

# Constitutional role of PM

I WISH to take readers way back to June 1957, two months before Merdeka Day. In that month, a White Paper called "Constitutional Proposals for the Federation of Malaya" was presented by the Secretary of State to the British Parliament by command of Her Majesty Queen Elizabeth II.

In the proposed Constitution of Federation of Malaya to be adopted on Merdeka Day, Article 122 (on the Supreme Court and its judges) read as follows:

1. The Supreme Court shall consist of a Chief Justice Supreme and other judges; but the number of the other judges shall not exceed fifteen until Parliament otherwise provides.

2. The Chief Justice and the other judges of the Supreme Court shall be appointed by the Yang di-Pertuan Agong.

3. In appointing the Chief Justice the Yang di-Pertuan Agong may act in his discretion, but after consulting the Conference of Rulers

and considering the advice of the Prime Minister; and in appointing the other judges of the Supreme Court he shall, after consulting the Conference of Rulers, act on the recommendation of the Judicial and Legal Service Commission.

4. Before acting, in accordance with clause (3), on the recommendation of the Judicial and Legal Service Commission the Yang di-Pertuan Agong shall consider the advice of the Prime Minister and may once refer the recommendation back to the Commission in order that it may be reconsidered.

Clearly, the prime minister was not intended to be totally removed from the process of appointing judges of the superior courts - that is, the High Court and the Federal Court, as they then were.

The superior courts are today the High Court, Court of Appeal and Federal Court.

It was intended that the Yang

di-Pertuan Agong was to act in his discretion, but after consulting the Conference of Rulers and "considering the advice of the prime minister".

The appointment of superior judges is now provided under Article 122B of the Federal Constitution. Article 122B(1) reads as follows:

The Chief Justice of the Federal Court, the President of the Court of Appeal and the Chief Judges of the High Courts and (subject to Article 122C) the other judges of the Federal Court, of the Court of Appeal and of the High Courts shall be appointed by the Yang di-Pertuan Agong, "acting on the advice of the prime minister", after consulting the Conference of Rulers.

To "consider" is different from to "act". The former means to "think carefully about something" while the latter means to "take action".

To "act on advice" means to

"take action as a result of advice". It is to take action or make a decision based on the advice provided by someone else. The action is therefore a direct result of the advice given, not something done independently.

So, while I agree that the judiciary cannot be its own "gatekeeper" of its independence, so, too the executive through the prime minister.

The Federal Constitution can be amended. It has been amended more than 60 times since 1957.

Article 122B can be amended so as to reflect the spirit and intention of the constitutional proposals for the Federation.

Mind you, the proposed Article 122 in 1957 was designed and intended "to maintain the independence of the judiciary from the executive and legislative authorities".

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