

## JUDICIAL APPOINTMENTS COMMISSION AS I SEE IT

By

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(Former Chief Justice and a Member of the Commission)

I was the Chief Justice when the proposal for the establishment of the Judicial Appointments Commission was made. I had given my comments on the contents of the then proposal. The proposal, with important modifications, to me, became law after I retired and I was appointed a member of the Commission along with three other members, namely Tan Sri Steve Shim, former Chief Judge (Sabah and Sarawak), Tan Sri Ainum Mohd. Said, former Attorney General and Tan Sri L.C. Vohrah, former High Court Judge. We were appointed for two years as provided by the law. We are now on our second term. The other members are the *ex officio* members as provided by the Act, with the Chief Justice of Federal Court Malaysia as the Chairman.

When I was appointed a Member, I took the position that I would work within the system. After all, I was appointed by the law with powers given by the law and to that extent only.

I was also of the view that a member should not be, and should not be seen to be, championing a particular person too much, whether for appointment or promotion. One of my reservations about the Commission when it was first mooted with the then proposed membership, was that it might be a conduit for lobbying for appointment as Judges. So, the most that I would say is “What do you think of so-and-so?” In case of promotion, when someone is going to be bypassed, my question would be, “What is wrong with him?” Of course, I would give my view about them but I would not go so far as to plead with other members to agree to appoint or promote them.

I was also of the view that a person should be a Judicial Commissioner first before being made a Judge of the High Court and he should serve as a High Court Judge first before he becomes a Judge of the Court of Appeal.

Let me explain why. Almost every appointment or promotion has a “probation” period before a person is “confirmed” on the appointment or promotion. The purpose is to observe whether the person can really do the job as is expected of him. Academic qualification is no guarantee that a person will be an able and good worker. I have seen that from experience. Similarly, a person who appears to be suitable for the job may turn out differently due to some factors that we are not aware about him.

In the case of appointment as a judge, the “probation period” is even more important. First, judgeship is a “permanent” appointment. Once appointed, he may not be disciplined except as provided by Article 125 of the Federal Constitution. As a Judge, he enjoys what goes with the independence of the Judiciary, including the provision that his salary may not be reduced. In any event, “prevention is always better than cure”.

Secondly, a person may have a very impressive academic qualification, had spent years teaching at the university or, had even been a successful litigation lawyer but he suddenly finds that the work of a Judge is very different from his what he had been doing and it does not suit him. On the other hand, a person may simply not have the aptitude required of a Judge.

Besides, there is also the administrative consideration. There may be a period when the Judiciary needs more judges to clear up the backlog but after a few years, there is no need for such a big number of judges anymore. The appointment of Judicial Commissioners [is the answer.

Regarding direct appointment to the Court of Appeal, the work of a trial judge is very different from the work of an appellate judge. A trial judge spends a major part of his time (my estimate is 80%) ascertaining the facts either through oral or documentary evidence. He has to sit patiently, listen to the evidence adduced orally and (until recently) write down in long hand the evidence of every witness. The most frustrating of all is the evidence of Investigating Officers which could take days to record, repeating similar things that he had done during the investigation, identifying every mark and signature on every document and exhibit as well as every person he handed them to and received them from. An appellate court judge does not have to deal with witnesses. In a High Court trial, a normal criminal case would have hundreds of pages of recorded notes, not to mention the exhibits. Then comes the sifting of the evidence to arrive at the finding of facts. This requires experience. Only then does he determine the law and apply it to the facts to come to a conclusion. In civil cases, documentary evidence may run into thousands of pages.

An appellate Judge is spared of this ordeal. He reads the judgment, may refer to parts of the recorded evidence, listen to the submissions of counsels and decide whether the trial Judge is right or wrong. An appellate Judge who had been a trial judge would understand the nature of work of the trial Judge and would be slower to find fault with a trial Judge. When debating this issue, I usually say that "Even Eusoff Abdoolcader was appointed a High Court Judge first." The other example I usually give is about a person who was appointed a Federal Court Judge directly. Even though he had been a very senior officer and was noted for prosecution, an arrangement was made for him to spend part of his time hearing High Court cases to give him experience. This happened when Tun Suffian was the Lord President.

Of course, in very exceptional cases, an exception could be made, even though I would be very reluctant to support it. Since

the establishment of the Commission, no one was appointed a Judge and no one was appointed an Appellate Court Judge, directly.

The major part of our duties involved appointment and promotions. We wanted to attract as many people who are qualified, able, suitable and prepared to work hard, for the job. To practising lawyers, we made it clear that they should not expect the appointment to be a semi-retirement. So, a website was opened for interested persons to apply besides writing directly to the Chief Justice or the Chief Registrar. The Chief Justice, the Chief Judges also looked around for suitable candidates. Some of us also suggested a few names.

As for officers of the the Judicial and Legal Service, Chief Judge Malaya and Chief Judge Sabah and Sarawak respectively would know the candidates who are on the judicial side. As for those in the legal side, we would rely on the recommendation of the Attorney General. There is a slight snag here. Quite often the Attorney General or even the Government did not want an officer to be “released” because his services were required where he was. This leads to an anomaly: a good officer is denied appointment as a Judicial Commissioner and later Judge because he is good and therefore cannot be released. The Judiciary is denied of a good material for Judgeship.

While we understand the problem, we tried to persuade the Attorney General to release such officers, at least a few of them. As for those who had “suffered” because “they were good” we gave special consideration when it came to confirmation as a Judge of the High Court or even promotion to the Court of Appeal later provided they had proved that they were good as Judges too. Similar consideration is also given to very senior members of the Bar who were appointed Special Commissioners.

A candidate's background, qualification, experience and suitability including integrity would be thoroughly checked. At the meeting the Chief Justice would brief us on each candidate. Members wanting to know more about the candidates would ask questions, followed by a free discussion and secret voting. While seniority is taken into account, integrity, suitability and their track records in their previous jobs would form important factors considered by the Commission. In the case of lawyers, the Chief Justice would usually consult the Bar Council as well even though the law does not require him to do so.

For appointment of High Court Judges, the list of Judicial Commissioners would be prepared according to seniority. The statistics regarding the number of cases disposed of by them, the number of judgments they have written, reported and unreported, the number of judgments pending are also made available. Statistics does not tell the whole truth. So, relying wholly on figures may may not give accurate results. Reports by the respective Chief Judge is important. All factors are taken into account. Here too, most of the time the views of the members are quite unanimous.

Regarding the appointments of the Chief Justice, the President of the Court of Appeal and the the Chief Judge (Malaya) made last year, of course the choices were more limited. However, we not only considered the immediate candidate in terms of seniority. There is an additional factor involved here: administrative capability. However, I must add here that, to me, a Chief Justice is a chief justice first an a chief executive officer second.

Having been a member for three years, speaking personally, I am happy to state that the Commission has served its purpose very well, decisions are mostly unanimous and that the Government has respected the Commission's recommendations. In short, it is working pretty well and it is worth having it.

The work of the Commission is not only confined to appointments and promotions of Judges. Equally important, is to keep an eye on the performance and behavior of Judges. At almost every meeting these issues are briefed, discussed or somehow raised. The Commission members are unanimous that Judges who don't perform and/or misbehave should be disciplined, the type of which depends on the seriousness of its nature. Hence during its first term, two High Court Judges were "advised" to resign. Indeed, in appropriate cases, the Commission is prepared to recommend that a Judge be appear before the Tribunal as provided by the Federal Constitution. On a number of occasions, the Chief Justice, the President of the Court of Appeal or the respective Chief Judge had (sometimes at the request of the Commission) "talked" to the Judges concerned and reported to the Tribunal at the next meeting.

Other matters regarding administration of Justice like construction of court houses, the problem of backlog, disposal of cases, staffing, equipments, training, salaries and promotion of not only Judges but also of Judicial and Legal Officers were always on the agenda. The Commission itself obtained a grant for training of Judges which was used to train judges, including in mediation, either by inviting foreign Judges to Malaysia to train them or by sending our Judges to be trained abroad. Thanks to the efforts of Tun Zaki and his colleagues and the support and cooperation of the Judges themselves, Malaysian Courts now stand as one of the best in terms of speedy disposal in the world, a fact recognized by the World Bank.

Lest it is said that it is achieved at the expense of justice, I would like to place on record that the non *ex-officio* members of the Commission are very concerned and very vocal about it. While it is admitted that, given less pressure to produce the quantity, the quality could improve, we found that, more often than not, those

who produce low quantity also produce low quality products and *vice-versa*. It is like a low horsepower engine, how much power can it generate?

When I was Deputy Registrar, I initiated the removal of the power to issue money lenders' license from the Chief Registrar of the Federal Court. It was transferred to the Local Governments. If I had my way, I would have revised the Court's Act 1948 too to:

- i). repeal the provisions regarding the Penghulu's Court;
- ii). provide that appointments of Magistrates made by the Yang Di Pertuan Agong, and not by the Ruler of a State;
- iii). abolish provisions regarding Justices of the Peace or at least remove it from the Act.

I initiated the same when I was Chief Justice but my term of office was too short for me to see it through. Anyway, Penghulu's Court has been abolished but the other two remain in the statute. I have brought up the issue again and work is in progress though at initial stage. Due to lack of space, I shall not give my reasons here except to say that, regarding the appointment of Magistrates, since Merdeka, the Judiciary is a Federal matter, Magistrates are Federal Officers and there is no reason why they should be appointed by the States. Regarding Justice of the Peace, they were never made to do the work of Magistrates by the British who introduced the institution, as in England, indeed I would strongly argue that they are unsuitable for the job, especially in this age of professionalism.

While our Judiciary may not perfect (show me one which is!), I think that honest and reasonable Malaysians should be happy with and proud of it.

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