

Constitutionalism in the Time of Corona

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It's been said that when democracy dies, it is rarely pronounced dead on the scene.[1] Often, though, we can point to a definitive time when democracy gasps for survival.

Sometimes democracy's struggle comes amidst a global pandemic. Over the last few months, governments around the world have invoked extraordinary measures to respond to the coronavirus crisis.[2] Asia has been no exception. The Philippines passed legislation that granted President Rodrigo Duterte special emergency powers, approved by Congress using Zoom.[3] In Thailand, Prime Minister Prayuth Chanocha invoked powers that include the authority to censor or shut down the media.[4] The Indonesian government has moved to pass an omnibus bill that would consolidate eighty laws to concentrate authority in the central government and give sweeping powers to the executive.[5]

And occasionally even an exact hour can be identified. On May 18, 2020, Malaysia's Parliament convened for an unusual one-day parliamentary sitting.[6] Barely an hour after the members of Parliament had gathered, the meeting was over, and Parliament adjourned for months.

The one-day sitting was the first time that Malaysia's Parliament had convened since a new governing coalition had taken over the government earlier this year.[7] No other matter was allowed on the agenda besides the King's half-hour opening address. Although the speaker of the lower house had initially accepted a vote of no confidence tabled against the newly appointed prime minister, Muhyiddin Yassin,[8] that motion was later dropped. Citing the coronavirus pandemic, the government made clear that the king's speech would be the only order of business for the meeting.[9] No debate and questions were permitted during the parliamentary sitting.[10]

The Malaysian government's move to bypass usual democratic procedures in the name of the coronavirus may not appear exceptional, especially when viewed in light of the expansive steps taken by governments worldwide during the pandemic.[11] Already, the

pandemic has generated debate over whether the health crisis has accelerated the broader phenomenon of democracies backsliding into authoritarianism.^[12]

Yet only two years ago, Malaysia had been considered an exception to the global trend of democratic erosion.^[13] In May 2018, Malaysia experienced a historic democratic transition—the country’s first—after the people voted out the Barisan Nasional coalition that had governed the country for more than sixty years.^[14]

Malaysia’s 2018 regime change was painted as a portrait of success for democracy and constitutionalism.^[15] “What we want to do is restore the rule of law,” declared Mahathir Mohamad, the ninety-two-year-old former prime minister who had led Pakatan Harapan—the Alliance of Hope—to victory.^[16] Shortly after, Anwar Ibrahim, opposition leader and heir apparent to the premiership, was released from prison. Government officials charged former premier Najib Razak as well as investment bank Goldman Sachs in connection with a billion-dollar financial scandal involving government fund 1Malaysia Development Berhad (1MDB).^[17]

But the portrait of Malaysia’s 2018 transition has always contained a darker, ironic side. Mahathir, lauded as a hero for returning to politics to lead the opposition alliance to victory, had sacked and imprisoned Anwar, then deputy prime minister, two decades earlier. And during his previous tenure as prime minister from 1981 to 2003, Mahathir had weakened the government’s system of checks and balances, creating a system of centralized executive power that would help entrench the dominance of the ruling coalition for decades. Still, in 2018, Mahathir returned to power as prime minister and, in the eyes of many, a savior.^[18]

And then came 2020. A government crisis, and a pandemic.

In February 2020, political defections and coalition realignments led to a battle for the country’s leadership between Mahathir, Anwar, and Muhyiddin eventually resolved by royal intervention. The king appointed Muhyiddin prime minister. On March 1, Muhyiddin was sworn in, along with a new coalition that contained many parties from the previous Barisan Nasional government.

Ever since Muhyiddin’s Perikatan Nasional government ascended to power, opposition politicians have sought to test the new prime minister’s claim of majority support through a vote in parliament. Muhyiddin first delayed Parliament’s meeting from March 9 to May 18. As May 18 approached, Mahathir tabled a motion for a no confidence vote to be held during the parliamentary sitting. Then, the government announced that no motions would be allowed during the one-day parliamentary sitting, stating coronavirus concerns.

Malaysia's contrasting experiences of the 2018 and 2020 political transitions highlight that political destinies are fickle, and fraught.[19] Heroes and villains are not always who they appear to be. State building based on the appeal of political personalities or parties is vulnerable to capricious circumstances, whether in the form of an unexpected regime change or a deadly pandemic.

Political regime change alone is not enough. It is crucial to focus on building the institutions that can help a constitutional democracy endure. Courts and constitutionalism are central to that endeavor.

That's the case even—indeed, especially—in times of crisis. Returning to the current coronavirus pandemic, in a recent article, Tom Ginsburg and Mila Versteeg find that, in what they call their “perhaps most surprising” observation, courts have played an active role in monitoring the executive in many countries to ensure that checks and balances remain robustly in place.[20]

That judicial role is all the more important in fragile democracies.[21] Malaysia today is no longer, as it once was, characterized by a dominant coalition that had never been ousted from power; it is now deeply fragile. The new governing coalition's grasp on power rests on a razor thin majority. At the May 18 parliamentary sitting, the Perikatan Nasional government appeared to hold a majority of just two legislators, the slimmest in Malaysia's history.[22]

Malaysia's political landscape remains in flux. Shortly after the May parliamentary gathering, Mahathir and four other Members of Parliament were sacked from their political party for sitting with the opposition bloc.[23] The opposition alliance continues to veer between putting forward Mahathir or Anwar as their leader.[24] Recently, the government dropped five 1MDB related money-laundering charges against Riza Aziz after he agreed to return \$107 million as part of a deal that has been decried by the former attorney general.[25] Former prime minister Najib's 1MDB corruption trial recently concluded, with a verdict set for next month.[26]

The fate of Malaysian governance has long appeared tied to particular individuals and epic political dramas.[27] But dramas can end in comedy or tragedy.

For constitutional democracy to thrive, in Malaysia or elsewhere, requires shifting away from a preoccupation with political personalities or parties. It calls for building and strengthening the institutions that can help a democracy avert constitutional tragedy.[28]

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[1] Masha Gessen, *We Won't Know the Exact Moment When Democracy Dies*, *The New Yorker* (April 16, 2020), <https://www.newyorker.com/news/our-columnists/we-wont-know-the-exact-moment-when-democracy-dies>.

[2] See Selam Gebrekidan, *For Autocrats, and Others, Coronavirus Is a Chance to Grab Even More Power*, *N.Y. Times* (last updated April 14, 2020), <https://www.nytimes.com/2020/03/30/world/europe/coronavirus-governments-power.html>.

[3] Julie McCarty, *Concerns In Philippines After Duterte Given Emergency Powers To Fight COVID-19 Spread*, *NPR* (March 24, 2020), <https://www.npr.org/sections/coronavirus-live-updates/2020/03/24/820906636/concerns-in-philippines-after-duterte-given-emergency-powers-to-fight-covid-19-s>.

[4] Panu Wongcha-um and Kay Johnson, *Thai leader to invoke emergency powers as virus infections climb*, *Reuters* (March 24, 2020), <https://www.reuters.com/article/us-health-coronavirus-thailand-emergency/thai-leader-to-invoke-emergency-powers-as-virus-infections-climb-idUSKBN21BoRV>.

[5] *Presiden Jokowi dalam wawancara eksklusif dengan BBC: 'Prioritas saya ekonomi, tapi bukan saya tidak senang HAM dan lingkungan'*, *BBC News* (Feb. 13, 2020), <https://www.bbc.com/indonesia/indonesia-51382305>; Febriana Firdaus, *Indonesians Fear Democracy Is the Next Pandemic Victim*, *Foreign Policy* (May 4, 2020), <https://foreignpolicy.com/2020/05/04/indonesia-coronavirus-pandemic-democracy-omnibus-law/>.

[6] See Richard C. Paddock, *Democracy Fades in Malaysia as Old Order Returns to Power*, *N.Y. Times* (May 22, 2020), <https://www.nytimes.com/2020/05/22/world/asia/malaysia-politics-najib.html>; *Live Updates: I tried to convince Dr M against resigning, says Agong*, *Malaysiakini* (May 17, 2020), <https://www.malaysiakini.com/news/526146>.

[7] For more on Malaysia's 2020 government crisis, see Hannah Beech, *Malaysia's Premier, Mahathir Mohamad, Is Ousted in a Surprising Turn*, *N.Y. Times* (Feb. 29, 2020), <https://www.nytimes.com/2020/02/29/world/asia/malaysia-mahathir-mohamad.html>; see also Yvonne Tew, *Malaysia's 2020 Government Crisis: Revealing the New Emperor's Clothes*, *I-CONNECT* (April 15, 2020), <http://www.iconnectblog.com/2020/04/malysias-2020-government-crisis-revealing-the-emperors-clothes/>; Dian AH Shah & Andrew Harding, *Constitutional*

Quantum Mechanics and a Change in Government in Malaysia, Int'l J. Const. L. Blog, Apr. 8, 2020, at: <http://www.icconnectblog.com/2020/04/constitutional-quantum-mechanics-and-a-change-in-government-in-malaysia/>

[8] Emmanuel Santa Maria Chin, *Speaker accepts Dr M's motion for no-confidence vote against Muhyiddin*, MalayMail (May 8, 2020), <https://www.malaymail.com/news/malaysia/2020/05/08/speaker-accepts-dr-ms-motion-for-no-confidence-vote-against-muhyiddin/1864280>.

[9] *May 18 Dewan Rakyat sitting only for royal address*, New Strait Times (May 13, 2020), <https://www.nst.com.my/news/nation/2020/05/592216/may-18-dewan-rakyat-sitting-only-royal-address>; *Malaysian PM delays confidence vote citing virus battle, Mahathir cries foul*, Reuters (May 13, 2020), <https://www.reuters.com/article/us-malaysia-politics/malaysian-pm-delays-confidence-vote-citing-virus-battle-mahathir-cries-foul-idUSKBN22P1DN>.

[10] Paddock, *Democracy Fades in Malaysia as Old Order Returns to Power*, *supra* note 6.

[11] See, e.g., Gebrekidan, *For Autocrats, and Others, Coronavirus Is a Chance to Grab Even More Power*, *supra* note 2; Serge Schmemmann, *The Virus Comes for Democracy*, N.Y. Times (April 2, 2020), <https://www.nytimes.com/2020/04/02/opinion/coronavirus-democracy.html>.

[12] See Tom Ginsburg and Mila Versteeg, *Binding the Unbound Executive: Checks and Balances in Times of Pandemic* at 48 (May 25, 2020), <https://ssrn.com/abstract=3608974>; see generally Steven Levitsky & Daniel Ziblatt, *How Democracies Die* (2018); Ginsburg & Huq, *How to Save a Constitutional Democracy* (2018).

[13] See Shadi Hamid, *What Democracies Can Learn From Malaysia*, The Atlantic (May 16, 2018), <https://www.theatlantic.com/international/archive/2018/05/malaysia-democracy-najib/560534/>; Anwar Ibrahim, *How Malaysia's democratic disruption stands apart in a year of populist nationalism*, S. China Morning Post (Dec. 13, 2018), <https://www.scmp.com/comment/insight-opinion/asia/article/2177481/how-malysias-democratic-disruption-stands-apart-year>.

[14] See *After six decades in power, BN falls to 'Malaysian tsunami'*, Malaysiakini (May 10, 2018), <https://www.malaysiakini.com/news/423990>.

[15] See Larry Diamond, *Malaysia's Democratic Breakthrough*, Am. Interest (May 15, 2018), <https://www.the-american-interest.com/2018/05/18/malysias-democratic-breakthrough/>.

[16] Alyaa Alhadjri, *Harapan gov't will not seek 'revenge' on Najib, says Dr M*, Malaysiakini (May 9, 2018), <https://www.malaysiakini.com/news/423993>.

[17] Jamie Fullerton, *Malaysia's ex-PM Najib Razak goes on trial over 1MDB scandal*, The Guardian (Apr. 3, 2019), <https://www.theguardian.com/world/2019/apr/03/najib-razak-malaysia-former-prime-minister-trial-1mdb-scandal>; Liz Hoffman & Aruna Viswanatha, *Goldman Sachs in Talks to Admit Guilt, Pay \$2 Billion Fine to Settle 1MDB Probe*, Wall St. J. (Dec. 19, 2019), <https://www.wsj.com/articles/goldman-sachs-in-talks-to-admit-guilt-pay-2-billion-fine-to-settle-1mdb-probe-11576760406>.

[18] See Laignee Barron, *Malaysia's Longest-Serving Prime Minister Returns to Power Promising a Tide of Change*, Time (May 11, 2018), <https://time.com/5273663/malaysia-mahathir-mohamad-prime-minister-reforms/>.

[19] See Bridget Welsh, "Saviour" Politics and Malaysia's 2018 Electoral Democratic Breakthrough: Rethinking Explanatory Narratives and Implications, 37 J. Current Se. Asian Aff. 85, 86 (2018) (observing that the focus has been "primarily on the role of individuals and leaders, in keeping with what is arguably the dominant paradigm for understanding Malaysian politics as a whole").

[20] Ginsburg & Versteeg, *supra* note 12, at 5.

[21] See Samuel Issacharoff, *Fragile Democracies: Contested Power in the Era of Constitutional Courts* 13 (2015).

[22] Jerry Choong, *Perikatan govt majority falls to two after Sarawak MP Masir Kujat insists still part of Opposition bloc*, Malay Mail (May 18, 2020), <https://www.malaymail.com/news/malaysia/2020/05/18/perikatan-govt-majority-falls-to-two-after-sarawak-mp-masir-kujat-insists-s/1867340>.

[23] Amir Yusof, *Former Malaysian PM Mahathir and 4 other MPs sacked from Bersatu*, Channel News Asia (May 28, 2020), <https://www.channelnewsasia.com/news/asia/malaysia-mahathir-mohamad-bersatu-sacked-muhyiddin-12720662>.

[24] Hariz Mohd, *Dr M or Anwar? Harapan and allies expected to name PM candidate*, Malaysiakini (June 9, 2020), <https://www.malaysiakini.com/news/529446>.

[25] *1MDB: Malaysia drops charges against Wolf of Wall Street producer*, BBC News (May 14, 2020), <https://www.bbc.com/news/world-asia-52661779>; AFP, *Thomas: Riza Aziz deal terrible for Malaysia*, New Strait Times (May 18, 2020) <https://www.nst.com.my/news/crime-courts/2020/05/593552/thomas-riza-aziz-deal-terrible-malaysia>.

[26] Hazlin Hassan, *1MDB-linked corruption trial closes, with defence saying Najib was victim of a scam*, The Strait Times (June 5, 2020), <https://www.straitstimes.com/asia/se-asia/1mdb-linked-corruption-trial-closes-with-defence-saying-najib-was-victim-of-a-scam>.

[27] See *Malaysia's political drama is worthy of Shakespeare*, BBC News (May 17, 2018), <https://www.bbc.com/news/world-asia-44144537>; James Massola, *Somewhere between Game of Thrones and The Crown: Malaysia's political soap opera*, The Sydney Morning Herald (Feb. 28, 2020), <https://www.smh.com.au/world/asia/somewhere-between-game-of-thrones-and-the-crown-malaysia-s-political-soap-opera-20200227-p54568.html>.

[28] Yvonne Tew's *Constitutional Statecraft in Asian Courts* is available in August 2020: <https://global.oup.com/academic/product/constitutional-adjudication-in-malaysia-and-singapore-9780198716839>.