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Making Sense of Malaysia's Institutional Reforms

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EXECUTIVE SUMMARY

- Institutional reforms are a key item on the agenda of the new Pakatan Harapan government. These are largely aimed at improving economic and political governance in Malaysia.
- They include fiscal reforms, enhancement of the autonomy of Parliament, and strengthening check and balance mechanisms.
- Legal reforms are likely to be delayed due to the opposition's (BN) control of the upper house and PH's lack of a two-third majority in the lower house.
- The impact of greater rule of law is expected to be felt much faster than the enhancement of check and balance mechanisms.
- Fiscal reforms will also affect public support for further institutional reforms.

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“If we fail or if we break our promises, by all means reject us in the next general election”
Mahathir Mohamad, Buku Harapan (election manifesto), 8 March 2018

“Actually, we did not expect to win, we made a thick manifesto with all kinds of promises”¹
Dr Mahathir Mohamad, New Straits Times, 14 August 2018

INTRODUCTION

On the 9th of May 2018, some 12.2 million Malaysian voted in the country’s 14th general elections. Of these, 5.6 million voters (45%) cast their ballots in favour of candidates from the Pakatan Harapan coalition (PH). This was enough to bring about the shock defeat of Barisan Nasional (BN), the political coalition which had ruled Malaysia uninterrupted since the country’s independence in 1957. In the aftermath of the elections, PH supporters and well-wishers expect the new PH government to bring about positive changes for the country over the next few years.

What are these expected positive changes? A total of 60 promises and five special commitments were made in PH’s election manifesto. Some of the easier ones such as the abolishment of the goods and services tax have been implemented. A significant number of these promises entail institutional reforms which will require time to implement and have longer lasting impact.² This essay examines the nature of the PH government’s institutional reform agenda and its potential impact.

ON INSTITUTIONS AND INSTITUTIONAL REFORMS

An understanding of the nature of institutional reform begins with an explanation of the notion of institution. One of the most cited definition of institutions comes from the Nobel laureate Douglass North who defined them as “the rules of the game in a society”, or more formally, “humanly devised constraints that shape human interaction”.³ Human interactions can be in different domains such as buying and selling in markets, formation and dissolution of marriages, and the selection of leaders and decision-makers (such as politicians and judges). Such interactions are constrained and influenced by some form of rules, whether they are formal (e.g. law) or informal (e.g. norms). Given this broad understanding, institutional reforms can be thus be described as attempts to change the rules affecting human interactions.

Given that there are many types of reforms that are institutional in character, it is useful to classify and analyse them in terms of a framework comprising three key elements - actors, domains, and effects. Ideally, voters elect politicians whom they think will best serve their material and non-material interests. Leaders from the winning political party then assume the executive mantle and implement policies and regulations that have positive material (e.g. economic growth, employment) and non-material effects (e.g. liberty, justice and spirituality). In addition, as members of parliament, elected politicians are also de facto law makers (legislature). The executive and legislature’s capacity to undertake these tasks is known as the institutional state capacity. A key factor in the executive’s ability to implement policies and regulations is its fiscal capacity or its ability to raise tax revenues⁴. In addition to the state’s legal capacity to enact laws, it is important that such laws are enforced in a just

and predictable manner. For this to take place, it is important to have rule of law – in which “all are subject to the same law administered in the same courts”. This will depend on the independence and quality of both the judiciary (courts) as well as enforcement agencies such as the police, the attorney general’s office and anti-corruption agency. Furthermore, the media play an important role in providing the public with information about politicians and the impact of their policies, thus making them accountable.

The term governance is often used to encapsulate the above set of institutions (related rules and processes) that shape how a society orders its affairs.⁵

In the real world, a number of things can go wrong with one or more of the above institutions. The electoral system may be biased in such a way as to prevent the selection of quality politicians. Once elected, these parliamentarians may implement policies and enact legislations that benefit themselves at the expense of voters. The judiciary and enforcing agencies may also be captured by politicians lobbied by private interests leading to a weakened system of governance. Such problems are often attributed to insufficient separation of powers amongst the three branches of the government – the executive, legislature and judiciary.⁶

Weak institutions can impose significant economic and non-economic costs.⁷ Corruption further leads to misallocation of resources towards unproductive activities. A weak legal regime also discourages investments and innovation by local and foreign-owned businesses, resulting in a decline in long-term economic growth. Citizens may also suffer from the deterioration in their access to non-material things that they value, such as justice, freedom and social harmony. It is within such contexts that recent calls for institutional reforms in Malaysia should be analysed.

THE PH GOVERNMENT’S INSTITUTIONAL REFORM AGENDA

Institutional reform is the key item on the agenda of the new PH government. This is not surprising as the new government has attributed almost all of the major problems experienced by Malaysia to the weak institutions under the previous Barisan Nasional (BN) government. Out of the 60 promises listed in Pakatan Harapan’s election manifesto “Buku Harapan” (Book of Hope), 19 promises involve “institutional and political reform” (Pillar 2).⁸ These are to be implemented within the next five years. Aside from the manifesto, both the Mid-Term Review of the Eleventh Malaysia Plan (published 11 October 2018) and the 2019 Budget (2 November 2018) have revealed additional information about these reforms. **Appendix Table 1** provides a summary of these reforms.⁹

A significant area of institutional reforms involves the executive body (government administration). The proposed reforms are aimed at reducing the concentration of power in the Prime Minister’s Office (PMO). These reforms include: a two-term limit for the positions of Prime Minister and Menteri Besar (and Chief Minister), fewer agencies and ministers under PMO, and lower financial allocation to PMO.¹⁰ The decentralization of fiscal resources away from the PMO has already begun in the 2019 Budget. Another set of reforms involve the fiscal capacity of the government. These involve changing the main sources of tax revenues (from GST to SST), improving the system of fiscal management (asset, debt and

liability), and making the procurement system more transparent. Even though raising tax revenues will remain a challenge in the coming years, the other fiscal reforms will help consolidate the liabilities and expenditures of the government in the medium to long-term. The greater transparency in the fiscal system will also improve governance which should lead to less corruption and more productive use of fiscal resources.

With regards to the legislature, the proposed reforms are clearly aimed at enhancing the role and autonomy of the Parliament as well as the quality of the law-making process. These are to be achieved by giving more resources to Parliament (e.g. Parliamentary Services Act) as well as the establishment and greater use of parliamentary select committees.¹¹ Thus far, the government has announced that it will establish six select committees covering the consideration of bills, budget, home and defence, rights and gender equality, Federal-State relations, and, major public appointments.¹² The use of parliamentary select committees for major public appointments for agencies such as the Elections Commissions (EC) and the Anti-Corruption Commission (MACC) will reduce the influence of elected politicians on such agencies. In addition, reforms involving the use of parliamentary select committees and expansion in opportunities and resources for opposition party participation will help improve the legislature process by intensifying deliberative activities in the Parliament.

Judiciary reforms are aimed primarily at removing the influence of the executive body (politicians) in the selection of judges and on the decisions of the judges. This is to be achieved by the use of a parliamentary select committee to approve the appointment of members of the Judicial Appointments Commissions. Another potentially significant proposal is that of empowering the judiciary to review the government's decisions and new laws. This is, amongst others, to ensure consistency of such decisions and laws with the Federal and State constitutions.

In general, enforcement agencies come under the influence and control of ministries through the appointment process and through funding. The proposed reforms in this area focus on enhancing the autonomy of these agencies by reducing the influence of elected politicians. One key proposal involves separating the Attorney General's Office (AGO, which is the legal adviser for the executive body) from the Public Prosecution Office (PPO). This is aimed at reducing the conflict of interest involving the AGO representing the executive body and prosecuting members of the same body. There are also significant numbers of proposals to give more independence to the Malaysian Anti-Corruption Commission (MACC). These include changing the legal status of MACC from a government agency to a commission under the Federal Constitution which reports directly to Parliament. Another class of legal reforms involve encouraging the reporting of corruption through the revision of laws such as the Whistleblower Protection Act, the Witness Protection Act and the Official Secrets Act.

The electoral system determines how politicians are selected to rule a country. The goal of electoral reforms is to improve the electoral system in such a way as to make the procedures of elections fairer (i.e. not biased in favour of certain politicians and political parties). This begins with a reform of the agency in charge of running elections, namely, the Elections Commission (EC). The PH's proposal is to make EC more independent by ensuring that its commission members are appointed and monitored by Parliament. Other electoral reform proposals deal with the efficiency of the system (e.g. electoral roll, postal voting) and creating a level playing field for political competition (e.g. political financing).

Another approach to strengthening the check and balance mechanism is to put greater emphasis on federalism by decentralizing more power and functions to the states. The PH's government's proposals to enhance federalism include greater involvement of states in the provision of selected public services and activities. This is to be accompanied by more access to financial resources (tax revenues and development allocations), especially for less developed states in the country.

The media plays an important role in providing information to the public. In doing so, it enhances public scrutiny and the accountability of politicians and the government. For the media to carry out these functions, it needs to have access to information and to enjoy the freedom to analyse and report. These are covered by a number of proposed legal reforms to improve access to information (Freedom of Information Act) and enhance dissemination of information (Printing Presses and Publications Act, Communications and Multimedia Act, Anti-Fake News).

A number of laws enacted under the previous BN-led government were aimed at enhancing national security and public order. However, some of these are seen by the PH government to contain elements that render them “oppressive” and limiting on the freedom of political participation. Laws that are expected to be either revised or revoked include the Security Offences (Special Measures) Act 2012 (SOSMA) and the Prevention of Crime (Amendment) Act 2015 (POCA).¹³

Overall, the PH government's list of institutional reforms is ambitious. Not all countries that have carried out similar reforms have been successful (Andrews, 2013). What will the challenges facing the PH government be in implementing institutional reforms?

IMPLEMENTATION CHALLENGES

Reforming institutions is a complex process due to institutional interdependence and complementarity. For example, reforming the courts without concomitant reforms in law enforcement may prove ineffective. There is also no single way to optimally sequence institutional reforms. Much depends on what is politically and legally feasible. As key policy decisions emanate from the executive body, it is this body that could be the focal point for reforms. This is exactly what the PH government did as soon as it took over the reins of the government.¹⁴ One key fiscal reform has been the zero-rating of the Goods and Services Tax (GST) on 1 June 2018. Though politically popular, this was a risky move due to its potential adverse impact on fiscal revenues. Some of this risk has been neutralized to some extent by fiscal consolidation and the RM\$30 billion dividend transfer from the national oil company Petronas. A number of other fiscal reform measures were also announced during the tabling of the 2019 Budget. These included a better system to monitor the government's debts and liabilities as well as a more transparent procurement system. The success of such fiscal reforms is important not only from a macroeconomic perspective – fiscal space can affect other areas of reforms such as the decentralization of public resources and services.

The sequencing of reforms has also been affected by enforcement exigencies. In this regard, one area of institutional reform that has not been implemented is the use of parliamentary select committees for major public appointments. The first parliamentary session after the

elections was scheduled to begin on 16 July 2018, and there was an urgency to hasten investigations into corruption charges against leaders from the previous regime. This had required a replacement of key officials such as the Attorney General and the Chief Commissioner of MACC. The PH government will likely need to revisit such appointments by using the select committee mechanism in the future. The establishment and operation of the proposed six parliamentary select committees should thus be a priority for the new government.

Aside from timing, institutional reforms involving the legislative process are likely to encounter other difficulties. The bill to abolish the Anti-Fake News Act was passed by the lower house (Dewan Rakyat) on 16 August 2018 but subsequently rejected by the BN-controlled upper house (Dewan Negara) on 12 September 2018.¹⁵ The PH government will need to re-submit such bills. PH will also find it difficult to implement reforms that require amendments to the constitution (e.g. term limit for the Prime Minister) as it does not have a two-third majority in the lower house. However, pending such reforms, the PH government could adopt practices such as term-limits as norms.

CONCLUSION

Institutional reform is the key item on the agenda of the new Pakatan Harapan government in Malaysia. The institutional reforms that have been proposed are aimed at strengthening the economic and political governance in the country, through enhancing the autonomy of the parliament and limiting the influence of elected politicians on key institutions such the judiciary, the anti-corruption agency, and the election commission.

The implementation of institutional reforms is still in the early stages and will take some time to complete. Early reforms have focused on the fiscal capacity of the government, and legal reforms are likely to encounter some delays in the next two to three years. Thus, whilst rule of (existing) law are likely to take effect rapidly, the enhancement of check and balance mechanisms will require a longer time.

It will also take some time before some of the benefits of institutional reforms will be felt. The impact of fiscal reforms will be felt sooner and may affect public support for further institutional reforms. Finally, a key challenge to institutional reform is changing the national mindset or consciousness in terms of what are – and what are not – acceptable levels of governance, accountability and performance by parliamentarians.¹⁶ The path towards forging a new social consensus on such matters is likely to be a difficult one, but ultimately rewarding.

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Appendix Table 1: Pakatan Harapan Government's Institutional Reform Agenda

Institution	Reforms
Executive (Administration)	<p>Collective cabinet administration system</p> <p>Prime Minister will not hold other ministerial posts</p> <p>Lower number of ministers in PM Dept from 10 to 3</p> <p>Lower financial allocation to PM Dept from RM17 bil (2018) to RM8 bil (2019)</p> <p>Reduce number of agencies under PM Dept</p> <p>Elected politicians and senior government officials to declare assets and income</p> <p>2-year term limit for PM, Chief Minister and Menteri Besar</p> <p>Remove PM's ability to influence and manipulate key institutions</p> <p>Publication of directorship and consultancy positions held by MPs</p> <p>Commissions of Inquiry into 1MDB, FELDA, MARA, Tabung Haji</p> <p>Reform governance structure for 1MDB, FELDA, MARA, Tabung Haji</p> <p>Limit the use of private consultants in public sector</p> <p>Parliamentary committee to receive MOF reports on GLCs regularly</p> <p>Reform and redesign public services</p> <p>Production of Green and White papers for policy discussions</p>
Fiscal Capacity	<p>Improve transparency and discipline of government's financial administration</p> <p>Adopt accrual accounting</p> <p>Enact a Fiscal Responsibility Act by 2021</p> <p>Fiscal consolidation during 2019-2021 period</p> <p>Setup a Debt Management Office to review and manage the government's debt and liabilities</p> <p>Re-evaluation and rationalisation of infrastructure major projects</p> <p>Zero-rating of Goods and Services Tax (GST) and implementation of Sales and Services Tax (SST)</p> <p>Review tax structure with the view to increase tax revenues e.g. gaming industry and property gains</p> <p>Reform public procurement system and promote open tendering</p> <p>Enact a new Government Procurement Act in 2019</p> <p>Reform Public-Private Partnership Unit to achieve greater transparency and eliminate corruption</p> <p>More extensive use of IT and online (cashless) systems in procurement</p>
Legislature (Parliament)	<p>Speaker of lower house and president of upper house must retire from partisan politics</p> <p>Leader of opposition to have minister status</p> <p>Transparent funding to MPs</p> <p>Establish select committee system</p> <p>Chairmanship of PAC to be held by opposition</p> <p>Reintroduce the Parliamentary Services Act to make parliament more independent</p> <p>Parliamentary committees to approve appointments to key commissions e.g. MACC, Elections Commission, Judicial Appointment Commission, National Audit Department, Human Rights Commission</p>

Judiciary (Courts)	Parliamentary Select Committee to determine membership of Judicial Appointments Commission Abolish clauses that prevent court from reviewing government's decisions and laws Introduce new rules that require judges to provide written judgements when their judgments are announced
Enforcement	Separate the Attorney General Office from Public Prosecution Office Upgrade MACC to a Commission under Federal Constitution Greater independence for MACC (appointment, tenure, finance) MACC to be answerable to Parliament directly Establish Independent Police Complaints and Misconduct Commission Revise Whistleblower Protection Act 2010 Revise Witness Protection Act 2009 Revise Official Secrets Act 1972
Electoral	Improvements in electoral process – electoral roll, postal voting, campaign period, fair access to media, and independent observers Election Commission to be fully monitored by Parliament Membership of EC requires Parliamentary approval Fair ratio in future delimitation exercises Enact the Political Financing Control Act Lower voting age from 21 years to 18 years
Federalism	States to have higher number of Senate appointments than Federal government Further decentralize powers to state e.g. public transport, social services, environmental protection, agriculture Return at least 10% of income tax revenues generated in a state to that state Ring-fence 50% of development expenditure to five poorest states Powers of the Malay Rulers to govern religion and Malay Customs will be returned to the states
Local Government	Amend Local Government Act 1976 to make local government more accountable
Media & Information	Enact Freedom of Information Act Revoke Sedition Act 1948, , Printing Presses and Publications Act 1984 Abolish Anti-Fake News Act 2018 Revise Communications and Multimedia Act 1998 Improve independence of RTM and BERNAMA Enable an open government environment
National Security, Public Order and Political Participation	Revise Universities and University Colleges Act 1971 (UCCA) Revise Peaceful Assembly Act 2012 Revise Security Offences (Special Measures) Act 2012 (SOSMA) Revise National Security Council Act 2016 Revise Prevention of Crime (Amendment) Act 2015 (POCA) Revise Prevention of Terrorism Act (POTA)

Source: Author's Compilation based on PH's Buku Harapan, Mid-term review of 11MP and the 2019 Budget

¹ Mahathir did clarify further: "... If we can't fulfil them, we will need a good reason that is acceptable to the people. Or else, if we fail to deliver on our promises, the opposition will use it against us and we may be defeated (in the next general election)".

² Of these, 19 fell under the category it designated as "institutional and political reform".

³ North (1990), p.3.

⁴ Besley and Persson (2011, p.6) define state capacity as the "institutional capability of the state to carry out various policies that deliver benefits and services to households and firms". State capacity comprises of: (i) fiscal (extractive) capacity which is the state's ability to raise tax revenues, and (ii) legal (productive) capacity which is the state's ability to provide regulation and legal services that protect investors and enforce contracts.

⁵ The World Bank (2017), for example, defines governance as "the process through which state and nonstate actors interact to design and implement policies within a given set of formal and informal rules that shape and are shaped by power".

⁶ Though the term separation of powers has been used in the media a lot, it is not a straight-forward concept. There are several meanings stemming from the experiences in different countries (Mollers, 2013). The most-common usage of the term implies two notions: (i) differentiation and separation of the powers, and (ii) reciprocal check and balance of the powers.

⁷ See World Bank (2008) and World Bank (2017) for discussions on the impact of institutions on growth and development.

⁸ After the May elections, an advisory committee – the Institutional Reforms Committee (IRC) – was set-up to provide recommendations on regulatory reforms. The IRC submitted its final report in July 2018 but the report has not been published thus far.

⁹ Other areas that also fall under institutional reforms but not covered in this essay include race-relations, human rights, bureaucracy and government linked companies (GLCs). Lack of space prevents treatment of these issues.

¹⁰ See Joshi (2018) for a more detailed analysis of the reduction in development expenditure allocation to the PMO.

¹¹ A parliamentary select committee is formed by and reports to the parliament. Such a committee comprises selected parliamentarians. The use of parliamentary select committees is not entirely new though they were not extensively used in the previous government. Under the Najib Administration, only two parliamentary select committees were used, namely, the Special Select Committee on Electoral Reform (2011-2012) and the Select Committee on the Lynas Advanced Materials Plant Project (2011-2012).

¹² "Six select committees to be formed soon", Malaysiakini, 16 August 2018.

¹³ In a BERNAMA report, the Malaysian Home Minister has indicated that more than 2,000 people have been detained under SOSMA, 475 under POCA and nine under POTA. See: <http://www.theedgemarkets.com/article/muhyiddin-more-2000-detained-under-sosma-475-under-poca-and-9-under-pota>.

¹⁴ However, there were mis-steps at the early stages. Upon his appointment as Prime Minister, Mahathir Mohamad initially announced that he would also be the Education Minister. This decision was quickly retracted following public outcry that this was inconsistent with the promise made in PH's election manifesto in which it was stated that the Prime Minister should not hold other ministerial positions.

¹⁵ The upper house currently comprised senators that are not elected but appointed with the recommendations by the ruling party. About 46 of the 66 senators in the upper house belong to the BN coalition. In voting for the bill to abolish the Anti Fake News Act, 28 senators voted against it while only 21 supported. Three senators abstained from voting.

¹⁶ The author thanks Michael Schaper for highlighting this important point.

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