13

Monarchy and Democracy in Modern Malaysia

Yvonne Tew

13.1 INTRODUCTION

No country in the world has as many monarchs as Malaysia. Among the monarchies in the world today,[1] Malaysia is unique in its system of a rotating, elected monarchy. Within the Malaysian Federation, nine Malay Rulers are sovereign as the constitutional head of their respective states. Every five years, the King who serves as Supreme Head of the Federation – known by the title of the Yang di-pertuan Agong – is elected in a rotating system from among these nine Rulers. The Federal Constitution of Malaysia set up a Westminster-style parliamentary system, with a constitutional monarch as the head of state. The written document explicitly sets out the monarch's powers, which limits the powers of the King in most areas of governance. As a matter of design, the constitutional text created at independence in 1957 contemplated the monarch as a constitutional figurehead with a largely symbolic role.

Not so in practice. In recent times, the contemporary monarch in Malaysia has emerged as a critical actor in the formation and functioning of the federal government. The monarch assumed a key role during a period of unprecedented democratic transition and disintegration in modern Malaysia.

In 2018, Malaysia experienced a historic national election that resulted in the ousting of the Barisan Nasional ruling coalition that had governed the country for more than sixty years since independence.[2] Malaysia's political transition was hailed as a democratic breakthrough, ending decades of dominance by a single political

Johanna Mintz, Hana Kassem, and Austin Lowe provided excellent research assistance.

[1] Tom Ginsburg, "East Asian Monarchy in Comparative Perspective," *The Long East Asia*. Springer, 2023, 199 (noting that "22% of the countries today are monarchies").

[2] See "After Six Decades in Power, BN falls to 'Malaysian Tsunami," *Malaysiakini* (May 10, 2018), www.malaysiakini.com/news/423990; "Malaysia Election: Opposition Scores Historic Victory," BBC (May 10, 2018), www.bbc.com/news/world-asia-44036178; see also Yvonne Tew, *Constitutional Statecraft in Asian Courts*. Oxford University Press, 2020, 1–5.

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coalition.[3] Twenty-two months after being elected, however, the newly elected Pakatan Harapan government disintegrated following a series of political defections. A divisive battle for government leadership ensued among former prime minister Mahathir Mohamad, his supposed successor Anwar Ibrahim, and senior politician Muhyiddin Yassin. The King intervened directly into this government crisis by deciding to appoint Muhyiddin Yassin as the new prime minister, cementing a government turnover to a coalition that returned to power many from the previously deposed ruling political party.

In the months that followed, the monarch played a central role in the country's governance. As the Perikatan Nasional government under Muhyiddin Yassin struggled to deal with the COVID-19 pandemic while maintaining its fragile grasp on power, the Agong refused the new premier's bid to declare emergency rule. Later, in July 2021, the Agong publicly rebuked Muhyiddin's administration for announcing that the emergency proclamations had been revoked without the monarch's consent.

This chapter explores the central part the monarch played in facilitating the political transition and in the constitutional governance of Malaysia's contemporary political order. Doing so raises broader questions about the role of the monarchy in a democracy and its institutional capacity to safeguard against incumbent capture or to accelerate democratic erosion. It begins in Section 13.2 by setting out the historical context for Malay kingship and its eventual transformation into a constitutional monarchy after Malaya's independence in 1957 from British colonial rule. It examines the constitutional design of Malaysia's federal parliamentary system and the design choices made regarding the ways in which the Federal Constitution structures the relationship between the monarchy and the other branches of government.

Section 13.3 tells the story of the monarch's rise during Malaysia's first change of government following a general election and the subsequent collapse of two successive governments. The political crises that occurred amidst these government transitions and during the COVID-19 pandemic have left the country's political parties and electoral institutions highly fragile. Meanwhile, following the royal interventions between 2018 and 2021, the monarchy has emerged with an enhanced position in Malaysia's contemporary constitutional order. Far from being an outdated or anachronistic institution, the story that emerges is that monarchy in Malaysia is not just surviving, it is thriving – a story that has broader resonance in other parts of Southeast Asia. Section 13.4 offers some concluding reflections on the role that the monarch can play in protecting or undermining constitutional democracy.

[3] See Shadi Hamid, "'What Democracies Can Learn From Malaysia' Malaysia," *The Atlantic* (May 16, 2018), www.theatlantic.com/international/archive/2018/05/malaysia-democracy-najib/560534/; Larry Diamond, "Malaysia's 'Malaysia's Democratic Breakthrough' Breakthrough," *American Interest* (May 15, 2018), www.the-american-interest.com/2018/05/18/malaysias-democratic-breakthrough/.

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13.2 OF SULTANS AND KINGS: HISTORY AND CONSTITUTIONAL DESIGN

13.2.1 *Malay(sian) Kingship: Historical Background*

Malaysia does not have one monarchy; it has nine. The origins of the nine Malay Rulers have their roots in the sultanate that presided over the famed port city of Malacca. The city rose to glory in the fifteenth century as one of the region's preeminent trading centers, situated at the crossroads of the spice route between the East and West. Following the fall of the Malacca empire in 1511 to the Portuguese, sons of the Malacca sultan established empires in Perak and Johor, and other new sultanates modeled on Malacca's emerged across the Malay peninsula.[4] Malay ideas of kingship drew on influences from Islamic traditions infused with local customs and Hindu and Buddhist elements.[5]

The Portuguese colonial powers were followed by the Dutch, and then the British. Between 1874 and 1930, the British established a series of treaties with the sultans of the nine Malay states. This system of indirect rule required the state Rulers to act on the advice of a British Resident, except in matters relating to Malay religion and custom. After the Second World War, during which the Japanese occupied the Malayan states for a few years, the British sought to unify the nine Malay states, along with Penang and Malacca, into a unitary entity – the Malayan Union – in 1946. Vehement opposition to the Malayan Union consolidated into a rallying point for Malay political leaders to form the United Malays National Organisation (UMNO), the political party that would dominate Malaysian politics for the next seven decades. The political rebellion against the proposed Malayan Union was due to many reasons, but a main objection was that the sovereignty of the Malay monarchs over their individual states would be abolished by the creation of a unitary state.

The British relented. The Federation of Malaya was created in 1948, replacing the proposed Malayan Union structure with a federal system of government that preserved the powers of the Malay sultans as the Rulers of their respective states. This federal arrangement would form the basis for the design of the constitutional system put in place at the Federation's independence.

In 1956, a constitutional commission consisting of five Commonwealth legal experts, chaired by Britain's Lord Reid, began the constitution drafting process based on terms of reference that had been agreed on by representatives of the Malayan

[4] See Andrew Harding and Harshan Kumarasingham, "The Malay Monarchies in Constitutional and Social Conception," *Asian Journal of Law and Society* 9(3): 399–417 (Special Issue), 2022.

[5] Kobkua Suwannathat-Pian, *Palace, Political Party, and Power: A Story of the Socio-political Development of Malay Kingship*. National University of Singapore Press, 2011, 7.

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government, the Malay Rulers, and the British government.[6] The draft constitutional text was modified in several aspects after scrutiny by a local working party and eventually ratified by the federal legislative council. The Constitution came into force on August 31, 1957, when the Federation of Malaya became fully independent. In 1963, when Sabah, Sarawak, and Singapore joined the Federation, it became the Federal Constitution of Malaysia.[7]

13.2.2 *Constitutional Design and Constitutional Politics*

The Malaysian Constitution provides for a constitutional monarchy, as well as a Westminster-style parliamentary system with a bicameral legislature, executive, and independent judiciary. It proclaims the Supreme Head of the Federation as the King, officially called the Yang di-Pertuan Agong[8] – quite literally, "One who is Made Supreme Lord." Federalism remains at the core of the design of the political system and the constitutional monarchy. The Constitution cemented the position of the Malay Rulers as the constitutional heads of their respective states. It guarantees the sovereignty of the Malay Rulers within their territories,[9] and the rights and privileges of each Ruler as the head of their states and as the head of the religion of Islam in those states.[10]

Malaysia has a unique system of rotating, elected constitutional monarchy.[11] The position of the Yang di-Pertuan Agong (Agong) rotates every five years among the sultans of the nine states traditionally headed by Malay Rulers. Electing the federal constitutional monarch is a matter for the Conference of Rulers, a body comprising the nine Malay Rulers and the governors of the other four states.[12] That task is carried out typically once every five years or when there is a vacancy, which may

[6] See generally Joseph M. Fernando, *The Making of the Malayan Constitution*. The Malaysian Branch of the Royal Asiatic Society, 2002.

[7] Malaysia is a federation consisting of nine states, with Malay Rulers, four states with governors, and three federal territories.

[8] Federal Constitution of Malaysia 1957, Article 32(1).

[9] Federal Constitution of Malaysia 1957, Article 181(1).

[10] Federal Constitution of Malaysia 1957, Article 71(1); 3(2). The Yang di-Pertuan Agong is the head of the religion of Islam in his own state and in the federal territories and states without a Malay Ruler. Federal Constitution of Malaysia 1957, Articles 3(3)–(5).

[11] Historical examples of elective monarchies include the Polish-Lithuanian Commonwealth, the Holy Roman Empire, the Mongol Empire, and the African Kingdom of Kongo. Today, Malaysia is one of the very few elective monarchies in the world (and the only one where the federal monarchy rotates among nine kings). Another (rare) example is Cambodia, where the king is elected for a life term by the Royal Council of the Throne.

[12] Federal Constitution of Malaysia 1957, Article 38. The nine states headed by Malay Rulers are Kedah, Kelantan, Johor, Perak, Perlis, Pahang, Selangor, Negeri Sembilan, and Terengganu. The four states that are headed by Governors, instead of monarchs, are Penang, Malacca, Sabah, and Sarawak.

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occur due to death or, more uncommonly, resignation.[13] In addition to the power to elect – and remove – the King, the consent of the Conference of Rulers is required to amend certain provisions of the Federal Constitution, such as those dealing with the status of the Rulers, the Conference of Rulers, the Malay national language, and the special position of the Malays and the natives of Sabah and Sarawak.[14]

The role of Malaysia's Agong was loosely modeled on that of a constitutional monarch in a Westminster-style political system. Unlike Britain's uncodified constitution, however, the powers of the Malaysian Agong are expressly set out in the Federal Constitution. The Malaysian Constitution vests executive authority in the Agong,[15] but specifies that the King "shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet, except as otherwise provided by this Constitution."[16] According to the Constitution, the Agong also possesses legislative authority as a constituent part of Parliament, which consists of the Agong and the two Houses of Parliament.[17] The King is constitutionally empowered to summon, prorogue, and dissolve (or decline to dissolve) Parliament.[18]

The monarchy in Malaysia has always been bound up with constitutional politics. Post-independence, the Rulers clashed with the governments ruling their states in several episodes in the 1970s and 1980s; ultimately, tensions and conflicts between the Rulers and the federal government resulted in a constitutional confrontation.[19] During the first Mahathir Mohamad administration, which spanned the 1980s and 1990s, the federal government pushed to amend the Federal Constitution to constrain the powers of the Rulers. Constitutional amendments passed in 1984 and 1994 limited the King's power to refuse assent to laws passed by Parliament, removed the royal immunity of the Rulers from suit, and required the Rulers to act on executive advice.[20]

Nonetheless, the Constitution specifies several areas in which the King "may act in his discretion," including: "(a) the appointment of a Prime Minister; (b) the withholding of consent to a request for dissolution of Parliament."[21] Those who view the sovereign as occupying a largely symbolic position in a Westminster-style parliamentary system consider the monarch's function to be primarily formal and ceremonial, with the head of state having no real discretion even in these circumstances.

[13] Federal Constitution of Malaysia 1957, Article 32(3). For a recent high-profile royal resignation, see Mike Ives, "Malaysia's King, an Unusual Monarch, Abruptly Leaves His Job," *New York Times* (January 7, 2019), www.nytimes.com/2019/01/07/world/asia/malaysia-king-muhammad-abdicates.html.

[14] Federal Constitution of Malaysia 1957, Article 159(5).

[15] Federal Constitution of Malaysia 1957, Article 39.

[16] Federal Constitution of Malaysia 1957, Article 40(1).

[17] Federal Constitution of Malaysia 1957, Article 44.

[18] Federal Constitution of Malaysia 1957, Articles 43(4), 55(1)–(2).

[19] See H. P. Lee, *Constitutional Conflicts in Contemporary Malaysia*, 2nd ed. Oxford University Press, 2017, 31–62; Suwannathat-Pian, *Palace, Political Party, and Power*, 345–370.

[20] Federal Constitution of Malaysia 1957, Articles 66(4A), 181(2), 71(1).

[21] Federal Constitution of Malaysia 1957, Article 40(2).

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Yet, in recent times, Malaysia's monarch has emerged to play a critical role in the formation and functioning of government in the country. As we will see, the Agong's appointment of the prime minister and the monarch's consent (or lack thereof) to emergency rule during the COVID-19 pandemic would turn out to be crucial turning points during Malaysia's 2020 government transition and in subsequent political crises.

13.3 CONSTITUTIONAL MONARCHY IN CONTEMPORARY PRACTICE

13.3.1 *Formation of Government*

The future of democracy in Malaysia was being decided in February 2020, so it appeared, inside a room in the palace. At half past two o'clock on a Wednesday afternoon, on February 25, the first wave of parliamentary members began arriving at the palace gates in Kuala Lumpur to be interviewed by the King. Over the course of that day and the next, they would meet one by one with the Agong. The palace announced that "his majesty himself" would interview each of the 222 members of the lower house of Parliament to determine which candidate the parliamentarians supported as prime minister.[22]

Days before, the Pakatan Harapan government had collapsed, after less than two years in power following its democratic triumph in the 2018 national elections. Initially triggered by several key members defecting from the governing Pakatan Harapan alliance to join forces with rival political blocs, a confounding political drama played out over the last week of February. Mahathir Mohamad resigned as prime minister, the Agong named him as interim prime minister, and then Mahathir sought to resume the mantle of prime minister. A battle for the country's premiership ensued between Mahathir Mohamad, the supposed premier-in-waiting Anwar Ibrahim, and Muhyiddin Yassin, a senior politician from Mahathir's own political party. Days of confusion followed as parliamentarians switched support for the contenders vying for the prime ministership in a series of bewildering political twists and turns.[23]

The King intervened at the heart of the political turmoil, seeking to exercise his constitutional power to appoint a prime minister. Never in the history of the country

[22] See Radzi Razak, "In Unprecedented Move, Agong to Interview Each MP to Determine Who Commands Majority,"*Malay Mail* (February 25, 2020), www.malaymail.com/news/malaysia/2020/02/25/in-unprecedented-move-agong-to-interview-each-mp-to-determine-who-commands/1840697.

[23] See James Massola, "'Somewhere between Game of Thrones and The Crown': Malaysia's Political Soap Opera," *Sydney Morning Herald* (February 28, 2020), www.smh.com.au/world/asia/somewhere-between-game-of-thrones-and-the-crown-malaysia-s-political-soap-opera-20200227-p54568.html.

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had the monarch's constitutional task seemed so fraught. What followed was a high-profile two-day interview process at the palace, during which the King met with all the members of Parliament to determine who commanded the support of the majority of the house. At the end of the two days, though, the King professed himself unable to reach a resolution, declaring that he was not confident that a single parliamentarian had the majority support to form a new government.[24] The Agong then asked for various party leaders to nominate their candidates for prime minister, and met with the party leaders as well as with the Conference of Rulers.

Soon after, the King announced that he had determined, based on the representations of the party leaders, that Muhyiddin Yassin had the support of the majority and that he would appoint Muhyiddin to the premiership. Even as the palace made its announcement, Mahathir Mohamad claimed that he had majority support, releasing a list of 114 parliamentarians who had allegedly signed statutory declarations in his support.[25] Nevertheless, the King refused to grant him an audience. As things turned out, Mahathir never got to be in the room where it happened.

On March 1, 2020, Muhyiddin Yassin was sworn in as the new prime minister. He took power at the helm of a hurriedly assembled Perikatan Nasional governing coalition containing many politicians from the United Malays National Organisation, which had been the key party bloc in the previously deposed Barisan Nasional government.

Malaysia's political crisis in 2020 resulted in an unusual government transition in a country that had hitherto experienced six decades of one-party rule and one (short-lived) democratic changeover when voters ousted the ruling Barisan Nasional coalition from governance for the first time.[26] Also unprecedented was the King's role in deciding who to appoint as prime minister. The events brought to the fore constitutional issues and constitutional conventions that had never been tested at the level of the federal government.

Begin with the constitutional text. The King's role in appointing a prime minister is laid out in Malaysia's Federal Constitution; Article 43(1)(a) states that "the Yang di-Pertuan Agong shall … appoint as Prime Minister to preside over the Cabinet 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." Up to this point in Malaysia's political history, which had been dominated for decades by a ruling

[24] "No One Has the Majority to Be New PM, Party Leaders to Nominate PM Candidate: Malaysian King," *Today Online* (February 28, 2020), www.todayonline.com/world/no-one-has-majority-be-new-pm-party-leaders-nominate-pm-candidate-malaysian-king.

[25] 114 members of Parliament constituted a (bare) majority of the 222-member lower house of Parliament. Jason Thomas, "Dr M Released List of 114 MPs Backing Him," *Free Malaysia Today* (February 29, 2020), www.freemalaysiatoday.com/category/nation/2020/02/29/dr-m-releases-list-of-mps-backing-him/.

[26] See Yvonne Tew, "Malaysia's 2020 Government Crisis: Revealing the New Emperor's Clothes," *International Journal of Constitutional Law Blog* (April 15, 2020), https://perma.cc/7NZR-ZMP7.

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coalition that controlled a vast majority of legislative seats, the monarch's appointment of the prime minister in Malaysia had been merely a pro forma task.

Not so in 2020. The government upheaval of February 2020, with political shenanigans resulting in razor thin, constantly shifting margins of support for each of the vying prime minister candidates, raised questions that had never come to the fore at the federal level. How was the King to exercise his "judgment" as to who was "likely to command the confidence of the majority" in appointing the new prime minister? And what evidence could the constitutional monarch rely on in making that determination?

The Malaysian monarch decided to directly intervene into the midst of the political crisis. The Agong took the extraordinary step of interviewing each individual member of Parliament and then met with the leaders of the competing political parties to hear their representations – a move that the palace itself characterized as going "beyond the call of obligation."[27]

Malaysia's case offers a striking example of a non-majoritarian institution playing an assertive role in influencing the government's formation. Textually, of course, the monarch is constitutionally empowered to appoint the person who "in his judgment" is likely to command majority support in Parliament.[28] But as Asanga Welikala observes, "the king's actions do raise a question that often arises in Westminster-style systems: a course of action that may be strictly legal may nevertheless be regarded as unconstitutional."[29]

Malaysia's unusual government transition in 2020 implicates fundamental questions of constitutional design. Under the constitutional framework of a Westminster-style parliamentary democracy, the monarch's role in appointing a prime minister is normally to affirm the outcome of the political process.[30]

Of course, times of political crisis are not the normal circumstances under which a monarch appoints a prime minister.[31] In extraordinary circumstances, the head of state may be pressed to draw on various sources of evidence to try to measure majority support.[32]

[27] Bernama, "Istana Negara's Statement on The Guardian's editorial," *New Straits Times* (March 8, 2020), www.nst.com.my/news/nation/2020/03/572767/istana-negaras-statement-guardians-editorial.

[28] Federal Constitution of Malaysia 1957, Article 43(1).

[29] Asanga Welikala, "The Dismissal of Prime Ministers in the Asian Commonwealth," *Political Quarterly* 91: 793 (2020).

[30] Vernon Bogdanor, *The Monarchy and the Constitution*. Clarendon Press, 1997, 84.

[31] Ibid., 89.

[32] While this question had not been addressed before at the federal level in Malaysia, in a dispute dealing with a state government, the High Court has held that the state Menteri Besar (a position equivalent to the governor of a state) can only be removed through a vote of confidence in the state legislative assembly. However, the Court of Appeal later overturned the lower appellate court's decision, determining that a formal vote of no confidence is not required by the state's constitution and thus a loss of confidence in the Menteri Besar can be determined from extraneous evidence, including representations made by the lower assembly

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In a situation of highly fraught political uncertainty, though, when there is serious dispute as to which candidate in fact commands majority support, there are strong arguments of democratic accountability and constitutional structure for allowing the political process to play out, rather than being resolved through premature royal intervention. When the palace announced the King's decision, effectively sealing the premiership, Muhyiddin and Mahathir both claimed to command majority support, and Mahathir had produced a list of members of Parliament declaring their support for him.

Had the monarch not decisively named a prime minister, the contenders might have continued to battle it out in the wider political sphere through negotiations, compromise, or political horse-trading.[33] Or the contentious matter could have been resolved in Parliament through a vote of confidence (or no confidence) to determine majority support openly on the floor of the legislature.

Amidst the political crisis, the King was thrust with the circumstances to play kingmaker.

Still, a constitutional monarch intervening too precipitously into a political controversy may end up being perceived as overturning the country's democratic mandate.[34] Royal assertiveness in the formation of government of the sort that resulted in the Malaysian government transition in early 2020 risks undermining, rather than promoting, democracy. The events that unfolded thereafter appeared to underscore this point. When Muhyiddin was appointed prime minister, Mahathir and the opposition parties immediately called for a vote of confidence to be held in Parliament – a call that was repeated throughout Muhyiddin's premiership.

Yet, as the next section describes, that vote of confidence never happened.

members and the Menteri Besar. The Court of Appeal's decision was upheld by the Federal Court. Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin lwn Dato' Dr Zambry bin Abd Kadir [2009] 5 Malayan L.J. 108 (High Court, Kuala Lumpur); Dato' Dr Zambry bin Abd Kadir v Dato'Seri Ir Hj Mohammad Nizar bin Jamaluddin (Attorney General of Malaysia, intervener) [2009] 5 Malayan L.J. 464 (Court of Appeal, Malaysia); Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir (Attorney General, intervener) [2010] 2 Malayan L.J. 285 (Federal Court, Malaysia).

Although this case might suggest that the head of state may make his decision based on evidence beyond the support expressed on the floor of the state legislative assembly, the upper appellate court decisions are viewed as controversial and problematic. See, e.g., Jaclyn Neo, "Change and Continuity: The Constitutional Head of State and Democratic Transitions in Malaysia," *Malayan Law Journal* 5: i, viii (2012).

[33] See Dian Shah and Andrew Harding, "Constitutional Quantum Mechanics and a Change of Government in Malaysia," *International Journal of Constitutional Law Blog* (April 8, 2020), www.iconnectblog.com/2020/04/constitutional-quantum-mechanics-and-a-change-of-government-in-malaysia/ (arguing "that a less proactive approach might in fact have been more appropriate and more usual in the context of a Westminster system of government, allowing the political elites to resolve the issue amongst themselves").

[34] See, e.g., Editorial, "The Guardian View on a Royal Coup: A King Overturns a Historic Election," *The Guardian* (March 3, 2020), www.theguardian.com/commentisfree/2020/mar/03/the-guardian-view-on-a-royal-coup-a-king-overturns-a-historic-election#maincontent.

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13.3.2 *Suspension of Government*

On May 18, 2020, after a prolonged period of suspension, members of Malaysia's Parliament convened for an unusual one-day parliamentary sitting.[35] Barely an hour after the parliamentarians had assembled in the lower house chamber, the meeting was over and Parliament adjourned yet again.

That one-day sitting was the first time that the Malaysian Parliament had convened since the Perikatan Nasional government, with Muhyiddin Yassin as prime minister, had come into power on March 1, 2020. The Agong opened the parliamentary sitting with a half-hour address. Although a vote of no confidence had been put forward against the newly appointed prime minister, the Speaker of the House of Representatives announced before the session that the motion had been dropped from the agenda.[36]

Citing the COVID-19 pandemic, the government declared that no motions would be allowed during the parliamentary session and that the King's speech would be the only order of business that day.[37] No debates or questions were permitted during the parliamentary sitting. It was a pro forma session held to satisfy – in form only – the constitutional requirement that no more than six months should elapse between parliamentary sittings.[38]

In the months to follow, Prime Minister Muhyiddin Yassin proclaimed a state of emergency due to the coronavirus pandemic and suspended Parliament. For more than half of 2021, Parliament remained shut down. No motion of confidence in the government was permitted or voted on throughout Muhyiddin's tenure.

To be sure, the Malaysian government's move to bypass usual democratic procedures in the name of the COVID-19 pandemic was not exceptional when viewed through a global lens. Throughout the pandemic, national executives across the world exercised expansive powers in response to the health crisis,[39] generating debate over whether the pandemic has accelerated the rise of authoritarianism globally.[40] Much of the discourse on the role of government power during the

[35] See Richard C. Paddock, "Democracy Fades in Malaysia as Old Order Returns to Power," *New York Times* (May 22, 2020), www.nytimes.com/2020/05/22/world/asia/malaysia-politics-najib.html.

[36] See "Malaysian PM Delays Confidence Vote Citing Virus Battle, Mahathir Cries Foul," *Reuters* (May 13, 2020), https://www.reuters.com/article/idUSL4N2CV1WY/.

[37] "May 18 Dewan Rakyat Sitting Only for Royal Address," *New Strait Times* (May 13, 2020), www.nst.com.my/news/nation/2020/05/592216/may-18-dewan-rakyat-sitting-only-royal-address.

[38] Federal Constitution of Malaysia 1957, Article 55(1).

[39] See generally Tom Ginsburg and Mila Versteeg, "The Bound Executive: Emergency Powers during the Pandemic," *International Journal of Constitutional Law* 19: 1–38 (2021).

[40] See, e.g., Selam Gebrekidan, "For Autocrats, and Others, Coronavirus Is a Chance to Grab Even More Power," *New York Times* (April 14, 2020). www.nytimes.com/2020/03/30/world/europe/coronavirus-governments-power.html; Larry Diamond, "Democracy versus the Pandemic," *Foreign Affairs* (June 13, 2020), www.foreignaffairs.com/articles/world/2020-06-13/democracy-versus-pandemic.

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COVID-19 pandemic focused on the accrual of power by elected executives worldwide.[41]

The Malaysian experience during the pandemic offers an example of the expansion of power by another executive branch actor: the monarch. As the Muhyiddin administration struggled to respond to the coronavirus pandemic, the King launched a series of interventions.

Consider the use of emergency powers. Prime Minister Muhyiddin Yassin first sought to invoke a national emergency in late October 2020. This push for emergency rule, which came several months after the one-day parliamentary session in May, after which time Parliament had been suspended, was justified by Muhyiddin as necessary to curb the spread of COVID-19 in the country. For many, the proposed emergency was simply another attempt by the premier to avoid a showdown in Parliament that might challenge his precarious position.

Stunningly, the Agong rejected the prime minister's request to declare a state of emergency. This display of royal authority was unprecedented: never before had the constitutional monarch rejected a request made by the prime minister, tendered on the advice of the government – on a matter of national emergency, no less.[42] Nor did the Agong hesitate to make clear his view on the matter, announcing that he saw no need for an emergency declaration and sternly calling on the politicians to end their politicking.[43]

The Agong's move was lauded by the public. At a time when citizens coping with pandemic restrictions were becoming increasingly disillusioned with the infighting among the political elite, the monarch's refusal of Prime Minister Muhyiddin's request boosted popular support for the Agong, who was widely praised for defending democratic values.[44]

Earlier that month, the King had also refused to recognize opposition leader Anwar Ibrahim's claim that he commanded a parliamentary majority such that he could

[41] See, e.g., Symposium, "Power and the COVID-19 Pandemic," *Verfassungblog*, https://verfassungsblog.de/category/debates/power-and-the-covid-19-pandemic-debates/ (accessed April 16, 2022).

[42] Constitutionally, the power to proclaim an emergency lies with the Yang di-pertuan Agong. Federal Constitution of Malaysia 1957, Article 150(1) ("If the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part thereof is threatened, he may issue a Proclamation of Emergency making therein a declaration to that effect.").

[43] See "Malaysia's King Rejects PM's Push for COVID Emergency Rule," *Aljazeera* (October 25, 2020), www.aljazeera.com/news/2020/10/25/malaysias-king-rejects-pms-push-for-coronavirus-emergency.

[44] See, e.g., A. Ananthalakshmi and Rozanna Latiff, "Malaysia's King Wins Plaudits during Political Storm," *Reuters* (October 27, 2020), www.reuters.com/article/us-malaysia-politics-royals/malaysias-king-wins-plaudits-during-political-storm-idUSKBN27C1M3; Serina Rahman, "Commentary: Malaysian King Steers a Country through Rough Waters," *Channel News Asia* (November 20, 2020), www.channelnewsasia.com/commetary/malaysia-king-agong-anwar-muhyiddin-johor-covid-19-mco-678786.

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unseat the incumbent Muhyiddin Yassin. Unconvinced by the evidence produced – Anwar had supplied the King with the number of legislators that he claimed supported him, but not their identities – the King had dismissed Anwar's bid for the premiership.

Eventually, however, the Agong acceded to Prime Minister Muhyiddin Yassin's request for a national state of emergency. On January 12, 2021, the King declared a state of emergency, which was set to expire on August 1. With the emergency decree, Muhyiddin Yassin's administration gained broad powers, claimed as necessary to tackle the COVID-19 spread. The emergency also allowed for suspending Parliament and the holding of any elections. It was the first time in more than half a century – since the country's devastating racial riots in 1969 – that a national emergency had been proclaimed.[45]

In January 2021, Parliament was promptly suspended, and the legislature did not sit for more than half of the year. Opposition politicians denounced the declared emergency as a blatant attempt by the government to cling to power. Throughout the months-long state of emergency, there were repeated calls for Parliament to reconvene, including from the Agong, who, on at least three separate occasions, publicly reiterated his call for Parliament to resume proceedings as soon as possible.[46]

Political tensions simmered and eventually reached a tipping point in July 2021. Faced with mounting criticism over the lengthy emergency rule and the government's handling of the pandemic, the government eventually held a special session of Parliament at the end of July. During that session on July 26, Prime Minister Muhyiddin Yassin's administration declared that all emergency ordinances had already been revoked – a sudden announcement that came as a surprise to the legislators, since the issue had not been debated in Parliament.[47]

Almost immediately, the King publicly announced that he had not given his assent to revoke any emergency ordinances, asserting that he had agreed only to the proposal being presented to Parliament. In a rare rebuke to the administration, the Agong expressed his "great disappointment" with the announcement that the government had revoked the emergency ordinances, emphasizing that the statement was "inaccurate and had misled members of the house."[48] The King excoriated Muhyiddin's Cabinet, stating that the misleading statements had not only failed to

[45] On the historical use of emergency powers in Malaysia, see Tew, *Constitutional Statecraft in Asian Courts*, 189–192.

[46] See "Malaysia's King Calls for Early Resumption of Parliament," *Reuters* (June 16, 2021), www.reuters.com/world/asia-pacific/malaysias-king-calls-parliament-resume-earliest-2021-06-16/; Eileen Ng, "Malaysian King Says Parliament Must Resume Despite Emergency," *AP News* (June 16, 2021), https://apnews.com/article/malaysia-coronavirus-pandemic-health-government-and-politics-d115ac90b085760247df9c30be8d5709.

[47] See Shannon Teoh, "Confusion in Malaysia as Govt Refuses to Explain Ending of Covid-19 Emergency law," *Straits Times* (July 27, 2021), www.straitstimes.com/asia/se-asia/confusion-in-malaysia-as-govt-refuses-to-explain-ending-of-covid-19-emergency-laws.

[48] Adib Povera, "YDP Agong Disappointed Emergency Ordinances Revoked without Consent," *New Straits Times* (July 29, 2021), www.nst.com.my/news/nation/2021/07/712776/ydp-agong-disappointed-emergency-ordinances-revoked-without-consent.

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uphold the rule of law but also ignored the Agong's functions and powers as the head of state, which included the power to promulgate and revoke emergency ordinances.[49]

The palace's statement made no bones about the King's conception of the role of the constitutional monarch:

> His Majesty is aware of the necessity for His Majesty to act in accordance with the advice of the Cabinet as stated in Article 40(1) of the Federal Constitution. Nevertheless, the King emphasizes that, as the Head of State, His Majesty has the responsibility to advise and reprimand in the event of any unconstitutional action taken by any party.[50]

In the aftermath of the palace's damning rebuke, which fueled public outrage over his government's handling of the emergency, Prime Minister Muhyiddin Yassin resigned on August 16. He conceded that he no longer had majority support in Parliament, ending his tenure after a turbulent seventeen months in power.

When a prime minister resigns, the Federal Constitution of Malaysia provides for the dissolution of Parliament, followed by elections, or for the King to appoint a new prime minister. The Agong ruled out holding a national election because of the COVID-19 pandemic. Instead, the monarch consulted with political party leaders, and the palace issued a call for members of Parliament to indicate their choice of a prime minister – through email, fax, or WhatsApp – to the palace.[51]

Yet again, the King was positioned as kingmaker. Soon after, the King announced that he was satisfied that that Ismail Sabri Yaakob – a leader from the United Malays National Organisation, which had been deposed in the 2018 national elections – had the backing of a (bare) majority of 114 of the 220 parliamentarians.

Five days after Muhyiddin Yassin's resignation, Ismail Sabri was sworn in as Malaysia's new prime minister on August 21, 2021, taking over as leader of the Perikatan Nasional alliance previously headed by Muhyiddin Yassin. It was the second time in less than two years that the leader of the government had assumed the premiership through royal appointment, instead of through an electoral outcome or a parliamentary vote of confidence.[52]

[49] Bernama, "Agong Expresses Utmost Disappointment over Revocation of Emergency Ordinances without Consent – Istana Negara," *Astro Awani* (July 29, 2021), www.astroawani.com/berita-malaysia/agong-expresses-utmost-disappointment-over-revocation-emergency-ordinances-out-consent-istana-negara-311109.

[50] Istana Negara, Facebook (July 29, 2021). www.facebook.com/IstanaNegaraOfficial (translated from Malay by the author).

[51] See Anisah Shukry and Yantoultra Ngui, "Malaysia's New Prime Minister May Be Chosen through WhatsApp," *Bloomberg* (August 16, 2021), www.bloomberg.com/news/articles/2021-08-17/malaysia-s-king-summons-party-leaders-after-pm-quits-kini-says.

[52] See Shad Saleem Faruqi, "Political Instability and Enhanced Monarchy in Malaysia," *ISEAS Perspective* (February 25, 2022), 6, www.iseas.edu.sg/wp-content/uploads/2022/01/ISEAS_Perspective_2022_18.pdf.

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13.4 CONCLUDING REFLECTIONS: CONSTITUTIONAL MONARCHY AND CONSTITUTIONAL DEMOCRACY

On August 5, 2017, in a speech at a convention held in the administrative capital city of Putrajaya, Sultan Nazrin Shah, the state Ruler of Perak, put forward his account of the constitutional monarch in striking terms:

> The King is not a rigid decorative ornament – without life – without soul .... It is a mistake to think that the role of a constitutional monarch is the same as that of a President, limited to what is written in the Constitution. The role of the Ruler goes above what is contained in the provisions of the Constitution.[53]

That statement would turn out to be predictive. In the four years after the speech was delivered, the monarch would emerge as a critical actor in the creation and governance of the federal government. When the Pakatan Harapan government collapsed in early 2020, the King intervened into the political dispute by appointing a new prime minister. And, as the new administration sought to maintain its tenuous hold on power while struggling to manage the coronavirus pandemic, the Agong came to play a crucial role in declaring the start, and the end, of emergency rule in the country. These royal interventions at the federal level throughout 2018 to 2021 placed the monarch at the very heart of the nation's constitutional politics.

Does an enhanced role for the monarch serve to protect or undermine constitutional democracy? Answers vary, unsurprisingly, depending on who you ask, and when that question is asked. For some, the constitutional monarch played a crucial part in "stabilizing" political crises and as a "check-and balance to the government in power."[54] Others have decried the royal assertiveness as illegitimate intrusions into the democratic process – indeed, some have called the monarch's actions a "royal coup"[55] – and voiced fears about "overreach by future

[53] Nazrin Shah, Sultan of Perak, Speech, "Institusi Beraja Satukan Negara" (Monarchical Institutions Unite the People), *Utusan Malaysia* (August 5, 2017) (translated from Malay by the author).

[54] Yang Razali Kassim, "Malaysia's Political Crisis: A New Power Twist?," *RSIS Commentary* (December 2, 2020), www.rsis.edu.sg/wp-content/uploads/2020/12/CO20206.pdf; Yang Razali Kassim, "Malaysia's King Becomes Kingmaker," *GIS* (November 13, 2020), www.gisreportsonline.com/r/malaysia-political-crisis/; Serina Rahman, "Commentary: Malaysia King's Role Comes into Sharper Focus as Country Sails through Bleakest COVID-19 Days," *Channel News Asia* (July 20, 2021), www.channelnewsasia.com/commentary/malaysia-king-role-sultans-agong-covid-19-parliament-rulers-2046151; see also A. Ananthalakshmi and Rozanna Latiff, "Malaysia's King Wins Plaudits during Political Storm," *Reuters* (October 27, 2020), www.reuters.com/article/us-malaysia-politics-royals/malaysias-king-wins-plaudits-during-political-storm-idUSKBN27C1M3.

[55] Editorial, "The Guardian View on a Royal Coup: A King Overturns a Historic Election," *The Guardian* (March 3, 2020), www.theguardian.com/commentisfree/2020/mar/03/the-guardian-view-on-a-royal-coup-a-king-overturns-a-historic-election#maincontent (discussing the King's appointment of Muhyiddin Yassin as prime minister in February 2020 and concluding that "a king has overturned a democratic election result that challenged a corrupt old order").

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monarchs."[56] What seems undeniable is that the monarch's position and powers have been augmented to an extent not seen since before Malaysia's independence in 1957.

How and why has the monarch come to assume such an empowered position in contemporary constitutional governance?[57] Those viewing the King's enlarged powers as "substantially departing from Westminster-modelled constraints" raise concerns over whether recent interventions have left "a lasting imprint on an 'Eastminster Constitution' with an enhanced monarchy."[58] As Andrew Harding asks: "Do we live in postmodern world of constitutionalism in which even apparently defunct or declining institutions can take on new life, taking their place alongside both the familiar and the innovative?"[59]

The revival of constitutional monarchy in contemporary Malaysia underscores the ways in which constitutionalism and practices of constitutional governance exist beyond the written text. In terms of constitutional design, the Malaysian experience highlights how the drafting of the written constitution and the structure it sought to put in place may produce effects unintended by the framers. When Malaysia's Federal Constitution was created at the Federation's independence from the British, the nation's founding fathers envisaged a Westminster-model constitutional monarchy, with a symbolic role for the Rulers. It was clear, Kobkua Swannathat-Pian notes, that they "were not in favor of a return to a time where the Rulers had socio-political powers"; rather, it was their "ardent desire that the Rulers' role would be limited to simply that of the symbolic kind."[60] The framing of the constitutional text reflected these aspirations, with limited discretionary powers afforded to the King. Unlike Britain, Malaysia's constitutional system accorded supremacy to a written text.[61]

Yet, there can be significant play in the joints when it comes to constitutional text and constitutional practice. Even in countries that accord primacy to the written constitutional document, like the United States, constitutionalism is recognized also to encompass the actual institutional practices of government.[62] For emerging

[56] Rozanna Latiff, "Monarchy Reshaped as Malaysia's King Looks to End Political Turmoil," *Reuters* (August 19, 2021), www.reuters.com/world/asia-pacific/monarchy-reshaped-malaysias-king-looks-end-political-turmoil-2021-08-19/ (quoting constitutional lawyer New Sin Yew); see also Joshua Kurlantzick, "Malaysia's Political Crisis Is Dooming Its COVID-19 Response," *Council on Foreign Relations* (July 26, 2021), www.cfr.org/article/malaysias-political-crisis-dooming-its-covid-19-response (stating that "the very fact that [the King] is wielding so much power is itself a blow to the country's democracy").

[57] See generally Saleem Faruqi, "Political Instability and Enhanced Monarchy in Malaysia."

[58] Ibid., 9.

[59] Andrew Harding, "The Rulers and Centrality of Conventions in Malaysia's 'Eastminster' Constitution," in *Viceregalism: The Crown as Head of State in Political Crises in Postwar Commonwealth* ed. H. Kumarasingham. Palgrave Macmillan, 2020, 273.

[60] Suwannathat-Pian, *Palace, Political Party, and Power*, 407.

[61] *See* Federal Constitution of Malaysia 1957, Article 4(1) ("This Constitution is the supreme law of the Federation.").

[62] See generally Samuel Issacharoff and Trevor W. Morrison, "Constitution by Convention," *California Law Review* 108: 1913–1954 (2020).

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democracies in Southeast Asia – of which Malaysia is a case in point – institutional practices and constitutional conventions are far from being settled. In a setting in which constitutional norms are still in flux, institutional actors – like the monarch – have greater space to negotiate their role in constitutional governance. That's especially so in times of political turmoil, during which the lack of established constitutional rules and political norms often create a lacuna that allows, or even compels, a monarch to step in.

In times of political or constitutional crisis, a monarch may take on a key role to resolve the conflict.[63] Tom Ginsburg describes the monarch's function in this kind of situation as "crisis insurance."[64] Examples of sovereigns who have acted to provide a "focal point" during times of crisis include King Juan Carlos I denouncing the 1981 Spanish coup d'etat attempt in a televised address, or Thai King Bhumibol summoning the prime minister general and the leader of the anti-government protest movement to the palace in 1992 for a royal audience that was broadcast on television.[65] This account captures part of the story, although Malaysia's constitutional monarch has taken on a role that arguably goes beyond serving as a symbol of unity. The Agong emerged as the critical actor that directly facilitated the government's turnover in early 2020 by deciding who to appoint as prime minister.

Recall the King's unprecedented intervention in interviewing all the legislators individually to determine who commanded majority support during the government crisis in February 2020. "Politically neutral institutions such as the judiciary and monarchy attract attention in such circumstances as potential power-brokers," Harding observes.[66] Of course, many established democracies in the West have also witnessed the breakdown of what have been thought to be well-established political and constitutional norms. In many constitutional systems, the spotlight has been on the rise of the courts as the institution empowered to decide. We see this, for example, in the United Kingdom Supreme Court's invalidation of the Boris Johnson administration's prorogation of Parliament in the lead up to Brexit at the end of 2019.[67]

In a system of fragile (judicial) constitutionalism, as in Malaysia, it is the monarch that stepped into the breach by intervening in the immediate political moment.

[63] See Ginsburg, "East Asian Monarchy in Comparative Perspective," 3. See also Michael Vatikiotis, "Monarchy and Modern Politics in Southeast Asia," *Brookings* (September 3, 2015), www.brookings.edu/opinions/monarchy-and-modern-politics-in-southeast-asia/; H. Kumarasingham, ed., *Viceregalism: The Crown as Head of State in Political Crises in the Postwar Commonwealth*. Palgrave Macmillan, 2020; Sonam Tshering, "Bhutan: The Role of the Constitutional Monarch in a Public Health Crisis," in *Covid-19 in Asia: Law and Policy Contexts* ed. Victor V. Ramraj. Oxford University Press, 2020, 279–293.

[64] Ginsburg, "East Asian Monarchy in Comparative Perspective," 9.

[65] Ibid., 9, 20.

[66] Harding, "The Rulers and Centrality of Conventions in Malaysia's 'Eastminster' Constitution."

[67] See R (on the application of Miller) v. The Prime Minister, Cherry and others v. Advocate General for Scotland [2019] UKSC 41; see also Yvonne Tew, "Strategic Judicial Empowerment," *American Journal of Comparative Law* 72 (2024), available at: https://doi.org/10.1093/ajcl/avad040.

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Turning the lens to other monarchies in Southeast Asia, think of the neighboring state of Thailand. Although described as following "in form" a "Westminster-style constitutional monarchy … in practice, the monarch [in Thailand] reserves the ultimate extra-constitutional powers to interpret, intervene, reject, or direct a course of action on the affairs of the state."[68] On this account this kind of assertive monarchy reflects a Southeast Asian model of constitutional monarchy.[69] Some have used the term "Eastminster" to describe British postcolonial systems that have developed and deviated from a Westminster model.[70] But cautionary tales exist, and monarch that is not circumspect about guarding their legacy risks damaging its institutional legitimacy and authority. [71]

The rules of democratic and constitutional engagement are not yet to be fully specified in regimes undergoing democratic transition(s),[72] or after a decades-long equilibrium has broken down in a dominant party system, as occurred in Malaysia. In such circumstances, a non-electorally legitimated institution – like the monarch – that draws on its reserve powers to intervene in a stabilizing capacity may well renegotiate its role in the country's governance.

Periods of instability or political transition may present a monarch with the opportunity to play a decisive role in modulating the transition process. A monarch's enhanced function in times of crisis may prove dysfunctional at a later time, however. And in a political system has emerged from an initial period of instability, it may prove challenging to tie the hands of a monarch that has come to wield an expansive part in affecting the democratic character of a regime.

[68] Suwannathat-Pian, *Palace, Political Party, and Power*, 408; see also Kobkua Suwannathat-Pian, "The Hard Struggle," in *Kings, Country and Constitutions: Thailand's Political Development 1932–2000*. Routledge, 2003, 145–168.

[69] Suwannathat-Pian, *Palace, Political Party, and Power*, 408–409.

[70] H. Kumarasingham, "Eastminster – Decolonisation and State-Building in British Asia," in *Constitution-Making in Asia: Decolonisation and State-Building in the Aftermath of the British Empire* ed. H. Kumarasingham. Routledge, 2016, 1–36.

[71] See, e.g., Kate Ng, "Coronavirus, Thai King Self-isolates in Alpine Hotel with Harem of 20 Women amid Pandemic," *Independent* (March 29, 2020), www.independent.co.uk/news/world/europe/coronavirus-thailand-king-maha-vajiralongkorn-grand-hotel-sonnebichl-germany-a9431936.html; Pavin Chachavalpongpun, Opinion, "Why Thais Are Losing Faith in Monarchy," *Washington Post* (May 15, 2020), www.washingtonpost.com/opinions/2020/05/15/why-thais-are-losing-faith-monarchy/.

[72] See generally Adam Prezeworski, "The Games of Transition," in *Issues in Democratic Consolidation* ed. Scott Mainwaring, Guillermo O'Donnell, and J. Samuel Valenzuela. University of Notre Dame Press, 1992, 105.

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