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SAFEGUARDING JUDICIAL INDEPENDENCE

APPOINTMENT, PROMOTION AND REMOVAL OF JUDGES IN MALAYSIA

by Serene Lim

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gabungan pilihanraya bersih dan adil

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46050, Petaling Jaya
Selangor Darul Ehsan

Tel: 03-76280371
Fax: 03-76280372
Email: info@bersih.org
Website: www.bersih.org

Written by:
Serene Lim

Edited by:
Yap Swee Seng and Ngeow Chow Ying

Project coordinated by:
Lhavanya Dharmalingam

Graphic and layout:
Amirah Azman

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Contents

Executive Summary 1

1. Introduction 4

    1.1. Malaysia civil court system 6

    1.2. Overview of judicial appointments system 6

    1.3. Conclusion 8

2. The Road to Judicial Appointments Commission 9

    2.1. The 1988 Judicial crisis 11

    2.2. VK Lingam tape and the Royal Commission 13

3. Appointments of judges to the superior court 15

    3.1. Composition of members and security of tenure 15

    3.2. The judicial selection process 20

        3.2.1. Application for vacancies in the High Courts 20

        3.2.2. Promotion of judges to the Court of Appeal and the Federal Court 21

        3.2.3. Assessment and selection 22

    3.3. Interaction between the Judicial Appointments Commission and the Executive 25

    3.4. Transference of judges 30

    3.5. Qualification of judges 30

    3.6. Diversity as merit-based 31

    3.7. Tribunal for removal of judges 33

    3.8. Judicial Commissioner 38

    3.9. Conclusion 39

4. Appointment of judges to the subordinate court 40

5. Recommendations 43

Executive Summary

This paper is part of civil society's ongoing effort to push for judicial independence through an independent appointments process. The importance of a merit-based, non-discriminatory and independent appointments process is even more salient as the nation copes with an unfamiliar normal amid the Covid-19 pandemic. New laws, subsidiary laws, regulations, executive orders, the proclamation of emergency and emergency ordinances are made to respond to the outbreak of the pandemic. Restricting the physical movement of the people, revising existing tax and fiscal laws/policy, criminalising spread of misinformation and disinformation and implementing nationwide contact tracing place unprecedented restrictions on our rights and liberty. Under such circumstances, securing suitable judges with the qualities of unimpeachable integrity, keen intellect and appropriate judicial temperament, and who can reasonably be expected to arrive at their own judgment without any improper influence or external pressure is even more important as judges are the bastions of justice that stand between the citizen and the State.

This paper looks at the existing mechanism in the appointment, promotion and removal of judges in Malaysia through desk research, interviews with three experts, and a virtual consultation workshop comprised of academics, civil society, lawyers and a former member of the Judicial Appointments Commission.

The paper is divided into four parts. The first part looks at the confluence of factors that led to the judicial reforms in 2009. A judicial crisis was sparked off in 1988 when power struggles within the main political party led to the unceremonious dismissal of the then Lord President, Tun Salleh Abbas, through a biased tribunal system. A second tribunal, set up in 1994, led to the removal of two of the five Supreme Court judges. The removal of judges under such troubling circumstances has been described as the judiciary's darkest hour with blatant executive interference and political patronage. What followed was a decay in judicial independence where grave allegations were raised against both Chief Justices, Tun Hamid Omar (1998-1994) and Tun Eusoff Chin (1994-2000), including questionable conducts, involvement of third parties in the appointment and promotion of judges, and unsavoury dealings to influence court decisions. Despite the various controversies and growing concerns among the people, both Chief Justices were never investigated and held accountable for any of the allegations. The tipping point in the prevailing biased appointment

system came when the infamous "VK Lingam Tape" surfaced on the Internet in September 2007. The video clip showed a senior lawyer engaged in a telephone conversation with a judge on the urgency to appoint him first to the position of the President of the Court of Appeal and then as the Chief Justice of Malaysia. The scandal led to the formation of a Royal Commission of Inquiry, and eventually, the Judicial Appointments Commission.

The second part of the paper looks at the appointments of judges to the superior court, namely the Judicial Appointments Commission Act 2009 ("JAC Act"). A Judicial Appointments Commission is established under the JAC Act, and is tasked to recommend candidates to the Prime Minister. The composition of the nine-member Commission and the process for forming it have been widely criticised. The Prime Minister retains the sole discretion to appoint five out of nine members and may in fact statutorily reinforce and validate the power of the executive in key aspects of the judicial appointments process. Further, members of the Commission lack security of tenure as the Prime Minister is given the power to revoke the appointment of any of the four eminent persons without assigning any reason. Despite that, the Commission has to some extent, responded to the concern of political patronage by putting in place a selection process via open advertisement, sifting through applications, interviews and having clear outlines of judges' criteria. However, the same openness is not applied when it comes to the nomination of judges to the Court of Appeal and Federal Court. Here the nomination is often done behind closed doors with neither a requirement for meaningful consultation nor clearly outlined criteria for promotions or elevations of judges to a higher position.

Perhaps one of the biggest criticism against the JAC Act is the lack of binding power of the Commission's recommendation for each vacancy over the Prime Minister, who is empowered to reject names, ask for further recommendations without citing any reason and to put forward names not recommended by the Commission. This effectively renders the Commission moot and toothless. The safeguard for judicial independence is further at risk when the Prime Minister and the Chief Justice are given the constitutional prerogative to initiate removal proceedings, which includes appointing members to the ad-hoc tribunal for removal. There is a lack of transparency in the entire inquiry process.

The next part of the paper examines the appointment of judges to the subordinate courts. This appointment is less talked about and understudied and yet it is the first and often the only point of contact with the court system for most of the public. It is not a constitutional appointment nor does it fall within the purview of the JAC Act. This also means that the many

safeguards for judicial independence under the Federal Constitution and the JAC Act are not accorded to the subordinate courts. They are regarded as legal officers within the purview of the Judicial and Legal Service Commission which supplies the interchangeable legal personnel who staff various executive departments as well as judges for the subordinate courts. Entrusting the appointment, transference and removal of judges to the Magistrates and Sessions Court within an executive department represents an anomaly where the executive is vested with the exclusive power to perform judicial roles in the subordinate courts – an anathema to the logic of the separation of powers.

The last part of the paper makes recommendations for improvements of the judicial appointments process based on desk research, interviews and an expert consultation workshop. Most notably, the paper recommends amendments to the Federal Constitution be made to ensure that the power to appoint and promote judges be vested in an independent Judicial Appointments Commission and Judicial Service Commission. The paper also makes recommendations to diversify the composition of the Judicial Appointments Commission to better reflect Malaysian society by including three representatives from the legal practitioner bodies, two representatives from the academic and/or civil society and four representatives from the judiciary in its composition. Several other suggestions, including those regarding the tenure of the members of the Commission, the power of the Prime Minister to reject the nomination, mandatory consultation, open access to information and removal procedure are also made to further strengthen the judicial appointments process.

1. Introduction

The idea of the independence of the judiciary is embedded in the doctrine of separation of powers so as to ensure that the judiciary can hold the scales of justice evenly without the influence of the other two branches of the government – the legislature and the executive. Judicial independence is a multifaceted concept and it requires different institutional, legal and operational arrangements to work complementarily to support the courage, integrity and impartiality of individual judges. If the independent performance of judicial functions by judges is a priority, the process of appointing them is as well. An independent judicial appointments system is not a merely philosophical issue; it has practical consequences on the administration of justice within the country. Judges who are appointed on account of political allegiance or favouritism pose a risk to the dispensing of justice independently according to law and justice. It is only through a merit-based, non-discriminatory and independent appointment process that we can secure suitable judges with the qualities of unimpeachable integrity, keen intellect and appropriate judicial temperament. Judges who are firm and yet compassionate, and who can reasonably be expected to arrive at their own judgment without any improper influence or external pressure. This is also a legacy issue. Decisions and judgments made by judges will live on long after those who have the temporary stewardship of the positions are no longer there. [1] For that, the integrity and fairness of the appointment process cannot be isolated from the excellence and independence of the judiciary.

Malaysia is a constitutional monarchy with a parliamentary system of government. The Yang di-Pertuan Agong is the constitutional head of state and is elected from the Conference of Rulers every five years. The Conference of Rulers comprises nine traditional rulers or Sultans from nine different states in Malaysia. The government is led by the Prime Minister, who is a Member of Parliament and who commands the confidence of the majority in the Dewan Rakyat (House of Representatives).

Malaysia adopted a dual court structure, namely the civil courts and the Syariah courts. The civil court system is based on the United Kingdom legal system and one that is familiar to many common law jurisdictions. The civil courts are established as federal courts to deal

[1] Cotler, I. (2011). The Supreme Court of Canada Appointment Process: chronology, context and reform. In Shetreet, S. & Forsyth, C. (Ed.). *The Culture of Judicial Independence : Conceptual Foundations and Practical Challenges* (page 281-300). Netherlands. BRILL.

with federal and civil matters whereas the Syariah courts are established as state-level courts to deal with matters related to Islamic law. The relationship between both court systems, in particular over questions of jurisdiction, has been delicate and controversial. Most notably, the Federal Court, in a ground-breaking judgment Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545, provides an extensive deliberation over the power and jurisdictions of both courts when it comes to unilateral conversion of a child's religion to Islam. The judgment reads:

> *"[98]…Article 121(1A)[2] does not constitute a blanket exclusion of the jurisdiction of civil courts whenever a matter relating to Islamic law arises. The inherent judicial power of civil courts in relation to judicial review and questions of constitutional or statutory interpretation is not and cannot be removed by the insertion of cl (1A)."[3]*

The Indira case represents a crucial turning point in clarifying the jurisdictional line between the civil and Syariah courts. The judgment is hailed as courageous as it was made within a tense and polarised political climax where religious matters are often manipulated for political mileage.[4] This also points to the importance of judicial independence and of appointing judicial officers who are able to arrive at their own judgment based on law and their own sense of justice, without any improper influence or pressure or fear of being penalised for doing the rightful thing. In Professor Shad Saleem Faruqi's words, "besides a deep and holistic knowledge of the law [judges] must have the moral courage to stand between the citizen and the State and to administer justice without fear of the other branches of the State or of public opinion".[5]

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[2] Article 121(1) of the Federal Constitution, before it was amended in 1988, 'vested' judicial power in the High Courts and such inferior courts as might be provided by federal law. The Constitutional Amendment Act 1988 passed in 1988 amended Article 121(1) by removing the terms 'judicial power' and 'vested'. Article 121(1) now specifies instead that the courts 'shall have such jurisdiction and powers as may be conferred by and under federal law.'

[3] Indira Gandhi a/p Mutho v Pengarah Jabatan Agama Islam Perak & Ors and other appeals [2018] 1 MLJ 545

[4] G25 praises Federal Court's 'courageous' decision on unilateral conversion. (2018). *The Star Online*. Retrieved from: https://www.thestar.com.my/news/nation/2018/01/31/g25-praises-federal-courts-courageous-decision-on-unilateral-conversion

[5] Edited text of the Lecture presented by Professor Shad Saleem Faruqi at the Fifth Raja Aziz Addruse Memorial Lecture at the International Malaysian Law Conference 2018, 15 August 2018 at The Royale Chulan, Kuala Lumpur, Malaysia.

1.1. Malaysia civil court system

For civil courts, Malaysia has a three-tier system: 1) Federal Court; 2) Court of Appeal, and; 3) High Courts. The Federal Court is the final and highest court in the country. It has appellate jurisdiction to hear appeals from the Court of Appeal; original or federal-state jurisdiction over whether a federal or state legislative body has legitimately made law within its power; referral jurisdiction to determine constitutional questions referred to it by another court; and advisory jurisdiction to give an advisory opinion on any question referred to it by the Yang di-Pertuan Agong concerning the effect of any provisions of the Constitution.[6] The Court of Appeal was created in 1994 as an intermediate appellate court between the High Courts and the Federal Court. Its primary role is to determine appeals against decisions of the High Courts. High Courts in Malaysia are separated by two co-ordinate jurisdictions: the High Court of Malaya for the states of peninsular Malaysia and the High Court of Sabah and Sarawak for the Borneo states. Both High Courts have general supervisory and appellate jurisdiction and have unlimited civil and criminal jurisdiction.[7]

The subordinate courts consist of the Sessions Court and the Magistrates' Court. Both courts have general jurisdiction in both civil and criminal matters. This is also where more than 90 per cent of criminal and 50 per cent of civil cases are adjudicated.[8]

1.2. Overview of the judicial appointments system

Across the countries, systems of judicial appointments come in three broad configurations:

1. Appointment of judges by the head of the state or executive;[9]
2. Election of judges by the legislature or the people; and
3. Appointment of judges by an independent judicial service commission or judicial council.

A country may have internal variation for different levels of court. For instance, the United States of the America uses election by the people for judges in some states, and judges at

[6] Tew, Y. (2011). The Malaysia Legal System: A Tale of Two Courts. *Georgetown Law Faculty Publications and Other Works*. https://scholarship.law.georgetown.edu/facpub/1922
[7] Ibid.
[8] Statistic are calculated based on pending cases from the Office of the Chief Registrar's website, from 2017 to 2020.
[9] Many countries have since moved away from this appointment system where the head of state or the executive is the sole decision maker, especially for judges to the superior courts or leadership positions.

the federal level are nominated by the President and confirmed by the upper chamber of the legislature.[10] In Pakistan, a Judicial Commission of Pakistan is empowered to select and recommend candidates to the Parliamentary Committee for confirmation proceedings[11]. However, when it comes to the appointment of the Chief Justice, the President must appoint the most senior judge of the Supreme Court to the position, following a constitutional provision.[12] In many countries, appointment by the head of the state is the most common methods, especially for higher courts, with striking variations regarding consulting, recommending or confirming entities.[13]

Malaysia has lived through three different methods of appointment of judges for superior courts since our independence in 1957 as explained in the table below.

Article 122 of the Merdeka Constitution 1957	The Federation of Malaya first adopted the method of appointment of judges by the head of state – Yang di-Pertuan Agong after consulting the Conference of Rulers and considering the advice of the Prime Minister, on the recommendation of the Judicial and Legal Service Commission. This Commission consisted of the Chief Justice of the Supreme Court, the Attorney General, the senior judges, the Deputy Chairman of the Public Service Commission and one or more sitting or former judges of the Supreme Court.
Constitution (Amendment) Act 1960 (Act 10 of 1960) and Article 122 of the Federal Constitution	The subsequent amendments to Article 122 of the Federal Constitution do away with the discretionary power of the Yang di-Pertuan Agong to appoint judges and render the judicial appointments of the Chief Justice and other judges of the superior courts a matter of Prime Ministerial discretion. The Yang di-Pertuan Agong is obliged to make the appointment of judges on the advice of the Prime Minister, given after consultation with designated constitutional entities.
Judicial Appointments Commission Act 2009	The Judicial Appointments Commission Act 2009 Act was enacted without amending the relevant provisions of the Federal

[10] Judicial Selection in the State. https://ballotpedia.org/Judicial_selection_in_the_states
[11] Article 175A(1)-(5) of the Constitution of the Islamic Republic of Pakistan 1973
[12] Article 175A (3) of the Constitution of the Islamic Republic of Pakistan 1973
[13] Ershadul Bari M. , Ehteshamul Bari, M. & Naz, S. (2015). The establishment of the Judicial Appointments Commission in Malaysia to improve the constitutional method of appointing the judges of the superior courts: a critical study. *Commonwealth Law Bulletin, 41:2*, 231-252, DOI: 10.1080/03050718.2015.1049634

	Constitution. Under the said Act, a Judicial Appointments Commission was established. The Commission is given the power to select, nominate and recommend candidates to the Prime Minister who retains his constitutional prerogative to give the names of his choice to the Yang di-Pertuan Agong.

Unlike judges to the superior courts, judges to the subordinate courts are part of the judicial and legal service and are appointed under the Judicial and Legal Service Commission, provided under Article 138 of the Federal Constitution.

1.3. Conclusion

With the foregoing in mind, this paper will be organised around four areas. First, the paper will examine the confluence of factors that led to the establishment of the Judicial Appointments Commission. Second, I will discuss the system of appointments, promotions and removal of judges to the superior court, namely whether the Judicial Appointments Commission established in 2009 has improved the process of appointment of judges. Third, I will discuss the appointment of judges for the subordinate courts under the Judicial and Legal Services Commission. Finally, the last chapter will put together recommendations for judicial appointments reforms based on desk research, interviews and an expert consultation workshop. It is important to note that this paper does not include appointment system in the Syariah courts.

2. The Road to Judicial Appointments Commission

The formation of the Judicial Appointments Commission under the Judicial Appointments Commission Act 2009 ("JAC Act") is aligned with international laws that recommend the appointment of judges through an independent nominating body (Commission or Council) with the power of selecting and recommending the best candidates to the head of state, executive or legislature for judicial appointments:-

Article 3(a), the International Bar Association Minimum Standards of Judicial Independence, 1982	Participation in judicial appointments and promotions by the executive or legislature is not inconsistent with judicial independence provided that appointments and promotions of judges are vested in a judicial body in which members of judiciary and the legal profession form a majority.
Article 2.14(b), the Universal Declaration on the Independence of Justice, 1983	Participation in judicial appointments by the Executive or Legislature is consistent with judicial independence, so long as appointments of judges are made in consultation with members of the judiciary and the legal profession or by a body in which members of the judiciary and the legal profession participate.
Article 10, the UN Basic Principles on the Independence of the Judiciary, 1985	Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned shall not be considered discriminatory.

Article 15, Beijing Statement of Principles on the Independence of the Judiciary in LAWASIA Region, 1995	In some societies, the appointment of judges, by, with the consent of, or after consultation with a Judicial Services Commission has been seen as a means of ensuring that those chosen judges are appropriate for the purpose. Where a Judicial Services Commission is adopted, it should include representatives the higher Judiciary and the independent legal profession as a means of ensuring that judicial competence, integrity and independence are maintained.
Guidelines II(1), the Latimer House Guidelines for Parliamentary Supremacy and Judicial Independence in the Commonwealth, 1998.	Jurisdictions should have an appropriate independent process in place for judicial appointments. Where no independent system already exists, appointments should be made by a judicial services commission (established by the Constitution or by statute) or by an appropriate officer of state acting on the recommendation of such a commission. The appointment process, whether or not involving an appropriately constituted and representative judicial services commission, should be designed to guarantee the quality and independence of mind of those selected for appointment at all levels of the judiciary. Judicial appointments to all levels of the judiciary should be made on merit with appropriate provision for the progressive removal of gender imbalance and of other historic factors of discrimination. Judicial appointments should normally be permanent; whilst in some jurisdictions, contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure. Judicial vacancies should be advertised.

It is also an emerging trend in most countries including South Africa, Zimbabwe, Zambia, Kenya, Pakistan, England and Wales, etc. In South Africa, the rationale for the creation of the Judicial Service Commission was to moderate the influence of the President and partisan interests in the appointment of judges. In a nation recovering from an apartheid system, the Judicial Service Commission also plays an important role in diversifying an overwhelmingly

"all-male, all middle-class and all-white" collection of judges and providing a better chance for meritorious candidates to be selected through stronger and impartial scrutiny of judicial candidates.[14] In England and Wales, a Judicial Appointments Commission was established in 2006 to replace a closed appointments process, informally known as a "tap on the shoulder" by the Lord Chancellor, a senior member of the government and the head of the judiciary. The former appointments process has been described in a report titled "Without Prejudice" jointly commissioned by the Bar Council and Lord Chancellor's Department as one that depended on "patronage, being noticed and being known"[15].

Examining the impetus that animated judicial reform in various jurisdictions can provide valuable insights towards the underlying principles and logic for the mechanism and procedures of the judicial appointments system. In Malaysia, the establishment of the Judicial Appointments Commission was an effort taken to rectify the 1988 judicial crisis. In the words of the former Prime Minister, Abdullah Ahmad Badawi, "it was a time of crisis from which the nation never fully recovered".[16]

2.1. The 1988 Judicial Crisis

Power struggles within the United Malays National Organisation (UMNO), the main political party that has ruled the government since the nation's independence in 1957, led to political interference within the judiciary. It started when UMNO was brought to court by members of the party to challenge the result of the party's election in 1987. The High Court ruled that UMNO and the branches were unlawful societies, and therefore the elections were invalid. What followed was a critical period of political uncertainty after the ruling party was declared unlawful. An appeal was filed by the party's members who initiated the court action. It was essential, for the then Prime Minister, Dato' Seri Dr Mahathir Mohamad, that the decision of the High Court should not be overturned.[17]

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[14] Swart, M (2019). Independence of the Judiciary. *Max Planck Foundation for International Peace and the Rule of Law*. https://oxcon.ouplaw.com/view/10.1093/law-mpeccol/law-mpeccol-e339

[15] Rackley, E. (2013). *Women, Judging and the Judiciary: From Difference to Diversity*. United Kingdom: Taylor & Francis Group.

[16] Koshy, S., Ng, C. L.Y., Habib, S., Fung, C, Teh, E. H., & Teh, Jo. (18 April 2008). Government moves to strengthen judiciary. *The Star Online.* Retrieve from https://www.thestar.com.my/news/nation/2008/04/18/government-moves-to-strengthen-judiciary

[17] Tan, K. Y. L. (2017). Judicial Appointments in Malaysia. In Corder, H. & Zyl Zmit, J. (Ed.). *Securing Judicial Independence: The Role Of Commissions In Selecting Judges In The Commonwealth*. South Africa: Siber Ink.; Harding, A.J. (1990). The 1988 Constitutional Crisis in Malaysia. *The International and Comparative Law Quarterly, 39(1),* pp. 57-81.

The then Lord President, Tun Salleh Abbas, scheduled a bench of nine judges for the appeal. Before the appeal could take place, a tribunal consisting of six members ("the First Tribunal") was put together to determine the removal of Tun Salleh on grounds of misbehaviour following a letter of complaint from him to the Yang di-Pertuan Agong. In this instance, it is important to note that a tribunal in which judges are tried by their peers for alleged misconduct is not a bad one in principle. It is the composition, lack of transparency and arbitrary grounds for removal that are of concern. The First Tribunal comprised of Tun Hamid Omar, the then Chief Justice of Malaya, who chaired the First Tribunal; the Chief Justice of Borneo; the Chief Justice of Sri Lanka; a judge of the Supreme Court of Singapore; and a former Malaysian High Court judge. The First Tribunal was highly criticised for its private hearing, vague procedure and above all, its composition. The Chairman was in line to succeed Tun Salleh in the office as Lord President if the latter was dismissed. Tun Salleh Abbas was subsequently removed as the Lord President unceremoniously and was then succeeded by Tun Hamid Omar.

A second Tribunal set up in 1994 and chaired by Tun Eusoff Chin, then recommended the removal of two of the five Supreme Court judges, namely Tan Sri Wan Suleiman and Datuk George Seah. Tun Eusoff Chin was then appointed as the Chief Justice of Malaysia in 1994 to succeed Tun Hamid Omar.[18]

Numerous grave allegations were made against both Chief Justices, Tun Hamid Omar (1998-1994) and Tun Eusoff Chin (1994-2000). They included questionable conduct, involvement of third parties in the appointment and promotion of judges, and unsavoury dealings to influence court decisions. Despite the various controversies and growing concerns among the people, both Chief Justices were never investigated over any of the allegations. The blatantly biased appointment and political patronage within the judiciary were rendered possible at a time when the Prime Minister held unchecked constitutional prerogative in the appointment of judges. The decay in the judiciary is aptly summarised by Harding as follows:

> "[M]atters got worse rather than better, the judiciary not simply neutered in public law matters, but mired in corruption allegations in relation to private law matters. In a string of commercial and defamation cases throughout the 1990s it seemed that some judges were not deciding cases according to law, but in order to please powerful business interests."[19]

[18] Ibid.
[19] Harding, A.J. (1990). Ibid.

2.2. VK Lingam Tape and the Royal Commission

The 1988 judicial crisis and its subsequent events severely shattered the public's confidence in the judiciary. From 2005 onwards, the Malaysian Bar, civil society and the public had advocated for the establishment of an independent Judicial Appointment Commission. However, the idea of an independent Commission, which inevitably limits the prerogative power of the Prime Minister in appointing judges, met stiff resistance from the then Chief Justice Tun Dato Seri Ahmad Fairuz and several UMNO ministers.[20]

The tipping point in the prevailing biased appointment system came when the infamous "VK Lingam Tape" surfaced on the Internet in September 2007. The video clip showed VK Lingam, a senior lawyer, engaged in a telephone conversation with Ahmad Fairuz Sheikh Abdul Halim, who was the then Chief Judge of Malaya, on the urgency to appoint the latter first to the position of the President of the Court of Appeal and then as the Chief Justice of Malaysia. A Royal Commission of Inquiry was set up under Prime Minister Abdullah Badawi to determine the authenticity of the tape; to identify parties in the video clip; to ascertain the truth of the content of the conversation; to determine whether any misbehaviours had been committed; and to recommend a course of action against the identified persons.[21]

The Report was submitted to the Yang di-Pertuan Agong on 9th May 2008, in which it stated that:

> "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 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…had the effect of seriously undermining and eroding the independence and integrity of the judiciary as a whole."[22]

Most significantly, the Report highlighted that element of political patronage and found that several individuals, including the former Prime Minister and two former Chief Justices, were entangled in the fixing of judicial appointments and judicial decisions. The Report also noted

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[20] Ershadul Bari M. , Ehteshamul Bari, M. & Naz, S. (2015). Op. cit.
[21] The Royal Commission of Enquiry on the Video Clip Recordings of Images of a Person Purported to be an Advocate and Solicitor Speaking on the Telephone on Matters Regarding the Appointment of Judges (2008) ("Royal Commission of Inquiry")
[22] The Royal Commission of Inquiry (2008), Report, vol 1, 2008 page 75-76.

that the "inherent flaws and weaknesses regarding the process of appointment and promotion of [judges]…is open to interference and manipulation by the Executive and other intrinsic forces including private citizens".[23] The formation of a Judicial Appointments Commission was recommended by the Royal Commission of Inquiry, including how it should be constituted, who its members should be, criteria of qualifications, etc. Under such circumstances, the ground for the formation of a Judicial Appointments Commission gained political standing, more so as it was a direction already taken by other jurisdictions like England. In April 2008, a month before the Royal Commission's report was submitted to the Yang di-Pertuan Agong, the government announced its decision to set up a Judicial Appointments Commission to ensure transparency in the appointment of superior court judges. The long-overdue Judicial Appointments Commission Act ("JAC Act") was passed in January 2009 and came into force on 2nd February 2009. The JAC Act 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".

At this juncture, it is important to note that the formation of the Judicial Appointments Commission was not an outcome of political will for the protection of judicial independence, but rather, an attempt to pacify the diminished prestige and loss of public confidence as a result of political interference and abuse of power. This explains the piecemeal approach taken by the Malaysian government in the establishment of the Judicial Appointments Commission. The next part of the paper will investigate the JAC Act in detail, including its strength and weaknesses.

[23] Ibid. page 175

3. Appointments of judges to the superior court

Despite its name, the Judicial Appointments Commission does not have the power to make judicial appointments. Rather, the principal functions of the Commission, as provided under Section 21(1) of the Judicial Appointments Commission Act 2009 ("JAC Act") 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;
(c) To formulate and implement mechanisms for the selection and appointment of judges of the superior court;
(d) To review and recommend programmes to the Prime Minister to improve the administration of justice;
(e) To make other recommendations about the judiciary; and
(f) To do such other things as it deems fit to enable it to perform its functions effectively or which are incidental to the performance of its functions under this Act.

The JAC Act is enacted without any amendment to the constitutional provision on the Prime Minister's power to appoint judges under Article 122B of the Federal Constitution. Against this backdrop, the Commission is tasked to recommend candidates to the Prime Minister, who retains his or her constitutional prerogative to give the names of his or her choice, including those not recommended by the Commission, to the Yang di-Pertuan Agong.

3.1. Composition of members and security of tenure

The independence of the Judicial Appointments Commission lies in its members and in the security of their tenures for it is intrinsically linked to their ability to exercise fair and impartial judgment based on the merits and qualification of candidates without any personal likeness or bias, external pressure, threats or improper influence. It is pivotal to ensure the genuine independence of the members of the Commission and at the same time, the required expertise and experience to perform the task of appointing judges.

Section 5(1) of the JAC Act provides that the Commission shall comprise 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 Society, the Advocates Association of Sarawak, the Attorney General of the Federation, the Attorney General of a State legal service or any other relevant bodies

Appointees listed from (a) to (d) are ex officio members – members appointed for the period during which they hold the relevant office. Appointees listed from (e) to (f) are members appointed for a period of two years by the Prime Minister and are eligible for reappointment.[24] Eminent persons are defined under the JAC Act as members who are not of the executive or other public service. In appointing the eminent persons, the Prime Minister is required to consult with the Bar Council and the Sabah Law Society, the Advocates Association of Sarawak, the Attorney General of the Federation, the Attorney General of a State legal service or any other relevant bodies. However, the Bar Council has complained that it was only asked to provide names and no further consultations were held on the appointments of the four eminent persons.[25]

The then President of the Malaysian Bar, Dato' Ambiga Sreenevasan, in a press statement responding to the newly enacted JAC Act, stated the sole discretion of the Prime Minister to appoint five out of nine members, "in fact seeks to statutorily reinforce and validate the power of the executive in key aspects of the judicial appointments process…The JAC [Act] leaves open the possibility that the Prime Minister may appoint politicians and former members of the Executive or the public services."[26]

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[24] Section 6(1) of the JAC Act
[25] Koshy, S. (8 February 2017). AG, Bar associations yet to be consulted on new JAC appointments. *The Star*. Retrieve from: https://www.malaysianbar.org.my/article/news/legal-and-general-news/legal-news/ag-bar-associations-yet-to-be-consulted-on-new-jac-appointments
[26] Press Statement by the President of Malaysian Bar, Dato' Ambiga Sreenevasen. (16 December 2008). Bar Council's Comments on the Judicial Appointments Commission Bill 2008. Retrieve from: https://www.malaysianbar.org.my/article/news/legal-and-general-news/members-opinions/bar-council-s-comments-on-the-judicial-appointments-commission-bill-2008

Evidently, the JAC Act grants the Prime Minister an indirect grip over the judicial appointments process by giving the Prime Minister the wide discretion to appoint more than half of the members of the Commission. The influence of the Prime Minister is further extended when he is given the power to revoke the appointment of any of the four eminent persons "without assigning any reason therefore".[27] The lack of security of tenure has been widely criticised as the four eminent persons cannot be expected to acquire the habit of independence in discharging their duties without fear of being removed where the grounds and procedure of removal are not transparent.[28]

Further, the Prime Minister is given wide and unfettered discretion to determine the amount of allowances to be paid to the members of the Commission.[29] In other terms, the Prime Minister is empowered to alter the amount of allowances to the members to their disadvantage without going through any form of vetting process. The actual allowances paid to the members are not made known to the public.

Globally there are different approaches and diverging views as to the composition of an independent judicial commission.

The Beijing Statement of Principles of the Independence of the Judiciary provides in Article 15 that "where a Judicial Service Commission is adopted, it should include representatives of the higher judiciary and the independent legal profession as a means of ensuring that judicial competence, integrity and independence are maintained." The inclusion of judges and representatives of the legal professions in the composition of the Commission, in theory, would give a certain degree of independence to the Commission from the government's influence.

The participation of lay members could also add value to the Commission. The Council of Europe's Commission for Democracy Through Law (the Venice Commission) highlighted that the judicial council should include members who are outside the judiciary and represent other branches of power or the academic or professional sectors. The Venice Commission states that the inclusion of such members would minimise the risk of corporatism and undue peer restraint within the judiciary.[30] The Dublin Declaration on Standards for the Recruitment and Appointment of Members of the Judiciary recommends the inclusion of independent lay members representing civil society, appointed from among well-known persons of high moral standing on account of their

[27] Section 9(1) of the JAC Act
[28] Ershadul Bari M. , Ehteshamul Bari, M. & Naz, S. (2015). Op. cit.
[29] Section 37 of the JAC Act
[30] Paragraph 27-30 of the Venice Commission, Judicial Appointments. Retrieve from: https://www.venice.coe.int/webforms/documents/default.aspx?pdffile=CDL-AD%282007%29028-e

skill and experience in matters such as human resources.[31] However, safeguards must be in place to ensure that the lay members are not appointed through political patronage.

In England, the law specifies that the Judicial Appointments Commission is made up of five judicial officers, two practising lawyers, six lay members, one tribunal member and one non-legally qualified judicial member to ensure the appointment of a more representative and diverse judiciary. The lay members must not be legally qualified and not be Members of the Parliament or civil servants. The inclusion of lay members from different backgrounds and expertise can inject fresh views and mitigate the possibility of prejudices held in the judiciary in the appointment process. To reduce the risk of political patronage in the appointment of lay members, the lay members' positions are openly advertised and appointments are made by an independent selection panel jointly assembled by the Lord Chancellor, the Chairman of the Commission and the Lord Chief Justice.[32] Members of the Judicial Appointments Commission may be appointed for up to five years at a time, which are renewable to a maximum individual service of ten years.

A report titled "Judicial Appointments Commissions: A Model Clause for Constitutions" published by the Commonwealth legal and judicial associations ("Model Clause") proposes that the members of the Judicial Appointments Commission should be appointed for a period of no more than four years. Broadly, the period in office for a Commissioner is around the three years mark. The report justified that tenure of four years is "considered to be sufficient time to become a very useful Commissioner, but not so long that the Commission itself becomes rigid and inflexible in approach."[33]

When it comes to the removal of members, in England and Wales, Fiji, Kenya and Swaziland, a disciplinary tribunal is set up to inquire into any alleged misconduct or incapacity with safeguards in place to ensure fairness in the inquiry process. This approach ensures that the members are able to deliberate independently on the merits of candidates and not be swayed by political allegiance to the person or entity who appointed them.

[31] Paragraph II.5 of the Dublin Declaration on Standards for The Recruitment and Appointment of Members of The Judiciary. Retrieved from: https://www.encj.eu/images/stories/pdf/GA/Dublin/encj_dublin_declaration_def_dclaration_de_dublin_recj_def.pdf

[32] Constitutional Reform Act 2005, Schedule 12 and Judicial Appointments Commission Regulations 2013.

[33] Brewer, K., Dingemans, J., and Slinn, P. (2013). Judicial Appointments Commissions: A Model Clause For Constitutions (report on behalf of the *Commonwealth Magistrates' and Judges' Association, the Commonwealth Lawyers' Association and the Commonwealth Legal Education Association*). 6. Retrieve from: http://www.cmja.org/downloads/latimerhouse/Judicial%20Appointments%20Commissions -%20CLA-CLEA-CMJA%20Report.pdf.

Table A: Studies on the composition of appointment bodies

	Malaysia	England	South Africa	Pakistan
Name	Judicial Appointments Commission	Judicial Appointments Commission	Judicial Service Commission	Judicial Commission of Pakistan
No of members	9	15	23	9 & more
Compositions of members	Five judicial members; four eminent persons, who are not members of the executive or other public service, appointed by the Prime Minister	Seven judicial members; two practising or employed lawyers; and six lay members	Three judicial members; the Minister of Justice; four legal practitioners; one legal academic; six members of the National Assembly, at least three of whom must be members of opposition parties; four members of the National Council of Provinces; and four persons designated by the President as head of the national executive.	Composition for appointments to Supreme Court Chief Justice, the four most senior judges of the Supreme Court, a retired Chief Justice or Supreme Court judge, the Federal Minister for Law and Justice, the Attorney-General and a senior advocate appointed by the Pakistan Bar Council. *Composition for appointments to High Court:* The above and joined by Chief Justice of the High Court to which the appointment is being made; Member; the most senior Judge of that High Court; Provincial Minister for Law; and a legal practitioner
Chairperson	Chief Justice	Lay member	Chief Justice	Chief Justice

Tenure (for ex officio members)	Two years and may be reappointed	Up to five years and it is renewable to a maximum of 10 years	Up to five years and may not be reappointed	Two years

3.2. The judicial selection process

The Judicial Appointments Commission (Selection Process and Method of Appointment of Judges of the Superior Courts) Regulations 2009 ("JAC Regulations") came into effect on 1st June 2009 to facilitate the selection process. The Regulations is a step forward to transparency in the appointment process by providing a detailed set of rules to be followed by the Judicial Appointments Commission from advertisement of vacancies to selection criteria.

3.2.1. Application for vacancies in the High Courts

The Judicial Appointments Commission has been given the discretion to advertise for vacancies in the office of judges on its website, or any other medium deemed appropriate.[34] The Commission is required to specify the office that is vacant, the experience and qualifications required, the remuneration and allowances and the closing date of application. At High Court level, any person having the experience of practising in a High Court as an advocate for ten years or as a member of the judicial and legal service of the Federation or of a state for ten years may apply for a vacancy for judge of the High Court.[35] The open application for the position of judges in the High Court is highly desirable as it helps in widening the pool of candidates to private practitioners and avoiding the "tap in the shoulder" approach of the former Westminster before its reform. Those who belong to communities historically underrepresented on the bench or those who do not have a close connection with the right persons may not benefit from the informal flow of information about vacancies in the judiciary.

[34] Section 21 of the JAC Act; Regulation 3 of the of the Judicial Appointments Commission (Selection Process and Method of Appointment of Judges of the Superior Courts) Regulations 2009 ("JAC Regulations")
[35] Regulation 4(1) of the JAC Regulations

3.2.2. Promotion of judges to the Court of Appeal and the Federal Court

For vacancies in the Court of Appeal and the Federal Court, candidates have to be nominated and only selected persons can nominate names. The absence of an open application for the two highest courts is not an anomaly considering that these often involve promotions of judicial officers from the High Court or the Court of Appeal or the Federal Court to a higher court or a leadership position. The JAC Regulations[36] specify that only the following person is entrusted to identify and propose candidates:

(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;
(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 Appeal, for vacancy in the office of judge of the Court of Appeal.

Notwithstanding the above, 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".[37]

The lack of openness in nomination procedure and meaningful consultation over the nomination for judges of the two highest courts in Malaysia is of particular concern. From the year 2009 to 2011, the Chief Justices had consulted the Bar Council on candidates for elevation to the Court of Appeal or the Federal Court, albeit being an informal process that ceased after 2013.[38] Most notably, in year 2015, retired Court of Appeal judge Mohd Hishamudin Yunus confirmed in public that his elevation to the Federal Court was halted by the then Prime Minister Najib Razak even though he was recommended by the JAC.[39]

[36] Regulation 5(1) of the JAC Regulations
[37] Regulation 5(2) of the JAC Regulations
[38] Lawyers question criteria for promoting judges. (30 September 2013). *Yahoo News*. Retrieve from: https://malaysia.news.yahoo.com/lawyers-criteria-promoting-judges-231011889.html
[39] The Malay Mail Online. (20 September 2015). Ex-appellate judge Hishamudin says hit glass ceiling because didn't get PM's nod. Retrieve from: https://www.malaymail.com/news/malaysia/2015/09/20/ex-appellate-judge-hishamudin-says-hit-glass-ceiling-because-didnt-get-pms/973227

Hishamudin Yunus is known to be an exemplar of judicial integrity and unwavering commitment to constitutional supremacy and human rights.[40] The learned judge is fiercely remembered for his landmark decisions including a transgender case where the Court of Appeal declared the Negeri Sembilan state shariah enactment that criminalises Muslim men for cross-dressing as invalid, a declaration of Section 15(5)(a) of the University Colleges Act 1971 as unconstitutional for restricting students from expressing support for or opposition to any political party. In an interview with the Sunday Star, he acknowledged that his landmark decisions throughout his 23-year judicial career may have impacted his promotion within the judiciary.[41] The issue of lack of openness in the promotion of judges was again raised in 2018 when several senior judges were passed over for promotion.[42]

The Prime Minister' prerogative discretion to pass over the JAC's nomination poses a real risk of executive interference in the promotion of judges and it is for this reason that safeguards, either through clear stipulation of criteria or mandatory meaningful consultations are fundamental to secure judicial independence.

In New Zealand, while there is no legislation or regulations that mandate consultation in the appointments process, it is a convention and recorded in its Judicial Protocol that the Attorney-General shall consult a list of parties for the nomination of names, i.e. the Chief Justice, the President of the Court of Appeal, the Chief High Court Judge, the Secretary for Justice, and groups representative of lawyers or other interest groups.[43]

3.2.3. Assessment and selection

An accountable and transparent assessment and selection process is no less critical to the independence of the judicial appointment system. The public in general has the right to know the procedure and mechanism by which their judges are appointed. The Dublin Declaration of the European Network of Councils for the Judiciary provides that "a clearly-defined and published set of selection competencies against which candidates for judicial appointment

[40] Faruqi, S. S. (17 September 2015). Judge with many landmark decisions. *The Star Online.* Retrieve from: https://www.thestar.com.my/opinion/columnists/reflecting-on-the-law/2015/09/17/judge-with-many-landmark-decisions
[41] The Malay Mail Online. (20 September 2015). Op. cit.
[42] Tariq, Q. (1 December 2018). Bar: Promote based on Seniority. *The Star Online.* Retrieve from: https://www.thestar.com.my/news/nation/2018/12/01/bar-promote-based-on-seniority-bypassing-senior-judges-is-a-disservice-to-the-judiciary
[43] Judicial Protocol, New Zealand. (April 2014). Retrieved from: https://www.crownlaw.govt.nz/assets/uploads/judicial-protocol.pdf

should be assessed at all stages of the appointment process."[44] Transparency of this kind can be achieved by publishing the procedures and steps followed by the Judicial Appointments Commissions and its secretariat, including the institution and persons involved and their roles, timeline, assessment criteria or any standards that are applicable.

In Malaysia, upon receiving application or nomination, the Secretary of the Commission is obliged to conduct a preliminary vetting process to ensure the candidates are qualified under Article 123 of the Federal Constitution.[45] They are then required to submit the names to various government agencies, namely the Malaysian Anti-Corruption Commission; Royal Malaysian Police; Companies Commission of Malaysia; and the Department of Insolvency for the screening process. This preliminary screening process is to verify the candidates' education qualification, financial position statement, tax payment record and credit history, and arrest and conviction history. The Secretary will then prepare a deliberation paper on each candidate for the Commission on who had passed the initial screening process.[46] Members and staff of the Commission are sworn to secrecy under the JAC Act.[47] To this date, very little information is made available as to the number or breakdown of those who applied or were shortlisted.

Candidates are usually called in for an interview by the Commission, though it is not a procedure required under any law or regulations. The interview is carried out for about 30 minutes[48] and in accordance with standard interview procedure where there could be a panel of three as determined by the Commission.[49] Globally, interview of candidates is widely adopted as a procedure in appointing judges.

The Commission meets at least once a month, and a quorum of seven members, including the Chief Justice as Chairman, is required.[50] Where the meeting is for the selection of judges

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[44] Paragraph I.1 of the Dublin Declaration on Standards for The Recruitment And Appointment Of Members Of The Judiciary. Retrieved from: https://www.encj.eu/images/stories/pdf/GA/Dublin/encj_dublin_declaration_def_dclaration_de_dublin_recj_def.pdf
[45] Regulation 7(1)(b) of the JAC Regulations
[46] Regulation 8 of the JAC Regulations
[47] Section 32 of the JAC Act
[48] BERSIH 2.0. "Sharing by Dato' Mah Weng Kwai, former Commissioner of the Judicial Appointment Commission". In *Bersih Stakeholder Consultation Workshop On Reforming Judicial Appointments 11 January 2021*. Virtual consultation.
[49] Tan, K. Y. L. (2017). Judicial Appointments in Malaysia. In Corder, H. & Zyl Zmit, J. (Ed.). *Securing Judicial Independence: The Role Of Commissions In Selecting Judges In The Commonwealth*. South Africa:
[50] Section 13 of the JAC Act

of the High Court, the Chief Justice is required to nominate a judge from among the members of the Commission to chair the meeting instead.[51]

The selection shall be made by "majority decision" and each member present has one vote by secret ballot and in the event of a tie, the Chairman or the member of the Commission presiding as the Chairman for the meeting shall have a casting vote.[52] The meetings or the minutes of the meetings of the Commission are not open to the public – a common practice and regulation adopted across most jurisdictions. In a selection meeting, the Commission is obligated to:-

(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.[53]

In South Africa, it has been a procedure of the Judicial Service Commission to interview all shortlisted candidates in public. This is no doubt a more radical approach to ensure transparency in a post-apartheid constitution.[54] The open interview model is also adopted by Kenya following the establishment of a new Judicial Service Commission under the post-conflict Constitution of 2010.[55]

In South Africa, the adoption of open interview should be contextualised against a post-apartheid nation that is in the midst of a constitutional transition where there is much need to build trust among the public and hold the Commission accountable for its conduct within the confines of the interview. The UN Special Rapporteur on the independence of judges and lawyers, Leandro Despouy, noted in his annual report that public hearings of candidates are adopted where there is a need to enhance the public certainty on the candidate's integrity.[56]

There are diverging opinions around public interviews or hearing of candidates. The Model Clause is opposed to this approach as it is more likely to deter potential applicants, noting that "reports have shown that although candidates are prepared to put themselves through an open and fair process, they are less willing to share their candidature, and any lack of success, with the public at large."[57]

[51] Section 24(1) and 24(2) of the JAC Act
[52] Section 13(6) of the JAC Act
[53] Section 22(2) of the JAC Act
[54] This is currently required by the Procedure of the Judicial Service Commission, Government Notice RR423 (2003), para 2(j) and 3(j).
[55] Judicial Service Act 2011, Schedule 1 s10(5)
[56] Paragraph 31 of the Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy. (24 March 2009). A/HRC/11/41.
[57] Brewer, K., Dingemans, J., and Slinn, P. (2013). Op. cit. 15.

In England and Wales, interview of candidates is conducted in private by three to five members from the selection panel. Observers may be present during some of the interviews to observe the panel and interview process. The interviews are recorded but will not be made available to the public and are stored for 12 months before they are destroyed.[58]

3.3. Interaction between the Judicial Appointments Commission and the Executive

Once the selection has been made, the Commission shall submit a report to the Prime Minister consisting of a list of recommended candidates and the reasons for their appointments, along with other necessary information the Commission deems necessary.[59] The Prime Minister may request for a further two names to be selected and recommended for his consideration for vacancies in any post except for High Court Judge.[60] The Commission is statutorily required to comply with such a request as soon as may be practicable.

In this instance, the Prime Minister has substantive say over the appointment process. The Prime Minister need not to justify his or her reasons for requesting further names for selection and recommendation and there is no limit stated as to how many times the Prime Minister may disagree. Theoretically speaking, the Prime Minister may reject a series of recommendations and wait until his choice of candidate is put forward by the Commission. The Commission is obliged to keep a pool of reserve candidates available for the purpose of compliance with any request that may be made by the Prime Minister.[61]

It can be argued that the initial screening and shortlisting process by the Commission could reasonably reduce the possibility of political patronage and unqualified appointments. However, in Malaysia, the law 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".[62] It is not explicitly stated that the Prime Minister must accept only the candidates recommended by the Commission before tendering his or her advice to the Yang di-Pertuan Agong. The lack of binding power of the

[58] Judicial Appointments Commission, England and Wales. Retrieve from: https://judicialappointments.gov.uk/guidance-on-the-application-process-2/selection-day/
[59] Section 26(1) of the JAC Act
[60] Section 27 of the JAC Act
[61] Regulation 9 of the JAC Regulations
[62] Section 28 of the JAC Act

Commission's recommendation for each vacancy has enabled continued executive interference in the appointment and promotion of judges, as evidently illustrated in 2013 when the then Prime Minister Najib Razak bypassed Hishamudin Yunus's elevation to the Federal Court even when he was recommended by the Commission.

The inability of the JAC Act to safeguard a fair and merit-based appointment system is further exemplified in 2017 when Tun Md Raus Sharif and Tan Sri Zulkefli Ahmad Makinudin were appointed as additional judges under the Federal Constitution. The former was appointed as the Chief Justice for another three years and the latter continued to serve as President of the Court of Appeal for another two years. Their continued terms were widely regarded as unconstitutional as they would exceed the constitutional retirement age of 66 years and six months for judges.[63] The appointments were challenged in court and the two senior justices gracefully resigned in 2018 before a judgment was delivered by the court.[64]

The power of the PM to reject and appoint people contradicts the best practices recommended by the UN Special Rapporteur on the independence of judges and lawyers. In instances where the executive is given the discretion to reject a candidate recommended by the Commission, the power the executive is granted should be confined to exceptional cases.[65] The UN Special Rapporteur, in his report, further spelt out two measures to safeguard the boundaries of that power:

(a) The executive should not be permitted to appoint an alternative choice who has not been considered and recommended by the commission; and
(b) For any rejection of any recommended candidate, reasons should be provided and these reasons should be based on well-established criteria that have been made public in advance.[66]

The following table shows the number of judges appointed to the High Court and promoted to the Court of Appeal and Federal Court.

[63] Article 125 (1) of the Federal Constitution
[64] Malaysian Bar questions appointment of Md Raus and Zulkefli as additional judges. (10 July 2017). *The Star Online.* Retrieve from: https://www.thestar.com.my/news/nation/2017/07/10/malaysian-bar-judges-appointment; Appointments of Raus and Zulkefli constitutional, court told. (13 September 2018). *The Malay Mail Online.* Retrieve from: https://www.malaymail.com/news/malaysia/2018/09/13/appointments-of-raus-zulkefli-constitutional-court-told/1672246
[65] Report of the Special Rapporteur on the independence of judges and lawyers, Leandro Despouy. (24 March 2009). A/HRC/11/41.
[66] Ibid

Table B: Judicial appointments between the year 2014 to 2020[67]

	2019	2018	2017	2016	2015	2014
Federal Court	5	7	2	3	1	1
Court of Appeal	7	8	3	9	1	7
High Court	19	8	11	5	2	12
Judicial Commissioner	24	7	12	4	15	12

There is neither documentation on how the Prime Minister decides on the final candidate nor data on the number of occasions when the Prime Minister has come back to the Commission for further candidates.[68]

Across the world, there are three distinct models for the interaction between an independent judicial appointment body and the executive:

(a) The commission submits a single name which is binding on the executive;
(b) The commission submits a single name and the executive has some latitude to disagree; and
(c) The commission is responsible for producing a shortlist of candidates for final selection and appointment by the executive.[69]

There are principles of good practices in each model and it varies from countries to countries. Model (a) and (b) may not differ much in practice in some jurisdictions.

In England and Wales, once the Judicial Appointments Commission has submitted names for each vacancy (only one name for high judicial offices like Lord Chief Justice), the Lord Chancellor is given limited powers to reject the candidates or to request the Commission to recommend other names. The power of Lord Chancellor is narrowly defined by law. The power to reject can only be exercised once and only in cases where in the Lord Chancellor's opinion, the candidate "is not suitable for the office concerned" and evidence or the lack of it are required to prove the Lord Chancellor's opinion.[70]

Commonwealth countries like Ghana, Kenya, Malawi, Maldives, Nigeria, Pakistan, Rwanda, Sierra Leone, Uganda and Zambia involved the legislature or parliamentary confirmation proceedings in the final appointment of judges.[71] In Ghana, Rwanda,

[67] Statistic compiled from the JAC Annual Report, available at http://www.jac.gov.my/spk/en/annual-report-judicial-appointsments-commission.html#2019
[68] Tan, K. Y. L. (2017). Op. cit.
[69] J. van Zyl Smit. (2015). The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A Compendium and Analysis of Best Practice (Report of Research Undertaken by *Bingham Centre for the Rule of Law*).
[70] Section 29 and 30 of the Constitutional Reform Act 2005
[71] J. van Zyl Smit. (2015). Op. cit. 28.

Malawi, Maldives, Nigeria and Kenya, the parliamentary confirmation proceedings is only invoked in cases of appointment to the highest court or judges appointed to leadership positions. In Pakistan, the power to reject candidates is entrusted to the legislature. The Judicial Commission is obligated to nominate only one name and the Commission is required to send another nomination only if the Parliamentary Committee consisting of eight members does not confirm the nomination by three-fourth of its total membership.[72]

Such an approach, which would no doubt increase the legitimacy of the judiciary, also runs the risk of politicisation and deadlocks. The danger of entrusting the legislature with the power of final confirmation is elaborated here in a report by the Bingham Centre for the Rule of Law:

> "First, politicians have a greater opportunity to extract undertakings from judges if they have to appear for repeated confirmation hearings, both at the time of their initial appointment and again if seeking promotion to an appellate court. Secondly, there is the danger of political deadlock as the effect of withholding confirmation may be to leave judicial vacancies open and, in the worst case, deprive a court of the quorum it requires to be validly constituted."[73]

Specific measurements are required to ensure the independence and impartiality of the appointment process including a guided structure for deliberation on the merit of candidates and a written report for rejection of any candidates or to limit the number of times the legislature can reject a recommended candidate.

Table C: Studies on the interaction between the judicial appointment bodies and executive

	Malaysia	England	South Africa	Maldives
Binding recommendation			The President of South Africa must appoint the judges of all other courts on the advice of the Judicial Service Commission, save for members of the Constitutional Court and the President and Deputy-President	Judges of the High Court are directly appointed by the Judicial Service Commission.

[72] Article 175A(8) of the Constitution of the Islamic Republic of Pakistan 1973
[73] J. van Zyl Smit. (2015). Op. cit. 28.

			of the Supreme Court of Appeal.	
Limited scope for executive's discretion to disagree		The Crown appoints the judges to the Court of Appeal and High Courts recommended by the Lord Chancellor of a candidate selected by the Judicial Appointments Commission. The Lord Chancellor may reject a candidate once with reason provided and request the Commission to recommend other names.	The President of South Africa appoints judges of the Constitutional Court from the list of candidates shortlisted by the Judicial Service Commission but he may reject one or more of these names as unsuitable with reasons furnished to the Commission.	
Wide discretion by the executive to appoint	The Prime Minister can reject names for an unspecified number of times and the Commission is obligated to resubmit its recommendation.		The President appoints the Chief Justice, Deputy Chief Justice, President and Deputy President of the Supreme Court of Appeal in consultation with JSC and leaders of the parties represented in the National Assembly.	The President appoints the Chief Justice and the judges of the Supreme Court after consulting the Judicial Service Commission and the People's Majlis will confirm the appointee by majority voting.

3.4. Transference of judges

In principle, the transference of judges to another court of the same status is a lateral movement of judges and a standard practice within the judiciary. This may happen within different divisions in the same court, a state or interstate. The power to transfer judges does not reside within the JAC and it is deemed as an administrative decision to be made by the Chief Registrar's Office.[74] In January 2021, it was made known that Justice Mohd Nazlan Mohd Ghazali who presided over Najib Razak's SRC International case will be transferred to the civil division, to replace Justice Wong Chee Lin who will be retiring.[75] The learned judge convicted Najib Razak to 12 years' imprisonment and fined him for RM210 million after finding him guilty of all seven charges related to the misappropriation of funds in SRC International.

The transference has raised some concerns in public confidence as he was set to hear several high profile cases involving Najib Razak and the transference cast serious doubt on interference in the administration of justice. At this point, very little information is known to the public when it comes to the procedure, requirement and justification behind the decisions to transfer judges.

3.5. Qualification of judges

A clear and public outline on the qualification of judges is an important requirement to ensure transparency so that the public and candidates are made aware of the basis and criteria used in the process of appointment of judges. Prior to the JAC Act, a candidate is qualified for selection as a judge of the High Court if he or she fulfils the constitutional requirements of citizenship and 10 years of experience as an advocate and solicitor of the High Court or as a member of the judicial and legal service of the Federation or of the legal service of a state.[76] The JAC Act further spells out the selection criteria to be taken into consideration by the Commission in deliberation and selection of candidates for judicial appointments:

(a) Integrity, competency and experience;

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[74] Hamdan, N. & Timbuong, J. (24 January 2021). Transfer of Judge a Routine Matter. *The Star Online.* Retrieve from: https://www.thestar.com.my/news/nation/2021/01/24/transfer-of-judge-a-routine-matter-say-experts

[75] Khairulrijal, R. (23 January 2021). Judge's transfer: Nazlan to continue presiding over ongoing criminal cases. *New Straits Times.* Retrieve from: https://www.nst.com.my/news/nation/2021/01/659915/judges-transfer-nazlan-continue-presiding-over-ongoing-criminal-cases

[76] Article 123 of the Federal Constitution

(b) Objective, impartial, fair and good moral character;

(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.[77]

The principle that judges should be appointed on merit is pivotal to many international declarations, statement and best practices for the judiciary, including the Basic Principles on the Independence of the Judiciary endorsed by the UN General Assembly resolutions[78] and the Beijing Statement of Principles of the Independence of the Judiciary[79].

3.6. Diversity as merit-based

The Basic Principles on the Independence of the Judiciary endorsed by the UN General Assembly resolutions and the Beijing Statement of Principles of the Independence of the Judiciary went a step further to specify that "no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory".[80]

The pursuit of judicial diversity is also supported by the Council of Europe's Commission for Democracy Through Law (the Venice Commission) as greater diversity would have the effect of enhancing the legitimacy of the judiciary:

> "[M]erit being the primary criterion, diversity within the judiciary will enable the public to trust and accept the judiciary as a whole. While the judiciary is not representative, it should be open and access should be provided to all qualified persons in all sectors of society."[81]

While diversity is not a criteria in Malaysia when it comes to appointment of judges, following the appointment of the first woman Chief Justice in Malaysia, Tengku Maimun Tuan Mat in 2019, the nation witnessed an increased number of women judges in the superior courts.

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[77] Section 23(2) of the JAC Act.
[78] Article 10 of the Basic Principles on the Independence of the Judiciary endorsed by the UN General Assembly resolutions. Retrieved from: https://www.ohchr.org/en/professionalinterest/pages/independencejudiciary.aspx
[79] Article 12. Retrieved from: https://www.icj.org/wp-content/uploads/2014/10/Beijing-Statement.pdf
[80] Article 10 of the Basic Principles on the Independence of the Judiciary endorsed by the UN General Assembly resolutions. See also Article 13 of the Beijing Statement of Principles of the Independence of the Judiciary
[81] Paragraph 66.

Three women Court of Appeal judges were elevated to the Federal Court in the same year and Federal Court judge Rohana Yusuf was elevated as Court of Appeal President.[82]

Discrimination is often done subconsciously and this can happen even to the greatest and fairest minds. As aptly described by Anne Morris in her comments on the lack of judicial diversity in England and Wales:

> "The white middle-class who still predominate the boardrooms, committee rooms and courts may instinctively and unconsciously prefer and select those who 'embody' what they consider to be the 'requirements' for the job. It need not be as obvious as the old school tie or a shared University education, or even connections of friendship or family. It may simply be that people are more comfortable with the kind of reflection they see in the mirror."[83]

Experience of gender and race should be recognised as a matter of merit. Judges may be called upon to consider the perspective of an objective or reasonable woman, make judgment in cases of gender-based violence and if a judge's embodied experience and knowledge contribute to a holistic understanding of the issues, guided by laws and her own sense of justice, this is uncontrovertibly a matter of merit.[84] The UN Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul, has stated that "the only way to ensure women's perspectives in the administration of justice…is through women's life experience and therefore through the appointment of women judges who also represent the diversity of society and who are therefore able to tackle judicial issues with fitting sensitivity."[85]

In England and Wales, a tie-break provision is adopted in cases where two or more candidates are found to be of equal merit, the candidate from a disadvantaged or under-represented group will be favoured. This provision should be contextualised against concerted efforts in the country to increase the number of women and members of ethnic minorities in the judiciary.[86]

[82] Anbalagan, V. (5 December 2019). History to be made with 3 women judges promoted to Federal Court. *Free Malaysia Today*. Retrieve from: https://www.freemalaysiatoday.com/category/nation/2019/12/05/history-to-be-made-as-3-women-judges-promoted-to-federal-court/

[83] Anne Morris, 'Embodying the Law*: Coker and Osamor v The Lord Chancellor and the Lord Chancellor's Department [2002] IRLR 80* (Court of Appeal)', *Feminist Legal Studies*, 11, 2003, 45, pp. 52–53.

[84] Federal Judicial Appointment Process by the Canadian Bar Association. (2005). Retrieve from: https://www.cba.org/CMSPages/GetFile.aspx?guid=81a459b1-0bd3-4c2c-a88f-12371fa80de2

[85] Report of the Special Rapporteur on the independence of judges and lawyers, Gabriela Knaul. (29 April 2011). A/HRC/17/30

[86] Rackley, E. (2013). Op. cit. pp 98.

In South Africa, the 1996 Constitution provides "the need for the judiciary to reflect broadly the racial and gender composition of South Africa must be considered when judicial officers are appointed".[87] The broad definition under the Constitution means that the Judicial Service Commission is given considerable discretion to achieve equal representation in the judiciary and to rebalance the almost all white and male composition in the post-apartheid nation.

3.7. Tribunal for removal of judges

Broadly, there are three removal mechanisms in most Commonwealth jurisdictions:

(a) Parliamentary removal (Australia, Bangladesh, Canada, India, Kiribati, Malawi, New Zealand, South Africa, the United Kingdom, etc.);
(b) A disciplinary body separate from both the executive and the legislature, including the use of an ad hoc tribunal, which is formed only when the need arises to decide whether a judge should be removed. (Bahamas, Fiji, Ghana, Kenya, Malaysia, Papua New Guinea, Singapore, certain states in Australia, etc.); and
(c) Ad hoc tribunal.[88]

Malaysia adopts an ad hoc tribunal system since 1957 independence. The 2009 reform does not touch on the mechanism for the removal of judges. During the 1988 judicial crisis, it was clear how the tribunal system under Article 125(3) of the Federal Constitution was abused to dismiss judges who were independent. Yet, no disciplinary actions were taken against certain judges from 1988 to 2008 for blatant misconduct and breach of judicial integrity.

Article 125 (3) of the Federal Constitution provides that where the breach of code[89] warrants dismissal, the Yang di-Pertuan Agong, on the advice of the Prime Minister or the Chief Justice, after consultation with the Prime Minister, shall appoint a tribunal, and on the recommendation of the tribunal, remove the judge from office. Article 125(3) of the Federal Constitution provides the grounds for removal as "any breach of any provision of the code of ethics prescribed under Clause (3b) or on the ground of inability, from infirmity of body or mind or any other cause, properly to discharge the functions of his office". Members of the Tribunal shall be appointed on an ad-hoc basis and consist of no fewer than five persons from the judiciary office from Malaysia or any part of the Commonwealth. Evidently, the

[87] Section 174(2) of the Constitution of the Republic of South Africa 1996
[88] J. van Zyl Smit. (2015). Op. cit. pp. 91
[89] Judges Code of Ethics 1994

power to remove a judge concentrates exclusively in the hands of the Prime Minister and the Chief Justice, with no means to safeguard against misuse of power.

A tribunal system for the removal of judges ought to be distinguished from the Judicial Ethics Committee system under Article 125(3A) of the Federal Constitution wherein the Chief Justice is given the power to deal with breaches of the Judges' Code of Ethics 2009 which in the opinion of the Chief Justice, does not sufficiently warrant removal. The Judicial Ethics Committee is fraught with its own problems too, notably, the lack of transparency, closed-door proceedings and concentration of power in the hand of the Chief Justice where she or he is not subject to the system. In February 2021, Court of Appeal Judge Hamid Sultan Abu Backer became the first judge to be suspended since the Judges' Ethics Committee Act 2010 came into effect following a closed-door inquiry proceeding by the Judicial Ethics Committee, chaired by the Chief Justice. The inquiry was held to investigate two complaints against Hamid Sultan by another judge involving his judgment as the Court of Appeal judge in the case of Aluma Mark Chinonso, and the affidavit he affirmed in support of another originating summons asserting judicial interference in several cases.[90] Hamid Sultan had repeatedly asserted that the closed-door proceedings and composition of the Committee contradict the principles of judicial independence. The Chief Justice is given a wide discretion to determine whether an alleged breach of Judges' Code of Ethics fall within the purview of the Judicial Ethics Committee or warrant initiation of a removal proceeding. When a matter is referred to the Judicial Ethics Committee, and if the committee is satisfied a breach has occurred, the committee may record an admonition or suspend the judge from office for a period of not more than one year. Whereas a tribunal triggered under Article 125(3) of the Federal Constitution, may result in the removal of the judge under scrutiny.

Vesting the power to initiate removal proceedings in the hands of the Prime Minister or the Chief Justice carries the risk of misuse of power, as exemplified in the 1988 judicial crisis. Therefore, the decision and power to commence removal proceedings against a judge is not a matter to be taken lightly. The UN Basic Principles of the Judiciary states that some form of investigation against the allegations should be in place before commencing any official removal proceedings against a judge.[91] Similarly, the Beijing Statement on Principles of the Independence of the Judiciary also envisages that a preliminary examination should be put in place to ensure that there are adequate reasons for initiating tribunal proceedings.[92]

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[90] Bernama. (5 February 2021). Hamid Sultan Suspended as Judge till Aug 27. *The Edge Markets.* Retrieved from: https://www.theedgemarkets.com/article/hamid-sultan-suspended-judge-till-aug-27
[91] Article 17 of the UN Basic Principles of the Judiciary
[92] Article 25 of the the Beijing Statement on Principles of the Independence of the Judiciary

Globally, it is accepted that as a minimum standard the decision to discipline or remove a judge should emanate solely from an independent body and the executive should not be the sole decision-maker in the process. The UN Human Rights Committee has characterised an executive power to dismiss judges as a threat to judicial independence which undermines the right to a fair trial before an independent court.[93] The IBA Minimum Standards recommends that the actual decision on whether to remove a judge should be entrusted to an institution that is independent of the executive, and should "preferably be vested in a judicial tribunal".[94]

The overall requirement affirmed by international declarations and standards is fairness. Therefore, mechanism and provision should be put in place to ensure an independent and transparent system where complaints can be received, inquiry to be made and sanction be recommended. The use of an ad hoc tribunal system is not without its strength. The tribunal is given the flexibility where the members can be chosen in ways to exclude individuals with close affiliation to the judge under scrutiny. Yet, one of the main concerns of the current ad hoc tribunal system is the power of the Prime Minister or the Chief Justice to appoint the members to the Tribunal and therefore open up the possibility of swaying the decisions of the Tribunal.

In determining how a tribunal process might operate fairly, a report of research undertaken by the Bingham Centre for the Rule of Law specified the following questions to be considered at different stages of the process:

(a) Who is responsible for deciding whether to institute a tribunal inquiry, how any allegations against a judge are investigated and whether the judge is given an opportunity to respond before the decision is made;
(b) How the members of the tribunal are selected and who selects or approves them;
(c) If the judge is liable to be suspended while tribunal proceedings are pending, how and by whom that decision is made;
(d) How tribunal proceedings are conducted, including both procedural and evidential aspects and the provision of reasons for the tribunal's decision; and
(e) Whether tribunal decisions are subject to review, appeal or confirmation by a court.[95]

[93] UN Human Rights Committee, General Comment 32 on Article 14: Right to equality before courts and tribunals and to a fair trial, UN Doc CCPR/C/GC/32 (23 August 2007), para 20.
[94] Article A.4. of the IBA Minimum Standards of Judicial Independence
[95] J. van Zyl Smit. (2015). Op. cit. pp. 91

Table D: Studies on removal of judges

	Malaysia	South Africa	Pakistan	Maldives
Mechanism or body in charge of removal proceedings	Ad hoc tribunal	Judicial Service Commission	Supreme Judicial Council	Judicial Service Commission
Grounds for removal	- Any breach of any provision of the code of ethics prescribed under Article 125 (3B) of the Federal Constitution, or - On the ground of inability, from infirmity of body or mind or any other cause, properly to discharge the functions of his office	- Incapacity - Grossly incompetent or is guilty of gross misconduct	- Incapable of properly performing the duties of his or her office by reason of physical or mental incapacity - Misconduct which includes conduct unbecoming of a Judge, is in disregard of the Code of Conduct and is found to be inefficient or has ceased to be efficient.	- Grossly incompetent - Guilty of gross misconduct
Initiation of removal proceedings	The Prime Minister alone or the Chief Justice, after consultation with the Prime Minister, may initiate the removal process by petitioning the Yang di-Pertuan Agong to appoint an ad hoc tribunal	The Judicial Service Commission can initiate a removal proceeding if it decided that there is a case to answer.	The removal proceeding is initiated by the recipient of a complaint against a judge to the Supreme Judicial Council.	The removal proceeding is initiated by the Judicial Service Commission.
Investigation	An ad hoc tribunal of no fewer than five members will investigate the alleged breach of the code of ethics. There is little to no legal framework that enforces	A tribunal of two judges and laypersons will be formed to conduct a full hearing in which the accused judge will be given reasonable notice, and at which the	Where there is sufficient ground to open an enquiry, the Council will meet to assess the information. The judge may be	The Judicial Service Commission may conduct the investigation or appoint an ad hoc Investigation Committee (members of the

	procedural fairness in the tribunal proceedings.	judge has the right to be present, to be legally represented and to call or cross-examine witnesses.	called to answer the allegations.	Committee may include non-JSC members). The judge is entitled to information and opportunity to be heard, including the right to self-representation or to be legally represented, to questioning witnesses and presenting witnesses.
Findings	The tribunal may present its finding and recommendation to the Yang di-Pertuan Agong.	The tribunal shall convey its findings of fact in a report to the Council, which makes the final decision whether to refer the matter to the National Assembly for removal.	A full report with the relevant findings will be submitted to the President.	A full report will be submitted to the relevant Committee of the People's Majlis by the Judicial Service Commission with the finding and recommended actions to be taken, including removal.
Power to remove	The Yang di-Pertuan Agong may remove the judge following the tribunal's recommendation.	Support from two-thirds of the members of the National Assembly is required to adopt a resolution to remove the judge. If a resolution is passed in accordance with this provision, the President must remove the judge from office.	The President is empowered by the Constitution to remove judges on the advice of the Supreme Judicial Council.	Support from the two-thirds majority of the People's Majlis is required to pass a resolution to remove a judge from office.
Right to appeal against the tribunal decision	Not available	Not available	Not available	Not available

3.8. Judicial Commissioner

Judicial Commissioners are temporary judges appointed to the High Court under Article 122AB of the Federal Constitution, wherein the Prime Minister is granted the power to appoint a qualifying person as a judge of the High Court, upon consultation with the Chief Justice, for a specified period and specified purposes. Judicial Commissioners are appointed for the "despatch of business of the High Court" and he or she shall have "the same validity and effect as if done by a judge of that Court, and in respect thereof he shall have the same powers and enjoy the same immunities as if he had been a judge of that Court."[96]

Over the years, judicial commissioners have been routinely appointed as probationary judges for two-year terms, often renewed, as a prerequisite to a permanent appointment. The practices of temporary judges have raised some concerns including the risk of being politicised as a test of loyalty before the executive decides whether the person deserved permanent appointment as a judge with tenure.[97] The IBA Minimum Standards of Judicial Independence adopted in 1982 recommends that "[t]he institution of temporary judges should be avoided as far as possible except where there exists a long historic democratic tradition."[98] 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.[99] Permanent appointments are favoured too in the Latimer House Guidelines but provide where contract appointments may be inevitable, "such appointments should be subjected to appropriate security of tenure".[100] Without the security of tenure, there is every possibility that a judicial commissioner will not hold the scales of justice especially when it may cost them the chance of appointment as a tenured judge to the High Court.

Advocates for the provision of judicial commissioners opine that a temporary appointment would provide an opportunity for prospective candidates to gain experience before applying for permanent judicial officers, vice versa, it also serves as a probation period for judges as "once appointed, it is almost impossible to remove a judge."[101]

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[96] Article 122AB of the Federal Constitution
[97] CJ: Confirmation of Judicial Commissioners as High Court judges based on performance. (29 November 2019). *The Malay Mail Online*. https://www.malaymail.com/news/malaysia/2019/11/29/cj-confirmation-of-judicial-commissioners-as-high-court-judges-based-on-per/1814341
[98] Article 23(b). of the IBA Minimum Standards of Judicial Independence
[99] Article 2.20 of the Montreal Declaration on the Independence of Justice
[100] Guideline II.1. of the Latimer House Guidelines
[101] Tun Mohamed Suffian, LP, The Role of the Judiciary [1987] 2 Malayan Law Journal xxiii, xxvi

Where appointments for judicial commissioners are desirable, and to ensure the provisions are for the purpose of genuine probational judges, certain safeguards should be clearly outlined to prevent appointment for political consideration. These safeguards are:-

(a) Clear limit on the period of appointment;
(b) Grounds for appointment should be provided by laws; and
(c) Judicial commissioners shall be appointed by the independent Judicial Appointments Commission.

3.9. Conclusion

Without a doubt, the Judicial Appointments Commission was born out of a difficult time for the nation and it continues to operate within an already compromised judicial appointments system. The Commission has to some extent, responded to the concern of political patronage by putting in place a selection process via open advertisement, sifting through applications, interviews and clear outlines of judges' criteria. However, these efforts are tempered by the Prime Minister's wide discretion to appoint members to the Commission, lack of security of tenure for the Commissioners which weaken their independence and the lack of binding power on the executive in the appointment and promotion of judges. The lack of safeguards against the removal proceedings could be a threat to judicial independence as the process can be used to intimidate or penalise judges and as seen in our history, to condone certain judges. Evidently, the unconstitutional appointments of Chief Justice and President of Court of Appeal in 2017 speak to the weakness of JAC Act in restraining executive control over two top leadership positions in the judiciary. The subsequent graceful resignation of the two judges, following the change of government in 2018, shows the intrinsic connection between the government of the day and judicial appointments.

Despite the criticism and wry observation, the JAC Act is a welcome reform and represents a turning point in the judiciary. More than anything, there are impending needs for greater effort in ensuring judicial independence and separation of powers between the three branches. Judges are not public servants and therefore a truly independent and impartial body to appoint, promote and remove judges is much needed to ensure the judicial officers are able to perform their duty as the bastion of justice. This will no doubt include not only mere amendments to the JAC Act but also constitutional reform to provide the Judicial Appointments Commission with a constitution status.

4. Appointment of judges to the subordinate courts

Comparatively, reform of judicial appointments at the subordinate courts is less talked about and understudied. This, however, should not diminish the importance of ensuring the independence and impartiality of the lower courts for these judicial officers are the first and often the only point of contact with the court system for the majority of the public. As the first instance courts, the magistrates and judges at the Sessions Court often have to deal with ordinary people. Some, who are unrepresented by lawyers or come from underprivileged backgrounds, are unlikely to have the resources to appeal against the judgment in instances where it does not favour them. Judges from the lower courts are tasked to deal not only with technical legal arguments but with many ordinary people who end up in court as a result of, perhaps not directly, the failure of the country's welfare, education, employment and mental health system. [102] Judges at the lower courts must manage their emotions while being able to comply with judicial ethics such as impartiality and fairness.

Unlike judges of the superior courts, judges of the lower courts are neither constitutional appointments nor do they fall within the purview of the JAC Act. This also means that the many safeguards for judicial independence under the Federal Constitution and the JAC Act, i.e. security of tenure, independent appointments process, Judges' Ethics Committee, are not accorded to the subordinate courts. Judges for the Magistrate and Sessions Court are legal officers as part of the Judicial and Legal Service, defined as public service under Article 132(1)(b) of the Federal Constitution. They are appointed by the Judicial and Legal Service Commission under Article 138 of the Federal Constitution. The Judicial and Legal Service Commission supplies the interchangeable legal personnel who staff various executive departments and also judges for the subordinate courts. In principle, a legal officer under the Judicial and Legal Service Commission could be assigned to the post of deputy public prosecutors, state legal advisers, legal advisers to the executive department and its agencies; the solicitor-general; treasury solicitors; federal counsel; and judges to the subordinate courts. For the longest time, a predominant number of judges to the superior courts come from the Judicial and Legal Service. The Judicial and Legal Service is also responsible for the promotion, discipline and dismissal of legal officers.

[102] Anleu, S. R., and Kathy M. (2005). Magistrates' Everyday Work and Emotional Labour. *Journal of Law and Society 32(4)*, 590-614.

Entrusting the appointment, transference and removal of judges to the Magistrates and Sessions Court within an executive department represents an anomaly where the executive is vested with the exclusive power to perform judicial roles in the subordinate courts – an anathema to the logic of separation of powers. The Judicial and Legal Service Commission consists of the Chairman of the Public Service Commission, the Attorney General and one or more judges appointed by the Yang di-Pertuan Agong. The presence of the Attorney-General within the Commission is of particular concern as it presents a clear conflict of interest. Under Article 145 of the Federal Constitution, the Attorney-General is the government's chief legal advisor and public prosecutor. From a standpoint of judicial independence, it is untenable for a judge of a subordinate court to be able to perform his or her duty without undue influence when he or she has to adjudicate a case involving the very person who also has the power to determine his or her career trajectory in the judicial and legal service. For instance, in some cases the magistrate may be of a lower rank than the prosecutor and may feel apprehensive or intimidated to deliver a judgment not favourable to the prosecutor, thus putting his or her career in jeopardy.[103] This was raised in the case of Maleh Su v PP (1984)[104] where the lower judge expressed that there was a likelihood of bias arising from the "[judicial and legal services] system". This was however dismissed by the High Court, which said there was "no real likelihood of bias".

Some had objected to the separation and opined that the separation would limit the career prospect and learning journey of officers in both divisions. This, in turn, will better prepare the officers for a well-rounded experience before becoming judges to the superior courts. Instead of breaking up the two different services, some had proposed the Chief Registrar should lead the judicial service to prevent conflict of interest.[105]

Globally, it is not uncommon for the executive branch to administer the appointment of judges to the subordinate courts, albeit with various safeguards in place to ensure the independence of judges to the subordinate courts. Administratively, there may be benefits that justify the executive's roles in appointing and administering the appointment process.

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[103] Anbalagan, V. (21 August 2018). AG open to separating Judicial and Legal Services, says source. *Free Malaysia Today*. https://www.freemalaysiatoday.com/category/nation/2018/08/21/ag-open-to-separating-judicial-and-legal-services-says-source/

[104] Maleh Su v PP [1984] 1 MLJ 311

[105] Boo, S.L. (10 August 2016). Ex Judge maintain Judicial and Legal Services System to Allow Career Growth. *The Malay Mail.* Retrieve from: https://www.malaymail.com/news/malaysia/2016/08/10/ex-judge-maintain-judicial-legal-services-system-to-allow-career-growth/1180029

However, the inextricable rotation of officers and its close connection with other public service organs carries the risk of compromising the independence and impartiality of judicial officers. In a lecture by Professor Shad Saleem Faruqi, it was shared that along with other civil servants, subordinate courts judges are required to attend Biro Tatanegara (National Civic Bureau) courses, which had been widely criticised as inflammatory and political in content.[106] A judicial officer born of a career in the public service reinforced the idea that the judiciary is a form of public service instead of the third branch of government that exists independently and separately from the executive and the legislature.

In South Africa, the appointment of the magistrate is administered by the Department of Justice and where an initial screening will be done to ensure the candidates meet the minimum requirements.[107] The Magistrates Commission will then conduct another round of scrutiny and shortlisting of candidates based on the experience and qualification of the candidates and the specific needs of the court. After a second round of shortlisting, successful candidates will be interviewed by the Magistrates Commission. Like its appointment of judges to the superior courts, interviews of the candidate for magistrates are made public and accessible to everyone. The Magistrates Commission will then make three recommendations for each vacancy to the Minister of Justice, who will then make the appointments.[108]

In England and Wales, the appointment of Circuit, District and Deputy District judges are by the Queen or the Lord Chancellor after an open competition administered by the Judicial Appointments Commission.[109]

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[106] Edited text of the Lecture presented by Professor Shad Saleem Faruqi at the Fifth Raja Aziz Addruse Memorial Lecture at the International Malaysian Law Conference 2018, 15 August 2018 at The Royale Chulan, Kuala Lumpur, Malaysia.; Suaram: Malaysia baru tidak perlukan biro tatanegara. (18 May 2018). *Free Malaysia Today*. Retrieve from: https://www.freemalaysiatoday.com/category/bahasa/2018/05/18/suaram-malaysia-baru-tidak-perlukan-biro-tata-negara/

[107] He or she must be either be a South African citizen or permanent resident; be fit and proper; be in good health; competent in the official languages desired by the Magistrates Commission; they must be legally qualified (which in practice implies having a law degree) and one must have the relevant experience as a legal practitioner.

[108] How Magistrates Are Selected And Appointed In South Africa. (2019, August 28). Retrieved from https://www.judgesmatter.co.za/opinions/how-magistrates-are-selected-and-appointed-in-south-africa/

[109] Circuit Judges, Judiciary UK. Retrieve from: https://www.judiciary.uk/about-the-judiciary/who-are-the-judiciary/judicial-roles/judges/ciruit-judge/

5. Recommendations

Appointment of judges to the superior courts

5.1. Constitutional position of the Judicial Appointments Commission

5.1.1. The Judicial Appointments Commission to be given constitutional status by a new Article 122BA to the Federal Constitution; and

5.1.2. Article 122B of the Federal Constitution be amended to provide for the appointment of judges to the superior court to be made of persons nominated by the Judicial Appointments Commission under the new Article 122BA

5.2. Composition, selection and removal of members of the Judicial Appointments Commission

5.2.1. The Judicial Appointments Commission shall consist of the following members:

5.2.1.1. Four ex officio members from the judiciary (Chief Justice of the Federal Court, President of the Court of Appeal, Chief Judge of the High Court in Malaya and the Chief Judge in Sabah and Sarawak) representing the judicial perspective;

5.2.1.2. Three members to be selected by the Bar Council, Sabah Law Society and the Advocates Associate of Sarawak representing the three legal practitioner bodies; and

5.2.1.3. Two lay members from civil society or academia to be selected by the seven other members in the Judicial Appointments Commission representing the perspective of public and civil society through open application and a clearly defined selection process.

5.2.2. Removal of the members of the Commission only for misconduct or incapacity and overseen by a disciplinary tribunal with safeguards in place to enable the members in question to challenge allegations against them.

5.3. Tenure of Commission

5.3.1. To fix tenure for members of the Judicial Appointments Commission for up to four years;

5.3.2. Members may serve one term only and can be reappointed for one additional term provided that the total two terms are not served consecutively;

5.4. Appointment and Promotion of Judges

5.4.1. To put in place mandatory consultation on the shortlisted nominees with the Bar Council, the Sabah Law Society, the Advocates Association of Sarawak, the Attorney General of the Federation, the Attorney General of a State legal service for the nominations of judges to the Court of Appeal and Federal Court;

5.4.2. Diversity and minority representation to be taken into consideration in the process of assessment and selection of judges.

5.5. Interaction between the Judicial Appointments Commission and the Executive

5.5.1. The Judicial Appointments Commission Act to be amended to limit the Prime Minister's discretion to reject nomination by the Commission to only one time for each vacancy and the Prime Minister must provide his or her reasons for doing so;

5.6. Appointment of Judicial Commissioner

5.6.1. Article 122AB of the Federal Constitution to be amended to provide for the power to appoint Judicial Commissioner to be given to the Judicial Appointments Commission; and

5.6.2. Judicial Commissioner may be appointed only for specified purposes and for no more than a single term of two years.

5.7. Removal of Judges

5.7.1. Article 125(3) of the Federal Constitution be amended to provide that a tribunal proceeding for the removal of judges may be appointed by the Yang di-Pertuan Agong on the advice of the Judicial Appointments Commission; and

5.7.2. Clear rules and grounds for the composition of the tribunal, power to appoint members, the procedure of tribunal proceedings including evidential requirement, right to appeal against the decision of the tribunal, etc should be developed in consultation with key stakeholders.

5.8. Open access to information

5.8.1. While acknowledging the need for confidentiality, important information relating to the manner in which the Commissioner discharges its mandate should be made public on website or through the annual report to ensure the broader objective of holding the Commission accountable.

5.8.2. Recommended information to be made public are numbers of applicants, the institutions and public office holders involved and their respective roles, reasons for rejection of nominees by the Prime Minister, and the procedures followed in the appointments, promotions, interviews and assessments. These should be made public on websites or through annual reports.

Appointment of judges to the subordinate courts

5.9. Judicial and Legal Services

5.9.1. The judicial and legal services be separated into a judicial service and a legal service, with the establishment of a Judicial Service Commission under an amended Article 138 and a Legal Service Commission to be established under a new Article 138A;

5.9.2. A new Judicial Service Commission Act be enacted to provide for clear rules and procedure for the appointments, promotions and transferences of judges to the subordinate courts;

5.9.3. Officers from both judicial and legal services should not be transferable, except if on a permanent basis.

ISTANA KEHAKIMAN

bersih 2.0
gabungan pilihanraya bersih dan adil