Malaysia's Electoral System: Government of the People?

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Abstract

This article seeks to examine the constitutional and legal aspects of Malaysia’s election laws (within its first-past-the-post electoral system) seen within the broader socio-political context of Malaysia’s plural society and ethnic-based political representation to evaluate if they conform to democratic principles and equitable standards. In particular, this article seeks to: (i) explore how the growth of the dominant political elite has had direct implications for the development of Malaysia’s electoral regime and arrangements for the holding of democratic elections; (ii) survey the implementation and enforcement of the election laws, including the Elections Act, Election Offences Act, Election Commission Act, Election Petition Rules and Elections (Conduct of Elections) Regulations; (iii) examine the need of immunity for the Election Commission; (iv) examine the role of the judiciary; and (v) highlight the areas for urgent electoral reforms to restore public confidence in the electoral system and ensure the legitimacy of the political system.

KEYWORDS: electoral system
INTRODUCTION

More a result of political developments brought about by its ruling elite, rather than a residue of history and inertia, Malaysia’s election laws have many of the forms and features of electoral democracy1 with the authoritarian structures and powers of a strong state.

Whilst the actual conduct of elections and the wider social conditions surrounding the conduct of elections – such as the situation of civil liberties, curbs and impediments imposed on the opposition2 and the degree of free and fair access to the mass media3 – are of critical importance to the existence of a democratic electoral process, this article is limited to Malaysia’s election laws. This article seeks to examine the constitutional and legal aspects of Malaysia’s election laws (within its first-past-the-post electoral system) seen within the broader socio-political context of Malaysia’s plural society and ethnic-based political representation, to evaluate if they conform to democratic principles and

2 For example, the barring of three opposition party leaders from participating in the 2004 general elections on grounds of criminal convictions related to their political activities: “Three opposition leaders barred from running in Malaysia elections”, AFX Asia, 4 March 2004. However, one of the accused was later not convicted: “Malaysian court quashes opposition leader’s prison sentence on state secrets charge”, Associated Press Newswires, 15 April 2004. Also, in view of the Prime Minister’s prerogative to advise the constitutional monarch to dissolve Parliament and to call for a general election, the ruling coalition can restrict the political campaigning by opposition parties by limiting the campaigning period to polling day to as short as 8 days in the 2004 general elections: “Malaysian Election Commission: Polls to be held Mar 21”, Dow Jones International News, 5 March 2004; William Case, “Malaysia’s general elections in 1999: a consolidated and high-quality semi-democracy” (2001) 25(1) Asian Studies Review 35 at 38. The Internal Security Act has also been used by the government to detain opposition party members, presumably to deny them the right to contest in the general elections: Francis Loh, “Understanding the 2004 Election Results: Looking Beyond the Pak Lah Factor” (2004) 24(3) Aliran Monthly 8 at 10. It has also been observed by commentators that the Sedition Act 1971, the 1970s amendments to the Constitution and the Elections Act prohibited opposition parties from freely campaigning on certain popular issues such as citizenship: see Diane K. Mauzy, Barisan Nasional: Coalition Government in Malaysia (Kuala Lumpur: Marican & Sons, 1983).
equitable standards. In particular, this article seeks to: (i) explore how the growth of the dominant political elite has had direct implications for the development of Malaysia’s electoral regime and arrangements for the holding of democratic elections; (ii) survey the implementation and enforcement of the election laws, including the *Elections Act*, *Election Offences Act*, *Election Commission Act*, *Election Petition Rules* and *Elections (Conduct of Elections) Regulations*; (iii) examine the need of immunity for the Election Commission; (iv) examine the role of the judiciary; and (v) highlight the areas for urgent electoral reforms to restore public confidence in the electoral system and ensure the legitimacy of the political system.

II. MALAYSIA’S POLITICAL SET-UP AND THE INHERITED ELECTION LAWS

Malaysia, a federation comprising 13 states, although politically dominated by the ethnic Malays, is heterogeneous with substantial Indian, indigenous and Chinese minorities. Its population today is estimated at some 28 million. Formerly known as the Federation of Malaya after its independence in 1957 from British colonial rule, it was later renamed the Federation of Malaysia in 1963 following the merger with Singapore and the Borneo territories of Sabah and Sarawak.

The form of government in Malaysia is constitutional, monarchical and parliamentary at both the state and federal levels with every state having its own constitution. Common to every state is a Federal Constitution which guarantees and provides for a separation of important powers at the federal level. While the federal government is bicameral in nature, the individual states in the federation consist of unicameral State Legislative Assemblies (Dewan Undangan Negeri).

Malaysia’s political mobilisation as a whole follows clear ethnic divisions, and its politics is communally-orientated. The three major component parties of

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4 11 states in Peninsular Malaysia and the East Malaysian states of Sabah and Sarawak.
6 Singapore later separated with the Federation in 1965.
8 The Senate (Dewan Negara) and the House of Representatives (Dewan Rakyat).

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its ruling coalition\textsuperscript{10} – which has remained in uninterrupted power since 1957\textsuperscript{11} – restrict their membership to those of one ethnic group respectively. The struggle for power is still generally among political parties representing, or are dominated by, particular ethnic groups. Ethnic-based political representation appears to be the predominant consideration any Malaysian political party must entertain to compete with their rivals on the political playing field.

More specifically, political contestation in Malaysia today engenders a clash between an assortment of opposition (but sometimes allied\textsuperscript{12}) members on the one hand, and the dominant, ethnically well-spread Barisan Nasional (BN) comprising the United Malays National Organisation (UMNO), Malaysian Chinese Association (MCA) and Malaysian Indian Congress (MIC) on the other side. It will be demonstrated in the course of this article how electoral democracy in Malaysia has for decades been persistently ethnicised by political forces, and how the ruling coalition has increasingly adopted a measured calculus to defeat its political rivals in the elections depending on their ethnic-polarity.

Demographically, the Malays make up approximately 62 per cent of the federal population, with the Chinese forming the second major race at around 24 per cent, and the Indians, 8 per cent. An estimated 7 per cent of the population is made up of non-Malay indigenous \textit{bumiputras} of Sabah and Sarawak.\textsuperscript{13} It will be seen in due course that even such native groups of the Borneo states play a significant role in shaping and developing a pervasively ethnicised, communalised or plural nature of the Malaysian society,\textsuperscript{15} pushing electoral politics in a direction that entails ethnically-polarised political representation and participation in Malaysia.\textsuperscript{16}

Since 1954, Malaysia has adopted election laws generally practised then in the United Kingdom.\textsuperscript{17} The main election laws are found in the \textit{Elections Act 1958}, \textit{Elections Offences Act 1954},\textsuperscript{18} \textit{Election Commission Act 1957}, \textit{Elections}\n
\textsuperscript{10} The Barisan Nasional (BN) comprising mainly the United Malays National Organisation (UMNO), the Malayan Chinese Association (MCA) and the Malayan Indian Congress (MIC).
\textsuperscript{11} Despite the recent setback in the 2008 elections where the ruling coalition lost power in five states in Peninsular Malaysia.
\textsuperscript{12} Such as the Barisan Alternatif (BA).
\textsuperscript{13} See Lim Hong Hai, \textit{supra} note 7 at 102.
\textsuperscript{14} \textit{Ibid}.
\textsuperscript{15} See Mavis Puthucheary, \textit{supra} note 9 at 3.
\textsuperscript{16} Lim Hong Hai, \textit{supra} note 7 at 102.
\textsuperscript{17} The basic electoral rules were formulated prior to independence, 1957, for the first federal election in the Federation of Malaya in 1955. These basic electoral rules, together with important additions and changes, were then incorporated into the Federal Constitution adopted at the independence. Important amendments were also made to the election laws both before and after the 1963 formation of the expanded Federation of Malaysia.
\textsuperscript{18} For a brief exposition of the various election offences, see “Elections Offences” (2004) 24(2) Aliran Monthly 29.
The electoral system essentially subscribes to a first-past-the-post or plurality method which favours big parties at the expense of the smaller ones, and promises a stronger government than does proportional representation.19 Throughout Malaysia’s political history, parliamentary elections have been held every four years or so, the latest on 8 March 2008. The BN (or its predecessor, the Alliance) has emerged as the main victor in every election despite its low vote percentage. For instance, the BN won 90.4 per cent of the parliamentary seats with a significantly low vote percentage of 63.9 per cent.20 A more egregious example would be the 1969 election results where the BN secured a 64 per cent of the parliamentary seats in spite of winning an all-time low of 49.3 per cent of votes cast.

It would be seen that this was, and is going to continue to be, made possible through a weightage principle that favours the rural (and mainly Malay) votes, thereby giving rise to an odd statistical comparison in the parliamentary elections.21

The Election Commission was constitutionally established in 1957 under Article 114 of the Federal Constitution.22 The intended objective was to allow for transparent administration and conduct of the electoral process that must be seen as fair to all competing political parties.23 However, this does not mean that the credibility of the electoral system is entirely dependent on the performance of the Election Commission, for the electoral process could be controlled and manipulated by the legislature and certain government practices.

It is important to appreciate that the overwhelming control by the BN has had direct implications on the way Malaysia’s electoral system is modified and adapted over the decades in order to preserve the status quo of retaining BN’s political leadership in Malaysia. This, as will be seen later, came in the form of constitutional amendments.

19 Lim Hong Hai, supra note 7 at 103.
21 See ibid. See also Khoo Boo Teik, “Limits to Democracy: Political economy, ideology and ruling coalition” in M. Puthucheary & N. Othman eds., Elections and Democracy in Malaysia (Bangi, Selangor: Penerbit Universiti Kebangsaan Malaysia, 2005) 42 which usefully details the relevant figures pertaining to BN’s electoral victory reproduced here in the following manner [year] (percentage of seats won: percentage of votes collected): 1959 (71%: 51.7%), 1964 (86%: 58.5%), 1969 (64%: 49.3%), 1974 (88%: 60.7%), 1978 (84%: 57.2%), 1982 (86%: 60.5%), 1986 (84%: 55.8%), 1990 (71%: 53.4%), 1995 (84%: 65.2%), 1999 (77%: 56.5%).
22 See online: <http://www.spr.gov.my/index/history.htm>.
23 Lim Hong Hai, “Making the system work” in M. Puthucheary & N. Othman eds., Elections and Democracy in Malaysia (Bangi, Selangor: Penerbit Universiti Kebangsaan Malaysia, 2005) 249.
Legislative interference, however, is not the only factor behind the BN’s control of the electoral process. The BN has at its disposal a whole array of state resources, including the command of administrative apparatuses, the control over economic resources, and the ownership and regulation of the mass media. This article analyses how the BN, ultimately, enlists a multi-pronged approach to stack the decks in its favour: legislative sculpting, behavioural conditioning of the Election Commission and exploitative use of the state machinery to aid in its campaigning efforts.

Finally, it would be seen that Malaysia has departed sharply from the orthodoxy of electoral democracy following the abolition of local government elections in the 1960s. This was to curb the growing influence of the Socialist Front which was at that time fast gaining popularity amongst the electorate. What was previously known as a democratic local government was therefore substituted with a nominated local government. Not only did this raise concerns over the accountability and transparency of the nominated local councillors, it also became unacceptable as the people no longer have a say in choosing their grassroot representatives in the government.

III. THE ELECTION COMMISSION – MANIPULATED, CONSTRAINED AND INEPT

Electoral administration in Malaysia is carried out by the Election Commission. The three main functions of the Election Commission are the delimitation of constituencies, the preparation and revision of electoral rolls and the conduct of elections for the House of Representatives (Dewan Rakyat) and the Legislative Assemblies of the states.

The Election Commission comprised three members when it was first set up in 1957 under Article 114 of the Federal Constitution. Membership grew to four in 1963 following the formation of Malaysia and the inclusion of Sabah and

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24 Khoo Boo Teik, supra note 21 at 40.
26 Ibid at 56.
27 Ibid at 62.
28 Ibid.
29 The general powers and duties of the Election Commission are spelled out under Section 5 of Elections Act 1958.
30 Comprising a chairman and two other members.
31 Article 114(1) today states: “The Election Commission shall be appointed by the Yang di-Pertuan Agong after consultation with the Conference of Rulers, and shall consist of a chairman, a deputy chairman and three other members.”
Sarawak. It was only in 1981 that the office of Deputy Chairman was created via a constitutional amendment, increasing its membership to five. The Election Commission may also appoint officers to assist in the administration and running of elections.

Today, the Election Commission comprises a total of seven members and is assisted by an office of the Secretariat. Office-bearers in the Election Commission enjoy security of tenure similar to that of the judiciary, as well as some measure of remunerative security. This seeks to ensure that the Election Commission can discharge its functions independently without any undue political influence. This objective, however, has not been achieved.

A. Inducing a Compliant Election Commission

The independence of the Election Commission is not constitutionally guaranteed. All that is provided by the Constitution is that the appointment of members “shall have regard to the importance of securing an Election Commission which enjoys public confidence”. The wider expression of “public confidence” does not necessarily equate with independence. It thus appears that Article 114(2) is a practically defective and unsatisfactory constitutional safeguard against potential partiality of the Election Commission in the discharge of its functions.

A good example is the ostensible pattern of appointing political party members and retired civil servants to office positions within the Election Commission. While such appointments do not ipso facto lead to a loss of “public confidence” in the Election Commission, the guarantee of an independent Election Commission is severely weakened. The fear of partiality and party bias could have been significantly allayed had Article 114(2) expressly provided for the independence of the Election Commission.

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32 Ibid.
33 Article 115(2) of the Federal Constitution; Section 3 of Elections Act 1958.
34 Comprising a chairman, deputy chairman, and five other members.
35 See online: <http://www.spr.gov.my/index/organization.htm>.
36 Article 114(3) of the Federal Constitution.
37 Article 125 of the Federal Constitution.
38 Article 114(5) of the Federal Constitution.
39 However, the independence and impartiality of the Election Commission has been severely doubted in view of its implementation and operation. For example, the 2004 general elections saw a mere 8 days of campaigning despite constitutional provisions stipulating that elections may be held within 60 days after the dissolution of Parliament: see “The Election Commission is Not Free and Fair” (2004) 24(2) Aliran Monthly 30.
40 Article 114(2) of the Federal Constitution.
41 For instance, members of the MCA and the MIC, both of which belong to the Alliance led by the dominant ruling party UMNO.
42 See Lim Hong Hai, supra note 7 at 114.
It is necessary to explain the position adopted by the governing political leadership. The ruling Alliance became aware that an independent Election Commission could harm its political control and dominance of the government, and thus saw the need to counterbalance any potential disadvantage such an Election Commission could bring to the Alliance, by making partisan appointments to the Election Commission.\(^{43}\)

The first chairman of the Election Commission, Dr Mustafa Albakri went through a strained relationship with the government in the 1960s due to his independent stance in attempting to re-delineate the electoral constituencies after the 1959 election. Article 114(4) was amended in 1960\(^{44}\) to provide for the removal of the chairman if he “engages in any paid office or employment outside the duties of his office”. Fortunately for Dr Mustafa Albakri, he was able to defend his office by relying on Article 114(6) which ensures that no terms of office of a member of the Election Commission shall be altered to his disadvantage after his appointment.\(^{45}\) This notwithstanding, the changes brought about by the amendment to Article 114(4) were widely perceived as an attempt aimed at removing him from the Election Commission.

However, the effect of this provision was later circumvented by the government via a constitutional amendment in 1962 which, \textit{inter alia}, empowered Parliament to “provide for the terms of office of members of the Election Commission other than their remuneration”.\(^{46}\) This gave the government the power to intervene on the terms of office for appointment holders even before they officially hold office in the Election Commission, thereby preventing the government from falling foul of Article 114(6) in achieving its political agenda.

This brought about the possibility that subsequently appointed members might become beholden to the very governmental organ the Election Commission was originally designed to enjoy independence from. This indirect ‘conditioning’ of subsequent appointment holders in the Election Commission was accompanied by the engineered co-optation of the Election Commission through partisan\(^{47}\) appointments within its office, thereby granting the Alliance considerable assurance of its continued dominance within the government.

Recent developments in the Malaysian electoral system also indicate clearly manipulative behaviour of the ruling coalition. In late 2007, Parliament moved to pass a bill the effect of which is the extension of the retirement age of

\(^{43}\) Ibid.

\(^{44}\) Constitution (Amendment) Act of 1960.

\(^{45}\) Article 114(6) of the Federal Constitution.

\(^{46}\) Constitution (Amendment) Act of 1962 (No. 14 of 1962), cl. 21, inserting Article 114(5A).

\(^{47}\) It was observed, however, that subsequent replacements of members were not found to be “flagrantly partisan”: Lim Hong Hai, \textit{supra} note 7 at 114. It could be surmised that the government is well aware of the controversy that it would attract had it done otherwise, and therefore retreated into a more subtle co-optation exercise in recent decades.
the Election Commission chairman from 65 to 66. 48 The Constitution (Amendment) Bill 2007 was tabled for the first reading in Parliament less than two months before expiry of the term of office of the incumbent Election Commission chairman. 49 In a matter of weeks, the bill was approved by Parliament, retaining the incumbent chairman in office for an additional year in spite of heavy resistance from both the public and opposition members in the legislature. 50 This was made possible only because the ruling coalition commanded an overwhelming majority in the legislature, holding more than four-fifths of the seats in the Lower House. 51

The ruling coalition found it imperative to retain and employ the service of an Election Commission chairman who was widely criticised for being deferential to the BN in the discharge of his duties. Or perhaps, at least, his presumed ineptitude in managing the administration of past elections has proved to have been serendipitously favourable to the continuous electoral success of the BN. The ruling coalition would, however, rather to turn a deaf ear to public outcry in the pursuit of its own political agenda, no matter how blatantly indiscreet its measures in doing so appear to be. 52

The perceived inefficiency of the Election Commission in administering elections – whether through impartiality or sheer ineptitude – could potentially lead to election outcomes which hardly reflect the true will of the people.

B. Delimiting the Powers of the Delimiter

Constitutional reforms over the decades have effectively reduced the Election Commission to a mere administrative body with virtually meaningless administrative powers. In order to appreciate the full effect of these constitutional reforms, it is important to revisit the initial position at the time the Federation of Malaya gained independence in 1957.

48 Article 114(3) of the Federal Constitution.
51 Such dominance far exceeds the requirement of a two-thirds majority for constitutional amendment.
The Alliance had by then acquired an overwhelming majority of 51 out of 52 seats in the first federal election in 1955. Back then, the Alliance seemed content with the electoral system already in place as evidenced by its support of the recommendations made by the Reid Constitutional Commission. The Alliance was subsequently to bring about a gradual departure from those recommendations.

Until 1962, the Election Commission enjoyed full and final authority in the review and the delimitation of constituencies. The Election Commission did not have to seek the approval of the legislature in carrying out the delimitation of constituencies at state and federal levels. Once constituencies were delimited by the Election Commission, the ruling party in Parliament had no power to change it. This prerogative of the Election Commission was removed with the passing of the Constitution (Amendment) Act 1962 which introduced a new Thirteenth Schedule to the Federal Constitution.

Part II of the Thirteenth Schedule laid down the rules and procedure to be followed by the Election Commission in the delimitation of constituencies. What is notable is the sharp departure from the pre-amendment position – the Election Commission no longer had the final authority to review and delimit constituencies. It had to submit a report to the Prime Minister who would then present it to the House of Representatives for approval (with necessary amendments, if any, by the Prime Minister) by a simple majority vote.

In 1973, the Constitution (Amendment) (No 2) Act 1973 amended Article 46 of the Constitution to allow the number of parliamentary constituencies and apportioned seats among the states to be established in accordance with what was specified in the new Article 46. This meant that the delimitation exercise by the Election Commission was severely restricted. Although it has been observed elsewhere that, notwithstanding the 1973 restrictions imposed on the Election Commission, the constituency reviews by the Election Commission could still extend to the total number of parliamentary constituencies, the combined effect of the 1973 amendments and the imposed mandatory parliamentary scrutiny of any

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54 Lim Hong Hai, *supra* note 23 at 252.
55 No. 14 of 1962.
57 See also Thirteenth Schedule, clauses 9-11 of the Federal Constitution today.
58 Act A206
59 The legislature now had the final say on the number of parliamentary constituencies and their apportionment among the states. An example would be the *Constitution (Amendment) (No. 2) Act 1984* (Act A585), cl. 14 which amended the number of members for the Federal Territories of Kuala Lumpur and Labuan under Article 46 of the Constitution.
60 Lim Hong Hai, *supra* note 23 at 253.
recommended review by the Election Commission\textsuperscript{61} has formalistically shrunk the scope of the Election Commission’s powers and its jurisdiction over constituencies. Today, the Election Commission’s jurisdiction to conduct the delimitation of constituencies and apportionment within every state continues to be subject to parliamentary approval.\textsuperscript{62}  
  
In 1984, the \textit{Constitution (Amendment) (No 2) Act 1984}\textsuperscript{63} removed the upper limit of the mandatory periodic review of constituencies, leaving only the lower limit of “an interval of not less than eight years [after the date of completion of the last review]”.\textsuperscript{64} The significance of this amendment is that there is no longer a requirement to compel a periodic review of constituencies if the Election Commission were not so minded. Periodic review, save for any eventualities specified in Article 113(3A),\textsuperscript{65} is no longer automatically triggered.  
  
It should also be noted that the amended Article 113(3A) potentially enables review of constituencies to be triggered at the whim of the dominant ruling party by simply passing an amendment of Article 46.\textsuperscript{66} This could effectively lead to the usurpation by the legislature of the Election Commission’s prerogative to initiate a review of constituencies at any time.  
  
The Election Commission therefore seems to have been relegated to being a mere executor administrator of the electoral system, always having to take its cue from the ruling government. As things stand today, the room for abuse is alarmingly wide.  

\section*{C. Failure to Measure Up}

No electoral administrator, however independent and politically-insulated, can bring about free and fair elections without exhibiting a high standard of competence and efficiency in the discharge of his or her responsibilities. Malaysia’s Election Commission has been attracting persistent criticism regarding its revision of electoral rolls and the actual conduct of elections.\textsuperscript{67}  

\textsuperscript{61} Thirteenth Schedule of the Federal Constitution.  
\textsuperscript{62} \textit{Ibid}.  
\textsuperscript{63} Act A585.  
\textsuperscript{64} See Article 113(2)(i).  
\textsuperscript{65} Article 113(3A)(i) reads: “Where the number of elected members of the House of Representatives is altered in consequence of any amendment to Article 46, or the number of elected members of the Legislative Assembly of a State is altered in consequence of a law enacted by the Legislature of a State, the Election Commission shall undertake a review of the division into federal or State constituencies, as the case may be, of the area which is affected by the alteration, and such review shall be completed within a period of not more than two years from the date of the coming into force of the law making the alteration.”  
\textsuperscript{66} See \textit{ibid}.  
IV. THE APPORTIONMENT AND DELIMITATION OF CONSTITUENCIES – GERRYMANDERING AS NORM

The Federal Constitution places the responsibility of delimiting constituencies on the Election Commission. The delimitation of constituencies ought to be done according to clear guidelines by a neutral and independent Election Commission because electoral results can differ greatly according to how the lines are drawn. There are broadly two ways in which the power to delimit may be abused: firstly, mal-apportionment (where the size of the constituencies delimited are grossly disproportionate) and, secondly, gerrymandering (where a delimitation is made with a view to unfairly favouring a particular political party).

Unfortunately, the Federal Constitution does not adequately spell out the guiding principles under which the Election Commission should carry out its duty in delimitation exercises. Vague and general guidelines give rise to inherent ambiguities that could work unfairly against contesting candidates. The vague usage of expressions such as “regard ought to be had”, “inconveniences attendant on alterations of constituencies”, and “maintenance of local ties” without further elaboration leaves much to be desired in assuring consistent and fair delimitation practices.

It would hence not come as a surprise that the electoral process is susceptible to abuse through arbitrary and capricious definitions adopted by the Election Commission of the day. For instance, nothing in the guidelines obliges the Election Commission to strictly adhere to the equal-sized constituency doctrine in the delineation process. This gives rise to mal-apportionment where disproportionately-sized constituencies can be delineated to favour a particular political party.

The Malaysian electoral system fails to adhere to the one-vote-one-value principle in its elections. A rural weightage principle is constitutionally provided for in the Thirteenth Schedule of the Federal Constitution, thereby augmenting the value of rural electors’ votes and, as a result, diluting the perceived advantage

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68 The suggestion of a radical system change to some form of proportional representation is politically not feasible, although it is the only effective way of solving the problem of unfairness in constituency delineation. A complete switch to proportional representation, judging by the past election results, would certainly deprive the ruling coalition of its two-thirds majority. See Lim Hong Hai, supra note 7 at 103.

69 Article 113(2) of the Federal Constitution.

70 See Lim Hong Hai, supra note 23 at 265.

71 It should, however, be noted that apportionment of parliamentary constituencies between the various states are no longer part of the Election Commission’s role following the 1973 amendments: see Article 113(2) of the Federal Constitution.

72 Clause 2 of the Thirteenth Schedule to the Federal Constitution.

73 Ibid.
(in terms of accessibility, connectivity and communication) their urban counterparts carry over them.  

However, the Federal Constitution does not define “rural” and “urban” for the purposes of constituency delineation.  Not once has the Election Commission attempted to define what “rural” and “urban” areas actually mean in the course of the delineation exercises.

The problem is made worse by the removal of the limitation on the maximum allowable difference in the number of electorates between the rural and the urban constituencies. Prior to 1957, the maximum allowable difference between the number of electorates in a rural and an urban district was 33 per cent. Following the Reid Commission’s recommendations in 1957, the limitation was reduced to 15 per cent. This produced a closer adherence to an equal-sized constituency doctrine. However, this limitation was relaxed to 50 per cent in 1962 and eventually entirely removed in 1973, resulting in Malay-based parties being given an electoral advantage.

Some empirical analysis on electoral trends between 1960 and 1999 is sufficient to illustrate the Malay electoral advantage. The Malay population in Peninsular Malaysia was relatively stable, measuring to an average of around 55 per cent of the entire Peninsular Malaysian population. One would have expected that this would be proportionally mirrored in the corresponding percentage of Malay-majority constituencies. However, it was observed that notwithstanding the relatively constant percentage of the Malay population, the percentage of Malay-majority constituencies has seen a consistent increase over the years.

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74 Technically, such a principle serves to assign more weight to the rural votes due to difficulties such as accessibility and outreach of the government to electors in the rural areas. However, because most Malay electors are concentrated in the rural areas, the rural weightage principle has been more conveniently exploited to favour Malay-majority parties in the elections. The resulting effect of such ethnic politics is the inclusion of more non-Malay-majority parties (such as the Chinese-based MCA and the Indian-based MIC) into the Alliance (or now the Barisan Nasional) who otherwise would be unable to secure parliamentary and state assembly seats in the government. Today, the ruling coalition has grown from a coalition of 3 parties to a coalition of 14.

75 Clause 2(a) of the Thirteenth Schedule.

76 Clause 2(c) of the Thirteenth Schedule as amended by Constitution (Amendment) Act (No. 2) 1973; it now simply states inter alia: “a measure of weightage”.

77 The maximum weightage on votes allowed was 2:1 for the rural constituencies from 1955 to 1957.

78 Constitution (Amendment) Act 1962.


80 The result is that a smaller population of the rural voters would lead to a higher weightage assigned to their votes.

81 Lim Hong Hai, supra note 7 at 129.
the years from the 1959 election to the 1999 election.\textsuperscript{82} This trend holds true at the Federal level as well.\textsuperscript{83}

One possible explanation for such an electoral pattern is the increasingly liberal franchise rules flowing from the Federation’s gradual move towards liberalisation of citizenship requirements over the decades.\textsuperscript{84} This invariably resulted in decreasing the enfranchisement advantage that the Malays had over other minority ethnic groups.

The ruling coalition saw the need to counterbalance this effect by adjusting the scale to maintain its electoral advantage over other opposition parties representing the minority non-Malay electorate. This could only be brought about through carefully engineered constituency re-delineations in a way that would enhance the political control of Malay-based political parties.\textsuperscript{85}

With respect to Sabah and Sarawak, political competition is heavily skewed in favour of the Muslim \textit{bumiputras} (including the Malays) \textit{vis-à-vis} non-Muslim \textit{bumiputras} and other ethnic groups. This has been made possible through a grossly disproportionate advantage given to the former that devalues the latter’s votes more drastically than the rural weightage imposed in Peninsular Malaysia. In both states, no electorally advantaged community constituted the majority in their state constituencies.\textsuperscript{86} Malay-based political parties had the most to gain from this. Again, the success of Malay-based political parties in Sabah and Sarawak\textsuperscript{87} would not have been possible without biased re-delineation practices.

The rural weightage principle would have become the UMNO-led coalition’s absolute trump card were it not for the opposition PAS (Parti Islam SeMalaysia). PAS is a predominantly pro-Islam Malay political party which primarily aims to attract Malay-Muslim votes. As such, the rural weightage principle becomes a double-edged sword in PAS-contested constituencies. UMNO runs a considerable risk of losing out to PAS, as evidenced by PAS’s historical success in diluting UMNO dominance in the 1999 and 2008 elections. In the 1999 election, PAS secured a total of 98 out of 394 seats in both the Federal and State legislatures in Peninsular Malaysia, posing a real threat to the BN.\textsuperscript{88}

\begin{itemize}
\item \textsuperscript{82} \textit{Ibid.}
\item \textsuperscript{83} Lim Hong Hai, \textit{supra} note 23 at 268.
\item \textsuperscript{84} Lim Hong Hai, \textit{supra} note 7 at 129.
\item \textsuperscript{85} For a detailed study on the percentage of Malay-majority constituencies broken down to the various Peninsular Malaysian states, see Lim Hong Hai, \textit{supra} note 7 at 131.
\item \textsuperscript{86} Lim Hong Hai, \textit{supra} note 23 at 270.
\item \textsuperscript{87} More particularly Sabah: see \textit{ibid} at 271.
\item \textsuperscript{88} Tunku Sofiah Jewa, \textit{Malaysian Election Laws} vol. 3 (Kuala Lumpur: Pacifica Publications, 2003) 1871.
\end{itemize}
In 2004, UMNO’s apparent stratagem against the PAS came in the form of mal-apportionment and gerrymandering in the 2003 constituency re-delineation.\(^89\) The opposition charged, \textit{inter alia}, that the effect of the constituency review was to diversify the ethnic composition in PAS-held constituencies so as to reduce PAS’s chances of securing victory in the 2004 election.\(^90\) True enough, it turned out that PAS suffered a huge setback, losing control over the state of Trengganu and securing only a marginal victory in Kelantan with a narrow majority of 24 out of 45 seats.\(^91\)

With respect to one of the most contentious states,\(^92\) Kedah,\(^93\) it was shown that “[t]he 2002 delimitation process involved moving ‘safe areas’ in traditional UMNO strongholds and non-Malays seats into constituencies that were vulnerable to the opposition and changing boundaries beyond the usual administrative areas in order to create constituencies that would strengthen the BN’s electoral position.”\(^94\)

Again, the 2002 re-delimitation exercise demonstrated how UMNO became the beneficiary of a tactical dilution-through-diversification approach against PAS-held state constituencies in Kedah. Non-Malay wards deemed to be the BN’s “safe state seats” were fused with PAS-held constituencies in the redrawing of boundaries.\(^95\) For instance, the cross-administrative district transplantation of the Gurun state seat to the parliamentary state seat of Yan (renamed Jerai) was cited as a particularly egregious case of gerrymandering, the intention of which was to defeat PAS which previously won the seat in Yan by a slim majority of 0.7 per cent of the votes cast.\(^96\) The political impact of importing the “safe votes” from Gurun to Yan essentially boosted the BN’s electoral strength by an estimated 5,233\(^97\) votes.\(^98\)

\(^89\) See Lim Hong Hai, \textit{supra} note 23 at 271. For a detailed breakdown of the delimitation exercise, see online: <http://www.aliran.com/oldsite/monthly/2002/8f.html>. It must be noted that the re-delimitation exercise began in early 2002, and was finally approved by parliament with minor changes in April 2003.

\(^90\) \textit{Ibid}. See also “Motion on EC proposal passed”, \textit{New Straits Times (Malaysia)}, 9 April 2003.


\(^93\) Comprising a “predominantly rural Malay majority with pockets of non-Malay urban areas”: \textit{ibid}.

\(^94\) \textit{Ibid} at 317.

\(^95\) \textit{Ibid} at 321.


\(^97\) A figure based on the 1999 election results.

\(^98\) Ong Kian Ming & Bridget Welsh, \textit{supra} note 92 at 339.
A similar pattern was observed in the parliamentary seats of Pokok Sena, Kuala Kedah and Baling. The parliamentary seat of Alor Setar (which previously gave the BN an overwhelming victory of 14,384 votes) was employed as a buffer to absorb the state seat of Telok Kechai, neutralising the electoral disadvantage it provided the BN (in the parliamentary seat of Kuala Kedah) in the 1999 election. The result of the 2004 election, as one might have expected, was a crushing defeat for PAS.

A revival of the limitation on the variation in the numbers of electorates between rural and urban constituencies has to be the primary focus of reform. It is not logical to assume that rural areas invariably remain rural in light of the relentless pace of urbanisation in Malaysia. This is sufficient to justify imposing a limitation – with the prospect of increasing equalisation – on the variation in electorate size between rural and urban areas.

As mentioned earlier, constitutional amendments over the years have gradually eroded the Election Commission’s status as an independent administrator of the electoral process. For instance, the dissatisfaction by the Alliance over the Election Commission’s Report of 1960 to re-delineate constituencies and reduce the number of seats in the House of Representatives from 104 to 100 was reversed by a constitutional amendment passed in Parliament. This showed how easily the Election Commission’s actions in delimitation could be reversed by dissatisfied political parties in power. This ‘thwarting mechanism’ makes a convenient tool for the ruling party to fine-tune any changes brought by the Election Commission to its own political advantage.

The Election Commission’s powers to delimit constituencies were also seriously constrained with the addition of the Thirteenth Schedule to the Federal Constitution, which effectively confined the Election Commission to reviewing only the division of the Federation and states into constituencies and recommending necessary changes.

Also, the Election Commission’s recommendations are now required to be submitted to the Prime Minister who reserves the right to alter the recommendations even before they are submitted to the House of Representatives. If the House of Representatives does not accept the

99 Ibid.
100 Ibid.
101 Compare ibid at 322 with 343.
102 Constitution (Amendment) Act 1962.
103 Article 113(2) of the Federal Constitution.
104 Clause 9 of the Thirteenth Schedule states: “As soon as may be after the Election Commission have submitted their report to the Prime Minister under section 8, he shall lay the report before the House of Representatives, together (except in a case where the report states that no alteration is required to be made) with the draft of an Order to be made under section 12 for giving effect, with or without modifications, to the recommendations contained in the report”.
recommendations, the Prime Minister may amend it “after such consultation with
the Election Commission as he may consider necessary”. The recommendations
for delimitation need only be objected to by one-half of the members in the House
of Representatives, and neither the Senate nor the Upper House (Dewan Negara)
need to be consulted.

Even though the public may under appropriate conditions submit its
objection to any recommendations proposed, thereby obliging the Election
Commission to conduct a local enquiry in respect of the relevant constituencies,
the Election Commission may not conduct more than two such local enquiries.

Other later changes include a prescriptive approach undertaken by
Parliament as a prerogative to apportion the seats amongst the states of Peninsular
Malaysia, as well as the removal of the limitation in the variation in electorate
numbers between the rural and urban constituencies. The exercise of the
Election Commission’s powers has since been relegated to the residual task of
delineating constituencies within every state. The more important macro
prerogative of apportioning seats in the House of Representatives is acquired by
Parliament.

More recent changes have further relaxed the rules regarding periodic
review of constituencies by allowing a special review of constituencies to be
undertaken for any state, or part of a state, whenever the House of Representatives
or any state assembly varies the number of its seats. Additionally, the upper
limit for mandatory periodic review of constituencies has been removed, giving
rise to the possibility that constituencies may turn static should the Election
Commission decline to initiate a review. The consequence of these changes is to

105 Clause 11 of the Thirteenth Schedule.
106 Clause 11 of the Thirteenth Schedule; this is despite having a bicameral system of
government.
107 Clause 5 of the Thirteenth Schedule states: “Where, on the publication of the notice under
section 4 of a proposed recommendation of the Election Commission for the alteration of any
constituencies, the Commission receive any presentation objecting to the proposed
recommendations from (a) the State Government or any local authority whose area is wholly or
partly comprised in the constituencies affected by the recommendation; or (b) a body of one
hundred or more persons whose names are shown on the current electoral rolls of the
constituencies in question, the Commission shall cause a local enquiry to be held in respect of
those constituencies”.
108 Clause 7 of the Thirteenth Schedule.
110 Article 46(2) as amended by Constitution (Amendment) (No. 2) Act 1973, s. 12.
111 Clause 2(c) of the Thirteenth Schedule now states: “the number of electors within each
constituency in a State ought to be approximately equal except that, having regard to the greater
difficulty of reaching electors in the country districts and the other disadvantages facing rural
constituencies, a measure of weightage for area ought to be given to such constituencies”.
113 Article 113(3A) of the Federal Constitution.

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enable the ruling party to effect any change to the constituencies at practically any
time.

This substantial whittling down of the constitutional role of the Election
Commission and the considerable transfer of constitutional power to Parliament
runs counter to the notion of an independent and effective Election Commission,
capable of discharging the independent and neutral administration of elections.\textsuperscript{114}

\section{Manipulating the Electoral Rolls – of “Missing” and
“Phantom” Voters}

One essential area of the administrative role\textsuperscript{115} of the Election Commission that
has been subject to heavy criticism is its preparation and revision of the electoral
rolls prior to the elections. The registration of electors is generally governed by
the \textit{Elections (Registration of Electors) Regulations 2002}.

Of the most serious concerns is the existence of evidence that the Election
Commission has been responsible for manipulation of the electoral roll. For
instance, it was estimated that the total number of the electorate in Peninsular
Malaysia, after seeing a steady increase in the past years, suddenly suffered a
sharp drop of approximately 8 per cent after the 1973-1974 registration
exercise.\textsuperscript{116} Numerically, this translated into approximately 330,000 names being
dropped out of the electoral roll.\textsuperscript{117} Out of these 330,000 names removed, a
majority consisted of non-Malays. This effectively resulted in a wider gap
between the Malay-majority voters and the minority non-Malay voters.

\begin{footnotes}
\footnote{114 Another such anti-democratic example was the abolition of local government elections within
every state since the 1960s, and the subsequent replacement of the nominative local government
system which eroded grassroots democracy and undermined the transparency of the nomination
process which has considerable impact on the interests of the local population and citizens: see
Goh Ban Lee, \textit{supra} note 25 at 49; Heikal Abdul Mutadir, “Rapping Local Councils” (Sep 16,
2006) Malaysian Business 52. This “demise” has effectively blocked out and excluded
intervention by the Election Commission to administer the local government elections, thereby
leaving the filling of local government official seats to the state assemblies who would most
probably be politically biased since their members are essentially members from the various
contesting political parties in the federal elections. A revival of local democracy is unlikely in
spite of recent calls for a re-introduction of elections at the local government levels: “A Thinking
Voter’s Checklist” (2004) 24(2) Aliran Monthly 22 at 23.}
\footnote{115 Section 5(1)(a) of the \textit{Elections Act 1958}.}
\footnote{116 Lim Hong Hai, \textit{supra} note 7 at 116.}
\footnote{117 See for example Ong Kian Ming, “Examining the Electoral Roll” in M. Puthucheary & N.
Othman eds., \textit{Elections and Democracy in Malaysia} (Bangi, Selangor: Penerbit Universiti
Kebangsaan Malaysia, 2005) 294, estimating a figure of around “230,000 fewer voters in the 1974
electoral rolls compared to the 1972 electoral rolls”.
}
In 1990, it was similarly observed that irregularities in the electoral roll affected about 300,000 voters. In 1999, approximately 680,000 registrants were reportedly deprived of their votes owing to late certification and endorsement by the Election Commission. These potential voters were widely seen as opposition supporters.

Criticisms pertain also to the accuracy of the electoral rolls for the purposes of election. Frequent observations have been made about the electoral rolls containing “missing voters” and “phantom voters”. Not infrequently the electoral rolls contained voters who were deceased or whose addresses were traceable to one single – sometimes non-existent – address. Additionally, there have been several occurrences showing different voters registered under the same identity card number. More serious still, there was evidence that ineligible voters were found to have been registered under forged identity cards. The Election Commission admitted to a systemic defect when it revealed that there was in fact more than one version of the electoral roll used for the same general election.

In spite of having technological support in updating the electoral rolls months before the actual polling, the Election Commission often failed to keep the electoral rolls up-to-date on polling day. This was notwithstanding the efforts by the Election Commission to boost its accessibility to the public by allowing voters to check their voting statutes via the Internet or Short Messaging Service (SMS). Often, these shortcomings are attributed to the Election Commission’s website failing to provide critical information of voters’ assigned polling centres, the inaccessibility of the website days before the election campaigning is to end, and the failure of the system to reply to SMS enquiries on polling day itself.

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118 Lim Hong Hai, supra note 23 at 272.
119 Ibid.
120 “Missing voters” has been defined as “qualified and registered persons whose names are improperly missing from the electoral rolls”: see Lim Hong Hai, supra note 7 at 115.
121 “Phantom voters” has been defined as “non-qualified persons who have nonetheless successfully registered and placed themselves on the electoral rolls”: see Lim Hong Hai, supra note 7 at 115. See also Ong Kian Ming, supra note 117 at 304; Salbiah Ahmad, “Some legal aspects of the electoral system” in M. Puthucheary & N. Othman (eds) Elections and Democracy in Malaysia (Bangi, Selangor: Penerbit Universiti Kebangsaan Malaysia, 2005) 346. Sabah has probably the worst such occurrences of “phantom voters” historically with several suspicious surges in registered voters prior to each election: see Francis K.W. Loh, “Electoral Politics in Sabah, 1999: Gerrymandering, ‘Phantoms’, and the 3Ms” in Francis K.W. Loh & Johan Saravanamuttu eds., New Politics in Malaysia (Singapore: Institute of Southeast Asian Studies, 2003) 240-2.
122 See for example Ong Kian Ming, supra note 117 at 298, observing further that these residential addresses often indicated multiple registered voters belonging to various racial groups.
124 Ibid.
125 Ibid.
As for the actual conduct of elections, there have been reports of voters being misled by false information and realising too late on the day of polling that their names were actually registered under a different constituency in which they did not reside. Such situations not only served to confuse the voters but also brought huge inconvenience to them through last-minute shuffling between polling stations just to get their ballots cast. In the course of such confusion, it can be expected that many ballots would have gone uncast on the actual day of election. Disorganisation, unreliability and lack of transparency seemed to be the order of the day.

This has a direct impact on the integrity and competence of the Election Commission. The reputation and image of the Election Commission have been seriously tarnished and marred for years. Doubt soon evolved into distrust and more recently it has escalated to contempt. This has raised serious concerns about whether the outcome of the elections depended not on the voters, but the Election Commission.

The Election Commission, in its defence, claimed that practical difficulties are to blame for its perceived poor performance. It claimed that “phantom voters” arise because voters failed to update the National Registration Department (NRD) about changes in residential addresses, and the failure by relatives of deceased voters to report the deaths of their family members to the NRD. As regards voters bearing the same residential addresses, the Commission explained that this arises because many rural residents register their addresses collectively under some prominent nearby location out of convenience. Since the preparation of electoral rolls is very much reliant on the statistics and information fed by the

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126 Such a problem has been occurring in every election. Even in the 2004 elections, there have been reports of inconsistencies in the electoral rolls such as missing voters’ names and wrong particulars of voters, thereby hindering the voting process and denying voters of their right to vote on polling day: see ibid; A. Kadir Jasin, “Improving on the Record” (1 April, 2004) Malaysian Business 7. See also “Voters ‘not being planted’ in opposition seats”, New Straits Times (Malaysia), 30 November 2007.


130 “Commission cannot remove names of ‘dead’ voters”, New Straits Times (Malaysia), 5 December.
NRD, the Election Commission claimed that there is little it could have done to prevent such discrepancies.\(^{131}\)

The Election Commission also blamed the absence of a provision in the law to vary or remove any registered voter from an electoral roll other than deceased voters,\(^{132}\) unless it was done with the consent or at the request of the voter, even where it was aware that maintaining the voter in the roll would result in inaccuracy. The Election Commission also blamed the citizens for their poor attitude in the presentation of proper facts such as their residential addresses.

Indeed, it would be unconstitutional for the Election Commission to vary the electoral rolls of living eligible voters, as it would be tantamount to interfering with the voters’ rights and privileges as guaranteed by the Constitution where they had already met the requirement of the “qualifying date”.\(^{133}\) However, such practical difficulties are not valid excuses for irregularities in the electoral roll.

The law may be reformed to provide for stronger enforcement of compulsory registration and oblige eligible voters to take their own initiative in updating any changes in their personal particulars, such as their residential addresses. Voting procedures may also be improved. For instance, the plan to introduce indelible ink and transparent ballot boxes in the 2008 election could have pre-empted electoral abuses;\(^{134}\) this plan was, however, cancelled days before the election. Much has to be done to restore public confidence in the Election Commission.\(^{135}\)

VI. THE ELECTION PETITIONS – QUAGMIRE FOR THE LOSERS

Elections may be challenged on two bases. The first is a challenge by the public against the accuracy of the electoral roll by way of a public inquiry; the second being an election petition by way of judicial review. The option of the preferred recourse primarily depends on two factors: the nature of the alleged wrongdoing or error in the election process, and the time at which the aggrieved party seeks to act.

A supplementary electoral roll may be challenged by way of a public inquiry under section 17 of the Election (Registration of Electors) Regulations 2002. The Registrar shall, as soon as practicable after receiving a claim for, or an

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131 Ibid.
132 This must nonetheless be substantiated with proof of death of the voter: see ibid.
133 Article 119(4) of the Constitution states that: “qualifying date means the date by reference to which the electoral rolls are prepared or revised”,
135 See for example, “Use of indelible ink a ‘backward’ step”, New Straits Times (Malaysia), 6 June 2007.
objection to, the inclusion of any name in the electoral roll, hold a public inquiry into the claim or objection which has been duly made, giving not less than seven days’ notice in a prescribed form to the claimant or the objector or the person in regard to whom the objection has been raised, and any person who appears to the Registrar to be interested in or affected by the inquiry may appear in person at the inquiry.136

However, following an amendment to the Elections Act 1958 in June 2002, the electoral roll is now deemed to be final and binding after it has been certified or re-certified, and is not reviewable by any court.137 Although this has yet to be tested in a proper case, existing case authorities seem to support the proposition that the appropriate mechanism for challenge would be to raise objections before the certification, since the roll would already be open for inspection before the actual certification.138

In any event, a penalty may be imposed under section 18 of the Elections (Registration of Electors) Regulations 2002 for objections made without reasonable cause. The question of whether a public inquiry may be a good alternative to judicial review of the electoral rolls does not attract a comforting answer because the regulations139 provide that the inquiry is to be conducted by the Registrar, who is after all an officer appointed by the Election Commission.140 There is thus a danger of the inquiry being subject to cover-up practices by officers within the Election Commission.

Thus, a plausible mechanism through which the independence and efficiency of the Election Commission can be put under thorough scrutiny is through an Independent Commission of Enquiry that is external to the Election Commission.141 This will provide an alternative means of ensuring that the

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136 Section 17(1) of the Elections (Registration of Electors) Regulations 2002.
137 Sections 9 and 9A of the Elections Act 1958. Section 9A states: “After an electoral roll has been certified or re-certified, as the case may be, and notice of the certification or re-certification has been published in the Gazette as prescribed by regulations made under this Act, the electoral roll shall be deemed to be final and binding and shall not be questioned or appealed against in, or reviewed, quashed or set aside by, any court”.
138 See Tg Nawawi bin Tengku Ab Kadir @ T Putra bwn Lokman bwn Muda & 2 Lagi [1996] 1 CLJ 551 (Unknown Court, Malaysia), per Abdul Hamid Mohamed H; Salbin bin Mukein v. The Sabah State Election Officer & 2 Ors (and Anor Election Petition) [1999] 4 AMR 4951 (High Court, Sabah and Sarawak (Kota Kinabalu)), per Hasan b. Lah J.
139 Section 17 of the Elections (Registration of Electors) Regulations 2002.
140 See definition of “Registrar” under Section 2 of the Elections (Registration of Electors) Regulations 2002 which alludes to Section 8 of the Elections Act 1958 (on “Appointment of officers”).
141 This has been supported by the Bar Council as well: “Bar Supports an Independent Commission of Enquiry” (2004) 24(3) Aliran Monthly 33. Even the Election Commission chairman has once suggested the need for an independent commission to investigate certain
Election Commission is effective and impartial in its operation and review of grievances from the public.

The other related issue that follows is, notwithstanding section 9A of the *Elections Act 1958*, whether a certified electoral roll can be challenged, if upon objection before certification, the Election Commission nevertheless proceeds with certification. The difficulty with this issue is that the judicial pronouncements on this point were made before 2002, and did not have the benefit of considering section 9A. While it was previously held in the *Wong Phin Chun* case (unreported, 1994) that it would not be appropriate to raise such disputes to an Election Court, the better view is that the electoral roll can be challenged because the very failure to hold a public inquiry after objections were raised is a contravention of the law.\(^\text{142}\)

Apart from challenges to the electoral roll, an election of a successful candidate to the House of Representatives or to the legislative assembly of a state can be called in question by an election petition.\(^\text{143}\) Election petitions are presented to the High Court having jurisdiction over the electoral constituency affected by the petition (also known as the Election Court). Every petition is tried by the Chief Justice or by a judge of any High Court\(^\text{144}\) nominated by the Chief Justice for the purpose.\(^\text{145}\) An election petition must be presented to the High Court within 21 days after the election results are gazetted.

At the conclusion of the trial, the election judge shall determine whether the candidate whose return or election is complained of, or any other person, was duly returned or elected.\(^\text{146}\) The election judge is also empowered to declare an election null and void, in which event a fresh election must be held by the Election Commission.\(^\text{147}\)

Except for the period after the first parliamentary election in 1955 when not a single election petition was filed, election petitions “seem to be the order of the day after every parliamentary election”.\(^\text{148}\) The conduct of election petitions is especially problematic because of the ambiguity of the language of the various electoral “fiascos” that happened during the 2004 elections. However, such a suggestion was rescinded shortly after: “Current Concerns” (2004) 24(3) Aliran Monthly 35.

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\(^{142}\) *Harris Mohd Salleh v. Ismail bin Majin Returning Officer & Ors* [2001] 3 MLJ 433 (High Court, Kota Kinabalu), per Muhammad Kamil J.

\(^{143}\) Article 118 of the Federal Constitution provides: “No election to the House of Representatives or to the Legislative Assembly of a State shall be called into question except by an election petition presented to the High Court having jurisdiction where the election was held”.

\(^{144}\) See also Section 34 of the *Election Offences Act 1954*.


\(^{146}\) Section 36 of the *Election Offences Act 1954*; See also ibid.

\(^{147}\) Tunku Sofiah Jewa, *supra* note 146 at xxii.
statutory provisions, coupled with conflicting judicial interpretations of the technical complexities entailed in such provisions.

One of the disputes raised in *Devan Nair v. Yong Kuan Teik* was whether a failure to comply with the time limits for the service of the petition by the aggrieved party under Rule 15 of the *Election Petition Rules 1954* would result in the petition being struck off and rendered invalid. The Privy Council upheld the trial judge’s decision that strict compliance with Rule 15 is mandatory rather than directory, and consequently a failure to comply with Rule 15 must render the petition a nullity. The decision of the Privy Council is salutary because of the need to ensure a speedy resolution to any disputes, as well as fairness in terms of allowing the other party to know the case against him timeously, and to prepare his evidence as soon as possible for the purpose of responding to the petition.

The issue of whether Rule 15 permits personal service on the returned candidate where an advocate has not been nominated by him under Rule 10, however, still remains uncertain. While there have been several post-*Devan Nair* cases holding that personal service of a petition under Rule 15 is permitted, the court took a complete turn in *Dr Lee Chong Meng v. Abdul Rahman (No. 2)*, where the it was held that personal service was not a recognised mode of service under Rule 15 in the absence of an advocate nominated by the returning candidate under Rule 10. However, the case of *Dr Lee Chong Meng* did not fit well with past decisions.

Yet another controversy that remains unresolved is the conflicting judicial decisions in *Rhina Bhar v. Karpal Singh* and *Salbin bin Muksin v. Sabah State Election Officer* on the issue of whether a failure to state clearly that a copy of

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150 See also *Ali Amberan v. Tunku Abdullah* [1970] 2 MLJ 15 (Unknown Court, Malaysia), per Raja Azlan Shah J; Section 28 of the *Election Offences Act 1954*.
152 Second Schedule to the *Election Offences Act 1954*; Rule 15 is on “Notice of petition and copy of petition to be served on respondent”.
154 [2000] 3 MLJ 218 (High Court, Kuala Lumpur), per Augustine Paul J.
155 Arguably, it also cannot be a binding authority on later decisions simply because there is no express right of appeal within the existing Malaysian election laws.
156 [1995] 4 CLJ 642 (High Court Malaya, Penang), per Tan Sri Dato’ Anuar bin Dato’ Zainal Abidin CJ (Malaya).
157 [1999] AMR 4951 (High Court, Sabah and Sarawak (Kota Kinabalu)), per Hasan b Lah J.
the petition may be obtained from the Registrar of the court was fatal to the party presenting the petition. However, the decision in *Ramely bin Mansur v. Suruhanjaya Pilihan Raya*158 seemed to adhere to a stricter view as seen in *Rhina Bhar* which cast an extremely heavy burden on the party presenting the petition to attend to technical issues of specific distribution of copies of the petition, and to ensure that the relevant copies must reach the respondent even after sufficient copies have been passed over to the Registrar.

The *Election Petition Rules 1954* must be reviewed and worded with more clarity so as to remove any ambiguity, rather than to leave such ambiguity to the inadequacy and futility of judicial interpretation.

Election petitions may also deal with the non-compliance of the respondent with the election laws. Some examples of non-compliance include a wrongful rejection of a nomination or failure to reject a nomination paper by returning officers,159 non-observance of regulations pertaining to the conduct of elections at the polling centre,160 as well as errors in the counting of votes and the failure to grant a request of recount.161

One question here is whether the duty incumbent on the petitioner to satisfy the election judge that the election was not conducted in accordance with the principles laid down in such written law and that such non-compliance affected the result of the election, must be construed conjunctively or disjunctively. 162

There are conflicting views. In *Mohamed Jaafar v. Sulaiman & Anor*,163 the election judge adopted the conjunctive view. This may seem to be logical since the provision under section 32(b) of the *Election Offences Act 1954* expressly uses the word “and” which suggests a conjunctive approach. In *Ishak*
Hamid v. Mustapha, the court held that a transgression of the law in the defective administration of a nomination paper of a successful candidate did not render the election results null and void. The reason as set out by the judge was that while there was indeed a procedural breach of the law by the returning officer in the admission of the nomination papers, the elections had been substantially conducted in accordance with the general principles of the law. The judge also observed that as the non-compliance of the law by the returning officer had not affected the result of the election, the respondent must be held to have been duly elected.

However, it is submitted that the better view should be the disjunctive view adopted in the later case of Re Tanjong Puteri Johore State Election Petition. The law should regard both procedural fairness and substantive fairness equally. The importance of procedural fairness in the conduct of elections would be undermined if the results of the elections (substantive fairness) are invariably made the controlling factor to trigger the operation of section 32(b) in every case. Moreover, it is speculative to attempt to determine if a non-compliance of any written rule did in fact affect the result of the election. There simply is no litmus test that can be applied consistently in every case.

Ensuring free and fair elections necessarily requires that both procedural fairness and substantive fairness be satisfied, and it is a disjunctive and not a conjunctive reading of section 32(b) that could bring about such an effect in the law. This does not, however, necessarily mean that every claim has to be given the full measure of judicial inquiry the moment a suit has been filed.

As much as justice must be seen to be done, the courts must be astute in dismiss unmeritorious cases. Before a full-blown inquiry is to be attracted, claimants must first prove to the satisfaction of the courts a prima facie case of non-compliance of election rules or a real possibility of an affected election result therefrom as a matter of preliminary inquiry. This will help the courts weed out frivolous and vexatious claims from losers of elections.

VII. JUDICIAL IMMUNITY – TIME FOR A SERIOUS RETHINK

The judiciary has been commended elsewhere for some of its decisions such as Stephen Kalong Ningkan v. Tun Abang Haji Openg and Tawi Sli and Koh Yin

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164 [1965] 2 MLJ 18 (Unknown Court, Malaysia), per Ismail Khan J.
165 In any event, the root of the problem lies in statutory ambiguity, and uncomfortable decisions like Ishak Hamid v. Mustapha could have otherwise been avoided and be more convincing if the wording of the relevant election laws were clear enough.
166 [1988] 2 MLJ 111 (Unknown Court, Malaysia), per Wan Yahya J.
167 [1966] 2 MLJ 187 (Unknown Court, Malaysia), per Harley CJ.
Chye v. Leong Kee Nyean\textsuperscript{168} where the Election Court rightly found the governing party to have been wrong. However, these achievements should not be overstated.\textsuperscript{169}

The question of whether the Election Commission or the returning officer of any constituency should enjoy immunity against judicial scrutiny – in the face of the increasing allegations made against the Election Commission for failing to discharge its duties satisfactorily – is critical here.

The traditional justification for immunity is to avoid defensive practices by the Election Commission that might lead to disruption in its ordinary functioning. Unfortunately, with the neutrality and competence of the Election Commission being subject to severe criticisms, it is time to rethink whether the Election Commission ought to enjoy continued judicial immunity.

The relevant cases do not provide clear authority on whether the Election Commission or any returning officer can be brought to court. In \textit{Re Pengkalan Kota by-election},\textsuperscript{170} it was suggested that a returning officer may be joined as a respondent in an election petition only if it would be necessary to do so. In \textit{Dewan Undangan Negeri Kelantan v. Nordin Bin Salleh},\textsuperscript{171} it was held that the Election Commission can be made a respondent to an election petition, but on the circumstances of the case it was held that the failure to join the Election Commission as a party in the case was not fatal to the case. However, the more recent case of \textit{Dr Lee Chong Meng v. Abdul Rahman bin Haji Abdullah (No. 1)}\textsuperscript{172} held that neither the Election Commission nor a returning officer could be made a respondent to an election petition.

The better view to adopt is that the proposition found in \textit{Dr Lee Chong Meng v. Abdul Rahman bin Haji Abdullah (No. 1)} does not confer judicial immunity and, accordingly, does not mean that the Election Commission cannot be held accountable for their acts. After all, the underlying purpose of an election petition is to submit an electoral dispute to the court to assess the validity of an election result, not to seek punitive remedies against the administrator of the election. The Election Commission could still be held accountable in law for any corrupt or illegal practice in the course of their administration under the criminal law. Allegations of wrongful conduct on the part of the Election Commission

\textsuperscript{168} [1961] MLJ 67 (Unknown Court, Malaysia), per Smith J.
\textsuperscript{169} The independence of the judiciary in Malaysia has also been criticised since the sacking of the former Lord President Tun Salleh Abbas in 1988.
\textsuperscript{170} [1981] 1 MLJ 265 (Unknown Court, Malaysia), per Abdoolcader J.
\textsuperscript{171} [1992] 1 MLJ 697 (Supreme Court, Kuala Lumpur), per Abdul Hamid Omar LP, Gunn Chit Tuan SCJ and Edgar Joseph Jr SCJ.
\textsuperscript{172} Election Petition No PP-1-2000, per Augustine Paul J. See also \textit{Ramely bin Mansur v. Suruhanjaya Pilihan Raya} [2000] 2 MLJ 550 (High Court, Kuala Lumpur) where Augustine Paul J referred to his own judgment in \textit{Lee Chong Meng (No. 1)} saying that the Election Commission is not an appropriate party to be made a respondent in an election petition.
merely serve a tactical litigation function in election petitions to secure annulment of the election outcome. It remains open for appropriate prosecution against any corrupt practice to be carried out in a separate criminal trial.

While making the Election Commission liable as a respondent to an election petition may undermine its administration of elections, what should be borne in mind is that since the Election Commission is charged with the responsibility of ensuring free and fair elections, it should be held accountable in law for its acts in the course of its administration.

Rather, subjecting the Election Commission to judicial scrutiny carries a strong signal that reinforces the raison d’être of the Election Commission – to administer and conduct elections in such a manner as to ensure free and fair elections.

No free and fair elections can be assured if the Election Commission could act, whether properly or improperly, under the absolute guarantee of impunity. From a constitutional perspective, it makes perfect sense to enforce judicial scrutiny over the Election Commission under the separation of powers model which aims to impose meaningful checks and balances over governmental behaviour. After all, as has been discussed earlier, there is a strong indication of legislative and executive interference with and manipulation of the Election Commission.¹⁷³

As for alleged practices falling short of criminal behaviour (i.e. negligence), the Election Commission may still be invited to testify as a witness to assist the election judge in coming to a decision on whether to quash a particular election result. Dr Lee Chong Meng v. Abdul Rahman bin Haji Abdullah (No. 1) does not seem to pose any difficulty on this point, for it merely held that the Election Commission could not be made a respondent to an election petition.

Next, the proposition that the Election Commission may be compelled to testify and provide evidence under section 37(2) of the Election Offences Act 1954 does not seem to fit well with the Election Commission Act 1957. Under the Election Commission Act 1957, although penalties are imposed on persons attempting to influence the Election Commission,¹⁷⁴ and also for any unauthorised disclosure of information by members of the Election Commission,¹⁷⁵ no person shall in any legal proceeding be compelled to disclose any information on any form of communication which has taken place between any member of the

¹⁷⁴ Section 10 of the Election Commission Act 1957.
¹⁷⁵ Section 9 of the Election Commission Act 1957.
Election Commission and any official in the government.\textsuperscript{176} The latter is inconsistent with section 37(2) of the \textit{Election Offences Act 1954}.

The blame for such confusion in the law should be placed on the poor drafting of statutes with little or no cross references between related Acts to ensure consistency in the law. Section 37(2) of the \textit{Election Offences Act 1954} should prevail as the Election Commission is after all the custodian of free and fair elections, and it ought to be held accountable to the public for its acts and not hide behind a veil of immunity. This is also consistent with the preferred view towards stripping the Election Commission of all immunity against judicial scrutiny, so as to allay the growing and increasing sentiments of scepticism towards its neutrality, integrity, competence and independence.

\textbf{VIII. OTHER ASPECTS OF THE ELECTION LAWS – OF SERIOUS CONCERNS AND CONFUSION}

Some residual aspects of the election laws that remain in confusion, or are in need of further reform, include the standard of proof in election dispute cases, the right to appeal from an Election Court’s decision, and certain aspects of election offences.

The prevailing view towards the standard of proof in disputes regarding the elections can be found in \textit{Wong Sing Nang v. Tiong Thai King},\textsuperscript{177} where it was held that since allegations are generally in substance criminal in nature (such as allegations of bribery and misrepresentation by successful candidates), the appropriate standard of proof should be that under a criminal case i.e. proof beyond reasonable doubt. However, the contrary view, as enunciated in \textit{Hamad bin Mat Noor v. Tengku Sri Paduka Raja}\textsuperscript{178} is that since the Election Court is essentially a civil court, and that Section 32 of the \textit{Election Offences Act 1954} expressly states that the petitioner need only to prove “to the satisfaction of the Election Judge” the commission of election offences, the standard of proof should be that of a civil case i.e. on a balance of probabilities.

While there have been suggestions urging that the \textit{Election Offences Act 1954} be amended to state specifically what standard of proof is to be expected from the petitioner, the requisite standard of proof should be made to be dependent on the nature of the allegations. If the allegation is one of criminal nature such as a bribery case, the standard to be followed must be that of beyond a reasonable doubt. On the other hand, if the allegation is directed at a criminally non-culpable practice, the recommended standard of proof may well be based on a balance of probabilities. In any case, the \textit{Election Offences Act 1954} should be

\textsuperscript{176} Section 5 of the \textit{Election Commission Act 1957}.
\textsuperscript{177} [1996] 4 MLJ 261 (High Court, Sibu), per Charles Ho J.
\textsuperscript{178} [1993] 3 MLJ 533 (High Court, Kuala Terengganu), per Lamin J.
reformed to categorically accommodate these two possibilities that may arise in a dispute.

Another area of confusion is the right to appeal against the decision of an election judge. Generally there is no automatic right of appeal in every Election Court decision due to the need of achieving a speedy resolution to disputes and the regard to be had for the public interest in ensuring that there is no indefinite delay in waiting for the outcome of the final decision as to whether a re-election is to be conducted. Although an intermediate stand seems to be adopted by the Privy Council in the *Devan Nair*\(^{179}\) case where it held that there can be a right to appeal provided that the election judge expressly allows for such a right in his judgment and that the case was of exceptional public importance, stronger views have been expressed for an automatic right to appeal. Thus in *Zulkaraini v. Syed Omar*\(^{180}\) the election judge said:

> “I do not think election judges do not make mistakes whereas other judges do. We are all not infallible. What then happens if an election judge commits an error? ... It appears to me the aggrieved party has no remedies under the law. Perhaps this matter can be also considered so as to safeguard against errors made. Perhaps a quick reference after judgment to the Federal Court within a short period of time to be provided in the law is the answer.”

This view is preferable. It gives effect to the recognition of the reality that election judges do make errors in their judgment at times, and that consequently a right to appeal – albeit expeditiously – can provide legal recourse to correct such errors.

In addition, the controversies surrounding various ambiguities of Rule 10 and Rule 15 of the *Election Petition Rules 1954* (as discussed earlier) would not have been so problematic had the Malaysian law allowed for appeals to be made against judgments of the Election Court. The right to appeal to an appellate court would demand that rules of *stare decisis* be observed, and this will aid the public in identifying with relative confidence the authoritative propositions of the law for various electoral legal issues.

Lastly, having an automatic right to appeal does not necessarily lead to undue delay and confusion, for strict limitation periods can be laid down for the various types of disputes that may arise from election petitions.

\(^{179}\) [1967] 2 AC 31 (Privy Council). Lord Upjohn, however, underlined the point that the Privy Council would be reluctant as a general rule to entertain interlocutory appeals, especially in election petitions, unless the case raised was of exceptional public and general importance.

\(^{180}\) [1979] 2 MLJ 143 at 146 (Unknown Court, Malaysia), per Mohamed Zahir J.
Another area for possible reform is to improve the Election Offences Act 1954 to include special provisions pertaining to divisive practices by election candidates that may create disharmony and hatred among the various ethnic communities in Malaysia.\textsuperscript{181} For example, an equivalent of the Indian Act (the Representation of People Act, 1951) can be incorporated into the Election Offences Act 1954 to prohibit divisive practices by candidates to swing votes in their favour based on religious threats or remarks.\textsuperscript{182} The enactment of such provisions would also reflect the respect that candidates must show to the electors’ ethnic and religious diversity, which in turn requires that voters are free from any undue influence in exercising their right to vote.\textsuperscript{183}

Some provisions in the Election Offences Act 1954 may also be abused by the governing party in securing the conviction of opposition party members. For instance, section 4A of the Election Offences Act 1954, whilst dealing with offences of promoting feelings of ill-will or hostility, is widely worded, and can potentially apply to any conduct made in the course of a political campaign launched by the opposition.\textsuperscript{184} It has been correctly pointed out that such a loosely worded provision in the Election Offences Act 1954 is not desirable.\textsuperscript{185}

**IX. CONDUCT OF ELECTIONS – AN UNFAIR GAME**

The focus of this section is on how a lack of level playing field has resulted from the consistent exploitative utilisation by the ruling coalition of the state machinery during elections to garner votes for itself.\textsuperscript{186}

For example, it has been noted that the 1990 nationwide rallies undertaken by the then Prime Minister were arranged months before the election, abusing state resources such as government jets, facilities and funds.\textsuperscript{187} Mass media access to the contesting parties in the pre-election period was also inequitably shared


\textsuperscript{182} Ibid.


\textsuperscript{184} Section 4A reads: “Any person who … does any act or makes any statement with a view or with a tendency to promote feelings of ill-will, discontent or hostility between persons of the same race or different races or of the same class or different classes of the population of Malaysia … shall be liable, on conviction, to imprisonment for a term not exceeding five years or to a fine not exceeding ten thousand ringgit or to both such imprisonment and fine”.


\textsuperscript{186} Khoo Boo Teik, supra note 21 at 40.

among all parties, with the BN standing to gain the most coverage and airtime.\textsuperscript{188} The government’s press regulatory regime also indicates strong government control as exemplified by the hostile treatment of Election Watch.\textsuperscript{189}

The Election Commission has been lacklustre in enforcing spending limits on campaign expenditure.\textsuperscript{190} Also, the ruling coalition appears to have conflated itself with the state in tapping state resources to advance its own political campaigning during the pre-election periods. In doing so, it has ignored the fundamental notion that the government becomes a caretaker government during the election period, whose function is to administer the daily affairs of the country until the swearing-in of the newly elected government.

As regards the actual conduct of election, there are three key concerns.\textsuperscript{191} The first is the dissatisfaction over insufficient supervision of absentee or postal votes involving mainly the civil service sector, the police and the military. Secondly, there is no secrecy of ballots, the justification for which is to enable the tracing of voters in election petition hearings. Thirdly, the 1990 reduction of the catering size of every polling station to no more than 700 voters has inevitably raised eyebrows for fear of “government reprisal” for voting against the BN. Arguably, this development also encourages gerrymandering by allowing the government to better derive more precise electoral result estimates in the elections by referring to past voting results in these bite-sized polling localities.

Finally, the progressive shortening of the campaign period from slightly over a month (prior to 1970) to less than two weeks (in 1986 and henceforth) has also been derided for giving the ruling party an undue advantage, since it can catch the opposition parties unaware in embarking on a full scale campaign without prior notice for preparation.\textsuperscript{192} Coupled with the inequitable access to the media and public facilities given to the contesting parties, this greatly reduces the ability of the opposition to mount a more meaningful challenge against the incumbent in the elections.

\textsuperscript{188} Ibid at 12. See also Lim Hong Hai, supra note 23 at 275.
\textsuperscript{189} An informal group comprising a few members who aim to restore free and fair elections through communication and collaboration with the Election Commission: see supra note 187 at i.
\textsuperscript{190} Lim Hong Hai, supra note 23 at 275.
\textsuperscript{191} Ibid.
\textsuperscript{192} Ibid at 274.
X. A SKEWED ELECTORAL REGIME – THE CONTINUOUS LEGITIMISATION OF A PLEBISCITARY PSEUDO-DEMOCRACY

This brief analysis of the nature, implementation and enforcement of the election laws of Malaysia seeks to highlight the areas where urgent electoral reform is needed.

A regime obsessed with colossal victories by its very nature breeds a strong resistance towards changes that may reduce its political advantage. To fuel such a political culture within the Malaysian society, the governing coalition has resorted to continuous, conscious and calculated legitimisation of its actions to secure electoral victory. Such an end can only be met through serious top-down distortion of electoral democracy.193

Barring an independent Election Commission and appropriate judicial remedies, electoral democracy risks being irretrievably jettisoned in Malaysia.194 Instead of the continuous legitimisation of an uninterrupted plebiscitary pseudo-democracy, urgent electoral reforms – in many areas – are needed in Malaysia to restore public confidence in its electoral system, as well as to ensure the legitimacy of its political system.

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193 Lim Hong Hai, supra note 7 at 136.
194 Ibid at 104.