

ORIGINAL ARTICLES

Malaysian Judicial Appointment Process: An Overview Of The Reform

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ABSTRACT

The Federal Constitution of Malaysia provides for an executive centric mechanism in judicial appointment where the Prime Minister has the final say. To make matter worse for this executive dominance, a commission of enquiry found that parties that should not have a say in judicial appointment managed to drown the Chief Justice's voice in proposing names of candidates to the Prime Minister. The finding of this commission compelled the government to form a Judicial Appointment Commission in improving the independence, integrity and accountability of the judiciary. This article seeks to examine the impetus of this reform and to explore the suitability of the principles adopted in the working of the Commission to achieve the stated objectives.

Key word: Federal Constitution, Judicial Commission, Judges, Prime Minister.

Introduction

Judiciary is indispensable in the healthy functioning of a state, particularly one that believes in the rights of the governed. The Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights requires a competent, independent and impartial tribunal. The Malaysian Constitution that provides one part guaranteeing fundamental liberties, likewise albeit implicitly, demands the same criteria of a tribunal. Furthermore, the extensive power held by the combined might of the executive and the legislature in a Westminster style of government as adopted in Malaysia requires not less than a strong and independent judiciary. If the judiciary also falls to the lure of power and greed, then all are doomed.

Judges must as far as humanly possible, be made fair and independent of the executive in the discharge of their duties in order to ensure that the will, liberties and rights of individuals are ensured against the encroachment of tyranny. It is also important for a society to have an impartial judiciary because the judiciary is the hope of the hopeless and voice of the voiceless in the society. When more cases relating to fundamental liberties are brought to the courts, judges' position gains more importance. Disputes between individuals, between the have and have not, the weak and the powerful, and between the governments at various levels requires judges of the highest calibre and integrity. To ensure one has an independent judiciary to decide such cases, it has to start with correct appointment process. One factor in ensuring a capable and independent judge is by ensuring appointment of judges with integrity. His qualification will be "badges of legitimacy" for the judiciary Malleon, Kate & Russell, Peter 2006).

Decay in the Malaysian Judiciary:

The reason for the reform of judicial appointment should be rooted on the need to guarantee the independence of the judiciary, to divorce it from party politics and to ensure the best candidate for the job (Malleon, Kate 2004). Looking from this perspective, one could relate the reform in Malaysia with the decay in the Malaysian judiciary beginning with the removal of Tun Salleh Abbas, the then Lord President, in 1988. Politics could be an invigorating process where a sense of purpose and passion could be instilled. It also could be toxic, weakening structures and organisation. When politicians resort to the court to solve political infighting, judges may be caught in between.

For most observers, this is what started the trouble with the Malaysian judiciary beginning in the 1980's. Power struggles within the main political party that have held power since the Independence in 1957, namely the United Malay National Union (UMNO), was brought to the court when members of the party challenged results of the party election. The courts were again caught in the web of a political power struggle when the then Prime Minister Tun Mahathir Mohamad in 1997 considered Anwar Ibrahim to be morally unfit to be the next Prime Minister. He was tried for, among others, corruption. His trials were controversial leaving bystander becoming highly cynical of the administration of justice (Lee, 1995).

This turmoil in administration of justice was not helped by the questionable conducts of judges. Pictures of a judge and a prominent lawyer holidaying together with their families made its ways into the internet. There were allegation of involvement of third parties in appointment and promotion of judges. These whispers about unsavoury dealings turned mainstream when the “VK Lingam Tape” surfaced on the internet in September 2007. The video clip shows images of a prominent lawyer engaged in a telephone conversation with a high ranking judicial officer in relation to appointment and promotion of judges.

To his credit, the Prime Minister Dato’ Seri Abdullah Badawi decided to tackle the debacle head on by forming a panel headed by Tan Sri Dato’ Seri Haidar Mohamed Noor to verify the authenticity of the video clip. In November 2007, the panel recommended the setting up of a Commission of Enquiry. Prime Minister Abdullah Badawi advised the Yang di-Pertuan Agong to establish the Commission, and in 12 December 2007, a Commission of Enquiry was formed headed by Tan Sri Dato’ Seri Haidar Mohamed Noor. The Commission was entrusted to determine the authenticity of the tape, to identify the parties in the video clip, to ascertain the truth of the content of the conversation, to determine whether any misbehaviour has been committed and to recommend course of action against the identified persons

The Commission submitted its report in May 2008. It found the video clip to be authentic, the man in the clip is Dato’ VK Lingam (a prominent lawyer) and he was speaking with Tun Ahmad Fairuz (a former Chief Justice). The Commission recommended that action to be brought against the individuals under the provisions on official secrecy (on the breach of secrecy of communication between a Chief Justice and the Prime Minister) under the Penal Code.

Regarding judicial appointment, the Commission found element of political patronage where the lawyer “was actively involved” in the promotion of a former Chief Justice together with a prominent businessman and a Deputy Minister (Prime Minister’s Department, 2008). Tun Mahathir, the then Prime Minister who has the constitutional power to advise the King (the Yang di-Pertuan Agong), (Federal Constitution, art. 122B(1) admitted the possibility of him receiving advice regarding judicial appointment from his acquaintance. However, he reiterated that he alone made the final decision and called it as his “prerogative.” With the above in mind, the Commission recommended for a judicial commission to be formed so that the process of judicial appointment is more transparent.

The Judicial Appointment Process:

The Federal Constitution provides that judges of the High Courts, the Court of Appeal and the Federal Court are to be appointed by “the Yang di-Pertuan Agong, acting on the advice of the Prime Minister, after consulting the Conference of Rulers”. For judges other than the Chief Justice, the Prime Minister should consult the Chief Justice before tendering his advice. Reading this provision together with the provision that requires the Yang di-Pertuan Agong to accept and act in accordance with advice, it appears that, legally, the Prime Minister has the final say in judicial appointment. This point was extended when the Federal Court declared that the Prime Minister can even disregard any views from the Conference of Rulers that the Yang di-Pertuan Agong had to consult. (*Re Application by Dato’ Seri Anwar Ibrahim to Disqualify a Judge of the Court of Appeal*). This executive dominance reflected by Tun Mahathir in giving his evidence before the Commission of Enquiry where he readily repeated the same line that irrespective of whomever he consults or consulted him; he is, as the Prime Minister, who makes the final decision.

The evidence before the Commission of Enquiry from those who cruise the corridor of power was a revelation to the inner world of judicial appointment which was not privy to ordinary mortals. It transpired that the Chief Secretary of State, a name that could not be found in the relevant constitutional provisions regarding judicial appointment, may even end up as the one that supplies the name to the Prime Minister. Conversely, the Chief Justice, a name found in relevant constitutional provision, may, in tendering suggestions for promotion and appointment of judges, be at the mercy of others.

Aftermath of the Enquiry:

The government made haste in riding through public opinion that saw irregularity in appointment and promotion of judges while the Commission of Enquiry was deliberating. In April 2008, the government made *ex-gratia* payment to Tun Salleh Abas and other judges that were removed from office by the tribunals set up in 1987.

The phrase “it looks like me, sounds like me, but it’s not me” taken from a witness who continuously refused to admit that he was the one in the video clip became a depiction of the sorry state of the judiciary that refuse to admit the problem within.

As the Commission of Enquiry found that the appointment and promotion of judges “is open to interference and manipulation by the Executive and other extrinsic forces including private citizens”, the Commission proposed a judicial appointment commission to be set up. It does not delve much further than that in its

proposal. Doubt was cast whether Abdullah Badawi's administration will take up this proposal. His hasten schedule of transfer of power to Datuk Seri Najib Tun Razak and the desire to leave a lasting legacy prove to be blessing in disguise for tabling schedule of a bill to establish a judicial appointment commission.

The Prime Minister Abdullah Badawi in early 2008 admitted that the level of trust and respect for the judiciary is low because of the perceived corruption and decline in quality. The Minister in charge of law at the time of the second reading of the Judicial Appointment Commission Bill said that the tabling of the bill is the first step to get back the trust of the people on the judicial appointment process under the principle of the independence of the judiciary. The long title of the Judicial Appointment Commission Act 2009 also declares that the Act is to provide "the continued independence of the judiciary".

Perhaps the impetus to form a judicial appointment commission could be compared with other countries. In England for instance, the reason for the establishment of a judicial appointment commission was not because the then existing system to be found corrupt or being abuse but to gain public confidence in the independence of the judiciary. This distinction perhaps explains the piecemeal approach taken by Malaysia compared with England. However, one could not argue against the Malaysian reform by saying "if it ain't broke don't fix it".

Membership of the Commission:

The Judicial Appointment Commission Act 2009 received its Royal Assent in January 2009. The Commission consists of five serving judges and four "eminent persons". Much discussion in the legislative assembly centred on who this "eminent persons" are. Suggestions were made to define phrase, something which the Act fails to define.

Members of the Commission consists of the higher echelon of serving judges namely the Chief Justice, the President of the Court of Appeal, the Chief Judges of the High Courts and a Federal Court judge appointed by the Prime Minister. Apart from serving judges, four "eminent persons" are appointed by the Prime Minister. The four persons must not be a member of the executive or public service. Private lawyer's bodies are involved in the appointment of these four persons by requiring the Prime Minister to consult the Bar Council and the law associations in Sabah and Sarawak.

Apart from those who are members by virtue of their office, members of the commission hold office for two years and not more than two terms. The perception that the Commission exist and continue to exist at the behest of the Prime Minister is exemplified by the power of the Prime Minister to remove any member. Although similar Commission in England also provide power of the government to recommend to Her Majesty to remove a Commissioner, the law provides specific grounds of removal such as being unfit to hold his office. Additionally, in Malaysia, it is the Prime Minister that appoints the Commissioners, not the Yang di-Pertuan Agong.

Criticisms were made against cronyism and favouritism in judicial appointments. The Act addresses this issue by specifically barring a member of Commission from being involve in decision making if a candidate being considered is "related and connected" to the member. Apart from family relation, the Act includes a nominee, a partner of a firm or a trustee of his family trust. It is an offence to fail to disclose such an interest.

Unfortunately, if the intention of the Commission is to introduce diversity in the appointing authority, then sadly it has not achieved its objective. The Prime Minister Abdullah Badawi appointed three retired judges and a former Attorney-General to fill in the seat for four "eminent persons". Thus, the membership is weight heavily to the judiciary: eight against one. There is no representation from lay persons, academicians or lawyers contrary to an indication given by the Minister in charge of the reform, Zaid Ibrahim. There will then be a tendency for the members of the commission to replicate themselves in the appointment and to rely on the old boys' network.

In appointing four eminent persons, the Act provides for consultation with the Bar Council and other relevant bodies. The Bar Council complained that they only had the opportunity to provide names but was denied further consultation. For them, consultation should mean more than giving a list of names.

In England, the law ensures that panel of selection will consist, apart from judicial officers, lay members. Inclusion of members with different backgrounds will broaden expertise and inject fresh views in the appointment process. It even provides that the Chairman must be a lay member. By composition, the Commission consists of judicial officers, practicing lawyers and five lay members apart from the Chairman. This is in stark contrast to the composition provided in the Malaysian Act and the actual appointment of members made by the Prime Minister.

Functions and Powers:

The Commission of Enquiry had criticised that the appointment process is not transparent leaving the possibility of other parties intruding in the appointment process. The Judicial Appointment Commission is to strive towards changing this. However, one should not have the wrong idea that now it is the Commission that

appoint judges and the judicial appointment process is taken away from the hand of the executive. The function of the Commission is only to propose candidates for the Prime Minister to consider. Perhaps the name Judicial Advisory Appointment Commission, as the Committee in Ontario Canada, is more apt for the Commission.

The core power of the Commission is to provide a list of candidates for the Prime Minister to consider. The Prime Minister may disagree with the suggested name and request another list. Since there is no limit to how many times the Prime Minister may disagree, he may wait until a name that he agrees comes out.

In contrast, the Judicial Appointment Commission in England must provide only one name. Thus, the government either may take it or leave it. The government could only decline once. The second time the Commission provides a name; the government has no option but to accept it. This limits the ability of the government to reject the candidate selected by the Commission.

The law provides that the Commission may receive application from qualified persons to be selected as judges. This is a new move by allowing application to be made directly for judicial post. This will widen the pool of candidates to be considered. Perhaps if the Commission would like to increase the number of applicant from a certain group, such as from women, invitation may be sent to qualified women to apply for the post.

The Prime Minister may reject the candidate of the Commission without ascribing any reason. Consequently, he may reject it on any ground. Conversely, the English Act restricts the power to reject the candidate on the ground that there is not enough evidence that the candidate is suitable or there is evidence that the person is not the best candidate on merit. The candidate could not be rejected on only any flimsy grounds or without grounds as happened when Tun Mahathir rejected proposed names from the Chief Justice.

It seems that functions of the Commission are not confined preparing a list of candidates to be considered by the Prime Minister. The Commission may propose programmes to the Prime Minister "to improve the administration of justice" and "other recommendations about the judiciary". The wording is open ended and provides a wide purview of the Commission in making recommendation regarding programmes to the betterment of the judiciary and administration of justice. This is commendable. However, it remains to be seen how actually the Commission takes advantage of this role to help the judiciary.

Qualification of Judges:

Previously, there is no mention of qualification of a judge except that he must be a citizen and has been a private or public lawyer for ten years. The 2009 Act provides that the Commission has to consider, among others, integrity, competency, impartiality, moral character, legal writing skill and case management. This is in line with the qualification stated in the Basic Principles on the Independence of the Judiciary endorsed by the General Assembly of the United Nation and the Beijing Statement of Principles of the Independence of the Judiciary.

Although the Commission in England for instance only provides the selection should be based on merit and the candidate of good character, the reason why specific qualifications such as legal writing skill are mentioned has to be understood from series of controversies regarding independence and competency of judges. It was revealed for instance that some judges who had failed to deliver written judgment were nevertheless promoted.

Thus, although some of the qualifications seem to be petty, in the past what is obviously an important quality seems to be lost to the appointing authority. This explains the need to put explicitly such criteria.

The Changes:

Members of Parliament in debating this Act had raised the issue of whether the Judicial Appointment Commission is enough to solve the problem as couched by the Prime Minister Abdullah Badawi - the perceived corruption and decline in quality. Looking at the provision as a whole, much still depends on the person of the Prime Minister. In other words, nothing changes.

The Federal Constitution provides that before the Prime Minister tenders his advice to the Yang di-Pertuan Agong to appoint judges, he has to consult the Chief Justice. The Chief Justice is a member and the chairperson of the Commission. The Act also provides that when the Prime Minister accepted any of the persons recommended by the Commission, he may tender his advice to the Yang di-Pertuan Agong. Thus, rather than consulting a person, now the Prime Minister consult the Commission.

This arrangement is certainly better since indirectly the consultation is expanded to other judicial officers and "eminent persons". However, since the "eminent persons" appointed consist of retired judges, consultation still confine to the judiciary. The Prime Minister is getting recommendation from the same group of people with the Chief Justice.

Additionally, apart from the four judicial officers who are members by their post, other members are appointed by the Prime Minister and may be removed as members by the Prime Minister. To avoid the appearance that the members are at the mercy of the Prime Minister, specific grounds may be given for the removal. This is in line with the intention to instil transparency in the whole appointment process.

If the intent is to divorce the appointment process of the judiciary from intervention of the political executive, then nothing changes. The role of the Commission is to provide a report which contains the recommended candidate for the post. The Prime Minister may request more names for his consideration. In other words, he may reject the Commission's recommendations, albeit by asking the Commission to submit another. If elucidated in the Commission of Enquiry, this happened when the then Chief Justice Dzaiddin recommended Justice Abdul Malek Ahmad to the post of Chief of Malaya but was rejected by the Prime Minister. The Prime Minister in turn suggested for the Chief Justice to recommend Justice Ahmad Fairuz to the post which the Chief Justice duly complied and the candidate was duly appointed.

The Judicial Appointment Commission does not change much the previous process. This may be caused by lack of political will to make "drastic change" as put forward by the British government in the consultation paper. To be fair to the government, there may be another reason for this incremental reform. It relates to reducing majority seats held by the ruling coalition in the aftermath of the year 2004 general election where the coalition failed to maintain a two third majority of seats in the House of Representative. In contrast to England, a reform of judicial appointment could not be done solely through enacting ordinary laws. Constitutional provisions regarding the Head of State, the Conference of Rulers and the special rights of State of Sabah and State of Sarawak need to be taken into account. The Federal Constitution provides that the Yang di-Pertuan Agong after receiving advice from the Prime Minister consult the Conference of Rulers. Before tendering his advice, the Prime Minister must consult the Chief Ministers of Sabah and Sarawak for the appointment Chief Judge of the High Court in Sabah and Sarawak.

Thus, the government may be hesitant in providing wider reform that could only be affected by constitutional amendments which requires the support of the opposition since the coalition party in party, namely the Coalition Front, failed to retain two third majority of the seat in the House of Representative after the 2008 General Election. Although the Opposition invited the government to make necessary constitutional amendments which they will support, the government rejected this overture because of the government reportedly could not trust the word of the Opposition.

The setting up of the Commission has indeed been challenged in *Robert Linggi* where the petitioner challenged the constitutionality of the Act on the ground that, among others, it changes the appointment procedure under the Federal Constitution. The High Court in return observed that the Judicial Appointment Commission only recommends qualified candidates for judgeship and the discretion of the Prime Minister in submitting a particular name to the Yang di-Pertuan Agong remains. Thus, the Act does not change the constitutional procedure in judicial appointment.

Concluding Remarks:

Public poise in the courts and their pronouncements depend on a common discernment that judges are independent and that those appointed are the best candidates available. That means the judicial appointment practice should be open, transparent and apolitical. Candidates should be assessed in terms of their independence, ability, professionalism and integrity. The proposals in Britain which had been carried out are an example of what would inject a welcome level of independence and scrutiny into the process.

The setting up of the Judicial Appointment Commission is a step in the right direction of improving the state of the judiciary in Malaysia. Considering the political climate, it is a bold move by the government. It provides the initial step towards a more transparent judicial appointment. However, the centre of power still resides with the Prime Minister. Thus, the breach of separation of powers is not considered an important issue, or alternatively, it is not considered as an issue that should need a second thought.

In this paper, comparison was made with the Judicial Appointment Commission in England to provide possible improvement to the existing Act. This does not mean that a Malaysian commission has to be a replica of a commission of another country. A commission has to be able to adapt and accommodate "particular legal, political and cultural conditions" of a country. Nevertheless, it is not a waste to learn lessons from others.

One point of concern though as far as the Malaysian Judicial Appointment Committee is concerned, is that the main function of the Commission is to provide a list of candidates for the Prime Minister to consider. What is striking is that the Prime Minister may disagree with the suggested name and request another list. This may be fair enough, however, what is more alarming is that since there is no limit to how many times the Prime Minister may disagree, he may wait until a name that he agrees comes out, frustrating the essence whole process altogether. If that is the case, much like the Judicial Officers Recommendation Commission of Hong Kong or the Judicial Appointment of Advisory Committee of Ontario Canada, the name of the Malaysian Commission should have reflected its true mandate. On the other hand, lessons may be seen in the English Act which restricts the power to reject the candidate on the ground that there is not enough evidence that the candidate is suitable or there is evidence that the person is not the best candidate on merit.

One thing that is encouraging however, is the 2009 Act's prescription of qualities in a Judge that the Commission has to consider such as integrity, competency, impartiality, moral character, legal writing skill and

case management. And what we cannot ignore is the fact that Malaysia may now be seen as a country embracing a wave of judicial reform which has been sweeping across the globe in the recent decade. It may not be there altogether just yet, but it is a step in the right direction. Whether the setting up of the Judicial Appointments Commission has put to rest the ghost of 1988, the jury is still out.

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