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WORKING OUT THE PRESIDENCY: NO PASSAGE OF RIGHTS – IN DEFENCE OF THE OPINION OF THE CONSTITUTIONAL TRIBUNAL

In 1994, a difference of opinion arose between the President and the Government on whether the President had the power, under Article 22H(1) of the Constitution, to veto a Bill to amend Article 22H(1). The Constitution was amended to establish a Tribunal to which any question as to the effect of a constitutional provision on any Bill could be referred for its opinion. In the first reference heard on 17 March 1995, the Tribunal advised that the President had no power under Article 22H(1) to veto a Bill to amend Article 22H(1) itself. The Tribunal's opinion as well as the case for the Government were strongly criticised in an article published in the December 1995 issue of this journal. This article is a reply to those criticisms.

I. INTRODUCTION

IN her article entitled "Working Out The Presidency: The Rites of Passage", Thio Li-Ann sees the introduction of the elected presidency in 1991 as "the latest in the long line of constitutional reforms intended to effectuate representative democracy *a la Singapour*".[1]

She also discusses the constitutional changes effected by the Constitution of the Republic of Singapore (Amendment No 2) Act of 1994, the legal effect of the advisory opinion of the constitutional tribunal[2] (hereinafter referred to as "the Tribunal") and of the amendment the Government wishes to make to Article 22H of the Constitution to clarify the veto powers of the President given by that Article. She concludes from her survey that:

> 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 chasing after the wind.[3]

1 See [1995] SJLS 509-557 at 514.

2 The intention of the Government to seek the advisory opinion of the Tribunal was announced in Parliament by the Deputy Prime Minister BG Lee Hsien Loong on 25 August 1994: see *Singapore Parliamentary Debates, Official Record*, 25 August 1994, Cols 454-455.

3 *Supra*, note 1, at 557.

Thio does not regard strong government as a necessary evil provided it leads to economic growth, but at the same time she fears that the "Singapore School" of strong government for the sake of economic success (the Singaporean love of *lucre*, as she puts it) could give rise to "some form of constitutional authoritarianism" to "trump more libertarian concerns".[4]

Thio finally doubts that the "parliamentary gap"[5] in Singapore can be closed or that "Constitutionalism and limited government" can be vindicated by the Government's efforts as "appeals to such values are often sacrificed at the altar of pragmatic expediency".[6]

II. Purpose of Response

This response is not concerned with Thio's academic musings on the present and future state of constitutional government in Singapore. It is concerned with Thio's detailed but one-sided critique of the advisory opinion of the Tribunal[7] on the question referred to it by the President under Article 100 of the Constitution. The question raised a fundamental issue in an unique context of a seeming conflict of constitutional powers between Parliament and the Presidency under the new dispensation of a parliamentary government overlaid with an elected presidency vested with the power to veto any Bill passed by Parliament which curtails such veto powers[8] (which Thio refers to as a "curtailing bill").

The general issue in the question was whether Parliament has the power to amend any of the constitutional provisions (including Article 22H) referred to in Article 5(2A), whilst Article 5(2A) is in a state of suspended animation, in the light of the words of Article 22H(1). The specific issue was whether Parliament may amend Article 22H(1) to restrict the President's veto powers therein to ordinary Bills.

The suspension of Article 5(2A) from operation was decided by the Government on the recommendation of the Select Committee on the Constitution of the Republic of Singapore (Amendment No 3) Bill of 1990 (hereafter called "the 1990 Constitutional Bill") in case there was a need for adjustments, modifications and refinements to be made to the novel provisions of the elected presidency law.

4 *Ibid*, at 557.

5 *Ibid*, at 515. Thio uses this expression to mean the absence of any parliamentary opposition to check the powers of the parliamentary executive.

6 *Ibid*, at 557.

7 Reported in *Constitutional Reference No 1 of 1995* [1995] 2 SLR 201.

8 *Ie*, any Bill which directly or indirectly circumvents or curtails the discretionary powers of the President conferred upon him by the Constitution as provided in Art 22H(1).

To answer the question and settle the issue as to the constitutional position in this regard during this *interregnum,*[9] the Tribunal examined the history of the elected presidency provisions, beginning from the two White Papers published in 1988 and 1990, the Select Committee Report, and ending with the ministerial speeches made in Parliament.[10] On the basis of such an examination, the Tribunal answered the question in favour of the Government.

Thio, who assisted in the preparation of the Presidency's case, strenuously maintains the correctness of the Presidency's case and disagrees strongly with the Tribunal's opinion. She practically condemns the Tribunal for having forsaken common sense[11] and accuses it of having ignored the relevant policy considerations that would have led to the opposite conclusion.[12]

This reply seeks to demonstrate that the Tribunal's opinion is correct on legal principles. The Tribunal's reading of Article 22H(1) accords with the intention of Parliament as disclosed in the parliamentary materials. Although the debate is now academic, it is suggested that Thio's critique of the Tribunal's opinion is wholly misconceived and rested on nothing more than the pre-conceived notion that the Presidency had to be protected from the Government during the *interregnum.* This reply also puts on the record of this journal the rebuttals of the Attorney General to Thio's arguments which Thio has ignored in her critique.

Thio's critique goes beyond the published reasons of the Tribunal's opinion to some of the arguments of the Attorney General which the Tribunal did not address, presumably because they were unnecessary for its finding. It is difficult to appreciate the need, even in an academic exercise, to resurrect these arguments, except for the purpose of scoring academic points. However, as this aspect of the critique is also one-sided in omitting to mention the reasoning underpinning such arguments, this reply will also rectify the omission.

9 *Ie*, the period during which Art 5(2A) remains suspended.

10 The 1990 Constitutional Bill, as amended, was passed and assented to by the President as the Constitution of the Republic of Singapore (Amendment) Act No 5 of 1991. Art 1 of the Act authorises the President (acting on advice) to appoint different dates for the coming into operation of the different provisions of the Act. The Act was brought into force on 30 November 1991, except for Art 5(2A).

11 *Supra*, note 1, at 533-535.

12 *Ibid*, at 554.

III. The First Constitutional Reference

A. *Relevant Articles*

Article 5(2A) provides as follows:

> 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, 68, 70, 93A, 94, 95, 105, 107, 110A, 110B, 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.

For convenience, the expression "core constitutional provisions", when used hereafter, means the Articles referred to in Article 5(2A).

Article 22H(1) provides as follows:

> 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.

B. *Question for Tribunal*

The question referred to the Tribunal was as follows:[13]

> 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 power thereunder to any non-Constitutional Bill which provides directly or indirectly for the circumvention or curtailment of the President's discretionary powers conferred upon him by the Constitution.

[13] See Appendix A for the full terms of reference.

C. *Case for the Government*

The case for the Government is summarised in paragraph 109(a) to (g) of the Case for the Government as follows:

(a) Singapore has a parliamentary system of government under which the Prime Minister and his Cabinet govern but the President, although elected directly by the electorate, has custodial functions to safeguard the national reserves, key appointments to the public services, the abuse of powers under the Internal Security Act, the Maintenance of Religious Harmony Act and the Prevention of Corruption Act.

(b) Except for the discretionary powers listed in Article 21(2), the President, as a constitutional Head of State, must in the exercise of his functions under the Constitution or under any other written law act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet as provided in Article 21(1). This function includes the giving of his assent to any Bill passed by Parliament.

(c) Parliament has plenary powers in every field of legislation. Its legislative competence consists of constitutional amending powers and ordinary legislative powers. Its constitutional amending powers as contained in Article 5 are expressed to be subject only to Article 5 itself (including Article 5(2A)) and Article 8, but not Article 22H.

(d) Since Article 5 deals exclusively with constitutional Bills, this class of Bills is excluded from the scope of Article 22H(1) which, by implication, is restricted to non-Constitutional Bills. Articles 5(2A), 8 and 22 are mutually exclusive in relation to the scope of their subject matter. Therefore, the President may not veto any Bill passed by Parliament to amend any of the core provisions (*ie*, the provisions covered by Article 5(2A)), including Article 5(2A) or Article 22H(1).

(e) In any case, the legislative intent of Article 22H(1), consistent with the legislative intent in Article 5(2A) and in Article 21(2)(c), is that the President shall have no power to veto any Article 5(2A) Bill, whether or not it circumvents or curtails the President's discretionary powers. The President's veto power in Article 22H(1)

cannot enlarge itself by reason only of Article 5(2A) not being in force.

(f) Article 5(2A), in its suspended state, represents the will of Parliament. The parenthetical clause exists as an operative provision in Article 22H(1) and has to be given a meaning and effect to reflect the legislative intent. The Tribunal should give effect to the legislative intent of Article 5(2A) and the parenthetical clause by modifying the parenthetical clause to refer to any Bill passed by Parliament seeking to amend any of the core provisions.

(g) Accordingly, the Tribunal should advise the President that the answer to the question on the general as well as the specific issue is that the President has no power to withhold his assent to any Bill passed by Parliament which amends any of the core provisions, and specifically, Article 22H in the manner described in the question.

D. *Case for the Presidency*

The case for Presidency[14] is summarised in paragraphs 15 to 23 of the Case for the Presidency as follows:

(a) ...the Constitution should be interpreted objectively, according to the meaning of the words actually used, in the light of the intention of Parliament as manifested at the time the provisions in question were enacted.

(b) The rationale for having an Elected President is to provide a mechanism to safeguard the country's reserves and the integrity of the public service.

(c) In order for the institution of the Elected Presidency to function properly, the President must have the power to protect his constitutional powers from curtailment or circumvention by the executive branch of government.

[14] The Presidency was represented by Mr Joseph Grimberg and Associate Professor Walter Woon of the Law Faculty of the National University of Singapore. The former was a former Judicial Commissioner and is currently a consultant in the firm of Drew & Napier of which he was the senior partner before his retirement therefrom. The latter is also a Nominated Member of Parliament ["NMP"].

(d) This power is provided in Article 22H(1) of the Constitution.

(e) It was not Parliament's intention to affect the President's powers under Article 22H(1) when the application of Article 5(2A) was deferred.

(f) Article 22H(1) is clear: the President may veto any bill which curtails his discretionary powers, except bills to which Article 5(2A) applies.

(g) Since Article 5(2A) is not presently in force, it does not "apply" to any Bill; the President may therefore veto any Bill that curtails his discretionary powers under the Constitution.

(h) The Government can still amend any of the constitutional provisions mentioned in Article 5(2A) without the President being able to veto the amendment, so long as the President's discretionary powers are not circumvented or curtailed. This is consistent with Parliament's intention as evidenced by the contemporaneous documents and statements.

(i) Therefore 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) in so far as such a Bill provides directly or indirectly for the circumvention or curtailment of the discretionary powers conferred upon him by the Constitution.

E. *Advice of Tribunal*

The Tribunal answered the question as follows:

> Although Article 5(2A) of the Constitution has not been brought into operation, the President has no 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 bill which provides directly or indirectly for the circumvention or curtailment of the President's powers conferred upon him by the Constitution.

The Tribunal accepted the narrower case for the Government and advised that Parliament in enacting Articles 5(2A) and 22H(1) did not intend the

President to have any power to veto any Article 5(2A) Bill passed by Parliament. That power is reserved to the People, and since Article 5(2A) is not in force, the People's power is also suspended.

IV. The Government Giveth, The Government Taketh Away?

A. *"Gift" of the Elected Presidency*[15]

Thio does not explain what the question mark to the above main title of Part V of her article signifies. However, having regard to the opinion of the Tribunal that on the scope of Article 22H(1), that the President does not have a veto over Article 5(2A) Bills, any claim or suggestion that what "the Government giveth, the Government taketh away" in relation to the powers of the President under Article 22H(1) is well off the mark.

However, Thio makes a reference to NMP Walter Woon's subsequent question in Parliament on whether the Government intended to take back the "gift" of the elected presidency law from the people. The reply of the Deputy Prime Minister, BG Lee Hsien Loong, was a definite "No".

But to understand why this question was asked at all requires clarification. Counsel for the Presidency had argued in paragraph 13.6 of the Case for the Presidency that the Tribunal should not interpret Articles 22H(1) and 5(2A) in a way which would allow an irresponsible government to squander all the national reserves as that would be completely inconsistent with the intention of Parliament when the 1990 Constitutional Bill was passed, the intention being *the immediate creation* of an elected presidency that could not be interfered with in this way.

The Attorney General's reply as set out in paragraphs 4.6 to 4.7 of the Reply for the Government was as follows:

> 4.6 The contention in paragraph 13.6 that it is possible for an unscrupulous, profligate government, with the requisite parliamentary majority, to remove all the President's discretionary powers without the President's consent is correct, but is entirely hypothetical. The reality is that the Government that established the Elected Presidency is the same Government that is seeking to amend Article 22H(1)...that it was this very Government that, out of due caution and prudence, decided against the premature

[15] See *supra*, note 1, at 527 and note 66 therein where Thio also raises the question to what extent, because the Attorney General has said that the elected presidency law is the gift of the Government to the people, the Constitution is that of the People as opposed to one by the Government. It is not clear what purpose this distinction serves.

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 nor is it relevant to the question in the Reference.

4.7 The Tribunal should not allow the hypothesis in paragraph 13.6 of the Case for the Presidency to influence its answer to the question in the Reference. The Tribunal's duty is to give a legal answer to a legal question on legal grounds. Whether or not the Elected Presidency should exist in its present form or should exist at all, if the question were to arise in the future, raises political issues beyond the remit of the Tribunal. In *Amalgamated Society of Engineers* v *Adelaide Steamship Co Ltd* [1920] 28 CLR 129, Issacs J, in delivering the majority judgment [Knox CJ, Isaacs, Rich and Starke JJ] of the High Court of Australia, pointed out at pages 151-152 of the report:

"... we should state explicitly that the doctrine of "implied prohibition" against the exercise of a power once ascertained in accordance with ordinary rules of construction, was definitely rejected by the Privy Council in *Webb* v *Outrim* ... From its nature, it is incapable of consistent application, because "necessity" in the sense employed – a political sense – must vary in relation to various powers and various States, and, indeed, various periods and circumstances. Not only is the judicial branch of the Government inappropriate to determine political necessities, but experience, both in Australia and America, evidenced by discordant decisions, has proved both the elusiveness and the inaccuracy of the doctrine as a legal standard. Its inaccuracy is perhaps the more thoroughly perceived when it is considered what the doctrine of "necessity" in a political sense means. It means the necessity of protection against the aggression of some outside and possibly hostile body. It is based on distrust, lest powers, if once conceded to the least degree, might be abused to the point of destruction. *But possible abuse of powers is no reason in British law for limiting the natural force of the language creating them.* It may be taken into account by the parties when creating the powers, and they, by omission of suggested powers or by safeguards introduced by them into the compact, may delimit the powers created. *But, once the parties have by the terms they employ defined the permitted limits, no Court has any right to narrow those limits by reason of any fear that the powers as actually circumscribed by the language naturally understood may be abused.* This has been pointed out by the Privy Council on several occasions, including the case of the *Bank of Toronto* v *Lambe*. The ordinary meaning of the terms employed

> in one place may be restricted by terms used elsewhere: that is pure legal construction. *But, once their true meaning is so ascertained, they cannot be further limited by the fear of abuse.* The non-granting of powers, the expressed qualifications of powers granted, the expressed retention of powers, are all to be taken into account by a Court. *But the extravagant use of the granted powers in the actual working of the Constitution is a matter to be guarded against by the constituencies and not by the Courts*. When the people of Australia, to use the words of the Constitution itself, "united in a Federal Commonwealth", they took power to control by ordinary constitutional means any attempt on the part of the national Parliament to misuse its powers. If it be conceivable that the representatives of the people of Australia as a whole would ever proceed to use their national powers to injure the people of Australia considered sectionally, it is certainly within the power of the people themselves to resent and reverse what may be done. No protection of this Court is such a case is necessary or proper. Therefore, the doctrine of political necessity, as a means of interpretation, is indefensible on any ground. The one clear line of judicial inquiry as to the meaning of the Constitution must be to read it naturally in the light of the circumstances in which it was made, with knowledge of the combined fabric of the common law and the statute law which preceded it, and then *lucet ipsa per se*". (emphasis added)

As the Reply of the Presidency invested the argument with a "doomsday" effect, the Attorney General considered it necessary to address the issue in the final paragraph of the Rejoinder of the Government in these terms:

> 16.1 The basis underlying the case for the Presidency is that if this Tribunal does not interpret Article 22H(1) to empower the President to withhold his assent to any Constitutional Bill, including an Article 5(2A) Bill (but excluding an Article 8 Bill), an irresponsible and profligate Government could take away all the President's safeguard powers without his consent.
>
> 16.2 This argument must be viewed in its proper context. It is an argument which is intended to apply and applies to the present Government and all future Governments. In relation to future Governments, no one can tell whether any one of them would want to take away all the discretionary powers of the President. It is therefore a hypothetical situation which may or may not come about. In the United Kingdom, there has been talk of abolishing the Monarchy for years. But it has yet to come about.

16.3 In relation to the present Government, the reality is that it is this Government which gave the institution of the Elected Presidency to the people of Singapore as the most workable and effective means to safeguard the national reserves and the integrity of the public services. However, the Government decided to act with caution in proceeding with the implementation of the system by not bringing the entrenchment provision in Article 5(2A) into operation so that it would have the ability and flexibility to adjust, modify and refine the system. The Government is still in the process of making the necessary changes to the system to ensure that it works smoothly.

16.4 Any suggestion of this Government suddenly becoming irresponsible and profligate is completely unrealistic. The Prime Minister, Mr Goh Chok Tong, in his speech at the swearing in of the President on 1 September 1993 reiterated his commitment to safeguard Singapore's long term future from being ruined or bankrupted by an irresponsible or unscrupulous government and stated that the Government had not the slightest intention to squander the financial reserves or depart from the cardinal principle of appointing the best officers to key positions in the public service on merit.

16.5 We are now only concerned with the interregnum between the suspension of and the bringing into operation of the entrenchment provision in Article 5(2A). Given this Government's commitment to safeguard Singapore's long term future, it is completely unrealistic to imagine that this Government would act irresponsibly and be profligate during this interregnum. The fact is that the present Government can entrench the President's discretionary powers at any time it perceives that Singapore's long term future would be jeopardised by the next Government.

16.6 In conclusion, this Tribunal should not allow itself to be influenced by the basis underlying the case for the Presidency but should give a legal answer to a legal question on legal grounds.

These submissions make it clear that the Attorney General had argued that there was no place for a doctrine of implied prohibition of the plenary powers of Parliament simply because Parliament could abuse those powers. They also demonstrate another misunderstanding by Thio on what the Attorney General had said to the Tribunal as to the intention of the Government

on the future of the elected presidency should the Tribunal answer the question in favour of the Government.

B. *Attorney General's Assurances?*

Thio claims that at the hearing of the Constitutional Reference, the Government, through the Attorney General, gave assurances that the Government would not seek to abolish the elected presidency and that such assurances were politically persuasive.[16] This claim is quite mistaken. The Attorney General gave no such assurance.[17] The Attorney General merely argued, as he was entitled to do, that if the argument of counsel for the Presidency was that an answer favourable to the Government could lead to the dismantling of the elected presidency law, the Tribunal had only to consider who gave the elected presidency to the people, and when and why it was done to reach the conclusion that the argument was groundless. He asked the Tribunal to give *a legal answer to a legal question on legal grounds*. This the Tribunal did.

Accordingly, Thio's comment that:

> Accepting the government's assurances comes with the cost of making *Principle* the handmaiden of *Pragmatism*[18] (emphasis added)

is an egregious mistake which impugns the Attorney General's professional integrity, and, if there be any suggestion that the Tribunal accepted such assurances, also its judicial integrity. It is astonishing that such a statement could be made and published in this journal.

[16] *Supra*, note 1, at 540.

[17] The fact that NMP Walter Woon asked in Parliament whether the Government intended to take back the gift of the elected presidency can be interpreted to mean that he did not understand the Attorney General to have given any assurance.
And even if the Attorney-General were authorised to and did give such an assurance, it could not by its nature be legally capable of having a binding effect on a future Legislature which has plenary powers in every field of legislation and can amend or remove any provision of the Constitution, subject only to the observance of any particular manner and form provision applicable to such amendment or removal: see *Bribery Commissioner* v *Ranasinghe* [1965] AC 172.

[18] *Supra*, note 1, at 540.

C. *Article 100 – Genesis*

1. *Withholding Presidential Initiative?*

Article 100[19] was drafted for a specific purpose: to enable the Government to refer to the Tribunal the question of the effect of Article 22H(1) on the proposed amendment to Article 22H(1). But, as drafted, its ambit is wide enough to allow a reference of the effect of any constitutional provision on any bill.

The purpose of Article 100 was explained in a ministerial speech in Parliament. The Deputy Prime Minister made it clear that only the Government would be able to exercise this power and explained that giving the President a discretionary power of reference would be inconsistent with the intention of the framers of the elected presidency that it would be a reactive and not a proactive institution. Thio considers this a feeble argument for not giving such a power to the President as "the presidency and its powers are still in flux 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".[20]

[19] Art 100(1) provides that "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 of this Constitution which has arisen or which appears to him likely to arise."
Thio quotes NMP Walter Woon's view that there were certain ambiguities in the drafting of Article 100, in that:

> "it is not clear whether the effect of a constitutional amendment bill as opposed to a constitutional provision may [be] 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."

This is surprising as the meaning of Article 100 is plain. A "provision in this Constitution" cannot refer to a Bill since a Bill cannot, by definition, be a provision in the Constitution. What is referable under Article 100 is an *existing* provision in the Constitution.
Thio goes further. She writes:

> "It may be possible to argue that the Art 100 power could fall within the ambit of the 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 [as] Art 35(7) and 22F."

This argument is also surprising since Thio does not explain how a purposive interpretation can give the result she asserts. She also cannot point to any other provision in the Constitution which authorises the President to act in his discretion in connection with the Article 100 power. It may be pointed out that in the Constitution whenever a discretionary power is given to the President, it is expressed as such: see Arts 22, 22A(1), 22B(2), 22C(1), 22D(2), 22E, 22G, 22H(1), 22I and 26(1)(b). Art 100 deliberately omits the crucial words "acting in his discretion".

[20] *Supra*, note 1, at 527-528.

Thio argues that a presidential right of reference would certainly have strengthened the institution of the elected presidency. But she does not explain how it does so. It is difficult to see how the acquisition of such a right can strengthen the presidency in a meaningful way when all the President has to do in an appropriate case is to say "No" to a Bill.

Indeed, the contrary case can be argued that the exercise of such a power is not in the interest of the Presidency. It may give the impression that there is a more serious conflict between the President and the Government than is otherwise the case. The President can perform his safeguarding role with the dignity and objectivity as befitting his office by requiring the Government to satisfy him that any Bill affecting his powers is not subject to his veto. The strength of the Presidency lies in the power to make the Government prove its case before a Constitutional Tribunal and not to seek to prove the President's case before it.

The rationale of Article 100 is entirely consistent with the safeguarding, and by definition, reactive role of the President. The Government retains the initiative to govern. The elected presidency law was not intended to and did not give any executive powers to the President. As Prime Minister Goh Chok Tong (then the First Deputy Prime Minister) said in Parliament:

> Let me stress here, however, that the Bill does not transfer the power of Government to the Elected President, nor vest in him absolute veto power. Firstly, even though the President is elected by the people, he is not the Head of Government. He is the Head of State. He is not the Chief Executive of the country. The Prime Minister is. The initiative and responsibility of governing Singapore stays with the Prime Minister. Secondly, the President can override the Government only in certain well-defined areas: use of reserves not accumulated by the Government, key appointments in the public services, detention under ISA, Prohibition Orders under the Maintenance of Religious Harmony Bill when it is passed, and certain investigations by CPIB. Thirdly, there are also checks on the Elected President.[21]

[21] *Singapore Parliamentary Debates, Official Record,* 4 October 1990, Cols 464-465. See also paragraphs 18(a), 20 and 33 of the 1988 White Paper which state as follows:-

Paragraph 18(a):

> "The Parliamentary system should be preserved. The Prime Minister and Cabinet should keep the initiative to govern the nation. This system has worked satisfactorily, and radical changes to it are not desirable. Any Constitutional checks and safeguards should be confined to the two stated areas, leaving the Prime Minister and Cabinet full freedom to govern in all other respects."

Paragraph 20:

> "The President will be entrusted with the duty of protecting the Republic's financial assets, and preserving the integrity of the public services. He will not be an executive

These considerations militate against any fine-tuning of the President's powers in the direction espoused by Thio during the "state of flux".

2. *May the Government ignore the Tribunal's opinion?*

Thio points out that, as the President had agreed to be bound by the opinion of the Tribunal, the Government must be assumed, on the principle of reciprocity, to act in good faith and not disregard the Tribunal's opinion. At the same time she also points out that nevertheless the Government seemed very determined to find some way of amending Article 22H and then goes on to state that had an opinion adverse to the Government been rendered, the Government would have had the option *to ignore the opinion entirely*.[22]

Thio does not explain how in these circumstances the Government could have ignored the opinion of the Tribunal and amended Article 22H(1) as it wanted without acting unconstitutionally. In the accompanying footnote to this statement, she refers to Article 100(4)[23] with the comment that the Article "would seem to preclude a challenge to the constitutionality of any constitutional or legal provision which has been the subject of a constitutional reference."[24]

On the basis of this interpretation, that the Government would be bound by the opinion of the Tribunal on the scope of Article 22H(1), Thio has an obligation to explain her enigmatic statement that the Government could have ignored the Tribunal's opinion. Otherwise, the statement makes no sense whatever.

President, unlike the President of France or Sri Lanka. The Prime Minister and Cabinet will continue to govern the country under our Parliamentary system of government."

Paragraph 33:

"To safeguard national reserves and assets, and the integrity of the public services, it is proposed to create an elected President who will serve as a watchdog or custodian in these two areas. The Parliamentary system of government will not be altered. The Prime Minister and his Cabinet will govern the nation. Even in these two critical areas, the Prime Minister and his Cabinet still take the decisions, but they must seek the President's concurrence. If the President does not concur, a Government which is convinced of the rightness of its actions can take the issue to the people."

22 *Ibid*, at 528 and notes 70 and 71 therein.

23 Art 100(4) 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."

24 *Ibid*, at 528 and note 71 therein. Thio's understanding of Art 100(4) is correct. Its purpose is to prevent any re-litigation of any issue which has been the subject matter of a reference to the Tribunal. No party to any court proceedings, including the Government, can mount a collateral attack on the opinion of the Tribunal on that issue. Art 100(4) effectively prevents the Government from taking any legal position contrary to the advice of the Tribunal, and thus from ignoring any adverse opinion of the Tribunal.

D. *The Constitutional Reference*

1. *Retrospective Ministerial Speeches*

In August 1994, the Deputy Prime Minister explained in Parliament why the Government wished to amend Article 22H(1). The explanation was that Article 22H(1) was mistakenly drafted and did not accord with the intention of Parliament that Article 22H(1) should apply only to non-constitutional amendment bills.[25] But, at the same time, the Deputy Prime Minister also disclosed in Parliament that the Attorney General had advised that the President could not veto an amendment to Article 22H(1).[26]

Thio cautions that the Deputy Prime Minister's explanation of the purpose of Article 22H(1) was a retrospective interpretation and that no weight should be given to such speeches in construing legislation.[27] This point was not in issue before the Tribunal. The Attorney General indeed accepted that the Deputy Prime Minister's statement could not be used to interpret the scope of Article 22H(1). He agreed with counsel for the Presidency that the Constitution should be interpreted according to the intention of Parliament as manifested at the time the provisions in question were enacted.[28]

The irony in this case may well be Thio's failure to appreciate the irony of her caution. In reply to the Attorney General's argument[29] that Article 22H(1) was applicable only to ordinary Bills, counsel for the Presidency pointed out that as the specific issue before the Tribunal had been drafted on the basis that Article 22H(1) applied to non-core constitutional Bills (*ie*, those not within the scope of Article 5(2A)), the Tribunal should construe Article 22H(1) on the same basis. In effect, this was equivalent to urging the Tribunal to accept the Deputy Prime Minister's retrospective statement that Article 22H(1) had been mistakenly drafted!

[25] *Ibid*, at 530 and note 75 therein.

[26] *Singapore Parliamentary Debates, Official Record,* 25 August 94, Cols 428-431.

[27] It is not clear whether the caution is directed to the Deputy Prime Minister's admission of a mistaken drafting or to his statement on the Attorney General's advice. It is also not clear what the caution is *a propos of*. Thio cannot be suggesting that the Tribunal's advice was influenced either way by the Deputy Prime Minister's speech. Indeed, contrary to Thio's own misunderstanding, the Tribunal made no finding on whether Art 22H(1) was mistakenly drafted as contemplated by the Deputy Prime Minister.

[28] See *Bennion: Statutory Interpretation,* 2nd edition at 352 and *Dimozantos* v *The Queen* (1993) 67 ALJR 812 cited in para 46 and 48 of the *Case for the Government.*

[29] The Attorney General sought to argue that the words "any Bill" in Art 22H(1) applied only to ordinary Bills. Paragraph 96 of the *Case for the Government* states as follows:
"The Attorney General has previously advised the Government on the scope of Art 22H(1) to the effect that the words "any Bill" in Art 22H(1) could mean any Constitutional or non-Constitutional Bill, for the reason that these words were immediately qualified by the

2. *The Tribunal – Procedure at Hearing*

Thio commends the Tribunal for its wise decision to pre-determine the procedure for the Constitutional Reference, but immediately questions the appropriateness of the pre-determined procedure. She writes:

> It may be questioned whether 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 practising certificate before the tribunal?[30]

Thio giveth praise, and then taketh away. In any case, the criticism is not justified. The prescribed procedure posed no difficulty to both parties.

The reference to the need for a practising certificate in this context is curious. It is not a procedural point, but a substantive point of law as to the right of audience before the Tribunal. Whether a person who is not an advocate and solicitor may appear before the Tribunal depends on whether his appearance, in this case to argue issues of constitutional law and interpretation, amounts to practising law under the Legal Profession Act.[31] That this was the relevant issue is demonstrated by Associate Professor Walter Woon's caution in not appearing to receive the opinion of the Tribunal when his practising certificate was delayed in the process.

3. *Issues Arising*

(a) *Common Sense Approach* v *(?) – Meaning of "Applies"*

Thio confines the rival interpretations of the parenthetical words "other than a Bill to which Article 5(2A) applies" referred in Article 22H(1) (hereafter referred as "the parenthesis") to two constructions:

parenthetical clause. As a result, the Deputy Prime Minister, BG Lee Hsien Loong, said in Parliament that:

"Art 22H has prematurely conferred upon the President a power to veto non-core Constitutional amendments..."

In the light of the submissions in this Case, the previous approach is unduly narrow. The statement of the Deputy Prime Minister does not reflect the legislative intent of the scope of Art 22H(1) at the time of its enactment. In fact, in the same statement, he said:

"...Art 22H was intended to cover non-Constitutional legislation". [Hansard, 25 August 1994, Vol 430]"

30 *Supra*, note 1, at 532 and note 78 therein.

31 See *Turner (East Asia) Pte Ltd* v *Builders Federal (Hong Kong) Ltd & Anor* [1988] 2 MLJ 280 where the High Court held that Section 30(1) of the Legal Profession Act is not restricted to proceedings in a court of law and only advocates and solicitors of the Supreme Court with practising certificates may practise Singapore law in arbitration proceedings.

> 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.[32]

This analysis gives an incomplete picture of the interpretational issues before the Tribunal.

Thio argues that since Article 5(2A) is not an operative law, the parenthesis is not capable of applying to Article 22H(1). Article 22H(1) becomes unqualified, and a literalist, common-sense approach to reading Article 22H(1) in that state would give the President the power to "withhold his assent to *any* bill". She supports this argument by stating that that is what Parliament intended, as "one may presume that Parliament, by dint of being omniscient, meant what it said."

English constitutional law has a doctrine of parliamentary supremacy. But parliamentary omniscience is neither a doctrine nor a fact in English law or in Singapore law. Be that as it may, it is surely pre-judging the issue for Thio to describe her preferred approach as common sense, and thereby imply that the Tribunal's approach is not. Thio's reliance on common sense to construe the parenthesis as having been "deleted"[33] from Article 5(2A) fails to take into account the Attorney General's argument that the parenthesis is an integral part of Article 22H(1) from inception. It cannot be ignored in determining the scope of Article 22H(1) because Article 5(2A) represents the will of Parliament as an existing law, albeit inoperative.[34]

Thio's analysis of this aspect of the Tribunal's opinion is indefensible. Statutory interpretation, and in particular when it concerns a constitution is not a matter of common sense. The rules of constitutional interpretation are well established.[35] The literal interpretation is one approach but it is by no means the only approach or the common sense approach. Literality

[32] *Supra*, note 1, at 533-535.

[33] *Ibid*, at 535.

[34] See *ibid*, at 539 where in note 90, Thio refers to the Attorney General's argument based on *R* v *Secretary Of State For The Home Department, Ex Parte Fire Brigades Union* [1995] 2 AC 513 without comment.

[35] Thio does not deal with the many authorities cited in paragraphs 50 to 52 of the *Case for the Government* that the established approach to constitutional interpretation is the purposive approach, and not the literal approach: See *Vishnu Agencies (PVT) Ltd* v *Commercial Tax Officer [1978] AIR SC 449 at 459; State of Karnataka* v *Union of India [1978] AIR SC 68 at para 82 and 84; and Chief Justice of Andhra Pradesh* v *LVA Dikshitulu* [1979] AIR SC 193 at para 63. The absence of a "central jurisprudential thread" running through our Constitution because of its history, as contended by Thio, (at 537 of her article) is not an argument in favour of the literalist approach any more than it is against a purposive approach.

is not tautologous with common sense. A common sense approach begs the issue as to whose common sense we are talking about. The bringing into operation of Article 22H(1) and the simultaneous suspension of Article 5(2A) by the Government for the stated purpose would, to any court of law, create a most uncommon situation giving rise to an almost unique problem of constitutional interpretation. Common sense should have dictated that there is no place for a common sense approach in such a situation.

The Tribunal rejected Thio's preferred approach in these words:

> Counsel for the Presidency *then* sought to argue that the word 'applies' in the parenthesis of article 22H(1) had the connotation in the sense that article 5(2A) would 'apply' only if it was in force. Since it had not been brought into force, article 5(2A) 'applied' to nothing. With respect, we find this argument a little tenuous. On a plain interpretation of the language of the parenthesis to article 22H(1), the word 'applies' was meant to identify the class of Bills to be excluded from the ambit of article 22H(1)... It was not intended that its meaning and effect were dependent on article 5(2A) being in force.[36] (emphasis added)

The Tribunal held 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)" on a purposive interpretation. Article 22H(1) cannot enlarge its operation by reason only of Article 5(2A) being inoperative. The Tribunal decided that the parenthesis merely performs a descriptive function in Article 22H(1) and does not serve to prescribe the scope of Article 22H(1).

(b) *The testudo*[37]

In an attempt to make the argument more persuasive, counsel for the Presidency invoked the powerful imagery of the *testudo,*[38] to demonstrate how Articles 5(2A) and 22H(1) would operate in the *interregnum*. When Article 5(2A) is in force, the People (the first shield?) would protect the discretionary powers of the President under Article 22H(1) from being reduced or nullified by Parliament. When Article 5(2A) is not in force, the President (the second shield?) would move in to provide the necessary protection.

The problem with the analogy is that Articles 5(2A) and 22H(1) are not structured like a *testudo*. Neither Article 5(2A) nor Article 22H(1)

[36] *Supra*, note 7, at 212I.

[37] The *testudo* analogy is not found in the written submissions of counsel for the Presidency.

[38] *Supra*, note 1, at 552. As described by Thio, this Roman military tactic required one shield to take the place of the fallen shield to ward off the enemy's blows.

contains any words which give either or both of them the shifting effect inherent in the military tactic. They simply could not be interpreted to have that effect. As will be seen later, the only explanation given by Thio for employing the *testudo* analogy was that otherwise the Presidency would have no power to protect its own existence. The Tribunal sensibly rejected the analogy as the basis of the dubious argument that the scope of the President's powers in Article 22H(1) increases or decreases according to whether Article 5(2A) is or is not in force.

(c) *Article 8 & Part III of the Constitution*

Article 6 in Part III of the Constitution prohibits the surrender or transfer of the whole or part of the sovereignty of Singapore and also the relinquishment of control over the Singapore Police Force or the Singapore Armed Forces. Article 8 provides that a Bill making an amendment to Part III shall not be passed by Parliament unless supported at a national referendum by not less than two-thirds of the electorate.

Article 8 is not expressed to be subject to Article 22H(1). Thio recognises that if Article 22H(1) is read literally to apply to all constitutional Bills, then any amendment to Part III of the Constitution (protecting the sovereignty of Singapore) would also be subject to the President's veto. She also recognises that this result could not have been intended by Parliament and points out that the Attorney General invoked this point to argue that Article 22H(1) should be interpreted to apply only to non-constitutional Bills.

Thio calls this a "problematical" argument, that is to say, it undermines the argument of counsel for the Presidency (which she endorses) that the words "any Bill passed by Parliament" in Article 22H(1) mean "any Bill". But to preserve the Presidency's argument, she concedes that Article 22H(1) should be read subject to Part III of the Constitution, either because Part III is *sui generis* (as it deals with the sovereignty of Singapore, and is a matter for the people to decide) or because Part III is an exception to Article 22H(1) since amendments concerning Part III have already been dealt with by Article 8.

A similar argument was made for the Presidency before the Tribunal, but on a different footing. The argument at the Constitutional Reference was based on an inferential fact that the Select Committee had deliberated on Article 8 and its relationship to Part III. Reliance was placed on the recommendation that Article 66 (dealing with general elections) and Part IV (dealing with fundamental liberties) be included in Article 5(2A) in a chapter bearing the title:

> Whether the President's safeguard role on amendments to the Constitution should apply to Articles other than those listed in the proposed new Article 5(2A).[39]

The Attorney General's reply to this argument was that the argument was pure conjecture and that in the absence of any evidence, the scenario that the Select Committee had satisfied itself that Part III could be interpreted as an exception to the unqualified meaning of the words "any Bill" was absurd. It was pointed out that the subject of that chapter shows clearly that it dealt only with representations from the public on matters to be included in Article 5(2A), and Article 8 was not one of them. The Tribunal wisely ignored the arguments of counsel for the Presidency on this point.

Thio now abandons the basis of the inference and relies on an equally unsubstantiated inference: that Article 22H(1) could well have been drafted without its drafters even contemplating the nature of its relationship with Part III of the Constitution.[40]

Whether the drafters or the Select Committee were conscious of or indifferent to the relationship between Article 8 and Article 22H(1) cannot be proved, nor should the Tribunal or any court admit any evidence to prove or disprove any such fact, unless there are contemporaneous published records to prove it. All that is known is that both Articles 8 and 22H(1) are not expressed to be subject to each other.

(d) *Meaning of the word "Bill"*

Article 22H(1) refers to the word "Bill" in two places: once in the main text and once in the parenthesis. In relation to the latter, it is not disputed that it refers to an Article 5(2A) Bill. In relation to the former, the Government's case was that, on a purposive interpretation, the word refers to an ordinary Bill.

Two lines of argument were advanced in support of this interpretation. Firstly, the meaning of the word depends on its context, and that in the context of Article 22H(1), the word "Bill" refers to a non-constitutional Bill. The second is that Article 21(2)(c) reinforces this construction.

The first line of reasoning as set out in paragraphs 82 to 84 of the Case for the Government and paragraph 12.6 of the Rejoinder of the Government is as follows:

> 82. ... Article 58(1) provides that the power of the Legislature to make laws shall be exercised by Bills passed by Parliament and

[39] See p xiii to xiv of the Select Committee Report on the 1990 Constitutional Bill.
[40] *Supra*, note 1, at 537.

assented to by the President. Article 58(2) provides that a Bill shall become law on being assented to by the President and such law shall come into operation in the manner described therein. Since Article 58(1) merely describes the law-making process, the word "Bill" in Article 58 means any Bill... The word "Bill" in the Constitution takes its meaning from its context. Article 58 is a clear illustration. In Articles 5 and 8, the word "Bill" can only refer to a Constitutional Bill as these Articles deal only with constitutional amendments. On the other hand, in Articles 22E, 144(2) and 148A, the word "Bill", in each context, refers to a non-Constitutional Bill as these Articles are concerned with amendments of ordinary Acts of Parliament as mentioned therein.

83. The word "Bill" appears in two places in Article 22H(1)...The literal meaning of the words "any Bill" [in the main text] is any kind of Bill ... It may be argued that this is the legislative meaning as the expression is immediately qualified by the parenthetical clause [referring only to Article 5(2A) Bills]. It may also be argued that if Parliament had intended the President's veto power to cover only non-Constitutional Bills, Article 22H(1) would have stated explicitly.

84. These arguments cannot stand against the purposive interpretation to be given to Article 22H(1) ... established principles of constitutional interpretation require, that the Constitution be given a broad purposive interpretation. A purposive approach would require the Tribunal to take into account the following matters:

(a) the rationale of the elected presidency;

(b) the relationship between Articles 5, 8 and 22H;

(c) the purpose of and relationship between Article 21(2)(c) and Article 22H;

(d) the reason for the parenthetical clause being inserted in Article 22H;

(e) the understanding of Parliament in enacting a provision to enable the Government to suspend any provision of the 1991 Constitutional Act; and

(f) the Government's intention in suspending the operation of Article 5(2A). If Article 22H(1) were interpreted purposively in the context of the overall constitutional division

> of legislative powers, it would be clear that the expression "any Bill passed by Parliament" covers only non-Constitutional Bills....
>
> 12.6 ... the legislative intent as reflected in Article 5(2A) itself is that Article 5(2A) Bills are outside the scope of Article 22H(1). In the case of [other] Constitutional Bills ... *eg*, an Article 8 Bill, in the absence of any express intent either in the White Papers, the Select Committee Report or the 1991 Constitution Act, and having regard to the existing constitutional role of the President embodied in Article 21(1), Article 5 continues to govern such Constitutional Bills which [therefore] are not subject to the President's veto power under Article 22H(1).

The Attorney General's second line of reasoning is set out later in this article in connection with Thio's arguments on the ambit of Article 21(2)(c).[41]

Thio ignores the Attorney General's arguments on this issue. She also ignores the Attorney General's final argument that if the words "any Bill" in Article 22H(1) are interpreted to apply to non-core constitutional Bills, then the latter would, if Article 5(2A) were in force, enjoy greater protection than the more important core constitutional provisions. A purposive interpretation in the manner contended for by the Attorney-General would avoid such an anomaly and give effect to the limited role of the Presidency as envisaged by the White Papers and the ministerial speeches in Parliament.

(e) *How to read the Constitution: A Purposive Approach?*

Since the Tribunal has, in its published opinion, clearly stated that:

> it is well-established and not disputed by either parties that a purposive interpretation should be adopted in interpreting the Constitution to give effect to the intent and will of Parliament.[42]

Thio, in putting a question mark to the above title in her article, appears to be suggesting that the Tribunal read the purpose wrongly and came to the wrong result.

Thio points out that the Constitution, as a fundamental and paramount law of the land, should be construed differently from an ordinary Act of Parliament and that as stated by Lord Diplock in *Ong Ah Chuan* v *Public*

[41] *Infra*, note 51.
[42] *Supra*, note 7, at 210G-H and 211E.

Prosecutor,[43] a Constitution (based on the Westminster model) should be treated as *sui generis.* However, *Ong Ah Chuan* and other Privy Council cases[44] where similar *dicta* have been expressed were not concerned with the division of constitutional powers between constitutional organs. They dealt with the conflict between constitutional rights and executive power, with preference being presumptively accorded to the former. No issue of conflict of state power and constitutional rights was before the Tribunal.

There is, as yet, no authority for a presumptive doctrine that prefers one or other of two high institutions of state in a clash of their constitutional powers. A more appropriate statement of principle is that of the Privy Council in *Attorney General For Ontario* v *Attorney General For Canada* (cited by the Attorney General to the Tribunal) that:

> ... In the interpretation of a completely self-governing Constitution founded upon a written organic instrument, such as the British North America Act, if the text is explicit the text is conclusive, alike in what it directs and what it forbids. When the text is ambiguous, as for example, when the words establishing two mutually exclusive jurisdiction are wide enough to bring a particular power within either, recourse must be had to the context and scheme of the Act....[45]

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

Thio summarises,[46] correctly, the Government's case that on a purposive interpretation, Articles 5(2A) and 22H(1) are mutually exclusive provisions demarking the different spheres of constitutional power. The argument is founded on the division of sanction or veto powers between the two Articles. Article 5(2A), although not in force, has not only vested a dispensing power in the President but also a veto power in the electorate exercisable by referendum on any amendments to the core constitutional provisions. The parenthesis in Article 22H(1) expressly excludes such amendments from its ambit.

The President's veto powers were so constituted from inception and thus could not include a veto power over such Bills. Accepting the Presidency's argument would mean that Article 22H(1) can operate to enlarge or reduce its own ambit according to whether or not Article 5(2A) is in force. There

[43] *Supra*, note 1, at 537 and note 85 therein.
[44] See also *Minister of Home Affairs* v *Fisher* [1980] AC 319; and *Attorney General of St Christopher, Nevis and Anguilla* v *Reynolds* [1980] AC 637.
[45] [1912] AC 571 at 583-584.
[46] *Supra*, note 1, at 539.

is nothing in the language of these Articles or the parliamentary materials which can support the Presidency's argument on this issue.

Thio, however, rejects the Tribunal's opinion on the ground that:

> the objective of the elaborate amendment mechanism 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.[47]

This statement concerning the final decision-making power of the President is incorrect as the Government could have gone to the People to amend Article 22H(1) even if Article 5(2A) were in force. In any case, Articles 5(2A) and 22H(1) have different objectives which Thio does not appreciate. She also seeks to strengthen her argument by her far-fetched imagination of the public understanding of the terms upon which the President was elected by asking:

> 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 the office on such a similar basis?[48]

This is special pleading of the highest order. What and where is the evidence for these statements? If the questions need to be answered, then the answer to the first question is "NO": the voters voted for the President on the basis of an inoperative Article 5(2A) which, in the Government's belief, would allow it to amend Article 22H(1) without the consent of the President. The answer to the second question is also "NO": the President took an oath that he would, *inter alia*, protect and defend the Constitution with an inoperative Article 5(2A).

(g) *Relationship between Articles 5(1), 21 and 22H(1)*

Thio rejects the Attorney General's argument that Article 22H(1) should be reconciled with Article 21(1) when read with Article 5 by construing Article 22H(1) to apply only to ordinary Bills. She argues that Article 22H(1) can be harmonised with Article 21, to give the contrary result, as:

[47] *Ibid*, at 540.
[48] *Ibid*, at 540.

> Article 22H(1) is a constitutional provision mandating an exception to the general principle in Article 21 concerning the presidential assent and personal discretion.[49]

This is yet another unsubstantiated assertion that Article 22H(1) contains such a mandate, when the whole question is whether it contains such a mandate.

The Attorney General's argument, which Thio ignores, runs as follows:

(a) Article 5(1) provides that, subject to Article 5[50] (which includes Article 5(2A) as a sub-article) and Article 8, the provisions of the Constitution may be amended by a law enacted by the Legislature.

(b) Article 5(2) provides that a Bill seeking to amend any provision in the Constitution shall not be passed by Parliament unless it has been supported on Second and Third Readings by the votes of not less than two-thirds of the total number of the elected Members of Parliament referred to in Article 39(1)(a).

(c) By virtue of Article 21, the President has a duty to assent to all constitutional bills passed by Parliament in accordance with Article 5. It follows that the President must assent to any Bill passed in accordance with Article 5(2).

(d) Since Article 5 is not expressed to be subject to Article 22H(1), it is not subject to Article 22H(1). Therefore to construe Article 22H(1) to give a presidential veto on constitutional amendment bills passed by Parliament in accordance with Article 5(2) is to contradict the express terms of Article 5(1) and make Article 5(1) subject to Article 22H(1).

(e) The President's duty to assent to constitutional amendment bills is reinforced by the terms of Article 21(2)(c) which provides that the President may act in his discretion in withholding his

[49] *Ibid*, at 540.

[50] Art 5(1) and 5(2) of the Constitution provide as follows:

(1) Subject to this Article and Article 8, the provisions of this Constitution may be amended by a law enacted by the Legislature.

(2) A Bill seeking to amend any provision in this Constitution shall not be passed by Parliament unless it has been supported on Second and Third Readings by the votes of not less than two-thirds of the total number of the Members thereof.

assent to any Bill under Article 22E, 22H, 144(2) or 148(A).[51] All these Articles, except for Article 22H, refer to subject matters regulated by ordinary legislation.

(f) If the word "Bill" in Article 21(2)(c) is interpreted to include constitutional bills, then Article 5 is also subject to Article 21(2)(c) when Article 5(1) is not so expressed and would also lead to the absurd result that the President has a veto power over constitutional bills passed in accordance with Article 5(2) or 5(2A), contrary to the express terms of those Articles.

Thio makes no attempt to deal with these arguments. She accepts that Article 22H(1) and Article 5(2A) were enacted at the same time, but argues that there must be some ramifications to Article 5(2A) not being brought into operation. What are these ramifications? She finds them in the reasons given by the Government for suspending Article 5(2A), which were, as she claims:

> to allow for fine-tuning the new presidency provisions *for specific purposes* without referendum.[52]

This argument will now be examined.

(h) *Article 22H(1) excluded from fine-tuning period*

Thio argues that Article 22H(1) was specifically excluded from fine-tuning because, firstly, the Government had "taken a long time ... to bring the Bill to this stage, deliberately", and secondly, "an omniscient Parliament ... thought this provision crucial enough to the whole institutional set-up of the presidency as to warrant bringing it into force."

This argument has no factual or logical foundation. The Government's timing in bringing the 1990 Constitutional Bill to that stage says nothing about the Government's intention to exclude Article 22H(1) from fine-tuning. Rather, the Government's stated purpose in suspending the operation of Article 5(2A) says a lot about its concern that the novel system may not work out smoothly. It thus sought to reserve to itself the power to adjust, modify and refine it.

[51] All the Articles, except for Art 22H(1), refer to subject matters regulated by ordinary legislation. The Attorney General had argued that it was permissible for the Tribunal to apply, by analogy, the *noscitur a sociis* rule of construction to hold that the same word "Bill" in relation to Art 22H(1) means an ordinary bill.

[52] *Supra*, note 1, at 541.

On the facts as they are, the position must be that the Government did intend to include Article 22H(1) and all the other Articles referred to in Article 5(2A) for fine tuning. The Government thought that it could do that by not bringing Article 5(2A) into force for the time being. Whether or not the Government had achieved this objective was essentially the question referred to the Tribunal. The Tribunal advised that the Government had indeed achieved this objective, with the consequence that the Government is also able to overhaul the elected presidency law if it wants to.

Thio argues that there is a qualitative difference between fine tuning and a complete overhaul and that amending Article 22H(1) in the manner proposed is a complete overhaul. She also latches onto the words of the Prime Minister on not having to go to referendum on procedural and technical provisions. She goes to the absurd length of arguing that this change "goes beyond the fine-tuning grace period" as if the words used by the Prime Minister were words in a statute.

But in fact what the Prime Minister said was this:

> 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 unforseen problems in actual implementation....
>
> 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 favour giving ourselves more time, to avoid having to go to referendum on procedural and technical provisions. I suggest we give ourselves four years for *adjustments, modifications and refinements to be made*.[53](emphasis added)

The Tribunal, correctly, gave effect to the general sense of what the Prime Minister had intended to say and came to the conclusion that he was talking about:

> changes to the system, be it substantive, technical or procedural, without having to face the prospect of a referendum.[54]

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

Whether or not Article 22H(1) applies to non-core constitutional bills is now academic in the light of the Tribunal's advice and the proposed

[53] See *Singapore Parliamentary Debates, Official Record*, 3 January 1991 at Col 722.
[54] *Supra*, note 7, at 213.

amendment to Article 22H(1). However, since Thio has resurrected the Presidency's case on this point, it is necessary to put the Government's case on record in case the impression is given that the Government has no answer to Thio's arguments.

The Attorney-General had argued[55] in paragraphs 65 to 67 of the Case for the Government that:

> 65. 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. Therefore, Article 5(1) states, by its own terms, that it is not subject to Article 22H ... 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. 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.
>
> 66. 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.
>
> 67. The Tribunal should eschew such contradictions and either:
>
> (a) harmonise Article 5 and Article 22H(1) by interpreting them to apply to different types of legislation, the former to Constitutional Bills and the latter to non-Constitutional Bills, or,

[55] See also *supra*, note 51 on the Attorney General's arguments based on Art 21(2)(c).

(b) if harmonisation is not possible, give effect to the unambiguous legislative words of Article 5 as expressing the dominant legislative intent[56] that its operation is not subject to any other Article except as expressly provided therein by modifying the language of Article 22H(1) accordingly.

Thio asserts that:

> ... 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.[57]

Thio makes no attempt whatever to rebut the Attorney General's argument founded on the relationship between Articles 5, 21 and 22H(1) in stating that the argument is "clearly wrong". Her opinion is based purely on her pre-conceived notion of what Article 22H(1) was intended to achieve without demonstrating it. The question is whether Parliament had intended to create such a broad exception as argued by Thio. Her assumption about what Article 22H(1) means or intends precludes any argument at all on the issue.

A literal interpretation of the words "any Bill" in Article 22H(1) may support Thio's argument. But that does not necessarily make the Attorney General's argument "clearly wrong" when proper consideration is given to the combined effect of Articles 5, 21 and 22H(1) and the Attorney General's argument on the scope of Article 21(2)(c).[58] It is hoped that her statement does not mean and is not intended to mean that the Attorney General did not see that his argument was clearly wrong or, worse, that he made the argument to the Tribunal knowing that it was clearly wrong.

(j) *Relationship between Article 4 and Article 22H(1)*

Thio also attempts to demonstrate her "whole point" by arguing that limiting the scope of Article 22H(1) to ordinary Bills would deny it of any function and render it meaningless. She writes:

[56] The authorities in favour of this approach are *Institute of Patent Agents* v *Lockwood* [1894] AC 347 at 360 and *R* v *Moore* [1994] Times Law Report, 26 Dec, cited by the Attorney-General in the Constitutional Reference.

[57] *Supra*, note 1, at 543-544.

[58] *Supra*, note 51.

> Presumably if such legislation ever came into effect, it would, applying the Article 4 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...
>
> 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 bills. Clearly, it applies to non-core constitutional amendment bills as admitted by the Deputy Prime Minister, and more controversially, to "core" constitutional amendment bills in the *interregnum* period.[59]

The Attorney General disagrees with this argument. Article 22H(1) will have no function only if it can be shown that every ordinary bill which curtails or circumvents the President's discretionary powers will also be unconstitutional for inconsistency with any provision of the Constitution. No such example has been given by counsel for the Presidency or Thio.

But, Article 22H(1) does have a function even if confined to ordinary Bills. If Parliament were to amend the Police Force Act to provide for the appointment of, say an Inspector General of the Police, with powers concurrent with those of the Commissioner of Police. If the President assents to such a Bill, it cannot be said that the legislation or the new appointment (without the consent of the President) is inconsistent with Article 22 or Article 22H(1) or any other Article of the Constitution.

Thio's claim that constitutional bills are the only type of bills which may potentially curtail the President's powers is not substantiated. As argued by the Attorney General, an argument Thio ignores, Article 22H(1) has a most important function. It gives the President a valuable power to protect his discretionary powers against any direct or indirect diminution by ordinary legislation passed by Parliament.

(k) *Division of Legislative Powers and Presidential Assent*

The Attorney General has argued that if Article 22H(1) is interpreted to apply to all Bills, it would contradict the division of legislative powers

[59] *Supra*, note 1, at 544.

in the Constitution and place the President at the apex of the constitutional structure. This would contradict the terms of Article 21(1) which entrenches the parliamentary system of government, and also the elected presidency law which only gives limited custodial powers to the President.

Thio rejects the Attorney General's argument for the following reasons:

(a) Parliament is not supreme;

(b) the Legislature consists of Parliament and the President;

(c) no Bill can become law unless the President assents to it;

(d) the President may withhold his assent to *any bill* under Article 22E, 22H, 144(2) or 148A (see Article 21(2)(c));

(e) these constitutional provisions re-allocate legislative powers such that the President, being elected with some executive powers, may now refuse to assent to any curtailing bill.

Thio's reasons are non-specific and do not advance her case. Firstly, it cannot be disputed that the elected presidency law has not abolished or downgraded the parliamentary system of government. Secondly, no executive power has been given to the President by the 1991 Constitutional Act. Thirdly, Article 5 explicitly excludes itself from being subject to Article 22H(1) and hence the latter is subject to the former, unless it is otherwise expressly provided. Fourthly, the expression "any Bill" in Article 22H(1) means ordinary Bills when read in the context of Article 21(2)(c).[60]

Accordingly, far from scotching 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", Thio's reasoning is based entirely on her claim that the status of the President has changed from that of a constitutional Head of State to that "with some executive powers", a claim that is contrary to all the known facts found in the White Papers and the ministerial speeches in Parliament.[61]

(l) *Tribunal's advice on non-core constitutional bills*

Thio also criticises the Tribunal for holding that Article 22H(1) only applies to non-constitutional Bills by means of a "strange inference", *ie*, by "a process of elimination to infer this conclusion by baldly stating":

[60] *Supra*, note 51.
[61] *Supra*, note 21.

> 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.[62]

The only thing strange about this is that the criticism is made at all. The Tribunal's words in the above passage cannot reasonably be read to mean that it is of the view that Article 22H(1) does not apply to all constitutional Bills. The Tribunal made no such finding as it was not necessary to do so. The Tribunal was able to answer the constitutional question on the basis of the narrower argument of the Attorney General that Article 22H(1) did not apply to Article 5(2A) Bills.[63]

Grounded on her own misunderstanding of the findings of the Tribunal, Thio writes:

> 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)).[64]

[62] *Supra*, note 1, at 546.

[63] It may be worth recording that during the hearing of the Constitutional Reference, the Attorney General was pointedly asked by Justice LP Thean whether it was necessary for the Tribunal to decide the broader issue (Art 22H(1) does not apply to all constitutional Bills) if the narrower issue (Art 22H(1) does not apply to Art 5(2A) Bills) were decided in favour of the Government. The Attorney General's reply was that the Tribunal should also decide the broader issue to avoid further constitutional questions being referred under Article 100. The Tribunal, in advising the way it did, was obviously not troubled by this prospect.

[64] *Supra*, note 1, at 547.

This passage is replete with factual, interpretational and doctrinal errors.

Firstly, an ordinary curtailing law is not necessarily unconstitutional.

Secondly, the Deputy Prime Minister's concern that the scope of Article 22H(1) might be overbroad in applying to non-core constitutional bills did not prompt the Constitutional Reference. What prompted it was the President's indication to the Government in July 1994 that he might veto the Government's proposed amendment to Articles 5(2A) and 22H.[65]

Thirdly, the Government's position was that Article 22H(1) was not intended to apply to non-core constitutional Bills, as otherwise such Bills would be better protected from amendment than core constitutional Bills. That was the problem with Article 22H(1). Thio's example of removing the President's "discretion" to appoint the Prime Minister and giving it to a civil servant was not an instance of the problem, much less the precise one which the Deputy Prime Minister had raised and sought to correct.

Fourthly, Thio's example could not have troubled the Deputy Prime Minister even as a possibility because the Government had made it clear that the existing parliamentary system of government would be preserved, with the Head of State appointing the Prime Minister on the basis that he commands the confidence of the majority of the elected Members of Parliament.

Fifthly, the nature of the discretion vested in the President by Article 25 is not the same as that envisaged by Article 22H(1). The power of appointing the Prime Minister is based on ascertaining a specific fact: which Member of Parliament commands the confidence of the majority of the Members of Parliament, even in a "hung" Parliament. Once that fact is ascertained to his own satisfaction, the President is required by Article 25 to appoint that Member as the Prime Minister. In contrast, Article 22H(1) requires the President not to ascertain a fact but to exercise a qualitative judgment on whether or not it is in the national interest that he should withhold his assent to any bill which circumvents or curtails his discretionary powers. The qualitative difference between these two types of discretionary powers is obvious.

Sixthly, even if, as conceived by Thio, Article 25 is amended to allow a civil servant to appoint the Prime Minister on the same conditions, this does not advance her case. Parliamentary government remains intact, albeit with a most unusual feature. The civil servant would still be subject to the same limitations as the President in appointing the Prime Minister. The problem is not one of constitutionalism but one of form or protocol. You do not ask the Registrar of the Supreme Court to appoint the Chief Justice, although the law may provide for such a procedure. This example merely confuses form with substance.

[65] *Ibid*, at 528.

If Thio had given some consideration to the rival arguments, she might not have been so rash as to have suggested that if the Tribunal decided that Article 22H(1) applied only to ordinary Bills, which it manifestly did not, Article 22H(1) would have been "corrected" by the Tibunal to apply only to non-constitutional bills.

(m) *The President: Is His Home His Castle?*

Thio argues by analogy that because the President's home should also be his castle, a purposive interpretation that gives effect to the policy considerations should lead to the result that the President must have the power to protect his discretionary powers from being curtailed. Otherwise, she says:

> [I]n a worst case scenario, the good that introducing the elected presidency seeks to accomplish could in one swell swoop be dismantled overnight by an irresponsible Government.[66]

She relies on paragraph 46 of the 1990 White Paper to support this argument. Actually, paragraph 46 provides precisely the contrary. Paragraph 46 provides:

> 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... (emphasis added)

Paragraph 46 plainly states that the President may withhold his assent to any Bill *other than one governed by the provisions on amendments to the President's powers*, that is to say, any Bill governed by Article 5(2A). Paragraph 46 makes explicit, and beyond any doubt, the Government's understanding of the scope of Article 22H(1) when it decided to suspend Article 5(2A) from operation. It says clearly that Article 22H(1) does not apply to Bills governed by the provisions on amendments to the President's powers: that is to say, Article 5(2A) Bills.

Thio seeks support for her comprehension of paragraph 46 by referring to the explanatory statement to Article 22H.[67] This attempt is misconceived. The explanatory statement does not even refer to the parenthesis in Article

[66] *Ibid*, at 548.

[67] See Art 22G and the Explanatory Statement to this Article in the Constitution of the Republic of Singapore (Amendment No 3) Bill No 23 of 1990.

22H(1), much less explain it. For this reason, the explanatory statement has not explained what is in the actual text and is therefore unhelpful as an explanation of the scope of that Article. But it would appear that nothing is too little to grasp as a *tabula in naufragio*.

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

Thio maintains that the Tribunal ignored important policy considerations which, on a purposive interpretation, would have justified it in holding that the presidential veto in Article 22H(1) would only be excluded when another safeguard was put in place, *viz,* the referendum procedure under an operative Article 5(2A). She argues that this would have been consonant with Parliament's intention to make the presidency an effective institution and that the Tribunal should have "correctively"[68] affirmed this by accepting the innovative *testudo* analogy.

If reliance is placed on a factual argument that Parliament's intention was to make the presidency an effective institution, the facts in this case show that Parliament did not derogate from that intention. All that the Government had wanted to do was to amend Article 22H(1) to reflect a coherent constitutional scheme for the enactment of certain constitutional Bills.

Thio's purposive interpretation amounts to saying that as Parliament could not have intended to give itself the power to abolish the elected presidency without the consent of the electorate as contemplated by Article 5(2A), the Tribunal should have "corrected" Article 22H(1) to ensure that this could not happen during the *interregnum*. The effect would have been to substitute the electorate's consent with the President's consent, a consequence which was never within the contemplation of Parliament at any time.

V. Conclusion

The case for the Presidency was initially based on what Thio believes to be a purposive approach which requires the Tribunal to "correct" Article 22H(1) to prevent the President's discretionary powers from being eroded by Parliament without the consent of the electorate. However, when the Attorney General advanced a more structured argument that Articles 5(2A) and 22H(1) contain separate and distinct divisions of constitutional

[68] *Supra*, note 1, at 554. In contrast, see *Ibid*, at 547 where Thio, on a mistaken understanding of the Tribunal's advice, criticises the Tribunal for having "corrected" Art 22H(1) by interpretation.

powers between the Presidency, Parliament and the People, and that the power to veto an Article 5(2A) Bill has been given to the People and not to the President, counsel for the Presidency had to fall back on the "doomsday" argument (that the Government could de-construct the elected presidency law) and the ill-fitting *testudo* analogy.

Whilst the Attorney General's argument is wholly consistent with and supported by all the parliamentary materials, the actual framework of Articles 5(2A) and 22H(1), and also the stated purpose of the Government in not bringing Article 5(2A) into force for the time being, the Presidency's argument is not so supported and, moreover, if accepted, would have the effect of compelling the Government to bring Article 5(2A) into force in order to achieve its goal.

The Presidency also relied on the literalist approach that since Article 5(2A) was not in force, the parenthesis applied to nothing and therefore Article 22H(1) covered all Bills. This was a simplistic approach which failed to take into consideration the parenthesis as an integral part of Article 22H(1) and Article 5(2A) as an existing provision of the Constitution, albeit inoperative. In similar circumstances such an approach might not even have been appropriate for an ordinary statute,[69] much less a constitution.

Thio's arguments require the Tribunal to change the Constitution forthwith, contrary to the wishes of Parliament when it authorised the Government not to entrench Article 22H(1) for the time being. These arguments were not based on legal principles but simply a wish for the "parliamentary gap" to be reduced or closed immediately.

However, the principle reaffirmed in the *Fire Brigades Union* case, that suspended legislation represents the will of Parliament which the courts may not ignore in construing the scope of the related statutory provisions, resolves any doubt as to the legislative scope of Article 5(2A) and of Article 22H(1). In terms of fidelity to the law, there can be no answer to the Tribunal's opinion that Article 22H(1) does not cover Article 5(2A) Bills, whether or not Article 5(2A) is in force.

CHAN SEK KEONG*

[69] See *Le Corfu Furniture & Carpet* v *Parson* (1990) 54 SASR 108 where the literal rule was rejected in favour of a purposive interpretation of the effect of a statutory provision which was, on its face, inconsistent with the object of suspending the operation of another statutory provision.

* The writer is the Attorney General of Singapore. He appeared for the Government at the Constitutional Reference. He wishes to express his gratitude to State Counsel Soh Tze Bian, who also assisted him at the Constitutional Reference, and State Counsel Mrs Owi Beng Ki for their many valuable suggestions on improving the initial drafts of this article.

APPENDIX A
REFERENCE UNDER ARTICLE 100 OF THE CONSTITUTION FOR OPINION ON CONSTITUTIONAL QUESTION

Constitutional Reference No 1 of 1995

To: The Chief Justice of the Supreme Court
of the Republic of Singapore

WHEREAS the Constitution of the Republic of Singapore provides for a parliamentary system of government under which

(a) the legislative power of Singapore is vested in the President and Parliament;

(b) the executive power is vested in the President exercisable subject to the provisions of the Constitution by him or by the Cabinet or any Minister authorised by the Cabinet;

AND WHEREAS Article 5 of the Constitution provides as follows:

"(1) Subject to this Article and Article 8, the provisions in this Constitution may be amended by a law enacted by the Legislature.

(2) A Bill seeking to amend any provision in this Constitution shall not be passed by Parliament unless it has been supported on Second and Third Readings by the votes of not less than two-thirds of the total number of the Members thereof.

(3) In this Article, "amendment" includes addition and repeal."

AND WHEREAS prior to 30 November 1991, a Bill, whether a constitutional Bill or an ordinary Bill, passed by Parliament required the assent of the President to become law, but the President had no power to withhold his assent to any Bill passed by Parliament;

AND WHEREAS on 29 July 1988, the Government presented to Parliament a White Paper (Cmd 10 of 1988) on "Constitutional Amendments to Safeguard Financial Assets and the Integrity of the Public Services" ("the 1988 White Paper") which contained proposals to establish an elected presidency as part of Singapore's constitutional government to protect its financial reserves and to safeguard the integrity of its civil service, that is to say, to require the Government of the day to seek the Elected President's concurrence,

(a) before it could spend any financial reserves which had been

accumulated before its term of office by its predecessors; and

(b) before it could make any appointments to certain constitutional offices, and other key offices in the civil service, statutory boards and Government companies;

AND WHEREAS Parliament, after having debated the 1988 White Paper on 11 and 12 August 1988, resolved as follows:-

> "That this House supports the principles set out in the White Paper ... as the basis for preparing a Bill for an Elected President";

AND WHEREAS in his Address at the Opening of Parliament on 7 June 1990, the President said:

> "The Government proposed creating an Elected President with veto powers, in order to safeguard the national reserves and the integrity of key appointments. It has taken some time to deliberate over this legislation, which is a major modification to our Constitution. The Bill to provide for an Elected President is almost ready. The legislation will be tabled in Parliament this year, and will be referred to a Select Committee.";

AND WHEREAS on 27 August 1990, the Government presented to Parliament a second White Paper (Cmd 11 of 1990) on "Safeguarding of Financial Assets and the Integrity of the Public Services" ("the 1990 White Paper") to explain its intention to introduce a constitutional amendment Bill at the next sitting of Parliament, such Bill to follow the proposals outlined in the 1988 White Paper with several refinements and modifications;

AND WHEREAS the Constitution of the Republic of Singapore (Amendment No 3) Bill was introduced in Parliament on 30 August 1990 and, after two days of debate on its Second Reading in Parliament, was committed to a Select Committee.

AND WHEREAS the said Bill contained clauses which, *inter-alia*, proposed to enact Articles 5(2A) and 22H(1) as follows:

> "5(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 220, 35, 65, 66, 69, 70, 93A, 94, 95, 105, 107, 110A, 110B, 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.";

"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."

AND WHEREAS in its report presented to Parliament on 18 December 1990 which recommended a number of amendments to the said Bill, the Select Committee stated as follows:

> "71. Different commencement dates for different aspects: As the public sector (including certain key statutory boards and Government companies) would have already begun its preparations for the FY 1991 Budget, the Committee recognises the immediate practical difficulties the public sector will face in complying immediately with the new provisions on safeguards of reserves for financial year 1991. Sufficient time may also be needed to put into place the necessary administrative arrangements for the smooth implementation of the various controls. The Select Committee therefore recommends that the Bill be amended to allow the financial aspects of the Bill to be brought into operation in stages.
>
> 72. In this regard the Committee notes that the amendments in the Bill, especially the financial provisions constitute radical changes to established law and procedures not only for the Government but also for the key statutory boards and Government companies. Considerable care has been taken in drafting these provisions to strike a balance so that while the President has an effective safeguard role, there is no undue constraint on the normal operations of Government, the key statutory boards and Governments companies.
>
> 73. But the amendments introduce novel arrangements, unparalleled elsewhere in the world. When the Act comes into force and the provisions are actually implemented, it is possible that unforeseen problems may arise in the working of the system. Further amendments may be needed to make adjustments and requirements in the light of experience gained in the implementation of the Bill, say, during the first 2 years after its implementation. Such amendments should not be made subject to the strict requirements set out in the proposed new Article 5(2A). Therefore new Article 5(2A) should be brought into operation only after any adjustments or requirements have been made."

AND WHEREAS on the Third Reading of the said Bill in Parliament on 3 January 1991, the Prime Minister and the then Minister for Defence,

Mr Goh Chok Tong in Parliament said [col 722]:-

> "Apart from these three changes, I would also like to draw the attention of Members to paragraphs 71 to 73 of the Committee's Report. This concerns the amendment to the Bill which will allow the different provisions to be brought into operation on different dates. The Committee has pointed out that the changes we are making to our Constitution are novel arrangements unparalleled elsewhere in the world. They are unique. They will bring about fundamental changes to law and procedure for Government, the key statutory boards and for the key Government companies. 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.
>
> 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 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. I agree with this comment. 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 favour giving ourselves more time, to avoid having to go to referendum on procedural and technical provisions. I suggest we give ourselves at least four years for adjustments, modifications and refinements to be made."

AND WHEREAS in accordance with its intention, the Government brought the said Bill into operation on 30 November 1991 (vide subsidiary legislation S518/91), save for Article 5(2A).

AND WHEREAS the present President was duly elected as President on 28 August 1993 and was sworn into office on 1 September 1993.

AND WHEREAS the Deputy Prime Minister announced at the sitting of Parliament on 25 August 1994 the intention of the Government to introduce a Bill to amend Article 22H of the Constitution to provide that the President shall have power to withhold his assent only to non-constitutional Bills which, directly or indirectly, curtail or circumvent the discretionary powers conferred upon him by the Constitution;

AND WHEREAS in connection with the said proposal, the question has arisen as to whether the President has the power to withhold his assent to the said Bill, having regard to Article 5(2A) not having been brought into force and to the rationale for the Government's decision not to bring Article 5(2A) into force;

AND WHEREAS the President has stated that it is desirable that this question be referred to the judiciary for its opinion;

AND WHEREAS on 25 August 1994, Parliament amended the Constitution to provide for a Tribunal of not less than 3 Judges of the Supreme Court to decide any constitutional question referred to it by the President.

AND WHEREAS in accordance with the wishes of the President the Cabinet has advised the President to refer the question for the opinion of a Tribunal of not less than three Judges of the Supreme Court to be constituted under Article 100 of the Constitution.

NOW I, Ong Teng Cheong, President of the Republic of Singapore, pursuant to Article 100 of the Constitution, HEREBY refer to the Tribunal of not less than 3 Judges of the Supreme Court to be appointed by the Chief Justice the following question for its opinion:

> "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 power thereunder to any non-Constitutional Bill which provides directly or indirectly for the circumvention or curtailment of the President's discretionary powers, conferred upon him by the Constitution."

Dated this 20th day of February 1995.

PRESIDENT
REPUBLIC OF SINGAPORE