
Asian Journal of Law and Policy

Vol 4 No 1 (January 2024)

eISSN: 2785-8979

Judicial Accountability: A Comparative Note on India and Malaysia

Rangaswamy D

Karnataka State Law University, India

glcrswamy@gmail.com

ORCID iD: 0000-0002-9501-6050

(Corresponding author)

ABSTRACT

India and Malaysia are the countries having similar characteristics of the political system. The self-governed model of Judicial Accountability has been given impetus importance in Malaysia contrary to the Indian legal system. The Judicial Standards and Accountability Bill 2012 being a replica of the Judges Enquiry (Amendment) Bill 2005, has been pending before the Parliament for many years. On the other hand, the Malaysian legal system adopted the judicial standards way back in 1986. Inordinate delay on the part of the Indian legal system seems to be a major setback for the image of the biggest democratic country. The severe allegations against judges of the Supreme Court of India and High Courts and aborted efforts of the Parliament in ensuring judicial accountability have inspired the author to take up a comparative study of the topic. The paper starts with a cursory view of the judicial system in India and Malaysia followed by a conceptual analysis of judicial accountability. It outlines the status of judicial accountability as contemplated under the constitutional and legal framework of both countries. It concludes by identifying the similarities, dissimilarities, and best practices of both systems in the context of ideal practices required for judicial accountability.

Keywords: Judicial accountability; Comparative law; India; Malaysia

Received: 2 Nov 2022, **Accepted:** 19 Mar 2023, **Published:** 31 Jan 2024



© (2024) 1 Asian Journal of Law and Policy 25–50

<https://doi.org/10.33093/ajlp.2024.2>

© Universiti Telekom Sdn Bhd. This work is licensed under the Creative Commons BY-NC-ND 4.0 International License.

Published by MMU Press. URL: <https://journals.mmupress.com/ajlp>



1. Introduction

A modern political system is the symbol of deep recognition of the Rule of law.¹ Constitutional philosophy calls upon the States and legal systems to live in line with Rule of Law. Every democratic system ought to perform in the spirit of the principles of Rule of Law. Legality,² legal certainty,³ prevention of abuse of power,⁴ equality before the law, non-discrimination,⁵ and access to justice⁶ are the benchmarks of Rule of Law. In its constitutional sense, Rule of Law indicates sovereignty of the people, primacy of the Constitution, Separation of Powers, pluralistic nature of political power, and representative democracy. Governance based on Rule of Law accelerates an environment conducive to a civil society free of oppression and exploitation, discrimination, and violence. Rule of Law acts as a weapon for the protection of human rights and dignity, fundamental rights and freedoms of the people. Accordingly, the Rule of Law concept radiates a good quality of life for the people and elevates the progress and prosperity of the nation to a greater height. It is not only a fundamental principle governing the domestic legal system of a country, it equally applies to the attitude of the States at the global level.⁷

An independent and impartial judiciary is *sine qua non* to establish the proper functioning of Rule of Law. The judicial system could serve as a supportive agent to the political system and dispense justice without fear of political harassment and interference.⁸ The following statement endorses the importance of the judiciary for human rights jurisprudence:

After all, if the Constitution was thought to mirror natural law and natural rights, a politically insulated judge exercising judicial review was not merely enforcing the people's will (i.e. the Constitution) against the popularly elected

¹ See generally, José María Maravall and Adam Przeworski (eds), *Democracy and the Rule of Law* (Cambridge University Press 2003) <<https://doi.org/10.1017/CBO9780511610066>>; Mortimer Sellers, 'An Introduction to the Rule of Law in Comparative Perspective' in Mortimer Sellers and Tadeusz Tomaszewski (eds), *The Rule of Law in Comparative Perspectives* (Springer 2010) 1–9 <https://doi.org/10.1007/978-90-481-3749-7_1>.

² See generally, Luis Fernando Barzotto, 'The Rule of Law: Contribution to a Theory of Legality' [2007] 2 *Direito GV Law Review* 219–260; Dan R Meagher, 'The Principle of Legality and a Common Law Bill of Rights: Clear Statement Rules Head Down Under' (2015) <<https://doi.org/10.2139/ssrn.2712334>>.

³ See generally, Marzena Kordela, 'The Principle of Legal Certainty as a Fundamental Element of the Formal Concept of the Rule of Law' (2008) 110 *Revue de Notariat* 587–605 <<https://doi.org/10.7202/1045553ar>>; Lei Lei 'Legal Methods, Legal Certainty and the Rule of Law' (2017) 5 *Renmin Chinese Law Review* 25–57 <<https://doi.org/10.4337/9781788110501.00006>>.

⁴ See generally, Steven Kay, 'Rule of Power or Rule of Law' (2007) 13 *UCL Jurisprudence Review* 149–156.

⁵ See Mohammad Reza Vijeh, 'Equality: The Basis of Rule of Law and Peace' (2015) 10 *Human Rights* 92–108.

⁶ Mark Elliott, 'The Rule of Law and Access to Justice: Some Home Truths' (2018) 77 *The Cambridge Law Journal* 5–8 <<https://doi.org/10.1017/S0008197318000132>>.

⁷ United Nations General Assembly Resolution 67/1 (24 September 2012) <<https://undocs.org/A/RES/67/1>>.

⁸ Hugh Corder (ed), *Democracy and the Judiciary* (Institute for a Democratic Alternative for South Africa 1989) <<https://archive.org/details/democracyjudicia0000hugh>>.

branch of government, but was also defending the natural order created by God.⁹

This is the backdrop against which immense importance has been given to Judicial Independence at the global,¹⁰ regional,¹¹ and national levels.¹² Judicial Independence could organise political power and political institutions in line with public trust and confidence.¹³ The lack of Judicial Independence in a constitutional system acts as a huge barrier to improving the quality of the political system. Along with impartiality and integrity, Judicial Independence is a prerequisite to upholding the Rule of Law and fair administration of the justice system.¹⁴ Men and institutions remain free only when freedom is founded upon respect for moral and spiritual values and the Rule of Law.¹⁵ Being conscious of the immense importance and great value of the judiciary, since time immemorial, greater importance has

⁹ HL Pohlman (ed), *Political Thought and the American Judiciary* (University of Massachusetts Press 1993); See also, Steven Foster, *The Judiciary, Civil Liberties and Human Rights* (De Gruyter 2006) <<https://doi.org/10.1515/9780748626670>>.

¹⁰ See for example, International Commission of Jurists, 'Montreal Universal Declaration on the Independence Of Justice' (1983) <<https://www.icj.org/wp-content/uploads/2016/02/Montreal-Declaration.pdf>>; The Basic Principles on the Independence of the Judiciary, 1985; the Bangalore Principles of Judicial Conduct 2002, value 1; The Beijing Statement of Principles of the Independence of the Judiciary, 1985, para 1 to para 9; The Latimer House Principles and Guidelines 1988, guideline II; The Universal Declaration of Human Rights (adopted 10 December 1948) UNGA Res 217 A(III) (UDHR) art 10; International Covenant on Civil and Political Rights (adopted 16 December 1966, entered into force 23 March 1976) 999 UNTS 171 (ICCPR), art 14(1); the International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families, (adopted 18 December 1990) UNGA Res 45/158, art 18(1); United Nations Convention on the Rights of Persons with Disabilities, (adopted 13 December 2006, entered into force 3 May 2008) 2515 UNTS 3, art 12(4); the Convention on the Rights of the Child (adopted 20 November 1989, entered into force 2 September 1990) 1577 UNTS 3, arts 37(d), 40(iii) and 40(v); the International Convention for the Protection of All Persons from Enforced Disappearance (adopted 20 December 2006, entered into force 23 December 2010) 2716 UNTS 3, art 11(3).

¹¹ See for example, The Code of Conduct for United States Judges 1973, Canon 1; The ABA Canons of Judicial Ethics, 1924, Canon 14; ABA Model Code of Judicial Conduct 2010, Canon 1; The American Convention on Human Rights (adopted 22 November 1969, entered into force 18 July 1978) 1144 UNTS 123, art 8(1); The European Convention on Human Rights, (adopted 4 November 1950, entered into force 3 September 1953) 213 UNTS 121, art 6; African Charter on Human and Peoples' Rights (27 June 1981, entered into force 21 October 1986) OAU Doc OAU/LEG/EXP/AFCHPR/PROT(III), art 13; Protocol to the African Charter on Human and People's Rights on the Establishment of an African Court on Human and People's Rights (9 June 1998, entered into force 25 January 2004) OAU Doc OAU/LEG/EXP/AFCHPR/PROT (III), art 17.

¹² See for example, the Constitution of Marshall Islands, 1979, s 1(1); the Constitution of Mauritania, 1991, art 89; the Constitution of Mauritius 1968, art 10(1); the Constitution of Mexico 1917, art 17; the Constitution of Republic of Moldova 1994, art 116; the Constitution of Monaco 1962, art 48; the Constitution of Mongolia 1992, art 49; the Constitution of Montenegro 2007, art 32; the Constitution of Morocco 2011, art 107; the Constitution of Mozambique 2004, art 217; the Constitution of Myanmar 2008, art 19; the Constitution of Namibia 1990, arts 12 and 78; the Constitution of Nauru 1968, art 10(2); the Constitution of Nicaragua 1987, art 129; the Constitution of Nigeria 1999, art 17; the Constitution of Norway 1814, art 95; the Constitution of Oman 1996, art 60; preamble of the Constitution of Pakistan 1973.

¹³ United Nations General Assembly Resolution 67/1, UN Doc A/RES/67/1, para 13.

¹⁴ United Nations General Assembly (n 13).

¹⁵ The Constitution of Barbados 2002, the Preamble.

been given to the structure, powers, and functions of the judiciary. Modern Constitutions are closely linked to the Rule of Law and Judicial Independence. Accordingly, the role of the judiciary in ensuring firm foundations of government by the people, and a State based on the Rule of Law is gigantic.

The concentration of power in the ruler is an essential feature of the State.¹⁶ However, it is equally an essential principle that power should be coupled with responsibility. Professor Trocker writes, 'a power without responsibility is incompatible with a democratic system.'¹⁷ The political system shall testify 'Accountability.'¹⁸ Judicial Accountability is an integral part of Judicial Independence. Diametrically, they look like irreconcilable principles. The Judicial Independence and Judicial Accountability must act as vital instruments for achieving the objectives of the Constitution based on the Rule of Law. The principle of Judicial Independence does not exonerate the judiciary from being accountable.¹⁹ Wherefore, it is a cornerstone of constitutional jurisprudence that in all cases, the judiciary shall be independent in the exercise of judicial power and accountable for the same. As rightly contemplated under the Egyptian Constitution:

Judges are independent, cannot be dismissed, are subject to no other authority but the law, and are equal in rights and duties. The conditions and procedures for their appointment, secondment, delegation and retirement are regulated by the law. It also regulates their disciplinary accountability.²⁰

The Judicial Independence and Judicial Accountability are the bedrock principles of the judicial system in India and Malaysia. The Hierarchy of the Court system in both countries reflects a unitary form of the judicial system. The concept of Judicial Independence and Judicial Accountability have been given top priority under the Constitution of India, 1950 and the Federal Constitution of Malaysia, 1957. In both countries, Judicial Independence and Judicial Accountability have been characterised as unwritten constitutional principles, and concepts such as human rights, judicial review, and federalism, have strengthened these principles with concrete words. However, judicial reform and completeness of these principles have to be worked out in both countries. The diversity and complexity of these principles and practices on judicial reform, and of the numerous reform initiatives that have already been undertaken by the different systems, could provide a comprehensive overview of the fundamentals of judicial reform. The purpose of this paper here is to identify what are the basic and recurring problems faced by India and Malaysia in designing and implementing an effective constitutional and legal reform in ensuring Judicial

¹⁶ Julian H Franklin (tr), *On Sovereignty: Four Chapters from the Six Books of the Commonwealth by Jean Bodin* (Cambridge University Press 1992).

¹⁷ Mauro Cappelletti, "'Who Watches the Watchmen?' A Comparative Study on Judicial Responsibility' (1983) 31 *The American Journal of Comparative Law* 1–62 <<https://doi.org/10.2307/839606>>.

¹⁸ The Constitution of Libya 2016, art 10.

¹⁹ Franks Van Dijk and Geoffrey Vos, 'A Method for Assessment of the Independence and Accountability of the Judiciary' [2018] 3 *International Journal for Court Administration* 1–21 <<https://doi.org/10.18352/ijca.276>>.

²⁰ The Constitution of Egypt 2014, art 186.

Accountability and suggest some conceptual tools that can be considered to address these difficulties.

2. Judicial System: A cursory View

India and Malaysia strictly adhered to the Rule of Law and integrity of the judiciary. Both of the systems have given priority to the living law doctrine.²¹ Accordingly, these two constitutional systems were moulded corresponding to the changing circumstances.²² Although both of the countries stand on different footage in terms of geographical area²³ and other allied matters,²⁴ there is a greater similarity in the political systems of both countries. The political philosophy of the Anglo-Saxon Law Model such as Supremacy of the Constitution, Rule of Law, Federalism, Fundamental Rights and Liberties, Parliamentary Democracy, Judicial Independence, and a Multi-party System are the core characteristics of both legal systems. The essential goals of both political systems are to serve the community, promote general prosperity, and guarantee the effectiveness of the principles, rights, and duties stipulated under the Constitution.

Judicial Independence is an integral part of Rule of Law, democracy, and Separation of Powers' theory. As rightly pointed out by Alexander Hamilton, 'limitations on government can be preserved in practice no other way than through the medium of Court of justice.'²⁵ The judiciary is not an exception to this rule of a limited form of State power. As rightly point out:

Judges and magistrates should come down from their ivory towers and simply start acting in consultation and in the interest of the people ... as a whole and not only in the interest of the ruling class.

The role of the judiciary has been structured under Constitution of India, 1950²⁶ as well as Federal Constitution of Malaysia²⁷ on the testimony of the fundamental principles of limited government and Rule of Law. Though both Malaysia and India are countries with federal forms of government, the unitary form of the judicial system has been adopted in these countries. The principle of Judicial Independence, the doctrine of Judicial Review,

²¹ Constitution of India 1950, art 368 and Federal Constitution of Malaysia 1957, art 159 respectively deals with provisions relating to the amendment of the respective Constitutions.

²² So far, the Constitution of India 1950 is amended for 105th time and Federal Constitution of Malaysia 1957 is amended for 57th times.

²³ The total area of Malaysia is 329,750 sq km (127,316 sq mi) and the total area of India is 3,287,590 sq km (1,269,338 sq mi). See, George Thomas Kurian, *Encyclopaedia of the World's Nations and Cultures* (Infobase Publishing 2007) 1483 and 1063.

²⁴ Such as National Religion, Elective Monarchy, Religious Courts.

²⁵ Alexander Hamilton, James Madison and John Jay, *The Federalist Papers* (New American Library 1961) <<https://archive.org/details/federalistpapers1961hami>>.

²⁶ Constitution of India 1950, Part V, arts 124–148 and Part VI, arts 214–231 provide provisions respectively relating to structure, jurisdiction and allied matters relating Supreme Court of India and High Court.

²⁷ Federal Constitution of Malaysia 1957, Part IX, arts 121–131A.

Judicial Activism, etc., is the intrinsic nature of the Indian judiciary. Malaysia has been an example of par excellence of f the principles noted above. As part of their Rule of Law reforms, the Constitution of both countries has given premier importance to the structure, powers, and privileges of the judiciary. The constitutional and legislative schemes of both countries in terms of appointment,²⁸ security of the tenure,²⁹ salaries and allowances,³⁰ service conditions,³¹ removal of the judges,³² contempt of Court,³³ privileges of the judges,³⁴ nexus with other organs of the State, etc., have been successful, on a larger scale, in removing obstacles and hurdles entangled around the autonomy and independence of the judiciary. However, many instances have proved that the real individual and institutional independence of the judiciary has been more difficult to attain. There have been many instances and political developments in India³⁵ and Malaysia³⁶ which have paralysed the Judicial Independence in both countries.

Judicial independence and Judicial accountability are extremely important components of both India and Malaysia. Monitoring and coordinating role of the apex courts play a vital role in ensuring these constitutional principles. There are many variations on the schemes and techniques used for this purpose under both Constitutions. The flow chart below indicates the Hierarchy of the Court system of the countries as carved out under the Constitution. Despite the federal characteristic of the political affairs of these nations, the unitary form of the judiciary has been adopted for the better administration of the justice system.

²⁸ Federal Constitution of Malaysia 1957, art 122B; Constitution of India 1950, arts 124 and 215.

²⁹ Federal Constitution of Malaysia 1957, arts 125(1) and 125(9); Constitution of India 1950 arts 124(2) and 217(1).

³⁰ Federal Constitution of Malaysia 1957, art 125(6) and art 125(7); Constitution of India 1950 arts 125 and 221.

³¹ Federal Constitution of Malaysia 1957, art 125(7); Constitution of India 1950 arts 125(2) and 221(2).

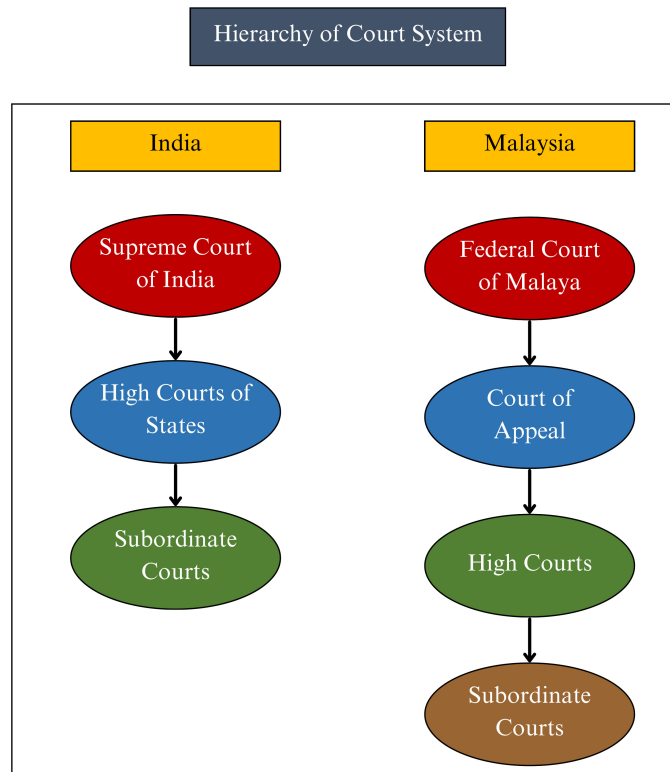
³² Federal Constitution of Malaysia 1957, art 125(3); Constitution of India 1950 arts 124(4) and (5), 217(1)(b).

³³ Federal Constitution of Malaysia 1957, art 126; and Constitution of India 1950, arts 125 and 219.

³⁴ For example, see the following Acts of Malaysia; the Government Proceedings Act 1956, s 6(3); the Courts of Judicature Act 1964 (Judicial Accountability), s 14; the Defamation Act 1957, s 11(1). Also see the following Indian legislations; the Judges (Protection) Act, 1985, s 3; the Judicial Officers Protection Act, 1850, s 1.

³⁵ On 2nd May 1973, a cabinet minister very frankly admitted in Parliament that Judicial Independence should be one who would 'help' the Government and whose political philosophy would be 'the most suitable' from the point of view of executive. NA Palkhivala, *Our Constitution Defaced and Defiled* (The Macmillan Company of India Ltd 1960) 99-100. Similarly, In the year 1973, following the Keshavananda Bharati case, AN Ray, who had constantly supported the central government was appointed as Judicial Independence by superseding senior Justices JM Sheelat, KS Hegde and AN Grover. In 1976, Justice MH Beg was appointed as Judicial Independence by superseding Justice HR Khanna due to his dissenting opinion in ADM Jabalpur case.

³⁶ Constitutional Crisis of Malaya 1988 resulted in removal of three judges, Lord President, Tun Salleh and two senior judges of the Supreme Court, Tan Sri Wan Suleiman, and Datuk George Seah of apex Court. See AJ Harding, 'The 1988 Constitutional Crisis in Malaysia' (1990) 39 *International and Comparative Law Quarterly* 57-81 <<https://doi.org/10.1093/iclqaj/39.1.57>>.



3. Judicial Accountability: A Conceptual Analysis

Accountability is a primitive concept.³⁷ The Concept of accountability assumed an immeasurable role in modern States. Every State must be, internally, a responsible State.³⁸ The distribution of the State's power amongst various organs of the State has resulted in an accountability crisis. The accountability principle is a call to hold political power and political institutions responsible for their performance in a State. It focuses greater attention on the responsible attitude of the governmental functionaries towards popular will.

Accountability stands for a liability to reveal, explain, and justify what one does.³⁹ It is a combination of various propositions of good governance.⁴⁰ It may be identified as an indicator of the relationship between the power holder and the power addressee.⁴¹ It tries to

³⁷ JT Abdy and Bryan Walker, *The Institutes of Justinian* (Cambridge University Press 1876) <<https://archive.org/details/institutesofjust00abdyuoft>>.

³⁸ Harold J Laski, *A Grammar of Politics* (George Allen & Unwin 1925) <<https://archive.org/details/in.ernet.dli.2015.30187>>.

³⁹ Colin Scott, 'Accountability in the Regulatory State' (2000) 27 *Journal of Law and Society* 38–60 <<https://doi.org/10.1111/1467-6478.00146>>.

⁴⁰ *Sub-Committee on Judicial Accountability vs Union of India* [1992] All India Reporter 320, [1991] Supreme Court Reports Supplementary (2) 1 (SC).

⁴¹ RK Gooch, 'Book Review: Political Power and the Government Process by Karl Loewenstein' (1958) 20 *Journal of Politics* 570–571 <<https://doi.org/10.1017/S0022381600033880>>.

advance legality, equity, rectitude, and propriety in public administration in addition to efficiency and effectiveness.⁴² In the views of Colin Scott: 'The central problem of accountability arises from the delegation of authority to a wide range of public and some private actors, through legislation, contracts or other mechanisms.'⁴³ It is not only the power distributed amongst various organs of the State that creates the problem of accountability, the recent tendency of contracting out governmental functions to private institutions has also triggered a dilemma of accountability.⁴⁴

Judicially speaking, accountability is used to denote constitutional, legal, and moral duty on the part of the judiciary to inform society about its policies, procedure, and decisions.⁴⁵ Accountability and transparency are interchangeably used phrases.⁴⁶ Judicial Accountability mandates that the judiciary shall function and manage the administration of the justice system in an accountable manner. The judiciary, in its activity, shall be accountable to the co-ordinated organs of the State, the people of the country, and to itself. In its negative sense, the judiciary shall not allow private interest to prevail over the public interest. Its aim must be to make the judicial functions responsible and transparent.

From the point of view of Ernest L Sakala, 'Judicial accountability ... refers to the notion that judges or those (who) sit in judgement over others need to account for their judicious and injudicious acts.'⁴⁷ Judicial Accountability is classified into different categories such as Institutional Accountability, Behavioural Accountability, and Decisional Accountability.⁴⁸ The far-reaching dimensions of the Judicial Accountability is presented as follows:

The extended scope of the judicial accountability under any matured legal system is not only applicable to the professional misconduct of the judges, but also to the evaluation of judicial performance, relation of the judges with staff of the judiciary, role of media and civility society in monitoring judicial process and academic role in nurturing the judicial accountability. It will not, therefore, simply regulate the personal trait of the judges in their performance, but will also apply to any instances of abuse of judicial authority which contradicts business of the Court, constitutional obligations and studious principles of law.⁴⁹

⁴² TN Chaturvedi (ed), *Administrative Accountability* (Indian Institute of Public Administration 1984) <<https://archive.org/details/in.ernet.dli.2015.274786>>.

⁴³ Scott (n 39) 41.

⁴⁴ Bruce LR Smith and DC Hague (eds), 'Accountability and Independence in the Contract State' in *The Dilemma of Accountability in Modern Government: Independence Versus Control* (St Martin's Press 1971).

⁴⁵ Van Dijk and Vos (n 19).

⁴⁶ *ibid*.

⁴⁷ Ernest L Sakala, 'The Accountability of the Judiciary: Accountability to Whom? Is There Such a Mechanism?' (2005) <<https://sacjforum.org/sites/default/files/reports/files/2020/Namibia%202005%20SAKALA%20EL%2C%20CJ.pdf>>.

⁴⁸ For explanation see part 4 of this paper.

⁴⁹ D Rangaswamy, 'Judicial Accountability in India: Issues and Challenges' (2020) 2 *International Journal of Governance and Public Policy Analysis* 67-89 <<https://journals.sjp.ac.lk/index.php/ijgppa/article/view/4800>>.

Wherefore, while understanding the accountability of the judges, instead of confining Judicial Accountability to the conduct of the judges, it shall be considered in its encircling sense. Judicial Accountability represents an inherent characteristic of judicial power. It legitimately holds itself as the guardian of the Constitution and the protection of human rights. It endeavours to remain concerned and sensitive to the goals and aspirations of the Constitution, thereby strengthening the social engineering by the judiciary.

4. Constitutional Status of Judicial Accountability

The need for accountability and responsibility is reflected in the development of record-keeping devices and inspectorates of one kind or another and reflects the spread of rational choice, calculation and control.⁵⁰ There are many devices through which democratic governments are held responsible for their actions.⁵¹ Each State has its mechanism for the purpose of accountability of the constitutional functionaries and these are in harmony with the social, political and historical conditions of the respective State. 'The economic, political and cultural conditions of a given nation', Stalin says 'constitute the only key to the question of how a particular nation ought to arrange its life and what forms its future Constitution ought to take.'⁵² Accordingly, the structure of accountability and authority are an embodiment of a polity's constitution.⁵³ Judicial Accountability is the cornerstone of Constitutionalism.⁵⁴ The Constitution must prescribe the methods and the form of accountability of those responsible for the judicial functions.

Where there is a greater commitment of the institution towards society, there would be the deepest responsibility of such an institution. The judiciary is meant for social welfare. According to Benjamin Cardozo, 'One of the most fundamental social interests is that law shall be uniform and impartial.'⁵⁵ The very strength of this uniformity and impartiality depends upon the quality of the judiciary. The sense of severe accountability attached to the judiciary is due to the societal purposes to be achieved through the judiciary. This nexus is reflected in the following terms of GA Almond and G Bingham Powell, Jr:

⁵⁰ Steve Hoadley, 'Book Review: Comparative Politics: A Developmental Approach by Gabriel A Almond and G Bingham Powell Jr (Boston: Little, Brown and Company, 1966, 348 pp)' (1969) 63 *American Political Science Review* 536–537 <<https://doi.org/10.2307/1954710>>.

⁵¹ Smith and Hague (n 44).

⁵² Joseph Stalin, *JV Stalin Work: 1907-1913, vol 2* (Foreign Languages Publishing House 1953) 375. See also, Harold J Laski, *An Introduction to Politics* (George Allen & Unwin 1931) 55.

⁵³ Gabriel A Almond, Scott C Flanagan and Robert J Mundt (eds), *Crisis, Choice, and Change: Historical Studies of Political Development* (Little, Brown and Company 1973) <<https://archive.org/details/crisischoicechan00almo>>.

⁵⁴ Jon Elster and Rune Slagstad (eds), *Constitutionalism and Democracy* (Cambridge University Press 1988) <<https://doi.org/10.1017/CBO9781139173629>>.

⁵⁵ Benjamin N Cardozo, *Nature of the Judicial Process* (Yale University Press 1921) <<https://archive.org/details/NatureOfTheJudicialProcess>>.

Responsibility can only come where some social function is definitely entrusted to the group for fulfilment. It is in the performance of such tasks that the personality of men obtains its realisation. It is in such tasks that their leisure can be made in a full sense rich and creative.⁵⁶

This part of the paper outlines the constitutional ways and means of both the countries, Malaysia and India, in cementing Judicial Accountability. For the purpose of a smooth understanding of this part, it has been explained under the following headings: (1) Institutional Accountability; (2) Behavioural Accountability; and (3) Decisional Accountability.

4.1 Institutional Accountability

The Institutional Accountability principle holds different organs of the State collectively accountable to the Constitution. This kind of institutional Judicial Accountability ensures accountability of the judiciary from the point of view of 'judiciary as an institution' instead of 'judges as individual members' of the judiciary. The 'judiciary' as an organ of the State would be the central part of the analysis of Judicial Accountability, contrary to 'judges' as part of accountability analysis. This research paper explains this Institutional Accountability under: (1) The separation of Power theory; and (2) The oath Clause.

4.1.1 Separation of Powers

The prime constitutional principle ensuring Institutional Accountability is the theory of Separation of Powers. The core idea of the Separation of Powers is the delegation of governmental authority to three distinct and independent branches of the State i.e., legislative, executive, and judicial. This theory of multi-functionality as the major tool for institutional accountability can be understood in the following words:

The constitutional purpose of preventing arbitrary abuse of power by officials was to be accomplished through separation of powers so that each independent branch of government would operate as a check on the other two. To affect the checking function, the Constitution allocates to each of the three departments some specific powers which are usually peculiar to one of the other departments.⁵⁷

One of the important facets of accountability adopted under various Constitutions is the check and balance theory. It is a modified version of Separation of Powers. It is a mixture of functions, preventing the aggrandizement of any institution at the expense of others, and

⁵⁶ Harold J Laski, *Authority in the Modern State* (Yale University Press 1919) <<https://archive.org/details/authorityinmoder00laskuoft>>.

⁵⁷ Arthur T Vanderbilt, *The Doctrine of the Separation of Powers and Its Present-Day Significance* (University of Nebraska Press 1953) <<https://archive.org/details/doctrineofsepara0000vand>>.

maintaining the balance of power.⁵⁸ The following words are appropriate to comprehend the check and balances as a crucial tool for guaranteeing institutional accountability:

Anglo-Saxon political thinking also adopted another device to buttress public accountability, namely, that of separation of powers and mutual checks and balances. These ideas were developed by Montesquieu and Locke. Montesquieu over-interpreted the British political system as one in which power was divided into three branches of the executive, the legislative and the judiciary each checking the other and thereby making them publicly accountable. Locke put forward a much more general argument for mutual checks and balances in a political system so that power holders were institutionally held accountable to other power-holders.⁵⁹

In India, the state has a constitutional obligation to ensure that its organs are separated.⁶⁰ With its wide legislative authority to change or repeal laws that had previously permitted a specific executive action, the Parliament has extensive control over the executive branch. It can also exert authority over the executive by approving treaties and the President's nominations of ambassadors, judges, and other constitutional functionaries. Each House of Parliament has the authority to impose sanctions on its members for disloyalty and to begin the impeachment process against judges. By employing its judicial review power, the Court has the capacity to hold the legislative and executive accountable by declaring their actions to be unconstitutional.

The theory of Separation of Powers is sacrosanct in the constitutional framework of Malaysia.⁶¹ The traditional three-way division of the Federation's sovereign powers is outlined in the Constitution. Judicial power is vested in a hierarchy of law Courts;⁶² legislative power is vested with Parliament;⁶³ executive power, although technically vested in the King,⁶⁴ is exercisable by cabinet and other non-ministerial institutions allowed to wield such power.

As part of the check and balance theory, Constitution of India, 1950 has given Supreme Power to the Parliament to remove judges from their office contrary to Federal Constitution of Malaysia.⁶⁵ The Executive as well as the judicial method has been adopted under the Federal Constitution of Malaysia. A basic constitutional idea, the doctrine of the Separation

⁵⁸ Hoadley (n 50).

⁵⁹ V Subramaniam, 'Public Accountability: Context, Career and Confusions of a Concept' (1983) 29 *Indian Journal of Public Administration* 446–456 <<https://doi.org/10.1177/0019556119830302>>.

⁶⁰ Constitution of India 1950, art 50.

⁶¹ *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Daerah Hulu Langat* (2017) 4 All Malaysia Reports 123 (FC); see also *Pengarah Tanah Dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd* [1979] 1 *Malayan Law Journal* 135 (FC).

⁶² Federal Constitution of Malaysia, art 121.

⁶³ *ibid* art 44.

⁶⁴ *ibid* art 39.

⁶⁵ For process of removal of judges see part 4.2.1 and 5.2 of this article.

of Powers was not intended to be and has never been applied as a rigorous norm in Malaysia.

4.1.2 Oath Clause

A judge shall uphold and promote the independence, integrity, and impartiality of the judiciary.⁶⁶ An Oath administered to judges acts as an instrument in reminding judges about these values. In fact, Oath clauses are ancient customs that rulers have adopted to bind themselves to a pure and flawless attitude.⁶⁷ It was practised in different forms. It affirms that the political branches are ultimately accountable to the people for their actions. It imposes a duty on constitutional functionaries to be faithful to preserve, protect and defend the Constitution. Through oath of office, judges are obliged to apply the law.⁶⁸ The very violation of the oath itself is regarded as misconduct under certain Constitutions.⁶⁹ Self-accountable judges will avoid any danger of bias by removing themselves from the case where a reasonable person would say temptation is present.⁷⁰ Policing themselves by the judges is the obvious way to preserve Judicial Independence and Judicial Accountability.⁷¹ The statement made by Justice Marshall in a judicial setting is very pertinent to understand the significance of the Oath Clause for the purpose of judicial accountability. He says:

Why otherwise does it direct the judges to take an oath to support it? This oath certainly applies in an especial manner, to their conduct in their official character. How immoral to impose it on them, if they were to be used as the instruments, and the knowing instruments, for violating what they swear to support!

If such be the real slate of things, this is worse than solemn mockery. To prescribe, or to take this oath, becomes equally a crime.⁷² Both the Federal Constitution of Malaysia⁷³ and Constitution of India, 1950⁷⁴ have specified Oath Clauses for the judges of the apex Courts.

⁶⁶ American Bar Association, 'Model Code of Judicial Conduct' (2020) Canon 1 (2020) canon 1 <https://www.americanbar.org/groups/professional_responsibility/publications/model_code_of_judicial_conduct/>.

⁶⁷ William Cyrus Sprague, Griffith Ogden Ellis, Clarence B Kelland, Walter K Towers and Frederick R Austin, *The Law Student's Helper*, vol 15 (Nabu Press 2012).

⁶⁸ Michael Robertson, 'The Participation of Judges in the Present Legal System' in Hugh Corder (ed), *Democracy and the Judiciary* (Institute for Democratic Alternatives in South Africa 1989) 67–76.

⁶⁹ The Constitution of Nigeria 1999, arts 161(d) and 205(d).

⁷⁰ Thomas J Noonan Jr and Kenneth J Winston (eds), *The Responsible Judge: Readings in Judicial Ethics* (Praeger 1993).

⁷¹ *ibid* 278.

⁷² *Marbury v Madison*, 5 United States 137 (1803) (SC).

⁷³ Federal Constitution of Malaysia, art 124 and sixth Schedule.

⁷⁴ Constitution of India 1950 art 124(6), art 219 and third Schedule.

4.2 Behavioural Accountability

Observing some peculiarities of the human mind, behavioural psychology enables us to see what they are.⁷⁵ The standards of the act of an individual can be assessed on the basis of the acquired manner in which a human being acts in a given situation. Behavioural accountability perceives that accountability depends ultimately upon the values, attitudes, beliefs, and interests of a person which underlie his behaviour. Behavioural accountability is based on an acquired or learned tendency of the judges to react towards or against something or somebody. It is evident from the either approaching or withdrawing types of behaviour of the judges. The object of such reaction becomes either a positive or negative value of the personal, professional, or institutional status of the judges. This research paper has considered two important components of the Constitution to understand Behavioural Accountability: First, provisions relating to impeachment or removal of the judges. Second, provisions relating to the Code of Conduct of the Judges.

4.2.1 Removal of the Judges

The direct way adopted under various Constitutions to ensure Judicial Accountability is impeachment or removal of judges. Constitutional offices are subjected to impeachment or removal process on the basis of divergent grounds such as: (a) inability to perform the functions of his or her office arising from infirmity of body or mind; (b) misconduct or misbehaviour; (c) contravention of the Code of Conduct applicable to judges; and (d) bankruptcy or entering into an arrangement with creditors,⁷⁶ bankruptcy and high treason.⁷⁷

Of the three branches of government, the judiciary is expected to be the most committed to professionalism. It is the branch most sensitive to charges of cronyism, partisanship, and ideological bias.⁷⁸ The conduct of affairs of the judiciary shall be transparent and judges shall be accountable for any failure in official duties. The predominant characteristic of both the Federal Constitution of Malaysia and Constitution of India, 1950 is that the accountability of the judges is given top priority. The specific provisions have been contemplated under Constitution of India, 1950 for the removal of the judges for their Misconduct and Incapacity.⁷⁹ The Federal Constitution of Malaysia mandates the removal of the judges for a breach of any provision of the code of ethics and on the ground of inability, from infirmity of body or mind or any other cause, properly to discharge the functions of his office.⁸⁰

⁷⁵ Asok Mukhopadhyay, 'Administrative Accountability: A Conceptual Analysis' (1983) 29 *Indian Journal of Public Administration* 473–487 <<https://doi.org/10.1177/0019556119830304>>.

⁷⁶ Constitution of Gambia, art 129.

⁷⁷ *ibid* art 143(d).

⁷⁸ Preble Stolz, *Judging Judges: The Investigation of Rose Bird and the California Supreme Court* (Collier Macmillan Publishers 1981) <<https://archive.org/details/judgingjudgesinv0000stol>>.

⁷⁹ Constitution of India 1950 art 124(4).

⁸⁰ Federal Constitution of Malaysia, art 125(3).

4.2.2 Code of Conduct

To understand the gist of Judicial Accountability, we have to get an insight into Code of Conduct and its constitutional sanctity.⁸¹ Every system on Judicial Accountability has behind it the inspiration of a Code of Conduct. An understanding of the constitutional sanctity of Code of Conduct is necessary for the comprehension of the maturity and ideal nature of the system. In fact, the very success of democracy strongly depends upon the Code of Conduct contemplated for constitutional machinery. Some of the Constitutions have entangled Code of Conduct with Oath Clause.⁸²

The constitutional scheme of Malaysia clearly indicates that the Code of Conduct for judges, the procedure to be followed in case of violation of Code of Conduct, and sanctions for violation of such cases may be prescribed by 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 after consulting the Prime Minister.⁸³ The Judge of the Federal Court, Judicial Commissioner⁸⁴ judges of the Court of Appeal, the High Court⁸⁵ and are bound by these Code of Conduct. The violation of these Code of Conduct may result in the following two consequences;⁸⁶ (1) removal of the judge from office, and (2) other sanctions prescribed under the law. The removal of the judges shall be dealt with by a tribunal⁸⁷ and the cases fit for sanctions other than removal shall be death by a body constituted under federal law.⁸⁸

India is noted for its long ethical history unbroken for over five thousand years. During this renowned long career, she has experienced ethical life from every conceivable angle and height.⁸⁹ Ethics was an integral part of dharma.⁹⁰ This legacy has structured her ethical life with a rare quality of richness, variety, and maturity. When many of the Constitutions stipulates Code of Conduct for various constitutional machinery in different scale, none of the constitutional provision deals with Code of Conduct for any constitutional machinery. Barring a few provisions on removal of the judges on incapacity and proven misbehaviour, nothing has been stipulated as to the Code of Conduct to be followed by the judges.

⁸¹ Constitution of Eritrea 1997, art 48(2); the Court of Gambia 2020, art 194(1)(c); the Constitution of Kenya 2010, art 168(1)(b).

⁸² The Court of Gambia 2020, Second Schedule; the Constitution of Barbados 1966, first Schedule.

⁸³ Federal Constitution of Malaysia art 125(3B).

⁸⁴ *ibid* art 125(3C).

⁸⁵ *ibid* art 125(9).

⁸⁶ *ibid* art 125(3A).

⁸⁷ *ibid* art 125(3).

⁸⁸ *ibid* art 125(3A).

⁸⁹ Ranganathananda Swami, *Eternal Values for a Changing Society* (Advaita Ashrama 1958) <<https://archive.org/details/dli.ernet.504839>>.

⁹⁰ *ibid* 531.

The formal introduction of the Code of Conduct for judges in India can be traced back to the adoption of Restatement of Values of Judicial Life on 7th May 1997 by Supreme Court of India. The very denomination used by the Supreme Court of India for these Code of Conduct as 'Restatement of Values of Judicial Life' was to acknowledge the rich heritage of the ethical practices practised in this country for time immemorial. The Values of the Judges are prefixed with 'Restatement' to indicate reinforcement of the ethical principles already embodied in the Indian legal system for many centuries as a matter of tradition or convention.⁹¹ To date, these Code of Conduct prescribed by the Supreme Court of India are considered for in-house procedure against judges. Complaints against judges pertaining to the discharge of his judicial functions and conduct of the judges outside the Courts are often received by the Supreme Court of India and High Courts and these in-house procedures are followed to initiate disciplinary action against judges.⁹²

4.3 Decisional Accountability

Judges are responsible for ultimate decisions over life, freedoms, rights, duties and property of citizens.¹ Without any limitations, improper influences, inducements, pressures, threats, or interferences, direct or indirect, from any source or for any purpose, the judiciary shall decide matters before them impartially.² The decisions of the Court shall be based on facts and in conformity with the law. Nurturing a supportive and cooperative attitude throughout the judiciary is an important function of the Court. It is possible through decisional accountability. Because of the following reasons, decisional accountability would be crucial: (1) The political nature of the impeachment process makes it highly difficult for the average citizen to participate in the impeachment process; and (2) the apex Courts hardly ever use its disciplinary authority against one of its members.

The details of how the concept of decisional accountability is formulated differ across academic literature, but the following are some of the typical ways to examine decisional accountability: First, publication of the proceedings and fair criticism and comments on the proceedings; Second, decisional monitoring by the apex Courts; and Finally, inordinate delay in disposal of the cases.

4.3.1 Publication of the Proceedings

Freedom of speech and expression in its true sense protects not only the censure of judges but also criticisms of specific Court decisions. Unless the criticism poses a severe threat to the Court's ability to fairly manage the administration of justice, fair comment and fair criticism of the cases are allowed. According to Preble Stolz,

⁹¹ Law Commission of India, '195th Report on the Judges (Inquiry) Bill 2005' (2006) 358 <<http://www.commonlii.org/in/other/lawreform/INLC/2006/1.html>>.

⁹² The Supreme Court of India at its Full Court Meeting held on 15 December 1999 adopted these 'In House Procedure'.

Lawyers, politicians, the press, and others sometimes deplore, sometimes approve, and sometimes ignore what the judges write. The justices, in turn, respond to external criticism by altering their behaviour to attract praise and to deflect harsh evaluation.⁹³

Unlike some Constitutions,⁹⁴ there are no specific provisions relating to pronouncement of judgement in open Court and reason-based decisions under both, Malaysian and Indian Constitutions. However, as part of the principle of natural justice, these tenets are followed in both countries. Contempt law is an integral part of both legal systems. However, it is evident that there is no such specific piece of legislation in Malaysia like India.⁹⁵ Fair reporting⁹⁶ and fair criticism⁹⁷ have ensured decisional accountability of the Courts by balancing freedom of speech and expression and open justice system in India.

4.3.2 Decisional Monitoring

Under the Indian legal system, hierarchically, Courts are categorized as Supreme Court of India, High Courts and Subordinate Courts. By 'Subordinate Court', the Constitution means, those District level Courts and Courts subordinate thereto, which judicial power is entrusted in accordance with law.⁹⁸ The cases will be heard and determined in the Subordinate Courts as per the jurisdictions of the Court. In some cases, the District Courts are appellate Courts subordinate to it. An appeal may then be taken to the High Court which has appellate jurisdiction over the State.

After the appeal is decided by the High Court, subject to the certification from the respective High Court, an appeal against the decision of the High Court can be filed before Supreme Court of India. In addition to appeal provisions,⁹⁹ Review of judgments or orders of the Supreme Court of India,¹⁰⁰ Special Leave Petition,¹⁰¹ Enforcement of decrees and orders of Supreme Court of India,¹⁰² Transfer of certain cases¹⁰³ and 'act in aid' clause of the Supreme Court of India¹⁰⁴ are predominant provisions relating to decisional oversight of

⁹³ Kay (n 4).

⁹⁴ For example, Constitution of Albania 1998, art 142; Constitution of Algeria 2020, art 175.

⁹⁵ In India it is dealt with under the Constitution of India 1950, art 129 and art 215 and The Contempt of Court Act 1971 is the specific piece of legislation in India. In Malaysia it governs under: para 26 in the Third Schedule in the Subordinate Courts Act 1948; Federal Constitution of Malaysia, art 127; Section 13 of Judicial Accountability 1964 and other legislations.

⁹⁶ Contempt of Court Act 1971, s 4.

⁹⁷ Vije (n 5).

⁹⁸ Constitution of India 1950, art 233.

⁹⁹ *ibid* arts 132–134A.

¹⁰⁰ *ibid* art 137.

¹⁰¹ *ibid* art 136.

¹⁰² *ibid* art 142.

¹⁰³ *ibid* art 139A.

¹⁰⁴ *ibid* art 144.

Supreme Court of India. The jurisdiction of High Courts such as control of Subordinate Courts,¹⁰⁵ superintendence power over all Subordinate Courts¹⁰⁶ and Transfer of certain cases to High Court¹⁰⁷ is the prime tool of the decisional oversight mechanism of High Courts.

In Malaysia, the Federal Court is the highest Court to determine appeals from the Court of Appeal, a High Court, or a judge thereof.¹⁰⁸ The Court of Appeal is the appellate authority against the decisions of the two High Courts i.e., High Court of Malaya and High Court of Sabah and Sarawak.¹⁰⁹ The High Courts have criminal¹¹⁰ and civil¹¹¹ appellate jurisdiction over Magistrate and Subordinate Courts. The power of the High Courts to review criminal proceedings¹¹² and call for records of civil proceedings of Subordinate Courts¹¹³ have enhanced the decisional accountability in Malaysia. In addition, the High Courts shall have general supervisory and revisionary jurisdiction over all Subordinate Courts.¹¹⁴

4.3.3 Inordinate Delay in Disposal of Cases

Every judge must pay close attention to the speedy disposal of the cases. The image of the country will be at stake if any delay in the justice delivery system, and often, late justice is little better than injustice. Speedy justice is an integral part of the right to life in India.¹¹⁵ There are no specific provision stipulating specific timeline for deciding cases under Indian Constitution. However, by taking adequate measures, the system has been ensured to speed the disposal of the cases. Speedy justice is ensured in India by improving infrastructure, appointment of judicial officers, application of information and communication technology, Alternative Dispute Resolutions and Fast Track Courts.¹¹⁶

To rationalise the speedy disposal of the cases, fundamental steps have been taken in Malaysia. By concentrating on means of clearing the backlog cases, and assuring the prompt resolution of the opening cases, and introduction of information and communication technology has substantially improved the conditions in Malaysia.¹¹⁷

¹⁰⁵ *ibid* art 235.

¹⁰⁶ *ibid* art 227.

¹⁰⁷ *ibid* art 228.

¹⁰⁸ Federal Constitution of Malaysia, art 121(2)(a).

¹⁰⁹ *ibid* art 121(1B)(a).

¹¹⁰ Courts of Judicature Act 1964, s 26.

¹¹¹ *ibid* s 27.

¹¹² *ibid* s 33.

¹¹³ *ibid* s 34.

¹¹⁴ *ibid* s 35.

¹¹⁵ See *Sunil Batra v Delhi Administration* 1980 All India Reporter 1579, 1980 Supreme Court Reports (2) 557 (SC); *State of Maharashtra v Champa Lal* 1981 All India Reporter 1675, 1982 Supreme Court Reports (1) 299 (SC).

¹¹⁶ Press Information Bureau, Government of India, Ministry of Law and Justice, 'Speedy Disposal of the Cases' (15 March 2022) <<https://pib.gov.in/newsite/PrintRelease.aspx?relid=233889>>.

¹¹⁷ Azahar bin Mohamed, 'Court Reform Programmes: The Malaysian Experience' [2015] 102 *Amicus Curiae* 15–24 <<https://doi.org/10.14296/ac.v2015i102.2432>>.

5. Legal Framework on Judicial Accountability

The grounds upon which disciplinary actions can be initiated against judges are broadly categorised by Marvin Comisky under the following four categories: First, Wilful misconduct in office; Second, wilful and persistent failure to perform judicial functions; Third, conduct prejudicial to the administration of justice that brings the judicial office into disrepute; Fourth, violation of the applicable code of judicial conduct or canons of judicial ethics.¹¹⁸ The legal system of countries across the globe have designed their judicial system in line with these principles. This part of the paper tests the legal framework of judicial accountability in the Indian and Malaysian legal system.

The vast and varied legislations of both the countries give an insight into the strength and substance of these systems in accelerating flavours of the Judicial Accountability. The thoughts and insights gained by these systems become the foundation and stimulus of all later reformative steps and developments of both countries. They have bequeathed stunning images for both countries which they have sustained legal system of both countries for centuries. They are dynamic even today. The legal regime governing judges of apex Courts is distinctive. These 'Legislations' necessarily raise questions of high constitutional significance, involving the fundamental but interrelated values of Judicial Independence, public confidence in the judicial system, and the authority of the Courts.¹¹⁹ The law shall provide for adequate standards and allied provisions to ensure Judicial Accountability.

5.1 Code of Conduct

'Ethics' is the foundation of Rule of Law.¹²⁰ It is to solve the conflicts between the rival demands of self and society, selfishness, and altruism.¹²¹ Contemplating Code of Conduct and structuring rules, processes and procedures for the implementation of the Code of Conduct are the nuts and bolts of the accountability system. Periodical monitoring and evaluation of such Conduct of Conduct are foundation for vibrant accountability system. It is equally important that the legal system shall make provision for the investigation of alleged breaches of the Code of Conduct and enforcement of the Code of Conduct by the State.

The legal framework for the accountability of the judges in Malaysia, in addition to the constitutional provisions, comprises the Judges Code of Ethics, 2009 and the Judges' Ethics Committee Act, 2010. Both the Indian¹²² and Malaysian¹²³ legal systems confined the scope of their legal regime to removal of the judges to the judges of the apex Court. The Judges Code

¹¹⁸ Marvin Comisky and Philip C Patterson, *The Judiciary: Selection, Compensation, Ethics, and Discipline* (Praeger 1987) 165.

¹¹⁹ MH McLelland, 'Disciplining Australian Judges' (1991) 17 *Commonwealth Law Bulletin* 675–690 <<https://doi.org/10.1080/03050718.1991.9986134>>.

¹²⁰ See David Lyons, *Ethics and the Rule of Law* (Cambridge University Press 1983) <<https://doi.org/10.1017/CBO9780511608933>>.

¹²¹ Swami (n 89) 86.

of Ethics, 2019 is supplementary to the mandate of Federal Constitution of Malaysia on removal of the judges and Judges' Ethics Committee Act, 2010 is complementary to the Judges Code of Ethics, 2019. The Judges Code of Ethics, 2019 and Judges' Ethics Committee Act, 2010 closely linked with Federal Constitution of Malaysia, are material to understand the context of Judicial Accountability. The Judges Code of Ethics, 2009 contemplates Code of Conduct for the judges mandatorily to be followed by the judges failure which render a judge to disciplinary proceedings. The process of selection of the judges and the quality of the judges are closely interconnected.¹²⁴ Part III of Judges Code of Ethics, 2009 bounds the judges to follow in their judicial,¹²⁵ extra-judicial¹²⁶, and administrative functions¹²⁷ including declaration of assets¹²⁸ and disassociation with firms.¹²⁹ It says that any complaint against a judge who is alleged to have committed a breach of Code of Conduct shall, in writing, lodge a complain to the Chief Justice of the Federal Court.

Code of Conduct for judges in India is an unfinished agenda. For many years the proposal to amend Judges Enquiry Act, 1968 to incorporate Code of Conduct is pending before the Parliament of India. The present version Code of Conduct of India is the Judicial Standard and Accountability Bill, 2012 waiting for the assent of Parliament. The Law Commission of India in its report on the Judges (Inquiry) Bill, 2005 recommended that the proposed Bill must provide that the 'Restatement of Values of Judicial Life' adopted by the Supreme Court of India in its Resolution dated 7 May 1997 shall be treated as the Code of Conduct for the purposes of the proposed law.¹³⁰

5.2 Removal of Judges

The major law governing Judicial Accountability in India is Judges Enquiry Act, 1968.¹³¹ The Judges Enquiry Act, 1968 provides the procedure for the removal of the Judges of the Supreme Court of India or High Court. The removal process can be initiated only if a notice of a motion for presenting an address to the President of India praying for the removal of the Supreme Court of India or High Court judge, is signed by not less than 100 members of the

¹²² For example, s 2(c) of the Judges Enquiry Act, 1968 defines the term 'Judge' to mean 'a Judge of the Supreme Court of India or of a High Court (High Court) and includes the Judicial Independence and the Chief Justice of a High Court.'

¹²³ For example, para 3 of the Judges' Code of Ethics define the term 'Judge' to mean 'a judge of the Federal Court, the Court of Appeal, the High Court and includes a Judicial Commissioner.'

¹²⁴ Sheldon Goldman, 'Judicial Selection and the Qualities That Make a "Good" Judge' (1982) 462 *Annals of the American Academy of Political and Social Science* 112–124 <<https://doi.org/10.1177/0002716282462001010>>.

¹²⁵ Judges Code of Ethics 2009, paras 5–7.

¹²⁶ *ibid* para 8.

¹²⁷ *ibid* para 11.

¹²⁸ *ibid* para 9.

¹²⁹ *ibid* para 10.

¹³⁰ Law Commission of India (n 91) 488.

¹³¹ The Act enacted by virtue of the Constitution of India 1950, art 124(5).

House of the People or 50 members of the Council of States. The Same is to be given to the Speaker of Lok Sabha¹³² or Chairman of Rajya Sabha as the case may.¹³³ The Speaker or Chairman as the case may be is empowered to either admit or refuse to admit the motion.¹³⁴ After the preliminary enquiry of the motion, the Speaker or Chairman will have to conclude that the motion is to be admitted, then he shall keep the motion pending and constitute Investigation Committee.¹³⁵ If the report of the Investigation Committee finds that the judge is guilty of any misbehaviour or suffers from incapacity the motion admitted by the Speaker or Chairman before constituting Investigation Committee shall be taken up for consideration by the House along with the report of Investigation Committee. If the motion is adopted by each House of Parliament in accordance with provisions of clause (4) of Art 124, then the misbehaviour or incapacity of the Judge shall be deemed to have been proved and the address praying for the removal of the Judge shall be presented to the President in the prescribed manner.

To the extent of Code of Conduct as grounds for the removal of judges, the Judges Code of Ethics, 2009 and Judges Ethics Committees Act, 2010 are applicable for the removal of judges in Malaysia. There is no analogous law regulating the procedure to be followed by the tribunal constituted for the purpose of removal of judges under Federal Constitution of Malaysia.¹³⁶

Comparison of Judicial Accountability		
	Judicial Accountability in India	Judicial Accountability in Malaysia
Constitutional Status	art 124(2), art 124(3) and art 124(5) of Constitution of India, 1950	art 125(3) to art 125(5) of Federal Constitution of Malaysia
Legal Status	Judges Enquiry Act, 1968	Judges Code of Ethics, 2009 Judges' Ethics Committee Act, 2010
Model	Parliamentary Model	Executive Model
Public Participation	The Parliamentarians can initiate action against judges	The public can lodge a complaint for minor action against judges. Public cannot initiate action for removal of the judges
Finality Clause	There is no specific Finality Clause for the proceedings under Judges Enquiry Act, 1968	There is a finality Clause under Judges' Ethics Committee Act, 2010 s 15(3)
Grounds for	Constitution of India, 1950 has	(a) Breach of any provision of the

¹³² Lok Sabha is the lower house of the Parliament and Rajya Sabha is the upper house of the Parliament.

¹³³ Judges Enquiry Act 1968, s 3(1).

¹³⁴ *ibid.*

¹³⁵ *ibid* s 3(2).

¹³⁶ Federal Constitution of Malaysia, art 125(3).

Removal	contemplated only two grounds i.e., Proved Misbehaviour and Incapacity	code of ethics (b) Inability from infirmity of body or mind (c) Any other cause
Code of Conduct for Judges	Still has not materialised. The Judicial Standard and Accountability Bill, 2012 is under consideration	Materialised through the Judges Code of Ethics, 2009 Judges' Ethics Committee Act, 2010

Various Stages Removal		
	India	Malaysia
Initiative Stage	The notice of a motion given by the Parliamentarians to the Speaker/Chairman of Lok Sabha/Rajya Sabha for presenting an address to the President praying for the removal of a Judge	The Prime Minister, or the Chief Justice after consulting the Prime Minister, represents to the Yang di- Pertuan Agong
Investigative Stage	The Investigation Committee constituted by Speaker/Chairman	The tribunal constituted by Yang di-Pertuan Agong Judges Ethics Committee
Hearing Stage	By the Investigation Committee	By the tribunal
Recommendatory Stage	If the Investigation Committee finds the Judge is not guilty of any misbehaviour or does not suffer from any incapacity, Parliament shall not be proceeded. If the Investigation Committee report finds that the Judge is guilty of any misbehaviour or suffers from any incapacity, then, the motion and report shall be taken up for consideration	The tribunal will be recommending for the removal of the judges.
Decisional Stage	If the motion is adopted by each House of Parliament in accordance with a 2/3 majority the misbehaviour or incapacity of the Judge shall be deemed to have been proved and an address praying for the removal of the Judge shall be presented to the President by each House of Parliament	Yang di-Pertuan Agong shall may on the recommendation of the tribunal remove the judge from their office

The Parliament is given substantial power in India for the purpose of the removal of judges contrary to Malaysia. The parliamentarian, by giving notice of motion to the Speaker

of Lok Sabha¹³⁷ or Chairman of the Rajya Sabha,¹³⁸ may present a case to the President praying for the removal of a judge. In Malaysia, The Prime Minister or Chief Justice, after consulting with the prime minister, will be referring the matter to the Yang di-Pertuan Agong, and on the basis of the representation of Yang di-Pertuan Agong, the tribunal will be constituted for consideration of the representation. Comparing the initiative stages of both legal systems, there is a greater dominance of the Executive in the case of the Malaysian system contrary to Indian legal system. There is no democratic value so far as Malaysian system is concerned. The researcher also found that there is the major difference between the Indian and Malaysian legal systems in terms of ensuring legal sanctity at the investigative stage, hearing stage, recommendatory stage, and decisional stage. The Judges Enquiry Act, 1968 has contemplated detailed provisions for the purpose of hearing and investigating cases against judges. On the other hand, despite intensive research to find out the procedure to be followed by the tribunal, the researcher did not come across any such ideal law relating to tribunals deciding cases. It is important to note here that the Judges Ethics Committee constituted under Judges' Ethics Committee Act, 2010 ought to follow the procedure for disciplinary actions against judges other than removal. However, there is no such ideal law to regulate the procedure to be followed by the tribunal constituted for the purpose of looking into the removal cases.¹³⁹

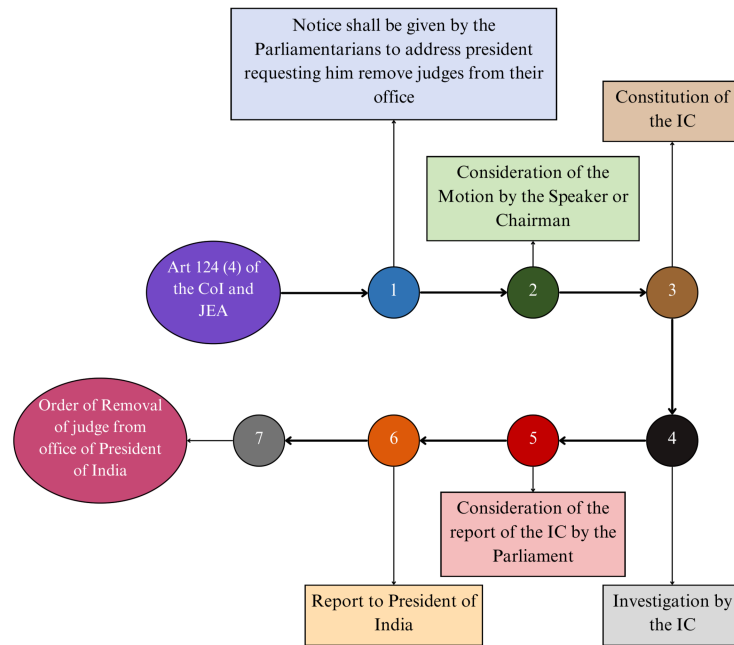
A comparison between the Indian and Malaysian judicial systems reveals that both have a common objective and framework—establishing a system of independent and accountable judicial system—which would be implemented and monitored through constitutional and legislative mechanisms.

¹³⁷ This is the House of People Representative similar to Dewan Rakyat of Malaysia.

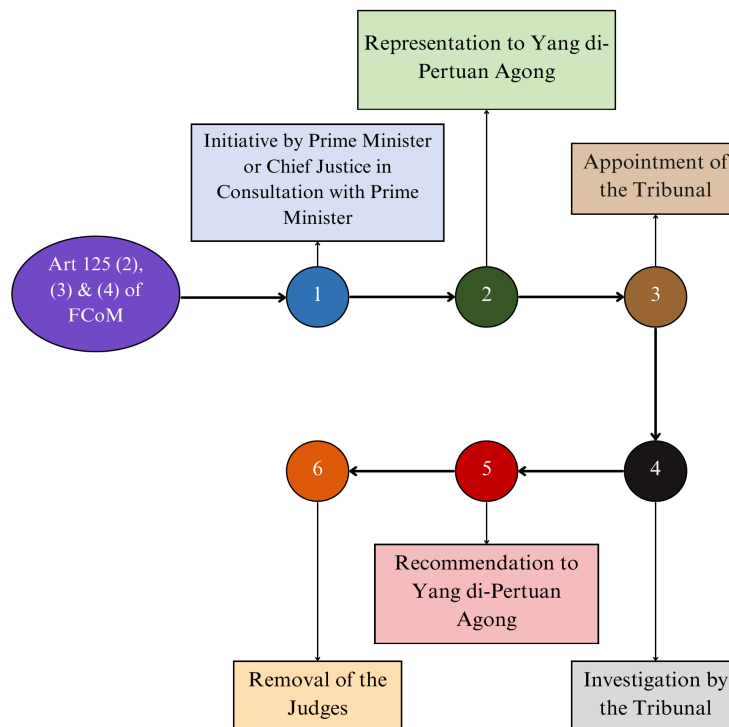
¹³⁸ This is the Council of State similar to Dewan Negara of Malaysia.

¹³⁹ For criticism of the Tribunal and recommendations for the procedure see, Harding (n 36); HP Lee and V Morabito, 'Removal of Judges: The Australian Experience' (1992) *Singapore Journal of Legal Studies* 40–56; H P Lee, 'A Fragile Bastion under Siege: The 1988 Convulsion in the Malaysian Judiciary' (1990) 17 *Melbourne University Law Review* 386–417 <<https://classic.austlii.edu.au/au/journals/MelbULawRw/1990/2.html>>; Malaysian Bar, 'Report of the Panel of Eminent Persons to Review the 1988 Judicial Crisis in Malaysia' (2008) <https://www.malaysianbar.org.my/cms/upload_files/document/PanelofEminentPersonsReport.pdf>.

REMOVAL OF JUDGES IN INDIA



REMOVAL OF JUDGES IN MALAYSIA



6. Conclusion, Findings and Discussion

Men grow to their full stature only in the environment of responsibility.¹⁴⁰ Accountability is the output of responsibility. Accountability of the State is the crux of the legal system to protect the sovereignty of the people. It corroborates public institutions to observe the values and principles enshrined under the Constitution and legal system. It authenticates strong governing standards and practices. It promotes the objects and principles of the fundamental law of the country. The Highest standards of professionalism and discipline amongst the judges of the apex Court is possible through the accountability mechanism. It sensitises judges to ensure the utmost respect for Rule of Law in executing their duties and responsibilities. Adjudication based on standards of human rights and fundamental freedoms and human dignity is the result of Judicial Accountability. It restructures the image of the judiciary with possible standards of competence and integrity. It promotes and facilitates the independence and accountability of the Judiciary and the efficient, effective, and transparent administration of justice. The Accountability principle prescribes a circle of action to each of the judges and within that circle they have a bounden duty to perform their functions.

An analysis of the Malaysian judicial system clearly reveals a tendency to increase unduly executive control over the administration of the justice system. It is worth to quote Sir Winston Churchill here to understand the threat of executive interference with the independence of the judiciary. He says:

The principle of the complete independence of the Judiciary from the Executive is the foundation of many things in our island life. It has been widely imitated in varying degree throughout the free world. It is perhaps one of the deepest gulfs between us and all forms of totalitarian rule.¹⁴¹

It is also contrary to the inherent relationship between the judiciary and executive that judicial matters are exclusively within the responsibility of the judiciary, both in central judicial administration and in Court level judicial administration.¹⁴² It is an accepted norm that the executive may participate in the discipline of judges only in referring complaints against judges¹⁴³ and the cases so referred shall be adjudicated by the judicial tribunal.¹⁴⁴ The power to remove judges from office necessarily shall be vested with the Parliament. The nexus between legislature and judiciary shall be minimised. This separation is desirable because the combination of judicial and executive power may result in a threat for life and liberty of the individual. However, the democratic value attached to the removal process is severally jeopardised as the role of the legislature in the removal process is completely

¹⁴⁰ Laski (n 56) 61.

¹⁴¹ House of Commons Debates, 23 March 1954, quoted by McLelland (n 119) 683.

¹⁴² International Bar Association, 'The IBA Minimum Standards of Judicial Independence' (1982) para 8 <<https://www.ibanet.org/MediaHandler?id=bb019013-52b1-427c-ad25-a6409b49fe29>>.

¹⁴³ *ibid* para 4(c).

¹⁴⁴ *ibid* para 4(b).

cornered in Malaysia.¹⁴⁵ The democratic value has been invigorated and strengthened in India by authorising Parliament to participate in the removal process. However, the success rate of the removal process in India clearly indicates that this democratic value can also be mutilated by politicians.

Likewise, both legal systems have adopted hierarchical patterns in the judiciary by subjecting judges to supervisory powers of the heads of the judiciary in dealing with disciplinary actions against judges. '[H]ierarchical patterns' Shimon Shetreet writes 'may even bring about attempts by judges to influence other judges' decisions or give rise to latent pressures on the judges which may result in subservience to judicial superiors.'¹⁴⁶ Notwithstanding such kind of hesitation against the hierarchical model, it is an ideal to infuse such model as it is inevitable for the system. The judges, being a part of such removal or disciplinary process, to judge the cases shall keep constitutional morality in their mind while dealing with such cases.

There is a close nexus between the accountability of State and the citizens of the nation. It is because of the emanation of sovereign power from the people of the country.

Theorists of democracy from Aristotle to Bryce have stressed that democracies are maintained by active citizen participation in civic affairs, by a high level of information about public affairs, and by a widespread sense of civic responsibility. These doctrines tell us what a democratic citizen ought to be like if he is to behave according to the requirements of the system.¹⁴⁷

Similarly, then Constitution of Gambia mandates that,

A member of the public has the right to petition the National Assembly on any matter within the authority of the Assembly, including a request to enact, amend, revise or repeal or revoke any legislation, or to debate a matter that is considered to be in the public interest or designed to ensure and promote governance, transparency and accountability.¹⁴⁸

Every independent institution and office derives its authority from the sovereignty of the people and shall, in the performance of its duties be guided by integrity, transparency and accountability.¹⁴⁹

¹⁴⁵ See for example International Commission of Jurists, 'Montreal Declaration' (n 10) art 2.33 and International Bar Association (n 142) para 4(c).

¹⁴⁶ Shimon Shetreet, 'The Limits of Judicial Accountability: A Hard Look at the Judicial Officers Act 1986' (1987) 10 *University of New South Wales Law Journal* 4–16, 11 <<https://www.unswlawjournal.unsw.edu.au/wp-content/uploads/2017/09/10-1-17.pdf>>.

¹⁴⁷ Gabriel A Almond and Sidney Verba, *The Civic Culture: Political Attitudes and Democracy in Five Nations* (The Princeton University Press 1963) 14.

¹⁴⁸ Constitution of Gambia 2019, art 161(1).

¹⁴⁹ *ibid* art 213(1).

It is evident from both systems that they have kept away the role of citizens to participate in the removal process. The Malaysian system has stabilised the system by strengthening citizens to lodge complaints against judges seeking disciplinary actions against the judges. India lacks such a legal mechanism.

Acknowledgement

The author would like to acknowledge the support extended by Karnataka State Law University by providing adequate time to write this article by relaxing my administrative duties for this academic purpose.

Funding Information

The author received no funding from any party for the research and publication of this article. ♦