

# PERSPECTIVE

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## **Malaysia Begins Rectifying Major Flaws in its Election System**

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### **EXECUTIVE SUMMARY**

- The first change in government since independence at the 14<sup>th</sup> General Election opened up possibilities to reform the electoral system in Malaysia.
- Serious structural flaws concerning the independence of the Election Commission and unfair delimitation of the electoral constituencies are in need of correction.
- The new Pakatan Harapan government has administratively allowed the EC to function independently but legislative amendments, including amendments to the Constitution, are required to institutionalise the Commission's independence.
- Other core reforms that need to be considered include: change to the current First-Past-The-Post system; re-delineation of the electoral boundaries; and enactment of a political financing act to curb corruption and abuse of political patronage.

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## INTRODUCTION

The 14<sup>th</sup> General Election (GE14) turned out to be momentous for democracy in Malaysia. On 9 May 2018, the rule of the once-invincible Barisan Nasional (BN) was brought to an end, and a peaceful transition of power was made to a new coalition government under the 93-year-old Tun Dr Mahathir Mohamad. With the change, Malaysia entered a political environment with new possibilities for democratic and electoral reforms.

This article will highlight some of the key conditions and circumstances that made GE14 an uneven playing field for the opposition parties even before the election was called, and biased the conduct of GE14 itself. This is followed by an overview of the situation after GE14, and a discussion of proposals for sustainable electoral reforms.

## STRUCTURAL IMPEDIMENTS TO FREE AND FAIR ELECTIONS

### *Lack of Independence of the Election Commission*

The current structure of the Election Commission (EC) as defined in the Federal Constitution allows for executive interference or influence since the King appoints its members on the advice of the Prime Minister.<sup>1</sup> During the BN's long rule, the EC was often perceived to be doing its best to ensure that the incumbent regime retained power. The fact that most commissioners were retired civil servants with known political affiliations bears witness to the EC's lack of independence.

### *Malapportionment and Gerrymandering of Constituencies*

The EC began a long-overdue re-delineation exercise for Sarawak in January 2015 and for Sabah and the peninsular states in September 2016. However, the constituencies became ever more grossly malapportioned and gerrymandered. This is against the principles set for delineation in Section 2 of the 13<sup>th</sup> Schedule of the Federal Constitution, where constituencies are proposed to be "approximately equal" in number of voters, and efforts to "maintain local ties" are called for. Malapportionment violate these principles by producing massive differences between constituency populations that result in the value of votes becoming extremely unequal. The table in Annex 1 illustrates the level of malapportionment for each state.

Gerrymandering, where boundaries are drawn to favour a particular party, usually by manipulating according to ethnic composition, encourages identity politics, which sows discord and hatred among the various ethnic communities. According to Section 2(a), constituencies should not transgress state boundaries, and district and local authority boundaries (PBT) should help define what constitute "local ties." For the most part, the EC used district and PBT boundaries in their delineation except when it served their purpose to either "pack" or "crack" opposition strongholds. "Packing" is the concentrating of an opposition party's voting power into one district to reduce the value of each individual vote, while "cracking" is the breaking up of an opposing party's supporters into many districts.

In the 2016-2018 re-delineation exercise, the EC packed opposition-leaning, ethnically mixed voters into some very large constituencies, and redrew boundaries around Malay-

populated districts to enlarge Malay majorities in various seats. For example, the constituency of P106 Damansara ended up with 161,037 voters, where over 80% of the voters were non-Malays, while P092 Sabak Bernam, for example, had only 40,164 voters, 83% of whom were Malays.

### *Limitations on Voter Registration*

After GE13, the EC limited the avenues for people to register as voters at a time when there were still roughly 4.2 million unregistered voters. Before GE13, there were 5,720 Assistant Registrar Officers (AROs) in existence but by GE14, there were only 205 AROs appointed nationwide.<sup>2</sup> Although the restricted registration avenue did not reduce the number of registered voters over the period,<sup>3</sup> there was concern that the selective appointment of AROs provided opportunities to prioritise the registration of people who were more likely to support BN.

### *Questionable Electoral Roll*

The integrity of the electoral roll has always been of concern with different civil society groups like MERAP,<sup>4</sup> ENGAGE and Bersih 2.0 independently exposing dubious voters in the roll by analysing available electoral roll data. Some of the issues included excessive numbers of voters registered in single addresses, voters on the roll with no addresses, voters with identical names and identical dates of birth, deceased voters and non-citizens on the electoral roll.

## **CONDUCT OF GE14**

Prime Minister Najib Razak announced the dissolution of the 13<sup>th</sup> Parliament on 6 April 2018, and the EC set the Nomination Day for 28 April and Polling Day on 9 May 2018, making for a mere 11-day campaign period.

### *Dissolution of PPBM and failure to register PH as a coalition*

The Pakatan Harapan (PH) coalition had applied to the Registrar of Societies (ROS) to be registered as a formal coalition in July 2017, which would allow them to contest under a single logo in the same way as BN did. The ROS, however, cited numerous problems that it had with component parties of PH, including irregularities in the Democratic Action Party's (DAP) internal party election and Parti Pribumi Bersatu Malaysia's (PPBM) AGM. On 5 April, just two days before Parliament was dissolved, the ROS provisionally dissolved PPBM pending permanent dissolution in 30 days.<sup>5</sup> This forced PH to announce on 6 April that all four parties would contest commonly using the Parti Keadilan Rakyat (PKR) logo.<sup>6</sup>

### *Weekday Polling Day*

For the first time since 1982, the EC chose a weekday—a Wednesday—as Polling Day.<sup>7</sup> While there is no law requiring the EC to choose a weekend, holding the General Election midweek caused great inconvenience to the many voters who worked outside their constituencies, and even in neighbouring countries who would have to take leave from work in order to travel back to their home constituencies to vote.

### *11-Day Campaign Period*

The 11-day campaign period fixed by the EC is the minimum allowed under Section 3(1) of the Elections (Conduct of Elections) Regulations 1981. Bersih 2.0 has long argued for a minimum period of 21 days to allow voters adequate time to assess the candidates and to make informed decisions, and more importantly, to allow enough time for overseas postal votes to reach the Returning Officers, who oversee the counting, by Polling Day.

### *Last Minute Conditions on Campaign Materials*

On 24 April, the EC announced additional conditions for campaign materials which effectively made it illegal to display the image of PH Chairman Tun Dr Mahathir Mohamad. As the longest-serving PM and former leader of BN and UMNO, Mahathir was perhaps the most recognized figure in national politics. Banners with Mahathir's face were consequently cut out of posters by the EC's enforcement teams.

### *Disqualification of Candidates on Nomination Day*

On Nomination Day, a total of six potential PH candidates were disqualified for not fulfilling criteria including not having a registered address in the state or being an undischarged bankrupt.<sup>8</sup> Two of these disqualifications were legally disputable and one was subsequently overturned by the Election Court. The extra-legal actions by EC officers highlighted long-held perceptions of power abuse, and concerns regarding the biases of many EC-appointed individuals closely linked to BN.<sup>9</sup>

### *Election Offences*

Bersih 2.0's election observation volunteers programme (Pemantau) recorded almost 1,000 election offences from Nomination Day till Polling Day in their Election Observation Report of the 14<sup>th</sup> Malaysian General Election (GE14 Pemantau Report).<sup>10</sup> Political parties and politicians on all sides had acted in defiance of election laws that were meant to ensure that elections were conducted in a clean and fair manner. The bias and the inaction of the EC, Malaysian Anti-Corruption Commission (MACC) and the Police were part of the causes for this.

### *Delay in Announcing Results and Swearing-In*

Official announcements by Returning Officers started shortly after 7pm on Polling Day and normally would continue without break for six or eight hours until all the results were in. The EC headquarters would also release official results as soon as they were transmitted to them. This did take place on 9 May, but only until around 9pm when the EC suddenly ceased all announcements without explanation. Just after 1am that night, the EC held a press conference to continue announcing results that in effect were already known to Malaysians who had been following unofficial results released by news portal MalaysiaKini. It is strongly suspected that there was executive interference in the 4-hour pause in announcing the results.

The swearing-in of Mahathir as the 7<sup>th</sup> Prime Minister would normally have taken place the very next morning but there was an unexpected delay. Eventually, he was able to take his oath of office before the King but only as late as just before 10pm on 10 May 2018.

## **POST-GE14 ENVIRONMENT**

Since GE14, we have seen some significant efforts taken to reform the electoral system, to renew the EC leadership and to improve the way by-elections were conducted. As yet, it is still too early to determine if these changes are sustainable without amendments to laws that govern the EC and elections. Nonetheless, the post-GE14 environment presents hope of better days ahead for free and fair elections in Malaysia.

### *Resignations of EC members*

On 13 June 2018, the EC announced that its Chairman Hashim Abdullah would cut short his tenure and leave on 1 July 2018. Eventually, all remaining Commissioners resigned by the end of 2018 in the face of a tribunal which was being formed to investigate their misconducts and remove them.<sup>11</sup>

### *New EC leadership*

Immediately after 9 May 2018, Datuk Elias Abu Bakar was appointed as new EC Secretary. By late September, lawyer Azahar Azizan Harun was appointed as the new Chairman, and by March 2019, new Commissioners from civil society, academia and the civil service were named.<sup>12</sup> They included well-known law professor Dr Azmi Sharom, Assoc Prof Dr Faisal S. Hazis, Senior Fellow, Institute of Malaysian and International Studies, Universiti Kebangsaan Malaysia and Zoe Randhawa, resource person at Bersih 2.0 (Coalition for Free and Fair Elections). The others were retired civil servants Datuk Seri Ramlan Ibrahim, former secretary-general of the Foreign Ministry; Datuk Chin Phaik Yoong, former director-general of the Manpower Department; and Dato' Awang Sahari E.M. Nadzeer, former deputy commissioner of police for Sabah.

The EC became more transparent, with regular engagements and consultations with stakeholders such as political parties, civil society organisations and international organisations on improving the electoral processes. The EC's conduct and public engagement in eight by-elections under the current leadership demonstrated a confidence to act independently and proactively. Under current laws, the EC is not empowered to prosecute election law offenders but the new EC has made numerous police reports to the Police when laws were broken. This was unheard of previously. They have also taken the initiative to send details of polling stations to voters during by-elections ahead of polling day. This has assisted voters greatly and quite likely resulted in higher voter turnouts on polling day.

*Electoral Reform Committee*

The Prime Minister formed the Electoral Reform Committee (ERC) on 16 August 2018 with former EC Chair Tan Sri Rashid Ab Rahman as its Chairman and tasked it to propose major revamps to the electoral system. The six terms of reference spelt out for the ERC include studying electoral and other laws that touch on election matters and processes, analysing the need to for a reformed election system, recommending legal amendments to strengthen the standards of election management, suggesting laws for caretaker governments following the dissolution of Parliament and state assemblies, studying the need for a law to empower the electoral management body to register and regulate political organisations and parties, and drafting election and other related laws after its report on election reforms have been accepted and approved by the government. It has a two-year timeframe to complete its tasks. Members of the ERC include representatives from ruling political parties, civil society organisation Bersih 2.0, political scientist Dr Wong Chin Huat, chief executive of think-tank Institut Darul Ehsan, Dr Mohd Redzuan Othman, and retired Election Commission officers.

*Caucus for Reform and Governance*

A parliamentary caucus on reform and governance was formed on 4 December 2018 to look into empowering Parliament as a branch of government responsible for instituting reforms in all aspects of the administration.<sup>13</sup> The Caucus is headed by Anwar Ibrahim, the newly-elected MP for Port Dickson and designated PM after Mahathir steps down. It comprises 12 MPs from both sides of the divide.

Members of the caucus are Iskandar Puteri MP Lim Kit Siang (Pakatan Harapan), Sepang MP Mohamed Hanipa Maidin (PH); Jeli MP Datuk Seri Mustapa Mohamed (PH); Sungai Petani MP Datuk Johari Abdul (PH); Segamat MP Santhara Kumar Ramanaidu (PH); Petaling Jaya MP Maria Chin Abdullah (PH); Kalabakan MP Ma'mun Sulaiman (Warisan); Pengerang MP Datuk Seri Azalina Othman Said (Barisan Nasional); Padang Rengas MP Datuk Seri Nazri Aziz (BN); Santubong MP Datuk Seri Wan Junaidi Tuanku Jaafar (Parti Pesaka Bumiputera Bersatu); and Kubang Kerian MP Datuk Tuan Ibrahim Tuan Man (Pas).

The role of the Caucus and other Parliamentary Select Committees (PSC) will be critical to the legislative process that many of the electoral reforms that are needed to restore free and fair elections in this country will have to go.

**KEY PROPOSALS FOR ELECTORAL REFORM**

In view of the issues listed above – structural weaknesses such as the control of the Executive over the EC, the manipulation of electoral boundaries to support ethnic political posturing, the integrity of the electoral roll, as well as problems with how GE14 was conducted – the following recommendations, ranked by order of importance, should be considered in order to ensure that future General Elections will be free and fair.

1. **Establish truly independent election management bodies.** The selection of Election Commissioners should be subject to scrutiny by a cross-party parliamentary committee, and the EC should have operational independence in staffing and

budgeting, subject to scrutiny by a dedicated parliamentary select committee. Without this, the potential for executive interference in the electoral process will remain.

2. **A new electoral system.** Consideration should be given to moving away from the first-past-the-post system towards a more proportional system that can promote national unity and centristism, allow for healthy competition between coalition partners, and better represent Malaysia's diverse population in Parliament. With FPTP and where voting is still largely based on ethnic lines, many minority ethnic groups like the Chinese (23%), Orang Asal/Asli (11%) and Indians (7%) are finding it increasingly difficult to see members of their communities elected where most electoral wards are Malay-majority. A new electoral system should not only ensure fair representation for all groups but also discourage identity politics.
3. **Re-delineation of electoral boundaries.** As long as Malaysia retains the first-past-the-post system, it should address the issue of malapportionment, both between the states on the peninsula, as well as within each state. Gerrymandering of constituencies that violates the spirit of Section 2(d) of the 13<sup>th</sup> Schedule of the Federal Constitution should also be reviewed. For example, the state of Selangor has 2.33 million voters but was allocated only 22 federal seats under Article 46 of the Federal Constitution while Johor with 1.78 million voters has 26 seats. Meanwhile, intra-state malapportionment reaches ridiculous heights in Sarawak where P207 Igan has only 19,079 voters while P195 Bandar Kuching has 81,632, a ratio of 4.3 to 1 (see Appendix Table 1).
4. **Enact a new law to regulate political funding.** The 1MDB scandal and former PM Najib Razak's justification that the nearly US\$700 million in his personal bank account was a personal donation from an unnamed Saudi prince and that the money was to fund election campaigns highlighted the need for a new law to regulate political funding. The lack of legislation on how politicians receive money and how they spend it has led to the prevalence of money politics, both at inter-party elections and intra-party elections where party warlords with access to funds are able to buy votes from party delegates. With the slew of corruption charges against Najib Razak and his ongoing trial, it will be interesting to follow the money trail of how public funds were being diverted for elections as well as for personal uses.
5. **Enhance the integrity of the electoral roll.** The electoral roll should be audited and managed in an open, inclusive and transparent manner, in order to enhance public trust in it. A new geocoded National Address Database should be developed and linked to the electoral roll and the civil registration records of the National Registration Department.
6. **Extend absentee/postal voting to disenfranchised voters.** Absentee voting should be extended to Malaysian voters living abroad. The Election Commission should take responsibility for ensuring that the campaign period is long enough and the

processes for the issuance and dispatch of postal ballots speedy enough, to allow the ballots to be returned in time to be counted.

7. **Expand voting rights to a broader range of Malaysians.** The PH government should fulfil its promise to lower the voting age from 21 to 18. A two-thirds majority is however required in Parliament to amend Article 119(1).
8. **Review and amend existing election laws.** Laws and enforcement on election offences must be strengthened, especially those involving bribery, corruption, hate speech and fraudulent acts to manipulate election (e.g. transferring of phantom voters).
9. **Define rules and regulations for caretaker government.** Rules and guidelines should be drawn up for managing transitions in government, codifying best practice and caretaker conventions.
10. **Free and fair media access for political parties.** The EC should develop a Code of Conduct for media during elections in consultation with media outlets, civil society, and journalists.
11. **Make civic/political awareness part of national education.** The Ministry of Education should develop a curriculum that make citizens more aware of their civil liberties, civic responsibilities and their role in nation-building.

The Electoral Reform Committee (ERC) has been given the task of studying all of these key areas of electoral reforms and making its recommendations to the Prime Minister by the end of 2020. Many of the above proposals will require in-depth research, extensive consultations with all stakeholders to encourage broad-based adoption and realistic implementation procedure and timeline, without which it would be met with rejection and failure.

The Election Commission manages the process that determines who comes to power. Its independence from the Executive must therefore be institutionalized. Much of the roadmap to such institutional reforms is already spelt out in the Pakatan Harapan Manifesto.<sup>14</sup> The PH government needs to have the political determination to push through these promises and where constitutional amendments are required, to persuade opposition parties that these reforms are also in their best interest and the interest of the nation.

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<sup>1</sup> Federal Constitution, Article 114(1).

<sup>2</sup> *Free Malaysia Today*, “DAP disappointed EC has only 205 assistant registrars”, 16 Nov 2017 <<https://www.freemalaysiatoday.com/category/nation/2017/11/16/dap-disappointed-ec-has-only-205-assistant-registrars/>> (Accessed 20 May 2019).

<sup>3</sup> As of 2018, 3.8 million eligible voters remained unregistered, lower than the figure at GE-13.

<sup>4</sup> Malaysian Electoral Roll Analysis Project.

<sup>5</sup> *The Star Online*, “Pakatan registration held up due to Pribumi says ROS”, 23 Mar 2018, <https://www.thestar.com.my/news/nation/2018/03/23/pakatan-registration-held-up-due-to-pribumi-says-ros/>, (Accessed 20 May 2019).

<sup>6</sup> *New Straits Times*, “Pakatan to use PKR logo in GE14”, 6 Apr 2018, <https://www.nst.com.my/news/politics/2018/04/354079/pakatan-use-pkr-logo-ge14>, (Accessed 20 May 2019).

<sup>7</sup> *MalaysiaKini*, “GE14 Polls on Wednesday, May 9”, 10 Apr 2018, <https://www.malaysiakini.com/news/419157>, (Accessed 20 May 2019).

<sup>8</sup> *The Sun Daily*, “Six PH candidates disqualified from contesting in GE14”, 28 Apr 2018, <https://www.thesundaily.my/archive/six-ph-candidates-disqualified-contesting-ge14-BUARCH543730>, (Accessed 20 May 2019).

<sup>9</sup> *Free Malaysia Today*, “Rafizi: Rembau Umno man was EC officer in Rantau”, 2 May 2018 <<https://ge14.freemalaysiatoday.com/c.php?id=1961&title=rafizi-rembau-umno-man-was-ec-officer-in-rantau>> (Accessed 20 May 2019).

<sup>10</sup> Bersih 2.0, GE14 Pemantau Report, pg.5-6, <<http://www.bersih.org/wp-content/uploads/2018/07/PEMANTAU-Election-Observation-Report-of-the-14th-Malaysian-General-Election.pdf>>

<sup>11</sup> *MalaysiaKini*, “AG: Tribunal can recommend stripping ex-EC members of retirement benefits”, 28 Feb 2019, <https://www.malaysiakini.com/news/466051>, (Accessed 20 May 2019).

<sup>12</sup> *The Sun Daily*, “Azmi Sharom new EC deputy chairman, four others appointed members”, 14 Feb 2019, <https://www.thesundaily.my/local/azmi-sharom-new-ec-deputy-chairman-four-others-appointed-members-IA525659>, (Accessed 20 May 2019).

<sup>13</sup> *New Straits Times*, “Anwar chairs new parliamentary caucus on reform, governance”, 4 Dec 2018, <https://www.nst.com.my/news/nation/2018/12/437069/anwar-chairs-new-parliamentary-caucus-reform-governance>, (Accessed 20 May 2019).

<sup>14</sup> The PH Manifesto, [http://kempen.s3.amazonaws.com/manifesto/Manifesto\\_text/Manifesto\\_PH\\_EN.pdf](http://kempen.s3.amazonaws.com/manifesto/Manifesto_text/Manifesto_PH_EN.pdf)

**Appendix Table 1 – Comparison of Largest and Smallest Parliament Seats by States  
(GE14)**

(From the worst malapportioned to the least)

STATE	LARGEST SEAT	VOTERS	SMALLEST SEAT	VOTERS	RATIO
<b>MALAYSIA</b> <sup>14</sup>	<b>P102 Bangi</b>	<b>178,790</b>	<b>P207 Igan</b>	<b>19,592</b>	<b>9.13</b>
Selangor	P102 Bangi	178,790	P092 Sabak Bernam	40,863	4.38
Sarawak	P195 Bandar Kuching	81,856	P207 Igan	19,592	4.18
Perak	P063 Tambun	107,763	P055 Lenggong	29,752	3.62
Johor	P162 Iskandar Puteri	138,299	P142 Labis	40,356	3.43
Pahang	P085 Pekan	88,899	P078 C Highlands	32,048	2.77
Kedah	P015 Sungai Petani	112,577	P004 Langkawi	42,697	2.64
Malacca	P138 Kota Melaka	126,848	P134 Masjid Tanah	51,441	2.47
Negeri Sembilan	P128 Seremban	110,168	P126 Jelebu	48,522	2.27
Sabah	P171 Sepanggar	62,415	P183 Beluran	28,509	2.19
Kelantan	P019 Tumpat	110,924	P032 Gua Musang	52,524	2.11
Penang	P051 Bukit Gelugor	91,595	P049 Tanjung	49,586	1.85
Terengganu	P040 Kemaman	107,593	P038 Hulu Terengganu	73,487	1.46
Kuala Lumpur	P116 Wangsamaju	88,482	P119 Titiwangsa	61,598	1.44
Perlis	P002 Kangar	55,938	P001 Padang Besar	46,096	1.21
Putrajaya	P125 Putrajaya	27,306	P125 Putrajaya	27,306	1.00
Labuan	P166 Labuan	28,356	P166 Labuan	28,356	1.00

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