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# An Examination On The Malaysian Civil Court, Good Governance And The Constitution

*by* Wasi Bintoro Rahadi

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AN EXAMINATION ON THE MALAYSIAN CIVIL COURT, GOOD  
GOVERNANCE AND THE CONSTITUTION

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ABSTRACTS

<sup>29</sup>  
Governance is crucial <sup>3</sup> both the private and public sectors, and the public sector is extremely important in society. The public sector, typically through a political process, determines the outcomes it seeks and the various types of intervention. These include enacting legislation or regulations, as well as delivering goods and services. Governments must also play a major role in promoting justice, peace, and order, as well as good international relations.

<sup>3</sup>  
Better decision-making is promoted by good governance in the public sector. Effective governance is characterised by rigorous scrutiny, which provides significant pressures for improving public sector performance and fighting corruption. Good governance could indeed enhance the effectiveness, leading to more effective intervention implementation, improved service delivery, and, ultimately, improve results. As a result, people's lives are being improved.

<sup>1</sup>  
It is argued that one way to maintain good governance is to uphold and respect the constitution as the supreme law of the land. As law can be defined as a legal means of regulating society, it can exist in a variety of forms, beginning with the constitution, which can be written or unwritten and is backed by laws and regulations. A good and effective constitution symbolises and provides effective legal protection for local and indigenous people, as well as protection for fundamental human rights and liberties within the context or legal meaning or definition of that country's constitution. The entire concept of a constitution should reflect the backbone of that government's and people's governance.

Therefore, this paper attempts to examine the current role of the Malaysian civil court and the constitution in achieving good governance. In analysing the same, this paper employs the common doctrinal legal method. The paper then offers suggestions and recommendations for improving Malaysia's current issues of good governance, intending to uphold the rule of law and preserve the basic structure of the constitution.

## INTRODUCTION

Before proceeding to the deeper discussion, it is<sup>6</sup> beneficial to define some terms for better comprehension of the overall discussion on good governance. Governance refers to the system by which an organisation is controlled and operated, as well as the mechanisms by which it and its employees are held accountable. Governance includes elements such as ethics, risk management, compliance, and administration (Governance Institute of Australia). While the principles of good governance<sup>18</sup> may differ, it is useful to adopt the eight (8) agreed principles of good governance articulated by the United Nations Economic and Social Commission for Asia and the Pacific (UNESCAP, 2020), namely accountability, transparency, responsiveness, compliance with the rule of law, equity, and inclusion, effective, efficient, and participatory, as well as judicial reforms. Rule of law as one of the good governance principles therein could be summed up as follows; legality, independence of the judiciary, impartiality, judgement with the reason(s), easy access, *audi alteram partem* and open hearing.

It is then necessary to delve deeper into Malaysia's government structure and judicial civil system. Malaysia approaches the Indonesian governmental system differently because it combines parliamentary democracy with constitutional monarchy. Malaysian parliamentary democracy is very similar to the Westminster<sup>19</sup> style of bicameral Parliament in the United Kingdom. Malaysia's legislature is divided into two chambers: the House of Representatives (Dewan Rakyat) and the Senate (Dewan Negara) (Parliament, 2020). This does not, however, imply that Malaysia's overall justice system must closely resemble the British style of governance. Furthermore, rather than the British parliamentary supremacy doctrine, the Malaysian justice system adheres to the constitutional supremacy concept. Furthermore, the Malaysian style of governance in government and the administration of the justice system should reflect Malaysia's aspiration and state of independence in ruling its own country and administering the justice system.

Malaysia's judicial system succeeds British common law, its colonial past, and is a distinct civil law system, as is Indonesia's. One of the core tenets is the adaptation of the doctrine of judicial precedent, i.e., the practise of applying the same court decision in future cases in analogous situations (Lewis, 1930). Nevertheless, it is argued that in performing the Malaysian judicial function in the interpretation of the law and the constitution, the basic structure of the constitution should be abided rather than the British tradition of applying common law. This will be discussed further in light of the principle of good governance, which will serve as the discussion's focal point.

## METHODOLOGY

The methodology employed in this paper's analysis is the commonly used doctrinal legal method for analysing primary and secondary sources of law. The constitution, acts of parliament, regulations, case laws, and other sources of law are the primary sources of law. Journal articles, textbooks, and other secondary sources are examples of secondary sources.

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## FINDINGS/DISCUSSION

From the research, on the examination<sup>24</sup> of the basic structure of the constitution and the civil court governance, the findings show many elements of good governance on the Malaysian civil court justice system and the underlying Malaysian constitution.

As mentioned previously of the characteristic of good governance are recalled as follows: accountability, transparency, responsiveness, follows the rule of law, equitable and inclusive, effective, efficient, and participatory as well as judicial reforms.

### (a) Accountability

Accountability means the inhabitants of the country should bear the obligation of behaving and conforming to the rules and laws of the land. As for accountability in the judiciary, they should be held responsible for implementing the law thus abiding by the rules of law and the nation's constitution. The judiciary is answerable to the public<sup>15</sup> and other organs of the government hence confining them to work within the legal constraint. Accountability is a relational concept linking agents and others for whom they perform tasks or get affected by the tasks they perform (Bowen, 2014). In this regard, it is submitted that considered Malaysia independence, the constitution, and the judiciary, should conform with the rules and laws of the land and nation's constitution.

The judiciary with the main aim of upholding the law is equipped with the task of interpreting the law not making the law as it is the function of the Parliament to make law.

In this light, the doctrine of separation of power<sup>30</sup> by Montesquieu should be further discussed. Chapter 3<sup>4</sup> of the Federal Constitution confers the Executive authority of Federation to the Yang diPertuan Agong and exercisable, subject to the provisions of any federal law and of the Second Schedule, by him or by the Cabinet or any Minister authorized by the Cabinet, but Parliament may by law confer executive functions on other persons.

The judiciary part is provided under part IX of the Federal Constitution. The executive authorities are illustrated in Chapter 3 of the Federal Constitution. The Parliament constitution, composition, qualification, and related matters are provided under Chapter 4 of the Federal Constitution.

Thus, the constitution of Malaysia highlights accountability as one of the good governance principles through the doctrine of separation of power, by clearly defining the roles of these important organs of the government namely, the executive, judiciary, and the Parliament.

The next pertinent issue at hand is, to what extent these organs of the government, namely the executive, Parliament, and especially the judiciary who are accountable to the administration of justice in Malaysia, work within their legal parameters of the constitution and existing laws. The judiciary's highest appellate court in the country is the Federal Court provides the final appellate forum for resolving disputes, a further appeal against dissatisfied decisions will not be allowed. This brought finality to the judicial decisions also to ensure judicial independence. The Parliament, on the other hand, has its procedures, roles, such as question-and-answer sessions also debates,



who are ultimately answerable to the people, and their respective voting constituents, hence the members even the leading political party might be changed through elections. The executive also government administration is held accountable to the public inter alia through ministerial responsibility doctrine, also judicial review process. This provides means of accountability towards the actions of these three main organs of the government.

#### **(b) Transparency**

Every judicial decision, order, and judgement should be transparent to the litigants, apart from matters of national security and government official secrets. In this regard, written judgement is a requirement in our legal system (HRH Sultan Azlan Shah, 2004). Despite issuing orders and judgments, the judiciary should strive to provide grounds for judgments to avoid accusations of bias and baseless allegations (Bernama, 2019). Apart from meeting the expectations of the public and other governmental bodies, this practise protects the judiciary from allegations of corruption and other malpractices.

#### **(c) Responsive**

The current law or legal administration system must be responsive to meet the needs of the current situation. For example, in the event of a Covid-19 pandemic, existing laws and justice administration should be improved or amended, allowing for better regulations or measures to flatten the Covid-19 curve. The recent ten amendments (Lee Shih, 2020) to the Rules of Court 2012 (ROC 2012), which take effect on December 15, 2020, demonstrate the responsive measures taken by court initiatives in response to the COVID-19 pandemic caused by the movement control order. The online hearing of cases also demonstrates the positive response of courts, theoretically defeating the adage "justice delayed is justice denied."

It is important to highlight here that the judiciary is vested with the power under Article 121 (1) where it states that there shall be two High Courts of co-ordinate jurisdiction and status, namely- and under Article 121(1A) The courts referred to in Clause (1) shall have no jurisdiction in respect of any matter within the jurisdiction of the Syariah courts. Thus, in this regard, it is submitted that any amendments to the existing constitution, judges' decision in that regard in interpreting the law should be considering the intended constitutional amendment. Hence in that regard, the amendment should be said to be responsive considering the intended amendment.

In this regard, it is interesting to note Roscoe Pound's definition of common law as he is a firm believer that wise common law judges implementing the principles of the taught legal tradition resulted in substantive change that reflected societal changes. The interpreters of the common law, judges had a special duty to consider the practical effects of their decisions and to strive to ensure that judging facilitated rather than hindered societal growth.

Pound placed his sociological jurisprudence in opposition to what he termed "mechanical jurisprudence," which he characterized as a common but odious practice whereby judges woodenly applied precedent to the facts of cases without regard to the consequences. For Pound, the logic of previous precedent alone would not solve jurisprudential problems.

#### <sup>13</sup> (d) Rule of Law

Rule of law as one of the principles therein could be summed up as follows; legality, independence of the judiciary, impartiality, judgement with the reason(s), easy access, *audi alteram partem* and open hearing.

##### <sup>13</sup> (i) Legality

A notion of legality is "...a general account of how to decide which particular claims are true... We could make little sense of either legality or law if we denied this intimate connection." (Dworkin, 2004). The legality of the organs of the government, executive and judiciary is established by the Federal Constitution as the highest form of law in Malaysia. Article 4 states that the Constitution is the supreme law of the Federation. Any law which is inconsistent with this Constitution shall, to the extent of the inconsistency, be void.

##### (ii) Independence of the Judiciary

The judiciary's independence is an important feature of the rule of law since it ensures that the judiciary is completely separate and impartial from executive and legislative influences. To that end, a variety of measures to ensure independence, such as the appointment of judges free of political influences, may be implemented. Corruption, bribery, and intimidation by higher-ranking judges, as well as the executive, must be addressed to ensure impartiality and the rule of law principles. Separation of powers, as well as the independence of the judiciary, are important for checking and balancing the other branches of government, the executive and the legislature if their actions are challenged in court to avoid ultra vires.

As the power of the court is clearly stated in the Federal Constitution and other laws and regulations, judges (Judges' Code of Ethics, 2009) and legal professions (Legal Professional Act 1976 and Practice and Etiquette Rules) must also adhere to their ethics, failing which they are subject to disciplinary and legal actions. Malaysia has an interesting history of constitutional challenges, which resulted in the removal of the Lord President of the Supreme Court, Tun Salleh Abbas, from his position in 1988. (Harding, 1990). This undermines judicial independence in Malaysia and allows the executive to wield power.

##### (iii) Impartiality

The use of judicial review is another important component of the check and balance of the government's organs. Judges, as one of the Constitution's Guardians, uphold the rule of law through a special position with judicial review power (Sinnadurai, 2004). Judicial review, as enshrined in Order 53 of the Rules of Court 2012, which was adapted from the British system, essentially allowed for a review of the powers or decisions of the executive and legislators, thereby preventing abuse of power (Jalil, 2004). This is one attribute of impartiality enforcement.

Since impartiality includes equality before the law, nationals are subject to rules and regulations if they violate the law. In Malaysia, the Rulers can also be charged in Special Court in their personal capacity, effectively removing the previous Rulers' immunity. This is a significant amendment to the Malaysian Federal Constitution made during the previous Tun Mahathir Mohamad administration (Harding, 1993).

Another aspect of impartiality is the concept of equality, which is <sup>14</sup>stated in Article 8 of the Federal Constitution: "All persons are equal before the law and are entitled to equal protection of the law."

As <sup>1</sup>the jury system in criminal cases was abolished, the establishment of various human rights movements, such as Suruhanjaya Hak Asasi Manusia (SUHAKAM) Malaysia, paved the way for civil rights to be heard and to provide feedback for the better realisation of the fundamental rights guaranteed by the constitution.

The Malaysian constitution guarantees <sup>1</sup>the protection of fundamental human rights. Article 5 of the Protection of Fundamental Liberties, for example, protects <sup>12</sup>person against unlawful detention of his or her life or personal liberty except under the law. Article 7 protects <sup>12</sup>against retroactive criminal laws and repeated trials. Article 9 prohibits exile and guarantees freedom of movement. Article 10 ensures freedom of expression, assembly, and association. The freedom of religion is guaranteed by Article 11. In this regard, <sup>1</sup>SUHAKAM has performed a variety of useful functions in balancing the various fundamental rights and liberties guaranteed by the Malaysian constitution, as well as Malaysia's adherence to international human rights conventions. The protection of human rights is a fundamental tenet of the constitution.

#### (iv)Judgement with Reason(s)

The reasons for a judge's decision are critical for ensuring adherence to existing laws, procedures, and regulations. Judges must be trained to be equipped with the necessary skills and expertise to generate good quality grounds of judgement.

The establishment of the Judicial Academy in Malaysia in 2012, among other things, planned, organised, and conducted training programmes and courses for judges of the superior courts. The Academy's goal is to improve judges' judicial skills in various aspects of judge-craft (United Nations Office on Drugs and Crimes, 2020). This is especially useful considering the recent influx of new laws governing technology such as nanotechnology, biosafety, cybersecurity, and a slew of others. This is consistent with the previously mentioned written judgement, which aligns with transparency as a requirement in good governance decision-making.

#### (v)Easy Access

As a sign of good governance, easy access to the court is one of the crucial components of fulfilling the rule of law of the judiciary, as it must respond to the expectations of the public, litigants, and administration.

<sup>2</sup>'[t]he core of the existing principle is...that all persons and authorities within the state, whether public or private, should be bound by and entitled to the benefit of laws publicly and prospectively promulgated and publicly administered in the courts,' wrote Lord Bingham in 'The Rule of Law' (2007). (Emphasis mine.) Lord Bingham later defined eight sub-rules, including the requirement that the law is accessible, clear, and predictable. The newly launched portal on court judgments in



2018 (The New Straits Times, 2018) is one example of how information technology is being used to benefit the public and litigants.

The fact that the rules of civil procedures are simplified in such a way that the public, litigants, and lawyers can easily follow and apply the civil procedure, i.e., The Rules of Court 2012 and related court procedures, is an important feature of the Malaysian civil courts' ease of access. Aside from the formal civil courts, alternative dispute resolutions have been implemented to resolve civil cases more quickly and cheaply.

(vi) *Audi alteram partem*

The *audi alteram partem* doctrine of "listen to the other side", or "let the other side be heard as well" is further enshrined by the constitution as mentioned earlier under Article 5 of Protection of Fundamental Liberties that protect a person of his life or personal liberty save following law, against unlawful detention. This is further strengthened by the repeal of the Internal Security Acts 1960 (Act 82). Under certain, legally defined circumstances, the ISA allows for detention without trial or criminal charges. On September 15, 2011, Malaysian Prime Minister Najib Razak announced that this legislation would be repealed and replaced by two new laws (Bernama, 2011). The Security Offences (Special Measures) Act 2012, which was passed by Parliament and received royal assent on June 18, 2012, replaced and repealed the ISA. The Act went into effect on July 31, 2012 (Federal Government Gazette, 2013).

(vii) Open Hearing

Except in certain cases provided by law, such as cases involving children, which can be held in camera, or cases involving national security, the court hearing must be open to the public. This promotes transparency, ensuring that justice is served. This is especially relevant considering the Covid-19 pandemic, as court hearings were broadcast live online to ensure the justice process is followed, albeit with limitations (Hamdan, 2020).

**(e) Equitable and Inclusive, Effective, Efficient and Participatory, Judicial Reforms**

These remaining and prevailing good governance characteristics of equity and inclusion, effectiveness, efficiency, and participation may overlap with the aforementioned rule of law principles. The existing law or legal administration structure must be responsive to the needs of the current situation. For example, in the event of a Covid-19 pandemic, existing laws and justice administration should be improved or amended, allowing for better regulations or measures to flatten the Covid-19 curve.

The legislation must be equitable and inclusive, rather than exclusive to some, to restore public trust in the justice system and ensure accountability. The definition of equality should not be defined based on its face value, but rather on the protection of the majority while not forgetting the rights of the minority.

To meet the expectations of litigants, the public, and stakeholders, the judicial system must be effective and efficient. To achieve this, reforms should be welcomed, not just in legislation but

also in the administration of the justice system. In this regard, the civil court's pre-trial case management provides better management of both civil and criminal litigation, allowing for the prevention of case backlogs, especially in times of pandemics.

In Malaysia, public participation in decision-making can be seen in a variety of ways, such as legal provisions that allow for public participation during the consultation process. The participatory feature is important in the judiciary, for example, the establishment of a Judicial Commission in Malaysia in 2009 (Akta Suruhanjaya Pelantikan Kehakiman 2009 (Akta 695)) that oversees the process for the nomination, appointment, and promotion of Superior Court judges is more transparent and comprehensive (Judicial Appointments Commission, 2020). Participatory governance allows citizens to participate in public decision-making and is gaining popularity as an effective way to address "democracy deficits" and improve public accountability (Civicus, 2020).

Whilst a lot of judicial reforms have been introduced by the notable chief justices in Malaysia, to ease the administration of the justice system in Malaysia, nevertheless, several areas need to be improved for the good governance of the same.

#### **Some Current Issues on Good Governance**

Nonetheless, despite these positive aspects of civil court governance and the underlying constitution, some areas need to be improved, as listed below.

##### (a) Appointment of Attorney General

Since this is an academic discussion rather than a political one, the appointment of the Attorney General should be administrative rather than political. This is consistent with the judiciary's impartiality and independence, allowing the AG to carry out its administrative functions without political interference. Constitutional amendments are required to reflect this, rather than enhance political propaganda or agendas.

##### (b) Judicial Review

Judicial review proceedings demonstrate that the legal system and the rule of law remain in place. No doubt allowing the doctrine of judicial review to operate freely in any given legal system will result in adherence to good governance principles such as respect for the rule of law, protection of human rights, accountability, and answerability of the executive arm. The growing trend of judicial review of the government should not be stifled, as it is one of the basic structures of the constitution that ensures the government is acting within its powers.

##### (c) Independence of the Judiciary

While there are many administrative measures to improve the judiciary's independence, what is more, important is that they are not influenced or pressured, taking the best interests of the parties and future consequences of the decisions to future generations, whether political, social, or economic.

(d) Accessibility to Justice

The issues of access to justice, rising litigation costs, and the post-COVID-19 pandemic, particularly for needy litigants, should not be overlooked. While litigation appears to be a luxury only afforded by the wealthy and famous at times, alternative means such as recourse to internal tribunals under various ministries, as well as social protection measures from a litigation standpoint, should be strengthened.

(e) Participatory

To include the public and intended relevant parties in the judicial process, more participatory measures must be improved. This should be in line with the needs of democracy and current governance in the justice system.

**CONCLUSION**

In conclusion, while much could be directed at improving Malaysia's current legal system, good governance, which is also a concept familiar in the eyes of Islam, should pave the way. In furthering the goals of good governance of the judiciary and constitution, it is critical, in addition to employing the intended different strategies, to uphold the constitution, with the basic structure of the constitution as a backdrop, by considering the future intended results for the people, as the dynamics of the law should not remain static. It should serve the purposes of people's justice, justice by the people, and justice for the people. To achieve good governance, the current and future judicial systems should embrace various recent governance strategies rather than becoming complacent with the conventional ones. My final remark on the intriguing features of Malaysia's civil and Syariah court system, which appears to be admired and being studied by interested Islamic countries such as Turkey, demonstrates that the existing Malaysian system should be further improved and strengthened rather than being taken for granted.

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