MALACCA LAW SEMINAR

JUDICIAL REVIEW OF ADMINISTRATIVE ACTION

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Judicial Review of Administrative Action

We are now living under the political philosophy of a welfare state. The idea is that it is the function of the government to seek the socio-economic welfare and development of the people. One inevitable result of this philosophy has been to multiply the functions of the state. The state protects the people from external and internal aggression. The state provides social services and minimum welfare to the people and ensures a minimum standard of living for all. This is sought to be achieved through provision for pensions, medical assistance, welfare benefits and other social services. Then the state acts as a regulator of various activities of the community. Thus we have town and urban planning, environmental control, regulation of private economic enterprise and a host of other regulatory activities of the state. The state also provides for the administration of justice and settlement of disputes and also arbitrates between competing social interests. Lastly the state runs a large number of undertakings and enterprises. As people demand more and more services from the state, the state responds to the demands and undertakes more and more varied functions.

One inevitable result of this development is the great increase in the powers of the administration. As the administration is required to discharge more and more functions, it needs more and more powers to discharge them. Not only there is proliferation of the powers

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of the administration, there is also proliferation of administrative institutions established to perform various functions. Thus a large extension of powers has taken place at the level of the administration. It makes policies, provides leadership to the legislature, implements the law and takes manifold other decisions. The Administration discharges the tasks of legislation, adjudication, licensing, search and seizure, enquiry, inspection etc. New administrative bodies with various designations, such as, departments, directorates, boards, commissions, corporations, bureaus, have come into existence. A number of tribunals and adjudicatory bodies outside the court-structure have come into existence. These bodies give binding decisions in many types of controversies, and decisions of many of these bodies have been declared to be final. The truth of the matter is that the Administration is the all pervading fact of life to-day. While the development has taken place in the name of public good and public interest, the truth also is that the individual interest has become subject to the administrative convenience. The modern administration impinges more and more on the individual. The Administration has acquired tremendous capacity to affect the rights, liberties and property of the individual.

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This aspect of the modern administration has caused anxiety among the thinking people. In fact, since the dawn of human history, philosophers have been musing over how to control power. This is not a new anxiety. A number of doctrines have been developed over time for the purpose such as rule of law, separation of powers, constitutionalism, fundamental rights, written constitutions - all these concepts and doctrines have the aim of controlling power so that individual freedom may be preserved to some extent against the powers of the government. In modern times, the same concern has become manifest through the instrumentality of administrative law - a branch of law which has become prominent during the last twenty five years or so. The function of administrative law is to control and regulate bureaucratic power in relation to the individual. The underlying aim is to control and structure power and afford redress and remedy to an individual if he is unduly injured by the exercise of an administrative power. Therefore a good system of administrative law lays emphasis on a sound control mechanism.

In the common-law world, great emphasis is laid on the courts as the control mechanism over the administration. It is regarded as a part of rule of law that courts ought to have the final power to assess whether the administration has acted legally or not in a

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particular fact situation. For long administrative law has been left to be developed by the courts. Under the impulse of socio-economic forces, legislature confers powers on the administration without at the same time imposing suitable controls and restraints on the exercise of administrative power. Thus the burden of overseeing the administration and developing suitable norms of administrative behaviour devolves on the courts. The courts have developed a number of principles and remedies for the purpose of overseeing the administration and affording suitable remedy to the individual when his rights are infringed unduly. But in course of time it has been realised in many common-law countries that the traditional judicial control over the administrative action is deficient in many respects and that some other control-mechanism to supplement judicial control over bureaucratic powers is a desideratum if individual rights are to be protected against erosion by the bureaucracy. This quest for better control mechanism has led to the institution of tribunals. Another very popular mechanism is that of ombudsman which has been borrowed from Scandanavian countries. It was adopted first in New Zealand in 1962. Then England adopted the system in 1966 and recently Australia has also adopted the ombudsman system. But we shall not say much about the ombudsman system as the topic for the day is Judicial Review and I shall like to confine myself to that topic.

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To understand the mechanics of judicial review of administrative action, we should first divide the powers of the administration into legislative and non-legislative powers. Many statutes confer legislative powers on the administration. The system of legislation by the Administration is known as subsidiary or delegated legislation. This can be recognised in practice by such terms as regulations, rules, ordinances, bye-laws etc. The power of delegated legislation is very significant. The administration can as vitally affect the rights of the people through delegated legislation as can a legislature through legislation. Of the total legislative output in a democratic country at the present moment, only a small portion is made directly by the legislature; by far the larger portion thereof emanates from the administration. As the power of delegated legislation results in the accession of powers of the administration, the question of controls in this area arises at once. Thus, the courts are called upon to develop norms for controlling delegated legislation. Any one adversely affected by any regulation challenges the same in the court. The court applies the doctrine of ultra vires to adjudge the validity of the rule or regulation in question. The underlying purpose of the doctrine is to assess whether the said regulation falls within the power delegated. In practice, however, the court control in

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this area is not very effective for several reasons : powers are usually conferred on the administration in very broad language and therefore it is difficult to hold any regulation as outside the scope of power[1]; the courts usually lean towards the validity of the regulation. In theory, the courts can declare a regulation ultra vires on the ground of unreasonableness, but it will be very rarely indeed that the court will hold any regulation as unreasonable because the meaning given to the word 'unreasonable' is extremely narrow and restrictive. To improve efficacy of judicial control over delegated legislation, it is necessary that the statutes avoid conferring powers on the administration in too broad and generalized terms and there be some substantive as well as procedural safeguards in the delegating formula. An important procedural safeguard may be for the rule-making authority to consult the interests going to be affected by the proposed rules. This means democratisation of the rule-making process. This sort of safeguard is necessary because court control is more of a symbolic rather than of practical value in this area.

[1] Reference may be made to Port Swettenham Authority v. T.W.Wu & Co.(M) Sdn. Bhd. (1978)2 M.L.J. 137, where a bye-law made by the port authority was declared ultra vires. Such example are however rare.

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Coming to the non-legislative powers of the administration, a significant development in recent years in this area has been the judicial insistence on the right of hearing to be given to a person who stands to be affected adversely by an administrative decision. In technical terms, it is known in Administrative Law as 'natural justice' or the concept of 'fairness'. It is a judge-made concept. It is a procedural safeguard for those whose rights are affected by administrative action. During the last two decades, the courts have come to insist more and more on the application of natural justice to larger and larger segment of administrative process. The reason underlying the trend is the judicial realisation that administrative bodies ought to follow some procedure before reaching a decision. Since there are not many safeguards woven into the law against the exercise of powers by the administration, the court feel that some protection may possibly be found for the rights of the people in insisting upon the administration following some procedures before taking a decision. The right of hearing emanates from the maxim that no one should be condemned unheard. The courts imply right of hearing in a statute. Even though a statute may be silent on the point, the courts may still insist that the administration must act according to natural justice. This emphasis on

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right of hearing has been initiated with the House of Lords' decision in 1963 in the celebrated case of Ridge v. Baldwin.[2] The courts is Malaysia also accept fully the principle of natural justice. The significant pronouncement in this connection is Ketua Pengarah Kastam v. Ho Kuan Seng,[3] a case of cancellation of a licence. The Federal Court in this case emphasized that fairness "is required as a rule of universal application" : it is "founded on the plainest principles of justice", and that "the silence of the statute affords no argument for excluding the rule, for the common law will supply the omission of the legislature". The court then enunciated the following broad principle regarding applying natural justice to administrative proceedings:

> "... the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action, no matter it be labelled 'judicial' 'quasi-judicial', or 'administrative', or whether or not the enabling statute makes provision for the hearing".

The courts in Malaysia have applied the principle of natural justice in a number of situations. For example, an order made by the Registrar of Trade Unions directing the concerned trade union to remove the names of 61 members from its register unilaterally on the complaint of the employers that they were involved in certain

2 (1964) A.C. 40.

3 (1971) 2 M.L.J. 152.

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illegal industrial action, without giving them an opportunity of defending themselves was quashed. The court said: "If persons are to be deprived of their rights the rule of audi alteram partem must be strictly observed".[4] In Sarawak Electricity Supply Corporation v. Wong Ah Suan[5], the Privy Council on appeal from the Federal Court ruled that before conditions in a licence can be changed, the licensee is entitled to a hearing. While many more examples may be cited[6], there are some crucial situations where the courts have refused to concede the right of being heard to the affected party. One such significant case is S. Kulasingam v. Commissioner of Lands, Federal Territory[7], where the Federal Court has ruled that when an order acquiring land is made under the Land Acquisition Act, no hearing is required.

Let us now refer to the discretionary powers of the administration. Most of the powers conferred on the administration are of a discretionary nature. One can see quite often in the statutes words to the effect that an authority can take a decision or action in its 'opinion', 'if it deems fit', in its 'discretion' or 'subjective satisfaction.' These words give large choices to the administrators.

4 Metal Industry Employees Union v. Registrar of Trade Unions, (1982) 1 M.L.J. 46.

5 (1980) 1 M.L.J. 65.

6 Pemungut Hasil Tanah, Daerah Barat v. Kam Gin Paik (1983) 2 M.L.J. 392.

7 (1982) 1 M.L.J. 204.

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If these words were to be interpreted literally, then the decision of the authority would practically be unquestionable on any ground. But the courts have created some norms to supervise the exercise of such powers. The basis premise is that any arbitrary action is contrary to rule of law. That arbitrary administrative powers is a contradiction of democratic values. Therefore the courts review discretionary powers on such grounds as mala fides, irrelevant considerations, non-application of mind, imposing fetters on discretion etc. In Malaysia, while the case-law in the area is scanty, yet it can be asserted that the principles developed by the British courts are equally relevant here. For example, the Federal Court has emphasized in Government of Malaysia v. Loh Wai Kong[8] that in exercising its discretionary powers, the Government "must act bona fide, honestly and honourably. If it is established that Government has acted mala fide or has in other ways abused its discretionary power, the court may, in our judgment, review government's action..." The most outstanding case in Malaysia in this branch of Administrative Law is Pengarah Tanah dan Galian, Wilayah Persekutuan K.L. v. Sri Lempah Enterprises[9]. This is one of the few cases in which a discretionary decision was quashed by the courts on the ground that the decision was based on irrelevant considerations and was for an improper purpose. Raja Azlan

8 (1979) 2 M.L.J. 33

9 (1979) 1 M.L.J. 135

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Shah Ag. C.J. repudiated the idea of uncontrolled discretion in these words:[10]

> "Unfettered discretion is a contradiction in terms... Every legal power must have legal limits, otherwise there is disctatorship... In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental agression."

The final question in the area of judicial review of administrative action is remedial. When a person feels aggrieved by an administrative action, he wants a remedy against the administration to protect his interest. The courts have a number of remedies at their disposal, viz., Habeas corpus, certiorari, prohibition, mandamus, injunctions and declarations. Although there are so many remedies available, the question of getting a remedy is embroiled in a number of technicalities and by and large the courts adopt a cautious and restrictive attitude in the matter of giving remedy to an aggrieved person against the administration. The important principles are: Giving of a remedy (except Habeas corpus) is discretionary with the court concerned; A remedy will denied if the applicant is guilty of laches, or if the law provides for any other alternative remedy. Then the applicant will be denied a remedy if he lacks legal standing.

[10] Ibid at 148.

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Habeas corpus is issued to quash an illegal detention of a person. Abdoolcader J. underlining the importance of the writ of habeas corpus has stated[11] that it is a high prerogative writ of summary character for the enforcement of the civil right of liberty and entitles the detainee to a judicial determination that the administrative order adduced as a warrant for the detention is legally valid. However, in the ultimate analysis, the efficacy of habeas corpus depends on the terms in which the relevant law under which a person is detained is couched. Usually the law confers broad powers on the administration. Mandamus is granted when the court is satisfied that the applicant has a right to the performance of a duty under any law by a person holding a public office. Thus, in Anthony Gomez v. Ketua Police, Daerah Kuantan[12], the Federal Court issued mandamus ordering the police to give a certified copy of the first information report to the accused-petitioner as he was a person interested in the report.

11 Yeap Hock Seng @ Ah Seng v. Minister for Home Affairs, Malaysia, (1975) 2 M.L.J. 279.

12 (1977) 2 M.L.J. 24.

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Prohibition lies when there is a failure of natural justice or for excess of jurisdiction. The function of prohibition is to stop a body from acting further. The function of certiorari is to quash. Certiorari is the most commonly sought writ against administrative authorities and statutory bodies. Recently the Federal Court has ruled that certiorari can lie against such a body as the Kuala Lumpur Stock Exchange - a body registered under the Companies Act but subjected to a good deal of administrative regulation under a statute.[13] Certiorari is issued on such grounds as error of jurisdiction, patent error of law, dental of natural justice and when there is no evidence to support a finding of fact. For example, in Hotel Jayapuri Bhd. v. National Union of Hotel, Bar and Restaurant Workers[14], an award of the Industrial Court was quashed by the High Court on the ground of error of law on the face of the record.

Courts have power to grant declarations if the plaintiff has a right to a legal character, or status or right to property. The court can give a declaration that an action of the administration is ultra vires, illegal or outside jurisdiction. Declaration is an important means of ascertaining the legal powers of public authorities, but the courts exercise caution in giving declarations.

13 O.S.K. & Parters Sdn. v Tengku Noone Aziz (1983)1 M.L.J. 179.

14 (1980)1 M.L.J. 109

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Against a government department, the courts can grant only a declaration and not an injunction. Injunction is a court order asking an authority to do or not to do something. The mos common use of injunctions is in the sense of a preventive measure to restraint a person from doing something. The efficacy of an injunction is very much diluted in Administrative Law because of the restriction that it cannot be granted against a government department. Thus, injunction can be granted against a municipal body or a statutory authority but not against the Menteri Besar[15] of a State or a government official like the Registrar of Titles.[16]

There are two more aspects of judicial remedy - one positive and the other negative - to which reference may be made here. The positive aspect is that the recent judicial tendency has been towards relaxation of the traditional view regarding legal standing so much so that now in some countries there is the growing concept of public interest litigation[17]. The Federal Court in Malaysia has taken somewhat relaxed view of legal standing in Mohamed bin Ismail v. Tan Sri Haji Osman Saat[18]. This enhance the breadth of the scope of judicial review. The negative aspect is that many statutes contain what are known as privative clauses, i.e. clauses seeking to exclude or

15 Ramamoorthy v. Menteri Besar of Selangor (1969) 2 M.L.J. 97.

16 Nanthakumaran v. Jaffness coop. Housing Society Ltd.(1980) 1 M.L.J.114.

17 For a full discussion of the topic see M.P. Jain, Public Interest Litigation in (1984) M.L.J. cvi.

18 (1982) 2 M.L.J. 179.

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restrict judicial review. Many statutory clauses declare decisions of many administrative authorities as 'final'. This has a corrosive effect so far as judicial review is concerned. In England, attempts have been made by the courts to restrict the damage done by such statutory formulae, but in Malaysia in South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Mfg. Employees Union[19] the privative clauses have been conceded a bigger effect so as to curtail judicial review of administrative action. While judicial review is curtailed no other control mechanism is substituted. The tribunal system in Malaysia has not yet prospered as much as in other common-law countries.

Finally, it needs to be mentioned, that Government in Malaysia is liable for any wrongful act done, or any neglect or default committed, by any public officer in the same manner, and to the same extent, as a private person. Thus, in case of tortious liability, the courts may award damages against the government to the injured party.

The above is rather a bare outline of an otherwise very complicated and technical subject.

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[19] (1980) 2 M.L.J. 165