The Dewan Negara and Constitutional Reform: Upper Houses in Comparative Perspective

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Abstract

This article looks at issues relating to the possibilities for reforming Malaysia's Dewan Negara (Senate) with regard to its constitutional functioning, rather than its internal operation. Two major functions of upper houses – representation and revision – are explored in comparative perspective, and the implications of these functions are discussed in relation to the composition of the Dewan Negara. It is suggested that the proportion of senators representing the states and government appointed senators has become imbalanced, reducing the efficacy of the House in both of its roles, and accordingly that the number of appointed senators should be reduced to a minority of the total. Over the last six decades the House has had too little impact on law-making and accountability. Reforms can tap into the House as a major resource in Malaysian public life.

Keywords: Law Reform, Upper House, Malaysia, Constitution, Legislature

The United Kingdom's House of Lords, an English joke goes, is rather like BBC Radio 3 (the classical music channel): everyone agrees it should exist, but nobody listens to it, or can say quite what it is for. Like all such jokes this is an exaggeration, and I believe the House of Lords in fact makes important contributions to legislation and policy; but the joke does raise the undoubted ambiguity surrounding the precise role to be fulfilled by upper houses, which seems to be pertinent in every system of government that involves a bicameral parliament. There is an almost tragic indeterminacy about upper houses.

The raising of reform questions across the board in Malaysia since 2018 has touched many – one might say almost all - aspects of the country's governance. It is natural therefore that reform of the *Dewan Negara* has

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also been discussed both within and outside the House.[1] Accordingly, in this contribution I wish to explore not so much the internal workings of the House, which could very well be an interesting subject for the discussion of reform[2] (and I do not mean to marginalise it), but rather the larger questions of the constitutional role of the House, and therefore also, necessarily, I will argue, the question of its composition.

Malaysia's Parliament was always from the beginning seen as inevitably bicameral, once the system of government was decided to be a federal one,[3] but until recently the *Dewan Negara* had been little noticed by most people. In this it is not unusual in the broader experience of upper houses.[4] Following the rejection in 2019 of the Bill to repeal the Anti-Fake News Act 2018, I was asked by several people about the issue of legislative process under the Pakatan Harapan government, as this was to many people a strange development. I was surprised to discover how many educated people had no idea of the existence, let alone the precise role, of the *Dewan Negara*. Even some of those who were well aware of its role questioned whether the upper house should really be necessary in a democratic system of government. It was as though the House had, paradoxically, lain quiet for some decades only to incur irritation when finally giving cause to be noticed. It was even suggested to me that appointed senators had no moral right to sit in the House after the election, let alone to block legislation that had passed the lower house. So in my view it is very timely to have public debate, especially amongst senators, MPs, scholars, and legal and state government officials, as to reform of the House. Even if no reform resulted from such debate, that would, if unfortunate, at least be very educative to all concerned. And in fact changes have been made already; for example, the House now has nine new committees mirroring the 'special select committees', established under Standing Order 80 in the *Dewan Rakyat*.[5]

1 S.S. Faruqi, 'The Malaysian Parliament: Problems, Prospects and Proposals for Reform' in M.A.M. Yusof and others (eds), *Law, Principles and Practice in the Dewan Rakyat (House of Representatives) of Malaysia* (Subang Jaya, Sweet & Maxwell, 2020) 513-6.

2 See, e.g., T.Z.A. Muhriz, *A New Dawn for the Dewan Negara? A Study of Malaysia's Second Chamber and Some Proposals* (Kuala Lumpur, IDEAS Malaysia, 2012).

3 A. Harding, *The Constitution of Malaysia: A Contextual Analysis* (2nd edn, Oxford, Hart/ Bloomsbury, 2021, forthcoming) ch.1.

4 M. Russell, *Reforming the House of Lords: Lessons from Overseas* (Oxford, Oxford University Press, 2000).

5 M.A.M. Yusof, 'The Committee System', in Yusof and others (n 1).

Comparative considerations

Malaysia is not unusual in having serious questions as to the role of its upper house, as I have indicated. Upper houses the world over have been very much challenged in finding a role that differs materially from that of the lower house, which inevitably enjoys greater electoral legitimacy.[6] Upper houses can of course comprise elected as well as appointed members, but even then, one has to explain in what way its legitimacy is increased by that fact; it is usually argued that upper house elections should be according to a different method from the lower house, for example by proportional representation as opposed to a simple majority, or the 'first-past-the-post' system. The Philippines, imaginatively, uses the 'plurality-at-large' system to elect 24 senators from the country as a whole as one constituency, with voters able to vote for up to 12 candidates.[7]

There remains, however, a good deal of ambiguity and uncertainty around the question of the role of the upper house. For example, the House of Lords in the United Kingdom has periodically been the subject of debates on reform, and occasionally even actual reforms (as during the government of Tony Blair, 1997-2007), ever since about 1650, and yet hardly anyone appears to think that the reform process is, even now, anywhere near complete, and there seem to be as many opinions as those pronouncing one as to how to move forward.[8] Even though there is broad agreement that reform is needed, there has been little agreement as to the shape or ultimate objective of such reform, so that the House of Lords seems to embody a series of unprincipled compromises rather than a finished article.[9] In particular the House of Lords has been bedevilled by the apparently elitist and illegitimate nature of its composition, embodied in the principle of heredity which means in effect, in the words of the Earl of Onslow during the debate on reform of the heredity principle in 1999, that '[the only] reason for my being here … [is that] my forbears got plastered [very drunk] with

6 See, e.g., D. Kapur and P.B. Mehta, 'The Indian Parliament as an Institution of Accountability' (2006) UNRISD Democracy, Governance and Human Rights Programme Paper no 23, 13ff.

7 Constitution of the Philippines, art VI, s 2.

8 P. Leyland, *The Constitution of the United Kingdom: A Contextual Analysis* (4th edn, Oxford, Hart/ Bloomsbury, 2021, forthcoming) ch 5.

9 ibid.

George IV'.[10] In 1911 and 1949 it was thought necessary to reduce the veto powers of the House of Lords to a mere delaying power. In 1911 this issue sparked a serious constitutional crisis, resolved only by the special measure of flooding the House with Liberal peers in order to get the Parliament Act 1911 passed.[11] The Prime Minister's power to elevate, for example, party donors or personal associates to the peerage, is another controversial matter.[12]

The House of Lords is often compared, sometimes to its detriment, with the United States' Senate. Yet here again there is controversy over both the composition and the powers of the House. It is asked why tiny states such as Wyoming (population 582,000) have the same number of representatives as states large enough to be nation-states in their own right, such as California (population 39,900,000, or about 68 times the size of Wyoming).[13] It is also asked why it is right for a Senate dominated by one party to be able to block legislation promised by its opponents who have won the presidency and a majority in the House of Representatives. The powers of the Senate over impeachment of the President and appointment of Supreme Court justices are also roundly criticised, both in principle and in their exercise. Justices are now openly referred to as 'Democrat' or 'Republican' judges.[14]

Wider afield, there is even less consensus around the exact purpose of having an upper house, and around its composition and what its powers should be, especially in its relation to the lower house. We can be fairly sure that a solid rationale exists for having an upper house in a federal system of government, because otherwise the rights or powers of states could be taken away or abridged by a majority in the lower house,

10 Debate on the House of Lords Bill, HL Deb 30 March 1999, vol 599, cc 352.

11 Leyland (n 8). It is worth noting here that although the way in which the Act was pushed through Parliament seems to enjoy dubious constitutionality, the House of Lords had itself acted contrary to constitutional convention by refusing to pass money bills that had been passed in the House of Commons. Such situation, thankfully, cannot occur in Malaysia due to Article 68 of the Federal Constitution, which provides that the *Dewan Negara* can only delay a money bill by one month, but cannot veto such bill.

12 'Boris Johnson's Tory-Linked Peerages Raise Fresh Claims of Cronyism' *The Guardian* (London, 24 December 2020).

13 'Why Should Wyoming voters Have More Power than Californians?' *Los Angeles Times* (California, 20 September 2020).

14 J. Gramlich, '5 Facts About the Supreme Court' *Factank* (Washington, 5 October 2020).

and the federal bargain effectively changed or even abolished entirely without agreement on the part of the federation's subjects – the states or provinces that comprise it.[15] Accordingly, there is actually no federal system that does not embody an upper house as an essential element. The United States, Canada, Germany, Nigeria, Kenya, India, Pakistan, and Australia, for example, as well as Malaysia, all have an upper house, and Ethiopia's is even called 'the House of the Federation'.[16] However, the similarity stops right there in terms of both powers and composition of these upper houses. Loosely speaking, in all these cases, it is the primary role of the upper house to represent the states in the federal system. But obviously issues relating to federalism do not arise all the time, and so it has other roles in addition. Its composition varies from direct election to appointment, there being several intermediate positions. Yet upper houses also exist and are of significance in unitary states too, such as the United Kingdom, Ireland, Japan, the Philippines, Thailand, Italy, Spain, South Africa, Chile, and France. On the other hand, New Zealand, Singapore, and Israel are unitary states with a unicameral parliament. The choice seems therefore to be principally between an upper house with the role of representing the states and perhaps other interests that would not otherwise be represented (for example minority groups), and the role of functioning as a chamber of second thoughts that can delay or prevent hasty legislation that is in some way unconstitutional, trespassing for example on fundamental rights or sacred principles of governance, or perhaps simply on reflection unwise. We can call these roles, respectively, 'representative' and 'revisionary'.

Of course, there is nothing to prevent an upper house performing both representative and revisionary functions. For example, one possible type of reform of the House of Lords might be for it to play a larger role in protecting the interests of the various regions and the four nations of the United Kingdom, giving it a representative in addition to a revisionary role. Similarly, in Malaysia the *Dewan Negara* could play a larger role than it presently does in the legislative process and in scrutinising the exercise of executive powers.[17]

15 F. Palermo and K. Koessler, *Comparative Federalism: Constitutional Arrangements and Case Law* (Oxford, Hart/Bloomsbury, 2017) ch 6.

16 Constitution of Ethiopia 1994, pt Two.

17 S.S. Faruqi, *Our Constitution* (Subang Jaya, Sweet and Maxwell, 2019) 224ff.

The *Dewan Negara* under the Constitution

In Malaysia the need for an upper house is deeply related to the federal structure adopted in 1948 and entrenched in the 1957 *Merdeka* Constitution, and the system of electing and appointing members was drawn up to reflect this underlying rationale. Given the brief experience of a unitary state (the Malayan Union of 1946-48) and the strong opposition thereto, guarantees were needed of the autonomy and continuance of the states.[18] This is confirmed indirectly also by the fact that the states themselves all have a unicameral legislature, unlike the US states, which all have a bicameral legislature.

The *Dewan Negara* is smaller than the *Dewan Rakyat*, comprising only 70 members, less than one third of the numbers of MPs (222).[19] However, it is usual (the House of Lords is an exception in this respect) to have a smaller upper house; the Philippines' Senate has only 24 members, as discussed above, while the Australian Senate has 76 members, all of whom represent states or territories.[20] Of the 70 Malaysian senators, currently 26 are elected by the 13 state legislative assemblies (two for each state), irrespective of the population or importance of the State. There is, however, no requirement for these members also to be members of their respective state legislative assemblies. The other 44 members are appointed by the *Yang di-Pertuan Agong* on the advice of the Government, and must be persons who have rendered distinguished public service or have achieved distinction in the professions, commerce, industry, agriculture, cultural activities, or social service, or are representatives of racial minorities or are capable of representing the interests of the *orang asli*. Of these appointed members, however, four are chosen to represent the three Federal Territories (two for Kuala Lumpur, and one each for Putrajaya and Labuan). These latter are good examples of the representative function, which appears to be the House's primary function in the Malaysian federal system.

A senator's term of office is a single term of three years, renewable once only (reduced from a single term of six years in 1978) and is not affected by a parliamentary dissolution.[21] Therefore, in the case of a change in the federal government (since 1957 occurring only twice, in 2018 and 2020), the executive is likely to be faced with a hostile, opposition-controlled *Dewan Negara*, whose composition it cannot change except slowly as

18 Harding (n 3).
19 Federal Constitution, art 45(1).
20 Constitution of Australia, pt Two, art 7.
21 Federal Constitution, art 45(3).

senators' three-year terms expire. This indeed was the case during 2018-20, when little legislation was actually passed, mainly due to a hostile *Dewan Negara*. In December 2018 indeed the House rejected a bill that had passed the *Dewan Rakyat* to repeal the Anti-Fake News Act 2018, which had been enacted under the previous government. This was the first time a bill had ever been rejected by the House. The three-year term also allows the government a considerable amount of patronage in that senators can be replaced more often than before 1978; and it thereby enhances the power of the government over the House.[22]

Following the 14th General Election in May 2018, it was argued by some that appointed senators should all resign as they were appointed by the previous government, although nothing in the constitution indicates that they should, and in fact the *Dewan Negara* is not dissolved when the *Dewan Rakyat* is dissolved.[23] Given that senators do not, in theory at least, represent any party as such and their support does not count in the calculation of a parliamentary majority for prime-ministerial appointment purposes, but are appointed from amongst worthy citizens, this argument lacks substance constitutionally. If the *Dewan Negara* proves to be an obstacle to legislation, the remedy is surely not to ask them to resign, but to invoke the general powers of the *Dewan Rakyat*, which include a power to override objections from the *Dewan Negara* on the expiry of one year, or one month in the case of a money bill.[24] The discussion of resignation of senators indicates that either a rethink or a clearer understanding of the powers of the *Dewan Negara* is overdue.[25] As with leaders of independent agencies and other official appointees, once appointed, senators are servants of the public, and they should not be regarded, or regard themselves, as party-political appointees, any more than the heads of independent agencies or leading officials like the Attorney-General and the Auditor-General.

This is of course a somewhat idealistic notion, and there is in practice a likelihood that appointed senators will exercise their functions on a purely party-political basis, given the method of their appointment and the fact that they have no long-term security of tenure, having tenure of only three years.

22 Faruqi (n 17) 225.
23 S. Alagan, *Federal Constitution: A Commentary* (Subang Jaya, Thomson Reuters, 2019) 276.
24 Federal Constitution, art 68(1).
25 Muhriz (n 2).

Composition of the *Dewan Negara*

Two solutions to the problem of representation versus revision come to mind.

First, another look at the process for appointing senators might be in order, with a view to ensuring that senators are appointed for good public reasons, and membership of the House is not simply what one commentator called a temporary parking lot for politicians.[26] This could be achieved by the establishment of a separate and independent commission to consider nominations on a national and non-political basis.

Secondly, a reduction in the number of appointed members is in my view in order. All commentators, as far as I am aware, have criticised the gradual increase in appointed senators so that they now easily outnumber the state-appointed members. The number of appointed members has increased from 16 to 44 since 1957; and since 1964 they have had a majority over the state-elected members. This position diminishes the representative role of the House while also reducing its independence from the government of the day, thus defeating both upper-house rationales, the representative and revisionary, in one blow. If one counted the four federal-territory senators as similar in nature to the state-appointed ones, giving, let us say, a number of 30 in all, then maximum number of appointed members should not exceed 30. The retention of at least a number of appointed members preserves the revisionary role of the House. At the same time, appointed members can represent other interests such as those of the *orang asli*, who are not concentrated in one or two states, and they can also bring to the House valuable expertise of one kind or another.

The issue of representation raises, however, somewhat awkwardly, the issue of representation of Sabah and Sarawak in the House. As matters stand these states are entitled under Article 45(1), in the matter of membership of the House, to the same treatment as the other eleven states. However, there is a case to be made for giving Sabah and Sarawak special protection of their constitutional status, as is strongly implied in the Malaysia Agreement 1963 as the founding document of post-1963 Malaysian governance, which was supposed to protect that status and offer equal partnership rather than a takeover of the Borneo states by the existing Federation of Malaya. In this hypothetical case it would

26 ibid.

follow that if, as provided in the Malaysia Agreement,[27] Malaysia is a partnership of three territories – the Federation of Malaya, Sabah, and Sarawak (Singapore having left in 1965) - then the composition of the Senate should arguably reflect the equal status of these three entities. This would mean, for example, that the state-appointed members should be one third from each entity, not two from each state as is presently provided: for example, eleven from Malaya (one for each state), eleven from Sabah and eleven from Sarawak.

This idea might seem odd, but is quite logical in terms of the representative role if we take the Malaysia Agreement seriously, provided one accepts the premise of equal partnership, which of course is a bone of contention in itself.[28] It is, however, open to a rather large objection, namely, that it would give Sabah and Sarawak a very large controlling interest in the legislative process such that a combination of the two could in effect veto any legislation whatsoever, even legislation which does not implicate any right or essential interest of those two states. It would in effect create an elephant trap for all legislative projects. Given that the combined population of Sabah and Sarawak is about six million, compared to more than 26 million in 'Semenanjung', this numerical dominance of two states over eleven, I anticipate, would not be acceptable to the majority of legislators, and might seem wrong in principle to many people. The objection, however, does not take account of the appointed members, and this cohort of members could dilute the controlling interest of the Borneo states. Any such change would require a constitutional amendment, which would in turn require some kind of political agreement concerning the participation of Sabah and Sarawak in the Federation. I present this idea in order to underline the fact that the representative role is important but difficult to express fairly, whether one stays with the present composition of the House or gives special representation to Sabah and Sarawak. The latter would also entail those states having no advantage in the allocation of seats in the *Dewan Rakyat* – one clearly cannot have two bites of the same cherry.

On this issue I conclude that the present allocation of state/territory had probably best be maintained, unless the number of state representatives

27 *The Report of the Commission of Enquiry: North Borneo and Sarawak, 1962*, published by the Colonial Office as Cmnd 1794/1962 (HMSO) para 327.

28 A. Harding, 'Devolution of powers in Sarawak: A dynamic process of redesigning territorial governance in a federal system' (2017) 12(2) *Asian Journal of Comparative Law* 257.

were increased (as is allowed by Article 45(4) of the Constitution) from two to three. Whatever decision is made on that, I would want to insist that the appointed members should not exceed in number the state members. The electoral process for senators should also be revisited to decide whether the present system produces the best results.

Turning to the process of reform, it would be possible to reform many other aspects of the House without constitutional amendment, and in fact the Constitution does envisage that its composition might change radically over time. Apart from the fact that Article 45(4) allows parliament to increase the number of state-elected members from two to three for each state, it also provides for the possibility of direct popular election of state members, as well as for the numerical decrease or even complete abolition of appointed members. By appointing members who support the government, the latter has been (until 2018) able to ensure that there will be no effective opposition to its measures in the *Dewan Negara*. The House has rarely amended Bills passed by the *Dewan Rakyat*. Its debates have made little impact on the wider political scene, being rarely reported in the news media. And its composition ensures that its role in protecting states' rights is quite limited.[29]

With imagination a more positive role for the House could be found in terms of checking constitutionality, ratifying appointments of public officials, or investigating or considering matters that the *Dewan Rakyat* has no time to investigate. As things stand the *Dewan Negara* has been striking for its lack of impact on legislation, on government, or on constitutional practice. It should be ranked as a 'dignified' element in the constitution (in the sense in which 19th-century author Walter Bagehot described the House of Lords) that could, in a new and more democratic era, instead become an 'efficient' element (also in Bagehot's sense).[30] The all-important question is, in what way that objective could be achieved. At the very least the Dewan Negara represents a valuable resource that has not been tapped, in terms of both the expertise of appointed members and the local knowledge of state members.

29 As an example, the Territorial Sea Act 2012 was passed, infringing on Sarawak's continental shelf to the benefit of the federation, without any demur in the *Dewan Negara* – states' rights were not protected on this occasion: T. Yeoh, 'Federal-state Relations under the Pakatan Harapan Government' in *Trends in Southeast Asia*, Issue 12, Yusof Ishak Institute for Southeast Asian Studies (2020). The Sarawak Assembly had passed a motion rejecting this Act.

30 W. Bagehot, *The English Constitution* (ed M Taylor, Oxford, Oxford University Press, 2000) 7.

It is well here to consider further the revisionary role of the House, where it acts as a chamber of second thoughts. The argument here is that a majority in the lower house may be carried away in passing a rash measure or one that requires deeper and more careful consideration. An upper house can provide an alternative view, or at least time (up to one year in Malaysia) for further reflection: delay is often an effective ameliorative measure. The large problem with this rationale lies in its implications. Upper houses are not normally elected, but even in the case of an elected upper house the question arises on what basis the upper house can overturn with finality decisions made by an elected lower chamber? This question has bedevilled the British parliament for more than a century, as we have seen, and it lurks as potential snag-net in any bicameral parliamentary system.

There is no very compelling answer to this question except the concession that the upper house may not be able to insist in the final analysis that its view prevails, becoming on this hypothesis a chamber of second thoughts rather than a blocking or vetoing chamber like the US Senate. Accordingly, constitutions normally give the lower house the power to affirm its view and override the upper house, often after a period of time or a process of amendment of a bill has been exhausted. Even where this is not the case, it is usual for the lower house to be able to pass the budget despite opposition from the upper house, which, by convention, or constitutional provision in some cases (as in Malaysia), concedes to the lower house. The reasons for this can be seen very clearly in the UK's constitutional crisis of 1910-11, when the powers of the Tory-dominated House of Lords to block legislation were reduced substantially. The same applies in relation to the constitutional crisis in Australia in 1975, where blocking of legislation in the Liberal-controlled Senate led to the controversial dismissal of a Labour government that controlled the lower house.[31] In both cases it was averred that the upper house had acted unconstitutionally, the majority therein abusing its powers to conduct a war of attrition against the elected government. In both cases a drastic measure was deployed – flooding of the House of Lords with Liberal peers in the UK, and dismissal of the government by the Governor-General in Australia.

31 P. Kelly and T. Bramston, *The Dismissal in the Queen's Name: A Ground-breaking New History* (Hawthorn, Penguin Australia, 2015).

Conclusion

We can identify several good general reasons for retaining upper houses and indeed for celebrating their contribution, even if such contribution sometimes seems a very quiet and unobtrusive one. In preparing this article I spoke to an Indian scholar whose excellent book on the Indian Constitution, I pointed out, made hardly any mention of the *Rajya Sabha*, the upper house of parliament.[32] Was this an indication, I inquired, of its lack of utility? He responded that in fact in his view the upper house was both inherently necessary and had made useful practical contributions. Despite the fact that arguments rage continually over the details of both powers and composition, only a few extreme ideologues will argue for complete abolition of an upper house. Experience indicates that both main rationales for retaining an upper house (representation and revision) have much to be said for them.

The problem of what we may called the animated but unreflective majority has troubled political philosophers ever since the problems experienced by ancient Athenian democracy. In 427 BCE the Athenian *ekklesia* (assembly) voted to put to death all the men of Mytilene, which had had the effrontery to rebel against Athens, and sell the women and children into slavery. A galley was sent to deliver the dreadful news to the Athenian general at Mytilene. The next day the members of the assembly thought the better of their cruel decision, sending a second galley with instructions to convey their reversal of the earlier decision. Thucydides reports that the oarsmen of the first galley, weighed down by their deeply troubling news, proceeded more slowly than the oarsmen of the second galley, which was motivated to get to Mytilene ahead of them. As it happened the first galley was forestalled as the second entered the harbour simultaneously, and the Mytileneans were saved.[33] For ever after those interested in political systems have been aware of the dangers of uncontrolled demagoguery, or populism as we now call it. We see many very troubling examples of this across the world. An upper house affords a legitimate and convenient place for second thoughts, where reflection can replace emotion as the tenor of decision-making, and larger principles can come to the fore. This is a general truth of no

32 A. Thiruvengadam, *The Constitution of India: A Contextual Analysis* (Oxford, Hart/Bloomsbury, 2017); see, however, Kapur and Mehta (n 6).

33 R.B. Strassler (ed), *The Landmark Thucydides: A Comprehensive Guide to the Peloponnesian War* (New York, Touchstone, 1998) 3.36-3.50.

special relevance to Malaysia. However, the *Dewan Negara* can in my view play a more significant role than hitherto in acting as a check on the operation of party politics. More than that, it is represents a very large human resource that can be put to better and indeed excellent use, not just as a preventive measure but as a producer of good policy, good questions to government, and acting ultimately as a force for national integration and good governance. Suitable reforms can facilitate such change in the role of the House for the future, and it is to be hoped that this aspect of the reform process will be moved forward. There is much that the House itself can do to further such reforms.

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