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An Overview of Judicial Review in The Malaysian Court

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Abstract
Judicial review is the power of court to revise the decision and act of the administrative power and legislative action which had acted in exceeds of their power. However, interpretation of 'exceeding their power' may differ from one case to another to which the courts are given the discretionary power to decide. This leave uncertainty on the interpretation of the judiciary power to review and may lead to the collapse of the rule of check and balance and the concept of good governance. This study aims to examine the principles and approaches adopted in the judicial review process in Malaysia. These concepts and theories serve as the threshold to the cases of judicial review in Malaysia. The study adopts a qualitative method utilising doctrinal and case study. Analysing cases decided by the Malaysian court on Judicial Review forms a major part of the data analysis. The study found that the Malaysian judiciary has made significant efforts to preserve the rule of law, protect the fundamental rights of the people, and uphold the good governance concept through the function of judicial review. The principles of cases involving judicial review in Malaysia have served as a guideline in describing the rules and restrictions that a judge should follow when exercising the judicial review function. The findings of the study may form a summarised development of judicial review in Malaysia that may be referred to by the policymakers, academicians, and future researchers.
Keywords: Judicial Review, Discretionary Power, Constitutional Law, Administrative Law

Introduction

Judicial review is an essential judicial power that may safeguard the rule of law, the violation of the fundamental rights of the people, and promotes good governance. The power that is based under the supervisory jurisdiction of the high courts is the basis for a democratic country. The effective function of judicial review is hooked to the independence of judiciary. The constitution provides for the general power of the judiciary and in interpreting the actual power of court to exercise judicial review requires reference to other legislation mainly the Courts of Judicature Act 1964, Rules of Court 2012, Interpretation Act 1948 and 1967 and its regulations. In discussing the practice of judicial review in Malaysia, the discussion can be

divided into two premises. First, the legal power and capacity of a court to determine the legality of a statute, or administrative regulation and secondly, the process by which the courts exercise their supervisory jurisdiction to evaluate public authorities that is claimed to have exceed their powers (Menon, 2019; Sharif, 2017). The judicial review holds the function of ensuring that public bodies which exercise law-making powers or adjudicatory powers are kept within the confines of the power conferred (Sharif, 2017).The Malaysian court, speaking through the late former Lord President, HRH Raja Azlan Shah in *Pengarah Tanah dan Galian, Wilayah Persekutuan v. Sri Lempah Enterprise Sdn Bhd [1979] 1 MLJ 135* expressed the importance to check the exercise of power of those accorded with powers. His Lordship said: "Every legal power must have legal limits; otherwise, there is a dictatorship." Defining the limits of legislative act and administrative body power frequently necessitates judicial intervention. Previously, many studies that delves into the role of judiciary look at how courts and legislatures interact with few examining how decided cases on the executive and legislative acts influence judicial decision-making process. This study intends to analytically compile an overview of the principles and stance of the Malaysian court in execution of the judicial review function.

This paper is organised as follows: the first section reviews previous literature, followed by a discussion of the power of the judiciary in judicial review, the entities eligible to apply for judicial review, and the issues surrounding judicial review. The following section delves into the current judicial review limitations in Malaysia. In the following discussion, a synopsis will be presented, and the final section concludes the study.

Literature Review

The study by Sultana (2012) highlighted that in a democratic state, the judiciary has a very important role such as safeguarding the liberties of the individual and enforcing the laws made by the executive and the legislature. In line with the study on the role of the judiciary, many studies discuss judicial review as a branch of the judiciary's role and relate this concept to the doctrine of separation of powers. These studies (Manan, 2020; Upadhyay, 2020; Okpaluba, 2017; Sultana, 2012; Priyanka, 2014) unanimously agreed that the judiciary body holds the important power to check the exercise of power by the executive and legislative. A writing on the Indian constitution by Anushka (2017) emphasised the importance of adhering to the doctrine of separation of powers as it forms the basic structure of the Constitution. In ensuring this, again, the role of judicial review is very important. However, she further stresses that intervention by the judiciary in ensuring that there are no violations of this doctrine shall not permit the interpretation of law inconsistent with the objective of the legislature. There is also concern about the judiciary's increasing power that has derived primarily not from fixed constitutional powers or assertions of power in judicial opinions but from the empowerment of courts by the elected branches (Lemieux, 2017). This refers to the work of the statute's amendment. The concern of Anushka and Lemieux was also echoed by studies on the Malaysian Constitution. Thambapillay (2007), in analysing the Malaysian court's approach in reviewing the administrative decision, had a good analytical discussion of the transformation of the trend that rely heavily on the principles of common law to uphold rights guaranteed under the federal constitution. Anantaraman (1994), while reviewing the Malaysian practice of judicial review, deliberated the idea of error of jurisdiction and mere error of law during the exercise of judicial review activity. Literature (Lobo, 2000) has also highlighted that the Malaysian courts have in judicial review, begun to examine the 'substance' or facts of an inferior body's impugned decision, thus 'eroding' the distinction

between ‘supervisory' and ‘appellate' jurisdiction since the case of (Chandran, 1997). These articles provide a good premise discussing all relevant principles guiding judicial review. Kuang et al (2017) consolidated an analytical discussion on the practice of judicial review in a Malaysian court. Deliberating the approach of courts on a case-to-case basis to review executive exercise of power that falls within the inherent powers of the judiciary in upholding the rule of check and balance. The preceding literature delves into the power of courts to intervene in the decision made by the executive and invalidate laws made by the legislative that exceeds their power. However, these studies did not state the analytical data on the court's approaches to resolving issues that can be subjected to judicial review.

The power of the courts to intervene in the deliberations of the authoritative body has been the subject of scrutiny in a number of earlier research endeavours, all of which came to the same conclusion: judicial review is an integral component of the framework upon which the Constitution is based (Shahizam, 2020). The judge has voiced their desire for a more engaged and active judiciary as well as the more widespread implementation of judicial review (Devi & Van Huizen, 2021). According to the most recent research in this field, the concept of judicial review encompasses not only the supervisory jurisdiction that ordinary courts have in public law to judicially review the actions of lower bodies and tribunals but also the decision-making authority of executive branch officials (Shahizam, 2020). It is argued that the basis for judicial review challenges is the allegation that the decision-maker did not fulfil his statutory obligations (Dyson, 2016). In other words, judicial review is one of the mechanisms that can be used to ensure that public bodies in a democratic system comply with the written legislation that has been enacted (Dyson, 2016). In light of this, according to the constitutional oath jurisprudence, the only thing that the judiciary is required to do is to prevent arbitrariness (Abu Backer, 2018). Putting an end to arbitrary decision-making does not imply interfering with the principle of the separation of powers (Abu Backer, 2018). The majority of challenges brought before the Judicial Review are based on what Lord Diplock referred to as procedural impropriety. For example, the most typical scenario involves the decision-maker not adhering to particular procedural rules, which are laws that have been formulated and perfected by the courts over the course of a significant amount of time. They are all intended to ensure fairness in decision-making (Dyson, 2016). The vast majority of studies that have been conducted in the past focus on the power of the judiciary to implement judicial review as part of their exercise of supervisory jurisdiction over authoritative bodies. While it is a useful source for understanding the application of judicial review in Malaysia, no in-depth analysis was conducted, particularly in regard to the pattern of Malaysian courts in exercising the power of judicial review.

Research Methodology

This study adopts a qualitative research method exploring in detail certain problems and issues that exist within the practice of judicial review in Malaysia. Doctrinal and case studies were conducted on both primary and secondary sources. The data collected were then analysed using thematic and content analysis. The selected themes include judicial power, the doctrine of separation of power and its relation to judicial review and the role of the judiciary in safeguarding the rule of law.

Findings and Discussions

Meaning of Judicial Review

Judicial review is the legal power and capacity of a court to determine if a legislative action or administrative regulation contradicts or violates the provisions of an existing constitution. The term judicial review also refers to the process by which the courts exercise their supervisory jurisdictions in reviewing act of the administrative body that is alleged to exceed their powers. In other words, judicial review is a process whereby a court examines the conduct of the administrative body in their exercise of the quasi-judicial and quasi-legislative power to establish whether they have acted lawfully, in the sense of acting within the scope of its lawful powers (Sharif, 2017). Malaysia recognises the judiciary's function as the ultimate arbitrator of the legality of government action. Articles 121 to 131A of the Malaysian supreme law of the land, Federal Constitution, provides for the judiciary power, immunities, appointment and dismissal of judges and structure. On the other hand, Article 62, 63, 72, 145,149, 150 and 151 provides for the limitations to the power. The judiciary's central role in upholding the rule of law is noteworthy and judicial review should be seen as providing an essential foundation for good governance under the rule of law. Accordingly, a discussion of the court's role in judicial review in Malaysia is pertinent.

Power of Judiciary on Judicial Review

i. Judicial review on legislative actions

Generally, all persons and authorities, including Parliament must act in compliance to the Constitution. Their basis of their scope and limits of power are defined by the constitution. Any unconstitutional act may be challenged and invalidated in court. Developed under the doctrine of *ultra vires*, a latin phrase that means 'beyond powers' or 'without powers', judicial review gives power to the court to declare that certain regulation passed by the administrator as void. The basis to this discussion lies on the concept of supremacy of the constitution as provided under Article 4(1) of the Federal Constitution. Any act passed after Merdeka may be declared ultra vires to the extent of its inconsistencies. Thus, in introducing subsidiary legislation, an administrative body must ensure that the regulations conform with the constitution. Section 23(1) and 87(d) of the Interpretation Act 1948 and 1967 gives power to the court to control the subsidiary legislation through judicial review.

Article 128 further confers power on the superior courts to determine the constitutional validity of federal and state laws.

"*128. (1) The Federal Court shall, to the exclusion of any other court, have jurisdiction to determine in accordance with any rules of court regulating the exercise of such jurisdiction:*

(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 the State has no power to make laws; and

(b) disputes on any other question between States or between the Federation and any State."

This article provides that the judiciary has the authority to review and invalidate any legislation passed by Parliament or by the Legislature of a state that violates the provisions of the Constitution. In reviewing the pre-Merdeka law, Article 128 must be read together with Article 162(6) FC. Article 162(6) lays down that any court or tribunal applying the provisions of any pre-Merdeka law may apply it with such modifications as may be necessary to bring it into accord with the Constitution.

A pertinent issue that is relevant to this discussion is the scope of judicial review. Whether the challenge on the validity of a legislation on the jurisdictional ground between the Parliament and State legislative body is amenable to judicial review. Can an affected person apply for declaration from the high court to invalidate the inconsistent act through judicial review or apply leave to the Federal court to determine the validity of the law (Article 4(3) &4(4), Federal Constitution)? It is to be noted that only the Federal Court has jurisdiction to decide whether any law made by Parliament, or a State Legislature is invalid on the ground that it relates to a matter on which the relevant legislature has no power to make law.
The issues of inconsistency act of the Parliament with the Constitution were raised in *Mamat bin Daud & Ors v Government of Malaysia [1988] 1 MLJ 119*; where the majority judgement held that it is not the Parliament's discretion to enact Section 298A of the Penal Code [PC]. Thus, this section is invalid and declared *ultra vires*. However, by applying the doctrine of pith and substance, the court stated that Section 298A of the PC is valid due to its nature of provision. In the case of *Iki Putra Mubarak v. Kerajaan Negeri Selangor & Anor [2021] 1 MLRA*, the petitioner who was alleged to have committed sodomy, challenged the competency of the Selangor State Legislature to enact Section 28 of the Syariah Criminal Offence (Selangor) Enactment 1995 that was said to fall under criminal offences. Legislating criminal offences falls under the jurisdiction of the Parliament and not the State legislative body. He was granted with the leave to file for such petition under Article 4(3) and (4) of the Federal Constitution. The court then decided that the enactment of Section 28 of the Syariah Criminal Offences (Selangor) Enactment 1995 was declared to be invalid since the Legislature of the State of Selangor is not empowered to make such laws. A similar approach can be seen in *Muhammad Juzaili bin Mohd Khamis and Ors. v. State of the government of Negeri Sembilan and Ors [2015] MLJU 65.* where the plaintiffs appealed to the Court of Appeal after the High Court rejected their application for judicial review relating to the validity of Section 66 of the Syariah Criminal Enactment 1992 (Negeri Sembilan) against the provisions of the FC.

ii. *Judicial Review on the administrative authority action.*

Order 53 of Rules of Court 2012 provides for application for Judicial Review and govern all applications seeking the relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964. Section 25(2) to the Schedule in the courts of Judicature Act 1964 provides for the additional powers of High Court to issue to any person or authority directions, orders, or writs, including writs of the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part II of the Constitution. The following discussion answers questions that are related to the person/party that has the rights to apply for judicial review.

Who can apply for Judicial Review?

In the case of *Asia Pacific Education Holdings Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2022] 1 LNS 1442 the interpretation of the person who is qualified to apply for judicial review was deliberated. It is stated that pursuant to Order 53 Rule 2(4) Rules of Courts 2012, the applicant has to establish that they are "adversely affected" by the decision of the respondent in order for leave to be granted. Leave from the Federal court are required before submitting the application for judicial review under Article 4(3) and 4(4).
In *Teh Guat Hong v. Perbadanan Tabung Pendidikan Tinggi Nasional* [2018] 2 CLJ 762 it was stated that “a genuinely aggrieved person who has been adversely affected by a 'decision ' which fell into a 'grey' area, so to speak, that is, where amenability

to judicial review was in doubt if at all, ought to be heard before she or he was shut out from the supervisory jurisdiction of the court. "

In *Gan Chong Guan Transport Sdn Bhd v Ketua Pengarah Jabatan Pengangkutan Jalan Malaysia* [2012] 2 CLJ 389, CA, Jeffrey Tan JCA (referring to the case of *Ahmad Jefri Mohd Jahri v Pengarah Kebudayaan & Kesenian Johor* [2010] 3 MLJ 145, [2010] 5 CLJ 865, FC) in deciding on the nature of case that can be amenable to judicial review held that O 53 of RHC 2012 is the appropriate procedure only if a dispute has substantive principles of public law. The claim herein, which was based on breach of duty and negligence, was more fact-based. It was a case against public authorities and a defendant (fifth respondent) who was licensed by the Minister of Transport. The fifth respondent had to examine and inspect the said vehicle on behalf of the first and second respondents and who were allegedly negligent in the examination and inspection of the said vehicle. There was also another defendant (sixth respondent) who was not a public authority. Thus, this dispute was not suitable for judicial review. In contrast, in the case of *SWW v. Ketua Pengarah Hasil Dalam Negeri [2020] 1 LNS(A) cxxxiv*, the High Court granted the taxpayer leave to apply for judicial review and further ordered a stay of proceedings and enforcement, pending the disposal of the taxpayer's judicial review application on the merits. This contrasted with the case described above, in which the applicant was denied leave to apply for judicial review. The High Court recognised that this case involved important land law issues and granted the taxpayer's judicial review application. These two cases necessitate the requirement of "adversely affected" and substantive principle of public law for leave to be granted.

Judicial Review and the Relevant Issues

i. Review is not an Appeal

Judicial review provides how judicial control of administrative action is exercised by the judges. In Malaysia, supervisory jurisdiction by the High Court over administrative or public bodies is found in Order 53 of Rules of Courts 2012[O 53 RHC 2012]. In the case of *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor* [2010] 3 MLJ 145, Federal Court and in *Oxygen Bhd v Soh Tong Wah and another appeal* [2015] 3 MLJ 730, the Court of Appeal held that judicial review arose from the High Court's supervisory jurisdiction and not from the appellate jurisdiction. The traditional stance in judicial review proceedings in Malaysia was to review the decision to ensure that the decision-maker had not defaulted in the decision-making process. Hence, the courts were more involved in vetting the decision-making process rather than questioning the actual decision itself. This Malaysian court traditional stance followed the common law approaches. In 1997, the court had deviated from its traditional stance by the decision made in the Federal Court in the case of *R.Rama Chandran v. Industrial Court of Malaysian & Anor [1997]1 MLJ 145*. The Federal Court in this case permit the courts to analyse the decision of inferior courts not only for process but also for substance and allows the courts to go into the merits of the matter. The liberal approach taken by the court in *Rama Chandran* case did not stand long when in the same year the Federal court through the case of *Kumpulan Perangsang Selangor Bhd v Zaid Noh [1997] 1 MLJ 789* spelt few limitations for future judicial review process that desired to adopt the Rama Chandran approach. The court in the case of *Ranjit Kaur a/p S Gopal Singh v Hotel Excelsior (M) Sdn Bhd* [2010]6 MLJ 1 in commenting the *Rama Chandran* case stated that "..there may be cases in which for reason of public policy, national interest, public safety or national security the principle in *Rama Chandran* may be wholly inappropriate". It must be noted that the court in Rama Chandran reviewed the decision of an Industrial court, thus the applicability

of the liberal approach in this case should not be promoted in cases of public order or national security where threat to the society is at stake.

There was question raised in previous cases on whether the applicant needs to exhaust his rights to appeal before applying for judicial review? The Federal Court in *Majlis Perbandaran Pulau Pinang v. Syarikat Bekerjasama-Sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 CLJ 65 held that if an applicant in judicial review proceedings can demonstrate illegality, that is to say, unlawful treatment, it would be wrong to insist that he exhausts his statutory right of appeal where one is available.

Similarly, in the *Asia Pacific Education Holdings Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2022] 1 LNS 1442* The High Court judge said that the matter centres around the issue of whether the respondent had refused to follow the law and whether the decision is illegal, irrational, unreasonable and lacking in the jurisdiction. By refusing to apply the law and case law authority, there is a clear lack of jurisdiction. The issue of illegality and lack of jurisdiction is a matter of law. The existence of a domestic remedy is not a bar to judicial review. The judicial review remains available so long as exceptional circumstances are present, namely, a clear lack of jurisdiction, a blatant failure to perform a statutory duty or a serious breach of the principles of natural justice. The applicant is seeking leave, and it has an arguable case.

In the above case, the applicant's claim that the dispute relates to a question of law, namely, can the respondent impose its own requirements (discretionary) to treat Asia Pacific School as a real property company in disregard of paragraph 16, read together with paragraph 15(2) Schedule 2 of the Real Property Gains Tax Act 1976 (RPGTA). Summarily, the Attorney General and the respondent's objections are premised on the ground that they should not be granted rights to judicial review as the issues raised by the applicant involved the question of facts which ought to be discussed before the Special Commissioners of Income Tax. In other words, the statutory right of the applicant to appeal must be exhausted first, as it would be an exercise in futility to create such a mechanism of appeal if it is not to be complied with. The respondent added that by a mere dispute as to the assessment raised, it does not make it an error of law nor does it raise the question of procedural and substantive fairness, proportionality and the right to access justice as the RPGTA has embedded the protection for the applicant to challenge the disputed assessment through the statutory appeal remedy and not through an application for judicial review where there is an absence of abuse of powers, errors of law and unreasonableness as in this case.

ii. Constitutional supremacy vs. Judiciary supremacy

In *Loh Kooi Choon v Government of Malaysia [1977] 2 MLJ 187*, the Federal Court held that the Constitution is the supreme law of the land and could not be internally inconsistent. Equipped with the power to review acts of the executive and legislature does not position the judiciary supreme from other government branch. In *Tan Seet Eng v. Attorney General & Anor* [2015] SGCA 59, it was held that the judiciary's exercise of power following its proper constitutional role does not constitute judicial supremacy. Nevertheless, if a legislative or executive action violates the Constitution, the court may declare it to be ultra vires and null. The courts are responsible for ruling on the constitutionality of any act that challenges the federal or state legislative act. In fact, constitutional supremacy would ring hollow without enforcement from the judicial branch. Hence, the role of judicial review is important to strengthen the concept of constitutional supremacy, where this branch acts to review the actions of the legislature and the executive on constitutional grounds. Any contravention to this written law by their actions will be invalidated by the courts. Lord Scarman highlighted

that a judicial review is “a great weapon in the hands of the judges, but the judges must observe the constitutional limits set by our parliamentary system on their exercise of this beneficent power”(Hogan, 1993).

iii. Judicial Review as a component of the Basic Structure

The court in *Indira Gandhi Mutho v Pengarah Jabatan Agama Islam Perak & Ors & other appeals* [2018] 3 CLJ 145, affirmed the vital role of judicial review as part of the basic structure of the Constitution and is non-amendable. The court again reinforced the same views stating that it is now "beyond a shadow of a doubt" that judicial power is vested exclusively in the courts, with the court's role being that of the "bulwark against unconstitutional legislation or unlawful action". Similarly, in the case of *Alma Nudo Atenza v. PP & Another Appeal [2019]5 CLJ 780*, the court recognised that the principle of separation of powers, and the power of the ordinary courts to review the legality of State action, are sacrosanct and form part of the basic structure of the Federal Constitution. In *Semenyih Jaya Sdn Bhd v Pentadbir Daerah dan Tanah Hulu Langat [2017] 3 MLJ 561,* the court opined that the vesting of judicial power by the Constitution in the courts, preservation of judicial independence and upholding the doctrine of separation of power constituted a crucial essential feature of the Constitution that is very significance to respecting the concept of judicial review. To date, the question of whether Malaysian Constitution have basic structure that shall not be subjected to any amendment process is still an ongoing debate. The cases mentioned in this subheading was cited to show the importance of preserving the spirit of judicial review that has direct implication to judicial independence and upholding justice.

The Scope of Judicial Review in Malaysia

i. Judicial review affecting legislative actions.

The legislative bodies have power to legislate that is limited by the Ninth Schedule of the Federal Constitution. Other that the limitation provided under the Ninth Schedule, it has been an established rule that the legislative and the administrative bodies shall not encroach on certain fundamental rights of an individual guaranteed under part II of the Federal Constitution. In *Dewan Undangan Negeri Kelantan & Anor v Noordin bin Salleh & Anor [1992] 1 MLJ 697*, the then Supreme Court declared a law passed by the Kelantan State Legislative Assembly to be void under Article 4(1) of the Federal Constitution as the said State law contravened the provisions of the Federal Constitution. In this case, the State Legislative Assembly had enacted a provision in the Kelantan State Constitution to provide, inter alia, that any member of the Legislative Assembly who ceased to be a member of a political party to which he belonged at the time of his election as a member of the State Legislative Assembly, shall cease to be a member of the Legislative Assembly. In short, this law criminalised the act of party-hopping. To the recent development of party hopping law, it is pertinent to note that a similar law was passed by Parliament in August 2022, overturning the stance that was made 20 years before.

It is very important for the legislative body to adhere to the division of power between the States and the Federation that is provided under the Ninth Schedule of the Federal Constitution (Kadouf, 2013). Since the authority of the Parliament/State legislative body is limited by the Constitution, it cannot exceed its defined jurisdiction. This is in line with the spirit of supremacy of the constitution as provided under Article 4 of the Federal Constitution, which was further affirmed in the case of *Ah Thian v. Government of Malaysia* [1976] 2 MLJ 112 where the court decided that the doctrine of parliamentary supremacy does not apply in

Malaysia. In short, there is a limitation of the power of the parliament and state legislature as they cannot make any law as they please. The limits of parliament power can be divided into two, first, is the substantive limits relating to subject matter, including jurisdictional error, to restrict fundamental rights and violating the federal-state division of competence under Article 74. The division of legislative power is shown in the Ninth Schedule of the Legislative Lists that show the limits between Federal and State involvement based on the power given according to the list.

The second limit is the procedural limits of Parliament which is about how power must be exercised. In performing the legislative function, Parliament is obliged to comply with the procedural requirements as stated in some provisions like Article 2(b), 38(4), 66, 68, 159 & 161E. An example of procedural restraint is Article 2(b) on the admission of new territories into the Federation. Article 2(b) stated as follows:

> *2. Parliament may by law:*
> *(a) admit other States to the Federation;*
> *(b) alter the boundaries of any State,*
> *but a law altering the boundaries of a State shall not be passed without the consent of that State (expressed by a law made by the Legislature of that State) and of the Conference of Rulers.*

This provision described procedurally the Parliament must first obtain the consent of affected state before altering the boundaries of any state. The reading of the procedure must be read together with the standing order. Another example was in 1993, the prerogative power of royal assent and conference of ruler was limited under Article 38(4) to allow prosecution and legal action against them. As the first attempt to amend Article 38(4) of the Constitution has breached the procedure (by passing the rulers before passing the amendment) there was heightened tension between the rulers and the government that was later resolved through negotiations and complying with the procedure (Yatim, 1996).

ii. Judicial Review on the Administrative authority action.

This involves the process by which the courts exercise their supervisory jurisdiction to see that public authorities do not act outside the limit of their powers. No person or institution shall exercise complete sovereign power, instead, the power shall be distributed among the Executive, Legislative and Judicial branches of government.

The executive actions have been invalidated by the courts for violation of the requirements of the Constitution. In Malaysia in the past 65 years, hundreds of executive actions have been invalidated by the court due to violations of the requirement of the Constitution. In *Telic Farm Sdn Bhd v. Majlis Bandaraya Melaka Bersejarah* [2008] 5 MLJ 452, The High Court held that the action to challenge the public officer should be taken under judicial review. All applications to challenge the decision of public authorities could only be done by an application for judicial review. In the case of *SIS Forum (Malaysia) v Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri)* [2010] 2 MLJ 377, the executive act for a declaration to ban a book was challenged. It was held that there was an error of law evident in the decision of the Minister, by the combined grounds of 'illegality' and 'irrationality'. When a book has been in circulation for over two years in Malaysia, it can give rise to a legitimate expectation not to have it prohibited without hearing the party affected.

In discussing judicial review under this context, the following discussion deliberates on this premise. What are the accepted grounds that permit the intervention of the judiciary in reviewing executive action?

In *Wira Swire Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri* [2019] 1 LNS 1026, *High Court Judge, Nordin Hassan*:

> "*The law on judicial review is well settled that the court may review a decision in the exercise of public duty or function on the grounds of illegality, irrationality or procedure impropriety.*"

In Federal Court *Peguam Negara Malaysia v. Chin Chee Kow (sebagai Setiausaha Kebajikan dan Amal Liam Hood Thong Chor Seng Thuan and another appeal* [2019] 4 CLJ 561 - This landmark decision moved the courts from a position of deciding whether prerogative power existed to decide if they were being carried out lawfully. Lord Diplock, in his speech enunciated three classic grounds for judicial review, namely illegality, irrationality and procedural impropriety. These grounds were affirmed and restated by Judge Vernon Ong in the case of *Laguna De Bay Sdn Bhd v Majlis Perbandaran Subang Jaya* [2014] 7 MLJ 545(HC). Judicial review can be classified under the following grounds upon which administrative action is subject to control by judicial review.

a) Illegality- where the decision-maker must correctly understand the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
b) Irrationality- what can by now be succinctly referred to as 'Wednesbury unreasonableness' (see *Associated Provincial Picture Houses Ltd v. Wednesbury Corp.* [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it."
c) Procedural impropriety – whether there is any violation of procedure described in the Constitution, legislation, or regulations.

In the case of *Shaikh Mohd Ibrahim Shaikh Omar v. Tan Sri Dr Haili Dolhan & Ors.[2022] 1 LNS 1397.* On claim of procedural impropriety, the appellant applied for *certiorari* to quash the decision of the disciplinary board to withdraw his emolument benefits and *mandamus* to restore his grade of service, benefits, and position as a schoolteacher at Sekolah Kebangsaan Pulai Chondong, Kelantan. This raised an issue of whether the procedure provided under the *Peraturan-Peraturan Pegawai Awam (Kelakuan dan Tatatertib) 1993* has been complied with**.** The judge decided that there was no impropriety of procedure by the respondent. Thus, the application for review was dismissed with cost.

In another case, *Huong Sing Mei v. Ketua Pengarah Jabatan Pendaftaran Negara & Ors [2022] 1 LNS 1361,* the appellants had filed an application for judicial review against the respondent seeking: *inter alia*, a declaratory order that the child was born in Malaysia and was a Malaysian citizen by operation of law, pursuant to Art. 14(1)(b), Part II, ss. 1(e) and 2(3) of the Second Schedule of the FC. In support of their application, the appellants argued that:

a) Since the child was an abandoned child, there was no proof that he was a citizen of any other country, entitling him to citizenship under s. 1(e);
b) the word "parents" in s. 1(a) of Part II of the Second Schedule of the FC ought to be construed liberally to include adoptive parents; and
c) the provisions of the Adoption Act 1952, which confer full legal rights on adoptive parents and extinguish all legal connection to the biological parents, ought to be read into s. 1(a) of Part II of the Second Schedule of the Federal Constitution.

Findings of court - s. 19B Part III of the Second Schedule of the Federal Constitution, which provides that any newborn child found exposed in any place shall be presumed until the contrary is shown to have been born there of a mother permanently resident there. Thus, the presumption under s. 19B cannot be invoked. The plaintiff has failed to cross this hurdle, which is an integral part of the application under s. 1(a) Part II of the Second Schedule. When there is no presumption under s. 19B, the question of rebuttal on the part of the respondents no longer arises. The following section will focus on the limitations of judicial review, which have been divided into two categories: emergency and security offences.

The Limitation of Judicial Review

There are areas that are not subjected to be reviewed by the court. The word 'justiciability' and 'ouster clauses' are the terms used to oust the power of court in reviewing act of the legislative or the administrative body. The following discussion deliberate on these areas:

i. Emergency

The power of the judiciary is not without limitation, particularly when the Parliament execute its special power to combat subversion and during an emergency. A Declaration of emergency may be made by his Majesty, the Yang Di Pertuan Agong (YDPA), who is the head of executive, if he thinks that there is a threat to the life of the people, economy, and public order. Following the declaration, if both parliaments are not in sitting concurrently, his Majesty may introduce the emergency law for the same purpose. However, the introduction of emergency law shall not legislate on six special area, namely Islamic law, Malay custom, native or customary law in Sabah and Sarawak, matters related to religion and citizenship, and language.

In 2020, the world was shocked by the emergence of COVID-19. Following the spike in the number of affected patients, the emergency proclamation was made in January 2021 to protect the safety and rights of the health of the people. Subsequently, the Ministry of Health (MOH) introduces the Standard Operational Procedure (SOP) for the nation to adhere to. Before the declaration of emergency, the Malaysian executive had also imposed the Movement Control Order (MCO), also known as the "lockdown", as a measure to restrict on movement, assembly, and international travel and to mandate the closure of business, industry, government, and educational institutions to curb the spread of COVID-19 virus. In normal circumstances, such act of the executive may be challenged on the ground of unconstitutionality due as it violates the fundamental rights of the people. However, the MCO sees the struggles of the executive in upholding the supremacy of the Constitution in one hand and maintaining the rights to health and livelihood of the people. Judicial review of a Proclamation of emergency and the emergency ordinance is barred by Art 150(8). Article 150(1) provides that if the YDPA satisfied that a grave emergency exists whereby the security, or the economic life or public order in the Federation or any part thereof is threatened, he may issue a proclamation of Emergency. Although there is distinct opinion on the constitutional procedure of declaration between the need to act on the advice or it falls within the prerogative power of the YDPA, but upon declaration the declaration shall not be subjected to judicial review. In the case of *Dato Seri Anwar Ibrahim v Tan Sri Mahiaddin bin Yassin & Anor [2021] 7 CLJ 894* the court held that the decision of the Prime Minister in advising the Yang di-Pertuan Agong to promulgate s. 14 of the Emergency (Essential Powers) Ordinance 2021 which resulted in the prorogation and/or suspension of Parliament, is not amenable to judicial review. The court further states that Article 150(6) and (8) of the Federal

Constitution, which is valid and constitutional, expressly prohibits any challenges to the validity of the Ordinance in any form and on any ground. Similarly, in the case of *Datuk Seri Salahuddin Ayub & Ors v. Perdana Menteri, Tan Sri Dato' Hj Mahiaddin Md Yasin & Anor[2021]8 CLJ 260* the court states that Article 150(8) of the Federal Constitution shuts the court's doors from any challenge or application being made against a proclamation and the Ordinances enacted under emergency law. Therefore, the decision of the Yang di-Pertuan Agong, made pursuant to art. 150(1) and 150(2B) of the Federal Constitution, could not be challenged by way of judicial review.

ii. Parliamentary Privileges

As Parliament discharges certain high functions of state, certain privileges are attached to it collectively as a House, and to its members individually, so that the House may function without any interference or obstruction from any quarter. The Constitution (Article 62) empowers the Parliament to regulate its own procedure and is therefore not subject to external regulation. In the case *Tun Dr Mahathir Mohamad & Ors v. Datuk Azhar Azizan Harun & Ors (2021) 3 CLJ 852* the court deliberated that the Parliament has the power or jurisdiction to elect and/or to dismiss the Speaker and the Deputy Speaker. Hence, the validation of such appointment/dismissal was not within the court's jurisdiction. In this case the plaintiffs, Members of Parliament, filed an application seeking, inter alia, for orders that the appointment of Datuk Azhar Azizan Harun as the Speaker of the Dewan Rakyat and the appointment of Dato' Sri Azalina Othman Said as the Deputy Speaker of the Dewan Rakyat is invalid. Similar privilege is accorded to the state legislative assembly (Article 63 & 72). In the case of *Yang Dipertua, Dewan Rakyat v Gobind Singh Deo [2014] 6 MLJ 812, FC* the court said that if the proceedings in the House have constitutional or legal support, the proceedings must be immune from legal challenge. However, because of the doctrine of constitutional supremacy, Parliament cannot do as it wishes and must bring itself within the confines and limits placed upon it by the Constitution. Only in cases where the Parliament had acted in violation of constitution provisions that the court is allowed to review the act of the legislative. This has been illustrated in the case of *Mohamed Tawfik bin Tun Dr Ismail v Pandikar Amin bin Haji Mulia (disaman sebagai Yang di Pertua Dewan Rakyat, Parlimen Malaysia) & Anor [2018] MLJU 552, HC* and *Dewan Undangan Negeri Selangor & Ors v. Mohd Hafarizam Harun [2016] 7 CLJ 143, FC.*

The case of *Sivakumar a/l Varatharaju Naidu v Ganesan a/l Retanam. [2010] 7 MLJ 355* sees the court seeking to examine whether the removal of members from their committees or principal members from their positions is subject to judicial review or whether they are non-justiciable being political questions. The court held that the removal of the plaintiff and the appointment of the defendant as the new Speaker were part of the proceeding of the Assembly on 7 May 2009. Pursuant to Article 36A of the State Constitution of Perak, the Assembly has the power or jurisdiction to elect and/or to dismiss the Speaker and that the issue of who was the validly appointed Speaker was not within the court's jurisdiction. An appeal to the Court of Appeal was also dismissed on similar grounds of non-justiciability of issues of political nature having regard to Article 72 of the Federal Constitution.

iii. Security offences

The Parliament is allowed to go beyond its limited jurisdiction in controlling any subversive action, act that may threaten public order and public security. Article 149 of the Federal Constitution permits the parliamentarian to introduce a law that may violate the fundamental

rights of the people protected under Articles 5, 9, 10 and 13. An example of such a statute is the Internal Security Act 1960 with the objective of deterring the issue of communist activity in Malaysia. This 1960 legislation was later repealed and replaced by Security Offences (Special Measures) Act 2012. The introduction of laws under this provision requires the statement of Article 149 in its preamble. Defining what amounts to a 'threat' that puts society into fear has been interpreted in several cases. The following table describes the summarised findings on the practice of Judicial Review in Malaysia.

Table 1
Judicial Review in Malaysia

Grounds to apply for Judicial Review	**Explanation & Federal Constitution provisions**	**Courts power**	**Example of Cases**
1.Legislative action	1. The power of the State shall not encroach on certain fundamental rights of an individual (Article 5 to 13 FC).	1.Article 128	*-Dewan Undangan Negeri Kelantan & Anor v Noordin bin Salleh & Anor [1992] 1 MLJ 697.*
	2. The division of power between the States and the Federation (Ninth Schedule, Article 73 to 75 FC).		*-Iki Putra Mubarak v. Kerajaan Negeri Selangor & Anor [2021] 1 MLRA.* *-Muhammad Juzaili Bin Mohd Khamis&Ors. v. State of Government of Negeri Sembilan, &Ors.*
2.Control over the executive body	The executive actions have been invalidated in various case by the courts for violation of the principles of illegality, irrationality/ reasonableness & procedure impropriety. (Okpaluba, 2017)	1.Subsection 25(2), Schedule of Courts of Judicature Act 1964. 2. Order 53 or Rules of Court 2012. 3. Chapter VIII of Part 2 of the Specific Relief Act 1950	*-SIS Forum (Malaysia) v Dato' Seri Syed Hamid bin Syed Jaafar Albar (Menteri Dalam Negeri) [2010] 2 MLJ 377.* *-Asia Pacific Education Holdings Sdn Bhd v. Ketua Pengarah Hasil Dalam Negeri [2022] 1 LNS 1442.*
• If a legislative or executive act violates the Constitution, the court may declare it to be ultra vires and null. The right to contest is subject to Article 4(3) and Article 4 (4) of the FC. • A genuinely aggrieved person who has been adversely affected by the decision of the executive body may apply for Judicial Review. *Teh Guat Hong v. Perbadanan Tabung Pendidikan Tinggi Nasional [2018] 2 CLJ 762*.			

- Judicial Review forms part of the basic structure of FC and shall not be subjected to the amendment. *Indera Ghandi* (2018) and *Semenyih Jaya* (2017)cases.

Conclusion

In general, it can be concluded that the Malaysian judiciary has made significant efforts to preserve the rule of law, check and balance, and the doctrine of separation of powers through the function of judicial review power. However, through the analysis of the cases the courts in the past have generally and technically bowed down to legislative and administrative body actions on many occasions, refusing to exercise judicial review. This has affected the judicial independence in Malaysia and can be evidenced by multiple writings condemning the role of the judiciary. In the later practice, the court decisions have evolved to restore the independence of judiciary through cases on judicial review. The importance of judicial review is emphasised when discussing protection of rights of the people where courts hold the power to review and reverse decision made by the legislative or administrative body that had exceeded their power. In exercising this power, the principles of cases served as a guideline in describing the rules and restrictions that a judge should follow when exercising the judicial review function.

Judicial activism has not been entirely free of controversy. There are always eminent dangers of judges overreaching themselves and trespassing into the territory of elected government. In this sort of situations judicial activism has passed into “judicial excessivism”. The problem is this: where does the province of the courts end and that of the elected representatives begin? The courts do not have jurisdiction to frustrate the powers of an elected government, but they have and must exercise a jurisdiction to prevent an elected government from exercising powers which it does not have or from exercising the powers which it does have by a procedure which is unfair. Except on those rare occasions when a legislature goes beyond its powers, the courts uniformly defer to the legislative will. It is politicians, not judges, who must take responsibility for the laws enacted by Parliament and for their operation. In matters of statute law, the courts are not the translators of democratic opinion; theirs is the more pedestrian role of interpreting the language of the law enacted by Parliament. If it were, otherwise, the rule of law and the democratic process would be subverted. The courts will review executive action only to ensure that the exercise of executive power is within the boundaries of the law, and by a procedure that accords natural justice to the affected party or parties. But the courts do not and cannot review the desirability of legitimate policies or strike down decisions which are fairly made in accordance with legitimate policies. The courts are fitted to determine and enforce individual rights; they are ill-fitted to settle administrative policies that must take account of the diverse interests of the whole community.

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