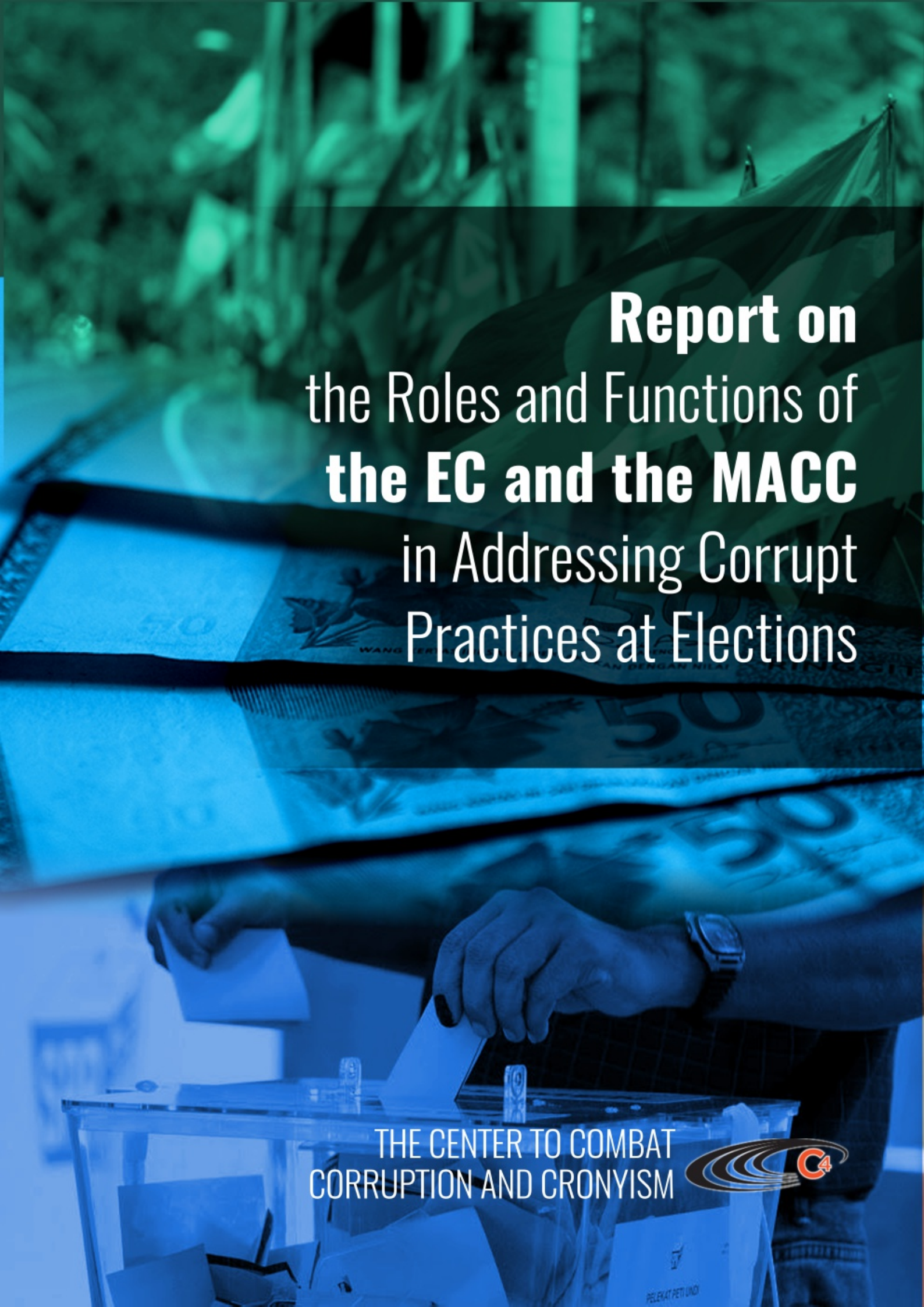

Report on the Roles and Functions of the EC and the MACC in Addressing Corrupt Practices at Elections

THE CENTER TO COMBAT CORRUPTION AND CRONYISM

C4 Center Report
(web version)
on

The Roles and Functions of the ELECTION COMMISSION and the MALAYSIAN ANTI-CORRUPTION COMMISSION In Addressing Corrupt Practices at Elections

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A Legal Analysis

Report On the Roles and Functions of the Election Commission and the Malaysian Anti-Corruption Commission in Addressing Corrupt Practices at Elections

C4 Center Report

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Glossary

1MDB	1Malaysia Development Berhad
C4 Center	Center to Combat Corruption and Cronyism
EC	Election Commission
EOA	Electoral Offences Act 1954
G25	G25 Malaysia
GE13	13th General Elections
MACC	Malaysian Anti-Corruption Commission
MACC Act	Anti-Corruption Commission Act 2009
People's Tribunal	The People’s Tribunal on Malaysia’s 13th General Elections
UDHR	Universal Declaration of Human Rights

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Introduction and Rationale

Watchers of Malaysian politics know that incidents of corrupt practices at elections are extremely pervasive in Malaysia. Massive vote-buying at elections is so commonplace that it is no longer shocking news.

Cogent evidence of corrupt practices has been documented systematically by election observers. But when they are brought to the attention of both the Election Commission (EC) and the Malaysian Anti-Corruption Commission (MACC), they are quick to pass the buck—saying that the matter is within neither of their purviews.[1] This has led concerned civil society organisations and electoral observers to ask the question, what does the law say about whose responsibility it is for enforcing electoral laws? How can we make those involved accountable?

This report aims to address these questions by:

(1) analysing existing laws governing corrupt practices committed during elections, in particular the Election Offences Act 1954 (EOA) and the Anti-Corruption Commission Act 2009 (MACC Act);

(2) examining the roles of the EC and the MACC under the existing laws in addressing issues related to corrupt practices committed during elections;

(3) identifying the enforcement body mandated to enforce the laws that criminalise corrupt practices at elections and the legal loopholes that enable these practices; and,

(4) identifying contextual incidences that should also be considered corrupt practices under the law.

This report will highlight a number of cases of electoral misconduct, in particular corrupt practices, documented by a group of election observers known as PEMANTAU during the 13th General Elections (GE 13) in 2013 and the 11th Sarawak State Elections in 2016 and conclude with a number of recommendations that are aimed at enhancing the effectiveness of the enforcement of the existing laws to combat corrupt practices at elections.

This report aims to clarify the roles and functions of both enforcement bodies (the EC and MACC) in addressing corrupt practices at elections and answer the question of who is and/or should be responsible for enforcing the existing laws. Understanding the enforcement gaps created by the legal loopholes is key to addressing the question of effective enforcement of the existing laws enacted to uphold electoral integrity.

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Context

Elections in Malaysia

There is consensus among States that elections are the foundation of democracy.[1] Elections provide a space for people to participate in the country's decision-making process, by choosing through voting their government that would administer the country. It is therefore imperative that elections be conducted freely and fairly in the interest of accurately representing the people's will.

Elections in Malaysia are provided for under Part VIII of the Federal Constitution (Articles 113 to 120). The provisions of Part VIII of the Federal Constitution spell out matters related to the conduct of elections (elections to the House of Representatives and the Legislative Assemblies of the States and prepare and revise electoral rolls for such elections), the establishment of the Election Commission (EC), assistance to the EC, federal constituencies, state constituencies, method of challenging election, method of questioning election petition of no return, qualifications of electors, and direct elections to the Senate. Furthermore, the right to vote is enshrined in Article 119 of the Federal Constitution.

Article 114 of the Federal Constitution provides for the establishment of the EC—a body tasked with conducting elections. It is noteworthy that Article 114(2) of the Federal Constitution puts emphasis on the importance of securing an EC that enjoys public confidence. In order to ensure that the EC enjoys public confidence, it is therefore imperative that elections are conducted in accordance with principles that promote electoral fairness and integrity.

It bears mentioning that the founding members of the Federal Constitution had affirmed the need to guarantee fundamental rights of individuals as the protection of these rights is key to upholding democracy.[2] In their words:

> *"A federal constitution defines and guarantees the rights of the Federation and the States: it is usual and in our opinion right that it should also define and guarantee certain fundamental individual rights which are generally regarded as essential conditions for a free and democratic way of life."*[3]

The protection of fundamental rights therefore forms the bedrock of Malaysian Parliamentary democracy, and this aspiration is clearly embodied in the Proclamation of Independence of Malaya:

> *"AND WHEREAS by the Federal Constitution aforesaid provision is made to safeguard the rights and prerogatives of Their Highness, the Rulers and the fundamental rights and liberties of the people and to provide for the peaceful and orderly advancement of the Persekutuan Tanah Melayu as a constitutional monarchy based on Parliamentary democracy."*[4]

Fundamental rights or liberties are specifically enshrined in Part II of the Federal Constitution. Among the fundamental rights protected under Part II of the Federal Constitution are the right to liberty of the person (Article 5), the right to equality (Article 8) and the right to freedom of speech, assembly, and association (Article 10). It is important to note the United Nations Human Rights Committee in reaffirming the obligation of States to protect the right to vote emphasised that "the right to freedom of expression, assembly, and association are essential conditions for the effective exercise of the right to vote".[5] The protection of the right to freedom of expression, assembly, and association and the right to vote under the Federal Constitution clearly demonstrates that these rights are indivisible, interdependent, and interrelated.

Given the Federal Constitution's recognition of the need to protect fundamental rights which would enable the realisation of the right to vote – a right which is integral to democracy and expressly provided for under the Federal Constitution – and the requirement that the EC enjoys public confidence, the government therefore has a constitutional obligation to uphold the right to free and fair elections.

The right to free and fair elections is also enshrined in the 1948 Universal Declaration of Human Rights (UDHR)—an international document that embodies fundamental human rights which ought to be universally protected by all States. Article 21(3) of the UDHR states that:

> *"The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting procedures."*

As a signatory to the UDHR, Malaysia therefore has a moral obligation to respect, uphold, and protect the rights embodied in the UDHR, which include the right to free and fair elections. Malaysian citizens had formed Bersih 2.0, a coalition of civil society organisations to demand free and fair elections. However, the Bersih 2.0 chairperson was arrested and detained in 2016 under Malaysia's security law. In turn, United Nations human rights experts responded by affirming that the call for a free, fair, and transparent election system is in consonance with international human rights law and also beneficial to society at large.[6]

The People's Tribunal on Malaysia's 13th General Elections

In response to gross irregularities, cheating, and corrupt practices in electoral practice, Bersih 2.0 was formed to push for a thorough reform of the electoral process in Malaysia.[7] In rebutting the claim by the EC that Malaysia's elections are fair, Bersih 2.0 emphasised that:

> *"Malaysian citizens themselves have expressed concerns over unfair and fraudulent elections in GE13, which led BERSIH 2.0 to set up the People's Tribunal to investigate and examine their claims. Supported by 30-strong legal team, the tribunal gathered evidence and witness statements from public hearings held nationwide, which included allegations of manipulation, excess expenditure, bribery, rigging and other electoral irregularities."*[8]

The People's Tribunal on Malaysia's 13th General Elections (People's Tribunal) was set up to investigate claims of gross irregularities, cheating, and corruption in the conduct of the GE 13 which were held in 2013.[9] The People's Tribunal's purpose was to examine whether any acts committed at the GE 13 violated the rule of law, international standards, and norms governing the conduct of elections.[10]

In concluding that the GE 13 violated standards of free and fair elections, the People's Tribunal articulated that:

> *"No doubt there were examples of 'mere' maladministration, but the Tribunal has no hesitation in holding that many of the shortcomings were both systematic and systemic."*[11]

As regards corrupt practices committed during the GE 13, the People's Tribunal found that:

> *"The evidence of bribery was strong. The PEMANTAU observers reported that money, hand-outs (vouchers/tickets/travel reimbursements), and promises of economic benefit upon victory by a particular candidate in exchange of votes were common practice, especially by BN. Food and drinks were distributed."*[12]

The Culture of Money Politics and Political Financing

Prime Minister Najib Razak has previously admitted to receiving donations from foreign sources to run elections.[13] It has also been reported that some funds from the controversial 1Malaysia Development Berhad or known as 1MDB—the world's biggest financial scandal—were used to finance the Prime Minister's campaign in the GE 13 in 2013.[14] Professor Bridget Welsh in her analysis on money politics in the 11th Sarawak State Elections in 2016 noted that:

> *"Money politics in Sarawak extends directly to individual voters beyond promises and projects. Voters are also given money and other favors directly. The amount of money involved here is estimated to reach well over RM1 billion. As in GE 2013, the Sarawak polls has featured regular 'free' dinners. These are not under the 1MDB label as occurred in West Malaysia, but are clearly organised by BN officials wearing their signature navy blue.*
>
> *Thousands are given a free meal, and prizes are raffled off as voters are encouraged to support the incumbent coalition. Many leave with a door prize of RM1000 or even higher. To put these funds in perspective, the Najib government has announced a new monthly minimum wage of RM920 during the Sarawak campaign. Amounts given are more than some monthly wages, and there is more expected on the final day of polling."*[15]

The Prime Minister's admission to receiving donations from foreign sources to run

elections highlighted two implications—firstly, the existence of secret political funds controlled by individuals or trustees, and secondly, access to phenomenal foreign funding which implies illegal political financing threatens the legitimacy of political parties.[16] This sad state of affairs has created an environment that allows the practice of money politics to be perpetuated with impunity. This is evident in the controversy that erupted during the Sibu by-election campaign in 2010 where Prime Minister Najib Razak had openly announced to a crowd that if Robert Lau won the by-election and became a member of Parliament, the government would prepare a cheque of RM5 million and give it to the people living in the constituency.[17]

This deeply embedded culture of money politics is closely linked to unregulated political financing. The practice of money politics is empowered and emboldened by the absence of transparent and accountable political financing laws to regulate the conduct of political parties in sourcing funds to run their party activities and sustain the party's survival. The absence of effective frameworks to ensure transparent and accountable political financing has huge implications on the legitimacy of Malaysian politics as it creates an uneven playing field and environment that breeds corruption and abuse of power.

In August 2015, the Prime Minister announced the setting up of a bipartisan panel called the National Consultative Committee on Political Funding to work on legislative reforms in relation to political financing.[18] In response to this move, G25 Malaysia (G25), a civil society group consisting of prominent former civil servants, and the Center to Combat Corruption and Cronyism (C4 Center) proceeded to draft a report recommending legislative and institutional reforms of political financing in Malaysia.[19]

G25 and C4 Center in their report highlighted a number of implications which result from the existing gap created by the absence of a transparent and accountable framework to regulate political financing—growing monetisation of politics given the substantial private funds flowing into the political sphere, unequal access to funding which creates an uneven playing field which undermines electoral fairness, covert funding of both political parties and actors, and money-based factionalism which would undermine public confidence.[20] This existing gap leaves the door wide open for the culture of money politics to continue to thrive with impunity. In light of this, G25 and C4 Center proposed that a Political Parties Act be enacted to create a comprehensive and standardised framework to regulate political funding.

It is noteworthy that among the worst cases of vote-buying at elections that were reported were from the early 1960s to late 1980s—the Sabah state government, under Tun Mustapha and then Datuk Harris Salleh, was involved in mass vote-buying where every adult Sabahan was given RM60 through the Sabah Foundation prior to every Sabah state election.[21]

The above observation demonstrates that Malaysia has a long history of money politics, in particular vote-buying at elections. The finding by the People's Tribunal as regards corrupt practices committed during the GE 13 and the finding by PEMANTAU, the election observers deployed by Bersih 2.0, on the same during the 11th Sarawak State Elections in 2016 reaffirm how the culture of money politics has continued to allow corrupt practices to be committed with impunity.

Abuse of Power by a Caretaker Government

In addition to vote-buying, abuse of power by a caretaker government during the election period has also been raised as an issue of concern because government resources were abused for partisan gain during the electoral period.

The Federal Constitution does not expressly provide for the appointment of a caretaker government after the dissolution of Parliament. However, there is a Commonwealth convention which provides that even though the government does not have to be reappointed after the dissolution of Parliament, it must remain politically neutral.

In articulating the roles of a caretaker government during the interim period after Parliament is dissolved which includes election campaigning, constitutional expert Dr Shad Saleem Faruqi stated that members of the caretaker government must refrain themselves from using their positions, government machinery, or funds for political gains.[22]

This long-established convention however has not been followed by the caretaker government. The breach of the caretaker government's obligation to refrain from using its position and resources for political gains during election campaigning period is evident in the GE 13 and the 11th Sarawak State Elections.[23]

Manipulation of Constituency Boundaries: Malapportionment and Gerrymandering

The principle of "one person, one vote" has become a widely recognised criterion for determining constituency boundaries (a process known as delineation or redelineation). Article 2(6) of the *Declaration on Criteria for Free and Fair Elections* reaffirms this principle where it states that "Every voter is entitled to exercise his or her right equally with others and to have his or her vote accorded equivalent weight to that of others".[24] The application of this principle is key to establishing equality in voting and representation in government.

The "one person, one vote" principle is enshrined in the Thirteen Schedule (Articles 116 and 117) of the Federal Constitution. Section 2(c) of the Thirteen Schedule specifically spells out the condition for ensuring that all electors have approximately equal voting power in order to be equally represented in government. Section 2(c) of the Thirteen Schedule reads:

> *"(c) the number of electors within each constituency in a State ought to be approximately equal except that, having regard to the greater difficulty of reaching electors in the country districts and the other disadvantages facing rural constituencies, a measure of weightage for area ought to be given to such constituencies..."*

Section 2(c) of the Thirteen Schedule serves as a safeguard against manipulation of constituency boundaries in order to ensure that individuals have equal voting power. Non-compliance with section 2(c) of the Thirteen Schedule will result in malapportionment. Manipulation of constituency boundaries by way of malapportionment can be seen in the delineation of six constituencies in Selangor namely Petaling Jaya Utara (voters increased from 84,000 to 150,000), Serdang (voters increased from 139,000 to 146,000), Klang (voters increased from 98,000 to 141,000), Petaling Jaya Selatan (voters increased from 78,000 to 129,000), Kelana Jaya (voters increased from 110,000 to 128,000), and Kota Raja (voters

increased from 110,000 to 121,000).[25]

Section 2 of the Thirteen Schedule also prescribes conditions that ought to be fulfilled by the EC before drawing constituency boundaries. The conditions are:

> *"(a) while having regard to the desirability of giving all electors reasonably convenient opportunities of going to the polls, constituencies ought to be delimited so that they do not cross State boundaries and regard ought to be had to the inconveniences of State constituencies crossing the boundaries of federal constituencies;*
>
> *(b) regard ought to be had to the administrative facilities available within the constituencies for the establishment of the necessary registration and polling machines;*
>
> *(c) the number of electors within each constituency in a State ought to be approximately equal except that, having regard to the greater difficulty of reaching electors in the country districts and the other disadvantages facing rural constituencies, a measure of weightage for area ought to be given to such constituencies; n*
>
> *(d) regard ought to be had to the inconveniences attendant on alterations of constituencies, and to the maintenance of local ties."*

The Malaysian Bar Council Constitutional Committee observed that the four conditions provided for under section 2 of the Thirteen Schedule serves as a safeguard against manipulation of electoral boundaries which would favour one party – a practice also known as gerrymandering.[26] Manipulation of constituency boundaries by way of gerrymandering is evident in the recent redelineation exercise in Sawarak which was aimed to give the Barisan Nasional a winning chance.[27]

Manipulation of constituency boundaries by way of malapportionment and gerrymandering clearly violates the safeguard embodied in Schedule Thirteen of the Federal Constitution. This violation undermines electoral fairness and integrity and has negative implications on the voters' right to equal voting power which is fundamental to ensuring that they have equal representation in government.

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Legal Framework

Elections in Malaysia are governed by a number of laws such as:

1) **The Election Offences Act 1954** (an Act to prevent electoral offences and corrupt and illegal practices at elections; to provide for the establishment of enforcement teams and for matters connected therewith; to provide for the appointment of election agents and to control election expenses; and to provide for election petitions);
2) **The Election Commission Act 1957** (an Act to make provision for the remuneration, privileges and protection of members of the Election Commission, for the punishment of offences in connection with the Election Commission, and for other matters connected with it);
3) **The Elections Act 1958** (an Act providing for elections to the Dewan Rakyat and to the Legislative Assemblies of the States);
4) **The Malaysian Anti-Corruption Commission Act 2009** (an Act to make provisions for the establishment of the Malaysian Anti-Corruption Commission and for the prevention of corruption).

The Election Offences Act 1954

The Elections Offences Act 1954 (EOA) was enacted, inter alia, to deal with three offences namely electoral offences and corrupt and illegal practices at elections. The preamble to the EOA states that:

> *"An Act to prevent electoral offences and corrupt and illegal practices at elections; to provide for the establishment of enforcement teams and for matters connected therewith; to provide for the appointment of election agents and to control election expenses; and to provide for election petitions."*

Part II of the EOA (sections 4, 5, and 6) deals with election offences—the commission of fraudulent acts related to the handling of the register of electors and ballot paper, the acts of promoting feelings of ill-will or hostility, and the maintenance of secrecy at elections. Part III of the EOA (sections 7, 8, 9, and 10) deals with corrupt practices at elections and spells out acts amounting to corrupt practices. Part IV of the EOA (sections 15A, 19, and 20) deals with, inter alia, illegal practices—prohibition of certain expenses during the campaign period.

This report will specifically focus on and examine offences amounting to corrupt practices at elections under Part III of the EOA and both the functions of the EC and the MACC under the EOA and other relevant laws.

Corrupt Practices under the EOA

Offences amounting to corrupt practices under Part III the EOA are provided for under sections 7, 8, 9, and 10 (see opposite).

It is important to note that the list of offences amounting to corrupt practices provided for under sections 8 (treating), 9 (undue influence), 10 (bribery) of the EOA covers both **direct** and **indirect** acts committed to induce any person to vote or refrain from voting.

As regards **treating** under section 8 of the EOA, a person is guilty of the offence if he/she commits direct or indirect vote-buying—giving or providing tangible items such as money, food, drinks, refreshment, provisions, or tickets.

Section 9 of the EOA provides that a person is guilty of **undue influence** if he/she interferes with a person's free exercise of his/her right to vote or refrain from voting. This particular section would therefore be applicable to government officials who have been reportedly warning civil servants that they would find out whom the civil servants would vote for.[1] It is also worth noting that a person's vote is secret and any person who breaches the secrecy of the vote commits an offence under section 5 of the EOA which deals with **maintenance of secrecy** at elections.

In reference to the offence of **bribery** under section 10 of the EOA, a person is guilty of the offence if he/she commits direct or indirect vote-buying—giving or offering money, office, place, employment, gift, or loan before, during or after an election. Section 10 of the EOA also covers **promises made to procure or to endeavour to procure valuable consideration** in order to induce any elector of voter to vote or refrain from voting. Valuable consideration would therefore include promises made for the implementation of development projects—projects which would normally require substantial amount of funds—promises which are often made by individuals such as candidates, supporters, ministers, or those in the positions of power —individuals who would participate in election campaigns to gain votes.

It is noteworthy that the provisions of section 7, 8, 9, and 10 dealing respectively with personation, treating, undue influence, and bribery under Part III of the EOA use the words "**every person**" which is wide enough to cover every single person—not only candidates—to be liable for committing these offences.

Legal Definitions of Corrupt Practices Under the EOA

Section 7 - Personation

"Every person who at an election applies for a ballot paper in the name of some other person, whether that name be that of a person living or dead, or of a fictitious person or who, having voted once at any such election, applies at the same election for a ballot paper in his own name, shall be guilty of the offence of personation."

Section 8 - Treating

"Every person who, corruptly, by himself or by any other person, either before, during or after an election, directly or indirectly gives or provides or causes to be given or provided, or is accessory to the giving or providing, or pays or engages to pay wholly or in part, the expense of giving or providing any food, drink, refreshment or provision, or any money or ticket or other means or device to enable the procuring of any food, drink, refreshment or provision, to or for any person for the purpose of corruptly influencing that person or any other person to give or refrain from giving his vote at such election or on account of any such person or any other person having voted or refrained from voting or being about to vote or refrain from voting at such election, and every elector or voter who corruptly accepts or takes any such food, drink, or refreshment or provision or any such money or ticket or who adopts such other means or device to enable the procuring of such food, drink, refreshment or provision shall be guilty of the offence of treating."

Section 9(1) & 9(2) - Undue Influence

Section 9(1) –

Every person who, before, during or after an election, directly or indirectly, by himself or by any other person on his behalf, makes use of or threatens to make use of any force, violence, or restraint, or inflicts or threatens to inflict, by himself or by any other person, any temporal or spiritual injury, damage, harm, or loss upon or against any person in order to induce or compel such person to vote or refrain from voting, or on account of such person having voted or refrained from voting, at any election, or who by abduction, duress, or any fraudulent device or contrivance impedes or prevents the free exercise of the franchise of any elector or voter, or thereby compels, induces, or prevails upon any elector or voter either to give or refrain from giving his vote at any election, or who directly or indirectly interferes or attempts to interfere with the free exercise by any person of any electoral right shall be guilty of the offence of undue influence.

Section 9(2) –

A person shall be deemed to interfere with the free exercise of the electoral right of a person within the meaning of this section who induces or attempts to induce such person to believe that he, or any person in whom he is interested, will become or will be rendered an object of divine displeasure or spiritual censure."

Section 10(a) - Bribery

Section 10(a) –

"every person who, before, during or after an election, directly or indirectly, by himself or by any other person on his behalf, gives, lends, or agrees to give or lend, or offers, promises, or promises to procure or to endeavour to procure, any money or valuable consideration to or for any elector or voter, or to or for any person on behalf of any elector or voter or to or for any other person, in order to induce any elector or voter to vote or refrain from voting, or corruptly does any such act as aforesaid on account of such elector or voter having voted or refrained from voting at any election;"

Section 10(b) –

"every person who, before, during or after an election, directly or indirectly, by himself or by any other person on his behalf, gives or procures, or agrees to give or procure, or offers, promises, or promises to procure or to endeavour to procure, any office, place or employment to or for any elector or

Legal Definitions of Corrupt Practices Under the EOA

Section 10(a) - Bribery (continued)

voter, or to or for any person on behalf of any elector or voter, or to or for any other person, in order to induce such elector or voter to vote or refrain from voting, or corruptly does any such act as aforesaid on account of any elector or voter having voted or refrained from voting at any election;"

Section 10(c) –

"every person who, before, during or after an election, directly or indirectly, by himself or by any other person on his behalf, makes any such gift, loan, offer, promise, procurement, or agreement as aforesaid to or for any person in order to induce such person to procure or endeavour to procure the election of any person, or the vote of any elector or voter at any election;"

Section 10(d) –

"every person who, either before or during an election, upon or in consequence of any such gift, loan, offer, promise, procurement or agreement, procures or engages, promises or endeavours to procure, the election of any person, or the vote of any elector or voter at an election;"

Section 10(e) –

"every person who, either before or during an election, advances or pays or causes to be paid any money to, or to the use of, any other person with the intent that such money or any part thereof shall be expended in bribery at any election or who knowingly pays or causes to be paid any money to any person in discharge or repayment of any money wholly or in part expended in bribery at any such election;"

Section 10(f) –

"every elector or voter who, before or during any election directly or indirectly, by himself or by any other person on his behalf, receives, agrees, or contracts for any money, gift, loan, or valuable consideration, office, place or employment, for himself or for any other person, for voting or agreeing to vote or for refraining or agreeing to refrain from voting at any such election;"

Section 10(g) –

"every person who, after any election, directly or indirectly, by himself or by any other person on his behalf, receives any money or valuable consideration on account of any person having voted or refrained from voting or having induced any other person to vote or to refrain from voting at any such election;"

Section 10(h) –

"every person who, after an election, directly or indirectly, by himself or by any other person on his behalf, on account of and as payment for voting or for having voted or for agreeing or having agreed to vote for any candidate at an election, or on account of and as payment for his having assisted or agreed to assist any candidate at an election, applies to such candidate, or to his agent or agents, for the gift or loan of any money or valuable consideration, or for the promise of the gift or loan of any money or valuable consideration or for any office, place or employment or for the promise of any office, place or employment; and"

Section 10(i) –

"every person who, either before or during an election, directly or indirectly, by himself or by any person on his behalf, in order to induce any other person to agree to be nominated as a candidate or to refrain from becoming a candidate or to withdraw if he has become a candidate, gives or procures any office, place or employment, or agrees to give or procure or offers or promises to procure or to endeavour to procure any office, place or employment, to or for such other person, or gives or lends, or agrees to give or lend, or offers, or promises to procure or to endeavour to procure any money or valuable consideration to or for any person or to or for such other person, or to or for any person on behalf of such other person."

It is important to note that the practice of money politics, in particular vote-buying at elections takes different forms. Teh Yik Koon in his analysis of money politics in Malaysia articulated that:

> *"Vote buying takes many different forms. They can, however, be categorised into two categories - direct and indirect buying of votes. The direct way is used mainly during election time where money and presents are distributed to voters. The indirect way is done over the long term to win the support of the people, for example, giving government business contracts to the supporters, approving development projects at the supporters' area and nominating the supporters as office bearers at some local community organisations."*[2]

This analysis highlights the elements of corrupt practices embodied in the EOA.

Punishment for Corrupt Practices under the EOA

As regards punishment for corrupt practices committed under sections 7, 8, 9, and 10 of the EOA, **section 11(1)(a) and (b)** of the EOA stipulates that on conviction, a person is liable to imprisonment not less than one thousand ringgit and not more than five thousand ringgit.

Section 11(2) of the EOA further provides that a person who is convicted of a corrupt practice under the EOA shall become incapable of being registered or listed as an elector or of voting at any election or of being elected at any election, and if at that date he/she has been elected at any election, his/her seat shall be vacated from the date of such conviction.

The Functions of the Election Commission under the EOA

Section 27B of the EOA provides that the EC may, if it considers it necessary, establish an enforcement team tasked with monitoring and controlling the activities of the candidates during elections. Section 27B of the EOA states that:

> *"The Election Commission may, if the Commission considers it necessary, establish an enforcement team or any number of enforcement teams for the purpose of monitoring and controlling the activities of the candidates during the campaign period until the expiration of the polling day."*

Section 27E of the EOA stipulates the functions of the enforcement team established by the EC. Section 27E of the EOA states that:

> *"27E. The functions of the enforcement team are—*
>
> *(a) to patrol, and to monitor the activities of the candidates, in its area of control to ensure that written laws relating to elections are being complied with;*
>
> *(b) to bring down or cause to be brought down immediately any campaign material in its area of control which contravenes or does not comply with any written laws relating to elections;*
>
> *(c) to stop or cause to be stopped any open public address or lecture held in its area of control which contravenes or does not comply with any written*

laws relating to elections, and, if it is necessary to detain any person involved with the open public address or lecture;

(d) to control and coordinate the carrying out of any campaign activity specified in any written law relating to elections in its area of control."

Despite the fact that section 27B provides for the establishment of an enforcement team, it however does not make it mandatory for the EC to establish the enforcement team. It is important to note that in the event the EC decides to establish an enforcement team, the functions of the enforcement team however do not include the power to investigate any suspected offence under the EOA.

The absence of express provisions to make it mandatory for the EC to establish the enforcement team limits its role and effectiveness as a body charged with the conduct of elections. This limitation creates a huge enforcement gap which prevents the full and meaningful implementation of the existing provisions of the EOA which is key to ensuring electoral integrity.

The Functions of the Malaysian Anti-Corruption Commission under the MACC Act

The MACC Act was enacted in 2009 to provide for the establishment of the Malaysian Anti-Corruption Commission (MACC), to make further and better provisions to deal with corruption, and matters related to it.[3]

The power to deal with corrupt practices at elections (offences under Part III of the EOA) is expressly provided for under sections 7 and 3 of the MACC Act.

Section 7 of the MACC Act stipulates the functions of the Commission. Sections 7(a) and 7(b) of the MACC Act in particular state that:

"The officers of the Commission shall have the following functions:

(a) To receive and consider any report of the commission of an offence under this Act and investigate such of the reports as the Chief Commissioner or the officers consider practicable;"

(b) to detect and investigate –

(i) any suspected offence under this Act;
(ii) any suspected attempt to commit any offence under this Act; and
(iii) any suspected conspiracy to commit any offence under this Act;"

Section 3 of the MACC Act provides that the term "offence under this Act" includes a prescribed offence. Section 3(c) of the MACC Act defines "prescribed offence" as offences which include "an offence under Part III of the Election Offences Act 1954".

Sections 3(c), 7(a), and 7(c) of the MACC Act clearly provide power to the MACC to investigate offences related to corrupt practices stipulated under Part III of the EOA. In light of these express provisions, the obligation to hold those who commit corrupt practices under Part III of the EOA accountable lies with the MACC. It is important to highlight that this power to investigate is only confined to offences under Part III (corrupt practices) of the EOA.

Comparatively, a more extensive mandate was given to the Independent Commission Against Corruption (ICAC) of Hong Kong where it is empowered to investigate alleged offences under the Elections (Corrupt and Illegal Conduct) Ordinance—a law similar to the EOA.[4] The preamble to the Ordinance states that:

> *"An Ordinance to prohibit corrupt conduct and illegal conduct at elections; to regulate electoral advertising; to impose requirements with respect to the receipt of donations and the expenditure of money at or in connection with elections; and to provide for related matters."*

Corrupt conduct under the Ordinance involves bribery, use of force or duress against candidates or prospective candidates, deceptive behaviour, defacing or destroying nomination or ballot papers, treating, impersonation, and making improper use of election donations. Illegal conduct under the Ordinance involves mismanagement of election expenses, publishing false statements about candidates, and publishing election advertisement that includes false claim of support.

Endnotes

1 The Malaysian Insight, Your vote is secret, Dr Mahathir assures civil servants, 26 July 2017, https://www.themalaysianinsight.com/s/8716/

2 Teh Yik Koon, Money Politics in Malaysia, *Journal of Contemporary Asia*, Vol. 32 Mo. 3, 2002.

3 Preamble to the Malaysian Anti-Corruption Act 2009

4 Hong Kong Independent Commission Against Corruption, http://www.icac.org.hk/en/about/power/index.html

EC's Mandate

MACC's Mandate

Section 27B of the EOA

The EC may, if it considers it necessary establish an enforcement team tasked with monitoring and controlling the activities of the candidates during elections.

Section 7(a) and 7(b) of the MACC Act

Function of the MACC:

(a) to receive and consider any report of the commission of an offence under this Act and investigate such of the reports as the Chief Commissioner or the officers consider practicable.

(b) to detect and investigate—

(i) any suspected offence under this Act.

(ii) any suspected attempt to commit any offence under this Act.

(iii) any suspected conspiracy to commit any offence under this Act.

Section 27E of the EOA, Functions of the Enforcement Team

(a) to patrol, and to monitor the activities of the candidates, in its area of control to ensure that written laws relating to elections are being complied with.

(b) to bring down or cause to be brought down immediately any campaign material in its area of control which contravenes or does not comply with any written laws relating to elections.

(c) to stop or cause to be stopped any open public address or lecture held in its area of control which contravenes or does not comply with any written laws relating to elections, and, if it is necessary to detain any person involved with the open public address or lecture.

(d) to control and coordinate the carrying out of any campaign activity specified in any written law relating to elections in its area of control.

Section 3 of the MACC Act, Interpretation

"offence under this Act" includes a prescribed offence; "prescribed offence" means—

(a) any offence under any written law as specified in the Schedule.

(b) an offence punishable under section 137 of the Customs Act 1967.

(c) an offence under Part III of the Elections Offences Act 1954.

(d) an attempt to commit any of the offences referred to in paragraphs (a) to (c).

(e) an abetment of or a criminal conspiracy to commit (as those terms are defined in the Penal Code) any of the offences referred to in paragraphs (a) to (c), whether or not the offence is committed in consequence thereof.

4

Cases of Corrupt Practice

Cases of corrupt practices at elections have been systematically documented by PEMANTAU. Among the cases of corrupt practices at elections documented during the GE 13 and the 11th Sarawak State Elections in 2016 are:

Cases documented by PEMANTAU in the GE 13

1) *Johan Bin Abu Bakar, political assistant to Abdul Halim Hussain, candidate for the State seat of Teluk Bahang testified that he saw people receiving RM160 from BN after the elections using vouchers or having had their name pre-registered before the elections.*[1]

2) *Batin Yok Ek Bin Cantan, Batin Tihang Bin Yok Chupuk, and Sani a/l Subang described how the Orang Asli Welfare Department told 12 village chiefs who attended a meeting in Kuantan, Pahang to vote for BN. The Department also distributed RM200 for each and every village chief who attended the meeting. The village chiefs then called all the villagers together and told them to vote for BN, telling them any villager who voted for the opposition would receive a police summons—as told by the BN state candidate Wan Rosdy. Wan Rosdy distributed RM20 for each villager and promised a further RM80 if the BN candidate won.*[2]

3) *Vasantha Kumar, PKR candidate for Tapah parliamentary seat saw Orang Asli being given rice and other food items packed in plastic bags with the BN candidate's photo and name, and the BN logo "Undilah BN" (Vote for BN).*[3]

Cases documented by PEMANTAU in the 11th Sarawak State Elections in 2016

1) *Local villagers in Pekan Bau received between RM30 to RM 40 for attending Barisan Nasional campaign events.*[4]

2) *On nomination say in Telang Usan, those present to support Barisan Nasional candidates were given RM20.*[5]

3) *In Long Bemang, five groups were given RM2000 each to prepare food for Dennis Ngau's visit.*[6]

4) *Adenan Satem gave RM10 million to 235 landowners for the Pan Borneo Highway.*[7]

5) *In Miri, Barisan Nasional candidates for Mulu, Telang Usan, and Ba'kelalan provided free food to over 1000 people at the five star Pullman Hotel.*[8]

The cases highlighted above clearly demonstrate violations of section 10 (bribery) and section 8 (treating) of the EOA.

Endnotes

1 Appendix A: People's Tribunal on GE 13 Evidence: Statutory Declaration 46, Johan Bin Abu Bakar, p. 37, http://www.bersih.org/wp-content/uploads/2014/03/Peoples-Tribunal-on-GE13-Findings-Report.pdf

2 ibid. p. 37: Statutory Declaration 61, Yok Ek Bin Cantan; Statutory Declaration 62, Tihang Bin Yok Chupuk; and Statutory Declaration 64, Sani a/l Subang.

3 ibid. p. 37: Statutory Declaration 54, Vasanthakumar a/l Krishnan.

4 PEMANTAU Report: 11th Sarawak State Election, PEMANTAU, p.21, http://www.bersih.org/wp-content/uploads/2016/09/Sarawak-Pemantau-Report_v3_A5_1.pdf

5 ibid., p. 22

6 ibid., p. 22

7 ibid., p. 23

8 ibid., p. 29

5

Recommendations

In light of the above analysis, we have 6 recommendations to make:

1. **MACC Act amendments.**

   Section 3(c) of the MACC Act which defines "prescribed offence" should be amended to include offences under Part II (election offences) and Part IV (illegal practices) of the EOA. This proposed amendment will extend the power of the MACC to investigate offences under Part II of the EOA and Part IV of the EOA. It is noteworthy that this proposed amendment would mirror the power of the Hong Kong ICAC—where the Commission is mandated to investigate all offences under the Hong Kong Elections (Corrupt and Illegal Conduct) Ordinance which is similar to the EOA.

2. **Caretaker Government amendments.**

   Offences amounting to corrupt practices under Part III of the EOA should be expanded to include abuse of power by a caretaker government committed during election campaign period and manipulation of constituency boundaries by way of malapportionment and gerrymandering.

3. **Enforcement team amendments.**

   Section 27B of the EOA should be amended to make the establishment of enforcement teams by the EC to monitor and control election activities mandatory.

4. **EC to engage civil society.**

   Civil society organisations working on electoral reforms and anti-corruption should be included in the training of the enforcement teams set up by the EC.

5. **EC to coordinate with enforcement agencies.**

   The EC should actively monitor the conduct of elections and coordinate with all enforcement authorities, in particular the police force and the MACC in order to ensure compliance with the existing laws dealing with corruption, abuse of power, and political violence. The EC should immediately lodge a report with the MACC and

other relevant authorities upon the discovery of non-compliance with the existing laws governing the conduct of elections.

6. MACC to investigate previous complaints.

The MACC should review all complaints brought to their attention and immediately investigate allegations of corrupt practices committed during the GE 13 and the 11th Sarawak State elections pursuant to sections 3(c), 7(a), and 7(c) of the MACC Act.

6

Conclusions

The practice of money politics which is manifested in massive vote-buying at elections has immensely defined the landscape of Malaysia's electoral politics which is laden with corruption and abuse of power. This deeply embedded culture of money politics has created an uneven level playing field and empowered the culture of impunity, thus making the quest for accountability an uphill battle.

This report has analysed and clarified:

(1) the existing laws governing corrupt practices committed during elections, in particular the Election Offences Act 1954 (EOA) and the Anti-Corruption Commission Act 2009 (MACC Act);

(2) the roles of the EC and the MACC under the existing laws in addressing issues related to corrupt practices committed during elections;

(3) the enforcement body mandated to enforce the laws that criminalise corrupt practices at elections and the legal loopholes that are enabling these practices; and,

(4) contextual incidences that should also be considered corrupt practices under the law.

Cast in this light, it is therefore imperative that the existing laws dealing with corrupt practices committed during elections be duly reformed, strengthened, and enforced in order to uphold electoral fairness and integrity. We urge that the recommendations put forth in this report be implemented without further delay.

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The Center to Combat Corruption and Cronyism (C4 Center) is a policy advocacy, non-profit center, dedicated to fighting corruption, cronyism and its related problems at all levels of government. We seek to open up governments and change the culture of governance by placing accountability, transparency and integrity at the heart of public policy and administration.

C4 Center works with public institutions, governments, political parties, and civil society organisations to build our vision of a corruption-free and open society.

MAJOR ADVOCACY AREAS

Political Financing and Cross-Border Corruption: We initiate political-legal research to publicly publishing reports on public mismanagement, push government agencies to be independent and accountable, and spearhead a good governance agenda programme.

Freedom of Information (FOI): We work towards embedding the culture of transparency in government, establishing a Federal FOI Law, increasing the proactive publication of data, strengthening whistleblower rights and aiding communities in using their rights to access public information.

Forest Governance and Sustainable Development: Recognising graft and abuse of public office within municipal councils and land administration, we put in effort to reach out to communities and to champion sustainable development as a anti-corruption issue.

Closing Civic Spaces: Authorities are increasingly narrowing civic spaces where citizens are free to exercise their right to demand accountability. We take on digital, alternative and innovative methods to engage with publics to ensure their voices are heard–through board games, apps and websites.

International Initiatives: We work with the UNCAC Coalition and the Conference of State Parties in support of the UN Convention Against Corruption, and are driving asset recovery advocacy for laundered funds originating from Malaysia.

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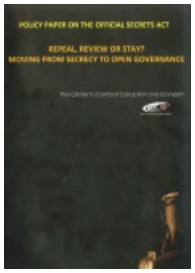

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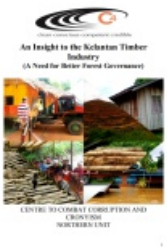

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