

Federalism and the COVID-19 Crisis: State-Federal Tensions Arise in Malaysia



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Already a highly centralised federal system, the COVID-19 pandemic led Malaysia's federal government to adopt even more top-down approaches in managing the public health crisis. Led by a new political coalition barely two weeks old when the crisis emerged, the federal government - through its National Security Council (NSC) chaired by the Prime Minister – would be the primary decision-making platform in responding to the crisis. The measures issued by the NSC included a strict movement control order (MCO) lasting six and a half weeks between 18 March and 3 May. During this period all industries were ordered to close, with the exception of essential goods and services. The NSC would also later make the decision to open up the economy under a conditional MCO (CMCO), allowing most industries to resume operations from 4 May.

In its very first meeting to discuss COVID-19 mitigation plans, the federal government excluded the heads of state governments controlled by the opposition coalition, although later it reversed this decision and invited the subnational leaders to subsequent meetings. This sparked initial tensions between the federal and state governments, which would later flare up again when states were not meaningfully consulted on reopening plans.

The law used to enforce the MCO and the CMCO is the Prevention and Control of Infectious Disease Act 1988, which sets out which authorities are permitted to act and under what circumstances during an outbreak. The Prevention and Control of Infectious Diseases (Declaration of Infected Local Areas) Order 2020 defined the "infected area" to include all states and three federal territories in Malaysia.

Unlike some countries which announced that their versions of a lockdown would last for a month or more, to be potentially extended once or twice before easing, the authorities in Malaysia only declared the MCO extensions every two weeks. As such, up to the end of the strict MCO, there were four different phases, each of which had regulatory variations that often caused negative unintended consequences. For instance, initially people required police permission to travel between states. But the requirement was dropped when thousands of Malaysians crowded police stations before the deadline, causing even more public contact en masse. Interstate travel was later restricted only to industries with official authorization, but many companies could not obtain approval quickly enough within the respective phase of the MCO before different rules were introduced in the following phase. Having slightly amended rules for different phases caused some confusion amongst the public, requiring them to check the new regulatory requirements every two weeks.

State governments also issued their own regulations for business operating hours of shops, eateries, petrol stations, and markets. They are empowered to do so because local governments have the authority to regulate operating hours, and to set conditions for the issuing of licenses and permits (which they issue). Crucially, local governments fall under state jurisdiction as provided for under the Federal





Constitution's Ninth Schedule. The Local Government Act 1976 is a robust piece of legislation that grants local governments, amongst other powers, the ability to preserve public health and prevent the outbreak and spread of diseases, as well as the jurisdiction to regulate and enforce quarantine, the disinfection of persons, and the disinfection of places and things. Of course, if any of these measures had been in direct contravention of the federal government's legal requirements under the MCO, the federal law would prevail. Article 81 of the Federal Constitution says that state government authority must be exercised so as not to impede or prejudice the exercise of the federal government's executive authority.

The legal interpretation of this principle became much more pertinent when the federal government abruptly announced that the MCO would ease, giving only three days' notice. Nine state governments in total reacted immediately by saying they would either not follow (Kedah, Sabah, Pahang, Penang, Kelantan and Sarawak) or not fully comply (Selangor, Perak and Negeri Sembilan) with the easing of the virus control measures concerning economic activity, otherwise known as the CMCO. They believed that the reopening of all sectors and industries was too abrupt, arguing that buffer time was needed to allow state governments and companies to adopt new standard operating procedures (SOPs) to ensure hygiene and public health.

Some experts cited Article 81 (above) in arguing that states must adhere to the federal law of the Prevention and Control of Infectious Diseases Act 1988, because all states had in 1989

agreed to promulgate a uniform law to prevent and control infectious diseases in Malaysia, enforceable throughout the country. There is, however, an alternative, and equally compelling view advanced by other experts. This is that states have the right to defy the federal government's law based on the fact that the Federal Constitution places public health, sanitation, and prevention of infectious diseases within the Concurrent List in the Ninth Schedule. It is also bolstered by the provisions of the Local Government Act as described above. Since all laws must adhere to the supremacy of the Federal Constitution, this means that both federal and state governments are to jointly decide on issues pertaining to these areas with equal weight.

Because the Constitution is vague on how "joint decisions" are to be made, it has never been clear whether state legislative assemblies need to vote on a particular matter of concurrent interest - and further, pass state-level legislation to that end - or whether mere 'consultation' is all that is required. At a meeting held on 28 April between the federal and state governments, the gradual reopening of the economy was apparently raised by the Prime Minister. However, one state government chief executive (the Chief Minister of opposition-led Penang) claims that the following approach was agreed at the meeting: first, the "District Risk Reduction Programme" proposal by the federal Ministry of Health was for only "green zones" to be reopened; second, the official SOPs were to be shared with all states in advance of any reopening; and third, the states were to be given time to strategise. However, the federal government proceeded on 1 May to announce that

all zones – green, orange, and red – would simultaneously reopen on 4 May, without informing the states or sending them the SOPs.

The federal government responded harshly with a statement saying that companies may possibly sue state governments if they refused to reopen. This was rebutted by the Penang state government, which stated that it was prepared to face legal challenges from industry players “if that is the repercussion for protecting its people” from the pandemic. While there may be different interpretations as to the legality of states’ non-compliance, it is evident that in order for any solution to the COVID-19 crisis and its accompanying economic fallout to work, it must win the support of everyone in the country, across all states and sectors.

The experience of tackling the COVID-19 crisis has highlighted yet again the tensions between federal and state governments in Malaysia. The new reality is that state governments, regardless of political affiliation (five out of the nine non-complying states were in the same political coalition as the ruling government), will begin to seek to exercise their legitimate constitutional rights more actively. Although Malaysia has been accustomed to a strong, highly fiscally and administratively centralised federal government since its independence in 1957, this is now very likely to gradually change. Federalism formed the very foundations of the nation, and states and local governments are well-placed to determine their own risk levels. They are better suited to comprehend the unique needs of their respective states’ geographic and demographic circumstances. In fact,

alongside the federal government’s fiscal stimulus package of approximately RM30 billion, many states complemented this by implementing their own aid packages to small businesses, frontline health workers, and low-income households.

The COVID-19 crisis is unlikely to end anytime soon, with some experts predicting it will take as long as 18 months before a vaccination is publicly available. In order to obtain the buy-in of all segments of society within all states required to deal effectively with the impact of the virus, the federal government’s decision-making processes will have to adapt to be more meaningfully inclusive and consultative. There is also growing concern that by choosing not to table the economic stimulus package for debate and approval in Parliament, this exacerbates the federal government’s executive dominance with no room for scrutiny from parliamentarians, a proportion of whom represent states across the country. Finally, the federal government is also faced with greater pressures on its public purse, as oil prices have plummeted. Approximately 20 percent of Malaysia’s national revenues are derived from oil and its fiscal deficit is growing as a result of the lower prices. Decentralising the country’s fiscal management will permit states to take some responsibility for the nation’s post-crisis economic recovery. In the long run, whether or not the federal government recognises it, the COVID-19 crisis has decentralised governance in ways that will change public administration in Malaysia for good.

