

ELECTION DISPUTES: A COMPARATIVE ANALYSIS OF THE JUDICIAL REVIEW PROCESS IN MALAYSIA AND INDONESIA

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ABSTRACT

This paper uses Zweigert and Kötz' classical functional approach in comparative law to compare judicial reviews relating to election disputes in Malaysia and Indonesia. It is seen here that even though Malaysia and Indonesia have similarities in their intent to settle election disputes and apply the method of judicial review to act as a means of check-and-balance, the judiciary in both systems has shown themselves rather unwilling in directly addressing the legality of these election petitions. There are variations in court structure and legal regulations governing the systems in Malaysia and Indonesia. Malaysia's Election Court often dismisses cases based on technicalities, while Indonesia's Constitutional Court adopts a wider approach, incorporating cultural norms and indigenous rules. Additionally, Malaysia's judicial system benefits from a more mature application of judicial review, grounded in its common law practice and a robust body of case law. By employing a micro-comparison method, this paper enhances understanding of the socio-political and legal contexts that influence the handling of election disputes in both countries. It also demonstrates the importance of considering the distinct legal structures, political influences, and historical legacies that define the electoral systems in Malaysia and Indonesia. The classical functional approach involving micro-comparison is best suited for the current study due to the particular problem of election disputes forming its focus. This paper aims at enhancing the understanding and knowledge regarding the social,

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cultural, historical, and other factors that influence the legal systems in both countries.

Keywords: Functional Approach, Micro-comparison, Election Disputes, Judicial Reviews, Legal System.

PERTIKAIAN PILIHANRAYA: SEBUAH ANALISIS PERBANDINGAN ANTARA PROSES SEMAKAN KEHAKIMAN DI MALAYSIA DAN INDONESIA

ABSTRAK

Makalah ini menggunakan pendekatan fungsional klasik oleh Zweigert dan Kötz dalam undang-undang perbandingan untuk membandingkan semakan kehakiman berkaitan pertikaian pilihan raya di Malaysia dan Indonesia. Di sini, dapat dilihat bahawa walaupun Malaysia dan Indonesia mempunyai persamaan dalam niat mereka untuk menyelesaikan pertikaian pilihan raya dan menggunakan kaedah semakan kehakiman sebagai alat kawalan danimbangan, badan kehakiman dalam kedua-dua sistem ini kelihatan agak enggan untuk menangani secara langsung kesahihan petisyen pilihan raya tersebut. Terdapat perbezaan dalam struktur mahkamah dan peraturan undang-undang yang mengawal selia sistem di Malaysia dan Indonesia. Mahkamah Pilihan Raya Malaysia sering menolak kes atas sebab teknikal, manakala Mahkamah Konstitusi Indonesia mengambil pendekatan yang lebih luas dengan menggabungkan norma budaya dan peraturan adat. Selain itu, sistem kehakiman Malaysia mendapat manfaat daripada penerapan semakan kehakiman yang lebih matang, berdasarkan amalan undang-undang lazim dan kumpulan kes yang kukuh. Dengan menggunakan metod mikro-perbandingan, makalah ini memperkaya pemahaman tentang konteks sosio-politik dan undang-undang yang mempengaruhi pengendalian pertikaian pilihan raya di kedua-dua negara. Ia juga menunjukkan kepentingan mempertimbangkan struktur undang-undang yang berbeza, pengaruh politik, dan warisan sejarah yang mendefinisikan sistem pilihan raya di Malaysia dan Indonesia. Pendekatan fungsional klasik yang melibatkan mikoperbandingan adalah paling sesuai untuk kajian ini memandangkan masalah khusus berkaitan pertikaian pilihan raya yang menjadi fokusnya. Makalah ini bertujuan untuk meningkatkan pemahaman dan pengetahuan mengenai faktor sosial, budaya, sejarah dan lain-lain yang mempengaruhi sistem undang-undang di kedua-dua negara.

Kata Kunci: Pendekatan Fungsional, Mikro-perbandingan, Pertikaian Pilihanraya, Semakan Kehakiman, Sistem Perundangan.

INTRODUCTION

Malaysia and Indonesia are two closely related countries that have similar cultural and ethnic heritage. Both countries have distinct colonial histories, and both nations gained independence and created their unique governments following World War II. The Dutch ruled over Indonesia, while Malaysia was under British control. Malaysia chose to establish a formal monarchy that grants authority to its citizens. In contrast, Indonesia adopted a republican system that empowers its citizens. Nonetheless, both countries have chosen the democratic road.

Elections are a critical institution in any democratic society, particularly in constitutional monarchies like Malaysia and republics like Indonesia. These institutions exist to uphold three fundamental democratic principles: sovereignty of the citizens, government legitimacy, and periodic changes in government change. These three principles are intended to safeguard and implement the ideas of independence, to prevent specific interests from taking root in government, and to prevent the people's sovereignty from being usurped by the ruler's sovereignty.

If the method for electing people's representatives to representative institutions operates properly, publicly, freely, honestly, and equitably, the ensuing government will have great legitimacy. In Malaysia and Indonesia respectively, election is a process that selects candidates for various political posts, ranging from the Prime Minister and his cabinet for Malaysia, to the selection of the President, Vice president, and other people's representatives in Indonesia. Those elected will later serve in government roles at all levels, from the central, state, district/provincial, regency/city, and village levels.

Elections are a visible demonstration of democracy in action, even if democracy is not synonymous with elections. Elections, on the other hand, are a component of democracy. As a result, it is common for countries that self-identify as democratic to establish a tradition of holding periodic elections to elect public officials at both the legislative and executive levels.

Malaysia as a Common Law Country and Indonesia as a Civil Law Country

Since Malaysia is a common law system with case law being the highest source of law, it is thus important to look into the cases in which judges of the Malaysian Election Court chose to strike out petitions on grounds of non-compliance. It is also important to look at the cases in which the election petitions were not struck out and made it to the court, then analyse the trends and tendencies of the courts in deciding the petitions. In doing so, the criteria which are often cited by the courts in making their decisions will be identified.

This is interesting given that Malaysia has a dominant party and coalition. The criteria and patterns that emerge will be helpful in exploring whether Malaysian courts simply give in to the politics of the day and its state of affairs – thus, playing only a limited role despite having the powers granted by the law – or whether Malaysia’s Election Courts in fact engage in a more robust judicial review over electoral disputes and legal challenges.

Unlike Malaysia, Indonesia is a civil law country, and it does not have a single dominant party or coalition. In this assignment, Indonesia’s methods of dealing with election disputes and legal challenges to electoral issues will be compared with Malaysia’s methods. In both Malaysia’s and Indonesia’s legal systems, the election results, when challenged, are heard through judicial reviews.¹

Judicial Reviews of Election Disputes

Judicial reviews by way of election petition are a usual response by unsatisfied candidates and this occurs after almost every general election in Malaysia. The results of an election can be challenged by way of election petitions, which render the winning candidate’s victory to be declared void. This is indeed a very strong power granted to the courts in a common law country like Malaysia. Section 32 of the Election Offences Act 1954 lists the grounds on which an election result may be declared void in Malaysia. This law provides an avenue

¹Po Jen Yap, ed., *Judicial Review of Elections in Asia* (New York: Routledge, 2016), 95.

for justice and ethics of an election to be upheld if breaches of the law take place.

Reading of the cases relating to election petitions in recent years reveals that the Election Court has been striking out election petitions simply because the petitions were not drafted properly,² hence denying the relief sought by the losing candidates. There have been numerous cases where the Election Court has struck out petitions on the grounds that the petition failed to identify the exact offence, did not specify the provisions of the law allegedly violated, or failed to clearly state the irregularities that led to non-compliance with mandatory legal requirements—all of which can be categorised as improper drafting of the election petition.³ In other words, technical and procedural non-compliances may be used by the Election Court to strike out petitions even before the petitions make their way to the court to hear the facts of the case. Again, this demonstrates a strong power held by the Election Court, at least in principle, to deny a petition by the losing candidate.

In Indonesia, the Constitutional Court is mandated by its 1945 Constitution to undertake judicial reviews on election disputes. The Indonesian national government created the Constitutional Court of Indonesia⁴ through the Third Amendment to the 1945 Constitution in 2001 (Article 24C of the 1945 Constitution). Subsequently, Law No. 24 2003 as amended by Law No. 8/2011 granted the Court its full authority (Law No. 8, 2011). Under the national statutes and the

²Skrine, "Challenging the Result of an Election," written December 2018, <https://www.skrine.com/insights/newsletter/december-2018>

1/challenging-the-result-of-an-election.(cases include *G. Manivannan a/l Gowindasamy v Khairuddin bin Tarmizi & 2 Ors*; *Mohamed Azni v Dato' Seri M. Saravanan & 2 others*, the Petitioner; *Faizul Ismail v Mohd Azhar bin Jamaluddin & 2 others*; *Zulkarnine Hashim v Dr Jurij Bin Jalaludin*)

³Skrine, "Challenging the Result of an Election."

⁴Camden Kelliher, Saldi Isra, Yuliandi, Zainul Daulay, Hilaire Tegnan and Feri Amsari. "Unconstitutional Authority of Indonesia's Constitutional Court: The Resolution of Pilkada Result Disputes". *Election Law Journal: Rules, Politics and Policy*. (September 2019): 297-308, <http://doi.org/10.1089/elj.2018.0535>.

Amended Constitution, the Court has five functions.⁵ The Court's main function is constitutional review, which grants the Court the jurisdiction to hear cases challenging the constitutionality of national statutes.

Using its judicial review authority, the Indonesian Constitutional Court decided cases with conditionally constitutional decisions that provide the Court's interpretation of statute.⁶ Since the establishment of the Constitutional Court in 2003, it has heard many cases disputing the results of the general elections.⁷ These cases focused on the claim of mistaken vote count by the Indonesian Election Commission, and in recent years, have moved to also review other electoral technical issues such as money politics, abuse and violations of power by incumbent candidates as well as nomination violations of law.⁸

In the aftermath of the 2014 general elections in Indonesia, the Indonesian Constitutional Court opened the hearings of 871 disputes on elections, with most of the alleged violations centred on incorrect ballot counts and vote-buying. However, the Constitutional Court had also found, in the hearings following the 2009 legislative election, that more than 50 percent⁹ of the election petitions were badly drafted and did not provide strong evidence for the claims made.

Interestingly, the recent Indonesian presidential election on 14 February 2024 saw two dissatisfied candidates put forth their respective appeals against the declared results made on 20 March 2024. The 2024 Indonesian presidential election candidates, former Jakarta Governor Anis Baswedan and former Central Java Governor Ganjar Pranowo, filed complaints with the Constitutional Court, challenging the integrity of the electoral process that ended in the victory of Prabowo Subianto.

⁵Faiz Pan Mohamad (2016). "The Protection of Civil and Political Rights by the Constitutional Court of Indonesia." *Indonesia Law Review* 6, no.2 (2016):158–179, DOI: 10.15742/ilrev. v6n2.230.

⁶"Indonesian constitutional politics," Iconnectblog, accessed October 2, 2021, <http://www.icconnectblog.com/2013/10/indonesian-constitutional-politics/>.

⁷Ina Parlina, "Constitutional Court starts hearing hundreds of election disputes," *The Jakarta Post*, May 24, 2014.

⁸Parlina, "Constitutional,"

⁹Parlina, "Constitutional,"

Against the Malaysian context, there have been critiques on the judicial review exercise in Malaysia, claiming that the Election Court tends to enable and favour the side of the ruling dominant party or coalition.¹⁰ However, a brief glance into some of the election disputes in Indonesia discovers that its Constitutional Court too, has had its share of criticism and a similar critique of the court favouring the ruling coalition is present.

In one opinion, Indonesia's Constitutional Court sets the standard of proof too high for the election petitioner and many times, the standards are "ambiguous".¹¹ Another criticism made against Indonesia's Constitutional Court is that election petitioners have to demonstrate that the suspected violations of election procedures were "systematic, structured, and massive" when no definition exists about what this means. Furthermore, plaintiffs had to also show a direct correlation between the alleged violation and how this has influenced the result".¹² This requirement surely puts the burden of proof on the election petitioner as very high because in most cases, it is extremely difficult to show a clear causal link between the alleged violation and the results obtained. These critiques argue that proof of the election violations should be sufficient to render the results void.¹³

AIM OF STUDY

Farid Sufian¹⁴ states how important it is to increase comparative law studies among the ASEAN countries or intra-Asia in order to enhance peace and security because the integration of the ASEAN economic community cannot be achieved without a better and fuller understanding of the legal system and laws in each ASEAN country.

¹⁰Tsun Hang Tey, "Malaysia's Electoral System: Government of the People?" *Asian Journal of Comparative Law*. no.1 (January 2010):1-32, <https://doi.org/10.1017/S219460780000034X>.

¹¹Jim Della-Giacoma and Veri Junaidi, "Prabowo's weak suit," *New Mandala*, August 14, 2014.

¹²Della-Giacoma, "Prabowo's weak suit,".

¹³Della-Giacoma, "Prabowo's weak suit,".

¹⁴Farid Sufian Shuaib, "Comparative Law in Asia: The Case for Intra-Asia Intensification," *Indonesian Comparative Law Review*, no. 1 (December 2018):1-4, <http://irep.iium.edu.my/id/eprint/70955>.

Farid further emphasised the advantages of comparing Malaysia with Indonesia given the shared features and the nearness of shared culture, heritage, history of colonisation, and religious majority. He encourages comparative lawyers to turn their focus more to the neighbouring ASEAN countries and see how the legal system works, rather than to far away countries where there are fewer religious-cultural-social similarities. Farid also cites the similarity of general jurisdictional parallel court systems in both Malaysia and Indonesia, as well as the *peradilan agama* system in Indonesia which is akin to Malaysia's *mahkamah Syariah*.

This paper therefore aims to analyse the judicial review exercise in Malaysia and Indonesia through a simple juxtaposition between the Malaysian Election Court and the Indonesian Constitutional Court. A comparative analysis of judicial reviews between Malaysia and Indonesia regarding election petitions will be interesting to observe the grounds and methods used by the courts in both of these countries in dealing with election disputes.

Furthermore, as reiterated by Farid, it is more beneficial and expedient to undertake a comparative legal study intra-Asia, and in this case, between Malaysia and Indonesia, given the proximity in terms of these two countries being neighbouring countries who share a strong affinity in terms of religion, culture, legal pluralism, and colonial history. This is true even though Malaysia is a common law country compared to Indonesia which is a civil law country.

METHODOLOGY

This study uses a black-letter-law-oriented and rule-based traditional comparative law method, which is normative, structural and positivistic.¹⁵ This study therefore will utilise a doctrinal approach since the data for analysis are documents and articles on the election laws. As stated by Erin Orucu in her ‘Methodological Aspects of Comparative Law,’¹⁶ doctrinal research ‘advocates the reading of statutes, cases, parliamentary debates and doctrinal works, and it regards the description of data and the identification of similarities and differences to be the final stages of the inquiry’.¹⁷

According to Orucu, the methodologist's blueprint in doctrinal research consists of three steps.¹⁸ The first step is choosing and identifying the concepts which will serve as the units of inquiry and the containers of the data. In the conceptualisation process, a choice has to be made between different strategies of comparative inquiry, which include, functional comparison, structural comparison, institutional comparison and others. The second phase in the process is the descriptive phase which may take the form of a description of the norm, concepts and institutions of the systems concerned.

In addition, this study applies the functional approach as defined by Zweigert and Kötz, who state that “the basic methodological principle of all comparative law is that of functionality” whereby the intellectual activity is its objects and comparison is its process.¹⁹ They state further that functionalism typically applies at the level of micro-comparison and macro-comparison. Micro-comparison focuses on smaller units when compared to macro-comparison which focuses on the study of legal families or engagement in grand systems discussion.²⁰ The dividing line between the two is flexible, wherein “one must often do both at the same time” to understand why a foreign

¹⁵Ralf Michaels, *Comparative Law: Oxford Handbook of European Private Law* (Basedow, Hopt, Zimmermann eds., Oxford University Press, 2011). <https://www.researchgate.net/publication/294430907ComparativeLaw>.

¹⁶Ralf Michaels, *Comparative Law*, 37.

Ralf Michaels, *Comparative Law*, 320.

¹⁸Ralf Michaels, *Comparative Law*, 321.

¹⁹Konrad Zweigert and Hein Kötz, *An Introduction to Comparative Law, Trans. Tony Weir* (New York: Oxford University Press, 1998), 34.

²⁰Zweigert and Kötz, "Comparative Law," 35.

system solves a particular problem in a certain way.²¹ In other words, a clear distinction between macro and micro does not actually exist, and so we have to observe their mutually complementary character.

According to Zweigert and Kötz, the functional approach necessitates several key steps: identifying shared legal or social problems across different legal systems in neutral, non-legal terms, followed by describing both legal and extra-legal solutions used by various systems. The next step involves comparing these solutions to identify similarities and differences. A conceptual language is then built to discuss these cases in a common framework. This is followed by a contextual analysis, examining the broader social, economic, and political factors influencing the legal systems. Finally, the findings are critically and normatively evaluated to understand their implications for law and policy. This method is particularly effective for micro-level projects focussing on specific legal institutions or issues, such as election disputes across jurisdictions.²² Hence, in this approach, the function itself serves as the *tertium comparationis*, which is the factor that links the comparison.

Therefore, in this study, the shared social problem is the electoral offences that happen during elections in Malaysia and Indonesia, where some electoral offences may even double up as both criminal offences and grounds for invalidating the results of the elections. The solution which has arisen in relation to the problem is a legal mechanism referred to as the election petition, which is actually a mechanism unique to electoral laws alone. Election petition is the primary way of reviewing the validity of elections, which is done by a judicial review. Judicial review of the election petitions therefore acts a check and balance to deal with the problem.²³

The next step, according to Zweigert and Kötz, is the identification of similarities and differences between the solutions. So in this study, a functional comparability is conducted to bring forth a “functional equivalence” between two sets of judicial reviews –

Zweigert and Kötz, "Comparative Law," 37.

²²Zweigert and Kötz, "Comparative Law," 32-47. See also: Petra Mahy, “The Functional Approach in Comparative Socio-Legal Research: Reflections Based on a Study of Plural Work Regulation in Australia and Indonesia”, *International Journal of Law in Context*, vol. 12, no. 4 (2016): 420-436.

²³Tey, “Malaysia’s Electoral System,” 5.

Malaysia and Indonesia - and here is where the functional juxtaposition is done.²⁴ The judicial reviews undertaken by the courts are of functional equivalence, since both are dealing with legal challenges brought with regards to elections – the set of problems are the same and the comparison made is between equivalent institutions and concepts.²⁵ Furthermore, the functional comparison is also done by looking at aspects relating to jurisdiction, composition, powers and the actual practise in the judicial reviews by both the systems in Malaysia and Indonesia. Thus, this paper deals more with micro-comparison, and will deal more with analysis and explanation, rather than evaluation.

ANALYSIS

The foundation of this analysis is rooted in the functionalist method as expounded by Zweigert and Kötz in their seminal work.²⁶ The functionalist approach is particularly suited for this study, as it allows for a detailed examination of how different legal systems address similar social problems—in this case, election disputes—while taking into account the broader socio-legal context. The theoretical framework for this research is further supported by the distinction between macro-comparison and micro-comparison as articulated by Zweigert and Kötz. While macro-comparison involves a broad analysis of the spirit, style, and overarching principles of different legal systems, micro-comparison focusses on specific legal institutions and their functions. This study utilises the micro-comparison approach to focus on the specific problem of election disputes and the judicial mechanisms employed to resolve them.

As stated earlier, in this research, the shared legal problem is the occurrence of election disputes, a challenge that both Malaysia and Indonesia face in their democratic processes. Both Malaysia and Indonesia face the challenge of ensuring free and fair elections. The

²⁴Ralf Michaels, *Comparative Law*, 325.

²⁵Ralf Michaels, *Comparative Law*, 326.

²⁶Zweigert and Kötz, 32-47. See also: Jaakko Husa, “The Traditional Methods of Comparative Law”, in *The Cambridge Handbook of Comparative Law*, edited by Matthias Siems and Po Jen Yap (Cambridge: Cambridge University Press, 2024), 15-31, <https://doi.org/10.1017/9781108914741.004>.

shared social problem is the need to provide a legal mechanism to resolve disputes that arise during elections. In Malaysia, the legal solution is provided by the Election Court, which focuses on procedural adherence and specific electoral violations. The Election Court is specially constituted to adjudicate election petitions. In contrast, in Indonesia, the Constitutional Court has a broader mandate, addressing not only procedural issues but also the constitutionality of laws affecting elections.

In terms of similarities, both systems aim to ensure the integrity of elections through judicial review. Both Malaysia and Indonesia emphasise judicial independence in resolving election disputes. Judges in both countries are also expected to act impartially and independently of political influence. However, the primary difference lies in the court structure. Malaysia's Election Court is a specialised court within the broader judiciary, while Indonesia uses its Constitutional Court, which also handles constitutional matters beyond elections. The scope of the review also differs significantly. The Malaysian system is more narrowly focused on procedural issues, while the Indonesian system allows for a wider examination of electoral laws and their implications. Furthermore, in Malaysia, there is an appeal process available, allowing parties to escalate the dispute to the Federal Court. In Indonesia, the Constitutional Court's decision is final, with no further recourse.

This is where the concept of "functional equivalence" becomes crucial, as it allows for the comparison of different legal mechanisms that serve the same purpose—upholding electoral integrity. While the mechanisms differ, their underlying function is similar.

The differences in judicial review can be explained by the broader political and legal contexts of each country. Malaysia's focus on procedural issues reflects its legal tradition and the structure of its judiciary, whereas Indonesia's broader approach is more influenced by its broader legal landscape, which emphasises constitutional oversight. Therefore, while both systems provide mechanisms for judicial review, the Indonesian system's broader scope may offer a more comprehensive approach to resolving election disputes. However, this comes with the challenge of ensuring that the Constitutional Court's decisions are not influenced by political considerations. In Malaysia, the more limited scope of review may lead to fewer challenges but could also miss broader issues affecting electoral integrity.

Legal Framework Governing Election Disputes in Malaysia

Article 118 of the Federal Constitution provides: “No election to the House of Representatives or to the Legislative Assembly of a State shall be called into question except by an election petition presented to the High Court having jurisdiction where the election was held”. Part IV of the Federal Constitution lays down the rules relating to the composition of Parliament and the Senate, while Part VIII of the Constitution deals with the conduct of elections. The life of Parliament is five years but following British practice, the Prime Minister has the discretion of seeking an early dissolution of Parliament.²⁷

There are three other laws of great relevance: the Elections Act 1958, the Elections Offences Act 1954 and the Election Commission Act 1957. Other rules are found in subsidiary legislation such as: the Elections (Conduct of Elections) Regulations 1981, Elections (Registration of Electors) Regulations 1971, Elections (Registration of Electors) (Sabah) Regulations 1971, Elections (Postal Voting) Regulations 1968, Elections (Control of Motor Vehicles and Vessels) Regulations 1959 and Fees (Remission of Postage on Parliamentary and State Election Communications) Order 1959.

Section 33 of the Act states that ‘every election petition shall be tried by the Chief Justice or by a Judge of any High Court nominated by the Chief Justice for the purpose’. The Chief Justice may not, however, nominate a Judge of a High Court of which he is not Chief Justice, without consulting with the Chief Justice of that Court.²⁸

²⁷The life of the Malaysian Parliament is set at five years from the date of its first sitting, but this does not mean that it must always last the full term. Following British parliamentary tradition, the Prime Minister holds the discretion to request an early dissolution of Parliament. The request for dissolution is made to the Yang di-Pertuan Agong (the King), who, while traditionally acceding to the Prime Minister's request, does have the constitutional authority to decline it under certain circumstances. Once Parliament is dissolved, a general election must be held within 60 days, and the process begins anew with the election of members to the Dewan Rakyat (House of Representatives). See: S. S. Faruqi, *Our Constitution*, (Subang Jaya: Sweet & Maxwell, 2019).

²⁸Section 33(1), Election Offences Act

Legal Disputes in Elections: Malaysia

Elections may be challenged on two grounds. First, the accuracy of the electoral roll is challenged by the public through public knowledge; The second is an election petition through judicial review. The choice to rely on preferences depends on two main factors: the alleged degree of wrongdoing or error in the electoral process, and when the aggrieved party is willing to act.²⁹

Electoral Roll

As regards the challenges to the accuracy of the electoral roll and by the public, this rule is contained in Section 17(1) of the Election (Registration of Electors) Regulations 2002. According to Section 17:

The Registrar shall, as soon as practicable after receiving a claim for, or an objection to, the inclusion of any name in the electoral roll, hold a public inquiry into the claim or objection which has been duly made, giving not less than seven days' notice in a prescribed form to the claimant or the objector or the person in regard to whom the objection has been raised, and any person who appears to the Registrar to be interested in or affected by the inquiry may appear in person at the inquiry.

Section 18 of the Election (Registration of Electors) Regulations 2002 states that unreasonable objections are punishable. However, Section 17 of the Act also states that the inquiry must be conducted by an official Registrar appointed by the Election Commission. This clause has been targeted by observers who believe that thus there is a risk of cover-up investigations by officials in the Electoral Commission.³⁰

Once an electoral roll has been officially certified or re-certified (as per Sections 9 and 9A of the Elections Act 1958), it becomes legally final and cannot be challenged. This rule was established after the Elections Act was amended in June 2002, which made the electoral roll

²⁹Tey, "Malaysia's Electoral System," 12.

³⁰Tey, "Malaysia's Electoral System," 13.

conclusive and unchangeable upon certification or re-certification. Any court action to review the electoral roll is not permitted.³¹

Specifically, Section 9A states that after an electoral roll is certified or re-certified, and public notice of this action has been published in the Gazette as prescribed by regulations, the roll is considered final and binding.³²

Malaysia Case Studies

Questioning the Electoral Roll

The power of the election judge to review the authenticity and accuracy of the electoral roll arose in the 2000 case of *Harris Mohd Salleh v. Ismail bin Majin, Returning Officer & Ors and Anor Application*.³³ In that case, Mohammad Kamil J, sitting as an election judge in the High Court in Kota Kinabalu, had to consider if he had the power to review the electoral roll prepared by the Election Commission. In this case, the petitioners had alleged, inter alia, that the electoral rolls contained names of phantom voters. The election judge held:

“If it should appear that there is evidence to show that non-citizens have been registered in an electoral roll as voters, that electoral roll is tainted by an illegality for the inclusion of non-citizens in an electoral roll, contrary to the law. In my view, an electoral roll which contravenes the provisions of the election laws and the Constitution and admits non-citizens or those citizens who are disqualified by the law, may be challenged. Needless to say, an electoral roll may be challenged on the grounds of illegality in those non-citizens’ names have inadvertently been entered into the roll, and the Election Court may make such a declaration that an electoral roll is illegal as contrary to federal law and therefore, is null and void” (per Mohammad Kamil J).³⁴

³¹Elections Offences (Amendment) Act A1177 came into effect on 16 January 2003 (EOA).

³²EOA.

³³[2000] 3 MLJ 434

³⁴*Harris Mohd Salleh* (n 36).

Election Petitions

Election petitions are singularly unique. They can annul the results of an election, consequently bringing about the announcement of a new candidate, and they can also result in criminal charges against an election candidate, which automatically results in the annulment of a candidate who may have won the elections. The mechanism in which election petitions are filed in courts is unique within electoral laws. In Malaysia, the laws governing the filing of election petitions are found in the Election Offences Act 1954 (“EOA”).

Election petitions can be filed in the High Court by a person ‘who voted or had a right to vote at the election’, or ‘some person claiming to have had a right to be returned or elected at such an election’ or ‘some person alleging himself to have been a candidate at such election’.³⁵

Section 34 of EOA emphasises the private nature of the election petition in that, only the persons directly affected by the results of the election can begin the process of the petition. The respondents in the petition are either the elected candidate alone, or the elected candidate with the returning officer. As stated in the Elections (Conduct of Elections) Regulations 1981 (“ECER”), a returning officer is “an officer appointed under section 3 of the Elections Act 1958 and includes an assistant returning officer”. Candidates can seek remedies including declaring the election void, stating that an individual was not rightfully elected, or requesting a scrutiny³⁶ if they believe they had a majority of lawful votes.³⁷ The petitioner must file his election petition within 21 days after the pronouncement of the election results of which he is dissatisfied with.³⁸

There are five grounds on which an election can be declared null and void by the election judge: These include instances where widespread bribery or intimidation significantly impacts election results; failure to comply with electoral laws affects the outcome of the election; corruption or illegal actions relating to the election involving

³⁵Section 34, Election Offences Act

³⁶Section 40, Election Offences Act, A ‘scrutiny’ means a recount of the votes to determine which votes are valid and whether they were properly counted.

³⁷EOA, s 35

³⁸EOA, s 35A

the candidate or their representatives; the candidate knowingly employs a person previously convicted by a Sessions Court, or by any election judge within seven years before he has performed such duty; or the candidate was ineligible at the time of the election. On the basis of any of these five grounds laid down by Section 32 of the EOA, the validity of a successful candidate's election to Parliament may be challenged via an election petition.

Once the election petition is filed, Section 35A of the EOA gives a time frame of six months within which the petition must be heard. After hearing the petition, the election judge is given 14 days to determine the outcome of the petition. The determination can either be that the election is null and void, necessitating a fresh election, or it can be determined that the respondent candidate against whom the petition is filed against be declared as the rightful winner. The election judge must thereafter certify his determination of the outcome to the appropriate authority – to the Election Commission or the State Authority, depending on whether the elections were held at the federal or state level, respectively.³⁹

The amendments to the Election Offences Act introduced an appeal process to the Federal Court, solidifying the Election Court's position within the judicial system and establishing it as not an inferior court subject to judicial review. Appeals must be lodged within 14 days⁴⁰ from the election judge's decision, and the Federal Court is obligated to adjudicate on them within six months⁴¹ of submission. The ruling made by the Federal Court at this stage is conclusive and final.⁴²

Section 32(b) of the Election Offences Act 1954

The issue tried in court concerns the question of whether compliance with electoral laws has actually affected the outcome of the election.

Section 32(b) of the Election Offences Act 1954 expressly uses the word, "and" which means that, although it must be shown that the

³⁹EOA s 36

⁴⁰EOA, s 36A (2)

⁴¹EOA, s 36B

⁴²EOA, s 36C

act was unlawful, it must also be shown that it is this non-compliance which gave the respondent a favourable vote.

In *Dr Shafie bin Abu Bakar v Pegawai Pengurus Pilihan Raya. No 26 Bangi - Mohd Zakri bin Hj Hussin & others*,⁴³ the Court held, inter alia, if an election petition is filed under Section 32(b) of the Act, it must be shown that any written rules relating to any election were not conducted in accordance with the prescribed principles, and such violation affected the result of the election. In other words, both these requirements must be complied with before the result can be invalidated.

In another case, *Adam bin Asmuni v Dato Dr Noor Azmi bin Ghazali & 2 others*,⁴⁴ even though the petition was struck out by the Election Court, it was held, inter alia, that even if the petitioner had relied on section 32(b) of the EOA, he would not have met the essential criteria outlined in section 32(b), specifically, the lack of adherence to written electoral regulations which directly caused the election outcome. Consequently, even if the petition had been allowed to proceed, it would have been futile since the link between purported election irregularities and the actual outcome had not been established.

Moving onwards, in *Khairuddin Abu Hassan v. Datuk Seri Haji Ahmad Hamzah & Ors*,⁴⁵ the Federal Court here dismissed an appeal by Datuk Seri Khairuddin Abu Hassan. In the unanimous decision by a five-member bench, Chief Justice Tengku Maimun Tuan Mat said that although the High Court agreed that there were issues of non-compliance, the applicant had failed to prove them as law such non-compliance affected the result of the polls for the seat in the 14th General Election.

In *Ishak Hamid v. Mustapha*,⁴⁶ the court held that the fraudulent use of the successful candidate's nomination paper did not invalidate election results due to violation of law. The reason according to the judge was that while the returning officer's failure to comply with legal requirements regarding registration forms was noted, the elections had adhered to the fundamental legal principles. Consequently, since the

⁴³[2005] 2 MLJ 149

⁴⁴Skrine, "Challenging the Result of an Election,"

⁴⁵[2019] 5 MLRA 459 (Federal Court, Putrajaya), per Tengku Maimun Tuan Mat CJ

⁴⁶[1965] 2 MLJ 18 (Unknown Court, Malaysia), per Ismail Khan J.

returning officer's non-compliance did not influence the election outcome, the successful candidate's victory was considered valid.

Additionally, in *Mohamed Jaafar v. Sulaiman & Anor*,⁴⁷ the election judge interpreted the phrase "and" in Section 32(b) of the Election Offences Act 1954 as requiring the petitioner to prove that any non-compliance with election rules directly resulted in the election not being in their favour.

Nonetheless, Tey disagrees with this narrow interpretation, arguing that fair elections require both proper procedures and a fair outcome, and a conjoined reading of Section 32(b) in which a direct link of the proper procedure causing an unfair outcome of the elections may not guarantee this aim.⁴⁸ Tey argues for a mutually exclusive reading of Section 32(b) whereby no causal link needs to be shown between a non-compliance of electoral laws and the outcome of the elections.

Section 32(c) of the Election Offences Act 1954

In *Dr Shafie bin Abu Bakar v Pegawai Pengurus Pilihan Raya. No 26 Bangi - Mohd Zakri bin Hj Hussin & others*,⁴⁹ the Court also held, inter alia, that an election challenge based on Section 32(c) of the Election Offences Act (EOA) must clearly state that a corrupt or illegal practice occurred in connection with the election. The petitioner must specify the alleged offenses and provide specific details and facts to support their accusations against the respondents. This requirement ensures that the respondents are not unfairly prejudiced or confused by the allegations against them.

Striking Out of Election Petitions

In drafting an election petition, the procedural requirements set out in Section 32 of the Election Offences Act must be strictly adhered to. Failure to adhere to procedural requirements can lead to the dismissal of an election petition and ends the possibility of a trial by the election

⁴⁷[1970] 1 MLJ 181 (Unknown Court, Malaysia), per Chang Min Tat J

⁴⁸Tey, "Malaysia's Electoral System," 25

⁴⁹[2005] 2 MLJ 149

judge. This dismissal typically occurs upon application by either the winning candidate or the Election Commission.

In *Dr Shafie bin Abu Bakar v Pegawai Pengurus Pilihan Raya. No 26 Bangi - Mohd Zakri bin Hj Hussin & others*,⁵⁰ the High Court stated, *inter alia*:

“Non-compliance with the mandatory requirements of the Act and the Rules, especially by those who were dealing with the drafting and presentation of the petitions would render the election petition defective. This must necessarily result in a jurisdictional defect and the court has no power to entertain the petition” (per VT Singham J).

The importance of strict compliance was underscored by the Privy Council during an appeal from the Federal Court’s decision in *Devan Nair v Yong Kuan Teik*.⁵¹ A significant aspect of this case revolved around the necessity of following the stipulations outlined in Rule 15 of the Second Schedule to the Election Offences Ordinance 1954 (now known as the Elections Offences Act 1954, or “EOA”), which could render the proceedings null and void. Furthermore, in this case, the Privy Council said that the provisions under Rule 15 are mandatory and that disregarding them would make the proceedings void. He also emphasised the significance of public interest in ensuring timely resolution of election-related disputes.

One example is the election petition brought in the Hutan Melintang state constituency, filed by *G. Manivannan a/l Gowindasamy v. Khairuddin bin Tarmizi & Ors*,⁵² the petitioner alleged that the 1st respondent’s reported election victory was invalid due to actions that constituted an offense under section 11(1)(b) of the Election Offences Act (EOA), including treating, undue influence, or bribery. The petitioner sought to have the election declared a nullity under section 32(a) of the EOA. The Election Court struck out the petition, *inter alia*, because it did not specify the precise offense committed and lacked sufficient details. The petition only mentioned the relevant law without providing specific instances of corrupt practices, making it difficult to determine whether there was a legitimate legal complaint.

⁵⁰[2005] 2 MLJ 149

⁵¹[1967] 1 MLJ 261

⁵²[2018] MLJU 1425

After Malaysia's 15th general election (GE15) held in November 2022, disputes arose regarding the election results. A total of 11 election petitions were filed nationwide to challenge the outcomes of contests for parliamentary seats in GE15.⁵³

One instance involved Barisan Nasional's candidate for Johor's Segamat parliamentary seat, M. Ramasamy, who filed a petition with the election court in January 2023, challenging the victory of Pakatan Harapan candidate R. Yuneswaran.⁵⁴ However, on 3 April 2023, the

⁵³Hafiz Yatim, "Eleven election petitions filed nationwide, four in Sabah", *The Edge Malaysia*, 31 January, 2023, <https://theedgemaalaysia.com/node/653581>

⁵⁴In GE15, Yuneswaran won the Segamat seat by a 5,669-vote majority, but Ramasamy claimed that Yuneswaran and the Election Commission (EC) violated election rules during the campaign, including distributing food parcels to voters with the corrupt intention of influencing them to vote for Yuneswaran. This, Ramasamy argued, raised a prima facie case of an offence under Section 8 of the Election Offences Act 1954. The High Court judge, in dismissing Ramasamy's petition, also accepted the preliminary objection by Yuneswaran, the returning officer for Segamat, and the Election Commission to strike out Ramasamy's petition on the grounds that Ramasamy failed to comply with Rule 15(4) of the Election Petition Rules 1954 regarding the particulars of his affidavit and failed to comply with the Election Petition Rules concerning the facts pleaded in his petition, which were incapable of sustaining the declarations sought. Following this, on 14 April, Ramasamy filed an appeal to the Federal Court against the High Court's dismissal of his election petition and the Election Court's decision to strike out his petition. On 1 August 2023, the Federal Court heard the case and, on 18 August, delivered its verdict, allowing Ramasamy's appeal and sending his Segamat election petition back to the Election Court for a full hearing. The Federal Court ordered the election petition to be heard before another judge and set aside the 3 April decision of the Election Court in Muar, which had struck out Ramasamy's election petition after accepting the preliminary objection raised by the respondents. However, on 8 November 2024, Ramasamy withdrew his election petition, resulting in Yuneswaran remaining as the Segamat Member of Parliament. See: New Straits Times, "MIC's Ramasamy appeals against dismissal of election petition for Segamat seat," 26 April, 2023, <https://www.nst.com.my/news/crime-courts/2023/04/903096/mics-ramasamy-appeals-against-dismissal-election-petition-segamat>; The Sun, "Federal Court allows BN candidate's appeal for full hearing of Segamat election petition," 18 August, 2023, <https://thesun.my/local-news/federal-court-allows-bn->

High Court in Muar, Johor dismissed Ramasamy's petition after ruling that there was non-compliance with the requirements of the Election Offences Act and the Election Petition Rules. In his grounds of judgement, High Court judge Mohd Radzi Abdul Hamid stated that a petition should not be based on inferences and presumptions but on actual and material facts. He held that Ramasamy's petition, claiming the distribution of food parcels to voters, lacked material facts that were clear and precise.

In *Wan Mohamad Hisham Wan Abdul Hamid v. Che Alias Hamid*,⁵⁵ involving the Parliamentary Constituency of Kemaman, Terengganu, Wan Mohamad Hisham from UMNO Terengganu filed an election petition on 3 January 2023 to annul Che Alias's victory in Kemaman in GE15 on the grounds that corruption had influenced voters. On 12 February 2023, the High Court in Terengganu accepted the preliminary objections raised by Che Alias and struck out the petition. However, on 2 May, the Federal Court overturned the decision and ordered the case to be sent back to the High Court for a full hearing on its merits. On 26 September 2023, the Terengganu Election Court annulled Che Alias's victory in Kemaman on the grounds that the petitioner had successfully proven that corruption had occurred through the distribution of funds to voters.

In *Abdul Hakim Abdul Wahid v. Mas Ermieyati Samsudin & Another Appeal*,⁵⁶ on 3 January 2023, Abdul Hakim, a Barisan Nasional (BN) candidate in the 15th General Election (GE15) for the Parliamentary Constituency of Masjid Tanah, Melaka, filed an election petition at the Melaka High Court under sections 32(a) and (c) of the Election Offences Act 1954 (EOA). In the petition, he sought, among other things, declarations that Mas Ermieyati was not duly elected in GE15 for the Parliamentary Constituency of Masjid Tanah and that the election be declared void. The petition was based on grounds of general

candidate-s-appeal-for-full-hearing-of-segamat-election-petition-EL11382134

⁵⁵Rahmat Khairulrijal, "Kemaman PN rep win in GE15 annulled by Terengganu Election Court", *New Straits Times*, 26 September, 2023, <https://www.nst.com.my/news/crime-courts/2023/09/959817/kemaman-pn-rep-win-ge15-annulled-terengganu-election-court>; See also *Abdul Hakim Abdul Wahid v. Mas Ermieyati Samsudin & Another Appeal* [2023] 5 MLRA 34 (FC).

⁵⁶[2023] 5 MLRA 34 (Federal Court, Putrajaya), per Nordin Hassan FCJ

bribery or general treating that affected the election result under section 32(a) of the EOA, as well as on grounds of corrupt or illegal practices by the respondent or her agent under section 32(c) of the EOA. The Election Judge struck out Abdul Hakim's election petition.⁵⁷

In all three cases discussed, there is a discernible tendency of the election court judges to strike out election petitions on the grounds of non-compliance with the requirements of the Election Offences Act and the Election Petition Rules.

⁵⁷In his election petition filed in January 2023, Abdul Hakim alleged that Mas Ermieyati and her agent had given money or valuable consideration to voters to induce them to vote for her and refrain from voting for other candidates, and that both the respondent and her agent had committed acts of treating the voters to corruptly influence them to vote for the respondent and refrain from voting for other candidates. The Election Judge struck out the election petition, but on 14 June 2024, the Federal Court allowed Abdul Hakim's appeal and ordered for the matter to be remitted to the High Court to be tried on their merits before a different Election Judge. Before a different Election Judge, Abdul Hakim's election petition was dismissed. Upon a further appeal to the Federal Court, a three-member bench comprising Justices Tan Sri Nallini Pathmanathan, Datuk Mary Lim Thiam Suan and Datuk Abu Bakar Jais held on 28 February 2024 that the Election Court judge was not wrong in his finding when dismissing Abdul Hakim's election petition. See: New Straits Times, "Apex court dismisses BN candidate's appeal, Mas Ermieyati remains as Masjid Tanah MP", 28 February, 2024, <https://www.nst.com.my/news/crime-courts/2024/02/1018952/apex-court-dismisses-bn-candidates-appeal-mas-ermieyati-remains>; Broad Grounds Abdul Hakim bin Abdul Wahid v Mas Ermieyati binti Samsudin.pdf, 28 February 2024, <https://www.kehakiman.gov.my/sites/default/files/Broad%20Grounds%20Abdul%20Hakim%20bin%20Abdul%20Wahid%20v%20Mas%20Ermieyati%20binti%20Samsudin.pdf>

Legal Framework Governing Election Disputes in Indonesia

As stated earlier, the Indonesian Constitutional Court was established in 2001 through the Third Amendment to the 1945 State Constitution of the Republic of Indonesia in 2001 (Article 24C of the 1945 Constitution).⁵⁸ Subsequently, Law No. 24 2003 as amended by Law No. 8/2011 granted the Court its full authority (Law No. 8, 2011).⁵⁹

According to the 1945 Constitution, the Constitutional Court holds sole responsibility for adjudicating election disputes at both the national and regional levels. The election disputes under the authority of the Constitutional Court are the Presidential elections (Pilihan Raya Presiden, PILPRES), the General elections (Pilihan Raya Umum, PEMILU) and Local elections (Pemilihan Kepala Daerah, PILKADA).⁶⁰

The Indonesian national government created the Constitutional Court of Indonesia through the Third Amendment to the 1945 Constitution in 2001 (Article 24C of the 1945 Constitution). Subsequently, Law No. 24 2003 as amended by Law No. 8/2011 granted the Court its full authority (Law No. 8, 2011). The Constitution establishes a Constitutional Court with nine justices. The President, the People Representative Council (Dewan Perwakilan Rakyat – DPR) and the Supreme Court each nominate three justices. In 2003, after these nominations were approved, the Indonesian government, DPR, and Supreme Court selected the judges, and the Court officially began operating on 13th August 2003.

Under the national statutes and the Amended Constitution, the Court has five functions.⁶¹ The main role of the court is constitutional review, which empowers the court to hear cases that challenge the

⁵⁸Camden Kelliher, Saldi Isra, Yuliandi, Zainul Daulay, Hilaire Tegnan and Feri Amsari. "Unconstitutional Authority of Indonesia's Constitutional Court: The Resolution of Pilkada Result Disputes,". *Election Law Journal: Rules, Politics and Policy*. (September 2019):297-308, <http://doi.org/10.1089/elj.2018.0535>. (retrieved from <https://www.liebertpub.com/doi/10.1089/elj.2018.0535>)

⁵⁹Kelliher, Isra, Yuliandi, Daulay, Tegnan and Amsari, "Unconstitutional Authority," 299.

⁶⁰Kelliher, Isra, Yuliandi, Daulay, Tegnan and Amsari, "Unconstitutional Authority," 299.

⁶¹Mohamad, "Protection of Civil and Political Rights," 160.

constitutionality of national statutes. The Constitutional Court has the final authority to resolve electoral disputes.⁶² The Court not only exercises authority over national elections but also has the power and authority to settle local electoral disputes.

Indonesia Case Studies

Disputes relating to Indonesian Presidential Election (PILPRES)

In the aftermath of the Indonesian presidential election in 2019, the losing presidential candidate, Prabowo Subianto (now President of Indonesia following the results of the 14 February 2024 election) filed a lawsuit with the Constitutional Court, alleging that the presidential election was marked by systematic electoral fraud, millions of votes were stolen, and the then-President Joko Widodo, had colluded state agencies including police and intelligence agencies for re-election.⁶³

The Constitutional Court, comprised of nine judges, said that the evidence and witnesses were flimsy, and subsequently rejected the case. Each judge individually addressed accusations of vote buying, “money politics,” and misuse of state authority, concluding that there was insufficient proof to uphold these accusations. In the end, the Court determined that the assertions lacked substantiation, thus rendering the argument legally unfounded.⁶⁴

The dismissal of Prabowo Subianto’s lawsuit means the results of the 2019 presidential election were upheld, and Joko Widodo was confirmed the president for a second and final term. The election ruling by the Constitutional Court cannot be appealed against because it is a legal remedy of last resort.

⁶²Mohamad, "Protection of Civil and Political Rights," 162.

⁶³Kate Lamb, "Indonesian court rejects appeal against election result," *The Guardian*, June 27, 2019, <https://www.theguardian.com/world/2019/jun/27/indonesian-court-rejects-appeal-against-election-result>.

⁶⁴Lamb, "Indonesian court,"

Disputes relating to Indonesian General Election (PEMILU)

The first high-profile case that involved the electoral process was the ‘Communist Party’ case in 2003,⁶⁵ prior to the election in 2004. Thirty-five political activists, acting as claimants, submitted a petition contesting the constitutionality of the General Election Law. This law prohibited former members of the Indonesian Communist Party and/or its affiliated groups from standing as candidates for national or regional legislative positions.⁶⁶

The Constitutional Court overruled the provision in the General Election Law and held that ‘individual members of the Communist Party and its affiliates should be treated equally as citizens without discrimination’.⁶⁷ In other words, the Constitutional ban on former communists running as parliamentarians was ruled unconstitutional by the Constitutional Court.

However, days after the Constitutional Court decision, the Chief Justice announced that the decision would not have immediate effect, as it would only be applicable to the 2009 general elections.⁶⁸ In addition, the Chief Justice held that the judgment should not be enforced because when the court announced its decision on February 24, 2004, the deadline for legislative nominations was in the year 2004 elections have passed.

In other words, the Court declared that the provision in the General Election Law is unconstitutional, but its invalidity will only

⁶⁵Constitutional Court Decision No. 011–017/PUU-I/2003; (the Communist Party case), quoted from Hendrianto, Stefanus. “Judicial review of electoral process in Indonesia”. *Judicial Review of Elections in Asia*, eds. *Po Jen Yap*. (2016): 98,

⁶⁶Law No. 12 of 2003 on the House of Representative Election, Article 60(g), quoted from Hendrianto, Stefanus. “*The Rise and Fall of Historic Chief Justices: Constitutional Politics and Judicial Leadership in Indonesia*”, *Washington international Law Journal*, no. 3(2016): 489, <https://digitalcommons.law.uw.edu/wilj/vol25/iss3/5>.

⁶⁷Constitutional Court Decision No. 011–017/PUU-I/2003 at pages 36-37, quoted from I. Ngastawa, “Implikasi Putusan Mahkamah Konstitusi Nomor 11-017/Puu-I/2003 Terhadap Perlindungan Hukum Hak Dipilih,” *Jurnal Magister Hukum Udayana (Udayana Master Law Journal)*, no. 4, (2015): 15, doi: 10.24843/JMHU. 2015.v04.i04.p15.

⁶⁸Stefanus, "Judicial review," 98.

apply in the future. This meant that the invalidation of the law would only take place in the next general election.

Then there was the case of Mohammad Sholeh case,⁶⁹ a legislative candidate from the Indonesian Democratic Party of Struggle (Partai Demokrasi *Indonesia Perjuangan*, PDI-P), and a legislative candidate from the Indonesian Democratic Party of Struggle (PDI-P). Sholeh raised concerns regarding the constitutionality of Law No. 10 of 2008 on Legislative Elections, citing two distinct reasons. Initially, he contested the requirement stipulating that at least one out of every three listed candidates must be female. Sholeh contended that this system favoured women in winning seats, as voters could readily identify female candidates, thus alleging discrimination. However, the Court determined that the provision promoting female candidates was not in violation of the constitution, as it aimed to fulfil international legal mandates for gender equality.

This type of conditionally unconstitutional decisions of the Indonesian Constitutional Court had been the typical form of decisions meted out by the Constitutional Court from its creation in 2003, not only in the three cases mentioned above but in a number of other cases relating to the election challenges brought to the Indonesian Constitutional Court.⁷⁰

⁶⁹Constitutional Court Decision No. 22–24/PUU-VI/2008 (the Mohammad Sholeh case), quoted from Stefanus, "Judicial review," 98.

⁷⁰Stefanus, "Judicial review," 95-109.

Disputes relating to Indonesian Local Election (PILKADA)

In 2017, the Constitutional Court received 60 applications for disputes over the local election results, compared with 152 applications received by the Court in 2016.⁷¹

Of the 60 applications the Court received in 2017, four were over the election of a governor, nine were over the election a mayor, and 47 were over the election of a regent. Out of these 60 applications, the Court accepted only nine of the applications. The other 51 applications were not accepted because of a failure to meet the ‘margin requirement’ of total votes, a lack of evidence, or other issues with the application.

Two applications were successful, and both dealt with local elections in Papua. Like Aceh and West Papua, the province of Papua is given a special autonomy status (special province) and thus, the Papuan people are allowed to retain their culture, and this includes the “*Noken*” system which allows the local tribe chief to cast one, unified vote on behalf of his entire tribe. In the two cases, the Constitutional Court decided the mathematical results of local election dispute cases but did not order new elections.⁷²

⁷¹Kelliher, Isra, Yuliandi, Daulay, Tegnan and Amsari, “Unconstitutional Authority,” 306.

⁷²Kelliher, Isra, Yuliandi, Daulay, Tegnan and Amsari, “Unconstitutional Authority,” 303.

CONCLUSION

It can be seen from the discussion above that the elements in the election process, in general, for both Malaysia and Indonesia, share similarities. Both legal systems have avenues for election petitions, and both legal systems provide clear laws containing the origins, basis, grounds for bringing a petition, petition procedures, and who are the eligible parties to an election petition. In both legal systems, there are costs payable when petitioners lose their cases.

Nevertheless, the approach taken in the judicial reviews by both Malaysia and Indonesia differ despite both sharing these similarities. Malaysia's courts, guided by extensive case law, tend to apply a more conservative and technical approach to electoral petitions. In contrast, Indonesia, despite its relatively nascent judicial review mechanisms, has demonstrated flexibility by considering a wider array of factors, including cultural, indigenous normative rules, and gender issues, in its election-related decisions.

It is seen here that even though Malaysia and Indonesia have similarities in aims to settle election disputes and apply the method of judicial review to act as a check-and-balance, the judiciary in both systems have shown themselves unwilling in directly addressing the legality of these election petitions. There are also signs of decisions partisan to the party in power which may reflect judicial motives.

In both Indonesia and Malaysia, courts have demonstrated a reluctance to overturn election results without substantial evidence. In Indonesia's 2024 presidential election, losing candidates Anies Baswedan and Ganjar Pranowo filed appeals alleging irregularities in the victory of Prabowo Subianto, but the Constitutional Court rejected their claims, citing a lack of evidence.⁷³ This mirrors Indonesia's handling of previous election disputes, where the courts required significant proof to invalidate results. Similarly, in Malaysia, courts have maintained a strict standard for electoral challenges, such as the dismissal of a November 2023 petition regarding Sabah parliamentary

⁷³Sebastian Strangio, "Indonesian Court Rejects Petitions Seeking Rerun of Presidential Election", *The Diplomat*, 23 April, 2024.

seats⁷⁴ and a case in 2024 involving former Nenggiri assemblyman Mohd Azizi.⁷⁵ Both countries' judicial systems show a consistent pattern of upholding election outcomes, demonstrating the need for concrete evidence of irregularities that directly impact the results, reinforcing electoral stability and judicial impartiality.

Using the classical functional approach by Zweigert and Kötz, this paper has demonstrated how different legal systems address the shared problem of election disputes. The functional approach in the scope of micro-comparison is very suited here since the focus is a particular problem of election disputes.

Malaysia benefits from a mature, precedent-driven legal system, while Indonesia's judiciary, despite civil law limitations, has begun to assert broader authority. This comparison highlights the significance of understanding the socio-political context in which judicial reviews operate, with each country's legal framework shaped by unique historical legacies and cultural influences. Ultimately, both systems aim to safeguard the legitimacy of electoral outcomes, but through markedly different judicial pathways.

⁷⁴Malay Mail, "Court dismisses Bersatu's application for judicial review against Dewan Rakyat Speaker's decision on four parliamentary seats in Sabah", November 16, 2023.

⁷⁵The High Court, when rejecting the interim injunction application by Aziz on 27 June, held that Azizi did not suffer from any irreparable harm as he could still participate in the by-election.

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