December 9, 2019

From Eligibility to Election: The Mechanics of the Presidential Poll

Jack Tsen-Ta Lee

Dr Jack Tsen-Ta Lee
http://jacklee.info

15 August 2018; published 9 December 2019

From Eligibility to Election: The Mechanics of the Presidential Poll

Jack Tsen-Ta *Lee**

* LLB (Hons) (Nat'l University of Singapore), LLM (UCL, Lond); PhD (B'ham); Advocate & Solicitor (Singapore), Solicitor (England & Wales).

From Eligibility to Election: The Mechanics of the Presidential Poll

Jack Tsen-Ta *Lee*[*]

This chapter examines a number of issues relating to the mechanics of how presidential elections are conducted: specifically, the process for obtaining certificates of eligibility and community certificates, and the reviewability of decisions of the Presidential Elections Committee, the Community Committee, and the latter's Sub-Committees. In addition, certain elements of the campaigning process are looked at – how candidates can conduct their campaigns, limitations on what candidates and voters can communicate electronically on cooling-off day and polling day, and whether Ministers and Members of Parliament should be allowed to endorse or criticize candidates. It is hard to escape the sense that underlying the various rules is the belief that voters cannot be trusted to properly assess whether candidates merit being elected to the nation's highest office. It should be asked whether this fundamentally underestimates the electorate's powers of discernment.

I. INTRODUCTION

ON 9 NOVEMBER 2016, Parliament enacted the most significant constitutional amendment in the twenty-first century thus far, making wide-ranging changes to the Elected Presidency scheme. These amendments were preceded by a detailed examination of aspects of the scheme by a Constitutional Commission chaired by Chief Justice Sundaresh Menon which rendered its report on 17 August,[1] and a White Paper issued by the Government in response to the report on 15 September.[2] Most of the debate on the constitutional amendment bill[3] that took place in Parliament on 8 and

---

[*] LLB (Hons) (Nat'l University of Singapore), LLM (UCL, Lond); PhD (B'ham); Advocate & Solicitor (Singapore), Solicitor (England & Wales). I thank Swati S Jhaveri, Jaclyn L Neo, and other participants of a workshop on the Elected Presidency held on 10 January 2018 for their helpful comments.

1 *Report of the Constitutional Commission 2016* [Chairman: Chief Justice Sundaresh Menon] (The Commission; 17 August 2016) <*https://www.gov.sg/~/media/elected%20presidency/files/report%20of%20the%20constitutional%20commission%202016.pdf*> accessed 29 July 2017 (archived at <*https://web.archive.org/web/20170729025724/https://www.gov.sg/~/media/elected%20presidency/files/report%20of%20the%20constitutional%20commission%202016.pdf*>) (hereafter *Constitutional Commission Report*).

2 *White Paper on the Review of Specific Aspects of the Elected Presidency* (Cmd 7 of 2016) (Government of Singapore, 15 September 2016) <*http://www.parliament.gov.sg/lib/sites/default/files/paperpresented/pdf/2015/Cmd.7of2016.pdf*> accessed 14 November 2016 (archived at <*https://web.archive.org/web/20161114084734/http://www.parliament.gov.sg/lib/sites/default/files/paperpresented/pdf/2015/Cmd.7of2016.pdf*>) (hereafter *White Paper*).

3 Constitution of the Republic of Singapore (Amendment) Bill 2016 (No B28 of 2016).

9 November concerned major alterations that were proposed. These were the increase in the minimum qualifying financial value of a company from $100 million in paid-up capital to $500 million in shareholders' equity for a prospective candidate seeking a certificate of eligibility under what is now termed the private sector service requirement,[4] and the introduction of elections from time to time reserved for members of particular ethnic communities.[5]

In the end, the 2017 presidential election – the first to which the changes mentioned above applied – turned out to be largely a non-event, as it was won by Halimah Yacob by a walkover on nomination day. Two others who had thrown their hats into the ring were determined by the Presidential Elections Committee (hereafter "PEC") not to have met the private sector service requirement, and were not issued the requisite certificate of eligibility for the election. Although there was thus no opportunity to observe in full the mechanics of the presidential poll, this chapter considers some of the changes to the procedure proposed by the Constitutional Commission and given legal effect by the Parliament. Specifically, it looks at the process for obtaining certificates of eligibility and community certificates, and the reviewability of decisions of the PEC, the Community Committee (hereafter "CC"), and the CC's Sub-Committees. In addition, some elements of the campaigning process will be examined, namely, how candidates can conduct their campaigns, limitations on what candidates and voters can communicate electronically on cooling-off day and polling day, and whether Ministers and Members of Parliament should be allowed to endorse or criticize candidates.

The examination reveals that the legal framework vests the various committees mentioned above with a high degree of discretion to determine whether persons are eligible to contest presidential elections. Yet, due to various mechanisms including finality and conclusive evidence clauses, limited recourse is provided for ensuring accountability for the decisions made. The message sent appears to be that voters should trust the authorities to do the right thing, rather than rely on their own discernment to decide whether a candidate is worthy of being elected to the nation's highest office. Additionally, because campaigning rules do not prohibit influential, politically linked persons from endorsing candidates, voters' opinions may be skewed in favour of these candidates, thus creating an uneven playing field.

II. QUALIFYING FOR AN ELECTION

One of the key features of a presidential election that distinguishes it from a parliamentary election is the need for people who wish to take part to undergo a qualification procedure. To contest, candidates must obtain certificates of eligibility from the PEC and, in a reserved election, community certificates from the CC declaring that they are from the community to which the election is confined. Thus, these committees are reposed with much discretion. Where, as we shall see, the exercise of such discretion can only be independently reviewed in very narrow circumstances, the perception that the committees are making decisions in a partisan manner may be hard to dismiss.

---

4 Constitution of the Republic of Singapore (1985 Rev Ed, 1999 Rep) (hereinafter "Constitution"), Arts 19(4)–(10), as amended by the Constitution of the Republic of Singapore (Amendment) Act 2016 (No 28 of 2016) (hereafter CAA 2016), in force with effect from 1 April 2017 except for a number of provisions. See generally the chapter by Eugene Tan on eligibility and the Council of Presidential Advisers, Chapter 4 in this volume.

5 Constitution, *ibid*, Art 19B, as inserted by the CAA 2016, *ibid*.

A. CERTIFICATE OF ELIGIBILITY

1. *Issuance*

The qualifications to be a presidential candidate are set out in Article 19 of the Constitution; in particular, an application must be made to the Presidential Elections Committee for a certificate of eligibility,[6] which will be issued if the PEC is satisfied that the applicant is "a person of integrity, good character and reputation"[7] and meets the potentially complex public or private sector service requirements set out in the Constitution.[8]

To enable the PEC to assess these requirements, the Constitutional Commission recommended that each applicant should submit a self-disclosure form containing information relevant to character and reputation, such as whether the applicant has a criminal record, or has been bankrupt or subject to disciplinary proceedings.[9] In view of the more stringent private sector service criteria, applicants relying on this eligibility route should be required to provide detailed information about their business affairs.[10]

Moreover, the Commission felt that the PEC should be entitled to seek further information from prospective candidates.[11] This recommendation was given effect by regulation 6 of the Presidential Elections (Certificate of Eligibility) Regulations 2017:[12]

> 6.—(1) The Committee may, for the purposes of deciding an application —
>
> (a) require the applicant or any referee of the applicant to provide further information;
>
> (b) interview the applicant or any referee of the applicant;
>
> (c) inform itself on any matter; or
>
> (d) consult any person.
>
> (2) The Committee may reject an application if the applicant or any referee of the applicant refuses to provide any information required by the Committee or to be interviewed by the Committee.

This provision does not appear to have addressed the issue of whether the Committee should be impressed with a duty to consider matters brought to its attention by

---

6 The period for applying starts three months before the incumbent President's term expires (or, if the office has fallen vacant before the expiry, the date when that occurred), and ends five days after the writ of election has been issued by the Prime Minister: Presidential Elections Act (Cap 240A, 2011 Rev Ed) (hereafter "PEA"), as amended by the Presidential Elections (Amendment) Act 2017 (No 6 of 2017), s 8(2).

7 Constitution (n 4) Art 19(2)(e).

8 *Ibid*, Arts 19(2)(g) and 19(3)–(7): see the PEA (n 6), s 8A.

9 *Constitutional Commission Report* (n 1) [4.78]–[4.80], implemented by the Presidential Elections (Certificate of Eligibility) Regulations 2017 (S 263/2017), reg 3 read with the Schedule, Form 1, Annex C.

10 *Ibid*, [4.82], implemented by the Presidential Elections (Certificate of Eligibility) Regulations 2017, *ibid*, reg 3, read with the Schedule, Form 1, Annex B5, and note Part 3 of the Regulations ("Further Provisions on Private Sector Service Requirement").

11 *Ibid*, [4.85].

12 Presidential Elections (Certificate of Eligibility) Regulations 2017 (n 10).

candidates.[13] It may be recalled that during the 2005 presidential election, one applicant for a certificate of eligibility, Andrew Kuan, was subject to what has been called a "trial by media" – it was reported in the news that his work performance had been less than satisfactory, that he had allegedly been ousted as chairman of his condominium management committee, and that he faced a defamation suit. The PEC reportedly asked the Jurong Town Corporation, one of Kuan's former employers, to provide a report on his character and tenure as the statutory board's chief financial officer, but did not ask Kuan for his response to the various allegations against him. Kuan was subsequently denied a certificate of eligibility on the ground of insufficient financial and managerial ability. Due to the absence of any other qualified candidates, S R Nathan was declared re-elected as President on nomination day without a poll.[14]

The present situation, therefore, does not adequately ensure that the PEC has before it the best information available to determine whether a person is qualified to seek the highest office in the land. It may even be that applicants are effectively denied the right to be heard, which is one of the pillars of natural justice, before decisions are made as to whether they should be issued certificates of eligibility.[15] It is submitted that a provision should be introduced to give applicants the right to provide the PEC with additional evidence, and requiring the PEC to take this evidence into consideration.

An example that might be followed is a procedure applicable in the planning law context. Under the Planning (Master Plan) Rules,[16] when the Master Plan is sought to be amended, the Urban Redevelopment Authority is required to invite the public to submit objections to and representations concerning the proposed amendment. Thereafter, unless the Minister for National Development is of the view that an objection or representation is "of a frivolous nature", the Minister[17]

> *shall* afford to any person whose objection or representation was received by him [...] an opportunity of appearing before and being heard by a person or persons appointed by the Minister for the purpose, or cause a public inquiry to be held [...].

The Minister is under a legal duty to consider the objections and representations, and the findings of the hearing or public inquiry, when deciding whether to approve the proposed amendment.[18]

By referring to the planning procedure, I do not intend to suggest that all of its elements are appropriate to presidential elections. Whether the PEC should receive representations from members of the public and hold public hearings, for example, are issues requiring further consideration. While public hearings can promote transparency and democratic participation on the part of the public,[19] they may

---

13 A point previously raised by Li-ann Thio, "Singapore: (S)electing the President – Diluting Democracy?" (2007) 5 *International Journal of Constitutional Law* 526, 538–539.

14 Thio, "(S)electing the President", *ibid*, 534–537. President Nathan was elected for the first time in 1999, also in an uncontested election.

15 *Ibid*, 537.

16 Cap 232, R 1, 2000 Rev Ed.

17 *Ibid*, r 6(1) (emphasis added).

18 *Ibid*, rr 6(2)(c) and (d).

19 Li-ann Thio has suggested that:

> since the PEC may potentially impugn the character of possible candidates by their findings, these candidates should have the right to respond to negative findings in a public setting, with broadcast media in attendance, as is the practice for vetting high administrative officials in the United States. [...] Such reform would enhance transparency and afford citizens a role in a more democratized process, open to public scrutiny.

politicize the process to an undesirable extent. However, the modest proposal of enshrining in legislation the right of applicants to place additional evidence before the PEC and the duty of the PEC to take such evidence into account in its decision-making, it is argued, would go some way towards redressing the imbalance of power between the Committee and potential candidates.

2. *Effect of False or Misleading Statements*

A further recommendation of the Constitutional Commission was that the PEC should have the power to revoke a certificate of eligibility if the application form on which it was based is found to contain material false declarations. This would be so even if the candidate has been elected as President, thus resulting in the office of President being vacated and another election being held. The Commission suggested that "to safeguard the President from potential abuse, any such determination by the PEC directed at an incumbent President should be open to challenge by the President before a Constitutional Tribunal".[20]

The Government decided to implement this recommendation differently. Within 21 days of the publication of the result of a presidential election in the *Government Gazette*,[21] the PEC[22] may apply to an Election Judge for a candidate's election as President to be declared void on the grounds:[23]

> that the candidate intentionally or knowingly made a materially false or misleading statement of fact, or intentionally or knowingly failed to state a material fact, to the Presidential Elections Committee for the purpose of demonstrating his eligibility to be elected as President.

The terms "materially false or misleading statement of fact" and "material fact" could be points of contention; the Act provides no guidance as to their meaning. (Another ground for a declaration of invalidity is "that the candidate was at the time of his election a person disqualified for election as President".[24] Such applications can be made by a voter, someone claiming that he or she should have been returned or elected at the election, or someone claiming to have been a candidate at the election.)[25] An Election Judge is the Chief Justice or a Judge of the Supreme Court nominated by the

---

See Thio, "(S)electing the President" (n 13) 540–41.

20 *Constitutional Commission Report* (n 1) [4.86]. Under the Constitution (n 4) Art 100(1),

> [t]he President may refer to a tribunal consisting of not less than 3 Judges of the Supreme Court for its opinion any question as to the effect of any provision of this Constitution which has arisen or appears to him likely to arise.

The Constitutional Commission proposed that the remit of the Constitutional Tribunal be expanded to enable it to decide if the PEC has correctly determined that an application for a certificate of eligibility contains material falsehoods: *Constitutional Commission Report*, *ibid*.

21 PEA (n 6) s 77(1).

22 *Ibid*, s 73(b).

23 *Ibid*, s 71(f). Presumably the phrase "materially false or misleading" in the provision should be read as "materially false or materially misleading", as it would make no sense for a statement of fact that was misleading but not material to an applicant's eligibility to be a presidential candidate to lead to an election being annulled.

24 *Ibid*, s 71(e).

25 *Ibid*, s 73(a).

Chief Justice who is constitutionally empowered to determine all proceedings relating to a presidential election.[26] Decisions by an Election Judge are expressed to be final.[27]

Once the 21-day window referred to above has closed, any allegation that the President has intentionally or knowingly stated materially false or misleading facts or failed to state material facts to the PEC has to be dealt with by what is essentially a process of impeaching the President under Article 22L(3)(e) of the Constitution.[28] The process must be initiated by the Prime Minister or not less than a quarter of the total number of elected Members of Parliament (MPs) and Non-constituency Members of Parliament (NCMPs) giving notice of a parliamentary motion alleging misconduct on the President's part.[29] If the motion is adopted by at least half of the elected MPs and NCMPs, the Chief Justice is to appoint a tribunal[30] comprising not less than five Supreme Court Judges to inquire into the allegations.[31]

What is interesting about this procedure is that if the tribunal reports to the Speaker of Parliament that it is of the opinion the President is guilty of the allegations levied, the Parliament has a choice whether or not to act on the report: Article 22L(7) states that "Parliament *may* by a resolution passed by not less than three-quarters of the total number of Members of Parliament (excluding nominated Members) remove the President from office" (emphasis added). One may wonder whether this provides a lacuna for political considerations to sway the decision. For example, if the President was formerly a member of, or otherwise associated with, the political party forming the government of the day, the Government might be reluctant to procure the impeachment of someone who used to be "one of its own". Nonetheless, the risk of this happening is probably outweighed by the fact that it would not be politically astute for the Government to exhibit partiality in this way.

B. COMMUNITY CERTIFICATE

Under the reserved election scheme which came into force on 1 April 2017,[32] a presidential election is reserved for a particular ethnic community if no one from that community has held the office of President for any of the five most recent terms of office.[33] The term *community* is defined as meaning the Chinese community, the Malay community, or the Indian or other minority communities,[34] the latter being treated as a composite group. I have described these as ethnic rather than racial communities, because a "person belonging to the Malay community" is specifically defined as "any person, *whether of the Malay race or otherwise*, who considers himself to be a member of the Malay community and who is generally accepted as a member of the Malay community by that community".[35]

While members of the Chinese community and Indian community are similarly defined by reference to self-identification and community acceptance, there is no

---

26 Constitution (n 4) Art 93A(1).
27 *Ibid*, Art 93A(2).
28 The word *impeachment* is not used in the Constitution.
29 Constitution (n 4) Art 22L(3)(e).
30 *Ibid*, Art 22L(4).
31 Unless the Chief Justice otherwise decides, he or she is one of the members of the tribunal: *ibid*, Art 22L(5).
32 The pros and cons of the reserved election scheme are discussed in detail in Eugene Tan's Chapter 6 and Jaclyn Neo's Chapter 5 in this volume.
33 Constitution (n 4) Art 19B(1).
34 *Ibid*, Art 19B(6).
35 *Ibid* (emphasis added).

mention of race in those definitions – a "person belonging to the Chinese community" means "any person who considers himself to be a member of the Chinese community" while a person belonging to the Indian community is "any person of Indian origin who considers himself to be a member of the Indian community", provided that their respective communities accept them as members thereof. It is unclear why members of the Indian community must be "of Indian origin" while there is no analogous requirement for people claiming membership of the Chinese community to be of Chinese origin. Likewise, where a person belonging to some other minority community is concerned, the only requirement is that he or she "belongs to any minority community other than the Malay and Indian community".[36]

It is patent that the definitions of persons belonging to the Malay community and Indian and other minority communities were borrowed from definitions laid down earlier for the Group Representation Constituency (hereafter "GRC") scheme;[37] indeed, Deputy Prime Minister Teo Chee Hean said as much in Parliament during the Second Reading of the Constitution of the Republic of Singapore (Amendment) Bill that established reserved elections.[38] Under the GRC scheme, electoral divisions designated as GRCs are contested by groups of candidates rather than individual candidates, and each group is required to have at least one candidate from a designated minority ethnic community to ensure representation of these communities in Parliament.[39]

The report of the select committee[40] convened to examine the GRC scheme before its introduction in 1988 sheds light on the definition of a "person belonging to the Malay community". The Constitution of the Republic of Singapore (Amendment) Bill and Parliamentary Elections (Amendment) Bill had specifically included people of Arab, Boyanese, Bugis, and Javanese descent in the definition. This was deemed unacceptable to some individuals who had made representations to the select committee on the ground that other groups from the Malay Archipelago were not mentioned in the definition.[41] Their understanding of the Malay community was clearly quite broad. The select committee agreed that it would be undesirable to "lay down prescriptive criteria as to who does or does not belong to the Malay community", and that this was a matter to be determined by the community. It thus recommended the current definition.[42]

With the advent of reserved elections, it became necessary to create a mechanism for determining which ethnic community a prospective presidential candidate belongs to. The 2017 amendments to the Presidential Elections Act

---

36 *Ibid*.

37 *Ibid*, Art 39A(4), and see also the Parliamentary Elections Act (Cap 218, 2011 Rev Ed), s 27A(8).

38 Teo Chee Hean (Deputy Prime Minister), speech during the Second Reading of the Constitution of the Republic of Singapore (Amendment) Bill, *Singapore Parliamentary Debates, Official Report* (7 November 2016), vol 94: "The definitions for the Malay, Indian and other minority communities are identical to those adopted in the GRC context." The Constitutional Commission also suggested adapting the GRC scheme's definitions of the communities for the reserved election scheme: *Constitutional Commission Report* (n 1) [5.37].

39 Constitution (n 4) Arts 39A(1) and 39A(2)(a).

40 *Report of the Select Committee on the Parliamentary Elections (Amendment) Bill [Bill No 23/87] and the Constitution of the Republic of Singapore (Amendment No 2) Bill [Bill No 24/87]* (Parl 3 of 1988) (hereafter *GRC Select Committee Report*).

41 *Ibid*, [39].

42 *Ibid*, [41]–[42]. The recommendation was accepted by the Government: Goh Chok Tong (First Deputy Prime Minister and Minister for Defence, speech during the Third Reading of the Parliamentary Elections (Amendment) Bill (as Reported from Select Committee), *Singapore Parliamentary Debates, Official Report* (18 May 1988), vol 51, cols 24–25.

established a Community Committee with a chairman and five members each from the Chinese community, Malay community, and Indian or other minority communities.[43] The five members from each group then form a sub-committee: for example, the five members belonging to Indian or other minority communities constitute the Indian and Other Minority Communities Sub-Committee. [44] A prospective presidential candidate is required to submit a community declaration to the CC either stating that he or she belongs to the Chinese community, Malay community, *etc*, and wishes to apply for a community certificate confirming this, or that he or she does not consider himself or herself as a member of any of the communities.[45] The period for making a community declaration begins three months before the expiry of the incumbent President's term (or the date when the office of the President falls vacant, if this happens prior to the term expiring), and ends five days after the date of the writ of election.[46]

Community declarations are required to be made whether or not a forthcoming election is a reserved election. This is because it is necessary to know which ethnic community, if any, the person elected as President belongs to for the purpose of determining whether a future election is to be a reserved election or not.[47] Where a non-reserved election is involved, in the general case the CC will accept a community declaration and refer it to the relevant Sub-Committee for the latter to determine whether the declarant does in fact belong to the community that he or she declares himself or herself to belong to.[48] If the Sub-Committee agrees with the declarant, the CC must issue a community certificate to the declarant stating that he or she belongs to that community.[49] In the event a declarant says he or she does not belong to any of the communities specified in the law, or if the Sub-Committee concludes that the declarant does not belong to the community as the declarant claims, the CC may invite the declarant to submit another declaration.[50] If the declarant then declines to do so, in the former scenario the CC must accept the community declaration, whereas in the latter scenario it must reject the application for a community certificate.[51]

However, when a reserved election is due to be held, the CC must reject community declarations in which the declarants state that they do not consider themselves as members of the community or communities to which the election is reserved.[52] Declarations that are not rejected for this reason are, as before, referred to the Sub-Committee for the community to which the election is reserved.[53] Depending on the Sub-Committee's view, the CC must either issue a community certificate to the declarant stating that he or she belongs to the relevant community, or reject the declarant's application for a community certificate.[54]

---

43 PEA (n 6) s 8E(1).
44 *Ibid*, ss 8E(3)–(5).
45 *Ibid*, s 8F(1).
46 *Ibid*, s 8F(3).
47 Once the Returning Officer declares a person to be elected as President, he or she must add the person, and the community (if any) that the person belongs to, to the Schedule to the PEA, which is then used for determining whether an election is reserved under Art 19B(1) of the Constitution: *ibid*, ss 5A(1) and (2).
48 *Ibid*, ss 8H(2) and (3).
49 *Ibid*, s 8H(4)(c).
50 *Ibid*, ss 8H(2)(b) and (4)(d)(ii). Only one such invitation may be issued: *ibid*, s 8H(7)(c).
51 *Ibid*, ss 8H(8).
52 *Ibid*, s 8G(2).
53 *Ibid*, s 8G(3).
54 *Ibid*, ss 8G(4)(c) and (d).

Sub-Committees are accorded much leeway in determining whether declarants are members of the communities they claim to belong to. They "must be guided by the merits of the case without regard to legal forms and technicalities, or to whether the evidence before it is in accordance with the law of evidence or not".[55] As the law provides virtually no guidance to Sub-Committees, they may potentially take into account factors that some may regard as irrelevant, unexpected or unfair. For instance, Salleh Marican, a prospective candidate for the 2017 presidential election, was criticized by some members of the public for his lack of fluency in speaking the Malay language;[56] he responded by saying he was taking regular Malay language lessons.[57] Would a Sub-Committee be justified in taking an applicant's language ability into account?

At a forum on the reserved election scheme organized by the Institute of Policy Studies on 8 September 2017, in response to a question on whether a person who was born into a Malay family but had decided to leave the religion of Islam would be accepted as a Malay, one speaker posited that being Muslim might be a requirement for being regarded as belonging to the Malay community.[58] This is not specified in the Presidential Election Act, and is in fact inconsistent with views expressed by legislators when the definition of a "person belonging to the Malay community" was adopted for the GRC scheme. The select committee examining the scheme said:[59]

> [A]s Singapore is a democratic secular state, and as the Constitution recognises the right of individuals to profess any religion of their choice, it is neither prudent nor appropriate for legislation to prescribe that a Malay must also be a Muslim in order to stand as a candidate for election. It will set an invidious and dangerous precedent to have in our laws a provision to single out a particular religion for special treatment.

---

55 *Ibid*, ss 8G(4)(b) and 8H(4)(b). In addition, when determining whether a declarant belongs to a community, a Sub-Committee may:

> (a) require the declarant to provide further information; (b) interview the declarant; inform itself on any matter; and (d) consult any person, and may take into account any refusal by the declarant to provide further information or to be interviewed.

Presidential Elections (Community Declaration and Community Certificate) Regulations 2017 (S 264/2017), reg 5(1).

56 Zakir Hussain, "Doubts about Presidential Hopefuls Not Being Malay Enough are Off Track", *The Straits Times* (Singapore, 20 July 2017) <*https://www.straitstimes.com/opinion/doubts-about-presidential-hopefuls-not-being-malay-enough-are-off-track*> accessed 27 April 2018 (archived at <*https://web.archive.org/web/20170823055603/https://www.straitstimes.com/opinion/doubts-about-presidential-hopefuls-not-being-malay-enough-are-off-track*>).

57 Safhras Khan, "Salleh Marican: I am Taking Malay Lessons ahead of Presidential Election 2017", *Yahoo! News Singapore* (19 June 2017) <*https://sg.news.yahoo.com/salleh-marican-taking-malay-lessons-ahead-presidential-election-2017-102557004.html*> accessed 27 April 2018 (archived at <*https://web.archive.org/web/20180206193220/https://sg.news.yahoo.com/salleh-marican-taking-malay-lessons-ahead-presidential-election-2017-102557004.html*>).

58 Nur Asyiqin Mohamad Salleh, "Presidential Election 2017: Question of Who is Malay Continues to be Raised", *The Straits Times* (Singapore, 9 September 2017) <*http://www.straitstimes.com/politics/question-of-who-is-malay-continues-to-be-raised*> accessed 8 January 2018 (archived at <*https://web.archive.org/web/20180108033511/http://www.straitstimes.com/politics/question-of-who-is-malay-continues-to-be-raised*>); see also Siau Ming En and Kelly Ng, "Community Committee 'Able to Deal with Evolving Concept of Race'", *Today* (Singapore, 9 September 2017) <*http://www.todayonline.com/singapore/community-committee-able-deal-evolving-concept-race*> accessed 8 January 2018 (archived at <*https://web.archive.org/web/20170911115450/http://www.todayonline.com/singapore/community-committee-able-deal-evolving-concept-race*>).

59 *GRC Select Committee Report* (n 40) [40].

This recommendation was accepted by the Government during the Third Reading of the Parliamentary Elections (Amendment) Bill in Parliament on 18 May 1988, the First Deputy Prime Minister and Minister for Defence commenting:[60]

> Several Malay representors and witnesses submitted that to qualify as a member of the Malay community, that person must be a Muslim. The Select Committee, however, concluded that as a secular State, the laws should not prescribe any religion for any individual as the Constitution recognizes the right of individuals to profess any religion of their choice. Anyway, whether a person is a member of the Malay community or not, it is for that person and the community to decide.

The Malay Community Sub-Committee itself has not commented publicly on whether it took into account the applicants' language ability and religion during the 2017 presidential election.

When introducing the Constitution of the Republic of Singapore (Amendment) Bill during its Second Reading in Parliament, the Deputy Prime Minister said: "It is useful to note that the 'other minority communities' refers to groups that have some degree of history, permanence, and established presence in Singapore, such as the Eurasian community".[61] As this limitation is not mentioned in the law, presumably the statement made in Parliament might be relied on to interpret the phrase "person belonging to the Indian or other minority communities" in Article 19B(6) of the Constitution.[62] However, this might work unfairness on prospective candidates of less traditional descent.

While one can understand the Government's desire to accord the CC and its Sub-Committees broad flexibility in determining the sensitive matter of which ethnic community a prospective candidate belongs to, for the avoidance of doubt it may be preferable for the issues highlighted above to be clarified in the legislation. As the GRC select committee stated, it is submitted that religion should be excluded as a factor to be considered in determining a person's membership of a community; to hold otherwise would be to impair the right to profess one's religion guaranteed by Article 15(1) of the Constitution. The possible limitation of "other minority communities" to those that have an "established presence" in Singapore adds a layer of complexity which might usefully be eliminated.

When prospective candidates of mixed ethnicity apply for community certificates for a reserved election, another peculiarity in the law becomes evident. The likelihood of this occurring is not slim. In the 2017 presidential election, the main prospective candidates were Halimah Yacob and Salleh Marican, whose fathers are Indian and mothers are Malay; and Farid Khan Kaim Khan who is of Pakistani descent.[63] All of them made community declarations that they belonged to the Malay community, and the CC issued community certificates to them in those terms.[64] It

---

60 Goh, speech during the Third Reading of the Parliamentary Elections (Amendment) Bill (n 42), col 25.

61 Teo, speech during the Second Reading of the Constitution of the Republic of Singapore (Amendment) Bill (n 38).

62 Pursuant to the Interpretation Act (Cap 1, 2002 Rev Ed), ss 9A(2) and (3)(c).

63 Nur Asyiqin Mohamad Salleh, "Presidential Election 2017: Question of Who is Malay Continues to be Raised" (n 58); see also Faris Mokhtar, "Reserved Presidential Election Casts Spotlight on 'Malayness'", *Today* (Singapore, 15 July 2017, updated 16 July 2017) <*http://www.todayonline.com/singapore/reserved-presidential-election-casts-spotlight-malayness*> accessed 8 January 2018 (archived at <*https://web.archive.org/web/20170719124842/http://www.todayonline.com/singapore/reserved-presidential-election-casts-spotlight-malayness*>).

64 "Press Release: Issue of Certificate of Eligibility and Malay Community Certificate for Presidential Election 2017" (Elections Department, Prime Minister's Office 11 September 2017) [4]

might be said that the CC and the Malay Community Sub-Committee heeded the Government's call for an "inclusive approach" to be adopted when determining if a person is a member of a community.[65] In the end, the PEC determined that Salleh Marican and Farid Khan did not meet the private sector service requirement (certainly a less controversial conclusion), with the result that Halimah Yacob was declared elected as President without the need for a poll.

In the community declarations made by prospective candidates for a particular election, the law restricts each of them to making "one (and only one)" statement that they either consider themselves as belonging to one of the three specified communities and wish to apply for a community certificate to that effect, or that they do not consider themselves to be of any of the specified communities.[66] In a reserved election, the CC will reject a community declaration if the declarant did not state that he or she belongs only to the ethnic community to which the election is reserved.[67] The law does not allow a person to state in a declaration that he or she belongs to more than one ethnic community – such a person must either aver that he or she belongs to one of the "other minority communities" in Singapore or, paradoxically, none of the communities. Depending on the declaration, the person would only be entitled to participate in an election reserved to the Indian and other minority communities, or a non-reserved election.

However, the law does not appear to expressly prevent a person of mixed ethnicity who has been issued a community certificate for a particular community, but who has been unsuccessful in a reserved election, from seeking to contest an election reserved for another community by making a fresh declaration that he or she is a member of that community. Although the earlier community certificate would be conclusive of the fact that the person belongs to one community,[68] when considering a subsequent community declaration a Sub-Committee is, as we have seen, not to be bound by legal forms and technicalities and evidence law.[69] One could argue that the law does not unambiguously require a person to claim for all time that he or she is a member of only one community and no other. It would be up to the Sub-Committee of the second ethnic community to decide whether to also recognize the declarant as a member of that community as well. In reaching its decision, the Sub-Committee would no doubt take the first community certificate into account, but would it be fair for the Sub-Committee and CC to hold that a person can only be a member of one community for the purposes of a presidential election in the absence of any express legal prohibition?

In Parliament, the Deputy Prime Minister expressed the view that the combination of self-identification and community acceptance "has proven to be capable of handling situations involving persons of mixed heritage" in the GRC

<http://www.eld.gov.sg/pressrelease/PreE2017/Press%20Release%20on%20Issue%20of%20Certificate%20of%20Eligibility%20and%20Malay%20Community%20Certificate%20for%20Presidential%20Election%202017.pdf> accessed 8 January 2018 (archived at *<https://web.archive.org/web/20170913231647/http://www.eld.gov.sg/pressrelease/PreE2017/Press%20Release%20on%20Issue%20of%20Certificate%20of%20Eligibility%20and%20Malay%20Community%20Certificate%20for%20Presidential%20Election%202017.pdf>*).

65 Chan Chun Sing (Minister, Prime Minister's Office), speech during the Second Reading of the Presidential Elections (Amendment) Bill, *Singapore Parliamentary Debates, Official Report* (6 February 2017), vol 94.

66 PEA (n 6) s 8F(2).

67 *Ibid*, s 8G(2)(b)(ii).

68 *Ibid*, s 8J(2).

69 *Ibid*, ss 8G(4)(b) and 8H(4)(b).

context,[70] and so presumably would not pose a problem for reserved elections either. Nonetheless, by effectively compelling a prospective candidate to choose between denying an aspect of his or her ethnic heritage and being disentitled from participating in a reserved election highlights a matter going to the heart of the scheme:[71] do reserved elections reinforce an unrealistic conception of ethnic uniformity, and the mistaken idea that a community cannot be properly represented in the office of the President by a person of mixed heritage?

C. JUSTICIABILITY OF DECISIONS BY THE PRESIDENTIAL ELECTIONS COMMITTEE AND THE COMMUNITY COMMITTEE

1. *Effectiveness of Finality and Conclusive Evidence Clauses*

Decisions by the Presidential Elections Committee as to whether a prospective candidate is a person of "integrity, good character and reputation" and satisfies the private sector or public sector service requirements, and by the Community Committee and its Sub-Committees as to community declarations, are expressed to be "final and [...] not subject to appeal or review in any court" by Article 18(12) of the Constitution[72] and section 8J(1) of the Presidential Elections Act[73] (hereafter "PEA") respectively. Moreover, certificates of eligibility issued by the PEC and community certificates issued by the CC are declared to be "conclusive of the matters" certified and also "not subject to appeal or review in any court" by sections 8C and 8J(2) of the PEA.

The extent to which the finality or ouster clauses are effective in ousting judicial review is uncertain in Singapore.[74] According to the High Court in *Stansfield Business International Pte Ltd v Minister for Manpower*,[75] such a clause must be construed strictly, and does not prevent judicial review if the decision-making body has "acted without jurisdiction" or "done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity", as the House of Lords put it in *Anisminic Ltd v Foreign Compensation Commission*.[76] However, the clause is effective if the decision-maker has "merely made an error of law which does not affect its jurisdiction, and if its decision is not a nullity for some reason such as breach of the rules of natural justice".[77]

---

70 Teo, speech during the Second Reading of the Constitution of the Republic of Singapore (Amendment) Bill (n 38).

71 For further discussion, see Jaclyn Neo's "Constitutionalizing Minority Representation: The Reserved Elections Mechanism and Politicization of Ethnicity in Singapore", Chapter 5 in this volume.

72 Constitution (n 4). Article 18(12) has the distinction of being a finality clause in a constitutional text, but apart from taking precedence over inconsistent ordinary legislation, it is submitted that there is no particular reason why it should have a different legal effect from a finality clause in such legislation.

73 PEA (n 6).

74 A number of decisions have affirmed the effectiveness of ouster clauses, but arguably without fully considering relevant cases: see, for example, *Mohamed Yusoff bin Mohd Haniff v Umi Kalsom bte Abas (Attorney-General, non-party)* [2010] SGHC 114, [2010] 3 SLR 481, 488, [25] (HC); and *Cheong Chun Yin v Attorney-General* [2014] SGHC 124, [2014] 3 SLR 1141, 1151–1152, [28]–[31] (HC).

75 [1999] SGHC 183, [1999] 2 SLR(R) 866 (HC).

76 [1968] UKHL 6, [1969] 2 AC 147, 171 (HL).

77 *Stansfield* (n 75) 874, [21]–[22], quoting *South East Asia Fire Bricks Sdn Bhd v Non-metallic Mineral Products Manufacturing Employees Union* [1980] UKPC 21, [1981] AC 363, 370 (PC on appeal from Malaysia). The finality clause in question in *Stansfield* was s 14(5) of the Employment

In contrast, in the later case of *Borissik v Urban Redevelopment Authority*,[78] the High Court held that the effectiveness of a finality clause no longer depends on whether an error is jurisdictional or not, but on "practical matters" including:[79]

> [...] the need in the circumstances for legal certainty and the need for finality on which the affected person may rely; the degree of expertise of the decision-making body; the esoteric nature of the traditions or legal provisions decided by the decision-making body; and the extent to which interrelated questions of law, fact and degree are best decided by the body which hears the evidence at first hand, rather than the courts on judicial review. In particular, account will be taken as to whether there has been previous appropriate opportunity for the claimant to challenge the relevant decision.

A difference of opinion thus exists as to whether the Singapore courts understand the reference in *Anisminic* to acting without jurisdiction or doing or failing to do something that causes a decision to be a nullity in the expansive way that the United Kingdom courts have done in cases like *O'Reilly v Mackman*[80] and *R v Lord President of the Privy Council, ex parte Page*.[81] In *Page*, for instance, Lord Browne-Wilkinson expressed the view that *Anisminic* had "rendered obsolete the distinction between errors of law on the face of the record and other errors of law by extending the doctrine of ultra vires", with the effect that "in general any error of law made by an administrative tribunal or inferior court in reaching its decision can be quashed for error of law".[82] The High Court was invited to rule on this issue in *Nagaenthran a/l K Dharmalingam v Attorney-General*,[83] but decided to refrain from reaching a firm conclusion on the matter.[84] It noted, though, that if the concept of jurisdictional error were understood broadly, this "would not appear to be aligned with the 'green-light' approach towards administrative law, which is presently the most accurate reflection of the socio-political attitude in the existing Singapore milieu".[85]

The matter may have been implicitly clarified by the Singapore Court of Appeal in *Per Ah Seng Robin v Housing and Development Board*.[86] The Court acknowledged that commentators have opined that ouster clauses that seek to prevent courts from reviewing "*justiciable* matters" or to "take away the judicial power of the court where its supervisory jurisdiction is concerned"[87] are incompatible with the rule of law since

---

Act (Cap 91, 1996 Rev Ed; now 2009 Rev Ed): "The decision of the Minister on any representation made under this section [for wrongful dismissal] shall be final and conclusive and shall not be challenged in any court." See also, to similar effect, *Re Application by Yee Yut Ee* [1978] SGHC 32, [1977–1978] SLR(R) 490, 494–497, [18]–[31] (HC), and *Attorney-General v Ryan* [1979] UKPC 33, [1980] AC 718, 730 (PC on appeal from the Bahamas). In the latter case, the finality clause in the Bahamas Nationality Act 1973, s 16 ("[T]he decision of the Minister on any such application or order shall not be subject to appeal or review in any court"), was held not to prevent the court from inquiring into the validity of the Minister's decision on the ground that it was made without jurisdiction and *ultra vires*.

78 [2009] SGHC 154, [2009] 4 SLR(R) 92 (HC).

79 *Ibid*, 100, [28], quoting Harry Woolf, Jeffrey Jowell and Andre Le Sueur, *De Smith's Judicial Review* (6th ed) (London: Sweet & Maxwell, 2007), [4-051]. See also *Tey Tsun Hang v Attorney-General* [2014] SGHC 253, [2015] 1 SLR 856, 869–870, [44]–[45] (HC) (ouster clause upheld as matters relating to national policy best left to the executive, and in any case the clause does not oust matters involving compliance with procedural requirements).

80 [1983] UKHL 1, [1983] 2 AC 237, 278 (HL).

81 [1992] UKHL 12, [1993] AC 682, 701–702 (HL).

82 *Ex parte Page*, *ibid*.

83 [2018] SGHC 112 (HC) (hereafter *Nagaenthran* (HC)).

84 *Ibid*, [107].

85 *Ibid*, [123].

86 [2015] SGCA 62, [2016] 1 SLR 1020 (CA).

87 *Ibid*, 1048, [65] (original emphasis).

it is the courts' duty to declare the limits of discretionary powers,[88] and may even be inconsistent with the vesting of judicial power in the courts by Article 93 of the Constitution.[89] However, as the respondent had not relied on section 56(6), the ouster clause in the Housing and Development Act,[90] the Court declined to reach a firm conclusion on whether the clause prevented judicial review of the executive decision in question.[91] Indeed, it is submitted the issue did not arise on the facts of the case as section 56(6) merely states: "The decision of the Minister shall be final and not open to review or challenge on any ground whatsoever." As *Stansfield* and other cases indicate, clauses of this nature do not oust judicial review completely.

The Court went on to assume that section 56(6) did not prevent the decision made by the Minister for National Development from being reviewed, and regarded the issues raised in the case as "eminently justiciable".[92] It then assessed the actions of the Minister on the traditional broad categories of grounds of judicial review in administrative law – illegality, irrationality, and procedural impropriety. The Court's conclusion was in line with its judgments in *Chng Suan Tze v Minister for Home Affairs* and *Tan Seet Eng v Attorney-General*.[93] While these cases involved subjectively worded executive discretion rather than finality clauses, the Court held in the cases that executive decisions to detain persons without trial for national security reasons under the Internal Security Act,[94] and for "public safety, peace and good order" under the Criminal Law (Temporary Provisions) Act,[95] were respectively subject to objective judicial review on traditional administrative law grounds.[96] Reference may also be had to *Yong Vui Kong v Attorney-General*,[97] where the Court of Appeal inferred that since the Constitution requires the Cabinet to consider certain materials when deciding how to advise the President to exercise the power of clemency,[98] this implies that the Cabinet has a constitutional duty to act impartially

---

88 Thio Li-ann, "Law and the Administrative State" in Kevin Y L Tan (ed), *The Singapore Legal System* (2nd ed) (Singapore: Singapore University Press, 1999), 195. See *Chng Suan Tze v Minister for Home Affairs* [1988] SGCA 16, [1988] 2 SLR(R) 525, 553, [86] (CA) ("All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power"), cited with approval in *Tan Seet Eng v Attorney-General* [2015] SGCA 59, [2016] 1 SLR 779, 816–818, [97]–[99] (CA).

89 Chan Sek Keong, "Judicial Review – from Angst to Empathy: A Lecture to Singapore Management University Second Year Law Students" (2010) 22 *Singapore Academy of Law Journal* 469, 477, [19]; Thio Li-ann, "The Judiciary" in *A Treatise on Singapore Constitutional Law* (Singapore: Academy Publishing, 2012), 538, [10.218]. In *Nagaenthran a/l K Dharmalingam v Public Prosecutor* [2019] SGCA 37, [2019] 2 SLR 216 (hereafter *Nagaenthran* (CA)) at 248–249, [71]–[74], the Court of Appeal found it unnecessary on the facts of the case to reach a final decision on the matter, but it expressed the view that a statutory clause which purports to oust the courts' power to review the legality of an executive decision, as opposed to its merits, will be regarded as "constitutionally suspect for being in violation of Art 93 of the Constitution as well as the principle of the separation of powers".

90 Cap 129, 2004 Rev Ed.

91 *Per Ah Seng Robin* (n 86) 1049, [66].

92 *Ibid*, 1049, [67].

93 *Chng Suan Tze* and *Tan Seet Eng* (n 88).

94 Internal Security Act (Cap 143, 1985 Rev Ed), s 8.

95 Criminal Law (Temporary Provisions) Act (Cap 67, 2000 Rev Ed) (hereafter CLTPA), s 30.

96 *Chng Suan Tze* (n 88) 563, [119]; *Tan Seet Eng* (n 88) 808, [74]. As is well known, the Court of Appeal's ruling in *Chng Suan Tze* relating to the Internal Security Act was legislatively reversed by the Constitution of the Republic of Singapore (Amendment) Act 1989 (No 1 of 1989) and the Internal Security (Amendment) Act 1989 (No 2 of 1989).

97 [2011] SGCA 9, [2011] 2 SLR 1189 (CA).

98 Constitution (n 4) Art 22P(2).

and in good faith.[99] If the Cabinet fails in this regard the court must be able to intervene, otherwise "the rule of law would be rendered nugatory".[100]

It is submitted that *Per Ah Seng Robin* may confirm that when interpreting finality clauses that do not seek a complete ouster of judicial review, the Singapore courts, like those in the United Kingdom, will examine all possible errors of law rather than adhering to the old distinction between jurisdictional and non-jurisdictional errors. Indeed, when the Government sought to have Parliament amend the Criminal Law (Temporary Provisions) Act in February 2018 by inserting a clause stating that detention decisions by the Minister for Home Affairs are "final",[101] it affirmed the Court of Appeal's ruling in *Tan Seet Eng* and said the new clause was not intended to, and indeed could not, alter the legal position regarding the reviewability of such decisions by the courts.[102]

As for the conclusive evidence clauses in the PEA, it appears they are capable of precluding judicial review of certificates of eligibility and community certificates to a greater extent than finality clauses.[103] In *R v Registrar of Companies, ex parte Central Bank of India*,[104] the Court of Appeal of England and Wales said that a clause containing words excluding the admission of evidence rather than excluding the courts' jurisdiction to grant judicial review is unaffected by the *Anisminic* rule.[105] It described the rationale underlying such clauses as the desirability of obviating the need for proof of statutory requirements which could be "so difficult as to be impossible",[106] and to accord certainty to transactions based on the certificates issued by the public authority.[107] While the Singapore Court of Appeal has accepted the rule,[108] it has ameliorated its strictness to a degree by accepting in *Teng Fuh Holdings*

---

99 *Yong Vui Kong* (n 97) 1235, [82].

100 *Ibid*, 1235, [83].

101 CLTPA (n 95) s 30(2), inserted by the Criminal Law (Temporary Provisions) (Amendment) Act 2018 (No 12 of 2018), s 3.

102 K Shanmugam (Minister for Home Affairs and Law), speech during the Second Reading of the Criminal Law (Temporary) Provisions (Amendment) Bill, *Singapore Parliamentary Debates, Official Report* (6 February 2018), vol 94.

103 Although the Evidence Act (Cap 97, 1997 Rev Ed), s 4(3), states that:

> [w]hen one fact is declared by this Act to be conclusive proof of another, the court shall, on proof of the one fact, regard the other as proved, and shall not allow evidence to be given for the purpose of disproving it,

the wording suggests that the provision does not apply to conclusive evidence clauses in other statutes: compare *Tun Datu Haji Mustapha bin Datu Harun v Tun Datuk Haji Adnan Roberts, Yang di-Pertua Negeri Sabah & Datuk Joseph Pairin Kitingan (No 2)* [1986] 2 MLJ 420, 465–466 (HC, Kota Kinabalu, Malaysia) (Evidence Act 1950 (Act 56; Malaysia), s 4(3), which is identical to Singapore's Evidence Act, s 4(3), held not applicable to the conclusive evidence clause in the Chief Minister (Incorporation) Ordinance (Cap 23; Sabah, Malaysia), s 5).

104 [1986] QB 1114 (CA).

105 *Ibid*, 1169–1170.

106 *Ibid*, 1172, citing *Re Yolland, Husson & Birkett Ltd* [1968] 1 Ch 152, 158 (Ch D).

107 *Ibid*, 1180–1181.

108 Contrast *Tun Datu Haji Mustapha* (n 103) 465–466, where the Malaysian High Court held that the Chief Minister (Incorporation) Act, s 5 ("A notification in the *Gazette* of the appointment of any person to hold or act in the office of Chief Minister, State of Sabah, shall be conclusive evidence that such person was duly so appointed"), was primarily designed to dispense with the need for detailed proof that a person had been appointed has the Chief Minister of Sabah by providing that production of a notification published in the *Government Gazette* sufficed. The notification was only conclusive as to the fact and procedural requirements of the appointment, and did not preclude a challenge to the validity of the appointment itself. The case was applied by the Federal Court of

Pte Ltd v Collector of Land Revenue[109] that a conclusive evidence clause will not prevent judicial review if there is proof that the public authority has acted in bad faith.[110]

It is incongruous, though, that while Article 18(12) probably does not prevent decisions of the PEC on a prospective candidate's good character and satisfaction of the public or private sector service requirements from being challenged on traditional administrative law grounds, the conclusive evidence clause in section 8C of the PEA seems to do so. Since section 8C is thus partially inconsistent with Article 18(12), it would appear to be void to the extent of the inconsistency.[111]

Of course, as mentioned earlier, it is possible that the finality and conclusive evidence clauses in the PEA may also be inconsistent with the vesting of judicial power in the courts by Article 93 of the Constitution and with the constitutional doctrines of the rule of law and separation of powers. When the time comes for the Court of Appeal to address this issue squarely, given its generally cautious and deferential approach towards judicial review,[112] in all likelihood it would hold that Article 93 and the rule of law principle require recognition of the UK position concerning ouster clauses, but not to the extent of rendering such clauses entirely ineffective. This would also avoid a clash between Article 18(12) and Article 93, which, both being constitutional provisions, the court would strive to read harmoniously.[113]

This position has been foreshadowed by *Nagaenthran*, which held that section 33B(4) of the Misuse of Drugs Act,[114] insofar as it ousts judicial review of non-justiciable determinations by the Public Prosecutor,[115] is not a violation of Article 93 or the constitutional doctrines mentioned above. The High Court said that judicial deference should be shown to the legislature's decision to enact the provision "by dint of the constitutional doctrine of the separation of powers" and "the relative institutional competence of the executive in respect of decisions that concern issues that judges are ill-equipped to adjudicate".[116] In any case, the ultimate position taken by the Court of Appeal towards finality or ouster clauses should similarly apply to conclusive evidence clauses as they serve essentially the same purpose and are often

---

Malaysia in *Lombard Commodities Ltd v Alami Vegetable Oil Products Sdn Bhd* [2010] 2 MLJ 23, 34, [26]–[28].

109 [2007] SGCA 14, [2007] 2 SLR(R) 568 (CA).

110 *Ibid*, 575–578, [25]–[42]. See also *Galstaun v Attorney-General* [1980] SGHC 17, [1979–1980] SLR(R) 589, 592–593, [16]–[18] (HC), citing *Syed Omar bin Abdul Rahman Taha Alsagoff v The Government of the State of Johore* [1979] 1 MLJ 49, 50 (PC on appeal from Malaysia) (a statutory provision stating that a declaration that certain lands were needed for specified purposes was conclusive evidence of that fact could be treated as a nullity if the public authority had acted in bad faith and misconstrued its statutory powers or specified a purpose not allowed by the statute); and *Eng Foong Ho v Attorney-General* [2009] 2 SLR(R) 542, 555–556, [39] (CA), citing *Syed Omar* and *Teng Fuh*, *ibid*.

111 Constitution (n 4) Art 4.

112 See, for instance, *Teo Soh Lung v Minister for Home Affairs* [1989] SGHC 108, [1989] 1 SLR(R) 461 (HC), [1990] SGCA 5, [1990] 1 SLR(R) 347 (CA), where a clause freezing the law governing judicial review of decisions made under the Internal Security Act (n 94) as at a specified date and a finality clause in s 8B of the Internal Security Act were found to be constitutional.

113 For an example of the application of harmonious construction to constitutional provisions, see *Phang Chin Hock v Public Prosecutor* [1980] 1 MLJ 70, 72, in which the Federal Court of Malaysia held that the basic structure doctrine did not apply to the Malaysian Constitution.

114 Cap 185, 2008 Rev Ed. For the wording of s 33B(4), see the text to n 119.

115 *Nagaenthran* (HC) (n 83) [82].

116 *Ibid*, [88]. In *Nagaenthran* (CA) (n 89), 237–239, [47]–[51], the Court of Appeal found that s 33B(4) was not in fact an ouster clause but a clause immunizing the Public Prosecutor from suit. As such, it was not unconstitutional. (This judgment was released too late to be substantively examined in the main text.)

coupled with ouster clauses.[117] It is paradoxical "that the strongest form of ouster clause may fail to protect some ultra vires decision or act whereas the weaker one [the conclusive evidence clause] may succeed in doing so".[118]

In addition, finality clauses cannot prevent the court from looking into alleged unconstitutional conduct by the executive. In *Cheong Chun Yin v Attorney-General*,[119] the High Court examined how section 33B(4) of the Misuse of Drugs Act should be interpreted. The section states:

> The determination of whether or not any person has substantively assisted the Central Narcotics Bureau in disrupting drug trafficking activities shall be at the sole discretion of the Public Prosecutor and no action or proceeding shall lie against the Public Prosecutor in relation to any such determination unless it is proved to the court that the determination was done in bad faith or with malice.

The High Court accepted that even though unconstitutionality of the Public Prosecutor's determination is not expressly mentioned in the section, it is a ground on which judicial review can be sought.[120] This position was confirmed by the Court of Appeal in *Muhammad Ridzwan bin Mohd Ali v Attorney-General*[121] on the basis that since "the Constitution is supreme and all governmental powers are ultimately derived from and circumscribed by the Constitution [...] all executive acts must be constitutional and the court is conferred the power to declare void any executive act that contravenes the provisions of the Constitution".[122] It therefore stands to reason that the fundamental liberties in the Constitution cannot simply be deemed irrelevant by finality and conclusive evidence clauses that exist in ordinary legislation.

Apart from the approach the courts might take towards the ouster and conclusive evidence clauses in the Constitution and the Presidential Elections Act, is there a case for them to be done away with? The Constitutional Commission disagreed with suggestions that judicial review of the PEC's decisions either on the merits or on the grounds of legality should be available. It felt that the judiciary would be asked to make decisions "which are, in substance, political", and this would be "an undesirable derogation from the principle of the separation of powers under the Constitution". Furthermore, it "would not be desirable to encourage collateral litigation connected with the office of President". The PEC was "uniquely qualified to decide whether the requirements set out in Art 19(2) are met", and it would be more "efficient and expeditious" to ensure legal propriety in the PEC's decision-making process by having a legally qualified person serve as a member of the PEC.[123]

In connection with this, the Commission proposed adding three members to the PEC in addition to the existing three.[124] This recommendation was adopted by

---

117 As is the case for the PEA (n 6) ss 8C (certificates of eligibility) and 8J (community certificates).

118 William Wade and Christopher Forsyth, "Restriction of Remedies" in *Administrative Law* (11th ed) (Oxford: Oxford University Press, 2014), 617.

119 *Cheong Chun Yin* (n 74).

120 *Cheong Chun Yin* (n 74) 1151–1152, [31].

121 [2015] SGCA 53, [2015] 5 SLR 1222 (CA).

122 *Ibid*, 1235–1236, [35], citing *Law Society of Singapore v Tan Guat Neo Phyllis* [2007] SGHC 207, [2008] 2 SLR(R) 239, 310, [143] (CA). While the latter case did not involve any finality clause, the Court of Appeal expressed the view that the rule of law entails that the exercise of prosecutorial discretion be subject to judicial review on the grounds of bad faith and contravention of constitutional protections and rights: *ibid*, 313, [149].

123 *Constitutional Commission Report* (n 1) [4.96].

124 The existing members of the PEC are the Chairman of the Public Service Commission, who serves as the Chairman of the PEC; the Chairman of the Accounting and Corporate Regulatory Authority;

Parliament. The new members are a current or former member of the Council of Presidential Advisers, to be appointed by the Chairman of the Council;[125] a person, to be appointed by the Prime Minister, with expertise and experience acquired in the private sector who would be able to provide insights as to whether prospective candidates satisfy the private sector service requirements;[126] and a person, to be appointed by the Chief Justice, who is qualified to be or has been a Judge of the Supreme Court.[127] The Commission said the latter person would be able to assist the PEC in ensuring the legal requirements of Article 19(2)(g) are satisfied, and that its decisions are reached in a procedurally fair manner.[128]

It is certainly not disputed that the PEC's legally qualified member would indeed be well positioned to advise the Committee on these matters.[129] The CC is not statutorily required to have a legally qualified member, though presumably it may consult someone with legal expertise if it deems necessary.[130] Nevertheless, the benefit of allowing decisions of the PEC, and the CC and its Sub-Committees, to be judicially reviewable is to provide public assurance that the decisions are subject to an independent legal check. In fact, despite the Constitutional Commission's view, the current state of the law suggests that the finality clause applying to certain decisions of the PEC does not prevent the courts from exercising judicial review on the ground of legality. Going a step further, it might be said that the decisions made by the various committees are more factual than "political" in nature. For example, a prospective candidate seeking a certificate of eligibility from the PEC based on the private sector service requirement must provide a plethora of financial information about the private sector organisation which the person has served as chief executive of.[131] A court is manifestly capable of determining if the PEC has properly evaluated such data and drawn correct inferences therefrom. Hence, there is no reason why decisions of the PEC and CC should not be appealable to the courts on both issues of law and fact.

Rather than derogating from the separation of powers doctrine, an appeal (or, at least, judicial review) would give effect to the concept of checks and balances that is a crucial and inseparable part of the doctrine. It is also, as has been pointed out earlier, consistent with the rule of law and the vesting of judicial power in the courts. If court review is unavailable, perceptions that the various committees are making determinations in a partisan and politicized manner may be difficult to dispel. It is not surprising the view has been taken that the non-reviewability of the PEC's decisions "poses problems for the practice of constitutional government, not to mention for the principles relating to the transparency and accountability of decision makers when exercising public power".[132]

---

and a member of the Presidential Council for Minority Rights appointed by the Chairman of that Council: Constitution (n 4) Arts 18(2)(a)–(c).

125 The recommendation was implemented by the Constitution, *ibid*, Art 18(2)(d).

126 *Ibid*, Art 18(2)(f).

127 *Ibid*, Art 18(2)(e): see the *Constitutional Commission Report* (n 1) [4.92].

128 *Constitutional Commission Report*, *ibid*.

129 The PEC is also required to consult the Attorney-General if it desires advice on any question of law arising in the performance of its duties: Presidential Elections (Certificate of Eligibility) Regulations 2017 (n 10) reg 33.

130 The Presidential Elections (Community Declaration and Community Certificate) Regulations 2017 (n 55) reg 5(1)(d) provides that a Sub-Committee may "consult any person" when deciding whether a declarant belongs to a certain community. Under reg 5(2)(d), the CC may do the same when deciding whether to invite a declarant to submit another community declaration.

131 Presidential Elections (Certificate of Eligibility) Regulations (n 10) regs 13–32 read with the Schedule, Form 1, Annex B5.

132 Thio, "(S)electing the President" (n 13) 527.

2. *Procedure for Judicial Challenges*

In view of the foregoing, under the law as it stands there are at least some situations where decisions of the PEC, CC, and Sub-Committees of the CC are subject to judicial review. Despite the applicable finality clauses, such decisions are probably at least challengeable before the courts on the grounds of illegality (including acting in bad faith), irrationality, and procedural impropriety. Non-compliance with any statutory procedure could be considered either a form of illegality or procedural impropriety. In contrast, the PEA provisions declaring certificates of eligibility and community certificates to be conclusive of the matters they certify are effective in preventing the courts from examining whether the certificates breach administrative law rules, unless it can be shown that the body issuing a certificate acted in bad faith.

However, it is submitted that finality and conclusive evidence clauses cannot prevent the courts from considering if any decisions of the PEC, CC, and Sub-Committees of the CC infringe constitutional rights. In connection with this, it should be noted that Article 19B(5) does not prevent decisions of the CC and its Sub-Committees as to whether a person is a member of a particular ethnic community from being disputed before the courts as contrary to Articles 12(1) and (2) of the Constitution; for example, it could be alleged that the person has been discriminated against on the ground of race or descent. Article 19B is the constitutional provision establishing reserved elections, and clause (5) of the Article states: "No provision of any law made pursuant to this Article is invalid on the ground of inconsistency with Article 12 or is considered to be a differentiating measure under Article 78." Yet, this only immunizes from incompatibility with the Constitution's equality clause the reserved election scheme as a whole,[133] and not the decisions by the CC or any Sub-Committee. Nonetheless, it would be an uphill battle for a prospective candidate to succeed in proving a violation of equality as the legal test is difficult to satisfy.[134]

We should not overlook the fact that only decisions of the PEC as to whether a person is of "integrity, good character and reputation" and satisfies the private sector or public sector service requirements are subject to a finality clause.[135] There is no bar against an applicant for a certificate of eligibility challenging the PEC's refusal to issue the certificate due to, say, a mistaken belief that the applicant is an undischarged bankrupt or holds an office of profit.[136]

The procedure for judicial challenges would benefit from some clarification. Article 93A(1) of the Constitution states that "[*a*]*ll proceedings* relating to the election of the President" shall be heard by an Election Judge,[137] which seems to require a person seeking to challenge a decision of the PEC, CC or a Sub-Committee to apply to an Election Judge rather than to the High Court, which would be the usual procedure.

---

133 Curiously, Art 19B(5) was not mentioned when the reserved election scheme was challenged for inconsistency with Art 12(2) in *Ravi s/o Madasamy v Attorney-General* [2017] SGHC 163, [2017] 5 SLR 489 (HC). Instead, the High Court relied on, among other things, the fact that Art 12(2) prohibits discrimination "[e]xcept as expressly authorised by this Constitution": *ibid*, 524–525, [81]–[84].

134 See *Lim Meng Suang v Attorney-General* [2014] SGCA 53, [2015] 1 SLR 26 (CA), discussed in Jack Tsen-Ta Lee, "Equality and Singapore's First Constitutional Challenges to the Criminalization of Male Homosexual Conduct" (2015) 16 *Asia-Pacific Journal on Human Rights and the Law* 150, and Jaclyn L Neo, "Equal Protection and the Reasonable Classification Test in Singapore: After *Lim Meng Suang v Attorney-General*" [2016] *Singapore Journal of Legal Studies* 95.

135 That is, the qualifications set out in the Constitution (n 4) Arts 19(2)(e) and (g): *ibid*, Art 18(12).

136 *Ibid*, Art 19(2)(d) read with Art 45(1)(b) and (c).

137 Emphasis added. On the meaning of *Election Judge*, see the text to n 26.

However, a number of things point to Article 93A having a narrower application. For one, the heading of the Article reads: "Jurisdiction to determine questions as to validity of Presidential election". While a provision's heading "is intended only to summarise the contents of sections for ease of reference, and is not always exhaustive or precise", and therefore cannot "control or limit the operation of the plain words" in the provision,[138] Article 93A(2) goes on to provide that the Election Judge "shall have the power to hear and determine and make such orders as provided by law on proceedings relating to the election of the President". The PEA, which is the relevant law, essentially provides that an Election Judge is empowered to determine if an election should be invalidated on specified grounds, including corrupt and illegal practices by a candidate or his or her election agents, and proof that the candidate was disqualified from standing in the election.[139] The Act says nothing about an Election Judge playing any role in judicially reviewing the decisions of the PEC, CC or a Sub-Committee. Thus, it is submitted that such applications must be brought before the High Court in the normal way.

The timeframes set out in the legislation do not contemplate any legal challenges being brought. The latest time that the PEC can issue a certificate of eligibility to an applicant or notify the applicant that a certificate will not be issued is the eve of nomination day.[140] The CC must adhere to the same deadline when informing declarants if their community declarations have been accepted, and issuing community certificates to them or notifying them of the rejection of their applications for certificates.[141] This means that a person aggrieved by the PEC and CC's decisions may well have less than a day to file a lawsuit and have it heard by the High Court, much less to appeal the matter to the Court of Appeal. The PEA provides for nomination day and polling day to be postponed for reasons such as riots, storms and floods, health hazards, fires, and "difficulties in the physical conduct" of nomination proceedings or polling,[142] but not because of pending legal proceedings.

Thus, it would be apposite for adjustments to be made to the relevant legislation clarifying the role of the Election Judge, requiring the PEC and CC to notify prospective candidates whether their applications for certificates of eligibility and community certificates are successful, and providing an expedited procedure for judicial review cases to be heard and appealed.

III. THE CONDUCT OF ELECTION CAMPAIGNS

Moving from the prerequisites for candidacy in a presidential election to the campaigning period between nomination day and cooling-off day, it will come as no surprise that the latter is also quite heavily regulated in Singapore, with rules ranging from the maximum amount that candidates can spend on their campaigns[143] to the

---

138 *Ezion Holdings Ltd v Teras Cargo Transport Pte Ltd* [2016] SGHC 175, [2016] 5 SLR 226, 231–232, [18] (HC), citing *Tee Soon Kay v Attorney-General* [2007] SGCA 27, [2007] 3 SLR(R) 133, 148, [41] (CA).

139 See generally the PEA (n 6), ss 68–76, and the Supreme Court (Presidential Elections) (Application for Avoidance of Election) Rules (Cap 322, R 7, 2007 Rev Ed).

140 *Ibid*, s 8B.

141 *Ibid*, s 8I.

142 *Ibid*, ss 36A and 36C.

143 The maximum amount is S$600,000 or 30 cents per elector, whichever is greater: PEA (n 6) s 50(1). Based on the number of electors as of 28 August 2017, the maximum amount for the 2017 presidential election was $754,982.40: "Campaigning Guidelines for the Presidential Election" (Elections Department website, Prime Minister's Office, 29 August 2017) [21]

sizes of posters.[144] In principle, the law should strive to accord candidates and voters freedom to share information and views that may help voters to decide how to mark their ballots, while preventing opinions from being unduly skewed by highly influential voices. In this respect, it might be said that the balance between these factors could be better struck.

A. The Conduct of Candidates during Campaigns

The 2011 presidential election was the first to have been contested by four qualified candidates. A controversy arose over statements made by some of these candidates concerning the President's role and what the President can publicly say without the advice of Cabinet. For example, Tan Kin Lian said that the President "represents the views of the people", and that if many people have views on an issue they regard as important and the Government has not addressed it, the President "should bring these to the Government's attention and have a dialogue with the Government".[145] Tan Jee Say, on his part, expressed the view that the President possesses "moral power" to air views in public on "issues of conscience" such as the building of casinos.[146] On the other hand, Law Minister K Shanmugam observed at a forum organized by the Institute of Policy Studies that while the President may privately offer advice to the Prime Minister, the Constitution requires that he or she only act and speak as the Cabinet advises.[147]

Commenting on this, the Constitutional Commission said:[148]

> [T]o the extent candidates in the last Presidential elections appeared to misstate what they could or would do if elected, this may have stemmed from a failure to understand the proper remit of the Presidency and in particular, the tendency to see it, mistakenly, as an alternative source of Executive policy-making power.

It proposed that the law should require candidates to declare that they understand the President's constitutional role before being issued a certificate of eligibility; that it should be an offence for candidates to make promises or take positions incompatible

---

<http://www.eld.gov.sg/pressrelease/PreE2017/Press%20Release%20on%20Campaigning%20Guidelines%20for%20the%20Presidential%20Election.pdf> accessed 9 September 2017 (archived at *<https://web.archive.org/web/20170909004737/http://www.eld.gov.sg/pressrelease/PreE2017/Press%20Release%20on%20Campaigning%20Guidelines%20for%20the%20Presidential%20Election.pdf>*) (hereafter Campaigning Guidelines).

144 Not to exceed 850 by 600 mm, except for posters on the day and at the site of any election rally held by a candidate: Presidential Elections (Election Advertising) Regulations (Cap 240A, Rg 3, 2000 Rev Ed) (hereafter Election Advertising Regulations), regs 6(1) and (3).

145 Tessa Wong, "Tan Kin Lian: President Should Speak Up Publicly", *The Straits Times* (Singapore, 28 July 2010), A6.

146 Leong Wee Keat, "Candidates Cross Swords", *Today* (Singapore, 24 August 2011).

147 The Minister for Law relied on the Constitution (n 4) Art 21(1) ("Except as provided by this Constitution, the President shall, in the exercises of his functions under this Constitution or any other written law, act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet."), and constitutional conventions applicable to the British monarch that Singapore inherited from the United Kingdom: see K Shanmugam, "Speech by Minister for Foreign Affairs and Law, Mr K Shanmugam, at the Institute of Policy Studies Forum on the Elected Presidency" (Ministry of Law website, 5 August 2011) *<http://app2.mlaw.gov.sg/News/tabid/204/Default.aspx?ItemId=567>* accessed 7 April 2012 (archived at *<https://web.archive.org/web/20120407001233/http://app2.mlaw.gov.sg/News/tabid/204/Default.aspx?ItemId=567>*); see also Teh Shi Ning, "The President's Role and Powers: Shanmugam", *The Business Times* (Singapore, 6 August 2011).

148 *Constitutional Commission Report* (n 1) 130, [7.15].

with the office of the President; and that the sanctions could range from criminal liability, to declaratory reliefs issued by an Election Judge, and, in "appropriate extreme cases", revocation of a certificate of eligibility.[149]

The Government decided against amending the law along these lines, resolving instead to require each candidate to make a statutory declaration in the nomination paper to be submitted to the Returning Officer on nomination day that he or she "understands the President's role under the Constitution, including any particular aspect of the President's role stated in the prescribed form".[150] Section B of the nomination paper now requires a candidate to declare that:[151]

> (d) I have read the explanatory material provided by the Returning Officer and understand the President's role under the Constitution, and in particular that —
>
> (i) the President is the Head of State and the symbol of national unity;
>
> (ii) it is also the function of the President to safeguard the reserves of Singapore and the integrity of the Public Services of Singapore, in accordance with the specific discretionary powers conferred on the President by the Constitution; and
>
> (iii) the President must exercise his functions according to the advice of the Cabinet, except where the Constitution otherwise provides.
>
> And I make this solemn declaration by virtue of the Oaths and Declarations Act (Cap. 211), and subject to the penalties provided by that Act for the making of false statements in statutory declarations, conscientiously believing the statements contained in this declaration to be true in every particular.

Hence, the possibility of criminal liability has not entirely disappeared. Under section 14(1)(a) of the Oaths and Declarations Act,[152] it is an offence for a person to make:

> in a statutory declaration a statement which is false, and which he knows or has reason to believe is false or does not believe to be true, touching any point material to the object for which the declaration is made or used.

It may be asked whether the chance that a candidate may inadvertently make comments inconsistent with the declaration in the nomination paper has a chilling effect on what candidates say while campaigning. The imposition of criminal liability seems unnecessary when the inaccuracy of any statement can simply be pointed out

---

149 *Ibid*, 130–131, [7.16].

150 PEA (n 6) s 9(3)(c)(iii).

151 Section B of Form P4 in the Schedule to the Presidential Elections (Forms and Fees) Regulations (Cap 240A, Rg 1, 2000 Rev Ed), as amended by the Presidential Elections (Forms and Fees) (Amendment) Regulations 2017 (S 266/2017). The Presidential Elections (Certificate of Eligibility) Regulations 2017 (n 10) r 35, states: "For the purpose of section 9(3)(c)(iii) of the [Presidential Elections] Act, the Returning Officer may provide explanatory material on the role of the President to a prospective candidate." During the 2017 presidential election, the Returning Officer issued a document entitled "Explanatory Material on Role of the President under the Constitution of the Republic of Singapore" (Elections Department website, 1 June 2017) <*http://www.eld.gov.sg/Resources/Presidential/Explanatory%20Material%20on%20Role%20of%20the%20President%20under%20the%20Constitution%20of%20the%20Republic%20of%20Singapore.pdf*> accessed 10 May 2018 (archived at <*https://web.archive.org/web/20180510081808/http://www.eld.gov.sg/Resources/Presidential/Explanatory%20Material%20on%20Role%20of%20the%20President%20under%20the%20Constitution%20of%20the%20Republic%20of%20Singapore.pdf*>).

152 Cap 211, 2001 Rev Ed.

and the facts clarified, as the Law Minister did during the 2011 election, and voters trusted to decide for themselves how credible the candidate making the statement is.

The Government took a lighter approach when responding to another of the Constitutional Commission's recommendations. The Commission had suggested that, "with a view to tempering the divisiveness of the election process and ensuring that campaigning remains consistent with the role of the President as a symbol of national unity and which preserves the dignity associated with the highest office in the land", rules should be enacted "to restrict or exclude acts that might inflame emotions, cause divisiveness or encourage invective. Such rules could also prescribe a 'white list' of approved campaign methods, such as televised debates or speeches". It was not clear to the Commission that holding election rallies was "either necessary or helpful in this context".[153]

The Government decided against disallowing candidates from holding rallies. Instead, during the 2017 presidential election the Elections Department, departing from previous practice, announced that it would not designate any rally sites for candidates to book, leaving it to them to make their own arrangements if they wished to hold rallies.[154] (No rallies were eventually held as Halimah Yacob was elected as President unopposed on nomination day.) Neither did the Government issue regulations banning particular campaigning methods. Instead, the Returning Officer introduced a voluntary undertaking that candidates could make, to be submitted on nomination day and publicly displayed on a notice board together with the nomination paper and associated documents.[155] The undertaking was that a candidate would "campaign for election as President in a manner that is dignified, decorous and consistent with the President's position as the Head of State and the symbol of national unity".[156] It is submitted that an addition to the voluntary undertaking in the form of a statement concerning a candidate's understanding of the President's constitutional role is preferable to requiring candidates to make a statutory declaration to that effect in their nomination papers.

B. Sharing of Information through the Internet

All election advertising, including advertising on the Internet, is regulated by the Presidential Elections Act and the Presidential Elections (Election Advertising) Regulations[157] issued thereunder.[158] The regulations relate to particulars that must be

---

153 *Constitutional Commission Report* (n 1) 128, [7.12]–[7.13].

154 Campaigning Guidelines (n 143) [14].

155 "Press Release: Presidential Election 2017" (Elections Department website, Prime Minister's Office, 28 August 2017) [9] <*http://www.eld.gov.sg/pressrelease/PreE2017/Press%20Release%20on%20Presidential%20Election%202017.pdf*> accessed 8 September 2017 (archived at <*https://web.archive.org/web/20170908154526/http://www.eld.gov.sg/pressrelease/PreE2017/Press%20Release%20on%20Presidential%20Election%202017.pdf*>).

156 "Voluntary Undertaking on Campaigning by Presidential Election Candidate" (Election Department website, Prime Minister's Office) <*http://www.eld.gov.sg/Resources/Presidential/Voluntary%20Undertaking%20on%20Campaigning%20by%20Presidential%20Election%20Candidate.pdf*> accessed 17 May 2018), also reproduced in Annex A of the *Presidential Election 2017 Candidate Handbook* (Elections Department, Prime Minister's Office 2017) 53 <*http://www.eld.gov.sg/pdf/Candidate Handbook for Presidential Election 2017.pdf*> accessed 9 May 2018 (archived at <*https://web.archive.org/web/20180509113641/http://www.eld.gov.sg/pdf/Candidate%20Handbook%20for%20Presidential%20Election%202017.pdf*>).

157 Election Advertising Regulations (n 144).

158 Pursuant to the PEA (n 6) s 60AA(1)(b).

provided together with the advertising,[159] the content of the advertising,[160] and various other requirements (for example, the sender of an e-mail or electronic message must cease sending such messages if requested to do so by a recipient,[161] and discussion fora must be moderated).[162]

In 2010, the concept of making the eve of polling day a "cooling-off day" was introduced in both parliamentary and presidential elections.[163] The idea was to provide voters with an opportunity to reflect on how to exercise their vote without being bombarded by messages sent on behalf of candidates. Restrictions on election advertising that had applied on polling day were extended to cooling-off day.[164] However, "the telephonic or electronic transmission by an individual to another individual of the first-mentioned individual's own political views, on a non-commercial basis", was exempted from the restrictions.[165]

What is somewhat uncertain is whether this exemption includes electronic messages that are sent by one person to a number of recipients, for example, by e-mail or a messaging app such as WhatsApp, or on social media such as Facebook or Twitter. This interpretation was given credence by a press release issued by the Elections Department during the 2015 general election which stated that "transmission of personal political views by individuals to other individuals, on a non-commercial basis, using the Internet, telephone or electronic means" on cooling-off day and polling day was permissible.[166] The use of the phrase *by individuals to other individuals* suggested that the exemption applied to communications from a single sender to multiple recipients, rather than being limited to communications from one sender to one recipient at a time.

On the other hand, speaking in Parliament on 27 April 2010, the Minister for Law explained the analogous provision in the Parliamentary Elections Act[167] – section 78B(2)(c) – differently during the Second Reading of the amendment bill leading to the inclusion of the provision in the Act.[168] (An identical change was debated and made to the Presidential Elections Act on the same day.)[169] Initially, he said:[170]

---

159 Election Advertising Regulations (n 144) regs 1B and 1C(2).

160 *Ibid*, reg 1C(1).

161 *Ibid*, reg 1C(3).

162 *Ibid*, reg 1D.

163 By the Parliamentary Elections (Amendment) Act 2010 (No 10 of 2010) and the Presidential Elections (Amendment) Act 2010 (No 11 of 2010), both in force with effect from 1 July 2010.

164 PEA (n 6) s 60A(1).

165 *Ibid*, s 60A(2)(c).

166 "Press Release: Cooling-off Day and Polling Day – General Election 2015" (Elections Department website, 9 September 2015) [5(f)] <*http://www.eld.gov.sg/pressrelease/ParE2015/Press%20Release%20on%20Cooling-Off%20Day%20and%20Polling%20Day.pdf*> accessed 1 May 2017 (archived at <*https://web.archive.org/web/20170501231459/http://www.eld.gov.sg/pressrelease/ParE2015/Press%20Release%20on%20Cooling-Off%20Day%20and%20Polling%20Day.pdf*>). Based on this information from the Elections Department, a similarly worded statement was published on the Government's website *Factually*: see "What Happens on Cooling-off Day?" (*Factually*, Government of Singapore website, 25 August 2015) <*https://www.gov.sg/factually/content/what-happens-on-cooling-off-day*> accessed 31 March 2016 (archived at <*https://web.archive.org/web/20160331083504/http://www.gov.sg/factually/content/what-happens-on-cooling-off-day*>).

167 Parliamentary Elections Act (n 37).

168 The amendment Act was the Parliamentary Elections (Amendment) Act 2010 (n 163).

169 By the Presidential Elections (Amendment) Act 2010 (n 163).

170 K Shanmugam (Minister for Law and Home Affairs), speech during the Second Reading of the Parliamentary Elections (Amendment) Bill, *Singapore Parliamentary Debates, Official Report* (27 April 2010), vol 87, cols 238 (emphasis added).

> [I]nstead of allowing only individual transmission of personal political views on the Internet (on a non-commercial basis), we have widened the exception to cover any form of telephonic or electronic transmission of personal political views *by individuals to other individuals* (on a non-commercial basis). This is to take into account new forms of individual personal communication.

This is essentially the same as the statement put out by the Elections Department in 2015. However, he subsequently clarified:[171]

> [I]ndividual-to-individual transmission of personal political views, on a non-commercial basis, is not caught by the prohibition on Cooling-Off day and Polling Day. So, if a person posts a message on his blog or on a website which everyone can read, asking readers to vote for a particular party or candidate, that would probably be election advertising. But if he sends an email or SMS to a friend to share his personal political views about the election and provided he does not collect money for doing so, then that would not be caught.

Thus, it appears that while one-to-one electronic communications made on cooling-off day and polling day are allowed, one-to-many communications are not. Given how widely messaging apps and social media are used these days, it may be asked if it is worth making such activities criminal offences. A halfway house might be to prohibit official representatives of candidates from communicating with multiple recipients while allowing voters to do so, though admittedly it would be quite hard to determine whether someone is communicating on behalf of a candidate or not. On balance, it may be better not to have a rule that is simply a trap for the unwary and probably upheld more in its breach than adherence, and to simply accord voters greater freedom to communicate with each other on political and electoral matters, even on cooling-off day and polling day.

C. Endorsement and Criticism of Candidates

As the President is supposed to be politically neutral, he or she is barred from being a member of a political party and, if formerly a Member of Parliament, must vacate his or her parliamentary seat.[172] A candidate for the office cannot be a member of any political party on nomination day,[173] and the Elections Department advises that "[p]olitical parties should not be involved in campaigning using their party names and symbols in support of a candidate".[174] Nonetheless, it has been pointed out that the Constitution does not prevent political parties, the government, or non-governmental bodies with close government ties from endorsing – or, indeed, criticizing – candidates.[175]

---

171 *Ibid*, cols 285–86 (emphasis added).

172 Constitution (n 4) Arts 19A(1)(c) and (d).

173 *Ibid*, Art 19(2)(f).

174 Campaigning Guidelines (n 143) [17]. There does not appear to be any legislative backing for this advisory. The only persons expressly excluded from taking part in election activity are students attending primary or secondary schools; persons against whom orders of police supervision have been made under the Criminal Law (Temporary Provisions) Act (Cap 67, 2000 Rev Ed), s 30(b); undischarged bankrupts; and non-citizens: PEA (n 6) s 65(1). *Election activity* is defined as including "any activity which is done for the purpose of promoting or procuring the election of any candidate at any election other than clerical work wholly performed within enclosed premises": *ibid*, s 65(8).

175 Thio, "(S)electing the President" (n 13) 537–538.

I proposed to the Constitutional Commission that Ministers and MPs should be barred from endorsing candidates, whether in their personal or official capacities. The Commission did not see the need for this requirement on the ground that political parties are "are likely to have strong and potentially relevant views on the merits or demerits of Presidential candidates" which voters may wish to consider.[176] It is submitted, though, that the expression of positive or negative views by influential members of political parties may be unfair to candidates because of the undue effect they may have on voters, and conflicts with the non-partisan nature of the office of the President reflected in the law and the Elections Department's policy. It has also been pointed out that prohibiting such persons from expressing these views would "preserve the objectivity and integrity" of the PEC's work in vetting prospective candidates and "ensure it is not prematurely politicized", as well as dispel public perceptions that this may be happening.[177]

IV. CONCLUDING THOUGHTS

This chapter has examined a number of issues relating to the mechanics of how presidential elections are conducted. Concerning the qualification process for becoming a candidate, it has been argued, among other things, that the Presidential Elections Committee should be impressed with a legal duty to consider evidence that applicants for certificates of eligibility may wish to place before it. It has also highlighted the lack of statutory guidance given to the Community Committee and its Sub-Committees when it comes to deciding whether a person who has applied for a community certificate belongs to a particular ethnic community. Moreover, it seems that persons of mixed ethnicity may find themselves in the invidious position of choosing between denying one aspect of their ethnic background and being unable to participate in a reserved election.

There are finality and conclusive evidence clauses in the Constitution and the Presidential Elections Act that seek to prevent decisions of the PEA, CC, and the latter's Sub-Committees from being challenged in court. At the time of writing, such clauses do not operate to prevent judicial review where the committees have acted unconstitutionally or where jurisdictional errors of law have occurred. It may well be that the concept of a "jurisdictional error of law" should now be understood broadly, with the result that courts may review all situations where an error of law, however characterized, has occurred. It remains undetermined whether ouster clauses are in fact entirely unconstitutional; the Court of Appeal has suggested they may be if they seek to prevent the courts from reviewing the legality of executive action.[178] It has been submitted that such clauses are unnecessary, and that the committees' decisions should be made appealable to the courts on both law and fact. This would arguably provide an avenue for independent scrutiny that aggrieved prospective candidates could avail themselves of, and help to dispel perceptions that the committees are arriving at determinations in a partisan and politicized manner.

During the campaigning period between nomination day and polling day, it is submitted that some of the applicable rules tend to slant public debate in favour of the views of highly influential persons such as Ministers and MPs. For instance, the possibility that presidential candidates who accidentally comment on the President's

---

176 *Constitutional Commission Report* (n 1) 131–32, [7.18].
177 Thio, "(S)electing the President" (n 13) 538.
178 *Nagaenthran* (CA) (n 89): see the text to nn 114–116.

role in a way inconsistent with the statutory declaration in the nomination paper may find criminal charges brought against them may have a chilling effect on what they speak about. Moreover, it seems that on cooling-off day and polling day, voters are prohibited from electronically sharing information and opinions to multiple recipients by e-mail or through a messaging app or social media. On the other hand, political parties, the Government, and non-governmental bodies with close government ties are not enjoined from criticizing or endorsing candidates. The rules could do with some rebalancing.

It is hard to escape the sense that underlying the various rules examined in this chapter seems to be a persistent belief that voters may not be trusted to properly assess whether candidates merit being elected to the nation's highest office. Thus, prospective candidates need to be pre-screened by various committees whose decisions are expressed to be final and probably only reviewable by the courts on narrow grounds, and what is said during election campaigns need to be carefully cabined. It is worth asking ourselves whether this fundamentally underestimates the electorate's powers of discernment. Ultimately, the procedures for electing the President should treat prospective and actual candidates even-handedly, and promote public confidence in the integrity of the process.