



FREE AND FAIR ELECTIONS;
THE CONSTITUTIONAL FRAMEWORK IN
MALAYSIA

BY

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ABSTRACT

This research offers critical insight on the concept of free and fair elections and its implementation under the constitutional framework in Malaysia. The study is aimed at analyzing whether the existing constitutional framework has provided enough support on the conduct of free and fair elections. The term ‘free and fair elections’ is used to describe the standards of election, which are mainly based on international obligations and general democratic principles. The term refers to the principle that supports the fundamental purpose of the election itself. This research explores the concept of free and fair elections based on a mixed academic and applied law research whereby conventional method is used along with historical and evaluative techniques. In this context the quality of elections in Malaysia is measured through assessment on the relevant constitutional provisions. Every element of election in the constitution is examined based on the concept of free and fair election. The findings reveal that, the framers of the Constitution had strongly recommended a reliable system but it has been weakened by the changes proposed by the Working Committee and the amendments afterwards. The result of this thesis also shows that the existing electoral process is partially free and fair. The facts that the political freedoms are curtailed, the restrictions on political critics and the failure to ratify international instruments are among the basis of the finding that the election is partially free. The conclusion that the Malaysia election is not completely fair is based on the many indicators such as: degree of neutrality the Election Commission; lack of caretaker government policy; unfair media access; and unfair delimitation. The study proposes a genuine electoral reform which should start with administrative reform. This research also strongly argues on the importance of fair competition, transparency, accountability and control on political party financing. The result obtained may assist in providing academic perspective for electoral reform. More importantly, it would be very helpful for more detailed research of essential areas on elections in order to improve the electoral process in Malaysia.

خلاصة البحث

يقدم هذا البحث البصيرة الحاسمة على مفهوم الانتخابات الحرة والنزيهة وتنفيذها في إطار وتهدف هذه الدراسة إلى تحليل ما إذا كان قد وفرت الإطار الدستوري .دستوري في ماليزيا انتخابات حرة ونزيهة' هذا 'يستخدم .القائم على دعم كاف على إجراء انتخابات حرة ونزيهة المصطلح لوصف معايير الانتخابات والتي تقوم أساسا على الالتزامات الدولية والمبادئ .مصطلح يشير إلى مبدأ أن تدعم الهدف الأساسي من الانتخابات نفسها .الديمقراطية العامة يستكشف هذا البحث مفهوم انتخابات حرة ونزيهة على أساس مختلطة البحوث الأكاديمية والتطبيقية القانون حيث يتم استخدام الطريقة التقليدية جنبا إلى جنب مع تقنيات التاريخية في هذا السياق يتم قياس نوعية الانتخابات في ماليزيا من خلال التقييم على الأحكام .والتقييمية يتم فحص كل عنصر من الانتخابات في الدستور استنادا إلى مفهوم .الدستورية ذات الصلة النتائج تكشف عن أن واضعي الدستور قد أوصى بشدة نظام موثوق .انتخابات حرة ونزيهة نتيجة لهذه .ولكن قد ضعفت من قبل التغييرات التي اقترحتها لجنة العمل والتعديلات بعد ذلك الحقائق التي يتم تقليص .الأطروحة تبين أيضا أن العملية الانتخابية الحالية هي حرة ونزيهة جزئيا الحريات السياسية، والقيود المفروضة على منتقدي السياسة والفسل في التصديق على الصكوك ويستند استنتاج مفاده أن .الدولية هي من بين أساس الاستنتاج أن الانتخابات حرة جزئيا الانتخابات ماليزيا ليست عادلة تماما على العديد من المؤشرات مثل: درجة من الحياد لجنة الانتخابات وعدم وجود سياسة حكومة تسيير الأعمال؛ صول وسائل الاعلام غير عادلة؛ وتقترح الدراسة إجراء إصلاح انتخابي حقيقي التي ينبغي أن تبدأ مع .وتعيين حدوده غير عادلة هذا البحث أيضا تحتج بشدة على أهمية المنافسة الشريفة والشفافية والمساءلة .الإصلاح الإداري النتيجة التي حصل عليها يمكن أن تساعد في توفير .والرقابة على تمويل الأحزاب السياسية الأهم من ذلك، سيكون من المفيد جدا للبحث .منظور الأكاديمية لإصلاح النظام الانتخابي أكثر تفصيلا من المجالات الأساسية في الانتخابات من أجل تحسين العملية الانتخابية في ماليزيا

ABSTRAK

Kajian ini menawarkan pandangan yang kritikal terhadap konsep pilihan raya yang bebas dan adil dan pelaksanaannya di bawah kerangka perlembagaan di Malaysia. Kajian ini bertujuan untuk menganalisis sama ada perlembagaan yang ada telah memberikan sokongan yang cukup untuk perjalanan pilihan raya yang bebas dan adil. 'Pilihanraya yang bebas dan adil' adalah istilah yang digunakan untuk menggambarkan piawaian pilihan raya berdasarkan obligasi antarabangsa dan prinsip asas demokrasi. Istilah ini merujuk kepada prinsip yang menyokong tujuan asas pilihan raya itu sendiri. Penyelidikan ini meneroka konsep pilihan raya yang bebas dan adil berdasarkan kaedah penyelidikan perundangan secara akademik dan aplikasi yang mana kaedah konvensional digunakan bersama-sama dengan teknik sejarah dan penilaian. Dalam konteks ini, kualiti pilihan raya di Malaysia diukur melalui penilaian terhadap peruntukan-peruntukan yang relevan dalam perlembagaan. Setiap elemen pilihan raya dalam perlembagaan dikaji berdasarkan konsep pilihan raya yang bebas dan adil. Dapatan menunjukkan bahawa, penggubal Perlembagaan telah mengesyorkan satu sistem yang kukuh tetapi syor itu telah dilemahkan oleh perubahan yang dicadangkan oleh Jawatankuasa Kerja dan pindaan-pindaan selepas itu. Hasil kajian ini juga menunjukkan bahawa proses pilihan raya yang kini adalah spara bebas dan adil. Hakikat bahawa kebebasan politik disekat, sekatan ke atas pengkritik politik dan kegagalan untuk meratifikasi instrumen antarabangsa adalah antara asas dapatan bahawa pilihan raya itu spara bebas. Kesimpulan bahawa pilihan raya Malaysia tidak benar-benar adil berdasarkan beberapa petunjuk seperti: tahap berkecuali Suruhanjaya Pilihan Raya; kekurangan dasar kerajaan sementara; akses media yang tidak seimbang dan persempadanan semula yang tidak adil. Kajian ini mencadangkan reformasi tulen pilihan raya yang harus bermula dengan perubahan badan pengendali pilihan raya. Kajian ini juga menekankan kepentingan persaingan yang adil, ketelusan, akauntabiliti dan kawalan ke atas pembiayaan parti politik. Keputusan yang diperolehi boleh membantu dalam menyediakan sudut pandangan ilmiah untuk reformasi system pilihan raya. Lebih penting lagi, ia dapat mendokong penyelidikan yang lebih terperinci ke atas aspek-aspek penting pada pilihan raya dalam usaha untuk memperbaiki sistem pilihan raya di Malaysia.

APPROVAL PAGE

The thesis of Muhammad Fathi Yusof has been approved by the following:

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DECLARATION

I hereby declare that this thesis is the result of my own investigations, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degrees at IIUM or other institutions.

Muhammad Fathi Yusof

Signature

Date

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LIST OF ABBREVIATION

AMR	All Malaysia Reports
art.	Article
ASEAN	Association of Southeast Asia Nations
AV	Alternative Vote
BN	Barisan Nasional (National Front)
CEDAW	Convention on Elimination of All Forms of Discrimination against Women
CLJ	Current Law Journal
CMA	Communications and Multimedia Act 1998
DAP	Democratic Action Party
EC	Election Commission
ed./eds.	Edition/editions; editor/editors
EOA	Election Offences Act 1954
et al.	(<i>et alia</i>): and others
FC	Federal Court
HC	High Court
ICCPR	International Covenant on Civil and Political Rights
IPU	Inter-Parliamentary Union
ISA	Internal Security Act 1960
Mafrel	Malaysian for Free and Fair Election
MCA	Malaysian Chinese Association
MIC	Malaysian Indian Congress
MLJ	Malayan Law Journal
NGO	Non-Governmental Organisation
NRD	National Registration Department
NRIC	National Registration of Identity Card
PAS	Parti Islam Semalaysia
PPPA	Printing Presses and Publications Act 1984
PR	Proportional Representation
PSM	Parti Sosialis Malaysia
ROS	Registrar of Societies
SLA	State Legislative Assembly
STV	Single Transferable Vote
UDHR	Universal Declaration of Human Rights 1948
UK	United Kingdom
UMNO	United Malay National Organisation
UN	United Nations
UNGA	United Nation General Assembly
vol./vols.	Volume/volumes
YDPA	Yang Di-Pertuan Agong

CHAPTER ONE

INTRODUCTION

It goes without saying that election is indispensable in modern democracy and it is unthinkable to have a real representative democracy without it. But in order to have free and fair elections there are a lot of prerequisites that need to be fulfilled. The Federal Constitution has provided several provisions to ensure that elections are free and fair. But thus far there have been a lot of questions pertaining not only to the conduct but also the appointment of the Election Commission itself. Malaysia has obtained independence since 1957 and has conducted twelve general elections. The time has come for us to evaluate the electoral process in the country. Until today, there is no standard work which deals with the issue of free and fair elections in Malaysia. But equally important is the fact that complaints about the conduct of elections have become louder and louder. Needless to say we have to prove to the world that our system is good but this cannot be done through rhetoric alone; it has to be done in a scientific manner. It is believed that this study will benefit the academics and practitioners as well as the electorate in general.

RESEARCH TOPIC

This thesis scrutinizes the constitutional framework of election in Malaysia according to the concept of free and fair elections. The term 'free and fair' has been used to describe the standards of election which are mainly based on international obligations and general democratic principles. Undoubtedly the terms 'free' and 'fair' subject to various interpretations and they often being used subjectively to describe the state of

electoral process. This research, however, provides analytical examination on the concept of free and fair election and offers detailed criteria by which to judge whether elections are free and fair. This study also makes references to international standards of election as provided under a number of declaration, covenants, guidelines and other documents. Such guiding criteria become the basis in the evaluation of the concept in the constitutional framework of election in Malaysia.

The term 'free and fair' supports the fundamental purpose of the election itself i.e. to enable people to take part in the conduct of public affairs and to provide an imperative means of giving voice to the will of people, which is the basis of governmental authority itself. An effective and successful election must be free and fair. For that reason, while this study is confined to the question of 'free and fair', it unavoidably covers extensive aspect of elections. But the issues outside the question of free and fair such as the question of cost-effectiveness, or ability to produce stable and coherent governments, are not within the purview of the research.

Basically the research focuses on electoral system based on the constitutional framework in Malaysia. In this context the quality of elections is measured through comprehensive assessment on the constitutional provisions relating to elections and decision of election courts. Yet, study on the implementation of the laws and the execution of power by the Election Commission and other relevant authority is also vital in order to understand the outcome of the constitutional system. In addition, analysis on government actions and response from the political parties or the public generally sometime necessary to comprehend how the constitutional structures operate. Such analysis is also essential to reveal weak points of laws and any loophole in the system. The study however shall not deal with issues which are not closely related to the constitutional framework such as the question of voters' turnout,

politics and socio-demographic, level of commission of offence in the country, political participation of different communities and nature of competitive electoral politics. It also confines to the elections to the House of Representatives and the SLA and shall not cover the election of Senate and the local authority elections.

Although the research topic indicates the scope of study on the ‘constitutional framework’, but the study in fact embraces almost every constituent element of the elections. This is because the constitution is the crux of the electoral system itself. Basically this study appraises the electoral system from five main perspectives: firstly, formation of government and political parties; secondly, the political freedoms; thirdly, the election management body; fourthly, the electoral system and the delimitation of the electoral boundary; and finally, the right to vote. Hence, the research is focuses on the constituent elements of the election i.e. the matters that provided under the constitutional framework. It basically does not specifically evaluate on the legal framework which governs the conduct of elections such as on the matters pertaining to registration of electors, nomination, electoral campaign, electoral offences, financing political parties and candidates, polling, counting and tabulating; and thirdly, the modes of judging elections through election petitions and electoral observation.

SIGNIFICANCE OF RESEARCH

The question of free and fair elections become one of the major national issue particularly since the 2004 general elections, when the opposition parties exposed many irregularities and claimed that it was the dirtiest election ever in Malaysian history. It was followed by a boycott on a by-election and various public discourses and advocacy activities on the issue. This campaign received a tremendous support

from several human rights groups, election watch groups and a number of other non-governmental organizations. Later in 2006, an alliance consisted of various NGOs and political parties named as the Coalition for Clean and Fair Election (Bersih) was formed to consolidate the citizens' effort in demanding electoral reform.

In fact prior to that, there were some citizens' initiatives which championed the demand for free and fair elections. Before the 1990 general elections for example, a group of very prominent public figures led by Tun Suffian had established the Election Watch. There were also other significant organizations that focused their effort in demanding genuine and clean elections such as Pertubuhan Kebajikan Budi Malaysia (BUDI) which led a group supported by 42 NGOs called the Malaysian Citizens Election Watch (PEMANTAU) Project (for 1999 general elections) and the Malaysian for Free and Fair Elections (Mafrel) (established in 2001).

Bersih movement however appears to be the most prominent and successful movement as it managed to enhance the public awareness and to pressure the government for a better system. For example, in 2007 the coalition had managed to gather about 40,000 people marching toward the National Palace to demand for reform in electoral system. In 2009, Bersih had boosted its support when it had reinvented itself to become Bersih 2.0, i.e. an expanded version of the group which is now purely comprised of non-political parties. The group mooted eight demands i.e.:

- (a) clean electoral rolls;
- (b) reform on postal ballots;
- (c) use of indelible ink;
- (d) free and fair access to media;
- (e) minimum 21 day campaign period;
- (f) improvement of public institutions;
- (g) corruption-free society;
- (h) end of dirty politics.

The government however failed to fulfill the eight demands and this scenario led to serious public dissatisfaction on the administration of election. The obvious discontent on the electoral system in Malaysia can be seen in 2011 demonstration when a large crowd