

Malaysian Administrative Law: Has It Come Of AGE?

Hari Chand*

There has been tremendous development of administrative law in the latter half of this century. Professor Jain aptly described this phenomenon in these words:

*"The twentieth century has been characterised as the "administrative age" and administrative law has been characterised as the "outstanding legal development of the twentieth century". All democratic countries have seen a tremendous growth of administrative law in quantity, quality and relative significance. Administrative law has grown into an identifiable and definitive system of law in its own right. Malaysia is no exception to this rule."*¹

The development of law in general and administrative law in particular is integrally connected with the development of economy, trade and commerce. The modern state is involved in regulating trade and commerce, transport and means of communication, education, health, environment, natural resources, economic development and a host of other matters. This phenomenal development of the state has necessitated the development of administrative law. This writer wrote in 1992:

*"Taking a metaphor from the Chinese culture, administrative law has risen like a dragon from under the ground and it is still rising high in the sky in the second half of the twentieth century. It is premature to say what shape it will take but it is certain that it will expand and extend in areas that remain untouched by it as yet. The norms of administrative law would not only become part and parcel of the legal culture but would also enter the common vocabulary of the people."*²

Looking at the decided cases in the field of administrative law in Malaysia in the last ten years, one gets the impression that the administrative law is taking long strides and replenishing its weak spots to rise to the occasion which the current pace of development requires. The judges are well aware of the stage of development Administrative law has attained in other Commonwealth Countries and they try to fill in the empty gaps in the law and enrich its various essential aspects. We propose to take up these aspects under the following headings.

SCOPE OF JUDICIAL REVIEW POWER

What is the scope of judicial review power in Malaysia? This question arose in several cases. The controversy was whether the judicial review power is limited or wide in its scope. The Court of Appeal as well as the Federal Court took the view that it is wider than the scope of judicial review power in Britain. An argument on the scope of judicial review power was made in *Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan*,³ that s.49 of the Specific Relief Act, 1950, does not

permit a High Court to issue an order of mandamus. The Court of Appeal rejected the argument on the ground that s.49 prohibits a writ of mandamus but not an order of mandamus. The Court pointed out that Order 53 of the Rules of the High Court 1980 as well as paragraph I of the Schedule to the Courts Judicature Act 1964 are the other two sources of the power of the High Court to issue any remedy in public law matters. The court observed:

“Consequently the powers of the High Court in the field of public law remedies is not confined to the grant of usual prerogative orders known to English law. Our courts should not consider themselves to be fettered by those antiquated shackles of restrictive traditionalism which the common law has imposed upon itself. They are at liberty to develop a common law that is to govern the grant of public law remedies based upon our own legislation. They may, of course, be guided by the decisions of courts of a jurisdiction which has an analogous provision. But ultimately, they must hearken to the provisions of our own written law when determining the nature and scope of their powers.

In my judgment, the wide power conferred by the language of para I of the Schedule enables our courts to adopt a fairly flexible approach when they come to decide upon the appropriate remedy that is to be granted in a particular case. The relief they are empowered to grant is by no means to be confined within any legal straightjacket. They are at liberty to fashion the appropriate remedy to fit the actual matrix of a particular case, and to grant such relief as meets the ends of justice.”⁴

This view of wider power of the courts to issue various remedies was upheld by the Supreme Court as well.

JUDICIAL REVIEW POWER – EXTENT IN MALAYSIA

Edgar Joseph Jr, FCJ observed in *Rama Chandran, R v. The Industrial Court of Malaysia & Anor*,⁵ that the powers of the courts in Malaysia, in the field of public law remedies are not limited in the same manner as that of the courts in the United Kingdom, where there are no such equivalent provisions as in Malaysia. The learned judge expressed his view in favour of moulding relief, if the circumstances of the case so require. Both the learned judges Mohd Eusoff b. Chin, CJ, Malaysia and Edgar Joseph Jr FCJ observed that there are no provisions in the Courts of Judicature Act, and the Rules of the High Courts that expressly or impliedly prohibit the High Courts from granting any relief.⁶ In their opinion s.25 of the Court of Judicature Act read with para I of the Schedule thereto provide that the power of the High Court includes power to issue to any person or authority directions, orders or writs including writs of the nature of habeas corpus, mandamus, prohibition, quo warrant and certiorari or any other for the enforcement of the rights conferred by Part II of the Constitution, or any of them or for any purpose.⁷

In his supplementary judgment Edgar Joseph Jr, FCJ, observed to make it clear the position in Malaysia:

*“It follows, therefore, that while Our Order 53 can only prescribe the procedure and practice to be followed by parties when applying for judicial review, the source of power enjoyed by our courts to grant relief in judicial review proceedings is the prerogative jurisdiction inherited from the United Kingdom Courts and, most importantly, para I of the schedule read with s.25 of the Courts of Judicature Act. The proviso to s.25(2) and, more particularly the Rules of the High Court, do not, and indeed cannot, narrow down or diminish or curtail the scope of the powers conferred upon our courts in judicial review proceedings.”*⁸

The learned judge, in a second explanatory judgment written in response to the dissenting judgment of Wan Yahya Pawan Teh, FCJ, shed a flood of light on several issues including the scope of judicial review in Malaysia. Quoting the majority opinion of the Court of Appeal in *Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan*,⁹ the learned judge observed that the powers conferred by the Schedule upon a High Court are according to its terms, ‘additional powers’, that is, powers in addition to those already seized of by that court. Resort may therefore be had to paragraphs in the Schedule to found jurisdiction to grant relief not expressly prohibited by written law. The Federal Court, in the opinion of the learned judge, took this very approach to found the Mareva jurisdiction in *Zainal Abidin v. Century Hotel*,¹⁰ relying upon para 6 of the Schedule.

CAN COURTS REVIEW ‘DECISION’ OR ONLY ‘DECISION MAKING’?

To what extent can the review of a case be undertaken by the courts? This question arose because the traditional thinking is that in judicial review only the decision – making should be reviewed and not the decision itself. In other words, the procedural aspect as to whether the authorities have complied with the law may be reviewed and not the merit of the case or the facts of the case. This traditional view still prevails in theory but the recent developments in administrative law have eroded the foundation of what constitutes the merit of a case. The concepts of jurisdictional error, error of law, error of fact, fact-finding, no-evidence rule, irrelevant consideration, irrationality, proportionality, reasonableness and legitimate expectation lead the judge into the arena of facts or merits of the case. So the net result is that the merit of a case is not immune from judicial review, though lip service is still paid in theory to the traditional idea. It can be visualised that the distinction between ‘decision’ and ‘decision-making’ already stands undermined and probably it is a question of time before the distinction is thrown to the wind so far as judicial review is concerned. The counter argument that if judicial review is allowed as regards the merit of a case, there would remain no difference between appeal and judicial review is going to lose its ground as the exigencies of the situations would blur the demarcating line whether we wish or not. The time would soon approach when the courts would say that it does not matter whether

you come by way of appeal or by of judicial review. We have to do justice and we have no time to waste. Let the distinction evaporate.

In a remarkable case of *Kumpulan Perangsang Selangor Bhd. v. Zaid bin Hj. Mohd. Noh*,¹¹ the Supreme Court confirmed the decision of the High Court which had set aside an award of the Industrial Court. The High Court had examined the facts of the case to determine whether the determination of the Industrial Court was right that the respondent was dismissed with just cause. An argument was made by the appellant that in a certiorari case the High Court is not entitled to go into the facts or merits of the case; the High Court is supposed to look at the decision – making and not the decision itself. If it goes into the merit of the case, it would be converting judicial review into appeal. The Supreme Court observed:

*“Until recently, it was generally thought that when a decision is challenged on grounds of ‘wednesbury unreasonableness’, the court is confined to an examination of the decision making process and not the merit of the decision itself. That is an error perpetuated by adherence to a narrow doctrinaire approach without analysing later judicial pronouncements that had addressed the subject. The fallacy of the doctrine that judicial review is always to the decision making process and never with the merits of the decision itself was exploded by the landmark decision of this court in R. Rama Chandran v. The Industrial Court of Malaysia & Anor.”*¹²

The learned judge quoted a para from Edgar Joseph Jr FCJ from *Rama Chandran’s* case to the effect that:

*“But Lord Diplock’s other grounds for impugning a decision susceptible to judicial review makes it abundantly clear that such a decision is also open to challenge on grounds of illegality, and ‘irrationality’ and, in practice this permits the courts to scrutinise such decision not only for process but also for substance.”*¹³

The learned judge pointed out that the current approach to the ‘wednesbury unreasonableness’ and the proportionality tests is that adopted by Lord Denning MR in the Court of Appeal in *Evans*. The Court did not adopt an absolute approach as in the next para the court enumerated cases in which, for reasons of public policy, national interest, public safety or national security, it may be wholly inappropriate for the courts to attempt any substitution of views.¹⁴

SHOULD THE APPLICANT FOR JUDICIAL REVIEW EXHAUST HIS OR HER DOMESTIC REMEDY BEFORE HE OR SHE APPLIES FOR JUDICIAL REVIEW?

There can be strict or flexible approaches to the question. If the strict view is adopted, the scope of judicial review is cut down whereas the flexible approach would enhance the scope of judicial review but may render the domestic remedy

ineffectual. In Malaysia the courts have adopted a via media between the two approaches which is sensible and easily workable.

ALTERNATIVE REMEDY PROVIDED – SHOULD THE APPLICANT EXHAUST HIS REMEDY?

In *Jeeram A/L Sanjiwi v. National Union of Plantation Workers*,¹⁵ the High Court, Alor Setar, held that an express provision in the rules that the plaintiff must first exhaust his domestic remedies, does not make the court bound by it but the plaintiff will have to show cause why the court should interfere. In a situation where the domestic tribunal has acted beyond its jurisdiction and its decision is void, there is no need for the aggrieved party to exhaust his domestic remedies before coming to the court. In the case in hand, the High Court came to the conclusion that the award made by the arbitrators was void and therefore, the court had jurisdiction to intervene notwithstanding the fact that the union rules provided for an appeal to the Triennial Delegate's Conference and the applicant chose not to appeal to the body.

Lans Koperal Chellapan A/L Kantasamy v. Mejar Wan Ghazali bin Wan Din & 2 ors,¹⁶ confirms the position of law when there is an alternative remedy provided but the applicant does not exhaust his domestic remedy. The application was to quash the decision of the court martial. The High Court, Taiping, allowed the application as the applicant had shown that the application was not frivolous. The court referred to the Supreme Court judgment in *Government of Malaysia & Anor v. Jagdis Singh* [1987] 2 MLJ 185 and followed Tan Sri Hashim Yeop A. Sani SCJ's observation:

*"A clear principle is reiterated here that is, it is not a rigid rule that whenever there is an appeal procedure available to the applicant he should be denied judicial review. Judicial review is always at the discretion of the court but where there is another avenue or remedy open to the applicant it will only be exercised in very exceptional circumstances"*¹⁷

Then the court summed up the position in these words:

*From the authorities cited, the trend would be towards a liberal approach in tackling the question of judicial review in respect of certiorari. The need to exhaust the domestic remedies should not fetter the discretion of the High Court in granting leave 'where there are very exceptional circumstances or a clear lack of jurisdiction or a blatant failure to perform some statutory duty or where there are serious breaches of the principles of natural justice.'*¹⁸

This approach is followed by other High Courts as well.¹⁹

In fact the Court of Appeal made it clear the circumstances in which the domestic remedy may not be followed and judicial review may be allowed.

Mahadev Shankar JCA, observed after considering the case of *Government of Malaysia & Anor v. Jagdis Singh* [1987] 2 MLJ 185:

“Whether a grievance should be redressed only by way of appeal, or by way of judicial review regardless of a domestic remedy available, must turn on whether the complaint is one of ‘abuse of power.’ We use this term in its widest sense and equate it to ‘an error of law’ as that term is used today to include, inter alia, a denial of a legitimate expectation, a breach of natural justice or a making of a decision which is irrational and unjust. Such a situation would be ‘exceptional or very exceptional’ because the objective of the decision-making process is to make lawful decisions within the ambit of the statutory powers conferred.

*The words ‘clear lack of jurisdiction or a blatant failure to perform some statutory duty or in appropriate cases a serious breach of the principles of natural justice’ which occur in the core passage of *Jagdis Singh* cannot today be treated as exhaustive but only as a series of open-ended instances in which the court will intervene.”²⁰*

JURISDICTIONAL ERROR

Abdul Rahim Jemali v. Merlin Management Corp. Sdn. Bhd. & Anor,²¹ is a landmark decision as the High Court set aside a decision of the Industrial Court on the ground that the Industrial Court came to an absurd conclusion or achieved the same absurdly. The applicant had applied for orders of certiorari and mandamus to quash in part the decision of the Industrial Court. The Industrial Court had concluded that the applicant was constructively dismissed. As the applicant had not acted immediately but waited for 22 days before tendering his resignation in writing, the Industrial Court further held that he had by this delay waived the breach and agreed to the variation in his contract of service. But the High Court did not agree with the conclusions of the Industrial Court. On the contrary the High Court held that the Industrial Court made an error of law that went to its jurisdiction in that it came to an absurd conclusion on the evidence before it. Instead of reverting the decision to the Industrial Court, the High Court itself quashed the findings, following *Hong Leong Equipment Sdn. Bhd. v. Liew Fook Chuan and another*.²²

ERROR OF LAW

In *Kumpulan Perangsang Selangor Bhd. v. Zaid bin Hj. Mohd. Noh*,²³ the Supreme Court following *Rama Chandran v. The Industrial Court of Malaysia*,²⁴ reiterated that if a court makes an error of law, it takes itself out of its jurisdiction and its decision will be set aside. The decision in the above case was not only set aside but the court thought it better to give the consequential relief itself, just as it had done earlier in *Rama Chandran*,²⁵ case.

JURISDICTIONAL ERROR – AND ERROR OF LAW

In *Syarikat Kenderaan Melayu Kelantan Bhd. v. Transport Worker's Union*,²⁶ the Court of Appeal per Gopal Sri Ram JCA, made bold to overrule the Privy Council decision in *Fire Bricks* which had maintained the distinction between a jurisdiction error and an error of law that did not go to jurisdiction. The Court of Appeal did away with the distinction and adopted Lord Denning's view that an inferior tribunal or other decision-making authority has no jurisdiction to commit an error of law. If an inferior tribunal or other public decision-maker does make such an error, then he exceeds his jurisdiction. Also jurisdiction is exceeded where resort is had to an unfair procedure. Almost adopting Lord Reid's view in *Anisminic*,²⁷ the learned judge observed:

"It is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that an error of law would be disclosed if the decision maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be conveniently termed an Anisminic error) or if he misstates the terms of any relevant statute, or misapplies or misstates a principle of the general law.

*Since an inferior tribunal has no jurisdiction to make an error of law, its decisions will not be immunized from judicial review by an ouster clause however widely drafted."*²⁸

It is submitted that the Court of Appeal took a very realistic view and brought Administrative law not only to a simpler but also to a clear and better position.

JURISDICTIONAL FACTS.

The High, Shah Alam, issued certiorari in *Capt. Alimuddin bin Tufail Muhd v. Lembaga Pelabuhan Kelang*,²⁹ to quash the decision of the respondent, a statutory body to suspend the applicant's pilot's license. The statutory authority, by a letter issued on July 13, '93, informed the applicant that the authority had reached a decision to suspend his pilot's license, with affect from July 15, '93 for one month. In fact the authority thought that the applicant had the same pilot's license which he used when he was in the authority's service. But this misconceived notion was wrong as the applicant was no longer using the authority's pilot's licence; he had another licence as he was employed by another company. The authority had held an enquiry about a collision and had decided to suspend the applicant's license.

The applicant was no longer an authority's pilot nor did he have any pilot's license at all when the authority made its decision. Thus there were no jurisdictional facts in existence showing that he had an authority's license or a license under s.29 CA of the Port Authorities Act 1963, before the authority could have

jurisdiction over the matter. So the condition precedent required for the authority to exercise jurisdiction over the applicant was not fulfilled.

OUSTER CLAUSE – JUDICIAL REVIEW.

The Supreme Court in *Petaling Tin Bhd. v. Lee Kian Chan*,³⁰ reiterated the well established principle in Administrative law that judicial review is available in respect of jurisdictional error even when there is an ouster clause. In other words, an ouster clause does not prevent the court from reviewing the decision in case there is an error of jurisdiction. The court can and should review the decision and issue certiorari if it wants to set aside the decision or give appropriate remedy.

SUBSTANTIVE *ULTRA VIRES*.

In Administrative law, *ultra vires*, is the first challenge the applicant for judicial review can make. The doctrine of *ultra vires* was understood in a narrow sense until *Anisminic*³¹ was decided. The narrow sense of *ultra vires* was that the applicant needed to argue that the respondent lacked the legal competence to make the decision under challenge. In other words, the applicant would contend that the action of the respondent lacked the legal basis and, therefore, it was illegal. The court would examine the legal frame work in which the decision-maker made the decision and then hold whether it was indeed without legal authority or not. In *Anisminic*, the House of Lords took a wider view of *ultra vires* in that if the action of the administrator was based on legal power but he committed some error, still it would be *ultra vires*. The decision-maker might fail in observing the principles of natural justice or might have asked a wrong question in his enquiry. In such cases also the act of the administrator would be null and void because of *ultra vires*. Thus the concept of *ultra vires* was widened from its narrow statutory source of legal power to a wider ground to include his other lapses. The courts these days apply *ultra vires* in a wider sense. This has expanded the scope of judicial review under this heading. The Malaysian Courts have adopted the extended meaning of *ultra vires* and thus keep pace with the courts in Britain.

In *Penang Development Corp. v. Teoh Eng Huat & Anor*,³² one of the argument made by the appellant was based on *ultra vires*, that an officer of the corporation did not have the power or authority to enter into private contract and, therefore, the same should be declared as null and void but the Supreme Court did not accept the argument. Mohd Jemuri CJ Borneo adverted to the doctrine of *ultra vires* and made it clear that these days, after *Anisminic*,³³ the doctrine of *ultra vires* is taken in a wider sense. The learned judge referred to the views of Lord Reid in *Anisminic* and accepted the doctrine in a broader sense, though in the case in hand, it was in the narrow sense that the counsel pressed the doctrine of *ultra vires* into service. The Court observed:

"... it has become increasingly clear from the authorities that the contemporary notion of ultra vires is by no means confined to a situation where a public authority

steps outside the boundaries of the field of activity allocated to it by the law. The notion of ultra vires now encompasses a situation where the public authority commits an error of law albeit that the authorities' action is undeniably of a kind falling within the field of activity allocated to it by the law."³⁴

PROCEDURAL *ULTRA VIRES*.

In case the administrator fails to comply with a procedural requirement, the act would be ultra vires on the ground of procedural ultra vires. In detention cases, the courts have taken rightly the stance that the administrator must comply with mandatory requirements strictly.

The High Court at Penang held in *Puvaneswaran v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor*³⁵ that if there is non-compliance with mandatory rules, it would be a breach of procedural requirement. The applicant, a detainee, was served with one copy of Form I instead of two copies. In Form I appear the grounds of detention. In case the detainee wants to engage a counsel, he should be provided with two copies of Form I – one for himself and one for the secretary of the Advisory Board. Without his own copy, he might be at a disadvantage in proceedings before the Advisory Board. The High Court held that the requirements for the delivery to a detainee of the requisite number of copies of Form I are not just a concession but a right designed to enable and not just to assist him in making representations to the Advisory Board. It is mandatory and, therefore, there was a serious breach of the mandatory requirement in this case which rendered the detainee's detention unlawful.

After *Puvaneswaran's* case, the Supreme Court also upheld the view taken in *Puvaneswaran* that if a detainee is given only one copy of the prescribed form instead of two copies, it is a clear breach of the procedure. The Supreme Court observed in *Aw Ngoh Seang v. Inspector General of Police & Ors*,³⁶ that the *maxim de minimis non curate lex* (the law does not concern itself with trifles) relied on by the trial judge could have no application in such a case as a breach of a mandatory requirement can never be a trifling matter when it involves the civil liberty of an individual.

This trend in judicial review is promotive of civil liberty and goes to create awareness on the part of the executive that arresting a person should be viewed a serious matter and all procedural requirements must be fully complied with. There are several cases where detainees have been successful in obtaining release on the ground that procedural requirements were not complied with by the detaining authorities.³⁷

In *Aria Kumar @ Omar bin Abdullah & Anor v. Ketua Pengarah Jabatan Hasil Dalam Negeri, Malaysia & Anor*,³⁸ the plaintiffs were transferred from Kuala Lumpur to Kuala Terengganu. They had appealed against their transfer and the Terengganu office had sent the plaintiffs AR registered letters requesting them to report for work. These letters were returned undelivered and by Gazette Notification No. 890 dated 2 March 1989, they were deemed dismissed from service. They applied to the High Court for declaration. The High Court, per

Wan Adnan Bin Ismail J., interpreted the relevant regulation 21(5) as meaning that the officer concerned must be absent and cannot be traced. Then and only then the disciplinary action may be taken against the officer. In this case, there was no attempt to trace the officer. It was only upon failure to find them after efforts to trace them had been made that they could be said to be "cannot be traced". Thus the Court found that one precondition had not been fulfilled. The plaintiffs were entitled to the declaration.

In *Low Teng Hai v. Menteri Dalam Negeri Malaysia & Ors*,³⁹ the High Court, Johor Bahru, held that the requirement to remind the detenu of his right to make representations is a mandatory requirement and noncompliance with it rendered the detenu's detention unlawful. The detenu was originally ordered by the Home Minister to be detained for a period of 2 years at the Rehabilitation Center at Pulau Jerejak Penang. He was brought to the centre on September 23, 1990 and was detained there until 14 May 1991 when he was removed to the Rehabilitation Centre at Simpang Rengam Johor, as a result of an order made by the Minister on the same day. But there was no evidence to show that the order was made before the actual removal of the detenu. The Court drew an inference favourable to the detenu and the detenu was set at liberty forthwith.

PROCEDURAL FAIRNESS.

These days 'Procedural Fairness' came to be known as a compendious term to cover not only the traditional principles of natural justice but also, the elements of 'acting fairly' and fairness in general. It is regarded as a wider concept than principles of natural justice and 'acting fairly'. It is heartening to note that the concept of procedural fairness in its widest meaning has been embraced by the courts in Malaysia, thus raising Administrative Law to the level of development in other Commonwealth countries.

The question arose in *Hng Ah Leong v. Inspector-General of Police & 2 Ors*,⁴⁰ whether it was proper in a case of dismissal in which the show cause notice was issued by the Inspector-General of Police and, after receiving a reply from the plaintiff, the Deputy Inspector-General of Police made an order of dismissal. The High Court Kuala Lumpur held, per Abu Mansor bin Ali, J., that only the first defendant who issued the show cause notice could consider whether the prima facie case was rebutted by the reply or not. The dismissal should have been exercised by the first defendant and not by the second defendant.

In *Milan Auto Sdn Bhd v. Wong Seh Yen*,⁴¹ an employee was dismissed on the ground that he was found sleeping at his job, that he was unproductive and arrogant. But the employer did not hold any statutory enquiry required by the Employment Act. The employee, on the Minister's reference, brought a claim for wrongful dismissal before the Industrial Court which held that it was wrongful dismissal as the employer failed to hold a domestic enquiry under the Act. The employer appealed to the High Court which dismissed the appeal but the Federal Court accepted his appeal on the ground that the Industrial Court should have cured the defect in not holding a domestic enquiry and as it did not decide the case on merit,

it made a jurisdictional error and its award was set aside by certiorari and the case was sent back to be tried by another division of the Industrial Court. It is submitted that the decisions of the Industrial Court as well as of the High Court proceeded rightly on the statutory provision to hold a domestic enquiry. The Federal Court's decision goes to make the statutory provision nugatory as in each case the employer may not hold any enquiry and dismiss an employee, relying upon the Industrial Court to do its job. The decision of the Federal Court clearly throws undue burden on the Industrial Court which it was not supposed to bear in each case. Of course, the proposition that the defect in the domestic enquiry is curable at the instance of the Federal Court, may be applicable in cases where the enquiry was not conducted properly but the defect of not holding an enquiry at all should not be curable otherwise most employers would just dismiss an employee without holding an enquiry thus rendering the statutory requirement of no use. It is an important principle of Administrative Law that no one should be condemned unheard. After all if Parliament provides for the right to be heard in the Act, the Federal Court should not keep the provision at abeyance. Moreover, it can be visualised that each employee who is dismissed without there being an enquiry, may not be able to bring the action before the Industrial Court as it is only by a reference by the Minister that an action can be brought.

NATURAL JUSTICE – RIGHT TO BE HEARD.

Shamsiah bte Ahmad Sham v. Public Service Commission, Malaysia and government of Malaysia,⁴² is a landmark decision in the context of natural justice. In this case the appellant sought a declaration from the High Court that her dismissal as a bookbinder with the Government Printers in Kuala Lumpur by the Public Service Commission was null and void. The main ground was that the Commission took into consideration prejudicial and extraneous material without giving her a reasonable opportunity to be heard. The High Court gave judgment against her but she was successful in the Supreme Court. The Supreme Court allowed her appeal on the ground that the Commission took into consideration the damaging materials concerning the past conduct of the appellant and the Commission had infringed the rules of natural justice in not giving the appellant the opportunity to be heard on her past record of service. The court observed:

*"...we are not saying and should not be quoted as saying that the past record of the appellant should not be taken into account in considering her guilt or the appropriate punishment if she were found guilty of the charge. What we are saying is that if these materials which have such damning effect on her case are to be used against her she should be given a right to be heard on them. It is not a matter of pure technicality but it is absolutely fundamental in law that the appellant should have been given an opportunity of stating her case regarding her past conduct, considering that the dismissal of a civil servant is no light matter."*⁴³

GIVING REASONS – PROCEDURAL FAIRNESS.

On giving reasons, *Hong Leong Equipment Berhad v. Liew Fook Chuan*,⁴⁴ is a major milestone in the development of Administrative Law in Malaysia. The Court of Appeal per Gopal Sri Ram JCA, and Siti Norma Yacob JCA, straightened several aspects of Administrative law, bringing the law to the modern position. The judgment touched on procedural fairness, on giving reasons, the jurisdiction of the courts to issue mandamus order to a Minister and the scope of judicial review. On each court, the Court rose to the occasion and adopted the latest position of Administrative Law as it obtains in Britain or in India. Gopal Sri Rama JCA observed:

“I said a moment ago that the principle of the common law of England, which imposes no obligation upon a public decision-maker to give reasons, is based upon the historic premise that courts there were under no obligation to give reasons for their decisions. English courts, therefore, declined to impose upon other public decision-makers a standard higher than that which they (the courts) were required to meet.

*But that is not the position in this country. Here, it has long been considered a duty of courts to produce reasons for their decisions ...”*⁴⁵

Siti Norma Yacob JCA, emphatically justified the duty to give reasons. In her own words:

*“...there is no statutory duty to give reasons, but in the modern climate of administrative law, such an omission may no longer be justified. The giving of reasons may be inconvenient, but I can see no ground at all why it should be against the public interest indeed rather the reverse. This being so, I would ask simply: is a refusal to give reasons fair? I would answer without hesitation that it is not.”*⁴⁶

An argument was made in *Minister of Human Resources & Ors v. National Union of Hotels, Bar and Restaurant Workers, Semenanjung Malaysia and Another*,⁴⁷ that the decision of the Director General of Trade Union (DGTU) should be set aside as he did not give any reason for choosing the method of secret ballot rather than the method of membership verification exercise. The High Court held that the decision without giving reasons was unreasonable and set it aside whereas the Court of Appeal reversed the decision of the High Court, Kuala Lumpur. It is to be noted that the Court of Appeal through Gopal Sri Rama JCA held that the decision of the DGTU was not unreasonable, though the DGTU did not give any reasons as he was under no duty to give reasons. In *Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan* the learned judge had given due weight to reasons particularly when he observed:

*"In my judgment, as a general rule, procedural fairness, which includes the giving of reasons for a decision, must extend to all cases where a fundamental liberty guaranteed by the constitution is adversely affected in a consequence of a decision taken by a public decision-maker."*⁴⁸

But the learned judge preferred to follow an English authority, namely, *Lonrho v. Secretary of State for Trade and Industry*,⁴⁹ by passing conveniently his own advice given in *Hong Leong*, that the English authorities are not relevant on the requirement of giving reasons:

*"Since our courts had imposed upon themselves a standard higher than the courts of England, it is difficult to comprehend the relevance or applicability of English authority which decide that a public decision-maker need not give a reasoned decision. Further, it may be legitimately asked of other public decision-takers in this country, why, if a judge has to give reasons for his decision, the like duty ought not to be imposed upon them based upon the principle of equality."*⁵⁰

The passage relied upon for the view that absence of reasons does not necessarily mean that the decision is irrational is this:

*"The absence of reasons for a decision where there is no duty to give them cannot of itself provide any support for the suggested irrationality of the decision. The only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision maker who has given no reasons cannot complain if the court draws the inference that he had no rational reasons for his decision."*⁵¹

In the first place, if the Malaysian judiciary is required to excel the British counterpart in requiring reasons, the passage is no guide at all. Secondly, the main idea of requiring reasons, amongst several other reasons, is to reveal the working of the decision maker's mind which is a great key to determining in modern Administrative Law as to how the decision was reached. The learned judge seems to have diluted the role played by reasons in decision making when he observes:

"It is axiomatic that a reasonable decision may often produce a result that is adverse to one or more parties who are affected by it. An unfair result does not necessarily make a decision unreasonable because unfairness must be gauged by reference to the decision itself, which may or may not include the consequences of such decision, depending upon the circumstances of each case."

The second sentence of the above statement appears to negate, if not completely eliminate, the role of reasons. Generally, it is reasons which reflect on the fairness or unfairness of a decision. In the absence of reasons, the judge is mainly left with intuitive approach to make his own impression and then characterise the decision as he pleases. The requirement of reason is to supply some objective grounds to

the judge in determining rationality or irrationality of the decision. If it is the circumstances of a case which must loom large in determining rationality or irrationality of a decision, the part played by reasons is relegated to the back whereas the modern Administrative Law emphasises on reasons to bring them to the forefront so that the judicial mind follows a surer path.

In *Re Haji Szali*,⁵² the High Court at Kuching set aside an order passed by the magistrate on the ground that the magistrate did not give any reasons in his judgment. The High Court stressed on the point that magistrates must give reasons for their decisions.

It has been established as a rule of procedural fairness that a body which is required by law to be satisfied personally about any matter, then the body alone and not anybody else on its behalf, must consider the matter.⁵³

PROPORTIONALITY.

The Court of Appeal per Gopal Sri Ram JCA delivered a significant decision.⁵⁴ There a civil servant was dismissed by the Department, after disciplinary proceeding for a criminal breach of trust but the Court of Appeal ruled that the dismissal was too severe a punishment to impose on the appellant. In other words the Court applied proportionality to the amount of punishment imposed. The Court observed:

*“Thus, the requirement of fairness which is the essence of article 8(1) when read together with article 5(1) goes to ensure not only that a fair procedure is adopted in each case based on its own facts, but also that a fair and just punishment is imposed according to the facts of a particular case.”*⁵⁵

The Federal Court adopted the principle of proportionality in Malaysia in a landmark case of *Rama Chandran*.⁵⁶ The Melaka High Court's decision in *Ekambaran a/l Savirimuthu*⁵⁷ set aside the punishment on the ground that the punishment was irrational and disproportionate. But the Federal Court refused to moderate the punishment in *Ng Hock Cheng v. Pengarah Am Penjara*⁵⁸ on the ground that the employer, including a government, is the best person to judge the seriousness of misconduct of an employee. It is submitted that if the government/ employer is accepted as the best judge of the seriousness of misconduct committed⁵⁹ by a civil servant, what avail is the judicial review of administrative acts regarding punishment? This latest case flies directly in the face of the decision of the Federal Court in *Rama Chandran* in which the Court adopted the principle of proportionality and applied the same and also goes to negative the holding in *Tan Pek Seng*'s⁶⁰ case.

REMEDIES.

Is an election judge amenable to certiorari? This question arose in *Choo Keong v. Lee Meng & Anor*.⁶¹ The Court of Appeal as well as the Federal Court held that

since the election judge is not less than the High Court, neither the High Court nor the Court of Appeal, nor the Federal Court has jurisdiction to review the decision of the election judge. It is submitted that the election judge could be treated like an election tribunal and thus a remedy could be given by the superior court. Though the election judge may be a High Court judge, it is difficult to equate the election judge with the High Court which is an institution in its own right.

*Hong Leong Equipment*⁶² made it very clear that s.49 of the Specific Relief Act 1950 is no bar to issuing a mandamus order to the Minister; s.49 refers to a mandamus writ and not a mandamus order.

TIME-FRAME.

*Yahya Kassim v. Kerajaan Malaysia & Anor*⁶³ is a decision which would have the effect of depriving some applicants of judicial review if they fail to apply within the time limit of six weeks for certiorari. They cannot apply for a declaration instead of certiorari. The Court of Appeal per Mahadev Shankar JCA held that this would be an abuse of the process of the court in that it attempted to evade the clear requirement of O 53 r. 1A of the Rules of the High Court 1980. It is to be noted that six weeks period is too short. In a complex case, the advocate may not be in a position to choose the right remedy and the failure to apply within the time limit is usually fatal. It is suggested that the ruling in the above case is likely to cause hardship to an applicant. There is need to relax the severity in cases where the delay is caused due to factors beyond the control of the applicant. The courts should be lenient as the strictness would result into deprivation of judicial review.

MOULDING RELIEF OR CONSEQUENTIAL RELIEF.

The Supreme Court in *Rama Chandran v. The Industrial Court of Malaysia*⁶⁴ and later in *Kumpulan Perangsang Selangor Bhd v. Zaid bin Hj Mohd Noh*,⁶⁵ embraced the idea of moulding relief. The Supreme Court's thinking was that when the court quashes a decision of the Industrial Court, it would be unnecessary prolongation of the case if it remits the case to the Industrial Court; instead it would be in the interest of justice if it itself gives a suitable relief. Gopal Sri Ram JCA who was one of the judges deciding *Kumpulan Perangsang – Selangor* observed:

*"... As far as possible, the anxiety and endeavour of the court would be to remedy an injustice when it is brought to its attention. On the facts of the case before us, to remit this matter to the Industrial Court would mean to prolong the dispute which would hardly be fair or conducive to the interests of the parties. In the circumstances, justice demands that to avoid further delay and expense we determine the consequential relief rather than remitting the case to the Industrial Court for that purpose."*⁶⁶

The learned judge again observed as he has done in *Hong Leong Equipment*, that:

*"In my judgment, the wide power conferred by the language of para 1 of the Schedule enables our courts adopt a fairly flexible approach when they come to decide upon the appropriate remedy that is to be granted in a particular case. The relief they are empowered to grant is by no means to be confined within any legal straitjacket. They are at liberty to fashion the appropriate remedy to fit the factual matrix of a particular case, and to grant such relief as meets the ends of justice."*⁶⁷

Rama Chandran,⁶⁸ was followed by the Court of Appeal in *Harris Solid State (M) Sdn Bhd & Ors v. Bruno Gentil s/o Pereira*.⁶⁹ The Court of Appeal instead of remitting the case to the Industrial Court, gave the consequential relief because the Court felt that the case had been pending for six years and if it was remitted it might take another six years for the matter to reach the Court of Appeal again, with a possible further appeal to the Federal Court. The Court rightly thought that such a consequence would produce the diametrically opposite result to that intended by Parliament, namely, the speedy adjudication and settlement of trade disputes.

In addition, it may be noted that the Indian Supreme Court in a landmark judgement in *Nilabati Behera*⁷⁰ held that the court has the power to make a monetary award as compensation for a violation of fundamental right, distinct from, and in addition to, the remedy in private law for damages for the tort resulting from contravention of the fundamental right.

The courts in Malaysia may consider to enlarge the scope of remedies available in Malaysia, including the question of damages.

LOCUS STANDING.

Locus Standi is on a weak footing in Malaysia. The judicial policy on it was laid down by the Federal Court in *Tan Sri Hj Othman Saat v. Mohamed bin Ismail*,⁷¹ when it observed:

*"The sensible approach in the matter of locus standi in injunctions and declarations would be that as a matter of jurisdiction, an assertion of an infringement of a contractual or a proprietary right, the commission of a tort, a statutory right or the breach of a statute which affects the plaintiff's interest substantially or where the plaintiff has some genuine interest in having his legal position declared, even though he could get no other relief, should suffice. When it comes however to the question of discretion on a consideration of the substantive application, it may well be proper in particular cases to refuse a remedy to persons who, though they may have standing as a matter of jurisdiction on the lines we have indicated, do not merit it, perhaps because, inter alia, others are more directly affected, or the plaintiff himself is fundamentally not."*⁷²

The test laid down is whether the plaintiff's interests are substantially affected or he has some genuine interest. It is the court's discretion to concede or refuse locus standi in a particular case. The question of locus standi was considered by the Supreme Court in UEM I⁷³ and UEM II,⁷⁴ conceding locus standi in the former but denying it in the latter on the same facts. Thus it is seen that the Supreme Court was liberal so far as *Locus Standi* is concerned until it decided UEM II in which the Court took a regressive step in that it adopted the view taken by the House of Lords in *Gouriet's case*,⁷⁵ that the plaintiff's rights must be at stake or when the matter does not concern private rights, the plaintiff must suffer or be about to suffer damage peculiar to himself.

Lim Kit Siang, leader of the opposition party who wanted to challenge the awarding of the North-South Highway to UEM was held as having no such interest and, therefore, he had no locus standing. This restrictive rule on standing has "the indirect effect of placing governmental actions outside the purview of judicial control and therefore above the law."⁷⁶

In *Abdul Razak Ahmad v. Kerajaan Negeri Johor*,⁷⁷ an advocate filed an application for a declaration that he had a right to search and examine the agreement entered between the Johor State Government and Johor Coastal Development (JCD), alleging that the agreement was illegal. The court held that the applicant did not have a genuine private interest, though the project, the subject matter of the agreement, appeared to be in breach of the structure plan. The applicant did not have locus standi even as a rate payer. The applicant then brought an action against Majlis Bandaraya Baru⁷⁸ seeking a declaration invalidating the grant of permission by the Datuk Bandar for the construction of the water city. But the High Court denied him locus standing. This is indeed an unnecessary restrictive approach. Professor Jain has rightly expressed the opinion:

*"...the Malaysian courts are not yet prepared to take cognizance of the liberal tendencies as regards locus standi which have emerged in the common law world. For a while in Malaysia in the pre-1988 era it appeared that the trend of the judiciary was towards liberalising the locus standi rule but this trend received a setback in 1988 with the majority decision of the Supreme Court in the UEM case and the law has not recovered since then. As compared to the Greenpeace⁷⁹ case, one could say that Abdul Razak had more concern and better standing to protect the environment concerns of the city of Johor Baru of which he was a resident. Instead of lauding concern and effort, the court practically gave him a bad name by calling him a trouble shooter ..."*⁸⁰

The latest case on locus standi decided by the Court of Appeal is an example of hard cases making bad law. There the respondents, residents of long houses of Long Bulan, Uma Daro and Baku Kalo complained about the Bakun Hydroelectric Project which Ekran Bhd was in the process of constructing in the State of Sarawak. These natives stated that the land sought to be acquired for the construction of the dam would affect their right to livelihood and their way of life and since they were not given any hearing under the Environmental Quality Act, 1974, though they

were given a copy of the environment impact assessment report on the project. The High Court had granted the declarations but the Court of Appeal reversed the High Court decision.⁸¹ The Court of Appeal held that the respondent had no substantive locus standi, though they might be conceded initial standing. The Court of Appeal, following UEM II, took the view that the respondent's action goes to enforce criminal penalties and therefore, the action could be taken only by the Attorney General. Also the Court ruled that the Environmental Quality Act was not applicable as the subject matter of the suit fell into the exclusive state list. The reasoning proceeded in this way. What is environmental? The answer was given that it depends upon water, air, vegetation, land etc. and all these matters are in the state jurisdiction. Therefore, the Federal law could not be made applicable to them. Gopal Sri Rama JCA observed:

*"... As pointed out to En Gurdial Singh during argument, the place where that power is to be generated is land and water. This, on the facts of the present case, is the 'environment' upon which the project will have an impact. Since 'environment' in question, by reason of item 2(a) of list II and item 13 of list III A, lies wholly within the legislative and constitutional province of the State of Sarawak that State has exclusive authority to regulate, by legislation, the use of it in such manner as it deems fit."*⁸²

If this definition of 'environment' is accepted, the Federal Act will have no application at all in the States. In other words the Environmental Quality Act has lost its ground and become inapplicable. To which area will the Environmental Quality Act apply after this decision? Since the respondent's rights were not affected under EQA, they had no substantive locus standi.

It is submitted that the Court could reach the final decision as it did, even after conceding substantive locus standing to the respondents. The fact that the massive investment had already been done and work started on the project could be a good justification for the court to refuse any remedy to the respondents. But to deny locus standing by holding the EQA not applicable to Sarawak is tantamount to rendering the Federal Act inefficacious. To say the least the decision is a great tragedy for not only environmentalists but for the development of Administrative law on the aspect of locus standing.

CONCLUSION.

From the survey of decided cases it can be safely said that the Malaysian judiciary has done splendid work in the field of Administrative Law. It has considerably extended and expanded the scope of judicial review. The power to review and give a suitable remedy is without any limit or restriction. The doctrine of *Ultra Vires* has been accepted and applied not only in its narrow sense but also in its extended and wide sense which is indeed a great leap forward. It has boldly acted and done away with the distinction between an error of law and a jurisdictional error by adopting Lord Denning's view that no authority has got jurisdiction to

make an error of law. So now every error of law may be taken as a jurisdictional error and the courts may issue certiorari to set aside the decision of an administrative authority.

The Malaysian courts have developed procedural fairness to a level obtaining in other commonwealth countries, using Art. 8 and Art 5 of the Federal Constitution to enrich its content. The emphasis on giving reasons goes to strengthen fairness as well as to prevent the abuse of discretion. 'Irrelevant considerations', 'acting mechanically', 'unreasonableness' and several aspects of the exercise of discretion have been reinforced.

The courts no longer look at judicial remedies as fixed entities and try to give relief suitable in the circumstances of the case. Thus, moulding relief has become a convenient tool to do justice in the case. It is indeed appreciable and remarkable creativity the judiciary has displayed. Most modern concepts like administrative torts and legitimate expectations are not only being embraced but applied creatively. Damages as a remedy in Administrative law seems to be emerging.

The weakest spot seems to be the *locus standi* question. It is submitted that there is need to take liberal attitude to *Locus Standi* rather than antiquated stance which unfortunately results into denial of judicial review. The courts should apply and extend the scope of proportionality in reviewing punishment as the Court of Appeal has done but the Federal Courts has refused to do. 'Proportionality' is being utilised by the European Courts in diverse situations. There is no reason why our courts should not gain from the experience of European Court of Justice.

It appears that Malaysia has reached a stage where Administrative Law may be enacted in a statute as Australia has done and thus clear the way for future development. This will make the law not only simple and clear but also intelligible to the people. The litigation in this field is on the increase and it may not be too early and premature to suggest the setting up of Administrative Courts as Australia, Indonesia and the Republic of China have done.

NOTES

- * LL.M (London), Ph.D (London), Professor of Law, Law Faculty Universiti Kebangsaan Malaysia
1. Jain, M.P., *Development of Administrative Law in Malaysia Since Merdeka* [1977] 2 MLJ ii
 2. Chand, H., "Two decades of Administrative Law in Malaysia" in *Developments in Malaysian Law* at p. I, (1992).
 3. [1996] 1 MLJ 481.
 4. Id. at 543-44.
 5. [1997] AMR 433 at 483.
 6. Id. at 463 and at 483.
 7. Id. at 481.
 8. Id. at 521.
 9. [1996] 1 MLJ 481.
 10. [1982] 1 MLJ 260.
 11. [1997] 1 MLJ. 787
 12. [1997] 1 MLJ 145.
 13. Id. at p. 789
 14. Id. at p. 799
 15. [1993] 3 CLJ 479.
 16. [1993] 4 CLJ 366.
 17. Id. at 367.
 18. Id. at 368.
 19. See *Ismail bin Abd Halid & ors v. National Union of Newspaper Workers* [1993] 3 MLJ 541; *Chin Shui Lan v. Director of Lands & Surverys* [1995] 4 CLJ 358; *Sabah Berjaya Sdn. Bhd. v. Director General of Inland Revenue Department & Anor* [1996] 5 MLJ 366.
 20. *Sykt Bekerjasama-sama Serbaguna Sungai Selangor Dengan Tanggungan Bhd. v. Majlis Perbadaran Pulau Pinang* [1966] 2 MLJ 697 at 728.
 21. [1997] 4 MLJ 422.
 22. [1996] 1 MLJ 481.
 23. [1997] 1 MLJ 789.
 24. [1997] 1 MLJ 145.
 25. [1997] AMR 433.
 26. [1995] 2 MLJ 317 at 342.
 27. [1969] 2 AC 147.
 28. [1995] 2 MLJ 317 at 342.
 29. [1994] 1 MLJ 685.
 30. [1994] 1 SCR 325.
 31. [1969] 2 AC 147
 32. [1993] 1 SCR 505.
 33. [1969] 2 AC 147.
 34. [1993] 1 SCR 505 at 521.

35. [1991] 3 MLJ 28.
36. [1993] 1 MLJ 65.
37. *Tan Hoon Seng v. Minister for Home Affairs, Malaysia & Anor* [1990] 1 MLJ 171; *Rajoo s/o Ramasamy v. Inspector, general of Police & Ors* [1990] 2 MLJ 87 and *Poh Chin Kay v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1990] 2 MLJ 297; *Mohd. Amin Bin Mohd. Yusoh v. Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia & Anor* [1995] 1 CLJ 94.
38. [1994] 4 CLJ 515.
39. [1992] 2 CLJ 1037.
40. [1995] 3 AMR 1993.
41. [1995] 2 SCR 229.
42. [1991] 1 SCR 92.
43. Id.at 101.
44. [1996] 1 MLJ 481.
45. Id. at 526.
46. Id.at 555.
47. [1997] 3 MLJ 377.
48. [1996] 1 MLJ 481 at 536-37.
49. [1989] 2 All ER 609.
50. [1996] 1 MLJ 481 at 527.
51. Quoted in the judgment by Gopal Sri Ram JCA at p. 384.
52. [1992] 2 MLJ. 864
53. *Sukumaran s/o Sundram v. Timbalan Menteri Hal Ehwal Dalam Negeri Malaysia & Anor*, [1995] 2 MLJ 247.
54. *Tan Tek Seng v. Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261.
55. Id.at 290.
56. [1997] 1 AMR 433 at 472.
57. [1997] 2 MLJ 454.
58. [1998] 1 CLJ 405.
59. [1997] 1 AMR 433.
60. [1996] 1 MLJ 261.
61. [1998] 1 MLJ 434.
62. [1996] 1 MLJ 481.
63. [1998] 1 CLJ 43.
64. [1997] 1 MLJ 145.
65. [1997] 1 MLJ 789.
66. Id.at 803.
67. [1997] 1 MLJ 789 at 803.
68. [1997] 1 MLJ 145.
69. [1996] 3 MLJ 489.
70. [1993] (2) SCC 504.
71. [1982] 2 MLJ 177.
72. Id.at 179.
73. [1988] 1 MLJ 35.

74. [1988] 2 MLJ 12.
75. [1977] 3 WLR 300.
76. Seah SCJ in UEM II at p.36.
77. [1995] 2 AMR 1177.
78. [1994] 2 MLJ 297.
79. [1994] 4 All E.R. 329.
80. Jain, M.P., *Administrative Law of Malaysia and Singapore*, Third Edn. P. 765-66.
81. [1997] 3 MLJ 23.
82. Id.at 38-39.