

A COMPARATIVE ANALYSIS OF JUDICIAL INDEPENDENCE IN MALAYSIA AND THE UNITED KINGDOM

By

Raja Mohamad Syahmi Bin Raja Ismail (2007294146)

Mohd Sabidi Samsi Bin Sidik (2007294352)

Emir Eizat Bin A. Malik (2007294084)

Mohd Haswadi Bin Mohamad Nor (2007294066)

Submitted in Partial Fulfillment of the Requirements for the Bachelor in Legal
Studies (Hons)

Universiti Teknologi MARA

Faculty of Law

October 2009

The students/authors confirm that the work submitted is their own and that appropriate credit has been given where reference has been made to the work of others.

ACKNOWLEDGEMENT

This research paper has been carried out by a team which has included Raja Mohamad Syahmi Bin Raja Ismail, Mohd Sabidi Samsi bin Sidik, Emir Eizat A. Malik and Mohd Haswadi bin Mohamad Nor. First and foremost, we would like to express our benevolent gratitude to Allah S.W.T. Secondly, in completing this project paper, we need a moral support as well as material support. Therefore we must record our indebtedness to many. We would like to express our utmost gratitude to our supervisor, Puan Mazlina Mohamad Mangsor for assisting us to complete this project paper and sometimes providing us the necessary motivation to complete this project paper. Thirdly, we must also record a very special thanks to Emeritus Professor Datuk Dr. Shad Saleem Faruqi and Puan Hafsyah Binti Idris for drawing our attention to several recent cases and also the current scenario regarding the issue of judicial independence in Malaysia and the United Kingdom. Last but not least, we must also record our gratitude to the constant support given by our family and close friend which is immeasurable. We had such firm support from our family members and friends who has been helping us through thick and thin. Finally thank you for those who assisted us directly and indirectly.

ABSTRACT

The issue of judicial independence usually involves the question of whether the judiciary can exercise its duty without the interference of the other organ namely the executive and legislative under the doctrine of separation of powers. Since in Malaysia the doctrine of separation of power is not fully apply although there is separation of powers as according to the doctrine, each organ cannot interfere with the function of the other organs. Under this issue, with the amendment of article 121 (1) of federal Constitution, the reference to the judicial power was deleted as the judicial power that was vested to the high courts had been amended to be vested under the federal law. So it means that the judiciary has lost its power to exercise its duty without the interfering of the other organ. So, it shows that the judiciary power have been deprived by this amendment and the judiciary credibility can be questioned by the restraint of its power impose by the other organ. Now there are some measures taken by the government for the judicial reform in Malaysia to restore the judicial independence of the judiciary body in Malaysia. This research paper will then be discussing the judicial independence in Malaysia and United Kingdom regarding the legal aspect of the judicial independence and then will be comparing the comparative aspects of judicial independence of both countries with emphasizing more on what has been taken by the both country to ensure that judicial independence is being upheld. Apart from that, this research paper will also examine the issues and crisis that both governments faced with regards to upholding judicial independence.

TABLE OF CONTENTS

Acknowledgement	ii
Abstract	iii
Contents	iv
List of Cases	vii

CHAPTER ONE: INTRODUCTION

1.0	Research Title	1
1.1	Background	1
1.2	Problem Statement	4
1.3	Research Objectives	5
1.4	Methodology	5
1.5	Scope and Limitation	6
1.6	Significance of Study	6
1.7	Provisional Plan of Research	6

CHAPTER TWO: LITERATURE REVIEW

2.0	Introduction	8
2.1	The Origin of the Concept of Judicial Independence	9
2.2	Significance The Concept of Judicial Independence	12
2.3	The Importance of Judicial Independence	15
2.4	Statutory Recognition of the Concept of Judicial Independence	17
	2.4.1 The United Kingdom	17
	2.4.2 Malaysia	18
2.5	Constitutional and Legal Issues in Judicial Independence	18
	2.5.1 Malaysia	18
	2.5.2 The United Kingdom	21
2.6	Conclusion	21

CHAPTER THREE: THE LEGAL ASPECT OF JUDICIAL INDEPENDENCE

3.0	Introduction	23
3.1	The Application of Judicial Independence in Malaysia Independence	24
	3.1.1 Security of Tenure	25
	3.1.1.1 The Composition of the Tribunal	26
	3.1.2 Insulation from Politics	27
	3.1.3 Judicial Immunity	27
	3.1.4 Contempt of Court	28

3.2	Constitutional and Legal Issues Concerning Judicial Independence in Malaysia	29
3.2.1	The 1998 Judicial Crisis	30
3.2.2	1998: The Shrinking of Judicial Power	32
3.2.3	The Case of <i>Kok Wah Kuan</i>	33
3.2.4	The Lingam's Tape Case	35
	3.2.4.1 The Individuals Named in the Clip	35
3.3	Constitutional Amendment 1998	36
3.3.1	Causes	37
3.3.2	Effects of the Amendment	40
3.4	Attitude of the Courts in Malaysia	44
3.4.1	Judicial Review	44
	3.4.1.1 Judicial Review of Legislation	45
	3.4.1.2 Judicial Review of Executive Action	47
3.4.2	Function of Interpreting the Constitutional Provisions	47
	3.4.2.1 Adoption of Liberal Approach	48
3.4.3	Safeguarding Fundamental Liberties	49
3.5	Recent Development of Judicial Independence in Malaysia	51
3.5.1	The Payment of Ex Gratia	51
3.5.2	The Establishment of Judicial Appointment Commission	54
3.6	Conclusion	58

CHAPTER FOUR: THE LEGAL ASPECT OF JUDICIAL INDEPENDENCE: THE UNITED KINGDOM

4.0	Introduction	60
4.1	The Application of Judicial Independence in the United Kingdom	61
4.1.1	Review under the UK Human Rights	62
4.1.2	Judicial Immunity	64
4.2	Method of Appointment of the Judges	64
4.2.1	Background	64
4.2.2	The Current System	66
	4.2.2.1 Role of the Executive	66
	4.2.2.2 Role of the Judiciary	68
	4.2.2.3 Role of Legislative	69
4.3	Terms of Service	70
4.4	The Judges' Salary in the United Kingdom	74
4.5	Conclusion	76