

Reforming Senatorial Appointments in the Dewan Negara

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Abstract

Despite being created with the purpose of ensuring oversight upon the popularly elected Dewan Rakyat, the Dewan Negara has been reduced to a mere rubber stamp over the decades. In order to reform the upper house and return it to a position of potency, this paper lays out several recommendations to improve upon the current system of senatorial appointment. This paper employs a legal doctrinal research methodology drawing from primary and secondary sources from a variety of legal jurisdictions, including a comparative legal analysis with the Republic of Ireland. First, the appointments made at the state level (which are currently done by the State Legislative Assemblies) are examined, and a system of direct elections is proposed as an alternative. Next, the paper focuses on the appointments made by the Yang di-Pertuan Agong (King) - which are currently done upon the advice of the Prime Minister and the Cabinet of Ministers - and explains why these should be done using the Irish specialist vocational panel system instead.

Keywords: Dewan Negara, Senate, elections, political reform, federalism.

1. Introduction

The Malaysian Parliament is a relic of the nation's colonial past, modelled after the bicameral Westminsterian legislature both in structure and powers. According to the constitution, Parliament (which is vested with the legislative authority of the federation) consists of the monarch and two houses: the Dewan Rakyat (House of Representatives) and Dewan Negara (Senate).¹ The latter is the upper house of Parliament, and was created with the intention of preserving the rights and interests of the States from being overwhelmed by the federal legislature. As Mehdi writes, '[u]pper houses in federal democracies have come to serve the crucial purpose of guarding against majoritarian rule'.² The Dewan Negara was also tasked with the duty of revising ill-considered populist legislation passed by

¹ Federal Constitution of Malaysia, Article 44.

² Tahir Mehdi, 'Case for direct Senate elections' (*Dawn*, 13 March 2018) <<https://www.dawn.com/news/1394959>> accessed 11 November 2018.

the elected Dewan Rakyat. However 61 years after independence, the Dewan Negara today holds an insignificant role in the nation's legislative process - primarily due to constitutional amendments which have acted 'contrary to the spirit of the original constitution'.³ The ruling government has, by appointing sympathetic members⁴ over the years, undermined the effectiveness of the Dewan Negara as a check on its measures, and the effect is glaring: Bills passed by the lower house are rarely amended and its debates have little impact on the larger political scene.⁵

This state of affairs is unfortunate because the Dewan Negara has the capacity to become an important safeguard for the protection of rule of law in Malaysia. The rule of law is a legal doctrine which embodies the supremacy of the law over people, and necessarily excludes arbitrariness or wide discretionary powers of the government.⁶ The Malaysian executive, which must also hold a majority in the Dewan Rakyat by virtue of Malaysia's parliamentary system, requires checks placed upon it to ensure the spirit of rule of law is not trampled upon, and currently the Dewan Negara is too domesticated to have this effect. Although the Dewan Negara does not have the power to veto Bills passed by the Dewan Rakyat, their criticisms hold important political capital. As the Bryce Commission noted, one of the main functions of an upper house is '[t]he interposition of so much delay (and no more) in the passing of a Bill into law as may be needed to enable the opinion of the nation to be adequately expressed upon it.'⁷ By amending a Bill or even delaying one, there will be more political pressure upon the Dewan Rakyat to take those considerations into account. This is further strengthened by the fact that the process of overruling the upper house is slower and more arduous than simply compromising with them,⁸ because Bills rejected by the Dewan Negara can only be tabled again in the lower house after a year.⁹ This would compel the Dewan Rakyat to accept suggested amendments instead of pressing forward with a controversial Bill. In short, by taking a more active role in the legislative process the Dewan Negara can effectively guard against abuse of power by the Dewan Rakyat.

³ Wu Min Aun & RH Hickling, *Hickling's Malaysian Public Law* (Longman 2003) 26-27.

⁴ Up until the Barisan Nasional (BN) government lost in the 14th General Elections in 2018, the Dewan Negara was predominantly filled with BN-aligned senators. Opposition parties made inroads in states like Kelantan and Penang when they started winning the majority of State Legislative Assembly seats (and thereby gained the power to appoint senators at the state level), but even as recently as the 13th Parliament (which was dissolved on the 7th of April, 2018) the Dewan Negara was overwhelmingly filled with BN affiliated senators. It was only when the Pakatan Harapan government came into power that non-BN senators were appointed by the monarch, see MohdAzroneSarabatin, 'Dewan Negara dikuasaipembangakang, sukar lulus RUU' *BeritaHarian* (30 July 2018) <<https://www.bharian.com.my/rencana/komentar/2018/07/455830/dewan-negara-dikuasai-pembangakang-sukar-lulus-ruu>> accessed 5 June 2019.

⁵ Andrew Harding, *The Constitution of Malaysia: A Contextual Analysis* (Hart 2012) 109.

⁶ Ahmad Masum, 'The Rule of Law under the Malaysian Federal Constitution' [2009] 6 MLJ c, civ.

⁷ Bryce Commission, *Report of the Conference on the Reform of the Second Chamber* (Cmd 9038, 1918) para 6.

⁸ Robert Connor, 'House of Lords: Relevant or Relic? An Analysis of the Political Relevance of Legislature Upper Houses' (2013) 14 *The Review: A Journal of Undergraduate Student Research* 12, 14.

⁹ Federal Constitution of Malaysia, Article 68(2).

In order to turn the upper house into an effective oversight chamber, the root of the problem must be tackled: the members sitting in the hall themselves. Thus, this paper seeks to establish that a reformed system of senatorial appointments is vital to enhance the rule of law in Malaysia.

Part I examines the potential in employing direct elections for senators, which is currently provided for (but remains unused) within the Federal Constitution. It is proposed that this would help strengthen the spirit of federalism in Malaysia and also foster greater accountability among senators to the people. Part II then looks at senatorial appointments made by the Yang di-Pertuan Agong (the King, henceforth referred to as the YDPA) upon the advice of the Prime Minister (PM) and the Cabinet - what this Article refers to as 'federal appointments' - and recommends that the Irish system of senatorial appointment from vocational panels be considered and applied to the Malaysian context.

2. Part I: Direct Election of 'State Senators'

According to the Seventh Schedule of the Federal Constitution, 26¹⁰ of the 70 senators are appointed by the State Legislative Assemblies – two for each state.¹¹ The intention of the framers of the constitution was that these state-elected members would advocate for their respective home state at the federal level, and as such there were originally more of them than 'federally appointed' senators. However subsequent amendments which increased appointments made by the YDPA from 16 to a whopping 44 today have greatly diminished their relative influence. Reform is desperately needed, and thankfully the constitution itself contains a provision which may be of assistance: Article 45(4), which reads as follows:

Parliament may by law -

- (a) increase to three the number of members to be elected for each State;
- (b) provide that the members to be elected for each State shall be so elected by the direct vote of the electors of that State.¹²

It is important to note that two drafters of the constitution, Sir William McKell and Justice Abdul Hamid disagreed wholeheartedly with the conception of a purely appointed senate. They believed that both Houses of Parliament should be elected by a full adult franchise, commenting that a Senate not created in such a manner 'does not conform to a system of

¹⁰ According to Article 45(1)(b) of the Federal Constitution, the remaining 44 senators are to be appointed by the YDPA, see below in Part II.

¹¹ Federal Constitution of Malaysia, Seventh Schedule.

¹² Federal Constitution of Malaysia, Article 45(4).

parliamentary democracy, and is not in keeping with the aspirations of a people whose desire it is to enjoy self-government in the real sense and democracy in its purest form'.¹³

It is trite to say that elected representatives will be keener to carry out the will of their electors because they derive their legitimacy from the people; the people are the source of all political power after all. Micozzi uses a principal-agent model to illustrate this point: representatives have an agency relationship with their constituents, and because the future of the representatives' legitimacy lies in the constituents' hands, they have the power of rewarding (or punishing) past behaviour during each election.¹⁴ Therefore, if senators were elected by the people, failure to perform adequately would make them unlikely to retain their position for long. The United States of America, which conducts senatorial elections, is a good example of this phenomenon: during the 2018 elections in the strongly Republican state of Texas, Democratic candidate Beto O'Rourke lost to Republican Ted Cruz by a mere 2.6%¹⁵ - a significant number of Texans were clearly dissatisfied with Cruz's performance and opted for a better option instead.

If the people are tasked with electing senators, they will be responsible for ensuring that they act in accordance with the interests of their state and its people. Shad Faruqi commented that the so-called 'state senators' do not always act as delegates of their states, choosing to follow party affiliations instead.¹⁶ This was seen in 2005, when women senators who vehemently opposed unjust amendments to the Islamic Family Law Bill were ultimately compelled to lend their support; and in 2015, when the National Security Council Bill was extensively discussed by the upper house yet accepted by them without any amendments.¹⁷ If the senators were accountable to the electorate instead, they would be more likely to suggest amendments or even delay controversial Bills.

Additionally, this proposal to increase the number of state senators, coupled with their direct election, would return the spirit of federalism to Parliament and allow for states to safeguard their interests more effectively. As stated above, the original intention of the

¹³ Federation of Malaya Constitutional Commission, *Report of the Federation of Malaya Constitutional Commission, 1957* (HMSO Colonial No 330, 1957) (Note by Sir William McKell and Mr Justice Abdul Hamid on Paragraphs 61 and 62).

¹⁴ Juan Pablo Micozzi, 'Does Electoral Accountability Make a Difference? Direct Elections, Career Ambition, and Legislative Performance in the Argentine Senate' (2012) 75(1) *J Politics* 137, 138.

¹⁵ 'Senate Election Results: Republicans Keep Majority' *The New York Times* (New York, 12 November 2018) <<https://www.nytimes.com/interactive/2018/11/06/us/elections/results-senate-elections.html>> accessed 13 November 2018

¹⁶ Shad Saleem Faruqi, 'Reflecting on the Law: Enhancing Senate's power' *The Star Online* (11 July 2012) <<https://www.thestar.com.my/opinion/columnists/reflecting-on-the-law/2012/07/11/enhancing-senates-power>> accessed 13 November 2018.

¹⁷ Shad Saleem Faruqi, 'Reflecting on the Law: Reflecting on Dewan Negara's Role' *The Star Online* (28 April 2016) <<https://www.thestar.com.my/opinion/columnists/reflecting-on-the-law/2016/04/28/restoring-constitutional-scheme-reflecting-on-dewan-negaras-role-people-would-like-to-see-the-dewan>> accessed 13 November 2018.

Constitution for the states to retain a degree of influence in federal policymaking by having a majority in the Dewan Negara has been eroded by subsequent amendments. As stated by former Lord President of the Federal Court Tun Mohamed Suffian, this is 'contrary to the spirit of the original constitution which established the Dewan Negara specially as a body to protect in the federal Parliament, state interests against federal encroachments'.¹⁸ The validity of these amendments was challenged in *Phang Chin Hock v PP*,¹⁹ but nevertheless was upheld by the Federal Court.²⁰ Thus the best way to return power to the states is to proportionally increase the number of state senators, and this can be done by invoking Article 45(4)(a) and allocating one extra seat to each state, bringing the total number of state senators to 39. As suggested below, this will be equal to the new reformed number of federally-appointed senators, thus creating a balance of power in the Dewan Negara and ensuring the voices of the states do not go unheard.

As for the most suitable electoral system, a single transferable vote (STV) system is recommended over the traditional first-past-the-post (FPTP) system. To clarify, STV requires that a candidate must, in order to be elected, secure enough votes equal to or exceeding a set quota. The quota is calculated by 'dividing the total number of votes cast by one more than the number of candidates to be elected, and adding one to the result.'²¹ Voters will be asked to rank candidates in order of preference, and candidates with more votes than the minimum required by the quota will have their surplus votes distributed according to their voters' ranking of preferences, until enough senators are elected.²² FPTP on the other hand is far simpler, where the single candidate who gets the most votes is declared victorious.²³

One of the main reasons STV is recommended over FPTP that it has the ability to eliminate the need for strategic voting that often occurs with the latter. An example to illustrate this fundamental flaw of FPTP would be the 2016 United States presidential election, where the polls indicated that either Donald Trump or Hillary Clinton would likely emerge victorious even though these two leading candidates were strongly detested by the general public in the United States.²⁴ This is because most of the registered voters were more concerned about whether their votes were going to go against the candidate they abhor, than for their ideal candidate. In such a scenario, it is highly unlikely that voters will cast their vote to

¹⁸ Wu Min Aun and RH Hickling, *Hickling's Malaysian Public Law* (Longman 2003) 26-27.

¹⁹[1980] 1 MLJ 70.

²⁰ However, in light of recent Federal Court decisions which have affirmed the basic structure doctrine as being applicable to the Malaysian Constitution this view may no longer be valid, see *Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals* [2018] 1 MLJ 545.

²¹ 'Electing Australia's Senators' (*Parliament of Australia*) <<https://www.aph.gov.au/Senate/briefs/brief01>> accessed 13 November 2018.

²² *ibid.*

²³ 'More about FPP' (*Department of Internal Affairs, New Zealand*) <https://www.dia.govt.nz/diawebsite.nsf/wpg_URL/Resource-material-STV-Information-More-about-FPP?OpenDocument> accessed 5 June 2019.

²⁴ Ed O'Brien and Nadav Klein, 'Why Trump and Clinton Are America's Most Disliked Presidential Candidates' *Fortune* (7 July 2016) <<http://fortune.com/2016/07/06/donald-trump-hillary-clinton-2>> accessed 9 April 2019.

third-party candidates as they fear that this might 'waste' their vote. This inevitably puts independent candidates at a disadvantage with no realistic chance of winning as voters would rather vote with the aim to prevent the other candidate from winning, than to vote for their preferred candidate.

With STV, voters would be able to cast votes that reflect their true preferences. This would not only grant voters the democratic choice they deserve, it would also provide independent candidates a fair chance to win. The possibility of forming an upper house in Parliament that incorporates independent candidates promotes more balanced discussions as there would be an eclectic blend of opinions. Subsequently, Parliament would be able to enact better laws. Furthermore, STV ensures voters that their vote has had an influence in the election, one way or another. In other words, by bringing STV into play, members of the electorate would be able to identify with a senator that they personally assisted to elect.

Thus, the proposed structure for a system of senatorial elections is as follows:

- (i) As provided for under Article 120, an entire state shall form a single constituency and each voter shall have as many votes as there are seats to be filled.²⁵
- (ii) The number of seats in the Dewan Negara allocated to each state shall be increased from two to three.²⁶ Increasing the proportion of elected senators to appointed ones will achieve a more balanced body and strengthen its democratic legitimacy.
- (iii) Instead of the first past the post system, proportional representation should be implemented, because if the former was used all seats could be won by candidates from the same party. Implementing proportional representation would ensure a diverse range of senators and allow small party and independent candidates to be elected. As was recommended for the panel elections above, a single transferable vote system is recommended.
- (iv) No other powers of the Dewan Negara shall be amended, especially those regarding their role in the legislative process.²⁷ It is important to affirm the superiority of the Dewan Rakyat as a wholly elected body in passing Bills to prevent deadlocks between both houses in the event of an inability to reconcile disagreements.

3. Part II: Appointment from Specialist Vocational Panels

As stated above, this nation is faced with the unfortunate reality that the Dewan Negara is practically a ceremonial house that rubber-stamps any legislation passed by the Dewan Rakyat.²⁸ One reason is because Article 45(1)²⁹ empowers the YDPA to appoint 44 out of 70

²⁵ Federal Constitution of Malaysia, Article 120(a).

²⁶ Federal Constitution of Malaysia, Article 45(4)(a).

²⁷ Federal Constitution of Malaysia, Articles 66(3) and 68.

²⁸ Ivan Oh, 'Total Revamp of Dewan Negara needed' *Malaysia Kini*(Malaysia, 28 May 2018) <<https://www.malaysiakini.com/letters/427210>> accessed 9 November 2018.

²⁹ Federal Constitution of Malaysia, Article 45(1).

senators and according to Article 40(1A),³⁰ the YDPA is bound by the advice of the PM. This would mean that the PM has complete control over the appointment of 63% of senators.

Having a majority of senators leaning towards the ruling party undeniably creates a house of yes-people that agrees to every legislation passed by the Dewan Rakyat. This was seen when 15 Bills were once passed in the Dewan Negara in just 2 days.³¹ In contrast, if the majority of senators are from the opposition party, the passing of a legislation may be challenging for the Dewan Rakyat. This is because a legislation passed by the lower house may be rejected by the Dewan Negara just for the sake of opposing due to party instructions, regardless of whether the legislation is good or bad or if it reflects the voice of the people.

Such a scenario was recently played out when the senators decided to reject the Anti-Fake News Act repeal. It is said that with this repeal bill, the freedom of expression and the constitutional rights enshrined in our Federal Constitution would be upheld.³² Nevertheless, it was rejected by the Dewan Negara, leaving many arguing that the rejection was not made with sincerity but coloured with political motivation.³³ As the rule of law should be recognised as having the potential to ensure the protection of individual rights,³⁴ such a rejection is seen as diluting the doctrine. Hence, there is a need for reform to create a proper balance within the chamber to ensure efficiency and create checks upon the government of the day.

According to the Federal Constitution, the appointed senators are supposed to represent the various sections of the Malaysian society such as persons who have rendered distinguished public service, profession, racial minorities and indigenous persons.³⁵ But the discussion above reveals that the spirit of the original Constitution has not been followed in today's context. The composition of the Dewan Negara is not supposed to be dominated with supporters of the PM to ease the passage of approval for a bill passed by the Dewan Rakyat. Thus, it is submitted that Article 45(1)³⁶ should be amended to ensure that federal appointments are more conducive to democratic legitimacy. As these are effectively done upon the wishes of the PM, it is suggested that such appointments should be removed entirely as there is room for political motivations and bias. Instead, a new system of appointment could be implemented where senators are appointed according to nominations made from specially constituted vocational panels.

³⁰ Federal Constitution of Malaysia, Article 40(1A).

³¹ Gan Pei Ling, 'Strengthening Dewan Negara' (*The Nut Graph*, 9 June 2010) <<http://www.thenutgraph.com/strengthening-dewan-negara/>> accessed 10 November 2018.

³² 'Yoursay: Don't expect BN senators to repeal law they helped bulldoze through' (*Malaysia Kini*, 14 September 2018) <<https://www.malaysiakini.com/news/443050>> accessed 11 November 2018.

³³ *ibid.*

³⁴ Ahmad Masum, 'The Rule of Law under the Malaysian Federal Constitution' [2009] 6 MLJ 100.

³⁵ *ibid.*, Article 45(2).

³⁶ Federal Constitution of Malaysia, Article 45(1).

In order to understand how such a system might be formed and how it would work, a similar system currently in place in the Republic of Ireland should be analysed, where 43 senators are elected to the upper house of the Irish legislature (Seanad Éireann) from 5 vocational panels.³⁷

Article 14 of the Constitution of Ireland provides a list of the 5 panels:

- (i) National Language and Culture, Literature, Art, Education and such professional interests as may be defined by law³⁸ for the purpose of this panel;
- (ii) Agriculture and allied interests, and Fisheries;
- (iii) Labour, whether organised or unorganised;
- (iv) Industry and Commerce, including banking, finance, accountancy, engineering and architecture;
- (v) Public Administration and social services, including voluntary social activities.³⁹

Further details on the creation of the panels are laid out in the Seanad Electoral (Panel Members) Act, 1947 (henceforth referred to as the 1947 Act). The process of appointing candidates to sit on the panels can be divided into two stages: nomination and election – each shall be explained in turn.

Nominations may be made either by members of the Oireachtas⁴⁰ or by registered nominating bodies which represent the different vocational groups. In order to qualify as a nominating body, the body must be primarily concerned with and representative of the interests and services relevant to the particular panel, and cannot be principally concerned with profit or composed mainly of persons under government employment.⁴¹ A Seanad Returning Officer is tasked with maintaining a register of these bodies, which is revised annually. Once admitted to the list, each nominating body is entitled to nominate a fixed number of candidates according to a detailed plan provided for under section 26 of the 1947 Act:

- (1) At a Seanad general election, a nominating body which is registered in the register of nominating bodies in respect of a particular panel shall be entitled to propose for nomination to the panel such number of persons as is provided in that behalf by this section.

³⁷ Constitution of Ireland, Article 18.

³⁸ According to section 3(2) of the Seanad Electoral (Panel Members) Act 1947, the professional interests which fall under this panel are law and medicine (including surgery, dentistry, veterinary medicine and pharmaceutical chemistry).

³⁹ Constitution of Ireland, Article 14.7.1°.

⁴⁰ The bicameral Irish legislature, which consists of the DáilÉireann (lower house) and the Seanad. For the purposes of this Article however, this method shall not be considered as it goes against the aim of the reforms to enhance the separation of powers between different political institutions.

⁴¹ Seanad Electoral (Panel Members) Act 1947, section 8(2).

- (2) Where one nominating body, and no more, is entitled to propose for nomination to a particular panel, that body shall be entitled to so propose -
 - (a) in the case of the cultural and educational panel - three persons,
 - (b) in the case of the agricultural panel or the labour panel - eleven persons,
 - (c) in the case of the industrial and commercial panel - nine persons,
 - (d) in the case of the administrative panel - five persons.
- (3) Where two nominating bodies, and no more, are entitled to propose for nomination to a particular panel, each shall be entitled to propose for nomination to the panel -
 - (a) in the case of the cultural and educational panel - two persons,
 - (b) in the case of the agricultural panel or the labour panel - six persons,
 - (c) in the case of the industrial and commercial panel - five persons,
 - (d) in the case of the administrative panel - three persons.
- (4) Where three or more nominating bodies are entitled to propose for nomination to a particular panel, each shall be entitled to propose for nomination to the panel -
 - (a) if the number obtained by dividing the appropriate number by the number of the nominating bodies is two or less - two persons, and
 - (b) if the number so obtained is more than two - the number so obtained of persons if it is a whole number or, if it is not a whole number, the next higher whole number of persons.
- (5) in subsection (4) of this section, the expression “the appropriate number” means -
 - (a) in the case of the cultural and educational panel- ten,
 - (b) in the case of the agricultural panel or the labour panel - eighteen,
 - (c) in the case of the industrial and commercial panel - sixteen,
 - (d) in the case of the administrative panel - twelve.

(For example, according to the 2018 revision of the Register there were 35 nominating bodies registered to propose nominations to the Cultural and Educational Panel,⁴² therefore according to section 26 each body would be entitled to nominate two persons - see subsection 4(a) and 5(a)).

Of these nominees, a certain number of members from each panel must be elected to the Seanad in accordance with section 52 of the 1947 Act. The electorate for these elections consists of the members of the incoming Dáil, the outgoing Seanad, and the members of every county council or borough.⁴³ The elections use a single transferable vote system.⁴⁴

⁴² Seanad Éireann, *Register of Nominating Bodies (2018)* <https://data.oireachtas.ie/ie/oireachtas/electoralProcess/nominatingBodies/seanad/2018/2018-03-21_register-of-nominating-bodies-2018_en.pdf> accessed 22 February 2019.

⁴³ Seanad Electoral (Panel Members) Act 1947, section 44.

The benefits of implementing such a system in Malaysia are self-evident. Having qualified figures and members in the Dewan Negara would mean that a more diverse set of representation is in place. These senators would have in-depth knowledge of the issues and interests of their respective fields, hence allowing for more productive debates and wiser decisions in solving questions of public importance facing the country. The wider range of expert opinions would make it more likely that legislation will be passed only after careful and mature consideration.

This system will also control the pool of candidates from which members may be appointed. Under status quo the PM may elect any person so long as they are, in the opinion of the YDPA,⁴⁵ persons who 'have rendered distinguished public service or have achieved distinction in the professions, commerce, industry, agriculture, cultural activities or social service'.⁴⁶ The key issue here is that the phrase 'in his opinion' is subjective and therefore would not be subject to judicial review unless it constitutes an unreasonable exercise of discretion.⁴⁷ Hence the discretion accorded to the PM is wide and would in theory allow the appointment of any person who has a reasonable degree of expertise. In contrast, if the panel system were put in place the overall quality of candidates would necessarily increase, as the nominating bodies would put forth their best candidates without being swayed by other irrelevant considerations (political patronage, partisanship etc.)

The Malaysian version of a panel system could be largely based upon the Irish structure, with some localised modifications. Firstly, the fields covered by the panels could be the same: culture and education, agriculture, labour, industrial and commercial, and social services. This shall remain similar to the grounds for appointment under Article 45(2) and would therefore cover all the necessary and relevant fields for consideration. The nominating bodies would, like in Ireland, be bodies which are primarily concerned with each field: for example, the Malaysian Medical Council and Bar Council would be eligible to nominate candidates to the culture and education panel, and the Malaysian Trades Union Congress would nominate to the labour panel.

However, one additional field would be important given Malaysia's multicultural society: a panel for minority race and aborigine representation. This is because it is challenging for these groups to elect a person of their own community to represent them in the Dewan

⁴⁴ *ibid*, section 2 of the Second Schedule.

⁴⁵ In effect the opinion of the PM as the YDPA is bound to heed their advice as provided for under art 40(1A) of the Federal Constitution.

⁴⁶ Federal Constitution of Malaysia, Article 45(2).

⁴⁷ See *Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 MLJ 135, 148.

Rakyat; the fact that the first Orang Asli Member of Parliament was only elected in 2019⁴⁸ is proof of this. Therefore, this particular panel should be focused upon electing individuals who are actively involved in advancing minority rights, thereby acting as a bridge for inter-ethnic political cooperation. By ensuring that these racial minorities and aborigines are not excluded from the process of governing, the Dewan Negara would be able to safeguard their interests and establish that the Malaysian Parliament stands as the absolute symbol of democracy in Malaysia.

The Dewan Rakyat would be placed in charge of voting for senators from the candidates nominated to the panels using an STV system as well (the benefits of which were explained above). Allowing MPs to vote may at first seem like an opportunity for bias, but one must bear in mind the fact that the candidates are first selected by nominating bodies, which would ensure that only the best of their respective fields would be up for consideration. Furthermore, the fact that a proportional representation system is used (rather than a first-past-the-post system) allows for greater diversity in opinion, further reducing the influence of irrelevant considerations.

With that said however, the Irish system is not without its criticisms, primarily the argument that the Seanad is merely 'a place for grooming new Dáil candidates and as a political resting place for defeated deputies.'⁴⁹ Despite the intended purpose of serving as a chamber for non-political figures, the nomination and selection process today has become undeniably partisan. As Coakley notes on the 24th Seanad election in 2011, most candidates put forth by the nominating bodies had well-established political careers, and those who did not were largely aspiring party politicians.⁵⁰ This has been a consistent pattern throughout Ireland's history, and threatens to undermine the very purpose of this suggested reform.

It cannot be definitively said that the same situation will not arise in Malaysia as well if this system is established. However, it is suggested that the alternative (i.e. the status quo) is clearly the worse option as the PM (and the Cabinet) are far more likely to select candidates whose views align with their interests. The inclusion of external parties in the decision-making process - who have a vested interest in ensuring the best of their own are represented in the Dewan Negara due to their organisations' economic pursuits and social justice aims, for instance - will promote the selection of suitable candidates; and even if these persons happen to also be politically affiliated it is unlikely that they would also be

⁴⁸ 'Official: BN's Ramli is first Orang Asli Member of Parliament' *New Straits Times* (26 January 2019) <<https://www.nst.com.my/news/nation/2019/01/454769/official-bns-ramli-first-orang-asli-member-parliament>> accessed 5 April 2019.

⁴⁹ Maurice Manning, 'The Senate election' in Howard R Penniman (ed), *Ireland at the Polls: The Dáil Elections of 1977* (American Enterprise Institute for Public Policy Research 1978) 167.

⁵⁰ John Coakley, 'The Final Seanad Election?' in Michael Gallagher and Michael Marsh (eds), *How Ireland Voted 2011: The Full Story of Ireland's Earthquake Election* (Palgrave Macmillan UK 2011) 247, 258-9.

underqualified or inept. The partisanship of candidates under this method would only be incidental, rather than determinative.

4. Conclusion

In conclusion, an amended version of Article 45(1), which clearly lays out the suggested system, is as follows:

The Senate shall consist of elected and appointed members as follows:

- (a) three members for each State shall be elected in accordance with the Seventh Schedule; and
- (b) thirty-nine members shall be elected from six vocational panels of candidates in such a way as provided under federal law, as follows:
 - (i) seven members from an Education and Culture Panel;
 - (ii) six members from an Agricultural Panel;
 - (iii) six members from a Labour Panel;
 - (iv) six members from an Industrial and Commercial Panel;
 - (v) seven members from a Social Services Panel;
 - (vi) seven members from a Racial Minorities and Aborigines Panel.

Further amendments to the Seventh Schedule shall reflect the change from appointments made by the State Legislative Assemblies to direct election.

Since independence, it is undeniable that the rule of law has gone through different phases and the analysis above reveals that post-1957 amendments have not only weakened the rule of law, but they have also affected the doctrine of separation of powers. These changes have empowered the government of the day to encroach into the domain of the legislature by allowing Parliament to be dominated by its supporters. Such dominance arguably erodes the law-making capabilities of the Parliament and causes the check-and-balance mechanism supposedly in place to lose its efficiency. Thus, the suggested amendments would be able to inculcate the spirit of the rule of law by deterring the possibility of abuse of power. With a more diverse composition, the Dewan Negara will finally be able to act as an effective check on the government of the day.

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