

Relationship between rule of law law constitutional administrative essay

[Law](#)



**ASSIGN
BUSTER**

The rule of law is one of the most challenging views of the constitution and it is also important to distinguish the prospective of the rule of law in ensuring the limitation of governmental power and the protection of individual rights. The rule of law cannot be viewed in separately from political society. Due to, the prominence on the rule of law as a yardstick for gauging both the level that government acts under the law and the level that an individual rights are recognized and protected by law.[1]AV Dicey argued that the rule of law in its practical demonstration have three main aspects. Firstly, no man should be punishable to suffer in body or properties except for clear breach of law recognized in the ordinary legal method before the ordinary courts of the land. In this sense, the rule of law is differentiated with all other system of government based on the implementation by individuals in authority of wide, arbitrary, or unrestricted powers of constraint. Next is no man is above the law. It is to be said that every gender is subject to the ordinary law of the realm and amenable to the jurisdiction of the ordinary courts, whatever be his or her position or condition. Lastly are the general principles of the constitution. For an example, the right of public assembly or the right to freedom. The general principles are the results of judicial decisions in determine the rights of private persons in certain cases brought before the courts.[2]

Separation of Powers

The principle of the separation of powers is that, in order that no one should have excessive power between the three bodies of the government. These three bodies that are the legislature, executive and judiciary must be clearly separated in membership and function. Furthermore, there should be a

checks and balances system between these three organs. In the book 'The Politics', Aristotle proclaimed that "There are three elements in each constitution ... if these are well arranged, the constitution is bound to be well arranged ..."[3]In the book 'The Spirits of the Law' which written by a French philosopher named Montesquieu states that each body of the government should have a separate and clear of power and there should also be a clear separation of functions between them. Monstesquieu added if the same person held all of these three powers, then there would be a dictatorship and arbitrary rule would prevail.[4]There are two different types of senses in the separation of powers, which are the strict sense and liberal sense. In Malaysia, the government is operating the liberal sense, means that there will be overlaps in membership and function between the three bodies of the government. However, there should be checks and balances system between the bodies. Therefore, the checks and balances system is introduced; it is an important part of the constitution to make sure that the powers between the three bodies of the government is balanced.

Relationship between rule of law and separation of power in Malaysia

In Malaysia the three bodies of the government are the guarantors in their respective scopes of the rule of law, the publicity and protection of the fundamental human rights. Besides, the establishment of good governance is based on the highest values of integrity, morality and accountability. The connection between the rule of law and the separation of power is that they are interconnected. These two doctrines make sure that all the three bodies of the government carry out their obligation equitably and independently.

The rule of law sets out laws that are binding to everyone. While, the separation of power is making sure that these laws are obeyed and the three organs shall not interfere the other organs and operate the law for their own benefits.[5] There is no reason to eliminate the parliamentary governments from the set of constitutional systems as long as the legislature makes the laws, the judiciary interprets and applies the laws, and the executive operates within the rule of law. The fact that there is partly overlapping membership in the legislature and executive does not mean that the executive itself can make laws or that the legislature happens to be a rubber stamp for the executive, much less that the judiciary is not liberated. A parliament is no less a rampart against a despotic or illegal executive than a conference in a presidential system. In short, highly concentrated executive decision making can happen within the rule of law. What troubles most for the doctrine of separation of powers is whether any branch of government can contravene the constitution with impunity. Hence, the rule of law is replaced with the rule of a single governmental agency, group, or individual.[6] In the relationship between the executive and judiciary, the rule of law requires judges to ensure that the government action is in accordance with the law. This function could not be fulfilled if the judges' independence was uncertain.[7] Basically the sense of separation of powers is under the study of political science moreover it also appears in Constitutional study. The separation of powers implements the concept of rule of law where government by law not rule by men. AV Dicey popularizes the rule of law, which is a British jurist. Ironically the country of his origin does not really portray the concept of rule of law through Separation of Powers. The fusion

powers between the executive and the legislature in Parliamentary system does not exactly bring benefit to the government. It may occasionally be positive and in the other time it might bring to tyrannical effect.[8]The separation of powers, together with the rule of law and parliamentary sovereignty, runs like a thread throughout the constitution of the United Kingdom.[9]

Why do we need Judicial Independence?

A country would not have a balance system of the government if the judiciary does not exist. Furthermore, without the judiciary system, the separation of powers of the country would be incomplete. Judiciary is the system of the courts that interpret and applies the laws in one country. Each state would have their own courts to interpret and applies the laws. The existence of the doctrine of separation of powers has made the judiciary to only interpret the laws. Under the same doctrine, judiciary also is not able to change the law as it is the duty of the legislature. Enforcing the law also cannot be done by the judiciary as the duty is to be done by the executive organ of the government. In most states, there are the courts that have the judges to interpret the laws. The courts are the superior courts and the subordinate courts. Through that idea, the judicial independence is created. In a nutshell, the creation of the judicial independence is an important medium to keep away the other branches of the government from influencing the judicial system. As said by Montesquieu[10], he puts forward the idea that if the judiciary power is not separated from the legislative and executive, there will be no liberty. The arbitrary control would expose the life and liberty of the subject which results on the judge would then be the

legislator if it would join with the legislative. While if judiciary were joined with the executive, the judge would perhaps behave with violence and oppression. Thus, based on the theory of Montesquieu, separation of powers between the judiciary and the other two branches is important in order to guarantee the liberty of the people. It also promotes efficiency in the administration. In Malaysia, politically practices Parliamentary democracy (Halim). The federal constitution stated that under Article 132(3) (c)[11], the judges of the superior courts are not civil servants. By the virtue of the Article 125(7) of the Federal Constitution, that the compensation and other terms of the office (including pension rights) of a judge ' shall not be altered to his disadvantage after his appointment' which enhances the security of tenure. Article 127 of the Constitution confines the dialogue of conduct of Judges in either Houses of Parliament except on a substantive motion of which notice has been given by not less than one quarter of the total number of members of that House, and shall not be discussed in the Legislative assembly of any State.[12]This shows that under the doctrine of the separation of powers, the other two branches of government shall not overlap the judiciary. Thus, we do need judicial independence. Based on Montesquieu theory, the separation of powers will help the courts to be free from any unwanted influences from the other branches of the government, and even from the private or adherent interests. The judges are ideally free on giving their judgments on cases and make rulings based on the rule of law and judicial discretion. The life tenure which is a part of the judicial independence would give the judges the power to decide on cases even if the decisions made would be politically unpopular or being opposed by

influential interests from any parties. The judicial independence is vital in providing the checks and balances. Constitution supremacy is a doctrine which the constitution is absolute and the government rules based on the constitution and at the same time the government is limited by the constitution itself. As stated in Article 4 of the Federal Constitution, any law passed after 31st August which is inconsistent with the Consistent shall be void, to the extent of the inconsistency. Constitutional supremacy is upheld by giving the courts the power to review executive and legislative acts on constitutional grounds. In the case of *Ah Thian v Government of Malaysia* [1976][13], Suffian the courts have power to declare a written law invalid based on a few grounds. In the case of *Loh Kooi Choon v Government of Malaysia* [1977][14], Raja Azlan Shah FJ has stated that " the constitution is the supreme law embodying 3 body concepts which are fundamental rights, distribution of sovereign power and separation of power. The judicial independence is also included in the five fundamental values of the justice system.[15]In order to have the justice to be developed in one country, a solid judicial independence is required. The judicial independence is undeniable important in one country. Even though to question the necessary of the judicial independence is unnecessary, it is still important to know the reasons and the answers to the question of " why do we need the judicial independence?". The need to have judicial independence in Malaysia can be affirmed in the talk as said by Lord Bingham[16]when he was delivering a lecture at Cambridge University, he has mentioned the subject of " The Rule of Law", this is due to this common expression has given no certainty " that all those who used the expression knew what they meant...or meant the

same thing" as quoted. We need the judiciary independence as there are always dispute on whether certain courts' judges have the rights on deciding criminal cases. Moreover, judicial independence is important in order to ensure that the decisions of judges are firm and as to assured that their independence by virtue of the tenure of the office. Previously, there had been wonders whether the judges at the subordinate courts and magistrates could cause the impartiality when they deal with criminal cases. Rumor has it that the Attorney General is the head of the Judicial and Legal Service. The Public Prosecutor would also be the Attorney General and one has the supervision and control of these subordinate court judges and there are possibilities that the magistrates to be bias. This can be seen that judicial independence is required as to settle the disputes that occur among the judges in the courts. In the case of *Maleb bin Su v Public Prosecutor*[17], it was held that Judicial and Legal Service Commission have the jurisdiction over the judicial officers. It is proven that the Attorney General is not the head of the judicial and legal service. Even by the virtue of the fact that he has the membership of the Judicial and Legal Service Commission, the subordinate court judges and the magistrates' independence is safeguarded. The judges would also be the victims of the judiciary crisis. The judicial independence is needed to avoid such cases that at some point making the judges as the victims. Other branches should not interfere with the judiciary. However, in *Tun Salleh Abas's* case in 1988[18], he was sacked even though he is actually not guilty. The conflict between the executive and the judiciary had come to a head. This shouldn't be happening as the executive is not supposed to overlap the judiciary. Based on the case, many flaws in the laws

were detected. Thus, we need the judicial independence in order to give protections to the judges. The common law regarding the judicial review has come across the "natural justice" or also known as "fairness" by the courts. Judicial independence will ensure the natural justice or fairness made by the courts. However, once the decision-maker attempts in good faith to address himself to the evidence and the issues, what constitutes determination of the merits as opposed to the process for determining the merits is often a difficult question. It is not natural for review on the basis of a lack of evidence to be described as natural justice or procedural review. The "no evidence" test of judicial review has sometimes been said to raise the issue whether there is any evidence of probative significance to support the decision at issue, i. e., the Moore^[19] test for natural justice in this area. This suggests the lack of any real imperative to talk in "natural justice" rather than "no evidence" terms in Moore. Furthermore, even while it might be arguable, as D. W. Elliott^[20] has also asserted, that "no evidence" review is properly seen as an aspect of natural justice. Natural justice made by the courts is an essential aspect of the judicial independence, thus this will help to maintain the power of the judges and the courts. The overlapping of the executive branch on the judiciary is been said by many articles. Tun Mahathir's action has caused a lot of unsatisfied feeling among the citizens. In the article of "Tun Salleh, Guilty or Not Guilty for Misconduct?"^[21], "I blame it on the failure of the government at the material time to explain adequately to the people the reasons for the setting up of a Tribunal to investigate into the judicial misconduct of Tun Salleh, the former Lord President of the then Supreme Court of Malaysia.", said by the author. In the

article from the Malaysia Bar, it is stated on how Tun Mahathir Muhammad destroyed the Malaysian Judiciary. As the prime minister of the country during that time, this shouldn't be happening as the concept of the Rule of Law and Judicial Independence should really be understood by all the responsible people under the doctrine of separation of powers. The principles of the separations of powers are very essential and would be the foundation on having a good democratic country based on the Rule of Law. Akin to Lord Bingham (AC, 2010)'s saying as the meaning of the concept of the " Rule of Law", the concept of the judicial independence is fundamental to be understood. According to Dicey, there are three meanings of the concept. Firstly, no one can be punished or suffer any loss for breaking the law except by order of the courts of the land. Secondly, in as many words, no one is above the law and everyone is subject to the same law applied in the same courts. Thirdly, the rule of law was the common law. In order to enforce the rule of law, independence judiciary is required with the supremacy to impose its verdicts without fear or favour. The judiciary must not be influenced by the extraneous pressures. Rule of law must be invested with all the essential powers to interpret and control the law and to make sure the public authorities within the limits of their competence. It is important to protect the rule of law, thus, the creation of supreme constitution, the safeguards for an independent judiciary and the constitutional power of judicial review are the lucid proof that legal system can help to protect the rule of law. With the rule of law, administrative law principles of ultra vires and natural justice have become better. (Faruqi, Document of Destiny, 2008) There are of course difficulties and dilemmas on upholding the Rule of Law (Faruqi). The judges

are holding a crucial role of enforcing the requirements of the legality, safeguarding human rights, directing the executive discretion and giving the independent system of the justice. It is also important to have the judiciary independence in a democratic country as it distinguishes democratic country and the totalitarian country. The judicial independence is significant for the country as a free society only could only exist as long as it is governed by the rule of law. In order to have good governance, the judicial independence shall be strongly obeyed. In the case of *Stephen Kalong Ningkan v Government of Malaysia*[22], the power of the judicial review is trusted to be a natural power of the courts. The power would still exist even if the power is not conferred by the statute which implies the doctrine of separation of powers. It is also a part of the theory of the check and balance in the common law which the courts must make sure that every party must follow the limits. It is the basis that the courts considered the challenge to an emergency declaration as in the case. In the case of *Liyanage v R*[23], the council has declared that a statute unconstitutional because it is breached any express constitutional stipulation but because it compromised judicial independence and was the opposite to the constitutional scheme. Judicial independence also will protect the Article 4(1) of the Federal Constitution[24] which it stated that in unmistakable language that " this Constitution is the supreme law of the Federation and any law passed after Merdeka Day which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void." Article 162(6) permits the courts to invalidate or modify pre-Merdeka laws that contravene the Constitution. In order to preserve judicial independence and integrity, Articles 121-131A of the

Constitution integrate certain safeguards into the fabric of the law.

Reestablishing judicial independence and rewarding integrity and ability are important. Judicial independence will secure the judges in the government.

The government must be alert that if respect for judges and the judicial process is demolish, there will be no one left to decide on the decisive issues which could rip the social fabric apart. Furthermore, the judges are the important part of checks and balance which could help to prevent the abuse of power.. BIBLIOGRAPHY Montesquieu, *The Spirit of the Laws*, Book XI. Shad Saleem Faruqi, *RULE OF LAW & INDEPENDENCE OF THE JUDICIARY: SOME ISSUES* Shad Saleem Faruqi, *DOCUMENT OF DESTINY : The Constitution of the Federation of Malaya* Sir Ninian Stephen, ' Why Judicial Independence?', The Centre for Democratic Institutions Asia- Pacific Judicial Educators Forum, January 2004 THE HON. MARILYN WARREN AC , CHIEF JUSTICE OF VICTORIA , THE VICTORIA LAW FOUNDATION LAW WEEK ORATION, DELIVERED BY

3

The definition of separation of powers in the liberal sense is that there are overlaps in function and membership between the executive, judiciary and legislative, on the condition that there should be checks and balances between these institutions. Malaysia is currently practicing such a form of separation of powers. By virtue of the Federal Constitution, the powers of legislature are clearly defined in Article 44; that of the executive in Article 39; and that of the judiciary in Article 121. In Malaysia, there is no overlap of membership between the legislature and the judiciary. The legislature does not infringe on the roles of judiciary or vice versa. Therefore, judges are absolutely barred from being members of either the Dewan Negara or the

Dewan Rakyat. In other words, they are barred from engaging in politics. This is to maintain the independence of the judiciary and the confidence of the public. However, since Malaysia applies the liberal sense of separation of power, overlapping of power between the judiciary and legislative is allowed, provided that there should be a check and balance between these organs. Article 127 prohibits the parliamentary discussion on the conduct of judges. This Article aims to secure the judiciary in performing their duty as the upholder of justice without fear or favour. However, there is an exception under this Article. Article 127 of the Federal Constitution also provides that the conduct of judges can be discussed on the ground that " a substantive motion of which notice has been given by not less than one quarter of the total number of members of that House and shall not be discussed in the Legislative of any state". In other words, the judges' conduct can still be discussed in either House of Parliament. In this sense, the application of the liberal sense of separation of power in Malaysia has directly affected judiciary independence. In actual fact, the conduct of judges should be protected firmly without any interference from the legislature and judiciary. As the Federal Constitution is the supreme law of the land, this Article has actually given the right to the parliament to discuss judges' conduct easily and at any time, as the provision only requires a substantive motion from one quarter of the total number of members in the House. This means that the judges' conduct might be discussed even without a simple majority agreement from the House. Thus, we can say that the loose application of separation of power has removed some aspects of judicial independence. However, this Article is still satisfactory in securing judicial independence as

it also firmly prohibits the State Assemblies from discussing the judges' conduct and thus only the Houses of Parliament can discuss the judges' conduct with certain requirements. This can be seen in the case of *Majlis Peguam Malaysia & Ors v Raja Segaran a/l Krishnan* [2005] 1 MLJ 15, whereby the Court of Appeal explained that public discussion on judicial conduct would amount to questioning the wisdom of the Yang di-Pertuan Agong in his selection. Open criticism of the judiciary could also invoke public misgivings and erode public confidence in our judicial system. Article 4(1), Article 128 and Article 162(6) allow the judges to review an Act of Parliament on constitutional grounds. The Parliament is not supreme in Malaysia. If an Act of Parliament is found to be unconstitutional, judges are able to declare it to be unconstitutional. In this sense, the judiciary checks on the legislature. Checks and balances are an important element in the doctrine of separation of powers as they make sure each organ does not abuse its powers. Judges are expected to perform their duty according to the obligations of the Constitution. However, Articles 149 and 150, in certain ways, affect the independence of the judiciary. Article 149 provides for 'legislation against subversion, action prejudicial to public order, etc.' "Subversion" has been defined in Article 149(1) to refer to the following: cause substantial number of citizens to fear organised violence against persons or property; exciting disaffection against the Yang di-Pertuan Agong Government in the Federation; promoting feelings of ill-will between classes of the population in such a way as is likely to cause violence; procuring alternation, otherwise than by lawful means, of anything by law established; prejudicing the maintenance of any supply or service to the public; or

causing prejudice to public order or national security. Article 149 augments the powers of Parliament to enact special legislation which are inconsistent with Articles 5, 9, 10 and 13 to combat subversion. These laws passed under the Article 149 can be draconian and often depart from the norms of separation of powers and limited government. The most famous legislation under Article 149 is the Internal Security Act 1960. Its validity has been repeatedly challenged and the courts have been unanimous that the law is perfectly permissible under Article 149. In *PP v Yee Kim Seng* [1983] 1 MLJ 252, section 57(1)(b) of the Internal Security Act prescribing the death penalty for unlawful possession of explosives was held to be within the powers stated in Article 149. Ajaib Singh further stated that judges in Malaysia are not willing to question the morality of the law passed by Parliament as they are just concerned with the administration of the law as is found in the statute book. Whether such laws are morally right or otherwise is a matter for Parliament to decide. It also shows the unwillingness of the courts to question the subjective opinion of the minister. The minister therefore needs to show that his grounds for acting are objectively reasonable. Courts also have the jurisdiction to review the Minister's subjective exercise of discretion to detain under section 8(1) of the Internal Security Act 1960. Therefore, we can conclude that Article 149 has affected the independence of judiciary, as the judiciary is not allowed to question the laws passed under Article 149. Parliament is supreme in this matter and the judiciary branch is not able to check on Parliament. Under Article 150(1), the term ' emergency' has been defined as threats to the security, economic life or public order of the federation or any part thereof. This Article also states

that " if the Yang di-Pertuan Agong is satisfied that a grave emergency exists whereby the security, or the economic life, or public order in the Federation or any part therefore is threatened, he may issue a Proclamation of Emergency making therein a declaration to that effect". With regards to the control by judiciary, prior to 1991, courts were of the view that they have the powers to check on declarations of emergency. Nevertheless, with the constitutional amendment and the insertion of Article 150(8), judicial review of an emergency proclamation is now constitutionally ousted. Article 150(8) provides that ' the satisfaction of the Yang di-Pertuan Agong mentioned in clause (1) and clause (2) shall be final and conclusive and shall not be challenged or called in question in any court on any ground". In other words, Article 150(8) has expressly removed the powers of judiciary to carry out checks and balances. Therefore, the executive branch has more powers compared to the judicial branch. It must be noted that in a country with a supreme Constitution like us, questions of unconstitutionality can never be removed from judicial review. Furthermore, Article 125(6) requires that the remuneration, pension and other benefits of office of the judges of the superior courts are provided by the Judges' Remuneration Act 1971 (Act 45). Judges' salaries are charged on the Consolidated Fund[25]. In other words, the remuneration is payable every year without the necessity for annual parliamentary approval. In addition, the salary of a judge, his other terms of office and pension rights, may not be altered to his disadvantage after his appointment[26]. This also means that their remuneration is not decided by the legislature. In this sense, they are independent from the interference of the legislature. Om the relationship between executive and judiciary, the

judges of the superior Courts such as the Federal Court, the Court of Appeal and the two High Courts are appointed by the Yang di-Pertuan Agong, who acts on the advice of the Prime Minister, after consulting the Conference of Rulers, and the Chief Justice[27]except for the appointment of the Chief Justice himself. The Prime Minister is required to consult the Chief Justice and the Chief Judges on appointment to the Federal Courts; the President of the Court of Appeal on appointments to the Court of Appeal; and the Chief Judge of a High Court on appointments to that High Court[28]. Some people may argue that the appointments of the judges are placed in the hands of the executive and this would lead to conflict of interests. However, the appointments are deeply affected by judicial advice and consensus as well as constitutional and diplomatic considerations. The Yang di-Pertuan Agong and the Conference of Rulers play little practical role in these appointments. The Yang di-Pertuan Agong only acts on advice of the Conference. Moreover, the Federal Constitution prescribes some safeguards to the appointments of judges. Article 123 of the Federal Constitution states that a person qualifies for appointment as a judge of the superior court if that person is a citizen and for the ten years preceding such appointment he or she has been an advocate of those courts or any of them or a member of the Judicial and Legal Service of the federation or the legal service of a state, or sometimes one and sometimes another. In other words, only those who have appropriate legal training and experience may be appointed. In this sense, the Prime Minister is not able to recommend any person who does not fulfill the requirements. Yet the situation is becoming worse because judges of subordinate courts such as the Session Courts and Magistrate Courts are part

of the Judicial and Legal Service. They may be transferred from the Bench to the Attorney General's Chambers and the government departments. This is an obvious breach of the doctrine of separation of powers, as the functions of the judiciary and the executive intermingle. Their institutional link with the executive and the influence of the executive on their transferability and career path subject them to problems and pressures that should be avoided. Moreover, judges of the subordinate courts hold office at the pleasure of the Yang di-Pertuan Agong. In theory, they can be removed or dismissed for any or no reason. Nevertheless, an independent Judicial and Legal Service Commission has secured their independency in discharging their judicial functions. In terms of the promotion and transfer of judges of the subordinate courts, the Attorney General who is part of the executive, has a very strong influence because he is member of the Judicial and Legal Service Commission as provided by Article 138(2)(b). In this situation, a breach of the doctrine of separation of powers occurs, as the executive may exert influence onto judges or threaten judges to make decisions which favour them. The Attorney General also has the power to transfer the cases laterally or vertically under Section 418A of the Criminal Procedure Code and Article 145(3A). In this sense, the executive branch is able to exert their influence in the judiciary. However, in the case of *Dato Yap Peng v PP* [1987] 2 MLJ 311, the Supreme Court relied on Article 121(1) to invalidate section 418A of the CPC as the impugned section conferred power on the Attorney General to withdraw cases from the lower courts and transfer it to the High Court even after proceedings in the lower court had commenced. This was a trespass on the jurisdiction of the courts and a violation of the doctrine of separation of

powers. Moreover, it also breaches an element of natural justice, *audi alterem partem*, which requires that the person who will be affected by a decision must have a right to be heard and that person should not be penalised by a decision affecting his or her rights or legitimate expectations, unless that person has been given prior notice of the case, a fair opportunity to answer it, and to present the case. Hence, the transfer of that case to another court clearly dismissed the right of an individual to have a fair trial. The decision in the case of *Dato Yap Peng v PP* showed the willingness of the judiciary to review the executive's actions. Furthermore, the maintenance of judicial independence at the lower rungs of the judiciary does indeed pose severe challenges and dilemmas as the Public Prosecutors who appear before subordinate courts' judges are often senior in ranking. This certainly affects the decision of the judges. The rise of the administrative tribunals leads to another conflict of interest between the judiciary and the executive. Chairpersons of hundreds of administrative tribunals are not full time judges. Most of them are full time officers of the executive branch or administrators without legal qualifications. It is a serious departure from the strict theory of separation of powers. The link of such tribunals with the executive may in some circumstances create the appearance of institutional bias. In this sense, the executive plays the role of judiciary and may decide the cases in favour of the executive. Hence, it sways the confidence of the public towards judiciary independence. Fortunately, most tribunals are subject to judicial control on the ground of unconstitutionality and natural justice. For instance, the High Court has jurisdiction to review decisions of quasi-judicial bodies or administrative bodies. In other words, the administrative tribunals are not

totally free from the interference of the superior courts which exercise their jurisdiction in protecting the independence of judicial branch. Judges of the superior courts also enjoy security of tenure. They are exempted from the general rule set out in Article 132(2A) that members of the public services hold office during the pleasure of the Yang di-Pertuan Agong as they are not public servants[29]. Therefore, a judge may only be dismissed by the Yang di-Pertuan Agong on the grounds of breach of any provision of the code of ethics prescribed under Article 125 (3A) (formerly ‘ misbehaviour’) or of inability, from infirmity of body or mind or any other cause, properly to discharge the functions of his office and then only on the recommendation of a tribunal. Hence, judges cannot be removed without any valid reason. In this way, they are able to perform their duty of preserving justice. The procedure set out in the Constitution in Article 125 is as follows. If the Prime Minister or the Chief Justice after consulting the Prime Minister, represents to the Yang di-Pertuan Agong that a Judge of the Federal Court, Court of Appeal, or the High Court, ought to be removed on the ground of breach of the code of ethics or inability, from infirmity of body or mind or any other cause, properly to discharge the judicial functions, the Yang di-Pertuan Agong shall appoint a Tribunal and refer the representation to it; and may on the recommendation of the Tribunal remove the judge from office. Article 125 specifies that the tribunal must consist of not less than five persons who hold or have held office as a judge of the Federal Court or the High Court, or it appears to the Yang di-Pertuan Agong expedient to make such appointment, person who hold or have held equivalent office in any part of the Commonwealth. The tribunal is presided over by the Chief Justice or the

member most senior in accordance with the order of precedence laid down. The procedure prescribed in Article 125 ensures that a judge can only be dismissed by the Yang di-Pertuan Agong after a fair investigation. In addition, Article 125(3A)[30] gives power to the Yang di-Pertuan Agong, on the recommendation of the Chief Justice, the President of the Court of Appeal and the Chief Judges, after consulting the Prime Minister, to prescribe a Code of Ethics which shall be observed by every judge of the Federal Court[31]. The Yang di-Pertuan Agong can dismiss any judge who breaches the said code. The Code of Ethics 1994 sets out nine principles for a judge to follow. According to the code, a judge must not subordinate his judicial duties to his private interests; bring his private interests into conflict with his judicial duties; conduct himself in any manner likely to cause a reasonable suspicion that he has allowed his private interests into conflict with his judicial duties so as to impair his usefulness as a judge or that he has used his judicial position for his personal advantage; conduct himself dishonestly or in such a manner as to bring the judiciary into disrepute or bring discredit thereto; lack efficiency or industry; inordinately and without reasonable explanation delay in the disposal of cases, the delivery of decision and the writing of grounds of judgment; refuse to obey a proper administrative order or refuse to comply with any statutory directions; absent himself from court during office hours (prescribed in detail by the code itself) without reasonable excuse or without prior permission of the Chief Justice. The President of the Court of Appeal, or the Chief Judge, as the case may be; or be a member of any political party or participate in any political activity. It can be said the code not only regulates the behaviour of a judge, but it also tries to maintain judicial independence,

as a judge is not allowed to bring private interest into the case. The Federal Constitution also attempts to guarantee that the executive cannot anticipate or secure the overruling of uncomfortable precedents by packing the courts with 'politically correct' judges of its own persuasion. This is to prevent the influences of the executive on the judiciary and to secure the independence of the judiciary. Article 122(1) of the Federal Constitution specifies the composition of the Federal Court; only the Chief Justice and the other judges of the Federal Court, appointed under Part IX, may sit; and the number of Federal Court judges is limited to seven. The Chief Justice may also nominate a judge of the Court of Appeal to sit as a judge of the Federal Court when he considers that the interest of justice so requires^[32]. Nevertheless, the prescribed number of Federal Court judges can be altered by the order of the Yang di-Pertuan Agong, so that the packing of the court by the government is, in theory, possible^[33]. Likewise, under Article 122A, only the Chief Judges and judges qualified and appointed under Part IX may sit in the High Courts. The number of the High Court judges is presently limited to forty-seven in the case of the High Court in Peninsular, and ten in the case of the High Court of Sabah and Sarawak^[34]. Judicial Commissioners may be appointed by the Yang di-Pertuan Agong acting on the advice of the Chief Justice for a limited period or limited purposes, 'for the dispatch of business' in the High Courts^[35]. In this sense, the Prime Minister is not able to recommend any judges who would favour the executive, as the number of judges in the superior courts is specified. Article 126 of the Federal Constitution and s 13 of the Courts of Judicature Act 1964 (Act 91) (Revised 1972)(CJA 1964) empower each of the superior courts to punish for contempt of itself. This is

one of the ways to ensure judicial independence, as the every citizen must respect and accept the decision of a judge. Any act or writing calculated to bring a court into contempt, to lower the authority of a judge, or to obstruct or interfere with the administration of justice,[36]may amount to contempt of court which also classified as a criminal offence. In contrast, disobedience to the judgment, order, or other process of court, and involving a private injury would be under the category of civil contempt[37]. Moreover, s 14 of the CJA accords judges and other judicial officers immunity from being sued or prosecuted for anything done by them in the discharge of their judicial duty. They are entitled to that immunity, whether or not the performed by them is within their jurisdiction, provided at the time it was done, they in good faith believed they had jurisdiction to perform that act complained of. Such immunity is very important to protect judicial independence, so that judges are not afraid to comment on any issue.