

Reform Judicial Appointment Process to Improve Judicial Independence

At the launch of a research report entitled “Safeguarding Judicial Independence: Appointment, Promotion and Removal of Judges in Malaysia” today, the Coalition for Clean and Fair Elections (BERSIH 2.0) calls for reforms to be made to the appointment process of judges at both the superior and subordinate courts to ensure a merit-based, non-discriminatory and independent appointment process.

The research paper is commissioned by BERSIH 2.0 and written by Serene Lim.

The report reveals that while the appointment process of judges has improved in recent years after the establishment of the Judicial Appointment Commission (JAC) in 2009, there is still much room to be improved in the process to safeguard judicial independence. Among the key weaknesses highlighted by the report include:

- The Prime Minister retains the sole discretion to appoint five out of nine members of the JAC and may, in fact, statutorily reinforce and validate the power of the executive in key aspects of the judicial appointments process.
- Members of the JAC lack security of tenure as the Prime Minister is given the power to revoke the appointment of any of the four eminent persons without assigning any reason.
- The lack of binding power of the JAC’s recommendation for each vacancy over the Prime Minister, who is empowered to reject names, ask for further recommendations without citing any reason and to put forward names not recommended by the Commission.
- The Prime Minister alone, or the Chief Justice in consultation with the Prime Minister, are given the constitutional prerogative to initiate removal proceedings by petitioning to the Yang di-Pertuan Agong to appoint an ad-hoc tribunal. There is a lack of transparency in the appointments of the members to the ad-hoc tribunal and the entire inquiry process.
- The appointment of judges to the subordinate courts is not a constitutional appointment nor does it fall within the purview of the JAC Act. Many safeguards for judicial independence under the Federal Constitution and the JAC Act are not accorded to the subordinate courts. They are regarded as legal officers within the purview of the Judicial and Legal Service Commission which supplies the interchangeable legal personnel who staff various executive departments as well as judges for the subordinate courts. Entrusting the appointment, transference and removal of judges to the Magistrates and Sessions Court within an executive department represents an anomaly where the executive is vested with the exclusive power to perform judicial roles in the subordinate courts – an anathema to the logic of the separation of powers.

Adopting the recommendations of the report, BERSIH 2.0 calls on the government to initiate reforms to the appointment process of judges by:

On the Judicial Appointments Commission

1. The Federal Constitution should be amended to give JAC constitutional status. The composition of the nine member-JAC should be restructured as follows:
 - a. Four ex-officio members from the judiciary (Chief Justice of the Federal Court, President of the Court of Appeal, Chief Judge of the High Court in Malaya and the Chief Judge in Sabah and

Sarawak) representing the judicial perspective as it is now;

- b. Three members to be selected by the Bar Council, Sabah Law Society and the Advocates Associate of Sarawak representing the three legal practitioner bodies;
- c. Two lay members from civil society or academia to be selected by the seven other members in the JAC representing the perspective of public and civil society through open application and a clearly defined selection process.

2. The Judicial Appointments Commission Act 2009 should be amended to limit the Prime Minister's discretion to reject nomination by the JAC to only one time for each vacancy and the Prime Minister must provide his reasons for doing so;

3. The tenure for members of the JAC should be fixed for up to four years;

4. Members of JAC may serve one term only and can be reappointed for one additional term provided that the total two terms are not served consecutively;

5. Removal of the members of the JAC may only be done for misconduct or incapacity and overseen by a disciplinary tribunal with safeguards in place to enable the members in question to challenge allegations against them.

6. While acknowledging the need for confidentiality, important information relating to the manner in which the Commissioner discharges its mandate should be made public on website or through the annual report to ensure the broader objective of holding the JAC accountable.

7. Recommended information to be made public are numbers of applicants, the institutions and public office holders involved and their respective roles, reasons for rejection of nominees by the Prime Minister, and the procedures followed in the appointments, promotions, interviews and assessments. These should be made public on websites or through annual reports.

On Appointment and Promotion of Judges

1. To put in place mandatory consultation on the shortlisted nominees with the Bar Council, the Sabah Law Society, the Advocates Association of Sarawak, the Attorney General of the Federation, the Attorney General of a State legal service for the nominations of judges to the Court of Appeal and Federal Court;

2. Diversity and minority representation to be taken into consideration in the process of assessment and selection of judges.

On Appointment of Judicial Commissioners

1. The JAC's mandate should also include the nomination for appointment of Judicial Commissioners to the Yang di-Pertuan Agong and not by the Prime Minister. Article 122AB of the Federal Constitution should be amended to provide the power to the JAC.

2. Judicial Commissioner may be appointed only for specified purposes and for no more than a

single term of two years.

On Removal of Judges

1. Article 125(3) of the Federal Constitution be amended to provide that a tribunal proceeding for the removal of judges may be appointed by the Yang di-Pertuan Agong on the advice of the Judicial Appointments Commission;
2. Clear rules and grounds for the composition of the tribunal, power to appoint members, the procedure of tribunal proceedings including evidential requirement, right to appeal against the decision of the tribunal, etc should be developed in consultation with key stakeholders.

On Appointment of Judges to the Subordinate Courts

1. The judicial and legal services be separated into a judicial service and a legal service, with the establishment of a new Judicial Service Commission under an amended Article 138 and a new Legal Service Commission to be established under a new Article 138A;
2. A new Judicial Service Commission Act be enacted to provide legal foundation for the Judicial Service Commission and clear rules and procedure for the appointments, promotions and transferences of judges to the subordinate courts;
3. Officers from both judicial and legal services should not be transferable, except if on a permanent basis.

**Released by,
The Steering Committee of BERSIH 2.0**

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