SELECTING OUR JUDGES: DOES MALAYSIA NEED A CHANGE?

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ABSTRACT

Around the world, the judicial selection method can be divided into four categories: selection of judges by the Head of State on advice of the executive, selection of judges by the Parliament or Legislative Assembly, selection of judges by public election and selection of judges by the judicial council or commission. The most common type of judicial selection in the world is by the Head of State on advice of the executive. Most Commonwealth countries, including Malaysia, have selected judges through this method. In 1988, Malaysia witnessed a controversial event in the history of its judiciary which later infamously became known as the 1988 Constitutional Crisis. The Malaysian Parliament was eventually forced to establish the Judicial Appointments Commission to assuage public distrust in the Malaysian courts following the VK Lingam Video Clip Scandal in 2009. However, the legislators fell short of amending the Federal Constitution to dilute the powers of the Prime Minister in the selection of the higher court judges and as a consequence the powers of judicial selection vested in the Judicial Appointments Commission are practically limited to provision of candidates to the Prime Minister for his discretion. This article provides an overview of the different types of methods of judicial selection of judges in the higher courts adopted worldwide and discusses the best-fit method for Malaysia to emulate in the selection of judges to the higher courts.

Keywords: judicial selection method, higher courts, judges, Malaysia

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INTRODUCTION

There are four main selection methods of judges in the higher courts which are selection made by the Head of State or Executive, selection via the Parliament or Legislative Assembly, selection by way of election and selection by a judicial council or commission.[1] The most widely practiced method of judicial selection around the world is the selection by the Head of State. Most Commonwealth states adhere to this method but the selection mechanism in terms of consultation, recommendation and final affirmation of the judges differ from state to state.[2] Figure 1 below depicts the different types of judicial selection method around the world.

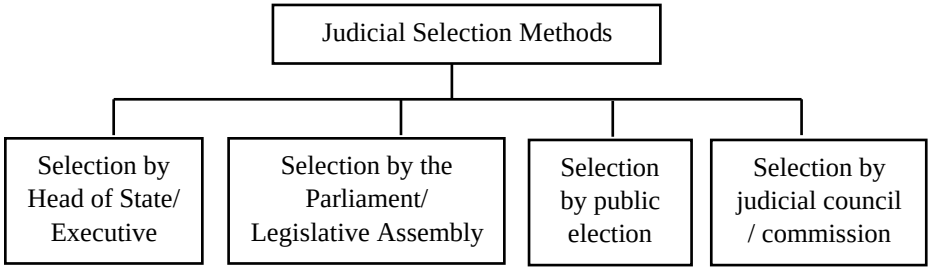

Figure I: Types of Judicial Selection Method of Higher Courts around the World

SELECTION OF JUDGES BY THE HEAD OF STATE

Historically, the selection method of judges by the Head of State finds its root in the Westminster system from the United Kingdom before the passage of the Constitutional Reform Act in 2005.[3] In this type of judicial selection method, the Head of Country or State usually

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1 Bari, M. Ehteshamul, "The Substantive Independence of the Judiciary Under the Constitutions of Bangladesh and Malaysia: A Comparative Study" (Masters Dissertation: University Malaya, 2011).

2 Hale, Lady. "Judges, Power and Accountability, Constitutional Implications of Judicial Selection." Speech given at the Constitutional Law Summer School, Belfast, (2017).

3 Go, Julian. "Chapter Four. A globalizing constitutionalism? Views from the Postcolony, 1945–2000." In *Constitutionalism and Political Reconstruction*, pp. 89-114. Brill, 2007.

appoints the judges on advice of the elected Head of the Executive. The Head of the Executive is typically empowered to advise on the selection of judges either for all levels of the court system or only the highest courts or only on the selection of the Chief Justice who is highest ranking judge in the court system. In some jurisdictions, the Head of State is given unilateral powers to select judges. This type of method is practiced by Brunei Darussalam whereas the judicial appointment by the Head of State in jurisdictions such as in India and South Korea requires that the Chief Justice be consulted. In countries in the British West Indies such as Guyana, Bahamas, and Belize, agreement of the leader of the opposition is mandated before appointment of judges. The judicial selection in Israel by the Head of State adheres to a commission-based method. The commission that recommends the candidates comprises of representatives from different groups of interest such as senior judges, members of the legislature, the government, and the members of the bar. A similar approach is also adopted in Nigeria where a Judicial Council provides advice to the Head of State on the selection of judges. In Chile, the Head of State acts on the proposal by the panel of nominees from the Supreme Court whereas in the United States, the President appoints based on the consent of the Senate.

Presently, it is uncommon for nations to legally confer the powers of selection of judges exclusively in the hands of the Head of the Executive. Statistics showed that only 19% of the Commonwealth nations have a judicial selection system which confers exclusive powers to appoint judges to all levels of the court system whereas 23% of the Commonwealth nations confine executive power of judicial selections to mere selection of the Chief Justice and 8% of Commonwealth nations empower the executive to select judges of the highest court.[4] Figure 2 below depicts the different types of selection of judges by the executive in Commonwealth nations.

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[4] Van Zyl Smit, J. "The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A compendium and analysis of Best Practice" (*Report of Research Undertaken by Bingham Centre for the Rule of Law*). London: The British Institute of International and Comparative Law, (2015).

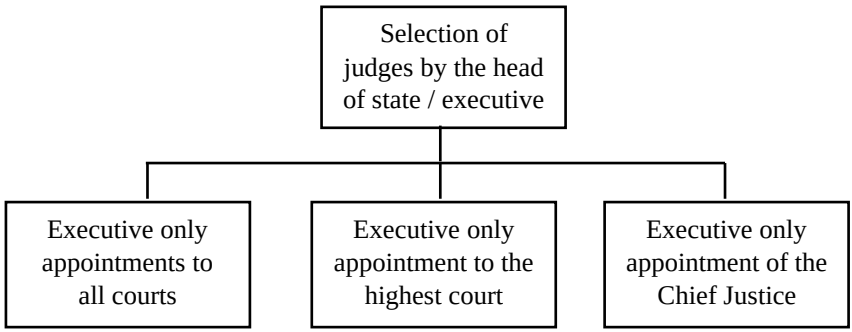

Figure II: Types of Selection of Judges by the Head of State / Executive

It is also observed that over time, the Commonwealth jurisdictions have established judicial commissions or councils in their judicial selection system and this system is now practiced in post-apartheid South Africa and Namibia. Malaysia embraced the judicial commission-based system by the enactment of the Judicial Appointment Commission Act in 2009 as the Malaysian Government was forced to establish the Judicial Appointments Commission to assuage public distrust in the Malaysian courts following the VK Lingam Video Clip Scandal. The current trend especially in Commonwealth nations exhibits an inclination to adopt a selection method which is commission-based with exceptions to countries such as Australia, Bangladesh, Brunei Darussalam, Canada, Nauru, New Zealand, Singapore, and Tuvalu that still adhere to a judicial selection system by the Head of State on advice from the executive.

According to the Universal Declaration on the Independence of Justice, participation in judicial appointments by the executive is consistent with judicial independence as long as decisions are made in consultation with members of the legal profession and the judiciary, or by a body in which both members participate.[5] Judiciary should also be involved in the selection process to ensure that the best candidates are

[5] Article 2.14(b) of the Montreal Declaration 1983 which was adopted at the first World Conference on the Independence of Justice held at Montreal on 10 June 1983.

selected for the judicial positions.[6] By this way, the independence of the judiciary is further strengthened. Furthermore, seeking the views of the bar may aid in the selection of suitable candidates for judicial office as they can provide valuable insights for the evaluation of the character and ability of lawyers nominated as candidates.[7]

SELECTION OF JUDGES BY PUBLIC ELECTION

The election of federal judges in Switzerland, some states in the United States, and the selection of judges for the German Federal Constitutional Court are all examples of jurisdictions that practise judicial selection by way of public election.[8] Proponents of this method of judicial selection argue that because judges are required to submit themselves to the electorate on a regular basis, they become more accountable for their performance while in office. This also provides direct access to the public for the selection the judges, and the elected judges would directly reflect the character of the society which the judges serve.[9] On the other hand, critics of this election method contend that the members of the public are not sufficiently knowledgeable to assess the qualification and competence of candidates which could lead to the selection of incapable judges.[10] This selection method also compromises the independence of judges as they would be more concerned of portraying a more populous stance that would appeal to the masses rather than being accountable to the rule of law and dispensation of justice, to ensure better likelihood of victory in re-elections. Judges would also need to finance their election campaigns which would entail substantial amount of sponsorship from external sources such as local lawyers. This would lead to conflict of

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6 Baar, Carl, and Ontario Law Commission. "Comparative Perspectives on Judicial Selection Processes." Appointing Judges: Philosophy, Politics and Practice, edited by Ontario Law Commission 140 (1991).

7 Gibbs, Sir Harry. "The Appointment and Removal of Judges." *Federal Law Review* 17, no. 3 (1987): 141-150.

8 Shetreet, Shimon. Who Will Judge: Reflections on the Process and Standards of Judicial Selection. 1986.

9 Webster, Peter D. "Selection and retention of judges: is there one Best Method." Fla. St. UL Rev. 23 (1995): 1.

10 Baar, Carl, and Ontario Law Commission. "Comparative Perspectives on Judicial Selection Processes." *Appointing Judges: Philosophy, Politics and Practice*, edited by Ontario Law Commission 140 (1991).

interest and gives the appearance of impartiality when such sponsors appear before the elected judges in court. A research on 54 non-unanimous decisions in the Illinois Supreme Court showed that judges who were elected frequently made predictable partisan decisions.[11]

SELECTION OF JUDGES BY THE PARLIAMENT OR LEGISLATIVE ASSEMBLY

In one out of five commonwealth nations, there is involvement from the Parliament or Legislative Assembly in the affirmation of candidates selected for judicial positions by a judicial appointments commission or council.[12] This was observed mostly in Commonwealth nations from Africa and South Asia such as Ghana, Kenya, Malawi, Maldives, Nigeria, Pakistan, Rwanda, Sierra Leone, Uganda, and Zambia. This method of selection allows the government to first choose the candidates of their choice who are then presented to the Parliament or Legislative Assembly for approval.[13] This type of selection method assures check and balance as well as transparency as it is open to the public eye.[14] However, some scholars disagree with this method of appointment by an assembly of politicians. They believe that this kind of judicial selection method would create avenues for political considerations in the selection process.[15] Professor Stephen believes that there is a risk of partisan politics and cronyism in the legislative

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11 Presser, Stephen B. "The Case for Judicial Appointments." University of Toledo Law Review 33 (2002): 353-392.

12 Van Zyl Smit, J. "The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A compendium and analysis of Best Practice" (*Report of Research Undertaken by Bingham Centre for the Rule of Law*). London: The British Institute of International and Comparative Law, (2015).

13 Akkas, Sarkar Ali. "Appointment of judges: A key issue of judicial independence." *Bond L. Rev*. 16 (2004): i.

14 Devlin, Richard, A. Wayne MacKay, and Natasha Kim. "Reducing the democratic deficit: representation, diversity and the Canadian judiciary, or towards a triple P judiciary." *Alta. L. Rev*. 38 (2000): 734.

15 Kirby, Michael. "Modes Of Appointment And Training Of Judges: A Common Law Perspective." *Journal of the Indian Law Institute* 41, no. 2 (1999): 147-159.

selection method.[16] One school of thought holds that even the selection of judges should not be subjected to parliamentary approval at all because it threatens the judiciary's independence.[17] What is most dreaded is the way that political inclination of judges may be the central consideration to select judges especially when the political party of the executive enjoys majority control in the Parliament or Legislative Assembly.[18]

In 2003, the Constitutional Affairs Committee of the United Kingdom proposed in their report that the principal objective to improve judicial independence from political interference would not be achievable if Parliament is empowered to directly influence the selections of judges.[19] Although judicial selection through Parliament approval may promote an emphasis on the selection criteria of judges, the Venice Commission, a Council of Europe advisory body on constitutional matters, has emphasised that this type of judicial selection method poses a risk of political consideration which can outweigh the merits of the judicial candidates.[20] Past confirmation proceedings before the US Senate have also seen several Supreme Court candidates being subjected to intrusive enquiries of their personal lives, as well as intense pressure to reveal their opinions on substantive legal issues.[21] Ronald Dworkin, a leading constitutional scholar, alleged that these Senate hearings of judicial candidates are

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16 Presser, Stephen B. "The Case for Judicial Appointments." *University of Toledo Law Review* 33 (2002): 353-392.

17 Chibesakunda, Lombe Phyllis, "Judicial Independence: The Challenges of the Modern Era". Conference Report, (2014).

18 Devlin, Richard, A. Wayne MacKay, and Natasha Kim. "Reducing the democratic deficit: representation, diversity and the Canadian judiciary, or towards a triple P judiciary." *Alta. L. Rev*. 38 (2000): 734.

19 Constitutional Affairs Committee, Judicial Appointments, and a Supreme Court (final court of appeal), First Report Session 2003-4, HC 48-I: http://www.publications.parliament.uk/pa/cm200304/cmselect/cmconst/48/48.pdf.

20 Ahrens, Helen, Horst Fischer, Verónica Gómez, and Manfred Nowak, eds. *Equal Access to Justice for All and Goal 16 of the Sustainable Development Agenda: Challenges for Latin America and Europe*. Vol. 22. LIT Verlag Münster, 2019.

21 Wittes, Benjamin. *Confirmation Wars: Preserving Independent Courts in Angry Times.* Rowman & Littlefield Publishers, 2009.

futile exercises and a parade of missed chances.[22] Therefore, it would be right to say that this sort of judicial selection method may be paradoxical as judges are not lawmakers and ought not to be treated in a manner as being equivalent to legislators.

Notwithstanding this, several Commonwealth nations have adopted this method of parliamentary affirmation in their judicial selection system. In Uganda, for example, a parliamentary committee is tasked with the responsibility for the assessment of candidates and is required to submit a report for the consideration to the Parliament which usually does not question the proposal of the parliamentary committee. [23] In some countries, specific safeguards were constitutionalised to ensure that political considerations are not taken into account during the selection of candidates. The selection method in Pakistan also adopted a Parliamentary affirmation method. However, in Pakistan, the Parliamentary committee is responsible to affirm the proposal presented to them by an independent Judicial Commission. The Judicial Commission in Pakistan consists of a balanced representation from the members of the government and the opposition. Article 175A of the Constitution of Pakistan allows non-acceptance or disapproval of any judicial candidate if 75% of the Pakistan Parliamentary Committee do not support the selected judicial candidate. The Constitution in Pakistan introduced this safeguard to ensure that the recommendation of the independent Judicial Commission is not easily overturned by the members of Parliament or Legislative Assembly. Also, in Zambia Article 140 of Zambian Constitution states that judges are appointed by the President based on recommendation of the Judicial Service Commission and subject to ratification by the National Assembly. Figure 3 below depicts the safety measures implemented by some states adopting the judicial selection method by the legislature.

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22 Dworkin, R. (2010, August 19);"The Temptation of Elena Kagan" *The New York Review*.

23 Parliamentary Rules of Procedure 2012 requires the membership of the Committee to be representative of the political-party composition of Parliament (rule 151). The Committee may also summon candidates to appear before it to gather more information (rule 156 (7)– (8)). Importantly, once the Committee reaches a decision, Parliament as a whole does not debate it (rule 158).

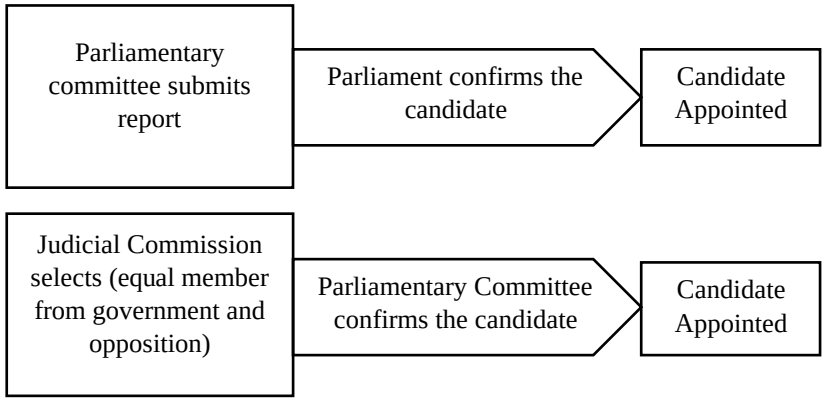

Figure III: Types of Safety Measures Implemented in Countries Adopting Judicial Selection Method by the Legislature

The selection of judges with Parliamentary affirmations proffers the legitimacy to the courts with the assurance that the best candidates have been selected to occupy this institution of justice through a rigorous process of assessment but appropriate safeguards in the Constitution must be expressly and carefully crafted to avert politicisation and deadlock in this selection method amongst legislators.

SELECTION BY A JUDICIAL COUNCIL OR COMMISSION

The utilisation of an autonomous body such as the Judicial Service or Appointment Commission in selecting judges is the most popular framework amongst the commentators of the contemporary world.[24] A commission-based body is the method adopted to shortlist and select judges in 81% of Commonwealth nations.[25] Some examples of Commonwealth nations that practise this commission-based judicial

[24] Akkas, Sarkar Ali. "Appointment of Judges: A Key Issue of Judicial Independence." *Bond L. Rev*. 16 (2004): i.

[25] Van Zyl Smit, J. "The Appointment, Tenure and Removal of Judges under Commonwealth Principles: A compendium and analysis of Best Practice" (Report of Research Undertaken by Bingham Centre for the Rule of Law). London: The British Institute of International and Comparative Law, (2015).

selection method are Bahamas, Belize, Botswana, Cameroon, Cyprus, Fiji, Ghana, Guyana, India, Jamaica, Kenya, Kiribati, Lesotho, Malawi, Malaysia, Maldives, Malta, Mauritius, Mozambique, Namibia, Nigeria, Organization of Eastern Caribbean States, Pakistan, Papua New Guinea, Rwanda, Samoa, Seychelles, Sierra Leone, Solomon Islands, South Africa, Sri Lanka, Swaziland, Tanzania, Tonga, Trinidad and Tobago, Uganda, the UK, Vanuatu and Zambia. This method of judicial selection is found to be working well in many states in the United States.[26] Many non-Commonwealth countries like the Netherlands and Israel also adopt the commission-based system in their judicial selection mechanisms. Judicial commissions are usually entrusted to shortlist and recommend shortlisted candidates.[27] This type of judicial selection method also mitigates the influence of executive interference in the selection of judges and also would preserve public trust in the commission as long as the selections remain fair and non-discriminatory.[28] The commission-based method is the most effective judicial selection method to assure public trust in the courts as compared to other types of judicial selection method particularly in the selection of higher court judges.[29] However, the effectiveness and public trust in this type of commission-based judicial selection system relies very much on the make-up and also the authority given to such commission.[30]

JUDICIAL SELECTION METHOD IN MALAYSIA

Under Article 122B, the Malaysian Federal Constitution confers the constitutional power on the Prime Minister to advise the Yang di-Pertuan Agong ("YDPA") on the selection of all judges of the higher courts. This includes the selection of the Chief Justice, who is the highest-ranking judicial officer in Malaysia, the President of the Court

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26 Akkas, Sarkar Ali. "Appointment of Judges: A Key Issue of Judicial Independence." *Bond L. Rev.* 16 (2004): i.

27 Lavarch, Michael. Judicial Appointments: Procedure and Criteria. 1993.

28 Malleson, Kate. The new judiciary: The effects of expansion and activism. Routledge, 2016.

29 Akkas, Sarkar Ali. "Appointment of Judges: A Key Issue of Judicial Independence." *Bond L. Rev.* 16 (2004): i.

30 Malleson, Kate. *The New Judiciary: The Effects of Expansion and Activism*. Routledge, 2016.

of Appeals, the Chief Judge of Malaya, and the Chief of the High Court of Sabah and Sarawak. The YDPA fulfils a perfunctory role in the appointment of the judges in Malaysia. The real power of selecting the top judges of the land is vested in the Prime Minister, notwithstanding, the requirements of Article 122B (4) of the Federal Constitution that mandates the Prime Minister to respectively consult the Chief Justice, the President of the Court of Appeal or the Chief Judges of the respective High Courts in the selection of the Malaysian higher court judges. Nevertheless, the Prime Minister is not obligated to follow the advice given by the top judges.

In 1988, Malaysia witnessed a controversial event in the history of its judiciary which later infamously became known as the 1988 Constitutional Crisis. In this event, the then Lord President, Tun Salleh Abas was subjected to a tribunal hearing for alleged misconducts and removed from his judicial office. Some articles refer to it as the "sacking" of Tun Salleh Abbas. The removal of Tun Salleh was purported to be a result of a fratricidal battle between two factions in the ruling party at that time which led to the courts declaring the party as unlawful. This was said to have sparked a series of judicial appointments that saw almost two decades of questionable impartiality in the Malaysian Court rulings.[31] The second controversy in the Malaysian judiciary was the uncovering of a video recording exposing the wheeling and dealing of judicial positions at the highest level of the Malaysian judiciary. This expose was very damaging to the already eroded trust of the Malaysian public towards the integrity of the Malaysian Courts. Following this, the Malaysian Parliament passed the Judicial Appointments Commission Act 2009 to form the Judicial Appointments Commission (JAC). The Judicial Appointments Commission Act of 2009, among other things, specifies the membership, duties, and operating procedures of the commission as well as the qualifications that applicants must meet before being recommended to the Prime Minister for consideration.

The formation of this commission was a progressive move by the Malaysian legislators to increase the level of independence in the

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[31] Kevin YL Tan, "Judicial Appointments in Malaysia" In Securing Judicial Independence" in *The Role of Commissions In Selecting Judges In The Commonwealth*, edited by Hugh Corder and Jan Van Zyl Smit, 114-136. South Africa: Siber Ink, 2017.

selection process of higher court judges in Malaysia and consequentially to restore the public confidence in the judiciary. Instead of the traditional "tap on the shoulder" practice, the JAC provides an extra layer of safety measure to make sure that candidates are sufficiently vetted. The formation of the JAC also reduces the unethical involvement of outsiders or entities in the judicial selection process, as revealed by the VK Lingam Video Clip scandal. Prior to the implementation of the Judicial Appointments Commission Act 2009, , the Prime Minister was required by the Federal Constitution to consult with the quadrumvirate of the top judges concerning the appointment of the respective judges under their charge before tendering his advice to the YDPA. Subsequent to the Judicial Appointments Commission Act 2009, the Prime Minister is practically no longer required to consult the quadrumvirate of top judges individually, as they are all members of the JAC and are considered to have been consulted once the JAC submits its recommendations to the Prime Minister. However, the legislators fell short of amending the Malaysian Constitution to dilute the powers of the Prime Minister in the selection of the higher court judges and as a consequence the powers of judicial selection vested in the JAC are practically limited to provision of names of candidates to the Prime Minister for his discretion.

THE BEST WAY FORWARD

After considering the various types of judicial selection structures used throughout the world and in the Commonwealth countries, the question of whether Malaysia's judicial selection method should be retained or changed arises. Selection of higher court judges by way of election is a far cry from our intention to have a more independent judiciary, whereas the judicial selection by the legislature would also not be a viable option for Malaysia given the history of political consideration in the selection of judges in the Malaysian higher courts. Furthermore, the current political landscape and the suspension of Parliament during the pandemic by the Government do not augur well for the judicial selection method by the Parliament. Therefore, this type of judicial selection is also not viable in Malaysia.

The next question is whether the current appointment by YDPA on the advice of the Prime Minister with the JAC's involvement pursuant to the Judicial Appointments Commission Act 2009 would be

the best selection method for Malaysia. The answer is a resounding – NO. As previously stated, the reality is that the selection of the judges of higher courts in Malaysia is purely vested in the Prime Minister. Therefore, this concentration of power in the executive can still pose as an inherent risk of abuse and the historical errors can still be repeated when the Prime Minister's position is challenged, be it within his own political party or in the Parliament.

Finally, the commission-based method appears to be the best method to guarantee a more independent method of selecting judges to the higher courts. However, the degree of independence of a commission is heavily dependent on the extent of executive involvement in the commission and the selection method both in terms of its administration and legal implications. The best way forward in Malaysian context is to amend the Federal Constitution to ensure that the real power of judicial selection is conferred to the commission as opposed to the Prime Minister or confined only to the top judges of the land. In the current system, the Prime Minister's discretion in having the final say in the appointment of higher court judges and requesting an unlimited number of standby candidates for selection would have to be reformed. In addition, the commission should be composed of pertinent stakeholders in the Malaysian judicial system. In this way, there is a greater possibility of ensuring independence of the higher court judges.

CONCLUSION

The discussion and analysis of the various types of selection methods adopted by different countries above illuminates the benefits and inadequacies of various judicial selection models and can guide us in determining the most viable method in the selection of higher court judges in Malaysia. It is incumbent on the Legislature to create a suitable legal framework by way of constitutional amendment to implement the best practices and standards in the selection of higher court judges that can be free from interference from the executive in order to regain the public trust in the Malaysian judiciary like in the past era of Tun Mohamed Suffian and Tan Sri Eusoffe Abdoolcader.