



Reviving the Local Government Election in Malaysia?

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ABSTRACT

Objective – Malaysia used to practice local government election before it was suspended due to several issues. Following the abolishment, the mode of election has been changed with the appointment of mayors and councillors in each local government level. However, in the past few years, especially after the 12th Malaysian General Election, this issue became debated among the Malaysian, not only the politicians and political parties, but also from non-governmental organisations and the people. Among the main reason why this election has not been able to be practiced in Malaysia is due to the absence of laws to allow this election to be held. Therefore, this paper attempts to discuss about the local government election issue within the context of legal perspective.

Methodology/Technique – This study adopted the qualitative approach to provide reliable data and information needed by conducting elite interviews with two constitutional experts and three delegates from Pakatan Rakyat and non-government association representative.

Findings – The Pakatan Rakyat (the coalition of opposition parties) especially Democratic Action Party has consistently endeavoured to revive local election in Malaysia. Unfortunately, the idea to restore the power of the third votes is disagreed by the Barisan Nasional (the ruling government). This indirectly means that if the Pakatan Rakyat insists to hold the election, they are facing obstruction from the federal government. However, the question whether the local government election can be reimplemented or not is debatable since both federal and state government claimed to have authority pertaining to the local government matter. This issue was brought to the Federal Court the court has ruled that the states have no jurisdiction to hold the local government election.

Novelty – There were few past studies that have been researched about this topic. Furthermore, since the local government election was suspended and discontinued, this topic seems has not been discussed further, thus provide limited information for academic discourse.

Type of Paper: Empirical

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1. Introduction

Local government system in Malaysia was influenced by British when they occupied Tanah Melayu. In the Malaysian context, the local government is including any local authorities such as municipalities, district

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councils, local councils and board of municipal autonomy. The bodies formed under the law jurisdiction and were stated as apart from federal and state government. Local government can be understood as a subordinate unit to state or federal government, in accordance with the law provision (Norris, 1980; Phang, 1989; Taylor, 1948). Thus, with consonance to this practice, local governments in Malaysia are subject to their superior government, where it is not fully decentralized as many other local governments in other countries such as Indonesia.

Local government in Malaysian context was clearly defined in Royal Commission of Inquiry Report, which also known as Athi Nahappan Report, which was to clarify the concept of local government (Athi Nahappan, 1970):

1. A government that responsible for local affairs, in which higher government (central or state governments) delegate authority to local governments to administer.
2. The local government is lower than federal or state government and also subject to any superior government (as according to law provision).
3. Have limited autonomy to the extent provided by the federal or state government and is usually associated in the field of finance matters and administration.
4. The local government has the characteristics of representative and non-representative.
5. If representative, thus elections need to be held for select the local councillor. But if non representative, it is vice versa. With or without a representative, the local government still holds the autonomy upon financial matters and administrative functions.
6. The local government is a separate organisation from the federal state or state government and also from other's local government units. Local government also has the power to sue, be sued, make contacts and own property.
7. The function of local government is to serve public within the jurisdiction area of particular local government.

In the early formation of local government in Malaya, the organisation was governed by the commissioner members which were appointed by the Governor or High Commissioner of British (Taylor, 1948). However, in 1857 and 1858, municipal elections were held to replace the appointment process and thus, municipal commissioner position filled by the elected people. This local government electoral system was introduced with the approval of the Local Authorities Elections Ordinance 1950. The ordinance also maintain the system as it was previously practiced, where it was administered by a council consisting of a president and council members, either wholly or partially selected (Phang, 1989).

Nevertheless, in 1965, federal government has suspended the local government elections due to the emergence of several issues such as Malaysia-Indonesia confrontation. Therefore, the election does not allow being further conducted (Tennant, 1973). Following to the suspension of the local election, it thus affected the democracy system in Malaysia. Till today, the local councillors are appointed by whom in the power. For instance, in Kuala Lumpur, the local councillors are appointed by the federal government (which relates to Barisan Nasional as the power holder in federal level) and in Selangor and Penang, which is under Pakatan Rakyat administration, and therefore appointment of local councillors are according to the state will. Other states are likewise.

2. Research Methodology

This study adopted the qualitative approach to provide reliable data and information needed. Furthermore, there are very limited information and sources related to the scope of study, thus focused on interviewing the informants that have knowledge regarding the topic seems convenient to be used. As according to Guba and Lincoln (1994), in-depth interview are not meant to be representative, but they are purposely chosen to provide the required information. Besides, they were also selected due to the stance of having quality criteria such as reliability and validity, hence can arguing with the correct description and explanation while giving opinion

and sharing information (Poortman and Schildkamp, 2012). Therefore, for the purpose to understand the local election issue from the constitutional perspective, two constitutional experts were interviewed – to illustrate the constitutional practice in Malaysia especially in understanding the issue being discussed. In addition, this study has also interviewed three delegates from Pakatan Rakyat and one non-government association representative.

3. Reinstatement of Local Government Election

The proposal to restore democratic process at local government level has the support from mass public and also from the non-government organisation (Wong, 2010). This was evident in Merdeka Centre study, where 71% of the respondents agreed if the local government election to be reinstate. The survey has simultaneously proved that even though the local election was abolished, it is still relevant to be reinstated according to public choice (Merdeka Centre, 2010).

Apart from that, there are several political parties which tend to bring back democracy at local government level. Definitely refer to the opposition parties, as it was abolished by the incumbent government, Barisan Nasional (formerly known as Alliance). One of the opposition parties that seriously wanted to have local election is Democratic Action Party (DAP). DAP is consistently championed the issue of re-implementing the local government election in Malaysia. Among of the DAP members who had raised this issued is Tan Kok Wai (Cheras Member of Parliament). He has led the DAP's central committee to restore local government election and also suggested that the Mayor of Kuala Lumpur must be chosen through the electoral process, not appointed by the Ministry of Federal Territories. Additionally, DAP Kuala Lumpur chairman, Dr. Tan Seng Giaw (Kepong Member of Parliament) also stated that it is a suitable time to elect the Mayor and local authorities President through election process, as what Malaysia had practiced in 1963 (Ziauddin Sharuddin, 2008).

Besides, since Selangor and Penang are controlled by the opposition (Pakatan Rakyat), these two state governments have recommended to the Election Commission of Malaysia to conduct local government elections in respective states (Election Commission, 2010). Unfortunately, Barisan Nasional disagreed to the idea to revive the third votes in Malaysia which can be identified through clear statement made by the Prime Minister himself, Datuk Seri Najib Razak. The Prime Minister states that there is no requirement to return the election because it cannot guarantee the improvement of local authority service quality. In addition, according to the Prime Minister, the local election will cause too much politicking issues in local government, instead of focusing to the responsibility of providing better services to the people (Johari Ibrahim, 2010).

Prime Minister views can be interpreted as a sign of unwillingness of the federal government to agree with the idea of restoring local government election in Malaysia. It also indirectly means that if the Penang and Selangor state government insist to hold the election idea, they have to deal with the obstruction from federal government. However, to what extent federal government has the power to stop local election? It has been stated that local government administration is under the state jurisdiction (as for Penang and Selangor) according to Article 4, Second List of Federal Constitutional. Nevertheless, Malaysian experienced has proved that the federal government has predominated state government in local election issue. This refers to the abolition of local government election in 1964 made by the Alliance party by using the Emergency Act as an instrument to suspend the local election in Malaya (Athi Nahappan, 1968).

The implication of this action has led to the repeal of Local Government Election Act 1960 (Act 473), which was later explained in the Local Government Act 1976 (Act 1717) within Article (15). Act 171 came into forced in Selangor starting January 1st 1976 and gazetted in Sel. P.U. 8/1977 in the Selangor State Government Gazette. While in Penang, the act came into effective since 15th December 1976, as accordance to Government of Penang Gazette (through Pg. P.U. 73). The repeal of Act 473 thus stops local election in Selangor during that time (Election Commission, 2010). Besides that, Act 171 subsection 10 (1) has determined that the local councillor for any local government must be made through appointment under the authority of state government (Local Government Act 1976, 2010).

Therefore, due to the abolition, today's Selangor and Penang state government have to confront the legal provision if they insist to pursue the idea to bring back local government election in both states (Wong, 2010). This view agreed by the informant, who was the former Selangor State Executive Councillor. According to him, legislation is among the main reason why until now state government is unable to implement the local election in Selangor. With so many acts and ordinance need to be referred, it brings a lot of questions whether the state government has the right to implement the local government election or not? Do they have the authority to reinstate the democracy at local level? What about the federal government power with regards to this issue? Is the repeal of Local Government Election 1960 has turned off the democratic process at the local government level?

4. Local Government Election and Constitutional Argument

Practice of democracy at local government level in Malaysia has begun in 1950, when the Local Authorities Ordinance 1950 was introduced to select the representative for this third tier of government (Goh, 2005). In addition, on 1st June 1960, Local Government Elections Act 1960 (Act473) came into force (Tan, 2009). Act 473 was intended to provide the election should be held to elect Town and Rural Boards. Similarly, within 5A section of Act 473, has allocated the members of Local Council are selected through the election process (Tunku Sofiah Jewa, 2003). Both acts allowed the local government election to be implemented and these have indirectly given the power to public to choose their own representative. However due to the issue of confrontation between Malaysia and Indonesia, on 3rd September 1964, declaration of emergency has been regulated by the government, based upon the authority conferred by Act 150 (Proclamation of Emergency) of the Malaysia Constitution (Athi Nahappan, 1968). Additionally, the parliament has given approval to enforce the Emergency (Essential Powers) Act 1964 on 18th September 1964 (Tan, 2009). Immediately, two bills, that were Emergency (Suspension of Local Government Elections) Regulations (1965) and Emergency (Suspension of Local Government Elections) (Amendments) Regulations (1965), have suspended the local government election process, (Athi Nahappan, 1968), which was scheduled to be held in 1965 and 1966 (Goh, 2005).

However, after the confrontation ended, and the relationship between Malaysia-Indonesia recovered, the Proclamation of Emergency was never cancelled. The reason given by the federal government is the country was still threatened with security issue from the communist, as the communist movement is still endangering the country by that time (Athi Nahappan, 1968). Furthermore, although local government election was suspended, the federal government continuously amended the Act 473 from time to time. It can be seen through the first amendment has been made towards Act 473 during the Emergency (Essential Powers) Ordinance No. 71, 1971 was enforced. This amendment later incorporated into Local Government Elections Act (Amendment) 1971. Apart from that, Act 473 was revised again on 1st September 1991 based on Law Revision Act 1968 and it is the last amendment has been made. The latest amendment of Act 473 came into force on 16th September 1991 and since then, no further amendment was made and remains until today without any changes (Tan, 2009).

The abolition of local election made by the federal government somehow created confusion regarding the legal jurisdiction between federal and state government. According to Act 72, Malaysia Constitution, federal and state government have their own legislative power as enshrined in the constitution. Besides that, perusal to item 4 of List II of the Ninth Schedule Malaysia Constitution clearly stated that local government outside the Federal Territories is falls under the state responsibility which include local administration, the municipal corporation and local government election itself. The constitution precisely stated that local government is within state jurisdiction. Therefore, any law relating to local government is under state authority either to hold or execute the law. The legislation matter also has been discussed by CGG in their advocacy paper to re-implementing local election in Selangor. Within the advocacy paper, the CGG specifies three strategies that the state can apply if the state government keen to reinstate local government election in Selangor. However, among the three strategies given, only third strategy requires the cooperation between state and federal

government (that is a need to make legislative amendments). Whereas for the first and second strategy, it allow the state government to implement the local election as according to jurisdiction given in law provision.

Hence, when this issue was discussed with two Malaysian constitutional experts, the study found that both of them have different views pertaining to this issue. For instance, according to first expert, he signified that the state government has the right to implement the local election based on the constitution provision (Second List of Ninth Schedule of the Malaysia Constitution). Additionally, if the states insist to reinstate the local election, they have to create relevant enactment of local election without getting any consent or approval from the federal government.

However, different argument was expressed by the second Malaysia Constitution expert that was interviewed, whereby according to her, the absence of laws to allow the local government election has simultaneously caused the democracy process at local level cannot be implemented. In addition, referring to Item 6 (a) in Federal List of Ninth Schedule asserts that “the machinery of government, subject to the State List, but including – (a) elections to both Houses of Parliament and the Legislative Assemblies of the States and all matters connected therewith”, implies that the Parliament had the power to enact law which include the local government election law (i.e. government machinery is Election Commission to conduct election).

However, according first expert, repealing the Local Government Election Act 1960 (Act 473) is only for the purpose of standardisation of local government law. He argued that:

“Essentially, the local government election is under the state jurisdiction. However, Act 76 (4) has allowed federal government to enact particular law for the purpose of standardisation with the concurrence from each state. But, refers to basic principles of the Malaysia Constitution regarding to local government matter, the local government is under the state authority and thus state government has the right to determine whether they want to run the local election or not. It is unnecessary for state government to refer Act 76 (4) which was previously had revoked the local election process. Thus, based on the fundamental provision of the Malaysia Constitution, this supreme law allow state government to administer and manage any matter relating to local government, including reinstating election at local level.”

Nonetheless, according to the second expert, Act 76 (1) paragraph (b), “for the purpose of promoting uniformity of the laws of two or more states”, can be interpreted as the Act is applicable to any state if Local Government Act 1976 (Act 171) is accepted by the state government itself. But if vice versa, meaning that as long as the states refuse to accept the act, not necessarily for the state to comply Act 171. Nevertheless, Election Commission (2009) had adduced evidence that the state has previously gazetted Act 171, as for Selangor, in Government of Selangor Gazette (through Sel. P.U. 8/1877) and Penang in Government of Penang Gazette (through Pg. P.U. 73). Act 171 later effectively to be enforced on 1st January 1976 and 15 December 1976 for respective states. Hence, this has proved that the state had previously accepted by laws to agree with the application of Act 171 and thus affirm the repeal of Act 473. However, should bear in mind that Penang and Selangor and other several states have never been fallen under opposition control, which for all these years, those states were only dominated by Barisan Nasional. Hence, during the Act 171 was gazetted, the states is under Barisan Nasional administration. Differ with the current situation (post 12th General Election), the Penang and Selangor state are under PR domination.

Subsequently, both experts have been asked with the stand of Act 75 which is referring to “if any state law is inconsistent with a federal law, the federal shall prevail and the state shall, to the extent of the inconsistency, be void”, first expert said that:

“Any laws contradict with the federal law (as stated in First List of Ninth Schedule), the law will be void. However, it is only an essence perspective, because at the same time the Parliament has no rights to enact any laws lies within state jurisdiction. In case if it still happened, the state laws will be prevailed. For instance, in this local government issues, as it was under the state authority, and thus the state law will be applied.”

However, second expert pointed out that the state government must bow to federal government authority as take into account of Act 81. The act set out the obligation of state towards the federal government, where “the executive authority to every state shall be exercised, (a) as to ensure compliance with any federal law applying to the state, and (b) as not to impede or prejudice the exercise of the executive authority of the federations”. Thus, the state must obey with the enforcement of the Local Government Act 1976 (Act 171) which then abides the abolition of Act 473. Additionally, federal government may give such command towards state government as granted in Act 93 (2) and Act 94 (3) of Malaysia Constitution.

Nevertheless, opinion by first expert towards this issue is still holding on the argument that law provision in Ninth Schedule need to be referred as a primary reference:

“There is no doubt or argument should be emerging if the local government is under the federal authority. The federal is allowed to enact any laws towards local government matter. But, it is however explicitly mentioned within the constitution that the local government is beneath state jurisdiction, specifically under List II (State List) of Ninth Schedule of the Malaysia Constitution. As such, it cannot be changed by any acts since Federal Constitution is the supreme law of the nation.”

Additionally, he also argued that although the federal government seems to have connection towards local government with the existence of National Council of Local Government (NCLG), but according to him, the states are actually have the real authority upon local government matter which refer to Ninth Schedule of Federal Constitution. However, his opinion was refuted by second expert. She is sticks to the stance whereby elections matter is supposed to be underneath of federal authority to determine, including local election issue. She also emphasises that the federal have the authority to hinder the state from pursuing local election practice besides stating that Local Government Act 1976 (Act 171) is valid. Somehow, she is not denying that there is ambiguity towards this local election issue. Hence, she recommended that if necessary (if the states are keen to re-implement the election) this issue should be referred to the court to prescribe whether the election could be done or not. Therefore, the final say can be determined by the court if both governments are failed to reach the consensus. The suggestion to let the court to decide was also agreed by the first expert. He added that if the states insist to have the local election, thus one way that they have to consider in getting the authority to convene local election is through court decision, but only if the final decision is on their site. Otherwise, either they need to find other legal options of doing democracy process at local government level or just let go the idea to bring back the third votes in Malaysia.

5. The Court Decision and What’s Next?

On 14th August 2014, the Federal Court has ruled that the state government has no jurisdiction to hold local government elections. The argument used was based on provision in Section 10 and 15 (Boo, 2014). Section 10 is referred to the clause of Councillor, which includes the following statement:

1. The local authority shall consist of –
 - (a) The Mayor or President; and
 - (b) Not less than eight and nor more than twenty-four other councillors to be appointed by the State Authority.
2. Councillors of the local authority shall be appointed from amongst persons the majority of whom shall be persons ordinarily resident in the local authority who in the opinion of the State Authority have wide experience in local government affairs or who have achieved distinction in any profession, commerce or industry, or are otherwise capable of representing the interest of their communities in the local authority area.
(Federal Constitution of Malaysia)

This section has mentioned the method of choosing the Mayor or President and the Councillors, that is by appointment, thus there is no requirement for the state to apply the election process in this circumstance. The argument then has been strengthened by the Section 15, underlining the provision relating to local government elections ceasing to have effect. This section stated that "...Notwithstanding anything to the contrary contained in any written law, all provisions relating to local government elections shall cease to have force or effect." It thus has indirectly prohibited the state legislature to surpass the federal jurisdiction. Furthermore, the court has also declared that the Penang state government had practiced ultra vires by regulating the Local Government Elections (Penang Island and Province Wellesly) 2012 Enactment 2012. Nevertheless, the Penang state has never obtained any commitment from the Election Commission to conduct the election in Penang Municipal Council and Seberang Perai Municipal Council (Qishin, 2014).

As for the judgment conclusion, the Court of Appeal panel that consisted of four justices namely Justice Raus Sharif as the president, Suryadi Halim Omar, Ahmad Maarop, Mohammed Apandi and Ramly Ali have unanimously dismissed the petition with no order as to cost. The verdict is however not making the Pakatan Rakyat give up with the idea to revive the power of the third votes. Even though there are disappointed with the decision, but they accepted the judgment and would comply with it. Yet, according to the Chief Minister of the State of Penang, who is also is a DAP General Secretary, Lim Guan Eng, has said that the best method to bring back the local government elections in Malaysia is through changing the federal government – for them (i.e. Pakatan Rakyat) to win the majority of parliamentary seats in the next general election (Anbalagan, 2014), which indeed not an easy task to do as well. Otherwise, they can find other practical democratic way in electing the mayors and councillors.

As according the DAP representative, who was also a former of Selangor Executive Council, they also have other initiative to hold the democracy process in electing the councillors, that is cooperating with any non-government association to assist them to be a manager to handle the local polls. If the Election Commission refuse to acknowledge the winners, then the state government can use their authority of appointing the councillors to make the appointment of winners is legitimate. This was also agreed by the one of the NGO's representative in Selangor and the representative also remarked that if the state government having a difficulty with financial issue, there should not be a big problem for them because they can minimise the polls expenditure by using the existing facilities such as community hall.

Besides, the recent announcement made by the former Selangor Chief Minister, Tan Sri Abdul Khalid Ibrahim, proclaimed that Selangor Economic Action Council decided to offer the local councillor position for qualified Selangor residents. They are also welcoming the application from Selangor folks including the professionals and activists (Lee, 2014). This is the response to the decision made by the Federal Court due to the rejection of Penang state government application to hold local election. This could be happened as Selangor had previously conducted a pilot project of Village Security and Development Committee chief election in three villages namely Kampung Baru Sungai Jarom, Kampung Baru Pandamaran and Kampung Bagan Pulau Ketam (The Star Online, 2011). Furthermore, the election was run by the local councils and district offices since the Election Commission declined to help (Gan, 2011).

6. Conclusion

Referring to the historical perspective of local government election in Malaysia, federal government seems play an important role upon the repeal of local election law that once existed in Malaysia. The abolition was made by using several law provisions in order to assure the local election discontinued, which eventually terminated the election to be practiced in Malaysia. The implication of the abolition is eternal till presently. The abolishment however has never stopped the public to openly discuss and raise this issue in varying communication medium. This issue was first brought up by opposition parties, which is Pakatan Rakyat, especially Democratic Action Party and Parti Keadilan Rakyat. The issue became more interesting especially after the Pakatan Rakyat succeed in gaining enormous victory during the 12th General Election but failed to defeat Barisan Nasional at federal level and several states. However, they have seen trying to revive the

democracy at local government level in Selangor and Penang as both states fell under their administration. However, several constraints have slowed them down. One of the biggest obstacles they have to face is from legal perspective.

Legal confusion emerges between federal and states government and this has indirectly impacted on the relationship between these two parties. Hence, this legal contradiction seems as one of the weaknesses in federalism practice, at least in Malaysian context. Indeed, each level of government is trying to grasp more authority within their jurisdiction, thus the conflict began when both level of government claimed to certain law jurisdiction. Thus, it is difficult to justify the jurisdiction provision as both claimed have the rights within the local government matter. Moreover, this conflict involves two level of government, and the two governments are governed by different political parties. Federal lead by Barisan Nasional and states (refer to Penang and Selangor) lead by Pakatan Rakyat. Therefore, the consensus or decision regarding to this matter is difficult to be attained.

The final decision has been decided through court decision. The judgment has dismissed the petition to hold local election and this has directly stopped or delayed the reimplementation of the local election. If the Pakatan Rakyat insists to revive the election, they have to struggle to compete with the Barisan Nasional in winning the most parliamentary seats. This is the best option they have at the moment. But, whether there are still interested to make it happen is questionable. Because, it seems that only DAP keens to bring back the local election compared to Keadilan, that has removed the promise of reviving local government election from their 2013 General Election manifesto, and obviously for PAS, which has shown less interest in remaking the local election in Malaysia. Additionally, the current political crisis in Selangor has made this issue slightly neglected and for Penang, it seems that there is no further action was taken at the moment due the order by the Federal Court of no local election for Malaysia.

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