

## Chapter II

### **The Method of Appointment of Judges to the Superior Courts of Malaysia Under the Federal Constitution and the Judicial Appointments Commission**

Despite the fact that the question of performing judicial functions independently by judges comes after their appointment, the method of appointment of judges is the crucial and dominant factor to ensure their substantive independence, the independence which greatly depends upon the independent character, integrity, equanimity, legal knowledge and keen intellect of the persons who would hold the office of judges. For, the appointment of a judge on account of political allegiance in utter disregard to the questions of his qualifications, merit, ability, competency, integrity and earlier performance as an advocate or judicial officer may bring in, to use the words of President Roosevelt, ‘Spineless Judges’ who can hardly be expected to dispense justice independently according to law and their own sense of justice without regard to the wishes and desire of the government of the day. There is a great possibility that such a judge may remain ‘indebted to those responsible for his designation ....., the beneficiary is exposed to the human temptation to repay his debt by a pliable conduct of his office’<sup>137</sup> especially when the executive itself is a litigant. As H. J. Laski aptly said, ‘It is not necessary to suggest that there will be conscious unfairness; but it is .... possible that such judges will, particularly in cases where the liberty of the subject is concerned’, find themselves unconsciously biased through over-appreciation of executive difficulty...’<sup>138</sup> Therefore, ‘in appointing judges, a government owes a duty to the people ... to ensure appointees of the highest calibre. Judicial independence can also be subverted by the appointment of persons who do not possess an outstanding level of professional ability, intellectual capacity and experience and integrity, and who cannot shake off a sense of

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<sup>137</sup> Karl Loewenstein, *Political Power and the Governmental Process* (Chicago: University of Chicago Press, 1957) at p. 164.

<sup>138</sup> H. J. Laski, *Studies in Law and Politics* (London: George Allen & Unwin Ltd., 1932) at p. 164.

gratitude to the appointing authority. It is ... in the interests of the ... people [not] to have their judicial tribunals reduced to timorous institutions.’<sup>139</sup> The confidence of public in the judges, who administer law, can be retained and preserved if the judges are seen to be not only qualified to perform their functions, but also courageous, independent, impartial and of integrity- integrity of judges being, in the words of Francis Bacon, who as early as 1612 said, ‘above all things ... their portion and proper virtue.’<sup>140</sup> Thus the appointment of right kind of judges having the requisite qualities of professional skill, ability and integrity will go a long way in applying, interpreting and enforcing the law without fear or favour. If ‘the judiciary should be really independent’, rightly observed Justice Venkataramiah in *S. P. Gupta v Union of India*<sup>141</sup>, ‘something more is necessary and that we have to seek in the judge himself and not outside .... It is the inner of strength of judges alone that can save the judiciary.’<sup>142</sup> In the same case, Justice Bhagwati also eloquently said: ‘Judges should be of stern stuff and tough fibre, unbending before power, economic or political, and they must uphold the core principle of the rule of law which says “Be you ever so high, the law is above you.”’<sup>143</sup> For this reason, some of the national constitutions of the world provide for qualities that a person should possess in order to be considered for appointment as a judge of the superior court. For example, the Constitution of the Islamic Federal Republic of the Comoros, 1978, provides that the members of the Supreme Court shall be chosen on the basis of their competence, their integrity and their knowledge of law.<sup>144</sup> The international standards as laid down in the Universal Declaration on the Independence of Justice, 1983 and the Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 1995 (as amended in Manila on 28 August 1997) also provide for certain criteria for the selection of judges. The

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<sup>139</sup> E. Campbell and HP Lee, *the Australian Judiciary* (Cambridge: Cambridge University Press, 2001) at p. 57.

<sup>140</sup> Francis Bacon, *Essay on Judicature* (1612).

<sup>141</sup> AIR 1982 SC 149.

<sup>142</sup> *Ibid.*, at 672.

<sup>143</sup> *Ibid.*, at 152.

<sup>144</sup> Article 32, the Constitution of the Islamic Federal Republic of the Comoros, 1978.

Universal Declaration enjoins that candidates for judicial officer shall be individuals of integrity, ability and well-trained in the law.<sup>145</sup> More or less in a similar manner, the Beijing Statement calls for ‘that judges be chosen on the basis of proven competence, integrity and independence.’<sup>146</sup>

Therefore, in order to select persons who are best qualified in terms of legal acumen, ability and knowledge of law for judicial office/ appointment, a suitable and appropriate method of appointment is to be haunted and resorted to as the just means to ensure substantive independence of the judiciary. As the Parliamentary Supremacy, Judicial Independence: Latimer House (in the UK) Guidelines for the Commonwealth, 1998, emphasises that ‘The appointment process .... should be designed to guarantee the quality and independence of mind of those selected for appointment at all lives of the judiciary.’<sup>147</sup> However, the manner in which judicial appointments are made in various countries of the world may broadly be grouped into four:

- a. appointment of judges by the head of the state either unilaterally (as in Sri Lanka<sup>148</sup>) or on recommendation of, or in consultation with, the Chief Justice of the Supreme Court (as in South Korea<sup>149</sup> and India<sup>150</sup>) or after obtaining the agreement of the Leader of the Opposition (as in the Republic of Guyana<sup>151</sup>) or after selection by a standing committee or commission comprising of the representatives of the higher judiciary, the legislature, the executive and the bar

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<sup>145</sup> Article 2.11, the Universal Declaration on the Independence of Justice, 1983.

<sup>146</sup> Article 11, Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, 1995 (as amended in Manila in August 1997).

<sup>147</sup> Guidelines II(1), Parliamentary Supremacy, Judicial Independence Latimer House Guidelines for the Commonwealth, 1998.

<sup>148</sup> Article 107, the Constitution of Sri Lanka, 1978.

<sup>149</sup> Article 104(2), the Constitution of the Republic of South Korea, 1948.

<sup>150</sup> Article 124(2), the Constitution of India, 1949.

<sup>151</sup> Article 127(1), the Constitution of the Co-operative Republic of Guyana, 1980.

(as in Israel<sup>152</sup>) or on the recommendation of a Judicial Council (as in Nigeria<sup>153</sup>) or from a panel of nominees proposed by the Supreme Court (as in the Republic of Chile<sup>154</sup>) or upon approval of the upper chamber of the legislature (as in the USA<sup>155</sup>);

- b. election of judges by the legislature (as in Switzerland<sup>156</sup>);
- c. election of judges by the people (as only in appointing judges of the lower courts in 38 of the States in the USA<sup>157</sup>; and
- d. appointment by the judicial service commission (as in case of appointing members of the judiciary by the Superior Council of the Judiciary in Italy<sup>158</sup> and appointment of judges by the National Judicial Council in Croatia<sup>159</sup>).

Of the four methods of appointment of judges, appointment by the head of the state is followed in most of the countries of the world, particularly in most of the common law countries, with striking variations, regarding consulting, recommending or confirming entities. As common law countries, Malaysia and Bangladesh have adopted the method of appointing judges of superior courts by the Heads of the States involving scope for the intrusion of politics in the selection process.

The following discussion will show how in Malaysia the provisions of the original Article 122 of the Merdeka Constitution, 1957 concerning constitutional functionaries required to be consulted and acted upon by the Head of the State, the Yang di Pertuan Agong, in appointing other judges of the Supreme Court have been changed by the Constitution (Amendment) Act,

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<sup>152</sup> Article 4(a), Basic Law: the Judicature, 1984. The Judicial Committee of Israel, which is chaired by the Minister of Justice, is comprised of nine members- of which three are judges of the Supreme Court, two are lawyers, two members of Parliament and two cabinet minister.

<sup>153</sup> Article 231, the Constitution of the Federal Republic of Nigeria, 1999.

<sup>154</sup> Articles 75(2) & 75(3), the Political Constitution of the Republic of Chile, 1980.

<sup>155</sup> Article 2, Section 2, the Constitution of the USA, 1787.

<sup>156</sup> Article 1(11), the Law on the Organisation of the Federal Judiciary.

<sup>157</sup> 1981 (Supp) SCR 87 at p. 791.

<sup>158</sup> Article 105, the Constitution of Italy, 1947.

<sup>159</sup> Article 123, the Constitution of the Republic of Croatia, 1990.

1960; the Head of the State's obligation, after consulting the Conference of Rulers consisting of nine Rulers (the Rulers being the monarchical heads of the component States of the Federation of Malaysia) and four Governors, to act on the recommendation of the Judicial and Legal Service Commission was dispensed with. Furthermore, the discretionary power of the Constitutional Monarch to appoint the Chief Justice of the Supreme Court, after consulting the Conference of Rulers considering the advice of the Prime Minister, was done away with and the real authority to select the judges for appointment was vested in the Prime Minister. The deliberation will also reveal that the Constitution (Amendment) Act, 1963 introduced the new element of consultation by the Prime Minister with the Chief Justice of Malaysia and the respective heads of the three superior courts- the Federal Court, the Court of Appeal and the High Court of Malaya, and the High Court of Sabah and Sarawak- before tendering his advice to the Head of the State for appointing judges of the relevant court. But an additional requirement of consultation with the Chief Minister of each of the States of Sabah by the Prime Minister is required in case of appointing the judges of the High Court of Sabah and Sarawak. It will also display that in order to facilitate the selection of the right candidates for the appointment of judges by the Head of the State, ultimately the Judicial Appointment Commission has been established under the Judicial Appointment Commission Act, 2009, the Act which has been passed without amending the relevant provisions (of Article 122B) of the Federal Constitution. Under the new arrangement, the Commission's independence has not been ensured, it has only been given the power to select and recommend candidates to the Prime Minister who retains his constitutional prerogative to put forward only those names from the list as per his choice and preference to the Yang di-Pertuan Agong, for making judicial appointment acting on his advice. Thus the Commission has fallen much short of the expectation of the relevant quarters.

## ***A. Method of Appointment of Judges to Superior Courts in Malaysia***

It may be recalled here that the Constitution of the Federation of Malaya was introduced on 31 August 1957- the Merdeka Day. Subsequently, it was introduced as the Constitution of the Federation of Malaysia on Malaysia Day on 16 September 1963.

### *A.1. Method of Appointment of Judges under the Constitution of the Federation of Malaya, 1957*

The Federation of Malaya Constitutional Commission headed by Lord Reid, a distinguished Lord of Appeal in ordinary, was set up to draft a Constitution of the independent Federation of Malaya. The Commission in its Report submitted in 1957 recommended that the power to appoint the Chief Justice of the Supreme Court should be vested in the Yang di- Pertuan Agong (the Head of the State) and other judges should be appointed by him after consultation with the Chief Justice.<sup>160</sup> This recommendation was revised by a Working Committee, constituted to examine the Report of the Reid Commission in details, and ultimately the following provisions were included in the Constitution of the Federation of Malaya, 1957 for appointing judges of the highest court of the land:

(2) The Chief Justice and the other judges of the Supreme Court shall be appointed by the Yang di- Pertuan Agong.

(3) In appointing the Chief Justice the Yang- di Pertuan Agong may act in his discretion, but after consulting the Conference of Rulers and considering the advice of the Prime Minister; and in appointing the other judges of the Supreme Court he shall, after consulting the Conference of Rulers, act on the recommendation of the Judicial and Legal Service Commission.

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<sup>160</sup> Federation of Malaya Constitutional Commission, 1956-1957 Report, Chapter XII (Summary Recommendations) at paras 54-55.

Before acting, in accordance with Clause (3), on the recommendation of the Judicial and Legal Service Commission the Yang-di Pertuan Agong shall consider the advice of the Prime Minister and may once refer the recommendation back to the Commission in order that it may be reconsidered.<sup>161</sup>

Although the executive authority of the Federation is vested in the Yang di-Pertuan Agong<sup>162</sup>, he is, as the constitutional monarch, required to exercise this power in accordance with the advice of the Cabinet<sup>163</sup> and is obligated to ‘accept and act in accordance with such advice.’<sup>164</sup> But he was empowered to act in his discretion in appointing the Chief Justice of the Supreme Court only after consulting the Conference of Rulers and considering the advice of the Prime Minister. Thus the Head of the State’s power to appoint the Chief Justice was to be exercised in accordance with his judgment after consulting and taking into account the advice of the two specified constitutional functionaries (the Conference of Rulers and the Prime Minister) who were in a best position to provide for detailed information about the background of the candidates for the position of Chief Justice e.g. education, reputation, integrity, credit history, temperament etc. On the contrary, they were not well equipped to offer any opinion with regard to the legal acumen, knowledge of law, professional skill, merit, competency and suitability of the candidates for the appointment. But in appointing other judges of the Supreme Court, the Yang- di Pertuan Agong did not have any discretion, he was required, after consulting the Conference of Rulers and considering the advice of the Prime Minister to act on the recommendation of the (original) Judicial and Legal Service Commission headed by the Chief Justice of the Supreme Court. The Yang di Pertuan Agong’s acceptance of

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<sup>161</sup> Original Article 122, the Constitution of the Federation of Malaya, 1957.

<sup>162</sup> Article 39, the Constitution of the Federation of Malaya, 1957.

<sup>163</sup> Article 40(1), *ibid.*

<sup>164</sup> Article 40(1A), *ibid.*

the recommendation of the Judicial and Legal Service Commission, consisting of the Chief Justice, the Attorney General, 'the senior puisne judge', the Deputy Chairman of the Public Service Commission and one or more sitting or former judges of the Supreme Court<sup>165</sup>, having intimate knowledge of the persons who might be eminently suitable for appointment on the bench, ensured that only the most right kind and the most suitable candidates would be appointed as the judges of the Supreme Court.

*A.2. Method of Appointment of Judges under the Constitution (Amendment) Act, 1960*

Within three years of the coming into effect of the Constitution of the Federation of Malaya, the Parliament passed on 31 May 1960 the Constitution (Amendment) Act, 1960 (Act 10 of 1960) which replaced the original method of appointment of judges of the Supreme Court to the following effect:

'...

(2) The Chief Justice and the other judges of the Supreme Court shall be appointed by the Yang di-Pertuan Agong.

(3) In appointing the Chief Justice, the Yang di- Pertuan Agong shall act on the advice of the Prime Minister, after consulting the Conference of Rulers, and in appointing the other judges of the Supreme Court he shall act on the advice of the Prime Minister, after consulting the Conference of Rulers and considering the advice of the Chief Justice.'<sup>166</sup>

Thus the discretionary power of the Yang di- Pertuan Agong to appoint the Chief Justice (i.e. in appointing the Chief Justice, he could act in his discretion) of the Supreme Court, after consulting the Conference of Rulers and considering the advice

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<sup>165</sup> Original Article 138, the Constitution of the Federation of Malaya, 1957.

<sup>166</sup> Amended Article 122, the Constitution of the Federation of Malaya, 1957.



of the Prime Minister, was taken away and real authority to select the Chief Justice was vested in the Prime Minister as the Yang di- Pertuan Agong was required to 'act on the advice of the Prime Minister in appointing the Chief Justice after consulting the Conference of Rulers. Furthermore, the Judicial and Legal Service Commission was abolished and under the new arrangement, it was made obligatory for the Yang di- Pertuan Agong to act on the advice of the Prime Minister, instead of recommendation of the Commission, in appointing other judges of the Supreme Court after consulting the Conference of Rulers and considering the advice of the Chief Justice. Although the new provision of considering the advice of the Chief Justice was introduced because of the realisation that he was properly equipped to know the qualities of the candidate and assess his suitability for appointment as a Supreme Court Judge, the real authority to select the judges was vested in the Prime Minister which did open the door of making appointment to high judicial offices on political consideration or personal favouritism.

***B. Method of Appointment of Judges of the Superior Courts under the Constitution of the Federation of Malaysia, 1963***

It may be remembered that the Supreme Court was the highest court in the Federation of Malaya next below the Privy Council until 15 September 1963. When the Federation of Malaysia was established on 16 September 1963 under the Malaysia Act (Act No 26/1963), the Part IX of the Constitution was amended to restructure the superior courts in the following manner:

- a) establishment of three High Courts (under the Constitution and Malaysia (Singapore Amendment) Act, 1965, Singapore left the Federation of Malaysia on 9 August 1965 and, as such, the High Court in Singapore was abolished. Thereafter, there are now two High Courts of coordinate jurisdiction and

status- namely High Court for Peninsular Malaysia and High Court for the Borneo, ‘the States of Sabah and Sarawak’ were substituted for ‘the Borneo States’);

b) establishment of the Federal Court as the apex court in place of the Supreme Court<sup>167</sup>; and

c) the Privy Council remained as the highest court appeal for Malaysia. But the Constitutional (Amendment) Act, 1983 provided for the establishment of the Supreme Court of Malaysia replacing the Federal Court as the final court of appeal and the highest court of land. For, the provisions concerning all appeals in civil matters from Malaysia to the Privy Council were abolished from 1 January 1985.<sup>168</sup> As a result, a two-tier superior court system came into existence in Malaysia-

- 1) the Supreme Court as the final court of appeal in Malaysia; and
- 2) the two High Courts.

But the Constitution (Amendment) Act, 1994, passed on 24 June 1994, renamed the Supreme Court as the Federal Court and provided for the establishment of the Court of Appeal as an intermediary court. As a result, Malaysia reverted to the following three-tier superior court system:

- 1) the Federal Court as the highest court of the country standing at the apex of the pyramid;
- 2) the Court of Appeal as an intermediary court between the Federal Court and the High Courts; and
- 3) the High Court of Malaya and the High Court of Sabah and Sarawak as the lowest tier of the three-tier superior courts.

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<sup>167</sup> Amended Article 121, the Constitution of the Federation of Malaysia, 1963.

<sup>168</sup> Article 131 of the Constitution was repealed.

The Constitution (Amendment) Act, 1963, as amended in 1965 and 1994<sup>169</sup>, provides for the following method of appointment of judges to the Federal Court, the Court of Appeal and the High Courts in the Federation of Malaysia:

- i. 'The Chief Justice of the Federal Court, the President of the Court of Appeal and the Chief Judges of the High Courts and (subject to Article 122C) the other judges of the Federal Court, of the Court of Appeal and of the High Courts shall be appointed by the *Yang di- Pertuan Agong*, acting on the advice of the Prime Minister, after consulting the Conference of Rulers.
- ii. Before tendering his advice as to the appointment under Clause (1) of a judge other than the Chief Justice of the Federal Court, the Prime Minister shall consult the Chief Justice.
- iii. Before tendering his advice as to the appointment under Clause (1) of the Chief Judge of a High Court, the Prime Minister shall consult the Chief Judge of each of the High Courts and, if the appointment is to the High Court in Sabah and Sarawak, the Chief Minister of each of the States of Sabah and Sarawak.
- iv. Before tendering his advice as to the appointment under Clause (1) of a judge other than the Chief Justice, President or a Chief Judge, the Prime Minister shall consult, if the appointment is to the Federal Court, the

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<sup>169</sup> By the Constitution and Malaysia (Singapore Amendment) Act, 1965 and the Constitution (Amendment) Act, 1994.

Chief Justice of the Federal Court, if the appointment is to the Court of Appeal, the President of the Court of Appeal and, if the appointment is to one of the High Courts, the Chief Judge of that Court.’<sup>170</sup>

Thus the above procedure for the appointment of judges of superior courts in Malaysia resembled the British practice obtaining prior to the enactment of the Constitutional Reform Act, 2005. The Sovereign (the Queen) used to appoint the Lords of Appeal in Ordinary (Law Lords), the Lord Chief Justice, the Master of the Rolls, the President of the Family Division, the Vice-Chancellor and the Lord Justices of Appeal by convention on the advice of the Prime Minister, who had consulted the Lord Chancellor<sup>171</sup>, the Chancellor who used to wear executive, legislative and judicial hats<sup>172</sup> as a Cabinet Minister, as the presiding officer (i.e. Speaker) of the House of Lords (the Second Chamber of the Parliament) and as the head of the judiciary (when the House of Lords sat as the final court of appeal) respectively. In the words of Lord Jowitt, who was the Lord Chancellor in the Labour Government until October, 1951,

in practice, the Lord Chancellor would always consult with the Head of the Division to which he was called upon to appoint a Judge. If I had to appoint a Judge to the Queen’s Bench Division, I should, in practice, always consult with the Chief Justice; if to the Divorce Division, with the President; if to the Chancery

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<sup>170</sup> Article 122B, the Federal Constitution of Malaysia, 1963.

<sup>171</sup> O Hood Phillips and Jackson, *Constitutional and Administrative Law* (London: Sweet and Maxwell, 2001) at p. 431; R.M. Jackson, *The Machinery of Justice in England* (New York: Cambridge University Press, 1960) at p. 232.

<sup>172</sup> The Constitutional Reform Act, 2005 took away the judicial and legislative roles of the Lord Chancellor.

Division, with the senior judge .... When it came to the Court of Appeal, I should consult the Master of the Rolls as to who was the most suitable person.<sup>173</sup>

The ordinary judges of the High Court, who are often called puisne judges, were appointed by the Queen as a convention on the advice of the Lord Chancellor, who no doubt used to consult the Prime Minister.<sup>174</sup> It is maintained that the Lord Chancellor,

who has always been a barrister, and must therefore be a member of one of the four Inns of Courts (completely independent of any governmental control), is the most appropriate Minister to advise on appointments and promotions for the very reason that he is a judge and is qualified for that position by actual practice at the Bar. He knows by experience as an advocate the nature and degree of the knowledge and kind of character and temperament which go to make the best Judges. When he sits he hears eminent Barristers arguing before him. He is in almost daily touch as a Law Lord and a Bencher of his Inn, with the Lords of Appeal and other Judges and members of the Bar. [Sir Albert Napier]<sup>175</sup>

However, under the new arrangement, the Constitutional Head is circumscribed to exercise his power of appointing the heads and other judges of three courts- the Federal Court, the Court of Appeal and the two High Courts (the High Court of Sabah and Sarawak) on the advice of the Prime Minister. The Prime Minister of the State, is always required to consult, before giving his advice to the Head of the State, the Conference of Rulers (the Rulers being the monarchical heads of the component nine States of the Federation of Malaysia) and in respect of the appointment of the judges of

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<sup>173</sup> John Honnold (ed), *The Life of the Law: Readings on the Growth of Legal Institutions* (New York: The Free Press, 1964) at p. 270.

<sup>174</sup> Supra note 171.

<sup>175</sup> Sir Albert Napier, the Permanent Secretary of the Office of Lord Chancellor, wrote in a paper prepared in 1963. John Honnold (ed), supra note 37.

three superior courts, the respective heads of the courts, i.e. Chief Justice, the President or the Chief Judge as applicable. Furthermore, in appointing judges of the High Court in Sabah and Sarawak, the Head of the State is obligated to consult the Chief Minister of each of the two States. The constitutional purpose of selecting the best and most suitable candidates from amongst those available for appointment as judges of the superior courts will be achieved through advice not only of the Prime Minister and consultation with the Conference of Rulers (and the Chief Minister of each of the two States of Sabah and Sarawak only in appointing judges of the High Courts in Sabah and Sarawak) but also consulting the heads of three superior courts so that every relevant particular about the candidates is known and duly weighed as a result of effective consultation among all the consultees. It should be stressed here that each of the functionaries has a distinct and valuable role to play as to the antecedents and legal suitability of candidates for appointment. The Conference of Rulers, through their instrumentalities, can procure relevant information about the suitability of the candidates proposed in terms of honesty, integrity, general pattern of behaviour, social acceptability, political affiliation/allegiance and commitment to rule of law which have a considerable bearing on his working as a judge. Sultan Azlan Shah finds it difficult 'to rationalise why a Prime Minister would not want to consider, or even abide by the views of nine Rulers and four Governors who constitute the Conference of Rulers' as they are independent persons, with vast experiences, and with no vested interest in the nominated candidates. Their duty is to fulfil their constitutional role in ensuring that only the best and most suited

candidates are selected for the posts.<sup>176</sup> Similar arguments can be put forward for the acceptance or giving great weight, unless there is strong and cogent reason for not doing so, of the advice of the heads of three superior courts- the Chief Justice of the Federal Court, the President of the Court of Appeal and the Chief Judges of the two High Courts as expert advices. For, they are in all likelihood profoundly qualified to render advice objectively on professional suitability of the candidates for judgeship in terms of their legal experience, reputation, knowledge of law, legal competence, keen intellect, neutrality of mind and judicial potentiality. Thus the provisions of consultation with the Conference of Rulers and the head of the three superior courts by the Prime Minister are aimed at to act as safeguards against the selection for appointment of improper and unsuitable persons as judges taken into account extraneous or irrelevant considerations. The effectiveness of this consultation process in making higher judicial appointment in Malaysia cannot straightaway be ascertained as the process is not transparent and known to the public; strict secrecy is maintained from identifying the candidates to the issuance of the warrant. Furthermore, after consultation with the constitutional functionaries, the final word in respect of the sensitive subject of the appointment of judges of superior courts belongs to the Prime Minister on whose advice the Head of the State is obliged to make the judicial appointment and, as such, seemingly there is the scope of considering those with the right political patronage and right beliefs as the most suitable for appointment. But Justice Abdul Hamid Omar, a former Lord President of the Supreme Court of Malaysia, made a wholesale and unqualified comment in 1994 that no Prime Minister of the

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<sup>176</sup> Sultan Azlan Shah, 'The Role of Constitutional Rulers and the Judiciary Revisited' in Sinnadurai, V (ed.), *Constitutional Monarchy, Rule of Law and Good Governance* (Kuala Lumpur: Professional Law Books, 2004) at p. 397.

Country was ever moved by parochial considerations in selecting the candidates for appointment as judges of superior courts by the Head of the State. As he said:

All successive Prime Ministers have been mindful of their constitutional role in the appointment of judges and have been sensitive to the .... need for an independent judiciary. As a result, unlike the appointment of judges in some other countries, judges in Malaysia, are not appointed because they support, or belong to the ruling party in power or become they are sympathetic towards certain issues of public interest, or ideologies.<sup>177</sup>

But there is a complete different version from another former Judge of the then Supreme Court of Malaysia, Datuk George Seah, an independent minded Judge who was removed as a victim of judicial crisis of 1988, the crisis, to use the words of former Prime Minister Abdullah Ahmad Badawi (2003-2009) 'from which the nation never fully recovered.'<sup>178</sup> He in an Article<sup>179</sup> published

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<sup>177</sup> Tun Dato' Seri Abdul Hamid Omar, *The Judiciary in Malaysia* (Kuala Lumpur: Asia Pacific Publications Sdn Bhd, 1994) at p. 85.

<sup>178</sup> Shaila Koshy, Chelsea L.Y. Ng, Shahanaaz Habib, Cecil Fung, Teh Eng Hock and Jo Teh, 'Government moves to strengthen judiciary', *The Star*, 18 April 2008 <<http://thestar.com.my/news/story.asp?file=/2008/4/18/nation/20992653&sec=nation>> (accessed on 5 November 2010).

<sup>179</sup> In that Article, Datuk George Seah referred to systematically the suspension of the then Lord President Tun Salleh Abbas which deprived him of the opportunity to preside over a full bench of nine judges of the Supreme Court to hear and determine the appeal challenging the validity and legality of the 1987 UMNO Presidential election. Then he referred to the subsequent hearing and dismissing of the appeal on 9 August 1988 by a Panel of 5 Supreme Court and High Court Judges headed by acting Lord President Tan Sri Hamid and Chairman of the First Tribunal set up to investigate the charges against the incumbent Lord President Tun Salleh as to the convening of a meeting of the judges (in which Sri Hamid Omar was also present) that decided to send the relevant letter (about the Prime Minister) to the King and State Rulers. Datuk George Seah also dealt with the convening of the Special Sitting of the Supreme Court on 2 July 1988 by five of its judges (presided over by Tan Sri Wan Sulaiman) that unanimously interpreted the provision of section 9(1) of the Courts of Judicature Act, 1964 to the effect that the acting Lord President Tan Sri Abdul Hamid could not exercise the powers or perform the duties of his office by virtue of being appointed as the Chairman of the Tribunal set up under Article 125(4) of the Federal Constitution and should distance himself from being involved, directly or indirectly, in any court proceeding brought by Tun Salleh Abbas and an Interlocutory Order restraining the First Tribunal from 'submitting any recommendation, report or advice 'to His Majesty Yang di- Pertuan Agong-pending the hearing and disposal of the civil suit that had been filed in the Kuala Lumpur High Court



in 2004 brought to light patronage appointments made after 1988 judicial crisis for the services rendered to the party in power:

Unsurprisingly, all the High Court Judges who were involved in the UMNO 11 appeal, in the Tun Salleh Abbas's civil suit and the Interlocutory Order and those in the Second Tribunal set up to deal with the charges against the five Judges of the Supreme Court were eventually elevated to the Supreme Court. Three of them were later appointed Chief Justices of the High Court in Malaya.<sup>180</sup>

He also made public:

The three Malaysian High Court Judges in the Second Tribunal who delivered the majority decision recommending the dismissal of [two Supreme Court Judges] Tan Sri Wan Sulaiman and Datuk George Seah were all appointed to the Supreme Court. One of them was subsequently appointed Chief Justice of the Federal Court (the Supreme Court of Malaya was later renamed the Federal Court) and another promoted as President of the Court of Appeal.<sup>181</sup>

He further divulged, 'Even Dato Ajaib Singh who first heard and refused' a temporary stay in the High Court in Kuala Lumpur, was later elevated to the Supreme Court.<sup>182</sup>

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challenging the 'constitutionality, legality and validity of the Tribunal. He focussed on the setting aside of this Interlocutory Order by a Panel of two judges of the Supreme Court and three judges of the High Court, and the establishment of the Second Tribunal to deal with the charges (intentionally convening the 2 July 1988 sitting of the Supreme Court in contravention of Section 38(1) and 39(1) of the Courts of Judicature Act, 1964 and without the permission or knowledge of the acting Lord President Tan Sri Abdul Hamid) against five judges of the Supreme Court. Furthermore, he commented on the signing of the majority judgment of the Tribunal by the three junior Judges of the High Court in Malaya (having ranked no 13, 14 and 25 in the seniority list as contained in MLJ Vol. 1. 1988) against the five suspended judges of the Supreme Court which tantamount to pronouncing judgment by the colonels against the generals. Datuk George Seah, 'Crisis in the Judiciary- Part 4 & 5, the Suspension of the Supreme Court,' *Infoline*, 1 May 2004, at pp. 46-49.

<sup>180</sup> Ibid, at p. 49.

<sup>181</sup> Ibid, at pp. 49-50.

<sup>182</sup> Ibid, at p. 50

There are some other direct appointments to the Federal Court made on the grounds of personal or political patronage. For example, former Attorney General Mokhtar Abdullah was appointed as a Federal Court Judge in January 2002 allegedly for his service rendered as the head of the prosecution team against former Deputy Prime Minister Anwar Ibrahim.<sup>183</sup> Similarly, Tan Sri Zaki Azmi, a former Legal Advisor to the UMNO and Chairman of the Party's Election Committee, was directly appointed as a Judge of the Federal Court in September 2007 and in October 2008 as its Chief Justice.<sup>184</sup>

However, commenting on the system of vesting the authority in the hands of the executive to appoint higher echelon judges, Justice Bhagwati of the Indian Supreme Court in *S. P. Gupta v Union of India*<sup>185</sup> observed:

This is, of course, not an ideal system of appointment of judges, but the reason why the power of appointment of judges is left to the Executive appears to be that the Executive is responsible to the Legislature and through the Legislature, it is accountable to the people, who are consumers of justice, .... [for making] any wrong or improper appointment.<sup>186</sup>

But it may be submitted that in a parliamentary democracy, which is prevalent in many countries, including Bangladesh, India and Malaysia, the Prime Minister commands a majority in Parliament and, as such, it can hardly be expected that a vote of censure be passed against him disapproving his 'wrong or improper appointment' of judges in superior courts. Even the Speaker of the Parliament, who always belongs to the ruling party, may not allow putting

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<sup>183</sup> SUARAM, Malaysian Human Rights Report (Civil and Political Rights), 2001, at p. 135.

<sup>184</sup> SUARAM, Overview of the Malaysian Civil and Political Rights Report, 2008, at pp. 19-20.

<sup>185</sup> 1981 Supp SCC 87.

<sup>186</sup> *Ibid.*, at p. 230.

down a question in the Parliament involving improper appointment of judges of superior courts.

However, the method to appoint judges in the superior courts, as provided for in the Federal Constitution of Malaysia, contains two types of provisions, namely, a) general provisions for the appointment of the Chief Justice of the Federal Court and all judges, and b) additional provisions involving requirement of consultation for the appointment of the Federal Court Judges, the Court of Appeal Judges, the High Court Judges, the President of the Court of Appeal and the two Chief Judges of the High Courts.

*a) General Provisions for the Appointment of the Chief Justice of the Federal Court and other Judges of the Three Superior Courts*

Article 122B(1) stipulates that the Chief Justice of the Federal Court, the President of the Court of Appeal and the Chief Judges of the High Courts and the other judges of these courts shall be appointed by the Yang di-Pertuan Agong 'acting on the advice of the Prime Minister, after consulting the Conference of Rulers.' It should be stressed here that the Constitution of Malaysia does not provide for further consultation with any other functionary by the Prime Minister in giving advice to the Head of the State for the appointment of the Chief Justice of the Federal Court as it is required in case of appointment of the heads of the two other superior courts in Malaysia. Thus the selection of the head of the Malaysian Judiciary and *paterfamilias* of the judicial fraternity depends entirely and exclusively on the Prime Minister's pleasure. Furthermore, the Constitution of Malaysia does not provide for any special criterion (e.g. senior most judge of the Federal Court for the appointment of Chief

Justice) except general eligibility criteria as laid down in Article 123 of the Constitution, to be discussed later on, which are equally applicable in cases of appointment of judges of all the three superior courts. Therefore, it can strongly be argued that theoretically any advocate or judicial officer who fulfils the stipulated criteria can directly be appointed as the Chief Justice of the Federal Court<sup>187</sup> apart from the judges of the Federal Court, the Court of Appeal and the High Courts. But in practice, no such person (i.e. an advocate or a judicial officer) has yet been directly appointed as the Chief Justice of the Federal Court. It may be suggested that the Constitution be amended to provide for the appointment of the senior most judge of the Federal Court as the Chief Justice of the Federal Court whenever vacancy occurs in that office although he might not be a brilliant judge. For selecting the Chief Justice by seniority will prevent the Prime Minister from picking and choosing from among the judges taking into account political affiliation and will forestall a scramble among the judges for the highest post to show who has better imbibed the gospel of the party in power. This promotion/ appointment on the basis of seniority has been considered in France as a guarantee of judicial independence. As Brown and Garner say: 'Promotion .... upon seniority of service .... is regarded by members of the Conseil [d'Etat, Judicial Section] as the essential guarantee of their independence.'<sup>188</sup>

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<sup>187</sup> In Pakistan, when it was composed of West Pakistan and East Pakistan, Justice Monzur Quader Chowdhury was directly appointed as the Chief Justice of West Pakistan.

<sup>188</sup> L.N. Brown and J. F. Garner, *French Administrative Law* (London: Butterworth, 1983) at p. 55.

*b. Special Provisions Involving Additional Requirement of Consultation for the Appointment of Judges of the Superior Courts and the Heads of the Court of Appeal and the two High Courts*

The Prime Minister, other than the appointment of Chief Justice of the Federal Court, has an additional constitutional duty to consult the Chief Justice and/or the heads of the different courts depending on which court the judge is being appointed. Thus he before tendering his advice to the Head of the State in respect of the appointment of a judge to the Court of Appeal, he is further needed to consult the President of the Court of Appeal and relating to the appointment of a judge to one of the High Courts, the Prime Minister is also enjoined to consult the Chief Judge of the [High] Court concerned. But it should be emphasised that for the appointment of all the judges of these three superior courts, the Article 122B (2) of the Federal Constitution of Malaysia makes it mandatory for the Prime Minister to consult the Chief Justice of the Federal Court before tendering his advice to the Yang di- Pertuan Agong and, as such, the Chief Justice of the Federal Court plays a definite and positive role in the judicial appointment process of Malaysia.

Since the President of the Court of the Court of Appeal is not categorised/graded as a Court of Appeal Judge and by virtue of his post is a member of the Federal Court, there is no additional stipulation mentioned in the Federal Constitution for his appointment; the Prime Minister under Article 122B (2) of the Constitution consults the Chief Justice of the Federal Court before tendering his advice to the Yang di-

Pertuan Agong for appointing a Federal Court Judge to the post of the President of the Court of Appeal.

In the appointment of the Chief Judge of the High Court of Malaya, the Prime Minister is required to consult the Chief Judge of Sabah and Sarawak and vice versa. But if the appointment is for the post of the Chief Judge of Sabah and Sarawak, the Prime Minister is further needed to consult the Chief Minister of each of the States of Sabah and Sarawak.

The consultation of the Prime Minister with different consultees, as required by the Constitution before tendering his advice to the Head of the State as to the appointment of judges to the superior courts, namely, the Federal Court, Court of Appeal and the High Court, in Malaysia does not mean that he is under an obligation to secure their consent. The Prime Minister is not at all required to accept their opinion or views.

The constitutional provisions concerning the appointment of judges of the superior courts in Malaysia were first examined by the Court of Appeal in 2002 in *Re Dato' Seri Anwar Ibrahim*<sup>189</sup> without addressing the main issue of disqualifying the judge concerned (Ya Datuk Hj Mokhtar bin Hj. Sidin) from hearing the present appeal from a decision of the High Court on the ground of likelihood of bias on the judge's part as the appellant, the then Deputy Prime Minister being the Acting Prime Minister (June- August 1997) of the Country made adverse comments against the elevation of the relevant judge to the Court of Appeal at the Conference of Rulers.<sup>190</sup> In interpreting the general provisions of Article 122B (1) of the Federal

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<sup>189</sup> [2000] 2 CLJ 570.

<sup>190</sup> The Judge Lamin Mohd. Yunus PCA, who delivered the decision of the Court of Appeal, was quite convinced and satisfied with the assertion of the judge concerned that 'he has nothing against' the appellant and with his assurance that 'he will perform his function and discharge his duties as a Judge without fear or favour in order to serve the ends of justice.' *Ibid.*, at 572 f.

Constitution concerning the manner in which judges of superior courts are appointed, Lamin Mohd. Yunus PCA, delivering the judgment of the Court, rightly held that: ‘the Yang di- Pertuan Agong must act on the advice of the Prime Minister.’<sup>191</sup> Although the Prime Minister is required to advise the Yang di- Pertuan Agong as to the appointment of heads and other judges of the superior courts, ‘after consulting the Conference of Rulers,’ Lamin PCA misconstrued this requirement as specified in Article 122B (1) as consultation between the King and the Conference of Rulers. As he observed:

... the Yang di- Pertuan Agong is required to consult the Conference of Rulers before making the appointment. To consult means to refer a matter for advice, opinion or views .... To “consult” does not mean to “consent” [as] the word consent is used [ in separate context] in Article 159(5) of the Constitution which states that amendments to certain provisions of the Constitution cannot be passed by Parliament without the “consent” of the Conference of Rulers .... so in the matter of the appointment of judges, when the Yang di- Pertuan Agong consults the Conference of Rulers, he does not seek its “consent”. He merely consults. So when the Conference of Rulers gives its advice, opinion or views, the question is, is the Yang di- Pertuan Agong bound to accept. Clearly he is not. He may consider the advice or opinion given but he is not bound by it.<sup>192</sup>

He further observed in this regard:

‘So in the context of the Article 122B (1) of the Constitution where the Prime Minister has advised that a person be appointed a judge and if the Conference of Rulers does not agree or withholds its views or delays the giving of its

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<sup>191</sup> Ibid., at 571-b.

<sup>192</sup> Ibid., at p. 571-b, d, f.

advice with or without reasons, legally the Prime Minister can insist that the appointment be proceeded with.’<sup>193</sup>

Sultan Azlan Shah, who was the head of the Malaysia Judiciary from 1982 to 1984 and is quite familiar with the constitutional practice of appointing judges (as an intimate insider), rightly called into question and objected to the above observation of Lamin PCA. As he contended:

[T]he statements made by Lamin PCA in this case seem to suggest that the Conference of Rulers gives its advice directly (and only) to the Yang di-Pertuan Agong, and not to the Prime Minister. In practice, this is not the case. The Prime Minister submits the names of the candidates to the Conference of Rulers. The Conference then submits its views to the Prime Minister before he tenders his advice to the Yang di- Pertuan. Therefore, the views of the Conference are strictly speaking, given to the Prime Minister. It is then for him to consider these views before he makes the final recommendation to the Yang di- Pertuan Agong.<sup>194</sup>

He further stressed:

To suggest that their [the Conference of Rulers] advice is given directly to the Yang di- Pertuan Agong will render this entire constitutional process meaningless, since when the Prime Minister submits the name to the Yang di- Pertuan Agong, the Yang di- Pertuan Agong is duty- bound, under Article 40 (1A) [and also under Article 122B (1)] to accept the advice of the Prime Minister.<sup>195</sup>

Thus after obtaining the views or suggestions of the Conference of Rulers (and other Constitutional functionaries, e.g. the three heads of the superior courts, the Chief Minister of each of the States of Sabah and Sarawak), the

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<sup>193</sup> Ibid, at p. 571-i- 572- a.

<sup>194</sup> Sultan Azlan Shah, supra note 176.

<sup>195</sup> Ibid.



Prime Minister gives his advice to the Yang di- Pertuan Agong for the appointment of judges of the superior courts and the King has no choice but to accept and act on his (Prime Minister's) advice and, as such, the selection and appointment of judges is virtually within the power and jurisdiction of the Prime Minister. Thus the Constitution has vested the pivotal role in the hands of the Head of the Government- the Prime Minister- regarding judicial appointment.

*c. Appointment of Additional Judge in the Federal Court*

Of the three superior courts- the Federal Court, the Court of Appeal and the High Courts- in Malaysia, the Federal Constitution speaks of the appointment of additional judges only in the Federal Court 'for such purposes or for such period of time as' the Yang di- Pertuan Agong 'may specify.'<sup>196</sup> Any person who has held high judicial office in Malaysia can be appointed by the Yang di- Pertuan Agong as an additional judge acting solely on the advice of the Chief Justice of the Federal Court.<sup>197</sup> It seems that, because of the temporary nature of appointment of an additional judge, unlike the appointment of regular judges of the Federal Court, the Head of the State has no obligation whatsoever to act on the advice of the Prime Minister, after consulting the Conference of Rulers in appointing an additional judge. Since any person who has held high judicial office in Malaysia can be appointed as an additional judge by the Head of the State entirely on the advice of the Chief Justice of the Federal Court and 'no such additional judge shall be ineligible to hold office by reason of having

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<sup>196</sup> Article 122(1A), the Federal Constitution of Malaysia.

<sup>197</sup> Ibid.

attained the age of sixty-six years,'<sup>198</sup> it seems that the provision for the appointment of an additional judge has been incorporated into the Constitution for judicial consideration. Thus such an additional judge can be appointed when a judge of the Federal Court is on leave of absence or is incapable of performing his functions or when the existing judges are either disqualified from hearing an appeal or insufficient in number to hear and determine a particular appeal involving constitutional interpretation. However, no 'additional judge has been appointed to the Federal Court ... in recent years.'<sup>199</sup>

*d. Appointment of Judicial Commissioners in the Two High Courts*

The Federal Constitution of Malaysia, as amended in 1963, provided for the first time the provision for the appointment of judicial commissioners in the two High Courts of Malaysia. Later on in 1994, the method of appointment was amended in the following manner:

1) For the despatch of business of the High Court in Malaya and the High Court in Sabah and Sarawak, the Yang di- Pertuan Agong acting on the advice of the Prime Minister after consulting the Chief Justice of the Federal Court, may by order appoint to be judicial commissioner for such period or such purposes as may be specified in the order any person qualified for appointment as a judge of a High Court; and the person so appointed shall have power to perform such functions of a judge of the High Court as appear to him to require to be performed.<sup>200</sup>

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<sup>198</sup> Proviso to Article 122(1A), *ibid.*

<sup>199</sup> Abdul Hamid Omar, *supra* note 177, at p. 79.

<sup>200</sup> Article 122AB, the Federal Constitution of Malaysia.

Thus under the new arrangement made in 1994, the previous difference introduced in 1963 between the method of appointment of judicial commissioners in two different High Courts<sup>201</sup> has been done away with. A new uniform procedure for the appointment of judicial commissioners in the High Court in Malaysia and the High Court in Sabah and Sarawak- the Yang di- Pertuan Agong, acting on the advice of the Prime Minister, after consulting the Chief Justice of the Federal Court, may appoint a judicial commissioner- has been introduced in 1994. Thus unlike the appointment of regular judges of the High Courts, the Prime Minister is not required to consult the Conference of Rulers (Majlis Raja- Raja) and the Chief Judge of the High Court concerned before tendering his advice to the Yang di- Pertuan Agong as to the appointment of judicial commissioners in the High Court in Malaya and the High Court in Sabah and Sarawak. The provision for non-consultation of the Chief Judge of the relevant High Court in which judicial commissioners are to perform functions can hardly be justified. It should be stressed here that Article 122A (3), added to the Federal Constitution of Malaysia in 1963, expressly provided for the situation- when a judge of the High Court in Borneo ‘is not for the time being available to attend to business of the court- in which judicial commissioners in that court could be appointed ‘for such purposes as may be specified in the order.’ But in case of the appointment of judicial commissioners in the High Court in Malaya no such express ground was

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<sup>201</sup> For the High Court in Borneo (since 1994 Sabah and Sarawak), the Yang di- Pertuan Agong acting on the advice of the Lord President of the Supreme Court (in 1994 the name of the Supreme Court was changed to Federal Court and the post of Lord President of the Supreme Court was changed to the Chief Justice of the Federal Court), or for ‘either State the Yang di- Pertuan Negeri of the State acting on the advice of the Chief Justice of the Court’, could appoint judicial commissioner<sup>201</sup> and for the High Court in Malaysia, ‘the Yang di- Pertuan Agong acting on the advice of the Lord President of the Supreme Court,’ could appoint judicial commissioners. Article 122A (3) and (5), as added to the Federal Constitution of Malaysia in 1963.

provided for; only vague expression of ‘for .... such purposes as may be specified in the order’<sup>202</sup> was mentioned. But the Federal Constitution of Malaysia, as amended in 1994, does not expressly provide for the grounds of appointment, by using the expression for ‘such purposes’ as may be specified in the order of appointment of judicial commissioners. As a result, judicial commissioners may sometimes be appointed not for judicial but for political considerations.

Furthermore, the tenure of judicial commissioners is at the pleasure of the appointing authority; they are appointed ‘for such period’ as may be specified in the order of appointment. Justice Abdul Hamid Omar, during whose tenure as the Lord President/Chief Justice, the practice of appointing judicial commissioners on a two year contract became the standard procedure for the appointment of High Court Judges, maintained, ‘As a general rule, most judicial commissioners who were initially appointed for such a period, have, subsequently, been appointed as High Court judges’<sup>203</sup> on the recommendation of the Chief Justice (or Lord President as it was known before) of the Federal Court, to the Prime Minister. This assertion of a former head of the Malaysian Judiciary reveals that not all the judicial commissioners, but ‘most’ of them, appointed on contract basis for an initial term of two years, found berths as the permanent judges of the High Courts. Later on, in March 2009, the Judicial Appointments Commission, which was set up in February 2009, recommended only 6 out of twenty-five applications received from serving judicial commissioners for appointment as judges of the High Court and

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<sup>202</sup> Ibid.

<sup>203</sup> Abdul Hamid Omar, *supra* note 177, at p. 81.

ultimately they were appointed as High Court Judges in October 2009.<sup>204</sup> Therefore, it can strongly be argued that a judicial commissioner may not always hold the scale of justice even between the state and the citizen without fear or favour. For, rendering a fearless judgment against the government may cost him appointment as a tenured judge of the High Courts. In an express reference to certain servile judicial commissioner Datuk Dato' Param Cumaraswamy, (a distinguished Lawyer of Malaysia and) the United Nations (first) Special Rapporteur on the Independence of Judges and Lawyers said that the recent 'promotions of Augustine Paul, Arifin Jaka and Pajan Singh Gill [in 2003] will be perceived by the public as a reward for having "delivered."<sup>205</sup> Unlike the judges of the three superior courts, the Federal Constitution does not limit the number of judicial commissioners to be appointed in the two High Courts of Malaysia. Taking the advantage of this lacuna, 68 judicial commissioners have been appointed until August 2010<sup>206</sup> as against seventy-one regular High Court Judges (in the face of sanctioned posts of 60 for the High Court of Malaya and 13 for the High Court of Sabah and Sarawak, altogether 73<sup>207</sup>) allegedly 'to clear the backlog of cases' who 'will be on

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<sup>204</sup> Annual Report of the Judicial Appointments Commission, 2009, at p. 28.

<sup>205</sup> Infoline, the Malaysian Bar's Official Newsletter, July 2003.

<sup>206</sup> Tunku Sofiah Jewa, Salleh Buang and Yaacob Hussain Merican (eds), *Tun Mohamed Suffian's An Introduction to the Constitution of Malaysia* (Petaling Jaya: Pacific Publications, 3<sup>rd</sup> edn, 2007) at pp. 118-119. Annual Report of the Judicial Appointments Commission, 2009, at p. 34. Appointments Summary of the Judicial Appointments Commission until 13 August 2010 <[http://translate.google.com.my/translate?hl=en&sl=ms&u=http://www.jac.gov.my/&ei=nyz9TKL1KY\\_RrQfB5qmZCA&sa=X&oi=translate&ct=result&resnum=1&ved=0CBsQ7gEwAA&prev=/search%3Fq%3Djudicial%2Bappointments%2Bcommission%2Bmalaysia%26hl%3Den%26safe%3Doff%26prmd%3Ddiv](http://translate.google.com.my/translate?hl=en&sl=ms&u=http://www.jac.gov.my/&ei=nyz9TKL1KY_RrQfB5qmZCA&sa=X&oi=translate&ct=result&resnum=1&ved=0CBsQ7gEwAA&prev=/search%3Fq%3Djudicial%2Bappointments%2Bcommission%2Bmalaysia%26hl%3Den%26safe%3Doff%26prmd%3Ddiv)> (accessed on 20 November 2010).

<sup>207</sup> Annual Report of the Judicial Appointments Commission, 2009, at p. 28. Appointments Summary of the Judicial Appointments Commission until 13 August 2010 <[http://translate.google.com.my/translate?hl=en&sl=ms&u=http://www.jac.gov.my/&ei=nyz9TKL1KY\\_RrQfB5qmZCA&sa=X&oi=translate&ct=result&resnum=1&ved=0CBsQ7gEwAA&prev=/search%3Fq%3Djudicial%2Bappointments%2Bcommission%2Bmalaysia%26hl%3Den%26safe%3Doff%26prmd%3Ddiv](http://translate.google.com.my/translate?hl=en&sl=ms&u=http://www.jac.gov.my/&ei=nyz9TKL1KY_RrQfB5qmZCA&sa=X&oi=translate&ct=result&resnum=1&ved=0CBsQ7gEwAA&prev=/search%3Fq%3Djudicial%2Bappointments%2Bcommission%2Bmalaysia%26hl%3Den%26safe%3Doff%26prmd%3Ddiv)> (accessed on 20 November 2010).

probation pending their elevation as High Court judges.’ The number of judicial commissioners functioning at the High Courts in Malaya and Sabah and Sarawak until 10 June 2009 is 38.<sup>208</sup>

Therefore, taking into account the detrimental impact of appointing on temporary basis the judicial commissioners upon the independence of the judiciary, only very few constitutions of the world, e.g. the Constitution of Singapore, 1963 and the Constitution of Sri Lanka, 1978 provide for the appointment of judicial commissioner to the Supreme Court of Singapore<sup>209</sup> (‘in order to facilitate the disposal of the business in the ... Court’) and to the High Court of Sri Lanka<sup>210</sup> (if the Justice Minister represents to the President that it is expedient that the number of the judges exercising the jurisdiction and power of the Court in any judicial zone should be temporarily increased) respectively. International standards also disapprove the institution of temporary judges. As the Montreal Declaration on the Independence of Justice, 1983 states that the appointment of temporary judges is inconsistent with judicial independence and calls for phasing out gradually where such appointments exist.<sup>211</sup>

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<sup>208</sup> Judicial Commissioners Of the High Courts In Malaya And Sabah And Sarawak (As at 10 JUNE 2009) <[http://www.kehakiman.gov.my/html/judiciary\\_members.shtml](http://www.kehakiman.gov.my/html/judiciary_members.shtml)> (accessed on 20 November 2010).

<sup>209</sup> Article 94(4) and (5), the Constitution of Singapore, 1963.

<sup>210</sup> Article 111A, the Constitution of Sri Lanka, 1978.

<sup>211</sup> Article 2.20, the Montreal Declaration on the Independence of Justice, 1983.

### ***C. Judicial Appointments Commission Act, 2009***

#### *C.1. Background of Enacting the Act*

The 1988 judicial crisis, which is an unprecedented upheaval and turmoil in the Malaysian Judiciary, witnessed the unceremonious dismissal of the then Lord President<sup>212</sup> and two Supreme Court Judges<sup>213</sup> and their vacant posts filled in allegedly with the favourites of the regime. For example, the then Chief Justice of Malaya and acting Lord President of the Supreme Court Abdul Hamid Omar, who chaired the First Tribunal that recommended the removal of Tun Salleh Abbas as Lord President, was appointed as Lord President to succeed Tun Salleh Abbas on 10 November 1988 and Tun Eusoff Chin, who chaired the Second Tribunal that recommended injudiciously the removal of two of the five Judges of the then Supreme Court, was first appointed as the Chief Justice of the High Court of Malaya on 21 May 1994 and eventually as the Chief Justice of Malaysia on 23 September of the same year (and remained in that office till December 2000).<sup>214</sup> Both the justices, particularly Tun Eusoff Chin, confronted with grave allegations during their terms of office which had the dreadful impact of eroding the public confidence in impartiality and independence of the Malaysian Judiciary. Lord President Abdul Hamid Omar, who upheld the allegations of misconduct against his predecessor Tun Salleh Abbas in 1988, faced allegations of meeting privately on 24 March 1994 with Chief Executive of a Company who had been involved in a litigation pending before the Supreme Court, and thereafter presiding over an interlocutory appeal (on 24 April 1994), in which he gave decision in favour of the company. Although later he admitted meeting the Executive in private, Abdul Hamid Omar maintained that he did not discuss the

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<sup>212</sup> Tun Salleh Abas.

<sup>213</sup> Tan Sri Wan Suleiman and Datuk George Seah.

<sup>214</sup> Supra note 179.

case with him.<sup>215</sup> If his admission is true, yet it is in violation of the celebrated oft-quoted maxim that justice must not only be done but also seen to be expressly and manifestly done. Perhaps Tun Eusoff Chin tops the list of the Chief Justices of Malaysia against whom several allegations of impropriety were brought about. In the first place, he went to New Zealand in 1995 with a lawyer on a family holiday (as pictures of this family trip appeared on the internet, the *de facto* Law Minister in the Prime Minister's Department described the conduct of the Chief Justice as 'improper behaviour'<sup>216</sup>), and, on return, he sat on an appeal case in which that lawyer appeared only to get the decision in his favour. Secondly, in deciding an appeal in 1995 in *Insas Bhd and Megapolitan Nominees Sdn Bhd v Ayer Molek Rubber Co Bhd and others*<sup>217</sup> against the granting of an interlocutory injunction by the Court of Appeal restraining Insas from exercising any rights attached to the shares of RM 160 million in pursuance of an ex parte order of the High Court pending the disposal of the appeal, the Chief Justice, Tun Eusoff Chin, not only masterminded the Coram of the Federal Court co-opting the High Court Judge P.S. Gill to sit in the Federal Court in violation of the provisions of Article 122(2) of the Federal Constitution (which allows only a Judge of the Court of Appeal to sit as a Judge of the Federal Court where the Chief Justice considers that the interests of justice so require) but also overruled the decision of the Court of Appeal expunging some of the observations made by Justice N.H. Chan to the effect that 'an injustice perpetrated by a court of law.' This set the first example of expunging the observation of a second ranked court, the Court of Appeal, in the judicial history of Malaysia.<sup>218</sup> In that case, N. H. Chan J of the Court of

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<sup>215</sup> Cited in Wu Min Aun, 'The Malaysian Judiciary: Erosion of Confidence', (1999) 1(2) *Australian Journal of Asian Law* 124.

<sup>216</sup> *New Strait Times*, 30 May 2000.

<sup>217</sup> [1995] 2 MLJ 833 (FCM).

<sup>218</sup> In September 2006, the High Court observed in *Dato V. Kanagalingam v David Samuels & Ors* that the decision of the Federal Court in the Ayer Molek case was a nullity. [2006] 3 CLJ 909; [2006] 5 AMR 402.



Appeal, with reference to the deliberate non-filing of the complex commercial case before the competent Commercial Division, observed: ‘... [the conduct of the judge and the lawyer in this case] give the impression to the right-thinking people that litigants can choose the Judge before whom they wish to appear for their case to be adjudicated upon.’<sup>219</sup> This case brought to the surface the serious accusation of influencing the system of justice by some businessmen and lawyers which had the effect of undermining public confidence in the integrity and impartiality of the Malaysian Judiciary. Thirdly, on 1 July 1996, a High Court Judge, Syed Ahmad Idid, who was allegedly forced to resign and subsequently to leave for London on 2 July, published a 33 page pamphlet accusing twelve judges including Chief Justice Eusoff Chin and bringing 102 allegations against them (of which 99 were charges of corruption, 21 of abuse of power, and 52 of misconduct, immorality and three claims of payments of RM 50,000 with recipients graduating to taking millions from named business entities).<sup>220</sup> No tribunal was set up under Article 125 of the Federal Constitution to look into these serious allegations<sup>221</sup> as it might have been believed: ‘To sweep things under the carpet like this will only make matters worse.’<sup>222</sup> However, the Bar Council’s call for the establishment of an ‘independent Royal Commission to look into the administration of justice and propose, if need be, radical reform’ went unheeded and unobserved. Furthermore, in November 1999 and in June 2000, the Malaysian Bar Council’s attempt to convene Extraordinary General Meeting of its nationwide members to consider serious allegations of impropriety

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<sup>219</sup> *Insas Bhd and Megapolitan Nominees Sdn Bhd v Ayer Molek Rubber Co Bhd* and others, [1995] 2 MLJ 734 (CA).

<sup>220</sup> Roger Mitton, ‘A Flurry of Questions about Malaysian Justice,’ *Asiaweek*, July 1996.

<sup>221</sup> The Attorney- General Mohtar Abdullah, who was later in January 2002 appointed as a Federal Court Judge as a reward particularly for his role as the head of the public prosecution team against former Deputy Prime Minister Anwar Ibrahim, disclosed that the Police and the Anti-Corruption Agency found the judges clean and claimed that resignation of the whistle-blowing judge concerned was sufficient punishment for committing the crimes of ‘highly seditious, defamatory and derisive.’ *Ibid*.

<sup>222</sup> This comment was made by Advocate Khaled Nordin, a Member of the Parliament from UMNO. *Ibid*.

made against certain members of the judiciary and to call for either the appointment of a tribunal in accordance with Article 125 of the Federal Constitution to investigate into the conduct of the Chief Justice, Tun Eusoff Chin or the establishment of a Royal Commission of Enquiry to investigate into the matter respectively were thwarted on both occasions by the same Judge of the High Court, R.K. Nathan, on the applications of the same lawyer by granting injunctions to restrain the holding of the Bar Council's meetings in November 1999 and on 23 June 2000.<sup>223</sup> In 2005, the Court of Appeal in *Majlis Peguam Malaysia and Ors v Raja Segaran*<sup>224</sup>, in which it was required to consider as to whether the Bar Council had the right to question the conduct of judges, more particularly that of Tun Eusoff Chin, decided the matter in the negative holding that to allow 'an open discussion on conduct of His Majesty's Judges could amount to questioning the wisdom of the King in his selection.' Furthermore, leave to appeal to the Federal Court was refused which prompted the Human Rights Commission (SUHAKAM) of Malaysia to make the following unhesitating comment: 'The ... Commission ... views with disquiet the discussion of the Federal Court on 11 October 2005 dismissing the Malaysian Bar Association's application for leave to appeal against the decision of the Court of Appeal.'<sup>225</sup> Despite so many controversies over the conduct of Eusoff Chin, his term of office as the Chief Justice of Malaysia was extended for a further period of six months from 20 June 2000.<sup>226</sup> Fourthly, in June 2001, Sabah High Court Judge Muhammad Kamil Awang, after cancelling the state assembly seat of Likas in Sabah, on Borneo island, won by Yong Teck Lee, a former Sabah Chief Minister, in election held in 1999 because of the presence of 'phantom

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<sup>223</sup> *Raja Segaran v Bar Council of Malaysia (No. 1)*, [2000] 1 MLJ 1 (HCM); *Raja Segaran v Bar Council of Malaysia (No. 2)*, [2001] 1 MLJ 472 (HCM).

<sup>224</sup> [2005] 1 MLJ 15 (CA).

<sup>225</sup> Media Statement titled 'SUHAKAM: Federal Court Lost An Opportunity', 14 October 2005.

<sup>226</sup> International Bar Association, *Justice in Jeopardy: Malaysia, 2000* (unpublished), at p. 58; International Commission of Jurists, *Malaysia: Attacks on Justice, 2002*.

voters', alleged that he had been instructed by a superior court judge to strike off the election petitions without a hearing.<sup>227</sup> This accusation has the oblique reference to the Chief Justice of Malaysia, Eusoff Chin as it was commented: 'CJ's may and/or can also give instructions [or advice] to judges on the cases they are hearing.'<sup>228</sup>

These kinds of improprieties in the state of affairs of the judiciary had the effect of seriously undermining and eroding the integrity and impartiality of the judges to such an extent that a reputed former Chief Justice deplored: 'When I am asked what I thought, my usual reply is that I wouldn't like to be tried by today's judges especially if I am innocent.'<sup>229</sup>

Under the abovementioned circumstances, the demand for the establishment of an independent Judicial Appointments Commission in Malaysia gained ground and found favour with the relevant quarters particularly the legal professions to ensure dispassionate scrutiny and eliminate political considerations in judicial appointments so that public confidence in the impartiality and independence of the judiciary can be restored and set to right. The Human Rights Commission of Malaysia, which was set up on 20 April 2000, recommended in 2005 for the establishment of an independent Judicial Appointments Commission to ensure transparency in the appointment process and enhance public confidence in the judiciary.<sup>230</sup> But the proposal for the formation of such a Commission received a hostile and unfavourable response, from a person none other than the Chief Justice of Malaysia, Tun Dato Seri Ahmad Fairuz Bin Dato Sheikh Abdul Halim (who became CJ in 2003), first in November 2005 in an International Conference held in Philippines and then in an interview with the New

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<sup>227</sup> Supra note 183, at p. 154.

<sup>228</sup> Charles Hector, 'Fortifying the Independence of the Judiciary', *Human Writes Issue* (An Infoline Pull-Out), 2 July 2003, at p. 6.

<sup>229</sup> Centre for Public Policy Studies (CPPS), Policy Factsheet: Judiciary <<http://www.cpps.org.my/downloads/factsheets/Judiciary%20factsheet.pdf>> (accessed on 2 February 2010).

<sup>230</sup> Report for the Universal Periodic Review on Malaysia, 4<sup>th</sup> Session, February 2009, From the Human Rights Commission of Malaysia, at p. 13.

Straits Times in February 2007 in Kota Baru after chairing a meeting with the Kelantan Judges. In the International Conference (held in Philippines), the Chief Justice said:

There have also been calls by some quarters that a Commission should be set up to deal with the appointment of judges in the superior courts. While that idea may be laudable, a commission to appoint judges does not necessarily guarantee judicial independence. The reverse may be true when members in the commission may well flex their muscles in the course of selecting candidates for later advantage. One argument advanced in favour of the present process is that since the appointing authority is the head of the elected representatives, judges are therefore appointed, albeit indirectly, in line with the wishes of the electors. Further the suggestion that the proposed commission should include civil servants and legal practitioners in its membership is incompatible with and would undermine the very basic concept of independence of the judiciary.

In my view the present system of appointment of judges in Malaysia had served well for the country since its independence. Change should not be made just for the sake of change. Under the present system it would appear that the Prime Minister has a major say in the appointment but in practice it is overall a process for consultation<sup>231</sup>

In February 2007, the then Chief Justice in opposing the proposal for the establishment of an Independent Judicial Appointments Commission went to the extent of saying that: ‘... transparency should have its limits. Don’t tell me when we are transparent, we have to be nude. That is not transparency, that’s nudity. You want everything to be absolute? There is no such thing as absolute freedom or absolute

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<sup>231</sup> Honourable Tun Dato Sri Ahmad Fairuz Bin Dato Sheikh Abdul Halim, ‘Judicial Independence, Accountability, Integrity and Competence- Some Aspects of the Malaysian Position’, presented during the International Conference and Showcase on Judicial Reforms held at the Shangri-la Hotel, Makati City, Philippines on 28-30 November 2005.

transparency. That's the way I look at things.'<sup>232</sup> This improper and indecorous comparison of the proposal for an Independent Judicial Appointments Commission, to ensure a more transparent process of appointment, with nudity by the Chief Justice displays his taste and frame of mind. The reasons for this antagonistic attitude of the Chief Justice towards the establishment of a Commission became distinct and crystal clear on 19 September 2007 when a video clip, recorded in 2002, showing senior lawyer V.K. Lingam's telephonic conversation with the then Chief Judge of Malaya (the Judiciary's third ranked post) Ahmad Fairuz Sheikh Abdul Halim on the urgency to get the latter appointed to the position of the President of the Court of Appeal (second in rank) and then Chief Justice of Malaysia- the highest judicial post in the country- was made public by the People's Justice Party. That the incumbent Chief Justice had been an overt beneficiary of the prevailing system of appointment was substantiated in the Report of the Royal Commission of Enquiry submitted to the Yang di-Pertuan Agong on 9 May 2008, thus:

In the final analysis, ... we are of the view that there was, conceivably, an insidious movement by Lingam with the covert assistance of his close friends ... to involve themselves actively in the appointment of judges, in particular, the appointment of Ahmad Fairuz as the Chief Justice of Malaya and subsequently as Court of Appeal President .... [which] had the effect of seriously undermining and eroding the independence and integrity of the judiciary as a whole.<sup>233</sup>

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<sup>232</sup> *New Straits Times*, 21 February 2007; Lim Kit Siang, 'CJ Fairuz's poor taste in equating Judicial Appointments Commission to "nudity"', 22 February 2007 <[http://www.malaysianbar.org.my/general\\_opinions/comments/cj\\_fairuzs\\_poor\\_taste\\_in\\_equating\\_judicial\\_appointments\\_commission\\_to\\_nudity.html](http://www.malaysianbar.org.my/general_opinions/comments/cj_fairuzs_poor_taste_in_equating_judicial_appointments_commission_to_nudity.html)> (accessed on 10 November 2010).

<sup>233</sup> The Royal Commission of Enquiry on the Video Clip Recording of Images of a Person Purported to be an Advocate and Solicitor Speaking on the Telephone on Matters Regarding the Appointment of Judges (2008) Report, Vol.1, at pp 75-76. The Commission found evidence that several individuals, including the former Prime Minister and two former Chief Justices, were involved in the fixing of judicial appointments and judicial decisions. Other judges accepted gifts and bribes from Lingam and other key individuals. Shockingly, in one case, a judge's judgment was completely written by Lingam himself, who was a counsel for the plaintiff, Vincent Tan.

However, the Malaysian Bar Council's reaction to the issuance of the said Video-Clip, as expressed in its Extraordinary General Meeting held in November 2007, was not only to propose the terms of reference for a Royal Commission of Enquiry but also to call for the establishment of an independent Judicial Appointments and Promotions Commission. Perhaps taking into account the seriousness of the matter and its far-reaching implications on the judiciary, the then Prime Minister Datuk Seri Abdullah Ahmad Badawi (replaced by Datuk Seri Najib Razak as Prime Minister in March 2009) in April 2008, one month before the submission of Report by the Royal Commission of Enquiry's on the V.K. Lingam affair, announced the decision of the Government to set up a Judicial Appointments Commission. In order to ensure transparency in the method of judicial appointment to the superior courts, much expected Judicial Appointments Commission Bill was placed before the Parliament on 10 December 2008. It is pertinent to mention here that, the initial response of the Cabinet to the draft Bill was not positive; the Cabinet meeting held in July 2008 witnessed the opposition of several UMNO Ministers as to the size (consisting of 13 members) of the proposed Commission and as to the curtailment of the powers of the Prime Minister regarding judicial appointments.<sup>234</sup>

However, the Judicial Appointments Commission Bill was approved by the Cabinet at its weekly meeting held on 9 November 2008 in which new Law Minister Mohamed Nazri Abdul Aziz gave a satisfactory and convincing answer to the question raised by his colleagues stressing the fact that the size of the Commission has been reduced from 13 to nine Members.<sup>235</sup> The Bill, placed on 10 December 2008 before the House of Representatives, the Lower House of the Parliament, was passed on 17 December

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<sup>234</sup> Cabinet approves Judicial Appointments Commission <  
[http://www.themalaysiainsider.com/index.php/malaysia/12957\\_cabinet\\_approves\\_judicial\\_appointments\\_commission](http://www.themalaysiainsider.com/index.php/malaysia/12957_cabinet_approves_judicial_appointments_commission)> (accessed on 10/11/2009).

<sup>235</sup> Ibid.

2008. Then the Bill was tabled in the Upper House of the Parliament, Senate, on 22 December and was approved on the next day, 23 December 2008.<sup>236</sup> The passing of the Bill by the House of Representatives within eight days of its initiation and approval by the Senate within two days of its introduction demonstrate that the Bill, concerning the establishment of an important body to ensure transparency in the judicial appointments, was not passed after adequate deliberation, thoughtful debate or meaningful discussion to maximise reasons and minimise the defects of the Bill.

However, a very few former Justices and Judges, namely former Chief Justice, Tun Mohamed Dzaiddin Abdullah (who was the Chief Justice from 20 December 2000 to 15 March 2002) and a former High Court Judge Dato Syed Ahmad Idid, who was allegedly forced to resign in July 1996 for publishing a pamphlet accusing the incumbent Chief Justice and eleven other judges of corruption, abuse of power and misconduct, hailed the Government for eventually introducing the Bill for establishing a Judicial Appointments Commission as a step forward to ‘improve the process of appointing judges’ and as a means to ensure the selection of ‘the right candidates to be judges’ respectively.<sup>237</sup> The Judicial Appointments Commission Bill, passed by the Parliament, received the Royal Assent on 6 January 2009. The Judicial Appointments Commission Act, 2009 came into force on 2 February 2009<sup>238</sup> which provides ‘for the establishment of the Judicial Appointments Commission in relation to the appointment of judges of the superior courts, to set out the powers and functions of such Commission, to uphold the continued independence of the judiciary, and to provide for matters connected therewith or incidental thereto.’<sup>239</sup> Under the

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<sup>236</sup> Annual Report of the Judicial Appointments Commission, 2009, at p. 5 [http://www.jac.gov.my/application/laporantahunan/lt2009\\_bi.pdf](http://www.jac.gov.my/application/laporantahunan/lt2009_bi.pdf) (accessed on 14 November 2010).

<sup>237</sup> ‘JAC Bill does not affect constitutional status of Sabah’, *Daily Express*, 18 December 2008 [www.dailyexpress.com.my/news.cfm?NewsID=61757](http://www.dailyexpress.com.my/news.cfm?NewsID=61757) (accessed on 11/11/2009).

<sup>238</sup> P. U. (B) 43/2009.

<sup>239</sup> As contained in the broad title of the Judicial Appointments Commission Act, 2009.

Act, the Judicial Appointments Commission has been empowered to deal with ‘the appointments of judges of the Federal Court, Court of Appeal and High Court and judicial commissioners and shall include the appointments of the Chief Justice of the Federal Court, the President of the Court of Appeal, the Chief Judge of the High Court in Malaya and the Chief Judge of the High Court in Sabah and Sarawak made on or after the commencement of this Act.’<sup>240</sup>

### *C.2. Composition of the Commission*

The Judicial Appointments Commission Act, 2009 provides that the ‘Commission shall consist of the following members:

- a) the Chief Justice of the Federal Court who shall be the Chairman;
- b) the President of the Court of Appeal;
- c) the Chief Judge of the High Court in Malaya;
- d) the Chief Judge of the High Court in Sabah and Sarawak;
- e) a Federal Court judge to be appointed by the Prime Minister; and
- f) four eminent persons, who are not members of the executive or other public service, appointed by the Prime Minister after consulting the Bar Council of Malaysia, the Sabah Law Association, the Advocates Association of Sarawak, the Attorney General of the Federation, the Attorney General of a State legal service or any other relevant bodies.’<sup>241</sup>

Thus the Commission is composed of nine members who are of two types: ex-officio and non ex-officio. The number of ex-officio members from the three superior courts- the Chief Justice of the Federal Court, the President of the Court of Appeal, the Chief Judge of the High Court in Malaya and the Chief Judge of the High Court in Sabah

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<sup>240</sup> Section 1(3), the Judicial Appointments Commission Act, 2009.

<sup>241</sup> Section 5(1), *ibid.*



and Sarawak- is four, whereas the number of non ex-officio members is five to be appointed by the Prime Minister. Of the five non ex-officio members, one is to be a judge of the Federal Court to be appointed by the Prime Minister at his sole discretion without consulting any relevant person or authority while other four non ex-officio members are to be 'eminent persons', not being 'members of the executive or other public service', who are to be appointed by the Prime Minister after consultation, not concurrence, with various stakeholders in the administration of justice, namely, (i) the Bar Council of Malaysia, the Sabah Law Association, the Advocates Association of Sarawak, the Attorney General of the Federation, the Attorney General of a State legal service or any other relevant bodies. Thus the Prime Minister appoints the majority of the members of the Commission- five out of nine- and in doing so he is more likely to be swayed by political allegiance of the persons concerned. This leaves the door wide open for selecting candidates by the Judicial Appointments Commission in deference to the Prime Minister's covert wishes for vacancies in the superior courts and, as such, the very purpose of setting up of the Commission, independent of the Prime Minister, for a fair, independent and impartial selection is tend to be defeated. The position may eventually go from bad to worse if the Prime Minister exercises, under the Act, the power of appointing 'any person he deems fit to fill the vacancy ... created [out of death, conviction, bankruptcy, insanity, resignation, absence from three consecutive meetings of the Commission without leave of the Prime Minister] for the remainder of the term vacated by the member or for the interim period until a new person is appointed to the office or the position held by that member prior to his vacating the office or position.'<sup>242</sup>

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<sup>242</sup> Section 10(2), *ibid.*

Therefore, in view of the fact that the prerequisite independence of the Judicial Appointments Commission precludes appointment of its members by a political authority like the Prime Minister involving the risk of party-political bias in the appointment of judges, it may be suggested that provisions for the appointment of non ex-officio members of the Commission may be replaced with those of the appointment of the immediately retired Chief Justice of the Federal Court, the President of the Court of Appeal and Chief Judge of the High Court in Malaya/the Chief Judge of the High Court in Sabah and Sarawak (by rotation) and two Deans of the Faculties of Law of the recognised Universities in Malaysia (in alphabetical order of the name of the Universities). The Chairman of the Judicial Appointments Commission should be given the power to fill in casual vacancy in the Commission as the Chief Justice of Namibia has been empowered by the Constitution to fill in any casual vacancy in the Judicial Service Commission.<sup>243</sup>

### *C.3. Establishment of the Judicial Appointments Commission*

However, the Judicial Appointments Commission has been constituted for the first time in the history of Malaysia on 11 February 2009 with Chief Justice Tan Sri Zaki Azmi as the ex-officio Chairman, and the Court of Appeal's President Tan Sri Alauddin Mohd Sheriff, Chief Judge of Malaya Datuk Arifin Zakaria and Sabah and Sarawak Chief Judge Tan Sri Richard Malanjum as its ex-officio members. The five non ex-officio members appointed to the Commission by the Prime Minister are Federal Court Judge Datuk Zulkefi Ahmad Makinuddin and four eminent persons namely former Chief Justice, Tun Abdul Hamid Mohamed, former Chief Judge of Sabah and Sarawak Tan Sri Steve Shim Lip Kiong, former High Court Judge Tan Sri

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<sup>243</sup> Article 85(4) of the Constitution of Namibia, 1990 provides that 'Any casual vacancy in the Judicial Service Commission may be filled by the Chief Justice or in his or her absence by the Judge appointed by the President.

L. C. Vohrah and former Attorney- General Dato' Seri Ainum Mohd Saaid.<sup>244</sup> Thus no senior law Professor of recognised merit having knowledge of the legal profession has been included in the Commission from the category of eminent persons.

It is pertinent to mention here that the present ex-officio Chairman of the Judicial Appointments Commission, Tan Sri Zaki Azmi, who had been a former legal adviser to the UMNO and had served the Party's Election Committee as Chairperson and Deputy Chairperson respectively, was appointed as the Chief Justice of Malaysia on 16 October 2008 only about one year after his direct appointment to the Federal Court in September 2007, bypassing the convention of first serving in the High Court and the Court of Appeal. Thus the apprehension and concern of a Parliament Member, expressed in the Parliament in 2007 and during the Royal Address in Parliament on 6 May 2008, about his appointment as the Chief Justice came true. As the Parliament Member said:

Will the Judicial Appointments Commission be formed in time to influence the appointment of the next Chief Justice in less than six months to ensure that the country does not have another infamous first, in having the first UMNO Chief Justice?

In the last Parliament, I had questioned the fast-track elevation of Tan Sri Zaki Tun Azmi in the judiciary, with his unprecedented triple jump to become Federal Court judge last September without ever being a High Court or Court of Appeal judge, then quadruple jump in three months as Court of Appeal President, and whether this is to be followed by quintuple jump in a matter of a year to become the next Chief Justice

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<sup>244</sup> Zaki Azmi is Chairman of Judicial Appointments Commission [www.themalaysianinsider.com/index.php/malaysia/1854-zaki-azmi-is-chairman-of-judicial-appointments-commission](http://www.themalaysianinsider.com/index.php/malaysia/1854-zaki-azmi-is-chairman-of-judicial-appointments-commission) (accessed on 10/11/2009).

when Datuk Abdul Hamid Mohamed steps down from the topmost judicial post in October.<sup>245</sup>

Then the Member put forward a question to the Prime Minister as to the appointment of next Chief Justice through the Judicial Appointments Commission: ‘Is the Prime Minister prepared to make a public commitment that the appointment of the next Chief Justice will be first referred to the Judicial Appointments Commission, which he has agreed to set up?’<sup>246</sup>

Therefore, it seems that the appointment of Zaki Azmi as the Chief Justice of the Federal Court in October 2008, between the Cabinet’s disapproval of the draft Judicial Appointments Commission Bill in July 2008 and approval in November 2008, was a calculated move to head the proposed Judicial Appointments Commission with a person of political allegiance in order to influence the selection process for having patronage appointments in the superior courts of Malaysia. Furthermore, the appointment of a former Chief Justice (previously Lord President) Tun Hamid Omar, who drew widespread criticism for his meeting in private with the Chief Executive of a Company whose case was pending before the Supreme Court and against whom the Malaysian Bar Council passed a resolution to boycott his court after his appointment as a regular Lord President, reinforces mistrust and scepticism in the impartiality of the Commission.

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<sup>245</sup> Lim Kit Siang Online, On Judicial Reform, 7 May 2008 < <http://blog.limkitsiang.com/2008/05/07/on-judicial-reform/>> (accessed on 9 February 2010).

<sup>246</sup> Ibid.

#### *C.4. Functions and Powers of the Commission*

The main 'functions of the Commission are-

- a) to select suitably qualified persons who merit appointment as judges of the superior court for the Prime Minister's consideration;
- b) to receive applications from qualified persons for the selection of judges to the superior court; [and]
- c) to formulate and implement mechanisms for the selection and appointment of judges of the superior court.<sup>247</sup>

The Commission, which meets every month, discusses, subjects other than the selection and appointment of judges, the disposal of cases and improving the performance of superior court judges.<sup>248</sup>

#### *C.5. Selection Criteria*

A candidate is qualified for selection as a judge of the High Court, as mentioned earlier, if he fulfils the requirements laid down in Article 123 of the Federal Constitution.<sup>249</sup> Since the functions performed by judges demand the qualities of independence, impartiality, honesty, integrity, high legal acumen and sound knowledge of law, the Judicial Appointments Commission Act, though not required by the Constitution, has spelled out the following criteria to take into account by the Commission in selecting candidates for appointment:

- a) integrity, competency and experience;
- b) objective, impartial, fair and good moral character;

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<sup>247</sup> Section 21(1), the Judicial Appointments Commission Act, 2009.

<sup>248</sup> In the Forward from the Chairman in the Judicial Appointments Commission's Annual Report, 2009.

<sup>249</sup> Section 23(1), *ibid.* The constitutional requirements are: i.e. citizenship, ten years experience as an advocate of the High Courts or as a member of the judicial and legal service of the Federation or of the legal service of a state.

- c) decisiveness, ability to make timely judgments and good legal writing skills;
- d) industriousness and ability to manage cases well; and
- e) physical and mental health.<sup>250</sup>

The enumeration of certain important criteria of honesty, fairness, good health, strong achievement, aptitude, knowledge and the ability to write judgments in time is a positive development in line with the modern trend of specifying certain benchmarks to be found in some of the constitutions of the world for selecting in a holistic manner the best candidates as judges. For example, the Constitution of the Islamic Republic of Comoros provides that the members of the Supreme Court shall be chosen on the basis of their competence, their integrity and their knowledge of law.<sup>251</sup> Jurist like Chief Justice Dickson (of Canada) also looks for in a good judge the five qualities of: integrity, equanimity, legal knowledge, patience and common sense.<sup>252</sup>

However, a serving judge or judicial commissioner must be disqualified for appointment if he has three or more pending judgments or unwritten grounds of judgments that are overdue by sixty days or more from the date they are deemed to be due.<sup>253</sup> Such a provision is also to be found in the 1994 Code of Ethics, adopted by the Yang di-Pertuan Agong on the recommendation of the Chief Justice of the Federal Court, the President of the Court of Appeal and the Chief Judges of the High Court, after consulting the Prime Minister in pursuance of the Constitution (Amendment) Act, 1994, which provides that judges should not inordinately and without reasonable explanation delay in the disposal of cases, the delivery of decisions and the writing of grounds of judgments. Despite these provisions, the justification of incorporating

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<sup>250</sup> Section 23(2), *ibid.*

<sup>251</sup> Article 32(6), the Constitution of the Islamic Federal Republic of the Comoros, 1978.

<sup>252</sup> Garry Sturgess and Phillips Chubb, *Judging the World Law and Politics in the World's Leading Courts* (Sydney: Butterworths, 1988) at p. 148.

<sup>253</sup> Section 23(3), the Judicial Appointments Commission Act, 2009.

similar provisions into the Judicial Appointments Commission Act demonstrates Government's seriousness to address past public criticisms regarding the appointment/promotion of a High Court Judge to the Federal Court in August 2007 'who had not submitted written judgments in 33 cases',<sup>254</sup> of which in three cases, death sentences were passed against the accused.

#### *C.6. Selection Process/Procedure*

In exercise of the powers conferred<sup>255</sup> by the Judicial Appointments Commission Act, 2009, the Prime Minister, on the recommendation of the Commission formulated the Judicial Appointments Commission (Selection Process and Method of Appointment of Judges of the Superior Courts) Regulations 2009, which came into effect on 1 June 2009, in order to achieve the underlying objectives of the parent law, i.e. to ensure transparency in the selection process as well as to select the best candidates for appointment of judges in the superior courts of Malaysia. Previously nothing was known to anybody from the day of proposing a person for judicial appointment till the issuance of the warrant except to the persons who were involved in it. The newly adopted Regulations provide for a detailed transparent procedure to be followed by the Judicial Appointments Commission from the advertisement of the judicial vacancies to the consideration and recommendation of persons for appointment by the Commission.

##### *C.6.1. Advertisement of Vacancy*

The Judicial Appointments Commission has been given the discretion as to 'advertise in the Commission's website or in any other medium the Commission deems

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<sup>254</sup> SUARAM, Overview of the Malaysian Civil and Political Rights, Kuala Lumpur, December 2007, at p. 15.

<sup>255</sup> Section 30, Judicial Appointments Commission Act, 2009.

appropriate to fill any vacancy in the office of a judge’<sup>256</sup> and the advertisement, *inter alia*, shall state: ‘...b) the requirement under Article 123 of the Federal Constitution; c) the experience, academic qualification and other qualification required; [and] d) the remuneration and allowances.’<sup>257</sup>

### *C.6.2. Vacancies in the High Courts*

Any citizen having the experience of practising in a High Court as an advocate for ten years or of a member of the judicial and legal service of the Federation or of a state for the same period (i.e. ten years) may apply for selection as a judge of the High Court.<sup>258</sup> Only the qualified serving judicial and legal service officer is required to submit the application to the Commission through the head of the department, who ‘shall forward the application to the Commission together with the relevant service information and a statement as to whether he supports the application or otherwise.’<sup>259</sup>

### *C.6.3. Vacancies in the Federal Court and the Court of Appeal*

But in case of the vacancies in the Federal Court and the Court of Appeal, the following persons have been entrusted with the core responsibility of identifying and proposing suitable ‘names’ to the Commission for selection:

- 1) ....
  - a) the retiring Chief Justice, for vacancy in the office of Chief Justice;
  - b) the Chief Justice and the retiring President of the Court of Appeal, for vacancy in the office of President of the Court of Appeal;

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<sup>256</sup> Regulation 3(1), the Judicial Appointments Commission (Selection of Judges of the Superior Courts) Regulations, 2009.

<sup>257</sup> Regulation 3(2), *ibid.*

<sup>258</sup> Regulation 4(1), *ibid.*

<sup>259</sup> Regulation 4(3), *ibid.*



- c) the Chief Justice and retiring Chief Judge of the High Court in Malaya or the retiring Chief Judge of the High Court in Sabah and Sarawak, as the case may be, for vacancy in the office of Chief Judge of the High Court in Malaya or Chief Judge of the High Court in Sabah and Sarawak;
  - d) the Chief Justice, for vacancy in the office of judge of the Federal Court; and
  - e) the Chief Justice and President of the Court of Appeal, for vacancy in the office of judge of the Court of Appeal.
- 2) Notwithstanding subregulation (1), the Commission may consider names proposed by eminent persons who have knowledge of the legal profession or who have achieved distinction in the legal profession in respect of vacancies in the Federal Court and the Court of Appeal.<sup>260</sup>

Thus it is a very rare arrangement that the initiations of the proposals for selecting the candidates for vacancies in the offices of the Chief Justice of Malaysia (i.e. head of the Federal Court), President of the Court of Appeal, Chief Judge of the High Court in Malaya and Chief Judge of the High Court in Sabah and Sarawak have been given to the retiring, not retired, heads of three superior courts respectively- the retiring Chief Justice, the President and Chief Judges- who are, through their long association with the respective court, conversant and best equipped to assess objectively the attributes of their fellow colleagues for proposing the names of their successors in office.

But the Chief Justice of Malaysia, the head of the Malaysian Judiciary and paterfamilias of the judicial fraternity, has also been given, following the constitutional scheme, the role of proposing names to the Commission for selection against the vacancies of the President of the Court of Appeal, and the Chief Judges of

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<sup>260</sup> Regulation 5, *ibid.*

the two High Courts. Furthermore, he has been empowered, not only to propose the names against vacancies in the office of the judges of the Federal Court, but also, along with the President of the Court of Appeal, for the vacant posts of judges of the Court of Appeal. For, he is in a better position to know the functional suitability of the candidates in terms of experience or knowledge of law, ability to handle cases, firmness and fearlessness requisite for appointment as superior court judges for ensuring dispassionate and objective adjudication. It is expected that the incumbent Chief Justice of Malaysia, President of the Court of Appeal and retiring heads of the three superior courts shall not be imperceptibly influenced by extraneous or irrelevant considerations and shall be free from bias, predilection or inclination in proposing names of the suitable candidates for appointment on the bench. Perhaps taking into account the nature and importance of judicial appointment, plurality of sources of proposing competent candidates from outside judiciary have been provided for: eminent persons having knowledge of the legal profession or achieved distinction in the legal profession have been empowered to propose names for the consideration of the Judicial Appointments Commission in respect of vacancies in the Federal Court and the Court of Appeal. Thus there is the scope for the stalwart in legal profession to be associated with the selection process for judicial appointment. This is line with the Indian Bar Council's opinion that

of all the segments of the society, the members of the Bar are pre-eminently suited to judge persons who should be appointed as Judges' of the superior courts and therefore, 'any reform or modification in the model for selection and appointments of

Judges .... must provide for adequate representation of the organized bar in the mechanism.<sup>261</sup>

*C.6.4. Vetting and Screening the Application or Proposal for Appointment in the Superior Courts*

Upon receiving an application or proposal, the Secretary to the Commission shall, inter alia, ‘vet the application or proposal to ensure that the applicant or candidate is qualified under Article 123 of the Federal Constitution.’<sup>262</sup> Then he shall, as soon as may be practicable, send the names of those candidates who have fulfilled the selection criteria laid down in Section 23 of the Act to the following agencies for screening:

... (1) ....

a) Malaysian Anti Corruption Commission;

b) Royal Malaysia Police;

c) Companies Commission of Malaysia; and

d) Department of Insolvency Malaysia.

(2) An agency specified in subregulation (1) shall, within seven days from the date of the receipt of the request from the Secretary, forward its report to the Commission.

(3) After receiving all the reports from the agencies specified in subregulation (1), the Secretary shall proceed to prepare a deliberation paper on each applicant and

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<sup>261</sup> The opinion was expressed by the Bar Council of India in 1979. ‘National Commission to Review the Working of the [Indian] Constitution’, A Consultation Paper on Superior Judiciary, 26 September 2001 <http://lawmin.nic.in/ncrwc/finalreport/v2b1-14.htm> (accessed on 9 February 2010).

<sup>262</sup> Regulation 7(1)(b), the Judicial Appointments Commission (Selection of Judges of the Superior Courts) Regulations, 2009.

proposed person who has passed the screening process by the agencies for the selection process by the Commission.<sup>263</sup>

Thus the transparent process of selection involves two parts, namely the screening of the antecedent or background of the candidates and ascertaining the suitability of the candidates for judicial appointment on the basis of fitness and competence. The initial investigation of potential judicial candidates by the four agencies of (a) Malaysian Anti Corruption Commission, (b) Royal Malaysia Police, (c) Companies Commission of Malaysia, and (d) Department of Insolvency Malaysia to verify their educational qualification, financial position statement, tax payment record and credit history as to arrest and conviction may be compared with the crucial investigation of the prospective judicial candidates done by the US Federal Bureau of Investigation (FBI) on receipt of three names from the Office of Policy Development (OPD) of the Department of Justice (supervised and directed by the Attorney General) after its positive preliminary evaluation.<sup>264</sup> However, the Secretary to the Commission prepares a deliberation paper on each of the candidates, about whom the relevant agencies have given satisfactory and positive reports, for the consideration of selection by the Commission.

#### *C.6.5. Selection Meeting*

The Chairman of the Judicial Appointments Commission- the Chief Justice of Malaysia- shall preside over the selection meeting<sup>265</sup> ‘except where the selection

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<sup>263</sup> Regulation 8, *ibid.*

<sup>264</sup> The names of the candidates are also sent to the American Bar Association (ABA) for assessing their qualifications including temperament. The ABA’s informal piece of advice to the Department of Justice on the rating of the candidates states: ‘well qualified’, ‘qualified’ or ‘not qualified.’ If the ABA rating is positive, the FBI report is satisfactory and the Department of Justice’s evaluation is favourable, then the Attorney General formally recommends the nomination to the President.

<sup>265</sup> Section 13(3), the Judicial Appointments Commission Act, 2009.

meeting is to consider the selection of persons for vacancies in the High Courts.’<sup>266</sup> It seems unjustifiable to disqualify the Chairman of the Commission from presiding over the selection meeting to consider selection of candidates for the lowest tier of superior courts (the High Court) and to require him to nominate ‘a judge from amongst the members of the Commission to be the Chairman’<sup>267</sup> of such a selection meeting. As to the quorum of the selection meeting of the Commission, the Act in Section 13(4) provides that the quorum of the Commission shall be seven including the Chairman. But in another place of the Act, it has been provided that ‘The quorum for every selection meeting shall be seven’<sup>268</sup> without any reference to the Chairman. Taking into account the facts that it may be a difficult task in reaching quorum requirement of seven in selecting the candidates for the posts of the Chief Justice of Malaysia and President of the Court of Appeal, for example, if the names of three ex-officio members of the Commission- the President of the Court of Appeal, Chief Judge of Malaya, Chief Judge of Sabah and Sarawak- and of the nominated Federal Court Judge, are considered for the position of the Chief Justice, they would be ‘disqualified from attending or participating in a selection meeting’<sup>269</sup> and if any of the members of the Commission is related or connected to any candidate he would also be disqualified from attending such a meeting, it has further been provided that ‘then the quorum shall not be less than five.’<sup>270</sup> ‘Every member of the Commission present shall be entitled to one vote by secret ballot and in the event of a tie in the number of votes casted, the Chairman or the member of the Commission presiding as the Chairman for the meeting shall have a casting vote’<sup>271</sup> and the selection shall be

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<sup>266</sup> Section 24(1), *ibid.*

<sup>267</sup> Section 24(2), *ibid.*

<sup>268</sup> Section 24(4), *ibid.*

<sup>269</sup> Section 25, *ibid.*

<sup>270</sup> Section 13(5), *ibid.*

<sup>271</sup> Section 13(6), *ibid.*

made ‘by majority decision’<sup>272</sup> i.e. on the basis of the majority of votes received. But if the Commission invites ‘any person to attend a meeting of the Commission for the purpose of advising it on any matter under discussion, then that person shall not be entitled to vote at the meeting.’<sup>273</sup> In a selection meeting, the Commission shall:

- a) ‘select not less than three persons for each vacancy in the High Court; or
- b) select not less than two persons for each vacancy where the vacancy is for judges of the superior courts other than the High Court.’<sup>274</sup>

After receiving the report of the Commission as to the selection of the candidates for the appointment to the office concerned containing reasons for selection and necessary information<sup>275</sup>, the Prime Minister may ‘request’ for two more names to be selected and recommended for his consideration with respect to any vacancy to the office of the Chief Justice of the Federal Court, the President of the Court of Appeal, the Chief Judge of the High Court in Malaya, the Chief Judge of the High Court in Sabah and Sarawak, judges of the Federal Court and the Court of Appeal, and the Commission [which maintains reserve candidates for this purpose] shall, as soon as may be practicable, comply with the request in accordance with the selection process as prescribed in the regulations made under this Act.’

Thus the Judicial Appointments Commission, which has been given the authority to vet and select the best candidates taking into account the selection criteria as laid down in Article 123 of the Federal Constitution and Section 23 of the Judicial Appointments Commission Act, 2009, requires unjustifiably to propose varying number of minimum candidates: not less than three candidates for each vacancy of

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<sup>272</sup> Section 24(5), *ibid.*

<sup>273</sup> Section 13(7), *ibid.*

<sup>274</sup> Section 22(2), *ibid.*

<sup>275</sup> Section 26(1), *ibid.*

the High Court Judge and not less than two persons for each vacancy of the Federal Court Judge and the Court of Appeal Judge. Again the Prime Minister may require the Commission to select and recommend two more names for his consideration, not for an appointment against a vacant post of the High Court, but only for appointment to an office bearer position of the three superior courts- the Chief Justice of the Federal Court, the President of the Court of Appeal, the Chief Judge of the High Court in Malaya and the Chief Judge of the High Court in Sabah and Sarawak- and judges of the Federal Court and the Court of Appeal. The Commission is required to comply with such a request from its reserve candidates as soon as may be practicable. Thus the Prime Minister is empowered to reject the well considered selection of two candidates by the Commission for vacant positions of the office bearers of three superior courts and judges of the Federal Court and the Court of Appeal without any obligation to make his reasons for such a rejection known to the Commission and request for two additional names without assigning any reasons whatsoever. Generally it is expected that the Commission will recommend the best two suitably candidates available for the first instance against those vacant posts and being requested for two additional names it shall comply with the request from the 'reserve candidates',<sup>276</sup> who may be of comparatively less appropriate candidates. The provision for providing the Prime Minister with the multiple choices of four candidates for appointment to the each office bearer position of the Federal Court, the Court of Appeal and two High Courts and each vacant post of judges of the Federal

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<sup>276</sup> As Regulation 9, the Judicial Appointments Commission (Selection Process and Method of Appointment of Judges of the Superior Courts) Regulations, 2009 provides that '1) In selecting candidates to be recommended for appointment to the superior courts, the Commission shall ensure that reserve candidates are available for purposes of complying with any request that may be made by the Prime Minister under section 27 of the Act. 2) Upon receiving a request from the Prime Minister under section 27 of the Act, the Commission shall submit the names of the reserve candidates and its report under section 26 of the Act.'

Court and the Court of Appeal is incompatible and inconsistent with the very purpose of establishing the Commission as an effective and meaningful selecting body.

#### *C.6.6. Tender of Advice*

As to the acceptance of the candidates recommended by the Commission for Prime Minister's consideration, the Judicial Appointments Commission Act provides that: 'Where the Prime Minister has accepted any of the persons recommended by the Commission, he may proceed to tender his advice in accordance with Article 122B of the Federal Constitution.'<sup>277</sup>

Thus it is not explicitly and unequivocally stated that the Prime Minister must accept only those candidates recommended by the Commission for proceeding to tender his advice to the Yang Di Pertuan Agong under Article 122B of the Federal Constitution. Because of the using of vague and imprecise words of 'where the Prime Minister has accepted any of the persons recommended by the Commission', it appears that the Prime Minister is not bound to recommend to the Head of the State after consulting the Conference of Rulers from among those candidates shortlisted by the Judicial Appointments Commission for appointment in the vacant posts of judges of the Superior Courts. If the Prime Minister is free to accept or reject the recommendation of the Commission, then there is little point and justification in having such a 'toothless tiger.'

#### *C.7. Independence of the Commission*

The kernel and success of the Judicial Appointments Commission lie in its independence. The member of the Judicial Appointments Commission is expected to perform their function of selection and recommending suitable persons for judicial

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<sup>277</sup> Section 28, the Judicial Appointments Commission Act, 2009.



appointment without submitting to their personal likeness or dislikeness and improper influences, inducements, pressures, threats or interferences from any quarter except toeing the line with the constitutional and legal criteria and the commands of their conscience. The Commission will only be as independent as the members of which it is composed of. The question of independence of the Commission is inextricably linked with, apart from the method of appointment, its members' security of tenure, salaries and other terms and conditions of service.

The empowering of the Prime Minister to appoint majority of the members of the Judicial Appointments Commission (five out of nine) is, as it seems, deliberately designed to staff the Commission with pro-Government people to retain his grip over the judicial selection and recommendation process. Furthermore, the four out of five appointed (except appointed Federal Court Judge) members of the Commission from the category of 'eminent persons' have not been given the security of tenure, the most fundamental of the guarantees of independence of the members of the Commission for enabling them to perform their functions without fear of the consequences regardless of whether their job or actions do not please the Prime Minister or some other person. For the appointment of any of the four eminent persons as members 'may at any time be revoked by the Prime Minister without assigning any reason.'<sup>278</sup> Thus the four non ex-officio members of the Commission (indeed eminent persons), who are appointed 'for a period of two years and are eligible for reappointment'<sup>279</sup> for another term only, cannot be expected to acquire that habit of independence in discharging their duties without fear or favour requisite in their office if their grounds of removal are not clearly specified and their removal procedure is not made a

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<sup>278</sup> Section 9(1), the Judicial Appointments Commission Act, 2009.

<sup>279</sup> Section 6(1), *ibid.*

difficult process involving careful consideration by an independent body other than the Prime Minister.

Furthermore, all the members of the Commission have not been given the security of providing them with adequate allowances and appropriate privileges during their terms of office. For, the ‘members of the Commission shall be paid such allowances as the Prime Minister may determine’<sup>280</sup> which implies that the Prime Minister has not only given the absolute and unfettered power to determine the amount of allowances for the Commissioners but also to alter the amount of allowances to their disadvantages. Taking these realities into account, the Constitution of the Sovereign Democratic Republic of Fiji, 1990 has aptly vested the power with the Parliament to fix allowances for the members to the Judicial Service Commission.<sup>281</sup>

On top of it, the Judicial Appointments Commission Act contains a very unusual stipulation as to the amendment of its provisions in Section 37 which provides that:

1. The Prime Minister may, whenever it appears to him necessary or expedient to do so, whether for the purpose of removing difficulties or preventing anomalies in consequence of the enactment of this Act, by order published in the *Gazette* make such modifications to any provisions of this Act as he thinks fit.
2. The Prime Minister shall not exercise the powers conferred by this section after the expiration of two years from the date of coming into operation of this Act.
3. In this section, ‘modifications’ includes amendments, additions, deletions, substitutions, adaptations, variations, alteration and non-application of any provisions of this Act.

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<sup>280</sup> Section 37, *ibid.*

<sup>281</sup> Article 131(3), the Constitution of the Sovereign Democratic Republic of Fiji, 1990.

Thus the Parliament, which has passed the Judicial Commissions Act, has been deprived of its inherent power of modifications, including ‘amendments, alteration and non-application of any provisions of this Act,’ to remove the defects of the Act after its coming into force with a view to improve the existing arrangement keeping pace with changing needs of time. The power of modifications has been completely given to the Prime Minister in the two years of the coming into operation of the Act by ministerial order usurping the power of the Parliament.

Therefore, it appears that the provisions of the Judicial Appointments have been carefully crafted to incapacitate the members of the Commission, particularly the members appointed from the category of eminent persons, from performing their functions of selecting and recommending candidates for appointment as judges of the superior courts independently and ‘to uphold the continued independence of the judiciary’ without paying any attentions to the wishes and desires of the Prime Minister.

***D. Whether the Judicial Appointments Commission Act is a Valid Piece of Legislation?***

The Federal Constitution of Malaysia provides for a detailed procedure in Articles 122B, 122, 122(1A) and 122AB, as mentioned earlier, for the appointment judges of three superior courts, appointment of additional judges in the Federal Court and appointment of Judicial Commissioners in the High Court in Malaya and the High Court in Sabah and Sarawak respectively by the Yang di-Pertuan Agong acting on the advice of, and, after consulting the designated constitutional functionaries. The qualifications for the appointment of judges in the superior courts of the Federal Court, Court of Appeal and of High Courts have been, as stated earlier, outlined in Article 123 of the Constitution. The Federal Constitution neither

contemplates of establishing any Judicial Appointments Commission for selecting candidates for the consideration of the Prime Minister with respect to judicial appointment in superior courts nor does it empower the Parliament to enact law determining the organisation, powers and functioning of the Commission, a power which has been given to the Parliament in the Constitution of Algeria, 1989, the Constitution of France, 1958, the Constitution of Italy, 1947, the Constitution of Namibia, 1990, the Constitution of Sudan, 1998 and the Constitution of Rwanda, 2003.<sup>282</sup> The Constitution of Malaysia has also not empowered the Parliament to pass any law prescribing additional qualifications for the appointment of judges of superior courts as it is to be found in Article 95(2) of the 1972 Constitution of Bangladesh.<sup>283</sup> Furthermore, the Constitution has given the Prime Minister unfettered prerogative of exploring any number of candidates for each judicial vacancy. Therefore, it can be strongly argued that the enactment of the Judicial Appointments Commission Act, 2009 providing for the establishment of a Judicial Appointments Commission, prescribing selection criteria and limiting Prime Minister's choice to three candidates for the appointment of judges in the High Courts and ultimately (2 + 2=) four candidates for appointment as judges of the Federal Court and the Court of Appeal is unconstitutional. For, the Parliament cannot assume a power which has not been conferred on it by the Constitution itself. Furthermore, the establishment of the Judicial Appointments Commission under an ordinary Act of the Parliament consisting of, *inter alia*, the Chief Justice of the Federal Court, the

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<sup>282</sup> Article 155 of the Constitution of Algeria, 1989, provides that 'The High Council Magistracy decides, within the conditions defined by the law, the appointment, transfer and the progress of the magistrate's careers.' Article 65 of the Constitution of France states that 'An institutional Act shall determine the member in which this article [dealing with the jurisdiction and powers of the High Council of the Judiciary concerning appointment and disciplining the judges and public prosecutors] is to be implemented.' Article 105 of the Constitution of Italy, 1947, lays down that 'The superior council of the judiciary, as defined by organizational law, has the exclusive competence to appoint, assign, move, promote and discipline members of the judiciary.' Article 102(2) of the Constitution of Sudan, 1998, provides that 'The Judiciary shall have a council to be known as the "the Supreme Council of the Judiciary", its composition and functions shall be prescribed by law.' Article 158 of the Constitution of Rwanda, 2003 stipulates that 'An organic law shall determine the organization, powers and functioning of the Supreme Council of the Judiciary.'

<sup>283</sup> After laying down the criteria of citizenship and 10 years of experience as an Advocate of the Supreme or Court or holding judicial office for 10 years, Article 95(2)(c) as an alternative requirement speaks of 'such other qualifications as may be prescribed by law for appointment as a Judge of the Supreme Court.'

President of the Court of Appeal, the Chief Judge of the High Court in Malaya and the Chief Judge of the High Court in Sabah and Sarawak as ex-officio members, has given rise to an over-lapping exercising of power under the Federal Constitution regarding judicial appointment in superior courts. For, after receiving the names of the candidates recommended by the Commission, the Prime Minister is required under the Constitution to consult again the Chief Justice of the Federal Court before tendering his advice to Yang di-Pertuan Agong for the appointment of all the judges of the superior court (Federal Court), consult the President of the Court of Appeal for the appointment of judges to the Court of Appeal and consult each of the Chief Judges of the two High Courts for appointing puisne judges to the High Court concerned. This will enable the heads of the superior courts, particularly the Chief Justice of Malaysia who is a common consultee in appointing all judges of superior courts, to express their personal impression and point of view for the second time as to the suitability of the candidates having disagreed with the Commission's decision taken in the selection meeting.

However, it should be stressed here that the present world shows a tendency to invest an independent nominating body (Commission or Council) with the power of selecting and recommending best candidates to the Head of the State for judicial appointment. For, the principles on the independence of judiciary, formulated and adopted by various international and regional organisations, particularly in the 1980s and thereafter<sup>284</sup>, favour the appointment of judges of superior courts by, on the recommendation, proposal/advice of, or after

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<sup>284</sup> See Article 3, the Text of the Lagos Conference of the International Commission of Jurists, 1961, Article 10(d), the Principles and Conclusions on the Independence of the Judiciary in the LAWASIA Region, 1982, Article 3(a), the International Bar Association's Minimum Standards of Judicial Independence, 1982, Article 2.14(b), the Universal Declaration on the Independence of Justice, 1983, Article 10, the UN Basic Principles on the Independence of the Judiciary, 1985, Article 14, Beijing Statement of Principles on the Independence of the Judiciary in LAWASIA Region, 1995 and Article II(1), the Latimer House Guidelines for Parliamentary Supremacy and Judicial Independence in the Commonwealth, 1998.

consultation with an appropriately constituted and representative judicial body.<sup>285</sup> In very recent times, the Constitutions of some of the countries of the world have been amended to provide for the establishment of an independent body for selection and recommendation of duly qualified persons for appointment of judges in the superior courts in order to ensure that neither political bias nor personal favouritism and animosity play any part in judicial appointment. For example, in the Constitution of Pakistan, 1973, Article 175(A) has been added to by the Constitution (Eighteenth Amendment) Act, 2010, which provides for the new method of appointment of judges of the superior courts involving a Judicial Commission headed by the Chief Justice of Pakistan (two senior judges of the Supreme Court and a retired judge nominated by the Chief Justice constitute a majority in the Commission) and a Parliamentary Committee (comprising of eight members with equal representation of the Government and the Opposition) having only the authority to return the recommendation back to the Judicial Commission only if least six out of eight members favour such an action.<sup>286</sup> Similarly, in the UK, the Constitution Reform Act, 2005, has been passed by the Parliament providing for the establishment of a Judicial Appointments Commission of 15 members headed by a lay person (as Chairman) having the authority to submit its report to the Lord Chancellor selecting one person for each vacancy in high judicial offices (i.e. Lord Chief Justice, other Heads of Division, Lords Justices of Appeal, High Court Judges) ‘solely on merit.’<sup>287</sup> In order to bring in greater transparency and accountability in judicial appointments, the Government of India introduced first in 1990 in the Lower House of the

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<sup>285</sup> Article 128, the Constitution of the Co-operative Republic of Guyana, 1980, Article 155, the Constitution of Algeria, 1989, the Constitution of the Republic of Croatia, 1990, Article 82(1), the Constitution of Namibia, 1990, Article 132(2), the Constitution of the Sovereign Democratic Republic of Fiji, 1990, Article 87(1), the Constitution of Nepal, 1990, Article 52, the Constitution of the Kingdom of Saudi Arabia, 1992, Article 174(3), the Constitution of South Africa, 1996, Article 147 and 149, the Constitution of the Federation of Rwanda, 2003, Article 179, the Constitution of Poland, 1997, Article 136(4), the Constitution of Albania, 1998, Article 44(E), the Constitution of the Republic of Iraq, 2005, Article 104(1), the Constitution of the Republic of Trinidad and Tobago, 1976, Article 231(1) and 231(2), the Constitution of the Republic of Nigeria, 1999.

<sup>286</sup> Hasan- Askari Rizvi, ‘Constitutional Amendment and Judicial Appointments’, *The Daily Times*, 16 May 2010.

<sup>287</sup> Sections 67-96, the Constitutional Reform Act, 2005

Parliament a Bill, titled the Constitution (Sixty-Seventh Amendment) Bill, 1990, seeking to constitute the National Judicial Commission and to make appointment to the Supreme Court and the High Court on the basis of its recommendation. But the Bill, which proposed introduction of Part XIII A (apart from amending Articles 124, 217, 222, and 231) in the Constitution, lapsed with dissolution of that Lok Sabha (the lower house of the Parliament).<sup>288</sup> Again in 2002, the Government introduced the Constitution (98<sup>th</sup> Amendment) Bill to constitute a National Judicial Commission, by including Chapter IVA in Part V of the Constitution, consisting of the Chief Justice of India [CJI] as its Chairman, two Judges of the Supreme Court next to the CJI in seniority, the Union Minister for Law and Justice, and one eminent citizen to be nominated by the President in consultation with the Prime Minister. Because of the controversies regarding the composition and functions of the Commission, the second Bill also lapsed in 2003.<sup>289</sup> Thus it may be suggested that the Federal Constitution of Malaysia be amended providing for the establishment of an independent, effective and meaningful body for vetting and selecting best candidates for the consideration of the Prime Minister excluding the present overlapping process which enables the office bearers of the superior courts, to be the constituent members of the Commission, to have a ‘second bite at the cherry’, while expressing their personal views about the candidates under the Constitutional selection procedure if they disagreed earlier with Commission’s choice.

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<sup>288</sup> ‘National Commission to Review the Working of the [Indian] Constitution’, A Consultation Paper on Superior Judiciary, 26 September 2001 <http://lawmin.nic.in/ncrwc/finalreport/v2b1-14.htm> (accessed on 9 February 2010).

<sup>289</sup> Rajeev Dhavant, ‘The Transfer of Judges,’ *The Hindu* (India), 29 October 2004; V. Venkatesan, ‘Judiciary: A Flawed Mechanism’, (2003) 20(II) *Frontline* (A Magazine Published by the Hindu Group of Publications).

### *E. Constitutional and Statutory Provisions in Malaysia Concerning the Number of Judges of Superior Courts*

The original Federal Constitution of 1957 fixed the maximum number of judges of the then Supreme Court and empowered the Parliament to increase the number of puisne judges: ‘The Supreme Court shall consist of a Chief Justice and other judges; but the number of the other judges shall not exceed fifteen until Parliament otherwise provides.’<sup>290</sup> In 1963, the Constitution was amended, on the formation of the Federation of Malaysia, which, *inter alia*, provided that the number of judges of the Federal Court (which replaced the Supreme Court), excluding the Lord President and the three High Court Chief Justices (Malaya, Borneo and Singapore) should be four other judges, until the Parliament otherwise provides. But the power of the Parliament to alter the number of judges was abolished on 27 August 1976 and Parliament was replaced with the Yang di- Petuan Agong as the authority to increase the number of judges of the Federal Court.<sup>291</sup>

In 1982, the Yang di-Pertuan Agong by an order increased the number of Federal Court Judges to seven excluding the Chief Justice of the Federal Court, and the two Chief Judges of the High Court in Malaya and the High Court in Borneo.<sup>292</sup> When in 1994, the Court of Appeal was established as an intermediate court between the Federal Court (Federal Court was renamed in 1985 as the Supreme Court having its head styled as Lord President and then again redesigned on 24 June 1994 as the Federal Court) and the High Courts, its President was made an ex-officio Judge of the Federal Court thus raising the number of ex-officio judges to four.<sup>293</sup> However, next increase in the number of other Judges of the Federal Court was accomplished by the Yang di-Pertuan Agong in 2005 when the number was increased,

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<sup>290</sup> Original Article 122(1), the Federal Constitution of Malaya, 1957.

<sup>291</sup> The Constitution (Amendment) Act, 1976, (Act A 354), P.U.(A) 114/1982.

<sup>292</sup> P.U.(A) 114/1982.

<sup>293</sup> The Constitution (Amendment) Act, 1994.



by one, to eight<sup>294</sup> (thus the total number stood at 4 + 8= 12). In 2009, the number of other judges of the Federal Court has been increased by 3.<sup>295</sup> Thus presently the total number of judges of the Federal Court is (12 + 3=) 15 including the Chief Justice of the Federal Court, the President of the Court of Appeal and the two Chief Judges of the High Courts.

Thus it is evident that the Parliament did not ever exercise its power of increasing the number of judges of the highest court of the land for a period of twenty years from 1957-1976. But after conferring this power on the Yang di-Pertuan Agong, the number of judges of the Federal Court has been increased thrice: in 1982, 2005 and 2009. In exercising its constitutional power, the Yang di-Pertuan Agong was required to ‘act in accordance with the advice of the Cabinet or of a Minister acting under the general authority of the Cabinet and “where the Yang di-Pertuan Agong is to act in accordance with advice, on advice, or after considering advice, the Yang di-Pertuan Agong shall accept and act in accordance such [an] advice.”’<sup>296</sup>

### *E.1. Number of Judges of the Court of Appeal*

The Court of Appeal, established in 1994, was to ‘consist of a Chairman (to be styled the ‘President of the Court of Appeal’) and, until the Yang di-Pertua Agong by order otherwise provides, of ten other judges.’<sup>297</sup> By virtue of this power, the Yang di-Pertuan Agong increased the number of judges in the Court of Appeal from ten to fifteen in 2001,<sup>298</sup> from fifteen to twenty-two in 2006<sup>299</sup> and from twenty-two to thirty-two in 2009. Thus the present number of judges of the Court of Appeal is more than three times of the original number (10:32), the increase being executed in a period of nearly eighteen years.

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<sup>294</sup> P.U.(A) 229/2005.

<sup>295</sup> P.U.(A) 163/2009.

<sup>296</sup> Article 40(1A), the Federal Constitution of Malaysia.

<sup>297</sup> Article 122A, the Federal Constitution of Malaysia.

<sup>298</sup> P.U.(A) 378/2001.

<sup>299</sup> P.U.(A) 385/2006.

## *E.2. Number of High Court Judges*

The Federal Constitution of Malaysia, 1963 originally specified the maximum and minimum number of judges of the High Courts excluding the Chief Justice. It was provided that each ‘of the High Courts shall consist of a Chief Justice and not less than four other judges; but the number of other judges shall not, until Parliament otherwise provides, exceed-

- a) in the High Court in Malaya, twelve [and]
- b) in the High Court in Borneo, eight ....’

Thus like Article 124 of the Indian Constitution, the Constitution of Malaysia has fixed the number of judges of the High Courts and then empowered the Parliament to vary the number. In exercise of this power, the Federal Parliament in 1969 increased the number of judges of the High Court in Malaya, not of the High Court in Borneo, to 15<sup>300</sup> (in place of 12 fixed by the Constitution). But this power of the Parliament was taken away and handed over to the Yang di-Pertuan Agong by a constitutional amendment in August 1976.<sup>301</sup>

The Yang di-Pertuan Agong increased the number of judges of the High Court in Malaya from 15 to 16 in 1977<sup>302</sup>, from 16 to 20 in 1980<sup>303</sup>, from 20 to 27 in 1984<sup>304</sup>, from 27 to 33 in 1989<sup>305</sup>, from 33 to 47 in 1994<sup>306</sup> (to accommodate the increase in the number of High Courts in the Country) and from 47 to 60 in 2006.<sup>307</sup> Thus the present number of judges of the High Court in Malaysia is 60. On the other hand, curiously enough, the number of judges of the High Court in Sabah and Sarawak (since 1994 it is so called) has only been enhanced twice (as against six times done in case of the High Court of Malaya) first in 1994 when the number

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<sup>300</sup> P.U.(B) 83/1969.

<sup>301</sup> The Constitution (Amendment) Act, 1976 (Act A354).

<sup>302</sup> P.U.(A) 308/1977.

<sup>303</sup> PU(A) 139/1980 (came into force on 1 March 1980) increased the number of judges to 18 and then P.U.(A) 310/1980 (came into force on 1 January 1981) increased the number to 20.

<sup>304</sup> P..U.(A) 304/84.

<sup>305</sup> P.U.(A) 132/1989.

<sup>306</sup> Section 15, the Constitution (Amendment) Act, 1994 (Act A885).

<sup>307</sup> P.U.(A) 384/2006.

of judges was increased from eight to 10<sup>308</sup> and then in 2006, from 10 to 13<sup>309</sup> by the Yang di-Pertuan Agong. Thus the number of judges of the High Court in Malaya has been increased five times more than its original strength (12:60), but in case of the judges of the High Court in Sabah and Sarawak; original number has not even been doubled (8:13) in 2010.

Therefore, the Yang di-Pertuan Agong's various orders, as gazetted, increasing the number of other judges of the Federal Court from four to 11 between 1976 and 2010, enhancing the number of other judges of the Court of Appeal from 10 to 32 between 1994 and 2010, augmenting the number of judges of the High Court in Malaya from 15 to 60 between 1977 and 2006, and raising the number of judges in the High Court of Sabah and Sarawak from eight to thirteen between 1993 and 2006, do not contain any reasons or justifications whatsoever as to the increase in the total number of judges of the superior courts in Malaysia. It cannot, therefore, be maintained that the decisions to increase the number of judges of the superior courts by the Yang di-Pertuan Agong in accordance with the advice of the Cabinet have always been taken on judicial considerations (e.g. increased number of cases, speedy disposal of cases etc), for accommodating (finding berth on the bench) and rewarding those favourites who have 'delivered' (as law officers, as party men and as judges). Therefore, it may be suggested that, in view of the establishment of the Judicial Appointments Commission in 2009, an amendment should be introduced in the Constitution requiring the Yang di-Pertuan Agong to exercise his power of increasing the number of judges of the superior courts either on the recommendation of the Commission as it is to be found in the

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<sup>308</sup> Supra note 306.

<sup>309</sup> Supra note 307.

Constitution of Namibia, 1990<sup>310</sup> or upon request of the Superior Court concerned as provided for by the Constitution of the Commonwealth of Puerto Rico, 1952.<sup>311</sup>

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<sup>310</sup> Article 79(1) of the Constitution of Namibia provides that ‘The Supreme Council shall consist of a Chief Justice and such additional Judges as the President, acting on the recommendation of the Judicial Service Commission, may determine.’ Article 80(1) of the same Constitution states that ‘The High Court shall consist of a Judge-President and such additional Judges as the President, acting on the recommendation of the Judicial Service Commission, may determine.’

<sup>311</sup> Article 3 of the Constitution of the Commonwealth of Puerto Rico, 1952 provides that ‘The Supreme Court shall be the court of last resort in Puerto Rico and shall be composed of a Chief Justice and four Associate Justices. The number of Justices may be changed only by law upon request of the Supreme Court.’