# A Reappraisal on the Constitutional Functions of the Crown, the Parliament and the Judiciary to Defend Malaysian Constitutionalism

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## Abstract

This article aims to delve into the reality of Malaysian constitutionalism, from the perspectives of the institution of the Crown in Malaysia, inclusive of His Majesty Yang di-Pertuan Agong and Their Royal Highnesses the Malay Rulers, the roles and functions of Parliament and the Judiciary. A doctrinal analysis is employed to ascertain the plethora of functions and powers of the Rulers, specifically on the executive authority of the Yang di-Pertuan Agong and His Majesty's roles in Parliament during times of emergency. The paper proceeded to discuss the Malaysian experience of the underlying principles of constitutionalism. Judicial cases, recent constitutional issues and events, actions by the Crown will be analysed and responded from the perspective of constitutionalism. This article concludes by reiterating the Crown, Parliament and the Judiciary as important institutions which uphold the core features of the constitution and endorse the values and characteristics of constitutionalism.

**Keywords:** Constitutionalism, Constitutional Monarchy, Executive Authority, Parliament, Judiciary

## Introduction: His Majesty the Yang di-Pertuan Agong and Their Royal Highnesses the Malay Rulers

The Crown in Malaysia is the symbol of strength, unity and religious tolerance. That being said, the role of the Yang di-Pertuan Agong and the Malay Rulers should not be construed just as a symbol, restricted to emblems and *Istiadat* only. Their Royal Highnesses are the bastion of the Malay culture and the religion of Islam. Generally understood,

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the functions of the institution of the monarchy in Malaysia is rooted in the concept of constitutional monarchy supplemented by the ideals of parliamentary democracy. The Yang di-Pertuan Agong is the Head of State, and in accepting such an appointment and before exercising the functions thereunder, His Majesty has to take the oath as stated in Article 37, Part 3 Schedule 4 of the Federal Constitution. The oath of Office of the Yang di-Pertuan Agong described four main responsibilities of His Majesty, which are; firstly, to perform duties in accordance with the constitution and laws of Malaysia; secondly, to uphold the laws of the country; thirdly, to fulfil the rules of law and order and promote good governance of the country; and lastly, to protect Islam as the religion of the federation at all times.

In view of the tumultuous political scene in Malaysia, the Yang di-Pertuan Agong played an active role in ensuring the functions and powers can be implemented in safeguarding the welfare and prosperity of the nation. The constitutional monarchical system practised in Malaysia is uniquely homegrown and different from any other monarchy system that survived in the modern world. The Yang di-Pertuan Agong is an institution in which a Malay ruler appointed from among the nine Malay Rulers in Malaysia by the Conference of Rulers in accordance with Schedule III of the Federal Constitution. The elected Yang di-Pertuan Agong will hold the post for a period of five years. When the Yang di-Pertuan Agong has been elected, the Keeper of the Great Seal of the Rulers will inform the result of the appointment by letter to both Houses of Parliament, the Dewan Rakyat and the Dewan Negara. The Yang di-Pertuan Agong may resign or be removed from office, as provided under Article 33(3) of the Federal Constitution. For countries that applied constitutional monarchy as in this country, all powers, functions and roles of the Yang di-Pertuan Agong as the Head of State are enumerated in the Federal Constitution, being the supreme law of the land.[1]

Further, Article 181(1) of the Federal Constitution guarantees the sovereignty and powers of the Yang di-Pertuan Agong and their Royal Highnesses, the Malay Rulers. His Majesty is accorded with the honour of preserving the special position of Malays and the natives of Sabah and Sarawak as the local inhabitants while protecting the interests of other racial groups in this country. Yang di-Pertuan Agong is the Head of Religion of Islam for the states of Pulau Pinang, Sabah, Sarawak and the Federal Territories of Kuala Lumpur, Putrajaya and Labuan.[2]

1 Federal Constitution, art 4(1).
2 ibid. art 3(3).

The Yang di-Pertuan Agong, being on top of the composition of the federal legislature,[3] has the power to summon, prorogue and dissolve the Parliament.[4] A Bill that has been passed by the House of Representatives and the House of Senate must be assented by the Yang di-Pertuan Agong before it is gazetted and enforced.[5] Article 66(4A) was amended and allowed the bill to become a law in 30 days without His Majesty assent.[6] This provision shows that the country upholds the power and roles of Parliament to legislate laws and in line with the principle of parliamentary democracy dan constitutional monarch that is practised in Malaysia. His Majesty may deliver His Royal Decrees in any of the Houses of Parliament or both.[7] An opening of Parliament marks the beginning of a parliamentary session each year, His Majesty usually addresses His royal decree in the House of Representatives. It takes place in front of both houses, in the presence of the executive and Judiciary. This constitutional practice is that His Majesty is the head authority of the Legislative as well as other government bodies, including the executive and judiciary.

The Yang di-Pertuan Agong is also the executive authority of the federation and has the power to rule, subject to provisions of the Federal Constitution. His Majesty shall hold, keep and use the Public Seal of the Federation.[8] The authority to govern is delegated to the executive branch of the government, and His Majesty fulfils the constitutional functions on advice by the Prime Minister and the Cabinet.[9] National safety and harmony are the responsibilities of the Yang di-Pertuan Agong[10] and the government of the day. Due to this, the Yang di-Pertuan Agong is accorded with the powers to proclaim a state of emergency if His Majesty is satisfied that a grave emergency exists whereby the security, economic life, or public order in the Federation or any part thereof is threatened.[11]

The constitution has envisaged provisions to protect the institution of the Crown from being the subject of ridicule and adverse critics.

3 ibid. art 43.
4 ibid. art 55.
5 ibid. art 66.
6 This provision was amended by Act 566 in force from 16 December 1983; Act 584 enforced on 20 January 1984; and lastly Act 885 enforced on 24 June 1994.
7 Federal Constitution (n 1) art 60.
8 ibid. art 36.
9 ibid. art 39.
10 Referring to the oath of office of the Yang di-Pertuan Agong in Federal Constitution, art 37(1).
11 Federal Constitution (n 1) art 150.

Article 10(2) and (4) empowered the Parliament to pass a law prohibiting the questioning of any matter, right, status, position, privilege, sovereignty or prerogative established or protected by the provisions of Part III, Article 152, 153 or 181, and firm effort must be done to enforce such legislations to protect the constitution and the institution of the Crown[12] for the harmony of the country.

## Executive authority of the Federation

Literal reading of the Federal Constitution would give the impression that the Yang di-Pertuan Agong wield vast powers in the federation. However, it should be noted that from the constitutional perspective, the reality is quite the opposite. The Federal Constitution, through Article 39, has vested the Yang di-Pertuan Agong with the executive authority of the federation, exercisable either by him or the Cabinet. This article, through plain words, made a distinction between to whom executive authority is given and to whom such authority may be exercisable, which brings into attention on the succeeding Article 40(1) and 40(1A) on the executive functions of the Yang di-Pertuan Agong. These provisions provide that the vast powers of the Yang di-Pertuan Agong are exercisable upon the advice of the Cabinet, and by constitutional convention, the advice of the Prime Minister. Any provisions which confer power on the Yang di-Pertuan Agong, either accorded by the Federal Constitution or any federal law, should not be read in isolation with Article 40(1)[13] and this position is entrenched in the judicial precedence in Malaysia.[14]

From the perspectives of principles of constitutional monarchy and parliamentary democracy, the powers exercised by the Crown are not personal to an individual monarch.[15] The exercise of the executive powers still largely remained with the Cabinet acting in the name of the Crown. The key starting point on the exercise of the powers of the Yang di-Pertuan Agong should be Article 40(1), and this is further supplemented with Article 40(1A), which require the Yang di-Pertuan

12 Section 3 of the Sedition Act makes the offence of incitement to incite dissatisfaction or disloyalty to the Yang di-Pertuan Agong.

13 S.S. Faruqi, *Our Constitution* (Subang Jaya, Sweet & Maxwell, 2019) 193.

14 *Stephen Kalong Ningkan v Tun Haji Abang Openg* [1967] 1 MLJ 46; *Stephen Kalong Ningkan v Government of Malaysia* [1968] 1 MLJ 119; *Karam Singh v Menteri Hal Ehwal Dalam Negeri* [1969] 2 MLJ 269; *Balakrishnan v Ketua Pengarah Perkhidmatan Awam Malaysia* [1981] 2 MLJ 259.

15 S.S. Faruqi, *Document of Destiny: The Constitution of the Federation of Malaysia* (Petaling Jaya, The Star Publication, 2007) 437.

Agong to mandatorily accept and act in accordance with advice after His Majesty was presented with such advice. The Yang di-Pertuan Agong is accorded with both non-discretionary and discretionary powers. Other than those express provisions which provided that the Yang di-Pertuan Agong may act on his discretion, non-discretionary powers would mean that the Yang di-Pertuan Agong exercised those powers and functions on the advice of the Prime Minister and evidently most of the powers accorded to the Yang di-Pertuan Agong by the Federal Constitution are in this category.

There are also executive functions of the Yang di-Pertuan Agong, which are exercisable on the advice of the Cabinet after consultation with the Conference of Rulers, which includes appointment to several constitutional institutions. Among such critical appointments is the appointment of superior court judges in accordance with Article 122B, whereby it is indicated that the Yang di-Pertuan Agong will appoint the superior court judges while acting on the advice of the Prime Minister, after consulting the Conference of Rulers. In *Re Dato' Seri Anwar bin Ibrahim*[16], it is worth reiterating the judgement of the learned judge in the following words:

> So in the context of art 122B(1) of the Constitution, where the Prime Minister has advised that a person be appointed a judge and if the Conference of Rulers does not agree or withholds its views or delays the giving of its advise with or without reasons, legally the Prime Minister can insist that the appointment be proceeded with. Likewise, in the case of a request from the Conference of Rulers for revocation of an appointment of an advice from it to revoke an appointment already made, the Prime Minister need not respond.[17]

Evidently, 'consultation' as mentioned in Article 122B(1) here should not be equated with 'consent' of the Conference of Rulers, which might pose a dilemma when the advice of the Prime Minister clashes with the wishes of His Majesty's brother Rulers. In this regard, Professor Shad opined[18] that the wishes of the Conference of Rulers are usually a 'make or break' decision because the Yang di-Pertuan Agong is highly likely to also respect the wishes of His Majesty's brother Rulers.[19] If

16 [2000] 2 MLJ 481.

17 *Re Dato' Seri Anwar Ibrahim* [2000] 2 MLJ 481, 484H-I.

18 Faruqi (n 13) 194.

19 See <https://www.bharian.com.my/berita/nasional/2020/10/746086/agong-mendapati-tiada-keperluan-isytihar-darurat> accessed 27 January 2021.

such a situations were to actualise, the Yang di-Pertuan Agong can advise, caution and warn the Prime Minister, however ultimately, it is His Majesty's constitutional duty to accept the advice of the Prime Minister. Article 40(2) conferred explicit discretionary powers to the Yang di-Pertuan Agong in specified situations, which are; firstly, on the appointment of the Prime Minister; secondly, he may withhold consent to dissolve the House of Representatives; and thirdly, on the requisitioning of a meeting of Conference of Rulers.

Regarding the first situation, i.e. the appointment of the Prime Minister, this discretion afforded is not absolute on the behest of His Majesty. The discretion is qualified by the requirement in Article 43(2)(a) that the prospective candidate for the premiership shall have the majority support of the House of Representatives. Judicial guidance in this regard is worthwhile to note. In *Tun Datu Hj. Mustapha v Tun Datuk Adnan Robert and Datuk Pairin Kitingan*[20] , where the court agreed that the Head of State cannot constitutionally exercise an appointment of Chief Minister without taking into account the number of elected seats secured by each and every political party. If the Head of State omits to take into account the number of seats of the political party, it cannot be said that he exercised his judgment under Article 6(3) of the Sabah Constitution. In this instance, the Head of State would be said to be acting unlawfully and unconstitutionally. If no single party obtained a majority in the House of Representatives to secure its leader's candidacy for the premiership, the Yang di-Pertuan Agong will designate the leader of any viable coalition that won the General Election, as has commonly been practiced in the context of Prime Minister appointment in Malaysia.

Constitutional experience in this regard has been put to the test through a situation that had arisen in the Malaysian political atmosphere in February 2020 whereby the Cabinet of Tun Dr Mahathir Mohamad fell when he lost the majority of the House of Representatives due to a number of Members of Parliament who crossed the floor of the August Chamber. Following Article 43(4), Tun Dr Mahathir Mohamad had the choice to either tender his resignation or request for the dissolution of Parliament and the country would face another election. However, the situation of Covid-19 could worsen, and an election would not be prudent at that time, he tendered his resignation to the Yang di-Pertuan Agong on 24 February 2020.[21] The exercise of the discretionary powers of

20 [1986] 2 MLJ 420.

21 See <https://www.astroawani.com/berita-politik/tun-dr-mahathir-resigns-as-prime-minister-231545> accessed 27 January 2021.

the Yang di-Pertuan Agong, by His Majesty's wisdom, had a significant effect in solving this constitutional puzzle. His Majesty, at his behest, decreed that all Members of Parliament to have an audience with His Majesty at the National Palace to inquire each of them as to whom shall have the majority support in Parliament.[22] By taking active steps in this regard, His Majesty Seri Paduka Baginda Yang di-Pertuan Agong Al-Sultan Abdullah Ri'ayatuddin Al-Mustafa Billah Shah managed to discern a viable coalition among the Members of Parliament under the leadership of Tan Sri Muhyiddin Yassin to form a government with the latter holding the premiership.[23]

## Power to combat Emergency: historical perspective and the functions of the Parliament

Another aspect of executive power of the Yang di-Pertuan Agong is embedded in Article 150(1) on the proclamation of emergency. The reason for the insertion of the power to combat emergencies can be traced back to the Reid Commission Report,[24] whereby back then the federation is shadowed with the threat of communist insurgency, the Commission was of the opinion that the federation should be accorded with adequate power in the last resort to protect essential national interests. The Reid Commission went on to state that suspension of the fundamental rights and State rights may only be justified to such an extent as may be necessary to meet any particular danger which threatens the nation. On this note, in *Stephen Kalong Ningkan v Government of Malaysia*,[25] the Privy Council gave guidance on the scope of what may amount to an emergency situation. It was held that emergency is warranted because of the grave emergency and as such threatens the security or economic life of the Federation, the term 'emergency' covers a wide range of situations which includes wars, famines, earthquakes, floods, epidemics and the collapse of civil government.[26] Pursuant to the Covid-19 pandemic, the government of Tan Sri Muhyiddin sought the satisfaction of the Yang di-Pertuan Agong to proclaim a state of emergency throughout the nation

22 See <https://www.astroawani.com/berita-malaysia/221-ahli-parlimen-selesai-menghadap-yang-dipertuan-agong-231801> accessed 27 January 2021.

23 See <https://www.astroawani.com/berita-malaysia/muhyiddin-yassin-dilantik-pm-ke8-232149> accessed 27 January 2021.

24 *Report of the Federation of Malaya Constitutional Commission 1957* (Her Majesty's Stationery Office, 1957).

25 [1968] 2 MLJ 238.

26 ibid. 242.

and such a proclamation was issued on 12 January 2021, which will last until 8 August 2021.[27] The proclamation sought to curb the spread of the Covid-19 pandemic and protect the citizens.

It is interesting to note the judicial tide has not subsided on the point that the Federal Crown shall act on the advice of the Cabinet even in the situation of an emergency, and this has been affirmed in *N Madhavan Nair v Government of Malaysia*,[28] where it was held that emergency rule which passes legislative powers from Parliament to the Yang di-Pertuan Agong has not displaced His Majesty's position as the constitutional monarch, and His Majesty is thus, still bound by the Constitution to act at all times on the advice of the Cabinet. The situation might be different if there is no Cabinet in sitting, and as such, the Yang di-Pertuan Agong may act on his discretion.[29] Another position on this matter when there is a caretaker government is highlighted below.

The Emergency proclamation of 1969 is a significant example. A general election was held on 10 May 1969, however the election, which is yet to be completed in Sabah and Sarawak were suspended by a Directive issued by the Yang di-Pertuan Agong.[30] The May 13th racial riots broke out, which is believed to stem from the clash of the Malay and the Chinese supporters on the evening of polling day. The riot extended till the next day, and the Proclamation of Emergency was declared on 15 May 1969.[31] His Majesty, the then Yang di-Pertuan Agong, Almarhum Sultan Ismail Nasiruddin Shah, had appointed Tun Abdul Razak as the Chairman of MAGERAN and to promulgate the Emergency Ordinance.[32]

The Emergency proclamation of 1969 is significantly different because the Parliament was dissolved, and the nation was governed by a caretaker government. On the pretext that the Yang di-Pertuan Agong is not bound by the advice of a caretaker government,[33] His Majesty acted within His Majesty's discretion and not on the advice of the caretaker Prime Minister. Under Ordinance 2 of 1969, the then Yang di-Pertuan Agong appointed Tun Abdul Razak as the Director of National Operations Council (NOC), also known in Malay as Majlis Gerakan Negara (MAGERAN) to exercise

27 See <https://www.straitstimes.com/asia/se-asia/malaysias-king-declares-national-state-of-emergency-to-curb-spread-of-covid-19> accessed 29 January 2021.

28 [1975] 2 MLJ 286, 289.

29 *Public Prosecutor v Mohd Amin Mohd Razali* [2000] 4 MLJ 679.

30 P.U. (A) 147/69, art 150(4).

31 *Report of the May 13th Tragedy: A Report of The National Operation Council* (Kuala Lumpur, October 1969).

32 Emergency (Essential Powers) Ordinance No.1 of 1969.

33 Also in *PP v Mohd Amin Mohd Razali* [2000] 4 MLJ 679, 692.

the executive authority of the Federation, under Article 39 and any powers that were granted by His Majesty and expressly stated under the law to include legislative authority.[34] Parliament was reconvened on 20 February 1971, after the suspended Sabah and Sarawak elections were completed. The Yang di-Pertuan Agong then repealed Ordinance 2 of 1969, and the NOC was abolished.

In reference to the proclamation of emergency, Article 150(3) requires the Yang di-Pertuan Agong to lay the proclamation before the House of Representatives and the House of Senate, and both Houses may pass a resolution to annul such proclamation. Such provision is the backdrop of a mechanism of parliamentary control over the actions of the executive during an emergency. In practice, however, the control is ineffective as the executive may enforce its will on Parliament due to the fact that there is the dominance of government MPs which has prevented the exercise of this power.[35] In addition, section 14 of the Emergency (Essential Powers) Ordinance 2021, an ordinance made pursuant to the proclamation of the emergency gazetted on 14 January 2021, provided that there would be no Parliament sitting throughout the proclamation unless the Yang di-Pertuan Agong thinks it is appropriate to summon the Parliament. Furthermore, parliamentary scrutiny is halted in an emergency as the Yang di-Pertuan Agong is empowered to prorogue or dissolve Parliament via Article 55(2), which would enable executive authoritarianism in governing the nation. At this juncture, Professor Shad commented that for all practical purposes, a proclamation of emergency by the Yang di-Pertuan Agong is not subject to adequate control by the Parliament.[36] Retrospectively, it is recommended by the Reid Commission that the Parliament should be called as soon as possible and get involved in approving the ordinances made by the government. They recommended the approval should come within 15 days from the date such ordinance is made.[37] It is humbly submitted that the recommendations put forth by the Reid Commission in their Report be used as the basis in promulgating the ordinances made under the proclamation of emergency and allowing the Parliament to be summoned.

Furthermore, on the basis that the functions and legitimacy of Parliament lie on the fact that such an authority is given by the will of the people of the nation, it is also submitted that the Parliament should

34 Ordinance No. 2 1969, s 8.
35 Faruqi (n 13) 222.
36 Faruqi (n 15) 676.
37 Report of the Federation of Malaya Constitutional Commission 1957 (n 24) art 175.

be allowed to perform its functions during the time of an emergency. Generally, legislating laws is the main function bestowed upon the Parliament, and no legislative proposal can be allowed to operate without going through the complex, yet required, the legislative process in Parliament. Despite executive dominance in the Malaysian Parliament, it must be upheld, in spirit and practice, Parliament's duty to legislate, even during an emergency. This is unmistakably allowed by Article 150(5) and (6), which supposedly widen the Parliament's power during an emergency. During an emergency, in enacting any legislation, there is no requirement to consult the States to get the consent of the Conference of Rulers and State Governors in areas where in usual times is needed, and such laws only require simple majority subsequently when it is tabled in Parliament. Historically, the federal legislature has exercised such powers, for example, over the state of Kelantan through Kelantan (Emergency Powers) Act 1977 and in amending the Sarawak Constitution through the Emergency (Federal Constitution and Constitution of Sarawak) Act 1966.

At this juncture, it is submitted that the emergency ordinance should be holistic in providing provisions that would facilitate the sitting of Parliament. Deputy Speaker of Dewan Rakyat, YB Azalina Othman Said, in her letter to the Attorney-General on 17 February 2021, addressed the need for provisions to improvise Parliament sittings instead of suspending Parliament altogether. This move is lauded for its emphasis to hold the government accountable to Parliament. Enforcing ministerial responsibility against the Cabinet and the ministers individually can no longer be done pursuant to the suspension of Parliament, according to the learned Deputy Speaker.

It is further submitted that from the constitutional perspective, Parliament must be allowed to fulfil its functions as enumerated in the Federal Constitution, despite the presence of the bulk of executive personnel in the August Chambers. The adoption of the concept of parliamentary government is coupled with the notion of 'responsible government', which made the government answerable to the will of the people, exercisable through the Parliament. Evidently, this is provided in Article 43(3) of the Federal Constitution that the Cabinet shall be collectively responsible to Parliament. Specifically, this is done during debates and daily Q&A session whereby government MPs have the opportunities to explain government policies and programmes. It is understood that some critics of the parliamentary governments opined that in this system, the legislature only legitimates the actions

of the executive and no longer are they afforded the control to legislate, seeing that the majority Members of Parliament are in the Cabinet.[38] This ultimately gives the idea that the role in legislating falls on the shoulders of the bureaucrats. However, it should also be noted that with the number of government MPs diminished to a simple majority in Dewan Rakyat, the scrutiny of government actions is more robust in the last few years. Professor Shad noted that the questions and debates in Parliament are more 'penetrative', resulting in the grand inquest of the nation acquiring greater significance. He further states that, however, this depends on the impartiality of the Speaker of the House.[39] With the advancement of modern technology and the proliferation of social media, Parliament debate activities are broadcasted across the nation. This gave a golden opportunity for the elected representatives to evidently show to their constituents that they are at work to fulfil the will and aspirations of their constituents. Public scrutiny in this modern age is indeed more penetrative, and surely this will be reflected in the coming polls.

Should Parliament failed in its duty to perform its constitutional functions, the will of the people might be curtailed, and the spirit of constitutionalism might wither away.

## Malaysian constitutionalism and the Crown's significant role

Professor Andrew Harding indicated that to understand what amounts to constitutionalism, considerations as to practical implementations, advanced applications of the constitution and understanding of the theoretical objectives behind such constitutional provisions are due in order to have a holistic concept of constitutionalism.[40] There must be a distinction between constitutional texts and their practical implementation coupled with the objective of such constitutional provisions. He further stated that constitutionalism is essentially the informing values and actual practices of the constitutions, and it is in the latter that evidence of the autochthonous character of Malaysian constitutionalism can be seen.

38 Federal Constitution, art 43(2), Prime Minister and his Cabinet is the coalition of political parties that won the majority in Dewan Rakyat. Ministers are also allowed to come from Dewan Negara, but Prime Minister must come from Dewan Rakyat, Federal Constitution, art 43(2)(a).

39 Faruqi (n 13) 223.

40 A. Harding, 'New Asian Constitutionalism: Myth or Reality?' (7th Professor Emeritus Ahmad Ibrahim Memorial Lecture Series, International Islamic University Malaysia, 2006).

In the context of the Crown, constitutionalism dictates the core teachings and compliance to the Malay *Adat* that transpires over centuries of usage, albeit there were times when those usages were curtailed and diminished to the point of insignificance during the British rule. The Federal Constitution of Malaysia dates back to 1957, but the constitutionalism of Malaysia, or rather Tanah Melayu, is older than that. Throughout Asian countries' historical perspectives, which bears upon them major constitutional changes in the 1980s and 1990s, the Federation's 1957 constitution survived virtually intact with its core values remained rooted. With that in mind, all these years, constitutionalism has survived longer, although admittedly through various changes, which is expected as it is in the nature of constitutionalism that it never stands still. The culmination of incidents, practices, the emergence of constitutional institutions, including that of the Federal Crown and the Conference of Rulers, has shaped Malaysian constitutionalism to be uniquely autochthonous to this land and remained relevant to this day.

Throughout the years of constitutional governments in Malaysia, we have seen how constitutional provisions, be it federal or state, are being applied by the Crown and other players of constitutionalism which are politicians and social activists. Some of these instances are recorded in judicial precedence, notably the case of *Dato' Seri IR Hj. Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir*[41] when the then Sultan of Perak took cognisance of the extraneous circumstances to gather enough information regarding who held the majority support of the Perak Legislative Assembly. This is an example where the ideals of constitutionalism, though not expressly stated, is at play. Practical implementation of the practice of choosing a head of government for a state legislative assembly, coupled with advanced applications of constitutional provisions on choosing the head of government and understanding the theoretical objectives behind such a provision, are the considerations that described constitutionalism in this aspect. The State Crown in this situation looked at limiting the establishment of majority support through the vote in the legislative assembly to be counter-productive, when in fact it is proven through any judicial or non-judicial precedence that it should not be limited to just one method. This view is also evident in *Datuk Amir Kahar v Tun Mohd Said bin Keruak Yang Di-Pertua Negeri Sabah & Ors.*[42]

41 [2010] 2 MLJ 285.
42 [1995] 1 MLJ 169.

In upholding ideals of constitutionalism, which includes the notion of limited government, it should be noted that Abdul Aziz Bari argued that the privileges accorded to the Crown are related to their role in helping the constitutional government's function according to its ideals, which may include limited discretionary powers of the executive.[43] This is because unfettered discretionary powers and constitutionalism do not mix. Hence, Article 40(1) attaches to the use of powers and functions of the Yang di-Pertuan Agong at the federal level, harmonised with the basic tenets of constitutionalism as the Crown in a constitutional monarchy system do not wield absolute power. The Crown's role in the context of upholding the core values of constitutionalism is therefore significant.

Its reference can be made to *Indira Gandhi v Pengarah Jabatan Agama Islam Perak*[44] where the Federal Court, quoting *Reference Re Secession of Quebec*,

> Constitutionalism facilitates … a democratic political system by creating an orderly framework within which people may make political decisions. Viewed correctly, constitutionalism and the rule of law are not in conflict with democracy, rather they are essential to it. Without that relationship, the political will upon which democratic decisions are taken would itself be undermined.[45]

Political dynamism which coloured the nation's parliamentary democracy is thus the product of the advancement of constitutionalism itself. The Crown, being the vessel of the core values of constitutional monarchy, is the safeguard of the ideals of parliamentary democracy, which seeks to uphold the values of constitutionalism, specifically concerning responsible government.

## Malaysian constitutionalism and an overview of the role of the judiciary

Professor Shad opined that constitutionalism entails the promotion of values and ideals to ultimately promote the good governance of a nation. This is applied together with the concepts of 'limited government', 'separation of powers' and 'rule of law', among others. The list of

43 A.A. Bari, 'The 1993 Constitutional Crisis: A Redefinition of the Monarchy's Role and Position?' in A. Harding and H.P. Lee (eds), *Constitutional Landmarks in Malaysia: The First 50 Years 1957 – 2007* (Petaling Jaya, LexisNexis, 2007) 229.

44 [2018] 1 MLJ 545, 565.

45 [1998] 2 SCR 217, Supreme Court Canada.

values and ideals form features of a democratic political system in which a country functions and these values and ideals at times overlap each other in their applications.[46] Some of these values and ideals are discussed below.

Constitutionalism demands that state authorities and citizens from all walks of life respect the law. Officers of the State authority would be deemed against the spirit of constitutionalism if they are allowed to deny or deprive citizens of the entitlements of their rights on the general, vague and subjective grounds of national interest, public policy, economic efficiency or good government.[47] This is also in line with the recommendations made in the Reid Commission Report, whereby fundamental rights should be guaranteed by the Constitution, and it is followed by the reiteration of the function of the Courts, which is accorded with the power and duty to enforce those rights.[48]

The Reid Commission further noted that they disagreed with the suggested curtailing of Courts' powers to be placed in the Constitution regarding certain principles or aims of policy. The disagreement stems from the fact that the constitutional guarantees would be illusory because it would be unenforceable in law and ultimately be counter-effective in protecting the rights of the citizens against the long arm of the executive or the legislature. Such celebration of the Courts' roles, while also upholding the values of constitutionalism, can be demonstrated in the *Pengarah Tanah dan Galian Wilayah Persekututan v Sri Lempah Enterprise Sdn Bhd*,[49] where Raja Azlan Shah CJ (as His Majesty then was) reminded of the functions of the courts as the bastion to safeguard the liberty of the people:

> Every legal power must have legal limits, otherwise, there is a dictatorship. In particular, it is a stringent requirement that a discretion should be exercised for a proper purpose and that it should not be exercised unreasonably. In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression. *In these days when government departments and public authorities have such great powers and influence, this is a most important safeguard for the ordinary citizen:*

46 Faruqi (n 15) 24.
47 ibid.
48 Report of the Federation of Malaya Constitutional Commission 1957 (n 24) art 161.
49 [1979] 1 MLJ 135, 148. FC

> *so that the courts can see that these great powers and influence are exercised in accordance with law.* I would once again emphasise what has often been said before, that "public bodies must be compelled to observe the law and it is essential that bureaucracy should be kept in its place" (per Danckwerts L.J. in *Bradbury v London Borough of Enfield* [1967] 3 All ER 434 442).[50]

Constitutionalism dictates limiting the discretionary powers of institutional abuse or misuse of powers.[51] Coupled with the words of the Raja Azlan Shah CJ (as His Majesty then was), such judicial control is to avoid destruction of constitutional values which the authority of the State should instead promote. It is here that judicial control can be regarded as the last bastion in order to ensure the executive exercise of discretionary powers is in line with the core values of constitutionalism. *Pengarah Tanah dan Galian Wilayah Persekututan v Sri Lempah Enterprise Sdn Bhd* echoed in *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors*[52] whereby it is stated that constitution must be interpreted in light of its historical and philosophical context, as well as its fundamental underlying principles, which includes the rule of law and constitutionalism. Pursuant to the underlying principles of constitutionalism, it strengthens the role of the judiciary as the ultimate arbiter of the lawfulness of state action.

Waldron commented that constitutionalism is not just about the normative theory about forms and procedures of governance of a State, it is also about 'controlling, limiting and restraining the power of the state'.[53] Such control, while some may be provided in statutory legislation, however, it is ultimately up to the Courts to ensure that such limitations and restrains in exercising the powers provided to the State authority are observed. In addition to this, Hamid Sultan JCA, dissenting in *Nik Noorhafizi bin Nik Ibrahim & Ors v Public Prosecutor*[54], quoting *IR Coelho* in the Supreme Court of India, touches on the duty of the Courts in upholding the constitution in that even judicial precedence which is unconstitutional must be disregarded. The exercise of the power of the authority of the State must be controlled in order to maintain democratic principles upon which it is founded. this is because according to *IR*

50 ibid. (emphasis added).
51 Faruqi (n 15) 30.
52 [2018] 1 MLJ 546.
53 J. Waldron, 'Constitutionalism: A Sceptical View' (2012) *New York University School of Law, Public Law Research Paper,* No.10-87, 13.
54 [2013] 6 MLJ 660, 713-4.

Coelho, constitutionalism is a legal principle, not just a philosophical concept which the Courts are entrusted to uphold. The Courts' duty is further emphasised in the judiciary is dutybound to interpret legislation on the assumption that Parliament would not wish to legislate contrary to fundamental rights.

At this juncture, it is vital to also reminisce the reminder by Salleh Abas LP in *Lim Kit Siang v Dato Seri Mahathir Mohamad*[55] that the Courts, as the guardian of the constitution within its ambit, are equipped with the power of judicial review, not just on construction and interpretation of legislation. This power of judicial review is not implying that the Courts are superior to the Parliament, but it connotes that both organs are the subjects and inferior to the constitution. The Courts, imbued with the responsibility to be the arbiter between the individual and the State and between individuals, must also, out of necessity and acting in accordance with the constitution and the law, 'be the ultimate bulwark against unconstitutional legislation or excesses in administrative action'.[56]

## Conclusion

Constitutionalism is not just some philosophical concept or understanding devoid of any sense of reality. It is the internalisation of constitutional values into the fabric that defines the actions and inactions of governments or any authority in the State and its impact on the people as a whole. It is the holistic outlook that goes beyond the constitutional texts and focuses on more than just the setting to which it applies. It is the tenets that shape the interpretation of the constitution into the everyday machinery of institutions that were created to protect the liberties of the people. Malaysian constitutionalism specifically denotes that the practices, ideals, conventions applicable in the Malaysian constitutional contexts are unique to Malaysia, dating back to the days even before the Federation of Malaya was formed. This is partly evident through the recommendations made to and accepted by the Reid Commission in promulgating the Federal Constitution as the bedrock of this nation.

Furthermore, a homegrown version of the ideals of constitutionalism that dictate the internalisation of values is the backbone of the concept of constitutional monarchy supplemented by parliamentary democracy. Malaysian constitutionalism dictates that the interpretations, practices and conventions should be moulded using the framework that is

55 [1987] 1 MLJ 383, 386-7.
56 ibid.

truly Malaysian, this is where the function of the Courts is vital. Such practices and conventions are results of the application of local laws and interpretation of local cultures embedded in our system, which is in line with Article 160 of the Federal Constitution on what is described as 'law'. The creation of Malaysia's own notion of constitutionalism is on track via the application in the cases as discussed.

From the perspective of the Crown, even though practitioners, teachers and students of the law can look at how other liberal societies around the world react to their monarchies, it is submitted that in Malaysia, we should look at and apply what has been transpired in this beloved land for many centuries, instead of plainly 'scooping' what other liberal societies are doing. Echoing Professor Shad in his famed *Document of Destiny*, His Majesty the Yang di-Pertuan Agong and Their Royal Highnesses the Malay Rulers are well-suited to promote good governance and protect the 'social contract' on which this nation was founded. Scrutinies by the Crown plays a crucial role in supplying check and balance and promote openness and transparency in government, which fulfils the ultimate aim of constitutionalism.

The Parliament, as the grand inquest of the nation, should be allowed to fulfil its functions as enumerated in the Federal Constitution and dictated by the principles of constitutionalism. The alleged subordination of the Parliament to the executive must be answered with openness and strong political will by both the government and the opposition. The internal process of Q&A, Minister question time, workings of opposition MPs, number of sitting days in Parliament are a few matters that required attention. During an emergency, the Parliament's functions should not be curtailed, specifically regarding the inability to sit as provided in the Emergency Ordinance. This would solidify the subordination of the Parliament to the executive. To uphold the spirit of constitutionalism, Parliament's functions should be strengthened to safeguard the integrity of the notion that it is the bastion of the people's will.

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