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The advisory jurisdiction of the Constitutional Tribunal under article 100 of the Constitution

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THE ADVISORY JURISDICTION OF THE CONSTITUTIONAL TRIBUNAL UNDER ARTICLE 100 OF THE CONSTITUTION

Singapore has a Constitutional Tribunal as provided for under Article 100 of the Constitution. The Tribunal is vested with advisory jurisdiction which ordinary courts do not have. This article explores the constitutional basis for the Tribunal's existence, jurisdictional issues surrounding the Tribunal, as well as the legal effect of the Tribunal's opinion. Moreover, this article evaluates the continued relevance of the Tribunal. In doing so, a comparative approach is adopted where appropriate.

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I. Introduction

1 Suppose the Government introduces a Bill in Parliament that changes the scope of a discretionary power exercisable by the President. The President holds a press conference and declares that, if the Bill were passed, he intends to withhold his assent pursuant to Article 22H(1) of the Constitution[1] on grounds that the discretionary power is being

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In this article, references have been made to Order 30 of the Rules of Court 2021 ("ROC"), which is a carbon copy of Order 58 of the Rules of Court (Cap 322, R 5, 2014 Rev Ed). Order 30 of the ROC provides for the Tribunal's procedural rules. It appears that Order 30 and its predecessor have been made without authority. The ROC is made pursuant to section 80 of the Supreme Court of Judicature Act 1969 (2020 Rev Ed) ("SCJA"). However, section 80 of the SCJA provides that the rules can only be made with respect to the High Court and Court of Appeal. But the Tribunal is neither. To the author's best knowledge, no written law has expressly authorised for the creation of rules to be followed in the Tribunal. It may be that the Tribunal has the inherent power to create its own rules. But these should not be part of the ROC. Alternatively, Parliament may wish to amend the Constitution or SCJA to authorise the making of rules to be followed in the Tribunal.

[1] Article 22H of the Constitution of the Republic of Singapore (2020 Rev Ed) ("the Constitution") provides:

President may withhold assent to certain Bills
22H.—(1) The President may, acting in his discretion, in writing withhold his assent to any Bill (other than a Bill seeking to amend this Constitution), if the Bill or any

curtailed. On the other hand, the Government contends that, far from curtailing the discretionary power, the Bill seeks only to refine the power.

2 In a world where courts do not render advisory opinions, what probably needs to transpire is that Parliament must first pass the Bill and the President subsequently vetoes it. Parties would then engage in an adversarial court battle to determine the legality of their acts. Luckily, our courts have advisory jurisdiction vested in them in the form of a Constitutional Tribunal ("**Tribunal**") that allows such a dispute to be promptly resolved in a non-adversarial process.

3 Article 100 of the Singapore Constitution vests advisory jurisdiction[2] in a Tribunal of not less than three Supreme Court Judges.[3] However, as of the time of writing, the Tribunal has only been constituted once.[4] That was more than 25 years ago. Although there have been attempts to persuade the Government to advise the President to refer constitutional questions to the Tribunal, none have succeeded.[5] One might wonder then if the Tribunal is irrelevant and obsolete. As will be seen, however, this is not the case—the Tribunal remains relevant today in the context of Singapore's increasingly pluralistic society. The

provision therein provides, directly or indirectly, for the circumvention or curtailment of the discretionary powers conferred upon the President by this Constitution.

(2) The President, acting in accordance with the advice of the Cabinet, may pursuant to Article 100 (and whether before or after his assent has been withheld to a Bill under clause (1)), refer to a tribunal for its opinion the question whether the Bill or any provision therein provides, directly or indirectly, for the circumvention or curtailment of the discretionary powers conferred upon the President by this Constitution; and where such a reference is made to the tribunal, Article 100 shall apply, with the necessary modifications, to that reference.

(3) Where a reference is made to the tribunal and the tribunal is of the opinion that neither the Bill nor any provision therein provides, directly or indirectly, for the circumvention or curtailment of the discretionary powers conferred upon the President by this Constitution, the President shall be deemed to have assented to the Bill on the day immediately after the day of the pronouncement of the opinion of the tribunal in open court.

2 *Black's Law Dictionary* defines an advisory opinion as "[a] nonbinding statement by a court of its interpretation of the law on a matter submitted for that purpose": *Black's Law Dictionary* (Thomson Reuters, 11th Ed, 2019). An advisory opinion is different from a declaration which is "[a] binding adjudication that establishes the rights and other legal relations of the parties without providing for or ordering enforcement".

3 The Tribunal is formally known as the Constitution of the Republic of Singapore Tribunal.

4 See *Constitutional Reference No 1 of 1995* [1995] 1 SLR(R) 803.

5 In 1999, an opposition politician who was charged under the Public Entertainments Act (Cap 257, 1985 Rev Ed) requested the Government to advise the President to refer a question on its constitutionality to the Tribunal. This was rejected on grounds that it would be an improper interference on the role of the Prosecution and the courts.

Tribunal's provision of a non-adversarial platform for constitutional issues to be resolved pre-emptively and authoritatively is to be commended and cherished.

4 Nonetheless, certain questions remain. Specifically, what happens if the President were to refer a question to the Tribunal? Can the Tribunal refuse to provide an answer, especially if the question is a controversial one? If an answer is provided, what is the effect of the Tribunal's opinion on parties and the other courts? Despite the existence of these questions, there is no substantive academic literature on the Tribunal,[6] which remains understudied. It is therefore timely to analyse the role and functions of the Tribunal.

A. Origins of the Tribunal

5 In January 1991, Parliament amended the Constitution to establish the office of an Elected Presidency.[7] As part of the amendment, a number of provisions were added into the Constitution, including Articles 5(2A) and 22H(1). Article 5(2A) provided that a Bill seeking to amend certain provisions in the Constitution, including Article 22H(1), shall not be passed by Parliament unless the President, acting in his discretion, otherwise directs the Speaker in writing. However, Article 5(2A) was never brought into force.[8] Article 22H in turn provided that the President may, at his discretion, withhold his assent to any Bill passed by Parliament (other than a Bill to which Article 5(2A) applied) if the Bill provided for the circumvention or curtailment of his discretionary powers under the Constitution.

6 In 1994, the Government sought to amend Article 22H(1) on grounds that it had been incorrectly drafted because the framers did not intend for the President to withhold assent to constitutional amendment

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6 The only academic literature on the Tribunal pertain to the merits of the *Reference No 1 of 1995* decision: See Thio Li-ann, "Working Out The Presidency: The Rites of Passage" [1995] SJLS 509, and Chan Sek Keong, "Working out the Presidency: No Passage of Rights – In Defence of the Opinion of the Constitutional Tribunal" [1996] SJLS 1.

7 Previously, the President was appointed by Parliament. However, owing to constitutional amendments that vested the President with veto powers over the country's financial reserves and key civil service appointments, Parliament decided to reform the Presidency to become a popularly elected office.

8 Article 5(2A) was eventually repealed by the Constitution of the Republic of Singapore (Amendment) Act 2016.

Bills.[9] Since Article 5(2A) was not in force, a question arose as to whether the President had the power under Article 22H(1) to veto any Bill seeking to amend provisions referred to under Article 5(2A), in particular, a Bill seeking to amend Article 22H itself.[10] Although the Government was of the view that the President had no power of veto, then-President Ong Teng Cheong ("**President Ong**") wanted to refer the question to the courts for a ruling in the interest of testing out the system.[11] However, under the Constitution then, there was no provision for the referral of questions of constitutional interpretation to the courts for an advisory opinion.

7 Accordingly, Article 100 of the Constitution was inserted for this purpose via Act 17 of 1994.[12] The framers of Article 100 alluded to having considered Article 130 of the Federal Constitution of Malaysia when drawing up Article 100.[13] However, it appears to this author that the framers of Article 100 may have taken inspiration from the language of the Irish Constitution, as Article 100 bears striking similarity to certain provisions in the Irish Constitution. The relevant provisions are Articles 26.1.1°, 26.2.1°, 26.2.2° and 34.3.3° of the Irish Constitution[14]

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9 *Constitutional Reference No 1 of 1995* [1995] 1 SLR(R) 803 at [11]–[14].

10 *Constitutional Reference No 1 of 1995* [1995] 1 SLR(R) 803 at [1].

11 *Singapore Parliamentary Debates, Official Report* (25 August 1994) vol 63 at col 454 (Lee Hsien Loong, Deputy Prime Minister).

12 Constitution of the Republic of Singapore (Amendment) Act 1994 (Act 17 of 1994).

13 See *Singapore Parliamentary Debates, Official Report* (25 August 1994) vol 63 at col 454 (Lee Hsien Loong, Deputy Prime Minister).

14 Articles 26 and 34 of the Constitution of Ireland (January 2020 Edition) provide:

> **Article 26**
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> **1.1°** The President may, after consultation with the Council of State, refer any Bill to which this Article applies to the Supreme Court for a decision on the question as to whether such Bill or any specified provision or provisions of such Bill is or are repugnant to this Constitution or to any provision thereof.
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> …
>
> **2.1°** The Supreme Court consisting of not less than five judges shall consider every question referred to it by the President under this Article for a decision, and, having heard arguments by or on behalf of the Attorney General and by counsel assigned by the Court, shall pronounce its decision on such question in open court as soon as may be, and in any case not later than sixty days after the date of such reference.
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> **2.2°** The decision of the majority of the judges of the Supreme Court shall, for the purposes of this Article, be the decision of the Court and shall be pronounced by such one of those judges as the Court shall direct, and no other opinion, whether assenting or dissenting, shall be pronounced nor shall the existence of any such other opinion be disclosed.

which are *in pari materia* to Clauses 1, 2, 3, and 4 of Article 100 of the Singapore Constitution, respectively.[15]

8 In *Reference No 1 of 1995*, the Tribunal answered the question of whether the President had the power under Article 22(H)(1) to veto a Bill seeking to amend Article 22H itself in the negative, *viz*., the President had no veto power under Article 22H(1). This was the only instance in which a question had been referred to and answered by the Tribunal.

B. Scope of the article

9 This article does not intend to examine the merits of *Reference No 1 of 1995*.[16] Instead, it seeks to answer certain more fundamental questions about the Tribunal:

(a) First, it may be contended that the Tribunal's existence itself is contrary to the principle of separation of powers and therefore constitutionally suspect as the rendering of advisory opinion by the Tribunal is not an exercise of judicial power.[17] If judges are meant to only exercise judicial power, it follows that the Tribunal's existence may affect judicial independence (Part II). However, this article argues that the Tribunal's existence is compatible with separation of powers (Part II) and actually promotes constitutionalism (Part VI).

(b) Next, jurisdictional issues will be examined in Part III. Article 100(2) provides that "it shall be the duty of the tribunal to consider and answer the question … in … not more than 60

Article 34

…

3.3° No Court whatever shall have jurisdiction to question the validity of a law, or any provision of a law, the Bill for which shall have been referred to the Supreme Court by the President under Article 26 of this Constitution, or to question the validity of a provision of a law where the corresponding provision in the Bill for such law shall have been referred to the Supreme Court by the President under the said Article 26.

15 The main difference between the relevant provisions of the two Constitutions is that in Ireland, only Bills may be referred by the President.

16 The merits of the *Reference No 1 of 1995* decision have already been thoroughly discussed by the learned authors in *The Rites of Passage* and *No Passage of Rights*: see note 7 above.

17 See [12]–[18] of this article.

days …". However, it seems odd that the Tribunal is constitutionally obligated to entertain a reference question under all circumstances, as it is conceivable that there will be some questions that cannot or should not be answered.[18] Accordingly, there is a need to examine whether the Tribunal possesses some sort of discretion to reject the exercise of its advisory jurisdiction.

(c) Third, in Part IV, we consider the legal effect of the Tribunal's opinion. Article 100(4) states that no court shall have the jurisdiction to question the Tribunal's opinion. Given that the Tribunal consists of three Supreme Court Judges, similar to the Court of Appeal ("**CA**"), it may be possible to interpret Art 100(4) as creating a form of vertical *stare decisis*, the effect of which is to enshrine the Tribunal at the apex of Singapore's judicial hierarchy.[19] However, adopting such a position poses significant difficulties, as the Tribunal can only be convened by the President on the advice of the Government. If there is an existing precedent made by the Tribunal, ordinary litigants cannot persuade the courts to change the law at the CA level. Yet, they have no right of access to the Tribunal.

(d) Finally, given that the Tribunal has only been convened once, some may argue that it no longer has practical utility and should thus be abolished. Part V explores the pros and cons of advisory jurisdiction and Part VI concludes with the recommendation that the Tribunal ought to be retained because it has not outlived its purpose. On the contrary, the Tribunal's relevance ought only to increase moving forward in light of Singapore's increasingly pluralistic society.

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[18] For instance, there could be questions which are framed in too broad and general terms, and thus lacking in specificity. Indeed, in *Re The Special Courts Bill* [1979] 2 SCR 476, the question posed to the Indian Supreme Court was whether "Whether the Bill or any of the provisions thereof, if enacted, would be constitutionally invalid?" The Indian Supreme Court considered to return the reference unanswered initially, but proceeded to answer the question after submissions by the parties helped narrow down the issues which arose for the court's consideration: at [26] of *Re The Special Courts Bill* [1979] 2 SCR 476.

[19] See [51]–[54] of this article.

II. Is the Tribunal's existence unconstitutional?

10 A popular contention against courts undertaking advisory jurisdiction is that it does not fall within the scope of judicial power.[20] This stems from the belief that courts should only exercise judicial power, but the rendering of advisory opinion is an exercise of non-judicial power. Hence, it may be contended that the existence of advisory jurisdiction is constitutionally suspect. However, whether the undertaking of advisory jurisdiction is an exercise of judicial power depends precisely on how judicial power is defined. Accordingly, framing the debate in such a manner merely obscures the real issues at hand. A closer scrutiny of the relevant debates shows that, when an argument is made along the lines of lack of judicial power, what the arguer seeks is ultimately to uphold the normative value of judicial independence. This is what is at stake. The real question is therefore whether judicial independence is compromised when the courts are asked to render advisory opinions to the other branches of government.[21]

11 Nevertheless, it is submitted that judicial independence is *not* compromised and so the Tribunal's existence should not be constitutionally problematic. Before that, let us examine the relevant arguments in relation to judicial power, in order to reveal the real question at hand.

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[20] Article 93 of the Constitution vests judicial power exclusively in "a Supreme Court and in such subordinate courts as may be provided by any written law". In Singapore, Chan Sek Keong CJ in *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 at [27] considered various authorities and concluded that the judicial function is premised on the existence of a controversy. The Chief Justice held that judicial power is exercised when the courts make a finding on the facts, apply the relevant law, and determine the rights and obligations of parties in dispute.

[21] It bears mentioning that, practically, a challenge to the Tribunal's constitutionality is almost bound to fail since, unlike some other jurisdictions, the Tribunal's existence is an expressly provided for under the Constitution. The only plausible way is to argue that Act 17 of 1994, an amendment Act which inserted Article 100, is unconstitutional as contrary to the Constitution's basic structure: see Chan Sek Keong, "Basic Structure and Supremacy of the Singapore Constitution" (2017) 29 SAcLJ 619 at [13] and [48]. Yet, the basic structure doctrine has yet to be accepted in Singapore: *Daniel De Costa Augustin v Attorney-General* [2020] 2 SLR 621 at [11].

A. The Fisher-Zines debate

12 One essential characteristic of judicial power appears to be its power of enforcement,[22] as stated by the majority of the High Court of Australia ("**HCA**") in *Brandy*.[23] Accordingly, Irving has observed that the rendering of advisory opinions is not an exercise of judicial power if they are non-binding, unlike regular judgments.[24]

13 Against this, Zines has pointed to the major role of advisory opinions in the development of Canadian constitutional jurisprudence, which, unlike Australian law,[25] has embraced the courts' advisory jurisdiction. To Zines, it is absurd to describe these advisory opinions as exercises of non-judicial power given that advisory decisions are no different from ordinary decisions—courts routinely cite these decisions and accord weight to them.[26] Further, there has been no evidence to suggest that an opinion has not been followed on grounds that it was merely an advisory opinion.[27]

14 However, Zines' views have been strongly criticised by Fisher. Fisher contends that the courts' undertaking of advisory functions is incompatible with judicial power. This is because the exercise of advisory functions does not settle a dispute as to the existence of a right or obligation which Fisher regarded as an essential attribute of judicial

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22 *Mohammad Faizal bin Sabtu v Public Prosecutor* [2012] 4 SLR 947 at [25], citing *Prentis v Atlantic Coast Line Co* 211 US 210 (1908) at 226. See also the High Court of Australia decision of *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 268.

23 *Brandy v Human Rights and Equal Opportunity Commission* (1995) 183 CLR 245 at 268.

24 Helen Irving, "Advisory Opinions, The Rule of Law, and the Separation of Powers" (2004) 4 Macquarie LJ 105 at 111.

25 The HCA in *Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265 held that the conferment of advisory jurisdiction was unconstitutional as judicial power of the Australian courts is confined to "matters" under the Australian Constitution and reference cases are not "matters".

26 Leslie Zines, "Advisory Opinions and Declaratory Judgments at the Suit of Governments" (2010) 22(3) Bond LR 156 at 163.

27 Leslie Zines, "Advisory Opinions and Declaratory Judgments at the Suit of Governments" (2010) 22(3) Bond LR 156 at 163, citing Peter Hogg, *Constitutional Law of Canada* (Thomson Carswell, 5th Ed, 2008) at p 254.

power.[28] The focus is instead on which "end" the power is directed at,[29] and the fact that an advisory opinion may contain authoritative declarations of the law is not determinative of whether the rendering of an advisory opinion is an exercise of judicial power.[30]

15 It seems that both Zines and Fisher are debating at cross-purposes. Zines' main argument is that advisory opinions are just like regular court decisions, and the undertaking of advisory jurisdiction does not make the courts less independent. Fisher does not deny this. Instead, Fisher was contending that the rendering of advisory opinion is incompatible with judicial power because it does not settle a dispute as to parties' rights or obligations. However, it would seem that Fisher has conflated the two disparate issues of (i) whether a right exists legally, and (ii) whether the declaration of that right had stemmed from a legal dispute. To elaborate: an advisory tribunal may properly declare that a legal right exists, but unlike a regular court of justice, the tribunal's declaration does not stem from that particular legal right being contested. On the definition that the exercise of judicial power involves the resolution of a "case or controversy", since rights are not contested, it follows that the rendering of advisory opinion should not entail the exercise of judicial power. This distinction also casts doubt on Zines' view that advisory opinions are in principle no different than ordinary court decisions.

16 It is submitted that whether the undertaking of advisory jurisdiction is contrary to judicial power ultimately depends on how judicial power is defined. Fisher has relied on the "case or controversy" definition.[31] As such, for Fisher, a reference case must be contrary to judicial power for it does not resolve a case or controversy. Similarly,

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28 Asaf Fisher, "A Comment on Professor Leslie Zines' Paper 'Advisory Opinions and Declaratory Judgments at the Suit of Governments'" (2010) 22(3) Bond LR 187 at 188 citing, *inter alia*, *R v Trade Practices Tribunal*; *Ex parte Tasmanian Breweries Pty Ltd* (1970) 123 CLR 361 at 374.

29 Asaf Fisher, "A Comment on Professor Leslie Zines' Paper 'Advisory Opinions and Declaratory Judgments at the Suit of Governments'" (2010) 22(3) Bond LR 187 at 189.

30 Asaf Fisher, "A Comment on Professor Leslie Zines' Paper 'Advisory Opinions and Declaratory Judgments at the Suit of Governments'" (2010) 22(3) Bond LR 187 at 189.

31 The "case or controversy" is a definition from US constitutional jurisprudence which interpreted the meaning of "case" and "controversy" under Article III, Section 2, Clause 1 of the US Constitution. Under US law, advisory opinions do not result from a case or controversy and hence, they were outside judicial power: *Muskrat v United States* 219 US 346 (1911).

by taking the view that an exercise of judicial power is predicated on its power of enforcement, it is unsurprising that Irving does not think that the rendering of advisory opinions is an exercise of judicial power. In contrast, if one defines judicial power consequentially like Zines, *viz*., advisory opinions hold that same precedential value as regular decisions, it may well be the rendering of advisory opinions is an exercise of judicial power.

17 Accordingly, it seems to be that whether the undertaking of advisory jurisdiction falls or does not fall within the ambit of judicial power depends precisely on how judicial power is defined.

18 Adding to this debate, it would appear that when an argument is made that the undertaking of advisory jurisdiction is not an exercise of judicial power, an underlying concern is that the independence of the courts may be compromised.[32] For instance, the UK Privy Council has raised concerns that the issuance of advisory opinions tend to sap courts of their independence and impartiality.[33] As such, it is submitted that the real concern behind such debates about advisory jurisdiction is whether judicial independence is compromised when the courts are asked to render such advisory opinions.

B. No compromise of judicial independence

19 This article argues that judicial independence is in fact not compromised when courts are asked to undertake advisory jurisdiction such that the Tribunal's existence should not be constitutionally problematic.

20 In 1793, the first US Chief Justice John Jay politely declined President George Washington's request for Supreme Court judges to opine extrajudicially on certain questions of law. Chief Justice Jay was of the view that such an endeavour would blur the lines between the

[32] See *e.g.*, the UK Privy Council's decision of *Boilermakers' Case* (1957) 95 CLR 529 (Privy Council on appeal from Australia) at 541, and Leslie Zines, "Advisory Opinions and Declaratory Judgments at the Suit of Governments" (2010) 22(3) Bond LR 156 at 164.

[33] *Boilermakers' Case* (1957) 95 CLR 529 (Privy Council on appeal from Australia) at 541.

executive and the judiciary.[34] Indeed, separation of powers has always been regarded strictly by the US federal courts.[35]

21 The courts in Canada, however, have no problem in rendering advisory opinions.[36] Provisions conferring advisory jurisdiction have been in the Canadian statute books since 1875.[37] It was recognised in *Reference re References* that Canadian courts have traditionally exercised advisory jurisdiction and judges have been called to advise the other branches in matters of law.[38] The American and Canadian experiences teach that whether judicial independence is compromised depends on how strictly separation of powers is regarded. Zines has similarly argued that the Canadian experience for more than a century suggests that no objective observer would allege that the Canadian courts are less independent than their Australian counterparts.[39]

22 Although the courts in Australia have rejected advisory jurisdiction as unconstitutional, because the jurisdictions of the Australian courts are constitutionally limited to "matters",[40] they have embraced the idea of judges carrying out non-judicial functions so long as doing so would not be incompatible with the judges' judicial function.[41] The HCA in *Grollo*[42] suggested three factors to determine if

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34 See *Letter from Chief Justice John Jay to President George Washington* dated 8 August 1793.

35 Bryan Garner *et al*., *The Law of Judicial Precedent* (Thomson West, 2016) at p 270–271.

36 In *References by the Governor-General in Council* [1910] 43 SCR 536, the Privy Council (on appeal from Canada) held that legislation conferring advisory jurisdiction was constitutional.

37 Gerald Rubin, "The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law" (1960) 6(3) McGill Law Journal 168 at 189.

38 *Reference re References* (1910) 43 SCR 536 at 546 (*per* Fitzpatrick CJ). See also Van Vechten Veeder, "Advisory Opinions of the Judges of England (1900) 13(5) Harvard LR 358–370 at 358.

39 Leslie Zines, "Advisory Opinions and Declaratory Judgments at the Suit of Governments" (2010) 22(3) Bond LR 156 at 164.

40 *Re Judiciary and Navigation Acts* (1921) 29 CLR 257 at 265. See also *e.g.*, in *Ex parte Australian Catholic Bishops Conference* (2002) 188 ALR 1 at 4, Gleeson CJ held that "the Court does not pronounce, in the abstract, upon the validity or meaning of Commonwealth or State statutes. To do so would not be an exercise of judicial power conferred by or under Ch III. Such pronouncements are made in an adversarial context, where there is an issue concerning some right, duty or liability." This is in spite of two constitutional commissions supporting non-binding advisory opinions: see Royal Commission on the Constitution 1929 and the Constitutional Convention of 1973–1985, *cf.* 1986–1988 Constitutional Commission which recommended against the conferment of advisory jurisdiction onto the HCA.

41 See the HCA's decision of *Grollo v Palmer* (1995) 131 ALR 225.

42 *Grollo v Palmer* (1995) 131 ALR 225 ("*Grollo*").

there is incompatibility, *viz*., if performance of the non-judicial function: (a) requires a "permanent and complete a commitment ... by a judge that the further performance of substantial judicial functions by that judge is not practicable"; (b) is "of such a nature that the capacity of the judge to perform his or her judicial functions with integrity is compromised or impaired"; and (c) results in the loss of public confidence in the impartial exercise of judicial power.[43]

23 The test in *Grollo* is appropriate in Singapore's context since, like Australia and Canada, Singapore has also embraced the idea of judges carrying out non-judicial functions. To illustrate, a Supreme Court Judge may be appointed to an advisory board whose function is to advise the President on the validity of preventive detentions orders,[44] and members of the judiciary may be appointed to the Presidential Council of Minority Rights ("**PCMR**") whose function is to, *inter alia*, scrutinise Bills and subsidiary legislation which might be racially or religiously discriminatory.[45]

24 On the assumption that the rendering of advisory opinions by the Tribunal is not a judicial function, the test in *Grollo* can be applied. Turning to the first *Grollo* factor, the fact that our judges are part of the Tribunal does not prevent them from practically carrying out their traditional judicial functions. This is because the provision of advisory opinion as part of the Tribunal is not a permanent and complete commitment as judges only sit on the Tribunal on an *ad hoc* basis. Indeed, the Tribunal has only been convened once to date.

25 The second factor in *Grollo* is more contentious. The motivation behind this factor likely stems from the concern that judges may pre-commit themselves to a particular view relevant in answering a reference question before the case is even heard. In *The Presidential Council,* Dr. Thio Su Mien made the following remarks on the Presidential Council, the predecessor body to the present Presidential Council for Minority Rights:[46]

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43 *Grollo v Palmer* (1995) 131 ALR 225 at 235.

44 See Article 151 of the Constitution.

45 See Articles 68–92 of the Constitution. The specific function of the scrutinise on Bills and subsidiary legislation which might be racially or religiously discriminatory is provided for under Article 77. At the time of writing, the present Chief Justice is the Chairman of the PCMR.

46 Thio Su Mien, "Paper 1" in Thio Su Mien *et al.*, The Presidential Council (1969) 1 Singapore Law Review 1 at p 6.

> "Suppose the Council advises against the enactment of a Bill on the basis that it is unconstitutional but the Government thinks otherwise and goes ahead with its enactment or where the Council makes no report within the prescribed time and the presumption arises that the Council has no adverse comments to make, or suppose the Council advises the Government that a Bill is not inconsistent with the fundamental rights of individuals, what is the position of these Council-Judges when subsequently faced with litigation challenging the constitutionality of that same piece of legislation? Would they not be judges in their own cause?"

26 In the context of the Tribunal, it would mean that a Judge ought not to hear a case involving the same issue in the Tribunal if he had heard it in the High Court or CA, or *vice versa.* However, the legal position is that one may not typically object to a Judge based on his previous decisions[47] because a Judge is entitled to change his view. However, the bigger question is whether he would even consider doing so when he should. It is perhaps in this respect that public confidence would be affected. Accordingly, even though a Judge need not recuse himself from the Tribunal by the mere fact that he had previously decided a similar issue, it would be prudent for him to offer to do so especially if the case involves questions of high constitutional importance. This is not without precedent locally.[48] In effect, justice must be seen to be done.[49]

27 Finally, we turn to the third *Grollo* factor which states that a non-judicial function is incompatible with a judicial function if the former results in the loss of public confidence in the impartial exercise of the latter.[50] However, the Tribunal's existence is unlikely to erode public confidence in the judiciary. Irving has elaborated that the discretionary exercise of jurisdiction is likely more palatable to the

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47 *Locabail (UK) Ltd v Bayfield Properties Ltd* [2000] 2 WLR 870 at 888.

48 In Dr. Tan Cheng Bock's constitutional challenge on the reserved presidential election, the Court of Appeal wrote to ask parties if either had any objections to CJ Menon sitting as part of the five-member coram. This is because the Chief Justice had chaired the 2017 Constitutional Commission which recommended changes to the Presidency: Joanna Seow, "Five judges to hear Tan Cheng Bock's case on presidential election in Court of Appeal" in *The Straits Times* (21 July 2017).

49 *Per* Lord Hewart in *R v Sussex Justices, ex parte McCarthy* [1924] KB 256.

50 *Grollo v Palmer* (1995) 131 ALR 225 at 235.

public.[51] This is probably because abuses of process can be prevented if the exercise of jurisdiction is discretionary, since frivolous references can be dismissed by the advisory tribunal. As will be argued below, the Tribunal ought to retain a residual discretion in the exercise of jurisdiction, despite the apparently mandatory nature of Article 100(2). Thus, there should not be any loss of public confidence in this regard. Further, Irving has proposed that processes must be fair and open; advisory opinions must be pronounced in open court to not undermine public confidence.[52] In Singapore, the Tribunal's opinion is pronounced in open court for everyone to see.[53] However, the plain wording of Article 100(3) suggests that *only* the majority or unanimous opinion may be pronounced in open court, as noted by one commentator.[54] However, it is equivocal as to whether this compromises public confidence because on one hand, the moral authority of a ruling may "depend on the real or apparent solidarity of the tribunal rendering it".[55] On the other hand, a lack of published opinion from the minority in instances where the Tribunal is split might bring about questions of accountability.[56]

28 Recall as well the possibility that Article 100 was inspired by the Irish Constitution.[57] Since the relevant Irish provision expressly provides that "no other opinion, whether assenting or dissenting, shall be pronounced nor shall the existence of any such other opinion be disclosed" (which phrase does not appear in our Constitutional provisions),[58] the fact that such a phrase was *not* included provides

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51 Helen Irving, "Advisory Opinions, The Rule of Law, and the Separation of Powers" (2004) 4 Macquarie LJ 105 at 124.

52 Helen Irving, "Advisory Opinions, The Rule of Law, and the Separation of Powers" (2004) 4 Macquarie LJ 105 at 124.

53 Article 100(3) of the Constitution. See also Order 30 rule 10 of the Rules of Court 2021.

54 See Lau Kwan Ho, "A Study in Separate Judgments" in Goh Yihan *et al*., *Singapore Law – 50 Years in the Making* (Academy Publishing, 2015) at p 260.

55 Lau Kwan Ho, "A Study in Separate Judgments" in Goh Yihan *et al*., *Singapore Law – 50 Years in the Making* (Academy Publishing, 2015) at p 262.

56 Lau Kwan Ho, "A Study in Separate Judgments" in Goh Yihan *et al*., *Singapore Law – 50 Years in the Making* (Academy Publishing, 2015) at p 262.

57 See [7] of this article.

58 Article 26.2.2° of the Irish Constitution provides: "The decision of the majority of the judges of the Supreme Court shall, for the purposes of this Article, be the decision of the Court and shall be pronounced by such one of those judges as the Court shall direct, and no other opinion, whether assenting or dissenting, shall be pronounced nor shall the existence of any such other opinion be disclosed". See also Nora Ni Loinsigh, "Judicial dissent in Ireland: theory, practice and the constraints of the single opinion rule" (2014) 51 Irish Jurist 123 at 134.

further support for the idea that Parliament did not intend for a minority opinion to be precluded from pronouncement.

29 Otherwise, empirical evidence has shown that, unlike the experience of other jurisdictions, Singapore's Constitutional Tribunal has not been tactically used to pursue political agendas.[59] In any event, as noted below, the Tribunal has a discretion to refuse the exercise of jurisdiction where there is an abuse of process.

30 Given the above, this article argues that the Tribunal's existence is unlikely to compromise judicial independence. That being the case, it follows that the contention above as to whether the rendering of an advisory opinion constitutes an exercise of judicial power, is, in the final analysis, inconsequential.

III. Jurisdiction of the Tribunal

31 At the outset, it is necessary to distinguish between the existence and exercise of jurisdiction. The former is more straightforward in that the Tribunal lacks jurisdiction at the outset, while the latter entails situations where jurisdiction exists but that the Tribunal refuses to exercise its jurisdiction.

A. Existence of jurisdiction

32 Let us consider two situations in which the Tribunal may or may not have jurisdiction.

(1) Questions of fact: no jurisdiction

33 An example would be references that contain only questions of fact since constitutional interpretation involves questions of law, and not of fact.[60] Thus, jurisdiction under Article 100 should not exist in relation

[59] Given that the Tribunal has only been convened once to resolve a potential dispute between the President and the Government. See [3] of this article.

[60] *Edwards (Inspector of Taxes) v Bairstow* [1956] AC 14 at 30–31. While there are debates about what exactly constitutes a question of fact or law, or even whether such a distinction should even exist in the first place (see *e.g.*, A. L. Young, "Fact/Law – a Flawed Distinction?" *U.K. Const. L. Blog* (21 May 2013) <https://ukconstitutionallaw.org/2013/05/21/alison-l-young-factlaw-a-flawed-distinction/> (accessed 9 September 2021), these are beyond the scope of this article.

to references involving questions of fact. Article 100 requires the Tribunal to determine the effect of the Constitution on another law. This is the Tribunal's *raison d'être*.[61] Indeed, resolving contested questions of fact would go against the *raison d'être* of the Tribunal, which is to answer contested constitutional questions without determining parties' rights and liabilities in a non-adversarial manner.[62] Whilst the Tribunal undoubtedly must consider the existence of certain states of affairs in interpreting the Constitution, no question of fact arises as parties need not establish any legal right or liability. To conclude, jurisdiction does not even exist where the reference question involves only questions of fact.

(2) Questions on constitutionality of Bills: jurisdiction exists

34 During the Article 100 debate, Professor Walter Woon contended that a plain reading of Article 100(1) does not accommodate a question as to the constitutionality of a Bill because provisions of the Bill are not yet part of the Constitution.[63] However, he did acknowledge that Article 100(4) envisages a Bill to be considered. [64]

35 It is submitted that Article 100(1) is wide enough to accommodate all Bills.[65] First, the plain wording of Article 100(1) states that the President may refer "any question as to the effect of any provision of this Constitution". This is wide enough to accommodate the

Suffice to say, this article takes the view that a distinction exists and constitutional interpretation involves questions of law, and not of fact.

61 *Singapore Parliamentary Debates, Official Report* (25 August 1994) vol 63 at col 428 (Lee Hsien Loong, Deputy Prime Minister).

62 Chan Sek Keong, "Judicial Review—From Angst to Empathy" (2010) 22 SAcLJ 469 at [4].

63 *Singapore Parliamentary Debates, Official Report* (25 August 1994) vol 63 at col 438 (Walter Woon).

64 In response, the Deputy Prime Minister remarked that "[w]e do not intend to refer a Bill under Article 100 to a tribunal of the Supreme Court for a decision": *Singapore Parliamentary Debates, Official Report* (25 August 1994) vol 63 at col 453 (Lee Hsien Loong, Deputy Prime Minister). However, this should be read in context to mean that the Government did not intend to refer a Bill seeking to amend Article 22H as it intended to refer a question on the then existing Article 22H. This must be the case since the dispute was essentially about whether the President could, under the then existing Article 22H(1), veto constitutional amendments to the same.

65 This is also former-Chief Justice Chan Sek Keong ("CJ Chan")'s extra-judicial view in Chan Sek Keong, "Working out the Presidency: No Passage of Rights – In Defence of the Opinion of the Constitutional Tribunal" [1996] SJLS 1 at 13.

effect of any provision of the Constitution in *any* Bill.[66] Second, Article 22H provides that the President, acting on the advice of the Cabinet may, pursuant to Article 100, refer a question as to whether a proposed Bill would have the effect of circumventing or curtailing his or her discretionary powers conferred by the Constitution. Third, as alluded to above, Articles 22H and 100 may have been inspired by the Irish Constitution. Article 26 of the Irish Constitution allows the Irish President to *only* refer questions as to the constitutionality of Bills to the Supreme Court. All the above reinforces the idea that the Tribunal can consider the constitutional validity of Bills apart from Acts.

B. The Tribunal does have the discretion not to exercise its jurisdiction

36 Article 100(2) provides that "[w]here a reference is made to a tribunal under clause (1), it shall be the duty of the tribunal to consider and answer the question so referred …". Given the operative word "shall", it appears that the Tribunal does not have the discretion to refuse to answer a question once a reference is made thereof under Article 100(1). This is reinforced by the constitutionally mandated deadline of 60 days for the Tribunal to consider and answer the question so referred.[67]

37 Despite this, it is contended that the Tribunal ought to have an inherent discretion to decline the exercise of jurisdiction in exceptional circumstances. First, the Tribunal should not be resolving questions which it lacks institutional capacity to answer. This relates to justiciability. Second, the Tribunal, possessing the attributes of a court, should be the master of its own processes to prevent an abuse of process.[68] This concerns questions which are otherwise justiciable but practically unanswerable.

38 The main obstacle to these is the seemingly mandatory nature of the Tribunal's duty to "answer the question". However, one could

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66 This appears to be CJ Chan's argument in Chan Sek Keong, "Working out the Presidency: No Passage of Rights – In Defence of the Opinion of the Constitutional Tribunal" [1996] SJLS 1 at note 19.

67 Article 100(2) of the Constitution.

68 See *Emilia Shipping Inc v State Enterprise for Pulp and Paper Industries* [1991] 1 SLR(R) 411 at [23]; *Roberto Building Material Pte Ltd v Oversea-Chinese Banking Corp Ltd* [2003] 2 SLR(R) 353 at [17]; *Re Nalpon Zero Geraldo Mario* [2013] 3 SLR 258 at [27]–[43].

argue that an unanswerable question is not really a question to begin with. Alternatively, there is room to interpret the verb "answer" to mean something else other than "to provide an answer", *e.g.*, "to provide a response". The point is that one should not adopt a legalistic and rigid interpretation to Article 100(2) because Parliament should not have intended an unworkable or impracticable result.[69] Neither can it be said that Parliament intended for the Tribunal to answer questions that it should not be answering.

39 Further, requiring the Tribunal to answer practically unanswerable questions or those that are non-justiciable would put the Tribunal in a difficult position and compromise its institutional authority. Nevertheless, the Tribunal should strive to answer questions posed as far as practicable and provide good reasons if it is unable to do so.

40 That said, non-justiciable questions are rare. Justiciability concerns whether the courts have jurisdiction to review a matter.[70] In respect of the Tribunal, there are certain questions that are non-justiciable and so the Tribunal should refuse to answer them. However, it is to be noted that such situations are rare. One such matter is the constitutionality of Bills since it may be argued that it is the role of Parliament and not the courts to ensure that Bills are constitutional.[71] However, in determining the constitutionality of a Bill, the Tribunal does not *legislate* but instead *interprets* the Bill. The interpretation of *laws* has always been regarded as falling within the courts' exclusive purview[72] because it has the best institutional ability to do so. There is

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69 *Hong Leong Bank Bhd v Soh Seow Poh* [2009] 4 SLR(R) 525 at [40].

70 *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 at [91]. Questions of justiciability arise when the court is asked to adjudicate issues that are beyond its institutional capabilities, such as those involving polycentric policy considerations, or when doing so would involve the court venturing into matters beyond its proper constitutional remit: Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2012) at [10.223]. See also *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 at [98]. Justiciability depends on the subject matter of the question. Examples of matters which have been held to be non-justiciable include the executive functions of "making treaties, making war, dissolving parliament, mobilising the Armed Forces": *Lee Hsien Loong v Review Publishing Co Ltd* [2007] 2 SLR(R) 453 at [91], [98].

71 *Re The Special Courts Bill* [1979] 2 SCR 476 at [8].

72 *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [154]. In *Re The Special Courts Bill*, preliminary objections were made to the Indian Supreme Court's advisory jurisdiction to determine the constitutionality of Bills on grounds that it would usurp Parliament's legislative function. The ISC responded at [33] that "the constitutionality of the Bill is a matter which falls within the exclusive domain of the courts".

no reason why this should cease to be the case once a Bill (and not an Act) is involved. Accordingly, it cannot be said that the Tribunal usurps Parliament's legislative function when it determines the constitutionality of a Bill.

C. The Tribunal should also refuse to exercise jurisdiction when the reference amounts to an abuse of process

41 This is justified on grounds that even though the Tribunal is technically not a court,[73] it was intended to possess the attributes of a court and a fundamental attribute is the ability to regulate its own proceedings[74] which surely must include a residual discretion to decline jurisdiction exceptionally. Parliament modelled the Tribunal after the CA,[75] and a reference to the Tribunal is "dealt with and regarded as an appeal to the [CA]."[76] Further, despite the use of the words "any question" in Article 100(1), Parliament could not have intended the Tribunal to answer an invalid question as a matter of common sense. Two common instances where an abuse of process may arise are where the question is a (*1*) hypothetical question, and/or (*2*) ambiguous.

(1) Hypothetical questions can be entertained but they must be based on real facts

42 A hypothetical question or case stands in contradistinction to a "live" case. In *Nicky Tan*, the CA held that the courts generally eschew hearing cases that are not "live". There must be an actual controversy between parties in dispute since the courts do not render advice or comment on hypothetical issues.[77] Moreover, parties do not have the incentive to argue a point that makes no difference to the result of the case.[78] However, this position is not absolute. In *Tan Eng Hong*, the CA, in dealing with an issue of *locus standi* in a constitutional challenge, opined that the absence of a real controversy does not inevitably deprive

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73 Given that the Tribunal is a specially constituted constitutional tribunal tasked with the sole purpose of rendering advisory jurisdiction to the President. Moreover, the Tribunal is not called a "court".

74 See *Emilia Shipping Inc v State Enterprise for Pulp and Paper Industries* [1991] 1 SLR(R) 411 at [23].

75 *Singapore Parliamentary Debates, Official Report* (25 August 1994) vol 63 at col 428 (Lee Hsien Loong, Deputy Prime Minister).

76 Order 30 rule 8(1) of the Rules of Court 2021.

77 *Tan Ng Kuang Nicky v Metax Eco Solutions Pte Ltd* [2021] 1 SLR 1135 at [62].

78 *Sun Life Assurance Company of Canada v Jervis* [1944] AC 111 at 113–114.

the court of its jurisdiction as it may exercise its discretion to hear hypothetical cases where public interest is involved.[79] In fact, it can be said that the Tribunal, being an advisory tribunal, must necessarily hear hypothetical questions since non-hypothetical questions, involving contested rights amongst litigants, could and should be resolved in the ordinary courts.

43 However, this is not to say that the Tribunal should entertain questions whose facts are conjured out of thin air. In other words, there must be a dispute based on *real*, as opposed to hypothetical (or invented) facts. This is supported by two provisions. First, Article 100(1) says that the Tribunal may be referred a question as to the effect of the Constitution which the President thinks is "likely to arise". This suggests that the case need not be "live" although it must be based on real facts. If it is not, the President would have no objective basis to think that the question is likely to arise. Second, the procedural requirement under the Rules of Court ("**ROC**") states that facts must be tendered as part of the reference insofar as is necessary to enable the Tribunal to decide the questions referred.[80]

44 Separately, in the earlier discussion of Fisher's conflation of whether (i) a right exists, and (ii) whether that right is being contested in a reference case, this article contended that in a reference case, rights do exist, but they are not being contested.[81] This further supports the proposition that the Tribunal can consider issues that are not "live", but the question must be based on real as opposed to invented facts.

45 Inspiration may also be taken from constitutional courts in civil law jurisdictions which do not require a "live" case to determine the constitutionality of a law under "abstract judicial review". To illustrate, the German Constitutional Court may review the constitutionality of a law upon the application of a federal or state government, or one-third of the members of the German Federal Parliament.[82] However, even in such an abstract judicial review, the facts must be concrete and there must be real conflicts of opinion between or within the various

79 *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [134]–[146].
80 See Order 30 rule 3 of the Rules of Court 2021.
81 See [15] of this article.
82 See Article 93(1)(2) of the Basic Law for the Federal Republic of Germany.

governing institutions.[83] In the same vein, the German courts will not anticipate a question in advance.[84] In sum, under "abstract judicial review", the court determines the constitutionality of a law in an abstract manner (*i.e*., outside the context of a "live" case), but there must have been a genuine dispute based on real facts before the court's abstract review jurisdiction may be invoked. Since the German model has worked for decades, the Tribunal should follow this approach, *viz*., the Tribunal should hear abstract cases, but those cases must be founded on real facts.[85]

(2) Ambiguous questions should not amount to an abuse of process if they can be properly reframed or answered

46 In other cases, the question may be ambiguous. There are two ways to resolve this. First, the Tribunal should reframe the question. Second, the Tribunal could provide answers to multiple scenarios. In relation to question reframing, analogy can be drawn to the CA's inherent discretion to reframe questions of law of public interest referred to it pursuant to section 397 of the Criminal Procedure Code ("**CPC**").[86] Whilst section 397(4) of the CPC now allows the court to reframe questions posed, section 60 of the old SCJA,[87] which is the statutory predecessor of section 397 of the CPC, did not provide for such a power. Despite this, the apex court in *Fernandez* held that:[88]

> "The overriding task of this court in any criminal reference is to clarify questions of law of public interest. … [W]here a question is couched in a manner which would inadvertently mask its true import (which is the situation here), the court retains a

[83] Donald Kommers, *Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 2nd Ed, 1997) at p 50.

[84] Donald Kommers, *Constitutional Jurisprudence of the Federal Republic of Germany* (Duke University Press, 2nd Ed, 1997) at p 50.

[85] The procedure under Article 22H is even clearer. The fact that the Cabinet advises the President to invoke the Tribunal under Article 22H(2) means that the President has withheld, or indicates his intention to withhold a Bill which he believes is circumscribing his discretionary powers. The dispute would then be with Cabinet and/or Parliament as the latter would presumably hold the view that the Bill does not touch and concern the President's discretionary powers. This dispute is certainly based on real, and not invented, facts.

[86] Criminal Procedure Code 2010 (2020 Rev Ed).

[87] Supreme Court of Judicature Act 1969 (2020 Rev Ed).

[88] *Public Prosecutor v Fernandez Joseph Ferdinent* [2007] 4 SLR(R) 1 at [19].

> discretion to pose the question in a manner which will be more appropriate and which will ensure that the substance of the question is rendered clear, save that the refashioned question has to remain within the four corners of [section] 60 of the SCJA."

Since the fundamental task of the Tribunal is to answer important constitutional questions, it follows that this purpose would be frustrated if questions are vaguely framed. Thus, the Tribunal should similarly reframe the question(s) where necessary.

47 Second, where the constitutionality of a law depends on the existence of certain facts, as is often the case, the Tribunal may answer the question hypothetically:

> If X, the law is constitutional. But if Y, the law is unconstitutional.

Should the question remain practically impossible of being answered, the Tribunal should exercise its discretion to refuse to answer.

IV. Legal effect of the Tribunal's opinion

48 There are two main questions here: First, the effect of the Tribunal's opinion on parties before it, and second, the effect of the Tribunal's opinion on other courts.

A. Parties are not bound by the Tribunal's opinion

49 Clearly, the literal words of Article 100(4) suggest that it is concerned with the effect of the Tribunal's decisions on other courts, or perhaps itself, in the future, and *not* with the effect of the Tribunal's opinion on parties of a particular case.[89]

50 This accords with Parliament's intention. The Deputy Prime Minister stated that one of the reasons behind the insertion of Article 100 was because "the President has stated that in the interest of testing out the system, he would like this question to be referred to the Courts for a

[89] This is also the *obiter* view of the CA in *Tan Eng Hong v Attorney-General* [2012] 4 SLR 476 at [103].

ruling, and that he will accept whatever interpretation of Article 22H the Courts rule to be correct".[90] From this, it is possible to imply that like President Ong, Article 100's framers, *viz*., the Government, also thought that they would *not* be bound by the Tribunal's opinion. This must be right since Article 100's header reads "Advisory Opinion", and the *raison d'être* of the Tribunal is to provide an advisory opinion without determining parties' rights and liabilities. It is also settled law in Canada that parties are not bound by the advisory opinions of the Supreme Court of Canada.[91] Finally, it may also be said that the Tribunal is not a court[92] and so its decisions are merely advisory and without the legal force of a judgment. In light of the above, the Tribunal's opinion does not bind the parties before it. The only exception is when a Bill that purportedly curtails the President's power is referred to under the new Article 22H, in which case if the Tribunal answers in the negative, "the President shall be deemed to have assented to the Bill".[93] Conversely, if the Tribunal answers in the affirmative the President may then exercise his discretion to withhold assent to the Bill.[94]

B. Neither are the courts bound by the Tribunal under stare decisis

51 To recapitulate, Article 100(4) states, "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" [emphasis added]. At this juncture, it is necessary to state that there appears to be *two* limbs in Clause 4. The first deals with "the opinion of any Tribunal" ("**the First Limb**"), while the second deals with "the validity of any law, or any provision therein, the Bill for which has been the subject of a reference" ("**the Second Limb**"). Let us begin by considering the First Limb.

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90 *Singapore Parliamentary Debates, Official Report* (25 August 1994) vol 63 at col 431 (Lee Hsien Loong, Deputy Prime Minister).

91 See *Re Statutes of Manitoba relating to Education* [1894] 22 SCR 577 at 678; *Attorney-General of Ontario v Attorney-General of Canada* [1912] AC at 589; *Reference re Secession of Quebec* [1998] 2 SCR 217 at 219.

92 See [41] of this article.

93 Article 22H(3) of the Constitution.

94 Article 22H(1) of the Constitution.

(1) The First Limb of Article 100(4)

52 Consider the following scenario:

> The President refers the constitutional validity of the mandatory death penalty for intentional murder under section 300(*a*) of the Penal Code and the Tribunal answers that it is valid. However, 20 years down the road, a convicted accused challenges section 300(*a*)'s constitutionality in the CA and a different *coram* is not minded to hold that it is unconstitutional—would the CA be bound by the Tribunal's decision 20 years earlier?

The answer to this essentially rests on the effect of the Tribunal's opinion on other courts, *viz*., whether all the other courts, including the CA, are bound by the Tribunal's opinion. Those who say yes would primarily point to the First Limb, but it is submitted that the First Limb does not place the Tribunal at the apex of Singapore's judicial hierarchy. Doing so would also lead to practical difficulties and would be contrary to empirical treatment of the Tribunal's decision, *viz.*, *Reference No 1 of 1995.* Instead, the true nature of the First Limb is that of an ouster clause which seeks to oust the supervisory jurisdiction of the courts over the Tribunal's decisions.[95]

(a) The First Limb does not place the Tribunal at the apex of Singapore's legal hierarchy

53 This article first explains why the First Limb does not place the Tribunal at the apex of Singapore's judicial hierarchy.

54 Those who argue that the First Limb enshrines the Tribunal at the apex of Singapore's judicial hierarchy would point to its plain language and the fact that the Tribunal is just like a court, consisting of a three-Judge bench that is similar to that of the CA. In Australia, Zines has forcefully argued that there is no reason why opinions delivered on

[95] Beatson *et al.*, *Beatson*, *Matthews and Elliott's Administrative Law: Text and Materials* (Oxford University Press, 4th Ed, 2011) at [15.6.1].

a reference should be treated differently as other judgments.[96] However, the plain language, "to question the opinion of any tribunal" is ambiguous since, apart from the First Limb being regarded as establishing vertical *stare decisis*, it may also be interpreted to be an ouster clause.

55 It is submitted that the First Limb does *not* enshrine the Tribunal at the apex of Singapore's judicial hierarchy. Fundamentally, the Tribunal does not undertake adjudicative functions but is instead an extra-judicial body[97] that is tasked with the *sui generis* function of rendering advisory opinions to resolve "actual and potential disputes … between constitutional organs".[98] If the Tribunal's opinions are characterised as advisory and not meant to bind parties,[99] it is hard to imagine why the Tribunal's opinions would therefore bind any other courts. Further, *stare decisis* is typically a doctrine which courts impose on themselves, rather than a constitutional or statutory requirement,[100] and so it is unlikely that the effect of the First Limb is to establish vertical *stare decisis.*

56 Treatment of the holding in *Reference No 1 of 1995* also shows that the Tribunal's opinion has not been regarded as binding precedent. In *Reference No 1 of 1995*, the Tribunal held that the court is entitled to look at all relevant materials to ascertain the meaning of any provision of a written law regardless of whether that provision was ambiguous.[101] Moreover, the court could also modify or reject the literal meaning of any provision to give effect to Parliament's intention.[102] However, later courts did not consider themselves bound by this. To the contrary, the CA in *Tan Cheng Bock* held that the court may only consult extraneous materials if the provision was ambiguous or its application leads to a manifestly absurd or unreasonable result.[103] Further, the High Court in

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96 Leslie Zines, "Advisory Opinions and Declaratory Judgments at the Suit of Governments" (2010) 22(3) Bond LR 156 at 163, citing Peter Hogg, *Constitutional Law of Canada* (Thomson Carswell, 5th Ed, 2008) at p 254.

97 See [41] of this article.

98 Chan Sek Keong, "Judicial Review—From Angst to Empathy" (2010) 22 SAcLJ 469 at [4]; *Singapore Parliamentary Debates, Official Report* (25 August 1994) vol 63 at col 428 (Lee Hsien Loong, Deputy Prime Minister).

99 See [49]–[50] of this article.

100 Neil Duxbury, *The Nature and Authority of Precedent* (Cambridge University Press, 2008) at p 116.

101 *Constitutional Reference No 1 of 1995* [1995] 1 SLR(R) 803 at [5].

102 *Constitutional Reference No 1 of 1995* [1995] 1 SLR(R) 803 at [5].

103 *Tan Cheng Bock v Attorney-General* [2017] 2 SLR 850 at [54].

Nation Fittings opined that "the court's interpretations should be consistent with, and should not either add to or take away from, or stretch unreasonably, the literal language of the statutory provision concerned."[104]

57 Accordingly, whilst the Tribunal's opinion would undoubtedly be persuasive, they bind no court. To hold otherwise would not only be theoretically incorrect, but also pose a practical conundrum as alluded to earlier, *viz*., if the Tribunal's opinion does bind all other courts, precedents by the Tribunal would be "immortalised" as ordinary litigants cannot persuade the courts to change the law at the CA level. Yet, they have no right of access to the Tribunal, which leads to an unpalatable result.

(b) The true nature of the First Limb is that of an ouster clause

58 Although the First Limb appears ambiguous,[105] its true purpose is to prevent collateral attacks on the Tribunal's decisions, making it an ouster clause which ousts the supervisory jurisdiction of the superior courts over the Tribunal's decisions and processes. At this juncture, it is necessary to state that, while the First Limb was intended as, and is, an ouster clause, whether this ouster clause is *effective* is a *separate* question which will, of course, be discussed shortly. *Why* the First Limb is an ouster clause are as follows.

59 A disgruntled party following an opinion by the Tribunal may attempt to quash the decision by way of judicial review. He may argue that the Tribunal's hearings were conducted in breach of the principles of natural justice, or that the Tribunal's invocation of jurisdiction was *ultra vires*. This would amount to a collateral attack on the Tribunal's decision.

60 However, in view of the Tribunal's status as a constitutional creation whose function is to resolve actual and potential disputes

[104] *Nation Fittings (M) Sdn Bhd v Oystertec plc* [2006] 1 SLR(R) 712 at [27]. This case was cited with approval by the CA in *Public Prosecutor v Lam Leng Hung* [2018] 1 SLR 659 at [6] which expressly cautioned that there are limits to purposive interpretation.

[105] *Singapore Parliamentary Debates, Official Report* (25 August 1994) vol 63 at col 438 (Walter Woon).

between constitutional organs [106] in an authoritative and speedy manner,[107] it would be undesirable for proceedings to be prolonged by potential collateral attacks upon the decision of the Tribunal. This is especially so given that the Tribunal's decision has constitutional significance. The finality of the Tribunal's decision is reinforced by Article 22H.[108] Under Article 22H, the President, acting on the advice of the Cabinet, may, pursuant to Article 100, refer a question as to whether a proposed ordinary Bill would have the effect of circumventing or curtailing his or her discretionary powers conferred by the Constitution. Article 22H(3) provides that where the Tribunal answers the question in the negative, "the President shall be deemed to have assented to the Bill on the day immediately after the day of the pronouncement of the opinion of the tribunal in open court."

61 Furthermore, it is anomalous that a single Judge sitting in the High Court could have the power to quash the decision of at least three Supreme Court Judges (likely the Chief Justice and two Justices of the CA) sitting on the Tribunal. Indeed, one must be alive to the fact that the Tribunal was expressly modelled after the CA by Parliament,[109] where even its procedures follow the CA's.[110] The above reasons are probably the reasons why advisory opinions rendered by the Supreme Courts of India and Canada cannot be challenged as well. In those jurisdictions, no ouster clause is necessary because reference questions are heard by their respective apex courts and no further appeal or review lies thereon.[111]

62 Next, this article turns to the question of whether the First Limb would be effective as an ouster clause. One may argue that a purported "opinion" tainted by a breach of natural justice, or an error of law *etc*., is not an "opinion" and thus not covered by the ouster effect of the First

106 See [55] of this article.

107 Since "it shall be the duty of the tribunal to consider and answer the question … not more than 60 days": Article 100(2) of the Constitution.

108 It is also interesting to note that under the old Article 22H, the Prime Minister may refer a question to the High Court on whether a Bill purports to curtail the discretionary powers of the President. More interestingly, an appeal was allowed. The fact that the High Court was replaced by the Tribunal under the new Article 22H suggests that Parliament intentionally wanted such questions to be resolved in the Tribunal, a non-fault-finding organ that renders advisory opinions in a speedy and certain manner.

109 See [41] of this article.

110 See Order 30 rule 9 of the Rules of Court 2021.

111 See Article 140 of the Federal Malaysian Constitution, and section 56 of the Canadian Supreme Court Act (RSC, 1985, c. S-26). Whilst Ireland has a similar provision to Article 100, Irish authorities have yet to determine their nature and/or effectiveness.

Limb. Such an argument was made in *Anisminic*.[112] Locally, the courts have expressed disdain towards ouster clauses as "[i]n a constitutional system of governance such as Singapore's, the courts are ordinarily vested with the power to adjudicate upon all disputes"[113] and so "there will (or should) be few, if any, legal disputes between the State and the people from which the judicial power is excluded".[114]

63 However, it is unclear if the preceding concerns will apply with equal force to the First Limb. First, the First Limb is not an ordinary ouster clause, but one specifically provided for in the Constitution. Second, the Tribunal is not adjudicating a dispute since, as stated above, the Tribunal is mainly concerned with hypothetical issues and its decisions are merely advisory and non-binding. On a practical note, the fact that the Tribunal's decision does not bind anyone or any court[115] also militates against the need for an appeal or review. Therefore, it is submitted that is it unlikely that the First Limb, an ouster clause, would be struck down for being unconstitutional.

(2) The Second Limb of Article 100(4)

(a) Its purpose is to emphasise the *res judicata* effect of the Tribunal's decision

64 What is the purpose of the Second Limb of Article 100(4)? It appears puzzling that Acts whose Bills have been subject to a reference are singled out in the Second Limb. Why was Parliament not concerned about Acts whose Bills had *not* been subject to a reference?

65 The Second Limb is related to Article 22H. As explained above, Article 22H states that the President, acting on the advice of the Cabinet, may pursuant to Article 100, refer a question as to whether a proposed ordinary Bill would have the effect of circumventing or curtailing his or her discretionary powers conferred by the Constitution. Article 22H(3) then provides that where the Tribunal answers the question in the negative, "the President shall be deemed to have assented to the Bill on

[112] *Anisminic Ltd. v Foreign Compensation Commission* [1969] 2 AC 147.
[113] *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [46].
[114] *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] 2 SLR 216 at [73].
[115] See [49]–[57] of this article.

the day immediately after the day of the pronouncement of the opinion of the tribunal in open court."

66 It appears, therefore, that Bills are singled out in the Second Limb because Parliament might have wanted to be doubly sure that the decision of the Tribunal with respect to an Article 22H reference is not subject to collateral attacks, *viz*., it is not open for anyone to say that while a *Bill* is not constitutionally suspect, the *Act* is, because an Article 22H reference has constitutional significance. In other words, if the Tribunal answers that the Bill does not circumvent or curtail the President's discretionary powers, the President is immediately deemed to have assented to it, pursuant to Article 22H(3). Accordingly, the Second Limb is meant to emphasise the *res judicata* effect of the Tribunal's decision with respect to the constitutional validity of Acts the Bill for which had been subject to a reference.

67 What about Bills not covered by Article 22H? These would refer to Bills that do not touch and concern the President's discretionary powers, but are referred solely under Article 100(1) since the Second Limb applies to all Bills. The Second Limb does not differentiate between Bills under Article 22H and all other Bills. While references of such Bills presumably do not require the extra protection against collateral challenges, unlike Article 22H Bills, there is no clear answer why such Bills are also brought within the Second Limb.

68 Recall that Article 100 may have been inspired by the Irish Constitution. In particular, the Second Limb appears in *pari materia* with Article 34.3.3° of the Irish Constitution.[116] However, Ireland's advisory jurisdiction framework is such that *only* Bills, and *all* Bills, can be referred. Thus, there is no defect with Article 34.3.3° of the Irish Constitution. However, when this article was transplanted wholesale here, it becomes anomalous because, unlike Ireland's advisory jurisdiction framework, the Tribunal here can be asked questions on *not just Bills*, but also Acts. Therefore, the anomalous situation might have been a result of legislative oversight.

[116] This article states: "No Court whatever shall have jurisdiction to question the validity of a law, or any provision of a law, the Bill for which shall have been referred to the Supreme Court by the President under Article 26 of this Constitution."

(b) The precise scope and ambit of the Second Limb remains unclear

69 Now that we have an understanding (albeit not a perfect one) of the purpose of the Second Limb, what exactly is its effect? As the Second Limb is broadly worded, there are two possible interpretations. First, it may be read to mean that once the Tribunal has ruled that Bill X is constitutionally valid, no court can subsequently hold that Act X is invalid, not even on another ground which was not canvassed before the Tribunal. Indeed, the Irish Supreme Court in *The Housing Bill* appeared to believe that this is the case.[117] Second, and not mutually exclusive to the first, the Second Limb may also be interpreted to exclude the ordinary courts' jurisdiction once Bill Y is subject to a reference, regardless of whether the Tribunal had specifically considered a particular provision thereof. That is to say, the Tribunal may have only opined that Clause 1 of Bill Y is constitutional, but a subsequent court shall not have jurisdiction to question the validity of the entire Act Y, or any provision therein.

70 Interpreting the Second Limb in the manner as in the preceding paragraph ("**the Broad Interpretation**") would certainly produce an absurd and unworkable result. The law has to evolve and develop over time and cannot be expected to be frozen in time. The better position is that Second Limb be read narrowly to apply only in cases where the matter is *res judicata* ("**the Narrow Interpretation**"). This would be the case when the arguments are essentially the same, opposing parties are similar or identical, and the impugned provision is the same. Further, the facts and circumstances giving rise to the Tribunal's decision must not have changed. This is especially relevant in constitutional cases where social facts and attitudes may change over time. Thus, the length of time between the Tribunal's decision and the subsequent challenge would be a relevant factor.

71 Unfortunately, the plain wording of the Second Limb would only support the Broad Interpretation and *not* the Narrow Interpretation. It may be that the draftsmen had overlooked the differences in Ireland's

[117] The Irish Supreme Court held, "if no repugnancy is found, the [opinion as to the Bill's constitutionality] may never be questioned again in any court": *The Housing (Private Rented Dwellings) Bill, 1981* [1983] 1 IR 181 at 186. See also *Dáil Éireann debate,* (19 May 1982) Vol. 344 No. 8 (Gerard Brady).

advisory jurisdiction framework when replicating Ireland's Article 34.3.3°. It is thus proposed that the Second Limb be amended accordingly to reflect the Narrow Interpretation. Parliament may also wish to amend Article 100(1) to state explicitly whether a non-Article 22H Bill could be subject to a reference.

V. Moving forward

72 As of this writing, the Tribunal had only been invoked once, more than 25 years ago, despite Parliament's intention to refer questions to the Tribunal "from time to time … especially in relation to new and complex provisions of the Constitution".[118] The Tribunal's continued existence is therefore questionable. The debate as to whether the courts should be vested with advisory jurisdiction has been a long and lively one in some jurisdictions and thus it is apt to consider them as we explore the Tribunal's future.

A. Far from compromising separation of powers, the Tribunal promotes it

73 There is of course the concern with separation of powers, but as mentioned in Part II above, the Tribunal's existence is not contrary to the separation of powers. Instead, the Tribunal may be seen as promoting separation of powers as the Executive may invoke its advisory jurisdiction before undertaking an action that may potentially run afoul of separation of powers.[119]

[118] *Singapore Parliamentary Debates, Official Report* (25 August 1994) vol 63 at col 428 (Lee Hsien Loong, Deputy Prime Minister). See also Kevin YL Tan, *The Singapore Legal System* (Singapore University Press, 2nd Ed, 1999) at p 270 where the learned author opined that even though the main purpose of setting up the Tribunal was to resolve constitutional issues likely to arise from the introduction of new constitutional provisions in relation to the elected President, "the wording of the article appears wide enough for the President to refer any question to [the Tribunal]".

[119] Lucas Moench, "State Court Advisory Opinions: Implications For Legislative Power And Prerogatives" (2017) 97(6) Boston University LR 2243 at 2273.

B. The likelihood of the Tribunal's advisory jurisdiction being abused is low

74 Opponents against the courts' advisory jurisdiction argue that it may be abused by the other branches of government.[120] Rubin has this to say:[121]

> "[T]here is often no clear-cut line between 'constitutional' cases and 'policy' cases. 'Constitutional' cases often involve strong elements of "policy" and vice versa. There is thus a danger that the federal executive, where a case involves both the constitutional issue and highly controversial questions of policy will shirk its disallowance responsibility and pass political 'hot potatoes' to the Supreme Court under the guise of following the rule that cases involving the constitutionality of a statute should not be decided by the executive but by the courts."

75 It is unlikely that the Tribunal can, or will be, abused by the Government in the above manner. First, as contended above,[122] the Tribunal retains a residual discretion to decline the exercise of jurisdiction if the invocation of the Tribunal's jurisdiction is adjudged to be an abuse of process. Second, experience has shown that the Government is mindful that the Tribunal may be abused to undermine the ordinary court process. As an example, in 1999, an accused who was charged under the Public Entertainments Act requested the Government to advise the President to refer a question on its constitutionality to the Tribunal, but this was declined on the basis that it would "constitute an

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120 Lucas Moench, "State Court Advisory Opinions: Implications For Legislative Power And Prerogatives" (2017) 97(6) Boston University LR 2243 at 2299; Mark Mina Mikhaiel, "The Dangers of the Reference Question: SCC v. SCOTUS" (2016) 40(1) Can-USLJ 71 at 78–79.

121 Gerald Rubin, "The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law" (1960) 6(3) McGill Law Journal 168 at 172. Mikhaiel has contended that the judiciary's independence may be compromised if politicians tactically refer reference questions to the courts in order to realise certain political goals where there is a lack of political capital: see Mikhaiel at 82. For example, Canadian commentators have argued that *Reference re Secession of Quebec* was a political play to influence public opinion on the constitutionality of Quebec's proposed secession from Canada: Mark Mina Mikhaiel, "The Dangers of the Reference Question: SCC v. SCOTUS" (2016) 40(1) Can-USLJ 71 at 79.

122 See [36]–[39] of this article.

improper interference with the judicial power of the courts and the constitutional functions of the Public Prosecutor".[123]

76 Further, as Singapore jurisprudence has shown, the courts are slow to decide matters of public policy that are beyond its remit[124] and this provides a robust defence against potential abuse because the Tribunal would likely decline the exercise of jurisdiction if it were asked to answer such questions. In *Lim Meng Suang*, a case concerning the constitutional validity of section 377A of the Penal Code which criminalises acts of gross indecency between males, the CA took pains to emphasise that extra-legal arguments are irrelevant insofar as the court is concerned because those are to be proffered in the political arena.[125] Hence, should the Tribunal's jurisdiction be abused by the posing of reference questions which touch and concern public policy, current jurisprudence suggests that Tribunal would decline the exercise of jurisdiction on grounds of non-justiciability.

77 Given the above, the Tribunal's advisory jurisdiction should not be abolished over such concerns.

C. Advantages in costs and efficiency of advisory jurisdiction do not really apply in Singapore's context

78 Proponents of advisory jurisdiction in the other jurisdictions have all pointed to the speed at which the constitutionality of a statute could be authoritatively determined under the courts' advisory jurisdiction without expense to private litigants whose cases may take

123 "Constitutional tribunal plea rejected" in *The Straits Times* (30 January 1999).

124 See *UKM v Attorney-General* [2019] 3 SLR 874; Chief Justice Sundaresh Menon, "Taming the Unruly Horse: The Treatment of Public Policy Arguments in the Courts" (Address at the High Court of Sabah and Sarawak in Kota Kinabalu, Malaysia, 19 Feb 2019).

125 *Lim Meng Suang v Attorney-General* [2015] 1 SLR 26 at [6]–[8]. Similarly, in *Tan Seet Eng,* it was recognised that the courts are "not the best-equipped to scrutinise decisions which are laden with issues of policy or security or which call for polycentric political considerations": see *Tan Seet Eng v Attorney-General* [2016] 1 SLR 779 at [93].

many years.[126] As Moench has noted, the benefits equally apply in determining the constitutionality of a Bill:[127]

> "This efficiency is supposedly achieved by facilitating greater interbranch collaboration to determine the constitutionality of a disputed statute *ex ante*, rather than wasting resources on its enactment, only to have it invalidated in court *ex post*."

However, it appears that the above benefits do not apply with equal force in Singapore. Although Article 100(2) compels the Tribunal to provide an answer within a certain period of time, the ordinary court process in Singapore is already very efficient.[128] To illustrate, at least 90% of trials in the High Court occur within eight weeks from the date of setting down, while originating summons are heard within six weeks.[129]

79 In relation to Bills, while it may be efficient to determine a Bill's constitutionality through the Tribunal, there have hardly been any disputes on a Bill's constitutionality in Singapore, rendering the efficiency argument to retain the Tribunal inapplicable. All government Bills are drafted by professional legislative draftsmen from the Attorney-General's Chambers.[130] Presumably, the drafters would try to ensure that the Bills conform to the Constitution.[131] Indeed, there has only been one

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126 See Oliver Field, "The Advisory Opinion-An Analysis" (1949) 24(2) Indiana LJ 203 at 207; Helen Irving, "Advisory Opinions, The Rule of Law, and the Separation of Powers" (2004) 4 Macquarie LJ 105 at 116; Gareth Evans in John McMillan *et al.*, *Australia's Constitution: Time for a Change?* (Law Foundation of New South Wales and George Allen & Unwin Australia, 1983) at p 283; Gerald Rubin, "The Nature, Use and Effect of Reference Cases in Canadian Constitutional Law" (1960) 6(3) McGill Law Journal 168 at 185.

127 Lucas Moench, "State Court Advisory Opinions: Implications For Legislative Power And Prerogatives" (2017) 97(6) Boston University LR 2243 at 2248. See also Hogan *et al.*, "An anthology of declarations of unconstitutionality" (2015) 54 Irish Jurist 1 at [18]–[19] where it was suggested that it is better to hold a Bill is unconstitutional at the outset, rather than striking it down years after it has become an Act as doing the latter will "have potentially drastic consequences which might attend a finding of constitutionality in an ordinary constitutional action".

128 Kevin YL Tan, "As efficient as the best businesses: Singapore's judicial system" in J.R Yeh *et al.*, *Asian Courts in Context* (Cambridge University Press, 2015) at p 237.

129 Singapore Courts 2020 Annual Report (Judiciary, 2021) at p 61.

130 Gary Chan Kok Yew *et al.*, *The Legal System of Singapore Institutions, Principles and Practices* (LexisNexis, 2015) at p 92.

131 The Attorney-General's Chambers' Chief Legislative Counsel has stated that Bills "must be structured and organised, and clearly expressed" so as to ensure that "new legal provisions can stand up against the scrutiny of an increasingly mature and

instance where a law was struck down as unconstitutional.[132] Even then, the decision was overturned on appeal.[133] Thus, a robust layer of checks already exists even before a Bill is presented to Parliament for scrutiny and debate. Moreover, as mentioned, the PCMR ensures that Bills are not racially or religiously discriminatory (and contrary to Article 13 of the Constitution) before they are presented for Presidential assent.[134] Finally, with respect to Bills which purport to curtail or restrict the President's discretionary powers, how often are such Bills tabled in Parliament? Even then, the Tribunal would only be invoked if the President wishes to withhold his or her assent.[135] This would be even rarer.

80 Accordingly, the efficiency argument for the courts' advisory jurisdiction, while valid, is hardly applicable in Singapore's context.

D. Interested parties are unlikely to be prejudiced by the Tribunal's consideration of a matter

81 Those hostile to advisory jurisdictions argue that interested litigants would be deprived of the right to appear in a case.[136] Moreover, the courts may not be appraised of all the relevant arguments as oftentimes, the best arguments come from litigants whose rights are personally affected for they have the most incentive to argue the case. However, if one confines the jurisdiction of the Tribunal to resolving disputes between constitutional organs that cannot be traditionally dealt with by the courts,[137] cases where interested private litigants may be prejudiced are few and far between. In any event, under the ROC, the Tribunal may grant any interested person the right to be heard.[138] The

outspoken public": *Ensuring Singapore's law remains clear, simple and practical* (Attorney-General's Chambers, 2018) <https://www.agc.gov.sg/docs/default-source/default-document-library/4)-legislation-division-meticulously-drafts-organised-and-clear-bills.pdf> (accessed 30 October 2021).

132 Thio Li-ann, *A Treatise on Singapore Constitutional Law* (Academy Publishing, 2012) at [04.071]. Section 37 of the Prevention of Corruption Act (Cap 241, 1993 Rev Ed) which provided that Singapore citizens are liable for corruption offences committed outside Singapore was declared to be unconstitutional in *Taw Cheng Kong v Public Prosecutor* [1998] 1 SLR(R) 78 (HC).

133 See *Public Prosecutor v Taw Cheng Kong* [1998] 2 SLR(R) 489 (CA).

134 See [23] of this article.

135 Article 22H(1) of the Constitution.

136 Helen Irving, "Advisory Opinions, The Rule of Law, and the Separation of Powers" (2004) 4 Macquarie LJ 105 at 115.

137 See [55] of this article.

138 Order 30 rule 5 of the Rules of Court 2021.

ROC also provides that the Tribunal may request any counsel to argue the case for a person whose interest is affected.[139] Finally, the Government's decision to advise the President to refer (and not to refer) a question to the Tribunal should be subject to judicial review since all power has legal limits.[140] Accordingly, it is conceivable that an individual could obtain a court order to compel the Government to refer a question to the Tribunal although it is unclear whether such an exceptional situation will ever arise.

VI. Conclusion: The Tribunal should be retained and utilised in appropriate situations

82 It was stated at the beginning of this article that the Tribunal was inaugurated as a response to the ambiguities of the old Articles 5(2A) and 22H(1).[141] The Government was of the view that the President had no power of veto under Article 22H(1) to veto any Bill seeking to amend provisions referred to under Article 5(2A), specifically Article 22H itself. However, President Ong wanted to refer the question to the courts for an advisory ruling, and the Government agreed, and Parliament created the Tribunal for this purpose. What if the Tribunal was not created? What if the Government insisted that it was correct and proceeded to amend Article 22H, and President Ong had disagreed and vetoed the amendment? For one, a constitutional crisis would probably have arisen. Moreover, it is likely that the Government would have filed a judicial review challenge against President Ong's veto in the courts. Such an adversarial and antagonistic process is hardly conducive for Singapore, a small nation where political stability is prized.

83 Recall that the *raison d'être* of the Tribunal's existence is to resolve actual or potential disputes between or within constitutional organs in a non-adversarial setting.[142] This article commends the non-adversarial nature of the Tribunal which would undoubtedly facilitate the speedy resolution of disputes between constitutional organs by reducing the friction and tension between them.[143] Previously, it was mentioned that the entire reference process is just like a CA hearing

[139] Order 30 rule 7 of the Rules of Court 2021.
[140] See *Chng Suan Tze v Minister for Home Affairs* [1988] 2 SLR(R) 525 at [86].
[141] See [5]–[8] of this article.
[142] See [55] of this article.
[143] Helen Irving, "Advisory Opinions, The Rule of Law, and the Separation of Powers" (2004) 4 Macquarie LJ 105 at 116.

given that the ROC provides that a reference is to be dealt with and regarded as an appeal to the CA.[144] Indeed, *Reference No 1 of 1995* itself was heard in the CA courtroom. However, these are merely procedural rules, and are not mandated by Article 100. It would also appear that, by inaugurating the Tribunal in the form of Article 100, instead of merely vesting advisory jurisdiction in the CA, Parliament envisaged that the Tribunal be institutionally different from the courts. This article thus suggests that, in order to further advance the non-adversarial nature of the Tribunal, the Tribunal could adopt a more inquisitorial approach. For one, there is no need to regard the President "as the appellant and all other parties as respondents".[145] Inspiration could be drawn from the way in which Constitutional Commissions and Parliamentary Select Committees are conducted. Ultimately, procedural rules are not cast in stone and should be flexible given that the Tribunal is not a traditional court of law.

84 Further, whilst existing institutions such as the office of the Attorney-General are well equipped to advise the Government on the law, the Tribunal, comprising independent Judges, would be seen as being more authoritative[146] which would in turn promote public confidence in the rule of law. The Tribunal also acts as a forum of last resort to authoritatively pronounce on the constitutional validity of the law, especially for exceptional questions of constitutional significance that may otherwise never be adjudicated in court.[147] This provides certainty to the law and allows the law to be open and adequately publicised.

85 Ultimately, the fact that the Tribunal has not been convened to hear questions on constitutional interpretation can be attributed to Singapore's political context. First, as mentioned, there is already a robust process to ensuring the constitutionality of an Act of Parliament.[148] Second, the political branches of government are not in

144 Order 30 rule 8(1) of the Rules of Court 2021.

145 See Order 30 rule 8(3) of the Rules of Court 2021.

146 This is because in his role as the Government's legal advisor under Article 35(7) of the Constitution, the Attorney-General must "defer to the Cabinet when it comes to issues pertaining to civil litigation, international law and the drafting of legislation": Walter Woon, "The public prosecutor, politics and the rule of law" in *The Straits Times* (29 September 2017).

147 Lucas Moench, "State Court Advisory Opinions: Implications For Legislative Power And Prerogatives" (2017) 97(6) Boston University LR 2243 at 2274. See also "Constitutional tribunal plea rejected" in *The Straits Times* (30 January 1999).

148 See [79] of this article.

the business of making unconstitutional laws[149] and hence legislation should not be treated as inherently suspect or unconstitutional.[150] Third, politics in Singapore is seen as a collaborative as opposed to confrontational process.[151] In other words, the legislative and executive branches and other constitutional organs like the Presidency do not, as a default attitude, view each other with suspicion. *Reference No 1 of 1995* was not an instance in which the Tribunal was asked to resolve an actual dispute between President Ong and the Government.[152] It was merely a potential one and the Tribunal was invoked principally because there were issues in relation to the drafting of Article 22H(1) of the Constitution,[153] and that the President had intended to test out the system to which the Government obliged.[154] Fourth, and finally, the Government respects the rule of law and will not abuse the Tribunal's advisory jurisdiction to disrupt ordinary court processes.[155]

86 Given the above, it is plain to see why the Tribunal has only been invoked once, but this should not mean that it is now irrelevant because the present political climate is not immutable. Indeed, there are signs that the political landscape is changing,[156] and more partisan politics may soon feature in Singapore's politics.[157] That is not to say that such developments are inherently negative, but rather, such potential developments highlight the Tribunal's relevance in the future. Moench has observed that advisory opinions may diffuse partisan tension in a

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149 See White Paper on Shared Values (Cmd 1 of 1991) at [41] where it was stated that the Confucian ideal of governance by honourable men is followed in Singapore. Under this concept, Singapore's political and public leaders "have a duty to do right for the people, and who have the trust and respect of the population" and so their actions should not be presumptively treated with suspicion.

150 *Cf*. *Saravanan Chandaram v Public Prosecutor* [2020] 2 SLR 95 at [154].

151 This stems from the fact that both the executive and legislative branches of government have been dominated by a single party since Singapore's independence: Kenneth Paul Tan, "The People's Action Party and Political Liberalization in Singapore" in Liang *et al.*, *Political Parties, Party Systems And Democratization In East Asia* (World Scientific, 2010).

152 Although President Ong expressed his intention to veto the Government's proposal to amend Articles 5(2A) and 22H because he would have had to assent without the benefit of legal advice, President Ong ultimately did not exercise his putative powers under Article 22H(1) to do: Thio Li-ann, "Working Out The Presidency: The Rites of Passage" [1995] SJLS 509 at 528.

153 See [6] of this article.

154 See [6] of this article.

155 See [75] of this article.

156 Lionel Lee, "The party's over? Singapore politics and the 'new normal'" (2015) 14(3) Journal of Language and Politics 455 at 455–457, 476.

157 Lionel Lee, "The party's over? Singapore politics and the 'new normal'" (2015) 13(3) Journal of Language and Politics 455 at 469–470.

pluralist political environment given that they are typically comprehensive and well-reasoned.[158] This would equally apply to Singapore's political landscape should it develop into a more pluralistic one in time to come.

[158] Lucas Moench, "State Court Advisory Opinions: Implications For Legislative Power And Prerogatives" (2017) 97(6) Boston University LR 2243 at 2288–2289.