



**Bar Malaysia
Malaysian Bar**

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**Resolution Adopted at the Extraordinary General Meeting of the Malaysian Bar
Held at the Kuala Lumpur and Selangor Chinese Assembly Hall
(Thursday, 3 August 2017)**

**Resolution on Upholding the Supremacy of the Federal Constitution and Defending the
Independence and Integrity of the Judiciary**

WHEREAS:

- (1) The Office of the Prime Minister announced, in a media statement dated 7 July 2017 (see Appendix A), that:

“Pursuant to Article 122B(1) of the Federal Constitution, His Majesty the Yang di-Pertuan Agong, on the advice of the Prime Minister and after consultation with the Conference of Rulers convened on the 24th and 25th of May 2017, is pleased to announce the following:-

- (i) *YAA Tan Sri Dato’ Seri Md Raus bin Sharif who has been appointed as an additional judge in the Federal Court for a period of 3 years commencing from 4th of August 2017 pursuant to Article 122(1A) of the Federal Constitution, to continue holding the position of the Chief Justice of the Federal Court from the date and for the same period; and*
- (ii) *YAA Tan Sri Dato’ Seri Zulkefli bin Ahmad Makinudin who was appointed as an additional judge for the Federal Court for a period of 2 years commencing from 28th of September 2017 pursuant to Article 122(1A) of the Federal Constitution, to continue holding the position of the President of the Court of Appeal from the date and for the same period.*
2. *The appointment of YAA Tan Sri Dato’ Seri Md Raus bin Sharif and YAA Tan Sri Dato’ Seri Zulkefli bin Ahmad Makinudin as additional judges in the Federal Court after each of them reaching the age of 66 years and 6 months is on the respectful suggestion and advice of the Chief Justice at the material time, YAA Tun Dato’ Seri Arifin bin Zakaria to His Majesty the Yang di-Pertuan Agong on the 30th of March 2017, before Yang Amat Arif retired. The proposal and advice was accepted by His Majesty the Yang di-Pertuan Agong in accordance with Article 122(1A) of the Federal Constitution.*
3. *The above decisions and procedure are consonant with the provisions of the Federal Constitution now.*

4. *The Malaysian Government is however contemplating tabling a proposal in Parliament for the amendment of Article 125 of the Federal Constitution to raise the retirement age of Apex Court judges to 70 years. This is consonant with the Commonwealth and international practice and jurisprudence.*”;

- (2) The Office of the Chief Justice of the Federal Court (“Chief Justice”) and the Office of the President of the Court of Appeal are key positions in the Judiciary, an institution that is independent under the doctrine of separation of powers that underpins our constitutional framework;
- (3) The Chief Justice, as the Head of the Federal Court, and the President of the Court of Appeal, as the Head of the Court of Appeal, are both leaders of the Judicial branch of the Government, which is entrusted with the supreme duty of determining the constitutionality of laws passed by the Legislative branch, and the legality of decisions made by the Executive branch;
- (4) Pursuant to their solemn oaths of office and allegiance, the Chief Justice and the President of the Court of Appeal pledge to “*bear true faith and allegiance to Malaysia, and will preserve, protect and defend its Constitution*”;
- (5) Article 125(1) of the Federal Constitution stipulates that “... *a judge of the Federal Court shall hold office until he attains the age of sixty-six years or such later time, not being later than six months after he attains that age, as the Yang di-Pertuan Agong may approve*”. There is no provision in the Federal Constitution, and it is thus unconstitutional, for a serving Chief Justice or a serving President of the Court of Appeal to continue to hold the positions of Chief Justice and President of the Court of Appeal, respectively, beyond the prescribed age limit of 66 years and 6 months;
- (6) Article 122(1A) of the Federal Constitution provides that “*Notwithstanding anything in this Constitution contained, the Yang di-Pertuan Agong acting on the advice of the Chief Justice of the Federal Court may appoint for such purposes or for such period of time as he may specify any person who **has held** high judicial office in Malaysia to be an additional judge of the Federal Court.*” (emphasis added). This provides an exception that is clearly limited to the appointment of an **additional** judge, and not for the appointment of a Chief Justice or a President of the Court of Appeal;
- (7) It is unconstitutional for YAA Tun Dato’ Seri Arifin bin Zakaria to have advised, on 30 March 2017 (on the eve of his retirement), that YAA Tan Sri Dato’ Seri Md Raus bin Sharif (“current CJ”) and YAA Tan Sri Dato’ Seri Zulkefli bin Ahmad Makinudin (“current PCA”) be appointed, purportedly as additional judges under Article 122(1A) of the Federal Constitution, when the latter two judges were still serving as judges;
- (8) Nothing in Article 122(1A) of the Federal Constitution permits an outgoing Chief Justice to advise the Yang di-Pertuan Agong in respect of any appointment of additional judges that is to take effect **after** he has ceased to be the Chief Justice. Otherwise, an outgoing Chief Justice may, before his retirement, advise on the appointment of additional judges that would take effect when he is no longer the Chief Justice, and even long after;

- (9) Furthermore, nothing in Article 122(1A) of the Federal Constitution permits any advice of an outgoing Chief Justice to be acted upon after his retirement;
- (10) Any such advice given by an outgoing Chief Justice would also unconstitutionally and unacceptably encroach upon and usurp the duties and powers of the serving Chief Justice, as the provision in Article 122(1A) of the Federal Constitution should only be exercised, if at all, by the serving Chief Justice, and on the basis of circumstances existing during the time that he is occupying the Office of the Chief Justice;
- (11) Any advice pursuant to Article 122(1A) of the Federal Constitution must therefore only emanate from a serving Chief Justice; and be considered, be acted upon, and be in respect of appointments that would take effect, during such serving Chief Justice's tenure;
- (12) Article 122(1) of the Federal Constitution stipulates that "*the Federal Court shall consist of a president of the Court (to be styled "the Chief Justice of the Federal Court"), of the President of the Court of Appeal, of the Chief Judges of the High Courts and, until the Yang di-Pertuan Agong by order otherwise provides, of eleven other judges and such additional judges as may be appointed pursuant to Clause (1A)*" (emphasis added), which unequivocally indicates that an additional judge cannot also be the Chief Justice or the President of the Court of Appeal;
- (13) The Malaysian Bar does not question the abilities, capabilities or suitability of the current CJ and the current PCA. However, their tenures do, and must, come to an end on 3 August 2017 and 27 September 2017, respectively, and they cannot continue to hold those respective positions thereafter;
- (14) The unconstitutional appointments of the current CJ and the current PCA purportedly as additional judges in the Federal Court, and to continue to hold the positions of Chief Justice and President of the Court of Appeal, respectively, beyond the age limit of 66 years and 6 months as prescribed in the Federal Constitution, lend to the inference that there is a dearth of appropriate candidates among the eminent current members of the Federal Court, who are suitable and have the necessary abilities and capabilities;
- (15) Should the current CJ and/or the current PCA continue to hold their respective positions beyond the age limit of 66 years and 6 months as prescribed in the Federal Constitution, any orders and/or judgments that may be made by panels of which the current CJ and/or the current PCA become(s) member(s) may be called into question as to their validity. Such orders and/or judgments will thus be controversial and adversely affect public confidence in the administration of justice, which would be inimical to public interest;
- (16) Should the current CJ and/or the current PCA accept their respective unconstitutional appointments, they will assume the risk of conducting themselves in a manner not befitting of a judge, or risk bringing disrepute to the office of a judge, contrary to

Paragraphs 7(8) and 8(7) of the Judges' Code of Ethics 2009¹ as prescribed under Article 125(3B) and Article 125(3C) of the Federal Constitution;

- (17) The Prime Minister, Dato' Sri Mohd Najib Tun Abdul Razak ("Prime Minister"), acted unconstitutionally in relying on an erroneous interpretation of the Federal Constitution in advising the Yang di-Pertuan Agong that the current CJ and the current PCA, who have been appointed purportedly as additional judges in the Federal Court, can continue to hold the positions of Chief Justice and President of the Court of Appeal, respectively, beyond the age limit of 66 years and 6 months as prescribed in the Federal Constitution;
- (18) Furthermore, the Prime Minister should not have given such advice to the Yang di-Pertuan Agong when the Prime Minister is in a conflict of interest position, as he is a litigant in numerous proceedings pending in the courts, both in his official and personal capacity;
- (19) The said unconstitutional appointments would result in a severe erosion of public confidence in the institution of the Judiciary, and may invite an adverse perception as to its independence and integrity; and
- (20) The vital nature of the roles and duties of the Chief Justice and the President of the Court of Appeal under the Federal Constitution requires the circumstances of their appointments to be beyond any constitutional controversy.

THEREFORE, the Malaysian Bar hereby resolves:

- (A) That the appointment of YAA Tan Sri Dato' Seri Md Raus bin Sharif purportedly as an additional judge, and to continue to hold the position of Chief Justice beyond the age limit of 66 years and 6 months as prescribed in the Federal Constitution, is unconstitutional, null and void;
- (B) That the appointment of YAA Tan Sri Dato' Seri Zulkefli bin Ahmad Makinudin purportedly as an additional judge, and to continue to hold the position of President of the Court of Appeal beyond the age limit of 66 years and 6 months as prescribed in the Federal Constitution, is unconstitutional, null and void;
- (C) That YAA Tan Sri Dato' Seri Md Raus bin Sharif and YAA Tan Sri Dato' Seri Zulkefli bin Ahmad Makinudin be called upon to decline the aforesaid unconstitutional appointments, and to retire as Chief Justice and as President of the Court of Appeal on 3 August 2017 and 27 September 2017, respectively;
- (D) That if the aforesaid unconstitutional appointments are not declined and/or they do not retire, the Malaysian Bar will no longer have confidence in YAA Tan Sri Dato' Seri Md Raus bin Sharif and YAA Tan Sri Dato' Seri Zulkefli bin Ahmad Makinudin continuing to hold their respective offices as Chief Justice and as President of the

¹ Paragraph 7(8) provides: *A judge shall not conduct himself in a manner which is not befitting of a judge or which brings or is calculated to bring disrepute to his office as a judge.*

Paragraph 8(7) provides: *A judge shall not act in a manner which brings disrepute to his office as a judge.*

Court of Appeal beyond the age limit of 66 years and 6 months as prescribed in the Federal Constitution;

- (E) That if the aforesaid unconstitutional appointments are not declined and/or they do not retire, YAA Tan Sri Dato' Seri Md Raus bin Sharif and YAA Tan Sri Dato' Seri Zulkefli bin Ahmad Makinudin should not sit on the bench of any court, or exercise any judicial or administrative powers whatsoever attached to the respective offices of the Chief Justice and the President of the Court of Appeal; including but not limited to the power to empanel any court to hear any proceeding;
- (F) That so long as they remain in office as Chief Justice and President of the Court of Appeal after they attain 66 years and 6 months, YAA Tan Sri Dato' Seri Md Raus bin Sharif and YAA Tan Sri Dato' Seri Zulkefli bin Ahmad Makinudin shall not be invited to any social function of the Malaysian Bar or Bar Council, and Members of the Bar are encouraged to decline social invitations from them, or inviting them;
- (G) That in the event of any legal challenge in respect of the appointments, since all serving judges are in a position of conflict, the Malaysian Bar, pursuant to Article 131A of the Federal Constitution and Section 9 of the Courts of Judicature Act 1964, calls upon the Chief Judge of the High Court in Malaya to advise the Yang di-Pertuan Agong, under Article 122(1A) of the Federal Constitution, to appoint persons who have held high judicial office in Malaysia, who are not serving judges, as additional judges for the purpose of empanelling a bench to hear and determine the said legal challenge; and
- (H) That the Bar Council be mandated to take any and all steps that it deems appropriate regarding the aforesaid unconstitutional appointments, including instituting legal proceedings, for and on behalf of the Malaysian Bar, to challenge the validity of the appointments, and to seek interim as well as permanent reliefs, and to give effect to the resolutions above.



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MEDIA STATEMENT

APPOINTMENT OF THE CHIEF JUSTICE AND THE PRESIDENT OF THE COURT OF APPEAL, MALAYSIA, WHO ARE APPOINTEES AS ADDITIONAL JUDGES IN THE FEDERAL COURT PURSUANT TO ARTICLE 122(1A) OF THE FEDERAL CONSTITUTION

Pursuant to Article 122B(1) of the Federal Constitution, His Majesty the Yang di-Pertuan Agong, on the advice of the Prime Minister and after consultation with the Conference of Rulers convened on the 24th and 25th of May 2017, is pleased to announce the following:-

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- (ii) YAA Tan Sri Dato' Seri Zulkefli bin Ahmad Makinudin who was appointed as an additional judge for the Federal Court for a period of 2 years commencing from 28th of September 2017 pursuant to Article 122(1A) of the Federal Constitution, to continue holding the position of the President of the Court of Appeal from the date and for the same period.

2. The appointment of YAA Tan Sri Dato' Seri Md Raus bin Sharif and YAA Tan Sri Dato' Seri Zulkefli bin Ahmad Makinudin as additional judges in the Federal Court after each of them reaching the age of 66 years and 6 months is on the respectful suggestion and advice of the Chief Justice at the material time, YAA Tun Dato' Seri Arifin bin Zakaria to His Majesty the Yang di-Pertuan Agong on the 30th of March 2017, before Yang Amat Arif retired. The proposal and advice was accepted by His Majesty the Yang di-Pertuan Agong in accordance with Article 122(1A) of the Federal Constitution.

3. The above decisions and procedure are consonant with the provisions of the Federal Constitution now.

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7 July 2017