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Reform of Parliament: Lessons from 2020-2021

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Parliament Building, located at Lake Gardens in Kuala Lumpur, Malaysia. Photo by CEphoto, Uwe Aranas.

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EXECUTIVE SUMMARY

- An elected and representative legislature is the central pillar of a democratic polity. One third of the Articles of the Constitution of Malaysia require Parliament to perform a number of essential functions, such as the making of laws, scrutiny of executive policy, supervision of national finance, and control of emergency powers.
- The House of Representatives gives legitimacy to the government, represents electoral constituencies, and approves electoral boundaries. Individual MPs help to redress the grievances of their constituents. The Senate represents the 13 States, the Federal Territories and minorities.
- Despite its key role in Malaysia's governance, Parliament has been in abeyance for much of 2020 and 2021. It played no role in restoring political stability to the nation after the fall of the Pakatan Harapan Government in February 2020, and has been an unwilling bystander in the devastating health and economic crisis caused by the Covid-19 pandemic.
- Reform of the law and practice of Parliament are necessary to give effect to the constitutional provisions on Parliament's functions and to enhance Parliament's institutional efficacy.
- This essay highlights those issues that surfaced in 2020 and 2021 when the institution of Parliament was at its ebb.

INTRODUCTION

When the Constitution of Malaya was drafted in 1957, fifty-seven out of 181 Articles of the basic charter were devoted to the role and function of an elected and representative Parliament, created to be the heartbeat of Malaya's constitutional and political system.

Regrettably, a wide gap has developed between the Westminster theory that the government is answerable, accountable and responsible to Parliament, and the reality of an omnipotent executive. This is not peculiar to Malaysia and is a challenge in almost all of the 33 or so "Westminster" democracies operating in the world today.¹ The factors that have contributed to the shift of power from the legislature to the political executive vary from society to society and require separate treatment.

This essay outlines the constitutional functions of the Malaysian Parliament but takes note of the reality of pervasive executive dominance. A comprehensive list of reforms to reverse this trend is not possible in this essay² but lessons from the last two years are noted because Parliament was in abeyance for most of the time between January 2020 and September 2021.³ It played no role in restoring political stability after the fall of the Pakatan Harapan Government in February 2020 and was an unwilling bystander in the devastating health and economic crisis caused by the Covid-19 pandemic.

ROLE AND FUNCTION OF PARLIAMENT

In Malaysia's Westminster system of "parliamentary government", the legislature is supposed to perform the following constitutional functions:

Giving democratic legitimacy to the government: Under Article 43(2)(a), the Monarch appoints a person to be the Prime Minister who in his judgement is likely to command the confidence of the majority of the members of the House of Representatives (the Dewan Rakyat).⁴ If this majority is lost,⁵ the PM has only two choices: advise a dissolution of the House or submit the resignation of the Cabinet.⁶

Legislative function: This includes the enactment, amendment, and repeal of ordinary laws,⁷ emergency laws⁸ and amendments to the Constitution.⁹ Ideally, the legislative role should also include the scrutiny of delegated legislation¹⁰ and a leadership role in law reform.¹¹

Oversight of executive policy and performance: The foundational principle of a parliamentary democracy is that Parliament should enforce accountability, answerability, and responsibility of the political executive to the Houses of Parliament or their committees. Article 43(3) sums it up well: "The Cabinet shall be collectively responsible to Parliament".

Control of national finance: This should include oversight of the government's long and short term financial and economic policies; examination of the use of financial resources optimally; allocation of the annual budget and supplementary budgets.¹² The Dewan

Rakyat's Public Accounts Committee reviews the reports of the Auditor-General to examine how the allocations were utilised.¹³

The constituency function: In Malaysia's electoral system of single-member constituencies, the 222 MPs represent the voters of one constituency each. It is part of each MP's function to redress his/her constituents' grievances and engage with them to obtain feedback on government policies and programmes. Many MPs run Service Centres to serve their constituents.¹⁴

Functions during an emergency: During an emergency, Parliament is not automatically dissolved or suspended (though it may be). Instead, Article 150 gives to Parliament three major functions during an emergency: (i) To scrutinise the Yang di-Pertuan Agong's (King's) Emergency Proclamation and, if need be, to annul it;¹⁵ (ii) To scrutinise the Yang di-Pertuan Agong's Emergency Ordinances and, if need be, to annul them;¹⁶ and (iii) To enact Emergency Acts of Parliament.¹⁷

Electoral boundaries: It is part of the Dewan Rakyat's function to approve or reject the Election Commission's proposals for new electoral boundaries.¹⁸

Malay Reserves Lands: Any de-reservation of a Malay Reserve requires legislation in the State Assembly along with a special majority resolution in both Houses of Parliament.¹⁹

Parliamentary privileges: Each House is empowered to exercise parliamentary privileges to protect the House, its members and officers and to ensure compliance with its decisions and orders.

Dewan Negara/Senate: Two Senators from each State represent the 13 States. In addition, 44 appointed Senators are supposed to give voice to the Federal Territories, minorities and marginalised groups.

Regrettably, except for the constituency function, Parliament fails to perform the other functions satisfactorily. There are many structural, legal and procedural impediments in the way of its independence and efficacy. The years 2020-2021 exposed some of these impediments dramatically.

LESSONS FROM 2020-2021

If Parliament is to perform any of the above constitutional functions, it must be allowed to assemble frequently enough! It must have some say over whether it can convene, and when. It must decide or at least be consulted over issues of adjournment and prorogation.²⁰ It must have the power to determine its agenda, to debate and discuss matters of national and public importance and to introduce motions. The Speaker²¹ and the Secretary of Parliament²² must not be subordinate to the political executive. Regrettably, the last two years have taught Malaysians that the political executive has near-total control over all aspects of the Parliament's life.²³

Constitutional principles and PM's discretion over parliamentary calendar: The summoning, adjournment and prorogation²⁴ of Parliament, are not a royal discretion but a prime ministerial power.²⁵ The number of parliamentary sittings per year is quite low.²⁶ The Dewan Rakyat meets 50-80 days a year. In 2020 it met for only 55 days; in 2021, (till 26 Sept) for only nine days. Due to the emergency in 2021, Parliament was convened for the first time only on July 26 but prorogued two days later. Our parliamentary calendar compares unfavourably with the UK where Parliament meets for about 170-180 days per year on average.²⁷

On 1 March 2020, when Tan Sri Muhyiddin Yassin was sworn in as PM, he postponed the scheduled parliamentary sitting from 9 March to 18 May in order to consolidate his position ahead of an anticipated vote of no-confidence. In subsequent weeks when the Palace advised PM Muhyiddin to summon Parliament as soon as may be, the Palace's press releases were largely ignored by the PM's office on the ground that the decision to summon Parliament rests with the Cabinet and not the King.²⁸

There is also the problem of the distinction between a 'Session' and a 'Meeting'.²⁹ Article 55(1) forbids no more than "six months to elapse between the last sitting in one *session* and the date appointed for (the) first meeting in the next *session*". The Constitution is silent about the interval between one meeting and the next meeting in the same session!³⁰

Increasing the number of sittings will assist Parliament to perform its roles more thoroughly. Reformers suggest that given the very lengthy periods when Parliament does not sit, parliamentary committees should be allowed to function both during an adjournment and a prorogation. It is in committee work that Parliament blossoms into "the grand inquest of the nation".

Parliamentary agenda: Though Parliament is supposed to be a separate pillar of our Constitution, it has no independence to determine its agenda! Under the Standing Orders of the House, the executive, and not the Speaker, determines or dominates the parliamentary agenda.³¹ Government business takes precedence over private members' business.³² The Standing Orders have a constitutional basis³³ and are probably unchallengeable in a court due to Article 63(1).³⁴

The dominance of the executive over Parliament was dramatically illustrated in several recent events.

In March 2020, after Tan Sri Muhyiddin was appointed Prime Minister, he postponed Parliament from 9 March to 18 May. But come 18 May, the Dewan Rakyat was allowed to sit for a mere half day to listen to the King's speech at the beginning of the new session. No debates or motions were allowed!

On 13 July 2020, the Speaker, Tan Sri Dato' Mohamad Ariff Md Yusof, a retired and respected former Court of Appeal judge, known for his independence and integrity, was summarily removed from his post in mid-term because, according to the PM "there is a new

candidate for the post”.³⁵ The Deputy Speaker only allowed two individuals from each side to debate for 10 minutes each.

In July 2021, the Dewan Rakyat met for the first time on 26 July 2021 for two days only and was then adjourned due to the Covid threat. During the two days, a motion of no-confidence was not allowed by the Speaker! The Emergency Ordinances required to be laid before the Houses under Article 150(3) were not allowed to be debated on the unconstitutional claim that the Cabinet had already annulled them.

Again in 2021, when Parliament returned to session on 13 September under the new PM Ismail Sabri, neither a motion of confidence in favour of the PM nor a motion against the Speaker were allowed on the Daily Order Paper.³⁶

Motion of no-confidence: It is a fundamental principle of parliamentary democracy that the PM and Cabinet are subject to votes of confidence in the elected House. Articles 43(3) and 43(4) indirectly recognise this principle.³⁷ A House of Commons Briefing Paper refers to the “core convention” that the government must be able to command the confidence of the House of Commons.³⁸

Despite this core convention, the Standing Orders of the Dewan Rakyat, framed during the days of Barisan Nasional’s monolithic power, do not have any specific provision for a motion of no-confidence. Since 2015, scores of such motions have been denied admission or placed at the bottom of the Order of Business. Most incredulously, several Dewan Rakyat Speakers have ruled that to give a Motion of no-confidence priority will require the Motion to be moved *by a Minister* under S.O. 14(1)(n) to alter the Order of Business!³⁹

The legality and propriety of a vote of confidence on the floor is under serious questioning in Malaysia. The feeling of some is that the judgment about who commands confidence is the exclusive function of the Yang di-Pertuan Agong under Article 43(2)(a) without recourse to Parliament. It is noteworthy that after the “Sheraton move”, when Tun Mahathir, the “Interim Prime Minister”, sought to convene the House to prove his majority, his request was turned down by the Speaker on the ground that “the appointing authority resides in the Head of State, not in the legislature”.⁴⁰ In the appointment of Muhyiddin Yassin in 2020 and Ismail Sabri in 2021, the King chose to interview MPs in person and consult his brother Rulers rather than convene the House to test the claimant’s majority on the floor.

To question the claim that Parliament is the best forum for testing the PM’s majority, the Attorney-General issued a Press Release on 4 September 2021 that as PM Ismail Sabri had been duly appointed by the Yang di-Pertuan Agong, a vote of confidence was unnecessary and would undermine the King’s powers.⁴¹ The AG went on to say that the power of the King to appoint a PM was absolute and could not be questioned. The AG’s views are out of sync with Articles 43(2)(a) and 43(4). Article 43(2)(a) links the Monarch’s discretion to the likelihood of someone commanding the confidence of the majority of the members of the House. Article 43(4) foresees the possibility that someone duly appointed by the King may cease to command this confidence. The AG’s views also contradict the explicit royal direction from the King when PM Ismail Sabri was appointed that the new PM must seek a

vote of confidence in Parliament.⁴² The AG also sidesteps clear precedents of votes of confidence when Tun Hussein Onn and Tun Abdullah Badawi assumed the premiership.⁴³ At the State level, there are eleven examples of successful votes of no-confidence between 1962-2020, the most recent being December 2020 in Perak.⁴⁴

Role of Malay Rulers: Since the Sultan of Pahang ascended to the federal throne on 31 January 2019, he has for many critical decisions sought the advice of his brother Rulers. Some of these occasions were the appointment of the PM in 2020 and again in 2021. This spirit of consultation is entirely commendable and is in line with the Conference's power under Article 38(2) to deliberate on "any other matter that it thinks fit". However, what is constitutionally significant is that only the Malay Rulers and not the Governors were invited for the consultation.⁴⁵

Number of cabinet ministers: Unlike all State Constitutions which prescribe the maximum number of Executive Council members, the Federal Constitution imposes no limit on how large the Cabinet can be. If a PM has unlimited power to choose the size of his Cabinet under Article 43(2)(b), that, along with his extensive power of patronage, makes it almost impossible for a vote of no-confidence to ever be successful. Also, the economic implications of a 70-strong Cabinet are staggering.

Covid-19 and hybrid sittings: Under Article 62(5), "members absent from a House shall not be allowed to vote". This law was cited as a hindrance to "hybrid sittings". Actually, all that is needed is an amendment to the Standing Orders to redefine "a House" to include any place permitted or required by the Speaker in or outside the main block of Parliament.

Control over emergency powers: Despite the command in Article 150(3) that a proclamation of Emergency and all Emergency Ordinances shall be laid before the Houses, no time frame has been provided for such laying.⁴⁶ If Parliament is not summoned before the emergency ends or if the government controls the agenda in such a way as to disallow any debate or motion on emergency laws (as was the case on 26 July 2021), then the constitutional requirement of Article 150(3) is frustrated.

Power to delay enforcement of Bills passed by Parliament: The last few years have brought to light a most undemocratic reality. Bills including constitutional amendments duly passed by the Houses and signed by the King are often left hanging because the executive had inserted a clause empowering it to choose the date of enforcement. If the executive fails to act, the will of Parliament remains unenforced. The Undi-18 Act passed and gazetted in September 2019 has suffered this ignominy.

MPs convicted of crimes: Under Article 48(4) MPs convicted of crimes are not disqualified from membership till their appeal is dismissed in the courts and their application for Royal Pardon is rejected.⁴⁷ Article 48(4) brings a bad name to Parliament. Additionally, MPs under the stigma of conviction may resort to pressures on the government to drop or modify the charges. In a situation of a hung Parliament or a slim majority, these pressures may destabilise a government.

Party-hopping: Malaysia needs an anti-hopping law to regulate the nefarious activity of defections.⁴⁸ Defections have caused the fall of many elected governments at the State level. At the federal level since 2020, two PMs have had to resign. However, one must be mindful that an anti-hopping law may be unhelpful in some circumstances.⁴⁹ For this reason, instead of an anti-hopping law, Malaysia could legislate a “recall law”, whereby any MP who crosses the floor could be required, if there is a Petition by 20 percent of the electorate, to return to the electorate in his constituency at a by-election for renewal of his electoral mandate.

CONCLUSION

The last 18 months have not been good for the Malaysian Parliament. One is reminded of the British Queen’s 1992 *annus horribilis* speech of 1992. Only once in earlier history has the Malaysian Parliament been so marginalized. That was during the dark days of the racial riots of May 1969 when Parliament was suspended for about 21 months.

One can think of some silver linings, though. An important constitutional development in early 2021 was that the emergency proclamation on 12 January carried a first-ever “sunset clause” to end the emergency on August 1, 2021. This could be a precedent for future Emergency Proclamations.

There is broad outrage at the way the political executive pulverized the nation’s legislative organ in 2020-21. An elected institution, meant to oversee the executive, is under the total control of those it is supposed to scrutinize!

During the Muhyiddin Yassin tenure, the Conference of Rulers and the King spoke repeatedly but in vain of the need to bring Parliament back to session to perform its constitutional functions. The monarchy earned praise for its role.

The new Law Minister, Wan Junaidi Tuanku Jaafar, has promised parliamentary transformation through wide ranging reforms.⁵⁰ On 13 September 2021, PM Ismail Sabri’s government signed a historic bipartisan deal with the opposition.⁵¹ One has to wait and see how things work out but in the area of parliamentary reform it appears that there will be many concessions to the parliamentary opposition. A balance of representation between opposition and government MPs in parliamentary Select Committees is proposed. Opposition members will have a place on the National Recovery Council. Opposition members will be permitted to contribute to the contents of Budget 2022. There will be equal allocations for constituency development funds.⁵² The PM’s term will be limited to 10 years. Undi-18 and automatic voter registration will be implemented. The Parliamentary Services Act will be reintroduced.

While the above piecemeal reforms are welcome, one notes with concern that nothing is said about reform of Standing Orders and other laws that deal with the parliamentary calendar, parliamentary agenda, question time, motions, and private members’ business. These enable the executive to dominate the legislature and silence dissent. There are other structural, legal and administrative reforms that are needed to restore Parliament’s dignity

and efficacy. Foremost should be the putting in place of a system of legislation committees and departmental committees, better scrutiny of the law-making process, a Law Reform Commission reporting to Parliament, better scrutiny of national finance, reform of the Senate, improvement of the electoral process, better representation for Sabah and Sarawak in Parliament, an Institute of Parliamentary Affairs, a law on Fixed Term Parliaments, regulation of party hopping, and rules about caretaker governments.

One hopes that the ripples being created will go far. Perhaps the marginalization suffered in 2020-2021 will inspire thorough reform.

¹ In the UK, Lord Hewart of Bury's book *The New Despotism* (1929) and G W Keeton's *The Passing of Parliament* (1952) recorded their alarm over the increasing ascendancy of the executive over Parliament and the courts.

² Shad Saleem Faruqi, "The Malaysian Parliament: Problems, Prospects and Proposals for Reform" in Mohamad Ariff Md Yusof, Roosme Hamzah and Shad Saleem Faruqi (editors), *Law, Principles and Practice in the Dewan Rakyat*, Sweet & Maxwell, 2020, pp. 495-524.

³ In 2020, the Dewan Rakyat met for a total of 55 days. In 2021 (till 26 September) it met for a mere 9 days.

⁴ Articles 40(2)(a), 43(2)(a).

⁵ There are two ways in which the loss of confidence can be measured: first by a vote on the floor of the House of Representatives. Second, by the King taking note of relevant facts outside the House: *Dato' Dr Zambry Abd Kadir v Dato' Seri Mohammad Nizar* [2009] 5 MLJ 464.

⁶ Article 43(4). In 2020 Tun Mahathir and in 2021 Tan Sri Muhyiddin Yassin resigned from the PM's post due to the loss of support of several defectors from their coalition. The British convention that with the fall of the PM, the doctrine of collective responsibility requires that the entire cabinet must resign, is explicitly incorporated into the Malaysian Constitution by Article 43(4). *In Datuk (Datu) Amir Kahar Tun bin Datu Haji Mustapha v Tun Mohd Said Keruak* [1995] 4 CLJ 184 the then Chief Minister of Sabah, Datuk Seri Joseph Pairin Kitingan of the ruling Parti Bersatu Sabah lost his majority to the Barisan Nasional due to defections. Pairin tendered his resignation. Amir Kahar, a member of Pairin's Cabinet brought an action that he was still a minister because only the Chief Minister had resigned. The Court held that when the Chief Minister resigns, the Cabinet resigns with it; whether or not there was a letter of resignation.

⁷ Articles 66, 73-79.

⁸ Article 150(5), (6) and (6A).

⁹ Articles 2(b), 159 and 161E.

¹⁰ In Malaysia, delegated legislation is referred to as 'subsidiary legislation'. Under the Interpretation Acts 1948/1967 "Subsidiary legislation means any proclamation, rule, regulation, order, notification, by-law or other instrument made under any Act, Enactment, Ordinance or other lawful authority and having legislative effect". Subsidiary legislation outnumbers parliamentary legislation by a ratio of 1:20. The stark reality is that in the legislative sphere, the executive is more important than Parliament. With the centre of gravity of the legislative process having shifted from Parliament to Putra Jaya, the Dewan Rakyat and Dewan Negara could in order to combat this situation by setting up a Joint Select Committee on Subsidiary Legislation in line with the British Joint Committee on Statutory Instruments. The UK committee has seven members from each House and alerts Parliament to any exceptional use or misuse of delegated power. See M P Jain, *Administrative Law of Malaysia*, 2020, pp. 131-150, esp. 145-150.

¹¹ The last two functions are not mentioned in the Constitution.

¹² Articles 96-112D.

¹³ Standing Orders of the Dewan Rakyat, S.O. 77.

¹⁴ How representative the Dewan Rakyat (House of Representatives) is will require a separate study of the constituency delineation process, the rules of electoral financing, the presence or absence of multi-member constituencies, the presence or absence of reserved seats, and how far the system allows minorities, women, the youth, orang asli, the professions and sectoral groups to eke out an electoral triumph. Under-represented groups may also acquire a voice by being nominated to the Senate (Dewan Negara) under Article 45(1)(2).

¹⁵ Article 150(3). However, the annulment by the Houses of a Proclamation does not exclude the possibility of (i) a new Proclamation by the King under Article 150(1) and (ii) the prorogation (the formal ending of a session until the next session is summoned by the King) under Article 55(2). A prorogation will give to the executive a free hand to handle the emergency without parliamentary oversight.

¹⁶ Article 150(3).

¹⁷ Articles 150(5), 150(6) but subject to 150(6A).

¹⁸ Thirteenth Schedule Part II.

¹⁹ Article 89(1)(b).

²⁰ There is a difference between ‘adjournment’ and ‘prorogation’. The former is a temporary break with or without a date fixed for the next sitting. A prorogation is a royal notification to end a ‘session’. A session normally lasts one year. Once it is prorogued, only a royal summon can bring it back. Between one session and the next, Article 55(1) mandates that no more than 6 months may elapse.

²¹ The tradition of an impartial, non-partisan Speaker has not taken hold in Malaysia. This contrasts with the UK where the impartiality of the Speaker is a key feature of the office. See footnote 36 below.

²² The Clerk of the Senate and the House of Representatives are members of the general public service and are transferrable to another office in the general public service: Article 65(2).

²³ This was not the intention of the Constitution. The spirit of the Constitution is that the elected Parliament should not be kept in abeyance for too long. No more than six months may elapse between one session and the next [Article 55(1)]. The King has a discretion to grant or refuse the PM’s request for a premature dissolution [Article 40(2)(b)]. If Parliament is dissolved, an election shall be held within 60 days and the new Parliament shall be summoned to meet within 120 days of the dissolution [Article 55(4)].

²⁴ Prorogation refers to the formal end of the session as opposed to the temporary adjournment.

²⁵ Under S.O. 11(2), the Leader of the House (the Prime Minister) shall determine at least 28 days before the commencement of each Session, the dates on which the House shall meet in the Session. Though under Article 55(1) and S.O. 11(1), the power to summon Parliament belongs to the King, this must be read in the light of Article 40(1) which requires the King to act on advice.

²⁶ Whether this reflects lack of reverence for Parliament in our system of democracy, or the need to make quick decisions unencumbered by lengthy debates and filibusters in Parliament is a matter of opinion. “Discussion before decision” may be the sine qua non of a democratic set up. However, in many Asian governments the practice is to “decide first, discuss and rectify afterwards”. A number of other factors have contributed to the marginalization of Parliament, among them: the continuous state of emergency from 1948-1960; 1964-2011; and 11 January to 1 August 2021. The Alliance/Barisan Nasional enjoyed a massive, 2/3 majority from 1955 to 2008 and this made it possible to treat Parliament as a legitimating and not as a check and balance institution.

²⁷ House of Commons Library, *Number of Sitting Days by Session Since 1945*. Briefing paper 04653, 23 May 2016.

²⁸ Malaysia in Transition. “Malaysian King Presses Muhyiddin to Reopen Parliament Immediately”, asia.nikkei.com, June 16, 2021.

²⁹ The parliamentary calendar is divided into ‘sessions’ (which last approximately one year), ‘meetings’ (which are 3 to 4 per session) and ‘sittings’ within each meeting.

³⁰ This flaw in the law means that the government of the day can keep Parliament in abeyance for as long as it likes between two meetings of the same session by not proroguing but adjourning *sine die* (without a fixed date for the next meeting).

³¹ Standing Orders of the Dewan Rakyat; O.14(1)(n), O. 14(2). However, the Speaker does have latitude over such matters as Question and Answer sessions, Debates, Motions, ‘Adjournment on a Definite Matter of Urgent Public Importance’, order and discipline within the House and matters of privilege. See Mohammad Ariff Md Yusof, “The Speaker’s Position and Functions”, in Ariff Md Yusof, Roosme Hamzah and Shad Saleem Faruqi in *Law, Principles and Practice in the Dewan Rakyat*, pp. 151-236.

³² Standing Orders, O. 15.

³³ Under Article 62(1), “Subject to the provisions of this Constitution and of federal law, each House shall regulate its own procedure”. The position is similar in other developed democracies like the UK and Australia. However, there the moderating influence of constitutional conventions is very strong. This is lacking in Malaysia and one indication is that the Standing Orders show no deference to the needs of private MPs who may wish to introduce Private Bills. Constituency allocations are withheld, in disregard of Article 8(1), from opposition MPs. Membership or Chairmanship of Committees was till 2018 generally monopolized by the ruling party members. However, PM Ismail Sabri’s recent MoU promises some positive transformation in this area.

³⁴ Article 63(1) ordains that proceedings in Parliament shall not be questioned in any court. The courts may refuse to intervene even if the Standing Orders disregard the spirit of the Constitution as in relation to a vote of no-confidence. Such a vote is implicit in Art 43(4) but is not provided for in the Standing Orders.

³⁵ *theedgemarkets.com*, July 13, 2020; *The New Straits Times*, July 13, 2020.

³⁶ The Constitution, in Article 57(1A) sought to promote the tradition of a non-partisan Speaker by providing that the Speaker may either be a member of the House or from outside the House. In either case, he/she must be elected or may be removed by the House. However, the tradition of an impartial Speaker has not taken hold in Malaysia. Subject to some honourable exceptions, the position of the Speaker in Malaysia is a little bit akin to the USA where the Speaker is a partisan figure and openly sides with his/her party. This contrasts with the UK and Ireland where the impartiality of the Speaker is a key feature of the office since the middle of the 19th century. The Speaker in the UK severs all ties with his/her party once elected. He/she answers to no monarch or party leader. If at the next general election, the Speaker wishes to contest, his seat is not contested by the main parties.

³⁷ Art 43(3) ordains that the Cabinet shall be collectively responsible to Parliament. Art 43(4) requires that if the PM loses the confidence of the majority in the House, he must either advise dissolution or submit the resignation of the Cabinet.

³⁸ R Kelly, “Confidence Motions”, Briefing Paper No 02873, March 14, 2019 (House of Commons Library), p. 3. In the UK’s House of Commons, there have been 4 confidence defeats since 1895: in 1895, Jan 1924, Oct 1924 and 1979. Since 1945 there have been 33 confidence motions that were debated. All but one (in 1979) were defeated.

³⁹ The UK tradition is that if there is a motion of no-confidence, the Speaker allows it to be debated as soon as is practicable.

⁴⁰ Mohamad Ariff Md Yusof, Roosme Hamzah and Shad Saleem Faruqi (editors), *Law, Principles and Practice in the Dewan Rakyat*, Sweet & Maxwell, 2020, pp. 533-535.

⁴¹ <https://www.malaysiakini.com>, 4 Sept 2021.

⁴² <https://www.thesundaily.my> 18 August 2021.

⁴³ Philip Koh, “Confidence Motion on PM will not erode King’s authority”, www.freemalaysia.com, Sept 5, 2021. “Does the Agong’s appointment of PM preclude the appointment from

being questioned or be subject to a vote of confidence in Dewan Rakyat?" <https://ceomorningbrief.theedgema.com/article/2021/0244/Home/15/584022>.

⁴⁴ "Perak MB Loses Confidence Vote", *Daily Express*, Dec 5, 2020.

⁴⁵ Except for matters enumerated in Section 7 of the Fifth Schedule, (election of the King and Deputy King), the Conference includes the four Governors of States not having a Ruler. Perhaps the Yang di-Pertuan Agong was mindful of Article 40(2)(c) under which his discretion to requisition the Conference is confined to matters relating to the privileges, honours and dignities of the Rulers. The appointment of the PM is, however, not covered by Article 40(2)(c).

⁴⁶ Such a time frame existed prior to the constitutional amendment in 1960. A Proclamation expired two months after issuance and an Ordinance came to an end 15 days after the first sitting of both Houses unless approved by both Houses.

⁴⁷ A learned survey of several countries is found in the European Commission for Democracy Through Law (Venice Commission). *Report on Exclusion of Offenders From Parliament*, Strasbourg, 23 Nov 2018, Opinion No. 807/2015.

In Canada, Section 750 of the Criminal Code, which applies to both members of the Senate and the House, provides:

(1) Where a person is convicted of an indictable offence for which the person is sentenced to imprisonment for two years or more and holds, at the time that person is convicted, an office under the Crown or other public employment, the office or employment forthwith becomes vacant.

(2) A person to whom subsection (1) applies is, until undergoing the punishment imposed on the person or the punishment substituted therefore by competent authority or receives a free pardon from Her Majesty, incapable of holding any office under the Crown or other public employment, or of being elected or sitting or voting as a member of Parliament or of a legislature or of exercising any right of suffrage. See James R Robertson, Parliamentary Research Branch, "Criminal Charges & Parliamentarians", 21 July 1994, *Publications, gc.ca*.

⁴⁸ In the past, defections caused the fall of governments in Terengganu (1962), Sarawak (1966), Kelantan (1977), Sabah (1994, 2018, 2020), Perak (2009, 2020), Johor, Malacca, Kedah (2020). At the federal level, party-hopping caused the downfall of the Mahathir government in 2020 and the Muhyiddin government in 2021. For a world survey of anti-defection laws, see Kenneth Janda, "Law Against Party-Switching, Defecting, or Floor-Crossing in National Parliaments", *The Legal Regulation of Political Parties*, Working Paper 2, August 2009, Northwestern University. K-janda@northwestern.edu. The learned author finds that out of 193 countries, 41 (or 21.2%) had anti-defection laws. According to his analysis, 14 per cent of 36 older democracies, 24 per cent of 54 newer democracies, 33 per cent of 58 semi-democracies and nine per cent of 45 non-democratic countries had anti-defection laws. See also, Csaba Nikolenyi & Shaul R Shenhav, "The Constitutionalisation of Party Unity: The Origins of Anti-Defection Laws in India and Israel", *The Journal of Legislative Studies*, vol 21, 2015 – Issue 3, pp. 390-407.

⁴⁹ First, if after an election, there is a hung Parliament and a political stalemate, a government cannot be formed if MPs from the opposition are forbidden from crossing the aisle to enable the formation of a government. Second, if due to the death, resignation or disqualification of a member, the government in power loses its majority, it needs a few cross-overs to remain in the saddle. Third, if an MP who falls out of favour with his party boss is expelled by the party on personal or malicious grounds, then in countries like India, this will trigger the penalties of the Anti-Defection Law. It is submitted that such expulsion should not amount to hopping. The MP should retain his seat as an Independent. Fourth, there is another evil tradition that is widespread in Malaysia's electoral politics. Most parties have a practice that any candidate who is nominated to contest an election in the name of the party must sign an undated resignation letter at the time of nomination. Courts have condemned this practice as not binding (*Datuk Ong Kee Hui v Sinyium anak Mutit* (1982)) but it remains widespread. Fifth, an MP may cross the floor for reasons of moral and conscientious objections to his party's direction or policies. Therefore, an anti-hopping law, if ever passed, has to

be crafted with care and with necessary exceptions. Sixth, in the *Nordin Salleh* (1992) decision, the Federal Court held that under Article 10(1)(c) the freedom to associate includes the freedom to disassociate. This means that an anti-hopping law in Malaysia will require a constitutional amendment to Article 10(2). Seventh, though Article 10(2)(c) imposes three restrictions on the right to associate – national security, public order and morality - the judges in *Nordin Salleh* held – most amazingly - that the term ‘morality’ refers merely to ‘sexual morality’ and not to ‘political morality’. This decision needs to be overturned by a constitutional amendment. Eighth, those who suggest that an anti-hopping law should be passed to (i) mandate a forced resignation; (ii) require a by-election, and (iii) permit the previous holder to go back to the voters to renew his mandate, fail to note Article 48(6) which prevents an MP who resigns from re-contesting for 5 years! If an MP hops and is required to resign by an anti-defection law, he cannot go back to the electorate to renew his mandate because of Article 48(6). This Article has to be repealed if an anti-hopping law or a “recall” law is to be passed.

⁵⁰ *The Star*, 03 Sept 2021.

⁵¹ Commentators are describing it as “Memorandum of Understanding on Transformation and Political Stability between Government and Opposition” and as “Malaysia’s first federal-level Confidence and Supply Agreement”. See *ideas.org.my*, Sept 14, 2021; Wong Chin Huat, “M’sia’s First Federal Level CSA – 8 Questions to Answer”, *Malaysiakini*, Sept 13, 2021, <https://m.malaysiakini.com/columns/591119>; “Malaysian govt, PH opposition sign historic bipartisan deal; polls not expected before Aug 2022”, *The Straits Times*, Sept 14, 2021; *ideas*

⁵² This will end the unconstitutional discrimination and violation of the Constitution’s Article 8 on equality before the law.

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