

Plenary Session I

Constitutionalism in Times of Economic Strife: Developments in Singapore

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ABSTRACT

In an age when terrorism is a fact of daily life, most constitutional lawyers and students see emergency powers as the draconian but necessary power for states to deal with security threats. However, economic emergencies are equally potent as a threat to national security, and this article argues that throughout our modern era, emergency powers have also been used regularly for economic, rather than security-type emergencies. This article is in two parts. The first half discusses how many constitutions embed in themselves, regimes of exception to deal with emergencies—security and economic. The second half of the article critically considers how in Singapore, the Constitution was amended in 1991 to create an elected executive presidency with powers of veto over the purse. The author argues that while the logic behind the creation of the elected president appears convincing, its operation proves rather more complicated, especially when the President is required to act in concert with the Presidential Council of Advisors, a group of unelected officials.

Keywords: *Emergency Powers, Elected President, Singapore, Economic Emergency, Constitution*

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I. INTRODUCTION

In the aftermath of terrorist attacks on the World Trade Centre in 2001, legal scholars have grappled with the legality of emergency legislation introduced to combat terrorism. Much of that discussion has centred on the constitutionality or legality of measures taken that would curb individual liberty within each state and even across borders. And because of the importance of this prevailing concern, it is easy to forget that emergency powers can, and often have been introduced to deal with non-terrorist or public order/public safety threats. This paper examines the use of emergency laws to deal with economic exigencies generally and considers how such exigencies are further met in the Singapore context by the institution of the elected president.

II. ECONOMIC EMERGENCIES: A BRIEF ACCOUNT

Constitutions have long provided recognized the need to temporarily suspend constitutional guarantees and liberties in times of national emergency. Extraordinary times call for extraordinary measures and when the survival of the state is threatened, an emergency can be declared under which the executive acts with almost dictatorial powers and liberties are temporarily sacrificed in the name of national interest. In his now-classic study of crisis powers, Clinton Rossiter pointed out that “in times of crisis a democratic, constitutional government must be temporarily altered to whatever degree is necessary to overcome the peril and restore normal conditions. This alternation invariably involves government of a stronger character; that is, the government will have more power and the people fewer rights.”¹

A state of siege or a declaration of war are classic instances under which emergency or even war powers can be declared.² However, not all emergencies arise from security threats. Rossiter posits three types of crises in the life of a democratic state: war, rebellion and economic depression.³ In relation to economic emergencies, Rossiter stated:

The economic troubles which plagued all the countries of the world in the early thirties invoked governmental methods of an unquestionably dictatorial character in many democracies. It was

1. CLINTON ROSSITER, *CONSTITUTIONAL DICTATORSHIP: CRISIS GOVERNMENT IN THE MODERN DEMOCRACIES* 5 (Transaction Publishers 2002) (1948).

2. For a recent comprehensive collection of essays on states of emergency, see *EMERGENCIES AND THE LIMITS OF LEGALITY* (Victor V. Ramraj ed., 2008).

3. See ROSSITER, *supra* note 1, at 6.

thereby acknowledged that an economic crisis could be as direct a threat to a nation's continued and constitutional existence as a war or a rebellion.⁴

Sometimes, security threats also rise from economic calamities, especially if cleavages within communities are exacerbated as a consequence of financial trouble. In some jurisdictions, the power to act in an economic emergency is a corollary of the war power. In Australia, for example, the emergency power enabling the Commonwealth to regulate social and economic life was deduced from the defence power.⁵ In some cases, it is a part of the general power of legislation. For example, in Canada, the power to enact emergency measures during peacetime has been considered constitutional under the Federal Parliament's general power to make laws "for the Peace, Order and Good Government of Canada" under Section 91 of the Constitution Act 1891. It was also under this general power that the Anti-Inflation Act, 1976 was declared constitutional.⁶ Under Article 48 of the Weimar Constitution, if "public security and order are seriously disturbed or endangered within the Reich, the President of the Reich may take measures necessary for their restoration, intervening if need be with the assistance of armed forces."⁷ Despite the fact that the text fails to define the type of public security or public order threat, it was invoked to promulgate emergency economic decrees to cope with the economic quagmire⁸ confronting Germany in the late 1920s and early 1930s.⁹

4. *Id.*

5. See Commonwealth of Australia Constitution Act, 1900, § 51(vi) (Ausl.) as interpreted by *Farey v. Burvett* (1916) 21 C.L.R. 433; and *Wishart v. Fraser* (1941) 64 C.L.R. 470.

6. See Reference re Anti-Inflation Act, [1976] 68 D.L.R. (3d) 452. For a discussion of the use of emergency powers in Canada, see Kim L. Scheppelle, *North American Emergencies: The Use of Emergency Powers in Canada and the United States*, 4 INT'L J. CONST. L. 213 (2006).

7. The official German text reads: "Der Reichspräsident kann, wenn im Deutschen Reiche die öffentliche Sicherheit und Ordnung erheblich gestört oder gefährdet wird, die zur Wiederherstellung der öffentlichen Sicherheit und Ordnung nötigen Maßnahmen treffen, erforderlichenfalls mit Hilfe der bewaffneten Macht einschreiten." The English translation above is from ROSSITER, *supra* note 1, at 31.

8. As Lee pointed out, the situation in Germany was dire: The devaluation of the mark started during the war but was aggravated by demobilization and by the stiff reparations imposed, under a provision in the Treaty of Versailles, in 1921. Speculation, massive over-printing of paper money and the French occupation of the Ruhr in 1923 all completed the collapse of the mark in November 1923 to 16,000 million to the pound. Savings were wiped out overnight and, for a few weeks, barter unofficially replaced the use of coinage.

STEPHEN J. LEE, *EUROPEAN DICTATORSHIPS, 1918-1945*, at 154 (Routledge ed., 2000) (1987).

9. There are numerous accounts of Germany's economic crisis and the use (and abuse) of Article 48 as a prelude to the rise of the Nazi Party. See, e.g., WILLIAM L. PATCH, JR., *HEINRICH BRÜNING AND THE DISSOLUTION OF THE WEIMAR REPUBLIC* (1998); DAVID ABRAHAM, *THE COLLAPSE OF THE WEIMAR REPUBLIC: POLITICAL ECONOMY AND CRISIS* (2d ed. 1986); *ECONOMIC CRISIS AND POLITICAL COLLAPSE: THE WEIMAR REPUBLIC, 1924-1933* (Jurgen B. von Kruegener ed., 1990); EDGAR J. FEUCHTWANGER, *FROM WEIMAR TO HITLER: GERMANY 1918-33*, chs. 2 & 3 (2d ed. 1993); HANS MOMMSEN, *THE RISE AND FALL OF WEIMAR DEMOCRACY*, chs. 7-8 (Elborg Forster & Larry E.

Although Britain was as badly affected by the economic crisis of 1929-1932, its approach towards extra-parliamentary emergency legislation was slightly different from that of Germany and France. In 1920, the government of David Lloyd George passed the Emergency Powers Act which made permanent the Defence of the Realm Act (DORA) of 1914. Under Section 1 of the Emergency Powers Act, the King is empowered to proclaim a state of emergency if it “appears” to him . . . that any action has been taken or is immediately threatened by any persons or body of persons of such a nature and on so extensive a scale as to be calculated, by interfering with the supply and distribution of food, water, fuel, or light, or with the means of locomotion, to deprive the community, or any substantial portion of the community, of the essentials of life.

Lloyd George had urgently requested the passage of this law to deal with the coal miners’ strike and to forestall the possibility of a general strike.¹⁰ The Act was invoked again in the general strike of 1926 and was in force for some eight months. The main safeguard provided under the EPA is that any proclamation of emergency lasts only for one month unless superseded by a new proclamation.¹¹ Between its enactment in 1920 and its amendment by the Emergency Powers Act 1964,¹² the statute was invoked a dozen times, mainly to deal with industrial strikes and unrest. Insofar as economic emergencies were concerned, the British Parliament chose to work through the instrument of enabling acts under which the government of the day was given temporary executive lawmaking powers. In the economic crisis of 1931, five such laws were passed.¹³

The use of delegated legislation was also employed by American President Franklin Delano Roosevelt shortly after he won the presidential elections of 1932. Roosevelt’s overwhelming control of and support from both Houses of Congress enabled him to push through a slew of emergency laws that would usher in the New Deal. Among these were: the Emergency Banking Act; the Economy Act; the Unemployment Relief Act; the Agricultural Adjustment Act; the Emergency Farm Mortgage Act; the

Jones trans., 1998) (1996); JOHE E. FINN, CONSTITUTIONS IN CRISIS: POLITICAL VIOLENCE AND THE RULE OF LAW 135-78 (1991); HELMUT HEIBER, THE WEIMAR REPUBLIC, chs. 3-6 (William E. Yuill trans., 1993); EBERHARD KLOB, THE WEIMAR REPUBLIC 101-35 (P. S. Falla & R. J. Park trans., Routledge 2d ed. 2005) (2002).

10. ROSSITER, *supra* note 1, at 173.

11. Emergency Powers Act, 1920, 10 & 11 Geo. 5, c. 55, § 1(1) (Eng.).

12. Emergency Powers Act, 1964, c. 38 (Eng.). This was itself replaced by the Civil Contingencies Act, 2004, c. 36 (Eng.).

13. These were: the Gold Standard (Amendment) Act; the National Economy Act; the Foodstuffs (Prevention of Exploitation) Act; the Abnormal Importations (Customs Duties) Act; and the Horticultural Products (Emergency Customs Duties) Act, all of which were passed in 1931. See ROSSITER, *supra* note 1, at 178-80. See also Michal R. Belknap, *The New Deal and the Emergency Powers Doctrine*, 62 TEX. L. REV. 67 (1983).

Federal Emergency Relief Act; the Home Owners Loan Act; the Farm Credit Act; the Emergency Railroad Transportation Act and the National Industrial Recovery Act.¹⁴

The exercise of emergency powers in times of economic strife in the jurisdictions mentioned above share one common trait—safeguards are in place to ensure that the suspension of normal constitutional and legislative activity does not become permanent. In the colourful words of Arend Lijphart, “. . . emergency powers must sail a precarious passage between the Scylla of sufficient power to solve a temporary but severe crisis and the Charybdis of this power becoming unrestrained and permanent.”¹⁵

In Singapore, as in many other former British colonies,¹⁶ emergency powers are specifically and explicitly provided for in Constitution.¹⁷ Under Article 150(1) the President may proclaim a state of emergency if he “is satisfied that a grave emergency exists whereby the security or *economic life* of Singapore is threatened.” Article 150 further provides that if the proclamation of emergency is made while Parliament is not sitting, the President shall “summon Parliament as soon as is practicable” and may, until such time, “promulgate ordinances having the force of law” if he is “satisfied that immediate action is required.”¹⁸ There is no constitutionally-stipulated life-span for an emergency. Under Article 150(3), the Proclamation of Emergency, as well as any Ordinance promulgated under it, ceases to have effect if Parliament passes a resolution annulling such law. This does not, however, preclude the President from issuing a fresh Proclamation of Emergency. Read literally, this means that a state of emergency can be prolonged indefinitely so long as the President is so satisfied and that he finds it impractical to summon Parliament.

The wording of Article 150 was derived from the Federation of Malaysia Constitution 1957 which is almost word-for-word the same as the Singapore provision, except that it contains a further ground for Proclamation of Emergency—if the “public order” of the Federation is threatened.¹⁹ The Malaysian emergency provisions have their genesis in the Proclamation of a Emergency by the British in 1948 while the Federation of Malaya was still under colonial rule.²⁰ This Proclamation applied to the

14. ROSSITER, *supra* note 1, at 261. *See also* Scheppele, *supra* note 6.

15. Arend Lijphart, *Emergency Powers and Emergency Regimes: A Commentary*, 18 ASIAN SURVEY 401, 404 (1978).

16. On the development of emergency powers in Britain, see Cornelius P. Cotter, *Constitutionalizing Emergency Powers: The British Experience*, 5 STAN. L. REV. 382 (1953). *See also* Ludwik Ehrlich, *British Emergency Legislation During the Present War*, 5 CAL. L. REV. 433 (1917); and H. Geraldine Lester, *British Emergency Legislation*, 7 CAL. L. REV. 323 (1919).

17. *See* CONSTITUTION OF THE REPUBLIC OF SINGAPORE, part XII.

18. CONSTITUTION OF THE REPUBLIC OF SINGAPORE, part XII, art. 150(2).

19. THE FEDERAL CONSTITUTION OF MALAYSIA, part XI, art. 150(1).

20. The British Military Administration governed Malaya under martial law from 1945 to 1948

whole of Malaya on 18 June 1948, and then to Singapore on 25 June 1948. Pursuant to the Emergency Proclamation, the colonial authorities enacted the Emergency Regulations Ordinance²¹ on 21 July 1948 “to confer on the Governor power to make regulations on occasions of emergency or public danger.”²² Section 3(1) of the Ordinance empowered the Governor in Council to proclaim a state of emergency . . . whenever it appears to him that an occasion of emergency or public danger has arisen, or that any action has been taken or is immediately threatened by any persons or body of persons of such a nature and on so extensive a scale as to be calculated, by interfering with the supply and distribution of food, water, fuel or light, or with the maintenance of health or health services, or any substantial portion of the community, of the essentials of life In addition, the Governor is empowered to make any regulations. . . which appear to him to be necessary or expedient for securing the defence of the Colony, the public safety, the maintenance of public order and for maintaining supplies and services essential to the life of the community including the maintenance of health and health services and to prescribe penalties to be imposed for any offence against any such regulation, and to provide for the trial, by such Courts as may be specified in such regulations, of persons guilty of such offences.²³

As a prelude to the grant of independence, a constitutional commission chaired by Lord Reid was established to recommend the form of constitution for Malaya. The Reid Commission took cognizance of the prevailing state of emergency (first declared in 1948) and recommended that any existing emergency legislation should be continued only for a year, and if was deemed necessary to retain such legislation, this should only be “done by resolution of both Houses of Parliament.”²⁴ The Commission further recommended that Parliament be authorized to enact provisions to deal with “any further attempt by any substantial body of persons to organize violence against persons or property.”²⁵ In addition, the Commission recommended that Parliament be authorized to enact provisions to foil any body of persons attempting to organize violence against persons or property, to the extent that such laws infringe fundamental or State rights.²⁶ In paragraph 175 of the *Report*, the words “security or economic life of the country” were first used. The Commission recommended that in emergencies . . . such as war, or internal disturbance, which constitute an immediate threat to *the security or economic life* of the country . . . there should be a Proclamation of

and issued the British Military Administration (Essential Regulations) Proclamation, 1948.

21. Emergency Regulations Ordinance, 1948, Law No. 17 (Malay.).

22. *Id.* pmbl.

23. Emergency Regulations Ordinance, 1948, sec. 4(1).

24. *Id.* para. 173.

25. *Id.*

26. *Id.* para. 174.

Emergency, and that the Federal Government should then have power to give directions to any State Government or State officer or authority. In such an emergency we recommend that Parliament should have power to enact any provision notwithstanding that it infringes fundamental rights or State rights. We do not think that it is possible or desirable to set general limits to this power, and we think that it is even necessary to authorise Parliament to extend its own duration for a year, or, if the emergency should last so long, from year to year [emphasis added].²⁷

The Federation of Malaya obtained its independence on 31 August 1957 and all the recommendations of the Reid Commission were accepted and duly enacted. The Malayan Emergency, first proclaimed by the British in 1948, officially came to an end in 1960.²⁸ At that time, the emergency provisions of the Federal Constitution were amended to their present form²⁹ and the Internal Security Act was introduced as part of the Government's anti-terrorism arsenal.

When Singapore joined the Federation of Malaysia in 1963, Part IX of the Federal Constitution—which contained the emergency powers of the head of state—applied to Singapore, as did the Internal Security Act which was enacted in the Federation of Malaya in 1960 to deal with the communist insurgency. When Singapore became independent on 9 August 1965, these same provisions were retained as part of Singapore's Constitution. Today, emergency powers are found under Part XII "Special Powers Against Subversion and Emergency Powers."

Since Singapore's independence in 1965, this provision has never been invoked and as such, this clause has never been challenged or interpreted by the Singapore courts.³⁰ As such, what qualifies as a sufficiently "grave emergency" in which Singapore's "economic life" is threatened is left very much to our conjecture. Likewise, even though the Yang di-Pertuan Agong (King) of Malaysia has proclaimed states of emergency in four separate instances—in 1964, 1966, 1969 and 1977—none of these were emergencies

27. *Id.* para. 175.

28. The Emergency came to an end on 31 July 1960, see Legal Notice 185 of 1960.

29. For an introduction to the legal issues involved in emergency legislation, see S. Jayakumar, *Emergency Powers in Malaysia: Development of the Law 1955-77*, 1 MALAYAN L.J. ix (1978); S. Jayakumar, *Legal Aspects of Emergency Powers in Malaysia*, 2 THE COMMENTARY 17 (1969); H. P. LEE, *Emergency Powers in Malaysia*, in THE CONSTITUTION OF MALAYSIA: FURTHER PERSPECTIVES AND DEVELOPMENTS: ESSAYS IN HONOUR OF TUN MOHAMED SUFFIAN 135 (Francis A. Trindade & H. P. Lee eds., 1986).

30. In 1964, while Singapore was a constituent state of the Federation of Singapore, a nation-wide Proclamation had been issued. When Singapore left the Federation on 9 August 1965, it appeared to have taken that state of emergency along since it was never formally repealed and since Section 13 of the Republic of Singapore Independence Act provided for the continuation of all "existing law" that applied to Singapore while it was part of the Federation. Furthermore, the Emergency (Essential Powers) Act (Cap 90), enacted pursuant to the 1964 Proclamation of Emergency, remains very much a part of Singapore's laws.

brought about by impending economic disaster.

III. ECONOMIC EMERGENCIES: THE ROLE OF THE COURTS

Exactly what would constitute an economic emergency justifying the proclamation of an emergency such that the “security and economic life of Singapore” would be threatened. Other than the Malaysian Constitution, this phrase can also be found in the 1956 and 1962 Constitutions of Pakistan.³¹ A whole new article on “economic and financial emergency” was included in its 1973 Constitution, under which the President is empowered to proclaim a state of emergency if he “is satisfied that a situation has arisen whereby the economic life, financial stability or credit of Pakistan, or any part thereof, is threatened.”³² Under this article, the President “may issue directions for the reduction of the salaries and allowances of all or any class of persons serving in connection with the affairs” of a province or the federation.³³

The courts of Pakistan, like those in Malaysia and Singapore are reluctant to adjudicate upon the meaning of what constitutes an emergency, believing that the discretion is one which the executive should be given wide latitude to exercise. Even in other jurisdictions, such as Canada, the courts are prepared to give the executive a wide berth in economic emergencies arising from a state of war or siege. For example, in the case of *Fort Frances Pulp and Power Co v. Manitoba Free Press*,³⁴ the Privy Council declined to question the validity of the exercise of emergency powers to regulate the economy even several years after the conclusion of World War I. This case involved government regulation of the price of newsprint under the War Measures Act. The Manitoba Press, a newspaper publisher, regularly bought its supplies of newsprint from Fort Frances Pulp and Power Co. When the latter tried to raise its prices, Manitoba Press brought an action against them for violation of the price control scheme. Fort Frances argued that the scheme was unconstitutional and the issue before Judicial Committee was whether the Federal Government was entitled to control prices under the “emergency doctrine” and if so, for how long. Lord Haldane held that “very

31. Article 191(1) of the 1956 Constitution provides that “If the President is satisfied that a grave emergency exists in which the security or economic life of Pakistan, or any part thereof, is threatened by war or external aggression, or by internal disturbance beyond the power of a Provincial Government to control, he may issue a Proclamation of Emergency in this Article referred to as a Proclamation.” CONSTITUTION OF PAKISTAN, 1956, art. 191(1). These same words were included under Article 30(1)(b) of the 1962 Constitution but in a rather more limited version. The 1962 provisions, the “grave emergency” in which “the security or economic life of Pakistan is threatened by internal disturbances beyond the power of a Provincial Government to control.” CONSTITUTION OF PAKISTAN, 1962, art. 30(1)(b).

32. CONSTITUTION OF PAKISTAN, 1973, art. 235(1).

33. CONSTITUTION OF PAKISTAN, 1973, arts. 235(3), 235(4).

34. *Fort Frances Pulp & Power Co. v. Manitoba Free Press*, [1923] A.C. 695 (Can.).

clear evidence that the crisis has wholly passed away would be required to justify the judiciary in overruling the decision of the Government that exceptional measures are still requisite.”³⁵

However, where the economic emergencies are not a direct consequence or corollary of state of war, the courts are prepared to undertake a greater scrutiny. Two useful Canadian cases prove instructive. The first is *Attorney-General for Canada v. Attorney-General for Ontario & Ors.*³⁶ This case involved the legality of the Employment and Social Insurance Act 1935 which, among other things, provided for a system of compulsory unemployment insurance throughout Canada. The problem was that it matters dealt with in the legislation fall clearly within the legislative competence of the provinces and not the Federal Government. Lord Atkin, delivering the judgment of the Judicial Committee held that the Act was *ultra vires* as it did “not purport to deal with any special emergency” but was instead founded on the Dominion’s general treaty-making powers.

The second case is *Re Anti-Inflation Act*,³⁷ in which the Supreme Court of Canada considered the validity of 1975 Anti-Inflation Act. This Act provided for the control of profit margins, prices, dividends and compensation in Canada to contain and reduce inflation, a problem the Canadian Parliament regarded as a matter of grave national concern. The Supreme Court of Canada was prepared to go beyond the assertions of the Government and consider if conditions existed that justified the Canadian Government enacting such legislation. After examining the economic data, Government white papers and other documentary evidence on the state of the Canadian economy, the Court concluded that the Act was validly enacted under the Government’s powers to legislative “for the Peace, Order and Good Government of Canada” under Section 91 of the Canadian Constitution.

Would courts in Malaysia and Singapore adopt a similar approach if legislation enacted pursuant to a perceived economic crisis was challenged in court? Going further, would the courts be prepared to allow litigants to challenge the executive discretion?

35. *Id.* at 706.

36. *Att’y-Gen. for Canada v. Att’y-Gen. for Ontario & Ors.*, [1937] A.C. 355 (Can.).

37. *Re Anti-Inflation Act*, [1976] 2 S.C.R. 373 (Can.).

IV. ECONOMIC EMERGENCIES IN SINGAPORE: THE ELECTED PRESIDENT³⁸

A. *Nightmares of Profligacy*

Beyond its emergency provisions, Singapore's Constitution has another complex scheme to deal with economic emergencies. This highly-complex and complicated scheme was created in 1991 when the Constitution was amended to transform the post of President from a ceremonial into an elected one. The idea for this scheme was articulated as early as in 1984 when then-Prime Minister Lee Kuan Yew suggested having an elected president to safeguard Singapore's foreign reserves.³⁹ In 1988, the first Government White Paper outlining the scheme was issued.⁴⁰ In the White Paper, the Government outlined its rationale for creating an elected presidency. The Government pointed out that in many countries, irresponsible governments often mismanaged their nations' finances by providing handouts and heavy subsidies to buy votes, and this often ruined these economies.⁴¹ Singapore had been fortunate in having a responsible government, but there is no guarantee that this will always be the case. With over \$30 billion national reserves, there is a great temptation for future irresponsible governments to raid the coffers and spend the nation's hard-earned money on short-term vote buying and popular measures.⁴² There was nothing to stop the present or a future government from squandering all the nation's reserves and ruining the Singapore economy, and it was thus necessary to have some kind of constitutional safeguard to prevent an irresponsible government from ruining Singapore.⁴³ Another point made in the White Paper related to the need to safeguard the civil service from being corrupted.⁴⁴

B. *Designing the Elected Presidency*

In designing a constitutional safeguard, the Government considered several factors vital.⁴⁵ First, it was determined to preserve the parliamentary

38. I do not intend to deal at length with all the intricacies and problems created by this institution as the literature on this is considerable. For a good introduction to the key debates and issues, see KEVIN TAN & LAM PENG ER, *MANAGING POLITICAL CHANGE: THE ELECTED PRESIDENT OF SINGAPORE* (1997).

39. *See Prime Minister's National Day Rally Speech*, STRAITS TIMES, Aug. 10, 1988, at 1.

40. *See* PARLIAMENT OF SINGAPORE, *CONSTITUTIONAL AMENDMENTS TO SAFEGUARD FINANCIAL ASSETS AND THE INTEGRITY OF THE PUBLIC SERVICES*, 1988, Cm. 10 [hereinafter *First White Paper*].

41. *See id.* para. 5, at 1.

42. *Id.* para. 6, at 1.

43. *Id.* para. 12, at 2.

44. *Id.* para. 11, at 2.

45. *Id.* paras. 18(a)-18(e), at 4-5.

system of government in the sense that the Prime Minister and his cabinet continue to retain initiative in governing Singapore. Second, the new mechanism had to be able to act quickly. Third, the institution had to have high moral authority derived from the will of the people in an election. Fourth, this person had to have ministerial, high executive or administrative experience since he needed to “balance the demands of political expediency and the public interest.” Finally, these qualities and qualifications should be built into the Constitution.

From the outset, the Government made it quite clear that the way Singapore’s reserves were going to be safeguarded was through the office of a person, rather than a group of persons. The proposals outlined in the first White Paper precluded any possibility of creating other types of constitutional mechanisms, such as an upper house or even creating an independent financial body such as the Federal Reserve Board in the United States. The office of the President would be transformed into an elected one and he would hold the constitutional “second key” to Singapore’s financial reserves.

A second White Paper, published in 1991, offered more concrete details regarding the new institution. Most of the proposals are not germane to our discussion. What was significant was that the second White Paper envisaged the creation of a Council of Presidential Advisors to assist the President in his deliberations. In the original proposal, a Presidential Committee for the Protection of Reserves was to have been created. This was renamed the Council of Presidential Advisors (CPA)⁴⁶ and would comprise 6 members (instead of the original 5).⁴⁷ Under this revised scheme, the President, the Chairman of the Public Service Commission and the Prime Minister would each nominate two members to the CPA⁴⁸ which was to give the President advice on all matters in which he has discretionary powers. The President was, however, only legally obliged to consult the Council only questions involving the budgets of the Government, statutory boards and key government companies.⁴⁹ A new provision was introduced to enable

46. The CPA is established under Part VA. Its 5 members must be Singapore citizens of at least 35 years of age, resident in Singapore and not subject to the disqualifications under art. 37E (*viz* the candidate must not be of unsound mind; is insolvent or an undischarged bankrupt; or has been convicted of an offence in Singapore or in a foreign country and sentenced to imprisonment for not less than 1 year or a fine of not less than \$2,000 and has not received a free pardon. The CPA meets in private and it possesses the power to “require any public officer or officer of any statutory board or Government company to appear before the Council.”).

47. Even though the Bill provided that the CPA was to comprise 6 members, the government appeared to have changed its mind. The final number of members in the amended provisions is 5. *See* CONSTITUTION OF THE REPUBLIC OF SINGAPORE, art. 37B.

48. *Supra* note 40, paras. 29-30, at 8-9.

49. *Id.*

Parliament to override the President's decision.⁵⁰

C. *At the Select Committee*

The Constitution (Amendment) Bill was submitted to Select Committee where it was hotly debated. Much of the debate in the Select Committee is not directly relevant to our discussion and need not detain us. Two points are worth noting. First, the office of the President was to be entrenched more tightly into the Constitution than any other institution. Under the proposed Article 5(2A), for example, amendments to certain critical provisions will require the support of two-thirds of the voters at a referendum unless the President directed otherwise. Second, it was originally proposed that the President would be given the discretion to withhold consent to a request for the issue of a Proclamation of Emergency under Article 150. After some deliberation, the Select Committee recommended against such an amendment on the grounds that "the decision to proclaim an emergency should be entrusted to the Prime Minister and Cabinet, not the President" and that the "process of satisfying the President of the need for a Proclamation and obtaining his concurrence may unnecessarily delay the Government's response to an emergency."⁵¹

The amending bill provided for 6 members in the CPA. The Committee recommended that for the first appointments to the CPA, half the appointees of the President and the Prime Minister serve 3 year terms, while the other half will serve 6 years together with the Chairman of the PSC's nominee. This staggering of terms will ensure that "an incoming President or Prime Minister cannot immediately replace the incumbent Presidential Advisors with his own personal nominees."⁵²

The Committee also recommended that the CPA be given powers to examine "any public officer, or officer of a key statutory board or Government company."⁵³ In respect of key appointments, the Committee felt that the President should be required to consult the CPA but left the final decision with the President. It felt that there was no need for the President to consult the CPA on questions of detentions under the Internal Security Act (ISA), or Restraining Orders under the Maintenance of Religious Harmony Act, or in approving CPIB investigations.⁵⁴

50. *Id.* paras. 31-35, at 9-10.

51. *Id.* at xiv.

52. *Id.* at xvi.

53. *Id.* at xvii.

54. *Id.* at xvii-xviii.

D. *The Financial Provisions*

The financial provisions are extremely complicated and many of the matters dealt with in the Select Committee Report concern methods of accounting and budgeting. The Committee's key recommendations were as follows:

1. the chairmen and chief executive officers (CEOs) of the key statutory boards and government companies be required to declare whether their budgets are likely to draw on the reserves;⁵⁵

2. appointments to the boards of directors of the key statutory boards and government companies be for a period of 3 years only. This will allow the President to "revoke their appointments where they subsequently are suborned or they collude with the plans of a profligate Government." These directors can be re-appointed but such appointment will require the concurrence of the President;⁵⁶

3. the President should not control investment decisions of the key statutory boards and government companies since this would "involve him in the actual operations" of these boards and companies;⁵⁷

4. the President's approval need not be obtained for the incurring of any debt since this was highly impractical. Instead, the Committee suggested that a duty be imposed on the Auditor-General and the Accountant General to inform the President of any proposed transaction "which in their knowledge is likely to draw on reserves."⁵⁸ At the same time the Minister of Finance would submit to the President a statement of outstanding guarantees and other financial liabilities at the close of each financial year.⁵⁹ If the President is of the opinion that "certain outstanding liabilities are likely to draw on the reserves, he shall formally inform the Prime Minister and shall cause his opinion to be published in the *Gazette*." This will enable the President to draw the attention of the public even if the transactions may not require his approval.⁶⁰

5. if the President fails to convey a decision on any Supply Bill or Supplementary Supply Bill within 30 days, he shall be deemed to have assented to the Bill;⁶¹ and

6. different aspects of the Bill should have different commencement dates. This is necessary for all the administrative and practical problems to

55. *Id.* at xxii-xxiii.

56. *Id.* at xxiii-xxiv.

57. *Id.* at xxiv.

58. *Id.* at xxvii.

59. *Id.*

60. *Id.*

61. *Id.* at xxviii.

ironed out before they become almost impossible to amend.⁶²

The Report of the Select Committee was debated in Parliament on 3 January 1991. In moving the Third Reading, Prime Minister Goh Chok Tong remarked that requirement that the President consults the Council of Presidential Advisors⁶³ gives the latter a larger role and strengthens it as a political institution.⁶⁴

E. *The Final Scheme in 1991*

Under the final scheme, the Elected President is to be a citizen of Singapore,⁶⁵ aged 45 and above,⁶⁶ not be a member of any political party on the date of nomination for election,⁶⁷ have his name appear on the current register of electors,⁶⁸ be a resident of Singapore at the time of nomination, and have been a resident for period amounting in aggregate of not less than 10 years,⁶⁹ and not subject to any disqualification under Article 45.⁷⁰ In addition, he had to satisfy the Presidential Elections Committee (PEC)⁷¹ that “he is a person of integrity, good character and reputation,”⁷² and has for a period of not less than 3 years, held office in one of numerous capacities laid down under Article 19(2)(g).⁷³

62. *Id.* at xxix-xxx.

63. See PARLIAMENTARY OF SINGAPORE, SINGAPORE PARLIAMENTARY DEBATES OFFICIAL REPORT 718 (1991).

64. *Id.* at 721-22.

65. CONSTITUTION OF THE REPUBLIC OF SINGAPORE, art. 19(2)(a).

66. *Id.* art. 19(2)(b).

67. *Id.* art. 19(2)(f).

68. *Id.* art. 19(2)(c).

69. *Id.* art. 19(2)(d).

70. *Id.* art. 45. It contains the disqualification criteria for Members of Parliament, *viz* being of unsound mind; or an undischarged bankrupt; or holding an office of profit; or failure to lodge return of election expenses, or being convicted of an offence in Singapore or Malaysia and imprisoned for not less than one year or fined not less than \$2,000; or voluntarily acquired or exercised citizenship rights in a foreign country; or conviction under an election offence.

71. The PEC is established under art. 18 of Constitution of Republic of Singapore and consists of the Chairman of the Public Service Commission, the Chairman of the Public Accountants Board established under the Accountants Act, and a member of the Presidential Council for Minority Rights nominated by the Chairman of the Council. Its main function is to ensure that candidates for the office of President comply with the requirements under art. 19 of Constitution of Republic of Singapore.

72. *Id.* art. 19(2)(e).

73. Specifically, these offices are: Minister; Chief Justice; Speaker; Attorney-General; Chairman of the Public Service Commission; Auditor-General; Permanent Secretary; chairman or chief executive officer of one of the statutory boards referred to in art. 22A read with Schedule 5 (*viz* Board of Commissioners of Currency, Singapore, Central Provident Fund Board, Housing and Development Board, Jurong Town Corporation, Monetary Authority of Singapore, and the Post Office Savings Bank of Singapore); chairman of the board of directors or chief executive officer of a company incorporated or registered under the Companies Act with a paid-up capital of at least \$100 million or its equivalent in foreign currency; or “in any other similar or comparable position of seniority and responsibility in any other organisation or department of equivalent size or complexity in the public or private sector which, in the opinion of the Presidential Elections Committee, has given him such experience and

Article 17(2) of the Constitution provides that the President “shall be elected by the citizens of Singapore in accordance with any law made by the Legislature.” To this end, the Presidential Elections Act 1991⁷⁴ was passed. Under the Act, elections will be held within 6 months after the office of the President becomes vacant, but not more than 3 months before the expiration of the incumbent.⁷⁵ The writ of election is issued by the Prime Minister addressed to Returning Officer⁷⁶ who must give notice of the writ at least 4 clear days before nomination day.⁷⁷

Section 8 also provides that any time after the notice of election and at least 2 clear days before nomination day, each candidate must apply to the PEC for a certificate stating that the PEC was satisfied that he is a qualified candidate under Article 19 of the Constitution.

The President’s term of office is for 6 years.⁷⁸ Generally, he must exercise his functions under the Constitution, acting on the advice of the Cabinet or of a Minister acting under the authority of the Cabinet.⁷⁹ However, he may act in his discretion when performing the following functions:

1. appointment of the Prime Minister;
2. withholding consent to a request for the dissolution of Parliament;
3. withholding assent to any Bill under Articles 22E,⁸⁰ 22H,⁸¹ 144(2)⁸² or 148A;⁸³
4. withholding concurrence under Article 144 to any guarantee or loan to be given or raised by the Government;
5. withholding concurrence and approval of appointments and budgets

ability in administering and managing financial affairs as to enable him to carry out effectively the functions and duties of the office of the President.”

74. Presidential Elections Act, No. 27 of 1991 (Sing.). It was passed by Parliament on 29 July 1991 and assented to by the President on 6 August 1991. For a commentary of the Act, see Valentine S. Winslow, *Electing the President: The Presidential Elections Act 1991*, 1991 SING. J. LEGAL STUD. 476 (1991).

75. Presidential Elections Act of 1991, c. 240A, § 6 (Sing.).

76. *Id.* 1991, c. 240A, § 6(2) (Sing.).

77. *Id.* 1991, c. 240A § 7 (Sing.).

78. CONSTITUTION OF THE REPUBLIC OF SINGAPORE, art. 20(1).

79. *Id.* art. 21(1).

80. This article relates to the President’s discretion to withhold assent “to any Bill passed by Parliament which provides, directly or indirectly, for varying, changing or increasing the powers of the Central Provident Fund Board to invest the moneys belonging to the Central Provident Fund.”

81. This article gives the President the discretion to withhold assent to any Bill which “provides, directly or indirectly, for the circumvention or curtailment” of his discretionary powers.

82. Under this article the President may withhold his assent to any Bill “providing, directly or indirectly, for the borrowing of money, the given of any guarantee or the raising of any load by the Government if, in the opinion of the President, the Bill is likely to draw on the reserves of the Government which were not accumulated by the Government during its current term of office.”

83. Assent may be denied if the President is of the opinion that any Supply or Supplementary Supply Bill “is likely to draw on the reserves which were not accumulated by the Government during its current term of office.”

of statutory boards and Government companies applicable under Articles 22A⁸⁴ and 22C;⁸⁵

6. disapproving of transactions referred to in Articles 22B(7), 22D(6) or 148G;⁸⁶

7. withholding concurrence under Article 151(4)⁸⁷ in relation to the detention or further detention of any person under any law or ordinance made or promulgated in pursuance of Part XII (Special Powers Against Subversion and Emergency Powers);

8. the exercise of his functions under Article 12 of the Maintenance of Religious Harmony Act 1990;⁸⁸ and

9. any other function the performance of which the President is authorised by this Constitution to act in his discretion.

To determine whether the President was guilty of the grounds stipulated under Article 22L, a tribunal appointed by the Chief Justice and consisting of not less than 5 Judges of the Supreme Court would be constituted.

A new Part VA was included in the Constitution to create the Council of Presidential Advisors. In its final incarnation, the CPA is made up of 6 members, two of whom are appointed by the President acting in his personal discretion. In appointing the other four members, the President must act on the advice of the Prime Minister (two members), the Chief Justice and the Chairman of the Public Service Commission (one member each).⁸⁹

F. *The 1994 Amendments*

In September 1994, the Constitution of the Republic Singapore (Amendment No. 2) Act came into operation.⁹⁰ This amendment Act is long

84. These companies are listed under Part I of Schedule 5 to the Constitution—Board of Commissioners of Currency, Singapore, Central Provident Fund Board, Housing and Development Board, Jurong Town Corporation, Monetary Authority of Singapore, and the Post Office Savings Bank of Singapore.

85. These companies are listed under Part II of Schedule 5 to the Constitution—Government of Singapore Investment Corporation Pte Ltd., MND Holdings Pte Ltd., Singapore Technologies Holdings Pte Ltd. and Temasek Holdings Pte Ltd.

86. These provisions require the respective board of directors and government officials to inform the President if their proposed Supply Bills would draw upon the accumulated reserves of the government companies or statutory boards.

87. This article provides: “Where an advisory board constituted for the purposes of this Article recommends the release of any person under any law or ordinance made or promulgated in pursuance of this Part, the person shall not be detained or further detained without the concurrence of the President if the recommendations of the advisory board are not accepted by the authority on whose advice or order the person is detained.”

88. This provision concerns the making of prohibition orders against religious leaders who violate the Act.

89. CONSTITUTION OF THE REPUBLIC OF SINGAPORE, art. 37B(1).

90. The Act was passed by Parliament on 25 Aug. 1994 and assented to by the President on 14 Sept. 1994.

and complicated, taking up close to 20 pages and some 32 sections in all. For our purposes, three changes should be noted. The first stipulates that if the President concurs with the drawing of the reserves, he is required publish his reasons for such concurrence in the Gazette. Secondly, new articles were added to provide that members of the CPA be remunerated⁹¹ and for the appointment of a Secretary to the Council.⁹² Third, a new Article 151A was inserted to render the presidential veto ineffective in respect of “any defence and security measure.”⁹³

V. THE PRESIDENT ACTS: THE FINANCIAL CRISIS OF 2008-2009

The financial crisis that broke out in the United States in 2007 spread like a wild fire throughout the world and by 2008, the world was facing its worst economic crisis since the Great Depression in the 1930s. It is not the purpose of this paper to discuss the causes of the current crisis. Suffice to say, it was caused by a number of reckless, speculative and unsustainable lending policies culminating in the sub-prime fiasco of 2007 and the collapse of Lehmann Brothers in 2008. Because of its open economy and its heavy reliance on exports to the United States and Europe, Singapore was immediately affected by the contagion.

In the fourth quarter of 2008, Singapore’s economy shrank by 12.5% while it declined 5.4% in the July-September quarter. It was the third consecutive quarterly decline in gross domestic product. Growth in the economy was only 1.5% for 2008, compared with 7.7% for 2007. By the end of 2008, the Government was predicting that Singapore’s economy would contract by 2% in 2009.⁹⁴ The economy was bleeding so badly that the Government announced that it was bringing forward the Budget debate from March to 22 January. Rumour was rife about the Government needing to draw down on its past reserves to meet the crisis. On 17 February 2009, President SR Nathan announced that he agreed to the first-ever draw on Singapore’s past reserves.⁹⁵ Nathan’s announcement, while not wholly unexpected, nonetheless attracted much interest from the public who was keen to understand the process under which the President exercised his

91. See CONSTITUTION OF THE REPUBLIC OF SINGAPORE, art. 37L(2).

92. *Id.* art. 37M.

93. See new art. 151A(1). For the purposes of this section, “defence and security measure” has been defined as “any liability or proposed transaction which the Prime Minister and the Minister responsible for defence, on the recommendations of the Permanent Secretary to the Ministry of Defence and the Chief of Defence Force, certify to be necessary for the defence and security of Singapore.” See art. 151A(2).

94. Kevin Lim, *Singapore Recession Deepens, Govt Cuts 09 Outlook*, REUTERS UK, Jan. 2, 2009, <http://uk.reuters.com/article/idUKTRE5010EM20090102> (last visited Dec. 4, 2009).

95. See Sue A. Chia, *President SR Nathan: Why I Said Yes (on Use of Past Reserves)*, STRAITS TIMES, Feb. 18, 2009, at 1.

discretion.

Under Article 148A(1) of the Constitution, the President may,

. . . acting in his discretion, withhold his assent to any Supply Bill, Supplementary Supply Bill or Final Supply Bill for any financial year if, in his opinion, the estimates of revenue and expenditure for that year . . . are likely to lead to a drawing down on the reserves which were no accumulated by the Government during its current term of office, except that if the President assents to any such Bill notwithstanding his opinion that the estimates, supplementary estimates or statement of excess are likely to lead to a drawing on those reserves, the President shall state his opinion in writing addressed to the Speaker and shall cause his opinion to be published in the Gazette.

If the President withheld his assent to the Supply Bill, Parliament could vote to overrule the President within 30 days by passing such a resolution with a two-third majority.⁹⁶ If such an overruling action was not feasible, Parliament can authorize the use of expenditure from the Consolidated Fund in an amount not exceeding the previous year's budget. This means that if President Nathan had not given his assent, Parliament—which is overwhelming controlled by the ruling People's Action Party—would have had no problem overruling his decision.

In any case, that did not happen. Indeed, Nathan took great pains to explain to the public how the decision was made to support the Government's two new schemes to alleviate the economic hardship of Singaporeans—Jobs Credit Scheme and Special Risk Sharing Initiative—especially since a number of observers were concerned that he was able to come to his decision within 11 short days. He explained that throughout 2008, he and his CPA members received regular briefings by officials from the Ministry of Trade and Industry and the Monetary Authority of Singapore and was kept apprised of the state of the global and Singapore economies. On 18 January, he was approached by Prime Minister Lee Hsien Loong, who explained the dire state of the economy to him and told him that extraordinary measures were needed to give confidence to the people and to address the impact of the economic crisis on the people, especially those in the low-income bracket. In this connection, the Prime Minister underscored the severity of the situation and requested the President's assent to use the past reserves. What happened next was revealed in President Nathan's interview:

96. CONSTITUTION OF THE REPUBLIC OF SINGAPORE, art. 148D.

The CPA and I were already aware of the circumstances that were prevailing and how they were impacting on us. So I agreed at that stage to give every consideration to the proposal when it was submitted to me.

After that, the Minister for Finance came to see me and he formally made a request the next day for the specifics of the scheme and sought a meeting to discuss this in greater detail.

So a meeting was convened with the CPA and myself and it was addressed by the Minister for Trade and Industry, Minister for Finance and it was attended by people from the Attorney-General's Chambers (and the) Accountant-General.

The Minister for Finance and the relevant officials went through the Resilience Package of \$20.5 billion with (its) focus on saving jobs, keeping companies afloat and the long-term infrastructure and capability development that have to be embarked upon.

When the CPA was convened on my direction, two briefings were provided—first by the Minister for Trade and Industry and his officials and the Monetary Authority of Singapore, and the second by the Ministry of Finance.⁹⁷

After the briefing, President Nathan left the meeting to allow the CPA to deliberate the proposals. The CPA reviewed the details of the proposal, sought legal advice on the constitutional implications of the request, and agreed to a formal proposal being tabled by Minister of Finance Tharman Shanmugaratnam on 19 January. In all, the process of obtaining the President's assent took 11 days "from the time the matter was first broached."⁹⁸

Some Observations

The ground-breaking move by President Nathan to assent to drawing down of Singapore's reserves highlights a number of constitutional issues. First, one should note that decision to use the second key was made by a group of non-elected officials. President Nathan himself was deemed elected into office in 2005 when he was the sole candidate in that presidential election. Furthermore, none of the six members of the CPA⁹⁹ were elected

97. Transcript of President Nathan's Press Conference, <http://www.straitstimes.com/STI/STIMEDIA/pdf/20090218/EDITED-TRANSCRIPT.pdf> (last visited Dec. 4, 2009).

98. *Id.*

99. They are: JYM Pillay (chairman); S Dhanabalan; Po'ad Bin Shaik Abu Bakar Mattar; Cham Tao Soon; Goh Joon Seng and Yong Pung How. The two alternate members appointed under art. 37C are: Stephen Lee Ching Yen; and Lim Chee Onn.

either. There is nothing unconstitutional about this since the constitutional provisions fully anticipate this counter-majoritarian scenario. What it does mean is that none of the key actors in this decision-making process can truly assert that they command a moral authority derived from the will of the voting public.

Second, the mechanism of checks and balances between the cabinet and the President with respect to the utilization of past reserves works only in a situation where either the President concurs with the cabinet (in which case, there is no necessity to check the cabinet) or one in which the ruling political party (in this case, the People's Action Party) has the super-majority needed to override the President's decision if he refuses to give his assent. In either situation, a deadlock is avoided and the business of government can carry on normally. However, if the President refuses to give his assent and if the government of the day did not have the requisite majority to overrule the President, then a deadlock will ensue. Government will continue to function—simply because the Constitution provides that the government ministries and departments may continue to draw on their budgets provided they do not exceed the amounts allocated in the preceding financial year—but the crisis cannot be resolved. Worse still the only way to break the deadlock is literally to force the President out of office.

Third, notwithstanding President Nathan's candid press interview on how he came to his decision, most of what he revealed pertained to the procedural, rather than substantial aspects of the decision-making process. Since the Constitution requires the President to consult but not necessarily heed the CPA,¹⁰⁰ it would be important to know how much weight the President accorded the advice offered by the CPA, and indeed, the nature of that advice. Perhaps the Constitution can be amended to require the advice tendered by the CPA to be appended to the President's reasons when they are published in the Gazette. This will make for greater transparency and accountability.

VI. CONCLUSION

While emergency powers have traditionally been used—and sometimes stretched—to deal with economic emergencies, this has never been the case in Singapore. A state of emergency, requiring the suspension of normal law-making powers has never been necessary in Singapore since the Government of the day has, since 1959, always secured such a commanding super majority in the legislature that the passage of practically any type of

100. Art. 21(2)(c) states that the President may act in his personal discretion when exercising his power under art. 148A (withholding of assent on Supply Bills). However, art. 21(3), the President "shall consult" the CPA "before performing any of his functions" under art. 148A.

legislation would be fairly easy. Indeed, one might go so far as to argue that the use of emergency powers in times of economic strife make sense only when there is a constitutional right to property. In states of emergency, constitutional protection and guarantees are often suspended in the name of public order and security, and to allow the state to pass draconian legislation affecting the rights of citizens if necessary. There is no constitutional right to property in Singapore, and as such, the invoking of an emergency even with the “economic life” of Singapore is threatened, seems rather liken an overkill.

Emergency powers are also often needed in states where the ruling government has a precarious majority in the legislature and needs to aggregate sufficient power to act swiftly. This has never been necessary in Singapore where the ruling People’s Action Party has never lost more than 4 seats in any single general election. Indeed, the fear is not so much whether the Government will have enough power to act, but rather whether there is anything or anyone to check on such a powerful government. The elected President scheme was devised to deal with this problem, but as the scope of the President’s scrutiny has progressively been whittled since 1991,¹⁰¹ there may not be much the President can do against a profligate government by the time he really needs to act.

101. For a comprehensive account of this, see Yvonne C. L. Lee, *Under Lock and Key: The Evolving Role of the Elected President as Fiscal Guardian*, 2007 SING. J. LEGAL STUD. 290, 318-19 (2007).

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