CHAPTER 4 : RECOMMENDATIONS AND POSTSCRIPT

Part 1
Recommendations

1. In our Introduction to the Report, we have stated that the Commission was constituted by Seri Paduka Baginda Yang di-Pertuan Agong under the Commissions of Enquiry Act 1950 to enquire into the video clip recording of images of a person purported to be an advocate and solicitor speaking on the telephone on matters regarding the appointment of Judges in the Malaysian Judiciary. The scope and extent of the Enquiry is confined in the Terms of Reference set out.

2. In the course of the Enquiry, ample evidence has emerged which clearly indicates that there is cause for concern about how Judges in the upper echelons of the Judiciary were appointed and the selection criteria employed. More specifically the evidence has disclosed inherent flaws and weaknesses regarding the process of appointment and promotion of High Court Judges as well as the Chief Judge Malaya, President Court of Appeal and the Chief Justice of the Federal Court.

3. In the circumstances, we are of the view that there is an urgent need for the necessary judicial reforms to be effected by the relevant authorities. In this connection, the Malaysian Bar Council has urged the Commission to consider recommending to the Government the setting up of two bodies, namely, (a) a Judicial Appointments Commission and (b) a Judicial Complaints Tribunal.

(a) The Judicial Appointments Commission

4. On the formation of a **Judicial Appointments Commission**, we say that there is merit in the proposal of the Malaysian Bar Council. Having heard the evidence presented to the Commission in relation to the video clip it would seem clear that the appointment and promotion of Judges of the higher Judiciary is open to interference and manipulation by the Executive and other extrinsic forces including private citizens. The video clip has been publicly exposed

via the Internet and is therefore within the public domain. The impact of the exposure has given rise to negative perceptions of the image of the Judiciary, which is one of the three important organs of Government in a parliamentary democracy.

5. We would add further that the inherent weaknesses in the process of appointment and promotion of Judges and its vulnerability to interference and manipulation could result in extreme damage to the independence and integrity of the Judiciary in particular and to the country in general.

6. We are not suggesting that the present system of appointment and promotion of Judges is totally flawed. In view of the public exposure of the video clip, we say that this system can be improved for the purpose of transparency, accountability and good governance if we are to expect the public and foreign investors to have confidence in the Judiciary.

7. The Judiciary plays a crucial role in respect of the rights of citizens against citizens as well as the citizens against the State. In other words, the Judiciary is the arbiter of all disputes that are brought to the Courts. Hence, it is imperative that the right persons should therefore be considered for appointment and promotion as Judges. There should be a check and balance system in place.

8. We have already set out the relevant provisions of the Federal Constitution on the need for consultation by the Prime Minister with the Chief Justice of the Federal Court and where necessary also with the Chief Judges of both High Courts.

9. The Federal Constitutional provisions show that the power of appointment and promotion of Judges is centered essentially on two persons, that is, the Prime Minister in consultation with the Chief Justice.

10. In practice, it is the Chief Justice who will initiate the appointment and promotion of Judges by nominating names to the Prime Minister for his consideration and if the Prime Minister agrees with his nomination, the normal process of submitting the names to the Conference of Rulers would follow before the Yang di-Pertuan

Agong appoints the Judges. However the Prime Minister at the material time with which we are concerned boldly stated that he was at liberty to put up candidates on his own without any prior input from the Chief Justice.

11. In the evidence before the Commission, two issues appear clouded. Firstly, the basis or criteria for the Chief Justice to nominate the candidates for appointment as Judges of the High Court including the Heads of various Courts (except the Chief Justice). Our concern here is that there is no established and discernable system or criteria in the selection process of Judges and their promotion. It therefore follows that the power to nominate the candidates to the various Courts is left entirely to the discretion of the Chief Justice. This subjective approach appears to have also operated in the minds of the Executive personages (i.e. the then Prime Minister and the Chief Secretary to the Government (KSN)) and is a manifest structural weakness in the selection process.

12. Secondly, from the evidence before the Commission, the meaning attributed by the Prime Minister and KSN to the word "*consult*" is so totally at variance with the ordinary meaning that they seemed to have thought it was equivalent to the word "*notify*". This would explain the Prime Minister's resort to the word "*prerogative*" as a rationale for conducting himself the way he did. What is the meaning to be assigned to the word "*consult*" has been extensively discussed by Dato' Cyrus Das, a senior advocate and solicitor of the High Court of Malaya in his article, **Consulting the Conference of Rulers under the Federation Constitution** in the Journal of Malaysian and Comparative Law, 2006 Volume 33 at pages 95 – 115. The said article was in particular reference of the judgement of the Court of Appeal in **Re An Application By Dato' Seri Anwar Ibrahim to Disqualify A Judge of the Court of Appeal [2000] 2 MLJ 481**. This is how the learned writer concluded at pages 115:

> "*The statement in the Judgement that 'in the final analysis the appointment of Judges is really a matter between the Yang di-Pertuan Agong and the Prime Minister personally' should be declared as constitutionally incorrect. The flaw lies in the failure to recognize that the consultation process is prescribed by the Federal Constitution itself (as the supreme law of the land) and as a Constitutional requirement it could not be dispensed with or treated in a casual manner".*

13. Given the perception by Tun Mohd. Dzaiddin (the then Chief Justice) that the Prime Minister had the prerogative of rejecting his recommendation on the choice of candidates for appointment as Judges without assigning any reasons, it would appear that he (Tun Mohd. Dzaiddin) did not find it appropriate or necessary to question the Prime Minister further on the matter. He merely adopted what can be described as the "Hobson's Choice" and accepted the nomination or suggestion made by the Prime Minister. This presented an unsatisfactory scenario which might well have been avoided with the formation of a Judicial Appointments Commission.

14. Other jurisdictions like England, Australia and New Zealand, to name a few, have changed the system and have established a judicial commission.

15. The power to recommend the appointment and promotion of Judges should be vested in a body of persons that would provide more transparency, accountability and good governance.

16. Hence, the public perception of the Judiciary would further improve as opposed to the negative perception presently. It would then be a respected Institution. The interference and manipulation as shown in the evidence before the Commission would be unlikely to occur. This appointment process would be acceptable to the public because it is a system that is more transparent.

17. In recommending for the establishment of a Judicial Appointments Commission, the relevant Articles in the Federal Constitution like Article 122B, would need to be looked into and amended accordingly.

18. The Prime Minister would then be in a better position to consider the candidates proposed by the Judicial Appointments Commission. The Judicial Appointments Commission would have thoroughly considered the background, the qualifications and the integrity of the candidates for appointment as Judges or Judicial Commissioners, as the case may be. Similarly, in terms of promotion for the Judges to the higher levels in the Judiciary, the Judicial Appointments Commission would have to consider, inter alia, their performance and conduct before recommending their promotion.

19. It follows that there would be no necessity for the Prime Minister to consult anybody else. It would be only on exceptional grounds that the Prime Minister would be inclined to reject the recommendation. However, in rejecting the recommendation, the Prime Minister would have to give his reasons in consonance with the norms of transparency and good governance.

20. On the issue of the composition and the powers of the Judicial Appointments Commission, guidance can be had to the commissions established by some countries. It is a matter entirely for the Government to consider as a matter of policy having regard to the interests of the public. However, in establishing the Judicial Appointments Commission, the Government would have to consider local conditions and the racial composition of the country. We would suggest however, that the Head of the Judicial Appointments Commission be the Chief Justice, being the Head of the Judiciary. We would add further that besides the President of the Court of Appeal, the Chief Judges of the two High Courts be appointed as automatic members; retired Chief Justices, Presidents of Court of Appeal, the Chief Judges of the two High Courts, Federal Court Judges in that order, may also be considered as members. As to the numbers, it is for the Government to consider.

21. In the circumstances we substantially agree and support the recommendation by the President of the Malaysian Bar Council in its Memorandum dated 27 September 2007 to the Government and the reasons and grounds advanced therein on the need to set up a Judicial Appointments Commission.

(b) Judicial Complaints Tribunal

22. The Malaysian Bar Council has proposed that the Commission consider recommending to the Government the setting up of another separate body, that is, a Judicial Complaints Tribunal, to look into the complaints against Judges and judicial officers. The complaints referred to, if we understand correctly, related to misbehaviour of the Judges and the judicial officers. It is to be noted that the primary role of the Judges and the judicial officers is judicial in nature and they are not involved in the ordinary administrative duties.

23. We respectfully do not think there is a need for such Tribunal to be established. Our reasons are:

(i) Judges are not public officers (Article 132(3)*(c)* of the Federal Constitution). In addition, by virtue of Article 127 of the Federal Constitution, the conduct of a Judge shall not be discussed in either House of Parliament except on a substantive motion of which notice has to be 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. It shows the unique position of Judges;

(ii) there are adequate legal provisions for action to be taken against the Judges, inter alia, for misbehaviour. The Yang di-Pertuan Agong in the exercise of the powers conferred under Article 125(3) of the Federal Constitution prescribed the Judges' Code of Ethics 1994 (P.U. (B) 600) to be observed by all the Judges. The relevant paragraph is 3(1) which reads:

"A Judge shall not-

(a) subordinate his judicial duties to his private interests;

(b) conduct himself in such manner as is likely to bring his private interests into conflict with his judicial duties;

(c) conduct himself in any manner likely to cause a reasonable suspicion that –

(i) he has allowed his private interests to come into conflict with his judicial duties so as to impair his usefulness as a judge; or

(ii) he has used his judicial position for his personal advantage;

(d) conduct himself dishonestly or in such manner as to bring the Judiciary into disrepute or to bring discredit thereto;".

24. If the breach of the Code warrants dismissal, the Yang di-Pertuan Agong shall appoint a tribunal under Article 125(4) of the Federal Constitution and may, on the recommendation of the tribunal, remove the Judge from office. It is clear that there is sufficient

mechanism in place for action to be taken for any misbehaviour on the part of the Judges. It is then a matter of enforcement that may be lacking for action to be taken as provided in the Judges' Code of Ethics 1994 and if need be for the removal of Judges. This is a matter for the Chief Justice, together with the President of the Court of Appeal and the Chief Judge of Malaya and the Chief Judge of Sabah and Sarawak respectively to seriously enforce the provisions of the Judges' Code of Ethics 1994.

25. In respect of the judicial officers, they are civil servants and they come within the public service under Article 132(1)*(b)* of the Federal Constitution, that is, Judicial and Legal Service. Their disciplinary authority is the Judicial and Legal Service Commission (Article 138 read with Article 144) which comprise the Attorney General and Judges appointed by the Yang di-Pertuan Agong after consultation with the Chief Justice. However, the Chairman shall be the Chairman of the Public Services Commission, Be that as it may, the Chief Registrar of the Federal Court, the most senior civil servant in the Judicial Department is the head, and in him or her lies the responsibilities of overseeing the conduct of the judicial officers and if there is any misbehaviour, to report to the Judicial and Legal Service Commission, in consultation with the respective Chief Judge of the High Court, for appropriate action to be taken, as the case may be. With the exception of the Chief Registrar and other judicial officers of the Federal Court, the judicial officers of the High Courts and Subordinate Courts in Malaya and in Sabah and Sarawak in their judicial role, are responsible to their respective Chief Judge. The nature of the work of the judicial officer is essentially judicial in character and is different from the work of other civil servants and hence, the need for a separate Commission. In the circumstances, we do not see the need to set up a Judicial Complaints Tribunal.

(c) Judicial and Legal Service Commission

26. It may be appropriate for the Commission to consider also the composition of the Judicial and Legal Service Commission. The Commission is more concerned with Article 138(2)*(c)* of the Federal Constitution which reads:

"The Judicial and Legal Service Commission shall consist of –

a) .....

b) .....

c) one or more other members who shall be appointed by the Yang di-Pertuan Agong, after consultation with the Chief Justice of the Federal Court, from among persons who are or have been or are qualified to be a judge of the Federal Court, Court of Appeal or a High Court or shall before Malaysia Day have been a judge of the Supreme Court.".

27. The officers in the judicial service comprise the Chief Registrar, Registrars, Deputy Registrars, Senior Assistant Registrars, Assistant Registrars, Sessions Court Judges and the Magistrates. The Registrars, Deputy Registrars, Senior Assistant Registrars, Assistant Registrars, Sessions Court Judges and the Magistrates are under the jurisdiction of the Chief Judge of the respective High Court. The appointment and promotion of these officers are within the jurisdiction of the Judicial and Legal Service Commission.

28. In the circumstances, it would only be appropriate that the Chief Judge of Malaya, and the Chief Judge of Sabah and Sarawak be appointed as members by virtue of their office and hence the need to amend the provision in the Federal Constitution accordingly. This would give meaningful effect to the role of the respective Chief Judges vis-à-vis judicial officers.

29. In addition thereto, we would suggest that for transparency, accountability and good governance and to give effect to the role of the Judicial Appointments Commission, the appointment of the members, other than the Chairman and the Attorney General, by the Yang di-Pertuan Agong should be made after consultation with the Judicial Appointments Commission instead of the Chief Justice (who will in any event be Chairman, as proposed).

(d) Article 121 (1) of the Federal Constitution – Judicial Power of the Federation

30. Broadly defined, the 'judicial power' is the power which every sovereign authority must of necessity have, to decide controversies between its subjects or between itself and its subjects, whether the rights relate to life, liberty or property (see **Huddart Parker Pty. Ltd. v. Moorehead [1908 – 1909] 8 CLR 330.**

31. In Malaysia, prior to its amendment, Article 121(1) of the Federal Constitution provided that *"subject to Clause (2) the judicial power of the Federation shall be vested in two High Courts of co-ordinate jurisdiction and status....and such inferior courts as may be provided by federal law"*. In 1988, following the decision in **Public Prosecutor v Dato' Yap Peng [1987] 2 MLJ 311**, this provision which vested the judicial power in the High Courts of Malaya and Borneo, was amended. Article 121(1) now reads:

> *"121(1) There shall be two High Courts of co-ordinate jurisdiction and status.....and such inferior courts as may be provided by federal law and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law."*.

32. The Supreme Court's majority decision in Dato' Yap Peng's case is the most important local case on the *'judicial power'* point and it appeared to have catalysed the amendment to Article 121(1) of the Federal Constitution. Abdool Cader, SCJ, in the majority judgement stated in Dato' Yap Peng's case on 'judicial power' at page 11:

> *".... Article 121(1) provides that subject to clause (2) the judicial power of the Federation shall be vested in two High Courts, namely, the High Court in Malaya and the High Court in Borneo, and in such inferior courts as may be provided by federal law. Judicial power may be broadly defined as the power to examine questions submitted for determination with a view to the pronouncement of an authoritative decision as to rights and liabilities of one or more parties. It is virtually impossible to formulate a wholly exhaustive conceptual definition of that term, whether inclusive or exclusive, and as Windeyer J. observed in the High Court of Australia in the Queen v. Trade Practices Tribunal; Ex parte Tasmanian Breweries Pty Ltd [1970] 123 CLR 361 (at page 394): 'The concept seems to me to defy, perhaps it were better to say transcend, purely abstract conceptual analysis,'and again (at page 396) that it is really amorphous'. In Liyanage & others v. The Queen [1967] 1 AC 259 Lord Pearce in delivering the judgement of the Privy Council, in the course of observing that the Judiciary Committee did not find it necessary to attempt the impossible task of tracing where the line is to be drawn between what will and what will not constitute an interference with the judicial power, said (at page 290):*

'Each case must be decided in the light of its own facts and circumstances, including the true purpose of the legislation, the situation to which it was directed, the existence (where several enactments are impugned) of a common design, and the extent to which the legislation affects, by way of direction or restriction, the discretion or judgement of the judiciary in specific proceedings. It is therefore necessary to consider more closely the nature of the legislation challenged in this appeal.'".

33. Be that as it may, is it necessary now to have a look again at the amended Article 121(1) of the Federal Constitution? Abdul Hamid Mohamed, PCA (acting Chief Justice), in **Public Prosecutor v. Kok Wah Kuan** [2008] 1 MLJ at pages 14-15, in considering the effect of the amendment states:

"After the amendment, there is no longer a specific provision declaring that the judicial power of the Federation shall be vested in the two High Courts. What it means is that there is no longer a declaration that 'judicial power of the Federation' as the term was understood prior to the amendment, vests in the two High Courts. If we want to know the jurisdiction and powers of the two High Courts, we will have to look at the federal law. If we want to call those powers 'judicial powers', we are perfectly entitled to. But, to what extent such 'judicial powers' are vested in the two High Courts, depends on what federal law provides, not on the interpretation of the term 'judicial power' as prior to the amendment. That is the difference and that is the effect of the amendment. Thus, to say that the amendment has no effect does not make sense. There must be. The only question is to what extent?".

34. Whilst the words *'judicial power'* are not defined, nevertheless, the said words had been entrenched in the Federal Constitution when they were adopted and approved. We, therefore, do not see the need for the amendment to be made to Article 121(1) of the Federal Constitution other than to overcome the decision of the Supreme Court in Dato' Yap Peng's case on the judicial power issue. We are therefore of the view that the status quo should

be maintained so that the Judiciary is free once again to live up to the highest expectations of society for all time. There will be no room for concern on the judicial power issue.

35. Perhaps it will be appropriate to quote the views of Prof. Shad Saleem Faruqi in his article entitled **Reflecting on the Law** in The Star dated 16 April 2008 on the need to amend Article 121(1) of the Federal Constitution:

> *"The amendment to Article 121(1) has created the wrong perception that the Malaysian Executive wishes to silence the Judiciary. All Judges feel humiliated. Some have accepted their truncated role as mere agents of Parliament and not as independent pillars of the Federal Constitution. Others insist that their review powers are intact. There is division within the ranks.".*

36. In the circumstances, we would recommend that the Government should have a relook at Article 121(1) of the Federal Constitution and amend it to its original form.