Consulting the Conference of Rulers under the Federal Constitution

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I. Introduction

The Conference of Rulers has been described as the most prestigious body in the country.[1] This observation by Tun Suffian is understandable from the standpoint of the status of the body because it comprises of the nine Sultans and the four Governors who are the constitutional heads of government in their respective States. However, its importance in the constitutional scheme of things tends to be misunderstood, if not, underestimated. This was reflected in the judgment of the Court of Appeal in *Re An Application By Dato' Seri Anwar Ibrahim*[2] (hereafter referred to as "the Judgment of the Court of Appeal" or "the Judgment" as the case may be) which sought to deal with the question of consulting the Conference of Rulers in respect of the appointment of judges to the higher judiciary under Article 122B(1) of the Federal Constitution. In brief, Article 122B(1) declares that the Chief Justice of the Federal Court, the President of the Court of Appeal, the two Chief Judges andthe Judges of the Court of Appeal and the High Court " ... shall be appointed by the Yang di Pertuan Agong, acting

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[1] See Tun Mohd Suffian, "Parliamentary System Versus Presidential System: The Malaysian Experience" (1979) 2 MLJ lii at p lvi.

[2] *In the Matter of An Oral Application by Dato' Seri Anwar Ibrahim to Disqualify A Judge of the Court of Appeal* [2000] 2 MLJ 481; reported also as *Dato' Seri Anwar Ibrahim v PP* [2000] 2 CLJ 570; and as *The Appointment of Judges to the High Court, Court of Appeal and the Federal Court* [2000] 2 AMR 1423. For the purposes of this article, the pages from the MLJ citation are referred to.

on the advice of the Prime Minister, *after consulting the Conference of Rulers*" (emphasis added). The fact that the Judgment drew a rejoinder from His Royal Highness Sultan Azlan Shah of Perak by way of a Postscript[3] to his seminal article on the role of constitutional rulers[4] underscores the importance of a proper understanding of the executive function of consulting the Conference of Rulers. In his Postscript, His Royal Highness decried the reduction of the process of consultation to a "mere formality"[5] and observed that the Judgment came to certain conclusions "without making any detailed study as to the scope of Article 122B nor as to the rationale behind it".[6]

In the main, the Court of Appeal had sought to distinguish between requiring "consent" of the Rulers and "consulting" them as a body. Based on this distinction, it proceeded to hold that by the process of consultation, the Yang di Pertuan Agong is not bound to accept the advice of the Conference, and that the Prime Minister could insist that his nominee to the higher Bench be appointed even if the Conference of Rulers do not agree or withhold their views or delay the giving of advice.[7] His Royal Highness's riposte was that the role of the Conference of Rulers "[could not] be diminished by drawing such slight distinction in terminology".[8] As to the judicial observation that a nomination could proceed regardless of the response or non-response from the Conference of Rulers, His Royal Highness observed that it "[went] against the grain and spirit of the Constitution".[9]

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[3] "Postscript: The Role of Constitutional Rulers and the Judiciary Revisited" in Professor Dato' Seri Visu Sinnadurai (ed), *Constitutional Monarchy, Rule of Law and Good Governance – Selected Essays and Speeches of HRH Sultan Azlan Shah* (Kuala Lumpur: Professional Law Books/Sweet & Maxwell Asia, 2004) at p 385 et seq.

[4] HRH Sultan Azlan Shah, "The Role of Constitutional Rulers" (1982) 9 *JMCL* 1. His Royal Highness was a former Lord President of the Federal Court of Malaysia prior to his ascension to the throne of Perak.

[5] *Supra*, n 3 at p 395.

[6] *Id* p 393.

[7] *Supra*, n 2 at p 484.

[8] *Supra*, n 3 at p 395.

[9] *Ibid.*

II. The Division of Opinions

The sharp contrast of opinion on this subject raises important questions over the constitutional role of the Conference of Rulers and the process of consultation provided for in the Federal Constitution.

His Royal Highness is undoubtedly right when he says that the process of consultation cannot be reduced to a "mere formality" notwithstanding the distinction made by the Court of Appeal between the process of seeking "consent" on the one hand and that of "consulting" on the other. This distinction is undoubtedly valid but a constitutional dictate that the appointing authority "consult" another named body before making an appointment nevertheless carries legal consequences relating to the validity of the appointment itself should there be a default in the consultation process. Of greater significance is whether the process of consultation could be treated as a perfunctory exercise so that it would not matter whether the requisite advice is tendered or not by the body consulted.

The principal objection to the Judgment of the Court of Appeal lies in its failure to appreciate the rationale behind the Conference of Rulers having a say in key appointments (and in some cases, legislation) under the Federal Constitution and the historical background to the incorporation of the "consulting" provision in the Merdeka Constitution. For example, the Court of Appeal failed to appreciate that the duty on the part of the Executive to consult the Conference of Rulers is not limited to certain key appointments, but extends also to any proposed change to the administrative policy under Article 153. This is a special constitutional provision dealing with the responsibility of the Yang di-Pertuan Agong to safeguard the special position of the Malays and the natives of Sabah and Sarawak, and the legitimate interests of the other communities.[10]

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[10] Such policy discussions are taken on the second day of the Conference which is attended by the Yang di-Pertuan Agong accompanied by the Prime Minister: see *Phang Chin Hock v Public Prosecutor (No 2)* (1980) 1 MLJ 213 at pp 213-214, per Raja Azlan Shah Ag LP (as His Royal Highness then was).

It may sensibly be asked why in a parliamentary system of government should a non-legislative body which is not answerable to the Parliament have a say in executive policy? The answer lies in the unique features of the Malaysian Constitution and its historical evolvement as recognised by the Reid Commission and the Whitehall White Paper. The failure by the Court of Appeal to show that it was mindful of how and why the Conference of Rulers were assigned a consultative role in certain matters considerably weakens the views it expressed on the consultative process. The judgment itself was *obiter dicta* on these matters because the issue before it was actually one of recusal of a particular judge and not the validity of his appointment or of the judges generally. Nevertheless, in view of the importance of the observations made, it is pertinent that we examine the historical evolvement of the role of the Conference of Rulers under the Federal Constitution especially in certain legislative and executive matters.

III. Historical Evolvement of the Conference of Rulers

There is a general misconception that the Conference of Rulers as a body was first established in 1957 under the Merdeka Constitution. This is not so. It evolved out of the Malayan Union crisis of 1946 when the MacMichael treaties[11] sought to reduce the Rulers to mere figure-heads in their own States. The subsequent abrogation of the Malayan Union arrangement and its replacement with the first ever unitary government in Malaya under the Federation of Malaya Agreement of 1948 also saw the establishment of the Rulers as a permanent committee called a Conference. This was the first time the Rulers gathered as a formal body although it is said that previously the Rulers of the four Federated Malay States sometimes met at a *durbar*

[11] For a brief account of the MacMichael treaties and the ill-advised move by Sir Harold MacMichael (the representative from the British Colonial Government) to force a consensus out of the Rulers for a post-war government for British Malaya, see Das, Cyrus, *Governments & Crisis Powers: A Study of the Use of Emergency Powers in Malaysia and the Commonwealth* (Kuala Lumpur: CLJ Publication, 1996) at pp 55-57.

with the British High Commissioner.[12] The Rulers as a Conference under the 1948 Agreement now played a consultative and advisory role on matters such as territorial changes to the Federation, the status and position of the Rulers themselves and matters affecting the Muslim faith.

There is again a popular misconception that the Reid Commission accepted this quasi-legislative-cum-executive role for the Rulers and recommended the continuance of the status and position of the Conference of Rulers as provided for under the 1948 Agreement. It is not so. The Alliance Party, the principal political party at the time, opposed any role for the Rulers other than as constitutional heads of government in their respective states. The Alliance Party was anxious that the Rulers should not be involved in the political arena after independence. They proposed that the Conference meet solely for the purpose of electing the Yang di-Pertuan Agong and the Timbalan Yang di-Pertuan Agong. The Alliance representative, Dato' Abdul Razak,[13] addressed the Reid Commission on the limited role envisaged for the Rulers as follows:

> They can discuss matters concerning the Muslim religion and Malay custom, but they cannot discuss any matters of administration unless they want to interest themselves in such matters; but their decisions will not be binding. They will be constitutional Rulers.[14]

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[12] See Tun Mohd Suffian, *An Introduction to the Constitution of Malaysia* (Kuala Lumpur: Government Printers, 2nd ed, 1976) at p 45. This observation may not be wholly correct. It ignores the fact that a Federal Council was established in 1909 under the Treaty of Federation 1895 forming the Federated Malay States where the Sultans of Perak, Selangor, Pahang and the Yam Tuan of Negri Sembilan sat together in a Council with the High Commissioner and the four Residents discharging legislative and non-legislative functions: see Braddell, R, *The Legal Status of the Malay States* (Singapore: Malaya Publishing House Ltd, 1931) at pp 40-44. For an account of the proceedings and type of questions asked by members reflecting that it was a proto-type parliament, see the recollections of Robson, JHM, a nominated member of the Council: Robson, JHM, "Records and Recollections 1889 – 1934" in Gullick, JM (ed), *MBRAS Reprint 21* (2001) at pp 105-107.

[13] Later Tun Abdul Razak, the Second Prime Minister of Malaysia.

[14] Commonwealth Office Records. Quoted in Fernando, Joseph M, *The Making of the Malayan Constitution* (Kuala Lumpur: MBRAS Monograph No 31, 2004) at p 117.

The Reid Commission agreed with the Alliance Party and assigned to the Conference of Rulers the unitary function of electing the King and the Deputy King.[15]

The Rulers protested this downsizing of their role at the Working Party meeting at Whitehall to consider the Reid proposals. The Rulers through their appointed legal counsel argued that the Conference of Rulers should have the additional functions previously exercised by them and be consulted on appointment of commissions, territorial changes, changes affecting the special position of the Malays, changes to the privileges and position of the Rulers and financial matters.[16] In short, they argued that they should continue to function as a Conference, dealing with all these matters, as they did under the 1948 Agreement.

In the end, the Working Party agreed with the proposals of the Rulers, except as regards finances. This was reflected in the White Paper (Federation of Malaya Constitutional Proposals 1957) at paragraph 17 which listed the additional functions of the Conference as falling under three categories: first, the exercise of functions of consenting or withholding consent to certain laws; secondly, the right to be consulted on certain appointments, or the special position of the Malays and the legitimate interests of the other communities; and, thirdly, the Conference would deliberate on matters of national policy and other matters it thought fit.

It is the function relating to consultation that is material for our immediate purposes. Thus Paragraph 17 of the White Paper in relation thereto is reproduced below in full:

> Secondly, the Conference will be consulted, each Ruler and Governor acting in his discretion, on the appointment of the Chief Justice and Judges of the Supreme Court, the appointment of the Auditor-General, and the appointment of members of the Election Commission and the Public Services Commission, since the holders of these appointments will exercise powers in respect of both State and Federal affairs. The

[15] See para 59 of the Reid Commission Report.

[16] *Supra*, n 14 at p 170.

> Conference will also be consulted on any changes in policy affecting the special position of the Malays or the legitimate interests of the other communities which it is proposed to introduce by administrative action, and on the acts, observances or ceremonies appertaining to the Muslim religion, and extending to the Federation as a whole, in which the Yang di-Pertuan Agong may be authorised to represent each of the Rulers.

The White Paper proposals were then incorporated into the Independence Constitution. In the result, Article 38 insofar as it touches on the consultation question declares as follows:

> Article 38(2):
> The Conference of Rulers shall exercise the functions of :
> (a) ...
> (b) ...
> (c) ... giving advice on any appointment which under this Constitution requires the consent of the Conference or is to be made by or after consultation with the Conference.
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> Article 38(5):
> The Conference of Rulers shall be consulted before any change in policy affecting administrative action under Article 153 is made.
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> Article 38(6):
> The members of the Conference of Rulers may act in their discretion in any proceedings relating to the following functions, that is to say:
> (a) ...
> (b) the advising on any appointment.

Elsewhere in the Constitution there are provisions providing for either the consent of, or consultation with the Conference, before an appointment is made. For example, Article 105(1) and Article 122B(1) provide for consultation with the Conference before the appointment is made of the Auditor-General and of the Judges of the higher judiciary. They are as follows:

> Article 105(1):
> There shall be an Auditor General, who shall be appointed by the Yang di-Pertuan Agong on the advice of the Prime Minister and after consultation with the Conference of Rulers.
>
> Article 122B(1):
> 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 of the advice of the Prime Minister, after consulting the Conference of Rulers.

These provisions would have to be read conjointly with Article 38 above where among the enumerated functions of the Conference is the function of tendering advice on appointments upon being consulted. It reflects a constitutional scheme that prescribes that the appointment to certain key positions in government could only be undertaken after consultation with the Conference. This factor would by itself underscore the importance of the consultation process. It is reinforced by the historical background to the evolvement of the present functions of the Conference of Rulers as reflected in the original Reid proposals and the subsequent White Paper that altered the proposals. It is accepted by the courts that historical constitutional documents like the Reid Report are legitimate sources of interpretation of the Constitution.[17]

IV. The Consultation Process

There are *ex facie* no constitutional restrictions on the deliberative functions of the Conference. The Conference has a complete discretion in tendering advice after consultation as seen in Article 38(6). For example, even on those matters where the Rulers act on advice, HRH Sultan Azlan Shah has said that the functions are exercised seriously,

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[17] *See Theresa Lim Chin Chin v Inspector General of Police* [1988] 1 MLJ 293 at p 296.

and consent not easily given. In his seminal article, His Royal Highness observed:

> It is true that the Conference of Rulers acts on advice in this matter. But one will not expect that the consent of the Rulers could be easily obtained in these matters.[18]

On the consultation process itself, His Royal Highness expressed puzzlement in his Postscript as to why an appointing body should want to discard negative advice from the Conference as to the suitability of a candidate. His Royal Highness was responding to that part of the Court of Appeal Judgment that stated somewhat forcefully that the Prime Minister could "insist that the appointment" be proceeded with notwithstanding, inter alia, a negative report.[19] His Royal Highness's observations on this point merit full consideration:

> Furthermore, it is generally accepted as good practice that whenever an appointing body receives from another independent and respected body an adverse report on a candidate, such advice should be given serious consideration. In most cases, the advice will provide sufficient and compelling reasons as to why the candidate should not be appointed to the post. If this procedure were complied with, the appointing authority will be in a position to avoid any accusations of bias or favouritism. This mechanism, thus, protects the appointing authority from any allegations of impropriety.
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> Therefore, in this regard, it is generally difficult to rationalise why a Prime Minister would not want to consider, or even abide by the views of nine Rulers and four Governors who constitute the Conference of Rulers. These are independent persons, with vast experiences, and with no vested interest in the nominated candidates. Their duty is to fulfil their constitutional role in ensuring that only the best and most suited candidates are selected for the posts.[20]

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[18] *Supra*, n 4 at p 16.

[19] *Supra*, n 2 see p 484 at para I.

[20] *Supra*, n 3 at p 397.

A critical failing in the Judgment is the diminished importance attached to the whole consultation process. The duty to consult and be consulted is not unusual as a statutory obligation imposed on a public decision-maker. It carries significant legal consequences, the breach of which could well invalidate the decision taken.

The requirement of consultation seems to be a progression from another type of statutory formula that requires the decision-maker to "have regard to" certain enumerated factors in the statute before arriving at a decision. Often it did not achieve the desired result (of making an informed decision) because there was no way of telling if the decision-maker did in fact "have regard to" those factors before making his decision. It was treated as sufficient if the decision-maker deposed to the fact that he was mindful of those factors before making his decision. However, case-law has diminished its importance by holding that the words "have regard to" should not be read as "having regard only to".[21] In some instances, the words have been treated as directory only, and the importance to be attached to the factors is for the relevant Government, and it is sufficient if reference is had to them.[22]

In contrast, a duty to consult an outside person or body removes the decision-making from being solely an internal matter and, therefore, more likely to achieve the broad considered approach sought for by the legislature. Thus, certain rules have evolved through case-law over the duty and process of consultation required by statute such that its breach could lead to impugning the decision made without the requisite statutory consultation.

First, the duty to consult is almost never regarded as a matter which is merely obligatory or directory. The duty to consult is mandatory, and if it does not take place, the decision made in default of consultation would be impugnable. For example, in *Agricultural, Horticul-*

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[21] See decision of the Privy Council in *Commissioner of Income Tax v Williamson Diamonds Ltd* [1958] AC 41 at p 49.

[22] See decision of the Indian Supreme Court in *Shri Sitaram Sugar Co Ltd v Union of India* AIR 1990 SC 1277 at pp 1290-1291.

tural and Forestry Industry Training Board v Aylesbury Mushrooms Ltd,[23] the Mushroom Growers Association of United Kingdom were entitled to be consulted before the setting up by the Agricultural Ministry of a training board for which a levy was imposed on them. The Association did not receive the notification calling for their views. It was held by the English Court that no consultation had taken place with the Association; the mere sending of a letter (which was not received) was but an attempt to consult. It was accordingly held that the members of the Association were not subject to the industrial training order issued by the Minister.

Secondly, it would seem that there could not be a dispensation on grounds of urgency of the statutory requirement to consult. In *R v Secretary of State for Social Services ex parte Association of Metropolitan Authorities*,[24] the Secretary of State was bound by statute "to consult" relevant organisations before enacting housing regulations. There was no dispute that the applicant was entitled to be consulted but it was contended for the Secretary that the urgency of the need for amendments to the regulations precluded the giving of sufficient time or opportunity. Webster J observed on the question of the need to consult: "There is no degree of urgency, however, which absolves the Secretary of State from the obligation to consult at all."[25] He held the obligation to consult as being mandatory and not directory.

A difficult situation could arise where the person to be consulted has an interest in the matter or is himself the potential beneficiary of the consultation. In *Sookoo & Anor v Attorney General of Trinidad and Tobago*,[26] the Privy Council had to consider the legitimacy of an advice tendered by the Chief Justice to the President, as required by the relevant statute, where extension of service of a judge due for

[23] [1972] 1 All ER 280. For a general discussion of the mandatory versus directory dichotomy, see *London & Clydeside Estates Ltd v Aberdeen District Council* (1980) 1 WLR 182 and *R v Home Dept Exp Jeyeanthan* (2000) 1 WLR 354.

[24] [1986] 1 All ER 164.

[25] *Id* at p 169 at para j.

[26] [1986] LRC (Const) 629.

retirement had become necessary to complete outstanding judicial work. The problem in that case was that the person concerned was the Chief Justice himself and he was obviously tendering an advice favourable to his own extension. The Privy Council repelled the argument founded on natural justice or misuse of power stating that the President wasunder the statute "to act on the advice of the Chief Justice" and matters of the sort argued relate to judicial misconduct to be taken up through the process established for that purpose.[27]

Next, the process must meet the test of being a genuine effort at consultation to constitute sufficient compliance with the statutory requirement. What constitutes sufficient consultation was comprehensively formulated by Bucknill LJ in *Rollo v Minister of Town and Country Planning*[28] based on the words of Morris J at first instance in the same case. It was a formulation that was to be used by the English courts with little modification in later cases. In dealing with a statutory provision that required the relevant Minister to consult the affected local authorities before deciding on the establishment of a new township, Bucknill LJ said that consultation meant on the one hand that the Minister ought to supply sufficient information to the local authority to enable them to tender advice, and on the other hand, a sufficient opportunity to the local authority to tender that advice.

The twin tests of "sufficient information" and "sufficient opportunity" have since occupied the attention of the courts when dealing with whether a consultation as known to law has taken place.

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[27] It may be observed in this regard that whilst the judgment of the Privy Council underscores the importance of meeting the statutory pre-requirement of "acting on advice", it ignores the fundamental question that if the advice tendered is lacking in good faith it is impugnable. As observed by Lord Greene MR in the famous Wednesbury decision, "good faith" stands by itself and is separate from the question of the reasonableness of the decision: see *Associated Picture Houses Ltd v Wednesbury Corporation* [1948] 1 KB 223 at 229. See also *Ex parte Association of Metropolitan Authorities, supra*, n 23 at p 169 at para h, where challenge on "good faith" grounds was recognised.

[28] [1948] 1 All ER 13.

On "sufficient information", it must relate to the purpose for which the consultation is called for and not some extraneous consideration related to the issue at hand. In the Privy Council case of *Port Louis Corporation v Attorney-General of Mauritius*,[29] the relevant statute required the Governor in Council of Mauritius to consult the local authority concerned before altering the boundaries of any town or village. The Port Louis Corporation, as the local authority for the town of Port Louis, was informed of the Government's proposal to enlarge the town area and then requested to submit its views. A controversy arose among the councillors leading to resignations and subsequent appointments to fill the vacancies; in the event the local authority sought information from the relevant Minister on 54 points and took the stand it needed the information before it could state its views. Many of the points asked for information on the intentions in the long term of the Government or as to future policy on various matters of local administration on the proposed areas to be included. The Minister did not respond, but after due notice of his intention to make a decision proceeded to decide on the enlargement of the town area without awaiting the views of the Port Louis Corporation. The Corporation then challenged the Minister's decision. The challenge failed. On the point relating to the information sought by the Corporation, Lord Morris observed:

> If there is a proposal to alter the boundaries of a town ... such alteration must not be made until after consultation with the local authority concerned. It follows that the local authority must know what is proposed before they can be expected to give their views. This does not however involve that the local authority are entitled to demand assurances as to the probable form of the solutions of the problems that may be likely to arise in the event of there being an alteration of boundaries.[30]

Further, it has been held that the process of consultation should not become a process for negotiations. There is the danger that the seeking of sufficient information or assurances of the consequences of

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[29] [1965] AC 1111.

[30] *Id* at p 1124.

the event postulated may transform the consultative process to something akin to negotiations. This was rejected by the New Zealand Court of Appeal in *Wellington International Airport Limited v Air New Zealand*.[31] The relevant statute required the Wellington Airport Authority to consult the user-airlines before setting landing fees. The airlines were supplied with the information they sought but declined to tender their views until more information was given. The Airport Authority then proceeded to set the landing fees without further discussion with the airlines. In criticising the approach of the airlines in using the process to reach an agreement on the charges, the New Zealand Court said:

> We do not think "consultation" can be equated with "negotiation". The word "negotiation" implies a process which has as its object arriving at agreement. There is no such requirement in the present case. The airport company is given the power to fix charges. Before doing so it must consult, and for consultation to be meaningful, there must be made available to the other party sufficient information to enable it to be adequately informed so as to be able to make intelligent and useful responses. The process is quite different from negotiation, however. One cannot expand the statutory requirement by replacing the word "consultation" with "negotiation" and then importing into the section the very different meaning of the latter word.[32]

However, it is in the area of "sufficient opportunity" that many of the cases dealing with failure of consultation have been decided. In *Ex parte Association of Metropolitan Authorities*,[33] the consultation failed because of insufficient time and insufficient information. The English Court recognised that in some cases the urgency of the decision to be made may justifiably curtail the time for response but that on the facts of the case it was held that the five working days given to respond was unreasonable in seeking views on the proposed amendments. The Court observed:

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[31] [1993] 1 NZLR 671.

[32] *Id* at p 676.

[33] *Supra*, n 24.

> ... [T]he urgency of the need for the amending regulations, as seen by the Secretary of State, taking into account the nature of the amendments proposed, was not such that the department was entitled to require views to be expressed within such a short period that those views would or might be insufficiently informed or insufficiently considered so that the applicants would or might be unable to tender helpful advice ... I am satisfied that the Secretary of State failed to fulfil his obligation to consult before making the regulations.[34]

There are two other matters that may be mentioned about the process of consultation. The first is that in the absence of a statutorily established procedure for the consultation to take place, the method of consultation is left to the parties. In *Re Union of the Benefices of Whippingham*,[35] the Privy Council rejected the argument that the decision of the local parish council on the matter consulted should be by formal vote or be recorded in official minutes. Lord Porter said:

> In their Lordships' opinion, however, although advisable, so elaborate and meticulous a proceeding is not essential. A full and sufficient opportunity must be given to the members of the council to ask questions and to submit their opinions in any reasonable way, but that is all that is required.[36]

In the *Port Louis Corporation case*,[37] the Privy Council observed that so long as the local authority was given reasonable opportunity to state its views, they may state them in writing or they may wish to state them orally.[38]

However, it should be noted that it is unusual for a formal consultative process to be attended by such informality as an oral advice as suggested above. It could lead to difficult evidential questions on whether consultation did take place and calling for a finding of fact by

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[34] *Id* at p 175 at para b.

[35] [1954] 2 All ER 22.

[36] *Id* at p 26 at para A.

[37] *Supra*, n 28.

[38] *Id* at p 1124 at paras D-E.

the court on the issue.[39] It had been held that a court determining the question whether the statutory requirement of consultation had been fulfilled would judge it on an objective basis.[40]

A further factor for consideration is the consistent observation by the courts that the requirement of consultation should not delay or frustrate the making of a decision. In the *Port Louis Corporation* case[41] and the *Wellington International Airport Limited* case,[42] the courts sanctioned the making of the decision although no consultation took place because the body consulted failed to respond in spite of sufficient time being given. In the *Agricultural Training Board* case,[43] Donaldson J (as he then was) observed in this respect:

> If the invitation is once received, it matters not that it is not accepted and no advice is proffered. Were it otherwise organisations with a right to be consulted could, in effect, veto the making of any order by simply failing to respond to the invitation. But without communication and the consequent opportunity of responding, there can be no consultation.[44]

Donaldson J's observation was of course based on there being a genuine effort at consultation with sufficient information and sufficient opportunity given. With respect, the observation by Lamin PCA in the Court of Appeal Judgment at hand to similar effect was made without a consideration of the legal rules relating to a valid consultation in law. Instead, the view taken was that consultation is a formality and a decision could be taken without awaiting the advice from the Conference of Rulers. The suggestion that flows from this reasoning that the consultation is directory and not mandatory is, with respect, wholly erroneous.

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[39] See *Re Union of the Benefices of Whippingham*, *supra*, n 35.

[40] See the *Wellington International Airport Limited* case, *supra*, n 31 at p 681(45).

[41] *Supra*, n 29.

[42] *Supra*, n 31.

[43] *Supra*, n 23.

[44] *Id* at p 284 at para f.

V. Judicial Appointment in Particular

The need for genuine consultation is heightened where it involves judicial appointments because of the immunity and the special protection against removal enjoyed by judicial officials after their appointment. Matters of suitability of judicial candidates and of judicial independence and accountability are all ingrained in the appointing process. These are not light matters as seen in the seminal decision of the Indian Supreme Court in *Supreme Court Advocates-on-Record Association v Union of India*.[45] It was a landmark decision which held that the consultation with the Chief Justice had to be a consultative process to arrive at a consensus over the judicial candidate, and if no consensus was reached, primacy was to be given to the opinion of the Chief Justice.

The Indian Constitutional provision, Article 217 reads as follows:

> Every Judge of a High Court shall be appointed by the President by warrant under his hand and seal *after consultation with the Chief Justice of India*, the Governor of the State, and, in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court ... . (Emphasis added.)

The Indian Supreme Court was at pains to explain the rationale behind the consultative process that it was to function as a check and balance against executive dominance in the appointing process and also the unsuitability of confiding total power in a single functionary. Verma J (later Chief Justice of India) observed as follows:

> It is obvious, that the provision for consultation with the Chief Justice of India and, in the case of the High Courts, with the Chief Justice of the High Court, was introduced because of the realisation that the Chief Justice is best equipped to know and assess the worth of the candidate, and his suitability for appointment as a superior judge; and it was also necessary to eliminate political influence even at the stage of the initial appointment of a judge, since the provisions for

[45] [1993] Supp 2 SCR 659.

> securing his independence after appointment were alone not sufficient for an independent judiciary. At the same time, the phraseology used indicated that giving absolute discretion or the power of veto to the Chief Justice of India as an individual in the matter of appointments was not considered desirable, so that there should remain some power with the executive to be exercised as a check, whenever necessary. The indication is, that in the choice of a candidate suitable for appointment, the opinion of the Chief Justice of India should have the greatest weight; the selection should be made as a result of a participatory consultative process ... . However, if conflicting opinions emerge at the end of the process, then only the question of giving primacy to the opinion of any of the consultees arises. For reason indicated earlier, primacy to the executive is negatived by the historical change and the nature of functions required to be performed by each. The primacy must, therefore, lie in the final opinion of the Chief Justice of India, unless for very good reasons known to the executive and disclosed to the Chief Justice of India, that appointment is not considered to be suitable.[46]

Verma J went on to explain the significance of the use of the word "consult" as opposed to "concurrence". Verma J's explanation merits close reading in the light of the significance attached by Lamin PCA in the Court of Appeal Judgment to the use of the word "consult" as opposed to "consent" in the equipollent Malaysian provision. On this point Verma J said:

> ... the executive should have power to act as a mere check on the exercise of power by the Chief Justice of India, to achieve the constitutional purpose. Thus, the executive element in the appointment process is reduced to the minimum and any political influence is eliminated. *It was for this reason that the word "consultation" instead of "concurrence" was used, but that was done merely to indicate that absolute discretion was not given to any one, not even to the Chief Justice of India as individual, much less to the executive*, which earlier had absolute discretion under the Government of India Acts.[47] (Emphasis added.)

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[46] *Id* at pp 757-758.

[47] *Id* at p 758.

The reasoning by Verma J is applaudable because it gives due regard to the doctrine of separation of powers that animates both the Indian and Malaysian Constitutions. An exclusive right in the Executive to appoint the judges without consultation is inimical to this doctrine and destructive of judicial independence.

Another aspect of the Indian judgment that is material for our discussion is the requirement for the constitutional Head of Government to act on cabinet advice even on the question of appointments. Lamin PCA in the Court of Appeal Judgment thought that the point was sufficiently conclusive to reduce the consultative process to a mere formality to the extent that an appointment could be made without awaiting the advice of the Conference.[48] In his Postscript, HRH Sultan Azlan Shah demurred and observed as follows:

> Clearly, this cannot be the correct interpretation. Just as the Prime Minister is duty-bound to consult the Chief Justice, he is equally bound to consult the Conference of Rulers. In such cases, the Prime Minister must consider the views expressed by both the Chief Justice and the Conference of Rulers. Only after a careful consideration of both their views should the Prime Minister make a final selection. Otherwise, the Prime Minister will have a free hand as to whom he can appoint, without an effective mechanism of checks and balances. So any negative views expressed by the parties (the Chief Justice or the Conference of Rulers) on a particular candidate must be taken seriously. The Prime Minister is duty-bound to give serious consideration to such advice.[49]

There is yet a stronger basis to His Royal Highness's observation. The rule of harmonious construction of different parts of the Constitution would dictate that Article 38(2)(c), Article 40(1A) and Article 122B(1) should all be read compatibly so that all the functionaries mentioned in these provisions are allowed to play their constitutional roles. The Indian judgment dealt with this point when reconciling the two Indian equivalent provisions. Verma J put it stronger when he spoke of

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[48] *Supra*, n 2 at p 484 at para I.

[49] *Supra*, n 3 at pp 396-397.

Article 74(1)[50] being circumscribed by Article 217(1), that is, the consultation requirement. His Lordship observed:

> If it were to be held that, notwithstanding the requirement of Articles 124(2) and 217(1) of mandatory consultation with the Chief Justice of India and Chief Justice of the High Court, the Council of Ministers has the unfettered discretion to give contrary advice, ignoring the view of the Chief Justice of India, and the President is bound by Article 74(1) to act in accordance with that advice, then the constitutional purpose of introducing the mandatory requirement of consultation in Articles 124(2) and 217(1) would be frustrated. It is for this reason, that in the matter of appointments of Judges of the superior judiciary, *the interaction and harmonisation of Article 74(1) with Articles 124(2) and 217(1) has to be borne in mind, to serve the constitutional purpose.* In short in the matter of appointments of Judges of the superior judiciary, the constitutional requirement is, that the President is to act in accordance with the advice of the Council of Ministers as provided in Article 74(1); and the advice of the Council of Ministers is to be given in accordance with Articles 124(2) and 217(a), as construed by this Court. In this sphere, Article 74(1) is circumscribed by the requirement of Articles 124(2) and 217(1) *and all of them have to be read together.*[51] (Emphasis added.)

This approach of the Indian Supreme Court is commendable because it reconciles the role of the constitutional head of state with that of the executive head of government where a consultation process is involved before a key appointment under the Constitution is made.

VI. Conclusion

In the light of the discussion above, the conclusion seems somewhat inevitable that the Judgment of the Court of Appeal was arrived at "without making any detailed study as to the scope of Article 122B nor as to the rationale behind it", as observed by His Royal Highness.[52]

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[50] The Indian equivalent to our Article 40(1A).

[51] *Supra*, n 45 at pp 760-761.

[52] *Supra*, n 3 at p 393.

The statement in the Judgment that "in the final analysis the appointment of judges is really a matter between the Yang diPertuan Agong and the Prime Minister personally"[53] should be declared as constitutionally incorrect. The flaw lies in the failure to recognise that the consultation process is prescribed by the Federal Constitution itself (as the supreme law of the land) and as a constitutional requirement it could not be dispensed with or treated in a casual manner.

[53] *Supra*, n 2 at p 485 at para B.

Rights and Liabilities of Scholars and Scholarship Authorities for Breach of Scholarship Agreements under the Contracts (Amendment) Act 1976*

*Sujata Balan***

I. Introduction

Many individuals seek to become beneficiaries of scholarship schemes in the pursuit of attaining qualifications and credentials to help fulfil their employment and economic needs. As the cost of education is steadily on the rise, the need for financial aid is a necessity for poor and needy students.

It is therefore propitious that the need for such financial aid coincides with the policies adopted by the government and other institutions which provide scholarships. Pursuant to the government's development programmes for the nation, large sums are allocated to give financial aid to deserving and talented students to pursue higher education. In return, a scholarship agreement will be entered into between the student

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* Valuable insights on the Contracts (Amendment) Act 1976 and its provisions may be obtained from an article published in 1976, namely, Saxena, IC, "Scholarship Agreements in Malaysia: A New Deal" (1976) 3 *JMCL* 253.

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