Judicial Accountability:

A Study of Malaysia.

By

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LL.B.Hons (UKM), LL.M (Lond.)

A thesis submitted
in fulfilment of the requirement for the degree of

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University of Warwick,

School of Law

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DECLARATION

This thesis is my own work, has not been published and has not been submitted for a degree at another university.

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University of Warwick
SUMMARY

This study aims to look into the practice of judicial accountability in Malaysia and at the same time contributes to the current debate calling for judicial accountability in political trials. The thesis investigates the nature of accountability on the part of the judiciary via court structure and jurisdiction, manner of appointment of judges, removal and discipline and decision-making which is named ‘adjudicative accountability’. Evaluation of adjudicative accountability is conducted in cases tried under preventive detention and security law, and criminal prosecution to eliminate political opposition involving Anwar Ibrahim, the former Deputy Prime Minister of Malaysia. The study has six chapters. The first chapter deals with the concept of judicial accountability, both theoretically and conceptually. The second chapter discusses the evolution of the concept of judicial independence in the judiciary and the position of judicial power under the constitution. It also evaluates the process of appointment and removal of Malaysian judges. The discussion of judicial accountability begins in this chapter. Chapter Three and Chapter Four look into adjudicative accountability, beginning with Chapter Three, which discusses the development of preventive detention and security law in Malaysia and the judicial approach in dealing with such cases. Chapter Four focuses on the trial of Anwar Ibrahim and comprehensive examination is conducted of the dilemma of the judiciary when having to try a case arising out of a political vendetta. Chapter Five looks at the mechanisms of supervising judicial conduct that comprise the code of ethics, parliamentary discussion and public intervention. The final chapter identifies the judiciary as accountable to the executive, compared with other forms of accountability, and offers suggestions on how to minimise executive domination and make judges accountable to the law as well as to the public.
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<td>ABA</td>
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<td>AC</td>
<td>Appeal Cases</td>
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<td>AIR</td>
<td>All India Reporter</td>
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<td>ALJ</td>
<td>Australian Law Journal</td>
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<td>Alberta Law Review</td>
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<td>Am J Comp Law</td>
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<td>AMR</td>
<td>All Malaysian Report</td>
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<td>Cardozo L Rev</td>
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<tr>
<td>CJ</td>
<td>Chief Justice, Chief Judge</td>
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<td>Chief Judge Sabah and Sarawak</td>
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<td>CLJ</td>
<td>Current Law Journal</td>
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<td>CM</td>
<td>Chief Minister</td>
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<td>DPM</td>
<td>Deputy Prime Minister</td>
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<td>FCJ</td>
<td>Federal Court Judge</td>
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<td>FMS</td>
<td>Federated Malay States</td>
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<td>Geo L J Legal EthicsE</td>
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<td>Har L Rev</td>
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<td>Harv Hum Rts J</td>
<td>Harvard Human Rights Journal</td>
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<td>IMF</td>
<td>International Monetary Fund</td>
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<td>J</td>
<td>Judge, Justice</td>
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<td>J Afr L</td>
<td>Journal of African Law</td>
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<td>J Crim L &amp; Criminology</td>
<td>Journal of Criminal Law and Criminology</td>
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<td>JCA</td>
<td>Judge Court of Appeal</td>
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<td>KB</td>
<td>Kings Bench</td>
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<td>J Indian L Inst</td>
<td>Journal of the Indian Law Institute</td>
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<td>JLS</td>
<td>Judicial and Legal Service</td>
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<td>Journal of Malaysia and Comparative Law</td>
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<td>LP</td>
<td>Lord President</td>
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CHAPTER ONE

JUDICIAL ACCOUNTABILITY: A THEORETICAL
AND CONCEPTUAL ANALYSIS

Introduction

Alexander Hamilton, one of the principal framers of the American Constitution, prophesised that the judiciary would be the weakest of the three branches of government. In 1788 he wrote:

Whoever attentively considers the different departments of power must perceive, that, in a government in which they are separated from each other, the judiciary, from the nature of its functions, will always be the least dangerous to the political rights of the Constitution; because it will be least in capacity to annoy or injure them. The executive not only dispenses the honors, but holds the sword of the community. The legislature not only commands the purse, but prescribes the rules by which the duties and rights of every citizen are to be regulated. The judiciary, on the contrary, has no influence over either the sword or the purse; no direction either of the strength or of the wealth of the society; and can take no active resolution whatever. It may truly be said to have neither FORCE nor WILL, but merely judgment; and must ultimately depend upon the aid of the executive arm even for the efficacy of its judgment.

Hamilton's view has great impact on the image of the judiciary and the treatment the judiciary receives from the executive and legislature. Several years after the ratification of the United States Constitution, the Supreme Court did not indicate that it would claim an overriding power and Hamilton's predictions about the relative weakness of the judiciary proved rather accurate. Nevertheless, approximately two decades later, the power of the judiciary escalated considerably. Alexander Bickel, a constitutional scholar, describes the forces as follows: 'The least dangerous branch of the

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2 The courts of individual states in the USA had shown their independence even before the United States constitution was drafted. See Sherry, Suzanna, 'Independent Judges and Independent Justice' (1998) 61 Law & Contemp Probs 15.
American government is the most extraordinary powerful court of law the world has ever known.\(^4\)

The transformation of the judiciary, from ‘the weakest branch’ to a ‘powerful institution’, expanded beyond the U.S.A into countries which practise ‘parliamentary sovereignty’, and without written constitutions namely the United Kingdom and Israel; countries practising a civil law system, such as France and Germany; newly independent and democratic countries like South Africa; and transitional, post-socialist countries of eastern and central Europe.\(^5\) This phenomenon is described as the ‘global expansion of judicial power’.\(^6\) Worldwide, the judiciary has become a powerful institution because it makes decisions that affect the lives of people, set aside and invalidate legislative enactments, and block executive actions found contrary to the law and constitution.

Expansion of judicial power commences with the establishment of judicial independence, the development of judicial review and the rise of judicial activism. Subsequently, the executive and legislature may strive to curb judicial power, leading to a call for an accountable judiciary and giving birth to the concept of judicial accountability.

This chapter tries to develop a theoretical and conceptual analysis concerning judicial accountability. It will begin by investigating the concept of the independence of the judiciary, which acknowledges the importance of the role of the judiciary in curbing government misuse of

\(^4\) Bickel, Alexander, _The Least Dangerous Branch_ (New Haven: Yale Uni Press, 2\(^{nd}\) ed, 1962) 1. Afterwards cited as _The Least Dangerous Branch._


power, and in protecting the rights of citizens. Judicial independence incorporates the assertion of judicial autonomy and supremacy against the executive and legislature, which flows from the claim of the power of judicial review and judicial activism inherent in review power. In view of this chain of activities, the question of judicial accountability becomes important.

1.1 Independence of the Judiciary

The concept of judicial independence is widely recognised, but the degree of independence varies from one country to another. Nevertheless, countries in general agree that the purposes of having an independent judiciary are firstly, to keep the government within the limits assigned by the constitution and the law, and secondly, to guard the rights

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of individuals. To achieve these purposes, the notion of judicial independence is set on the notion of conflict resolution by a 'neutral third', in other words by someone, who can be trusted to settle controversies after considering only the facts and their relation to relevant laws. At this stage, the notion of judicial independence is restricted to the independence of an individual judge only. Later, when the sovereign starts to exert its will over judges, the struggle to free the judiciary from subordination begins.

One of the countries, which pioneer the fight for an independent judiciary, is England. The 1701 Act of Settlement passed in England became the first affirmation of the independence of a judge. The 1701 Act absolved judges from the Crown’s control when it provided for security of tenure and remuneration. At the same time, Parliament oversaw the suitability of a judge to remain in office. Hence, as the power of the Crown over the judiciary began to slip, the influence of the executive and legislature over the judiciary began to increase. Thus, the dimensions of the idea changed considerably. Shetreet illustrates this as follows:

The concept of judicial independence carried different meanings in different periods. While the same phrase may have been used, the standard prevailing in society at large and the social and political environment changed with the times. Therefore, the meaning given to the term judicial independence at any period must be seen within the context of the political philosophy of that time.

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10 n 8 above Shetreet, Judges on Trial, 1.
Universally, the concept of judicial independence underwent significant alterations due to the weakening of the ‘natural third’ notion, caused by executive involvement in court litigation arising out of executive violation on private rights or misuse of discretionary power. The executive, at the same time, being directly involved in the appointment of judges, therefore has a direct interest in the outcome of the case. Additionally, legislative control over the executive began to weaken, thus the executive may easily propose bills affecting judicial independence and get it passed in the two Houses of Parliament. The imbalance of power between these three organs shifted the concern from the independence of individual judges to institutional independence, which requires judges to operate collectively and not individually. This has become the concern of modern scholars and numerous techniques are sought to insulate the judiciary from politics.

‘Political insularity’ provides the assurance that the judiciary does not become a tool to further the political aims of political actors pursuing regime-specific interests, or, is punished for preventing their realisation.11 Political insularity nevertheless should not take place in an absolute form because disengagement from ‘popular control might well interfere with democratic values.’12

The judiciary kept popular control and democratic values in various forms, the most remarkable being through the method of selection of judges. A common practice throughout the world is appointment by the executive, but the process differs from one country to another. For

12 ibid, 60.
example, in the United States, the President appoints federal judges subject to confirmation by a vote of a majority of the Senate. In England, the Crown, with the advice from either the Lord Chancellor or the Prime Minister, appoints judges. Many South African countries restrict the power of the President to appoint judges because the process requires consultation with the Judicial Service Commission.

The life of the court, like the appointment of a judge, is also the concern of another government organ. The legislature creates the court, regulates the court jurisdiction, decides on the numbers of justices, and approves the budget to support court business. Furthermore, the judiciary relies on the executive to enforce judgments. The judiciary therefore often finds itself dependent on the other branches of government and is thus, less insulated from politics. This situation, however, does not render the claim for independence empty.

An expansive conception of judicial independence entails complete institutional or administrative autonomy for the functioning of courts in matters such as, setting dates for trial, organising judicial workloads and resolving cases. Further, this autonomy also extends to full

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discretion in regard to appreciation of evidence and procedures, including the determination of fact-finding and application of relevant legal norms in the facts of a case.\textsuperscript{16} In this respect, an independent judiciary is one, which consists of judges, who are able and free to decide 'according to the law and the constitution.' This is in accordance with the oath of office sworn by judges when they accept the position. Deciding, according to the law, remains problematic because the law declared by legislature requires consistent application for everyone at all times. Society, however, does not remain static. Should judges then ignore the developments taking place within the society? Or, should they alternatively take on the challenge to assert values contrary to the belief of the government of the day?

Another challenge to the independence of the judiciary is its ability to resist pressure that casts judges into the political arena. Such a challenge is faced, not only in developing countries, but in developed countries as well. Executive domination in judicial appointments and the uninhibited power of the legislature to ascertain court powers and jurisdiction allows the regime in power to manipulate the courts to achieve political gain. Thus at this level, the scope of judicial independence needs to be expanded to liberate judges from political manipulation.

Judges may collectively agree that they should enjoy security in tenure and salary. However, they do not have a uniform value on what constitutes justice and fairness, nor share similar understanding on what amounts to judicial independence. Some judges have an 'introspective

understanding\(^{17}\) of the concept of judicial independence, which means the individual judge's perspective on the concept will determine its nature. Consequently, judicial independence may carry a perverted meaning contrary to established norms and create a 'myth of judicial independence.'\(^{18}\) Such understanding impairs collective independence and does not help in fostering an independent judiciary. Therefore, the core meaning of judicial independence should be outlined.

Judicial independence suggests two crucial ideas. First, independence is attributed to the manner by which a judge exercises judicial function. Secondly, it relates to the manner in which judicial business is managed and administered. Thus, judicial independence includes both adjudicative independence\(^{19}\) and administrative independence,\(^{20}\) which combines the independence of an individual judge and the judiciary's collective independence, in running court administration. The 'introspective understanding' of judicial independence is minimised when the principle of reflective judiciary,\(^{21}\) which requires the composition of the judiciary to represent the array of society, is introduced as one of the prerequisites of judicial independence especially in a multicultural society.

The claim for institutional/collective judicial independence has a considerable influence in elevating the standard of judicial independence,

\(^{19}\) n 16 above, 158.
\(^{21}\) n 16 above, 167.
because judges, to a certain extent possibly share common training and experiences. Furthermore, the institutionalisation of judicial independence by the constitution\(^{22}\), brings in a claim for judicial autonomy or supremacy that can transform the judiciary, to an authoritative and influential institution shaping the political, social and economic outlook of a country. The judiciary then becomes a contender towards the executive and legislative authority. Thus, slowly a restrictive definition of judicial independence, which introduces an element of control into judicial business, develops. According to this new understanding of judicial independence, restrictions that do not impair judicial independence are permissible. What amounts to appropriate control is identified by asking the question,

...what effect [do] the changes have on party impartiality? If it is directly or indirectly weakened, whether in a particular case or future cases in general, the changes would amount to a breach of judicial independence. If, on the other hand, the effects of increased mechanisms of accountability were limited to the way in which the judicial process operates and the general approach of the judges to their work there would be no objection to their introduction. If, for example new mechanisms of accountability sought to promote more openness, efficiency, competence and responsiveness in the judiciary, either collectively or individually, then such developments would be entirely compatible with the demands of judicial independence.\(^{23}\)

In sum, judicial independence should not be absolute. There can be control imposed on the workings of the judiciary and the performance of judges' tasks, so long as such control does not prevent the judges from acting impartially, and in fact, encourages better performance in the judicial branch. This new meaning does not go against the aims of judicial

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\(^{22}\) The term constitution is used loosely, to include written and unwritten constitutions, see Wheare K C. *Modern Constitutions* (London: OUP, 1969) Chapter 1.

\(^{23}\) Mallesson, Kate, *The New Judiciary. The Effects of Expansion and Activism* (Dartsmouth: Ashgate, 1999) 73. Afterwards cited as 'The New Judiciary'.
independence because the meaning evolves according to time and changes in the standards prevailing in the social and political environment.24

1.2 Judicial Autonomy

Autonomy in general is a concept closely related to the idea of self-regulation, self-governance and self-direction. This concept helps individuals, states and institutions to be in charge of their own affairs, claim legitimacy in their action and structure their perception on numerous issues. According to Rawls, when a person acts autonomously, he freely chooses the principles of his action, which he feels are the most adequate possible expression of his nature as a free and equal rational being. Further, according to Rawls, 'the principles he acts upon are not adopted because of his social position or natural endowments, or in view of the particular kind of society in which he lives or the specific things that he happens to want.'25

Rawls's view of autonomy suggests that persons become autonomous when their choice of principle is according to a principle that they would choose, as rational and independent persons in an original position of equality. A rational and independent individual being has the ability to act, and at the same time desire the act and the result. This is important because only under this position can a person freely make a choice and have full control of the outcome of the act. A claim for


autonomy invites the impression that a person wants to be accountable for
the outcome of any act taken. Rawls’s concept of autonomy is not only
applicable to individuals but also to an institution such as the judiciary.

Having autonomy is important to enable a judiciary to resist
whatever power others exercise over it, and at the same time to have any
judicial pronouncement enforced and obeyed. The source from which the
judiciary derives its autonomy varies and at least three are identifiable:
first, when there is a written constitution establishing the concept of
separation of powers, which explicitly grants each of the government
organs specific power. The executive has the power to execute the law, the
legislature to make policy and legislate while the power to decide disputes
is granted to the judiciary. Further, the presence of such provision confers
co-equal status among the three organs, hence disallows one organ from
dictating and interfering with the other, but allows for checks and balances
among the three branches.

Second, the judiciary may claim to have an inherent power to
enable it to exercise its adjudicative function and to discharge court duty to
deliver justice. Inherent power is exercisable through the power of judicial
review,26 which is the most conspicuous example of judicial autonomy.
Judicial review power was first unequivocally laid out in 1803 by the
United States Supreme Court decision in Marbury v Madison.27 Judicial
review becomes the basis for judicial autonomy because the judiciary may

26 The discussion on judicial autonomy has to be read together with the discussion on
Judicial Review under sub-topic 1.4.A.I at page 17-25.
27 5 U.S. (1 Cranch) 137. The foundation of judicial review may also be traced from the
ancient tradition of ‘higher law’ famously associated with Bracton’s remarks “The King
ought not to be beneath any man, but beneath God and the Law.” See Dean, Howard E,
scrutinise and declare that executive and legislative actions are unconstitutional and, hence, invalid.

Third, judicial autonomy depends on the political culture and societal values on the workings of the judiciary. In a system of government which believes in both the need for power and the need for restraints upon it, a claim for judicial autonomy will prosper. The claim becomes stronger if the public strongly supports judicial independence, by exerting pressure on the executive, to abide by court order. Failing to do so will cause the executive to gradually lose public confidence.

Judicial autonomy has the danger of the judiciary turning into a 'super-legislature' thus leading to an usurpation of power. This threat supports the demand to impose some control on the judiciary which, if let loose may succumb to dishonest practices, hence rupturing the balance of power among the three government arms.

1.3 Judicial Accountability

The claim that the judiciary should be an autonomous institution and judges autonomous officials, conflicts with the concept of judicial accountability. Judges forming the judiciary are human and matters they decide often have a profound effect on the community and government institutions. Therefore, it is important to have the means to curb any autocratic or unreasoned exercise of judicial power. How this extent of overreach and, indeed, abuse of judicial power is to be determined furnishes a much-contested terrain.

\[28\] n 27 above, Dean, Howard E, 11.
The word 'accountability' is used in many senses. A person is accountable when he/she has the liability to explain and justify any conduct he/she performs. Normally this takes place when a person has to give reasons, for example in the form of reporting how a decision has been reached. We may call this 'justificatory accountability.' In another sense, a person may be held accountable if there is a constraint limiting the exercise of his/her power. There are two forms of constraints in the exercise of power, firstly, internal constraints that operate in most professional careers, like the legal and medical professions. Members of these professions are normally restricted by professional etiquette to behave and conduct their activities accordingly. A breach of ethics may result in disciplinary action taken against the professional. This is known as 'professional accountability.' In a third sense, accountability ensues when a person becomes responsible for correcting an injustice, or bears the cost of loss, if there has been a mistake in a decision or conduct. We may call this 'compensatory accountability.'

In sum, accountability represents the duty of a public decision-making body to explain, legitimise, and justify a decision and to correct any decision that causes injustice or harm. These duties arise from litigants' legitimate expectation that judges in exercising their power will do so in accordance with the manner in which that power was exercised previously.

At the same time, the exercise of judicial power is also subject to 'law',

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which according to Hart, consists of 'primary rules', that is, rules which impose duties, and 'secondary' rules which are rules conferring powers.\textsuperscript{32}

Litigants may legitimately expect that judges should exercise their power and function judicially and plausibly. The exercise of power and function, according to Radin, should take place according to the rules which operate to limit judges' discretionary power. Failure to observe the rules may lead to judicial arbitrariness and subsequently undermine democracy.\textsuperscript{33} Furthermore, litigants are entitled to receive equal and impartial treatment, be granted a judicial decision expeditiously and be assured that the requirement of procedural and substantive justice is fulfilled. A breach of these legitimate expectations might result in judges being made accountable on the omission of their expected duty.

Judges are held accountable when their decisions are subject to appeal or judicial review. In extreme situations, they may be subject to question in the legislature, by media censors, or removal by the legislature. These forms of accountability are provided within the ambit of judicial independence, which has been formed over the centuries. However, this traditional model suffers from two major deficiencies, such as a vague standard of judicial misconduct and cumbersome removal mechanism,\textsuperscript{34} or judges are placed under an 'impenetrable protective cloak',\textsuperscript{35} thus denying redress to aggrieved parties.

\textsuperscript{32} Hart, H L A, \textit{The Concept of Law} (Oxford: Clarendon, 1994). Primary law is also refers to substantive law while secondary law means procedural law.


Several categories of judicial accountability have been developed to address the question. Cappelleti, for example, expounded a typology of judicial accountability that divides accountability into four categories: political accountability, societal accountability, vicarious state accountability and personal liability of judges.\footnote{Cappelletti, Mauro, ‘Who Watches the Watchman? A Comparative Study on Judicial Accountability’ in Shetreet, Shimon and Deschens, Jules (eds.) Judicial Independence: The Contemporary Debate (Amsterdam: Martinus Nijhoff, 1986) 557.} The first category refers to accountability to political bodies, such as the legislature and executive, which generally operates through an impeachment process or removal on address by both Houses of Parliament. The process always involves political considerations; however, it is seldom used. Societal accountability includes control over judges exercised by the media and pressure groups. According to Cappelletti, this is the most effective method of making judges accountable, but it has to depend on how a society values freedom of speech. The last two categories are the least effective because of limitations in scope and are subject to stringent procedure. Both involve legal considerations and are enforced by the judiciary itself.\footnote{For detailed discussions on the typology of accountability, see ibid, 557-569.}

Shetreet, an expert in judicial functioning, includes professional control as a means of controlling the judiciary. This control is exercisable through professional pressure exerted on judges by their peers and professional colleagues.\footnote{\textsuperscript{38} n 8 above Shetreet, Judges on Trial, 266-268.}

Based on the classification of judicial accountability that he devised, Cappelletti has constructed models to implement accountability. He distinguishes three models of judicial accountability: the repressive or dependency model, which rests the power of controlling judges in the
political branches of the government; the autonomous corporative model, which leaves the function of controlling judges in the exclusive hands of the judiciary itself; and finally, the responsive consumer-oriented model – that combines a reasonable degree of participation between the judicial and political branches, and includes the public to take the task of controlling the judiciary.39

Most popular amongst the three is the responsive consumer-oriented model since it reflects the ideals of a democratic system.40 Furthermore, it balances the tension between independence and accountability when participants from other branches and the public check judicial autonomy without denying the judiciary a voice in their business.41

Numerous countries today adopt this model when they design or revise methods of judicial appointment and scrutiny. For example, some continental European countries such as France, Italy, Spain and Portugal have introduced new arrangements, which reduce the role of the executive in the appointment processes. These countries established judicial self-governing bodies commonly known as higher councils of the judiciary which are comprised of judges, representatives from the executive, members of the legal profession and lay members with some legal knowledge.42 On the other side of the world, in South Africa, after the demise of apartheid, the new Constitution provided that the President will confirm the appointment of judges after a consultative process between the

39 n 33 above, 570-575.
40 n 32 above, 3.
Judicial Service Commission and the leaders of parties represented in the National Assembly. These councils act as nominating bodies which restrict executive choice in the appointment of judges.

1.4. Support for Judicial Accountability

There are two types of argument for judicial accountability: rationalist and institutional. The former examines the reasons for judicial accountability becoming necessary, while the latter refers to how the judiciary is organised.

1.4. A Rationalist Argument

There exist numerous patterns in the functions of the judiciary signifying the judiciary as an overseer of government power, therefore it enjoys superior position. Most important is the exercise of the power of judicial review and the power to interpret the constitution and law, which consequently endorses the judiciary's supreme status. The degree of superiority is however, uncertain, since the legislature may alter the courts' power through legislation. Nonetheless, in most instances, the power of judicial review and interpreting the constitution and the law, are two essential judicial functions which most probably will escape legislative overruling.

44n 20 above, 37.
1.4. A. I. Judicial Review: Judges as Policy-makers

In popular but narrow usage, the term 'judicial review' refers to the power of a comprehensive judicial inquiry into, and examination of the actions of the legislative, executive and the administrative branches of the government, with the purpose of ensuring their conformity to the specified constitutional provisions. In a narrow sense, judicial review is essentially collateral. It does not assume authority to examine the merit of an impugned decision but examines only its constitutionality or its basic legality.

The expression, when loosely used, refers to the revision of a decree or sentence of an inferior court by a superior court. All the questions of fact and law, that is the merits of the whole case, will be open to review. This takes place in the form of 'appeal, revision and the like as prescribed by the laws of the land, irrespective of the political system which prevails.' Therefore, judicial review in the wider sense may involve review of a dispute between private parties, or between a private party and the State or a public authority. In a narrow sense, it exclusively refers to the power of the courts to give an authoritative interpretation upon the constitutionality of legislative and executive acts. Today, judicial review is used restrictively in public law, and, it is in this area that the power of judicial review becomes controversial.

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45 Judicial review refers to both judicial review of executive acts and legislation.
48 ibid.
1.4. A.II. Challenge to Judicial Review

Why is the power of judicial review regarded as an intrusion on the executive and legislative domains? The main objection to judicial review is its undemocratic character, or popularly referred to as ‘the countermajoritarian problem’. The power is undemocratic because judges are unelected and therefore do not represent the people. Consequently, their judgment cannot replace executive decision or legislation, which is the product of an institution that is subject to periodic popular vote. Because judicial review frustrates the will of the majority, it goes against the principle of democracy and has ‘a tendency over time seriously to weaken the democratic process.’

This argument rests on the process of appointment of judges, which excludes public participation. Dean, an American constitutional scholar, describes the status of Supreme Court judges as:

...a veritable aristocracy of the robe, functioning as a super-legislature, yet neither chosen by the people nor politically responsible to them. Since in a democracy it is the responsibility of the people to correct the errors of the government, the vital function would never be surrendered into the hands of a body of judicial 'Platonic Guardians.' Or, to state the change more formally (if with deceptive simplicity): policy making by officials who are not popularly elected is undemocratic; judicial review is policy-making by non-elective officials; therefore judicial review is undemocratic.

Another justification to reject the court’s exercise of judicial review power is due to the absence of explicit provision conferring that power. Without express conferment of power, there is no reason for judges...
to make an authoritative investigation on the legality of executive acts and legislation.

1.4. A.III. Judicial Review and Democracy

Democracy is a form of government where the people as a body have sovereign power.53 The principle at its earlier inception takes the form of direct rule; today's democracy however, is representative and liberal in character. This new form of democracy combines the authority of democratic governments with limits on the scope of their action. The goal is to secure individual rights from unwarranted demands by the government itself and protects the minorities from a tyrannical majority.

The liberal character of modern democracy negates the contention that judicial review is undemocratic and countermajoritarian. Of course, declaring an executive act or legislation as unconstitutional goes against the wishes of the electorate, who elect persons who presumably represent their interest. This belief is however illusory, because democracy can turn to tyranny. The fulfilment of a democratic procedure does not necessarily guarantee that all the results of the machinery of ascertaining the will of the majority would in fact correspond to the opinion of the majority. There is also no guarantee that the assessments carried out and approved by the majority would be just.54

Hayek intelligibly highlights the danger of democracy:

...the government of a very homogenous and doctrinaire majority democratic government might be as oppressive as the worst dictatorship. The false assurance which many people derive from this belief is important

cause of the general awareness of the dangers which we face. There is no justification for a belief that so long as power is conferred by democratic procedure, it cannot be arbitrary; the contrast suggested by this statement is altogether false; it is not the source but the limitation of power which prevents it from being arbitrary. Democratic control may prevent power from becoming arbitrary, but it does not do so by mere existence. If democracy resolves on a task which necessarily involves the use of power which cannot be guided by fixed rules, it must become arbitrary power.55

Even though judicial review power has a weak democratic justification, there is strong reason in demanding that the judiciary act as overseer of government power. This opinion was adopted by proponents of courts' judicial review power, after considering the position of the judiciary in contrast with other government departments, which is "undoubtedly the best 'Department' in which to vest such power since by the independence of their tenure they were least likely to be influenced by diverting pressure."56

Numerous judicial decisions in various countries illustrate how the power of judicial review protects the rights of the minority and maintain the balance of power between government arms and the citizens. Brown v Board of Education57, illustrates an historic and dramatic incident in which the United States Supreme Court acted as an arbiter of the minority rights. The case ended the regime of 'separate but equal' access to education and precipitated the move to end racial segregation not just in schools, but also across public areas. The positions of African-Americans have been improving since then and today they receive equal treatment in all aspects. Elsewhere, the Supreme Court of India delivered a series of

groundbreaking decisions starting with *Golaknath v State of Punjab*,\(^{58}\) *Kesavananda Bharati v State of Kerala*\(^{59}\) and *Minerva Mills Ltd. v Union of India*\(^{60}\) pronouncing that Parliament’s power to amend the constitution was not absolute and subject to the basic structure doctrine. The Supreme Court tried to restrict Parliament from passing laws which transgress fundamental rights or destroy the basic structure of the Indian Constitution, which among others includes the supremacy of the Constitution, separation of powers, the federal character of the Constitution and protection of human rights.\(^{61}\)

At the birthplace of common law, British courts began to develop elaborate fundamental or constitutional principles to control the increase of executive power to the advantage of the private individual.\(^{62}\) For example,

\(^{58}\) AIR 1967 SC 1643.
\(^{59}\)(1973) 4 SCC 225, "We find it difficult to accept the contention that our Constitution makers after making immense sacrifices for achieving certain ideals, made provision in the Constitution itself for the destruction of those ideals. There is no doubt as men of experience and sound political knowledge, they must have known that social, economic and political changes are bound to come with the passage of time and the Constitution must be capable of being so adjusted as to be able to respond to those new demands. Our Constitution is not a mere political document. It is essentially a social document.... A Constitution like ours contains certain features which are so essential that they cannot be changed or destroyed.... If one or more of the basic features of the Constitution are taken away to that extent the Constitution is abrogated or repealed.... The personality of the Constitution must remain unchanged." per Hegde and Mukherjee, JJ. 480-481. For critics on the *Kesavananda Bharati* case see Tripathi, P.K, ‘Kesavananda Bharati v State of Kerala Who Wins?’ (1974) 1 SCC (Jour) 3.

\(^{60}\) (1980) 3 SCC 625.


in *R v Secretary of State for the Home Department, Ex p Leech (No. 2)*,\(^63\) the court ruled that access to legal advice is a 'constitutional right.' In another case, *R v Secretary of State for the Home Department, Ex p Pierson*,\(^64\) the court introduced the common law principle against retroactive aggravation of penalties, a constitutional principle if breached without express parliamentary authority would be contrary to the principle of legality and rule of law.

The above judicial decisions, legitimate courts claim in exercising judicial review power which is not only permissible by means of constitutional sanction but supported by the advantages served by the power. In conclusion, judicial review power is indispensable in democratic government because:

1. it preserves the constitutional balance of authority between the central and state governments in a federal system;
2. it maintains and preserves the balance between the executive and legislative power on the same government level; and,
3. it defends the fundamental human freedoms and thus acts as the 'great sentinel' of the cherished values of life.\(^65\)

Does judicial review power strikingly amount to expansion of judicial power and is therefore undemocratic? I would concede that even if not fully consistent with pure democracy, judicial review can achieve

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\(^{63}\) [2001] 3 All ER 433.

\(^{64}\) [1998] AC 539.

\(^{65}\) \text{n 41 above, 24.}
'some measure of consonance ... a tolerable accommodation with the theory and practice of democracy,' and this justifies the power.

Further, it would be a mistake to imply that judicial review brings about judicial supremacy. In the first place, judicial review is effective as long as judges remain scrupulously independent from other institutions of government, or other government branches are willing to enforce the decision. The fallacy of the judiciary as a detached institution is significant in the United States 2000 Presidential Election disputes. Critics and analysis on the Supreme Court decision indicate that political interference had increased, and political ideology is becoming the main criterion in judicial selection. The decision was heavily criticised because the Supreme Court justices were divided along party lines; thus, the decision was one-sided. Therefore, judicial review does not outrightly substantiate the independence of judiciary.

The judiciary also has limited authority to enforce its judgment because it does not have the last word in enforcement. This was stated at

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the beginning of this chapter when Hamilton regarded the judiciary as the weakest department, with no force or will, and dependent on the executive for the efficacy of its judgment.\textsuperscript{69} The difficulty of implementing the Supreme Court desegregation ruling in 1954\textsuperscript{70} illustrates the limit of its power. The decision was enforced only after President Eisenhower despatched federal troops to Arkansas to force the schools to comply with the court order. This step was taken only after violence had erupted. The President was personally not in favour of the court ruling and consequently delayed full compliance with the court ruling that had been in place for over three decades.\textsuperscript{71} This event indicates that the judiciary is ‘almost powerless’ to effect their decision especially when ‘it touches the course of national policy.’\textsuperscript{72}

In addition, if judges accept their role as policymakers, they have to operate as part of the government machinery and within the political rule established by the political players and public opinion. This was demonstrated in the battle between Prime Minister Indira Gandhi and the Indian Courts in the 1970s. The conflict began with the Indian High Court decision in 1975 declaring Indira Gandhi guilty of electoral malpractice and disqualified her from political office for six years. When the Indian Supreme Court suspended the disqualification pending an appeal, within days Indira Gandhi declared a ‘state of emergency’ that allowed for the

\textsuperscript{69} n 1 above.
\textsuperscript{70} n 54 above.
arrest of hundreds of her political opponents and for the introduction of stiff censorship. The Parliament also overzealously amended the Constitution; the amendments put restrictions on the judiciary from examining the election of the Prime Minister and the Speaker of the lower house. This was an attempt by the Prime Minister to frustrate the decision of the High Court through legislative process, which was a camouflage for the political motive. Such practice is common in parliamentary forms of government especially when the executive dominates Parliament. Contrary to the Prime Minister's wishes, the Supreme Court declared the amendment as unconstitutional because it went against the basic structure of the Constitution.

In retaliation to the Supreme Court decision, Parliament once again amended the Constitution, taking away the Supreme Court's jurisdiction over constitutional amendments and declared as unlimited Parliament's power to amend the Constitution. Thus, the judiciary was not able to match the political technique employed by Gandhi. Finally the Court order was defeated when the political weapon was invoked.

The illustrations above demonstrate that judicial review power does not corroborate the claim that the judiciary is supreme; consequently, it cannot become the sole ground in making judges accountable. Besides

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73 *Indira Gandhi v Raj Narain* AIR 1975 SC 2299. Famously referred as 'the Election case.'
75 However, Gandhi was defeated in the 1977 election, an indication of public objection to her attitude. The Supreme Court in 1980 ruled the amendment as unconstitutional in *Minerva Mills v Union of India* AIR 1980 SC 1789. This decision was made during the Ghandi premiership signifying the court persistent attempts to block the escalation of executive power. For further discussions on the court decisions see Baxi, Upendra, *Indian Supreme Court and Politics* (Lucknow: Eastern Book, 1980), Sathe, S.P, *Judicial Activism in India, Transgressing Borders and Enforcing Limits* (New Delhi: OUP, 2002) 73-77.
judicial review, there are other reasons to check on judges affairs, such as their involvement in law-making and the manner in which they conduct themselves.

1.4. B Judges as ‘Law-makers’

Jurists have divergent views concerning the judicial process. The classical jurists, Blackstone\(^76\) and Montesquieu\(^77\), contend that they are merely the mouth that pronounces the law. Another jurist, Bentham, did not equate ‘judicial order’ with legislation, stating that judges are not law-makers.\(^78\) On the contrary, jurists who belong to the realist school, such as Holmes and Cardozo, claim that judges make the law.

The shift in juristic views came about in tandem with the expansion of both the executive power and growth of legislation, but the most important factor was the growth of the judicial role in modern society.\(^79\)

The image of the judge as a simple applier of the law has now become a myth,\(^80\) and the dichotomy in opinion becomes irrelevant; the question jurists ask today is to what extent judges should make law. Cardozo’s observation on the power of judges ‘to declare the law carries with it the power, and within limits the duty, to make law when one exists,’

\(^77\)n. 44 above, 163.
\(^80\) Lord Reid, ‘The Judge as Law Maker’ (1972) 12 Society of Public Teachers of Law 22.
is now the general rule.\textsuperscript{81} Notwithstanding this, many judges still consciously practise the virtues of judicial self-restraint.

The term ‘make law’ does not connote that judges are totally inventing new law altogether. Kelsen, highlighted that ‘when settling a dispute between two parties or when sentencing an accused person to punishment, a court applies ... a general norm of statutory or customary law ...simultaneously the court creates an individual norm...’\textsuperscript{82} The individual norm becomes the law that binds parties to the conflict, but the general norms stipulated by the legislation remains as law applicable to the general public. Therefore, when judges make law, it is not the same as legislative law-making.

Judicial law-making is limited in its scope. One sees this when examining the nature of judicial process. Cardozo, in his classic \textit{The Nature of the Judicial Process}, examined several questions on judicial law-making, such as when and how judges should exercise their power, and what factors need to be considered along the path of constructing the law.

Cardozo states that the judicial process starts with the ascertainment of facts and proceeds with the application of law or legal principle relevant to the case. Most of the time, the statute may have the ‘answer’ for the problem, but if no answer is provided the judge will move to precedents and the process will further continue when precedents do not give the answer. Thus according to Cardozo’s nature of judicial process, judges should only exercise their law-making power when statute fails to


give an answer to the problem. 'He [A judge],' says Cardozo, 'legislates only between gaps. He fills the open spaces in the law.'

When judges legislate, they do not take over the legislator's task, nor replace the existing statute. Their duty is to maintain a relation between law and morals, between the precepts of jurisprudence and those of reason and good conscience.

While having the power to fill in the omission, judges may do so to clarify or settle uncertainty in the law. Again, Cardozo reminds judges to distinguish between, '...right and power, between the command embodied in a judgment and the jural principle to which the obedience of the judge is due. Judges have, of course, the power though not the right, to ignore the mandate of a statute, and render judgment in despite of it. They have the power, though not the right to travel beyond interstices, the bounds set to judicial innovation by precedent and custom.' He cautions judges not to abuse the power because it amounts to violation of law, and if done intentionally will subject them to removal or punishment. However, it will not invalidate their judgment.

Inherent to judicial task is the exercise of judicial discretionary power. This power has to be judiciously exercised. Cardozo suggests four 'directive forces' known as, the (i) rule of analogy, or the method of philosophy, (ii) method of evaluation/history, (iii) method of tradition and (iv) method of sociology. All these methods guide judges to develop new

83 n 61 above, 113.
84 ibid, 127.
85 ibid, 133.
86 ibid, 128.
87 ibid, 129.
88 ibid.
principles and no one method supersedes the other.\textsuperscript{89} These directive forces are exerted along the line of logical progression, and none of them have an overriding value, since one may override the other.

Each directive force has its own credibility. For example, the rule of analogy supplies a logical description in decision-making and support the duty to decide the same case alike, because acting otherwise goes against judicial conscience.\textsuperscript{90} Fidelity to precedent, however, does not operate in all situations; it is only operative when 'they are projections of a principle to its logical outcome, or outcome supposed to be logical' and not 'dictated by variant considerations of policy or justice.'\textsuperscript{91}

The method of history, according to Cardozo, will throw light on the past, present and the future. It points towards the customs that have formed part of the law, and at the same time provides for the measurement of moral practice at the time. In a sociological view, Cardozo acknowledges public policy as the ground for decisions.\textsuperscript{92} However, decisions based on public policy have less weight than decisions formulated on principle, which are purely legal.

Cardozo finally concludes that, 'logic, and history, and custom, and utility, and the accepted standards of right conduct, are the forces which singly or in combination shape the progress of the law.'\textsuperscript{93} The choice of which forces will gain supremacy is influenced by 'the comparative

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\textsuperscript{89} ibid, 99.
\textsuperscript{90} ibid, 33.
\textsuperscript{91} ibid, 39.
\textsuperscript{92} ibid, 72. He outlines two ways the term 'public policy' may mean. In common usage it refers to 'the good of the collective body,' with emphasis on 'mere expediency or prudence.' Alternatively, it means 'the social gain that is wrought by adherence to the standards of right conduct, which find expression in the \textit{mores} of the community.'
\textsuperscript{93} ibid, 112
\end{flushright}
importance or value of the social interests that will be thereby promoted or impaired. Social interest demands uniformity and impartiality in law achievable through adherence to precedent. At the same time, Cardozo is aware of the possibility that 'uniformity may turn to uniformity of oppression.' Thus, the stress for certainty needs to be 'balanced against social interest served by equity and fairness or other elements of social welfare.' When this situation arises, a departure from precedent or law stands justified.

Contemporary jurists, for example Hart and Dworkin, expand the Cardozo-discourse on judicial decision-making. These jurists defend judicial law-making as a controlled process regulated by precedent, seeking for predictability and coherency. However, both have a different understanding on how this may take place.

Judges cannot apply the letter of the law (which also includes the Constitution), because no law has a clear, definite meaning. Hart attributes this uncertainty to law's 'open structure.' General legal rules, if not sufficiently articulated, according to Hart, cannot resolve a particular controversy. Attempts to apply such rules must overcome vague or ambiguous languages as well as conflicts among the values that different rules seek to advance. Hart contends that in such circumstances, judges must supplement the rules implicated by the case; they must legislate.

94 ibid.
95 ibid, 113
96 ibid.
When judges have to interpret rules that carry a 'penumbra of uncertainty,\(^98\) their interpretation may come close to legislation.

As a rule-making authority, a judge, according to Hart, must exercise discretion, which is very wide. The choice a judge has is confined 'to add to a line of cases a new case because of resemblances which can reasonably be defended as both legally relevant and sufficiently close.'\(^99\) Judges might exercise the discretion wrongly and fall into the 'jurist's heaven of concepts,' reached when a general term is given the same meaning not only in every application of a single rule, but whenever it appears in any rule in the legal system.\(^100\) Here, judges do not have to put extra effort to interpret the term in the light of the different issues at stake in its various recurrences. Hence, judges fail to respond to see the dissimilarities between cases and retard the development of new precedent.

Conversely, judges may fall into the trap of 'rule-scepticism,' claiming that 'talk of rules is a myth, cloaking the truth that law consists simply of the decision of courts and the prediction of them.'\(^101\) In this situation judges free themselves from observing any rules.

These two extreme situations portray the difficulties in curbing judges' discretionary power. Hart resolved the problem of discretion in his 'rule of recognition,' which operates on the union of primary and secondary rules. Primary rules are those which impose obligations. The content of the primary rules are frequently uncertain, thus there must be secondary rules to deal with the problem, operating as a master rule. The master rule will

\(^98\) ibid, 12.
\(^99\) ibid, 127.
\(^100\) ibid, 130.
\(^101\) ibid, 136.
assist the actors within the legal system to recognise those rules which are
law and distinguish them from those which are not. The rule of recognition
operates in two ranks:

...one is expressed in the external statement of fact that the rule exists in the
actual practice of the system; the other is expressed in the internal statement
of validity made by those who use it in identifying law.102

The factual statement of fact that the rule exists is identified

...by reference to some general characteristic possessed by the primary
rules. That may be the fact of their having been enacted by a specific body
of their long customary practice, or their relation to judicial decisions.103

This refers to laws, which are enacted by the Parliament, and the decisions
of the courts which acquire authoritative status under the doctrine of
precedent, while the second part relates to what legal officials in fact
recognise as the sources of law of that system. The rules are ascertained
using the same test used by legal officers from the past.

Dworkin disagrees with Hart’s ‘rule of recognition’ because he
believes, every legal problem has one right answer and judges only have
weak discretion.104 Dworkin believes that legal problems are bound by
‘principles’ contrary to Hart’s concept which relies on ‘rules.’ The
difference between the two is that rules decide issues in an all-or-nothing
fashion while principles support a decision. Principles are used to identify
the rights of individuals and judges must always try to uphold rights of the
party. ‘Rights are trumps’, which means that if there is any right which
comes into conflict with any policy, the right must prevail. This is the

102 ibid, 111-112.
103 ibid, 95.
104 For the debate on Hart/Dworkin thinking see Soper, E.Philip, ‘Legal Theory and the
rights theory described by Dworkin in his seminal work *Taking Rights Seriously*.

In *Law's Empire*, Dworkin extended his 'rights theory.' He introduced a new approach to solve the problem of discretion by viewing the judicial role in adjudication as situated between conventionalism and pragmatism. He recognised that judges faced a large element of choice in judicial law making, but a responsible judge is not bound by a duty to apply core statutory meaning and to follow precedent. He calls this the 'plain-fact view' of the grounds of law – 'law is only a matter of what legal institutions, like legislatures and city councils and courts, have decided in the past.' The question of law is answered by looking at the documents where the records are kept. Literal interpretation is given to the words of the documents, without considering the contextual meaning of the word: this is also known as mechanical jurisprudence. Ascribing plain meaning to words distorts legal practice and goes against judges' responsibility to find the correct proposition of a legal system. Rather, a responsible judge has a duty to approach cases in a way consistent with what he called 'law as integrity.' When applied to the judicial process it becomes an 'adjudicative principle of integrity.'

The adjudicative principle of integrity, according to Dworkin, 'instructs judges to identify legal rights and duties, so far as possible, on the

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106 ibid, 7.
107 ibid, 17-18.
assumption that they were all created by a single author - community personified - expressing a coherent conception of justice and fairness.  

Dworkin explains his idea of ‘law as integrity’ by making an analogy between judging and literary criticism. Judges and literary critics deal with texts whose overall meanings are subjective. For this reason, both judges and literary critics confront problems of interpretation that call for a theoretical approach, which brings a diversity of elements to one's understanding of text, such as history, philosophy, politics, religion, and psychology. Dworkin observed, however, that the analogy between judging and literacy criticism breaks down in a crucial respect. The judge not only interprets law, but also makes it. A judge’s interpretation of the body of law, as it applies to a particular case, becomes part of the body of law for judges to interpret in the future. As a result, the judge is like a critic, but like an author as well.  

Dworkin illustrates how integrity surfaces by drawing an analogy of adjudication and literary activity by equating judging to the activity of writing a chapter in a chain novel. In a chain novel, each author takes the responsibility for construing the subsequent chapter to his best ability to represent the best interpretations and continuation of the novel as a whole. Continuing a chain novel requires creativity and the author must develop a conception of how the novel is inter-connected, and how the plot, character and narrative style cohere with one another.

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108 ibid.
109 ibid, Chapter Two.
110 ibid, 226.
111 ibid, 229.
112 ibid, 228-232.
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The scale of creativeness is constrained by two dimensions, the 'dimension of fit' and 'dimension of interpretation.' The latter, requires the author to choose 'which of these eligible reading makes the work in progress best.'\(^{113}\) The dimension of fit, on the other hand, requires the author to reject an interpretation, which is unacceptable by other authors writing the novels.\(^{114}\) Hence, the author must at all times be conscious of how other writers may write their chapter and try as best he/she can, to fit into the flow of the other writers’ thoughts. If one of the authors cannot write in conformity with other authors' approach, he/she must abandon the job.

The same responsibility is placed on judges; they must be alert of the precedent which provides coherence among the diverse sources of law. According to Dworkin again, the duty of a judge in a given case cannot be analysed as following precedent, if one interprets this to mean reaching the result absolutely demanded by prior case law. The law makes no such absolute demands. For Dworkin, judges fulfil their duty by adopting the standpoint of law as integrity, i.e., by 'trying to find, in some coherent set of principles about people's rights and duties, the best constructive interpretation of the political structure and legal doctrine of the community.'\(^{115}\) Law as integrity thus requires a judge 'to test his interpretation of any part of the great network of political structure and decisions of his community by asking whether it could form part of a coherent theory justifying the network as a whole.'\(^{116}\)

\(^{113}\) ibid, 231.
\(^{114}\) ibid, 230.
\(^{115}\) ibid, 255.
\(^{116}\) ibid, 245.
For Dworkin, judicial decision-making is a controlled process taken to preserve continuity and coherency in legal development without sacrificing the principles that bring fairness and justice, and valuing due process. These three virtues sometimes conflict, but law of integrity requires regard to be given to all three without sacrificing any one of these values.

The foregoing discussion on the approaches of Cardozo, Hart and Dworkin involves the issue of the legitimacy of the court decision-making process. Each addresses why judges have moral rights to decide issues for others and why litigants have a duty to regard a court ruling as binding. First, the theories offer a general account of the approach judges take to reach a just decision when interpreting the law. It shows that judges bind themselves to principles. Second, it explains the constraints on judges’ powers in deciding cases. The constraint can be ‘personal’ or ‘institutional’: personal when it relates to judges’ inner beliefs on political, ethical, social or economic issues, while institutional in instances where they are bound by precedent, the constitution or legislation.

There is an unexplained area highlighted by Hart in judges’ decision-making in which the operation of the restrictions described above is suspended. He wrote,

...when courts settle previously unenvisaged questions concerning the most fundamental constitutional rules, they get their authority to decide the

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117 Dworkin interpret the three virtues as Justice - 'a matter of the right outcome of the political system; the right distribution of goods, opportunities, and other resources.' Fairness - 'a matter of the right structure for that system, the structure that distributes influence over political decisions in the right way.' Procedural due process - 'a matter of the right procedures for enforcing rules and regulations the system has produced.' ibid, 403-404.

accepted after the questions have arisen and the decisions has been given.
Here all that succeeds is success.  

This area renews the debate on what ground judges claim authority to decide as such.

1.4. C Judicial Activism

Underlying judicial review power and law-making activity is the notion of judicial activism. This idea prospers if judges assume an active rather than a passive role. An 'activist' judge is in favour of expanding the role of the judiciary, and a 'restraintivist' judge would prefer a non-intrusive role or even to restrict it.

Whether a judge is an activist or restraintivist, he/she may nonetheless contribute to judicial activism. Judicial activism can be either positive or negative. Positive judicial activism takes place when 'a court engage[s] in altering the power relations to make them [those in power] more equitable,' while negative activism refers to the situation when 'a court use[s] its ingenuity to maintain the status quo in power relations.'

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119 n 97 above, 153

120 Baxi, Upendra, *Courage, Craft and Contention, The Indian Supreme Court in the Eighties* (Bombay: N.M Tripathi, 1989) 6. Afterwards cited as 'Courage, Craft and Contention'. Ely, John Hart in *Democracy and Distrust*, n.40 above, 1; uses the term 'interpretivism' which means judges deciding constitutional issues should confine themselves to enforcing norms that are stated or clearly implicit in the written constitution. Another term he uses is 'noninterpretivism', where courts should go beyond that set of reference and enforce norms that cannot be discovered within the four corners of the document.


123 Sathe, S P, ibid.
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Judicial activism may cause changes in power relations and relates to the manner in which judicial power is exercised 'which seeks recodification of power relations among the dominant institutions of state, manned by members of the ruling class,' thus it is bound to be political in nature. Why does the judiciary resort to judicial activism? Judges switch to activism when executive power escalates, endangering civil liberties, and election becomes ineffective to convey people's remonstration. At the extreme, lack of protection for the people when the state defies the law urges the judiciary to intervene. In response to this phenomenon, public interest litigation or social interest litigation ensues. The main dilemma faced by the judiciary in this type of litigation is to what extent they should stretch their activism when responding to people's grievances and how to avoid the allegation that they are usurping the power of the legislature and executive.

Regardless of the desire of justices to adopt an activist approach, there is a situation when they have to retract, particularly when activism creates a risk to judicial independence. The experience of the US Supreme Court provides a clear illustration on this point. In the late nineteenth century and early twentieth century, for example, the US Supreme Court used the doctrine of 'due process' to strike down welfare and social legislation. Roosevelt's New Deal statutes in the early 1930s became the main target. Roosevelt responded to the court's activist stance by

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125 n 122 above, Mason, Alpheus Thonios, 389.
126 n 120 above, Baxi, *Courage, Craft and Contention*, 15.
launching ‘a court packing’ plan. The proposal was to retire every judge who completed the age of 70 years and in his place, to appoint two judges with the consequence that the majority on the Supreme Court bench would be nominees of the President. Although the plan did not materialise due to lack of congressional support, the court retreated from its earlier stand.\textsuperscript{128}

Hence, judicial activism puts the judiciary in a precarious position, and demands activism to be exercised prudently and with restraint because indiscriminate use of activism will bring the judiciary into contempt from the government and public.

Despite the requirement that judges must seem apart and relatively autonomous from the executive and the legislature, judges are not autonomous \textit{in toto}. They may ignore these two institutions but not the ‘taught tradition of the law,’\textsuperscript{129} namely judicial deference, which implies that the judiciary will acknowledge the other two branches’ wishes,\textsuperscript{130} contemporarily known as judicial-restraint, which has wider meaning than judicial deference. This is lucidly expressed by Cardozo:

\begin{quote}
A jurist is not to innovate at pleasure. He is not a knight-errant, roaming at will in pursuit of his own beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to the “primordial necessity of order in the social life.”\textsuperscript{131}
\end{quote}

Judicial restraint is always perceived as antithetical to judicial activism; however, restraint does not mean that judges should never make

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\textsuperscript{129} A term used by Abraham, Henry in \textit{The Judicial Process}, 359.
\textsuperscript{131} n 69 above, 141
\end{flushleft}
law or stay passive. It means the invocation of self-awareness as to when to embark on activism. Judges when performing an activist stance should:

a. Endeavour to preserve judicial integrity;

b. Grant a close and necessary regard for the rules of procedure;

c. Place consideration on equal treatment before the law;

d. Show deference to legislative enactments;

e. Give judicial recognition of the realities of the cultural, ideological, and institutional setting the judges share with their fellow citizens, not excluding the political realities;

f. Have regard for stare decisis or adherence to precedent.\textsuperscript{132}

Judicial activism may be well regarded if characterised by moderation and self-restraint. Thus, the executive and the legislature may function effectively under the vigilant eye of the judiciary.

1.4. D Maintaining Judicial Ethics

The call for accountability is backed by the fact that ‘judges are human and share the virtues and weaknesses of mortal generally\textsuperscript{133} which is manifested in the deterioration of judicial standards or ethics.\textsuperscript{134} Judicial misconduct has occurred for ages,\textsuperscript{135} and numerous methods of judicial


\textsuperscript{133} Frank, Jerome, Courts on Trial, Myth and Reality in American Justice (Princeton: Princeton Uni, 1973), Chapter 3.


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discipline have been employed as 'a deterrent to misconduct and as remedy for purifying the judicial system of those few whose conduct warrants removal'.\textsuperscript{136} Some of the methods remain and are tailored to suit current situations; meanwhile new procedures are emerging. Directly affected is the concept of judicial immunity which is diluted because it has 'disastrous consequences for [the] litigant.'\textsuperscript{137} Thus, if judges unlawfully and intentionally infringe the right of litigants, they may face disciplinary action.

Such situations trigger the need to control judges' behaviour whether on or off the bench. The decline in judicial standards takes place in various forms: for example, rampant corruption, involving not only bribery, but also an unsystematic interpretation of law by the judiciary,\textsuperscript{138} lack of decorum while on the bench,\textsuperscript{139} showing support and approval on any issue,\textsuperscript{140} and inappropriate campaigning in a system where election is the


\textsuperscript{137} n 32, 2.


\textsuperscript{139} Cumaraswamy, Param 'Transnational Standard of Independence of Judiciary' presented at the 13th Law and Society Seminar on The New Frontier on Malaysian Independence of Judiciary, Organized by The Law Society, University Kebangsaan Malaysia, 14 July 2001. Lack of decorum's take place when judges show impatience by sighing and groaning during defence counsel's address to jury; \textit{R v Hircock} [1970] 1 QB 67, descending into the arena depriving a party to present the case effectively; \textit{Jones v National Coal Board} [1957] 2 QB 55, \textit{Yuill v Yuill} [1945] P 15 or when they make disparaging remarks against litigants. In \textit{Gardiner v A H Robins Co} 747 F 2d 1180 (Cir 1984) a judge makes a statement against the representative of the company without giving them the benefit of a trial and without hearing the evidence. The justice, Judge Lord, in an application to sanction a settlement in a Dalkon Shield litigation case, insisted three corporate officers be present. When they appeared, the judge accused them of permitting women to wear 'a deadly depth charge in their wombs' and of 'violations of every ethical precept.' These statements were unwelcome.

The strategies to uphold and improve judicial delinquents are diverse, ranging from setting guidelines for judicial ethics, providing modes of punishing errant judges, and educating judges on the issues.

1.4. D.I The Rise of Judicial Codes of Ethics

Judicial scandals could weaken public confidence in judges hence calls for swift remedial action. Most countries respond to the problem by drafting code of judicial ethics to guide judges in the performance of their duty and at the same time provide a basis for discussion and canvassing ethical issues. Judicial codes are not new; the US has had a *Model Code of Judicial Conducts* since 1920. Most countries today have a judicial code, to name a few: *Code of Conduct to be observed by Judges of the Supreme Court and of the High Courts of Pakistan* implemented in 1968; *Code of Judicial Conduct of the Philippines* applicable in September 1989; and *Code of Conduct for Judicial Officers, Kenya*, enforced in July 1999. Today, the *Bangalore Draft on Code of Judicial Conduct* provides the basic principles of judicial conduct which could be adopted by any country.

There are concerns that judicial codes may allow the legislative branch to exert influence when writing the contents of the code of judges and the code possibly will become out of date progressively. Experiences of other countries demonstrate that judicial codes do not necessarily originate from the legislature; other parties may take the initiative. Because

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141 Brauer, Alex, Loh, Tyng, 'Judicial Misconduct' [2001] 14 *Geo L J Legal Ethics* 963, illustrates a series of cases where judges used misleading statements to win the election to the office.
this practice had produced positive results, it is advisable to get the involvement of numerous parties and have a widespread consultation when preparing the codes. The Canadian Judicial Council, for example, held more than 50 meetings and conferences, met with the judges from all parts of Canada and organised a special judicial seminar on the subject. In addition, the Canadian Bar Association, the Federation of Law Societies Canada, the Canadian Association of Provincial Court Judges, academia and the Deputy Attorney General contributed their ideas.142 The Judges’ Code of Ethics of Malaysia, on the other hand, originates from the political branch of the government and is lacking consultation. The codes are also subject to review and most of the times are loosely drafted for flexibility and so as not to interfere with judges’ primary responsibility. Constant improvements may also be conducted on the code; the US Model Code for example has been revised repeatedly to reflect changing realities and new concerns.143

1.4. D. II Enforcing Judicial Codes of Ethics

Because ethical behaviour is crucial, all encompassing procedures are very essential to enforce the standards echoed in the code. Canada is one of the countries which have an all encompassing method of enforcing judicial ethics. The Canadian Parliament grants the Canadian Judicial Council (CJC) to receive and investigate complaints from the public and from the government on judges’ conduct. The members of the CJC are

strictly judges, therefore it is self-regulatory. When dealing with the complaints, the CJC is concerned with the conduct and not the decisions of the federally appointed judges. The Judicial Conduct Committee, a section within the CJC, deals with all complaints.

The claim has to be in writing and provide the name of the judge under complaint. There is no formal procedure and the complainant does not have to engage a legal representative. In the consideration of the complaint, the Chair or Vice-chair of the Judicial Conduct Committee, first examines the complaint and decides whether it may be considered on its own, or whether a response from the judge should be sought. Then, if necessary for the full treatment of the matter, further inquiries may be made by an independent counsel. If the complaint requires in-depth investigations, a panel will be set up.

The complaint is closed if it is without merit; when the judge admits inappropriate conduct has taken place and no further action is necessary; or, with the consent of the judge, remedial measure is required.

If the matter is very serious, or if requested by a provincial Attorney General or the Minister of Justice of Canada, an Inquiry Committee may be appointed to consider whether a recommendation should be made to the Minister of Justice for removal of the judge. The inquiry is normally conducted in public. The Inquiry Committee will report their finding to the CJC, which will then make recommendations to the Minister. The CJC is not vested with the power of removal.144

144 The information is mainly gathered from Canadian Judicial Council Webpage accessed 16 Mar 2005.
While the means of judicial discipline must be available to protect the citizenry from abuse by biased and arbitrary judges, those sanctions must never be applied to preclude judges from deciding cases in accordance with their understanding of the law and the dictates of their own conscience.145

1.4. E Institutional Perspective

Institutionally the judiciary is dependent on the executive and the legislature because judges are not self-appointed; neither is their power self-endowed. This reality supports the claim that judges are not totally independent as discussed concerning the meaning of judicial independence. This had been described in part I.I.

1.5 Opponents of Judicial Accountability

Despite an aspiration to make judges accountable, the topic requires cautious treatment because it might jeopardise judicial independence. An independent judiciary is established for two reasons, namely to ensure ‘impartial decisions in individual cases’ and ‘to check over-concentrations of power in the political branches.’146 The aim is to protect public interest.

Critics claim that subjecting the judiciary to scrutiny will deter them from delivering an unreserved decision because of their worries on

the repercussions.\textsuperscript{147} The executive may use this opportunity to subvert the judiciary, by initiating impeachment proceedings. For example, nine members of the Argentine Supreme Court were subject to impeachment following their judgment of 1 February 2002 declaring unconstitutional a government decree which imposed restrictions on the withdrawal of bank deposits.\textsuperscript{148}

Dissatisfaction also arose in the USA regarding the Judicial Council Reform and Judicial Conduct and Disability Act of 1980, which provided a mechanism of disciplining judges in addition to the impeachment process provided in Article II, section 4 and Article III, section 1 of the American Constitution. The major complaint is that judicial independence is compromised because the Act imported a political element into the scrutiny of judicial conduct. Most of the judges removed are politically unpopular judges. This is facilitated by the condition that any person may lodge a complaint, and the standards of conduct are vague.\textsuperscript{149}

Another disadvantage of this method of complaint is that dealing with such complaints is time-consuming and adds a burden to the judiciary, which currently is facing a backlog of cases.

The vulnerability of judges to external pressure makes the introduction of accountability inadvisable especially in semi-authoritarian and new democratic countries. Furthermore, attacks and threats on the judiciary are still continuous and numerous, and need to be tackled first.\textsuperscript{150} Accountability in this situation will have an adverse affect on judicial independence.

Rivalling views on the importance of judicial accountability have to bow to the idea that judicial independence is qualified.\textsuperscript{151} The qualified judicial independence advocates regard accountability as compatible with independence,\textsuperscript{152} and believe that appropriate accountability enhances judicial legitimacy and thereby helps to safeguard judicial independence.\textsuperscript{153} Furthermore, most of the opposition to accountability can be resolved by devising open and transparent mechanisms to monitor judicial acts, providing safeguards to prevent abuse and insisting on strict compliance with the requirement of fair trial. Therefore, the remaining issue to focus on is how to find a balance between judicial independence and accountability.

1.5.1 Balancing Independence and Accountability

The evolution of the doctrine of judicial independence does not suggest the judiciary to be totally free from any control. In the UK, the Act of Settlement 1701 liberated judges from Crown control, but they now are

\textsuperscript{150} Justice Kirby, Michael, Attacks on Judges – Universal Phenomenon, American Bar Association Section of Litigation Winter Leadership Meeting Maui, Hawaii, January 5\textsuperscript{th} 1998, accessed 17 Mar 2003.
\textsuperscript{152} Nicholas, R D, 'Judicial Independence and Accountability: Can They Co-exist?' (1993) 67 \textit{ALJ} 404.
subject to Parliament, which after the Revolution of Settlement 1688 gains supremacy and now has the power to legislate on matters relating to the judiciary. The executive branch at the same time has an active role in the appointment of judges, while Parliament is responsible for removing errant judges. The situation differs in countries with a written constitution and which practise constitutional supremacy, where the judiciary enjoys coequal position with the other two government organs. However, judges remain relatively 'dependent' and 'lower' in status than the executive and legislature.

A balance between independence and accountability is difficult to achieve as most of the time, the judiciary is the losing party. It is important to avoid this from happening. The 'responsive consumer-oriented' model of accountability designed by Cappelletti offers reasonable guidance in setting any methods of accountability for the judiciary. Membership of any mechanism of accountability should represent the judiciary, the executive and, if necessary, the legal profession and general public.

In addition, the Latimer House Guidelines for the Commonwealth on 'good practice governing relations between the executive, parliament and the judiciary in the promotion of good governance, the rule of law and human rights,' requests each government institution 'to exercise responsibility and restraint in their exercise of their power within its constitutional sphere so as not to encroach on the legitimate discharge of constitutional functions by the other institutions' is worth considering.154

Thus, judicial independence and accountability may find a balance when the three institutions are respectful of one another and at the same time observe self-restraint. As a complement, there should exist an independent body which oversees that the three government arms observe this responsibility.
CHAPTER TWO
THE JUDICIARY AND THE CONSTITUTION

Introduction

From a historical point of view, the judiciary obtained its formal unitary structure in 1946, when the Malayan Union Act in Council established a Supreme Court, a Court of Appeal and the High Court, with the Chief Justice as head of the judiciary.¹ Under the Federation Agreement of 1948, the structure remained unchanged, except that the Supreme Court was designated as the Supreme Court of the Federation of Malaya.²

The 1948 Federation Agreement was also a hint that independence was forthcoming. The Preamble of the 1948 Agreement states, 'progress should be made towards federal self-government' and preparations for self-government took place progressively.³ In 1951, a 'member system' was introduced in the Legislative Council, where certain nominated members of the Legislative Council were made responsible for various departments and functions of government.⁴ In 1952, the Federal Executive Council was expanded so that all members with portfolios could become members of the Executive Council. Finally, in 1955 an election was held to vote for people's representatives to the Federal Legislative Council. The Alliance⁵

¹ Malayan Union Gazette (Extraordinary) 1946, No. 2 of 1946.
² Federation of Malaya Agreement 1948, Clause 77.
³ Ibid.
⁵ The major political party composed of the United Malays National Organisation, the Malayan Chinese Association and Malayan Indian Congress. Today the party was renamed Barisan Nasional (National Front).
won the election, winning 51 of the 52 seats available for elected members.6

With the mandate from the people, the Alliance began to work for the attainment of independence at the earliest possible date, and in January 1956, a conference was held in London, attended by the representatives of Their Highnesses the Rulers and the Alliance. The conference resolved the basic principles upon which independence could be achieved. At the conference, it was also agreed that an independent Constitutional Commission should be appointed to make recommendations for a form of constitution for a fully self-governing and independent Federation of Malaya within the Commonwealth. At the same time, the conference agreed that full self-government and independence for the Federation within the Commonwealth should be proclaimed by August 1957.7

2.1 The Making of the Constitution

To Malaysia, like others countries on the edge of achieving independence, a new constitution was indispensable. The new constitution marked the end of dependency and embodied the visions, aspirations and hopes of the new country’s leaders and peoples.8 An entirely non-Malayan constitutional commission, also known as the Reid Commission (RC), named after its Chairman, Lord Reid, prepared the Malaya constitution. The RC consisted of representatives from Britain, Australia, India and Pakistan. The stature of the majority members of the RC was described as

7 Ibid.
proponents of liberal values and democratic norms.' The draft constitution prepared by the RC contained the foundation for a democratic government, with strong guarantees for the protection of fundamental rights and a broad scope for the public to attain redress for infringement of such rights, and an independent judiciary to enforce the rights to justify the description.

The RC proposal was provisional. According to the terms of reference establishing the RC, its task was to propose suitable provisions to be included in the constitution. Once the task was completed, the proposition was reviewed by a working party, which at the same time, redrafted the proposal. The working party consisted of four representatives of Their Highnesses the Rulers, four representatives of the Alliance government, the Chief Secretary and the Attorney General. The working party reported their deliberation in a White Paper, which was then studied and finalised in London. Consequently, the Reid Constitution Proposal was amended in both substance and form. According to Hickling, an expert in Malaysian constitutional history, the Reid proposal was, 'hastily demolished and re-constructed by an energetic Working Party.' Among the provisions that had been edited and remodelled were those affecting judicial powers.

This chapter will examine the RC proposal provisions relevant to the judiciary and the changes made in order to appreciate the factors that

10 ibid, 132-3.
11 ibid, 149; n 6 above, 14. The Working Party's task was to ensure that the new Constitution would be politically acceptable to the Malayan polity.
influence the form and nature of the judicial role and its power in Malaysia today.

2.2 The Process of Appointment

2.2. A Reid Commission Draft Proposal

Perhaps an illustration of the constitutional background of the method of judicial appointment might help in understanding the competing aims and opposing forces that have resulted in the present method of appointment.

The rule for judicial appointment proposed by the RC attempted to isolate political influence in the appointment of judges. The RC suggested that the power to appoint the Chief Justice is exercisable by the Yang di-Pertuan Besar (YdPB)\textsuperscript{13} alone, while the YdPB appoints other Supreme Court judges after consulting the Chief Justice.\textsuperscript{14} The RC opposed the involvement of the Judicial and Legal Service Commission\textsuperscript{15} (JLSC) in the appointment of Supreme Court judges, because it considered it improper for a body, which appoints subordinate courts judges, to appoint Supreme Court judges.

\textsuperscript{13} The title of the head of the country as proposed by the RC. But the Working Party changed the title to Yang di-Pertuan Agong because the title can be confused with the title of the ruler of Negri Sembilan.

\textsuperscript{14} Art. 114 (2) Part IX, Draft Constitution of the Federation of Malaya in Report of the Federation of Malaya Constitutional Commission, 1957 (The Reid Commission Report). The provision reads:

(2) The Chief Justice of the Supreme Court shall be appointed by the Yang di-Pertuan Besar and other judges shall be appointed by Him after consultation with the Chief Justice.

\textsuperscript{15} Full discussion is in a section discussing appointments from the Judicial Legal Service. As a background, the Reid Commission set up JLSC to preserve the independence of the judiciary. The JLSC is mainly composed of judges and may include retired judges, if they are not members of the executive. The composition of JLSC proposed by the Reid Commission is: the Chief Justice as Chairman, the senior Puisne Judge, the Chairman of the Public Service Commission and one or more other persons nominated by the Chief Justice, each of whom shall be either a judge or a retired judge who is not a member of the executive.
The RC outlined the basic qualifications for appointment of a judge, namely the person must have been an advocate of the Supreme Court and/or have been in the judicial service for at least ten years.

2.2. B Government White Paper

The Government Working Party altered the RC's proposal. There were now three actors in the process of selecting judges: the Conference of Rulers,16 the Judicial and Legal Service Commission,17 and the Prime Minister (PM). Appointment of the Chief Justice required only the YdPA to consult with the Conference of Rulers and consider the advice of the PM. Other judges of the Supreme Court are appointed by the YdPA acting on the recommendation of the JLSC, after consulting the Conference of Rulers. However, before acting on the recommendation of the JLSC the YdPA has to consider the advice of the PM and may once refer the recommendation back to the JLSC for reconsideration.18 According to the White Paper these

16 The Conference of Rulers is a body composed of rulers of the Malay States holding (1) the power to elect the YdPA and the Deputy YdPA, (b) the right to consent or withhold consent to certain laws, (c) the right to be consulted on appointment of officials including the Chief Justice and Judges of the Supreme Court. The Conference of Rulers acts at its own discretion when advising on any appointment. See Art. 38.
17 The composition of the JLSC was altered by the White Paper as indicated in bold. At this time it consists of the Chief Justice as Chairman, the Attorney-General, senior Puisne Judge, Deputy Chairman of the Public Service Commission and one or more members who shall be appointed by the YdPA after consultation with the Chief Justice, from among judges or former judges of the Supreme Court.
18Art. 122 (2), (3) and (4) Proposed Constitution of Federation of Malaya in Federation of Malaya Constitutional Proposal 1957, afterwards referred as the White Paper:
(2) The Chief Justice and the other judges of the Supreme Court shall be appointed by the Yang di-Pertuan Agong.
(3) In appointing the Chief Justice the Yang di-Pertuan Agong may act in his discretion, but after consulting the Conference of Rulers and considering the advice of the Prime Minister; and in appointing the other judges of the Supreme Court he shall, after consulting the Conference of Rulers, act on the recommendation of the Judicial and Legal Service Commission.
(4) Before acting, in accordance with clause (3) on the recommendation of the Judicial and Legal Service Commission the Yang di-Pertuan Agong shall consider the advice of the Prime Minister and may once refer the recommendation back to the Commission in order that it may be reconsidered.
changes are ‘designed to maintain the independence of the judiciary from
the executive and legislative authorities.’

2.2. C Legislative Council Debates

The effectiveness of the new method of appointing judges was
questioned during a debate on the constitutional proposals in the legislative
council. Mr Devaser objected to the requirement of advice from the PM,
the head of the executive. He contended that the practice contravened the
idea of an independent judiciary. The Attorney-General (AG), who
responded to his claim, regarded his worries as unfounded because the
YdPA ‘is not bound to accept the advice – he is merely bound to consider it
— and one would have thought that as a matter of courtesy and a matter of
common sense, he would be a very suitable person to consult....’

The Attorney-General’s explanations on the operation of the new
method of judicial appointments have led to two interpretations. He might
have had in mind the practice of judicial appointment in England, where the
appointment of the Chief Justice is subject entirely on the advice of the PM.
This however is not possible, because the draft constitution makes the duty
to consult the Conference of Rulers indispensable. Furthermore, the word
‘consult’ and ‘consider’ in the provision advocate for the same reflection to
be given to the opinions of the Conference of Rulers and the PM. A second
interpretation is probably for the YdPA’s deliberations with the Conference
of Rulers and the PM’s advice to be assessed collectively.

19 Para 31, the White Paper.
20 Column 3022, Legislative Council Debates, Official Reports of the Second Legislative
The PM's influence in the appointment of other Supreme Court judges is minimised when advising the YdPA on the choice of candidate, he is bound by the recommendation of the JLSC. However, if the PM's advice differs from that of the JLSC, the YdPA may refer the recommendation back to the JLSC for consideration before making the appointment. Again, the YdPA is not strictly bound by the PM's advice.

The inclusion of the JLSC in the appointment process allows the judiciary to contain the PM's choice of candidate and scrutinise the candidate's professionalism. On the other hand, the consultation with the Conference of Rulers and advice from the PM will address other information beyond the knowledge of the JLSC, such as reports from the Special Branch and other government departments. It is clear that the intention of the Working Party was to have an appointment process which is free from political pressure. The White Paper version served the purpose and was adopted in the 1957 Constitution.

There were no changes made on the qualifications of the judges, and the provision for the appointment of judges was refined in the White Paper's constitutional proposals.

2.3 Background of the Removal Process

2.3. A Reid Commission Draft Proposal

It was the recommendation of the Reid Commission that a judge should not be removed from office, except, by an order of the YdPA in pursuance of an address passed by a two-thirds majority of each House of

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Chapter Two

Parliament. Prior to the notice of the motion, there should be proof of misconduct or infirmity of mind or body.\textsuperscript{22}

2.3. B Government White Paper

The Working Party altered the RC’s recommendation because in the working party’s members’ opinion, a trial by peers was the best protection for judicial independence. Removal will ensue when recommended by a tribunal comprising of five persons, who hold or have held equivalent office in any other parts of the Commonwealth. The formation of the tribunal is upon the request of the PM or of the Chief Justice after he has consulted the Prime Minister. Members of the tribunal are appointed on the recommendation of the JLSC. A judge is removable upon the Tribunal’s recommendation to the \textit{YdPA}.\textsuperscript{23}

\textsuperscript{22} Para 125 Reid Commission Report. The draft provision proposed by the Reid Commission read:

\textbf{Article 116}

(1) A judge of the Supreme Court –
(a) may resign his office by writing under his hand addressed to the Yang di-Pertuan Besar;
(b) shall cease to hold office on attaining the age of sixty-five years; and
(c) shall not be removed from office except by an order of the Yang di-Pertuan Besar made in pursuance of an address by Parliament supported by the votes of not less than two-thirds of the members present and voting in each House of Parliament

(2) Before any motion for the removal of a judge is proposed in either House of Parliament –
(a) there shall be such proof as Parliament may by law require that the said judges has been guilty of misbehaviour or suffers from such infirmity of body or mind as renders him incapable of acting as judge of the Supreme Court; and
(b) the notice of motion shall be signed by not less than one-quarter of the members of the House in which the motion originates.

\textsuperscript{23} Article 125, Government White Paper

(a) A judge of a Supreme Court may at any time resign his office by writing under his hand addressed to the Yang di-Pertuan Agong but shall not be removed from office except in accordance with the following provisions of this Article.
(b) 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 Supreme Court ought to be removed on the grounds of misbehaviour or inability from infirmity of body or mind or any other cause, properly to discharge the functions of his office, the Yang di-Pertuan Agong shall appoint a tribunal in accordance with clause (4) and
2.3. C Legislative Council Debate

Not much discussion took place on this topic during the debate. Mr Devasar objected singly to the new process of removal, because it was at odds with that in other Commonwealth countries, such as India, Pakistan and Ceylon. He argued that maintaining the power of removal in the House of Parliament supports the Federation’s competency to govern the country. Mr V T Sambanthan challenged his opinion because it exposed the judiciary to political pressure. According to him:

"With our strength in the House today, we felt, and perhaps rightly too, that in the future there could always be a possibility of some party getting a two-thirds majority or more in the House. But then with the clauses of the Reid Commission you would have perhaps had a state of affairs where a judge may be afraid to speak his own mind if it went counter to the desires of the ruling party. ...the removal of judges should not be within the pale of Parliament."

Mr Sambanthan view had a strong ground and remains so today.

The AG, however did not address Devasar's objection, and evaded the protest with a sweeping reply that Devasar's had contradicted himself by that argument, because all this while, Devasar had argued that the court should control the legislature’s power.

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refer the representation to it; and may on the recommendation of the tribunal remove the judge from office.

(1) The said tribunal shall consist of no less than five persons appointed on the recommendation of the Judicial and Legal Service Commission, being persons who hold or have held office as judge of the Supreme Court or if it appears to the Commission expedient to do so recommend, persons who hold or have held equivalent office in any other part of the Commonwealth, and shall be presided over by the Chief Justice, if he is a member, and in any other case, by the person first appointed to the said office.

(2) Pending any reference and report under clause (3) the Yang di-Pertuan Agong may on the recommendation of the JLSC suspend a judge of the Supreme Court from the exercise of his function.

24 Column 2991, Debate on 11 July 1957.
25 Column 3009 – 3010, Debate on 11 July 1957.
2.4 Background on Judicial Power

2.4. A Reid Commission Draft Proposal

The RC draft proposal on the Constitution did not include a ‘vesting clause’ conferring judicial power to the Supreme Court. The Supreme Court’s power and jurisdiction had been provided by a statute passed under the 1948 Federation of Malaya Agreement. However, the commission proposed to enlarge the Supreme Court’s powers. The Supreme Court was to have the authority to interpret the Constitution and this was to be shared with the subordinate court. In addition, the Supreme Court was equipped with the exclusive power to declare as invalid, law that was enacted by the legislature.

The extension of powers was intended to secure the states’ autonomy within the Federal system; to enable challenges to breaches of

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26 Article 114 (1), Reid Commission Draft Constitution: There shall be a Supreme Court which shall consist of a Chief Justice and not more than fifteen other judges; Provided that the number of judges may be increased by Act of Parliament.

27 Article 120, Reid Commission Draft Constitution: If the Supreme Court is satisfied that a case pending in a court subordinate to it involves a substantial question of law as to the interpretation of this Constitution the determination of which is necessary for the disposal of the case, it shall withdraw the case and may –

(a) either dispose of the case itself, or
(b) determine the said question of law and return the case to the court from which the case has been so withdrawn together with a copy of its judgment on such question, and the said court shall on receipt thereof proceed to dispose the case in conformity with such judgment.

28 Article 119, Reid Commission Draft Constitution

(5) The Supreme Court shall, to the exclusion of any other Court, have original jurisdiction in any dispute between :-

(a) the Federation on the one side and one or more of the States on the other, or
(b) the Federation and one or more of the States on the one side and one or more of the States on the other, or
(c) one or more of the States on the one side and one or more of the States on the other, if in so far the dispute involves –

(i) any question whether of law or fact on which the existence or the extent of the legal rights depends, or
(b) any question as to the interpretation of this Constitution

(2) The Supreme Court shall have such other jurisdiction as may be provided by federal law.
fundamental rights provision and facilitate the clarification of critical constitutional questions.  

To guarantee the fundamental rights conferred by the Constitution, the RC proposed to confer the courts with the power 'to enforce the rights and to annul any attempt to subvert any of them whether by legislature or administrative action or otherwise.' The draft provisions proposed by the Reid Commission were very extensive and befitted the Supreme Court's image as guardian of fundamental rights. The pervasiveness of the provisions is evident when it expressed:

**Article 4**

1. Without prejudice to any other remedy provided by law --
   1. a) where any person alleges that any provision of any written law is void, he may apply to the Supreme Court for an order so declaring and, if the Supreme Court is satisfied that the provision is void, the Supreme Court may issue an order so declaring and in the case of a provision of a written law which is not severable from other provisions of such written law, issue an order declaring that such other provisions are void; 
   2. b) where any person affected by any act or decision of a public authority alleges that it is void because --
      1. (i) the provision of the law under which the public authority acted or purported to act was void, or
      2. (ii) the act or decision itself was void, or
      3. (iii) where the public authority was exercising a judicial or quasi-judicial function that the public authority was acting without jurisdiction or in excess thereof or that the procedure by which the act or decision was done or taken was contrary to the principle of natural justice, he may apply to the Supreme Court and, if the Court is satisfied that the allegation is correct, the Court may issue such order as it may consider appropriate in the circumstance of the case; 
   3. c) where it is alleged that a public authority owes a duty under this Constitution, or the Constitution of any State, and that such duty has been neglected or has not been carried out in accordance with the law, any person aggrieved thereby may apply to the Supreme Court for an order requiring the public authority to perform such duty in accordance with the law and, if the Court is satisfied that the allegation is correct, it may make such order as it may consider appropriate in the circumstances of the case. 

In addition to Article 4, the RC suggested a provision declaring the Constitution as the supreme law. With this declaration, any law or any

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29 Reid Commission Report, Para 123.
30 ibid, Para 161.
31 Reid Commission Draft Constitution.
executive act that is inconsistent with the Constitution becomes void. This provision reinforces in court the duty to defend the Constitution. A scholar argued that this provision indicates that the 'members of the Commission were distrustful of politicians and decided to enshrine these fundamental guarantees to the Constitution rather than to allow them to be subject to the vagaries of party politics and ordinary legislation.' Nevertheless, it is the 'trust' of a single member of the RC in the politicians that determines the survival of this provision.

2.4. A.I Justice Abdul Hamid's Note of Dissent

Justice Hamid, a member of the Commission from Pakistan, disputed the inclusion of para (iii) of sub-clause (b) in Article 4, which according to him 'seeks to protect not the Constitution but the "principles of natural justice."' Justice Hamid in his note of dissent argued that this clause caused 'legal and constitutional complications', because the 'principles of natural law' were not part of the Constitution nor any written law. Its lack of exact definition was thus difficult to comprehend. Without a consensus on what constitutes principles of natural justice, any acts or decisions of judicial or quasi-judicial authorities are disputable. Simultaneously it will be problematic to the Supreme Court to gauge the validity of the erroneous act. On these grounds, he proposed that the

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32 Article 3, Reid Commission Draft Constitution: (1) This Constitution shall be the supreme law of the Federation, and any provision of the Constitution of any State or of any law which is repugnant to any provision of this Constitution shall, to the extent of the repugnancy, be void. (2) Where any public authority within the Federation or within any State performs any executive act which is inconsistent with any provision of this Constitution or any law, such act shall be void.
33 n 9 above, 133.
Commission removes the phrase; 'or that the procedure by which the act or decision was done or taken was contrary to the principle of natural justice.'

Justice Hamid also pointed out that the word 'reasonable', which appears before the word 'restrictions' in three sub-clauses of Article 10 gave the court the power to assess what is reasonable. He suggested that the power of the legislature to impose restrictions in the freedom of speech, assembly and association in the interest of security should be definite. The legislature should retain the power to decide on what is reasonable, if not, all legislation on this subject can be impugned, thus causing uncertainty of the law.

2.4.B Government White Paper

The White Paper did not record any thought about the provisions on judicial power proposed by the Reid Commission. However, the Working Party had made major alterations on the Reid draft.

It appeared that the Working Party had adopted the 'vesting clause' as in the American Constitution, thus judicial power was expressly vested in the Supreme Court. The declaration of the supremacy of the Constitution remained, but queries on the imposition of restrictions in Article 9(2) were prevented, unless the challenge alleged that the restrictions imposed did not relate to Article 9(2). Limits were also imposed on the right to challenge the restrictions on freedom of speech and

34 Reid Commission Report, Para 13 (i), Note of Dissent by Mr Justice Abdul Hamid.
35 ibid, Para 13 (ii).
36 Proposed Constitution of Federation of Malaya, Article 121.
The Judicial power of the Federation shall be vested in a Supreme Court and such inferior courts as may be provided by federal law.
association. However, if the dispute is on restrictions that were not deemed necessary or expedient for the purpose mentioned in the proviso, the confines were inapplicable.

A major setback occurred when the Working Party proposal obliterated the Supreme Court's power to enforce the rule of law, including the power to examine the reasonableness of restrictions imposed on freedom of speech, assembly and association. The omission of the power to enforce the rule of law was the outcome of a consideration that the provision was unsatisfactory and it was 'impracticable to provide within the limits of the Constitution for all possible contingencies.' This decision is suspected of having been taken based on the dissenting opinion of Justice Hamid on the issue.

2.4. C Legislative Council Debates

The Working Party proposal to omit court jurisdiction on the enforcement of the rule of law received minor resistance during the legislative assembly debate on the White Paper draft Constitution. Mr Devasar made queries on the reason behind the replacement of Article 3 proposed by the RC on 'The Rule of Law' with Article 4 now entitled 'Supreme Law of the Federation.' According to him, the changes had altogether omitted the power of the Supreme Court to uphold the rule of law. Concern was also raised by him on the omission of constitutional remedies contained in Article 4 of the RC proposal. The elimination of the constitutional remedy amounted to 'giving a gun and not providing

ammunition\textsuperscript{39} rendering meaningless the power to ascertain the constitutionality of government's action.\textsuperscript{40}

Mr Devasar cautioned on the risk of leaving the power to ascertain the reasonableness of restrictions on fundamental rights to the legislature, because there was no guarantee that future governments would restrain themselves from making unreasonable legislation. He said:

...politics is a shifty game and one never knows who will come after the present Chief Minister.\textsuperscript{41}

He further asserted that the court of law was the best repository for the rights of the people, not the executive or legislature. Mr Devasar was the chief contestant to the wide power of the legislature in lawmaking and the only member of the legislative council that voiced distrust on the government's authority and fought for greater court power for the sake of protecting fundamental rights.\textsuperscript{42}

In reply to Mr Devasar's queries and objections, the Attorney General (AG) illuminated the essence of the alteration of Supreme Court powers. In essence, the exclusion of the power to ascertain on the constitutionality of restrictions to fundamental rights was intended to separate politics from the Court.\textsuperscript{43} The AG's response confirmed that Justice Hamid's dissent was the reason that the power granted to the Supreme Court had to undergo major changes.\textsuperscript{44} The AG stressed the difficulties the legislature would face if the court had the power to ascertain

\textsuperscript{39}ibid, Column 2985.
\textsuperscript{40} ibid, Column 2982-2987.
\textsuperscript{41} ibid, Column 2986.
\textsuperscript{42} He repeated this argument during the legislative debate on 15 August 1957. Another member of the legislative council who inquired about the changes on judicial power was S M Yong, subsequently appointed as a judge in 1965.
\textsuperscript{43} ibid, Column 3021.
\textsuperscript{44} ibid, Column 3018.
the reasonableness of the restrictions on fundamental rights, especially when it involved the interest of the state. The fundamental rights provisions might have to be rewritten. He put forward a ‘countermajoritarian’ argument when claiming that the power should remain with the legislature:

...it seems very undesirable to give to a single Judge the business of overruling, if he thinks fit, the considered opinion of Parliament. It seems absurd and unreasonable in itself to set up the opinion of one or two men on such matters against the opinion of over a hundred. Moreover in most of these cases, the question that would be before the Court would be whether something was reasonable or whether it was in the public interest.... Such a question is essentially political, and in most cases the Judge is not the best person to decide a political issue of that sort.45

The AG also argued that unlike the US Supreme Court, the judiciary in Malaya never had the experience of examining political questions and probably would not be able to face political challenge if the courts play prominent role in political questions. Even the US Supreme Court, according to the AG, with its long tradition of judicial review, nearly lost its power during the New Deal legislation controversy in 1930s.

In continuance to his reply, the AG indicated his sense of distrust of judges who possessed certain political ideology and at the same time were irresponsible for their decision. The principle - *Fiat justitia ruat coelum* - let justice be done, though the heavens fall, according to the AG, was unsuitable in dealing with a political question that put the country at risk.46

The PM, Tunku Abdul Rahman, on the other hand explained that the provisions on fundamental rights were re-drafted to make them more exact and to avoid ambiguity.47 In addition, he argued that restrictions on fundamental rights, especially on freedom of speech and association, were a

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45 ibid, Column 3020.
46 ibid, Column 3164, debate on 15 August 1957.
47 ibid, Column 3137, debate on August 15 1957.
necessity to protect public interest and for the well-being and security of a
country. He stated,

Such restrictions should not of course, be any more than is reasonably
necessary for the purpose of safeguarding public interest, nor should they
fall short of what is reasonably necessary particularly because Malaya has
to battle today with a foe from within and to meet and tackle the subversive
activities of a section of the population who has made a common cause with
the terrorists in order to overthrow the Government of the people and set up
in its place a reign of terror.48

The Prime Minister advocated the thought that the true guardian of
fundamental rights and liberties is the people themselves and entrusted
these rights for safekeeping to their representatives in Parliament.49

When the legislative council passed the draft Constitution, the
provisions on judicial power were deeply undermined. However, since the
government - as Tunku Abdul Rahman, the PM, had pledged during the
legislative council debate - will not aggressively violate fundamental rights,
the extent of judicial power provided by the 1957 Constitution was at that
time considered reasonable.

In detailing judicial power, the RC had been aware of the
importance of preserving racial harmony within Malaya’s multi-racial and
multi-religious society and the ongoing emergency, therefore the provisions
had been drafted to suit this situation. As discussed above, the RC took the
approach of giving priority to the protection of individual citizens’ rights
with the court playing the main role. The purpose of this was to save the
citizens from unfair treatment and stop the arbitrary exercise of powers by
the government. However, the Working Party took a different approach,
believing in the government as the best party to protect fundamental rights.

48 ibid, Column 3138.
49 ibid.
Thus, fundamental rights were qualified and the court's judicial review power was restricted.

2.5 The Constitution in Operation

The kernel of judicial provisions in the Constitution is intended to enhance and preserve judicial independence. The novel aspirations of the RC and the Working Party were expressed in different forms. As evaluated above, the final draft proposal had compromised judicial independence and power but as no drastic action to suppress judicial independence was taken by the government at that period, the position of the judiciary was spared.

However, safeguards on judicial independence and power are continuously threatened. Lord Elwyn-Jones observed, 'some governments assert that they respect judicial independence', but at the same time 'they do all they can to undermine it.' Preservation of judicial independence therefore does not entirely rely on constitutional provisions but also on other external factors. This is supported in the next observation on how the provisions are implemented, the political circumstances in the country and how the attitude of the judiciary itself dictates the future of judicial independence and the courts' power.

2.6 Appointment Process

The life of the judicial appointment provision introduced in the 1957 Constitution was very brief. The noble intent to exclude politics from the process of appointment disappeared when the JLSC was abolished and

Article 122 was amended in 1960. The Alliance government in their effort to curb communist activities, introduced the Internal Security Act 1960 and amended Article 149 and 151 on preventive detention. The new ISA and scheme of preventive detention legislation required judges who are government sympathisers, thus it was essential for the government to have more power over judicial appointments. However, the government attests that pro-government outlook was not regarded as the sole criteria for appointment as a judge.

The Deputy Prime Minister (DPM), Tun Abdul Razak, when moving the 1960 Constitutional (Amendment) Bill, pledged to shield judicial appointment from politics. He said:

As the House will no doubt agree, appointments to the judiciary are matters of the greatest importance in the administration of the country as on these appointments depend the standard of justice, the standing and impartiality of the courts and the good name of the government. In putting forward this amendment, I would like to make it quite clear that it does not reflect in any way on the appointment of Judges and others in the judiciary so far made. However the government feels that as the Government will in the last resort be held responsible for these appointments, the appropriate course for the government is to assume direct responsibility as in the case of the United Kingdom. I would like to say here quite clearly that there is no intention whatsoever to bring political influence in these appointments. Indeed, this is far from the wish of Government. In the proposed amendment, there are adequate safeguards. In recommending the appointment of the Judges, the Prime Minister will have the advice of the Chief Justice and the Conference of Rulers will have to be consulted.

When the amendment made its way into the Constitution, it resulted in ousting the JLSC's role in judicial appointment. Consequently, the control over PM's power in judicial appointment was reduced. The power to appoint the Chief Justice remained with the YdPA acting on the advice of the PM, but freed from the duty to consult other authorities. Other

52 s.20 Constitution (Amendment) Act 1960, Act A10.
53 ibid.
judges on the other hand, were appointed by the YdPA on advice of the PM after consulting the Conference of Rulers and considering the advice of the Chief Justice.\textsuperscript{55}

The reinstating of JLSC in 1963\textsuperscript{56} did not revive the Commission’s power to give recommendations concerning the appointment of judges. Moreover, the composition of the JLSC did not help in asserting judicial autonomy in judicial appointments.\textsuperscript{57} Fortunately, the government at that time without demur never tried to influence the judiciary,\textsuperscript{58} and the PM in principle respected the opinion of the head of judiciary when advising the YdPA on the appointment of judges. According to Salleh Abas,

\begin{quote}
The process of appointment is initiated by the Lord President and the respective Chief Justices of the two High Courts who submit the name of the candidate with recommendation for appointment. Never in the history of our independence has there been any rejection by the Prime Minister or the Conference of Rulers or the King of the name of the candidature submitted by the Judiciary. In fact, the Prime Minister takes this request of appointment as a matter of course.\textsuperscript{59}
\end{quote}

The PM’s advice to the YdPA in fact was the product of the recommendation of the Chief Justice and approval by the Conference of Malay Rulers’ and ‘a mere matter of formality.’\textsuperscript{60} If, in any instance, the

\textsuperscript{56} s.52, Malaysia Act 1963, Act 26/1963.
\textsuperscript{57} At present the composition of JLSC is Chairman of the Public Service Commission, as the Chairman, the Attorney-General, or the Solicitor General if the Attorney General is a Member of Parliament or not appointed among members of the Judicial and Legal Service, one or more other members appointed by the YdPA after consultation with the Chief Justice selected among serving judges or retired judges. They must qualify to be appointed as superior court judges. See Art 138.
\textsuperscript{58} n 55 above, 241.
\textsuperscript{59} Salleh, Mohamed Abas, ‘Independence of the Judiciary’ [1987] \textit{1 MLJ} xl, xli. In an interview with a retired Federal Court judge who wished not to be named, he reiterated that the Lord President/Chief Justice is the active player in the appointment process and undertakes the task of investigating the fitness of the candidate based on his record of service and consultation with members of the Bar and other authorities including the police.
Prime Minister insisted on his own candidate, ‘it could result in a great deal of unhappiness and discontentment among the judges, thus creating suspicion and undermining the public confidence in the integrity and impartiality of the judiciary.’ This, according to Salleh Abas, had never occurred before.

Besides the Conference of Rulers and the Chief Justice, the Bar was also consulted especially when the candidate was among a member of the Bar. It did not only limit political appointment, but ensured only persons of good character and proficiency are appointed.61

The practice has developed into a convention after being employed for almost thirty years. Thus, the criticism that the PM influences the appointment of judges was without foundation since he/she consults the head of the judiciary. Suffian, with confidence in 1978 proudly announced, the judiciary ‘has remained completely unpolitcised.’62 Nevertheless, convention is breakable, especially when it obstructs administrative efficiency. Subsequently in 1988, the practice of judicial appointment changed drastically.

2.6. A The Current Appointment Process

The Federal Constitution vests the power to appoint the Chief Justice of the Federal Court, the President of the Court of Appeal, the Chief Judges of the High Court of Malaya, and Sabah and Sarawak, together with other judges of the Federal Court onto the YdPA, who acts on the advice of

62 n 55 above, 241.
the PM after consulting the Conference of Rulers.\footnote{Art. 122B (1) Federal Constitution.} Besides consulting the Conference of Rulers, the PM has a constitutional duty to consult:

a) the Chief Justice in the appointment of a judge other than the Chief Justice;\footnote{Art. 122B (2), ibid.}

b) the Chief Judge of each High Court in the appointment of a Chief Judge, and if the appointment is to the High Court of Sabah and Sarawak the Chief Minister of each of the states of Sabah and Sarawak;\footnote{Art. 122B (3), ibid.}

c) the Chief Justice of the Federal Court if the appointment is of a judge at the Federal Court;

d) the President of the Court of Appeal if appointment is to the Court of Appeal, and

e) if the appointment is to one of the High Courts the Chief Judge of that Court.\footnote{Art. 122B (4), ibid.}

The phrase 'Before tendering …' in clause (2), (3) and (4) of Article 122B requires consultation to take place before the PM tenders his advice to the \textit{YdPA}. The PM cannot bypass any of them; and according to convention, the PM has to advise the \textit{YdPA} according to the proposition made by the Conference of Rulers and members of the judiciary. However, this is not how the provisions work.

In 2002, the operation of Article 122B was adjudicated for the first time.\footnote{In the Matter of Oral Application of Dato' Seri Anwar Ibrahim to Disqualify a Judge of the Court of Appeal [2002] 2 MLJ 481.} It emerged in the application of Anwar to disqualify Mohtar JCA
from the quorum hearing an appeal on the High Court decision rejecting Anwar's claim that he was prosecuted under a statute which was in the process of annulment, thus the prosecution was an abuse of process.\footnote{Public Prosecutor v Dato' Seri Anwar Ibrahim (No 2) [1992] 2 MLJ 249. Further elaboration see p 182.} Anwar seek to disqualify the named judge because he believed that the judge was likely to be biased. Anwar contended that when he was the Deputy Prime Minister, he represented the PM at the Conference of Rulers in which the appointment of Mohtar was in question. The Conference of Rulers, in disregard of the PM's recommendation was critical of Mohtar's standing. Thus, Anwar alleged the named judge might have wrath against him.

The Court of Appeal, while resolving the issue whether Mohtar JCA should disqualify himself, took the opportunity to clarify the process of judicial appointment in the country. Justice Lamin, President of the Court of Appeal, expounded the scheme of judicial appointment as:

i. The YdPA when appointing a judge must act on the advice of the PM, and prior to the appointment, has to consult the Conference of Rulers.

ii. When the YdPA consults the Conference of Rulers, this does not mean he must obtain consent to appoint the named candidate; neither is he bound by the Conference of Rulers’ advice.

iii. According to Clause (1) of Article 40, the YdPA is constitutionally bound to act according to the direct advice given by the PM who makes the recommendation
and not advice obtained after consultation with the Conference of Rulers.

iv. Even if the Conference of Rulers disagrees or withholds its views or delays in releasing its advice with or without reasons, the PM can still insist and proceed with the appointment.

v. The Prime Minister may ignore the request or advice from the Conference of Rulers to revoke an appointment already made.

The propositions outlined by the Court of Appeal are flawed. It fails to consider the convention on judicial appointment stated earlier. The Court of Appeal in rushing to dismiss Anwar's application, overlooked the salient feature of judicial appointment, namely, free from political pressure as intended by the framers of the Constitution and adhered to by previous PMs. Consultation may not mean approval, but contains the element of compromise among advice-givers. The advice-giver ought to give priority to candidates acceptable to all parties, regardless of their interest. This will inculcate respect and confidence in the judiciary and avoid disgruntlement.

The learned judge in this case can be argued to have acted mechanically and without activism. If the two competing principles, namely, the principle of judicial independence and the plain facts principle, i.e., restrictively looked at what the Constitution provides; were weighed together, the Court of Appeal may arrive at a better answer. Furthermore, the Constitution's framers' intention clearly does not support the idea that word of the PM is the determining factor. Thus, the PM retains the right to
advise the YdPA, and consultation operates as a safeguard against arbitrary advice.

The outcome of the Court of Appeal interpretation corroborated criticisms that the current process of appointment is not transparent, and dominated by the executive.\textsuperscript{69}

2.6. B The Current Qualifications

Another concern on judicial appointment is the imbalance of judges' professional background. This is reflected in the values and an idea that judges uphold which is revealed in judicial decisions rendered by them and is described in Chapter Three and Four.

The qualifications of judges were set out similar to the Reid Commission proposal, and differed in drafting only. Article 123 required a nominee to be a citizen of Malaysia, and for not less than ten years have been enrolled as an advocate of the superior courts or any of the superior court, or be a member of the judicial and legal service of the Federation or the legal service of a state, or sometimes one and sometimes another. They must not pass the retirement age of 66 years.\textsuperscript{70}

The advantage of the system is, it allows judges from both professions to share experiences and narrow the gap in legal knowledge among judges.\textsuperscript{71} According to Dzaiddin, the former Chief Justice of the Federal Court, this method provides judges with 'a sound, wide legal and

\textsuperscript{69} n. 57 above; Hector, Charles, 'Mahathir and the Judges, The Malaysian Judiciary During the Mahathir Era', \textit{Relevan}, Kuala Lumpur Bar Newsletter, Issue No.2/03, 18.

\textsuperscript{70} s.2 and s.3, Constitution (Amendment) Act 2005, Act A1239. Prior to the amendment the age of retirement was 65 years.

\textsuperscript{71} n. 55 above, 241.
judicial experience, a less confrontational attitude with most of them more willing to listen and judge.\textsuperscript{72}

2.6. B.I Appointment from the Bar

The appointments of advocates to the bench are an exception rather than the rule. Why is this so? The legal profession in Malaysia is a fused profession; however approximately only 25\% out of the total number of legal practitioners are advocates. The rest are solicitors. According to the Oxford Legal Dictionary the word ‘advocate’ means ‘one who argues a case for a client in court.’ Since solicitors do not argue cases in court they are effectively out of the selection pool. Furthermore, the executive suspected the Bar of opposition and thus demurred from nominating its members as judges.\textsuperscript{73}

This belief was reinforced when a number of advocates publicly affirmed their personal belief in the justice of their client's cause which is contrary to professional ethics.\textsuperscript{74} Furthermore, representations in court always take place along political lines.\textsuperscript{75}

The explanation for appointing advocates as judges lies in the theory, that those who have spent a long time arguing cases before the court, should have acquired extensive experience of the trial procedure and are well versed in the values implicit in the adjudication process. This will


\textsuperscript{74} Gordon, Robert, 'The Independence Lawyers,' [1988] 68 \textit{Boston ULR} 1, 13.

\textsuperscript{75} Philips, Fred, Sir, \textit{The Evolving Legal Profession in the Commonwealth} (New York: Oceana 1978) 112.
have prepared them with the knowledge of how to preside and give judgment. Moreover, their abilities and professional stature are venerable, useful for asserting authority during a trial.76

A professional judge generally has an independent and critical mind. Having a successful legal career and outstanding qualities they usually have a distinctive outlook towards the profession and do not consider judicial office as service to the government. This mindset is important because it determines how judges carry out their duty and execute the power conferred by the constitution. Judges will be able to expand legal principle, explore new areas and become activists if, they regard dispensing justice as their main responsibility. Justice Kirby illustrates the attitude as:

People nurtured in the private sector are more likely to be questioning and candid .... There are likely to be more insistent upon the right to dissent .... They do not pretend that the law is always clear and ambiguous lest ambiguity or dissent might unsettle obedience to government and respect for law.77

An advocate who always boldly defends his/her clients' case will turn out to be a courageous judge, as 'acting courageously enables one to become a courageous person.'78 This is essential for a judge whose tasks are to defend the constitution and personal liberty, and advocate judicial independence. In consequence, political appointments are minimised because the executive is cautious about the reaction the executive might receive from the legal fraternity and the public.79

79 ibid.
2.6. B.II Appointment from the Judicial and Legal Service

The Judicial and Legal Service (JLS) is a joint service which provides for officers in the subordinate courts and the Attorney General's Chambers. Officers of the subordinate court are Magistrates, Judges of the Sessions Court and Senior Assistant Registrars; while officers at the Attorney General's Chambers are draftsmen, Deputy Public Prosecutors, Federal Counsels and State Legal Advisor, Legal Advisors at government departments, Counsels at the Public Trustee and Official Assignees, and Legal Aid Officers at the Legal Aid Bureau. These officers are transferable between the various departments. They are considered as civil servants and do not enjoy the security of tenure as superior court judges. Members who have been appointed as judges cease to be officers of the service.

The majority of Malaysian judges come from this service and such members treat the appointment as career development, not a vocation. Only four out of seventy-one (71) superior court judges have been appointed from the Bar. This has created a career judiciary where judges tend to identify themselves as government officials, and probably have an executive mindset, resulting from the confusion of their correct status. Hickling aptly describes the judges' dilemma:

Recruited in large part from the ranks of the judicial and legal service, the Malaysian judiciary inevitably possesses an official cast of mind. It is independent, but it is still very much a part of what Professor Griffith would no doubt call the establishment.

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Chapter Two

There are no supporting data that judges appointed from the JLS always sided with the Executive. They do decide against the government. However, the prevailing insinuation is; a person, who for the past ten years or more has acted in defence of the government, will face a dilemma to free his mind from such a duty. Hence, Laski opined such appointments as undesirable:

…it is probably undesirable that a man who has at all recently engaged in the task of advising government departments should suddenly reach a position where the problems to which his works gives rise have to be analyzed in an impartial way.83

Preconception on legal disputes especially when they involve the executive and a private individual occurs because of over-appreciation of the difficulty of the executives, a sector which once the judge belonged to.84 Due to this, their independence is viewed suspiciously by the Bar and the public.85

There are no data to support the contention, but in a random survey of cases reported in the Malayan Law Journal, the oldest law report in Malaysia, four cases demonstrate an ‘over-appreciation of executive difficulty’ mindset of a judge. When the Karam Singh case86 was argued at the Federal Court in 1969, Salleh Abas was the Solicitor-General and argued vehemently for the application of the ‘subjective test’ on Ministers’ discretion to issue a detention order under s.8 of ISA 1960. In 1988, when he was a Federal Court judge listening to the argument on reviewability of police power in making order for detention and arrest under s.73 of the

84 ibid.
85 n 37 above, lviii.
86 Karam Singh v Menteri Hal Ehwal Dalam Negeri, Malaysia [1969] 2 MLJ 129, see Chapter Three for a detailed discussion.
same Act, he extended the application of ‘subjective test’ to police power.\textsuperscript{87} The grounds supporting the extension of the power are similar to his argument when he represented the government in the \textit{Karam Singh} case.

In another case, \textit{Public Prosecutor v Oh Keng Seng},\textsuperscript{88} Salleh Abas, at that time a Solicitor General, defended the constitutionality of s.418A Criminal Procedure Code. He argued that s.418A does not violate Article 8 of the Federal Constitution. Once again his arguments in this case became the foundation to his dissenting decision when he sat as a judge in the \textit{Dato' Yap Peng} case. These cases might not form conclusive evidence that judges appointed from the JLS possessed an executive mindset. However, it strongly suggests the vulnerability of the judicial mind and judges must consciously guard themselves from this pitfall.

In contrast with this view, some scholars point out that a professional judge may also possess a conservative view and regard themselves as the upholders of law and order of the government in power, especially when they perceive their task to consist only of declaring the law.\textsuperscript{89}

\section*{2.6.B.III Women in the Judiciary}

In contrast with other Commonwealth countries, women are relatively well-represented in the judiciary. Eight out of seventy-one (71) judges are women.\textsuperscript{90}

\textsuperscript{87} Theresa Lim Chin Chin \& Ors \textit{v Inspector General of Police} [1988] 1 MLJ 293 discussed in Chapter Three.
\textsuperscript{88} [1969] 2 MLJ 129.
\textsuperscript{90} Table 2.
Chapter Two

2.7 The Process of Removal and Judicial Discipline

The provision of the removal of judges is the least used, but when applied, had catastrophic effect on the judiciary for decades. The aim of the framers, as the following illustrations will reveal, to separate politics from the removal process has failed. In 1988, the country watched as the Lord President (LP) was unjustly forced out of office. Five other Supreme Court judges, who attempted to defend judicial independence, were also subject to tribunal; two were removed from office. Throughout this episode, the judiciary was in crisis.

Critics of Tun Salleh Abas's tribunal ardently argued that the setting of the tribunal and his dismissal was political. This conclusion was reached based on the circumstances leading to the formation of the tribunal, the composition of the tribunal, the charges against the LP, the procedural aspects of the tribunal and the grounds for dismissal.

2.8 Brief Account of the 1988 Judicial Crisis

The chaotic events leading to the LP’s dismissal have been detailed elsewhere. Only a summary will be provided to convey the importance of

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91 Report on the Tribunal established under Article 125 (3) and (4) of the Federal Constitution Re: Y.A.A Tun Dato' Haji Mohamed Salleh Abas, Lord President Malaysia. Edited version is reported in [1988] 3 M.L.J xxxiii.
93 n 71 above, 218.

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the events in shaping the view of the judiciary on their role. The précis is based on the most accepted view of the events. The crisis began when the judiciary adjudicated matters in which the government had significant interest.

Divergence between the judiciary and executive surfaced when a series of judicial decisions went against the government in 1987. The PM’s concerns over the lack of certainty in the favourable outcome of cases in which his political party was involved, forced him to initiate public assailment against the judiciary. The executive nervousness was accentuated by the breach of the tradition of judicial deference previously practised by the judiciary. In turn, the judiciary treated the censure as a misconception of the court’s role when viewed objectively and dispassionately, and in proper perspective were merely displaying the executive’s frustration when unable to achieve their aims due to judicial intervention. However, when the assaults became treacherous, the LP had to defend the judiciary, and he then called for a meeting of judges’ in order to solve the problem. In May 1988, 20 judges attended the meeting and unanimously agreed that the LP should write to the YdPA and other Rulers, expressing their anxiety over the executive’s criticisms.


95 ibid, Harding, A J, 70.
96 Lim Kit Siang v Dato’ Seri Dr. Mahathir Mohamed [1987] 1 MLJ 383
97 n 93 above, Trindade, F A, 52.
The letter, which was described as ‘quiet, courteous and dignified’, provided the cause for the executive to act against the LP, who was about to preside along with other Supreme Court judges on an appeal involving UMNO, the PM’s political party. The High Court had previously declared UMNO an unlawful party because some of the branches were unregistered. Hamid Omar CJ, also the Acting LP, rescheduled the appeal. The appeal came up for hearing after the LP and two other Supreme Court judges were removed; with a successful conclusion favouring the PM since the appeal was dismissed. According to Salleh Abas, the PM decided to dismiss him after the PM felt uncertain about how the Supreme Court would decide the appeal because the case could affect the position of the PM.

Once the LP removal process was over, the PM’s political position was safe, but the judiciary had to pay a heavy price for it. The judiciary was not only flabbergasted, but within the judiciary, a rift arose. There was strong dissent on the role taken by Hamid Omar, the Chief Justice of Malaya, in Salleh Abas’s dismissal. He, argued Trindade, should have disqualified himself from the tribunal hearing the charges against the incumbent because he was an interested party. Moreover, he had attended the meeting of judges at which, it was agreed that a letter be sent to the YdPA, which constituted the main ground for Salleh Abas’s removal. Allegations against the LP were also viewed as an afterthought. In

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98 n 93 above, Lee, H P, 388.
100 n 93 above, Trindade, F A, 57, Lee, H P, 404.
addition, the conduct as described did not amount to ‘misbehaviour’ and did not justify removal from office.

This crisis had a prolonged effect on the judiciary. Its members had failed to defend themselves against an attempt to subjugate judicial independence. In consequence, the judiciary became abject and exceedingly accountable to the executive. Gradually, judicial decisions became suspect not only when involving government interest, but in commercial and private litigations. In the aftermath of this attack, the Malaysian judiciary became a more cautious institution, which allowed Mahathir to use the judiciary in discrediting his deputy, Anwar Ibrahim.

The judiciary also became defensive when the public began to query judiciary business and cited judicial independence to shield their misdoings thus exempt from public accountability. The details of this attitude are described in Chapter Five.

2.9 Judicial Power

Six years after Merdeka, a legal scholar conducted an assessment on how the court exercised the power to interpret the constitution; he observed that he was yet to see that ‘any settled approach has been worked out to the job of constitutional interpretation.’ He was also shocked to find that it took the Privy Council to give quietus to the theory of constitutional supremacy.

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101 n 93 above, Trindade, F A, 67.
103 ibid., 1357.
Only ten years later, the Supreme Courts began to litigate serious constitutional cases involving not only breach of fundamental rights but political disputes. Chapters Three, Four and Five will deal with the relevant cases. As predicted by the AG during the legislative debates on constitutional proposals in 1957, the judiciary failed to stand up to the challenge and in 1988, judicial powers endured another process of downsizing.

Thirty years after independence, the judiciary was criticised for failing to exploit the Constitution to oversee the exercise of government power. 'Many Malaysian judges,' according to Shad Faruqi, a constitutional expert in Malaysia, 'have exhibited a general reluctance to deal with constitutional issues and had often side-stepped our document of destiny.' Numerous excuses were offered to justify this attitude, including unfamiliarity with the new concepts introduced by the document. As Ahmad Ibrahim, a prominent scholar in Malaysian law pathetically argued,

> It was difficult for judges, brought up in the English tradition in which the sovereignty of Parliament is of paramount consideration, to adjust themselves to the new power given by the constitution.

While this excuse might have been valid during the transition period prior to the phasing out of expatriate judges, it became a lame excuse after the period of adjustment was over. Judges who, in the majority

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are promoted from the civil service remained executive-minded, thus hampering the process of injecting the activism necessary in realising their task as protectors of fundamental rights and interpreters of the Constitution. Malaysian judges may learn from activism displayed by the Indian judiciary, and move away from the British tradition of judicial deference, which heavily leans towards the executive. The British tradition does not help in establishing a judiciary which is co-equal with the other two branches, let alone a strong judiciary.

Realising that the judiciary was not sufficiently expert to fulfil a constitutional role, but was preparing to reinterpret the scope of its power when it began to examine executive action zealously and to view the encroachment of fundamental rights seriously, the executive decided to counter attack.

Mahathir's arguments against judicial review are three fold: first, it usurps legislative powers; second, laws should be certain and everyone, including the executive, should know the standard by which their conduct is adjudged. Finally, judges have their own political ideal and can be biased but cannot be made accountable. This was illustrated in his speech when moving the Constitution (Amendment) Bill 1988:

Allowing the courts to make their own laws and then to implement those laws means the courts are carrying out the role of the legislature and the judiciary. This is contrary to the Doctrine of Separation of Powers.

106 For a full analysis on Mahathir's attitude on judicial power see Hickling, R H, Wishart and David A, 'Malaysia: Dr Mahathir's Thinking on Constitutional Issues' [1988-89] Lawasia 47.
107 Perhaps the PM read Dworkin, where Dworkin objects to judges acting as 'deputy legislators' for two reasons: first, it offends the democratic ideal that a community should be governed by elected officials answerable to the electorate. Second, when judges create a new law the losing party will be punished not because he has violated some duty he had, but rather a new duty created after the event. Freeman, M D A, Lloyd's Introduction to Jurisprudence (London: Sweet & Maxwell, 2001) 1391-1392.
According to this doctrine the legislative body must make laws and the judiciary will make decisions according to those laws.

It is extremely difficult for anyone to do anything if it is not known whether his action is wrong or not wrong because the written law can be disregarded. Maybe the individual acts because he thinks that what he is doing does not breach any law. How unfortunate it would be for him if suddenly he is prosecuted and the court decides his case according to judicial discretion, without taking into account the existing law....

To ensure that a balance is achieved, we need the judiciary ... not to be involved in party politics. Unfortunately, in recent times, we find several members of the judiciary have been involved in politics. Having an attitude interpreted as fiercely independent amongst several members of the judiciary means indirectly that they are involved in opposition politics....

...there are judges who while imposing sentences make unfounded statements as though to vent their anger. These statements are made because of the belief that whatever they say cannot be criticised. If criticised, the judge will decide that it is contempt of court. If there is any appeal the case become sub judice and once again all comments about the case will be regarded as wrong. In other words, the judge can degrade a person because that person has no right to defend himself.  

With this view in mind, Article 121 was amended. The 1988 constitutional amendment had negative ramifications for judicial power when it deleted the express vesting of judicial power. The absence of express provision caused uncertainty as to where the power was now vested in. Legal scholars and judges however, preferred to conclude that the power remains vested in the judiciary, even though now it becomes easier for the legislature to grant the power to other bodies. The corollary of this

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109 s.8, Constitution (Amendment) Act 1988, Act A704.
110 Harding, A J, Law, Government and the Constitution in Malaysia (Kuala Lumpur: Malayan Law Journal, 1996) 135-136; n 93. Hickling, R H, 26; Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor [1998] 3 MLJ 289, 307. Sri Ram, Gopal JCA ; "...we do not overlook the amendment to art 121 (1) of the Federal Constitution whereby the words 'judicial power of the Federation' were deleted on 10 June 1988 by Act A704. However, in accordance with well-established principles of constitutional interpretation, the deletion does not have the effect of taking away the judicial power from the High Courts."
understanding is the judiciary is no longer a co-equal branch, but a ‘fragile bastion’.111


After the process of readjustment of judicial power was completed, Parliament in 1994 passed the Judges’ Code of Ethics which, if infringed, constitutes a ground for removal of a judge. The code of ethics failed to discipline judges, and gross judicial misconduct was witnessed to have taken place between 1996 and 2000.

Uncertainty of judicial decisions is not the concern of the executive only; the public shares the same anxiety. If the government feels that judges are political when a court decides not in the government’s favour, other litigants may have the same feelings when they lose in their action against the government. This became significant during the Anwar Ibrahim trial when a group of judges were accused of playing politics. Judges and the judicial process are viewed as politicised. How do we, for example, explain that the courts’ ruling in Anwar trial was not political? What are the essential features of a political trial? How should judges decide and hence, not be considered as political? Parts of the discussion had taken place in Chapter One, which describes on the theories of adjudication

112 P.U (A) 187/69.
offered by Cardozo, Hart and Dworkin. The details of the Anwar trial is presented in Chapter Four.

2.10 Studying Judicial Accountability in Malaysia

The theories and concepts underlying the discussion on judicial accountability are based on an Anglo-American perspective involving democracies and legal systems, such as the USA, United Kingdom and India. In these countries the concept of judicial independence are well entrenched in their constitutional practices. The judiciary is also vigilant and plays an active role in defending its status. In consequence the USA and Indian courts have emerged as powerful political forces and the UK court is marching in the same direction, where the judiciary is equal in strength, if not stronger than the executive and the legislature. Such unchecked judicial supremacy subsequently threatens democracy and may turn to tyranny. In response to this problem, the notion of accountability has been imported into the judiciary.

In contrast, Malaysia has a relatively well-developed legal system and a written constitution that guarantees an independent judiciary. Regretfully, it has not been well preserved. The disturbing situation is closely associated with the governmental and political background and structure of the country itself. The last part of this chapter narrates what the situations are.

As illustrated in the previous discussion, since 1988 until late 2003, the executive had continuously put the judiciary under pressure and steadily eroded its independence. Since the judiciary was unable to stand up
and defend judicial independence, an international mission then recommended to the judiciary, ways to restore its independence:

4. The judiciary should act and be seen to act with complete independence from the executive...
6. The judiciary should do all its power in the wider interest of justice, to counter the harshness of repressive legislation and overbearing actions on the part of the executive. This is the role of the judiciary when faced with repression, no matter where it comes from...in the light of the experiences in 1988, that will require great courage, but it is essential if the reparation of the judicial system in Malaysia is to be restored to what it should be.\textsuperscript{113}

Lacking independence, the Malaysian judiciary is faced with the big question of the suitability of imposing accountability. The discussions in Chapter One suggest that judges should be accountable because they wield enormous power by actively exercising their power of judicial review, and acting as lawmakers and also because of the swelling incidents of judicial misconduct. However, the situation is different in this country. It is most likely that Malaysian judges do not enjoy similar great powers as their counterparts in the USA and India or in the UK. This, however, does not render superfluous the debate about judicial accountability in Malaysia.

The illustrations of constitutional and statutory provisions and the ensuing events which have suppressed judicial independence together with the deterioration of judicial ethics described in the previous section, have stimulated the interest in judicial accountability in Malaysia. Among the areas where the notion of judicial accountability could be employed are:

a. in the exercise of judicial power;

b. in defending judicial independence;

c. in the exercise of the head of judiciary 'executive power' when scheduling cases for hearing; when granting a 'stay', adjournment or discontinuance of a case, and when ascertaining the composition of judges for hearing a trial or appeal.\textsuperscript{114}

Most of these questions had arisen during the 1988 judicial crisis, in the adjudication of security and emergency law and during Anwar Ibrahim's trial. The following chapter and Chapter Four will look at how judges appraise the judicial process and view accountability in the exercise of judicial power.

2.11 Malaysia: Government and Political Background

Formed in 1963, the Federation of Malaysia consists of thirteen states and three federal territories. The Federation is headed by the Yang di-Pertuan Agong (YdPA), a constitutional monarch, who is elected by the Conference of Rulers for a term of five years. The Conference of Rulers consists of the hereditary rulers of the states of Malaysia. Only rulers of the Malay states are eligible to be appointed as the YdPA.

The Federal Constitution, which is the supreme law, provides the political and legal framework for the administration of the country. It embodies the principle of separation of powers, establishes a parliamentary system of government, gives protection to fundamental rights and provides division of power between the Federation and the states.

Chapter Two

The legislative power of the Federation is vested in Parliament, which consists of the YdPA, Dewan Negara (Senate) and Dewan Rakyat (House of Representatives). The Dewan Negara consists of 26 members elected from the legislative assemblies of the states and 43 appointed by the YdPA. The public directly elects the members of the Dewan Rakyat for a period of five years.

The executive authority is vested in the YdPA and is exercisable by His Majesty or by the Jemaah Menteri (Cabinet) or any other minister authorised by the Cabinet. As a constitutional monarch, the YdPA has to exercise his power in accordance with the advice of the Cabinet or of a Minister authorised by the Cabinet. Members of the Cabinet are appointed by the YdPA among members of Dewan Rakyat and therefore are responsible to the Dewan Rakyat. The YdPA will first appoint the Prime Minister, who in his judgment is most likely to command the confidence of the majority of the members of Dewan Rakyat. Other members are appointed on advice of the Prime Minister.

The doctrine of separation of powers is breached in Malaysia, because members of the Cabinet are also members of the executive, and therefore potentially allows concentration of power in one branch. The judiciary, which exercises judicial power, is unconnected to the legislature and executive in term of its setting and membership thus enjoys a certain degree of independence.

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115 Art. 44.
116 Art. 45.
117 Art. 39.
118 Art. 40(1).
119 Art. 43.
Chapter Two

Malaysia holds a periodic election every five years and this symbolises that democracy is alive in Malaysia. However, democracy is practised only in a limited sense, since authoritarian features was also present in the system. This practice is known as, ‘semi-democracy’\textsuperscript{120} or ‘soft-authoritarian.’\textsuperscript{121} Regretfully, elements of authoritarianism are more prominent than democratic elements. This situation is the result of a number of factors, such as constitutional tradition, ‘politics of consociationalism’, and the dominant role of the state in economic growth.\textsuperscript{122}

The character of the Malaysian constitution was influenced by the state of emergency declared at the end of colonial rule and the race factor. Consequently, the constitution allows the suspension of rule of law to counter insurgency and curb racial conflict. The constitutional sanction has however, rendered rights inconsequential and laws have become an apparatus to suppress opposition leaders and dissenters.

\textit{Barisan Nasional}\textsuperscript{123} (BN) in general and United Malays National Organization (UMNO) in particular, have ruled the country for more than three decades. Lack of political competition within UMNO and other BN component parties, and from the opposition facilitates the concentration of power in the executive. The lacks of political checks and balances have made the legislature and the judiciary impotent in enforcing executive


\textsuperscript{121} Peerenbaum, Randal, \textit{Asian Discourses of Rule of Law} (London: Routledge, 2004) 16.


\textsuperscript{123} A coalition of 14 political parties, working together to win the election and forms the government of the day.
responsibility; as a result, they have fallen under the control of the executive.\textsuperscript{124}

In the economic sphere, the government became an active player when the New Economic Policy (NEP) was designed to improve the economic achievement of Malays. The NEP did achieve this aim, but a large proportion of the benefit went to Malay entrepreneurs, who are granted business opportunities as a reward for political support. Government institutional backing was expanded in government-owned companies such as PETRONAS (Petroleum Nasional), PROTON (Perusahaan Otomobil Nasional Berhad) and TELEKOM (Telekom Malaysia). To maintain the performance of these companies, BN and UMNO had to remain in power.\textsuperscript{125}

Mounting criticism of the authoritarian style of leadership led to the invention of 'Asian values' championed by former Malaysia Prime Minister, Mahathir Mohammad. He argued that Asians tend to value community and appreciate order and harmony, hard work, respect for leaders and family loyalty. These values justify the Malaysian government's policy of concentrating on economic growth rather than political or civil rights. The achievement of outstanding economic growth required a 'strong' government, thus a powerful ruling party was tolerated. This situation was reinforced by the values of respect and loyalty to leaders.

Critics of Asian values see little justification for the claim and perceive the idea as trying to justify the leaders' authoritarian practices.


Chapter Two

The idea of Asian values lost its legitimacy when the Asian economy plunged into recession in 1997. Economic recession followed by a political upheaval in Malaysia gave the opportunity for the nation to review and redefine the political future of the country. The dismissal of the Deputy Prime Minister, Anwar Ibrahim, and his conviction on corruption and sodomy brought a wave of objection to the authoritarian style of Prime Minister Mahathir’s leadership. Discourse on human rights and democracy surged, and the judiciary once again was censured for its failure to stand up for justice.

The place of the judiciary in the constitution, and the background of the government and political system as illustrated in this chapter laid the foundation in assessing the application of the notion of judicial accountability as described in Chapter One. The forthcoming chapter will reflect judicial attitude on harsh legislation which shows the judicial acknowledgement of executive domination in security matters.

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TABLE 1

Members of the Judiciary by Professional Background and Gender

<table>
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<tr>
<th>Courts</th>
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<th>Former Advocate</th>
<th>Former JLS Member</th>
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<td>6</td>
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<td>1</td>
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<tr>
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<td></td>
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<td><strong>71</strong></td>
</tr>
</tbody>
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Source: List as at December 22 2004

Legend
M - Man
W - Woman
C - Chinese
I - Indian

TABLE 2

Members of the Judiciary by Ethnicity and Gender

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<th>Courts</th>
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<th>C</th>
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<td></td>
<td><strong>71</strong></td>
</tr>
</tbody>
</table>

Source: List as at December 22 2004

Legend
M - Man
W - Woman
C - Chinese
I - Indian
CHAPTER THREE
MITIGATING THE HARSHNESS OF LEGISLATION:
THE INTERNAL SECURITY ACT 1960

Introduction

The birth of the Federation of Malaya (Malaya) in 1957 was not only welcomed with the cheers of ‘Merdeka’,¹ but also worries as to the security of the country and the populace, from communist threat. The negotiations for achieving Merdeka were conducted in the midst of the communist insurgency, which had begun in June 1948 and lasted until 1960. The British administration attempted numerous methods – military, social, economic, political and legal in their attempt to end the emergency before the independence day. On 19 June 1948, the Federation of Malaya High Commissioner declared a state of emergency throughout Malaya; subsequently emergency legislation was passed giving the ‘High Commissioner power to make regulations on occasions of emergency or public dangers.’² This Ordinance lasted until 1948 and was then replaced with the Internal Security Act in 1960.

Apart from the emergency, innate communal sentiments among the population constituted another serious problem to Malaya. The Chinese wanted to maintain their identity and loyalty to China and at the same time demanded the right of permanently domiciled citizens in Malaya.³ The Indians, like the Chinese, also considered India to be their home and were

¹ Literally means ‘independence’. The word is commonly used to indicate self-government and self-determination.
² Emergency Regulation Ordinance, Federation of Malaya No.10 of 1948.
more interested to politics in India, thus they tended to be sidelined. As the natives, the Malays received special treatment from the British. It had been the policy of the British administration to give preferential treatment to protect both the economic and political interests of the Malays. Nevertheless, the Malays still felt threatened by the other races.

Thus, the RC, when preparing the draft constitution had to take into consideration the existing emergency and racial sentiments of the inhabitants, and instantaneously prepared mechanisms to enable the preservation of state security and a democratic way of life. The design was intended to be sufficient to prevent the occurrence of any activities that posed a threat to national interests.

3.1 Preventive Detention Law - Constitutional Foundation

3.1.1 Reid Commission Scheme of Preventive Detention

The duty to preserve national security arises not only after an emergency becomes life threatening, but may begin when there is a sign of an acute crisis critically threatening the safety of the state. This is known as 'informal states of emergency' or 'de facto' emergency. The RC observed,

But the history and continued existence of the present emergency show that organised attempts to subvert constitutional government by violence or other unlawful means may have to be met at an early stage by the use of emergency powers if they are to be prevented from developing into serious and immediate threats to the safety of the state.6

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4 ibid, 36-37.
6 Para 172, Reid Commission Report 1957.
To combat the problem, the RC proposed several specific provisions. The proposed provisions allowed Parliament to pass an Act infringing fundamental rights, namely articles 5, 9, 10, 68 or 73 provided the Acts contained a preamble stating that the purpose of the Act is to counter 'action [that] has been taken or threatened by any substantial body of persons, whether inside or outside the Federation, to cause, or to cause any substantial number of citizens to fear, organized violence against person or property.\textsuperscript{7}

Even though the RC viewed 'organized violence against person or property' seriously, they were also concerned about the power being misused. Therefore, they proposed that the Act of Parliament be valid for only a year from the date of enactment. Parliament however, maintained the right to renew the operation of the law.\textsuperscript{8}

Furthermore, procedural safeguards devised to guard individual rights, requiring detention not to last more then three months, unless an advisory board, after considering a representation was satisfied, that there existed sufficient cause for prolonging the detention, recommended extending the detention order, provided additional protection against misuse of power. Additionally, the detainee had to be informed of the ground of arrest together with the allegation of facts engendering the order and granted the earliest opportunity of making representation. The authorities however, had the right to suspend disclosure of facts if detrimental to national security.\textsuperscript{9}

\textsuperscript{7} Article 137 (1) Reid Commission Draft Constitution.
\textsuperscript{8} Article 137 (2), ibid.
\textsuperscript{9} Article 139 (1) and (2) ibid.
Justice Hamid, one of the RC members, abhorred the idea. He commented

...such extraordinary powers should be available only on the occurrence of an emergency of an extremely dangerous in character and not when the Parliament without the existence of an emergency of any serious kind makes use of these extraordinary powers by making a statement that a situation has arisen which, calls for the exercise of those power. If there arises any real emergency, and that should only be emergency of the type mentioned in art 138, then and only then should such extraordinary powers be exercised. It is in my opinion unsafe to leave in the hands of Parliament power to suspend constitutional guarantees only by making a recital in the Preamble that conditions in the country are beyond the reach of ordinary law. Ordinary legislative and executive measures are enough to cope with a situation of the type described in art 137. That article should in my view be omitted. There should be no half-way house between government by ordinary legislation and government by extraordinary legislation under the conditions mentioned in art 138.10

Unlike his dissent on judicial power, which had received approval from the Working Party, this time his view was marginalised.

The Working Party adopted in toto the RC proposal on Parliament’s power to legislate on preventive law. Thus, the White Paper did not address this topic; neither did the legislative council debate on the constitutional proposal. Articles 149 and 151 were swiftly carved into the Constitution and gradually Justice Hamid’s worries became a reality.

3.2 Amendment on Articles 149 and 151

In 1960, on the eve of the declaration of the termination of emergency declaration, i.e., 31 July 1960, the Federation of Malaya Parliament passed the Internal Security Act 1960 (ISA),11 a replication of the 1948 Emergency Ordinance. Prior to the passing of the 1960 Act, Articles 149, 150 and 151 had undergone a surgery to sustain the breadth of

10 Justice Abdul Hamid, Note of Dissent para 13(vii), Reid Commission Report.
Chapter Three

power conferred by the new Act.\textsuperscript{12} The impact of the amendment on the fundamental rights was enormous and had widely digressed from the RC's intention.

The amendment bill proposed to add a new Article 150A enabling Parliament to pass a law authorising the Minister to issue a detention order for a period of up to two years, if the *YdPA* is satisfied that the detention is necessary, "with a view to preventing him from acting in a manner prejudicial to the security of Malaya or any part thereof, or the maintenance of public order or essential services in Malaya.\textsuperscript{13}"

The Alliance Government, after vigorous objections from the opposition had to withdraw from inserting this new article and amended Article 149 instead.\textsuperscript{14} The new Article 149 allowed Parliament to legislate an Act preventing subversive activities, or suppression of organised violence conducted by a substantial body of persons. The proposed legislation is valid despite being inconsistent with Articles 5, 9 and 10 and

\begin{itemize}
\item \textsuperscript{12} Government Gazette, Constitution (Amendment) Bill, 1960. 31 March 1960.
\item \textsuperscript{13} Ibid, Clause 30, the article reads as,
\end{itemize}
Meanwhile, on 14 April 1960, an Internal Security Bill was presented and read for the first time in Parliament.

3.3 The Internal Security Act (ISA)

3.3.1 Legislative History

The DPM, Tun Abdul Razak, eloquently stated the aim of the law:

...the object of detention is to safeguard the security of the country and not to punish persons for crime. A person is detained for what it is considered he may reasonably be expected to try to do but not for what he is proved beyond doubt to have done. He is detained because he represents a risk to the security of the country and not because he is a member of a lawful political party. The Government has no desire whatsoever to hinder healthy democratic opposition in any way. This is a democratic country and the Government intends to maintain it as such. It is the enemy of democracy who will be detained.\(^\text{16}\)

In line with Article 149, the life of the proposed internal security legislation, called the Internal Security Bill would continue until repealed or annulled by Parliament; any party, either ruling or opposition, may raise at any time a motion to repeal the bill.\(^\text{17}\)

The DPM also stated that the aim of the Internal Security Bill was to tackle subversive activities and terrorists when the communists turned to subversive means to overthrow democracy after the government had successfully cordoned off armed struggle.\(^\text{18}\) Similar to the Constitution (Amendment) Bill 1960, the Internal Security Bill was also subject to lively debate. The opposition was apprehensive about the totality of power enjoyed by the executive, the magnitude of action categorised as threatening internal security and the perpetuality of detention.

\(^{15}\) The Amendment received Royal Assent on 26 May 1960.
\(^{17}\) Column 1190.
\(^{18}\) Column 1188.
Chapter Three

Despite the call that the passing of the bill ‘will be a tragedy to the human rights, democratic liberties and self-determination of the people of Malaya’, the bill was passed and came into operation on the 1 August 1960. The government however, had to concede to some of the objections, mostly concerned on the language of the provisions, raised during the debate. However, most substantive objections failed. For example, an imperative suggestion forwarded by an opposition MP, Lim Kean Siew, which will assist to clarify the duty of the court when adjudicating preventive detention cases, was rejected. He proposed that the words ‘on reasonable grounds’ should be inserted after the word ‘satisfied’ to facilitate court to inquiry into the lawfulness of the detention order, but the DPM refused and reasoned that challenge to the legality of the order is not barred, it only restricts the Court from probing into the truth of the matters brought under s.8 (1).

Hence, the DPM indicated that the legislative intent was not to oust judicial review entirely, but to restrict the scope of court judicial review power.

3.4 The Operation of ISA 1960 between 1960 – 1969

Enacted pursuant to Article 149 of the Constitution, the ISA empowers the YdPA, if ‘satisfied’, to prevent a person from acting in a way ‘prejudicial to the security of Malaya or any part thereof’, to request a Minister to order that person to be detained for a period not exceeding two

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19 Column 1264 the debate was on 21 June 1960.
20 Column 1361 – 1362 the debate was on 22 June 1960.
years. The Act also lays down the minimum safeguard with which any law passed in pursuant to Article 149, must comply. It says broadly, that a detainee must be informed of the grounds of his detention, must be notified of the allegations of fact supporting the order, unless the disclosure is detrimental to national interest, and be given an opportunity to make representation against the order without delay. A detainee has the right of representation to an Advisory Board within 14 days, and the Board has to submit its recommendation within three months from the date of detention.

The Minister may also renew the order of detention, but may do so after the Board has communicated its recommendation to the YdPA. The Board must review every order of detention at least once every six months.

In its original form, the power to detain granted to police is very limited, and exercisable against offences committed in security areas only, where an arrest without warrants can be effected.

Two years after its implementation, 'the legacy of preventive detention used by the British and passed on to the newly independent Government,' observed Hickling, one of the ISA draftsmen 'has certainly not been abused.' The first legal challenge to ISA came about nine years later when Karam Singh in 1969 challenged the detention order issued by the Minister of Home Affairs against him. This suit does not only concern the judicial reaction to the ISA alone, but to judicial reaction in light of two

21 s.8 (1) ISA 1960.
22 s.9 ibid.
23 s.63 ibid.
25 [1969] 2 M.L.J 129
major constitutional amendments. The amendments are firstly, the judicial appointment process that was discussed in Chapter Two, and secondly, on special powers against subversion discussed earlier in part 3.2.26

The case was heard in the Federal Court (FC) in its appellate capacity against the High Court (HC) decision dismissing an application for the writ of habeas corpus. The appellant had been detained under an order of the Minister, which cited as the grounds for detention the YdPA’s prerogative, i.e., ‘the Yang di-Pertuan Agong is satisfied with respect to the undermentioned person that with a view to preventing that person from acting in any manner prejudicial to the security of Malaysia/maintenance of public order therein/ the maintenance of essential services therein, it is necessary to make the following order ...’27

The heart of the grounds of detention was, that the appellant had acted in a manner prejudicial to the security of Malaysia. In addition, 12 allegations of fact on which the order was based were outlined. The core of allegations of fact was, Karam Singh’s involvement in communist activities and assisting the ‘Crush Malaysia’ operation during the Malaysia-Indonesia confrontation. The learned trial judge held that the order of detention was

26 In the case that follows the discussion, there is repeated change in the title of the court and head of the judiciary. For readers’ convenience, the changes on superior courts structure in Malaysia since independence are outlined below:
1957 – 1963: Supreme Court headed by the Chief Justice of Malaya. Other judges are known as Supreme Court Judges.
1963 – 1988: Federal Court headed by the Lord President. He is assisted by Chief Justice of Malaya, who headed the High Court of Malaya and Chief Justice of Borneo, who headed the High Court of Borneo.
1988- 1994: Supreme Court headed by the Lord President. The High Court remains the same.
1994 until now: Federal Court headed by the Chief Justice. The Court of Appeal headed by the President of the Court of Appeal and two High Courts headed by Chief Judge of Malaya and Chief Judge of Sabah and Sarawak.
27 ibid, 144.
made in exercise of a valid power and the detainee had not discharged the burden, which was on him, to show that the order was made *mala fide* or improperly. Dissatisfied with the High Court decision, *Karam Singh* appealed, arguing that:

(a) the trial court had misdirected itself as to the question of burden of proof,

(b) the order under which the appellant was detained was invalid in that it stated three objects in the alternative out of the four objects for which an order can be made under section 8(1) (a) of the ISA 1960. This showed the casual and cavalier attitude of the authorities indicating that they had not given the matter adequate consideration, and therefore the order of detention was invalid and the appellant’s detention unlawful, and

(c) the allegations of facts supplied were vague, insufficient and irrelevant and thus hampered the appellant in the exercise of his right to make representations, and thus rendered the detention unlawful.

The appeal was dismissed, and the FC ruled that the burden to prove *male fide* and improper exercise of power lay with the appellant, which he had failed to prove. As no challenge to the validity of the Act was forwarded, the FC presumed that the legislation was valid and went to deal with the important point of:

**The power to review the Minister’s satisfaction in issuing a detention order that was defective due to defects in the detention order and the allegations of fact supplied were vague, insufficient and irrelevant.**
Chapter Three

The FC unanimously\(^\text{28}\) ruled that there could be no judicial review of the ‘minister’s satisfaction’ to make an order of detention. Suffian FJ stated:

The discretion whether or not the appellant should be detained is placed in the hands of the Yang di-Pertuan Agong acting on Cabinet advice. Whether or not the facts on which the order of detention is to be based are sufficient or relevant, is a matter to be decided by the executive. In making their decision, they have complete discretion and it is not for a court of law to question the sufficiency or relevance of these allegations of fact.\(^\text{29}\)

The FC justices had drawn inspiration from English authorities such as Rex v Holliday,\(^\text{30}\) Liversidge v Anderson,\(^\text{31}\) Greene v Secretary of State for Home Affairs,\(^\text{32}\) The King v Secretary of State of Home Affairs, Ex parte Lees\(^\text{33}\) to support their reasoning, ignoring the fact that the impugned law in those cases was an emergency legislation,\(^\text{34}\) unlike ISA, which is not. In Liversidge, Lord Atkinson expressed the view that, in times of war, liberty could be sacrificed to what he called, ‘preventive justice.’

Liversidge was a case spawned by wartime regulations, which empowered the Secretary of State to detain a person where, he had a reasonable cause to believe a person to be of hostile association so that it was a necessary exercise to control over him. Notwithstanding the regulations that spoke of reasonable cause and necessity of control, the House of Lords by a majority, declined to review the Secretary’s order of detention. The explanation of the justices in this case was consistent with

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\(^{28}\) Azmi LP, Ong Hock Chye CJ (Malaya), Suffian, Gill and Ali FJJ.

\(^{29}\) ibid, 151.


\(^{33}\) [[1941] 1 K.B 206.

\(^{34}\) Defence Regulation 18B was passed under s.1 (2) of the Emergency Powers (Defence) Act 1939. This provision gave the Secretary of State the power to make regulations, including those for the detention of persons whose detention appeared to him to be expedient for securing public order and safety.
Chapter Three

precedent on wartime cases where the court acquiesced to Parliament’s intent requiring that there should not be judicial scrutiny because executive action in times of war, is not normally intended to be fettered but must be swift and unhampered by fear of reprisal. Lord Macmillan said:

...in time of emergency when the life of the whole nation is at stake it may well be that a regulation for the defence of the realm may quite properly have a meaning which because of its drastic invasion of the liberty of the subject the courts would be slow to attribute to a peace time measure. The purpose of the regulation is to ensure public safety, and it is right so to interpret emergency legislation as to promote rather than to defeat its efficacy for the defence of the realm.\(^\text{35}\)

Furthermore, the secretary was required by the regulations to make regular reports to Parliament which then would exercise overall scrutiny.\(^\text{36}\) Lord Wright in giving effect to the regulation declared that the duty to act in the national interest was a ‘higher duty’ and the court was inhibited in evaluating the subject due to the shortage of information on which the minister had acted and the inability to appreciate the full importance to the national interest of what the information had disclosed.\(^\text{37}\)

In Greene, the detainee sought a writ of habeas corpus claiming that his detention and continuance of detention was due to political animosities and was political persecution, hence was unreasonable. Additionally, discrepancy in reasons of detention had caused prejudice in his hearing before the advisory board. Conversely, the Secretary of State presented an affidavit stating baldly that the detention had complied with the requirement of the regulation. The House of Lords, following Liversidge, held that the mistake did not invalidate the order. The Lordships enquired as to whether there was a legal cause of detainment and

\(^{35}\) ibid, 252.  
\(^{36}\) ibid, 253  
\(^{37}\) ibid, 266
took the affidavit as a sufficient answer, but declined to go behind the allegation of facts.

Karam Singh’s counsel argued that Greene was inapplicable because habeas corpus was entrenched in the Constitution, unlike in England where it is provided for by Common Law.

All the English cases held that where a statute requires that a Minister should be satisfied, as indeed the ISA did, that certain action was necessary, the effect was virtually to exclude all judicial review on the ground that Ministerial action taken under such authority is purely administrative. For then the test to apply was subjective. The only matters that the courts should inquire into were matters relevant to the legality of the detention. The House of Lords recognised the power of Parliament to enact for subjective satisfaction in executive detention. It follows that the question whether the court can scrutinise a detention order, as well as the question of who bears the burden of proof, are matters for case-by-case analysis.

The FC too considered the detention order as an ‘administrative order’; which was not bound to follow the standards of criminal indictment. According to Suffian FJ, ‘the document in question is not a conviction nor an indictment nor even a charge. There is nothing in the Act requiring the order should be in any particular form ...’

The defence counsel had attempted to bring in Indian authorities which gave favourable treatment to detainee, but these authorities were

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38 n 24 above, 147
discounted. The FC distinguished Indian law on preventive detention with the Malaysian constitutional provisions on various grounds such as:

1. The power to issue a detention order in Malaysia is entrusted to the highest authority in the land (the YdPA) acting on the advice of Minister responsible to and accountable in Parliament. In India the power is entrusted to comparatively unimportant officials. Thus, strict compliance with procedure is necessary; 39

2. In India strict compliance to procedure is needed under the Constitution, while the Malaysian Constitution merely requires non-deprivation of personal liberty save in accordance with law; 40

3. Malaysia is claimed to have more in common with England than with India in matters relating to preventive detention. ‘Malaysia is compact’ and according to Ong CJ, like England ‘the problem is not address along “parochial or provincial lines”.’ All Malaysian share the same view on subversions while India is a vast subcontinent and the people think differently, 41 and

4. English courts, in contrast with Indian court, taken a more realistic view, while Indian judges act as ‘...as indefatigable realist seeking valiantly to remake the irreconcilable whenever good conscience is pricked by an abuse of executive power.’ 42

5. The detainee’s rights in Malaysia are wider than in India. He/she is entitled not only to be informed of the grounds for detention and an opportunity of making representation but two other additional

39 ibid, 148 and 150.
40 ibid.
41 ibid, 141
42 ibid.
rights, namely (a) to be informed of the allegations of fact on which the order is based, article 151 (1) (a) and s. 11(2) (a) (ii) of the Act, and (b) to be furnished in writing with a statement of such other particulars, if any, as he/she may, in the opinion of the Minister, reasonably require in order to make representation against the order, namely s. 11(2) (b) (iii) of ISA.43

The FC resolution not to follow the Indian authorities was unsatisfactory. In construing somewhat similar legislation, Indian courts had established that the information supplied to the detainee could not be so vague, irrelevant and insufficient as to prevent the detainee from availing himself of the opportunity of making representations before the Advisory Board.44

On the contrary, the FC gave full effect and paid great deference to the executive. The government policy propagated during the legislative debate was adhered to and the court decision reflected the mood of the government at that time to have full control on questions of national security and interest. The FC adopted Hart’s ‘plain fact view’ idea thus treating the law as a matter that legal institutions, such as the legislature have decided or proclaimed. The apex court answers the ‘hard case’ by looking at the documents where the records of institutional decisions are kept.45

43 ibid, 150
45 Described in Chapter 1 see section 1.4 B.
Chapter Three

This case, as the forthcoming discussion will manifest, was consistently followed by Malaysian courts and reaffirmed in many instances. The law on preventive detention is thus coherent and uniform in this country. The uniformity however, is to the disadvantage of liberties. The judiciary had fallen into Hart's 'heaven of formalism', where precedent is followed blindly without considering the implication on rule of law and democracy in this country.46

The government thus had complete freedom of action, barring formal challenges as to the validity of an order and the extremely difficult charge of *mala fides*, to order the detention of any citizen up to two years without the intervention of the courts. Even when the allegation was of the commission of a criminal offence, the government had an option between pursuing the matter under ordinary law, thereby risking failure, or simply making a detention order which would secure the person's imprisonment.47 As the period of detention was renewable and the government could therefore keep the citizen incarcerated at pleasure, the latter was obviously more attractive. When the executive chose to hide behind a detention order, the conscience of the courts was salved; they had nothing to do with the denial of the subject's freedom, nor could they interfere with it, whether just or not. Hence, the court will safely claim that the truthfulness or otherwise of the allegations is not an issue; it is irrelevant.

The approach of the judges was legalistic. As *Karam Singh's* case has illustrated, they were controlled by the language of legislation

46 ibid.
47 See for example the case of *Public Prosecutor v Teh Cheng Poh* [1978] 1 MLJ 68.
especially as interpreted by the courts of England to which they looked almost exclusively for guidance. The applicability of decision depended solely on the literal construction of words in similar statutory provisions in both countries. Where such strict interpretation of the law favoured the individual, the individual would benefit from it, otherwise the state prevailed.48

3.5 The amendment to the ISA

The ISA was amended in 197149 and then revised in 1972 with its scope extended.50 The preamble added a new cause of action considered as endangering internal security, namely, 'to procure the alteration, otherwise than by a lawful means, of the lawful Government of Malaysia by law established.' Section 8 was redrafted, the power of making detention orders was transferred to the Minister and the purpose of detention was enlarged to include the prevention of the furtherance of action that may be 'prejudicial to the security of Malaysia or any part thereof or to the maintenance of essential services therein or to the economic life thereof.'51 A 'ministerial detention' order lasting no more than two years can however be extended repetitively, provided that the extension does not exceed two

50 Internal Security Act, 1960 (Revised 1972) Act 82. The revised Act superseded the previous Act.
51 s.8 (1), ibid.
years each time a renewal is made. Thus, the incarceration may continue indefinitely.\textsuperscript{52}

Meanwhile, police power was augmented. The police may effect an arrest without warrant against an individual for whom they ‘have reason to believe’ that detention is justified or ‘has acted’ or is ‘about to’ or ‘likely to’ act in any manner that would threaten Malaysia’s security, ‘essential services’ or ‘economic life.’\textsuperscript{53} The police may intern the suspect for up to 60 days for investigation. After 60 days, the Minister-in-charge can issue a two-year detention order and will now take charge of the detainee.

A person detained under ministerial direction is entitled to the order as soon after detention is conducted and has the right to make a representation to an Advisory Board. The detainee, when the order is served, shall be informed of the right to make representation and supplied with the grounds of the order, the allegations of fact on which the order is made, and other particulars that the Minister feels reasonable to assist representation against the Advisory Board.\textsuperscript{54} If the Minister considers the information to be against national interest, he/she may withhold disclosure. Conversely, a person under police detention has no such rights.

3.5.1 The operation of ISA 1960 (Revised 1972) between 1970 - 1988

Under the revised Act, the police began to play an important role in making arrests, thus a new series of court actions against the exercise of police power in detaining a person began. In \textit{Re Tan Sri Raja Khalid bin

\textsuperscript{52} s.8 (7), ibid.
\textsuperscript{53} s.73 (1) ibid.
\textsuperscript{54} s.11 ibid.
Raja Harun the respondent had been arrested by a police officer, who deposed that he arrested and detained the respondent pursuant to s.73(1) of ISA 1960 (Act 82). At the time of the arrest, the officer explained to the respondent that he had reason to believe that there were grounds, which justified the respondent's detention under s. 8 of ISA and that he had acted in a manner prejudicial to the security of the country. The respondent instituted habeas corpus proceedings in the High Court. The police officers, who had arrested and detained the respondent, gave an affidavit giving the allegations of facts leading to the arrest.

The affidavit stated that at all material times the respondent was the managing director of the Malayan Commercial Services Sdn Bhd, a company dealing in consultancy services. During the period October 1975 to August 1985, the respondent was also a director of the Perwira Habib Bank and a member of its loans committee. It was alleged that the respondent provided consultancy services through the said company that resulted in massive loans by the bank to various parties, thereby causing substantial losses to the bank.

A police investigation of the alleged criminal breach of trust of monies during the respondent's tenure as director of the bank, was undertaken during the first week of January 1987 and the police interviewed the respondent for three days in that connection. According to the Deputy Superintendent, he had reason to believe that the substantial losses suffered by the bank were caused particularly through the acts of the respondent, which evoked feelings of anger, agitation, disaffection and

resentment amongst members of the armed forces. The basis for the belief as stated in para 5 of the affidavit states: 'The Lembaga Tabung Angkatan Tentera (LTAT) holds 46.48 percent of the shares of the Bank. All servicemen in the armed forces who do not qualify for pension are required by law to contribute to the LTAT. In addition, a large number of members of the armed forces are account holders of the bank.'

After considering the lengthy affidavit of the police officer, the learned judge, Harun J. held, that no evidence was disclosed to show that the respondent had acted in a manner which was prejudicial to the security of the country, and accordingly, immediately ordered the release of the respondent. The police appealed. Salleh Abas LP, delivering the Supreme Court (SC) decision ruled that the burden of proof on the challenge of the validity of the detention order lay upon the authority, but once the authority clarified that the detention was lawful, the burden shifted to the detainee to show that detention was made *mala fide* or improper.

In this case the LP relied on *Liversidge*, despite the contention of the respondent's counsel that the English authority on subjective test should be discarded and replaced with an objective test enunciated by local case law, *Merdeka University Bhd. v Government of Malaysia*.\(^5\)\(^6\) Salleh Abas LP proclaimed that the objective test was a general proposition applicable only in 'normal judicial review cases'.\(^5\)\(^7\) He steadfastly held to *Liversidge* after considering Lord Denning's critic on Lord Atkins' dissent. He also referred to the *Council of Civil Service Unions v Minister for the Civil Service*.\(^5\)\(^8\)

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\(^5\)\(^6\) [1982] 2 MLJ 243.
\(^5\)\(^7\) ibid, 186.
\(^5\)\(^8\) [1985] AC 374.
where the House of Lords unanimously ruled that in matters concerning national security, the responsibility rested on the executive and not the court to decide the right action. This view was upheld because the 'judicial process is inept to deal with the problem'\textsuperscript{59} and the 'nature and subject matter are such as not to be amenable to the judicial process.'\textsuperscript{60}

Echoing \textit{Liversidge}, Salleh Abas ruled that judicial review is only exercisable when the court can adjudicate on the exercise of the power. In this instance, because the issue involved grave national security, the matter was unjusticiable.

In what the LP believed was a realistic approach, he expanded the application of subjective test to the discretionary power exercised by the police, which according to the English authorities was primarily intended to be a discretionary power exercised by the Minister. His grounds for expanding the power were that, s.73 (1) and s.8 of ISA were inextricably connected, thus the subjective test could apply to both.\textsuperscript{61} According to the LP:

\begin{quote}
The arrest and detention under section 73(1) is pending enquiries to see if an order under section 8 should be made by the Minister. It is clear from the language of the two sections that section 73 provides for the initial detention and cannot be divorced from section 8 of the Act which provides for the final detention.\textsuperscript{62}
\end{quote}

The SC also gave absolute effect to clause (3) of Article 151 when it declared that the court would not demand the authority to furnish

\begin{itemize}
\item \textsuperscript{59}ibid, Lord Diplock, 412.
\item \textsuperscript{60}ibid, Lord Roskill, 419.
\item \textsuperscript{61}ibid, 187
\item \textsuperscript{62}ibid, 186
\end{itemize}
restricted facts, unless the police voluntarily offered to disclose the facts exhaustively and in great detail.63

A further extension of police power to effect arrest and detention took place in the *Theresa Lim* case.64 Following their arrests, the appellants were kept in separate places and barred from seeing their counsel. They contested their detention claiming that the arrest was illegal and therefore habeas corpus should be issued. The High Court rejected the application and the appellants appealed. The appeal raised six important questions on the scope of police power under s.73 of ISA, namely:

a. On the constitutionality of s.73, since s.73 does not comply with Article 151(1) namely, the provision for informing a detainee of the grounds of his detention and allegations of facts constituting the grounds, the provision is therefore void and the arrest and detention conducted under the provision are illegal;

b. The scope of Article 149 is limited to counter communist insurgency and subversion only, thus does not cover the appellants' activities;

c. The power to arrest and detain possessed by the police is open to judicial examination and the test is an objective test;

d. Article 5(2) must be read into s.73 of ISA, therefore the court must hold an inquiry to determine the lawfulness of the appellants' arrest and detention;

63 ibid, 188.
64 [1988] 1 MLJ 293
e. Besides the right of enquiry, the appellants have also the right to consult and be defended by a legal practitioner of their choice. The denial of any of these rights may render the arrest and detention illegal;

f. The detention ceases to be preventive in nature because the appellants were put in solitary confinement, in which the nature is punitive. Hence, it becomes illegal since it is outside the purview of s. 73 ISA.

The answers to all the questions above were in disfavour of Theresa Lim. The SC, like its previous ruling on preventive detention cases, was anxious to give effect to the executive’s goal and accordingly, proceeded to conduct the appeal, 'in the broad principles of the constitutional provisions and also the provisions of the ISA.' The question of the constitutionality of ISA was ascertained in the light of 'the clear words of the Constitution and the Statute.' The learned LP adopted the Privy Council’s observation in Teh Cheng Poh v Public Prosecutor, where Lord Diplock declared:

The Article [Article 149] is quite independent of the existence of a state of emergency. On the face of it the only condition precedent to the exercise by Parliament of the extended legislative powers which it confers is the presence in the Act of Parliament of a recital stating that something had happened in the past viz. that action of the kind described “has been taken or threatened. It is not even a requirement that such action should be continuing at the time the Act of Parliament is passed. Clause (2) of the Article provides expressly that the law shall continue in force until repealed or annulled by resolutions of both Houses of Parliament. Their Lordships see no reason for not construing these words literally. The purpose of the Article is to enable Parliament, once subversion of any of the kinds described has occurred, to make laws providing not only for suppressing it but also for preventing its recurrence. Where such an Act of Parliament confers powers on the Executive to act in a manner inconsistent with Article 5, 9 or 10, the action must be taken bona fide for the purpose of stopping or

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65 ibid, 295.
preventing subversive action of the kind referred to in the recitals to the Act, for in order to be valid under Article 150 (1) [sic presumably art. 149 (1) is meant] the provision of the Act which confers the power must be designed to stop or prevent that subversive action and not to achieve some different end.67

Following the Privy Council’s literalist approach, and recognising the status of ISA as a special law despite its unpopularity with the public, the LP concluded that the legality of ISA was depicted in, ‘the scheme of the legislation both under the Constitution and the ISA.’68 The scheme of legislation was determined by the recital of activities stipulated in Article 149.69

Salleh Abas also reiterated and fortified his dicta in Tan Sri Raja Khalid on the inseparability of s.73 (1) and s.8 (1). According to him, ‘there is only one preventive detention and that is based on the order to be made by the Minister under section 8.’70 S.73, he argued, provides the information and evidence to enable the Minister to issue a detention order. Therefore, s.73 must be viewed as a ‘facilitative provision’, entrusting the police to conduct ‘necessary investigation and, pending enquiries, to arrest and detain a person, in respect of whom the police has reason to believe that there exists grounds which would justify the detention of such person under section 8.’71

Subsequently, the LP excluded the application of Article 151(1) from s.73. According to him this article ‘would come into play only after the Minister’s order of preventive detention has been executed.’72

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67 ibid, 54.
68 ibid, 59.
69 ibid.
70 ibid.
71 ibid.
72 ibid.
enquiries, the detainee has no legal protection and his/her fate is dependent on the police will.

The challenges on the scope of ISA were also fruitless. Theresa Lim’s counsel reference to the framers’ intent on Article 149 and ISA, was rejected. The LP treated the practice of reference to the RC reports and speeches in legislative assembly as, ‘to appreciate the legislative history of an Act,’ however, it did not form ‘the basis or the determining factor for interpreting the Act or any provision of the Act.’ Compliance with legislative intent will grab the court’s role as the ‘ultimate interpreters of law because in the end what is law will be guided by what the politicians said in Parliament.’ Accordingly, the LP declared that the wording of the statute did not indicate that it was restricted to communist activities.

Salleh Abas reconsidered the dispute as to whether the court should adopt the ‘objective’ or ‘subjective’ test when assessing ‘reason to believe.’ The LP had refused to apply the ‘objective test’ as he did in the Tan Sri Raja Khalid case. He clarified that in the Tan Sri Raja Khalid case, the appellant succeeded with the appeal not because the SC adopted the ‘objective test’, but because the activity referred to, i.e., bank fraud, was a criminal offence. He distinguished the Nakudda Ali and Merdeka University cases cited by the counsel, stating that the case did not involve the question of national security.

He further illuminated that the applicability of the objective test was subject to two conditions: firstly, the case does not involve a matter of

73 ibid, 296.
74 ibid.
75 [1951] AC 66.
national security; secondly, it involved the court’s competency to enquire on the issue. According to the LP, the executive derived the right not to disclose any information on national security from s.16 of the ISA and Article 151 (3). Acceding to the statutory provisions, he declared that the court could not make an inference on the legality of the arrest and detention. It is a futile effort by the court if it still wants to take an objective view; fraught with evidentiary scarceness, the court is powerless. Alarming he said,

The expression “subjective and objective tests” is merely a label to show the results of the court’s attitude as to whether or not it will or it will not exercise its jurisdiction. It is descriptive of the result of the court’s decision elicited from factual situations reflecting judicial attitude rather than a starting point or a legal element from which legal result[s] could be arrived at. In this case, whether the objective or subjective test is applicable, it is clear that the court will not be in a position to review the fairness of the decision-making process by the police and the Minister because of the lack of evidence since the Constitution and the law protect them from disclosing any information and materials in their possession upon which they based their decision. Thus, it is more appropriately described as a subjective test. 77

This opinion is perturbing because the SC declined the responsibility to examine the lawfulness of the police action, ignoring the absence of non-legal control.

However, the SC wisely afforded the detainee the protection of Article 5(3), namely, the right to consult a counsel of his choice. The right is nonetheless subjugated to ‘the good judgment of the authority as and when such right might not interfere with police investigation’. 78 The burden is on the detainee to show that the ‘police has deliberately and with bad faith obstructed a detainee from exercising his right under the

77 ibid, 297.
78 ibid, 297.
Contrary to the LP’s dicta that the court did not abdicate their function and shy away from its responsibilities, the legal fraternity’s view is that, this was a case of judicial abdication. With this case, the judiciary had ensured the supremacy of police power over individual rights.

In his dicta, the LP stated that the ‘law is clear,’ thus withholding the court from filling in the gap. However, in my submission, the law on police power of arrest and detention is obscure, thus calling upon the judiciary to employ its creativeness and delineate the principle governing police power. The LP’s decision to follow Liversidge was without a forceful rationale. From the English authorities, some important features of British preventive detention, which may be extracted, include:

(1) The order of detention was issued and made by the Secretary of State who is answerable to Parliament;

79 ibid, 298.
81 Per Salleh Abas LP, 298:
"...we are not unmindful of our grave responsibility to be between the executive and citizens. We would like to reiterate that we do not abdicate our function and shy away from our responsibilities. It would be very much to be regretted and indeed it would be most unfortunate if the results of this appeal were to be understood as an abdication of our duties. This misunderstanding may arise in view of so many recent adverse comments against the judiciary and the legal system of the country. The court must be neutral and independent. When the law is clear, we must declare what the law is."
He further explained the court stance:
"In a proceeding like the present one where both legislation and the executive act under it were challenged, our duties are not to substitute our decision for that of the executive. We are only concerned with the procedural aspects of the exercise of executive discretion. We have no interest, nor desire to, to embark upon trespassing into the domains of the legislature or the executive. In a democratic society in which the government is not absolute but a limited one, there is a duty on the part of the executive to act with fairness and follow a fair procedure. Since in these appeals, the law is clear, despite the fact that it is much criticized both at home and abroad, our decision cannot be otherwise than what we have said earlier. We made this observation because we feel that we owe a duty to the public to put our position on record in view of so many adverse comments made against us."
(2) The Secretary of State has to report to Parliament on the action he has taken and the orders he has made.

(3) Persons aggrieved by the detention may make representation to the Advisory Board.

None of these features is present in the Malaysian preventive detention law, therefore in Malaysia, there are no checks and balances in police power to detain suspect. Therefore, the verdict to follow *Liversidge* in deciding this case, was weak.

A further amendment to ISA in 1988\(^{82}\) and 1989\(^{83}\) was the formalisation of this mind-set. Altogether, the constitutional amendment deleting the vesting of ‘judicial power’ to the judiciary was a response to judicial trepidation.\(^{84}\) The executive, realising that the judiciary will always defer to government interests, grabbed this opportunity to strengthen their power and position.\(^{85}\) The judiciary thus, missed the opportunity to creatively craft judicial surveillance over executive and police power, which the Constitution at first had earlier conferred to the judiciary by reason of its pessimistic attitude.


\(^{84}\) Constitution (Amendment) Act 1988, Act A704, s. 8 (3).

\(^{85}\) Contrary to Johan Shamsuddin Sabaruddin opinion in ‘Constitutional Law’ [1998] *Survey of Malaysian Law* 89, 90, where he argued the executive had unreasonably grab the power of judicial review from the judiciary.
3.5.II The Application of ISA 1960 (Revised 1972) Post-1988

The ISA has been subject to prolonged criticisms, locally\(^{86}\) and internationally.\(^{87}\) The core of these criticisms is, that ISA circumvents crucial human rights safeguards enshrined in the Federal Constitution and gives unfettered discretion to the Minister and police. It facilitates patterns of human rights violations, including torture and abuse, and promotes a climate of executive and police impunity. The severity of ISA is increasing with the lack of effective judicial scrutiny engendered by constricted judicial review power and lack of judicial courage and creativity to soften the effect of the law.\(^{88}\)

The main concern therefore, is why the Malaysian judiciary has not attempted to reprove the manner in which the police and executive exercised their power of arresting and detaining a person. In many legal systems, like India’s and Israel’s, the granting of extensive powers for the purpose of maintaining public order is offset by the prospect of judicial review, which can constitute a significant safeguard against the abuse of


\(^{88}\) ibid.
these powers. However, in Malaysia not only is judicial review ineffective, other safeguards have also been reduced and become only a mockery.\textsuperscript{89}

Post-1988 detention under the ISA revealed its true menace. In 1987, following the split during the UMNO party election, the government faced serious political and social dissent. To stifle dissent, the government resorted to ISA under the guise of protecting national interest. Massive arrests of opposition leaders, social activists and religious leaders were made under 'Operation Lalang'.\textsuperscript{90} One of the detainees, Karpal Singh, an MP, state assemblyman and an advocate was arrested to prevent him from continuously issuing statements and holding public rallies, which could have incited racial unrest. He contested the detention order and applied for the writ of \textit{habeas corpus}.\textsuperscript{91} His main contention was on the defect in the allegation of facts forming the reasons for detention, and the Minister admitted this, as erroneous. In allowing the application, the HC outlined three exceptions to the non-reviewability of the minister's satisfaction, namely (a) \textit{mala fide}, (b) the stated grounds of detention not being within the scope of the enabling act, and (c) the failure to comply with a condition precedent.

\textit{Mala fide}, in the HC judge's view, did not only mean malicious intent, but encompassed powers exercised for a collateral or ulterior purpose, i.e., for a purpose other than the purpose for which it is professed to have been exercised. The judge relied on Ong Hock Chye's FCJ dicta in

\textsuperscript{91} Karpal Singh s/o Ram Singh v Menteri Hal Ehwal Dalam Negeri Malaysia [1988] 1 MLJ 468.
Karam Singh's case, and questioned whether the detention order had been made without care, caution and a proper sense of responsibility.

Taking the principle in Theresa Lim that s.73 is the preliminary process to the issuance of a ministerial detention order, and thus, was a continuous process, the error committed by the police tainted the Minister's exercise of discretion. Thus, viewed objectively and not subjectively, the error was substantial.

Peh Swee Chin, J was dissatisfied with the clarification on the erroneous allegation, which appeared to be an inaccurate allegation of fact, thus amounting to the detention order being made without care, caution and a proper sense of responsibility. The error went beyond a mere matter of form and was outside the scope of the Act. The Minister attempted to sustain the validity of the detention order by swearing that despite allegation no. 6, he had been satisfied with the rest of the allegations. The judge refused this explanation because the executive will find a way where, 'a detention order can be made first, and the maker satisfies as to its necessity later.' He relied on Abdooldacer J's dicta in Re Application of Tan Boon Liat v Menteri Hal Ehwal Dalam Negeri.92

I held in my judgment on Yeap Hock Seng v The Minister of Home Affairs, Malaysia that although the courts are precluded from adjudicating on the sufficiency of the subjective satisfaction of the Minister they can examine the grounds disclosed by the Minister for the detention to see whether they are germane and relevant to the object which the Ordinance prescribes. In other words, it is open to the courts, in determining the validity of any order of preventive detention, to consider whether the grounds of detention fall within the scope of the law of the preventive detention under which the order professes to be made. An order of detention based on irrelevant grounds is invalid and if any of the grounds furnished to the detenu are found to be irrelevant while considering the application of the relevant legislation under which the detention is ordered and in that sense are foreign thereto, the satisfaction of the detaining authority on which the order of

detention is based is open to challenge and the detention order liable to be quashed.

The judge refused the minister's clarification on four grounds; firstly, the principle in Tan Boon Liat's case, would be worthless, secondly it would set a precedent and open the floodgates when the authorities would pledge error to justify defects to the detention order. Thirdly, there was considerable force in the submission that the Minister satisfaction must be formed at the time of making the detention order, and not later. Fourthly, if the authority is allowed to re-exercise his discretion which initially was exercised based on factual error, an objection or criticism will ensue because the detention had amounted to condoning an authority in re-exercising his discretion wrongfully.93

The learned judge, unlike judges in Karam Singh's case, was not hesitant to follow cases decided by the Indian courts, especially when 'our own authorities are silent on any particular point'.94 Judicial activism thus was beginning to trickle; unfortunately, the activist approach was negated when on appeal from the Minister the SC overturned the HC decision.95 Abdul Hamid J., the acting LP, invoked the deep-seated subjective test. Arguing that the trial court had failed to distinguish between the grounds of detention and the allegations of fact supplied to the detainee, he ruled that, whether the grounds of the detention order fall within the scope of the act is subject to review, the allegation of facts did not. The HC judge, according to him, had misdirected himself on the question of the reviewability of

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93 ibid.
94 ibid, 471.
95 Minister for Home Affairs, Malaysia & Anor v Karpal Singh [1988] 3 MLJ 29.
ministerial satisfaction. Thus, the SC held, that the so-called error in allegation of facts no. 6, was unsustainable.

The SC, as the apex court vested with the power to protect the liberty of the individual, reverted to the old position, rendering fundamental rights worthless.

A decade after the Karpal Singh case, the HC once again showed its willingness to diverge from the subjective test. When the HC sat to hear Abdul Ghani Haroon v Ketua Polis Negara, the learned judge declined to abdicate. The police under s.73 detained the internees, both members of the political party, Parti Keadilan Nasional. Their detention had been extended twice subsequent to their arrest. Since then, they were denied the opportunity to meet and consult their counsel. Hishamuddin J, believed that the court has to vigilantly act as protectors of fundamental liberties of the subjects. Hence, he favours Lord Atkin’s dissents in Liversidge, which objected to the principle of non-reviewability of ministers’ discretionary power.

He took the fading of liberty seriously; hence his court will 'stretch forth a saving hand while yet there was time.'

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96 [2001] 2 MLJ 689. Prior to the decision of this case the same judge heard the application of Abdool Ghani on the right to appear in court during the hearing of writ of habeas corpus application. He declared that the applicant had a constitutional right to be present in the court and the right is implicit in Article 5(2) of the Federal Constitution. Abdul Ghani Haroon v. Ketua Polis Negara [2001] 2 CLJ 574. On appeal the ruling was overturned by the FC, Ketua Polis Negara v Abdul Ghani Haroon [2001] 4 MLJ 11, holding that the procedure governing the application for writ of habeas corpus does not require the attendance of the detainee because it was conducted by way of affidavit evidence and no oral evidence is necessary. The right is conferred on court discretion only. There was insufficient material before the trial judge for the exercise of his judicial discretion.

Hishamuddin J ruled, that the detention was unlawful due to, firstly, the failure to comply strictly with s.73 (1) ISA read jointly with s.8 of ISA. This conclusion was arrived at after examining the affidavit which vaguely stated the grounds of arrest. He enumerated what the affidavits should contain:

(a) whether he has reason to believe that the detention of the detainee was necessary with a view to preventing him from acting in a manner prejudicial to the security of Malaysia or any part thereof; or
(b) whether he has reason to believe that the detention of the detainee was necessary with a view to preventing him from acting in a manner prejudicial to the maintenance of essential services in Malaysia or any part thereof; or
(c) whether he has reason to believe that the detention of the detainee was necessary with a view to preventing him from acting in a manner prejudicial to the economic life of Malaysia or any part thereof.98

According to him, the police officer could not 'simply parrot' the provision of s.73 (1) (a) of ISA but concurrently, had to show in his affidavit that he had directed his mind to the requirement of s.8 of ISA. Additionally, the word 'and' at the end of s.73 (1)(a) required sub-clause (b) of the same provision to be read conjunctively, thus the affidavit must further state;

(a) whether he has reason to believe that the detainee has acted or is about to act or is likely to act in a manner prejudicial to the security of Malaysia or any part thereof; or
(b) whether he has reason to believe that the detainee has acted or is about to act or is likely to act in a manner prejudicial to the maintenance of essential services in Malaysia or any part thereof; or
(c) whether the [sic] he has reason to believe that the detainee has acted or is about to act or is likely to act in a manner prejudicial to the economic life of Malaysia or any part thereof. (Emphasis added)99

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98 ibid, 698-699.
99 ibid, 699.
The learned judge underlined the importance of sufficient details; nevertheless he did not request detailed information. The responsibility to furnish sufficient information was demanded according to the judge because, “the phrase ‘prejudicial to the security of Malaysia’ is too general or vague in nature (so too are the phrases ‘prejudicial to the maintenance of essential services of Malaysia’ and ‘prejudicial to the economic life of Malaysia’).”  

Reasonable information forming the grounds for the arrest was also important to enable the detainee to defend his innocence.

Secondly, the arresting officer had breached Article 5(3) of the Constitution which guarantees the right of information on the grounds of arrest, because the affidavits of the arresting officer merely stated that he had informed the detainees what the grounds of arrests were, but failed to stipulate what they were.

Thirdly, the extension of the detention was unlawful because it failed to state what the purposes of the extension were. Although the police are empowered by s.73 (3) to extend the detention up to a maximum of 60 days, this power is not absolute. It has to be exercised reasonably and fairly, and subject to review by court in a habeas corpus proceeding.

Justice Hishamuddin had re-formulated a principle that protected individual rights, and diminished the ‘absolute police power’ outlined in previous cases. He interpreted s.73 (3) as a

... built-in departmental safeguard[s] against possible abuse of the powers of arrest and detention under the ISA. In order to achieve this purpose, the officer concerned must be objective, independent minded and professional in their approach.  

100 ibid, 699 - 700.

101 ibid, 703.
He further equated the power of the officers to the power of a magistrate in issuing a remand order under s.117 of the Criminal Procedure Code, in which judgment is made without fear or favour, and subject to higher court evaluation.

Fourthly, the extension of detention was made in *mala fide*, because the decision to prolong the detention was prematurely made. The detaining officers had decided for an extension since the early stage of detention, thus violating the procedural safeguard of s.73 (1) (c) stipulating that detention for more than 30 days, may take place, after a police officer of, or above, the rank of Deputy Superintendent has reported the circumstances of the arrest and detention to the Inspector General or to a police officer designated by the Inspector General in that behalf, who shall forthwith report the same to the Minister.

Fifthly, the judge inferred *mala fide*, from the denial of family visits, which according to the Inspector General and Director of Special Branch would have disturbed police investigation. He rejected the police's reason in refusing family visits, in that the request for the visit was not made immediately. He furthermore stated that meeting with the family can take place under police surveillance. He protested the blind enforcement of a law that affecting fundamental rights, and favoured a humane interpretation and implementation. Thus he found the denial unjustified by ISA. 102

Sixth, the denial of access to a lawyer amounted to *mala fide*. Hishamuddin J found the denial ‘cruel, inhuman and oppressive’ but ‘[was]  

102 ibid, 704.
also a blatant violation of the applicants' constitutional rights under Article 5(3) of the Constitution.' More serious was the effect of the denial to the right of the applicants to argue their case. The judge stated:

Now, if the applicants truly believe that they have done no wrong at all and that from their standpoint they have been framed or prosecuted, how are they to present their case in the best possible manner if they are not allowed access to counsel? This denial to counsel is not only unjust; it also makes a mockery of the right to apply for habeas corpus as guaranteed by Art 5(2) of the Constitution.103

Once again the judge failed to see the justification of the police's wholesale excuse, i.e., that since police investigation was still in progress, access to counsel may impede police investigation. The judge also reminded the police that the supreme law of the country is the constitution and not ISA.

The judgment of Hishamuddin J had significantly curtailed police power to arrest and detains a suspect, while at the same time advocated a meaningful supervisory role of the judiciary. All this while the police had capriciously and arbitrarily used s.73 to arrest and detain suspects, but at the same time, sound supervision on the manner in which they had exercised their power was lacking. This situation not only bred abuse of power but also ill-treatment of detainees during the investigation period.104

The judiciary too had always abdicated from acting as the defender of individual liberties, and always restrained itself from exercising judicial review power. This was an attempt by the High Court to make itself the principal institution of the state in applying the doctrine of the separation of

103 ibid, 706.
104 See Statutory Declaration by Dr. Munawar Muhamad Anees on November 7 1998, illustrating the torture he experienced during the period of investigation, accessed 15 October 2004.
powers, where each of the three branches of government checks and balances the others' exercise of power. At the same time, Hishamudin J’s judgment restored the supremacy of the Constitution when the ISA was read as being subject to the Constitution, not vice versa.

Trailing Abdul Ghani was the controversial Mohd Ezam bin Mohd Noor v Ketua Polis Negara & Other Appeals case. The appellants in this case were ‘Reformasi’ activists appealing against the decision of the HC refusing the grant of the writ of habeas corpus for their detention under s.73 of the ISA. The FC allowed the appeal and granted the writ of habeas corpus. The FC decision in a limited respect represented a landmark in Malaysian law. It reversed the precedent laid in Theresa Lim and the power of the police to arrest and detain a person now became subject to review. These appeals against the non-reviewability of police power under ISA were not the first time; but had been sporadically forwarded by the HC, but then reversed by the FC, and if not reversed then were not binding because they had been decided at the HC level.

The principles outlined in cases prior to the Federal Court judgment in Mohd Ezam’s concerning police power were reconsidered and repeal. At present, the new positions are: (a) The exercise of discretion under s.73 (1) of ISA is subject to review by a court of law. The governing principle is now the ‘objective test’. This test allows the court to examine the

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107 see Peh Siew Chin J’s decision in Karpal Singh n 75 above.
108 see Abdul Ghani Harun, n 80 above.
109 See Mohamed Dzaidin Chief Justice, Steve Shim Chief Judge (Sabah and Sarawak), Abdul Malek Ahmad FJ.
Chapter Three

sufficiency of the particulars supporting the detention and to ascertain that it was not based on 'collateral' or 'ulterior' motives, at variance with the intention of the law.¹¹⁰

In this case, the FC found that despite the press statement of the respondent notifying that the appellants had been detained because they were involved in activities that threatened national security, they were not interrogated on militant actions and neither were they questioned about getting explosive materials and weapons. Rather, the appellants were questioned on their political activities and for intelligence gathering. Thus the FC ruled that the detentions were for ulterior purposes and unconnected with national security and further,

(i) The rule allowing non-disclosure of facts or production of documents that are against national interest conferred by s.16 had no application to s.73;¹¹¹

(ii) The right of the authority to conceal information concerning national security under Article 151 (3) was only applicable to the detainee but not to the court;¹¹²

(iii) The police officer had to satisfy a 'jurisdictional threshold' prior to exercising the power of arrest and detention. First, the police officer had to justify the detention. A statement that arrest and detention were conducted following the detainee having acted in a manner likely to prejudice the security of the country, was adequate. Next, the police officer had to satisfy the court by way of material evidence that the detaining

¹¹⁰ Mohamed Dzaiddin CJ, 464.
¹¹¹ Steve Shim CJ, 475-476.
¹¹² ibid, 476.
authority had reason to believe that the appellants had acted or were about to act or were likely to act in any manner prejudicial to the security of Malaysia. In this case, the second condition was unsatisfied. The affidavits filed by the police officer did not present particulars that the appellants acted or were about to act in any manner prejudicial to the security of Malaysia.\footnote{ibid, 479.}

Steve Shim CJ (SS) made a courageous statement when he said that although those who were responsible for national security were the most appropriate judges on the matter, that did not stop the court from examining the manner in which the executive exercised this power. The court 'will not question the executive's decision as to what national security requires', nevertheless it will 'examine whether the executive's decision is in fact based on national security considerations.'\footnote{ibid, 480.}

Regretfully, the FC was not prepared to hold that s.73 and s.8 are two absolutely isolated provisions. In this instance, it is argued that Steve Shim CJ (SS) was correct when he opined that holding s.73 and s.8 as inextricably connected 'would have the effect of inhibiting or restricting the unfettered discretion of the minister.'\footnote{ibid, 473.} The Minister who is responsible for national security has to make his own judgment and need not necessarily have to consider and rely on police investigation. Further, he concluded that if Parliament intended to 'impose a mandatory obligation on the part of the Minister to consider the police investigation under s.73

\footnote{ibid, 479.} \footnote{ibid, 480.} \footnote{ibid, 473.}
before he could issue a detention order under s.8, Parliament would have expressly provided for it.'\textsuperscript{116}

In the absence of express provisions, both provisions could not be regarded as 'inextricably connected'. But, Mohamed Dzaiddin CJ later concluded,

although ss 73(1) and 8 are connected, they can nevertheless operate quite independently of each other under certain circumstances. Section 8 is not necessarily dependent on s 73(1) and vice versa. In the circumstances, it cannot therefore be said that they are 'inextricably connected'.\textsuperscript{117}

The conclusion represented the cardinal principle that these two provisions were still integrated. However, whether or not they were interconnected depended on the circumstances.

The scope of ISA enunciated in the \textit{Theresa Lim} case was also re-argued, and the counsel for the appellants claimed that the ‘framers’ intent’ determined the scope of Article 149. This is ascertainable if one inspects the historical character and origin of the provision in question, and to this end, contemporaneous speeches and documents relating to that provision should be referred to. Appellants’ counsel argued that in \textit{Theresa Lim} the SC was mistaken in law when evaluating the probative value of the documents relied on. He quoted \textit{Pepper v Hart}\textsuperscript{118} that propagated framers’ intent as a new approach to legislative construction.\textsuperscript{119} Abdul Malek FCJ however, upheld the ratio in \textit{Theresa Lim} and declared:

The purpose and intent of the ISA is for all forms of subversion but was more directed to communist activities which was prevailing at the time the law was enacted. The long title and the preamble indicate that it is not confined to communist activities alone although the speeches in Parliament concentrated on that form of activity.\textsuperscript{120}

\textsuperscript{116} ibid, 474.
\textsuperscript{117} ibid.
\textsuperscript{118} [1993] 1 ALLER 42.
\textsuperscript{119} Full arguments see 485 – 493.
\textsuperscript{120} ibid, 493.
(b) The right to counsel was also reinvigorated by the FC. Justice Norma disagreed with the respondent's contention that they were entitled to deny requests for access to legal counsel because investigations were ongoing. She asked the police to act promptly and professionally in conducting their investigations, so that the detainee's rights to consult the counsel of their own choice would not become illusory or ineffective. In this instance, she adopted the 'direct effect test' to ascertain whether the denial had violated the fundamental rights guaranteed by the Constitution, and ruled that the denial was unreasonable and had thus violated Article 5(3). According to her, denying access during the earlier part of the detention would have been acceptable to facilitate police investigations, but to stretch that denial throughout the 60-day period made a mockery of Article 5. Norma FCJ also ruled that *habeas corpus* is not a proper remedy for denial of access to counsel, although it is a proper remedy if the detention is unlawful on other grounds.

(c) The effects of the *Abdul Ghani Harun* and *Mohd. Ezam* cases were twofold. On the one hand, there is now a clear demarcation between a preventive detention order issued by the Minister, and an investigative preventive detention conducted by the police. The latter is reviewable, while the former is non-reviewable. On the other hand, the authority may elude court probe by issuing a ministerial order of detention under s.8 when the detainee files an application for *habeas corpus*. The breaking point from

\[\text{121} \text{ Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor [1992] 1 MLJ 697 following Maneka Ghandi v Union of India AIR 1978 SC 597.}\]
the hardship caused under investigative preventive detention is therefore temporary.

In *Mohd Ezam*, the FC with reservations attempted to construe police power strictly. However, the legal position is stagnant in regards of ministerial detention power. In *Kerajaan Malaysia & Ors v Nasharuddin bin Nasir*, the FC reaffirmed *Karam Singh* and for the first time ruled on the implication of s.8B of ISA.

The detainee was arrested under s.73 (1) of the ISA. He filed an action pleading for the right of access to legal representation and the order of habeas corpus. Before the application for habeas corpus was heard, the Minister had issued an order for detention under s.8 of the ISA. The HC allowed the application for access to counsel and also granted the writ of habeas corpus; the Minister appealed against the order. Two main issues were considered in the appeal: first, on the court's jurisdiction to hear a complaint against the detention order issued by the Minister under s.8 when the motion before the HC has been directed at the police instead of the Minister. Additionally, what was the effect of the ouster clause in s.8 of the ISA on the court's jurisdiction? Secondly, did the legality of s.8 hinge on s.73 of the ISA?

The FC decided that since the detainee was currently placed under ministerial detention order made pursuant to s.8, the police no longer had custody of the respondent. The custody of the respondent had been transferred to the Minister. Hence, the option left was for the respondent to

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122 [2004] 1 CLJ 81.
123 *Nasharuddin bin Nasir v Kerajaan Malaysia & Ors* [2002] 6 MLJ 65.
file a fresh application for a writ of habeas corpus against the detention order issued by the Minister.

Further, the FC ruled that the ouster clause under s.8B of ISA which immunises the powers of the Minister from judicial review is constitutional. Judicial review, according to the FC's is a creature of common law. Therefore, statutory legislation prevails over judicial review if the statute unequivocally excludes judicial review by the courts. The court must then give effect to the provision.

The respondent contended that the detention made under s.73 was illegal because the senior police officers, when they extended the detention periods acted mechanically, by failing to apply their minds whether the detention order ought to be extended. It was further argued that the illegality had tainted the legality of the detention order issued by the Minister under s.8. The FC was unable to accept the argument. This was because the question of whether or not the allegations in the police report on which the ministerial detention order was based, were sufficient or relevant, was a matter to be decided by the Minister and only by him. It was held that it is not open to the Court to examine the sufficiency or relevance of the report and the basis upon which the Minister came to such conclusion, the test being a subjective one.

As the issue was now on Ministerial detention order and involved national security, the FC considered the effect of the ouster clause on court jurisdiction to judicial review. Dzaiddin CJ, declared:

Under s.8, the Minister has been conferred powers of preventive detention. The powers can be said to be draconian in nature. They are obviously designed to stop or prevent subversive actions or actions prejudicial to public order or national security... s.8B being an ouster clause, has the effect of immunizing ...the powers of the Minister from judicial review. As such it
plays an integral part within the whole scheme relating to the Minister’s preventive powers and decisions made thereunder. In this sense s.8b is intrinsically linked to s.8 thereby creating a combined effect in combating subversive actions or actions prejudicial to public order or national security. It falls squarely within the parameters of Art. 149 (1) aforesaid. In the circumstances, s.8B is not an unconstitutional provision.

The CJ concluded that because matters of national security require special treatment, judicial review could be excluded.

Thus, in 2003 the track of preventive detention diverged. While the developments of law governing the exercise of police power of arrest and detention is favourable to the principle of good governance and encourages preservation of personal liberty, the ministerial power of detention is still haunted by the ghost of ‘Karam Singh’.

Conclusion

The judicial approach in interpreting the scope of discretionary power possessed by the Minister in issuing detention orders and the police power in effecting arrest and detaining a person leaned deeply towards the executive and legislature. Until recently, judicial law making in Malaysia operated within the discipline of Anglo-American traditions; where the courts always recognised that their function was not to make or alter the law but to interpret it only. The law they created was always justified by the strictest necessity of the case in hand. Judicial law making always sought to promote the legislative purpose and never to oppose or frustrate it. Thus, the courts gave the widest scope to the ISA and constitutional provisions against subversive acts. In addition, the FC never encouraged attempts to challenge the ultimate supremacy of popular will manifested in constitutional amendments. This disposition, when assessed against the
jurists' view on judicial process discussed in part 1.4 of Chapter One, does not strictly fulfil those jurists' understanding on judicial process.

Only a section of Cardozo four 'directive forces' is observed. The judges in general, overlook Cardozo's reservations on the operation of each directive force and the requirement, that in choosing which one will dictate the outcome of a case depends on 'the comparative importance or value of the social interests that will be thereby promoted or impaired.'¹²⁵ Malaysian judiciary takes the local case, Karam Singh, and the English case, Liversidge, to operate in all situations, thus failing to evaluate 'its [a case's] logical outcome, or outcome supposed to be logical'¹²⁶ and manifested considerations of policy rather than right.

Most of the time, Malaysian judges had fallen into what Hart described as a 'jurist's heaven of concepts', where a word is treated as having the same meaning whenever a statute has used it. This was evident when the court extended the application of 'subjective test' on ministerial power to order detention because the term 'if the Minister is satisfied' connotes subjectivity to police power because the term 'has reason to believe' bears the same connotations as 'if the Minister is satisfied.' The learned judge overlooked the dissimilarities between the nature of the powers and disregarded the core issue at stake. At times, local judges displayed 'rule-scepticism' and treated precedent as determinate, and rejected other existing rules and principles.

¹²⁶ ibid, 39.
Hart’s ‘rule of recognition’ restrictively assists judges on rendering a logical decision, because the judge is required to ascertain the rule according to the same test used by the legal officer from the past. Thus, the judiciary is bound to give effect to law enacted by Parliament and precedent. At any moment, the judiciary may fall into a ‘jurist’s heaven of concepts’ or ‘rule-scepticism’.

Dworkin’s idea on ‘law as integrity’ is far too perfect for Malaysian judges. Law as integrity imposes a duty on judges to find the best interpretation, encompassing coherency in the development of law in line with people’s rights and duties, and the political structure and legal doctrine of the community. In developing the preventive detention jurisprudence most of the time the judges stumbled, thus the law developed in a distorted manner. The interpretation on police power in Theresa Lim was inconsistent with the ‘dimension of interpretation,’ but then Abdul Ghani Haroon and Mohd. Ezam cases put the judiciary back on the right track in interpreting the scope of police power. Thus, the haphazard progress of the law was remedied.

The three jurists, Cardozo-Hart-Dworkin, called upon judges to employ creativity in rendering judicial decisions without abandoning the traditional constraint of precedent and principles. In ISA cases this call had not been fully answered by the Malaysian judiciary because the tensions and fears from the communists and emergency, as this chapter has illustrated, is still dominant in this country.

Fear dominated the thinking of the government, hence allowed the continued existence of the ISA, which bestows upon the executive and
legislature, extensive powers for the protection of the national security, but renders the judiciary impotent and powerless. The definition of national security was left to the executive and the legislature and allowed one political regime to determine the situation, gradually enabling it to advance its political interest in the name of the state.127

'Security culture'128 does not only grant the executive and legislature unbridled power, but contributes to the dishonour of human rights and dignity. The ultimate question on a judicial approach to ISA today is: Can deference to the state in the early stages of independence and nation-building be justified indefinitely, in situations where maintenance of the nation often seems to have given way to maintenance of a particular government or party and in light of clear evidence that ISA has violated fundamental rights?


CHAPTER FOUR

POLITICAL CRIMINAL PERSECUTION

The Trial of Anwar Ibrahim

Introduction

In 1997, an economic crisis struck Malaysia and a drastic economic plan was demanded to curb the economy from worsening. However, in the process of finding the right formula to sustain the country’s economy, unfortunate developments took place in the relationship between the Prime Minister Dato’ Seri Dr’ Mahathir Mohamed (Mahathir) and his deputy, Dato’ Seri Anwar Ibrahim (Anwar). Starting with a disagreement over a suitable plan for economic recovery, the disagreement spread into political divergence. Anwar’s opposition to Mahathir’s economic plan was considered by Mahathir as Anwar’s plan to challenge Mahathir’s leadership. The disputes escalated and subsequently on 2 September 1998, Anwar was dismissed as Deputy Prime Minister, and from all Cabinet posts. A day later, he was expelled from the UMNO. What shocked Malaysians and the world was that Anwar was dismissed on the grounds of ‘immoral conduct’: an accusation which went against Anwar’s image as a staunch Muslim.

Anwar did not quietly accept his fate. Shortly afterwards, he organised a nationwide rally to answer all accusations against him. He claimed that there was a conspiracy to ruin his political future and the accusation regarding his immoral conduct was a sham. Initially, there was no constraint put against him in holding a public rally. However, when his
supporters began to act aggressively, by destroying the UMNO Gallery at UMNO's Headquarters' at the Putra World Trade Centre, the police began to monitor any public gathering held by Anwar, and finally he was arrested under ISA on 20 September 1998. What was previously a political scuffle had turned into a legal battle.

This chapter studies the series of trials on Anwar and his associates, which were related to the offences he was charged with. It analyses the role of the judiciary in political cases and the extent of the judiciary's involvement in political conflicts. Because states are highly involved in political trials, the judiciary is seen as subservient to the government in power. Thus, how the Malaysian judiciary reacted to this disposition is the supreme issue in this chapter. We focus here not only on the legal contents of the trial, but the events taking place prior to and during the trial. The case confronted the court with a delicate issue of accountability when dealing with trials, that emanate from political crisis or lead to political disagreement. Three key aspects of accountability emerge, first accountability from political aspects, secondly accountability to the law and last, accountability to the society. These three notions of accountability which had been discussed in Chapter One, compete with each other in Anwar's trials. This chapter will examine which among these three forms of accountability, gains prominence during the Anwar's trials, and what impact the dominating forms of accountability have on the independence of the judiciary.
4.1 Politics and the Judiciary

Judges are expected to operate apolitically. Nevertheless, is the law that the judiciary applies, politically neutral? Most law, especially statutory law, is the product of a political process, since the policy underlying most legislation is generally the product of political negotiation. Meanwhile legislative text may be regarded as legal because the content is subject to judicial scrutiny. Any bill has to go through legislative process where it is debated before receiving Royal Assent. During parliamentary debates, members representing different political parties scrutinize the purpose and merit of a bill. At this stage, politics play an important role to see the bill through. However, not all bills are seconded based on political lines; MPs may in consensus, support a bill on its merit. For example, when the government proposed a bill removing the legal immunity of Malay Rulers in 1993 the opposition voted for the bill together with the government. When a law contains a political element, indirectly the judiciary may be regarded as recognising the political aspiration of the legislature.

Meanwhile, the term ‘politics’ is commonly understood to designate a struggle to gain power and secure authority over others. It signifies domination. Does judicial decision have this effect? Superficially, it does and that is why in conflict situations, any government will go to court to exert authority over its action, and the decision upholding the validity of the action
will lend legitimacy to the action taken.\textsuperscript{1} The courts are unable to get away from adjudicating on this subject, however much it struggles to disassociate the institution from such an agenda. Becker illustrates this difficulty:

In a sense . . . all trials are political. Since courts are government agencies and judges are part of 'the system', all judicial decisions can be considered political.\textsuperscript{2}

The term political trial thus has a heavier meaning, otherwise all trials become political trials and all judicial decisions become political decisions because every judicial decision whether on contract or divorce, has the heavy hand of government upon it. It is important to distance the court from such a superficial meaning of political trial, because political trial involves challenge to the integrity of the courts, and the morale of the legal profession.\textsuperscript{3}

4.2 Understanding Political Trial

Before starting the discussion on the Anwar case, it is important to understand the nature of a 'political trial' and the effect it has, on the judiciary. In general, it is important for judges to be vigilant in rendering judicial decisions, as the task is intricate in view of competing interests, which need to be evaluated and assessed. Additional care is required when the trial has the inclination of being political in the sense that, the outcome shows that the decision rendered satisfies the political aim of one of the


\textsuperscript{3} ibid.
litigants. Judges in this situation easily invite the accusation of succumbing to the government regime, which is equivalent to questioning the integrity of the court.

Although judges try to defend themselves from the above allegation, it is not easy to make politicians, the public and even lawyers to understand the nature of judicial process. The difficulties are not only exacerbated by the mystery of the judicial process, but also because judges cannot reply to the accusations except through written decisions. It is not the public's fault when they accuse judges of being 'political' because undeniably, judges do under certain circumstances, act as if they were subservient to politicians.

4.2.A Defining Political Trial

The Black Dictionary of Law⁴ defines political trial as, 'A trial (especially a criminal prosecution) in which either the prosecution or the defendant (or both) uses the proceedings as a platform to espouse a particular political belief; a trial of a person for a political crime – a crime (such as treason) directed against the government.' Literally, the definition indicates not only persons in power, but those striving for power will make use of court proceedings to achieve their political aspirations. The paramount motive of the trial is to advocate political ideals, while the legal issue is only secondary.

A political trial may also refer to trial for a crime, which is political in nature, namely, treason. The crime is considered as political because it

affects the stability of a legitimate government and involves illegal activities to topple legitimate government. This definition shows that the litigants use the court to advocate their political aspiration, and the court is only a passive player.

Kirchheimer describes political trial as a situation where, administration of justice uses the devices of justice to bolster or create new power positions. The courts will conspire with the regime in power to eliminate the political foe according to some prearranged rules. According to him, in a political trial, ‘the judicial machinery and its trial mechanics are set into motion to attain political objectives which transcend both the bystanders’ curiosity and the governmental custodian’s satisfaction in the vindication of the political order.’ In his opinion, a political trial is practical, to ‘exert influence on the distribution of political power.’ The aim of the trial could be ‘to upset - fray, undermine or destroy - existing power positions, or to strengthen effort directed at their preservation.’ Motive is a key indicator in Kirchheimer’s definition and the trial will either affect the distribution of political power by weakening the position of power holders, or strengthening the grip of power.

Shaklar, in answer to the question of ‘What after all is a political trial?’ describes a political trial as ‘a trial in which the prosecuting party,
usually the regime in power aided by a cooperative judiciary, tries to eliminate its political enemies.’ The objective of the trial is ‘the destruction, or at least the disgrace and disrepute of a political opponent’ forcing the political rival to go. Another scholar, Hein,11 uses the term, political trial in reference to a trial, ‘involving defendants who have either broken the law in pursuit of their political objectives or who have been prosecuted as part of an attempt by the state to control or repress political unrest.’

Analyses of the definitions of political trial offered by these scholars reflect that motive is the key element that constitutes a political trial. If the motive of the trial is to eliminate a political opponent by invoking judicial process, the trial becomes political. It also operates on the presumption that the trial is prompted by the regime in power.

However, not all scholars agree with the above definition. Christenson12 maintains that motive does not form the sole criterion in defining political trial. A trial, according to him, is political when it involves ‘dual legal and political agenda’ and if it is a ‘partisan trial’. The latter, i.e., a ‘partisan trial’ according to Christenson, ‘proceeds according to a fully political agenda with only a façade of legality’ and ‘substitutes political expediency for law.’

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10 ibid.
agenda’ is also a political trial but operates within the rule of law.\textsuperscript{14} When the trial is within the rule of law, parties are equally treated, and the trial takes place fairly despite the political agenda. This does not become the subject of criticism as it is conducted according to the rule of law. Partisan trial, on the other hand, ‘carries the stamp of despotism’,\textsuperscript{15} thus is contentious.

A trial then can be political despite the absence of the motive to destroy others’ political career, or its taking place within rule of law. The concern of this thesis is a partisan trial, because this is when the judiciary and judges are bombarded with the accusations of playing politics, and shifting the duty to be accountable to the law and justice, with accountability to the government in power or political ideology, that the government subscribes to.

4.2.B Form or Nature of Political Trial

If the object of a political trial is to eliminate a political opponent, the trial will usually take place in a peculiar form, as opposed to an ordinary criminal trial.\textsuperscript{16} The judiciary will be fully geared to achieve political objectives, and during the trial, ‘the judge will be subservient to the prosecution, the evidence false, the accused bullied, the witness perjured, and rules of law and procedure ignored.’\textsuperscript{17} Political trials also highlight an imbalance in the opportunity to turn to court for legal recourse. As already

\begin{footnotesize}
\begin{enumerate}
\item ibid.
\item ibid, 9.
\item n 1 above, 49.
\item n 9 above, 149.
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discussed, both persons in power and opponents have the opportunity to invoke a political trial. However, there is an inherent structure of unequal opportunity because of the existence of procedural limitations, which allow only the government to institute a public action. Others will have to find a less salient procedure, for example, filing a defamation suit or provoking others to sue them, which is 'a useful weapon' to exert 'against any political competitor in or out of government.'\textsuperscript{18} The purpose of defamation suits is to reveal the 'attitudes and acts' of political rival and subject them 'under judicial scrutiny, indirectly.'\textsuperscript{19} This is achieved when the attitude and actions are put for judicial determination. Again, such revelation only operates in a limited space, especially in a totalitarian government structure, where the court review of political conduct is prohibited from being discussed in public. All things considered, those in power still have the upper hand.

4.2. C Categories of Political Trial

A political trial is classified into three main categories. The categorization is set according to the motives of the trial.\textsuperscript{20} The first category is a 'trial involving a common crime committed for political purposes and conducted with a view to the political benefits which might ultimately accrue from successful prosecution.'\textsuperscript{21} This category stresses the political gain of the

\textsuperscript{18} n 1 above, 50.
\textsuperscript{19} ibid.
\textsuperscript{20} ibid, 46.
\textsuperscript{21} ibid.
prosecution against a crime committed for a political purpose. In this situation, the perpetrators need not necessarily be politicians, although it takes a person with political interest to commit the crime.

The second is the ‘classical political trial’, which refers to a situation when ‘a regime attempts to incriminate its foe’s public behaviour with a view to evicting him from the political scene.’\textsuperscript{22} This is the most common form of political trial, which takes place especially in autocratic or totalitarian forms of government. Last in the category is, ‘derivative political trial’, a case where ‘the weapons of defamation, perjury, and contempt are manipulated in an effort to bring disrepute upon a political foe.’\textsuperscript{23} A derivative political trial connotes that the trial results from another form of legal action, which is not political \textit{per se}, but is used in order to achieve political profit.

However, motive is not the decisive element. The status of parties involved in the litigation also determines the nature of the trial. If the trial involves a ‘political figure’ it is categorised as a ‘high profile political trial’. On the other hand, it becomes a ‘low profile political trial’ when an ordinary man is involved, with a slight political element only.

\textbf{4.2. D The Dilemma of Political Trial}

A political trial triggers the question of the morality and legitimacy of the judicial process. The judiciary has to make a choice of whether to bow

\textsuperscript{22} ibid.
\textsuperscript{23} ibid.
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to the government in power, or stand firm to the principle of justice and rule of law. During a political crisis, the judiciary may assist the regime in power to accomplish its plan, inattentive of the repercussion on the image of the judiciary.\textsuperscript{24} This is not only peculiar to totalitarian countries, but whenever the judiciary lacks independence. In this situation, the judiciary operates as an agent to preserve the power of the regime and assert its legitimacy regardless of the injustice it causes to the people.

However, if political trials take place repeatedly, the government and the judiciary may suffer from crises of confidence. Frequent exploitations of the judicial process for political ends cause the people to lose confidence in the government as it indicates despotism. Further, the court’s decision will be suspect and considered as partisan, therefore lacking legitimacy.

4.3 The Political Role of the Malaysian Judiciary

A judicial decision has political connotations when the court’s decision supports order and stability in the country and sometimes helps to ascertain who is entitled to remain in power. This takes place according to what is provided by the law, and normally after making a policy of its own in the process. In this context, the Malaysian judiciary has on several occasions, exercised its power to maintain political stability in the country. For example, in the wake of the formation of Malaysia, one of the Malay States,

\textsuperscript{24} ibid, 6.
the state of Kelantan, took legal action challenging the constitutionality of the formation of Malaysia. The grounds of challenge were that the Malaysia Agreement 1963 and the Malaysia Act violated the Federation of Malaya’s Agreement of 1957, because both would have had the effect of abolishing the Federation of Malaya established in 1957. In addition, the changes were devoid of consent from states constituting the Federation of Malaya when the Ruler of Kelantan, who should have been a party to the Malaysia Agreement, was passed over. Besides, constitutional convention demanded consultation with rulers of individual states, if, the 1957 constitution had to undergo substantial changes; and finally, the Federal Parliament had no power to legislate for Kelantan in respect of any matter regarding which that state had its own legislature.

The High Court (HC) had to dispose of the case hurriedly, because the Agreement was due to operate within 24 hours from the disposal of the application. Therefore, admitted the Court, ‘time does not permit ...very lengthy discussion.’ The case was decided in an exceptional situation, and the HC discarded the normal practice in the application for interim injunction. Thomson CJ said,

Convention demands that in discussing such a question a Judge should as far as is possible, consistently with disposing of the question immediately before him, refrain from expressing any definitive views as to the merits of the plaintiff’s case. Today, however, the Court is sitting in exceptional circumstances. Time is short and the sands are running out. We cannot close our eyes and our ears to the conditions prevailing in the world around us and a clearer expression of opinion than would be customary is clearly required in a matter which relates to the

26 ibid, 356.
interests of political stability in this part of Asia and the interests of ten million people, about half a million of them being the inhabitants of the State of Kelantan.27

The political situation at that time\textsuperscript{28} compelled the HC to solve the dispute to maintain political stability not just in the federation but regionally. Nevertheless, the CJ at the same time offered judicial reasons in denying the State of Kelantan’s claim. According to the CJ, the State of Kelantan in 1957, had surrendered to the Federation the power to amend the Constitution concerning the admission of new states. Therefore, the Cabinet constitutionally exercised the power of admitting other states to the Federation.

Three years later in 1966, the judiciary also lent a hand in solving the political deadlock in Sarawak when the Chief Minister (CM) of Sarawak challenged the constitutionality of his dismissal\textsuperscript{29} leading to the declaration of emergency in Sarawak. During this quandary, the judiciary had to ascertain the constitutionality of the declaration of emergency in Sarawak, after the HC in an earlier legal suit had declared the dismissal of the CM as unconstitutional.\textsuperscript{30} Constitutional points emerged when the Federal Government after declaring a state of emergency in Sarawak, amended the state constitution to enable the removal of the CM. The estranged CM

\begin{flushright}
\textsuperscript{27} ibid, 357-358.
\textsuperscript{28} To stop Singapore and Malaya from falling into communist influence Hanna, Willard A, \textit{The formation of Malaysia: New factor in world politics: An analytical History and Assessment of the Prospects of the Newest State in Southeast Asia}, based on a series of reports written for the American Universities Field Staff (New York: American Universities Field Staff, 1964).
\textsuperscript{29} \textit{Stephen Kalong Ningkan v Tun Abang Haji Openg and Tawi Sli} [1966] 2 MLJ 187.
\textsuperscript{30} \textit{Stephen Kalong Ningkan v Tun Abang Haji Openg & Tawi Sli (No.2)} [1967] 1 MLJ 46.
\end{flushright}
challenged the constitutionality of the emergency declaration, claiming that the aim of the declaration was not to deal with a grave emergency, but to remove him from office.\textsuperscript{31} He contended that the proclamation was made \textit{in fraudem legis}. The Federal Court ruled that the YdPA's power to declare an emergency was unjusticiable, and he was the sole judge in the matter. However, besides this ruling, one of the Lordships, Ong Hock Thye J, dissented on the question of nonjusticiability of the YDPA's power.

\textbf{4.3. A Ong Hock Thye J's Judgment in the Stephen Kalong Ningkan's case}

His Lordship's judgment deserves special discussion because, while approving the validity of the emergency declaration, he dissented on the point of the executive as the sole judge in assessing whether there was a need to declare for emergency, thus making the power unjusticiable. He made this finding after taking into consideration the surrounding circumstances that had led the petitioner to challenge the \textit{bona fides} of the declaration, which to a certain extent involved consideration of the political situation in Sarawak. Relying on \textit{Lawrance v Lord Norreys},\textsuperscript{32} which stated that in the case of allegation of fraud, full allegation of facts was required and therefore, the judge was bound to scrutinise the facts of the case, the HC judge examined the undisputed facts that led to the declaration of emergency in Sarawak,

\begin{footnotesize}
\begin{itemize}
\item \textsuperscript{31} \textit{Stephen Kalong Ningkan v. Government of Malaysia} [1968] 1 MLJ 119.
\item \textsuperscript{32} 15 App Cas 210.
\end{itemize}
\end{footnotesize}
including what had taken place in the State Legislative Council. However, before the learned judge dealt with the issue of facts, he cautioned himself on the duty and function of the court, which according to him was not concerned with the political implication of the application of the written constitution. In his words, the learned judge said:

I would first of all state plainly what I conceive to be the duty and function of the judiciary. Even though inconveniences are liable to flow from a written constitution, as happened in this case, it is outside the competence of the court to concern itself in any way with politics or the rights and wrongs in the maneuvers of political factions.33

After stating this, His Lordship went on to deal with the question of whether the proclamation was made (a) not to deal with a grave emergency whereby the security or economic life of Sarawak was threatened, but (b) to remove the petitioner from the office of Chief Minister of Sarawak. He concluded that the declaration was in fact for removing the petitioner, but held that this did not automatically render the action faulty. He declared,

My view rightly or wrongly is that this primary objective is not necessarily incompatible with a genuine concern -- whether on adequate grounds or not is not for me to say -- felt by the Cabinet as regards the security situation in Sarawak.34

In assessing the compatibility of the state to go through the crisis, His Lordship further stated:

I think it is true that the lesson of the twelve-year emergency in Malaya had not been forgotten. Now Sarawak naturally cannot be compared with more advanced countries that possess a more sophisticated electorate and electoral system, in which political squabbles pose no problems imperiling national security. It may very well be true that political instability in Sarawak could possibly have serious repercussions on the security of the State, although some may quite honestly consider it improbable or farfetched.35

33 Stephen Kalong Ningkan v. Government of Malaysia [1968] 1 MLJ 119, 128 per Ong Hock Chye J.
34 ibid.
35 ibid.
With these remarks, his Lordship bowed to the demand of security when he concluded:

Therefore, after the most anxious consideration of the matter, on both sides, I have come to the conclusion that I am unable to say, with any degree of confidence, that the Cabinet advice to His Majesty was not prompted by bona fide considerations of security. 36

The petitioner’s plea therefore failed.

It is interesting to venture the grounds of His Lordship’s dissent regarding the fact that the court could not inquire into YdPA’s satisfaction. Ong Hock Chye J viewed the act of the YdPA as an act of the Cabinet, and it was the Cabinet’s decision, which was reviewable, not the YdPA’s. Therefore, retracting review power meant ‘repudiation of the Rule of Law’ and the Cabinet according to him ‘has never claimed to be above the Law and the Constitution’. 37 At the same time he opined that failure to review a Cabinet decision in advising the YdPA to declare an emergency amounted to allowing the Cabinet to have ‘carte blanche to do as they please’, which was ‘a strange role for the judiciary who are commonly supposed to be bulwarks of individual liberty and the Rule of Law and guardians of the Constitution’. 38

This is a courageous admission on the role of the judiciary and should today guide the judiciary as to their role.

Both cases illustrate that in adjudicating, politics is one of the values considered by a judge. Political value will then be evaluated together with

36 ibid, 128.
37 ibid, 125.
38 ibid, 126.
other competing values such as historical, philosophical and then matched with legal considerations. Hence, there is no restriction on the judiciary to vet political situations. Judges should not shy away from considering the political background of a case and at the same time may balance and weigh the political facts with other considerations.

In constitutional adjudication, political consideration in general is unavoidable, because the constitution concerns the allocation and restriction of power between government institutions. This requires the court to look at the political events surrounding a dispute. What about criminal prosecution? Earlier, it was stated that a person can be tried for an offence which is political in nature or for a political reason. In Malaysia, criminal prosecution due to political rivalry is very rare, but politicians are not spared from prosecution if they breach the law.

In the mid-70s, the judiciary tried Datuk Harun Haji Idris (Harun), a prominent politician, who was at that time the *Menteri Besar* (Chief Minister) of the state of Selangor and the head of UMNO Youth Division. Harun’s trial left an indelible mark in Malaysian legal history because for the first time an allegation that a trial was provoked by political hostility, was adduced in court. Harun was charged and tried for (i) corruption under Prevention of Corruption Act, 1961 and (ii) forgery for the purpose of cheating under

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39 See Chapter Three. ISA was used to deal with most political challenges from the opposition.
40 *Public Prosecutor v Datuk Haji Harun bin Idris (No2)* [1977] 1 MLJ 15, presided by Raja Azlan Shah FJ.
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s.468 of the Penal Code and (iii) abetment for criminal breach of trust under s.106 and s.406 of the Penal Code.

4.4 The Datuk Harun Idris trial

The trial of Harun revealed judicial attitudes in dealing with cases involving politicians, and when dealing with public and political pressure. The trial judge, Raja Azlan Shah FJ (at that time), while evaluating evidence tendered by the witnesses, states that a '...salutary principle to observe is the fact that this is not a court of morals, and I am not to allow any moral disapproval to colour my judgment on matters of fact.' The judge reminded the accused that morals were outside the purview of the law, while everyone is equal under the law; hence the court would treat everyone who appears before the court equally as the law is no respecter of persons, and this included politicians. The court did not relent to any pressure and firmly pronounced, 'I believe the extensive coverage of this hearing in the press has permeated all levels of our society. To me this hearing seems to re-affirm the vitality of the rule of law. But to many of us, this hearing also suggests a frightening decay in the integrity of some of our leaders.'

In another trial on forgery and criminal breach of trust where Harun was also involved, Abdoollcadeer J in reply to allegations that the trial was political stressed that he was 'an obedient servant of the law and of justice':

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41 Public Prosecutor v Datuk Harun bin Haji Idris & Anor [1977] 1 MLJ 180, presided by Eusoffe Abdoollcadeer J.
42 ibid. 40, 19 per Raja Azlan Shah FJ.
43 ibid. 32.

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It would also appear that in the course of this trial political undertones and overtones seem to have infiltrated but I must make it abundantly clear that I have only allowed such matter as is strictly and properly relevant to the case and particularly that for the defence. In determining this matter, I am not concerned with any of the political matters introduced in evidence except in so far as they are pertinent to or have bearing upon the case presented before me. I am of course in this trial moved by no considerations other than that of determining whether or not the evidence adduced and in law the charge preferred are strictly sustainable within the confines of the Penal Code.

The learned judge also reiterated that:

Let me as a postlude add this. The pre-eminence of the first accused at the material time which has been raised and relied on by the defence and the confidence and faith of the directors of the Bank in the ability, wisdom, guidance and leadership of the first accused and second accused can be no reason or excuse for them to transcend the law, for no one is above the law....that ours is a system of law which no expediency can wrap and no power can abuse with impunity.

The same voice was again echoed at the appeal application. Wan Sulaiman FCJ, reading the judgment of the FC stated that:

As to the allegation that this trial was a political trial, Abdul Aziz Salehuddin and others like him seem to be of the opinion that the party leaders who have strayed from the straight and narrow path should enjoy legal immunity, which if granted would be tantamount to an open invitation to our politicians to rob the rakyat and plunder the country rather than serve them. As to the Attorney General’s exercise of his discretion to charge these appellants, he would quite properly have lain himself open to a charge of gross failure of his public duty if he had known of these facts yet decided not to prosecute, since his duty under the constitution and the law is, regardless of the consequences to him personally and politically, to bring before the courts any person who has committed a serious breach of the law, and the most serious charge that may have been leveled against the Attorney General is that he prosecutes only members of the Opposition but at all costs protects members of his own political party.

All judges involved in the trial of Harun remained unmoved by the political claim, and successfully dealt only with the legal aspect of it.

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45 ibid, 216.
46 Datuk Haji Harun bin Haji Idris & Ors. v Public Prosecutor [1978] 1 MLJ 240, 252.
4.4. A.I Political Background of Datuk Harun's case

According to Means,\textsuperscript{47} who has written several books on Malaysian politics,\textsuperscript{48} Harun is 'the most outspoken critic' of Hussein Onn, the Prime Minister at that time. Means described Harun as a person with 'dynamic personality' and 'commanded the support of a large faction of UMNO members'. During the 1969 racial crisis, he showed courage and determination in defending Malay rights and privileges against anyone, who questioned that status and because of this, he is regarded as a Malay warrior. However, he fell prey to corruption and all began when he acted as the principal organiser of the World Heavyweight Boxing championship fight in Kuala Lumpur between Muhammad Ali and Joe Bugner in 1975. To bring the fight to Malaysia required enormous sums of money, and consequently, questionable financial transactions ensued which led to the collapse of Bank Rakyat. Investigations conducted by the Anti-Corruption Agency and the police revealed that various corrupt and irregular practices had taken place.

To avoid prosecution, Harun, after his removal as the Menteri Besar was offered a post as an ambassador to the United Nations. However, he was unwilling to accept the post and/or quietly exit from politics. Because of his unwillingness to accept the political compromise offered by the government, he had to face charges of corruption and criminal breach of trust. The first indictment had been filed before the death of Razak, the Prime Minister


\textsuperscript{48} His first books entitled \textit{Malaysian Politics}, was published in 1970 followed by \textit{Malaysian Politics: The Second Generation} (Singapore: OUP, 1991).
before Hussein Onn, but the actual trial commenced during Hussein Onn’s premiership, who was left with the problem of facing the political consequences of that action.

Following the criminal charges and the court proceedings, Harun retaliated in two forms. He pleaded not guilty to the charges and claimed trial; at the same time he used his position and influence in UMNO to show that his action was for the party interest. He received strong political back-up, because at the UMNO General Assembly in June 1975, he was elected as one of the UMNO Vice-Presidents even though at that time the corruption charges had already been laid. His supporters tried to bring in political reasons behind the prosecution and accused Razak and later Hussein Onn as having been influenced by the ‘Communists’. They formed the idea that these actions against Harun were motivated by fear of Harun’s ‘anti-Communist’ stand. However, this was not argued during the trial.

When Harun was found guilty of corruption and sentenced to two years’ imprisonment, his supporters pleaded for pardon or remission of sentence. Meanwhile, Hussein Onn moved to expel Harun from UMNO, without waiting for the result of Harun’s appeal to the Privy Council against his conviction on corruption. Harun’s supporters, known as the ‘UMNO Old Guard’ tried to lobby for his re-entry into UMNO during the 1977 UMNO General Assembly.

Harun lost his fight in the court of law when the Privy Council rejected his appeal in 1978. An appeal for pardon was submitted to the YdPA, but this too, was rejected. Despite these setbacks, Harun retained widespread
political Malay support that was revealed at the 1978 UMNO General Assembly sessions, when he was elected to the UMNO Supreme Council and his nephew, Suhaimi Kamarudin, was elected President of UMNO Youth. Despite receiving continued political support within UMNO, no pardon was arranged and Harun served his prison sentence until mid-1981.

The political elements in Harun's case are vague and do not leave any negative marks on the judiciary. There is no blatant accusation that a judge presiding in his case was biased or influenced by political considerations. Harun was granted a fair trial conducted in accordance with a fair trial procedure and the charges were genuine. Additionally, the trial did not cause a serious split within UMNO or rock the solidarity of the government.

These cases signify that Malaysian judiciary had, till then, already encountered cases with a political tone. In all instances, the judiciary managed to uphold the rule of law, and this was possible because the government did not try to influence the judges presiding in the case. The Public Prosecutor at the same time acted professionally. The trial not only delivered justice but justice was seen to be done by the public.

4.5 Anwar Ibrahim's Trials

When this chapter was written, the decision of Anwar's appeal to the FC on his sodomy conviction had just been delivered. The decision was
unanticipated: the FC with a majority of 2-1 overturned the HC decision and Anwar on 2 September 2004 became a free man. A few weeks later, the FC rejected the application to review the corruption conviction because the court had found that there was no merit to the court’s application.

It is the view of this thesis that the appropriate method of evaluation on Anwar and his associates’ trials should not be strictly legal but conducted in consideration with the economic and political circumstances surrounding the events. The discussion is divided into three parts, namely, the events preceding the prosecution and trial, during the trial, and after the trial.

4.5. A Events Prior to Prosecution

After surviving the economic recession in the 80s, Malaysia’s economy soared, and became part of what was described as the ‘Asian miracle’. Economic stability and prosperity helped to curb the widespread dissension in the country, although between 1988 and 1994 several political crises had taken place, such as the sacking of the Lord President and two Supreme Court judges, the removal of rulers’ immunity and increased used of ISA to arrest and detain opposition leaders. Public confidence in the government remained, with slight dissent which mostly came from non-Malays. When the economy plunged in 1997, the tribulations began.

49 [2004] 3 MLJ 405. Prior to his release, rumours had been going around that the FC would decide in favor of Anwar after a compromise between the newly appointed PM, Abdullah and Anwar was reached on Anwar political career. Both denied these rumors. Anwar and Abdullah. No Deal For Anwar’s Release, Says Abdullah. accessed 3 September 2004.

50 Dato' Seri Anwar Ibrahim v Public Prosecutor [2004] 3 MLJ 517.
In a development which is, hardly noticed by the ordinary people, the solidarity between Mahathir, the Prime Minister, and his deputy Anwar was in crisis. Two contributory factors led to the clashes between the two. First, both had different approaches to the economic solution suitable to the economic crisis, and second, Anwar’s popularity domestically and internationally had threatened Mahathir’s position in UMNO.

Mahathir preferred to use his own formula to solve the economic crisis and tried his best to avoid subscribing to the International Monetary Fund’s (IMF) suggestion. Anwar, who was also the Finance Minister, on the other hand favored the IMF approach. Mahathir argued that resorting to the IMF in solving the economic problems would amount to surrendering the sovereignty of the country to the western world. It would open the door for the west to meddle with the internal problems of the country and may start a new form of colonisation. The truth was that the IMF formula may have been liable to affect the business interests of his family and close friends, as the IMF required more transparency in business deals and conditions. Anwar was against the bail-out policy proposed by Mahathir, which mainly benefitted his family and close friends.

Anwar’s economic remedy approach showed that he was not prepared to protect Mahathir’s family and cronies after his premiership.

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51 An Epochal Struggle, December 2004. accessed 1
52 Nation on Trial, December 2004. accessed 1
However, when pressure from affected government companies mounted, Anwar had to agree to Mahathir’s approach. At the same time, Mahathir adopted some of Anwar’s suggestions in his plan of economic recovery. Mahathir’s rage accumulated because of Anwar’s knowledge of questionable business deals among UMNO members and their business allies. Sharing Mahathir’s feelings were fractions of UMNO members involved in questionable business deals. The economic crisis spread to become a political crisis.  

Apart from the economic crisis, both were also preparing for the 1998 UMNO General Assembly (UMNO GA), where rumors had spread that Anwar would contest Mahathir for the President’s seat. While Anwar was working to garner more influence within UMNO, a campaign was on-going to stop Anwar from becoming the next Prime Minister. His move in raising the issue of ‘corruption, cronyism and nepotism’ during the 1996 UMNO GA was perceived by his political rivals as an attack on Mahathir’s policy. Indirectly it sent a signal that he was preparing to contest the UMNO President seat, if, he managed to secure adequate nomination from UMNO branches. Realising this, Mahathir began to control the expansion of Anwar’s influence, and amended the UMNO constitution. The widely held view on this polemic is that Mahathir trapped Anwar by driving him to agree that

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54 For details on the economic crisis and how it turn into a political crisis see Hilley, John, *Malaysia, Mahathirism, Hegemony and New Opposition* (New York: Zedbook, 2001) in particular Chapter 2.
there should not be a contest for the President seat in 1998 UMNO General Assembly.

While Anwar was working to exert control and influence over UMNO, a campaign was on-going to topple Anwar from his position. There was talk that the partnership between Mahathir and Anwar was collapsing. Both vehemently denied the rumors, with Anwar narrowing his disagreement with Mahathir's economic policy and Mahathir, defending Anwar against allegations on his morality.

Accusations on Anwar's involvement in immoral activities emerged during the 1997 UMNO GA when a book entitled '50 Dalil Kenapa Anwar Tak boleh Jadi PM' [50 Reasons Why Anwar Cannot become PM, (afterwards 50 Dalil)] was distributed to the delegates. Together with the book, a poison letter entitled 'Talkin Untuk Anwar' (Requiem for Anwar) was also circulated. The Prime Minister in the 1997 UMNO GA addressed the danger of slander, and Mahathir called all delegates not to succumb to such practice. During the assembly, the fight between Anwar and his rivals became apparent despite the support Mahathir showed for Anwar.

Following the distribution of the book, Anwar made a police report to enable the police to investigate the case and at the same time, successfully got the HC to issue an injunction, to stop the circulation of the book.

55 Dr. Mahathir tells Delegates not to slander one another, nstp e-media 4 September 1997.
Zahid: reveals culprit identities, nstp e-media, 5 September 1997

56 Mazlan Nordin, Loyalty, Betrayal: Then and Now, nst e-media
However, this did not end the allegation. On receiving the report, the police began their investigations and a number of arrests was made. The outcomes of the investigations were unfavourable to Anwar, as evidence mounted showing Anwar’s involvement in immoral activities. The police successfully accumulated evidence against Anwar from the person arrested; however, the evidence had been gathered through extortion, it was thus suspect.

First arrested was S. Nallakarupan (hereafter called Nalla) on August 1998. Initially, the arrest was for assisting police investigations against Anwar. However, when the police searched his house looking for proof to implicate Anwar, they found pistols and three sets of bullets in the house. One set of bullets was without valid permit. In consequence, he was charged with unlawful possession of ammunitions under s.57 (1)(b) of ISA, which carries a mandatory death sentence. Following the discovery, Nalla was held incommunicado. His legal counsel was concerned that he might be coerced into giving evidence implicating Anwar in various offences.

Manjeet Singh Dillon (afterwards Manjeet), Nalla’s legal counsel, objected to his prosecution under ISA. Manjeet requested the Public Prosecutor to review the charge because it was inconsistent with precedent and the offence was not serious enough to justify prosecution under ISA.\(^{57}\) Nalla was tried from November 1998 with an adjournment in December. Then in January 1999 Nalla gave a cautioned statement to the police stating

that he had procured women for Anwar around 1997. It was doubtful that Nalla voluntarily gave the information, because the prosecutor, according to Manjeet, had offered to reduce the charge to one which would not carry the death penalty, if Nalla would give a statement to implicate Anwar with sexual offences.\(^5\)

On resumption of the trial in February 1999, the charge was amended to s.8 (a) of the Arms Act, which carries a maximum 7 years' sentence. This reinforced Manjeet's claim that plea-bargaining had taken place while the Nalla trial was going on. Eventually, Nalla pleaded guilty to the amended charge, and was sentenced to three and a half years' imprisonment. He appealed the sentence arguing that it was excessive, and in August 1999, the Court of Appeal ordered his release.

While Nalla was on trial, Anwar was sacked from the posts of Deputy Prime Minister and Minister of Finance on 2 September 1998, and expelled from UMNO the next day. Immediately after his dismissal, more arrests were made to assist police investigation on the book 50 Dalil.

Next in line was Munawar, who was arrested under ISA on 16 September 1998. He suffered severe physical and psychological pressure during detention to extract confession on sexual acts with Anwar. On 19 September he was convicted of 'unnatural offences' under s.377D of the Penal Code, after having pleaded guilty to having 'allowed himself to be sodomized'

by Anwar. He later appealed his conviction and sentence, claiming that his confession was unwilling. In a statutory declaration, he narrated the sufferings and the nature of torture he went through, such as aggressive and prolonged interrogation, threats of indefinite detention and degrading treatment including being stripped, and ordered to mimic homosexual acts.\(^{59}\) He later withdrew his appeal and disappeared.

Another of Anwar’s close acquaintances, Sukma Dermawan (afterwards Sukma),\(^{60}\) was arrested on 6 September 1998. Sukma too was initially arrested 'for investigation' under the Criminal Procedure Code (CPC). Like Munawar, severe psychological and physical harm was inflicted upon him during investigation. He complained that he was stripped naked in a cold room, humiliated, struck, and threatened with indefinite detention under the ISA. Due to the intolerable ill-treatment, Sukma on 17 September 1998 made a confession before a Magistrate who then issued a remand order of 14 days and throughout remained in police custody. Based on his confession he was charged in the Sessions Court under s.377D of the Penal Code, on the same day Munawar was charged.

Sukma pleaded guilty to the charge of allowing himself to be sodomized by Anwar and was sentenced to six months’ imprisonment. At the Sessions Court, there was a commotion regarding the counsel representing

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\(^{60}\) An Indonesian businessman with Malaysian citizenship, he was Anwar’s adopted brother and came to Malaysia in 1977.
Sukma at the hearing. After a short adjournment, he opted for the counsel offered to him by the police and not the counsel appointed by his family. He made an application for revision and to set aside the conviction and sentence. The application was supported by an affidavit illustrating the nature of the threats forcing him to plead guilty. The HC however ruled that there was no miscarriage of justice. According to the HC, Sukma was not barred from arguing in the Sessions Court that when he pleaded guilty, he was doing so under duress or in fear. Abdul Wahab J pronounced,

How much credence can be given to this? The trial is not a closed door trial. There is no such thing in this country. The trial is in public. The trial is open to public scrutiny. These days the public scrutiny is not limited to those who find seats in the courtroom, but even those outside the courtroom, the city, and the country. To my mind, provided there is accurate reporting, this is the best guarantee to every individual. In addition there are the avenues of appeal and revision. In other words, the proceedings are subject to scrutiny by appellate courts, whose proceedings are also in public. Any action that is improper or wrong is immediately apparent and soon reported. One word [therefore] of protest by the applicant in that court, would be heard not just by the judge but also by everyone in the court and soon, everyone outside the court. …Mere appearances of propriety pale[s] in importance since his actions and decisions will speak louder than appearance. Very little credence can therefore be given to excuse[s] given for not telling the court that he did not intend to plead guilty. Indeed once charged he would be in prison custody, and out of the clutches of those he professes to fear.

The learned judge overlooked the fact that fear is not caused by physical torture only. It is not visible when torture has taken place mentally. Usually, the victim may come forward to complain after they have overcome their fear.

Sukma faced two additional charges following his confession. One, for abetting Anwar in commission of carnal intercourse against the order of nature with Azizan, and two, for voluntarily committing carnal intercourse.

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62 ibid, 26-27.
against the order of nature with Azizan. Both offences were punishable under s.377B of the Penal Code. He was jointly tried with Anwar who was charged with an offence punishable under s.377B of the Penal Code.

The trial of these three persons took place prior to any charges being officially made against Anwar. However, lucid illustration of Anwar's sexual activities had been available to the public when the media, mostly owned by the government, reported every development of police investigations on Anwar. Every affidavit filed in the court in support of the allegations against him was made public. When Nalla's case commenced, Musa Hassan, a police officer from the Criminal Investigation Department, filed an affidavit against Nalla. The New Straits Times widely covered the affidavit. The second affidavit filed by the Attorney-General Mohtar Abdullah also received the same wide publicity. Despite objections from the Bar Council on the manner in which the media reported the issue, news on Anwar's sexual activities continued to receive wide coverage. The publicity amounted to trial by media and was in breach of the rules of natural justice and fair play.

The trial and conviction of Munawar and Sukma at the Sessions Court was also irregular. The CPC allows several accused persons who committed the same offence, or several offences of the same kind or different offences, in the same transaction; then all the accused persons can be charged with committing all the offence at the same trial.63 The rationale of the rule is

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63 s.170 CPC Act 593 (Revised 1999), Jayaraman & Ors v Public Prosecutor [1979] 2 MLJ 88.
that if the trial involved same witness, the court may save time and expense, and expedite the trial. Failure to do so may cause injustice.64

The effect of the separate trials was unfavourable to Anwar. Besides providing the preliminary suggestion that he was involved in immoral activities, the trial sought to present an image of Anwar as promiscuous. This was presented as incongruous to a future Prime Minister, or the people’s representative. To challenge the verity of suggestions disclosed in the court proceedings and trial by the media, Anwar started to launch a public rally, the only avenue available to him. The gatherings attracted huge crowds consisting of his supporters and curious citizens. His efforts stopped when he was arrested under ISA.

Like other ISA detainees, Anwar was held incommunicado and denied legal counsel or any visit from his family. What transpired while he was in police custody was shocking. When he appeared in the Sessions Court on September 29 to hear the charges against him, he was injured. Anwar verified he had been assaulted and denied medical attention. The government, due to political pressure, set up a Royal Commission to investigate the injury. The Commission, after lengthy inquiry, found that the Inspector General of Police, Tan Sri Rahim Noor, had assaulted Anwar. Prior

64 Public Prosecutor v Ridzuan Kok bin Abdullah [1995] 2 MLJ 745.
to the investigation, Rahim Noor offered his resignation to demonstrate that he took responsibility for the affair.\footnote{Following the decision of the Commission, he was charged in Sessions Court for assault. When convicted, he appealed to the High Court against the sentence because it was excessive. The High Court allowed his appeal, maintaining the jail sentence and setting aside a fine. \textit{Tan Sri Rahim Noor v Pendakwa Raya} [2001] MLJ 193. The Public Prosecutor appealed to the Court of Appeal and reinstated the Sessions Court's sentence. \textit{Tan Sri Abdul Rahim bin Moh. Noor v Public Prosecutor} [2001] 3 MLJ 1. 
\textit{Dato' Seri Anwar bin Ibrahim v Prime Minister of Malaysia & Anor.} [1999] 5 MLJ 193. 
\textit{Dato' Seri Anwar bin Ibrahim v Dato' Seri Dr. Mahathir bin Mohamed} [1999] 4 MLJ 58 (HC); [2001] 1 MLJ 305 (CA); [2001] 2 MLJ 65 (FC). 
\textit{n 65, 198. For critics on this case see Bari, Abdul Aziz, 'Dato' Seri Anwar Ibrahim v Dato' Seri Dr. Mahathir Mohamad: The Constitutional Dimension' [1999] 4 MLJ cxc. See also Bari, Abdul Aziz, Cabinet Principles in Malaysia (Kuala Lumpur: The Other Press, 2002) Chapter 6.}

4.5. B The Trial Begins

More astounding and startling events and stories surfaced during Anwar’s corruption and sodomy trials, generating distrust of the genuineness of the prosecution and impartiality of the trial. Besides defending himself against the criminal charges, Anwar filed two civil suits against Mahathir; challenging the constitutionality of his removal\footnote{Dato' Seri Anwar bin Ibrahim v Dato' Seri Dr. Mahathir bin Mohamed} and a defamation suit over a public statement made by Mahathir on Anwar’s licentiousness.\footnote{Dato' Seri Anwar bin Ibrahim v Dato' Seri Dr. Mahathir bin Mohamed} Both civil suits failed. In fact, the merit of the application to ascertain the constitutionality of Anwar removal was not examined because the HC refused to allow the application on the ground that the plaintiff's case 'discloses no reasonable cause of action and is obviously unsustainable.'\footnote{The defamation suit had an adverse outcome on Anwar. He claimed that the PM, defamed him when the PM falsely and maliciously spoke and exposed to a crowd of journalists from both the national and the international media of, and concerning the plaintiff and accused the plaintiff of

The defamation suit had an adverse outcome on Anwar. He claimed that the PM, defamed him when the PM falsely and maliciously spoke and exposed to a crowd of journalists from both the national and the international media of, and concerning the plaintiff and accused the plaintiff of
homosexuality. The PM applied to strike out the suit, arguing that the suit was frivolous and vexatious, and an abuse of the process of the court.

The PM contended that his statement was true, made based on established facts presented during the trials of Munawar and Sukma, who had been convicted based on their confession. Additionally, the statements had become public knowledge at the time when uttered. The HC agreed upon this. The court also valued the defendant's words as made in bona fide and relevant, expressed with a view to repelling the charges made by the plaintiff. The PM's words were therefore spoken on an occasion of qualified privilege. The PM also spoke the words with a mind devoid of malice. Interestingly, the HC acknowledged the PM to have a duty to defend the government from legal suits instituted with a bad motive. According to R K Nathan J,

It is important that the primus inter pares of the country and his cabinet colleagues be protected from such frivolous, vexatious and abusive suits. Otherwise rather than running the country towards achieving peace and prosperity for its citizens, the officials of the government will forever be looking over their shoulders for fear of being dragged to court with an unwanted, but well -heralded suit. Whilst admittedly no one is above the law, yet the Court must be ever vigilant, never indolent, ever watchful, never fearful of its duty to check on the conspiratorial machinations of parties or persons motivated with the express desire of dragging top officials who run the country, to court, with intent to cause nothing more than embarrassment to such officials.

These two civil suits contain elements of political trial discussed in the earlier part of this chapter. Anwar, claiming himself as the victim of political grudge, seeks civil remedies which may clear his image. However, the court relied on the decision against Sukma in the sodomy trial, which implicated Anwar's guilt and denied Anwar from getting any civil relief. The

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69 n 65, 72.
70 ibid.
court failed to adjudicate the dispute afresh, free from the surrounding events that associated Anwar with the criminal offence. Unavoidably, the High Court judgments in the civil suits stamped the truth of the allegations although Anwar had not yet been tried or convicted for the criminal offences he allegedly had committed. Despite, the trials of his affiliates had indirectly put him under trial too and their convictions imputed Anwar's guilt, thus denying him from alternative relief.

4.5. C Events during Anwar's Corruption Trial

Anwar was supposed to be tried in the Sessions Court, but his case was transferred to the High Court. He appeared before the High Court on 5 October 1998 and was charged with five accounts of sodomy under s377 of the Penal Code and five accounts of corrupt practice under s 2(1) of the Emergency (Essential Powers) Ordinance No 2 1970. He pleaded not guilty, and claimed trial to all charges. Upon the prosecution's application, the four charges on corruption were tried together. In the same proceeding, Anwar's defense counsel made an oral application for bail but to no avail. The trial for the four corruption charges took place first, and for sodomy, it was later. Arguably, the trials should be joined, because they involved the same witnesses, the evidence was overlapping and the offences were committed in the same transaction.

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71 [1998] 4 MLJ 481.
72 see n 61 and n 62.
When the Prosecution opened their case on 2 September 1998, the defense counsel raised a preliminary objection on the use of Emergency (Essential) Powers Ordinance No. 22 of 1970 to prosecute Anwar. The grounds of objection were, firstly, that Dewan Rakyat had passed a resolution to annul the ordinance with retrospective effect from 8 January 1998. Secondly, as Dewan Rakyat had taken this resolution it would be 'invidious and oppressive' to subject Anwar to prosecution under the Ordinance and finally, Article 159, which had a saving provision, could not sustain offences under the 1970 Ordinance upon annulment, as was the case with s.30 of Interpretation Act 1970. The preliminary objection was rejected.

The kernel of the defense argument was police conspiracy. The defense team asserted that the evidence tendered was directed to show the changes in the manner in which the police force and Special Branch (SB) had handled the investigation on the sexual allegation. Several times the defense team managed to show inconsistency in the prosecution witness's evidence. For example, the Director of the SB, Said caused a stir in the court when he admitted that he might lie under oath if he was instructed to do so by someone higher than the DPM, which included the police chief and the PM.

At the same time, the statement of the police officers in court pointed to the sudden change in the police position in dealing with the sexual allegations.

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74 Public Prosecutor v Dato' Seri Anwar Ibrahim (No 2) [1999] 2 MLJ 249.
75 *n 73 above, 79-78.*
against Anwar. In their first investigation of a letter written by Ummi, Said reported to Mahathir that the allegation was unsubstantiated and someone had been pestering Ummi and Azizan to fabricate stories about Anwar.

In 1997, Police Chief Rahim Noor made a media statement stating that police investigations of the two letters alleging sexual scandals involving Anwar found that the claim was untrue and considered the case as solved. Mahathir also informed the media in 1997 that the accusations of a sex scandal involving Anwar were slanderous and the work of a group of people who wanted to prevent Anwar from succeeding him. However, after Anwar’s dismissal, the police suddenly came out with evidence on Anwar’s sexual activities and Mahathir at the same time stated that he now believed the allegations, even though they were unpalatable. This evidence, although inadmissible, cast doubt on the professionalism of the police force in conducting the investigation, raising an inference that the evidence had been fabricated. The effort to prove police conspiracy became complex when the trial judge repeatedly ruled the question on police conspiracy as irrelevant.

A major setback to Anwar’s defense took place when the prosecution at the end of their case amended the charges. Throughout they had adduced evidence directed at proving Anwar had committed sexual misconduct and sodomy. His reputation suffered when Azizan tendered his

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76 Ummi, is the sister of Anwar’s private secretary who wrote a letter to Mahathir accusing Anwar of both heterosexual and homosexual affairs. She is one of the key witnesses in Anwar sodomy trial.
77 ibid, 82-88.
78 ibid, 182.
statement, because of wide media coverage. The most alarming incident in Azizan’s testimony was when the prosecution brought into the court a mattress allegedly stained with semen in order to prove Anwar’s ‘ravenous sexual appetite’. DNA tests revealed the origins of the genital fluids as Anwar’s and his private secretary’s wife, plus another male’s and two other females’. The defense counsel strongly challenged the evidence by disputing the accuracy of the test and discrediting the chemist’s report. The defense counsel also put to the court the possibility of Anwar’s semen being extracted from him while he was unconscious after having been beaten in police custody and then planted on the mattress. The same might have happened to his partner. The chemist, as an expert witness, also cautioned the court on the inconclusiveness of the DNA test. The police officer, who had seized the mattress from Tivoli Villa testified that he did not know whether the mattress had been tampered with, but agreed that there was a possibility that it could have happened.

After Azizan testified, Ummi came in to give her evidence. The essence of Ummi’s evidence was on the process she had to undergo to get her statement retracted and the reason that she wrote to Mahathir regarding Anwar’s behavior. At the same time, her statement also contained a narration of Anwar’s immoral activities. The defense counsel’s attempt to dispute Ummi’s real intention failed when the trial judge refused to allow the playing of a recorded tape conversation between Ummi, a Malaysian politician and a businessperson.
After the dramatic illustration of Anwar’s sex activities in court, the prosecution, on the 45th day of Anwar’s trial and before closing their case, applied to the court to amend the corruption charges against Anwar. After the amendment, the truth of his sexual misconduct and sodomy was no longer the issue, causing the evidence tendered that related to ‘the truth or falsity of the allegations referred to in the charges [to be no longer] relevant.’ Paul J expunged all evidence adduced to prove that the acts had taken place and were true. According to Paul J, the amended charges only referred to directions given by Anwar to Said and Amir Junus to obtain statements from Ummi and Azizan to deny allegations of sexual misconduct and sodomy made against him and advantages he would get. This required expunction of the evidence from the record. At the same time, Paul J. ruled that the retention of the evidence adduced by the prosecution to show the truth of the allegation was highly prejudicial to the accused. He said:

Firstly, when the accused is called upon to answer a charge he is entitled to have meet only relevant and admissible evidence. Secondly, the existence of such evidence on the record to show the allegations could be true may tend to suggest the inference that the accused wanted them to be retracted. In order to ensure that this does not have a prejudicial effect in the mind of the person hearing the case it must be disregarded. It was for that purpose that I had to take a drastic step to guarantee that my mind is not moved in any manner whatsoever to the detriment of the accused. A High Court has inherent power to make any order for the purpose of securing the ends of justice. This extends to expunction or ordering expunction of irrelevant evidence.

Paul J. in this ruling was concerned that the prosecution evidence adduced prior to the amendment of charges might sway him from assessing the legal question. Anwar’s interest was not the reason for the issuance of the

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79 ibid, 32.  
80 ibid, 33.
ruling. While this might have secured the ends of justice, was justice seen to be done to Anwar?

When the HC allowed the evidence on sexual misconduct, which later became irrelevant, the court indirectly conspired to damage Anwar's reputation. Both the prosecution and the court together 'set out to weave a tale of alleged sexual misconduct over several years.' The evidence worked to crush Anwar's reputation.

The prosecution benefited from the amendment of the charges. They could now concentrate on how Anwar had used his position to influence the police to halt the investigation into the allegations against him. On the other hand, the defense counsel was caught by surprise and had no time to review the best strategy for defending Anwar against the new charges. They continued to rely on the 'political/police conspiracy' argument.

With the charges amended, any evidence directed at proving the truth or falsity of the allegations had become irrelevant and the judge ordered such evidence expunged from the record in order not to prejudice the accused. This came too late; the accused's character had already been assassinated. Undoubtedly, the judge has the power to allow the amendment of charges and expunction of evidence but it has to be exercised carefully and diligently to show that 'justice is not only done but seen to be done.'

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The defense team was also subject to intimidation in the form of threats of contempt of court. Indeed, one of the defence team members, Zainur, was cited for contempt for trying to undermine the integrity or authority of the court and to interfere with the administration of justice. The contempt proceedings originated from Anwar’s application to disqualify the prosecutors, Abdul Gani Patail and Azahar Mohamed, for unethical conduct, namely, requesting Nalla to fabricate evidence against Anwar.82 Zainur moved the application, which Paul J took as baseless and Zainur was convicted and sentenced to three months’ imprisonment.83 He failed to set aside Paul J’s decision at the Court of Appeal.84 However, he was successful on appeal to the FC.85 The FC, adjudicating on appeal for Zainur’s contempt conviction, threw light on the unfairness of the trial against Anwar.86

Besides Zainur, Raja Aziz Addruse and Christopher Fernando were also repeatedly reminded by the judge that they would be cited for contempt if they continuously ‘jump[ed] the gun’. Throughout the trial, the defense counsel viewed Paul J’s conduct as impartial when he was on several occasions involved in a row with the defence counsel and Anwar.87

82see Public Prosecutor v. Dato’ Seri Anwar Ibrahim (No.4) [1999] 5 MLJ 545. The application was set aside because the motion as the court found it was contemptuous. Augustine Paul. J; ‘When there is an abuse of the process of the court, that is to say a proceeding which is frivolous, vexatious or oppressive, the court may strike out the pleading or stay the proceeding under its inherent jurisdiction.’
84 Zainur Zakaria v Public Prosecutor [2000] 4 MLJ 134.
85 Zainur Zakaria v Public Prosecutor [2001] 3 CLJ 673.
86 ibid see Steve Shim CJ (Sabah and Sarawak) judgment p. 690-69, and Abdul Malek FCJ’s judgment, 716-717.
Occasionally strong remarks were exchanged between the judge and the defense counsel. Christopher Fernando, one of Anwar's defense counsels, was astounded by the remarks made by the judge against him and consequently filed an application to cite Paul for contempt.88

The defence counsel also complained of impediments in establishing its case when the court continuously interrupted their questions during cross-examination and repeatedly ruled their questions as irrelevant.89 Furthermore, the defence application to have the PM give evidence was initially refused by the HC. At the same time, according to the judge, the prosecution's failure to call the PM as a witness was not fatal to the prosecution case.90 Surprisingly, later the judge implied that the defence had failed by not calling the Prime Minister as a witness.

Realizing that he was going to lose the legal battle, Anwar, claiming that he was losing faith in the impartiality of the trial, began to politicise the trial. His behaviour in the court annoyed the judge and the prosecution. While this was regretful, the inequitable trial provoked his unbecoming conduct. He used the time in court to retaliate against the attacks against him made outside the courtroom, to which after his arrest he would not have had the opportunity to reply.

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88 There was no outcome on the application. On this point, the High Court decided that the Attorney General would represent Paul J against the action. *Public Prosecutor v Dato’ Seri Anwar Ibrahim* [2002] 2 MLJ 730.
90 n 73 above, 72.
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Total dissatisfactions with the conduct of the trial formed the grounds of Anwar's appeal to the Court of Appeal, and when it was turned, the Federal Court had to deal with the issue. Both the Court of Appeal and Federal Court shared the same opinion on almost all the issues challenged. Both higher courts upheld the High Court decision, finding that there was no miscarriage of justice, and that the judge had exercised his discretion according to the legal provision.

4.5. D Subjects of Appeal

The issues argued at both Court of Appeal and Federal Court were:

a. The charges under s.2(1) of the Emergency (Essential Powers) Ordinance No. 22 of 1970 was an abuse of process, because the government had expressed its intention to have it annulled and Anwar had legitimate expectation that the Ordinance would be annulled;
b. The judge had erred in allowing the prosecution to amend the charge;
c. It was improper for the judge to expunge all evidence relating to the truth or otherwise of the allegations of sexual misconduct and sodomy;
d. The trial judge erred in assessing the credibility of witness;
e. Frequent interruptions by the learned judge;
f. Threats of contempt and contempt against the defense counsel acting on behalf of the appellant showed a tendency towards the prosecution.
The last three were grouped together under the heading of miscarriage of justice.

4.5. D.I On Abuse of Process

The Court of Appeal,91 as agreed upon by the Federal Court,92 did not regard an abuse of process the prosecution’s decision to charge Anwar under the 1970 Ordinance. The courts relied on Article 145(3) of the Federal Constitution, which granted the Attorney General absolute discretion in deciding suitable charges under any law he deemed fit, as long as the law remained in force. Both courts opined that because Dewan Negara had not passed the resolution to annul the ordinance, it was a valid law, and remained in force. The Federal Court further added that Article 159 Clause 8(b) may be argued as ‘closing the doors of the court’ and is therefore harsh and unjust. However, the Federal Court opined that the answer to the argument lay with the legislature, not the court, and they had their remedy at the ballot box. In sum because the law was still in force, the question of abuse of process did not arise.

4.5.D.II Amendment to the Charge

Haidar FCJ referred to the opening address of the prosecution in

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91 *Dato’ Seri Anwar Ibrahim v Public Prosecutor* [2000] 2 MLJ 486. The judges were Lamin PCA, Ahmad Fairuz, Mohtar Sidin JCA.
92 *Dato’ Seri Anwar Ibrahim v Public Prosecutor* [2002] 3 MLJ 193. The judges were D Zaiddin CJ, Steve Shim CJ (SS), Haidar FCJ.
order to justify that the learned judge had exercised his discretion correctly when ordering the amendment of the charge. According to Haidar FCJ, 'The prosecution should to a certain extent be faulted for framing the original charges not in accordance with what it intended to prove as stated in its opening address.' However, there was no substantial miscarriage of justice because the learned judge only ordered the amendment of the charges after hearing from counsels for both parties.

The justification used by the FC was unpersuasive and showed the trial judge as incompetent in managing the trial. He should have been alert to the prosecution's strategies and should not in the first place have allowed the prosecution to produce irrelevant evidence, pointing towards the commission of 'unnatural sexual activities.' The judge was supposed to have control over the proceedings. He could have ordered the Public Prosecutor (PP) to amend the charge after the opening statement, or shortly after the PP had adduced their evidence, ruled the evidence as irrelevant and advised the PP to amend the charge. The learned judge does not have to wait until the end of the prosecution case to order for amendment of charges. Does this imply that the PP with the sanction of the judge should allow the production of irrelevant evidence during the prosecution case to hurt Anwar's reputation? This implicated the judge's credibility, as he himself could not be sure where the

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93 ibid, 210.
94 Amendment of charge may take place at any stage of the trial and can be made either on the application by the prosecution or on court initiative. Prosecution however cannot amend the charge as a matter of right but needs to seek the leave of the court. The power to alter or amend therefore resides in the court, not the prosecution.
evidence would lead him in making his decision. The remarks of the defense counsel that the prosecution and judge were 'going fishing' were deemed to be correct and had caused the defence counsel to lose faith on the judge's impartiality.

When the prosecution's opening address was relied upon to justify the correctness of the learned trial judge decision, the role of charge sheet as an official document to inform the accused on the charge against him/her was taken over by the opening address. This reduced the time the accused may have had to prepare their defence. They would have to wait until the prosecution began their case before preparing their defense. This was unfair to the defendant.

4.5. D.III Expunction of Evidence

In agreement with the Court of Appeal, Haidar FCJ opined that the High Court had the inherent power to expunge prejudicial evidence in order to prevent the prejudicial effect on the defence case and to secure justice. Failure to expunge the evidence, according to him, would have become the grounds for appeal and probably the conviction would be quashed. It appears that even if the evidence had remained on record and the charge was not amended, Anwar could still have been convicted if the prosecution had succeeded in proving that the offence was committed. Therefore, expunction of evidence was not to protect the accused but to enable the prosecution to secure a conviction without having to prove the commission of the offence.
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4.5. IV Miscarriage of Justice

The defence counsel's complaint against the trial judge's behaviour caused a miscarriage of justice. The behaviour complained about were: (i) frequent interruptions by the learned judge; and (ii) threats of contempt and contempt against Zainur, a counsel for the appellant, as evidence of a marked tendency towards the prosecution and the judge's subjectivity. These complaints indicated a lack of objectivity on the part of the trial judge. However, according to Haidar FCJ, none of these complaints on the judge's behaviour has resulted in a 'substantial miscarriage of justice.'

Haidar FCJ ruled that Justice Abdul Malek's statement criticizing Paul J as leaning towards the prosecution during Zainur's contempt proceeding is only applicable to the contempt proceedings and not to the corruption proceeding. Paul J, according to Haidar FCJ, had considered the appellant's case at length judiciously and stated,

The learned judge...was concerned more about the issue of relevancy and admissibility.... In the course of the trial there would be occasions where he would need to enforce his ruling. In this case, in view of the publicity generated in the trial, not only nationally but internationally, there is more reason for the learned judge to be extremely cautious or perhaps he was being overzealous as things appeared to get a bit out of hand.95

As argued before, Paul J may have overcome such a situation if he, from the beginning of the trial, had asserted his power to control the evidence adduced and clearly outlined, which evidence was to be expunged. Personal conscience of the publicity received by a case should not be the ground for

95 Dato' Seri Anwar bin Ibrahim v Public Prosecutor [2003] 3 MLJ 193, 223.
frequent interruption. Such conduct could hamper justice from being delivered to the accused. Furthermore, a judge should be capable of enduring challenges during proceedings and have full control of a trial. External pressure is not an excuse for him to act imprudently: he should act conscientiously.

The trial judge tried his best to portray that the trial was being conducted within the law according to procedure. He managed to do so, but he let justice die when he denied the defense counsel reasonable opportunity to adduce evidence to support their defense and thwarted the course of justice by his ruling allowing amendment of charges and expunction of evidence.

In this case, although the defense team failed to persuade Paul J to accept the defence of political/police conspiracy, they succeeded in winning public sympathy. Representing Anwar as helpless and victimised, they achieved political mileage by creating dissatisfaction among the public against the government and exposed the misdeeds of the government agencies. The government’s intention that the case would lend legality to their action in sacking Anwar was unsuccessful. In this trial, the Malaysian public was waiting for ‘incontrovertible proof’ of Anwar’s immorality and nothing could be more important than the truth and falsity of the allegations of sodomy. Although the prosecution and the court managed to pour evidence and statements of Anwar’s immorality, the truth was doubtful because the evidence and statement had been extracted unjustly.
Six years afterwards, on 15 September 2004 the Federal Court concluded Anwar’s fight to clear his name from the corruption conviction.\textsuperscript{96} Anwar applied for the review of the High Court, Court of Appeal and Federal Court decisions.\textsuperscript{97} Abdul Malek PCA, ruled that the FC had the jurisdiction to hear the application under r.137 of the Rule of the Federal Court when it was necessary to prevent injustice and abuse of the process of court. However, the FC declined to exercise its power; Alauddin FJ ruled that what Anwar’s claimed as new evidence had already been considered by the Federal Court. Anwar therefore lost his final appeal.

\begin{itemize}
\item[97] The grounds of the application for review are there exists new evidence which was not available during the trial and:
\begin{enumerate}
\item The Federal Court’s decision handed down on 10\textsuperscript{th} July 2002 is in infringement of the provisions of section 94(2) of the Courts of Judicature Act, 1964 [Act 91] (Revised 1972);
\item The Federal Court was wrong in not directing its mind to the fact that the Mahkamah Rayuan did not have the opportunity of considering the remarks directed by the Federal Court in Zainur Zakaria v Public Prosecutor [2001] 3 M.L.J 604 against the learned trial judge Augustine Paul J and their effect on the trial subsequently thereby depriving the appellant an opportunity for that court to rule on the vital consideration as to the learned trial judges’ suitability to have continued with the trial to its conclusion;
\item The Federal Court was wrong in not directing its mind to the fact that the remarks passed by the Federal Court in Zainur Zakaria’s appeal amounted in substance to ruling that the learned trial judge had infringed the provision of rule 3(1)(d) of the Judges’ Code of conduct 1994 which states, ‘A Judge shall not conduct himself dishonestly or in such manner as to bring the Judiciary into disrepute or to bring discredit thereto’ and had thereby disqualified himself from conduct of the appellant’s trial;
\item The Federal Court was wrong in considering the remarks passed against the learned trial judge in Zainur Zakaria’s appeal in isolation when the proceedings to commit Zainur Zakaria for contempt of court were irrevocably linked to the appellant’s trial which became hopelessly contaminated by the role played by the learned trial judge in those proceedings, particularly when considered in the light of the learned trial judge’s belligerent stance, convicting and sentencing Zainur Zakaria to three month’s imprisonment, an attempt to cite the entire defence team for contempt of court and general bias against the defence; and
\item The Federal Court was wrong in not considering the appellant’s trial was so fatally flawed by the bias shown by the learned trial judge which was so serious that the proviso to section 92 of the Courts of Judicature Act 1964 could not under the circumstances be invoked.
\end{enumerate}
\end{itemize}
4.6 Trial of Sodomy

The trial began on June 1999 and the trial was for one out of four other sodomy charges Anwar faced. The other four charges were dropped when Ainum Said replaced Mohtar as the AG. The second trial as described by a political analyst 'was as troubled if not more bizarre than the first trial.' The AG led the prosecution team, while the same defence team, as in his corruption case, represented Anwar. Sukma was charged together with Anwar and was jointly tried in the High Court. The charge against Sukma was 'committing sodomy and assisting Anwar to sodomise Azizan.' Azizan was not charged but became the key witness in the trial.

From the beginning of the trial, the case was 'flawed' because several indiscretions transpired during the trial: repeated amendments to the charges had paved the way. Anwar was originally charged with committing sodomy 'on one night in the month of May 1994 ...at Tivolli Villa.' Sukma was also charged on the same terms. The first amendment to the charge was on 27 April 1999 in respect of the date the offence was committed: from May 1994 to May 1995. On 7 June 1999 at the commencement of the trial the charge was once again amended. The amended date was between January to March 1993. Because Sukma was indicted and tried jointly, the charge against him was also amended. Both pleaded not guilty and claimed trial.

100 He was convicted in the Session Court for the offence of allowing Anwar to sodomise him.
Prior to the amendment of the charge, Sukma’s counsel filed a notice of alibi as a defence to the accusation. When the charge was amended, they applied to the court to file a new notice of alibi. Nevertheless, the trial judge opined that the first notice of alibi was adequate and remained effective.\textsuperscript{101}

The defence counsel also protested against Ariffin J hearing the case. According to the defence counsel, there ‘exists a real danger or reasonable apprehension or suspicion’ that the judge may be biased, because prior to the appointment and elevation of Arifin as a High Court judge, he was a shareholder and director of a company where the Prime Minister’s son, Mirzan Mahathir, was also a shareholder and director. Arifin J treated the application as baseless and intended to embarrass him and to delay the proceedings.\textsuperscript{102}

Political analysts observed that Arifin J handled the trial strictly and fairly. Both the defense counsel and prosecution were treated even-handedly.\textsuperscript{103} He was composed when an application to recuse him from hearing the case was forwarded. At the same time he viewed conscientiously the applications to cite various individuals for contempt from both parties. To avoid more chaos, he issued a gag order to all parties to stop public statements on the case.

\textsuperscript{101} [2001] 3 MLJ 193, 216.
\textsuperscript{102} ibid, 245.
\textsuperscript{103} Being Judge Arifin, accessed 1 December 2004.
Unlike Paul J, Arifin J restrained from overruling as irrelevant evidence in support of political conspiracy and fabrication of evidence. Several prominent Ministers and Deputy Ministers were implicated. The evidence given by Raja Kamarudin Wahid, one of the defence witnesses, revealed a pact by Abdul Aziz Shamsuddin, who was then Mahathir’s political secretary, to destroy Anwar’s reputation so he could never become Prime Minister. According to the witness, Abdul Aziz told him he was paying Azizan and Ummi to make up stories about Anwar. This arrangement was within the PM’s knowledge.\textsuperscript{104} Arifin J at the same time cautioned the defence counsel,

...conspiracy to topple Dato’ Seri Anwar from his government and party posts are not relevant to the issue before the court. Political rivalry and toppling one another is common amongst politicians and is a norm in their daily activities...at the same time...a conspiracy to fabricate evidence against Dato’ Seri Anwar as far as the sodomy charge is concerned is undeniably relevant and the defence should therefore adduce evidence within that perimeter.\textsuperscript{105}

However, when Arifin J rejected the defence counsel’s application to subpoena the PM to give evidence in court, he closed the accused’s opportunity to prove that there was political conspiracy in his prosecution. On appeal, the Court of Appeal agreed with the High Court that the PM need not appear in court.\textsuperscript{106}

Arifin J, before passing the verdict, allowed the defence application to review the court ruling regarding Azizan’s testimony because certain

\textsuperscript{104} n 97 above, 288-294 and n 80 above, 171.
\textsuperscript{105} n 97 above, 288.
\textsuperscript{106} Param Cumaraswamy pointed out that this ruling set a bad precedent as in future people may refuse to come to court to testify on grounds that what is going to be asked is irrelevant. At the same time he said that neither the defence nor the prosecution has the duty to disclose what they are going to ask the witness.
evidence adduced against Azizan’s credibility had required further consideration. This last opportunity commended Arifin J’s fairness in conducting the trial. However, dissatisfaction ensued when he ruled that Mahathir’s evidence was irrelevant for this trial. Furthermore, according to Arifin J, ‘to call Dr. Mahathir to give evidence on this fact is to my mind tantamount to having a confrontation with your own witness which may lead to indecent questions or questions intended to insult or annoy[ing to] be asked.’

During the trial, Karpal Singh, Sukma’s defence counsel on 10 September, told the court that Anwar had been poisoned. According to Karpal Singh, samples of Anwar’s urine sent to the pathology laboratory in Melbourne showed a dangerous level of arsenic. Arifin J immediately sent Anwar for medical examination. After thorough tests in Malaysia and overseas, the results showed no clinical signs of acute or chronic arsenic poisoning in Anwar’s urine. Since the allegation was fallacious, Karpal Singh was then charged for sedition for his statement in court stating that ‘It could well be that someone out there wants to get rid of him. It would be a shame if the conspiracy we have been referring to should include murder’ and further said that he suspected that some people in high places were ‘in all likelihood

\[\text{References:}\]

107 n 97 above, 304.
responsible for the situation.’ The Attorney General at a later stage withdrew the charge.\textsuperscript{110} Anwar’s righteousness was however bruised by this event.

In this case, Ariffin J tried to confine the trial to legal arguments with restricted opportunity of political argument to support the defence’s argument of conspiracy to fabricate evidence. The political arguments were evaluated according to the rule of evidence. However, political arguments forwarded in this case did not receive legal recognition. Ariffin J, in his judgment regarded Anwar’s contention of political conspiracy as irrelevant. The judge opined that the purpose of Anwar’s allegation on political conspiracy was to tarnish the image of his former Cabinet colleagues in the eye of the public.

Finally, both were convicted. Anwar was sentenced to six years imprisonment to run consecutively with his corruption sentence, while Sukma, was sentence to six years of imprisonment and two strokes of whipping for the first and second charge.

Anwar and Sukma exhausted their right to appeal. After the Court of Appeal dismissed their appeal, the case at last reached the FC. In the beginning, Anwar sought to have two judges disqualified from hearing the appeal. He claimed that Justice Abdul Hamid Mohamad was biased and that Justice Tengku Baharudin Shah Tengku Mahmud lacked experience.\textsuperscript{111}

\textsuperscript{110} In addition to the sedition charge, Karpal Singh was also cited for contempt of court. However, he was spared when Paul J, despite the serious nature of the allegations, found him not guilty but referred the conduct complained of to the Disciplinary Board of the Malaysian Bar for further action. \textit{Public Prosecutor v Karpal Singh} [2002] 2 AMR 2421.

\textsuperscript{111} The Star, Tuesday 11 May 2004 Anwar’s bid to remove judges fails accessed 12 May 2004.
Contrary to his claim, these two judges decided in his favour; the FC set aside his convictions and sentences.

4.6.A The Federal Court Decision\textsuperscript{112}

It is interesting to examine how the Federal Court detached itself from the 'politics' of Anwar's sodomy case.

At the outset of the majority judgment written by Abdul Hamid Mohamad, FCJ the court clearly stated that 'this court (and the trial court too) in considering the case is 'a court of law' and therefore confined itself to the 'narrow legal issue.' The legal issue is 'whether, at the end of the prosecution's case, the prosecution had proved beyond reasonable doubt that, in respect of both appellants, the appellants had sodomised Azizan bin Abu Bakar at Tivoli Villa one night between the month of January until March 1993 and in respect of the second appellant only, whether he had abetted the offence committed by the first appellant.'\textsuperscript{113}

The Federal Court was not only concerned with whether all the ingredients of the offence had been proved beyond reasonable doubt, but took into account whether there was a miscarriage of justice resulting from misdirection or non-direction in evaluating the case.

Abdul Hamid FCJ began by looking at the credibility of Azizan as the key witness. He stated that while the appellate court would not interfere


\textsuperscript{113} ibid, 414.
with the finding of the trial court on the credibility of witness, it would if
'there are substantial and compelling reasons for disagreeing with the
finding.' Based on this principle, the majority of judges decided that they
would evaluate the facts, disregarding of the findings made by both the HC
and Court of Appeal on the probity of Azizan's depositions.

After analyzing Azizan's testimonies, Abdul Hamid FCJ concluded
that Azizan was not a reliable, credible and truthful witness. Azizan's refusal
to answer questions put to him during the trial indicated that he was very
evasive and appeared unable to answer simple questions. Furthermore,
Azizan was very uncertain about the date of the offence. He might not have
been an 'outright liar' but he was not a credible witness.

Abdul Hamid FCJ also disagreed that Azizan was not an accomplice,
after evaluating the manner in which Azizan had submitted to Anwar's and
Sukma's order to commit the offence. There had been no evidence of
resistance despite the fact that he had the opportunity to save himself from
participating in the act of sodomy. For this reason, the majority held him as
an accomplice. The judge dealt at length with Sukma's confession to
ascertain whether the trial court was correct in deciding that the confession
had been voluntary. Finding that 'there seems to be so many unusual things

114 ibid, 418.
115 ibid, 423.
that happened regarding the arrest and confession', Abdul Hamid FCJ decided that the confession was involuntary. The unusual things referred to by the judge were: uncertainty on charges to be made against Sukma, method of interrogation and denial of counsel of his own choice.\textsuperscript{116} The HC and Court of Appeal therefore, according to the FC, had seriously misdirected themselves when evaluating Sukma's confession.

As a result of the above findings, Abdul Hamid FCJ continued to examine whether the prosecution, towards the end of their case, had proved the case beyond reasonable doubt. The Federal Court found that the prosecution had not done so because the charges required that the offence must have been committed on the date mentioned in the charge. The prosecution failed to prove that the offence had taken place on the date stated in the charge. This was concluded by the court when it found that the prosecution was not sure when the offence was actually committed. Abdul Hamid pointed that:

\begin{quote}
If the prosecution had such a record (record on the first appellant's movement), which should include the night(s) the first appellant went to Tivolli Villa, then the prosecution should be able to know when the first appellant visited Tivolli Villa. Instead, the prosecution had given three "dates" as the date of the commission of the offence covering the period of three years (1992, 1993 and 1994) and the final dates covers a period of three months. It only shows that the prosecution was not sure.\textsuperscript{117}
\end{quote}

In addition to this, Azizan was ruled as an accomplice, and his testimony was admissible, only if, corroborated. The learned FC judge however did not find any corroborative evidence sufficient to convince him to

\textsuperscript{116} ibid, 424-437.
\textsuperscript{117} ibid, 444.
convict the appellants. The judge cautioned himself as to the nature of the offence, i.e., it was a sexual offence and it was unsafe to convict a person for a sexual offence based on uncorroborated evidence. Abdul Hamid FCJ however, at the end of his judgment, stated:

even though reading the appeal record, we find evidence to confirm that the appellants were involved in homosexual activities and we are more inclined to believe that the alleged incident at Tivoli Villa did happen, sometime, this court, as a court of law, may only convict the appellants if the prosecution has successfully proved the alleged offences as stated in the charges, beyond reasonable doubt, on admissible evidence and in accordance with established principles of law. We may be convinced in our minds of the guilt or innocence of the appellants but our evidence must be based on the evidence adduced and nothing else.\textsuperscript{111}

With this statement, the learned judge confided that the court would not discard the rule of evidence and convict the accused simply because the act was immoral. This approach was intended to show that judges are bound by the law and do not act arbitrarily. However, the assurance was unconvincing, because the learned judge exposed his personal belief on the guilt of the accused.\textsuperscript{119} The statement disclosing the judges' thought was inappropriate, because the remark can be taken as suggesting the judges' political view. Without such remarks, the FC may have escaped from the 'politics' of the case.

4.7 Effect of the Trial on Judicial Accountability

Anwar's corruption and sodomy trial may be damaging to the judiciary's image but had positively changed the way many Malaysians

\textsuperscript{111} ibid, 448.
\textsuperscript{119} 'Return to Independence and Accountability,' Infoline July/August/ Sept. 2004, 12-13.
viewed their government, and its instruments of power and authority.\textsuperscript{120} However, this is not the concern of the thesis.

This thesis is looking for how the judiciary, when facing a political trial maintained its accountability to the law, not the political regime. In Anwar's trials, the judiciary's attempts to prevent the trial from being viewed as political failed when it disregarded procedural justice, which is concerned with the correct application of procedure in order to achieve a just result, and not just substantive justice which is only concerned with the outcome regardless of how it has been achieved.\textsuperscript{121} These included the series of amendments to the charges, which altered the prosecution's burden of proof and related to the dates of the alleged offences, rulings on the introduction of evidence and calling of witnesses, and statements by Prime Minister Mahathir Mohamad that undermined the presumption of innocence of the accused. The judiciary also failed to protect the rights of Anwar and the other accused in the related trial, from being violated when the courts ignored the evidence of ill-treatment, at times amounting to torture inflicted against them. This attitude fortified the perception that in politically sensitive cases the independence of the judiciary could no longer be guaranteed.


\textsuperscript{121} See Rawls, John, \textit{Theory of Justice}, Klaus F.Rohl, Steven Machura (eds.), \textit{Procedural Justice} (Ashgate: Dartmouth, 1997) for further discussion.
Chapter Four

The failing of the judiciary was remedied by the public’s reaction. The public put the judiciary under close scrutiny and every step and rule the judge took was questioned and measured. Justice was not exclusively the concern of the judiciary; the public applied their own measure of what was just and unjust, and assessed the justices with public opinion. When the conduct of a trial is subject to public assessment the notion of public accountability is brought into the judiciary. Adherence to strict legal principles is inadequate to convince the public. A trial must also fulfill public expectation, which believes in the rule of natural justice and the concept of rule of law, which comprise the notion of procedural justice and the just treatment of offenders. People tend to accept decisions if the decisions are reached by procedures seen as fair. A fair procedure has the effect of legitimising a trial.

The result of the trial was favourable to Anwar’s political rival: Anwar chances to succeed Mahathir was eradicated. At the same time, due to the long imprisonment, Anwar’s political future is also in jeopardy. Moreover, the accusations and trial had disgraced Anwar and tarnished his personal reputation. But, on the other hand, Anwar managed to strike back by weakening the government’s credibility, especially the police and the Attorney General’s Office. Anwar’s trial had educated the Malaysian society by giving them the opportunity to reconsider the workings of the government machinery, such as the executive, police, Attorney General and the judiciary. The public has become alert to the importance of expressing their dissent on
the violation of rights, and more critically, towards the government. It was a moment of society rebuilding and redefining.

Critics view the Federal Court’s decision on the Anwar sodomy case as an indication of the revival of judicial independence in Malaysia. However, it is argued that to revive judicial independence requires more than just getting the judgment that we want. The decision of the FC was controversial because it was postponed from the initial date that the FC was supposed to deliver their judgment. Could it be possible that initially the decision of the FC was to uphold Anwar and Sukma’s convictions? Was there an instruction to change the decision because Anwar’s health was deteriorating and to avoid the government from further condemnation if an unwanted result should ensue? Or was it a strategy by Abdullah, the new Prime Minister, to end a liability from the former administration and boost his image?

Again, this is not the concern of this thesis, but the concluding part of Anwar’s trial injects confidence into Abdullah’s administration. The trial satisfied whatever political agenda lay behind it, but the judiciary dragged into the mayhem remained in the weakest state of judicial independence, lacking of accountability to the law. Earlier the High Court, the Court of Appeal and even the Federal Court had compromised law and justice to serve the government’s political ends.
Conclusion

Anwar’s trial, described as the trial of the decade, left a great impact on the country’s political, social and economic development. His trial was ultimately a political trial because it had the characteristics of a political trial as discussed in the earlier part of this chapter and appropriate to Anwar’s claim that the trial ‘has been political persecution hiding behind the cloak of law.’ Anwar, unlike the two other earlier Mahathir deputies, when given an ultimatum, had refused to resign and maintained his innocence. The option left was to charge him with offences that would destroy his clean image. Harun’s case set the precedent that once a leader had been found guilty of corruption, his political career is doomed. Sexual allegations too proved effective in terminating one political career as had happened to Rahim Thamby Chik, the Chief Minister of Malacca and one of the UMNO Vice-Presidents at the Supreme Council.

The government, on the other hand, projected the Anwar trial as a sign that the rule of law was present in this country, claiming that no one was above the law. However, the image the government had tried to project failed because the trials went against the basic principle of natural justice.

Accusations that Anwar’s trial was political may not happen if the judiciary had been independent and accountable to the law and the public, or

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the crisis settled in a more appropriate forum, namely political. If political
dispute had to be solved through legal means, there are ample legal
techniques to handle such cases which would have allowed the court to
evaluate the evidence and apply the law in line with the notion of 'law as
integrity' as discussed in Chapter One.

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124 See pages 35-37 of Chapter One.
CHAPTER FIVE
METHODS FOR SUPERVISING JUDGES

Introduction

Dissatisfaction with the conduct and performance of judges runs high in today’s society. The crisis of confidence against the judiciary takes place worldwide, not restricted to newly independent countries, but can strike a country with a strong and reputable judiciary like the United States of America. As a consequence, modern countries, such as United States of America, Canada, Australia, South Africa, Pakistan, and Malaysia at present have judges’ codes of ethics to assist judges in carrying out their onerous responsibilities. The preparation of the judges’ code of ethics in these countries was expedited when demand for a more accountable judiciary intensified. An international response to this development was the formulation of a code of judicial conduct known as the Bangalore Draft as a model for countries which do not as yet have one by Judicial Group on Strengthening Judicial Integrity. The Bangalore Draft contains the best practices taken from various codes of conduct already articulated in various nations.

2 Jayawickrama, Nihal, Dr, ‘The Bangalore Principles of Judicial Conduct’, The 13th Commonwealth Law Conference, Melbourne, Australia 13 – 17 April 2003. The necessity of having a standard draft is because:
1. The Chief Justices recognized that the principle of accountability demands that the national judiciary assume an active role in strengthening judicial integrity by affecting such systematic reform as is within its competence and capacity.
2. They recognised the urgent need for a universally acceptable statement of judicial standards which, consistent with the principle of judicial independence, is capable of being enforced at the national level by the judiciary without the intervention of either the executive or legislative branches of government.
Because judges have an important role to play in society, judges’ conduct has to be beyond reproach. ‘Judges’ says Shaman, ‘are important public officials whose authority reaches every corner of society. Judges resolve disputes between people, and interpret and apply the law, which regulate our life. Through that process they define our rights and responsibilities, determine the distribution of vast amounts of public and private resources, and direct the actions of officials, in other branches of government.’ Considering the importance of judges’ role, they are expected to be competent and ethical. They have to earn respect for their judgment both intellectually and ethically, inclusive of their on-bench and off-bench conduct. In this situation, a judge must be like Caesar’s wife, who must be above suspicion; or he/she will have to risk embarrassment and censure by the public and media.

Failure to behave ethically will undermine judicial independence and incriminate irresponsibility. This chapter endeavours to examine the various methods of supervising judges’ conduct in Malaysia and the nature of accountability imposed on judges when a particular style is employed to check on judges’ behaviour. The methods combine both ‘hard accountability’, where judges will ultimately be removed from office, and ‘soft accountability’, which uses techniques that oversee judge’s conduct in order to make them aware that they are being watched and subject to condemnation.

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5.1 Judicial Ethics in Malaysia

Until 1988, the subject of judicial ethics was of little interest to the legal profession, the media, and Malaysian public. Judges in Malaysia enjoyed a very quiet life and court proceedings were rarely reported unless the trial involved politicians or merciless criminals. Judges were reputed as learned, disciplined and dedicated individuals, who were guided by the oath of office to do justice according to the law and the constitution. Thus, public respect was not only directed to the office, but to the person occupying the seat. Seclusion from the public domain contributed to the preservation of public confidence and trust.

At the same time, judges practically conformed to ethical conduct consistent with their oath of office. The minute a judge has taken the oath of office, requiring him to sustain the law without fear or favour and defend the constitution, the judge had undertaken to subscribe to the rule of law and was expected to preserve the dignity of the office. The awareness among judges of their duty to uphold the law and convey justice was very high. For example, Wan Sulaiman Pawan Teh, on his elevation to a High Court judge in 1966, constructed ten directives for new judges, namely:

1. Be kind; 2. Be patient; 3. Be dignified; 4. Don’t take yourself too seriously; 5. Remember that a lazy judge is a poor one; 6. Don’t be dismayed when reversed; 7. Remember there are no unimportant cases; 8. (I accept this with some reservation) Don’t impose [a] long sentence; 9. Don’t forget your common sense; 10. Pray for divine guidance.

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4 HRH Sultan Azlan Shah, 'Supremacy of Law in Malaysia' [1984] 11 JMCL 1, 2.
5 [1966] 1 MLJ xxix, xxxi.
Another judge, Tun Azmi,\(^6\) suggested ‘Rukun Keadilan’ (Principles of Justice), comprising the following statements:

a. A Judge must be independent; b. A Judge must have no interest in any matter he has to try; c. Justice must be seen to be done; d. A Judge must act on evidence; e. A Judge must give reasons for his decision; f. A Judge must conduct himself well whether in the course of his judicial duties or in his private life.

Meanwhile, other judges when elevated to the bench make a consequential speech on their duty to uphold the law and constitution without fear and favour.\(^7\) The standards set by these judges become an informal guideline not just to the judge concerned, but fellow peers.

Furthermore, judicial ethics is embedded in the training they receive and for them a formal code to remind them of the ‘dos and don’ts’ of the profession, is needless. High standards of conduct become the custom because the process of selection and appointment of judges is very stringent and only the most qualified person with the best brain is appointed as a judge.\(^8\)

5.2 Judicial Delinquents

The tranquillity and security from public and media surveillance was disturbed in 1988. Public concern emerged when Salleh Abas, the Lord President at that time, was dismissed from his office on the grounds...
of 'misbehaviour' and 'inability to properly discharge the functions of the office of Lord President.' With him, two Supreme Court judges were also dismissed. Long after Salleh Abas's dismissal, the subject remained in the minds of members of the public, members of the legal profession, politicians, and the judiciary itself. The line between what is ethical and unethical became confusing, especially when the legal experts who studied the tribunal's recommendation unanimously concluded that Salleh Abas' and the other two SC judges' conduct did not amount to misconduct at all.9

The alleged 'misbehaviours' of Salleh Abas were first, delivering lectures consisting seditious statements criticising the government and promoting Islamisation, thus inciting fear among non-Muslims. Such speeches were incompatible with his position as an LP. Second, misuse of power when ordering the case of Susie Teoh to be adjourned sine die, indicating that he was biased in the case. Third, the conduct of sending a letter to the YdPA and State Rulers conveying the feelings of the judiciary on the comments and accusations made by the PM against them. Finally, making untruthful statements that politicised the conflict, thus discrediting the government.

In sum, the issues in question were on the scope of judges' freedom of speech, the right to manage court hearings and the role of the head of the judiciary in defending judicial independence.

To clear the air, the government in 1994 amended the provisions for the grounds to dismiss judges, and replaced 'misbehaviour' with

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The amendment was prompted by the codification of the Judges' Code of Ethics in 1994. Contrary to the idea that a written code of ethics would help to improve a judge's behaviour, the reversed situation ensued in this country. After the implementation of the code of ethics, breaches of judicial ethics spiralled. The course of judicial misconduct started with an unconstitutional sitting of the FC in conducting the trial of Air Molek's case, when contrary to clause (2) of Article 122, which stated that only a Court of Appeal judge may sit as a judge of a Federal Court, a High Court Judge was nominated to form the quorum. A year later, the AG, Mohtar Abdullah announced the circulation of a poison-pen letter alleging judicial impropriety which was 'intended to ridicule, abuse and insult the judiciary.' The situation became intolerable when Rais Yatim, a Minister in charge of judicial affairs at the Prime Minister's Department, in an interview with Australian Broadcasting Radio publicly censured CJ Eusoff Chin's conduct. The CJ had gone on a holiday with a lawyer, V K Lingam, who had appeared in a case presided by him. Finally, before the retirement of the CJ, Muhammad Kamil Awang, an HC judge in Sabah, revealed in his judgment that he had received instructions from his

superior on how to decide an election petition against a BN party component.14

Equally alarming were sudden changes in the judicial approach to the quantum of damages awarded in defamation suits and contempt of court proceedings. The award in defamation suits suddenly increased15 without lawful justification, which the new Chief Justice Tan Sri Dzaiddin described as ‘a blot on the legal landscape.’16 Meanwhile, lawyers were unreasonably threatened with contempt, or cited for contempt of court.17

In parallel with these ethical regressions, the public at the same time became more critical and conscious of their rights. The change in the public perception was similar to what had taken place in other jurisdictions. In Australia, for example, Thomas illustrates a challenge to judges’ authority:

As society became increasingly complex, Austinian jurisprudence, which assumed that the law had a satisfactory answer to every problem, declined. Litigants no longer unquestioningly accepted judges’ decisions and mystique was no longer a sufficient protection. The job became harder, judges began to be seen less as the impersonal agent of a system and more as a human being responsible for failure of the losing party. Attacks shifted from the ball to the player. Litigants began to make allegations of bias, which when examined were almost invariably found to have no more basis than that the judge accepted the evidence of someone else other than the complainant. Shortly stated, public attention to the performance of

14 Harris Mohd. Salleh v Ismail bin Majin (As the Returning Officer) & 6 Ors [2001] 3 M U  433.
Justice Kamil in the judgment states: The only guide to a man is his conscience, the only shield to his memory is the rectitude and the sincerity of his action. In my view, it is an insult to one’s intelligence to be given a directive over the phone that these petitions should be struck off without a hearing, and above all, it is with prescience condescensions that I heard these petitions. God has given me the strength and fortitude, as a lesser mortal, to act without fear or favour, for fear of a breach of oath of office and sacrifice justice, and above all to truly act as a Judge and not a ‘yes-man’. 456-457.
16 Reining Back Quantum of Damages,
the judiciary become more focused than ever before, along with a willingness to criticise the judge when expectations were disappointed.\footnote{Am, Thomas, ‘Guide to Judicial Conduct: A New Handbook for Judges’ (2003) 77 ALJ 240, 242.}

The same scenario occurred in Malaysia: judges were asked to disqualify themselves for trivial reasons, for example, having a son who was a lawyer, or because he previously was a shareholder in a company of which the prime minister’s son was the director. In addition, statements from counsel airing dissatisfaction about court decisions took place on a regular basis.

5.3 Methods of Supervising Judges’ Conduct

The method of judicial accountability generally falls into two main categories, namely, formal and informal. The former refers to methods governed by the constitution and/or law, while the latter is a reaction by an individual or group of professional or individual such as the law society, non-government organisations or political parties. At the same time, the media acts as a conduit in expressing disapproval, and also performs a valuable role in checking judges’ behaviour. In contrast, the informal method lacks legal sanction and depends on the strength of the pressure to generate an effective measure to control judges’ conduct. The discussion will begin with the formal method of removal practiced in Malaysia, namely removal from office and discussion in Parliament.
5.3.A Formal Mechanism

5.3.A.I Tribunal

Chapter Two has investigated the requirement that judges should be selected through a method that will ensure they possess essential qualities. Judges are only human and fallible, while the methods of selection do not always guarantee that the most qualified candidate is appointed, or even if the candidate is initially virtuous, he/she may not remain pure. Francis Bacon, the great English Lord Chief Justice, was involved in the act of corruption\(^{19}\) and a number of judges fall victim to corrupt practices.\(^{20}\) Due to this reality, the Federal Constitution\(^{21}\) states that a judge is subject to a tribunal and removal upon order of the YdPA, after considering the recommendation of the tribunal.

5.3.A.I.a Grounds for Setting Up a Tribunal

Judges in Malaysia hold office until the age of 66 and are given protection against arbitrary removal from office. Thus, judges are independent from the government. The independence is curbed however by the requirements that they have to abide by the code of ethics and able to discharge their duties as a judge properly. It is almost impossible to remove a judge except on the grounds of (i) breach of the code of ethics; or (ii) on the grounds of inability, from infirmity of body or mind or any other cause, to discharge the functions of his office.\(^{22}\) Prior to the introduction of the code of ethics as a ground for removal in 1994,

\(^{21}\) Federal Constitution, Clause (3) of Article 125.
\(^{22}\) Ibid.
‘misbehaviour’ constituted one of the grounds for removal. ‘Code of ethics’ replaced ‘misbehaviour’ in order to give more clarity on the grounds when a judge can be dismissed. However, the ethical standards enumerated in the Code of Ethics make removal easier.

5.3. A.I.b The Composition and Power of the Tribunal

The removal of a judge may take place when there is a representation suggesting that a judge is unfit to hold the office. The power to make representation is exclusively conferred on the Prime Minister, but the Chief Justice after consulting the Prime Minister may also make representation. The representation is to the YdPA who will afterwards appoint a tribunal allocated with the power to investigate the representation from the PM or the Chief Justice.

The tribunal comprises five members who are appointed by the YdPA from those who hold or have held office as judge of the Federal Court, the Court of Appeal, or High Court. Alternatively, the YdPA may appoint persons who hold or have held equivalent office in any part of the Commonwealth if it is expedient to do so. The Chief Justice of the Federal Court or the President or the Chief Judge shall preside over the tribunal according to the precedence among themselves, and in case of other members, the position is according to the order of their appointment to the office qualifying them for membership. If they are appointed on the same date, the older will come before the younger. The tribunal will deliberate on the representation and make recommendations to the YdPA as to the
appropriate action. The *YdPA* may decide on whether or not to remove a judge from office after reflecting on the recommendation of the tribunal.23

The rationale for setting up a tribunal as a means of removing a judge is to protect the independence of the judiciary and to wipe out political influence in the process. At the same time, distrust over the competency of legislators, who, in the majority represent the party forming the government make trial by peers as the best choice to remove judges. The duty to defend judges’ integrity and independence is entrusted with people who have a deep understanding of the nature of judges’ work, conversant with the needs of the profession, and at the same time remain fully aware of the significance of the alleged misconduct of judicial independence. Undoubtedly, judges will utilise their legal knowledge and skills to decide on the question and act impartially without surrendering to external pressure, taking into consideration the distinctiveness of the judge’s role and status.24

Such a proposition, however, was repudiated during the 1988 judicial crisis, which ended with the removal of three Supreme Court judges. From the point of view of political analysis and legal scholars, the cause of the removal was ‘political’, i.e., the upshot of the struggle within UMNO (United Malay National Organization)25 and the political survival

21 Federal Constitution, Article 125(4).
23 UMNO is the biggest political party representing the Malays. The President of UMNO will normally be the Prime Minister.
of Mahathir Mohamed, the Prime Minister at that time. The process of removal provided for by the constitution was meant to restrict the involvement of political players, namely the executive and legislature in the removal of a judge. However, the provision had failed to curb political influence and this 'disturbing' result calls for a review on the suitability of the current process.

The proposal to review the process may go to the extreme, i.e. removal by Parliamentary address, originally planned by the Reid Commission. Nevertheless, the practice in the Malaysian Parliamentary system, which is vastly different from the British tradition, disapproved this alternative. In Malaysia, the executive dominates Parliament and the ruling party always enjoy an overwhelming majority, usually more than two thirds. Hence, such removal will be absurd. In addition, the 'patronage political system' currently practised, does not allow MPs to go against the wishes of the Prime Minister or cast votes contrary to their

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patron wishes, for fear of losing their opportunity to stand at the next election.\footnote{In a survey conducted among 16 MPs, five MPs stated that they voted for the bill on a party basis, four on the principle promoted by the bill, four because the bill benefits their constituency while three, on all the three grounds mentioned before. This shows that at least nine out of 16 MPs (56.25\%) voted because they belonged to the party that moved the bill.}

The available alternative was to go back to the 'drawing board' and re-draft Article 125 of the Federal Constitution. The flaws in Article 125, as identified by scholars criticising the 1988 events, lay in the manner in which the Article has been composed.\footnote{n 30 above, Trindade, F A , 'The Removal of Malaysian Judges', 85. He states: The choice and composition of the two tribunals, the procedures followed by them (particularly by the Tun Salleh Tribunal) and the broad definition of judicial 'misbehaviour' adopted by those Tribunals might well have left those judges who have been removed with a distinct feeling that these matters should have been spelt out in greater detail and that Article 125 in its present form is not the safeguard for judges that it was intended to be. This constitutional provision needs to be looked at again by those concerned with constitutional matters in Malaysia. See also n 29 above, Harding, A J, '1988 Malaysian Constitutional Crisis,' 77.} The provision had been written in a vague and loose framework, thus failed to provide the intended protection. Political interference was possible due to uncertainty on the power of YdPA to appoint members of the Tribunal. For example, when could the YdPA appoint judges from other Commonwealth countries, what was the procedure of inquiry, how should 'misbehaviour' be determined and whether the YdPA was bound to act on the tribunal's recommendation. These uncertainties made it easy to manipulate the removal process.

The new Article 125 should clearly specify the composition of the tribunal and its power to appoint its members, its procedure, and the grounds for removal to ensure that the provision will be safe from manipulation. At the same time, the application of Article 125 should
address the ‘spirit of the article and not merely the letter of the law’.\textsuperscript{33} Therefore, members of the tribunal were to understand that the inquiry was final and no appeal could be made on their finding. As far as possible, the standard of the proceedings need to be proper because the outcome touched not just the judge put on trial, but also the integrity of the judiciary. It was then argued that the tribunal should be composed of completely disinterested, or retired judges\textsuperscript{34} unlike in Salleh Abas’s dismissal, where his subordinate and judges of lower standing became the arbiters.

The term ‘misbehaviour’, which forms the grounds of removal, has a very wide meaning and there is no fixed test to determine what amounts to misbehaviour. The second Tribunal which investigated the five Supreme Court allegations of misbehaviour defined ‘misbehaviour’ as ‘any conduct which is disgraceful, contrary to honesty, any unjustified absence from duty, neglect or refusal to perform official duties...’ and also includes the wide definition used in the first Tribunal: ‘... unlawful conduct, or immoral conduct such as bribery [and] corruption, [and] acts done with improper motives relating to the office of a judge or which would shake the confidence of the public in a judge.’\textsuperscript{35}

In the Salleh Abas tribunal, the standard adopted was very low and none of the conduct amounted to, or fell within the criteria of judicial


\textsuperscript{34} ibid, 32.

\textsuperscript{35} Report on the Tribunal established under Article 125(3) and (4) of the Federal Constitution – Re: YA Tan Sri Wan Sulaiman bin Pawan The, Supreme Court Judge; YA Datuk George Edward Seah, Supreme Court Judge; YA Tan Sri Dato Haji Mohd Azmi bin Dato Haji Kamaruddin, Supreme Court Judge; YA Tan Sri Dato Eusoffe Abdoolicadeer, Supreme Court Judge; YA Tan Sri Wan Hamzah bin Haji Mohd Salleh, Supreme Court Judge [1989] 1 MLJ lxxxix, xcix.
misbehaviour, which would have rendered him unfit to hold the office. Today, the Judges' Code of Ethic replaces 'misbehaviour' as grounds for removal, but regretfully the contents of the code do not address the alleged misbehaviour of Salleh Abas, especially the limits of extra-judicial statements.

5.3.A.I.c Did the Working Party Really Intend to Free Article 125 (3) and (4) from Political Influence?

If the words of the first Prime Minister, Tunku Abdul Rahman, during the debate on the Government Working Paper on Constitutional proposal are to be taken as conclusive, Article 125 (4) should have liberated the removal process from political influence. However, during the 1988 judicial crisis, the intention of Article 125 (4) did not materialise. The Prime Minister, under Article 125 (4), has full discretion to decide whether to initiate the process. Judges are indirectly subject to the Prime Minister, if their conduct touches the Prime Minister's political interest, or if they suddenly fall out of the Prime Minister's favour. However, when the conduct was politically insignificant the said judge is safe from inquiry.

The Chief Justice, although given the power to make a representation to the YdPA, has to consult the Prime Minister before he can make any representation to the YdPA, and most probably, can be stopped from making a representation, if the Prime Minister disagrees. Such an attitude was reflected in the setting up of the Second Tribunal due by the conduct of the five judges who bypassed the acting LP in deciding
to form a special sitting to hear Salleh Abas’ application to injunct the First Tribunal from submitting their recommendation to the YdPA. On the other hand, other judges who had made dubious decisions, or were in breach of the Code of Ethics did not have to face the tribunal, strengthening the view that removal is in the hands of the PM.

The neutrality to call upon the setting up of a tribunal requires total elimination of the Prime Minister’s involvement in the process. The Prime Minister and other politicians however may resort to Article 127, discussed in the next section, as a means of criticising judges.

The elusiveness of Article 125 enables the executive to exert political control on the judiciary when the judiciary poses threats to the executive programme. The misuse of Article 125 can therefore be curbed not through legal means, but legislative, namely by amendments to the process of removal, which requires political will.

In this respect, other means of controlling the judiciary need to be found, as in the USA where the conduct of judges is now governed by the Canons of Judicial Ethics, which is strictly legal in form. The process takes place under the auspices of the Judicial Council without the interference of the executive. Removal of judges, though constitutionally sanctioned, should not be invoked, except in extraordinary circumstances. The preservation of the rule of law and procedure is important to avoid the legitimacy of the whole process becoming questionable and to avoid the stigma that the judiciary is subservient to the government, and therefore not independent. Meanwhile, the government should be spared from the allegation of trying to subvert judicial independence.
If Article 125 is meant to be a political device to control judges’ conduct, the task of trying the judge concerned is then unsuitable for his/her peers. As illustrated in the tribunal investigating Salleh Abas conduct, the failure of the members who were drawn among judges to observe the concept of natural justice made the integrity of the tribunal questionable, and tarnished the image of the judges forming the tribunal. The failure to observe strict procedures also raises doubts as to the impartiality of the tribunal. At the same time, it is difficult to avoid the allegation that the tribunal is surrendering its independence and conspiring with the government to get rid of a judge found to be objectionable by the government. This situation becomes worse as this practice develops a sense of distrust among judges and splits the judiciary.

5.3.B Code of Ethics

Following the dismissal of Salleh Abas, Wan Sulaiman, and George Seah in 1988, the 1994 constitutional amendment substituted ‘misbehaviour’ with, ‘breach of the Code of Ethics’ as a ground for removal. The Federal Constitution states that the YdPA, on the recommendation of the Chief Justice, President of the Court of Appeal and the Chief Judges of the High Court, will prepare a code of ethics. It is a requisite that before the YdPA endorses the written code of ethics, His Majesty must consult with the Prime Minister first. The code of ethics

36 Federal Constitution, Clause (3A) Article 125 reads:
The Yang di-Pertuan Agong on the recommendation of the Chief Justice, the President of the Court of Appeal and the Chief Judges of the High Courts, may after consulting the Prime Minister, prescribe in writing a code of ethics which shall be observed by every judge of the Federal Court.
binds all judges, and any breach to the code may invite removal from office.

The main intention in formulating the code of ethics, according to the Lord President (at that time Hamid Omar), was to serve the interest of the judges, as they are also human and not free from weaknesses. The purpose of the code was to regulate the conduct and performance of judges and to specify disciplinary action against them when a breach of the code occurs. In this case, judges are to be disciplined by way of removal from office, as there is no other form of discipline provided for by the Constitution, or ordinary law. At the same time, the code would act as a reminder to judges to behave ethically as befitting the high office they hold. The Chief Judge drafted the Code and all judges agreed upon the contents of the code. The Conference of Rulers also unanimously seconded it. The Code of Ethics took effect on 2 December 1994 and the Secretary of the Cabinet issued the Code. The Bar Council, however, criticised the Code as further subjugating the independence of judiciary and for lack of consultation especially with the legal fraternity.

5.3.B.I Reasons for Having a Written Code of Ethics

As public scrutiny and media exposure increases, and public confidence is undermined by judicial scandals, judges' ethics become an
increasingly important topic not only for judges, but also for the Bar, legislature and the public. The Code of Ethics operates, not only as a means to guide judges in discharging their duties, but also provides knowledge for the public on the standard of behaviour expected from judges. The code provides a uniform means to assess judges’ conduct and facilitates any plans to improve on judicial performance. Hence, the outcome of the code of ethics is an enhanced appreciation on how judges function, increase public confidence in the judiciary, and finally, improvements in the level of judicial independence. Undoubtedly, public confidence is vital if judicial independence is to be maintained. There can be no judicial independence if the judiciary fails to adhere strictly to the standards of behaviour expected. Furthermore, whether or not judges adhere to ethical standards can be easily evaluated because the code provides an opportunity for the public to canvass a judge’s action.

A written code of ethics gives an update on the standard of behaviour acceptable, which would reflect the current social values and circumstances. Hence, what was tolerable before need not be tolerable today. For example, while it was acceptable during the 17th century for judges to have a political affiliation, it is strongly objectionable today.

While the belief is that the code of ethics makes removal easier, in practice it does not. This is to the disappointment of proponents of judicial accountability, who criticise ‘codes of conduct as being a token of gesture to greater accountability rather than an effective mechanism for

ensuring good conduct amongst judges.\textsuperscript{42} Despite the great benefits of the code of ethics, there has been some doubt as to their articulation. The objection most often quoted, is that the code of ethics endangers the independence of the judiciary. Such sentiment is valid because accountability is prone to outside interferences, and hence, requires special attention in terms of how it should operate.

The code of ethics as a means of accountability shares the same ends as judicial independence: namely, to preserve public interest and the impartiality of judges. While independence safeguards impartiality from external pressure, accountability ensures impartiality from within, because when accountability is observed, judges will strive to eliminate any gesture of judicial impropriety that may undermine judicial independence. Judges' effort to straighten their behaviour requires guidance and the code of ethics serves this purpose. The code of ethics acknowledges that judges are human beings with strengths and weaknesses. Thus, the code seeks to protect judges from human weaknesses while encouraging them to be objective and behave according to the highest standards. By adhering to the standards outlined, judges will gradually gain the public's confidence.\textsuperscript{43}

In addition to the general grounds for having a written code of ethics, there are reasons peculiar to Malaysian judiciary and politics that compel the adoption of a written judicial code. Before going into the reasons, it is worth mentioning that the need to have a code of ethics is

\textsuperscript{42} Malleson, Kate, \textit{The New Judiciary} (Dartsmouth: Ashgate, 1999) 229.
caused by two forms of pressure: pressure from within or 'internal pressure'; and pressure from outside or 'external pressure'. The former refers to the development and situations within the judiciary itself, which suggests the urgency of formulating a judges’ code of ethics. For example, in Canada, the Canadian Judicial Council, a body composed entirely of judges, made an effort to draft a set of principles addressing the ethical issues that bind judges in their work. This took place after the council had to deal with numerous complaints on judicial misconduct and to remedy the shortcomings of the outcome of 'Justice Berger's Affair' in 1984.44 The latter, refers to pressure due to external occurrences, or pressure from a body or person outside the judiciary such as the executive, legislature, a body representing the legal profession or the public and is sometimes moved by political considerations. The best illustration of this are the steps taken by the American Bar Association (ABA) to formulate Canons of Judicial Ethics in 1924 to respond to a crisis in public perception of the judiciary.

Both factors influence the formulation of the judicial code of ethics in Malaysia. However, 'external pressure' which was political in nature, was believed to be the nucleus. After the removal of Salleh Abas, Wan Sulaiman and George Seah, the ruling party suffered a loss of political support from the masses. In order to correct public perception of the event, the government moved to amend the Constitution to clarify the grounds for removal. This was done to show that dismissal of these judges

had taken place in accordance with the law, and that the government had not acted arbitrarily. From a political perspective, the purpose of the code of ethics was to recapture public approval and confidence, which had deteriorated since the dismissal of the three Supreme Court judges. On the other hand, it had an ulterior motive of making absolute the subjugation of the judiciary to the executive. Based on these two observations a sound conclusion will be the government had exploited the political uncertainty on the issue to expedite the formulation of the code.

Regardless of the political factors involved, the process of codification could be perceived as a means to enhance the judiciary's reputation. The code forced the judiciary to take the responsibility to uphold their standards by improving their efficiency and competency while at the same time continuously maintaining ethical practice. In this regard, the code of ethics operated to enhance the eminence of the judiciary. While judicial impropriety was trivial before 1988, there were constant complaints regarding delays in trying a case or writing decisions. In this instance, the code of ethics was intended to remedy these weaknesses. Thus, the code attended to the internal need of the judiciary to overhaul the institution.

Equally important was a need for clarification on the standards of behaviour expected from judges. During the inquiries by the tribunals

45 Muzaffar, Chandra, 'Assault on the Judiciary: Public Perceptions', Seminars on the Independence of the Judiciary, Kuala Lumpur, organised by Malaysian Bar Council, on 4 & 5 November 1988. Kuala Lumpur. Datuk Shahrir Ahmad, from opposition party Semangat 46, won the Johore Bahru by-election in 1998. The removal of Salleh Abas and suspension of the five Supreme Court judges was one of the issues highlighted in his campaign and has significant impact in securing supports from voters.
established under Article 125 (4) on the conduct of Salleh Abas and the other five Supreme Court judges, the tribunals needed to identify whether their conduct had amounted to 'misbehaviour'. Misbehaviour in Salleh Abas's tribunal was defined as, 'unlawful conduct such as bribery, corruption, acts done with improper motives relating to the office of a judge which would affect the due administration of justice or which would shake the confidence of the public in a judge.'\(^47\) In the Tribunal of the Five Judges, the word 'misbehaviour' was interpreted as 'any conduct which is disgraceful, dishonourable, contrary to honesty, and unjustified absence from duty, neglect or refusal to perform official duties...' and included the meaning given in the Salleh Abas tribunal.\(^48\) In this tribunal the report also stated that 'the grounds of removal set out in Article 125(3) certainly include (and by no means limited to) the following: (a) the improper exercise of judicial functions; (b) wilful and unjustifiable absence from duty, neglect of duty or refusal to perform official duties; and (c) conviction for an offence involving moral turpitude.'\(^49\) It is significant from the two tribunals that to classify an act as misbehaviour is an agony. Regardless of the difficulties of categorising whether or not an act amounts to misbehaviour, a code of ethics was necessary to clarify what was or was not ethical.

\(^47\) Report of Tun Salleh Tribunal, 49.
\(^48\) Report of the Tribunal for Five Judges, xcix.
\(^49\) ibid, xcviii.
5.3.B.II The Scope of the Judges' Code of Ethics 1994

The Code\(^5\) begins with a declaration stating that the Code is prescribed by the \textit{YdPA} on the recommendation of the Chief Justice, President of the Court of Appeal and Chief Judges of the High Court of Malaya, and Sabah and Sarawak after consultation with the Prime Minister. Sub section (1) of Section 2 stipulates that the Code is applied to a judge throughout the period of his service, and further in sub section (2) asserts the implication that if the code is breached, the result is removal from office.

The ethical principles are outlined in Section 3 and there are three important values upheld by the Code: judicial propriety, integrity and competency. Judicial propriety is incorporated into the prohibition in that a judge should not subordinate his judicial duties to his private interests. Judicial integrity\(^1\) is articulated in the restriction from engaging in conduct, which might result in a conflict between private interests and judicial duties; involvement in an act that could cause a reasonable suspicion that the judge’s private interests conflict with his judicial duties and cause prejudice to his function as a judge; or exploiting his judicial position for personal advantage. Finally yet importantly, a judge should avoid behaving dishonestly or acting in such a manner as to bring the

\(^{5}\) P.U. (B) 600, 22 December 1994.

\(^{1}\) Allegation of bias amounted to a challenge of judges' integrity, see \textit{Bumicrystal Technology (M) Sdn. Bhd. v Rowstead System Sdn. Bhd.} [2004] 6 MLJ 169, where an application to recuse Appandi Ali HCJ from trying the case was made on the grounds of his previous service as UMNO legal advisor and candidate representing UMNO during the general election back in 1990.
judiciary into disrepute, or bring discredit to the judiciary; and should not be a member of any political party or participate in any political activity.

The principle of judicial competency is installed when judges are called upon to work efficiently, dispose of cases, deliver judgements and provide written judgments expeditiously, abide by proper administrative and statutory order, attend office according to the office hours fixed, and finally, if requested by the Chief Judge, declare in writing all his assets. In addition to the fixed office hours, judges have to clock in and clock out like ordinary public officers.

The first amendment to the code took place in 2000. It amended the meaning of office hours provided by Paragraph 3(2) which, after the amendment was stated, to refer to normal office hours and do not include staggered working hours applicable to Federal Government officers in the State or Wilayah Persekutuan (Federal Territory) where the judge is stationed. A new Paragraph 4 requiring judge to cease to have any connection with their practising firm, if they had practised as an advocate or solicitor prior to appointment, was also inserted to strengthen judicial impartiality.

52 Gopal Sri Ram in Hong Leong Equipment Sdn.Bhd. v Liew Fook Chuan and Anor Appeal [1996] 1 MLJ 481, 527, regards judges as duty-bound to give reasons for their decision and states it is the judicial policy backed by the Judges Code of Ethics.

53 The working hours are (i) For states where Sunday is a weekly holiday: Monday to Thursday: 8.00 a.m. to 12.45 a.m. and 2.45 a.m. to 4.15 p.m. Friday: 8.00 a.m. to 11.30 p.m. and 2.00 p.m. to 4.15 p.m. except for Sabah and Sarawak, 8.00 a.m. – 12.45 p.m. and 2.45 p.m. to 4.15 p.m. Saturday: 8.00 a.m. to 12.45 p.m.

(ii) For States where Friday is a weekly holiday: Saturday to Wednesday: 8.00 a.m. to 12.45 a.m. and 2.00 p.m. to 4.00 p.m. Thursday: 8 a.m. to 12.45 p.m.

54 P.U. (B) 182, Judges' Code of Ethics (Amendment) 2000.
5.3.B.III Issues on Judges' Code of Ethics

Earlier, it has been stated that the reasons for the codification of ethics were influenced by the outcome of three factors: to serve political ends, to upgrade the judicial service and to clarify judicial ethics. All these factors influenced the philosophy underlying the code of ethics and the drafting of the code.

First, because the code was politically motivated, the way it is written has been influenced by the 'notion of the role of those its regulates.'\(^5\)\(^5\) The 1994 Code was drafted as a result of the removal of three Supreme Court judges in 1988, and the purpose was allegedly to curb judicial independence. Against this background, judges are treated as 'jackals' not as 'lions'. As 'lions', judges are recognised as capable of regulating themselves. Therefore, there is no need for a code encompassing in detail the conduct prohibited. On the other hand, if judges are 'jackals' with doubtful characters, then they require 'procrustean limitation' on their behaviour.\(^5\)\(^6\) Doubt as to the character of judges is marked when the code expressly prohibits judges from indulging in bad practices, and removal will ensue, if they breach the prohibitions.

This is in contrast with the code of ethics in other jurisdictions, such as the Code of Conduct for United States Judges, and the Canadian Ethical Principles for Judges, both of which embody principles written in an inspirational manner, suggesting that judges are possessed of good


\(^{6}\) ibid, 4.
qualities and should strive for better standards. In contrast, the Malaysian Judges' Code of Ethics is punitive in nature.

This situation also indicates that the quality of the person considered for judicial appointment is not given priority in Malaysia as judges may easily become subject to a tribunal if they breach any item on the stipulated code of ethics.

The 1994 Code is also criticised as relegating judges on the same level as public servants. The similarity of the principles incorporated in the 1994 Code with the public officers' code of conduct supports this contention.\(^57\) This direct incorporation from other codes of conduct demonstrates that no serious thought or effort was given, nor was ample time spent in drafting the code to be in accordance to the status and prestige of the office of a judge. The evidence that judges are equated to public servants is obvious from the requirement of observing office hours and adhering to clocking-in and clocking-out. This rule has been criticized as resulting from a lack of proper understanding of how judges work.

According to Justice Thomas:

Judges are not public servants and are not expected to punch clocks or work within particular timeframes, save of course for the turning up at appointed times for hearing cases. A judge is always potentially on duty. It is sometimes

\(^{57}\) P.U.(A) 395/93, Public Officers (Conduct and Discipline) Regulations 1993.

(2) An officer shall not –
(a) subordinate his public duty to his private interest
(b) conduct himself in such a manner as likely to bring his private interest into conflict with his public duty;
(c) conduct himself in any manner likely to cause a reasonable suspicion that
   i. he has allowed his private interests to come into conflict with his public duty so as to impair his usefulness as a public officer; or
   ii. he has used his public position for his personal advantage;
(d) conduct himself in such a manner as to bring the public service into disrepute or bring discredit to the public service;
(e) lack of efficiency and industry;
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overlooked that the judge (not the courtroom) is the court.... Judicial power is vested entirely in the person of the judge, who can convene a court anywhere at all, and at any time, subject only to observing natural justice and the rules of court.58

In stating that judges will punch clocks the Chief Justice, Tun Eusoff Chin, clearly indicated that judge's office hours are the same as public servants’.59 This again shows that the Malaysian judiciary is reduced to a civil servant mentality and is ready to compromise judicial independence to the extent of subordination to the executive. This move is humiliating to the judges and objections as to its impropriety have been raised by the Bar Council.60 It is important to stress that in reality, judges are not public servants, and are not expected to punch clocks or work within a particular period.

The rush to draft and enforce the 1994 code resulted in the failure to consult interested parties such as the Bar Council and legal academicians, who would have been able to contribute to a better code of ethics for judges. There is also a view that the code was the product of the Lord President alone and no consultation had taken place with judges.61

Realising that the whole process was highly politicised, when he took the CJ office in 2002, Dzaiddin decided to part from the 1994 Code, and instead proposed a College of Judges, which seemed to gain support from members of the judiciary. Neither plan took effect as both parties, the

58 Am, Thomas, Justice, Judicial Ethics in Australia (Australia: LBC, 2nd ed, 1997).
60 Sunday Star 29 July 2001. The Star interview with Datuk Shaik Daud Ismail.
61 ibid. In this interview Datuk Shaik Daud Ismail reiterates, “The code was never properly discussed. It was drawn up and brought to one of our conferences for us to agree. There were some arguments and the judges made some proposals for change but the changes never took place.”
judiciary and the executive, failed to come to a consensus and the problems remain to this day.

Again, this is contrary to the formulation of the Canons of Judicial Ethics prepared by the American Bar Association and the Canadian Judicial Council, where all legal brains pulled together to draft the code of ethics and only after serious deliberations were they implemented. Lack of consultation among judges, the Bar and other interested parties caused the 1994 Code to be defective, not only in the manner in which it was drafted, but also in garnering acceptance from the judges themselves. The code of ethics also allowed the executive branch to have immense influence in drafting the code, thus making the code rigid and unrealistic.

A problem surfaced when at the implementation stage of the Code the government and the judiciary pointed at one another as to who should be responsible for its enforcement. The government pressured the head of the judiciary, 'to work out procedures for a problem-solving mechanism in the code so that it can operate effectively as a self-regulating system.' More power if necessary was to be given to the Chief

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62 American Bar Associations, *Opinions of the Committee on Professional Ethics with the Canons of Professional Ethics Annotated and Canons of Judicial Ethics Annotated*, (1967 Edn); Ethical Principles for Judges, Canadian Judicial Council, Ottawa. In the commentary on the purpose of the Code, it is stated that; 'The process which resulted in these Statements, Principles and Commentaries was carried forward by a Working Committee representative of both the Canadian Judicial Council and the Canadian Judges Conference. An extensive process of consultation within the judiciary and beyond ensured that these Statements, Principles, and Commentaries have been the subject of painstaking examination and vigorous debate. The intention is that Canadian judges will accept these Statements, Principles and Commentaries as reflective of their high ethical aspirations and that they will find them worthy of respects and deserving of careful consideration when facing any of the issues addressed in them.
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Justice to enforce the Code of Ethics. On the other hand, the judiciary suggested having a College of Judges to deal with problems in the judiciary including complaints against judges. Tan Sri Dzaiddin, the Chief Justice at that time, also proposed that the College should formulate guidelines on judges' ethics.

This tussle indicates that the judiciary wanted to dispense with the 1994 Judges Code of Ethics and to reformulate the Code free from executive interference. Indeed, there was no provision in the 1994 Code that gave power to the Chief Justice to take action against errant judges, except for as provided by Article 125(4) where the Prime Minister, or the Chief Justice after consulting with the Prime Minister, may make representation to the YdPA that a tribunal needs to be set up to investigate a breach of the code of ethics. Therefore, the blame does not befall totally on the judiciary for its passive reaction. Furthermore, since Tun Hamid’s and Tun Eusoff Chin’s leadership, the Prime Minister had been blind to judges’ misconduct as this served the PM’s political wishes.

The issues arising from the 1994 Code suggested that the time was ripe to conduct a review of the code of ethics, as agreed upon by the government, the Bar and political parties. The review of the Code was also meant to include the possibility of setting up an independent machinery to receive public complaints on breaches of the judges’ code of

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66 The Star, 4 December 2001; Lim Kit Siang Media Statement, One ‘Black Sheep’ Judge is One Too Many. accessed 21 April 2004.
ethics. At the same time, the code of ethics was intended to address and
deal comprehensively with all instances of judicial improprieties and
misconduct that had taken place in Malaysia. For example, it was meant to
deal with the extent of judges’ freedom of speech, bias and prejudice;
attacks on other judges; absence, inefficiency and incompetency; and
finally how breaches against the Judges’ Code of ethics could be invoked
against the head of the judiciary.67

It would only be fair if the judiciary, of its own accord
determined what constituted judicial ethics and at the same time devised a
method of disciplining judges.

5.4 Discussion of Judicial Conduct in Parliament

The Malaysian Constitution did not adopt the British
constitutional practice of conferring power on Parliament to remove a
judge from office. Instead, it adopted the practice of allowing Parliament
to discuss the conduct of judges as a means of exercising control over
them. Parliamentary discussion on judicial conduct may take place in
three ways, namely by way of substantive motion, which is expressly
allowed by the constitution, during parliamentary question and answer
sessions, or debates on bills. There is no constitutional or legal sanction on
the last two. However, such activities do take place.

67 ibid.
5.4.A.1 Substantive Motion

Article 127 states that generally, no discussion on judges' conduct may take place in Parliament except on a substantive motion and a notice has been given to 'not less than one quarter of the total number of members of that House.' Contrary to what takes place in the British Parliament, where a substantive motion will end either with removal or with criticism, censure, and condemnation of the judge concerned, Article 127 does not state what will ensue out of the motion. Since Article 125 (3) has provided for removal from office, the most rational purpose of Article 127 is only for criticism, censure and condemnation of judges' conduct. The Prime Minister may use the substantive motion as grounds for making a representation to the YdPA. This provision provides a political forum to raise the issue of dissatisfaction with a judge's conduct and to pressure the judge concerned to resign from office, without having to invoke Article 125(4), which requires the setting up of a tribunal.

There have been two attempts to bring to discussion judges' conduct in Malaysian Parliament; however, both failed to materialise. The first motion was planned in 1987 against Harun Hashim, a High Court judge but was aborted due to inadequate support. The second attempt took place in 1999, when Lim Kit Siang, an MP from Jelutong, moved a motion to discuss the judicial impropriety of Chief Justice Eusoff Chin.69

68 n 29 above, 47, Salleh Abas, Tun.
69 as stated in his motion reproduced below:

That this House, under Standing Order 36(8), EXPRESSES grave concern at the most serious allegations about judicial impropriety
The Speaker of Dewan Rakyat rejected the substantive motion for failing to fulfil the requirement of Article 127. The ground for refusal given by the Speaker was its failing to satisfy the one-quarter requirement. Any motion made by an opposition member would not have satisfied the one-quarter requirement, as the number of opposition members in Parliament has never reached one-quarter of the total number of MPs, and it would have been impossible to get the backbenchers to support the motion.

There is no reason stated in the Government White Paper during the review on the Reid Constitutional Draft constitution proposal, as to why this provision was included in the constitution. Presumably, the inclusion of substantive motion is to put the judiciary under political scrutiny. When substantive motion is invoked, it will operate as a forum to discuss political dissatisfaction of certain judges' conduct and to let the

alleged in court in August in the Asian Wall Street Journal (AWSJ) defamation case, viz:

- That the 1994 judgment by Justice Datuk Mohtar Sidin in the Tan Sri Vincent Tan vs MGG Pillai defamation was 'written in part by the plaintiff's counsel, Dato V K. Lingam, and initially typed by the said Dato V K. Lingam's secretaries, viz. one Jayanthi and Sumanthi; that the judgment was corrected by the said Dato V.K. Lingam and the final draft dispatched to the judge 'on floppy disk.'
- That Datuk V K Lingam placed Chief Justice Tun Eusoff Chin in his debt by getting their families to holiday together in New Zealand. The holiday involved flights together to luxury resorts in Queenstown and Christchurch, where Datuk V K Lingam and the chief justice 'posed for pictures with their arms around each other and with each other's families.'

NOTES that neither Tun Eusoff Chin nor Datuk Mohtar Sidin had responded or cleared their name although more than a month had passed since the allegations of judicial impropriety although they strike at the very core of public confidence in judicial independence and integrity; CALLS on Tun Eusoff Chin and Datuk Mohtar Sidin to appear before the full House of the Dewan Rakyat to answer the charges of judicial impropriety and to defend their integrity.


70 ibid.
judiciary know of the disapproval. Undoubtedly, a substantive motion, if properly utilised, may become an effective way of sending a message regarding judges, who do not conduct themselves according to the expected standard, or puts pressure on judges who are not suited to remain on the bench due to old age or other health reason. However, it may operate to the disadvantage of the judiciary when judicial decisions become the reason for making the motion.

5.4.A.II Questions and Answers

Members of Parliament have sometimes used the question time to raise issues on subjects relating to the judiciary or to criticise judges. However, these occur rarely. And the reason could be that, Members of Parliament do not know to whom the question should be addressed, or feel it is unwise to pose any questions about the judiciary, or they may worry that the question might subject them to contempt.

5.4.A.III Debate on Bills

Failure to propose a substantive motion in the House of Parliament does not stop discussions on matters regarding the judiciary from taking place. Debates may still take place especially concerning constitutional amendments on the judiciary or bills relating to judges' remuneration or changes in court jurisdiction.

In the course of the debates on the amendment of Clause (4) of Article 125 replacing 'misbehaviour' as grounds of removal with breach
of the code of ethics,\footnote{Parliamentary Debates (Dewan Rakyat), 8th Parliament, 4th Session. Debate on Constitutional (Amendment) Bills 1994, Second Reading, 9 May 1994.} Wee Chee Keong MP disclosed a business deal involving the previous LP, Tun Hamid Omar, and a businessman. This conduct constituted misbehaviour because the businessman was a party in a court litigation. The MP lamented that no action had been taken regarding such conduct, which indicated incompetence. In 2002,\footnote{Parliamentary Debate (Dewan Rakyat) 10th Parliament, 4th Session, Second Meeting. 20 June 2002.} commenting on the delay of a bill to increase the retirement age of judges from 66 to 67, Husam Musa reiterated the Tun Hamid Omar impropriety as stated previously, and questioned the failure of the government to take appropriate action. At the same time, he pointed out delays in delivering judgment or producing written judgment, which was inconsistent with the Chief Justice's directive, that written judgments should be ready eight weeks from the trial date.

In the course of the same debate, Teresa Kok commented on the dereliction of judicial integrity and the controversial appointment of Mohtar Abdullah, formerly the Attorney General, as Federal Court judge. Another MP, Wan Junaidi Tuanku Jaafar, condemned the acts of certain judges, who resorted to the press to voice dissatisfaction and cause polemics in the judiciary. At the same time, he commented on the way judges socialised, calling that judges should not only distance themselves from politicians but also businesspersons and even suggested that judges should not play golf for fear of bias when any of their golf partners has to appear before the court.
None of the MPs involved in the discussion was charged for contempt of court, and neither did the Speaker of the Dewan Rakyat reprimand the MPs for raising these points.

Parliamentary discussion on judicial conduct, however, does not form an effective method of controlling judges' conduct. Nor does it result in the named judge being censured, or at the least, being subject to investigation. The debate operates only as a notification that judges do misbehave, but provides no sanction.

5.5 Appellate Review

The court structure, which provides for the right of appeal against the decision of the trial court, is an important mechanism in guaranteeing the judiciary, especially the trial court, to decide a case ethically. An appeal allows the appellate court to reverse the trial court's decision, while a review makes it possible for the trial court to correct any wrong according to the suggestion of the appellate court. At the same time, the appeal and review processes become a forum for senior judges to reprimand the conduct of their peers. However, this type of accountability is not widely practised or welcomed by judges in Malaysia.

A criticised judge may respond to the reproach with revenge causing a rift within the judiciary. There are many cases to illustrate this situation. In the case of Ayer Molek Rubber Company Bhd & Ors v Insas Berhad & Ors,73 the Court of Appeal commented on the recklessness of the High Court judge in allowing abuse of the process of the High Court

73 [1995] 2 MLJ 734. Judges were Chan N H, Siti Norma Yaakob, KC Vohrah JJCA.
to take place causing the right-thinking person to speculate that litigants could choose the judge before whom they wished to appear.\textsuperscript{74} The Court of Appeal was concerned with public confidence and wanted to guarantee that justice must not only be done, but also seen to be done. Chief Justice Eusoff Chin, during the appeal of the same case to the Federal Court, viewed the comment of the Court of Appeal judge as unacceptable and reminded judges to,

\ldots refrain from criticizing another court, their brother judges and lawyers who have no opportunity to correct such injustice caused to them, which will have a detrimental effect on their characters and professional careers especially in cases like this where there is no evidence or cause to warrant their criticism, and where the judges of the Court of Appeal had no jurisdiction to hear an oral application when the motion for stay had been withdrawn. They must remember that they are themselves not infallible and should not use the Bench as a forum to pass harsh and disparaging strictures on others. Such conduct may be seen as being malicious, mischievous and irresponsible, and will bring the administration of justice into disrepute. Judges and magistrates must not only act neutral and fair, but be seen to act so. They should not jump into the arena and do battles with the parties, lest they may be blinded by the dust of the battle.\textsuperscript{75}

The warning from the Chief Justice signifies that judges cannot make adverse statements on the manner a trial is conducted, even though such conduct is wrong.

\textsuperscript{74} ibid, 743-744, Chan N H J said:
The fact that the proceedings were filed in the wrong division does not render the proceedings in any way invalid but may, coupled with other considerations in the present case, give the impression to right-thinking people that litigants can choose the judge before whom they wish to appear for their case to be adjudicated upon. This, we consider, may lead to very unhealthy negative thinking and since justice must not only be done but must also be seen to be done, it is incumbent on the trial judge, upon perusal of the pleadings, to have taken the initiative of transferring the proceedings to the right division so as to dispel any notion that he is partial to any party. This is yet another reason for strengthening our conviction that it is right and proper that we exercise our inherent power to prevent an injustice being done by the issue of an interim injunction restraining the respondents from enjoying the fruits of the registration of the infamous shares in their names. These observations are made so that people will not say, 'Something is rotten in the state of Denmark,' -- Shakespeare, \textit{Hamlet}, 1.

\textsuperscript{75} \textit{Insas Berhad & Anor v The Ayer Molek Rubber Company Berhad & Ors} [1995] 2 MLJ 833. The constitution of the Federal Court itself is found to be illegal as P.S Gill is unqualified to sit as a Federal Court judge. He was at that time a High Court judge. Another judge was Datuk Shaik Daud FCJ.
Another case illustrating disapproval of judicial admonishment took place when Justice Gopal Sri Ram in the case of *Lee Chan Leong v Juruterah Konsultant (SEA) Sdn. Bhd. & Ors*[^76] advised on the proper and right manner of using the power to cite for contempt. The judge, against whose decision the appeal was made, reacted by accusing the Court of Appeal of attacking him personally. The part of the judgment which had caused the controversy, was, ‘If contempt proceedings are instituted purely because of the personal ego of a judicial arbiter, it brings indignity to the court and muddies the very streams of justice that a judge has by his oath of office sworn to keep pure.’ Such a sentence does not amount to ‘personal vilification’, claimed the Court of Appeal judge.[^77] It has the effect of reminding all judges on when not to invoke contempt power.

The Federal Court also exercised supervision of judicial conduct that might endanger public confidence. In the *Re Zainur Zakaria*[^78] case, the appellant contested the unfairness of the procedure employed by Justice Augustine Paul in contempt proceedings when Zainur was refused time to prepare his defence and call witnesses. In other words, there had been a denial of ample time and opportunity to answer the charge. The Federal Court unanimously found that the High Court judge had blatantly disregarded the rules of procedure and acted contrary to best principles in conducting a contempt of court proceeding. Abdul Malek FCJ strongly disapproved of the conduct of the trial court judge and stated:

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[^76]: [2002] 3 MLJ 718.
[^77]: *Yusri Mohamad & Anor v Aznan Mohamad & Anor* [2002] 4 CLJ 43. The judge was R.K Nathan HCJ. He specifically addressed the issue under the heading Personal Attacks on High Court Judges by A Court of Appeal Judge. The reply does not have any relevance to the case in dispute.
The manner he conducted the proceedings, in particular the interrogation of the appellant and the speedy finding of guilt without even allowing the appellant to call any witness, gave the picture that he was behaving as though he was acting as counsel for the two prosecutors in the motion.

and went on to find

There is a blatant breach of rules and procedure and considering the frame of mind the learned trial judge was in, he should have been the last person to deal with the contempt issue.

A trial judge may mistakenly decide on the wrong principle, as for example, in the case of Hock Hua Bank (Sabah) Bhd v Yong Link Thin & Ors,79 when a High Court judge, in order to avoid allegation of bias being rendered against him decided to disqualify himself from hearing a case for the extension of a Mareva injunction. His decision to exclude himself was not due to a complaint made by the respondent, but because of his personal sentiment. In ordering the trial court to re-hear the case, Gopal Sri Ram JCA commented that the trial judge failed to act according to the right principle and the decision had not been well reasoned.

In Majlis Peguam Malaysia & Ors v Rajasegaran a/l Krishnan80 the Court of Appeal criticised the way the trial judge had exercised discretion in ordering the discontinuance of an application for declaration that the public statement, the proposed extraordinary general meeting (EGM) and the publication of the statement in the press constituted contempt of court. Gopal Sri Ram JCA found that the learned trial judge in ordering discontinuance had ‘[taken] into account a policy consideration, namely that the hands at the helm of the judicial vessel had changed and that the issue was no longer available for discussion at an academic level. That in our view is an irrelevant consideration.’

The Supreme Court in *Teng Boon How v Pendakwa Raya*, criticised the excessive interruption by trial judges or judicial loquacity,\(^8^1\) because if a judge descends into the arena he might not be able to form a detached view when forming his conclusion. In this case, the Supreme Court found that miscarriage of justice had taken place and the conviction was quashed. However, if an intervention only amounts to a 'criticism of counsel in handling the case rather than of the case itself' this does not amount to excessive interference.\(^8^2\)

The appellate court has an important role in reminding judges of ethics while on the bench and when making a decision. It does not only correct injustice, but condemnation of the misconduct helps to restore public confidence in the courts which might otherwise have been impaired. The party offended or prejudiced and the public at large might be tempted to attribute misconduct of a particular judge to the judiciary as a whole. The disapproval and criticism of the appellate court, even without amending the judgment, eliminates such a danger and restores the scale of justice to its proper balance. The appellate court at the same time may suggest a possible way in which particular circumstances should be handled in future to avoid possible deviations from high standards of judicial behaviour and to eliminate possible damage to public confidence in the courts. For example, Justice Augustine Paul after being cautioned by the Federal Court on the manner he had used the power to initiate

\(^{8^1}\) [1993] 3 MLJ 553.
\(^{8^2}\) *Juraimi bin Husin v Public Prosecutor and Mohd. Affendi b. Abdul Rahman & Anor. v Public Prosecutor* [1998] 1 MLJ 537.

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contempt proceedings became more cautious in citing counsel for contempt.\textsuperscript{83}

Furthermore, the disciplinary power of the appellate court has a restraining and preventive effect on judges. Many High Court or Sessions Court judges look for promotion: frequent reversal or reprimand without reversal moves a judge away from the list of candidates for promotion. Such a disciplinary action has implications for his self-respect or his image in the eyes of his fellow judges, the Bar and the public at large. In consequence, judges try their best to avoid being reprimanded by the appellate court.

The appellate court addresses cases of judicial misconduct which do not justify removal and discipline. However, this is not an effective way to control misconduct. Relatively few cases of judicial misconduct come before the appellate court. In many cases, counsel would not appeal on grounds of misconduct of the trial judge because of lack of sufficient evidence to support the challenge, particularly when the misconduct was not, or did not admit of being, reported in the transcript. In this sense, the

\textsuperscript{83} See \textit{Public Prosecutor v Karpal Singh} [2002] 2 AMR 2421, In this case Augustine Paul, J did not invoke contempt proceeding against Karpal Singh over his statement when he applied for certain persons to be granted observer status, but refers him to the Disciplinary Board of the Malaysian Bar. Karpal Singh had stated: 

...No doubt Judges are obliged to uphold the rule of law and uphold the Constitution, in particular Article 5(1). The judge must keep within the parameters of the law. In particular Yang Arif has been known that in the case of Dato Seri Anwar Ibrahim when defence counsel was cited for contempt by Yang Arif and sentenced to imprisonment. In the appeal the Federal Court found that Your Lordship acted more as a prosecutor than as a Judge. The finding made by the Federal Court that Yang Arif acted more as a prosecutor and with that finding it is more important that you should be observed. Rightly you should have been tribunalised. It is as clear as a pikestaff that having regard to the finding by the Federal Court there ought to be observers. That will ensure that nothing goes amiss. Above and beyond this our criminal justice system itself will be on trial. I have filed an application to have your Lordship disqualified.'
role of the Court of Appeal in the discipline of judges is limited. Misconduct complained of and corrected by the Malaysian court as illustrated above include: intervention, improper behaviour toward persons in Court, misapplication of legal principle, unnecessary remarks made by judges and manifesting partiality or prejudice. However, dissatisfaction on judges’ conduct does not totally operate as a bar to appointment as a judge or promotion to higher court. For example, despite being admonished by the Federal Court, Augustine Paul was promoted to the Court of Appeal.

The appellate review process at the same time assists the head of the judiciary in supervising the conduct of his subordinates. Supervision, however, is restricted to conduct performed while exercising judicial duty, i.e., while presiding a case and does not extend to off-bench behaviour. In this case, other forms of control are necessary.

5.6 Informal Methods of Checking Misconduct

5.6. A The Bar

The Malaysian Bar has proved to be vigilant both in defending judicial independence and impelling for the highest judicial conduct. During the events leading to the dismissal of the Lord President and two Supreme Court judges, the Bar took the lead in criticising and condemning the part played by the acting Lord President and certain segments of judges in removing Salleh Abas, Wan Sulaiman, and George Seah. The Bar passed a vote of no-confidence against Hamid Omar,
boycotted any functions attended by him, and did not invite him to any of the Bar gatherings.

When Hamid Omar retired, the Bar began to mend their relationship with the new Chief Justice. However, in the course of improving the rapport the Bar made a move to query several judicial improprieties, a step disapproved of by the executive and the judiciary itself.

The Malaysian Bar has a very strict professional etiquette governed by the Legal Profession Act 1976 and high standards, which they expect judges to conform to. The Bar has several ways of checking upon judges’ conduct, sometimes in very confrontational forms.

5.6. A.I Role in the Appointment of Judges

The Bar checks judges’ conduct by participating in the process of appointing a judge. As illustrated in Chapter Three, the head of the judiciary ordinarily consults prominent members of the Bar and any opinion from the Bar may influence a candidate’s opportunity of being appointed as a judge. Therefore, it is important for members of the JLS to conduct themselves ethically in order to receive a favourable recommendation from the Bar.

5.6.A.II Protest to the Chief Justice

When the conduct of a judge is in question, the Bar may make a representation to the head of the judiciary informing him of the improper conduct. The Bar usually comes to know about a judge’s bad conduct
from complaints lodged by its members. According to the President of the Kuala Lumpur Bar Committee, a section has been set up where members can lodge complaints about judges’ misconduct and forward the complaint to the Chief Justice for further action.\textsuperscript{84} The complaint must be in written form, and the conduct complained of, must be stated clearly. However, only a few lawyers are ready to lodge a complaint for fear of retaliation by the concerned judge.

5.6.A.III Bar Meeting

Another form of surveillance by the Bar is the calling of an Extraordinary General Meeting (EGM) to deliberate and pass resolutions on judges’ conduct. There were two attempts made by the Malaysian Bar to call for an EGM to sanction judges’ misbehaviour. Both failed. The first EGM was scheduled to take place on 29 November 1999 to discuss several issues, amongst others, serious allegations of impropriety that had been made against certain members of the judiciary. The discussion was intended to produce a resolution to ‘bring to the attention of the appropriate authorities all relevant instances of controversy that have undermined confidence in the Malaysian judiciary and to do all that is necessary to pursue the appointment of a Royal Commission of Inquiry to make such inquiries and recommendation as may be appropriate to ensure that confidence in the Malaysian judiciary is fully restored.’

One of the members of the Malaysian Bar (the Bar) by the name of Rajasegaran (the Plaintiff), on receiving the notice of the said EGM,

\textsuperscript{84} Interview with Kuala Lumpur Bar President, Mr. Ragunath Kesavan at Kuala Lumpur Bar Committee Office, Wisma Tun Perak, Kuala Lumpur, 4 October 2002.
wrote to the Bar requesting that the EGM be aborted. He gave the Bar 72 hours to take such action. Failing to do so would result in court proceedings. The Bar did not bow to the Plaintiff’s demand and the Plaintiff then applied for an interim injunction, together with a plea for a permanent injunction, ‘to restrain the defendants either by themselves and/or through their servants and/or their agents from holding and/or causing to be held any further meetings that constituted contempt and/or abuse of power and/or a contravention of the Sedition Act 1948, and damages and costs.’

The High Court granted the interim injunction, requested by the Plaintiff. In doing so, the learned judge opined that the granting of an interim injunction did not amount to interrupting the right to freedom of speech, as the subject the Bar was going to discuss was outside the power conferred by the Legal Profession Act, and would possibly land the Bar with contempt proceedings and criminal charges for sedition. On the crucial point of method of discussing judicial conduct, the HC opined that the call for the establishment of a Royal Commission amounted to an attempt to sidestep a constitutional safeguard because any misconduct of judges should be dealt with under Article 125 of the Constitution. Contempt proceedings could be instituted against the Bar because in arriving at the resolution, the Bar had attacked the independence, competence, and integrity of the judiciary. The discussion amounted to a

Chapter Five

sedition because it had the effect of inciting disaffection amongst the public against the judiciary.\(^{86}\)

The HC delivered the decision on the permanent injunction on 10 November 2003, mainly recycling its reasoning in the interim injunction application.\(^{87}\) Justice R K Nathan, spelt out the permissible scope of discussion on judicial conduct. The judge ruled that the Bar had no power to discuss the conduct of the judiciary and the attempt to do so was contrary to Article 127 of the Constitution. The proper means and to do justice to the judge in question was to act in accordance with the Indian Supreme Court’s advice in the case of C Ravichandran Iyer v Justice A M Bhattacharjee,\(^{88}\)

The threat of action on vague grounds of dissatisfaction would create a dragnet that would inevitably sweep into its grasp the maverick, the dissenter, the innovator, the reformer – in one word the unpopular. Insidious attempts pave the way for removing the inconvenient. Therefore, proper care should be taken by the Bar Association concerned. First, it should gather specific, authentic and acceptable material which would show or tend to show the conduct on the part of a judge creating a feeling in the mind of a reasonable person doubting the honesty, integrity, impartiality or act which lowers the dignity of the office but necessarily, is not impeachable misbehaviour. In all fairness to the judge, the responsible office-bearers should meet him in camera after securing the interview and apprise the judge of the information they had with them. If there is truth in it, there is every possibility that the judge would mend himself. Or

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\(^{86}\) According to Sedition Act 1948, Ss 3 (1) A ‘seditious tendency’ is a tendency (c) to bring into hatred or contempt or to excite disaffection against the administration of justice in Malaysia or in any State.

s.4 (1) Any person who –
(a) does or attempts to do, or makes any preparation to do, or conspires with any person to do or conspire with any person to do, any act which has or which would, if done, have a seditious tendency; ...

\(^{87}\) Raja Segaran A/L Krishnan v Bar Council Malaysia & Ors [2004] 1 MLJ 34. Delays in delivering the decision were due to changes in the judicial leadership, which in the HC judge’s opinion rendered the dispute as academic. The HC judge then on the date fixed for mention of the case, called upon the parties to resolve the disagreements between them. Subsequently, the plaintiff made an application to discontinue the suit, which was opposed by the defendants. The application for discontinuance was allowed. See Raja Segaran S Krishnan v Bar Council Malaysia & Ors (No.4) [2001] 4 C.L.J 85. Feeling dissatisfied, the defendants appealed to the Court of Appeal (CA). The CA then ordered the HC judge to deliver his decision on a date convenient to him. Majlis Pegtiam Malaysia v Raja Segaran a/l S Krishnan [2002] 3 MLJ 155.

\(^{88}\) [1995] 5 SCC 457, 479.
to avoid embarrassment to the judge, the office-bearers can approach the Chief Justice of that High Court and appraise him of the situation with material they have in their possession and impress upon the Chief Justice to deal with the matter appropriately.

Again in 2000, because of a statement made by Rais Yatim censoring the conduct of Chief Justice Eusoff Chin in holidaying with a counsel, the Bar called for another EGM. The purpose of the meeting was to ‘deliberate and pass resolutions on matters relating to the allegations made by Rais Yatim against the Chief Justice.’ The same Plaintiff again took out a summons and prayed for an injunction to stop the Bar from holding the EGM. The same High Court judge, R K Nathan, in granting the injunction held that there was no basis for the Bar to hold the EGM. The judge formed this view after he found that the meeting had been called on hearsay evidence, and would have caused an injustice to the Minister making the statement. Furthermore, according to the judge, the Bar had failed to seek clarification on the truth of the statement, and therefore did not act to protect the sanctity of the judiciary. The learned judge opined the act as condemning a person without a hearing. He stated:

If the Malaysian Bar is not concerned with the truth or otherwise of the allegations but want to have this meeting only to satiate their hunger for a public debate over the Chief Justice by wresting the discussion from the general public and by so doing trying to show that they are protecting the sanctity of the judiciary, it seems to me that this effort is totally misconceived.

The EGM did not take place as scheduled. Another attempt was made by the Bar to call for an EGM in 2003, this time to discuss on the appointment and promotion of judges, which has a bearing on judges’

89 Raja Segaran a/l Krishnan v Bar Malaysia & Ors [2000] 4 MLJ 571.
90 ibid, R K Nathan J, 580.
Members of the Bar reacted with differences of opinion to the Bar decision. This time there was no legal suit arising out of the notice for EGM and the resolutions issued by the Bar. In the end, the EGM had to be called off due to lack of quorum. The Bar had therefore failed to use the EGM as a forum to discuss judges' conduct. The failure of members from committing themselves to the discussion could be due to the suit by Raja Segaran which cast an uncertain air on the status of the meeting. It could also be because members are more concerned with 'bread and butter issues', so there is less unity amongst them to uphold the public principles collectively adopted by the Bar.
5.6. A.IV Bar Newsletter and Publications

It is a tradition for the legal profession to circulate newsletters among members to inform them on the current development of the law, the Bar programme or changes in court proceedings and latest legal news. At present there are two such as: Infoline, the official newsletter of the Malaysian Bar published by the Malaysian Bar Council; and Relevan, the newsletter of the Kuala Lumpur Bar published by the Kuala Lumpur Bar. The Malaysian Bar Council also publishes INSAF, the Bar law journal containing articles by lawyers or law academicians on legal subjects. The newsletters are also a medium of communication among members of the Bar, and the judiciary. At the same time, the newsletters also contain criticism of judges, who failed to conform to professional standards. Most of the time the criticisms rendered are very strong.

When Justice R K Nathan wrongly treated Justice Gopal Sri Ram’s remarks as personal and ventilated against the statement by adding into his judgment a reply to Justice Gopal Sri Ram statement, Relevan, the KL Bar Newsletter criticised Justice R K Nathan’s conduct under the head ‘Judicial Ego Out of Control’ and described it as ‘undignified’, ‘unprecedented and has brought the administration of justice and the judiciary into public scandal, odium and disrepute.’ In an earlier issue, Relevan highlighted interference among judges which affected their decisions, as revealed by former Court of Appeal Judges Dato’ Shaik Daud Ismail and Justice Muhammad Kamil Awang in the case of Harris

Mohd. Salleh v The Returning Officer, Ismail bin Majin & 6 Others.\(^{96}\)

Infoline\(^ {97}\) also published a press statement censuring R K Nathan’s conduct and treated such conduct as, ‘out of line with judicial dignity and decorum’, and ‘abuse of judicial proceedings.’ The Bar requested that part of Justice Nathan’s judgment expunged and proposed to the CJ to make appropriate representation to the PM to advise the YdPA to set up a tribunal to inquire into Justice R K Nathan’s action.

In another issue, Relevan published an article criticising the practice of joining legal firms by retired judges or acting as consultants to a firm immediately after retirement.\(^ {98}\) Such a practice is condemned because it creates an impression that negotiations had started while the judge was still in office.

5.6.A.V Public Forum and Discussion

Unlike the newsletter, which is restricted to members of the Bar only, public forums and discussions are also organised by the Bar to highlight and discuss judges’ conduct. In general, these forums are open to the public. The first discussion on judges’ conduct was held immediately after the removal of the Lord President and two Supreme Court judges, and on the operation of Article 125 (3) and (4).\(^ {99}\) The Malaysian Law Conference is another forum where discussion on judges’ conduct may

\(^{96}\) [2001] 3 MLJ 433.
take place. In 2002, the Bar organised a colloquium,\textsuperscript{100} which among other aspects, discussed the topics ‘Who Judges the Judges?’, ‘Justice Is Not a Cloistered Virtue’, ‘Are Judicial Criticisms Inter Se Permissible’, and ‘Judicial Appointments: Who Would Have the Say?’ At the same time, the Kuala Lumpur Bar also held a forum discussing judicial appointments and touching upon the subject of judicial ethics, involving incidents in which judges immediately after their retirement were appointed as directors and chairpersons of companies, because this hints at impropriety on the judge’s, especially when previously such judges handled cases involving the company.

5.7 The Press

The effectiveness of the media’s role in supervising judicial conduct relies upon the extent of freedom it enjoys in reporting news involving the judiciary. The relationship between the media and judiciary is mutual; a free media depends upon the existence of a free judiciary, and a free judiciary depends in turn upon a free and independent media.\textsuperscript{101} Despite the fact that freedom of the press in Malaysia is restricted and most of the prime newspapers and television stations are controlled by the ruling party or its party components, the press does have an important role in highlighting judicial impropriety and stimulating on discussions on the topic. Lord Denning has noted the importance of the media:

\textsuperscript{100} Colloquium on “Current Judicial Trends and the Rule of Justice” 21 September 2002 organised by Bar Council Malaysia, Kuala Lumpur.

\textsuperscript{101} Lord Woolf, Lord Chief Justice, ‘Should the Media and Judiciary be in a Speaking Term?’ Eight RTE/UCD Law Faculty Lecture Dublin, 22 October 2003. accessed 5 May 2004.
In every court in England you will, I believe, find a newspaper reporter...He notes all that goes on and makes a fair and accurate report of it...He is, I verily believe, the watchdog of justice...The judge will be careful to see that the trial is fairly and properly conducted if he realises that any unfairness or impropriety on his part will be noted by those in court and may be reported in the press. He will be more anxious to give a correct decision if he knows that his reasons must justify themselves at the bar of public opinion.102

The role of the media is in supplying the information upon which other mechanisms can operate to discipline a misbehaving judge or to remedy defects in the administration of justice. Thus, following reports in the press, Members of Parliament may initiate a motion to discuss judges' conduct or to alert the head of the judiciary to urgently attend to the problem. Moreover, when the press reports a sanction against an errant judge, public confidence will be restored.

The media hold the judiciary accountable by exposing to the public the activities of the judiciary, while acting as cleansing agents. They can highlight allegations of corruption and abuse of power, even at the peril of being cited for contempt of court. Judges who cannot afford to have their conduct exposed to the public gaze will act quickly to stop improper behaviour, or risk being subject to public condemnation.

Media reporting should however be treated cautiously: it can be biased or contain limited information about the judiciary.103 The range of news made known to the public is ‘neither a representative nor systematic review of the judges’ work.’ Stories reported by the media rely heavily on the ‘capacity to sell papers and airtime.’ Malleson states:

The coverage exposes some judges unfairly while equally failing to spotlight others whose conduct ought to be scrutinised. Poor performance of a judge is

103 n 42 above, 196.
revealed only if it happens to come to the attention of a journalist and is sufficiently shocking or unusual to attract public attention. Sexual scandals, however trivial, are likely to fall into this category, whereas routine rudeness, incompetence or insensitivity which might have a far more profound affect on the standard of justice, may well be neglected.\textsuperscript{104}

5.8 Judicial Conduct and Judicial Accountability

Judicial accountability can be achieved by having a number of rules and practices that regulate the conduct of judges, which may be expressed either in a written code of ethics, or common law or practices operating in the legal system. The manner of supervision of judges' conduct stipulated in Article 125(3) gives rise to possibly three forms of accountability: disciplinary accountability, constitutional accountability and political accountability. Disciplinary accountability arises from the creation of a tribunal and removal, if necessary, which operates to discipline an errant judge and warn other judges not to commit the same offence. Constitutional accountability comes into operation because the method of supervision of a judge's conduct is provided for in the constitution. Both disciplinary and constitutional accountability, however, share the elements of political accountability when the nature of the misconduct or the process of supervision contains political considerations.

Political elements exist in Article 125(3) where the Prime Minister is given the power to initiate the process by making a representation to the \textit{YdPA}. To use as the grounds for invoking his power to make a representation to the \textit{YdPA} for a 'breach of the code of ethics and inability, from infirmity of body or mind or any other cause' is a

\textsuperscript{104} ibid.
political decision by the Prime Minister. This is illustrated in the setting up of the tribunal inquiring into Salleh Abas’s conduct and the failure to establish a tribunal to inquire into the alleged misconduct of Eusoff Chin and other judges who had been named as acting unethically.

Other forms of surveillance on judges’ misconduct as exercised by the Bar and the media are shaped to impose public accountability on the judiciary. Public accountability puts judges under the public’s spotlight. Therefore to retain the public’s confidence and respect of the institution, judges have to behave strictly according to the highest standards required by the profession. Thus the appropriate model of judicial accountability on judges’ conduct cannot be strictly ‘repressive’ or ‘legal’ but should be ‘responsive.’ However, because of the imbalance of strength and influence among the players involved in disciplining judges, the ‘responsive’ model has turned into a ‘repressive’ model.

Conclusion

Accountability through inspection of judges’ conduct forms an effective means of maintaining a high standard of behaviour among judges. This takes place in various forms, as discussed above; however, judges should be able to self-regulate. Judicial supervision, formal or informal, offers a guide and a reminder to judges as to their responsibility to act ethically. However, the existence of multi-surveillance instruments described in this chapter, does not condone the practice of appointing a judge short of the best behaviour required for the profession. A candidate for judgeship must have a good intellectual record, as well as good
character traits such as honesty, integrity, courtesy, patience, and diligence.\textsuperscript{105}

The most glaring shortcoming of the methods of supervising judges' conduct lies in the impact that it has in curbing judicial misbehaviour. Further action has to depend on the political will of the executive, while the head of judiciary in most situations is very defensive and tries to protect an accused judge by claiming that internal disciplinary action will ensue. This protective attitude does not help in imposing accountability on judges for their negative conduct.

CHAPTER SIX
SUGGESTIONS AND CONCLUSION

Introduction

Judicial accountability has dominated the Malaysian political and legal discourse for more than a decade. Such discussions however, have now decreased after a change of leadership and the release of former Deputy Prime Minister Anwar from prison. Despite this development, it is important to sustain interest on the subject; otherwise, the initiative for creating an independent judiciary will be stymied. A continuing demand for accountability of the judiciary will keep judges on the alert about their obligation to sustain the confidence of the public by not committing any misdeeds that would jeopardise their position, if made public.

6.1 Strong political accountability

This thesis has discussed various judicial accountability practices within the legal and governmental structure of Malaysia. An evaluation of the practices reveals negative elements that indicate a strong political accountability as compared to other forms of accountability. This conclusion is supported by the following observations:

First, the tendency of the judiciary to be accountable to the government is very significant. This is the result of the broad decision-making power possessed by the executive and legislature on the jurisdiction and structure of courts, and the power to appoint and remove judges. The
The judiciary has conceded these powers.\textsuperscript{1} The constitutional requirement for the \textit{YdPA} to act on the Prime Minister's advice supersedes the convention of seeking agreement from the head of judiciary and the Bar Council before the name of a candidate for judicial appointment is presented to the \textit{YdPA}.

Furthermore, the bulk of judicial appointees comprises those with a record of service in the JLS. The number of advocates forming the bench is steadily decreasing. As a result, the bench operates like a branch of the public service, with a strong inclination towards protecting governmental interests. This is not to doubt the impartiality of the judges, but the description in Chapters Three and Four reveal that most judges are non-activists. Self-restraint is significant when faced with issues that affect government interests and human rights; the 'executive-mindedness' of the judiciary is therefore perceptible when we recall the nature of the duties they performed while serving the JLS, when government interest always had priority in decision-making.

Second, the executive has full control concerning the regimes of disciplinary action against an errant judge. Obviously, political factors dominate the modes of decision by the Prime Minister in any acts of his to invoke his power to advise the \textit{YdPA} to establish a tribunal to investigate judges' misconduct or a breach of the judges' code of ethics. We saw in Chapter Five where other forms of action had been used to deal with the allegation of misconduct by judges: the government had resorted to ordering investigation by the Anti-Corruption Agency in place of setting up a tribunal to investigate a breach of the judges' code of ethics. This is

\footnote{See the case of \textit{In re Application of Dato' Seri Anwar Ibrahim} in Chapter Three.}
distinctive when the judge involved had a close association with the executive.

The executive has the upper hand in dealing with disciplinary action against judges because the judiciary is unsystematic in dealing with judges' misbehaviour. The Chief Justice, as the head of the judiciary, repeatedly adopts a defensive attitude when dealing with accusations of judges' misconduct. The Chief Justice opts to tackle the issue personally, leaving the public to wonder whether ample action has been taken to address the misbehaviour.

Other forms of disciplinary mechanisms described in Chapter Five have a low level of effectiveness because of the lack of real sanctions. The remedial action is personal to the judges named. He may opt to dismiss the complaint and claim the criticism as against the notion of judges' independence.

Third, the influence of the positivist school of thought is obvious in the approach adopted by judges when they exercise their adjudicative function. Two essential principles of 19th century English positivism still influence the judicial perception of their task. Firstly, judges perceive law as the command of a political superior to a political inferior, supported with the threat of a sanction, and secondly that law as it is should be distinguished from law as it ought to be, and hence divorced from legal values and moral standards. With the acceptance of these rigid distinctions, the Malaysian judiciary has accepted the division between legislative function and the judicial function and treated it as their duty to apply the law without questioning the will of Parliament.
This view allows the judiciary to apply the 'harshest of laws with an easy conscience'\(^2\) and pass the blame on the unjustness of the law to the legislature. It is the belief of most Malaysian judges that they do not have to answer for the cruelty of the law because it lies beyond their duty. However, a 21st century judge cannot simply hide, in an Age of Human Rights, behind this excuse.

Adherence to legal positivism has hindered Malaysian judges from taking an activist approach in interpreting the law, causing the law to stagnate while leaving old precedents to rule which may be incompatible with contemporary situations. This is illustrated in Chapter Five by the precedent set in the *Karam Singh* case, which still haunts the judiciary when dealing with preventive detention matters, regardless of the unjustness of the law and changes that have taken place in issues concerning the violation of human rights not just in Malaysia, but worldwide. Malaysian judges should take Lord Denning's advice on how to deal with precedent. According to Denning, while precedent is important, it must not be applied rigidly, 'You must cut out the dead wood and trim off the side branches, else you will find yourself lost in the thickets and brambles.'\(^3\)

Fourth, the judiciary fails, or rather has failed, to pass the severest test of their ability to withstand political pressure. The Anwar trial was fraught with legal controversies and has exposed the fiction that political trials are unknown in Malaysia. Anwar has been depicted as one, whose veracity was in doubt, whose acts threatened national security and legal


order. He had to face this perception even before prosecution. At the same time, he had to endure judicial hostility and perjured evidence that had gotten him convicted. This resulted in an intentional miscarriage of justice. Furthermore, he was charged under ‘historic’ law – “The law hath not been dead, though it has slept” to quote Shakespeare’s *Measure for Measure*; indeed the law was in the process of annulment.4

In addition, the trial was political not only because it seemed to satisfy the political ends of the regime in power, but it had also radically changed public perception of the judiciary's role as an independent institution. Putting the political scenario at the time of Anwar’s prosecution and the reaction of the judiciary towards the establishment and the idea of justice, the judiciary may be accused of compromising in its duty to make impartial decisions.

A judiciary, which is very much accountable to the government, negates the effectiveness of public accountability, legal accountability and substantive accountability. Therefore, judicial independence is at stake. To revitalise judicial independence, evaluation of the institutional structure of the judiciary including the power and process of appointment and removal is crucial. Reform is therefore imperative.

6.2 Reform of the Judiciary

The complex question of judicial accountability has produced proposals to improve two main areas relating to the judiciary, namely the method of judges’ appointments and supervision of judicial conduct. The

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4See p 180-181 at Chapter 4.
change of judges' perceptions on their role is dealt with under the title of judicial education.

6.2. Appointment of Judges

Dissatisfaction with the method of selection of judges in Malaysia arises due to the overriding power possessed by the Prime Minister, which subsequently leads to a lack of transparency in the appointment of a candidate. However, regardless of the discontent with the power of the Prime Minister in judicial appointments, the executive should continue to have a role in judicial appointment but should be assisted by a mechanism that aims to ensure transparency and uses merit as the main consideration in appointments.5 This position is consistent with international declarations on judicial independence: for example the 1982 Tokyo Principles on the Independence of the Judiciary in the Asian Region recognises any form of judicial appointment that ensures the appointment of 'proper persons to the office of a judge' and 'provide[s] safeguards against appointments being influenced by inappropriate factors.'6

Malaysia does not have to look at other jurisdictions in conducting reforms in its method of judicial selection and appointment. Even though the original version of the Merdeka Constitution ruled out the involvement of the Judicial and Legal Service Commission (JLSC) in the nomination and selection of candidates for a judgeship post, the Government White Paper revising on the Reid Commission proposal as explained in Chapter

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6 Principles 10(a) Tokyo Principles on the Independence of Judiciary in the LAWASIA Region in Shetreet and Deschenes, n 5 above, Chapter 37.
Two incorporated JLSC in judicial selection and appointment. The involvement of JLSC in selecting judges has balanced the Prime Minister’s influence in nominating candidate for judges’ post. However, in 1960, the role of JLSC in judicial selection was removed, and this situation persists until today. Malaysia may want to reinstate the procedure prior to 1960 as other jurisdictions are now resorting to the practice of having a commission to filter the candidate for judges’ post.

6.2.A.I New Format of Judicial Appointment

i. Composition

The revival of the JLSC’s role in the selection process requires changes in the composition of the JLSC membership. The present composition is unsuitable because of executive domination. Therefore, the composition of the JLSC should revert to the original provision as proposed by the Reid Commission. To recapitulate, the Reid Commission proposed the JLSC should comprised of: the Chief Justice as the Chairman, the Attorney General, the senior puisne judge, the deputy Chairman of the Public Service Commission, and one or more other persons, appointed by the YdPA, after consultation with the Chief Justice from among judges or former judges of the Supreme Court. To make the JLSC more representative, it is proposed that the composition of the Judicial and Legal Service Commission may be extended to include the representative of the Bar Council, the Human Rights Commission and a layperson to represent

7 See Chapter Two, 2.2.B.
8 Countries like Canada, South Africa and the United Kingdom have already formed judicial commissions to vet candidates for judicial appointment.
the public. The person selected should have vast experience in the workings of the judiciary but not necessarily with a legal qualification.

ii. Role

The JLSC will recommend suitable candidates with the best qualifications to the Prime Minister before he tenders the name to the YdPA. The choice of final candidate is limited to the list of names proposed by the JLSC. If the PM disagrees with the name submitted by the JLSC, he has to refer the name back to the JLSC, stating his reasons for refusal. The JLSC may resubmit the name of the same candidate and the PM then has to accept the recommendation. A compromise between the JLSC and the PM, is therefore foreseeable. Ideally, negotiations should take place within the spirit of ensuring that the best person takes the seat while preserving the independence of the judiciary.

iii. The Process and Criteria of Appointment

It will become evident from the discussions in the previous chapters that well-known criteria in judicial nomination and a transparent process of appointment are crucial to build a competent and resilient judiciary. Transparency is vital because potential litigants want to have members of the bench who are representative not only of the government but the public interest too. The judiciary should therefore outline the fundamental criteria that judicial candidates should possess, the combination of both moral qualities and intellectual or professional ability. In addition to these two criteria, which constitute the prime consideration of eligibility, gender,
ethnicity and religious or ideological preference are important aspects in forming a representative bench.

In the age of human rights, it is prudent if the JLSC consider having a reflective judiciary. In Malaysia, there is no complaint that the bench is not representative of the people of Malaysia in the sense of gender, ethnicity, or religion, but criticism is levelled at the diversity of ideas represented. Malaysia has a very restrictive judiciary since almost 90 percent of judges come from the public service. To alter this viewpoint, it is pertinent to have more judges appointed from the bar in order to have a judiciary more alert to the issues concerning society and human rights.

6.2. B Removal of Judges

At present, scrutiny of allegations of judges' misconduct can only be conducted through an enquiry by a tribunal set up under Article 125(3) of the Federal Constitution. If the allegation is proven, the judge involved will be removed from office. The description in Chapter Five, however, shows that Article 125 had the experience of being abused, because it allows the executive to manipulate the process of removal. Thus, Article 125(3) has not been effective in barring judicial misconduct. To overcome this problem, executive involvements in the removal process necessitate

9 Generally, this means diversity among the judges appointed, which should reflect the make-up of the society. It should be distinguished from partisan representation as a judge does not represent any group. The basis of reflective judiciary is like other government institutions in a democracy: the judiciary must also be representative of the society. Due regard should be given to preserving public confidence in the court. For further discussion see Davis, Rachael and Williams, George, 'Critique and Comment: Reform and Judicial Appointment Process: Gender and the Bench of the High Court of Australia' [2003] 27 Melb Univ L Rev 819.

Chapter Six

restriction. The International Bar Association's Code of Minimum Standards of Judicial Independence, which prepares a standard to preserve judicial independence suggests, that the involvement of the executive is only to the extent of 'referring complaints against judges, or in the initiation of the proceedings, but not the adjudication of such matters.'

It is important to highlight that involvement in adjudication takes place not necessarily when the executive acts as an arbiter, but when members of the executive are also involved in nominating members of the body arbitrating the reference. Article 125(3) therefore shows the need to eschew the Prime Minister's involvement in naming members of the Tribunal and leaving it to the JLSC to advise the YdPA in appointing members of the Tribunal. Equally important in curtailing the executive's role in the removal process, is the procedure governing the inquiry. The procedure must be spelt out clearly and made public.

As has been argued in Chapter Five, the standards forming a Judges' Code of Ethics are very trivial. The standard imposed in the Code of Ethics is superfluous if stringent criteria are employed during the selection of candidates suitable for appointment. The Judges' Code of Ethics therefore does not form a concrete ground for removal. The appropriate grounds for removal should be proven incapacity, serious criminal default or serious misconduct. This can be found in the Tokyo Principles, which regards a person as unfit to be a judge if he were to commit such behaviour. On the other hand, the repeated infringement of the expected standards may cause disciplinary action to be taken, and if

11 Code 4 (a) International Bar Association Code of Minimum Standards of Judicial Independence, in Shetreet and Deschenes n. 5 above, Chapter 32.
12 n 6 above, Principle 11(d) Tokyo Principles.
necessary, removal from office, provided that the ethical standards provided in the code of ethics are right for a judge.

Because the code of ethics provides guidance on how judges should behave, it therefore should be stated in an inspirational not punitive manner. The 1994 Code of Ethics therefore needs re-drafting. The effort to build an accountable judiciary requires advancement in the area of supervising judicial conduct, although this has the danger of diluting the judiciary's image as an independent and impartial institution. There is an urgent need to review the Code to make it more efficient.

The existence of a code of ethics is meaningless in the absence of an enforcement body. An independent institution acting as a judicial complaint bureau to filter complaints against judges is essential to enforce the code. Any complaint received by the body will be investigated thoroughly and conscientiously; if the complaint is serious, the bureau can forward the report to the Prime Minister for further action. The bureau may also handle less serious complaints and reprimand judges if necessary. The Judicial Complaint Bureau should comprise independent persons, headed by the Chief Justice. Only High Court and Court of Appeal judges will be subject to the investigation conducted by the bureau. Federal Court judges however, require special thought. The tribunal fitted with the new composition and procedure discussed before should become the forum to remove judges of the Federal Court.

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6.2. C Judicial Education

The two previous suggestions do not directly address the manner in which judges decide a case. However, any proposal for judicial education needs to be carefully considered as this may have an adverse impact on the adjudicative independence of judges. Judicial education is considered very important in Malaysia due to the restricted view of the role of judge possessed by the Malaysian judiciary. As indicated earlier, Malaysian judges confine their role to declaring the law only, thus they need to reconsider their role and herein lies the core of the problem.

Malaysian judges need to acknowledge that their duties extend further than merely declaring what the law is, because in the process they may interpret and make new law. Interpretation is a creative activity involving the invention of new principles, and requires judges to look beyond the ‘black letter law’ or the legislative intention. Unavoidably, judges need to take a more activist stand and be more inventive when interpreting and applying the law to suit the current challenges to the social structure, state and citizens’ relations, and human rights. At the same time, judges have to tread carefully. This is a very delicate area and requires a paradigm shift, which according to Malaysian Commission of Human Rights, is very complex.14

This thesis does not specifically address judicial education as it is outside its scope. However, as it has merit in enhancing judicial accountability and independence by inspiring changes on judicial outlook and may instil better accountability, Malaysian judiciary should initiate a

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programme where judges may continually undergo courses to enhance their knowledge in the latest developments of the law and legal theory.

6.2.D Eliminating Fallacy

Malaysian judges hold steadfastly to the belief that they should dismiss politics when adjudicating. However, as illustrated in Chapter Four all trials have by their very nature, political elements, the difference however, lies in the degree of political involvement. Courts, especially the apex court, is the centre of political power because it can influence the political direction of a country through its power to pronounce on the validity of executive and legislative action, together with the power to strike down laws. Besides, it is common for the government to refer political disputes to the judiciary in order to claim legitimacy for their action. However, the judiciary should not lend a hand to satisfy the political ends of the government of the day. Chapter Four has illustrated the seriousness of the damage to the judiciary’s reputation caused by political trials. A numbers of bad precedents ensued and justice was distorted to suit the political ends of the government in power. In spite of this, judicial approach may change under numerous situations such as, when there are changes in judicial leadership, when the public shows strong opinions on certain issues and when the regime in power is more tolerant of court ruling. These occasions give the judiciary an opportunity to remedy its position and image in the public eye.

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15 In particular, page 140-141.
17 ibid, 20
The Malaysian judiciary today cannot deny that court rulings are political. For example, in Mohd Ezam’s habeas corpus application and Anwar’s sodomy case, the Federal Court judges abruptly changed their approach in dealing with the question of law challenged during the appeal. The Federal Court judges in Mohd Ezam’s case suddenly departed from the precedent laid in Theresa Lim’s case that excluded the police detention order from review. Meanwhile, the majority of Federal Court judges in Anwar’s review application for sexual conviction opted to adopt a more stringent test in accepting testimony for sexual offences and ruled that in sexual cases the exact date the alleged activity took place must be stated in the charge. A range of assumptions lies within this ruling. One valid guess is, the shifts in approach was influenced by the change in the country’s leadership after the new Prime Minister, Datuk Seri Abdullah Haji Ahmad Badawi, pledged that he would not interfere with the judiciary. Yet more negative speculation may arise, doubting the court decision as genuinely based on legal principle.

The shift in judicial approach also indicates that the court respects the wishes of the constituents, although not in the same way that politicians do. When taking such a course, the judiciary ‘tries to reach out to different groups through its decisions and to generate consensus and acceptance of its authority.’

Awareness of the people’s feelings and sensitivity to political movement are essential for the judiciary to garner respect from the public and to remain as an important government institution. If the Malaysian

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judiciary continues to shun politics, and gives less attention to social and
economic elements of cases, the judiciary is guilty of neglecting the spirit
of the Malaysian Constitution, which guarantees political, social and
economic rights. As such, in adjudicating, especially in constitutional
issues, judges have to consider these elements and other values as had been
discussed in Chapter One.19 Douglas’s view supports this stance:

The electronics industry — resourceful as it is — will never produce a machine to handle
these problems. They require at times the economist’s understanding, the poet’s insight,
the executive’s experience, the political scientist’s understanding, the historian’s
perspective.20

Conclusion

This thesis proposes, ‘law as integrity’ as an alternative to legal
positivism. It has presented some theoretical foundations to support the
claim that judges are accountable to the law when deciding disputes. Law
as integrity, combines both ‘conventional’ and ‘pragmatic’ approaches of
adjudication. It allows judges to move forward when facing difficult cases
and at the same time ties judges as they move from the ‘old’ to the ‘new’
precedent and develop new laws. Principles and justifications give strength
to their judgment because they project consistency, coherency and
continuity of law, which presents law as integrity because the public would
see how the law develops in a symbiotic relationship from previous
precedents.

A judiciary that is accountable to the executive will not be able to
exercise its duty freely and effectively; the same will happen if it is

19 Especially the discussion section 1.4.B Judges as ‘law-makers’,
from O Brian, David, Storm Center The Supreme Court in American Politics (New York:
accountable to the people. Accountability to the law may save the judiciary from this dilemma. The notion of law as integrity indicates that it is possible for judges to claim accountability to the law, without offending any party in the litigation, especially in matters involving the state and citizens.

In conclusion, I believe this thesis has given a picture on the practice of judicial accountability in Malaysia and of the ways, in which judicial accountability, may influence the course of judicial independence in Malaysia. The purpose was to show that rebuilding public confidence in the judicial independence will, at the end of the day, depend on the proper exercise of judicial power. Judges must subjugate themselves to the 'law' and not the will of the executive. To unshackle the judiciary from executive domination, wisdom, creativity and proper restraint that fuse independence with accountability would have to be developed by the Malaysian judiciary.
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