

Enhancing the Institutional Efficacy of Parliament: Problems and Prospects

Hannah Yeoh* and Shad Saleem Faruqi**

I. THE CONSTITUTIONAL ROLE OF AN ELECTED LEGISLATURE

In a parliamentary democracy with a responsible, Westminster-style government, the elected and representative legislature is expected to perform a number of key functions.¹ From a long list, one can specify the following premier functions:

1. The legislative function of enacting, amending and repealing laws.² This function should include the keeping of subsidiary legislation under check.
2. The oversight of executive policy and performance. This is to ensure accountability, answerability and responsibility of the political executive to the elected legislature.³
3. The control of finance by allocating finances in an optimum manner⁴ and keeping tabs on how money is spent.
4. The “constituency function” of improving the well-being of citizens by redressing their grievances and engaging with them to obtain a feedback on government policies and programmes.
5. The giving of democratic legitimacy to the government in power.⁵
6. Representing the electorate.⁶
7. The exercise of parliamentary privileges.⁷

In addition to the above functions which are common to both federal and state legislatures, the Federal Parliament performs the following additional roles:

8. Scrutinising the Yang di-Pertuan Agong (King’s) Emergency Proclamations⁸ and Emergency Ordinances.

* Speaker, Selangor State Legislative Assembly.

** Tunku Abdul Rahman Professor of Law, Faculty of Law, University of Malaya.

¹ Shad Saleem Faruqi, *Document of Destiny: The Constitution of the Federation of Malaysia*, Star Publications, 2008, pp.511-532; Philip Norton, *The Constitution in Flux*, Basil Blackwell, 1982, pp. 97-133.

² Federal Constitution, Articles 73-79.

³ Articles 43(3) & (4).

⁴ Articles 67, 68, 96, 99 & 100.

⁵ Article 43(2).

⁶ Article 46.

⁷ Article 63.

9. Approving or rejecting the Election Commission's proposals for new electoral boundaries.⁹

10. Safeguarding Malay Reserve Lands.¹⁰

11. The Dewan Negara has the additional function of representing the 13 States¹¹ of the Federation and giving representation to minorities and marginalized groups.¹²

The general public perception is that in respect of most of the above functions, our federal and state legislatures are failing to live up to the trust reposed in them.¹³ To improve their institutional efficacy, a few suggestions are proposed, some of which are already in operation in some states.

II. THE LEGISLATIVE FUNCTION

It has been observed by critics at both federal and state levels, that the fundamental principle of democracy - that an elected and representative legislature must control the legislative destiny of the nation - is not being realised.¹⁴

A. *Executive domination*

Due to the hegemony of political parties and their insistence on loyalty to the party and its leader, the political executive dominates the legislative agenda at both the federal and state levels. The government drafts the legislation, determines the timing of its introduction and uses its majority to push its Bills through. Parliament reacts and does not act on its own. Aside from token resistance, the executive's legislative proposals are almost always converted into legislation without much debate or analysis.

B. *Dewan Rakyat*

In the Dewan Rakyat, a study reveals that most Government Bills are passed without any changes whatsoever to the Bill. Data collected for a period of about ten years from 12 October 1982 to 7 May 1992 and spanning the Sixth, Seventh and Eighth Parliaments indicates that an overwhelmingly large number of Bills introduced in the Dewan Rakyat are passed without any amendments. Of the 404 Bills scrutinized by the author, 361 or 89.35% were passed without any amendment; 27 or 6.68% were amended on the floor; and 16 or 3.96% were withdrawn by the Government. No Bill was ever defeated.¹⁵

⁸ Federal Constitution, Article 150(3).

⁹ Thirteenth Schedule, Part II, Para 10.

¹⁰ Article 89(1)(b).

¹¹ Article 45(1)(a) and 45(1)(aa).

¹² Article 45(1)(b).

¹³ This was the sentiment expressed at the "Persidangan Speaker-Speaker Parlimen Dan Dewan Undangan Negeri Seluruh Malaysia, Tahun 2017", 13 May 2017, Concorde Hotel, Shah Alam, Malaysia.

¹⁴ Lord Hailsham, *The Dilemma of Democracy*, London, 1978, esp. Ch. 20; K C Wheare, "The Decline of Legislatures?" In K C Wheare, *Legislatures*, Oxford, Oxford University Press, 1963, p.219; See also Kevin YL Tan & Thio Li-Ann, *Constitutional Law in Malaysia & Singapore*, Lexis Nexis, 2010, pp. 353-358; Shad Saleem Faruqi, *Supra* n1, pp.581-586.

¹⁵ Faruqi, *Ibid.* p. 513.

C. Dewan Negara

The Dewan Negara is subordinate to the Dewan Rakyat in the legislative sphere. There are restrictions on introduction of Bills and moving of amendments involving taxation and expenditure in the Upper House.¹⁶ In case the Dewan Negara refuses to support a Dewan Rakyat Bill, the Dewan Rakyat can bypass the Dewan Negara after prescribed time limits.¹⁷

Despite these provisions it must be noted that under Article 66(2) Bills can originate in either House of Parliament. Except under Article 68, the assent of both Houses is needed before a Bill is presented to the Yang di-Pertuan Agong. In theory, the Dewan Negara can debate, delay and amend Dewan Rakyat Bills. In practice Senators speak courageously but vote in favour of whatever is sent to them. There is no record in the last 58 years of any Dewan Rakyat Bill ever being defeated or significantly amended by the Dewan Negara.

D. Embargo on Bills

What is most regrettable is that Bills are embargoed under the Official Secrets Act and secrecy surrounds them till they are laid for First Reading in the House.

E. Unconstitutional shift of power

From the above it appears that the elected legislature merely legitimates; it does not legislate. The centre of gravity of the legislative process has unconstitutionally shifted from the legislative branch to the executive branch. The executive has captured the legislative process and has become more important than the legislature in law making. It must be noted that this is a worldwide trend in parliamentary democracies. To mitigate this unconstitutional shift of power, a number of steps can be proposed.

F. Pre-Legislation Green and White Papers

The department that sponsors a legislative proposal must be duty-bound to prepare policy papers on proposed Bills to enable non-governmental and community organisations to participate in a dialogue with their *wakil rakyat* at the pre-legislation stage.

G. Register of community-based organizations

The Green or White Policy Papers must be made available to all community-based organizations that are registered with the State Assembly Secretariat. If citizens are expected to give their input, the existing culture of secrecy surrounding Bills should be replaced with more openness. There should be pre-parliamentary consultations with affected interests. Decisions in which people participate are decisions they are likely to respect. With computer technology at our command such an effort is within reach.

¹⁶ Article 67.

¹⁷ Article 68.

H. Draft Bills must be submitted to members well in time

Members of the Assembly must be supplied with draft Bills at least two weeks before the beginning of the session. This is to enable them to study the provisions and seek independent advice. Controversial Bills are often supplied on the day of the debate itself.¹⁸

I. Secrecy surrounding Bills

The secrecy that surrounds Bills till they are laid before the Assembly should be lifted.

J. Select Legislation Committees

To save on parliamentary time, important Bills should be committed to Select Legislation Committees of the Houses as is the practice in the United Kingdom. These committees could sit either before or after the second reading of the Bill. Such committees can invite expert outsiders to assist in fine-tuning the legislation and proposing amendments. NGOs and concerned members of the public should be regarded as public benefactors and not busybodies and should be heard during the committee stage.

Ad hoc legislation committees (by whatever name called) for scrutiny of Bills (either before the second or after the second reading) are common in most democracies. In the UK all public Bills other than annual Bills for public expenditure are sent to Standing Committees.¹⁹ Regrettably, in Malaysia such a tradition has not taken hold. A search of parliamentary records indicates that since the first election in 1959, fewer than 10 legislative proposals at the federal level were committed to Special or Select Committees. Among them were the Minor Offences (Amendment) Bill 1960, Criminal Procedure Code (Amendment) Bill 1966, Courts of Judicature (Amendment) Bill 1968, Law Reform (Marriage & Divorce) Bill 1973, the Dangerous Drugs (Special Preventive Measures) Bill 1984 and the Criminal Procedure (Amendment) Bill 2007. The usual Malaysian practice is to for a Bill to be examined by a Committee of the Whole House.

At the State level there is an example of a Select Special Committee in Selangor. Public consultation was resorted to when the House formed the Special Select Committee on Freedom of Information Enactment (Selangor) 2010 to consult and gather feedback from stakeholders such as the Bar Council, Centre for Independent Journalism, civil societies and civil servants before the Bill was passed.²⁰

As an alternative to ad hoc legislation committees that lack continuity and fail to develop legislative expertise, the “Departmental Committee” concerned (discussed below) may be charged with the task of reviewing every proposed State Enactment or amendment in the Committee’s field of specialisation.

¹⁸ Refer to the press release of the DAP Socialist Youth about the Constitution (Amendment) Bill 1993 to amend Article 181 to remove the immunities of the King and the Sultan. The Bill was allegedly supplied to the MPs only on the day when the Bill was introduced: *New Straits Times*, Jan 8, 1993, p 2.

¹⁹ De Smith, *Constitutional & Administrative Law*, 5th edition, 1989, p. 280.

²⁰ “Selangor Passes Historic Freedom of Information Enactment”, 1 April 2011, The Edge Markets: <http://www.theedgemarkets.com/article/selangor-passes-historic-freedom-information-enactment>. Site accessed on 15 May 2017.

K. Private Members' Bills

Assemblymen should be encouraged to submit Bills for consideration²¹. The Speaker's Office can draw lots and those whose names appear in the top three slots should be given time and financial aid (as in the UK) to submit their proposals to the Assembly. Private Members' Bills often take up causes that the government, for political reasons, may be unwilling to espouse. Private Members' Bills may encourage participation by NGOs and community groups and may reflect the democratic impulses of society.

L. Law reform

All laws must remain dynamic to meet the felt necessities of the times. In all societies, there is a great divergence between the law in the book and the law in action. Between form and functioning a wide gap develops. This hinders justice because justice is not in legislation but in effective and fair administration. For these reasons the form and functioning of all laws must be kept under review. Those who make the law must also be ultimately responsible for its reform. At the federal level there is a unit in the Attorney-General's office to look into law reform. But there is no official machinery at the State level for keeping laws in tune with the times and removing their defects. A law reform mechanism must be created. This can be done in two ways.

First, every new federal Bill or State Enactment must contain a provision appointing a Post-Legislation Review Committee. The Committee could consist of suitable ex-officio persons from within and without the government (whether federal or State) to keep the law's functioning in view and to report to the legislature periodically. This approach was adopted in Selangor when the Committee on Competency, Accountability and Transparency (SELCAT) carried out a public hearing to review the implementation of the freedom of Information Enactment, its application and weaknesses and made recommendations to the Selangor State Government for improvement.²²

Second, an independent, permanent Law Reform Commission or Committee should be appointed at the federal level to report to Parliament on the need for amendments to existing laws. Suitable examples of such bodies in the UK and India are available for emulation.

M. Dewan Negara

To lighten the legislative load of the Dewan Rakyat and to enable greater scrutiny of legislative proposals, some politically non-controversial, non-money Bills should originate in the Dewan Negara. This will require both Houses to sit concurrently. No law forbids concurrent sessions.

N. Control of subsidiary legislation

In most Acts of parliament and State Enactments there is delegation of law-making power to a named authority. The delegate is a Minister, an EXCO member, an unelected local authority or an unelected member of the executive branch who is not directly answerable to the legislature.

²¹ Standing Order 50 of the State Legislative Assembly of Selangor 1965 (Rev 2016).

²² "Penyata Jawatankuasa Pilihan Khas Mengenai Keupayaan, Kebertanggungjawaban dan Ketulusan (Special Select Committee on Competence, Accountability and Transparency (SELCAT) Bagi Dewan Negeri Selangor Berkenan enakmen kebebasan Maklumat (Negeri Selangor) 2011", Kertas Bil. 3/2015, [http://dewan.selangor.gov.my/assets/pdf/Penyata/2015/01/KERTAS%20BIL.%203%20TAHUN%202015%20-%20\(SELCAT\)_ENAKMEN%20KEBEBASAN%20MAKLUMAT.pdf](http://dewan.selangor.gov.my/assets/pdf/Penyata/2015/01/KERTAS%20BIL.%203%20TAHUN%202015%20-%20(SELCAT)_ENAKMEN%20KEBEBASAN%20MAKLUMAT.pdf), Site accessed on 15 May 2015.

Add to this “undemocratic” reality (that the law-maker is more often than not an unelected administrative officer) is the fact that subsidiary legislation outnumbers primary legislation by a ratio of 20:1 or more. Today the bulk of laws affecting citizens are crafted by executive officers without any reference to the elected assembly. These subsidiary laws affect citizens’ rights as much as primary laws enacted by the elected assembly. Yet, there are no measures to control subsidiary legislation. Our Parliament and State Assemblies’ inability (or unwillingness) to scrutinize subsidiary legislation is a serious violation of the doctrine of separation of powers. It amounts to an unconstitutional transfer of their legislative power to the executive.

Two methods of controls are available to Parliament and the State legislatures to keep them informed of what the delegate has done:

First, laying procedures should be prescribed. The parent law should prescribe that the draft subsidiary legislation shall be laid before the legislature before enforcement. There are several types of laying procedures. First, “laying subject to an affirmative resolution” i.e. subject to the approval of the Assembly before the instrument goes into operation. This method involves time commitment on the part of the Assembly as an affirmative resolution has to be passed. A second method is “laying subject to a negative resolution”. Under this method, if a negative resolution is passed, the instrument is killed. But silence is deemed consent.

Second, a Scrutiny Committee on Subsidiary Legislation should be created and empowered. All subsidiary legislation should be laid before a Scrutiny Committee of the House and the Committee should have discretion to scrutinize any instrument and submit a report to the Assembly on whether to accept or annul the subsidiary legislation.

In many countries Scrutiny Committees have done a great job to keep delegates under control and to prescribe guidelines and constitutional principles and presumptions that must be adhered to by the delegate in framing delegated legislation. The quality of subsidiary legislation has improved as a result. This bipartisan Scrutiny Committee must invite a member of the concerned Departmental Committee to advise it on the aims and objects of the instrument.

III. OVERSIGHT OF GOVERNMENT

In a parliamentary democracy the political executive must be answerable, accountable and responsible to the legislature. A number of principles and methods exist to enforce this accountability and answerability:

A. The doctrine of collective ministerial responsibility²³

This requires that the political executive must speak with one voice and be collectively and vicariously responsible for all actions of the government.

B. The doctrine of individual ministerial responsibility

This requires all Ministers and EXCO members to be vicariously responsible for the acts of commission or omission of public servants under the Minister or EXCO member’s portfolio.

²³ Federal Constitution, Article 43(3).

However, due to partisan politics on the floor of the Assembly, it is difficult to censure an individual minister for his department's failings.

C. Question-time in the Assembly

Unlike in the presidential system where the President and his cabinet are not members of the legislature, in our system of "responsible government" the executive is part of Parliament and is required to be present and to answer questions, supply information and justify policies. Members may present Petitions.²⁴ Though not provided for by law, question time is a hallowed tradition of our legislative assemblies.²⁵ This tradition has positive implications for accountability but there are clear time constraints with the question-answer session.

To enhance the Assembly's oversight function, the following suggestions may be worthy of consideration:

Better procedures need to be evolved to determine the order in which questions are placed on the Daily Order Paper. Given the fact that not all questions can be reached before time runs out, the suspicion has to be allayed that inconvenient or hostile questions are deliberately placed at the bottom of the Daily Order Paper.²⁶

To each question that is tabled a member should be allowed to ask two Supplementary Questions with the permission of the Presiding Officer. Most questions tabled on the daily Order Paper are not "reached" due to paucity of time. Oral questions that are not reached must be given a written reply within a strict time limit. In Selangor Standing Order 24(7) requires that the written reply (for an unanswered oral question) must be given before the motion for the adjournment of the Assembly".

The Prime Minister should subject himself to a weekly Q & A session. In the UK, every Wednesday from 12 to 1230 p.m., the PM faces an 'open question' from an MP who is then allowed to ask a Supplementary on any subject. Following that, the Leader of the Opposition is permitted to ask a total of six questions.²⁷ A similar proposal at the federal level in Malaysia has not been taken up. In some State Assemblies, however, like in Selangor, the Menteri Besar takes the floor to supply information, justify policies and answer questions.²⁸

D. Debates

The rules of debate, time and manner of speaking, content of speeches, interruptions, anticipation, closure of debate, collection of voices and divisions are provided for in detail in the Standing Orders.²⁹ Debates are allowed on innumerable occasions: on motions of adjournment,³⁰

²⁴ Standing Orders of the Dewan Rakyat, SO 19.

²⁵ Standing Orders of the Dewan Rakyat, SO 21-25.

²⁶ Lim Kit Siang, *Malaysia in the Dangerous 80s*, Democratic Action Party, 1982, p. 347.

²⁷ www.parliament.uk. Accessed 16.05.2017.

²⁸ Standing Orders of the Selangor Asembly, S.O. 24(7).

²⁹ Standing Orders of the Dewan Rakyat, SO 35-47.

³⁰ S.O. 16-17.

in relation to Petitions³¹, Motions,³² Bills³³ and annual estimates³⁴. Together they keep the ministers on their toes.

E. Motions

Motions including a motion of no-confidence are parliamentary techniques to force a debate and vote and to call the executive to account.³⁵ Though a motion of no-confidence is implied in Article 43(4) of the Federal Constitution, surprisingly the Standing Orders of the Dewan Rakyat do not specifically provide for a motion of no-confidence. A motion of no-confidence will therefore have to be introduced under the ordinary rules relating to motions.

Another special type of motion is a motion to discuss a definite matter of urgent public importance.³⁶ The Speaker has wide discretion to admit or refuse such a motion and most are refused.

F. Committees

Standing, Sessional, Select, Special Select or Joint Committees scrutinize various aspects of executive policy and performance.

G. Live Telecasts

Question-time and debates on Bills should be televised to allow citizens to watch the quality of the question and answer session and the aptitude and performance of individual members. The Selangor Assembly has innovated in this area. The entire Assembly sitting is telecast live: S.O. 10A.

H. Investigatory Committees

Around the world Parliaments have a number of committees known by many names and exhibiting many forms. In the Malaysian Parliament³⁷ there are four types of committees: First, Committee of the Whole House to vet legislative proposals after the second reading. Second, Sessional Select Committees like the Committee on Selection, Standing Orders Committee, Committee on Privileges, the Public Accounts Committee and the House Committee.³⁸ These committees are appointed at the beginning of each session and continue until the end of the session. These committees are often called Permanent or Standing Committees. They have powers to send for persons, papers and records. Third, Special Select Committees. These are appointed on an ad hoc basis for specific purposes e.g. to scrutinise a Bill or investigate a particular matter assigned to it by the House. Fourth, Joint Select Committee of both Houses.³⁹

³¹ S.O. 19.

³² S.O. 26.

³³ S.O. 48-64.

³⁴ S.O. 65, 65A, 66, 75.

³⁵ S.O. 26-34.

³⁶ S.O. 18.

³⁷ Standing Orders of the Dewan Rakyat 54, 55, 56, 57, 59, 60, 76-80 and 81.

³⁸ Standing Orders of the Dewan Rakyat 76-80.

³⁹ Standing Orders of the Dewan Rakyat 87-88; SO of the Dewan Negara 79-80.

Commentators are generally agreed that given the politically-charged atmosphere on the floor of an Assembly, a system of well-serviced investigatory committees holds the key to enabling Parliament to become an effective check and balance institution over the executive.⁴⁰ The committee system must, therefore, be strengthened by creating new investigatory (Special Select) Committees to include:

- One Departmental Committee for each portfolio as in Britain. This way Assemblymen and women can generate public policy proposals through committees. Backbenchers can get involved and prove their competence. As a beginning, a Departmental Committee can supervise several related portfolios.
- A Special Select Committee on Public Grievances (Selangor has already established a committee for this purpose called SELCAT).
- A Special Committee on Socio-Economic Policy should be appointed to oversee the delivery of socio-economic programmes initiated by the government, to review strategies to combat poverty, environmental degradation, supply of water etc.

The above Special Select Committees should be in addition to the legislation committees discussed above namely the Ad hoc Legislation Committees before or after the second reading of a Bill; the Committee on Law Reform; and the Scrutiny Committee on Subsidiary legislation.

The proposal to create more committees has been partially implemented in the Selangor State Assembly. Besides Select Committees on Standing Orders, Rights and Privileges and Public Accounts, Selangor has the following additional Special Select Committees; Committee on Competency, Accountability and Transparency (SELCAT); Committee on Local Government; Committee on Poverty Eradication; Committee on Water Management and Committee on House Management.

The Federal Parliament has also tried to strengthen its committee system. In 2016, the Speaker of the Dewan Rakyat proposed to the federal executive to set up nine new departmental and scrutiny committees on: Transportation and Cities; Foreign Affairs; Education; Food and Health; Energy, Environment and Water; Rural Wellbeing; Economics; Women's Affairs; and Integrity.⁴¹ It is quite telling of the state of affairs that the Dewan Rakyat and its Speaker have to obtain the prior permission of the political executive to set up new House committees. From what is known the Speaker's proposals have neither been accepted nor rejected but referred to a Cabinet Committee.

To ensure effectiveness, all committees need financial allocations and professionally trained staff. The reports of the Committees must be compulsorily reported to the House by the Minister concerned or the Menteri Besar. Selangor has innovated in this area.⁴² It is noteworthy, however, that in reporting to the Assembly, the MB does not always agree with the conclusions of the committee.

⁴⁰ Philip Norton, *Legislatures*, OUP, 1990, p.254.

⁴¹ Refer to paper by Datuk Seri Dr Ronald Kiandee (Deputy Speaker of the Dewan Rakyat): "Transformasi Parlimen Ke Arah Memartabatkan Wadah Demokrasi", p. 13 at the Persidangan Speaker-Speaker Parlimen Dan Dewan Undangan Negeri Seluruh Malaysia, Tahun 2017, 13 May 2017, Concorde Hotel, Shah Alam, Malaysia.

⁴² SO 76(7), Selangor Assembly.

Besides submitting Committee reports to the Assembly, transparency should be promoted by making Committee reports available on the Assembly's website as in Selangor.

Another issue that has cropped up is that those Assembly committees that investigate issues on which there is already executive machinery for scrutiny are criticised as duplicating the work of the executive and trespassing on the executive's turf. This criticism is misplaced. In a parliamentary democracy there is no strict compartmentalization of executive and legislative functions. Instead of strict separation, check and balance is at the heart of parliamentary democracy. The enforcement of responsibility, accountability and answerability of the political executive requires Parliament to remain vigilant of all exercise or abuse of power by the executive.

I. Ombudsman:

As an alternative to the Assembly's Special Select Committee on Public Grievances, an Ombudsman or a Commissioner of Complaints could be appointed on the lines of the British Parliamentary Commissioner of Administration to investigate and make recommendations on resolving public complaints. The federal Public Complaints Bureau should, in line with our federal system, concentrate on federal departments.

J. Participation of community representatives

Expert witness participation in Select Committees should become a routine practice. The government does not always know best and must tap the expertise of ordinary citizens.

K. Right to know

A Freedom of Information Act should be passed to enable transparency in government, to protect whistleblowers and to make it difficult to sweep corruption or abuse of power under the carpet. The Freedom of Information Enactments in Selangor (2011)⁴³ and Penang (2010) are a small but significant step towards giving citizens the information they need to monitor and assess their government. The federal Whistleblowers Protection Act 2010 is also significant but is criticized because it does not permit disclosure to outsiders.

L. Power to punish for contempt

On another note, Parliament and State Assemblies should use their power to punish for contempt to compel ministers, civil servants and citizens to appear before committees and to supply information. The discourtesy to Parliament of senior civil servants sending their junior colleagues to appear before parliamentary committees must be censored. Refer to the New South Wales cases of *Egan v Willis & Cahill* [1996] 40 NSWLR 650 and *Egan v Chadwick* (1999) 46 NSWLR 563 in which a minister was found guilty of contempt of the House for non-cooperation. In its judgment the High Court held by a 5 to 1 majority that the New South Wales Legislative Council has the implied power to require one of its members, who is a Minister, to produce State papers to the House, together with the power to counter obstruction where it occurs. The relevant test is that an implied power must be reasonably necessary for the exercise of the Council's functions: these include its primary legislative function, as well as its role in

⁴³ Abdul Khalid bin Ibrahim, "Freedom of Information in Selangor: Building Better Governance", *The Parliamentarian*, 2011, Issue One XCII, p. 24.

scrutinising the Executive generally. In their joint majority judgement, Justices Gaudron, Gummow and Hayne concluded that, in determining what is reasonably necessary at any time for the proper exercise of the functions of the Council, reference is to be made to what, at the time in question, have come to be conventional practices established and maintained by the Legislative Council.

In the context of Malaysia's federal system there is some doubt about whether a State Assembly has the power to order the execution of a warrant of arrest for contempt of the Assembly. The Selangor Constitution, Article LXXVII, is not precise enough: "The Legislative Assembly shall have the privileges and powers set out in the Schedule thereto". The Schedule thereto confers no power of arrest. Perhaps one can rely on English common law which has for centuries recognized that the power to punish for contempt is an undoubted part of parliamentary privileges.

This still raises the issue whether the power to prosecute a contemnor resides with the Assembly or with the federal Attorney-General under Article 145(3) of the Federal Constitution. Most respectfully a State Assembly's power to initiate and enforce contempt proceedings is a common law power which is not subject to the control of the Attorney-General. The Attorney-General is the master of "proceedings for an offence" before a court of law. Proceedings for contempt of the Assembly are (i) not in relation to a crime, (ii) nor are in a court of law.

M. Impartiality of the Speaker of the House

In politics as in life, appearances are as important as reality. The hallowed traditions of a Westminster Parliament necessitate that the Presiding Officer(s) of a democratic legislature must act with dignity, political neutrality and a sense of fair play. To cement these traditions the UK has evolved a constitutional convention that the Speaker of the House of Commons, once elected, resigns from the party that elected him/her to the post. This is done to underline the Speaker's political neutrality. If at the next General Election, the Speaker wishes to seek reelection to his/her constituency, there is another constitutional convention that no political party will put up a candidate to challenge the Speaker!

One must note that conventions are not legislated and are not laws but mere "political morality" of the day. Nevertheless, a move towards these conventions may help to raise the stature of the Speaker's office and of the legislative assembly as a whole. Loyalty to conventions is not unknown to our Assemblies. A large number of the Standing Orders that deal with Question Time, Motions, recognition of the Leader of the Opposition and the committee system are based on Westminster conventions.

At the 2017 Speakers' Conference in Shah Alam it was pointed out that the political neutrality of the Speaker is an impossible dream because in practice the Speaker's election is dependent on the MB's nomination. But it was also pointed out that if the government consists of a coalition, the Speaker may not belong to the political party of the MB and that may assist the Speaker to maintain neutrality between the Government and the Assembly.

IV. CONTROL & SCRUTINY OF FINANCES

A. Scrutiny of financial policy

The Federal Constitution and State Constitutions explicitly state that “there shall be no taxation unless authorized by law”.⁴⁴ The Federal and State Constitutions impose a duty on the executive to submit the Annual Finance Statement to the legislature⁴⁵. Supply Bills require legislative consent.⁴⁶ Supplementary and excess expenditure, authorization of expenditure for unspecified purposes, creation of Contingencies Fund and withdrawal from the Consolidated Fund all require legislative authorization.

Despite these provisions, economic policies and decisions about how much to tax and how much to spend have become the absolute monopoly of the executive. Also, there is a wide disconnect between planned and actual spending. Governments reconcile this gap with supplementary estimates.

In reality Parliament hardly exercises any control over finances. This must change. There is no constitutional bar to a Parliamentary Committee on Estimates to review the government’s planned income and expenditure and to allocate finances in an optimum and balanced manner.

Ways need to be devised to limit the executive’s power to seek post-budget allocations contrary to stated economic policies and budget estimates. The political dilemma is that questioning the government on the budget is conventionally regarded as a sign of disloyalty and lack of confidence. There is a constitutional convention that a defeat on the budget will amount to a vote of no confidence.

B. The scrutiny of expenditure

The jurisdiction of the Public Accounts Committee (PAC) should be expanded to cover all institutions that receive public funds, whether a Ministry, a statutory body, a GLC or a Syariah authority. The practice for many decades of exempting “Off-Budget Agencies” or “Non-Financial Institutions” from scrutiny by the Auditor-General must cease. Due to constraints of time, and the vastness of his job, the Auditor-General does not report on the spending of each and every government institution. The Dewan Rakyat and each Assembly’s PAC should retain the right to summon and question government institutions that have escaped the scrutiny of the Auditor General. PAC to be headed by Leader of Opposition: The PAC should be headed by a member of the Opposition as in the UK and in the State of Selangor: Standing Order 68(1).

V. CONSTITUENCY FUNCTION

It is a recurring dilemma for parliamentarians whether they should be social workers for a few or legislators for all. Whatever their preference, the political reality is that MPs and Assemblymen have to combine the role of legislators, ombudsmen, problem solvers, spokesmen for their areas and social workers.

⁴⁴ For the Federal Constitution, see Article 96. For Selangor see Article LXXXIV.

⁴⁵ Federal Constitution, Article 99.

⁴⁶ Federal Constitution, Article 100.

In a survey conducted by the *New Straits Times*⁴⁷ many MPs expressed unhappiness with the fact that a large amount of their time is spent on particularized demands of their constituents. Many of them feel that MPs should devote more time to monitoring national, federal and legislative matters and less to self-help and cleanliness projects, feasts and social work. But a similar survey in various states indicates that the general public believes that the *wakil rakyat* are voted in to serve the particularized needs of the constituents and must meet people's needs and champion people's causes.⁴⁸

Given the constraints of influencing legislative policy and enforcing accountability in government, it will be ironic if MPs scale down their constituency work which is their forte and in which their record is generally quite commendable. A foreign study observes that "one of the marked characteristics of politics and administration in Kelantan is that the relations between politician and administrator on the one hand and the rakyat on the other are much closer than in a developed Western society".⁴⁹

A. Service Centres

Aid and assistance ought to be given to every elected member to pay for a Service Centre in his/her constituency. This aid should not be withheld from opposition members in accordance with the constitutional promise in Article 8 of equality before the law and equal protection of the law, e.g. In Selangor, RM200,000 was announced for opposition assemblymen.⁵⁰

B. Interaction with community-groups

Constituencies are good laboratories to measure concerns about programmes and service delivery. Instead of waiting for members of the public to come to them, members should use technology-based means to solicit the views of constituents.

NGOs, consumer groups, environmental groups, residents' associations, PTAs and other affected interests should be encouraged to register with the Assembly Secretariat and this register should be used to send out information and invitations to members of society and to seek their feedback.

C. Support structures

To assist MPs and Assemblymen in their legislative and oversight functions, each MP and member should be assigned research staff and legislative assistants. In many Asian countries like the Philippines, each Congressman or women is assigned a few paid "legislative assistants". The Houses of Parliament should have their own legal counsel.

⁴⁷ "Balancing the Role of Lawmaker and Problem Solver", *New Straits Times*, March 22 to March 24 and March 26, 1983 (A four part series).

⁴⁸ "What a Wakil Rakyat Should Do?" *The New Sunday Times*, Sept 1, 1991, p.6.

⁴⁹ J H Beaglehole, *The District: A Study in Decentralisation in West Malaysia*, OUP, 1976, p. 77.

⁵⁰ Lee Choon Fai and Vathani Panirchellvum, 26 November 2014, "Azmin: BN Reps to get RM200,000 despite refusal", *The Sun Daily*, <http://www.thesundaily.my/news/1238291>. Site accessed on 15 March 2017.

VI. GIVING DEMOCRATIC LEGITIMACY TO THE GOVERNMENT

In a parliamentary democracy the political executive derives its right to rule because of its ability to command the support of the majority of the members of the elected legislature. In the last decade a few contentious issues have emerged to challenge democratic theory.

First, how is “confidence” to be measured? Is a vote of no-confidence the only way to test the Assembly’s support for the executive? Or can the Head of State rely on facts outside the Assembly to determine who commands confidence? In the 2009 Perak crisis,⁵¹ our apex court overruled *Stephen Kalong Ningkan*⁵² to hold that the Head of State is not barred from taking note of facts outside the Assembly to determine the question of confidence.

A second and more complex issue is defection, party-hopping or crossing the floor. In countries like India, the law discourages party-hopping and the political instability it unleashes. In India MPs who defect from their party have to return to the people at a by-election to renew their popular mandate. In Malaysia our apex court has held that the right to join an association includes the right to disassociate from the association: Federal Constitution, Article 10(1)(c). Any limitations on crossing the floor are, therefore, unconstitutional: *Dewan Undangan Negeri Kelantan v Nordin Salleh* [1992] 1 MLJ 343.⁵³

VII. REPRESENTING THE ELECTORATE

Parliament may be elected but it may not be representative. Around the world, charges of elitism are levelled at elected assemblies and a number of problems are highlighted:

First, women and minorities are underrepresented.⁵⁴ Second, in countries like the UK and Malaysia, with the winner-take-all, single-member constituency system, the “winning” candidate in a multi-cornered contest does not always secure more than 50% of the vote. His/her democratic legitimacy is questioned. Third, for the overall election result, there may be no proportionality between popular votes obtained and seats won. In the UK, the party forming the government has at times won as little as 37% of the popular vote but more than 50% of the seats in the House of Commons. In Malaysia too the disproportionality between percentage of popular vote and percentage of Dewan Rakyat seats won by the Government is quite glaring.

Election Year	Popular vote (%)	Seats (%)
1959	51.7	71.5
1964	58.5	85.58
1974	60.7	87.66
1978	57.2	84.22
1982	60.5	85.71
1986	55.8	83.62

⁵¹ *Dato Seri Ir Hj Mohammad Nizar Jamaluddin v Dato’ Seri Dr Zambry Abdul Kadir* [2010] 2 MLJ 285.

⁵² *Stephen Kalong Ningkan v Tun Abang Haji Openg & Tawi Sli (No 2)* [1967] 1 MLJ 46.

⁵³ But see a contrary approach in *Tun Dato Haji Mustapha v Legislative Assembly of Sabah* [1993] 1 MLJ 26.

⁵⁴ Mrs. Maxine A Henry-Wilson, “Strategies for Attracting More Women into Politics”, *The Parliamentarian*, 2011, Issue One CXII, p. 44.

1990	53.4	70.55
1995	65.2	84.38
1999	56.5	76.68
2004	63.9	90.41
2008	50.6	63.06
2013	47.3	59.90

Electoral reform is a complex matter and outside the scope of our paper. It is also constitutionally outside the jurisdiction of State Assemblies. But what needs to be highlighted is that the federal government can learn from the experience of countries like Singapore and New Zealand and give some thought to multi-member constituencies, proportional representation, and seats reserved for women and minorities to make our elected assemblies less elitist and more representative of population groups.

VIII. EXERCISE OF PARLIAMENTARY PRIVILEGES

The Federal Constitution and State Constitutions confer on Parliament and the State Assemblies many privileges, powers and immunities including the power to punish for contempt. These special powers are necessary to safeguard members' freedom of speech, to ensure compliance by insiders and outsiders with the orders of the House and to protect members against threats and intimidation. A Standing Committee of each House enforces these privileges.

In traditional constitutional theory, the *existence* and *extent* of parliamentary privileges is open to judicial review but the *exercise* of known privileges is immune from judicial interference on the principle of separation of powers.

IX. FEDERAL PARLIAMENT'S POWER TO SCRUTINISE EMERGENCY ORDINANCES

During an emergency under Article 150(1), the Yang di-Pertuan Agong acquires parallel law-making powers: Article 150(2B). In constitutional theory, an Emergency Proclamation as well as an Emergency Ordinance must be laid before both Houses and can be annulled by the Houses under Article 150(3). In practice parliamentary intervention is rare. For example emergency laws promulgated after the 1964 and 1969 emergencies were annulled only 47 years later in 2011.

X. FEDERAL PARLIAMENT'S POWER TO APPROVE ELECTION COMMISSION'S PROPOSALS FOR NEW ELECTORAL BOUNDARIES

Under the Thirteenth Schedule, Part II, Paras 10-11 of the Federal Constitution, the Dewan Rakyat has the important and exclusive function of approving or rejecting the Election Commission's periodic proposals for re-delineation of federal and state electoral constituencies. State Assemblies except for Sabah and Sarawak have no say in the matter.

XI. FEDERAL PARLIAMENT'S DUTY TO SAFEGUARD MALAY RESERVE LANDS

Under Article 89(1)(b), any State Enactment that de-reserves a Malay Reservation must be approved by resolution of each House of the Federal Parliament.

XII. SPECIAL FUNCTIONS OF THE DEWAN NEGARA

Not being a popularly elected assembly the Dewan Negara has the special function of representing the 13 states of the Federation and giving representation to minorities and marginalised groups.

Under the Federal Constitution, Article 45(4), direct elections to the Senate can be provided for; the number of indirectly elected Senators can be increased from two to three; and the number of appointed members can be decreased. The constitutional dream of enhancing the position of the Dewan Negara has, sadly, not been given any thought.

XIII. OTHER ISSUES: TRAINING & PROFESSIONALISM OF MEMBERS

A. Training in parliamentary affairs

All MPs and members of Legislative Assemblies, especially the newly elected ones, must be required by Standing Orders to attend specially drafted courses to enhance their knowledge of the Federal and State Constitutions, the Interpretation Acts, the Standing Orders of the State Assembly and economic and social data relevant to their legislative work.

B. Institute of Parliamentary Affairs

In the manner of the National Institute of Public Administration (INTAN) and the Judicial and Legal Training Institute (ILKAP), an Institute of Parliamentary Affairs should be established to familiarise MPs and Assembly members with the Federal and State Constitutions, train them in the law and procedure of Parliament and hone their abilities in research, drafting and analysing legislative and monetary proposals. This can be done in one of two ways: First, a Department or Institute in each Assembly Secretariat could be established to provide the training. Alternatively, the federal and state governments could cooperate to set up a Joint Institute of Parliamentary Affairs to supply such training to all MPs and members of State Assemblies.

The Department or Institute should be manned by research staff and legislative assistants and should have library and office space.⁵⁵ It should have its own, independent legal counsel. The Department should conduct ongoing, short-term courses or lectures in all matters of concern to Members of the Legislative Assembly. If models are needed we can turn to functioning Institutes in India and Pakistan for guidance.⁵⁶

⁵⁵ Selangor has hired three full time researchers in the Secretariat.

⁵⁶ Faisal Karim Kundi, "Pakistan Institute for Parliamentary Services: A New Beginning", *The Parliamentarian*, 2011, Issue One CXII, p. 48.

XIV. NUMBER OF “PARLIAMENTARY DAYS”

The work of the Federal Parliament and of the State Assemblies has increased by leaps and bounds. But the number of “parliamentary days” has not.

There is a strong case for a drastic increase in the number of parliamentary sittings in one year. In 1981 the Dewan Rakyat sat for 78 days. In 1993 it sat for 66 days. The Dewan Negara sat for a mere 26 days in 1993. State Assemblies likewise sit for about thirty days. This can be contrasted with the United Kingdom where during the years 1959 to 1984, Parliament convened for 172 days per year on the average.

The small number of parliamentary sittings and the long periods of prorogation are owed partly to the constitutional provision in the Federal and State Constitutions that between one prorogation and the summoning for the next session, six months may elapse.⁵⁷

Add to this is the fact that the work of parliamentarians is not a full time job and the representatives of the people are allowed to have other professional commitments.

It is submitted that though MPs, Assemblymen and Assemblywomen need to have some time to attend to their constituents and to their businesses and professions, there is a strong case for an increase in the number of parliamentary days in order to attend to the multi-faceted tasks of a modern parliamentarian.

XV. SHORTAGE OF PARLIAMENTARY TIME

A modern Parliament performs so many functions that the non-availability of adequate time is a serious problem. A very large number of questions for the Question & Answer session cannot be taken up. A Member’s desire to discuss and debate Bills, introduce motions and propose legislation is frustrated a great deal of the time. The opposition is worse affected. To mitigate the problem a number of measures can be adopted.

A. Full-time job

To ease the pressure on parliamentary time, the work of MPs should be a full-time job. The arrangement of parliamentary sittings to enable members to pursue outside business and vocations conflicts with the idea of a modern and effective Parliament. A part-time federal Parliament, sitting for about 75 days a year⁵⁸ cannot possibly cope with an executive branch that works overtime throughout the year.

B. Parallel sittings

In order to attend to the increasing amount of business in the Dewan Rakyat and to find more time for motions and debates, the Speaker of the Dewan Rakyat recently introduced the practice of the House sitting in parallel sessions during the afternoon. Issues like emergency motions which cannot be taken up in the House due to shortage of time or non-compliance with Standing Orders could be heard in the parallel session. Likewise, for adjournment speeches. This brilliant

⁵⁷ At the federal level, refer to the Federal Constitution, Article 55(1). For Selangor refer to Article LXX(1).

⁵⁸ The number of sittings per year for the State Assemblies is much lesser.

reform helps accommodate some business that is presently rejected. This innovation needs to be examined and possibly to be emulated in State Assemblies.

C. Opposition time

Since November 2016 the Selangor Assembly has reserved part of the Assembly time as “opposition time”. During this time, the opposition has a guaranteed time to speak and engage with the Menteri Besar.

D. Time limits on speeches

At both federal and state levels, members’ who are long-winded or who wish to filibuster a Bill or a Motion are prevented from hogging attention by limiting their speeches to a fixed time or fixed number of words.

XVI. CODE OF CONDUCT

Like all professional bodies, each House of Parliament and State Assembly must have its own detailed Code of Conduct to be enforced by the Committee of Privileges.⁵⁹ The existing Standing Orders provide a good beginning point though more rules need to be developed to cover conflict of interest situations and racial, religious and gender slurs.

In the UK each House maintains a Register of MPs’ Private Interests that is open for public scrutiny. Legislative Assemblies may also wish to impose a Declaration of Assets requirement on their members.

XVII. SEPARATION OF POWERS BETWEEN PARLIAMENT & EXECUTIVE

As a separate and independent pillar of the Constitution, Parliament, its members and staff should not be subject to the administrative or financial control of the Public Services or the political executive. Repeated recommendations to secure independence of Parliament from the executive have not borne fruit. It is time to reenact the Parliamentary Services Act 1963 which provided for the Parliament of Malaysia to conduct its own administration, staffing and financing. The Act was repealed in 1992 for reasons not well known.

XVIII. TOOL KITS

The starting point for any reform is recognition that there are problems, and then to devise principles, institutions and methods to tackle them.

Along with the above proposals we need to develop a tool kit to measure the performance of the legislature. There are many recognised benchmarks for democratic legislatures. The Commonwealth Parliamentary Association, the World Bank Institute and the Inter-Parliamentary

⁵⁹ Hon N H Cole Simons, “Codes of Conduct for Members of Parliament – The Right Thing to Do”, *The Parliamentarian*, 2011, Issue One CXII, p. 40; “Rules for Parliamentarians – Recent Developments Concerning Codes of Conduct for Members”, *The Parliamentarian*, 2015, Issue Four XCVI, p. 282.

Union have established a number of parameters that could be used to measure the effectiveness of Parliament. For example, one could measure the amount of time spent by legislators to debate a Bill; the number of amendments proposed by backbenchers; how many amendments were passed; the ratio of private members' Bills to government Bills; percentage of Bills struck down by the courts; and percentage of laws amended subsequently by the legislature within three years.

There is no shortage of metrics to develop a framework for measuring the effectiveness of a legislative Assembly. What is needed is political will by the executive and the members of the Assembly.

XIX. RECOMMENDATIONS

A. In Relation to Legislation

The secrecy surrounding Bills should be lifted. At the pre-legislation stage, sponsoring departments should issue Green and White Papers for public scrutiny. To promote public participation, these Green and White Papers should be made available to all community-based organizations that register with the Secretariat. Such a system of registration should be encouraged. Draft Bills should be submitted to MPs and Assemblymen well in advance to enable them to seek independent opinion. Ad hoc Second Reading or Select Legislation Committees should be regularly appointed and these committees should encourage citizen participation. As an alternative to ad hoc Legislation Committees, Special Departmental Committees could be appointed and Bills committed to them for scrutiny. Backbenchers should be encouraged, and financially supported, to introduce Private Members' Bills.

Laws are journeys, not destinations. Law-making should include law reform. Parliament and State Assemblies should keep laws under review and establish Legislation Review or Law Reform Committees to study the working of laws and the need for reform. Subsidiary legislation should be kept under control through (i) laying procedures and (ii) a Scrutiny Committee on Subsidiary Legislation. In line with Article 45(4) the Dewan Negara's composition should be strengthened. It should assert its role as a second revising chamber. As with the UK's House of Lords the Dewan Negara should be allowed to sit concurrently with the Dewan Rakyat and to introduce some legislation.

B. In Relation to Enforcing Executive Responsibility

Attendance of the PM, Ministers, MB and EXCO members in the House should be improved. Data should be made available to the public. One day a week, the PM/MB should personally face the House during question time. Questions not answered orally must be given written answers before the end of the session. As in Selangor, the House should provide for "Opposition Time" during which the opposition has the floor. Standing Orders about how to introduce a vote of no confidence should be clarified.

More Select/Special (Investigation) Committees on matters of critical importance to the citizens should be appointed. The example of Selangor can be studied. The Reports of these Committees should be laid before the House and made available on websites. The MB should be duty bound as in Selangor to submit his response to all reports approved by the House. There should be live

telecast of parliamentary proceedings as in Selangor. On the lines of UK's "Parliamentary Commissioner of Administration", the elected Assembly could appoint an Ombudsman to investigate citizens' grievances and report to the Assembly. A Freedom of Information Act should be enacted to improve transparency. Selangor provides a precedent.

C. In Relation to Control over Finances

Besides scrutinizing expenditure through the Public Accounts Committee, Parliament should set up a committee to assert parliamentary control over financial policy and estimates.

The PAC should be headed by a member of the Opposition. The PAC's findings should be given some teeth and the government should be obliged to respond to the PAC's findings.

D. In Relation to the Constituency Function

Members should be given financial assistance to set up Service Centers in their constituencies. Such assistance should be available to all members irrespective of party affiliation.

In line with developed Parliaments, each MP should be assigned research staff, legislative assistants, office space and support structures.

E. Training and Professionalism

An Institute of Parliamentary Affairs with adequate staff should be established to provide training and enhance the professionalism of MPs and assemblymen. If we wish to have a world class Parliament, we have to man it with world class parliamentarians.

F. Representing the Electorate

To improve Parliament's representative nature, the electoral system should be reformed to improve female and minority representation. Multi-member constituencies, proportional representation and reservation of some seats for women and minorities should be given consideration.

G. Other Reforms

The number of parliamentary sittings per year must be increased. Parallel sittings as in the Dewan Rakyat should be emulated. A detailed Code of Conduct to supplement the Standing Orders should be evolved. The institution of Parliament should be freed from administrative and financial control by the executive.

The starting point for any reform is recognition that there are problems. Tool kits, metrics or measures should be evolved to measure the performance of legislative assemblies.

XX. CONCLUSION

The decline of the powers of Parliament is a world-wide phenomenon due to a host of factors. The idea that Parliament reflects the will of the people has been undermined by the rise of hegemonic political parties that determine the nation's agenda and expect unquestioning obedience from party members. The legislative role of enacting, amending and repealing laws has been captured by executive technocrats. Taxation likewise has come under the control of the

executive. Cabinet government has been transformed into prime ministerial government. The role and function of government has expanded phenomenally. Forces external to parliament like corporate groups, religious groups, and off-shore and international bodies exert decisive influence on policy formulation. The internal timetable of Parliament is deliberately revised to favour government business. Secrecy in government is pervasive.

The result is that parliament plays a largely reactive role. The government initiates laws and policies and the role of parliament appears to be to support the cabinet in all its decisions and policies and to legitimate all legislative proposals.

But not all is lost. There are some functions in the performance of which our parliament meets high standards. Constituency work is one of them. The time devoted to question time is generous compared to many developed democracies.⁶⁰

Legislative assemblies in Malaysia should augment their strengths and mitigate their weaknesses. Some reforms suggested above are purely internal. Others require executive cooperation.

⁶⁰ In Selangor, for example, with 56 Assemblymen the question-time is 90 minutes. In the UK with 650 MPs, question time is sixty minutes.