



GOVERNMENT'S DECISIONS - CAN THEY BE CHALLENGED?

Most of us would have experienced having our applications being rejected by public bodies, or having been put through considerable difficulties because of a sudden change in rules or policies by public authorities. One might wonder - is there any available recourse to challenge such decisions, or are we bound by them unconditionally?

The doctrine of separation of powers ensures that any exercise of power could not be done arbitrarily without being subjected to challenges and scrutiny. Almost all functioning democracies would recognize the doctrine of separation of powers to a certain degree. Such a separation is entrenched in our Federal Constitution, which recognizes the three traditional branches of government – the executive, the legislative and the judiciary.

Judicial Review

The role of the judiciary as part of the checks and balances against the exercise of powers by the executive and legislative is one of the most important features of the doctrine of separation of powers. In Malaysia, this scrutiny by the judiciary is often carried out through the process of judicial review. The powers of the Court to review any exercise of power by public authorities and the Parliament is inherent and could not be ousted or limited by any Act of Parliament. This principle was recently reiterated and stressed by the Federal Court in the landmark case regarding unilateral conversion of children.

Judicial review is a specific process that can only be enforced against decisions made by the executive in the public law realm. The recognized grounds for judicial review are illegality (where the authority had exceeded its powers), irrationality (where the authority had made a decision so unreasonable) and procedural impropriety (where the authority had failed to observe natural justice). If a public authority had arbitrarily made its decision without giving the other party an opportunity to be heard, the decision would be procedurally improper and may be challenged by way of judicial review.

A recent example of judicial review is the application made by a former Chief Minister against the decision of a Head of State to dissolve a state assembly. Judicial review had also been used by companies to challenge by-laws that were gazetted without being passed by the Parliament, by employers and/or employees to challenge the decisions of the Industrial Court or the Minister, as well as by any individual and/or group against the decisions of any Ministry or Minister which violate constitutional rights.

Yes, you can challenge government's decisions

All powers are derived from the law and accordingly have to be exercised within the parameters of the law. This applies to anyone holding public office, including the Prime Minister, any other Ministers, Members of Parliament (“MPs”), public bodies and even an ordinary civil servant. Judicial review is an integral process to uphold the rule of law in the country. The premise for judicial review itself is to ensure that all exercise of powers by the executive is subject to the law, and there is no person or body whose action or decision is above the law.

The principle of rule of law is an integral cornerstone to a functioning democracy and is honoured by the Malaysian judiciary. The principle is not limited to only public law decisions made by the government, but also decisions containing private law elements. For example, the Government Proceedings Act 1956 allows for actions in contract and tort to be brought against the government.

Westminster System

The doctrine of separation of powers is a common feature of the Westminster system that we have inherited from our British colonials. In Malaysia, however, there is a significant overlap between the legislative and executive. This creates a weakness in our check and balance system, for example MPs who are part of the executive are unlikely to vote against a bill that is introduced by the executive themselves. In this regard, we are different from countries such as the USA, where the members of the executive are completely separate from members of the Congress (which forms the legislative).

It must be remembered that power tends to corrupt, and absolute power corrupts absolutely. Regardless of the overlap between the executive and the legislative, the principle of separation of powers remains intact in our country. The judiciary is the only constitutional organ that is completely distinct from the executive and legislative. An independent and functioning judiciary is therefore crucial and must be allowed to properly play its role to uphold the rule of law.

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