

## LEGISLATION COMMENTS AND LIST

### ELECTING THE PRESIDENT: THE PRESIDENTIAL ELECTIONS ACT 1991<sup>1</sup>

#### *Introduction*

THE Presidential Elections Act 1991 was passed, as a consequence of the passing of the Constitution of the Republic of Singapore (Amendment) Act 1991,<sup>2</sup> which created, *inter alia*, the new institution of a directly elected President for Singapore. That constitutional amendment provides that: "The President shall be elected by the citizens of Singapore in accordance with any law made by the Legislature."<sup>3</sup> The Presidential Elections Act accordingly prescribes the procedure for the election of the President.

It should perhaps be stated that although this Act has been passed, it has yet to be brought into operation by an appropriate *Gazette* notification. Indeed, the constitutional amendments relating to the elected Presidency have not been brought into operation either, although some minor amendments not relating to the Presidency, have.<sup>4</sup> Thus, the machinery is in place for an elected President, and an official decision to bring these Acts into force will probably only be made when it is thought fit to have an election, and meanwhile to bring into force the transitional provisions<sup>5</sup> of the Constitution which will give the incumbent President the powers functions and duties of the office of elected President as if he had been elected.

#### *Scheme of the Act*

The provisions of the Presidential Elections Act appear to be patterned along the lines of the existing provisions in the Parliamentary Elections Act.<sup>6</sup> Sections are divided into six parts. Part I contains "Preliminary" matters; Part II deals with "Elections"; Part III, "Offences and Corrupt and Illegal Practices"; Part IV, "Grounds for Avoiding Elections"; Part V, "Election Petitions"; and Part

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<sup>1</sup> No.27 of 1991, passed by Parliament on 29 July 1991 and assented to by the President on 6 August 1991. See G.N. No. A29/91.

<sup>2</sup> No.5 of 1991.

<sup>3</sup> *Ibid.*, section 4, enacting and substituting the new Article 17(2) of the Constitution.

<sup>4</sup> Sections 7 and 16 came into operation on 1 February 1991. See G.N. No. S65/91.

<sup>5</sup> No.5 of 1991, s. 26.

<sup>6</sup> Cap.218, 1985 Rev. Ed.

VI, "General" matters. It is not proposed to go through these provisions in detail, but to highlight some apparently significant provisions.

### *Preliminary Matters*

Part I contains matters relating to the short title, commencement, interpretation of terms, administration, and certain other matters. Of significance is the interpretation in section 2 of "register of electors" as being the (same) register of electors for any electoral division maintained under the Parliamentary Elections Act. Thus the same register is usable for both forms of election, and this is certainly a convenient and cost-saving arrangement.

### *Elections*

Part II deals with the actual procedure of Presidential elections, namely nomination, voting, and counting of votes. Section 6 provides for the timing of the Presidential election. Where the office becomes vacant prior to the expiration of the term of office of the incumbent, it is to be held within six months after the office becomes vacant. In any other case, it should be held not more than three months before the date of expiration of the term of the incumbent.

Unlike the Parliamentary Elections Act, where the President will issue a writ of election, here, under section 6(3), the Prime Minister shall issue a writ, addressed to the Returning **Officer**.<sup>7</sup> By section 7, the Returning Officer will then give notice of the writ and the day, time and place of the nomination at least four clear days before nomination.

Section 8, however, is productive of difficulties. It may be remembered that under the new substituted Article 18 of the Constitution, a Presidential Elections Committee ("PEC") was set up to oversee the qualifications of candidates. To this end, section 8 provides that at any time after the notice of election, and at least two clear days before nomination day, every potential candidate shall apply to the PEC for a certificate certifying that (i) the PEC is satisfied that he is a person of integrity, good character and reputation; and (ii) (where he does not automatically qualify under Article 19(2)), he has held office for not less than three years in such a position of seniority and responsibility in the public or private sector as described in Article 19(2)(g)(iv) so that he "has such experience and ability in administering and managing financial affairs as to enable him to carry out effectively the functions and duties of the office of President."

If the PEC is so satisfied, it shall, not later than the day before nomination day, issue the certificate to the applicant and "any such certificate shall be final and shall not be subject to appeal or review in any court."<sup>8</sup>

The writer must record his misgivings with these requirements. First, not only do they reflect the subjective nature of the determination that a potential

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<sup>7</sup> Appointed by the Minister under section 3.

<sup>8</sup> Section 8(2).

candidate is qualified, but they also attempt to place the ruling of the PEC beyond judicial review, however questionable its decision may be. As far as the writer is aware, no other country has such stringent criteria (namely, experience and ability in financial affairs) for Presidential candidates. As the constitution nowhere provides for the independence<sup>9</sup> of the PEC, this provision places an unseemingly great power in that body, by giving it discretionary power to determine who is fit enough to offer himself as a candidate, and providing for less than objective criteria. A failing in the system must surely be the potential candidate's lack of awareness that he is eligible until he receives a certificate to that effect. Second, by reference to the time frame involved, a potential candidate has very little time to attend to various requirements. He must, not more than two days from receiving notice of the election, apply for a certificate, and must obtain it not later than the day before nomination day. Then, at the time of his nomination, he must, by section 9(4), deliver to the Returning Officer, a statutory declaration of his qualifications, a statutory declaration stating that on nomination day, he is not a member of any political party, and the certificate of the PEC issued under section 8. Does not this time frame appear to be unduly hasty? Why could not more time have been given for the nomination process - especially as there are few likely candidates, and they surely need to be looked at carefully?

As in the case of Parliamentary elections, the candidate must have his nomination paper signed by two persons being the proposer and seconder respectively, and four persons who are registered electors.<sup>10</sup>

The deposit required of a Presidential candidate is to be three times that required of a Parliamentary election candidate.<sup>11</sup> As in the case of unsuccessful Parliamentary candidates, the deposit will be forfeited if less than one-eighth of the total number of votes is polled by him.<sup>12</sup>

Section 15 provides that where only one candidate stands nominated, he shall be declared elected to the office of President. Although this seems a normal procedure, in view of the stringent qualifications of candidates and the power of the PEC to certify persons as being qualified, the writer must confess disappointment at this provision. If an elected President is to have a mandate to protect the reserves and to veto proposed public appointments,

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<sup>9</sup> The Constitution of India (Article 324), for instance, provides for an Election Commission, independent of executive control, and with security of tenure for its members, to ensure an election of Members of Parliament free from the control of the party in power. The (Federal) Constitution of Malaysia (Articles 113-4), also makes provision for an Election Commission. The Constitutional Commission, 1966 (Singapore) had recommended that there should be, in the Constitution, a new entrenched right of the people "to elect a government of their choice as expressed in general elections held at reasonable periodic intervals by secret vote." (Report of the Constitutional Commission, para.43.) As this was not implemented, serious attention should in future be given to the institution of an Election Commission for both Parliamentary (general) elections as well as Presidential elections.

<sup>10</sup> Section 9(2).

<sup>11</sup> Section 10(1).

<sup>12</sup> Section 10(5).

it is desirable that he should receive a minimum percentage of votes cast by the electorate, as an endorsement of him. It is regrettable that a President should be allowed to be elected by "default", as it were, if the PEC has ruled every other proposed candidate as unqualified and this is not open to appeal or review.<sup>13</sup> Ultimately, whose view should have assumed greater importance: the PEC's or the electorate's? Would an elected President's "mandate" to exercise discretionary powers in opposition to an elected government's will be meaningful if he was elected unopposed? Would a PEC which is not constitutionally "independent" be credible in the nomination process where so much subjectivity is involved?

### *Offences and Corrupt or Illegal Practices*

The provisions of Part III set out the various offences, illegal and corrupt practices in connection with a Presidential election, defences available to charges of corrupt or illegal practices, and the consequences of conviction. The provisions here parallel those in the Parliamentary Elections Act. One provision of interest is section 50, which specifies the maximum limit of expenses to be incurred by any candidate as being \$600,000 or an amount equal to 30 cents for each elector on the registers, whichever is the greater.

It is obvious that a Presidential election campaign will entail considerable expense, far more than most candidates can personally afford. However, it seems from the framework of the Act, that political parties may not directly nominate candidates or finance them. Section 56 requires the candidate's election agent, within 31 days of the publication of an election result in the *Gazette*, to transmit to the Returning Officer a true return of expenses, including moneys, securities and valuable considerations received by or promised to the agent from or by any candidate or *any other person* for the purpose of expenses incurred or to be incurred, naming every *person* from whom any sums have been received or promised. It does not seem to be envisaged that political parties may donate expenses or otherwise assist financially, as only individuals or corporations are legally "persons", parties being societies; and a society is not a body corporate under the Societies Act although it is allowed to sue and be sued in its registered name.<sup>14</sup> However, there appears to be nothing to prevent political party members from acting as election agents, canvassing for the candidate or making donations for expenses, in their personal capacities.

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<sup>13</sup> However, the courts are likely to hold that an absence or excess of jurisdiction by a body will be no bar to *certiorari* (see *Re Application by Yee Yut Ee* [1978] 2 M.L.J. 142) or will still open the door to review on the basis that the determination of the body was not a "determination" at all, so that the privative or ouster clause is irrelevant (see *Anisimic Ltd. v. Foreign Compensation Board* [1969] 2 A.C. 147). Nevertheless, legislatures never seem to be deterred from attempting to oust review by ouster clauses, as there is presumably always a hope for a judicial change of heart, or the occasional "timorous" soul on the Bench.

<sup>14</sup> Societies Act, Cap.311, 1985 Rev. Ed.

### *Election Petitions*

Section 72 provides that every election petition shall be tried by an Election Judge, who is defined in section 2 as being the Chief Justice or a Judge of the Supreme Court nominated by him for the purpose. The provisions are similar to those in the Parliamentary Elections Act, but section 75 provides that at the conclusion of the trial of an election petition, he shall make a determination and certify such determination to the Prime Minister (and not the President, as under the Parliamentary Elections Act). He is also to report to the Prime Minister whether any corrupt or illegal practice has been committed by or with the knowledge and consent of any candidate or his agent, and the nature of the practice; and the names of any persons proved to have been guilty of any such practice.<sup>15</sup> The Prime Minister shall cause a copy of the report to be published in the *Gazette*.

### *Miscellaneous Provisions*

Part VI, entitled "General", contains provisions of a miscellaneous nature. Section 81 empowers the Minister to make regulations prescribing anything that is to be prescribed under the Act and generally, for the purposes of giving effect to the provisions of the Act. Section 85 amends the Parliamentary Elections Act "in the manner set out in the Schedule". These are of a minor nature.

### *Conclusion*

It will be seen that although many of the provisions follow the pattern of the Parliamentary Elections Act and are not particularly objectionable, several provisions give effect to the constitutional provisions for an elected President. Those which give effect to the constitutional provisions appear to be important enough to have merited a Select Committee hearing as was done with the constitutional amendments themselves; which, regrettably was not done.

Some misgivings have been already mentioned under the head "Elections",<sup>16</sup> above. Another observation is in relation to the new Article 17(2)<sup>17</sup> of the Constitution and its implications. This merely makes reference to the election of the President in accordance with a law made by the Legislature.<sup>18</sup> An anomaly is that there is no guarantee that the people will have the right to *directly* elect a President on the basis of one man, one vote, and the Presidential Elections Act is an ordinary law, not protected from future amendment. It is possible for the Legislature in future to pass, by a simple majority, an amendment to the Presidential Elections Act providing for some other method of election - perhaps even indirect election through the intervention of some

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<sup>15</sup> Section 76.

<sup>16</sup> And see also note 9, above.

<sup>17</sup> See the text above note 3, *supra*, for the words of Article 17(2).

<sup>18</sup> Similar provision is made for Parliamentary elections in Article 44 of the Constitution.

kind of electoral college. On the other hand, the Act may specify that the vote will no longer be according to the **first-past-the-post** system, but (say) a single transferable vote, or an election that goes through two or more rounds. This may, thus, expose Singapore citizens to strange new procedures. This is a worst-case scenario, of course, but is it not the practice in any constitutional set-up, to make provision for the avoidance of such a scenario? If the present government is committed to **fairplay**, there is no guarantee that a future government will be.

The words of the Constitutional Commission in 1966, in recommending a right to choose a government in free and fair elections, are always worth bearing in mind - for they portend dangers which transcend boundaries of time:

With this limited experience of elections, we do not consider it safe to assume that a significant proportion of the people of Singapore will be able to realise, **until** it is too late to prevent it, that any inroads have been made into the democratic system of general elections by a future government intent on undermining first and ultimately destroying the practice of democracy in **Singapore**.<sup>19</sup>

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*Postscript:* While the above comment was in press, the Constitution of the Republic of Singapore (Amendment) Act 1991 (Act No. 5 of 1991) was fully brought into operation on 30 November 1991 by G.N. No. S518/91 - with the exception of section 3 (which provides for the "entrenchment" of Articles 5(2A) of the Constitution). The incumbent President Wee Kim Wee is now invested with the powers of the elected President as if he had been elected.

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<sup>19</sup> Report of The Constitutional Commission 1966, para. 43.

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