

APPOINTMENT OF A PRIME MINISTER

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This essay examines the nature and extent of, and the limits on, the monumental power of the Yang di-Pertuan Agong to appoint a Prime Minister in a host of situations - after a General Election; if the PM resigns, if the PM is incapacitated or dies in office; if he loses the confidence of the majority of the members of the House; or when he is disowned by his party or coalition. The constitutional issues surrounding the controversial elevation of Tan Sri Muhyiddin Yassin to the post of the 8th Prime Minister of Malaysia are also examined.

INTRODUCTION

In the aftermath of a general election or due to a vacancy in the office of the Prime Minister caused by any reason whatsoever - whether death, incapacitation, resignation or loss of confidence of the majority¹ - the most critical and controversial issue is the appointment of the Prime Minister (PM).

The Federal Constitution does not provide comprehensive guidance about the murky world of government formation. If a party or coalition commands the confidence of an absolute majority² of the members of the Dewan Rakyat, the King has no choice but to choose its leader as the PM. However, in many conceivable circumstances the Yang di-Pertuan Agong (the Malaysian King) has a wide margin of discretion and his wisdom and sagacity can be tested seriously. The exercise by him of his royal discretion can alter the course of the nation's history. This is in fact what happened on March 1, 2020.

FALL OF THE MAHATHIR GOVERNMENT

In an unexpected and shocking move, Prime Minister Tun Dr Mahathir Mohamad submitted his resignation to the Yang di-Pertuan Agong on 24 February 2020 – just 22 months after his Pakatan Harapan (PH) coalition won a comfortable majority in Parliament at the 14th General Election in May 2018.

The resignation was perhaps triggered by two major factors. First, constant squabbles between the Mahathir and Anwar factions in PH over the timetable for handing over the mantle of leadership to Dato' Seri Anwar Ibrahim. Second, irreconcilable differences within Tun Mahathir's own BERSATU party on the extent of cooperation with arch-rivals UMNO and PAS to form a new Malay centric government. It is reported that Tun Mahathir was receptive to

¹ The loss of confidence may be on a vote of no-confidence or reflected by events outside the House.

² Majorities can be (i) simple i.e. 50% + 1 of those present and voting, (ii) absolute majority i.e. 50% + 1 of the total membership of the House, or (iii) special majority which in Malaysia is 2/3 of the total membership though it can be % or any other proportion in other countries.

recruiting individual members of UMNO but not the party as a whole as many of its leaders were facing criminal charges in the courts. Tan Sri Muhyiddin Yassin was in favour of a full link-up between BERSATU and UMNO.³

Party realignments: Soon after Mahathir's resignation, new political alignments emerged and re-emerged and the Pakatan Harapan (PH) government collapsed after it lost its parliamentary majority. It is reported that PH's numbers were reduced from 129 to 92 due to the withdrawal of Bersatu's 26 MPs and the defection of 11 PKR MPs to the new Perikatan Nasional coalition headed by Tan Sri Muhyiddin Yassin.

King's response: On receipt of the PM's letter of resignation, the King followed a constitutional convention and asked Tun Mahathir to continue in an interim capacity till a new appointment was made.

The King then chose the unprecedented and remarkable measure of interviewing all 222 MPs personally to determine which political leader was likely to obtain the support of a majority of the members of Parliament. The one-to-one audience of the MPs with the King in the presence of the Chief Secretary to the Government, lasted two days. During the audience, written declarations were obtained from the MPs. It is not known who, if any, aspirant for the PM's post managed to obtain the endorsement of at least 112 out of the 222 MPs to form a majority government. Due to the fluidity of the political situation, many MPs switched loyalties after their audience with the King and it appears that none of the three contenders - Tun Mahathir, Dato' Seri Anwar Ibrahim and Tan Sri Muhyiddin Yassin - commanded a clear majority in the Dewan Rakyat.⁴ Who commanded the largest number of votes is also not known as there was no official release of data from the Istana. The situation appeared to be one of a "hung Parliament". This was confirmed by the interim Prime Minister who revealed that "no candidate has been able to gain the majority support of Malaysia's 222 MPs, and hence, the matter will be referred to Parliament".⁵ Tun Mahathir also told reporters on Thursday (Feb 27) evening after his audience with the King that a special parliamentary session would be held on March 2 to deal with the issue".⁶

Mahathir's attempt to convene Parliament: At one point, however, Tun Mahathir claimed that he had enough support to form the government. He sought to have his majority tested in the Dewan Rakyat by writing to the Speaker of the Dewan Rakyat, Tan Sri Mohamad Ariff Yusof, to convene the House on March 2 instead of March 10 (the date on which it was scheduled to meet). Presumably Tun Mahathir was acting under Standing Order 11(3) of the Dewan Rakyat which states that:

³ Audrey Wilson, *foreignpolicy.com/2020/02/25*; Shannon Teoh, *The Straits Times, Singapore*, Feb. 27, 2020.

⁴ For a few days after the PM's resignation, many MPs from Bersatu, PKR and DAP were switching camps and avowing loyalty to rival leaders in much the same way the traditional Malay game of hopscotch called Teng-teng is played by children.

⁵ Trinna Leong, "Mahathir confirms no candidate has majority as PM; Parliament to decide at next sitting", *The Straits Times*, Feb. 27, 2020.

⁶ ibid

"If during an adjournment of the House, it is represented to Tuan Yang di-Pertua by the Prime Minister that the public interest requires that the House should meet at an earlier date than that to which the House was adjourned, Tuan Yang di-Pertua shall give notice thereof forthwith and the House shall meet at the time stated in such notice.

The Interim Prime Minister's request was, however, turned down by the Speaker on three main grounds. First, that the House "could only be convened after the Yang di-Pertuan Agong decides on the formation of a new government".⁷ The power to appoint the PM rests with the King under Article 43(2)(a) and should not be usurped by the House. Second, there was a serious procedural flaw in the interim PM's request in that the interim PM failed to appoint "the business set down for that day" as required by S.O. 11(3). Third, the notice of the meeting should be given by the Speaker and not the PM.

APPOINTMENT OF TAN SRI MUHYIDDIN AS PM

After interviewing individual MPs and party leaders, the Yang di-Pertuan Agong also consulted with his brother Rulers. A special meeting of the Conference of Rulers was called on 28 February.⁸ Next day (29 February) the Palace announced the King's decision to appoint Tan Sri Muhyiddin Yassin as Malaysia's 8th Prime Minister. The Palace announcement stated that "Upon getting the representation from all parties' representatives and independent MPs, it is ... the opinion of Yang di-Pertuan Agong that the one who most likely to have received the trust of the majority of MPs is the Pagoh MP, Muhyiddin".⁹

The Palace announcement did not claim that Muhyiddin had proved his majority but that he was "most likely to" obtain the trust of the majority. This is within the contemplation of Article 43(2)(a), under which whoever "is *likely* to command the confidence of the majority" is eligible to be appointed as PM. However, what is significant is that the King did not impose on the new PM any time frame to summon Parliament in order to test and prove the confidence of the parliamentary majority.¹⁰

The British newspaper, *The Guardian*, went on to describe the installation of the Muhyiddin government as a "royal coup".¹¹ Many Malaysians reacted to this view with anger and indignation and pointed out that the King "painstakingly interviewed all MPs until he was satisfied that a government could be formed, and decided swiftly to restore stability to the country. All this was within his constitutional authority to do".¹² There is no doubt that the

⁷ "Speaker Rejects Mahathir's Bid to Call for Special Dewan Sitting", *FMT Reporters*, February 28, 2020

⁸ It is reported that some NGOs like Majlis Perundingan Melayu (MPM) or Malay Consultative Council with several other NGOs sent a memorandum to the Yang di-Pertuan Agong at about 10.15am on 28.02.20.

⁹ "Palace: Muhyiddin to be sworn in as PM", *The Star*, 29 Feb. 2020.

¹⁰ In fact, the reverse happened. The newly appointed PM postponed the convening of Parliament from March 10 to May 18. This postponement could not have been done unilaterally by the PM as it is the King whose earlier summon to Parliament for March 10 under Article 55(1) had to be cancelled and postponed to May 18.

¹¹ [theguardian.com/commentisfree/2020/mar/03](https://www.theguardian.com/commentisfree/2020/mar/03)

¹² freemalaysiatoday.com/category/nation/2020/03/04

political chaos of shifting loyalties on and after February 24th left the King with difficult constitutional choices. Neither Mahathir, nor Anwar nor Muhyiddin seemed to have a commanding majority. There was a hung Parliament. The cabinet had been dissolved and the government was at a standstill. The economy was running aground. A new general election was not desirable due to the state of the economy and the covid-19 pandemic.

Formation of the Muhyiddin cabinet: The new PM took nine days to form his 70-member Cabinet¹³ which was sworn in on March 10. Some constitutional issues were raised about the undue delay of nine days to swear in the new Ministers. However, there was no violation of the law as no time limits are prescribed in the laws. The size of the cabinet (70) aroused concern because this has significant economic implications in terms of salaries and allowances. The Constitution does not impose any limits on the number of ministers who can be appointed. Out of the 70 ministers, one is a PM, 4 are Senior Ministers, 27 are cabinet ministers, and 38 are deputy ministers. Whether there will be additional Parliamentary Secretaries (Article 43B) and Political Secretaries (Article 43C) is not known. Virtually every supporter of the government in Parliament may end up having an executive post!¹⁴

No Deputy Prime Minister (DPM) was appointed. This is perfectly legal as the post of DPM is not mentioned in the Constitution and is purely conventional. Instead of a DPM, four Ministers were anointed as “senior Ministers”. This is quite innovative as the Constitution in Articles 43 and 43A talks of Ministers and Deputy Ministers and there is nothing about Senior Ministers in either the Constitution or other laws.¹⁵ However, the matter can be regarded as the creation of a new convention as in countries like Singapore and Indonesia.

Six of the ministers are from the Senate. This is permitted by the Constitution which in Article 43(2)(b) states that Ministers (other than the PM) can belong to either House of Parliament.¹⁶

In relation to PM Muhyiddin’s cabinet appointments, the greatest criticism is centred around the choice of MPs to helm the important portfolios. Some of these criticisms are understandable. But one must note the systemic constraints a PM works under in a parliamentary system.

Unlike the system in the USA where the President is permitted to draw upon any talent outside the Congress, the Malaysian Prime Minister is constrained by Article 43(2)(b) to choose his colleagues from among members of either House. It is inevitable that many old war horses will be bridled. Political realities demand that all coalition partners, all States of the federation, all races, religions and regions and both genders get some representation. The PM is expected to

¹³ This is reported to be the largest cabinet in Malaysia’s history consisting of the PM, 4 Senior Ministers, 27 other Cabinet Ministers and 38 Deputy Ministers.

¹⁴ At the time of writing there was news of new appointments including the appointment of the PAS leader to a cabinet rank post.

¹⁵ Refer to Ministerial Functions Act 1969 [Act 2].

¹⁶ What is noteworthy, however, is that the appointment of some Senators to the cabinet was made in advance of their swearing in.

award portfolios to senior members of his party or coalition irrespective of their individual qualities. The leading politicians may even stipulate the posts they are prepared to accept.

All in all, the PM appoints some individuals primarily for their competence, some for their ability to represent important factions and some for their personal loyalty. Cabinet formation in a coalition government is an acrobatic feat of political juggling.

Postponement of the sitting of parliament: A disappointing fact was that instead of facing the Dewan Rakyat to obtain an immediate vote of confidence, the new PM postponed the summoning of Parliament from March 10 to May 18.¹⁷ Though it cannot be confirmed, it is presumed that the PM did not act unilaterally. It is presumed that he sought and obtained the Yang di-Pertuan Agong's consent. The power of summoning Parliament under Article 55(1) belongs to the Yang di-Pertuan Agong who acts on the advice of the Prime Minister under Article 40(1). The command to the Speaker to postpone the summoning of the House and fix a new and much later date must also come from the King under Article 55(1).

Despite the legality of the postponement, it aroused the suspicion that PM Muhyiddin lacked a majority in Parliament and was not eager to face the representatives of the people and was adroitly making use of Article 55(1). The Article mandates that no more than six months must elapse between the last sitting in one session and the first meeting in the next session. The last meeting of the Dewan Rakyat was on 5 December 2019. This means that the Dewan can legally remain adjourned till 4 June 2020. At the time of writing there are questions about whether and how the sitting of the Malaysian Parliament can be further postponed due to the COVID-19 health crisis? It is submitted that no postponement beyond 4 June is possible due to the constitutional command in Article 55(1). The home-stay order in the infectious diseases regulations¹⁸ cannot override the supreme Constitution. One suggestion is to have a virtual meeting through video-conferencing. A second solution is for each political party to send a limited number of MPs to attend Parliament. This will satisfy the quorum requirement of 26¹⁹ (excluding the chair), and at the same time maintain the "social distancing" on the floor of the House due to the covid-19 crisis. A third extreme possibility is for the Yang di-Pertuan Agong, acting on advice, to proclaim an emergency under Article 150(1) and promulgate an Emergency Ordinance to dissolve or prorogue Parliament due to the emergency.

When the postponement of Parliament was announced, some lawyers suggested that the PH coalition (or what remained of it) must invoke the courts' power of judicial review to challenge the inordinate delay in convening Parliament which last met on 5 December 2019 and was now scheduled to meet next on 18 May. Knocking on the doors of justice for legal redress is, of course, a legal right but it would have dragged the courts into the vortex of partisan party politics from which the institution would not have emerged a winner.

¹⁷ theedgemarkets.com, February 25, 2020; nst.com.my/news/politics/2020/03/571644.

¹⁸ Prevention and Control of Infectious Diseases Act 1988 and the Prevention and Control of Infectious Diseases (Measures Within the Infected Local Areas) Regulations 2020.

¹⁹ Standing Orders of the Dewan Rakyat, S.O. 13.

A similar situation occurred in the UK in August 2019. Prime Minister Boris Johnson advised the Queen to prorogue Parliament despite the impending exit of Britain from the European Union. The matter was challenged in the court in the case of *R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland*.²⁰ The High Court ruled that the issue of prorogation was purely political and not fit for judicial determination. On appeal, however, the Supreme Court ruled that the prorogation was reviewable and unlawful; “because it had the effect of frustrating or preventing the ability of parliament to carry out its constitutional functions without reasonable justification.”

Backdoor government: A serious criticism levelled against the Muhyiddin government was that it was an undemocratic “backdoor government” that was created by 30 or so conniving party-hoppers who were able to overturn the electoral verdict of GE-2018. This criticism is justified. However, it must be noted that party-hopping, crossing the floor or defection is a system-based (systemic) problem of all parliamentary democracies. The “Westminster system” does not guarantee security of tenure to a party or coalition that triumphs at a democratic election. In parliamentary democracies, unlike in presidential systems like in the USA, the elected government must not only win an election but must, on daily basis, maintain the confidence of the representative assembly. If there is a vote of no-confidence or a loss of majority due to the despicable but legally permissible practice of party-hopping, the government elected by the people loses power, becomes the opposition and those rejected by the people at the poll are allowed to seize the leadership of the nation. This is what happened in Malaysia in 2020. The government of the day has undoubtedly legality but must work hard to earn democratic legitimacy.

These and many other issues caused a political turmoil whose fires are still smouldering. The national and international criticisms that followed the appointment of the new Prime Minister and the new cabinet require a thorough examination of the constitutional provisions dealing with these engaging constitutional issues.

YANG DI-PERTUAN AGONG’S POWER TO APPOINT

Controlled discretion: Under Articles 40(2)(a) and 43(2)(a) the appointment of the prime minister is an undoubtedly discretionary function of the Yang di-Pertuan Agong. However, though the discretion is broad, it is not absolute. In a democratic, rule of law society, with constitutional provisions for democratic elections, the Monarch’s power to choose a PM cannot be absolute and must be exercised within the perimeters of the Constitution and conventions. However, the relevant constitutional rules, and the scope of the discretion, may vary from situation to situation.

²⁰ [2019] UKSC 41

Not bound by advice of Conference of Rulers: In the exercise of his discretion to appoint a Prime Minister, is the King bound by the advice of or instruction from the Conference of Rulers? From a purely legal perspective, the answer has to be in the negative. Though the Conference of Rulers elects the King and has the power to remove him from office²¹ this does not entitle the Conference to dictate to the King how to perform the multifarious functions assigned to him by the Constitution.²² The power to appoint and remove does not carry within it the authority to dictate how the appointee should perform his constitutional functions. For example, superior court judges are appointed by the King and are removable by him²³ but this does not permit the King to tell judges how to adjudicate any dispute. The detailed functions of the Conference of Rules are outlined in Articles 2(b), 38, 121, 159, 181, 182, 183 and the Third and Fifth Schedule of the Constitution. Advising on the appointment of the federal PM is not mentioned anywhere as within the authority of the Conference of Rulers. What is noteworthy is that the Conference is required to be consulted by the King on some appointments, for example of superior court judges²⁴ and some Commissions²⁵ but there is no mention of the need to consult the Conference in the appointment of the Prime Minister. However, there is nothing illegal about the Yang di-Pertuan Agong consulting with his brother rulers on this or any other matter. Consultation does not carry any duty to comply with the advice rendered.

ROYAL POWERS AFTER A DISSOLUTION

Once elections are called, a significant new power equation may come into place. Much will depend on the relationship between the King and the PM and the political realities of the day.

Appointment of a Caretaker PM: What is constitutionally relevant is that with the dissolution of the House, the PM and cabinet do not have a parliamentary majority to give them their democratic legitimacy. The Constitution is blissfully silent on who should advise the King during the interim between a dissolution and the convening of the new parliament – a period that can last up to 120 days under Article 55(4).

What is clear from the overall scheme of constitutional monarchy is that after a dissolution, the King cannot rule the country on his own. Even if he disapproves of the former PM and other leading political figures, the monarch must appoint a caretaker Prime Minister to advise him on such issues as the summoning of Parliament after a general election, the dissolution of parliament (if that becomes necessary after an electoral stalemate) and the piloting of the

²¹ Article 32(3).

²² Shad Saleem Faruqi, *Document of Destiny, The Constitution of the Federation of Malaysia*, 2008, pp. 433-444.

²³ Articles 122B, 122C and 125.

²⁴ Article 122B(1).

²⁵ Article 141A.

government in the interim period between dissolution and the appointment of a new government after elections.

In Article 43(1) there are fleeting and untested words to the effect that “if an appointment is made (to the posts of PM and cabinet) while Parliament is dissolved a person who was a member of the last House of Representatives may be appointed”. Do these words give to the King a discretion to ask the PM (who called the dissolution) to vacate the premiership? During the dissolution, can the King appoint a caretaker Prime Minister and cabinet of his choice under Article 43(2)?²⁶ The Constitution is not explicit on these issues. For this reason, we follow the Westminster convention that the PM who advised dissolution and his cabinet remain at the helm in a caretaker capacity till a new PM is appointed in the post-election era.

However, if the previous PM did not contest the election, or has withdrawn from politics, or has died, then the Yang di-Pertuan Agong’s discretion to appoint a new caretaker PM²⁷ is very wide. His Majesty is bound only by the requirement of Article 43(2) that the caretaker PM must be a member of the previous House. The caretaker may be the previous Deputy Prime Minister, or any other senior member from the ruling party before the election, or any respected figure from the previous Parliament.

Conventionally, a caretaker government should not take drastic initiatives and should merely keep the machinery of government going. In *PP v Mohd Amin Mohd Razali* [2002] 5 MLJ 406, the High Court opined that Article 40(1) which requires the monarch to act on advice is not applicable if the advice is rendered by a caretaker government during the dissolution.

QUALIFICATIONS OF A PRIME MINISTER

Member of the Dewan Rakyat: Under Article 43(2)(a), the PM must belong to the Dewan Rakyat. Can he/she belong to the Dewan Negara? Unlike in Australia where the PM can belong either to the House of Representatives or the Senate, our PM must be an elected MP in the Dewan Rakyat. It is conceivable, however, that in some extreme circumstances we may follow the Douglas-Home precedent from the UK. In 1963, Lord Alec Douglas-Home, a peer in the House of Lords, was elected leader of the Conservative Party. When his party won the elections, he resigned his peerage from the House of Lords, became Sir Alec Douglas-Home, and was appointed PM even though he had no seat in the House of Commons. Soon thereafter, a vacancy was created in the Commons; a by-election was held which he contested and won. But for twenty days Douglas-Home was Prime Minister while a member of neither house of Parliament, a situation without

²⁶ For a few years Bangladesh had inserted a unique (and admirable) constitutional provision that during the dissolution of parliament pending a general election, the PM and cabinet must resign and the President will appoint a neutral, caretaker government to pilot the nation through the election. The amendment was later repealed.

²⁷ The expression ‘caretaker’, ‘interim’ or ‘acting’ do not appear in the Constitution.

modern precedent. A somewhat similar situation occurred in Selangor, Malaysia in 1997. Datuk Abu Hassan Omar, a federal minister was nominated to be the Menteri Besar of Selangor even before he was elected to the State Assembly. A bye-election was engineered for his sake and when he won the seat, he was formally sworn in as MB.

It is recommended that the Abu Hassan/Alec Douglas Home precedents should not be followed in Malaysia due to the explicit requirement in Article 43(2)(a) that the PM must belong to the Dewan Rakyat.

Citizen: The PM must not be a citizen by naturalization: Article 43(7).

Ethnicity: The race, religion, region and gender of the nominee are not mandated by the law. This is in contrast with the Constitutions of the “nine Malay States” which are explicit that unless the Ruler makes an exception, the Menteri Besar must be a Malay/Muslim. Despite the absence of an ethnic requirement in Article 43, politics will probably dictate that the PM-designate must be a Malay/mixed Malay. However, this is a mere tradition and not a law. A constitutional convention cannot override the equality clause in Article 8(2). In some distant future a Sabah or Sarawakian Bumiputera may be nominated by the majority party and it will *not* be illegal to appoint him/her as the PM if he/she commands a majority in the Dewan Rakyat. We must remember that Sabah and Sarawak together have 56/122 seats. Fifty-six is 50% of the magic number of 112 and a Sabah/Sarawak coalition can make or break a future government

WHEN A PARTY/COALITION WINS A CLEAR MAJORITY

Leader of majority has a conventional right to be summoned: Under Article 43(2)(a) the PM must, “in the judgement of the Yang di-Pertuan Agong”, be “likely to command the confidence of the majority of the members of the House”. The words “in the judgement of the Yang di-Pertuan Agong”, lead some commentators to believe that the Monarch has unlimited and subjective discretion in appointing the PM. Most respectfully, the absolute discretion theory is not in keeping with the scheme of a constitutional monarchy. The PM is not a *wazir* of the Malacca Sultanate days. The PM is doubly elected – first by the constituents as an MP and second by his party or coalition as their leader. The “confidence of the majority of the members of the House” is not a purely subjective or abstract matter. It refers to the verifiable evidence of seats and votes in the House. If a party or coalition commands the confidence of an absolute majority of the members of the Dewan Rakyat (i.e. 112 out of 222 members), the King has no choice but to choose its leader as the PM. As a non-partisan, constitutional monarch His Majesty must act impartially and disregard his personal and political preferences. Any departure from such a non-partisan exercise of power may embarrass the King if his personal appointee is immediately voted

out of office on a vote of no-confidence. This may plunge the country into the abyss of a constitutional crisis and may endanger democracy and the monarchy.

Percentage of electoral votes is irrelevant: In selecting the PM, the King should not take the percentage of electoral votes into consideration. It is the percentage of seats in the Dewan Rakyat that matters.

PM need not belong to largest faction: The PM-designate need not belong to the largest party. Whether the PM-designate's party is a majority or minority partner in a political coalition is constitutionally irrelevant. The relevant issue is whether he has the political loyalty of an absolute majority in the lower House. In Perak after GE 2008, Dr Nizar was appointed as MB even though he belonged to PAS which had only 6 seats out of 59 in the Perak assembly. He was chosen because the winning coalition gave him its support. Likewise, after GE-14 at the federal level, Tun Mahathir, the anointed leader of the PH coalition, belonged to a faction of the coalition holding only 12/121 seats. It was, therefore, argued by some that Tun Mahathir was not eligible for the PM's post because he was not the leader of the PKR under whose banner he contested. This criticism had no legal basis because under the Constitution's Article 43(2)(a), the PM-designate must be "likely to command the confidence of the majority of the members of (the lower) House". On 10 May 2018 there was irrefutable written evidence that the unregistered Pakatan Harapan's leader, Tun Mahathir, had the loyal support of 121-plus elected members and a clear, absolute majority in the House. The constitutional requirement of Article 43(2)(a) was satisfied.

Coalition need not be registered: Under the Constitution, there is no requirement that the coalition, if any, must be registered. The coalition can be formal or informal, registered or unregistered, pre-election or post-election. In many countries, coalitions are cobbled together after the election. Such was also the situation in Malaysia during GE-14. The informal opposition coalition (called the Pakatan Harapan) had a clear absolute majority though no individual component held the magic number of 112. PKR won 48, DAP 42, PPBM 12, Amanah 11 and Warisan 8, totaling 121. Independents and others contributed a few more seats.²⁸

Majority party locked in a leadership dispute: If the majority party is locked in a leadership dispute, there is no clear constitutional guidance in Article 43(2). The King has wide discretion to give anyone from the majority party, "the first bite of the cherry".

Party-hopping: The despicable practice of party-hopping often erodes the winner's majority. This is what happened to Stephen Kalong Ningkan in Sarawak in 1966, Pairin in Sabah in 1994, Dr Nizar in Perak in 2009, Musa Aman in Sabah in 2018 and Tun Mahathir in 2020. Party-hopping is not

²⁸ The numbers were enhanced in subsequent months due to defections to the Pakatan Harapan government. Some seats were however lost due to death and by-election defeats. The Pakatan Harapan government collapsed on 24 February 2020 due to the resignation of Tun Mahathir and the defection of some PKR and PPBM legislators to the new Malay coalition headed by Tan Sri Muhyiddin.

banned in Malaysia. In fact, the right to switch political parties in mid-stream is part of freedom of association under Article 10(1)(c).²⁹

If the House is in session, the issue of confidence is best determined in the House. But if the House is not in session, as was the case in February 2020, the Yang di-Pertuan Agong is not required to wait for the House to reconvene. He may use other methods to ascertain the will of the majority of the members of the House. In Perak in 2009, the Sultan interviewed the party hoppers, the Menteri Besar and the leader of the opposition Barisan Nasional to determine who commands the majority in the Assembly. In Putra Jaya in February 2020 the King interviewed all 222 MPs, all contenders to the office of the prime minister and all party-leaders to ascertain who is likely to command the confidence of the House. It is also known that various NGOs submitted Memorandums to the King.

IF THERE IS A HUNG PARLIAMENT

A hung Parliament is one in which the election throws up no clear winner. No party or coalition commands an absolute majority of the total membership of the House. There is political uncertainty about who, if anyone, commands the confidence of the members of the House. In such a situation, Articles 40(2)(a) and 43(2)(a) permit a large measure of discretion to the King relating to the appointment of the prime minister.

Caretaker PM: The PM who advises dissolution is conventionally allowed to be a caretaker PM till a new government takes power. No maximum time limit is provided for his tenure. However, his position is more of a convention than a binding constitutional requirement. It is conceivable that after an indecisive election, the King may terminate the caretaker and appoint a new Acting Prime Minister. He could be a senior member of the largest party or grouping in Parliament.

Acting or interim PM of a minority government: Even if there is no party or coalition commanding a clear majority, the King has to appoint a PM or an Acting/Interim PM to advise him on the affairs of state. For all practical purposes such a government is a “minority government” put in place because elections may not be in the best interest of the country at that time. The minority government may consist of the largest party or faction in Parliament. In appointing it the Yang di-Pertuan Agong has considerable latitude under Article 43(2)(a). The way the Article is framed, the appointee need not show clear proof of his support. He must, in the judgment of the King, be “*likely* to command the confidence of the majority of the members”. In situations of political fluidity, the King’s reasoned judgment of who is likely to win the loyalty of a majority can alter the course of political history.³⁰ The appointment of anyone as Prime Minister or Acting Prime Minister puts him in considerable advantage. He gets the first bite of the cherry. He may use his power of patronage to attract fence-sitters. The band-wagon effect will work in his favour.

²⁹ Nordin Salleh v Dewan Undangan Negeri Kelantan [1992] 1 MLJ 343.

³⁰ This was perhaps the position in late February 2020 in Malaysia.

However, if political negotiations throw up a new leader, the Acting Prime Minister must resign and His Majesty, on being satisfied that the PM-designate has sufficient Article 43(2)(a) support, must appoint him formally as the new Prime Minister.

How must this Article 43(2)(a) support be proven? The law is silent on this point and His Majesty has vast discretion. The Yang di-Pertuan Agong is not required to accept the word of the aspiring candidates or their party or coalition. The party may be concealing from the King the fact of an internal revolt. The party leadership may be out of sync with the mood of its MPs. The party leadership and the parliamentary membership may not be united. For these reasons, His Royal Highness can (i) require the leader to submit written letters of support or a Statutory Declaration from at least 112 MPs. (ii) His Majesty may wish to meet the MPs individually or as a group who support the PM-designate; (iii) His Majesty may insist that the appointee must advise His Majesty to summon Parliament as soon as may be to test the appointee's support on the floor of the House.

Factors outside the House can be considered: The confidence must come from the “majority of the *members*” of the House. The Constitution does not say that the confidence must be that of the *House*”. This means that the House need not be in session. The issue of confidence can be adjudged outside the House.³¹

Majority can come from independents: The “majority of the members” of the House need not belong to the PM’s party or coalition. Some of them may be independents. Some may be *ad hoc* supporters on critical issues like the Motion on the Royal Address or the Annual Budget. This is what happened in Australia in 2010. The election results showed a 72-72 tie between the two major parties in the 150-seat House. Julia Gillard of the Labour Party retained her prime ministership due to the support of four cross-benchers who did not join her party but gave her their support.

PM can be an independent: There is no requirement that the PM must be the leader of a political party or a coalition. In fact, the PM can be an independent and not a member of any political party at all! In the 80s, the then PM, Dato’ Seri Dr Mahathir was without a party when UMNO was deregistered. In India, in the late 60s, PM Indira Gandhi was expelled from her Congress party but remained the PM because the majority of the members of the Lok Sabha gave her their support. The Constitution does not mention political parties at all! The PM may be a compromise candidate who is a non-party or a minority party person who is temporarily given the support of a sufficient number of MPs from the various parties.

Unity government: If in a hung Parliament the minority government is unable to function, the Monarch may have to play the role of a statesman and a political bridge builder to appoint a unity government. To perform such statesmanship, His Majesty may consult with political stalwarts in the country and the leaders of the various political factions to put together a workable short-term coalition. The Australian states have many such examples.

³¹ Refer also to *Nizar v Zambry* [2009] 5 MLJ 464; [2010] 2 MLJ 285.

The minority government may be appointed on the tacit understanding that the Acting PM will advise a dissolution and a return to the electorate at an appropriate time.

[?]

IF THE PM RESIGNS, IS INCAPACITATED OR DIES IN OFFICE

Resignation: Five of our eight Prime Ministers have resigned. They are Tunku Abdul Rahman Putra Al-Haj (1970), Tun Hussein Onn (1981), Dato' Seri Mahathir Mohamed (2003), Tun Abdullah Badawi (2009) and Tun Mahathir (2020). In the first four cases, the Deputy Prime Minister was appointed as the new PM.

Death: In 1976, the then Prime Minister Tun Abdul Razak Hussein died in office on 14 January 1976, while seeking medical treatment in London. The next day, the Deputy Prime Minister, Tun Abdul Razak's brother-in-law, Tun Hussein Onn, was appointed Prime Minister.

Automatic transition to Deputy is not required by law: There is no legal requirement that the Deputy PM must necessarily take over. Our Constitution is silent on the issue of succession. Unlike in the United States, where the succession is clearly laid down: If the president dies, the vice president takes over; if the Vice President dies, then the Speaker of the House of Representatives takes over.

In the light of the 1976 precedent, some commentators suggest that if the PM dies in office, the Deputy Prime Minister automatically becomes the Prime Minister. Legally, there is no basis for this presumption and the discretion of the Yang di-Pertuan Agong should not be discounted. In 1976 we were in political waters and not legal waters. Politics and tradition prevailed over the law. The reason why the DPM has no constitutional right to the "first bite of the cherry" are the following:

- Under Article 43(2), (3) and (4), if the Prime Minister dies or is defeated, the entire Cabinet is vacated. The Cabinet is recommended by the Prime Minister and if he resigns, is voted out of office or dies, technically, his ministers, including the DPM, no longer hold posts. The idea that if there is a deputy Prime Minister, he/she always rises to become Prime Minister or Acting Prime Minister is not based on law but on political tradition.
- The post of Deputy Prime Minister is nowhere mentioned in the Constitution. It is a conventional post totally at the discretion of the Prime Minister. The PM may not appoint anyone as DPM (as happened in 2020).

- The DPM may not have the majority support in the Dewan Rakyat. That judgment belongs to the Yang di-Pertuan Agong. Though it is not a subjective, arbitrary assessment, the discretion of His Majesty is very wide indeed.
- The qualifications for a PM and DPM are not the same. According to Article 43(7) the PM cannot be a citizen by naturalisation. A DPM may, however, be a citizen by naturalisation. Therefore, a DPM may be disqualified under the Constitution to hold the post of Acting PM or PM.
- The view that the DPM should automatically be the Acting Prime Minister undermines or shows disrespect to the role of the Yang di-Pertuan Agong in situations when a void is created. The King has to step into the breach and has to supply the steady hand.

Ruling party is locked in leadership tussle: Pending the formal election of a new leader by the ruling party or coalition, His Majesty may appoint an Acting or Interim Prime Minister. This will be an interim, administrative measure. The person appointed must be told that the position is temporary; that it is a case of standing-in for the deceased or ex-leader. The Yang di-Pertuan Agong can create an interim or provisional caretaker PM while he consults politicians and advisors and weighs all the options. Perhaps the highest-ranking Cabinet minister – the DPM, Home, Defence, Foreign or Finance Minister - may be appointed. But this is a temporary provision to enable the Yang di-Pertuan Agong to measure the mood of Parliament and to familiarise himself with the new political alignments that are inevitable once the PM leaves the scene for whatever reason.

While an Acting Prime Minister temporarily “holds the fort” the Yang di-Pertuan Agong must give to the ruling party or coalition a reasonable time to choose its new leader. If the ruling party or coalition is solidly united behind a leader, this should suffice to determine who is likely to command the confidence of the Dewan Rakyat.

If there is some uncertainty, His Majesty may ask the new leader to prove his majority: In an unstable political situation, when the ruling party is deeply divided on the choice of the leader, the King is not bound to follow the decision by the Presidential or Supreme Council of the ruling party or coalition. It is entirely possible that when a Prime Minister dies, there may be realignments, (party) hoppings, new relationships or new alliances created. The Supreme Council of the ruling party may not be in sync with the sentiments on the floor and the realignments in the Dewan Rakyat. His Majesty is bound by the majority *in the House* rather than the majority in the Presidential or Supreme Council. His Majesty may give to the new leader a reasonable time (a week or two) to prove that he/she has the backing of at least 112

MPs in the Dewan Rakyat. The person appointed as PM must command the confidence of an absolute majority of the MPs because, otherwise, on the first day when the Dewan Rakyat meets, the representatives could pass a vote of no confidence against the appointee. That would embarrass not just the Yang di-Pertuan Agong, it would create a lot of uncertainty and instability.

PRIME MINISTER LOSES CONFIDENCE OF MAJORITY OF LEGISLATORS

The loss of confidence need not be expressed in a vote of no confidence on the floor of the House. Loss of confidence can be communicated to His Majesty in other ways e.g. by a Petition or letter or a Statutory Declaration. The *Stephen Kalong Ningkan v Tun Abang Haji Openg dan Tawi Sli* (1966)³² ruling that confidence can be lost only on the floor has now been overruled in the *Nizar* precedent in Perak in 2009.³³

If confidence is lost, Article 43(4) applies. The PM has two choices: (i) tender the resignation of his whole cabinet. In such a situation, His Majesty may ask the PM to continue to hold the fort till a new government is appointed. His Majesty then has to search for a new PM and Cabinet. (ii) The PM may request the Monarch to dissolve the Dewan Rakyat so that a new election can be held. Under Article 40(2)(b) the King has undoubted discretion to accept or reject this advice. The advice should be rejected if the security or economic conditions of the country do not permit the electoral exercise or if a new, stable government can be easily put in place.

If the PM who has lost confidence of the House and whose advice to dissolve is rejected, still does not resign, he can be dismissed in accordance with the *Nizar* precedent from Perak.

PRIME MINISTER IS DISOWNED BY HIS PARTY/COALITION

If the party high command loses confidence in the PM as its leader, the PM should normally submit his resignation to the Yang di-Pertuan Agong. But if the PM still commands the confidence of the House, he need not resign. In India in 1968 PM Indira Gandhi was expelled from her Congress Party by her party bosses. But as she still had a majority in the Lok Sabha, she continued to serve as the PM.

³² *Stephen Kalong Ningkan v Tun Abang Haji Openg Tawi Sli* [1966] 2 MLJ187.

³³ [2009] 5 MLJ 464, CA; [2010] 2 MLJ 285, FC.

If the ruling party turns against its leader or if there are divisions within it, His Majesty has a critical, non-partisan role to play.³⁴ The constitutional criterion in Article 43(2)(a) is “confidence of the majority of the members of the House” and not confidence of the party leadership. A Prime Minister disowned by his party may forge a new coalition. His Majesty needs to look at support in the House and not the support of the party elite.

OTHER ISSUES OF DEMOCRATIC LEGITIMACY

Can the King dissolve Parliament on his own? A dissolution by the King on his own initiative would be against the Constitution. To dissolve Parliament, the King, must act on advice under Article 40(1). In contrast, refusing a dissolution is a discretionary power. Under Article 40(2)(b), the Yang di-Pertuan Agong can refuse the PM’s advice for premature dissolution but His Majesty cannot dissolve the House on his own to call a new election. Such a revolutionary move would frustrate the results of the last election and will pit the monarchy against the political executive.

Party-hopping: Defection refers to the phenomenon of Members of Parliament elected by the rakyat on one party ticket, switching camps during mid-stream. The practice is widespread in all parliamentary democracies. Malaysia has had many shameful instances of its occurrence.³⁵ Yet the practice is supported by some as being an aspect of freedom of association³⁶ and as an exercise of freedom of conscience against overbearing party stalwarts. There are celebrated examples of “crossing the floor” on ideological or moral grounds. However, the exercise of this right can result in the midstream fall of governments, thereby causing political instability. Hundreds of millions may have to be spent to hold another general election. The premature fall of a government duly elected by the electorate means that the result of a general election can be reversed by the political manoeuvring of opportunistic politicians. Often there are corrupt motives for abandoning ship and hopping on to another ship.

With many parliamentary democracies rocked by the shifting alliances of political turn-coats, attempts have been made around the world to curb this evil. In some countries anyone who defects is required to resign his seat but is allowed to return to the electorate at a by-election

³⁴ There is some evidence that a majority of the Supreme Council members of Tun Mahathir’s own party (Bersatu), had turned against him on the issue of abandoning PH and forming a new government with UMNO. This led to his resignation from the Chairmanship of the Party.

³⁵ Defections caused the downfall of the Stephen Kalong Ningkan government in Sarawak in 1966, the Pairin government in Sabah in 1994, the Nizar government in Perak in 2009, the Musa Aman government in Sabah in 2018 and the Tun Mahathir government at the federal level in 2020.

³⁶ *Nordin Salleh v Dewan Undangan Negeri Kelantan* [1992] 1 MLJ 343.

to regain his mandate.³⁷ In other countries a defector is barred from holding any remunerative political post for the remaining tenure of the legislature unless he is re-elected. In some countries the size of the Cabinet is prescribed by law so that there is no temptation of offering Cabinet posts as incentives to cross the floor.³⁸

In Malaysia, veteran politician Lim Kit Siang in 1978 tried unsuccessfully to introduce a private Member's Bill to require an MP to vacate his seat within 30 days of his resignation or expulsion from his party. The Bill required a by-election at which the MP would be eligible to seek a new mandate from the electorate. In 2018 the Coalition for Free and Fair Elections (Bersih 2.0) expressed concerns on the possibility of Umno MPs being accepted into Parti Pribumi Bersatu Malaysia on the ground that party hopping betrays voters and the ideals of democracy.

In 1986 an anti-hopping law was passed by the Sabah Assembly in 1986 and was upheld by the courts in *Abdul Karim Abdul Ghani vs Legislative Assembly of Sabah* (1988).³⁹ Kelantan followed suit in 1990. Regrettably, the Kelantan law was challenged by Barisan supporters in the courts: *Nordin Salleh vs Dewan Undangan Negeri Kelantan* (1992).⁴⁰ The High Court and the Federal Court held that the Kelantan law was unconstitutional on several grounds. First, that the law was a violation of the constitutional guarantee of freedom of association in Article 10(1)(c). Second, that the forum for passing the law was wrong. Fundamental rights in Article 10 can be restricted by the federal Parliament and not by State Assemblies. Third, to the argument by Kelantan that freedom of association in Article 10(1)(c) can be restricted on the permissible ground of "morality" in Article 10(2)(c), a judge expressed the astounding view that "morality" in Article 10 refers to sex morality and not "political morality". An anti-hopping law will, therefore, require legislative overruling of the 1992 *Nordin Salleh* court decision.

120-day time limit for summoning new Parliament: The new Parliament, whether a "hung Parliament" or one with an absolute majority, must be convened within 120 days after the dissolution of the last Parliament: Article 55(4).

No double dissolution: If a general election results in a hung Parliament, an immediate, new election cannot be called. Within 120 days of the dissolution, the new House must be

³⁷ In Malaysia this position will pose a constitutional dilemma: under Article 48(6) "a person who resigns his membership of the House of Representatives shall, for a period of five years beginning with the date on which his resignation takes effect, be disqualified from being a member of the House of Representatives".

³⁸ Malaysia has no limit on the number of cabinet posts.

³⁹ [1988] 1MLJ 171

⁴⁰ [1992] 1 MLJ 343, HC.

summoned: Article 55(4). Only after that, the Prime Minister or Acting PM may advise a new dissolution and a new election, subject to His Majesty's discretion under Article 40(2)(b).

Summoning & dissolving is on advice: Though there is some scholarly disagreement on this point, it is submitted that His Majesty cannot summon or dissolve Parliament on his own initiative and must act according to advice under Article 40(1). Article 40(2)(b) that permits the King to refuse a premature dissolution is akin to a veto power but it does not authorise the King, on his own initiative, to dissolve an elected Parliament and overturn the electorate's wishes without the advice of the PM or an interim PM. Views to the contrary would arm the King with the unconstitutional power to reject an electoral verdict and call an immediate fresh election to seek an alternative result. Likewise, in the matter of summoning, there is no mention in Article 40(2) of a royal discretion in this matter. The King's power in this area is a conventional one to caution, to advise and to warn. However, in the last resort he must accept advice.
