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EXPLORING THE EFFECTIVENESS OF THE JUDICIAL REVIEW PRACTICES WITHIN MALAYSIAN LEGAL SYSTEM

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Abstract: *This research aims to investigate the effectiveness of the judicial review system in Indonesia. The method used in this research is qualitative method. This method is adopted due to the fact that the researcher is not collecting primary data through survey of which quantitative analysis will be conducted. However, the major design selected for this study is desktop research design. It is type of data collected without field work. The main fields for data collection for this kind of research are libraries and internet. As said earlier that the major sources of this desktop research involve the internal data which are collected within the judicial and legal institutions in Indonesia such as legal report, and other important judicial information. The second source of data in the present study is the library and the items to be collected in the library consist of the hardcopies of journals, newspapers, directories and government statistics. Online data base is the third strong source of data collection in the present study. This research has succeeded in explaining the concept of judicial review as well as the procedures along with its functions and importance as it's relates to the Malaysian political context. It was finally discovered that, judicial review has been explained and proven to be very useful and effective tool to democratic constitutionalism. It was made known from the passages that, judicial review is the major instrument to control and ensure that, the executive and legislative arms of government's action are in line with the federal constitution and equally ensure that the right of individual and public in Malaysia is protected against aggression of lawlessness. Finally, it shows that, the institution of judicial review is a good indication that legal system and operation of the rule of law in Malaysia remain functioning.*

Keywords: judicial, review, Malaysia, legal, system.

1. Introduction

In the Malaysia context the authority to conduct judicial review is vested in the hand of judiciary as other countries that practice viable democracy. Meanwhile, judicial review is fined as the authority given to the court to review legislation or law or an official act of government, to examine violation of basic principles of justice or constitutionality of legislation (Mokhtar & Alias, 1979). It is equally seen as means whereby the high court of Malaysia exercises and practices its supervisory jurisdiction as conferred on it by the federal constitution over the proceedings and verdicts of the inferior tribunals, courts as well as other bodies or individuals who conducted or implement quasi-judicial function related to the performance of public duties and actions (Mokhtar & Alias, 1979). It is equally seen as procedures by which court implemented its supervisory control over the public authority's activities within the realm of public law (Hamid, Nawang, Salleh, Harun, & Bidin, 2018; Mustafa, 2012). It is stated as the accepted supervisory jurisdiction of the high court over the proceedings of other inferior courts, tribunal and other public organization or individual who perform quasi-judicial function and duties (Lee, 2005). Briefly, it is the means by which judicial control of the court or administrative actions of the court is implemented. Judicial review is also referring to the process by which the court exercises their supervisory power to ensure that public institution do not act outside the limit of their power. It means, a situation whereby court investigate the acts or conduct of an organization or individual to ascertained whether the organization or the individual has acted lawfully by acting within the scope of its power limit (Chand, 1998).

2. Literature Review

The supervisory jurisdiction conferred on the court can be found in Order 53 of Rules of High court (RHC) Rule 1 of Order 53 thus:

“This Order shall govern all applications seeking the relief specified in paragraph 1 of the Schedule to the Courts of Judicature Act 1964 and for the purpose therein specified Power to issue to any person or authority directions, order 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, or any of them or for any purpose”.

The aforementioned jurisdiction was originally derived from the Malaysian common law which was now regulated by the statutes and rules of court. In view of this, the judicial review of civil matters is governed and administered by the rules of high court under the specific relief act of 1950, as well as in pursuant of the embedded powers granted to the court under paragraph 1 of the courts of Judicature Act of 1964:

The cardinal importance of judicial review is the viability and effective tool to exercise checks and balances on the executive and legislative arm of government (Mokhtar & Alias, 2019). It means the court has the authority to overturn the executive decision and act, strike down the legislations of the house of parliament, commanded the public officials to act in a particular manner as provided by the constitution. Therefore, judicial review is an inevitable aspect and concept of the rule of law, because it greatly assist the polity to maintain balance between the individual right and the right of the state (Mokhtar & Alias, 2019). It is stated that by the time the basic of concept of separation of powers is fully entrenched and grounded through judicial review power, the court could effectively check and control the excesses of the executive and the legislative arms of the government (Mokhtar & Alias, 2019). In view of this, the court through judicial review is the only defense of human liberty against organizational aggression, executive oppression and legislative excesses, because the general public are compelled to observed the rules of law as essential bureaucracy that should be kept (Tan, 2000).

Among the several functions and roles of the judicial review is to ensure that the aggrieved person or organization is duly compensated in monetary terms or kind. The court through the judicial review provides remedies to judicial issues such as Habeas Corpus, Certiorari, Mandamus as well as prohibition. Judicial review equally ensures that, individual or organization is fairly treated by the authority in terms of its decision making power. It enables any individual who is aggrieved by an administrative action or decision to apply for review at court concerning the lawfulness of the decision (Satriawan & Mokhtar, 2016). The high court is equally empowered to investigate the decision making process of the lower court such as the industrial court.

Once the application is successfully submitted by the aggrieved party, the court may render the reported legislation invalid or order the lower court to re-hear the case. Even in rear situation the high court may substitute the lower court verdict instead. In view of these points the purpose of the high court via judicial review is to ensure that, the tribunals or lower courts use their authority or power properly and justly (Dhillon, 2012). More so, the high court perform the role of providing remedy to the substance or merit of the case involved without leaving it to the lower courts or tribunals such as industrial court (Dhillon, 2012). Judicial review also seeks to relief individual or group from unfair legal matters with respect to prohibition, habeas corpus, quo warranto and certiorari which are wrongly enforced on the aggrieved individual or party or organization (Lee, 2005). It provides remedies by protecting the right of both private and public institution by allowing both to apply for judicial review, therefore, the interest of the public bodies are protected (Lee, 2005).

Equally, judicial review in Malaysia context provides an essential background for good governance under the rule of law. In the same vein, it assists the public to tackle judicial challenges such as the issue of freedom of speech, freedom of assembly and right to privacy as well as those issues relating to economic and property interest. It assists and protect individual against the illegal action of the administration by providing solution and finding redress for wrong done to individual. The high court through judicial review ensures that administrative bodies act lawfully, perform their civic responsibilities, in accordance with the rule of law. In essence, the dual role of the judicial review as can be summarized from the aforementioned discussion was to provide relief to an individual has a problem with a particular administrative lawsuit and to influence the subsequent administrative action.

More so, in case there is any legislation or statute even the one amending the constitution should contrast the basic features and structure of the constitution, no matter how important an issue might be, the judiciary has the inherent jurisdiction, through judicial review to strike out the legislation or statute as unconstitutional under article 4.

The judiciary through judicial review can declare an act of parliament as unconstitutional (Chand, 1998). Through judicial review is able to exercise control over subsidiary legislation. It means any subsidiary legislation that is not consistent with state enactment or an act of parliament shall be null and void by the court. Therefore, the role of judicial review is significant to good governance in Malaysia. These roles can equally be viewed from two angles. The first aspect is a situation where power is vested on the superior court to investigate the constitutionality of any federal and state legislation and hence invalidate it on the ground of unconstitutionality. The second aspect is when constitutional supremacy is maintained by reviewing action of the executive as unconstitutional.

The theoretical foundation of the first aspect was founded under the juristic basis of the doctrine of “Ultra Vires”. The phrase “Ultra Vires” is a Latin phrase means beyond power or without powers. It should then be noted that, the common law doctrine of ultra vires is the theoretical foundation of judicial review which is comprehensively applied to the action of the executive or inaction which violates the right of the citizen(Chand, 1998). The application of this doctrine from the inception was designed strictly and exclusively to ensure that administrative authorities do not abuse or exceed their legal powers. In view of this, the entire administrative activities of the executive were brought under the purview of judicial control as to their vires on the basis that;

1. Every action of the executive must have a legal basis that back it up
2. Every legal power of the executive must be executed within its limit, in good faith and reasonably to achieve the main objective of the power.

In conducting judicial review the legislation and statute in question must fulfilled some criteria in the Malaysia context these are the principles of illegality, irrationality and procedural impropriety (Hamid et al., 2018). It means for any law to be challenged and filled for judicial review it must fulfills the criterion of the principle of illegality, which means that, the law maker has failed to keep the law strictly within the parameters of its powers or the legislation is acutely in contrast of the rule of law or the federal constitution. The irrationality principles which is otherwise known as *Wednesbury* unreasonableness means that, the decision is defiance outrageously to human logic or accepted moral standard of the community that no sensible person who is rational in his thinking would have decided to arrive at. The procedural impropriety on the other hand, is a situation whereby the decision maker has failed to follow some basic rules of natural justice or procedural rules (Hamid et al., 2018).

Meanwhile, based on the above criteria there are some principles governing judicial review which was neatly encapsulated thus: firstly, judicial review is majorly concerned with decision making process but not the substance, merits or justification. Secondly, it states that, the first principle can be an exception in case the court could investigate the substance or justification in a bid to satisfy itself that the law maker has not transgressed the criteria of irrationality, illegality and the principle of procedural impropriety (Hamid et al., 2018). Therefore, the boundaries which normally distinguish the review process and that of substance have then been removed.

After the criteria as well as the principles governing the judicial review have been understood, the aggrieved individual or party will have clear picture of how to get started the procedures of the judicial review. This next stage after this is to determine whether the aggrieved individual or party is amenable to judicial review. In this case, the source of power or authority is main traditional test to determine this (Hamid et al., 2018). That is, the individual has the responsibility to determine whether the power is derived from the state or non-statutory or prerogative right. The nature of the power is also advised to be looked into. That is, if the duty is public one therefore, the body in question which serves as the subject matter is justifiable to be subjected to judicial review.

However, if the source of power is a statute or subordinating legislation under a statute, the body in question will be tenable to judicial review. However, the authority given to the judiciary in case of judicial review is not absolute, but has its own limit and scope of operation. For example, the court has no authority to review the decision on its merits and determine whether or not it was the decision the court would have made. But the court only has the authority to investigate whether the decision was made by the decision maker lawfully (Mokhtar & Alias, 1979). It was equally reiterated by (Lau, 2018) that, the judicial review is concerned with the legality of an action but not the merit of the case. In essence, the scope and limitation of judicial review is briefly highlighted here that judicial review only consider and consider whether a particular action is legal but not have appellate jurisdiction and does not have the jurisdiction to consider the merits of the issue.

3. Methodology

The method used in this research is qualitative method. This method is adopted due to the fact that the researcher is not collecting primary data through survey of which quantitative analysis will be conducted. However, the major design selected for this study is desktop research design. It is type of data collected without field work. The main fields for data collection for this kind of research are libraries and internet. As said earlier that the major sources of this desktop research involve the internal data which are collected within the judicial and legal institutions in Indonesia such as legal report, and other important judicial information. The second source of data in the present study is the library and the items to be collected in the library consist of the hardcopies of journals, newspapers, directories and government statistics. Online data base is the third strong source of data collection in the present study. This research has succeeded in explaining the concept of judicial review as well as the procedures along with its functions and importance as it's relates to the Malaysian political context.

3.1 The Effectiveness of The Judicial Review Practices whitin Malaysian Legal System

Procedures in Malaysian Judicial Review

After being aware of the criteria as well as the principles involve in judicial review, the aggrieved individual by the administrative action or decision could seek judicial review from court. He must prove at the first instance that he has locus standi (the right or authority to bring an issue to court or appear at court), that he has sufficient interest in the subject of the case and negatively affected by the administrative decision (JALIL, 2004). In determining sufficient interest Lim Ben Choon (cited in (JALIL, 2004) express his opinion on how to determine whether the applicant has sufficient interest when he stated thus:

“The extent of sufficient interest depends on diverse variable factors such as the content and intent of the statute of which contravention is alleged, the nature of the breaches of statutory power, the specific circumstances of the case, the nature and extent of the applicant's interest or grievance and the nature and extent of the prejudice or injury suffered by him”.

It can be understood from the above quotation that sufficient interest equally means that the aggrieved person must be adversely affect by the administrative law in question. In this regard, the major requirement to apply for the judicial review is that the individual must prove to the court that, he/she is adversely affected by the administrative action, law or legislation (JALIL, 2004). Equally, this prove serve as locus standi as mention by AbdoolCader J. in the federal high court of Malaysia thus:

“The sensible approach in the matter of locus-standi in injunctions and declarations would be that as a matter of jurisdiction, an assertion of an infringement of a contractual or a proprietary right, the commission of a tort, a statutory right or the breach of a statute which affects the plaintiff's interest substantially or where the plaintiff has some genuine interest in having his legal position declared, even though he could get no other relief, should suffice”

From this, it means the locus standing right of the applicant in the Malaysia context is to have special interest which is translated to mean “adversely affected” In essence, for the applicant to have the right to seek redress at court for judicial review, he must prove to the court that he has been adversely affected” by the administrative law or action (JALIL, 2004).

However, the meaning of the phrase “adversely affected” is not very clear. This may generate two meanings; the first is whether the administrative decision has affected applicant’s legal right adversely or any right (equitable right) or interest is affected. In summary, it is clear that, the interest or right of the appellant must be adversely affected by the public authority decision to have locus standing to apply for judicial review. It means if the rights are not adversely affected by the public authority’s decision, the applicant may not have the locus standing to apply for judicial review(JALIL, 2004).

After the applicant has ascertained his status concerning the locus standing the applicant can thereafter file a written application to the court. This application will be purposely meant to challenge the decision of a public authority which was authorized by Order 53 RHC 1980. This application shall be made promptly or within 40 days from which the laws arose or when the decision was first communicated. The order equally stated that, the applicant might not be able to make any application unless leave has been granted according to order 53 rule 3 (1). Application for leave must be made on behalf of the applicant to a judge in chamber which must include a statement setting out the name, description, and the relief sought and the ground on which is sought. The applicant must also give notice of the application for leave, which should not be later than three days. After all these, the application for judicial review is brought before a court. Meanwhile, the discretion whether or not to grant the relief lies with the court.

Meanwhile, the application for judicial review seeks any of the following reliefs; prayer for declaration either jointly or individually, injunction, damages, discovery and interrogation in the court (Chand, 1998). After the application the aggrieved individual will pursue his complaints against a public authority’s decision made by them, that affect him, in order to ensure correct procedure (Lee, 2005). As a general rule the application for relief by the aggrieved person must adhere strictly to the laid down rules and regulation in the Order 53 or else the application could be liable to be struck out for abusing the process of court (Lee, 2005). In summary, the judicial review procedures are itemized below:

1. Judicial review application
2. Application for relief (the relief can be more than once) the court is not confined by the claimed relief but may mold or modify the remedy.
3. Meeting up locus standing criteria
4. Application for leave prior to the commencement of judicial review
5. Applicant has limitation of forty days from the date of the awareness of the faulted decision or action.
6. Finally, court has the authority to grant damages.

Despite the procedures and guidelines put in place for judicial review in Malaysia, its institution is equally without its own itches and challenges. In the first place, the practical application of these procedures and guidelines of judicial review to the real life experience in Malaysian courts have been far from being robust explanation of protecting constitutional right of the public, which result to de-facto legislative supremacy (Tew, 2016). The executive and legislative arm of government still maintain a strong control over government power (Tew, 2016). It is seen that, the reality in Malaysia politics is that the external constraints undoubtedly influence, the courts' exercise of judicial review (Tew, 2016). The inability of the judiciary to challenge the executive council action through judicial review has not only violated the principles of separation of powers but also the fundamental human right of the citizens. Therefore, it is a great challenge to discovered that judiciary as an important arm of government in Malaysia is lacking the will to counter-veil the action of the political authority as well as its ability to influence democracy (Lau, 2018). Equally, it was asserted that, the judicial review and appeal process in reality serve the opportunist influential people or group rather than serving the poor public (Dhillon, 2012). In view of this, it is clearly understood that, the judicial review operation in Malaysia is causing all sort of problem for the poor people by failing to protect their fundamental human right (Dhillon, 2012).

3.2 Judiciary and Judicial Review in Malaysia

The authority to exercise judicial power in any nation is given to the judiciary of which Malaysia is not an exemption. Therefore, to ensure that the will, right and liberties of the public are protected and uphold strong spirit of separation of powers the federal constitution has conferred the authority to conduct judicial review on the judiciary. This judicial review is the main and most complex responsibility conferred on the judiciary, due to the fact that, the judiciary will have to exercise its judicial power through judicial review to check the excesses of both the legislative and executive arms of government. The judiciary in this regard, will have to totally independent and free from the influence of other arms of government. Therefore, the present section will investigate the mechanisms put in place by the Malaysian government to ensure judicial independent and dignity of the judiciary such as the aspect of appointment of court judges, termination etc.

3.3 Appointment of Judges

Due to the complexity and the sensitivity in the aspect of administration of justice, the procedures for the appointment of Judges are very stringent.

- Firstly, the number of Judges to be appointed is restricted. But the king has the power to increase the number of judges in the federation as conferred on them by the federal constitution.
- The Judges shall be appointed by the Yang di-Pertuan Agong on the advice of the prime minister after making consultation with the conference of rulers.
- To appoint judge other than the chief Justice the PM shall consult the chief justice of the federation.

Basic Requirement of Judges Appointment

For a person to be qualified to be a court Judge in Malaysia such person must be:

- A citizen of the country
- Should be a presiding officer and advocate in court for ten years. The Judge shall hold the office until he/she attain the age of sixty six years.

3.4 Judicial Appointment Commission

In order to further strengthen the dignity and independence of the judiciary in Malaysia, there was provision for the establishment of the Judicial Appointment Commission (JAC) in Act 695. Those who constitute the Judicial Appointment Commission Include; the Chief Justice of the federation, who serves as the chairman, the president of the court of appeal, the chief judge of the high court in Malaysia, the chief judge of the high court in Saba and Sarawak the federal high court judge to be appointed by the prime minister, and four eminent personalities who are not member of the executive neither are they public servant. These four eminent personalities shall be appointed by the prime minister after consulting the Bar Council of Malaysia, the Saba law association, Advocate Association of Sarawak, the Attorney general of the federation and the Attorney general of the state legal service. In this regard, the section 21 of act 695 stipulated the major functions of the JAC as:

- To select appropriately qualify person who met the appointment criteria as judges for prime minister consideration.
- Receive application from the candidate intended to be judges
- Formulate as well as implement strategies for the selection and appointment.

For the selection and appointment of Judges, the major selection criteria as stipulated in section 23 of act 695 are as follows:

- Integrity, experience and competence
- Impartial, fair, objective and good character
- Ability to make timely judgment, decisiveness, and good legal writing skills
- Ability to manage case well and industriousness
- Physical and mental health.

The procedures for the selection and appointment of the judges by JAC are as follows:

- Application for the vacant post in the high court
- Screening and vetting of the proposal and application form by the secretary of the JAC after which the selected names will be sent to the Royal Malaysia Police, Companies Commission Malaysia, Department of Insolvency Malaysia and the MACC for verification of their educational background and qualification, financial position, tax payment record and credit and history of any arrest and conviction.
- The secretary thereafter prepares deliberation paper on each candidate based on the reports collected from each agency for consideration by the commission.
- The selection of the candidate will be made by the entire commission member. This selection shall be made on majority decision.
- This list of the selected personnel shall be tendered to the prime minister for consideration after which the PM then tenders his advice to the Yang di-Pertuan Agong, after he has consulted the conference of rulers.

3.5 Judge's Code of Ethics

The main figure in the court is the Judge who is in charge of interpreting law and settling political and other disputes in the court. Therefore, activities of the judge must also be managed and put into shape in order to prevent the abuse of office by the Judges. As a result, the Judges codes of ethics as stipulated in the section 4(1) of Judges' code of ethics 2009 states that,

- Judge shall exercise judicial function independently promote integrity and judicial impartiality.
- Judicial office should not influence private involvement and interaction
- Performing judicial duties fairly and efficiently without prejudice and extra-judicial activities
- Should not conflict with judicial obligation
- Should not involve in any political activities
- Finally, the judges shall declare his/her assets on his appointment to office or at any time might be required to do so.

3.6 Judges' Ethics Committee

In order to further curtail the abuse of power and office by Judge, there was provision for the establishment of the Judges' ethics committee. In case of any complaint against any Judge or has committed a breach of any provision of the code. This committee was set up in 2010 under act (703) to carry out inquiry and investigations into the complaints against the particular judge. The jurisdiction of the JEC covers any matter related to conduct and discipline of any judge, other than removal of a judge from office.

JEC membership comprises following:

- The chief Justice of the federal court, who serve as the chairman.
- the president of the court of appeal,
- Chief Judges of the high courts of Malaya, Sabah and Sarawak,
- Judge of the federal court and the court of appeal judge.

The appointment to this committee shall be on temporary basis and members of the committee shall be those who are superior in order of precedence of the Judge which is the subject of the disciplinary action. Proceeding of the committee shall be in camera and the majority decision from the committee member constitutes the decision of the entire committee and their decision shall be the final which will not be challenged.

More so, to further maintain the integrity of the Judges court cases hearing were made to be transparent. The Malaysian courts are open to public as stipulated in Act 1964 that general public must have access to court matters either civil or criminal. However, court may order that nobody should publish the name, address or photograph of any witness in any case or matter. During the court hearing monitoring technology system (CRT) is placed in the courtroom by the chief registrar of the court. The CRT record the pre-trial case management or trial proceedings.

In order to ensure impartiality and absence of biasness of judges, provisions were made in section 417 to transfer any criminal case. If there is fear that impartiality and justice cannot be maintained. Equally no magistrate shall be allowed and be given permission to try a case to or which he/she is interested personally. More so, every verdict after hearing shall be pronounced and made to be open or made to pages. Even court shall be made available for public inspection and copy of court hearing shall be made available to the intended member of the public upon payment of an appropriate charges. In this regard, any Judge can be removed in case of any breach of any provision of codes of ethics or inability resulting from sickness of body or mind. The judge is removed by the Yang di-Pertuan Agong on the recommendation of the constituted tribunal.

4. Conclusion

This research has succeeded in explaining the concept of judicial review as well as the procedures along with its functions and importance as it's relates to the Malaysian political context. It was finally discovered that, judicial review has been explained and proven to be very useful and effective tool to democratic constitutionalism. It was made known from the passages that, judicial review is the major instrument to control and ensure that, the executive and legislative arms of government's action are in line with the federal constitution and equally ensure that the right of individual and public in Malaysia is protected against aggression of lawlessness. Finally, it shows that, the institution of judicial review is a good indication that legal system and operation of the rule of law in Malaysia remain functioning.

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