LEGISLATION COMMENT

THE CONSTITUTION (AMENDMENT) ACT, 1979 (No. 10)

The Constitution (Amendment) Act, 1979 (hereafter referred to as the amending Act) was passed by Parliament on 30 March 1979 and received the President's assent on 26 April 1979.[1] It amends the Constitution of Singapore in six respects. *First,* the provision for amending the Constitution is itself amended; *secondly,* the provisions on the Judiciary are amended to provide for the office of Judicial Commissioner; *thirdly,* the provisions for the oath of office for Judges are amended; *fourthly,* a new provision is introduced concerning renunciation of citizenship which differs from the provision of the Constitution of Malaysia which had previously been applicable in Singapore; *fifthly,* an anomaly in the Constitution concerning qualification for election as President of the Republic is removed; and, *sixthly,* the Attorney-General is authorised to print and publish a single, composite document to be known as the "Reprint of the Constitution of the Republic of Singapore, 1979" which would be a consolidated reprint of the Constitution of Singapore as amended from time to time and which would also amalgamate with those provisions of the Constitution of Malaysia as are applicable in Singapore.

Each of these six aspects of the amending Act will be commented on separately.

(a) *Amendment of the process of amending the Constitution*

Article 90 of the Constitution provided for the Constitution to be amended "by a law enacted by the Legislature." This resulted in a very flexible Constitution where (except for Part IIB) the procedure for amending the Constitution was no different from that of amending any statute. The amending Act repeals and re-enacts Article 90 and the new Article 90 now provides that a Bill seeking to amend:

> "any provision of this Constitution shall not be passed Parliament unless it has been supported on Second and Third Readings by the votes of not less than two-thirds of the total number of the Members thereof".

The writer offers the following four observations.

First, the amendment of Article 90 to require a special majority of votes for legislation to amend the Constitution was not unanticipated. The Constitutional Commission chaired by Chief Justice Wee Chong Jin in its report of 1966 devoted considerable attention to Article 90. The Commission, it may be recalled, had proposed three different methods of amendment and of entrenchment of different parts of the Constitution.

[1] The date of coming into operation was 4 May 1979.

One of its proposals did envisage the requirement of at least two-thirds vote of Members of Parliament in the final voting. The Government subsequently indicated acceptance of this recommendation. However, while the Commission had recommended that this method should apply to only certain selected parts of the Constitution,[2] the Government's approach (as reflected in the amending Act) is to make the two-thirds majority requirement the general rule. This is to be welcomed.

What is curious, however, is that the Government in explaining this amendment did not make any reference whatsoever to the recommendations of the Constitutional Commission. The Minister for Law and Science and Technology, in his statement during the Second Reading of the Bill, explained that the amendment would restore the position as it existed before December 1965 when Article 90 had been amended to remove the requirement of two-thirds majority. He added:

> "… 14 years have gone by since. All consequential amendments that have been necessitated by our constitutional advancement have now been enacted. The Government has therefore decided that the time has come to restore the position before December 1965, so that after this Bill goes through, all future amendments to our Constitution will require a two-thirds majority of the total number of Members of the House."[3]

Secondly, it is most regrettable that the Government has not taken this opportunity to implement another recommendation of the Constitutional Commission, namely, that a Bill for altering the Constitution shall not be passed by Parliament unless is *expressed* to be one for the amendment of the Constitution and contained no other provision. The Constitutional Commission had proposed this to protect the Constitution "from amendment by implication" and felt it should apply to *every* provision of the Constitution. After some Members of Parliament in 1967 had supported incorporation of this method, the Minister for Law said, "… I am pleased to state that this method of entrenchment, however weak it is, is acceptable to Government and will find a place in our Constitution".[4] He noted that the only useful purpose in this method is to ensure that there will not be any amendment of the Constitution "through sheer inadvertance or by implication."[5]

In view of the clear acceptance by the Government of that method, it is difficult to comprehend the failure now to implement it in the amending Act.

The problem of implied amendments can still arise even with the new requirement of a two-thirds majority for constitutional amendments. This is especially so in the present situation where all the Members of Parliament are from the party in power. Most legislation will be carried by votes exceeding the two-thirds majority. If a particular legislation (which was not expressly stated to be a constitutional amend-

[2] Provisions dealing with the Public Service Commission, the Council of State, the Judicial and Legal Service Commission, the office, powers and functions of the Attorney-General in so far as concerned with his discretion exercised in relation to institution conduct or discontinuance of civil or criminal proceedings, the Ombudsman, Remuneration of the Speaker and Citizenship.

[3] *Singapore Parliamentary Debates,* Vol. 39, Col. 295.

[4] *Singapore Parliamentary Debates,* Vol. 25, Col. 1438.

[5] *Ibid*., Col. 1437.

ment) received more than a two-thirds vote but was in conflict with a provision of the Constitution then would such a law (a) be void because of the inconsistency, pursuant to the supremacy clause to Article 52, or, (b) be considered to be an implied amendment of the Constitution? This dilemma can be avoided if the Constitutional Commission's recommendation had been implemented. That this is not an academic problem is clearly demonstrated by the Privy Council decision in *Kariapper* v. *Wijesinha*.[6]

Thirdly, the writer feels that in re-enacting Article 90 an opportunity has been missed to relate Article 90 to Article 52L. Article 52L provides that any amendment to Part IIB of the Constitution (Protection of the Sovereignty of the Republic of Singapore) shall not be passed by Parliament unless it has been supported *at a national referendum* by at least two-thirds of the votes of the electorate.

The position, therefore, is that the Constitution prescribes *two* methods of constitutional amendment: (a) the general method, applicable for all provisions *other than Part IIB,* as set out in Article 90, and, (b) the special method of amendment of Part IIB as set out in Article 52L. The intention clearly was to specially entrench Part IIB.

It would have been desirable to have provided *either* that Article 90 was subject to the provisions of Article 52L *or* to have re-enacted Article 52L as a separate clause within Article 90. Either of these approaches, in the writer's view, would have made it clear that the general rule of two-thirds majority in Parliament is subject to the *special* rule that a national referendum is required for amendments to Part IIB.

Fourthly, it should be noted that the new Article 90 does provide for an exception. Clause (3) of Article 90 states that any amendment consequential on such a law as is mentioned in clause (1) of Article 23 shall be excepted from the two-thirds majority requirement. Article 23 provides, *inter alia,* that Parliament shall consist of such number of elected members as the Legislature "may by law provide". It is clear that the "law" referred to is not a constitutional amendment. The intention of this exception probably is that the two-thirds majority rule need not apply where the constitutional amendment merely gives effect to the number already prescribed by law.

(b) *Provision for the office of the Judicial Commissioner*

Article 52B of the Constitution is amended by the addition of the new clause (3) to provide for the appointment of a Judicial Commissioner of the Supreme Court "in order to facilitate the disposal of business in the Supreme Court."

Method of appointment: The method of appointing a Judicial Commissioner is the same as that of the appointment of Judges of the Supreme Court. The appointment is by the President, acting on the advice of the Prime Minister and the Prime Minister, before tendering his advice, shall consult the Chief Justice. The *qualifications for appointment* as a Judicial Commissioner are the same as those for

[6] [1968] A.C. 717.

appointment of a Judge, that is, the person must have been a qualified person within the meaning of section 2 of the Legal Profession Act 1966, or a member of the Legal Service in Singapore or both for an aggregate period of not less than 10 years.

Duration of appointment: There is flexibility as regards to the duration of appointment since it is provided that a person can be appointed Judicial Commissioner for "such period or periods as the President thinks fit."

Functions, powers and immunities: Although appointed by the executive it is the Chief Justice who will specify the "class or classes of cases" in respect of which the Judicial Commissioner will exercise his functions. It is provided that he will exercise the powers and functions of a Judge of the Supreme Court in respect of such cases. Provision is also made for him to have the same powers and immunities as a Judge of the Court in respect of his acts done when acting in accordance with the terms of his appointment.

The Minister for Law and Science and Technology, in his statement during the Second Reading of the Bill, said that the Judicial Commissioners will be appointed for "limited periods of time and with such limited jurisdiction as may be deemed appropriate" to help out in the disposal of cases in the High Court.[7] He pointed out that many other Commonwealth countries also provided for appointment of temporary Judges to deal with any backlog of cases. In response to a question from the sole Member of Parliament who spoke on the Bill (Mr. P. Selvadurai), the Minister speculated that "As in England where Judicial Commissioners are appointed just to hear divorce cases, a situation might arise in Singapore where we have so many claims with regard to personal injuries or deaths caused by accidents on the road — we have a spate of cases — and in order to help the High Court get rid of this backlog of cases, a Judicial Commissioner is appointed just to deal with accident cases".[8]

What is not clear, however, is whether Judicial Commissioners will be drawn from the ranks of the members of the Legal Service or whether private legal practitioners will also be appointed. In this regard, it is interesting to note that in Malaysia, where the office of Judicial Commissioner also has been introduced, lawyers from private practice have been appointed.

Article 52B(2) of the Constitution already provides that in addition to the Judges of the Supreme Court a person qualified for appointment as a Judge (or who has ceased to hold office of a Judge) may be designated to sit as a Judge as occasion requires and such person shall hold office for such period or periods as a President, acting on the advice of the Prime Minister, shall direct.

One interesting question that arises is: what is the substantive difference between the new office of a Judicial Commissioner and a person who is designated to sit as a Judge under article 52B(2)? An examination of the provisions governing the two types of appoint-

7 *Singapore Parliamentary Debates,* Vol. 39, Col. 295.
8 *Ibid.*, Col. 297.

ments does not reveal any significant differences, for both the Judicial Commissioner as well as the person appointed to sit as a Judge pursuant to article 52B(2) are to hold office "for such period or periods" as the President may decide.

The phrase "such class or classes of cases as the Chief Justice may specify" in respect of the Judicial Commissioner (a phrase absent in the provisions of Article 52B(2)), seems to suggest that the Judicial Commissioner will sit for shorter periods than the person appointed under Article 52B(2). The Minister's explanation, quoted earlier, that the Judicial Commissioners will be appointed "for limited periods of time" also bears this out.

A point which may appear highly academic but, nevertheless, may prove to be important in a rare situation, is that there is no provision for *termination* of appointment of the Judicial Commissioner prematurely, before the expiration of the period or periods for which he was appointed. Article 52F provides for a complicated procedure for the removal of a Judge of the Supreme Court. This writer believes it would be straining the language of Article 52B(3) (he — the Judicial Commissioner — "shall have the same powers and enjoy the same immunities as if he had been a Judge of that Court") to argue that this complicated procedure in Article 52F would also be applicable to premature termination of appointment of a Judicial Commissioner.

(c) *Amendment to oath of office of Judges*

The Constitution provides (Article 52E) for the Chief Justice and every person appointed to be a Judge of the Supreme Court to take an oath of office. The amending Act

(a) amends Article 52E to extend the requirement of taking the oath to persons designated to sit as a Judge and to persons appointed as Judicial Commissioners; and

(b) amends the wording of the oath (First Schedule) by deleting the words "and Allegiance" in the heading and by deleting the words "and I will be faithful and bear true allegiance to the Republic of Singapore".

No explanation has been given for deletion of this element of faithfulness and allegiance to Singapore. In fact the explanatory statement to the Bill did not refer to this amendment at all. The statement of the Minister, during the Second Reading, also did not refer to this point.

One can only speculate. The writer feels that this amendment is probably intended to facilitate the appointment (as a Judge or as a Judicial Commissioner) of a person who is a non-citizen and who holds a foreign citizenship and who may find it very difficult to take an oath of allegiance to Singapore as this may jeopardise his foreign citizenship.[9]

[9] For example, the Constitution of Malaysia provides (Art. 25(1A)) that a person who is a citizen by naturalisation or a citizen by registration under Article 17 or 16A may be deprived of his citizenship if, inter alia, he worked in any office, post or employment under the Government of any country outside Malaysia "in any case where an oath, affirmation or declaration of allegiance is required in respect of that office, post or employment". This provision is applicable to Singapore by virtue of the Republic of Singapore Independence Act, 1965.

(d) *Renunciation of citizenship*

Although the Constitution of Singapore contains provisions on citizenship, certain provisions of the Constitution of Malaysia are also applicable by virtue of the Republic of Singapore Independence Act, 1965. One of the Malaysian provisions that was applicable was Article 23 relating to renunciation of citizenship. The amending Act now provides that this shall cease to apply in Singapore and a new Article 60A is inserted in the Singapore Constitution to provide for renunciation of citizenship.

The new Article 60A contains all the elements of the Malaysian Article 23. However, the new provision has an additional limb (which is absent in Malaysia) whereby the Government can withhold registration of a declaration of renunciation of citizenship by a person subject to the Enlistment Act who has not discharged his liability for full-time national service liability or rendered at least three years of reservist service or has not "complied with such conditions as may be determined by the Government".

The objective of this additional provision clearly is to prevent persons evading national service obligations by renouncing their citizenship. Since a renunciation is effective only when it is registered with the Government, the power now granted to withhold registration in this situation means that a citizen cannot renounce his citizenship unilaterally and thereby claim to be outside the scope of the Enlistment Act.

(e) *Qualifications for election as President of Singapore*

The amending Act rectifies an anomaly in the Singapore Constitution, namely Article 2(1), which provided that "A person who is not a citizen of Singapore born in Malaya shall not be elected President".

This writer in 1976 had drawn attention to this unusual provision by referring to it as "a provision which is somewhat incongruous after Singapore's separation even though the Constitution says in Article 91(1) that "Malaya" means "Singapore and the Malay Peninsula".[10]

The amending Act deletes the words *"born in Malaya"*. With this change the person to be elected as President must still be a citizen but the kind of Singapore citizenship he possesses (by birth, by descent or by registration) is irrelevant. During the Second Reading of the Bill, the Minister for Law and Science and Technology explained that the Constitution of Singapore was enacted as the Constitution of the State within a larger federation and this accounted for the requirement that the person should be born in Malaya. He added "Now that Singapore is an independent sovereign nation, it would seem incongruous to have a provision stipulating that a person cannot be President of Singapore without his having been born in Malaya,"[11]

[10] S. Jayakumar, *Constitutional Law (with documentary materials),* Singapore Law Series No. 1 (1976), p. 9

[11] *Singapore Parliamentary Debates,* Vol. 39, Col. 296.

(f) *Preparation of a single, composite, consolidated reprint of the Constitution*

Article 93 of the Constitution is amended to authorise the Attorney General, as soon as may be after the commencement of the amending Act, to:

> "cause to be printed and published a consolidated reprint of the Constitution of Singapore, as amended from time to time, amalgamated with such of the provisions of the Constitution of Malaysia as are applicable to Singapore, into a single, composite document to be known as the Reprint of the Constitution of the Republic of Singapore 1979".

This provision is long overdue and members of the legal fraternity as well as the public will welcome the early publication of the proposed 1979 Reprint of the Constitution.

In the writer's view, the Constitution is the most important legal document of a nation and its provisions should be made easily available to both lawyers and interested members of the public. Legal practitioners, law teachers and law students have for long felt the urgent need for the publication of the Constitution in a single composite document. This is because *first,* the last time the Constitution was reprinted was thirteen years ago (RS(A) 14/1966 w.e.f. 25 March 1966) but it is difficult to use that document because there have been fifteen amendments or modifications to the Constitution since that date. No official reprint has been issued incorporating all these amendments.[12] *Secondly,* after the enactment of the Republic of Singapore Independence Act, 1965 several specified provisions of the Constitution of Malaysia were made applicable to Singapore. So long as these are not incorporated into a single document together with the provisions of the Singapore Constitution, problems of interpretation and application can arise in relating the Malaysian provisions to the existing provisions of the Constitution of Singapore. This is particularly true in regard to citizenship provisions.

It should be noted that what is envisaged by the amending Act is not a new Constitution but a reprint which consolidates all previous amendments and which also incorporates the applicable provisions of the Constitution of Malaysia.

In this connection it may be recalled that the Prime Minister in 1970 told Parliament that a new Constitution was being planned.[13] It would seem, however, that the idea of a completely new Constitution has been abandoned in favour of the approach now reflected in the amending Act. The Government's thinking on this matter was hinted on by the Prime Minister on 23 December 1977 at the University of Singapore when he gave the following reply to a question from a law student as to why independent Singapore after 12 years was still relying on borrowed provisions of the Malaysian Constitution:[14]

> "The reason is simple. To draw up a constitution we need a skilled parliamentary draftsman — a rare creature.

[12] However the Law Faculty produced, for teaching purposes, an unofficial cyclostyled compilation incorporating all amendments. Another unofficial compilation was published by the writer in his *Constitutional Law (with documentary materials),* No. 1 in the Singapore Law Series (in Appendix A),

[13] *Singapore Parliamentary Debates,* Vol. 29, Col. 572.

[14] *Straits Times,* 3 January 1978.

> Parliamentary draftsmanship is more than craftsmanship with words and phrases. It is infinitely more difficult than ghost writing for political leaders.
>
> From the first draft produced, I am convinced that we cannot hire such a draftsman. He may be a good draftsman. But he does not know Singapore's conditions and the contingencies that may arise.
>
> I dread adopting a draft which would lead to endless litigation all the way up to the Privy Council.
>
> As I watched the amendments that have been made by the Government of Malaysia and by the Government of Singapore to the Malaysian Constitution from which we derived a part of our Constitution, I became more convinced that we will have less pitfalls if we reformulate, recast, and restore into coherent form what we have now got and have worked successfully, instead of making a brand new constitution.
>
> It may be that I am becoming more careful and cautious. But I am not in favour of exchanging oil lamps for new ones.
>
> Brand new constitutions have been drawn up for about 30 new Commonwealth countries. They have been torn up by nearly as many colonels and generals.
>
> We have got a working constitution, even though it does not look neat and tidy. Its framework has ensured you a university education and the prospect of a fairly lucrative career.
>
> Constitutions are drawn up by experts. But they have to be made to work by political leaders for the benefit of the people.
>
> And this can only succeed if the political leaderships have a grasp of the realities of the country, get the people to understand the limits of choice, and together, political leaders and voters, adapt, adjust, amend and accommodate to changing realities within the agreed constitutional framework."

It should also be noted that the Attorney-General and his staff will not be involved in a simplistic mechanical exercise. The amending Act confers on the Attorney-General considerable discretionary powers. For example, in the task of merging existing provisions of both the Singapore and Malaysian provisions, the Attorney-General shall have the discretionary power to make such "modifications as may be necessary or expedient in consequence of the independence of Singapore upon separation from Malaysia". Another example is that he may re-arrange the Parts, Articles and provisions of both Constitutions in such connected sequence as he thinks fit "omitting inappropriate or inapplicable provisions" in the Malaysian Constitution.

S. JAYAKUMAR