Welcoming the new monarch

The King, despite his role as a constitutional monarch, is vested by the Constitution and by prerogatives with some discretionary functions that can have a telling effect on the legal and political life of the nation.

Despite the age of egalitarianism and democracy, the system of kingship remains a popular and robust symbol of unity, stability and dignity in many nations like Belgium, Denmark, the Netherlands, Norway, Spain, Sweden, the UK, Brunei, Japan, Thailand, Cambodia and Malaysia.

On April 11, our system of constitutional monarchy will again be celebrated when Tuanku Abdul Halim Mu'adzam Shah, the Sultan of Kedah, is installed as our 14th Yang di-Pertuan Agong.

It is perhaps a coincidence that Tuanku Halim's first reign as King from Sept 21, 1970 to Sept 20, 1975 was at a critical time when the country needed to be shepherded back to normalcy after the trauma of May 1969, the declaration of an emergency, and the suspension of Parliament for about 21 months.

Now, again his healing and uniting touch is needed because political, racial and religious differences seem to have trumped decades of harmonious living.

What role can he play in building bridges between the communities, uniting people and healing wounds?

Let us examine the Yang di-Pertuan Agong's constitutional position under the Federal Constitution.

The Yang di-Pertuan Agong is the formal head of the executive branch and has a variety of other powers in relation to the legislature, the judiciary and matters of Islam. A vast array of powers is vested in him by scores of constitutional provisions and by hundreds of federal laws.

On a literal reading of these laws,
the lay person would get the impression that the monarchy is the real seat of power in the country. Actually the legal position is quite different. His Highness’ powers and functions may be divided into two categories—non-discretionary and discretionary powers.

**Non-discretionary powers**

These are powers that His Majesty exercises as a constitutional monarch in accordance with the advice of the Cabinet or of other agencies. In relation to these powers, the King is head of state but not head of government. However, two qualifications must be noted. First, acting on advice does not mean that the King must act mechanically or immediately. His Majesty is entitled “to caution, to advise and to warn”. He is entitled to delay the giving of his assent. He may seek further information under Article 40(1) and no information can be withheld from him.

Second, in the matter of advising the King, the Prime Minister does not have a monopoly. The Yang di-Pertuan Agong’s non-discretionary powers are divisible into three categories:

- Functions exercisable on the advice of the Prime Minister, e.g. assent to laws.
- Functions exercisable on the advice of the PM after “consultation” with other named bodies like the Conference of Rulers.
- Consultation does not carry a duty to accept or obey the advice.

Nevertheless, mandatory consultation necessitates discussion and consideration of alternative views other than the PM’s views.

- Functions exercisable on the advice of constitutional bodies other than the Cabinet.

For example, in matters relating to Islam or the grant of pardons, the King acts on the advice of a Council or Pardons Board, respectively. The PM is not a member of these constitutional bodies.

**Discretionary powers**

In respect of these, the Yang di-Pertuan Agong may act according to his personal judgment or he may choose to be guided by constitutional conventions (which, though not legally binding, are politically wise to conform to).

In either case he must act in a non-partisan manner and in the best interest of the nation. Among the discretionary powers are:

- Appointment of the Prime Minister;
- Premature dissolution of the Dewan Rakyat;
- Requisitioning of a meeting of the Conference of Rulers; and,
- Any other case mentioned in the Constitution”.

This vague category covers such matters as asking for any information in the possession of the Cabinet; delaying legislation by 30 days under Article 66; making some special appointments like to the Public Services Commission and the Education Services Commission.

**Inherent powers**

The Constitution is detailed but not comprehensive. There are many gaps in the law because life is always larger than the law and new situations may emerge requiring the King to exercise some “reserve powers” in order to preserve the security and integrity of the nation.

Some possible situations may be the following:

- As head of the religion of Islam in eight regions of the country, the King can promote enlightened and moderate views to cement ties with other communities.
- As a member of the Conference of Rulers, the King can participate in debates and resolutions on any matter of national concern. There is considerable scope here for leadership and statesmanship to moderate extremism.
- According to PP v Mohd Amin Mohd Razali (2002), during the dissolution of Parliament, the King is not bound by the advice of the caretaker government.
- The declaration of an emergency under Article 150 is on the advice of the PM. However, according to Mohd Amin Mohd Razali, during the dissolution of Parliament, the King can proclaim an emergency and promulgate Emergency Ordinances on his own initiative.
- The case of Supt of Pudu Prison v Sim Kie Chon suggests that despite the existence of a Pardons Board in Article 42, the power of pardon is discretionary.
- Article 43(4) and (5) imply that the King has no power to dismiss the PM. However, in many Commonwealth countries like Australia, India and Pakistan, the Head of State has occasionally used “reserve powers” to dismiss the PM.

For instance, if the political executive ceases to command the confidence of the members of the lower house; fails to secure a dissolution; and yet refuses to resign, the King can dismiss him.

This is what happened in Perak in 2009. Or, if the caretaker PM fails to win an absolute majority and fails to muster a coalition but refuses to step down, then, after a reasonable time, the King may dismiss him.

In normal circumstances, the PM’s advice to the King to prorogue Parliament is regarded as binding.

But if a PM is facing a vote of no confidence in Parliament and is desirous of avoiding the House, and therefore advises prorogation for a period up to six months under Article 55(1), the King can possibly refuse such advice.

- If Parliament, in passing some critical constitutional amendments under Articles 38(4), 159(5), 2(b) or 161E violates constitutional procedures and yet the PM advises the King to sign the Bill, the King will be justified in withholding assent.

One must remember that the Yang di-Pertuan Agong is part of the check and balance mechanism under the Constitution.

- The Federal Constitution is silent on the grant of federal honours. Presumably, the power is a prerogative power.

In sum, despite his role as a constitutional monarch bound by advice, His Majesty the Yang di-Pertuan Agong is vested by the Constitution and by prerogatives with some discretionary functions that can have a telling effect on the legal and political life of the nation.

> Shad Saleem Faruqi is Emeritus Professor of Law at UiTM and Legal Consultant to USM