

SELECTION OF CANDIDATES FOR APPOINTMENT AS JUDGES BY PARLIAMENT:
A COMMENTARY

By
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I refer to YAB Prime Minister Tun Dr Mahathir Mohamad's speech to officers of the Prime Minister's Department reported in the internet on October 10, 2018. As the reports differ, through a friend, I obtained the verbatim text in Malay.

I believe that it was not a prepared speech as it was not well organized. I will reproduce the part I would comment on and try to understand what it means.

Among others, in the speech, the Prime Minister said:

"Judges do not have to fear when doing their job fairly. The priority is justice, not because of the fear and (sic) not getting a promotion of certain parties. That is why at present the selection of judges will be given to parliament. People's representatives are elected by all citizens. They will determine whether the candidate submitted is good or bad.

If previously there was no scrutiny by a parliamentary committee, we will establish a parliamentary committee to filter all candidates for a particular position. Only after that, the names can be submitted to Agong. That's our way." (My translation).

What I understand is that, in order to enable Judges to carry out their duties fairly, without fear (including the fear of not getting a promotion) of a particular party, selection of candidates for appointment as judges will be made by Parliament. Parliament will determine the suitability of the candidates. For that purpose, a parliamentary committee will be established to select the candidates before their names are forwarded to the Yang di-Pertuan Agong for appointment.

I believe the "particular party" is the Prime Minister, because it is the Prime Minister who advises the Yang di-Pertuan Agong to make the appointment.

It is not clear whether the names will be submitted to the Yang di-Pertuan Agong after the selection by the parliamentary committee or whether, subsequently, the names will have to be approved by Parliament (meaning the Dewan Rakyat) first.

It is also unclear whether the proposal is only for the selection of candidates for the first appointment (judicial commissioners) or includes promotions, for example, from Judicial Commissioner to Judges of the High Court; from Judges of the High Court to Judges of the Court of Appeal right up to the Chief Justice. But, since it all involve new appointments, we will discuss promotions too.

Briefly, the Malayan Constitution of 1957 provides:

“122b. (1) ... Judges....shall be appointed by the yang di-pertuan Agong, acting on the advice of the prime Minister, after consulting the Conference of Rulers.

(2) before tendering his advice as to the appointment under Clause (1) of a Judgesthe Prime Minister shall consult the Chief Justice.”

The provision remains until now. However, in 2009, the Judicial Appointments Commission was established with the view to submit names of suitable candidates for appointment and promotion of Judges to the Prime Minister.

During the period of 51 years, until the establishment of the commission, Malaysia had five Prime Ministers namely Tunku Abdul Rahman, Tun Abdul Razak, Tun Hussain Onn, Tun Dr, Mahathir and Tun Abdullah Ahmad Badawi.

Discussions on the relationship between the Executive and the Judiciary could be divided into two parts. The first part is the period during which Tunku Abdul Rahman, Tun Abdul Razak and Tun Hussain Onn were Prime Ministers. The second part is when Tun Dr. Mahathir was the Prime Minister.

Coincidentally, the first three Prime Ministers were lawyers who, like the Chief Justices, read law in England at the same time, at least partly, and knew each other as students.

The first three Prime Ministers also had quite similar background. That might have influenced the way they act and react on a matter.

During that period, the relationship between the Executive and the Judiciary could be described as respectful of each other. Certainly, there were not many judges then. In 1970s, there were only four judges in High Court Kuala Lumpur compared to 29 today. When an appointment has to be made, the Chief Justice would submit the name of the candidate to the Prime Minister and appointment is made.

Among the judges appointed during that period, apart from Judicial and Legal Service officers (such as Dato' Wan Yahya Pawanteh, Tan Sri Gan Chit Tuan and Encik Abdul Razak Abu Samah) were lawyers (such as Tan Sri Eusoffe Abdoolcader, Sri Chang Min Tat and Dato' Fred Arulanandum), former BN politicians (such as Tun Mohd Zahir Ismail and Tan Sri Wan Adnan Ismail), former opposition politicians (such as Datuk Seri George Seah (SUPP – I stand corrected) and Dato' Mustapha Husain (Gerakan and, later, KITA (meaning, WE))). According to him, it was not long before, KITA (WE) became SAYA (ME)!

(His story about how he was offered the post of judicial commissioner is most interesting. After his political career had ended, one afternoon, he was jogging along Gurney Drive, Penang. A car carrying YM Raja Azlan Shah (who was in Penang for the Federal Court hearing) stopped beside him. Raja Azlan Shah called him and asked, *"Do you want to be a judicial commissioner?"* *"Sure, Engku,"* he replied. He was made Judicial Commissioner and, subsequently, he was appointed Judge of the High Court.)

I must say that the system had its weaknesses too. I saw a lawyer coming to see Tun Suffian a few times. Later, he was appointed a judicial commissioner. Shortly after that, he was charged in court for the offence of criminal breach of trust. He was found guilty and sentenced to imprisonment. Certainly, he thought he would be safe when he was appointed a judicial commissioner. He misled Tun Suffian who trusted him.

In 2000s, a number of officers of the Judicial and Legal Service from a particular state whose Sultan was close to the Chief Justice were appointed judicial commissioners despite their proficiency in English were weak. This shows the weakness in relying on one person, even the Chief Justice, to suggest the names of candidates for appointment as judicial commissioners (judges).

The rationale of Tun Dr. Mahathir's proposal is that since the selection is made by the Parliamentary Committee, judges do not have to fear the Prime Minister anymore.

Actually, if there was a Prime Minister who was most feared by the (coward) Judges, he was the one. A senior judge who had just returned from a meeting with the Prime Minister when I went to see him told me he had just returned from a meeting with the Prime Minister; he was scared, so he carried the Surah Ya-sin in his shirt pocket. He pulled it out and showed it to me.

Tan Sri Mohd Azmi Kamaruddin and Tan Sri Harun Hashim were bypassed in the promotion from the High Court to the Supreme Court (Federal Court). They were promoted much later and retired as Supreme Court Judges. The only "sin" committed by Tan Sri Mohd Azmi was that Dato' Harun Idris was his uncle. Likewise, the "sin" committed by Tan Sri Harun Hashim was that he was the Judges in the Appellate and Special Powers Division and, because of that, he often gave orders against ministers, the Government and government agencies.

Prior to that, Tan Sri Harun Hashim was downgraded to President of the Industrial Court. It meant that orders made by him were subject to judicial review by the High Court. I believe Tan Sri Harun Hashim was unaware of the motive as he continued to enjoy the salary and perks of a High Court Judge. He believed that a judge was required to lead the Industrial Court. Indeed, the court became famous when he was President just as the Anti-Corruption Agency became famous when he was its Director General, before he was appointed a Judges. The Attorney-General, Tan Sri Abu Talib Othman said to me, *"I am making him a magistrate."*

When I was a member of the Judicial Appointments Commission after my retirement, we too bypassed some judges when recommending names for promotion. But, we did so for different reasons. We did so because the number of cases disposed of by them was very low (we had the statistics before us); their written judgments were not satisfactory (we read their judgments); they do not have the correct disposition expected of a judge; their integrity was questionable and so on.

There were those who were placed on the fast track from the day they were appointed judicial commissioners. A good example is an officer in the Attorney General's Chambers who is very good in his work in a particular area of law. Because of that he could not be released. As a result, his juniors who might not be as good were released and became judicial commissioners, judges of the High Court and even of Court of Appeal when the officer was finally released.

We would not appoint him a Judge of the Court of Appeal straight away. On the other hand, it is not fair to him to join the queue based on the date of appointment as a judicial commissioner or a judge. So, while he has to start from the bottom, we put him on a fast track i.e. if he proves himself to be a good judge, he would get his promotion much faster than the others so that he could recover his seniority. Otherwise, he would be punished for being good.

We would not appoint him a Judge of the Court of Appeal straight away for three reasons. First, he must have the experience of being a trial judge to sit on appeal. The High Court is a trial court, meaning that the judges will have to listen to and record the testimony of witnesses and conduct the proceedings from the beginning of a case to the end. Whether in a civil or criminal case, that is where the rule of procedure and law of evidence really come into play.

Secondly, we want to see whether he has the right judicial temperament. A person may be very learned in law but does not have the right judicial temperament. He should not be made a judge.

Thirdly, we want to see whether he can really do the job. A judicial commissioner with a Ph.D. was not confirmed as a judge because, even given an extension, his "production" was very low. We knew the type of cases, the average time it would take to dispose them and the average number a judge could dispose of in a month by comparing his production with that of his colleagues.

We could do all these because not only we knew the nature of the job, but we had done the job ourselves.

Another judicial commissioner, a former President of the Bar Council, declined to be considered for judgeship because, he admitted, he could not make decisions. As a lawyer he only looked at his client's side of the case. I respect him for his honesty.

That is why I prefer a person to be appointed a judicial commissioner, on a two-year contract, first and not to be appointed a judge straight away, what more a Court of Appeal judge.

Coming back to Tun Dr. Mahathir's era, it was he who advised the Yang di-Pertuan Agong to appoint Dato' Seri Gopal Sri Ram to be appointed a Court of Appeal judge straight away while the longer serving officers of the Judicial and Legal Service, on the same day, were only appointed judicial commissioners before being appointed judges of the High

Court and only after ten years, they were appointed Court of Appeal judges even though they were not bypassed by anybody. Why was he so special? He was Tun Dr. Mahathir's lawyer in the case regarding his election as UMNO President in which he defeated Tengku Razaleigh Hamzah by only 20 votes.

Could it be, it is all these memories that haunted Tun Dr. Mahathir that made want to hand over the role of selecting candidates for appointment as judges to Parliament so that the Prime Minister could not be blamed?

However, some judges benefitted from Tun Dr. Mahathir's intervention in the promotion of Judges e.g. Tun Eusof Chin, Tan Sri Lamin and Tan Sri Anuar Zainal Abidin.

Tan Sri Anuar who had been bypassed because the perception of his integrity was quite poor, was shocked when he was offered the position of Chief Judges (Malaya). We could read Tun Dr. Mahathir's motive: he believed that Tan Sri Anuar would be indebted to him. But, Tan Sri Anuar was a chess player. He knew he was at the peak of his career. He has nothing to lose. His judgments did not show such inclination.

Next, we will discuss the suitability of this proposal. We will begin with first appointment, meaning the selection of candidates for appointment as judicial commissioners.

I do not think it is appropriate for members of Parliament to select candidates for appointment as judicial commissioners. First, it is a violation of the doctrine of separation of powers. What if, candidates for members of Parliament, minister or Prime Minister, are required to be selected by the judges?

Secondly, no academic qualification is required to become a member of Parliament. Even illiterates may become candidates. How are they going to judges a person's knowledge of the law?

It is said that a parliamentary committee will be established for that purpose and, of course, members of Parliament who are qualified for the job will be appointed as members. If the candidate is a Judicial and Legal Service officer, how are they going to know his performance as such an officer? If he is a Deputy Public Prosecutor, they might have read his name in the press. That is insufficient to judge his knowledge of the law and his performance. If he is from the drafting, advisory and international law divisions, for example, his name might not have been heard.

If the candidate is a Sessions Court Judge, his name may have appeared in the press. Nobody would remember. Anyway, that is not enough to determine his suitability.

If the candidate is a lawyer doing criminal cases, it is likely that his name is publicly known. However, it is also not enough to determine his suitability as a judge. But if he is not a litigation lawyer, specializing in conveyancing, corporate an energy law, his name may not be heard by the public.

As a result, the members of the Parliament will not be able to judge the legal knowledge of the candidates. They may end up following the example of members of the Senate Judiciary Committee of the United States that they read in the newspapers who question the candidates' stance on same sex marriage, possession of guns, abortion, etc.

In Malaysia, we can imagine that DAP Members of Parliament will be asking about the candidate's stance on Shariah, LGBT, the United Examination Certificate (UEC) and so on while the PAS parliamentarians will ask whether the candidate is practising the pillars of Islam, drink alcohol, commit grave sins, his stance on implementation of hudud, LGBT, similar same sex marriage and so on.

In fact, those questions are not relevant. They are candidates for appointment as judges. The function of a judge is to interpret and implement the law. Laws are made by Parliament. If Parliament makes a law, whether he likes it or not, the judges should apply it in deciding a case. If the law is well drafted, there is little room for interpretation.

Even in the interpretation of law there are rules to follow. It cannot be done at will. If the Federal Court has interpreted a law giving a meaning which was not intended by Parliament, Parliament may amend the law to restore its meaning. That is the way the separation of powers works, not by the lawmakers selecting candidates for Judgeship whom they believe would decide the way they want it to be.

Regarding shariah qualification, we are not selecting candidates for Qadis, but candidates for civil court judges. If a Muslim who commits major sins is not qualified, a non-Muslim who does not believe in Allah at all, is even more unqualified.

In the end, the members of Parliament would vote according to party lines, race, religion and region.

I also fear that there are members of the parliamentary committee who will become swollen headed and abuse the power and position given to them.

It will also create a dilemma. To appoint suitable members of Parliament to the committee, Parliament will, most probably, appoint members with legal background. They or lawyers from their firms will certainly have cases before the judges later.

This will, at least, lead to the perception of bias from their opponents. I am not surprised if there are members who would abuse their position as members of the parliamentary committee to promote their business.

We will now discuss the selection of judges for promotion. What is meant here is an appointment to a higher position, for example, from a Judicial Commissioner to a High Court Judge, from a High Court Judge to a Court of Appeal Judge, right up to Chief Justice.

For promotion of judges too, I submit that members of Parliament do not have enough information to judge the Judges' performance. How many of them read the full judgments of the judge?

Some judges who lack substance to rely on will resort to other means in order to be seen and known by the members of the committee, ministers and even Prime Minister and will openly show their support for the ruling party and the government to win their favour.

All my other observations made in the earlier discussion concerning the selection of candidates for the first appointment, equally apply here.

It should be remembered that during the period when Tunku Abdul Rahman, Tun Abdul Razak, Tun Hussain Onn and Tun Dr. Mahathir were Prime Ministers, the provision of the Constitution regarding the appointment of judges was the same. Only the Prime Minister changed. So, the problem is not legal, but human.

When Tun Abdullah Ahmad Badawi became Prime Minister, there was an attempt to bypass the most senior judge: me.

As I (together with Tengku Baharuddin Shah) acquitted Dato' Seri Anwar Ibrahim of his first sodomy case, UMNO did not want me to be promoted to the post of President of the Court of Appeal and, subsequently, Chief Justice although I was the most senior judge at the time. Politicians do not care about the reasons you give in your judgment. They don't even read the judgment. If you acquit Anwar, you are Anwar's man. So, you are our enemy. That is the way politicians think, no matter from which party.

However, when Allah s.w.t. wants something to happen, it will happen. Tun Abdullah Ahmad Badawi, the Prime Minister, at that time, conceded to the objection by DYMM Sultan Azlan Shah and I was appointed President of the Court of Appeal and, a month later, Chief Justice. However, Tun Dr. Mahathir was dissatisfied. Tun Abdullah Badawi should not have conceded, he said.

At that time, Dato' Zaid Ibrahim, the Minister in the Prime Minister's Department in charge of legal matters, backed by the Bar Council, was proposing for the establishment of the Judicial Appointments Commission.

As the Chief Justice, I opposed it because the majority of its members are lawyers who are still actively practicing law. They appear before the judges, representing their clients and, at the same time, they will determine whether the judges will be promoted.

Whether it will happen or not, it will create a perception that, most likely, judges will favor him. Perhaps some might even use their position to claim that judges will favour them. This will give them an unfair advantage besides damaging the integrity of the court. "*Judges will kneel to the lawyers*", I wrote in my comment to the proposal.

In my meeting with Tun Abdullah Badawi to discuss the establishment of the commission,

I asked him, "*Why are you surrendering your prerogative to the Bar Council?*" I emphasised that the law had existed since independence. There were no problems. Problems arose when Tun Dr. Mahathir became Prime Minister and interfered in the promotion of judges. We do not have to change the system because the system is not the problem. It is a human problem.

The constitution gives the Prime Minister the right to choose, if it is done fairly and wisely, not only for political reasons alone, it will work well as during the era of Tunku Abdul Rahman, Tun Abdul Razak and Tun Hussain Onn.

However, the law was made. The commission was established but its membership was amended. Section 5 of the Judicial Appointments Commission Act 2009 provides:

"5. (1) The Commission shall consist of the following members:

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

Note, in particular, paragraph (f) on the requirement of consultation with Malayan, Sabah and Sarawak Bar as well as the Attorney General in the appointment of the four eminent persons.

If that was the provision in the draft given to me I might not oppose it. But, would it be amended if I did not oppose it?

I admit, due to changing times and circumstances, the old practice of identifying the candidates is not suitable anymore. The court requires expertise in various areas of law. The old system did not allow candidates in various areas of law to be appointed judges. Furthermore, it was less transparent. Thus, the establishment of the Judicial Appointments Commission to assist the Chief Justice and the Prime Minister to get suitable candidates was a right move.

I must say that it worked well after its establishment through the premiership of Tun Abdullah Badawai and the early part of Dato' Seri Najib's premiership. For first appointments (as judicial commissioner), any qualified person could apply online. The Chief Justice would scrutinise them, get all the information required and present all the information to the commission. Member of the commission might suggest some names too. They would also give their input regarding the candidates. The Bar Counsel was also consulted if they were lawyers.

For promotion, we were given the full list of judges of the respective court according to their seniority; the names of those recommended by the Chief Justice, the President of the Court of Appeal and the respective Chief Judges (as the case may be) so that we know who would be bypassed. We were also given samples of their judgments, statistics showing number and types of cases disposed by them by the year and reasons why they deserve promotion or otherwise.

Discussion was thorough and open. Votes were taken by secret ballot.

I can speak about the period of the two terms as a member. Even though the appointments of some candidates recommended by us were delayed, as far as I can remember, none was rejected outright by the Prime Ministers. However, I would not be honest if I were to say that the two Prime Ministers completely put aside the political considerations in making their choice. Otherwise they are not politicians. Hence the postponements and delays in respect of some candidates. However, as far as I can remember, no one was totally rejected.

During that period, a former President of the Bar Council and a defeated Pas candidate were not only appointed but placed on the fast track.

What happened subsequently was regrettable. The first Tun Dr. Mahathir's era seems to make a comeback. First, Dato' Seri Najib tried to circumvent the provisions of the Constitution by appointing Tun Md Raus Sharif, the incumbent Chief Justice and Tan Sri Zulkifli Ahmad Makinuddin, the incumbent President of the Court of Appeal as Additional Federal Court Judges and to continue to hold their number one and number two posts respectively after serving their six months extension following their mandatory retirement age of 66 years. The effect was to extend their services as the number one and number two judges beyond the age of 66 years and six months by three and two years effectively.

I criticised the appointment on the ground it was unconstitutional. That was an attempt to retain judge considered by the BN government to be favourable to it in the face of the coming 14th General Election (GE 14).

Sadly, after GE 14 and the change of government, Tun Dr. Mahathir, now Prime Minister of the PH Government, apparently repeating the Tun Salleh Abas episode, summoned the two judges and demanded their resignation. Subsequently, Tun Daim Zainuddin, as Chairman of the Council of Elders also did the same. The problem was solved when they both resigned.

That gave the new government the opportunity to appoint the Chief Justice of their choice. That is acceptable but for fact that no appointment of other Chief Justice in the Malaysian legal history had been so politicised. Politicians belonging to the coalition of parties in power were openly campaigning for him.

This suggests that even if the parliamentary committee is established, it cannot prevent the repeat of such interference. It is beyond the power of the committee. After all, the committee is only concerned with appointment. What happens after that depends on the man who becomes Prime Minister and the ruling party.

The next question is: Is the parliamentary committee meant to replace the Judicial Appointments Commission or in addition to it, and, if so, where it will be placed? After the candidates are selected by the commission?

I am sure that some people would like to adopt the United States' system of appointing the Supreme Court Judges even though they do not know it in detail and how it works. We should not always think that the systems in other countries are better and suitable for our country.

As far as I know, for the appointment of Supreme Court Judges, a candidate must appear before Senate Judicial Committee. After that, he must be approved by the Senate. From what we read, the candidates are questioned about their stance on abortion, same sex marriage, ownership of firearm and others, regarding which I have discussed above. I do not know how good or bad the system is.

During my visit to the Court of Appeal in California, we were briefed by a Judge of the Federal Court of Appeal. On the issue of corruption, I asked him whether the majority of judges charged for corruption were appointed or elected judges? He replied, "Almost all were elected judges."

At the end of the briefing I asked him, "*Suppose you are given a chance to rewrite the U.S. Constitution, would you recommend that all judges be elected?*" " *No way,*" he replied.

There may also be activists who want activists to be appointed judges. The answer is, no activist is suitable for appointment as a judge. He has an agenda. He will only see a case from his point of view. He will not be neutral. He will not be fair.

An Australian judge I met at an international conference told me they had made a big mistake in appointing social activists as judges. Their decisions are one sided.

In conclusion, any system could be abused by the people who implement it. Our existing system of appointment and promotion of judges is good enough. What is necessary is the mutual respect between the Prime Minister and the Chief Justice, between the Prime Minister and the Judicial Appointments Commission, between the Prime Minister and the

Yang di-Pertuan Agong and all of them should abide by the Constitution and its conventions. Judges must abide by their ethics.

Appointment and promotion of judges should not only be made on the basis of the political interests of the ruling party. The Prime Minister should not repeat the mistakes made in our country's legal history beginning with the Tun Dr. Mahathir's first era. Hopefully he will not repeat them and his successors will not repeat them too.

The new Pakatan Harapan government had made a commendable decision i.e. politicians would no longer be appointed chief executive officers of statutory bodies, government-owned companies and as ambassadors. It should not make a bigger mistake by giving politicians the power to select candidates for appointment of judges and for their promotions.

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