

CONSTITUTIONAL MONARCHY IN MALAYSIA

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OVERVIEW

This presentation will examine the powers, functions and constitutional position of:

- I. The Conference of Rulers;
- II. The Yang di-Pertuan Agong; and
- III. The Malay Rulers in the nine Malay States.

In Malay history the Rulers had nearly absolute powers

The colonial government reduced the Rulers to a ceremonial role except in matters of Islam and *adat*.

The Malay revolt against the Malayan Union halted the attempt to marginalise Malay Rulers further.

The Merdeka Constitution restored some of the lustre of the monarchy.

- (i) It provided for a constitutional monarchy but with important discretionary powers;
- (ii) It conferred on the Majlis Raja-Raja some critical, discretionary powers and functions;
- (iii) It gave iron-clad guarantees of the rights of Rulers under their State Constitutions.

The 1971 Constitutional Amendments after the race riots strengthened the royal position.

Regrettably, the 1983/1984/1994 amendments to Article 66 allow the YDPA and the Rulers to be bypassed in the legislative process. To some commentators, *the constitutionality of the 1994 amendment affecting State Rulers is open to question.*

The 1993 amendment to Article 181 and the insertion of Articles 182 and 183 deprived the Rulers of their absolute legal immunity.

A new awareness is, however, developing, that despite adverse constitutional changes in 1983, 1984, 1993 and 1994 the Conference of Rulers, the Yang di-Pertuan Agong and the State Rulers have important check and balance functions in our constitutional set-up.

I: THE CONFERENCE OF RULERS

THE mystique of the monarchy is best reflected in the unique institution of the Conference of Rulers. This august assembly dates back to July 1897 when it met for the first time in Kuala Kangsar, the citadel of the Sultan of Perak.

Under the Federal Constitution, the Conference of Rulers has been invested with a number of critical constitutional functions that can impact on constitutional supremacy, rule of law, position of Islam in the legal system, good governance and the social contract on which this nation was founded. The main functions of the Conference are the following:

Election of the King

Under Article 38(2) the Majlis Raja-Raja has the important constitutional function of electing the Yang di-Pertuan Agong and the Timbalan Yang di-Pertuan Agong. The significance of this power is that the Yang di-Pertuan Agong is in some respects the delegate of the Majlis Raja-Raja and is accountable to the Majlis.

Dismissal of the King

The Majlis Raja-Raja has the great and dramatic power to dismiss the Yang di-Pertuan Agong. Though never exercised, this remarkable power under Article 38(6) probably exerts a significant pressure on the King to respect the wishes of his brother rulers.

Legislative veto

The Majlis Raja-Raja has the power to veto federal legislation and constitutional amendments on ten critical and sensitive issues.

- (i) Any law affecting the privileges, position, honours or dignities of the Rulers:
Articles 38(1), 159(5);
- (ii) Any law altering the boundaries of a state: Article 2(b);

(iii) An amendment to Article 70 of the Constitution that deals with the precedence of Rulers;

(iv) An amendment to Article 71(1) that guarantees rights and privileges of the Ruler to succeed to the state throne;

(v) An amendment to Article 10(4). Article 10(4) permits restrictions on the questioning of “sensitive issues”;

- (vi) An amendment to Articles 63(4) and 72(4) of the Constitution that forbid seditious speeches on the floor of Parliament and State Legislative Assemblies;
- (vii) An amendment to Article 152 dealing with Bahasa Melayu as the national language;
- (viii) An amendment to Article 153 on special position of Malays and the natives of Sabah and Sarawak; and
- (ix) Any amendment to provisions of Part III regarding citizenship.
- (x) Any amendment to Article 159(5) that requires consent of the Conference of Rulers.

Constitutional Appointments

The Majlis Raja-Raja has the right to be consulted before several critical federal posts are filled. Among these are: judges of the superior courts, the Auditor-General, and chairpersons and members of the Public Services Commission and the Election Commission.

Religion of Islam

Though the Sultans are the head of Islam in their states, the Conference can, in order to promote unity, agree or disagree to the extension of any religious acts to the Federation as a whole.

Special Position of Malays & Natives

Article 38(5) requires that the Conference be consulted before any changes in policy relating to privileges of the Malays and the natives of Sabah and Sarawak are made.

Pardon

- Under Article 42(5) the Conference may exercise the power of pardon in relation to the Yang di-Pertuan Agong, the Sultans and their consorts after considering any written opinion of the Attorney-General.

Special Court

If the Yang di-Pertuan Agong or a Sultan is subject to judicial proceedings in a civil or criminal court, Article 182 requires that the action be commenced in a Special Court of five judges, two of whom shall be nominated by the Majlis Raja-Raja.

National Policy

- Under Article 38(2), the Conference has been given the power to deliberate on questions of national policy and any other matter it thinks fit.
- This role contains tremendous potential. In relation to it, the Constitution invests the conference with a unique unifying and advisory role.

- It is notable that this function is non-discretionary because the rulers are accompanied by the prime minister and the chief ministers and are bound by any advice tendered. Further, the views of the conference are not binding on the federal government.
- Nevertheless, the very fact that the Constitution explicitly authorises the Conference of Rulers to deliberate on questions of national policy and on “any other matter it thinks fit” points to the possibility that the Conference can ask the government to supply information and justify policies.

- Scrutiny by the Conference can supply some check and balance and promote some openness and transparency. There is some potential for influencing the nation's goals and policies, for promoting unity and reducing inter-ethnic conflicts. One must remember that even in the UK the constitutional monarch is not prevented from "advising, cautioning and warning".
- Because of the prestige of their offices, and the long years on the throne, the Sultans can bring to bear to the deliberations of the Conference, a large fund of expertise in public affairs. There is a large potential for statesmanship, for providing a check and balance in government and for providing a unifying, dignifying and stabilising influence.



II. THE YANG DI-PERTUAN AGONG

Hundreds of provisions in the Federal Constitution and federal laws confer on the Yang di-Pertuan Agong (YDPA) vast powers in relation to the executive branch, the legislative branch, the judicial branch, matters of Islam, emergency proclamations and the armed forces etc. For example:

- Under Article 43(2)(a) the Yang di-Pertuan Agong shall appoint a Prime Minister to preside over the Cabinet “a member of the House of Representatives who in his judgement is likely to command the confidence of the majority of the members of that House”.
- Under Article 43(2)(b) he appoints other Ministers and Deputy Ministers on the advice of the PM.

- Under Article 41 the YDPA is the supreme commander of the Armed Forces.
- Under Article 150(1) he has the power to proclaim an emergency: “If the Yang di-Pertuan Agong is satisfied that a grave emergency exists ... he may issue a Proclamation of Emergency ...”
- Under Article 66 [but subject to 66(4A)] his assent is required before a Bill can become law
- He appoints 44 Senators to the Dewan Negara: Article 45(1)
- He appoints judges of the superior courts: Article 122B.
- He can remove judges in accordance with Article 125.
- He is the head of Islam in eight regions of the Federation - the three Federal Territories, his own state, Melaka, Penang, Sabah and Sarawak.

These provisions are subjectively worded and, if read literally, appear to confer clear discretionary powers on the Yang di-Pertuan Agong in the whole field of government. It is as if the country is ruled by an absolute Monarch.

Actually the constitutional position is quite different. Most of the above powers of the King are not personal prerogatives but are exercisable under Article 40(1) and 40(1A) on the advice of the Prime Minister or other constitutional agencies.



A CONSTITUTIONAL MONARCH IS BOUND BY ADVICE

A constitutional monarch reigns, he does not rule. He is Head of State but not Head of Government. He is the *de jure* head of state but the *de facto* head of the government is the PM. A King is generally bound to act on the advice of his elected political executive or some other agency (like the Pardons Board) specified in the Constitution and federal laws.

This conclusion is based on Articles 40(1), 40 (1A) and

Article 40(1)

This is a generic and over-arching provision which reads that “in the exercise of his functions under this Constitution or federal law the Yang di-Pertuan Agong shall act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet...”

- Article 40(1) must be read into or grafted onto every provision, whether in the Federal Constitution or in any federal law that confers on His Majesty any power or function. No legal provision conferring power on the King must be read in isolation. All Articles conferring power on the King must be read in the light of Article 40(1).
- There is considerable case law to support this view: *Stephen Kalong Ningkan v Tun Abang Haji Openg* (1967); *Stephen Kalong Ningkan v Govt* (1968); *Karam Singh* (1969); *Madhavan Nair* (1975); *Teh Cheng Poh* (1979); *Balakrishnan* (1981); *Dato Seri Anwar Ibrahim v PM* (1999); *Abdul Ghani Ali* (2001).

Article 40(1A)

Article 40(1) is further reinforced by Article 40(1A) that the YDPA shall act on advice.

Article 39

- This Article states that “the executive authority of the federation shall be vested in the Yang di-Pertuan Agong”. But it is qualified by the following words:
- Executive authority is “exercisable subject to the provisions of any federal law and of the Second Schedule”
- Executive authority is exercisable “by him or by the cabinet or any Minister authorised by the cabinet”
- “Parliament may by law confer executive functions on other persons”.
- According to Sheridan & Groves “Article 39 makes clear, there is a distinction between the person in whom executive authority is vested and the person or body of persons by whom it is exercisable”. [The Constitution of Malaysia, 4th edition, p. 133].

The overall constitutional position is that the Yang di-Pertuan Agong performs two categories of functions:

- (i) Non-discretionary functions exercised on advice.
- (ii) Discretionary functions.

NON-DISCRETIONARY FUNCTIONS

These are divisible into three categories:

- (i) Functions exercisable on the advice of the PM under Art. 40(1), 40(1A) & 39. Most of the functions of the King fall under this category.
- (ii) Functions exercisable on the advice of the PM but after “consultation” with the Conference of Rulers. Consultation is not the same thing as “consent”. Nevertheless, the Conference is not a rubber stamp. It is known that its wishes often make or break a decision because, despite Article 40(1) the King is unlikely to go against the wishes of brother Rulers.
- (iii) Functions exercisable on the advice of other constitutional bodies like the Islamic Religious Affairs Council under Article 3(5) and the Chief Justice of the Federal Court under Article 122(1A).

DISCRETIONARY FUNCTIONS

These too are divisible into three categories:

(i) Powers in relation to which the Constitution explicitly confers a discretion: Article 40(2)(a), (b) and (c)

(ii) “Any other case mentioned in the Constitution”: Art 40(2).

(iii) Matters not explicitly covered by the Constitution but which may be regarded as “reserve”, “inherent”, “residual” or “prerogative” powers of a Head of State permitting personal discretion.

KING'S DISCRETIONARY POWERS

Within a narrow field, the Constitution places on the shoulders of the Monarch the awesome burden of making critical decisions on affairs of state in his personal wisdom. These situations can be summarised as follows:

- 1. Appointment of the PM - Article 40(2)(a) and 43(2)(a):** It is expressly stated in 40(2)(a) that appointment of the PM is a discretionary power. Under Article 43(2)(a) “the Yang di-Pertuan Agong shall first appoint as ... Prime Minister to preside over the Cabinet a member of the House of Representatives who in his judgement is likely to command the confidence of the majority of the members of that House”.

Note, however, that though the discretion is undoubted, it is not absolute.

- The PM must come from the lower House.
- He must be likely to command the confidence of the majority in that House.
- If a party or coalition has an absolute majority, its leader has a democratic right to be commissioned as PM and the YDPA has no personal discretion. But note some difficult precedents from the States.

- Majority of the scholars believe that at the federal level, only if there is a “hung Parliament” or a loss of majority due to the death, defection, resignation or disqualification of MPs, does the King’s discretion come alive.
- The law is similar for the Sultans and the Governors in the States though there have been a few spectacular, instances of royal assertiveness in this area. In Terengganu in 2008 the incumbent leader with majority support, Dato’ Seri Idris Jusoh, was not appointed by the Sultan. In Perlis in 2008, Shahidan Kassim, the incumbent MB was refused appointment. In Selangor in 2015 Dr Wan Azizah, the choice of the ruling Pakatan, was bypassed by the Sultan. These precedents arouse the belief that in the States the Sultans have a personal discretion as to who to appoint.

2. Dissolution of Parliament: Under Article 40(2)(b), the King has undoubted power to refuse a premature dissolution of the Dewan Rakyat. Thus, if a PM loses his majority in the House and wishes to return to the people for a fresh mandate but the King is satisfied that an alternative government is viable, he may refuse dissolution. However, if a PM is firmly in the saddle, and wishes to call an early election, then conventionally the monarch does not stand in the way and lets the PM choose the timing of the dissolution.

3. Requisitioning of the Conference of Rulers - Article 40(2)(c): The King may act in his discretion in the requisitioning of the Conference if it is concerned solely with the privileges, positions, honours and dignities of Their Highnesses.

4. In any other case mentioned in this Constitution - Article 40(2): This category is not clearly defined, explained or precisely explicated. It is largely undetermined. It is humbly submitted that what is meant is that discretion exists –

(i) in any other case mentioned explicitly in this Constitution, or

(ii) because of necessary implication.

One has to scan the entire Constitution to determine these areas. A partial list would be:

4.1 Right to ask for any information from the government: Article 40(1). This means that there is no Official Secrets Act against the YDPA. This provision is of tremendous significance to ensure openness and accountability. In India Rajiv Gandhi was almost dismissed because he tried to withhold the Bofours Arms bribery scandal report from the President.

4.2 Delaying legislation for 30 days under Article 66(4A).

4.3 Appointments to the Public Service Commission under Article 139(4) and to the Education Service Commission under Article 141A(2) are in the King's discretion but only after he has considered the advice of the PM and consulted with the Conference of Rulers

4.4 In appointing members of the Election Commission the King “shall have regard to the importance of securing an Election Commission that enjoys public confidence” Article 114(2).



5. UN-ENUMERATED, RESIDUAL, PREROGATIVE, RESERVE

INHERENT POWERS

In addition to the constitutionally conferred discretionary powers mentioned in Article 40(2), there are probably other instances where residual, reserve, prerogative and inherent powers of the Yang di-Pertuan Agong may come into play. We have to remember that life is larger than the law and no Constitution is exhaustive or can anticipate every contingency. The residual power situations may be the following:

5.1 Appointment of caretaker government:

The Constitution is thunderously silent about who manages the affairs of state during the dissolution of Parliament. Constitutional conventions in the UK dictate that the government that advised dissolution continues in a caretaker capacity. Nevertheless, the appointment of a neutral caretaker government during a dissolution is within the realm of possibility under Article 43(2). Appointment of a neutral caretaker government during the dissolution of the Dewan Rakyat is something that has never been done before but is within the realm of possibility under Article 43(2).

5.2 Advice of caretaker government: The case of *PP v Mohd Amin Mohd Razali* (2002) ruled that in the interim period after a dissolution, the monarch is not bound by the advice of a caretaker government.

5.3 Dismissal of a PM: Article 43(5) mentions the power of the King, acting on the advice of the PM, to remove “Ministers other than the Prime Minister”. To some scholars, this implies that the PM, once appointed, is never removable by the King. He is only removable only if he loses the confidence of the majority of the members of the Dewan Rakyat.

To this proposition some exceptions must be noted:

- i. Previously it was thought that this dismissal must be done by a vote of no-confidence in the Dewan Rakyat under Article 43(4). However, the Perak precedent of 2009 (the *Nizar* case) laid down that the members' loss of confidence can also be expressed in other ways e.g. by informing the Sultan outside the Assembly of their lack of confidence in the MB.

- iii. Despite Article 43(5) the King may dismiss a PM if the PM loses the confidence of the Dewan Rakyat; advises dissolution; fails to secure the King's consent to a dissolution; and yet refuses to step down contrary to Article 43(4). In such a situation, the King has no choice but to remove him from office. This is similar to the *Nizar* case in Perak.

- iii. If the caretaker PM (who called the General Election) fails to obtain a majority of the lower House seats but refuses to step down, the King can force him to resign.
- v. If at the ruling party's internal election, the PM loses his party's leadership position but does not resign a PM, or if he is expelled from the party, then the YDPA may be constitutionally justified in sacking him. The "doctrine of necessity" may assist the unusual exercise of power.
- vii. Lately, a view has been expressed that the Yang di-Pertuan Agong can dismiss a PM for abuse of power or if the PM loses the confidence of the general population even though he maintains a majority in the Dewan Rakyat. It must be stated that the population at large has no power to dismiss a PM except at an election. There has been no example of a Malaysian Ruler dismissing an incumbent simply because of abuse of power.

vi. However, the Commonwealth has many examples of the Head of State dismissing the PM even without a vote of no confidence by the MPs.

In Australia in 1975 Governor-General Sir John Kerr dismissed PM Whitlam even though Whitlam had a majority in the House of Representatives. Whitlam's "failing" was that his annual budget was defeated in the Senate and there was, therefore, a financial crisis in the country.

In India in 1987 the President contemplated dismissing PM Rajiv Gandhi because of Gandhi's refusal to supply the full report on the Bofors bribery scandal that implicated Gandhi.

In Pakistan President Ghulam Ishaq Khan sacked PM Benazir Bhutto (1990) and PM Nawaz Sharif in 1993 on alleged corruption.

5.4. Grant of honours. The Federal Constitution, unlike State Constitutions, is silent on this matter of honours. The power is, therefore, a prerogative power.

5.5. Power of pardon: This power and the manner of its exercise on the advice of the Pardons Board are specifically provided for in Article 42. Yet, the Supreme Court in *Sim Kie Choon* (1986) stated that pardon is a discretionary, prerogative power.

5.6. Refusing consent to unconstitutional legislation: Suppose the government and Parliament try to pass laws in disregard of constitutional safeguards. Is the Yang di-Pertuan Agong bound to give his consent under Article 40(1) or does he, as part of the check and balance mechanism, have a right to demand compliance with procedural provisions.

- Article 2(b) requires the consent of the State Assembly and the Majlis Raja-Raja before the boundary of a State is altered.
- Article 159(3) requires a two-thirds majority for most constitutional amendments.
- Article 159(5) requires a two-thirds majority plus the consent of the Majlis Raja-Raja to 10 types of constitutional amendments.

- Article 161E mandates the prior consent of the Governors of Sabah and/or Sarawak to amendments that affect our East Malaysian States.

Some commentators argue that the King is absolutely bound by advice and it is for the courts to set things right. It is submitted that this is too narrow a view of the Malaysian Monarch's powers. His Majesty's oath includes fidelity to the laws and the Constitution and this requires him to ensure that the Constitution is never subverted.

5.7 Other unconstitutional conduct by the executive: In other situations of blatantly unconstitutional conduct by the political executive, the King may have to exercise his reserve power to safeguard the Constitution. The influence of a constitutional monarch can never be undermined though this will have to be in an exceptional or revolutionary situation where the survival of the state is at stake.

Our learned and late Sultan Azlan Shah, writing in 1986, summed up the situation beautifully. “A King is a King, whether he is an absolute or a constitutional monarch...It is a mistake to think that the role of a King...is confined to what is laid down by the Constitution. His role far exceeds those constitutional provisions”.

III. THE STATE RULERS

- All nine Malay States have their own unique State Constitutions.
- The political powers of the State Rulers are similar to the constitutional powers of the Yang di-Pertuan Agong. All State Constitutions contain some “essential provisions” prescribed by the Eighth Schedule of the Federal Constitution. These provisions require the Ruler to act on advice, appoint an Executive Council and to have an elected state legislature.

- However it must be noted that State Rulers have larger powers than the YDPA over such matters as Islam, Malay *adat*, appointment of a Menteri Besar and conferment of honours.
- All State Constitutions confer on the Ruler vast personal, prerogative powers unknown to the Yang di-Pertuan Agong.
- In addition, the Federal Constitution in Art 71(1) guarantees the right of a Ruler to succeed, hold and enjoy the rights of a Ruler according to his State Constitution.

- Any dispute as to title shall be determined solely by State authorities under the State Constitution: Art. 71(1).
- Unlike the YDPA who is limited to a term of 5 years under Article 32(3), a Ruler has a life-term.
- A contentious area is the 1994 constitutional amendment to Sch 8, Section 11(2A) and (2B) to bypass the State Rulers in the legislative process after 30 days. Was the 1994 amendment assented to by the Conference of Rulers in accordance with Arts. 38(4) and 159(5) or was it wrongly enacted under Art. 66(4B)?



CONCLUSION

Though the Constitution and the laws confer on the Conference of Rulers, the Yang di-Pertuan Agong and the State Rulers a vast range of powers and functions in the executive, legislative and judicial fields, in reality most of these powers belong to the elected government of the day. Unlike the monarchy in Brunei or Arabia, the monarchs in Malaysia are constitutional monarchs.

- However, comparisons with the largely ceremonial monarchy in the UK are not appropriate for a number of reasons.
- First, our unique institution of Conference of Rulers has been conferred with significant powers to deliberate on issues of principle and policy that would be outside the powers of the British monarch.
- Second, our State Sultans have considerable personal powers that the UK monarch does not possess.
- Third, constitutional conventions in the UK transformed an absolutist monarchy into a constitutional one. In Malaysia the role of conventions has been the opposite. A constitutional monarchy has been conferred personal discretions which the law did not envisage e.g. the power of the state Sultans over the appointment of state MBs.

- Fourth, the Yang di-Pertuan Agong, though generally bound by advice of the political executive does not tamely rubber stamp all its political and legal decisions if the Conference of Rulers instructs him otherwise. The Yang di-Pertuan Agong's power to caution, warn, delay and, in the last resort, to reject advice cannot be discounted.

- Fifth, as in all other countries with a split executive (King-PM, President-PM) the Yang di-Pertuan Agong and the Sultans have some reserve, inherent, prerogative, non-statutory powers which can be exercised in exceptional situations in order to save the nation. The nature and extent of such powers is, however, a matter of great controversy.

Wassalam