



Law-making and accountability in responding to COVID-19: The case of Malaysia

Wilson Tay Tze Vern

Malaysia is an upper-middle income country within the Commonwealth, with a population of approximately 32 million. Its system of law-making and governance is based largely on the British or 'Westminster' model of parliamentary democracy, albeit with a codified Federal Constitution. Although it is a federation of 13 states, most major governmental functions are exercised at federal level, and the federal government controls the largest sources of revenue available to the country.

Malaysia's response to the crisis caused by the Covid-19 took place in the context of a simultaneous political crisis created by the spectacular collapse of the ruling coalition at federal level, the Pakatan Rakyat [Pact of Hope] (PH), on 24 February 2020. On that day, months of internal political intrigue within the four-party PH culminated in one of its component parties, plus a sizeable renegade faction of another component party, exiting the coalition – thereby depriving PH of the hard-won parliamentary majority that it achieved in the landmark general election of May 2018. Tun Dr Mahathir Mohamad, the PH Prime Minister, resigned the same afternoon, triggering a week of political uncertainty as Malaysia's constitutional monarch (the Yang di-Pertuan Agong) attempted to personally determine whom His Majesty could appoint as Dr Mahathir's successor. This proved challenging, considering that the constitutional precondition for appointment is the likelihood of commanding a majority in the elected lower house of Parliament; Parliament was in recess, and the rival coalitions in the House were then of almost equal numerical strength.

Eventually, on 1 March, the Agong appointed Tan Sri Muhyiddin Yassin, a former PH Cabinet minister who was among those who exited the coalition, as the new Prime Minister. Mr Muhyiddin now headed a different ad hoc coalition called Perikatan Nasional [National Alliance] (PN), comprising parties that had earlier been in opposition plus the various factions that had abandoned PH. Because this appointment was based on expressions of support by individual MPs and the heads of the various political parties to the Agong, and not a vote of confidence in Parliament, it was by no means clear that Mr Muhyiddin did in fact enjoy a parliamentary majority at that point. This was because, in addition to the finely-balanced breakdown of seats in the House, certain MPs' allegiances were shifting back and forth during this time. Indeed, the palace's statement that Mr Muhyiddin was the one most likely to command the confidence of the majority was disputed that same evening by Dr Mahathir, who was by then seeking to reclaim his post.

As will be discussed further below, this context had an important influence on the way Malaysia responded to the Covid-19 crisis, which was escalating dramatically at the same time: the number of cases in Malaysia passed 100 on 9 March, and triple-digit daily increases in new infections began to occur from 15 March onwards. On 16 March a nationwide 'Movement Control Order' (MCO) was announced by the Malaysian Government, and this went into effect two days later.

What were the main mechanisms used to handle the COVID 19 challenges, both health and economic, in your country? How well did they work for the purpose?

Two main mechanisms – one legislative and the other executive – can be identified in Malaysia's ongoing response to the challenges posed by Covid-19. The legislative mechanism is the *Prevention and Control of Infectious Diseases Act 1988* (Act 342) (hereinafter 'the Act'), which the Federal Government invoked to proclaim a series of Movement Control Orders (MCOs) throughout the country. Under the Act, the Minister for Health can proclaim any area within Malaysia as an 'infected local area' and prescribe by way of regulations (ie executive-issued subsidiary legislation) the measures to be taken to control or prevent the spread of infectious disease. The Act also gives broad powers to authorized officers to direct any person to subject themselves to isolation, observation, treatment, or surveillance, and to take 'any other measures as the authorized officer considers necessary to control the disease.'

On 16 March, the Government gazetted the entirety of Malaysia as an 'infected local area', and imposed progressively stringent measures such as the suspension of all international travel in and out of Malaysia, the drastic reduction of business hours (except for limited 'essential services' such as petrol kiosks and pharmacies), the closure of public parks and amenities, the restriction of public transportation services, the banning of inter-State travel, and eventually the limiting of all daily activities to within a 10 km radius of one's home. In locations with unusually high rates of infection, an 'Enhanced Movement Control Order' (EMCO) would be proclaimed whereby all residents within the area would be restricted to their homes around the clock (effectively a 24-hour curfew) and subjected to mandatory Covid-19 testing. Violations of the MCO continue to be punished, to this day, by summonses with a compound rate of RM1,000 (approximately US\$240), a hefty sum for most Malaysians. The Malaysian Army was called out to support the Royal Malaysian Police in setting up numerous 24-hour roadblocks in every locality to enforce the movement controls.

The executive mechanism is the National Security Council (NSC), which became the co-ordinating body for the Cabinet and the executive branch's response to the Covid-19 situation. The Senior Minister (Defence and Security Cluster) became the de facto spokesperson of the NSC, communicating the Federal Government's agenda, strategy, and directives on a daily basis via the mass media. At the same time, daily briefings were also conducted by the Director-General of the Ministry of Health to communicate more operational matters such as the daily number of infections, the locations of new infection clusters, the state of healthcare facilities, and updated best practices that the public would be expected to adhere to.

In general, the legislative and executive mechanisms above could be said to have worked well. Many Malaysians would have been surprised to discover that a hitherto little-known statute could confer on the Federal Government the power to impose what was effectively a nationwide lockdown, backed by the Armed Forces, without the need to proclaim a state of emergency or even to invoke security legislation such as the *National Security Council Act 2016* (Act 776). The Act undoubtedly empowered the Government to take all the action it deemed necessary to control the outbreak, despite imposing considerable limitations on the freedom of movement. By the end of April, it was clear that Malaysia had overcome at least that round of the battle against Covid-19: daily infections were in the low double digits, the death toll remained low, and healthcare facilities continued to have spare capacity. On 4 May, the MCO was replaced by a 'Conditional Movement Control Order' (CMCO), under which some of the earlier draconian restrictions were lifted as the country partially reopened. On 9 June, this was superseded by the 'Recovery Movement Control Order' (RMCO), in force until 31 August,

under which the country was practically reopened subject to a 'new normal' of precautionary Standard Operating Procedures (SOPs) such as mask-wearing, temperature-taking, and facilitating contact tracing.

Through the NSC, the Government was seen to be speaking with one voice despite the all-of-government, nationwide response to the Covid-19 pandemic. This created a single, authoritative point of reference for the media and the anxious population, and averted the problem seen, for example, in the United States, where the governmental response was hampered by conflicting agendas and finger-pointing between Federal and State authorities. Also, because most of the important agencies involved in the MCO (such as the Ministry of Health, the Royal Malaysian Police, and the Armed Forces) are federal bodies, the NSC also enjoyed practically untrammelled power to co-ordinate and implement the country's response.

To what extent were responses to the pandemic influenced by the parliamentary structure of your system?

Because Malaysia's response to the pandemic was essentially executive-driven, it was not significantly influenced by the parliamentary structure of the system. The sort of response that the Malaysian Government mounted throughout the relevant period could probably have been done regardless of whether the systemic structure had been parliamentary, presidential, or semi-presidential in nature.

If elections were due during the emergency period, were they held or postponed? If they were held, what concessions were made to the emergency conditions? If they were postponed, with what consequences?

No federal- or state-level elections were due during 'the emergency period', the last general election having just taken place in May 2018. One by-election to the State Legislative Assembly of Pahang (the Chini by-election) did take place on 4 July 2020, due to the untimely demise of the incumbent. This was, however, at the time of the 'Recovery MCO', when most businesses had already been allowed to resume anyway. The by-election took place as planned, with the Election Commission of Malaysia (EC) drawing up and imposing SOPs such as the mandatory wearing of face masks, the provision of hand sanitizer and temperature-taking devices, and the requirement to maintain social distancing in polling centres. Due to the ongoing RMCO, there were also limits on the number of attendees at campaign rallies, and on the timing in which political activities could be scheduled. No infection cluster is known to have developed as a consequence of the by-election.

On 29 August, there will be another state-level by-election (again due to the demise of the previous officeholder), in the Slim constituency of the State Legislative Assembly of Perak. On 26 September, there will be state-wide elections to the State Legislative Assembly of Sabah, triggered by the dissolution of the Assembly on 30 July due to a political crisis. In both these elections, the EC and other relevant bodies are expected to again enforce the applicable SOP.

One significant election that was postponed as a result of the Covid-19 crisis was the internal party elections of the Malaysian United Indigenous Party (Bersatu), which were supposed to be held on 18 April. This was interesting because Bersatu was the party whose departure from PH caused the coalition government's collapse in February, and it occupied the Prime Minister's position both before and after the change of government. At the time, Dr Mahathir (who had publicly distanced himself from Bersatu's decision to ditch PH) and Mr Muhyiddin, the newly appointed Prime Minister, were engaged in a tussle for control over the party. Dr Mahathir's son, Mukhriz Mahathir (also a Bersatu

MP) was running for president against Mr Muhyiddin, and a win for Mr Mukhriz would have put the Prime Minister in an extremely awkward position. The then-indefinite postponement of the party election paved the way for Dr Mahathir and his faction to be expelled from the party on 28 May, ostensibly over their public criticism of the party and their continuing association with Bersatu's former partners in PH. This had the practical effect of cementing Mr Muhyiddin and his faction's control over Bersatu (and, accordingly, the Prime Ministership).

Were there departures from usual practice in the ways in which the legislative functions of law-making, representation and holding the government to account were managed?

There were significant departures in that during the height of the pandemic, the session of the House of Representatives (the elected house of Parliament) which was originally scheduled for 9 March was postponed to 18 May, amid the political turmoil set out above. Then, on 18 May, Parliament was only able to meet briefly for a half-day session in order to comply pro forma with the constitutional requirement that there shall not be a gap of six months or more between the last sitting in one session and the first meeting in the next session. At this meeting, the only item allowed on the agenda was the Agong's royal address, and the House was immediately adjourned afterward. No law-making, representation, and/or holding the government to account could be done at this session. This was despite formal notice having been given to the Speaker of several MPs' intention to move a motion of no confidence in order to test Mr Muhyiddin's purported parliamentary majority. It was only on 13 July (at the time of the Recovery MCO) that the House was able to convene again.

Apart from the drastic shortening of the May session, certain other procedural changes were indeed made to the seating arrangement of MPs during the May and July sessions. For example, social distancing requirements meant that some MPs had to be moved to the public gallery in order to create the requisite space between their colleagues (microphones were set up in the aisles so that they could still participate in the proceedings). The wearing of face masks was also made mandatory, except when an MP is addressing the House. During the July session, plastic barriers were also erected to partition MPs sitting on the benches from one another.

Until the House met in July, it appeared that the usual legislative functions of law-making and representation were in abeyance, despite it being highlighted that there was a need for Covid-specific legislation to cover the disruptions to commerce and contractual arrangements caused by the lockdown.

It could not really be said that legislative power was 'delegated' to the executive during this crisis because it turned out that the broad powers exercised by the Government by way of gazetted subsidiary legislation were already available to it since 1988, when the *Prevention and Control of Infectious Diseases Act 1988* was passed. The situation would be different if, for example, a Proclamation of Emergency had been made under Article 150(1) of the Federal Constitution, whereupon the executive branch would be vested with the power to legislate by promulgating Ordinances under Article 150(2B). As it happened, it was rather that the Government unearthed precisely the statute that it needed and proceeded to draw heavily on it.

Through the invocation of the Act, the executive certainly assumed greater-than-usual law-making power in order to enforce what was practically a lockdown over the entire country. If anything, this episode again underlined how, in Malaysia, tremendous power is concentrated in the hands of the executive branch through the broadly-worded nature of statutes and even constitutional provisions.

In terms of scrutiny, because Parliament (and the State Legislative Assemblies, for that matter) did not sit during the height of the pandemic, these assemblies were unable to scrutinize executive action during this time. Nonetheless, judicial recourse appeared to be available against certain excesses in the enforcement of the MCO despite the limited opening hours of the Courts and the closure of law firms during this time (lawyers not being classified as an 'essential service'). For instance, on 8 April the High Court at Taiping quashed on an urgent basis the 3-month jail term meted out by a subordinate court against three fishermen who were caught for violating the lockdown (the accused claimed that they were only trying to feed their families). The sentence, which had created considerable outrage on social media, was substituted with a community service order.

How were decisions about spending made? What oversight has there been over spending policies and their execution in practice?

Decisions on spending continued to be made by the executive branch, headed by the Prime Minister, and announced via the mass media. This was particularly interesting given the political imbroglio set out at the beginning of this paper, and the obvious incentive for the new administration to shore up support with targeted government spending.

On 27 February the (then-interim) Government announced an economic 'stimulus package' worth RM20 billion (approx. USD4.80 billion), and on 16 March was augmented by Mr Muhyiddin, the new Prime Minister. What really raised eyebrows, however, was a whopping RM250 billion (approx. USD60 billion) 'Caring for the People' (Prihatin Rakyat) stimulus package announced on 27 March to assist Malaysians who were economically affected by the ongoing lockdown. Additional measures worth RM35 billion (USD 8,4 billion) were rolled out in a subsequent 'Generator' (Penjana) package on 6 April. In total, close to RM300 billion worth of additional economic stimulus measures were rolled out as a result of the Covid-19 crisis, including direct cash transfers to eligible Malaysians, although only part of that was financed directly from the public purse, as banks and state investment funds also participated in the measures.

At the time, concerns were raised in some quarters over the apparent lack of legal basis for the additional public expenditure, given that Malaysia's 2020 budget (passed in November 2019) did not appear to make provision for such large additional outlays. As in other constitutional democracies, public expenditure in Malaysia must in principle be authorized beforehand by Parliament through the annual budget. However, as noted above, Parliament did not sit throughout most of the crisis, and when it did, it was merely a pro forma half-day session.

The Government's approach appeared to have been to announce and execute the additional economic measures first, and then seek to retrospectively 'legitimize' the expenditure through a raft of bills currently at various stages of passage in the ongoing Parliamentary sitting, which began on 13 July. At the time, the Government justified this by reference to the pressing exigencies of the health crisis, and indeed it is arguable that the Federal Constitution does envisage such unforeseen crisis expenditure being legitimized at a later date. However, in the circumstances set out above, this also bought valuable time for the nascent administration to consolidate its then-uncertain support amongst MPs and the wider public before testing its majority in Parliament on an question of supply, which in the Westminster tradition amounts to an issue of confidence. Since the current session began, the Government has been able to get its business through the House with slim albeit sufficient majorities.

Overall, what has been the effect of the pandemic on the balance between the authority of the legislature and the executive? Do you expect it to have long-term consequences?

In the context of Malaysia, legally speaking it could not really be said that the pandemic has had significant effect on the balance between the authority of the legislature and that of the executive. This is because, as a result of the party-political system and the concentration of power in the executive branch over the years, the balance of authority has always been in favour of the executive. This is not to say that Parliament is a mere rubber stamp – the Government has, at times, had to withdraw or amend legislative proposals in the face of parliamentary resistance – but a Government sufficiently determined to get its legislative agenda across has never to date been prevented from doing so by Parliament, except on matters of constitutional amendment, for which a super-majority is required.

As a matter of public perception, however, two episodes during the pandemic may have significantly undermined the public's view of Parliament's standing vis-à-vis the executive. The first was the short sitting on 18 May, in which the Speaker appeared to have had to acquiesce to a 'directive' in a signed letter from the Prime Minister (as Leader of the House) to shorten the agenda to half a day, despite it having been publicly announced earlier that several MPs had submitted motions of no confidence against the Government. The second was the unprecedented mid-term replacement of the Speaker himself (and one of his deputies) at the instance of the Government – the first order of business when the House reconvened on 13 July. Although the replacement was done through a duly passed motion in the House, it was perceived as an agenda of the government of the day against a Speaker appointed by the previous administration. Through these two episodes, the very weak position of the legislature vis-a-vis the executive branch was clearly underscored.

What positive or negative lessons can be taken from this experience in your country for the role and procedures of the legislature during an emergency of this kind?

From a constitutional and legal perspective, the Covid-19 episode in Malaysia was remarkable in that the Government was able to impose what was practically a lockdown of the country (albeit called a 'Movement Control Order') through the use of existing ordinary legislation, without the need for a proclamation of emergency or the invocation of security legislation.

It is also significant that the new administration, whose parliamentary majority was uncertain in the early days, was able to simply avoid recalling Parliament and then, when it came up against a constitutional requirement to do so, it orchestrated a pro forma half-day session at which opposing parliamentarians had no opportunity to test its majority. Of course, this could not continue indefinitely – Parliament was eventually recalled in July – but these manoeuvres bought precious time for the nascent administration to consolidate its support, and for the ruling party to purge itself of a rival faction. While it could of course be argued that the repeated deferral of the Parliament sitting was due to the dangers posed by Covid-19, it appears that the UK Parliament (in a country hit much harder by the pandemic) was able to continue meeting with the use of video links and social distancing. In any case, it appeared incongruous to make all the logistical arrangements, procedural adaptations, and SOPs to organize a session on 18 May, only for it to last merely half a day.

More importantly, despite the repeated deferrals of the parliamentary sitting, the executive branch continued to impose tight restrictions on the freedom of movement and to announce economic stimulus packages involving large sums of public expenditure. These actions raise concerns over the

ability of Parliament to effectively check and balance against the executive's management of the country, and indeed, its use of public funds.

It is inherent in the principle of the separation of powers that governmental power should be effectively divided and vested in separate bodies so as to prevent the manifestation of tyranny. No doubt, Malaysia's battle against Covid-19 has, to date, been relatively successful – the health authorities, in particular, have won international acclaim for their response – and this may or may not have been aided by the concentration and streamlining of governmental power in the ways described above. However, from the perspective of constitutionalism and the rule of law, the relative ease with which the government was able to side-step parliamentary scrutiny whilst imposing a tight grip on the country should give reason for pause to examine the constitutional and legal framework, in particular the ability of Parliament as the elected body of the nation to assert itself against the executive if necessary. A future administration, given the pretext of a similar crisis, may turn out to be much less benign.

Biography: *Wilson Tay Tze Vern is Senior Lecturer at Taylor's Law School, Taylor's University, Malaysia. He teaches constitutional law, administrative law, and the legal systems of England and Malaysia. He is also Deputy Editor of the Asian Journal of Comparative Law. Previously, he was a Research Fellow at the Centre for Asian Legal Studies, Faculty of Law, National University of Singapore (NUS), having completed his doctorate at NUS in the summer of 2019.*