NUS Students' Union Adjudication Committee

Constitutional Reference Case No. 1

[2014] NUSSU AC 1

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Request Date: 5 December 2013
Decision Date: 17 January 2014
Panel: Messrs Soh Yi Da (Chairman), Law Zhe Wen, Ong Kah Han Shermon, Tan Kian Wei Alvin, Ng Zhi Liang Dennis, Sean Ling Wei Tsi and Miss Chen Wei Wei
Amicus Curiae: Mr Koh Zhixun and Mr Joseph Chin Shi Hao

Mr Ong Kah Han Shermon (delivering the grounds of decision on behalf of the Panel):

1. The Adjudication Committee of the Union ("AC") is set up to be the recognised body of the Union in adjudicating disputes, interpreting the provisions of the Union Constitution and listening to any appeals from disciplinary actions taken under the Disciplinary Regulations. This case was raised by Mr Liu Ziming ("the Requestor"), a Year 5 student from the Faculty of Engineering, on 5 December 2013. He listed down a total of six questions for the AC's answer. They are:

    1) Who can raise an issue to the Adjudication Committee, against whom can such issues be raised and what issues may be raised?
    2) Under Article 2.1 of the Union Constitution, does the definition of "any law enacted by the Union" include those enacted by the Executive Committee and Constituent Clubs? What about pre-existing laws that were in effect before the commencement of the Constitution?
    3) What are the limits of the Council's legislative powers and the Executive Committee's executive powers, especially with regard to the decisions that they may make and their respective jurisdictions?
    4) When the Council considers and endorses the Union budget annually, does the fact that it only approves the Executive Committee's budget but not the Constituent Clubs' budgets contravene Articles 1.6(1) and 1.6(3) of the Union Constitution?
    5) When the Council considers and endorses an allocation of subscription fees, are there any limits to the rights and obligations of the Council, the Executive Committee and the Constituent Clubs?
    6) When the Council considers and endorses the Union budget annually, are there any limits to the rights and obligations of the Council, the Executive Committee and the Constituent Clubs?

1 Main Issues

2. The six questions may be re-categorised as five different issues. The first issue is the adjudicatory jurisdiction of the AC under the Union Constitution ("Adjudicatory Jurisdiction Issue"). The second issue is the scope of Union members' interests under the objects of the Union Constitution ("Members' Interests Issue"). The third issue is what constitute legislative powers, what constitute executive powers and how to delineate both ("Legislative-Executive Issue"). The fourth issue is the extent of the autonomy each Constituent Club has under the federal nature of the Union Constitutional structure

("Constitutional Supremacy Issue"). The fifth issue is the legal limits to the exercise of the Union's legislative powers by the Union Council ("Legislative Limits Issue").

3. Of the six questions, questions 1 falls under the Adjudicatory Jurisdiction Issue as question 1 is concerned about the bases of the AC's jurisdiction under the Union Constitution. Question 4 falls under the Members' Interests Issue as it is essentially about determining whether the provision in question is inconsistent with the Union Constitution, thus it is unconstitutional and void. Question 3 falls under the Legislative-Executive Issue while Question 2 falls under the Constitutional Supremacy Issue as it is about the extent of the Union Constitution's supremacy being able to derogate each Constituent Club's autonomy. Lastly, questions 5 and 6 come within the Legislative Limits Issue as they are similar in seeking the limits as to how the Union Council may exercise its legislative powers to consider and endorse the Union subscription fees' allocation and the Union budget respectively.

2 Preliminary Issues

4. Before exploring the main issues, there remain several small but important preliminary issues that must be settled at the outset. They are:

    1) Which copy of the Union Constitution should be the AC use exercising its powers?
    2) What are some of the principles the AC has to adhere to in exercising its powers?
    3) Whether this Adjudication Panel is validly constituted?

5. These three preliminary issues, however, must be answered while keeping in mind the overall picture of the Union Constitutional framework. In the course of this decision, the words "NUSSU" and "Union" shall be used interchangeably.

2.1 The Union Constitutional Framework

6. Since 1975, after the University of Singapore (Amendment) Bill 1975, the Union has been constituted pursuant to two documents. Firstly, the statutory basis of the Union can be found in the National University of Singapore (Corporatisation) Act[1] where section 19 states:

> *[T]he National University of Singapore Students' Union and its constituent bodies shall be deemed to be constituted pursuant to the provisions of the constituent documents of the [University] company*.

7. Secondly, from this statutory basis, the University Company (i.e. National University of Singapore) is able to pass Statutes and Regulations (the latter being subordinate to the former). Clause 1 of Statute 5 (Student Associations and Activities) states:

[1] National University of Singapore (Corporatisation) Act (Cap. 204A, 2006 Rev Ed)

> *There shall be a student association, to be known as the National University of Singapore Students' Union (the "Union"), which shall be constituted pursuant to the provisions of the Articles of Association, and which shall consist of such constituent bodies as the Board of Trustees may approve from time to time*.

Read together, these two documents form the statutory basis for the Union's existence.

8. However, this is not the end. On the student level, there is a Union Constitution that binds every Union member. Also, for the Constituent Clubs of the Union, they have their individual Constitution to regulate behaviour among their respective members. Although not expressly stated in the University's Statutes and Regulations that the Union and Constituent Clubs' Constitutions will be void to the extent of the inconsistency, if they are inconsistent with the University Statutes and Regulations, implicit support for such a proposition may be found in clause 7 of Statute 1 (Interpretation) where it is stated:

> *In the event of: (a) any Statute being inconsistent with the provisions of the Articles of Association; or (b) any Regulation being inconsistent with the provisions of the Articles of Association or any Statute, the provisions of the Articles of Association or Statute, as the case may be, shall prevail and that Statute or Regulation, as the case may be, shall to the extent of the inconsistency be void.*

9. Summing up the general structure, there are many Constitutional and statutory documents that give rise to the Union's existence. At the very top is the Constitution of the Republic of Singapore. Following that are the respective Acts that give rise to the University Company before the University's own constituent documents and then the University's Statutes and Regulations enacted pursuant to its own constituent documents. Finally, on the student level, the Union Constitution governs the relationships between Union members inter se as well as the Union entities such as Union Council and Executive Committee (and possibly Union Constituent Clubs, which shall be explored later).

2.2 Preliminary Issue 1 – Which copy of the Union Constitution?

10. Preliminary Issue 1 arises because of the above-mentioned constitutional structure of the Union. The current version of the Union Constitution ("Union Constitution 2012") came into force on 4 August 2012 during the 5th Council Meeting of the 33rd NUSSU Council. The Union Constitution 2012 replaced the previous Union Constitution ("Union Constitution 1976"). In the Union Constitution 1976, the amendment procedures were as follows:

> *Article XII – Amendments to the Constitution*
>
> *1. The University Council may propose amendments to the Constitution, including the revocation of part or whole of the Constitution, and such*

amendments, immediately on their being prescribed by Statute, shall be communicated to the Honorary General Secretary.

2. The Union or its Executive Committee may propose for the University Council's consideration, amendments to the Constitution, including the revocation of part or whole of the Constitution, provided at least 2/3 of the members present at the meeting have voted in favour of such amendments.

3. An amendment to the Constitution, or any revocation thereof, shall take effect immediately after it has been prescribed by Statute or on such date as may be prescribed by Statute.

11. It is not in contention that Article XII(1) of the Union Constitution 1976 is not applicable as those amendments were proposed by the 33rd NUSSU Executive Committee. They were passed with at least two-thirds majority as required by Article XII(2). However, Preliminary Issue 1 is concerned with whether the fact that the Article XII(3) procedure was not completed meant that the Union Constitution 2012 is not the Constitution in force, but rather the Union Constitution 1976. If the answer is in the affirmative, many Union Constitutional structures, including the 34th and 35th NUSSU Executive Committee elections as well as the existence of this AC, will be unconstitutional and therefore void.

12. One view is that since the express provisions of Article XII(3) of the Union Constitution 1976 were not adhered to, the Union Constitution 2012 cannot come into effect and is thus void until such amendments were prescribed by University Statute. Hence, it may be said that failure to obtain the prescription by University Statute, the amendments are *prima facie* void.

13. That being said, can the constitutional amendments be "saved" in some way and given effect to? There are three differing, but not necessarily mutually-exclusive, views as to how this may be achieved. The first view is analogous to the *Re Rose*[2] doctrine. The *Re Rose* doctrine extends the equity maxim of "Equity sees that as done what ought to be done" to the fact that if a person has done all he/she is obliged to make an action valid, the action is valid despite some legal requirements not being satisfied.

14. The second view is the doctrine of promissory estoppel as enunciated in the case of *Cobbe v Yeoman's Row Management Ltd*[3]. The 3 requirements to invoke this doctrine are: 1) there was a representation made by a representor to a representee, 2) the representee relied on the representation and 3) this reliance was made to the detriment of the representee. The representor is then estopped from denying the validity of the representation.

15. The third view is that constitutional documents govern rights between different stakeholders in the Union. Some examples include rights between Union members *inter se*, rights between Union members and the Union student groups etc. When constitutional

[2] As stated in the case *Re Rose* [1952] Ch 499
[3] [2008] UKHL 55

documents are amended, the amendment procedures are there to obtain the necessary consent and give notice of the amendment of rights allocation in between stakeholders so that such rights may be enforced against the stakeholders from then on. Hence, Article XII(2)'s two-thirds majority requirement is a step needed to enforce rights between Union members and student groups on the student level while Article XII(3) is to be able to enforce such rights vis-à-vis the University administration.

16. Having laid out these three views, the question is which view is preferable in applying on the Union constitutional context? Critical analysis must be carried out on all views. On the first view, has the Union done all it could to make the constitutional amendments valid even though Article XII(3) requirements are not met? Although the answer may be said to be yes since Article XII(3) cannot be fulfilled without the University's participation, the Union should be slow to adopt such a view.

17. The first view is essentially founded on equity and it is tenuous, to say the least, on how such constitutional arrangements require the operation of equitable doctrines. It must be kept in mind that equity developed to ameliorate the harshness of the certain but inflexible common law. In constitutional arrangements, given that Union members are subject to the Union Constitution, certainty should be prized for the members' legitimate expectations are founded on the express text of the Union Constitution. The first view could be applied in situations where *all* prescribed procedures have been carried out except for promulgation through communication channels. Perhaps, it could then be contended that the Union has done all it could do.

18. On these facts, it can hardly be said that the Union has done all it could. If the only 'defect' left was for the University's Board of Trustees' Secretariat to print out their resolution agreeing to the change, then the first view applies. Yet, the amendments have not been submitted to Provost's Office, at least 2 steps away from the Board of Trustees. It is recognised that getting the Board of Trustees' approval is difficult, but *difficulty should not be confused with impossibility*. Saying that the Union has done all it could do denotes a sense of impossibility. That sense of impossibility is not present here. Thus, the first view does not rectify the deficiency.

19. The second view of promissory estoppel is not without its own problems. Firstly, there must be detriment incurred and it must be linked to the reliance (*Lam Chi Kin David v Deutsche Bank AG*[4]). Secondly, the doctrine may only be used as a defence, not as a cause of action (c.f. the Australian approach in *Walter Stores (Interstate) Ltd v Maher*[5]). The representor is the Union while the representee is probably that of an ordinary Union member. Hence, only the Union may be estopped for it is the representor. However, in this case, it is the Union which seeks to rely on the amendments. In essence, if the second view is employed, the Union is seeking to estop itself. This is a logical absurdity.

[4] [2010] SGCA 42
[5] (1988) 164 CLR 387

20. Additionally, it may be debatable as to whether any detriment was incurred on the facts before this Panel. As this involves a constitutional interpretation instead of a live dispute (the distinction between these two shall be elaborated later), promissory estoppel may thus be of limited function when there is *prima facie* no reliance or detriment involved, especially in constitutional interpretations. Hence, the second view is, in our view, of limited use and would not be satisfied on the facts here. Therefore, promissory estoppel does not give validity to the constituent amendments.

21. It is now that we come to the third view which, in our opinion, is the most useful for cases of this type in the future. Although some may frown upon the constitutional theory of constitutions being social contracts, we find it useful as a theoretical model here. A look at both Union Constitutions reveals that the Union Constitution is meant to govern rights between Union members *inter se*, between the Union Council and the different Union student groups as well as between Union members and all the different Union student groups.[6] Also, there are other clauses that are meant to govern rights between students (with the Union as their representative) and the University Administration. To give effect to such rights, the Union Constitution must therefore be enforceable against these parties. Otherwise, such rights are merely illusory.

22. On the facts, given that the constitutional amendments of the Union Constitution 1976, which gave rise to the Union Constitution 2012, were only approved by the Union Council but not by the University Administration, the Union Constitution 2012's enforceability against all parties is bifurcated into the student level and the Union vis-à-vis the University Administration.

23. On one level, as all the necessary amendment procedures (as per Article XII(2) of the Union Constitution 1976) on the student level have been complied with, the amendments are therefore enforceable by the Union against students and student groups on the student level because the necessary student-level consent has been obtained. To contend that the consent given on the student level is somehow invalid or deficient without the consent of the University Administration is to relegate the consent of Union members nugatory, illusory or even inconsequential. That is antithetical to the notion of the Union being an autonomous student body that is to "*promote and safeguard the interests of the members of Union within the University*" as stated in Article 1.6(1) of the Union Constitution 2012.

24. On the next level, it is to be recognised that Article XII(3) procedures is required for the Union Constitution 2012 to be enforceable against the University Administration. This is because the University Administration, without having given its consent in the form of prescribing by a University Statute, cannot be deemed to have given its consent to have its rights modified by the constitutional amendments. As such, for the Union Constitution 2012 to be enforceable vis-à-vis the University Administration, the Article XII(3) procedures must be complied with.

[6] Article III(3) of the Union Constitution 1976 – "*Members shall abide by the Constitution and not act in any way inconsistent with its objects.*" and Article 1.9 of the Union Constitution 2012 – "*Union Members shall abide by the Constitution and shall not act in any way inconsistent with its objects.*"

25. On the facts before this Panel, using the approach enunciated above, the Union Constitution 2012 is therefore enforceable against the entirety of the Union on the student level as the Article XII(2) procedures have been complied with. However, as the Article XII(3) procedures have not been complied with, the Union Constitution 2012 is therefore unenforceable against the University Administration. There is a caveat, however, to this approach. If the consent of students were not obtained in the prescribed manner (e.g. having not met the requisite voting majorities), then the constitutional amendments would not be enforceable against the entirety of the Union even on the student level.

26. Therefore, to answer Preliminary Issue 1, as the Union Constitution 2012 is enforceable against the entirety of the Union on the student level, therefore **the copy of the Constitution this Panel, and the AC, shall use is the Union Constitution 2012**. For the purposes of this decision, the Union Constitution 2012 shall be referred to as the "Union Constitution" from this point onwards.

2.3 Preliminary Issue 2 – Principles to be adhered to by the AC

27. The next preliminary issue is about the general principles that the AC has to adhere to in exercising its powers. Although this is not meant to be, neither can it possibly be, an exhaustive iteration of all the general principles, this Panel shall nevertheless seek to enunciate certain principles that are to be kept in mind when the AC exercises its powers.

28. The first general principle is that of *purposive construction of written provisions*. As mentioned above, the Union is subjected to Singapore statutory laws. As such, the Interpretation Act[7] is binding upon the Union. Sections 9A(1) and 9A(2) of the Interpretation Act are of interest and they will be reproduced here:

> *9A.— (1) In the interpretation of a provision of a written law,* ***an interpretation that would promote the purpose or object underlying the written law*** *(whether that purpose or object is expressly stated in the written law or not) shall be* ***preferred to an interpretation that would not promote that purpose or object****.*
>
> *(2) Subject to subsection (4), in the interpretation of a provision of a written law, if any material not forming part of the written law is capable of assisting in the ascertainment of the meaning of the provision, consideration may be given to that material —*
>
> > *(a) to confirm that the meaning of the provision is the ordinary meaning conveyed by the text of the provision* ***taking into account its context in the written law and the purpose or object underlying the written law****; or*

[7] Interpretation Act (Cap. 1, 2002 Rev Ed)

(b) to ascertain the meaning of the provision when —

(i) the provision is ambiguous or obscure; or

(ii) the ordinary meaning conveyed by the text of the provision taking into account its context in the written law and the purpose or object underlying the written law leads to a result that is manifestly absurd or unreasonable.

[emphasis added]

29. Essentially, section 9A of the Interpretation Act requires the AC to interpret written provisions of Union documents in a manner not only according to their express written meaning but also the purposes, objects and context underlying them. External materials may be used in assisting in ascertain such purposes, objects and context. Examples of external materials include any reports produced pursuant to a Constitutional or Regulation review/Commission. Minutes of General and Council Meetings where such written provisions are legislated are also helpful in this aspect.

30. However, it is to be noted that a purposive construction *cannot ignore the ordinary meaning of the written provisions*. For example, if a provision states "*all vehicles shall turn off their engines when parking in the Union facility*", external materials may be used to determine the purpose of the provision (e.g. to reduce exhaust from vehicles which are parking for a long time, hence probably not including vehicles which are just stopping for a short time). That being said, the plain and ordinary meaning of the written provision requires the presence of an "engine", so a bicycle parked for some time is not caught by the provision, notwithstanding that it may be caught under the purpose in a way.

31. The second principle that must be adhered to by the AC is that it *must be neutral in the exercising of its functions and roles*. Such neutrality is perhaps best encapsulated in the principle of *nemo iudex in causa sua*. In Latin, it means that one shall not be a judge in his/her own cause. If a member of a Panel is found to have a non-insignificant interest in the dispute brought before it, that member should, accordingly, recuse himself/herself from adjudicating the dispute.

32. It is entirely understandable that the current structure of the AC does not permit for full independence and thus may fall foul of the "*Justice must not only be done but also seen to be done*" principle as stated in the seminal case of *R v Sussex Justices, ex parte McCarthy*[8], it is to be noted that the structure of the AC as enshrined under Article 5.1 of the Union Constitution will *never be fully independent* for the Chairperson of the Council and the President of the Union are both Council members with voting rights.

33. Nevertheless, to strike a balance between the constitutional structure and the need to be neutral, the AC would do well to remember that *it has to remain neutral, despite its ostensible non-independence*. Only when the AC dispenses its roles and functions in a neutral and fair manner would it engender confidence among the Union members and

[8] [1924] 1 KB 256

student groups in the AC's abilities and fairness. It is needless to say that amending the Union Constitution to provide for a fully independent AC would be the best way to ensure a fully independent and neutral AC, but that is the prerogative of the Union Council and the Union Executive Committee, not the AC.

34. The third and last principle to be noted by the AC is that as the adjudicatory body of the Union, it should *restrict its role to deciding on legal issues, not policy issues*. This principle will be elaborated more under the Adjudicatory Jurisdiction Issue, but it suffices to state here that there are some issues that are inherently more suited for the Union legislative body (i.e. the Union Council) to decide. When faced with a policy issue, the AC should decline to make a decision and instead remit it to the appropriate Union entity to decide on the issue.

35. It must be acknowledged that distinguishing between a legal and a policy issue is one that has plagued even national judiciaries since time immemorial. Yet, despite such difficulties, the AC should constantly and consciously remind itself of this principle as it goes about dispensing its roles and functions.

2.4 Preliminary Issue 3 – Whether this Adjudication Panel is validly constituted?

36. Preliminary Issue 3 essentially deals with the constituting of this Adjudication Panel and its validity. Article 5.4 of the Union Constitution, which states how an Adjudication Panel is constituted, is reproduced here:

> *5.4 During adjudication processes, the Adjudication Committee shall form an Adjudication Panel for the purposes of hearing the dispute.*
>
> *(1) The Adjudication Panel shall consist of the Chairman of the Adjudication Committee and other Adjudication Committee Members such that the total number of members on the Panel is an odd number and not less than five.*
>
> *(2) There shall be no more than one member from any Constituent Body on the Adjudication Panel.*
>
> *(3) If the Chairman of the Adjudication Committee is, by any reason, unable to sit on the Adjudication Panel, the members of the Adjudication Panel shall elect a Chairman from among themselves.*

37. Article 5.4(1) is not in dispute since the number of this Panel is seven, which is an odd number and more than five. Article 5.4(3) is also not in dispute since the Chairman of the AC, Mr Soh Yi Da, is not unable to sit on the Panel. Thus, the only outstanding issue whether Article 5.4(2) was satisfied. This, in our view, turns on the meaning of "Constituent Body" in that provision.

38. In our view, the meaning of Constituent Body is to be interpreted in a way to mean Faculty Constituent Clubs only. This is because all four Non-Faculty Constituent Clubs have their

membership base defined as including all Union members[9], subject to certain special statutory requirements[10]. Hence, if no two Panel members are allowed to be from the same Constituent Body, there would be no one able to sit on the Panel as they would be all members of Community Service Club, Cultural Activities Club and Sports Club. This result will defeat the purpose of a Panel in the first place.

39. Additionally, the exclusivity of the Constituent Club of every Panel member is not an unqualified exclusivity. In the Constitution Review Commission Report ("CRC Report") which accompanied the Union Constitution, it was mentioned at page 12 that Article 5.4(2)'s purpose was "…to ensure maximum impartiality…" By reading "Constituent Body" to mean "Faculty Constituent Body", it gives effect to purpose of Article 5.4(2) in allowing for the maximum impartiality while still being able to achieve the purpose of Article 5.4 of constituting a Panel in the first place. As such, **the definition of "Constituent Body" in Article 5.4(2) must be read to mean only "Faculty Constituent Body"**.

40. On the composition of this Panel, Mr Dennis Ng is from Faculty of Engineering, Mr Alvin Tan from Yong Loo Lin School of Medicine, Mr Sean Ling is from the School of Business, Ms Chen Wei Wei is from the Faculty of Science and Mr Shermon Ong is from the Faculty of Law. Thus, for these 5 Panel members, they are not in conflict with Article 5.4(2).

41. For Mr Soh Yi Da and Mr Law Zhe Wen, there needs to be an extension of principle because they are both from the University Scholars' Programme ("USP"), albeit from different faculties, a Constituent Body as defined under Regulation 9 of the University. Although both can be allowed to sit on the same Panel by virtue of the fact that they are the only two members guaranteed a place on the AC by the Union Constitution, future issues may arise due to other members being from USP.

42. To resolve such a conundrum, a special exception must be carved out of Article 5.4(2) for USP members in that *USP members may choose, for the purposes of Article 5.4(2), to affiliate with their non-USP Constituent Body or USP, but not both. In addition, there must be only a maximum of 1 member on the Panel that is affiliated with USP for the purposes of Article 5.4(2)*. In the current scenario, Mr Soh Yi Da, being from the Faculty of Arts and Social Sciences, will therefore affiliate with that Constituent Body while Mr Law Zhe Wen will affiliate with USP. This is also in accordance with reasonable expectations as Mr Law is concurrently the President of the University Scholars' Club, the Constituent Club of USP.

[9] Point 5.23 of the 6th Council Meeting, 34th NUSSU Council

[10] NUS Students' Political Association, due to its political nature, has a Singapore citizenship requirement for its members, in line with national policy.

3 Question 1 – Adjudicatory Jurisdiction Issue

43. Having settled the Preliminary Issues, we shall now turn to the first of four Main Issues – the Adjudicatory Jurisdiction Issue. The starting points to exploring this issue are Articles 5.5 to 5.8 ("the AC Function Articles") of the Union Constitution. They are set out as follows:

> *Functions*
> *5.5 The Adjudication Committee shall be the recognized body of the Union on adjudicating disputes:*
> *(1) between the Union and its member(s);*
> *(2) between the Union and its Constituent Body/Bodies or Associate Body/Bodies;*
> *(3) between Constituent Body/Bodies or Associate Body/Bodies;*
> *(4) between Constituent Body/Bodies and its/their member(s); and*
> *(5) between Associate Body/Bodies and its/their member(s).*
>
> *5.6 The Adjudication Committee shall be responsible for the interpretation of the provisions in this Constitution.*
>
> *5.7 The Adjudication Committee shall hear any appeals arising from any disciplinary actions taken pursuant to the Disciplinary Regulations.*
>
> *Powers*
> *5.8 The Adjudication Committee shall have the power to:*
> *(1) interpret the provisions of this Constitution;*
> *(2) refuse to adjudicate any dispute if it is of such opinion that adjudication such dispute has no merits;*
> *(3) hear any appeals from any disciplinary actions taken pursuant to the Discipline Regulations.*

44. The structure of the AC Function Articles is such that for each function, there is usually a corresponding power granted to entity to fulfil that function. In the Union Constitution, Article 5.8(1) gives the AC the power to exercise its Article 5.6 function. Similarly, Article 5.8(3) allows AC to have the power to exercise its Article 5.7 function. Although Article 5.8(2) does not expressly provide positively for the AC to exercise its Article 5.5 function, there is still a link between the two in that Article 5.8(2) stipulates that the AC has the discretion not to exercise its Article 5.5 function.

45. Looking at the AC Function Articles, we can discern three disjunctive areas in which the AC's adjudicatory function arises constitutionally. First, there must be a dispute between parties as stated in one of the five situations stipulated in Article 5.5. Second, the AC is called upon to interpret provisions of the Union Constitution. Third, the AC is hearing an appeal from disciplinary actions taken under the Discipline Regulations.

3.1 Are the adjudicatory powers of the AC judicial power on the Union level?

46. Taking into account of these three areas, can the AC therefore be characterised as having a power under the Union Constitution that is in substance a judicial power? It is apposite at this point to define what it means by "judicial power". The significance of equating the AC's powers to that of a judicial power on the Union level will be elaborated later. The definition of judicial power can be found in the Australian High Court case of *Huddart Parker Pty Ltd v Moorehead*[11] ("*Huddart Parker*"). *Huddart Parker* was quoted in the Singapore High Court case of *Mohammad Faizal bin Sabtu v Public Prosecutor*[12] ("*Mohammad Faizal*") at [20]:

> *In [Huddart Parker], Griffith CJ provided what is now regarded as the classic definition of "judicial power" as follows (at 357):*
>
> > *… [T]he words 'judicial power' as used in sec. 71 of the [Australian Commonwealth] Constitution mean* ***the power*** *which every sovereign authority must of necessity have* ***to decide controversies between its subjects, or between itself and its subjects****, whether the rights relate to life, liberty or property. The exercise of this power* ***does not begin until some tribunal which has power to give a binding and authoritative decision*** *(whether subject to appeal or not)* ***is called upon to take action****.*
>
> [emphasis added]

47. In [27] of *Mohammad Faizal*, then-CJ Chan went on to add:

> *In essence, the judicial function is premised on the* ***existence of a controversy*** *either between a State and one or more of its subjects, or between two or more subjects of a State. The judicial function* ***entails*** *the courts* ***making a finding on the facts as they stand****,* ***applying the relevant law to those facts*** *and* ***determining the rights and obligations of the parties concerned*** *for the purposes of governing their relationship for the future.*
> [emphasis added]

Although it was, in a strict sense, not the *ratio decidendi* of *Mohammad Faizal*, then-CJ Chan's *obiter* is still useful for this Panel to determine if the AC powers granted by the Union Constitution, in substance, equates to judicial power on the Union level.

48. *Looking* at both the *Huddart Parker* and *Mohammad Faizal* formulations of "judicial power", a few salient features may be distilled. Firstly, judicial power entails the ability to <u>*determine controversies*</u>. Secondly, <u>*such controversies must be between Subjects or between Subjects and the State*</u>, where "Subjects" are legal personalities that are subjected to a sovereign power (exercisable by the State) which may be enshrined in a constitutional document.

[11] (1909) 8 CLR 330
[12] [2012] 4 SLR 947

Thirdly, the entity exercising such power must be able to *determine, with binding authority, on such controversies for governing the parties' relationships for the future*.

49. Do *the* AC's adjudicatory powers have these salient features then? It must be answered in the affirmative. Firstly, it is stated expressly in Article 5.9 that the AC's decisions "*shall be conclusive and binding on the parties involved.*"

50. Secondly, the AC is given the ability to determine disputes as encapsulated in Article 5.5. For the purposes of Article 5.6, a request for interpretation of constitutional provisions can be seen as an inchoate dispute between Union members *inter se*, between Union members and student groups or between Union student groups *inter se*. Alternatively, such interpretations can be viewed as requests to determine, with binding authority, the governing relationship between the interested parties (necessarily the Union and Union members). Either way of interpreting Article 5.6 power will still fall within the *Huddart Parker* and *Mohammad Faizal* formulations of judicial power.

51. Lastly, disputes brought before the AC necessarily involve "Subjects" and the "State", which means Union members or student groups and the Union as a whole respectively in the context of the Union Constitution. As such, **the AC's adjudicatory powers under the Union Constitution are, in substance, judicial powers on the Union level**.

3.2 Does judicial power equate to jurisdiction?

52. Another sub-question, after characterisation of the AC's adjudicatory powers, is whether judicial power is necessary same as jurisdiction (viz whether the AC's powers are one and the same with its jurisdiction). This question was considered in the then-Supreme Court of the Federation of Malaya case of *Lee Lee Cheng (F) v Seow Peng Kwang*[13]. The case was concerned with interpreting the words "judicial power" and "jurisdiction" in an Ordinance on the judiciary. Thompson CJ stated the following:

> *This leads to the view that in the Ordinance there is* ***a distinction between the jurisdiction of a Court and its powers****, and this suggests that the word* ***"jurisdiction" is used to denote the types of subject matter which the Court may deal with and in relation to which it may exercise its powers****. It cannot exercise its powers in matters over which by reason of their nature or by reason of extra-territoriality, it has no jurisdiction.* ***On the other hand, in dealing with matters over which it has jurisdiction, it cannot exceed its powers****… when the Clause says that jurisdiction is unlimited it means that there is* ***authority to exercise such judicial power as is given by law in any type of matter whatsoever in which the law authorises or requires judicial power to be exercised****.*
> [emphasis added]

[13] [1960] 1 MLJ 1

53. This conceptual distinction, although fine, must be recognised. To paraphrase Thompson CJ's words, a court may have judicial power but the fact that it is vested with judicial power *does not in and of itself mean that it can exercise such power in any matter*. This is where the concept of jurisdiction comes in – the court may only exercise its judicial power only in areas which the law authorised it, whether the law is constitutional or statutory in nature.

54. Drawing back to the context, the AC may be vested with powers, as determined in [51] above, that are in substance judicial powers, but such powers may only be exercised in jurisdictions conferred onto it by the laws of the Union. In our opinion, the AC's jurisdiction is conferred upon by the AC Function Articles.

55. However, the jurisdiction granted by the AC Function Articles is not exhaustive. The AC, by virtue of being vested with the Union's judicial powers by the Union Constitution, has an inherent judicial jurisdiction to regulate its processes, defeat any attempted thwarting of its processes and enforce its rules of practice (see *Connelly v DPP*[14]). Historically, such inherent jurisdiction included the power to punish for contempt of court and regulating its processes to prevent abuse of court process. However, since none of the six questions is directly asking on the extent of the AC's inherent jurisdiction, it would be more suitable for it to be elaborated in a later case.

56. Summarising this sub-point, **the AC's jurisdiction is not equivalent to its judicial-like powers (albeit on the Union level). The AC's jurisdiction includes those granted by the AC Function Articles as well as any jurisdiction inherent for the exercise of its judicial powers**.

3.3 What does the AC's adjudicatory jurisdiction entail?

57. It is undoubted that the underlying question undergirding the entire Adjudicatory Jurisdiction Issue, especially with regard to question 4 raised by the Requestor, is the extent of the AC's jurisdiction to conduct what is essentially known as judicial review. It is to be noted at this point that the concept of judicial review here pertains to the AC examining the constitutionality of the Union's laws with respect to the Union Constitution. It does not include another form of review, which is also widely known as judicial review, that essentially reviews whether an act or decision by other organs of the Union lacks legality substantively or procedurally. It is suffice at this point to state that the AC, by virtue of its judicial powers on the Union level, has the right to supervise the legality of decisions and acts are substantively or procedurally legal.

58. The ability for courts to pronounce on the constitutionality of statutes is often not explicitly vested by constitutional or statutory documents. Instead, they are often asserted by the courts themselves. One of the earliest instances of a court asserting its right to pronounce

[14] [1964] AC 1254

on a statute's constitutionality is in *Dr Bonham's Case*[15]. Coke CJ, sitting in the Court of Common Pleas, stated:

> *…the common law will control Acts of Parliament, and sometimes adjudge them to be utterly void; for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it, and adjudge such an Act to be void*.

59. The "common law" that Coke CJ referred to here is not the judge-made law which can be statutorily overturned but rather some form of higher law that supersedes even statutory law. This is of significance in England where Parliamentary supremacy and the lack of written constitution means that the only thing which hitherto could have overruled Parliament was Parliament itself. Coke CJ, in introducing the concept of a higher "common law", essentially placed a limit on the extent of Parliamentary supremacy. Alas, this position did not last long. With the Glorious Revolution of 1688, the Parliament under King James II declared itself supreme.

60. Almost two centuries later and an ocean away, a similar issue arose in another jurisdiction, albeit also common law-based like England. It was the fledging United States of America. Different from England where Parliament has supremacy, the United States of America was a constitutional supremacy. All organs of the State, including the legislature (the United States Congress), are subordinate to the written United States Constitution. Perhaps, one could look at the written Constitution as a codified form of Coke CJ's "common law".

61. In the seminal and much-celebrated United States Supreme Court case of *Marbury v Madison*[16]("*Marbury*"), Marshall CJ stated the following much-cited passages in *Marbury* at 177-178:

> ***It is emphatically the province and duty of the Judicial Department to say what the law is****. Those who apply the rule to particular cases must, of necessity, expound and interpret that rule.* ***If two laws conflict with each other, the Courts must decide on the operation of each****.*
>
> *So, if a law be in opposition to the Constitution, if both the law and the Constitution apply to a particular case, so that the Court must either decide that case conformably to the law, disregarding the Constitution, or conformably to the Constitution, disregarding the law, the Court must determine which of these conflicting rules governs the case. This is of the very essence of judicial duty.*

[15] (1601) 8 Co. Rep. 107
[16] (1803) 5 U.S. 137

> ***If, then, the Courts are to regard the Constitution, and the Constitution is superior to any ordinary act of the Legislature, the Constitution, and not such ordinary act, must govern the case to which they both apply***.
>
> *Those, then, who controvert the principle that the Constitution is to be considered in court as a paramount law are reduced to the necessity of maintaining that courts must close their eyes on the Constitution, and see only the law.*
>
> ***This [legislative-supremacy] doctrine would subvert the very foundation of all written Constitutions***. *It would declare that an act which, according to the principles and theory of our government, is entirely void, is yet, in practice, completely obligatory. It would declare that, if the Legislature shall do what is expressly forbidden, such act, notwithstanding the express prohibition, is in reality effectual. It would be giving to the Legislature a practical and real omnipotence with the same breath which professes to restrict their powers within narrow limits. It is prescribing limits, and declaring that those limits may be passed at pleasure.*
> [emphasis added]

62. In Singapore, the concept of the courts being able to strike down unconstitutional statutes was affirmed by Yong CJ in *Chan Hiang Leng Colin v Public Prosecutor*[17] ("*Colin Chan*") at [50]:

> *…the court has the power and duty to ensure that the provisions of the Constitution are observed. The court also has a duty to declare invalid any exercise of power, legislative and executive, which exceeds the limits of the power conferred by the Constitution, or which contravenes any prohibition which the Constitution provides.*

63. This was subsequently restated by Karthigesu JA in *Taw Cheng Kong v Public Prosecutor*[18] ("*Taw Cheng Kong (SGHC)*") at [14]. On appeal to the Singapore Court of Appeal, Yong CJ stated once again[19]:

> *Questions on the constitutionality of our laws and whether they have been enacted ultra vires the powers of the Legislature are matters of grave concern for our nation as a whole. The courts, in upholding the rule of law in Singapore, will no doubt readily invalidate laws that derogate from the Constitution which is the supreme law of our land.*

64. Drawing back to the context of the Union, by virtue of its judicial-like powers and the jurisdiction conferred upon Article 5.6 of the Union Constitution, the AC is able to declare any laws of the Union unconstitutional if they contravene the provisions of the Union

[17] [1994] 3 SLR(R) 209
[18] [1998] 1 SLR(R) 78
[19] Public Prosecutor v Taw Cheng Kong [1998] 2 SLR(R) 489 at [89]

Constitution. This is supported by the express text of the Union Constitution. Article 2.1 states:

> *Supremacy of this Constitution*
> *2.1 Any law enacted by the Union after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.*

In addition, the CRC Report stated the following at page 11:

> *In the opinion of this Commission, one of the primary sources of dispute in the Union governance structure is whether the provisions of this Constitution, the various Regulations or prescribed procedures have been adhered to. Hence, there should be an organ to be charged with interpretation of such provisions and the Commission recommends instituting an Adjudication Committee.*

65. Summing up for this section, it suffice to say that **the AC**, by virtue of its judicial-like powers, the express text of Article 2.1 of the Union Constitution and the CRC Report, **has the power to pronounce on the constitutionality of the laws of the Union**. This is in addition to its supervisory jurisdiction to pronounce on the legality of the acts and decision of other Union organs, be it on substantive or procedural issues.

3.4 Who can be parties to an issue before the AC and what issues may be raised?

66. Having examined the characterisation and scope of the AC's powers, it is apposite to turn our attention to question 1. Essentially, the question entails examining the AC's bases of jurisdiction. As mentioned earlier at [54] – [56], the constitutional bases of the AC's jurisdiction can be found in the AC Function Articles. As mentioned earlier at [45], there are three disjunctive areas in which the AC's function/jurisdiction arises constitutionally – a dispute between specified parties, a request to interpret constitutional provisions and hearing an appeal to a disciplinary action by the Union Council.

3.4.1 Disciplinary Appeals

67. For disciplinary appeals, the answer may be disposed of relatively quickly. Section 10 of the Discipline Regulations states:

> *10. The member of the Union shall have the right to appeal the Council's decision to the Adjudication Committee.*

It is therefore clear and unambiguous that for decisions of the Union Council regarding disciplinary matters may be appealed to the AC by the Union member who has been disciplined by the Union Council.

68. However, for the Union Council, does it have a right to appeal, if the Union member is not disciplined, to the AC under Article 5.7 of the Union Constitution despite not given the express right to do so under the Discipline Regulations? In our view, the right answer must be in the negative.

69. Firstly, any disciplinary action taken under the Discipline Regulations is a decision of the Union Council. Section 9 of the Discipline Regulations states:

> *9. Upon submission of the Disciplinary Findings Report to the Council, the Council shall decide if disciplinary action(s) is/are to be taken against the member.*
>
> > *(1) Any disciplinary action shall be taken only when no less than two-thirds of the Voting Council Representatives present have voted in favour of the findings of the Disciplinary Commission and the disciplinary action(s) proposed by the Disciplinary Commission to be taken against the Union member.*

70. It would seem odd, to say the least, that a Union Council would want to appeal against a decision which it had just rendered. If Article 5.7 is allowed to be interpreted to allow the Union Council to *appeal against its own decision*, it not only flies in the face of logic but also allows the side which failed to muster a two-thirds majority in the Union Council to have a second bite at the cherry. This must be not be allowed, especially when it involves disciplinary actions that may deprive a Union member of his membership rights and/or impose a monetary fine on him/her.

71. As such, **for disciplinary appeals raised under Article 5.7 of the Union Constitution, it is only possible under 1 situation – only the Union member who has been disciplined by the Union Council may appeal to the AC**.

3.4.2 Constitutional Interpretations

72. The next area of constitutional interpretation is a bit trickier. The provision giving rise to this area, on the other hand, is simple:

> *5.6 The Adjudication Committee shall be responsible for the interpretation of the provisions in this Constitution.*

73. Two issues may, to the astute observer, immediately arise – who can raise a question of interpretation to the AC and what is the meaning of "this Constitution". These two issues shall be termed as the Standing Issue and the Constitutional Extent Issue respectively.

74. For the Standing Issue, it essentially asks who has the standing, or *locus standi*, to raise questions of constitutional interpretation to the AC. The issue of *locus standi* for public interest cases was discussed in a trio of recent Singapore Court of Appeal ("*SGCA*") cases, namely *Tan Eng Hong v Attorney-General*[20] ("*Tan Eng Hong*"), *Vellama do Marie Muthu v Attorney-General*[21] ("Vellama") and *Jeyaretnam Kenneth Andrew v Attorney-General*[22] ("*Kenneth Jeyaretnam*").

75. The SGCA in *Kenneth Jeyaretnam*, as with the SGCA in *Tan Eng Hong* and *Vellama*, adopted the test stated in *Boyce v Paddington BC*[23] ("*Boyce*"). The *Boyce* test was cited in *Kenneth Jeyaretnam*:

> *A plaintiff can sue without joining the Attorney-General in two cases: first,* ***where the interference with the public right is such as that some private right of his is at the same time interfered with*** *(e.g., where an obstruction is so placed in a highway that the owner of premises abutting upon the highway is specially affected by reason that the obstruction interferes with his private right to access from and to his premises to and from the highway); and, secondly,* ***where no private right is interfered with, but the plaintiff, in respect of his public right, suffers special damage peculiar to himself from the interference with the public right***.
> [emphasis added]

76. The two limbs to the *Boyce* test are essentially as follows: the plaintiff must have had a private right, or when he did not, he must have suffered "*special damage peculiar to himself*". The *Boyce* test was subsequently adopted in Singapore through the line of cases such as *Gouriet and others v H.M. Attorney-General*[24] ("*Gouriet*"), *Karaha Bodas Co LLC v Pertamina Energy Trading Ltd*[25] ("*Karaha Bodas*") and finally through *Tan Eng Hong*, *Vellama* and *Kenneth Jeyaretnam*.

77. As the SGCA in *Kenneth Jeyaretnam* stated at [34], the law of *locus standi*, being judge-made law, exists because "*…in public law, such rules are put in place in order to prevent the wastage of the court's time and public money by the multiplicity of litigation brought by busybodies that could amount to an abuse of the legal process*."

78. In *Tan Eng Hong*, the plaintiff's own private constitutional rights under Articles 9, 12 and 14 of the Constitution of the Republic of Singapore[26] ("Singapore Constitution") were affected (*Kenneth Jeyaretnam* at [51]). In *Vellama*, *Kenneth Jeyaretnam* stated at [51] that "*it was her*

[20] [2012] 4 SLR 476
[21] [2013] 4 SLR 1
[22] [2013] SGCA 56
[23] [1903] 1 Ch 109
[24] [1978] AC 435
[25] [2006] 1 SLR(R) 112
[26] Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Reprint)

public right, as a voter of a constituency which was then without a Member of Parliament, to seek a declaration on the proper construction of Article 49 of the Constitution", thus satisfying first and second limbs of the *Boyce* test respectively.

79. The SGCA in *Kenneth Jeyaretnam* also enlarged the category of cases in which *locus standi* would be granted. At [64], the SGCA stated:

> *… in the rare case where a non-correlative rights generating public duty is breached, and the breach is of sufficient gravity such that it would be in the public interest for the courts to hear the case, an applicant sans rights may be accorded locus standi as well,* ***at the discretion of the courts***.
> [emphasis added]

80. As stated above, an application outside of the *Boyce* test may only be granted by the courts' discretion. On the plaintiff's case in *Kenneth Jeyaretnam*, the SGCA stated emphatically that the plaintiff had no *locus standi* because "*not only does [he] lack any public or private rights in this matter… he has also failed to show that the Government had in any way breached its duties under Art 144 (ie, there was no public duty that was infringed to begin with).*"

81. Having surveyed through the line of cases in Singapore regarding *locus standi*, we are of the opinion that such tests should **not** be imported into constitutional interpretation cases brought to this AC under Article 5.6 of the Union Constitution. There are several reasons to distinguish the constitutional framework under the Singapore Constitution and the Union Constitution and not import a similar test into the context of the Union.

82. Firstly, as stated above at [77], such *locus standi* rules are instituted by judges to prevent a flood of cases brought by "*busybodies*" that amounts to wasting public time and money and almost amounting to an abuse of legal process. However, that is, in our view, plainly not analogous in the context of the Union. It took almost a year for the first case to be raised to this AC. A survey at similar student government adjudication in the National Taiwan University revealed that less than five cases were brought before their adjudicatory arm over the course of almost two decades. This shows that the fears of courts on the national level are inapplicable for the Union context.

83. Secondly, as stated in *Kenneth Jeyaretnam*, Article 100 of the Singapore Constitution allows the President to seek an advisory opinion from a tribunal of three judges. An analogous provision does not exist in the Union Constitution. As *Kenneth Jeyaretnam* quoted Lord Diplock at [61]:

> *the emergence of a "grave lacuna" in the system of public law if applicants were to be denied locus standi by virtue of standing rules that would stop them from bringing matters "to the attention of the court to vindicate the rule of law and get the unlawful conduct stopped"*

If the *locus standi* rules as enunciated in *Kenneth Jeyaretnam* were allowed to be applied in the Union context, it would result in Union members being denied the very avenue to have constitutional provisions interpreted by the AC. This removes the safeguard which is otherwise preserved by Article 100 of the Singapore Constitution.

84. As such, **with regard to the Standing Issue for constitutional interpretations**, we are of the opinion that **the only thing needed to satisfy *locus standi* is that the person raising up the issue must be a Union member**. This minimum threshold is expressed indirectly by Article 1.9 of the Union Constitution – "*Union Members shall abide by the Constitution and shall not act in any way inconsistent with its objects.*"

85. For the Constitutional Extent Issue, the question facing this Panel is whether the AC can only interpret provisions of the Union Constitution *only* or it can also interpret other written laws of the Union. It is relevant to set out Article 2.1 again:

> *Supremacy of this Constitution*
> *2.1 Any law enacted by the Union after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.*

Read together with Article 1.2, "*"law" means any written law, Constitutional provisions or regulations passed by the Council which is in operation in the Union*".

86. If the contention that Article 5.6 to be read restrictively means that the AC can only interpret provisions of the Union Constitution *only*, Article 2.1 will be rendered nugatory. Without being able to interpret any laws that are supposedly subordinate to the Union Constitution, how is the AC able to determine whether such laws are inconsistent with the Union Constitution? Hence, the only logical interpretation that is demanded here is that **the phrase "*this Constitution*" in Article 5.6 includes those "laws" as defined by Article 1.2**.

87. It is also apposite at this point in time to note one particular question that is begging to be answered. If the meaning of "this Constitution" can be extended to mean the Union's laws, can the meaning therefore be further extended to include those laws of Constituent Clubs/Associate Bodies? This is perhaps best answered in the Constitutional Supremacy Issue and we reserve our judgement on that extension as of now. It will be explored later under the Constitutional Supremacy Issue and question 2.

88. Summarising the pointers on constitutional interpretation, **any Union member may raise an issue of constitutional interpretation to the AC under Article 5.6 of the Union Constitution and the provisions that may be interpreted by the AC include not only the Union Constitution but also the laws of the Union as defined by Article 1.2**.

3.4.3 Disputes

89. The third area that the AC may claim jurisdiction is that of disputes between specified parties. There are five different cases that arise under Article 5.5. They are disputes between:

> *(1) between the Union and its member(s);*
> *(2) between the Union and its Constituent Body/Bodies or Associate Body/Bodies;*
> *(3) between Constituent Body/Bodies or Associate Body/Bodies;*
> *(4) between Constituent Body/Bodies and its/their member(s); and*
> *(5) between Associate Body/Bodies and its/their member(s).*

Hence, as per the constitutional interpretation area, the questions of *who* has standing and *what* qualifies as a "dispute" are of importance here.

90. On the question of *who*, it is first important to note that there are four different entities being specified under Article 5.5 – the Union, Constituent Body, Associate Body and members. Members ostensibly refer to ordinary Union members. This necessarily encompasses the entire Union membership.

91. The slightly more vexing problem arises when it comes to defining which party may raise or be raised against under Article 5.5. This is because every Constituent Body or Associate Body is nothing but more than a defined constituency of Union members. To answer this portion of the question, it entails examining the nature of the different entities.

92. The status of Constituent/Associate Bodies is granted by Articles 2.5 and 2.6 of the Union Constitution respectively. A Constituent/Associate Body is essentially a constituency of students that are defined constitutionally. These constituencies may overlap. For example, a Union member may be concurrently a member of the Students' Science Club as well as a member of the Students' Sports Club.

93. Hence, when a dispute involves a Constituent/Associate Body, under the constitutional structure, it cannot be said to involve the entire membership base of the Constituent/Associate Body. If this were to be true, the essence of Articles 5.5(4) to (5),

> *(4) between Constituent Body/Bodies and its/their member(s); and*
> *(5) between Associate Body/Bodies and its/their member(s).*

will be tautological as a member of a Constituent Body can raise a dispute against his entire constituency, including himself. As a dispute involves a notion of disagreement, the concept of being able to have a dispute with oneself is illogical. Hence, under Article 5.5, *Constituent/Associate Body cannot be taken to mean the entire constituency*.

94. As a dispute requires at least two clearly identifiable parties, it is therefore necessary to define a polity representing each constituency. Having regard to the entire constitutional structure, it is in our view that *the polities are the Management Committee ("MCs") of Constituent Clubs, the Junior Common Room Committees ("JCRCs") of Halls and the College*

Student Committees ("CSCs") of Residential Colleges. As they are voted into office by their respective constituents and any actions taken by the MCs/JCRCs/CSCs can bind their respective constituencies, therefore they can be said to represent their respective constituencies under the constitutional structure.

95. Hence, *for the purposes of Article 5.5, the meaning of Constituent/Associate Body shall be taken to mean the MCs, JCRCs or CSCs, as the case may be. As for the phrase "its member(s)", it shall be taken, clear and unambiguously, the members of that Constituent/Associate Body in question*. Whether a Union member is a member of that Constituent/Associate Body is a question of fact to be determined in each case.

96. On the same vein, when having regard to the definition of the "Union" under Article 5.5, it cannot be taken to mean the entire Union membership. There are three possible interpretations of the meaning of "Union" – the Union Council only, the Union Executive Committee only or both? The Union Constitution gives constitutional status to both the Union Council and Union Executive Committee under Articles 3.4 and 4.1 respectively, it is therefore incongruent with the constitutionals status of both Union organs to regard them as one as the same, or one representing the other. Instead, *the meaning of "Union" under Article 5.5, in our view, should be taken to mean both the Union Council and the Union Executive Committee, in a several but not joint manner*.

97. On the meaning of "dispute", the essence of a dispute involves a notion of disagreement. Such disagreement may come in the form of an assertion to the contrary or competing assertions. Such assertions may be written, verbal or through actions. The notion of disagreement requires an opposition or conflict, hence it is of fundamental importance that *it involves two opposing parties whose categories fall under the five sub-sections of Article 5.5*.

98. We would also like to take this opportunity to state that when a member wishes to seek a clarification on the interpretation of written sources of law by the Union, a Constituent Body or Associate Body, *such clarification shall be deemed to be a "dispute" under Article 5.5*, notwithstanding the apparent lack of a contrary or opposing view by another party. A written source of law is a form of representation by the promulgating entity that its relationship and rights vis-à-vis the member are to be governed in a certain manner. As such, there is a "dispute" in the form of the member's asserted interpretation in contrast to the unknown implicit representation by the written source of law (as it has not been clarified by the AC).

99. Summing up, for disputes to be raised under Article 5.5, the following points are pertinent. First, **disputes involve two opposing parties or that an interpretation of written sources of law is sought by any Union member**. Second, **the meaning of Constituent/Associate Body shall be taken to mean the MCs, JCRCs or CSCs**, as the case may be. **For the phrase "its member(s)"**, it shall be taken, clear and unambiguously, **the members of that Constituent/Associate Body in question**. **For "the Union"**, it means **both the Union Council and the Union Executive Committee, in a several but not joint manner**.

4 Question 2 – Constitutional Supremacy Issue

100. The next question touches on the extent of the supremacy of the Union Constitution. This is to be split into two portions – first, whether the Union Constitution has supremacy regardless of the temporal factor; second, whether the Union Constitution has supremacy over other written sources of law not included in those defined under the Article 1.2 meaning of "law".

4.1 Temporal Dimension

101. The temporal dimension pertains to the second part of question 2. Essentially, the issue at hand is whether a piece of law on the Union level, whether written or unwritten, is subject to the supremacy of the Union Constitution despite having been in effect before the Commencement of the Union Constitution. As this part does not involve determine whether a *particular* piece of law is subject to the Union Constitution's supremacy, the date of commencement of the Union Constitution (i.e. 4 August 2012 per Article 1.10) is of lesser importance. Nevertheless, for the purposes of this discussion, it shall be known as the "Commencement Date".

102. As pointed out by Mr Koh Zhixun, a similar issue arose in *Tan Eng Hong*. In it, the SGCA had to decide (at [34]) if a law enacted prior to the commencement of the Singapore Constitution can be voided pursuant to Article 4 of the Singapore Constitution as set out here:

> *Supremacy of Constitution*
> *4. This Constitution is the supreme law of the Republic of Singapore and any law enacted by the Legislature after the commencement of this Constitution which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.*

103. The Attorney-General ("AG") in *Tan Eng Hong* submitted that Article 4 may only be used to void unconstitutional laws enacted after the commencement of the Singapore Constitution (see *Tan Eng Hong* at [36]). For unconstitutional laws enacted prior to the Singapore Constitution's commencement, they cannot by voided but must be modified according to Article 162 of the Singapore Constitution, as set out here:

> *Existing laws*
> *162. Subject to this Article, all existing laws shall continue in force on and after the commencement of this Constitution and all laws which have not been brought into force by the date of the commencement of this Constitution may, subject as aforesaid, be brought into force on or after its commencement, but all such laws shall, subject to this Article, be construed as from the commencement of this Constitution with such modifications,*

adaptations, qualifications and exceptions as may be necessary to bring them into conformity with this Constitution.

104. The SGCA reviewed jurisprudential authorities from Malaysia, which had a similar provision in their Constitution. On the position in Singapore, the SGCA stated, at [58]:

> *While Art 162 imposes a duty on the courts to construe modifications, etc, into unconstitutional existing laws, it is clear that there are limits to construction... In our view, Art 162 only directs that all laws be read in conformity with the Constitution* ***as far as this is possible****.*
> [emphasis in original]

The SGCA went on to state, at [59] to [61]:

> *In the event that construing a modification into an unconstitutional law is impossible, the supremacy of the Constitution must continue to be upheld, and the offending legislation will be struck down under Art 162 read harmoniously with Art 4.* ***To the extent that any law does not conform to and cannot be reconciled with the Constitution through a process of construction, it is void****. Article 4 provides for the unconstitutional portion of the law to be severed while retaining the remaining part of the law in the statute books. In other words,* ***the court's power to void laws for inconsistency with the Constitution under Art 4 can be interpreted to include the power to void laws which pre-date the Constitution****…*
>
> *…Therefore, we find that the supremacy of the Constitution* ***cannot be dependent on when a law was enacted: constitutional supremacy must apply equally*** *both to laws which pre-date and laws which post-date the enactment of the Constitution…*
>
> *...The fact that Art 162 does not itself provide for the voiding of unconstitutional existing law does not mean that such law cannot be voided under another provision, viz, Art 4.*
> [emphasis in original and added]

105. From *Tan Eng Hong*, the SGCA has stated unambiguously that the <u>*principle of constitutional supremacy*</u> enshrined in Article 4 of the Singapore Constitution <u>*applies equally to laws enacted both pre-commencement and post-commencement*</u>.

106. We are of the view that <u>*the same principle should be applied in the Union Constitution*</u>, notwithstanding the lack of an Article 162 equivalent in the Union Constitution. As stated in the CRC Report at page 7:

> *Taking* ***reference from the Singapore Constitution/Statutes structure****, the Commission recommends that the current Constitution be divided into the*

> *Constitution and various subordinate Regulations.* ***The Constitution shall be the supreme document of the Union*** *insofar as student governance structure is concerned. The* ***various Regulations are subordinate to the Constitution*** *and shall be analogous to Statutes in the national context. This* ***hierarchy is manifested in Article 2.1 of the Constitution*** *where any "law" enacted by the Union, including the proposed Regulations, are void to the extent that they are inconsistent with the Constitution.*
> [emphasis added]

107. Also, comparing Article 4 of the Singapore Constitution (see above at [102]) and Article 2.1 of the Union Constitution (see above at [64]), some similarities may be seen:

> *Supremacy of Constitution*
> *4. This Constitution is the supreme law of the Republic of Singapore and* ***any law enacted*** *by the Legislature* ***after the commencement*** *of this Constitution* ***which is inconsistent*** *with this Constitution shall, to the extent of the inconsistency,* ***be void****.*
>
> *Supremacy of this Constitution*
> *2.1* ***Any law enacted*** *by the Union* ***after the commencement*** *of this Constitution* ***which is inconsistent*** *with this Constitution shall, to the extent of the inconsistency,* ***be void****.*
> [emphasis added]

108. Comparing the two provisions, they are not only remarkable in their similarities but also the frequency of similarities. Coupled with the CRC Report excerpt (see above at [106]), it is therefore logical to infer that the drafters of the Union Constitution intended for the constitutional supremacy regime to be similar and *in pari materia* to that of the Singapore Constitution. As such, the principle laid down in *Tan Eng Hong* by the SGCA should logically, given the similar regime, be applicable to the Union Constitution.

109. It was raised, as a matter of suggestion, by Mr Koh Zhixun that the lack of an Article 162 equivalent in the Union Constitution be resolved with the addition of such a clause into the Union Constitution. Notwithstanding the express clarity afforded by such a measure, we are of the view that, by importing such a similar regime of constitutional supremacy into the Union Constitution and explicitly stating so in the CRC Report, the drafters have also imported the concept of modification of pre-existing laws as enshrined in Article 162. However, this concept, on the Union Constitution level, remains unwritten. Nevertheless, the fact that it is unwritten should not be an obstacle to the AC implying an equivalent clause into the Union Constitution.

110. For the temporal dimension, as a matter of summing up, the position on pre-existing laws under the Union Constitution is the same as that under the Singapore Constitution – **the principle of constitutional supremacy enshrined in Article 2.1 of the Union Constitution**

applies equally to laws enacted both pre-Commencement Date and post-Commencement Date.

4.2 Exhaustiveness of Article 1.2 definition of "law"

111. The starting point for the issue of exhaustiveness of Article 1.2 is this:

> *Interpretation*
> *1.2 In this Constitution,* ***unless*** *it is otherwise provided or* ***the context otherwise requires*** *–*
> *… "law" means any written law, Constitutional provisions or regulations passed by the Council which is in operation in the Union;*
> [emphasis added]

112. A *prima facie* reading of Article 1.2 definition of "law" would mean restrict its meaning to those laws that have gone through legislative procedures under the Union (which would be exercised by the Union Council per Article 3.1). Mr Koh Zhixun submitted to this effect. Mr Joseph Chin also addressed this indirectly by stating that it should mean "a university-wide law".

113. Hence, if the Article 1.2 definition of "law" is exhaustive, then the *prima facie* meaning should be given effect. This essentially means that any written law that was not passed pursuant to the legislative process of the Union Council would not be caught under the Union Constitution, thus not subject to the Union Constitution's supremacy regime under Article 2.1. This reading, as we will explain below, is patently antithetical and prone to abuse.

114. The first reason why such a reading should not be given effect is because it allows a group of Union members to effectively oust the application of the Union Constitution by just passing a law among themselves without going through the Union Council legislative process. For example, if a group decides that they no longer wish to be bound by the objects Articles of the Union Constitution, they will be able to oust the application of these objects Articles if they pass a law among themselves allowing the derogation of such objects without the law going through the necessary legislative procedures.

115. This would lead to an absurd outcome that is antithetical to the Union constitutional structure. Article 1.9 states clearly that "*Union Members shall abide by the Constitution and shall not act in any way inconsistent with its objects.*" That reading, if given effect to, will directly conflict with the constitutional objective, as codified in Article 1.9, that all Union members are subordinate to the Union Constitution. If such a reading is allowed, it will render the constitutional structure nugatory. Such a reading, therefore, must not be allowed.

116. Secondly, the Union, as a quasi-federal organisation, requires all its members and the entities comprising it (i.e. the Executive Committee, Constituent Clubs and Associate Bodies) to sacrifice a part of their autonomy in exchange for an overarching governance framework

among the student body. This requirement can only be legally effected if there is some form of legal framework to ensure that all entities and members will adhere to stipulated Union-wide standards. Such a framework would be found in Article 2.1 of the Union Constitution. This is to ensure that all laws promulgated within the entities are not inconsistent with the greater Union-wide laws. Also, such a hierarchy is also manifested in sections 5 and 6 of the Management Committee Elections Regulations where the Union-wide laws, including the Union Constitution, are made expressly supreme to those laws by the individual Constituent Clubs. To allow the reading of Article 1.2 definition of "law" will lead to a lack of legal control over different entities, thus compromising the entire Union governance framework.

117. Thirdly, some national courts have interpreted "laws" to not only mean constitutions and statutes. In *Operation Dismantle Inc v The Queen*[27] ("*Operation Dismantle*"), the Supreme Court of Canada ("SCC") was to examine whether executive acts were caught within the meaning of "law" under section 52 of the Canadian Charter of Rights and Freedom, as set out here:

> *52. (1) The Constitution of Canada is the supreme law of Canada, and any law that is inconsistent with the provisions of the Constitution is, to the extent of the inconsistency, of no force or effect.*
> *(2) The Constitution of Canada includes*
> *(a) the Canada Act, 1982, including this Act;*
> *(b) the Acts and orders referred to in the Schedule; and*
> *(c) any amendment to any Act or order referred to in paragraph (a) or (b).*
> *(3) Amendments to the Constitution of Canada shall be made only in accordance with the authority contained in the Constitution of Canada.*

Dickson J, on behalf of the majority, stated at [39]:

> *I would like to note that **nothing** in these reasons should be taken as the adoption of the view that the reference to "laws" in s. 52 of the Charter **is confined to statutes, regulations and the common law**. It may well be that **if the supremacy** of the Constitution expressed in s. 52 **is to be meaningful, then all acts taken pursuant to powers granted by law will fall within s. 52**.* [emphasis added]

118. In the case of *University of Wollongong v Metwally*[28] ("*Metwally*"), the High Court of Australia ("HCA") was to decide on whether a particular Act of a state was caught under section 109 of the Constitution of Australia as set out here:

[27] [1985] 1 S.C.R. 441
[28] [1984] HCA 74

> *"When a law of a State is inconsistent with a law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid".*

Murphy J stated the following:

> *Our legal system is based on the principle that there cannot be inconsistent laws…* ***whatever the source of law*** *(constitutional, legislative, delegated legislative or decisional (common) law)… The binding Federal law* ***includes not only the express words but also the common law of the Constitution****, that is, the implications and silent principles… such as separation of judicial from other powers… or responsible government… The phrase "all laws made by the Parliament ... under the Constitution" makes clear the supremacy of the Constitution - the only federal laws which bind judges as well as others are those authorized by the Constitution.*
> [emphasis added]

119. To sum up the two cases cited, both the supreme appellate courts of Australia and Canada (the HCA and SCC respectively) have stated that the meaning to be given to the word "law", especially when it came to supremacy clauses, is to be given a wide meaning than just the express words. Both courts readily included the common law (i.e. decisional law) under the ambit of the word "law".

120. In *Operation Dismantle*, the SCC extended the ambit to include executive acts. The HCA, on the other hand, excluded administrative decisions made by officials exercising executive power to be outside of the ambit of law[29]. However, for the purposes of this question, whether executive acts are caught within the ambit of the word "law" is not necessary for this Panel's determination.

121. Coming back to the Union Constitution, it is undeniable that the *prima facie* express text of Article 1.2 (set out at [111] above) only refers to laws passed through the legislative process of the Union. However, as listed from [114] to [120] above, there are many reasons why such a literal reading of Article 1.2 should not be done so.

122. That being said, is the AC then obliged to go beyond the express text of Article 1.2 in order to include written laws by the Executive Committee, Constituent Clubs and Associate Bodies under the meaning of "law" under Article 2.1? The answer is no. If one were to look at the text of Article 1.2 again (set out at [111] above), the Article 1.2 definitions only apply if: 1) it is not otherwise provided or 2) the context does not require otherwise. As (1) is inapplicable for Article 2.1, the crux is now whether the <u>*context*</u> of Article 2.1 requires a meaning to be given to the word "law" instead of that given by Article 1.2. As elaborated in the paragraphs above, **<u>the context of Article 2.1 requires a wider meaning to be given to the word "law",</u>**

[29] *Airlines of New South Wales Pty Ltd v New South Wales (No 1)* (1964) 113 CLR 1

to one that includes laws enacted by the Executive Committee, Constituent Clubs and Associate Bodies.

4.3 Summary of Question 2

123. The answers for question 2 shall, in our view, be these: 1) **the context of Article 2.1 requires a wider meaning to be given to the word "law", to one that includes laws enacted by the Executive Committee, Constituent Clubs and Associate Bodies** and 2) **the principle of constitutional supremacy enshrined in Article 2.1 of the Union Constitution applies equally to laws enacted both pre-Commencement Date and post-Commencement Date**.

4.4 Paramountcy of Union Regulations

124. As a side note, although it has been mentioned at [123] and [86] that the laws enacted by the Union Executive Committee/Constituent Clubs/Associate Bodies ("non-Union Council laws") and the laws enacted by the Union Council ("Union Council laws") are respectively subordinate to the Union Constitution, the question remains as to what happens if the conflict is not between the Union Constitution and Union Council/non-Union Council laws but between a Union Council and a non-Union Council law.

125. Unlike the Australian Constitution which provided for a clear hierarchy of federal-versus-state laws (see [118]), the Union Constitution does not provide expressly for such a hierarchy. This is similar to the case in Canada where there is no analogous provision in the Canadian Constitution. In response to the lack of such an express provision, the SCC developed the doctrine of paramountcy. It is apposite to quote Professor Hogg in *Constitutional Law of Canada*[30] ("*Hogg*"). At pages 424-425, *Hogg* stated:

> *…[T]he doctrine of "federal paramountcy": **where there are inconsistent (or conflicting) federal and provincial laws, it is the federal law which prevails**… The doctrine of paramountcy applies where there is a federal law and a provincial law which are **(1) each valid, and (2) inconsistent**… [T]he issue does not arise unless each law has first been held to be valid as an independent enactment… It is only if each law independently passes the test of validity that it is necessary to determine whether the laws are inconsistent…*
> [emphasis added]

In footnote 9 of page 424 of *Hogg*, Professor Hogg added:

> *Paramountcy is a quality **inherent in federal legislative power**…*
> [emphasis added]

[30] Peter Hogg, *Constitutional Law of Canada*, 4th ed (Scarborough, Ontario: Carswell, 1997)

126. Coming back to the Union context, it has been mentioned, at [116], that the Union governance structure, being a quasi-federal one, requires its entities to submit to greater Union-wide laws[31]. **As such, our view is that where a validly-enacted non-Union Council law is inconsistent with a validly-enacted Union Council law, the Union Council law shall prevail over the non-Union Council law to the extent of the inconsistency**. As to what constitutes "inconsistency", it would be decided in a more appropriate case in the future[32].

[31] Kenneth Clinton Wheare, *Federal Government*, 4th ed (London, New York: Oxford University Press, 1963) at page 74

[32] For the Australian approach under section 109 of the Australian Constitution, reference may be sought from Peter Hanks, Patrick Keyzer & Jennifer Clarke, *Hanks Australian Constitutional Law: Materials and Commentary*, 9th ed (Chatswood, N.S.W: LexisNexis Butterworths, 2013) ("*Hanks*"). For the Canadian approach, *Hogg* would suffice.

5 Question 3 – Legislative-Executive Issue

127. Question 3 demands that this Panel examine the bright red line demarcating the division of powers between the executive branch and the legislative branch of the Union. However, before the bright red line may be determined, it is apposite to examine the respective jurisdictions of the two branches before looking at points of confluence/conflict where a bright red line must be demarcated.

128. The starting point to this question can be found in Part III of the Union Constitution:

> *3.1 The legislative power of the Union shall be vested in the Council.*
> *3.2 The executive authority of the Union shall be vested in the Council and exercisable by the Council, the Executive Committee or any Executive Committee Member authorised by the Executive Committee.*
> *3.3 The Council may appoint such standing or other committees as are necessary for the proper administration of the Union.*

From these three Articles, some salient points may be established. First, the legislative power of the Union is unequivocally vested in the Union Council. Second, the executive authority of the Union is also vested in the Council but it is exercisable by the Council, the Executive Committee or any other Executive Committee Member who is authorised by the Executive Committee. Third, the Council may also appoint any other committees necessary for proper administration of the Union.

5.1 Where is executive power exactly vested in?

129. Some points may be stated at the outset. Given that the Union Council itself is made up of Council Representatives representing different Constituent Clubs, it is a misconception to state that the executive power of the Union resides in the Union Council *per se*. As stated in the CRC Report at page 3:

> *To draw parallels with the Westminster model, the* ***Council can be said to be the Parliament while the Executive Committee can be said to be the Cabinet****.*
> [emphasis added]

Under the Westminster system, the executive power resides in the Cabinet while the legislative power resides in Parliament. Given the similarity between the Westminster model and the Union governance structure, both *de jure* and *de facto*, it is therefore more appropriate to characterise the executive power as being vested in and exercisable by the Union Council *only because the Union Executive Committee sits in the Union Council*. To put it another way, if the Union Executive Committee is not part of the Union Council, Article 3.2 necessarily has to be interpreted to mean that the executive power resides in and exercisable by the Union Executive Committee *only*.

130. This view would be reinforced by two points. First, the equivalent of Article 3.2 can be found in Article 23(1) of the Singapore Constitution:

> *23.—(1) The executive authority of Singapore shall be vested in the President and exercisable subject to the provisions of this Constitution by him or by the Cabinet or any Minister authorised by the Cabinet.*

If one were to compare Article 3.2 with Article 23(1), one could substitute the words "President" with "Council" and "Cabinet" with "Executive Committee". The President of Singapore is a position that represents the Sovereign. In the Union context, there is a lack of an analogous position, so the closest analogue is that of the Union Council. This, coupled with the fact that executive power flows from the Sovereign (through historical reasons), means that the *executive power is vested in and exercisable by the Union Council in Article 3.2 only because the Union Council is the closest analogue to a Sovereign on the Union level*.

131. Secondly, it is important to draw a slight but important distinction between the Westminster system and the Union governance structure. While it may be accurate to characterise both as a fused executive-legislative system with the concept of responsible government, the way the executive branch in both systems obtain their respective mandates are different. For the Westminster system, the executive branch is selected by the legislature giving its vote of confidence in the Prime Minister, who then proceeds on to select his Cabinet from among members of the legislature. As such, the mandate of the Cabinet is directly derived from the legislature. The mandate given by the Ministers' respective voters only guarantees them a seat on the legislature, not a seat in the Cabinet.

132. This is to be contrasted with the Union governance structure. Firstly, under Article 3.4(3), members of the Union Executive Committee must be voted in by members of their respective Constituent Bodies. This shows that Union Executive Committee members are voted in there *qua* Union Executive Committee member, not *qua* Union Council member. Secondly, Article 3.4(3)(a) provides the clear separation of Union Executive Committee and Management Committees. This is unlike the Westminster system where the role of a Member-of-Parliament is fused together with a Cabinet Minister. Thirdly, the nature of the mandate is shown in Article 3.8 where a Union Executive Committee member may only be removed under two situations – where he loses the mandate of his Constituent Body (as expressed by that Constituent Body's Club Management Committee) or a vote of no confidence in a General Meeting of the Union (i.e. the entire electorate). The Union Council (i.e. the legislature) has *no power* to remove a Union Executive Committee member.

133. Hence, the Union Executive Committee members can be said to derive their mandate from their respective Constituent Bodies, not the Union Council. This means that *the Union governance structure is not exactly that of a Westminster responsible government system*. This, together with the lack of a President/monarch analogue on the Union level, necessarily means that although the Union executive power is *de jure* vested in and exercisable by the

Union Council, in reality *such power is de facto vested in and exercisable by the Union Executive Committee which sits in the Union Council*.

5.2 What is legislative power?

134. To determine the scope of the Union Council's legislative powers per Article 3.1 of the Union Constitution, it is necessary to understand what it means by "legislative power" and what the historical functions/purposes of legislatures are in general and the Union Council specifically. The historical purpose of a legislature was stated (in the context of the House of Commons) by A V Dicey[33] ("*Dicey*") at page xxiv:

> *The House of Commons once **performed the function of resisting the demands of the Crown for supply** until its grievances had been redressed… the **modern House of Commons is a forum in which both parties put forward incessant demands** for the remedying of some social or economic ill of the body politic. The remedy necessarily **increases the demands of the Government for supply**, i.e. **for the money necessary to administer** the control or service which is demanded.*
> [emphasis added]

It is added at pages 39 to 40 of *Dicey*:

> *…Parliament… has… the right to make or unmake any law whatever… [which is]… defined as "any rule which will be enforced by the courts."*

135. No doubt that *Dicey* was describing the British Parliament which operates under the principle of Parliamentary supremacy. That said, the essence of the meaning of legislative powers still applies to a legislature operating under a written Constitution, *mutatis mutandis*. From the above passages, it is undoubted that legislative powers refer to the powers to make legally-enforceable rules for the body polity.

136. Also, as referred to by *Dicey* (see above), the legislature also possesses the power to control the expenditure of money by the Sovereign or the Executive. This stems from both historical underpinnings of the House of Commons as well as modern legislature functions. Indeed, one may look at Part XI of the Singapore Constitution where several acts of the government relating to finances may not be done without the authorisation of Parliament. Such acts include raising loans/giving guarantees (Article 144), expenditure (Article 148) etc.

137. In our view, **the Union Council, being the entity in the Union vested with legislative powers, has the powers to make laws and scrutinise apportionment of finances**. It is also necessary to keep in mind the supremacy of the Union Constitution. Hence, such legislative powers are

[33] Albert Venn Dicey, *Introduction to the Study of the Law of the Constitution*, 10th ed (London: MacMillan & Co Ltd, 1959)

not unrestricted (c.f. the British Parliament). They **may only be exercised in accordance with the Union Constitution**. For example, the laws enacted by the Union Council may not be inconsistent with the objects of the Union under Article 1.6 (see Article 3.12 (1)). Also, the powers of the Union Council may not exceed those provided for in Article 3.14.

5.3 How can the Union Council validly enact laws?

138. Under the Westminster system, there lay a distinction between a Resolution/Motion of the House and a Bill of the House. A quote from the Parliament of Canada website is apposite on this point[34]:

> *In deciding between a bill and a motion, the first difference to keep in mind is in their effect. Since **in agreeing to a motion expressing a resolution, the House is only stating an opinion**, the government will not be bound to adopt a specific policy or course of action. By contrast, because **it becomes law when passed by Parliament, a bill may have far reaching implications** for both the government and the public.*
> [emphasis added]

Similar, *Dicey* at page 55 stated to the same effect:

> *First, **the resolution of neither House [of Parliament] is a law**. This is the substantial result of the case of Stockdale v Hansard… a libellous document did not cease to be a libel because it was published by the order of the House of Commons, or because the House subsequently resolved that the power of publishing it… was an essential incident to the constitutional functions of Parliament.*
> [emphasis added]

139. From these two excerpts, one may infer, properly, that in order for a legislature to validly enact laws, it needs to do something more than merely expressing its opinion/stand. This is because of the potential binding impact of such newly-enacted laws. Indeed, under the Singapore Constitution, it is provided under Article 58(1) that:

> *Exercise of legislative power*
> *58.—(1) Subject to the provisions of Part VII, the **power of the Legislature to make laws shall be exercised by Bills passed by Parliament** and assented to by the President.*
> *(2) **A Bill shall become law on being assented to by the President** and such law shall come into operation on the date of its publication in the Gazette or, if it is enacted either in such law or in any other law for the time being in*

[34] Parliament of Canada <http://www.parl.gc.ca/About/House/PracticalGuides/PrivateMembersBusiness/PG4PMB_Pg03-e.htm> (accessed 16 December 2013)

force in Singapore that it shall come into operation on some other date, on that date.
[emphasis added]

140. It does not provide for a mere Resolution/Motion of the Singapore Parliament to have the binding force of law. However, under the Union Meeting Regulations, there is no such distinction. Indeed, all activity of the Union Council is that of a Motion. This is seen from paragraph 14 of the First Schedule where it is provided:

Legislative Activity
14. All motions (including amendments) shall be raised by a proposer…

141. As such, how may the Union Council exercise its legislative power to enact laws when there is no formal distinction of Parliamentary activity (c.f. the Singapore Constitution)? It is in our view, then, that one looks at the ***effect, not the label*** of the Motion to decide if the result has the binding force of law on the Union level. For example, if the Motion is to enact, amend or repeal any provision in the Union Constitution or a Union Regulation, the results of such Motion must therefore be construed as an exercise of the Union Council's legislative power. This is to be contrasted with a Motion that simply declares the Union Council's stand on certain issues (e.g. reduction of elected positions). Such a Motion, although indicative of Union Council's collective opinion, is nevertheless lacking the binding force of law on the Union level.

142. Although it may be contended that looking at the effect instead of the formal label carries with it an inherent uncertainty as to whether the result of a Union Council Motion has the binding force of law on the Union level, we are of the view that **a Motion enacting, amending or repealing any provision in the Union Constitution or a Union Regulation has the binding force of law if passed**. This is supported by the provisions of the Union Constitution (see Article 2.2) and various Union Regulations (see sections 3 of the Finance Regulations, Meeting Regulations, Discipline Regulations etc).

5.4 Articles 3.12, 3.13 and 3.14

143. In light of the clarification above about the Union Council's legislative powers, the next question to be begged is how Articles 3.12, 3.13 and 3.14 of the Union Constitution are to be interpreted in the framework elaborated above at [137]. Article 3.12 states the functions of the Union Council (i.e. its jurisdiction). Article 3.14 states the powers of the Union Council while Article 3.13 grants the Union Council the power of publication. It is, in our view, that *Articles 3.12 to 3.14 are to be read in a manner consistent with the framework stated in [137] (i.e. the power to make laws and scrutinise apportionment of finances exercised in accordance to the Union Constitution)*.

144. For example, Article 3.12(1) states that the Union Council shall "*… be responsible for laying down the policies of the Union, consistent with its objects …*" The word "policies", in light of

the Union Council's legislative powers, shall be taken to mean laws validly enacted by the Union Council in the form of Union Regulations (or provisions of the Union Constitution, subject to valid amendment procedures). Article 3.12(1) *cannot* be taken to mean that the Union Council is entitled to make policy decisions in any manner it desires. It has to crystallise those policy decisions through a Motion amending or creating a new Union Regulation (c.f. a simple Motion of the Union Council) and such crystallised policy decisions, in the form of Union Regulations, must not be inconsistent with the Union Constitution.

145. Similarly, although Article 3.14(2) states that the Union Council has the power to "… *exercise control over the Executive Committee, standing committees and any other committee of the Union …*" and Article 3.14(7) also provides that it has the power to "… *give a decision upon any matter which affects the welfare within the University of any member of the Union but is not provided for in this Constitution …*", these Articles *cannot* be read to mean that the Union Council is therefore able, outside of the framework elaborated above at [137], to exert control or give a decision in without exercising such powers through the Union Regulations. *The nature of the Union Council's legislative powers, coupled with the rule of law principle undergirding the Union Constitution, demands that such "control" or "decisions" be only exercised through laws that have been validly enacted (i.e. Union Regulations)*.

5.5 What is executive power?

146. Having examined what constitutes legislative power, the next issue is to examine what constitutes executive power. The starting point can be found in *A Treatise on Singapore Constitutional Law*[35] by *Prof Thio Li-ann* ("*Thio*"), she stated at pages 369 and 371:

> *[The] parliamentary executive… facilitates the implementation of the policies of the elected government… The Cabinet thus plans a central role in the administration of the state…*

In a similar vein, Article 4.6 of the Union Constitution states:

> *4.6 The Executive Committee shall be responsible for the carrying out the general policies consistent with the objects of the Union as laid down by the Council.*

As executive power is vested in the Cabinet on the national level and the Executive Committee on the Union level, it is therefore not unsuitable to characterise the Union executive power as the ability to make decisions according to the policies laid down by the Union Council. As stated in [144] above, "policies" in the Union Constitution would be construed to mean Union Regulations, hence **the Union executive power entails ability to make decisions according to the Union Regulations (and also the Union Constitution, which is the source of the Union executive power)**.

[35] Thio Li-Ann, *A Treatise on Singapore Constitutional Law* (Singapore: Academy Publishing, 2012)

147. The next question to arise is, if the Union executive power is to make decisions according to the Union regulations, does it entail the ability to make decisions in subject-matters not covered by the Union Regulations? If yes, is such ability unfettered? The starting point can be found in a 17th century *Case of Proclamations*[36]. In it, Sir Edward Coke CJ stated emphatically that "*the King hath no prerogative, but that which the law of the land allows him.*" This placed a limit on the sovereign's executive prerogative in that he may not make new law without the legislature. However, it still does not address whether the executive has certain prerogative powers which, if left uncircumscribed by the legislature, continue to exist and are exercisable.

148. It is therefore apposite to look at the House of Lords case of *Burmah Oil Co (Burma Trading) Ltd v Lord Advocate*[37] ("*Burmah Oil*"). In *Burmah Oil*, the issue facing the court was whether the British government, exercising its wartime prerogative to destroy properties in a land to be lost to the Japanese, gave rise to a claim by the British owners for compensation. It is worth quoting at length Lord Reid's opinion from pages 99 to 100:

> *It is not easy to discover and decide the law regarding the royal prerogative and the consequences of its exercise... The definition of Dicey (Law of the Constitution, 10th ed., p. 424), always quoted with approval: "**The residue of discretionary or arbitrary authority, which at any given time is legally left in the hands of the Crown**," does not take us very far. It is extremely difficult to be precise because in former times there was seldom a clear-cut view of the constitutional position. I think we should beware of looking at older authorities through modern spectacles. We ought not to ignore the many changes in constitutional law and theory which culminated in the Revolution Settlement of 1688-89, and there is practically no authority between that date and 1915. I am no historian but I would suppose that Maitland is as good a guide as any. In his Constitutional History he says: "I do not wish you to think that a definite theory to the effect that while legislative power resides in king and parliament, the so-called executive power is in the king alone, was a guiding theory of mediaeval politics. On the contrary, the line between what the king could do without a parliament, and what he could only do with the aid of parliament, was only drawn very gradually, and it fluctuated from time to time." (p. 196.) and again: "Where is sovereignty? I have before now given my reasons why we should not ask this question when studying the Middle Ages - why we should understand that no answer can be given." (p. 297.) **So it appears to me that we must try to see what the position was after it had become clear that sovereignty resided in the King in Parliament. Any rights thereafter exercised by the King (or the executive) alone must be regarded as a part of sovereignty which Parliament chose to leave in his hands**. There is no doubt that control of the*

[36] (1611) 12 Co Rep 74
[37] [1965] AC 75

armed forces has been left to the prerogative… subject to the power of Parliament to withhold supply and to refuse to continue legislation essential for the maintenance of a standing army: and so also has the waging of war.
[emphasis added]

Viscount Radcliffe, at pages 117 to 118 of *Burmah Oil* stated:

A more just and, I think, a more illuminating conception of what is involved in the prerogative power of the executive is to be found in John Locke's "True End of Civil Government," the 14th chapter of which is entitled "Of Prerogative." I draw on Locke because his work was profoundly influential, not only with the Whigs who dominated so much of English politics for 150 years after 1688 but also with the founders of the American Constitution. I will take liberty to quote a passage from his chapter: "For the legislators not being able to foresee and provide by laws for all that may be useful to the community, the executor of the laws, having the power in his hands, has by the common law of Nature a right to make use of it for the good of the society, in many cases where the municipal law has given no direction, till the legislative can conveniently be assembled to provide for it; nay, many things there are which the law can by no means provide for, and those must necessarily be left to the discretion of him that has the executive power in his hands, to be ordered by him as the public good and advantage shall require; nay 'tis fit that the laws themselves should in some cases give way to the executive power, or rather to this fundamental law of nature and government - viz. that as much as may be all the members of the society are to be preserved. For since many accidents may happen wherein a strict and rigid observance of the laws may do harm as not to pull down an innocent man's house to stop the fire when the next to it is burning; and a man may come sometimes within the reach of the law, which makes no distinction of persons, by an action that may deserve reward and pardon; 'tis fit the ruler should have a power in many cases to mitigate the severity of the law, and to pardon some offenders, since the end of government being the preservation of all as much as may be, even the guilty are to be spared where it can prove no prejudice to the innocent. This power to act according to discretion for the public good, without the prescription of the law and sometimes even against it, is that which is called prerogative ..."

The essence of a prerogative power, if one follows out Locke's thought, is not merely to administer the existing law *- there is no need for any prerogative to execute the law -* ***but to act for the public good, where there is no law, or even to dispense with or override the law where the ultimate preservation of society is in question.***
[emphasis added]

149. In a subsequent English Court of Appeal case of *Laker Airways Ltd v Department of Trade*[38] ("*Laker Airways*"), the court was faced with whether the British government correctly exercised its prerogative to make certain directions regarding airline policies. Lord Denning MR stated at page 705:

> ***The prerogative is a discretionary power exercisable by the executive government for the public good, in certain spheres of governmental activity for which the law has made no provision, such as the war prerogative*** *(of requisitioning property for the defence of the realm),* ***or the treaty prerogative*** *(of making treaties with foreign powers). The law [i.e. the common law] does not interfere with the proper exercise of the discretion by the executive in those situations: but it can set limits by defining the bounds of the activity: and it can intervene if the discretion is exercised improperly or mistakenly. That is a fundamental principle of our constitution.*
>
> *It derives from two of the most respected of our authorities. In 1611 when the King, as the executive government, sought to govern by making proclamations, Sir Edward Coke declared that: "the King hath no prerogative, but that which the law of the land allows him": see the Proclamations Case (1611) 12 Co.Rep. 74 , 76. In 1765 Sir William Blackstone added his authority, Commentaries , vol. I, p. 252: "****For prerogative consisting (as Mr. Locke has well defined it) in the discretionary power of acting for the public good, where the positive laws are silent****, if that discretionary power be abused to the public detriment, such prerogative is exerted in an unconstitutional manner."*
> [emphasis added]

It may also be of interest to read Roskill LJ's quotations from *Attorney-General v. De Keyser's Royal Hotel Ltd*[39] from pages 719 to 721 of *Laker Airways* for a more detailed explanation of the nature of prerogative powers. Reference may also be made to the House of Lords case of *Council of Civil Service Unions v Minister for the Civil Service*[40] ("*GCHQ*") for the speeches made by Lord Fraser at page 398B-C, Lord Scarman at page 407C and Lord Roskill at pages 416F-H and 417A.

150. The last case to be quoted is that of *R. v Secretary of State for the Home Department Ex p. Fire Brigades Union*[41] ("*Fire Brigades Union*"). At page 533, it is stated:

> *In the De Keyser case [1920] A.C. 508, Lord Atkinson said, at p. 540: "****after the statute has been passed, and while it is in force, the thing it empowers the Crown to do can thenceforth only be done by and under the statute, and subject to all the limitations, restrictions and conditions by it imposed,***

[38] [1977] QB 643
[39] [1920] AC 508
[40] [1985] AC 374
[41] [1995] 2 AC 513

> ***however unrestricted the Royal Prerogative may theretofore have been.****" If the statutory provisions were not in force the question would not arise. The executive's powers would not have been abridged or qualified by any law nor would the executive be acting contrary to any law.*
> [emphasis added]

151. Looking through the cases of *Burmah Oil*, *Laker Airways*, *GCHQ* and *Fire Brigades Union*, one may deduce the following principles. Firstly, there exist some executive prerogative powers vested in the executive where statutory law is silent. Such powers include war-making and treaty-making powers on the national level. Secondly, such prerogative powers may be fettered by statutes passed by the legislature. Thirdly, even if such prerogative powers are not fettered by statutes, they must not be exercised in an improper or mistaken manner (or per Lord Diplock in *GCHQ*, exercise of such prerogative powers may be reviewed on grounds of irrationality, illegality or procedural impropriety). Fourthly, it is also to be noted that such prerogative powers may not be expanded to recognise new rights or powers (see *Hanks Australian Constitutional Law: Materials and Commentary*[42] ("*Hanks*") at pages 921 to 924).

152. That being said, such considerations are at best academic on the Union level given that the Union may not declare war (for obvious reasons). Hence, it is salient to note that **there are some prerogative powers of the Union executive (i.e. the Union Executive Committee) that may be exercised where the Union Regulations are silent. These powers could include treaty-making powers (e.g. power to enter into agreements with other student governments). However, the scope of such powers may not be expanded. Also, such powers must not be exercised contrary to the Union Constitution**. These powers are in addition to those described at [146].

5.6 Interaction between the Union's legislative and executive powers

153. It would not be inaccurate to paint the Union governance structure as a hybrid between the responsible government model (i.e. the Westminster model) and the complete separation model (i.e. the American model). This concept was mentioned in a similar vein at [133]. As such, the constitutional model of the Union, although largely based on the Westminster model, its unique features such as members of the executive being elected *qua* members of the executive, it is a *sui generis* model. Thus, judicial guidance on various national constitutional systems may provide salient pointers, but where necessary, there will be departure from such guidance in order to give effect to the unique nature of the Union constitutional model.

154. It would be a mistake to conceive of a boundary between the respective jurisdictions of the Union Council and the Union Executive Committee. This is because, as described in [137], [146] and [152], there is a confluence and overlap between the respective powers of the

[42] Peter Hanks, Patrick Keyzer & Jennifer Clarke, *Hanks Australian Constitutional Law: Materials and Commentary*, 9th ed (Chatswood, N.S.W: LexisNexis Butterworths, 2013)

Union Council and Union Executive Committee. Hence, it would be more accurate to describe this part of the question as examining the interactions between the respective powers of the Union Council and Union Executive Committee.

155. The first interaction between the respective powers is stated in [146] where *the Union Executive Committee may only make decisions in accordance to the Union Regulations (as well as the Union Constitution)*. This essentially states that executive power can be expressly fettered by the statutory provisions in the form of Union Regulations (which the Union Council is empowered to enact). If the Union Executive Committee makes decisions contrary to express provisions of the Union Regulations, such decisions are made *ultra vires* and thus void.

156. The second interaction is partly derived from the first. Although the Union Executive Committee is not vested with the Union's legislative powers, it does not mean that it does not have *any* power to legislate. Indeed, it would be contrary to proper administration of the Union if the executive arm is not given any powers to regulate behaviour. Instead, like the executive branch of national systems, *the Union Executive Committee has the power to promulgate rules as long as such promulgations are allowed by the Union Regulations (or the Union Constitution such as Article 4.7(4))*. Such rules would be like subsidiary legislation in that they will always been subordinate to the Union Regulations (and the Union Constitution). Any rules promulgated by the Union Executive Committee contrary to the Union Regulations or Union Constitutions will *ipso facto* be void.

157. This brings us to the third, and possibly most important, interaction – does the Union Executive Committee have the prerogative power to make rules or decisions in areas that the Union Regulations are silent on? As stated in [152], the answer must be yes. However, as stated also, the scope of such powers may not be expanded and they must not be exercised contrary to the Union Constitution.

158. That being said, although the scope of such powers may not be expanded, it does not mean that such powers have a very small scope to begin with. On the contrary, due to the *sui generis* nature of the Union constitutional model and the fact that the Union Executive Committee and Union Council members are elected differently, the Union Executive Committee effectively has quasi-presidential powers like those in a presidential system. This is because the Union Executive Committee as a whole, in their capacities as Executive Committee Representatives, can be said to have a very strong Union-wide mandate, second only to the collective whole of the Union Council. This means that when the Union Council is silent (through the lack of Union Regulations) on a certain area, the Union Executive Committee has the mandate to promulgate rules and make decisions in such areas.

159. Hence, it is safe to say that the scope of prerogative powers that the Union Executive Committee have is effectively very wide, especially when it is on Union-wide matters that the Union Council is silent on. *Where the Union Council has omitted to expressly enact Union Regulations, the Union Executive has the prerogative power to make rules and decisions in such areas, provided that they are not contrary to the Union Constitution*.

5.7 <u>Sovereignty of Constituent Clubs and Status of Union Executive Committee</u>

160. It is also apposite, at this point, to add our views to certain areas. The Union has long been vexed over the concept of the sovereignty of Constituent Clubs and the status of the Union Executive Committee vis-à-vis the Constituent Clubs. The former entails the question of the degree to which the Union Executive Committee or Union Council may interfere into the affairs of Constituent Clubs. The latter pertains to whether the Union Executive Committee is a first-among-equals (where equals = Constituent Clubs) or the Constituent Clubs are subordinate to the Union Executive Committee. It is not the job of the AC to state its views on what seem to be political issues. That being said, however, we would just state how the legal principles enunciated above should be applied for the two scenarios.

161. For the issue of sovereignty of Constituent Clubs, as stated above in [116] and [126], the quasi-federal Union structure requires the submission of Union entities such as Constituent Clubs to greater Union-wide laws. This means that there is no legal basis why a non-Union Council law, or a decision taken pursuant to that law, should not be found to be void if it is inconsistent with a Union Council law, or a decision taken pursuant to the Union Council law. A non-Union Council law cannot be deemed valid, despite being inconsistent with a Union Council law, just because of the sovereignty of Constituent Clubs. That sovereignty refers to the ability of Constituent Clubs to make laws and decisions on their own. However, when such laws and decisions are inconsistent with wider Union laws, under the paramountcy doctrine, they are necessary void to the extent of inconsistency.

162. For the issue of the status of the Union Executive Committee vis-à-vis the Constituent Clubs, we find it sufficient to reiterate that the Union Executive Committee will exercise its powers in accordance to the Union Constitution and in accordance to the Union Regulations on subject matters that are expressly legislated on by the Union Council. Hence, when the decision of the Union Executive Committee conflicts with that of a Constituent Club, the decision of the Union Executive Committee shall prevail unless the Union Executive Committee's decision is found to be unconstitutional or *ultra vires* the Union Regulations. Also, the quasi-presidential nature of the Union Executive Committee gives it the ability to make rules and decisions on Union-wide matters where the Union Regulations are silent on. There is little reason why its rules and decisions on such matters should not prevail over inconsistent ones from Constituent Clubs.

6 Question 4 – Members' Interests Issue

163. This question essentially asks this Panel to determine whether section 16 of the Finance Regulations ("the offending section") contravenes Articles 1.6(1) and 1.6(3) of the Union Constitution. If the answer is in the affirmative, then section 16 is unconstitutional and thus void and not legally enforceable. To answer this question, a few steps have to be taken. First, the definition and scope of Articles 1.6(1) and 1.6(3) will be examined and crystallised. Second, the effect of the offending section will be examined so as to determine whether it is unconstitutional.

6.1 Presumption of Constitutionality

164. One preliminary point to be noted is that the courts, in finding the constitutionality of statutory provisions or the exercise power of under them, give effect to the presumption of constitutionality. *Thio* explained this presumption, in the context of equality under Article 12 of the Singapore Constitution, at pages 733 to 734:

> *… This presumption places the onus upon the person alleging unequal protection to provide relevant materials to show that a statutory provision or the exercise of power under it is "arbitrary and unsupportable".*
>
> *The correct approach towards this presumption was that adopted by Wee CJ in Lee keng Guan v Public Prosecutor, drawing from Ram Krishna Dalmia v Justice Tendolkar. It was* ***to be presumed that Parliament knows best the needs of its people and that it legislates to address the problems that experience makes manifest****, such that legislative differentiations are based on adequate grounds.*
>
> *To sustain this presumption, the court could consider matters of common knowledge, common report, the history of the time and the state of facts considered to exist at the time of legislation. Thus it was not helpful "unless the law is plainly arbitrary on its face" to postulate hypothetical examples of arbitrariness in the abstract to rebut the presumption. This is because another could postulate examples where the law did not operate arbitrarily.* [emphasis added]

165. In the case of *Ramalingam Ravinthran v Attorney-General*[43] ("*Ramalingam*"), the SGCA, from [44] to [46], stated the presumption of constitutionality in the context of an exercise of power:

> *In view of the co-equal status of the two aforesaid constitutional powers, the separation of powers doctrine requires the courts not to interfere with the*

[43] [2012] 2 SLR 49

exercise of the prosecutorial discretion unless it has been exercised unlawfully… In view of his high office, the courts should proceed on the basis that when the Attorney-General initiates a prosecution against an offender (regardless of whether he was acting alone or in concert with other offenders), the Attorney-General does so in accordance with the law. ***In other words, the courts should presume that the Attorney-General's prosecutorial decisions are constitutional or lawful until they are shown to be otherwise****.*

This presumption would be consistent with the constitutional standing of the office of Attorney-General. In Yong Vui Kong v Attorney-General [2011] 2 SLR 1189 ("Yong Vui Kong (Clemency)"), one of the issues raised before this court was whether the constitutional clemency process was justiciable. In discussing this issue, this court considered the possibility of unconscious bias or inadvertent errors on the part of, inter alios, the Attorney-General in submitting his opinion to the Cabinet under Art 22P(2) of the Constitution vis-à-vis an offender who had been sentenced to death. This court (per Chan CJ) observed at [139] of Yong Vui Kong (Clemency):

> *Given the high constitutional offices held by these individuals [ie, the persons directly involved in the making of a clemency decision, namely, the trial judge, the presiding judge of the appellate court (if there is an appeal), the Attorney-General, the members of the Cabinet and the President], no court is justified in hypothesising that the trial judge and (where there is an appeal) the presiding judge of the appellate court may write biased or inaccurate reports, or that the Attorney-General may give a spiteful opinion on the offender's case, or that the Cabinet members and/or the President may be unconsciously prejudiced against the offender or may not give his case full and fair consideration. In my view, until the contrary is shown, the courts, instead of proceeding on such fanciful hypotheses, should proceed on the basis of presumptive legality encapsulated in the maxim 'omnia praesumuntur rite esse acta' - all things are presumed to have been done rightly and regularly, ie, in conformity with the law. [emphasis added]*

Although these observations were not made in the context of prosecutorial decisions, it is our view that they provide additional support for applying a presumption of constitutionality in the prosecutorial context. Given the constitutional status of the Attorney-General, the courts should presume that he acts in the public interest as the Public Prosecutor, and that he acts in accordance with the law when exercising his prosecutorial power. This approach should not be regarded as the courts deferring to the Prosecution. ***It is, instead, really an application of the established principle that the acts of high officials of state should be accorded a presumption of legality or***

regularity, especially where such acts are carried out in the exercise of constitutional powers*.*
[emphasis added]

166. With the greatest respect to the learned judges in *Ramalingam* and the cases cited in *Thio*, it is our view that the presumption of constitutionality be calibrated in the context of the Union. It is our view that having an overly-strong presumption of constitutionality on statutory provisions or powers exercised will result in such provisions or powers being struck down for unconstitutionality in the rarest of cases. Indeed, with an overly-strong presumption, Union officers and entities will be able to hide behind the shield of presumption of constitutionality and leave the Union complainant having to fight an uphill battle in the form of the presumption.

167. It is this Panel's view that the presumption of constitutionality should be retained but it should not be a strong presumption. Indeed, future Panels will do well to be slow in letting it morph into an unruly horse[44] that presents a Goliath future Union complainants have to face. A calibrated approach, with the balance tilted towards the complainant, will do well to ensure that the rule of law is upheld under the Union constitutional model instead of rendering it illusory under an overly-strong presumption of constitutionality.

168. The last note about this preliminary point is that although *Thio* stated the need for the complainant to adduce the relevant materials, given that this Panel is exercising its powers under Article 5.8(1) to interpret the Union Constitution, there is no need for the requestor of such interpretation to do so for it is not a "dispute". The standing requirement, as stated in [84], is a rather low one (i.e. the requestor must be a Union member). On the facts of this case, this standing requirement is fulfilled and thus the Panel will proceed on to determine question 4.

6.2 <u>Definition and Scope of Articles 1.6(1) and 1.6(3)</u>

169. It is salient to set out the exact provisions of Article 1.6(1) and 1.6(3) here. They can be found in Part I of the Union Constitution:

> *Objects*
> *1.6 The objects of the Union are:*
> *(1) To promote and safeguard the interests of the members of Union within the University.*
> *…*
> *(3) To promote the welfare of members of the Union within the University.*

[44] This is a reference to Burrough J's metaphor in *Richardson v Mellish* (1824) 2 Bing. 252, albeit that it was used in a public policy context.

From here, one may see that Article 1.6(1) is concerned about the interests of Union members ("the Interests Object Clause") while Article 1.6(3) is concerned about the welfare of Union members ("the Welfare Object Clause").

170. Looking at the Interests Object Clause, the most important determination is the definition of "*interests of the members of the Union*" under it. Although there are scant judicial interpretations of the word "interest", reference may be taken to judicial interpretations of "public interest" with such interpretations adapted *mutatis mutandis* to the Union context.

171. The first source can be found in *Stroud's Judicial Dictionary*[45] ("*Stroud's*") at page 2370:

> *PUBLIC INTEREST. A matter of public or general interest "does not mean that which is interesting as gratifying curiosity or a love of information or amusement; but* ***that in which a class of the community have a pecuniary interest, or some interest by which their legal rights or liabilities are affected****" (per Campbell C.J., R. v Bedfordshire, 24 L.J.Q.B. 84)*
> [emphasis added]

172. In *Black's Law Dictionary*[46] ("*Black's*"), the definition of "public interest" is stated at page 1350 to be:

> *public interest. (16c) 1. The general welfare of the public that* ***warrants recognition and protection****. 2.* ***Something in which the public as a whole has a stake****; esp., an interest that justifies governmental regulation.*
> [emphasis added]

173. Sir Megarry V-C stated in *British Steel Corporation v Granada Television Ltd*[47] at page 1113:

> *Throughout this case, as well as other cases, there is always the difficulty of the protean meaning of the phrase "public interest" when used by itself. I use it, of course, not in the sense of something which catches the interest of the public out of curiosity or amusement or astonishment, but in the sense of* ***something which is of serious concern and benefit to the public****.*
> [emphasis added]

174. In the English Court of Appeal case of *Reynolds v Times Newspapers Ltd*[48], then-Lord Bingham CJ stated at page 909:

> *We do not for an instant doubt that the common convenience and welfare of a modern plural democracy such as ours are best served by an ample flow of information to the public concerning, and by vigorous public discussion of,*

[45] *Stroud's Judicial Dictionary*, 8th ed, vol 3 (London, UK: Sweet & Maxwell, 2012)
[46] Bryan A. Garner, ed, *Black's Law Dictionary*, 9th ed (USA: West Publishing Co., 2009)
[47] [1981] AC 1096
[48] [1998] 3 WLR 862

> *matters of public interest to the community. By that we mean* ***matters relating to the public life of the community and those who take part in it****, including within the expression 'public life' activities such as the conduct of government and political life, elections… and public administration, but we use the expression more widely than that,* ***to embrace matters such as (for instance) the governance of public bodies, institutions and companies which give rise to a public interest in disclosure****, but excluding matters which are personal and private, such that there is no public interest in their disclosure.*
> [emphasis added]

175. Also, in *D v National Society for the Prevention of Cruelty to Children*[49] ("*NSPCC*"), Lord Hailsham stated at page 230:

> *The categories of public interest are not closed, and must alter from time to time whether by restriction or extension as social conditions and social legislation develop.*

From the above sources, we may deduce the following. *Firstly, public interest is something that concerns the public, or at least a class of the public. Secondly, such interests include, but are not limited to, legal interests, pecuniary interests, governance of public bodies, matters affecting public life of the community and matters that require attention and protection (by legislation if necessary). Thirdly, the categories of public interest are not static. They may change from time to time as social conditions require*.

176. Drawing back to the Union context, the Union members' interests under Interests Object Clause has a similar content to the extent that such content are relevant on the Union context. We agree with Lord Hailsham's statement that the categories of public interests are not static. Hence, it would be unwise and foolhardy to define, exhaustively, categories of the Union members' interests. As we would elaborate later, since the offending section involves matters relating to financial governance of Union entities, it is *prima facie* a matter of Union members' interests.

177. For the Welfare Object Clause, there is little guidance for the definition of "welfare", save for a snippet from *Black's* at page 1732:

> *welfare. (14c) 1. Well-being in any respect; prosperity.*
> *general welfare. (17c) The public's health, peace, morals and safety.*
> *public welfare. (16c) A society's well-being in matters of health, safety, order, morality, economics, and politics.*

Drawing back to the Union context, the Union members' welfare would therefore include matters concerning Union members' well-being, such as academic welfare, tangible welfare

[49] [1978] 1 AC 171

in the form of free giveaways etc. As with the word "interests", we are of the opinion that it would not be suitable to exhaustively define the categories of Union members' welfare.

6.2.1 Overlap between "interests" and "welfare"

178. Another interesting point that arises from these examinations is whether there is an overlap between the Interests and Welfare Object Clauses. *Given the highly similar nature of "interests" and "welfare", we are of the opinion that "welfare" in Article 1.6(3) is subsumed under "interests" in Article 1.6(1)*, but they are not one and the same. Interests include, but are not limited to, welfare. In other words, when there is a contravention of Welfare Object Clause, there is *ipso facto* a contravention of the Interests Object Clause as well. However, the converse may not be true. For example, there may be situations where the interests of Union members are affected, such as the lack of transparent elections, but these are *prima facie* not matters of Union members' welfare.

179. Further support for the overlap is seen from the new Vision and Mission of the Union:

> *Our Vision*
> *To be a representative and inclusive institution advocating NUS students'* ***interests****.*
>
> *Our Mission*
> *To promote and safeguard the* ***interests*** *of full-time NUS undergraduates through active communication and engagement.*
> *To achieve fair representation while respecting differences among members of the Union.*
> [emphasis added]

The current object clauses under Article 1.6 were one and the same with the previous mission statement of the Union. However, the 34th Union Council passed a motion to change the vision and mission statements. These statements, although merely passed in a motion of the Council, were not given constitutional changes as the requisite amendment procedures were not followed. That being said, the lack of legal effect of these statements does not preclude such statements from having persuasive effect before this Panel.

180. Comparing the current object clauses under Article 1.6 and the new vision and mission statement, one of the biggest difference is that the word 'welfare' has been removed but the word 'interests' has been retained. In fact, the word 'interests' is now given greater prominence as it is present in both the vision *and* mission. This, in this Panel's view, is indicative of Union members' welfare being subsumed as a part of Union members' interests. No doubt, some may contend that legislative intent behind a change is not reflective of the legislative intent *before* the change. However, bearing in mind that categories of interests and welfare can change with time, it is therefore our view that the meaning behind both the

Interests and Welfare Objects Clauses should change accordingly such that welfare is subsumed under interests.

181. Mr Koh Zhixun brought up another point in that welfare cannot be subsumed under interests because the Interests Object Clause requires interests to be "promote[d] and safeguard[ed]" while the Welfare Object Clause only requires welfare to be "promote[d]". He suggested that the lack of the word "safeguard" under the Welfare Object Clause means that welfare is not subsumed under interests but rather they are different species of the same genus.

182. Before we can consider Mr Koh's words, it is apposite to look at the meanings behind the words "promote" and "safeguard". *Stroud's*, in the context of a legislative provision "safeguard and promote the welfare of children", stated at page 3226:

> *"…I should add, too, that promoting the welfare of a child is a different concept from safeguarding his welfare…" (R. (on the application of TS) v Secretary of State for the Home Department [2010] EWHC 2614 (Admin).)*

183. We agree with the statement of the learned judge as quoted in *Stroud's*. *The idea of "promote" suggests the notion of advancement while the idea of "safeguard" suggests the notion of prevention of derogation.* While some may contend that the lack of advancement is in essence derogation (and vice versa), we disagree with this contention. It may be one thing to say that the number of welfare packs did not increase but it is another thing altogether to say that it has decreased.

184. Turning back to Mr Koh's point, his reading of the Welfare Object Clause means that the Union is to only advance the welfare of its members but never to prevent the derogation of such welfare. Such a situation, even if it does not contravene the Welfare Object Clause, may (but not always) contravene the Interests Object Clause if the omission to prevent derogation of welfare is sufficient to derogate the Union members' interests.

185. To prevent a confusing double standard to be applied in considering contraventions of the Welfare and Interests Object Clauses, we are of the opinion that subsuming welfare under interests enables the Union, in making decisions and enacting Union Regulations, to consider the Union members' interests holistically instead of having to grapple with an artificial bifurcation. Hence, we are thankful for Mr Koh's submission on this point but we would respectfully reject his submission. Instead, as stated earlier, welfare is subsumed under interests, although they are not one and the same.

6.3 Effect of Offending Section

186. The offending section is stated as below:

16. The budget of the Union shall refer to the budgets of the Executive Committee and any other committee of the Union.

(1) However, for the purposes of the allocation of subscription fees, it shall also refer to the budgets of the individual Constituent Clubs to the extent that the allocation of subscription fees affects these Clubs' budgets.

Under section 15 of the Finance Regulations, the "*budget of the Union… shall be considered and endorsed by the Council…*" on an annual basis during the second Council Meeting of the Incoming Union Council. Read together with the offending section, this means that the Union Council, in considering and endorsing the budget of the Union, only considers and endorses the Union Executive Committee's budget. The Constituent Clubs' budgets, by virtue of the offending section, are not considered and endorsed during this annual process.

187. Before considering the effects of the offending section, it is apposite to give an overview of the annual financial consideration and endorsement processes of the Union Council under the Finance Regulations. Essentially, the process is a two-step process. The first step, as stated in section 13, requires the Union Council to consider and endorse the allocation of subscription fees. This is the step where the Union Council will decide the quantum of the lump sum to be given to each of the entities stated in section 14 for the term.

188. The second step, as per section 15, requires the Union Council to consider and endorse how that lump sum is going to be spent by the entities. The effect of the offending section is to remove Constituent Clubs from having the spending of their respective lump sums considered and endorsed by the Union Council. Section 16(1) only allows the Union Council to consider and endorse the Constituent Clubs' budgets to the extent of the *modification* of the allocation of subscription fees.

189. For example, if Faculty Clubs are originally given $8 by each Union member, the spending of this $8 is not required to be considered and endorsed by the Union Council. If the sum allocated is raised to $9 the next term, the Union Council is then entitled to consider and endorse the spending of the extent of the modification (i.e. $9 - $8 = $1). The following year, however, if the subscription fees are remain status quo, the entire $9 will be not be considered or endorsed by the Union Council since there was no modification of allocation of subscription fees that term.

190. As stated earlier at [176], the offending section involves matters relating to financial governance of Union entities (the Union Executive Committee as well as Constituent Clubs). Per the principles stated in [175], such matters concern the general Union membership and include pecuniary interest (in the form of subscription fees) and governance of Union entities. Hence, the offending section does involve matters falling under "interests", therefore falling under the Interests Object Clause.

191. For the offending section to be unconstitutional under the Interest Object Clause, its effect must therefore *not* promote nor safeguard the Union members' interests. As such, the crux

is whether the differing degree of scrutiny for the sum allocated to the Union Executive Committee and the Constituent Clubs promotes and safeguards the Union members' interests. Given that it is a conjunctive provision, it is sufficient for the offending section to fail to promote *or* safeguard in order for it to be unconstitutional. In our view, the offending section fails to satisfy both.

192. The offending section, by restricting the consideration and endorsement of the Union budget to include only the Union Executive Committee's budget, creates a scrutiny process with differing levels of scrutiny. For Constituent Clubs, the offending section, together with section 13, only creates scrutiny to the allocation of fees to each Union entity. For the Union Executive Committee, however, the offending section requires scrutiny not only as to allocation of fees but also how that allocation is to be spent.

193. Are the differing levels of scrutiny something that promotes or safeguards the interests of Union members then? We are of the view that such tiered scrutiny not only fails to promote the interests of Union members but also fails to safeguard them. By effectively exempting the budgets of the Constituent Clubs from scrutiny by the Union Council, the offending section creates a lacuna in the financial governance and accountability framework of the Union. Constituent Clubs are free to spend, as they deem fit, the sum of money they are allocated without any oversight from other organs of the Union (e.g. the Union Council). This derogates the interests of Union members when the offending section, under the current allocation framework, removes such oversight for two-thirds (i.e. $16) of the subscription fees they pay (i.e. $24).

194. It was initially contended that Constituent Clubs should retain flexibility in allocating their individual budgets for each Constituent Club's unique circumstances. By allowing the Union Council to have oversight over each Constituent Club's budget, it was contended that it will not lead to an informed decision being made by the Union Council since they would not be privy to the deliberations and repercussions of each Constituent Club's budgetary deliberations.

195. As much as such contentions are not without merit, we are of the opinion that such contentions are as, if not more, applicable to the Union Executive Committee. Just as each Constituent Club is responsible for their members' interests, the Union Executive Committee is also responsible for the entire Union membership's interests. As there may be unique circumstances faced by the Union Executive Committee that the Union Council, largely made up of representatives from each Constituent Club's Management Committee, are not privy to, such contentions would necessarily mean that the Union Executive Committee's budget should not be scrutinised by the Union Council.

196. In addition, it is to be noted that for the Union Executive Committee, its executive power of spending is restricted and scrutinised by the Union Council exercising its legislative powers. For Constituent Clubs, the budgets are prepared by the individual Management Committees in their executive capacities but they do not have equivalent legislative oversight on each Constituent Club's level. This means that each Constituent Club's Management Committee is

free to draw up a budget without sufficient oversight from other student representatives of their respective Constituent Club. Such a concern, alone, would require the Union Council to step in and exercise its legislative role to scrutinise each Constituent Club's budget.

197. It is also to be noted that under the current financial governance system, each Constituent Club is not required to submit its annual Statement of Accounts ("SOA") or Annual General Meeting ("AGM") report to the Union Council. The only Union entity that does so is the Union Executive Committee. We find that this is an additional factor as to why the offending section fails to safeguard Union members' interests. Not only is there a lack of legislative scrutiny over how each allocated sum is going to be spent but its actual spending is not publicised for ordinary Union members' scrutiny. Scrutiny in the form of allocation of subscription fees is insufficient.

198. Aggregating the reasons stated above, the offending section, by exempting Constituent Clubs' budgets from Union Council consideration and endorsement, has created a lacuna in the Union financial governance and accountability framework. Even if the share of subscription fees allocated to Constituent Clubs drop to an infinitesimally small proportion from its current two-thirds, each Union member deserves to have oversight and scrutiny over how that share is being spent. Such oversight should, in the absence of equivalent legislative bodies in each Constituent Club, be exercised by the Union Council. **Hence, we are of the view that the offending section has failed to safeguard the interests of Union members'. Accordingly, it is inconsistent with the Interests Object Clause. As per Article 2.1 of the Union Constitution, the offending section is thus void to the extent of the inconsistency and unenforceable**.

199. As mentioned above (at [178]), the concept of "welfare" under the Welfare Object Clause is subsumed under that of "interests" under the Interests Object Clause. Hence, we feel there is little need to discuss whether the offending section is inconsistent with the Welfare Object Clause, except to state for future Panels' reference that financial governance and accountability is an issue that is part of Union members' interests but not part of Union members' welfare. That, however, will not affect the finding that the offending section is inconsistent with Article 1.6(1) of the Union Constitution.

6.4 Additional Points

200. There are some additional points that we wish to add. Firstly, there is a fear that finding the offending section to be unconstitutional and void would introduce much uncertainty into the system given that budgets have been planned for this Academic Year. Hence, should the unconstitutionality of the offending section be given retrospective or prospective effect? We now turn to Lord Nicholls' quote in the case of *Re Spectrum Plus*[50] ("*Re Spectrum Plus*") at pages 690 and 699:

[50] [2005] 2 AC 680

> *People generally conduct their affairs on the basis of what they understand the law to be.* ***This "retrospective" effect of a change in the law of this nature can therefore have disruptive and seemingly unfair consequences****. "Prospective overruling", sometimes described as "non-retroactive overruling", is a judicial tool fashioned to mitigate these adverse consequences. It is a shorthand description for court rulings on points of law which, to greater or lesser extent, are designed not to have the normal retrospective effect of judicial decisions…*
>
> *…Instances where this power has been used in courts elsewhere suggest there could be circumstances in this country where prospective overruling would be necessary to serve the underlying objective of the courts of this country: to administer justice fairly and in accordance with the law. There could be cases where a decision on an issue of law, whether common law or statute law, was unavoidable but the decision would have* ***such gravely unfair and disruptive consequences for past transactions or happenings*** *that this House would be compelled to depart from the normal principles relating to the retrospective and prospective effect of court decisions.* [emphasis added]

201. We agree with the learned Law Lord's statement on the underlying principle behind prospective ruling. On the facts of *Re Spectrum Plus*, the court declined to prospectively overrule as the prior decision relied on by the banking community was a first instance decision and the consequences of retrospective overruling are not so "unfair and disruptive" as to merit prospective overruling.

202. However, in our view, a retrospective ruling of the unconstitutionality would bring about consequences that are disruptive and unfair because the budgets of Constituent Clubs would have to be scrutinised by the Union Council in the middle of the term. Given that some money has been spent while other initiatives are planned on the basis of the budgets, any changes arising from the scrutiny may result in disruptive consequences to each Constituent Club. Such outcomes are unfair, to say the least, if retrospective effect is given to the offending section's unconstitutionality. **As such, we are of the view that the unconstitutionality of the offending section should be given prospective effect such that it is unconstitutional only from the date of the decision of this Panel**.

203. Another point to note is that it is not this Panel's role to define what is an acceptable allocation of fees among Union entities and how each of them should spend their allocated fees in their respective budgets. That is an issue that we feel should be determined through political means. However, that does not mean that there are some basic standards to adhere to in the Union financial governance and accountability framework. **There should be legislative oversight as to how much fees to allocate to each Union entity, how the respective executive bodies plan to spend their budgets and that each spending should be accounted to Union members in the form of publicising to all Union members in the form of SOAs and/or AGM reports**.

6.5 Effect of unconstitutionality on other provisions

204. As to the effect of the unconstitutionality, we would like to state that the offending section has been rendered void and thus unenforceable. The onus then falls onto the legislature (i.e. the Union Council) as to whether it wants to enact a different provision that is consistent with the Union Constitution. Otherwise, in the absence of a new legislative provision, the unconstitutionality of the offending section means that the Finance Regulations will be silent on the meaning of the "budget of the Union" under section 15 of the Finance Regulations.

205. It is up to a future Panel of the AC to rule, should a dispute or interpretation request arise, in the future to the meaning. We would not definitively state our views as to the meaning of the "budget of the Union" here except that it should not deviate from the principles discussed above with regard to the need for legislative oversight on the budgets of all Union entities.

7 Questions 5 and 6 – Legislative Limits Issue

206. We have decided to answer questions 5 and 6 together because of the similar focus they have. In essence, the focus is on the rights and obligations (and the limits of both) of the different stakeholders in different stages of the financial consideration and endorsement process (see [187] to [189] for a detailed explanation). To answer these two questions, we will first look at the general principles detailing the legal limits on the exercise of powers before going down into the detailed rights and obligations of the different stakeholders in the financial consideration and endorsement process.

7.1 Limits to exercise of powers

207. As alluded to above (at [57]), that the AC has the right to supervise the legality of decisions made by virtue of its judicial powers on the Union level. We will now elaborate more on this point as this is an important principle that needs to be clarified before answering the questions substantively.

208. The starting point can be found in a judicial proclamation in the seminal case of *Chng Suan Tze v Minister of Home Affairs*[51] ("*Chng Suan Tze*") at [86]:

> *In our view, the notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power.*

This principle, known as the Chng Suan Tze principle, was subsequently affirmed in the case of *Law Society of Singapore v Tan Guat Neo Phyllis*[52] ("*Phyllis Tan*") and *Yong Vui Kong v Attorney-General*[53] ("*Yong Vui Kong (Clemency)*") at [78].

209. This approach to judicial review of decisions followed the decision in *GCHQ* where the House of Lords declined to follow the categorical approach where the *type* of power exercised is crucial to whether it is reviewable. Instead, all powers exercised are reviewable, but to varying degrees. For example, for cases involving national security, judicial review of the *merits* of that decision is precluded. Instead, the judiciary will just review whether considerations of national security were involved (see *Chng Suan Tze* at [89]).

210. In *Chng Suan Tze*, it explicitly allowed review of a statutory power. In *Phyllis Tan*, it was extended to include constitutional powers (see *Yong Vui Kong (Clemency)* at [79]). In *Yong Vui Kong (Clemency)*, judicial review was also extended to the President's exercise of clemency powers under Article 22P of the Singapore Constitution (see *Yong Vui Kong (Clemency)* at [80]). Given that these are cases involving the powers granted by the Singapore Constitution, the highest in the lands, *we see little reason as to why powers*

[51] [1988] 2 SLR(R) 525
[52] [2008] 2 SLR(R) 239
[53] [2011] 2 SLR 1189

exercised under the Union Constitution or prerogative powers exercised by the Union Executive Committee should be immune from judicial review by the AC.

211. The grounds for judicial review are, in our view, stated succinctly in *Chng Suan Tze* at [119]:

> *In the circumstances, it is in our judgment clear that the scope of review [under the Internal Security Act is limited to]* ***normal judicial review principles of "illegality, irrationality or procedural impropriety"*** *(the GCHQ case ([89] supra)). We would also observe that by "irrationality", Lord Diplock in the GCHQ case meant "what can by now be succinctly referred to as* ***Wednesbury unreasonableness*** *(Associated Provincial Picture Houses Limited v Wednesbury Corp [1948] 1 KB 223)". Lord Diplock had there described* ***an "irrational decision" as one so "outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it"****.* [emphasis added]

We agree with the learned judges in *Chng Suan Tze*. Additionally, exercise of powers may be judicially reviewed on whether a jurisdictional or precedent fact is involved (see *Chng Suan Tze* at [108] and [110]). For example, if a power may only be exercised upon event X, it is up to the entity exercising that power to prove to the judicial body that event X occurred.

7.2 Reviewability of Union Council's decisions on financial consideration and endorsement process

212. The next tricky issue is whether the Union Council's decisions taken under sections 13 and 15 in considering and endorsing can be judicially reviewed. On one hand, one may characterise the exercise of such powers as within the inherent powers of the Union Council, thus it is not reviewable on the *Chng Suan Tze* grounds. On the other hand, one may also characterise such decisions of the Union Council as exercising its powers conferred by the Finance Regulations or the Union Constitution (as part of the Union's "legislative power"), thus it is an exercise of legislatively-granted or constitutionally-granted powers respectively.

213. To answer this issue, we would like to state the following. Firstly, as stated at [137] above, the Union Council's legislative powers, as granted by the Union Constitution, includes the power to scrutinise apportionment of finances. Hence, such a power is granted, as part of legislative power, by the Union Constitution. Secondly, sections 13 and 15 of the Finance Regulations also grant the Union Council powers to *specifically* consider and endorse the allocation of subscription fees and budgets of Union entities respectively.

214. Without offering our opinions as to whether there is a difference between the power granted by the Union Constitution to scrutinise apportionment of finances and the powers granted by the Finance Regulations to consider and endorse the allocation of subscription fees and budgets of Union entities, it is sufficient to state that **decisions exercised under**

both sets of powers are reviewable on the *Chng Suan Tze* grounds of illegality, irrationality and procedural impropriety. Also, as stated at [137] above, such decisions may only be exercised in accordance with the Union Constitution. This is only right given the supremacy of the Union Constitution.

215. It bears little repeating that judicial review is *not about reviewing the merits* of a decision exercised by other Union entities (in this case, the Union Council). The following statements from *Yong Vui Kong (Clemency)* at [75] are apposite to illustrate this point (in the context of clemency power):

> *Given that the clemency power is a constitutional power vested exclusively in the Executive, **it is not justiciable on the merits**, firstly, on the basis of the doctrine of separation of powers … and, secondly, on the basis of established administrative law principles ... In our local context, this entails that, assuming the clemency power is exercised in accordance with law, **the merits of the clemency decision made will fall outside the purview of our courts**. Our courts cannot look into whether a clemency decision is wise or foolish, harsh or kind; neither can they substitute their own decision for the clemency decision made by the President simply because they disagree with the President's view on the matter…*
> [emphasis added]

7.3 Rights and obligations of other Union entities

216. Under the Finance Regulations, the other Union entities (i.e. the Union Executive Committee and Constituent Clubs) do not have the power to make any decisions with regard to the consideration and endorsement of allocation of subscription fees and budgets except to the extent of their representatives on the Union Council making the decision *qua* voting representative of the Union Council. However, that being said, given that financial accountability and governance affects the interests of Union members (see above at [190]), there are some rights possessed by and obligations on the Union entities.

217. With regard to rights possessed, we are of the view that **all Union entities have a legitimate and reasonable expectation that their proposals for allocation of subscription fees and their respective budgets will be considered fairly by the Union Council**. They also possess **a right to make counter proposals and make constructive criticisms as part of the Union political process**. Any breach of such legitimate and reasonable expectation would naturally allow a review on one of the *Chng Suan Tze* grounds elaborated above.

218. With regard to obligations, any Union entity wishing to have allocated a portion of the Union subscription fees and proposing a budget from using those allocated fees will, as stated at [203] above, have **an obligation to subject its budget to legislative oversight as well as accounted to Union members in the form of publicising, to all Union members, their SOAs**

and/or AGM reports. These are, in our view, the basic baselines that all Union entities have to follow in the Union financial consideration and endorsement process.

8 Summary

In summary, these are our views on the various questions raised by the Requestor:

8.1 Question 1

219. Under the Union Constitution, the AC has the power, as part of its judicial power, to pronounce on the constitutionality of the laws of the Union. For disciplinary appeals under Article 5.7 of the Union Constitution, only the Union member who has been disciplined by the Union Council may appeal to the AC.

220. For constitutional interpretations under Article 5.6, any Union member may raise an issue of constitutional interpretation to the AC under Article 5.6 of the Union Constitution and the provisions that may be interpreted by the AC include not only the Union Constitution but also the laws of the Union as defined by Article 1.2.

221. For disputes under Article 5.5, it must involve two opposing parties or that an interpretation of written sources of law is sought by any Union member. The meaning of Constituent/Associate Body shall be taken to mean the MCs, JCRCs or CSCs, as the case may be. For the phrase "its member(s)", it shall be taken, clear and unambiguously, the members of that Constituent/Associate Body in question. For "the Union", it means both the Union Council and the Union Executive Committee, in a several but not joint manner.

8.2 Question 2

222. Firstly, the context of Article 2.1 of the Union Constitution requires a wider meaning to be given to the word "law", to one that includes laws enacted by the Executive Committee, Constituent Clubs and Associate Bodies. Secondly, the principle of constitutional supremacy enshrined in Article 2.1 of the Union Constitution applies equally to laws enacted both pre-Commencement Date and post-Commencement Date. Thirdly, where a validly-enacted non-Union Council law is inconsistent with a validly-enacted Union Council law, the Union Council law shall prevail over the non-Union Council law to the extent of the inconsistency.

8.3 Question 3

223. Firstly, the Union Council, being the entity in the Union vested with legislative powers, has the powers to make laws and scrutinise apportionment of finances and such powers may only be exercised in accordance with the Union Constitution. For the purposes of defining which actions of the Union Council has the binding force of law, a Motion of the Union Council enacting, amending or repealing any provision in the Union Constitution or a Union Regulation has the binding force of law if passed.

224. Secondly, the Union executive power entails ability to make decisions according to the Union Regulations (and also the Union Constitution, which is the source of the Union executive power). Also, there are some prerogative powers of the Union executive (i.e. the Union Executive Committee) that may be exercised where the Union Regulations are silent. These powers could include treaty-making powers (e.g. power to enter into agreements with other student governments). However, the scope of such powers may not be expanded. Also, such powers must not be exercised contrary to the Union Constitution.

225. Thirdly, where the Union Council has omitted to expressly enact Union Regulations, the Union Executive has the prerogative power to make rules and decisions in such areas, provided that they are not contrary to the Union Constitution.

226. Fourthly, when the decision of the Union Executive Committee conflicts with that of a Constituent Club, the decision of the Union Executive Committee shall prevail unless the Union Executive Committee's decision is found to be unconstitutional or *ultra vires* the Union Regulations. Also, the quasi-presidential nature of the Union Executive Committee gives it the ability to make rules and decisions on Union-wide matters where the Union Regulations are silent on. Its rules and decisions on such matters should prevail over inconsistent ones from Constituent Clubs

8.4 Question 4

227. Firstly, as the offending section has failed to safeguard the interests of Union members, it is inconsistent with the Interests Object Clause. As per Article 2.1 of the Union Constitution, the offending section is thus void to the extent of the inconsistency and unenforceable. Also, the concept of "welfare" under the Welfare Object Clause (Article 1.6(3)) is subsumed under that of "interests" under the Interests Object Clause (Article 1.6(1)).

228. Secondly, the basic standards in the Union financial governance and accountability framework require legislative oversight as to how much fees to allocate to each Union entity, how the respective executive bodies plan to spend their budgets and that each spending should be accounted to Union members in the form of publicising to all Union members in the form of SOAs and/or AGM reports.

229. Thirdly, in view of the potentially unfair and disruptive outcomes from a retrospective application of the ruling of unconstitutionality, the unconstitutionality of the offending section should be given prospective effect such that it is unconstitutional only from the date of the decision of this Panel.

8.5 Questions 5 and 6

230. Firstly, decisions made by the Union Council to scrutinise finance apportionment as well as to consider and endorse the allocation of subscription fees and Union entities' budgets are

reviewable on the *Chng Suan Tze* grounds of illegality, irrationality and procedural impropriety. Also, such decisions may only be exercised in accordance with the Union Constitution.

231. Secondly, all Union entities have a legitimate and reasonable expectation that their proposals for allocation of subscription fees and their respective budgets will be considered fairly by the Union Council. They also possess a right to make counter proposals and make constructive criticisms as part of the Union political process. Correspondingly, they have an obligation to subject its budget to legislative oversight as well as accounted to Union members in the form of publicising, to all Union members, their SOAs and/or AGM reports.