

RESEARCH ARTICLE

# The Malay Monarchies in Constitutional and Social Conception

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## Abstract

This article examines the constitutional nature of the Malaysian monarchies in their social context. We discuss the evolution of the monarchies through pre-colonial, colonial, and post-colonial history, and account for their survival despite several attempts to curb their powers, including restriction of the royal assent and sovereign immunity. It is argued that the powers of the monarchies respond to their historical role and social embeddedness of the monarchies, stretching the role of the Rulers beyond the Westminster norms as set out in constitutional texts. Moving to contemporary issues, we see the assertion of the right to uphold the Constitution in relation to prime-ministerial appointments, and acting on advice. Here, the monarchies reflect a braiding of both traditional elements and Westminster constitutional norms.

**Keywords:** constitutional monarchy; Malay monarchy; heads of state; constitutional conventions; royal powers

The King is not a monumental ornament—without life—without soul . . . everything that happens is in the vision and hearing of the King . . . it is a mistake to think that the role of a constitutional monarch is just like a President, limited to what is written in the constitution. The role of the constitutional monarch is beyond what is contained in the constitution.<sup>1</sup>

## 1. Introduction

In this article, we examine Malaysia's nine monarchies in their constitutional and social context, as constitutional monarchies that, despite that description, perform functions going well beyond limits that are supposedly drawn by constitutional texts.<sup>2</sup> These monarchies, we argue, are defined by both their social context and their social standing, as these have evolved over time, as well as by the Westminster conventions that supposedly act as limits on their powers. Both types of discourse are necessary, we argue, in order to understand the true nature of the Malay monarchies. At no time since the independence of Malaya in 1957 has this dichotomy between law and society been more apparent than during the current period of political fragmentation from May 2018 to the time of publication. During this period, the exercise of both constitutional power and political

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<sup>1</sup> The Sun Daily (2017).

<sup>2</sup> Harding (2020).

influence by Malaysia's traditional Rulers<sup>3</sup> has proved highly significant, in some respects determining the course of political events as Malaysia negotiates its way through a difficult period defined by the pandemic and unusually intense competition over political power, the latter beginning with the general election of May 2018, which ended a run of 13 successive election wins by the Barisan Nasional, the dominant coalition since the independence of the Federation of Malaya in 1957.<sup>4</sup>

There are nine monarchies in Malaysia, or ten if one counts the unique office of *Yang di-Pertuan Agong*, the constitutional head of the federation, who is elected by the nine Rulers from amongst their own number in a generally rotational manner.<sup>5</sup> In this article, however, we utilize as a case-study the monarchy of the state of Perak.<sup>6</sup> We do so for a number of reasons. First, Perak was the first state to enter into a "residential" treaty with Britain (1874), which was a precedent for all of the other states.<sup>7</sup> Second, the incumbent Ruler, Sultan Nazrin Shah, and his father and predecessor, Sultan Azlan Shah, have done more than any other Rulers to define the modern monarchy system as explored in this article. Third, the Perak monarchy has spawned more historical research than other states, allowing us to trace the evolution of its monarchy more easily.<sup>8</sup> Fourth, it is, as will be discussed in more detail below, in most respects a typical Malay monarchy.

Accordingly, we proceed by discussing the historical evolution of the monarchies, especially the Perak monarchy, from pre-colonial times up until independence in 1957. That discussion emphasizes both formal and contextual factors and developments, in order to assess their evolution in parallel. We then discuss the limiting of royal power during the first Mahathir administration (1981–2003) and its expansion since then. Here we will see most clearly that royal power is defined by social norms and political contexts (sometimes conflicting ones) that have resulted in changes to the text of the Constitution. At the same time, as we move to a discussion of more recent constitutional history, we find that the text does not reflect the real social embeddedness of the monarchy, but rather tends to stretch the text to meanings that lie beyond the traditional norms of Westminster constitutionalism.

In order to the frame the ensuing discussion, some background information may be required. Constitutionally speaking, the Malay monarchies are framed by their state Constitutions and by the Federal Constitution of Malaysia 1957, Article 181(1) of which preserves the "sovereignty, prerogatives, powers and jurisdiction of the Rulers . . . within their respective territories as hitherto had and enjoyed." The word "hitherto" clearly begs questions as to what exactly is being preserved in Article 181(1). In addition, Article 71(1) guarantees the right of a Ruler "to succeed and to hold, enjoy and exercise the constitutional rights and privileges of Ruler of that State in accordance with the Constitution of that State."<sup>9</sup> Moreover, Article 38, which relates to the Conference of Rulers, provides that legislation directly affecting the "privileges, position, honours or dignities of the Rulers" may not be passed without the consent of the Conference of Rulers, which itself is a body of increasing constitutional significance, as we shall see. This body, deriving from the "Durbars" of the colonial period, is given some constitutional powers, being empowered to elect the *Yang di-Pertuan Agong*, to discuss state policies, to protect the position of

<sup>3</sup> In accordance with normal usage, we will refer to them in this article as "the Rulers."

<sup>4</sup> Neo, Shah, & Harding (2018); Harding et al. (2018); Gomez & Osman (2020).

<sup>5</sup> Federal Constitution, Third Schedule.

<sup>6</sup> Andaya (2018). For a detailed study of royal protocols, see Tung (2019). This book contains 970 pages and is devoted to only one of the nine monarchies—a vivid indication of the extensive and complex nature of the subject.

<sup>7</sup> Sadka (1968).

<sup>8</sup> Andaya, *supra* note 6.

<sup>9</sup> For discussion of the scope of prerogative powers in Malaysia, see Hickling (1975), and for an opposing view, see Harding (1986).

the Rulers, and to be consulted on various matters, including some official appointments, such as those of judges and the Auditor-General.<sup>10</sup>

However, the Federal Constitution also codifies the “Westminster” conventions requiring the *Yang di-Pertuan Agong* to assent to Bills passed by the legislature, and act on government advice.<sup>11</sup> The matters designated in the Constitution for the exercise of discretion by the *Yang di-Pertuan Agong* are limited, but include the appointment of the prime minister on the basis of the confidence of a majority of the members of Parliament, the refusal of a request for a dissolution of Parliament, and summoning a meeting of the Conference of Rulers.<sup>12</sup> To complete the circle of Westminster-convention requirements, Schedule 8 of the Federal Constitution also requires the state Constitutions to be in conformity with the Westminster conventions as discussed in this paragraph, so that not only the *Yang di-Pertuan Agong* but also the Rulers acting at the state level are required to observe them.<sup>13</sup>

One other aspect of the delineation of royal power that merits mention here as a critical aspect of law and society is the role of the Conference of Rulers in relation to the system of Malay privileges—a form of affirmative action that is established under Article 153 of the Constitution as an exception to equality before the law.<sup>14</sup> This system provides for special quotas for Malays and natives of Sabah and Sarawak in respect of public service positions, trade licences, scholarships, and, previously, university admission. In 1971, Article 159, which deals with constitutional amendments, was amended to require the consent of the Conference of Rulers to the passing of both constitutional amendments and ordinary laws that relate to the “sensitive issues” that form what is referred to as Malaysia’s “social contract:” citizenship, the special privileges of Malays and natives of Sabah and Sarawak, the national language, and, significantly, the Rulers themselves, and laws governing the questioning of policy on those issues.<sup>15</sup> This means nothing less than the entrusting to the Rulers themselves the guardianship of Malay privileges, what Article 153 refers to as the “legitimate interests” of non-Malays, and the entire social contract.<sup>16</sup> In the next section, we survey briefly the stages through which the present constitutional monarchy system has evolved.

## 2. Historical evolution of the Malay monarchies: a conspectus

### 2.1 Precolonial history

Consideration of pre-colonial history affords us the opportunity to grasp the traditional understanding of the Malay concept of monarchy, untainted, so to speak, by the Westminster conventions. The nine Malay states<sup>17</sup> began their existence in something resembling their modern form as fragments of the Malacca empire that was shattered by the Portuguese victory over it in 1511. Rulers with dynastic connection to the Malacca Sultan established themselves as Rulers of the various states. The Malacca Sultan’s eldest son, Muzaffar, for example, became the Ruler of Perak. Although there were

<sup>10</sup> Federal Constitution, *supra* note 5, Arts 38, 105, 159.

<sup>11</sup> *Ibid.*, Arts 40, 66.

<sup>12</sup> *Ibid.*, Arts 40(2), 43(4). Advice tendered to the *Yang di-Pertuan Agong* shall be accepted and followed by him: *ibid.*, Art. 40(1A).

<sup>13</sup> As we shall see, the operation of these conventions at the state level raises very similar issues to their operation at the federal level.

<sup>14</sup> Lee (2021).

<sup>15</sup> Harding (2007), pp. 120–3.

<sup>16</sup> Harding (2022), p. 69, empowers the government to exercise discretion in these matters in a manner that would otherwise be unconstitutional, but the Rulers are entrusted with safeguarding them against any legislation seeking to amend the Constitution in any respect that is relevant to Art. 153 and the social-contract provisions.

<sup>17</sup> Johor, Kedah, Kelantan, Negeri Sembilan, Pahang, Perak, Perlis, Selangor, and Terengganu.

written laws, such as the Ninety-Nine Laws of Perak,<sup>18</sup> the Constitution was, like the British Constitution, largely a matter of custom and protocol, but also varied somewhat according to the political power the incumbent Ruler was able to assert.<sup>19</sup>

The Rulers were variously called “*Yang di-Pertuan*” (one who is made Lord), “Raja,” or “Sultan,” but are nowadays called “Sultan,” except for Perlis, which has a Raja, and Negeri Sembilan, which has a unique local *adat* form of royalty, in which territorial chiefs are headed by the *Yang di-Pertuan* or, colloquially, “*Yamtuan*.” The Malay idea of kingship was essentially a syncretic creation with many influences—Hindu, Buddhist, and Muslim.<sup>20</sup> Malay ideas of magic were also associated with it. As late as 1874, records Winstedt, “Perak folk saw nothing strange in their Sultan ‘Abdullah, sitting at a séance on the shaman’s mat and becoming possessed by the genies of the State, who prophesied the death of the British Resident destined soon to be murdered.”<sup>21</sup> The Resident, J. W. W. Birch, was indeed subsequently murdered at the behest of ‘Abdullah. Subsequent British administration under Resident Sir Hugh Low showed more respect for Malay customs and traditional office-holders than Birch had done.<sup>22</sup>

The actual structure of government prior to British rule owed much to Hindu ideas, for example in the astrological obsession with multiples of four. Perak had four great, eight major, and 16 minor chiefs, and 32 territorial chiefs. Even the throne was 16-sided, while the palace had 32 pillars for each section of the building, and salutes were given in number eight, 16, or 32. A Malay concept of constitutionalism certainly existed, and the *Sejarah Melayu*, the Malay history, according to Barbara Andaya,

frequently reminds rulers to consult their senior officials in matters of government, and prominent ministers felt it was their prerogative to offer words of advice or admonishment when they felt tradition or protocol had been disregarded—sometimes high-ranking ministers exercised more influence than the ruler . . . . Because they had authority over certain areas of the state from which they could draw tribute or service, the great chiefs, the *orang besar*, could essentially act as independent agents, and without their support the sultan was virtually powerless.<sup>23</sup>

Thus, while Malay governance undoubtedly required the existence of a *Raja* (the Malay word for government itself is “*kerajaan*”<sup>24</sup>), constitutionalism as conceived in Malay culture did not embody absolute monarchy, as the *Raja* was, as we have seen, in general subject to the power of his ministers and the territorial chiefs. In Perak, the “*waris negara*” or custodians of the state, the minor royalty, also acted as a significant check on the Ruler. Even in relation to external affairs, a matter normally within the Ruler’s competence, any major developments required the consent of the chiefs. For example, while most of the Perak chiefs assented to the Pangkor Engagement, the treaty between Perak and Britain in 1874 that established the residential system, the fact that some refused to approve it cast doubt on its constitutionality, according to Malay constitutional norms.<sup>25</sup> Similarly, when all the Rulers, not at that point in favour due to their collaboration with the Japanese during 1942–45, were prevailed upon to sign the MacMichael treaties with Britain in 1946, establishing the Malayan Union, which would have abolished the Rulers’ powers and the states as autonomous entities, their acts were argued to be

<sup>18</sup> Zakaria & Sulkafe (2020), pp. 104–16.

<sup>19</sup> Gullick (1988).

<sup>20</sup> *Ibid.*

<sup>21</sup> Winstedt (1958), p. 64.

<sup>22</sup> Parkinson (1960), p. 328.

<sup>23</sup> Andaya, *supra* note 6, pp. 5–6.

<sup>24</sup> Milner (1982).

<sup>25</sup> Harding, *supra* note 16, p. 7.

unconstitutional as they had not obtained the assent of the chiefs. Some Rulers were even accused of “*derhaka*” (treason) for signing away the sovereignty of their states.<sup>26</sup> Malay opinion prevailed as the British abandoned the plan to unify Malaya in favour of a federation, established under the Federation of Malaya Agreement 1948.<sup>27</sup> Thus the Malay monarchies are closely related to federalism, in the sense that the continuation of each depends largely on the continuation of the other.

## 2.2 The colonial period

The Pangkor Engagement required the Ruler to act on the advice of a British Resident, except in relation to matters relating to Islam and Malay custom. This pattern was repeated in residential treaties with the other states over the following half-century.<sup>28</sup> This had three important effects on the evolution of the monarchy system. First, the principle of acting on the advice of a chief executive became routine, albeit in practice depending on the relationship between the Resident and the Ruler. Indeed, as Andaya reminds us, “the very basis of colonialism in Malaya rested on the assumption that the [R]uler would generally be willing to abide by the ‘advice’ he received from the British Resident.”<sup>29</sup> Second, the role of the Ruler over religion became similarly entrenched, leading ultimately to divided legal jurisdiction.<sup>30</sup> Third, the presence and prominence of the Ruler were enhanced, even as their powers were restricted in scope by the treaties. As Kumarasingham writes of the system of indirect rule in the British empire, “local rulers, real or manufactured, were there to provide an element of constitutional localism beneath the canopy of imperialism.”<sup>31</sup> In Malaya, some Rulers were indeed “manufactured,” as the already vague rules of royal succession were frequently manipulated to ensure an outcome of somewhat uncertain contingency—a Ruler who was both able and convincing, and yet also sufficiently pliable.<sup>32</sup> This was apparent right from the start, as contestation over the Perak succession became the very occasion for British intervention, and its manipulation the means of achieving it.<sup>33</sup> The boundary between British and Malay power was a matter of constant tussle between the Ruler and the Resident.<sup>34</sup> The best model for a successful relationship between Ruler and Resident was that of Perak under Raja Idris and Resident Sir Hugh Low—one in which

the *Raja* and his minister were indeed usually in accord, but only as a result of good sense on both sides. The Resident did not always refrain from giving advice on religious matters, technically within the purview of the Ruler, presumably on the basis that nothing in the 1874 Treaty prevented him from offering it. On the other hand the *Raja* sometimes ignored Low’s advice even on matters within the Resident’s purview. Low was able to achieve more by indirect means than others were able to achieve by direct means.<sup>35</sup>

<sup>26</sup> Lau (1991).

<sup>27</sup> Federation of Malaya Agreement 1948.

<sup>28</sup> Allen (1981).

<sup>29</sup> Andaya, *supra* note 6, p. 15.

<sup>30</sup> Shah (2017).

<sup>31</sup> Kumarasingham (2022).

<sup>32</sup> Andaya, *supra* note 6, p. 15.

<sup>33</sup> Winstedt, *supra* note 21, pp. 222ff.

<sup>34</sup> Harding, *supra* note 16, pp. 6ff.

<sup>35</sup> *Ibid.*, p. 8.

### 2.3 Federalism

Naturally, the existence in Malaya of nine states and three colonies (the Straits Settlements of Penang, Malacca, and Singapore) having different degrees of autonomy and different systems of government presented an awkward constitutional arrangement, and moves began as early as 1895 to centralize administration. This too became a matter of tussle between the British and the Malay Rulers.<sup>36</sup> Shifting policy on this issue hardly resulted in greater rationalization, as some states (the “Federated States of Malaya”) were federalized, but others (the “Unfederated States of Malaya”) were not. The complete failure of this system of government to withstand the Japanese onslaught of 1941 pointed to a need for definitive resolution of the problem as a prior condition for independence. It was for this reason that the Malayan Union of 1946 was instituted, before its rejection in the manner indicated above. This in turn led to the Rulers agreeing to a federal arrangement, incorporating all of the existing states and colonies, except Singapore, under the Federation of Malaya Agreement 1948, which was signed by all of the Rulers. The case for retention of the Rulers’ powers, advocated not just by Malay leaders but by some British officials too, was fundamentally a cultural one.<sup>37</sup> Abolition of the Rulers and states that were hundreds of years old was seen by this body of opinion as a form of cultural desecration, and the political rebellion that followed consolidated Malay opinion behind the monarchy and behind the party that championed Malay rights—the United Malays National Organisation (UMNO), which was destined to become the dominant party, as the dominant force in the Barisan Nasional coalition in independent Malaya/Malaysia. The federal system of 1948 retained the powers of the Rulers at the state level as constitutional monarchs, even as the introduction of institutions of responsible, democratic government (an elected legislature and ministerial offices held by Malaysians) presaged independence.<sup>38</sup>

### 2.4 Independence

The position established in 1948 was hardly changed by the constitution-making process of 1956–57, in which the continuance of constitutional monarchy was predetermined before the Reid Commission began the drafting process.<sup>39</sup> The only real impact of the independence Constitution of 1957 with regard to the monarchy was to establish the office of *Yang di-Pertuan Agong* in place of the High Commissioner of the Federation, and entrench the powers and privileges of the Rulers. The only matter of real controversy regarding the Rulers was the institution of Islam as the religion of the Federation under what became Article 3 of the Constitution. This troubled the Rulers, who naturally, in view of the constitutional history as discussed above, conceived of Islam as a state, not federal, matter, and saw Article 3 as eroding the main constitutional power they had retained. But the provision was ultimately seen as one that did not impinge on the Rulers’ powers in respect of Islam; being only the formality of establishing an official religion, powers over Islam remained at the state level.<sup>40</sup>

## 3. Post-independence: controversy and renewal

Despite the appearance of royal power being in effect codified and trammelled by Westminster conventions in the Constitution of 1957, its survival through the tumultuous constitutional changes of the 1940s and 50s seemed to make it stronger. The story of the

<sup>36</sup> Sadka, *supra* note 7; Parkinson, *supra* note 22.

<sup>37</sup> Lau, *supra* note 26.

<sup>38</sup> Harding, *supra* note 16, p. 16.

<sup>39</sup> Fernando (2002).

<sup>40</sup> Fernando (2006).



monarchy was never confined within the constitutional narrative, as the Rulers began to make themselves felt in a variety of ways. The assertion of royal power was common—most evident in disagreements between the Ruler and the state chief minister, and also often apparent in stand-offs and persistent failure by the Ruler to sign Bills passed by the state Assembly. This refusal was clearly contrary to Westminster conventions, as codified in the Constitution. It became, nevertheless, the standard method whereby a Ruler indicated displeasure. There was, however, no statement in the text that the Ruler must give assent, only that the Ruler's assent was required in order for legislation to be effective.

### 3.1 The royal assent

Occurrences of this kind at the state level were a matter for concern but not, apparently, for any concerted corrective action. However, when similar behaviour by the Rulers was threatened at the federal level, the relationship between the government and the monarchy became a matter of hardball politics. In 1983, as he was about to become the *Yang di-Pertuan Agong*, the Sultan of Johor made no secret of his detestation of politicians, and had even announced his intention of proclaiming an emergency and “throwing out all the politicians.”<sup>41</sup> Accordingly, in order to forestall a political and constitutional crisis of a kind that had never occurred previously, the then Prime Minister Mahathir proposed a constitutional amendment that would, in effect, abolish the need for royal assent to legislation, and remove the *Yang di-Pertuan Agong* from any role in emergency proclamations. The Bill provided that the royal assent would be deemed to have been given in the event a federal or state Bill that had been passed was not assented to within 15 days, and vested the power to proclaim an emergency in the prime minister, acting alone, instead of vesting it in the *Yang di-Pertuan Agong*, acting on cabinet advice.

The result was to provoke the very outcome the Bill was designed to prevent. The *Yang di-Pertuan Agong*, with the agreement of the other Rulers, refused his assent to the Bill. A lengthy battle followed, with both sides rallying popular support. It was brought to an end by a compromise under which the *Yang di-Pertuan Agong* was given a constitutional right to refer back Bills that had been passed in Parliament, while the government for its part withdrew the provision concerning emergency proclamations. The Rulers also undertook not to withhold assent to Bills passed by the state assemblies, although this was not required by the amendment Bill itself.<sup>42</sup>

As a result, the Constitution (Amendment) Act 1984 was passed, giving the *Yang di-Pertuan Agong* power to send a Bill that had been passed by Parliament back to the House where it originated within 30 days, with a statement of the reasons for his objection to the Bill. If the Bill were to be passed again by both Houses, then, if it did not receive royal assent within another 30 days, it became law automatically. A further constitutional amendment in 1994, which was an outcome of the crisis on the issue of royal immunity (discussed in the next subsection), reduced the powers of the *Yang di-Pertuan Agong* in this regard such that the position now is that there is no right to refer a Bill back to Parliament, but he must assent to a Bill that has been passed within 30 days, otherwise it becomes law automatically.

### 3.2 Royal immunity

The 1984 crisis only dealt with the royal assent at the federal level and emergency powers. It did not deal with the position of the Rulers per se. Indeed, political interference by

<sup>41</sup> Mauzy & Milne (1999), p. 32.

<sup>42</sup> Lee (1984); Rawlings (1986); Barraclough & Arudsothy (1985). Of course, provision for the royal assent at the state level would properly have required amendment to all the state Constitutions.

Rulers continued to occur, accompanied by the now familiar stand-offs and symbolic expressions of disagreement with the chief minister. Furthermore, in a crisis over the dismissal of Lord President Tun Salleh Abas (in effect, the Chief Justice) in 1988, the *Yang di-Pertuan Agong* himself was involved in the public furore that followed. In Kelantan, the Ruler even campaigned for the opposition in the 1990 general election. Alleged criminal acts by the late Sultan of Johor, both when he was the Crown Prince of Johor and when he was the *Yang di-Pertuan Agong*, were the subject of extensive speculation. An MP listed no fewer than 15 allegations of criminal acts by the Sultan and six relating to two of his sons. The press highlighted the luxurious lifestyle of the Rulers, and their occasional flouting of the law; in one instance the Sultan of Pahang was criticized for spending RM4,000 per day maintaining his horses in air-conditioned stables.<sup>43</sup> Since the Rulers enjoyed immunity from both criminal and civil suits, allegations of unlawful conduct could not be pursued in the courts.<sup>44</sup>

In addressing public disquiet over royal behaviour, the government proposed a self-regulatory *Proclamation of Constitutional Principles* (adopted on 4 July 1992), which was designed, after some negotiations, to place the Rulers in a straightjacket of their own making. It clarified the operation of constitutional conventions, and affirmed the Rulers' intention of acting within the law and the Constitution.<sup>45</sup> However, the document that emerged was itself rather unclear on some points, and was signed only by the *Yang di-Pertuan Agong* and six of the other Rulers.<sup>46</sup> Moreover, it was clearly not constitutionally binding. Realizing that the consensual approach had failed, the government used an assault by the Sultan of Johor on a hockey coach to signal its intention of hardening its approach and used its two-thirds' majority in Parliament to amend the Constitution.<sup>47</sup>

The resulting constitutional amendment Bill was passed by both Houses in January 1993. The amendment removed the immunity of the *Yang di-Pertuan Agong* and the other Rulers from suit when acting in a personal capacity, and conferred jurisdiction in such cases (criminal and civil) to a Special Court.<sup>48</sup> However, proceedings against a Ruler could be brought only with the permission of the Attorney General, were still not possible in the ordinary courts, and the Conference of Rulers was empowered to choose some of the judges who would sit on the Special Court. The amendment also conferred parliamentary privilege in respect of anything said during proceedings in Parliament or a State Legislative Assembly concerning a Ruler, except for advocating the abolition of the Ruler's constitutional powers.<sup>49</sup>

The Conference of Rulers then met, issuing a statement that it had unanimously decided not to consent to the Bill, on the grounds that further consultation was required. They were constitutionally empowered to do this, since the consent of the Conference of

<sup>43</sup> Suwannathat-Pian (2011), p. 363.

<sup>44</sup> Under Arts 32(1) and 181(2) of the Federal Constitution, the *Yang di-Pertuan Agong* and the Rulers were not liable to any proceedings whatsoever in any court. This immunity related to the Rulers acting in their personal capacity and did not of course mean that the federal or state government enjoyed legal immunity from acts done in the name of the head of state. This had been clarified by local cases and in 1980 the Privy Council itself in *Stephen Kalong Ningkan v. Tun Abang Haji Openg and Tawi Sli (No2)* [1967] 1 M.L.J. 46; and in *Teh Cheng Poh v. Public Prosecutor* [1980] A.C. 458, 467, per Lord Diplock.

<sup>45</sup> See "Statement by the Keeper of the Rulers' Seal and Proclamation of Constitutional Principles," Suwannathat-Pian, *supra* note 43, Appendix 1.

<sup>46</sup> Negeri Sembilan, Pahang, Perlis, Perak (Regent), Selangor, Terengganu, and the Sultan of Perak in his capacity as *Yang di-Pertuan Agong*. The Rulers of Johor, Kedah, and Kelantan did not sign. For the text, see *Malaysia Now* (1992).

<sup>47</sup> Shad Saleem Faruqi (1993).

<sup>48</sup> This court consisted of the Chief Justice of the Federal Court as chairman; the chief judges of the two high courts; and two other judges or former judges of the Federal Court or the high court, appointed by the Conference of Rulers.

<sup>49</sup> Gillen (1995).



Rulers was required for measures affecting the powers and privileges of the Rulers<sup>50</sup>; they also maintained that the Bill was unconstitutional as it trespassed on states' rights, and that the Special Court was an unsuitable forum for dealing with matters relating to the Rulers. However, the statement also recognized that "there cannot be two systems of justice in the country," and that "no Ruler has the right to hurt or cause harm to another person." Just as in 1983, an accommodation was reached, and in March 1993, an amended Bill was passed by Parliament, providing for a Special Court, constituted as in the original version of the Bill. However, there were two limitations on actions against a Ruler. First, proceedings could only be taken by or against the *Yang di-Pertuan Agong* or a Ruler acting in his personal capacity. Second, as in the original Bill, proceedings could not be brought against them except with the consent of the Attorney General.

Since 1993 there have been only two cases dealt with by the Special Court, both of which were civil cases against a Ruler. The first, in 1996, failed for lack of jurisdiction because the plaintiff was not a Malaysian citizen, while the second, in 2008, succeeded, when the Ruler of Negeri Sembilan was ordered to honour the terms of a letter of credit.<sup>51</sup>

### 3.3 Royal revival

The outcome of the monarchy crises of 1983–93 was not as drastic as the political furore accompanying them might suggest. The royal assent issue left matters little different from before 1983, and the royal immunity was left hedged with limitations so that, although there may well have been some consequential modification of royal behaviour, the Rulers' position was not dramatically affected. More importantly, if there were any opportunities to abolish the monarchy after independence, they came in 1984 and 1993, during the premiership of Malaysia's most ambitious and iconoclastic prime minister, Tun Mahathir. Yet the Rulers' position, irrespective of the behaviour of some Rulers, remained part of the social contract, and the events of 1946 had shown that they were immovable. At any rate, the government had attempted but essentially in the end failed to clip the wings of royal power in any meaningful way.

One result, however, of this critical phase in the evolution of Malaysian monarchy has been to compel an understanding on the part of the Rulers that their public behaviour must be vastly improved, if not beyond all reproach. Moreover, they need to be seen to perform an important public function, namely that of upholding constitutional values and protecting society from what have come to be seen as the worst excesses of politicians. In this sense, the tide has turned since retirement of their *bête noir*, Tun Mahathir, in 2003, and the Rulers have become the moderators of weakness and folly, rather than the moderated.<sup>52</sup> The new monarchy, described as "Nazrinian monarchy," after Sultan Nazrin Shah of Perak,<sup>53</sup> presents itself as a symbol of unity in a multi-ethnic society, an advocate of good governance, and a potential arbitrator of political and interreligious conflict. A new generation of highly educated and politically sensitive Rulers and princes have set out to fulfil the ideal of the Ruler as the personally meritorious and politically neutral guardian of the Constitution, morality, and justice. As an example of this trend, in 2019 the Sultan of Kelantan resigned as *Yang di-Pertuan Agong*, an unprecedented occurrence, under pressure from the other Rulers concerning his treatment for drug addiction and marriage to a Russian model who, it was speculated, might, as a non-Malay non-Muslim, become his "*Raja Permaisuri*" (Queen).<sup>54</sup>

<sup>50</sup> The government disputed this reasoning.

<sup>51</sup> Lee (2010).

<sup>52</sup> Suwannathat-Pian, *supra* note 43, pp. 339–44.

<sup>53</sup> Harding (2017); Harding, *supra* note 2.

<sup>54</sup> Teoh (2019).

The undoubted leader of this trend is Sultan Nazrin Shah, a published academic author with a PhD in political economy and government from Harvard University.<sup>55</sup> In both writing and speeches, he outlines a version of the monarchy that sees the Ruler as a check on government and a father figure for society in general. Sultan Nazrin has also in his speeches emphasized the importance of constitutional values such as the rule of law and judicial independence. He was reported in October 2021, for example, as saying that

although the role of the monarch was to rule and not to govern, the Ruler is still responsible for overseeing and ensuring a fair and just, orderly and transparent administration, as well as being a wise arbitrator to the legislative, executive and judicial branches . . . [He said it was] important to ensure the check and balance mechanism was implemented, thus helping to strengthen the people's confidence in the practice of transparent democracy.<sup>56</sup>

"The new royal role," asserts one scholar, "certainly goes beyond what was understood to be the responsibility and role of a constitutional monarch ever practised in the country."<sup>57</sup>

One interesting aspect of this notion of monarchy is that it deals with issues of multiculturalism. In one instance, the Sultan of Selangor intervened in an interreligious dispute over a raid on a Methodist church by Islamic religious police.<sup>58</sup> In another, the Sultan of Johor intervened in a controversy surrounding a launderette that refused the business of non-Muslims.<sup>59</sup>

In the next section, we turn to a different type of discourse concerning the Rulers that discusses their role from a constitutional perspective as heads of state. Again, in the background of that section, we examine the role of the monarchy in relation to the fragmentation of politics during the period from May 2018 to August 2021.

#### 4. Viceregalism in Malaysia

In this section, we explore the role of the Malaysian monarchy in the context of the general function of heads of state in a Westminster-style parliamentary system of government. This section, thus, represents the Westminster constitutional nature of the monarchy, which we argue is one strand of the "braid"<sup>60</sup> that provides a true picture of the institution.

In states that have a parliamentary system, it is common when analyzing executive power to focus on the position of prime minister as the critical political actor. The prime minister, as head of government, is the natural focus in parliamentary states in understanding the exercise of power, as many accounts testify.<sup>61</sup> In contrast, the head of state in parliamentary systems receives cursory attention in terms of the position's institutional power. This tendency to gloss over the constitutional, social, and political significance of the "parliamentary head of state" has resulted in a hazardous lack of appreciation of the critical importance of the office.<sup>62</sup> The danger of ignoring the parliamentary head of state as a distinct and real political actor is especially heightened during constitutional crises when the powers of the head of state are often called upon.<sup>63</sup> During normal times, the

<sup>55</sup> Nazrin Shah (2020).

<sup>56</sup> The Star (2021).

<sup>57</sup> Suwannathat-Pian, *supra* note 43, p. 383.

<sup>58</sup> Harding, *supra* note 16, p. 126.

<sup>59</sup> Harding, *supra* note 2, p. 261.

<sup>60</sup> Harding & de Visser (in this issue).

<sup>61</sup> See e.g. Rhodes, Wanna, & Weller (2010); Strangio, 't Hart, & Walter (2013).

<sup>62</sup> Kumarasingham (2020), pp. 2–3.

<sup>63</sup> Harding & de Visser, *supra* note 60.

parliamentary head of state's role in the summoning and dissolving of Parliament, the appointment of a prime minister, selection of the Cabinet, making legislation into law, and the general business of government is routine and rarely commented on beyond the ceremonial aspect. Part of the reason for this neglect is the reality that the head of state in a parliamentary system by convention has little active role in these staples of government life; they are usually left to the Cabinet and elected representatives to determine, aided by the civil service. The regular and effective exercise of these powers and others by the prime minister and Cabinet mask the fact that many of these powers are formally and legally in the possession of the head of state. It follows that the power of a prime minister as the head of state's chief adviser is perhaps the most critical, constitutionally speaking, since the head of state becomes the necessary vessel for a prime minister to implement key constitutional objectives from the timing of elections and duration of Parliament to the composition of the Cabinet and enacting of law. In a parliamentary regime, the relationship between head of state and head of government is therefore critical and demands attention; yet, the mechanics and intrigues of the highest partnership in the constitutional hierarchy of the state seldom receive scrutiny.

As a corrective to the scholarly and societal inclinations to relegate the parliamentary head of state to nothing more than a decorative part on the constitutional stage, Kumarasingham developed the concept of *Viceregalism* in order to see such heads of state as crucial political actors in their own right.<sup>64</sup>

Viceregalism is particularly concerned with states, such as Malaysia, which were once part of the British Empire and therefore derived an experience of monarchy through not only the British sovereign, but also from the colonial-era Crown where the monarch's representative, such as the Residents in the Malay states, held real and vast executive power, even though, as we have seen, there was no transfer of sovereignty. The British and colonial legacy was a crucial constitutional one when developing understandings of the role of head of state, especially at the point of independence. If we recall that the colonial period saw these vice-regal individuals, such as the Governor of the Straits Settlements and, analogously, the High Commissioner of the Federation of Malaya, act often as virtually absolute monarchs, it seems clear that the transition to constitutional monarchy upon independence did not mean a dramatic change in law, but more a change in convention where the head of state was expected to act more in accordance with constitutional mores of Elizabeth II than those of the (fifteenth-century) Elizabeth I.

In the new Constitutions of the decolonizing period that were often put together with swiftness,<sup>65</sup> there were inevitably colonial continuities when it came to the head-of-state provisions. While in practice the British monarch's successors in the newly independent states of the Commonwealth were to be a subdued and secondary player in the parliamentary democracy, the newly minted constitutional articles nonetheless through their purposeful ambiguity maintained, in theory and law, much of the awesome power characteristic of old autocratic imperial rule. This meant that the new head of state held, in the new constitutional arrangements, substantial formal power that often continued the practices of the colonial era.

While parliamentary heads of state are neither absolute monarchs, since they function in a democracy, nor executive presidents where the role of head of state and head of government are often fused, there is substantial scope for them to influence and direct political affairs. Even in the "old Dominions" with the longest history of parliamentary democracy in the Empire-Commonwealth, like Canada, Australia, and New Zealand, their Constitutions contained strong monarchical powers.<sup>66</sup> New Zealand's 1986 Constitution Act, for example,

<sup>64</sup> Kumarasingham, *supra* note 62, pp. 1–43.

<sup>65</sup> In Malaya, the process took just a few months in 1956–57.

<sup>66</sup> Boyce (2008); and generally Twomey (2018).

like its predecessors and other Commonwealth states, is filled with references to the Governor-General and the Crown, but contain no mention of the prime minister. Famously, on 11 November 1975, the Governor-General of Australia, Sir John Kerr, shocked the country by using the powers granted to the head of state by the 1901 Federal Constitution to sack Labour Prime Minister Gough Whitlam, whom he believed could not be relied upon to get the country out of the stand-off with the opposition, especially in the powerful Senate, that was paralyzing the state. Just 26 days before the sacking, the then Malaysian Prime Minister Tun Abdul Razak (1971–76) was a guest of Kerr in Canberra, where Whitlam joked about himself or Kerr being sacked to solve the crisis. Razak was “mildly astonished” by the joke, but no one was more surprised than Whitlam at being dismissed, since he never imagined the powers of the Australian head of state would be used to abruptly end his prime ministership.<sup>67</sup>

Walter Bagehot famously stated in 1867 that the British monarch had three rights: to warn, to encourage, and to be consulted. While useful, these rights do not adequately cover the real or perceived constitutional rights of the monarch nor those of the localized heads of state, such as the Malay Rulers, whose constitutional constraints were borrowed from the British template. Viceregalism puts forward three other rights potentially available to a parliamentary head of state: the right to rule, the right to uphold, and the right to oblige. The right to rule describes the head of state using the full powers of the office to effectively be the Ruler of the state. The right to oblige illustrates the position where the head of state bows to the demands of the head of government even when he is perceived to be going against the “customary usages,” if not the laws, of the Constitution. The right to uphold, which in some ways lies between the other two rights, indicates the parliamentary head of state acting as “guardian of the Constitution,” which is very often a self-determined interpretation.<sup>68</sup>

As we move to discuss the role of the monarchy in Malaysia’s recent history, we will see that the “right to uphold” is very much in evidence as a constitutional theory that lies at the root of the assertion of expanded powers by the Malaysian monarchy in recent years. Viceregalism’s active “rights” of parliamentary heads of states are particularly prominent in what Kumarasingham has conceptualized as “Eastminster” systems. These are states, outside the “White-settler” cases like Canada and New Zealand, emerging from British colonialism that crafted governance systems and institutions that borrowed heavily and consciously from the colonial-era precedents and Westminster, but with critical adaptations and “deviations” in line with their own cultures, traditions, and innovations. In Eastminster countries, due to a combination of colonial examples of powerful proconsuls, local history, and hierarchy, as well as experiencing periods of infirm and contested democracy, there is often a higher consequential role for the head of state than in other parliamentary systems including at Westminster itself.<sup>69</sup> Malaysia exemplifies many of these Eastminster tendencies, as we will shortly find.

## 5. Expanding Eastminster I: the Perak constitutional crisis

There are numerous instances of the decisive exercise of royal power in Malaysia at the state level. We cannot examine these fully in the present article, but we advance one notable example—the handling of the constitutional crisis in the state of Perak in 2009.<sup>70</sup>

<sup>67</sup> Kelly (1995), pp. 131–2.

<sup>68</sup> Kumarasingham, *supra* note 62, pp. 15–35.

<sup>69</sup> Kumarasingham (2016), pp. 1–35.

<sup>70</sup> The following account is generally based on that in Harding, *supra* note 16.

The State Constitution in those states that have a Ruler as head of state usually requires the “*Menteri Besar*” (chief minister) to be Malay.<sup>71</sup> The Ruler is, however, empowered, in his discretion, to override any provisions in the state Constitution restricting his choice of *Menteri Besar* if, in his opinion, it is necessary to do so in order to comply with the duty to appoint whoever has the confidence of the Assembly. This in itself is an interesting compromise between Malay governance traditions and Westminster constitutionalism. It has rarely been put to the test.

The issue addressed in the foregoing paragraph arose in Perak in March 2008 but, instead of asking the Ruler to override the constitutional provision requiring the appointment of the leader of the party with most seats as *Menteri Besar*, which would have meant appointing a Chinese *Menteri Besar*, the Pakatan Rakyat (PR) coalition (in opposition at the federal level) proffered a Malay member, Datuk Nizar, who was acceptable to all three parties in the PR, even though his party had the lowest number of seats among those parties. Nizar took office but was soon in trouble with the Ruler when he purported to transfer a religious official without consulting the Ruler, who is the Head of Islam in the state.

As is explained above, the Constitution of Perak, along with the other state Constitutions, provides for the operation of Westminster-style conventions. Under Article 16(2)(a), in the context of the appointment of the Executive Council:

His Royal Highness shall first of all appoint as *Menteri Besar* to preside over the Executive Council a member of the Legislative Assembly who in his judgement is likely to command the confidence of a majority of members of the Assembly.

Article 16(6) goes on to state:

If the *Menteri Besar* ceases to command the confidence of the majority of the members of the Legislative Assembly, then, unless at his request His Royal Highness dissolves the Legislative Assembly, then he shall tender the resignation of the Executive Council.

There is, however, no express provision for the *dismissal* of the *Menteri Besar*.<sup>72</sup>

In a 59-member Assembly, the PR held 31 seats, while the Barisan Nasional (BN, in power at the federal level) held 28 seats. In February 2009, three PR Assemblymen announced their resignations from the PR, leaving the Assembly apparently deadlocked at 28:28. The three defectors then switched sides to the BN. Nizar approached the Ruler on 5 February 2009 for a dissolution “to resolve the deadlock” in the Assembly. The Ruler refused the request but, before informing Nizar of his decision, he had met with 31 assemblymen and satisfied himself that these 31 members (including the three defectors) supported the BN leader, Datuk Zambry, as the *Menteri Besar*. Accordingly, the Ruler, immediately following his refusal of a request for dissolution, informed Nizar that he no longer commanded the confidence of a majority of the Assembly and asked for his resignation. This was not forthcoming, but later the same day the Ruler’s office issued a press statement stating that the office of *Menteri Besar* had fallen vacant and that Zambry had been appointed as he commanded the confidence of a majority in the Assembly. Thus, Nizar was ousted without any vote being held in the Assembly. He sued Zambry for declarations to the effect that he, Nizar, was still the *Menteri Besar* of Perak. The courts had to decide whether the Ruler had power in effect to dismiss the *Menteri Besar* by declaring the office vacant and appointing another member, there being no express power of dismissal in the Constitution, and whether such power, if it existed, could be exercised on the basis

<sup>71</sup> *Ibid.*, p. 121.

<sup>72</sup> As was the case in Australia in 1975: see above.

of events occurring outside the Assembly, there having been no motion of no confidence or similar event in the Assembly.

The case caused considerable excitement across the country. A high court decision in favour of Nizar was appealed to the Court of Appeal successfully by Zambry, who again succeeded on a further appeal by Nizar to the Federal Court.<sup>73</sup> The outcome was that the courts read into the Constitution a power to declare the office of *Menteri Besar* vacant, and found it was constitutionally valid for the Ruler to take such action even without a vote in the Assembly. The decision broke new ground in allowing the Ruler considerable latitude, which is not apparent in the constitutional text or in general understandings of constitutional conventions, to reach his own judgement as to the issue of the legislature's continued confidence in the head of government.

Seen from a Westminster perspective, this decision is a highly problematical understanding of the notion of confidence and the proper role of the head of state. However, the way in which a change of government at the federal level was effected in March 2020, as discussed in the next section, appears to support the broad interpretation of royal powers indicated by the Federal Court. Under "Nazrinian monarchy," in which everything happens under the vision and hearing of the king,<sup>74</sup> the resolution of the crisis appears legitimate, even if a strict Westminster-style analysis would say that the Ruler, as opposed to the Assembly, had no power to dismiss the *Menteri Besar*.

## 6. Expanding Eastminster II: the Rulers as heads of state in contemporary Malaysia

In this section, we examine the period from May 2018 to August 2021, with regard to the role of the Rulers in assessing the confidence of the majority of members of the legislature for the purpose of appointing the head of government, and when responding to advice tendered by the government. As is apparent from the previous sections, there are situations in which the heads of state in Westminster-type systems exercise discretion, and others in which they are required to act on advice, with reserve powers, or the right to uphold, as a possible complicating element.

The appointment of Tun Mahathir as prime minister for the second time on 10 May 2018 was the first occasion on which a prime-ministerial appointment had ever presented any issues for the *Yang di-Pertuan Agong* to determine. The Pakatan Harapan (PH) coalition had clearly won the election but delays in issuing the official results gave rise to fears of constitutional manipulation, especially given Mahathir's historically fraught relationship with the Rulers, which we examined earlier. It was also not entirely certain, in the eyes of some at least, that Mahathir should be appointed, because he was the leader of a party, Parti Pribumi Bersatu Malaysia (PPBM), that had won only 13 seats in a 222-seat Parliament. Nonetheless, he had been endorsed by all the PH parties as their candidate for prime minister. The *Yang di-Pertuan Agong* met with the various party leaders and received a letter signed by all of the PH's newly elected members; he was also visited by the heads of the police, the army, and the civil service, who stressed the need to appoint the prime minister immediately to avoid public disorder. He then concluded that Tun Mahathir was likely to command the support of a majority of MPs and, late on the day following the election, the latter was finally sworn in as prime minister.<sup>75</sup> Thus, albeit with

<sup>73</sup> *Datuk Nizar Jamaluddin v. Datuk Seri Zambry Abdul Kadir* [2010] 2 M.L.J. 285. For an extensive critique and discussion of the Perak crisis, see Quay (2010).

<sup>74</sup> See quotation at the head of this article.

<sup>75</sup> For the whole story of this change in government, see Neo, Shah, & Harding, *supra* note 4, and the other items cited in that note.



some delay, Westminster constitutionalism, as provided for in the Malaysian Constitution, was put into effect.

During February 2020, defections from the PH caused the government to collapse. Tensions over succession issues within the Parti Keadilan Rakyat (PKR), the largest of the PH parties, led to a realignment of PH parties and factions with a view to the construction of a new government involving parties then in opposition. Mahathir then resigned as prime minister on the basis that he no longer had the confidence of a majority of MPs. The *Yang di-Pertuan Agong* accepted his resignation, and appointed him as “interim prime minister”—an office for which the Constitution makes no provision. Following some days of confusion over who had majority support, the *Yang di-Pertuan Agong* then interviewed all MPs to gauge their support, without being able to reach any conclusion. He also met with party leaders, and called a meeting of the Conference of Rulers. Both Mahathir, and Muhyiddin Yasin, now leader of the PPBM (Bersatu), claimed to have majority support. On 1 March 2020, the *Yang di-Pertuan Agong* appointed Muhyiddin as prime minister. On the basis of Westminster principles, it might be argued that support should have been tested on the floor of Parliament; yet, Parliament was not summoned until some seven weeks after the appointment.<sup>76</sup>

The Muhyiddin government, styled Perikatan Nasional (PN), in fact continued in office for almost a year and a half, but no motion of confidence or of no confidence in the government was ever debated or voted upon. We consider this to be a record duration amongst Westminster-style systems of government that had not demonstrated the confidence of a majority of MPs at any point during its tenure. For several months in the first half of 2021, then, due to the currency of an emergency proclamation, Parliament did not meet, and the Speaker ruled confidence motions as having lower priority than government business. It was not clear at any point that the PN government had a parliamentary majority. Political fragmentation and jockeying continued unabated during a period in which Malaysia was attempting to deal with the COVID-19 pandemic, until finally it was clear that Muhyiddin had lost majority support and, after, as previously, interviewing all MPs, the *Yang di-Pertuan Agong* appointed Ismail Sabri Yaakob, with a working majority of six, as prime minister on 20 August 2021. This majority too was not confirmed by a confidence vote in Parliament.

During the term of Muhyiddin’s government, the question of acting on advice also became controversial. An initial request for a proclamation of an emergency by the *Yang di-Pertuan Agong* in October 2020 was rejected by him, following a meeting of the Conference of Rulers. This was unprecedented in terms both of emergency proclamations and the tendering of advice by the government to the *Yang di-Pertuan Agong* more generally. The reasons provided by the *Yang di-Pertuan Agong* referred to substantive issues, rather than his powers over the matter, and ruled that the government could, and was encouraged to, carry on with the benefit of existing policies and legislation, whereas a proclamation of emergency was not required to deal with the situation. The rejection of the request was greeted with virtually universal approval amongst the public, who praised the *Yang di-Pertuan Agong* for protecting both public health and democracy by his decision. An important aspect of this instance is that the advice received by the *Yang di-Pertuan Agong* was tendered by a government whose legitimacy was seriously in question, as we have indicated above. Nonetheless, emergency proclamations in respect of two electoral districts with pending by-elections were approved, and, in January 2021, a full emergency covering the entire federation was approved, which had the effect, when a consequential emergency law was passed, of suspending meetings of Parliament and elections at all levels. Incidentally, this emergency measure also resulted in prolonging the period during which no motion of no confidence in the government could be debated or voted upon until 1 August 2021. This episode may be regarded as an example of the right to oblige, as we discussed above. The refusal of the emergency proclamation in October

<sup>76</sup> For a full account and critique of this process from a constitutional perspective, see Shah & Harding (2020).

2020 can perhaps be seen as an exercise of reserve powers or as an example of the right to uphold. If so, it remains obscure in what way the subsequent granting of an exactly similar emergency proclamation in January 2021 is consistent with that of October 2021. There does not appear to be any change in circumstances warranting a different decision.

From the point of view of assessing the current status of the monarchy, these events leave a number of questions to be answered. The exercise of power by the *Yang di-Pertuan Agong* on these occasions may not seem, in a number of respects, to be consonant with Westminster principles.

First, the events of 10 May 2018 ending with Mahathir's appointment as prime minister only narrowly avoided reaching the point of creating an unconstitutional situation.

Second, in February and March 2020, an odd situation occurred in which a prime minister resigned due to loss of support in Parliament, yet there had been no evidence in Parliament itself that he was unable to command the support of a majority. Such a situation is not in itself, however, unusual in Westminster systems, where prime ministers have stepped down due to the loss of support from their own party or coalition.

Third, there is no precedent or practice supporting interviews with all MPs before making an assessment of support, as occurred in February 2020 and August 2021. Normally, one would expect a head of state to rely on the assessment of party leaders.

Fourth, there is no precedent for formally appointing an "interim prime minister" (without a cabinet, as the Cabinet had already resigned when Mahathir did so), as opposed to allowing a prime minister who has lost support to continue in office as prime minister, pending his or her replacement by the usual processes.

Fifth, it is also very surprising that a government was allowed to take office in circumstances under which it was very unclear that there was a mandate for it to do so, and without, apparently, any obligation on its part to survive a subsequent confirmatory vote in Parliament, or even to summon Parliament at all.

Sixth, a confirmatory vote in Parliament was persistently avoided for many months on the basis of an astonishing ruling by the Speaker that government business had precedence over confidence motions filed by the opposition.<sup>77</sup> This aspect of the events of 2018–21 took Malaysia completely outside Westminster constitutional logic. It can be strongly argued that government business can only be government business when the government is able to demonstrate a mandate to govern. For this reason, confidence motions must always have priority over government business.

However, in assessing these diversions from Westminster norms, described by Kumarasingham at the level of international comparison as evidence of "Eastminsters," one has to concede that the public, undoubtedly frustrated by what was described (including by the *Yang di-Pertuan Agong* himself) as "politicking" during an extremely difficult period of pandemic and resulting economic problems, largely approved the actions of the *Yang di-Pertuan Agong* and the Rulers on all of these occasions.<sup>78</sup> It was the politicians who were almost universally criticized for their responses during this critical period, as though the public interest had been neglected in favour of seeking personal and party, factional, or coalition advantage. In public perception, the *Yang di-Pertuan Agong* had in some ways filled the breach left by the fragmentation of party and government.

## 7. Conclusions

The Malaysian monarchy system is the result of constitutional development over the last 500 years; it is also the product of a society in which law is influenced in practice by social

<sup>77</sup> Harding, *supra* note 16, p. 88.

<sup>78</sup> Reuters.com (2020).

factors that, in some situations, will deny the strict application of authentically Westminster traditions, as we have noted.

In this article, we have explained both the roots and the survival of social norms regarding the monarchy. We have also provided and discussed examples of how they interact with the constitutional rules to produce a monarchy system that appears to be unique to Malaysia. This system, as we describe it, will not satisfy the adherent of either Westminster constitutionalism or traditional Malay/Islamic governance. But what seems to have emerged from the process of adapting different sources of origin is a compromise that lies between, and owes something to, both of these ideal types.

It is to this adaptation that we can attribute the fact that these monarchies have survived. That they have survived is attributable also to their centrality in Malay culture, and their association with Malay nationalism and the social contract. Beyond that, the Rulers are essential to the maintenance of the Malay character of the Constitution and, at the same time, the need for a multi-ethnic, multireligious society to have a vivid symbol of unity that lies beyond mere politics and constitutional rules.

These factors have in fact enabled the monarchy system to survive four centuries of advancing colonialism following the fall of Malacca in 1511, constitution-making episodes, attempts to curtail their powers by constitutional amendment, and such modern factors as the intensity of party political competition and fragmentation, and intrusive news media. In a world in which monarchy has become increasingly rationed, confined, and subjected to critical scrutiny, the Malaysian monarchies have gone against the trend, becoming, in recent years, probably more powerful than they have been at any time since 1945.<sup>79</sup>

Malaysian constitutionalism in the wider sense represents a braid in which we can discern the interweaving of two strands: Westminster-style constitutional structures that require a specially defined role for the head of state and, on the other hand, traditional and symbolic elements that speak of Malay culture and governance traditions. Historically, the Rulers are somehow identified with *both* strands of constitutionalism. In this, they conform closely to many of the attributes of Viceregalism, which sees the need to understand parliamentary heads of state as important political, and not just ceremonial, actors. Malaysia's Rulers also demonstrate the reliance in Westminster political cultures for such heads of state to be more than just occupying an ornamental office, but also potentially fulfilling a position of substantial cultural and constitutional power.

Although this enhanced "Nazrinian" role for the Malay Rulers appears to be acceptable in contemporary Malaysian society,<sup>80</sup> one question that seems to arise is whether the Rulers are to enjoy increasing immunity from criticism of the way they perform this role, even as their *legal* immunities are removed.

One consequence of this evolution of monarchy has been to enhance also the role of the Conference of Rulers, which has begun, in recent years, to assert itself in relation to judicial appointments, even though its role is stated as merely that of being consulted. Moreover, in 2018, the Rulers initially objected to the appointment of a non-Malay/Muslim as Attorney General, even though there is no such restriction of the choice of Attorney General and the Rulers have no constitutional role as such in relation to the appointment.<sup>81</sup> The prime minister's choice of Attorney General was eventually confirmed by the *Yang di-Pertuan Agong*, but not without serious reconsideration by the prime minister, who at one point immediately after the appointment asked the new incumbent to resign as a result of the royal objections.<sup>82</sup>

<sup>79</sup> Suwannathat-Pian, *supra* note 43, pp. 371–8.

<sup>80</sup> A research project by the Institute of Southeast Asian Studies in Singapore in 2017 found that 75% of Johor residents approved of occasional interventions in politics by the Ruler: Saat (2017).

<sup>81</sup> New Straits Times (2018).

<sup>82</sup> Thomas (2021), pp. 236–7.

There are clearly advantages and disadvantages in the rejuvenated twenty-first-century monarchy. It seems likely that most would welcome the distinct improvement in royal behaviour, making the Rulers into exemplary figures who can also interfere in the operation of the political system: some would see the monarchy as an antidote to the arrogance and unethical behaviour of some politicians, and also as a recourse when all else fails politically. At the same time, there is also a view that the expansion of an unaccountable royal power may be used for ill as well as for good, and that strict confinement of this power by constitutional constraint is, in the end, a safer option. In this sense, the future role of the monarchy may depend on the evolution of the political system as a whole.

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