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We can be reached at:

**Constitutional Law Committee
Bar Council Secretariat**
No. 15, Leboh Pasar Besar
50050 Kuala Lumpur

t: 03.2031.3003
f: 03.2026.1313
e: perlembagaanKu@gmail.com

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Frequently Asked Questions

1. What is special about Constitutional Institutions?



Constitutional Institutions are special because they are set up and given functions and powers by the Constitution itself. A Constitutional Institution can only be abolished or have any of its powers taken away or increased by amending the Constitution. In general, this requires approval by two-thirds of the members in the Dewan Rakyat and the Dewan Negara.

However, some argue that Parliament cannot change the basic structure of the Constitution so as to abolish Constitutional Institutions, remove rights and liberties or interfere with the separation of powers principle because they are fundamental to the Constitution.

2. Is one Constitutional Institution more important than another?

No. All these institutions are equally important. Each has a different function and role to play.

3. Has Parliament ever amended the Constitution to remove power from Constitutional Institutions? What is the effect of this?

Yes. For example, in 1988 a constitutional amendment was made by Parliament limiting the power of the Courts.

Before this amendment, the Courts' power was unlimited and came directly from the Constitution. The Court could examine or review all laws made by Parliament.

The 1988 constitutional amendment however tried to change this so that the Courts could only examine or review laws which Parliament allowed the Courts to examine.

If this position is correct, the Courts are no longer able to act as an effective check on Parliament and the Government. This means there is no longer a proper system of checks and balances between the main Constitutional Institutions.

However, many argue that the power of the Courts cannot be taken away by Parliament through an amendment to the Constitution as it forms part of the basic structure of the Constitution, and therefore the 1988 amendment is ineffective.

4. How do the three main Constitutional Institutions check each other's power under the Separation of Powers principle?

Example 1: How are the powers of the Government checked by Parliament?

Elected representatives of the Dewan Rakyat can require the Prime Minister or Cabinet to explain anything that the Government has or has not done. If the Cabinet acts against the wishes of the Dewan Rakyat, then the Dewan Rakyat can pass a motion of no confidence against the Prime Minister. The Prime Minister and his Cabinet should

then resign. Here, the Dewan Rakyat (i.e. Parliament) ensures that the Government acts in the best interests of the people and does not abuse its powers.

Example 2: How are the powers of the Government checked by the Courts?

The Courts can review actions by the Government and if those actions are against the Constitution or the laws made by Parliament, then the Courts can correct those actions. However, some argue that the Courts' power is limited, and therefore it cannot review certain actions by the Government. (See Question 3 above)

Example 3: How are the powers of Parliament checked?

Parliament makes laws, but the Courts have the power to say what a law means when there is uncertainty or if one law contradicts another law. The Courts may also say that a law is against the Constitution and therefore need not be followed.

However, there are certain things that the Courts cannot question such as Parliamentary proceedings.

Example 4: How are the powers of the Courts checked?

If a Judge misconducts himself or herself or breaches the Judges' Code of Ethics or if he or she is mentally or physically not well enough to continue to work as a Judge, then the Prime Minister can advise the YDPA to set up a tribunal to decide if the Judge must be removed from office. This tribunal is made up of other Judges.

Either the Dewan Rakyat or the Dewan Negara can debate the conduct of a Judge, but only if a motion to do so is supported by at least one quarter of the total members of that particular Dewan.

In other words, Parliament and the Government can recommend that action be taken against a Judge who abuses his or her power, but it is only other members of the Courts that can decide if a Judge is to be removed from office.

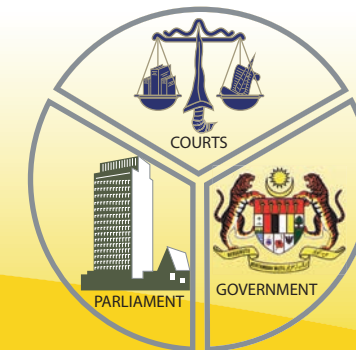
Example 5: Why is it important that the Courts are independent?

The Courts play an important role in making sure that the laws passed by Parliament do not go against the Constitution and in checking any abuse of power by the Government. For the Courts to continue to play this role, it is important that Parliament and the Government do not have power to remove Judges from office on their own. Otherwise, Judges may be worried that they might be removed from office if they decide against Parliament or the Government in any legal case.

What's Next?



Learn about your Constitution in our other *Rakyat* Guides on Federal-State relations, the *Rakyat*, the Executive, the Parliament, the Judiciary, Elections and more!



The Rakyat Guides

2. Constitutional Institutions & the Separation of Powers

Introduction



In *The Rakyat Guides: 1. What is the Federal Constitution?*, we learnt that the Constitution sets up our democratic system, and that it is the supreme law of Malaysia.

In this guide, we will learn about the different institutions which are set up by the Constitution. What do these institutions do and why are they so important?

What are Constitutional Institutions?

You live in Malaysia. You want to practise your faith, express your views, work, play, travel, own property, and live in peace. You want public roads, clean water, electricity and good schools. These things are made possible **by laws**.



But who makes these laws? Who enforces them? If you and I do not agree on what a particular law means, who then decides? Under the Constitution, different institutions exist to do these things.

There are three main Constitutional Institutions:

- The Legislature ("Parliament") makes **laws**
- The Executive ("Government") governs the country according to the **laws**
- The Judiciary ("Courts") decides what the **laws** mean and can order people and the Government to follow the **laws**

Parliament

Parliament consists of the Yang di-Pertuan Agong ("YDPA"), the House of Representatives ("Dewan Rakyat") and the Senate ("Dewan Negara").

Parliament makes, amends and abolishes laws which are called Acts or Statutes. The Constitution says what laws Parliament can or cannot make, and the procedure for making laws.

Government

The Government consists of the YDPA, Prime Minister, Cabinet Ministers and the public services. The Government runs the country according to the Constitution and the laws made by Parliament.

Courts

There are several types of Courts in Malaysia such as the civil courts, the Syariah courts and the native courts. Each of these courts has its own powers and functions.

The Courts decide on legal disputes which include disputes between people, and between people and the Government.

What is the Rule of Law?

The Rule of Law refers to many ideals, among them that:

- Parliament, the Government, the Courts and all other Constitutional Institutions can only do what the law allows them to do
- A person can only be punished if the Courts find him guilty of breaking the law
- Laws must be clear and made available to everyone
- Laws must be just, fair, and must respect human rights and the independence of the Courts
- Everyone must obey the law
- Everyone is equal before the law



What is the Separation of Powers?

You may wonder why the Constitution sets up three main institutions (Parliament, the Government and the Courts) to govern the country, and gives each institution different functions and powers. Why not just have one institution to run the country?



The idea behind this is called the Separation of Powers and the system of checks and balances.

Why do powers need to be separated? Imagine if under the Constitution, there is only Institution X. Institution X possesses all powers to govern the country. It has the power to make laws, to enforce laws and to decide what the laws mean when there is a dispute.

Now imagine if Institution X passes a law to say that from today onwards, all property will belong to it, and no one else has the right to own property. Your property is then taken away from you by Institution X. You believe that this is wrong because the Constitution says you can own property. Who will you complain to about the law made by Institution X and how will you recover your property? Since Institution X has all powers to govern the country, you will have to complain to Institution X. Remember that this is the same institution that made the law and took away your property in the first place.

Wouldn't it be better if there were a separate and independent institution to hear your complaint and decide whether or not the law and the act of taking away your property is correct? Isn't it more likely that a separate and independent institution would decide fairly?

Separation of Powers means that power to govern the country is divided between different and independent

institutions. One institution makes the laws, one institution enforces the laws and another institution decides what the laws mean and can order people to follow them. This is to ensure that no one institution becomes too powerful or has absolute power.

It also puts in place a system of checks and balances. This means that each institution acts as a check or watchdog on the other institutions. This ensures that the institutions act in accordance with their constitutional roles, and do not abuse their power.

What are the other Constitutional Institutions?

At the federal level, besides the three main institutions (Parliament, the Government and the Courts), the Constitution also sets up other institutions, which have particular roles to play. For example:

- ◆ National Land Council
- ◆ Election Commission
- ◆ Education Service Commission
- ◆ Pardons Board
- ◆ Public Services Commission
- ◆ Attorney General
- ◆ Armed Forces Council
- ◆ Lands Tribunal
- ◆ Judicial and Legal Service Commission
- ◆ National Finance Council
- ◆ Auditor General
- ◆ National Council for Local Government
- ◆ Yang di-Pertuan Agong
- ◆ Police Force Commission
- ◆ Conference of Rulers

The Yang di-Pertuan Agong

Nine of Malaysia's states have Sultans and every five years they elect one amongst themselves to be the YDPA. The YDPA has Executive and Legislative functions and powers. In exercising *most* of these functions and powers, the YDPA must follow the advice of the Prime

Minister or Cabinet. Examples include the appointment of Cabinet Ministers, the Attorney General and Senators to the Dewan Negara. This shows that his powers are limited and come from the Constitution. He is what is known as a constitutional monarch.

However, for some functions and powers, the YDPA has a margin of discretion and does not have to act on the advice of the Prime Minister or Cabinet. An example of this is in the appointment of the Prime Minister. The Prime Minister must be a member of the Dewan Rakyat who, in the YDPA's opinion, is likely to command the confidence of the majority of the members of the Dewan Rakyat.

The Attorney General

The Attorney General ("AG") is the principal legal adviser to the Government and the YDPA. The AG has the power and discretion to start, conduct and stop proceedings in the Courts against any person for any criminal offence. The AG is appointed by the YDPA on the advice of the Prime Minister.

The Election Commission

The Election Commission ("EC") runs the election process in Malaysia and to do so, Parliament has given the EC various functions and powers. The EC consists of a chairman, deputy chairman and five other members. All members are appointed by the YDPA after consulting the Conference of Rulers. In appointing members, the YDPA must consider the importance of having an EC that enjoys public confidence.

Public Services Commission

The Public Services Commission is responsible for the appointment, promotion, transfer and discipline of all members of the general public service of the Federation

and joint federal-state public services. However, the judicial and legal service, the police force and the education service are subject to their own commissions. The YDPA appoints the members of the Public Services Commission after considering the advice of the Prime Minister and after consultation with the Conference of Rulers.

Judicial and Legal Service Commission

The Judicial and Legal Service Commission is responsible for the appointment, promotion, transfer and discipline of all members of the judicial and legal service. Public servants who are members of the judicial and legal service include magistrates, sessions court judges, registrars of the Courts and members of the AG's chambers. The Judicial and Legal Service Commission consists of the chairman of the Public Services Commission, the AG and at least one other member appointed by the YDPA after consultation with the Chief Justice of the Federal Court.

Police Force Commission

The Police Force Commission is responsible for the appointment, promotion, transfer and discipline of all members of the police force. The chairman of the Commission is the Minister who is responsible for the police (currently the Minister of Home Affairs).

Education Service Commission

The Education Service Commission is responsible for the appointment, promotion, transfer and discipline of all members of the education service. Members of the education service include teachers in all government schools. The members of the Commission are appointed by the YDPA after considering the advice of the Prime Minister and after consultation with the Conference of Rulers.