

# Measures to Mitigate Covid-19 in the *Dewan Rakyat* (House of Representatives) of Malaysia: Implications to Parliamentary Privileges

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## Abstract

The surge of Covid-19 cases all around the world has had its impact on how every institution discharge its functions, including the legislature. Governments, under the pretext of containing the spread of the virus, have paralysed parliament and incapacitated it from performing its duties, particularly the oversight function. The pandemic, thus, has presented trying times for the legislature to withhold its parliamentary privileges that serve as a bulwark for parliament to perform its duties. This article explores the extent to which the standard operating procedures (SOP) for Covid-19 in the *Dewan Rakyat* (House of Representatives) of Malaysia should be permitted in accordance with the Federal Constitution of Malaysia on parliamentary procedure. As the House shall regulate its procedure, measures to mitigate Covid-19 in the House's proceedings must not be implemented contrary to the parliamentary procedure. It is also the aim of this article to critically examine measures to mitigate Covid-19 are justifiable and not in violation of parliamentary privileges. Despite attempts to restrict parliament in many countries, legislatures such as in Canada, Australia and Brazil have demonstrated their ability to adapt and move progressively to minimise disruptions that the pandemic might cause to parliament. Such a willingness to depart from the conventional parliamentary practice and procedures shows the flexibility and responsiveness of legislative institutions to remain relevant and efficient in current situations. Taken together, legislatures' responses in times of Covid-19 offer an interesting impression into parliamentary privileges while also raise an important question of the role of parliament in representing people and checking the government actions.

**Keywords:** Dewan Rakyat, Parliamentary Privileges, Procedure, Separation of Powers, Standing Orders

## Introduction

The devastation caused by the pandemic Covid-19 since it emerged in late 2019 has impacted how every institution discharges its functions, including the legislature. The scale of the damages is unprecedented to the extent that public health measure has always overridden the legislature's principal duty in checking the government into account. The executive, using Covid-19, holds all the aces over the legislative in carrying their action without adequate check and balance from the legislative. The pandemic, thus, has presented unexpected challenges for the legislature to perform its duties while at the same time ensuring the government is successful in managing the disease. Despite Jean Blondel's term 'viscosity' on the legislature's role in slowing down the realisation of executive's action and proposal,<sup>1</sup> in times of emergency, the balance must be struck to allow necessary measures taken.

The separation of powers concept between the three branches of government, the executive, the legislative, and the judiciary, marks a salient feature of legislative institutions to function effectively. The feature is demonstrated in the power of parliament to regulate its procedure, which is non justiciable by any courts of law. The power to regulate its proceedings without possible interference from the judiciary is essential for parliament to carry out its functions, although a Westminster parliamentary system means that there is a fine relationship with the executive. As the executive is also part of the legislative, the separation between these two branches seems vague. Still, as noted in the Commonwealth Latimer House Principles on the Separation of Powers, 'each branch of government to restrain the exercise of authority to its own sphere to avoid encroaching on the legitimate discharge of constitutional functions by the other branches.'<sup>2</sup> Article 62 of the Federal Constitution of Malaysia provides Parliament with the power to regulate its procedure. The non justiciability of parliamentary proceedings in any courts is provided in the preceding Article 63, hence the parliamentary privileges are protected under the Constitution.

This paper analyses the impact of the change of rules and procedures in the *Dewan Rakyat* (House of Representatives) of Malaysia on parliamentary privileges. Measures to mitigate Covid-19 have been taken to prevent the spread of the virus while allowing parliament sittings to take place. It is imperative for such measures to be implemented since the Parliament

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<sup>1</sup> Philip Norton, "Parliamentary reform," *Revue Française de Civilisation Britannique. French Journal of British Studies* 11, no. XI-3 (2002): 18-30, <https://doi.org/10.4000/rfcb.696>

<sup>2</sup> Commonwealth, *The Commonwealth Latimer House Principles Practitioner's Handbook* (London: Commonwealth Secretariat, 2017).

of Malaysia are still holding to the traditional method of physical meeting with no remote participation has been permitted, citing the country's legal scheme preventing so. Therefore, the paper considers the implications of the rules and procedures changes towards the right to attend parliamentarians to parliamentary sittings and the impact of member seating changes in the chamber against parliamentary privileges. The paper also assesses the extent to which the standard operating procedures (SOP) for Covid-19 in the *Dewan Rakyat* should be permitted under Article 62(1) of the Federal Constitution of Malaysia on 'regulating own procedures'.

In so doing, the paper compares the different ways in which other legislatures such as the House of Commons, Canada, the House of Representatives, Australia, and the Chamber of Deputies, Brazil carry their legislative businesses in times of Covid-19. The progressive aspect of these legislatures to depart from the conventional way for parliamentary sittings is corroborated by their creative approach in ensuring legislative institutions continue to function. This paper therefore set out to assess the justification for measures taken to mitigate Covid-19 in the *Dewan Rakyat* against parliamentary privileges. Understanding the ultimate objective of legislative institutions should hold the key in carrying any measures to circumscribe parliamentary functions. Inasmuch as public health measures are crucial, the check on the intelligibility of those measures is also pivotal.

### **Rules and procedures changes in the *Dewan Rakyat* due to COVID-19**

The third meeting of the *Dewan Rakyat* in 2020, supposedly the most important meeting of which the Federal Budget will be tabled, was called in the midst of the rising Covid-19 cases. There was a surge of Covid-19 cases in early November 2020, as later admitted by the government,<sup>3</sup> caused by the Sabah State Election in September 2020. The daily Covid-19 cases were kept below 100 cases before the Election saw a tenfold increase ahead of the parliamentary sitting in November 2020. The country, which was under the Recovery Movement Control Order following a steady containment of the disease since June 2020, was put under a more strict measure of Conditional Movement Control Order in November 2020.

Against the backdrop of increasing Covid-19 cases, the scheduled Third *Dewan Rakyat* Meeting took extra precautionary measures. Transparent barriers were installed between MPs'

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<sup>3</sup> "Emergency helped prevent further spike in Covid-19 cases, says Health DG," *The Edge Markets*, May 11, 2021, accessed June 17, 2021, <https://www.theedgemarkets.com/article/emergency-helped-prevent-further-spike-covid19-cases-says-health-dg>

seats in the *Dewan Rakyat* to reduce the risk of infection of Covid-19. Having the transparent barriers would also allow MPs to return to their designated seats in the main chamber which were denied to several MPs in the previous meeting due to physical distancing measure. In addition, MPs were required to undergo Covid-19 screening prior to the meeting and every fortnight during the sitting to ensure none had contracted the virus, thus spread it to others. Furthermore, the access to Parliament building had been limited with a Police roadblock deployed to only allow MPs, parliamentary staff, and those with a negative result of Covid-19 screening to enter.

On top of all the safety measures taken, the Speaker of the *Dewan Rakyat* also introduced new rules and procedures for the House proceeding. Ahead of the Budget 2021 tabling in the *Dewan Rakyat* by the Minister of Finance on November 6, 2020, the Speaker made a ruling affecting the House's changes in rules and procedures. He necessitated the changes as a preventive measure to ensure the safety of proceeding in the House. Interestingly, the ruling was made through a consultation among the Speaker with all party whips of major blocks in the House. In that *Dewan Rakyat* business coordination meeting, all 11 members, including the Speaker, discussed matters related to procedures of the House throughout the Third Meeting of 2020.

As a result, the Speaker announced nine changes on a temporary basis through a Speaker's ruling on November 5, 2020.<sup>4</sup> The changes are listed as follow:

1. Changes in the *Dewan Rakyat* proceedings starting from Monday, November 9, 2020, until Tuesday, December 15, 2020, as follows:
  - (i) Sitting of the *Dewan Rakyat* will begin at 10.00 a.m. until 2.00 p.m.
  - (ii) The Question Time session for oral answer on Mondays and Wednesdays shortened to one hour from 10.00 a.m. until 11.00 a.m. The Question Time session for oral answers on Tuesdays and Thursdays shortened to 55 minutes from 10.05 a.m. until 11.00 a.m. Only one supplementary question is permitted, and it must be brief.
  - (iii) The Minister's Question Time will be held on Tuesdays and Thursdays for five minutes from 10.00 a.m. The Member who put the question will be called to read his or her question and the answer will be given in writing on the same day. Both question and answer will be published in the Parliament's portal as soon as possible.

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<sup>4</sup> Malaysia. *Hansard Parliamentary Debates*, Dewan Rakyat, 5 November 2020, 2-4, <https://www.parlimen.gov.my/files/hindex/pdf/DR-05112020.pdf>.

2. Debates on the Budget 2021 at the policy level will be held for eight days from Monday, November 9, 2020, until Thursday, November 19, 2020.
3. Replies by Ministers at the policy level remain for three days from Monday, November 23, 2020, until Wednesday, November 25, 2020.
4. Debates on the Budget 2021 at the committee level will be held for 11 days from Thursday, November 26, 2020 until Tuesday, December 15, 2020.
5. The number of sitting could be extended for another two days *i.e.* Wednesday, December 16, 2020, and Thursday, December 17, 2020, if required.
6. Provided the proceedings of the *Dewan Rakyat* to end at 5.30 p.m. according to the existing Order Business, there would be a total of 89 hours and 30 minutes provided for Members to debate, including replies by Ministers for the Budget 2021 at the policy and committee level. The new time limits will see the total hours for debates and replies at both policy and committee level reduced to 66 hours.
7. The attendance of Members throughout the Third Meeting of 2020, including the Budget 2021 tabling session, is as follows:
  - (i) Limited to 80 members at one time in the main chamber, including the debating Member. The attendance breakdown is 41 members from the government bench and 39 members from the opposition and independent bench.
  - (ii) Each party will determine the attendance of its members in the main chamber. A special pass will be distributed by the Secretary of the *Dewan Rakyat* to the Member for Kota Bharu to coordinate the attendance for members of the government bench. Member for Sungai Petani will coordinate the attendance for members of the opposition and independent bench.
8. The Member's attendance record in the *Dewan Rakyat* procedure is as follows:
  - (i) The 80 Members with the special pass to enter the main chamber must record their attendance through their laptop's system as usual.
  - (ii) Members who are not given the special pass may record their attendance at Door 3 of the Main Block and the main entrance of the MP and Administration Block, Parliament of Malaysia. A number of serjeants-at-arms will be stationed at both locations to assist Members in recording their attendance.
9. The voting process through division will be amended. When a division has been ordered, the bell will ring for two minutes, followed by a 10 minutes break. Another two minutes bell will ring afterwards before the division starts. All members are permitted to enter the main chamber to vote.

As mentioned, the rules and procedures changes were to be effected from the Budget 2021 tabling day on November 6, 2020, until the end of the session. However, as early as the Budget 2021 tabling day, the 80 Members attendance in the main chamber ruling was challenged by the present Members. Members from both political divides supported allowing all members to present in the main chamber, specifically for the Budget 2021 tabling. In defending the ruling, the Minister of Law argued that the challenges were a *functus officio* as the ruling was agreed earlier. As pressures from members mounted, the Speaker finally allowed all members to be present in the main chamber.<sup>5</sup>

Some of the changes were implemented through the suspension of standing orders. Standing Order 90(2) was repeatedly used to suspend relevant provisions relating to the shortened time of parliamentary questions and Minister's Question Time, time change for the Special Chamber proceedings, and the procedure for Minister's Question Time being conducted.<sup>6</sup> Other changes were implemented, believed to be under the power of Speaker, and in pursuance of Article 62(1) of the Federal Constitution on the House's prerogative in regulating its procedure.

### **Comparison with parliaments of Canada, Australia and Brazil**

States and legislatures around the world have been grappling with Covid-19 to discharge their functions properly. While governments were taken into tasks of overcoming the virus and protecting the health and lives of their people, legislatures, on the other hand, face challenges in checking executive dominance in times of crisis. Despite being the highest lawmaking institution, legislatures were left struggling to play their lawmaking and oversight role. Covid-19 has exposed the strengths and weaknesses of many legislative systems in the world. Indeed, the state of emergency has further substantiated the government's expediency in bypassing legislatures role against their actions. The situation has raised questions of the balance between executive lawmaking and parliamentary lawmaking inter alia whether the pandemic has been used to marginalise the legislature and its functions.<sup>7</sup>

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<sup>5</sup> Malaysia. *Hansard Parliamentary Debates*, Dewan Rakyat, 6 November 2020, 1-6, <https://www.parlimen.gov.my/files/hindex/pdf/DR-06112020.pdf>.

<sup>6</sup> Detailed discussions on the suspension of standing orders in Muthanna Saari, "Legitimacy of the Suspension of Standing Orders: The Case of the *Dewan Rakyat* (House of Representatives) of Malaysia," *Parliamentary Affairs* (2021), <https://doi.org/10.1093/pa/gsab063>

<sup>7</sup> Ronan Cormacain and Ittai Bar-Siman-Tov, "Legislatures in the Time of Covid-19," *The Theory and Practice of Legislation* 8, no. 1-2 (2020): 3-9, <https://doi.org/10.1080/20508840.2020.1816017>.

On a micro level, legislatures' functions have been reduced under the pretext of limitation on parliamentary rules and regulations. Moreover, constitutional provisions have been referred to as the hindrance for parliament to operate amidst the pandemic. Nevertheless, legislatures have been adapting to the situation of Covid-19 in each country and responded through various approach and mechanism. As will be shown in this paper, legislatures have had their procedures improvised, particularly adapting technologies to enable their operations. In this regard, Philip Norton points out that the Covid-19 crisis creates two unprecedented threats to legislatures; first, the process in which legislature performs its duties, and second, the substance of legislature's function, especially in dealing with the sweeping executive powers.<sup>8</sup>

After dealing with the Covid-19 for more than a year, sharing of practices and the utility of technology in legislatures is now widely available. The Inter-Parliamentary Union (IPU), as the global organisation of national parliaments, updates a compilation of parliamentary responses to the pandemic.<sup>9</sup> Moreover, in the context of the latest innovation in parliament, the IPU Innovation Tracker has a more detailed sharing of practices, including practices during the pandemic.<sup>10</sup> INTER PARES, an EU global project to strengthen the capacity of parliaments, have a data tracker for parliamentary responses during the pandemic.<sup>11</sup> Presented as a dashboard, parliamentary practices could be grouped and filtered based on preset procedures. Commonwealth Parliamentary Association (CPA) published a toolkit for Commonwealth parliaments for practices sharing purposes and contains practical guidance and strategies for parliaments in response to the Covid-19 outbreak.<sup>12</sup>

### *The House of Commons, Canada*

The House of Commons Canada established a Special Committee on the COVID-19 Pandemic (COVI) on April 20, 2020. The Committee consisted of all members and chaired by the Speaker met to consider ministerial announcements, allow Members to present petitions, allow

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<sup>8</sup> Philip Norton, "Global Legislative Responses to Coronavirus," *The Theory and Practice of Legislation* 8, no. 3 (2020): 237–38, <https://doi.org/https://www.tandfonline.com/action/showCitFormats?doi=10.1080/20508840.2020.1818369>.

<sup>9</sup> "Country Compilation of Parliamentary Responses to the Pandemic," IPU, 2020, <https://www.ipu.org/country-compilation-parliamentary-responses-pandemic>.

<sup>10</sup> IPU, "IPU Innovation Tracker," 2020, <https://www.ipu.org/knowledge/ipu-innovation-tracker>.

<sup>11</sup> INTERPARES, "INTER PARES Parliamentary Data Tracker," 2020, <https://www.inter-pares.eu/inter-pares-parliamentary-data-tracker>.

<sup>12</sup> CPA, *COVID-19: CPA Toolkit for Commonwealth Parliaments* (London: Commonwealth Parliamentary Association (CPA), 2020), <https://www.cpahq.org/media/gb1athp1/cpa-toolkit-covid-19-coronavirus-e-version.pdf>.

Members to make statements, and question ministers, including the Prime Minister, in respect of the Covid-19 pandemic and other matters. The Committee meetings took place in the main chamber, and members may participate in person or via videoconference and continued to meet until June 18, 2020.<sup>13</sup> In the Standing Committee on Procedure and House Affairs (PROC) report mandated to study ways for Parliament to continue its business during the pandemic, the Committee had suggested fully virtual and hybrid sittings of the House to support the House's function as a deliberative assembly.<sup>14</sup>

Members who participated in proceedings either in person or remotely maintained their usual parliamentary privileges. In presenting its report, the PROC had raised at least four key procedural issues: the presence of members (quorum), the tabling of documents, reports and returns, participation in proceedings, and decision-making. The quorum of the House, as in the Constitution of Canada and the Standing Orders, state that there must be the presence of at least 20 members to constitute the meeting of the House. However, the exclusive rights of the House to regulate its internal affairs leave the definition of 'presence', hence needed Standing Order 29(1) be amended to clarify the remote participation of members count for quorum purposes.

Another procedural issue worth considerable attention towards parliamentary privileges is members participation in proceedings and making a decision. Virtual participation provides certain challenges, particularly to the Chair, in preserving order and decorum while maintaining members' privileges. Impromptu speaking in terms of raising points of order, questions of privilege, making comments after a speech would be enabled through features built into the videoconferencing system. Decision making in virtual proceedings environment would require the Chair to cautiously ensure that the will of all participating members are understood. This includes the objection to requests of unanimous consent, required numbers for division requests, and finally, the recorded division method for all participating members. Changes to procedures have been adopted in the House on January 25, 2021, which involves measures such as the suspension of standing orders, reinterpretation of particular standing orders to

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<sup>13</sup> Heather Bradley, "Fact Sheet: Special Committee on the COVID-19 Pandemic (COVI)" (House of Commons Canada, 2020), <https://www.ourcommons.ca/Content/Newsroom/Articles/Factsheet-Special-Committe-COVID-19-EN-May-27.pdf>.

<sup>14</sup> Anthony Rota, "VIRTUAL CHAMBER: A Report in Response to the Statement of the Speaker of the House on April 8, 2020" (Ottawa, 2020), [https://www.ourcommons.ca/content/Committee/431/PROC/WebDoc/WD10754665/431\\_PROC\\_reldoc\\_PDF/MP-RotaAnthony-2020-05-11-e.pdf](https://www.ourcommons.ca/content/Committee/431/PROC/WebDoc/WD10754665/431_PROC_reldoc_PDF/MP-RotaAnthony-2020-05-11-e.pdf).

accommodate changes, and voting mechanism for both members participating in person and remotely.<sup>15</sup>

### *The House of Representatives, Australia*

The House of Representatives Australia, too, as early as March 23, 2020, adopted a Resolution entitled ‘Special provisions for human biosecurity emergency period’. The House resolved that it may meet in a manner and form not otherwise provided in the standing orders with the agreement of the Leader of the House and the Manager of Opposition Business. The manner for members may be present, including to achieve a quorum, were determined by the Speaker. Secondly, the agreement of the Leader of the House and the Manager of Opposition Business is needed for any consequent changes to the rules and orders to enable such a meeting.<sup>16</sup> In another resolution to allow remote participation in proceedings, the House authorised the use of an official video facility. Members’ attendance and contribution through the official video facility would be recorded in the Votes and Proceedings of the House.<sup>17</sup>

Two important circumstances could be summarised from the agreement of the Leader of the House and the Manager of Opposition Business for members to contribute remotely to parliamentary proceedings. Firstly, members are only allowed to participate remotely using the official parliamentary video facility at either an Electorate Office or a Commonwealth Parliament Office. Second, members participating remotely were stripped off certain rights such as voting or being counted for the quorum, moving or second any motion, calling for a division, or calling for a quorum to be counted. Since voting is not permitted for members participating remotely, an already established pairing system –

*can be used to enable a Member on one side of the House to be absent for any votes when a Member from the other side is to be absent at the same time or when, by agreement, a*

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<sup>15</sup> Canada. *Journals No. 49*, House of Commons, 25 January 2021, 1-4, <https://www.ourcommons.ca/Content/House/432/Journals/049/Journal049.PDF>.

<sup>16</sup> Australia. *Hansard*, House of Representative, 23 March 2020, [https://www.aph.gov.au/Parliamentary\\_Business/Hansard/Hansard\\_Display?bid=chamber/hansardr/bead2837-76c9-4ce9-952b-cafe8e2d614f/&sid=0015](https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansardr/bead2837-76c9-4ce9-952b-cafe8e2d614f/&sid=0015).

<sup>17</sup> Australia. *Hansard*, House of Representative, 24 August 2020, [https://www.aph.gov.au/Parliamentary\\_Business/Hansard/Hansard\\_Display?bid=chamber/hansardr/29e6e8cb-9928-4774-850a-c2018b9b3e7e/&sid=0374](https://www.aph.gov.au/Parliamentary_Business/Hansard/Hansard_Display?bid=chamber/hansardr/29e6e8cb-9928-4774-850a-c2018b9b3e7e/&sid=0374).

*Member abstains from voting. By this arrangement a potential vote on each side of a question is lost and the relative voting strengths of the parties are maintained.*<sup>18</sup>

Notwithstanding deprived rights for members participating remotely, it must be noted that the practices were substituted with other procedure to accommodate the emergency period caused by the pandemic. Another essential practice to note is the working democracy in terms of fairness between the government and opposition in reaching consensus. The fairness in the House was exemplified in the amendment of Standing Order 47(c)(ii) on the suspension of standing orders. The original provision ‘can be carried only by an absolute majority of Members’ was amended to include words ‘or by a majority of Members present if agreed by the Leader of the House and the Manager of Opposition Business’.

#### *The Chamber of Deputies, Brazil*

The Chamber of Deputies Brazil had relatively quick in putting forward a solution for Parliament to convene during the Covid-19 pandemic. On March 17, 2020, the Chamber approved Resolution No. 14/2020 to establish a Remote Deliberation System (SDR) enabling virtual plenary session of the House. The Brazilian Federal Senate also approved the SDR as the solution for parliamentary business in times of emergency. The SDR is defined as –

*a technological solution that makes it possible to discuss and vote on matters, to be used exclusively in situations of war, social upheaval, public calamity, pandemic, epidemiological emergency, collapse of the transport system or situations of force majeure that prevent or make it impossible for the Senators to meet in person in the National Congress building or in another physical location.*<sup>19</sup>

The Resolution specifically emphasised the mechanism for virtual plenary proceedings and the voting procedure, which, as the Resolution stated, ‘must preserve the confidentiality’ and ‘will occur entirely in [the] institutional systems of the Chamber of Deputies’.<sup>20</sup>

Therefore, the videoconferencing system utilising the Zoom application was integrated with InfoLeg mobile app to provide attendance recording, and the voting mechanism was used

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<sup>18</sup> David Elder and Peter Fowler, *House of Representatives Practice Seventh Edition* (Canberra: Department of the House of Representatives, 2018), 283.

<sup>19</sup> *Technology Transfer Handbook Remote Deliberation System of the Brazilian Federal Senate* (Brasilia, 2020), 8, [http://www.senado.leg.br/senado/hotsites/sdr/pdf/SDR\\_SF\\_DS\\_V162\\_eng.pdf](http://www.senado.leg.br/senado/hotsites/sdr/pdf/SDR_SF_DS_V162_eng.pdf).

<sup>20</sup> “Resolution of the Brazilian Chamber of Deputies No. 14/2020,” 2020, <https://virtual.camara.leg.br/static/arquivos/CoronaVirusResolution.docx>.

for virtual proceedings. The SDR allows all 513 members to participate virtually, although some MPs, usually party leaders<sup>21</sup> were allowed to present physically in a place named the ‘Tribune’ if they chose to. The InfoLeg app, which has already existed to provide information on all bills, including the full text of bills and any amendments, was upgraded to incorporate secure voting during virtual proceedings. Data security is essential as emphasised in Article 3(IV) of the Resolution, ‘no technological solution used by the SDR will involve the transfer of biometric data from parliamentarians over the Internet’. The first virtual proceedings for the Chamber of Deputies Brazil held on March 25, 2020, showed determination in ensuring Parliament continues its operation, as stated by the Secretary-General of the Board of the Brazilian Senate, ‘in times of crisis, Parliament cannot stop’.

### **Right to attend to parliamentary proceedings**

The right of parliamentarians to attend parliamentary sittings is an inherent and indispensable right of a parliamentarian. It forms part of parliamentary privilege that allows parliamentarians to discharge their duty, and as Erskine May states, “without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals”.<sup>22</sup> The case of Richard Strode, a British Member of Parliament, marked a point of how important is the right to attend parliamentary sitting for parliamentarians to perform their functions. In 1512, as he attempted to introduce a bill to regulate the rights of tin miners in Dartmoor, Strode was arrested and imprisoned.<sup>23</sup> Upon his release from imprisonment, the Privilege of Parliament Act and commonly known as Strode’s Act, was passed in Parliament, which gives immunity to bills or speeches in Parliament.<sup>24</sup>

The centrality of the right to attend parliamentary sittings is shown in the motion moved in the House at the beginning of every session of Parliament, i.e. the first day of the sitting after Parliament commences after the General Election and the day after King’s Royal Address for the subsequent new parliamentary session. The motion ordering the Inspector-General of

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<sup>21</sup> Tadeu Cariolano dos Santos. (Chamber of Deputies Brazil), in discussion with the author during the IPU Virtual e-Parliament Conference. 17 June 2021.

<sup>22</sup> David Natzler and Mark Hutton, *Erskine May’s treatise on the law, privileges, proceedings and usage of Parliament* (25th edition, 2019)

<sup>23</sup> Muthanna Saari and Wan Noorzaleha Wan Hasan, “The Extent of the Right to Freedom of Speech and Expression for the Parliamentary Immunity and Privilege,” *The Asian Yearbook of Human Rights and Humanitarian Law* 4 (2020), 206, 211, [https://doi.org/10.1163/9789004431768\\_010](https://doi.org/10.1163/9789004431768_010)

<sup>24</sup> Privilege of Parliament Act 1512, s II, <https://www.legislation.gov.uk/aep/Hen8/4/8/section/II>

Police to provide free passages to members of both Houses is moved by the Minister of Home Affairs as follows,

*That this House orders the Inspector-General of Police to take care that during the present Session of this House the passages through the streets leading to this House be kept free and opened and that no obstruction be permitted to hinder the passages of Members to and from this House that there be no annoyance therein and thereabouts; and that Setiausaha Dewan Rakyat do communicate this Order to the Inspector-General of Police aforesaid.*<sup>25</sup>

The motion passed in the House became an order or resolution that must be complied with, in this case by the Inspector General of Police, to provide a safe passage to parliamentarians to attend Parliament. Any obstruction against members of Parliament to reach Parliament shall be deemed as violating the order or the resolution of the House. The Police roadblock leading to the Parliament building set in adhering to the Covid-19 parliamentary SOPs, albeit standing in the way of free and clear access for members, could be regarded as a health and safety precaution in limiting other than parliamentarians' presence in Parliament. However, during the Special Meeting of the *Dewan Rakyat* in July 2021, parliamentarians were blocked from entering Parliament, with Police roadblocks were set on every road leading to the Parliament building.<sup>26</sup>

The incident raises the question of whether the right of members to enter and attend Parliament has been violated. Firstly, the motion to guarantee the safe passage for members that passed at the beginning of every parliamentary session usually takes effect for the whole parliamentary session until the next session as traditionally it is unless otherwise provided.<sup>27</sup> Secondly, the impact of the motion on others outside the House, in this motion, the Inspector General of Police may be limited. The limitation of parliamentary orders on outsiders was shown in *Stockdale v Hansard (1839)*, in which the court ruled that an order of the House of Commons alone was not adequate to protect a person carrying out the order under the parliamentary privilege provision. Therefore, despite the validity of the motion to provide the

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<sup>25</sup> Order Paper Dewan Rakyat, The Fourteenth Parliament Malaysia First Session Dewan Rakyat, Monday 16 July 2018, <https://www.parlimen.gov.my/files/opindex/pdf/OPDR16072018-Isnin.pdf>

<sup>26</sup> "Malaysia opposition MPs gather at Merdeka Square after being blocked from entering parliament," *Channel News Asia*, August 21, 2021, accessed February 14, 2022, <https://www.channelnewsasia.com/asia/malaysia-opposition-dataran-merdeka-parliament-postponed-covid19-2084501>

<sup>27</sup> Elder and Fowler (n 16), 314.

right to attend for parliamentarians, it seemed that the pretext of Covid-19 has been used to allow such an obstruction towards parliamentarians heading to Parliament.

In addressing the issue of parliamentary privilege limitations on the outside world, an Act of Parliament may be enforced to broaden the power of the House. As such, the Houses of Parliament (Privileges and Powers) Act 1952 (referred to as Act 347 onwards) stipulates such an obstruction as an offence and shall be punished for contempt of the House.<sup>28</sup> Despite the provision that protects the right to attend for members of Parliament, the relatively low threshold of the punishment of such offence makes the provision contradictorily with the nature of parliamentary privileges. Moreover, the statute has not been utilised to the extent that other lesser legislation used to reprimand such an obstruction offence. In 2017, eight people were charged at a magistrate court for attempting to attack Member of Parliament for Shah Alam at the parking lot in Parliament Complex in November 2016. Instead of the protection under the parliamentary privilege provision, the perpetrators were only subjected to the lesser legislation of the Minor Offences Act 1955,<sup>29</sup> which carries a fine not exceeding MYR100 (less than £20) upon conviction.<sup>30</sup>

However, in an earlier incident in 2009, the House punished four members of a political party who confronted and mobbed wheelchair-bound Member of Parliament for Bukit Gelugor in the Parliament's compound under Act 347.<sup>31</sup> In a rare move, a special committee was formed and chaired by the then Speaker of the *Dewan Rakyat* to investigate the incident for parliamentary contempt.<sup>32</sup> The committee proposed that those involved in obstructing the member of Parliament from entering the House be fined MYR1,000 (around £175) each under Section 9(e) of Act 347.<sup>33</sup> These occurrences demonstrate that obstruction that violates the right to attend for parliamentarians is not tolerated, although the varying degree of punishment signals inconsistencies in protecting the sanctity of Parliament.

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<sup>28</sup> Houses of Parliament (Privileges and Powers) Act 1952, s 9(e).

<sup>29</sup> Minor Offences Act 1955, s 14.

<sup>30</sup> "8 who attempted to attack Amanah MP outside Parliament charged," *New Straits Times*, April 3, 2017, accessed February 16, 2022, <https://www.nst.com.my/news/2017/04/226858/8-who-attempted-attack-amanah-mp-outside-parliament-charged>

<sup>31</sup> "RM1,000 fine for Umno Youth leaders who obstructed Karpal (Update)," *TheStar*, June 30, 2009, accessed February 16, 2022, <https://www.thestar.com.my/news/nation/2009/06/30/rm1000-fine-for-umno-youth-leaders-who-obstructed-karpal-update>

<sup>32</sup> Malaysia. *Hansard Parliamentary Debates*, Dewan Rakyat, 26 February 2009, 115, <https://www.parlimen.gov.my/files/hindex/pdf/DR-26022009.pdf>

<sup>33</sup> Malaysia. *Hansard Parliamentary Debates*, Dewan Rakyat 2 July 2009, 70-122, <https://www.parlimen.gov.my/files/hindex/pdf/DR-02072009.pdf>

The Speaker's ruling to limit parliamentarians' attendance to parliamentary sitting in the main chamber of the *Dewan Rakyat* thus raises serious concerns over the right to attend. Understandably made to contain the spread of Covid-19, the ruling, albeit legitimate as the House shall regulate its procedure, is still contentious against the free representational mandate of parliamentarians. Having limited access to attend parliamentary sittings, how do MPs perform their duties and act according to their conscience? MPs are not bound to the specific slot given to them either in debating motions or bills or posing parliamentary questions. Their mandate includes arguing and counter-argue to any other matters raised in the House, and they are carried out deliberatively among members. The attendance of MPs to parliamentary sitting would guarantee their ability to perform their representative function, which is otherwise impaired if they are stripped of the right to attend Parliament.

The importance of the right to attend for MPs is demonstrated in other legislatures in times of Covid-19. As shown in Canada, Australia, and Brazil, although physical attendance in the House was limited, an alternative attendance method was made available to MPs. The responsiveness of the House to immediately establish ways for parliaments to continue their business amid the uncertainty in the early stages of the virus spread marks the House's percipience. Such a restriction that does not deprive the principal right of MPs to attend and perform their duties would be understandable its intention to contain the spread of the virus in the parliament precinct. The realisation, or otherwise, of the right to attend has escalated the parliamentary privileges issue as this right constitutes a parliamentarian's fundamental principle. In the section that follows, related issues arising from the right to attend for MPs are discussed its implications on parliamentary privileges.

### **Members seating and implication to parliamentary privileges**

The 80 members limit at one time in the *Dewan Rakyat* is imposed in accordance with the SOP for parliamentary proceedings that stipulates that at least a metre of physical distancing is observed in the main chamber.<sup>34</sup> The limit represents only one-third of the total members of the House, thus denying the larger remaining members from attending the sitting. The rule seems rigid as to why alternatives were not in place to accommodate every member's right to

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<sup>34</sup> "SOP Pelaksanaan Persidangan Parlimen dikemaskini pada 9 September 2020," National Security Council, <https://asset.mkn.gov.my/web/wp-content/uploads/sites/3/2021/01/SOP-PELAKSANAAN-PERSIDANGAN-PARLIMEN.pdf> accessed 25 February 2022.

attend? The Speaker argued that the limitation was a result of the King's Proclamation for parliamentary proceedings to be held in the Parliament building.<sup>35</sup> The Federal Constitution Proclamation summoning Parliament for the First Meeting of the Third Session of the Fourteenth Parliament stipulated the date and time, including the place of the meeting, as accorded by Clause (1) of Article 55 of the Federal Constitution.

However, the initial date, as stated in the Proclamation, on Monday, March 9, 2020, has been varied by the Prime Minister as the Leader of the House, to Monday, May 18, 2020.<sup>36</sup> The change was made under paragraph (2) of Standing Order 11, which provides the Leader or the Deputy Leader of the House to vary the dates appointed by the King from time to time. The Standing Order only allows for variation of the dates but not the place of the first sitting in each session, hence the Speaker's argument that the sitting location is as per decreed by the King. Notwithstanding, the provision in the Standing Orders raises an issue as to whether the subsequent sittings' place is bound to the King's Proclamation since it explicitly specifies details for the first sitting of the session.

Looking at other legislatures that practise a Westminster system, how can they be more flexible in allowing remote participation in parliamentary proceedings? For example, the Proclamation of the Governor-General of the Commonwealth of Australia summoning Parliament has almost similar provisions in Malaysia's King's Proclamation. It contains the date and time and states Parliament House as the place to hold a session of the Parliament instead of the first sitting of the session.<sup>37</sup> Despite the very exact nature of the Proclamation, the House is still able to allow a remote participation of members to parliamentary proceedings, as has been resolved on 23 March 2020 by the way of the remote participation of MPs is not considered to be in attendance and not counted for quorum purposes.

The enabling of remote participation by MPs in parliamentary proceedings legitimises such participation to be protected by parliamentary privileges, the same way as MPs

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<sup>35</sup> "Speaker: Dewan Rakyat sitting cannot be held virtually," *New Straits Times*, October 23, 2020, accessed February 24, 2022, <https://www.nst.com.my/news/nation/2020/10/634658/speaker-dewan-rakyat-sitting-cannot-be-held-virtually>

<sup>36</sup> P.U. (A) 144/2020,

[https://lom.agc.gov.my/ilims/upload/portal/akta/output/pua\\_20200506\\_P.U.%20\(A\)%20144.pdf](https://lom.agc.gov.my/ilims/upload/portal/akta/output/pua_20200506_P.U.%20(A)%20144.pdf)

<sup>37</sup> Australia. *Votes and Proceedings*, House of Representative, 2 July 2019,

[https://parlinfo.aph.gov.au/parlInfo/download/chamber/votes/cf860efb-2aae-4521-aaab-79bb79f14428/toc\\_pdf/rep-vp.pdf;fileType=application%2Fpdf#search=%22chamber/votes/cf860efb-2aae-4521-aaab-79bb79f14428/0000%22](https://parlinfo.aph.gov.au/parlInfo/download/chamber/votes/cf860efb-2aae-4521-aaab-79bb79f14428/toc_pdf/rep-vp.pdf;fileType=application%2Fpdf#search=%22chamber/votes/cf860efb-2aae-4521-aaab-79bb79f14428/0000%22).

participating in person.<sup>38</sup> It is not difficult for the Speaker to rule that parliamentary privileges cover remote participation of Members since the Standing Orders has enabled parliamentary committees to conduct their proceedings using audio visual, or audio links with members of the committee or witnesses not present in one place.<sup>39</sup> Apart from the precedent of parliamentary committees' audio visual proceedings, it is logical for remote participation by a member, complying with every rule and procedure of the House, to also be protected by parliamentary privileges.

The second issue from the limitation to attend parliamentary sitting is reflected from the seating arrangement in the *Dewan Rakyat*. The physical distancing regulation has deprived certain members of their designated seats and moved them to other parts in the main chamber, namely in the officer seats behind members' seats in both aisles and the public gallery. The rearrangement has caused difficulties for members seated in other parts of the chamber as their access to speak has been constrained by the limited number of available microphones, including lower visibility from the Speaker to get a chance to speak compared to members in their designated seats. This, in turn, has denied the free representational mandate of an MP to voice out his view in the House at his or her will.

Nevertheless, the seating arrangement raises parliamentary privileges issue on the boundaries of the chamber that is considered for the protection of parliamentary immunity. From the practice and rulings of the Speaker, the public gallery and the government officials' gallery shall be considered part of the debating chamber for MPs. Furthermore, the public gallery has also been designated for members under the Home Surveillance Order by the Ministry of Health to vote for any proposed bills or motions. These MPs are required to don complete personal protective equipment (PPE) before being allowed to attend and cast their vote.<sup>40</sup> This ruling explicitly expanded the boundaries of members' seats and the permitted area to vote, which will have an implication on parliamentary privileges.

The Standing Orders of the *Dewan Rakyat* is silent on the definition of members area in contrast with Australian practice, which defines the area for members and voting procedures

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<sup>38</sup> Australia. *Hansard*, House of Representative, 24 August 2020, <https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fvotes%2Fe8769b7c-8f58-42c3-8bbc-700f3420583d%2F0004;query=Id%3A%22chamber%2Fvotes%2Fe8769b7c-8f58-42c3-8bbc-700f3420583d%2F0000%22>

<sup>39</sup> Australia House of Representatives Standing Orders, SO.235.

<sup>40</sup> "MPs under HSO wear PPE to vote for Supply Bill in Dewan Rakyat," *New Straits Times*, December 14, 2020, accessed March 3, 2022, <https://www.nst.com.my/news/nation/2020/12/649315/mps-under-hso-wear-ppe-vote-supply-bill-dewan-rakyat>

in terms of the place eligible for voting.<sup>41</sup> On the other hand, an occurrence in the Selangor Legislative Assembly could be mirrored to expanding the area protected under parliamentary privileges. In 2009, the Speaker ruled that a member's act of handing a writ of summons to another member in the precinct of the Legislative Assembly as violating the member's rights and privileges.<sup>42</sup> The ruling, as contended by the Speaker, was made based on the Commonwealth practice, that the precinct of a legislative body is saved from any court activities, which means that parliamentary privileges apply to the larger area of the legislative precinct.

## **Conclusion**

This paper has discussed the measures to mitigate Covid-19 in the *Dewan Rakyat* and the implications towards parliamentary privileges. The standard operating procedures and the Speaker's rulings for parliamentary proceedings were meant to contain the spread of the virus, although contended to have deprived certain rights and privileges of parliamentarians. The paper has shown that most of the decisions concerning the procedure for parliamentary proceedings made on the basis of the House shall regulate its procedure. Drawing out from this power lies the principles of separation of powers in which Article 63 of the Federal Constitution of Malaysia guarantees parliamentary immunity from being questioned in the courts of law. 'A hands tied approach' has been primarily adopted by the courts in relation to matters brought before them for adjudication,<sup>43</sup> signifying a near-absolute power for Parliament to determine its procedures.

As exemplified by other legislatures, the willingness to adapt and depart from conventional practices ensures Parliament continues its sittings as the House is the master of its procedures. One of the more significant findings to emerge from this paper is that the free representational mandate is closely related to his or her rights and privileges under the parliamentary privileges. The right to attend constitutes the building block of an MP's representative function, without which the free representational mandate could not be fulfilled. The Standing Orders provides adequate provision for the House, head by the Speaker, to

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<sup>41</sup> Australia House of Representatives Standing Orders, SO.2 & SO.128-129.

<sup>42</sup> Selangor State. *Hansard*, Selangor Legislative Assembly, 13 July 2009, 27-31, <http://dewan.selangor.gov.my/wp-content/uploads/2019/02/04.HANSARD.130709.pdf>

<sup>43</sup> Hunud Abia Kadouf and Abdulfatai O. Sambo. "Justiciability of Legislative Proceedings: A Legal Analysis of the Malaysian Courts' Approach," *IJUM Law Journal* 21, no. 2 (2013), <https://doi.org/10.31436/iiumlj.v21i2.103>

introduce and enforce rules and regulations to allow Parliament to perform its functions in times of the pandemic Covid-19. The Speaker, through Standing Order 100, is given residuary powers in regulating any matters not specifically provided in the Standing Orders, so long they are not inconsistent with the other orders.

Although the House is the master of its procedure and matters related to parliamentary proceedings are non justiciable before courts of law, the percipience of the House is most sought-after in determining its procedure. Beyond everything, measures taken to mitigate the risk of Covid-19 in Parliament must be done reasonably not to impede the rights and mandate of parliamentarians, parliamentary privileges and the functions of parliament, as ‘there is also real danger of legislator’s overestimating the [health] risk, and responding by taking unjustified and irrational decisions about their continued operation.’<sup>44</sup>

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<sup>44</sup> Ittai Bar-Siman-Tov. “Covid-19 meets politics: the novel coronavirus as a novel challenge for legislatures,” *The Theory and Practice of Legislation* 8, no. 1-2 (2020): 11-48, <https://doi.org/10.1080/20508840.2020.1800250>

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