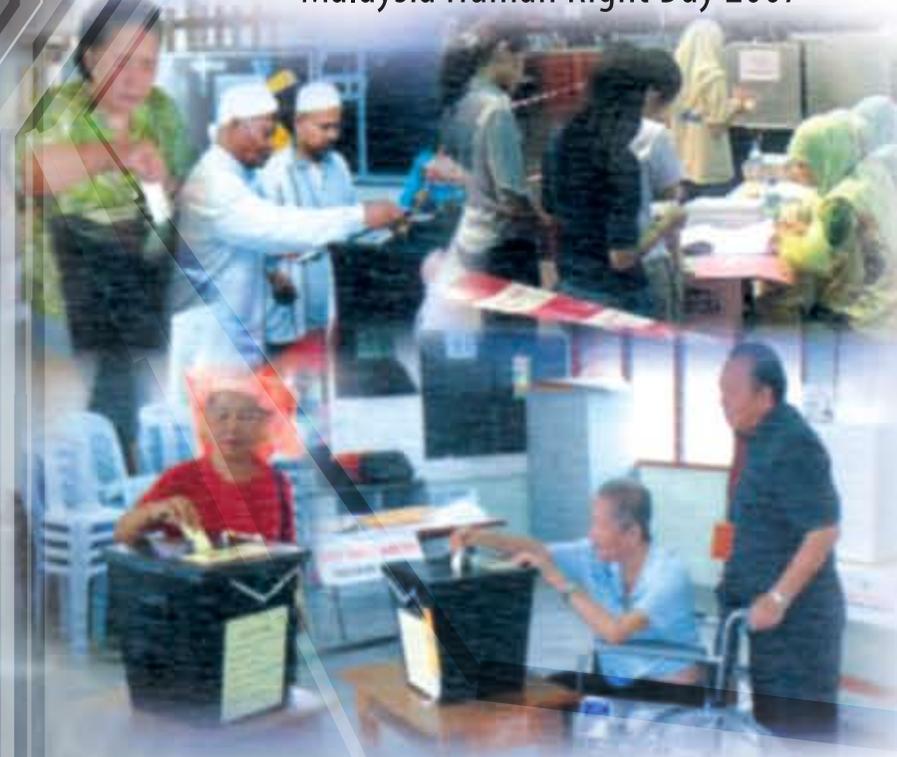


HUMAN RIGHTS and ELECTION

SUHAKAM'S Conference in Conjunction with
Malaysia Human Right Day 2007



SUHAKAM
HAK ASASI UNTUK SEMUA

Suruhanjaya Hak Asasi Manusia Malaysia

Level 29, Menara Tun Razak, Jalan Raja Laut
50350 Kuala Lumpur, Malaysia
603-2612 5600 (T)
603-2612 5620 (F)
humanrights@suhakam.org.my



SUHAKAM
HAK ASASI UNTUK SEMUA

SURUHANJAYA HAK ASASI MANUSIA MALAYSIA
HUMAN RIGHTS COMMISSION OF MALAYSIA

HUMAN RIGHTS AND ELECTION

SUHAKAM'S Conference in Conjunction with
Malaysian Human Rights Day 2007

9 september 2007
KUALA LUMPUR, MALAYSIA



SUHAKAM
HAK ASASI UNTUK SEMUA

Level 29, Menara Tun Razak, Jalan Raja Laut
50350 Kuala Lumpur, Malaysia
603-2612 5600 (T)
603-2612 5620 (F)
humanrights@suhakam.org.my

Cetakan Pertama 2009 / First Printing, 2009

© Hak Cipta Suruhanjaya Hak Asasi Manusia Malaysia (SUHAKAM), 2009
© Copyright Human Rights Commission Of Malaysia (SUHAKAM), 2009

Diterbitkan di Malaysia oleh / *Published in Malaysia by*
SURUHANJAYA HAK ASASI MANUSIA /
HUMAN RIGHTS COMMISSION OF MALAYSIA
E-mail : humanrights@suhakam.org.my
URL: <http://www.suhakam.org.my>

Di cetak di Malaysia oleh / *Printed in Malaysia by*
A&D TOTAL SOLUTIONS
No. 4A, Jalan LP 1A/3, Taman Lestari Perdana,
43300 Seri Kembangan,
Selangor Darul Ehsan.

Hak cipta ini adalah milik SUHAKAM. kesemua atau mana-mana bahagian laporan ini boleh disalin dengan syarat pengakuan sumber dibuat atau kebenaran diperolehi daripada SUHAKAM. SUHAKAM menyangkal sebarang tanggungjawab, waranti dan liabiliti sama ada secara nyata atau tidak ke atas sebarang salinan penerbitan yang dibuat tanpa kebenaran SUHAKAM.

The copyright of this report belongs to SUHAKAM. All or any part of this report maybe reproduce provided acknowledgement of source is made or with SUHAKAM's permission. SUHAKAM assumes not responsibility, warranty and liability or implied by another reproduction of this publication which is done without SUHAKAM's permission.

Perpustakaan Negara Malaysia Cataloguing-in-Publication- Date

SUHAKAM's Conference (7th: 2007: Kuala Lumpur)

Human Rights and Election: a report of SUHAKAM'S Conference held in conjunction with the seventh Human Rights Day, 9 September 2007, Kuala Lumpur, Malaysia.

ISBN 983-2523-56-7

1. Human Right - Congress 2. Civil rights - Malaysia. 3. Elections - Congress. i. Suruhanjaya Hak Asasi Manusia Malaysia ii. SUHAKAM's Conference (2007 : Kuala Lumpur) iii. judul

CONTENTS

1.	EXECUTIVE SUMMARY	5
2.	CONFERENCE PROCEEDINGS	
	i. Welcoming Address By Dr. Chiam Heng Kheng	16
	ii. Keynote Address By Tan Sri Abu Talib Othman	18
3	PANEL SESSION	
	i. Human Rights and Elections – Electoral Process	26
	ii. Human Rights and Elections – A Voter's Perspective	28
	iii. Human Rights and Elections – A Legal Perspective	37
4.	DISCUSSANT	43
5.	QUESTIONS AND ANSWER SESSION	49
6.	SUHAKAM'S RECOMMENDATIONS	61
7.	ANNEXURES	65

EXECUTIVE SUMMARY

EXECUTIVE SUMMARY

INTRODUCTION

As in previous years, the Human Rights Commission of Malaysia (SUHAKAM) celebrated the Malaysian Human Rights Day on September 9 by hosting a conference on a specific human rights issue. The theme for this year was "Human Rights and Election". This theme is deemed most fitting as Malaysia celebrated 50 years of independence and free and fair election is the bedrock of democratic self-rule.

The fundamental right of citizens to choose their own representatives and participate in the government is enshrined in the Article 21 of the Universal Declaration of Human Rights. In Malaysia, the right of citizens to vote in any election to the House of Representatives or the Legislative Assembly is guaranteed in Article 119 Of the Federal Constitution.

The Conference was a half-a-day event since Malaysian Human Rights Day 2007 fell on a Sunday. The programme comprised a keynote address by Tan Sri Abu Talib, Chairman of SUHAKAM and a panel session. Three panellists were invited to speak on different aspects of "Free and Fair Election": Tunku Abdul Aziz Ibrahim spoke on the topic from a voter's viewpoint, Dr Marvis Puthuchery looked at free and fair election from the perspective of the electoral process and Mr. Rangunath Kesavan considered the topic of the panel session from the legal angle. Professor Dr. Abdul Aziz Bari, the discussant, commented on the panellists' views and gave a brief analysis of the situation in Malaysia.

SPEAKERS	DESIGNATION	TOPIC
Dr. Chiam Heng Kheng	Commissioner SUHAKAM	Welcoming Address
Tan Sri Abu Talib Othman	Chairman, SUHAKAM	Keynote Address
PANEL SESSION: Human Rights and Election		
Tunku Abdul Aziz Ibrahim	President, CAUX Round Table, Malaysia	Human Rights And Election - Electoral Process
Dr Mavis Puthuchery	Associate Senior Fellow, IKMAS, Universiti Kebangsaan Malaysia	Human Rights and Election - Voter's Perspective.
Mr. Rangunath Kesavan	Vice-President, Bar Council, Malaysia	Human Rights and Election - A Legal Perspective
Professor Dr Abdul Aziz Bari	International Islamic University Malaysia	Discussant

When the session was opened to the floor for questions, comments and suggestions, there was immediate and overwhelming response. The participation was animated but the views were expressed with rationality and human dignity and respect were upheld throughout the session.

Dr Chiam Heng Keng, the Organizing Chair, presented the welcoming address and the Conference was closed by Tan Sri Dato Seri Panglima Simon Sipaun, the Deputy Chairman of SUHAKAM.

The objective of the Conference was to engage concerned citizens in public discourse to examine the electoral process so as to identify its strengths and shortcomings and to propose ways to improve its efficacy and to ensure free and fair election. This objective seemed to have been achieved as both panellists and participants raised numerous concerns, were critical but rational in their assessment of the conduct of the elections in Malaysia and proposed several recommendations for consideration.

SOME OF THE ISSUES/CONCERNS RAISED AND SUGGESTIONS MADE

The general consensus that emerged from the Conference was that while elections in Malaysia had been free and had measured up to a certain level of the international standard, it has not been altogether fair. The followings were among the concerns expressed and suggestions made:

1. Respect for Fundamental Human Rights

The prevailing atmosphere at elections should be one of respect for human rights, especially fundamental freedoms which include freedom of expression, freedom of association and freedom of association, access to information and the right to security.

- Freedom of speech and expression by parties, candidates, voters and the media. Everyone has the right to express political opinions without interference; and to seek, receive and impart information. However, freedom of expression has to be accompanied by responsibility. No individuals, parties or candidates should use this liberty to utter false, slanderous and racists to incite excitement, hatred or violence or raise false expectation.

The government has the responsibility for ensuring peace and security, but laws, such as the Sedition Act, Official Secrets Act, Internal Security Act, the Police Act, the Printing Press Act and the Societies Act should not be used arbitrarily to restrict the freedom of expression.

- Freedom of Assembly
Oppositions claimed that they were denied permit to hold political ceramah and the Registrar of Societies had rejected applications for registration made by political parties on the ground of public order and national security. Issuance of permits should not be discriminatory and rejection should be based on evidence and not on speculation, suspicion or fear. Procedures for application and approval of permit should be clear and transparent.

2. Access to Media

Voters should have access to information for them to make informed choice.

- Political parties do not have equal access to the media. It is difficult for the opposition because the majority of the mainstream media are either directly or indirectly controlled by the government.
- Fair access does not confine only to allocation of broadcast time or print space to all parties and candidates but also to encompass fairness in the placement of timing of such access, i.e. prime time versus late night broadcast or front page versus middle page publication.
- The media should cover the election campaigns freely, without interference or restrictions imposed by the authorities.
- Unequal access to media indicates that the playing field is not level; candidates and parties are not competing on equal and impartial treatment.
- The Election Commission should consider a mechanism of assuring a fair distribution of media access to all candidates and political parties.

3. Phantom Voters

- The issue of phantom voters was brought up by speakers and participants.
- Despite several measures taken by the Election Commission, such as: (i) the availability of checking one's status of registration online through the Commission website; (ii) registration is throughout the year at any post office with a computerized system; and (iii) the electoral roll is available on a CD-ROM which the public can purchase from the Election Commission, many were convinced that the phantom voters had not been removed from the electoral lists.
- The Election Commission should be empowered to check on the validation of one's claimed residence and the authority to transfer an elector from one constituency to another due to change in address.
- The immediate expunge of the deceased name from the electoral roll will help to reduce the number of phantom voters.

4. Independent and Impartial Election Commission

- To effect and preserve free and fair elections, an independent and impartial Election Commission should be tasked to conduct and oversee elections.
- When members of the Commission are appointed by the Prime Minister, the Commission is unlikely to be able to act independently. To be fully independent, the Election Commission should be directly accountable to the Parliament.
- The election administration at all levels should be professional and neutral in conduct; voting, counting and the tabulation process should be absent of fraud or manipulation.

5. Limitations of the Election Commission

- The Election Commission claimed that it has limited powers and resources. It has no control over the delineation of constituencies; the authority to ensure all candidates have equal access to the media; the authority to ensure political parties have the freedom to conduct rallies; and take action against corrupt or illegal practices.
- The Election Commission is in full control of certain aspects of the electoral process such as the nomination of candidates, polling, vote counting and announcement of the results.
- To be effective, the Election Commission should be given greater control on all aspects of the electoral process.

6. The Playing Field Is Not Level

Besides unequal access to media and the arbitrary denial of permit to hold assembly, the other inequalities include:

- Short election notice which implies that the ruling party has the unfair advantage in preparing for election campaign. The notice has become increasingly shorter over the years.
- Delineating constituencies to favour the government.
- Large differences in the size of some of the constituencies imply unequal representation.
- There is no caretaker government to take charge when the Parliament is dissolved and the government of the day continues to function during this period.
- Claims of the government of the day using of public funds and public facilities during election campaigns.
- Postal balloting is less transparent than the normal ballot casting and this can lend itself to manipulation.
- Malaysia may have the culture known as “clientelist control”. When a party is in continuous power for a long time, voters may see little prospect of change of government and feel that their vote is unlikely to make any difference to the electoral outcome. They either do not bother to vote or continue to vote for the government of the day.

7. The First-Past-Post System

- This system may not truly reflect the will of the people. Since the winner takes all, there can be a huge disparity between the percentage of votes received by a political party and the number of parliamentary seats they win.
- This disproportion is further aggravated by the large differences in the size of some of the constituencies.
- A system of proportional representation or a system that combines the first-past-the-post system with proportional representation like the German model¹ can probably resolve the incongruence.

1. In the German Model, the legislature consists of both Constituency MPs and MPs who are on the party list. Each voter votes twice – one for his /her Constituency and another for the party of his/her choice. Parties are then allocated additional seats other than their Constituency seat so that the number of seats that a party has matches the percentage of votes cast for the party

8. Formal and Informal Disenfranchisement

- The use of an ethnic form of gerrymandering was said to be used to control electoral outcomes.
- Another strategy adopted is the mass transfer of voters from constituencies where support for the government is strong, to constituencies where the contest is likely to be keenly fought. Although such practices are illegal they are extremely difficult to detect because the Election Commission registers voters according to the addresses on their identity cards which is under the jurisdiction of a government agency.

9. Election Reform

Besides the need for an independent and impartial Election Commission, reforms in other areas are deemed necessary. This includes the Judiciary.

- A large number of election petitions filed in High Court had been thrown out on technical grounds. Amendments to electoral laws have further curtailed the power of the Bench.
- The Judiciary needs to be given greater leeway to adjudicate such disputes. Subjecting the electoral process to greater scrutiny and oversight will result in everyone having greater regard for the rules and the need to refrain from unscrupulous tactics.

10. Confidence in the Electoral Reform

- Concern was raised that many Malaysians have serious doubts about the fairness of the current electoral system. This could be one of the reasons why almost one in three eligible voters has yet to register.

SUHAKAM'S RECOMMENDATIONS

SUHAKAM makes the following recommendations to ensure that elections are not only free but also fair:

1. The Right to Vote

The will of the people shall be the basis of the authority of the government. Hence citizens have the right to select their representatives. For them to make informed choice, they have the right to access to information which includes right to hear the manifestoes of all parties and candidates. Access to information necessitates for the right to assembly. Thus, SUHAKAM recommends the followings:

- **Right of Assembly**
All political parties are allowed to hold rallies and ceramah without having to apply for permit during the period of campaigning with the proviso that the assembly is peaceful and speech is not used to slander, create disharmony, incite hatred and compromise national security. The onus

is on the organizers to ensure the assembly is peaceful and the freedom of expression is not used to incite disharmony, hatred and violence or to cause moral degradation or mental harm. The organizers shall be charged if people's safety (both physical and psychological) is threatened or public disorder occurs.

However, the police should not act on suspicion, speculation, fear or imagination. There must be evidence of public disorder or incitement to create violence. Restrictive laws as the Sedition Act, the Internal Security Act, the Police Act and the Official Secrets Act should be exercised judiciously and a balance must be struck between security and civil rights and freedom.

- **Access to the Media**

All parties shall have equal access to the media in terms of broadcast time and print space as well in terms of the placement of timing and page. In short, access to the media should be non-discriminatory. The media is to be allowed to cover the campaigns freely, without interference or unreasonable restrictions imposed by the authorities.

- **Universal Suffrage**

Persons with disabilities and indigenous people have the right to vote. Hence, it is recommended that polling stations be accessible to indigenous people in remote areas, polling stations to be disabled friendly and ballot papers in Braille be available to the visually handicapped.

2. **View of the People to be Truly Reflected**

The candidates elected should reflect correctly the choice of the people. Hence, SUHAKAM recommends:

- **Phantom Voters**

- The Election Commission has to devise measures to ensure those on the electoral roll are genuine electors. The measures that the Commission has taken so far are good but they are inadequate to expunge all phantom voters.
- The government shall consider amending all relevant laws to empower the Election Commission to check on the validation of one's claimed residence and the authority to transfer an elector from one constituency to another due to change in address.
- There shall be better co-ordination between the Registration Department and the Election Commission so that deceased electors are expunged from the electoral roll as soon as the death certificate is issued.

2. **Automatic Registration**

- All eligible voters shall be automatically registered upon attaining the age of 21.

Delineation of Constituencies

- Constituency delineation designed to dilute or increase the votes of a particular candidate or party is unacceptable in the light of international norm of equality of suffrage. In this respect, SUHAKAM urges that the principle of democracy enunciated in the Federal Constitution and Article 21 of the Universal Declaration of Human Rights be respected and given due consideration in delineating the constituencies.
- The use of an ethnic form of gerrymandering to control electoral outcomes should be discontinued.

Longer Campaign Period

- The campaign period for general elections shall be longer as was in the 1959, 1964 and 1969 elections so that all views are equally represented and for voters to hear the views of all parties.

3. **Equality to be Exercised during Elections**

For the election to be truly fair, equality should be exercised at all times during the election. Hence SUHAKAM recommends:

- **Administration of Election-related Laws**
Election-related laws should be implemented and enforced non-selectively to ensure that every candidate has an equal chance of winning.
- **Caretaker Government**
It is recommended that when Parliament is dissolved, a caretaker government takes charge to ensure impartiality. This measure is necessary to ensure public facilities and funds are not used for campaigning.

4. **Independent and Impartial Election Commission**

Free and fair elections require an Election Commission which is independent and impartial. In this regard, SUHAKAM recommends that the Election Commission be directly accountable to Parliament rather than to the Executive to ensure its independence.

5. **Redress**

The Court should be given greater leeway to adjudicate electoral disputes. Subjecting the electoral process to greater scrutiny and oversight will result in everyone having greater regard for the rules and the need to refrain from unscrupulous tactics.

6. Candidates Should Act Responsibly

As aspirants wanting to represent electors and lead the nation, candidates should act responsibly. Hence,

- SUHAKAM suggests that at all rallies and during any campaign activities, candidates refrain from slandering, making false allegations and using their freedom of speech to incite hatred, racial and religious tensions.
- SUHAKAM recommends that those who resort to undemocratic means to win elections as well as those who are responsible for violations of the law be made accountable in a timely manner and not after five years. Undemocratic means include vote buying that ranges from outright gifts (cash handouts, grants to private schools, allowances ostensibly to cover expenses of party supporters and as compensation in lieu of wages), and various non-cash inducements such as speeding up administrative processes (e.g. the issuing of ownership titles to house owners).

CONCLUSION

Citizens of Malaysia have the right to select their representatives to form the government. To ensure the government truly reflects the will of the people, elections have to be free and fair. The general consensus of the participants of the Conference was that while elections in Malaysia had been free and had measured up to a certain level of the international standard, they had fallen short on the scale of fairness. There is a need to reform the electoral process to enhance the public's confidence in the election system.

The will of the people shall be the basis of the authority of the government"². Based on this mandate, citizens should take their right to vote seriously and responsibly, and candidates and their parties should also be responsible in their actions.

It is not just during elections that elected members and candidates are seen, heard and judged. As Tunku Abdul Aziz Ibrahim said at the Conference when he quoted a Commonwealth Election Commission representative: "Mr. Prime Minister, democracy is not just about elections, but what happens between the elections."

2. Article 21 of the Universal Declaration of Human Rights

CONFERENCE PROCEEDINGS

WELCOMING ADDRESS
By
DR. CHIAM HENG KENG
Chairperson
Malaysian Human Rights Day Committee

Your Excellencies High Commissioners and Ambassadors,
Representatives of Foreign Missions
Yang Berbahagia Tan Sri Abu Talib Othman,
Tan Sri-Tan Sri, Puan Sri- Puan Sri,
Dato'-Dato', Datin-Datin,
Fellow Commissioners,
Honourable guests,
Ladies and gentlemen,

It is with great pleasure that I, on behalf of the Human Rights Commission of Malaysia (SUHAKAM), welcome Your Excellencies, Distinguished Guests and all present to this major annual event of the Commission. Your presence on this Sunday morning to celebrate with SUHAKAM the 7th Malaysian Human Rights Day speaks of your commitment to the upholding of human rights and your support of SUHAKAM. For your presence and your support, SUHAKAM would like to express its appreciation with grateful thanks.

Ladies and gentlemen,
The Commission, like other members of Malaysia, is indeed proud and happy that our country has achieved the 50th year of its independence. "Human Rights and Election" is therefore a fitting theme for SUHAKAM and the nation to celebrate the Malaysian Human Rights Day in this 50th year of self-government.

Elections are central institutions of democratic representative governments, and free and fair election is the bedrock of a democratic society. I am sure hardly any citizen of a democratic nation would dispute the necessity for elections to be free and fair. Many countries, especially the developed countries, have pledged or claimed to have free and fair elections. However, the definitions of and the criteria for free and fair elections are rather diverse. For instance, in 2000, the UN Commission issued a declaration on what constitutes a free and fair process; in 1990, the Organization for Security and Cooperation in Europe in its Copenhagen Document set forth standards for elections in its 55-member countries; and the Inter-Parliamentary Union in its 1994 Declaration adopted a set of criteria for free and fair elections. The diversity has made an agreed-upon set of specific practical criteria for judging whether the election is free and fair elusive.

Ladies and gentlemen.
In spite of this setback there is substantial consensus on international norms governing the legitimacy of an election. Furthermore, the complexity in judging what constitutes free and fair elections should not deter or hinder any country from striving to hold free and fair

elections. As Malaysia works towards the achievement of Vision 2020 it needs, like other developed countries, to strive for free and fair elections as far as possible. SUHAKAM hopes that this conference will provide a platform for Malaysians to review the electoral process critically (not to find faults but to seek for improvements); to identify the strengths as well as the shortcomings of the current electoral process; and to offer constructive suggestions for the improvement of the elections.

SUHAKAM also hopes that the conference will succeed in raising awareness of the right to vote, and the responsibility of citizens to exercise this right and exercise it wisely.

As the Malaysian Human Rights Day falls on Sunday this year, our celebration is only in the morning to enable families to spend some time together and for workers to have their rest. SUHAKAM also subscribes to the contribution of our conferences' participants. Hence, we have omitted inviting a distinguished guest to officiate the celebration to give as much time as possible for participants to partake in the Question & Answer session after the panellists have made their presentations.

There is another difference in this year's celebration. Instead of an invited guest, our Chairman – Tan Sri Abu Talib Othman – will be giving the keynote address.

Ladies and gentleman,

Before I invite YBhg Tan Sri Abu Talib to address the conference, allow me to take this opportunity to thank the Organizing Committee for working with me wholeheartedly in making this event a reality. Our grateful thanks to all the speakers and discussant for graciously accepting our invitation and help us celebrate the Malaysian Human Rights Day. We would also like to appreciate the staff of Hotel Crowne Plaza Mutiara for being cooperative and accommodating. Lastly but not least, I would like once again thank all our guests and participants for the support and we hope you will continue to work with us to ensure the rights of our people are not denied.

May I now invite YBhg Tan Sri Abu Talib, Chairman of SUHAKAM, to present the keynote address.

Keynote address

By

Tan Sri Abu Talib Othman
Chairman, Human Rights Commission Of Malaysia

Excellencies,
Distinguished panellists,
Honoured guests,
Ladies and gentlemen,

On behalf of SUHAKAM it gives me great pleasure to welcome all of you to this conference. It is heartening to see so many of you this Sunday morning to join us. I would like to thank each of you for your response to SUHAKAM invitation to attend this conference. Your presence demonstrates your strong commitment to human rights and support for the theme of this year's conference, that is "Human Rights and Election". Thank you, ladies and gentlemen for your support.

This year marks the 50th year of national independence or Merdeka, a half-century of self-rule. Policies under colonial rule were determined by a colonial parliament or colonial office. Since Merdeka we have been able to exercise our own political destiny, through our own elected members. Independence gives rise to high expectations. While some are thoroughly happy and satisfied with Malaysian democracy, others are not. There still exists economic gaps and some have serious doubts about public and private governance, accountability, bureaucracy and efficiency.

It is worth pointing out in this connection that international declarations and norms have exerted democratic elections to be the basis of legitimate government. Countries and people across the globe have recognised that free and fair elections are crucial points on the continuum of democratization and an imperative means of giving voice to the will of the people which is the basis of a government authority. A democratic country, having a government by the people and for the people, should have an electoral system that is able to produce results that accurately reflects the will of the voters. It is a fundamental human right for citizens of a country to be able to choose their own representatives freely, thereby participating in the government of their country. The right to take part in their government is a fundamental right, enshrined in Article 21 of the Universal Declaration of Human Rights which reads: .

The will of the people shall be the basis of the authority of the 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.

In Malaysia the right of citizens to vote in any election to the House of Representative (Dewan Rakyat) or the Legislative Assembly (State Assembly) is enshrined in Article 119 of the Constitution. In order to effect and preserve free and fair elections, an independent and impartial Election Commission is tasked to conduct and oversee these elections. Unfortunately, because its members are appointed by the government and the Commission is under the jurisdiction of the Prime Minister administratively, it is often accused of being biased against opposition parties.

Ladies and gentlemen.

It would generally be agreed that elections in Malaysia have been free. Voters were relatively free from the threat of violence when choosing their representatives. Elections have generally been smooth and seem to have measured up to a certain level of the international standard. The concern, however, has always been whether the elections are fair. Are there impediments to freedom of speech and expression, freedom in voting rights, respect for human rights or fairness in the electoral process? In the context of today's topic, the concern is with regard to the conduct of the elections; whether candidates have fair chances of airing their electoral views without unreasonable restrictions and whether the electorate has been unduly persuaded by unfair means. To be really free and fair, the electorate must be allowed to make informed choices. This can only be done when all contending parties are allowed fair campaigning and as far as possible equal access to public mass media and respect for human rights. Of course there is no such thing as ideal political system. At worst there are powerful dictators and at best selfless statesmen who place national interest above personal interest.

In a modern democracy, any Tom, Dick or Hillary can qualify as a candidate as long as he or she can garner enough popularity and/or financial support. Indeed many amongst Malaysians aspire a political career with minimum qualification in the belief that politics could bring them instant status and other benefits to the chagrin of the more intelligent electorate. Malaysians deserve better than the services of elected members described by YAB Deputy Prime Minister, Datuk Seri Najib Tun Abdul Razak at the Gallery of Elected Members of the ruling party, and I quote as who "just feel good when given recognition during official functions and disappear when it is time to work". A truly fair election is the only way for Malaysians wishing to serve the public with integrity and competence will have equal chance of winning. Citizens should, therefore, take their right to vote seriously and responsibly.

Ladies and gentlemen.

Let us look at some of the frequently expressed areas of concern. I do not intend to cover all of them as I am sure our distinguished panellists, with their respective expertise and experience, are likely to raise them and are more competent to do so. I will try to highlight some which I reckon are pertinent to fundamental rights and to the core of the election process.

1. **The Electoral Roll System**

This has been one of the most criticized aspects of the electoral process. Phantom voters were alleged to occur in many constituencies. There were more claims of phantom voters in the last two elections than previously.

As a response to the criticisms and accusations, the Election Commission has recently instituted several steps to clean up the electoral rolls. These include:

- (i) The availability of checking one's status of registration online through the Commission website;
- (ii) Registration throughout the year at any post office with a computerized system;
- (iii) The availability of electoral roll on a CD-ROM which the public can purchase from the Commission; and
- (iv) The likely use of indelible ink in the next general elections.

All these measures are highly commendable but they are insufficient to address numerous criticisms to the electoral rolls. Even if the irregularities and discrepancies are not the doing of the Commission or how small they can be, nevertheless that may likely affect the outcome of the elections, especially as the winner is based on the "first past the post" system. In this connection, the government should consider amending the election laws to empower the Election Commission to check on the validation of one's claimed residence and to transfer an elector from one constituency to another due to change of residence. There should be better co-ordination between the Registration Department and the Election Commission so that dead electors are expunged from the electoral roll as soon as the death certificate is issued. In addition, all eligible voters should be automatically registered.

2. **Accessibility to the Mass Media**

It is often argued that opposition parties and parties in power do not have equal opportunity of access to the media. Communication with the electorate is fundamental in the process of political work. Access to the media remains a serious problem with the opposition parties, particularly so where the major information media are either directly or indirectly government controlled. Further, election notice and the campaign periods are very short. Election notice can be as short as seven days from the date of nomination to balloting. This creates problems for the opposition parties to organise ceramahs or house to house visits or to respond effectively to challenges from the ruling party. To the party in power, it is not a problem as they would have easy access to all government machinery.

To be fair, access to the media should be fairly distributed. Fair media access means not only allocation of broadcast time or print space to all parties and candidates but also fairness in the placement of timing of such access, i.e., prime time versus too late night broadcast or front page versus back page publication.

In this connection, perhaps the Election Commission should consider a mechanism of assuring a fair distribution of media access for all candidates and political parties. It is however important that the use of media for campaign purposes should be responsible in terms of content, such that no party makes statements which are false, slanderous or racist, or which constitute incitement to violence or the building of false expectation.

3. Respect for Fundamental Human Rights

Guarantee for free speech, opinion, information, assembly, movement and association take on greater significance during elections. The prevailing atmosphere should be one of respects for human rights and fundamental freedom and be characterized by an absence of intimidating factors. These rights are critical to voters, candidates, parties and campaigns. Without access to information, voters would not be able to formulate or express their opinion about the candidates, the parties and the process. Let all arguments be heard. An election manifesto outlines the policies on which a political party seeks popular mandate so that the elected party cannot assume that once elected it can govern without reasonable limits. Currently there are various laws such as The Sedition Act, Official Secrets Act, Internal Security Act, the Police Act and the Societies Act which empower the state to arbitrarily restrict the right to freedom of expression for reasons of national security, public order or morality.

It may well be true that every country needs security laws. However, there must be a balance between safeguarding national security and at the same time not sacrificing public rights and freedom. A balance must be struck between security and civil rights and freedom when drafting such laws. A society with absolute freedom could become chaotic and insecure, while a society that puts too much focus on tightening security would put unnecessary restrictions on its citizens.

There have been cases where opposition parties were refused police permit to hold political ceramah and in two cases as far as I know, application for registration of political parties were rejected by the Registrar of Societies on grounds of threat of public order and national security without adducing concrete evidence to that effect. With respect, in my view, a mere statement of threat of public order and national security without clear evidence is not enough to reject any application for a police permit to hold political ceramah or to register a political party. The right to hold peaceful assembly and to form association is guaranteed by the Constitution.

We recognise that the government is responsible to ensure peace and security of the country. We also recognise the need and the right of the government to regulate speeches advocating national, racial and religious hatred that constitute incitement to discrimination, hostility or violence. In this regard it is in my view it is permissible for the government to regulate the activities of political parties whose policies conflict with any of the human rights enumerated in the Covenant. Restraints upon activities of this nature are, in fact, vital during an election period in order to ensure that the political environment is free of any forces that may seek to intimidate the elected or any political actors, or to violate the fundamental rights of any group. However, the government should act on concrete evidence, not on speculation or imagination, that there is indeed a genuine and serious threat to national security or public order. Any unfair restriction, in whatever way it might be attempted to be justified, is wrong. It would, therefore, be helpful if adequate and transparent procedures are put in place to ensure effective restraint on the arbitrary exercise of such powers by the relevant government agencies so that the general interest of the electorates and not special interest of any particular individual, group or party are served.

4. Universal Suffrage

Every eligible man and woman has the right to vote. This right is given to all citizens, including the disabled and minority indigenous people. Most of the polling stations were not disabled friendly, thus deterring the physically disabled from exercising their rights. In addition, ballot papers had not been printed in Braille, thus depriving the blind from expressing their choice.

Many indigenous people living in remote parts of the country have no access to polling stations because of poor public transport and inaccessibility to polling stations. They too are denied their rights to vote. Restriction of postal voters to the armed forces, police personnel, diplomats and registered students also denied people of the right to vote. For those who were out of the country on the election day, their votes are forfeited. In any event, ladies and gentlemen, the practice of "postal votes" continues to be a controversy.

5. One Person One Vote Democracy

Universal suffrage is, of course, only one element of fairness. Another is the concept of equal suffrage. This is the idea traditionally expressed as "one person, one vote". This system acknowledges all votes are of equal importance and carry equal weight in order to satisfy the element of fairness.

Many observers have raised concern regarding the delimitation of constituencies in Malaysia. Some urban constituencies appear to have three to four times as many voters as their rural counterparts. Constituency delimitation designed to dilute the votes of particular individual groups or geographic areas are unacceptable in light of the international norms of equality of suffrage. The will of the people should be given due consideration in delineating the constituencies because the principle of

democracy as enunciated in the Federal Constitution and Article 21 of the Universal Declaration of Human Rights which is "the will of the people shall be the basis of the authority of the government" should be respected.

Electoral boundaries should therefore be such that elections may lead to a fair representation, given the fact that Malaysia is a multi racial and multi cultural society.

6. Unfair Use of Public Resources for Campaign

One of the criteria of fairness is level playing field. In this respect, besides providing adequate opportunities for all parties and candidates to communicate with voters and win their support, public resources should not be used unfairly for one candidate or candidates. For example, during the recent by-election campaign in a certain state which attracted and aroused much interest and excitement, the government announced allocation of funds and development projects to improve the infrastructure in that constituency. Having regard to the timing of the announcement, i suppose the sole intention was to induce voters to vote for a particular candidate. In addition other government facilities are also readily made available to the ruling party during campaign period. The call of integrity should transcend the conduct of election.

Ladies and gentlemen.

Election which is the bed-rock of a democratic nation and which gives legitimacy to a government has to be conducted with transparency and accountability. Free and fair elections may not have the same meanings for all governments and societies. As explained by the organising committee chairperson, despite these differences, there are numerous international declarations, agreements and norms that share a set of agreed-upon criteria. These criteria, which directly or indirectly pertain to human rights, should be the ultimate guiding norm for all elections.

Elections in Malaysia have generally met international standards to a degree. But criticisms and allegations of misconduct, phantom votes, vote buying and abuse of postal votes and unfair tactics for campaigns have been on the rise in the previous elections. The Election Commission has since taken several measures to address these issues. However, more needs to be done, especially to the election laws and to implement all election-related laws non-selectively to ensure free and fair elections. The electorate of today, being better educated and informed, do not only expect higher standards but also demand for justice. In this regard, we are encouraged by the assurance of YAB Datuk Seri Abdullah Ahmad Badawi, the Prime Minister of Malaysia when he spoke at the mammoth Merdeka Celebration at Stadium Merdeka on 31st August 2007 that the government would not allow injustice against any citizen. It is now up to the government and the Election Commission to do as they are obliged to do to ensure that no injustice is meted out to citizens who are out to elect leaders that could serve the best national interest. Failure to do so may only generate resentments that may destabilize the country.

After 50 years of self-governance this is a good time to review the electoral laws through public dialogue and forum such as this to examine how we can go forward as a nation to ensure that our fundamental human right to elect a government of our choice continues to be protected and made truly fair. Allow me, ladies and gentlemen, to remind you, that this conference is not intended to be a forum for condemning or convicting any party. As it must be, this forum should look at measures that all parties should do in order to ensure that elections in this country are truly free and fair, and fundamental human rights and freedom are respected.

On behalf of SUHAKAM i would like to thank all of you again for attending this conference. I hope this conference will serve its purpose and generate beneficial outcomes. I wish you all a fruitful and productive conference.

Thank you.

PANEL SESSION

**HUMAN RIGHTS AND ELECTION:
ELECTORAL PROCESS
By
TUNKU ABDUL AZIZ IBRAHIM**

Tunku Abdul Aziz started his presentation by reminding the participants that ‘we get the leadership that we deserve’. This notion is true because our country chooses its leaders through the electoral process and it is also the precise reason why the ability for people to exercise their democratic rights is important to ensure that a responsible and caring leadership is put into place.

Transparency and accountability goes hand in hand with the right to govern. The mandate given by the public should reflect one’s objective to put the interests of the many over those of the few. Those, who are elected, have an obligation to adopt universal accepted best practices, consistent with the economic, political, social and ethnic needs of a moral and caring society. It is expected of the leadership to build an ethical and socially responsible government. This is the responsibility to be borne by them due to the trust given by the public.

Human rights is central to democratic values; these basic and fundamental rights are enshrined in the Federal Constitution that differentiate us from an authoritarian regime. Freedom of assembly and of speech are crucial in an active democratic society. The reason of safeguarding national security to allow constraints in organizing public rallies is no longer acceptable. It denies voters access to different views and prevents them from making sound decision when voting. It is also a disadvantage to the opposition who do not have access to the mass media as most of them are directly or indirectly owned by members of the ruling party. As such, there is a need for new laws prohibiting political parties to own media and furthermore legislations that are contradictory to the rights of freedom of assembly and of speech have to be repelled.

Abuses in elections are common over the world. Nowadays, independent election watchers are well informed and more sophisticated. Therefore it will be a bad idea for the Election Commission to deceive them who are committed to the ideals of free and fair elections. Candidates must be required by law to disclose the sources and amounts of funds they had received and be held legally accountable for those declarations. The Election Commission must determine how much each candidate can spend depending on the size and nature of each constituency.

The Commission’s members should be people well known for their integrity, non-partisanship in political matters and selected by an all-party parliamentary committee for approval by

the Yang Di Pertuan Agong. Independence from the government is crucial to ensure public confidence.

Below are some of the best practices drawn from all over the world:

- There should be an agreed code of conduct between among the parties as to how they would conduct themselves during an election campaign so as to be seen as far as possible to be free and fair.
- The Election Commission should, where possible, establish a forum for debates and consultations with and between political parties to ensure that all political parties fully understand their rights and responsibilities with regard to all aspects of the election process.
- Contributions in cash or kind by individuals or corporations should be limited to a reasonable amount so that it fall shorts of being perceived as being influenced.
- Sponsored radio and television advertising should be controlled to acceptable levels if not banned altogether.

**HUMAN RIGHTS AND ELECTIONS:
A VOTER'S PERSPECTIVE
By
DR. MAVIS PUTHUCHEARY**

The theme of this forum "Human Rights and Elections" focuses on the core principle of democracy – elections that are conducted under conditions of freedom and equality. Approaches to studies on elections and democracies in non-western societies can be divided into two broad categories. Those (mainly political scientists) define democracy as a political form which is different from other political forms in that they have certain attributes such as independent judiciaries; protection for individual rights and liberties of expression, association, belief and participation; consideration for the rights of minorities; limits on the ability of the party in power to bias the electoral process; effective guarantees against arbitrary arrest and police brutality; no censorship; and minimal government control of the media. For countries to qualify to be called liberal democracies or electoral democracies depends on whether they meet all or some of these criteria.

Other scholars (mainly sociologists) have tended to focus on how certain values associated with democracy – anti-colonialism, dreams of freedom and the tensions between democratic values and cultural forms – have produced particular kinds of struggles or arrangements in different parts of the world. In this paper I attempt to combine both approaches in order to show the nature of the political system and how it was shaped by history, politics and culture. I make the argument that the founding moments of the Malaysian nation-state were fraught with major contradictions and basic tensions resulting in the development of a democratic system which is very much different from the one which was developed in the west.

The starting point of my analysis is the Constitution because in many respects, it is an amalgamation of the aspirations and struggles of the different groups that make up the country's plural society. At the same time the Constitution is not immutable but has changed in response to different ideas and beliefs. In Part 1 of the paper, I discuss ways in which contradictions in the Constitution were first "finessed" or "fudged" and then resolved in favour of the primacy of "ethnic nationalism" over "civic nationalism". In Part 2, I examine different dimensions of electoral choice using the more traditional approach to the study of democracy. In Part 3, I make a plea for urgent reforms to revitalize our democracy.

PART 1 - HISTORICAL ANALYSIS

The Malaysian Constitution is a product of the country's history, culture and politics. This is reflected in the contradictions that existed in the original document and in the numerous amendments that have been made since. I focus on three contradictions which are relevant to this paper – the highly centralized federal structure, “inalienable rights” versus Parliamentary sovereignty, and the incorporation of two contradictory notions of the state, one based on “civic nationalism” and the other based on “ethno-nationalism”.

Historical factors played an important role in determining the nature of the post-independence state. After the Second World War, the British had attempted to do away with the federal system and establish a Malayan Union. The new Malay political elite mobilized the support of the Malay Rulers and through them they received the support of the Malay masses to reject the Malayan Union and replaced it with a federal structure which symbolized the sovereignty of the Malay Rulers. Although the federal structure was necessary to retain the political identity of the Malay Sultanates, the fact that ethnic groups were not concentrated solely in particular territories, but traverses the whole country made federalism as a strategy to resolve conflicts of limited value. Indeed, as suggested by Simandjuntak, “This type of racio-political structure made it inevitable for the federation to be highly centralized. The national leaders had to re-orientate themselves in terms of community rather than state interests. Under these conditions political parties were naturally not regional or state parties but pan-Malayan” (Simandjuntak 1969:298). While the identity of Malaya as a federation made up of former “Malay states” could be seen as purely symbolic, with the entry of the Borneo States of Sabah and Sarawak the nation-state assumed the character of a genuine federation. For the first time cultural diversity coincided with particular territories. Although some attempts were made to give these new states a greater measure of autonomy than enjoyed by the Peninsular states, the structure of the government remained highly centralized, both in terms of the imbalance of powers between the centre and the states, and the administration of elections. This is seen especially in the limited powers given to the states to have a say in amending the Constitution – through representation in Dewan Negara – and in the appointment of a federal agency to conduct elections for the state legislative assemblies as well as for the national parliament.

Fundamental Liberties in the Constitution

The definition and guarantee of fundamental liberties in the Constitution followed the practice adopted in several other former Commonwealth countries. In October 1953 the British government had extended the European Convention on Human Rights to 42 of its overseas territories whose international relations it was responsible. As these British dependencies became independent, the framers of their new Constitutions, some of whom were involved in drawing up Constitutions for several of these former British dependencies, included clauses guaranteeing fundamental rights and liberties. (Anthony Lester 1984:55). As Britain did not have a written Constitution, the inclusion of these rights in the Constitution had signalled a clear departure from the British model and a move towards the American system. According to Lester:

One practical effect of the absence of fundamental rights in this country [ie Britain] is that the courts of other Commonwealth countries increasingly refer to United States case law when interpreting their own codes of fundamental rights. It is inevitable that they should do so, not only because of the relevance of American constitutional concepts of equal protection, free expression, personal privacy, due process, and so on, but also because British constitutional law confined by the Austinian concept of parliamentary omnipotence, provides scant guidance to Commonwealth courts when they decide claims of infringements of fundamental rights (Lester 1984::57).

In Malaysia, two factors must have been of paramount importance to the framers of the Constitution when considering the provision of fundamental liberties in the Constitution. The first factor was the state of emergency that was already in force in the country and which restricted fundamental liberties. The members of the Constitutional Commission supported these repressive laws in the interest of national security. It is significant that the Commission had recommended that even after emergency rule was lifted, Parliament should be authorized to enact provisions designed to protect the security of the nation, "notwithstanding that such provisions may involve infringement of fundamental rights or state rights." (Report of the Commission 1956:75).

The second factor was that the framers of the Constitution were drawn from the Commonwealth and trained in the British system of parliamentary democracy. Many of them believed in the supremacy of Parliament as the embodiment of the "people's will". Unlike the American Bill of Rights which recognized the inalienable rights of man which was god-given and could not be taken away even by Parliament, the Malaysian Constitution qualified most of the rights and freedom by such phrases as "save in accordance with the law". This gave the legislature a role in deciding how much freedom should be permitted. Thus, as Groves sourly put it, the fundamental freedom associated with movement, speech, assembly and association are so limited in the Constitution and by ordinary acts of Parliament that they are "only as free as Parliament chooses them to be" (Groves 1978:33).

The Notions of "Civic Nationalism" versus "Ethnic Nationalism"

The Constitution was cobbled together with the assistance of three main political actors; the British administrators, the Alliance politicians and the members of the independent Constitutional Commission. Their different perceptions of what the future nation-state should look like were incorporated in the Constitution. Thus on one hand, the Constitution recognized the individual's freedom "within" or as part of the state's new "freedom" or sovereignty – that is, the notion of citizenship – and the right to vote which conveyed the notion of legal status and entitlement. On the other hand, the Constitution also recognized the status of the Malay rulers, the Malay language as the official language, and the status of Islam as the official religion, all of which symbolically identified the state with Malay culture. In addition, the Constitution provided for the State to recognize "the special position of the Malays and the legitimate interests of the other communities".

In the first ten years of Independence these contradictions remained largely undetected because the leaders in the multi-ethnic Alliance had negotiated and reached an agreement

through compromise. An elite “social contract” was able to give the impression of unity and consensus, making it possible for the contradictions to be “finessed” and fudged.”

The 1969 elections, however, signalled a paradigm shift in the political system. It is often assumed that it was the eruption of ethnic violence in the streets following the 1969 elections, as the reason behind the suspension of Parliament and the imposition of emergency rule. Yet a careful study of history reveals that it was not “racial riots” on the streets that ignited a regime crisis; rather a regime crisis, a blow to the underlying logic of political rule since 1957, triggered rioting. This required strong government measures in the short term, but which were then used to establish a new form of strong government for the long term.

Since 1969 the leaders who guided the country have sought to base the legitimacy of the state on the primacy of ethnic nationalism over civil nationalism. Several strategies were adopted to achieve this end. Firstly, the Constitution was amended to raise those sections in the Constitution which were related to various forms of Malay nationalism to the status of “entrenched provisions” . This meant that they were guaranteed special legal protection. In addition to the usual two-thirds majority in both Houses of Parliament, these clauses required the consent of the Rulers in Council.

These amendments signalled a clear departure from the notion of civic nationalism. In other democratic countries with a written constitution, it is the section guaranteeing fundamental rights that is given a special status in that even elected representatives are limited in their powers to infringe these fundamental rights. These rights are protected by the courts. Indeed, of fundamental importance to a democracy, is the potential conflict between the civil rights secured through the courts and political rights secured through the electoral process.

Secondly, new electoral rules were introduced to bias the electoral process in favour of the ruling coalition. The powers to re-delineate constituencies to reflect demographic changes and increases in the size of parliamentary constituencies had been shifted from the Election Commission to Parliament in the mid-1960s. Over the years, the law limiting the extent to which rural constituencies could be smaller in electoral size to urban constituencies was altered so that by the 1970s the legal limit was removed altogether. This made it possible for those in power to create many more rural (Malay) constituencies than urban (Chinese) constituencies. In addition, the apportionment of parliamentary seats among the state, which was supposed to be based on the distribution of population was made in an arbitrary manner. Although ostensibly to take into account other legitimate factors such as land size, it also made it possible for mal-apportionment to take place. Thus a situation is created whereby “a disproportionately high representation of the Malay electorate which is distributed over less densely populated rural constituencies, and an under-representation of non-Malays, and especially Chinese voters, resident in very densely populated urban constituencies” (Khoo 2005:321).

These changes in the laws set down the framework for the creation of a binary between the indigenous and the non-indigenous citizens and for the establishment of an authoritarian paternalistic state to emerge which regarded, as its main purpose, the protection of “weaker” segments of society defined in this way

PART 2: LIMITS TO ELECTORAL CHOICE

Even though elections are not necessary to change or confirm a government of a country, they are employed everywhere as part of a complex effort of governors in search of that popular consent needed to advance their aspirations for a fully legitimate authority. The dilemma facing the authoritarian paternalistic state is how to gain legitimacy by holding competitive elections while at the same time ensuring a particular electoral outcome. A comparative study of democracies listed seven conditions which must exist if regular elections are fulfilled the promise of effective democratic choice (See Table 1). These conditions must exist together because “they form a metaphorical chain which, like a real chain, holds together only so long as each of its links remains whole and unbroken” (Andreas Schedler 2002: 39).

How does Malaysia Measure up to these Conditions?

Limiting the Scope of Elective Office

Elections exist to select the polity’s “most powerful collective decision-makers”. In Malaysia a large number of Senators are not elected but nominated by the government. Authoritarian rulers may also pre-empt potential threats emanating from popular elections by circumscribing the scope of elected office. In Malaysia the law abolishing local government elections which was passed in the 1970s, has been endorsed by all future governments.

Restricting Access to the Electoral Arena

The idea of a democratic election presupposes the free formation of alternatives. In most democratic countries there are no restrictions on the freedom of citizens to form, join, and support parties with different ideologies and policies. In Malaysia, some political parties have rules which restrict membership to a particular ethnic or religious group. Does this constitute an infringement of basic human rights? In addition, in order to form a new political party one would first have to apply to the Registrar of Societies for a license. An agency of the government – which the major competitor in the elections – decides whether or not to register one of its potential competitors.

Restricting Political and Civil Liberties; Restricting Access to the Media and Money

Democratic elections presuppose the free formation of voter preferences. In order to vote intelligently, the voters need to know the available choices, including an access to plural sources of information. In Malaysia, several laws including and especially the 1971 amendment to the Sedition Act places severe limits on freedom of speech. Certain issues described as “sensitive issues” cannot be discussed even in Parliament. Elected representatives are therefore deprived of the very reason they are in Parliament – to debate issues which concern the welfare of the people they represent. These laws are justified as being necessary to avoid ethnic conflict. Yet experience has shown time and time again and in many other countries, that conflict cannot be resolved by coercive means. The absurdity of a law that curbs the power of the elected representatives was shown up during the 1983 constitutional crisis when Parliament could not debate a bill to amend the Constitution but passed it anyway. The official view that the Constitution and its fundamental provisions are

too “sensitive” a matter for its own citizens to discuss and read about is patently absurd. What sort of a nation is it whose citizens may not discuss its constitutional foundations?

Formal and Informal Disenfranchisement

In the contemporary world, restrictions of the franchise once commonly applied on the bases of property, education, gender or ethnicity are not legitimate anymore. More subtle techniques have been used to control electoral outcomes by controlling the composition of the electorate by informal means. The use of an ethnic form of gerrymandering has already been identified as one such means to control electoral outcomes. Another strategy adopted is the mass transfer of voters from constituencies with a strong support for the government, to constituencies where the contest is likely to be keenly fought. Although such practices are illegal they are extremely difficult to detect because registration of voters by the Election Commission was done according to the addresses on their identity cards which is under the jurisdiction of a government agency.

Table 1: The Chain of Democratic Choice

Dimensions of Choice	Normative Premises of Democratic Choice	Strategies of norm Violation
1. The object of choice	Democratic elections involve the delegation of decision-making authority	Limiting scope of elective office
2. The range of choice	Citizens must be free to form, join, and support conflicting parties, candidates, and policies	Restricting access to the electoral arena
3. The formation of preferences	Citizens must be able to learn about available alternatives	Restricting political and civil liberties, restricting access to media
4. The agents of choice	Democracy assigns equal rights of participation to all citizens	Formal and informal disenfranchisement
5. The expression of preferences	Citizens must be free to express their preferences	Voter intimidation or vote buying
6. The aggregation of preferences	Principle of one person, one vote, equal value	“Redistributive” electoral management
7. The consequences of choice	Elections without consequences do not qualify as democratic	Preventing victors from taking office, or elected officers from concluding their constitutional terms

Source: adapted from Andreas Schedler “The Menu of Manipulation” *Journal of Democracy* 13.3 (2002)

Corruption: Vote Buying

If power and money determine electoral choices, constitutional guarantees of democratic freedom and equality turn into dead letters. In Malaysia, although there is little evidence of violence or the threat of it to keep voters from exercising a free choice, vote buying is widely used especially by the ruling party. Vote-buying takes many forms, ranging from outright gifts (cash handouts, grants to private schools, allowances ostensibly to cover expenses of party supporters and as compensation in lieu of wages) as well as various non-cash inducements such as speeding up administrative processes such as the issuing of ownership titles to house owners.

Concerns about the "clientelist control" of poor voters arise in almost all developing countries. However clientelist control is likely to be greater in situations like Malaysia where the party has been in continuous power for so long that many voters see little prospect of a change in government. They figure that as their vote is unlikely to make any difference to the electoral outcome, they might as well reap whatever material benefits they can obtain.

"Redistributive" Electoral Rules and Management

The democratic ideal of equality demands weighting votes equally. In Malaysia, the creation of a disproportionate increase of Malay-majority constituencies through ethnic gerrymandering has produced serious distortions in voter preferences. It has altered the relationship within the ruling coalition. Within the larger political system, the distortion inflates the political significance of political competition within the Malay community while reducing the political significance of the other communities. It also makes the UMNO-led government heavily sensitive and vulnerable to the electoral expression of popular Malay discontent – which makes UMNO, the BN and the nation "hostage" to the Islamic/PAS agenda.

Reversal of Electoral Outcomes

Elections are only meaningful if electoral outcomes are not reversed by nullifying elections or aborting the electoral game by ousting elected officials before their constitutional mandate has expired. The use of emergency powers is a convenient way to reverse electoral outcomes that threaten the regime. However, on the whole winners and losers have been willing to abide by the decision of the Election Commission.

PART 3: REVITALIZING OUR DEMOCRATIC SYSTEM

Malaysia exhibits some of the features we associate with democracy and free elections – universal suffrage, periodic elections contested by a number of political parties, the general absence of persecution of opposition leaders, a general absence of electoral violence, and a relatively high voter turn-out (as a percentage of registered voters). The absence of an open environment where civil and political liberties are not subject to repression has made it possible for a dominant elite to emerge which uses its control over the electoral process to maintain itself in power. Elections have permitted a degree of competition and contestation to take place but within a situation of "contained popular participation" with serious consequences for the future of the Malaysian nation-state.

First, a very narrow vision of democracy is developed, one in which democracy is equated only with elections. Participation in political decision-making outside the electoral arena is minimal and perfunctory. Second, the concept of majority rule is interpreted by politicians and the general public as giving the majority absolute power, even to the extent of making fundamental changes in the Constitution. Those who rule often assume that the vote cast for them during the general election is a mandate to rule unencumbered in the intervening years. There is therefore no need to get the views of the public on particular issues or to explain why certain proposed laws are necessary.

Unlike other countries which use the referendum as a way to gauge public opinion on important constitutional issues, the Malaysian ruling elite see little need to seek public opinion, claiming that the people's will had already been demonstrated when they elected the Barisan Nasional (BN). Yet, the BN cannot always claim to have the support of the majority of the people. For instance, the ruling coalition obtained only 49 percent of the votes in the 1969 elections. Far-reaching amendments to the Constitution made in 1971 were facilitated by the cooptation of various political parties which had won seats as opposition parties. Indeed, the BN's claim to represent the majority of voters can even be challenged if we take into account the large number of eligible voters who have not registered to vote. It is estimated that in the last elections, only one-half of the eligible voters actually voted. This means that the BN received the support of only about one-third of the eligible voters.

Third, the government has a vested interest in keeping the general public uninformed of matters that directly affect them. Government controls over the media are especially useful in this regard. Generally, the mass of the people of Malaysia know little and care less concerning the policies and objectives of the political parties. One may take the view that this is generally true of most countries. However, in a country like Malaysia where the state seems to have encroached into almost all aspects of life, an ignorant and apathetic public can constitute a real danger to the polity. It gives the government almost unlimited power through the promulgation of new laws of repression as well as the continuation of repressive laws whose existence can no longer be justified. When asked to explain why the government continues to use the communist bogey when it is no longer a threat, Amir Muhammad replied:

Authorities just find it convenient to psychologically prolong the Emergency. Malaysia still has a few emergency-style laws, including the notorious Internal Security Act which was supposed to be a temporary thing. The curbing of judicial review in 1988 also has an emergency feel to it. It's a lot easier to control the masses if you tell them they are constantly 'under threat' and this has been the logic of governance for decades. People who are afraid are those who won't question" (Amir Muhammad quoted in an article by Huzir Sulaiman in the *Starmag*, Sunday 25 March 2007).

A serious consequence of the increasing authoritarian style of government is that diminished sense of national identity. The multi-cultural rhetoric of the ruling coalition which had been the basis of the country's political stability has gradually been altered to a form of politics that is becoming increasingly exclusionary. Thus to the extent that the coalition trapped the leaders into an ethnic logic, it has impeded the development of the notion of citizenship which is crucial for the development of a national identity. Over the years Malaysian society has become infinitely more segmented and fractured. Even less so than before 1969 is the modern Malaysian state "a state of all its citizens".

There is an urgent need for a counterforce which would supply a public culture of pluralism that will check this dangerous trend. It is here that free and fair elections can make its most important contribution. Only by creating political and social organizations at the grass roots can we advance a public culture of pluralism based on mutual respect and amity. We need to critically examine the social contract, not to destroy it, but to revitalize it so that ethnic groups at all levels, operating within a system of free and fair elections may work together in a spirit of mutual respect and amity.

There is an urgent need to improve the electoral system so that the notion of citizenship which is fundamental to the creation of a free and democratic society will have a chance to develop. We need to advance the idea of a nation united around political ideals and values rather than around ethnic and religious identities. Electoral and political reforms to improve the electoral process will contribute significantly towards achieving a united Malaysian nation.

REFERENCES

1. Anderson Benedict, *The Spectre of Comparisons*, Verso Publications, 1998.
2. Crouch Harold, Malaysia: Do Elections Make a difference?" in *The Politics of Elections in Southeast Asia*, edited by R.H.Taylor Woodrow, Wilson Center Press, 1996.
3. Groves, H.E. "Fundamental liberties in the Constitution of the Federation of Malaysia" in *The Constitution of Malaysia - its development: 1957-1977*, Kuala Lumpur, Oxford University Press, 1978
4. Hickling R.H, *Essays in Malaysian Law*, Kuala Lumpur, Pelandok Publications, 1991.
5. Khoo Boo Teik, "Limits to Democracy: Political Economy, Ideology and Ruling Coalition" in *Elections and Democracy in Malaysia* edited by Mavis Puthucheary and Norani Othman, Penerbit Universiti Kebangsaan Malaysia, Bangi, 2005.
6. Lacey, Nicola "Are Rights Best Left Unwritten?" *The Political Quarterly* Vol 60, No 4 Oct-Dec 1989
7. Lester Anthony "Fundamental Rights: the United Kingdom Isolated?" Public Law Spring 1984
8. Schedler Andreas. *The Menu of Manipulation*, Journal of Democracy (Special issue on elections without democracy) Vol 13.2 (2002).
9. Simandjuntak B, *Malayan Federalism 1945-1963*, Kuala Lumpur, Oxford University Press, 1969.

HUMAN RIGHTS AND ELECTIONS :
A LEGAL PERSPECTIVE
By
RAGUNATH KESAVAN

PRELIMINARY OBSERVATIONS

A discussion on the failings and inadequacies of the existing electoral system and ways in which it can be reformed, has to begin by asking two basic questions: What is a democracy? What are the essential features of a democracy?

What is a Democracy?

The word “democracy” comes from a combination of two Greek words - “demos” meaning whole citizen living within a particular city-state and “kratos” meaning power or rule. Democracy is thus a system of self-government where citizens are allowed to participate both directly and indirectly in the decision-making process.

Citizens need to have a say in how society is structured and functions; they need to decide the areas in which they want the state to intrude and the areas in which they expect the state to stay out of; they need to have a say in how public resources and the power of the state are used to protect and advance the values and interests that are important to them.

An important principle upon which democracy rests is “majority rule”. However to rely on this principle, and this principle alone is a recipe for disaster, we would end up with the “tyranny of the majority” and the erosion of the rights of individuals and minorities. Thus democracy must operate within a constitutional framework where the power of the state is limited and fundamental liberties are enshrined. In a proper constitutional democracy all citizens have certain fundamental liberties and the exercise of these liberties is as a matter of right. The exercise of these liberties by an ethnic minority, a religious minority or a person of a minority political persuasion or any individual, for that matter, should not have to depend on the goodwill of the majority.

Such fundamental liberties need to be enshrined in a document i.e. Constitution, that is extremely difficult to alter. Having a Federal Constitution where these rights are watered down or where these rights are subject to the dictates of the legislative assembly or where fundamental provisions in the Constitution can themselves be amended by the legislative body³, is the thin edge of the wedge, which will lead to the “tyranny of the majority”.

What are the Essential Features of a Democracy?

A brief outlining of some of the essential features of a democracy will make it clear why we need to look beyond electoral laws if we are to have a strong and vibrant democracy

3. In both Australia and the Republic of Ireland a referendum is required to amend the Constitution

• Edited and abridged from Namibia Civic and Voter Education Campaign, Namibia Institute For Democracy

1. Citizen participation

- People need to be brought into the decision-making process at various levels. This is in order that leaders are kept in check and do not abuse their power. By their participation the government is informed of the wishes of the citizens, and can make decisions that will truly benefit the people.

2. Equality

- all people are equal in the eyes of the law.

3. The rule of law

- All people are subject to the same fair and impartial laws. Irrespective of the ethnicity, religion, gender, race or social status, any person who violates the law will be held accountable.

4. Human rights

- In a constitutional democracy, all citizens possess certain fundamental inalienable rights, and the exercise of these rights by individuals or minorities should not depend upon the goodwill of the majority.

5. Regular, free and fair elections

- Allow citizens to express their will by voting and to choose their representatives in government. A key aspect of democratic elections is that the results should be accepted by all contesting parties and other stakeholders.

6. Separation of powers

- The Executive, Judiciary and legislative are all separate from each other without an over concentration of power, which could lead to abuse. It is usually provided for in the constitution, which clearly establishes and assigns the powers of each branch so that there is a check and balance.

7. Accountability

- Elected and appointed officials are expected to discharge their duties properly and according to the law. The government is constantly answerable for its policies and actions to public opinion and periodically through elections.

8. Transparency

- The people are entitled to know what their government is saying and doing on their behalf. In order for the government to be accountable, it must be opened regarding the conduct of public affairs, especially concerning the decisions, actions and motives of its ministers and officials.

9. Political tolerance

- The willingness of individuals, political parties, other groups and organisations to accept, respect and actively defend the democratic right of others to hold and express opinions, even if these are unpopular, provided that these opinions do not infringe on the rights of others e.g. hate speech. In a democracy a diversity of views and opinions should be encouraged.

10. Multi-party system

- A system that allows various political parties to operate freely, including recruiting members and taking part in elections.

11. Agreeing to the rules of the game

- All citizens have the obligation to obey the laws of the land and to accept the outcomes of the democratic process.

12. Freedom of the mass media

- The media should not be controlled by government or any other powerful concerns and should have the same rights to freedom of expression as individuals. Only by having such freedom can the media perform in its role of providing a diversity of information and educating the people. During elections all candidates should have equal airtime especially on national television and radio.

AREAS OF CONCERN

Election Commission – Independent and in Charge

The Election Commission has limited power and resources. It is only fully in control of certain aspects of the electoral process i.e. the setting the date, nomination of candidates, polling, vote counting and the announcing of the results. The Election Commission is not fully in control of the delimitation of constituencies⁴. Neither does the Election Commission have the authority to ensure that all candidates have equal access to the media during the campaigning period, the authority to ensure that political parties are allowed or free to conduct rallies, or the power to register political parties⁵. Even taking action against corrupt or illegal practices is not within the power of the Election Commission.

The Election Commission needs to be fully independent and given a greater control over all aspects of the electoral process. The Election Commission should be directly accountable to Parliament rather than to the Executive.

Caretaker Government

When Parliament is dissolved, the government of the day continues to function. Their use of governmental authority, state resources and government machinery gives them a huge advantage over their political rivals.

The only way in which there can be a level playing field is for a caretaker government to take charge the moment Parliament is dissolved. This will prevent the misuse of state resources, facilities and government machinery for the incumbent party. This will also put an end to development funding during the campaign period.

4. All recommendations are subject to amendments by the Prime Minister before being submitted to Parliament for approval

5. The Malaysian Dayak Congress and the Parti Sosialis Malaysia have not been registered by the Registrar of Societies

Cleaning up the Electoral Rolls

There is a great concern about the authenticity of the Electoral Rolls. Allegations abound that the rolls contain phantom voters. There are cases of hundreds of voters being registered at one address and many instances of voters registered at non-existent addresses. There are also frequent complaints that names are removed arbitrarily from the rolls and that voters are transferred from one polling station to another without their knowledge.

The Electoral Rolls need to be cleaned up and the process needs to be done in an open and transparent manner. The Election Act also needs to be amended to allow all affected parties the right to challenge the credibility of the roll.

Since we have a system of national registration, we might want to consider a system of automatic registration. It is merely a question of transmitting the information in the National Registration Department to the Election Commission.

Revising Electoral Districts and Size of Constituencies

The Federal Constitution allows the number of voters in a rural constituency to be less than that in an urban constituency. At independence rural weightage was restricted to a ratio of 1: 1.35 by Article 13 of the Federal Constitution. The ratio was increased to 1:2 by an amendment in 1962 and then in 1973 all restrictions as to rural/urban weightage were removed. There is thus today, no restriction on how large the gap between rural and urban constituencies can be⁶.

The largest constituency in the country is Kapar in Selangor, which has 104,185 registered voters. The number of voters in Kapar is 20 times the number of voters in Putrajaya which has a mere 5,079 registered voters. This means that a voter in Putrajaya has the electoral clout of 20 voters in Kapar, a situation that makes nonsense of the concept of "one person, one vote".

There are frequent allegations that the electoral boundaries are redrawn in an arbitrary manner to favour the ruling party. The Chairman of the Election Commission, Tan Sri Abdul Rashid Abdul Rahman has suggested a separate, multi-party commission to review electoral boundaries and create new constituencies.

Campaign Period

In the 1959, 1964 and 1969 general elections, the campaign period was in excess of 6 weeks. The campaign period has become steadily shorter with every passing election. Since 1986 the campaign period has become 15 days or less. In the last elections it was a mere 8 days!

A short campaign period works to the advantage of the ruling party, which has at its disposal state machinery as well as national television and radio. It severely restricts the ability of opposition parties to reach out to the electorate.

In order that voters are apprised of the issues and can make an informed choice, a longer campaign period is necessary in order that all candidates have the opportunity to put forward their policies and programs. The campaign should be at least 20 days.

6. Law and the Electoral Process – S Sothi Rachagan

Postal Ballots

The process in which postal balloting is done is far less transparent than the way in which normal ballots are cast. Polling agents are unable to or have great difficulty in monitoring the process and this has consequently led to the popular view that the postal ballots are tampered with.

There may be a necessity for some persons to vote by way of postal ballot but an effort should be made by the Election Commission to keep the number of postal ballots to a bare minimum. It is suggested that postal voting be restricted to police and army personnel who are on active duty, overseas voters and diplomats.

Election Petitions

An election can be called into question only by way of an election petition presented to the High Court having jurisdiction where the election is held. It is unfortunate that a large number of election petitions have been thrown out on technical grounds. Succeeding in such an endeavour has always been a difficult task since the petitioner needs to show that he/she lost the election because of the irregularities; something that may not be easy if the election was lost by a large margin.

The power of the Bench has been further curtailed as a result of amendments to electoral laws that make it illegal to challenge the election on the basis of irregularities in the electoral rolls. The Judiciary needs to be given greater leeway to adjudicate such disputes. Subjecting the electoral process to greater scrutiny and oversight will result in everyone having greater regard for the rules and the need to refrain from unscrupulous tactics.

The First Past the Post System

A "first-past-the-post", winner take all electoral system results in disproportion and a huge disparity between the percentage of votes received by a political party and the number of parliamentary seats that they won.

In the 2004 general elections, the Barisan Nasional obtained 63.9% of the popular votes yet ended up with 90.4% of the seats in the Dewan Rakyat. Meanwhile, PAS only secured 2.7% of seats despite having 15% of voter support, DAP 5.5% of seats with its 10% voter support, and Parti Keadilan Rakyat 0.5% of seats with 9% voter support.

Thus the proportion of parties to one another in the Dewan Rakyat, is far removed from the proportion of popular support enjoyed by these parties. If 15% of voters support PAS, then their share of seats in the Dewan Rakyat should be in the region of 15% rather than a meagre 2.7%.

One long term solution to resolve this incongruence is to introduce a system of proportional representation or an electoral system which combines the "first-past-the-post" system and proportional representation like the German Model⁷.

7. In the German Model, the legislature consists of both Constituency MPs and MPs who are on the party list. Each voter votes twice—one for the his/her Constituency and another for the party of his/her choice. Parties are then allocated additional seats other than their Constituency seat so that the number of seats that a party has matches the percentage of votes cast for the party

ENHANCING PUBLIC CONFIDENCE IN THE SYSTEM

Electoral reform is about enhancing public confidence in the system. In a democratic system of government, it is vital that all citizens and political parties accept the outcome of the democratic process and this will only happen if people feel the system is fair. The legitimacy of the political leadership derives not from the result of the elections or from a massive mandate but from public confidence in the fairness of the electoral process.

Many Malaysians have serious doubts in the fairness of the present electoral system. This is one reason why almost 1 in 3 eligible voters has yet to register. Today there are about five million citizens who are eligible but they have not bothered to register as voters.

We call on the government to set up an independent commission of inquiry to examine not just electoral laws but the entire electoral system. The entire system is in need of a massive overhaul. We hope that the government of the day has the political will to take this courageous step. Since what is at stake is the long term survival and legitimate of the entire system.

DISCUSSANT

DISCUSSANT

By

PROF. DR. ABDUL AZIZ BARI

The three presenters have dealt with various aspects of human rights and elections; especially the problems with the existing system and how to overcome them. In summation they have dealt with various issues which are important in order for us to have free and fair elections. Indeed in his keynote address Tan Sri Abu Talib has highlighted various issues of concern, including those needing immediate attention.

I agree on the point raised by Suhakam Commissioner Dr Chiam Heng Keng on the diverse of the definitions and criteria for free and fair elections. But perhaps we can simply put the following characteristics as some of the requirements; namely: (i) that virtually all adults would be able to vote, (ii) that the elections are being held regularly, (iii) no one is being prevented from contesting, (iv) almost all places in the legislature are being made available for election, (v) campaigns are being conducted openly and fairly and (vi) that votes are being cast and counted secretly⁸. To my mind some of the definitions noted by her such as those issued by the United Nations in 2000 as well as the Inter-Parliamentary Union Declaration in 1994 as complementary to each other.

The links between human rights and elections, particularly the rights of ordinary men in the streets to take part in the running of the state through elections, has been recognized by various international human rights instruments. Some of these include, as has been rightly identified by Tan Sri Abu Talib Othman, art.21 of the Universal

Declaration of Human Rights 1948 and the provisions in the International Covenant on Civil and Political Rights 1966. Fundamentals of democracy, namely the right to freedom of expression, assembly and association, are the pre-requisites of free and fair elections⁹. It has to be emphasized that a credible election process is not only important from the point of view of the citizens but also from that of the government: it would find its mandate questioned if the electoral process is riddled with undemocratic and unfair practices¹⁰.

Tunku Aziz Tunku Ibrahim in his paper said we deserved the system we get. This underlines many things. Obviously such is the reflection of our quality; thus a bad system is the reflection of the quality of the people who run the system. And we would remain in the present state of affairs if we do nothing about it. Needless to say this unsatisfactory state of affairs has been due to the lack of initiative on our part. It is a pity that we are still talking about the basics although we have been independent for the past 50 years and that some of the states in the Federation are already claiming that they have or about to achieved the develop nation status.

Tunku Aziz was right in saying that all over the world elections are open to abuse. This is because everywhere politicians are the same; wanting the power for themselves and would

8. See Abdul Aziz Bari, *Malaysian Constitution: A Critical Introduction*, Kuala Lumpur: The Other Press, 2003, p.214

9. *Ibid*, p.213

10. For more insights on this see, e.g., Abdul Aziz Bari, *Politik Perlembagaan*, Kuala Lumpur: Institut Kajian Dasar (IKD), 2006, pp.56-97

try to remain in office as long as they can. But this is not a problem if electoral laws and regulations are being applied without fear or favor and the authorities charged with their application have no integrity problem.

Tunku Aziz was absolutely right to say that law to restrict public rallies is bad; hence the need to remove all such laws. For one thing the laws have to be administered and this inevitably falls on the shoulder of the executive. But as the executive has been formed by the winning party or parties it is essentially part of the contenders for the power.

This alone is good enough to explain the difficulty of having an impartial and fair implementation of such laws. Which is why in some countries, no authority, is allowed to regulate, let alone take away, the right to freedom of expression or those related to this such the right to freedom of assembly and association. Invariably the laws to regulate these – essentially the fundamentals for a functioning democracy – would be abused by those in power. As such the only sensible option is to do away with such laws.

Perhaps one may add that the existence of such laws underlines the condescending attitude; namely that the people are no mature enough or that they are not able to deal with the freedom. History shows that it was the colonial powers which originally put such laws in place. Unfortunately these have invariably been retained by the indigenous rulers who subsequently fear that they could not retain the power without the help of those oppressive laws. Some of the laws mentioned by Tan Sri Abu Talib Othman are indeed have their roots in the British administration. The former Attorney-General was correct in saying that laws such as Sedition Act 1948, Official Secret Act 1972, Police Act 1967 and Societies Act 1971 could be arbitrarily used to restrict the right to freedom of expression by citing reasons of national security, public order and morality.

My view is that our citizenry today is matured enough to live without these laws. A society replete with laws – especially the restrictive ones – is in itself a community without self-confidence and restraint. I wonder how we can realize the ideals and goals of Vision 2020 given the prevalent of such restrictive laws.

Until and unless we have a system that is inherently fair and everybody is committed to it we need to have, as has been correctly pointed out by Tunku Aziz, a robust and independent election commission in order to put free and fair elections in place. Constitutionally speaking the Election Commission, as prescribed by art.113 (1) of the Federal Constitution, has two major duties. These are (i) to conduct federal and state elections as well as (ii) to prepare and revise electoral rolls for such elections. However I believe the list is not exhaustive and it is only logical that these constitutional duties must be carried out in fair and transparent manner. The commission must also take into account other factors which are incidental to its constitutional duties. As Tan Sri Abu Talib Othman has observed: free and fair elections involved far more than (just) ballot boxes, voter registers and campaign posters.

As such it is important to take note what Tunku Aziz has reminded that having fair elections is not everything for it is also important to be mindful of what happens between elections. From my point of view this underlines the crucial point that while elections form part of

democracy one must remember that democracy is not election per se. Of no less important is continuous process of checks and balances, the prevalent of transparency etc. These, especially when they are applied against the elected government might be seen as interference with popular mandate. This explains why the executive is not keen to have a strong and independent judiciary which often means judicial activism expressed through judicial review. Without doubt this is important for otherwise we would see the emergence of winners take all which is not really what democracy is all about.

Perhaps it should be emphasized that while elections are important to ensure that governments are answerable to the electorate they are not enough to ensure that the notion of limited government would be put in place. In fact elections may become the process that would obscure that idea.

What is particularly important in Mavis Puthuchery's paper is that our electoral system is very much rooted in the history, politics and culture of the country. To me this underlines why we have not been able to have the sort of openness and fairness one finds in other Westminster democracies such as the United Kingdom, Australia or India. Those three factors, to my mind, are more crucial than the Westminster model when it comes to the prevalent of laws that favour the powers that be. In other words it is the culture and the absence of commitments to democracy and fair play rather than the British system that has prevented the emergence of a fairer system and mechanism.

The United Kingdom¹¹, Australia¹² and India are fine examples where electoral systems are being constantly reformed to ensure that they would be able to deliver. Similarly it is not the British system that should be blamed when it comes to vote buying, draconian laws such as sedition or detention without trial laws. Perhaps one should remember that the existence of a second chamber such as Senate has been envisaged to provide the checks and balances mechanism. This brings back the point made by Tunku Aziz earlier. In fact one should know that the amendment which makes the government senators outnumber the state Senators was made after the independence: in the Reid Commission scheme¹³ the upper house was meant to be a revising chamber apart from protecting the interests of the states. But Mavis Puthuchery was absolutely right in pointing out the abolition of local government elections that has denied the grassroots to have a say in the running their local affairs.

Ragunath Kesavan lamented about first-to-past-the-post system which, like most observers, have contributed to the denial of representation to most of the electorate. While this is undoubtedly correct one has to bear in mind that elections are also the means to form a government and the alternative system, namely the proportional representation, has been linked with unstable government. Perhaps we should have the middle path; namely that some of the elections in the country should adopt proportional representation rather than

11. For more see, e.g., Ian Loveland, *Constitutional Law, Administrative Law and Human Rights*, London: LexisNexis, 3rd edition, 2003, pp.189-226 and Alex Carroll, *Constitutional and Administrative Law*, 2nd edition, London: Longman, 2002, pp.30-33

12. For more see, e.g., Chris J. Sumner, "Constitutional and Parliamentary Reform for South Australia" in C. MacIntyre & J. Williams (eds), *Peace, Order and Good Government: State Constitutional and Parliamentary Reform*, Kent Town: Wakefield Press, 2003, pp. 22-46

13. See Colonial Office, *Report of the Federation of Malaya Constitutional Commission*, London: Her Majesty's Stationery Office, 1957, No.330.

first-to-past-the-post. One should bear in mind that the Constitution, in art.120, provides for direct election for the Senate, the upper house of Parliament. At the moment it is composed of appointed members and senators representing the states.

But Ragnath Kesavan was right in emphasizing the prevention of majority rule which might descend to a situation where tyranny of the majority prevails and reminded the protection for the minority and so on. This is indeed what one means by constitutional democracy and not just rule of the majority. Which is why modern democracy invariably means constitutional democracy; namely a framework whereby there exist separation of powers and limited government. This the reason why the executive – despite being elected – but nonetheless would not be given a free hand to run the state without any checks or limitations.

Both Ragnath Kesavan and Mavis Puthuchery agreed on the need to make sure that the constituencies need to be revised to reflect true democracy. I would like to add that the Constitution has provided enough protection for the indigenous elements such as Islam and the Malays; namely through the powers of the Conference of Rulers. As such these considerations should not feature again in the electoral system. This is because our system has provided enough safeguard for the indigenous elements and our electoral system should reflect the spirit and dictates of democracy.

Ragnath Kesavan made a good point about the caretaker government. The practice of the more established democracies, particularly in the Westminster world, has been consistent. Unfortunately this is not the case with Malaysia. It is a pity that even the court has been unwilling to make this a rule that should be observed by the government. One recalls the case of where the court allowed to government to make election promises during a bye-election: *Re Pengkalan Kota Bye-Election (1981)*¹⁴. This put a question mark on whether our court is able to become just arbiter when it comes to election petitions. Experience thus far shows that our judges have been unable to do that¹⁵. As such one wonders whether more powers to election court would be in the direction of improving the electoral system as suggested by Ragnath Kesavan. For one thing a mature democracy does not depend too much on the court. In any case the ultimate judges are the people themselves, not the unelected judges.

Without doubt elections are just part of democracy. As such to ensure that every portion of the society will have a say there is a need to ensure that all other agents of democracy work and functioning. These include the right to freedom of peaceful assembly and association. In this respect the recommendations put forward by the Royal Commission on the Police Force¹⁶ on public rallies are indeed relevant and need to be implemented.

As far as the Constitution is concerned perhaps it is fair to say that it has provided enough to ensure that a credible election commission could be appointed. This is said given the

14. See Abdul Aziz Bari, *Malaysian Constitution: A Critical Introduction*, supra, pp.220-221

15. Ibid.

16. For more insights on this see, e.g., Abdul Aziz Bari, "Police Force Commission: A Constitutional Perspective" *The Law Review*, Vol.1, 2005, pp.606-619

provisions with which it is to be appointed to questions pertaining to the security of tenure of the commission's chair and members: it is up to members of the commission to live up to the expectation. The Constitution says, in art.114 (2), that in appointing the commission the Yang di Pertuan Agong is under a duty to make sure that the commission would have public confidence. The Constitution has also prescribed, through art.114 (1), that the appointment must be made in consultation with the Conference of Rulers. Given that the government is an interested party on the matter, I do not think the advice of the Prime Minister, as mentioned by art.40 (1) of the Federal Constitution has the overriding impact here. For one thing art. 40(1) is of a general nature while the provisions in art.114 (1) and (2) are the more specific ones.

Free and fair elections are also important if we are to have strong and effective opposition in parliament. It is important to remember that opposition has a role to play in the constitutional scheme as one could see from art. 43(3); it is difficult to see how responsible government could be put in place without a strong opposition in parliament. The executive in Westminster system is known as responsible government as it needs the support of the House in order for it to survive¹⁷. The government under this system is subject to scrutiny all the times in the form of question time as well as the confidence of the House: it is for members of parliament to ensure that the government of the day is able to live up to its electoral promises. We need strong opposition if we are to have a really meaningful responsible government.

But the problem in the developing societies is the prevalent of the culture which considers opposition and dissenting views as threats to security and national integration. Given the provision of the Constitution in particular and the nature of democratic government in general such a perception is obviously incorrect. The opposition is indeed part of the constitutional system; it is neither threat nor national enemies. Which is why in the United Kingdom the Leader of Opposition is consulted by the government in matters of national interests: the holder is officially known the Leader of Her Majesty's Opposition. In Australia the Leader of the Opposition in parliament is privy to matters of national security. The problem in Malaysia, it appears to me, rooted in the fact that we have been ruled by the same party since independence and the people, rightly or wrongly, come to perceive whatever is done by the ruling party as correct and representing national interest.

Presenters and participants have raised issues pertaining to the idea of checks and balances. It has to be said that the mechanism for this is there in the Constitution. Indeed one could say that checks and balances is inherent in any democratic constitution. As such the office of the Yang di Pertuan Agong, the Conference of Rulers, the Senate and the judiciary are all there to carry out the role of checks and balances. And one needs to bear in mind the role of a free press as well. In short one has to remember the *raison d'être* for the Constitution, in Malaysia and all over the world, is to create and maintain the notions of democracy and constitutionalism which is encapsulated in the idea of checks and balances.

Checks and balances are there to ensure that powers are not misused: indeed one may say that it is actually meant to check even against legal and legitimate powers. It is not actually about illegal power which may be dealt with by the judiciary through judicial

17. For more on this see Abdul Aziz Bari, *Cabinet Principles in Malaysia: The Law and Practice*, 2nd edition, Kuala Lumpur: The Other Press, 2002.

QUESTION AND ANSWER SESSION

The response during the question and answer session was overwhelming. Participants queued up to ask questions, make comments and /or propose suggestions.

DR. JOHN GURUSAMY

I am John Gurusamy from Malaysian Interfaith Network. I like to pay tribute to SUHAKAM for having organised this Human Rights Day Conference and for their very well done Annual Reports.

Unless we have a conscience, unless we uphold our Rukunegara, which we very often forget we will not implement it in spite of good intentions. It is pointless to hear that the Prime Minister says he is going to be fair to all citizens, when an incident like during the Ijok by-election is not put to a stop. We must actually be seen to be fair, not just bringing about some forms of development to some neglected areas just before elections.

I agree with all what the speakers have said, and I like to pay a tribute to all of them. My question is, "Can someone please tell us, who were there when our founding fathers got independence for us on 31st August 1957?" I was one of them. I feel we have gone back from what we were then – a united nation. We have become segregated. We can still put humpty dumpty together again if we have the conscience to help SUHAKAM to amend the election laws suggested, and have local elections to avoid or to minimise corruption that is rampant in many local authorities, and to bring about the suggestions to have Braille in the ballot papers for the blind to cast their votes. So, we ask the Commissioners what we as civil servants or citizens can help SUHAKAM and the government to implement the noble suggestions.

MD. HAFIZ KAMARUZAMAN

I am Md. Hafiz Kamarulzaman from the Islamic University of Malaysia (IIUM). I have two questions and my questions pertain to campus elections. How do you find electronic voting system, I mean e-voting? Our local universities have introduced e-voting since 2004 and in my opinion, this kind of system has no transparency and has the tendency to be manipulated by certain higher authorities. Our student leaders have already submitted some proposals and some petitions to make elections into a common election system. Sad to say, it has been rejected by the university authorities. How then to ensure the transparency of this system? Is it a preparatory stage by the government to implement e-voting system in our general elections in future?

My second question is that university authorities have initiated some new approaches in campus elections, whereby students need to undergo an interview with university authorities. It shows that there is a selection even before elections.

MOTHER MANGALAM (Pure Life Society)

Who appoints the Election Commissioners? Is it the ruling government or representatives of the political parties? This is something I like to know. The elements of fear and paranoia should be eliminated.

MD. ZULKHAIRY

I am from the Student Representatives Council of IIUM. I definitely agree with Tan Sri Abu Talib's view pertaining to accessibility to media by all parties. If I am not mistaken, in Indonesia, all parties and candidates involved in the election are allocated space and time to give speeches and express their manifestos via the public media.

Can any of the distinguished panellists comment on the campus general elections - whether it is actually upholding the spirit of democracy, equal treatment and transparency, etc? Every year students have been submitting memorandum to SUHAKAM to ensure that campus election is free and fair. I hope one of the Commissioners can answer this question. To what extent have these memoranda been taken into consideration and how serious is SUHAKAM in taking the issues expressed in the memoranda?

ANSWERS:

RAGUNATH KESAVAN

On the point of e-voting by the university authorities,(I am a product of a local university as well), the Universities and University Colleges Act (UUCA) is very oppressive. It is extremely prohibitive in terms of what you can and what you cannot do. If you organise a function that supports the government, you will be allowed to, if you don't, you won't get any kind of support.

The crux of it is the UUCA. The Malaysian Bar has taken up the case where students have been cited for violations of the Act – for even lodging a report with SUHAKAM. They have been charged by the university. This is the level of repressive legislation that we have and the level of bureaucracy in the university in terms of how they perceive the rights of individuals. Again, in my personal view, e-voting is completely undemocratic. So far as the Bar Council is concerned, we can assist to mount a public interest challenge. I think we would be quite happy to take it on. We are very pleased to take up such issues. What is there to ensure that the person who is voting is the person who is logging on the computer and taking part in the election?

TUNKU BADUL AZIZ

I like to refer to the point raised by Dr. John Gurusamy. He wants to know what citizens can do to help SUHAKAM implement the various suggestions brought forward this morning.

I think the best thing to do is, we must be like in the business of fighting corruption, and this cannot be left to either the Election Commission, the government or political parties alone. We all have a role to play. In other words, we must exercise our rights to be concerned about some of these issues. It has got to be done in a way which is persuasive, which is non-confrontational and I think, having seen the Election Commission performance, I would say that SUHAKAM in fact, has much greater claims to being able to be proactive, to point out some of the deficiencies in the system so that changes can be made.

It is obvious as we all have seen; we have agreed that while they do their best, the Election

Commission on its present state hasn't really addressed even some of the very basic concerns that would bring about a radical change in the way elections are conducted in this country. Well, the point I am trying to make is that we have a role to play and we should support SUHAKAM in these endeavours because it is too much to expect for example from the police and the Election Commission.

DR. MAVIS PUTHUCHEARY

I would like to take the point made by John Gurusamy - the feeling that our society is becoming more separated and perhaps even more exclusionary. There is a general feeling that the social contract in terms of arrangement between our political leaders in the past and the society is not kept. There has to be a culture of pluralism. We see differences in terms of mutual respect and harmony. We need to go back to that. Our biggest problem with our social contract is that it has been elitist. We do not go down to the lower level because we do not have the social organisations to encourage a feeling that we are all a part of this great nation. We need to jumpstart this movement, perhaps with local government elections. I'm not sure, but we need to start walking. This forum is a very good beginning.

QUESTIONS

P.K.CHEW

I am a member of BN. I thank the panellists for a very eloquent presentation. It has given me a few thoughts to share with everybody. First of all, I would like to quote Dr. Mavis Puthucheary, on Bumi and non-Bumi, which is discriminatory. I think we should avoid this kind of vocabulary. We should classify as Malaysian Chinese, Malaysian Indians, Malaysian Malays and Muslims, Buddhists and Christians and other faiths and not use words which segregate us too obviously.

Secondly, Mr. Ragunath has talked about our education system, and about human rights. It must be part of our curriculum for students. SUHAKAM should do the same as well.

Thirdly, Prof Dr. Abdul Bari with his point on checks and balances. SUHAKAM represents the platform for human rights, but reporting to the Executive itself is already indicative there is no check and balance.

Referring back to the first point by the Chairman, Yang Berbahagia Tan Sri Abu Talib, he said that being in BN and believing in BN doesn't mean neither endorsing all the policies advocated by the government nor being anti-government. SUHAKAM should stop whoever making this kind of statement. An example - the hoisting of the flag year after year shows our patriotism.

Freedom of expression or without expression cannot give you the right to brand whether a person is patriotic or not. Again, SUHAKAM should stop people using that kind of publicity. I have two more points. First, SUHAKAM is considered as the watchdog for human rights.

Whoever is elected to Parliament, SUHAKAM should act as a watchdog to ensure they behave, act and talk within the framework of human rights. For example, 'the monthly leak' as mentioned by one of the members of Parliament – that kind of statement affects a woman's dignity, and we should not endorse or allow for this to happen again.

Lastly, I would recommend SUHAKAM to organize more public dialogues in order to harness public opinion. Only through public opinion the Executive would be able to listen and to take steps and actions on matters raised.

ZULKIFLI AHMAD (Representing Bersih)

Bersih is a voluntary coalition for free and fair elections. I would very quickly pinpoint this. It is all consoling, admittedly all to appearing and refreshing to have heard the Chairman of SUHAKAM deliberated his ideals and I would not be far from wrong to have said that whatever be the ideals, what being practised is far away from the ideals proposed by the Chairman earlier.

It is noted by academicians Prof. Puthuchery in her writing and by many others that the last election was in fact the worst in the political history - not only of irregularities but downright illegalities. Now on the brink of the coming 12th general elections, I think that is important that we will not be ending this conference on a note of only 'apologia' of academic. We must have concrete plans, in at least short term, plans in a short timeline, before the next general elections. On concrete plans, as propounded and advocated by Bersih, is to have at least witnesses.

The Election Commission should seriously consider the use of indelible ink, as a way to mitigate the existence of phantom voters. Secondly, the cleansing of the electoral roll. The fact that the Election Commission has now admitted that they have omitted 180,000 voters in the last few months, and at the last meeting with Bersih, again they have admitted that another 22,433 voters were not in the electoral roll. Therefore, our accusation on the existence of phantom voters is very evident and needs an immediate electoral reform. There is also a need to confine postal voting to only diplomatic missions because postal vote is plagued with non-transparency. In order to make this meaningful in the forth coming election, I would like to suggest that SUHAKAM take the lead in meaningful electoral reform. Last but not least what Bersih hopes to see is not so much an equal access, but at best an equitable access to media of all contending candidates and political parties, and what Tunku Aziz said earlier, it's not just unethical and being unfair, but it is indeed illegal to give candidates seven days of campaign as compared to once up to 42 days in our political history. It is certainly far away from a free and fair election. Lets hope that SUHAKAM will take the lead, and we are all for SUHAKAM in this electoral reform.

Muhammad Shafee Abdullah (SUHAKAM Commisioner)

Muhammad Shafee Abdullah, a Commissioner of SUHAKAM, and a member of the Bar, stated that in most democratic countries the courts are the driving force in laying down

principles of fair elections, because nobody else can act with such an authority other than the courts. You will see this in India, England and the USA.

In 2005, in the case of Ismail Kamus in the Federal Commission, the Federal Court had ruled a very good decision known as Tanjung Puteri decision, which brings about two points.

The first point says that if they are contraventions of certain laws pertaining to the elections, including the Election Commission (EC), or it can show it has affected the results of the elections, the election can be declared void. If it can show that there are much contraventions of such laws, even if it does not affect the result of the elections, it is in fact a shame and the election can also be declared void. The Tanjung Puteri case was actually inspired by a leading decision in England called *Morgan V. Simpson*. We are until today the only exception to the *Morgan V. Simpson* rule. Now, the EC has devilled that rule, and until now we can prove it has affected the result of the election, but there is no way the election can be declared void. To me that is a ridiculous decision because you can have a situation, where many rules are broken just like the elections. If there is no proof as a matter of evidence that it has affected the result of the election, the election cannot be declared void. It is also ridiculous because it is totally against the spirit of democracy.

Touching on what Prof. Aziz Bari has raised about declaring of various projects by the government during election period. The same thing happened in court where it was alleged that the court is not driving the principles of democratic rights. In the case of Tengku Razaleigh in Tanjung, Penang where it was declared that the government is going to build the Penang Bridge. The government insisted in announcing it during the election period, and it is alright to the government since it is the jobs of the ministers to make the announcement. The question is why during such period that the government was suddenly inspired to announce on the building of the bridge. To defend this, I must say that I have been defending election petitions in forums organized by Barisan Nasional. But in Ismail Kamus case, if the EC does not refer to *Morgan V. Simpson* case, they will one day find a situation where they cannot do anything if there is a snap election.

Now, I would like to invite members of the Panel to consider this particular issue because it is a serious one. If the court cannot be the driving force to ensure democratic principle where a fair election is guaranteed, you have no way to having a fair election in a democratic system of government.

RAJENDRAN from Johor Bahru Spastic Association

What is the percentage of OKU (Orang Kurang Upaya) allowed to vote?

YAP SWEE CHING from Suara Rakyat Malaysia (Suaram)

The first question is whether the Election Commission was invited to this conference because I think it is important that the EC is here to listen to the general public of their opinion.

Secondly, my comment is on one of the points raised by Prof. Aziz Bari. He seems to imply that the law is okay since it was passed by the Parliament, and it is the Judiciary that have abdicated their duties.

CSS

I would like to mention that the case where the Judiciary had declared the invalidity of UMNO which caused the three top judges to lose their jobs, including the Lord President, in 1988, because they had interfered in the UMNO party election. The other is the Likas case where the court had ruled the election null and void, and that there should be a re-election. Subsequently, the Parliament amended the law and made it such that the electoral roll cannot be challenged in the court. Once the electoral roll is gazetted it should be considered as genuine and we should not challenge its integrity. So, to say that the Judiciary is not doing their job, I think it is totally unfair. It is the Parliament that has to be accountable to all these ridiculous laws that it passed. The same applies to other laws, as in the case of the Printing Presses and Publications Act which give the minister the absolute powers to grant a licence for publication of all forms of mass media. The decision cannot be challenged in court. Similarly, under the Internal Security Act quite a number of people, including politicians, have been arrested. The arrested cannot challenge their detention in court, except on technical and procedural grounds.

Lastly, I have two suggestions. My first suggestion is for SUHAKAM to consider monitoring the general election, since SUHAKAM has taken up the issues, and secondly, I think it has been agreed that what is important is not just the elections, but it is the period between the elections. Therefore, it is important for civil society and the general public to participate. Legislation of the laws in the country and bills which tabled in the Parliament should be made public before they are presented and implemented.

DR. CHONG ENG LEONG (Sabah)

We are talking about fundamental rights of our citizens to elect our government. Such rights shouldn't be infringed by participation of non-qualified electors on the electoral roll. I am saying this because, in Sabah, there are lots of foreigners who obtained their identity cards through illegal way or through popularly known as "projek IC holders", which enabled them to vote in elections. These people are termed as 'phantom voters'. In other words, phantom voters are foreigners but their names are on the electoral roll.

I was the one who petitioned the Election Petition case in Likas and I proved to the Court there are a lot of non-qualified electors. Therefore if our fundamental rights are infringed by these foreigners who became citizens through the back door and can elect our government, then, this means the election is unconstitutional. I hope SUHAKAM having organised today's human rights and elections, should go deeper into the pre-election environment not just the few months before the elections, but go back years before the election to scrutinize the eligibility of the electoral roll.

ANDREW KHOO

My name is Andrew Khoo from the Bar Council. I have three questions. The first has to do with the method of delineation of constituencies. I think this was referred to in Dr. Puthuchear's paper. When the Constitution was propagated in 1957, there was a provision in the 13th Schedule that spoke about representatives of rural constituencies to have a 15% variation in terms of electorate. Subsequently, that has been changed. But I stand to be corrected. Apart from a practical consideration of convenient and along those lines, there isn't really too much of a guideline any more as to how to delineate constituencies. So, my question is this – in the absence of any strict criteria do we need not then in whatever criteria that is used in the context of Article 8 of the Constitution which talks about equal protection of the law. If it is possible therefore, I've looked at the Human Rights Commission Act, which has set up SUHAKAM. They are corporate bodies, they have a right to be sued and to sue. Is it not possible, will the Commissioners not consider a possibility of a lawsuit by SUHAKAM against the EC in order to give effect to Article 8 of the Constitution?

On the one hand, and also according to its terms of reference with regard to the Universal Declaration of Human Rights which Tan Sri Abu Talib has referred to in Article 21, about fair elections. To me, there seems to be an ability on the part of SUHAKAM to actually do this under Section 12 of the HRC Act, in response to any complaints, and I will be most happy to make a complaint under that section.

The second question is concerning manifestoes. I think it was Tunku Abdul Aziz who mentioned that there are these manifestoes, but they disappeared after the elections. Isn't the manifesto the basis on which people offer themselves for election? Isn't it therefore a binding contract between the person who puts up the manifesto and the people, and as such there should not be any departure from that manifesto and they shouldn't be doing anything that has not been mentioned in the manifesto. I believe this is the practice in some matured democracies.

My third question is to my Vice-President. He talked about fixed terms for our elected members of Parliament. What is the period of the fixed terms that should be used? In the House of Representatives in the USA it is two years, in the Australian Parliament it is three years, the Presidency of the USA is four years, ours is five years, the Presidency of France is six years. What fixed term would be appropriate under the Malaysian context?

KHOO

I'm Khoo from SUARAM. I strongly go for transparency and accountability and I think the most important thing is the issue of abuse of power. I have been hearing a case and seeing police and ACA for years, and I haven't stopped at the case. We all agree with what we heard this morning and I support all of them. What is important is being proactive, and how do we go about it? May I suggest that it is spreading awareness of what we have heard. The multiplying effect of the opinions from the few here will go a long way.

JIMMY

My name is Jimmy. I am from the Deaf Club, YMCA and I am using the voice of my sign language interpreter. I have three questions. As deaf voters, we face a lot of discrimination and barriers as all the information does not reach us. We have campaigns on TV and radio, but sad to say we do not understand them? How can SUHAKAM and any of the Election Commissioners help us in this? A lot of candidates talk about us voting for them, but how can we know who are the best for us to vote for? The third question is, after the elections, what are the benefits for the deaf community? Are they helping us during the elections or are they going to help us even after the elections?

ANIMA FARAH

I am Anima Farah from Parti Keadilan Rakyat. Firstly, I would like to congratulate Tan Sri Abu Talib for his excellent speech. I would be happy to see it reported in tomorrow's mainstream newspapers. Seriously speaking, I think it is high time for the Malaysians to realise that having a legitimate government and seen to be legitimate through fair and free elections is important. I would like to refer to the Ijok by-election, where a foreign correspondent was heard commenting, "My God, this isn't an election, this is a war." I think everybody who was there understood why he said that. Another thing is about the short period of campaigning which is a big handicap to especially the oppositions. That is perhaps why this election was termed as a "war". It is therefore very important that we go back to what was said by Tunku Abdul Aziz that democracy is what happens between elections. I think we have to take a lot more efforts to improve the situation so that all parties have equal rights and freedom in the campaigns and the election.

I would also like to especially comment on UUCA which I think is a gross violation or denial of the rights of students. Many students are eligible to be voters and if not they will shortly be voters later. There is no reason to consider a university campus as outside public space. It is a public space and the students have every right to be involved in politics. What is scary is that the denial is legitimised with legislation. I think it is unacceptable. There is also plenty of evidence to show that since UCCA came into effect, the students have become less and less interested in politics especially on national issues. I think this is a bad thing for our country's future because they are responsible citizens and most importantly they are our future leaders. I agree with Mr. Ragunath's suggestion that human rights should be taught in primary as well as in secondary schools. But with the condition that it is in the form of open debate in the form of teaching people how to think critically. To be informed and how to think critically, not in the form of indoctrination which is useless. Finally, I would like to report just in case this doesn't reach the newspapers tomorrow.

I understand that yesterday, Bersih, the NGO for promoting free and fair elections together with some political members held a programme in Batu Burok, Kuala Terengganu which was attended by amongst others, PAS President Tuan Guru Haji Hadi Awang, and the Secretary-General of Parti Keadilan Rakyat, Tan Sri Abdul Khalid Ibrahim. The FRU were surprisingly

called in, but what was very surprising and very shameful is that they fired live bullets to disperse the crowd. I don't think this would be reported in the newspapers, but this is the fact. Ten people have been hospitalised. This is a gross violation of the freedom of assembly and it is a very worrying trend. Thank you.

ANSWERS:

TUNKU AZIZ

I totally agree with most of speakers who have said that human rights should be taught at the most basic level, in the kindergarten.

I would like to refer to the points raised by Dato' Shafee earlier. The courts are to ensure that everything is done legally, as far as elections are concerned. It is very important under normal circumstances, for the courts to take the lead. Unfortunately, in our country today, many of the institutions which are supposed to be part of our constitutional developments have all been compromised, to such an extent that the courts will have to reinvent themselves in order to gain public confidence. Similarly with the office of Attorney-General, the police and so on. I agree, because if we cannot go to the courts as a last resort, where do ordinary people like us go to when we need justice? So the role of the judicial system has to be reinvented in order to get the confidence of the public in the system.

I think one of the greatest mistakes we have been making is that anything that is passed by the Parliament is treated as having the legitimacy. No doubt there is the legitimacy because these laws have gone through the process accordingly. But knowing the way and how quickly these laws are passed, it is something that we should look into. There is no judicial review. To me, what we are having to live with are bad laws. Any lawyer will tell us that that they are not necessary good laws, even though they have been passed by the Parliament.

DR. MAVIS PUTHUCHEARY

Several people today have tried to lay the blame on different institutions, especially the legislature. It is certainly true that the Parliament has to take the blame for most of these repressive laws, and as I mentioned in my paper, the freedom that we have are only as free as the Parliament chooses them to be. So, I suppose we have to put part of the blame on the Parliament, and at the same time we must also look at the other institutions.

The EC is labouring under a lot of disadvantages, as it has to work with the government which has been in power for so long, and also likely to be in power for many more years. But I do think that EC could play a role particularly in scrutinizing the electoral rolls, but most of all to allow access to foreign as well as domestic observers to observe the election and to produce reports. My own experience has been very difficult. EC has taken the attitude that "you can come, we are not going to give you access - to polling stations, and access to

information" that they usually provide to other parties, particularly the ruling parties. They have taken this rather, what I consider high-handed action. I think the role in observing the election played by Bersih and other organizations is very crucial because it is only through this kind of observation and reports that EC is kept on its toes.

The third part is of course the courts. It is true that the courts are somewhat limited in their functions, and I think the courts also have to take some share of the blame. I understand in one of the elections the judge had ruled that EC cannot be sued. I think this is ridiculous. Any institution can be sued if it is wrong. Whether this is going to be challenged in another court of law, I do not know.

There is also the question raised by Dato' Shafee that the courts have taken the attitude that an election petition to be null and void is one where it can be shown that the results have been affected by the infringement of the law. I think this is nonsense. What they should do is that if there is any infringement of the law, that particular election must be declared null and void. It is very difficult for anyone to prove that. For example in the case of an infringement that actually affected the results. If you really want to stop any infringements to the election laws, then that particular election must be declared null and void.

MR. RAGUNATH

I started earlier to say that human rights education should be taught in primary schools as well. Tunku Aziz added on to say that it should be earlier - in kindergarten. I agreed on what you have said, it has to start even at the highest level of the Judiciary. I mean basic human rights training should also be given to the judges.

I am pleased to hear that other than lawyers, members of the public - people like you are also concerned about the Judiciary. I have said it earlier. Dato' Shafee is right. We need a progressive Judiciary. If you look at other jurisdictions, India, for example, if a law is absurd, courts can strike it down as being unconstitutional. Our Judiciary has been quite conservative when it comes to looking at laws in that manner. Again, this is our pitch again, the reason forth is that the calibre of people appointed to the Judiciary. This is a point we have made repeatedly. You need a Judicial Commission, you need to have a more transparent and open appointment system.

PROF. DR. AZIZ BARI

On checks and balances. It is not something that is in black and white in the Constitution. However, the idea is there. Anyway it is there to prevent the prevalence of absolute power and to check legal powers. There is a provision pertaining to the Yang di-Pertuan Agong in his obligation to ask for advice. The Yang di-Pertuan Agong has the right to ask for information from the Cabinet. Of course there is no time limit for him to put that advice into effect. There is also the Conference of Rulers with some specific functions including matters of national interest, including the appointment of senior judges and matters in judicial crisis

in 1988. The power given to the Conference of Rulers also includes the appointment of judges, the appointment of members of EC and senior members in the Armed Forces.

When it comes to Dewan Negara, it has the power to delay Bills to a maximum of twelve months for non-money bills, and one month for money-bills. Of course the power to veto the amendment is passed by the Parliament. All these are examples of checks and balances in our Constitution and I think if you do more research, you will get more examples of checks and balances, and may be SUHAKAM and EC could play their role in this.

Finally, on ISA I think we can do something about it and I think SUHAKAM has done something on ISA, like a very detailed study on the abolishment of ISA.

SUHAKAM'S RECOMMENDATIONS

SUHAKAM'S RECOMMENDATIONS

SUHAKAM makes the following recommendations to ensure that elections are not only free but also fair:

1. The Right to Vote

The will of the people shall be the basis of the authority of the government. Hence citizens have the right to select their representatives. For them to make informed choice, they have the right to access to information which includes right to hear the manifestoes of all parties and candidates. Access to information necessitates for the right to assembly. Thus, SUHAKAM recommends the followings:

- **Right of Assembly**

All political parties are allowed to hold rallies and ceramah without having to apply for permit during the period of campaigning with the proviso that the assembly is peaceful and speech is not used to slander, create disharmony, incite hatred and compromise national security. The onus is on the organizers to ensure the assembly is peaceful and the freedom of expression is not used to incite disharmony, hatred and violence or to cause moral degradation or mental harm. The organizers shall be charged if people's safety (both physical and psychological) is threatened or public disorder occurs.

However, the police should not act on suspicion, speculation, fear or imagination. There must be evidence of public disorder or incitement to create violence. Restrictive laws as the Sedition Act, the Internal Security Act, the Police Act and the Official Secrets Act should be exercised judiciously and a balance must be struck between security and civil rights and freedom.

- **Access to the Media**

All parties shall have equal access to the media in terms of broadcast time and print space as well in terms of the placement of timing and page. In short, access to the media should be non-discriminatory. The media is to be allowed to cover the campaigns freely, without interference or unreasonable restrictions imposed by the authorities.

- **Universal Suffrage**

Persons with disabilities and indigenous people have the right to vote. Hence, it is recommended that polling stations be accessible to indigenous people in remote areas, polling stations to be disabled friendly and ballot papers in Braille be available to the visually handicapped.

2. View of the People to be Truly Reflected

The candidates elected should reflect correctly the choice of the people. Hence, SUHAKAM recommends:

- **Phantom Voters**

- The Election Commission has to devise measures to ensure those on the electoral roll are genuine electors. The measures that the Commission has taken so far are good but they are inadequate to expunge all phantom voters.

- The government shall consider amending all relevant laws to empower the Election Commission to check on the validation of one's claimed residence and the authority to transfer an elector from one constituency to another due to change in address.
- There shall be better co-ordination between the Registration Department and the Election Commission so that deceased electors are expunged from the electoral roll as soon as the death certificate is issued.

- **Automatic Registration**

- All eligible voters shall be automatically registered upon attaining the age of 21.

- **Delineation of Constituencies**

- Constituency delineation designed to dilute or increase the votes of a particular candidate or party is unacceptable in the light of international norm of equality of suffrage. In this respect, SUHAKAM urges that the principle of democracy enunciated in the Federal Constitution and Article 21 of the Universal Declaration of Human Rights be respected and given due consideration in delineating the constituencies.
- The use of an ethnic form of gerrymandering to control electoral outcomes should be discontinued.

- **Longer Campaign Period**

- The campaign period for general elections shall be longer as was in the 1959, 1964 and 1969 elections so that all views are equally represented and for voters to hear the views of all parties.

3. **Equality to be Exercised during Elections**

For the election to be truly fair, equality should be exercised at all times during the election. Hence SUHAKAM recommends:

- **Administration of Election-related Laws**

Election-related laws should be implemented and enforced non-selectively to ensure that every candidate has an equal chance of winning.

- **Caretaker Government**

It is recommended that when Parliament is dissolved, a caretaker government takes charge to ensure impartiality. This measure is necessary to ensure public facilities and funds are not used for campaigning.

4. **Independent and Impartial Election Commission**

Free and fair elections require an Election Commission which is independent and impartial. In this regard, SUHAKAM recommends that the Election Commission be directly accountable to Parliament rather than to the Executive to ensure its independence.

5. **Redress**

The court should be given greater leeway to adjudicate electoral disputes. Subjecting the electoral process to greater scrutiny and oversight will result in everyone having greater regard for the rules and the need to refrain from unscrupulous tactics.

6. Candidates Should Act Responsibly

As aspirants wanting to represent electors and lead the nation, candidates should act responsibly. Hence,

- SUHAKAM suggests that at all rallies and during any campaign activities, candidates refrain from slandering, making false allegations and using their freedom of speech to incite hatred, racial and religious tensions.

SUHAKAM recommends that those who resort to undemocratic means to win elections as well as those who are responsible for violations of the law be made accountable in a timely manner and not after five years. Undemocratic means include vote buying that ranges from outright gifts (cash handouts, grants to private schools, allowances ostensibly to cover expenses of party supporters and as compensation in lieu of wages), and various non-cash inducements such as speeding up administrative processes (e.g. the issuing of ownership titles to house owners).

ANNEXURES

ANNEXURE 1: PROGRAMME

MALAYSIA HUMAN RIGHTS DAY 2007
THEME: "HUMAN RIGHTS AND ELECTION"
DATE: 9 SEPTEMBER 2007
VENUE: CROWNE PLAZA MUTIARA HOTEL
JALAN SULTAN ISMAIL, KUALA LUMPUR

Programme

0830 – 0930
0930 – 1030

Registration
Welcoming Address
Commissioner Dr. Chiam Heng Keng
Human Rights Commission of Malaysia

Keynotes Address
Tan Sri Abu Talib Othman
Chairman
Human Rights Commission of Malaysia

1040 – 1250

Panel Session on Human Rights and Election

Panelist 1: Tunku Abdul Aziz Ibrahim
President, CAUX Round Table
Malaysia

Panelist 2: Dr. Mavis Puthucheary
Associate Senior Fellow, IKMAS,
Universiti Kebangsaan Malaysia

Panelist 3: Mr. Ragunalth Kesavan
Vice-President
Bar Council, Malaysia

Discussant: Professor Dr. Abdul Aziz Bari
Lecturer
International Islamic University

Moderator: Commissioner Dato' Dr. Michael Yeoh
Human Rights Commission of Malaysia

1250 – 1300

Closing Remarks
Tan Sri Datuk Seri Panglima Simon Sipaun
Deputy Chairman,
Human Rights Commission of Malaysia

1300

Lunch

ANNEXURE 2: BIODATA OF PANELISTS & DISCUSANT

PANELIST 1: YM TUNKU ABDUL AZIZ

Tunku Abdul Aziz Ibrahim has held senior management positions in large private and public sector organisations in Malaysia, Hong Kong and the UK.

He began his business career with the Guthrie Corporation Ltd., after completing his tertiary education in England and Australia. He then moved to the Central Bank of Malaysia as Advisor. He returned to the private sector, his preferred option, joining Dunlop Malaysian Industries before being appointed a Group Director of Sime Darby Limited. He left Malaysia in 1985 to take up a directorship at the Commonwealth Secretariat, London, returning to Malaysia, on retirement, in 1992.

He was at one time or another a member of the Council of the Federation of Malaysian Manufacturers, the Malaysian National Shippers Council, the Asean Business Council, the Asean-US Business Council, and the Asian-EU Business Council. He was for two terms Chairman of the Asean Chambers of Commerce and Industry Working Group on Industrial Complementation that produced the Asean Motor Industry Guidelines. He served for several years on the Employers' Panel of the Industrial Court of Malaysia.

Tunku Aziz founded, with the support of like-minded individuals, the Malaysian Chapter of Transparency International, the global coalition against corruption, known locally as The Kuala Lumpur, now the Malaysian Society for Transparency & Integrity of which he was the President until December 2004. In October 1997 he was elected to the international board of Transparency International and in March the following year, he became Vice-Chairman of the Board of Directors of Transparency International. He was re-elected Vice-Chairman of the Board of Directors in October 1999 and relinquished that position in October 2002.

Tunku Aziz devoted the whole of his time to Transparency International on a voluntary basis from 1995-2004 and has written and spoken widely on corruption and integrity issues both domestically and internationally. His book, *Fighting Corruption: My Mission*, was released in 2004.

He is a member of the World Bank High Level Advisory Group on Anti-Corruption in the East Asia and Pacific Region, and a member of the Advisory Board of Global Public Policy Networks, a project of "Visioning the UN", an initiative of the Secretary-General of the United Nations and the United Nations Foundation. He also serves as a member of the Asian Pacific Advisory Panel on Good Urban Governance, and is a member of the Board of the International Institute of Public Ethics. He was a member of the UNDP Advisory Panel for the Human Development Report 2002. He is on the Global Advisory Council of Caux Roundtable, a US-based business organization promoting, among other things, principles of good governance. In February 2004 he was appointed a member of the Royal Commission inquiring into the police service.

He was appointed, in Jan. 2006, Special Adviser to the Secretary General of the United

Nations, and in that capacity set up the UN Ethics Office. He returned from New York on completion of his work in January 2007. Tunku Aziz is a columnist for the New Straits Times.

Last updated: 15.3.2007

PANELIST 2: DR. MAVIS PUTHUCHEARY

Mavis Puthucheary is an Associate Senior Fellow at the Institute of Malaysia and International Studies (IKMAS), UKM. She was previously a civil servant in the Singapore government and Chairperson of the Division of Public Administration, Faculty of Economics and Administration, University of Malaya. Her main academic interest is in Malaysian politics and administration and on issues relating to ethnicity and the management of ethnic conflict.

PANELIST 3: RAGUNATH KESAVAN

Ragunath Kesavan was admitted to the Malaysian Bar on 1 November 1991. He graduated from the University of Wales, Aberystwyth with a LLB degree in 1989. Ragunath Kesavan is a Barrister-at-law of Gray's Inn and was called to the Bar of England and Wales in 1990. In 1996, he completed his LLM at the University of Malaya. He also has a BSc Degree in Genetics from the University of Malaya (1985).

Ragunath Kesavan was the Chairman of the Kuala Lumpur Bar Committee for two terms, 2002/3 and 2003/4, and he has been a member of the Bar Council since 2002.

Ragunath Kesavan is currently serving as the Vice Chairman of the Bar Council 2007/8 and has been the Chairman of the Bar Council's Professional Indemnity Scheme since 2004.

DISCUSSANT: DR. ABDUL AZIZ BIN BARI

Dr Abdul Aziz Bin Bari (b.1959) is Professor of Law at the International Islamic University Malaysia (IIUM), Gombak, Selangor Darul Ehsan where he has been teaching at its law school since 1989. He obtained his master of laws degree (LLM) from University of Nottingham, England (1991), majoring in International law. He wrote a dissertation entitled English Conflict of Laws against the background of Muslim parties. His PhD thesis was on constitutional law, from Birmingham University, England (1996), entitled the Development and Role of Constitutional Monarchy in Malaysia.

His areas of interest are public law (especially constitutional law, administrative law etc.), comparative law and legal theory. He teaches both undergraduate and post-graduate levels and has served as external examiners for postgraduate courses and theses at UKM, UM, UiTM and UUM. He was Head Department of Public Law (1997-99) and is still the course coordinator for constitutional law. He was also the Deputy Dean (research and development) at the university's research centre (2004-05). Apart from these positions he is also the chief editor of IIUMLJ, the university's law journal (since 2000). He also sits in the editorial board of Kanun, a quarterly law journal published by Dewan Bahasa dan Pustaka, MJSL (published by KUIM), Rekayasa (published by UUM) and the Law Review (published

by Sweet & Maxwell Asia). He has also been appointed as assessor for manuscripts (by DBP, Malaysian Law Journal and UiTM). He also sits on various boards of studies and staff promotion committees at University Malaya, Universiti Kebangsaan Malaysia, University Teknologi MARA and Kolej Universiti Islam Malaysia.

He has published extensively in his field. To date he has published more than 60 works (books, chapters from books and articles in local and international journals) including *Malaysian Constitution: A Critical Introduction* (The Other Press: 2003) which was reprinted just three months after it hit the market. His *Cabinet Principles in Malaysia – The Law and Practice* is already in second edition (The Other Press 2002: the first edition appeared in 1999). In 2001 his *Perlembagaan Malaysia – Asas dan Masalah* was published by Dewan Bahasa dan Pustaka, another bestseller and has already been reprinted three times. His book on the Conference of Rulers entitled, *Majlis Raja-Raja – Kedudukan dan Peranannya dalam Perlembagaan*, published by the DBP, was launched by the Yang di Pertuan Agong. The *Federation of Malaysia: Text and Commentary* (with Farid Sufian Shuib) has been published by Pearson-Prentice Hall (2004 & 2006). This was followed by *Islam dalam Perlembagaan Malaysia* (Petaling Jaya: IntelMAP, 2005) and *Politik Perlembagaan* (IKD, 2006). He is now working on a book to commemorate 50th anniversary of independence, to be published by Oxford University Press in 2007.

In July-August 2000 he attended a summer institute on the American Rule of Law at Yale University, New Haven. He was in Europe between July-September 2001 for a research of EU and ASEAN under the the sponsorship of Asia-Europe Institute. He was back in the US between June-August 2002 to attend the Fulbright Summer Institute on the US Constitution. He was in Germany between April and May 2003 to do a research on the German Constitution. He also went to France to see the functioning of the European Court of Human Right and presented a paper at the Centre for International Legal Studies, Salzburg, Austria. In September 2003 he participated in the Workshop for Rule of Law in Southeast Asia in Ho Chi Minh City, Vietnam.

He has so far presented more than 90 papers in national and international seminars and conference. He has also been writing for the popular press: he has published more than 250 articles, some of which have appeared in his columns such as "Constitutional Insights" in *Sunday Sun* (1996-98), "Bicara Undang-undang" in *Eksklusif* (1999-2000), "Dunia Pemikiran" in *Dewan Masyarakat* (between January 2000-December 2002) and "Bicara Pensyarah" in *Minda* (monthly between January – December, 2003).

He has been invited to sit on various committees at the Attorney-General's Chambers, Islamic Judiciary Department (JKSM), Ministry of Culture, Arts and Heritage (KEKKWA) and Ethnic Relations Course for Public Universities. He has also been appointed as the expert for international law in the MARBBIM Committee for legal terminologies. He is a member of the International Bar Association (IBA), London, Society of Legal Scholars (SLS), Oxford and American Society of International Law (ASIL), Washington.

He was the President, Academic Staff Association, International Islamic University Malaysia,

2003-4, and a life member of the Malaysian Academic Movement (MOVE). He was listed in Marquis' Who's Who in the World 2005 (22nd Edition) and Marquis' Who's Who in Asia 2007 (forthcoming)

PHOTO GALLERY



Students registering at the conference



Participants at the conference



Participants at the conference



Panelist: from left-Tunku Abdul Aziz Ibrahim, Dr. Mavis Puthucheary, Dato Michael Yeoh (moderator), Mr. Rangunath Kesavan and Professor Abdul Aziz Bari



Press conference: from left- Tan Sri Datuk Seri Panglima Simon Sipaun, Tan Sri Abu Talib Othman and Dr. Chiam Heng Keng



SUHAKAM'S staff at the conference

QUESTIONS AND ANSWERS SESSION

