

ROYAL ROLE ON ISSUE OF CONFIDENCE

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I have been asked by many to give my perspective on the controversial claim that PM Muhyiddin Yassin has allegedly lost the confidence of the House. Indeed, in parliamentary democracies, governments have no fixed tenure and issues of confidence crop up from time to time to add turbulence to the treacherous political waters.

Loss of confidence: In Article 43(4), it is provided that “if the Prime Minister ceases to command the confidence of the majority of the members of the House of Representatives, then unless at his request the Yang di-Pertuan Agong dissolves Parliament, the Prime Minister shall tender the resignation of the Cabinet”.

What amounts to a loss of "the confidence of the majority of the members of the House" is nowhere defined and is, by no means, a settled issue. Law and constitutional convention are both relevant and may clash.

Besides a clear-cut motion of "no-confidence" on the floor of the House,¹ there are many other possible ways of losing confidence like a defeat on the Annual Budget; or the failure of the Motion of Thanks to the King after his address; or defeat on a major Bill. However, decline of public support or the defeat of the PM's ruling coalition at a state election, do not amount to a loss of parliamentary confidence. Under Article 43(4) what is relevant is "the confidence of the majority of the members of the House". It is submitted that the term 'majority'² refers to an absolute majority (50% + 1) of the total membership of the House.

After the 2010 Federal Court decision in the *Dato' Seri Ir Hj Nizar Jamaluddin v Dato' Seri Dr Zambry Abdul Kadir Nizar Jamaluddin* case,³ evidence from outside the House like statutory declarations from the MPs can be taken into consideration by His Majesty in determining whether there is a loss of confidence. The Federal Court in the *Nizar Jamaluddin* case overruled the earlier Privy Council decision in *Stephen Kalong Ningkan v Tun Abang Haji Openg dan Tawi Sli* which had ruled that once a Chief Minister was appointed, only the Assembly had the power to dismiss him on a vote of no-confidence.⁴

The King's discretion to determine the issue of confidence is wide, but not uncontrolled as no power can be absolute and unlimited. This important point was reiterated by Raja Azlan Shah FJ (as His Majesty Sultan Azlan Shah was then) in the Sri Lempah case: “Unfettered discretion is a contradiction in terms... Every legal power must have legal limits, otherwise

¹ Most surprisingly and in disregard of Article 43(4), the Standing Orders of the Dewan Rakyat do not provide for a Motion of No-Confidence. However, there are procedures for ordinary Motions which could achieve the purpose of a Motion of No-Confidence: Standing Orders 26-34.

² Under the Federal Constitution, four types of majorities are referred to: First, a simple majority of *members present and voting* as in Article 62(3). This could be referred to as the “simple majority” rule. Second, two-thirds of the *members present and voting* as in Article 89(1)(a) for Malay reservations. This could be referred to as the “two thirds of those present” rule. Third, majority of the *members of the House* as in Articles 43(2), 43(4) and 89(1)(a). In Schedule 13, Part II, Rule 10, the phraseology is “one-half of the total number of members”. This could be referred to as the “absolute majority” rule. Fourth, two-thirds of the *total members* of the House as in Article 159(3).

³ *Dato' Seri Ir Hj Nizar Jamaluddin v Dato' Seri Dr Zambry Abdul Kadir* [2010] 2 CLJ 925, FC.

⁴ [1966] 2 MLJ 187.

there is dictatorship...Every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the court to intervene”.

⁵However, it is a separate and complex issue whether judicial review may lie if there is mala fide exercise of this power by the King or an unreasonable refusal to exercise it in accordance with Articles 40(2)(a), 43(2)(a) and 43(4).

What is clear is that whatever the facts, the incumbent PM does not lose his position automatically once there is loss of such confidence. There must be a royal decision to accept his resignation or exceptionally to remove him from office.

Role of the King: What is the role of the Yang di-Pertuan Agong (YDPA) in a situation when there is an extra-parliamentary claim that the incumbent PM has lost the support of the House? The King is above politics and his role is to evaluate the situation impartially and to determine the claim's credibility, reliability and sustainability irrespective of his likes or dislikes of the personalities involved.

1. If the Yang di-Pertuan Agong is satisfied that there is a credible claim or proof of loss of confidence, the YDPA has a constitutional duty to look into the matter. He must grant an audience and allow the Leader of the Opposition or any other alternative leader to present his evidence within a reasonable time. Once the evidence is presented, the King is not required to act in haste and may resort to consultations and seeking of counsel.
2. If presented with sufficient evidence, the King may ask the incumbent PM to convene the House to obtain a vote of confidence. If the vote is in favour of the incumbent, the matter ends there.
3. If the PM refuses to convene the House, the YDPA can then make his own judgment or decision about who commands the confidence of the House. If the House is not in session, the King may take note of evidence outside the House to arrive at his judgment. He may interview all MPs (as the King did in February 2020). Or he may interview those alleged to have crossed the floor as the Sultan of Perak did in Perak in 2019. This course of action was adjudicated to be constitutional by the 2019 ruling of the Federal Court in the case of then Perak MB, Dato Nizar Jamaluddin.
4. If the King is satisfied that the parliamentary support for the PM has been forfeited, he can require the PM to observe the PM's duty under Article 43(4) to either advise dissolution or resign.
5. If the PM resigns, the King has a choice (i) to appoint a new interim PM from the House, or (ii) ask the resigning PM to stay on in an interim capacity till a final decision is made on who is to fill the vacancy. This what happened in May 2020 on the resignation of Tun Mahathir.
6. If, instead of resigning, the PM advises dissolution, the King has the discretion under Article 40(2)(b) to accept or reject the advice to dissolve. If the King accepts the advice, then elections must be called within 60 days of the dissolution: Article 55(4). In the

⁵ *Pengaruh Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprises* [1979] 1 MLJ 135 at 148.

meantime, the PM remains at the helm as a caretaker in accordance with constitutional conventions.

7. If the King rejects the advice to dissolve, he can demand that the PM resign. If the PM refuses to resign, the PM can be removed in accordance with the 2009 Perak ruling. The King can then appoint someone else who in his judgment is likely to command the confidence of the House.

Dissolution: In cases where there is uncertainty about who commands confidence, can the King dissolve the House on his own initiative in order to call a General Election? Some constitutional lawyers give two arguments to support royal discretion in this area. First, that under Article 40(2)(b) the King has an undoubted discretion in relation to “the withholding of consent to a request for the dissolution of parliament”. With all due respect, the discretion conferred by Article 40(2)(b) of the Constitution is to refuse the PM’s advice, not to initiate the process of dissolution himself. There is a significant difference between “dissolving on his own initiative” and “withholding consent to a request” from the Prime Minister under Article 40(2)(b). In a constitutional monarchy, the King should not dissolve a House on his own initiative. This is also explicit in the wording of Article 43(4) that “unless at his (the PM’s) request the Yang di-Pertuan Agong dissolves parliament...”

A second argument is that Article 55(2) explicitly provides that “the Yang di-Pertuan Agong may prorogue or dissolve Parliament”. With all due respect, Article 55(2) should not be interpreted literally or in isolation. The powers of Article 55(2) to dissolve or prorogue are not autonomous discretionary powers but are subject to Article 40(1) and 40(1A). These clauses command that “in the exercise of his functions under this Constitution or federal law, the Yang di-Pertuan Agong shall act in accordance with the advice of the cabinet...”. We are a constitutional and not an absolutist monarchy and most of the powers of the King must be read in the light of Article 40(1)’s overarching requirement to act on advice.

Role of Timbalan Yang di-Pertuan Agong: If due to illness, absence from the Federation or any other cause the King is unable to exercise any of the functions of his office including those under Article 43(4) for 15 or more days, the Timbalan Yang di-Pertuan Agong may assume these powers after 15 days: Article 33(1).

The Constitution goes further. It even permits the Deputy King to step into the breach earlier than 15 days if the Deputy King is “satisfied that it is necessary or expedient to exercise such functions”: Article 33(1). This is an exceptional power and is unlikely to be exercised except in the most extreme or pressing circumstances when national interest is at stake. Its exercise or non-exercise is unlikely to be subject to judicial review.