PART ONE

THE PRESENT SYSTEM IN MALAYSIA

CHAPTER 1

JUDICIAL CONTROL OVER THE ADMINISTRATION

The role of the courts in the administration of justice has been a very much debated point. One school of thought argues that judicial review defeats the will of the people and that the courts cannot be a better guardian of the rights of the citizen than the Legislature itself. However, the written Constitution of a country is a legal document and the fundamental law of the land and, as Marshall C.J. pointed out in the American case of Marbury v Madison,[1] "it is emphatically the province and duty of the judicial department to say what the law is".

What then is justice and on what principles will courts act? "..... justice is not something you can see ..... it is what the right-minded members of the community - those who have the right spirit within them - believe to be fair"[2]. As a basis for discussion we may adopt D.O. Aihe's[3] conclusion that "justice is what the reasonable members of the society would consider to be fair and just having regard to the legal situation"[4].

The Principles on which Courts act.

It is worthwhile to note that the core of the matter in the judicial control of administrative discretion is, the dilemma faced by the courts whether or not to impose their objective standards on the decisions of persons to whom Parliament has granted discretionary power and subjective satisfaction.

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1 (1803) 1 Cranch 137.
2 Sir Alfred Denning: "The Road to Justice" 4 (1955)
3 Lecturer in Law, University of Ife, Nigeria.
4 D.O.Aihe "Fundamental Human Rights Provisions as a means of Achieving Justice in Society - The Nigerian Bills of Rights" 15 Mal LR 41.

It appears that the courts would act on the basic premise that "there is a duty in all cases to act fairly. This is a duty which rests on them, the administrative authority as on any other body although they are not judicial or quasi-judicial but only administrative"[5]. In Malloch v Aberdeen Corporation[6] it was held that "the right of a man to be heard in his own defence is the most elemental protection of all and where a statutory form of protection would be less effective if it did not carry with it the right to be heard, it was difficult not to imply the right".

The other pertinent issue pertains to the question of State privilege. In Conway v Rimmer[7] the House of Lords held that the claim by the Government not to produce documents is not final and courts can look into its substantiality. Although a House of Lords decision, and since it is post-1956, therefore, by virtue of Section 3 of the Civil Law Act, 1956 (Revised - 1971), the case is not binding in Malaysia. Here the extent and scope of the privilege would, in all probability, depend on the extent to which public interest is affected. In Malaysia, Section 124 of the Evidence Act, 1960 (Revised - 1971) Act 56, provides that "No public officer shall be compelled to disclose communications made to him in official confidence when he considers that the public interest would suffer by disclosure. If it is in the interest of the State, then the Government would retain the right not to disclose whatever documents it claims privilege over.

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5 Lord Denning in Re Pergamon Press [1970] 3 ALLER 535.
6 [1971] ALLER 1278.
7 [1968] ALLER 873.

A further problem arises with regard to the effect of the so-called "finality clauses". A noteworthy case on point is Anisminic Ltd. v Foreign Compensation Commission[8]. Hence although the Act recited that "the determination by the Commissioner of any application shall not be called in question in any court of law" their Lordships held, inter alia, that:

(i) Finality clauses do not preclude jurisdiction of courts to issue certiorari in all cases;

(ii) The concept of error of jurisdiction is very broad and includes all aspects which can be related to the question of jurisdiction.

The case reached the highest stage of English judicial process despite the finality clause in the Foreign Compensation Commission Act, 1950. The courts went round this obstacle by deciding that the Commission had misconstrued an Order-in-Council by taking irrelevant considerations into account, thereby rendering its determination not a proper one within the meaning of the Act. Thus it was held that the Commission had acted in excess of jurisdiction and that his determination could properly be questioned in court in spite of the finality clause.

In the recent local case of Mak Sik Kwong v Minister of Home Affairs[9], (Case 1) Justice Eusoffe Abdoolcader followed the Anisminic case. Here the applicant sought to quash an order made by the Minister under Article 24 (2) of the Federal Constitution depriving him of his citizenship. The two grounds of his application were:-

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8 [1968] 2 QB 862
9 [1975] 1 MLJ 168

(i) that the Minister acted in excess of jurisdiction by wrongly taking into consideration the applicant's entry into China in 1956;

(ii) that the Minister had so acted in breach of the rules of natural justice.

It was held firstly, in relation to the finality clause in Schedule 2 to the Constitution, that the ouster provisions did not exclude the court from entertaining an application for an order of certiorari. "Whether the grounds for an order can be established and whether the application will succeed are matters which can be decided at the hearing of the substantive motion itself to be determined on the grounds and merits of the application". Secondly, there was no excess or lack of jurisdiction when the Minister made the deprivation order as he was empowered to take into account what he considered relevant without disclosing where such disclosure would be prejudicial to the public or national interest.

With these considerations in mind we can now examine the remedies available to an aggrieved person under the present system in Malaysia. If a citizen's rights and freedoms are violated he can resort to the following remedies through a court action:-

(i) The prerogative orders of certiorari, mandamus, prohibition, the writs of habeas corpus and quo warranto;

(ii) The equitable remedies of injunction and declaration;

(iii) The common law remedies such as the right of appeal and in certain cases damages.

These are highly specialised remedies. Each has its hidden pitfalls. If in a particular situation a wrong remedy is sought, or

wrong procedure followed, the application would fail. In Haji Ismail b Che Cik v State Commissioner, Penang[10] (Case 2), the applicant applied by way of Originating Motion for an injunction against the increased quit rent and the order for demanding and for collecting it. Justice Chang Min Tat held that the application should have been by way of writ and more significant by virtue of Section 29 (2) of the Government Proceedings Act, 1956, the courts have no jurisdiction to entertain an application for an injunction against the Government.

We can now say a few words with respect to each of the remedies. Habeas Corpus can be used only in specific situations to challenge arrest or detention as being unlawful. Article 5 of the Federal Constitution deals with the liberty of the person. Clause (1) states that "No person shall be deproved if his life or personal liberty save in accordance with law". Clauses (3) and (4) prescribe the procedure on arrest while Clause (2) stipulates that if a complaint is made to the High Court and the court is satisfied that the detention is unlawful it can order release. In Ooi Ah Phua v Officer-in-Charge, C.I.D. Kedah/Perlis[11] (Case 3) the applicant claimed that:

(a) the right to consult counsel (under Article 5 (3) of the Federal Constitution) commenced immediately after arrest;

(b) that the right is an unqualified right and the denial of it rendered the detention unlawful.

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10 [1975] 1 MLJ 271.
11 [1975] 2 MLJ 198.

The Federal Court held that in any event habeas corpus was not the correct remedy in this case as the only complaint was that after the arrest the solicitor was denied access to his client. The court took the view that if detention was lawful to start with it does not become illegal subsequently.

In Yeap Hock Seng @ Ah Seng v Minister of Home Affairs, Malaysia[12] (Case 4) the applicant claimed he was unlawfully detained under Section 4 (i) of the Emergency (Public Order and Prevention of Corruption) Ordinance, 1969 and that the detention was null and void, and in breach of Articles 5 and 7 of the Federal Constitution. He also challenged the order on the grounds of mala fide alleging that the Minister had taken into account certain facts (which he was not entitled to) without disclosing such facts to him. The court held inter alia that:

(i) the onus of proving mala fide on the part of the detaining authority is on the applicant who has to prove improper or bad motive and not mere suspicion;

(ii) mere circumvention of ordinary procedure of law cannot by itself amount to mala fide.

Thus the applicant was held to have been legally detained as he had failed to establish that the detention was tainted with mala fide.

In the case of the quo warranto it is solely for the purpose of challenging an appointment of a person to a public office. Prohibition does not call for special discussion.

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12 [1975] 2 MLJ 279.

In administrative law it will lie to the same bodies as certiorari (considered below) and on similar grounds. Occasionally the two remedies may be awarded in conjunction.

Certiorari is used to quash a decision. It can only be issued after a decision has already been made. There are four main grounds on which the courts would review the functions of lower courts, tribunals or quasi-judicial bodies:

(i) where there is a denial of natural justice;
(ii) where there is a patent error of law on the face of record;
(iii) where there is a defect of jurisdiction;
(iv) where there is a finding of fact not supported by evidence.

Certiorari can only issue against quasi-judicial bodies and not against any administrative act. In Mohamed Ashraff v The Commissioner for the Federal Capital, Kuala Lumpur[13] (Case 5), the only issue was whether or not the principles of audi alteram partem applied in respect of an application to the Commissioner under Section 18 A of the Rent Control Act. The Commissioner had ordered Mohammed, the tenant of 77, Jalan Tuanku Abdul Rahman, to deliver up the vacant possession in return for compensation of $23,164.80. Mohammed sought an order of certiorari to quash the order.

It was held that as there was no provision as to the mode of inquiry in the Act, the question of failure to observe natural

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13 [1972] 2 MLJ 69.

justice arises as the Commissioner's function was purely administrative. It is submitted here that this distinction is a rather legalistic exercise, because in reality, the lines of distinction are clouded. Instead, justice could perhaps be better administered by analysing the case by reference to the nature of the power given to the authority, the subject-matter itself, and the effect upon the citizen of such decision.

Further, the grounds on which certiorari would issue are fraught with technicalities. In Foh Hup Omnibus Co. Bhd. v Minister of Labour and Manpower[14] (Case 6), the Federal Court dismissed the appeal to quash the decision of the Minister whereby the latter accorded recognition to a Trade Union. A certiorari, it was said, could not issue because the Minister had complete discretion as to the manner in which he was to act in settling a dispute and in the circumstances of the case there was no breach of the rules of natural justice.

Tan Hin Jin v Prabhulal G.Doshi [15] (Case 7) was a case under the control of Rent Act, 1966. The Appeal Board set up thereunder reduced the assessment of rent by the Rent Tribunal from $800 to $600, by taking into consideration the fact that the tenant had made repairs previously. Suffian F.J. held that to "succeed in their application for an order of certiorari in the High Court the landlords had to show that not only had the Appeal Board erred in law but also that the error of law was apparent on the face of the Board's Order".

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14 [1973] 2 MLJ 39.
15 [1971] 1 MLJ 274.

The function of Mandamus, is to compel performance of an obligatory duty. Thus, mandamus can issue only when the duty placed on the administrative authority in question is obligatory and not when it is discretionary. This inherent limitation is recited in judgment of Justice Sharma in Koon Hoi Chow v Pretam Singh[16] (Case 8) "any duty or obligation falling under a public servant out of a contract entered into by him as such public servant, cannot be enforced by machinery of a writ of mandamus ..... Mandamus does not lie to enforce a civil liability out of a breach of contract. A civil suit for damages or for the enforcement of civil liability may be the only proper remedy in such a case. Similarly, Mandamus does not issue to enforce a civil liability arising under torts". The facts of this case were that the defendant had paid damages to an infant in respect of an accident involving leg injuries. The defendant then filed this suit against the respondent, a surgeon alleging that the amputation was not necessary. The court held that the requisite ingredient for mandamus was not proved. The applicant could not show that he had a legal right to compel the performance of a public duty by the respondent. Mandamus can however be issued if a discretionary function is not performed legally, that is, if its performance suffers from mala fide, irrelevant considerations etc.

The case of Sungai WangiEstate v UNI[17] (Case 9) serves as a good illustration of how wrong procedure can affect the outcome

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16 [1972] 1 MLJ 180.
17 [1975] 1 MLJ 136.

of a case. Here there was an error on the face of record but the applicant sought a declaration that the award of the Industrial Court be declared invalid. In actual fact, the proper procedure, as the court pointed out, would have been an application for an order of certiorari to be commenced by writ.

The foregoing case-law has been cited to illustrate the effectiveness or otherwise of the judiciary in redressing individual grievances. What is abundantly clear is that if a citizen chooses the wrong remedy, or follows the wrong procedure (Case 3, 9), his claim will be dismissed and he will have to start all over again at his own expense and also at the cost of meeting all legal expenses incurred by his adversary by making good a defence which has no substantive merit. There also then arises the question of limitation. On the other hand, if a functionary of the government violates the citizen's right while performing a duty classified as administrative (Case 5) and not quasi-judicial, the order of certiorari would be unavailable to the citizen.

Finally it appears that the courts have a tendency to lean towards the administration in two ways:-

(i) by interpreting the powers of the administration widely as in Tan Hee Lock v Commissioner for the Federal Capital[18] where it was held that "it was within his (the Commissioner's) powers to adopt whatever procedure he considered suitable in order to make such enquiries". In this respect, Section 22 of the Commissions of Enquiry Act[19] which provides that

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18 [1973] 1 MLJ 238.
19 Commissions of Enquiry Act 1950 (Revised - 1973) A 119.

the procedure and form of enquiries are to be "in the discretion of the Commissioner" supports my view.

(ii) by not insisting that the rules of natural justice be strictly adhered to in all cases and also by taking a restrictive view of natural justice itself. The Privy Council decision of Anandarajan v Mahadevan[20] held that all those rules require is that in deciding whether to expel the appellant the headmaster should "act fairly and what is fair depends on the circumstances and is a matter of commonsense".

Finally, it must be emphasized that those who are aggrieved by an administrative act may find the remedy in a claim for damages for tort or for breach of contract. In Shaaban Sons v Chong Fok Khan[21] the Federal Court awarded $2,500 to each of the respondents in respect of false arrest by the appellant-policeman. Though the Privy Council could not agree as to this amount, the case shows that where the arresting authority has exceeded or abused its powers, this gives rise to a tortuous remedy even against government officers.

Further, the case of Government of Malaysia v Lee Hock Ming[22] serves to illustrate the limitations that exist in a suit against the Government. Here, Section 20 of the Education Act, 1961 imposed a duty on the Minister to provide primary education in schools. Pursuant to Section 2, the Minister entered into a contract with the defendant to build a school. There was a breach of contract and the defendant sued for arrears of payment.

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20 [1974] 1 MLJ 13.
21 [1969] 2 MLJ 219.
22 [1973] 2 MLJ 51.

In this particular case, the action failed because:

(1) he did not comply with Section 2 of the Public Authorities Protection Ordinance, 1948, which prescribed a one year limitation for such suits;

(2) he could not show that this was a public contract made in the course of exercising a public duty. Though the duty here was public, the contract to build the school was held to be a private one.

These then are the various remedies available to a citizen aggrieved by unfettered interference of administrative officers with his personal liberty.

The statistics shown in Table 1.1, at the end of this Chapter, enumerates the administrative law cases that have been entertained by the courts in Malaysia during the period 1970 - 1975. A year-by-year breakdown of the figures is charted in Table 1.2 and 1.3. The figures in Table 1.1 show that only 12, that is, about 25% (8 in the High Court, 3 in the Federal Court, and 1 in the Privy Council) cases have received the remedy requested. In a total of 31 cases, the remedy was refused for reasons already elicited from Cases 1 - 9.

It is a fact that the technicalities of the writs, the formalities of the rules of evidence, the sophistication and expense of traditional judicial process have made law "one of the greatest obstacles to the effective protection of civil and political rights"[23]. However, the judicial system is an important machinery in meting out "justice" and protecting the individual

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23 S.S.Ramphal: "Effective Realisation of Civil and Political Rights at National Levels" U.N. Publication 1968 K 2 ST/TAO/HR/381.

against unfettered interference with his rights. Although the law governing the role of the courts in affording legal redress for grievances is still complex and rather confusing, it is possible to elicit general principles according to which the courts will afford remedies and redress to a person aggrieved by an administrative action. "The principles have to be stated at a high level of generality but they are at least intelligible"[24] says S.A.De Smith.

AN ADMINISTRATIVE DIVISION IN THE HIGH COURT?

One way in which the role of the courts can be improved and strengthened is by the setting up of a specialised division in the High Court. Judges could sit with Assessors where necessary. I am obliged here to refer to the Reports by Justice[25]. This proposal is perhaps akin to the role of the Consul d'tat in the French administrative law[26], where the citizen has a right to approach a court in most cases when he considers himself to be adversely affected by an administrative act. The exact structure and procedure to be followed by such body are beyond the scope of this Paper. Nevertheless, the procedure should create confidence in both the public and the administration that a speedy and a fully expert decision is given.

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24 S.A.De Smith "Constitutional and Administrative Law" (2nd Edition) (Penguin), 536.

25 "Administration under Law" (Stevens & Sons Ltd) 1971 24

26 This is not a suggestion to transplant the French System here. To achieve this, constitutional amendment would be necessary and it would also involve a recasting of the whole system but some broad policy conclusions relevant to the Malaysian scene can be drawn from such foreign models.

TABLE 1.1

ADMINISTRATIVE LAW CASES BEFORE THE COURTS IN THE PERIOD 1970 - 1975.

Remedy or Remedies sought	No. of Applications	Granted	Refused	Granted	Refused	Granted	Refused
		High Court	Federal Court		High Court	Privy Council	
Certiorari	11	2	5	1	3		
Mandamus	3	1			2		
Declarations	5		1		4		
Prohibition	2		1	1			
Certiorari & Mandamus	2		1				
Certiorari & Prohibition	1				1		
Habeas Corpus	7	1	3		3		
Others/e.g. actions under Disciplinary Regs, G.O's, A.132 etc.	13	4	2	1	4	1	1
TOTAL	44	8	13	3	17	1	1

TABLE 1.2

YEAR-BY-YEAR BREAKDOWN OF ADMINISTRATIVE LAW CASES IN MALAYSIA.

Remedy sought	No. of Applications	Granted (High Court)	Refused (High Court)	Granted (Federal Court)	Refused (Federal Court)	Granted (Privy Council)	Refused (Privy Council)
1975							
Certiorari	2	1			1		
Mandamus	1				1		
Prohibition	1			1			
Declaration	2				2		
Habeas Corpus	4	1	2		1		
Others	2	1	1				
TOTAL	12	3	3	1	5		
1974							
Certiorari	2	1			1		
Habeas Corpus	2		1		1		
Others	3	1				1	1
TOTAL	7	2	1		2	1	1
1973							
Certiorari	3		2	1			
Declaration	2	1					
Others	1				1		
TOTAL	6	1	2	1	1		

TABLE 1.3

Remedy sought	No. of Applications	Granted	Refused	Granted	Refused	Granted	Refused
		High Court	Federal Court		High Court	Privy Council	
1972							
Certiorari	3		2		1		
Mandamus	1				1		
Declaration	1				1		
TOTAL	5		2		3		
1971							
Certiorari & Mandamus	2	1	1				
Certiorari & Prohibition	1				1		
Mandamus	1	1					
Declaration	1			1			
Others	3		1		1		1
TOTAL	8	2	2	1	2		1
1970							
Certiorari	1		1				
Prohibition	1		1				
Habeas Corpus	1				1		
Others	3	2			1		
TOTAL	6	2	2		2		