



Electoral Reform in Malaysia

A Roundtable



The Way Forward For Free & Fair Elections

Report Of The Electoral Reform Roundtable

Held At Parliament House, Kuala Lumpur

On 30 November & 1 December 2018



Kofi Annan
FOUNDATION

Towards a fairer, more peaceful world

“The end result of our electoral reforms must not merely be to have clean, free, and fair elections, but also for Malaysia to become a robust multi-party democracy.”

– Dato’ Mohamad Ariff bin Md Yusof

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Foreword

by the Speaker of the House of Representatives,
Parliament of Malaysia

The results of the 14th general election held on 9 May 2018 signal a new era for our nation. Nearly 60 years after the first Parliament of the Federation of Malaya first met, a much-anticipated change at the federal level has finally taken place. We have witnessed a remarkable transition, one which has been peaceful and which has garnered international praise. The results were perhaps a limited testimony to the soundness of our electoral system and processes, whereby a large-enough swing among the electorate resulted in a decisive change of government.

Despite this democratic achievement, we must not rest on our laurels. There are still pressing areas in our electoral laws and regulations that require attention and change. The end result of our electoral reforms must not merely be to have clean, free, and fair elections, but also for Malaysia to become a robust multi-party democracy. In the new spirit of Malaysia Baharu, we have no choice but to succeed. Malaysia is now seen as a beacon for democratic change regionally, and it is incumbent on us to prove that this is not a transient change but one that is here to stay.

This Roundtable on Electoral Reform in Malaysia has therefore been an important part of the ongoing reform effort. We are very privileged to have had a gathering of reputable national and international experts as well as members of Parliament, the Cabinet, the Election Commission, and the Electoral Reforms Committee to share their views, and I am pleased that members of civil society, academia, and the media, among others, have been free to come and engage in the debate.

I am therefore pleased to have officiated at the Roundtable and hope that this report of its proceedings and conclusions will be widely read and will inform the efforts towards the reform of our nation's electoral laws at this key juncture in our history.

Thank you.

Dato' Mohamad Ariff bin Md Yusof

Foreword

by Mr Alan Doss, President of the Kofi Annan Foundation

When the Kofi Annan Foundation first discussed the idea of organizing a conference on democracy in Southeast Asia in Kuala Lumpur in 2017, some of our international interlocutors were sceptical. But we were encouraged by Global Bersih to persevere, and we benefited from the support of the Human Rights Commission of Malaysia. Although that conference was a success, many observers questioned the prospects for free and fair elections in Malaysia and in other countries in the region. But on 9 May 2018, Malaysia stunned the region and the world when a broad coalition of opposition parties won office, ushering in Malaysia's first transfer of power since independence in 1957.

Malaysia's experience shows us that politics cannot stand still in the face of changes brought by economic development, urbanization, and mass education. That experience also shows that it is possible to overcome the politics of identity and offer voters a credible democratic alternative; it also demonstrates that high voter participation can level the electoral playing field to deliver democratic change.

Following the election of the new legislature, the Kofi Annan Foundation was invited by the Speaker of the House of Representatives, the Election Commission, and Bersih 2.0 to co-organize an electoral reform roundtable with the Electoral Reforms Committee, political parties, and civil society in Malaysia. We teamed up with our partners in the Foundation's Electoral Integrity Initiative, including the United Nations' Electoral Assistance Division, the International Institute for Democracy and Electoral Assistance, the International Foundation for Electoral Systems and the National Democratic Institute to arrange the roundtable. I would like to thank them all for contributing to a successful and fruitful roundtable.

This Report encapsulates the key points that were raised and the recommendations that were made during the two-day roundtable. I hope that this Report will make a substantial contribution to the ongoing reforms of Malaysia's electoral system, and that Malaysia's example will encourage similar progress in other parts of Asia and beyond.

Alan Doss

Foreword

by Mr Thomas Fann, Chair of Bersih 2.0

On behalf of Bersih 2.0, I would like to thank the House of Representatives Speaker's Office, the Election Commission of Malaysia, the Kofi Annan Foundation, the International Institute for Democracy and Electoral Assistance, the International Foundation for Electoral Systems and Global Bersih for co-organizing the Roundtable on Electoral Reform in Malaysia.

For Bersih 2.0, the Roundtable has been a key step in ushering in a New Malaysia that will be a real, vibrant, and sustainable multi-party democracy. There can no multi-party democracy without free, fair, and clean competition between political parties. Although we recognize the gigantic tasks that lie ahead of us in re-establishing multi-party democracy, and mindful of the need to avoid becoming lost in the euphoria of change, we are determined to identify and overcome the challenges that must be overcome to make political competition work.

The New Malaysia belongs to all Malaysians, regardless of the parties they support, and we would like here to explicitly thank all parties and coalitions that were represented at the Roundtable; namely, People's Justice Party, Democratic Action Party, Parti Pribumi Bersatu Malaysia, Parti Amanah Nasional, and National Heritage Party in the Pakatan Harapan, Malaysian Chinese Association and Malaysian Indian Congress in the Barisan Nasional, Pan-Malaysia Islamic Party, Parti Pesaka Bumiputera Bersatu in the Gabungan Parti Sarawak, the United Pasokmomogun Kadazandusun Murut Bersatu, Parti Bersatu Sabah and Socialist Party of Malaysia.

This Roundtable is the first platform to be held on strengthening multi-party democracy through electoral reforms. It must not, and will not, be the last. After the Roundtable, we hope that the conversation on electoral reform will continue in cities, towns, and villages nationwide, as well as in Parliament through a Parliamentary Select Committee to deliberate on and facilitate the constitutional and legal amendments necessary for electoral reforms.

We hope that this Report, which draws together the views that have been expressed and the consensus that have been reached during the Roundtable, will form the basis of these further conversations and deliberations.

Thank you.

Thomas Fann



Executive Summary

The Roundtable on Electoral Reform in Malaysia was held at Parliament House, Kuala Lumpur, over two days on 30 November and 1 December 2018, following the historic Malaysian general election of 9 May 2018, which saw a new government coming to power with a commitment to electoral and other democratic reforms. Since the election, the Malaysian government has appointed a new Election Commission chairman and established an Electoral Reforms Committee to draw up proposals for reform.

Malaysia, having experienced its first democratic transition, faces a unique opportunity for democratic reform. The experience of other countries shows, however, that the window of opportunity for such reform can be short. Malaysia should take account of international experience and best practice when designing and implementing electoral reforms and ensure that the process of reform is carried out in an inclusive, transparent and participatory manner, with the involvement of civil society and of all participants in the electoral and political system.

Reforming Malaysia's electoral system will require cross-party support in order to secure necessary amendments to the Federal Constitution, and consensus will need to be forged on the reforms that are necessary for clean, free, and fair elections and for Malaysia to sustain a healthy and robust multi-party democracy. Given the likely scale of the reforms, Malaysian reformers will need to set priorities for the most important and the most achievable reforms and manage expectations while sustaining the momentum of an ambitious programme of electoral reform.

Specific areas of reform that have been identified include the electoral system, the apportionment and delimitation of constituencies, the integrity of the electoral rolls, absentee voting, the regulation of political financing and spending, the investigation and punishment of election offences, the independence of the Election Commission, and the management of transitions of power. Malaysia will also need to consider the opportunities and challenges posed by emerging technologies.

Despite the long road that lies ahead, the Roundtable has demonstrated the encouraging level of commitment to electoral reform that exists amongst Malaysian stakeholders, and the depth of experience and expertise that is available and that can be called upon from both local and foreign sources.

Presentations and transcripts of speeches from the Roundtable are available for download from <https://drive.google.com/drive/folders/1-AhzAMazgtoj7izNjDrz8Cyl2fpghb5q?usp=sharing>

List of Recommendations

1. 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 centrism, allow for healthy competition between coalition partners, and better represent Malaysia's diverse population in Parliament.
2. So long as Malaysia retains the first-past-the-post system, it should address issues of over- and under-representation both between the States of Malaya, as well as within each State. Constituencies should also be fairly and impartially drawn. Seats should be distributed between the States on the basis of electorate size, while strict numerical standards should be reinstated for variations between constituencies.
3. The electoral rolls should be audited and managed in an open, inclusive and transparent manner, so as to build public trust. A new geocoded National Address Database should be used to audit the electoral rolls and the civil registration records of the National Registration Department. The electoral rolls should be made available for public inspection and monitoring, and the integrity of the electoral rolls should be ensured before the implementation of automatic voter registration.
4. Absentee voting should be extended to Malaysian voters living in neighbouring countries as well as those living further afield. The Election Commission should take responsibility for ensuring that the campaign period is long enough and the processes for the issuance and despatch of postal ballots are speedy enough to allow the ballots to be returned in time to be counted. While absentee voting facilities should be provided for some domestic voters — in particular, East Malaysian voters in West Malaysia and vice versa — in the long run, voters should be encouraged to vote where they actually reside. Consideration should be given to holding polling for military and police voters on election day. Military and police voters should also be given the option of voting in their home constituencies via absentee voting.

5. Because of the difficulties of auditing electronic and online voting systems, and of securing public trust in such systems, careful investigations together with public consultations should be carried out before adopting any form of electronic and online voting in Malaysia.
6. While it should not be for government authorities to decide what is or is not “fake news”, the Election Commission and other authorities should play a role in monitoring political spending, electoral misconduct, and hate speech online.
7. The regulation of political spending must be extended to political parties and third parties, both during and outside the campaign period, and to internal party elections. Political contributions, both in cash and in kind, should also be declared and subject to limits. Public funding should take the place of some forms of private funding, and parties should have equitable and unrestricted access to state media.
8. Rules and guidelines should be drawn up for managing transitions in government, codifying best practice and caretaker conventions. Consideration should also be given to a constitutional amendment submitting defecting Members of Parliament to re-election. Alternatively, if a mixed-member system is introduced, a distinction may be drawn between constituency MPs and party list MPs in terms of party affiliation.
9. Election offences laws should be updated to clarify the roles and powers of the various state agencies and to empower the Election Commission to monitor, investigate, and penalize breaches of election offences laws.
10. The selection of Election Commissioners should be subject to scrutiny by a cross-party parliamentary committee, and the Election Commission should have operational independence in staffing and budgeting, subject to scrutiny by a dedicated parliamentary select committee. The Election Commission should be given responsibility for the registration and regulation of political parties, while consideration may be given to transferring responsibility for the delimitation of constituencies to an independent boundaries commission.

List of Abbreviations

AFNA	Anti-Fake News Act 2018 (Malaysia)
EC	Election Commission, Malaysia
EMB	Electoral Management Body
GE13	13th General Election, Malaysia (2013)
GE14	14th General Election, Malaysia (2018)
FPTP	First Past the Post
FTPA	Fixed-term Parliaments Act 2011 (UK)
MMP	Mixed-Member Proportional
MP	Member of Parliament
NRD	National Registration Department, Malaysia
UK	United Kingdom



Session I

Reform of the Electoral System: Dealing with Identity Politics, Fair Representation and Healthy Political Cooperation

Malaysia operates a Westminster-style parliamentary system with a first-past-the-post (FPTP) electoral system for both federal and state elections. At the federal level, the country is divided into 222 geographic constituencies, each represented by a single Member of Parliament (MP), who has received the largest number of votes in that constituency.

As a rule, there is no one electoral system that can be recommended for every country. Each country needs to choose its electoral system based on the issues it faces in terms of democratic representation, and the social or political constituencies that it considers most important to represent. Each electoral system needs to be assessed in the context of the political party behaviour that develops in response to the rules of the system over time. It is important that these assessments are made after broad and inclusive consultation that includes all stakeholders in the country.

Although the FPTP voting system is both simple to understand and simple to operate, the share of seats won by each political party in Parliament is typically not proportionate to the share of votes cast for that party nationwide. FPTP has conventionally been lauded for producing a British-style two-party system with two dominant centrist parties that alternate in power without the need for post-election coalition forming. While minor national parties typically receive very few seats relative to their share of the popular vote, this has traditionally been seen as a price worth paying for competitiveness, stability and moderation.

In the Malaysian context, however, there is reason to believe that FPTP, rather than promoting moderation and a sustainable national two-party / two-coalition system, may instead be encouraging the proliferation of regional or communal parties, leading after GE14 to the emergence of multiple regional two-party systems, with a risk of volatility at the national level. While FPTP encourages power-sharing through broad coalitions formed in advance of general elections, it may fail to provide for inter-party competition, leading to fixed coalitions that are increasingly stagnant, unresponsive to voter preferences, and susceptible to infighting.

Malaysians should consider the merits of adopting a more proportional electoral system that can promote national consensus and moderation, allow for healthy competition between coalition partners, as well as better represent the complexity of Malaysia's diverse population in Parliament. Examples of such alternative systems include a two-tier party list system, in which MPs are elected from both regional and national party lists, and a mixed-member proportional (MMP) system, in which MPs are elected from a combination of FPTP and national party lists. The use of national party lists in both systems is designed to maximise proportionality at the national level. However, any such changes to the electoral system will require cross-party support in order to secure an amendment to the Federal Constitution.

CASE STUDY: THE TWO-TIER PARTY LIST SYSTEM

When South Africa adopted a new constitution following the end of apartheid, the challenge it faced was to select an electoral system that would suit a highly divided and unequal society in the process of a delicate democratic transition. A two-tier party list system was selected due to its inclusivity, its simplicity, and its tendency to encourage coalition governments.

The seats in the South African National Assembly are divided equally into regional and national seats, with nine electoral regions corresponding to the country's nine provinces. Each party prepares a regional list and a national list of candidates for the National Assembly. Voters cast their votes for a party, and not for individual candidates. Votes are first counted at the regional level, and regional seats are allocated to the candidates on the regional party lists in proportion to each party's share of the vote in each region. Votes are then counted at a national level, and national seats are then allocated to the candidates on the national party lists in order to maximise proportionality at a national level. The system thus maximises proportionality while also giving representation to regional parties with a narrow base at the national level.

CASE STUDY: THE MIXED-MEMBER PROPORTIONAL SYSTEM

The MMP system was first devised for West Germany after World War II and has since been adopted by a number of Commonwealth countries, including New Zealand, Lesotho, Scotland, and Wales.

In the most common form of the MMP system, each voter has two votes, one for a constituency representative and one for a political party. Constituency MPs are elected as per FPTP but are supplemented by a number of party list MPs. The ratio of constituency MPs to party list MPs varies from country to country but ranges from 1:1 to 2:1.

Party list seats are allocated to the various parties at the national or regional level in such a way as to make the total number of MPs elected for each party approximately proportionate to its share of the national/regional party vote. A minimum threshold, e.g., 5% of the vote, may be imposed that parties must reach before they are entitled to representation.

“Malaysia’s experience shows us that politics cannot stand still in the face of changes brought by economic development, urbanization, and mass education.”

– Alan Doss



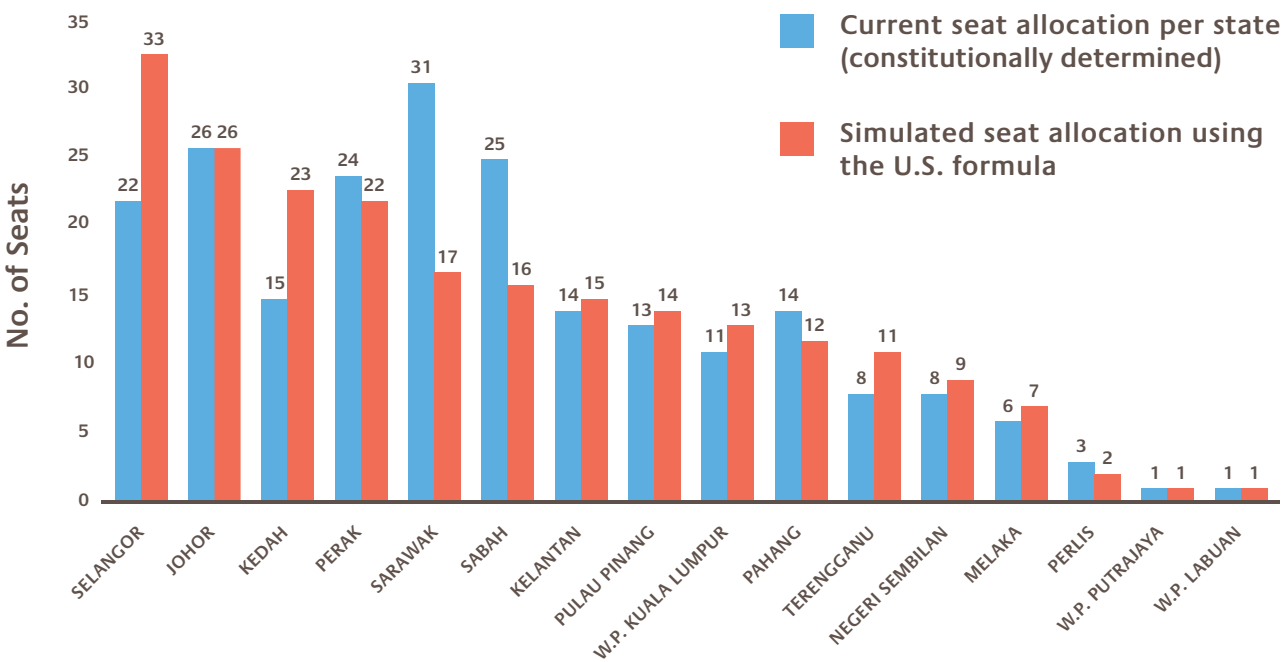
Session II

Ensuring Fair Representation: Re-Delineation and Boundary Drawing

Fair representation in a democracy requires not just literal adherence to the principle of “one person one vote”, but also that each vote be given approximately equal weight. Unlike with more proportional electoral systems, the fairness of the FPTP system is highly dependent on the manner in which geographical constituencies are delineated.

There are several ways in which votes are treated unequally in Malaysia. First, the allocation (since 1973) of a fixed number of seats to each State and Federal Territory by Article 46 of the Federal Constitution causes some States and Territories to be under-represented relative to their population, while others are over-represented (See Chart 1). While it is accepted that the States of Sabah and Sarawak should be entitled to special representation — ideally, in the long run, in a democratically-elected and empowered upper House of Parliament — the allocation of parliamentary seats between the various States of Malaya should be based on the relative size of their electorates (as they may vary from time to time), and should not be fixed by the Constitution.

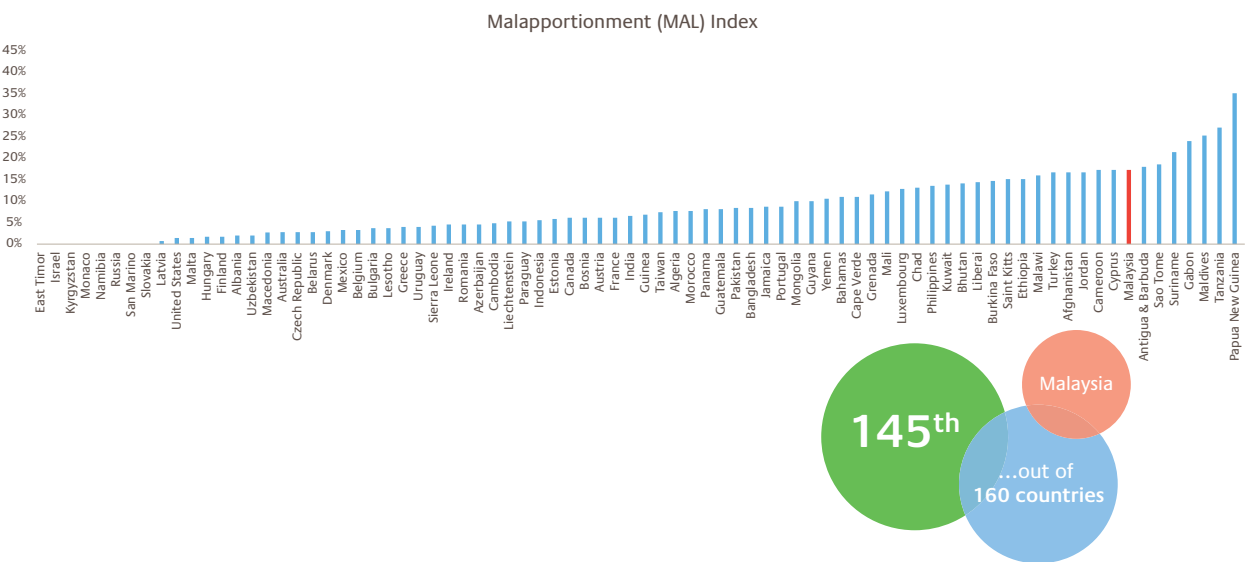
Chart 1: Under and Over-Representation in Seat Allocation at Inter-state Level



Source: Presentation of Prof Yuko Kasuya at Electoral Reform Roundtable: The Way Forward for Free and Fair Elections, at Kuala Lumpur, 30 November – 1 December, 2018.

Within each State and Federal Territory, the Federal Constitution requires that the numbers of electors in each constituency be “approximately equal”, with a measure of weightage for area to be given to rural constituencies. Before 1962, the Constitution provided that the maximum ratio between the number of electors in the largest and smallest constituencies in each State should be not more than 1.35:1 ($\pm 15\%$ from the average), while between 1962 and 1973, the Constitution provided for a maximum ratio of 2:1 ($\pm 33\%$ from the average). Today, however, the ratio between the number of electors in the largest and smallest constituencies in some States is as high as 4:1, and Malaysia, as a result, ranks 145th out of 160 countries for fairness in the apportionment of parliamentary constituencies (See Chart 2). This should be remedied through the reinstatement of strict numerical standards for variations in constituency electorate sizes.

Chart 2: Ranking of Malaysia in Malapportionment Index



Source: Presentation of Prof Yuko Kasuya at Electoral Reform Roundtable: The Way Forward for Free and Fair Elections, at Kuala Lumpur, 30 November – 1 December, 2018.

There are also reasons to doubt that many constituency boundaries in Malaysia have been impartially drawn. Not only do the sizes of constituencies tend to mirror local support for particular political parties, but many constituency boundaries appear also to be drawn in an irregular manner, in defiance of local human- and physical-geographical factors. Malaysia should follow international best practice, which requires that constituency delimitation be conducted by an independent and impartial body without partisan intervention from the Executive or Legislature.

CASE STUDY: RURAL WEIGHTAGE IN AUSTRALIA

From the 1920s until the 1970s, Australia operated a rural weightage system that allowed rural seats to have fewer electors than urban seats, with a $\pm 20\%$ tolerance (equivalent to a maximum ratio of 1.5:1 between the largest and smallest seats). Because of complaints that the system was biased in favour of certain political parties, after 1974, this tolerance was reduced to $\pm 10\%$ (equivalent to a maximum ratio of 1.22:1), and after 1984, rural weightage was eliminated completely in favour of the principle of equal representation. These reforms were adopted in spite of the fact that Australia has some of the largest parliamentary constituencies in the world, the largest in Western Australia at one point covering nearly 2.3 million km² — nearly 7 times the size of Malaysia. However, in recognition of the difficulty of serving large rural constituencies, Australian MPs are entitled to increased travel and other allowances based on the geographic size of their constituencies.



Session III

Voter Registration and the Integrity of the Electoral Rolls

A sound electoral roll is the bedrock on which the entire electoral system rests. Increasing public confidence in Malaysia's electoral system requires building public trust in the integrity of the voter registration system and the electoral rolls, which should be designed, audited and managed in an open, inclusive and transparent manner. Success in the reform of the electoral rolls depends on broad stakeholder engagement and genuine commitment to the reforms that are agreed upon, with the necessary funding and appropriate training for officials and voter education.

The first step that Malaysia needs to take in reforming the electoral rolls is the creation of a standardized, geocoded National Address Database, which should be maintained nationally in collaboration with local authorities. This database should form the basis for an audit and verification of the electoral rolls and of the records of the National Registration Department (NRD). Voters whose addresses are blank, incomplete or non-existent, or whose addresses contain a questionable number of voters, should be verified by an investigation team. As part of these verifications, voters should be encouraged to register to vote where they actually reside, and changes of address should only be registered by the NRD with proof of residency.

With Malaysia's plans to introduce automatic voter registration with a new voting age of 18, access to the NRD's records will be needed to add voters to the rolls automatically, to verify them from time to time, and to remove them upon their demise or disqualification. All changes to the electoral rolls, including boundary corrections, that are carried out outside periodic re-delineations should only be carried out after proper verification, and should then be published in a transparent manner. The electoral rolls must also be made available in electronic format in order to allow political parties and independent civil society organizations to participate in the auditing and monitoring of the integrity of the rolls.

In order to reduce fraud and manipulation, the process of displaying supplementary electoral rolls should be reviewed to increase the display period and to curb objections based on racial profiling. Section 9A of the Election Act 1958, which prevents judicial review of certified electoral rolls, should be repealed, and the Election Offences Act 1954 should be amended to increase the penalties for voter registration fraud.

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– Thomas Fann

Session IV

Workshop 1 — Facilitating Participation of Absentee Voters in Elections

Recent general elections in Malaysia have seen a number of changes to the way absentee voters are able to vote. The 2013 general election (GE13) saw the introduction of advance voting for police and military personnel in place of mass postal voting, and the introduction of postal voting — in practice, a form of advance voting — for Malaysians living overseas.

The 2018 general election (GE14) has seen the implementation of actual postal voting for Malaysians living overseas, as well as the extension of postal voting to additional categories of public servants within Malaysia. However, absentee voting is still not available for Malaysians living in neighbouring countries (Singapore, Brunei, Indonesian Kalimantan and Southern Thailand), for East Malaysians living in West Malaysia (and vice versa), or for Malaysians who for various reasons live far from the constituencies where they are registered.

While it is not possible to specify an absentee voting system that is ideal for all countries, every system needs to balance voter convenience and inclusion with the protection of the integrity of the election. When reforming the absentee voting system, particular care is required to prevent electoral fraud and to ensure the secrecy of the vote. It is also desirable to ensure that absentee voting results are not disclosed before in-person voting has ended.

For overseas voters, absentee voting should be extended to Malaysian citizens residing in neighbouring countries, as well as those living further afield. If the existing postal voting system is retained, it is important that a minimum campaign period of at least 3–4 weeks is provided to allow sufficient time for overseas postal ballots to be despatched and returned in time to be counted (as was regrettably not the case in GE14). The EC should be responsible for ensuring that the campaign period is long enough and that procedures for the issuance and despatch of postal ballots are speedy enough to allow the postal voting and vote counting systems to function properly. The EC should also consult with overseas Malaysians to streamline and improve the process for registration of absentee voters and the despatch and return of postal ballots.

For domestic voters, on the other hand, it is likely that a larger-scale extension of postal voting would, in addition to increasing the administrative burden of the issuing and processing postal ballots, arouse public concerns about an increased risk of electoral fraud. While many Malaysians who have moved to work in urban areas choose to retain their electoral registration in their home constituencies, where their votes are generally given greater weight, once inequalities in apportionment are corrected, Malaysians should be encouraged to register to vote where they actually reside. An exception to this may be made for East Malaysian voters residing in West Malaysia (and vice versa), in view of the special representation that is given in Parliament to the States of Sabah and Sarawak.

Consideration should be given to holding polling for police and military voters on election day, and to restricting postal voting to those public servants (including police and military personnel) who are actually on duty outside their registered constituencies on Election Day. Police and military voters should also be given the option to vote in their home constituencies via absentee voting, rather than being forced to vote in the constituency where they are stationed, as at present.

Session IV

Workshop 2 — Election Integrity in the Digital Era: Threats and Opportunities

Technology is bringing rapid change to societies everywhere, and democratic systems are not immune from these changes. Electoral management bodies (EMBs) and politicians who participate in elections must therefore be prepared to deal with the challenges as well as the opportunities that digital technology brings.

While all electoral systems have their vulnerabilities, elections in the digital era face new vulnerabilities that need to be addressed before new technology is allowed into the polling booth. While electronic and online voting systems are not inherently riskier than paper-based ones, the mechanisms that are needed to monitor electronic voting and counting processes and to secure them from outside manipulation or attack are much more complex and difficult to audit. Electronic voting systems also face greater difficulties in obtaining the trust and confidence of the electorate and of political parties. Careful investigations and public consultation are therefore required before any such systems are introduced.

Even where countries retain traditional paper voting systems, digital technology has brought a new dimension to election campaigns. While unlawful behaviour during election campaigns is not new, the Internet and social media now allow voters to be influenced surreptitiously and from halfway around the world, making the regulation of campaign spending, hate speech, and fake news a much more difficult task.

As Malaysia has recently seen, it should not be for government authorities to decide what constitutes “fake news” and what does not. However, EMBs and other authorities do have a role in policing campaign spending, electoral misconduct, and hate speech online. Digital platforms should also be responsible for taking reasonable measures to monitor the content that is hosted on their platforms. In addition, fact-checking websites and online archives can play a role in ensuring that voters have access to the resources needed to question and verify online political content.

Finally, measures should also be taken to ensure transparency in online campaigning, so that voters are aware when political content on social media is being financed by political parties or foreign entities, and to ensure that all political financing and online campaign spending is duly declared and reported.

CASE STUDY: FAKE NEWS LEGISLATION IN MALAYSIA

In April 2018, Malaysia enacted the Anti-Fake News Act 2018 (AFNA), which criminalized the knowing publication of “fake news”, which included any information, data and reports that were “wholly or partly false”. The offence, which had extra-territorial application and did not require malice or ill-intent, could be punished with up to six years’ imprisonment. The Act also criminalized the failure of host platforms to remove a publication after “knowing or having reasonable grounds to believe” that the publication contained “fake news”. The first prosecution under AFNA took place within a month of its enactment.

AFNA also allowed a person aggrieved by “fake news” to obtain a court order for the removal of the publication. Where the court order was obtained by the Government on the grounds that the “fake news” was “prejudicial or likely to be prejudicial to public order or national security”, the court order would not be subject to challenge. This led to criticisms that the Act was designed to make the Government the arbiter of what was and was not “fake news”, and to stifle legitimate dissent and criticism.

Following the change of government after GE14, the Malaysian House of Representatives passed a bill repealing AFNA in August 2018. However, the bill was subsequently rejected by the Senate, which means that the repeal may be delayed by up to a year.

Session V

Controlling Political Financing to Ensure Clean Politics

While Malaysian law currently regulates campaign spending by candidates in elections, it leaves the vast bulk of political financing and spending activities unregulated. For instance, there is currently no regulation of donations, in cash or in kind, to political parties and candidates in Malaysia. In addition, spending by political parties and persons other than the candidate is also totally unregulated. Unregulated political financing not only increases the risk of bribery and undue influence during the election campaign, but also undermines public confidence in the integrity of the electoral process and, in turn, the legitimacy of the entire political system.

As a first step, it is essential that Malaysia extend the regulation of political expenditure to cover spending by candidates, political parties, as well as third parties, both during and outside the campaign period. Political spending limits should take into account the number of seats that are contested by each political party, as well as the size of the electorate and the geographic size of constituencies.

While there has historically been concern among opposition parties that the reporting of political contributions could lead to retribution by government agencies, the reporting of political spending to the EC, with appropriate safeguards for protecting confidentiality and punishing retribution against donors, is necessary if there are to be limits on political contributions as well as on expenditure.

Limits on contributions, both in cash and in kind, are desirable in order to reduce the potential for corruption and the monetization of politics. Corporate contributions should be subject to disclosure to shareholders, and contributions by government agencies, government-linked companies, and foreign entities should be prohibited. In order to provide a level playing field for political competition and to reduce the influence of money in politics, public funding of political parties should take the place of some of these forms of private funding. Political parties should also be given equitable and unrestricted access to the national broadcast media during campaign periods.

Internal party elections are another key area that is in need of regulation in Malaysia. It is believed that the volume of funds involved in the internal elections of some parties far exceeds political spending during general elections. “Money politics” in internal party elections must be curbed because it undermines the selection of capable representatives and allows incumbents, party “warlords”, and other wealthy donors to reinforce their grip on party machineries.

A new law governing political parties should therefore introduce public funding of political parties, improve the regulation of political spending and financing, prevent the misuse of government funds and resources for political purposes, and regulate party ownership of the media and other businesses. Reforms to the law need also to be accompanied by institutional reforms to the EC and to the prosecution authorities to ensure that the law is properly and impartially enforced.

Session VI

Responsibility and Powers of a Caretaker Government After the Dissolution of Parliament

In many parliamentary democracies, there are rules or conventions that govern the behaviour of government ministers between the dissolution of Parliament and the formation of a new government after a general election. These conventions recognise the fact that until the election result is known and the new government is sworn in, the old government has no democratic mandate to make major policy decisions and functions as a caretaker only.

Caretaker conventions generally require that the government refrain from making major decisions that are likely to commit the new government, from making significant appointments, and from entering major contracts or undertakings. Caretaker governments are also prohibited from using government resources for the purposes of the election campaign. In particular, ministers should not announce government projects during the election campaign in order to win votes.

If the caretaker government is defeated in the general election, it can remain in office in a caretaker capacity until the new government is formed, which may be necessary in the event of a hung parliament, where coalition negotiations have to take place. However, in this situation the potential for the abuse of power is great. Elected MPs may be persuaded to switch parties through lawful or unlawful inducements. Several countries, such as India and Singapore (and formerly New Zealand), have therefore provided that defecting MPs must face re-election in order to obtain a fresh democratic mandate. This would require a constitutional amendment in Malaysia, as a similar law in Kelantan has been held to be unconstitutional, and as Article 48(6) currently prohibits a resigning MP from seeking re-election for five years. However, while it is desirable to prevent party defections caused by unlawful or dishonourable inducements, it is also necessary to ensure that MPs are able to change their party support on points of principle. Alternatively, if a mixed-member system is introduced, a distinction may be drawn between constituency MPs, who are elected with a personal mandate (and are therefore not tied to any political party), and party list MPs, who are elected as representatives of a party.

Although the concept of a caretaker government has been accepted in Malaysia, for instance by the 2012 Parliamentary Select Committee on Electoral Reform, no definitive rules or codes of conduct have been published. In other countries, the caretaker conventions have been set out in a Cabinet manual, in a code of conduct issued by the EMB, or in legislation. Rules and guidelines setting out clear procedures for managing transitions in government, providing for pre-election civil service engagement with the opposition, and codifying best practice and the conventions of Westminster parliamentary democracy, should be set out in legislation or in Cabinet or civil service manuals, in order to provide clarity and certainty for future transitions of power. Legislation should also be adopted to criminalise the abuse of government power and resources and the breach of administrative political neutrality.

CASE STUDY: CARETAKER GOVERNMENTS IN PAKISTAN

In Pakistan (and formerly in Bangladesh), the concept of a caretaker government has been extended to the replacement of ministers of the outgoing government by independent officials during the election campaign. This is done in order to prevent the abuse of power by elected politicians. During the election campaign, the outgoing Prime Minister is replaced by a caretaker who is appointed by the President upon the advice of the outgoing Prime Minister and the Leader of the Opposition. If the outgoing Prime Minister and Leader of the Opposition cannot agree on the name of the caretaker Prime Minister, the selection is referred to a cross-party parliamentary committee. If the parliamentary committee cannot agree on a candidate, the selection is made by the Election Commission. Other caretaker ministers are appointed upon the advice of the caretaker Prime Minister.

Session VII

Enforcement of Election Offences Laws: Institutions and Coordination

The impartial enforcement of laws relating to election offences is necessary for the maintenance of a level playing field on which parties can compete in free and fair elections.

In Malaysia, the Election Offences Act 1954 currently provides for enforcement to be carried out in each constituency by enforcement teams comprising representatives of the EC, the police, the local authority, and party candidates. The powers of the enforcement team and of the EC itself are limited: the punishment of election offences requires investigation by the police or by the Malaysian Anti-Corruption Commission and prosecution by the Public Prosecutor. The regulation of online activities falls within the purview of the Malaysian Communication and Multimedia Commission.

Due to the overlapping responsibilities of the various authorities and insufficient co-ordination between them, in recent years, most court cases involving election offences have been instituted by the losing party by way of election petitions. However, election judges in Malaysia have generally imposed unduly high thresholds for petitions to be heard, requiring proof that election offences have had an actual impact on the result of the election.

In many other countries such as in Indonesia, on the other hand, the EMB is empowered to supervise the conduct of political parties and candidates, to conduct inquiries into complaints of election offences, to adjudicate on disputes, and to take action against offenders. The EMB is also empowered to monitor social media to counter hate speech and intolerance during elections.

Malaysia should take action to update its election offences laws to clarify the roles and powers of the various state agencies and to ensure their independence and impartiality. In particular, the EC as the specialist body overseeing elections should be empowered to monitor the conduct of political parties both during and outside the election campaign, to receive and investigate complaints of election offences, to impose civil penalties, and to refer appropriate cases to the Public Prosecutor for prosecution.



Session VIII

Ensuring the Independence of the Election Management Body

It is the role of EMBs to ensure that elections are conducted in a clean, free, fair, and transparent manner. Ensuring the independence and impartiality of EMBs is not always easy, given the incentives for governing parties to have an EMB that is favourable to their interests, but is essential for any EMB to enjoy the trust of the electorate and to confer legitimacy on election results.

Institutional safeguards in the selection of members of the EMB are important to ensure that members of the EMB are suitably qualified, have cross-party support, and have abandoned any prior political affiliations for a number of years before appointment. This can be done by the scrutiny of nominations by a cross-party parliamentary committee, as is done in the United Kingdom (UK) and as has been proposed in Malaysia.

EMB should have operational independence in day-to-day matters such as staffing and budgeting but should also be subject to clear codes of conduct and subject to scrutiny by a dedicated parliamentary select committee, or by an independent advisory and oversight body (as in Indonesia). In Malaysia, election commissioners can only be removed in the same manner as a Federal Court judge; that is to say, by a tribunal constituted to consider allegations of misconduct, and this safeguard should be retained.

Other matters that should be considered in the future institutional reform of the EC in Malaysia include responsibility for the delimitation of constituency boundaries (which in the UK is handled by separate Boundary Commissions) and responsibility for the registration and regulation of political parties. As the Registrar of Societies comes under the supervision of the Home Ministry, it is preferable that the registration and regulation of political parties be transferred to the independent EC. However, separating responsibility for the delimitation of constituencies would require an amendment to the Federal Constitution.

CASE STUDY: FIXED-TERM PARLIAMENTS IN THE UNITED KINGDOM

In 2011, the UK enacted the Fixed-term Parliaments Act 2011 (FTPA), which abolished the Government's power to dissolve Parliament and call a general election at a time of its choosing. The FTPA provides instead for general elections to be held on a fixed date in May every five years. Early elections can only be held where the House of Commons passes a motion calling for a general election by a two-thirds' majority, or where it passes a motion of no confidence in the Government and no alternative government is confirmed by the House within 14 days.

In practice, however, the FTPA has not successfully constrained the Government from calling snap general elections because the Opposition is afraid of appearing weak or unprepared by turning down an opportunity to unseat the Government in an early general election. The House of Commons therefore voted 522 to 13 in favour of an early general election in 2017 (only two years after the previous election in 2015), despite the fact that the Opposition was then trailing in the opinion polls and expected to do badly in the snap election.

Appendix

Roundtable Speakers

Welcome speech: Mr Thomas Fann, Chairperson of BERSIH 2.0
Mr Alan Doss, President of the Kofi Annan Foundation

Opening speech: The Honourable Dato’ Mohamad Ariff bin Md Yusof,
Speaker of the Dewan Rakyat, Malaysia

Session I — Reform of the Electoral System: Dealing with Identity Politics, Fair Representation and Healthy Political Cooperation

Dr Wong Chin Huat, Member of Electoral Reform Committee / Penang Institute

Prof. Jorgen Elklit, Faculty of Political Science, Aarhus University

Mr Maarten Halff, Senior Political Affairs Officer, United Nations

Ms Mir Nadia Nivin, Governance Adviser, UNDP Malaysia (moderator)

Session II — Ensuring Fair Representation: Re-Delineation and Boundary Drawing

Mr Thomas Fann, Chairperson of BERSIH 2.0

Prof. Yuko Kasuya, Keio University, Japan

Mr Damaso Magbual, Spokesperson, Asian Network for Free Elections

Dr Lim Hong Hai, Retired professor, University of Science, Malaysia (moderator)

Session III — Voter Registration and the Integrity of the Electoral Roll

Mr Seah Hong Yee, Resource Person, BERSIH 2.0

Mr Peter Erben, Senior Global Electoral Adviser, International Foundation for Electoral Systems

Mr Mario Mitre, Senior Programme Manager for Elections and Research,
National Democratic Institute

Ms Beverly Joeman, Vice-Chairperson for Sabah, BERSIH 2.0 (moderator)

Session IV, Workshop 1 — Facilitating Participation of Absentee Voters in Elections

Ms Nirmala Devi Windgaetter, Secretary, Global Bersih

YB Khoo Poay Tiong, Member of Parliament for Kota Melaka

Mr Antonio Spinelli, Senior Electoral Expert, International IDEA

Mr Peter Erben, Senior Global Electoral Adviser, International Foundation
for Electoral Systems (moderator)

Session IV, Workshop 2 — Election Integrity in the Digital Era: Threats and Opportunities

Mr Keith Rosario, Independent ICT consultant

Mr Alan Doss, President of the Kofi Annan Foundation

Sir John Holmes, Chairman of the Electoral Commission of the United Kingdom

Ms Masjaliza Hamzah, Former Treasurer, BERSIH 2.0 (moderator)

Session V — Controlling Political Financing to Ensure Clean Politics

Prof. Edmund Terence Gomez, Faculty of Economics & Administration, University of Malaya

Ms Rumbidzai Kandawasvika-Nhundu, Head of Political Participation and Representation, International IDEA

Mr Vasu Mohan, Regional Director, Asia Pacific, International Foundation for Electoral Systems

Ms Cynthia Gabriel, Executive Director of the Centre to Combat Corruption and Cronyism (moderator)

Session VI — Responsibility and Powers of a Caretaker Government After the Dissolution of Parliament

Assoc. Prof. Dr Faisal S. Hazis, Member of the Election Reform Committee / National University of Malaysia

Dato’ Ambiga Sreenevasan, Former member of the Institutional Reforms Committee

Ms Nadia Nivin, Governance Adviser, UNDP Malaysia

Mr Adhy Aman, Senior Programme Manager, Asia Pacific, International IDEA (moderator)

Session VII — Enforcement of Election Offences Laws: Institutions and Coordination

Tan Sri Rashid bin Abdul Rahman, Chairman of the Electoral Reform Committee

Mr Yap Swee Seng, Executive Director of BERSIH 2.0

Mr Rahmat Bagja, Commissioner of BASASLU, Election Supervisory Body, Indonesia

Ms Ann Teo, Chairperson of Rise of Sarawak Efforts (moderator)

Session VIII — Ensuring the Independence of the Election Management Body

Mr Azhar bin Azizan Harun, Chairman of the Election Commission of Malaysia

Sir John Holmes, Chairman of the Electoral Commission of the United Kingdom

Mr Hadar Gumay, Former Election Commissioner of Indonesia

Mr Amerul Muner Mohammad, Head of the Secretariat of the Electoral Reform Committee (moderator)

Closing panel:

Mr Azhar bin Azizan Harun, Chairman of the Election Commission of Malaysia

Tan Sri Abdul Rashid bin Abdul Rahman, Chairman of the Electoral Reform Committee

Mr Alan Doss, President of the Kofi Annan Foundation

Mr Thomas Fann, Chairperson of BERSIH 2.0 (moderator)

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The Electoral Integrity Initiative in brief

Elections are the established mechanism for the peaceful arbitration of political rivalry and transfers of power. In practice however, many elections actually prove deeply destabilizing, sometimes triggering conflict and violence. This series of policy briefs is part of the Kofi Annan Foundation's Electoral Integrity Initiative, which advises countries on how to strengthen the integrity and legitimacy of their electoral processes and avoid election related violence. Looking beyond technical requirements, the Foundation focuses on creating conditions for legitimate elections, making it possible to govern in a climate of trust and transparency.

For more information about our ongoing projects visit:

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