Singapore: (S)electing the president—diluting democracy?

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President of Singapore—elections—democracy—lack of competition—stringent criteria—preselection process—rule of law and unaccountable constitutional organs

In 1991, Singapore undertook a novel constitutional experiment and modified its inherited Westminster model of parliamentary government by creating the institution of the Elected Presidency (EP).¹ Formerly a ceremonial head of state chosen by Parliament, the EP is elected for a six-year term on a nationwide one-person–one-vote basis, with no term limits.² The office was originally conceived as a safeguard against the potential fiscal mismanagement of national reserves—recently estimated at US$87.7 billion³—by a rogue parliamentary executive with untrammeled power. The legislative intent was that the officeholder should possess “the legitimacy and moral authority to block

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2 SING. CONST. art. 20.

the Government” in order to protect these reserves, an action that might otherwise become a “highly controversial and politicized issue.” Thus, the first white paper on the EP asserted that “such authority can only be derived from the will of the people as expressed in an election,” since unelected bodies “would be placed in a highly invidious position” in opposing the will of an elected government.4

Since the inception of the EP, three presidential elections have been held—in 1993, 1999, and 2005—and only the first of these was contested. Section 15 of the Presidential Elections Act (PEA)5 declares that, when elections are uncontested, the EP may be a single nominated candidate. In 2005, the incumbent S. R. Nathan, who was unchallenged in 1999, was reelected unopposed. However, this was not for the want of potential candidates; rather, the constitutionally established Presidential Elections Committee (PEC)6 refused to award a certificate of eligibility (COE) to any of the other aspiring EP candidates. The committee considered each as having failed to meet the constitutional criteria. The PEC consists of three unelected “wise men,” as identified in article 18(2), who are bureaucrats or members of the establishment. PEC decisions are final and not “subject to appeal or review in any court.”7 That this 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, seems all too apparent. It is the purpose of this note to evaluate the constitutional and statutory regime governing the election of the president, with reference to the 2005 elections. Additionally, it will consider the impact that uncontested elections may have on an institution specifically designed to incorporate a populist or democratic element by requiring that the officeholder be the product of democratic choice as expressed through national elections.8

1. The rationale and role of the EP within Singapore’s constitutional order

Prior to the constitutional amendment that established the office of president (or EP),9 the head of state, in whom executive authority is formally vested,10

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4 Constitutional Amendments to Safeguard Financial Assets and the Integrity of the Public Service, 1988, Cm. 10, at 4, para. 18(c) [hereinafter First White Paper].
5 Cap 240A.
6 SING. CONST. art. 18.
7 SING. CONST. art. 18(9).
8 Thio Li-ann, Is Singapore Heading for a Selected Presidency?, STRAITS TIMES (Singapore), Aug. 19, 2005, at 31.
10 SING. CONST. art. 23.
acted on the advice of the cabinet, which has the “general direction and control of the Government.” The initial proposal would have conferred on the EP the power to withhold assent to certain government financial bills and, possibly, to veto key civil service appointments in the interests of preventing corruption. Later, the EP’s constitutional portfolio of reactive powers was expanded to include a limited authority to review statutory exercises of power that curtailed constitutional liberties under the Internal Security Act (ISA) and Maintenance of Religious Harmony Act (MRHA), both of which contain clauses precluding judicial review.

This shift toward institutionalism was remarkable, given the prevailing official neo-Confucian ideology that valorizes “the concept of government by honorable men” whom the population trusts and respects, as contrasted with the “Western idea” of giving governments “as limited powers as possible … [and treating them with] suspicion unless proven otherwise.” Donald Lutz, in a general survey of post–World War II constitutional trends, evokes the Singaporean experience, noting that many new democracies have had “elected presidents with varying degrees of political authority” and have similarly manifested a “general move towards a greater degree in the separation of powers.” While certain elected presidents possess “minimal powers,” nevertheless, “their presence has been matched by reducing the ability of parliament to appoint officials and/or to revise the constitution without the intervention of some other body.”

11 SING. CONST. art. 21(1). Exceptionally, the president was authorized to exercise his judgment in assessing whether a member of parliament commanded the confidence of a parliamentary majority; this was in relation to the appointment the prime minister or declaring this office vacant: arts. 25, 26.

12 SING. CONST. art. 24.

13 First White Paper, supra note 4.

14 Such powers were first delineated in Safeguarding Financial Assets and The Integrity of the Public Service, 1990, Cm. 11, at 7, paras. 24–27 [Second White Paper].

15 Cap 143.

16 Cap 167A.

17 Preventive detention orders issued under the ISA restricted rights to life and liberty (art. 9) while restraining orders issued under the MRHA would limit rights to religious freedom (art. 15) and rights to freedom of speech, assembly, and association (art. 14). The EP’s checking powers are set out in articles 151(4) and 221, respectively, and are limited, particularly since the EP works in tandem with other nonelected or bureaucratic constitutional bodies such as the ISA Advisory Body and Presidential Council for Religious Harmony. See Li-ann Thio, Lex Rex or Rex Lex: Competing Conceptions of the Rule of Law in Singapore, 20 UCLA PAC. BASIN L.J. 53 (2002).


Functionally, the EP and cabinet, as components of the executive branch, are involved—as participants—in the same decision-making process when, for example, it is a matter of proposing, adopting, or rejecting a supply bill. If, contrary to the recommendations of a six-member constitutional organ called the Council of Presidential Advisers, the EP decides to withhold assent to a supply bill, this may be overruled by a two-thirds majority of Parliament. Thus, the EP is effectively powerless when the cabinet minimally commands a 66.6 percent parliamentary majority, as it does at present (the People’s Action Party, or PAP, government secured 82 of 84 electoral seats in the 2006 general election).

2. Prequalifying to contest the presidential elections

It is easier to qualify as a candidate for the United States presidency or, indeed, for prime minister of Singapore than for the EP, which wields far less political power than either of those offices. The process is as follows.

Elections are indirect; potential candidates are vetted by the three-member PEC, consisting of the chairmen of the Public Service Commission and Public Accountants Board and a member of the Presidential Council for Minority Rights. Before awarding a COE, the PEC must be subjectively satisfied that the applicant “is a person of integrity, good character and reputation”; additionally, the individual must have “such experience and ability in administering and managing financial affairs” as to provide for the effective discharge of EP functions. The latter requirement is assessed in two ways: first, it is automatically satisfied if a candidate has held any of certain stipulated public offices for a minimum of three years. This ensures that the person has high executive or administrative experience in the public sector, although not necessarily financial expertise across the board. The chairman or CEO of certain statutory

20 SING. CONST. part VA.
21 SING. CONST. art. 148D(1).
22 U.S. CONST. art. II, §1 requires a presidential candidate to be a natural born citizen, minimally thirty-six years of age who has resided in the U.S. for fourteen years.
23 SING. CONST. art. 44 stipulates the criteria for parliamentarians, including citizenship, as a minimum age of twenty-one, residence in Singapore for minimally ten years prior to the date of nomination for election, the candidate’s name must be in the current register of electors, and he must have sufficient linguistic proficiency to participate in parliamentary debates.
24 SING. CONST. art. 18(2).
25 SING. CONST. art. 18(9), § 8(3).
26 SING. CONST. art. 19(2)(e), § 8(1)(a).
27 SING. CONST. art. 19(2)(e), § 8(1)(b).
28 Minister, chief justice, Speaker, attorney general, chairman of the Public Service Commission, auditor general, accountant general, or permanent secretary: SING. CONST. art. 19(2)(g)(i).
boards, or private sector companies with a minimum paid-up capital of $100 million may also qualify: thus, a candidate may demonstrate financial literacy without necessarily having experience in managing public affairs. These provisions are more illustrative than determinative, since the other way to qualify is for a candidate to have held “any similar or comparable position of seniority and responsibility” in a public or private sector organization “of equivalent size or complexity,” thus providing sufficient “experience and ability in administering and managing financial affairs.” The application of this loosely conceived criterion is nonjusticiable. In the absence of malice, section 8A of the PEA renders the PEC immune from defamatory suit when it exercises its discretion in denying a COE on the basis of bad character. The PEC may interview anyone it considers to have relevant information about candidates, and its proceedings are conducted in camera.

3. Ensuring independence?

To prevent conflicts of interest, article 19(3) precludes the EP from holding any other constitutional office, such as a parliamentary seat; having active commercial engagements; or being a member of any political party. Thus, the first EP (and former deputy prime minister) Ong Teng Cheong had to sever links with the PAP and relinquish his parliamentary seat. Despite concerns that President Ong’s former PAP affiliation would hinder his ability to operate independently, this proved otherwise at a 1999 press conference, in which he made public a long list of grievances and obstacles he had encountered during his tenure—an action that the government considered confrontational. Ong felt that certain ministers and civil servants considered him “a nuisance” and was concerned that he was not consulted in connection with the sale of the Post Office Saving Bank, a statutory body whose reserves came under presidential protection, and, in fact, only learned of the sale from a newspaper report. This sparked a

29 SING. CONST. art. 19(2)(g)(ii)–(iii).
30 SING. CONST. art. 19(2)(g)(iii).
31 During Select Committee discussions, it was proposed that there should be a five-year interval before former members of a political party, particularly those who had held high political office, would be allowed to run for the office of EP. This would allow for some distancing from cabinet policy and lessen the prospect of unwarranted parliamentary influence that could affect the perception the EP’s potential independence.
33 Issues raised by President Ong Teng Cheong at His Press Conference on 16th July 1999 (Statements by the PM and Minister for Finance), 70 SING. PARL. REP., Aug. 17, 1999, cols. 2068, 2022.
parliamentary debate and resulted in various ministerial statements, culminating in a third white paper spelling out the nonbinding principles designed to facilitate a “harmonious working relationship” between the president and government.\textsuperscript{15}

4. The EP as a work in progress; downsizing presidential powers

Article 5 of the Singapore Constitution requires that constitutional amendments be passed by a special two-thirds parliamentary majority. A special constitutional entrenchment mechanism, article 5(2A), was devised to require that EP-related amendments be passed by Parliament with the support of two-thirds of the voters at a national referendum.\textsuperscript{36} This procedure remains dormant some fifteen years later; the initial four-year moratorium was justified by the need for a grace period during which it would be easier to effect amendments to the new institution in the light of experience.\textsuperscript{37} (That, of course, leaves nine years without a rationale.) The government perceives the EP scheme as a work in progress\textsuperscript{38} and by keeping it subject to article 5—with its relatively easier amendment process—the government can maintain greater control over the office. That the government can muster, at any point, a two-thirds majority is a foregone conclusion; as things stand now, the cabinet controls 97 percent of available parliamentary votes.

On the whole, constitutional amendments to the EP scheme have curtailed the scope of presidential powers.\textsuperscript{39} Senior government officials have downplayed...
the EP’s function as a counterweight to Parliament, while highlighting its ceremonial or symbolic role.\textsuperscript{40} This brings up the question of whether the exacting qualifications for the EP are excessive, given the office’s limited and progressively shrinking role in the system of checks and balances.\textsuperscript{41}

5. The 2005 presidential elections: election by default

The PEC is not constitutionally obliged to give the reasons behind its decisions to award or deny COEs, which it must render before Nomination Day, although brief explanations have been volunteered. In 1993, former district judge and opposition politician J. B. Jeyaretnam and Tan Soon Phuan, both Worker’s Party members, were denied COEs for not satisfying the so-called good character requirement and for lacking the requisite financial expertise.\textsuperscript{42} The PEC awarded COEs to Ong Teng Cheong and former accountant general Chua Kim Yeow, whom government ministers had persuaded to run despite his reluctance. The latter made his disinclination quite clear by calling Ong the “far superior candidate.”\textsuperscript{43} The government declared both these candidates acceptable, although the PAP declared support for Ong.\textsuperscript{44} While no candidate campaigns under the banner of a party political, the PAP retains an interest in determining individuals’ eligibility and has adopted the practice of endorsing those it prefers. In 1999, the PEC rejected two other applications and awarded


\textsuperscript{42} Teng Cheong, \textit{Chua Can Run for President; Jeya Rejected}, \textit{Straits Times} (Singapore), Aug. 17, 1993, at 3. Both Jeyaretnam and Tan have been jailed for fraud and for refusing to pay a parking fine, respectively.

\textsuperscript{43} Chua: I’m Running for President out of Public Duty, \textit{Straits Times} (Singapore), Aug. 23, 1993, at 1. Despite not campaigning or putting up posters, as did Ong, Chua received 41.3 percent of the votes cast after giving only two televised speeches, one in which he presented himself as a non-PAP candidate asking, “[d]o you want the PAP to dominate the presidency?” Lydia Lim, \textit{What’s Behind the Election Divide}, \textit{Straits Times} (Singapore), Aug. 15, 2005; Chua: Do You Want PAP to Dominate Presidency as Well?, \textit{Straits Times} (Singapore), Aug. 27, 1993, at 1.

\textsuperscript{44} PAP Supports DPM Ong for Elected President, \textit{Straits Times} (Singapore), Aug. 11, 1993, at 2. Prime Minister Goh said that Chua was a “credible apolitical alternative” though he hoped the voters would select Ong, whom PAP members would campaign for in their personal capacity. Warren Fernandez, \textit{Another August Election}, \textit{Straits Times} (Singapore), Sept. 4, 1993, at 32.
S. R. Nathan, who was endorsed by the government and by such groups as the National Trade Union Congress (NTUC),\textsuperscript{45} which has close PAP ties,\textsuperscript{46} with the sole COE.\textsuperscript{47} This state of affairs was repeated in 2005 when Nathan alone of four applicants received a COE.\textsuperscript{48}

The 2005 elections were notable for the way the PEC treated the application of a promising candidate Andrew Kuan, then aged 51,\textsuperscript{49} who appeared to have significant financial expertise. Kuan had prepared well—creating a web site and informational CD-ROMs,\textsuperscript{50} stating in media interviews his desire to see “more transparency, better corporate governance and better management of the nation’s financial reserves,” and stressing that the EP’s role transcended the ceremonial. He criticized the government’s approach in various matters, such as having sought public feedback on its casino resort plans when it had already made its decision.\textsuperscript{51} Clearly, his proposed candidature discomfited the government. Nomination Day was August 17, 2005, with polling slated for August 27, allowing for an eleven-day campaign period. The last day for the PEC to issue COEs was August 16. Even before Kuan could be formally declared a candidate, that is, while the PEC’s (ultimately negative) determination was still pending, his presidential aspirations were discredited in the media and by reports of government statements impugning his competence and character. The bias in the news coverage of Nathan and Kuan was both evident and troubling, reflecting the fact that the media in Singapore is monopolized by Singapore Press Holdings, which has close informal ties with the government.\textsuperscript{52}

\textsuperscript{45}President Nathan’s Backers Leaving Nothing to Chance, STRAITS TIMES (Singapore), July 14, 2005, at H6.

\textsuperscript{46}The NTUC secretary-general is a PAP cabinet minister, and the NTUC, an umbrella organization with sixty-five affiliated unions representing some 400,000 workers, has endorsed its close ties with the PAP government by annual resolution since 1980. See generally Anthony Woodiwiss, Singapore and the Possibility of Enforceable Benevolence, in GLOBALISATION, HUMAN RIGHTS AND LABOUR LAW IN PACIFIC ASIA ## (Cambridge Univ. Press 1998).

\textsuperscript{47}The other candidates were private tutor Ooi Boon Ewe and opposition politician Tan Soon Phuan. Only Nathan Gets Eligibility Cert., STRAITS TIMES (Singapore), Aug. 18, 1999, at 2.

\textsuperscript{48}Nomination: Where and When It’ll Be Held, STRAITS TIMES (Singapore), Aug. 13, 2005, at H6. These were Nathan, Kuan, Ooi Boon Ewe, and Ramachandran Govindasamy.


\textsuperscript{50}It’s a risk but… NEW PAPER (Singapore), Aug. 6, 2005, at 10.

\textsuperscript{51}Lee U-Wen, Nathan Ready for Race: President Says He Will Take Election Contest in Stride, TODAY (Singapore), Aug. 6, 2005.

The current lack of rules governing fairness in electoral campaigning is a major flaw in government’s institutional design.

5.1. Campaigning outside the campaigning period
The confirmation of S. R. Nathan’s candidacy, on July 12, 2005, was accompanied by a flurry of declarations of support by government ministers and organizations, such as the NTUC, as well as by the frequent appearance of his name in the press.53 This tacit but effective publicity occurred even before the prime minister issued the Writ of Election—it came at a point where there were no declared candidates, only interested parties.54 Such endorsements might deter other Singaporeans from running for EP, because to do so might be thought of as challenging the political mainstream, a significant factor in a depoliticized, semiauthoritarian state.

In contrast, when Kuan announced his presidential aspirations in August 2005,55 he was presented as an intriguing surprise candidate,56 who had been a grassroots leader57 and a member of PAP (who was intending to resign).58 He had also held various positions relevant to high financial management: he had been the chief financial officer (CFO) of the Jurong Town Corporation (JTC),59 a statutory board whose past reserves are subject to presidential scrutiny, and the CFO of the Hyflux joint venture. However, news reports took on increasingly negative connotations60 as his “trial by media”61 began. News photos presented Kuan looking harried and beleaguered62 when reports of his supposed May 2001 “ouster” from the chairmanship of his condominium management committee emerged,63 and, again, when news that he faced a potential

53 Chua Chim Kang, Offer All Candidates Equal Chances in the Presidential Election, STRAITS TIMES (Singapore), Sept. 27, 2005, at 22.
54 Id.
55 Lynn Lee, Mr Surprise Files for Cert of Eligibility: Former JTC Man Says He’ll Go All the Way in Race for President if He is Eligible to Run, STRAITS TIMES (Singapore), Aug. 6, 2005.
56 Derrick A. Paulo, Meet Mr. Andrew Kuan, the Presidential Hopeful, TODAY (Singapore), Aug. 6–7, 2005; Analysts Surprised, But Are Intrigued at Possibilities, TODAY (Singapore), Aug. 6–7, 2005, at 6.
57 Chua Mui Hoong & Peh Shing Huei, I Would Like to Offer My Friendly Hand to All Singaporeans, STRAITS TIMES (Singapore), Aug. 5, 2005.
58 Andrew Kuan to Quit as PAP Member, STRAITS TIMES (Singapore), Aug. 15, 2005.
59 Li Xueying, Kuan Jointed JTC to Boost Chances, STRAITS TIMES (Singapore), Aug. 8, 2005.
60 Derrick A Paulo, Battle Begins Early for Andrew Kuan: Lawyer Takes Offence at Candidate’s Allegations, TODAY (Singapore), Aug. 10, 2005.
61 Siew Kum Hong, A Price Too High to Pay, TODAY (Singapore), Aug. 17, 2005, at 3.
defamation suit became public.\textsuperscript{64} It is a matter of speculation whether these allegations, the veracity of some of which remained in doubt,\textsuperscript{65} and media reports of these allegations influenced the PEC decision of August 13, denying Kuan a COE. Thus, unopposed, S. R. Nathan, aged 81, was declared EP for a second term.

5.2. Trial by media

Kuan’s trial by media came in three waves. First, his character was impugned by press reports quoting unidentified persons who described Kuan in pejorative terms, such as “conceited” or “arrogant,” although these reports noted that there were some who spoke of him warmly.\textsuperscript{66} Second, a question mark as to Kuan’s ability was raised, albeit obliquely, by widely reported ministerial statements warning against the caprices of election results and pointing to the importance of having a qualified candidate rather than elections for elections’ sake.\textsuperscript{67} These reports also stressed the importance of the highest office of the land\textsuperscript{68} and the need for the EP to be able to “carry the flag of Singapore high in the international arena” and to rally the people in times of national crisis.\textsuperscript{69} Such statements implied that Kuan had been judged and found wanting,\textsuperscript{70} in contrast to S. R. Nathan, who had a stellar diplomatic career; and similarly, that Kuan was ill-suited for high office since it was one thing to be a grassroots leader “but heading the nation is quite something else.”\textsuperscript{71} This could be seen as an attempt to dampen the growing public appetite for contested elections. Third, his competence was questioned when a succession of Kuan’s former employers were said to have declared his job performance unsatisfactory, with no details given. Urged by Prime Minister Lee to be transparent and disclose

\textsuperscript{64} Karen Wong, Lawyer Threatens to Sue Andrew Kuan, Leaving Him to Face Battle on Two Fronts, NEW PAPER (Singapore), Aug. 10, 2005, at 11; Jean Chua, Andrew Kuan Undeterred by Allegations, STRAITS TIMES (Singapore), Aug. 11, 2005.

\textsuperscript{65} Murugaian M. Nirmala, President Nathan Poised to Serve 2nd Term: Election Panel Approves His Application and Rejects Kuan and Two Others, STRAITS TIMES (Singapore), Aug. 14, 2005.

\textsuperscript{66} Li Xueying & Peh Shing Huei, Financially Sound, but Mixed Reactions: While Some who Know Andrew Kuan Describe Him Warmly, Others Detect Some Conceit, STRAITS TIMES (Singapore), Aug. 6, 2005.

\textsuperscript{67} Zakir Hussain, What Matters More is a Good President, Not Contest: Swee Say, STRAITS TIMES (Singapore), Aug. 7, 2005, at 6. Minister Lim warned that “we must accept that in any contest, any of the candidates may win… . Even if it’s a very slim chance of 1 per cent, it can still happen,” implying Kuan’s unsuitability.

\textsuperscript{68} The office carries a basic annual salary of SGD$2.5 million. Derrick A Paulo, President’s Annual Salary Adjusted to $2.5 Million, TODAY (Singapore), Jan. 19, 2006.

\textsuperscript{69} What Matters More is a Good President, Not Contest, STRAITS TIMES (Singapore), Aug. 7, 2005 (quoting Minister Lim Swee Say).

\textsuperscript{70} Siew Kum Hong, A Price Too High to Pay, TODAY (Singapore), Aug. 17, 2005, at 3.

\textsuperscript{71} Tor Li Ching, supra note 65.
his employment history, so the people could make an informed judgment, “job-hopping” Kuan sent the media his résumé. A tempest followed when several former employers made public their grievances. PAP MP Inderjit Singh, founder of United Test & Assembly Centre, said that his performance as consultant for that company had been below par. Hyflux released a statement declaring its disappointment with Kuan, stating that he would not have been hired had his personal ambitions been known, and that he had been asked to leave or else to be terminated. The PEC reportedly asked the JTC to submit a report (sent on August 11, 2005) assessing the work and character of Kuan, who was its CFO from June 2001 to July 2004. Apparently, that organization also had told him to leave or be sacked because of unsatisfactory work, although the JTC had kept him on long enough to allow him time to seek alternative employment. Following the prime minister’s call for candidates to be open and transparent, the JTC held a press conference on August 11, 2005, where board members stated that, while the JTC had no reason to comment on presidential candidates, it was responding to Kuan’s public comments concerning his employment at and resignation from JTC. It was

72 Alexandra Ho, Be Open about Your Past, PM Advises Kuan, BUSINESS TIMES (Singapore), Aug. 10, 2005.
73 Lynn Lee, Presidential Hopefuls Must be Open, STRAITS TIMES (Singapore), Aug. 10, 2005, at 3; Loh Chee Kong, Job-hopping Kuan Explains His Switches, TODAY (Singapore), Aug. 11, 2005, at 2; Kuan Gives 5-Page CV to the Media, STRAITS TIMES (Singapore), Aug. 11, 2005, at 4.
74 Siew Kum Hong, supra note 73.
75 Peh Shing Huei, Kuan Let Go as He’s Not a Team-Player: Ex-Employer, STRAITS TIMES (Singapore), Aug. 13, 2005, at H6.
76 He Kept Us in the Dark about Poll Plans, Says Hyflux, STRAITS TIMES (Singapore), Aug. 12, 2005, at H8; Peh Shing Huei, supra note 78. The Hyflux CEO issued a statement to the effect that Kuan was not suited to the joint-venture job, in response to Kuan’s reportedly telling the media he had come to Hyflux to learn and to prepare for the election. She added, “He couldn’t just come to our company to play-play, to look see look see. It’s very unfair to Hyflux.” Kuan issued a statement saying he had resigned because the joint-venture companies were not formed and his work plan was not approved.
77 Lynn Lee, Andrew Kuan Was Asked to Resign or to Face Sack from JTC, STRAITS TIMES (Singapore), Aug. 12, 2005, at 1; Chen Huifen, JTC, Hyflux Disappointed over Hiring Kuan: Presidential Hopeful Disputes Their Claims, STRAITS TIMES (Singapore), Aug. 12, 2005.
78 Murugaian M. Nirmala, Report on His Work to be Sent to the Elections Panel, STRAITS TIMES (Singapore), Aug. 12, 2005, at H8.
79 As CFO, Kuan was one of JTC’s nine directors, ranked below the three assistant CEOs. Id.
80 JTC Was Not Satisfied with Kuan’s Work: Ex-Bosses Say They Let Him Stay Despite Performance as JTC is Employer with ‘Heart’, STRAITS TIMES (Singapore), Aug. 12, 2005.
81 Tor Li Ching, supra note 65.
82 Supra note 83.
83 Why It Is Speaking Up, STRAITS TIMES (Singapore), Aug. 12, 2005.
reported that Kuan had been asked three times to resign; this was accompa-
nied by the terse explanation that he needed more “handholding” than was
appropriate for a CFO.84 Nevertheless, the JTC did not characterize his perform-
ance as “poor” or comment on his character. Kuan issued a statement pointing
out that his performance for June 2001 to March 2002 had been rated “good”
and that he had received performance bonuses.85 Two days later, the PEC
announced its negative decision. Kuan had not been asked to attend any PEC
interview, and, indeed, the PEC is not obliged to conduct one, which violates
the rules of natural justice.86 Basically, Kuan’s character and competence had
been assailed in the media and in the public eye, with no redress available.

The PEC, volunteering a justification of its denial of a COE to Kuan, explained
that he lacked the requisite financial credentials, seniority, and responsibility
required by the Constitution, choosing not to invoke the more subjective “good
character” clause, which could have been politically controversial.87 This is
incongruous, as one would assume that someone who served as CFO of a large
statutory board for three years would have more than a passing acquaintance
with accounting principles, certainly more than the Speaker of the House.
However, the PEC’s reasoning is not subject to legal or political scrutiny, and
its verdict is final.

6. Analysis and comment

This section critically analyzes the current legal regime regulating presidential
elections and proposes possible reforms.88 The aim would be to reinforce and
solidify the practice of constitutional democracy.

6.1. Confining the campaign to the campaigning period

The Constitution bars a presidential candidate from membership in a political
party;89 the purpose of this is to remove presidential elections from the realm of
party politics. The EP is meant to be elected directly by popular vote and, there-
fore, is political but nonpartisan. This is, of course, in contrast with the general
elections, which are primarily, if not exclusively, a contest between political
parties, although individuals without party affiliation may run as independent
candidates for Parliament. There is nothing in the Constitution that prevents

84 Lynn Lee, supra note 80.
85 My Performance Was Rated Good, STRAITS TIMES (Singapore), Aug. 12, 2005, at H8.
86 Murugaian Nirmala, Who Qualifies? 3 ‘Wise Men’ to Decide, STRAITS TIMES (Singapore), Aug. 13,
87 Why There’s Only One Candidate, STRAITS TIMES (Singapore), Aug. 14, 2005.
88 Sue-Ann Chia, Elected Presidency: What to Change?, STRAITS TIMES (Singapore), Sept. 5, 2005,
at H5; Let MPs Elect President from List Given by Panel, STRAITS TIMES (Singapore), Sept. 9, 2005.
89 SING. CONST. art. 19(2).
political parties, government, or nongovernmental bodies with close government ties, from endorsing a candidate.

However, because the Constitution requires that potential candidates be vetted by the PEC before they are eligible to contest EP elections, it may be argued that, to preserve the objectivity and integrity of this preselection process and to ensure it is not prematurely politicized, certain rules should be adopted. These rules could require political parties, government, and nongovernmental bodies with government ties to refrain from endorsing any candidate prior to the campaign period. This would forestall the perception, in theory, that the endorsement or criticism of a potential EP candidate by influential political parties or other actors was affecting the independence of the PEC decision-making process, which should be insulated from such extraneous considerations. In particular, since the EP serves as a check on the government, the government should, as a matter of constitutional propriety, refrain from “revealing who they would rather have as their supervisor.”\(^{90}\) The built-in legal requirement of nonpartisanship governing the behavior of the EP candidate may be undermined by a political party’s endorsement, given that the constitutional intent is that the EP should be directly accountable to the electorate, rather than beholden to any political formation.

Because the institution of the EP is vested with largely reactive powers, candidates for this office do not contest elections on the basis of a positive program. Rather, they are scrutinized on the basis of their financial or high administrative competence and good character. As Prime Minister Goh Chok Tong observed: “In the elections, what would be at issue? Surely it is the candidate’s competence and experience for the job as well as his character and reputation, rather than his political affiliation.”\(^ {91} \)

It is the peculiarity of the office of EP, or of its limitations, that so much emphasis falls upon a candidate’s good repute. As result, the reputations of the candidates as public figures are deeply implicated in the electoral process; especially so, when one bears in mind the premium placed on the reputations of public officials and public institutions in Singapore. This is reflected in the case law on political libel that characterizes as a public nuisance any speech that criticizes the running of public institutions where this abuses or harasses those in control of such institutions.\(^ {92} \) In light of this, however, perhaps the reputational interests of those seeking to run for the EP warrant similar protection, possibly through a right of reply to allegations that bear on character or competence, or by a procedure before the PEC (whose members cannot be sued for

\(^{90}\) Chua Chim Kang, *Offer All Candidates Equal Chances in the Presidential Election*, *Straits Times* (Singapore), Sept. 27, 2005, at 22.


\(^{92}\) Chee Siok Chin v. PP [2006] 1 SLR 582, 630–632.
where candidates would have the right to present their side of the case. In addition to providing potential candidates with a forum in which to present their case or defend their reputation against attack, such a procedure would enhance the fairness and transparency of the process and allow the public to hear all viewpoints. This arrangement would, in turn, enhance the ability of voters to make informed decisions, as is appropriate within a democratic society.

The Court of Appeal in *Jeyaretnam v. Lee Kuan Yew* held that politicians, public officeholders, or public figures were entitled to protection of their reputations pegged at the same level as that enjoyed by private individuals. The ruling explicitly rejected the proposition, enshrined in the U.S. Supreme Court decision of *New York Times v. Sullivan* and the European Court of Human Rights case of *Lingens v. Austria*, that “the limits of acceptable criticism of persons holding public office or politicians in respect of their official duties or conduct are wider than those of ordinary persons.”

The Court of Appeal approvingly cited *Gatley on Libel and Slander*, which states, “so wide an extension of privilege [as is afforded under U.S. law] would do the public more harm than good. It would tend to deter sensitive and honourable men from seeking public positions of trust and responsibility, and leave them open to others who have no respect for their reputation.”

By analogy, the media’s subjection of Andrew Kuan’s potential candidacy to intense public scrutiny, prior to Nomination Day, may serve as a cautionary tale to future candidates. Kuan was not given the opportunity to present his side of the story fully vis-à-vis the criticisms made of him. Aside from his reputational interests, such criticism, left unrebutted, may have contributed to the failure of his candidacy. The prospect of such treatment may deter future candidates from seeking to run for EP. Were this to result in future uncontested elections, the institutional legitimacy of the EP could be severely undermined. Both the office and the procedure by which someone is elected to it were meant to confer on the EP a popular mandate, thus arming the office with a moral and political legitimacy that would enable it to serve as a countervailing power in relation to a popularly elected cabinet government. That goal is in jeopardy. A vote, as an expression of the political will, is meaningless in the absence of choice, even though the law provides a default rule for such contingencies.

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93 Presidential Elections Act, Cap 240A, § 8A.
97 [1992] 2 SLR 310, 332H
98 Id. at 333H-I, (citing *GATLEY ON LIBEL AND SLANDER*, (8th edition, Sweet & Maxwell 1981)).
6.2. The PEC and the rule of law

While it is true, as the PM’s press secretary asserts, that the government cannot influence the PEC’s composition, as these are holders of stipulated government offices, the current operation of the PEC, nonetheless, contravenes the rule of law and standards of procedural fairness, since it is not accountable to any external body and its processes are less than transparent. The buck stops with the three wise men, so called, who are its members. The press secretary argues that the PEC must be “shielded from political pressures” to assess candidates “objectively and dispassionately … based on their best judgement” when reviewing submitted information and confidential reports. He claims that public hearings would “ politicise the decision,” discouraging “frank and forthright assessments.”

However, quis custodiet ipsos custodes? The unelected PEC, in performing its gate-keeping function, is making a political decision and should be subject to public scrutiny, as well as legal checks, perhaps through review before the Constitutional Tribunal or in the courts on the petition of a concerned citizen-voter. This may allay charges of political partiality, thus preserving the integrity of the electoral process. As the Court of Appeal noted in Chng Suan Tze v. Minister of Home Affairs, “the notion of a subjective or unfettered discretion is contrary to the rule of law. All power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power.” As a body with quasi-judicial powers and to avoid the appearance of arbitrary discretion, the PEC should be legally obligated to divulge the reasons for its decisions. Such disclosure would ensure a greater degree of accountability, which is an essential element of good governance and an important facet of the commitment to institutional checks and balances.

Furthermore, 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. This is important from a standpoint of natural justice—as an aspect of the rule of law—and given the fact that reputations are involved and, particularly so, as the opinions of the PEC cannot be ruled libelous. In relation to Kuan, the concerns expressed as to why the JTC continued to employ him and award him performance bonuses if his performance was substandard...

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100 SING. CONST. art. 105(1). See Reckless to Lower Criteria for Presidential Candidates, STRAITS TIMES (Singapore), Sept. 20, 2005.

101 Chen Hwai Liang, Why the High Standards for Presidential Hopefuls, STRAITS TIMES FORUM (Singapore), Aug. 20, 2005.

102 Id.

103 [1988] SLR 132, 156B-C.

104 Kwang Bee Geok, Assess Presidential Hopefuls in Public, STRAITS TIMES FORUM (Singapore), Aug. 12, 2005.
warranted a public airing. Such reform would enhance transparency and afford citizens a role in a more democratized process, open to public scrutiny.

6.3. The PEC and so-called Asian democracy: Onerous criteria, unnecessary filter?

The democratic character of the EP electoral process is hampered, first, by the interposition of the PEC as a mechanism for guillotining certain candidates and, second, by the application of stringent, elitist criteria. The situation constitutes a clear obstacle to the unmediated expression of the citizens’ preferences.

The argument against allowing the presidency to be contested through direct elections is unconvincing and is predicated on a typical feature of democracy as it is interpreted in Asia, namely, the government’s paternalistic distrust of the electorate. This harks back to the days of colonial tutelage when natives were presumed to need schooling in the art of democratic government.

Prime Minister Lee has argued that the selection process is necessary and has been “carefully designed to ensure that the electorate is presented with qualified candidates” who are able to discharge EP functions with dignity and competence. He links this to the idea that the election processes of the U.S. president and the Singapore prime minister are subject to political scrutiny or parliamentary endorsement, since a candidate for either of those offices must satisfy “his own political party’s selection criteria and leadership tests.”

Because the EP does not stand as a political party nominee and has not been subjected to the safeguards of an internal selection process, the filtering mechanism is deemed necessary to separate the wheat from the chaff. One might argue, on principles of direct democracy, that this task and privilege belong to the electorate, rather than the unelected bureaucrats or members of the establishment who do not represent any political constituency and are not subject to any form of democratic accountability. The prime minister, while maintaining that the current system has worked “satisfactorily,” has acknowledged that it could be “refined further over time,” although he deems it “reckless” to substitute less stringent criteria.

105 Why Keep Andrew Kuan on If He Was Unsuitable, STRAITS TIMES FORUM (Singapore), Aug. 16, 2005; Kelly Wee, Only ‘Poor’ Performers Denied Bonus, Pay Hike, STRAITS TIMES FORUM (Singapore), Aug. 20, 2005.


107 Prime Minister Lee, at President Nathan’s second swearing-in ceremony, Nathan Sworn in for 2nd Term, STRAITS TIMES (Singapore), Sept. 2, 2005, at 1.

108 Chen Hwai Liang, supra note 103.


110 PM on the Elected Presidency, STRAITS TIMES (Singapore), Sept. 2, 2005, at H10.

111 Reckless to Lower Criteria for Presidential Candidates, supra note 102.
In contrast to the qualifications for members of Parliament, which relate to residency, language competency and age, and the absence of such disqualifying factors as bankruptcy, the current criteria for the EP are comparatively onerous. By requiring that candidates be at least forty-five years of age and hold or have held high public office or directorships in private sector companies with a paid-up capital of $100 million, the pool of possible candidates is somewhat restricted. The elitist, proestablishment nature of these qualifying criteria is technocratic rather than democratic, and it severely limits the pool of available candidates. This institutional arrangement impairs the equal right of candidacy, which is an aspect of equality under the law. Furthermore, the logic of democracy demands that a broad selection of people should be able to stand for high public office.

In 1999, then prime minister Goh estimated that this pool represented about three to four hundred people, although the basis for this estimation was not given. The small size of the pool of potential candidates caused public disquiet, impelling the prime minister’s press secretary after the 2005 elections to send a letter to the press suggesting there were seven to eight hundred possible candidates. The purpose of this, of course, was to refute criticisms that the pool—which currently excludes diplomats and grassroots leaders—was underinclusive and quantitatively minute. Downplaying the importance of the electoral process, the press secretary wrote that the dignity of the EP office and Singapore’s reputation would be diminished by elections in which “manifestly unfit candidates participate, just for the sake of having one.”

There has been no persuasive justification advanced for the implicit assumption that the electorate is unable to determine whether a candidate is worthy. Further, the imposition of more demanding eligibility requirements for the office of the EP than for that of prime minister appears unreasonable, given that the prime minister’s governing powers are far more substantial than the custodial and executive functions with which the EP is charged. The qualifications for the EP should on a par with the qualifications for prime minister, which are the same as those for members of Parliament.

112 SING. CONST. art. 45.
113 Presidential Elections Slated for Aug 28, STRAITS TIMES (Singapore), Aug. 5, 1999, at 1. This article noted that “it has been reported that only about 400 people qualify for the office.”
114 Lydia Lim, Candidates Must be Worthy, Says PMO, STRAITS TIMES (Singapore), Aug. 20, 2005. In a letter to the press, the press secretary to the prime minister argued that the pool of potential EP candidates was not small, since it included ministers, public sector appointment holders, and the chairmen and CEOs of companies with paid-up capital of $100 million or more. As there were 440 such companies, it was estimated that some seven hundred to eight hundred people in Singapore were qualified.
115 Chen Hwai Liang, supra note 103.
116 Leong Sze Hian, Review President’s Eligibility Criteria, BUSINESS TIMES (Singapore), Aug. 17, 2005.
6.4. Diluting democracy: An endorsed or selected president?

The right to vote in competitive elections is integral to a functioning democracy and its underlying principles of representation, participation, and legitimacy. Unfortunately, the phenomenon of election by default, a regular feature of Singapore’s parliamentary and presidential elections, only harms the practice of democracy.

It would be an unhealthy precedent if presidential elections were to become just such political nonevents—portending the erosion of political consciousness—even if the legal system does provide that an uncontested candidate may be declared the EP. This would breed an increasingly depoliticized environment and alienate the citizen from the polity; furthermore, skeptics might conclude that there will be no EP contests unless the government wants one, thus delegitimating the institution. The meaningfulness of a right to vote is predicated on the existence of an authentic choice, since elections are also a method for determining individual merit. One way of legitimating the institution and assessing the strength of a mandate, where there is only one EP candidate, may be to vote on the sole candidate but require that a certain minimal percentage is secured before the candidate is declared the EP.

President Nathan reportedly said, “The man in the street has the chance to vote. Only thing is, the candidates did not come forward”; furthermore, he said, candidates had to display a “certain dignity and respectability” for the sake of the office. This is consonant with the notion of a ceremonial head of state whose office has only symbolic significance. However, in making the office elective, the decision as to whether a candidate is competent or sufficiently dignified is allotted to the people’s judgment. Furthermore, the electoral system must not diminish democratic choice by unduly burdening prospective candidates with unreasonable electoral requirements, giving rise to the oxymoron of an unelected elected president.

117 Raymond Lim, Contest for EP Desirable, but by No Means Critical, STRAT T S TIMES (Singapore), Aug. 20, 1999, at 53 (arguing that as the Constitution is the principal source of political legitimacy and provides for election by default, such an EP “has as much moral authority as one who wins in a contested election”).

118 The lack of understanding regarding the institution’s elective nature is evident in a letter to the Straits Times lauding Nathan as an “excellent choice” for EP. The letter’s author continued, “In order not to embarrass any future candidate whom the Government wishes to nominate to continue as President, it is preferable to change the Constitution to allow for this without the need for a contest.” Chan Kim Yong, Allow President New Term Without Contest, STRATTS TIMES FORUM (Singapore), Aug. 11, 2005, at H9.
