

**A COMMENTARY: PERHAPS THE TIME IS RIGHT FOR
THE ELECTION COMMISSION OF MALAYSIA TO
ENHANCE ITS INDEPENDENCE AND IMPARTIALITY**

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The commentary reviews the independence and impartiality of the Election Commission (hereinafter referred to as 'EC') and discusses the need for an independent and impartial EC in a parliamentary democracy, highlighting criticisms levelled at this institution in Malaysia. The commentary suggests that reviewing the independence and impartiality of the EC, the scrutiny of Article 114 of the Federal Constitution of Malaysia will be helpful. The commentary also makes recommendations towards a new structure for the EC.

Introduction

In the realm of a parliamentary democracy as envisaged in the Federal Constitution of Malaysia (hereinafter referred to as 'FC'), an independent EC acts as an impartial referee that is above the political fray providing the level-playing field that is required in any election. A referee that is not even-handed is akin to a situation where a judge presides over a case involving a party which he supports. The EC plays a pivotal role in preserving and protecting democracy through free and fair elections. Regarded as an important instrument of the democratic process, it is imperative that the EC discharges its duties in an even-handed manner without fear or favour. Responsible and transparent institutions with fair practices that respect the people's wishes are held in high esteem in a democracy. Widespread dissatisfaction against the EC and calls for the resignation of the top brass in the EC come in the midst of heightened public awareness of democratic rights and the changing political landscape in Malaysia.

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Election Regulator under Attack

The EC's independence and impartiality has been a prominent subject of concern in the 13th General Election (known to Malaysians as 'GE13'). There is widespread dissatisfaction against its handling of the recently concluded general election. In a joint interim report released on 9 May 2013 on GE13 by the two electoral watchdogs, the Institute for Democracy and Economic Affairs (IDEAS) and Centre for Public Policy Studies (CPPS), the polls were described as 'partially free, but not fair'.¹ The opposition coalition and five individuals filed a suit at the High Court on 15 July 2013 to nullify the results of all the contested parliamentary seats in GE13 and order fresh polls due to the "indelible ink fiasco".² The opposition also organized a series of Blackout 505 rallies after the GE13 to highlight the allegations of irregularities and electoral fraud. A total of 78 election petitions were also filed before the 12 June 2013 deadline to challenge the results of the general election. Chief Justice Tun Arifin Zakaria disclosed that 58 of these election petitions had been filed in Peninsular Malaysia and another 20 in Sabah and Sarawak.³ For the speedy disposal of the election petitions, 13 High Court judges had been appointed as Election Court judges to preside over the cases. Growing concerns over election irregularities have also led to several judicial review applications filed by dissatisfied voters and concerned parties against the EC.⁴ There have been instances of Malaysians residing abroad finding out that they had been registered as voters in

¹ Interim Observation Report on Malaysia's 13th General Election, *Was GE13 Free & Fair?* (IDEAS and CPPS, 9 May 2013) 31.

² 'Challenged' *The Sun* (Petaling Jaya, 15 July 2013) <<http://www.thesundaily.my/news/770845>> accessed 17 July 2013. The High Court judge dismissed the application; see V Anbalagan, 'Court throws out Pakatan's bid to nullify results of parliamentary contests in GE13' (*The Malaysian Insider*, 7 February 2014) <<http://www.themalaysianinsider.com/malaysia/article/court-throws-out-pakatans-bid-to-nullify-results-of-ge13>> accessed 8 April 2014.

³ Mazwin Nik Anis, 'Case Management To Begin' *The Star* (Kuala Lumpur, 24 June 2013) 12.

⁴ Gan Pei Ling, 'Voting Fraud Victim Goes To Court' *Selangor Times* (Selangor, 5-7 April 2013) 2.

their constituencies back home without their consent.⁵ Prior to GE13, judicial recourse had been sought by some Malaysian citizens residing abroad to compel the EC to register them as absent voters for purposes of voting in the general elections.⁶ The EC has also been pressured to answer allegations of electoral fraud at the recently concluded *Sabah Royal Commission of Inquiry* on illegal immigrants in Sabah by a five member panel chaired by former Borneo Chief Judge Tan Sri Steve Shim.⁷ Suggestions have been made to cancel the entire electoral roll and re-register voters. The "People's Tribunal" was set up by the election reforms group *Bersih* consisting of a coalition of more than 80 non-governmental organisations to investigate allegations of electoral fraud in the 5 May 2013 polls and will begin its proceedings on 18 September 2013.⁸

Several allegations of electoral fraud and irregularities have been made against the EC. Among them are claims of the switching and stuffing of ballot papers and boxes, power blackouts at polling centres during the counting of votes, phantom voters and the indelible ink that could be washed off.⁹ There have also been allegations of multiple voting by registered electors and manipulation of postal votes. The entire institution of the EC has been criticized for failing to manage the

⁵ Alyaa Alhadjri, 'EC Can't Verify Voter Signatures' *The Sun* (Petaling Jaya, 3 April 2013) 7.

⁶ *Teo Hoon Seong and Ors v Suruhanjaya Pilihan Raya* [2012] 4 MLJ 245. Also see Hafiz Yatim, 'Six Overseas Malaysians Lose Bid To Be Absent Voter' (*Malaysiakini*, 6 Jan 2012) <<http://www.malaysiakini.com/news/185834>> accessed 20 January 2012.

⁷ Azril Annuar, 'Ambiga: EC Must Answer Now' (*The Malay Mail*, 23 January 2013) <<http://202.75.60.244/source/azril-annuar>> accessed 26 June 2013.

⁸ Anbalagan and Farhan Darwis, 'People's Tribunal to Hear Complaints of Polls Fraud Despite Absence of EC, Police' (*The Malaysian Insider*, 17 September 2013) <<http://www.themalaysianinsider.com/malaysia/article/peoples-tribunal-to-hear-complaints-of-polls-fraud-despite-absence-of-ec-po>> accessed 17 September 2103. Also see Clara Chooi, 'Bersih's People's Tribunal A Moral Force To Investigate Electoral Fraud' (*The Malaysian Insider*, 21 May 2013) <<http://www.themalaysianinsider.com/malaysia/article/ambiga-bersih-peoples-tribunal-a-moral-force-to-expose-electoral-fraud/>> accessed 2 June 2103. See also <<http://www.globalbersih.org>>. The tribunal has produced recommendations and findings that will be presented to the relevant authorities.

⁹ Shahanaaz Habib, 'Polls Panel Insist Elections Were Clean' (*The Star Online*, 12 May 2013) <http://www.pru13.gov.my/default.berita.utama.php?news_id=102> accessed 17 May 2013.

general election in a professional manner.¹⁰ Despite widespread dissatisfaction, the EC insists that it has conducted the polls fairly and professionally, citing the higher turnout of voters, being 84 per cent, as evidence of voters' confidence in the Malaysian electoral system.

Concerns over the EC's independence and the public's perception of its ability to project itself as an impartial institution will have to be addressed with urgency and diligence in order to justify the legitimacy of the government. Article 114 of the Federal Constitution, focusing on the elements of independence and public confidence, will have to be reviewed to ensure that free and fair elections in Malaysia remain an important vehicle for people-power.

Article 114 of the Federal Constitution - Composition and Appointment

The EC derives its powers mainly from the FC, the Election Act 1958 and the Election Offences Act 1954. The EC is constituted in accordance with Article 114 (1) FC and consists of a chairman,¹¹ a deputy chairman¹² and five other members.¹³ A newly appointed EC Secretary took office on 19 August 2013.¹⁴ The EC members are appointed by the Yang di-Pertuan Agong (i.e. the King) after consultation with the Conference of Rulers.¹⁵ It is stipulated in Article 114 (2) FC that such appointments 'shall have regard to the importance of securing an EC which enjoys public confidence'.¹⁶ The discussion on the EC's independence and the public's perception of impartiality are closely tied to Article 114 FC.

¹⁰ 'EC Members Should Resign, Says NGO' (*The Star*, 15 May 2013) <<http://thestar.com.my/news/story.asp?sec=nation&file=/2013/5/15/nation/13110628>> accessed 26 June 2013.

¹¹ Tan Sri Abdul Aziz Mohd Yusof.

¹² Datuk Wan Ahmad Wan Omar.

¹³ Datuk Mohamed Ramji Alli, Datuk Dr P. Manogran, Datuk Christopher Wan Soo Kee, Datuk Md Yusop Mansor and Abdul Aziz Khalidin.

¹⁴ Datuk Abdul Ghani Salleh replaced Datuk Kamaruddin Mohamed Baria who retired on 13 August 2013.

¹⁵ Federal Constitution, Article 114 (1), Part VIII.

¹⁶ Federal Constitution, Article 114 (2), Part VIII.

Independence of the EC

Can an institution which is not under the purview of Parliament be viewed as independent? From the government's point of view, the EC is seen as an independent institution that answers only to the King. The Prime Minister's EC.¹⁷ The Parliamentary Select Committee (hereinafter referred to as 'PSC') Report on Electoral Reform recommended in 2012 that the EC be made directly responsible to Parliament. The 9 member panel of the PSC¹⁸ submitted its interim report to Parliament in December 2011 and its final report to Parliament in the following year. The Report was subsequently adopted by the Lower House on 3 April 3 2012.¹⁹

The King, as in established democracies, is regarded as a constitutional monarch in Malaysia. This position is supported as in other democratic countries by constitutional conventions. As a constitutional monarch, the King acts on the advice of the Prime Minister. Although the King exercises his power to appoint the EC after consultation with the Conference of Rulers, it can be reasonably assumed that the Prime Minister puts forward the list of preferred candidates to the King. Nevertheless, the King provides a balancing mechanism by exercising some degree of personal discretion in appointing the EC as the King is under a duty to 'have regard to the importance of securing an Election Commission which enjoys public confidence'.²⁰ Furthermore, the King also plays an important part in the removal of the EC members from office.²¹

¹⁷ Nik Majwin and Yvonne Lim, 'Nazri: EC Answers To King' (*The Star*, 9 October 2012) <<http://thestar.com.my/news/story.asp?sec=parliament&file=/2012/10/9/parliament/12141924>> accessed 12 October 2012.

¹⁸ Pauline Wong, 'Nine-MP Panel' *The Sun* (Petaling Jaya, 18 August 2011) 7.

¹⁹ Standing Order 86 (5)^{*} was invoked by the Speaker Tan Sri Pandikar Amin Mulia. Members from the opposition were ejected from the House when they insisted on a minority report to be inserted into the PSC Report.

²⁰ Federal Constitution, Article 114 (2), Part VIII.

²¹ Federal Constitution, Article 114 (3) & (4), Part VIII.

It is submitted that instead of making the EC an entity in the Prime Minister's Department, Article 114 FC should be amended to ensure that the EC becomes directly answerable to Parliament. In addition, the FC, which is the supreme law of the land by virtue of Article 114 (5A) FC, already provides for a mechanism to place the EC under the purview of Parliament. Parliament is empowered by law to determine the terms of office of the EC members.²²

Comparison with other Jurisdictions

The accountability of the institution of the EC in Malaysia differs from other jurisdictions. In most mature democracies, such institutions are answerable to their respective legislative bodies. In the UK, the EC is an independent body set up by Parliament. One of its roles is to regulate political parties and election finances as well as setting standards for a well-run election.²³ It is also bound by the Speaker's Committee on the Electoral Commission, a statutory body which has been set up by Parliament. The task of this committee is to oversee the appointment of the EC and to examine its five-year plans.²⁴ The EC prided itself on its principles of trust, participation and no undue influence while carrying out its various roles in ensuring the transparency and integrity of party and election finance.²⁵

²² Article 114 (5) of the Federal Constitution provides for the remuneration of members of the EC. Article 114 (5A) further provides that "Subject to the provisions of this Article, Parliament may by law provide for the terms of office of the members of the Elections Commission other than their remuneration".

²³ Legislation on Political Finances, (Electoral Commission Website) <<http://www.electoralcommission.org.uk/party-finance/legislation>> accessed 8 August 2013.

²⁴ 'Most ECs in Different Democracies Work Differently' (*The Star Online*, 2 June 2013) <<http://thestar.com.my/news/story.asp?file=/2013/6/2/nation/13189030&sec=nation>> accessed 18 June 2013. Also published in the *Singapore Star* on 1 June 2013 <<http://www.singaporestar.com/index.php/sid/214918192/scat/48cba686fe041718>> accessed 18 June 2013.

²⁵ Regulation of Parties and Election Finances, (Electoral Commission Website) <<http://www.electoralcommission.org.uk/about-us/roles-and-responsibilities/regulation-of-party-and-election-finances>> accessed 9 August 2013.

Although the EC in the UK plays a crucial role in a democracy, its competence remains questionable.²⁶ Allegations of irregularities and electoral frauds surfaced in previous elections and the EC had been accused of having 'lack of courage, competence and leadership' over party funding and concerns of voter frauds.²⁷ Sam Younger, the former EC chairman acknowledged the need for reforms but maintained that its work had brought the much needed transparency in relation to party funding.²⁸ Its mandate was considered 'too weak in some areas and too broad in others' as a result of which the EC was unable to perform its core duties effectively.²⁹ These deficiencies were not addressed in the Political Parties, Elections and Referendums Act 2000. Subsequently, the Electoral Administration Act 2006 was enacted following the "cash-for-peerages" scandal.³⁰ Some of the deficiencies were addressed pertaining to loans obtained by political parties and the submission of reports on the reviews of polling stations.³¹ Further investigatory and supervisory powers were granted to the EC following the enactment of the Political Parties and Elections Act 2009.³² Furthermore, the EC is made accountable to Parliament and is required to report annually to Parliament on the progress of the voluntary collection of personal identifiers from electors.³³

²⁶ Jerome Taylor and Oliver Wright. 'Electoral Commission Boss Faces Fight for Job after Claims of Fraud' (*The Independent*, 3 May 2012) <<http://www.independent.co.uk/news/uk/politics/electoral-commission-boss-faces-fight-for-job-after-claims-of-fraud-7707489.html>> accessed 12 August 2013.

²⁷ 'Election Watchdog Lacks Courage and Competence' (*Voiceover*, 18 January 2007) <<http://www.politics.co.uk/news/2007/01/18/election-watchdog-lacks-courage-and-competence>> accessed 12 August 2013.

²⁸ *ibid.*

²⁹ *ibid.*

³⁰ Greg Hurst, 'Sleaze Row as Election Donors Get Peerages' (*The Goals*, 8 November 2005) <<http://www.thetimes.co.uk/tto/news/politics/article2027372.ece>> accessed 12 September 2013.

³¹ Electoral Administration Act 2006 <<http://www.legislation.gov.uk/ukpga/2006/22/contents>> accessed 13 August 2013.

³² Political Parties and Elections Act 2009 <<http://www.legislation.gov.uk/ukpga/2009/12/contents>> accessed 10 August 2013.

³³ The Electoral Commission, 'The Political Parties and Elections Act 2009 in Action' <http://www.electoralcommission.org.uk/_data/assets/pdf_file/0007/78919/PPE-Act-A-summary-guide-to-what-is-changing.update.26.01.10.pdf> accessed 10 August 2013.

Like its UK counterpart, the Australian EC is also directly answerable to Parliament. It is accountable to the Joint Standing Committee on Electoral Matters and other committees set up by Parliament to inquire into the electoral process.³⁴

The Constitution of the United States, however gives the respective states the powers to implement presidential elections. The state election coordinators are either appointed or elected. The appointment is made by the Governor or the Secretary of State. The election coordinators also work with the Federal EC which is an independent regulatory body established by the United States Congress to regulate campaign financing.³⁵

The position of the election regulators in some of the Asian countries is, however, less transparent. For instance, in Singapore, the election is conducted by the Elections Department which is directly answerable to the Prime Minister's Office whereas in Indonesia, the Parliament approves and appoints members in the EC from a list submitted by the President.³⁶ The members of the EC in Thailand are appointed by the King on the advice of the Senate. Its independence was put into serious doubt in the controversial 2006 general elections when the constitutional court in Thailand annulled the election results and jailed three of the EC members.³⁷

Public Confidence in the EC

Under Article 114 of the Federal Constitution, in appointing members of the EC, the King shall have regard to the importance of securing an EC which enjoys "public confidence".³⁸ Even in the early days, elections were based on limited powers given

³⁴ 'Most ECs in Different Democracies Work Differently' (*The Star Online*, 2 June 2013) <<http://thestar.com.my/news/story.asp?file=/2013/6/2/nation/13189030&sec=nation>> accessed 18 June 2013.

³⁵ *ibid.*

³⁶ *ibid.*

³⁷ *ibid.*

³⁸ Federal Constitution, Article 114 (2), Part VIII.

to the Election Management Body (presently known as the EC), and which must at all times 'enjoy the confidence of the people'.³⁹

Does the EC enjoy public confidence as envisaged in Article 114 of the Federal Constitution? There seems to be real concern over the public's perception of the ability of the EC to project itself as an impartial institution. The EC's role as an impartial referee is in doubt due to its alleged bias towards the ruling party. Accusations of partisanship by the EC officials and the significant discretion vested in the institution to administer our elections have triggered proposals to reform the institution.

On 1 June 2013, the Prime Minister, in conjunction with the Yang di-Pertuan Agong's birthday celebration, announced the formation of an independent bipartisan PSC to oversee the functions of the EC.⁴⁰ This means that the election regulator will be reporting to the PSC, which is comprised of members from both sides of the political divide, and not to the PM's office. Will this move suffice to restore public confidence in the EC as an independent and non-partisan body?

Such a change is in line with Article 114 FC which aims at securing an independent body that enjoys public confidence. It will also, to some extent, draw the EC closer to Parliament and make its decision-making more credible. It will be a step forward to establish an independent bipartisan PSC to select members of the EC in order to ensure that only those who are impartial and credible are allowed to register voters, conduct elections and redraw the constituency boundaries. The EC and its administrative machinery are currently viewed as biased as it is constituted mainly of retired civil servants who may be seen as supporting the government agenda.

³⁹ Abdul Rashid Abdul Rahman, *Electoral Reforms: Facts & Fallacies* (first published MPH 2013) 39.

⁴⁰ Alyaa Alhadjri, 'EC welcomes move' (*The Sun*, 2 June 2013) <<http://www.thesundaily.my/news/727938>> accessed 18 June 2013.

While some of the attacks against the EC, spread through the social media networks, are mainly due to a lack of knowledge and understanding of the laws on elections and the electoral process, others merit serious attention. The government cannot remain oblivious to the many allegations against the EC by the opposition parties and civil society groups. The government and the EC should work towards rectifying the flaws and constitutional deficiencies in the electoral processes. The EC will have to discard its bureaucratic ways in handling electoral issues and counter the allegations levelled against it in a professional manner in order to redeem its credibility and restore its public confidence and trust.

It is timely for the Malaysian Anti-Corruption Commission (hereinafter referred to as 'MACC'), the Public Accounts Committee of Parliament and the Auditor General's office to investigate serious allegations of irregularities in the GE13. The MACC had taken the initiative to probe the "indelible ink fiasco" to determine the truth⁴¹ and will also investigate the use of public office for any form of gratification under the MACC Act 2009. If the EC is found to have breached public confidence, then the King is empowered to take the necessary steps to remove the EC members under Article 114 (3) and (4) of the Federal Constitution.

A roadmap towards substantial and effective reform of the EC with regards to its independence and impartiality is necessary. Although one may not be sure which election structure is best for Malaysia, it is clear that the current EC is in dire need of reform. The lawmakers from both sides of the political divide will have to work together to rectify the fundamental provision (Article 114 FC) and adopt a model of good practice from other democratic countries to enhance the accountability mechanism of the EC.

⁴¹ Clara Chooi, 'EC Pleased With Probe, Offers Full Cooperation' *The Malay Mail* (Petaling Jaya, 1 July 2013)10.

The re-delineation exercise in Malaysia is just round the corner. The EC is charged with the exercise to redraw the constituency boundaries.⁴² It is timely to reform the EC by amending Article 114 FC. The revamped EC will then be seen to conduct the re-delineation exercise in a professional manner and make good and fair recommendations. Only then will the public perceive this institution as independent, impartial and credible giving it the dignity the Constitution intended it to enjoy.

⁴² Federal Constitution, Article 113 (2) Part VIII.