Findings of the People's Tribunal on Malaysia's 13th General Elections
Volume 1 “Elections are the cornerstone of representative democracy. Through elections, governments obtain their democratic mandate and are held accountable for their performance in office. Flawed elections deprive people of their voice in governance and undermine sustainable democratic development.” – International IDEA
Members of the Tribunal and the Organising Committee
The People’s Tribunal on Malaysia’s 13th General Elections

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List of Abbreviations

BN – Barisan Nasional
CPPS – Centre for Public Policy Studies
DAP – Democratic Action Party
DBKL – Dewan Bandaraya Kuala Lumpur (KL City Council)
EC – Election Commission
EMB – Electoral Management Body
GE13 – Malaysia’s 13th General Elections
IDEAS – Institute for Democracy and Economic Affairs
JKKK - Jawatankuasa Kemajuan & Keselamatan Kampung
KTM – Ketua Tempat Mengundi
PACA - Polling Agent and Counting Agent
PAS – Parti Islam Semalaysia
PKR – Parti Keadilan Rakyat
PR – Pakatan Rakyat
SD – Statutory Declaration
SPR – Suruhanjaya Pilihan Raya Malaysia
Chapter 1: Background to the People’s Tribunal on GE13

The People’s Tribunal was set up by BERSIH 2.0 to investigate the conduct of the General Elections of 2013 (generally known as the GE 13). BERSIH 2.0 is a Coalition for Clean and Fair Elections which brings together 84 civil society organizations. The Tribunal was set up in response to public outcry and concerns about electoral fraud and irregularities. The impetus for the Tribunal was that BERSIH 2.0 had deployed observers throughout the country and received many allegations and complaints about electoral misconduct. Allegations were also circulated in the social media. There was intense public outcry on the integrity of the process.

The Tribunal’s purpose was to examine whether any acts committed in relation to the elections until and on the polling date on 5 May 2013 violated the rule of law and international standards and norms governing the conduct of elections, including the UN Human Rights Standards Regarding Elections and the Declaration on the Criteria for Free and Fair Elections by the Council of Inter Parliamentary Union.

The Tribunal was assisted by a 30-strong legal team, which carried out investigations and presented the law, arguments and evidence. The Tribunal was also assisted by other administrative staff responsible for administrative affairs. All of them, as did members of the Tribunal, provided their services without any remuneration.

On the basis of the evidence that it received, in public hearings, the Tribunal has prepared its report which was presented to BERSIH 2.0 on 25 March 2014.

Nature of the Tribunal

BERSIH 2.0 conceived the Tribunal as “essentially a citizen’s effort and a people’s platform to investigate the conduct of the last general election,” and as “a tribunal of conscience, mandated with a moral force by the people to arrive at the truth.” It set up the Tribunal to investigate the truth and to give the people the opportunity “to make their voices heard” and to provide “a platform for evidence to be presented and scrutinized, while inaccuracies are exposed and facts sifted from a sea of allegations. The People’s Tribunal ensures that truth will not be a casualty.”

The institution of a People’s Tribunal has been used, for several decades now, to examine issues of public interest. It is largely an investigatory body. It has been used to examine culpability of governments, international agencies and other public agencies for particular crimes or infliction of suffering on the people. Malaysians know the institution well, having participated in or witnessed the Kuala Lumpur War Crimes Tribunal 2011 on the conduct of wars, sponsored by an organisation headed by the former Prime Minister Mahathir.

The Tribunal on GE13 is a manifestation of people’s initiative, indeed an expression of their sovereignty. As an exercise in democracy, it is a very effective way to promote the
participation of the people in public affairs. It represents the efforts of many individuals and organizations to find the truth, raise public consciousness and affirm national values. It provides a democratic process to find solutions to deficits of democracy.

As a technique for getting at the truth, it has some advantages over formal state institutions, especially the courts. Its rules of procedure do not exclude those who might be intimidated by the rituals of the court. While scrupulous in the examination of evidence presented to it, it does not set up barriers to the kind of evidence that may be presented to it nor does it limits groups that may present evidence. Its decisions do not determine concrete outcomes, but gives the tribunal the opportunity and indeed the incentive to explore a range of issues and the fundamental values underlying the issue in question. The Tribunal is able to propose solutions which are often beyond the mandate of the courts. As the Tribunal was convened several months after the contested elections, it is easier to investigate the conduct and consequences of fraudulent elections in a more rational and reflective way as opposed to immediately after the contested elections.

A people’s tribunal does not have the authority of the courts nor does it have the power to make rulings that may be enforced, but in a way, this provides the incentive to the tribunal to be even more transparent, fair, careful and impartial in its analysis of the evidence. We have been conscious of the fact that our mandate comes from the people, not the state – if we carry any authority it must be moral, not legal. Our report will carry conviction and enjoy legitimacy only if we observe the highest standards of integrity, transparency and professionalism. If we hope for civil society to utilize our findings, conclusions and recommendations, we must be persuasive. We have tried to search for the truth: that is the only way we can uphold our mandate from the people, and help Malaysians to strengthen democracy and integrity in public life.

**Members of the Tribunal**
The Tribunal has five members, two of whom are from overseas:

Professor Yash Pal Ghai, Kenyan, Chair of Tribunal, expert in constitutional law and human rights, Emeritus Professor of Public Law, University of Hong Kong. Chair of the Kenya Constitution Review Commission and Chair of the National Constitutional Conference (2000-2004).


Datuk Azzat bin Kamaludin, Malaysian, Advocate and Solicitor of the High Court of Malaya. Former Administrative and Diplomatic Officer with the Ministry of Foreign Affairs Malaysia.
Dr. Mavis Puthucheary, Malaysian, former Associate Professor at the Faculty of Economics and Administration, University of Malaya. Co-editor of a book entitled *Elections and Democracy in Malaysia*.

Rev Dr. Hermen Shastri, Malaysian, Methodist Minister, General Secretary of the Council of Churches of Malaysia (CCM). Member of the Executive Committee of Malaysian Consultative Council of Buddhism, Christianity, Hinduism, Sikhism and Taoism.

Lead Counsel was Professor Gurdial Singh Nijar, Professor of Law, University of Malaya, and Director of the Centre of Excellence for Biodiversity Law.

**Mandate of the Tribunal**  
The mandate of the Tribunal is defined in the Terms of Reference established by BERSIH 2.0, as follows.

(i) Investigation of any violation of laws, rule of law, and international norms/standards of free and fair elections;

(ii) Whether these acts had an impact on the legitimacy of the outcome of GE13;

And to:

(i) Review the electoral process which took place during GE13 and in particular

(ii) Identify any shortcomings in the formation, powers, functions and operating procedures of the Electoral Commission (EC) that (a) do not adhere to international standards and (b) prevent or impede a free and fair electoral process;

And

(i) To consider and make recommendations as the Tribunal deems appropriate with regard to any findings or conclusions made by the Tribunal.

Therefore the Tribunal is to:

(a) Explain international norms and standards, as well as Malaysian electoral laws (both to see if they are consistent with international norms and whether they were violated in GE13),

(b) Whether violation of these norms had impact on the results; and

(c) Investigate allegations made by witnesses, or reports, videos etc by individuals or organizations on the conduct of elections and consult what documentation it considers relevant for the purpose of arriving at a proper conclusion.

**Proceedings of the Tribunal**  
The Legal Team announced the dates of the Tribunal meetings and invited people to make their submissions. It also invited the Government(s) and the Electoral Commission to do the same.  
The Tribunal held several public sessions from 18th to 21st September 2013 in Kuala Lumpur where the people had the opportunity to present their experiences of, or research on, the
The Tribunal held several public sessions from 18th to 21st September 2013 in Kuala Lumpur where the people had the opportunity to present their experiences of, or research on, the elections and air their complaints of irregularities. The proceedings were opened by Lead Counsel Professor Nijar who outlined for the Tribunal the range of issues on which evidence would be presented. Most of the evidence was led by the Counsel assisting the Tribunal. In all, 75 witnesses attested to different aspects of the electoral process. Of these 49 gave their evidence before the panel and affirmed to the truth and veracity of their testimony, and there were 66 statutory declarations, made under the Statutory Declarations Act, 1960.

The witnesses included politicians, party officials, parliamentary candidates, election observers, academics and scholars, specialist NGOs, electoral experts and ordinary citizens. There were multiple witnesses to most of the matters attested to. Some of the witnesses came forward once the hearings had started, wishing to make their own contributions. In a final day of hearing, also in public, the Lead Counsel, in a marathon statement, summarised and highlighted all the evidence presented.

The Tribunal wishes to thank the witnesses who gave up their time, with often no apparent benefit to themselves and tolerated our questioning with good humour. This demonstrated altogether a true commitment to the national interest.

The Tribunal was impressed by the great amount of work, research and dissemination of information by civil society (including the academic community) presented by the Legal Team through their examination and submission of documents. This demonstrated their commitment to democracy and fairness and to holding the relevant authorities accountable. The Legal Team presented a variety of documents including the Constitution, legislation, international and regional instruments, videos, photographs, newspaper and journal articles. The Tribunal thanks the Lead Counsel and his team for their excellent presentation of evidence. It was clear that a great deal of careful work had gone into their submissions.

Unfortunately, the absence of the Government, the Electoral Commission (EC) and the ruling party at the hearing meant that there was no challenge to the allegations of manipulation, excess expenditure, bribery, rigging, and other electoral irregularities. In the absence of any adversarial questions, the Tribunal itself probed the witnesses for the reliability of their evidence. The Government and the EC missed a great opportunity to engage in discussions on the practice and possible reform of the electoral process. The Tribunal was particularly sorry that the EC, an independent body, was not there to comment on the numerous criticisms of the way in which it had conducted the elections. The Tribunal also missed the opportunity to secure the views of the EC on possible reforms of the system and its practice (many submissions touched on these issues). It is now the Tribunal’s hope that the Government and the Commission will take this report seriously. It has not been written to embarrass either of them, but to assist them to reform the rules and practices which have affected the legitimacy of elections in the past. Another objective of this report is to stimulate national debate about the state of the electoral system and electoral governance, and possible lines of reforms.
After the conclusion of the public proceedings of the Tribunal, its members retired to study
the voluminous materials it had received from the witnesses and the Legal Team. Unfortunately due to the absence from Malaysia of the external members, the progress of the
completion of its report was greatly delayed. The Tribunal apologises to BERSIH 2.0 and the
Malaysian public that it was not possible to publish the report until now.

The Report is in two volumes. The first volume deals with international norms and standards
governing the electoral process, the proceedings of the Tribunal, the examination of the
relevant law and the evidence submitted to it as well as its conclusions and recommendations.
The second volume contains all the evidence and other matters submitted to the Tribunal by
the Lead Counsel and witnesses. As the latter is voluminous, it is not available in hard copy
but is provided in a CD, which accompanies the first volume. The CD, which contains both
the volumes, will also be made available from BERSIH 2.0.
Chapter 2: Elections, Electoral Systems and Electoral Governance

Elections are an event, perhaps the key event in the democratic life of a nation. But they are also a process and a context for governance. Political parties, relevant government agencies, including law makers, will be preparing for the next election as soon as one is over. And the fact that they will occur dominates political life.

Many elements make up the whole topic of “elections”, of which three aspects deserve to be distinguished: “electoral system”, “electoral governance” and the “integrity of the process”. The first two can be found in the Constitution and the laws of the country, the third is what actually takes place.

Most of the evidence before the Tribunal, and, indeed, its terms of reference, focus on the latter two, and particularly on the last: how the elections are run, and by whom. The phrase “electoral system” is used here in a narrow sense – as International IDEA says:

At the most basic level, electoral systems translate the votes cast in a general election into seats won by parties and candidates. The key variables are the electoral formula used (i.e. whether a plurality/majority, proportional, mixed or other system is used, and what mathematical formula is used to calculate the seat allocation), the ballot structure (i.e. whether the voter votes for a candidate or a party and whether the voter makes a single choice or expresses a series of preferences) and the district magnitude (not how many voters live in a district, but how many representatives to the legislature that district elects).¹

The electoral system is concerned with the design of the process. It is a topic that most people do not focus on very much, at least until some dramatic anomaly draws their attention to it. Such an anomaly occurred in Malaysia in 2013. The Government Coalition, Barisan Nasional, won 47.4% of the vote and the opposition People’s Pact (Pakatan Rakyat or PR) coalition 50.9%. Yet the BN won 133 seats to the PR’s 89. Although this has happened once before, in 1969, at that time the opposition parties were not united and there was no party that was close to the ruling party in terms of seats and votes obtained. In 2013, the political scenario had changed and the opposition coalition could claim a moral, if not legal, victory.

The principal features of the Malaysian electoral system are the following:

the county is divided into “districts” known as constituencies and each is represented by a single elected member;

the boundaries of the constituencies are drawn by the Election Commission and approved by Parliament;

every voter casts a single vote for a candidate of their choice;

the candidate who wins the largest number of votes in a constituency is elected regardless of what proportion of the votes he or she receives (often known as the first past the post system);

being a parliamentary system, the election of members of parliament determines the make up of the government;

there is a similar system at state level.

The basic nature of the electoral system – single member constituencies – is required by the Constitution (Article 116).

The Tribunal received few submissions on the electoral system and it was not explicitly referred to in its terms of reference. However, it is a very important element in the context of the issues that are the main focus of this report. This is especially so because the first past the post system, to operate properly, requires that great attention be paid to the construction of the individual constituencies, to ensure that as far as possible every voter’s vote counts equally, and that voters are able to vote in the “right” constituency. Moreover, the terms of reference require the Tribunal to make recommendations as it deems appropriate with regard to any of its findings or conclusions. It is specifically asked to address the effect of electoral rules and practices on rights of voters and particularly minority communities. In multi-ethnic societies, a test of the relevance and effectiveness of an electoral system must be how it affects ethnic harmony and co-operation. Depending on the system, elections can either sharpen ethnic divisions or promote political integration and unity. The multi-racial character of Malaysia requires that some attention be paid to the broad objectives and principles of the electoral system. Elections can also be seen as a mechanism for peaceful political changes either in terms of elite circulation or changes in the pattern and direction of public policy. Electoral systems can be engineered in order to bring about a more democratic political system, such as party system, better representation, more representation of women and voting behaviour.

The solitary act of voting by itself does not guarantee that one's interests are protected even if the candidate of one’s choice wins. The question of "representation" involves a wide range of issues including the political culture of the society and the level of political awareness among the citizenry. We return to this issue in the concluding section of the report. The governance aspect of the electoral process includes who runs it, and how: the structure of the body(ies) responsible, rules about how they operate, and how the many individual steps in the process are to be carried out. Again this is a design matter.

“Integrity” has been used to refer to the way in which the entire process works:

we define an election with integrity as any election that is based on the democratic principles of universal suffrage and political equality as reflected in international
standards and agreements, and is professional, impartial, and transparent in its preparation and administration throughout the electoral cycle.²

The word “justice” has also been used for the same basic idea.

**The purpose of elections**

Before analysing GE13, we offer a few remarks on the functions of elections, to set out the broad framework within which the Malaysian electoral process may be discussed and assessed. There has been a remarkable development and consensus among the nations of the world on the essential features of a fair electoral process, with the focus on the procedures. This consensus sometimes obscures the fact that the precise structure of rules and the objectives governing the voting system can vary depending on the historical, social and political circumstances of the country. Some are consistent with the values and objectives of the country and some not.

For every country, though, elections are the foundation of democracy – rule by the people. They are the principal way in which most citizens participate in government. Other forms of participation and consultation are necessary to complete a truly democratic society, but without elections there can be no democracy, other than in tiny societies.

The more specific purposes of elections were set out in *The International IDEA Handbook of Electoral System Design* (p. 9), and though this is in the specific context of electoral systems, the objectives are valid for thinking about the entire process.

**Ensuring a Representative Parliament**

An elected representative may represent the people of a geographical area, as in Malaysia. The way the boundaries of that area are drawn affect whether the people are homogenous or varied: are they all from the same ethnic, language or religious group, or class? If not, do they all feel represented by that person? Are there ways in which the voice of everyone, including women, and minorities is ensured?

**Making elections accessible and meaningful**

It is important that people understand why elections are carried out and how they are carried out. Even apparently simple matters like the design of ballot papers can be significant. Obviously how far people feel represented is one factor affecting how meaningful the elections seem to them.

**Facilitating the setting up of a government – and one that is stable and efficient**

If the election is for the legislature as the basis for forming government, as GE13 was, the perception of the people of its fairness may affect their view of the government, and their

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acceptance of it, even if they did not vote for it. The electoral system also affects the number of political parties, and possibly even who wins the election, with possible consequences for the make-up of government, and its workability and longevity. Other factors are very important, including the nature of political parties – the regulation of parties is one of the issues that this Report discusses, albeit in a minor way.

Providing incentives for conciliation and collaboration
Political systems vary in the degree to which opposing groups and ideologies confront or collaborate with each other. Electoral systems, and other aspects of the electoral process, may be important in this: some encourage parties to focus on their core support, while others encourage them to reach out to other groups in society, and thus foster cross-cutting political parties. The more divided a society, the more important this factor will be. In some countries, elections are far from being celebrations of democracy and other political values. Instead they are periods fraught with anxiety and fear of: massive corruption, intimidation, and violence politically driven and organised—and above all incitement to racial violence, weakening the very fabric of society.

Encouraging political parties
Political parties are, in the modern world, essential for democracy. Some countries permit only members of political parties to stand for office, while some electoral systems encourage the growth of large number of parties, but others are more likely to lead to two or three parties only. And not only numbers but the type of parties will be affected, not only by laws about parties but by other factors.

Holding the government and law-makers accountable
Elections are not a one-off; they happen regularly, because this is a way to hold those elected to their promises and to standards of competence and integrity. Elections produce a legislature and perhaps a government; the next election may lead to the same people being rejected. This is the simplest form of accountability. But various rules, for example about campaigning, may affect how well elections-as-accountability actually work. The next point concerns the ongoing accountability of government.

Promoting a parliamentary opposition
If there is only one political party, or any non-government party is very small, there is likely to be no effective opposition in the elected body. Such a body is not achieving the main purpose for which we have large elected bodies rather than individual or small coteries to run government.

Norms and Standards for Fair and Free Elections


And the following websites:

- The ACE project (Electoral Knowledge project) at http://aceproject.org/

When countries first introduced elections, they struggled to develop rules that ensured those elections were fair and produced the results for which the system was set up. This met resistance from those whose entrenched positions in society were threatened by the very idea of elections.

Not only has national law developed enormously, but various bodies, both official and private, at the international level, have developed norms and guidelines for the structure of laws and systems for elections, and ways in which the adherence to those laws and systems can be achieved.

**International law and “soft law”**

Generally speaking, elections are a matter for national law, and concern the relations between citizens and their governments. However, major international legal instruments do have some relevance, including the Universal Declaration of Human Rights (Article 21), although not a formally binding document, should be taken as a commitment of its implementation by a member of the UN. Malaysia is not a party to the International Covenant on Civil and Political Rights (ICCPR), which reproduces these UDHR provisions in a binding document for those states that are parties. The UDHR says:

1. Everyone has the right to take part in the government of his country, directly or through freely chosen representatives.
2. The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures.

The UN Human Rights Committee’s General Comment No. 25\(^3\) on the ICCPR Article is thus useful, as the language of the latter and the UDHR are identical. The General Comment says:

11. States must take effective measures to ensure that all persons entitled to vote are able to exercise that right. Where registration of voters is required, it should be facilitated and obstacles to such registration should not be imposed. If residence requirements apply to registration, they must be reasonable, and should not be

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\(^3\) CCPR/C/21/Rev.1/Add.7 27 August 1996.
imposed in such a way as to exclude the homeless from the right to vote. Any abusive interference with registration or voting as well as intimidation or coercion of voters should be prohibited by penal laws and those laws should be strictly enforced. Voter education and registration campaigns are necessary to ensure the effective exercise of article 25 rights by an informed community.

12. Freedom of expression, assembly and association are essential conditions for the effective exercise of the right to vote and must be fully protected. Positive measures should be taken to overcome specific difficulties, such as illiteracy, language barriers, poverty or impediments to freedom of movements which prevent persons entitled to vote from exercising their rights effectively. Information and materials about voting should be available in minority languages. Specific methods, such as photographs and symbols, should be adopted to ensure that illiterate voters have adequate information on which to base their choice.

Sectoral human rights treaties and instruments, including the “Women’s Convention” (CEDAW), the Convention on the Rights of Person with Disabilities, and the UN Declaration on the Rights of Indigenous Peoples, also contain relevant provisions. Malaysia is a party to the two treaties on indigenous peoples and voted for the Declaration. There is a large number of other instruments, some of regional and some of global significance.

Many of the most basic and familiar rights in human rights instruments are relevant to elections, especially:

- equality
- human dignity (not mentioned specifically in all, but often viewed as the underlying basis of human rights generally)
- freedom of expression
- freedoms of association and assembly
- right to a remedy and fair proceedings in case of a dispute.

**Guidelines, standards etc.**

More specific guidance is to be gained from the various documents that do not have the status of law. These include:

- International IDEA International Electoral Standards: Guidelines for reviewing the legal framework of elections (described as being based on “a set of regional guidelines, applicable to the Organization for Security and Co-operation in Europe (OSCE) region, jointly developed by International IDEA and the Office for Democratic Institutions and Human Rights (ODIHR) of OSCE in Warsaw” ([http://www.idea.int/publications/ies/upload/electoral_guidelines.pdf](http://www.idea.int/publications/ies/upload/electoral_guidelines.pdf)),
• International Parliamentary Union Declaration on Criteria for Free and Fair Elections (1994) [http://www.ipu.org/cnl-e/154-free.htm](http://www.ipu.org/cnl-e/154-free.htm)


There is no template for “How to do it”. There is a wide variety not only of electoral systems but of structures for management, down to details like designing ballot papers. However, every county’s system will have to confront basically the same issues, and there is no doubt that the experience of other countries, including lessons learned from their mistakes, is distilled into these various guidelines etc., can be valuable.

Seven broad parameters of elections that are just or have integrity are:

- First, equal representation guaranteed in apportionment and districting, voter registration, and converting votes into seats.
- Second, electoral laws and regulations based on the democratic principles of election (universal suffrages, direct, secrecy, free, just and fair, transparent and accountable) as well as lawfulness or legal certainty.
- Third, free and fair contestation – providing a level of playing field for all electoral contestants.
- Fourth, participation of all stakeholders in the electoral process (parties, civil society etc.).
- Fifth, an independent and professional electoral management body for electoral governance.
- Sixth, electoral integrity in voting, counting, aggregating, and reporting results of election.
- And seventh, electoral dispute resolution conducted in just and timely manner.

This Report is largely structured around the issues that these standards, and national laws, address and at this stage it is unnecessary to elaborate on them in detail. However, we set out here the basic issues that will be implied in the apparently simple statement that “an election is a process by which people choose their representatives.” But the importance of each individual issue must be viewed in terms of the objectives to be served. While the rule of law, meaning the adherence of procedures, practices and behaviour to the Constitution and the law, is very important, the core issue for the Tribunal was the overall integrity of the process,
so it is essential to have constantly in mind why a particular rule, principles or guideline exists.

Returning, therefore, to the statement that “election is a process by which people choose their representatives,” we can break it down into three components: (i) the people, (ii) the choice and (iii) representatives. There is a fourth category of issues: the existence of mechanisms, including those for resolving disputes, to ensure that the people do indeed choose their representatives.

**The people: OPOVOV (One person, one vote, one value)**

The right to vote is one of the few that are recognised as being limitable to citizens. Some countries do in fact allow some non-citizens to vote, in certain circumstances, sometimes only for local elections, but this is relatively rare. Assuming that citizens do have the right to vote in principle, there remain questions such as: do citizens no longer living in the country have a right to vote, and if so is there a time after which they can no longer do so, and are such rules reasonable in the particular country? Are citizens temporarily out of the country, studying perhaps, able to vote? Are prisoners able to vote? This is a question that may have quite complex answers, in terms of lengths of sentences etc., and one on which there is no very clear answer in terms of international standards or national practices. Various countries’ courts (including those of South Africa and Canada) have decided that blanket ban on prisoners voting is a violation of human rights, and the European Court of Human Rights has taken a similar view in appeals from the UK.

Moving to issues on which standards are clearer: are there any other categories of citizens who are unable, by law or practice, to vote? Law may exclude persons “of unsound mind” to use the old-fashioned phrase, something that is on the face of it against human rights principle of equality and non-discrimination. These days very few countries debar women, but practices, such as location of polling stations, structure of polling booths, lack of adequate voter education and information, timing of election, and day of election, debar or discourage women, persons with disabilities, those unable to read, the elderly, people in certain occupations, members of certain ethnic groups, or followers of certain religions from voting. No-one who is not entitled under law to vote should vote. Such voting could distort the electoral wishes of the genuine voters.

It is common, if not universal, to have registers of voters, and those not on the register may not vote: being on the register is the gateway to voting. It is a mechanism to ensure that everyone who is entitled can vote and those not entitled cannot. Everyone entitled to vote should be on that register. The registration process must be accessible, physically and in other ways. The register must be updated to ensure that people are registered with their correct residences, that everyone can register within reasonable time after having attained voting age, and that those dead or moved are no longer there. The registration mechanism should not be so cumbersome that people are unable to register or are deterred by inconvenience, and voters must be able to check that they are in fact registered.
When a person arrives to vote at the polling station, there must be a check that they are entitled to vote, which means that relevant registers must be available, and those who check must be honest and efficient, recording that the person has voted already, so no-one else can vote in their name; in fact it may be desirable to mark a digit of the hand of a person who has voted to ensure no double voting; electronic methods if used must be functional. Ideally the polling station should be able to cope with the number of voters within a reasonable time, and must open when expected. If the system depends on voters voting in a certain geographical area, it should not be possible for them to vote, or to register, anywhere else.

While mechanisms should be provided for those who are unable – through illness or the nature of their work – to vote in person at the time and place assigned to them, such a mechanism should be designed so that it is not possible for such a vote to be cast without the permission of the voter.

No international standard specifies the best electoral system, in terms of majoritarian or proportional system etc. But the principles of equality and fairness do have implications for certain technical aspects of the electoral system. There must be political equality of each and every citizen or one person, one vote and one value (OPOVOV) which implies voter registration that is comprehensive, up to date and accurate. Apportionment and districting must achieve equal representation, and that every vote must have the same value i.e. for example one person’s vote must not worth more than another because they vote in a much smaller district.

The choice
The way an individual voter votes is a matter for that person and no-one else. The key concept here is that of the “secret ballot”. Secrecy is important lest a person be victimised for voting for or against a particular candidate. The core of this is that the person must be able to cast the vote in private, so that others cannot see or have any reason to guess the way he or she has voted. The layout of polling stations, the placing of ballot boxes, the complexity of ballot papers and method of marking the paper or the screen (so that voters can vote unaided) all affect whether the voting is truly secret. So does the way in which a record is kept of who has voted: does it enable anyone to find out how a vote has been cast?

Voters must be able to make their choice. This means they must have the information they need about who is standing for election, and must be able to know what the candidates stand for. This involves opportunities for campaigning for parties and candidates, and for the media to comment on the choices facing voters.

The voter’s choice must not be affected by irrelevant factors, so far as the law and the procedures can guarantee this. For this reason bribing of voters is wrong, as is “treating” – such as offering them food and entertainment. Poverty especially may lead voters to trade their vote for a meal. It is very common for electoral laws to try to insulate voters from last minute influences on the mind of voters, by banning campaigning for one or two days before the elections, prohibiting posters etc, close to the polling stations, banning opinion polls for a
certain time before the polling day, and banning the publication of exit poll results before polling has closed.

Violence and flagrant forms of abuse such as “booth capturing” (where a group takes over the polling station and casts votes on behalf of non-existent voters, or for those yet to arrive to vote) are clearly a violation of the whole principle of elections.

A “level playing field” is important to ensure that the voter can properly evaluate the competing claims of parties and candidates. The two particular risks are that (i) the incumbent government abuses their control of resources to make their message more prominent than that of their rivals and (ii) that money rather than the merits of candidates and policies becomes the decisive factor. Government resources should not be used for electioneering. It is very common for countries to regulate the maximum amount that can be used for campaigning, overall or in any one constituency, by party or candidate. Another risk of the power of money is that interests may finance candidates or parties, but in a way that is not apparent, thus gaining advantages that ought only to be available, if at all, through open decision making. The interests might be those of business (hoping for contracts), governments (hoping for favourable policy decisions) or individuals (hoping for personal advancement or even honours). Laws commonly require that large donations for elections be publicly declared or even ban contributions from certain sources such as corporate interests or foreign governments. Some limitation on freedom of media may be required to ensure that there is fair access for all to means of communication with the electorate.

Representatives
The purpose of legislative elections is to select representatives. This requires that the choice open to the voters be as broad as possible; they must have a genuine choice. Restrictions on political parties to organise and campaign must be as few as possible. Restrictions on how political parties may be formed should not violate principles of equality, nor freedom of choice, unless such restrictions are justified in terms of other important values, such as peace and security.

Supporting mechanisms and procedures
The laws in place to support these various requirements must satisfy certain criteria, not just in terms of their objectives but in terms of their clarity etc.; they must exhibit legal certainty so that:

- They are comprehensive, covering all the aspects of the elections
- They are consistent, without contradictions
- They are clear as possible so as not to give rise to conflicting interpretations
- They are capable of being implemented.

Their scope must, for example, cover malpractices, including corruption and contain effective remedies and punishment. There must be no room for impunity.
The laws and regulations, and indeed practice, must ensure that the register of voters is set up and maintained properly. Perfection is not perhaps possible to attain, but standards would indicate that registers be comprehensive to the extent of 95-100%, be up to date to 92-95% and be accurate in terms of the data to the extent of 92-95%.

Rules must ensure that votes are counted accurately, results conveyed correctly to the management body and the public, that materials are kept and when necessary transported safely.

Secondly, there must be a proper mechanism for running elections – the Electoral Management Body (EMB) – often in the form of an electoral commission. It must organize the election strictly according to the electoral law, not according to pressure from the government, political parties, candidates, or other forces or individuals (it must be independent); the commissioners and secretariat must manage elections professionally, with competency, neutrality, accuracy, and efficiency; and the commissioners and secretariat must act according to the Electoral Code of Conduct.

Among the most important guarantees of electoral integrity and justice is transparency: apart from the secrecy of the vote. The following forms of openness and public participation are part of the accepted standards:

- The involvement of civil society organizations in voter education
- Party members involved in selecting candidates and in deliberating of party policies on many public issues
- Organized and committed citizens able to express support or opposition to policy position of political parties and/or candidates
- Electoral observers able to oversee and monitor one or more stages of electoral processes
- Print and electronic mass media covering and broadcasting the whole electoral processes
- Research institutions circulating information regarding the results of survey on political parties, candidates, electoral management bodies, electoral system and electoral processes
- Research institutes circulating information regarding the results of “Quick Count” on the results of election in the sample polling stations

4 Where vote counting is first conducted in polling stations, the final results of the election in one constituency can be predicted based on the basis of a Quick Count of the votes in a sample of polling stations.
Finally, there must be a mechanism for resolving disputes: the EMB may resolve some, but access to an independent, impartial and competent tribunal or court that sits in public is a human right, applicable just as other forms of dispute. It requires especially an independent judiciary, independent lawyers, no prohibitive court fees, and reasonable speed in dealing with the cases.
Chapter 3: GE13

Past elections
This Report focuses on the 2013 election, and on the evidence presented to the Tribunal. However, it makes little sense to propose recommendations for change (as the Tribunal is required to do), without being able to assess whether the shortcoming identified are systemic or a “one-off”. For this purpose, and in order to assist in its determination not just of what happened, or did not happen, but of why and how they happened, it is important to understand how far there is a pattern to the events analysed.

One of the witnesses before the Tribunal was Mr Wong Chin Huat, a co-author of an article, “Malaysia – towards a topology of an electoral one-party state”. That article’s conclusions include:

We have demonstrated how the Barisan Nasional has managed to perpetuate its rule through various forms of electoral manipulation and administrative repressions. On one hand, its initial electoral strengths have been entrenched through control of franchise, alternation of international and administrative boundaries, mal-apportionment and gerrymandering of electoral constituencies, controlled electoral campaigns and polling irregularities. On the other hand, political opposition is disempowered with infringement of civil and political liberties, extensive patronage networks and abuse of federal apparatus to suppress intergovernmental competition. The opposition state governments are discriminated against and in some cases overthrown through direct federal intervention, while the local elections which the ruling coalition had largely failed to win were outright terminated since 1965 (p. 942).

Earlier, it says:

In the Malay heartland, constituencies were mal-apportioned and gerrymandered to discriminate against the Malay-based oppositions. In a detailed case study of the 2002 delimitation exercise in Kedah, Ong and Welsh pointed out that ‘safe areas’ in traditional UMNO strongholds and non-Malay seats were moved into marginal seats with awkward boundary changes not corresponding to administrative divisions.

The combined effect of the malapportionment, gerrymandering and uneven distribution of party supporters is the severe violation of the ‘one person one vote’ principle. Tables 7.1, 7.2 and 7.3 show respectively the vote share, seat share and the seat/vote ratio of the alliance/BN and major opposition parties since 1955. Some opposition parties were always under-represented, while others were simply denied representation despite winning respectable vote shares.

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5 In the journal *Democratization*, Vol. 17 pp. 920-949.
The greatest victims of these systemic manipulations were opposition parties, especially the leftist parties like Pekemas and PRM and the Malay-based opposition parties like Parti Negara, PAS, Semangat 46 and Parti Keadilan Rakyat up until 2008, whose supporters tend to be geographically dispersed.

As we shall see, these issues recurred in GE13. As one writer has commented:

It is not the system that has changed; elections are arguably no less clean now than they were in years past. But for a host of reasons, the public is now less willing to accept norms and tradeoffs previously taken for granted or deemed unassailable. The underlying premise of BERSIH is that parties alone should not monopolise political space and that democracy requires more than going through the motions of elections.  

It is not that elections in the past have been clean and fair. What is now happening is that the general public is less willing to accept the outcome if the electoral process is not seen to be free and fair.

**The constitutional and legal framework**

Malaysian House of Representatives elections are governed by the following:

1. The Federal Constitution - Articles 46 and 113 to 119; and Thirteenth Schedule;
2. Elections Act 1958;
3. Election Offences Act 1954;
4. Election Commission Act 1957;
5. Elections (Conduct of Elections) Regulations 1981;
6. Election (Registration of Electors) Regulations 2002; and

Many of these have been amended since they were first enacted, including some amendments as recent as 2012. The Constitution sets the numbers of MPs from each state (Art. 46), and requires the establishment of the Election Commission (EC) (Art. 113), specifies its composition and method of appointment (Art. 114), and gives it the task of reviewing boundaries of constituencies, with not less than eight years between reviews (Art. 113(2)(ii)).

The Constitution also recognises the right of all to equality and to the equal protection of the law (Art. 8), and the freedoms of expression assembly and association (Art. 10), albeit with wide powers to Parliament to limit the latter rights in the interests of security, public order or morality, without any requirement, found in many constitutions, that such limitations be justified in a democratic society.

The details of these various pieces of legislation will be considered as they are relevant to the particular allegations analysed below.

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Interestingly, apart from a requirement that election officers be held to standards of “fairness, impartiality and compliance with [the law]” the legislation is devoid of any explicit expression of the need for elections to be fair.

The 2013 Elections
This Chapter summarises and evaluates the allegations of shortcomings, malpractices, and illegalities in the conduct of the whole GE13 process presented to the Tribunal, and the evidence put forward in support of those allegations. Those allegations concern sometimes the law, sometimes the adherence to the law, or lack thereof, and sometimes practices that, while not necessarily in breach of the law, fall short of the standards for free and fair elections.

Under each topic, as far as possible, we indicate the relevant standard that ought to be attained, drawing on international standards, what Malaysian law has to say on the subject, what the evidence showed actually happened in GE13, and some conclusion on the matter of why. Recommendations designed to ensure that these things do not happen in the future are in Chapter 4 of this Report.

Overview
This Report contains the Tribunal’s findings and its recommendations on the way in which Malaysia’s system, laws and procedures could be changed. There was a mass of evidence and the Tribunal has considered it carefully. The evidence is referred to in detail in the course of the Report. And the conclusions of the Tribunal on that evidence, and its recommendations are spelled out in some detail towards the end.

However, it may help the reader to absorb the full document to know what the broad conclusions of the Tribunal are – rather than being compelled to wait to the end for a sense of the outcome. (There is also a separate Executive Summary that covers the whole Report).

The Tribunal, having approached its task with an open mind, has found itself compelled to reach a conclusion that there were multiple failings in the way GE13 was conducted, and that virtually every tenet of a fair election was violated at some place and at some time.

Although all Malaysian citizens are entitled to vote, and there are a few exclusions, it seems that the chance for those overseas to vote (introduced for the first time in 2013) was not fairly distributed. More seriously, some people who wanted to vote turned out not to be registered, and many turned out to be registered somewhere where they did not live. Names and addresses of registers were inaccurate. Dead people still registered. Some were registered even though they did not apply. Some errors are to be expected; the last is inexplicable, and the others sufficiently widespread to cast serious doubt on the integrity of those responsible for managing the system. Overall there are grave doubts about the accuracy of the register of voters: a vital tool in achieving fair elections. This makes it easier for those who wish to manipulate the actual voting.
The structure of the county in terms of constituencies is vital especially in the electoral system that Malaysia has: one member per constituency. Everyone’s vote is supposed to count the same. And constituencies should be formed on a rational basis. Instead there are unjustified variations in sizes, which tend to distort the results, and sometimes significant numbers of voters as a group were moved to the “wrong” constituency.

On polling day some entitled to vote could not do so because their names were not to be found. But some found that someone else had voted in their name. And devices intended to prevent double voting (by the same people) were not well implemented including “indelible ink” that could be removed.

Large numbers of people could vote by post or in advance, especially military and police – far more than necessary. Yet this creates obvious risks (how do you store the votes not done on polling day is the most serious, as well as how to ensure that everyone who votes is entitled, and their votes are attributed to the right place). There was evidence of a lot of problems arising out of these arrangements.

When it came to counting, inaccuracies in the forms recording numbers of ballot papers and votes were detected by witnesses, as well as failures in custody of the materials.

There was a good deal of outright bribery of voters. And also a lot of undue influence: politicians and parties promising and threatening benefits for those who voted for a certain party, and losses for those unwise enough not to do so.

And although parties are supposed to pay for their own campaigns, far too many government resources were used by candidates of the ruling party for what were purely party activities.

How could all this happen in a well ordered country? The key institution is the Election Commission. It simply does not seem to have taken charge of the elections in a firm way as it should. It exists to prevent abuses. Yet it seemed unable to do so, even unwilling to do so. Its professionalism is thrown in doubt. Closer scrutiny shows that it is too close to power: not sufficiently independent in the way it operates, or the way it is appointed. The sort of people who make it up are too closely associated with those in power.

Finally, the police were shown in some evidence to be reluctant to respond to complaints about improper behaviour. And the courts have not proved helpful to candidates who seek a remedy for what they see as abuse of the process. Partly the law precludes the role of the courts in some important respects, and partly the courts themselves sometimes seem to have been keen to throw out challenges on the basis of technicalities.

And, in the ultimate analysis, the general thrust of the evidence is that the failures and abuses of all sorts that took place tended in one direction: to maintain the ruling party in power. And so great were some of the abuses, notably in “gerrymandering” of constituencies and the
misuses of postal and advance voting, and so close the results in a considerable number of constituencies, that it may well have had just that effect.

**The evidence before the Tribunal**

Evidence was submitted by many individuals, and a number of organizations. Three groups that had observed the elections submitted their reports and individuals appeared before the Tribunal to present those reports: Pemantau Pilihan Rakyat submitted a Report entitled *Clean and Fair?* IDEAS and CPPS submitted their joint Interim Report *Was GE13 Free and Fair: An Interim Report on Malaysia’s 13th General Election* and the Merdeka Centre its *GE13 Election Watch Report*.

**The right to vote**

The Constitution does not recognise a right to vote as a “fundamental liberty”; the European Convention on Human Rights, a source of many former colonies’ human rights provisions, did not originally contain any such rights, and although the First Protocol was soon adopted, including an undertaking (Article 3) by member states “to hold free elections at reasonable intervals by secret ballot, under conditions which will ensure the free expression of the opinion of the people in the choice of the legislature,” this seems to have been overlooked by the drafters of independence constitutions.

The Malaysian Constitution specifies 21 as the minimum age for voting, and requires that people be registered in respect of a particular constituency, and they must be citizens to vote (Article 119). Under the law, the register is supposed to be revised every three months, which should make it possible for most people to vote after they become 21. Anyone who is detained as a “person of unsound mind” (which would mean someone found not guilty of a crime on the ground of insanity and detained, or detained as unfit to plead to a criminal charge, or certified under mental health legislation and detained) is disqualified (Article 119(3)(a) as is someone convicted of certain electoral offences like bribery, which leads to a 5 year disqualification (Electoral Offences Act).

Anyone serving a sentence of imprisonment or who has ever been sentenced to death or to imprisonment for over 12 months and still remains liable to serve any punishment for the offence cannot be registered as an elector (Art. 119(3)). This was not an issue raised before the Tribunal, but the Home Minister has been reported as suggesting that those imprisoned for more than 3 years should be allowed to vote. He observed that those on parole are unable to vote as they are still liable to serve punishment as they may be called back to prison if they breach the parole.

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Ambiga Sreenevasan, Co-chair of BERSIH 2.0, told the Tribunal that overseas Malaysians were allowed to vote by post with two conditions: they have to come back to Malaysia for at least 30 days in the last five years, and they can post their ballot back by themselves or through the diplomatic bags. The witness regarded the first condition as unconstitutional; but the Tribunal is less convinced of that: it is not uncommon to deprive those overseas of the right to vote, on the basis that they may lose contact with “home” and the issues in the election. The Constitution contains no right to vote as such.

However, the system is not evenly applied. The Merdeka Centre and Pemantau shared information from MyOverseas Vote (MOV) with the Tribunal that the 40% of overseas Malaysians who live in Singapore, as well as those in South Thailand, Kalimantan and Brunei are excluded from right to vote.\(^{12}\)

Finally, Malaysia is extremely unusual in having 21 as the voting age (otherwise only Singapore, Japan and a few Gulf and Pacific Islands states have more than 18 as the age). BERSIH 2.0 shared with the Tribunal its own 2010 Memorandum to the EC recommending, among many other things, the lowering of the age to 18.

**Findings and Observations on Right to Vote**

1. It is regrettable that the Constitution does not include a clear statement of the right to vote, as a human right.
2. Any right to vote conferred by law should not discriminate, depending on factors such as where they live.
3. Discrimination on the basis of how long they have lived abroad may be permissible.
4. It is particularly regrettable that prisoners on parole are not able to vote: parole is intended to be a way of reintroducing offenders to normal life. The Tribunal is glad to know that the government is considering the position of prisoners as voters.
5. It is perhaps surprising that Malaysia retains a voting age of 21.

**The integrity of the Register of Electors**

In order to vote a person must be on the register of voters; so the integrity of that register is of critical importance. As the Organisation for Security and Cooperation in Europe has said, “The right to vote is of diminished value if it is not possible to determine who should and who should not vote in a given election. Further, the right to vote is also of diminished value if the election system fails to ensure accuracy in voter registers.”\(^{13}\)

\(^{12}\) MyOverseas Vote website (6 April 2013) The EC Should Not Be Surprised by Low Overseas Voter Numbers When It Has Deliberately Restricted the Number of Eligible Voters. Available at http://myoverseasvote.org/2013/04/06/ec-should-not-be-surprised-when-it-has-deliberately-engineered-low-overseas-postal-voter-registration/

\(^{13}\) International Standards and Commitments on the Right to Democratic Elections: A Practical Guide to Democratic Elections Best Practice Osce/Odihr Draft Paper (p. 10)
The Elections (Registration of Electors) Regulations lay down the procedure for registration. Voters are supposed to be registered where they live, and are registered not automatically, but because they apply.

If the integrity of the roll is suspect, the whole election must be suspect. The whole process should be transparent, and conducted strictly according to the rules. Though the EC had said it would use the roll as gazetted on February 22 2013, it actually used one changed, and updated to April, but what the differences were was not clarified to the public.\textsuperscript{14}

The evidence before the Tribunal indicated that many people who were entitled to vote were not registered, that some people not entitled to vote (or dead) were registered, and some people who, though entitled to vote did not register found that they were in fact on the register but not where they would have wished to be registered. Three major issues were the sudden increase in the number of registered voters in all the states except Negeri Sembilan, the large voter increase in rural and semi-rural constituencies; and possibility of misuse of advance or postal votes.

One study suggested that as many as 30\% of the total roll of 13 million or so voters comprises voters over whom there is some doubt\textsuperscript{15}.

Pemantau Observers reported (in their Report \textit{Clean and Fair? submitted to the Tribunal})\textsuperscript{16} that on polling day they observed 67 cases of electoral roll irregularities: names missing (12 cases), polling centre to which voter was assigned changed (7), constituency changed without notice (6). Complaints they received online from the public included: new voters de-registered (230 cases), others de-registered (107), registered without their knowledge (116), constituency changed (54), dead voters on roll.

\textit{Comprehensiveness}

The number of voters registered was, (12,992,661 normal voters, 272,387 advanced voters – see below); although the voting age is 21 years old, the extent of voter registration seems to be rather low – 46.87\% of the whole\textsuperscript{17}. Malaysia has 28.3 million population (2010 Census); 54\% of the population in fact are aged 24 or over\textsuperscript{18}, or about two million more than registered, and those aged 21-23 would presumably comprise about one million or so more.

On that basis about 81\% of eligible voters were registered. However, since registration is voluntary, it is not possible to know whether the number of those unregistered indicates lack of enthusiasm on the part of potential voters, or lack of some effort on the part of the EC.

\textsuperscript{14} Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 30, Lee Wee Tak
\textsuperscript{15} Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 30, Lee Wee Tak
\textsuperscript{17} Excluding postal voters who would not have been counted in the census
\textsuperscript{18} 2013 estimates, see http://www.indexmundi.com/malaysia/demographics_profile.html
Among those registered, however, turnout is high, though perhaps not as high as the EC indicates, in view of some of the evidence to the Tribunal.

**Non-citizens registered**

A number of witnesses gave evidence about non-citizens being allowed, even shipped in, to register and to vote. For example, Ang Chong Ang\(^{19}\) showed a foreign worker who was registered. Peh Poh Yeap\(^{20}\) also gave evidence as to a suspected foreign worker. There was evidence to the effect that there were some 29,000 persons who were clearly of foreign origin were registered, but their race not specified (as the law requires), which causes some doubt about their nationality.\(^{21}\)

The involvement of the National Registration Department (NRD) in the distribution of fake identity cards in Sabah has already been brought to light in the recently concluded Royal Commission of Inquiry into Illegal immigrants in Sabah (which was told by the Director General of the Sabah NRD that there were 113,000 problematic ICs in Sabah\(^{22}\)). There has been a call for all identity cards issued by the Sabah NRD office to be recalled and investigations carried out. It was stated to the tribunal that evidence was submitted to this Commission that NRD officers have been involved in the issuance of these fake identity cards.\(^{23}\) The extent of this illegal practice is not known although investigations into recent robbery cases have revealed that some of those involved have been found to be in possession of fake identity cards issued in Sabah.

The EC has claimed that it cannot verify the authenticity of these identity cards. It accepts the IC as proof of citizenship and if they apply to be registered as voters, includes their names as legitimate voters. Thus, from the point of view of the EC, they are not phantom voters.

However, in 2001 the election court\(^{24}\) took the EC to task for not doing its own work in assessing the eligibility of applications for registration and merely accepting the identity cards issued by the NRD as proof of citizenship. Commenting that the identity card is not proof of citizenship the judge went on to say that “the fact that the SPR [EC] took into

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19 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 8, Ang Chong Ang
20 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 9, Peh Poh Yeap
21 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 30, Lee Wee Tak
22 [http://www.themalaysianinsider.com/print/malaysia/sabah-rci-ends-now-comes-the-hard-part-says-commission-chairman](http://www.themalaysianinsider.com/print/malaysia/sabah-rci-ends-now-comes-the-hard-part-says-commission-chairman). The RCI was set up in response to allegations about the great growth in Sabah’s population and that this was used to “flood” Sabah with Muslims, and affect the elections. Its Terms of Reference included:
   1. To investigate the number of foreigners in Sabah given blue Malaysian ICs or citizenships;
   2. To investigate if the award of such ICs or citizenships were according to the law;
   3. To investigate if those given blue ICs, temporary identification receipts or citizenships through unlawful means have been registered in Sabah’s electoral roll;….

By early 2014 its report had not been released.
23 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 30, Lee Wee Tak
account not only persons with identity cards for registration but also those with temporary identity cards showed much abuse on its part.”

The response to this case was to amend the Elections Act to prevent challenge to the electoral roll in court once they had been gazetted (now s. 9A). Leaders of opposition parties objected that the revised rolls being available only shortly before elections, and the campaigning period being very short (in most cases less than 10 days), there was very little time for the arduous task of scrutinizing the rolls, and the procedures for making complaints and for a public inquiry to be made to ascertain the veracity of the objector’s claim. The amendment virtually absolved the EC from any responsibility for providing clean and accurate electoral rolls. It had far-reaching consequences as it allowed other forms of electoral manipulation to go on unchecked. For later cases on s. 9A see below.

**Not registered in the right constituency**

The electoral system used assumes that people vote where they live or at least work, and the Constitution refers to residence (Article 119(1) (b)). If they are registered somewhere else this can have various impacts: (i) that the voter cannot vote at all because of inconvenience – or because they do not even know where they are registered, simply discovering that they are not registered where they thought, (ii) that the voter has to vote where he or she does not live and has no involvement and probably no interest, (iii) that a voter’s vote may be neutralised (because the voter might have had an impact in the right constituency, but not in the one to which he/she is moved), or (iv) that there is a registered voter in that other constituency who will not turn up and who can be impersonated by someone else.

In 2003, it was estimated that 2.8 million of the 9 million registered voters were not registered in the constituency where they lived. This problem has continued to exist. Charles Santiago, DAP MP for Klang testified that he found 2,195 voters were transferred out to other constituencies of Johor, Selangor, Sabah, and Sarawak, without reason, while some 500 voters who had voted in Klang in previous elections were transferred out of the constituency.25 (The witness considered this last irregularity as a delineation exercise which must be approved by Parliament first but that has never happened).

**25 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 34, Charles Santiago**

KJ John wrote in Malaysiakini26 that for 28 years he had been registered in Bukit Gasing/PJ Utara constituency, despite living in PJ Section SS1, and that his registration had been moved there. Yap Siew Lin was an overseas voter, but found that he was not registered as such but was registered as a resident in Kuala Lumpur but should have been registered for Johore Jaya.27


**27 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 10, Yap Siew Lin**
Registered though not apparently having applied
Some eligible voters were registered without their consent. Charles Santiago MP testified to complaints by residents who found themselves or their relatives registered as voters although they did not to be registered, e.g one found himself registered under the Butterworth Parliamentary constituency in state of Pulau Pinang and Shah Alam state legislative assembly constituency in Selangor.28

The witness also stated that in 2008, a total of 60 electors were registered with the same address at 994 Jalan Papan, Pandamaran (in Klang constituency). In 3rd Quarter 2011, 13 were transferred out leaving 47 but in 2nd Quarter, another 2 new electors were registered using same address. The registered owner of the premises said he had not given consent to any of the 60 to use his address to register themselves. Precisely who these people were is not clear.

Inungkiran binti Mongijal testified that she was registered in Tawau without her knowledge even though she originates from Kudat and had never been to Tawau. She also testified that she received a short message service (SMS) invitation from a BN representative to a function.29

Removed from the roll
Various witnesses testified that they and others had been removed from the roll – without having asked to be removed and without any process.30

In India, the Supreme Court has held that a person should not be removed without a fair hearing: Lal Babu Hussein & Others vs Electoral Registration Officer 1995 AIR 1189, 1995 SCC (3) 100 (but in India there is express provision for the person being heard, unlike the Malaysian law).

Charles Santiago MP said that review of 3rd Quarter Electoral Roll showed that 3,457 electors were removed from the 2008 Electoral roll, even though some of them were alive and had not changed address.31

Findings and Observations on the Electoral Roll
Perfection is not to be expected. But accuracy within a margin of tolerance must be achieved for the election to be credible. Even unintentional errors may deprive individuals of the effective right to vote. Even errors may give opportunities for fraud if there are also failures at the polling station to check identities. Larger numbers of inaccuracies may actually be manipulated to affect the result of individual races: by moving voters out of somewhere where they would have made an impact.

28 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 34, Charles Santiago
29 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 37, Inungkiran Binti Mongijal
30 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 28, Patricia Utap
31 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 34, Charles Santiago
1. It is hard to see how someone who did not apply could be registered by accident, and the Tribunal must conclude that this was the result of some deliberate act of fraud, though on whose part precisely is not clear. However, since no-one is supposed to register without showing identification, it is hard to believe that there was no collusion on the part of EC staff.

2. Some of the evidence about “foreigners” voting was somewhat speculative (people who “appeared” to be foreign), which would not satisfy burdens of proof require in a court, and it is hard to draw any firm conclusion about this.

3. Registering one or two people in the wrong constituency might be carelessness; registering those who have not sought registration is suspicious. Registering a large number of people wrongly looks very much like fraud.

4. Overall there is strong evidence of various inaccuracies on a scale so great in GE13 that there is reason to suppose that this is designed to set the scene for fraud. The responsibility of the EC is obvious. And since the EC seems to be closely associated with the ruling party through appointment of commissioners and the affiliation of many staff with the public service, one cannot rule out the possibility that these inaccuracies were designed to help that party.

**Are those registered able to vote?**

Every voter has the right to equal and effective access to a polling station in order to have his or her vote accorded equivalent weight to that of others

(IPU Standard 2(6))

Being registered to vote will be meaningless if on polling day there is no accessible polling station, or it is so congested that some cannot vote, or one’s name cannot be found on the register. This was not one of the central focuses of evidence, but there was some indication of problems in this respect.

**Availability**

One would expect that in the more remote areas, especially in Sarawak and Sabah where transport is primitive and voters would have difficulty getting to the polling stations, the polling stations would remain open if anything for longer periods than elsewhere. Instead, in some remote areas they were shorter. In the parliamentary constituency of Baram in Sarawak the hours of opening was just 3 hours – from 8 am to 11 am. According to one witness (Roland Engan32) the polling station was closed sharp at 11 am even though there was a long queue and some electors had already had their names verified on the register. There seems to be no logical explanation for this as the counting of the ballots is done within the constituency and relayed to the centre. It is probably contrary to the law, which says that if any voter has been issued with a ballot paper before the station is closed they are allowed to vote (Conduct of Elections Regulation 23).

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32 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 49, Roland Engan
Ensuring that those not entitled to vote do not do so
This is a crucial issue: a register is effectively useless if people who are not registered are actually able to vote, whether they pretend to be someone who is registered (personation) or are able to vote despite not even pretending to be registered.

Personation is a criminal offence: committed by voting in the name of another person, living, dead or fictitious, or voting having already done so. It is punishable by a fine of RM2000-5000 and two years imprisonment (ss. 7 and 11, Election Offences Act). It would equally be an offence for anyone, including an EC official, to assist anyone to do this. It would be an offence to vote if one is not a legitimate voter without even pretending to be some other person entitled.

Pemantau found several instances of people saying that they came to vote only to find that someone had voted in their name.

Failure to produce proper identification
Not all systems of election law require voters to produce identification; in the USA whether this is a constitutional requirement is the subject of litigation. In a country with a problem of electoral system integrity, it would seem to be an elementary precaution to have some ID check. Regulation 20 of the Conduct of Elections Regulations enables the presiding officer at any polling station, in his discretion, to allow a person without any proper identification to vote by simply filling in a form to declare his or her identity. The problem with any such procedure is that if it is later discovered that the declaration was false, it is effectively impossible to cancel the vote cast. Only if, in an election petition, it could be proved that this happened on such a large scale that the result was likely to be affected could there be any remedy.

Witness Azli bin Hussein (Pengarah Pilihanraya (Elections Director) for the PKR in the constituency of Batu, Kuala Lumpur) testified that he was informed by a candidate’s polling agent, stationed at Stream 4 of Sekolah Kebangsaan Bandar Baru Sentul, that voters at that stream were not required to produce their Identification Cards to the EC officer, but were merely required to read out their IC numbers. Upon inquiring at the polling station he was told by the EC officer in charge that this was “to expedite the voting process as there was a long queue.” This would make it easy for a person to pretend to be another.

Ginnie Lim, PKR candidate for State seat Machap, gave evidence that that she could not send party agent to observe transportation and counting. When she arrived at the polling

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33 The underlying problem for the US is that there is no system of ICs, so people are often required to produce something like a passport or driving licence – but poorer sections of society may have neither (so the issue become party-political). As recently as July 2013 a court in Pennsylvania held such a law unconstitutional, contradicting the US Supreme Court. Free IDS were to be provided, but the judges held it would be too difficult a procedure: Viviette Applewhite and others [including the NAACP] v Commonwealth of Pennsylvania 330 MD 2012.
34 Appendix A: People’s Tribunal on GE13 Evidence. Witness Statement of Azli bin Hussein
35 Appendix A: People’s Tribunal on GE13 Evidence. Police report of Ginnie Lim.
station, a voter (woman) complained to her that someone else had already voted on her behalf. The woman told the witness that she later managed to vote after filling out Form 10A but the previous vote was not cancelled – as it could not be, in view of the fact that no indication is to be made on the electoral roll of the number of the ballot paper issued to a particular voter (C/E Regulation 19(5)).

Mohd Fadhli bin Khaharuddin\(^{36}\) testified that he reported to the Kuantan police station that he voted once and then returned to the polling station and was issued another ballot paper.

His motive was to keep the ballot paper and voting stream number as proof that the procedure and credibility of the Election Commission, and made the police report to avoid being accused of manipulating the electoral process. To his knowledge no action had been taken against him or the KTM. To do this he had washed off the supposedly indelible ink. He convinced the Tribunal that he did not intend to vote again but only to prove that someone can vote again. YB Fuziah Salleh, PKR MP for Kuantan, elaborated on this experience of Mohd Fadhli bin Khaharuddin, a voter in her constituency. She suggested that a new EC Guideline issued before Polling Day – providing that if there are more than 20 people lined up, there can be a separate queue and a fresh roll opened up to cater for the new queue – facilitated this double voting. Those who voted earlier were not marked for having done so on the new roll. Pakatan Rakyat (PR), she said, became only aware of the guideline after election.

**Non-indelible ink**

The use of this ink, to be placed on the finger of someone who voted, was supposed to be an important safeguard against double voting and was introduced by the Elections (Conduct of Elections) Amendment Regulations 2012. As Steven Ng Eng Joo, a trained chemist,\(^{37}\) told the Tribunal, for the ink to serve its purpose (i.e. to prevent multiple voting), it should stay on for more than seven days for advanced voters, and for ordinary voters at least three days.

The fact that the application of indelible ink could not apply to postal voters and that even when it did apply as in the case of advance voters, the ink proved to be not indelible, gave rise to serious concerns about the integrity of the voting system.

There were very many testimonies to the effect that the ink was often easy to remove. Lye Yoong Seng,\(^{38}\) Joseph Chandran a/l Xavier Michael,\(^{39}\) Pemantau Observers, had been told this by many voters. A voter told the Tribunal that her finger was marked with pen instead of ink in Rawang.\(^{40}\) She made a police report but there was no response from the police.

\(^{36}\) Appendix A: People’s Tribunal on GE13 Evidence: Police report of Mohd Fadhli bin Khaharuddin
\(^{37}\) Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 29, Ng Eng Joo
\(^{38}\) Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 14, Lye Yoong Seng
\(^{39}\) Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 11, Joseph Chandran A/L Xavier Michael
\(^{40}\) Appendix A: People’s Tribunal on GE13 Evidence. Statutory of Declaration 16
Tian Chua, a candidate in Batu, also had evidence of the ink being removable (though not from his own finger) and he told the Tribunal that on polling day 130 police reports were filed in his constituency (Batu) on the failure of indelible ink.\textsuperscript{41} So far no action has been taken by the police. An EC official insisted that what he witnessed was an isolated case.

The Pemantau Report reported that in 21 out of 87 constituencies they observed that the ink was easily removed, while the Merdeka Centre told the Tribunal that in 2008 a plan to use indelible ink was abandoned four days before polling, while for GE13, indelible ink was used for advance voters on 30 April 2013 but was found to be easily washable. Akmal Nasrullah Bin Mohd Nasir (giving Siasat PRU13’s findings)\textsuperscript{42} said that there had been over 1,000 complaints to the police about the ink.

There was also a record number of spoilt votes –172,068 – in GE13, which helped shaped final outcomes.\textsuperscript{43} The number of spoilt votes was larger than the electoral majority in 11 seats. The main reason was the indelible ink, which was applied before the voter was given the ballot paper. Some voters used that inky finger to mark the ballot paper, or were even told to do so. The ink is applied before the person votes, but evidence showed that sometimes it had not dried before the person voted, thus creating a risk of smudging the ballot paper. It is perhaps not surprising that voters may have thought it was to mark the ballot paper – rather as one might mark a document with a finger print. Far from reducing the problem of double voting, the methods whereby the indelible ink was administered seemed to discredit the electoral system further.

Steven Ng Eng Joo gave the following explanation to the Tribunal on why the ink was easily removed. An important component in indelible ink is silver nitrate, which, upon exposure to UV rays, leaves a visible stain. To stay for 3 to 7 days, silver nitrate is needed at least 10-18%. A Minister in PM’s Department, Shahidan Kassim, said in Parliament that the silver nitrate was only 1%. This does not make the ink indelible. The witness’s own experience was that the ink was completely removed on the day by washing with soap, toothpaste and Clorox. This is contrary to what the EC deputy chair had claimed, namely that the mark would stay between 5-7 days. EC has not confirmed minister’s revelations about 1% silver nitrate. They said at some point it was 4%.

As the witness observed, there are unanswered questions: why did the ink contain only 1% silver nitrate, and 29% moisturizer? Was the ink not delivered according to specification? Was the ink not properly used and why? Explanations offered by the EC – including that the ink was not properly shaken or applied by poorly trained staff – are not acceptable. On 21 May, it was announced that EC had set up a team to investigate the failure of the indelible ink. No findings were revealed as at the date of the Tribunal sittings.

\textsuperscript{41} Appendix A: People’s Tribunal on GE13 Evidence. Signed Statement 67, Chua Tian Chang
\textsuperscript{42} Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 27, Akmal Nasrullah Bin Mohd Nasir
\textsuperscript{43} Bridget Welsh, Statistical Anomalies in Malaysia’s GE13 Results – A Preliminary View


**Advance and postal voting**

It is appropriate to provide special arrangements for those who cannot vote on the normal voting day, usually by postal voting or voting in advance of the polling day. But these devices do open the way for various types of malpractice and manipulation, at both the registration stage and the stages of storing and counting the completed ballot papers.

The Elections (Postal Voting) Regulations 2003 deal with the former. Postal voters mail their ballot paper in an envelope supplied, and on receipt the envelope still sealed is to be stored as specified until polling day. Then the box is to be opened in the presence of party agents.

There is also the possibility of advance voting— in person on a specified day. Certain people are required to vote in advance: serving members of military forces, members of a public service on duty outside Peninsular Malaysia or Sabah or Sarawak, students studying away from the country, and the spouses of the last two categories. Police were added in 2012. These various categories must vote in advance – or by post if not able to vote on the advance polling day.

The General Regulations provide that ballot boxes containing the votes of advance voters must be kept in safe custody of the returning officer or in accordance with arrangements approved by the EC (Reg. 27a). In the case of postal votes the returning officer is to make “arrangements for safe custody.”

For the first time, Malaysians living abroad were given the right to vote – by post. But surprisingly only 6,000 registered as overseas voters. The increase of postal voters was due to the increase in the number of EC officials who could opt to vote by post.

Military and police personnel and their spouses, who in previous elections had voted by post, were to vote in advance – and voted in the army camps and police barracks under supervision of the EC and political party representatives. Voting in an atmosphere of military discipline seems a less than ideal arrangement. And military personnel ought to be able to vote in their home areas. If they are all registered in the place where the camp is located, they can affect the outcome, yet they have no fundamental political interest in the result there.

Several issues were of major concern to those monitoring the elections. First, some voters had a choice as to whether to vote by post or in advance. Second, complete lists of the names of postal and early voters were not supplied to all the candidates. One witness, a candidate in the 2013 election (Tian Chua), claimed that some of the names in the advance voter roll were also in the main roll with no indication that they were advance voters.

This meant that it was theoretically possible for the persons involved to vote twice especially as postal voters could not be subjected to the inking process. Third, the process for allocating

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44 Appendix A: People’s Tribunal on GE13 Evidence. Signed Statement 67, Chua Tian Chang
different postal voters to different constituencies was not clear making it possible for there to be considerable “flexibility” in deciding where to place them.

Wong Piang Yow, Tindak Malaysia Founder, told the Tribunal that advance voting for police, journalist, polling and counting agents and military was given without right reasons. Advance voting should be given only to the voters who are going to be away on polling day.

YB Fuziah Salleh, PKR MP for Kuantan, related to the Tribunal her experience: she achieved hardly 5-10% of the advance voting when the results were disclosed which she could not believe as she had better results in 2008. The messages of support she received from advance voters were more than those eventually revealed during counting.

**Findings and Observations on whether only those entitled to vote were able to vote and not others**

The injustice to individuals of not being able to vote is considerable: they are deprived of one of the fundamental rights in a democratic society. There was also considerable evidence of those not entitled to vote being able to do so.

1. There was considerable evidence of at least sloppiness in ensuring that those who voted were entitled to do so in some polling stations or streams.
2. The Tribunal takes the view that advance voting was indeed used excessively in this election (though some countries permit it to anyone who chooses to do so). The right to cast advance voting should not be based on occupation but to those who cannot cast their vote on the polling day.
3. There is distressingly strong evidence that the procedures for postal and advance voting were not properly applied.
4. Evidence in connection with the supposedly indelible ink was strong; and hard to explain away. This is technology used now in many countries and it should have been perfectly possible for the EC to acquire ink that worked as well as anywhere else. In this regard the EC can be categorized as unprofessional.

**The principle of “one person, one vote and one value” (OPOVOV)**

Every voter has the right …… to have his or her vote accorded equal weight to that of others

IPU Standard 2(6)

This issue raises the question of whether the structure of electoral districts ensures that, within reason, they are of equal size so that the votes of voters are of equal weight in terms of the make-up of Parliament and the formation of government. The allocation of seats to voters is often called “apportionment”. The system of one member for a geographical constituency usually requires that individual constituency boundaries take into account issues designed to ensure that a constituency has some coherence, making it feasible for the member to

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45 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 31, Wong Piang Yow.
46 Testimony of YB Fuziah Salleh.
represent it. The Constitution, in the Thirteenth Schedule, provides limited guidance (other than the “approximately equal” provision discussed earlier): facilities available for registration and polling are mentioned, and the maintenance of local ties. Coupled with the facts that the EC lack independence (see below), and that its recommendations are just that, with Parliament having the last word, there is really no serious attempt to guarantee that votes are of equal value.

The Constitution says that within a State the number of electors should be approximately equal for each constituency, with “weightage” being permitted for rural constituencies (i.e. fewer voters) (Schedule 13 s.2).

Evidence before the Tribunal shows various problems: (i) there is serious malapportionment, which accounts for ability of a party to win clearly with under 50% of the vote; (ii) the mechanism for apportionment has been much weakened by constitutional changes and (iii) the EC violates the Constitution by its interpretation.

Before June 1962 the law required that populations in constituencies be approximately equal, but permitted variations up to an average 15% (or electoral quota) allowing for differences in population and in means of communication (Article 116(4) of the Federal Constitution). This provision was repealed by Act 14/1962.47

Until 1962, the Election Commission enjoyed final authority on the review and delimitation of constituencies at state and federal levels. This was changed by the Constitution (Amendment) Act 1962 which introduced a new Thirteenth Schedule to the Constitution. The EC now had to submit a report to the Prime Minister who would then draft an Order for the approval of the recommendations, with or without changes, and present it to the House of Representatives for approval, if any, by a majority of all the members. It seems that the House of Representatives must vote Yes or No on that Order, but may not itself make any changes.

The Constitution (Amendment)(No. 2) Act 1984 removed the upper time limit for mandatory periodic review of constituencies, leaving only the lower limit of “an interval of not less than eight years [after the date of completion of the last review].” Thus periodic review of constituencies is no longer mandatory, but left to the EC (on the impartiality of which see below). However, if Article 46 (on the number of MPs) is amended there must be a review of boundaries in the area affected (Art. 113(3A)), and if it is more than 8 years since the last regular review, such a regular review must be conducted.

In theory at least the EC’s recommendations are open to the public for discussion. However, the practice seems to have been adopted for the EC to have prior discussions with the Prime Minister’s Department and to incorporate the views of the government in its own recommendations. This means that the public does not know who to blame for

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47 This section draws on the evidence and SD31, Mr. Wong Piang Yow to the Tribunal
recommendations which are clearly against democratic principles of representation: the EC or the government of the day.

A further power of Parliament (Article 2) is to create Federal Territories, which are designated as States. For example, on 1.2.1974, the Federal Territory of Kuala Lumpur was carved out of Selangor changing its racial composition.

As between states, evidence before the Tribunal showed that there is a huge disparity in the average number of voters per constituency. Terengganu, though less developed than Johor and Perak, has a higher average enrolment, so the notion that the EC gives weightage to the rural areas is a fiction.

Dr Wong Chin Huat\(^{48}\) testified that the EC in 2011 developed a scheme of malapportionment under which constituencies are divided into 3 categories: voter numbers for Urban Parliamentary Constituencies are to be over 60,000; for Semi-Urban Parliamentary Constituencies 30,000-59,000 and Rural under 30,000 while voter numbers of Urban State Constituencies would be more than 25,000, Semi-Urban 15,000–24,000 and Rural less than 15,000. He observed that this actually violates the Thirteenth Schedule and “approximately equal”, which gives no basis for a three-class scheme, allowing special treatment only for rural areas. Urban constituencies also have no upper limit. The EC has essentially amended the Federal Constitution. This process has also resulted in some semi-urban constituencies being larger in terms of population than some urban constituencies. It seems that many of these semi-urban constituencies have large numbers of Malay voters who supported the opposition party in the 2008 elections.

In Kedah, for example, it was demonstrated that Baling was designated as a semi-urban constituency with an electorate of 93,376, while Alor Setar, the capital of the state and an urban constituency has an electorate of 69,189.\(^{49}\) The tendency to increase the size of constituencies where the opposition is strong is reflected not only in the case of Baling but also in the difference between two state constituencies within the same parliamentary constituency of Puchong. Both state constituencies, Sri Sedang and Kinrara are designated as semi-rural constituencies; but Kinrara, a constituency with large BN support has an electorate of only 34,290, while Sri Sedang, a constituency with large opposition support, has grown in size from 49,757 to 72,845 between 2008 and 2013. If the votes of the Sri Sedang voters were of the same value as that of those of Kinrara, they would perhaps have elected two opposition members instead of only one.

Overall, on average, the same witness stated, a vote for BN was worth 1.6 times a vote for PR, because PR leaning constituencies are on average larger (79,000 or so voters) than those likely to favour BN (46,000 or so).

\(^{48}\) Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 48, Wong Chin Huat
\(^{49}\) Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 48, Wong Chin Huat
In response to an allegation that there has been a sudden increase in the population size of several constituencies represented by the opposition candidates, the EC stated that the increase in voter registration was not planned by the EC for any particular purpose, but offered no explanation.

Population increase cannot explain the increase of new voters in Selangor, Pahang, Johor and Terengganu where the increase was significantly larger than it was in the period between 2004 and 2008: 19.4 per cent as opposed to 8.2 per cent. One scholar commented that it is unclear why these largely rural constituencies have such large voter increases when one would expect the flow to be in the opposite direction as a result of out-migration from rural to urban areas50.

Mr. Ong Guan Sin51 in his evidence submitted that the delineation provisions could result in constituencies breaking up a community and raise suspicion of gerrymandering. He acted as a polling agent and counting agent (PACA) for the Keadilan Rakyat candidate who contested the Parliamentary seat P140 Segamat. After GE13 Mr. Ong set up an organization, Pasukan 140, to look into the area that comprised P140 specifically in relation to his kampong i.e., Kampong Abdullah. To quote from his SD:

> Historically the voters of Kampong Abdullah were known to vote in favour of Opposition candidates and against BN candidates. The delineation exercise of 2003 transferred a significant number of the voters (‘the affected voters’) out to a newly created constituency known as ‘P141 Sekijang’ while P125 Segamat was renamed ‘P149 Segamat’.

Further examination showed that the 3008 voters in “Kampong Abdullah” were divided between 2 different parliamentary constituencies, and that there was no consistent pattern in the voter assignment. It is common for family members voting for different constituencies. There is an extreme case where husband and wife who stay in the same house (sleep in the same bed) belong to different constituencies. One bed two constituencies! The only explanation he could offer was to weaken support for the opposition by the voters of Kampong Abdullah. Had the community of Kampong Abdullah remained intact electorally i.e., the affected voters were not arbitrarily transferred the results of P140 Segamat during GE13 (a slim majority of 1,217 for the) BN would have been different.

**Findings and Observations on boundary drawing**

1. The first past the post electoral systems depends heavily for its integrity on the issue of the constituency boundaries. Firstly the individual voters will not be equally represented if they are in constituencies with significantly different numbers of voters, and secondly the actual outcome of overall results can be severely affected by moving boundaries: the process known as gerrymandering. Family members who stay in the same house but belong to different

50 Bridget Welsh. Disturbing Questions Surrounding GE13 Polling. Available at https://mail.google.com/mail/u/0/#inbox/144dae138922c285
51 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 66, Ong Guan Sin.
constituencies, or ‘One bed two constituencies,’ is probably the clearest example of gerrymandering in the world.

2. The law, in fact the Constitution, of Malaysia is rather weak in the ways it deals with both these issues, but the way in which it has been applied is the greater problem. It is hard to see how having one constituency 9 times the size of another in terms of electorate can be described as “approximately equal”.

3. There is some rationality to allowing rural constituencies that are sparsely populated to have fewer voters, in order to ensure that the MP does not have an impossibly large area to cover. But it does subordinate the equality of the vote to administrative convenience and representation. There is no justification for giving more urban areas greater representation – by means of making voter numbers smaller.

4. Unfortunately there is considerable evidence that these anomalies work in one direction only: to the benefit of the ruling coalition.

How far is the ballot genuinely secret?

The principle of secrecy of the vote requires that election regulations underline that secret voting is not only a right on the part of the voter, but an absolute obligation. Election officials have an obligation to provide adequate facilities to ensure that voters have the space and time necessary to cast their vote in secret.

OSCE

It is not supposed to be possible to know which ballot paper was issued to which voter (E(CE) Regulations 19(5)), and the voter is supposed to mark the ballot paper “secretly” (Reg. 19(7)). Otherwise there is little in the regulations that address how secrecy is to be maintained.

Disabled voters who need assistance may nominate a person (a citizen of at least 21) to make the ballot paper at his/her directions; but if there is no person nominated the presiding officer is to do so (Reg. 19(10)).

There was some evidence about voters with disability being hindered in this exercise of their right. Witness Low Yeik Hwa\(^{52}\) testified that a party worker (specifically BN) had assisted a voter with disability – in violation of the law.

Unfortunately, it seemed that presiding officers were not always neutral: Charles Santiago, DAP member of Parliament for Klang,\(^{53}\) testified that a physically-disabled man had come to a polling station with his daughter. The witness told the People Tribunal that the daughter was kept out of the polling booth, and the person-in-charge told the man that he would help this man to vote. After the voter had expressed his wish to vote for DAP candidate, the EC

\(^{52}\) Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 5, Low Yeik Hwa.

\(^{53}\) Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 34, Charles Santiago.
official put a cross next to BN candidate’s name on the ballot paper. After hearing what her father told her, the daughter then demanded that her father be allowed to vote again. But the witness said that he was not sure if the disabled man had voted again. And again, as mentioned earlier, there is no way to cancel an individual vote, so even if the voter had voted again his vote would have counted for little: it would in effect be halved as the first vote cast supposedly for him would cancel it out.

**Freedom to organise and campaign**

**Organising**

Everyone has the right to join, or together with others to establish, a political party or organization for the purpose of competing in an election.

IPU Standard 3(2)

In most countries, political parties play an important part in politics. They develop policies and programmes, aggregating the views of voters. Most people attach importance to the party when choosing who to vote for. Freedom to organise and join parties is crucial, and some constitutions even include it as a specific right (e.g. South Africa).

19. (1) Every citizen is free to make political choices, which includes the right—

(a) to form a political party;

(b) to participate in the activities of, or recruit members for, a political party; and

(c) to campaign for a political party or cause.

There is a right in Malaysia to form associations, which is subject to the very wide limitation clause: “such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, public order or morality” (Constitution Article 10(2)(c)). This seems to leave the decision in the hands of the government and legislature, without there being any check that this is “justified in a democratic society.”

The formation of a political party is subject to the rules as laid down in the Societies Act. Under these rules the Registrar of Societies, a civil servant, may refuse registration of a political party if “it appears to him that such local society is …likely to be used for unlawful purposes or any purpose prejudicial to or incompatible with peace, welfare, security, public order, good order or morality in Malaysia” (s. 7(3)(a)).

Evidence was given (by Terence Gomez54) that the Registrar of Societies refused to register the Opposition Coalition (PR), so they were compelled to campaign as separate parties. They were denied what they considered would have been a benefit of a common party symbol.

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54 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 19, Professor Dr Edmund Terence a/l Eric Boniface Gomez
Are candidates and parties able to campaign freely?

Everyone individually and together with others has the right:

To express political opinions without interference;
To seek, receive and impart information and to make an informed choice;
To move freely within the country in order to campaign for election;
To campaign on an equal basis with other political parties, including the party forming the existing government.

IPU Standard 3(3)

Political campaigns in an active democracy are likely to be vigorous, and even sometimes verging on the offensive – certainly to those in power. The OSCE has suggested that “The best practice, as stated in clear terms by the European Court of Human Rights, is for a government to display restraint and accept that even offensive, shocking, and disturbing speech can contribute to pluralism and must usually be tolerated in a democratic society.

This is especially true during electoral campaigns and of speech that targets government authorities, elected officials, and candidates for office.”\textsuperscript{55} The Constitution’s freedom of expression provisions is relevant here. This right and the need to ensure as level a playing field as possible may come into some tension, and the European Court of Human Rights held in a case against the UK that limits on expenditure must not be set so low as to impede freedom of expression.\textsuperscript{56}

Witnesses gave evidence that political parties and candidates, especially the ruling party coalition (BN), tended to seek power from the voters by using intimidation and coercion. Campaign activity of a party/candidate was disturbed, party office or campaign tools vandalized, hampering candidates in campaigning. Candidates from PKR were the victims of intimidation and obstruction.

Amani William-Hunt Abdullah\textsuperscript{57}, PKR candidate in Chenderiang, Perak, testified that he was prevented by RELA (Malaysia Volunteer Corps) from campaigning in an Indigenous (Orang Asli) village. The police took no action on his report.

Vasantha Kumar\textsuperscript{58}, PKR candidate for Tapah Parliamentary seat testified that BN campaigner B. Kalaivanan punched Loganathan, his assistant, attempted to attack Vasantha Kumar himself and another assistant, and threatened to kill another. He also testified that Murugan, a security officer and a supporter of PKR, received death threats by phone from a BN supporter, and was later found brutally murdered; no action had been taken thus far by the police. Murugan’s mother\textsuperscript{59} movingly testified to the Tribunal about her son and his murder.

\textsuperscript{55} P. 26
\textsuperscript{56} Bowman v. United Kingdom Case 24839/94; (1998) 26 EHRR 1; [1998] ECHR 4
\textsuperscript{57} Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 22, Amani Williams-Hunt Abdullah
\textsuperscript{58} Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 54, Vasanthakumar a/l Krishnan
\textsuperscript{59} Appendix A: People’s Tribunal on GE13 Evidence. Written Statement of Rajamah AP Pachiappan
Nurul Izzah\textsuperscript{60}, PKR MP for Lembah Pantai, said that her campaign was continuously subject to violence or threats of violence. Seven police reports were lodged by the victims but there was no action by the police. Rocks and eggs were thrown at speakers and supporters in a PKR rally, the wire of the public announcement system was cut, a party worker was injured during an assault in the election tent, her PKR volunteers were attacked, flags put up by volunteers were removed and workers were threatened. A billboard advertisement with her (Nurul Izzah) image was vandalized. The Kuala Lumpur City Council (DBKL), which is controlled by Minister of Federal Territories, Raja Nong Chick, BN candidate for MP Lembah Pantai, allowed posters to be put up by BN candidates even before the campaign period started. But Nurul Izzah’s banner would not last two hours without it being taken down by the DBKL. Her supporters planted Malaysian spring flags in support of her party but that did not stop DBKL from coming and removing them.

In Tandek, Kota Marudu, BN instructed the village head to warn the community members not to receive any visitors.\textsuperscript{61} During campaigns, BN could use the village halls but opposition parties could only use supporter’s houses.

Pemantau\textsuperscript{62} reported loud motorcycle noises and other forms of disturbance disrupting campaign meetings.

**Findings and Observations on freedom to organise and campaign**

1. There is some reason that to believe that the Registrar of Societies is not even-handed in treatment of government and opposition parties.
2. Unfortunately there was significant evidence that parties and candidates were not always free to campaign, that intimidation was found in some places, and that this was sometimes supported by official sources.
3. This evidence indicates not so much that the law restricts freedom to campaign, but parties, supporters and even officialdom obstruct the exercise of the freedom.
4. The victims of the obstruction of freedom to organize and campaign were mostly opposition candidates.

**Does voting itself take place in an atmosphere where the voters can feel free to exercise their choice?**

Here we are concerned not with pressures on parties and candidates but with the freedom of mind of the voter to exercise his or her choice.

\textsuperscript{60} Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 3, Nurul Izzah binti Anwar
\textsuperscript{61} Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 65, Jannie Lasimbang
**Manipulation of ethnic identities and creation of ethnic hostility**

In a multi-ethnic society like Malaysia, a particular risk is that ethnic hostility will be stirred up. This discourages candidates from contesting in hostile areas, dissuades voters from voting, and affects the way in which voters evaluate the choices before them.

According to the Election Offences Act, it is an offence to promote ill-will or hostility, between races or classes generally, with the intention of inducing anyone to vote or not to vote or to vote in a particular way (s. 4A). A person convicted may not vote for 5 years. But the Tribunal heard considerable evidence of ethnic manipulation and fomenting of hostility. The SPR has not taken any action to stop this kind of behaviour. The Pemantau election monitors reported speeches with racist or racial sentiments, and religious hatred observed.

Among the many reports highlighted by various Elections Observers group, one that stands out is a closed-door session by UMNO at Sungai Ramal Dalam, Selangor, where the speaker warned the audience that the Malaysian Chinese wanted to abolish the monarchy and remove Islam from being Malaysia’s official religion (see IDEAS/CPPS report 5.3).

Alfian Zohri bin Moh. Tahir, a journalist for Free Malaysia Today, testified that he saw three banners with inflammatory content in Tebrau apparently created with the intention to incite violence. They said things like A vote for DAP is a vote for PAS and an Islamic state. Mandeep Singh a/l Karpal Singh, electoral observer, told the Tribunal that at a meeting attended by caretaker Prime Minister Najib at Southern University at Skudai, he saw several pamphlets and posters distributed widely. These pamphlets demeaned opposition leaders and BERSIH 2.0 leader, Datuk Ambiga, while one poster said “Malay supremacy would be threatened, and there was a Chinese figure doing something to a royal figure, if BN lost election.”

Pemantau Observer, Lee King Thim, described what he had seen at a BN public rally. An UMNO speaker incited racial hatred by reminding Malay voters about the May 13, 1969 events where Chinese chased out the Malays, something that induces fear in the Chinese electorate and induces both Chinese and Malay voters to vote for BN to keep the peace.

Ramakrishnan a/l Suppiah, DAP candidate for Labis testified that he found two booklets, without the name of publisher or author, in Malay houses and kampungs. One called “DAP RASIS” contained racist inflammatory propaganda including “DAP insults Malays”. The IDEAS/CPP Report reproduces examples of inflammatory leaflets and posters. IDEAS in its Interim Report said “Malays were given the impression that if BN were to lose, Chinese Malaysians would benefit at the expense of Malays.” (p. 22).

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63 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 23, Alfian Zohri Bin Mohd Tahir
64 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 20, Mandeep Singh a/l Karpall Singh
65 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 12, Lee King Thim
66 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 43, Ramakrishnan a/l Suppiah
Unfair campaigning
Some of the campaigning was not so much inflammatory as unfair. The balance between this and freedom of speech is of course a difficult one to achieve. Personal insults (such as the leaflet reproduced in the IDEAS Report saying the Anwar Ibrahim was born out of wedlock) or the BN posters saying “We respect the rule of law, not the rule of the jungle” or “We develop the country, not demolish it” are regrettable – the first particularly. These are the sorts of issues that should be addressed in a Code of Practice that EMBs in most countries now produce.

Restrictions on campaigning around election day
Voters are supposed to be able to go to the polls without being subject to pressure in the way they exercise their vote, even from political campaigners. For this reason the law prohibits campaign material been displayed within 50 meters of a polling station (Regulation 24B(7) General Regulations), including t-shirts, caps, rosettes, bottles etc. (Reg. 26 (1)(g) and prevents active campaigning (rallies, loudspeakers etc.) (Reg. 26 (1)(a) and (b)).

There were various reports of violations of these rules in GE13. Pemantau reported that in 38 of the 87 constituencies they observed there was continued campaigning on polling day, and in 22 this was within 50 metres of polling stations.

Specific cases of which direct evidence was given to the Tribunal including testimonies from witnesses Vivien Chong and Ang Ching Ang, both of whom spoke of campaigning activities within the prohibited distance of polling stations.

Findings and Observations on the free atmosphere for voting
1. Freedom of speech is good, but there are good reasons for some degrees of restraint and even control during elections periods.
2. There is strong evidence that some parties seriously overstepped the mark in terms of their “campaign strategies”, behaviour that can be not just unfair but dangerous in a potentially volatile situation.
3. The law relating to stirring up hatred seems to be largely not enforced at this time.
4. The same can be said of restrictions on campaigning in terms of time and place. The main offenders seem to be BN parties.

The voters free choice unaffected by promises and threat of personal benefit or loss
The competence and experience of the candidates and the policies of the parties ought to be the basis for voters’ choices. It is a deeply sad thing if voters are influenced by the chance of a momentary benefit.

Bribery and “treating” of voters are criminal offences. Bribery is the transfer of money or other valuable things to influence voting, or agreeing to do so (s. 10 of the Election Offences

67 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 13, Vivien Chong Siew Ying
68 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 8, Ang Chong Ang
Act). “Treating” involves giving food, drink, refreshment or provision, or any money or ticket or other means or device to enable the procuring of any food, drink, refreshment or provision, to or for any person for the purpose of corruptly influencing that person or any other person to give or refrain from giving his vote....” (s. 8). They can both be punished by up to two years imprisonment, and RM1,000 - RM5,000 fine. Also someone convicted is barred from voting or standing for 5 years. Prosecutions have to be approved by the Public Prosecutor, in other words the Attorney-General, an officer who owes the appointment to the government, and can be dismissed at will.

The borderline between bribery and abuse of government power to influence voters’ choices is a fine one (see below), but here we are concerned with the giving or offering of benefits to individual voters, rather than to communities. And bribery as such is something that can be committed by those who seek office as much as those who already hold it.

The evidence of bribery was strong. The Pemantau observers reported that money, hand-outs (vouchers/tickets/travel reimbursements), and promises of economic benefit upon victory by a particular candidate in exchanges of vote were common practice, especially by BN. Food and drinks were distributed.

Sometimes this is a matter of payment or gift from an individual candidate or his/her supporters or associates. Sometimes it is more from the ruling group as such. But the line is not always clear: as with Zainal Kaptar, voter in Cameron Highland parliamentary seat, who testified that he received RM20 from BN candidates Palanivel and Wan Rosdy via the village head.

Gifts from or through official sources included those testified to by Jannie Lasimbang, working with Indigenous People Network, who described that village security and development committee (JKKKS) of every village in the Sabah area were used to give out cash to villagers during campaign period. Villagers were told to vote for BN because they have received cash from BN. BN vouchers given out before and on polling day only to villagers who were identified as BN supporters. Villagers could cash the voucher in amount of RM100 after election. Villagers in Sook, Keningau were given land titles – after waiting for 30 years – two days before election but the titles were unsigned. They were told that BN could get them signed after the election. Although BN candidates won the election in Sabah area, the authorities refused to sign after the election.

Various witnesses testified to having seen rice and other food items in BN packing being distributed. They included Charles Santiago, MP for Klang, some Orang Asli witnesses about the district of Klang and Kuala Woh village of indigenous people, and Vasantha Kumar, PKR candidate for Tapah Parliamentary seat, who saw Orang Asli given rice and other food.

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69 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 1, Zainal Kaptar
70 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 65, Jannie Lasimbang
71 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 54, Vasanthakumar a/l Krishnan
items packed in plastic bags with the BN candidate’s photo and name and BN logo “Undilah BN” (Vote for BN).

Johan bin Abu Bakar\textsuperscript{72}, political assistant to Datuk Abdul Halim Hussain, candidate for the State seat of Teluk Bahang, testified that he saw people receiving RM160 from BN after the election, using vouchers or having had their name pre-registered before the election. People knew about the lucky draw and cash voucher not through any official invitation or announcement from BN but through word of mouth.

Batin Yop En bin Cantan\textsuperscript{73}, Batin Tihang bin Yok Chupuk\textsuperscript{74}, and En San\textsuperscript{75} described how the Orang Asli Welfare Department told 12 village chiefs, who attended the meeting in Kuantan, Pahang, to vote for BN. The Department also distributed RM200 for each and every village chief who attended the meeting. The Village Chief then called all the villagers together and told them to vote for BN, telling them any villager who voted for the opposition would receive a police summons – the BN state candidate Wan Rosdi had told him so. Wan Rosdi distributed RM20 for each villager and promised a further RM80 if BN candidate won.

Roland Engan, PKR candidate for Baram\textsuperscript{76} testified that the village headman of Kampung Long Jeeh, who was the BN polling agent, gave instructions after polling on May 14 2013 to distribute money to those who voted for BN candidates. The father of the witness was also given RM20 to vote.

Siow Chun Fatt\textsuperscript{77}, polling agent, testified that on election day he took photographs and video of people (who had voted since they had indelible ink on their fingers) queuing for money outside a house with BN flag in Johor Baru. A video showing a woman who was queuing up being given RM200 after some papers were checked and signed. There was no response from the police to the report and pictures.

\textit{Findings and observations on bribery and related matters}

1. There is considerable evidence that bribery is a common practice in parts of the country. Notably many of the witnesses were either Orang Asli themselves or had seen others offering bribes of various types in Orang Asli communities.

2. It is also notable that most of the evidence was of measures intended to benefit BN candidates.

3. And the evidence points in the direction of not only candidates but government officers, such as the Department for Orang Asli and some village chiefs, playing a part in this debasement of the electoral process.

\textsuperscript{72} Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 46, Johan bin Abu Bakar
\textsuperscript{73} Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 61, Yok Ek bin Cantan
\textsuperscript{74} Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 62, Tihang bin Yok Chupuk
\textsuperscript{75} Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 64, Sani a/l Subang
\textsuperscript{76} Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 49, Roland Engan
\textsuperscript{77} Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 42, Siow Chun Fatt
Is there a “level playing field”, in the sense that as far as possible “government” candidates and others compete equally without the former having unfair advantages?
This is a specific example of the general principle that everyone standing in an election must have an equal chance of appealing to the voters.

The evidence presented to the tribunal was of four types of violation of the position of the incumbent, the BN. First by the making of government decisions in the run-up to the elections in a way apparently designed to influence the voters, particularly by favourable initiatives; second by promises of policy benefits for communities that voted for BN (a form of collective bribery that could be indulged in by opposition candidates also, but would not have the same credibility perhaps as when coming from incumbents); third, threats that areas that did not vote for the BN would be deprived of benefits from government; and finally, the actual use of government resources including vehicles, for campaigning.

A caretaker government?
An issue of concern was that the government during the election period was supposed to be a “caretaker government”, and that it should be careful not to use its governmental powers to influence the outcome, but this restraint was not observed. This is not specifically provided in the Constitution but was argued with some force that there was a convention of Westminster (parliamentary) systems that ought to be followed. Government must continue its day to day activities but should avoid any initiatives that might affect voters’ preferences during the campaign period.

The Merdeka Centre reported that the caretaker government, after dissolution of Parliament, committed pre-election fiscal manipulation for campaign purposes. Several big projects were announced during caretaker period:

- RM8 billion for projects in Cyberjaya
- MOU with Hindraf (Indian rights group)
- RM3.8 million allocations for Sikh groups
- Promising to build low and medium cost houses in Penang and
- Promising that GLC Sime Darby would build a new hospital in Kapar.

Undue Influence: Promises – and threats
This can include promises of future government decisions that will benefit the voters – if they vote for the government – and threats that existing benefits will be withdrawn if they do not. Pemantau reported a considerable number of this sort of promise (p. 27).

Norman a/l Kong⁷⁸, an indigenous person of Kg Pos Siderut, Kuala Lipis, Pahang, testified that BN candidates G. Palanivel (Parliamentary) and Wan Rosdi (State) promised that a road would be tarred. He and other witnesses (Zainal Kaptar, Batin Yop En bin Cantan, Batin Ti Han, and En Sani) stated that there was a promise that BN Bantuan Rakyat (Aid for People) 1 Malaysia (BR1M) would be increased from RM500 to RM1200 if they voted BN, and that

⁷⁸ Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 3, Norman a/l Kong
there was even a threat to abolish the BR1M if BN did not win. Similarly, if the community voted against BN, free education and hospital services would be terminated. Jannie Lasimbang\(^79\) said that BN threatened to withdraw amenities, such as water tanks, given to the villagers in Sabah if BN lost.

Abdullah Izhar bin Mohamed Jusof\(^80\) testified that Kuala Lumpur Municipal Council (DBKL) was instructed by the Minister for Federal Territories, Raja Nong Chik, candidate of BN, not to take action against PPR residents who were in areas before the election. DBKL only started taking action after the BN candidate lost. The residents supporting UMNO received preferential treatment because their pipes remained unclamped although payment was not made, but the supporters of Nurul Izzah were immediately warned by DBKL of having outstanding bills.

Toh Kin Woon, former Gerakan Minister,\(^81\) testified that JKKK held cooking and sewing classes in local villages and BN candidates introduced themselves to the women at these kinds of events. If a road is to be repaired in opposition controlled territories, funds sent will be withheld for some time; after a while the road would be built and UMNO/BN take credit for it. BN tried to send the message to the people that there is no difference between voting for BN and PAS (one of the party belong to PR, opposition coalition parties) and the people would be able to get their roads repaired even if they do not vote for BN.

An Orang Asli witness, Norman a/l Kong\(^82\), living within the parliamentary constituency of Cameron Highlands and the state constituency of Jelai reported that they were told that if they did not vote for the BN candidates, the government would withdraw the free education and hospital services now provided. As the community depended on these services including the free helicopter services for emergency treatment in city hospitals, he was afraid to vote for the opposition as he could not risk being singled out as an opposition supporter. Yok Bim bin Yok Tihang gave similar evidence.\(^83\)

**Use of public resources**

Pemantau reported that they had witnessed use of government machinery or state property during the campaigning period in 11 constituencies (p. 44), including buses, school halls and official government cars.

GLC corporations and agencies, such as RISDA and FELCRA used resources, transportation, and personnel for BN campaign purposes. The Merdeka Centre report showed that the caretaker government often campaigned at government venues, such as school, army camps, and meetings with civil servants.

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\(^79\) Appendix A: People’s Tribunal on GE13 Evidence. Statutory of Declaration 65, Jannie Lasimbang

\(^80\) Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 63, Abdullah Izhar bin Mohamed Yusof

\(^81\) Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 41, Toh Kin Woon

\(^82\) Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 3, Norman a/l Kong

\(^83\) Appendix A: People’s Tribunal on GE13 Evidence. Statutory of Declaration 2 Yok Bim bin Yok Tihang
Alfian Zohri bin Mohd. Tohir, a journalist for Free Malaysia Today, testified that he saw the National Service Training Department under the Ministry for Defence carrying a busload of students to attend a BN campaign event in the Southern University main hall, at which the caretaker Prime Minister Najib and other BN leaders were speakers.

Jannie Lasimbang, Indigenous People Network in Malaysia, stated that Village Heads were supposed to be only looking after the adat but during election they were all mobilized to be involved in the campaign for BN. Other witnesses to similar effect were Mandeep Singh a/l Karpal Singh and Toh Kin Woon.

Koh Jun Lin, a journalist for Malaysiakini assigned to cover Deputy PM Muhyiddin Yassin’s campaign, testified that when he sought clarification from the organiser of the event on the use of government property in the campaign, he was chased out.

**Findings and Observations on the issue of level playing field**

1. Governments want to win elections by showing the electorate that they have and will benefit from re-electing them. But the inducement should be the adoption of policies that benefit the people, not the use of government resources in ways that discriminate unfairly, and is little different from a bribe.

2. Unfortunately there was convincing evidence that the latter was happening. This was often in the same areas where outright bribes were being given (see previous section).

3. This is not only unfair but is taking advantage of the more vulnerable sections of society.

4. The brazen use of government resources such as buses, of which there was also clear evidence, demonstrates an inability to distinguish between what belongs to the nation and what belongs to the party.

**Money politics and campaign expenditure**

It has become common for countries to limit the amount that may be spent for election campaign (and for the requirement of openness about this matter) and about sources of funding for parties and candidates.

In Malaysian law, there are restrictions on the amount of money that may be spent during the campaign period by candidates and their agents: the maximum to be incurred by candidates and agent for any Dewan Rakyat election is RM200,000 (Election Offences Act s.19). Candidates are also required to submit declarations of expenditure within 31 days after the publication of the official results (s. 23). These restrictions apply only to the amount spent by the candidates and not by their political parties on their behalf. Also, it does not include

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84 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 23, Alfian Zohri bin Mohd Tahir
85 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 20, Mandeep Singh a/l Karpal Singh.
86 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 41, Toh Kin Woon
87 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 25, Koh Jun Lin
expenses incurred by individual supporters and private corporations on behalf of certain political parties and candidates.

Terence Gomez\textsuperscript{88} gave evidence (via video link) to the effect that the limits are often exceeded, with the excess being attributed to the party not the candidate; he quoted Chua Soi Lek\textsuperscript{89} to the effect that the expenditure was usually exceeded the limit and was between RM500,000 and RM1,000,000 rather than up to 200,000.

Evidence was given to the Tribunal that the expenses are not monitored by the EC or any other authority. Yet in Malaysia the EC has chosen to interpret the laws very narrowly. It takes the view that its hands are tied; the former Chairman of the EC in an interview in September 2003\textsuperscript{90} stated that:

the law states that we are not to be concerned by the expenditure [of candidates], we can only impose a limit on candidates, but we are not to scrutinize them. They make their declarations on expenditure and we accept them (at face value). It is up to the rival candidate to scrutinise (the expenditure declaration). As long as you submit in time, we don’t bother. We just gazette it. We do make it public so if there is a dispute, the rival candidate can take it to court through an election petition (Malaysiakini, 11 Sept 2003).

The only recourse is for the rival candidate to take the matter to court through an election petition. This seldom, if ever, happens, as it is very difficult to separate the expenditure incurred by a candidate from that of the political party that he or she belongs to.

**Findings and observations on campaign expenditure**

1. Controlling expenditure is not easy. For a start, people are not going to declare what they spend on bribes. Nor will they declare that as government, they have been spending money in a way that improperly attracts votes. So the worst evils may go unreported.

2. The current legislation promises more than it delivers, for it does not really require party expenditure to be declared. Nor does it prevent supporters spending money lavishly.

**Is there a level playing field in terms of access to the media?**

Every candidate for election and every political party shall have an equal opportunity of access to the media, particularly the mass communications media, in order to put forward their political views.

IPU Standard 3(4)

\textsuperscript{88} Appendix A: People’s Tribunal on GE13 Evidence, Statutory Declaration 19, Professor Dr Edmund Terence a/l Eric Boniface Gomez.

\textsuperscript{89} In TI-Malaysia Reforming Political Finance in Malaysia (2010)

\textsuperscript{90} Malaysiakini. EC Chief: I cannot do anything, my hands are tied. Available at: http://www.malaysiakini.com/news/78409.
Professor Terence Gomez, from University of Malaya,\(^{91}\) testified that Malaysia is one of the few countries in the world which allows political parties to be actively involved in business. Thus they have access to enormous funds, especially BN. BN also owns the media: UMNO owns more than 50% of Utusan Malaysia, and the Star is under the control of Malaysian Chinese Association (MCA), a component party of BN. Middle class voters will be well informed with alternative media (such as online media and social media) but the rural population only received information from mass media controlled by BN.

Dr. Tessa Houghton, associate professor in Media and Communication at University of Nottingham, Malaysia Campus,\(^{92}\) and Zaharom Nain, Professor of Media and Communication Studies at Nottingham University, Kuala Lumpur Campus,\(^{93}\) each gave evidence based on their joint research. Dr Houghton spoke about their analysis of Malaysian print and electronic media (Watching the Watchdog, Media Monitoring the 13\(^{th}\) Malaysian General Elections), which involved the analysis of 17,000 press articles.\(^{94}\)

Overall results showed a huge imbalance in the coverage on BN compared to that on opposition parties. Except for online media and Mandarin print newspapers, citizens would not get fair and objective information regarding parties, nor on the policies of candidates with which to construct an informed voting preference. The principles of respect for truth and the right of the public to the truth, the right of comment and criticism, and only reporting facts, are violated by the mainstream media. They also found that this phenomenon is the result of the pattern of ownership, control, and socialization. The fact that Malaysia is a developing country is used by BN as an excuse for non-conforming to international standards. Since 1981, when Mahathir Mohamad became Prime Minister, political parties have gone into business (economic control of journalism). They also found that journalists are trained, in educational institutions, to be conformist, not to question.

Masjaliza binti Hamzah\(^{95}\), Executive Officer of the Centre for Independent Journalism, testified based on her qualitative study concerning political bias of Malaysian media (involving interviews with 8 reporters and 5 editors representing varied backgrounds medium, age, gender, experience and language) in East Malaysia and Kuala Lumpur. The study shows that journalists are very aware that political ownership has an impact on coverage, and they must cover news according to directions from the publisher/the owner. Journalists working for BN newspapers were unable to provide balanced coverage and were forced to exercise self-censorship for survival, e.g. not writing on the opposition, not calling opposition sources, appointing themselves as guardians of the BN news, or watering down the content of their news reports.

\(^{91}\) Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 19, Professor Dr Edmund Terence a/l Eric Boniface Gomez
\(^{92}\) Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 39, Dr Tessa J Houghton
\(^{93}\) Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 53, Prof. Zaharom Nain
\(^{94}\) Materials from this study are available at http://www.scribd.com/collections/4297029/Watching-the-Watchdog-Media-M
\(^{95}\) Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 47, Masjaliza Binti Hamzah
As a specific example, Nurul Izzah Anwar\textsuperscript{96}, re-elected MP for PKR, showed the Tribunal a clipping of a newspaper belonging to BN. It alleged that if she won the election, the changes in Malaysia would be like those brought by the Khmer Rouge and included a picture of a skeleton in the killing fields of Cambodia.

\textbf{Findings and observations on the media}

1. In modern society, the media are a crucial part of democracy. The people depend heavily for their information about parties, candidates and their policies on the media. And normally the mainstream media, state owned or private, are thought to be the most reliable sources. It is a grave dereliction of professional obligations not to provide that information in a reasonably balanced and honest way.

2. The Tribunal concludes, however, that Malaysian mainstream print and electronic media are clearly biased against opposition parties, with BN portrayed in positive terms and opposition parties negatively.

3. Interestingly, the very fact that the mainstream media largely ignored the People’s Tribunal hearing, which was covered quite widely by online media, corroborates this finding.

\textbf{Safe custody of electoral materials and reliable counting procedures}

State authorities should ensure that the ballot is conducted so as to avoid fraud or other illegality, that the security and the integrity of the process is maintained, and that ballot counting is undertaken by trained personnel, subject to monitoring and/or impartial verification.

IPU Standard 4(6)

In terms of custody of ballot boxes, serious failings were reported by a number of witnesses in connection with boxes of advance ballot papers.

Advance voting took place days before the main polling day. Although the boxes are supposed to be kept in the custody of the returning officer, or in accordance with arrangements made by the EC, it was suggested that no such alternative arrangements had been made. In fact, many boxes were kept in the local police lock-up. But candidates were unable to check on their security - as testified by Hajah Fuziah Saleh\textsuperscript{97}.

Security is clearly a problem and police stations might seem an obvious solution. But there is evidence that the boxes were in some instances not really secure. Abu Husin bin Tamby\textsuperscript{98}, representative for a PKR candidate, testified that he escorted advance ballot boxes to a police station where they would be kept until polling day. He told the Tribunal that he saw a pile of loose papers on the floor in the lock-up and people wearing EC shirts counting them. He then

\textsuperscript{96} Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 3, Nurul Izzah binti Anwar
\textsuperscript{97} Testimony of YB Fuziah Salleh
\textsuperscript{98} Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 44, Mohd Azri Bin Mohamad Ghazali
made a police report and requested to see CCTV of the incident but police refused and there was no further response.

Vasantha Kumar A/L Krishnan, the Parti Keadilan Rakyat’s candidate for Tapah, testified that he saw SPR officers removing boxes from lock-up where advance ballot boxes were kept. He saw yellow bags that were kept in the lock-up were no longer in the lock-up when the boxes were taken out. The witness described suspicious bags that he saw at tallying centre as follows: (a) bags of ballot papers on top of sealed yellow bags with ballot boxes inside, (b) there was a black bag labelled “Kerajaan Malaysia” on top of one yellow bag, (c) mixed up votes: pink bag for state ballots in Parliament box, and (d) two yellow bags with numbers but no ballot boxes inside. When the boxes are delivered, each box and bag has a number.

The witness also told the Tribunal that he saw some ballot boxes from Chendriang arriving extremely late – at about 10pm, despite the fact that it is only 15 minutes away and counting had finished at 6pm. The EC refused to entertain any complaint.

Nurul Izzah Anwar, PKR MP for Lembah Pantai, gave the following testimony to the People’s Tribunal: advance voting ballot boxes were moved without her observers being present. Boxes were kept in the police station. Her agents requested to spend the night to monitor the boxes but were denied the right as the police station is a restricted area. She convinced the Tribunal that if the right to monitor is given, tampering after their removal can be prevented.

Mohd Azlee Hussein, PKR election director in Batu for Tian Chua, told the Tribunal that during the counting, he waited for the results from 8pm until 3am. Some presiding officers placed Forms 14 into the ballot boxes by mistake, instead of keeping a copy. They had to ask 5 agents of the candidate to come and monitor the reopening of 18 ballot boxes to retrieve the Form 14s. The witness commented that the presiding officers were poorly trained.

Rejecting votes
Mr. Wong Piang Yow commented that the Regulations give too much power to the election officer on this matter. Reg. 25(7), while specifying the kind of ballot paper the presiding officer shall reject, contains a proviso that would enable him to declare an invalid ballot paper valid if the absence of stamp was due to an act or omission by him or a person acting under his authority. Hence some officers would declare an unstamped ballot paper valid, while others would declare it invalid. Under Reg. 25(8), if the mark made by a voter on a ballot paper clearly indicates the intention of the voter, even if not in the right pace of form, to the satisfaction of the presiding officer he or she may accept the paper. The decision of the presiding officer under these Regulations is final.

Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 54, Vasanthakumar a/l Krishnan
Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 55, Nurul Izzan Binti Anwar
Appendix A: People’s Tribunal on GE13 Evidence. Written Statement of Azli bin Hussein
Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 31, Wong Piang Yow
However, it should be noted that Regulation 25(9) requires that the presiding officer show the ballot paper to each candidate and agent and listen to their views before deciding. It is not easy to see how the Regulation could be improved. Inevitably the presiding officer must be trusted to make various important decisions. The issue must be whether the presiding officers are in fact carrying out their trust with the appropriate care and integrity. The decision of the presiding officer cannot be questioned in an election petition (s. 41 of the Election Offences Act).

The adding process
Once votes have been counted at the polling station, the totals from all the polling stations have to be added up to get the total for the constituency. These totals are entered into forms 13 (recording numbers of ballot papers issued, spoiled and not used) and 14 (recording total counted at counting station). There was evidence about counting not “adding up”. Dr Hj Dzulkefly bin Ahmad testified that the SPR score sheet showed the total number of reported spoilt votes was 934 and lost votes were 118. But his team discovered that there were 1,605 missing votes, “meaning that that the ballot papers were issued to voters but were not placed into the ballot boxes”.

One member of Tribunal suggested that the form should not be signed off if the numbers do not add up. The agents for candidates should protest on the spot and refuse to sign. However it is pointed out by Lead Counsel that the EC Officer is the only one to confirm the statement that the numbers recorded are accurate signing off on the form. The polling agents who signed below do not confirm the accuracy of the number. And if the polling agents never signed off, the form 14s could very easily be exchanged. Members of the Tribunal suggested that in view of manifest errors, there should at the very least be an inquiry.

Witness Lim Chye Seng testified that his persistent objections that the votes did not tally were not entertained by the KTM (Ketua Tempat Menguandi). Dato Abdul Halim bin Hussain, the PKR candidate, confirmed Witness Lee Chye Seng’s account; he elaborated in great detail the mistakes in Forms 13 and the discrepancies between Forms 13 and 14 which in effect meant that the number of votes exceeded the number of issued ballot papers.

Witness Dr Hj Dzulkefly bin Ahmad, the candidate of the Pan-Malaysian Islamic Party (PAS) for parliamentary seat of Kuala Selangor (P096) attested to various infractions in the handling of Form 14s by the Heads of Polling Station (Ketua Tempat Mengundi or KTMs): “I found that there were various discrepancies in the total number of ballot papers as stated in the Forms 14 that were not corrected or rectified by the respective Heads of the Polling Centre. The falsification went completely unimpeded especially considering that it was

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103 Appendix A: People’s Tribunal on GE13 Evidence. Signed Statement 69, Dr Haji Dzulkefli Bin Ahmed
104 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 60, Lim Chye Seng
105 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 45, Dato’ Abdul Halim bin Hussain
106 Appendix A: People’s Tribunal on GE13 Evidence. Signed Statement 69, Dr Haji Dzulkefli Bin Ahmed
obviously apparent that the Forms 14 showed figures that were wrong or did not tally with the total which should have been calculated…”

Other witnesses who testified to discrepancies in the forms were Supaya a/l Subramaniam, Dato Abd Halim Hassan and Annamalai a/l Arumagam.

**Openness**
The vote cast by a voter must be secret, and a certain framework of management is essential to ensure this. The security of the elections materials at all times is also essential but openness to scrutiny by candidates and their agents and the public is also important.

Witness Wong Piang Yow contended that the legal framework as it relates to the conduct of elections grants excessive discretionary power to Election Officers, including that under C/E Regulation 25, an election officer could exclude a counting agent during the counting of votes. However, that Regulation does not seem to confer a discretion expressly; it says that no more than one counting agent of any candidate is to be present. It does not however, state clearly that there is a *right* to be have one’s agent present.

Witness Lim Chye Seng, the PACA for Abdul Halim bin Hussain, the Party Keadilan candidate for the state constituency N40 Telok Bahang in Penang testified that when he asked to be present at the counting of votes he was refused on the ground that there was already one PACA from PKR. Despite arguing that there were two PACAs from BN who were present, he was still escorted out of the premises by four armed policemen. In this case an officer of the Election Commission intervened and instructed the KTM to allow him to enter the counting venue. Regulation 25 states that there must be only one agent per candidate present.

**Findings and observations on counting related matters**
1. Here again, perfection is not possible, but a very high standard is rightly expected. Procedures exist, and if they are followed carefully errors ought to be few.
2. But the Tribunal heard sufficient evidence to indicate that after being cast, votes are not necessarily either stored or counted with adequate care.
3. There were a number of witnesses who stated that they or their agents were unable reasonably to observe stages of the process after the actual vote.

**Is there reason to believe the issues identified affected the results?**
Errors, deliberate or otherwise, are regrettable. Like the administration of justice, perceptions are crucial – justice must not only be done but must be seen to be done, and if it seems not to
be done the damage is almost complete. But it also matters whether the errors actually have an impact on the results.

Mr Wong’s Statutory Declaration referred to work of Dr Adam Carr, who points out that “the outcome of GE13 resulted in the ruling Barisan Nasional (BN) coalition polling 5,237,699 votes, or 47.4% of the vote. The opposition People’s Pact (PR) coalition polling 5,623,984 votes or 50.9% of the vote. Yet the BN won the election in terms of seats; and not by a whisker, but with the comfortable margin of 133 seats to 89. The PR increased their vote by 2.9% while the BN vote fell by 3.9%, yet the PR made a net gain of only 7 seats”.  

According to Dr Carr, the gross malapportionment of constituencies explains this outcome. Doubt over the validity of postal and advance votes is also of great significance. Although the number of advance and postal voters was small – only about 2 percent of the total number of registered voters – their placement in strategic constituencies can be of vital importance in determining who wins. There were at least 30 parliamentary seats where the contest was very close and where these votes could have influenced the outcome. According to the Merdeka Centre, BN would have lost the election without postal or advance votes. “These votes alone gave BN victory in 22 parliamentary constituencies”.  

In 10 seats the total number of postal voters alone (excluding early voters) was over 100% of the electoral majority. For example, in Lembah Pantai there was only over 100 names on the list but 645 voters actually voted through this process.

Witness Lee Wee Tak, suggested that if the electoral roll had been “cleaned up”, there would have been different overall outcomes in Perak and Negri Sembilan.

In individual races, Dr Hj Dzulkefly bin Ahmad said his team discovered that there were 1,605 missing votes (above). He lost to the BN candidate by a majority of 460 votes. He is convinced that the number of missing ballot papers could have influenced the result.

YB Fuziah Salleh, PKR MP for Kuantan, said the results announced showed that she achieved hardly 5-10% of the advance voting; which she could not believe this as she had better results in 2008. The messages of support she received from advance voters were more than those eventually revealed during counting.

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114 Appendix A: People’s Tribunal on GE13 Evidence. Oral Testimony of Nurul Izzah Anwar

115 Bridget Welsh. Statistical Anomalies in Malaysia’s GE13 Results: A Preliminary Review

116 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 30, Lee Wee Tak.

117 Appendix A: People’s Tribunal on GE13 Evidence. Signed Statement 69, Dr. Haji Dzulkefly Bin Ahmed.
The significance of these various failings in terms of the legitimacy of the elections is discussed later.

Supporting mechanisms and procedures

Independence of the Electoral Commission

*Formal structures etc. of the EC*

The role of the EMB is key. The Constitution provides

> The Election Commission shall be appointed by the Yang di-Pertuan Agong after consultation with the Conference of Rulers, and shall consist of a chairman, a deputy chairman and five other members (Article 114(1)).

It goes on to say “(2) In appointing members of the Election Commission the Yang di-Pertuan Agong shall have regard to the importance of securing an Election Commission which enjoys public confidence”. Lead Counsel referred to the view of Andrew Harding, expert on the Constitution, who observed that this implies appointees should have no political connections – a view that to the Tribunal appears well-founded. However, there is no guarantee of how that confidence is to be achieved, especially in view of the fact that the Yang di-Pertuan Agong has to act on the “advice” – which is a polite way of saying instruction – “of the Cabinet or of a Minister acting under the general authority of the Cabinet”\(^\text{118}\). It should be noted also that the Conference of Rulers, whose views are to be sought, are themselves to act on the advice of their state Executive Council, unless their State Constitution specified otherwise.\(^\text{119}\) So there must be some doubt about the independence of mind of the EC, although the members can be dismissed only in the way and for the reasons a judge can be dismissed (clause (3), and, like judges, their remuneration must not be altered to their disadvantage after appointment (clause (6)).

*Members and staff*

The practice of appointing former civil servants to be members of the EC has been the subject of considerable public criticism. This would not be a bad thing if civil servants work in an environment where there is respect for the role of a civil service as impartial and non-partisan. But in Malaysia, there is wide-spread public perception that the civil service has been highly politicised. Even though many civil servants are not formally active in party politics, they do advise their political masters on a wide range of issues, including party matters.

The close relationship between leaders of the ruling party and Malay civil servants goes back in history when civil servants, especially members of the elite Malayan Civil Service and the Malay Administrative Service were closely allied to the United Malays National

\(^{118}\) 40. (1) In the exercise of his functions under this Constitution or federal law the Yang di-Pertuan Agong shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet, except as otherwise provided by this Constitution.

\(^{119}\) Constitution Eight Schedule s.1(1).
Organization (UMNO) the political party that dominates the ruling coalition. Indeed the early leadership of UMNO came from the civil service. Although the Constitution provides for an independent and impartial civil service, it has been not uncommon for civil servants to be actively involved in UMNO politics albeit on an informal basis. The present chairman and deputy chairman of the EC were members of UMNO when they were in the civil service on their own admission. Although they claim that they have not been active members of UMNO and did not renew their membership once they became members of the EC, their close relationship with UMNO leaders cannot be denied. Whether or not this association with UMNO has inhibited them from carrying out their constitutional duties as members of the EC is not clear.

The practice of seconding a serving civil servant to be Secretary of the EC has made it possible for the government to have close links with the EC. For example, the current Deputy Chairman of the EC was secretary to the EC while he was still a serving government officer and continued to work closely with Chief Secretary.

Most of the regular staff of the EC is also drawn from within the civil service. Article 115 of the Constitution empowers the EC to employ such number of persons it needs on such terms and conditions that the EC may, with the approval of the Yang di-Pertuan Agong (which means of the Prime Minister), determine. The practice, however, has to rely on the civil service for recruiting the regular staff. It is not known how they are selected and on what terms and conditions. They may be transferred back to the civil service at any time. As their career prospects are determined within the civil service and not in the Office of the election commission, it is not difficult to see where their loyalties lie.

In addition to the regular staff, the EC employs about 240,000 personnel as temporary election officers to carry out duties during the elections. In the past, the practice was to recruit temporary personnel from the civil service, giving them special allowances for performing election duties. In recent years, there has been a tendency to employ people from outside the civil service. It is not clear how these persons are selected and what kind of training they receive. There have been several cases where EC officers have been found to be active members of political parties, especially the ruling party. For example, in the 2013 elections it was reported that an election officer directly in charge of processing applications for registration of voters was an active UMNO member, and in one case the presiding officer was known to be an active committee member of the local branch of the Malaysian Indian Congress (MIC), a party within the ruling coalition. It seems that instead of fiercely guarding its independence by appointing its own staff, the EC has chosen to depend on the civil service, thus eroding its status as an independent body in the eyes of the general public.

The master-servant attitude that characterizes the civil service of Malaysia is transferred to the EC. Though in the past the EC maintained a strict physical separation from the government at least in its establishment, it is now under the Prime Minister’s Office in Putra Jaya.
**Modes of operation**

The recent revelation by the former Chairman of the EC that when he was chairman he conducted three re-delineation exercises that ensured that Malays (by this he means UMNO), continued to remain in power is worrying.\(^{120}\)

The lack of clear, transparent explanations on why voters are registered in some areas in such large numbers in 2013 election compared to past patterns understandably raises doubts about the integrity of the EC. Various other sections of this report indicate reluctance on the part of the EC to explain itself to the public, and the collaboration, to say the least, of the EC in excluding party agents and observers from counting stations.

The EC has appeared ambivalent about monitoring the caretaker government. It claims that the role of the caretaker government is outside its jurisdiction. It has made recommendations to the government suggesting that certain guidelines should be followed by caretaker governments at national and state levels but this has been rejected. The Parliamentary Select Committee on Elections requested the EC to prepare guidelines and a code of conduct for caretaker governments. So far this has not been done.

There was considerable evidence of unwillingness on the part of the EC to exercise powers that it clearly has. For example, Ahmad Fahmi\(^{121}\) complained that posters had been put up without the DBKL permission, but the EC said it was not their responsibility. Charles Santiago\(^{122}\) gave evidence that in response to his question, the EC claimed it could not strike out names of those registered fraudulently because the law does not allow change to the electoral roll. Although he won the election, the witness questioned the registration irregularities because he just wanted a free and fair election.

**Findings and Observations on the Electoral Commission**

1. The EMB is at the heart of an election system. Courts can handle only a small number of cases. The real first line of defence against malpractice is the Commission. Like the judiciary, the Commission must be independent and be seen to be independent.
2. The Constitution and the law do not adequately guarantee that independence, and that is further undermined by the practice of filling it with current and retired public servants, all, necessarily, having served the particular party that forms government. This makes it hard to escape a conclusion that Suruhanjaya Pilihan Raya (SPR) or EC Malaysian was designed as the instrument of the ruling party to help keep it in power.
3. The conclusion seems inescapable that radical change in the EC is essential if faith in Malaysian elections is to be restored.


\(^{121}\) Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 24, Ahmad Fahmi bin Mohamed Fadzil

\(^{122}\) Appendix A: People’s Tribunal on GE13 Evidence Statutory Declaration 34, Charles Santiago
4. A revamped EC must put in place effective measures to monitor its own staff, who can be subject to pressures and temptations.

**Role of the police and public servants**

The police play a most important role at elections time, but there was a good deal of evidence before the Tribunal that the police did not always play a positive role.

The whole issue of the custody of advance ballot boxes is of concern: they were not always kept securely, and the police do not seem to have internalised the importance of their role in the democratic process in terms of working with the candidates and their agents to monitor the safe custody of the boxes.

YB Fuziah Salleh told the Tribunal that her polling agents were stopped by the police from accompanying the advance voting ballot boxes to the cells (restricted areas) contrary to what was agreed to by the EC Chief. She testified that she received a tip-off that ballot boxes were going to be exchanged, that the EC would open the cell, take out the ballot papers and indelible ink and thus making the boxes vulnerable. She described to the Tribunal how she went around 7pm - 8pm and insisted on escorting the boxes as she has every right being a candidate. Police on duty blocked her. She then stopped the EC officers and insisted the EC should not go in without her. The OCPD came and told her she could not go in. She then requested for CCTV recording in the cell but was told they were all not working. OCPD then shouted at her and they blocked her with rifles and ushered the officers into the cell. She ended her testimony with this statement; if she had not stopped they would have used force.

According to the SD of Vasantha Kumar\textsuperscript{123}, when he asked about suspicious ballot boxes “Federal Unit Officers were brought in…. all armed with guns and batons … and…we were chased out from the hall”, while BN candidates remained inside the hall. The witness was allowed to enter the tallying centre at 1am when the announcement made. It means that counting and tallying of votes were done without him or his agents presented.

Chiefs and other public agencies were also shown in the evidence to have sometimes shown excessive deference to the ruling party and its interests.

**Findings and observations on police and administrators**

These important aspects of the governmental system do not appear always to have fully internalised the nature of the roles they are to play in connection with elections. The evidence suggests a culture of party subservience that is at odds with the ideals of a democratic system.

**Independent observers of the process**

Citizen group initiatives and domestic and international observer groups can be important factors in reinforcing an EMB’s work. This is especially true in the case of Malaysia where, over many years of uninterrupted rule, the incumbent party has been able to construct an

\textsuperscript{123} Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 54, Vasanthakumar a// Krishnan
electoral system in its favour. Had the EC been able to establish close relations with other stakeholders, it could have maintained some independence from improper influence. However, it has not taken advantage of other political actors who may be its allies in bringing about electoral reforms. One accredited observer group commented that “The lack of a coherent stakeholder engagement strategy has resulted in a significant proportion of the public distrusting the EC despite the many initiatives that it has undertaken”.  

Although there were groups in the country with experience in observing elections in the past, the EC chose to ignore them on the grounds that they were closely linked to the opposition parties and therefore would provide biased reporting. By their own admission, the organizations selected lacked the expertise or the experience to carry out the task. The EC also set down terms and conditions which severely restricted the scope of these groups’ work.

GE13 was eventually observed by six accredited election observers: namely IDEAS (Institute for Democracy and Economic Affairs), CPPS (Centre for Public Policy Studies), CPPS, Merdeka Centre, MBW (Malaysian Youth Council), and Malaysian Confederation for Disabled (MCD). IDEAS and CPPS decided to work together as a team and to write one report on election observation.

According to one accredited group, some stages of the electoral process were considered to be out of bounds. This organization was unable to observe the postal voting process and not able to observe the transporting and storage of the ballot boxes containing the advance ballots in the police lock-ups. They were also not given access to the polling stations to observe the polling and could not choose where to observe the counting process. In addition, each organization could not place more than 3 observers in one parliamentary constituency. Limiting the personnel to 3 for each constituency was meaningless. It was estimated that in order to cover 10% of the electorate on average, one would need to have at least 15 observers.

Pemantau observers reported being harassed by both party supporters and the police, even sometimes physically. On polling day itself they had such experiences in 21 of the 87 constituencies where they observed.

Another accredited election watch group commented that the terms and conditions set by the EC were arbitrary instead of being benchmarked against international standards of

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125 See preceding footnote.
128 P. 46.
democratic elections. Their observers were denied entry into polling centres in Machang, Kangar, Lembah Pantai, Bukit Katil, Batu and Segambut.129

Although there were some international observers allowed to observe the 2013 elections, no report of foreign observers has been made public.

Findings and Observations on Election Observers
Election observers, national and international, have become established as a means of monitoring election practices, strengthening public faith in the system. A country that tries to shackle them does itself no service. There is no basis for viewing foreign observer teams as some sort of colonial conspiracy.

While foreign observers contribute to be an international focus on the elections, it is often the case that the local groups understand the issues better, and they will almost certainly be able to cover more ground, and do so over a longer period.

The evidence suggests that the government could have strengthened the local observations by choosing some other groups, though groups that were involved in GE13 seem to have done admirable work.

Dealing with Election Disputes
If the electoral law provisions are to be more than just words on a page, failure to comply with the electoral law must be open to challenge before an appeal body. This applies in particular to the election results: individual citizens may challenge them on the grounds of irregularities in the voting procedures. It also applies to decisions taken before the elections, especially in connection with the right to vote, electoral registers and standing for election, the validity of candidatures, compliance with the rules governing the electoral campaign and access to the media or to party funding.

European Commission for Democracy Through Law (Venice Commission) Code of Good Practice In Electoral Matters

Here the issue is the role and effectiveness of the courts. The Tribunal heard evidence of two types of electoral dispute related to GE 13, first, disputes with respect to the electoral rolls to be used, and, secondly, provided for and governed by Elections Act 1958, a dispute challenging with the election result as a result of breaches of the electoral laws by way of an election petition.

Challenge to the Electoral Roll
Only one of the first types was received in evidence – from Witness Charles Anthony Santiago130, the current Member of Parliament for Klang (P110) in Selangor. He was first

elected to the seat in 2008 and was re-elected at GE 13 – for the Democratic Action Party (“DAP”). He explained that early in 2012, in preparation for GE 13, he instructed his party volunteers to conduct a review of the Principal Electoral Roll and the Supplementary Electoral Roll up to 4th Quarter 2012 and this revealed several irregularities and errors (see above). When he raised the issue in Parliament the EC Chairman requested that he writes to the EC.

Though the EC had attempted to provide an explanation for the registration of the 60 people at the same address, their representatives at a briefing organised by the EC had admitted the irregularities but claimed they were not empowered to strike out the names of the affected electors from the Electoral roll.

When he did not receive any reply to his letter of 21.12.2012 he filed his application on 21.2.2013, and received an unconvincing reply. So he applied for leave to bring judicial review proceedings. On 14.3.2013, Justice Vernon Ong Lam Kiat dismissed the application for leave with no order as to costs which mean the substantive and specific issues regarding the irregularities will not be looked into. The judge took the view that once the electoral roll has been gazetted, Section 9A of the Elections Act 1958 barred the court from questioning or reviewing it – the electoral roll is final and cannot be questioned in any court.

A Notice of Appeal was filed on 18.3.2013 and remains to be heard by the Court of Appeal.

Lead Counsel to the Tribunal argued that the response of the Malaysian courts to this issue has been disappointing: the courts have accepted, apparently readily, that their jurisdiction is ousted by s. 9A, contrasting it with Indian cases, including Chief Commissioner, Ajmer vs Radhey Shyam Dani 1957 AIR 304, 1957 SCR 68 where the Supreme Court said “Suffice it to say that the electoral roll …was not in conformity with the provisions of s. 30, sub-s. (2), and the relevant provisions of the Regulation and could not form the basis of any valid elections to be held to the Ajmer Municipal Committee.” The Court was able to say that since procedures that should be in existence to enable citizens to check the accuracy of the roll had not been followed, there was no roll that attracted the protection of the provision about it being impossible to challenge the roll:

…opportunity should be given to the parties concerned to scrutinize whether the persons enrolled as electors possessed the requisite qualifications. Opportunity should also be given for the revision of the electoral roll and for the adjudication of claims to be enrolled therein and entertaining objections to such enrolment. Unless this is done, the entire obligation cast upon the authorities holding the elections is not discharged and the elections held on such imperfect electoral rolls would acquire no validity and would be liable to be challenged at the instance of the parties concerned.

Appendix A: People’s Tribunal on GE13 Evidence Statutory Declaration 34, Charles Santiago

See also Mohamad Samusi Md. Nor Iwn. Mohd Tajuddin Abdullah & Yang Lain [2009] 1 CLJ 1 holding that review of the gazetted list was impossible under s.9A
As member of the Panel observed during the Tribunal hearing, the problem in Malaysia lies with the regulations.

The Malaysian s.9A is very clear, and emphatic in its language: the electoral roll shall be deemed to be final and binding and shall not be questioned or appealed against in, or reviewed, quashed or set aside in any court.” And the Constitution of Malaysia does not recognise any right to a trial before an independent court or tribunal for civil disputes, a right that could be used to challenge the legislation.

**Election petitions**

An election petition is a court challenge to the result after the election. The Malaysian system manages to deal with these with commendable speed.

**The law**

Part VII of the Election Offences Act 1958, sections 33 to 42, provide for the appointment and powers of an Election Judge (usually a High Court Judge), to whom one may present a petition, the relief that may be claimed, the time for presentation of petition (within 21 days of the election result being gazetted unless grounded on a corrupt practice and specifically alleging a payment of money in which case 28 days after date of such payment); the time for completion of trial (not less than six months from the date of the presentation) and the time for appeal (within 14 days of date of decision of Election Judge). The Election Petition Rules are appended to the Act.

The grounds for challenge are set out in Article 32 of the Elections Offences Act 1958:

The Election of a candidate is to be declared void “on any of the following grounds only….”

(a) that general bribery, general treating or general intimidation have so extensively prevailed that they may be reasonably supposed to have affected the result of the elections;

(b) non-compliance with the provisions of any written law relating to the conduct of any election if it appears that the election was not conducted in accordance with the principles laid down in such written law and that such non-compliance affected the result of the election;

(c) that a corrupt practice or illegal practice was committed in connection with the election by the candidate or with his knowledge or consent, or by any agent of the candidate;

(d) that the candidate personally engaged a person as his election agent or as a canvasser or agent, knowing that such person had within seven years previous to such engagement been convicted or found guilty of a corrupt practice by a Sessions Court or by the report of an Election Judge; or

(e) that the candidate was at the time of his election disqualified for elections.

In short: the election of a person must be set aside in those circumstances and in no others. If there was a violation of the law that affected the results of the election, it must be set aside. If the candidate was personally guilty of corruption of illegal practice, it must be set aside. So it
must be if the person committing the act is his/her agent; and if neither actually committed the act but the candidate consented to it – or even knew of it. The last is pretty tough and proving knowledge may be hard. The provision about the agent (d) is interesting, because there is no requirement that the result be affected. Para (e) is essential: if the person ought not to have been a candidate he or she cannot be validly elected. Para (a) is also interesting: it makes it possible for the court to set aside the election even if it was not proved to have been affected by the illegality, provided the illegality was bribery, treating or intimidation and the court thinks that the reasonable conclusion is that it was so extensive that it must have affected the result.

Sub-sub-section (b) has a history. It seems to derive from the English Ballot Act 1872 which read:

> No election shall be declared invalid by reason of a non-compliance with the rules contained in Schedule 1 to this Act, or any mistake in the use of the forms in Schedule 2 to this Act, if it appears to the tribunal having cognizance of the question that the election was conducted in accordance with the principles laid down in the body of this Act, and that such non-compliance or mistake did not affect the result of the election.

That provision required that the election could not be declared void if both the conditions (emboldened) applied. And the English Court of Appeal held that this should be read as requiring that if this provision did not apply the election must be declared void (Morgan v Simpson [1975] Q.B. 15, [1974] 3 All ER 722). In other words, if the election was not conducted in accordance with the principles laid down in the body of the Act, it was to be declared void, even if the result was not shown to be affected.

The Malaysian Act changes this to provide that even if the Act was not complied with (and the “principles of the Act”, not just details) the election remains valid unless it can be proved that the result was affected. Unlike when corruption etc. has occurred, it is not enough that it can be reasonably supposed to have affected the result of the elections. The burden is heavy on the petitioner. The Federal Court held that the English Morgan v Simpson case was not relevant, in Dato’ Ismail Kamus v Pegawai Pengurus Pilihanraya (Zainal Abidin Azim) & Ors [2005] 2 CLJ 237.

The effect of other provisions of the law is that various potential factors that may affect the outcome of the election cannot be challenged at all in court, for example: that significant numbers of those on the roll were not entitled to be there (explicitly excluded as we have seen), and that the returning or presiding officer wrongly excluded ballot papers (excluded by s. 41 EOA).

**GE13 Petitions**

The Tribunal was provided with copies of 26 Election Petitions filed, 25 for parliamentary constituencies and 1 for a state constituency. Of the 26, 20 were filed by PKR candidates, 3 by BN candidates and 3 by individual voters. In all cases the Election Petition would name
the winning candidate as 1st Respondent, the Returning Officer of the Parliamentary constituency as 2nd Respondent and the Election Commission as 3rd Respondent.

The following are a sample of the Election Petitions filed together with their grounds for petitioning the Court to declare the result void:

1. Vasantha Kumar a/l Krishnan, Tapah Parliamentary constituency (Perak), on grounds
   a. failures to observe the procedures with respect to postal voting;
   b. doubts and discrepancies arising from postal voting, advance voting, and Forms 13 and 14;
   c. the KTM of Saluran 3 Sekolah Kebangsaan Satu Jalur Hospital holding position of Head of Women of MIC (a component party of Barisan Nasional);
   d. Fraud of the 2nd and 3rd Respondent in not using the proper indelible ink;
   e. Breach of Section 10 of the Election Offences Act 1954 viz. bribery from Nomination Day (20 April 2013) to Polling Day (5 May 2013);

2. Ab Aziz bin Ab Kadir, Ketereh Parliamentary constituency (Kelantan), on grounds of:
   a. Doubt or discrepancies arising from Form 14 and actual number of ballot papers in ballot box;
   b. Doubt or discrepancies arising from postal vote and advance vote;
   c. Breach of Section 4(d)(offence by an election officer in wilfully preventing any person from voting at the polling station) and 32(b) of the Election Offences Act 1954;
   d. Fraud in not using the proper indelible ink.

3. Madhi Hasan, Bagan Datoh Parliamentary constituency (Perak), on ground of:
   Breach of Section 10(a) viz. bribery – giving away money and bags of rice.

4. Mohd Ridzuan bin Asit, a voter who was registered and had voted in State constituency of Lubok Merbau (Perak), on grounds of;
   a. Breach of Section 10 (a)(bribery) and Section 11(b)(treating, undue influence or bribery of Election Offences Act 1954;
   b. Failure to observe Section 4 and 5(1)(a) of Election Act 1958;
   c. Failure to observe Rule 15(4) of the Elections (Conduct of Elections) Act 1981 (Not more than one polling agent of each candidate shall be admitted at a time to any polling station whilst the poll is open);
   d. Failure to observe Rules 24 (Procedure on close of poll), 24A (Fresh poll at polling station in the case of unlawful removal, loss, destruction etc., of any ballot box; 25 (counting of votes by presiding officer), 25A (safe custody of election documents) and 25D(proceedings of returning officer after return of ballot boxes and official addition of votes.

As may be seen from the above 4 samples and gleaned from all the other Election Petitions filed all the petitions fall under Article 32(a)(b) and or (c) of the Election Offences Act 1954.
Dismissal on the basis of technicalities

Among the reasons why the system is able to deal rapidly with cases is the fact that, as at the conclusion of the Tribunal’s hearing on 22nd September 2013, almost all the Election Petitions, including the 4 examples above had been dismissed on technical grounds.

Taking the view that “strict compliance with the provisions of the Election Offences Act 1954, the Election Petition Rules 1954 and the Election (Conduct of Elections) Regulations” was necessary to avoid “opening the floodgates”, to quote from one of the written judgments, preliminary objections were sustained to dismiss the Petitions on such grounds as:

a. an advocate and solicitor appointed by a Petitioner under Rule 9 of the Election Petition Rules, may not appoint another to act; an advocate appointed by the authorized advocate to argue the matter would not have locus resulting in the Petitioner being without an advocate to respond to the preliminary objection.

b. The Petition is defective in that the Petition and the notice of presentation of Petition were filed and served by a law firm … and not by an advocate and solicitor authorized by the petitioner, having regard to Rule 9 read with Rule 34” notwithstanding that the advocate and solicitor authorized is a partner of the firm;

c. Petition must be served by Petitioner personally or by the duly authorized advocate and solicitor and not by a clerk of the law firm;

d. Petition not served on a Respondent personally

e. Failure to plead specific sub-section of Section 32 of the Election Offences Act;

f. Failure to state not only the facts but also the grounds relied on in support of the complaints or alleged breaches.

Not every judge takes such a narrow view of procedural issues. In Andipai v Tan Sri Joseph Kurup and the Returning Officer, Bubudan Ot Majalu Election Petition No. K26-02 of 2008, Justice Ya Tuan David Wong Dak Wah quoted an earlier court itself quoting, the Federal Court in Tan Chwee Geok & Anor v. Khaw Yen-Yen & Anor [1975] 2 MLJ 188 at p. 189 said:

10. The Rules of the Supreme Court are intended to facilitate, not impede, the administration of civil justice.

In the bad old days in England from where we took our Rules, if you put a comma wrong you were thrown out of court, so strict were they about technicalities.

15. But over the years this strictness gave way to common sense, and every time the Rules were amended it was with the object of removing fussy technicalities, and making it easier for parties to get justice.

And he held that the test of the petition was “Whether, after reading the petition in its totality, the Respondents as reasonable people understand the complaints made by the Petitioner and whether the complaints give rise to a cause of action?” in election petition cases not less than in other civil cases.
**Award of costs against petitioners**

In our judgment, public law principles for the award of costs are an appropriate guideline in the case of a legitimate and serious challenge to a ballot paper that was decisive of the outcome of an election. There is an important public interest in clarifying the legitimacy of the ballot and the vote on which the disputed paper depends. It would be contrary to the public interest to deter such scrutiny because of the disproportionate consequences in costs for any unsuccessful petitioner.

*Pilling and others v Reynolds* [2008] EWHC 316 (QB)

Petitioners in election cases have to deposit security for costs of at least RM10,000. The dismissals of the Election Petitions on preliminary objections based on technical grounds were invariably followed by the awarding of costs to the three respondents. With a few exceptions the costs that the losing Petitioner had to pay totalled not less than RM50,000 with at least RM30,000 awarded to the 1st respondent and the balance shared between the 2nd and 3rd Respondents. According to Witness Akmar Nasrullah who was part of a team set up by Parti Keadilan Rakyat (PKR) to receive and investigate complaints on electoral fraud, the 20 election petitions filed by the PKR, save one which was still being heard, resulted in total costs of about RM1,000,000 being awarded against the PKR.

Costs in the Election Petition by the losing Barisan Nasional candidate for the Lembah Pantai parliamentary constituency took a different course. The Petitioner withdrew charges against the 3rd Respondent before the preliminary objection was heard so no cost was awarded against the Petitioner. The remaining 2nd Respondent was awarded cost but graciously and generously it would appear, waived his right to it. So the Petitioner only had to pay the 1st Respondent RM40,000 costs.

The losing DAP candidate for the Cameron Highlands parliamentary seat was not so fortunate. Before hearing of the preliminary objection, he withdrew charges against the 3rd Respondent on tactical grounds. In spite of doing so, when his petition was dismissed because he pleaded insufficient facts, he had to pay costs of RM40,000 to the 1st Respondent, RM5,000 to the 2nd Respondent, and to his surprise, RM5000 to the 3rd Respondent.

Given the provisions for filing an Election Petition and given the period stipulated for completion of trial of an election petition, it cannot be denied that all the Election Petitions filed in relation to GE 13 were disposed of in a timely manner. Since they were not disposed on the merits it is arguable whether they may be said to have been justly considered. As a matter of principle an Election Court should be slow to dismiss an Election Petition on technical grounds that are purely procedural such as the filing, appointment and authorization of advocate and solicitor and the serving of a petition unless it is fundamentally prejudicial to the Respondents – to dismiss on the basis of some of the technical grounds cited above, does

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132 Appendix A: People’s Tribunal on GE13 Evidence. Statutory Declaration 27, Akmal Nasrullah bin Mohd Nasir
not help the Election Court’s reputation as a place where justice can be sought. If an Election Court is to be guardian of the legal framework of the electoral process, an Election Petition should be disposed of on the merits after a full trial and witnesses have been heard.

(As a footnote, the newspapers of 24 December 2013 carried reports that the Federal Court had granted the appeals of the 4 Election Petitions referred to above and remitted the Petitions to the Election Court to hear the Petitions on their merits. 4 other appeals were dismissed. The written judgment of the Federal Court will no doubt throw some light on what technical grounds are sustainable. The media reported the presiding judge, Tan Sri Raus Sharif, as saying of the decision, "The petitioner does not have to physically file the petition himself".133)

Findings and Observations on Dispute Resolution through the Courts

1. Over the years the law has been changed to limit the scope of dispute resolution in elections cases through the courts. It is particularly regrettable that the roll can no longer be challenged after it has been gazetted.

2. Without a detailed reading of the individual cases it is not easy to see how far judges have been excessively technical in their judgments in election petition cases.

3. Awards of costs should not be used in a way that acts as a major deterrent to bringing elections petitions.

Findings

Below is a list of specific findings drawing from the earlier sections of the Report. Following that list the Panel draws some broad conclusions. The following section of this Part makes various concrete recommendations.

The right to vote

1. It is regrettable that the Constitution does not include a clear statement of the right to vote, as a human right.

2. Any right to vote conferred by law should not discriminate, depending on factors such as where they live.

3. Discrimination on the basis of how long they have lived abroad may be permissible.

4. It is particularly regrettable that prisoners on parole are not able to vote: parole is intended to be a way of reintroducing offenders to normal life. The Tribunal is glad to know that the government is considering the position of prisoners as voters.

5. It is perhaps surprising that Malaysia retains a voting age of 21.

Registration

6. It is hard to see how someone who did not apply could be registered by accident, and the Tribunal must conclude that this was the result of some deliberate act of fraud, though on whose part precisely is not clear. However, since no one is supposed to register without showing identification, it is hard to believe that there was no collusion on the part of EC staff.

7. Some of the evidence about “foreigners” voting was somewhat speculative (people who “appeared” to be foreign), which would not satisfy burdens of proof required in a court, and it is hard to draw any firm conclusion about this.

8. Registering one or two people in the wrong constituency might be carelessness; registering those who have not sought registration is suspicious. Registering a large number of people wrongly looks very much like fraud.

9. Overall there is strong evidence of various inaccuracies on a scale so great in GE13 that there is reason to suppose that this is designed to set the scene for fraud.

Voting

10. There was considerable evidence of at least sloppiness in ensuring that those who voted were entitled to do so in some polling stations or streams.

11. The Tribunal takes the view that advance voting was indeed used excessively in this election (though some countries permit it to anyone who chooses to do so). Anyone who would be away on the polling date should have the right to advance voting. But this right should not be extended on the grounds of profession (such police, army, voting officials, postal officials).

12. There is distressingly strong evidence that the procedures for postal and advance voting were not properly applied.

13. Evidence in connection with the supposedly indelible ink was strong; and hard to explain away. This is technology used now in many countries and it should have been perfectly possible for the EC to acquire ink that worked as well as everywhere else.

Boundaries

14. The first past the post electoral systems depends heavily for its integrity on the issue of the constituency boundaries. Firstly the individual voters will not be equally represented if they are in constituencies with significantly different numbers of voters, and secondly the actual outcome of overall results can be severely affected by moving boundaries: the process known as gerrymandering.

15. The law, in fact the Constitution, of Malaysia is rather weak in the ways it deals with both these issues, but the way in which it has been applied is the greater problem. It is hard to see how having one constituency 9 times the size of another in terms of electorate can be described as “approximately equal”. The EC failed to implement the principle of equal representation in apportionment and districting.

16. There is some rationality to allowing rural constituencies that are sparsely populated to have fewer voters, in order to ensure that the MP does not have an impossibly large area to cover. But it does subordinate the equality of the vote to administrative
convenience and representation. There is no justification for giving more urban areas greater representation – by means of making voter numbers smaller.

17. Unfortunately there is considerable evidence that these anomalies work in one direction only: to the benefit of the ruling coalition.

**Organising and campaigning**

18. There is some reason to believe that the Registrar of Societies is not even-handed in treatment of government and opposition parties.
19. Unfortunately there was significant evidence that parties and candidates were not always free to campaign, that intimidation was found in some places, and that this was sometimes supported by official sources. The victims were mostly opposition candidates.
20. This evidence indicates not so much that the law restricts freedom to campaign, but parties, supporters and even officialdom obstruct the exercise of the freedom.
21. Freedom of speech is good, but there are good reasons for some degrees of restraint and even control during elections periods.
22. There is strong evidence that some parties seriously overstepped the mark in terms of their “campaign strategies”, behaviour that can be not just unfair but dangerous in a potentially volatile situation.
23. The law relating to stirring up hatred seems to be largely not enforced at this time.
24. The same can be said of restrictions on campaigning in terms of time and place. The main offenders seem to be BN parties.

**Bribery treating and undue influence**

25. There is very considerable evidence that bribery is a common practice in parts of the country. Notably many of the witnesses were either Orang Asli themselves or had seen others offering bribes of various types in Orang Asli communities.
26. It is also notable that most of the evidence was of measures intended to benefit BN candidates.
27. And the evidence points in the direction of not only candidates but government officers, such as chiefs, playing a part in this debasement of the electoral process.

**Skewed playing field**

28. Governments want to win elections by showing the electorate that they have and will benefit from re-electing them. But the inducement should be the adoption of policies that benefit the people, not the use of government resources in ways that discriminate unfairly, and is little different from a bribe. Unfortunately there was convincing evidence that the latter was happening. This was often in the same areas where outright bribes were being given (see previous section).
29. This is not only unfair but is taking advantage of the more vulnerable sections of society.
30. The brazen use of government resources such as buses, of which there was also clear evidence, demonstrates an inability to distinguish between what belong to the nation and what belongs to the party.
Control of campaigning expenses
31. The current legislation promises more than it delivers, for it does not really require party expenditure to be declared. Nor does it prevent supporters from spending money lavishly.

Role of Media
32. The Tribunal concludes that Malaysian mainstream print and electronic media are clearly biased against opposition parties, with BN portrayed in positive terms and opposition parties negatively.

After the voting: Counting etc.
33. The Tribunal heard sufficient evidence to indicate that after being cast, votes were not necessarily either stored or counted with adequate care.

Transparency
34. There were a number of witnesses who stated that they or their agents were unable reasonably to observe stages of the process after the actual vote.

Electoral Commission
1. The EMB is at the heart of an election system. Courts can handle only a small number of cases. The real first line of defence against malpractice is the Commission. Like the judiciary, the Commission must be independent and be seen to be independent.
2. The Constitution and the law do not adequately guarantee that independence, and that is further undermined by the practice of filling it with current and retired public servants, all, necessarily, having served the particular party that forms government. This makes it hard to escape a conclusion that Suruhanjaya Pilihan Raya (SPR) or EC Malaysia was designed as the instrument of the ruling party to help keep it in power.
3. The conclusion seems inescapable that radical change in the EC is essential if faith in Malaysian elections is to be restored.
4. A revamped EC must put in place effective measures to monitor its own staff, who can be subject to pressures and temptations.

Police and administrators
These important aspects of the governmental system do not appear always to have fully internalised the nature of the roles they are to play in connection with elections. The evidence suggests a culture of party subservience that is at odds with the ideals of a democratic system.

Observers
1. Election observers, national and international, have become established as a means of monitoring election practices, strengthening public faith in the system. A country that tries to shackle them does itself no service. There is no basis for viewing foreign observer teams as some sort of colonial conspiracy.
2. While foreign observers contribute to an international focus on the elections, it is often the case that the local groups understand the issues better, and they will almost certainly be able to cover more ground, and do so over a longer period.

3. The evidence suggests that the government could have strengthened the local observations by choosing some other groups, though groups that were involved in GE13 seem to have done admirable work.

Disputes

1. Over the years the law has been changed to limit the scope of dispute resolution in elections cases through the courts. It is particularly regrettable that the Roll can no longer be challenged after it has been gazetted.

2. Without a detailed reading of the individual cases it is not easy to see how far judges have been excessively technical in their judgments in election petition cases.

3. Awards of costs should not be used in a way that acts as a major deterrent to bringing elections petitions.
The Tribunal’s Verdict

The Panel’s Terms of Reference require it to:

• make findings on
  o any acts in relation to GE13 that violate Malaysian law, the rule of law or international norms and standards, and
  o whether these had an impact on the outcome of the elections, and
  o whether they affected the legitimacy of the elections
• to identify any shortcomings in the formation and functioning of the EC in terms of international standards and prevent or impede a free and fair electoral process.

We summarise our findings here in relation to these terms of reference, though not in the same precise order.

Compliance with law

Bribery and treating are against the law, criminal conduct in fact. Yet the evidence is convincing of widespread violations at least in certain places.

There is violation of the Constitution’s requirements that constituencies be “approximately equal”; whatever this may mean, it cannot mean constituencies having sizes several times that of other electorates.

The basic procedures for registration and voting are all a matter of law. That law is violated when a person who is entitled and applied to be registered is denied, when someone who does not apply is registered, and when someone who is registered is assigned to the wrong constituency. All these things have happened on a large scale.

Any individual who knowingly registers or votes without being entitled to do so, or voted more than once, is guilty of a criminal offence. So is anyone who knowingly aids and abets this, whether they are EC or other official, politician or simply a busybody. Even if the Panel does not feel able to confirm that huge numbers of foreigners were registered to vote, there is significant and credible evidence of numbers of others having been able to commit such offences.

Procedures for custody of ballot boxes, including with postal or advanced votes, for counting votes and recording information on forms 13 and 14 etc. are also laid down by or under law. But those laws have been violated in various instances.

Compliance with law it not the only test of the integrity of an election. That is especially true if the law is inadequate. And the Malaysian law designed to form the framework for elections has been weakened over the years by the ruling party.
The rule of law and international standards
The focus of the broad concept of the rule of law and the more specific injunctions of international standards can be summarised in terms of equality and non-discrimination, openness, fairness including level playing field, and effective recourse and remedies.

A process like this Tribunal will inevitably attract attention from those who were disappointed by the last election and its results. This inevitably meant that more allegations would be made against the BN. The Tribunal was fully aware of this. But, even allowing for this, the uneven nature of the playing fields of Malaysian elections is glaring. The determination of boundaries is too much in the hands of the incumbent government through its control of Parliament. The registration process for parties is not sufficiently independent. The mainstream media are too closely allied to the incumbent party, thus skewing the main means of public debate. Public resources are used and abused, in campaigning. Government does not exercise restraint in terms of use and promises of resources in ways that can influence elections, as good practice would dictate.

Openness in matters of party and campaign finance are now accepted parts of fair elections, but the Malaysian law is weak and allows for parties and supporters to spend lavishly without control.

While freedom of speech is important, restraint is also needed, especially when speech takes the form of the advocacy of ethnic suspicion, even hatred, and can affect the outcome of the elections. There is strong evidence that abuses took place in certain quarters.

Other forms of openness, such as access of party agents to counting, permitting effective domestic and international observer teams to operate without harassment – indeed with official support – were also violated.

Finally, the police were shown in evidence to be in many instances unresponsive to complaints about abuses. And the ultimate recourse of the courts has been at least disappointing.

Specific shortcomings of the EC
The Panel was aware that, for example, the IDEAS/CPPS Report, which included much useful information showing failings in the election also said (p. 30)

…our observation indicated that the EC functioned generally well during the period between the dissolution of parliament and polling day. Most procedures and operations were conducted smoothly and there were no major glitches during nomination, advanced voting, and the announcement of results. normal voting, counting

It is important to stress that our conclusions do not necessarily implicate the EC – especially at the top level of its management – in improper behaviour, nor do they imply that the majority of the staff violated their important obligations.
Nonetheless, the Panel believes the heart of the problem lies with the failings of the EC. The very reason it has become standard practice to appoint an “independent” commission to run elections, is that there are risks associated with this that are less acute in running other things: namely that people will cheat. They will cheat because the stakes are the highest that the public realm offers: control of the state, and, if not of its resources, of its polices and direction. If people do cheat, and they are not detected and checked, the EMB has failed.

Sloppiness in the application of rules and procedures – such as by permitting voters to read out their IC numbers – indicates at least weakness in training. There were serious signs of lack of professionalism in this, and in the “indelible ink” saga: including in the use of pens as substitute for indelible ink, and the application of ink so thickly that it did not dry before the voter was to mark the paper.

Failures to ensure proper custody of ballot boxes and other materials suggest more serious failures. Registering people to vote who have not applied cannot be a mistake: EC staff must have been at least complicit. Gerrymandering constituencies requires the involvement of some in the EC again at a very high level. Failure to get ink that is indelible is totally inexcusable, and would implicate some at high levels in the EC.

There was also evidence of evasiveness in responding to questions, including about the ink. This breach of the principle of transparency enhances the public feeling that there is something to cover up.

The EC knows what it is supposed to do. It is the body that ought to be aware of the risks. It should be sensitive to political currents in the nation. Instead of performing its vital function it seems to have succumbed to a culture of at least acquiescence. Malaysia is a sort of one-party state. One party has ruled for many years – far longer than in most countries that have an ostensibly fair electoral process. Such a situation breeds various attitudes: the ruling party comes to believe it is entitled to rule. The public service becomes used to the idea that they need only consider the views of that party; indeed they may come genuinely to believe that that party represents the national interest. The habit of critical thinking about politics atrophies and a particular state of affairs acquires the feel of inevitability – the natural order of things. Most Malaysians have never known any other sort of rule.

When the body running the elections is drawn from those civil servants, it is only to be expected that they will share these attitudes. It is in its very composition that the failing of the EC almost certainly lie.

It does receive complaints of impropriety and it should take care to guard against such actions. Yet its reactions to complaints are often weak – non-existent. It has failed to elaborate a Code of Practice for Elections, found in very many countries these days. It has failed to take charge of the situation that it was founded to control. Consequently, the major responsibility for the many failings of the process must lie with the EC.
Under its watch the EC has been weakened in law and in practice. It seems to lack the will to tackle abuses – and those abuses are not restricted to the ruling party, but that party is clearly the architect of many. The ruling party complies with the law in the most superficial sense, it does not submit itself to the verdict of the people as the law requires. It is not that it cannot imagine losing – the efforts to which it has gone to, to avoid that over the years, can only be explained on the basis that it actually fears it might lose.

**Impact on outcome**

Errors, deliberate or otherwise, are regrettable. Like the administration of justice, perceptions are crucial – justice must not only be done but must be seen to be done, and if it seems not to be done the damage is almost complete. But it also matters whether the errors actually have an impact on the results.

The evidence to the Tribunal suggests that the outcome of the election was not to be laid at the door of the “first past the post” electoral system, though that system does lay the basis for manipulation. Gross malapportionment of constituencies is a very major explanation. Doubt over the validity of postal and advance votes is also of great significance as there were at least 30 parliamentary seats where the contest was very close and where these votes could have influenced the overall outcome.

And some individual constituency results also stood out as having perhaps been influenced by other malpractices. The Tribunal determines that large numbers of irregularities and illegalities were committed in the conduct of GE13, sufficient to render the results in numerous constituencies void.

Overall – taking into account the ‘macro-level’ of apportionment– there is some reason to believe that the “wrong” party was declared to have won the 2013 elections.

**Impact on legitimacy**

Whereas some of the malpractices were somewhat concentrated in certain areas, especially targeting Orang Asli communities, they do affect public perceptions of the entire process – as well as demonstrating lack for respect for the voters, not to mention the rule of law. And as stated earlier, elections, like courts and banks, depend upon public confidence. Lead Counsel used an apt quotation (from the Indian case of Rampakavi):

> Free and fair elections are the very foundation of a democratic institution, and just as it is said that justice must not only be done, but must also be seen to be done, similarly elections should not only be fairly and properly held, but should also be seen to be so conducted as to inspire confidence in the minds of the electors, that everything has been above board and has been done to ensure elections, free elections.

From the large number of complaints presented to it as well as through the reports and studies of the conduct of these elections by scholars, civil society organisations, and observers, the

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Tribunal has no doubt that large sections of the community have no confidence in the fairness of the elections. There is widespread feeling throughout the country that the elections were rigged by the ruling party with the connivance of the EC. The reaction of the witnesses ranged from sadness at the failure of democracy to anger at the betrayal of their mandates by the ruling party and the EC. The Tribunal has no difficulty in concluding that among vast sections of the people, the GE13 has no legitimacy.

Lead Counsel observed that the Tribunal should determine whether what was revealed in evidence to it was “systemic” or showed maladministration “along the way”. No doubt there were examples of “mere” maladministration, but the Tribunal has no hesitation in holding that many of the shortcomings were both systematic and systemic.

To return to the seven broad parameters for elections that have integrity, listed earlier:

- First, equal representation.
- Second, electoral laws and regulations based on the democratic principles of election.
- Third, free and fair contestation.
- Fourth, participation of all stakeholders.
- Fifth, an independent and professional electoral management body.
- Sixth, electoral integrity in voting, counting, aggregating, and reporting results.
- And seventh, electoral dispute resolution conducted in just and timely manner.

The inescapable conclusion must be that GE13 fell short in every one of these respects.

In the event that the Tribunal found that the elections violated standards of free and fair elections, it is required to make recommendations with regard to our finding. We address that part in the next and final chapter.
Chapter 4: Recommendations

Introduction
Something needs to be done. Public faith in the EC and the whole election process has been severely undermined by the recent elections, and Malaysia’s image overseas has been damaged. The government and the BN may feel it can shrug off headlines like “A tawdry victory” (in The Economist), but they are damaging to the country in various ways. There was a high turn-out in the elections, but that may not continue if people feel their votes count for little. If elections fail as a way of changing things, in many countries people have resorted to more direct – and violent – action, a particular risk in ethnically divided countries.

Many of the recommendations focus on how the integrity of the system should be better secured. One reason the integrity of elections is undermined is that they are not merely about the mandate to rule, but a way of obtaining a licence to exploit, even to plunder, the resources of the state, for private gain, including the gain of one’s community. This consideration necessitates that the institutions that manage elections should be independent, and the individuals involved have integrity, and have the authority and the capacity to counter malpractices and worse.

The recommendations in this section are based in the submissions and evidence made to the Tribunal. Sometimes witnesses themselves suggested what ought to be done. In other cases the suggestions are the Tribunal’s own, based on what evidence showed to be weaknesses in the system as it is. There have been many other proposals for change. The Parliamentary Select Committee Report in 2012 contained 22 recommendations which were accepted by Parliament, but only two implemented – and neither of them fully and effectively, as evidence showed (indelible ink and overseas voters). The various bodies that made submissions to the Tribunal, BERSIH 2.0, IDEAS, the Merdeka Centre and Pemantau, have included recommendations for change in their own reports and publications, as has Transparency International (specifically on party financing).

Some of the recommendations for change are very precise, when the remedy is clear. For other ills of the election system there may be various solutions, or the details would need to be worked out. Sometimes the recommendation takes the form not of a firm proposal but on the lines of “consideration should be given”.

The Constitution
The Constitution is the framework for government, and for governance. Like many constitutions of its period it says relatively little about elections. It deals with the EC, and the qualifications of electors, the basic structure of the election system (single member constituencies) and boundaries. Most changes to the electoral system (to proportional representation for example) would require constitutional change.
Specifically the Constitution says nothing about the right to fair elections, and it says nothing about political parties.

It is recommended that consideration be given to amending the Constitution to:
- include a right to vote, in free and fair elections
- lowering the voting age to 18
- set out the principles of a free and fair electoral system, especially secret ballot
  and as far as possible the votes should be of equal value
- provide in connection with either elections or freedom of media, the principle of equal access to the media particularly at election time
- provide some framework principles for political parties and their regulation.

Some other changes to the Constitution are essential to achieve other recommendations listed below. These would mainly restore the Constitution to the state before it was amended. The changes would be:
- the independence of the EC should be restored, not just in terms of a statement to that effect, but in terms of its method of appointment
- the question of boundaries is to be determined by a separate boundaries commission rather than the EC – if that recommendation (see below) is adopted.

The Tribunal considers that were the constitution to include one or more articles on the values and principles of free and fair elections in a democratic society as set out above, it would set the tone for and the expectations people would have of elections. The validity of electoral laws, regulations and practice would be determined by these values and principles. When there are systematic, or several, violations of the principles, the courts would be free to declare the election invalid, without the petitioner having to prove that the candidate declared the winner would not have won if there were no violations.

The Electoral Commission
The EC lies at the heart of the matter. It is not just the front line, it is the bulwark of a fair election system. Going to court to resolve issues is not just expensive, it simply cannot deal with most of the issues that arise.

The EC must be independent: in its method of appointment, its operation and in its mindset. To achieve this some changes in law are required, and some changes in appointment practices and some changes in behaviour are required. The ACE project (Electoral Knowledge Network) has suggested the following characteristics of a good EC:
- Is institutionally independent from executive branch of government.
- Exercises full responsibility for implementation.
- Has some degree of good governance constraints.
- Has powers to make policy decisions independently under its legal framework.
- Is composed of members who are outside the executive while in EMB office.
- Members have security of tenure.
• Has and manages its own budget independently of day-to-day governmental control.
• Has autonomy to determine its staffing needs, rules, and policies.

There are two basic models of independent EC: (i) where the membership is designed to be free of influences of political parties and appointed for their expertise and (ii) where the members are actually nominated by parties – with the intention that they are balanced.

ACE comments135:

Many countries, especially those that experienced difficult transitions from authoritarian rule to multiparty democracy, have chosen multiparty-based or partisan EMBs. In such societies, public servants are likely to have been largely discredited as electoral policy makers due to a history of being agents of the authoritarian former ruling party or military regime. Additionally, the fight against authoritarianism may have polarized society to the extent that it is difficult to find public figures widely accepted as ‘independent’ to serve on the EMB for a transitional election. Many of the countries of Central and Eastern Europe adopted multiparty-based EMBs during their transitions.

Many electoral analysts believe that having political party representatives on the EMB engenders consensus among actors in the electoral contest and contributes to enhanced transparency, all of which lead to improved confidence in the electoral process. Voters may feel more encouraged to participate in elections if their political party leaders are playing an active role in the electoral process, specifically through representation on the EMB.

On the other hand, a political party-based EMB can put at risk or cripple decision-making, especially in situations where their critical interests are at stake. The presence of politicians on the EMB may undermine confidentiality in matters such as the security of balloting materials. Multiparty-based EMBs also tend to generate dissatisfaction, especially among minority parties which might be excluded from sitting on the EMB either because they are not represented in the legislature or because they did not participate in the negotiation leading to the initial appointments of EMB members….

Some electoral legal frameworks specify that EMB members should be partly drawn from independent technocrats - such as judges, academics, civil society representatives and career public servants - and partly from appointments by political parties. This may combine advantages from both models, producing even-handed bodies that have both political party buy-in and transparency in their operations.

The original model of EC for Malaysia was intended to be more on the lines of the expert independent commission rather than the party based. It would be necessary to develop a method for appointment of a truly independent commission. The current method is essentially

135 http://aceproject.org/ace-en/topics/em/emd/emd01/emd01c/onePage
the same as for the senior judiciary. That method would not be considered sufficiently independent in many countries, judicial service commissions having been widely adopted for appointing judges.

The EC must be pro-active, and it must have the legal backing for that action. The ACE project proposed a Checklist for Electoral Management Legal Framework\textsuperscript{136}

1) Does the legal framework provide for the EMB to be constituted as an independent and impartial institution?
2) Does the legal framework require and enable the EMB to operate in an impartial and transparent manner?
3) Does the legal framework protect EMB members and staff from arbitrary dismissal?
4) Does the legal framework define the accountability, powers, functions, and responsibilities of the EMB at each level and relationships between the levels?
5) Does the legal framework adequately define the EMB’s relationships with external stakeholders?
6) Does the legal framework provide clear guidance for all EMB activities yet allow the EMB practical flexibility in its implementation?
7) Does the legal framework allow timely and enforceable review of an EMB decision?
8) Does the legal framework allow the EMB sufficient time to organize electoral events effectively?
9) Does the legal framework ensure that the EMB has sufficient and timely funding to manage its functions and responsibilities effectively?

Consideration should be given – in revising the legislation – to enforcement powers; should it have the power to prosecute? It is also suggested that the Public Prosecutor should not be involved in decisions about prosecutions of such a politically sensitive nature.

Among its functions it would perhaps be appropriate for it to be directed to prepare Codes of Practice for parties, candidates, media and government. The last is particularly important for governments in a “caretaker capacity” in the run-up to elections.

The reformed EC will need capacity building so its staff can cope effectively with new responsibilities and challenges.

Overall, the reborn EC would need a change of culture: not one that pre-supposes the outcome of the elections, but one that allows the people to determine that outcome.

\textsuperscript{136} http://aceproject.org/ace-en/topics/em/emb/emb04/emb04a
Boundaries
Boundary delimitation is a crucial element of a fair system, the more so in a “first past the post” system, and evidence showed it to be a major weak spot in the Malaysian system. There are several issues:
- the criteria for boundaries
- who fixes them
- by what process
- how often?

The question of criteria is not necessarily very obvious. In the US there is a very rigid approach to the matter of size of constituencies; within that there is an effort to make populations within a constituency homogeneous, with the result that some are of a very strange shape. In other countries more importance is attached to other factors, such as local administrative structures, and geographical features. The most important factor is that sizes of constituencies should not differ any more than is necessary. And criteria should be consistent and consistently applied. The evidence showed this is not the case in Malaysia currently. It is therefore recommended that the law be changed to clarify the criteria and the extent to which they may be diverged from to accommodate sparsely populated areas.

The Tribunal endorses the recommendation that the task of boundary delimitation be conducted by a body other than the EC, to strengthen the integrity of the process and avoid over-burdening the EC. That body should also be independent, and expert, and its reports submitted direct to the House of Representatives.

Consideration should be given to providing that any changes in the recommendations should be made only by an enhanced (more than the existing majority of all the members) majority in the House of Representatives. Or to leaving the final decision with the expert body.

Suspicions are also raised by the flexibility of the requirements about when boundary reviews should take place. These would be less if the body was independent. But if it was separate it would be necessary to fix the cycle anyway. The norm is to require it after every census. The Tribunal recommends that this approach be adopted and the Constitution amended accordingly.

The Register of Electors
The Register is a key element in elections. If it is not accurate there is no guarantee that voters will be able to vote – and that no-one who is not a voter will be able to do so. That is precisely the situation that the evidence established before the Tribunal. It is recommended that the following steps are taken, once the EC has been reformed:
- The register must be regularly and scrupulously checked to make sure that dead and other “phantom” voters are not included.
For East Malaysia at least – but preferably for the whole country – the register should be compiled afresh from scratch since such serious shortcomings have been revealed. Care must be taken to ensure that it is clear what the final register is.

The law and regulations should be overhauled to ensure that there is adequate opportunity for the roll to be inspected and corrections made.

Law and practice must ensure that no-one’s name is removed without their being given the chance to object.

**Political parties**

Registration under the Societies Act should be replaced by a system tailored to the situation, with specific legislation for parties, administered by the revamped EC.

The legislation should require parties to have constitutions providing for internal democracy.

Parties should be required to be open about their finances including major sources of funds.

Consideration should be given to whether some sources of funding of parties should be forbidden.

They should be restricted in the business interests they can be involved in, especially media.

There should be restriction of the possible expenditure by parties, as well as by candidates, on elections, and requirements of disclosure.

Expenditure incurred by a party tailored to the campaign of a particular candidate should be attributed to the candidate.

**Other changes in the law**

Many of the previous recommendations would require a change in the law or even the Constitution. Other desirable changes in the law are:

Restricting advance and postal voting to strictly necessary cases

Regulating expenditure on behalf of candidates, as well as by them

Removing unreasonable restrictions on court challenge, notably the ouster of the jurisdiction of the courts in connection with (i) the register of voters once it is gazetted (repeal s. 9A of the Election Offences Act) and (ii) the decision of a presiding officer to reject a ballot.
Other necessary measures
There are a number of steps that a reformed EC should undertake or sponsor, including:

Public education so that voters are better informed about the process and what is and is not acceptable behaviour, by them and by other actors

Procure and use genuinely indelible ink: there is absolutely no excuse for the Malaysian EC to fail so dismally in the use of a piece of simple technology that is so widely used

Reduce how many days before advance voting takes place, so that ballot boxes are stored for a shorter time and there is no risk of indelible ink fading

Ensure accessibility of polling station in every sense: in terms of opening hours, numbers of stations, access by persons with disability etc

Train staff better, including in the use and purpose of indelible ink

Institutionalise a system of national and international observers, ensuring they have the access and facilities they need

Codes of practice for all actors in the process including parties, media and government

The campaign period should be at least 21 days

There is need for training of police and other public servants on the need for political neutrality, to understand the importance of their role in the democratic process

Reviewing the Electoral System
The Tribunal believes that if these reforms were undertaken, elections would become substantially free and fair. But we would recommend that Malaysia could with profit undertake a review of its electoral system. Elections have consequences, some positive and some not, that go beyond the purposes normally associated with elections that we listed in Section 1 of this report. In some countries elections are not celebrations of democracy, but periods of intense anxiety and sometimes of extreme violence. Malaysia had experience of political violence in 1969 but the experience is not unique to it. It is the norm in connection with elections in many newer, multi-ethnic states. In many countries elections threaten the very existence of the state—the breaking away from Pakistan of what is now Bangladesh due to the refusal of the federal authorities to accept the results of elections is well known in the Asian region. Many African states are particularly vulnerable to break-up or intense internal conflict: recent examples include the 2007 general elections in Kenya, the 2008 elections in Malagasy Republic (Madagascar), 2011 in the Central African Republic. But even Europe is not immune, as in the case of Belgium which has come close to break-up of the state.
Even when elections do not lead to such a result, they impact negatively on the state and society in other ways. Campaigns are based less on what a party will offer the country than on settling ethnic scores. Often a party will concentrate its campaign on a particular (usually ethnic) community, a majority in the constituency, as that is sufficient for its candidate to secure plurality of votes. Many countries emerge weaker in terms of national unity after elections than before. Elections are regarded (correctly) as critical because of the political economy of these states. What is at stake is the capture and plunder of the state—the principal mode of accumulation of wealth and influence in so many countries. This leads to the exclusion of some ethnic groups from state benefits and services. Winners seem to get all, the losers nothing. Electoral systems in such countries are inevitably corrupted and rigged. They do little for nation building or equitable development. They delegitimize the political system. Faulty and rigged elections are sometimes offered as justification for defiance of the government or even of coups.

There are several types of electoral system by which we mean the rules by which constituencies are drawn up and the votes are cast – determining how those votes translate into members, legislatures, and governments. Electoral systems have an influence in shaping forms of, and attitudes to, political participation and the style of campaigning which in turn affect the fortunes of national unity and political integration. The electoral system determines the organisation and strategies of political parties and the way in which people choose to cast their votes. Some place a premium on parties which spread their appeal beyond one ethnic community. The system can also determine the fortunes of gender representation in the legislature. Most former colonies of the British Empire adopted the single member first past the post electoral system—a system which was designed for Britain on the assumption of a united nation, with broad consensus on social, political and economic matters. The commonality of their interests was deemed to outweigh differences among the various sectors of society. This system was applied in the original colonies on the notion of white supremacy, with common interests among the settlers. Whether these assumptions of common interests, values and culture apply in the newer Commonwealth states with diverse ethnic groups has begun to be much debated.

We received few submissions on the reform of the electoral system in the way we have defined it. The present system was taken for granted and most recommendations for reform were within it. The bulk of our recommendations deal with modifying existing rules and practices to produce free and fair elections. We do not therefore intend to address the question of fundamental changes to the electoral system. We do realise the difficulties of moving to a new political system—something not to be undertaken lightly. A lengthy period of preparation is necessary, and much effort in civic education. Nevertheless, we do urge that consideration should be given to other forms of electoral systems that might be more suited to Malaysia, as for example, transcending the centrality of ethnicity, providing incentives for parties to reach out to all communities, a greater focus on policies, placing of equal value on all the votes, etc.
Electoral systems help shape and reshape the political environment. To make any decision about changing the system, it would be necessary to understand the different systems and their advantages and disadvantages in terms of achieving what are considered to be the main goals that we want the electoral system to achieve. For example, do we want the main goal to be proportionality of seats to votes, or to make sure that all those elected have the support of the majority of voters, or do we want the electoral system to produce greater minority representation in the legislature etc.? Sometimes the “first past the post” system can leave minorities out – though this depends on how constituencies are made up, and whether majorities are actually united.

One factor is devising other systems is to try to ensure that candidates have to appeal more widely across the divides within society, because they cannot rely on winning on the basis of support of a single group.

The discrepancy between votes and seats observed in GE13 is common in first past the post system, though in the case of Malaysia the evidence suggests that malapportionment of constituencies, and deliberately done, was the major immediate cause. The benefit of proportional representation (PR) systems is seen to be that they avoid such outcomes: by definition they are devised to produce an overall outcome proportional to the vote: 30% of the votes should produce 30% of the seats.

PR needs multi-member constituencies – maybe 7, 8 or so members – and in a few countries there is just one constituency. It may involve party lists: voters vote for parties not individuals, and would take into account the make-up of the list in terms of individuals; if a party wins 20 seats, it takes the top 20 names from its list (unless voters have been given the chance of changing the order of names on the list). It may involve voters ranking the individual candidates in order of preference; then once a candidates has won enough votes to get a seat, their extra votes are assigned to the voters’ second choices. There are other systems. PR is criticised for tending to produce large numbers of parties. The party list system gives a lot of powers to parties to make up the lists, while the preferential voting system is complex, and hard for the voter to understand.

Multi-member constituencies can leave the voter with no sense that “This is my MP”. Some countries, including Germany and New Zealand, have adopted a system that involves both single member constituencies and party lists: the latter members are allocated so as to ensure overall proportionality of the elected assembly.

Even within a single-member constituency, it is possible to have a different system intended to make it hard for a candidate to win based on appeal to a single group only. This may be a run-off (a second vote between the 2 top runners if no-one wins more than half the votes cast). Alternatively, voters can be asked to rank the candidates so that there is no second voting but the second choices of the supporters of the candidates with the fewest votes are used (beginning with the candidates with the fewest votes) until someone does get support of
a majority. If Malaysian elections settle into a pattern of a battle between two alliances, this system would make little difference.

All the systems are used in various countries. It is hard to get people to accept a change in their system. After careful consideration of whether and how to change, there is a need for massive public education, postponing the coming into force of the new system for a few years.

The Tribunal recommends that a committee composed of civil society representatives, experts and perhaps a former chair of the EC should be appointed to consider the matter and report within a year. There is a great deal of research and literature on the subject of electoral systems, including on electoral systems for multi-ethnic states that can assist the deliberations of the committee. We would urge BERSIH 2.0 to promote discussion of alternatives.

The electoral system is important, but is hard to change and needs much consideration. And the evidence suggests that it was not the real reason why the elections of 2013 have been so discredited.

About the real reasons, something can be done. Though weakened in some respects, the framework for an election process with integrity is there. It needs to be implemented, fully and with commitment. Criminal law needs to be enforced. Laws and principles on constituency delimitation must be properly applied. Staff needs to be trained. Procedures must be taken seriously. A culture of compliance must be instilled.

The role of the EC is key to all this. It needs to be re-designed, and conceived as a truly independent body. Other countries have done it. It is from the EC that true change will come; without them no serious improvement will take place.

At present the system fails to meet international standards in many respects. Most important (and in violation of what those international standards are designed to achieve) it fails the people of Malaysia.

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Appendix A
Evidence of the People’s Tribunal on GE13