

# SEPARATION OF POWERS IN “NEW MALAYSIA”: HOPE AND EXPECTATIONS

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**Abstract:** This article reviews contemporary events in Malaysia involving the “1MDB” corruption scandal and the country’s 14th general election held on 9 May 2018 that changed the national government for the first time after 60 years of nationhood. Underlying those events were political and legal contests concerning the separation of powers within Malaysia’s constitutional system. Serious erosion of the separation of powers that occurred under the previous government contributed to the scandal that implicated the Prime Minister personally and endangered the nation’s ability to change the government through free and fair elections. The new government has proposed institutional reforms with the aim of rebuilding a strong separation of powers system. This article examines selected institutions that those reforms will involve and offers some initial observations on the trajectory and efficacy of the proposed reforms. The institutions include Parliament; the ministerial departments and other executive entities including the public services, the anti-corruption commission and the Attorney-General; and the judiciary. The institution of constitutional monarchy is also examined.

**Keywords:** *Malaysia; institutional reforms; separation of powers; 1MDB; elections; government accountability; parliamentary scrutiny; judicial independence and accountability; Attorney-General; constitutional monarchy*

## I. Introduction

On 9 May 2018, Malaysia, for the first time in its 60-year history, experienced a change of government, after its 14th general election (GE14). The Barisan Nasional (BN) coalition government which had governed the country since national independence from Britain in 1957 was defeated and the Opposition coalition, the Pakatan Harapan (Harapan) — the “Hope Alliance” — took over the reins of government. Prime Minister Najib Razak was replaced by Harapan’s leader, Dr Mahathir Mohamad.

This epochal political change offers promising prospects for a revitalisation of the constitutional separation of powers. One major impetus for the change of government was the “1MDB” scandal that surfaced in 2015. Prime Minister Najib and his associates were accused of having stolen for themselves some US\$4.5 billion from a state-owned company called 1MDB through a series of complex and opaque international money-laundering manoeuvres that precipitated investigations

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in several countries. The US Attorney-General called it “kleptocracy at its worst”.<sup>1</sup> However, in Malaysia, the investigations that exonerated Najib appeared spurious and failed to gain public confidence. Seen first as having stolen the 1MDB money, Najib was then seen as also taking steps to “steal” the general election in order to remain in power.<sup>2</sup> Both developments were regarded as manifesting failures in the separation of powers. The checks and balances within the constitutional system were undermined to such an extent that they were apparently unable to ensure, first, accountability over the 1MDB matter and, second, free and fair elections in which Malaysians could exercise their political right to remove Najib and his government.

Harapan had fought the general election on the need to rebuild a strong separation of powers in government to combat the abuse of power. Mahathir was previously Prime Minister in the BN government for 22 years (1981–2003). He achieved economic advances for the country but was also responsible for seriously eroding the separation of powers during that first period as Prime Minister. Mahathir had asserted “executive supremacy”,<sup>3</sup> concentrated power within the Prime Minister’s Department (PMD) and substantially destroyed the independent judiciary. In 1998, Mahathir removed his deputy Anwar Ibrahim from the government and their party, the United Malays National Organisation (UMNO), BN’s dominant party, and Anwar was imprisoned after highly criticised trials on criminal charges which many regarded as politically motivated. Anwar’s ouster led to the emergence of the Opposition party Parti Keadilan Rakyat (PKR) (People’s Justice Party), which his wife Dr Wan Azizah Wan Ismail led. Released in 2004 but again charged with new offences in 2008 and imprisoned in 2015 after Najib became Prime Minister, Anwar was still in prison when GE14 occurred.

Outraged by the scale of the 1MDB scandal and Najib’s apparent legal immunity, Mahathir quit UMNO and, in 2016, founded a breakaway party, Bersatu.<sup>4</sup> In March 2017, Bersatu joined PKR and two other Opposition parties in Harapan, and Mahathir combined with Anwar and his other former political enemies for the common goal of removing Najib’s government. In January 2018, with GE14 imminent, the Harapan parties declared Mahathir their unanimous choice to become Prime Minister again if they won, with Anwar to succeed Mahathir after a pardon is obtained for his release.<sup>5</sup> More importantly, Harapan promised that Mahathir’s

1 Joseph Sipalan, “Jeff Sessions Calls Malaysia’s 1MDB Scandal ‘Kleptocracy at Its Worst’” *Reuters* (5 December 2017), available at <https://www.reuters.com/article/us-malaysia-scandal-doj/jeff-sessions-calls-malaysias-1mdb-scandal-kleptocracy-at-its-worst-idUSKBN1DZ0MX> (visited 17 August 2018).

2 “Stop, Thief! Malaysia’s PM is about to steal an election” *The Economist* (10 March 2018), available at <https://www.economist.com/leaders/2018/03/10/malaysias-pm-is-about-to-steal-an-election> (visited 17 August 2018).

3 Rais Yatim, *Freedom under Executive Power in Malaysia: A Study of Executive Supremacy* (Kuala Lumpur: Endowment, 1995).

4 Parti Pribumi Bersatu Malaysia (Malaysian United Indigenous Party).

5 Sumisha Naidu, “Mahathir Named Malaysian Opposition’s Prime Minister Pick” *Channel NewsAsia* (7 January 2018), available at <https://www.channelnewsasia.com/news/asia/mahathir-named-malaysian-opposition-s-prime-minister-pick-9840014> (visited 16 August 2018).

government would undertake extensive institutional reforms for an effective separation of powers. When Harapan achieved electoral victory, Mahathir, whom a court once described as “confused” about the separation of powers,<sup>6</sup> became a champion of the doctrine, with a unique opportunity to revise his political legacy.

In its first week, the new Harapan government established an interim “Institutional Reforms Committee” (IRC) to initiate such reforms. This article seeks to examine some of the fundamental legal and political issues pertaining to the separation of powers in Malaysia’s constitutional system that should or are likely to inform the trajectory of the reforms. The article explores key aspects not only in the interrelationships among the three branches of government but also those affecting the supposedly independent entities that are vital parts of the checks and balances within the executive branch, namely, the Malaysian Anti-Corruption Commission (MACC), the Attorney-General, the public services and the Election Commission (EC). Another relevant entity which is examined is the institution of constitutional monarchy. The article will first provide an overview of Malaysia’s constitutional system and the historical erosion of the separation of powers. The 1MDB scandal is then briefly described and the failures in ensuring accountability are reviewed. The obstacles to Harapan winning GE14 and forming government are then described before, finally, some conclusions are offered about the selected entities in the system.

## II. Constitutional System and Erosion of Separation of Powers

Malaysia inherited a Westminster-model constitution when the diverse society comprising the predominant Malays (who are communally Muslims) and the minority Chinese, Indian and other races gained nationhood as a federal democracy with constitutional monarchy.

The written Constitution has all the apparent hallmarks of a separation of powers. The federal system already diffuses power between the 13 states and the Federation. Nine states are Malay monarchies and, every five years, the “Malay Rulers” who comprise a constitutional body called the “Conference of Rulers” elect from among themselves, on a rotational basis, the national King, styled the “Yang di-Pertuan Agong”. The Constitution prescribes the familiar tripartite division of the Federation’s sovereign powers: legislative power is vested in a bicameral Parliament;<sup>7</sup> executive power, formally vested in the King, is exercisable by cabinet government and other non-ministerial entities authorised to exercise such power;<sup>8</sup> and judicial power is vested in a hierarchy of law courts.<sup>9</sup>

6 *Lim Kit Siang v Mahathir Mohamad* [1987] 1 MLJ 383, 385.

7 Constitution art.44.

8 Constitution art.39.

9 Constitution art.121. See text to note 90.

From its inception, the Constitution incorporated this separation of powers in order to ensure the rule of law under the principle of “constitutional supremacy”.<sup>10</sup> The Constitution, not Parliament, is expressly declared to be supreme.<sup>11</sup> The Constitution may only be amended if a two-thirds majority in each house of Parliament approves an amendment.<sup>12</sup> However, the federal–state division of powers created a strong central government and, for five decades until 2008, BN held more than the required two-thirds majority and the government easily amended the Constitution to systematically enlarge executive power.

### A. *Constitutional monarchy*

In relation to the institution of monarchy, the Malay Rulers in their roles as traditional rulers and heads of the religion of Islam in their states wield significant influence in the governance of the country. Constitutionally, however, they retain only limited powers *vis-à-vis* the elected national and state governments. The Constitution incorporates Westminster conventions of constitutional monarchy in its detailed provisions. Article 66 provides for royal assent to parliamentary legislation. Article 40(1) provides the general rule that, in executive functions, the King “shall act in accordance with the advice of the Cabinet”, and art.40(1A) further elaborates that “where [the King] is to act in accordance with advice, on advice, or after considering advice, [the King] shall accept and act in accordance with such advice”. Only exceptionally, the Constitution permits the King and the Rulers to exercise a limited personal discretion. Particularly in the formation of a government, art.40(2) allows the King to act “in his discretion in ... the appointment of a Prime Minister”, and art.43(2) requires that the King “shall first appoint as [Prime Minister] a member of the House of Representatives who in his judgment is likely to command the confidence of the majority of the members of that House” before appointing other ministers according to the Prime Minister’s advice. The state constitutions contain equipollent provisions.<sup>13</sup> In his first term as Prime Minister, Mahathir had fought major constitutional battles with the Rulers to demarcate their place within the democratic system. Various contentious constitutional amendments between 1983 and 1994 regulated the royal assent, abolished the Rulers’ personal legal immunity and added art.40(1A) described above for good measure.<sup>14</sup> Those events which earned Mahathir antagonism from certain royal houses were thought to have finally settled the limits of the Rulers’ constitutional position but after Mahathir’s departure, the Rulers’ influence again resurged as UMNO’s own political base

10 *Ah Thian v Government of Malaysia* [1976] 2 MLJ 112; *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187.

11 Constitution art.4(1).

12 Constitution art.159.

13 Constitution art.71 Sch.8.

14 HP Lee, *Constitutional Conflicts in Contemporary Malaysia* (Oxford: Oxford University Press, 2nd ed., 2017) pp.31–62.

weakened.<sup>15</sup> In GE14, the Rulers’ constitutional role was again tested: the operation of art.43(2) became critical during the power transition and art.40(1) and 40(1A) produced a crisis within the new government’s first weeks.

## **B. Parliament and the executive**

### **(i) Parliament**

Constitution art.44 defines Parliament as comprising the King, the House of Representatives<sup>16</sup> and the Senate.<sup>17</sup> Members of the House of Representative are elected every five years (MPs), but Senators are either elected (supposedly to represent the interests of the various states and territories) or appointed (purportedly on the basis of their contribution to the community or professional achievements).<sup>18</sup>

Bills must be approved by both Houses and obtain royal assent to become formal legislation.<sup>19</sup> While the Senate may revise and delay legislation, it cannot block or override bills passed by the House of Representatives. Bills passed by the lower house can be presented for royal assent after the maximum delay period of one year and one month.<sup>20</sup> A constitutional amendment in 1994 ensured that a bill presented for royal assent will automatically become law after 30 days, if assent was not given.<sup>21</sup>

Due in large part to decades of uninterrupted rule of the BN government, there has not developed a system of standing orders or parliamentary committees capable of ameliorating the executive’s majority power in Malaysia.<sup>22</sup> There are no standing committees dedicated to scrutinising bills or considering law reform. Select parliamentary committees to consider public and expert submissions for the purposes of recommending law reform are rarely set up.<sup>23</sup> Also, a culture of participatory law-making by way of public consultation or engagement with relevant stakeholders, such as the Malaysian Bar, the Human Rights Commission (SUHAKAM) or other civic organisations, has not developed.<sup>24</sup> Under the BN government, parliamentary

<sup>15</sup> *Ibid.*, pp.63–75.

<sup>16</sup> Known in the Malay language as *Dewan Rakyat*.

<sup>17</sup> Known in the Malay language as *Dewan Negara*.

<sup>18</sup> Constitution art.45(2).

<sup>19</sup> Constitution art.66.

<sup>20</sup> Constitution art.68(2).

<sup>21</sup> Constitution art.66(4). For a discussion of the amendment, see Lee, *Constitutional Conflicts in Contemporary Malaysia* (n.14) pp.43–50.

<sup>22</sup> The Standing Orders of the Dewan Rakyat of Malaysia only provide for the following committees: Selection Committee, Public Accounts Committee, Standing Orders Committee, House Committee and Committee of Privileges.

<sup>23</sup> From 1957 to 2017, there have only been six select parliamentary committees with the capacity to take public or expert submissions and recommend legislative changes. These occurred in 1960, 1966, 1968, 1978, 1985 and 2004; Wan Arfah Hamzah and Ramy Bulan, *An Introduction to the Malaysian Legal System* (Selangor Darul Ehsan: Penerbit Fajar Bakti Sdn Bhd, 2003) p.46.

<sup>24</sup> Chandra Muzaffar, *Freedom in Fetters: An Analysis of the State of Democracy in Malaysia* (Penang: ALIRAN, 1986) p.43; Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (Oxford:

scrutiny usually took place only after the second reading of the bill, when the House of Representatives would convert into a Committee of the Whole House where the executive remains in the majority. During this limited time, amendments would be proposed, but as policy papers or bills were almost never published beforehand, and MPs were often given bills on very short notice — sometimes only hours before it is tabled — there was usually little time for thorough analysis and meaningful debate. The BN government almost always rejected amendments proposed by the Opposition and bills were often passed with “indecent haste”,<sup>25</sup> sometimes in the space of one day.<sup>26</sup> Because the task of legislating was often delegated to executive departments or ministries, subsidiary legislation today significantly outnumbers principal Acts.<sup>27</sup>

The role of the Senate in exercising effective scrutiny over legislation was undermined by constitutional amendments. At Independence, the Constitution originally provided for a majority of elected members. Provisions also exist for the increase of elected members and the eventual abolition of appointed members to enhance the Senates’ federal function and democratic legitimacy.<sup>28</sup> However, this was reversed by the BN government through a series of constitutional amendments that ensured a majority of appointed members.<sup>29</sup> Another constitutional amendment in 1978 shortened a Senator’s term from six years to three.<sup>30</sup> Because Senators are appointed on the government’s advice, these amendments allowed the executive arm of government to “pack” the Senate, turning the upper house into a “rubber stamp”.<sup>31</sup> These amendments lend force to the criticism that “Parliament merely legitimates; it does not legislate”.<sup>32</sup>

Parliament has also been ineffective in holding government to account or in being a forum to discuss important issues of the day. Besides the Public Accounts Committee (PAC), there are no other permanent committees to scrutinise the

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Hart Publishing Ltd, 2012) p.100; Amanda Whiting, “Emerging from Emergency Rule? Malaysian Law ‘Reform’ 2011–2013” (2013) 14(2) *Australian Journal of Asian Law* 39, available at [https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2396928](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2396928) (visited 2 September 2018); Shad Saleem Faruqi, “Restoring Parliament’s Eminence” *The Star* (14 April 2016), available at <https://www.thestar.com.my/opinion/columnists/reflecting-on-the-law/2016/04/14/restoring-parliaments-eminence-systems-in-which-people-participate-are-systems-they-are-likely-to-re/> (visited 2 September 2018).

25 Muzaffar, *Freedom in Fetters* (n.24) p.37.

26 See, eg, Constitutional (Amendment) Separation of Singapore Act 1965; Constitution (Amendment) 1981; Constitution (Amendment) Act 1983.

27 Faruqi, “Restoring Parliament’s Eminence” (n.24).

28 Constitution art.45(4).

29 Shad Saleem Faruqi, “Reflecting on Dewan Negara’s Role” *The Star* (28 April 2016), available at <https://www.thestar.com.my/opinion/columnists/reflecting-on-the-law/2016/04/28/restoring-constitutional-scheme-reflecting-on-dewan-negaras-role-people-would-like-to-see-the-dewan/> (visited 2 September 2018).

30 Constitution (Amendment) Act 1978 s.2(1)(c).

31 RS Milne and Diane K Mauzy, *Politics and Government in Malaysia* (Selangor: Federal Publications, 1978) p.239; Harding, *The Constitution of Malaysia* (n.24) pp.109–110.

32 Shad Saleem Faruqi, “Parliament’s Constitutional Role” *The Star* (19 March 2015), available at <https://www.thestar.com.my/opinion/columnists/reflecting-on-the-law/2015/03/19/parliaments-constitutional-role/> (visited 2 September 2018).

work of government departments or ministries. The PAC has had little impact on government accountability. Unlike its Westminster counterpart, the Malaysian PAC has always been chaired by a government MP, a factor that has affected the depth and rigour of investigations. Other variations in standing orders grossly affect the effectiveness of question time<sup>33</sup> and Ministers are often absent, leaving their deputies to deal with questions. There is no specific time for Prime Minister’s questions and no days allocated to discuss Opposition business. The Opposition’s attempts to raise grievances were often frustrated by government MPs who would leave the House *en masse* and force the sitting to end for lack of a quorum.

In 1996, Harding observed that so far as its ability to scrutinise legislation and to hold government accountable is concerned, Parliament was “clearly lacking in sufficient potency and independence”.<sup>34</sup> This view was reiterated in 2012.<sup>35</sup>

## (ii) Prime Minister’s Department

Within the executive, power was increasingly concentrated in the hands of the Prime Minister.

Not only have Prime Ministers in Malaysia enjoyed immense political power as Chairman of UMNO and President of BN but their power within the executive also increased considerably through the expansion of the PMD.

The PMD grew from three divisions at Independence to 48 when Mahathir was the Prime Minister.<sup>36</sup> During Najib’s tenure, there were over 90 divisions, agencies, sub-departments and units.<sup>37</sup> Originally established to assist the Prime Minister in carrying out his duties, the various bodies under the PMD developed to oversee the formulation and implementation of government policies on a wide range of matters, from government KPIs, the economy and private–public partnerships to national unity, judicial and legal training and religious matters.

Significantly, the PMD transformed into a ministry where the Prime Minister could pack the Cabinet with loyalists<sup>38</sup> and more importantly, became an avenue through which the Prime Minister could circumvent or directly interfere with other

33 Harding, *The Constitution of Malaysia* (n.24) pp.104–105; Milne and Mauzy, *Politics and Government in Malaysia* (n.31) pp.233–239.

34 Andrew Harding, *Law, Government and the Constitution in Malaysia* (Hague: Kluwer Law International, 1996) p.103.

35 Harding, *The Constitution of Malaysia* (n.24) p.111.

36 Ho Khai Leong, “Aggrandizement of Prime Minister’s Power: The Transformation of the Office of the Prime Minister in Malaysia” (1992) 23(1–2) *Internationales Asienforum* 227, 234–235.

37 Royce Tan, “Massive Overhaul in PM’s Dept with MACC, EC among Agencies Placed under Parliament” *The Star* (1 July 2018), available at <https://www.thestar.com.my/news/nation/2018/07/01/massive-overhaul-in-prime-ministers-department-with-macc-ec-among-agencies-placed-under-parliament/> (visited 17 August 2018).

38 Dan Slater, “Iron Cage in an Iron Fist: Authoritarian Institutions and the Personalisation of Power in Malaysia” (2003) 36(1) *Comparative Politics* 81, available at [https://www-jstor-org.ezproxy.lib.monash.edu.au/stable/4150161?sid=primo&origin=crossref&seq=1#metadata\\_info\\_tab\\_contents](https://www-jstor-org.ezproxy.lib.monash.edu.au/stable/4150161?sid=primo&origin=crossref&seq=1#metadata_info_tab_contents) (visited 2 September 2018).

decision-making bodies, such that during Mahathir's tenure, the PMD had become "a matrix of autocracy".<sup>39</sup> These bodies included those that are constitutionally designed to be independent of the executive such as the Public Services Commission (PSC) and the EC or at least, those that ought to be apolitical and free from executive influence such as the MACC. The Prime Minister already enjoys considerable power in determining the appointment of the heads of these bodies as they are appointed by the King on his advice.<sup>40</sup> However, administratively, the PSC, EC and MACC were also placed under the jurisdiction of the PMD.<sup>41</sup> Thus, while they remained constitutional or statutory bodies that ought to be independent of and separate from the executive, the administrative arrangement rendered this separation difficult to maintain. Indeed, they were openly regarded by the Najib administration as "departments and agencies" under the PMD.<sup>42</sup>

### (iii) Public Services Commission and Election Commission

The Constitution establishes the PSC and the EC as independent institutions<sup>43</sup> necessary for the efficient administration and functioning of a rule of law and democratic nation, regardless of the Prime Minister or political party in power. The PSC appoints, promotes, dismisses and generally manages members of the civil service<sup>44</sup> as a body corporate whose members owe their allegiance to the Head of State.<sup>45</sup> The EC conducts federal and state elections, prepares and revises the electoral rolls, reviews federal and state constituency boundaries once every eight years and recommends proposals for changes if necessary.<sup>46</sup> To ensure the impartiality of these commissions, the constitution provides, for instance, that members of the legislature cannot sit on any commission of the public services.<sup>47</sup> Further, the Constitution specifically provides that in appointing members of the EC, regard must be given to "the importance of securing an Election Commission which enjoys public confidence".<sup>48</sup> Members of both the PSC and the EC also enjoy security of tenure similar to that of judges.<sup>49</sup>

39 Ho, "Aggrandizement of Prime Minister's Power: The Transformation of the Office of the Prime Minister in Malaysia" (n.36) p.243.

40 Constitution arts.114 (1) and 139(4); Malaysian Anti-Corruption Commission Act 2009 s.5.

41 Prime Minister's Department, "History of PMD", available at <http://www.jpm.gov.my/jpm2/en/history-pmd> (visited 2 September 2018).

42 Prime Minister's Department, "Heads of Departments and Agencies under PMD", available at <http://www.jpm.gov.my/jpm2/ms/agensi-direktori-views/PBT?title=&tid=2> (visited 1 May 2018).

43 Constitution arts.139 and 114.

44 Constitution art.144(1). Constitution art.132(1) defines the public services as the armed forces, the judicial and legal services, the general public services of the Federation, the police force, the joint public services established by federal law, the public services of each state and the education service.

45 Constitutional Commission, *Report of the Federation of Malaya Constitutional Commission* (London: HMSO, 1957) para.153.

46 Constitution art.113(1), 113(2).

47 Constitution art.48(1).

48 Constitution art.114(2).

49 Constitution arts.139–114.

However, the independence of the PSC and the EC has been eroded by the Prime Minister’s ability to determine the appointment of the respective heads. In the case of the public service, it was observed that while civil servants should “feel free to tender advice to Ministers, without fear or favour, according to their conscience and to their view on the merits of a case”<sup>50</sup> in reality, there was “little doubt that public servants, rather than being strictly neutral, [were] expected to support Government policies”.<sup>51</sup>

A succession of constitutional amendments has relegated the EC to a mere “agency” of the government and has cast serious doubts over the credibility of the election system.<sup>52</sup> A significant amendment made in 1962 transferred the EC’s power to review and delineate constituencies to the Prime Minister.<sup>53</sup> Under the amendment, the EC is required to submit its review report and redelineation proposals to the Prime Minister. The proposals are then tabled with or without amendments in the House of Representatives for approval.

Over the years, malapportionment and gerrymandering have caused the Malaysian public to lose confidence in the EC’s ability to conduct elections or oversee the electoral process in a fair and independent manner.<sup>54</sup> The Constitution allows a “measure of weightage”<sup>55</sup> to be given to rural areas to account for problems like low population density, inaccessibility and other attendant disadvantages. However, the absence of constitutional definitions to the terms “rural” and “urban”, and the subsequent removal of the constitutionally prescribed limit to the variation between voters in rural and urban constituencies<sup>56</sup> have led to the abuse of the “rural weightage” principle, and allowed severe malapportionment and blatant gerrymandering in favour of BN. In the context of the 2013 general election, constituencies were gerrymandered such that, on average, “a vote for BN was worth 1.6 times a vote for the Opposition because Opposition-leaning constituencies [were] on average larger (79,000 or so voters) than those likely to

50 Constitutional Commission, *Report of the Federation of Malaya Constitutional Commission* (n.45) para.153.

51 Harding, *The Constitution of Malaysia* (n.24) p.64.

52 Tsun Hang Tey, “Malaysia’s Electoral System: Government of the People?” (2010) 5(1) *Asian Journal of Comparative Law* 1, 8–10.

53 Constitution (Amendment) Act (No14) 1962 introduced the Thirteenth Schedule which lays down the procedure for the delineation exercise.

54 See generally, Whiting, “Emerging from Emergency Rule? Malaysian Law ‘Reform’ 2011–2013” (n.24) pp.30–31; Tey, “Malaysia’s Electoral System: Government of the People?” (n.52); Chin Huat Wong, James Chin and Norani Othman, “Malaysia — Towards a Topology of an Electoral One-Party State” (2010) 17(5) *Democratisation* 920–949; Kai Ostwald “Malaysian Elections, Malapportionment, and Redelineation” *New Mandala* (28 December 2013), available at <http://www.newmandala.org/malaysian-elections-malapportionment-and-redelineation/> (visited 3 September 2018); “Gerrymandering Evidence Damning, EC Must Answer” *Malaysiakini* (1 June 2014). Press releases, reports and information on public rallies demanding free and fair elections organised by election watchdog Bersih are available at <http://www.bersih.org/>.

55 Constitution art.113(2) Sch.13 Clause 2(c).

56 Constitution (Amendment) Act (No 2) 1973.

favour BN".<sup>57</sup> The 11 parliamentary seats in Kuala Lumpur had approximately one seat per 156,363 people, while the 22 seats in Selangor reflected approximately one seat per 26,818,181 people.<sup>58</sup> Even after considering the need to address rural problems, the significant disproportion of seats between these highly urbanised areas and the rest of the country escapes reasonable explanation.<sup>59</sup> Moreover, ethnic gerrymandering has been strategically done to strengthen BN's position and weaken its opponents'.<sup>60</sup>

Since 2007, Bersih, a coalition of NGOs and political parties campaigning for free and fair elections, has organised five public rallies demanding electoral reform.<sup>61</sup> In October 2011, shortly after Najib announced his plans for "government transformation" and law reform, the government established a bipartisan parliamentary select committee to consider electoral reform. However, the government failed to implement any meaningful reform.<sup>62</sup>

#### (iv) Malaysian Anti-Corruption Commission

Unlike the PSC and the EC, the Anti-Corruption Agency (ACA) and its successor, the MACC, was never a constitutional body, but a statutory one.<sup>63</sup> Its Director-General was determined by the Prime Minister,<sup>64</sup> and its officers were recruited and managed by the PSC. As part of the executive, the ACA was essentially ineffective in dealing with corruption involving high-ranking public officials or influential government politicians. On the other hand, corruption investigations or threats thereof, were perceived as selectively carried out against low-ranking officials or to discredit, harass or intimidate political opponents.<sup>65</sup> Following scandals that

57 "Findings of the People's Tribunal on the 13th General Elections" *Bersih* (25 March 2014) p.41.

58 In 2013, Kuala Lumpur had approximately 1.72 million people, while Selangor had approximately 5.9 million people: Department of Statistics of Malaysia, "Malaysia @ a Glance" available at [https://www.dosm.gov.my/v1/index.php?r=column/cone&menu\\_id=ZmVrN2FoYnBvZE05T1AzK0RLcEtiZz09](https://www.dosm.gov.my/v1/index.php?r=column/cone&menu_id=ZmVrN2FoYnBvZE05T1AzK0RLcEtiZz09) (visited 1 May 2018).

59 Harding, *The Constitution of Malaysia* (n.24) pp.89–90. See also, Diane Mauzy, "Resilient Hybrid Regimes" (2006) 2(6) *Taiwan Journal of Democracy* 47, 64; "Gerrymandering Evidence Damning, EC Must Answer" (n.54).

60 Tey, "Malaysia's Electoral System: Government of the People?" (n.52) pp.12–15.

61 Public rallies were held in 2007 (Bersih), 2011 (Bersih 2.0), 2012 (Bersih 3.0), 2015 (Bersih 4.0) and 2016 (Bersih 5.0): *Bersih*, "Bersih Rallies", available at <http://www.bersih.org/#> (visited 3 September 2018).

62 For Bersih's response to the committee's recommendations, see "Response from Bersih 2.0 to the Recommendations of the Parliamentary Select Committee on Electoral Reform" *Bersih*, available at <https://www.bersih.org/response-from-bersih-2-0-to-the-recommendations-of-the-parliamentary-select-committee-on-electoral-reform/> (visited 3 September 2018).

63 Anti-Corruption Act 1997. See also Prevention of Corruption Act 1961; Anti-Corruption Agency Act 1982. For a short history, see Malaysian Anti-Corruption Commission, "Organisation", available at <http://www.sprm.gov.my/index.php/en/corporate-info/mengenai-sprm/organisation-info/organisation> (visited 3 September 2018).

64 Anti-Corruption Act 1997 s.3(2).

65 See, eg, Fauwaz Abdul Aziz "BN Backbencher Joins Chorus for Independent ACA" *Malaysiakini* (20 October 2008), available at <https://www-malaysiakini-com.ezproxy.lib.monash.edu.au/news/91624> (visited 7 September 2018).

exposed high-level corruption and executive interference within key institutions,<sup>66</sup> as well as the government’s poor performance in the 2008 general election, the government announced plans to implement institutional reform. This included plans to restructure the ACA so as to establish a “fully independent” body that could regain public confidence.<sup>67</sup>

However, the reforms fell far short of the government’s promises. The new Malaysian Anti-Corruption Commission Act 2009 (MACCA 2009)<sup>68</sup> which established the MACC does not actually restructure or separate the new body from the PMD, or protect it from party politics and executive control. It continues to enable the Prime Minister to determine the appointment of the Chief Commissioner (replacing the position of “Director-General”),<sup>69</sup> does not grant the Chief Commissioner security of tenure and remuneration<sup>70</sup> and preserves the former system where the PSC controls the recruitment, promotion, reassignment and transfer of MACC officers.<sup>71</sup>

A new feature under the MACCA 2009, however, is its creation of the Anti-Corruption Advisory Board, the Special Committee on Corruption and the Complaints Committee,<sup>72</sup> with the explicit aim of establishing a “checks and balances mechanism”.<sup>73</sup> In addition, an Operations Review Panel and a Consultation and Corruption Prevention Panel were also administratively created.<sup>74</sup> With the exception of the Special Committee on Corruption whose members are drawn from Parliament, these bodies comprise former senior government officers, politicians as well as experts and distinguished professionals appointed by the executive.<sup>75</sup> There is also little publicly accessible information on the activities of the Special Committee on Corruption which reports directly to the Prime Minister and has been chaired by a BN politician since its inception. While the Special Committee is required to submit annual reports of its activities to the Prime Minister who shall then table the report to Parliament,<sup>76</sup> it is unclear whether this has actually been done or whether the Special Committee can order investigations into irregularities or specific complaints against the MACC.<sup>77</sup> While these bodies were established

66 See works referred to in notes 108 and 109.

67 “PM: ACA to be Fully Independent” *Malaysiakini* (21 April 2008), available at <https://www-malaysiakini-com.ezproxy.lib.monash.edu.au/news/81664> (visited 4 July 2018).

68 MACCA 2009 s.73 repealed the Anti-Corruption Act 1997.

69 MACCA 2009 s.5(1).

70 MACCA 2009 s.5(3)–5(4).

71 Malaysian Bar *et al.*, “Memorandum for the Reform of the Malaysian Anti-Corruption Commission” *Malaysian Bar* (28 July 2015) p.9, available at [http://www.malaysianbar.org.my/index.php?option=com\\_docman&task=doc\\_view&gid=5111&Itemid=332](http://www.malaysianbar.org.my/index.php?option=com_docman&task=doc_view&gid=5111&Itemid=332) (visited 3 September 2018).

72 MACCA 2009 ss.13–15.

73 Malaysian Anti-Corruption Commission, “Organisation” (n.63).

74 These two bodies were established by the Prime Minister: Malaysian Anti-Corruption Commission, “Organisation” (n.63).

75 MACCA 2009 ss.13–15; Malaysian Anti-Corruption Commission, “Organisation” (n.63).

76 MACCA 2009 s.14(5).

77 Malaysian Anti-Corruption Commission, “Special Committee on Corruption”, available at <http://www.sprm.gov.my/index.php/en/korporat/check-and-balance-mechanisme> (visited 7 September 2018).

to provide a measure of external and independent oversight, unresolved scandals, including the mysterious death of an Opposition MP's political aide while in the MACC's custody,<sup>78</sup> and the alleged abuse of government loans by a senior Cabinet Minister<sup>79</sup> exposed continued executive pressure, if not direct interference with the MACC's work. In 2014, the MACC itself urged the government to set up an independent constitutional commission to replace the PMD and the PSC in the appointment of the Chief Commissioner and other officers, and in the overall management of the commission. In a candid report, the MACC admitted that under the present system, the Chief Commissioner "is easily put under the influence of the power (*sic*) that be. In certain circumstances, he has to toe the line to safeguard his position".<sup>80</sup> This along with other calls to separate the MACC from the PMD and to remove the Prime Minister from the appointment process was ignored.

#### (v) The Attorney-General

The office of Attorney-General is another constitutional office within the executive branch with strong elements of independence. The Attorney-General heads the federal law department, the Attorney-General's Chambers (AGC), and Constitution art. 145 establishes the Attorney-General as the principal law officer to the executive government and, concurrently, as the Public Prosecutor.<sup>81</sup> The legal duties under art. 145 require that the Attorney-General should give independent advice to ensure that the government acted according to the law, conduct independent prosecutions and protect the public interest.<sup>82</sup> From the outset, it was considered "essential that ... the Attorney-General should act in an impartial and quasi judicial [*sic*] spirit".<sup>83</sup> In particular, early cases decided that the Attorney-General's very wide discretion in criminal prosecutions should be exercised *bona fide* and professionally in the public interest, but the discretion was not open to judicial review and the courts could not compel the Attorney-General to initiate any prosecution.<sup>84</sup>

The Constitution originally protected the Attorney-General's independence in three ways: an independent body, the Judicial and Legal Service Commission (JLSC), advised the King in appointing an Attorney-General; only a career officer

78 "Report of the Royal Commission of Inquiry into the Death of Teoh Beng Hock", *Malaysian Bar* (27 July 2011); M Mageswari, "Open Verdict in Teoh Beng Hock Inquest Overturned, Suicide Ruled Out" *The Star* (5 September 2014), available at <https://www.thestar.com.my/news/nation/2014/09/05/teoh-beng-hock-open-verdict-incorrect-court-of-appeal/> (visited 3 September 2018).

79 "NFC Scandal: Shahrizat Cleared of Involvement" *The Star* (31 May 2012), available at <https://www.thestar.com.my/news/nation/2012/05/31/nfc-scandal-shahrizat-cleared-of-involvement/> (visited 3 September 2018).

80 *Malaysian Bar et al.*, "Memorandum for the Reform of the Malaysian Anti-Corruption Commission" (n.71) p.10, citing the Malaysian Anti-Corruption Commission's "Position Statement" submitted on 18 June 2014.

81 See also Criminal Procedure Code s.376.

82 *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12, 26.

83 Colonial Office, *Constitutional Proposals for the Federation of Malaya* (Cmnd 210, 1957) para.52.

84 *Long Samat v PP* [1974] 2 MLJ 152; *PP v Zainuddin* [1986] 2 MLJ 100.

from the Judicial and Legal Service (JLS) who qualified for judicial appointment could be appointed; and once appointed, an Attorney-General held secured tenure like a judge. However, after an amendment to art.145 in 1963, the Prime Minister advised the King on appointments; any person who qualified for judicial appointment could be appointed; and an Attorney-General held office only “during the pleasure of [the King]”, ie, the government could remove an Attorney-General at any time.

Thereafter, Attorneys-General could be classified according to two categories. The first was a “political” Attorney-General, ie, a government minister who combined the legal duties under art.145 with a “law and justice” ministerial portfolio. The second was a non-political or “professional” Attorney-General who performed only those legal duties while a separate minister performed the ministerial functions. Within the second category, an Attorney-General could be appointed either from the JLS or from a source outside the JLS, principally the Bar or the superior judiciary. In fact, only two “political” Attorneys-General ever took office. From 1980, only “professional” Attorneys-General were appointed and all except one were appointed directly from the JLS. This practice continued until July 2015 when, after the 1MDB scandal broke, Prime Minister Najib appointed a Federal Court judge (Apani Ali) who resigned his judicial office to take up the Attorney-General’s position.<sup>85</sup>

Nonetheless, after 1980, given that they served at the government’s pleasure, “professional” Attorneys-General became strongly political actors and the office became politicised. Attorneys-General played significant roles in the government’s undermining of the judiciary during and after the 1988 crisis,<sup>86</sup> and were often accused of pursuing “selective” or politically motivated prosecutions, including those relating to Anwar Ibrahim.<sup>87</sup> Given the settled law, the Attorney-General’s power was impossible to check and criticism of the Attorney-General’s actions even resulted in a prosecution for supposedly undermining the administration of justice.<sup>88</sup> By the 1990s, the AGC had been placed under the PMD.

### C. *The judiciary*

Constitution art.121 provides for a judicature comprising the Federal Court,<sup>89</sup> the Court of Appeal, two co-equal High Courts (for separate territories) and the subordinate courts.<sup>90</sup> The four head judges are the Chief Justice, the President of

85 Loshana K Shagar and M Mageswari, “Mohamaed Apani Ali Replaces Gani Patail as Attorney-General” *The Star* (28 July 2015), available at <https://www.thestar.com.my/news/nation/2015/07/28/gani-patail-terminated/> (visited 3 September 2018).

86 See text to note 95.

87 See, eg, “Sedition: Selective Prosecution and Persecution?” (*ALIRAN*, 19 November 2014), available at <https://aliran.com/thinking-allowed-online/2014-ta-online/sedition-selective-prosecution-persecution/> (visited 16 August 2018).

88 *Lim Guan Eng v PP* [2000] 2 MLJ 577.

89 From 1985 to 1994, the Federal Court was named the Supreme Court.

90 These courts administer both federal law and state law (except in two matters that are not relevant here).

the Court of Appeal and the Chief Judges of the High Courts.<sup>91</sup> Superior court judges are qualified persons who were previously either members of the private Bar or government service lawyers mainly from the JLS.<sup>92</sup> They hold office until the mandatory retirement age and may be removed only upon the recommendation of a judicial tribunal established under Constitution art.125. The superior judiciary is strictly separate from the other branches of government but the subordinate judiciary consists of public servants from the JLS that also supplies legally qualified personnel interchangeably to the court registries and the executive departments. Notwithstanding this anomaly, the system envisaged that the superior judiciary would vouchsafe the subordinate judiciary's independence but, in reality, the JLS system had the opposite effect of weakening the independence of the whole judiciary (this will be explained later).

At the outset, the Constitution art.121 provided that "the judicial power of the Federation shall be vested" in the courts but the Constitution also provided for only a weak conception of judicial review in the system.<sup>93</sup> While art.4(1) gave the superior courts a general power to invalidate unconstitutional legislation, art.4(2) on the other hand created a substantial exception in respect of legislation which restricted the fundamental rights of freedom of speech, assembly, movement and association that art.9(2) and 10 supposedly guaranteed. Parliament could legislate to undermine those rights, which are vital to a democracy, without being subject to judicial review. Furthermore, judicial review of executive actions was not constitutionally entrenched at all and was left completely vulnerable to statutory ouster clauses. Despite those limitations, the judiciary prior to 1988 was highly respected as a strongly independent check on government. The Federal Court recognised that a separation of powers was basic to the Constitution for the rule of law and strongly articulated the judiciary's duty to enforce, so far as possible, legal restraints especially on the executive.<sup>94</sup> Judicial independence reached its zenith during the era of the Supreme Court between 1985 and 1988.

In 1988, however, after suffering defeats in important cases, Prime Minister Mahathir attacked the judiciary.<sup>95</sup> It was "[b]y far the most far-reaching and devastating attack... on the 'checks and balances' system in Malaysia",<sup>96</sup> the effects of which remain today.<sup>97</sup> First, the government undermined judicial

91 The President and the Chief Judges are also members of the Federal Court.

92 Constitution art.123. JLS officers resign from the service upon being appointed a judge.

93 Lim Hong Hai, "The Eve-of-Independence Constitutional Debate on Fundamental Liberties and Judicial Review: A Window on Elite Views and Constitutional Government in Malaysia?" (1989) 7 J of Malaysian Studies 1.

94 *Loh Kooi Choon v Government of Malaysia* (n.10); *Pengarah Tanah Dan Galian v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135.

95 Lee, *Constitutional Conflicts in Contemporary Malaysia* (n.14) pp.77–110.

96 RS Milne and Diane K Mauzy, *Malaysian Politics under Mahathir* (London: Routledge, 1999) p.46.

97 HP Lee and Richard Foo, "The Malaysian Judiciary: A Sisyphean Quest for Redemption?" in Hoong Phun Lee and Marilyn Pittard (eds), *Asia-Pacific Judiciaries: Independence, Impartiality and Integrity* (Cambridge: Cambridge University Press, 2018) p.231.

independence when a majority of Supreme Court judges were falsely accused of misconduct and three senior judges were removed from their judicial office. The tribunal mechanism, used for the first time, failed to protect the judges because the government held the power to appoint the tribunal members and the proceedings did not ensure procedural fairness. Second, the government attacked judicial power by amending art.121 to remove the express vesting of “the judicial power of the Federation” in the courts and instead a new provision supposedly empowered Parliament to determine the ambit of the judiciary’s power. After this amendment, statutory ouster clauses also proliferated to exclude judicial review of executive actions in many more situations.<sup>98</sup> Although poor drafting in fact prevented any substantive change to the meaning of art.121,<sup>99</sup> in 2007, the Federal Court in *PP v Kok Wah Kuan*<sup>100</sup> conceded that after the amendment Parliament determined the whole nature and extent of the judiciary’s power. The Court even denied that the Constitution ever incorporated the separation doctrine. In 2017, the Federal Court unexpectedly overturned the position in *Kok Wah Kuan*. In *Semenyih Jaya Sdn Bhd v PTD Hulu Langat*,<sup>101</sup> the Court ruled that a separation of powers was essential to the Constitution’s “basic structure” and art.121 still vested judicial power exclusively in the judiciary. In *Indira Gandhi v Pengarah Jabatan Agama Islam Perak*,<sup>102</sup> the Court further asserted that judicial review was “inherent” in the “basic structure”.<sup>103</sup> With GE14 approaching, the government did not obviously react to those decisions. The decisions were as yet isolated and the government still maintained strong controls affecting the judiciary’s institutional independence.

In the wake of the 1988 judiciary crisis, the government had systematically strengthened those controls. The judiciary was recast as a type of public service. The subordinate judiciary already comprised JLS officers, and the JLS, like the other public services, was subjected to greater politicisation affecting the officers who served interchangeably between the judicial and the executive branches.<sup>104</sup> Second, the JLS became even more the predominant source of appointments to the superior courts and, consequently, the “civil service mindset” pervaded upwards, producing an “executive-minded” judiciary.<sup>105</sup> Third, administrative changes within the superior judiciary itself reinforced the public service effect when

98 Shaila Koshy, “Time to Repeal Ouster Clauses” *The Star* (20 May 2018), available at <https://www.thestar.com.my/news/nation/2018/05/20/time-to-repeal-ouster-clauses-if-you-want-to-have-a-strong-judiciary-judges-must-have-the-power-and/> (visited 21 May 2018).

99 Richard S K Foo, “Malaysia — Death of a Separate Constitutional Judicial Power” [2010] *Singapore J of Legal Studies* 227.

100 [2008] MLJ 1.

101 [2017] 3 MLJ 561.

102 [2018] 1 MLJ 545.

103 *Ibid.*, [48].

104 *Wong Hua Seh v Abang Mohd Porkan* (HC, 9 June 2008).

105 RH Hickling, *Malaysian Law: An Introduction to the Concept of Law in Malaysia* (Subang Jaya: Pelanduk, 2nd ed., 2001) pp.163–164.

the judiciary's mode of self-governance changed from a collegiate system to a stricter "command and control" system similar to that governing public servants. The pre-1988 judiciary exercised collegiate governance through the Councils of Judges<sup>106</sup> and the peak Supreme Court functioned strongly as a collegiate body.<sup>107</sup> But in 1994, a new art.125(10) in the Constitution made the other head judges "responsible to the Chief Justice" and a new Judges' Code of Ethics imposed strict administrative compliance on judges. The Chief Justice was no longer only "first among equals" in the Federal Court but held ultimate administrative power in an arrangement which allowed the government to control the judiciary through compliant heads.

Key to this arrangement was the government's power over judicial appointments and discipline. Constitution art.122B requires the Prime Minister to "consult" the head judges and the Conference of Rulers before advising the King to formally appoint superior court judges but, from 1988, the Prime Minister had asserted a "prerogative" over appointments and many appointments, especially promotions to the head positions, appeared motivated by politicisation and cronyism. The Rulers could rarely intervene and compliant head judges no longer constituted any check on the Prime Minister. Instead, senior judges were exposed engaging in "appointments-fixing" to promote judges aligned to them "for the sake of the PM",<sup>108</sup> and judges who engaged in serious misconduct were promoted.<sup>109</sup> Public backlash in the 2008 general election to those revelations compelled the government to reform the appointments and the accountability systems but those reforms were largely a sham.<sup>110</sup> A statutory Judicial Appointments Commission (JAC) was added to the appointments process but the JAC, a recommending body, was heavily dominated by the four head judges and another senior judge and included four "eminent persons" chosen by the Prime Minister;<sup>111</sup> and, in any event, regardless of the JAC's recommendations, the Prime Minister retained the "prerogative" to decide appointments. A new Judicial Ethics Committee (JEC) discipline system was added to the tribunal system to address misconduct that did not warrant a judge's removal.<sup>112</sup> However, the weaknesses in the tribunal system exposed by the 1988 removals were not rectified and the Prime Minister and the Chief Justice remained in control of the whole removal and discipline system. Only those two persons could initiate a tribunal proceeding and the Chief Justice controlled the JEC system. Consequently, those reforms too did not assure transparent judicial accountability.

106 Courts of Judicature Act 1964 s.17A.

107 *Government of Malaysia v Lim Kit Siang* (n.82), 47.

108 Report of the Commission of Enquiry on the video clip recording of images of a person purported to be an Advocate and Solicitor speaking on the telephone on matters regarding the appointment of Judges (2008 Vol.1) p.127.

109 "Param: Shame on Those 'Leapfrog' Judges" *Malaysiakini* (11 June 2008), available at <http://www.malaysiakini.com/news/84323> (visited 16 August 2018).

110 Lee and Foo, "The Malaysian Judiciary: A Sisyphean Quest for Redemption?" (n.97).

111 Judicial Appointments Commission Act 2009 s.5.

112 Judges' Ethics Committee Act 2010.

In 2017, the government’s ability to control the judiciary reached an unprecedented level. A controversy erupted when Prime Minister Najib insisted on extending the terms of the top two judges — Chief Justice Raus Sharif and President Zulkefli Ahmad Makinudin — beyond their mandatory retirement dates. Senior judges and the Attorney-General apparently cooperated to achieve that outcome by giving a strained construction to Constitution art. 122(1A). This rarely used provision allowed a Chief Justice to advise the King to appoint temporary “Additional Judges” to the Federal Court “for such purposes” specified<sup>113</sup> and also permitted Additional Judges to hold office above the normal retirement age. Thus, in a highly unusual move before he retired, immediate past Chief Justice Arifin Zakaria (ie, Raus’s predecessor, who was concurrently the JAC’s chairperson) advised the King *in futuro* to appoint Raus and Zulkefli as Additional Judges immediately after their retirement dates in 2017 and, on that basis, Najib then reappointed them Chief Justice and President until 2020 and 2019, respectively. Attorney-General Apandi Ali declared the extensions valid and compliant with the JAC system,<sup>114</sup> and both judges accepted their extensions despite public objections. The general legal consensus, however, was that temporary Additional Judges could not be appointed for the purpose of becoming the permanent judiciary’s head judges, especially given their strong administrative powers. Critics regarded the “back door” appointments as attempts by Najib to keep the judiciary in “steady hands” while traversing GE14.<sup>115</sup> Harapan strongly opposed the extensions but, in late 2017, the High Court dismissed challenges filed by Mahathir.<sup>116</sup> The Bar Council also challenged the extensions as “blatantly unconstitutional”<sup>117</sup> and, in March 2018, the Federal Court (necessarily comprising judges subordinate to Raus and Zulkefli) heard the case but reserved its decision. When GE14 occurred two months later, Raus and Zulkefli were still in office.

### III. 1MDB and Accountability

In early 2015, 1MDB began to attract negative attention for accumulating approximately US\$11.6 billion in debt.<sup>118</sup> 1MDB is a state-owned development company established to promote global partnerships and attract foreign direct

113 Only two other appointments had occurred in the previous 60 years.

114 Tan Sri Mohamed Apandi Ali, “Pelantikan Md Raus ikut Perlembagaan” *Berita Harian* (8 August 2017) p.10.

115 “Chief Justice, IGP Tenure to be Extended as BN Faces GE14” *The Malaysian Insight* (26 April 2017), available at <https://www.themalaysianinsight.com/s/2092/> (visited 27 October 2017).

116 “Dr M Loses Bid to Challenge Appointment of Top Judges” *Malay Mail* (6 November 2017), available at <https://www.malaymail.com/s/1503955/dr-m-loses-bid-to-challenge-appointment-of-top-judges> (visited 8 November 2017).

117 George Varughese, “Justices Raus and Zulkefli Must Fulfil Vow to Uphold Constitution” *Malaysiakini* (9 July 2017), available at <https://www.malaysiakini.com/news/387967> (visited 26 October 2017).

118 Praveen Menon and Yantoultra Ngui, “Exclusive: Malaysia’s 1MDB to be Dismantled under Debt Plan—Sources” *Reuters* (5 March 2015), available at <https://www.reuters.com/article/us-malaysia-1mdb/>

investment in Malaysia.<sup>119</sup> It was founded in 2009 by Najib, who was also Chairman of its Advisory Board. As a state-owned company, 1MDB came under the direct purview of the Finance Ministry, which Najib also led as Finance Minister. Matters quickly took a sharp turn when an article published by Wall Street Journal (WSJ) on 2 July 2015 alleged that approximately US\$700 million had been deposited into Najib's personal bank accounts through a series of complex and opaque international transactions involving companies linked to 1MDB.<sup>120</sup> Approximately, US\$681 million were channelled through Tanore Finance, a British Virgin Islands company, and approximately US\$11.1 million were channelled through SRC International, a subsidiary of 1MDB which was later taken over by the Finance Ministry. A similar article was also published by Sarawak Report, a whistle-blower site.<sup>121</sup> Najib denied any wrongdoing and his personal accounts identified in those articles were soon closed.

A multi-agency task force was set up to investigate the allegations.<sup>122</sup> The task force was led by the Attorney-General, the Chief Commissioner of the MACC, the Governor of the Central Bank, the Inspector General of Police and the Director of the Special Branch, a division within the police force. The task force froze six bank accounts believed to be linked to the transactions and seized various documents from 1MDB and its associated companies. The PAC also initiated inquiry proceedings and scheduled meetings to question senior officers responsible for 1MDB including its Chief Executive Officer and the Treasury Secretary-General.<sup>123</sup>

Najib responded by dismantling the task force and the PAC. Attorney-General Abdul Gani Patail who spearheaded the task force was removed from his post, purportedly for "health problems".<sup>124</sup> He was replaced by Apandi Ali, a sitting Federal Court Judge.<sup>125</sup> The Director of Special Branch was also dismissed.

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exclusive-malaysias-1mdb-to-be-dismantled-under-debt-plan-sources-idUSKBN0M10WU20150305 (visited 3 September 2018).

119 Public Accounts Committee, *Public Accounts Committee (PAC)'s Report on Governance Management Control of 1Malaysia Development Berhad (1MDB)*, p.5, available at <http://www.parlimen.gov.my/pac/laporan-mesyuarat-pac.html?arkib=yes&year=2016&id=66> (visited 12 October 2018).

120 Tom Wright and Simon Clarke, "Investigators Believe Money Flowed to Malaysian Leader Najib's Accounts Amid 1MDB Probe" *Wall Street Journal* (2 July 2015), available at <https://www.wsj.com/articles/SB10130211234592774869404581083700187014570> (visited 7 September 2018).

121 "Sensational Findings! — Prime Minister Najib Razak's Personal Accounts Linked To 1MDB Money Trail Malaysia Exclusive!" *Sarawak Report* (2 July 2015), available at <http://www.sarawakreport.org/2015/07/sensational-findings-prime-minister-najib-razaks-personal-accounts-linked-to-1mdb-money-trail-malaysia-exclusive/> (visited 3 September 2018).

122 Tan Sri Abdul Gani Patail, Media Statement: Special Task Force Investigates Allegations of Funds Transferred to the Prime Minister's Account (4 July 2015).

123 Johan Affandi, Kenyataan Media: YB Nur Jazlan Tan Sri Mohamed, Pengerusi Jawatankuasa Kira-kira Wang Negara (PAC) Parlimen Malaysia Mengenai Prosiding Syarikat 1Malaysia Development Berhad (1MDB) Kementerian Kewangan Malaysia (11 May 2015).

124 Ida Lim, "In First Public Appearance, Gani Patail Says on Dialysis but Doing Fine (VIDEO)" *Malay Mail* (3 November 2015), available at <https://www.malaymail.com/s/998765/in-first-public-appearance-gani-patail-says-on-dialysis-but-doing-fine> (visited 3 September 2018).

125 Shagar and Mageswari, "Mohamaed Apandi Ali Replaces Gani Patail as Attorney-General" (n.85).

Najib also “promoted” four out of the 13 PAC members, including its Chairman, Nur Jazlan, to Cabinet positions.<sup>126</sup> This disqualified them from sitting on the committee and the vacancies caused the PAC’s inquiry to be suspended.<sup>127</sup>

Within days of assuming his new post, Attorney-General Apandi Ali stated that there was a conspiracy to overthrow Najib.<sup>128</sup> Senior officers within the task force were arrested and interrogated for allegedly committing “activities detrimental to parliamentary democracy”,<sup>129</sup> a new security offence captured by the widely criticised Security Offences (Special Measures) Act 2012 (SOSMA).<sup>130</sup> Their homes and offices were raided and documents related to the 1MDB investigation were confiscated.<sup>131</sup> The Attorney-General subsequently disbanded the task force.<sup>132</sup>

The chain of international transactions documented by the WSJ triggered investigations in several countries, including the United States, the United Kingdom Switzerland and Singapore.<sup>133</sup> When a former UMNO politician attempted to travel to New York to lodge a report with officials who were investigating the matter, he was arrested for attempting to commit an “activity detrimental to parliamentary

126 Hemananthani Sivanandam, “Nur Jazlan: I Didn’t Sell Out” *The Star* (31 July 2015), available at <https://www.thestar.com.my/news/nation/2015/07/31/nur-jazlan-i-didnt-sell-out-pac-will-go-on-without-me-says-new-deputy-minister/> (visited 3 September 2018).

127 Melissa Chi, “Parliament Officially Suspends PAC Hearings on 1MDB” *Malay Mail* (3 August 2015), available at <https://www.malaymail.com/s/945135/parliament-officially-suspends-pac-hearings-on-1mdb> (visited 3 September 2018).

128 “AG: ‘False’ Charge Sheet Indicates Plot to Topple PM” *Malaysiakini* (31 July 2015), available at <https://www.malaysiakini.com/news/306788> (visited 3 September 2018); “MACC: Our Officers not Part of Topple Gov’t Plot” (*Malaysiakini*, 30 July 2015) available at <https://www-malaysiakini-com.ezproxy.lib.monash.edu.au/news/306752> (visited 3 September 2018); Praveen Menon and Trinna Leong, “Malaysia Says Charge Sheet against Najib is False, an Attempt to Topple PM” *Reuters* (1 August 2015), available at <https://www.reuters.com/article/us-malaysia-politics-idUSKCN0Q51UL20150731> (visited 3 September 2018).

129 Nadirah H Rodzi, “Trio Only Brought in to Facilitate 1MDB Investigation, Says Ahmad Zahid” *The Star* (2 August 2015), available at <https://www.thestar.com.my/news/nation/2015/08/02/police-detained-trio-1mdb-investigations-igp/> (visited 3 September 2018); “Two More Malaysian Anti-Graft Officers Give Police Statements Amid Probe over Leaks on 1MDB” *Straits Times* (4 August 2015), available at <https://www.straitstimes.com/asia/se-asia/two-more-malaysian-anti-graft-officers-give-police-statements-amid-probe-over-leaks-on> (visited 3 September 2018); See also, Geraldine Tong, “IGP: Bank Negara officials Probed under FSA” *Malaysiakini* (13 August 2015), available at <https://www.malaysiakini.com/news/308474> (visited 7 September 2018).

130 See, eg, Whiting, “Emerging from Emergency Rule? Malaysian Law ‘Reform’ 2011–2013” (n.24) pp.16–20; Tyler James Brent Jeffrey, “Preventive Detention in Malaysia: Constitutional and Judicial Obstacles to Reform and Suggestions for the Future” (2013) 41 *Georgia Journal of International and Comparative Law* 535; Bar Council, “Malaysian Bar’s Memorandum on the Security Offences (Special Measures) Bill 2012, Amendments to the Penal Code, Amendments to the Evidence Act 1950, and Amendments to the Criminal Procedure Code”, *Malaysian Bar* (29 August 2015) paras.28–106.

131 “Cops Disrupted Our SRC Probe, Decries MACC” *Malaysiakini* (6 August 2018), available at <https://www.malaysiakini.com/news/307509> (visited 7 September 2018).

132 “1MDB Task Force No Longer Needed, Says MACC” *Malaysiakini* (5 August 2015), available at <https://www.malaysiakini.com/news/307493> (visited 7 September 2018).

133 Shamim Adam, Yudith Ho and Cedric Sam, “How Malaysia’s 1MDB Fund Scandal Reaches around the World” *Bloomberg* (2 August 2018), available at <https://www.bloomberg.com/graphics/2018-malaysia-1mdb/> (visited 3 September 2018).

democracy” and detained for 28 days under SOSMA.<sup>134</sup> When the charge fell through, he was re-arrested along with his lawyer Matthias Chang, for attempting to sabotage the country’s banking and financial services, another new offence captured by SOSMA.<sup>135</sup> While the duo successfully resisted the use of extraordinary security trial procedures under SOSMA, they were nonetheless tried under ordinary criminal proceedings on charges that the Malaysian Bar described as an “incredible and quantum leap of logic”.<sup>136</sup> In the end, the prosecution withdrew its case “in the interest of justice and fairness”<sup>137</sup> and the pair was acquitted. The proceedings were, from beginning to end, clearly aimed at forestalling the investigation.

In January 2016, Attorney-General Apandi Ali publicly cleared Najib of any wrongdoing and ended the investigation in Malaysia.<sup>138</sup> Apandi declared that the case was closed and “ordered”<sup>139</sup> the MACC to cease investigations. The MACC ignored Apandi’s “order” and continued investigating on its own. However, Chief Commissioner Abu Kassim who had publicly pledged to “get to the bottom”<sup>140</sup> of the scandal was abruptly replaced by one of Apandi’s own officers from the AGC. By the end of 2016, the remaining investigating officers were either reassigned

134 “Khairuddin detained” *The Star* (20 September 2015), available at <https://www.thestar.com.my/news/nation/2015/09/20/khairuddin-detained-umno-man-who-lodged-reports-against-1mdb-overseas-remanded/> (visited 12 October 2018); Mayuri Mei Lin and Boo Su-Lyn, “Lawyers Raise Eyebrows at 1MDB Critic’s Arrest under Anti-Terror Law” *Malay Mail* (24 September 2015), available at <https://www.malaymail.com/s/975589/lawyers-raise-eyebrows-at-1mdb-critics-arrest-under-anti-terror-law> (visited 12 October 2018).

135 “Khairuddin Held under Sosma for 28 days” *New Straits Times* (24 September 2015), available at <https://www.nst.com.my/news/2015/09/khairuddin-held-under-sosma-28-days> (visited 3 September 2018); Farik Zolkepli, “Matthias Chang Detained under Sosma” *The Star* (8 October 2015), available at <https://www.thestar.com.my/news/nation/2015/10/08/matthias-chang-detained-under-sosma/> (visited 3 September 2018).

136 Steven Thiru, “The Police Must Not Misuse SOSMA and Must Not Ignore the Solicitor–Client Relationship” *Malaysian Bar* (9 October 2015), available at [http://www.malaysianbar.org.my/press-statements/press\\_release\\_%7C\\_the\\_police\\_must\\_not\\_misuse\\_sosma\\_and\\_must\\_not\\_ignore\\_the\\_solicitor\\_client\\_relationship.html](http://www.malaysianbar.org.my/press-statements/press_release_%7C_the_police_must_not_misuse_sosma_and_must_not_ignore_the_solicitor_client_relationship.html) (visited 3 September 2018).

137 V Anbalagan, “1MDB Critics Freed of Sabotaging Nation’s Banking System” *Free Malaysia Today* (12 May 2017), available at <https://www.freemalaysiatoday.com/category/nation/2017/05/12/1mdb-critics-freed-of-sabotaging-nations-banking-system/> (visited 3 September 2018).

138 Shanon Teoh, “Malaysia’s Attorney-General Clears Najib of Corruption over Cash Gift from Saudi Royals” *Straits Times* (27 January 2016), available at <https://www.straitstimes.com/asia/se-asia/malaysias-attorney-general-clears-najib-of-corruption-over-cash-gift-from-saudi-royals> (visited 3 September 2018).

139 In fact, the Attorney-General does not have such powers and Apandi was apparently acting against precedent: Hafiz Yatim, “AG Has No Power to Direct MACC to Close Files, Says Veteran Lawyer” *Malaysiakini* (28 January 2016) <https://www-malaysiakini-com.ezproxy.lib.monash.edu.au/news/328578> (visited 7 September 2018); A Ruban, “Oversight Panel Man: Law Empowers MACC to Continue SRC, RM 2.6b Probes, AG Must Help” *Malay Mail* (29 January 2016), available at <https://www.malaymail.com/s/1050401/oversight-panel-man-law-empowers-macc-to-continue-src-rm-2.6b-probes-ag-must> (visited 4 September 2018).

140 “MACC Chief Vows to Get to the bottom of PM’s ‘Donation’ Case” *Malaysiakini* (25 December 2015), available at <https://www.malaysiakini.com/news/324523> (visited 7 September 2018).

or transferred to other government departments,<sup>141</sup> and the MACC’s Deputy Commissioner opted for early retirement.<sup>142</sup>

Parliament failed to perform an oversight role. Instead, the Speaker of the House of Representatives prohibited any parliamentary discussion on 1MDB.<sup>143</sup> The new PAC Chairman even exonerated Najib in a press interview, stating that the inquiry — which resumed in October 2015 and ended in April 2016 — found no evidence of wrongdoing by the Prime Minister.<sup>144</sup> By early 2018, the MACC had ceased its investigation and MPs were no longer permitted to ask questions about 1MDB in Parliament.<sup>145</sup> The Speaker argued that the matter had been fully considered by the PAC and further, any discussion in Parliament would be “prejudicial to a case under trial” or *sub judice*, in breach of standing orders.<sup>146</sup>

In another apparent attempt to stop public discussion of 1MDB, the government passed the Anti-Fake News Act 2018 (AFNA 2018).<sup>147</sup> Anyone who created, offered, published, distributed, circulated or disseminated “fake news” could be imprisoned for six years or fined approximately US\$127,000, or could be punished with both.<sup>148</sup> Those in possession or in control of fake news, eg media companies or administrators of social media platforms, had to immediately remove such material or they faced hefty fines.<sup>149</sup>

The judicial system was apparently unable to secure accountability over the 1MDB issue. Actions by the Bar Council and others seeking judicial review of the Attorney-General’s decision to exonerate Najib failed entirely in the courts<sup>150</sup>

141 “Six MACC Officers Involved in SRC Probe Transferred” *Malaysiakini* (31 December 2016), available at <https://www-malaysiakini-com.ezproxy.lib.monash.edu.au/news/367733> (visited 4 September 2018).

142 Ziri Kamarulzaman, “Dzulkiifi Was a Traitor to the Country, Says New MACC Chief” (*Malaysiakini* (22 May 2018), available at <https://www.malaysiakini.com/news/426184> (visited 7 September 2018).

143 M Hamzah Jamaludin, “Pandikar: Questions on DoJ’s 1MDB Issue Not for Present Dewan Sitting” *New Strait Times* (17 October 2016), available at <https://www.nst.com.my/news/2016/10/180944/pandikar-questions-doj-1mdb-issue-not-present-dewan-sitting> (visited 4 September 2018); Ram Anand, “Pandikar: 1MDB Discussion in Parliament Ended after PAC Probe” *Malay Mail* (27 July 2017), available at <https://www.malaymail.com/s/1430115/pandikar-1mdb-discussion-in-parliament-ended-after-pac-probe> (visited 4 September 2018).

144 “Full Interview with PAC Chairman Hasan Arifin” *The Star* (8 April 2016), available at <https://www.thestar.com.my/news/nation/2016/04/08/full-interview-with-pac-chairman-hasan-arifin/> (visited 4 September 2018); “PAC Members: We Never Said No Wrongdoing, Cash Went Missing” *Malaysiakini* (12 April 2016), available at <https://www.malaysiakini.com/news/337439> (visited 4 June 2018). Also, see work referred to in note 119.

145 Chester Tay, “Dewan Rakyat Done with 1MDB Questions” *The Edge Markets* (8 March 2018), available at <http://www.theedgemarkets.com/article/dewan-rakyat-done-1mdb-questions-speaker-tells-lawmakers> (visited 4 September 2018).

146 *Ibid.*

147 “Anti-Fake News Bill Passed in Parliament” *New Straits Times* (2 April 2018), available at <https://www.nst.com.my/news/nation/2018/04/352180/anti-fake-news-bill-passed-parliament> (visited 4 September 2018).

148 AFNA 2018 s.4.

149 *Ibid.*, s.6.

150 See text to note 84.

but, interestingly, in the Federal Court, Chief Justice Raus refused to disqualify himself from the bench, rejecting arguments of apparent bias (Najib, whom Apandi exonerated, had extended Raus' term as Chief Justice) and a later bench headed by President Zulkefli refused to review Raus's refusal to disqualify himself.<sup>151</sup> Actions against Najib for "misfeasance in public office", with the main action commenced by Mahathir, also failed. Common law principles defined a person in "public office" for this tort but the courts instead cited the Interpretation Acts (which applied for the interpretation of statutes) and ruled that Najib, as Prime Minister and Minister of Finance, was not holding a public office.<sup>152</sup> The Bar Council criticised the decision as "irreconcilable with the established principles".<sup>153</sup> However, the Federal Court affirmed the decision and, again, Chief Justice Raus refused to disqualify himself, although he and Mahathir was opposing litigants in Mahathir's legal challenge to his extension as Chief Justice.<sup>154</sup>

On the other hand, the judicial system was effective against Najib's detractors. When Najib sued a Harapan politician in defamation, the Court of Appeal took judicial notice of the Attorney-General's out-of-court announcement that Najib "had done no wrong in relation to the 1MDB issue" and accepted that decision as "final".<sup>155</sup>

The judiciary's standing was further dented when an artist was convicted under the Communications and Multimedia Act 1998 (CMA) for posting an image on Facebook.<sup>156</sup> The image depicted Najib as a clown, contained a notice warning the public not to spread the image and bore the logo of the Communications and Multimedia Commission. He was charged for posting online content that was "false ... with the intent to annoy ... another person".<sup>157</sup> The court rejected the defence of satire and parody, saying it was not expressly provided for in the CMA<sup>158</sup> and further held that even if it were satirical, it was posted "with the intent to annoy another person".<sup>159</sup> It was not necessary to establish who this "person" was;<sup>160</sup> the offence

151 Hafiz Yatim, "Three Parties Apply for Recusal of CJ" *Malaysiakini* (28 July 2017), available at <https://www.malaysiakini.com/news/390095> (visited 17 August 2018); Alyaa Azhar, "Zaid, Khairuddin's Bid to Review CJ's Decision Dismissed" *Malaysiakini* (15 December 2017), available at <https://www.malaysiakini.com/news/405559> (visited 17 August 2018).

152 *Mahathir bin Mohamad v Mohd Najib bin Abdul Razak* [2017] 9 MLJ 1.

153 George Varughese, "Uphold Established Principles of Common Law" *Malaysian Bar* (10 May 2017), available at [http://www.malaysianbar.org.my/press\\_statements/press\\_release\\_%7C\\_uhold\\_established\\_principles\\_of\\_common\\_law.html?date=2017-06-01](http://www.malaysianbar.org.my/press_statements/press_release_%7C_uhold_established_principles_of_common_law.html?date=2017-06-01) (accessed 17 August 2018).

154 Hafiz Yatim, "Misfeasance in Public Office Suit: Apex Court Rejects Dr M's Appeal Bid" *Malaysiakini* (27 February 2018), available at <https://www.malaysiakini.com/news/413591> (visited 17 August 2018).

155 *Tony Pua Kiam Wee v Mohd Najib bin Abdul Razak* [2018] 4 MLJ 192, [37].

156 Amanda Yeap, "Fahmi Reza Jailed One Month, Fined RM30,000 over Offensive Caricature of PM" *The Star* (20 February 2018), available at <https://www.thestar.com.my/news/nation/2018/02/20/fahmi-reza-gets-one-month-jail-fined-rm30000-over-offensive-caricature-of-pm/> (visited 5 September 2018).

157 CMA s.233.

158 *Mohd Fahmi Reza in Mohd Zarin lwn Pendakwa Raya* (Sessions Court Ipoh, 20 March 2018), 13.

159 *Ibid.*, 14.

160 *Ibid.*, 9.

was made out as the image was “clearly aimed at criticising the authorities”.<sup>161</sup> The court considered the artist’s action a serious offence and to teach him “a lesson”,<sup>162</sup> not only imposed a fine of approximately US\$7,313 but also a one month jail sentence.<sup>163</sup>

Considering the systemic accountability failures described above, the Rulers also had little effective role in securing accountability over the 1MDB issue. The MACC briefed the Conference of Rulers twice on their investigations but came away “disappointed”.<sup>164</sup> The Rulers issued a statement calling for full, expeditious and transparent investigations but were otherwise constrained in their actions.<sup>165</sup> Certain Rulers, however, urged continuing public support for Najib.<sup>166</sup>

## IV. The Power Transition

### A. Winning the election

#### (i) The EC and the redelineation exercise

In December 2013, the EC announced that it would review constituency boundaries and conduct a redelineation exercise, citing the need to accommodate the significant increase in the number of voters and to balance the disparities in the size of different constituencies.<sup>167</sup> The process commenced in 2014 and was due to be completed in time for GE14. Constitutionally, the EC had to publish its recommended proposals for public review, and objections could be made by State Governments or individuals numbering one hundred or more.<sup>168</sup> An objection would trigger the holding of a public enquiry to hear public submissions after which the EC could revise its recommendations and republish them.<sup>169</sup> The EC’s proposals to redraw electoral

161 *Ibid*, 14.

162 *Ibid*, 15.

163 Melissa Darlyne Chow, “Fahmi Reza’s Punishment for Clown Art Excessive, Say Critics” *Free Malaysia Today* (21 February 2018), available at <http://www.freemalaysiatoday.com/category/nation/2018/02/21/fahmi-rezas-punishment-for-clown-art-excessive-say-critics/> (visited September 2018).

164 Zikri Kamarulzaman, “MACC Asked Cabinet to Axe Najib — Shukri” *Malaysiakini* (22 May 2018), available at <https://www.malaysiakini.com/news/426170> (visited 17 August 2018).

165 “Rulers Want 1MDB Probe Wrapped Up, Wrongdoers Punished” *Malaysiakini* (6 October 2015), available at <https://www.malaysiakini.com/news/314769> (visited 17 August 2018).

166 “Pahang Sultan Urges People to Support Najib” *Straits Times* (17 April 2015), available at <https://www.straitstimes.com/asia/se-asia/pahang-sultan-urges-people-to-support-najib> (visited 17 August 2018); “Give Najib a Chance, Johor Sultan Tells Daily” *Malaysiakini* (27 December 2015), available at <https://www.malaysiakini.com/news/324622> (visited 17 August 2018).

167 “In Upcoming Redelineation, EC Seeks to Balance Unequal-Sized Election Seats” *Malay Mail* (26 December 2013), available at <https://www.malaymail.com/s/587901/in-upcoming-redelineation-ec-seeks-to-balance-unequal-sized-election-seats>; “EC: Constituency Re-Delineation Motion Expected in March” *Sin Chew Daily* (1 June 2016), available at <http://www.mysinchew.com/node/95011> (visited 5 September 2018).

168 Constitution Sch.13 ss.4 and 5.

169 Constitution Sch.13 s.7.

boundaries in Sarawak were published for public review in January 2015 while proposals for Sabah and Peninsula Malaysia were published in September 2016.

However, the entire exercise was “dogged by procedural issues from the very beginning”<sup>170</sup> and quickly proved to be a sham.<sup>171</sup> Throughout 2015 and 2017, voters from various states complained that the EC not only failed to provide sufficient information when it published its recommended proposals<sup>172</sup> but also rejected almost all the public objections raised at the constitutionally mandated local enquiries.<sup>173</sup> Further, the proposals would exacerbate existing malapportionment, and create new Malay-majority constituencies that would clearly place UMNO at an advantage.<sup>174</sup> Moreover, the proposals could facilitate what Bersih termed the “subversion of democracy”<sup>175</sup> as the redelineation would allow BN to win a simple majority by securing only 16.5 per cent of the total votes.

The proposals spawned an “unprecedented number”<sup>176</sup> of legal challenges. As voters could not effectively ventilate their objections at the local enquiries, they turned to the courts for judicial remedy, alleging that the EC had breached constitutional provisions aimed at ensuring equal apportionment, fair representation and public consultation. However, none of the actions succeeded as the superior courts dismissed

170 George Varughese, “Redelineation Proposals Are Fundamentally Flawed, Inherently Unfair and Unconstitutional” *Malaysian Bar* (3 April 2018), available at [http://www.malaysianbar.org.my/press\\_statements/press\\_release\\_%7C\\_redelineation\\_proposals\\_are\\_fundamentally\\_flawed\\_inherently\\_unfair\\_and\\_unconstitutional.html](http://www.malaysianbar.org.my/press_statements/press_release_%7C_redelineation_proposals_are_fundamentally_flawed_inherently_unfair_and_unconstitutional.html) (visited 6 September 2018).

171 There are numerous reports on the irregularities. For a representative sample, see Razak Ahmad, Wani Muthiah, Nelson Benjamin *et al.*, “Many against EC’s New Lines” *The Star* (15 October 2016), available at <https://www.thestar.com.my/news/nation/2016/10/15/many-against-ecs-new-lines-controversial-proposals-draw-more-than-100-objections> (visited 5 September 2018); “Tilting the Playing Field: How Malaysia’s Next Election Will Be Rigged” *The Economist* (8 March 2018), available at <https://www.economist.com/asia/2018/03/08/how-malysias-next-election-will-be-rigged> (visited 5 September 2018); “Stop, Thief! Malaysia’s PM is about to Steal an Election” (n.2); “Redelineation Report: Analyst Breaks Embargo, Claims ‘Disaster’” *Malaysiakini* (27 March 2018), available at <https://www.malaysiakini.com/news/417298> (visited 5 September 2018); Ong Kian Ming, “EC Redelineation: Unfair, Unprecedented, and Dangerous” *Malaysiakini* (28 March 2018), available at <https://www.malaysiakini.com/news/417496> (visited 5 September 2018); Steering Committee of Bersih, Media Statement: Boundary Changes: Seven Major Violations by Electoral Commission, PM (*ALIRAN*, 3 April 2018), available at <http://www.bersih.org/media-statement-3-april-2018-seven-major-violations-by-the-election-commission-and-the-prime-minister-in-the-redelineation-report/> (visited 5 September 2018); Netina Tan and Cassandra Preece, “Malaysia’s Dire Democratic Crisis” *The Conversation* (26 March 2018), available at <https://theconversation.com/malysias-dire-democratic-crisis-93737> (visited 6 September 2018).

172 Ahmad, Muthiah, Benjamin *et al.*, *Ibid.*

173 Bede Hong, “EC Dismisses Almost All of Selangor Voters’ Objections”, *The Malaysian Insight* (28 March 2018), available at <https://www.themalaysianinsight.com/s/45480> (visited 5 September 2018).

174 Ong Kian Ming, “EC Redelineation: Unfair, Unprecedented, and Dangerous” (n.171); Steering Committee of Bersih, Media Statement: Boundary Changes: Seven Major Violations by Electoral Commission, PM (n.171); Tan and Preece, “Malaysia’s Dire Democratic Crisis” (n.171).

175 Steering Committee of Bersih, Media Statement: Boundary Changes: Seven Major Violations by Electoral Commission, PM (n.171).

176 Bridget Welsh, “From the Streets to the Courtroom: Judicial Electoral Contestation” *New Mandala* (14 April 2018), available at <http://www.newmandala.org/streets-courtroom-judicial-electoral-contestation/> (visited 6 September 2018).

one complaint after another. In the case filed by voters from Sarawak<sup>177</sup> (long regarded as BN’s “fixed deposit” state), the High Court accepted evidence that the EC’s proposed recommendations published for public review lacked important details such that voters could neither make an informed decision nor reasonably exercise their right to raise objections at local enquiries.<sup>178</sup> Thus, the judge ordered the EC to republish its proposed recommendations with the necessary details, in compliance with constitutional requirements. However, the Court of Appeal reversed the decision and the judge’s findings of fact.<sup>179</sup> Before the voters’ appeal to the Federal Court could be heard, the EC gazetted its proposals and submitted them to the Prime Minister.<sup>180</sup> By the time the voters’ appeal reached the Federal Court, then President Raus, who presided, dismissed the matter on the ground that the proposals had already been submitted to the Prime Minister.<sup>181</sup> Although the proposals had not been tabled or passed by the House of Representatives, President Raus took the view that the issue had become “academic”.<sup>182</sup>

The courts went further in the cases brought by voters from the states of Malacca and Perak. In both cases, the Court of Appeal denied its own jurisdiction to review the EC’s proposals in the absence of any provision that ousted the courts’ jurisdiction.<sup>183</sup> Instead, the Court relied on art.63(1), a constitutional provision that protected parliamentary proceedings from judicial review.<sup>184</sup> The courts had in the past, interpreted art.63(1) as protecting only those proceedings relating to the internal management of Parliament from judicial scrutiny.<sup>185</sup> However, the Court of Appeal interpreted this provision, along with the constitutional provision requiring the EC to hold local enquiries, as rendering the EC’s proposals a matter within Parliament’s exclusive jurisdiction.<sup>186</sup> The Court also held that since the Constitution provided for the holding of local enquiries, those enquiries, and not the courts, were

177 See *Chee How v Election Commission of Malaysia* [2016] 8 MLJ 384.

178 *Ibid.*, [86]–[119].

179 *Election Commission of Malaysia v See Chee How* [2016] 3 MLJ 365, [35], [95].

180 Sulok Tawie, “Why the Rush to Gazette Sarawak Redelineation, PKR Asks EC” *Malay Mail* (5 September 2015), available at <https://www.malaymail.com/s/964553/why-the-rush-to-gazette-sarawak-redelineation-pkr-asks-ec> (visited 6 September 2018).

181 “Apex Court Upholds Courts of Appeals’ Verdict on EC’s Sarawak Re-Delineation Exercise” *The Sun Daily* (15 October 2015), available at <http://www.thesundaily.my/news/1582767> (visited 6 September 2018).

182 *Ibid.*

183 *Peguam Negara Malaysia v Chan Tsu Chong* [2018] 1 MLJ 409, [44]–[46]; *M Kula Segaran v Suruhanjaya Pilihanraya Malaysia* [2018] 4 MLJ 111, [36]–[37].

184 Constitution art.63(1) reads: The validity of any proceedings in either House of Parliament or any committee thereof shall not be questioned in any court.

185 See, eg, *Fan Yew Teng v Government of Malaysia* [1978] 2 MLJ 262; *Teng Chang Khim v Badrul Hisham Abdullah* [2017] 5 MLJ 567. This was acknowledged by the High Court Judge in *Kerajaan Negeri Selangor v Suruhanjaya Pilihanraya Malaysia* (High Court of Malaya at Kuala Lumpur, Appellate and Special Powers Division, 13 December 2017), [51].

186 *Peguam Negara Malaysia v Chan Tsu Chong* (n.183), [40]–[47]; *M Kula Segaran v Suruhanjaya Pilihanraya Malaysia* (n.183), [32]–[43]. Cf *Kerajaan Negeri Selangor v Suruhanjaya Pilihanraya Malaysia* (n.185), [52]–[55].

the proper forum for the public to ventilate their objections,<sup>187</sup> seemingly unable to appreciate that it was arguably the various irregularities in the conduct of the local enquiries that had forced voters to seek judicial remedy.<sup>188</sup> Further, the Court of Appeal held that because the proposals were subject to Parliament's approval, they were not "final" decisions that were open to judicial review.<sup>189</sup> When the voters filed a joint application for leave to appeal against the Court of Appeal's decisions, the Federal Court again dismissed the application.<sup>190</sup> According to Chief Justice Raus (by now appointed as such) the Court could not review matters pertaining to the redelineation exercise as this "will be seen as encroaching on the functions of other bodies".<sup>191</sup> The Malaysian Bar criticised the Federal Court's position as being "wholly untenable" and Chief Justice Raus's apparent reliance on the doctrine of separation of powers as mere "tokenism".<sup>192</sup>

With nothing to stop him in the courts, Najib succeeded in tabling the EC's consolidated proposals in the House of Representatives on 28 March 2018. Despite widespread criticism against the proposals, the Speaker, who had in an unprecedented move, placed an embargo on the proposals<sup>193</sup> to prevent public exposure before the parliamentary debate, ruled that MPs could only have 10 minutes each to debate the motion. Without any meaningful discussion, the proposals were passed within the day and the entire exercise was completed just weeks before the general election.<sup>194</sup> The Malaysian Bar said:

"... if there is to be a real respect for the doctrine of separation of powers, ... then the Legislative branch of government must not only be independent, but must be seen to be independent. It should not bow or tie itself to the Executive branch, and must oppose any attempt by the Executive branch to rush through legislation to meet the latter's own political agenda ..."<sup>195</sup>

187 *Peguam Negara Malaysia v Chan Tsu Chong* (n.183), [46]; *M Kula Segaran v Suruhanjaya Pilihanraya Malaysia* (n.183), [34], [42]–[43]. See also *Election Commission of Malaysia v See Chee How* (n.179), [57].

188 *Cf Kerajaan Negeri Selangor v Suruhanjaya Pilihanraya Malaysia* (n.185), [56]–[59].

189 *Peguam Negara Malaysia v Chan Tsu Chong* (n.183), [47]; *M Kula Segaran v Suruhanjaya Pilihanraya Malaysia* (n.183), [35]–[36].

190 Asila Jalil, "Federal Court Dismisses Leave Application to Challenge EC Redelineation in Malacca, Perak" *The Malaysian Insight* (19 February 2018), available at <https://www.themalaysianinsight.com/s/38700> (visited 6 September 2018).

191 *Ibid.*

192 Varughese, "Redelineation Proposals Are Fundamentally Flawed, Inherently Unfair and Unconstitutional" (n.170).

193 Alyaa Alhadjri, "Speaker: EC Redelineation Report to the Tabled Next Wed" *Malaysiakini* (22 March 2018), available at <https://www.malaysiakini.com/news/416646> (visited 6 September 2018).

194 Hemananthani Sivanandam, Faril Zolkepli, Hanis Zainal *et al.*, "Redelineation Motion Passed by Dewan Rakyat" *The Star* (28 March 2018), available at <https://www.thestar.com.my/news/nation/2018/03/28/redelineation-motion-passed/> (visited 6 September 2018).

195 Varughese, "Redelineation Proposals Are Fundamentally Flawed, Inherently Unfair and Unconstitutional" (n.170).

In her analysis, Welsh remarked that the legal challenges, incapable as they were of halting the redelineation, nonetheless exposed various breaches in standards of electoral integrity such that the EC could not be said to be independent. She said:

“Repeatedly, the EC — a constitutionally mandated body — came off as ‘the government’ rather than as a professional autonomous (or even semi-autonomous) body, the international standard of electoral integrity. With the EC reporting directly to the prime minister, the court cases documented the EC’s political colours.”<sup>196</sup>

Four days before the election campaign began, the EC issued additional guidelines perceived to be specifically aimed at stopping the use of Mahathir and Anwar’s photographs in Harapan’s campaign material.<sup>197</sup> The guidelines stated that only photographs of the president and the deputy president of a registered political party could be used, other than the photograph of the candidate. Thus, even though Mahathir was Harapan’s prime ministerial candidate, his photograph could not be used in campaign material other than those in his own constituency because he was neither president nor deputy president of Bersatu. The photograph of Anwar Ibrahim, who was widely recognised as *de facto* leader of PKR and a symbol of the Opposition, could not be used either as he too was neither the party’s president nor deputy president. While the guidelines were justified on the need to “prevent confusing the voters” and to ensure a “peaceful and smooth” election campaign,<sup>198</sup> they were clearly aimed at curbing the influence of Harapan’s most widely recognised leaders. As the additional guidelines were issued at the last minute, most of Harapan’s campaign posters and banners with Mahathir and Anwar’s photograph had already been printed. When the posters were put up, the EC responded by instructing its officers to cut out those images<sup>199</sup> — a move that many, including UMNO’s own Deputy President, Hishammudin Hussein, saw as a step too far.<sup>200</sup> When SUHAKAM issued a statement criticising the EC’s conduct, the latter responded by barring SUHAKAM from monitoring the election.<sup>201</sup> Instead, the EC permitted observers

196 Welsh, “From the Streets to the Courtroom: Judicial Electoral Contestation” (n.176).

197 Bernama, “EC Announces Additional Requirements for Campaign Materials” *Malaysiakini* (24 April 2018), available at <https://www.malaysiakini.com/news/421434> (visited 6 September 2018).

198 *Ibid.*

199 “Dr M and Anwar’s Faces Cut Out of Billboard in Penang” *The Star* (2 May 2018), available at <https://www.thestar.com.my/news/nation/2018/05/02/dr-m-and-anwars-faces-cut-out-of-billboard-in-penang/> (visited 6 September 2018); “Dr M Gone in 60 Seconds — Officers Cut Out His Image from Billboard” *Malaysiakini* (30 April 2018), available at <https://www.malaysiakini.com/news/422280> (visited 6 September 2018).

200 Zunaira Saieed, “Hisham: Cutting Out Dr M’s Face from Billboard Was Not Right” *The Star* (1 May 2018), available at <https://www.thestar.com.my/news/nation/2018/05/01/hisham-cutting-out-dr-ms-face-from-billboard-was-not-right/> (visited 6 September 2018).

201 “EC Bars SUHAKAM from Monitoring GE14”, *The Star* (26 April 2018), available at <https://www.thestar.com.my/news/nation/2018/04/26/ec-bars-suhakam-from-monitoring-ge14/> (visited 6 September 2018).

from Kyrgystan, Azerbaijan, Cambodia, Timor Leste, Indonesia, Thailand and Maldives, most of which ranked lower than Malaysia in democracy indices.<sup>202</sup> These actions significantly tilted the playing field in favour of BN such that Harapan did not really seem to have a “fighting chance” in the election.

(ii) The Registrar of Societies, the public services and the Rulers

The Registrar of Societies (ROS), the regulator for political parties, was clearly partisan. No sooner had one Harapan component party satisfied the ROS’s demands than the ROS cited irregularities in another component party, Bersatu, and, on that basis, the ROS also refused to register Harapan as a coalition.<sup>203</sup> Then, just one day before Najib called the election, the ROS issued a provisional dissolution order against Bersatu and effectively barred Bersatu from campaigning. Fortunately for Bersatu which sought urgent judicial review, a High Court judge, finding an arguable case of abuse of power by the ROS, stayed the dissolution order or those eleventh-hour developments might have derailed Harapan’s campaign.<sup>204</sup> Still unable to register as a coalition, the Harapan parties contested the election using as their common logo the better-known logo of just one component party (PKR’s) and this, as it turned out, proved to be a winning stroke.<sup>205</sup>

Attempts were also made to ensure that public servants continued to support BN. The public services Director-General urged civil servants to give their “undivided support” to Najib,<sup>206</sup> and, similarly, the armed forces chief urged the forces to be “grateful” and give their “undivided loyalty” to Najib’s government.<sup>207</sup> Nonetheless, significant elements of political neutrality remained within the services<sup>208</sup> and, as the election loomed, Mahathir urged the military and police

202 “EC Slammed for Rejecting Suhakam as Election Observer” *Malaysiakini* (27 April 2018), available at <https://www.malaysiakini.com/news/421811> (visited 6 September 2018); George Varughese, “Remove the Unreasonable and Unnecessary Restrictions Imposed upon Election Candidates” *Malaysian Bar* (28 April 2018), available at [http://www.malaysianbar.org.my/press\\_statements/press\\_release\\_%7C\\_remove\\_the\\_unreasonable\\_and\\_unnecessary\\_restrictions\\_imposed\\_upon\\_election\\_candidates.html](http://www.malaysianbar.org.my/press_statements/press_release_%7C_remove_the_unreasonable_and_unnecessary_restrictions_imposed_upon_election_candidates.html) (visited 6 September 2018).

203 “Harapan Gives ROS Ultimatum to Register Coalition” *Malaysiakini* (7 February 2018), available at <https://www.malaysiakini.com/news/411498> (visited 17 August 2018).

204 Hafiz Yatim, “Bersatu Granted Stay against ROS Dissolution Order” *Malaysiakini* (23 April 2018), available at <https://www.malaysiakini.com/news/421187> (visited 17 August 2018).

205 Chan Kok Leong, “BN Lost because of Pakatan’s Single Logo, Najib Attacks, Says Zahid” *The Malaysian Insight* (22 June 2018), available at <https://www.themalaysianinsight.com/s/56287> (visited 17 August 2018).

206 “Public Servants Should be Loyal, Support Govt, Country, Says PSD DG” *Malay Mail* (25 February 2018), available at <https://www.malaymail.com/s/1584837/public-servants-should-be-loyal-support-govt-country-says-psd-dg> (visited 17 August 2018).

207 Zikri Kamarulzaman, “Be Loyal to Gov’t and PM, Armed Forces Chief Tells Troops and Police” *Malaysiakini* (31 March 2018), available at <https://www.malaysiakini.com/news/417824> (visited 17 August 2018).

208 “Troops Loyal to King and Country Not Parties, Clarifies Armed Forces Chief” *Malaysiakini* (10 April 2018), available at <https://www.malaysiakini.com/news/419134> (visited 17 August 2018); “Vote as You Like, Your Vote Is Secret, Navy Chief Tells Seamen” *Malay Mail* (3 May 2018), available at <https://www.malaymail.com/s/1626965/vote-as-you-like-your-vote-is-secret-navy-chief-tells-seamen> (visited 17 August 2018).

chiefs to respect the democratic process and not enforce a state of emergency, should Najib declare one after the election.<sup>209</sup>

Certain Rulers were also overtly opposed to Mahathir and Harapan. During the campaign, as Mahathir aimed an invective at Najib, the Selangor Ruler also took offence at Mahathir’s words and attacked Mahathir as being “ungrateful” to his former party UMNO.<sup>210</sup> The Johor Ruler disparaged Mahathir and his new alliance within Harapan,<sup>211</sup> and, just one day after Najib called the election, the crown prince made a strong veiled attack on Mahathir and urged the public not to change the government.<sup>212</sup> Separately, the Kelantan Ruler (the current King) revoked state honours previously awarded to Mahathir and two Harapan leaders.<sup>213</sup> These were powerful signals by the Rulers that could affect the election.<sup>214</sup>

In the end, however, Harapan and their allies won a clear victory, winning 122 of the 222 parliamentary seats and 9 of the 13 states.

### B. Forming government

Despite winning the vote, Harapan encountered further challenges in forming government.<sup>215</sup> Apart from a delay by the EC in announcing the election results, the King deviated from constitutional understandings in commissioning a Harapan government. The King invited not Mahathir but Wan Azizah (PKR’s leader) to become the Prime Minister (on the basis that, within Harapan, PKR had won the most seats), but she declined the offer saying that Mahathir was Harapan’s unanimous choice for Prime Minister. Harapan reiterated their support for Mahathir to be appointed Prime Minister by sending to the palace a letter signed by all their elected representatives. As public pressure mounted that afternoon on 10 May 2018, three top officials (the civil service head, the police chief and the armed forces chief) advised the King behind the scenes for an expeditious and orderly transition to the new government while the Johor Ruler publicly urged the King to appoint the

209 “Dr M Writes to Armed Forces Generals, Urges ‘Freedom to Choose’ for Men” *Malaysiakini* (2 May 2018), available at <https://www.malaysiakini.com/news/422721> (visited 17 August 2018).

210 “Dr Mahathir Suffering from Inferiority Complex, Says Selangor Sultan” *The Malaysian Insight* (10 December 2017), available at <https://www.themalaysianinsight.com/s/26919> (visited 17 August 2018).

211 “Johor Ruler Mocks ‘Senile’ Leader over Ties with Former Foes” *Free Malaysia Today* (23 February 2017), available at <http://www.freemalaysiatoday.com/category/nation/2017/02/23/johor-ruler-mocks-senile-leader-over-ties-with-former-foes/> (visited 17 August 2018).

212 “TMJ Chides ‘Forked Tongue’ Leader” *Malaysiakini* (7 April 2018), available at <https://www.malaysiakini.com/news/418843> (visited 17 August 2018).

213 “Kelantan Palace Revokes Dr M’s Title” *Malaysiakini* (8 February 2018), available at <https://www.malaysiakini.com/news/411591> (visited 17 August 2018).

214 Shannon Teoh, “Mahathir Mohamad Stands Ground, but Royal Feud May Damage Opposition” *Straits Times* (12 December 2017), available at <https://www.straitstimes.com/asia/se-asia/dr-m-stands-ground-but-royal-feud-may-damage-opposition> (visited 17 August 2018).

215 Leslie Lopez, “Malaysia Election: How Power Changed Hands in 24 Hours from Najib to Mahathir” *Straits Times* (10 May 2018), available at <https://www.straitstimes.com/asia/se-asia/malaysia-election-how-power-changed-hands-in-24-hours-from-najib-to-mahathir?xtor=CS3-18> (visited 17 August 2018).

new government “now”.<sup>216</sup> The King summoned Mahathir and the Harapan party leaders at 5 pm but the uncertainty prolonged while the King interviewed the party leaders without Mahathir before, finally, Mahathir was sworn in at 10 pm, ending a nervous 24-hour period. Afterwards, the palace issued a statement strongly denying that the King delayed Mahathir’s appointment.

Prime Minister Mahathir immediately set about cleaning up the government and commencing reforms. He established an advisory “Council of Eminent Persons” (CEP) to oversee governance and economic issues and commence implementing Harapan’s election promises. In turn, the CEP established two committees — the “1MDB Committee” which coordinated renewed investigations into 1MDB and the IRC which, as a priority, set its sights on reforms to five important institutions: the judiciary, the AGC, the police, the MACC and the EC. Public servants who had been partisan were moved from their positions. The Treasury secretary-general (the 1MDB chair) was removed from duties and the Najib-appointed MACC head resigned. Within a week, the ROS suddenly no longer saw irregularities in Bersatu’s affairs and approved Harapan’s registration but, days later, she was reassigned.<sup>217</sup> Her department later conceded in court that Bersatu had always been legally compliant.<sup>218</sup>

Attorney-General Apani Ali was immediately put on gardening leave. However, replacing him precipitated another crisis between the new government and the King. Apani had refused to resign and yet, apparently, the government had taken no steps to remove him from office. In fact, the King had delayed acting on the Prime Minister’s advice to remove Apani and appoint a senior lawyer (Tommy Thomas) as the new Attorney-General, and an impasse had arisen. The King reportedly disagreed with Thomas’s appointment because he was not a Malay-Muslim (as previous Attorneys-General, discounting early British expatriates, had been) but Mahathir refused to submit any other name.<sup>219</sup> The crisis escalated when the King called for an extraordinary meeting of the Conference of Rulers but, at the last moments, the King finally agreed to appoint Thomas and removed Apani.

One month after the election, Chief Justice Raus and President Zulkefli tendered their resignations. That event too involved a small controversy. Since Harapan had contested their extensions as invalid, it was inevitable that the new government would pursue the departure of those judges as part of its promise to clean up the judiciary. Unknown to the public, Raus and Zulkefli had indicated their intention

216 Justin Ong, “Johor Sultan Urges Agong to Pick PM ‘Now’” *Malay Mail* (10 May 2018), available at <https://www.malaymail.com/s/1629322/johor-sultan-urges-agong-to-pick-pm-today> (visited 17 August 2018).

217 “New RoS Chief Appointed” *Malaysiakini* (25 May 2018), available at <https://www.malaysiakini.com/news/426777> (visited 17 August 2018).

218 Ho Kit Yen, “RoS Affirms PPBM as a Valid Party after Deregistration Tussle” *Free Malaysia Today* (14 August 2018), available at <http://www.freemalaysiatoday.com/category/nation/2018/08/14/ros-affirms-ppbm-as-a-valid-party-after-de-registration-tussle/> (visited 17 August 2018).

219 “Govt and Malay Rulers in Standoff over Choice of New A-G” *The Malaysian Insight* (2 June 2018), available at <https://www.themalaysianinsight.com/s/51809> (visited 17 August 2018).

to resign when they met with Prime Minister Mahathir in the first week after GE14 but, apparently after they delayed resigning, the CEP chairperson had met with the judges and allegedly “demanded” their resignations.<sup>220</sup> Lawyers criticised this as an unacceptable interference with the judiciary but they also criticised the judges for meeting privately with the executive. With the resignations, the issue was resolved and in July 2018, new appointments to the four head judge positions were made, all from within the Federal Court.<sup>221</sup>

## V. Conclusions

### A. *Parliament and the executive*

Over the course of time since the attainment of Independence, the executive arm of government has become all powerful, at the expense of the Parliament. The Malaysian Parliament was contemplated as an institution which would play an important role as a pivotal check on abuse of power by the executive and other agencies of government. In a traditional Westminster system of government, Parliament through its various committees and question time could ensure accountability and transparency on the part of the executive. However, years of uninterrupted BN rule and a number of constitutional amendments transformed Parliament into a toothless entity. Appointed senators now outnumber the elected senators, thus rendering the Parliament a “rubber-stamp” of the government of the day. Other bodies which have been entrenched in the Constitution (eg, the EC and the PSC) have, as a result of the power wielded by the Prime Minister, become ineffective bodies. Their ineffectiveness was starkly illustrated by the 1MDB scandal. To survive the scandal, Najib simply dismissed entities which could have forced him to account for his role, and replaced them with loyal supporters. It is clear that the new post-GE14 government has to reform the huge PMD. It is also clear that fundamental reforms to Parliament are vital in order to usher Malaysia into a golden age of a vibrant democracy.

### B. *The judiciary*

Thirty years after 1988, a change in government has finally exposed the judiciary to democratic accountability and provided an unparalleled opportunity to comprehensively reset the judicial branch as an effective check within the system. Many conscientious judges remain within the judiciary. Decisions like *Semenyih Jaya Sdn Bhd v PTD Hulu Langat* were bold attempts to restrain parliamentary

220 “Daim Demanded CJ and COA President Resign, Sri Ram Claims” *Malaysiakini* (10 June 2018), available at <https://www.malaysiakini.com/news/429094> (visited 17 August 2018).

221 Hafiz Yatim, “Richard Malanjum Takes His Oath as New CJ” *Malaysiakini* (11 July 2018), available at <https://www.malaysiakini.com/news/433779> (visited 17 August 2018).

government and without a High Court judge preventing the ROS from dissolving Bersatu, Harapan's road to government would almost certainly have been much more difficult. But reforms were necessary to strengthen the judiciary's institutional independence in order to support the decisional independence of individual judges and enable the judiciary to effectively perform its "check and balance" function. The groundwork for such possible reforms was performed by the IRC which, after calling for public submissions, completed the gargantuan task of completing its report to the government within 60 days.<sup>222</sup>

The first concern was to restore the judiciary's constitutionally entrenched judicial power that the 1988 amendment had purportedly abolished. Attention inevitably focussed on amending Constitution art.121 to reinstate the express provision that "the judicial power of the Federation shall be vested" in the courts. *Semenyih Jaya Sdn Bhd v PTD Hulu Langat* which corrected the position in *PP v Kok Wah Kuan* was not a decision of the Federal Court *en banc* and an express vesting provision was necessary in order to put the issue beyond doubt and prevent any future court departing from *Semenyih Jaya Sdn Bhd* on this point. The re-establishment of the original tripartite structure, showing three co-equal branches taking their basic powers from the Constitution, would also remove doubts created by *Kok Wah Kuan* about the separation doctrine's incorporation within the Constitution. Beyond those issues, however, the occasion also provided the first opportunity since the Constitution was written to recast a fuller conception of judicial review in the system.<sup>223</sup> Central to this objective would be the removal of art.4(2) and amendments to enable judicial review of all legislation, particularly legislation that curtailed fundamental rights. Furthermore, judicial review of executive actions should no longer be merely statute based but should be constitutionally entrenched as well to prevent or at least significantly limit any statutory ouster. Such constitutionally guaranteed review powers were necessary if the Federal Court were to fulfil its claim in *Semenyih Jaya Sdn Bhd* of "keeping every organ and institution of the state within its legal boundary".<sup>224</sup> Whether or not the reforms will eventually go that far, it appears public law is nevertheless set to gain a greater role. In July 2018, the new Chief Justice announced that future constitutional law cases would be heard by nine-judge divisions of the Federal Court including the four head judges.<sup>225</sup> New Attorney-General Tommy Thomas also announced policy changes within the AGC to remove obstacles to judicial review which had been entrenched under the old government and made other proposals to streamline court procedures to enhance access to judicial review. Shortly thereafter, the Attorney-General also disclosed

222 The following discussions on the judiciary and the Attorney-General are based on Richard Foo's submissions to the IRC and subsequent exchanges.

223 See text to note 93.

224 *Semenyih Jaya Sdn Bhd v PTD Hulu Langat* (n.101), [88].

225 V Anbalagan, "CJ Proposes Larger Bench in Constitutional, Public Interest Cases" *Free Malaysia Today* (12 July 2018), available at <http://www.freemalaysiatoday.com/category/nation/2018/07/12/cj-proposes-larger-bench-in-constitutional-public-interest-cases/> (visited 17 August 2018).

that he would be recommending the repeal of ouster clauses and that the AGC would no longer rely on technical objections in public law litigation.<sup>226</sup>

Other reforms involved reviewing both the judiciary’s relationships with the other branches and the judiciary’s mode of internal governance. It was recognised that the executive’s powers which weakened the judiciary’s institutional independence were no longer acceptable and should be dismantled and that instead the judiciary’s capacity to protect its independence should be strengthened.

First, there was little doubt that the long-standing personnel interchangeability between the judicial and the executive branches under the JLS system, and politicisation of that system, has had the insidious effect of undermining judicial independence. It had been an anomaly that executive public servants should be placed in judicial organs to exercise judicial power. Thus, the IRC readily considered separating the JLS into a judicial service and other legal public services for the executive branch.<sup>227</sup> The subordinate judiciary and court registrars would be permanently placed within the judicial service whose governing body would be judiciary-managed and protected from executive influence. This arrangement, if implemented, would nonetheless be only a half-way house and, in the long term, further reforms should restructure the subordinate courts into autonomous courts with permanent judges, like the superior courts.

The shift for subordinate judicial officers to be administered independently from the executive branch also prompted questions about how the superior judiciary’s governance could promote its greater independence. The IRC accepted that while superior court judges held public office and served the public, they were not public servants and should not be treated as such. But the upward-pervading “civil service mindset” combined with the top-down “command and control” administrative system had reinforced the misconception of the judiciary as a type of public service, contrary to its character as the third branch of government. A “command and control” system offered greater scope for abuse by head judges and subjecting individual judges to “disciplined subservience” while external sources could also more easily pervert the judiciary merely by suborning head judges. In contrast, collegiate self-governance, especially in the Federal Court, would allow member judges to act collectively as an internal check against any individual judge attempting to pervert a court. Thus, it was thought imperative that the judiciary should revert to a collegiate model of self-governance, one even stronger than that which originally existed. It was considered that the Councils of Judges should now be given constitutional recognition to emphasise the judiciary’s collegiate character

226 “AG’s Chambers Seeks to Enhance Access to Courts in Judicial Review Cases” *The Star* (23 July 2018), available at <https://www.thestar.com.my/news/nation/2018/07/23/ag-chambers-seeks-to-enhance-access-to-courts-in-judicial-review-cases/> (visited 17 August 2018); Rahmat Khairulrijal, “AG: Govt Will Not Resort to Technicality to Dismiss Lawsuits against It” *New Straits Times* (14 August 2018), available at <https://www.nst.com.my/news/nation/2018/08/401232/ag-govt-will-not-resort-technicality-dismiss-lawsuits-against-it-nsttv> (visited 17 August 2018).

227 See text to notes 235, 236.

and the Constitution should charge the Councils with the collective role of ensuring the judiciary's good governance.

Unsurprisingly, reforms concerning the judicial appointments system took centre stage in the IRC's deliberations. Clearly, the existing appointments system had little capacity to combat politicisation and cronyism because, despite the introduction of the JAC, the system was strongly subject to the control of the government and senior judges. The Raus and Zulkefli incident demonstrated the extent to which the government could freely manipulate judicial appointments at the highest levels, confident that the legal and judicial establishment would fall in line and the public would be powerless to object.<sup>228</sup> A new system was required that could actually remedy the problems exposed. Harapan's election manifesto had proposed removing the Prime Minister altogether from the process and allowing the JAC to decide appointments, subject to the "wisdom and discretion" of the King and the Rulers<sup>229</sup> but that model would deny the unelected judiciary the required democratic link and give the Rulers excessive non-accountable power. The IRC instead examined, among others, the model of the Judicial Appointments Commission for England and Wales but, considering peculiar local needs, also added distinctive innovations. The basic model of a recommending JAC with a final decision by the Prime Minister could be retained but the JAC's role had to be enhanced while the Prime Minister's power had to be regulated. It was considered that the JAC (now only a statutory body) should become a constitutional body and the primary check in the appointments process on the executive appointing power. The JAC's composition would have to be completely revamped. One bold measure envisaged that the head judges would be excluded from the JAC's membership (although they would still be consulted as part of the JAC's selection process) and, instead, reflecting the new collegiate governance, judges elected by the Councils of Judges would represent the judiciary within the JAC. The legal profession (both private and service lawyers) and academia would now also be represented. Another special feature would be the replacement of the "eminent persons" by a significant number of independent-minded and socially diverse lay members who would be appointed not by the government but by a committee involving three independent public bodies: SUHAKAM, the MACC and the central bank.<sup>230</sup> The reformed selection process would require the JAC to select candidates on an open competitive basis based solely on merit and, subject thereto, to enhance diversity

228 V Anbalagan, "Challenge on Judges' Extension Unlikely to Succeed, Says Ex-AG" *Free Malaysia Today* (8 July 2017), available at <http://www.freemalaysiatoday.com/category/nation/2017/07/08/challenge-on-judges-extension-unlikely-to-succeed-says-ex-ag/> (visited 17 August 2018); "Appointment of Chief Justice, Appeal Court President Indisputable, Says Jalsoa" *The Malaysian Insight* (19 August 2017), available at <https://www.themalaysianinsight.com/s/11453/> (visited 17 August 2018). Jalsoa is the Judicial and Legal Service Officers Association.

229 Pakatan Harapan, *Buku Harapan: Rebuilding Our Nation Fulfilling Our Hopes* (Petaling Jaya: Pakatan Harapan) p.50.

230 Reflecting public concerns about human rights, integrity in government and the economy.

within the judiciary. Correspondingly, the Prime Minister would no longer exercise any “prerogative” and could only reject a candidate or request the JAC to reconsider a candidate by giving reasons, and after two such attempts, the Prime Minister had to accept a candidate selected by the JAC. The constitutional requirement to consult the Rulers would remain but an effective JAC system would give the Rulers little need to question appointments.

Finally, the IRC also considered the need for an independent and transparent complaints and discipline system for judicial misconduct. Past events showed that the public had little capacity to hold judges to account because the Prime Minister and the Chief Justice, in whom the discipline power was concentrated, could misuse the power one way or the other without being accountable themselves. The tribunal system could be abused to remove independent-minded judges on specious grounds of misconduct and such abuse could not be stopped while, on the other hand, judges who undermined judicial independence and integrity could not be brought to account. The JEC system<sup>231</sup> added more powers to the Chief Justice without addressing the root problem of misconduct by Chief Justices and their associates. The IRC therefore accepted that effective reforms should break the duopoly of the Prime Minister and the Chief Justice on the discipline power and introduce an independent system with public oversight and accountability that assured fairness to both complainants and judges. Given its limited time, however, the IRC was only able to consider that the issue should be further examined.

Soon after GE14, one news source wryly observed that “senior judges at the Palace of Justice suddenly sound[ed] like judges”.<sup>232</sup> A real culture of judicial independence, of course, does not emerge overnight, particularly given the legacy of a continuing judiciary.<sup>233</sup> The reforms considered by the IRC await further public debate, and it remains to be seen if the judiciary will redeem itself as an independent judiciary and not simply realign itself as governments change.

### C. *The Attorney-General*

Events also brought to a head issues about the Attorney-General’s position. Critical weaknesses, latent in the position since 1963, had been laid bare. It was clear that the Prime Minister’s ability to “hire and fire” an Attorney-General at will had effectively eliminated the position as an independent check within the executive government. An Attorney-General who did not refrain from prosecuting members of the government or who did not supply advice that gave the government’s actions a specious cover of legality could be easily replaced. The upshot, as one Najib

231 See text to note 112.

232 “Yes It’s True, Dr Mahathir Is More Powerful than Ever” *The Malaysian Insight* (9 June 2018), available at <https://www.themalaysianinsight.com/s/53545> (visited 17 August 2018).

233 V Anbalagan, “Sri Ram: Judges Need to Drop Civil Service Mentality” *Free Malaysia Today* (25 July 2018), available at <http://www.freemalaysiatoday.com/category/nation/2018/07/25/sri-ram-judges-need-to-drop-civil-service-mentality/> (visited 17 August 2018).

opponent put it, was that “a crooked PM [need only] appoint a crooked AG”.<sup>234</sup> Reforms were needed to secure both the independence and the accountability that the Attorney-General’s different duties required.

As regards prosecutions, Harapan are apparently pursuing its promise to separate the office of Public Prosecutor completely from the position of Attorney-General while the IRC also considered such a change. The new Public Prosecutor would assume all the prosecution-related powers and head a new non-ministerial department staffed by a separate public prosecutions service. It is expected that the appointment and removal of a Public Prosecutor would involve structures and processes reflecting the reformed systems for appointing and removing judges and that the Public Prosecutor would be given an ample fixed-term tenure to safeguard his independence. The accountability of the prosecution service is expected to be ensured, first, through detailed codes of conduct and prosecutorial practices supported by an independent complaints mechanism and, second, through periodic or *ad hoc* reporting to Parliament and scrutiny by a parliamentary select committee. The shift away from the dangers of executive politicisation necessarily requires accountability to Parliament instead if the prosecution service is to retain the requisite democratic link. Even before reforms were fully decided, it was announced that a new “Public Prosecutor’s Office” which is independent of the PMD would report directly to Parliament.<sup>235</sup>

The Attorney-General would retain all other functions.<sup>236</sup> However, it appears that no other reforms are being contemplated to secure the Attorney-General’s independence. The Attorney-General as the government’s chief legal adviser would remain under the PMD and, in fact, Harapan proposed that the Attorney-General should necessarily be a minister again.<sup>237</sup> The reason for this retrogressive step is unclear. As mentioned earlier, since 1980, the role of legal adviser, undertaken by a “professional” Attorney-General, has already been separated from the role of a minister. The real need now is to better secure a “professional” Attorney-General’s independence and accountability. Events showed that failures in the Attorney-General’s duty to give wholly independent and impartial legal advice to uphold the law and the public interest could have serious national ramifications. Attorney-General Apandi’s advice supporting the Raus and Zulkefli extensions, based on an interpretation of the Constitution generally regarded as far-fetched, resulted in a crisis affecting the nation’s highest judicial positions that further undermined judicial independence generally. If a “professional” Attorney-General’s independence has been seriously problematic,<sup>238</sup> then having a “political” Attorney-General

234 Hafiz Yatim, “Court Dismisses Zaid’s Bid to Challenge AG’s Decision on PM” *Malaysiakini* (11 November 2016), available at <https://www.malaysiakini.com/news/362480> (visited 17 August 2018).

235 Tan, “Massive Overhaul in PM’s Dept with MACC, EC among Agencies Placed under Parliament” (n.37).  
236 *Ibid.*

237 Pakatan Harapan, *Buku Harapan* (n.229) p.43.

238 After his removal, Apandi Ali agreed to join UMNO’s Supreme Council before resiling but the incident reinforced public suspicions about his independence while in office. “It’s Like Coming Home, Says

would only exacerbate the problem by importing the well-known conundrum of whether a party politician and member of the government itself could properly be a non-partisan legal adviser in the public interest. Some other jurisdictions have considered modern reforms to avoid precisely that dilemma.<sup>239</sup> Given the concerns about the Attorney-General’s independence as adviser, further consideration aimed at strengthening the Attorney-General’s post-reforms position will be required.

#### D. *The Rulers*

No legal reforms to the Rulers’ position are envisaged but GE14 also provided valuable lessons about the Rulers’ role in the context of the separation of powers. The decisive action of certain Rulers at critical junctures must be credited with putting the power transition to Harapan beyond doubt. The King and the deputy King had upheld Harapan’s election victory and the Johor Ruler’s action spurred the appointment of a new government. Nonetheless, the power of constitutional monarchy in a democratic system is necessarily limited and the institution must be open to democratic checks. As the 1MDB controversy shows, constitutional rulers are unable to deal with serious governance faults, especially when other systemic safeguards have failed; and to ascribe excessive power to a non-democratic institution might, in some instances, risk democracy itself.

GE14 highlighted the critical issue of the limits of a constitutional monarch’s power in choosing the head of government for the formation of a government. Contests had often occurred at the state level when Rulers asserted their power to choose the head of government rather than accept the majority’s choice, and that phenomenon now appears to have affected this first change of government at the federal level. In this instance, once the King accepted that all the elected representatives from the Harapan component parties constituted the required majority, it was also clear that Mahathir was their agreed choice for Prime Minister who fulfilled Constitution art.43(2). The letter signed by all the Harapan elected representatives conclusively determined the matter and Mahathir should have been sworn in straightaway. Contrasted with the quick initial offer to appoint Wan Azizah, the drawn out circumstances on 10 May 2018 created the impression that Mahathir was appointed only after the Harapan leaders stood their ground. Mahathir later described the delay as a failure to adhere to the law, revealing that most of the other Rulers had disagreed with the delay.<sup>240</sup>

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Apandi of His UMNO Supreme Council Appointment” *The Star* (14 July 2018), available at <https://www.thestar.com.my/news/nation/2018/07/14/its-like-coming-home-says-apandi/> (visited 17 August 2018).

239 See, eg. Joshua Rozenberg, “Queen’s Speech: Reforming the Role of the Attorney General?” *The Guardian* (27 May 2010), available at <https://www.theguardian.com/law/2010/may/27/queens-speech-attorney-general-reform> (visited 17 August 2018).

240 “Malay Rulers Visited Me over A-G Appointment, Says Dr Mahathir” *The Malaysian Insight* (8 June 2018), available at <https://www.themalaysianinsight.com/s/53360> (visited 17 August 2018).

The crisis over the new Attorney-General's appointment reaffirmed the government's authority, for now, over constitutional monarchy. Clearly, the King had only a formal power to appoint an Attorney-General and was obliged to act in accordance with the government's advice under Constitution art.40(1) and 40(1A).<sup>241</sup> The government was entitled to select an appointee, regardless of race or religion, whom it considered best qualified to perform the role of Attorney-General (particularly in pursuing accountability over IMDB and the government's promised institutional reforms).<sup>242</sup> Again, as Mahathir later revealed, the majority of the Rulers also disagreed with the delay which occurred.<sup>243</sup>

Mahathir as Prime Minister is expected to be a formidable check on constitutional monarchy but the Rulers may also encounter new levels of accountability at the popular level as a more questioning public emerges in New Malaysia. Royal personages had acted with obvious political overtones before GE14 in preferring the BN government but their views were rejected in the election.<sup>244</sup> Despite existing sedition laws, criticism against the Rulers has become more vocal after GE14. During the impasse over the new Attorney-General's appointment, a Harapan-connected figure had written a scathing article about the financial cost of monarchy and the Rulers' duty to respect the Constitution like everyone else,<sup>245</sup> and SUHAKAM took the stand that "No issue should be sacrosanct in the context of our democratisation".<sup>246</sup> Another young writer who described monarchy as a "feudal relic" maintained that "in a democracy... no institution is immune from criticism".<sup>247</sup> Such boldness had been rare prior to GE14. After GE14, royals have continued to play an "out-sized role",<sup>248</sup> but future events may confirm that their proper observance of the constraints on their constitutional power is crucial to their given position within the democracy.

241 Farik Zolkepli, "Bar Council: King Is Constitutionally Bound to Accept PM's Choice of Candidate for AG" *The Star* (4 June 2018), available at <https://www.thestar.com.my/news/nation/2018/06/04/bar-council-king-is-constitutionally-bound-to-accept-pms-choice-of-candidate-for-ag/> (visited 17 August 2018).

242 May Robertson, "Delay in Appointing New AG Means Delay in Institutional Reforms, Lawyers Group Says" *Malay Mail* (3 June 2018), available at <https://www.malaymail.com/s/1637805/delay-in-appointing-new-ag-means-delay-in-institutional-reforms-lawyers-gro> (visited 17 August 2018).

243 "Malay Rulers Visited Me over A-G Appointment, Says Dr Mahathir" (n.240).

244 In Johor, the people voted decisively to change the government. "TMJ Chides 'Forked Tongue' Leader" (n.212).

245 A Kadir Jasin, "Constitution: The King and the Pauper" *The Scribe* (4 June 2018), available at <http://kadirjasin.blogspot.com/2018/06/constitution-king-and-pauper.html> (visited 17 August 2018).

246 Razali Ismail, "Press Statement No 20 of 2018" *SUHAKAM* (8 June 2018), available at <http://www.suhakam.org.my/press-statement-no-20-of-2018-on-decision-to-investigate-datuk-a-kadir-jasin-and-hishamuddin-rai/> (visited 17 August 2018).

247 Jasmine Foong, "No One Free from Criticism, Says Lawyer over Article on Monarchy" *Malaysiakini* (11 July 2018), available at <https://www.malaysiakini.com/news/433764> (visited 17 August 2018).

248 "The Royals and Some Lessons from the A-G episode" *The Malaysian Insight* (5 June 2018), available at <https://www.themalaysianinsight.com/s/52680> (visited 17 August 2018).

## VI. Epilogue

Harapan reached their 100th day in government on 17 August 2018 just as this article was completed. Anwar Ibrahim was pardoned on grounds of miscarriage of justice and released from prison just a week after polling day. The 1MDB investigations have progressed and, on 4 July 2018 (57 days after GE14), former Prime Minister Najib was charged in court with the first related charges. His trial will be held in February 2019. The Malaysian people, from all sides of politics, have achieved a remarkable feat in ensuring a peaceful transition of power once feared unlikely and expectations remain high that separation of powers in government will strongly direct their building of a revitalised nation.