

A Comparison of Constitutional Adjudication Institutions in Malaysia and Indonesia

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ABSTRACT

The tyranny of majority against the minority is prevented or minimised by constitutional safeguards enforced primarily by the court. This is one of the reasons why Malaysia and Indonesia adopted the doctrine of constitutional supremacy when they achieved independence in 1957 and in 1945 respectively. This paper compares constitutional adjudication as one of the mechanisms of constitutional democracy in both countries. In spite of their geographical proximity and having similar cultural and historical heritages, the two countries have fundamentally different constitutions. Malaysia follows the common law model where superior courts adjudicate constitutional issues while Indonesia has adopted Kelsenian model by establishing a separate new court, namely the Constitutional Court. This is a qualitative research that examines the role and power of constitutional adjudications institutions of both countries. The development and experiences of the institutions in both countries not only shed light on constitutional democracy of the two countries, but also influences the process of democratic consolidation in the region.

Keywords: Adjudication, constitution court, democracy, Kelsen

INTRODUCTION

Malaysia and Indonesia adopted the doctrine of constitutional democracy when they

attained independence in 1957 and in 1945 respectively. According to this doctrine, Parliament represents the will of the people but it is bound by the constitution as supreme law of the nation. In August 2003, Indonesia by amending its 1945 Constitution established the constitutional court. Its emergence was a result of political reform and judicial history of the country. In Malaysia, the superior courts are institutions

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which facilitate the citizen to bring constitutional adjudication to the courts. The establishment of the Constitutional Court in Indonesia in 2003 and the function of the superior courts in Malaysia is a part of realising the concept of constitutional democracy.

METHOD

This is a qualitative research that focuses on the establishment, role and power of constitutional adjudications institutions in Indonesia and Malaysia. The development and experiences of these institutions will shed light on the workings of constitutional democracy in the two countries, and the process of democratic consolidation in the region.

RESULTS AND DISCUSSION

The Conceptual Ground of Constitutional Democracy and Constitutional Adjudication

Constitutional adjudication is much older and more deeply entrenched in the United States (US) than in Europe. Judicial review as a part of constitutional rights has been implemented continuously in the US since the Supreme Court's landmark decision in *Marbury v. Madison*, 5 U.S. 137 (1803). Constitutional review in Europe is largely a post-World War II phenomenon (Gamper, 2009; Rosenfeld, 2004). Since the end of World War II, 'a new constitutionalism' has emerged and widely diffused in Europe. Human rights have been codified and given a privileged place in the constitutional law and quasi-judicial organs called constitutional

courts have been charged with ensuring the normative superiority of the constitution. These courts can be found in Austria (1945), Italy (1948), the Federal Republic Germany (1949), France (1958), Portugal (1976), Spain (1978) and Belgium (1985) (Sweet, 2000).

Hans Kelsen shows the origins of judicial power to review legislation is from the constitution which is the supreme law of a country. He emphasises that supremacy is not real unless there is review. Without review, the constitution is not truly binding (Troper, 2003). The constitution is safeguarded by the court which necessitates judicial review when the need arises. The supremacy of the Constitution entails judicial supremacy. The courts determine the constitutional standards and examine whether the regimes can meet the standards (Tremblay, 2005). Judicial Review is justified for its role in correcting 'malfunctions' in democratic government that entrench the powerful and disregard minorities (Stone, 2010). Judicial review needs to be set in the context of mechanisms which seek to achieve broader political accountability (Woolf, Jowell, & Le Sueur, 2007).

Constitutional Democracy and Constitutional Adjudication in Malaysia

The doctrine of separation of powers involves a system of "check and balance". Each branch of government is given specific powers of oversight (check) over the other branches of government, and powers to restrain the actions of the other branches of government. The aim is to ensure a

balance of power between the three arms of government and to prevent one branch of government from usurping power or taking over functions from the other branches of government. In *Loh Kooi Choon V Govt. of Malaysia* [1977], it is stated that:

“The constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying three basic concepts:

One of them is that ... no single man or body shall exercise complete sovereign power, but it shall be distributed among the executive, legislative and judicial branches of government.”

Article 4(1) of the Malaysian Constitution proclaims the Constitution to be the “supreme law” of the Federation and that a law which is inconsistent with the Constitution “shall, to the extent of the inconsistency, be void”. Because the Constitution embodies fundamental liberties, the protection of such liberties is entrusted to the judiciary. The judiciary exercises the potent power of judicial review which is described as ‘the power of a court to review a law or an official act of a government employee or agent for constitutionality or for the violation of basic principles of justice’. The court has the power to strike down the law, to overturn the executive act/decision, or order a public official to act in a certain manner if it believes the law or act to be unconstitutional or to be contrary to law of a free and democratic society.

The Framework of Constitutional Adjudication in Malaysia: The Superior Courts and the Federal Court of Malaysia

The system of the Government in Malaysia is closely modelled on Westminster Parliamentary system with its own peculiarities. Malaysia has a written Constitution that spells out the function of the three branches of the Government, namely the Executive, Legislative and Judiciary. Article 39 of the Federal Constitution vested the executive authority of the Federation in the YDPA (Yang di-Pertuan Agung) and exercisable by him or by the cabinet. Article 44 vested the legislative authority of the Federation to the Parliament while Article 121 deals with the judicial power of the federation. Judicial Review is an important tool for the judiciary’s exercise of check and balance on the Legislature and the Executive.

The judicial power of the Federation is contained in Part IX of the Constitution. The country, although federally constituted, has a single-structured judicial system consisting of two parts - the superior courts and the subordinate courts. In the hierarchy of courts, the subordinate courts comprise the Sessions Court and Magistrates Court while the superior courts comprise the High Court, Court of Appeal and the Federal Court. The Federal Court of Malaysia is the highest judicial authority and the final court of appeal in Malaysia.

The Federal Court, earlier known as the Supreme Court and renamed the Federal Court vide Act A885 effective from June 24, 1994, stands at the apex of this pyramid.

Before January 1, 1985, the Federal Court was the highest court in the country but its decisions were further appealable to the Privy Council in London. However, on January 1, 1978, Privy Council appeals in criminal and constitutional matters were abolished and on January 1, 1985, all other appeals i.e. civil appeals except those filed before that date, were abolished. The setting up of the Court of Appeal on June 24, 1994 after the Federal Constitution was amended vide Act A885 provides litigants one more opportunity to appeal. Alternatively, it can be said that the right of appeal to the Privy Council is restored, albeit in the form of the Federal Court.

In Malaysia there is no specialised Constitutional Court. Most constitutional cases begin at the High Court. In certain circumstances, constitutional cases are heard only by the Federal Court.¹ The ¹ Section 20 of the Courts of the Judicature Act deals with reference of constitutional question by subordinate court to the High Court. Section 30 provides 'Where in any proceedings in any subordinate court any question arises as to the effect of any provision of the Constitution the presiding officer of the court may stay the proceedings and may transmit the record thereof to the High Court'. Any record of proceedings transmitted to the High Court under this section shall be examined by a Judge of the Court and where the Judge considers that the decision of a question as to the effect of a provision of the Constitution is necessary for the determination of the proceedings he shall deal with the case in accordance with section 84 as if it were a case before him in the original jurisdiction of the High Court in which the question had arisen. Section 84 of the Courts of the Judicature Act which deals with reference to constitutional question by High Court to the Federal Court states that 'where in any proceedings in the

superior courts have the jurisdiction to hear constitutional cases. The decision of the Federal Court is the most important because it is the highest court in the land. Being the court at the apex of the hierarchy in the common law system of Malaysia the Federal Court plays a dual role - as the most authoritative interpreter of the Constitution and also as the highest appellate tribunal relating to all matters. Therefore, the Federal Court can be regarded as the constitutional court of the country. It also plays a pivotal role in the defence of fundamental liberties as provided in Part II of the Constitution.

The jurisdiction of the Federal Court is spelt out in Article 128. It has an exclusive jurisdiction in regard to any question whether law made by Parliament or by the Legislature of a State is invalid; the Legislature of the State has no power to make laws. It also has an overriding power related to disputes between States or between Federation and the State. It also has jurisdiction over the lower court. The Federal Court is also conferred the advisory jurisdiction under Article 130 of the Constitution under which the Yang di-Pertuan Agong may refer to the Federal Court any question as to the effect of any provision of the constitution which has arisen or appear to him likely to arise. His Majesty has done so only once in *The Government of Malaysia v. Government of the State of Kelantan* [1968].

High Court a question arises as to the effect of any provision of the Constitution the Judge hearing the proceedings may stay the same on such terms as may be just to await the decision of the question by the Federal Court.

Review of Primary Legislation/Check on the Legislature in Malaysia. Art 4(1) of the Malaysian Constitution proclaims the Constitution to be the “supreme law” of the Federation and that a law which is inconsistent with the Constitution “shall, to the extent of the inconsistency, be void”. The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please. The court in Malaysia can declare invalid legislation enacted by the Federal Parliament or the legislature of a State. The Federal Court in *Ah Thian v. Govt. of Malaysia* [1976] had explained the legal position in detail. Under the Constitution, a written law may be invalid on the following grounds:

- (1) in the case of Federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of State written law, because it relates to a matter which respect to which the State legislature has no power to make law, article 74; or
- (2) in the case of both Federal and State written law, because it is inconsistent with the Constitution, see article 4(1); or
- (3) in the case of State written law, because it is inconsistent with Federal law, article 75.²

² The Court's power to declare any law invalid on the second and third grounds is not subject to any restrictions, and may be exercised by any Court in the land and in any proceeding whether it be started by Government or by an individual. But the power to declare any

Review of Action and Decision/Check on the Executive in Malaysia. The Courts are the only recourse for the individual against any state abuse or misuse of power. Administrative law and judicial review are indivisible aspects of the concept of rule of law. Its importance lies in maintaining the balance between state rights and rights of the individual. In this context, Lord Hewart described the rule of law as ‘*the predominance of law, as opposed to mere arbitrariness, in determining or disposing of the rights of individuals*’ (Hewart, 1929).

Judicial review is the process by which the High Court exercises its supervisory jurisdiction over the decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged under statute to perform public acts and duties. This jurisdiction evolved in common law and was exercised by the issue of the prerogative writs of mandamus, certiorari and prohibitions. They are now regulated by statute namely Paragraph 1 of the Schedule to the Courts of Judicature Act, 1964 and procedurally by rules of Court that is Order 53 of the Rules of the High Court, 1980.³

law invalid on ground (1) is subject to three restrictions prescribed by the Constitution. The procedure and power to declare law made by the legislature invalid based on *ultra vires* are stated in art. 4(3) and (4) which need to be read together with article 128(1).

³ Order 53 must be invoked when the defendant or one of the defendants in the action is the government or a public authority. It has been said that the purpose of Order 53 is “to provide certain protections to the public body or authority when their public act or decision is being challenged”. The current Order 53 came

The court cannot when exercising its judicial review jurisdiction, subject to the legislative provisions to the contrary, substitute or replace the decision of the public authority with its own. In the context of judicial review of administrative actions in Malaysia, the appellate courts have cautioned against unjustified judicial interference with administrative decisions if this is done with a view of substituting those decisions with some others which the courts may feel fairer or more reasonable on merits. After a finding that a particular decision cannot stand in law, the court will then remit the matter to the authority for reconsideration. The court in the exercise of its judicial review jurisdiction is not to substitute its decision for that of the authority. However, there is one qualification: the non-decision substitution feature of judicial review is subject to contrary legislative intention.

Constitutional Adjudication in Indonesia

The discussion below is on constitutional adjudication in Indonesia. The role of Supreme Court is also discussed to highlight the different authorities of both the Constitutional Court and the Supreme Court in terms of judicial review.

into effect on 21 September 2000. It has been said that the new Order 53 was introduced to cure the mischief of its precursor, which was much narrower and more restrictive. See *TR Lampoh AK Dana & Ors v Government of Sarawak* [2005] 6 *Malayan Law Journal* 371, p. 390 and *Sivarasa Rasiah v Badan Peguam Malaysia & Anor* [2002] 2 *Malayan Law Journal* 413.

The Supreme Court. The Supreme Court of the Republic of Indonesia is the independent judicial arm of the state. It maintains a system of courts and sits above the other courts and is the final court of appeal. It can also re-examine cases if new evidence emerges. The Supreme Court has oversight over the high courts (*Pengadilan Tinggi*) of which there are about 20 throughout Indonesia and district courts (*Pengadilan Negeri*) of which there are around 250 with additional district courts being created from time to time. As of mid of 2011, there were a total of 804 courts of various kinds in Indonesia (Pompe, 2005). About 50 justices sit in the Supreme Court while other high and lower courts across Indonesia employ around 7000 judges.

The Supreme Court is the final court of appeal following appeals from the district courts to the high courts (Indrayana, 2008). Constitutional matters, however, fall within the jurisdiction of the Constitutional Court of Indonesia, established in 2003.

Regarding the judicial review, the Supreme Court shall have authority to review subsidiary laws such as Government Regulation, Presidential Regulation and Provincial Regulation and Regency/

Municipality Regulation.⁴ These are

⁴ See Art 7 (1) of Law No. 12 of 2011 on Legislation Making. In this article, it is stated the hierarchy of legislation in Indonesia, as follows:

- (a) 1945 Constitution (UUD 1945);
- (b) Decree of People's Consultative Assembly (TAP MPR);
- (c) Laws/Government Regulation in Lieu-Law (Undang-Undang/Peraturan Pemerintah Pengganti Undang-

‘the judicial review’ exercised by the Supreme Court, while judicial review of laws exercised by the Constitutional Court are known specifically as the ‘constitutional review’.

The Constitutional Court. The Constitutional Court of Republic of Indonesia is a new state organ in Indonesia. The Third Amendment of the 1945 Constitution gave birth to this Court (Anonymous, 2010). The Constitutional Court is independent and equal to the Supreme Court. It was established as the guardian of the Constitution as well as the sole interpreter of the constitution. The role of the Constitutional Court is to ensure checks and balances in the constitutional system. This mechanism may also overcome the gap between lack of sense of justice in society and the practice of authoritarian regime and state abuse of power.

Only the Constitutional Court has the authority to settle any disputes on constitutional cases, which relate to consistency of implementation of constitutional norms. The power vested in the Constitutional Court to decide on the constitutional cases is derived from the Constitution (Anonymous, 2010). Article 24 paragraph (2) of the 1945 Constitution states

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- Undang);
 - (d) Government Regulation (Peraturan Pemerintah);
 - (e) Presidential Regulation (Peraturan Presiden);
 - (f) Provincial Regulation (Peraturan Daerah Provinsi);
 - (g) Regency/Municipality Regulation (Peraturan Daerah Kabupaten/Kota).

that judicial power shall be implemented by a Supreme Court and its subordinate judiciatures, in the general judicature, the religious judicature, the military judicature, the state administration judicature, and by a Constitutional Court. Article 24C, which consists of 6 paragraphs, stipulates that the Constitutional Court shall have the authority to hear cases at the first and final levels, the decision of which shall be final, in conducting judicial review on laws against the Constitution, in deciding disputes concerning the authorities of state institutions whose authorities provided by the Constitution, to make decisions on the dissolution of political parties, and to decide disputes concerning the result of general elections. The Court shall also be required to pass decisions on the opinion of the House of Representatives concerning alleged violations committed by the President and/or the Vice President in accordance with the Constitution.

The Constitutional Court consists of nine constitutional court justices as stipulated by the President, comprising three justices each proposed by the Supreme Court, House of Representatives and the President. The Chief Justice and the Vice Justice of the Constitutional Court shall be elected from among and by constitutional court justices. Constitutional court justices must possess integrity and flawless personality, must be fair, a good statesman with a mastery of the constitution and state organisation and shall not concurrently serve as state officials. Their appointment and dismissal, the procedural law and other provisions

concerning the Constitutional Court are regulated by law.

Judicial Process of the Constitutional Court. Judicial process is a mechanism to ensure substantive justice. Judicial process needs a series of procedure for the people to access justice. The procedures of the Constitutional Court have salient characteristic which are different from other courts. The main characteristic of the court procedures lies in the legal bases of the court procedure used in the Constitution: the 1945 Constitution. Even though there are some acts and regulation of the Constitutional Court as the legal bases of the procedure, they can be used as long as they do not contradict the 1945 Constitution. This is because the role of the Constitutional Court is essentially to decide on constitutional cases.

The Constitutional Court hears cases filed by the petitioners. There are three kinds of hearings in the Constitutional Court, namely panel hearing, consultative meeting of justices (RPH), and plenary hearing (Anonymous, 2010). Panel hearing is a meeting attended by 3 (three) constitutional court justices assigned to hold a hearing for preliminary examination. This hearing is held to examine the legal standing of the petitioner and the substance of the petition. Constitutional court justices may give advice for revision of the petition. Consultative Meeting of Justices (RPH) is a closed and confidential meeting. This meeting can only be attended by the Constitutional Court Justices and the Registrar. In this meeting,

the case is discussed in detail and the decision of the Constitutional Court is made. This meeting must be attended by at least seven constitutional court justices. During the RPH, the Registrar takes notes and records every subject matter of discussion and the conclusion. A plenary hearing is held by the panel of the constitutional court justices with minimum attendance of 7 (seven) constitutional court justices. This hearing is open for the public with the agenda to hear examination and pronouncement of the decision. Hearing examination includes listening to the petitioner's statement, expert's statement, witness' statement, and statements of the related parties, as well as examining the evidence.

Constitutional Adjudication: A Comparison between Malaysia and Indonesia

From the foregoing, there are similarities and differences in constitutional adjudication between both countries. Similarity in the constitutional adjudication of both countries is part of realising the goal of rule of law and ensuring democracy (Asshiddiqie, 2009). First, the authority and organs of the state are subject to the supremacy of the Constitution as the supreme law of the nation. This is a formula of modern state for ensuring dignity to its citizens. The existence of the constitutional adjudication is also a part of fundamental rights of citizens. Second, exercising judicial review in both countries is a part of mechanism of constitutional adjudication. Having this mechanism, the constitutional adjudication in both countries

act as a check and balance mechanism of the state's main organs. This mechanism also prevents the trend of abuse of political powers. From a logical and rational point of view, this general power of all judges and courts to act as constitutional judges is the obvious consequence of the principle of judicial supremacy of the Constitution. If the Constitution is the supreme law of the land, in case of conflict between a law and the Constitution, the latter must prevail and it is the duty of the judiciary to determine the issues in each case (Brewer-Carias, Bolivar, & Bur, 1989). Thus, the parliament is not considered as the final and absolute element of democracy. In this sense, even the parliament as the representative of the will of people needs to be controlled by the courts to honour the spirit of the constitution as the highest law.

The Constitutional adjudication of both countries also have differences. First, both countries follow different model of constitutional adjudication. Malaysia follows the common law model⁵ where superior courts function as organs of the constitutional adjudication, while Indonesia follows the Kelsenian models⁶

⁵ This system has also been qualified as a diffuse system because all the courts in the country, from the lowest level to the highest, are permitted the power of judicial review. Although in case of Malaysia, judicial review is limited to the superior courts. In the US, as first model of the common law, judicial review may be exercised by all level of courts. See further Allan R. Brewer-Carias, *Judicial Review in Comparative Law*, Cambridge University Press, 1989, at 89.

⁶ Most European countries have established special constitutional courts that are uniquely

by establishing a new court, namely the Constitutional Court. Malaysia has adopted the US model also called John Marshall's doctrine. According to this doctrine, judicial review is conducted on every case relating to constitutional issues by all ordinary courts through a decentralised or diffused or dispersed review (Fallon, 2004). This system has also been qualified as a diffuse system because all the courts in the country, from the lowest level to the highest, are permitted the power of judicial review (Brewer-Carias et al., 1989). In other words, in this model of constitutional adjudication, the review is not separate but includes in other cases that are ongoing process in every level of court. Therefore, all levels of courts have the power of judicial review. On the other hand, is the Kelsenian model which is also known as the European/Continental model. Most European countries have established special constitutional courts that are uniquely empowered to set aside legislation that runs counter to their constitutions. Typically, such constitutional courts review legislation in the abstract, with no connection to an actual controversy. This is in contrast to the US model, whereby all courts have

empowered to set aside legislation that runs counter to their constitutions. Typically, such constitutional courts review legislation in the abstract, with no connection to an actual controversy. This is contrast to the "American" model, whereby all courts have authority to adjudicate constitutional issues in the course of deciding legal cases and controversies. See Victor Ferreres Comella, "The European Model of Constitutional Review of Legislation: Toward Decentralisation?", 2004, Volume 2, issues 3, the *International Journal of Constitutional Law*, 461.

authority to adjudicate constitutional issues in the course of deciding legal cases and controversies (Comella, 2004). Unlike the American model that has a diffuse system, the Continental model is a concentrated system of judicial review. The concentrated system of judicial review is characterised by the fact that the constitutional system empowers one single state organ of a given country to act as a constitutional judge. It is the only state organ to decide upon constitutional matters regarding legislative acts and other state acts with similar rank or value, in a jurisdictional way. This state organ can be either the Supreme Court of Justice of the country, in its character as the highest court in the judiciary hierarchy, or it can be a particular constitutional court, council or tribunal, specially created by the Constitution and organised outside the ordinary judicial hierarchy (Brewer-Carias et al., 1989). Secondly, consequential of the models, Malaysia has an appeal mechanism of the constitutional adjudication because it may start from the High Court, while Indonesia which has a centralised model, has no appeal mechanism because the Constitutional Court's decision is final.

CONCLUSION

The establishment of the Indonesian Constitutional Court in 2003, and the functions of the superior courts in Malaysia are part of realising the goal of the rule of law and democracy. The constitutional adjudication in both countries acts as check and balance mechanism of the main

state organs. However, both countries follow different model of constitutional adjudication. Malaysia follows the common law model where the superior courts function as an organ of the constitutional adjudication, while Indonesia adopted the Kelsenian models by establishing a new court, namely the Constitutional Court. The courts ensure a dignified life for the citizens of a country, and undertake judicial review to guarantee justice and fairness.

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