



# NAJIB RAZAK'S MINORITY JUDGEMENT & THE MALAYSIAN JUDICIAL INTEGRITY



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***Dr. Mahathir has yet again struck the very foundations of the Malaysian judiciary seeking to realign it to benefit him as the Prime Minister."***

- Senior Malaysian Legal Counsel, Datuk Seri Dr. Jahaberdeen Mohamed Yunoos

***"Tun Hamid expressed his disappointment and concerns over the recent conduct of the judiciary. He felt that in recent times the judiciary seems to view itself as indeed highly elevated compared to even the Malay Sultans, or "Raja-Raja Melayu."***

- Former, retired Chief Justice of Malaysia, Tun Abdul Hamid Mohamad

***"The Criminal procedure in India and Malaysia entitles an accused to have opportunity to be represented fairly. The denial of time to the new team appointed by Najib and led by Hisham Teh deprived Najib of being represented by counsel of his choice, constituted a failure of justice, a principle accepted across common law jurisdictions."***

- The Former Additional Solicitor General of India and Senior Advocate Mr. Sidharth Luthra

***"Mr. Jho Low the integral mastermind and principal witness in all of Mr. Najib's trials, who interestingly has been absconding from May 2018 and believed to have asylum in China, had actually sought to offer a minimum of US\$ 30 million to the re-election campaign of the former US President, Mr. Barack Obama..."*** **continue reading in article.**

**14 April, 2023**

**Minority Judgement in Dato' Seri Najib Razak's case.  
- Spotlight on Malaysian judicial integrity.**

On 31 March 2023, the Judicial Review of the former Prime Minister, Dato' Seri Najib Razak, ended with a four to one judgement to not substantiate his claims of a blatant denial of his rights as a citizen and the basic justice that is to have been accorded to him at his appeal in the SRC International<sup>1</sup> Case, back in August 2022. While admittedly, it is a high profile case but the actual judicial conduct and the circumstances surrounding Mr. Najib's case have indeed

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<sup>1</sup> SRC International: Edge Markets 15 April 2019, Here's everything you need to know to follow Najib's SRC trial.

opened up several debates around three major themes, namely, *1. Machinations by a Nonagenarian Despot; 2. Malaysian Judicial Integrity;* and, *3. Possible foreign state players interfering in Malaysian domestic affairs.*

### **1. Machinations by a Nonagenarian Despot.**

Firstly, we delve into the circumstances and chronology of events leading up to the SRC International trial. This will require the understanding of the events surrounding the Malaysian Judiciary immediately following the 2018 General Elections in Malaysia as asserted by Senior Malaysian Legal Counsel, Datuk Seri Dr. Jahaberdeen Mohamed Yunoos<sup>2</sup>. Ironically, these events have further been carefully chronicled by the then Attorney General, Tan Sri Tommy Thomas, in his memoir *My Story: Justice in the Wilderness*. Mr. Thomas was appointed as the Attorney General soon after the 2018 General Elections by Malaysia's 7<sup>th</sup> Prime Minister, the nonagenarian, Tun Dr. Mahathir Mohamad.

In the memoir, Mr. Thomas chronicles his own appointment as Attorney General and he also goes on to describe in relative detail how he and Dr. Mahathir went about screening and selecting judges to fill senior judicial positions, including that of the Chief Justice of Malaysia. This is a serious violation of the Judicial Appointments Commission (JAC) Act of 2009. This act was actually brought into existence following the Royal Commission of Inquiry on the infamous VK Lingam<sup>3</sup>, widely regarded as an intermediary for, none other than, Dr. Mahathir, for illegal intervention into the judicial appointment process of Malaysian judges.

Mr. Thomas has also penned how it was decided with tacit approval of Dr. Mahathir that Justice Zaharah was to be appointed to the post of Chief Judge of Malaya in June 2018. Again, while it was a gross circumvention of the JAC Act of 2009 however, Justice Zaharah's first act as Chief Justice of Malaya was to replace Justice Sofian who was already assigned to adjudicate Mr. Najib's SRC International trial with a relatively junior judge with little or no experience in adjudicating criminal cases, Justice Nazlan<sup>4</sup>.

Dr. Jahaberdeen says that this entire episode of realigning judicial appointments is reminiscent of Dr. Mahathir's act of firing the then Lord President of the Malaysian Judiciary, Tun Salleh Abbas, in 1988, in order to appoint judges who are compliant to the Prime Minister and the political elite of Malaysia. This, in essence, was the first assault on the independence and integrity of the Malaysian

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<sup>2</sup> Astro Awani: Tetuan Datuk Seri Dr. Jahaberdeen Mohamed Yunoos, Jahaberdeen & Co

<sup>3</sup> Reuters 21 January 2008: "It looks like me" says lawyer in Malaysian probe.

<sup>4</sup> Lim Sian See Facebook post

judiciary. Mr. Thomas' memoir now serves to show that the nonagenarian despot, Dr. Mahathir has yet again struck the very foundations of the Malaysian judiciary seeking to realign it to benefit him as the Prime Minister and his political compatriots.

This has now resulted in the current Minister in the Prime Minister's Department (Law and Institutional Reform) announcing that the Malaysian Cabinet, under the able stewardship of Dato' Seri Anwar Ibrahim, has decided to institute a Royal Commission of Inquiry (RCI)<sup>5</sup> to seriously look into the actions of the former Attorney General along with the the then Prime Minister, Dr. Mahathir.



## 2. Malaysian Judicial Integrity.

Judge Nazlan is the one, enigmatic personality who has raised several concerns over judicial integrity with his very persona, conduct and eventual judgement over the SRC International case. In early 2022, the Malaysian Anti Corruption Commission (MACC) had mounted an investigation on the learned Judge which was triggered by allegations of corruption and an eventual police report that he had himself filed. In usual Malaysian fashion, this investigation<sup>6</sup> was leaked online given that the country lacks an appropriate Freedom of Information Act.

This investigation had identified several interesting facts. Firstly, it confirmed that Justice Nazlan was indeed conflicted in adjudicating over the SRC International case. This was because he was personally involved as the Legal Advisor and Company Secretary of the very bank that was responsible for recommending the establishment of SRC International and was also materially involved in the raising of the bond on its behalf. Clearly he did not recuse himself from adjudicating on the case. The investigation papers were eventually submitted to the Attorney General, and the Chief Justice of Malaysia, Tun

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<sup>5</sup> The Edge Markets, 11 January 2023: Cabinet agrees to form RCI to look into Tommy Thomas' book revelations.

<sup>6</sup> Free Malaysia Today 6 April 2023: MACC found Nazlan conflicted, breached judges' ethics, says Azalina. Malaysia Now 7 April, 2023: Leak of MACC probe explained in Dewan Rakyat, says Azalina.

Tengku Maimun, as confirmed in Parliament on 23 February 2023 by the Minister for Law and Reforms<sup>7</sup>.

Secondly, the leaked copy of the letter dated 20 March 2023 from the MACC to the Chief Justice of Malaysia, Tun Tengku Maimun, as highlighted by Mr. Lim Sian See<sup>8</sup>, a senior Malaysian political analyst and the Deputy Director of Malaysian political coalition, Barisan National's Strategic Communications Centre, has further revealed that Justice Zaharah, soon after her appointment as Chief Judge of Malaya in June 2018, had actually done a "Judge Shopping" exercise. The report states that despite the court having an independent and possibly unbiased system of assigning judges to cases, the Chief Judge of Malaya had personally approached<sup>9</sup> three other judges to take over the case from Justice Sofian, who had already begun hearing the case. These three learned Judges had simply refused the offer, not a formal recusal, citing possible conflicts of interest. It was following this that the Chief Judge of Malaya transferred Justice Nazlan from the civil courts to adjudicate over the criminal proceedings of the SRC International case. It must be duly noted here that at the relevant timeframe, Justice Nazlan did not possess the necessary experience to preside over a criminal case as further pointed out by Mr. Lim. And, that too, one of the most high profile cases in the nation, let alone across the world, thanks to intense global media attention. The extent of Justice Nazlan's conflict of interest, according to Mr. Farhan Shafee of Shafee & Co., the legal counsel for Mr. Najib, was never fully revealed to the defense team until after Mr. Najib was convicted<sup>10</sup> by the learned judge on 28 July 2020.

Post the initial conviction and leading up to the appeal, Mr. Najib sought to strengthen his defense team with legal capabilities from around the Commonwealth. In this case, it was to include Mr. Jonathan Laidlaw, King's Counsel<sup>11</sup>. The application was first raised by way of a letter on 25 January 2022 by Messrs Shafee & Co, Mr. Najib's lawyers, to the secretariat of Chief Justice Tun Tengku Maimun, and then it was duly registered on 31 May 2022 in time for the appeal hearing that was set for 15 August 2022. Strangely, despite clear previous precedence in Malaysian judicial history, in this instance, there was concerted opposition from the Malaysian Bar Council<sup>12</sup>. The Courts too eventually rejected the application on 21 July 2022, with around 3 weeks to Mr. Najib's appeal hearing. At this point, Mr. Najib was left with little choice but to

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<sup>7</sup> Bernama 23 February 2023: MACC report on Judge Nazlan handed to Chief Justice – Azalina.

<sup>8</sup> Lim Sian See, 2 April 2023: Facebook Post of the copy of the leaked letter from the MACC to the Chief Justice of Malaysia, Tun Tengku Maimun.

<sup>9</sup> Investigation papers or LSS post

<sup>10</sup> The Edge Markets 28 July 2020: SRC Trial: Najib sentenced to 12 years in jail, fined RM210 mil.

<sup>11</sup> The Star 31 May 2022: King's Counsel Jonathan Laidlaw applies to appear as Najib's lawyer in SRC appeal.

<sup>12</sup> The Edge Markets 14 June 2022: Malaysian Bar to oppose QC Laidlaw's admission to represent Najib in his final SRC appeal.

seek the assistance of a fresh set of lawyers. Discharging his original legal team, Mr. Najib engaged the legal firm Zaid Ibrahim Suffian TH Liew & Partners<sup>13</sup> with senior lawyer, Mr. Hisham Teh along with two senior counsels from India to assist and bolster his legal team. The senior counsel team from India consisted of the former Additional Solicitor General of India and Senior Advocate, Mr. Sidharth Luthra and Senior Advocate Mr. Kavin Gulati.

Mr. Najib's new defense team literally had less than three weeks to prepare for this significant and clearly high profile appeal hearing. In order to become duly competent to defend their client, the team had to review and digest over 30,000 documents. The senior counsel, Mr. Hisham Teh approached the five member bench<sup>14</sup>, led by the honourable Chief Justice of Malaysia herself, Tun Tengku Maimun, with two requests. The first request was for a three month adjournment in order to adequately study the documents. And the second, was to adduce fresh evidence on Justice Nazlan that was not materially available to the legal team during the original trial proceedings. Both requests were summarily refused. This left the new defense team with little or no recourse but to request to discharge themselves from repressing Mr. Najib citing their inability to competently argue the case given the insufficient time to prepare for such a case. Sadly, the Court of Appeal, led by Chief Justice of Malaysia herself, Tun Tengku Maimun, did not allow the counsel to discharge themselves. This then resulted in Mr. Najib having to endure the appeal hearing without effective legal representation. Surprisingly, the judgement to uphold the sentencing was announced three days earlier on 23 August 2022 despite the Court Registry having scheduled it for 26 August 2022<sup>15</sup>. The Former Additional Solicitor General of India and Senior Advocate Mr. Sidharth Luthra said, "The Criminal procedure in India and Malaysia entitles an accused to have opportunity to be represented fairly. The denial of time to the new team appointed by Najib and led by Hisham Teh deprived Najib of being represented by counsel of his choice, constituted a failure of justice, a principle accepted across common law jurisdictions."

Chief judge of Sabah and Sarawak Datuk Abdul Rahman Sebli<sup>16</sup>, who chaired a five-member bench of the Federal Court on Mr. Najib's Judicial Review, on 31 March 2023, and as the sole dissenting judge, said that the previous panel of the Federal Court was likely to have been unfair when it heard and dismissed his appeal against conviction and sentence in SRC International case, when he was not legally represented. Justice Abdul Rahman Sebli said therefore, he is of the

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<sup>13</sup> Free Malaysia Today 26 July 2022: Najib ditches Shafee, appoints Zaid to lead SRC final appeal.

<sup>14</sup> The Star 23 August 2022: Najib's final SRC appeal: federal Court's full judgement.

<sup>15</sup> The Star 31 May 2022: King's Counsel Jonathan Laidlaw applies to appear as Najib's lawyer in SRC appeal.

<sup>16</sup> The Edge Markets, 11 January 2023: Cabinet agrees to form RCI to look into Tommy Thomas' book revelations.

view that the proper order against Najib would be an order of acquittal and discharge for all the offences that Najib was charged with. In his 78-page grounds of written judgement, he said it appears clear to him that there had been a miscarriage of justice that Mr. Najib had been deprived of a fair hearing.

Justice Abdul Rahman Sebli further emphasised that “Justice is not only about the guilt or innocence of the accused person. It is also about according him a fair trial. The accused person should feel that he has had a fair trial. If he cannot be tried fairly for the offence that he is charged with, he should not be tried for it at all. Denying the accused of a fair trial is a grave form of injustice.”

Datuk Zaid Ibrahim<sup>17</sup>, a senior legal practitioner and a former Malaysian Law Minister, said that he was puzzled at how the Federal Court, at every turn, rejected Mr. Najib’s bid to adduce new evidence and to postpone the trial, as defence lawyers require adequate time to prepare and argue the case. Recounting what transpired during the final hearing, Mr. Zaid said the defence team was not asking for Mr. Najib to be acquitted but was instead seeking to refer the case before another high court to see weather new “evidence” was relevant. However, he said the apex court insisted on proceeding with arguing the merits of the final appeal.

A former, retired Chief Justice of Malaysia, Tun Abdul Hamid Mohamad<sup>18</sup>, has recently criticised the conduct of the judicial process and that of the current Chief Justice of Malaysia, Tun Tengku Maimun, in particular. This is in regards to the investigation undertaken by the MACC on Judge Nazlan and how the Current Chief Justice of Malaysia had dismissed it. The learned Chief Judge had insisted that the MACC had not followed protocols to seek her permission prior to initiating any such investigation hence it may not be valid. Tun Hamid asserts that there exist no such law with regards to this protocol or procedure. He further expressed his disappointment and concerns over the recent conduct of the judiciary. He felt that in recent times the judiciary seems to view itself as indeed highly elevated compared to even the Malay Sultans, or “Raja-Raja Melayu”. Indeed unprecedented moves and trends by the Malaysian judiciary that may possibly give rise to doubts over the very integrity of this august institution.

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<sup>17</sup> The Vibes.com 2 September 2022: Bad faith to accuse Najib’s defence team of delay tactics: Zaid Ibrahim

<sup>18</sup> Free Malaysia Today 3 March 2023: Protokol apa, shoal Bekas ketua hakim berkait Ke-Utusan siasatan Nazlan.

## MALYSIAN JUDICIAL ACCOUNTABILITY AND INTEGRITY

■ The Malaysian Anti-Corruption Commission (MACC) mounted investigation on Judge Nazlan, confirming his conflict of interest, but did not recuse himself.



- Personally involved as the Legal Advisor and Company Secretary of the bank that was responsible for recommending the establishment of SRC International
- Involved in the raising of the bond on its behalf

■ Chief Judge of Sabah and Sarawak, Abdul Rahman Sebli who chaired a five-member bench of Federal Court on Najib's Judicial Review said in his 78-page grounds of written judgement that there had been a miscarriage of justice. Najib had been deprived of fair hearing as he was not legally represented.

### Najib's journey in seeking for a fair trial

25 January 2022	Registered application for representation by QC	
21 July 2022	Application <b>REJECTED</b>	
26 July 2022	Appointed new legal team led by Hisyam Teh Poh Teik. New counsel sought for 3-month adjournment to study 30,000 documents & adduce fresh evidence <b>REJECTED</b>	Lawyer requested to discharge themselves given insufficient time to prepare for the case <b>REJECTED</b>
15 August 2022	Trial	
23 August 2022	Sentenced guilty 3 days earlier than scheduled	
31 March 2023	Federal Court dismissed Najib's request for Judicial Review in 4-1 Judgment	

### 3. Possible foreign state players interfering in Malaysian domestic affairs.

In early 2022, during the trial proceedings of Mr. Roger Ng<sup>19</sup> in the New York courts for a case that is closely related to that of Mr. Najib's in Malaysia, his legal team had applied to access material information that would have provided exculpatory evidence and possible valuable positive inputs to his ongoing trials. This was duly granted by the New York courts. But, interestingly the United States Department of Justice (USDOJ) had immediately imposed a stay<sup>20</sup> on the order granted by the New York courts citing matters of grave importance to their national security. Neither was Mr. Najib's legal team able to appeal further to access this material information nor was the Malaysian Attorney General's Office willing to pursue it in the name of fair trial or proper disclosure.

<sup>19</sup> Associated Press 24 February 2022: Ex-Goldman Sachs Banker's Trial in 1MDB Scheme Hits Snag in Roger Ng Trial in New York; Malaysia Gazette 17 February 2022: Bringing in 1MDB business to Goldman made us heroes-Leissner.

<sup>20</sup> Malaysia Gazette 27 October 2021: Najib wants Time Leissner to name 1MDB, government officers he bribed; Reuters 11 December 2020: U.S. withheld evidence in ex-Goldman banker's 1MDB Malaysia corruption case, lawyer claims.

Then, in the recent Prakazrel "Pras" Michel trial in the US<sup>21</sup>, in yet another case that has direct implications on Mr. Najib's trials in Malaysia, it was revealed that Mr. Jho Low<sup>22</sup>, the integral mastermind and principal witness in all of Mr. Najib's trials, who interestingly has been absconding from May 2018 and believed to have asylum in China, had actually sought to offer a minimum of US\$ 30 million to the re-election campaign of the former US President, Mr. Barack Obama. This revelation was forthcoming from none other than Mr. Leonardo DiCaprio, the charming hero from the 1997 movie, "The Titanic".

Finally, in the March 2023 trial of Former Goldman Sachs Group Inc. banker Tim Leissner<sup>23</sup>, in a similar case with serious implications on Mr. Najib's legal entanglements, Mr. Lim Sian See asserts that it was revealed that several officers implicated in Mr. Najib's cases were all paid substantial monetary inducements by Jho Low, the integral mastermind and principal witness. Two of these officers are Datuk Azlin, Mr. Najib's Principle Personal Secretary in the Prime Minister's office, who tragically died in a helicopter crash in 2015 and Mr. Nik Faisal, the Chief Executive of SRC International, who surprisingly is also absconding since 2018. This is of significance as the judgement of the learned Justice Nazlan, was specifically based on the description of these two individuals being able officers who did not receive additional financial inducement and hence did not have a vested interest to withhold the actual financial machinations that were inherently taking place in SRC International from the then Prime Minister, Mr. Najib. Thus Mr. Nazlan placed all of the burden on Mr. Najib alone in summarily sentencing him.

The involvement and actions of foreign state actors is quite prevalent globally. It is most evident in recent regional and global political turmoil and possible intervention-tactics that we have been witnessing. It clearly raises the question of how these tactics impacted Mr. Najib's leadership tenure as Prime Minister not just from outside but also from growing counter-productive movements sponsored and propagated from within.

All in all, this entire episode has begun to highlight how institutions are compromised with machiavellian-type corruption by despots, and by increasing domestic activism with possible external influences that may not allow for balanced and centrist functioning of key Malaysian institutions and on its democracy.

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<sup>21</sup> Reuters 4 April 2023: Leonardo DiCaprio says Malaysian financier planned to donate to Obama's 2012 campaign.

<sup>22</sup> New Straits Times 31 August 2022: Jho Low in China, spotted in Victoria Secret's party?

<sup>23</sup> The Edge Markets 4 March 2023: Ex-Goldman banker Tim Leissner ordered to forfeit US\$43.7 mil over 1MDB bribery fraud; Lim Sian See's Facebook post.



Mr. Najib is now seeking a Royal Pardon from the King, The Yang Di Pertuan Agung of Malaysia. While the pardon is the prerogative of the King, The nation awaits to see how the Prime Minister of the Day, Mr. Anwar Ibrahim, defines his premiership and eventual legacy to truly reform the various institutions, in this case the Judiciary. Mr. Anwar's catapult to global fame was his famous rallying call for reform, or "Refomasi". It is may now be an opportune time to embrace his political partners to help drive the nation toward realising this call.

**POSSIBLE FOREIGN STATE PLAYERS INTERFERING IN MALAYSIAN DOMESTIC AFFAIRS AND DEMOCRACY**

- USDOJ imposed a stay in Roger Ng's trial immediately after the New York court granted his legal team access to material information that would have valuable in his case, citing matters of grave importance to their national security.
- Neither Najib's legal team was able to appeal further to access this material information nor was the Malaysian Attorney General's Office willing to pursue it in the name of fair trial or proper disclosure.
- Jho Low, mastermind and witness in Najib's trials, sought to offer minimum \$30 million to Obama's re-election campaign.

***Najib is now seeking a Royal Pardon from the King while the nation awaits Prime Minister Anwar Ibrahim to truly reform the judiciary system.***



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