

**International Conference**  
**«Protection of Rights and Constitutional Supervision»**

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**Session I «Initiating Constitutional Review with the Aim to Ensure  
Constitutional Rights and Freedoms»**

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**Keynote Speech**

**Introduction**

1. First and foremost, on behalf of the Malaysian delegation, I would like to extend my gratitude to the organizers for inviting us to this International Conference.

2. It is indeed an honour and privilege for me to speak on the topic of ‘Initiating Constitutional Review with The Aim to Ensure Constitutional Rights and Freedoms’ before such an esteemed audience today. I will address the topic specifically in the context of Malaysian experience.

3. I wish to state at the outset that the Federal Constitution is the supreme law of the land and any law which is inconsistent with the Federal Constitution is, to the extent of the inconsistency, void. Strictly speaking Malaysia does not have a specifically constructed and constituted constitutional court. However, to a certain extent, the Federal Court which is the apex court of the country may be considered as the constitutional court. When it comes to constitutional review, depending on the regulatory model engaged, all the superior courts comprising the High Courts, the Court of Appeal and the Federal Court are conferred the jurisdiction to deal with the matter.

## **Concept of Constitutional Review**

4. When a citizen or a litigant feels that he or she has been wronged, it is to the Courts, as the final bastion of justice that he or she turns to for redress. It is the very person who is aggrieved that is allowed access to justice, or in the context of our topic, to initiate constitutional review, which essentially concerns the invalidity of legislative and/or executive conduct to the extent that they are in excess of constitutionally permissible limits.

5. From the Malaysian perspectives, there are three (3) regulatory models or modes by which a constitutional review may be initiated by a citizen or a litigant. They are as follows:

(i) By invoking the Federal Court's exclusive jurisdiction under Article 128 of the Federal Constitution;

(ii) By invoking the Federal Court's referral jurisdiction under sections 84 and 85 of the Courts of Judicature Act 1964; and

(iii) By way of appeals.

6. The first mode is also commonly referred to as an 'incompetency challenge' where a citizen or a litigant would approach the Federal Court directly. Generally, the relief sought from the Federal Court is a declaration that certain laws enacted by either Parliament or a State legislature is null and void as Parliament or the State legislature as the case may be, had no power to enact such law. The special requirement under this regulatory model or mode is that the applicant must first obtain leave or permission from a single judge of the Federal Court before he could commence proceedings under this mode.

7. Under the second model or mode, where in any proceedings in the High Court a question arises as to the effect of any provision of the Constitution, the judge hearing the proceedings may stay the same and state the question which in his opinion has arisen as to the effect of the Constitution in the form of a special case, in a form which shall permit of an answer being given in the affirmative or the negative, by the Federal Court. After the Federal Court has answered the question referred to, the High Court shall continue to dispose of the proceedings in

accordance with the judgment of the Federal Court.

8. The third mode of review which is also known as the appellate jurisdiction refers quite simply to the ordinary appeal process where a dissatisfied litigant may appeal to the higher court against a decision of the lower court. In the Malaysian context, an appeal from a decision of the High Court shall lie to the Court of Appeal and from the Court of the Appeal to the Federal Court. This regulatory model or mode is essentially provided by statutes and the Rules of the respective courts. For this mode, the dissatisfied litigant or the appellant will have to exhaust the remedies at the correct tier of appeal, before they can move the higher court for constitutional review or redress.

9. In terms of statistics, 42 constitutional review cases were initiated from 2019 until 31 May 2024. The breakdown under the various regulatory models or modes relating to constitutional rights and freedoms are as follows:

(i) Under the Federal Court's exclusive jurisdiction: 10 cases

(ii) Under the Federal Court's referral jurisdiction: 8 cases

(iii) Under the appellate jurisdiction: 24 cases

10. Except for 7 cases under the appellate jurisdiction which are pending consideration, the numbers stipulated above are cases that have all been considered on the merits.

### **Constitutional Rights and Freedoms**

11. I will now move to discuss the subject of constitutional rights and freedoms as enshrined in Part II of the Federal Constitution under 'fundamental liberties', highlighting some of the cases brought under the various regulatory models or modes and the judgments rendered by the Malaysian Courts.

12. Before I delve into the case laws on the various subject matters, allow me to state that the Malaysian constitutional jurisprudence has developed in a way that the provisions on constitutional rights and freedoms are to be interpreted prismatically and broadly, in favour of the rights and freedoms.

13. The first provision on rights and freedoms that frequently comes up for constitutional review is Article 5 of the Federal Constitution. It guarantees the right

to life and personal liberty of a person. Life is the ultimate right of a human being. Article 5 has been accorded a broad construction. For example, in a case where a headmaster in a government school was dismissed on grounds that he had been convicted, though on appeal he was later released on a bond of good behavior, the Court of Appeal in holding that his dismissal from the public service was a disproportionate punishment, propounded the principle that the right to life should be read broadly so as to include the 'quality of life' and the right to a clean environment<sup>1</sup>.

14. Flowing from this principle, we have a case where numerous litigants had sued the local authority for their plans to redevelop a public park area. The Federal Court among others, liberalized the definition of *locus standi* in the law by allowing anyone affected or claiming to be affected by the destruction caused to the park to bring an action<sup>2</sup>.

15. The right to life and personal liberty encapsulated in Article 5(1) also fundamentally guarantees the right to a fair trial. Where the accused person is represented by a defence counsel who is flagrantly incompetent, the courts have decided that the accused person had been denied the right to a fair trial which entitled him to be acquitted and discharged<sup>3</sup>.

16. Implicit in the right to life guaranteed under Article 5, is also the right of access to justice<sup>4</sup>.

17. Also inextricably linked to the right to life and personal liberty contained in Article 5 of the Federal Constitution is the right to citizenship<sup>5</sup> and the right to

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<sup>1</sup> Tan Teck Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 1 MLJ 261.

<sup>2</sup> Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors and other appeals [2023] 3 MLJ 829.

<sup>3</sup> Yahya Hussein Mohsen Abdulrab v Pendakwa Raya [2021] 9 CLJ 414.

<sup>4</sup> Public Prosecutor v Gan Boon Aun [2017] 3 MLJ 12; Robinder Singh Jaj Bijir Singh v Jasminder Kaur Bhajan Singh [2024] 3 CLJ 647. Robinder Singh concerns the failure to supplement cause papers filed in English language with the translation in the National language. The question before the Federal Court was whether dismissing an interlocutory application on this ground alone would effectively deprive the appellant's access to justice. The Federal Court answered the question in the affirmative.

<sup>5</sup> Chan Tai Ern Bermillo & Anor v Ketua Pengarah Pendaftaran Negara & Ors [2021] 6 CLJ 472; CCH & Anor v Pendaftar Besar Kelahiran dan Kematian Malaysia [2022] 1 CLJ 1.

travel abroad<sup>6</sup>.

18. Another case law relevant to right to life and personal liberty concerns a group of men suffering from ‘gender identity disorder’. They initiated an action for constitutional review challenging the constitutionality of an Enactment passed by a State legislature prohibiting them from cross-dressing. Their claim was premised on the argument that the enforcement of that law rendered them subject to harassment in violation of (among others) their right to privacy implied in Article 5 of the Federal Constitution and their right to express themselves under Article 10. The Court of Appeal agreed with them on all counts and struck down the law so prohibiting them, as being unconstitutional<sup>7</sup>.

19. On the subject matter of equality, it is a right codified in Article 8 of the Federal Constitution. Clause (1) states that all persons are equal before the law and are entitled to the equal protection of the law. Clause (2) expressly forbids discrimination on the grounds of race, descent, place of birth or any gender unless expressly authorized by the Federal Constitution.

20. Recently, the rights of women under Article 8(2) were ensured by the Federal Court when it pronounced section 498 of the Penal Code unconstitutional. Section 498 of the Penal Code provides that it is an offence to entice a married woman. Put another way, it allows a husband to complaint against the enticement of his wife. A wife however is not allowed to complaint against the enticement of her husband. The Federal Court found that section 498 of the Penal Code unlawfully discriminates only on the ground of gender which is violative of Article 8(2)<sup>8</sup>.

21. On the subject of freedom of speech and expression, while the Malaysian

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<sup>6</sup> see the minority judgment in *Maria Chin Abdullah v Ketua Pengarah Imigresen & Menteri Dalam Negeri* [2021] 2 CLJ 579.

<sup>7</sup> *Mohamad Juzaili bin Mohd Khamis & Ors v State Government of Negeri Sembilan & Ors* [2015] 3 MLJ 513. The decision of the Court of Appeal was reversed by the Federal Court on procedural grounds but the Court of Appeal’s decision on the merits received no adverse comment from the Federal Court (see *State Government of Negeri Sembilan & Ors v Muhamad Juzaili bin Mohd Khamis & Ors* [2015] 6 MLJ 736). Subsequently however, the Federal Court overruled its own decision in *Muhamad Juzaili*. (see *Gin Poh Holdings Sdn Bhd v The Government of the State of Penang & Ors* [2018] 3 MLJ 417 at [33]).

<sup>8</sup> *PP v Lai Hen Beng* [2024] 2 MLRA 21.

Federal Constitution guarantees every citizen such right, the freedom can be restricted on the grounds of interest of security of the Federation or any part thereof; friendly relations with other countries; public order, public morality and restriction designed to protect the privileges of Parliament, the Legislative Assembly or to provide contempt of court, defamation or incitement of any offence<sup>9</sup>.

22. Notwithstanding the restrictions, the constitutional rights and freedoms for speech and expression have been ensured by the Malaysian Courts. In a case where four (4) books were banned by the Minister of Internal Security on the ground that the publication of the books was prejudicial to public security and order, the Court of Appeal held that the order by the Minister to ban the books was illegal and that the order amounted to a restriction on the author's constitutional and fundamental right to freedom of expression<sup>10</sup>.

23. In a case involving the publication of 'The Edge' and the 'The Edge Financial Daily' which was suspended for three months by the Minister for reporting about the possible mismanagement of 1MDB, the High Court allowed the constitutional review to quash the suspension order of the Minister. The decision of the High Court was premised among others, on the ground that the suspension was unconstitutional and in violation of Article 10(1) of the Federal Constitution. The decision of the High Court which was affirmed by the Court of Appeal ensured the constitutional right on freedom of speech and expression<sup>11</sup>.

24. Freedom of religion is provided for in Article 11 of the Federal Constitution. In a case where an identity card of a person bears a Muslim name but she has never professed the religion of Islam nor has she led a life as a Muslim, as she was raised as a Buddhist by her Buddhist mother, the Federal Court, based on

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<sup>9</sup> The following legislations have the effect of restricting the rights under Article 10(1) of the Federal Constitution:

(i) Printing Presses and Publication Act 1984;  
(ii) Official Secrets Act 1972; and  
(iii) Sedition Act 1948.

<sup>10</sup> Mohd Faizal bin Musa v Kementerian Keselamatan Dalam Negeri [2018] 3 MLJ 14.

<sup>11</sup> The Edge Communication Sdn Bhd v Ketua Setiausaha Kementerian Dalam Negeri & Anor [2016] MLJU 1842.

the evidence, allowed her application for a declaration that she was never a Muslim, thus ensuring her right to freedom of religion<sup>12</sup>.

25. Article 13 is on the right to property. The law through the Land Acquisition Act 1960 allows for compulsory acquisition of land by the State Authority if the land is needed for public purpose. In the event of compulsory acquisition of land, the law requires the owner to be compensated for the deprivation of his property. In order not to infringe Article 13 of the Federal Constitution, it has been held by the Malaysian Courts that compensation should be construed to mean a fair and adequate compensation<sup>13</sup>.

26. In addressing the complaint of adequacy of compensation, the law requires that the Court balance the competing interests of the land owner and the acquiring authority or the paymaster<sup>14</sup>.

27. The Malaysian Courts have indeed been vigilant in ensuring rights to property. It recognized that a statute should not be interpreted as to allow for the violation of an owner's right to quiet possession of the property and that any duty or obligation imposed by statute or any authority must be performed lawfully<sup>15</sup>.

28. Even in matters concerning seizure of assets/properties under the Anti-Money Laundering, Anti-Terrorism Financing and Proceeds of Unlawful Activities Act 2001, it was acknowledged that there is a need to balance the wide powers of the enforcement agency and the need to protect the rights of possession and peaceful enjoyment of the property guaranteed under Article 13 of the Federal Constitution<sup>16</sup>.

29. Another case signifying how the Courts have ensured right to property is where the Court declared section 4C of the Income Tax Act 1967 unconstitutional.

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<sup>12</sup> Rosliza binti Ibrahim v Kerajaan Negeri Selangor & Anor [2021] 3 CLJ 301.

<sup>13</sup> see for instance *Jais bin Chee v Superintendent of Land & Surveys Kuching Division* [2014] 6 MLJ 439.

<sup>14</sup> *Tegas Sejati Sdn Bhd v Pentadbir Tanah dan Daerah Hulu Langat & Anor and Another Appeal* [2024] 4 CLJ 1.

<sup>15</sup> *Tenaga Nasional Bhd v Bukit Lenang Development Sdn Bhd* [2019] 1 MLJ 1.

<sup>16</sup> *Raqeem Rizqin Enterprise & Yg Lain v Ketua Polis Negara & Satu Lagi* [2019] 8 CLJ 41 where the Court of Appeal held that where there are certain follow up actions to be taken within a prescribed period, and those actions have not been taken, the assets or properties seized must be released.

By section 4C, the Director General of Inland Revenue was given the power to impose tax on compensation received by a company for its land compulsorily acquired by the government. It was held by the Federal Court that the effect of section 4C was to diminish the value of compensation awarded to the company, thus rendering Article 13 on adequate compensation, illusory<sup>17</sup>.

### **Conclusion**

30. By whichever of the three models or modes a citizen or litigant initiates a constitutional review; the Malaysian Judiciary will continue to make a proactive and collective effort at ensuring constitutional rights and freedoms. The above case laws are, but some of the decisions of the Malaysian Courts attesting to that effort. As it stands, the current regulatory models are sufficient and have worked well to serve justice. There is thus no discussion on the necessity to update or reform the current system.

Thank you.

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<sup>17</sup> *Wiramuda (M) Sdn Bhd v Director General of Inland Revenue* [2023] 8 CLJ 21.