

Is the AG refuting the constitutional power and authority of the Dewan Rakyat, and of the Agong, to require the PM to test his confidence in Parliament? AG asked

We, the undersigned civil society groups, respond to the Attorney General (AG) Tan Sri Idrus Harun's statement on 4 September 2021. The AG referred to the operation of Articles 40(2)(a) and 43(2)(a) of the Federal Constitution and drew two conclusions as a result:

(a) His Majesty the Yang di-Pertuan Agong's power to appoint a prime minister is an absolute power ("kuasa mutlak"); and

(b) Any step by the Dewan Rakyat to verify whether or not Prime Minister Dato' Seri Ismail Sabri has the confidence of the majority of the members of the Dewan Rakyat through a direct vote in the House would be an attempt to supplant the alleged absolute power of the Agong.

With respect to the office of the Attorney General, Tan Sri Idrus Harun's conclusions are preposterous. It goes against the spirit and letter of Malaysia's constitutional democracy and embarrasses the office of the Attorney General. In light of the same, the public deserves to know Tan Sri Idrus Harun's advice to the government and the Agong on these issues:

First, is it Tan Sri Idrus Harun's position that Malaysia is governed by a monarchy with absolute power? As every Malaysian knows, Malaysia practises a system of parliamentary democracy with a constitutional monarchy, under which no institutions have absolute power – whether it is the constitutional monarch, the Executive, Parliament or the Judiciary. All of these institutions exercise their powers based on the limits imposed under the constitution, the principles of constitutional democracy and the rule of law. His Majesty the Yang di-Pertuan Agong has himself stressed this point to the government on a number of occasions in the past few months, and we refer to, for example, the statements from the Istana Negara dated 29 July 2021 and 18 August 2021. As eminent scholars have explained, a constitutional monarch's discretion under Articles 40(2)(a) and 43(2)(a) is a "controlled discretion" because "no discretion can be absolute and must be exercised within the parameters of the law and conventions." (Faruqi 2020, p. 6).

Second, is Tan Sri Idrus Harun refuting the power and authority of the Dewan Rakyat under the Constitution and established principles of democracy to make and unmake Government through, among others motions of confidence and no confidence? Even the Federal Court in *Nizar v Zambry* agreed with the view expressed by Raus Sharif JCA (as he then was) in the appellate court that while a constitutional monarch may rely on external evidence apart from a vote in the legislative body to determine the question of confidence, "actual voting in the [legislative body] is ideal" (*Dato' Seri Ir Hj Mohammad Nizar bin Jamaluddin v Dato' Seri Dr Zambry bin Abdul Kadir (Attorney General, intervener)* [2010] 2 MLJ 285, at 307 [47 – 48]). It is abundantly clear from the Istana Negara's statement of 18 August 2021 that His Majesty the Yang di-Pertuan Agong was deeply cognizant of this fact and of the constitutional role of Parliament, as he explicitly advised that the new Prime Minister "must as soon as possible bring a motion of confidence in the Dewan Rakyat to confirm/verify that he has the confidence of a majority of the members of the Dewan Rakyat".

Third, by trying to frame Dato' Seri Ismail Sabri's appointment as Prime Minister as an exercise of the Agong's "absolute power" that cannot be subject to a vote of confidence, is Tan Sri Idrus Harun in fact taking the position that the Agong's advice in the statement of 18 August 2021 was unconstitutional or should not to be followed?

Fourth, is Tan Sri Idrus Harun refuting the basic principle of parliamentary democracy captured in the spirit if not the words of Articles 40(2)(a) and 43(2)-(4) that the Prime Minister's obligation to retain the confidence of the majority of the members of the Dewan Rakyat is a continuing obligation throughout his/her term of office? And therefore, the Dewan Rakyat equally retains the power and authority to express confidence or loss of confidence in the Prime Minister during his/her term of office? In other words, any future move by the members of the Dewan Rakyat to test the confidence in the Prime Minister whether during the sittings in September, October, November or December have absolutely nothing to do with the Agong's appointment of the Prime Minister in August.

Fifth, by trying to frame Dato' Seri Ismail Sabri's appointment as Prime Minister as an exercise of the Agong's "absolute power" that cannot be subject to a vote of confidence, is Tan Sri Idrus Harun attempting to set the stage to suppress legitimate expression of opinion and action that may be taken on the matter?

While we await the AG's response, we are acutely aware that under the Houses of Parliament (Privileges and Powers) Act 1952 and its Standing Orders, the Dewan Rakyat has the ability to call or summon any person before them, which should include the Attorney General, to answer questions and clarify their position on matters that threaten or call into question the powers, rights and privileges of the House. The AG's indefensible position on Malaysia's governmental system - that the monarchy is absolute instead of constitutional - calls into question his suitability and tenability for the office. Such high-level fundamental confusion will inevitably pose unnecessary obstacles and distractions to the government's legislative and governance agenda.

*This statement is initiated by the **Seed Community for a Professional Parliament**, a network*

of individuals active in civil society organisations, think tanks and academia working towards a professional Parliament that facilitates healthy policy competition between parties.

Signed by:

1. Coalition for Clean and Fair Elections (BERSIH 2.0)
2. Bait Al-Amanah
3. Persatuan Pengundi Muda (UNDI18)
4. ENGAGE
5. REFORM
6. IDEAS