

LEGAL DISCOURSE IN MERBOK 2007 – INTERNATIONAL HUMAN RIGHTS
LAW

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**RESOLVING CONSTITUTIONAL ISSUES: IS CONSTITUTIONAL COURT THE
ANSWER?**

By

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Towards the end of last year, quite unexpectedly, I received an invitation from the Konrad Adenaur Foundation to speak at the Asian Constitutional Court Judges Conference in Manila and also to participate in the conference. The conference was attended by Chief Justices and Judges of the Constitutional Courts from various countries in Asia, including the Chief Justice of the Constitutional Court of Thailand, who, at that point of time, no longer had a court because the Constitutional Court of Thailand had been abolished by the Military Junta in a coup de tat. I was one of the few Judges at the conference who came from a country without a Constitutional Court. Towards the end of the conference, I made this comment: I observe that the participants of this conference may be divided into two groups. The first are participants from countries with Constitutional Court. The second are participants from countries without Constitutional Court. From the speeches of the participants, I also observe that in countries with Constitutional Courts there is the problem of their Governments not accepting their judgments. On the other hand, in countries without the Constitutional Courts, the Courts do not seem to have that problem. The question then is: Is the Constitutional Court relevant? Or, perhaps, looking at it the other way, could that be the reason why Constitutional Courts are necessary in those countries? (I need not tell you the response from the participants and the Chairman. May be I'll tell you in private during the coffee break!)

That should give you some indications of what my answer to the question posed to me, is going to be.

Before going any further, let me first make this pertinent point, because it will also have a bearing on my view. The point is: I am not an academician. I am only a "worker". As a Judge, my job is to ascertain the facts, determine the issues, look for the relevant law and, where the law is clear, apply it, of course, giving reasons for it. As far as we are concerned, it is the reasons that matters. To the public, who do not read the judgments, it is the result that matters: whether it is what they would like it to be or not. If it is what they would like it to be, they say it is a

good judgment, no matter how bad the reasons are, in law. If it is not what they would like it to be, they say it is a bad judgment, no matter how sound the judgment is, in law and on the facts. That is one of the occupational hazards that Judges have to face. Where the law is open to interpretation, speaking for myself, I try my best to give a reasonable interpretation, taking into consideration, where relevant, the local circumstances, public interest and so on. Hence, in Meor Atiqulrahman (2006) 4 CLJ 1, I said:

“ ‘Justice is blind.’ Yes. But not Judges. They should not be.”

So, because of the nature of my job, my outlook is a practical one.

For almost fifty years of our post-independence judicial history, there was no mention of having a Constitutional Court in Malaysia. Everybody seemed to be happy with our judicial system. This idea has been mooted only in the last few years. Why? Is it because some of our neighboring countries like Indonesia and Thailand which are not common law countries and following the civil law countries like France and Germany, have them? If that is the reason, I do not think that that is a sufficient reason.

The worst experience in the post-independence Malaysian judicial history, in my view, was the dismissal of Lord President Tun Salleh Abas and two Federal Court Judges in 1988 by the Tribunal established under Article 125 of the Federal Constitution. Yet, there was no call for the establishment of the Constitutional Court to replace the Tribunal then or soon after the incident.

Is it because, of late, there have been a number of judgments of the courts regarding the jurisdictions on the civil and the syariah courts that a section of the society is unhappy with? If that is the reason, again I do not think that that it is a valid reason. Do you replace the courts with a new court because you lose a case or a number of similar cases? In any proceeding, one party is bound to be unhappy with the judgment because one party has to lose. Sometimes, both parties are unhappy. Even where a consent order is entered, quite often, both parties are still not very happy because they do not get everything they want: they have to compromise.

The problem of conflict of jurisdiction of the civil court and the syariah court is nothing new. In fact, I have dealt with that issue at length in my latest judgment, Latifah Bt. Mat Zin v. Rosmawati Binti Sharibun & Anor., Federal Court Civil Appeal No. 02-39-2006 (W). I have pointed out that that is a problem of the Legislature, not the court's. The function of the court is to interpret the Constitution, not to amend it which is the function of the Legislature. I have pointed out that the Constitution was drafted in 1950's under very different social circumstances which have changed tremendously in the last fifty years. As a result, issues which were not envisaged then have arisen, some of which the courts, applying the existing provisions, actually have no answers for them.

However, as everybody looks to the courts to solve what actually is the problem of the Legislature, the courts tried to provide answers for them giving reasons which, at times and with respect, are not very convincing. That, I think, is a mistake. I have suggested that the Legislature takes a fresh look at the relevant provisions of the Constitutions and the statutes, decides as a matter of policy how to overcome those problems and makes the necessary amendments if it thinks it should.

Now, let us take a quick look at our system. The Federal Constitution establishes three superior courts, namely the High Court, the Court of Appeal and the Federal Court, the Federal Court being the highest court in the country. Article 128 that the Federal Court shall, to the exclusion of any other court, have jurisdiction to determine (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 a State, has no power to make laws; and (b) disputes of any other question between States or between the Federation and any State.

Clause (2) further provided that where in any proceedings before another court a question arises as to the effect of any provision of the Constitution, the Federal Court shall have jurisdiction to determine the question and remit the case to the other court to be disposed of in accordance with the determination. In such a case “the other court”, usually the High Court would stay its proceedings and refer the question to the Federal Court for the Federal Court’s determination. Having determined the question, the Federal Court would remit the case back to the High Court for the determination of the case, applying the answer given by the Federal Court on the question.

In the past fifty years, very few cases have been referred to the Federal Court under this Article.

Beside Article 128, there is also Article 130 which empowers the Yang Di-Pertuan Agong to refer to the Federal Court for its opinion any question as to the effect of any provision of the Constitution which has arisen or appears to him likely to arise.

So, if we want to speak in terms of Constitutional Court, the Federal Court is the “Constitutional Court” or the apex court on constitutional as well other matters.

In practice, constitutional issues arise even in the High Court. The High Court usually gives its opinion in its decision but it is the Federal Court that has the last say when the matter reaches the Federal Court.

As we see in the case of Juma’aton Iwn. Raja Hizaruddin (1998) 6 MLJ 556, even the syariah court tried to interpret the Federal Constitution. This had prompted me to make the following comment in my keynote address at the

Syariah Community Forum organized by the Attorney General's Chamber in December 2005":

"Ustaz cuba mentafsir Perlembagaan. Peguam cuba mentafsir Al-Qur'an." ((Islamic) religious scholars try to interpret the Constitution. (Common law) lawyers try to interpret the Al-Qur'an")

For my opinion on that case, please see Latifah Bt. Mat Zin (supra).

Let us now see some examples of the jurisdiction of the Constitutional Court in some countries. I have done some on-line research on the Constitutional Courts of the following countries: Indonesia, Thailand, South Korea, Germany and Austria. The first thing to note is that these are non-common law countries. Secondly, of all the countries mentioned, Thailand has the longest and most detailed provisions on Constitutional Court but, ironically, the court has ceased to exist!

I shall now list down in brief the jurisdictions of the Constitutional Courts of those countries.

In Indonesia, the Court has jurisdiction to determine on:

- (i) the constitutionality of laws as against the 1945 Constitution of the Republic of Indonesia,
- (ii) Dispute of Authority among the State Departments as mandated by 1945 Constitution,
- (iii) dissolution of political parties,
- (iv) dispute of the result of the general Election.

The Court has nine Judges appointed for a three-year term.

In Thailand, the Court has jurisdiction to determine on:

- (i) the constitutionality of the statutes and organic law bills,
- (ii) the qualifications of a Member of the House of Representatives, a Member of the Senate, a Minister, the Election Commissioners and any person holding a political position who shall submit an account showing particulars of his/her assets and liabilities,
- (iii) disputes regarding the powers and duties of organizations under the Constitution,
- (iv) other matters as stipulated by the Constitution and Organic Law e.g. whether a person or a political party has exercised the rights and liberties prescribed in the Constitution with the purpose to overthrow the democratic regime of government with the King as head of State or to acquire power to rule the country by any means which is not in accordance with the procedures provided by the Constitution. (Now

we know why the Military Junta had abolished the Constitutional Court in Thailand). Other examples are the jurisdiction to determine appeals by Members of the House of Representatives regarding the termination of their membership in a political party, jurisdiction to determine whether an order of the registrar of political parties refusing the registration of a political party or the removal of a leader or an Executive Committee of a political party from office.

The court has (may be more correctly, had) a President and 14 judges. They hold office for only one term of nine years.

In South Korea, the Constitutional Court has jurisdiction to determine:

- (i) the constitutionality of laws,
- (ii) impeachment of the President, the Prime Minister, members of the State Council, Ministers, Justices of the Constitutional Court, judges, members of the Central Election Management Committee, Chairman or Commissioners of the Board of Audit and Inspections and other public officers,
- (iii) dissolution of political parties,
- (iv) jurisdictional disputes between government entities,
- (v) constitutional disputes i.e. any person whose fundamental rights guaranteed by the Constitution have been infringed through the exercise or non-exercise of governmental powers may petition the court for relief.

The court has nine justices who serve a six year renewable term.

We now go to Eastern Europe, i.e. Austria. The Constitutional Court in Austria has jurisdiction:

- (i) to review the constitutionality of decrees made by administrative authorities,
- (ii) to review the constitutionality of laws, regulations and state treaties,
- (iii) to clarify whether a certain matter is to be dealt with by the federation or by one of the state governments;
- (iv) to adjudicate jurisdictional conflicts between courts or between courts and administrative authorities;
- (v) to adjudicate disputes regarding the extent of the review powers of the Audit Office and the Ombudsman's Office;
- (vi) to examine pecuniary claims under public law against the federation, a federal state or a community,
- (vii) to examine the legality of elections;
- (viii) to judge culpable violations of laws by the highest bodies of the Republic.

The court consists of a President, a Vice-President and twelve judges.

Lastly, we look at a country in Western Europe, i.e. Germany. In Germany,

The Constitutional Court has jurisdiction:

- (i) to hear complaints for infringement of fundamental rights by public authorities,
- (ii) to determine whether a statute is incompatible with the basic Law,
- (iii) to settle difference of opinion arising between constitutional bodies or between the Federation and the Federal States regarding their mutual constitutional rights and duties.

The court has sixteen judges who serve for only one term on twelve years.

What do we see from the list of jurisdictions? For practical purpose, I think they can be grouped into two broad categories:

- (i) interpretation of the Constitution,
- (ii) judicial review.

Do we need a special court of ten or more judges to decide on constitutional issues? If a pure constitutional issue of great importance is referred to the Federal Court either under Article 128 or 130, the Chief Justice may even constitute the full bench of the Federal Court which will consist of twelve Judges. No such occasion had arisen so far. More often than not a constitutional issue arises in a non-constitutional case. A good example is the recent case of Latifah Bt. Mat Zin (supra) which started as a probate and administration matter. Then a question arose whether a particular asset was part of the asset of the estate of the deceased. That depends on whether there had been a gift inter vivos of that particular asset to one of the beneficiaries. The next question was whether the gift inter vivos was to be determined in accordance of the common law or the Islamic law of "hibah". The Federal Court decided that the parties being Muslims, is should be decided in accordance with the principles of "hibah". Then the next question arose i.e. whether it was within the jurisdiction of the civil court or the syariah court to decide whether there was a "hibah", it being an Islamic law issue. The Federal Court decided that that was a matter within the syariah court to decide, notwithstanding the Syariah Court of Appeal's decision in Juma'aton (supra).

Such situations occur very often. If we have a Constitutional Court, does it mean that where the plaintiff's counsel envisages that he would be relying on a provision of the Constitution, he will have to file the case in the Constitutional Court or, where a provision of the Constitution is referred to in the course of the argument by either party, the case will have to be transferred to the Constitutional Court? If we do that, in my view, the Constitutional Court will end up deciding more non-constitutional issues than constitutional issue besides causing delay and incurring more costs. On the other hand, if we say that the Constitutional Court will only decide constitutional issues, then, it would mean that those cases will have to be referred to the Constitutional Court first for the determination of the constitutional issue and then remitted back to the other

court for the determination of other issues and the final decision? Again this cause delay and additional costs.

If we were to establish a Constitutional Court, most likely it will only be established in the Federal Capital, otherwise it will be too costly and there would not be enough cases for the Judges, especially in the States, to hear. It would mean that every time a constitutional issue were to be raised or is raised, the case will have to be filed in or transferred to the Federal Territory. If we include election petitions and judicial review cases as cases that come within the jurisdiction of the Constitutional Court as in some of the countries that I have referred to, which will have to be heard in the Federal Capital, one can imagine the cost of bringing the lawyers, parties and witnesses to the Federal Capital from all over the country. At least, under the present system, the cases may be filed and heard or the issue raised and argued in any High Court in any State. The High Court would conduct the trial and decide the cases. When they reach the Federal Court, by way of appeal or even reference, only the lawyers need appear in the Federal Court. Bear in mind that the Federal Court also sits in the States for convenience of parties.

It might be argued the Constitutional Court may also sit at State capitals. But, to transport 10 or more Judges every time the Constitutional Court wants to sit in the State capitals, including to conduct trials as opposed to hearing appeals, may not be convenient besides costly. To establish a Court is not just a matter of appointing Judges. We have to think of the buildings, the equipments, the support staff and so on. If Constitutional Courts were to be established in the State Capitals, another question arises: will there be enough cases for the Judges? Are the judges going to be appointed on part-time basis? In 1970's, we appointed practicing lawyers as part-time Judicial Commissioners to hear cases in the High Court, sitting alone and not in a bench of ten or more. It was a failure and had to be scrapped. Hearing a case is not like attending a meeting. From the day a case is filed in court until the delivery of the judgment, the case has to be fixed for hearing on numerous occasions, including for the hearing of interlocutory applications. Sometimes, the hearing lasts for only a few minutes. At times, it may take weeks. The job is more suitable for full-time judges.

Let us now focus on the length of the term of office the Judges of the Constitutional Courts in the countries that I have mentioned earlier. They vary from a three-year, I believe, renewable term in Indonesia, a six-year renewable term in South Korea, a one-term only of nine years in Thailand to a one-term only of twelve years in Germany. It is arguable, at least theoretically, that a short renewable term does not ensure the security of tenure and therefore the independence of the Judges. (Of course, Thailand looks better on paper than Indonesia and South Korea, but the Judges of the Constitutional Court of Thailand not only lost their jobs but also their court!) Following the same argument, again at least theoretically, a Judge who is appointed until the fixed

compulsory retirement age of 66 as in Malaysia enjoys better security of tenure and should, therefore, be able to be more independent.

Looking at the jurisdiction of the Constitutional Courts in those countries that I have referred to there is one further point that I would like to make and it is this. We have our own way of handling those cases, suitable to the circumstances in our country. Indeed, looking the list of jurisdictions of the Constitutional Courts in those countries, we see that each is different from the other, again depending on the circumstances in the respective countries.

Actually, the framers of our Constitution are quite genius in many ways in framing a Constitution that suits the local conditions and circumstances. Take for example the office of the Yang Di-Pertuan Agong. Where in the world do you find a country with a King elected by his peers for a fixed term of five years? We have Article 153 on special privileges of the Malays. It used to be criticized as discriminatory. But, the Malaysian Constitution is perhaps the only Constitution drafted in 1950's for former British Colonies that obtained their independence that still survives. That Article has now been copied by Fiji and South Africa. Recently, I had a visit from the Director of Ains-Shams Legal Centre from Jordan. When I explained to him about the provision of Article 153 he said how he wished that they have a similar provision in their constitution in view of the influx of Palestinians! Two years ago, I spoke at the Maxwell School of Citizenship and Public Affairs at Syracuse University in the United States in which, among other things, I explained the reasons why we have Article 153 in our Constitution. After I had finished, a white American professor commented: "I wonder what the United States would be like if the Indians are still the majority like the Malays in Malaysia?" I replied: If that is the case, may be, the United States will be like Malaysia!

Besides, we also have the Special Court established under Article 182 to try the Yang Di-Pertuan Agong or the Ruler of the a State in his personal capacity, something which even Great Britain does not have. I am privileged to be appointed by the Rulers' Conference to be one of the Judges of that Court even though I have not had the occasion to hear any case so far, which, I think, is a good sign for the country.

In the post-Independence history of the Malaysian Judiciary, we have seen our courts dismissing a slander suit by the Minister of Health leading to his resignation (Abdul Rahman Talib v. Seenivasagam & Anor. (1965) 31 MLJ 142; (1966) 2 MLJ 66, F.C.); convicting the Menteri Besar of Selangor for corruption (Public Prosecutor v. Datuk Haji Harun Bin Haji Idris (No. 2); (1977) 1 MLJ 15; (1977) 2 MLJ 155, F.C.); convicting the Minister of Culture, Youth and Sports for murder (Dato' Mokhtas Hashim & Anor. v. Public Prosecutor (1983) 1 CLJ 138; (1983) 2 MLJ 232, F.C.); declaring UMNO, the main component of the ruling party, illegal (Mohd. Noor Bin Othman & Ors. v. Mohd. Yusof Jaafar & Ors. (1988) 2 MLJ 129; (1988) 2 CLJ 597 F.C.); ruling that there was no appeal in an

election petition case to the Court of Appeal the effect of which was that the election of the Barisan Nasional Chief Minister of Sabah was null and void (Yong Tek Lee v. Harris Mohd. Salleh & Anor.(2002) 3 MLJ 230, C.A.); setting aside the conviction of the main political opponent of the ruling party (Dato, Seri Anwar Ibrahim v. Public Prosecutor (2004) 3 MLJ 405, F.C) to give only a few examples. All these show that, even under the existing system, there were occasions when the courts gave judgments against influential leaders and judgments which were not popular with the political leaders in power. Of course, you may cite some judgments and argue to the contrary. It is a matter of opinion.

In 1970's, at a time when the Government was unhappy with the courts over emergency laws and the Bar Council was unhappy with the courts for not wanting to follow the judgments of the Indian Supreme Court that declared some provisions of the Indian Constitution sacrosanct and, therefore, could not be amended, the late Tun Suffian, the then Lord President, in his usual wit, said to me: "You know Hamid, when both the Government and the Bar Council are not happy with our judgments, it means that we are independent." (I had the privilege of working directly under him for seven years, as Deputy Registrar.) Now, let me pose one hypothetical question to you: Suppose we had the Constitutional Court in 1988, do you think that the dismissal of Lord President Tun Salleh Abas and two Federal Court Judges could not or would not have happened? It is anybody's guess!

I must admit that I am quite conservative when it comes to changing a system. I prefer to improve the quality of the people who implement the system. This is because, I believe that, in the final analysis, whatever system we have, it is the men that matters – the men in authority, be they in the Executive, the Legislature or the Judiciary. Do they respect the rule of law? Are they sincere in upholding the Constitution? In the case of Judges, do they have enough courage to give judgments that they honestly believe to be right in accordance with the law and on the facts before them no matter how unpopular the decision may be and no matter what effect it will have on their career? Those are questions which only each individual can answer for himself.

Ladies and gentlemen,

I always like to end speech by quoting Imam Abu Hanifah. It is reported that after giving his ruling (fatwa) on a matter referred to him, Imam Abu Hanifah would say, "This is only my opinion. If there is a better argument, follow it." On my part I would go one step further and say: if there is a better argument, I too will follow it.

I hereby declare this Legal Discourse in Merbok 2007 officially opened.

Thank you.