

Appointment of the PM after the polls

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By Tommy Thomas

COMMENT Truth is the first casualty in the BN-controlled mass media in the final run-up to the 13th general election.

Among the falsehoods widely disseminated is firstly, the extent and scope of the discretion of the Agong in inviting a person to become the prime minister in order to form the next federal government; and secondly, the allegation that the BN is regarded as 'one party' while Pakatan Rakyat is considered 'a coalition' is relevant in computing the level of support in the Dewan Rakyat for the purpose of appointing a prime minister.

We have to turn to the federal constitution for the answers. Article 40(2) provides that 'the ... Agong may act in his discretion in the performance of the following functions, that is to say, (a) the appointment of a prime minister'.

The words 'in his discretion' may indicate that the Agong has a wide discretion. However, Article 43(2)(a) substantially narrows such discretion by stating that the Agong shall 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'.

Hence, within the terms of the constitution itself, the Agong cannot act with total freedom. Instead, the prime minister so appointed must be:

(i) a member of the Dewan Rakyat (as opposed to being a Senator); and

(ii) must be able to command the confidence of the majority, that is, at least 112 members of parliament out of a total membership of 222.

Articles 40(2) and 43(2)(a) merely set out in express terms the constitutional convention which has existed for at least two centuries of the Westminster type of parliamentary government which Malaysia has.

We have a government, elected once in five years, which is responsible to Parliament, that is, a government that is accountable to the elected branch of the legislature.

Because that is a fundamental pillar of parliamentary democracy, a person can only be the prime minister if he can initially command, and subsequently retain for the entire parliamentary term of five years, the confidence of the majority of the members of the Dewan Rakyat.

It would be noted that the terms 'party' and 'coalition of parties' are not referred to in Article 43(2)(b). That represents the constitutional position. Under the constitution, how a

prime minister achieves a majority in the Dewan Rakyat is not stated.

The constitution, intended to serve as the nation's supreme law for posterity, is deliberately drafted in wide, broad and general terms, and is also to be interpreted in a liberal and generous fashion. What is fundamental is the ability of a prime minister to control the majority of the Dewan Rakyat so that he has a stable government.

The task facing the Agong, as constitutional monarch, is clear when appointing a prime minister after a general election (as opposed to the death or retirement of a prime minister).

He invites the leader of the coalition of parties - either Najib Abdul Razak or Anwar Ibrahim - who enjoys the support of 112 or more members of the Dewan Rakyat. It is as simple and plain as that.

The political reality is the dominance of parties in the modern democratic system, and more significantly, the use of the party whip to ensure discipline among party members.

This means that parties (or coalitions of parties) are the dominant actors in the political realm. They choose the candidates, fund them, and ensure that they run on the party ticket supporting the party manifesto.

The electorate invariably votes for the party, rather than the candidate, although there are always charismatic candidates who would personally receive some votes, rather than through their party.

After the election, the successful members of parliament accept the party whip and vote with their party throughout the life of that Parliament. The party itself elects its leader.

Thus, for all practical purposes, the leader of the political party that has won the general elections will be invited by the monarch to form the next government; for example, Tony Blair leading the Labour Party to victory in 1998, and being invited by Queen Elizabeth to become prime minister. In such circumstances, the monarch has absolutely no choice in the matter.

In Malaysia, no single party (not even Umno) has been able to command the majority of the members of the Dewan Rakyat. Instead, the first government of independent Malaya which took power on Aug 31, 1957 was the Alliance coalition comprising Umno, MCA and MIC.

In 1972, the Alliance expanded into the BN coalition which now consists of 14 different political parties. All the six prime ministers headed coalitions, and that trend will continue in the foreseeable future.

Disingenuous argument

The disinformation circulating in the BN mass media is that there is a major distinction

between the BN and Pakatan coalitions which the Agong should take into account when appointing a prime minister after the GE13.

According to this argument, the BN has been registered as a political party by the Registrar of Societies (ROS) under the Societies Act, 1966.

As a result, all the candidates for the 222 parliamentary seats contested by the BN will stand on a common BN ticket. In contrast, Pakatan candidates will contest as PAS, PKR or DAP candidates rather than as Pakatan candidates.

This is a wholly disingenuous argument. What is never disclosed is that the ROS is a bureaucrat totally subservient to the BN government. He never acts independently, fairly or correctly.

Just one example of his bias would be sufficient: it should be recalled when the High Court declared Umno illegal in 1986, the ROS immediately approved Prime Minister Dr Mahathir Mohamad's application for the formation of Umno Baru while rejecting the application by former premiers Tunku Abdul Rahman and Hussein Onn for the registration of their own political party.

Therefore it is not surprising to learn that the ROS rejected Pakatan's application to register itself as a political party while approving BN's similar application. Thus, Pakatan is prevented from contesting as a single party.

In such circumstances, by the abuse of the law, Pakatan is not treated the same way by BN. Surely that cannot objectively be a relevant factor in the exercise of the Agong's discretion under Article 43(2)(b) as to who is likely to command the confidence of the majority of the Dewan Rakyat.

What stands out in this general election is a close contest which offers a simple, straight-forward choice between the BN and Pakatan.

Likewise, it is a simple, straight-forward choice between Najib and Anwar as prime minister. Indeed, in the presidential style campaign adopted by Najib, his personality is very much emphasised, rather than that of Umno or BN.

The 13.3 million voters are also aware that they have this simple, straight-forward choice in the ballot box, and are being invited to vote along such lines in straight fights in nearly all the seats.

Against this background, it is absolutely flawed to argue that Najib can take into account all the BN members of parliament when computing his support in the Dewan Rakyat, but Anwar can only take into account the PKR parliamentarians (but not the others who were elected under DAP, PAS or other Pakatan-friendly parties). This myth must be demolished.

Like all Malaysians, the Agong and palace advisers will be closely following the campaign,

the elections and the results. The Agong is entitled constitutionally to exercise his judgment quietly, calmly, freely, independently and impartially. No pressure or threat must be used to influence the Agong.

There must be no repeat of the shameful episode in Sabah in April 1985 which resulted in the grab for power by Datu Mustapha Datu Harun and Harris Salleh which became the subject of litigation in *Tun Mustapha Harun v Tun Mohd Adnan Robert and Datuk Joseph Pairin Kitigan* [1986] 2 MLJ 420.

Most critically, the Agong is entitled to receive independent legal advice, that is, independent of BN and Pakatan.

This means that the Attorney-General's (AG) Chambers, which has been in the forefront of giving partisan legal advice to the BN government for years, and the AG who is personally beholden to Najib and who has prosecuted Anwar since 1998, should not also advise the Agong in this most important constitutional duty - the appointment of the next prime minister.

The Agong should look elsewhere for independent legal advice, if that becomes necessary.

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