



Rethinking Judicial Appointments in Malaysian Superior Courts: Constitutional Reforms

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Abstract. Judicial independence is significant in any justice system because the role of the judiciary is to provide a meaningful system of checks and balances between the executive and the legislature in line with the doctrine of separation of powers. Past researchers had shown that the enactment of the Judicial Appointments Commission Act (JACA) in 2009 did not introduce any true reforms in the Malaysian judicial appointments system. However, no previous scholars had proposed any comprehensive reforms to address these deficiencies in Malaysian laws. The objective of this paper is to address the weaknesses of the post-JACA laws governing the judicial appointment system and to propose relevant reforms to safeguard and uphold judicial independence in the Malaysian superior courts. The objective was achieved by using qualitative methods based on document analysis. The findings of the research showed that the constitutional role and powers of the Prime Minister must be curtailed and reformed to limit the involvement of the executive. In addition, the composition of the Malaysian Judicial Appointments Commission should be increased to include other relevant stakeholders. This requires amending the Federal Constitution, the Judicial Appointments Commission Act 2009, and all other consequential laws.

Keywords: Judicial Appointments Commission, Judicial Independence, Superior Courts

1 Introduction

1.1 Background of Research

Judicial independence and diversity are essential determinants to ensure the appearance of impartiality and equitable administration of justice, therefore, it is imperative that the judicial appointment mechanisms in any judicial system ensures that appointments and removals of judges as administrators of justice are independent from any form of interference and discrimination. According to Dijk, the executive and Parliament tend to retain some level of control over the judiciary by exploiting the judicial appointments system because they do not want to submit important decisions for review by an independent judiciary[1]. Moreover, judicial independence is significant in any justice system because the role of the judiciary is to provide a meaningful system of checks and

balances between the executive and the legislature in line with the doctrine of separation of powers. Thus, judicial independence is the proposition of keeping the judiciary separate from the executive and the legislature to avoid improper influence from them.

Judicial independence is not for the protection of judges but designed to protect the system of justice and the rule of law in order to maintain public trust and confidence in the court.[2] In the words of Sir Harry Gibbs, judicial independence means “that no judge should have anything to hope or fear in respect of anything which he or she may have done properly in the course of performing judicial functions”.[3] Thus, judicial independence is fundamental to every democracy, both as a guarantor of the separation of powers in the state and of the rule of law.[4] The purpose of the doctrine of the separation of powers is to prevent the concentration of power in any particular arm of government which may increase the likelihood of abuse of powers.[5] However, amongst the three arms of government, the judiciary is the most vulnerable, therefore, its independence must be protected against executive or legislative incursions that could jeopardise the role of the courts to protect the state and its citizens from the tyranny of the majority[6] without fear or favour.

1.2 The Appointment system of the Superior Court judges

The Federal Constitution of Malaysia stipulates that the Chief Justice of the Federal Court, the President of the Court of Appeal and the Chief Judges of the High Courts and all other superior court judges shall be appointed by the Yang di-Pertuan Agong (YDPA), acting on the advice of the Prime Minister (PM), after consulting the Conference of Rulers.[7] The Federal Constitution makes it clear that the YDPA must act on the advice of the PM and that the YDPA has no discretion. In fact, the Court of Appeal In the matter of an oral application by Dato’ Seri Anwar Ibrahim[8] had made it clear in its decision that by virtue of Article 122B(1) of the Federal Constitution, the appointing authority is the PM and that the YDPA must act upon the advice of the PM.[9] The court emphatically said that the PM may legally insist that an appointment of a particular judge be proceeded even if the Conference of Rulers does not agree or withholds its view or delay the giving of its advice with or without reasons.[10] This emphasis by the judge is an indication that the Conference of Rulers’ view could be discarded. Thus, the PM has the final say as the YDPA must act on his advice and the Conference of Rulers cannot veto any recommendation.[11]

Dhanapal and Sabaruddin in their article reiterated that the requirement to consult the Conference of Rulers is merely perfunctory.[12] It must be conceded that this provision of conferring the appointment solely on one person is unsatisfactory because it gives rise to the perception that the judiciary is beholden to the executive.[13] However, according to some scholars, the legal position as explained by the court in the case of Dato’ Seri Anwar Ibrahim v Public Prosecutor,[14] would very much depend on political realities especially the influence and the standing of the PM and the Conference of Rulers.[15] On the contrary, former Lord President, Sultan Azlan Shah finds it unfathomable to rationalise why a PM would not want to consider, or even abide by the views of nine Rulers and four Governors who constitute the Conference of Rulers

as they are independent persons with vast experiences and with no vested interest in the nominated candidates.[16] In addition, Justice Abdul Hamid Omar, a former Lord President of the Supreme Court of Malaysia had opined in his book that all successive PMs have been mindful of their constitutional role in the appointment of judges and had been sensitive for an independent judiciary and that judges in Malaysia are not appointed because they support or belong to the ruling party but because they are sympathetic towards certain issues of public, or ideologies.[17] On the contrary, Seah had a totally different view when he highlighted that several patronage appointments were made after the 1988 judicial crisis for services rendered by judges in agreement with the political will.[18] Seah was a former Supreme Court judge of Malaysia and was among the three judges who were sacked in the Tun Salleh Abas saga.

In the Malaysian judicial structure, the apex courts are headed by the Chief Justice (formerly called the Lord President) by virtue of Article 122(1) of the Federal Constitution. The President of Court of Appeal heads the Court of Appeal[19] whilst two Chief Judges head the High Courts in Malaya as well as Sabah and Sarawak.[20] Article 123 (a) and (b) of the Federal Constitution stipulates only two requirements for a person to be qualified for appointment as a judge in the superior courts. Firstly, he or she must be a Malaysian citizen and secondly, for the “10 years preceding his or her appointment, he or she has been an advocate of those courts or any of them or a member of the judicial and legal service of the Federation or of the legal service of a State, or sometimes one and sometimes another”. [21] These requirements are general in nature and there are no further criteria for the appointment of the superior court judges under the Malaysian Constitution. Theoretically, any advocate or judicial officer who fulfils these criteria may be directly appointed as the Chief Justice of the Federal Court although there has been no such appointment made so far. The YDPA may also appoint any person as the judicial commissioner if they meet the requirements for a High Court judge. The late Tun Suffian, a former Lord President explained that the intention of this provision is to make appointments from among the senior members of the Malaysian Bar and senior civil servants when required, especially to help a regular judge who is not well or on leave or is busy chairing a commission, to cover areas where there is no resident judge or to clear backlog cases.[22]

Article 122B of the FC, further stipulates for the requirement of the PM to consult the Conference of Rulers in the appointment of all superior court judges and also the Chief Justice (CJ) for the appointment of all other superior court judges with the exception of the CJ.[23] With regards to the appointments of the Chief Judge of the High Courts, the PM is required to consult the Chief Judge of each of the High Courts and, if the appointment is to the High Court in Sabah and Sarawak, the Chief Minister of each of the States of Sabah and Sarawak.[24] The PM may also advise the YDPA upon consulting the CJ the order of precedence among the judges appointed in the Federal Court, Court of Appeal or High Courts without any reference to their date of appointment.[25] Moreover, Article 122(2) of the FC empowers the CJ in the interest of justice to nominate a Court of Appeal judge to sit as a judge of the Federal Court.

Apart from the provisions discussed earlier, the Federal Constitution also provides for the appointment of additional judges based on Article 122(1A) of the Federal Constitution. The YDPA may also appoint a person who has held high judicial office in Malaysia to be an additional judge of the Federal Court on the advice of the CJ.[26] This provision was first invoked when the late Tan Sri MacIntyre at the age of sixty-five was appointed as an additional judge on his retiring from the High Court of Malaya.[27] Thus, it is evident that the FC has conferred on the Chief Justice a significant role in the appointment of fellow superior court judges. However, it should be emphasised here that in appointing the CJ, the Federal Constitution does not provide for further consultation with any other persons or bodies as with the appointments of other superior court judges.[28]

As highlighted earlier, the PM wields the ultimate power and has the final say in the appointment of the highest positions in the judiciary namely the Chief Justice (CJ), President of the Court of Appeal, the two Chief Judges, judges of the Federal Court, the Court of Appeal and the High Court. Although, the FC requires the PM to consult the quadrumvirate of top judges regarding the appointments of superior court judges in Malaysia, the PM is not constitutionally required to adhere to the views or opinion of any those judges. This executive dominance was reflected by Tun Dr Mahathir himself when he gave evidence in the Royal Commission of Inquiry into the V.K. Lingam Video Clip where the former PM unequivocally stated that irrespective of whomever he consults or consulted him, he as the PM has the final say.[29] This statement by Tun Dr Mahathir exemplifies the unilateral power of the PM over the appointments of superior court judges in Malaysia. Foo also stated that cronyism and politicisation in the Malaysian judiciary were the result of such unchecked powers.[30]

2 Problem Statement

Despite the reforms undertaken by the enactment of the Judicial Appointments Commission Act (JACA) in 2009 and the establishment of the Judicial Appointments Commission (JAC), the present legal framework does not uphold judicial independence and diversity in the appointment system of the Malaysian superior court. The central reason for this is that the current judicial appointment system does not uphold the doctrine of separation of powers between the judiciary and the executive. Notwithstanding the JACA, the Federal Constitution still confers the judicial appointment power to the executive.[31]

The current appointment system places the power to advise the Yang di-Pertuan Agong (YDPA) on the appointment[32] of superior court judges in the hands of the PM. Although, the PM is constitutionally required to consult the judiciary, which includes the Chief Justice of Malaysia, the President of the Court of Appeal, the Chief Judge of Malaya, or the Chief Judge of Sabah and Sarawak[33] but the PM is not obligated to follow the recommendation of the quadrumvirate of judges or the JAC.[34] The requirement to consult the Conference of Rulers is also merely perfunctory.[35] Hence, the fact that the PM is the ultimate decision maker remains unchanged even after the establishment of the JAC since the Federal Constitution bestows an executive-

centric mechanism in the judicial appointment of the superior courts. The above arguments give credence to the problem statement of this research that there are clear weaknesses of the post-JACA laws governing judicial appointment system which must be reformed to safeguard and uphold the independence of Malaysian Superior Courts.

3 Research Question

The research question for this research paper is what are the reforms for judicial appointments that upholds independence in the Malaysian superior courts?

4 Purpose of Study

The purpose of this study is to suggest reforms that policymakers may emulate to limit undue interference in the appointment of judges to Malaysian superior courts. The safeguarding of judicial independence has the potential to improve the quality of the judiciary and to align it with international standards, thereby increasing domestic and international confidence in the Malaysian justice system. Secondly, the proposed reform alters the composition of the JAC, increasing the involvement of direct stakeholders in the appointment of Malaysian superior court judges. This would bring the Attorney General Chambers and private bar associations together to strengthen the judicial appointment process in the Malaysian superior courts.

5 Research Methods

This paper is based on doctrinal research where document analysis of both primary and secondary sources was studied. Primary data was based on the Federal Constitution of Malaysia, Acts of Parliament and case laws in Malaysia, United Kingdom and South Africa. Secondary data was gathered from published materials such as books, articles from journals, doctoral and master's dissertation, published and unpublished conference papers, reports, seminar papers, newspaper articles, and other relevant publications in relation to the research topic. Legal databases such as LexisNexis, CLJLaw, LawNet, Westlaw as well as Google Scholar were used for collecting both primary and secondary materials.

6 Findings

6.1 Appointment Mechanism

Based on this research, the commission-based judicial appointment system is still the best type of system for Malaysia, as demonstrated by the fact that approximately 81% of Commonwealth jurisdictions utilize a commission-based judicial appointment system. [36] Therefore, it is suggested that the current commission-based system is still maintained with some modification to its processes and mechanisms.

6.2 Limiting the role and powers of the Prime Minister

Firstly, the researcher proposes that the role and powers of the PM in the appointments of superior court judges be limited, as currently practiced in United Kingdom (England and Wales),[37] where the role of the executive in judicial appointments has been significantly reduced. Under Section 27 of JACA, the PM can request for two more names to be selected and recommended for his consideration if the PM is not satisfied with JAC's recommendations. This obviously proves that the present system is flawed and warrants reform. If the appointment of judges is subjected to the executive discretion as provided under Section 27 of JACA, then the very essence of an independent judiciary will be flawed. As such, the current system of providing another name whenever there is a rejection by the PM cannot work because it places too much power in the hands of the executive. While it should be appreciated that the executive has a role to play in the appointment of judges as a form of check and balance, the executive must never have the final say in the appointment of Judges.

In line with this, it is recommended that the United Kingdom (England and Wales) [38] model of a three-stage scrutiny process be adopted by the Malaysian judicial appointment system with some modification. In this model, whenever a vacancy arises in the superior courts, the JAC will select the candidates after a process determined by the members of the commission itself. This is to strengthen judicial independence and to ensure that appointment is based on merit as opposed to the current system of submitting few names and bestowing the prerogative to the PM to decide from a given list or to reject and to request for further names.[39] Under the proposed system, once the names have been submitted, the PM is given a limited and narrow power to reject any candidate based on the three-stage scrutiny process as adopted in the United Kingdom. Once the first name has been submitted at Stage 1, the PM has three options which are (a) to accept the candidate; (b) to reject the candidate; or (c) to require the commission to reconsider their decision in selecting the candidate. However, in this proposed appointment mechanism, the PM has the power to reject and re-quest to reconsider only once respectively for each vacant position. The PM may consult any of the members of the commission or the Chief Ministers of Sabah or Sarawak if the appointment is to the High Court in Sabah and Sarawak. The PM can only reject the candidate on reasonable grounds that the candidate is not suitable for office, and this must be given in writing to the JAC. As for the third option, the PM may require the JAC to reconsider the candidate selected on reasonable grounds that there is insufficient evidence that the candidate is fit for judicial office, the candidate lacks merit or other reasons which the PM deems fit, and this too must be given in writing to the JAC. This would ensure accountability and transparency in the decision-making process as well as an important safety net against abuse by the executive. If at Stage 1, the PM opts to either reject or request for reconsideration, Stage 2 of the appointment process is initiated if the written grounds given by the PM have merits; otherwise, the PM must accept the recommendation by the JAC.

At Stage 2 of the proposed process, the JAC shall recommend the name of a 2nd candidate to the PM in lieu of the rejected 1st candidate for the consideration of the PM. At this juncture, the PM can either accept or ask JAC to reconsider the 2nd candidate. If the

2nd candidate is to be reconsidered then JAC can either resubmit the name of the 2nd candidate or another 3rd candidate to the PM. If JAC resubmits the 2nd candidate, it is incumbent upon the PM to accept the 2nd candidate whereas in the event, if a 3rd candidate is proposed by the JAC then the PM can either accept the 2nd or 3rd candidate. In the event if the PM had requested JAC to reconsider the 1st candidate then the JAC has the option to either resubmit the name of the 1st candidate or another 2nd candidate to the PM. If the PM rejects the 1st candidate, then the JAC can submit the name of a 2nd candidate and this time, the PM must accept the 2nd candidate as recommended by the JAC. Alternatively, if JAC proposes a 2nd candidate to the PM then the PM has the power to reject this candidate and the JAC shall submit the name of a 3rd candidate. At this juncture, the PM can either agree to the 1st candidate or 3rd candidate as recommended by the JAC. Ultimately, the three-stage scrutiny does not place the final decision in the hands of the PM because if the appointment process reaches the third stage, the PM is obligated to accept the JAC's selection. Although the JAC's role is to recommend but in reality, this system ensures that JAC has the final say in the appointment process of the superior court judges while the PM assumes a check and balance role in line with the doctrine of separation of powers. Subsequently, the PM sends the name list of finalised candidates to the YDPA for formal appointment. This would ensure an independent selection process as well as provide the subtle check and balance needed to give legitimacy to the judiciary as a separate and independent branch of the system of governance in Malaysia.

These recommendations are also compliant with international and regional instruments and standards. Firstly, Latimer House Guidelines on "Parliamentary Supremacy and Judicial Independence" of 1998, [40] advocates that states should have a suitable independent judicial appointments system and further recommends that where existing appointment mechanisms do not conform with this standard, states should entrust the appointment of judges to a commission, either directly or via recommendations made by the commission to another officer of state.[41] The proposal by the researcher limits the powers of the executive and strengthens the independence of the JAC by ensuring that the selection of a superior court judge is binding on the PM at Stage 3. The proposed reform recommends a single candidate as opposed to a list of candidates with limited scope for the PM to disagree. This ensures that the appointments are entrusted to an independent commission and is no longer the prerogative of the PM in line with the Latimer House Guidelines. [42]The requirement for a single candidate ensures judicial independence and the principle of appointment on merit.[43] The fact that in England and Wales, the Lord Chancellor had only exercised each power (to reject or to reconsider) on a handful of occasions is an indication that the PM may find it very difficult to use the option to reject or to request for reconsideration especially if the candidate is a presiding judge and is seeking promotion.[44] Thus, as discussed, the best mechanism for appointment of superior court judges would be the JAC and by proposing the three-stage scrutiny process, the executive's role is merely perceived as a check and balance to the JAC compliant with the doctrine of separation of powers.[45]

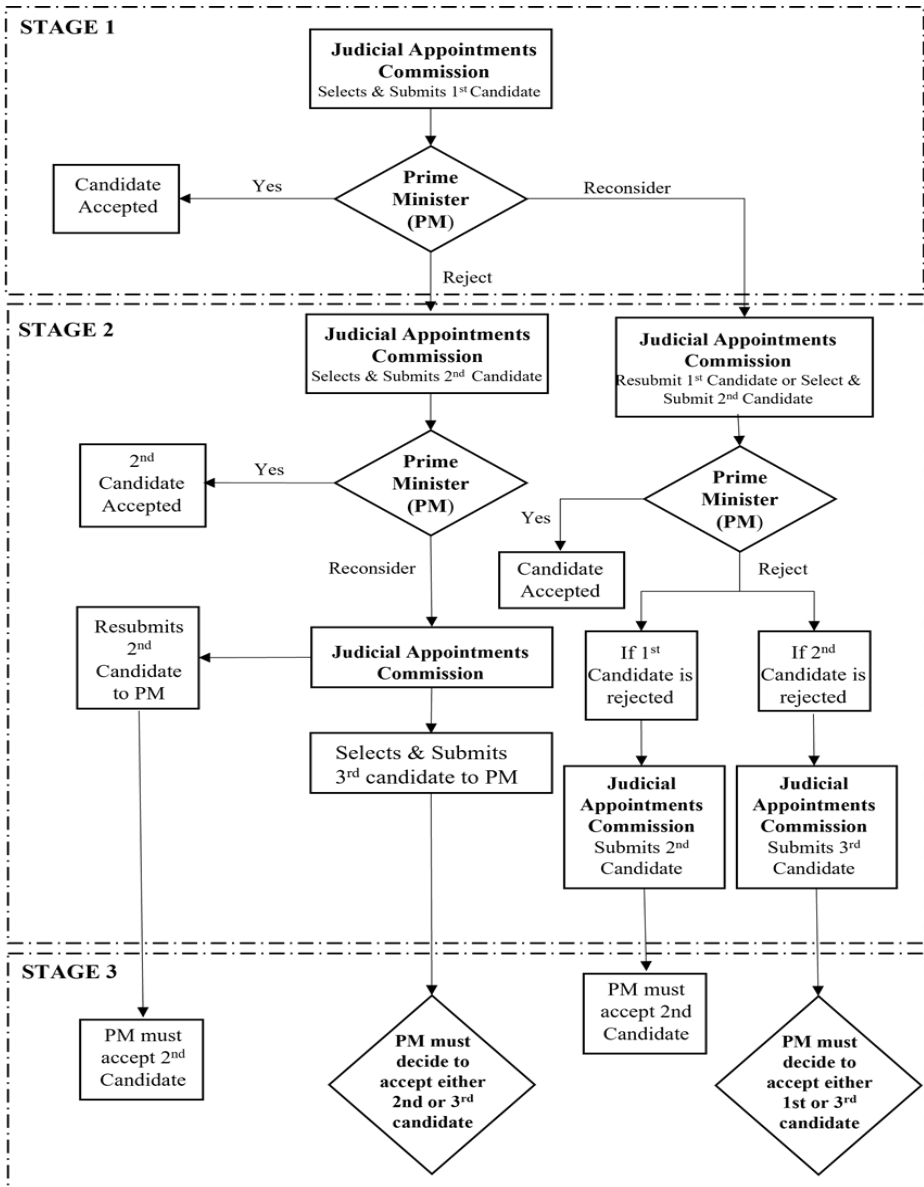


Fig. 1. Proposed reforms to the appointment of superior court judges

Furthermore, the role of the PM as the ultimate decision-maker diminishes with the implementation of the proposal. Thus, the PM is unable to request more names for his consideration and this safeguards the appointment against any improper motives by the executive.

6.3 Composition of the Judicial Appointments Commission

A JAC that is independent and diverse can ensure judicial independence. The United Nations Special Rapporteur on the Independence of Judges and Lawyers mentions that the composition of the commission must be “plural and balanced” as well as to shield the judiciary and their career processes from political interferences.[46] As such, its composition and powers would have to be carefully crafted to ensure the effectiveness of the JAC in upholding judicial independence. Currently, the composition of the JAC is biased towards the judiciary as 8 out of 9 members are judicial members with only 1 eminent person from academia. Therefore, the researcher proposes a 11-member JAC comprising of five judicial members and another six non-judicial members consisting of the Attorney General or his/her representative, President of the Malaysian Bar or his/her representative, President of the Sabah Law Society or his/her representative, President of the Advocates Association of Sarawak or his/her representative and two eminent persons (an academic and a non-practising legally qualified person).

The proposed new composition of the JAC is structured to conform with the Venice Commission’s recommendation that all members of the commission should not consist of judges to avoid situations where appointments are based on personal interests or with a narrow perception of potential judges.[47] The composition of the judicial member of the proposed new JAC retains the 4 top judicial members and a former Federal Court judge. These top four judges are senior judges having vast experience and acquaintance with the judges seeking promotion as they have been their peer or superior and are able to understand the role and task of a judge holistically. Furthermore, these senior judges have been on the bench for a significant amount of time and may have known counsels appearing in court before them in terms of knowledge of law, court decorum and temperament. This would certainly facilitate decision-making in the selection process if any members of the Bar apply for the appointment of superior court judges. Therefore, it is crucial to have senior judicial members in the JAC. Moreover, the proposed new JAC has been reduced from eight to five judicial members, which matches the position adopted by the Judicial Appointments Commission for England and Wales (JACEW), according to which the composition of judicial members must not exceed the composition of non-judicial members inclusive of the chairman. [48] Because more than half of the members of the JAC are judicial, there is a risk that they will appoint self-perpetuating elites. Moreover, having a JAC with substantial judicial membership would again ensure that little would change from the current status quo[49] as there may be “potential for cloning”.[50] While the new proposed JAC reduces the number of judicial members, nevertheless the judicial members together with the representatives from the legal profession form the majority in the JAC having a total of 9 out of 11 members as proposed. This aligns with the principle of good

practice emerging from the commonwealth states that although judicial members need not constitute a majority, the judiciary and the legal profession should account for at least half of the commission members.[51]

Table 1. Current versus the proposed composition of the JAC.

Composition of members	Currently (As at 31 Dec 2021)	Proposed Reform
Chief Justice	1	1
President of the Court of Appeal	1	1
Chief Judge of Malaya	1	1
Chief Judge of Sabah & Sarawak	1	1
Federal Court judge	1	-
Former Federal Court judge	2	1
Former Court of Appeal judge	1	-
Attorney General/ representative	-	1
President of Malaysian Bar/representative	-	1
President of Sabah Law Society/Representative	-	1
President of Advocates' Association of Sarawak/representative	-	1
Eminent person (academic)	1	1
Eminent person (non-practising legally qualified person)	-	1
Total members	9	11

This encourages the JAC's independence ensuring that the legal fraternity and the public recognises the judges appointed because of its legitimacy.[52] Besides, international instruments advocate two types of models. The first type is where members of the judiciary and legal professionals form most of the commission and the second type is where the judicial members constitute a majority or half of the total members. The pro-

posed new JAC conforms with the first type of model in line with international instruments. The composition of the proposed JAC includes the main stakeholders in the judicial and legal system which are the Attorney General or his representative and the three bar presidents from Peninsular, Sabah and Sarawak or their representatives. These stakeholders would be able to provide the right input and valuable insights into the appointment process as they attend and appear before judges recurrently. Members of the Malaysian Bar appear daily before the judiciary and would certainly be a relevant advisor in the judicial appointments and promotions. An eminent person who is a non-practising legally qualified person is proposed to provide external perspective and greater diversity than the judicial and legal members. He or she could also add experience of modern recruitment and selection processes from the industry, as well as business and managing experience, performance appraisal skills and interviewing skills.[53]

6.4 Selection of the JAC Commissioners

To ensure that there is independence in the appointment system, the appointment of commissioners themselves must be independent from the executive. Currently, there are nine commissioners in the JAC of which four are appointed by virtue of them holding the top judicial position while five other members are appointed by the PM. If the commissioners are appointed by the PM, then this may lead to the perception that the judges appointed by the JAC are also inclined to be pro-government. This is evident from literature review as some scholars' view that there is enormous influence being vested on the PM in the selection of the members of the commission as all nine members of the commission are appointed by the PM challenging the independence of the judiciary.[54] Therefore, the power of the PM in appointing the commissioners must be removed.

The appointment of the top four judicial members remains the same by virtue of them holding the office whereas the power to appoint a former Federal Court judge by the PM is removed and entrusted to the top four judicial members. The researcher opines that it would be best for the top four judicial members to appoint another judicial member in the JAC having knowledge of the personal qualities, intellectual capacity, efficiency, and communication skills of all other superior court judges subordinate to them. Similarly, the appointment of the eminent persons by the PM would also be removed and entrusted to the JAC members to appoint, removing any perception of the executive having influence and or interference in the appointment of superior court judges through the JAC members.

Table 2. Current and proposed reform on the appointments of JAC members.

Composition of members	Currently appointed by	Proposed reform (appointment by)
Chief Justice	By virtue of holding the office	By virtue of holding the office
President of the Court of Appeal	By virtue of holding the office	By virtue of holding the office
Chief Judge of Malaya	By virtue of holding the office	By virtue of holding the office
Chief Judge of Sabah & Sarawak	By virtue of holding the office	By virtue of holding the office
Federal Court judge	By Prime Minister	-
Former Federal Court judge	By Prime Minister	Appointment by 4 top judicial members
Attorney General/ representative	-	By virtue of holding the office
President of the Malaysian Bar/representative	-	By virtue of holding the office
President Sabah Law Society/ Representative	-	By virtue of holding the office
President of Advocates Association of Sarawak/ representative	-	By virtue of holding the office
Eminent person (academic)	By Prime Minister	Appointed by the JAC
Eminent person (3 former judicial members)	By Prime Minister	-
Eminent person (non-practising legally qualified person)	-	Appointed by the JAC
Total members	9	11

The JAC members consisting of a diversified cluster of members would be able to appoint suitable eminent persons to the JAC with the approval of the majority. All other members of the JAC will automatically be a member of the JAC by virtue of them holding the office of Attorney General, President of the Malaysian Bar, President of the Sabah Law Society and President of Advocates' Association of Sarawak. It is proposed that the representatives from these bodies can represent them in the event if they are on long leave for medical reasons, overseas performing official duties or any other unforeseen emergencies.

Apart from this, if any of the judicial member in the JAC would like to be promoted, for example a Chief Judge of Malaya (CJM) would like to be appointed as a President of the Court of Appeal (position vacant due to retirement, demise, bankruptcy, or criminal offence), the CJM would have to nominate his name to the JAC. The CJM would not be allowed to participate in the deliberations and vote in the JAC as to that appointment to avoid any conflict of interest. In the event, there is equality of votes as the remaining members in the JAC are ten members, the chairman of the JAC shall have a second or casting vote as is customary in company meetings.[55] Besides, if any of the judicial members either (a) passes away, (b) is declared a bankrupt, (c) has committed any criminal offense, (d) unfit or unable to perform their duties; then their positions would become vacant and will be temporarily replaced by a retired Chief Justice or a retired Court of Appeal President or a retired Chief Judge of Malaya or Chief Judge of Sabah and Sarawak (top-down) until a new member is appointed by the JAC. Similarly, if the eminent person's position becomes vacant, the remaining JAC members would appoint a new eminent member to fill the vacant position. On the other hand, if the situation involves the public and private lawyers in the JAC, the new person appointed by their respective bodies would then sit in the JAC.

7 Conclusion

The importance of reforming the judicial appointment system as the pillar to uphold judicial independence cannot be understated. Scandals such as the 1988 Judicial Crisis and VK Lingam Tape Scandal are clearly a result of weaknesses in the judicial appointment system in upholding judicial independence in the Malaysian superior court. A reprise of those dark times in our judiciary's history remains a risk even until today as there were no significant reforms made to the role and powers of the PM and the quadrumvirate of top judges in Malaysia following the enactment of the JACA in 2009. Hence, from the research it is concluded that the current judicial appointment system does not uphold independence and that the current legal framework that governs the judicial appointment system should be reformed to safeguard and uphold independence in the Malaysian superior courts. The proposed amendments would enhance public confidence and judicial legitimacy, as well as to strengthen good governance and the rule of law in Malaysia. Nevertheless, the proposed legal reforms would not be effective without amending the Federal Constitution which would require a two-third majority support of Parliament. Hence, the legislators from both the government and opposition must muster the will to transcend political divides to table a motion in Parliament to affect constitutional amendments as proposed by the researcher. In conclusion, the proposed reforms to the judicial appointment system does not guarantee that independence of superior court judges are not unfringeable in all circumstances, however, it does provide a viable solution to strengthen the judicial appointment system to uphold judicial independence as compared to the present system.

References

1. Dijk, F. : Perceptions of the Independence of Judges in Europe: Congruence of Society and Judiciary. Switzerland: Springer Nature (2021).
2. Segars-Andrews, V.: Judicial Merit Selection Commission, 387 S.C. 109 (2010).
3. Sturgess, G., Chubb, P.: Judging the world: Law and politics in the world leading courts. Sydney: Butterworths (1988).
4. QC, G. R.: Judicial Independence: Some Recent Problems. Griffith Journal of Law & Human Dignity, 1(1) (2014).
5. Abdul, A. B., Farid, S. S.: Constitution of Malaysia: Text and commentary. Petaling Jaya, Selangor: Prentice Hall (2012).
6. Tan, K.Y.: The role of Judges in the Promotion of Constitutional Government. Paper presented at the Commonwealth Law Conference, Kuala Lumpur, Malaysia (1999).
7. Federal Constitution, Article 122B (1).
8. In the matter of an oral application by Dato' Seri Anwar Ibrahim to disqualify a Judge of the Court of Appeal 2 MLJ 481 (2000).
9. Dato' Seri Anwar Ibrahim v Public Prosecutor 2 CLJ 570 (2000).
10. Dato' Seri Anwar Ibrahim v Public Prosecutor 2 CLJ 570 (2000).
11. Nijar., G. S.: Who should appoint judges? The Sun Daily (2018). <https://www.the-sundaily.my/archive/who-should-appoint-judges-HUARCH585721>, last assessed 2023/6/20.
12. Dhanapal, S., Sabaruddin, J. S.: Judicial Independence in Malaysia: Is it a Myth or a Reality?. In Sharom, A., & Spooner (Eds.), Human Rights and Democracy in Indonesia and Malaysia. (pp111-142). Petaling Jaya, Selangor; Nakhorn Pathom, Thailand: Strategic Information and Research Development Centre (2019).
13. Jalil, M. A.: PM should have no role in appointment, promotion of judges, says G25 (2017). The Malaysian Insight. <https://www.themalaysianinsight.com/s/26768/>, last accessed 2023/6/21.
14. Dato' Seri Anwar Ibrahim v Public Prosecutor 2 CLJ 570 (2000).
15. Bari, A. A., Shuaib, F. S.: Constitution of Malaysia: Text and Commentary (3rd ed.). Malaysia: Prentice Hall (2009).
16. Lee, H. P.: Constitutional conflicts in contemporary Malaysia. Oxford University Press. New York, NY: Oxford University Press (2017).
17. Omar, A.H.: The judiciary in Malaysia. Kuala Lumpur: Asia Pacific Publications (1994).
18. Seah, G.: Crisis in the judiciary: The hidden story. The Malaysian Bar (2005). <https://www.malaysianbar.org.my/article/news/legal-and-general-news/legal-news/crisis-in-the-judiciary>, last accessed 2023/6/20.
19. Federal Constitution, Article 122B (1).
20. Federal Constitution, Article 122AA (1).
21. Federal Constitution, Article 123 (a) & (b)
22. Suffian, M.: The judiciary - during the first twenty years of independence. In Suffian, M., Lee, H. P., & Trindade, F. A. (Eds.). The Constitution of Malaysia: its development, 1957-1977 (pp. 231-241). New York: Oxford University Press (1978).
23. Federal Constitution, Article 122 B (2).
24. Federal Constitution, Article 122 B (3).
25. Federal Constitution, Article 122 B (6).
26. Federal Constitution, Article 122(1A).

27. Suffian, M.: The judiciary - during the first twenty years of independence. In Suffian, M., Lee, H. P., & Trindade, F. A. (Eds.). *The Constitution of Malaysia: its development, 1957-1977* (pp. 231-241). New York: Oxford University Press (1978).
28. Bari, M. E.: The substantive independence of the judiciary under the constitutions of Bangladesh and Malaysia: a comparative study. (Unpublished master's thesis). University of Malaya, Kuala Lumpur, Malaysia (2011).
29. Shuaib, F. S.: Malaysian judicial appointment process: An overview of the reform. *Journal of Applied Sciences Research*, 7(SPECIAL ISSUE), 2273–2278 (2011).
30. Foo, R. S. K.: 'Delivering Justice, Renewing Trust': An Analysis of the 2008 Reforms to the Judicial Appointments and Accountability Systems in Malaysia (Unpublished doctoral dissertation). Monash University, Australia (2016).
31. Bari, M. E.: The substantive independence of the judiciary under the constitutions of Bangladesh and Malaysia: a comparative study. (Unpublished master's thesis). University of Malaya, Kuala Lumpur, Malaysia (2011).
32. Federal Constitution, Article 122B (1).
33. Federal Constitution, Article 122B (1).
34. Foo, R. S. K.: 'Delivering Justice, Renewing Trust': An Analysis of the 2008 Reforms to the Judicial Appointments and Accountability Systems in Malaysia (Unpublished doctoral dissertation). Monash University, Australia (2016).
35. Dhanapal, S., Sabaruddin, J. S.: Judicial Independence in Malaysia: Is it a Myth or a Reality?. In Sharom, A., & Spooner (Eds.), *Human Rights and Democracy in Indonesia and Malaysia*. (pp111-142). Petaling Jaya, Selangor; Nakhorn Pathom, Thailand: Strategic Information and Research Development Centre (2019).
36. Smit, J. v. Z.: 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). London: The British Institute of International and Comparative Law (2015). Commonwealth countries with judicial appointments commission are Bahamas, Belize, Botswana, Cameroon, Cyprus, Fiji, Ghana, Guyana, India, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Maldives, Malta, Mauritius, Mozambique, Namibia, Nigeria, Organisation of Eastern Caribbean States, Pakistan, Papua New Guinea, Rwanda, Samoa, Seychelles, Sierra Leone, Solomon Islands, South Africa, Sri Lanka, Swaziland, Tanzania, Tonga, Trinidad and Tobago, Uganda, the UK, Vanuatu and Zambia.
37. Constitutional Reform Act 2005.
38. Constitutional Reform Act 2005, Section 73 to Section 75.
39. Constitutional Reform Act 2005, Paragraph 27, Section 27(8), Section 67 to 94.
40. Nathan, B. L.: Who Judges Who Judges - Judicial Appointments and Disappointments: A Comparative Study of Judicial Appointments with Particular Reference to England and Wales. *Journal of Comparative Law*, 8(2), 405–443 (2013).
41. The Commonwealth is an association of 54 countries working together based on a mutually agreed set of standards or principles which can be found in the Commonwealth Charter. The Commonwealth countries draw up declarations and other instruments including the Latimer House Principles. The objective of the Commonwealth Latimer House Principles is to provide some guidelines or framework to be adopted by the governments, parliaments and judiciaries based on their respective laws of their land.
42. The Commonwealth. *The Commonwealth Latimer House Principles, Practitioner's Handbook* (Frankson, J. R. Ed.). London, United Kingdom: Commonwealth Secretariat (2017). <https://thecommonwealth.org/sites/default/files/newsitems/documents/Latimer-HousePrinciplesPH7Jul17.pdf>, last accessed on 2023/6/20.

43. Nathan, B. L.: Who Judges Who Judges - Judicial Appointments and Disappointments: A Comparative Study of Judicial Appointments with Particular Reference to England and Wales. *Journal of Comparative Law*, 8(2), 405–443 (2013).
44. Gee, G., Hazell, R., Maleson, K., O'Brien, P.: Judicial appointments. In *The Politics of Judicial Independence in the UK's Changing Constitution* (pp. 159-193). Cambridge: Cambridge University Press. doi:10.1017/CBO9781107589223.008 (2015).
45. Heywood, A.: *Political ideologies: An introduction*. London: Red Globe Press *Judicial Careers Porta* (2021).
46. United Nation. Report of the Special Rapporteur on the independence of judges and lawyers. UN Doc A/HRC/38/38 (2018). <https://digitallibrary.un.org/record/1637422?ln=en>. See para 17, last assessed 2023/6/20.
47. Judicial Appointments. Report adopted by the Venice Commission at its 70th Plenary Session. (Venice, 16-17 March 2007) at para 27-30. (2017) [https://www.venice.coe.int/web-forms/documents/CDL-AD\(2007\)028.aspx](https://www.venice.coe.int/web-forms/documents/CDL-AD(2007)028.aspx), last assessed 2023/6/21. See also para 3.2, Chapter 3 of *The Dublin Declaration on Standards for the Recruitment and Appointment of Members of the Judiciary*. <https://www.encj.eu/node/378>, last assessed 2023/6/21.
48. Judicial Appointments Commission Regulations 2013, Regulation 4.
49. Maleson, K., & Russell, P. H.: *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World*. Toronto; Buffalo; London: University of Toronto Press (2006).
50. Kennedy, H.: *Eve was framed*. London: Vintage (2005).
51. Smit, J. v. Z.: *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). London: The British Institute of International and Comparative Law (2015).
52. Zammit Borda, A.: The appointment, tenure and removal of judges under Commonwealth principles: a compendium and analysis of best practice. *Commonwealth Law Bulletin*, 41(4), 501-501. doi:10.1080/03050718.2015.1093767, (2015).
53. Maleson, K., & Russell, P. H.: *Appointing Judges in an Age of Judicial Power: Critical Perspectives from around the World*. Toronto; Buffalo; London: University of Toronto Press, (2006).
54. Rahman, H.: Independence of the Judiciary. In Azmi, T. D. S. Z. T. (Eds.), *The Malaysian Judiciary (149-201)*. Kuala Lumpur: The Malaysian Current Law Journal Sdn Bhd, (2017). See also, Bari, M. E., Bari, M. E., & Naz, S.: 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 (2015).
55. Judicial Appointments Commission Act 2009, Section 13(6). See also Companies Act 2016, Section 10 and 21, Third Schedule.

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