

Malaysia's 2020 Government Crisis: Revealing the New Emperor's Clothes

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admin

—[Yvonne Tew](#), Georgetown University Law Center^[1]

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In 2018, Malaysia was hailed as a story of democracy's triumph. In a historic national election, voters ousted the Barisan Nasional ruling coalition, ending its six decades grip on power.^[2] The Pakatan Harapan coalition, the Alliance of Hope, formed the new government under the leadership of Prime Minister Mahathir Mohamad. Opposition icon Anwar Ibrahim was released from prison as part of the coalition's pledge that he would eventually succeed Mahathir as the next prime minister.^[3] Ousted premier Najib Razak was swiftly arrested on corruption charges connected to a billion-dollar scandal involving state fund 1Malaysia Development Berhad (1MDB),^[4] one of the world's largest financial scams.^[5]

For the first time in the country's history, Malaysia experienced a democratic change of government. Many described Malaysia's 2018 political transition as a "democratic breakthrough," even a "miracle." ^[6] At a time when democratic erosion had become a familiar trend around the world,^[7] Malaysia's story was an outlier to the global rise of illiberal nationalism.^[8]

And then that tale of democratic success appeared to fall apart.

In February 2020, the Malaysian government led by the multi-ethnic Pakatan Harapan, the Alliance of Hope, collapsed.^[9] Over the course of the last week in February, a high stakes political drama played out, triggered by a number of parliamentary members led by then Economic Affairs Minister, Azmin Ali, who defected from Anwar's party to form a new governing alliance with some opposition parties. Mahathir resigned, and was then reappointed by the King as interim prime minister. What followed was a battle for the country's leadership among Mahathir, Anwar, and Muhyiddin Yassin, a senior politician aligned with the deposed Barisan Nasional coalition. Over the next few days, parties and legislators declared and switched support for the various contenders in a series of political twists and turns.^[10]

In an effort to determine who commanded the support of the majority of parliamentarians, Malaysia's King met individually with all the members of parliament's lower house. After the two-day interview process, apparently still not confident that a single person

commanded distinct majority support, the constitutional monarch then invited party leaders to present their candidates for Prime Minister.[11] On February 29, the King announced that, after hearing representations from the party leaders, he had decided to appoint Muhyiddin as the new Prime Minister. The palace's announcement came even as Pakatan Harapan declared that Mahathir had majority support and released a list of 114 parliamentarians who had signed statutory declarations supporting Mahathir's candidacy as prime minister.[12] Nevertheless, the King refused to grant Mahathir an audience. On March 1, at the end of a week of intense political turmoil, Muhyiddin was sworn in as the new head of government.

Muhyiddin ascended to power at the helm of a predominantly mono-ethnic Malay-Muslim coalition, which includes the United Malays National Organization—a constituent party of the corruption-tainted ruling coalition voted out two years earlier—and the Malaysian Islamic Party, Parti Islam se-Malaysia. Muhyiddin's appointment was immediately met with calls for a vote of no confidence at the next parliamentary sitting. In response, the newly appointed prime minister postponed the start of the parliamentary session from March 9 to May 18. Shortly after, Muhyiddin announced a cabinet with an expansive roster of thirty-one ministers and thirty-nine deputy ministers, consolidating his incumbent position and the new Perikatan Nasional administration.[13]

Malaysia's 2020 government crisis was unprecedented. As such, constitutional conventions and constitutional law brought to the fore during the transition, at a federal level of government, had never before been tested. These constitutional aspects require scrutiny.

Begin with the King's role in deciding who to appoint as prime minister. Textually, the constitutional monarch's capacity is laid out in Article 43(1)(a) of the Malaysian Constitution, which states that the King shall appoint as Prime Minister "a member of the House of Representatives who in his judgment is likely to command the confidence of the majority of the members of that House." For decades, in practice the King's appointment of the Prime Minister had been a *pro forma* task in a political system dominated by a ruling coalition that controlled a vast majority of legislative seats. But in February of this year, a razor thin margin of support among the legislators for each of the competing prime minister candidates thrust to the fore the question of who actually commanded majority confidence. And how was the King to exercise his judgment?

To determine who likely commanded majority support, the King took the active, and unprecedented, step of meeting with all individual members of parliament and the leaders of the various political parties—a move the palace itself characterized as going "beyond the call of obligation." [14] To be sure, for the monarch to try to determine majority support based on the evidence at hand is not in itself an issue.

Still, under the parliamentary democracy framework set up by Malaysia's Constitution, the monarch's role in appointing a prime minister is primarily to affirm the outcome of the political process. Here, Muhyiddin's claim to command the confidence of the majority was immediately contradicted in fact by the statutory declarations signed by 114 Members of Parliament in support of Mahathir. In such a highly fraught situation of political uncertainty, when there is serious dispute as to which candidate in fact commands majority support, there are strong arguments of democratic accountability and constitutional structure for allowing the political process to play out, rather than being resolved through premature royal intervention. The contenders could have been allowed to continue to battle it out in parliament, by determining majority support through an open vote on the floor of the legislature, or in the wider political sphere through negotiations and compromise bargains.^[15] Otherwise, an unelected body intervening too precipitously into a political controversy risks being perceived as undermining the country's democratic mandate.^[16]

Next, consider the newly appointed Prime Minister's move to delay parliament from sitting amid a threatened vote of no confidence. Once in power, Muhyiddin quickly pushed back the start of the next parliamentary session for more than two months from March 9 to May 18. That move effectively blocked the Pakatan Harapan coalition from bringing a no-confidence vote to test Muhyiddin's support in Parliament. Crucially, it also enabled the new Prime Minister to consolidate his position and new government. On March 9, the new Prime Minister announced the members of his cabinet. With the next parliamentary sitting months away, Mahathir has acknowledged that a no confidence motion is unlikely to unseat the new premier who has now been able "to offer inducements to many," such as cabinet positions to co-opt those who may previously have supported Mahathir.^[17] Notably, Muhyiddin's cabinet line-up, with seventy ministers including four senior ministers in lieu of a deputy prime minister, has fourteen more members than Pakatan Harapan's Cabinet and is the largest in Malaysian history.

Formally, Muhyiddin's postponement of the next parliamentary sitting is in line with parliamentary rules and the constitutional specification that not more than six months should elapse between parliamentary sessions.^[18] Constitutional conventions such as these are all well and good under a regular state of affairs. But these are not normal circumstances.

Broader issues of constitutional structure and democratic legitimacy are at stake here. The newly appointed prime minister came into power with neither electoral nor parliamentary mandate and his appointment rests on the challenged ground that he does indeed command the confidence of the majority. In an unprecedented situation like this, even if the King had exercised good faith in determining which contender held majority support, it behoves the prime minister to allow that contested question to be tested as soon as possible through a parliamentary vote of confidence. While some delay in convening

parliament may be justified for a new government setting a fresh legislative agenda, the cause and duration of any such postponement must be reasonable and proportionate. In light of the urgency of the question of majority support, which goes to the heart of the government's democratic and constitutional legitimacy, it is imperative that the matter be settled, openly and transparently, on the floor of the legislature.

Ivor Jennings once wrote that constitutional conventions “provide the flesh which clothes the dry bones of the law; they make the legal constitution work.”^[19] In a developing constitutional democracy like Malaysia, such conventions are still evolving; they should be shaped in line with parliamentary accountability and democratic legitimacy.^[20] Constitutional conventions should not function as mere fig leaves, or be used as garments that provide a cloak of legitimacy to obscure the true state of affairs.

In the aftermath of Malaysia's recent political crisis, many have portrayed the 2020 government transition as signaling the death of the 2018 narrative of democracy's triumph. Much of the commentary has had the flavor of a requiem for a dream. In their column on this blog last week, Andrew Harding and Dian Shah conclude: “Early signs are that backsliding is indeed under way, that ethnocracy is restored, and that the reform process is now history.”^[21] And in some ways it may appear so.

But let us be clear. In stark contrast to the 2018 change of government, the 2020 political transition was not brought about by an electoral outcome or popular support. It was triggered by political defectors and marked by a battle among political elites followed by unprecedented royal intervention. Throughout all of this, the Malaysian public watched, haplessly from the sidelines, as the outcome of a democratic election was overturned in favor of what has been called a “backdoor government.”^[22] Nevertheless, the Perikatan Nasional governing coalition does not enjoy the same dominance as the Barisan Nasional ruling regime that had enjoyed single party rule for decades; it is more fragile.

2020 has brought many upheavals, political and otherwise. Among the many ironies of Malaysia's political saga is that during his tenure as the country's longest-serving prime minister, Mahathir pushed for Vision 2020, a national goal for Malaysia to become a fully developed and united nation by the year 2020. In 2020, Mahathir would become Malaysia's shortest-serving premier, replaced after a bitter political battle that has left the nation more deeply divided.

Like the rest of the world, Malaysia is in the midst of battling a deadly pandemic. At least for now, the COVID-19 health crisis has shifted the country's focus away from the recent political crisis. The Perikatan Nasional government has scrambled to respond to the coronavirus disease,^[23] and Malaysia currently has the highest documented number of coronavirus cases in Southeast Asia.^[24] Still, while attention is now focused on the pandemic, this, too, shall pass.

Constitutional conventions and institutions, though, are meant to help a democracy endure. It is thus important that the constitutional claims underlying Malaysia's 2020 government changeover do not escape scrutiny. When viewed with clear-eyed — or, if I may, 20/20 — vision, the claims legitimizing the new regime, stitched from threadbare constitutional arguments, fall away to reveal the state of the new emperor's clothes.

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[1] Yvonne Tew's book, *Constitutional Statecraft in Asian Courts*, is forthcoming with Oxford University Press in July 2020.

[2] See *After six decades in power, BN falls to 'Malaysian tsunami'*, Malaysiakini (May 10, 2018), <https://perma.cc/YY6E-TQG7>; Richard Paddock, *Malaysia Opposition, Led by 92-Year-Old, Wins Upset Victory*, N.Y. Times (May 9, 2018), <https://perma.cc/F3CY-Q8YS>.

[3] See Simon Denyer, *Malaysian reformist Anwar Ibrahim released from prison, granted royal pardon*, Wash. Post (May 16, 2018), <https://perma.cc/439N-XX5R>.

[4] Jamie Fullerton, *Malaysia's ex-PM Najib Razak goes on trial over 1MDB scandal*, Guardian (Apr. 3, 2019), <https://perma.cc/8E48-J6HD>; 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://perma.cc/2E5A-239H>.

[5] See Bradley Hope & Tom Wright, *Billion Dollar Whale: The Man Who Fooled Wall Street, Hollywood, and the World* (2018).

[6] See Larry Diamond, *Malaysia's Democratic Breakthrough*, Am. Interest (May 15, 2018), <https://perma.cc/ZQ2E-E9S6>; Tsu Chong Chan, *Democratic Breakthrough in Malaysia—Political Opportunities and the Role of Bersih*, 37 J. Current Se. Asian Aff. 109 (2018); Marvin Ott, *Malaysian Miracle*, Asia Dispatches (May 24, 2018), <https://perma.cc/H8KW-5T5G>;

[7] See Tom Ginsburg & Aziz z. Huq, *How to Save a Constitutional Democracy*, (2018); Steven Levitsky & Daniel Ziblatt, *How Democracies Die* (2018).

[8] *Malaysia seen as 'bright spot' in democracy ranking after May 9 elections*, Today Online (Jan 8 2019), <https://www.todayonline.com/world/malaysia-seen-bright-spot-democracy-ranking-after-may-9-elections>

[9] See Hannah Beech, *Malaysia's Premier, Mahathir Mohamad, Is Ousted in a Surprising Turn*, The New York Times (Feb. 29, 2020), <https://www.nytimes.com/2020/02/29/world/asia/malaysia-mahathir-mohamad.html>.

[10] See James Massola, 'Somewhere between Game of Thrones and The Crown': *Malaysia's political soap opera*, 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>

[11] *No one has the majority to be new PM, party leaders to nominate PM candidate: Malaysian King*, today online (Feb. 28, 2020), <https://www.todayonline.com/world/no-one-has-majority-be-new-pm-party-leaders-nominate-pm-candidate-malaysian-king>.

[12] 114 Members of Parliament constituted a (bare) majority of the 222-member lower house of Parliament. See Jason Thomas, *Dr M released list of 114 MPs backing him*, Free Malaysia Today (Feb 29, 2020), <https://www.freemalaysiatoday.com/category/nation/2020/02/29/dr-m-releases-list-of-mps-backing-him/>.

[13] See Stefanie Palma, *New Malaysia Cabinet sworn in to calm political turmoil*, Financial Times (Mar. 10, 2020), <https://www.ft.com/content/17b6a1bc-61b8-11ea-b3f3-fe4680ea68b5>

[14] Bernama, *Istana Negara's statement on The Guardian's editorial*, New Straits Times (Mar. 8, 2020), <https://www.nst.com.my/news/nation/2020/03/572767/istana-negaras-statement-guardians-editorial>.

[15] See Dian Shah & Andrew Harding, *Constitutional Quantum Mechanics and a Change of Government in Malaysia*, Int'l J. Const. L. Blog (Apr. 8, 2020), <http://www.iconnectblog.com/2020/04/constitutional-quantum-mechanics-and-a-change-of-government-in-malaysia/> (arguing that "that a less proactive approach might in fact have been more appropriate and more usual in the context of a Westminster system of government, allowing the political elites to resolve the issue amongst themselves").

[16] See, e.g., Editorial, *The Guardian view on a royal coup: a king overturns a historic election*, The Guardian (Mar. 3, 2020), <https://www.theguardian.com/commentisfree/2020/mar/03/the-guardian-view-on-a-royal-coup-a-king-overturns-a-historic-election#maincontent>.

[17] *No-confidence motion against PM Muhyiddin unlikely to succeed, says Mahathir*, Channel News Asia (Feb. 28, 2020), <https://www.channelnewsasia.com/news/asia/malaysia-mahathir-muhyiddin-no-confidence-motion-parliament-12525230>.

[18] The last session of the Malaysian Parliament ended on December 5, 2019.

[19] Ivor Jennings, *The Law and the Constitution* 81 (1959).

[20] *See* R (Miller) v The Prime Minister and Cherry v Advocate General for Scotland ([2019] UKSC 41) (affirming that “the conduct of government by a Prime Minister and Cabinet collectively responsible and accountable to Parliament lies at the heart of Westminster democracy”).

[21] Dian Shah & Andrew Harding, *Constitutional Quantum Mechanics and a Change in Government in Malaysia*, Int’l J. Const. L. Blog (Apr. 8, 2020), <http://www.iconnectblog.com/2020/04/constitutional-quantum-mechanics-and-a-change-in-government-in-malaysia>.

[22] *See* ‘Backdoor government is undemocratic, a betrayal of GE 14 voters’, New Straits Times (Feb. 27, 2020), <https://www.nst.com.my/news/nation/2020/02/569741/backdoor-government-undemocratic-betrayal-ge-14-voters>.

[23] *See* Krithika Varagur, *Malaysia’s Preventable Coronavirus Disaster*, Foreign Policy (Mar. 26, 2020), <https://foreignpolicy.com/2020/03/26/malaysia-preventable-coronavirus-disaster-political-crisis-muhyiddin-yassin/>; *Singapore says Malaysian workers stranded there sent to temporary relief centres* (Mar. 19, 2020), <https://www.malaymail.com/news/malaysia/2020/03/19/singapore-says-malaysian-workers-stranded-there-sent-to-temporary-relief-ce/1848230>.

[24] *Malaysia virus tally hits highest in Southeast Asia due to mosque event*, Reuters (Mar. 15, 2020), <https://www.reuters.com/article/us-health-coronavirus-malaysia/malaysia-virus-tally-hits-highest-in-southeast-asia-due-to-mosque-event-idUSKBN2120BE>.