

Do election petitions really work?

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ANALYSIS The 13th general election held on May 5 set a number of records, one of it being the highest number of people turning up to vote. This election is now expected to set yet another record that is not going to look good for Malaysia in the face of the rest of the world: a record number of election petitions.

Both Pakatan Rakyat coalition members and the BN are expected to file these election petitions for both state and parliamentary seats and going by earlier reports, at least 70 such petitions are expected to be filed, with the results of the election having been gazetted on May 22.

Petitions must be filed within 21 days of the gazetting. According to earlier news reports, Pakatan intends to file more than 40 election petitions, with PKR alone planning to file 27, while the BN is considering to file about 30.

Effectively, the last day for the filing of the petitions will be June 12. Section 34 of the Election Offences Act allows the voter, the candidate who lost or other candidates who contested in the election to file the petition.

The Act also stipulates the relief that can be sought by the petitioner:

A declaration that the election is void;

A declaration that the person was not duly elected or ought not to have been returned (declared the winner); and

Where the seat is claimed for an unsuccessful candidate on ground that he had the majority of lawful votes, a scrutiny of the votes be done.

The judge the hearing election petition is called an election judge and these people must be High Court judges and are given six months to dispose of the case.

The decision of the election judge can be appealed before the Federal Court, within 14 days, failing which the decision of the election judge is deemed as final.

Going by the intent of political parties working to file the petitions, the courts will see a surge in such cases, which need to be disposed of quickly. The question is whether this is going to be an easy task.

Bukit Bintang and Likas cases

Malaysia has seen several important election petition cases such as the Bukit Bintang election petition of 1995 and the Likas election petition of 1999.

NONE In the Bukit Bintang case, Wee Choo Keong (left) won the election, but this was contested by Dr Lee Chong Meng of the MCA. Lee lost his appeal, and Wee later lost the seat, after he was fined RM7,000 for contempt of court and therefore, disqualified as an MP.

However, the Election Court made an unprecedented move by naming Lee as the Bukit Bintang MP, despite losing at the ballot box.

In the case of Likas, two election petitions were filed - one by former Sabah chief minister Haris Salleh and the other by PBS candidate Dr Chong Eng Leong, who is now with the PKR.

In this landmark case, the election judge found that people who are not qualified to vote to have voted in the election and therefore nullified the result that saw Yong Teck Lee declared as the winner.

The landmark decision that saw a challenge to the electoral roll arose from "questionable people" said to be non-citizens allowed to vote through what is now known as "Project IC" or "Project M", which is an on-going matter before the Royal Commission of Inquiry into illegal immigrants in Sabah.

However, since then the government has amended the Election Act 1958 with the addition of a new Section 9A that bars the citizens from challenging the electoral roll drawn up by the Election Commission, which comes under the Prime Minister's Department.

Bribery, threats and procedural irregularities

Despite challenges to the electoral roll being thrown out by the courts, as proven in several recent cases filed by Klang MP Charles Santiago and Lembah Pantai MP Nurul Izzah Anwar, election petitions can still be filed.

Under the Election Offences Act, an election petition can only be filed on specific grounds, such as bribery being involved, threats and procedural irregularities.

Lawyer Wan Mutalib Embong, who has appeared for PAS in numerous election

petitions, believes allegations of bribery, threats and procedural irregularities can still be raised in election petitions, despite the petitioners not being able to question the electoral roll.

"However, the evidence must be strong," Wan Mutalib said when contacted.

NONEPAS legal bureau chief Asmuni Awi (left), who is tasked with the election petitions this time around, agrees with Wan Mutalib. The standard of proof for such cases should be "beyond reasonable doubt" and the petitioner must therefore have a strong case, Asmuni said.

"At present we are investigating the cases to build a strong case," he said.

Another lawyer, Azhar Azizan Harun, pointed to difficulties in winning election petition cases.

"I have won all of them when I acted for the winner. And I have lost all of them when I acted for the loser (or the petitioner).

"Let me tell all of you how high the standard of proof in an election petition is. And this is not the standard set just by our courts. It is the standard set by the Indian courts; the Canadian courts as well as the United Kingdom courts. So, please... don't say our courts are biased," Azhar said

azlan"I acted for Zaid Ibrahim in the Hulu Selangor by-election. The prime minister said if BN won, he would give RM3 million to the Chinese school (if I remember correctly). Some 3,000 people were at the ceramah. BN won. Cheques were delivered the next morning. I lost.

"You see, I have to show how the result was substantially affected by the act which formed the complaint. That is the burden," Azhar wrote on his Facebook page recently.

He further states that one could show thousands of videos of Bangladeshis in a bus, people getting paid and blackouts at counting centres, but in the election court, such evidences may not have any weight.

This is because, as stated earlier, the Likas election court case was a major blow to the ruling coalition, which caused it to change the election law so that the people can no longer challenge the electoral roll.

NONEAnother lawyer, Malik Imtiaz Sarwar (left), who together with Azhar had

acted for Zaid, had also written on the issue in The Edge and posted on his blog. Malik contends that the election court is limited in its scope because of the restrictive approach laid down over time by the Federal Court.

"This requires such courts to act strictly by reference to the legislation that circumscribes such courts, rather than the underlying purpose of the law.

"As such, though the courts recognise the need for due emphasis to be given to the overriding principles of democracy, and the need to protect the purity of the election process, they are often times left powerless to deal with what might reasonably be perceived as electoral impropriety by an unduly strict interpretation of the legislation imposed on them by the apex court," says Malik

Petitioners go through a minefield

This, Malik added, has caused lawyers and petitioners "to navigate through a minefield" of procedural obstacles that have ultimately drastically reduced the number of, otherwise potentially, successful challenges.

"The strictness of this approach has undermined the right of the voter to a free and fair election and the associated right of meaningful access to justice."

NONEHe also cited a 2008 decision of Justice David Wong Dak Wah, now a Court of Appeal judge, that if a "strict observance approach" is adopted, no citizen would be able to act for himself or herself in filing an election petition because, as surely as night follows day, the petition would be knocked out by preliminary objections.

"Further, if the respondents' contention is sustained, the petitioner will have to go through the relevant provisions of the Election Act, Election Offences Act or Election (Conduct of Elections) Regulations 1981 with a fine tooth comb and put the relevant provisions in the petition. That would be a task a petitioner will not be able to fulfil.

"In election cases, what chance does a person who wants to file an election petition himself or herself have? My answer would be next to none and that would, in my view, make the constitutional right of access to justice an illusory one.

"The remedies of law should be accessible to the ordinary people and laws should not be interpreted in such a manner that only rocket scientists can access remedies in the law, as that cannot ever be the intention of Parliament," wrote Justice Wong.

Malik further said that he was writing this not to discourage the aggrieved parties to

avoid the courts.

"They must seek recourse and present their respective cases as best as they can. I doubt, however, that the court actions will in themselves serve to assuage the discontented amongst us."

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