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## The Malaysian Election Commission: Navigating Electoral Authoritarianism and Political Change

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### Abstract

The urgency of electoral reforms has long been identified as a key to improving democracy in Malaysia. For decades, electoral manipulation through gerrymandering, malapportionment, and issues with the electoral roll and conduct of elections have undermined democratic quality and competition. The Malaysian Election Commission (EC) has – understandably – come under scrutiny for its role in facilitating and sustaining these problems. However, what requires a greater level of attention is the question of how the EC – despite its position as a constitutional institution that exists independently from the other branches of government – has operated in ways that undermined Malaysia’s democracy and maintained a dominant party regime for over six decades. This Article brings this to light by examining the structural, institutional, and political conditions that shape the EC’s operation, particularly with regard to re-delineation of constituencies and the conduct of elections. It argues that flaws in constitutional design, along with subsequent constitutional amendments, have rendered the EC vulnerable to partisan capture and thus affected its ability to function as an independent constitutional institution. In addition, this Article demonstrates how changes in political imperatives and judicial restraint in reviewing the EC’s decision-making have also contributed to the deficiencies in Malaysia’s electoral democracy.

**Key words:** Electoral Reform

In the wake of Malaysia’s historic, first political change in May 2018, the new federal government led by *Pakatan Harapan* (Coalition of Hope, or PH) immediately took steps to fulfil its pledge for electoral reform. Indeed, this was identified as one of the priorities for the PH government – decades of electoral manipulation, chiefly through gerrymandering and malapportionment sanctioned by the Election Commission (EC), had largely favoured the previous ruling coalition (*Barisan Nasional* or BN) and thus crippled the possibility of a regular change in government. This has been the case even at state level, where BN was extremely dominant. With the exception of the northeastern states of Kelantan and Terengganu, BN had controlled all state governments since the first post-independence elections in 1959 until 2008. It was only in 2008 that the opposition coalition managed to win the west coast states of Penang and Selangor. Following PH’s win, the EC’s membership was completely revamped – in September 2018 a senior public lawyer was appointed as its Chairman, followed by the appointment of five new commissioners (comprising a mix of legal and political science academics, civil service officers, and an electoral reform activist). Previously, the sheer dominance of the BN at both federal and state levels allowed the government to fully control the appointment of EC members. There was no parliamentary select committee scrutiny involved; the King appointed members based on the advice of the

Prime Minister and after consulting the Conference of Malay Rulers.<sup>1</sup> Historically, this system has enabled partisan appointments to be made, and there has also been a pattern of appointing retired civil servants with connections to the ruling party.<sup>2</sup> Viewed against this background, there are reasons to question the roles and workings of the EC as an independent body that supports Malaysia's constitutional democracy. At best, the EC has been described as 'nominally independent',<sup>3</sup> while others have provided detailed accounts of practices and policies that call into question its credibility and impartiality in administering elections in the country.<sup>4</sup> To be sure, the EC is not a regular administrative body; it is an institution that is set up, regulated, and empowered by the Federal Constitution. But to what extent has this constitutional entrenchment shaped its independence and its ability to insulate itself from executive and legislative pressures? How effectively has it performed function in administering free and fair elections, in providing institutional oversight of other government branches, and in facilitating the development of a robust democracy?

This Article illustrates that contrary to the view that emphasizes the importance of electoral commissions or bodies in ensuring a working democracy and electoral integrity,<sup>5</sup> the Malaysian Election Commission has instead played a role in maintaining a dominant party system for over six decades. In spite of its status as a constitutional institution that exists independently from the traditional structures of government, the EC has nonetheless been subjected to 'partisan capture' and interference.<sup>6</sup> However, I do not intend to suggest that the EC's role and operation have been the main or the only factor in sustaining the dominance of the BN coalition and Malaysia's semi-democracy. There is a confluence of factors at play, including the pervasiveness of identity politics, voting patterns, voter turnout, and changing political dynamics between and within parties or coalitions. A detailed examination of these factors has been done elsewhere, especially in political science literature, and I will deal with these factors briefly in Part IV of this Article. The core of my analysis instead highlights the EC's roles in re-delineation exercises and the conduct of elections that have provided significant advantages to the incumbent, and in turn contributed to the overall decline in the quality of democracy in Malaysia.

To that end, I shall first highlight – in Part I – the structural and institutional features of the EC, including its jurisdiction, responsibilities, tenure, and mode of appointment. The analysis points to two related factors that underpin the EC's operation and its vulnerability to interference from other government branches – constitutional design and subsequent constitutional amendments that chip away at the institutional integrity of the EC. Part II assesses the EC's operation through two main case studies: (1) electoral re-delineation exercises; and (2) the conduct of elections. While structural and institutional challenges will be made obvious, these case studies are also important in illuminating an understanding of the 'politics' behind the EC's role and how it has facilitated decades of dominance by the BN coalition. A crucial piece of the puzzle which will also be examined in this respect is the role of the courts in adjudicating controversies surrounding malapportionment and gerrymandering. In Part III, this Article turns its attention to the 2018 general election, which led to the (short-lived) political change led by the PH coalition. Aside from addressing

<sup>1</sup>The Malay Conference of Rulers is a body comprising the traditional rulers (*sultans*) of the nine Malay states.

<sup>2</sup>Francis E Hutchinson, 'Malaysia's 14<sup>th</sup> General Elections: Drivers and Agents of Change' (2018) 49(4) *Asian Affairs* 582, 586.

<sup>3</sup>Kai Ostwald, 'How to Win a Lost Election: Malapportionment and Malaysia's 2013 General Election' (2013) 102(6) *The Round Table* 521, 523.

<sup>4</sup>See for eg, Lim Hong Hai, 'Electoral Politics in Malaysia: "Managing" Elections in a Plural Society', in Aurel Croissant (ed), *Electoral Politics in Southeast and East Asia* (Friedrich-Ebert-Stiftung 2002) 106.

<sup>5</sup>Michael Pal, 'Electoral Management Bodies as a Fourth Branch of Government' (2016) 21(1) *Review of Constitutional Studies* 85.

<sup>6</sup>*ibid* 88. Pal acknowledges that the constitutional status of electoral management bodies does not completely remove partisan interference; instead it merely channelled such interference in other directions.

the role of the EC in administering the elections and ultimately validating the results, this section also seeks to examine the following issue: if the EC has been beset by partisan capture and insufficiently impartial, what explains the ability of opposition parties to make electoral gains both at state and federal levels?

### The election commission as a constitutional institution: design features and political realities

Malaysia's EC is an institution established by, and entrenched in, the Federal Constitution.<sup>7</sup> When the Reid Constitutional Commission prepared the draft constitution in the lead up to Malaya's independence in August 1957, it was particularly conscious about the need for free, impartial, and fair elections, given the context of Malaya's plural but severely divided society.<sup>8</sup> The possibility of electoral violence was not taken lightly because as part of the political bargains made during the constitution-making process, the non-Malays would be conferred *jus soli* citizenship and thus eligible as voters.<sup>9</sup> Moreover, in pre-independent Malaya, Malays were largely concentrated in rural areas and the British colonial government had practiced malapportionment in favour of rural areas.<sup>10</sup> The then-status quo was obviously preferred by UMNO (the dominant Malay party, which led the Alliance Party (1957–1973) and the *Barisan Nasional* (1973 – present)) because it would ensure Malay political dominance. Mindful of these contexts, the Reid Commission sought – in drafting provisions for the constitution of the EC – to ensure that the EC ‘enjoys the confidence of all democratic political parties and of persons of all communities’. The concern, it seems, was not only about safeguarding the EC from partisan politics and the potential influence of political (ethnic) majorities, but also about ensuring that the electoral system and the administration of elections are *seen* by the plural populace as fair.

### Structure and function

Most of the Reid Commission's proposals on the structural and institutional features of the EC made their way into the 1957 Federal Constitution, more specifically Part VIII, which deals with elections. The structure of the Constitution, therefore, positions the EC as an independent and separate institution from the other political branches. Under Article 114(1), the EC's seven commissioners – including the Chairman and Deputy Chairman – are appointed by the *Yang di-Pertuan Agong* (the constitutional Head of State, ie the King) after consulting the Conference of Malay Rulers. In exercising his power of appointment, the King does not act on his sole discretion. Instead, in keeping with the conventions of a Westminster form of government with a constitutional monarchy, the King acts on the advice of the Prime Minister. Although the Article 114 does not *explicitly* state that the King has to act on advice, this provision ought to be read with Article 40 which specifies only three situations in which the King could exercise his discretionary powers.<sup>11</sup> In addition, Article 114(2) also provides that in appointing members of the EC, the King ‘shall have regard to the importance of securing an Election Commission which enjoys public confidence’. This formulation departs from the Reid Commission's initial – perhaps even more stringent – proposal

<sup>7</sup>Federal Constitution of Malaysia 1957, art 113.

<sup>8</sup>Lim (n 4) 106.

<sup>9</sup>Citizenship for the non-Malays was one of the most divisive issues during the constitution-making process. The Malay political leaders agreed that non-Malays would be granted citizenship in exchange for the agreement by non-Malay leaders that Islam would be constitutionally recognized as the ‘religion of the Federation’ and that Malay would be the sole national language.

<sup>10</sup>Lim (n 4) 105.

<sup>11</sup>That is, (a) the appointment of a Prime Minister; (b) withholding consent to a request to dissolve the Parliament; and (c) convening a meeting of the Conference of Rulers only where matters implicate the privileges, position, honors, and dignities of their royal highnesses.

that the EC should enjoy the confidence of all political parties and communities. With regard to the EC's secretariat (ie, its regular staff apart from the seven commissioners), Article 115(1) stipulates that the EC may – with the King's approval – employ persons to provide assistance to the Commission. However, in practice, unlike bodies such as the National Human Rights Commission (SUHAKAM), which controls its own hiring process, the EC's regular staff are civil servants hired and assigned by the Public Service Department.

That said, Commissioners of the EC enjoy security of tenure until the mandatory retirement age of 66 years old, and they can only be removed from office on grounds similar to those pertaining to the removal of a Federal Court judge.<sup>12</sup> There are three further grounds for removal by the King: (1) where they are declared bankrupt; (2) where they engage in any other paid employment outside of the EC; and (3) where they become a member of parliament (either the elected lower house or the appointed upper house) or a member of state legislative assembly.<sup>13</sup> To strengthen the commissioners' independence and security of tenure, Article 114(6) protects commissioners against any disadvantageous changes to their remuneration and terms of office *after* their appointment. This is also presumably designed to shield the EC from potential encroachments by dominant political majorities. Indeed, as I shall explain below, this provision has proven to be significant in the context of a single party dominant system where it was easy to pass constitutional amendments that could jeopardize the EC's institutional integrity.

With regard to the EC's functions and authority, the Constitution spells out three primary roles: preparing and revising electoral rolls, reviewing and re-delineating electoral boundaries for federal and state constituencies every eight years, and conducting elections. To facilitate the performance of its functions, the EC's annual funding and budget is allocated and approved by Parliament, and the remuneration scheme for its members is set out in detail in the Election Commission Act 1957. However, the Constitution itself does not specify *how* the EC ought to conduct elections at both the federal and state levels. This is instead governed by the Elections Act 1958, and there are specific laws (passed by the Federal Parliament) that govern the role of the EC and the running of elections.<sup>14</sup> This Elections Act, for example, empowers the EC to appoint an enforcement officer in each electoral constituency for the purpose of enforcing laws on the conduct of elections;<sup>15</sup> make regulations for the registration of electors (such as preparing, publishing, and maintaining electoral rolls);<sup>16</sup> and establish regulations governing nomination and vote counting procedures.<sup>17</sup> These regulations must be tabled for parliamentary approval, which demonstrates that there remains significant room for partisan and legislative interference in setting the rules of the (elections) game. In addition, individual state constitutions specify procedures relating to the formation of state governments and the dissolution of state legislative assemblies. This means that while state elections are typically conducted simultaneously with federal elections, each state could – in theory – decide when to hold its election.

### *The election commission's independence: structural flaws and local contexts*

Despite the EC's constitutional entrenchment, the flaws in its institutional design have cast some doubt on its ability to function as an independent institution. One clear issue arises from the fact that appointments to the EC are virtually the exclusive prerogative of the Prime Minister. In practice, under the BN administration, membership of the EC was dominated by former civil

<sup>12</sup>Federal Constitution of Malaysia, art 114(3).

<sup>13</sup>Federal Constitution of Malaysia, art 114(4).

<sup>14</sup>For eg, the Elections Offences Act 1954 (which spells out electoral offences and illegal conduct during elections), Elections Regulations 1981 (a set of regulations promulgated by the EC on the procedures and rules relating to the conduct of elections), and the Election Commission Act 1957 (which governs the administration of the EC).

<sup>15</sup>Elections Act 1958, ss 3(d) and 4(5).

<sup>16</sup>Elections Act 1958, s 15.

<sup>17</sup>Elections Act 1958, s 16(2).

servants. Although they were not actively involved in party politics, the decades-long dominance by the BN (which is led by the established Malay party, UMNO) led to the instrumentalization of the civil service to implement the government's policies and agenda. In other words, the civil service's loyalty to the government has become synonymous with loyalty to the party in power, resulting in a highly politicized civil service. On top of that, given Malaysia's political history, the civil service has always been dominated by the ethnic Malay community, who comprise almost 70 per cent of the country's population.<sup>18</sup>

The upshot of all this is that the EC, over the years, has virtually functioned as government department that implements policies of the government of the day. This institutional culture is further bolstered by the fact that – as I have mentioned above – the EC's regular secretariat staff is drawn from the ranks of the Public Service Department (PSD). They are not hired independently by the EC and on terms set by the EC. As civil servants they can be transferred at any time by the PSD and they cannot be dismissed from office. Previously, in many cases the Chief Secretary of the EC Secretariat would eventually become the Chairperson of the EC. Worse still, in some cases, the Chairperson and Deputy Chairperson were civil servants who were also – on their own admission – previously active members of UMNO.<sup>19</sup> These details are not only important in understanding *how* the EC operates, but also in assessing prospects for reforms from *within* the EC. Even if the EC is strengthened by a set of commissioners who are competent, reform-minded, and independent, the regular staff remain crucial oils to the gears of reform. At present, the structural features of the EC and the ways in which its regular staff are appointed do not create incentives for robust reform initiatives.<sup>20</sup>

Another fundamental issue that might curtail the effectiveness of the EC in administering elections and upholding electoral integrity (and, by extension, democratic integrity) pertains to its authority as defined by the laws governing the EC and electoral administration. At this juncture, it is worth recalling that the Federal Constitution – in general terms – grants authority to the EC to conduct elections, prepare and revise electoral rolls, and propose changes to electoral boundaries. However, the specific rules governing the functioning of the EC and the administration of elections are made by the EC and the legislature, which – until 2018 – has been consistently dominated by the BN coalition.

There are four sets of laws and regulations that are relevant to elections in Malaysia: the Elections Act 1958, the Elections Offences Act 1954, the Elections (Registration of Electors) Regulations 2002, and the Societies Act 1966. The Societies Act regulates the formation and registration of political parties. The Registrar of Societies (which is essentially a government department under the purview of the Home Affairs Ministry) is empowered to review applications for the registration of political parties. Unlike in countries like Australia, where independent electoral management bodies are tasked to register and monitor political parties, the EC in Malaysia does not play such role. This has had some impact on the quality of electoral competition in Malaysia because under the Societies Act the Home Minister has the final say in appeals against the Registrar's decision (regarding the refusal to register a party)<sup>21</sup> and he is also empowered to declare a political party unlawful on the basis of public order.<sup>22</sup> There have been several significant cases illustrating the perils of having political parties regulated by the executive branch. For example, in April 2018, just a day before the

<sup>18</sup>See James Chin, 'History and Context of Public Administration in Malaysia', in Evan M Berman (ed), *Public Administration in Southeast Asia: Thailand, Philippines, Malaysia, Hong Kong, and Macao* (Routledge 2011) 143–145. Until the 1950s, non-Malays were excluded from the civil service in pre-independent Malaya because the British colonial government saw the need to co-opt the Malays population in governance to serve their needs.

<sup>19</sup>This was the case in 2014, as reported in *Findings of The People's Tribunal on Malaysia's 13<sup>th</sup> General Elections* (The Coalition for Clean and Fair Elections, 25 March 2014) <<https://www.bersih.org/wp-content/uploads/2014/03/Peoples-Tribunal-on-GE13-Findings-Report.pdf>> accessed 10 February 2021.

<sup>20</sup>Interview with an EC Commissioner in February 2021.

<sup>21</sup>Societies Act 1966, s 17.

<sup>22</sup>Societies Act 1966, s 5.

Parliament was dissolved to make way for the 14<sup>th</sup> General Election, the Registrar temporarily disbanded a component party in the *Pakatan Harapan* (PH) opposition coalition on the ground that it had failed to fulfil the Registrar's request for documents relating to the party. This then affected the registration of the PH as an official political coalition ahead of the May 2018 general election, which meant that the coalition could not use its common logo in the campaign materials and on the ballot. In addition, two weeks before polling day the EC announced additional conditions governing campaign materials, which meant that PH could not feature photos of its chairperson and leader in campaign materials.<sup>23</sup> Although in the end these hurdles did not prevent the PH from winning the election, they were nonetheless seen as a form of 'pressure' on opposition parties<sup>24</sup> and as a means of diluting the influence and electability of PH – the use of a common logo was thought to cast the image of a stable, solid coalition and to reduce the visibility of the Democratic Action Party (a predominantly Chinese party that has been cast by BN as a threat to the Malays) in Malay-majority constituencies.<sup>25</sup>

Aside from these issues, given the context of Malaysia's politics (ie, the control that the BN had over the legislature), there was significant room for partisan interference in the laws governing the EC and elections. For instance, in 1990 and just before the 8<sup>th</sup> General Election, the government amended the Elections Act 1958 and Elections Offences Act 1954 to change the rules on vote counting. Instead of the previous practice where votes are tallied at a central counting centre in each constituency, the new rules mandated that votes be counted at the individual polling stations within the constituency.<sup>26</sup> This is deemed disadvantageous to opposition parties because as the EC subsequently expanded the number of polling stations and set limits to the number of electors for those stations, voting secrecy was compromised – it was possible to identify who voted for the opposition, which in turn generated some trepidation in voting for the opposition due to the fear of government retaliation.<sup>27</sup> In a political period that saw the emergence a credible opposition that could potentially form a government,<sup>28</sup> these changes in electoral laws and regulations were particularly significant.

### *Constitutional amendments in a dominant party regime*

We have seen in the preceding sections that the EC is set up and positioned by the Federal Constitution to function independently from other branches of government. Yet, its authority and integrity have been diminished by the specific laws and design features governing its structure and operation – a problem magnified by the dominance of the BN ruling coalition. This dominance, underlined by BN's consistent two-thirds majority in Parliament from independence until 2008, left the EC vulnerable to a series of constitutional amendments designed to undermine its constitutional position.

Such amendments began as far back as the 1960s, when the Constitution (Amendment) Act 1960 introduced new grounds for removal of EC members: they can now be removed from office if they are undischarged bankrupts, or if they engage in any paid office or employment beyond

<sup>23</sup>For a detailed explanation of these conditions, see PEMANTAU, *Election Observation Report of the 14<sup>th</sup> Malaysian General Election* (The Coalition for Clean and Fair Elections 2018) 46–47 <<https://www.bersih.org/wp-content/uploads/2018/07/PEMANTAU-Election-Observation-Report-of-the-14th-Malaysian-General-Election.pdf>> accessed 10 February 2021.

<sup>24</sup>Hutchinson, 'Drivers and Agents of Change' (n 2) 596.

<sup>25</sup>See for eg, Francis E Hutchinson, 'GE-14 in Johor: Shock or Just Awe?', in Francis E Hutchinson & Lee Hwok Aun (eds), *The Defeat of Barisan Nasional: Missed Signs or Late Surge?* (ISEAS 2019) 328; Muhamad M N Nadzri, 'The 14<sup>th</sup> General Election, the Fall of Barisan Nasional, and Political Development in Malaysia, 1957–2018' (2018) 37(3) *Journal of Current Southeast Asian Affairs* 139, 155.

<sup>26</sup>Lim (n 4) 126.

<sup>27</sup>ibid.

<sup>28</sup>Khoo Kim Hoong, 'MALAYSIA 1990: The Election Show-down' [1991] *Southeast Asian Affairs* 161, 161.



their duties in the EC.<sup>29</sup> On the surface, these provisions might seem innocuous but they were significant in the context of the souring relationship between the EC and the government at that time. The trigger for this amendment was the EC's re-delineation of electoral constituencies in 1960. While the re-delineation was in line with constitutional provisions designed to limit rural weightage and reduce the disparities in electoral weight among different constituencies, it was seen as potentially damaging to the ruling government's interests in the next election (1964), as the government was reliant on Malay votes (Malays were concentrated in rural constituencies).<sup>30</sup> This amendment targeted the then-chief of the EC (who had business interests providing remunerations),<sup>31</sup> despite the clear provision in the Constitution (Article 114(6)) stating that the terms of office of the EC members "shall not be altered to his disadvantage after his appointment". Thus, while the attempt to remove the EC Chairman failed, it signalled to the EC that there would be grave consequences if they failed to toe the government line. Subsequently, in 1962, the government passed yet another constitutional amendment to strengthen its control (via the legislature) over the EC. A new subsection 5A was inserted into Article 114, which provides that "Parliament may by law provide for the terms of officer of members of the Election Commission other than their remuneration".

That said, it is important to note that the Election Commission Act 1957 spells out certain safeguards to "protect" the EC from external influence. Specifically, Section 10 criminalizes direct or indirect influences on, or any attempts to influence, the EC's decision. In addition, another provision prohibits the EC and its members to disclose to 'any unauthorized person' any communication or information pertaining to the functions of the EC.<sup>32</sup> One way to read these provisions is that they aim to secure the integrity of the EC in discharging its functions. However, the same Act protects communications between the EC or any of its members with the government, minister, or any public officer – these communications cannot be produced or disclosed in any legal proceedings, unless the King consents to the disclosure.<sup>33</sup> The provision criminalizing acts that influence or attempt to influence the EC does not completely insulate the EC from risk of political interference, and in practice, protecting communications between the EC and the government waters down the concrete impact of such provision. In short, the "privileged communication" clause could produce perverse consequences: it effectively allows the government to shield itself from being prosecuted should there be any attempts to influence the EC through its communications with the EC.

### Navigating electoral authoritarianism

Despite the EC's constitutional status and (theoretical) independence from the other branches of the state, and the existence of certain laws that aim to protect the integrity and authority of the EC, there are crucial structural flaws as well as legal and policy changes that – taken as a whole – have weakened the capacity of the EC to discharge its functions impartially. All of this must be considered along with Malaysia's political context for over sixty years – the dominance of the BN ruling coalition in Parliament facilitated virtually unchecked powers of the government to enact and amend laws and regulations relating to the EC and electoral administration. This has arguably created a vicious cycle of electoral authoritarianism where a dominant government (whom for the most part of its administration held legislative super-majorities) enacted rules that enhance their electoral chances,

<sup>29</sup>Federal Constitution of Malaysia, art 114(4).

<sup>30</sup>Lim (n 4) 108. The government's dissatisfaction with the EC was recorded in the minutes of the ruling coalition's committee meeting – the chairman from the UMNO party expressed that the EC made a "major mistake" by not discussing the electoral re-delineation report with the Cabinet, so see Lim (n 4) 113.

<sup>31</sup>Sothi Rachagan, 'The 1974 Parliamentary Election in Peninsular Malaysia: A Study in Electoral Geography' (PhD Thesis, School of Oriental and African Studies, University of London, 1978) 49. In its pre-amended form, Article 114(4) stated: 'A person is disqualified for appointment as a member of the Election Commission if he holds *any other office of profit* or is a member of either House of Parliament or of the Legislative Assembly of any State'. (emphasis added)

<sup>32</sup>Election Commission Act 1957, s 9(1).

<sup>33</sup>Election Commission Act 1957 s 5.

and those rules, in turn, returned the same government<sup>34</sup> to power. An electoral authoritarian regime<sup>34</sup> holds regular elections that are ‘broadly inclusive (they are held under universal suffrage), minimally competitive (opposition parties, while denied victory, are allowed to win votes and seats), and minimally open (opposition parties are not subject to massive repression, although they may experience repressive treatment in selective and intermittent ways)’.<sup>35</sup> For decades, the EC has had to navigate these conditions in exercising its functions and authority. Here, I focus on two issues that shed light not just on the operation of the EC, but also the electoral and democratic controversies that have plagued Malaysia.

### *Systematic malapportionment and gerrymandering*

The core of Malaysia’s problems in electoral democracy rests in systematic malapportionment and gerrymandering to the advantage of the ruling coalition. To be sure, these are not new issues in the Malaysian political landscape. In the lead up to the first federal-level elections before independence, the British-appointed committee tasked to examine and submit recommendations for federal elections had agreed to establish electoral constituencies with roughly equal proportions.<sup>36</sup> However, this was qualified by the acceptance of two to one rural weightage rule in 1954 – a vote in a rural constituency is equal to two votes in an urban constituency. The committee’s rationale for this appeared to be rooted in pragmatic considerations, that is, the ‘greater difficulty of contacting voters in the country districts and other disadvantages facing rural constituencies’.<sup>37</sup> However, what is also unmistakable was the fact that the success of the Alliance political coalition (an UMNO-led multi-racial coalition which won British-administered local elections in the early 1950s) hinged on establishing Malay political superiority, and that superiority depended on support from the Malay electorate who were largely concentrated in the rural areas (as opposed to the non-Malays who dominated urban constituencies). In short, malapportionment in favor of rural (predominantly Malay) constituencies was crucial for the victory and survival of the dominant political coalition.

These considerations and practices that revolve around ethnic politics have shaped Malaysia’s democratic controversies and the EC’s operation post-independence. In 1957, before the country secured its independence, the Reid Constitutional Commission introduced specific constitutional limitations to restrict malapportionment, even as the rural weightage principle was retained. For instance, the Commission set a 15 percent limit on deviations from the average constituency electorate in each state and included provisions for equitable distribution of constituencies among the eleven states based on population and electorate.<sup>38</sup> This in effect reduced the degree of rural weightage by more than half, and it was seen as a move to increase the political role and participation of non-Malays post-independence.<sup>39</sup> However, all these changes were subsequently undone through constitutional amendments between 1962 and 1973. The 1962 amendment restored the two-to-one rural weightage and stripped the EC of authority over delineation of constituencies by conferring the Prime Minister and Parliament with significant powers on re-delineation decisions. More specifically, the role of the EC is now confined to recommending the delineation of new constituencies to the Prime Minister, who would then table those recommendations with or without modifications before the Parliament. The Parliament only needs to approve the changes by a simple majority. Even

<sup>34</sup>Wong characterizes Malaysia as an electoral authoritarian regime. See Chin-Huat Wong, ‘Constituency Delimitation and Electoral Authoritarianism in Malaysia’ (2018) 107(1) *The Round Table* 67.

<sup>35</sup>Andreas Schedler, ‘The Logic of Electoral Authoritarianism’, in Andreas Schedler, *Electoral Authoritarianism: The Dynamics of Unfree Competition* (Lynne Rienner 2006) 3.

<sup>36</sup>Lim (n 4) 104.

<sup>37</sup>ibid 105. See also Ostwald (n 3) 523, arguing that malapportionment has been justified on the basis that the infrastructure issues in rural areas necessitated smaller number of voters in rural constituencies, so as to alleviate problems in representatives reaching their constituents.

<sup>38</sup>Lim (n 4) 106.

<sup>39</sup>ibid.



if this fails, the Prime Minister is empowered to make amendments to the recommendations and he may do so after consulting the EC ‘as he may consider necessary’. What this means is that in practice the government of the day (via the Prime Minister) has been able to dictate the re-delineation of electoral constituencies in ways that would be advantageous to its electoral interests and prospects.

Again, as with attacks on the EC that I have explained in the foregoing section, the 1962 amendment was reactive in nature. A crucial background to this was the post-independence increase in non-Malay voting power, which was facilitated by the easing of citizenship rules and the reduction of rural weightage alluded to earlier.<sup>40</sup> In 1960, the EC conducted a re-delineation exercise, which – although consistent with the terms of the Constitution – was deemed unfavorable to UMNO.<sup>41</sup> In particular, the re-delineation had afforded better electoral weight to urban (predominantly non-Malay) voters who were expected to shift their support for opposition parties in the next general election in 1964. All this also developed on the back of the 1959 election results, where the ruling coalition lost significant electoral support from both the Malays and non-Malays. In that election, a formidable opponent emerged in the form of PAS (*Parti Islam Se-Malaysia* or Pan-Malaysian Islamic Party), which broke UMNO’s dominance among the Malay electorate. It then became imperative for the UMNO-led ruling coalition to mobilize its resources to secure its Malay voter base.

These circumstances worked even more to the disadvantage of the EC and securing free and fair elections. Not only did the government annul the 1960 re-delineation of constituencies, in another constitutional amendment in 1973, the power of the EC to apportion parliamentary electoral constituencies among the various states in the Federation was removed.<sup>42</sup> Instead, Article 46 of the Constitution was amended to specify the number of constituencies for each state, and any changes to this could only be effected through constitutional amendment.<sup>43</sup> Then, in 1984, the government engineered another constitutional amendment to remove the upper limit of the mandatory periodic review of the boundaries of electoral constituencies.<sup>44</sup> Therefore, a fresh review could only be conducted after a minimum of eight years has passed since the last review, but in theory the boundaries could remain unreviewed indefinitely.

The 1973 amendment also removed any remaining constitutional limits to rural weightage. Previously, the Constitution stipulated that within individual states, the size of constituencies may vary to an extent that ‘rural constituencies may contain as little as one half of the electors’ in an urban constituency. By contrast, the provision now stipulates relatively vague standards. It only requires that constituencies be ‘approximately equal’ to one another, ‘except that, having regard to the greater difficulty of reaching electors in the country districts and the other disadvantage facing rural constituencies, measure of weightage for area ought to be given to such constituencies’.<sup>45</sup> One interpretation of this amended provision is that it provides ‘equal apportionment within the same state as the rule’, with an exception made for over-representation ‘on the basis of vast geographical area’ in rural constituencies.<sup>46</sup> Yet, data before the 2018 re-delineation exercise showed that only four states met the ‘approximately equal’ apportionment standard.<sup>47</sup>

The 1973 amendments have become the basis for extreme inter-state malapportionment that benefitted the ruling coalition. Consider data on the average electoral size of federal constituencies in 2015–2016 (ie, just before the last re-delineation exercise in which began in 2016 and ended in

<sup>40</sup> *ibid* 107.

<sup>41</sup> *ibid* 108.

<sup>42</sup> Lim (n 4) 111.

<sup>43</sup> It was not difficult for the BN coalition to engineer constitutional amendments during its rule. Until 2008, it has always held a two-thirds majority in parliament.

<sup>44</sup> Tsun Hang Tey, ‘Malaysia’s Electoral System: Government of the People?’ (2010) 5(1) *Asian Journal of Comparative Law*.

<sup>45</sup> Federal Constitution of Malaysia, Thirteenth Schedule, s 2(c).

<sup>46</sup> Wong (n 34) 72.

<sup>47</sup> *ibid* 73.

2018): the average number of voters in a constituency in the states of Sabah and Sarawak (widely regarded as “fixed deposits” for the then-dominant *Barisan Nasional* coalition) are 39,829 and 35,779, respectively. However, in the states of Selangor and Penang (where the BN coalition faced strong opposition) the average voters per constituency were 94,469 and 66,750, respectively.<sup>48</sup> Further studies indeed illustrate the correlation between malapportionment and the electoral strength of political parties. For example, data from the 2013 general elections showed that the opposition coalition, *Pakatan Rakyat* (PR) won most of the over-sized constituencies, while the then-ruling coalition, BN, won most of the under-sized constituencies.<sup>49</sup> Although PR secured 4 percent of the popular vote, it ended up with almost 20 per cent deficit in terms of seat allocation in the federal legislature.<sup>50</sup>

The quality of Malaysia’s democracy has been further eroded by extensive gerrymandering, and this, too, brings to light the role of the EC in constituency re-delineation exercises. In particular, through gerrymandering, the ethnic composition of electoral districts is altered to weaken opposition strongholds in urban constituencies and diminish the electoral significance of non-Malay votes. This is done, for example, by decreasing the number of mixed constituencies (particularly those where Chinese voters are more dominant) and increasing the number of Malay-majority constituencies (ie, constituencies where more than 70 per cent of the electorate are Malay).<sup>51</sup> In the past, however, where the ruling coalition had performed better in semi-urban mixed constituencies, subsequent re-delineation exercises were crafted to increase the number of mixed seats in order to boost the electoral advantage of the ruling coalition in the next election.<sup>52</sup> These examples again demonstrate that the ways in which the EC operates and performs its functions may be conditioned by the ruling coalition’s electoral and political imperatives.

### *Challenging malapportionment and gerrymandering*

The last re-delineation exercise by the EC was conducted just before the 2018 general elections. The EC commenced the exercise in September 2016, and the final report was submitted to the Prime Minister in March 2018 – two months before the elections. Critics argued that the entire process – from commencement to the submission of the report and subsequent approval by Parliament – was rushed. Re-delineation exercises typically involve two stages: the first is where detailed recommendations are drawn up and at this stage there is room for public participation. Notably, state governments or local authorities whose constituencies are affected by the re-delineation exercise, or a group of at least 100 persons who are voters in such constituencies, may object to the EC’s recommendations.<sup>53</sup> The EC is then obligated to hold a local inquiry in those constituencies, but the EC has sole discretion to evaluate the objections and it is not required to provide reasons for rejecting the objections. The second stage is where prime ministerial and parliamentary approval takes place.

<sup>48</sup>ibid 71.

<sup>49</sup>ibid 70.

<sup>50</sup>Ostwald (n 3) 524. In other words, this means that BN won only 47% of the popular vote and yet it managed to secure 60% of the seats in Parliament. By contrast, in the 2008 general elections, BN won 51% of the popular vote, and secured 63 per cent of parliamentary seats.

<sup>51</sup>This was the case in the 2018 re-delineation exercise: 4 such mixed seats were reduced, and 3 Malay-majority seats were added. See Merdeka Center for Opinion Research, *Malaysia General Elections XIC Outlook: Prospects and Outcome* (26 April 2018) <<https://merdeka.org/v2/malaysia-general-elctions-xiv-outlook-prospects-and-outcome/>> accessed 23 March 2021.

<sup>52</sup>This was the case with the 2003 re-delineation exercise, where 26 new parliamentary seats were created, most of which were semi-urban mixed seats. This was in response to the results of the 1999 election, where the BN coalition lost considerable support in the Malay constituencies to its rival party, PAS. In the 2004 general election, under the freshly re-delineated boundaries, the BN coalition won convincingly, securing 63% of the popular vote and 90% of the seats in parliament. See Francis Loh, ‘Understanding the 2004 Election Results’ 3 *Aliran Monthly* (2004) <<https://aliran.com/archives/monthly/2004a/3g.html>> accessed 22 March 2021.

<sup>53</sup>Federal Constitution of Malaysia, Thirteenth Schedule, s 5.

The 2018 re-delineation exercise did not reduce the disparity between the number of voters in the parliament and state constituencies. Instead, it either retained the status quo in most constituencies or made changes to several constituencies in ways that only worsened malapportionment of those constituencies.<sup>54</sup> In fact, it resulted in the most extensive malapportionment in the country's history. This was particularly apparent in the state of Selangor (which has been controlled by the opposition coalition since 2008). In 2018, the Coalition for Clean and Fair Elections (BERSIH2.0 – a civil society organization monitoring and campaigning for clean and fair elections in Malaysia) criticized the parliamentary approval of the re-delineation exercise, as the EC had not completed the second round of local inquiries in Selangor.<sup>55</sup> It also highlighted two kinds of gerrymandering that emerged from the 2018 re-delineation – partisan gerrymandering and ethnic gerrymandering – that were prevalent in selected constituencies, and these were done based on historical voting patterns.<sup>56</sup> With partisan gerrymandering, polling districts with historically strong opposition support were transferred and packed into “super-sized” parliamentary constituencies. With ethnic gerrymandering, voters were transferred in to different constituencies so as to transform those constituencies from mixed constituencies (the opposition had a better track record of winning such constituencies) into majority Malay or majority Chinese constituencies.

The issues surrounding the re-delineation in Selangor made its way to court even before the government gazetted the EC's final re-delineation report. In 2017, the Selangor state government filed a constitutional challenge against the EC's proposed recommendations from the re-delineation exercise on the grounds that there was malapportionment and gerrymandering in certain constituencies in the state and that the EC neglected to rely on the latest electoral roll in its re-delineation exercise.<sup>57</sup> The Selangor government contended that these gave rise to violations of Article 113(2) of the Constitution, and Sections 2 and 3 of the Constitution's Thirteenth Schedule.<sup>58</sup> The High Court found that there was indeed malapportionment and gerrymandering of constituencies, but it nonetheless dismissed the application for judicial review on the basis that the EC's discretion to make recommendations (on re-delineation) to the Prime Minister was non-justiciable. Among other arguments, the court took the position that the recommendations were not binding and therefore they did not affect the rights of the Applicant. The Selangor government's appeal was premised on four issues, the most important being that the EC's decisions are subject to the law and thus justiciable.<sup>59</sup>

A day after the appeal was heard at the Court of Appeal (27 March 2018), Parliament swiftly tabled and passed the EC's re-delineation recommendations, and the King, on 29 March 2018 (the day the Court of Appeal delivered its judgment), completed the process by consenting to the re-delineation. Following the High Court, the Court of Appeal dismissed the claim on the basis that the court did not have jurisdiction to review the re-delineation recommendations or the Principal Electoral Roll used by the EC. For the Court, the EC's exercise of discretion in these respects were ‘non-justiciable’, even if the allegations of malapportionment and gerrymandering were undisputed.<sup>60</sup> This is because the ‘proper forums’ for such allegations and complaints are at the local inquiries. In this regard, it is important to note that while the Constitution's Thirteenth

<sup>54</sup>Wong Chin Huat, ‘Constituency Delimitation and Electoral Authoritarianism in Malaysia’ (2018) 107(1) Roundtable: The Commonwealth Journal of International Affairs.

<sup>55</sup>The Coalition for Clean and Fair Elections, ‘Seven Major Violations by the Election Commission and the Prime Minister in the Redelineation Report’ (Media Statement, 3 April 2018) <<https://www.berseh.org/wp-content/uploads/2018/04/52-Redelineation-analysis-ver6-FINAL.pdf>>.

<sup>56</sup>ibid. See also Chan Tsu Chong, ‘Democratic Breakthrough in Malaysia – Political Opportunities and the Role of Bersih’ (2018) 37(3) Journal of Current Southeast Asian Affairs 109, 123.

<sup>57</sup>*Kerajaan Negeri Selangor v Suruhanjaya Pilihan Raya and Ors* [2018] 1 LNS 982 (Court of Appeal, Putrajaya).

<sup>58</sup>Article 113(2) stipulates that the EC shall review the division of federal and state constituencies and recommend such changes as the EC may think necessary *in order to comply with the Thirteenth Schedule* (emphasis added).

<sup>59</sup>*Kerajaan Negeri Selangor* (n 57) para 6.

<sup>60</sup>ibid para 11.

Schedule mandates the convening of local inquiries, it does not spell out the obligations and powers of the EC during such inquiries (for instance, it does not stipulate how objections and representations ought to be handled by the EC). The procedures relating to the local inquiries are, however, subject to judicial review.<sup>61</sup>

While this offers the possibility of challenging the manner in which the EC carries out its quasi-judicial function, the Court of Appeal decision demonstrates the adverse implications of removing clear constitutional limits on malapportionment. In fact, the High Court previously agreed that the Constitution – after the 1973 amendments – now confers wide (though not unfettered) discretion and flexibility on the EC to craft re-delineation proposals ‘in any manner it considers fit’, having taken into account the broadly-worded principles in Section 2 of the Thirteenth Schedule.<sup>62</sup> With the courts exercising judicial restraint on the basis that Parliament is the ‘ultimate authority’ deciding on constituency re-delineation,<sup>63</sup> it would seem that there is virtually little to stop a government that possesses a simple majority in Parliament to re-draw electoral boundaries to its advantage. Indeed, in previous cases challenging re-delineation exercises, the courts have taken the position that judicial review of such exercises would encroach on the functions of the legislature,<sup>64</sup> or that the EC’s re-delineation proposals cannot be challenged on grounds of unconstitutionality or unreasonableness.<sup>65</sup> This line of decisions appears to be grounded on a strict textual reading of the Thirteenth Schedule, but they did not pay enough attention to the fact that the EC – notwithstanding subsequent constitutional amendments that affected its functions – is set up as an independent, constitutional institution separate from Parliament and the Executive. These decisions also failed to take into account the broader power dynamics between the Executive (namely, the Prime Minister) and the EC, and the ways in which such dynamics have weakened free and fair elections in Malaysia. In the past, it was thought to be common practice for the Prime Minister to direct the EC on the substantive outcomes of the constituency re-delineation process. Even though in several cases, the courts have emphasized that complaints of malapportionment and gerrymandering ought to be raised to the EC during local inquiries, the reality is that the EC often failed to address or ignored such complaints.

### Other electoral controversies

Aside from the EC’s role in malapportionment and gerrymandering, the EC’s integrity and impartiality has suffered due to a range of issues in the administration of elections. These include reports of widespread voter bribery that have gone unsanctioned, defective electoral rolls, and phantom voters (individuals who are ineligible to vote but paid to vote using names of deceased voters or fictitious persons),<sup>66</sup> all of which have compromised fair elections and conferred significant advantage to the BN coalition for decades.<sup>67</sup> Given these systemic issues, the regime change brought about by the 14<sup>th</sup> General Election in 2018 was widely unexpected. In fact, weeks before polling day on May 9, 2018, BERSIH2.0 found serious issues with the electoral roll, such as irregular voter movement and inconsistencies in personal information, which raised alarm about possible voting fraud on polling day. The EC then set polling day in the middle of the week, which led to concerns over voter disenfranchisement due to the inability of those residing outside of their hometowns to return

<sup>61</sup> *ibid.*

<sup>62</sup> *Kerajaan Negeri Selangor v Suruhanjaya Pilihan Raya Malaysia & Ors (No 3)* [2018] 8 CLJ 111, paras 44 and 48 (High Court, Kuala Lumpur).

<sup>63</sup> *Suruhanjaya Pilihan Raya & Ors v Kerajaan Negeri Selangor* [2018] 4 MLJ 350, 356 (Court of Appeal, Putrajaya).

<sup>64</sup> *Peguam Negara Malaysia v Chan Tsu Chong* [2018] 2 CLJ 274, para 46 (Court of Appeal, Putrajaya).

<sup>65</sup> *Kerajaan Negeri Selangor* (n 62) para 40. In this case, Justice Azizul Adnan conceded that he was bound by the decisions of the Court of Appeal holding that such matters were non-justiciable.

<sup>66</sup> Meredith Weiss, ‘1999 Malaysian General Elections: Issues, Insults, and Irregularities’ (2000) 40(3) *Asian Survey* 413, 432.

<sup>67</sup> Chan (n 56) 110.

home to cast their votes (it was estimated that between 1.7 million to 3.5 million voters were affected by this).<sup>68</sup> The EC also abruptly announced additional conditions for campaign materials and this effectively made it illegal for the PH coalition to display campaign materials with the image of its Chairman (Mahathir Mohamad) – a move widely seen as a means of disadvantaging the opposition given the popular appeal of Mahathir, particularly amongst Malay voters. The EC's eleven-days campaign period (which is the minimum allowed under the Elections Regulations 1981) was also deemed disadvantageous to the opposition coalition in terms of mobilizing support, especially since the mainstream media is controlled by the government, thus providing the ruling coalition with substantial advantage in campaigning. Finally, the EC rejected applications by foreign and local organizations to observe the election process. Notably, the EC denied SUHAKAM's (Malaysian Human Rights Commission) application but instead appointed other unknown observer organizations that were set up just before the election. A study found that for one of these organizations, its members comprised individuals linked to UMNO (leading party in the then-ruling coalition).<sup>69</sup> That said, it is pertinent to note that there have been efforts at improving transparency: for example, the EC's regulations allow contesting candidates and political parties to place polling and counting agents to observe the vote tallying process. This is important given previous allegations that ballot boxes and ballot papers were tampered with by EC officers to the detriment of opposition candidates.

In any case, the problems described above, while not unheard of in previous elections, were amplified in the lead up to, and during the 14<sup>th</sup> General Election as opposition support gradually grew stronger in the years preceding the election. Although democratic competition (through the presence of a strong opposition) is an indicator of a robust, maturing democracy, the imperative of the then-ruling coalition was to remain in power by weakening its competitor. Thus, while Malaysians are generally free to cast their vote for their preferred candidate or party, the electoral system and the conduct of elections could hardly be described as fair. As I mentioned above, the role of the EC in the conduct of elections has been the subject of much criticism, but aside from malapportionment and gerrymandering, flaws in the electoral roll have been a perennial controversy for Malaysia.<sup>70</sup>

Although Article 119 of the Constitution guarantees the right to vote for citizens who have reached the age of twenty-one, they must be a resident in a constituency and registered in the electoral roll as a voter in that constituency. There is no automatic registration mechanism upon reaching the voting age; instead, Malaysians must proactively register themselves on the electoral roll. The problem with the electoral roll, which is generated and sustained by the EC, takes several forms. First, there has been documented evidence that voters have been systematically moved from one constituency to another without their knowledge or prior notice. For example, a few years before the 14<sup>th</sup> General Election, BERSIH2.0 found "suspicious" additions to the electoral roll in specific constituencies, namely those that were won (either by the ruling coalition or the opposition coalition) with slim majorities in the previous election.<sup>71</sup> After verification processes were carried out, it was found that these "new voters" were not in fact residents in the constituency, or worse, they did not even exist. These issues are significant not only because they contradict the constitutional requirement on residency to qualify for voting eligibility; they also facilitate the problem of phantom voters. In some cases, non-citizens have been allowed to vote (for the ruling coalition) by using the identities of the phantom voters.<sup>72</sup> In a more brazen example of electoral fraud, a report found that

<sup>68</sup>ibid 118.

<sup>69</sup>Nadzri (n 25) 154–155.

<sup>70</sup>See generally, Chan (n 56); Harold Crouch, *Government and Society in Malaysia* (Allen & Unwin Australia 1996).

<sup>71</sup>PEMANTAU (n 23) 39. Some voters also reported that their names were no longer found on the electoral roll and had been removed without their knowledge.

<sup>72</sup>ibid 73.

in a polling station in the parliamentary constituency of Klang, twenty voters who possessed unrecognized National Identity Card numbers were escorted by EC personnel and allowed to vote.<sup>73</sup>

With the courts consistently declining to adjudicate electoral roll irregularities on the basis that section 9A of the Elections Act 1958 ousts judicial review,<sup>74</sup> it would seem – at least for now – that the will to remedy electoral roll issues has to develop from within the EC itself. Doing so would require not just structural changes to enhance the EC's independence and impartiality, but also a shift in institutional culture. The latter is particularly important because having been controlled – directly and indirectly – for decades by the Executive under a dominant party regime, there is a significant degree of institutional inertia that could hinder reforms.

### A breakthrough? the EC and the 2018 political change

At this juncture, it is clear that the conditions leading up to the 14<sup>th</sup> General Election did not generate much hope or confidence for free and fair elections. As the preceding sections have illustrated, the EC played an instrumental role in generating and sustaining these conditions. With regard to malapportionment, for example, the problem was so extensive that a simple majority in Parliament could be achieved by securing the smallest 112 constituencies (out of the 222 constituencies) and these constituencies only represented a third of the electorate.<sup>75</sup> Yet, against all odds, the PH coalition managed to win 113 seats with 47.9 percent of the popular vote.

Even though PH's win had become clear by midnight of May 10, the EC had not released the official results declaring that a new government had been voted into power. To compound this issue, anecdotal accounts about attempts by EC officials to manipulate the running and outcome of the elections began to emerge from various polling stations. A report released by BERSIH2.0 after the elections confirmed some of these allegations – for example, there were multiple incidents where presiding officers from the EC refused to sign a final tally document (known as Form 14).<sup>76</sup> All this fuelled suspicion that the EC was reluctant to declare PH as the winner under pressure from the outgoing regime, although it was later revealed that the EC was unsure about the ability of PH to form government as it did not officially register as a coalition during the election.<sup>77</sup> Eventually, as public pressure grew, along with statements from the Inspector General of Police and the Chief Secretary to the Government subtly calling for electoral results to be respected, the EC relented and announced that PH had secured a simple majority to form the next government.

The Malaysian experience in 2018 thus demonstrates that democratic breakthrough and political change are possible even as institutions such as the EC have been subjected to partisan capture and involved in stifling the democratic process. This might, perhaps, provoke a re-evaluation of when, how, and the extent to which fourth-branch institutions can play an effective role in building and maintaining democracies. As explained in the preceding sections, certain structural and institutional conditions relating to the electoral system and process militated against the PH coalition and critics feared that political change would never be possible. Yet, there were other drivers for the unprecedented political change that proved to be crucial in overcoming even the most deep-rooted and systemic electoral issues. This has been addressed extensively elsewhere,<sup>78</sup> but here I highlight three factors.

<sup>73</sup>ibid 41.

<sup>74</sup>See *Marcel Jude v The Chairman, Election Commission of Malaysia* [2014] 10 MLJ 216 (High Court, Kuala Lumpur); *Charles Anthony Santiago v Suruhanjaya Pilihanraya Malaysia & Anor* [2014] 7 MLJ 271.

<sup>75</sup>Kai Ostwald, 'Electoral Boundaries in Malaysia's 2018 Election: Malapportionment, Gerrymandering and UMNO's fall', in Edmund Terence Gomez & Mohamed Nawab Mohamed Osman (eds), *Malaysia's 14<sup>th</sup> General Election and UMNO's Fall: Intra-Elite Feuding and the Pursuit of Power* (Routledge 2020) 86.

<sup>76</sup>PEMANTAU (n 23).

<sup>77</sup>Interview with an EC Commissioner in February 2021.

<sup>78</sup>See generally, Hutchinson, 'Drivers and Agents of Change' (n 2); Nadzri (n 25); Ostwald (n 75); Chin-Huat Wong and Kee Beng Ooi, 'Introduction: How did Malaysia End UMNO's 61 Years of One-Party Rule? What's Next?' (2018) 107(6) *The Round Table* 661.



The first factor revolves around the changing political dynamics within competing coalitions – in the lead up to the elections, the ruling BN coalition had been progressively weakened by factional struggles between and within its component parties and the unpopularity of its leader, Najib Razak. The PH coalition, though still not the most stable of coalitions at the time, bolstered its strength especially after Mahathir Mohamad (Chairman of the BERSATU party and subsequently appointed leader of the coalition) and Anwar Ibrahim (Leader of the PKR party) buried their two-decade hatchet and presented a united front. In addition, it is worth noting that since the 2008 elections, opposition parties have already begun making inroads. Here, demography and shifts in voting behaviour are important – aside from greater cross-ethnic voting, certain opposition parties are stronger in states or constituencies dominated by a particular ethnic group. In the 2008 elections, for example, estimates showed that Chinese and Indian voters clearly preferred opposition parties. In that election, the Indian voters virtually abandoned the Malaysian Indian Congress (MIC), one of the three major parties in the ruling BN coalition.<sup>79</sup> Indeed, all these magnified the BN's insecurities ahead of the 2018 elections, which spurred the extensive manipulation of the electoral process. The widespread discontent with Najib Razak and the BN regime was also rooted in economic factors. The 1MDB financial scandal, along with several other high-profile corruption cases, gripped the nation as the populace grew frustrated with the rising cost of living, the introduction of the Goods and Services Tax (GST), and growing economic inequality.<sup>80</sup> For a regime that thrived on rapid economic development and performance legitimacy,<sup>81</sup> these issues only broadened the scale of voter discontent. Finally, the development of social and digital media facilitated access to information for political participation. This has been crucial for the opposition and civil society to mobilize support and raise awareness about governance issues, given BN's control over traditional broadcast and print media.

## Conclusion

In light of the fall of the PH government in February 2020, the EC is now at a critical juncture: there is an urgent need to reform itself to regain public confidence and trust, as well as to reform Malaysia's flawed electoral system and processes. For decades, the EC has suffered crises of legitimacy, integrity, and confidence attributable to weaknesses in its structure and authority and interference (in both direct and subtle forms) from the Executive.

As soon as the PH coalition came to power, it appointed five new commissioners and a new set of a Chairman and Deputy Chairman, but the former Chairman Azhar Harun left his position to accept an appointment as the Speaker of the Parliament under the new *Perikatan Nasional* government. Thus, although the incumbent government appointed a new Chief Secretary and promoted the EC's Chief Secretary as the new Chairman, most of PH's appointees still remain in office. Here, the constitutional provisions that provide security of tenure have proven to be important in protecting the EC's commissioners from political change and uncertainties. At the same time, given the latest appointments, going forward, the issue of institutional inertia might continue to be relevant in assessing the EC's operations and desire for reforms. As this Article has shown earlier, historically, the appointment of career civil servants to lead the EC has not proven to be feasible in improving its independence as well as its institutional and political culture. This in turn might affect the ways in which the structural shortcomings in the EC's day-to-day operation are addressed. For instance, there is currently a lack of clear standard operation procedure on how the EC is to be run on a daily basis (for instance, there is no requirement that the EC convenes regular internal meetings). The crippling of the EC's power and authority in constituency delimitation exercises

<sup>79</sup>Johan Saravanamuttu, 'The March 2008 General Election in Malaysia as a Historical Conjuncture', in N Ganesan (eds), *Conjunctures and Continuities in Southeast Asian Politics* (ISEAS 2019) 191.

<sup>80</sup>See Nadzri (n 25) 160; Hutchinson, 'Drivers and Agents of Change' (n 2) 589–590.

<sup>81</sup>Ostwald (n 75) 87.

is also one of the most significant structural issues, as this paves way for the government to dictate the outcomes of delimitation exercises to its advantage. In addition, since the Constitution stipulates that the Parliament is the final authority on matters pertaining to constituency re-delineation, there is a lack of incentive structure for the EC to proactively redress malapportionment and gerrymandering.<sup>82</sup>

In spite of these issues, the EC has begun several initiatives to improve the electoral system and process in Malaysia after the 2018 elections. For example, there have been efforts to clean up the electoral roll, and proposals to reform the EC's internal structure and processes are underway. These include the possibility of convening an independent secretariat to run the EC's day-to-day operations. Ahead of the Malacca state elections on 20 November 2021, the EC also abolished the eligibility restrictions for postal voting for Malaysians residing overseas.<sup>83</sup> However, more needs to be done to insulate the EC from the influences and pressures from prevailing political dynamics and to institute more robust forms of checks and balances. As this Article has illustrated, previous episodes of assaults against, or interference with, the EC during constituency delimitation exercises were shaped not only by changing political dynamics between the incumbent government and the opposition, but also by ethnic politics. In other words, in thinking about the 'politics' behind the operation of the EC, it is important to bear in mind the context of Malaysia's divided society, where ethnic and religious identities are highly salient. Therefore, the 'politics' is not just shaped by the desire to weaken opposition parties; it is also driven by the need to maintain the political dominance of the ethnic (Malay) majority. Against this background, any improvements in the operation of an impartial and independent EC requires stronger judicial oversight – thus far, the judiciary has largely adopted a deferential approach in adjudicating controversial questions relating to the functions of the EC, ignoring the broader repercussions on Malaysia's constitutional democracy. In addition, it perhaps high time that a Parliamentary Bipartisan Oversight Committee (which was originally proposed by the PH government) is set up to check on the functions performed by the EC.

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<sup>82</sup>Interview with an EC Commissioner in February 2021.

<sup>83</sup>Election Commission of Malaysia, '15th Malacca State Legislative Assembly General Election Matters', (*Press Release No. 13/2021*, 18 October 2021).

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