed, Oxford University Press (1991).

[37] Art 17(2), Republic of Singapore Constitution.

legitimacy he needs, should he oppose cabinet expenditure policy.

To avoid the spectre of gridlock, Article 148D is a counter-balancing provision. It provides that where the President withholds his assent to any Supply Bill contrary to the recommendation of the Council of Presidential Advisors,[38] Parliament may by a two-thirds resolution overrule the decision of the President. In a Parliament where the ruling government currently holds 77 of the 81 elected parliamentary seats, this requirement should not pose much of an obstacle. Once obtained, the President's hands are tied in regard to this matter.

However, a recent constitutional amendment[39] withdrew defence and security spending from the President's purview, thereby reducing the President's supervisory empire.

This amendment partially amputates as opposed to merely shackles the President's arms over those fiscal matters pertaining to defence and security. The new Article 151A reads:

> 151A(1) Articles 22B(7), 22D(6), 148G(2) and (3) and 148H shall not apply to any defence and security measure
>
> (2) For the purposes of clause (1), a defence and security measure means any liability or proposed transaction which the Prime Minister and the Minister responsible for defence, on the recommendations of the Permanent Secretary to the Minister of Defence and the Chief of Defence Force, certify to be necessary for the defence and security of Singapore, and any certificate under the hands of the Prime Minister and the Minister responsible for defence shall be conclusive evidence of the matters specified herein.

The first three clauses referred to in Article 151A(1) relate to the power

[38] It is to be noted that Art 21(3) of the Singapore Constitution imposes a mandatory constitutional duty on the President, in the exercise of certain discretionary powers including the withholding of assent to Supply Bills, to consult the Council of Presidential Advisers (see Part VA for the composition, mode of appointment to and functions of this Council). Any counsel that this Council may proffer is not binding but does play a significant role where the President departs from it in certain instances, *viz,* it is the condition precedent for the initiation of the parliamentary override mechanism in Art 148D.

[39] Constitution of the Republic of Singapore Amendment (No 17 of 1994) Act which introduced the new Art 151A. This amendment of course entailed a curtailment of presidential powers, potentially offending Art 22H of the Constitution which empowers the President to withhold granting his assent to "curtailing bills". However, no such issue arose because President Ong gave his assent to this particular amendment and clearly, the fact that he assented to this amendment does not mean he does not have the power to veto it. The first constitutional reference arose in relation to the question whether Art 22H could be amended without presidential consent.

of the President to disapprove the proposed transactions of statutory boards, certain government companies and any proposed transaction by the Government itself which is likely to draw on the reserves of the Government which were not accumulated by the Government during its current term of office. While the President will still be informed of these transactions, there is precious little that he can do since his veto power has been curtailed. Furthermore, since Article 148H[40] is not applicable to defence and spending measures, even the relatively weaker check of publication and publicity[41] has been banished to the constitutional graveyard. The watchdog has been de-fanged even before it uttered a bark, let alone assayed a bite. The buck, in effect, would no longer stop here.

The *raison d'être* for the elected presidency was to bifurcate the executive arm of government by conferring negative discretionary powers upon the head of state to check the head of government and his cabinet in matters pertaining to the national reserves. By creating this exception to the President's fiscal custodianship, through the qualitative differentiation of spending purposes, Parliament is effectively backtracking on principle and diluting the separation of powers prescription. Indeed, this whittling down of the President's powers was acknowledged during the Second Reading of the Constitution of the Republic of Singapore (Amendment No 2) Bill on 25 August 1994, when the Deputy Prime Minister BG Lee said:

> As this is a significant deviation from the principle of having two keys, we have incorporated a safeguard.[42]

The question naturally arising is: When the presidential veto is extinguished in this instance, how easily might an irresponsible government of fiscal wastrels circumvent the institutional check over its powers which the elected presidency was designed to provide?

Should such an unfortunate scenario arise, the government's remedy for

[40] Art 148H reads: "Where the President considers that certain liabilities of the Government, *though not requiring his approval,* are likely to draw on the reserves of the Government which were not accumulated by the Government during its current term of office, he shall state his opinion in writing to the Prime Minister and shall cause his opinion to be published in the Gazette." (italics mine).

[41] It was pointed out in parliamentary debate that if the need to preserve the secrecy of such transactions were compelling, this could be accomplished by less drastic means than by chopping off the president's veto in it's entirety. Professor Woon had argued that this could be effected by the president's retention of his veto power but suspension of his constitutional duty to give reasons or to introduce a parliamentary override mechanism akin to that in Art 148D pertaining to Supply Bills, operating with Parliament acting in camera. *Supra,* note 15, col 437-438.

[42] *Supra*, note 15, col 424.

this gap was to introduce substitute safeguards the efficacy of which is open to question. A Bill concerning expenditure on defence and security measure must be certified as being "necessary for the defence and security of Singapore". Article 151A provides that the latter decision is not to fall within the sole prerogative of the Prime Minister and the relevant Minister. Before both these parties may certify any Bill as such, the recommendations of the Permanent Secretary to the Ministry of Defence and the Chief of Defence Force[43] are required.

This reaffirms the need to check the powers of the parliamentary executive by replacing the popularly elected president's veto with the recommendations of two non-political appointees: a 'civil servant filter'. Presumably, the logic of this is that these two civil servants will have the requisite expertise in this sensitive field to make wise recommendations.

One obvious reason for introducing this amendment was the desire to avoid potential future gridlock or conflict over expenditure on sensitive, security-related measures:

> We cannot take the risk of a disagreement between the Prime Minister and the President over whether some spending is necessary for defence and security.[44]

Despite the stringency of the constitutional provisions[45] pre-qualifying one for presidential candidature, it now appears too risky to trust the President in this matter. This is in spite of the fact that these stringent provisions were designed to guarantee "exacting standards of competence, experience and rectitude of Presidential candidates".[46] The Prime Minister himself stated during the Third Reading of the Constitution of the Republic of Singapore (Amendment No 3 Bill):

> The Elected Presidency's responsibility is as critical as that of the Prime Minister's. He has to ensure that Singapore does not fall apart through a drop in the high standard of governing. This is not an easy job. He has to keep an eye on the Government in the two key areas entrusted to him, and if he disagrees with the government, to withhold consent to specific proposals of the Prime Minister within these areas (fiscal

[43] The Chief of Defence Force's appointment is subject to presidential concurrence while Permanent Secretaries are appointed by the President acting on the advice of the Prime Minister, from a list of names submitted by the Public Service Commission.

[44] *Supra,* note 15, col 424.

[45] See Art 19 of the Singapore Constitution. See also Tan & Thio, *supra,* note 28, particularly the section on the "Head of State".

[46] Prime Minister Goh, *supra,* note 8, col 718.

> reserves and key civil service appointments). This means he must be at least as experienced and wise as the Prime Minister, if not, more so, and have the moral stature to say 'no' to the Government.[47]

The justification for withdrawing the need for the President's concurrence over transactions pertaining to spending for defence and security purposes was based on the asserted qualitative difference of such transactions *vis à vis:*

> giving handouts to the population or subsidising social services, which were the dangers the Elected President mechanism was designed to protect against. The Prime Minister and Cabinet are ultimately responsible for Singapore's defence and security, not the President.[48]

There is, of course, nothing to preclude the two civil servants from withholding their recommendations, in which case the same spanner would be thrown into the works of government machinery. But can two civil servants, unelected and unaccountable to no one beyond their political masters, render independent judgment? The Elected President, having his own electoral base and thereby the moral stature[49] to stand up against the government, would be in a far stronger position to check the government. Great trust is invested in the person who will wield the powers of this office.

It is to be noted that one of the criteria the Presidential Elections Committee is bound to apply is to ensure an eligible presidential candidates be a person of "integrity, good character and reputation".[50] As stated by Nominated Member of Parliament Walter Woon during the Second Reading debates concerning the Article 151A amendment:

> A person who has reached the office of the Elected President has no more desire to go higher because he has reached the highest. The Chief of Defence Force and the Permanent Secretary still can be offered inducements. They may be ambitious people. The Elected President has constitutional protection against being sued, constitutional protec-

47 *Ibid,* col 718-719.

48 *Supra,* note 15, col 423-423.

49 To ensure that the President is perceived to be independent of the parliamentary executive, it is interesting to note that the Oath of Office of President found in the First Schedule of the Constitution requires the President to swear to discharge his duties "without regard to any previous affiliation with any political party". Strangely, and rather unfortunately, this statement is not present in the oath of the Person Exercising Functions of Office of President (Chairman of the Council of Presidential Advisers/Speaker of Parliament). This is a regrettable omission.

50 Art 19(2)(*e*) of the Republic of Singapore Constitution.

> tion against having his Civil List cut. The Chief of Defence Force and the Permanent Secretary have to live with the Government, even if they are inclined to stand up to the Prime Minister.[51]

Furthermore, the term, "defence and security measure" is nebulous and lends itself to broad construction, subject only to the conclusive definition of the Prime Minister and Minister for Defence, with the recommendation of the two non-political appointees discussed above. No other voices need be heeded, including, presumably, those of scrutinizing parliamentarians, since power is concentrated in the hands of a few people who do not even have to account for their decisions to Parliament. Even parliamentary oversight seems to be banished from the scene.[52] As inimitably expressed by Professor Woon:

> An irresponsible, profligate government intent on getting its way might, by threats or inducements or outright bribery, get the recommendation from the Chief of Defence Force and Permanent Secretary, and nobody can challenge that. Since the determination is conclusive, imagine what an irresponsible Prime Minister could do! He could circumvent all the safeguards by certifying any transaction as necessary for national security, and national security being such a wide thing that it would be possible to fit any sort of handout within that rubric if you are intelligent enough. All you need is a smart and crooked lawyer to help you to do this. And it should be possible, especially when nobody can challenge it ... ... There is no point in having two keys to a door if you leave the door unlocked. And this is what I am afraid that Article 151A might do.[53]

In this manner, vote-buying social subsidies masquerading as defence

[51] *Supra,* note 15, col 435-436.

[52] Mr Low Thia Khiang in parliamentary debates had argued that the Bill introducing Art 151A set an unfortunate precedent: the Government had utilised the method of amending the Constitution to arrogate absolute power in certain areas, excluding even parliamentary supervision over the Government's expenditure on national defence and security. Besides leaving an immediate accountability gap in this area, this method could be utilised again to further concentrate power in the hands of Government, contrary to the notion of the Rule of Law and limited government. He gave the example of a future Bill providing that in the interests of national solidarity and security, the Government could arrest those deemed a threat to national solidarity, provided that the Prime Minister and Minister for Home Affairs agree and provide a certificate to that effect: Pandora's Box would be open, releasing disembodied spirits hungry for more power. *Supra,* note 15, 443-444.

[53] *Ibid,* col 436.

[54] *Eg*, Mr Low Thia Kiang , a Worker's Party MP, suggested two examples of how broadly matters pertaining to "defence and spending" might be interpreted: firstly, is the purchase

and spending measure might glide past the loophole[54] left gaping by the removal of the presidential veto. The *raison d'être* of having a fiscal guardian would thus be severely undermined as fiscal management in this regard would revert back to effective cabinet control. This could be disastrous should Providence decree that Singapore suffer a future government of incompetents and wastrels.

It should be noted that the President still has a say in the overall budget although he cannot object to a specific transaction. It was argued by the Deputy Prime Minister that should the elected Executive decide to go to war, they must have the wherewithal to execute that decision, *eg,* to purchase war weaponry. Furthermore, to deal with possible abuse, besides the need for the recommendation of the Chief of Defence Force and the Permanent Secretary to push a defence and spending bill through, he stated that there were internal checks and balances within Mindef, which operates the defence budget. Furthermore, there were external auditors who "go in and vet Mindef's spending and make sure Mindef does not become a camouflaged Ministry for Community Development."[55] There are always inherent limitations in internal checks though it must be stated that in the business of government, there is no perfect trade-off between the need for operational flexibility and adequate anti-power abuse safeguards, since "fallible human digits"[56] are involved.

Although the removal of the veto represents the Government's desire to loosen self-imposed bonds, the desire to appear bonded, however lax the knots, is reflected by the introduction of the civil servant recommendation requirement. Voluntarily chaining oneself while keeping the key to the chain in one's pockets has little to commend itself. During the Second Reading of the elected presidency bill, then Deputy Prime Minister Goh stated that in introducing this bill, "the present government is in fact clipping its own wings."[57] Reminiscent of the head-growing ability of the Hydra,[58] Nominated Member of Parliament Kanwaljit Soin aptly noted that Article 151A represented an attempt to "add on some feathers".[59]

and sale of arms included in the so-called "proposed transaction"? Secondly, if the Government allows a certain country to set up a military base or to install nuclear weapons in Singapore, will this be included in the so-called "transaction or liability" in this new Article? *Supra*, note 15, col 442.

55 *Supra*, note 15, col 452.

56 *Ibid,* col 453.

57 *Singapore Parliamentary Debates, Official Records,* 4 October 1990, cols 462-463.

58 In Greek mythology, the Hydra of Lerna was a many-headed serpent reared by the goddess Juno to menace Hercules who was tasked with destroying it as his second labour. Each time he cut off one of its heads, two more grew. See Stuart Gordon, *The Encyclopedia of Myths and Legends*, Headline (1993) at 232-233.

59 *Supra,* note 15, col 444.

V. The First Constitutional Reference: The Government Giveth, the Government Taketh Away?

The Elected Presidency was a gift from the Government to the people.

The Attorney General[60]

We would be out of our senses to throw it away.

BG Lee[61]

A. *Setting up the Tribunal: Withholding Presidential Initiative*

In acknowledgment of the growing complexity of the Singapore Constitution, the Constitution was amended to introduce Article 100[62] which provides for the creation of a Constitutional Tribunal[63] empowered to give advisory opinions to constitutional questions referred to it on an *ad hoc* basis. Article 100(1) reads:

> The President may refer to a tribunal consisting of not less than 3 Judges of the Supreme Court for its opinion any question as to the effect of any provision[64] in this Constitution which has arisen or appears to him likely to arise.

60 *Reply of the Government,* Constitutional Reference No 1 of 1995, filed by the Attorney General on 14 March 1995, Item I concerning Para 8 of the President's case; mentioned as part of the Attorney General's oral submission before the Tribunal.

61 Spoken in reply to Nominated MP Walter Woon's query as to whether the Government intended taking back the "gift" of the EP law from the people. BG Lee replied that the law was a safeguard and would not be taken away. Reported in *Straits Times*, 8 July 1995 at 1, "Long Way to go before EP legislation is final".

62 Constitution of the Republic of Singapore Amendment Act (No 17 of 1994), s 16.

63 In introducing the proposal for a Constitutional Tribunal. Deputy Prime Minister Lee alluded to the gap in the Singapore Constitution in contradistinction to S 130 of the Malaysian Constitution which provided for the Yang Di Pertuan Agong to refer a constitutional question to the Supreme Court for an advisory opinion: *supra,* note 15, col 428. Unlike the Malaysian provision which provides for reference to a standing Supreme Court, the Singapore provision provides for reference to an *ad hoc* tribunal constituted by Supreme Court judges. Other countries have sitting constitutional courts which deal exclusively with defined constitutional complaints. *Eg*, see Art 137 of the Austrian Constitution and Art 93 of the Basic Law of the Federal Republic of Germany. See also "Constitutional Complaints: The European Perspective", Gerhard Dannemann (1994) 43 ICLQ at 142.

64 There was very little time to consider the proposed Art 100 as it was not included in the original amendment bill but only introduced at the Committee stage. In spite of the fact that it is a substantive provision, most parliamentarians had only one to two days to consider it. Nominated Member of Parliament Woon pointed out certain ambiguities in its drafting.

On a *prima facie* reading, it appears that the President has the discretion to refer a constitutional question to the tribunal. However, since Article 21(2), which lists the personal discretionary powers attending the presidency, does not expressly[65] refer to a presidential discretion to initiate a Article 100 reference, Article 100 must be read subject to Article 21 which requires the President to act on the advice of Cabinet except where otherwise stated. Thus, a constitutional question may only be referred when the Cabinet discerns an ambiguity in the Constitution; the President cannot initiate this procedure. This is an unnecessary restraint upon the President. As the people's elected official, he has sworn an oath to preserve, protect and defend the Constitution, including the powers conferred on the presidency itself. The presence of a defect would be made apparent where the President wishes to refer a perceived ambiguity to the tribunal but cannot, where the Government refuses to so advise him.

A presidential right of reference would certainly have strengthened the institution of the presidency though the government rejected this on two bases: first, Article 100 was drafted following the Malaysian precedent which does not confer the discretionary power of reference on the *Yang Di Pertuan Agong*. However, unlike the Agong who is a ceremonial head of state, our President, a unique innovation, is elected. Secondly, the drafters[66] of the elected presidency designed the institution such that the initiative would remain in the hands of the Government which "decides and sets the rules".[67] This itself is a feeble argument; the presidency and its powers are still in

Eg, it is not clear whether the effect of a constitutional amendment bill as opposed to a constitutional provision may referred to the tribunal. Woon said that a situation might arise where an amendment Bill would have to be passed before it was referred to the tribunal. *Supra,* note 15, cols 437-438.

65 It may possible to argue that the Art 100 power could fall within the ambit of presidential discretion by virtue of Art 21(2)(*I*) which authorises the President to act in his discretion with regard to "any other function the performance of which the President is authorised by this Constitution to act in his discretion" but this would require a purposive interpretation. Art 21(2)(*I*) probably was intended to refer to articles such Art 35(7) and 22F.

66 To the extent that it was drafted by the government rather than being put to the people through a referendum procedure, the presidency was the brainchild of a government purporting to limit itself. It begs a further question: to what extent is the Constitution of Singapore the People's as opposed to one imposed by the Government?

67 *Supra,* note 15, col 454.

68 This is reflected by the fact that Art 5(2A) has not yet been brought into force so that the elected presidency provisions might be fine tuned by an ordinary two-thirds parliamentary resolution rather than being subject to the scheme of the referendum (subject to presidential waiver) provided for in Art 5(2A). See the Prime Minister's Third Reading speech on the elected president bill, *supra,* note 25, col 722. Of course, it might be pointed out that fine-tuning only relates to technical and procedural matters although this has not proved to be the case, *eg,* the Art 151A amendment.

flux[68] and it is certainly not inconsistent with the idea of the presidency as a countervailing power *vis à vis* the government to grant the former an independent right of reference.

As far as the first constitutional reference was concerned, the President had in fact requested that "in the interest of testing out the system",[69] he would like a court ruling on the constitutional issue. In amicable spirit, the government granted this request. This might well be the initiation of a non-binding convention but it is submitted that it would have been better for there to have been a legal rule conferring a presidential right of reference.

From the outset, we should note that the opinion rendered by the tribunal is purely advisory in nature and therefore not binding. President Ong had stated from the outset that he was willing to abide by its decision come what may. To him, it was a non-adversarial affair, purely a question of legal interpretation. On the basis of the principle of reciprocity, one must assume that the government in good faith would not disregard the tribunal opinion.[70] Had an opinion adverse to the government been rendered, this would not portend gridlock as the government would have the following three options: to ignore the opinion entirely;[71] to activate Article 5(2A) to take the matter out of the Article 22H(1) reach or lastly, to persuade the President to assent to the Article 22H amendment.

B. *Circumstances Precipitating the First Constitutional Reference:*

In July 1994, the Government had asked the President to give his consent, within 24 hours, to a Bill to amend the Constitution, including proposals to amend Article 5(2A) and Article 22H. Without the benefit of independent legal advice, the President had advised the Government that if the Bill was passed by Parliament, then he would have to veto it. In light of the President's reply, the Cabinet decided to excise those provisions relating to Article 5(2A) and Article 22H whereupon the remainder of the Bill was passed

[69] *Supra,* note 15, col 431.

[70] Nevertheless, the government seemed very determined to find some way of amending Art 22H. The Deputy Prime Minister had said, in introducing Art 100, that "after the tribunal has ruled and cleared the ambiguity, the Government will decide on the timing and approach to amending Art 22H." He also stated "if the courts rule that we cannot change, we will find some other way. But it has to be put right." *Supra,* note 15, col 432 and 454 respectively. As is discussed in this article, a ruling adverse to the government did not foreclose on the government's options: there are other ways of amending Art 22H.

[71] Art 100(4) of the Constitution reads: " No court shall have jurisdiction to question the opinion of any tribunal or the validity of any law, or any provision therein, the Bill for which has been the subject of a reference to a tribunal by the President under this Article." This would seem to preclude a challenge to the constitutionality of any constitutional or legal provision which has been the subject of a constitutional reference.

[72] Letter of Correspondence between Professor Tommy Koh and Professor S Jayakumar,

by Parliament and assented to by the President.[72]

In August 1994 during the parliamentary debates, the Deputy Prime Minister first mentioned how Article 22H had been mistakenly drafted. It must be noted from the outset that Article 22H had, at this stage, already been brought into operation and was standing law. This is particularly important since it had previously been decided that the new constitutional provisions would be brought into force in a staggered manner, that is, at different stages. As mentioned, the government wanted at least a four year moratorium during which they would have a free hand to fine-tune the elected presidency provisions before they felt it "safe" to entrench the provisions.[73]

As a caveat, it must be noted that the Deputy Prime Minister's interpretation of Article 22H in 1994 was a retrospective interpretation.[74] In construing a provision, recourse must first be had to the contemporaneous 1991 parliamentary debates made before a particular provision attains legal status. Any post-contemporaneous ministerial speeches interpreting a particular legal provision is susceptible to a charge of *ex post facto* reasoning and therefore, re-writing. It would, of course, set a dangerous precedent if one could attribute a novel meaning to a provision which would override or supercede a natural and ordinary meaning discernible from contemporaneous sources of interpretation.

The problem arose because, according to the Deputy Prime Minister, it had been intended that any constitutional amendment which circumvented the Elected President's discretionary powers should be subject to a referendum *via* the Article 5(2A) "master entrenchment clause". However, Article

Ministry of Foreign Affairs, 17 January 1995. See also BG Lee's speech, *supra,* note 21, col 431 where he explains why a new Art 5(A) and amendments to Art 22H and 5(2A) were excluded from the Constitution of the Republic of Singapore (Amendment No 2) bill [on file with author].

73 It is of course a little perplexing to note the enthusiasm to eventually entrench the novel and untried elected presidency constitutional provisions. This is in the light of the fact that constitutional provisions relating to the independence of the judiciary (Art 98), the legislature (Art 38) and, until recently, fundamental liberties (Part IV) have yet to be entrenched, notwithstanding the 1966 Wee Chong Jin Constitutional Commission recommendation (see para 81) that they be entrenched *via* a referendum mechanism. Surely entrenching Art 93, 98 and 38, *eg,* must be more important than entrenching those provisions relating to the Education Service Commission, financial provisions and the Presidential Council for Minority Rights which will be subject to the Art 5(2A) entrenchment mechanism.

74 The Deputy Prime Minister's comments about Art 22H was retrospectively made after the coming into force of this provision itself. S 9A(3)(*d*) of the Interpretation Act (Cap 1) allows one to "look into material in any official record of debates in Parliament." Nevertheless, it may be asserted that the weight accorded to such a retrospective ministerial statement should be taken into account, to avoid setting the unfortunate precedent of allowing the government of the day to retrospectively re-define a constitutional provision in a manner contrary to the original intent of the drafters of the provision.

5(2A), for the reasons stated above, has yet to be brought into operation. Until Article 5(2A) is operational, any constitutional provision falling within its future purview may be amended in accordance with the two-thirds parliamentary majority set out in Article 5(2).

Article 22H(1), on a *prima facie* reading, is designed to allow the President the power to veto any bill which seeks to curtail or circumvent powers belonging to his supervisory empire ("curtailing bills"). Article 22H(1) was apparently drafted sloppily, resulting in unintended legal consequences:

> Unfortunately, we overlooked another Article – Article 22H, which was incorrectly drafted and which has been brought into effect. Article 22H was intended to cover non-Constitutional legislation.[75]

What kind of "curtailing bills" fell within the ambit of Article 22H(1)? Three potential candidates may be identified:

1. Curtailing constitutional amendment bills to which Article 5(2A) applies: the "core" provisions

2. Curtailing constitutional amendment bills to which Article 5(2A) does not apply, *eg,* Article 25 and 26: the "non-core" provisions

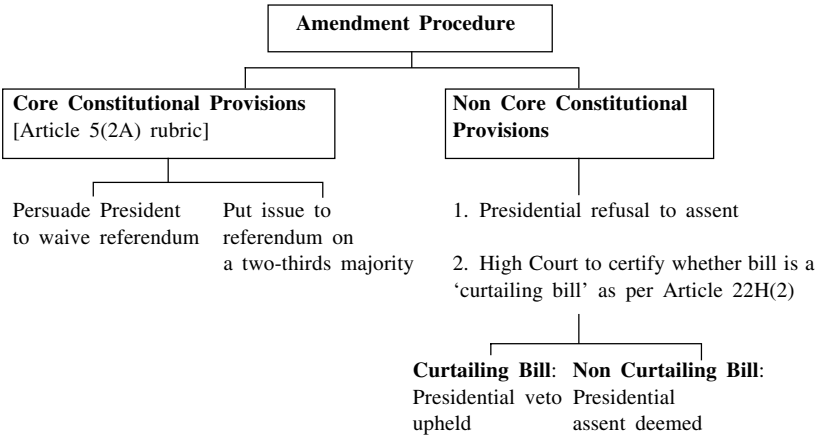
3. Curtailing non-constitutional bills, *ie,* ordinary Acts of Parliament passed by a simple parliamentary majority.

Article 22H(1) was apparently wrongly drafted because first, it was only intended to cover non-constitutional 'curtailing bills' but also unintentionally covered "constitutional amendments other than the core provisions which have already been covered by Article 5(2A)." Furthermore, since Article 5(2A) had not yet been brought into effect, it was uncertain whether those constitutional provisions falling under the Article 5(2A) rubric would be subject to the presidential veto in Article 22H(1).

At any rate, the nub of the problem was that Article 22H(1) offered more protection to the non-core constitutional provisions than Article 5(2A)- were it in force- would offer to the "core" provisions. Figure 1 illustrates this.

[75] *Supra,* note 15, col 429.

Figure 1



Assuming Article 5(2A) (which clearly covers "core" constitutional provisions) was in force, the desirability of passing any 'curtailing "core" bill' would be subject to political resolution either through Cabinet prevailing upon the President to accept its policy considerations, waive the referendum and assent to the proposed amendment bill or by allowing the people to vote on the issue through referendum. In the case of non-core constitutional provisions,[76] if the High Court certifies the proposed "non-core" constitutional amendment as a 'curtailing bill', then the Presidential veto overrides cabinet policy without there being a referendum outlet. Besides this lack of a referendum outlet, Article 5(2A) not being in force, the President had been prematurely conferred a veto power over non-core constitutional amendments, rendering them more entrenched than the so-called "core" constitutional provisions falling under the Article 5(2A) umbrella: an anomaly had thus arisen. Furthermore, it could not be redressed by simply amending Article 22H(1) as the President potentially had the discretion to veto such an amendment bill.

To resolve this imbroglio, the President and the government agreed to refer this question to the Article 100 tribunal. Accordingly, the Attorney General drafted the questioned to be referred to the Tribunal in the following manner:

[76] Examples given by the Deputy Prime Minister included possible amendments to remove Singapore Technologies Holdings from the Fifth Schedule or to devolve Public Service Commission powers found in Part IX of the Constitution, *supra,* note 15, col 430.

> Whether because Article 5(2A) of the Constitution has not been brought into operation, the President has the power under Article 22H(1) of the Constitution to withhold his assent to any Bill seeking to amend any of the provisions referred to in Article 5(2A), and specifically to any Bill seeking to amend Article 22H to restrict the President's powers thereunder to any non-Constitutional Bills which provides directly or indirectly for the circumvention or curtailment of the President's discretionary powers conferred upon him by the Constitution.

In a nutshell, the question posed before the constitutional tribunal was whether or not the President had the power to veto a proposed constitutional amendment purporting to reduce his discretionary powers, particularly with regards to such provisions as were mentioned in Article 5(2A).

The hearing was fixed for 17 March, 1995 and lasted for a day. The President was allowed independent legal counsel.[77] The tribunal was headed by Chief Justice Yong Pung How and the two Judges of Appeal, M Karthigesu and LP Thean. As master of its own procedure, the tribunal, in satisfaction of the requirements of procedural propriety, wisely pre-determined that the procedure to be adopted at the hearing of the constitutional reference would be similar to that followed in the Court of Appeal.[78] According to Article 100(3), the tribunal had 60 days from the date of reference (20 February 1995) to deliver its opinion. An unanimous opinion was duly delivered on 20 April 1995.

C. *The First Constitutional Reference Proper: Issues Arising*

Since the constitutional reference concerned the inter-relationship of Article 22H(1) read with Article 5(2A), it would be useful to set these out in full. Article 5(2A), which is a mechanism for constitutional entrenchment reads:

> (2A) Unless the President, acting in his discretion otherwise directs the Speaker in writing, a Bill seeking to amend this clause, Articles 17 to 22, 22A to 22O, 35, 65, 66, 69, 70, 93A, 105, 107, 110A, 110B,

[77] This assumed the form of Joseph Grimberg, a former judicial commissioner and present consultant at the law firm of Drew & Napier and Associate Professor Walter Woon, Nominated MP and law lecturer.

[78] It may be questioned whether this adopting this procedure *en bloc* is appropriate as strictly, we are dealing not with a court of law subject to the strict rules of procedure and evidence, but with an *ad hoc* tribunal. *Eg,* would one require a practicising certificate to appear before the tribunal?

> 151 or any provision in Part IV or XI shall not be passed by Parliament unless it has been supported at a national referendum by not less than two-thirds of the total number of votes cast by the electors registered under the Parliamentary Elections Act.

It bears reiteration that Article 22H(1) falls within the scope of the Article 5(2A) amendment procedure, which has yet to become operative law. Any bill seeking to amend Article 22H(1) must *ipso facto* be a curtailing bill. Article 22H(1) itself reads:

> 22H**.** – (1) The President may, acting in his discretion, in writing withhold his assent to any Bill passed by Parliament (other than a Bill to which Article 5(2A) applies) if the Bill provides, directly or indirectly, for the circumvention or curtailment of the discretionary powers conferred upon him by this Constitution.

1. Parsing the Parenthesis: The Meaning of the Word "Applies":

A central issue was the scope of President's Article 22H(1) veto and the government's contention that it had a more extensive application than originally intended. The doubt as to the scope of Article 22H(1) was due in part to the fact that Article 5(2A) was suspended and not operative law. The Attorney General contended that irrespective of Article 5(2A) being in force or not, Parliament had intended that the scope of Article 22H(1) be confined to non-Constitutional curtailing bills. Thereby, all constitutional curtailing bills would fall outside the scope of Article 22H(1). It was the government's case that Article 22H(1) did not affect the legislative competence of Parliament to enact any law to amend that Article and that the President was not empowered to withhold his assent to such a Bill.

Counsel for the Presidency contended that instead of just applying to non-Constitutional legislation which curtailed the President's powers, the Article 22H(1) veto potentially also applied to curtailing constitutional amendment bills, core or otherwise. If this was so, the President would have the final say in the desirability or otherwise of curtailing the powers of the presidency. According to BG Lee, a referendum outlet reposing the final say in the People was absent owing to mistaken drafting.

It is perhaps a tad ironical to note that while amending the Constitution to *introduce* the elected presidency was not subject to the people's endorsement *via* referendum, apparently, any move to *modify* presidential powers should be made contingent upon a referendum procedure.[79]

The constitutional tribunal examined the legislative intent of the drafters

[79] See Kevin Tan, *supra*, note 4, at 191-193.

of Article 22H(1), considering the effect of its parenthesis, *other than a Bill to which Article 5(2A) applies*. Could Article 5(2A), which was not operative law, be meaningfully said to apply to anything?

There are at least two possible constructions as to how the words in the parenthesis might be construed: first, the words could be treated as a "list" or alternatively, an ordinary, common sense meaning could be given to the word "applies" whereby the parenthesis would be rendered superfluous. These possible constructions will now be examined in turn.

(a) *The Parenthesis as Incipient Limitation*

Article 5(2A) as it appears in the Article 22H(1) parenthesis could be read as a list, enumerating those constitutional provisions which lie beyond the scope of the presidential veto. The word "applies" would merely serve a shorthand, descriptive function. If this construction were adopted, then the legislature must have intended from the outset that the enumerated articles should fall outside Article 22H(1), thus constituting an incipient limitation on the scope of the presidential veto over curtailing bills. If so, Article 5(2A) – whether operative or not – would have no bearing on the meaning of the parenthetical clause in Article 22H(1), which would remain constant. The plenary legislative power to amend the "list" provisions by the usual two-thirds parliamentary majority would thereby be unhindered, as indeed the government contended.

(b) *The Parenthesis as Superfluous*

A more common sense approach would entail reading the Article 22H(1) parenthesis as superfluous. This is because the "list" approach entails reading the word "applies" in an unnatural manner, as though it meant "refers to". The Oxford English Dictionary definition of the word "refers"[80] is to consider something as belonging to a certain class; alternatively, it can mean to commit or to hand over something to a decision making body for consideration. If Parliament had intended that the parenthesis be read as a list, surely a more appropriate phrasing of the Article 22(H)(1) parenthesis would be "other than a Bill to which Article 5(2A) *refers*".

A common sense or literal approach to the phrase "to which Article 5(2A) applies" presupposes applicability, that something is in operation. In the context of the parenthesis, it denotes that certain legal provisions would

[80] It is interesting to note that the word "refer" appears at least 5 times in the Constitution: Art 22(H)(2), Art 98(3), Art 107(2), 133(2) and 18(2) of the Third Schedule. In all these instances, the word "refer" bears the connotation of handing over or committing something to a body, *eg,* High Court, Tribunal or Committee of Inquiry for consideration.

be subject to, or fall under the operation of Article 5(2A). Article 5(2A) read naturally must have some kind of legal impact on the provisions under its purview. To "refer to" something has connotations of lesser import as it merely suggests that something is indicated but not necessarily that it is impacted or affected. Since "applies" must refer to something in operation and since Article 5(2A) has been deliberately suspended, the parenthesis cannot apply to anything and must be considered entirely superfluous. The parenthesis is redundant and *sans* meaning since the exception it seeks to create to the Article 22H(1) veto is not operational by virtue of Article 5(2A)'s suspension. The paranthesis only comes to life when Article 5(2A) is brought to life; presently, it lies dormant.

It follows from this literal construction that Article 22H(1) should be read as though the parenthesis was deleted from it with the President's power to withhold assent to all curtailing bills being unimpaired. This construction is further buttressed by the wording "withhold his assent to *any* bill" since "any" where not qualified by "other than" is indicative of being all-encompassing in scope. One may presume that Parliament, by dint of being omniscient, meant what it said. That Parliament intended that the words it employed should be afforded a clear meaning.

However, the tribunal rejected the literalist, common-sense approach to reading Article 22H(1) as they stated that this did not effectuate Parliamentary intention. They opined that the word "applies" ought to be read as a list identifying the class of bills to be excluded from the ambit of Article 22H(1).

(c) *Constitutional Amendment Procedures and Part III*

An argument could be made to the effect that if, applying a literalist approach, it was accepted that Article 22H(1) applied to all constitutional bills because of Article 5(2A)'s suspension, then Part III[81] of the Constitution which, *inter alia,* protects the sovereignty of the Republic of Singapore, must be read subject to Article 22H(1) in accordance with the doctrine of harmonious construction.

Suppose the people of Singapore decided at a national referendum that, as an act of self-determination, they would like Singapore to become a member of a federation of states, could the President then override such a decision? After all, if Singapore became a constituent state of a Federation as it formerly was of the Federation of Malaysia, would this not entail cutting down the President's powers? Any constitutional amendment bill which seeks to transfer or cede the sovereignty of Singapore as an independent

[81] Part III of the Singapore Constitution stipulates that the whole or partial surrender or transfer of the sovereignty of the Republic has to be supported by two-thirds of the total number of votes cast by electors registered under the Parliamentary Elections Act: Art 6(1)(*b*).

nation must, *ipso facto,* be a curtailing bill. No longer would the President preside over an independent nation; he would be the President of a federal state, with his powers limited by the terms of the federal constitution.[82]

If such a bill which purports to cede sovereignty is subject to Article 22H(1), it would logically follow that the desirability and endorsement of such a bill must lie ultimately not in the hands of the People at a national referendum but in the hands of the President. It would be manifestly absurd to vest such enormous powers in the hand of a single man, for why should one man be able to stand against the wishes of an entire nation?

> Article 8 is not, in terms, subject to Article 22H(1). Article 8 is not a core provision within the scope of Article 5(2A), but it provides a stronger mode of entrenchment than Article 5(2A) .... In principle, it is possible for a Bill within the ambit of Article 8 to be passed by Parliament in accordance with its terms which directly or indirectly circumvents or curtails the President's discretionary powers ... it would be manifestly absurd and unreasonable to contend that the President may invoke Article 22H(1) to veto any such Bill passed by Parliament after it has been duly approved by the electorate.[83]

This problematical interpretation was invoked to lend strength to the Attorney-General's more general argument that Parliament cannot have intended Article 22H(1) to apply to constitutional bills; that from the start, an Article 5(2A) Bill was never intended at the time of its enactment, to be subject to the President's veto powers under Article 22H(1), whether Article 5(2A) was in force or not.

> ...an interpretation that Article 22H(1) empowers the President to veto an Article 5(2A) Bill passed by Parliament after it has been duly supported at a referendum by the electorate is a constitutional heresy, in that the President may, in a parliamentary system of government, override the wishes of the electorate.[84]

For an Article 5(2A) curtailing bill to go to referendum, it must implicitly be sanctioned by the President who could otherwise waive the need for such a bill to be put to a referendum. In such a scenario, Article 5(2A) must be in force which is not, at present, the case. If in force, the matter is taken out of the President's hand by the terms of the Article 22H(1)

[82] This argument first arose in the context of discussions with members of the team advising the presidency.

[83] *The Case for the Government, supra* note 9, at 46-47.

[84] *Ibid,* at 46.

paranthesis.

As far as Article 8, a non-core Constitutional provision is concerned, the Attorney-General argued that it was not subject to Article 22H(1). This is quite correct. However, this does not lend strength to the further argument that since Article 8, a non-core constitutional provision, falls without the reach of Article 22H(1), therefore all other non-core constitutional provisions fall beyond Article 22H(1)'s scope. The subject matter covered by Article 8, which goes to the heart of Singapore's status as a sovereign Republic differs from other non-core constitutional provisions like Article 25 as a special procedure applies to Part III of the Constitution. Part III must be treated as *sui generis,* or as an exception to Article 22H(1) since the subject matter concerning Part III was already considered dealt with by Article 8. Article 5(2A), after all, was included in Part II instead of Part III of the Constitution, which suggests a certain distinctiveness about Part III.

It is evident from a reading of Article 6 that it was envisaged that a bill purporting to cede Singapore's sovereignty should live or die at the hands of the People at a referendum; it does not envisage that such a momentous decision should vest in the hands of an elected official, but rather, the electorate at large. The point may also be made that Singapore's Constitution has undergone numerous amendments since Independence: like re-soling an old boot rather than buying a new pair, it has been pragmatically sewn together in a fairly piecemeal fashion; it would defy optimism to discern a holistic consistency as there is no central jurisprudential thread running through it. Article 22H(1) could well have been drafted without its drafters even contemplating the nature of its relationship with Part III of the Constitution.

2. *How to read the Constitution: A Purposive Approach?*

The tribunal rejected a literalist mode of interpretation as they found that the wording of Article 22H(1) was drenched in ambiguity, particularly complicated when considered in the light of its inter-relationship with other constitutional provisions. Instead, a purposive approach to construing the Constitution was preferred.

As the fundamental and paramount law of the land, a Constitution should be construed differently from an ordinary Act of Parliament. As stated by Lord Diplock in the seminal case of *Ong Ah Chuan* v *Public Prosecutor*[85]

> ...the way to interpret a constitution on the Westminster model is to

[85] [1981] 1 MLJ 64 at 70.

> treat it not as if it were an Act of Parliament but as '*sui generis*, calling for principles of interpretation of its own, suitable to its character ... without necessary acceptance of all the presumptions that are relevant to legislation of private law.'

The Indian Supreme Court has held that in construing the constitution:

> It is legitimate for the Court to go beyond the arid literal confines of the provision and to call in aid other well-recognised rules of construction, such as its legislative history, the basic scheme and framework of the statute as a whole, each portion throwing light on the rest, and the purpose of the legislation, the object sought to be achieved, and the consequences that may flow from the adoption of one in preference to the other possible interpretation.[86]

Additionally, section 9A of the Interpretation Act (Cap 1) provides a statutory basis for allowing reference to be made to parliamentary materials as an aid to construction, in order to promote the purpose or object underlying the written law. Clearly, section 9A does apply to the Constitution as expressly stated in Article 2(9). The tribunal also approvingly quoted from English and Australian case law[87] which sanctioned resort to contemporaneous speeches and documents as an aid to construing an ambiguous legislative provision. The tribunal went so far as to approve Dawson J's judgment in *Mills* v *Meeking*[88] where the learned judge asserted that ambiguity was not needed in having recourse to contemporaneous material in construing a provision: if reference to the purposes of an Act would reveal a drafting defect, insofar as this could be corrected as a matter of construction, it could and should be done. The important thing to note is that since a court is obliged to objectively determine parliamentary intention as evident from contemporaneous speeches and documents, *ex post facto* ministerial statements[89] should have no bearing on construing the relevant constitutional

[86] *Chief Justice of Andhra Pradesh* v *Dikshitulu* [1979] AIR SC 193, Sakaria J at para 63.

[87] Specific reference was made to the seminal House of Lords case of *Pepper* v *Hart* [1993] AC 593 and *Mills* v *Meeking* (1990) 169 CLR 214.

[88] *Ibid,* at 235.

[89] It should be pointed out that even contemporaneous ministerial statements are not determinative regarding issues of construction: such speeches do not necessarily reflect the intention of Parliament unless the matter has been thoroughly discussed in Parliament and then endorsed. See Lord Browne-Wilkinson's judgment where he stated, "the question then arises whether it is right to attribute to Parliament as a whole the same intention as that repeatedly voiced by the Financial Secretary," *Pepper* v *Hart* [1993] AC 593 at 642.

provision.

3. *Article 5(2A) and Article 22H(1) as mutually exclusive provisions?*

In ascertaining Parliament's intention concerning both Article 5(2A) and Article 22H(1), the government contended that whether Article 5(2A) had or had not been brought into operation was entirely immaterial. The Attorney General asserted that the original intention of Parliament was that certain constitutional provisions be excluded from the Article 22H(1) ambit, as listed out in Article 5(2A). Even though the suspended Article 5(2A) was not operative law, it nevertheless still represented the will of Parliament until repealed or amended at any time by the government.[90]

> Article 5(2A), whether or not in force, represents the will of Parliament with respect to the legislative intent manifested therein .... Where Article 5(2A) is in force, the court must give effect to its provision, Where it is not in force, the courts must recognise its status as embodying the will of Parliament, until it is amended or repealed. In the case of Article 5(2A), the will of Parliament is that the President shall have no power to withhold his assent to any Bill within the scope of Article 5(2A).[91]

As such, Article 5(2A) and Article 22H(1), which were enacted at the same time, were enacted as mutually exclusive provisions. Hence, the same meaning either provision had at the time of its enactment should remain constant and not change by virtue of Article 5(2A)'s suspension:

> The scope of the President's veto power under Article 22H(1) cannot enlarge itself by reason of Article 5(2A) not being in force. If at the time of enactment Article 22H(1) did not confer such a wide veto power on the President, no such power can accrue to him under Article 22H(1) by reason only of Article 5(2A) not having been brought into operation.[92]

Further, the Attorney General argued that the legislative intent behind Article 5(2A) was that at no time did the President have discretion to veto

[90] To advance the proposition that enacting and then suspending the provisions of an Act did not detract from the legal status of such provisions as part of an Act having clear parliamentary approval, the House of Lords case of *R* v *Secretary of State for the Home Department ex parte Fire Brigades Union* (1995) Times Law Report House of Lords 6 April was cited.

[91] *Supra,* note 9, 40I to 41.

[92] *Ibid,* at 48 E-F.

a Article 5(2A) bill – that Article 22H(1) had to be read subject to Article 21 which imposes a constitutional duty on the President to assent to Bills, 'Except as provided by this Constitution'. The contrary view is that Article 22H(1) made the president's power to withhold his assent to certain bills, including Article 5(2A) bills, a matter of personal discretion. A perfectly harmonious construction *vis à vis* Article 21 is possible as Article 22H(1) is a constitutional provision mandating an exception to the general principle in Article 21 concerning presidential assent and personal discretion.

Rejecting the view that the parenthetical words in Article 22H(1) were redundant, the Tribunal, agreeing with the Attorney-General's submissions, stated:

> ...the President's veto under Article 22H(1) could not enlarge itself by reason only of Article 5(2A) not being in force as, at the time of enactment, Article 22H(1) did not confer such a wide veto power on the President.[93]

We should remember that the whole objective of these elaborate amendment mechanisms was to "clip the wings" of the government by placing the final decision-making power in this regard out of the government's hands, and into the hands of either the President or the People. The acceptance of the Attorney General's argument would mean that as long as Article 5(2A) was not brought into force, the government would effectively have a free hand to amend any of the constitutional provisions mentioned in Article 5(2A). If this were so, the government could, taken to its logical conclusion, easily deconstruct the presidential institution it had constructed. Did not the voters vote for the President on the basis of the office having a fixed bundle of powers which could not be taken away unilaterally? Did not the President take the oath of office on such a similar basis?

Of course, the assurances[94] given by the Attorney General that the government would not take this route are politically persuasive. However, constitutional law operates on the basis of providing for the worst case scenario by providing institutions and procedures to control potential power

[93] *In the matter of Arts 5(2), 5(2A) and 22H(1) of the Constitution of the Republic of Singapore,* Constitutional Reference No 1 of 1995, [1995] 2 SLR 201 at 212G.

[94] In the Reply of the Government, supra, note 60, the Attorney General had stated that "the reality is that the Government that established the Elected Presidency is the same Government that is seeking to amend Art 22H(1)....it is this very Government, that, out of due caution and prudence, decided against the premature entrenchment of President's discretionary powers. The question of whether or not the Government has adopted a locus poenitentiae in relation to the Elected Presidency does not arise at all in this Reference", at para 4.6 at 9 of the *Reply*.

abuses. Accepting the government's assurances comes with the cost of making Principle the handmaiden of Pragmatism.

It is true that Article 22H(1) and Article 5(2A) were enacted at the same time but on a purposive interpretation, one could argue that there must be some ramifications to Article 5(2A) not being brought into operation. Article 5(2A) was suspended to allow for fine-tuning the new presidency provisions for specific purposes without referendum. This will now be further examined.

4. *Article 22H(1) specifically excluded from fine-tuning period*

It may be argued that Article 22H(1) was specifically excluded from this grace period of constitutional fine-tuning for at least two reasons. First, despite the then Deputy Prime Minister's statements that "we have taken a long time and taken our time to bring the Bill to this stage, deliberately,"[95] a period for fine-tuning this complex institution was still considered necessary. Due deliberation had been taken in conceiving and formulating this major innovation in our constitutional development; we may assume that the same deliberate care was taken to decide which constitutional provisions should be made subject to the grace period, as potentially requiring adjustments

Article 5(2A)[96] was specifically made susceptible to fine-tuning while Article 22H(1) was left outside the grace period of adjustment. It may be contended that this was not so much an oversight as a deliberate omission. We may take it that an omniscient Parliament, in enacting and bringing into operation Article 22H(1) without subjecting it to a moratorium, thought this provision crucial enough to the whole institutional set-up of the presidency as to warrant bringing it into force at once.

Second, the reason for the suspension of Article 5(2A) was to provide for the contingency of dealing quickly and easily with difficulties encountered in the practical implementation of the provisions. As stated by the then Deputy Prime Minister,

> I favour giving ourselves more time, to avoid having to go to referendum

[95] *Supra,* note 8, col 717.

[96] Art 5(2A) was deliberately not brought into force when the rest of the Elected Presidency provisions were brought into force on 18 January 1991 as the Constitution (Amendment) Act No 5 of 1991 which came into operation on 30 November 1991 except for Art 5(2A). The new provisions Art 5(2A) and Art 22H(1) debuted in the 1990 Elected President Bill (passed on 3 January 1991) which added some additional safeguard functions to the role of the presidency.

[97] *Supra,* note 8, col 722.

> on *procedural* and *technical* provisions.[97] [*italics mine*]

He further stated:

> I am all in favour of moving cautiously, as you can see from the way I have taken this Bill through Parliament, and I would argue for a longer period of four years so that the *technical provisions can be dealt with.* Otherwise, once we invoke that Article on referendum where provisions have to be changed [*ie*, Article 5(2A)], it becomes quite messy for us to change the provisions.[98] [*italics mine*]

There is a qualitative difference between fine tuning and a complete overhaul and it may be contended that paring down the scope of the Article 22H(1) veto would constitute a substantive change which falls outside the reach of the fine-tuning grace period. Abrogation far supercedes "adjustments and refinements". Accepting the case for the presidency's assertion that modifications are to be limited to technical and procedural matters do not in any impugn the government's ability to rule. Furthermore, the government can amend the Constitution to effect adjustments to technical and procedural provisions. So long as these adjustments do not curtail the powers of the presidency, there is no need to go to a national referendum; nor is there a Presidential veto.

The tribunal discounted the words of the then Deputy Prime Minister by asserting that the whole reason for suspending the operation of Article 5(2A) was to enable the government to make any changes whatsoever it wished to the elected presidency system it engineered. Changes could be anything from finishing touches to complete re-workings, "be it substantive, technical or procedural, without having to face the prospect of a referendum."[99] Basically, until the government feels that its creation, the elected presidency, is satisfactorily "workable", it can re-call and re-cast its product before forever relinquishing its right to mould the presidency, *sans* the referendum outlet.

5. *Non-constitutional bills as the sole subject of Article 22H(1):*

The Deputy Prime Minister had asserted that regardless of whether Article 5(2A) was or was not in force, the original intent of Article 22H(1) was that it should apply only to non-constitutional curtailing bills, that is, Acts of Parliament which curtailed the President's powers.[100] Furthermore, that all constitutional bills were outside the scope of Article 22H(1), "core" or

[98] *Ibid,* col 749.
[99] *Supra,* note 93 at 213C.
[100] *Supra,* note 15, col 429.

"non-core". The Attorney General argued then that:

(i) All "core" Article 5(2A) constitutional curtailing bills fall within the ambit of Article 5(2A)

(ii) All "non-core" constitutional curtailing bills fall under the government of Article 5 which deals exclusively with constitutional amendments

(iii) All curtailing non-constitutional bills fell within Article 22H(1) regulation by way of implication.

On the Attorney-General's interpretation, a bill to amend Article 22H(1), which is mentioned in Article 5(2A), is exempted from the presidential veto, despite Article 5(2A) not being in force. Article 5(2A) and Article 22H(1) would therefore stand independently of their own accord. The argument was framed thus:

> The plenary power of Parliament to amend the Constitution is expressed in Article 5(1) to be subject to Article 5 itself and Article 8. By implication ... Article 5(1) is not subject to any other Article of the Constitution ... the subject matter of Article 5(2A) was not intended to be within the scope of Article 22H(1). It follows that *the President may not invoke his power in Article 22H(1) to prevent the enactment of any law to amend the Constitution*. [italics mine] If Parliament had intended to reduce its plenary legislative power to amend the Constitution by giving the President a discretionary power under Article 22H(1) to veto any constitutional amendment bill, Parliament would have done so expressly by making Article 5 subject to Article 22H(1), or by incorporating such a power in Article 5 itself or by locating Article 22H(1) in Part II of the Constitution.
>
> To interpret Article 22H(1) to empower the President to withhold his assent to any Bill amending the Constitution passed by Parliament in accordance with the terms of Article 5(1) is to negate and thereby contradict the President's constitutional duty to assent to such a Bill. Furthermore, to interpret the President's veto power under Article 22H(1) to apply to any such Bill is to contradict the express terms of Article 5(1) and make Article 5(1) subject to Article 22H.[101]

[101] Case for the Government, *supra,* note 9, p 42 para 65–66.

With respect, this is clearly wrong. The whole point of Article 22H(1) was to create an exception to the constitutional duty of the President to rubber-stamp a constitutional amendment law. The constitution can still be amended; it's just that the President has a more active role in this process.

The Attorney General suggested that Article 5 and Article 22H(1) be harmonised by interpreting them to apply to different types of legislation: Article 5 would apply to Constitutional Bills and Article 22H(1) to non-Constitutional Bills. This is a strained interpretation. On the wording of Article 22H(1) itself, no distinction is drawn between constitutional and non-constitutional bills. Rather, the sole distinction drawn is between Article 5(2A) Bills and non-Article 5(2A) Bills. The latter could encompass curtailing bills of both the constitutional and non-constitutional variety.

There is no indication whatsoever in the contemporaneous parliamentary debates or ministerial speeches that Article 22H(1) should only extend to non-constitutional legislation which purported to curtail the President's discretion. Indeed, no distinction was made between constitutional and non-constitutional curtailing bills.

If the retrospective ministerial speech is accepted, this would imply that the sole effect of Article 22H(1) would be to confer upon the President a pre-emptive first strike against such non-constitutional curtailing bills. Effectively, the President could prevent such a bill from ever becoming an Act by refusing to assent to it. However, interpreting Article 22H(1) as conferring a power on the President "to prevent non-constitutional legislation from curtailing or circumventing the Elected President's discretionary powers[102] does not seem to make much sense. Presumably, if such legislation ever came into effect, it would, applying the Article 4[103] supremacy clause, be unconstitutional and subject to judicial review on those grounds – legislation inconsistent with the Constitution is *ipso facto* void and hence would not be able to impact the President's discretionary powers. Article 22H(1) must, logically, apply to constitutional bills as these are the only type which may potentially curtail the President's powers, were the requisite two-thirds parliamentary majority garnered.

If Article 22H(1) applies only to non-constitutional bills, then the purpose of Article 22H(1) is minimal indeed. What is the point of giving the President such a pre-emptive strike over non-constitutional curtailing legislation?

For Article 22H(1) to be possessed of substantive and a reasonable meaning, a purposive interpretation would read it as apply it to constitutional curtailing bills. Clearly, it applies to non-core constitutional amendment

[102] *Ibid,* col 431.

[103] Art 4 provides: "The Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void."

[104] *Supra,* note 15, col 430.

bills, as admitted by the Deputy Prime Minister,[104] and more controversially, to "core" constitutional amendment bills in the *interregnum* period.

The Attorney General sounded the alarm[105] that if the submission that Article 22H(1) applies to both Constitutional and non-Constitutional Bills was accepted, this would contradict the constitutional division of legislative power intended by Parliament and render Parliament's plenary legislative powers subject to the President's veto power:

> ...such a division of legislative power would place the President at the apex of the constitutional structure, contrary to (a) Article 21(1) which preserves the parliamentary system of government, and (b) the limited custodial role of the Elected President as envisaged by Parliament.[106]

Article 38 of the Constitution provides that the Singapore legislature consist of the President and Parliament. Of course, unlike the mother of all Parliaments in Britain, Singapore's Parliament does not possess plenary legislative powers in the sense that it is absolute and illimitable since the constitution is supposed to be supreme in Singapore and delimits the boundaries of the powers of government. Article 58 incorporates the British convention that requires the head of state to assent to bills passed by Parliament. Article 22H(1) is a specific exception to this as it allows the President to veto curtailing bills. Article 21(22)(*c*) unequivocally provides that the President has the discretion in "the withholding of assent to *any Bill* [*italics mine*] under Article 22E, 22H, 144(2) or 148A." Once again, no distinction between constitutional and non-constitutional bills is made. Furthermore, if the President refuses to assent to, for example, a constitutional amendment bill, Article 58(2) provides that such a bill cannot become law. This scotches the argument put forward by the Attorney General that "[a]rticle 5(1), read with Article 21(1) effectively means that, subject to Article 5 and 8, Parliament may enact any law to amend the Constitution."[107] Article 5 applies only to a *law* and not to a *bill* and where the President, empowered by Article 22H(1) read with Article 21(2)(*c*), refuses to assent to the latter, it cannot become law.

These constitutional provisions re-allocate legislative power and it is no answer to hark back to the Westminster practice of the head of state acting in accordance with Cabinet advice as *per* Article 21(1): having an elected head of state with some executive powers changed all that. Our system of government is unique.

[105] *Supra,* note 9, Part V, F, at para 97.
[106] *Ibid.*
[107] *Supra,* note 9, Part E, at para 27.

There is nothing unsound in leaving it to the Elected President to resolve whether a constitutional curtailing bill is desirable as a matter of policy, provided that the Elected President is not a power unto himself. As an elected official, he is ultimately accountable to the electorate. This would effectively limit the power of the parliamentary executive which is entirely consonant with the rationale of the elected president scheme. Indeed, as will be further discussed in the next section, how effective a guard can the Elected President be, if he cannot even safely bolt up his own household?

The tribunal seems to have concluded that Article 22H(1) only applies to non-constitutional bills by means of a strange inference. It must be remembered that the government had admitted that a mistake in drafting had conferred upon Article 22H(1) a wider scope of application than originally intended. According to the government,[108] the Article 22H(1) veto was only to apply to non-constitutional curtailing bills. However at present the veto also would seem to extend to "non-core" constitutional amendment bills, *eg,* removing Singapore Technologies Holdings from the Fifth Schedule which lists key statutory boards and government companies whose annual budgets are subject to some presidential oversight. Other non-core constitutional provisions which relate to the President's powers are Articles 25, 26, and 154A which deals with the presidential discretion in appointing and removing the Prime Minister and the power to exempt transactions from the Article 144 operation which deals with loan-raising bills.

As such, amendments to the "core" constitutional provisions, because of Article 5(2A)'s suspension, could be effected by the Article 5(2) two-thirds parliamentary majority procedure while proposed amendments to "non-core" provisions would be subject to the presidential veto.

In coming to the conclusion that Article 22H(1) applies only to non-constitutional bills, the tribunal seemed to employ a process of elimination to infer this conclusion by baldly stating

> Thus we are of the view that Article 22H(1) would not apply to any Bills which fall within the scope of Article 5(2A), and we note that the scope of Article 5(2A) would essentially cover *all* Constitutional Bills.[109] [*italics mine*]

On the tribunal's interpretation, Article 22H(1) would not apply to Bills falling within the scope of Article 5(2A) on the understanding that "Article 5(2A) would essentially cover all Constitutional Bills." Since all constitutional bills, core or non-core are stated to fall within the scope of Article

[108] *Supra,* note 15, col 430.
[109] *Supra,* note 93, at 213D.

5(2A), there would seem to be little or nothing at all which would fall within the scope of the Article 22H(1) veto, aside from non-constitutional bills, whatever these may be. By this reasoning, surely Article 22H(1) must be confined to non-constitutional bills if there is virtually nothing left for Article 22H(1) to apply to.

The most generous interpretation would be that Article 22H(1) at most could apply to ordinary bills which purport to curtail presidential powers and possibly, any 'renegade' constitutional bill not covered by Article 5(2A) which the tribunal seemed to assert were virtually non-existent. If this is the case, then Article 22H(1) has been "corrected" by constitutional interpretation and the only function an amendment to Article 22H(1) might have would be to make express the tribunal's opinion that Article 22H(1) could only apply to non-constitutional or ordinary curtailing bills.

Since a "curtailing" ordinary or non-constitutional bill would be judicially struck down as unconstitutional, does not Article 22H(1) then seem a bit redundant? Furthermore, the tribunal's opinion seems to dismiss Deputy Prime Minister Lee's concern that the scope of Article 22H(1) was overbroad in applying to non-core Constitutional Bills, which concern prompted the first constitutional reference in the first place! Would not Article 22H(1) apply to a proposed amendment to, for example, transfer the President's discretion to appoint as Prime Minister that parliamentarian who in his opinion would command the confidence of the majority of parliamentarians, to some civil servant? This would clearly be a curtailment of the President's discretion and Article 25 which confers this appointment power on the President does not fall within the umbrella of Article 5(2A). Is this not precisely an instance of the problem the Deputy Prime Minister raised and sought to correct? Quite clearly, not all Constitutional Bills which could curtail the President's powers fall within the scope of Article 5(2A) *(eg,* Article 25, 26 and 144(2)).

6. *Guarding one's own house and demanding the return of keys: limiting cabinet*

(a) *The President: Is his home his castle?*

A purposive approach to construction admits of recourse being had to policy considerations, which in the case of the elected presidency are arguably quite crucial.

It is clear from both white papers on the elected presidency that it was envisaged that the President would be able to protect his discretionary powers from being curtailed by the parliamentary executive:

> The President can withhold his assent to any Bill (other than one

> governed by the provisions on amendments to the President's powers) which is designed to circumvent or curtail his discretionary powers under the Constitution. When the President does so, the Prime Minister may refer the Bill to the High Court to determine whether it is indeed designed to circumvent or curtail these Presidential powers. If the High Court rules that it is not, the President shall be deemed to have assented to the Bill.[110]

When this was translated into a constitutional provision, the explanatory statement to Article 22G (presently Article 22H) read:

> The new Article 22G confers upon the President the power to withhold his assent to any Bill passed by Parliament which is designed to circumvent or curtail the discretionary powers conferred upon the President by the Constitution.[111]

The phrase "any Bill" would of course be limited by the Article 22H(1) parenthesis. Bearing in mind that the elected presidency was created to serve as a countervailing power over the powerful parliamentary executive, it was clearly envisaged that the President be empowered, in the interests of the effective functioning of the institution, to protect his own powers from being whittled down by a potentially hostile parliamentary executive. One can hardly be a guardian if one does not have the power to guard one's own house and prevent marauders from stealing your weapons! Surely Parliament could not have intended to create an ineffective guardian institution?

Were this the case, taken to its logical conclusion, the President's veto powers could be removed where the requisite two-thirds parliamentary majority was garnered. Article 22H(1) would be meaningless and in the worst case scenario, the good that introducing the elected presidency seeks to accomplish could in one fell swoop be dismantled overnight by an irresponsible government. The sweet slumber that Singaporeans might have had knowing their hard-earned financial reserves was under the watchful eye of their guardian President might, *absit omen,* be rudely disrupted! Such ease of disarming would certainly be alarming and would not seem to sit easily with the idea of setting up a "two key" safeguard system to safeguard the President's custodial powers exercised to check the executive. Parliament must have intended to arm the elected presidency in adequate fashion.

The present Prime Minister in discussing why the removal mechanism

[110] Para 46, *Safeguarding Financial Assets and the Integrity of the Public Services, The Constitution of the Republic of Singapore (Amendment No 3) Bill,* Cmd 11 of 1990.

[111] See the Explanatory Statement to the Constitution of the Republic of Singapore (Amendment No 3) Bill 1990 (No 23 of 1990).

concerning the presidency was more onerous that the installation mechanism had this to say:

> ....if you have a house and you are trying to install a security system, you want a system that is easy to install and easy to operate. But you want a system that is very difficult for potential thieves, robbers or burglars to dismantle. You have to switch it off. So we have on purpose made it difficult for anyone to try and dismantle they system.[112]

This surely is apposite in considering the enlarged powers of the presidency. Counsel for the Presidency had argued that Parliament would have understood this "difficulty in dismantling" principle to apply to the circumvention of presidential powers:

> Why go to the bother of making it difficult to remove the President if an unscrupulous Executive could achieve the same result by curtailing or circumventing the President's powers? When the matter was put to Parliament by Mr Goh Chok Tong, it was done on the basis that the system was deliberately engineered so that it would be difficult to dismantle.[113]

The objection might be made that the elected president is a reactive institution and that the drafters of the elected presidency scheme had intended that government would remain firmly vested in the hands of the parliamentary executive. The then Deputy Prime Minister Goh had asseverated during parliamentary debates that the President would not be the Chief executive of the country as the Prime Minister retained the reins of control: "the initiative and responsibility of governing Singapore stays with the Prime Minister."[114] However, the short answer is that declaring that the President had power to veto bills which would impinge upon the realm of presidential powers is hardly much cause for concern – it is hardly initiatory to guard one's own house! It does not go to government of the country but preservation of one's powers from encroachment. Nor is the President in protecting the powers of the presidency appropriating more power than what the Constitution confers; he is remaining within the well-defined areas of supervision and safeguarding his supervisory powers from attrition.

A capsule summary of the whole philosophy of having an elected presidency

[112] *Supra,* note 57, col 565.

[113] President's Counsel's Brief, Case for the Presidency, Part C para 13(6).

[114] *Supra,* note 57, col 464-465. See also paras 18(a), 20 and 33 of the *Constitutional Amendments to Safeguard Financial Assets and The Integrity of the Public Service* (Cmd 10 of 1988).

may be found in the statement of the present Prime Minister that "it is prudent for us to institute a system of checks and balances in our political system, instead of banking on good fortune to throw up good government for the next 30 years."[115] It was submitted by the Counsel for the Presidency that the power to veto curtailing bills was inherent in the institutional design of the presidency as an effective check over Parliament.

(b) *Interlocking shields: a seamless web of protection?*

The bundle of discretionary powers conferred upon the presidency is not writ in stone and sacrosanct. Procedures have been provided whereby the President's powers may be reduced or enlarged as thought desirable. The crux of the matter, however, is who should have the final say on the desirability or otherwise of such an amendment. In this respect, there are three possible final decision-makers: the Government, the President and the People.

Counsel for the presidency had argued that in the interregnum prior to Article 5(2A) being brought into force, there must be some other locus of power which determines whether curtailing any particular power of the presidency is desirable, other than the parliamentary executive whose power in this respect must be limited. The Attorney General conversely argued:

> If the contention that the President has a veto power over any Article 5(2A) Bill when Article 5(2A) is not in force is upheld by the Tribunal, it would lead to the manifestly absurd and unreasonable result that when Article 5(2A) is in force, the President has nothing more than a dispensing power with respect to an Article 5(2A) Bill, but when it is not in force, the dispensing power mutates into an absolute veto power over any such Bill.[116]

The whole scheme of Article 5(2A) and Article 22H(1) ensures that the final say over certain constitutional amendments should not lie in the hands of the Cabinet. As far as Article 5(2A) is concerned, final say will rest with either the President or if he directs, the People. While Article 5(2A) is not in force, greater responsibility may be said to be invested in the President as there is no referendum outlet; hence he has the absolute veto over an Article 5(2A) Bill. When Article 5(2A) is brought into force, the President is not out of the picture as he then possesses the "dispensing power" responsibility of deciding whether or not to waive the referendum requirement. The bottom line is that there is nothing absurd about the

[115] *Ibid*, col 462.
[116] *Supra* note 9, at 59 A-C

President's interim power: the point is that restrictions on the government's amendment powers must be in place – that is the whole point of the Article 5(2A) scheme. Even greater responsibility rests on the President as far as Article 22H(1) since the buck stops with him.

Why should so much power rest in the hands of one man? Constitutionalism is predicated on a cynical distrust of human nature. Yet the assumption is clearly that the President be a man worthy of trust. To allow a greater likelihood that this should be the case, a potential President would have to clear the onerous hurdles erected by the stringent Article 19 preselection criteria. That such criteria makes it harder to be the President than the Prime Minister was to ensure that not just any Tom, Dick or Harry could ascend to this office. Otherwise, why not link the eligibility criterion for parliamentarians in Article 44 with that for the President? Surely the weight of the office must be worthy of one of such extraordinary presidential calibre? If this were not the case, than all the pronouncements made as to how "the elected president's responsibility is as critical as that of the Prime Minister" and how he must be "at least as experienced and wise as the Prime Minister, if not more so"[117] seem hyperbolic.

That aside, it is obvious that the creators of the elected presidency perceived it to be crucial to Singapore's increasingly hybrid scheme of government, as reflected by the desire to entrench these debuting provisions. The 1990 White Paper had proposed at paragraph 48:

> To ensure that the Presidential custodial powers may not be easily removed by ordinary constitutional amendments, it is proposed that the changes to the President's powers be incorporated into Part III of the Constitution. The consequence will be that subsequent amendments to these provisions of the Constitution will have to be confirmed by a two-thirds majority of the total electors at a Referendum if the President is of the view that the amendments negate the constitutional safeguards.

Note that the referendum procedure only comes into play if the President so directs. It is evident then, that the President has a role to play should his custodial powers be threatened. It was on the basis of this understanding that the President took his oath to safeguard the Constitution.

Since Article 5(2A) is not in force, the People have nary a role to play concerning the Presidency, as asserted by the Attorney-General:

> Until Article 5(2A) is brought into operation, the electorate would not be directly involved in any decision as to whether the discretionary

[117] *Supra,* note 8, col 718-719.
[118] *Supra,* note 60, Para 14 at 5.2.

> powers of the President should be reduced or modified or even the Elected Presidency abolished.[118]

After all, in the Attorney General's own words, the elected presidency was a gift from the Government to the people. If it wanted to, the government could effectively demand the return of the gift:

> The two key mechanism now in place merely enables the President, with his key, to refuse to unlock the "safe" containing the national reserves and the integrity of the public services. However, the legislative scheme was that the President would not have a permanent right to possess the key for all time. Until Article 5(2A) is brought into operation, the Government, with the due support of Parliament, has the power to demand the return of the President's key. When Article 5(2A) is brought into operation, the Government, if supported by the electorate, has the power to demand the return of the President's key in the event of any disagreement between the President and the Government over the use of the President's key. In either situation, the President may not refuse such a demand.[119]

This statement was made in the context of refuting counsel for the presidency's analogy drawn from the Roman defence strategy termed *testudo*:[120] counsel had suggested that Article 5(2A) and Article 22H(1) had been intended to operate as interlocking shields, such that when one was done, there would be a 'fall-back' shield ready in place to ward off the enemy's blow.

Going back to first principles, one recalls that the *raison d'être* of the elected presidency was to provide a check against the executive abuse of powers, particularly in the realm of financial reserves and key civil service appointments. A President imbued with custodial veto powers would constitute a two-key safeguard mechanism against the executive. If the President was not able to veto amendments to core constitutional Bills, which would include those pertaining to his veto powers in the two specified areas, this would tantamount to saying that the executive had *carte blanche* concerning the recall of keys entrusted to the President:

[119] *Ibid,* Para 10 and 11 at 3.2.

[120] This comprised a protective screen formed by a phalanx or body of troops in close contact with overlapping shields. If one shield should fall away, the other shields would move forward to protect the cohort.

[121] Associate Professor Walter Woon's oral submissions, reported in the *Straits Times,* 18 March 1995 at 25.

> The legislation was not meant surely to give the President the second key but then to take it back at will.[121]

However, the constitutional tribunal declared this an imprecise analogy:

> The "two-key" mechanism applied to the *use* of such discretionary powers of the President. This has to be distinguished from the mechanism which Parliament intended to use to protect the President's discretionary powers. The "two-key" mechanism had no bearing on the *removal* of such powers, in which situation the power would then be handed over to the electorate under Article 5(2A) ... ... As such, there was no interregnum contemplated by Parliament that, if Article 5(2A) was suspended from operation, the President would under Article 22H(1) assume the role of the electorate under Article 5(2A).[122]

This is not entirely accurate. If we look at the way Article 5(2A) is phrased, the evident principle is that the executive garnering a two-thirds parliamentary majority will not have a free hand to amend any constitutional provisions referred to in Article 5(2A) – the so-called "core" provisions. There is the presumption that the desirability of amending these "core" provisions will go to the electorate *via* referendum for final resolution. However, this presumption is entirely rebuttable as the President has a crucial role to play in this matter: he can waive the need for the referendum if, in the exercise of his independent judgment, such an amendment *(eg,* to remove or further qualify a Part IV fundamental liberty) is considered in the best interests of Singapore. I have argued[123] that since fundamental liberties are the precious possessions of Singapore citizens, such a matter should be left in their hands ultimately especially since, as John Philpot Curran stated, "the condition upon which God hath given liberty to man is eternal vigilance."[124]

The Attorney-General had argued that because Article 5(2A) was not yet in force, the legislative competence of Parliament with respect to Article 5(2A) bills has yet to be reduced and that Article 22H(1) does not limit the legislative power to amend Article 5(2A) bills.

However, the elected presidency was given a role over the constitutional amendment procedure, which is an additional constraint on legislative power. The emergent principle is that further limits were to be placed on

[122] *Supra,* note 93, at 213 B-C.
[123] *Supra*, note 17.
[124] *Speech on the Right of Election of Lord Mayor of Dublin, 10 July 1790,* quoted in Hyman, *A Dictionary of Famous Quotations,* Pan Reference Books (1983) at 116:98.

legislative powers, to circumvent the "untrammeled power of the parliamentary executive" scenario. The presidential veto would only be excluded where another safeguard was in place: the referendum procedure under an operative Article 5(2A). As long as the latter is inoperative, the presidential veto must stand as it is the sole safeguard against a government bypassing the protective mechanisms Parliament intended to construct by creating an elected presidency. This interpretation, which would be consonant with Parliament's intention to make the presidency an effective institution, would have strengthened the institution but the tribunal unfortunately choose not to correctively affirm this. Ignoring the important policy considerations informing this purposive interpretation, the tribunal declared that there was no interregnum protection, rejected the innovative *testudo* analogy, concluding that both Article 22H(1) and Article 5(2A) were in relation to each other, islands entire of themselves.

To affirm that the government has a free hand to scale down the powers of the presidency, either brick or brick or through a single detonation, is to drastically erode the presidency's capacity to serve as an effective countervailing power *vis à vis* the parliamentary executive.

VI. Prospect: Whither the Presidency?

Since Independence, the PAP Government has been amending the Constitution almost every year. I think the frequency in which we have been amending the Constitution may well earn us another "first in the world". From what the Deputy Prime said just now, it would appear that our Constitution, which is already scarred and battered, may have to suffer many more amendments, and I really do not know when these amendments will end.

Low Thia Kiang[125]

Although the first constitutional tribunal proceedings must have been caviare to the general,[126] it was undoubtedly a milestone in Singapore's constitutional history[127] and, together with all the recent constitutional amendments, has contributed towards the clarification of the extent of the powers of the presidency. Critics have opined that the very fact that the

[125] *Supra,* note 15, col 441.
[126] William Shakespeare, *Hamlet*, Act II Scene ii, ln. 413.
[127] See "The Elected President's powers", *Straits Times,* 26 April 1995 at 28.
[128] Singapore Government Press Release No 01/Sep, *Speech by President Ong Teng Cheong at the Swearing in of the Fifth President at the Istana on Wednesday, 1 September 1993 at 8.00pm.*

government amicably accommodated the presidential request for a constitutional reference merely reflects the commitment, articulated in the President's swearing in speech,[128] of the President and the government to "feel their way forward" in a non-contentious, co-operative spirit. Indeed, some[129] have opined that the presidency has been strengthened as having a constitutional reference was indicative of the independence of the President *vis-à-vis* his former political party. What is clear from the tribunal's conservative opinion is that even the spectre of any potential Gaullist ghost of active creationism will be speedily exorcised.

The amendments made thus far to the presidency have been directed at either reducing the ambit of presidential powers or rendering the exercise of the office's discretionary powers more accountable. The constitutional reference has made low the mountains obstructing the government's desire to amend Article 22H(1) which would certainly entail a further reduction of presidential power. What is clear is that we have yet to reach the end of the amendment road, as Singapore's constitution continues to evolve not in accordance with any clear jurisprudential basis, but in the Holmesque spirit of functional pragmatism. The elected presidency will continue to be the point at which the parliamentary draftsman will cut his teeth further. From the Deputy Prime Minister's parliamentary speech of 25 August 1994,[130] we can anticipate the arrival of a bifurcated Article 22H and a new Article 5A as well as an amendment to Article 5(2A) to include Article 5A within its umbrella of protection. The latest ministerial pronouncement of 8 July 1995[131] seems to confirm the prognosis that the final product still has some way to go ere it is completed. Despite the expiration of the four year 'grace period' running from November 1991, it was stated that it would take several more years before Article 5(2A) would be brought into effect and a second or even third round of amendments to fine-tune the elected president laws.

None of the amendments passed thus far have gone towards strengthening the presidency as a counter-balancing institution *vis à vis* the powerful parliamentary executive. It must be remembered that this institution was introduced to help assuage the effect of having a parliamentary "gap". The

[129] Walter Woon, Nominated MP and President's Counsel has opined "whichever way the tribunal decides, the presidency is strengthened. Cynics had thought the president would be a tool of the ruling party. It's quite clear he's not." Asiaweek, "Defining the Limits", 21 April 1995 at 30.

[130] *Supra,* note 15, cols 430-431: an amended Art 22H will cover legislation other than constitutional amendments, whereby the presidential veto will be conclusive as to non-constitutional curtailing legislation. The new Art 5A will cover non-core constitutional amendments like Art 25, creating a referendum outlet should the President refuse assent to this type of curtailing bill.

[131] *Straits Times,* 8 July 1995 at 1, "Long way to go before EP legislation is final".

present Prime Minister, in discussing his government's philosophy of government said:

> We believe that a good system of Government must have checks and balances. Our present parliamentary system of Government does not provide adequate checks. A political party which holds the majority of seats in Parliament can do practically anything it wishes, provided it acts lawfully. It can take any decision on our reserves and on appointment of key civil service positions. We consider that no Government, present or future, should be allowed to do this without some form of check and balance.[132]

Although the elected president was introduced as a substantial check on government powers in limited areas, the parliamentary gap, like Tantalus' thirst, has yet to be satisfied by our present modified parliamentary system, with an elected head of state superimposed on it. The government's wings' may still be expansively extended. When the institution was introduced in 1991, Prime Minister Goh spoke of it as being a "change to our familiar system of government" as being "novel arrangements unparalleled elsewhere in the world". At present, the 'change' element is being considerably played down: "The 1991 Constitution Act was not intended to and did not change the parliamentary system of government in Singapore."[133]

Without an effective parliamentary opposition, a central feature of Westminster modeled parliamentary systems, even what Schumpeter called "democratic elitism"[134] is absent. This state of affairs at least checks a present government by presenting it with the possibility of being replaced by an alternative viable government at the next general elections, ringing out the message that no one is indispensable.

If a causal link exists between strong government and economic growth, as protagonists of the Singapore School suggest, pointing to Singapore's immense empirical success achieved under the iron hand of oligarchy, then a dominant one party state having a parliamentary system with a token lilliputian opposition may not be a necessary evil. In this conception, the paramount objective driving Singapore Incorporated must needs not be the

[132] *Supra,* note 8, col 722 and 723.

[133] *Supra,* note 9, at 6 G-H.

[134] Democratic elitism entails a restriction of public participation to a periodic take it or leave it choice between competing political elites, freeing the elected group to do virtually anything it wills between elections. J Schumpeter, *Capitalism, Socialism and Democracy* (1943).

[135] See Andrew Phang's discussion of the Singaporean preoccupation with materialism in *The Development of Singapore Law: Historical and Socio-Legal Perspectives*, Butterworths (1990) at 138-146.

democratic aspiration of ensuring the accountability of the rulers to the ruled; rather, to maintain and perpetuate the economic success story in pursuit of satisfying the Singaporean love of *lucre*.[135] If the latter can be accomplished by some form of 'constitutional authoritarianism', itself an oxymoronic idea, than the draw of *lucre* might well trump more libertarian concerns. As an aside, it is by no means clear that democracy and economic growth are mutually incompatible.[136]

Filling in the parliamentary gap would vindicate Constitutionalism and limited government – values which are often sacrificed at the altar of pragmatic expediency. Nevertheless, appeals to such values, reflected in the basic objectives of the elected presidency, crop up intermittently, although these are perhaps not always concretised. Thus far, the attempts to actualise limited government – however well-intentioned – through the crafting of new constitutional creatures including the elected presidency, regrettably smack of a chasing after the wind.

THIO LI-ANN*

[136] For some readings on this contentious topic, see, *eg,* Fareed Zakaria, "Culture is Destiny: A Conversation with Lee Kuan Yew", *Foreign Affairs*, March-April 1994, 109; Eric Jones, "Asia's Fate: A Response to the Singapore School", *The National Interest*, Spring 1994, 18; "Democracy and Growth: why voting is good for you", *The Economist,* August 27-2 September 1994 at 15 and Kim Dae Jung, *Is Culture Destiny? The Myth of Asia's Anti Democratic Values,* Foreign Affairs Nov-Dec 1994, 189.

* BA (Oxon); LLM (Harv); Barrister (GI); Lecturer, Faculty of Law, National University of Singapore.