The Federation of Malaya Constitutional Commission or the Reid Commission in its report (Reid Report), which later became the basis of the Federation of Malaya Constitution 1957 and later known as the Malaysian Constitution 1963, stated that:

A Federal constitution defines and guarantees the rights of the Federation and the States: it is usual and in our opinion right that it should also define and guarantee certain fundamental rights which are generally regarded as essential conditions for a free and democratic way of life….The guarantee afforded by the Constitution is the supremacy of the law and the power and duty of the courts to enforce these rights and to annul any attempt to subvert any of them whether by legislative or administrative action or otherwise (emphasis added).¹

The significance of the power of the court to review legislation made by the legislature and action and decision of the executive is very obvious in the above recommendation. It is crucial for a federal democracy to have an independent and powerful judiciary to protect rights of the people and rights of the states and the federation. Otherwise the country would be a country with a constitution but void of constitutionalism.

The term "constitutionalism" may be described as the concept of limited government, whereupon the powers of the different wings of government are defined, and the rights of the governed, enshrined. “Constitutionalism” and “Constitutional Government” share the same underlying idea that is government can/should be limited in its powers. Constitutionalism is achieved through a number of different legal devices, ranging from Dicey's rule of law, to Montesquieu and Alexander Hamilton's separation of powers doctrine. Constitutionalism covers or related to various concepts which can be employed to limit and check exercise of power by the government which includes the doctrines of separation of powers, rule of law, limited government, good governance, transparency, accountability, democracy and human rights.

The rule of law is the bedrock of civilised society. One of the hallmarks of a rule of law society is that the Government is not above the law. There is equal subjection of all persons and classes, including the officials of the state, to the ordinary law of the land administered by the ordinary courts. This is true in Malaysia. The functionaries of the state, from the Yang di-Pertuan Agong down to the ordinary public servant, are liable to the process of the courts both in their personal and official capacities. The Government is liable for the wrongs of its servants in much the same way as a principal is liable for the wrongs of his agent. There is much in the Malaysian legal system to honour these ideals. The Government Proceedings Act permits actions in tort against the Government. The Government Contracts Act allows contractual claims to be made against the Government. In addition to ordinary civil claims for monetary compensation, the Government is also subject to “judicial review” by the courts if its actions are unconstitutional, beyond its powers or lacking in the principles of “natural justice”. Under the Constitution and a wealth of other
laws like the Specific Relief Act, Government Proceedings Act, Rules of the High Court and thousands of judicial decisions, the superior courts have the power to issue remedies like habeas corpus, certiorari, prohibition, mandamus, injunction, declaration and quo warranto.

The ideal that the Government is subject to the law and amenable to the jurisdiction of the ordinary courts however is subject to a number of departures that give to the Government a massive advantage over private litigants. In a large number of situations, laws like the Government Proceedings Act, Emergency (Essential Powers) Ordinance and Control of Imported Publications Act grant to public authorities total immunity from civil liability. In other cases, liability is limited to the maximum amount fixed by the law, no matter what the extent of the damage may be. Under laws like the Public Authorities Protection Act, special and shorter time limits are also fixed for suits against the Government. Under some laws, the remedies that citizens have against each other are not available against the Government. For example, for breach of contract the remedy of specific performance does not lie against the Government. Execution procedures available against private parties are also not available against public authorities. For example, government property cannot be attached or sold to satisfy a debt.

24.2 DOCTRINE OF SEPARATION OF POWERS, PRINCIPLE OF CHECK AND BALANCE AND JUDICIAL REVIEW

Montesquieu stated that judicial power should be separated from legislative power in order to prevent the over-concentration of power in the hands of the legislature. He argued for the separation of all three organs of government, with each playing a role to check on the power of the two other bodies. The judiciary should serve to review legislation enacted by
Parliament in order to ensure that it bears the values of higher law (the constitution). The doctrine is briefly as follows:

i. There are three functions of government, namely legislative function, executive function and judicial function.

ii. Each of these three functions should be vested in one organ of government namely the legislature, the executive and the judiciary with no overlap.

iii. Each organ should act as check and balance on the other.

iv. To concentrate more than one function in any one organ of government is a threat to individual liberty.

v. A government of separated powers is less likely to be tyrannical and more likely to follow the rule of law.

Government action must be constrained by laws. Power is divided to prevent absolutism (where all branches are concentrated in a single authority) or corruption arising from the opportunities that unchecked power offers. A separation of powers can also make a political system more democratic by making it more difficult for a single ruler, such as a monarch or a president, to become dictatorial. With separation, Montesquieu claims that each body would check the other and ensure they did not exceed or abuse their power. The same view is echoed by the saying of Lord Acton “Power tends to corrupt, absolute power corrupt absolutely”. Raja Azlan Shah in Pengarah Tanah dan Galian, Wilayah Persekutuan v Sri Lempah Enterprise Sdn Bhd share similar sentiment when it is stated that “Every legal power must have legal limits, otherwise there is dictatorship”.

24.2.1 Doctrine of Separation of Powers in Malaysia

[1979] 2 MLJ 135
In *Loh Kooi Choon V Govt. of Malaysia*\(^3\) it is stated that “The constitution is not a mere collection of pious platitudes. It is the supreme law of the land embodying three basic concepts:

*One of them is that ... no single man or body shall exercise complete sovereign power, but it shall be distributed among the executive, legislative and judicial branches of government.*”

Article 39 of the Federal Constitution vested the executive authority of the Federation in the YDPA and exercisable by him or by the cabinet. Article 44 vested the legislative authority of the Federation in a Parliament. Article 121 deals with the judicial power of the federation.

Within a Westminster-style "responsible" government, however, there exists a lesser degree of separation than that which exists in the case of the American system of "independent" government. The former type of government, upon which model the Malaysian government is based, defines itself in terms of Cabinet (part of the executive) responsibility to the legislature. This takes the form of membership of Cabinet Ministers within the legislature. It requires Ministers to give account to the legislature as to the bases of Cabinet decisions. It empowers the legislature to pass a vote of no-confidence towards the Prime Minister of the day.

All this differs significantly from the concept of independent government. The President of the United States of America and his Cabinet (as the executive) are in a definite sense separate from the Congress, comprising the legislature. They do not hold membership within the legislature, and are not required to account to Congress for their decisions - although Congress is empowered to veto a bill posited by the executive. There is no procedure for the passing of no-confidence vote by Congress *vis-a-vis* the President; although provisions exist for the impeachment, in extreme cases, of the President.

\(^3\) [1977] 2 MLJ 187.
The lesser degree of separation within the context of Malaysian constitutional framework has been recognized by the court in *PP V. Kok Wah Kuan*\(^4\) whereby it is stated that under the Westminster System the separation does not fully exist. The three branches exist but Ministers, for example, are both executives and legislators. Malaysia, like the United States has a written Constitution that spells out the functions of the three branches. At the same time it follows the Westminster model and has its own peculiarities. Our Constitution does have the features of the separation of powers and at the same time, it contains features which do not strictly comply with the doctrine.

The powers of the courts to review the decision of the legislative body has somewhat been curtailed by the amendment of Article 121 of the Federal Constitution. It is a common belief that the doctrine of separation of powers has always been part and parcel of our constitutional fabric. This has come into question since the amendment to Article 121 in 1988.

Article 121 prior to the amendment reads as follows:

Subject to clause (2) **the judicial power of the Federation shall be vested in the** two High Courts of co-ordinate jurisdiction and status namely –

(a) …

(b) …

and in 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.

Under the new Article 121 it would appear that the judicial power is no longer vested in the Judiciary as the jurisdiction and powers of the courts are limited to those conferred by or under the federal law. If this is so, then the doctrine of separation of powers no longer

\(^{4}\) [2007] 6 CLJ 341.
exists within our Constitution. There are strong arguments that the amendment should be given a restricted interpretation in order to preserve the constitutional order.

This issue came to be considered by the Federal Court in PP v Kok Wah Kuan\(^5\). In that case the accused who was 12 years and 9 months old at the time of the commission of the offence was charged in the High Court for the offence of murder punishable under section 302 of the Penal Code. He was convicted and ordered to be detained during the pleasure of the Yang Di-Pertuan Agong pursuant to section 97(2) of the Child Act 2001. Upon his appeal, the Court of Appeal upheld the conviction but set aside the sentence imposed on him and released him from custody on the sole ground that section 97(2) of the Child Act was unconstitutional. The Public Prosecutor appealed to the Federal Court.

The Court of Appeal held that the doctrine of separation of powers is very much an integral part of the Constitution and any post-Merdeka law that violates this doctrine must be struck down as being unconstitutional. The Court of Appeal applying what it considered settled principles went on to hold that section 97(2) of the Child Act had contravened the doctrine of separation of powers by consigning to the Executive the judicial power to determine the measure of sentence to be served by the accused. By virtue of Article 39 of the Constitution, the executive power of the Federation vests in the Yang Di-Pertuan Agong who, in accordance with Article 40 of the Constitution, must act in accordance with the advice given by the Cabinet.

On appeal the majority of the Federal Court Judges rejected the finding that the amendment to Article 121 was of no effect, ruling that after the amendment, there is no longer any declaration in the Constitution that the judicial power of the Federation vests in the two High Courts. It was therefore no longer necessary to interpret the term “judicial power” and all we need to do now is to look at the federal law to know the jurisdiction and

\(^{5}\) Ibid.
powers of the two High Courts. On that premise, section 97(2) was held not inconsistent with any provision of the Constitution.

Alluding to the Court of Appeal’s finding that section 97(2) had violated the doctrine of separation of powers, Abdul Hamid Mohamad, PCA (who later became the Chief Justice of Malaysia) dismissed the doctrine as a mere political doctrine that is not absolute. Although admitting that the doctrine had influenced the framers of the Constitution, the learned Judge was emphatic that it was not a provision of the Malaysian Constitution and no provision of law can be struck down as being unconstitutional merely because it offended that doctrine. His lordship held *inter alia* that the doctrine of separation of powers “is not definite and absolute” in the Constitution. This landmark decision is said to have confirmed the fears expressed in 1988 when Article 121 was amended to remove the judicial power from the courts and the dangers it posed to the system of checks and balances in governmental power.

Richard Malanjum, CJ (SS) although agreeing with the majority as to the outcome of the appeal do not seem to agree with the view of the majority that with the amendment of Article 121 the court in Malaysia can only function in accordance with what has been assigned to them by the federal laws. The learned Chief Judge firmly rejected the view that the amendment had the effect of removing the doctrines of the separation of powers and the independence of the Judiciary as basic features of the Constitution. Thus, this case shows a divergence in approach between the majority and the minority with regard to constitutional interpretation even though their decision to dismiss the appeal was unanimous. Thus the issue is far from settled.

**24.2.2 The Principle of Check and Balance**
The doctrine of separation of powers involved a system of “check and balance”. Each branch of government is given specific powers of oversight (check) over the other branches of government, and powers to restrain the actions of the other branches of government. The aim is to ensure a balance of power between the three arms of government. This helps to prevent one branch of government from usurping power or taking over functions from the other branches of government. Judicial Review is an important tool for the judiciary’s exercise of check and balance on the Legislature and the Executive.

24.2.3 Judicial Review

The judiciary exercises the potent power of judicial review. Judicial review has been described as ‘the power of a court to review a law or an official act of a government employee or agent for constitutionality or for the violation of basic principles of justice’. The court has the power to strike down the law, to overturn the executive act/decision, or order a public official to act in a certain manner if it believes the law or act to be unconstitutional or to be contrary to law in a free and democratic society.

24.2.3.1. The Scope and Nature of Judicial Review

The traditional test for determining whether a body of persons is subject to judicial review is the source of power i.e. whether the power is derived from state or non-statutory or prerogative. In this regards it also helpful to look at the nature of the power. If the duty is a public duty then the body in question in so far as the subject matter is justiciable will be subject to judicial review. If the source of power is a statute, or subordinate legislation under a statute, then the body in question will be amenable to judicial review, unless Parliament clearly evinces its intention to exclude or limit judicial review by means of ouster or privative clauses. The position would be likewise where the matter is non-justiciable or is a matter of pure private law.
The purpose of the judicial review jurisdiction is to ensure that the individual is given fair treatment by the authority in the exercise of its decision making power; it is not part of the purpose of judicial review jurisdiction to substitute the opinion of the judiciary for that of the authority constituted by law to decide the matters in question.

24.2.3.2. Relief Available in Judicial Review

Judicial review within Malaysian context has been defined as ‘the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions who are charged with the performance of public acts and duties.' This jurisdiction was originally derived from the common law, and was exercised by the issue of the prerogative writs of mandamus, certiorari and prohibition, but is now conferred and regulated by statute and rules of court. Thus in Malaysia Administrative law is received and practised as part of the common law of England and by the authorisation of the Courts of Judicature Act 1964. Judicial review of civil causes or matters is governed by The Rules of the High Court, The Specific Relief Act 1950, and pursuant to the inherent powers granted to the courts under para. 1 of the Schedule to the Courts of Judicature Act 1964.

24.2.3.3. Review of Primary Legislation / Check on the Legislature

It is the province of Constitutional Law when it deals with the validity of primary legislation such as laws made by the Parliament and state legislative assemblies. Issues in relation to validity of delegated or subsidiary legislation are discussed under the area of administrative law.

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Art 4(1) of the Malaysian Constitution proclaims the Constitution to be the "supreme law" of the Federation and that a law which is inconsistent with the Constitution "shall, to the extent of the inconsistency, be void". Because the Constitution embodies fundamental liberties, the protection of such liberties is entrusted to the judiciary.

The court in Malaysia can declare invalid legislation enacted by the Federal Parliament or the legislature of a State. The Federal Court in *Ah Thian v. Govt. of Malaysia* had explained the legal position as quoted below:

The doctrine of the supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State legislatures in Malaysia is limited by the Constitution, and they cannot make any law they please. Under our Constitution written law may be invalid on one of these grounds:

(1) in the case of Federal written law, because it relates to a matter with respect to which Parliament has no power to make law, and in the case of State written law, because it relates to a matter which respect to which the State legislature has no power to make law, article 74; or

(2) in the case of both Federal and State written law, because it is inconsistent with the Constitution, see article 4(1); or

(3) in the case of State written law, because it is inconsistent with Federal law, article 75.

The Court has power to declare any Federal or State law invalid on any of the above three grounds.

The Court's power to declare any law invalid on grounds (2) and (3) is not subject to any restrictions, and may be exercised by any Court in the land and in any proceeding whether it be started by Government or by an individual.

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7 [1976] 2MLJ 112.
But the power to declare any law invalid on ground (1) is subject to three restrictions prescribed by the Constitution.

First, cl (3) of article 4 provides that the validity of any law made by Parliament or by a State legislature may not be questioned on the ground that it makes provision with respect to any matter with respect to which the relevant legislature has no power to make law, except in three types of proceedings as follows:-

(a) in proceedings for a declaration that the law is invalid on that ground; or
(b) if the law was made by Parliament, in proceedings between the Federation and one or more states; or
(c) if the law was made by a State legislature, in proceedings between the Federation and that State.

It will be noted that proceedings of types (b) and (c) are brought by Government, and there is no need for any one to ask specifically for a declaration that the law is invalid on the ground that it relates to a matter with respect to which the relevant legislature has no power to make law. The point can be raised in the course of submission in the ordinary way. Proceedings of type (a) may however be brought by an individual against another individual or against Government or by Government against an individual, but whoever brings the proceedings must specifically ask for a declaration that the law impugned is invalid on that ground.

Secondly, cl (4) of article 4 provides that proceedings of the type mentioned in (a) above may not be commenced by an individual without leave of a Judge of the Federal Court and the Federation is entitled to be a party to such proceedings, and so is any State that would or might be a party to proceedings brought for the same
purpose under type (b) or (c) above. This is to ensure that no adverse ruling is made without giving the relevant government an opportunity to argue to the contrary.

Thirdly, cl (1) of article 128 provides that only the Federal Court has jurisdiction to determine whether a law made by Parliament or by a State legislature is invalid on the ground that it relates to a matter with respect to which the relevant legislature has no power to make law. This jurisdiction is exclusive to the Federal Court, no other Court has it. This is to ensure that a law may be declared invalid on this very serious ground only after full consideration by the highest Court in land.

As explained above the procedure and power to declare law made by the legislature invalid based on *ultra vires* are stated in in-art. 4(3) and (4) which need to be read together with article 128(1).

From several decided cases below it seems the courts in Malaysia had consistently tried to avoid from reviewing the decision of legislative body as it had recognized the sanctity of the latter’s proceedings.

In *Fan Yew Teng v Government of Malaysia*\(^8\) where the Plaintiff, a Member of Parliament was convicted for sedition and was fined RM2,000. Deputy Minister of Co-ordination of Public Corporations on 31 October 1975, introduced in the Dewan Ra’ayat (Senate) a motion that the question whether by reason of the conviction and sentence the plaintiff had become disqualified for membership of the house be referred to the Committee of Privileges and that the Committee be instructed to report to the House. The motion was passed on 4 November 1975, and the matter was referred to the Committee of Privileges of the Dewan Ra’ayat.

Chang Min Tat J., in dismissing the applicant’s action for declarations said that:

\(^8\) [1976] 1 LNS 28.
I must necessarily go on to hold that this Court cannot interfere with the right of the Dewan to decide the question of the plaintiff becoming disqualified for membership or the corresponding right to the Dewan under the proviso to Art. 53 to decide, if it be so minded, postponing taking a decision in order to allow for the appeal to be heard or for the plaintiff to make an application for pardon. With respect, I am therefore of the opinion that the reliefs sought by the plaintiff are outside the jurisdiction of the Court.

Abu Mansor Ali J in *Abd. Ghapur Hj. Salleh V. Tun Datuk Hj. Mohd. Adnan Robert Tyt Yang Di-Pertua Negeri Sabah & Ors.* had also taken the same stand. In his written judgment he said:

Following this authority I am satisfied that dissolution of the Legislative Assembly of Sabah by the 1st defendant under Article 21(2) of the State Constitution is a Legislative act and not an Executive act and that is consistent with the 1st defendant’s position in Sabah Constitution, Article 13 which provides that the Legislature of the State shall consist of the 1st defendant, the Legislative Assembly. If I am right in holding that the act of dissolution is a Legislative act, in no way can the Court intervene and that there is therefore no triable issue that there was encroachment.

In *Loh Kooi Choon v. The Government of Malaya* Raja Azlan Shah FJ (as he then was) speaking for the Federal Court said:

The question whether the impugned Act is “harsh and unjust” is a question of policy to be debated and decided by Parliament, and therefore not meant for judicial determination. To sustain it would cut very deeply into the very being of Parliament.

As can be observed from the passages and cases above, the courts in Malaysia have been reluctant to encroach into the Legislative territory. Nevertheless the courts had on numerous occasions indirectly control Parliament and State Legislative by determining the

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constitutionality of the latter’s decision whereby any laws passed by the Parliament or State Legislature which is inconsistent with the Constitution shall, be void.

In Dewan Undangan Negeri Kelantan & Anor. V. Nordin Salleh & Anor.\textsuperscript{11} the plaintiffs were elected to the Dewan Undangan Negeri Kelantan (State Legislative Assembly) during the General Elections held on 21 October 1990 and subsequently sworn in as members. On 25 April 1991 the first defendant passed the State Enactment amending the state Constitution which provides that if any member of the State Legislative Assembly who is a member of a political party resigns or is expelled from, or for any reasons whatsoever ceases to be a member of such political party, he shall cease to be a member of the Legislative and his seat shall become vacant. The plaintiffs then resigned from their party and joined another party. The first defendant passed a resolution pursuant to the impugned legislation that the first and second plaintiffs had ceased to be members of the Dewan Undangan Negeri Kelantan and declared the relevant seats vacant.

Abdul Hamid Omar LP when delivering judgment of the court said:

In all the circumstances, we have arrived at the unanimous conclusion that the direct and inevitable consequences of Article XXXIA of the Kelantan State Constitution which is designed to enforce party discipline does impose a restriction on the exercise by members of the Legislature of their fundamental right of association guaranteed by Article 10(1)(c) of the Federal Constitution, and that such restriction is not only not protected by Article 10(1)(c) of the Federal Constitution but clearly does not fall within any of the grounds for disqualification specified under s. 6(1) of Part I to the Eight Schedule to the Federal Constitution. Accordingly, we agree with the learned Judge in the Court below though on somewhat different grounds that by virtue of

\textsuperscript{11} [1992] 2 CLJ 1125.
Article 4(1) of the Federal Constitution, Article XXXIA of the Kelantan Constitution is to that extent void.

In *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd*¹² the Federal Court had the opportunity in interpreting Section 72 of the Pengurusan Danaharta Nasional Berhad Act 1998. In that case Kekatong Sdn Bhd applied for an interlocutory injunction against Danaharta Urus Sdn Bhd to restrain it from selling its charged land under the Pengurusan Danaharta Nasional Berhad Act 1998 (‘the Act’). The issue before the Federal Court is whether the said section 72 contravenes article 8(1) of the Federal Constitution. Article 8 of the Federal Constitution guarantees for equality among citizens before the law and their equal entitlement for legal protection.

Section 72 of the act states:

72. Limits on the grant of orders of court.

Notwithstanding any law, an order of a court cannot be granted-

(a) which stays, restrains or affects the powers of the Corporation, Oversight Committee, Special Administrator or Independent Advisor under this Act;

(b) which stays, restrains or affects any action taken, or proposed to be taken, by the Corporation, Oversight Committee, Special Administrator or Independent Advisor under this Act;

(c) which compels the Corporation, Oversight Committee, Special Administrator or Independent Advisor to do or perform any act, and any such order, if granted, shall be void and unenforceable and shall not be the subject of any process of execution whether for the purpose of compelling obedience of the order or otherwise.

The Federal Court in delivering the judgment referred to the Minister’s speech while introducing the Bill to the Act in the Parliament and was of the opinion that Parliament’s

clear intention in enacting the Act was to ensure that the acquisition of non-performing loans by the appellant would ease the pressure upon banks and other financial institutions with the appellant being entrusted with the task, as the nation’s Asset Management Company, to take over these bad loans (together with securities, where available) with a view to maximise recovery values. The appellant was thus given three principal duties namely the acquisition of non-performing loans and assets, management of such assets, including by way of the appointment of Special Administrators to temporarily manage the affairs of corporate borrowers in place of their directors and disposition of the acquired assets. The court further held that the provision of Section 72 “applies to all persons in the same position as the respondent”, thus ruled that the provision is not unconstitutional.

One of the landmark cases on Malaysian federalism illustrates how the court has become the protector and champion of state rights. In *Mamat bin Daud & Ors V Govt. of Malaysia*¹³ each of the petitioners in this case was charged for an offence under section 298A of the Penal Code for doing an act which is likely to prejudice unity among persons professing the Islamic religion. They were alleged to have acted as an unauthorised Bilal, Khatib and Imam at a Friday prayer in Kuala Terengganu without being so appointed under the Terengganu Administration of Islamic Law Enactment 1955.

The issue before the court is whether the said section which was enacted by Parliament by an amending Act in 1983 is *ultra vires* Article 74(1) of the Federal Constitution, since the subject matter of the legislation is reserved for the State Legislatures and therefore beyond the legislative competency of Parliament. Leave was obtained for the petitioners to file a suit for declaratory orders to the effect that the new section 298A of the

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Penal Code is invalid on the ground that it makes provision with respect to a matter with respect to which Parliament has no power to make laws.\(^{14}\)

It was contended by the petitioners that the law is invalid as being ultra vires the Constitution because, having regard to the pith and substance of the section, it is a law which ought to be passed not by Parliament but by State Legislative Assemblies, it being a legislation on Islamic religion, according to Article 11 clause (4) and item 1 of List II, Ninth Schedule of the Federal Constitution. The respondent on the other hand contended that the section is valid because it is a law passed by Parliament on the basis of public order, internal security and also criminal law according to Article 11 clause (5) and items (3) and (4) of List I of the Ninth Schedule of the Federal Constitution.

Majority of the judges after having considered and examined the provisions of section 298A of the Penal Code as a whole concluded that it is a colourable legislation in that it pretends to be a legislation on public order, when in pith and substance it is a law on the subject of religion with respect to which only the states have power to legislate under Articles 74 and 77 of the Federal Constitution. Thus it was held that there must be a declaration that section 298A of the Penal Code is a law with respect to which Parliament has no power to make law and a declaration that section 298A of the Penal Code is invalid and therefore null and void and of no effect. However the ruling shall not apply to the Federal Territories of Kuala Lumpur and Labuan.

24.2.3.4. Review of Action and Decision / Check on the Executive

The Courts are the only recourse for the individual against any state abuse or misuse of power. Chief Justice Hidayatullah of the Indian Supreme Court called the Judiciary ‘the upholders of the rule of law’ and ‘the best protection against the despotism of the people’s

\(^{14}\) See [1986] 2 MLJ 192
The Court’s role in reviewing administrative action is the essence of administrative law. The Court’s exercise of control over the executive is mainly through the issue of the prerogative writs. In a lecture titled ‘Misuse of Power’ Lord Denning said:

In order to ensure this recourse (i.e. to law), it is important that the law itself should provide adequate and efficient remedies for abuse or misuse of powers from whatever quarter it may come. No matter who it is - who is guilty of the abuse or misuse. Be it government, national or local. Be it trade unions. Be it the press. Be it management. Be it labour. Whoever it be, no matter how powerful, the law should provide a remedy for the abuse or misuse of power, else, the oppressed will get to the point when they will stand it no longer. They will find their own remedy. There will be anarchy.\(^\text{16}\)

The significance of administrative law lies in the safeguards provided to the individual against encroachment of his rights and privacy by the Executive. The task of administrative law in ensuring that government keeps itself within the law and not act arbitrarily towards its citizens is chiefly the task of the Courts. Lord Diplock described it as ‘\textit{a first priority in the preservation of the rule of law and the maintenance of the quality of life in a democratic society}.’\(^\text{17}\)

Administrative law and judicial review are indivisible aspects of the concept of rule of law. Its importance lies in maintaining the balance between state rights and rights of the individual. In this context, Lord Hewart described the rule of law as ‘\textit{the predominance of law, as opposed to mere arbitrariness, in determining or disposing of the rights of individuals}.’\(^\text{18}\)

\(^{15}\) M. Hidayatullah, \textit{A Judge’s Miscellany} (First Series) (Tripathi, 1927) p. 98.
\(^{18}\) Lord Hewart, \textit{The New Despotism} (Ernest Benn Ltd., 1929) p. 23.
Judicial review enables a person aggrieved by an administrative decision or action to seek review by a court of the lawfulness of that decision. Judicial review is brought before a court, and the court determines whether the decision complained about is unlawful and of no effect. The court then exercises its discretion regarding whether or not to grant relief. The court has no power to review the decision "on its merits" and determine whether or not it was the decision the court would have made. The court only has the power to review the decision to see whether the decision-maker made the decision lawfully.

24.3 SELECTED ISSUES AND CASES

In Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors the use the appropriate procedure for use in judicial review has been discussed. The appellant’s main contention before the Federal Court was that the procedure under O 53 of the RHC was not a mandatory procedure — a person aggrieved with the decision of a public body could therefore seek relief by way of writ or originating summons.

The Federal Court in dismissing the appeal explains that judicial review provides a means by which judicial control of administrative action is exercised. In Malaysia, supervisory jurisdiction by the High Court over administrative or public bodies is found in O 53 of the RHC. The stringent conditions imposed by O 53 of the RHC are intended to protect those entrusted with the enforcement of public duties against groundless harassment and to reduce delays in resolving applications in the interest of good administration. It should be noted that not every decision made by an authoritative body is suitable for judicial review. There must be sufficient public law elements in the decision made. In the instant case, the appellant’s claim was based solely on public law. There was no trace of private law

involvement. Neither did the circumstances justify an exception to the general rule. Thus, the appellant’s writ was rightly struck off as an abuse of the court’s process.

As can be observed above Order 53 must be invoked when the defendant or one of the defendants in the action is the government or a public authority. It has been said that the purpose of Order 53 is “to provide certain protections to the public body or authority when their public act or decision is being challenged”.\textsuperscript{20} The current Order 53 came into effect on 21 September 2000. It has been said that the new Order 53 was introduced to cure the mischief of its precursor, which was much narrower and more restrictive.\textsuperscript{21} In addition, it has also been noted that the creation of Order 53 in the Rules of the High Court 1980 is to provide certain protections to the public body or authority when their public act or decision is being challenged, for example, the time limit within which the challenge to the public act or decision must be made.\textsuperscript{22} Regardless of the reasons for its introduction, it was observed that there are “stringent mandatory requirements” under the new Order 53.

One such additional requirement, as noted above, is the fact that a plaintiff representing a group of persons seeking judicial review and any form of relief from the court is required to make the application “promptly and in any event within 40 days from the date when grounds for the application first arose or when the decision is first communicated to the applicant”.\textsuperscript{23} Although the court has the discretion to extend the period of 40 days, it can only do so if the court “considers that there is a good reason for doing so”.\textsuperscript{24} This requirement poses as an obstacle to a potential representative action against the government or any public authority. For instance in \textit{TR Lampoh AK Dana & Ors v Government of Sarawak}, a representative action brought by a group of natives alleging that their native customary rights

\textsuperscript{21} Sivarasa Rasiah \textit{v} Badan Peguam Malaysia \textit{&} Anor [2002] 2 Malayan Law Journal 413.
\textsuperscript{23} Order 53 rule 3(6) of the Rules of the High Court 1980.
\textsuperscript{24} Order 53 rule 3(6) of the Rules of the High Court 1980.
over certain communal native customary lands had been impaired and abridged by the act of
the defendant was struck out on the ground that the plaintiffs were out of time.

Besides the limitation period of 40 days, a plaintiff intending to commence a
representative action is also required to obtain leave from the court in accordance with the
requirement in Order 53 rule 3(1). The application must be made *ex parte* to a Judge in
Chambers and must be supported by a statement setting out the name and description of the
applicant, the relief sought and the grounds on which it is sought, and by affidavits verifying
the facts relied on.

The plaintiff is also required to give notice of the application for leave
not later than three days before the hearing date to the Attorney General’s Chambers and
must at the same time lodge in those Chambers copies of the statements and affidavits.

Another barrier faced by potential plaintiffs is the fact that in granting leave, the
Judge may impose such terms as to costs and as to the giving of security as he thinks fit.
Finally, the plaintiffs in the representative action must also be able to demonstrate to the
satisfaction of the court that they are “adversely affected by the decision of the public
authority”.

An application for the writ of quo warranto has been made in the recent case of *Dato’
Seri Ir Hj Mohammad Nizar bin Jamaluddin lwn Dato’ Dr Zambry bin Abd Kadir*. Although the decision of the High Court was later reversed by the Court of Appeal which
later been affirmed by the Federal Court it is submitted the point of law relating to
application for quo warranto remains intact. In this case the applicant was sworn in as the
Chief Minister of Perak on 17 March 2008. Subsequent to an allegation that the two Perak

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26 Order 53 rule 3(3) of the Rules of the High Court 1980.
29 *Dato’ Dr Zambry bin Abd Kadir v Dato’ Seri Ir Hj Mohammad Nizar bin Jamaluddin (Attorney
30 *Dato’ Dr Zambry bin Abd Kadir v Dato’ Seri Ir Hj Mohammad Nizar bin Jamaluddin (Attorney
General of Malaysia, intervener) [2010] 2 CLJ 925.*
State Assemblymen had resigned on 30 January 2009, the applicant appeared before the
DYMM Tuanku Sultan Perak (‘DYMM Tuanku’) and prayed that the DYMM Tuanku
dissolve the State Legislative Assembly (‘SLA’). The DYMM Tuanku did not consent to the
application and instead had sworn in the respondent as the new Chief Minister of Perak.
Thereafter, the applicant filed an ex parte application under O 53 of the Rules of the High
Court 1980 (‘RHC’) for leave to submit an application for judicial review. The applicant had
proposed to claim, *inter alia*:

(i) for a declaration order that he is and was at all material time still the Chief Minister
of Perak;

(ii) for a declaration order in relation to the interpretation of art XVI(6) of the Perak
State Government Standing Order (‘art XVI(6)’) as to whether the Chief Minister of
Perak’s position could be or had been vacant; and

(iii) for a writ quo warranto against the respondent.

In allowing the application the court explained that the two parties agreed that the
DYMM Tuanku had the sole discretionary power in matters of dissolving the Legislative
Assembly and the appointment of the Chief Minister. The applicant’s question was whether
the usurpation of the Chief Minister of Perak’s position by the respondent was valid in law,
as in accordance to the provisions of the Perak State Government Standing Order.

The test that the applicant should apply to obtain leave under O 53 was simple. The
applicant had only to convince the court that he had a prima facie case to submit based on the
facts stated in his application. At this stage it was not the duty of the court to look at the merit
of the applicant’s case. The court had only to be satisfied that the applicant’s application was
not a frivolous and vexatious application; but instead the applicant had an arguable case.
However, leave should not be granted only as a formality. The purpose to obtain leave was to
enable the court to filter the judicial review applications which were groundless or hopeless at an early stage.

The issue that required further investigation was whether the applicant had lost the majority vote in the SLA and whether the Chief Minister’s position was vacant when the DYMM Tuanku refuse to consent to the dissolution of the SLA on the applicant’s application. The applicant had an arguable prima facie case. The declaration order sought was parallel with the applicant’s application to obtain a writ quo warranto.

In *Minister of Finance, Government of Sabah v Petrojas Sdn Bhd*\(^{31}\) the respondent had obtained a monetary judgment at the High Court at Sandakan against the State Government of Sabah. The respondent then applied for and obtained a certificate of judgment sum and order for costs pursuant to s. 33(1) of the Government Proceedings Act 1956 (“GPA”). The party named in the certificate is the State Government of Sabah. As the State Government of Sabah did not make payment as required by the certificate, the respondent filed an ex parte application for leave for judicial review for an order of mandamus against the appellant, the Minister of Finance, Government of Sabah, to pay the judgment sum in accordance with said certificate. Leave was granted. The respondent then filed the substantive application for judicial review for the said order. The High Court dismissed the application. On appeal to the Court of Appeal, the court allowed the appeal of the respondent.

The issue before the Federal Court is whether Judicial Review proceedings may be taken against the Minister of Finance, Government of Sabah to compel the payment according to the abovementioned certificate. The Federal Court granted the order of mandamus to be issued against the Minister of Finance, Sabah. In the judgment of the court it is stated that:

\(^{31}\)[2008] 5 CLJ 321.
… it would appear that under s. 33(4) of the GPA the Government is excluded from the ordinary enforcement procedure but on the other hand by s. 33(3) of the GPA the Government is under a statutory duty to pay the judgment sum as stated in the certificate. This duty to pay under s. 33(3) of the GPA is clearly a statutory duty which is binding on the State Government. The appellant in the present case, as the Minister in charge of financial matters for the State is naturally responsible for the payment of the judgment sum. An order of mandamus may, in the circumstances, be issued to enforce such compliance by the appellant.

In the same judgment, the judge also made an observation that the Government Proceedings Act 1956 is not to enable the Government to flout the law, it merely provides a special procedure in order to avoid the embarrassment of execution proceedings being taken against the Government.

Commenting the above case Prof. Shad Faruqi has expressed his optimism when he stated that ‘Administrative law relating to remedies is now richer because the Federal Court and the Appeal Court broke new ground in [the] heartening and innovative decision.’ In making their decision to issue an order of mandamus the courts were faced with many hurdles. One was the legal issue that under section 44(1) of the Specific Relief Act, the order of mandamus can lie only to “a person holding a public office”. A unanimous Court of Appeal held that governments and ministers are fully subject to prerogative orders and to injunctions and interim injunctions. At the Federal Court, Abdul Hamid felt that under section 44(1) of the Specific Relief Act, the Sabah Government did not qualify as “a person holding a public office”. But, intent on doing justice, he overcame this hurdle by relying on the additional powers of the court under section 25(2) of the Court of Judicature Act to grant the remedy.
From constitutional dimension an admirable aspect of this decision is that the Chief Justice saw a seemingly purely civil dispute in a constitutional light. Petrojas was entitled to the sum granted to it by the court. This sum was a property. Property is protected by Article 13(1) of the Constitution which states that “no person shall be deprived of property save in accordance with law”. According to the Chief Justice, mandamus must issue for the purpose of enforcing the right of a person who has been deprived of his property not in accordance with law.

Prof. Shad further concluded ‘This is very heartening. The Court of Appeal and the Federal Court deserve congratulations for extending the horizons of constitutional and administrative law.’

24.5 CONCLUSION

On the basis of the separation of powers doctrine, it is suggested that the time has come for the courts to better assert their judicial review power, as it is an important tool given to the court in exercising the principle of “check and balance” on the legislature and executive. This would not only ensure good governance, which is also an important rule of constitutionalism, but more importantly it can provide a sufficient condition for public confidence that the rights of individuals in the administrative process of the country are adequately protected.