

KEEP APPOINTMENT OF CHIEF JUSTICE OUT OF PARLIAMENTARY SELECT
COMMITTEE

By
Tun Abdul Hamid Mohamad

On 12 November, 2019, The Malaysian Insight reported:

“Parliament will this month receive a report on appointments of four government agency chiefs, said William Leong, the chairman of the parliamentary select committee (PSC) on major public appointments.

The four are that of the chiefs of the Malaysian Anti-Corruption Agency (MACC) and Election Commission, the Inspector-General of Police (IGP) and chief justice.

MACC chief Latheefa Koya was summoned by the committee last June where she was asked to explain her vision, mission and focus, among others.

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Leong said then a report will be tabled in Parliament on the outcome of the meeting.

Dr Mahathir, however, later said the appointments of the EC Chairman and its members, MACC chief commissioner, and members of the Judicial Appointments Commission and the Human Rights Commission of Malaysia (Suhakam) will go through the committee from now on.

Asked if the other three were summoned to the committee’s hearing like Latheefa, Leong said the committee engaged with the respective agencies instead of the individuals.

“We have already discussed with most of them, so we are now in the process of finalising the report. We hope in the next two to three weeks to table the report,” Leong told The Malaysian Insight.

At this juncture, the committee has been given the approval by the government to look into the four positions but more will be added from time to time, he said.”

I am most concerned about the Chief Justice (CJ) being included in the list. It shows that, to the Prime Minister (PM) and members of the PSC, the position of CJ is similar to IGP, Chief Commissioner of MACC and Chairman of the Election Commission (EC), indeed other heads of government departments. Whether that is intentional or due to ignorance, it is really worrying.

The CJ is the head of one of the three branches of the Government i.e. the Judiciary. The Judiciary is expected to be independent from the Executive. The doctrine of separation of powers demands that the three branches of the government should not encroach into each other’s jurisdiction. This is more so with regard to the Judiciary.

Members of the PSC are politicians, majority of whom are from the ruling parties. They may not even be lawyers. What do they know about the performance of those judges? Do they read the judgments of those judges, and, if they do, do they understand them?

I fear that, politicians being politicians, at the end of the day, they would only be looking for persons who are favourable to the Government or the ruling party (parties). Knowing that they need the approval or support of the PSC, to win the favour of the PSC members, some judges, usually those with less integrity, self-respect and merits, may even lobby members of the PSC, hoping for their support for selection to the top post in the Judiciary. Both are bad.

Is the PSC going to interview the candidates for CJ? Bear in mind that the most likely candidate is the President of the Court of Appeal (PCA), and, may also be the Chief Judge (Malaya) (CJ(M)) and Chief Judge (Sabah and Sarawak) (CJ (S&S)). What are they going to ask the judges? Whether they are pro-government or pro-opposition? If they had read in the newspapers or in the internet about a decision of the judge, the result of which they do not like, are they going to ask the judges why they decided the way they did?

(I intentionally use the words “the result of which they do not like”, because, speaking from experience, that is what politicians do. If the accused person is their political enemy and you acquit him, to them, you are his man. They do not care about the charge, the evidence and the law.)

In any event. I submit that it is a flagrant breach of the doctrine of separation of powers, it undermines the independence of the Judiciary and arguably unconstitutional, to subject the judges to such inquisition by politicians.

The Federal Constitution provides:

“122B. (1) the Chief Justice of the Federal Court, ...shall be appointed by the Yang di-Pertuan Agong, acting on the advice of the Prime Minister, after consulting the Conference of Rulers.”

Note that while the PM is a politician, the Rulers who are members of the Conference of Rulers and the YDP Agong are apolitical. The system worked smoothly under the first three PMs, who were themselves lawyers. Seniority was strictly followed.

The meddling in the appointment of CJ (and Judges) started and continued during the long reign of Tun Dr. Mahathir as PM. The problem is man, not the system. Involve more politicians in the selection of Chief Justice, they will politicise the selection more. They will bring in the question of race, religion and the region of origin of the candidate(s). The CJ will be identified with the government that caused him to be appointed – a PH CJ or BN CJ. That should not be.

In any event, in 2009, the Judicial Appointments Commission (SAC) was established by law, the Judicial Appointments Commission Act 2009 as compared to the PSC which was established under the Standing Orders of Parliament, which is comparable only to the Rules of Court, a subsidiary legislation. The act was legislated “to uphold the continued independence of the judiciary”.

Section 2 provides:

“Upholding independence of judiciary

2. The Prime Minister must uphold the continued independence of the judiciary and must have regard to —

- (a) the need to defend that independence;
- (b) the need for the judiciary to have the support necessary to enable them to exercise their functions;
- (c) the need for public interest to be properly represented in regard to matters relating to the judiciary, the administration of justice and related matters.”

Note the duty imposed by the act on the PM to uphold and defend the independence of the judiciary.

Section 5 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 Judge of the High Court in Malaya
- (d) the Chief Judge of the High Court in Sabah and Sarawak;
- (e) a Federal Court judge to be appointed by the Prime Minister; and
- (f) four eminent persons, who are not members of the executive or other public service, appointed by the Prime Minister after consulting the Bar Council of Malaysia, the Sabah Law Association, the Advocates Association of Sarawak, the Attorney General of the Federation, the Attorney General of a State legal service or any other relevant bodies.”

Note that to appoint the four eminent persons, the PM is required to consult the AG of Malaysia, the AG of Sabah, the AG of Sarawak, Bar Council, Sabah Law Association, Sarawak Advocates Association. They and the members of those associations are all lawyers who appear in court, including before the judges in question, read their judgments and know their performance. They are the people whom the PM must consult and rightly too.

Since the establishment of the JAC, the four eminent persons who had been appointed were former CJs, former CJ (Malaya), former CJ (Sabah and Sarawak), former Judges and former AG. I do not think it can be argued that they are less independent and less knowledgeable in law, administration of justice, aptitude and performance of the candidate(s) than those MPs. Just look at how they behave when Parliament is in session. Are such people to judge who should be CJ?

Since we already have the JAC to recommend a suitable candidate to the PM, what is the necessity for the candidate(s) to be scrutinized by the PSC? At what stage are they going to come in, before or after the JAC?

Lateefa Koya was called to appear before the PSC even though she had been appointed by the YDP Agong and asked to explain her vision, mission and focus, among others. So far, the PSC had not called the CJ to appear before them. Perhaps they are not going to. They better not.

Anyway, a report on the appointments of the four top posts are ready to be submitted to and tabled before Parliament. Of course, one of the four is CJ. We do not know what the report on the appointment of CJ contains. Anyway, lest some MPs do not know or forget, let me remind them of the provision of Article 127 of the Constitution:

“127. the conduct of a judge of the Federal Court, the Court of Appeal or a high Court shall not be discussed in either house of parliament except on a substantive motion of which notice has been given by not less than one quarter of the total number of members of that house, and shall not be discussed in the Legislative Assembly of any State.”

Note that the judges' conduct shall not be discussed in both houses without the procedure being followed. Can it be discussed in the PSC at all and a report be made about it?

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tunabdulhamid@gmail.com

<http://www.tunabdulhamid.my>

<https://tunabdulhamid.me>