

**A COMPARATIVE ANALYSIS OF THE JUDICIAL
APPOINTMENT COMMISSION'S EFFECTIVENESS IN
LIMITING EXECUTIVE INFLUENCE OVER THE
JUDICIAL APPOINTMENT PROCESS IN MALAYSIA
AND THE UNITED KINGDOM**

Mark Goh Wah Seng*

Introduction

In 2009, Malaysia established a Judicial Appointment Commission¹ to 'mainly... receive applications from qualified persons for the selection of judges to the superior court in Malaysia and to select suitably qualified persons who merit appointment as judges of the superior court for the Prime Minister's consideration.'² A similar Judicial Appointment Commission was created in the United Kingdom in 2005.³

This article aims to analyse comparatively the Judicial Appointment Commissions (hereinafter referred to as "JAC") of Malaysia and the United Kingdom from a constitutional perspective, focussing on the possible impact these commissions may have on judicial appointments. This article examines and analyses the following areas: firstly, the reasons that led to the establishment of

* Senior Lecturer in Law, HELP University.

¹ The Act [P.U.(B) 43/2009] received the Royal Assent on 6 January 2009 and was subsequently gazetted on 8 January 2009. It came into force on 2 February 2009.

² *Functions of Judicial Appointment Commission*, Judicial Appointments Commission <http://www.jac.gov.my/index.php?option=com_content&view=article&id=54&Itemid=14&lang=en> accessed 12 March 2012.

³ United Kingdom's Judicial Appointment Commission was created by the Constitutional Reform Act 2005 (UK). Chapter 4 was passed on 24 March 2005 as part of a bigger reform of the Judiciary in the UK. Please refer particularly to Part 3 entitled 'The Supreme Court' and Part 4 entitled 'Judicial Appointments and Discipline.' Other reforms created by the Constitutional Reform Act 2005 (UK) include the creation of the Supreme Court and the alteration of the Lord Chancellor's position. See <<http://www.legislation.gov.uk/ukpga/2005/4/introduction>> accessed 12 March 2012.

these JACs. It also reviews the JACs established in both these jurisdictions and the possible reason(s) for them. Finally and more importantly, this article discusses the impact which the respective JACs have on the influence of the Executive in Malaysia and the United Kingdom over the judicial appointment process. Have the respective JACs effectively reduced the influences of their Executives over the appointment of judges or are they merely acting as a gloss over the current judicial appointment system?

Reasons which led to the creation of the Judicial Appointment Commission in Malaysia and the United Kingdom

The reasons and events which led to the creation of the JAC for both Malaysia and the United Kingdom are both distinctively different. The event which brought about the establishment of the JAC in Malaysia was the public exposure of the "Lingam video clip".⁴ The revelation prompted the Malaysian Government to set up a Royal Commission of Enquiry (hereinafter referred to as the "Royal Commission").⁵

⁴ 'SPECIAL REPORT: The Lingam tape' (*Malaysiakini*, 24 September 2007) <<http://www.malaysiakini.com/news/72772>> accessed 13 March 2012. The online news article commented on the video as follows: 'The eight minute video, taken in 2002, shows lawyer VK Lingam having a telephone conversation with the then Chief Justice Ahmad Fairuz on the promotion of judges.'

⁵ 'Commission of Enquiry on 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' (Percetakan Nasional Malaysia, 2008). The Royal Commission was established pursuant to the Commissions of Enquiry Act 1950. Consisting of 3 volumes, it was presented to the Yang Dipertuan Agong on 9 May 2008.

The Royal Commission was given the task to investigate allegations of purported brokering of judicial appointments and promotions (particularly senior appointments) by certain groups or private individuals.⁶

Upon completion of the enquiry, the Royal Commission found that there was indeed evidence of brokering of judicial appointments.⁷ The Royal Commission proceeded to recommend for the establishment of a JAC,⁸ which the then Prime Minister Abdullah Badawi supported and whose government proposed in Parliament.

Unlike Malaysia (where the JAC was created as reaction to an event), the establishment of the United Kingdom's JAC was seen as a proactive and anticipatory step towards compliance with the European Convention of Human Rights, particularly Article 6(1) and the strengthening of the doctrine of separation of powers.

⁶ 'Panel finds Lingam video clip authentic' (*The Star Online*, 10 May 2008) <<http://thestar.com.my/news/story.asp?file=/2008/5/10/nation/21213763&sec=nation>> accessed 24 August 2010. See also, 'Royal Commission on Lingam video clip: Businessman 'showed disrespect to panel' (*The Malaysian Bar*, 15 January 2008) <http://www.malaysianbar.org.my/bar_news/berita_badan_peguam/royal_commission_on_lingam_video_clip_businessman_showed_disrespect_to_panel.html> accessed 24 August 2010; Ambiga Sreenevasan, 'Press Statement: Judicial Appointments Commission must be founded on separation of powers and transparency' (*The Malaysian Bar*, 3 October 2008) <http://www.malaysianbar.org.my/press_statements/press_statement_judicial_appointments_commission_must_be_founded_on_separation_of_powers_and_transparency.html> accessed 24 August 2010.

⁷ *ibid* (n 5) Chapter 3 Part 3, [19.7], [20.24]-[20.25], [20.34] and [20.36].

⁸ *ibid* (n 5) Chapter 4 'Recommendations and Postscript', [3]-[4].

The decisions of the European Court of Human Rights in *Starrs v Procurator Fiscal, Linlithgow*⁹ and *McGonnell v United Kingdom*¹⁰ substantiate United Kingdom's move towards this direction. In both these cases, the European Court of Human Rights was of the opinion that the positions of the 'convening officer central to prosecution and closely linked to prosecuting authorities' and the Bailiff of Guernsey (which is similar to that of the position of the Lord Chancellor prior to the enactment of the Constitutional Reform Act 2005 in the UK) were in breach of Article 6(1) of the European Convention of Human Rights.¹¹

⁹ [2000] HRLRL 191; (2000) 8 BHRC 1, where the Court of Sessions in Scotland held that the Executive's systematic reliance on temporary judges who could be discharge at any time without challenge or explanation was inconsistent with an independent judiciary and the right to an impartial trial under Art 6(1) of the ECHR. In *Findlay v United Kingdom* (1997) 24 EHRR 221(courts martial); RJD 1997-I 263 the court at para 73 established that for a tribunal to be considered 'independent', regard must be had, inter alia, to the manner of appointment of its members and their term of office, the existence of guarantees against outside pressures and the question whether the body presents an appearance of independence...As to the question of 'impartiality' there are two aspects of this requirement. First, the tribunal must be subjectively free of personal prejudice or bias. Secondly, it must also be impartial from an objective viewpoint, that is, it must offer sufficient guarantees to exclude any legitimate doubt in this respect...The concept of independence and objective impartiality are closely linked.

¹⁰ In *McGonnell v United Kingdom* (2000) 30 EHRR 289, the court considered the concept of independence and objective impartiality together as both these conditions are closely linked. The court found that there was a violation of Article 6(1) as the Bailiff who presided over the Royal Court in the legal proceedings giving rise to this case presided also (as deputy Bailiff) over the States of Deliberation in 1990 when DDP6 was adopted. *McGonnell* and *Findlay* were applied recently in the case of *R (on the application of Barclay and others) v Secretary of State for Justice and the Lord Chancellor and others* [2008] EWHC 1354.

¹¹ Article 6(1) ECHR provide: 'In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law. Judgment shall be pronounced publicly by the press and public may be excluded from all or part of the trial in the interest of morals, public order or national security in a democratic society, where the interests of juveniles or the protection of the private life of the parties so require, or the extent strictly necessary in the opinion of the court in special circumstances where publicity would prejudice the interests of justice.' Human Rights Constitutional Documents <http://www.hrcr.org/docs/Eur_Convention/euroconv3.html> accessed 18 September 2010).

In view of these cases and the anomalous position of the Lord Chancellor, the United Kingdom's government, was prompted to make various reforms to the judiciary¹² (which includes the establishment of the JAC)¹³ as a step towards complying with the Human Rights Act 1998 (particularly Article 6(1) of the European Convention of Human Rights). The second reason for reforming the judicial appointment process (which includes the creation of the JAC) stems from the desire to conform to the doctrine of Separation of Powers. As Kate Malleson succinctly puts it:

...the Constitutional Reform Act's removal of the highest court from Parliament, establishment of a free-standing Supreme Court, and overhaul of the Lord Chancellor's responsibilities for judicial appointments reflect [the] growing awareness of the importance of [the] separation of powers principles.¹⁴

¹² Tom Bingham, 'The old order changeth' (2006) 122 (Apr) 211, 223. Bingham states that: 'A detailed study of the office funded by the Economic and Social Research Council concluded in 2001 that the [Lord Chancellor's] office in its present form was "untenable"; that the Lord Chancellor's multiple roles were no longer "sustainable", that he should relinquish his role as judge and that it was unacceptable for him to sit as a judge.'

¹³ A speech given by the Hon Mr Justice Beatson, Justice of the High Court, 'The 31st Blackstone Lecture', delivered in Pembroke College, Oxford on 16 May 2009. See <www.judiciary.gov.uk/NR/.../justicebeatsonblackstonelecture160509.pdf>. See also Jack Beatson, 'Reforming an unwritten constitution' (2010) 126 (Jan) LQR 48, 71. Beatson commented that: '...when the changes were made to the office of Lord Chancellor, there was a debate about the need to protect the independence of the judiciary from government. The Government maintained that the reform would enhance it.'

¹⁴ Kate Malleson's Oral evidence to Justice Committee of the Canadian Parliament 2004 cited in Mary L Clark, 'Introducing a Parliamentary Confirmation Process for New Supreme Court Justices: Its Pros and Cons, and Lessons Learned from the US Experience' [2010] PL 464. However, one should take note of the opposing view that the doctrine of Separation of Powers 'was primarily a French invention. It had never been part of the British Constitution, or the Westminster model. If it were, the executive, including the Prime Minister, would have to be removed from the House of Commons.' Hansard, HL col.127 (8 September 2003). In spite of the differing view, the government went ahead with the judicial reform. See also C Elliot and F Quinn, *English Legal System* (10th edn, Pearson Longman 2009) 154.

The other reasons for establishing the JAC are pre-emptive in nature i.e. to ensure that proper safeguards are created in anticipation of possible future political manipulation of the judicial appointment process.¹⁵

1 for Malaysia and 2 for the United Kingdom

Another difference (albeit a small one) between the JACs of both these countries is the number of JACs which have been created. There is one JAC (created by the Judicial Appointments Commission Act 2009)¹⁶ in Malaysia. It is charged with selecting judges to the superior courts i.e. from the High Court (which includes Judicial Commissioners) to the highest appellate court i.e. judges of the Federal Court.¹⁷

On the other hand, the creation of the JAC in the United Kingdom forms part of a bigger reform to the judicial arm of the United Kingdom.¹⁸ Due to the United Kingdom's unique history and legal position,¹⁹ the United Kingdom (unlike

¹⁵ Kate Malleon, 'Creating a judicial appointments commission: which model works best?' [2004] PL 102, 104-105.

¹⁶ The Act received its Royal Assent on 6 January 2009, was gazetted on 8 January 2009 and came into operation on 2 February 2009 via P.U.(B) 43/2009. A bill was passed in the Dewan Rakyat vide DR 20/2010 entitled the Judicial Appointments Commission (Amendment) Act 2010 (Mal) to enlarge the definition of "judges of the superior courts" to include judicial commissioners.

¹⁷ The intention of the Judicial Appointment Commissions Act 2009 (Act 695) (Mal) can be gleaned from its preamble which reads as follows: 'An Act to provide for the establishment of the Judicial Appointments Commission in relation to the appointment of judges of the superior courts, to set out the powers and functions of such Commission, to uphold the continued independence of the judiciary, and to provide for matters connected therewith or incidental thereto.'

¹⁸ The Constitutional Reform Act 2005 (UK) has made a host of amendments and modifications to the legal system of the UK. They include arrangements to modify the position of the Lord Chancellor (Part 2); the establishment of the Supreme Court (Part 3); Judicial Appointments and discipline (Part 4) and the Removal of Judges (Part 5). At the Constitutional Reform Act. See <<http://www.legislation.gov.uk/ukpga/2005/4/contents>> accessed 18 September 2010.

¹⁹ Alisdair A Gillespie, *The English Legal System* (OUP 2007) 190. Gillespie comments that: 'Appointments to the (UK) Supreme Court have to be kept separate because it is a court of the United Kingdom and not England and Wales and the Acts of Union creating the United Kingdom guaranteed that the legal systems of Scotland and Northern Ireland would be preserved as sovereign systems in their own rights, so the United Kingdom court cannot be under the direction of English procedures.'

Malaysia) established two JACs;²⁰ one for selecting candidates for all judicial appointments,²¹ whilst a separate and distinct JAC is responsible for appointing judges to the new Supreme Court.²² Although membership of these JACs differs, nevertheless, both JACs of the United Kingdom adopt an almost identical process in appointing judges.²³

The Degree of Executive Influence on the Judicial Appointment Process in Malaysia and the United Kingdom Prior to the Amendments

In the United Kingdom, appointments of superior court judges are controlled by the executive.²⁴ As Griffith expressed in his book, 'The most remarkable fact about the appointment of judges is that it is wholly in the hands of politicians.'²⁵ Appointments to the then House of Lords and the most senior judicial positions were made by the Queen on the advice of the Prime Minister whilst High Court judges were appointed by the Queen on the Lord Chancellor's²⁶ advice (who is a cabinet minister and is personally appointed by the Prime Minister).²⁷

In Malaysia, the processes of appointing superior court judges (which includes Judicial Commissioners), though codified in the Federal Constitution are

²⁰ *ibid* 188. Gillespie adds that: 'The CRA 2005 places judicial appointments onto a statutory basis. Two schemes, apply for constitutional reasons. The first applies to members of the Supreme Court and the second applies to all judicial appointments. The systems are actually comparable but the principal distinction is that the former is an ad hoc commission that is constituted when a member needs to be nominated whereas the latter will be a permanent body.'

²¹ Constitutional Reform Act 2005 (UK), ss 61-107, Part 4 Judicial Appointments and Discipline.

²² *ibid* ss 23-37, Part 3 The Supreme Court.

²³ The process of selection is governed by ss 25-31 for the Supreme Court and ss 61 -107 of the Constitutional Reform Act 2005(UK).

²⁴ KD Ewing and A W Bradley, *Constitutional and Administrative Law* (14th edn, Pearson Longman) 385. See also Penny Darbyshire, *Darbyshire on English Legal System* (9th edn, Sweet & Maxwell 2008) 420, 432-434; C Elliot & F.Quinn, *English Legal System* (10th edn, Pearson Longman 2009) 154.

²⁵ John Griffith, *The Politics of the Judiciary* (5th edn, Fontana 1997) 8.

²⁶ Supreme Court Act 1981(UK), s10. See also D Kelly and G Slapper, *The English Legal System* (11th edn, Routledge 2010-2011) 400,401.

²⁷ Andy Williams, *UK Government and Politics* (2nd edn, Heinemann 1998) 173.

no different than that adopted in the United Kingdom.²⁸ Even though the Federal Constitution has provided 'an extensive and multi-layered process of consultations between the Executive (Prime Minister), the Yang di-Pertuan Agong and the Conference of Rulers',²⁹ it is the Executive arm that effectively dominates the appointment process.³⁰ In *Re an oral application by Dato' Seri Anwar bin Ibrahim to disqualify a judge of the Court of Appeal*,³¹ the Court of Appeal explicitly stated that in appointing judges under Art 122B of the Federal Constitution,³² the Prime Minister could insist on the appointment of a judge even though the Conference of Rulers has rejected, withheld or even delayed in giving its advice to the Yang di-Pertuan Agong. Similarly, the Prime Minister need not respond to the request from the Conference of Rulers if he decides to revoke the appointment of a judge.³³

²⁸ Article 122AB of the Federal Constitution of Malaysia governs the appointment of Judicial Commissioners whilst Article 122B governs the process of appointment of judges to the Federal Court, Court of Appeal and the High Court.

²⁹ Shad Saleem Faruqi, *Document of Destiny: The Constitution of the Federation of Malaysia* (Star Publication 2008). Please also refer to Article 122AB and Article 122B of the Federal Constitution for the process of appointing superior court judges in Malaysia which include Judicial Commissioners.

³⁰ The Chief Justice, President of the Court of Appeal and the Chief Judge of the High Courts are appointed by the Yang di-Pertuan Agong, acting on the advice of the Prime Minister, after consulting the Conference of Rulers. Article 122B of the Federal Constitution of Malaysia. The Court of Appeal in *Re an oral Application by Dato' Seri Anwar bin Ibrahim to disqualify a judge of the Court of Appeal* [2000] 2 MLJ 481 distinguished between the word 'consult' and 'consent' in the context of Art 122B and held that the word 'consult' merely refers to the seeking of advice, opinion or views of the respective body. The person [Prime Minister in this context] is not compelled to accept the advice, opinion or views that he has received. Conversely, the word 'advise' in Article 122B compels the person [the Yang di-pertuan Agong in this case] to accept the advice given by the Prime Minister.

³¹ [2000] 2 MLJ 481.

³² Article 122B of the Federal Constitution (Mal) is entitled 'Appointment of judges of Federal Court, Court of Appeal and of High Court. 'It is divided into six subsections.

³³ *Re an oral Application by Dato' Seri Anwar bin Ibrahim to disqualify a judge of the Court of Appeal* [2000] 2 MLJ 48 as per the judgment of His Lordship Lamin PCA.

The effectiveness of the JACs in limiting the influence of their Executives over Judicial Appointments

The Malaysian experience

The Malaysian government has declared that upon its creation, the JAC will limit the influence of the Executive over judicial appointments thereby restoring the independence of the judiciary.³⁴ However, the result was different. The JAC that was finally established under the Judicial Appointments Commission Act 2009 merely acted as a "thin veil"³⁵ and a further bureaucratic layer for the Prime Minister to exercise his discretion in the appointment process.³⁶

This view can be substantiated by the following reasons:

a) Firstly, the Prime Minister has absolute control over the composition of the JAC. His control over the JAC can be seen from the appointment, tenure and dismissal of members of the JAC.

³⁴ 'PM declares victory for his reforms' (*The Malaysian Insider*, 18 December 2008) <http://www.malaysianbar.org.my/legal/general_news/pm_declares_victory_for_his_reforms.html> accessed 14 October 2010. The newspaper article quoted the then Prime Minister: "With the Judicial Appointments Commission, we will bring back the confidence of the public in the judiciary," [Badawi] added...They will know that there is no corruption or very little of it and will have confidence in our judiciary," [Badawi] said.

³⁵ Tricia Yeoh, 'Restoring Institutional Strength and Separation of Powers' (Perdana Discourse Series 9) <<http://www.themichammandate.org/2009/05/restoring-institutional-strength-and-separation-of-powers/>> accessed 13 March 2012.

³⁶ Baradan Kuppusamy, 'The compromise of reform' (*The Malaysian Insider*, 12 December 2008) <<http://www.themalaysianinsider.com/opinion/article/The-compromise-of-reform/>> accessed 13 March 2012. The article comments that: "The original aim was to eliminate executive influence over the judiciary. Instead of eliminating this influence, the Bar Council said, the bill gives "too much" power to the executive over judicial appointment. It's a double blow, lawyers said. "The judiciary is already subjected to laws passed by parliament and now with the new JAC bill the executive has considerable influence over the appointment of judges."

Members of the commission (which comprises of five Superior Court Judges)³⁷ are appointed by the Prime Minister.³⁸ This is supported by the decision of *Re an oral Application by Dato' Seri Anwar bin Ibrahim to disqualify a judge of the Court of Appeal* which states that the judges of the superior courts are effectively appointed by the Prime Minister.³⁹

Although the Act also requires the Prime Minister to appoint another 'four eminent persons', who are not members of the Executive or other public service after consultations are made with the relevant bodies,⁴⁰ the Prime Minister is not bound by the recommendations of these bodies.

In *Re an oral Application by Dato' Seri Anwar bin Ibrahim to disqualify a judge of the Court of Appeal*, the Court of Appeal distinguished between the word 'consult' and 'consent' which appears in several parts of the Federal Constitution, including the provisions on the appointment of superior court judges.

³⁷ 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. See Judicial Appointment Commission Act 2009, s 5(1) (Mal).

³⁸ *ibid* (n30) and (n33).

³⁹ *ibid* (n30).

⁴⁰ The Commission shall consist of the following members:... (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. See Judicial Appointment Commission Act 2009, s 5(1)(f) (Mal).

The Court of Appeal held that the word 'consult' refers to an act of 'asking the advice or opinion of someone' which the person requesting is not bound to accept whereas the word 'consent' on the other hand denotes an opinion, view or advice which the person requesting must accept.⁴¹

Applying the decision of *Re an oral Application by Dato' Seri Anwar bin Ibrahim to disqualify a judge of the Court of Appeal*, it can be argued that the Executive still controls the appointments of the 'four eminent person' since the Prime Minister only needs to consult the relevant bodies on this appointment.⁴²

Another point of consideration relates to the tenure of the members in the Commission which is submitted is too short to secure any independence in the JAC. Members of the Commission can only hold office for two years with a maximum term of two terms.⁴³ Furthermore, members of the Commission may be revoked by

⁴¹ In *Re an oral Application by Dato' Seri Anwar bin Ibrahim to disqualify a judge of the Court of Appeal* [2000] 2 MLJ 481, His Lordship Lamin PCA emphatically distinguished between the word 'consent' and 'consult' and state that 'To 'consult' does not mean to 'consent'. The Constitution uses the words 'consent' and 'consult' separately... So in the matter of the appointment of judges, when the Yang di-Pertuan Agong *consults* the Conference of Rulers, he does not seek its 'consent'. He merely consults. So when the Conference of Rulers gives its advice, opinion or views, the question is, is the Yang di-Pertuan Agong bound to accept. Clearly he is not. He may consider the advice or opinion given but he is not bound by it. But art 40(1A) of the Constitution provides specifically as to whose advice the Yang di-Pertuan Agong must act upon... Clearly therefore the Yang di-Pertuan Agong must act upon the advice of the Prime Minister. The advice envisaged by art 40(1A) is the direct advice given by the recommender and not advice obtained after consultation.' See also Choo CT and Lucy Chang NW, 'Constitutional Procedure of Consultation in Malaysia's Federal System' [2005] 4 MLJ xiii.

⁴² Baradan Kuppasamy, 'Badawi's 'Toothless Bills' Harm Reform Agenda - Critics' <<http://ipsnews.net/news.asp?idnews=45129>> accessed 13 March 2012. An extract from the article: "Under the JAC the selection is done by a committee, some of whose members are appointed by the government," Sreenevasan told IPS.... Of the proposed nine members of the commission, five would be appointed directly by the government. "Politicians and others connected with the government could end up in the committee and compromise its independence," she said.'

⁴³ Judicial Appointments Commission Act 2009, s 6(2) (Mal).

the Prime Minister at any time without giving any reasons; even before the expiry of the Commissioner's term.⁴⁴

A combined reading of Section 10(1)(f) with Section 5(1)(f) and Section 6(2) of the Judicial Appointment Commission Act 2009 suggests that the Executive will be able to "replace" Commissioners who have made decisions or proposals which are unfavourable to the Executive.⁴⁵

b) The JAC is empowered to 'select suitably qualified persons who merit appointment as judges of the superior court for the Prime Minister's consideration.'⁴⁶ It is noted that the JAC is only empowered *to recommend* [not to appoint] candidates to the Prime Minister. The final decision still lies with the

⁴⁴ The office of a member of the Commission shall be vacated if-- his appointment is revoked by the Prime Minister. S 10(2) Judicial Appointment Commission Act 2009 reads: 'Where the office of a member of the Commission is vacated pursuant to subsection (1), the Prime Minister may appoint any person he deems fit to fill up the vacancy thereby created for the remainder of the term vacated by the member or for the interim period until a new person is appointed to the office or the position held by that member prior to his vacating the office or position.'

⁴⁵ Param Cumaraswamy, 'Judicial Appointments Commission Bill 2008 - A Disappointment' (*Malaysia Today*, 12 December 2008) <<http://www.malaysia-today.net/judicial-appointments-commission-bill-2008-a-disappointment/>> accessed 13 March 2012. The article states that: 'Provisions for the Prime Minister of the day to defend the independence of the judiciary and power conferred on him to appoint and remove any or all the non-judicial members (eminent persons) of the Commission at any time without giving any reasons in essence means that the independence of the judiciary would be dependent on the personality of the Prime Minister in power, in effect the executive arm of the government...the power of the Prime Minister to remove the eminent persons in the Commission at any time without giving reasons pursuant to clause 9(1) virtually gives legal legitimacy for executive dominance over the judicial arm of the government.'

⁴⁶ The functions of the Commission are: (a) to select suitably qualified persons who merit appointment as judges of the superior court for the Prime Minister's consideration;(b) to receive applications from qualified persons for the selection of judges to the superior court;(c) to formulate and implement mechanisms for the selection and appointment of judges of the superior court;(d) to review and recommend programmes to the Prime Minister to improve the administration of justice;(e) to make other recommendations about the judiciary; and (f) to do such other things as it deems fit to enable it to perform its functions effectively or which are incidental to the performance of its functions under this Act. See Judicial Appointments Commission Act 2009, s 21(1) (Mal).

Prime Minister.⁴⁷ This view was affirmed by the recent High Court case of *Robert Linggi v The Government of Malaysia*.⁴⁸

c) Part IV⁴⁹ of the Judicial Appointments Commission Act 2009 describes the selection process of judges. Section 28 provides:

Where the Prime Minister has accepted any of the persons recommended by the Commission, he *may [emphasis added]* proceed to tender his advice in accordance with Article 122B of the Federal Constitution.

This provision allows the Prime Minister (Executive) to indirectly control the selection of judges by not expressly compelling the Prime Minister to accept the recommendations of the Commission. Neither does it expressly provide for a situation when the Prime Minister rejects the Commission's recommendations.⁵⁰ By adopting the ratio of his Lordship Lamin PCA in *Re an oral Application by Dato'*

⁴⁷ Chen Mian Kuang, 'Judicial Appointments Commission: No Representation from the Bar' (*Loyarburok.com*, 16 February 2009) <<http://www.loyarburok.com/2009/02/16/judicial-appointments-commission-no-representation-from-the-bar/>> accessed 15 October 2010. The article commented that: 'The effectiveness of the JAC has already come into question due to the fact that they can only make recommendations to the prime minister; the prime minister is not under any obligation to follow those recommendations... Taken together, the foregoing factors give rise to a strong perception that despite the setting up of the JAC, the ultimate aim of the Government is to retain the status quo. See also N Navaratnam and Wye WW, 'Impact of recent judicial reforms' (*International Law Office*, 20 April 2010) <<http://www.internationallawoffice.com/newsletters/detail.aspx?g=c28c7e23-97f7-41d4-9a41-5acc78046fb4>> accessed 15 October 2010. The article commented that: 'Concerns have also been expressed that the Judicial Appointments Commission may be a lame duck because the prime minister continues to retain absolute discretion over the appointment of judges and may in theory decline to follow recommendations made to him.'

⁴⁸ [2011] 2 MLJ 741, [40] where His Lordship held that '...all JAC do in their function is to recommend to the Prime Minister qualified candidates for judgeship and such recommendations remain as 'recommendations' only in that the Prime Minister's discretion is completely untouched which is as provided in arts 122AB and 122B of the Federal Constitution.'

⁴⁹ Judicial Appointment Commission Act 2009, ss 22-29 (Mal).

⁵⁰ Param Cumaraswamy, 'Judicial reforms must meet the test of constitutionality' *The Sun* (Petaling Jaya, 30 December 2008).

*Seri Anwar bin Ibrahim to disqualify a judge of the Court of Appeal*⁵¹ it is submitted that the word “may” in this context does not compel the Prime Minister to accept the Commission’s recommendations.⁵² Thus, the Prime Minister’s prerogative and powers as set out in Article 122AB and Article 122B of the Federal Constitution remain unaffected.⁵³ Furthermore, the function of the JAC which is limited to only ‘selecting suitably qualified persons who merit appointment as judges of the superior court for the Prime Minister’s consideration’⁵⁴ implies that the final decision on the selection of judges rests with the Prime Minister.

The Prime Minister may also:

...invoke his amending power to provide for such [anomalous] situations⁵⁵ thereby legitimately abusing his powers in the same way as how the former Prime Minister illegitimately abused under article 122B over the appointment of judges. Though the present Prime Minister is well meaning and may not abuse such powers the same cannot be said about future Prime Ministers. Executive dominance over the judiciary will continue to be apparent.⁵⁶

d) There is another method provided for in the Judicial Appointments Commission Act 2009 which legalizes Executive dominance over the JAC. Under Section 37 of the Act, the Prime Minister (Executive) is empowered to amend the same legislation within two years ‘for the purpose of removing difficulties or preventing anomalies’

⁵¹ *ibid* (n30).

⁵² *ibid* (n30).

⁵³ William Leong, ‘Text Speech On Debate Judicial Appointments Commission Bill 2008’ <<http://williamleongjeekeen.blogspot.com/2009/10/text-of-speech-on-debate-judicial.html>> accessed 10 February 2011.

⁵⁴ *ibid* (n46).

⁵⁵ The Prime Minister may, whenever it appears to him necessary or expedient to do so, whether for the purpose of removing difficulties or preventing anomalies in consequence of the enactment of this Act, by order published in the *Gazette* make such modifications to any provisions of this Act as he thinks fit. See Judicial Appointment Commission Act 2009, s 37 (Mal).

⁵⁶ *ibid* (n 50).

by order published in the *Gazette*.⁵⁷ As opposed to the United Kingdom’s aim (which is to strengthen the doctrine of Separation of Powers when it established its JAC), delegating legislative function to the Executive has allowed the Malaysian Executive to indirectly control the JAC which in dilutes the doctrine of separation of powers. This view was affirmed by his lordship Justice David Wong in *Robert Linggi v The Government of Malaysia* where His Lordship had declared that the said provision, Section 37, as null and void as it contravenes the Federal Constitution.⁵⁸

The UK Experience

The influence of the Executive over the JAC in the United Kingdom is considered in three parts. They are the composition of the JAC, its selection process and the creation of a “Judicial Appointments and Conduct Ombudsman” (which considers and deals with any complaints that may arise as regards to appointments of judges).

⁵⁷ The Prime Minister may, whenever it appears to him necessary or expedient to do so, whether for the purpose of removing difficulties or preventing anomalies in consequence of the enactment of this Act, by order published in the *Gazette* make such modifications to any provisions of this Act as he thinks fit. See Judicial Appointment Commission Act 2009, s 37 (Mal).

⁵⁸ [2011] 2 MLJ 741 [45] His Lordship comments: ‘...for s 37 of the Judicial Appointment Commission Act, whichever way one reads it; it gives the power of the Prime Minister to amend any provisions of the Judicial Appointment Commission Act by way of a *Gazette*. Any amendment to the Judicial Appointment Commission Act or for that matter any legislation is an exercise of legislative power. The doctrine of separation of powers embodied in the Federal Constitution dictates that only the Parliament can make or amend laws. Accordingly I am left with no option but to hold that s37 of the Judicial Appointment Commission Act null and void as it contravenes the Federal Constitution. This finding is now of course academic as this provision has a sunset clause of two years and the sun has since set on 9 February 2011.’

a) Members of the JAC

i. Composition

Members of the United Kingdom's JAC differ from Malaysia mainly in two aspects - in relation to its numbers and the appointment process of its members.

Unlike Malaysia (where all commissioners are effectively appointed by the Executive),⁵⁹ the JAC of the United Kingdom limits the dominance of the Executive over its composition by guaranteeing the presence of lay members and the legal profession in the Commission as provided by the Constitutional Reform Act 2005. The members of the Commission comprises 14 members i.e. 5 judges, 5 lay members (including the chair), 2 legal professionals, 1 tribunal member and a lay magistrate.⁶⁰

To strengthen the independence of the JAC in the United Kingdom, the Act has set out the process of appointing its members. Although the Act states that the Commissioners are appointed by the Queen on the Lord Chancellor's⁶¹ recommendation,⁶² the process the Lord Chancellor must follow before submitting his recommendations to the Queen has effectively curtailed his discretion. Under the Act, the Lord Chancellor is compelled to accept the selection made by the Judges' Council for judicial members of the Commission⁶³ and recommendations made by the "Panel" (established under Section 8 of Schedule 12 of the Act) for the remaining members of the Commission.⁶⁴ The Lord Chancellor may however

⁵⁹ *Supra*, refer to sub-point a) under the Heading, 'The Malaysian Experience'.

⁶⁰ Constitutional Reform Act 2005(UK), s 2 Part 1 Schedule 12.

⁶¹ The Lord Chancellor is a Cabinet minister and currently a Member of the House of Commons. See <<http://www.parliament.uk/about/mps-and-lords/principal/lord-chancellor>> accessed 17 March 2011.

⁶² Constitutional Reform Act 2005(UK), s 1 Part 1 Schedule 12.

⁶³ Constitutional Reform Act 2005 (UK), s 7(1) Part 1 Schedule 12.

⁶⁴ Constitutional Reform Act 2005 (UK), s 7(2) read with s 7(3) Part 1 Schedule 12.

control the composition by dismissing members of the JAC, albeit a much limited control.⁶⁵

ii. Tenure

In *Valente*,⁶⁶ the Supreme Court of Canada defined the term "security of tenure" to mean '[an] office [which] is free from all discretionary or arbitrary interference by the Executive or the authority responsible for making appointments.'⁶⁷ Long office tenures often reflect an impartial office, which in turn increases public confidence in the integrity of the judiciary.⁶⁸ Security of tenure can be achieved by the following methods. It may include holding the office for an indefinite term until the person reaches the age of retirement, for a fixed term or on *ad hoc*⁶⁹ coupled with a removal from office only for incapacity or serious misconduct (and not for gross incompetence). It would also include pay and other conditions of employment that cannot be manipulated by outsiders.⁷⁰ Security of tenure forms one of the terms in the judiciary,⁷¹ civil servants⁷² and senior positions in central banks.⁷³

Applying these principles of the security of tenure, it would seem that members of the JAC in the United Kingdom enjoy greater independence since its

⁶⁵ Constitutional Reform Act 2005 (UK), s 15(2)(d) Part 1 Schedule 12.

⁶⁶ *Valente v The Queen* [1985] 2 SCR 673 (Canada).

⁶⁷ *ibid* 698. See also *R v Généreux* [1992] 1 SCR 259, 303 (Canada).

⁶⁸ *Examining Judicial Independence and Security of Tenure of the Office for Judges, Center for accountability and rule of law*, <http://www.carlsl.org/home/index.php?option=com_content&view=article&id=45:joseph-koroma&catid=4:articles&Itemid=23> accessed 13 March 2012. The report states: The appearance of impartiality to the public at large is of vital importance to the integrity of the institution as a whole. In any country, the appearance of impartiality is as important as the impartiality itself... The appearance of impartiality is compromised by the judges' lack of security of tenure, unnecessarily undermining public confidence in the judicial system.

⁶⁹ *ibid* (n 66) 698.

⁷⁰ Willem Buiters, 'What's left of central bank independence?' (Maverecon, 5 May 2009) <<http://blogs.ft.com/maverecon/2009/05/whats-left-of-central-bank-independence/>> accessed 13 March 2012.

⁷¹ *ibid* (n 27) 141.

⁷² Hilare Barnett, *Constitutional and Administrative Law* (7th edn, Routledge Cavendish 2009) 252.

⁷³ *ibid* (n 70).

members are appointed for a longer period (up to 5 years, renewable for a further term of 5 years).⁷⁴ In Malaysia, its members are only appointed for 2 years subject to a renewable period of another 2 years.⁷⁵

b) The Selection Process

The responsibility of selecting senior judges in the United Kingdom lies with the JAC.⁷⁶ Although the Constitutional Reform Act 2005 prescribes different appointment processes for appointing Justices of the Supreme Court (sections 23-31), the Lord Chief Justice and the respective Heads of Division (sections 67-75 and section 96) and the appointment of Lords Justices of Appeal (sections 76-84), these processes are similar.⁷⁷

Whenever any vacancy arises for any positions in the superior court (with the exception of the appointment of the Lord Chief Justice)⁷⁸ the Lord Chancellor (a personal appointment of the Prime Minister)⁷⁹ is obliged to make a recommendation to fill that vacancy. With the exception of the Justices of the Supreme Court (where the Lord Chancellor will convene a selection commission on an *ad hoc* basis⁸⁰), the Lord Chancellor (representing the Executive) cannot request the JAC to convene a

⁷⁴ A person (a) may not be appointed as a Commissioner for more than 5 years at a time, and (b) may not hold office as a Commissioner for periods (whether or not consecutive) totalling more than 10 years. Constitutional Reform Act 2005 (UK) s 13.

⁷⁵ *ibid* (n 43).

⁷⁶ Judicial Appointments Commission, see <<http://www.judicialappointments.gov.uk/about-jac/142.htm>> accessed 27 October 2010. The Constitutional Reform Act 2005 creates a Judicial Appointments Commission that, unlike the first commission, will have a role in the appointing of persons instead of just auditing the process. See also *ibid* (n 19) 188.

⁷⁷ *ibid*. The website states that 'The Constitutional Reform Act 2005(UK) sets out the different processes that must be followed for appointments above High Court level.'

⁷⁸ Subsection (2) (the consultation process) does not apply where the office of Lord Chief Justice is vacant or where the Lord Chief Justice is incapacitated for the purposes of section 16 (functions during vacancy or incapacity). See Constitutional Reform Act 2005, s 69(3) (UK).

⁷⁹ A person may not be recommended for appointment as Lord Chancellor unless he appears to the Prime Minister to be qualified by experience. See Constitutional Reform Act 2005, s 2(1)(UK).

⁸⁰ Constitutional Reform Act 2005 (UK), s 26(5) read with Schedule 8.

panel unilaterally unless he has first consulted the Lord Chief Justice.⁸¹ Such consultation provides a check and balance by the Judiciary over the Executive.

Furthermore, only one name can be recommended by the JAC to the Lord Chancellor⁸² and the Lord Chancellor can only appoint candidates who are recommended by the JAC.⁸³ These procedures cumulatively provide a further mechanism to limit the discretion of the Lord Chancellor. It also prevents the Lord Chancellor, a member of the Executive, from appointing judges unilaterally without consulting the Judiciary.

The judicial appointment process which is prescribed by the Constitutional Reform Act 2005 has also curtailed the influence of the Executive over the Judiciary. Under the Act, the Lord Chancellor may reject or request the JAC to reconsider the application *only once*. If the JAC maintains its original recommendation, the Lord Chancellor *must accept* the Commission's recommendation and advise the Prime Minister accordingly.⁸⁴ For appointments to

⁸¹ Before making a request the Lord Chancellor must consult the Lord Chief Justice, see Constitutional Reform Act 2005, ss 69(2) and 78(2). The Lord Chief Justice and the Lord Chancellor have now 'become partners in the administration of justice, but as a matter of constitutional principle the Lord Chief Justice is now the senior partner; see Select Committee on Constitution Sixth Report, *Relations Between the Executive, the Judiciary and Parliament*,

<<http://www.publications.parliament.uk/pa/ld200607/ldselect/ldconst/151/15103.htm#note5>> accessed 13 March 2012.

⁸² One person only must be selected for each recommendation to which a request relates. The same process applies to appointments of Supreme Court Judges, appointments of the Lord Chief Justice and Heads of Division and Lords Justices of Appeal; see the Constitutional Reform Act 2005, ss 27(10), 70(3) and 79(3). See Mary L Clark, *Introducing a Parliamentary Confirmation Process for New Supreme Court Justices: Its Pros and Cons, and Lessons Learned from the US Experience* [2010] PL 464, 471. The author comments that: 'Because the CRA requires the appointment commission to recommend only one candidate per vacancy and constrains the Lord Chancellor to accept, reject, or seek reconsideration of that recommendation, the justices on the appointment commission play a substantial role in selecting their colleagues.'

⁸³ See for the appointment of Supreme Court Judges, see Constitutional Reform Act 2005 (UK), ss 29-31.

⁸⁴ *ibid* (n 26) 404. See Constitutional Reform Act 2005(UK), s2 9-s31 for the appointment of Supreme Court Judges particularly s 29(4); s 67, s73 particularly s 73(4) for the selection of Lord Chief Justice and Heads of Division and ss76-84 particularly s 82(4).

the Supreme Court, the Lord Chancellor can only provide one name to the Prime Minister whom the Prime Minister must accept.⁸⁵

Unlike its Malaysian counterpart, the process introduced by the Constitutional Reform Act 2005 has severely limited the Lord Chancellor's discretion whilst effectively removing the Prime Minister's influence over the selection process.⁸⁶ The process is drafted so restrictively to the point where it would seem that in practice it is almost inevitable that the Lord Chancellor must accept the JAC's recommendation.⁸⁷ This process is a radical departure from the previous common law position where the Lord Chancellor and the Prime Minister were effectively in charge of selecting superior court judges.⁸⁸ This will result in an increase of public confidence in the judiciary.⁸⁹

Judicial Appointment and Conduct Ombudsman

The UK Constitutional Reform Act 2005 has also created a Judicial Appointment and Conduct Ombudsman amongst others to 'receive and investigate complaints from candidates for judicial office, including members of tribunals, about the way in which their application for appointment(s) [are] handled.'⁹⁰ No such office is established under the Malaysian Act.

⁸⁵ Constitutional Reform Act 2005(UK), s 26(3) read with s 29 See *ibid* (n 19) 191.

⁸⁶ *ibid* (n 15) 102. Malleon comments that: '[The JAC had] significantly reduced the role of the executive in the selection process and sought to establish the best method for creating a strongly independent appointments process.'. See *ibid* Darbyshire (n 105) 425; Richard Cornes, 'Gains (and dangers of losses) in translation - the leadership function in the United Kingdom's Supreme Court, parameters and prospects' [2011] PL 509, 511.

⁸⁷ Lord Mance, 'Constitutional reforms, the Supreme Court and the Law Lords' (2006) 25 (Apr) CJK 155. *ibid* Cornes.

⁸⁸ *ibid* (n 19) 192-193. Gillespie comments that: 'An independent appointments commission should, at least, remove the potential for bias or partisan politics to play a role....The Lord Chancellor has not, of course, been removed from the decision-making process and some may have concerns as to whether this underpins the integrity of the appointment system.'

⁸⁹ Kate Malleon, *The Legal System* (3rd edn, OUP 2007) 220.

⁹⁰ Constitutional Reform Act (UK), s 62 and Sch 13.

The existence of this office allows any applicant (who may feel that his application may have been unfairly dismissed because of any alleged bias by the Executive or otherwise) an opportunity to review decision(s) of the JAC.⁹¹

Conclusion

The creation of the JAC in the United Kingdom has not only brought about a positive impact supporting the independence of their judiciary, but also it indicates that they are moving in the right direction in their quest to uphold the rule of law and the separation of powers. However, the same cannot be said of Malaysia.

⁹¹ Judiciary of England and Wales, see <<http://www.judiciary.gov.uk/about-the-judiciary/introduction-to-justice-system/constitutional-reform>> accessed 3 November 2010). Website describes as follows: 'A Judicial Appointments and Conduct Ombudsman, responsible for investigating and making recommendations concerning complaints about the judicial appointments process, and the handling of judicial conduct complaints within the scope of the Constitutional Reform Act.'