

Comparative Judiciaries: Unveiling Judicial Review Practices in Malaysia & Indonesia

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ABSTRACT

This comparative study analyses the judicial review systems in Malaysia and Indonesia. It highlights the constitutional framework, the highest courts in each country, and the limitations on judicial review. Malaysia's constitution is based on a parliamentary democracy with a constitutional monarchy, while Indonesia's constitution is based on a presidential democracy with a separation of powers between the executive, legislative, and judiciary branches. In Malaysia, the Federal Court is the highest court, while in Indonesia, the Constitutional Court is the final authority on constitutional matters. Both countries have limitations on judicial review but have demonstrated a commitment to strengthening their systems to promote transparency, accountability, and good governance. The aim of this study is to analyze the judicial review systems in Malaysia and Indonesia to identify the strengths and weaknesses of both systems. The study adopts a qualitative approach, utilizing doctrinal and case study methods. Analyzing cases decided by the Malaysian and Indonesian courts on judicial review forms a significant part of the data analysis. The collected data were analyzed using thematic and content analysis through specific themes and coding. The findings of this study provide a summary of the development of judicial review in Malaysia, which may serve as a reference for policymakers, academicians, and future researchers. Future research should focus on comparative studies with other Commonwealth countries that share similar legal systems or with countries that follow civil law systems.

Keywords: Judicial Review, Malaysian Constitutional Law, Republic of Indonesia Constitutional Court, court system.

INTRODUCTION

The judiciary refers to the branch of government responsible for interpreting and applying the law in a legal system. Its primary function is to resolve disputes and administer justice. The judiciary is typically separate and independent from the executive and legislative branches to ensure fairness and impartiality in the legal process. One of the significant powers held by the judiciary is judicial review. Judicial review allows the courts to review the actions of the legislative and executive branches of government to determine their constitutionality. It ensures that laws and governmental actions adhere to the principles and provisions outlined in the constitution, which is the supreme law of the land. It helps uphold the rule of law, ensuring that the government operates within its legal limits and respects individual rights and freedoms. Judicial review safeguards individual rights and liberties by allowing the courts to strike down laws or actions that infringe upon constitutional rights. Within this action, judicial review contributes to legal consistency and stability by ensuring that laws are coherent and consistent with the constitution. It helps prevent contradictory or conflicting legislation and provides predictability in the legal system, allowing individuals and businesses to understand and comply with the law more effectively. It serves as a vital mechanism to protect citizens from potential abuses by the government or the majority, ensuring that fundamental rights are not violated.

This power serves as a crucial check on the other branches of government, preventing them from overstepping their authority or violating individual rights. The judicial review helps maintain the balance of power and upholds the rule of law in a democratic society. It is a fundamental principle of the rule of law and a cornerstone of democratic societies. The importance of judicial review lies in its ability to safeguard individual rights, ensure fairness and impartiality in the legal system, and uphold the separation of powers between the executive, legislative, and judiciary. The power of judicial review grants the judiciary the authority to interpret the Constitution. Courts analyse constitutional provisions, historical context, legal principles, and precedents to determine the meaning and scope of constitutional rights and principles. This process helps in clarifying the intent of the framers and adapting the Constitution to contemporary circumstances. Malaysia and Indonesia have different structures of court systems, nevertheless the role of the court to check and balance the functioning of the executive and legislative remains the same. In Malaysia, the Federal Court is the highest court, while in Indonesia, the Constitutional Court is the final court on the area of the Constitution. Malaysia's constitution is based on the Westminster model, which emphasizes parliamentary supremacy. In contrast, Indonesia's constitution is based on a presidential system, which emphasizes a separation of powers between the executive, legislative, and judiciary. Both Malaysia and Indonesia have judicial review systems that are essential in upholding the rule of law and ensuring the protection of individual rights and constitutional rights. However, there are differences in their constitutional frameworks and limitations on judicial review. Despite these differences, both countries have shown a commitment to strengthening their judicial review systems to promote transparency, accountability, and good governance.

In summary, judicial review enhances public accountability by subjecting government actions to legal scrutiny. It enables citizens and advocacy groups to challenge government decisions and seek redress for potential violations of their rights. This process promotes transparency, accountability, and public trust in the legal system.

LITERATURE REVIEW

The field is dynamic, with ongoing debates and new perspectives continually emerging. Scholars examine from various perspectives that includes the historical origins and evolution of judicial review in different countries and legal systems, justification and criticisms, constitutional interpretations and judicial activism and restraint. The studies from the historical perspective were designed into tracing its roots in landmark cases, constitutional conventions, and the influence of various legal traditions. For studies that analyzed the justifications and criticisms over judicial review explored the theoretical justifications for judicial reviews, such as the protection of individual rights, the preservation of the rule of law, and the promotion of democratic principles. They also consider criticisms of judicial review, including concerns about judicial activism, democratic legitimacy, and potential limitations on popular sovereignty. The study by Sultana (2012) highlighted that in a democratic state, the judiciary has a very important role such as safeguarding the liberties of the individual and enforcing the laws made by the executive and the legislature. There is also concern about the judiciary's increasing power that has derived primarily not from fixed constitutional powers or assertions of power in judicial opinions but from the empowerment of courts by the elected branches (Lemieux 2017). This refers to the work of the statute's amendment. The concern of Anushka and Lemieux was also echoed by studies on the Malaysian Constitution. There are also pieces of literature that delved into the relationship between judicial review and the separation of powers doctrine. It analyses how judicial review functions as a check on the legislative and executive branches and explores the delicate balance between the judiciary and the other branches of government. These studies (Manan 2020; Upadhyay 2020; Okpaluba 2017; Sultana 2012; Priyanka 2014) unanimously agreed that the judiciary body holds the important power to check the exercise of power by the executive and legislative. Writing on the Indian constitution by Anushka (2017) emphasized the importance of adhering to the doctrine of separation of powers as it forms the basic structure of the Constitution. In ensuring this, again, the role of judicial review is very important. However, she further stresses that intervention by the judiciary in ensuring that there are no violations of this doctrine shall not permit the interpretation of law inconsistent with the objective of the legislature. In addition, some scholars explain the variables in constitutional development. The primary factors influencing the evolution of constitutional systems with robust judicial review are how society perceives the legitimacy of legal authority and its views on political authority (Roux 2018).

Some scholars investigate the methodologies and approaches employed by courts in interpreting constitutional provisions. This includes exploring originalism, textualism, living constitutionalism, and other interpretive theories that shape judicial decision-making. Thambapillay (2007), in analyzing the Malaysian court's approach in reviewing the administrative decision, had a good analytical discussion of the transformation of the trend that relies heavily on the principles of common law to uphold rights guaranteed under the federal constitution. Anantaraman (1994), while reviewing the Malaysian practice of judicial review, deliberated on the idea of error of jurisdiction and mere error of law during the exercise of judicial review activity. Literature (Lobo 2000) has also highlighted that the Malaysian courts have in judicial review, begun to examine the 'substance' or facts of an inferior body's impugned decision, thus 'eroding' the distinction between 'supervisory' and 'appellate' jurisdiction since the case of Rama Chandran (1997). These articles provide a good premise discussing all relevant principles guiding judicial review. Some comparative studies that were made on judicial review examined the practice of judicial review in different legal systems, analyzing similarities and differences in approaches, powers, and outcomes. This helps provide insights into the effectiveness and challenges of judicial review in various contexts. There were also researchers who assess the impact of judicial review on governance, policy-making, and social change. They examine how court decisions shape public policy, influence political dynamics, and contribute to societal development.

The Court serves as a bridge between the rule of law and public demands, countering populism in the legislative or executive branches when necessary. To do this, the Court must stick to its role of interpreting and upholding the law to protect constitutional and legal principles (Salman and Ristawati 2020). The literature explores the concept of judicial activism, referring to instances where courts take an active role in shaping public policy or interpreting the law expansively. Scholars discuss the benefits and drawbacks of judicial activism, as well as the idea of judicial restraint, which suggests that courts should defer to the elected branches of government. From the judicial independence and accountability perspectives there are scholars who analyse the importance of judicial independence for effective judicial review. They examine mechanisms to ensure judicial accountability while safeguarding the judiciary's autonomy from political pressures and influence. Kuang et al. (2017) consolidated an analytical discussion on the practice of judicial review in a Malaysian court. Deliberating the approach of courts on a case-to-case basis to review executive exercise of power that falls within the inherent powers of the judiciary in upholding the rule of check and balance.

The power of the courts to intervene in the deliberations of the authoritative body has been the subject of scrutiny in a number of earlier research endeavours, all of which came to the same conclusion: judicial review is an integral component of the framework upon which the Constitution is based (Shahizam 2020). The judge has voiced their desire for a more engaged and active judiciary as well as the more widespread implementation of judicial review (Devi and Van Huizen 2021). According to the most recent research in this field, the concept of judicial review encompasses not only the supervisory jurisdiction that ordinary courts have in public law to judicially review the actions of lower bodies and tribunals but also the decision-making authority of executive branch officials (Shahizam 2020). It is argued that the basis for judicial review challenges is the allegation that the decision-maker did not fulfil his statutory obligations (Dyson 2016).

In other words, judicial review is one of the mechanisms that can be used to ensure that public bodies in a democratic system comply with the written legislation that has been enacted (Dyson 2016). In light of this, according to the constitutional oath jurisprudence, the only thing that the judiciary is required to do is to prevent arbitrariness (Abu Backer 2018). Putting an end to arbitrary decision-making does not imply interfering with the principle of the separation of powers (Abu Backer 2018). The majority of challenges brought before the Judicial Review are based on what Lord Diplock referred to as procedural impropriety. For example, the most typical scenario involves the decision-maker not adhering to procedural rules, which are laws that have been formulated and perfected by the courts over the course of a significant amount of time. They are all intended to ensure fairness in decision-making (Dyson 2016).

The literature on judicial review in Indonesia is constantly evolving like Malaysia. There is significant focus of the literature is on the Constitutional Court of Indonesia, which was established in 2003. Scholars examine the Court's role, powers, and its impact on the country's legal and political landscape (Horowitz 2013). On the judicial review process the literature explores the procedural aspects of judicial review in Indonesia, including

the mechanisms for filing constitutional challenges, the role of the Court in reviewing legislation, and the criteria used to determine constitutionality. The literature also explores the role of judicial review in protecting and promoting human rights in Indonesia. It examines how the Court has dealt with cases related to freedom of expression, religious freedom, minority rights, and other fundamental rights.

Previous literature also explores on the relationship with other branches of government where the scholars investigate the relationship between the Constitutional Court and the legislative and executive branches of government. The analysis deliberated on the Court's interactions with other institutions, its influence on policy-making, and the dynamics of power among the branches. The literature examines the independence of the judiciary in Indonesia, including the mechanisms in place to safeguard judicial independence and ensure accountability for judges. The concept of judicial activism and restraint is also explored in the context of Indonesia. Scholars assess instances where the Court has taken an active role in shaping public policy or exercising self-restraint to defer to the elected branches.

The vast majority of studies that have been conducted in the past focus on the power of the judiciary to implement judicial review as part of their exercise of supervisory jurisdiction over authoritative bodies. While it is a useful source for understanding the application of judicial review in Malaysia, no in-depth analysis was conducted, particularly in regard to the pattern of Malaysian courts in exercising the power of judicial review. The preceding works of literature delves into the power of courts to intervene in the decision made by the executive and invalidate laws made by the legislative that exceeds their power. However, these studies did not state the analytical data on the court's approaches to resolving issues that can be subjected to judicial review.

RESEARCH METHODOLOGY

This study adopts a qualitative research method exploring in detail certain problems and issues that exist within the practice of judicial review in Malaysia. Doctrinal and case studies were conducted on both primary and secondary sources. The documents that were analyzed include the Federal Constitution, The Reid Commission draft of the original constitution of Malaysia, the 1945 UUDNRI (the Amended Constitution) of the Republic of Indonesia, historical documents and cases of law relevant to judicial review. The data collected were then analyzed using thematic and content analysis. The selected themes include judicial power, the doctrine of separation of power and its relation to judicial review and the role of the judiciary in safeguarding the rule of law.

FINDINGS AND DISCUSSIONS

An Overview of Judicial Review

Judicial review is the process by which courts, typically at the highest levels, review the actions of the executive or legislative branches of government to ensure that they are consistent with the constitution or other laws. In other words, judicial review is the power of a court to examine and, if necessary, invalidate or modify actions taken by other branches of government that are inconsistent with the law.

The purpose of judicial review is to ensure that the actions of the government comply with the legal framework established by the constitution and other laws. It is an essential component of the checks and balances that are necessary for the proper functioning of a democratic society. Through judicial review, the courts act as a safeguard against abuses of power by the executive or legislative branches of government. At the outset it should also be noted that the remedy of judicial review is not concerned with reviewing the merits of the decision in which the application for judicial review is made. Instead, the remedy of judicial review is primarily a review of the decision-making process. In performing this role the court is sitting in its supervisory jurisdiction and not in its appellate jurisdiction (Arjunan 2000; Ringgit Exotica Sdn Bhd v Pengarah Tanah & Galian Selangor & Ors [2014] ; Michael Lee Fook Wah v Minister of Human Resources, Malaysia & Anor [1988])

In some countries, judicial review is explicitly provided for in the constitution, while in others, it is based on

common law principles established through judicial precedent. The scope of judicial review can vary depending on the legal framework of a country, with some countries allowing for a broad review of all government actions, while others limit it to specific areas or issues. Judicial review is a vital tool for maintaining the rule of law and ensuring that the government acts within its legal boundaries. It is an essential component of the separation of powers and serves as a check on the power of other branches of government.

Court Structure/Composition/System

The court system in Indonesia plays a crucial role in upholding the rule of law, ensuring justice, and safeguarding constitutional rights. The judicial system is structured hierarchically, with various levels of courts responsible for handling different types of cases. At the apex is the Supreme Court, serving as the final appellate court. High Courts handle appeals from District Courts, which are the primary courts of first instance. Religious Courts handle family law matters for Muslim citizens, while Administrative Courts address administrative disputes. Military Courts have jurisdiction over offenses committed by military personnel, and State Administrative Courts handle conflicts involving state administrative bodies.

In addition to these courts, Indonesia has a specialized institution known as the Constitutional Court. Established in 2003, the Constitutional Court is an independent judicial body responsible for constitutional adjudication. It has the authority to review legislation and government actions for their constitutionality, ensuring adherence to the supreme law of the land. The Court's decisions are final and binding, setting precedents for future cases. It also handles electoral disputes and encourages public engagement in its proceedings. The court system in Indonesia continues to undergo reforms aimed at enhancing efficiency, accessibility, and the protection of constitutional rights. It is a vital component of the country's legal and political framework, upholding the principles of justice, accountability, and the rule of law.

The court system in Malaysia operates on a hierarchical structure, consisting of several levels of courts with distinct jurisdictions and responsibilities. At the apex of the system is the Federal Court, serving as the highest court in Malaysia. It hears appeals from the Court of Appeal, which, in turn, reviews appeal from the High Courts. The High Courts have both original and appellate jurisdictions, handling a wide range of civil and criminal cases. The subordinate courts such as the Sessions Courts and Magistrates' Courts deal with less serious criminal offenses and civil matters of lower value. Syariah Courts have jurisdiction over Islamic family and personal law matters for Muslims, while the Native Courts handle indigenous customary law issues in specific states.

The Federal Court and the Court of Appeal have the authority to interpret the Federal Constitution and other federal laws, ensuring their constitutionality and compatibility. The court system in Malaysia serves as the final arbiter in legal disputes, interpreting and applying the law to resolve conflicts, protect individual rights, and maintain social order. It contributes to the development of legal principles and precedents that shape the nation's legal landscape. Efforts are continually made to improve the efficiency and accessibility of the court system, such as implementing e-filing systems and alternative dispute resolution mechanisms. The judiciary's role is vital in ensuring the proper functioning of Malaysia's legal system and upholding the principles of justice, equality, and the rule of law. In Indonesia, the composition, term of office, functions, and jurisdiction, the Indonesian Constitutional Court is cut off from the ordinary courts, its judges are appointed principally from outside the career judiciary, for limited terms, and for a specific function.

The Constitutional Court in Indonesia consists of nine judges, who are appointed by the president with the approval of the House of Representatives (DPR). The judges serve for a term of five years and can be reappointed for one additional term. To be eligible for appointment, a judge must have a background in law, be of good character, and have a high level of integrity.

In contrast, the Yang di-Pertuan Agong of Malaysia holds the non-discretionary power to appoint federal court judges (Article 122B, Federal Constitution). There is no limitation on the number of years to serve as judges in Federal court. As provided under Article 125 (1) of the Federal Constitution, a judge of the Federal Court shall hold office until he attains the age of sixty-six years or such later time, not being later than six months after he attains that age, as the Yang di-Pertuan Agong may approve. Article 123 of the Federal Constitution provides

that a person is qualified for appointment under Article 122B as a judge of the Federal Court, as a judge of the Court of Appeal or as a judge of any of the High Courts if (a) he is a citizen; and (b) for the ten years preceding his appointment he has been an advocate of those courts or any of them or a member of the judicial and legal service of the Federation or of the legal service of a State, or sometimes one and sometimes another.

Scope of Power on Judicial Review in Malaysia

Judicial Review on Legislative Actions

Generally, all persons and authorities, including Parliament must act in compliance to the Constitution. Their basis of their scope and limits of power are defined by the constitution. Any unconstitutional act may be challenged and invalidated in court. Developed under the doctrine of *ultra vires*, a latin phrase that means 'beyond powers' or 'without powers', judicial review gives power to the court to declare that certain regulation passed by the administrator as void. The basis to this discussion lies on the concept of supremacy of the constitution as provided under Article 4(1) of the Federal Constitution. Any act passed after Merdeka may be declared *ultra vires* to the extent of its inconsistencies. Thus, in introducing subsidiary legislation, an administrative body must ensure that the regulations conform with the constitution. Section 23(1) and 87(d) of the Interpretation Act 1948 and 1967 gives power to the court to control the subsidiary legislation through judicial review. Article 128 further confers power on the superior courts to determine the constitutional validity of federal and state laws.

"128. (1) The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction:

- (a) any question whether a law made by Parliament or by the Legislature of a State is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament or, as the case may be, the Legislature of the State has no power to make laws; and*
- (b) disputes on any other question between States or between the Federation and any State."*

This article provides that the judiciary has the authority to review and invalidate any legislation passed by Parliament or by the Legislature of a state that violates the provisions of the Constitution. In reviewing the pre-Merdeka law, Article 128 must be read together with Article 162(6) FC. Article 162(6) lays down that any court or tribunal applying the provisions of any pre-Merdeka law may apply it with such modifications as may be necessary to bring it into accord with the Constitution.

A pertinent issue that is relevant to this discussion is the scope of judicial review. Whether the challenge on the validity of a legislation on the jurisdictional ground between the Parliament and State legislative body is amenable to judicial review. Can an affected person apply for declaration from the high court to invalidate the inconsistent act through judicial review or apply leave to the Federal court to determine the validity of the law (Article 4(3) & 4(4), Federal Constitution)? It is to be noted that only the Federal Court has jurisdiction to decide whether any law made by Parliament, or a State Legislature is invalid on the ground that it relates to a matter on which the relevant legislature has no power to make law.

The issues of inconsistency act of the Parliament with the Constitution were raised in *Mamat bin Daud & Ors v Government of Malaysia* [1988] 1 MLJ 119; where the majority judgement held that it is not the Parliament's discretion to enact Section 298A of the Penal Code [PC]. Thus, this section is invalid and declared *ultra vires*. However, by applying the doctrine of pith and substance, the court stated that Section 298A of the PC is valid due to its nature of provision. In the case of *Iki Putra Mubarak v. Kerajaan Negeri Selangor & Anor* [2021] 1 MLRA, the petitioner who was alleged to have committed sodomy, challenged the competency of the Selangor State Legislature to enact Section 28 of the Syariah Criminal Offence (Selangor) Enactment 1995 that was said to fall under criminal offences. In 2024 the judicial review case of *Nik Elin Zurina bt Nik Abdul Rashid & Anor v. Kerajaan Negeri Kelantan*, [2024] 2 MLJ 140 becomes a landmark decision of the Federal Court of Malaysia in which the court held that the Kelantan State Legislative Assembly did not have the power to enact 16 Sharia laws pertaining to criminal matters, which were deemed null, void and unconstitutional.

Legislating criminal offences falls under the jurisdiction of the Parliament and not the State legislative body. He was granted with the leave to file for such petition under Article 4(3) and (4) of the Federal Constitution. The court then decided that the enactment of Section 28 of the Syariah Criminal Offences (Selangor) Enactment 1995 was declared to be invalid since the Legislature of the State of Selangor is not empowered to make such laws. A similar approach can be seen in *Muhammad Juzaili bin Mohd Khamis and Ors. v. State of the government of Negeri Sembilan and Ors* [2015] MLJU 65. where the plaintiffs appealed to the Court of Appeal after the High Court rejected their application for judicial review relating to the validity of Section 66 of the Syariah Criminal Enactment 1992 (Negeri Sembilan) against the provisions of the FC.

Judicial Review on the Administrative Authority Action

Order 53 of Rules of Court 2012 provides for application for Judicial Review and govern all applications seeking the relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964. Section 25(2) to the Schedule in the courts of Judicature Act 1964 provides for the additional powers of High Court to issue to any person or authority directions, orders, or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution. The following discussion answers questions that are related to the person/party that has the rights to apply for judicial review. On February 25, 2025, the government of Malaysia has filed an application to stay the High Court's decision allowing a judicial review by a pensioner regarding the payment of pension adjustment for retirees based on their final salary according to the 2016 Public Services Department Circular, effective January 2022. Aminah who retired as a civil servant with the Ministry of Foreign Affairs, filed the judicial review application on Jan 12 last year in her capacity and on behalf of 56 retired members of the public service. She was seeking a mandamus order to compel the respondents to expedite the pension adjustments to the qualifying amount following the formula contained in Sections 3 and 6 of the Pensions Adjustment Act 1980 (PAA 1980) before amendments were made under Sections 3 and 7 of the Pensions Adjustment Act (Amendment) 2013 (PAA 2013).

In 2023, the case of *Muhammad Fitri Bin Saad v Timbalan Menteri Dalam Negeri Malaysia & Ors* (CA) the Court of Appeal was required to decide whether a restriction order was validly issued under s. 6(3) of the Dangerous Drugs (Special Preventive Measures) Act 1985. The appellant stated that the Restriction Order was invalid and bad in law due to the lack of accompanying grounds and allegations of fact. This omission amounted to a breach of the procedural requirements under the Act and indicated that the Appellant's involvement in drug trafficking activities was not adequately established. The Court of Appeal held that there was no procedural non-compliance in the issuance of the Restriction Order and there was insufficient evidence of the Appellant's involvement in drug trafficking activities with a "substantial body of persons".

In the case of *Sundra Rajoo a/l Nadarajah v Menteri Luar Negeri, Malaysia & Ors* that was decided in 2021, the Appellant had filed a judicial review application seeking declarations of immunity from prosecution and orders of prohibition to prevent the AG and MACC from prosecuting him. The Federal Court ruled on whether the Attorney General's (AG) or Public Prosecutor's (PP) discretion under Article 145(3) of the Federal Constitution is subject to judicial review. The Court concluded that such discretion should be evaluated only in exceptional cases, such as where the law is misinterpreted or applied incorrectly. In this case, the appellant successfully demonstrated both illegality and compelling prima facie evidence, completing the two-step test. Consequently, the Court determined that the AG's or PP's powers were subject to judicial review, granting the judiciary full authority to issue appropriate remedies.

Scope and power of Judicial Review in Indonesia

Judicial Review of law by the Constitutional Court of the Republic of Indonesia

The establishment of the Republic of Indonesian Constitutional Court was by the Third Amendment of the Constitution in 2003. Article 24 of the Indonesian Constitution stipulates that the Constitutional Court of the Republic of Indonesia has the competence to review the Laws against the Constitution at the first and the final level. Furthermore, according to the Law No 23 of 2004 on the Constitutional Court of the Republic of Indonesia (Constitutional Court Law 2004), the Constitutional Court has the competences on the area of

upholding the Constitution including the competence to review the constitutionality of Laws. On the other hand, the competence to review the legality of other laws belong to the Supreme Court. Starting from its establishment in 2003 until now (2023), there are at least 1684 cases of judicial reviews in the Constitutional Court of the Republic of Indonesia.

The Constitutional court's Power to Review the Constitutionality of Laws Which May Have Direct Impact to the Regulation and Government Actions

According to Article 24C Section (1) and Section (2), the Constitutional Court in Indonesia has jurisdiction over disputes related to the interpretation of the Constitution, the dissolution of political parties, the impeachment of the president and vice-president, and electoral disputes. The Court has an obligation to decide whether the opinion of the DPR concerning alleged violations by the President and /or Vice-President of the Constitution found its legality. The competence to review the constitutionality of Law may have consequence that the Court is interpreting the Constitution to decide the cases. To this extent, most of the judicial reviews are connected to the constitutional damage where Law may or potentially crosses constitutional rights of individual Indonesian citizen, Indonesian Legal entities, the Indonesian indigenous community, or others who have legal standing to bring the case before the constitutional court of the Republic of Indonesia as according to Article 51 of the Constitutional Court Law. To this extent, such competence is the improvement democratic process in Indonesia as part of a series of political and legal reforms following the fall of the authoritarian regime of Suharto in 1998 (Ibrahim 2022). Though, the Constitutional Court has the authority to review the constitutionality of laws, its decision may have indirect consequences to the regulations, and government actions since the decisions are binding on all state institutions and citizens. (Bourchier 2014).

In most of all constitutional aspects, since its establishment, the Constitutional Court has played a significant role in shaping Indonesia's legal and political landscape. It has struck down numerous laws deemed partially or wholly unconstitutional, including several provisions related to blasphemy, corruption, and electoral disputes on the relevant Laws. The court has also been active in defending human rights and has issued landmark decisions related to freedom of religion, the rights of indigenous peoples, and the protection of the environment as the areas are covered in the Constitution. The Indonesian Constitutional Court has issued several important decisions related to the interpretation of the constitution as summarized in Table 1 below.

Table 1: Significant decision in Judicial Review in Indonesia

Matter	Decision
Freedom of religion	In a 2009 decision, the Constitutional Court clarified the meaning of the principle of freedom of religion in the Indonesian Constitution. The court held that the principle not only protects the right of individuals to practice their own religion, but also includes the right to change one's religion and to not have a religion at all.
Presidential term limits	In a 2019 decision, the Constitutional Court upheld the two-term limit for the presidency that was introduced in 2002. The court rejected arguments that the limit was unconstitutional, finding that it was consistent with the principles of democracy and good governance.
Anti-corruption commission	In a 2014 decision, the Constitutional Court struck down a provision in the law establishing Indonesia's anti-corruption commission that required the commission to obtain permission from the president before investigating senior officials. The court found that this provision violated the principle of the separation of powers and undermined the independence of the commission.

Electoral disputes	The Constitutional Court has also been active in resolving disputes related to elections. In a 2014 decision, the court overturned the result of a closely contested presidential election and declared Joko Widodo the winner. The court found that there had been significant irregularities in the election process, including voter fraud and irregularities in the vote counting process.
Presidential Decree on tobacco advertising	In 2012, the Constitutional Court struck down a presidential decree that allowed tobacco companies to advertise on billboards and in the print media. The court found that the decree was unconstitutional because it violated the right to health and the right to a clean environment. The court also found that the decree had been issued without proper consultation with the public and other stakeholders.
Fuel price increase	In 2013, the Constitutional Court rejected a request to review the government's decision to increase fuel prices. The court found that the decision was a policy matter that fell within the executive's authority and was not subject to judicial review.
Moratorium on forest concessions	In 2013, the Constitutional Court upheld a presidential regulation that imposed a moratorium on new forest concessions. The court found that the regulation was constitutional because it was issued to protect the environment and promote sustainable development.

Limitation of Judicial Review in Malaysia

There are areas that are not subjected to be reviewed by the court. The word ‘justiciability’ and ‘ouster clauses’ are the terms used to oust the power of court in reviewing act of the legislative or the administrative body. The following discussion deliberates on these areas:

Emergency

The power of the judiciary is not without limitation, particularly when the Parliament execute its special power to combat subversion and during an emergency. A Declaration of emergency may be made by his Majesty, the Yang Di Pertuan Agong (YDPA), who is the head of executive, if he thinks that there is a threat to the life of the people, economy, and public order. Following the declaration, if both parliaments are not in sitting concurrently, his Majesty may introduce the emergency law for the same purpose. However, the introduction of emergency law shall not legislate on six special area, namely Islamic law, Malay custom, native or customary law in Sabah and Sarawak, matters related to religion and citizenship, and language.

In 2020, the world was shocked by the emergence of COVID-19. Following the spike in the number of affected patients, the emergency proclamation was made in January 2021 to protect the safety and rights of the health of the people. Subsequently, the Ministry of Health (MOH) introduces the Standard Operational Procedure (SOP) for the nation to adhere to. Before the declaration of emergency, the Malaysian executive had also imposed the Movement Control Order (MCO), also known as the “lockdown”, as a measure to restrict on movement, assembly, and international travel and to mandate the closure of business, industry, government, and educational institutions to curb the spread of COVID-19 virus. In normal circumstances, such act of the executive may be challenged on the ground of unconstitutionality due as it violates the fundamental rights of the people. However, the MCO sees the struggles of the executive in upholding the supremacy of the Constitution in one hand and maintaining the rights to health and livelihood of the people.

Judicial review of a Proclamation of emergency and the emergency ordinance is barred by Art 150(8). Article 150(1) provides that if the YDPA satisfied that a grave emergency exists whereby the security, or the economic life or public order in the Federation or any part thereof is threatened, he may issue a proclamation

of Emergency. Although there is distinct opinion on the constitutional procedure of declaration between the need to act on the advice or it falls within the prerogative power of the YDPA, but upon declaration the declaration shall not be subjected to judicial review.

In the case of *Dato Seri Anwar Ibrahim v Tan Sri Mahiaddin bin Yassin & Anor* [2021] 7 CLJ 894 the court held that the decision of the Prime Minister in advising the Yang di-Pertuan Agong to promulgate section 14 of the Emergency (Essential Powers) Ordinance 2021 which resulted in the prorogation and/or suspension of Parliament, is not amenable to judicial review. The court further states that Article 150(6) and (8) of the Federal Constitution, which is valid and constitutional, expressly prohibits any challenges to the validity of the Ordinance in any form and on any ground. Similarly, in the case of *Datuk Seri Salahuddin Ayub & Ors v. Perdana Menteri, Tan Sri Dato' Hj Mahiaddin Md Yasin & Anor* [2021] 8 CLJ 260 the court states that Article 150(8) of the Federal Constitution shuts the court's doors from any challenge or application being made against a proclamation and the Ordinances enacted under emergency law. Therefore, the decision of the Yang di-Pertuan Agong, made pursuant to art. 150(1) and 150(2B) of the Federal Constitution, could not be challenged by way of judicial review.

Parliamentary Privileges

As Parliament discharges certain high functions of state, certain privileges are attached to it collectively as a House, and to its members individually, so that the House may function without any interference or obstruction from any quarter. The Constitution (Article 62) empowers the Parliament to regulate its own procedure and is therefore not subject to external regulation. In the case *Tun Dr Mahathir Mohamad & Ors v. Datuk Azhar Azizan Harun & Ors* (2021) 3 CLJ 852 the court deliberated that the Parliament has the power or jurisdiction to elect and/or to dismiss the Speaker and the Deputy Speaker. Hence, the validation of such appointment/dismissal was not within the court's jurisdiction. In this case the plaintiffs, Members of Parliament, filed an application seeking, inter alia, for orders that the appointment of Datuk Azhar Azizan Harun as the Speaker of the Dewan Rakyat and the appointment of Dato' Sri Azalina Othman Said as the Deputy Speaker of the Dewan Rakyat is invalid. Similar privilege is accorded to the state legislative assembly (Article 63 & 72).

In the case of *Yang Dipertua, Dewan Rakyat v Gobind Singh Deo* [2014] 6 MLJ 812, FC the court said that if the proceedings in the House have constitutional or legal support, the proceedings must be immune from legal challenge. However, because of the doctrine of constitutional supremacy, Parliament cannot do as it wishes and must bring itself within the confines and limits placed upon it by the Constitution. Only in cases where the Parliament had acted in violation of constitution provisions that the court is allowed to review the act of the legislative. This has been illustrated in the case of *Mohamed Tawfik bin Tun Dr Ismail v Pandikar Amin bin Haji Mulia* (sued as Yang di Pertua Dewan Rakyat, Parlimen Malaysia) & Anor [2018] MLJU 552, HC and *Dewan Undangan Negeri Selangor & Ors v. Mohd Hafarizam Harun* [2016] 7 CLJ 143, FC.

The case of *Sivakumar a/l Varatharaju Naidu v Ganesan a/l Retanam*. [2010] 7 MLJ 355 sees the court seeking to examine whether the removal of members from their committees or principal members from their positions is subject to judicial review or whether they are non-justiciable being political questions. The court held that the removal of the plaintiff and the appointment of the defendant as the new Speaker were part of the proceeding of the Assembly on 7 May 2009. Pursuant to Article 36A of the State Constitution of Perak, the Assembly has the power or jurisdiction to elect and/or to dismiss the Speaker and that the issue of who was the validly appointed Speaker was not within the court's jurisdiction. An appeal to the Court of Appeal was also dismissed on similar grounds of non-justiciability of issues of political nature having regard to Article 72 of the Federal Constitution.

Security offences

The Parliament is allowed to go beyond its limited jurisdiction in controlling any subversive action, act that may threaten public order and public security. Article 149 of the Federal Constitution permits the parliamentarian to introduce a law that may violate the fundamental rights of the people protected under Articles 5, 9, 10 and 13. An example of such a statute is the Internal Security Act 1960 with the objective of

detering the issue of communist activity in Malaysia. This 1960 legislation was later repealed and replaced by Security Offences (Special Measures) Act 2012. The introduction of laws under this provision requires the statement of Article 149 in its preamble. Defining what amounts to a 'threat' that puts society into fear has been interpreted in several cases. Learned counsel Gopal Sri Ram submitted that section 15B Prevention of Criminal Act 2015 (POCA) is unconstitutional as it infringes the provisions of Art 121(1) FC in relation to judicial power and should therefore be struck down.

This in turn is because it curtails the right to judicial review save on procedural grounds. The ouster clause infringes judicial power vested in the High Court to remedy, through judicial review, the detention of a detainee who seeks to challenge the lawfulness or legality of his detention. It also removes the constitutionally guaranteed right of a detainee under Art 5 FC to challenge his detention on substantive grounds. In other words, a detainee ought to be able to challenge his detention on both procedural as well as substantive grounds (Rovin Joty a/l Kodeeswaran v Lembaga Pencegahan Jenayah & Ors and other appeals [2021]).

Limitation of Judicial Review in Indonesia

In general, the limitation of judicial review of the Constitutional Court may be turning down constitutional challenges to the higher-level of laws, namely the MPR Decrees to the lower-level laws including the government regulation and ministerial decisions (Butt, 2015). The role of the constitutional court might face constraints, including that the court decisions have no effect on ongoing judicial proceedings or past verdict based on the respective piece of a constitutional order (Croissant and Lorenz 2018).

Judicial review in Indonesia faces various challenges that pose significant implications for the effective functioning of the constitutional court system. The limited resources and capacity constrain the ability of the Constitutional Court to handle the increasing caseload and effectively fulfill its mandate. Insufficient staffing, funding, and infrastructure hinder timely and quality adjudication, potentially undermining the court's impact on constitutional governance. In Indonesia, the law on judicial review limits the Constitutional Court's power to review laws passed before the enactment of the law on judicial review in 2003.

Second, the politicization of judicial appointments and potential external pressures threaten the independence and impartiality of the judiciary. Political influences and vested interests may affect judicial decision-making, eroding public trust in the judiciary and diminishing the integrity of the constitutional review process. Current case was indicated that the politicization of judicial appointment of the constitutional judges may be potentially threats for judicial independence.

Third, the complexity of constitutional interpretation poses challenges. Different interpretive methodologies and divergent views among judges on constitutional provisions can lead to inconsistent decisions and uncertainty in the law. Harmonizing interpretive approaches and promoting greater legal certainty are essential for a robust judicial review system.

Fourth, the accessibility and understanding of constitutional rights and legal remedies remain obstacles for ordinary citizens. Limited legal literacy, high costs, and procedural complexities often deter individuals from accessing the Constitutional Court, limiting its potential as a venue for protecting fundamental rights.

Fifth, the enforcement of court decisions and compliance by other branches of government can be problematic. Weak mechanisms for enforcing the Court's decisions and occasional resistance from other branches may undermine the effectiveness of judicial review in shaping public policies and ensuring constitutional compliance. Furthermore, the constitutional justice composition and appointment may be one or other challenges to the judicial independence in conducting the Court's competence including the judicial review. From the first to the current period, the Court may face pressures which have consequences to the judicial independent (Hendriato 2018).

Lastly, striking a balance between judicial activism and judicial restraint is a perpetual challenge. The Court must navigate between asserting its role in safeguarding constitutional principles and respecting the prerogatives of elected representatives, avoiding overreach that may be perceived as undemocratic. Addressing

these challenges requires comprehensive reforms, including adequate resource allocation, ensuring transparent and merit-based judicial appointments, enhancing legal literacy, improving enforcement mechanisms, promoting judicial independence, and fostering dialogue between the judiciary and other branches of government. Overcoming these challenges would strengthen judicial review in Indonesia, reinforcing the rule of law, protecting constitutional rights, and contributing to a robust democratic system.

Table 2: Comparative analysis on Judicial Review in Malaysia and Indonesia

Items	Malaysia	Indonesia
Constitutional framework	Malaysia's constitution is based on the Westminster model, which emphasizes parliamentary supremacy.	Indonesia's constitution is based on a presidential system, which emphasizes a separation of powers between the executive, legislative, and judiciary.
Source of power	Judicial Review on 2 grounds: 1. Validity of law 2. Validity of administrative action	1. The supreme court holds the power at the highest level of trial as well as judicial review on the legality of executive laws and regulations 2. The competencies of the Constitutional Court are more about the "constitutional matters." In conducting the "constitutional matters," the Constitutional Court would not only be about interpreting the Constitution but also about interpreting the Law as it mainly aims to find the constitutionality of the Law.
Court system	In Malaysia, the Federal Court is the highest court, and it has the power to interpret the federal constitution and determine the validity of laws passed by the federal and state governments. The Federal Court also has the power to hear appeals from lower courts, including the Court of Appeal and the High Court. In addition to the Federal Court, Malaysia also has a separate Syariah Court system that applies Islamic law in matters such as family law, inheritance, and religious offenses. The Syariah Court is only applicable to Muslims.	In Indonesia, the Constitutional Court is the first and the final court in matters of constitutional law area. It has the power to review legislation and government actions for conformity with the constitution. The Constitutional Court also has the power to hear disputes between state institutions. The Constitutional Court shall possess the authority to try a case at the first and final level and shall have the final power of decision in reviewing laws against the Constitution, determining disputes over the authorities of state institutions whose powers are given by this Constitution, deciding over the dissolution of a political party, and deciding disputes over the results of general elections. In addition to the Constitutional Court, Indonesia also has a Supreme Court, which is the highest court for non-constitutional matters. The Supreme Court hears appeals from lower courts, including the District Court and the High Court.
Grounds/Guideline for Judicial Review	1. Validity of law - must be consistent with the Federal Constitution 2. Validity of administrative action - proportionality, reasonableness, natural justice 3. Procedural irregularities	Normative and positivist - The principle of legality in criminal law declares that no crime and punishment can exist without a legal base / nullum crimen, nulla poena sine lege (Latin).

Role of court	The binding of precedence principle.	The guardian of the constitution, interpretation to the Constitution and the Laws.
Limitation to Judicial Review	In Malaysia, the Sedition Act and the Internal Security Act restrict the scope of judicial review.	In Indonesia, the law on judicial review limits the Constitutional Court's power to review laws passed before the enactment of the law on judicial review in 2003.

Based on the discussion above, it can be said that both Malaysia and Indonesia face significant challenges in maintaining judicial independence, despite constitutional provisions meant to safeguard it. Malaysia's judiciary has struggled with independence issues since the 1988 constitutional crisis, which fundamentally altered the relationship between the executive and judicial branches. The executive branch, particularly through the Prime Minister's Office, has historically wielded significant influence over judicial appointments and promotions. According to Harding (2012), the constitutional amendments following the 1988 crisis effectively subordinated the judiciary to Parliament, allowing political considerations to infiltrate judicial decision-making. The Judicial Appointments Commission, established in 2009, was meant to increase transparency, but studies show the Prime Minister still retains final authority on appointments. Lee (2010) notes that despite reforms, the Prime Minister still holds effective veto power over judicial appointments, raising questions about genuine independence.

Indonesia has made significant reforms since the fall of Suharto's authoritarian New Order regime in 1998, but judicial independence remains precarious. Butt and Lindsey (2010) document how judicial corruption remains pervasive despite reform efforts, with decisions frequently influenced by bribery at various court levels. The Judicial Commission, established to oversee judicial conduct, has faced resistance from the Supreme Court. Pompe (2005) describes a continuous power struggle between oversight bodies and the courts themselves, limiting the effectiveness of accountability mechanisms. According to Mietzner (2018), The gap between legal frameworks and institutional practices remains substantial, with reform efforts frequently stalling due to resistance from entrenched interests. Aspinall and Mietzner (2010) conclude that both countries demonstrate how constitutional guarantees of judicial independence can be undermined through informal practices and political interference, despite differences in their political systems.

Malaysia's judicial review in human rights cases has been notably constrained, particularly regarding fundamental liberties. The courts have shown reluctance to robustly review government actions affecting civil liberties, especially in cases involving the Internal Security Act (prior to its repeal) and its successor security laws. As Harding (2012) observes, "Malaysian courts have generally adopted a deferential posture when reviewing executive decisions on matters of national security, limiting the effectiveness of constitutional rights protections. However, there have been some promising developments. There are several high-profile cases (Nik Elin, Iki Putra, Juzaili) challenging the constitutionality of certain laws, rights, and religious freedom that have seen more assertive judicial reasoning. The Federal Court has occasionally delivered progressive judgments in cases involving Indigenous land rights, though implementation remains problematic.

Indonesia's Constitutional Court, established in 2003, has been comparatively more assertive in human rights protection. Butt (2015) notes that "Indonesia's Constitutional Court has nullified numerous provisions of legislation found to violate constitutional rights guarantees, particularly in cases involving freedom of expression and religious liberty." Among the case are the striking down restrictive provisions in the Criminal Code, enhancing protections for indigenous communities, upholding religious freedom in several landmark cases and expanding recognition of economic and social rights.

Malaysian courts have generally upheld property rights and contract enforcement, creating a relatively predictable environment for domestic and foreign investment. However, Lee (2018) points out that "judicial predictability has sometimes come at the cost of excessive deference to executive economic policies." While in Indonesia, the Constitutional Court's decisions on resource laws and investment regulations have created some uncertainty but have also strengthened legal frameworks protecting local interests and environmental considerations. Judicial review has supported anti-corruption efforts by validating the powers of the Corruption

Eradication Commission (KPK), though recent decisions have somewhat weakened these protections.

The contrast between these neighboring countries reveals important patterns. Indonesia's post-1998 constitutional reforms created more robust judicial review mechanisms than Malaysia's, particularly through its dedicated Constitutional Court. Malaysia's judicial review has been more effective in maintaining economic predictability but less impactful in advancing rights protection. Indonesia's more assertive judicial review has contributed to democratic consolidation but sometimes created policy uncertainty. As Crouch (2019) concludes, "The different trajectories of judicial review in Malaysia and Indonesia demonstrate how institutional design, political context, and judicial leadership collectively determine the impact of constitutional review on governance outcomes."

CONCLUSION

Judicial review plays a critical role in upholding the rule of law and protecting constitutional rights in both Malaysia and Indonesia. The constitutional courts in these countries serve as guardians of the constitution, ensuring the legality and constitutionality of laws and government actions. However, there are notable differences and challenges in the practice of judicial review in Malaysia and Indonesia. In Malaysia, the court system operates within a framework that emphasizes the separation of powers and judicial independence. The Federal Court, as the highest judicial authority, has the power to interpret the constitution and federal laws. The judiciary in Malaysia has made significant strides in developing legal principles and maintaining its independence, contributing to the stability and effectiveness of the judicial review process.

In Indonesia, the establishment of the Constitutional Court in 2003 marked a significant milestone in the country's legal system. The Constitutional Court has been instrumental in protecting constitutional rights, ensuring constitutional compliance, and promoting the rule of law. However, the Constitutional Court faces challenges related to resource constraints, politicization, consistency in interpretation, accessibility, enforcement, and striking a balance between activism and restraint. Despite these challenges, both Malaysia and Indonesia have made significant progress in establishing and developing their respective systems of judicial review. The courts in both countries play a vital role in interpreting and safeguarding the constitution, providing checks and balances on the other branches of government, and protecting the rights of individuals and society at large. Moving forward, continued efforts to enhance the effectiveness, independence, and accessibility of judicial review will be crucial. Strengthening the capacity and resources of the courts, ensuring transparent and merit-based judicial appointments, promoting legal literacy, improving enforcement mechanisms, and fostering dialogue among stakeholders are essential for the continued development and effectiveness of judicial review in Malaysia and Indonesia. By upholding the principles of justice, equality, and the rule of law, judicial review in Malaysia and Indonesia contributes to the overall stability, democratic governance, and protection of individual rights in these nations. Future research should be done in the area of comparative study with another commonwealth country that shares similar features of the legal systems and countries with civil law legal systems.

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