Judicial Review In Security Offence Cases:
The Malaysian Experience

by

Ho Peng Kwang*
Assoc. Prof. Dr Johan Shamsuddin Sabaruddin**
Dr Saroja Dhanapal***

Introduction

The fundamental principle which gave the courts the right to strike down any act which goes beyond any legal authority is the *ultra vires* rule. This concept of *ultra vires* has been accepted as the ground for the courts to apply the spirit and intent of the Legislature. Besides, it is to be noted that the courts’ role is not restricted to control the limits of legal powers as legislated by Parliament; it must also take the role of ensuring that natural justice is done. Judicial review is generally sought by way of an application by the aggrieved person in the High Court against any act or decision made by the Executive which is deemed incoherent with the rule of law standards. Thus, judicial review of a governmental action in fact evokes challenges to the court in the performance of its judicial function to allow people to contest the decision of the authority. If a decision of an Executive is antithetical to law, the Judiciary is authorised under the law to declare it as invalid. This is the concept of what we discern as separation of government functions, which is a typical characteristic of a democratic state. The courts have a primary duty to interpret the laws passed by Parliament and ensure that they affirm or conform to the ideals of constitutionalism.

Following this understanding, it is therefore imperative for a Federal Government like Malaysia to have a robust and independent judicial system to safeguard civil rights and prevent same from being violated. Otherwise, a sovereign state like Malaysia will be a state with constitutional rights but lacks enforcement of such rights. Hence, actions by the Executive that are

* PhD Candidate, Faculty of Law, University of Malaya (richo@siswa.um.edu.my)
** Dean, Faculty of Law, University of Malaya (johans@um.edu.my)
*** Senior Lecturer, Faculty of Law University of Malaya (saroja.dhanapal@um.edu.my)
deemed unlawful must be controlled by the laws. With the separation of powers, each of the separate body will limit the other to make sure they will not go beyond or misuse their authority. This point of view is reflected by Lord Acton when he wrote: “Power tends to corrupt, absolute power corrupts absolutely.” 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 echoed similar viewpoint when His Lordship said: “Every legal power must have legal limits, otherwise there is a dictatorship.”

Notwithstanding the importance of this doctrine of separation of powers, especially the role of the court in limiting the arbitrary power of the Executive, but for matters concerning the nation’s security, the Government claims that the court is unsuitable to judge on these areas. It was said that the court lacks the skill of the Government, especially when dealing with terrorism threats. However, scholars disagree and believe that submitting to judicial review would help keep the rules of law sacrosanct.

Delineating The Scope And Nature Of Judicial Review

When Malaysia was facing judicial crisis in 1988, art. 121(1) of the Federal Constitution was amended wherein the function of the courts to review the decision of the authorities was substantially curtailed. Article 121(1), as amended, stripped 'judicial power' from the exclusive domain of the courts. The amendment saw the setting aside of the principle as laid down in Dato' Yap Peng v. PP that "judicial power" of the Federation must remain exclusively in the Judiciary and cannot be arrogated by or given to any other bodies of the Government. Thus, the amendment aimed to abolish the renowned doctrine of separation of powers. As highlighted earlier, the separation of the three branches of Governments' power has been an integral part of our democratic framework. However, the amendment to art. 121(1), gives the idea that the power of the courts are only confined to what has been granted by or under the statute. In PP v. Kok Wah Kuan, the Federal Court ruled that after the change to art. 121, the judicial strength of the Federation no longer vested in the two High Courts (Malaya and Sabah & Sarawak). The term "judicial power" now means the scope and powers of the two High Courts in Malaysia as derived from the federal laws or statute. It was for Parliament to decide on what powers it will give to or take away from the Judiciary. To quote the dicta of former Chief Justice Abdul Hamid Mohamad in that case:
If we want to know the jurisdiction and powers of the two High Courts we will have to look at the federal law. If we want to call those powers ‘judicial powers’, we are perfectly entitled to. But, to what extent such ‘judicial powers’ are vested in the two High Courts depend on what federal law provides, not on the interpretation the term ‘judicial power’ as prior to the amendment.8

The decision in *Kok Wah Kuan* seemingly repudiated the doctrine of separation of powers as declared by the Federal Court. Effectively, the decision had also dismantled the independence of the Judiciary and the rule of law by switching from Constitutional supremacy to Parliamentary supremacy. However, the recent Federal Court ruling in *Semenyih Jaya Sdn Bhd v. Pentadbir Tanah Daerah Hulu Langat*,9 saw the return of the judicial power of the court. Speaking through Justice Zainun Ali FCJ, the apex court penned the following strong words as a reminder:

> With the removal of judicial power from inherent jurisdiction of the judiciary, that institution was effectively suborned to Parliament, with the implication that Parliament became sovereign.

Further, Her Ladyship added:

> The important concepts of judicial power, judicial independence and the separation of powers are as critical as they are sacrosanct in our constitutional framework.

Justice Zainun’s *dicta* above appeared to reassert the doctrine of separation of powers and judicial independence as fundamental to the Malaysian constitutional framework. Despite the enfeebling effect of art. 121(1), judges had boldly censured the Executive whenever it exceeded or abused its powers.

As observed in *Semenyih Jaya*, even though the amended art. 121(1) remains intact, the court has certainly enervated it. As of now, the judicial power exercised by the court is understood as the inherent authority of the Judiciary to examine and review a law or an Executive action or when there is a breach of fundamental rules of law. The court retains the authority to invalidate a law, to set aside a Government’s decision/act, or instruct a government officer to take action in a specific way if the court feels the provision of the law or the conduct to be unlawful or inconsistent with the law. Thus, the classic test for finding out whether the actions of an individual or authority is liable to judicial review, is to know whether the power is assumed from the state or non-statutory power. If the body in question performs a public duty, then the subject matter can be reviewed by the court. Likewise, if the body or authority in question carries out a statutory power under a statute,
then it is vulnerable to review by the court, unless Parliament plainly made known its objective to remove judicial scrutiny by having ouster clauses in place. For example, s. 19(1) of the Prevention of Terrorism Act 2015 (POTA 2015). Perennially, the aim of having the court to review any decision or action of the authority is to safeguard a citizen’s right and ensure that the Government gives a person a fair and reasonable treatment in its decision-making process.

In the Malaysian Judiciary’s context, traditionally, the High Court exercises its supervisory power over the judgments of subordinate courts or individuals who carry out quasi-judicial functions in tribunals entrusted with the administration of public acts and duties. The court is not involved in finding out if there are any ‘merits’ in the decision reviewed nor if a ‘right’ decision has been deliberated by the authority in the decision-making process. The court is merely concerned if the authority has acted illegally during the decision-making process. Usually, the courts will only intervene when the authorities had exercised their power unlawfully and in ways not sanctioned by the statute (ultra vires) or in situations when the authority applies its powers unfairly or arbitrarily. However, in the Federal Court case of R Rama Chandran v The Industrial Court of Malaysia, not only was the main relief prayed for by the claimant granted, the majority decision of the court granted damages which ordinarily is within the purview of the tribunal reviewed; this was permissible subject to any contrary legislative intention. Apparently, the decision in Rama Chandran enlarged the powers of the High Court in exercising judicial review powers. It is no longer limited to its supervisory role as highlighted earlier. However, in following Rama Chandran, the principle that in judicial review cases the courts cannot usurp the decision-making jurisdiction of the body reviewed has been difficult to discern. Indeed, it has been distinguished by later cases. Thus, in Petroliam Nasional Bhd v. Nik Raml Nik Hassan, the Federal Court viewed the exercise in Rama Chandran with regard to the power of the reviewing court to substitute the decision of public bodies or tribunals with its decision without the need to remitting the same for re-adjudication as an exercise of controlled judicial activism to balance the needs of justice in the light of the broadening powers conferred on public bodies or tribunals. The Federal Court went on to qualify that such action does not mean that the reviewing court is exercising appellate powers. It further views the same as an exercise of the discretionary power of the court depending on the factual matrix and/or modalities of the case.
Apart from the scope and the inherent power of the court in a judicial review application, the nature of the judicial review is such that the aggrieved person may like to seek civil law reliefs such as certiorari, mandamus, prohibition and habeas corpus. Although under administrative law, there are also private law remedies available such as damages, injunctions and declarations, this paper will however only focus on habeas corpus - a well-recognised prerogative writ often applied to preventive detention for security offences. A writ of habeas corpus is a judicial order to the prison officials requiring that a detainee is brought to the court so it can be ascertained whether that person is detained legally and whether he should be released from detention. A habeas corpus petition is an application filed in court by an individual who opposes his own or another's detention. The petitioner must establish that the authority calling for his detention made a legal or factual error in issuing such detention order. As such, the writ of habeas corpus serves as a powerful check and balance on how a state values constitutional rights, especially in protecting personal freedom against any unreasonable and unlawful conduct of the state. In essence, a writ of habeas corpus will be allowed if the petitioner or detainee can prove the detention order is ultra vires or there is an inordinate delay in framing a charge against him.

**Limiting Judicial Review Through Ouster Clauses**

Ouster clauses are statutory provisions intended to prohibit certain governmental decisions or actions from being subjected to judicial review by the court. They are considered as controversial because such clauses are perceived as an attempt by Parliament and the Government to suppress constitutional powers given to the court under the Constitution. Hence, ouster clauses have a precarious relationship with the rule of law merely because they are used to put certain administrative decisions beyond challenge in the courts, and apparently, such clauses are also within the limits of the constitution. Notwithstanding the constraints imposed by ouster clauses as seen in most security legislations in Malaysia, recent jurisprudence on the bounds of judicial review can be found in the recent Court of Appeal case of Pathmanathan a/l Krishnan (also known as Muhammad Riduan bin Abdullah) v Indira Gandhi a/p Mutho and other appeals\(^6\) where Justice Hamid Sultan JCA made the following remarks on judicial review:

Judicial review parameters of the court under the doctrine of constitutional supremacy are wide. The Judiciary is empowered to review (a) Executive decision; (b) legislation; (c) any constitutional amendments; (d) any policy decision. The methodology they can employ in any of the review process is principally based on the jurisprudence that the Executive
and/or Legislative decisions must conform to the constitutional framework and the decision-making process must not be arbitrary. For example, if a legislation or constitutional amendment or policy, violates the constitutional framework, it will be struck down as of right based on ultra vires doctrine. If the ultra vires doctrine is not applicable, the court may employ the concept relating to illegality, irrationality, procedural, impropriety, reasonableness and proportionality to check the decision-making process of the Executive. (emphasis added)

The above remarks by Justice Hamid Sultan JCA seem to divide the doctrine into a few criteria that are acceptable to bring a judicial review application in court. In fact, Justice Hamid Sultan’s views echoed the broad classification of the famous Lord Diplock’s trilogy on “illegality (unlawfulness), irrationality (unreasonableness) and procedural impropriety (unfairness)” in the case of Council of Civil Service Unions v. Minister for the Civil Service (‘the GCHQ case’). Lord Diplock in that case endeavoured to establish the key grounds for applying judicial review in court in a modern setting as follows:

Judicial review has I think developed to a stage today when, without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds on which administrative action is subject to control by judicial review. The first ground I would call ‘illegality’, the second ‘irrationality’ and the third ‘procedural impropriety’. That is not to say that further development on a case by case basis may not in the course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of ‘proportionality’ which is recognised in the administrative law of several of our fellow members of the European Economic Community […]. (emphasis added)

The above grounds that are now considered acceptable to bring claims for judicial review are, however, not exhaustive, as there can be other grounds which had periodically been used like for instance, the error of law on the face of the record. The error of law may be committed to actions taken or decisions made within the jurisdiction of the authority concerned. However, one of the major shortcomings of judicial review has often been perceived as politically and administratively disturbing for the government, and Parliament has responded by attempting, through ouster clauses in legislation, to oust or limit the court’s jurisdiction to review administrative decisions. Ouster clauses usually have an express provision such as “not subject to judicial review” or “shall not be questioned in any court of law.” Over the years, various forms of ouster clauses have evolved with varying
success.\textsuperscript{19} In fact, the court’s inimical attitude to ouster clauses has resulted in the court’s giving “an expansive rather than a narrow or strict interpretation”\textsuperscript{20} of ouster clauses. It is to be noted that in a situation where a statute provides for finality of a decision and such decision given shall not be further appealed against or quashed, the court can still step in.\textsuperscript{21} Beside, such ouster clauses in statutes would have to face the challenge premised upon any constitutional rights guaranteed under the Federal Constitution.

**Judicial Attitude Towards National Security Actions**

Although the court faces the constraints set by the boundaries of ouster clause, the court is still yet vested with the discretionary power to check the legitimacy of the Executive decisions. However, a cursory analysis of past Internal Security Act 1960 (ISA 1960) cases before the enactment of POTA 2015 showed that the Judiciary, in giving priority to national security interest, was viewed as unwilling to exert its role in safeguarding the rule of law, including those pertaining to human rights. This experience prompted many critics in the legal fraternity to accuse, rightly or wrongly, that the Judiciary was primarily serving as a ‘rubber stamp’ to endorse the Executive actions, without realising that the scale of justice had been tipped towards national security concerns. The court’s deferential approach on national security issues, it was said, could be observed from decided case laws. For example, when the validity of s. 8B\textsuperscript{22} of the ISA 1960 was challenged in court in the case of *Kerajaan Malaysia & Ors v. Nasharuddin Nasir*.\textsuperscript{23} In that case, the Federal Court declined to query the legitimacy of s. 8B as it would be perceived as improper questioning of the clear intent and purpose of the enacted law. Hence, the stance taken by the court goes to show the ability of the Legislature’s power to oust judicial scrutiny, which has led some critics to argue that it may lead to grave consequences for the adherence of the rule of law principles.

Another dominant issue that often arose in the court during the ISA era was whether adequate grounds to justify a detention under the security laws ought to be made available to those detained. The common argument put forward by counsel representing the detainee has always been the impossibility to mount an effective challenge in court on behalf of the detainee in a writ of *habeas corpus* petition without being supplied with an adequate reason for detention. The example can be drawn from the case of *Nik Adli bin Nik Abdul Aziz v. Ketua Polis Negara*.\textsuperscript{24} In that case, the court decided a new statement of reasons for extending the detention order was not required from the Minister before the expiry of the first detention order. Thus, arguably, the
The detainee may be held indefinitely based on the Ministerial order and the uncontested statement of allegations of facts in the original detention order when it was first made. In another ISA case known as *Ahmad Yani bin Ismail & Anor v. Inspector General of Police & Ors*, the appellants argued in court that the police failed to give reasons for arresting the detainees and so has breached art. 5(3) of the Constitution. In response to this argument, the Government relied on s. 16 of the ISA to claim immunity besides taking refuge under the Constitution. Article 151(3) of the Federal Constitution states: “information needs not be supplied if it is the opinion of the authority that disclosure would be against the national interest.” In *Ahmad Yani*, the court adopted a more restrictive approach by justifying the reason to refuse information regarding the detainee’s arrest by the officers on the grounds of national interest. This is perceived as seriously deterring any challenge on the validity of the detention.

As stated in the preceding paragraph, s. 8B of ISA 1960 – the ouster clause – coupled with the subjective test of the Ministerial discretion has substantially removed the court’s power to review ISA cases at that time. However, the subjective test for judicial review was abandoned in the recent Federal Court decision of *Titular Roman Catholic Archbishop of Kuala Lumpur v. Menteri Dalam Negeri & Ors* whereby it is trite now that the test to be adopted for judicial review in court will be the objective criterion. Nevertheless, the trend in judicial reasoning in the earlier security cases, in particular the ISA cases, will shed some light on how the Malaysian court will play its role, especially in the wake of the constant terrorist threats globally. As discovered in the majority of court judgments handed down during the era of ISA, the courts were not prepared to question the powers exercised by the Executive particularly, if it involved the security of the country. Most judges seemed to have avoided deliberating on national security issues as the matter was presumed to be under the purview of the Executive. Thus, in *Nasharuddin Nasir* the Federal Court delineated the Judiciary’s role as follows:

> It seems apparent from these cases that where matters of national security and public order are involved, the court should not intervene by way of judicial review or be hesitant in doing so as these are matters especially within the preserve of the executive, involving as they invariably do, policy considerations and the like.

On the other hand, as observed now, the court has been very serious in eliminating terrorism threats from the country in the era of global terrorism. This was apparent when the courts have shown no mercy when trying terrorism offences. Severe sentences were already handed down since the
beginning of 2016. Offences such as withholding terrorist information will warrant a maximum imprisonment term of seven years under s. 130M of the Penal Code.\textsuperscript{30}

**Revisiting Security Cases Under ISA 1960**

To date, there have been no cases brought to court to challenge the legality of preventive detention order as issued under the POTA 2015, nor to contest the efficacy of its ouster clause under s. 19(1). However, it is interesting to note that the ouster clause provision under s. 19(1) of POTA 2015 was similarly worded as s. 8B(1) of the repealed ISA 1960.\textsuperscript{31} The same goes for other preventive security law such as s. 15A(1) of POCA 1959, which states (\textit{inter alia}) that: “There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Board in the exercise of its discretionary power in accordance with this Act …”

So, by analysing past ISA cases, we can appreciate and see the trend adopted by the court in dealing with judicial review of security offences by virtue of the doctrine of judicial precedent. It is also germane to note that, the remarkable extent of powers previously conferred upon the government under the much controversial ISA, has made a point for a strong judicial institution, so as to be able to review and protect any human rights abuses. Unfortunately, the legal restrictions thus imposed on court’s judicial power, has induced a “court with thin courageous exceptions, disinclined to read the provisions to ameliorative effect.”\textsuperscript{32} This said, it could however be hypothesised that the Malaysian courts would still have considerable room for improvement in the light of Semenyih Jaya (supra), instead of being simply recognised as deferential to the Government.

Initially, a subjective test was adopted by the courts when interpreting the discretionary power of the authority. This can be seen in the 1969 habeas corpus case of \textit{Karam Singh v. Menteri Hal Ehwal Dalam Negeri}, where Justice Suffian stated:

> Whether or not the facts on which the order of detention is to be based are sufficient or relevant, is a matter to be decided solely by the executive. In making their decision, they have complete discretion and it is not for a court of law to question the sufficiency or relevance of these allegations of fact.\textsuperscript{33}

The subjective test was followed by \textit{Theresa Lim Chin Chin v. Inspector General of Police}\textsuperscript{34}, a case where Theresa was held during \textit{Operation Lalang} – a nationwide clampdown on detractors of the government by the police force. She filed a writ of habeas corpus against the Government for her immediate release from ISA detention. In dismissing her habeas corpus petition, the court
maintained that the subjective test referred to both police and Ministerial ordered detentions as “one scheme of preventive detention.” Interestingly, in PP v. Koh Yoke Koon, a case under s. 4 of the Emergency (Public Order and Prevention of Crime) Ordinance 1969, the detainee was supposed to be detained for two years at the detention centre at Pulau Jerejak. The court found that the detainee was incarcerated in a place other than what had been unequivocally stated in the detention order issued by the Home Minister. The High Court later allowed the habeas corpus application. On appeal by the prosecution, the then Supreme Court, speaking through Hashim Yeop Sani SCJ, construed the emergency powers of the state strictly and dismissed the appeal stating:

Detention not in accordance with law is inconsistent with the fundamental right guaranteed under Article 5(1) of the Federal Constitution where a law deals with detention. There are abundant authorities to show that the provisions of such law must be construed strictly and, in the case of doubt, the Court should lean in favour of the subject.

Gradually, the courts were moving away from the subjective test to objective test in deciding security offences cases. For instance, in the case of Karpal Singh v. Menteri Hal Ehwal Dalam Negeri, Justice Peh Swee Chin held that “there exist exceptions to the non-justiciability of the Minister’s mental satisfaction, including mala fides.” In Karpal’s case, it was alleged that out of a total six charges framed against him, one was substantially wrong and made in error. Hence, the court was of the view that if taken objectively, Karpal’s arrest was mala fide and accordingly, habeas corpus was allowed. Following the release of Karpal by the court and the 1988 amendments, the Government proposed taking away the role of the court in reviewing any discretionary power exercised by the Minister under the ISA. Thus, a new s. 8B of the ISA (ouster clause) was introduced by the government.

As a result, challenges on habeas corpus applications in court were very much restricted to a fragile opportunity involving s. 73 of the ISA 1960 – the initial 60-day detention made by the police. Despite the difficulty faced by ISA detainees in getting habeas corpus in court on the narrow ground available, in 2001, the High Court in Abdul Ghani Haroon v. Ketua Polis Negara allowed the habeas corpus application. Justice Hishamudin in the landmark case decided that “procedural irregularities, including failures to grant access to lawyers and family, and failures to specify the reasons for detention and extension of the detention, caused the police detention invalid.” The judge also remarked the refusal of these basic rights “makes a mockery of the right to apply for habeas corpus as guaranteed by art. 5(2) of the Constitution.” Hishamudin J further declared, “it is perhaps time for Parliament to consider whether the ISA ... is really relevant to the present day situation.”
Mohamad Ezam bin Mohd Noor v. Ketua Polis Negara & Other Appeals was another remarkable case supporting a habeas corpus petition. Ezam, together with few others were reformist activists who were detained for purportedly organising a demonstration on the street. The Federal Court opined that the intention of confining Ezam and his friends was not for security reasons, because the police did not investigate them for their supposed military action, but subjected them to the undisclosed objective of intelligence gathering “unconnected with national security.” Therefore, based on procedural arguments in court, the detention order was held to be mala fides. The above cases seem to move away from precedent whereby the court prefers to use an objective test on the decision of the police due to the “enormous power conferred upon police officers … and the potentially devastating effect … arising from any misuse thereof.” Moreover, the court also pointed out that ss. 73(1) and 8 “though related, can still operate rather independently.” In short, even though the police made a wrong decision, it did not nullify the subsequent Ministerial detention order.

As observed, in the history of the past ISA judicial review cases, the courts were subservient to the Executive power in matters concerning security. Lately, the court has been prepared even in the slightest chance available, to restrict the Government’s excessive power. For example, in the recent case of Khairuddin Abu Hassan and his lawyer Matthias Chang. Initially, both of them were charged under s. 124L of the Penal Code read together with the Security Offences (Special Measures) Act 2012 (SOSMA 2012) for allegedly seeking to undermine the Malaysian banking and financial services by making various police reports on 1MDB financial scandal across five countries. The Kuala Lumpur High Court ruled that the charge under s. 124L of the Penal Code was not a security offence and therefore should not be read together with SOSMA 2012. Unsatisfied with the decision, the prosecution appealed against the High Court ruling, whereof the Court of Appeal by a unanimous decision upheld the decision of the High Court.

On another note, the Kuala Lumpur High Court has also recently allowed a habeas corpus application for non-security offences in the case of Lim Kean Teck – a drug related case where the accused was held under a preventive detention order issued by the Minister under the Dangerous Drugs (Special Preventive Measures) Act 1985 (‘DDA 1985’). In that case, the court was satisfied that the applicant’s arrest and detention were made with mala fide, to wit, building up the case against the applicant. At the time the applicant was caught by the police, there was no reason to believe or that there was any valid grounds which could warrant his detention under s. 6(1) of the DDA 1985. The court held that there was clearly a breach of mandatory procedural requirement which makes the applicant’s detention unlawful.
Hence, habeas corpus was granted. Although, arguably, Lim Kean Teak’s case was unrelated to security offence per se, however, in light of these recent developments, we can assume that the court has adopted a more proactive stance to uphold civil liberties against any form of governmental abuse of process, especially in cases involving preventive detention laws such as Prevention of Crime Act 1959 (POCA 1959), SOSMA 2012 and POTA 2015. Granted that not all the judges in Malaysia may share the same outlook and are deferential toward the Executive powers, but, the court ought to be constantly reminded of the sage words of former Lord President Suffian when he commented on preventive detention:

... Preventive detention is, therefore, a serious invasion of personal liberty. Whatever safeguards that is provided by a law against the improper exercise of such power must be zealously watched and enforced by the court. In a matter so fundamental and important as the liberty of the subject, strict compliance with statutory requirements must be observed in depriving a person of his liberty. The material provisions of the law authorising detention without trial must be strictly construed and safeguards which the law deliberately provides for the protection of any citizen must be liberally interpreted. Where the detention cannot be held to be in accordance with the procedure established by the law, the detention is bad and the person detained is entitled to be released forthwith. Where personal liberty is concerned an applicant in applying for a writ of habeas corpus is entitled to avail himself of any technical defects which may invalidate the order which deprives him of his liberty.” (See Ex-parte Johannes Choeldi & Ors [1960] 1 LNS 25; [1960] MLJ 184.)

Final Remarks

The key point to a debate about the role of the courts in judicial review would inevitably display the inherently constitutionalist question it evokes. At its core, the issue is about how rather than whether to ensure that national security actions do not represent extreme exercises of the authority. Frequently, the issue at hand pertains to how the measures that were taken by the authority and its limitations may be determined. Another pertinent problem is how are we to evaluate whether national security actions have gone beyond those boundaries, since, admittedly, figuring out the limits is not a straight forward exercise. In the ordinary course of events, people depend on the Judiciary to determine where the boundaries of permissible Government actions lie. Hence, the doctrine of ultra vires allows the underlying concept of having judicial review in court and to demand that state establishments do not apply power to any greater degree than explicitly sanctioned by the law. The role of the courts is therefore crucial in
safeguarding the legal rights of individuals besides affirming the fundamental rule of law values which a democratic system of government like Malaysia observes. It is further conceived that the principle of judicial oversight as a measure of accountability in promoting good Governance should be encouraged. Unfortunately, the power to decide the limitations of permissible Government actions, which is supposedly within the purview of the courts, has been curtailed in light of the constitutional amendment to art. 121(1) and the presence of ouster clauses as found in most security legislations. It is hoped that with the recent Federal Court’s decision of Semenyih Jaya, the outlook for the return of judicial powers will be more promising. However, it may be too early to theorise the impact of this landmark decision on future judicial review proceedings in court.

Endnotes:

1. See O. 53 of the Rules of Court 2012. The Malaysian position regarding judicial review is governed by the Specific Relief Act 1950 (Act 137) and consistent with para. 1 of the Schedule of the Courts of Judicature Act 1964 (Act 91) where the court is granted with the inherent powers.

2. Lord Acton wrote to Bishop Creighton that the same moral standards should be applied to all men, political and religious leaders included (1887) – Online Library of Liberty.Oll.libertyfund.org. Retrieved 2 December 2016, from http://oll.libertyfund.org/quote/214.


6. Article 121(1) states “There shall be two High Courts of co-ordinate jurisdiction and status, namely:

   (a) one in the States of Malaya, which shall be known as the High Court in Malaya and shall have its principal registry at such place in the States of Malaya as the Yang di-Pertuan Agong may determine; and (b) ... and such inferior courts as may be provided by federal law; and the High Courts and inferior courts shall have such jurisdiction and powers as may be conferred by or under federal law.


8. Ibid.

10. Section 19(1) (inter alia): “There shall be no judicial review in any court on any act done or decision made by the Board in the exercise of the discretionary power except in regard to any question on compliance with any procedural requirement governing such act or decision”


12. The court can interfere if there is an error on the facts but decided cases said “a court of supervisory jurisdiction does not have the power to substitute its own view of the primary facts for the view reasonably adopted by the body to whom the fact-finding power has been entrusted” – See Adan v. Newham London Borough Council [2001] EWCA Civ 1916.


14. See Court of Appeal case of Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor [1996] 2 CLJ 771. However, In Ng Hock Cheng v. Pengarah Am Penjara & Ors [1998] 1 CLJ 405 the Federal Court overruled the majority of the decision of the Court of Appeal in Tan Tek Seng with regard to the narrow point that the court has jurisdiction to substitute the penalty imposed by the body reviewed.

15. [2003] 4 CLJ 625, FC.


18. See Syarikat Kenderaan Melayu Kelantan Bhd v. Transport Workers’ Union [1995] 2 CLJ 748, as per Gopal Sri Ram JCA.

19. For example, Pihak Berkuasa Negeri Sabah v. Sugumar Balakrishnan [2002] 4 CLJ 105 where s. 59A of the Immigration Act 1959/63 (Act 155) was held to exclude judicial review). See also s. 19(1) of POTA 2015 (supra).


21. See R Rama Chandran (op cit).

22. Section 8B(1) of the ISA 1960 states, “[t]here shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision. (emphasis added)”
26. In the first limb of art. 5(3) of the Federal Constitution, it explicitly provides the right to be informed of the reasons for arrest.
27. Section 16 of the ISA 1960 states: Nothing in this Chapter or in any rules made thereunder shall require the Minister or any member of an Advisory Board or any public servant to disclose facts or to produce documents which he considers it to be against the national interest to disclose or produce.
31. Section 8B(1) of the ISA 1960 provides: “There shall be no judicial review in any court of, and no court shall have or exercise any jurisdiction in respect of, any act done or decision made by the Yang di-Pertuan Agong or the Minister in the exercise of their discretionary power in accordance with this Act, save in regard to any question on compliance with any procedural requirement in this Act governing such act or decision.”
34. [1988] 1 LNS 132.
35. Ibid at p 296.
38. [2001] 2 MLJ 689.
39. Ibid at 690-691.
41. Ibid.
42. Ibid.

43. Section 124L provides: “Whoever attempts to commit sabotage or does any act preparatory thereto shall be punished with imprisonment for a term which may extend to fifteen years.”


46. Section 6(1) of the DDA 1985 states ‘… the Minister must consider, *inter alia*, the report of the inquiry officer before making the detention order.’

47. See *Re Datuk James Wong Kim Min, Minister of Home Affairs, Malaysia & Ors v. Datuk James Wong Kim Min* [1976] 1 LNS 129.