

The parameters of presidential powers

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The transformation of the presidency in 1991 from a ceremonial head of state to an elected office with additional functions was revolutionary, departing from the inherited Westminster parliamentary system. Modified in the light of practice through 11 constitutional amendment Bills in the past two decades, the presidency has developed in evolutionary fashion; in some instances, its powers were reduced, as where presidential oversight of defence spending measures was removed in 1994.

The primary function of this novel experiment was to remedy the lack of institutional checks to prevent an irresponsible government commanding a strong parliamentary majority or a weak one-seat majority coalition government from raiding the national reserves to economic ruin. Proposed alternatives such as vesting checking powers in an Upper House and mandating an annual budget surplus were rejected.

Direct elections would confer on the President the moral legitimacy to oppose certain decisions of the Prime Minister, who bore the confidence of the parliamentary majority. Detractors maintained that a parliamentary democracy with an effective opposition would be a better check than a President with limited 'veto' powers.

Nonetheless, the two-key solution was adopted. The Cabinet held the 'first key' or power of initiative over matters like proposing a Supply Bill, which needed the President's concurrence - the 'second key' - to be adopted. A basic principle was the preservation of parliamentary government, where the Cabinet governs the nation. Singapore's presidency is not an executive one, although the President can exercise reactive executive or 'custodial' powers.

Presidential powers are part of the constitutional regime regulating the conduct of the executive in financial policy. For example, the Government in applying the principle of inter-generational equity under Article 142 may only spend up to 50 per cent of net investment income per financial year, saving the rest. However, the President's powers as a financial guardian are circumscribed by the terms of the Constitution. Three points are worth highlighting.

First, the President's veto only applies to budgets or transactions of the Government (or fifth schedule statutory boards and government companies) drawing down on past reserves (not accumulated during the Government's current term of office), not current reserves. The parliamentary opposition has an important role in checking imprudent spending funded from current as well as past reserves.

Second, potential gridlock between the President and Prime Minister may be resolved by a parliamentary override mechanism. While the President checks the Cabinet, Parliament checks the President. For example, under Article 148D, where the President acts contrary to the Council of Presidential Advisers' (CPA) recommendation in withholding assent to a Supply Bill, a resolution supported by a two-thirds parliamentary majority overrules the President's 'veto' which is severely blunted as a check in a dominant party state.

Third, the President does not act alone in his custodial role but in tandem with the constitutionally established six-member CPA composed of independent people, which exerts

a moderating influence as a de facto Senate. Under Article 148D, if the CPA agrees with the proposed Supply Bill, the presidential check cannot be activated.

The President is not expected to be his own accountant and would be wise to select financially astute advisers to help him negotiate complex financial provisions (for example, long-term real rate of return) and decisions. Even CPA members may have limited expertise in this field, although they will be persons with a track record of balanced judgment. The President may also consult other experts on the investment environment. The fact that the President has pools of expertise to draw upon is relevant in considering whether a presidential candidate possesses sufficient fiscal competence to qualify for a 'certificate of eligibility' by satisfying Article 19 requirements.

The Elected President need not be a financial whiz, but must have sound judgment. Article 19 stipulates that holders of high public office (for example, Accountant-General) or chairmen/chief executive officers of companies with a paid-up capital of \$100 million would satisfy financial literacy and managerial requirements. Beyond this, Article 19(g)(iv) allows the Presidential Elections Committee to find qualified a person who demonstrates he possesses the experience and ability in administering and managing financial affairs from holding 'comparable' public- or private-sector positions in bodies of 'equivalent size or complexity', to enable the effective discharge of presidential functions.

This criterion should be applied purposefully, not pedantically, to ensure financial literacy, not financial wizardry, considering that the Finance Minister need only satisfy the modest qualifications for being a parliamentarian under Article 44. A chief financial officer or CEO of a company with a paid-up capital of \$99 million should presumptively satisfy Article 19(g)(iv).

Could it be argued that the President has the power to perform acts so long as the Constitution contains no 'specific prohibition'? The counter-argument is that the President's powers must be specifically authorised. The general principle under Article 21(1) is that the President acts on the advice of the Cabinet, without exercising personal discretion, except for the exceptions listed in Article 21(2), such as withholding assent to key civil service appointments.

The constitutional text is not exhaustive as presidential powers may be found in two further sources, insofar as the Constitution is a 'living institution'.

First, constitutional conventions or political morality maxims derived from long practice. These are not legally binding but disregard would entail political repercussions. By convention, a form of accepted precedent, the President engages in charitable and community welfare work without government objection.

Second, 'soft constitutional law' in the form of guidelines or rules of engagements written down in a non-binding instrument may shape exercises of presidential powers. These do not derive from past practice, but seek to influence future conduct, stemming from the action and reaction of constitutional actors.

A good example is the 1999 white paper which the Government drew up and which the President accepted, containing non-exhaustive principles for determining and safeguarding national reserves and for shaping institutional interaction. These principles will bind future presidents or governments unless mutually amended or where one party formally notifies the other it no longer wishes to abide by the principles. These principles were a by-product of the Ong Teng Cheong presidency, and the emphasis on a 'harmonious working relationship' was presumably in reaction to President Ong's 'adversarial' press conference in 1999 where his public complaints of obstacles encountered received strong rebuttal by ministers before

Parliament. It also contains guidelines not in the Constitution, such as providing that the President first inform the Government of his intention to gazette his opinion that a liability eats into past reserves before doing so, giving the Government the option to avoid a potential draw-down by transferring an amount equivalent to a potential 'draw-down' from the current to past reserves. It would be of interest to know if presidential aspirants intend to adhere to these principles.

If the President publicly calls for increased government spending or supports a politically controversial cause, this raises issues of legitimacy and cannot itself create a new convention or soft constitutional law, unless the Government acquiesces and does not act to show such conduct is unacceptable.

If the President oversteps his powers, short of the Article 22L removal procedure, the matter will be addressed not by judicial review, but by political negotiation whose resolution depends on the sense and sensibility of the relevant actors.

The writer is professor of law at the National University of Singapore. This article is based on a speech that she delivered at the Institute of Policy Studies' Forum on the Elected Presidency last Friday.