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Corruption and Accountability of Public Officials: Comparative analysis from Malaysia and Indonesia

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Abstract
Corruption and accountability are challenging issues of public officials in Malaysia and Indonesia. This study compares approaches taken to control corruption and abuse of powers among public officials under Administrative Law. It comparatively examines the presidential and parliamentary systems and to study reported cases. Administrative Law approaches in both countries are analysed to determine its mechanism in this matter. The finding suggests a fusion of both approaches by an increasing use of codes and policy guidelines to enhance transparency and accountability. These will eventually promote good management and trust of the public towards the administration of both nations.

Keywords: Corruption; accountability; public officials; good governance

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1.0 Introduction

Controlling corruption and enhancing accountability in public administration is the responsibility of the government of any nations worldwide. Nonetheless, the widespread of corruption transcends boundaries. Transparency International reported that the top five least corrupt countries in the world share similar features. Among those features are of good governance and a high standard of integrity in public service. These are the key features for corrupt-free public officials.

In the recent Corruption Perception Index 2019, Malaysia ranks at 51 with a score of 53 whilst Indonesia stays at 85 with a score of 40 (Transparency International 2019). This score has put Malaysia within the 1/3 countries with a score of above 50. Indonesia has remained within the group scoring below average on the perception index in their perceived levels of public sector corruption. Indeed, statistics from the Malaysian Anti-Corruption Commission consistently recorded a high percentage of public officials involved in corruption (SPRM 2020). In Indonesia, the country's Corruption Eradication Commission reported that the highest corruption cases came from the Central Administration (KPK 2020).

1.1 Purpose of the Study

This study explores the use of Administrative Law as an alternative measure in monitoring corruption among public officials. It aims to investigate the mechanisms of corruption control among public officials in Malaysia and Indonesia from the lens of Administrative Law. Understanding different systems of governance and legal measures can contribute to the improvement of public administration in both countries.

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1.2 Objective of the Study

This paper has the objectives of identifying the mechanism of legal control of corruption represented by difference system of administration adopted in Malaysia and Indonesia.

2.0 Literature Review

There is abundant literature on the diversity of corruption. Corruption exists at different levels and perpetrated by various personnel. Generally, corruption is an abuse of public office for private gain (Kaufmann 1997) (Tanzi 1998). The World Bank extended the meaning of *abuse* to include accepting, soliciting and extorting bribes for private gain. Patronage and nepotism are also part of corruption (World Bank, 1997). The United Nations describes corruption to constitute the combined effect of the monopoly of power plus discretion in decision-making in the absence of accountability (United Nations, 1997). Corruption impacted on the society politically, economically and socially (Rose-Ackerman 1997) (Duasa 2008). Transparency International identifies poverty as a factor that contributes to corruption and becomes part of a mean of survival (Transparency International 2000). Jong-Sung and Khagram (Jong-sung and Khagram 2005) imply that there is a direct link between poverty and corruption and that economic inequalities lead to a greater incidence of corruption (Kaufmann 1997). Bribes are considered as incentives to cover the costs of living to make up for low income earned as government officers. With the opportunity offered by being public officials, they utilised the money earned from corrupt practices to maintain the standard of living (Quah 1988) (Rose-Ackerman 1997).

Control of corruption is through criminal law enforced by anti-corruption agencies. In Malaysia, the Malaysian Anti-Corruption Commission (MACC), created under the Malaysian Anti-Corruption Commission Act 2009 enforces the law against corrution. In Indonesia, the Corruption Eradication Commission (KPK) enforces Law Number 8 of 2010 concerning Prevention and Eradication of Money Laundering (TPPU) and Law Number 20 of 2001 concerning Eradication of Corruption. Corruption offences are difficult to prove. With the high legal burden of proof and technicalities in establishing criminal guilt, administrative law provides for an alternative control to corruption and abuse of powers. The exercise of discretion is monitored through the principles of accountability and good governance. According to Linder, the pursue of accountability is a response to the iniquitousness associated with discretion (Linder 1978). Exercise of discretion must be legitimised and justified to prevent abuse (Stone 1995). Discretion is the exercise of subjective judgment allowed by statutes, rules or judicial decisions (Applegate 1982). Justice William Douglas, as quoted from the case of *State of New York v United States* (1951) 342 US 822 at 844, states, "Absolute discretion, like corruption, marks the beginning of the end of liberty". Public officials must be accountable in performing his duties and take sanctions and redirection in the event of a breach. Accountability is one of the features of a democratic nation which is used to control corruption. Jillian & Dimancesco (2020) confirmed that the assimilation of accountability, transparency and anti-corruption measures can reduce the risk of corruption.

3.0 Methodology

This study is socio-legal research that was designed based on the primary and secondary data. Instances of corruption and abuse of powers addressed form the lens of administrative law and system of governance can be a mechanism to control such abuse within the public administration. The discussion in this paper is limited into looking at the laws and theoretical aspects in governance. No empirical analysis made in as it focuses on a comparative doctrinal analysis and theoretical discourse. Analysis is made on the different system of governance i.e. the presidential and parliamentary system. Upon examination, public law approaches under administrative law can provide for mechanisms of control against corruption and abuse of power in addressing issues of lack of accountability in public administration. The data is examined via content analysis approach and doctrinal study.

4.0 Findings and Discussion

4.1 Presidential system vs parliamentary system

Corruption and abuse of power have been prevalent in some new emerging nations alongside matured old States. Studies have indicated that well-established democracies show lower levels of corruption than authoritarian regimes or young democracies (Fjelde and Hegre 2014) (Kalenborn and Lessmann 2013) (Mohtadi and Roe 2003). Research findings have also indicated that high levels of corruption undermine democracy (Kolstad and Wiig 2016) (Kubbe 2015) (Montinola and Jackman 2002).

Indeed, both the presidential and the parliamentary systems practice democracy. Malaysia practices the system of parliamentary democracy, and the Indonesian counterpart, of the presidential system. The parliamentary versus presidential design choice affects both the constitutional law of administration and the politics of administrative action. The parliamentary system refers to the institutional arrangement where the people will elect their representatives in parliament and, those who command control of parliament will form the government of the day. The executive, which is the government of the day, is accountable, through a confidence relationship, to the parliament (Strøm 2000) (Steffani 1979). Hence, in the parliamentary system, the Prime Minister and his cabinet are accountable to the Parliament. Through the vote of no confidence taken at the House of Representative, the Prime Minister and his cabinet can be voted out of office.

The presidential system of government is where the people will choose both the executive, i.e. the President and the members of the legislative assembly through voting. The people will have a broader selection of choices. The President, which is the chief executive,

and the Legislative assembly will have a fixed term of office and involve in policymaking. The executive and the legislative body may comprise of different political affiliations. Under pure presidential system, the President has the right to retain ministers of his choice regardless of the composition of the legislative assembly (Mainwaring and Shugart 1997).

Presidential systems have attractive features that can promote democracy and accountability. Mainwaring and Shugart claim that empowerment of voters through the election of top officials legitimises the appointment and contributes to democracy (Mainwaring and Shugart 1997). Voters can support a candidate from a political party at the legislative level but choose another from a different political affiliation as the head of government. This election effort will indirectly create electoral accountability where elected policymakers are responsible to the people. Presidentialism is superior to parliamentarism in this context because the chief executive wins by popular vote. There is direct accountability between voters and elected officials. The results of the next election signifies the due performance of the President and his political parties. Election rights of the people allow for maximum accountability while the assembly election permits broad representation (Mainwaring and Shugart 1997). Hence, there will be multiple principles where public officials must be accountable to. Public officials may have to report to the president as well as to one or several legislative chambers. Besides, they will also be monitored by the courts (Strøm 2000). Nonetheless, it must be noted that despite whichever system of governance one country adopts, its indirect effect may contribute more on democratic stability due to the complexity on the nature of governance system (Hiroi and Omori, 2009).

Parliamentary democracy conversely reflects a more straightforward system of governance. In a single chain of command, each delegate will be accountable to one principal (Strøm 2000). Through the doctrine of individual ministerial responsibility, a Minister is responsible to parliament for the actions of his public officials. A political appointee of a state-owned corporation will be directly accountable to the individual who appoints him. In Malaysia, this governs the relationship between the Prime Minister or Ministers and their top officials. The appointment of high-ranking government officials such as the Secretary of States and CEOs of important Government Agencies such as Khazanah is usually subject to the approval of the Prime Minister or Ministers. There is a risk that these political appointees will only be loyal towards the individuals who appointed them. This practice, however, is not unique to Malaysia. Indonesia, whilst conforming to the presidential system, the minister of the Ministry of SOE (KBUMN), for example, is empowered to appoint top officials of State-Owned companies such as Board of Directors of Pertamina. These have resulted in people having to rely on more indirect chains of delegation and accountability. The single chain of command where each agent is accountable to one principal has created the burgeoning culture of 'yes' man. The subordinate aims to please his superior rather than performing his function legitimately (Strøm 2000). The interest of the political parties in the parliamentary system overrides that of the people (Gerring, Thacker and Moreno 2009).

Nonetheless, administrative efficiency is regarded to be superior in the parliamentary system (Strøm 2000). Administrative efficiency is better here due to more successful passing of legislation and, administration is much more cost-efficient (Moe and Caldwell 1994). On the contrary, policy decisions in the presidential system involve more than one player who is legitimately and democratically elected by the people. For example, President Trump in the United States may formulate his policy for the nation and the Congress (the lawmakers) may also have their direction in policymaking. Similarly, in Indonesia, the President and the People's Consultative Assembly may have their policy directions. Elections accord them with a degree of veto power and each person have significant roles in policymaking. These multiple veto opportunities present some challenges in the passing of legislation. Successful bills are principally products of policy bargains that are practically impossible to reverse once legislated (Eaton 2000). Attempt to veto policy changes is difficult if different parties control the executive and legislative branches (Eaton 2000).

Besides, legislators in presidential systems are more cautious about delegating discretion to public officials for fear of unwarranted use of these officials by the president. In the United States, once the legislature has delegated powers to the president, any attempts by Congress to overturn executive actions require the acquiescence of the executive himself. Indonesia similarly comprehends this experience. Contrary, in parliamentary systems, legislators retain ultimate authority over the cabinet and government officials if they undermine the majority in the legislature and the object of the law (Cowhey and McCubbins 1994).

Besides, identifying who should be accountable can also be quite challenging in a presidential system. The power-sharing between the executive and legislative branches opens opportunities to evade sole responsibility for policy failures. To hold someone accountable becomes more complicated. In parliamentary systems, the people can identify responsible parties in the event of policy failure with ease (Eaton 2000). The centralised governmental power in a parliamentary system creates more centralised accountability (Pierson and Weaver 1993).

4.2 Discretion, accountability and judicial review in government administration

One can perceive the modern framework of government's accountability from several levels; namely, political accountability, administrative accountability, professional accountability and democratic accountability (Cendon 2000). Political accountability is a relationship that links those in the high positions of the administrative structures and has vertical as well as horizontal dimensions (Cendon 2000). Within its vertical dimension, officials are appointed and removed due to their political positions. The horizontal dimension refers to the relationship of the government vis-à-vis the Parliament. This constitutional set-up explains Malaysia's system of governance. This dimension of political accountability is unclear in a system that practices presidential democracy, like Indonesia (Cendon 2000).

Under the parliamentary system, political accountability is centred within the practice of ministerial responsibility. This doctrine imposes on ministers to accept responsibility for actions performed on their authority (Stone 1995) and promotes accountability of public officials. This public character of accountability provides safeguard against corruption, nepotism, and other forms of inappropriate behaviour (Rose-Ackerman 1999) and enhances the integrity of shared governance.

Malaysia adheres to the principles of administrative law that governs the exercise of discretion of public officials. Accountability embeds within it, the principles of good governance via soft laws, guidelines or Standard Operating Procedure of each government departments. A prominent chain of command in this constitutional set-up effectively makes ministers as a conduit between democratically elected parliaments and public administration. Ministers, being responsible to parliament, may direct and control the work of those under their command (Ziller 2007) and maintains official accountability.

Different from Indonesia, codified laws govern public officials' actions and discretions. Discretion is not allowed without the sanction of regulations. Indonesia has Law No 30 of 2014 on Government Administration that regulates the administrative exercise of discretion; Law No 5 of 1986 and the Laws and General Principles on Good Governance (AUPB). Abuse of authority is an element of a criminal act of corruption as per Article 3 of Law Number 31 of 1999, which was amended by Law Number 20 of 2001 (Hidayat, Marten and Razak 2018). These laws provide a clear scope of the exercise of discretion. Public officials Charges can be charged for the wrongful exercise of discretion. Nazaruddin Sjamsudin is an example where a former Chief of General Election Commission was sent to jail for seven years for abuse of powers (Andi 2017). Hence, Indonesia does not tolerate flexibility; rules dictate every action. This way, corruption and abuse of authority are prevented.

4.3. Legality and Judicial Review of the administration

The principle of legality under administrative law is perceived differently according to different jurisdictions. Actions of officials require strict legal formalism conditioned by law (B Guy Peters and Jon Pierre 2007). In the Netherlands, Germany and France, the legality requirement features three aspects: first, the administrative action must be founded on the law; secondly, the law must provide a standard for the content of the administrative action and third, the administration must apply the law (Oldenziel, 1998: 45). The Court can scrutinise administrative decision-making since the statute employs the rights-based theory. Only minimal interference with individual rights is allowed. The exercise of administrative discretion is fiercely guarded (Nolte 1994). Officials must make decisions based on the rule of law. The law is a set of rules posited by the legislature (Bovens and Zouridis 2002) (Bignami 2011). Hence, the principle of legality is statute-based.

Indonesian Constitution, which outlines the fundamental law in Indonesia, provides for judicial review. The judicial review exists but limited under specific settings of codified law. Judicial review decision, once made, will generally be binding as seen in Law No. 12 of the year 2011, particularly in Article 8. Indonesia has already had a clear administrative law to control any possible abuse through its codified law. This provides for legal certainty on the scope of discretion allowed (Nalle 2018). Some, however, argue that reading of both Government Administration Law (Law No. 30 of 2014) and Law No 20 of 2001 (Corruption Eradication Law) has resulted in over criminalisation of officials in the exercise of discretion. This is counterproductive considering the increasing number of criminal actions taken against administrators (Gumbir and Nurhayati 2016).

Unfortunately, this does not eliminate the abuse of discretion within the Indonesian administration. Policy rules in Indonesia which govern its public officials exercise of choice does not fall within the purview of the Government Administration Law. There have been instances where the use of policy rules violates constitutional rights which cannot be subject to judicial review under the existing codified law (Nalle 2018). Hence, a review of discretion is only made through administrative efforts to the Supreme Court. Supreme Court Regulation No 1 of 2011 recognises the Supreme Court's power of judicial review. This measure, unfortunately, does not provide for legal certainty that is generally practised in Indonesia. Decisions relating to these issues reflect disagreements and inconsistencies among judges of the Supreme Court because the Court Regulation No. 1 does not provide an exhaustive list as to what amounts to rules and regulations. This reflects the drawbacks of judicial control on administrative discretion in Indonesia (Nalle 2018). Interested individuals can certainly exploit these weaknesses while performing their public duties.

Judicial review is a mechanism to control the exercise of administrative actions in common law countries like Malaysia. Indeed, under the principle of legality, actions of administrators must be sanctioned and authorised by law. The recognition of the court power of judicial review in common law countries reflects a degree of extension on the concept of legality (Woehrling 2006). Judicial review refers to the process where the Court exercises its jurisdiction over the administration performing public acts and duties. Following the rule of law, executive actions and decisions must always be subject to judicial review to prevent abuse of power and the flourish of corruption within the government administration.

Malaysian administrative law has an established mechanism of control against abuse by public officials. Judicial decisions are binding. Laws are not only that passed by parliament but also decisions of the court. The power of judicial review in Malaysia is constitutionally enshrined in Articles 4(1), 75, 128 and 162(2) of the Federal Constitution. Here, judges have the duty to preserve, protect and defend the Constitution, which includes the inappropriate exercise of discretionary power. This power of judicial review ensures the accountability of public officials while performing their public duties. It embeds flexibility. In the absence of clear written law, the court becomes the guardian against abuse of power to preserve accountability. There are several grounds for judicial review on administrative actions. They are substantive *ultra vires*, extended *ultra vires* and procedural *ultra vires*. Hence, it is safe to say that despite different set up of the law, control on administrative discretion remains in place.

The above approaches on judicial review reflect degrees of flexibility in the control of public officials' exercise of discretion. While acknowledging that discretion is necessary for effective administration, too much and uncontrolled discretion can lead to abuse of power. Corruption may be the byproduct. Indeed, contemporary approach on control of public official or administrative actions and accountability have seen other additional control mechanisms and substantive considerations on top of judicial review. Public officials must beware not only of courts policing for the rule of law but also ombudsmen, parliamentary oversight committees, constitutional rights, transparency guarantees, and supranational regulatory committees (F. Bignami 2011).

5.0 Conclusion and Future Recommendations

The administrative law in Malaysia depends on the court's control via judicial review. This promotes flexibility that is needed in public officials' decision making. Nonetheless, the approach taken by more progressive nations like Australia is moving towards developing a stronger legal framework for administrative decision-making through statutory innovation (Stone 1995). Hence, some countries are adopting the civil law approach by enacting statutory guidelines or written standards to be observed by the public officials.

Some nations are comfortable in having soft law to govern the exercise of discretion. There is increasing use of codes of ethics and policy guidelines governing the conduct of decision making. In Canada, soft law has been used to render discretionary judgments more transparent and coherent (Sossin and Charles 2003). These ethical and policy guidelines assist the decision-making process so that discretion can be exercised appropriately. In exercising discretionary powers, officials should comply with standards of rationality, purposiveness and morality. More specific legal principles of accountability can be developed from these (Galligan 1986). Transparency is contributed by the fact that ethical and policy guidelines are published publicly. This with indeed contribute to accountability and ease the process of judicial review.

In the Malaysian context, the formation of Governance, Integrity and Anti-Corruption Centre (GIACC) and the recent launching of the National Anti-Corruption Plan 2019-2023 will reflect the formulation of policies on governance, integrity and anti-corruption measures within public service. In promoting accountability and transparency, production of guidelines or Standard Operating Procedures can be a measure to assist administrators in the running of the government businesses.

For Indonesia, control on the exercise of administrative discretion is governed mainly by codified law. Judicial review is allowed but needs to be sanctioned by law. Perhaps it is high time to allow for extended power of judicial review as a form of control. Some flexibility in the interpretation of the scope of administrative action can help ease the administrative works and promote efficiency.

Despite the above differences, democratic virtues are achievable in both presidential and parliamentary systems, albeit in varying degrees (Albert 2010). In the control of abuse of powers of administrators and government officials, irrespective of whichever system of governance adopted, there is an almost similar mechanism in place to ensure efficiency and accountability. Greater promotion to openness and transparency adopted by both system (Markell, 2005) may provide some solution against corruption and abuse or powers.

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Paper Contribution to Related Field of Study

The outcome of the study may assist both nations, head of departments and government officials, policymakers and the legal fraternity in strengthening mechanism of control against corruption and abuse of accountability by adhering to controls afforded by administrative law as an additional measure to criminal actions.

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