

# Judicial Review and Abuse of Powers<sup>1</sup>

by

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*Unless we make the requirements for administrative action strict and demanding, expertise, the strength of modern government, can become a monster which rules with no practical limits on its discretion. Absolute discretion, like corruption, marks the beginning of the end of liberty.*<sup>3</sup>

## Introduction

Modern governance increasingly entrusts wide discretionary powers to the executive to regulate public administration. While such powers may be necessary for effective governance, the rule of law requires legal limits to the exercise of such powers by a public authority. The unbridled exercise of executive powers — or unfettered discretion — offends a basic tenet of the rule of law; every legal power must have legal limits.<sup>4</sup>

Judicial review is the principal legal mechanism through which restrictions are placed on the exercise of executive powers. It enables the courts to ensure that governmental authorities act within the confines of the law. Judicial review is concerned with the *vires* or legality of public decision-making, and it curbs the abuse of public power.

Judicial review — as part of administrative law or the common law of public administration — operates as a vital safeguard against the abuse of executive powers by requiring that public power remains accountable to law. It forms an essential component of constitutional governance. It sets standards for administrative propriety.<sup>5</sup> Thus, Lord Diplock in *R v Inland Revenue Commissioners*<sup>6</sup> observed that “*progress towards a comprehensive system of administrative law . . . I regard as having been the greatest achievement of the English courts in my judicial lifetime*”.

## Origins of Judicial Review

Judicial review is based on the supervisory jurisdiction historically exercised by the superior courts through the prerogative writs of certiorari, mandamus, prohibition, and *quo warranto*, which enabled the courts to ensure that public authorities acted within the limits of their lawful authority. Through this jurisdiction, the courts gradually developed principles governing the lawfulness of administrative decision-making.

One of the most significant developments in this evolution was the treatment of errors of law in administrative decision-making. In *Anisminic*<sup>7</sup>, the House of Lords rejected the earlier distinction between jurisdictional and non-jurisdictional errors of law, holding that a decision affected by an error of law could not be regarded as legally valid even where legislation purported to exclude judicial review<sup>8</sup>. The decision marked a significant expansion of the supervisory jurisdiction of the courts by affirming that errors of law render administrative decisions reviewable.

The modern doctrinal foundation for judicial review was subsequently articulated by Lord Diplock in *GCHQ*<sup>9</sup> where his Lordship identified three principal grounds of review — **illegality**, **irrationality**, and **procedural impropriety** — and possibly a fourth, namely **proportionality**. This formulation provided a structured framework through which courts could control the legality of administrative decision-making.

While judicial review developed organically in the common law, Malaysian law recognises both statutory and constitutional foundations for the jurisdiction. Judicial review in Malaysia is not therefore confined to the common law limitations, and offers a broader judicial scrutiny of the exercise of executive powers.

The supervisory jurisdiction of the courts is provided by section 25(2) of the Courts of Judicature Act 1964 (read with the Schedule to the Act), which recognises the traditional prerogative remedies. The procedural mechanism for invoking judicial review is governed by Order 53 of the Rules of Court 2012.

However, Malaysian jurisprudence has increasingly recognised that judicial review also derives its authority from the Federal Constitution of Malaysia. In *Semenyih Jaya*<sup>10</sup>, the Federal Court of Malaysia emphasised that the courts' authority to review executive action flows from Article 121, which vests judicial power in the superior courts. This constitutional basis was further reinforced in *Indira Gandhi*<sup>11</sup>, where the Federal Court of Malaysia affirmed that judicial review constitutes part of the basic structure of the Federal Constitution of Malaysia.

Judicial review in Malaysia thus functions as a constitutional safeguard against unlawful executive or legislative encroachment by protecting core principles such as the rule of law, separation of powers, and fundamental liberties. The supervisory jurisdiction of the civil courts is seen as essential in ensuring that exercises of public power remain subject to constitutional limits.

### Grounds of Judicial Review

Thus, the principles governing judicial review have developed through case law and are commonly housed in distinct grounds. These grounds — illegality, irrationality, procedural impropriety, and proportionality — provide the framework through which there can be judicial intervention with a public decision. It allows the courts to assess the legality of administrative action.

The infringement of these grounds gives rise to a challenge based on errors of law committed by the decision-maker that would warrant curial intervention through judicial review.

These are therefore not merely technical categories. They reflect deeper constitutional requirements of legality, fairness, and rational justification in the exercise of public power. The precepts expressed in these grounds of review are ultimately implicit in the very idea of governance through law.<sup>12</sup>

### Illegality

Illegality arises where a public authority acts outside the scope of powers conferred by law. A decision will be unlawful where the decision-maker misdirects itself as to the law, exercises a

power for an improper purpose, or otherwise exceeds the limits prescribed by statute. In ***Council of Civil Service Unions v Minister for the Civil Service***<sup>13</sup>, Lord Diplock stated:

*By 'illegality' as a ground for Judicial Review I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of a dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.*

### Irrationality

Irrationality is often described as Wednesbury unreasonableness, and strikes at arbitrary or capricious conduct by public authorities.

In ***Wednesbury Corporation***<sup>14</sup>, Lord Greene MR explained that a decision may be regarded as unreasonable if it is a decision that is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided would have arrived at it.

Although the threshold for establishing irrationality is high, the doctrine reflects the principle that discretionary powers must be exercised rationally and in accordance with the purposes for which they were conferred.

### Procedural Impropriety

Procedural impropriety is concerned with whether the decision-maker complied with the procedures governing the exercise of its powers and whether the process adopted ensured fairness. This ground includes both breaches of statutory procedural requirements and violations of the principles of natural justice or due process, including the right to be heard and the rule against bias.

Procedural fairness plays an important role in ensuring that administrative decisions are reached through processes that respect the rights and legitimate expectations of those affected.

But legitimate expectation has also a substantive basis. Where a public authority conducts itself so as to create an expectation that a certain course will be followed, it will be unfair if it follows a different course to the detriment of those who entertained the expectation and who acted on it.<sup>15</sup> The doctrine of substantive legitimate expectation ensures that public authorities do not abuse the power entrusted to them.<sup>16</sup>

### Proportionality

Proportionality requires that measures adopted by public authorities must not go further than necessary to achieve a legitimate objective. The judicial review court will determine whether the means adopted by a public authority to achieve a particular purpose are rationally connected to the objective pursued, and whether the interference with rights or interests is excessive.<sup>17</sup>

Within Malaysian public law, proportionality has assumed particular significance in cases involving constitutional rights, where courts assess whether governmental measures unjustifiably restrict protected liberties.<sup>18</sup> In short, it has been said that a sledgehammer must not be used to crack a nut.<sup>19</sup>

### Constitutional Judicial Review

Judicial review may also arise where an impugned executive decision or legislative provision is alleged to violate constitutional limits on public power. In such cases, the court's supervisory jurisdiction engages not only administrative legality but also the supremacy of the Constitution.

This broader constitutional dimension accepts that judicial review should be seen not as judicial aggrandisement, but as how courts enforce the standards of legitimate governance that give legal authority its constitutional validity.<sup>20</sup>

The constitutional significance of this supervisory jurisdiction is manifest. T.R.S. Allan recently observed that judicial review reflects the common law's deeper constitutional commitment to the rule of law: the legality of governmental action depends upon its conformity with fundamental legal principles that limit the exercise of public power.<sup>21</sup>

In Malaysia, the constitutional foundation of this jurisdiction lies primarily in Article 4(1) of the Federal Constitution of Malaysia, which declares the Constitution to be the supreme law of the Federation and renders void any law inconsistent with it. As affirmed in *Semenyih Jaya*<sup>22</sup>, the authority of the courts to undertake such review derives from Article 121 of the Federal Constitution of Malaysia, which vests the judicial power of the Federation in the superior courts.

In *SIS Forum (Malaysia)*<sup>23</sup>, the Federal Court explained that judicial review operates on two related but distinct planes: constitutional judicial review, and statutory judicial review. Constitutional judicial review concerns challenges to legislation or executive conduct alleged to contravene the Federal Constitution, whereas statutory judicial review concerns administrative decisions challenged on traditional public law grounds such as illegality, irrationality, or procedural impropriety.

Recent decisions in Malaysia such as *Maria Chin Abdullah*<sup>24</sup>, *Rovin Joty*<sup>25</sup>, and *Nivesh Nair*<sup>26</sup> further demonstrate the continuing role of judicial review as a constitutional safeguard against statutory provisions or executive action that infringe constitutional guarantees, and emphasise that ouster clauses cannot displace judicial review where constitutional rights are affected.

### Locus Standi

The expansion of judicial review into the constitutional sphere has influenced the doctrine of locus standi.

The classic pronouncement on locus standi appears in *R v Inland Revenue*<sup>27</sup>, where the House of Lords held that an applicant must demonstrate “*sufficient interest*” in the subject matter of the challenge.

Malaysian jurisprudence has historically adopted a more restrictive approach, often requiring the applicant to demonstrate that they were “*adversely affected*” by the impugned decision. In recent years, however, the courts have adopted a more liberal approach where issues of constitutional importance or public interest arise.

In *Trellises*<sup>28</sup>, the Federal Court of Malaysia recognised that locus standi may be granted where the challenge raises matters affecting the rule of law and constitutional governance. The court emphasised that rigid standing requirements should not prevent legitimate scrutiny of governmental action.

This approach was reinforced in *Nik Elin Zurina*<sup>29</sup>, where then-Chief Justice Tun Tengku Maimun Tuan Mat observed that constitutional supremacy would be undermined if access to the courts were unduly restricted by narrow requirements.

More recently, in *Attorney-General of Malaysia v Sabah Law Society*<sup>30</sup>, the Federal Court of Malaysia noted the current position that “*the courts should take a broad and liberal approach to locus standi in respect of public interest litigation*”.

#### *Adjectival Framework: Order 53 of the Rules of Court 2012*

Judicial review proceedings in Malaysia are governed procedurally by Order 53 of the Rules of Court 2012, which gives effect to the supervisory jurisdiction under section 25(2) of the Courts of Judicature Act 1964.

Order 53 establishes a leave-based procedure for commencing judicial review proceedings. The leave stage serves as an important filtering mechanism designed to ensure that only arguable challenges proceed to a substantive hearing.

Two procedural features are particularly significant. First, strict time limits apply. Under Order 53 Rule 3(6), an application for judicial review must be filed promptly and, in any event, within three months from the date the grounds of the application first arose. Although the court retains

discretion to extend time where good reason exists, the requirement of promptness reflects the public interest in certainty and finality in administrative decision-making.

Secondly, the Rules of Court 2012 require precision in the formulation of the challenge. An application for leave must be supported by a Statement identifying the relief sought and the specific grounds relied upon, together with affidavits verifying the relevant facts. An applicant for judicial review is bound by the pleaded grounds in the Statement; otherwise, the proceedings risk becoming, in the words of Tan Sri Chang Min Tat FJ in *Dr A Dutt*<sup>31</sup>, an exercise that allows a party applying for judicial review “*to roam at large, well outside its proper confines*”.

### *Recent Developments in the United Kingdom and Malaysia*

Recent developments in both the United Kingdom and Malaysia reaffirm the constitutional significance of judicial review.

In *R (Miller) v Prime Minister*<sup>32</sup>, the United Kingdom Supreme Court held that the exercise of prerogative powers remains subject to legal limits enforceable by the courts. The decision confirmed that all executive powers must conform to constitutional principles.

Similarly, in *R (Privacy International) v Investigatory Powers Tribunal*<sup>33</sup>, the United Kingdom Supreme Court held that an ouster clause would not always exclude judicial review for errors of law, with Lord Carnwath observing that the supervisory jurisdiction of the High Court is a fundamental element of the rule of law.

Malaysian jurisprudence reflects comparable developments. In *Trellises*<sup>34</sup>, the Federal Court of Malaysia adopted a broader approach to standing and public law scrutiny, emphasising that judicial review serves as an important mechanism of accountability in matters affecting community rights and governance.

Recent litigation in Malaysia such as *Attorney-General of Malaysia v Sabah Law Society*<sup>35</sup> further illustrates the continuing importance of judicial review in resolving constitutional questions concerning the limits of governmental power.

### Conclusion

Ultimately, the continued efficacy of judicial review depends upon meaningful access to justice. As Lord Reed observed in *R (UNISON) v Lord Chancellor*<sup>36</sup>:

*Courts exist in order to ensure that the laws made by Parliament, and the common law created by the courts themselves, are applied and enforced. That role includes ensuring that the executive branch of government carries out its functions in accordance with the law. In order for the courts to perform that role, people must in principle have unimpeded access to them. Without such access, laws are liable to become a dead letter, the work done by Parliament may be rendered nugatory, and the democratic election of members of Parliament may become a meaningless charade.*

Without such access, the protection of legal rights risks becoming illusory, and the rule of law itself may be undermined.

The effectiveness of judicial review also depends upon the existence of an independent legal profession capable of representing litigants without fear or intimidation. Lawyers play a critical constitutional role in holding public authorities accountable and in ensuring that the legality of governmental action may be tested before the courts.

Recent international developments, including the Council of Europe Convention on the Protection of the Profession of Lawyer (‘Luxembourg Convention’) adopted in 2025, reflect growing recognition that lawyers must be protected in the discharge of this constitutional function. By establishing binding obligations on states to safeguard the independence, safety, and professional privileges of lawyers, the Convention reinforces a fundamental premise of the rule of law: that the

protection of rights depends upon lawyers who are able to act freely and fearlessly in upholding justice.

An independent judiciary composed of judges who faithfully uphold their constitutional oath to administer justice without fear or favour is fundamental to the operation of judicial review. The effectiveness of judicial review ultimately depends upon courts willing to enforce legal limits on public power. In doing so, the judiciary ensures that the rule of law remains a living constitutional principle rather than a purely theoretical ideal.

Finally, for lawyers the world over — particularly young lawyers — the road ahead will be challenging. There will be times when the political costs of upholding rights seems too high, or when the dry letter of a statute yields an unjust result. In those moments, stand firm in the knowledge that the rule of law is not a static or lifeless doctrine but a living, dynamic responsibility. It requires your courage, your discernment, and your unwavering commitment to respecting the equal dignity of every person. Uphold the rule of law not because it is the rule, but because it is the very foundation of a free and dignified society.

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<sup>1</sup> Speech delivered at the Institute of Professional Legal Studies, Queen’s University Belfast, 6 March 2026.

<sup>2</sup> With the assistance of Yadhurshan Soma Sundhareem Kumar, and Justyn Avynash Jiwa, pupils in chambers of Steven Thiru; and Chin Oy Sim.

<sup>3</sup> Douglas J. in *New York v United States* 342 US 882, 884 (1951).

<sup>4</sup> *Pengaruh Tanah dan Galian v Sri Lempah Enterprises* [1979] 1 MLJ 135.

<sup>5</sup> Rabinder Singh, *Substantive Principles of Administrative Law: Developments Since 1987* (Public lecture at the LSE, 11 March 2026).

<sup>6</sup> *R. v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses Ltd.* [1982] AC 617.

<sup>7</sup> *Anisimic Ltd v Foreign Compensation Commission* [1969] 2 AC 147.

<sup>8</sup> *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers’ Union* [1995] 2 MLJ 317.

<sup>9</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

<sup>10</sup> *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Hulu Langat* [2017] 3 MLJ 561.

<sup>11</sup> *Indira Gandhi v Pengarah Jabatan Agama Islam Perak* [2018] 1 MLJ 545.

<sup>12</sup> T.R.S. Allan, ‘Constitutionalism at Common Law: The Rule of Law and Judicial Review’ (2023) 82(2) *Cambridge Law Journal* 236, 243.

<sup>13</sup> *Council of Civil Service Unions v Minister for the Civil Service* [1985] AC 374.

<sup>14</sup> *In Associated Provincial Picture Houses v Wednesbury Corporation* [1948] 1 KB 223.

<sup>15</sup> Rabinder Singh, *ibid*, 6–10.

<sup>16</sup> *R (Nadarajah) v Secretary of State for the Home Department* [2005] All ER (D) 283.

<sup>17</sup> *Ngiam Geok Mooi v Pacific World Destination East Sdn Bhd* [2016] 6 CLJ 395.

<sup>18</sup> *Ong Weng Foo & Co v Securities Commission Malaysia* [2018] 1 LNS 1590.

<sup>19</sup> *Regina v Secretary of State for the Home Department, ex parte Brind And Others*, [1991] 1 AC 696.

<sup>20</sup> T.R.S. Allan, ‘Constitutionalism at Common Law: The Rule of Law and Judicial Review’ (2023) 82(2) *Cambridge Law Journal* 236, 242–244.

<sup>21</sup> *Ibid*, 236–238.

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- <sup>22</sup> *Semenyih Jaya Sdn Bhd v Pentadbir Tanah Hulu Langat* [2017] 3 MLJ 561.
- <sup>23</sup> *SIS Forum (Malaysia) v Menteri Dalam Negeri: BKA-1-01/2021(W)*.
- <sup>24</sup> *Maria Chin Abdullah v Ketua Pengarah Imigresen & Anor* [2021] 2 CLJ 579.
- <sup>25</sup> *Rovin Joty Kodeeswaran v Lembaga Pencegahan Jenayah & Ors and Other Appeals* [2021] 4 CLJ 1.
- <sup>26</sup> *Nivesh Nair a/l Mohan v Dato' Abdul Razak bin Musa, Pengerusi Lembaga Pencegahan Jenayah & Ors (Criminal Appeal No.: 05(HC)-7-01-2020(W))*.
- <sup>27</sup> *R. v Inland Revenue Commissioners, ex p National Federation of Self-Employed and Small Businesses Ltd.* [1982] AC 617.
- <sup>28</sup> *Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors* [2023] 3 MLJ 829.
- <sup>29</sup> *Nik Elin Zurina bt Nik Abdul Rashid v Kerajaan Negeri Kelantan* [2024] 2 MLJ 150.
- <sup>30</sup> *Attorney General of Malaysia v Sabah Law Society (Federal Court Leave Application No.: 08(f)-201-07/2024 (S))*.
- <sup>31</sup> *Dr A Dutt v Assunta Hospital* [1981] 1 MLJ 304.
- <sup>32</sup> *R (Miller) v Prime Minister* [2019] UKSC 41.
- <sup>33</sup> *R (Privacy International) v Investigatory Powers Tribunal* [2019] UKSC 22.
- <sup>34</sup> *Datuk Bandar Kuala Lumpur v Perbadanan Pengurusan Trellises & Ors* [2023] 3 MLJ 829.
- <sup>35</sup> *Attorney General of Malaysia v Sabah Law Society (State Government of Sabah, intervenor)* [2024] 4 MLJ 436.
- <sup>36</sup> *Regina (UNISON) v Lord Chancellor (Equality and Human Rights Commission and another intervening) (Nos 1 and 2)*, [2020] AC 869.