

The Principles Of Good Judiciary In Indonesia And Malaysia

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Abstract. The judiciary is part of the government, so it is obliged to implement good governance in judicial administration. the principles of good judiciary at least contain elements of equal treatment by the law (equality before the law), honesty (fairness), impartiality, freedom in making verdict, the ability (competency), the open integrity or transparency, easy to visit (easy access), timely (timeliness), certainty.

Indonesia and Malaysia have accommodated the principles of good judiciary, such as: the principle of judicial independence, the principle of legality, the principle of impartiality, the principle of judgment must be accompanied by reasons, the principle of easy access, the principle of *audi et alteram partem*, and the principle of openness to trials. The mechanism for implementing good judgment in these two countries is carried out by accommodating these principles in statutory regulations.

Keywords : the principle, good judiciary, governance, fairness

1. Background

The trial procedure in the judiciary received criticism because the justice-seeking community had to go through a complicated and long procedure. The trial process is considered a scourge because it is very complicated. A World Bank research in 2011 also stated that there was a record of the slow process of resolving business disputes in Indonesia [1]. J. David Reitzel stated that “*there is a long wait for litigants to get trial*” [2]. On the other hand, effectiveness and efficiency are benchmarks for state institutions in implementing the principles of good governance, which require accountability [3] for public services. Good governance is a solid and responsible implementation of development management that is in line with the principles of democracy and an efficient market, avoiding misallocation of investment funds and preventing corruption both politically and administratively carrying out budget discipline as well as creating a legal and political framework, for the growth of business activities [4].

At the present time, great efforts have been made by the Supreme Court in order to create an effective and efficient judiciary. In order to achieve this goal, the Supreme Court has been fixing a set of rules regarding case examination at trial, starting from the application of mediation in court, limiting the nominal value of cases through simple prosecution procedures, application of e-court and in 2020 the Supreme Court launched e-litigation in all judicial institutions. However, the current reforms are still considered far from being the effectiveness and efficiency of the trial. The fact is that not everyone understands trial procedures and trial times have not been cut significantly through the existing reforms.

In order to get a comprehensive description of the application of the principle of the good judiciary, this paper will discuss the the principles of good judiciary in Indonesia and Malaysia in the framework of realizing good governance

2. Good Judiciary Principles on Judicial Power in Indonesia and Malaysia

2.1. Good judiciary Principles on Judicial Power in Indonesia

The current reformation in the judiciary in Indonesia is constantly being strengthened for the realization of an independent judicial power, to administer the judiciary to uphold law and justice, as mandated by Article 24 paragraph 1 of the 1945 Constitution of the Republic of Indonesia as the manifestation of Indonesia as a constitutional state. Judicial power is regulated in Chapter IX, Article 24 of the 1945 Constitution which states that:

“The judiciary power shall be exercised by a Supreme Court and such other courts of law as are provided for by law. The composition and powers of these legal bodies shall be regulated by law.”

It can be concluded that the judicial power is an independent power. Therefore, there must be guarantees in the law regarding the position of judges. The power of the judiciary in carrying out its duties and authorities cannot be influenced by the government. According to Scheltema, an independent judicial power must be upheld, both as a principle in a rule of law, and to allow judicial powers to ensure that governance is not carried out arbitrarily [5]. When viewed from the doctrine of separation of powers, an independent judicial power is part of the effort to guarantee freedom and prevent arbitrariness. In other words, the judicial power which is free from the influence of government power is an effort to guarantee and protect the freedom of the people from the possibility of arbitrary action by the government. Thus, the presence of an independent judicial power is no longer determined by the separation of powers system or the distribution system of power, but as *a conditio sine quanon* for the creation of a rule of law, guaranteeing freedom and control over the running of state government.

Universal Declaration of Human Rights, stated that “*Everyone is entitled in full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him*”[6].

It can be said that an independent judicial power is a reflection of the Universal Declaration of Human Rights, and the International Covenant on Civil and Political Rights [7], which regulates independent and impartial judiciary. Article 14 International Covenant on Civil and Political Rights stipulates that “... *in the determination of any criminal charge against him, or of his rights and obligations in a suit at law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law*”[8]. The independence of the judiciary implies that judges and all judicial instruments are free from the interference of extra-judicial powers, including executive, legislative and other extra-judicial powers in society such as non-governmental organizations (NGOs), the press, and litigants[9].

An independent judicial power does not mean that it can be exercised freely without signs of supervision. In the aspect of proceeding in court, it is known that there are general principles of proper justice, and rules of a procedural or procedural nature that open the possibility of filing various legal remedies [10]. Thus, the function of the judiciary is a whole series of activities in the form of adjudicating a dispute case that is concrete individual and in relation to the concept of independent judicial power, which in the context of law includes authority, authority, rights, and obligations. Thus, judicial power can be interpreted as the power, rights, and obligations to determine what and how the legal norms in cases of concrete-individual-conflict. Therefore, the judicial power is bound by procedural regulations called the Procedural Law.

An independent judicial power is manifested in the freedom of judges in the judicial process. Regarding the freedom of judges in exercising their authority, there are signs of formal legal rules and material law, as well as unwritten norms called general principles of proper justice. Judicial power, in other words, is bound by material legal rules and procedural rules, namely procedural law. Thus, it can

be said that material legal rules and procedural regulations are normative limits to the freedom of judicial power or the freedom of judges in the judicial process.

The explanation above shows how important the principle of judicial independence is for law enforcement in Indonesia. In fact, this principle is reaffirmed for judges when conducting trials. In this case, the judge may not have an interest either in the case being examined or with the parties. This is confirmed in the provisions of Article 17 of Law no. 48 of 2009 concerning Judicial Power. Apart from these principles, there are still a number of principles that must be applied in order to accommodate a good judiciary in Indonesia as follows.

1) *Principle of legality*

Legality is the main principle in a constitutional state, apart from the principle of protecting freedom and human rights. In Indonesia, the legality principle rests on Article 1 paragraph (3) of the 1945 Constitution which states: The State of Indonesia is a constitutional state. The principle of legality means that the administration of justice puts forward the legal basis for a decision. Consequently, decisions cannot be made arbitrarily. This is expressly accommodated in Article 50 of Law no. 48 of 2009 concerning judicial power. The existence of the legality principle is a derivative of the principles of honesty (fairness) and certainty.

2) *The principle of the decision must be accompanied by reasons.*

The court decision must contain the reasons as a basis for the decision to be made. Unwritten law which is used as the basis for adjudicating a judge's decision must be based on a comprehensive legal reasons (legal reasoning, *ratio decidendi*). A decision that does not have sufficient consideration causes the decision to be categorized as *onvoldoende gemotiveerd*. This condition allows the verdict to be overturned by a higher court.

3) *The principle of openness of the trial.*

The principle is carried out to accommodate the principle of freedom in making verdict and the ability (competency). In granting reasons, there is no requirement for equality between judges to one another, differences of opinion are permitted, and this is regulated in Article 14 of Law no. 48 of 2009 concerning Judicial Power. Such regulation is the embodiment of the principle of independence that judges have in making decisions, and is an application of the principles of open integrity or transparency and honesty (fairness).

4) *The principle of ease of access*

Access to justice is one of the basic principles in law enforcement. Ease of access will make it easier for the public to hear the voice of the public in upholding their rights, prevent discrimination in obtaining justice, and realize the accountability of the judiciary to the public. This is intended to grow trust in the judiciary, because the growth of public trust in the law is very basic. This principle is accommodated in Article 52 of Law no. 48 of 2009 concerning judicial power which emphasizes that the judiciary is obliged to provide access to the public to obtain information relating to decisions and court fees in the trial process. This principle is an embodiment of the easy to visit (easy access) principle of good judiciary.

5) *The Principle of Audi et Alteram Partem*

The parties who are litigating in a civil process before the court must be treated equally by the judge. This principle is an implementation of the principles of equal treatment by the law (equality before the law) and honesty (fairness) in good judiciary. The judiciary must not be discriminatory, including in case examination. The parties must be given the same opportunity, both in the process of answering questions, and in providing evidence. This principle is accommodated in the provisions of Article 4 of Law no. 48 of 2009 concerning judicial power.

6) *Openness of the trial*

The main substance of the principle of openness is the obligation to state decisions in trials that are open to the public. This principle aims to make court decisions more transparent and accountable[11]. This principle is an integral part of the fair trial principle[12]. Its main purpose is to ensure that the judicial process is protected from misbehavior by judicial officials[13]. The trial must be conducted openly, so that all parties can witness, access, and monitor the trial

examination process. Violation of this principle will result in the verdict being invalid. This principle has long been accommodated in the law on judicial power for the first time in 1970 which then has undergone several changes and changes and continues to exist until the last judicial power law, namely the Law No. 48 of 2009 on judicial power. The principle of openness is regulated in Article 13, and becomes a reference for all laws and regulations regarding other judicial institutions. This principle is the application of the principles of honesty (fairness), easy to visit (easy access) and the open integrity or transparency in good judiciary.

7) *Simple, Fast, and Low Cost Justice.*

The principles of simple, fast, and low cost justice consist of three terminologies. The word “simple” is attached to a trial process that is easy to understand, “fast” indicates that the trial time is not long, and “low cost” is the cost of the court process that can be borne by the public. This principle is accommodated in Law no. 48 of 2009 in Article 2. The implementation of the simple principle of justice, fast and low cost, will ultimately bring honesty to the court and accommodate the timeless principle of good judiciary. In addition, low fees are also a manifestation of the principle of easy access, because there are low costs so that all justice seekers can access the judiciary.

2.2. *Good judiciary Principles on Judicial Power in Malaysia*

The principles that must be applied in order to accommodate a good judiciary in Malaysia as follows

1) *Legality*

A conception 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”[14]. 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. Chapter 3 of the Federal Constitution emphasizes the executive power, Chapter 4 and 5 highlights the Federal Legislature and Legislative Procedure. Part IX provides for the Judiciary in Malaysia.

Whilst the judicial power and courts jurisdictions are in accordance with the Federal Constitution, it is further supported by these laws namely: Subordinate Court Act 1948, Court of Judicature Act 1964, Rules of Court 2012, Federal Court and Court of Appeal Rules. Apart from that, in civil cases there are governed by Evidence Act 1950, Limitations Act 1948, Public Authorities Protection Act (PAPA) and many other sources of civil laws.

The limits and control of judicial powers are then limited by the courts locality and monetary limit of jurisdictions. As mentioned earlier Malaysia inherited its common law judicial system from the British colonial past that influenced Malaysian legal system.

2) *Independence of the Judiciary*

Independence of the judiciary is an important feature of the rule of law to ensure that judiciary is totally separated and independent from executive and legislative influences. In order to achieve this end, a range of measures could be implemented to ensure independence such as the appointment of judges must be free from political influences. Issues of corruption, bribery, intimidation by judges of higher in ranks also the executive, must be addressed to ensure impartiality thus upholding the rule of law principles. Separation of power, also independence of the judiciary is important for check and balance of other branches of the government of executive and legislative, in case of their actions were challenged in court of justice so as to avoid *ultra vires*.

As the power of the court is clearly mentioned in the Federal Constitution and other abovenamed laws and regulations, the judges[15] and the legal professions[16] also have to abide their own ethics, failing which make them liable to disciplinary and legal actions. Malaysia has its own interesting history on constitutional challenges in 1988 that later led to the removal of the Lord President of the Supreme Court, Tun Salleh Abbas from his seat[17]. This undermines the judicial independence in Malaysia and exerts of power by the executive[18].

3) *Impartiality*

Another important element of check and balance of the organs of the government is the usage of judicial review. Judges as one of the Guardians of the Constitution and uphold rule of law with special position granted with special power of judicial review[19]. Judicial review by virtue of Order 53 of the Rules of Court 2012 that is adopted from the British system basically allowed review of the powers or decisions of the executive and law makers thus preventing abuse of power[20]. This is one aspect on the enforcement of impartiality.

Impartiality includes equality before the law thus citizens are subject to rules and regulations for breaching the law. In Malaysia, the Rulers can also be charged in Special Court under his personal capacity, thus abolishing the previous Rulers immunity. This is an important amendment made to the Malaysian Federal Constitution during the previous Tun Mahathir Mohamad premiership[21].

The participation in the decision making process can be seen in many ways in Malaysia such as legal provisions that provides for public participation during consultation process. As the jury system in criminal cases have been abolished, the establishment of various human rights, such as Suruhanjaya Hak Asasi Manusia (SUHAKAM) Malaysia have pathed the way for civil rights to be heard and to provide feedbacks for better administration of the justice system.

4) *Judgement with Reason*

Judges reasons of judgment are important to ensure abidance towards the existing laws, procedures and regulations. In order to produce good quality grounds of judgments the training of judges is important to enable them to be equipped with the necessary skills and expertise. The establishment of Judicial Academy in 2012 in Malaysia inter alia, plan, organise and conduct training programmes and courses for judges of the superior courts. The objective of the Academy is to enhance judges' judicial skills in various dimensions of judge-craft[22]. This is particularly useful in the rise of the recent new laws concerning technology such as nanotechnology, biosafety, cybersecurity and numerous others.

5) *Easy Access*

Easy accessibility to the court is one of the important features fulfilling the rule of law of judiciary as it has to meet the expectations of the public, litigants and administration as signs of good governance. Lord Bingham in 'The Rule of Law' argued that 'The 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'.

6) *Audi Alteram Partem*

The right to be heard is another important aspect of natural justice so as both parties will be heard by the court. In order to achieve this there must be procedural and legal transparency. This doctrine was previously argued by litigants in habeas corpus applications against detention under previously abolished law of Internal Security Act 1960 (Act 82) [23], that legally provides detention without trial to maintain national security now repealed and replaced by the Security Offences (Special Measures) Act 2012 but not yet in force. In Malaysia this doctrine is suggested to be replaced with 'reasonable opportunity of being heard' as the previous case does not imply the right to be heard orally[24], under Article 135(2) of the Federal Constitution but today there is still no clear cases yet[25].

7) *Open Hearing*

The hearing of the court must be an open hearing except for some cases provided by the laws, sensitive cases such as involving children that can be held in camera or concerning national security. This promote transparency thus ensuring justice must be done. This is especially relevant recently in view of COVID-19 pandemic as the court hearings were streamed online to ensure the justice process is observed even though with restrictions[26].

3. Conclusion

Indonesia and Malaysia has accommodated the principles in good judiciary, namely the principle of judicial independence, the principle of legality, the principle of impartiality, the principle of judgment must be accompanied by reasons, the principle of easy access, the principle of *audi et alteram partem*, the principle of openness of trials, and the principle of simple justice, fast and low cost.

References

- [1] Fakhriah, EL, 2012. Eksistensi Small Claim Court dalam Mewujudkan Tercapainya Peradilan Sederhana, Cepat, dan Biaya Ringan. Research Report on 2012. p. 4
- [2] Reitzel, J.D, 1990. Contemporary Business law, Principle and Case. Forth Edition. MC. Graw Hill. Pub. Comp. New York. p. 46.
- [3] Adiyanta, FCS, 2019. Urgensi Good Judiciary Governance Pada Pelayanan Administrasi Lembaga Pengadilan Konstitusi Sebagai Jaminan Bagi Akses Publik Untuk Memperoleh Keadilan, Masalah-Masalah Hukum. 48: 257-265.
- [4] von Mises, L, 1985. Menemukan Kembali Liberalisme. Freedom Institute. Jakarta.
- [5] Scheltema, M. 1989. De Rechtsstaat, dalam J.W.M. Engels (et.al), De Rechtsstaat Herdacht, Tjeen Willink, Zwolle. p. 15-17.
- [6] United Nation, Universal Declaration of Human Rights, available at http://www.un.org/en/udhrbook/pdf/udhr_booklet_en_web.pdf, accessed September 2016. This was later implemented in Article 17 of Law No.39 of 1999, regarding Human Rights, which states: "Every person, without discrimination, has the right to obtain justice by submitting applications, complaints and lawsuits, both in criminal, civil and administrative cases and to be tried through a trial process that is free and impartial, in accordance with procedural law which guarantees an objective examination by an honest and fair judge in order to obtain a fair and correct decision".
- [7] Adji, OS. 1980. Peradilan Bebas Negara Hukum. Erlangga. Jakarta. p. 251; International Covenant on Civil and Political Rights, Adopted and opened for signature, ratification and accession by General Assembly resolution 2200 A (XXI) of 16 December 1966, Entry Into Force: 23rd March 1976, in accordance with Article 49.
- [8] United Nation, International Covenant on Civil and Political Rights. Adopted by the General Assembly of the United Nations on 19 December 1966, tersedia di <https://treaties.un.org/doc/publication/unts/volume%20999/volume-999-i-14668-english.pdf>, accessed in September 2016.
- [9] Witianto DY dan Kutawaringin, AP. 2013. Negara Diskresi Hakim (Sebuah Instrumen Menegakan Keadilan Substantive Dalam Perkara-Perkara Pidana). Alfabeta. Bandung. p. 3-4.
- [10] IKAHI, 2000. Conclusion of the seminar "Empowerment and responsibility of the Supreme Court of the Republic of Indonesia in exercising independent judicial power", held by IKAHI, March 22, 2000 in Jakarta, Varia Peradilan, No. 178. July 2000. p. 118.
- [11] *Ibid.* p. 49
- [12] Harahap, Y, *Op.cit.* p. 894 . HRH Sultan Azlan Shah, "Constitutional Monarchy, Rule of Law and Good Governance."
- [13] *Ibid*

- [14] Dworkin, Ronald. 2004. "Hart's postscript and the character of political philosophy." *Oxford Journal of Legal Studies* 24, no. 1: 1-37.
- [15] Judges' Code of Ethic 2009
- [16] Legal Professional Act 1976 and Practice and Etiquette Rules
- [17] Harding, Andrew James. 1990. "The 1988 constitutional crisis in Malaysia." *The International and Comparative Law Quarterly* 39, no. 1: 57-81.
- [18] Yatim, Rais. 1994. "The Rule of Law and Executive Power in Malaysia: A Study of Executive Supremacy." PhD diss., University of London
- [19] HRH Sultan Azlan Shah, "Constitutional Monarchy, Rule of Law and Good Governance."
- [20] Jalil, Md Abdul. 2004. "Locus standi rule for judicial review: The current law in the UK and Malaysia." *Jurnal Undang-undang dan Masyarakat* 8:59-77.
- [21] Harding, Andrew. 1993. "Sovereigns immune? The Malaysian monarchy in crisis." *The Round Table* 82, no. 327: 305-314.
- [22] Malaysia, "Thematic Compilation of Relevant Information Submitted by Malaysia Article 11 UNCAC Judicial and Prosecutorial Integrity," United Nations Office on Drugs and Crimes, accessed August 24, 2020, https://www.unodc.org/documents/corruption/WG-Prevention/Art_11_Judicial_and_prosecutorial_integrity/Malaysia.pdf.
- [23] *Thamil Vanen Kandasamy v. Timbalan Menteri Keselamatan Dalam Negeri & Ors* 2007 [SAHC]
- [24] *Najar Singh v Government of Malaysia & Anor* [1976] 1 MLJ 203 (PC).
- [25] Ibrahim, Zukiferee, and Abdul Majid Tahir Mohamed. 2019. "Reasonable Opportunity of Being Heard Under Article 135 (2) of The Federal Constitution: A Mist of Obscurity." *International Journal* 4, No. 15:113-120.
- [26] Norbaiti Hamdan. 2020. "Appeals Court to Live Stream Proceedings for First Time Ever, Open to Public," *The Star*, April 22, <https://www.thestar.com.my/news/nation/2020/04/22/appeals-court-to-live-stream-proceedings-for-first-time-ever-open-to-public>.