JUDICIAL REVIEW OF THE EXECUTIVE DISCRETIONARY POWERS: JUDICIAL ACTIVISM VIS-À-VIS JUDICIAL SELF-RESTRAINT OF MAINTAINING A DIVIDING LINE BETWEEN SUPERVISORY AND APPELLATE JURISDICTION

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ABSTRACT

Malaysian court unhesitant approach in departing from the traditional English common law concept of judicial review manifested itself in the locus classicus of R Rama Chandran v The Industrial Court of Malaysia & Anor [1997] 1 CLJ 147. This landmark decision of the Federal Court transformed the entire learning on the subject. The conceptual distinction of supervisory and appellate jurisdiction if any, are put aside for the notion of "where justice of the case so demand" which allowed the court to go into the merits of the matter. The effect left behind by the decision in Rama Chandran is that courts are not to be restrained by the distinction between legality and merits review from exercising judicial discretion when justice and fairness call for an intervention. In Federal Court decision of Petroliam Nasional Bhd v Nik Ramli bin Nik Hassan [2003] 4 CLJ 624, Steve Shim CJ observed that the progressive views expressed in Rama Chandran have been accepted and adopted by the Malaysian Judiciary at the highest level. The article attempts to analyse the areas where the courts in Malaysia have displayed admirable judicial creativity, not only in defending citizens from the abuse of discretionary powers, but also in protecting and enhancing their jurisdiction of judicial review of public authorities' actions. In order to achieve this objective the document research is conducted. A large number of legal documents such as Malayan constitutional documents, law books, law cases and other legal literatures have been studied extensively to gain comprehensive and impartial information.

Keywords: judicial review, discretionary powers, supervisory jurisdiction, appellate jurisdiction, judicial creativity

INTRODUCTION

The need to check and prevent abuse in the exercise of executive discretion saw courts playing their role in a democracy type government through the powers of judicial review. In this context, the Lord Chancellor of England and Wales, Lord Irvine acknowledged that judicial review promotes the rule of law. Lord Irvine said that:

There should be no political and certainly no party political aspect to judicial review. In exercising their powers of judicial review the judges should never give grounds for the public to believe that they intend to reverse Government policies simply because they dislike them. The Court does not substitute its opinion for that of the decision maker on whom Parliament has conferred power. The Court rules only on the legality of the decision not its correctness. In doing so the Court is not acting against the will of Parliament but in support of it (Wan Azlan Ahmad & Andri Aidham Ahmad Badri, 2007)

The statement emphasized the importance of preventing undue interference with the exercise of administrative discretion. The same views were expressed by Federal Justice, Raja Azlan Shah in *Loh Kooi Choon v. Government of Malaysia* ([1977] 2 MLJ, p. 187) that ñthe question whether the impugned Act is harsh and unjust is a question of policy to be debated and decided by Parliament, and therefore no fit for judicial determinationò.

Nevertheless, it could not be denied that the courts play a very active role in judicial review. It has the onerous duty of not just to defend citizens against arbitrariness of executive decisions but having to ensure that the development of public law is on track for the right reasons. There were some evidences that the superior courts of Malaysia, interpreting the Constitution liberally in protecting the constitutionôs promise of liberty and equality. The principle of constitutionality and the administrative law principles of *ultra vires* and principles of natural justice as well as principles of substantive fairness, proportionality and irrationality enable the courts to ensure that no matter how high and mighty the functionary of the government may be, the law is always above him.

JUDICIAL REVIEW

Judicial review is the process by which the High Court exercises its supervisory jurisdiction over the proceedings and decisions of inferior courts, tribunals and other bodies or persons who carry out quasi-judicial functions or who are charged with the performance of public acts and duties. (Lord Diplock in *Council of Service Unions v Minister for the Civil Service* [1985] AC 374,408). Sunkin, Calvo and Platt (2008), defines judicial review as the High Court procedure by which those with a sufficient interest can challenge the decisions of public authorities on the grounds that authorities have failed to meet their legal obligations, including human rights obligations; or have acted unfairly or exceeded or abused their legal powers (or threatened to do these things).

Clive B. Lewis (2000) defines judicial review as the process by which the courts exercise a supervisory jurisdiction (or control) over the activities of public authorities in the field of public law. This control is exercised through the application for judicial review of decisions and policies made by public authorities. Lewis asserts that judicial review jurisdiction only operates in the field of public law. Further he says that the procedure is generally regarded as public law remedy. More accurately, the application for judicial review is a specialized procedure to seek one or more of the specific remedies, for example an order quashing the decision of the decision-making body.

From the publicôs perspective, judicial review is a remedy of final resort used only when other avenues of redress, such as complaint or appeal, have been exhausted or would be inadequate. (Sunkin, Calvo and Platt, 2008). For the purpose of this article, judicial review refers to the process by which the courts is able to review the legality of decisions affecting the public made by a wide varieties of bodies, ranging from government, ministers and officials exercising statutory discretionary powers.

THE THEORIES OF JUDICIAL REVEIW

In discussing the theory of judicial review, it is worth to look into the meaning of judicial activism and judicial self-restraint. Judicial activism has been defined as judicial policy making tantamount to ómaking lawsô when its decisions tend to have a prospective rather than a retrospective effect. Judicial self-restraint, on the other hand, equates with judicial self-discipline in upholding the doctrine of separation of powers in a parliamentary democracy (Charles J, Olgetree Jr., 2002). Judicial self-restraint is often justified on the basis that the judgesô role in judicial review is different from that in an appellate process (Roger Tan, 2003). The former does not entitle the judge to review the merits of the administrative decisions. Judges who exercise judicial self-restraint will generally be commended by the executive and those who engage in judicial activism will be rebuked (Charles J. and Ogletree Jr., 2002).

Judicial self-restraint

The article analyses two theories of judicial review. The first theory asserts that judicial review is not concerns with reviewing of the merits of the decision in regard of which the application for judicial review is made, but the decision-making process itself. It is due to the fact that the purpose of the remedy of judicial review is to ensure that the individual is given fair treatment by the authority constituted by law to decide the matters in questions. In the case of *R v Northumberland Compensation Appeal Tribunal; ex p Sha*w, Denning LJ observed that:

> The Court of King's Bench has an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extends not only to seeing the inferior tribunals keep within their jurisdiction, but also to seeing they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it, offends against the law. The Kingôs Bench does not substitute its own views for those of the tribunal, as a court of appeal would do. It leaves it to the tribunal to hear the case again, and in a proper case may command it to do so ([1952] 1 All ER 121; p. 127).

In *Chief Constable of the North Wales Police v Evan*, Lord Brightman said that ñjudicial review, as the words imply, is not an appeal from a decision, but a review of the manner in which the decision is madeò. He observed that ñjudicial review is concerned, not with the decisions, but with the decision-making process. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing the abuse of power, be itself guilty of usurping powerò([1982] 1 WLR 155 , p. 160).

In other words in judicial review, the court could only examine the correctness of the decision making process rather than correctness or reasonableness of the decision itself. In *R v Panel on Take Overs and Mergers, ex p Datafin plc,* Sir John Donaldson MR commented ([1987] 1 All ER 564, p. 580, CA) that ñan application for judicial review is not an appeal. Judicial review is a protection and not a weapon. It is thus different from an appeal. When hearing an appeal the court is not concerned with the merits of the decisionò. Further, in *R v Entry Bombay Clearance Officer, Re Amin*, Lord Fraser observed that ñjudicial review is concerned not with the merits of a decision but with the manner in which the decision was made. Judicial review is entirely different from an ordinary appeal. It is made effective by the court quashing an administrative

decision without substituting own decision, and is to be contrasted with an appeal where the appellate tribunal substitutes its own decision on the merits for that the administrative officerò ([1983] 2 All ER 864 , p. 869,HL).

The same views were expressed by Lord Greene MR in *Associated Provincial Picture Houses v Wednesbury Corporation* ([1948] 2 All ER 681): (known as *Wednesbury's* case) as follows: ñonce the local authority has properly taken into consideration a matter of public interest, it seems to me that there is nothing which suggests that a court could interfere with a decision because it took a different view of what was the public interest. It is obviously a subject on which different minds may have different viewsò.

The above case emphasized the importance of preventing undue interference with the exercise of administrative discretion. At the same time, Lord Greene MR also drew a distinction between the appellate and judicial review/ supervisory jurisdictions of the courts and pointed out the limited nature of the latter jurisdiction. In this context, Lord Greene MR remarked the court can only interfere with an act of executive authority if it be shown that the authority has contravened the law. In consequence, whenever it is proved that the local authority has contravened the law, the court must not substitute that decision for that authority. When an executive discretion is entrusted by Parliament to a body such as the local authority, an exercise of that discretion can only be challenged in the courts in a strictly limited class of case since the court is not a court of appeal (*Associated Provincial Picture Houses v Wednesbury Corporation*, 685).

The landmark ruling of the House of Lords in limiting the nature and scope of judicial review was endorsed by the Malaysian judiciary with strictness analogous to that of the pronouncements of Lord Brightman in *Chief Constable of the North Wales Police v Evan* and of Lord Fraser in *Re Amin*. In Malaysia, Abdoolcader J SC, in *Tanjung Jaga Sdn Bhd v Minister of Labour and Manpower(* [1987] 1 MLJ 125) echoed the House of Lords ruling stating ñit is of considerable significance to bear in mind that judicial review is of the hearing and not of the decisionò, whereas Seah FJ was more explicit in endorsing Lord Brightman's dictum in *Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar and Restaurant Workers* ([1984] 1 MLJ, p. 363 FC), when he stated that: ñin the exercise of its inherent jurisdiction over inferior tribunal of limited jurisdiction, the High Court must always remember that it is not sitting as a Court of Appeal to review the findings of the inferior tribunals. The High Court, it must be observed, has no jurisdiction to consider the merits of the case. Its only function is to consider whether the inferior tribunal has performed its duties according to lawò. Similarly Jemuri Serjan SCJ *in Harpers Trading (M) Sdn Bhd v National Union of Commercial Workers* ([1991] 1 MLJ 417, p. 421) said ñon the authorities quoted above it is not the function of the High Court in the exercise of its supervisory jurisdiction to hear a dispute *de novo* and decide on its meritsò.

Consequently, the courts are required to confine themselves to reviewing the decision making process leading to the making of any administrative decision only. The courts are not concerned with reviewing the merits of such decision. Thus, the role of the courts in their judicial review jurisdiction is merely to test the legality of administrative decisions as opposed to the merits of the same.

This principle and philosophy had been redolent by the Federal Court case of *Hotel, Bar and Restaurant Workers v. Minister of Labour and Manpower* ([1980] 2 MLJ p.189) where Raja

Azlan Shah CJ observed that ñthis subjective formulation is sufficient to show that the Minister has a discretion to determine the desirability or otherwise of a particular course of action within the scope of the discretionary power. The exercise of this discretion is vested in the Minister, not in the courtsò. He emphasized that ñwhen this discretion is challenged, the courts must be vigilant and resist any temptation to convert the jurisdiction of the court to review, into reconsideration on the merits as if it is an appealò.

In 1997 the Court of Appeal in *Michael Lee Fook Wah V. Menteri Sumber Tenaga Manusia, Malaysia & Anor* 1998] 1 CLJ 227 has reiterated the same principle and philosophy in the following words of Shaik Daud JCA:

> First and foremost it must be emphasised that in an application for certiorari, the High court is not sitting in its appellate jurisdiction but in its supervisory jurisdiction. The court is more concerned with the decision-making process and not on the decision itself. The court should not readily question the administrative decision of the first respondent as that is his absolute discretion. If the first respondent had acted *ultra vires*, unfairly or unjustly in exercising his discretion, then it is the duty of the courts to interfere in an application for review of that decision. The underlying principles of judicial review have been stated in a number of cases, and it is the exercise by those with whom discretionary power is vested, not in the courts, that the courts are required to review.

Therefore, the power of the court to interfere in each case is not as an appellate authority to override a decision of the public authorities, but as a judicial authority to see whether the public authorities have contravened the law. In other words the High Court should not act as a court hearing appeals from subordinate courts. In explaining why in judicial review proceedings the Court is not concerned with the factual merits of the impugned decision M, Supperstone and J,Goudie (1992) have said:

> It is easy to understand and why this is so. The paradigm case of a judicial review challenge arises where a body whose functions are conferred by statute are said to have acted in a manner in which the law does not allow. But if the only complaint is that the body has reached a decision unfavourable to the applicant on the facts, and the claim put forward is a plea to the Court in effect to substitute a different decision, the proceedings would amount to an invitation to the Court to exercise the very function which statute had confided to the body reviewed; to accede to such an invitation would be to usurp the will of Parliament. Since, of course, Parliament includes the elected element of the legislature; any such stance by the Court might reasonably be castigated as undemocratic.

Judicial activism

The second theory acknowledges of moulding relief. In late 1990 there is an upsurge of judicial activism of the courts in Malaysia that in judicial review the courts have questioned not only the process but also the decision itself and where necessary the courts have substituted their own views for that decision-maker. In other words, the Malaysian courts claim to have the jurisdiction not only to look at the form, but also the *substance* of the decision and to reconsider the case on the merits. Thus, the courts do not stop at merely quashing the decision and remitting; they have assumed the jurisdiction to go ahead and grant consequential relief,

whenever they deem necessary, instead of remitting the case to the original decision-maker with directions. In so doing, they have resolutely set their face against English law and begun to develop their own common law (see articles by Sudha CKG Pillay, 1998; B. Labo 2000, 225; Vijayan Venugopal, 2001; Anwarul Yaqin and Nik Ahmad Kamal Nik Mahmod, 2004).

In this regard, the Federal Court in *R .Rama Chandran v Industrial Court* ([1997] 1 MLJ, p. 145) (known as *Rama Chandran* case) said:

> It is often said that judicial review is concerned not with the decision making process (see e.g. *Chief Constable of North Wales Police v Evans*). This proposition at full face value may well convey the impression that the jurisdiction of the courts in judicial review proceedings is confined to cases where that aggrieved party has not received fair treatment by the authority to which he has been subjected. But Lord Diplockôs other grounds for impugning a decision susceptible to judicial review make it abundantly clear that such a decision is also open to challenge on the grounds of illegality and irrationality and, in practice, this permits the courts to examine such decisions not only for process, but for substance.

Therefore, where the grounds of illegality or irrationality were relied on in challenging the executive decision, the reviewing courts was not confined to reviewing only the decision-making process but could in addition review the decision for substance. Basically the grounds of judicial review of the executive decisions are illegality, irrationality/ *Wednesbury* unreasonableness and procedural impropriety. Dicta of Lord Greene MR in Associated *Provincial Picture Houses v Wednesbury Corporation,* that the decision may be struck of out if unreasonable decision had been arrived. The unreasonable decision is one that is so absurd that no sensible person could over dream that it lay within the powers of the authority to make such a decision. Lord Diplock equated *Wednesbury* unreasonableness with irrationality (see case of *Council of Service Unions v Minister for the Civil Service* [1985] AC 374). Irrationality applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. In consequence, whenever unreasonable or irrationality ground is applied, the courts are straying into the merits of an administrative decision. Likewise, the ground permits the review of the executive decision only in the most extreme of cases and as a last resort when all else fail. (Sudha CGK Pillay, 2000) Thereafter, Lord Bridge in *Hammersmith & Fulham LBC v Secretary of State for the Environment* ([1991] 1 AC, p. 521) remarked that ñif the decisions have been taken in good faith within the four corners of the Act, the merits of the national economic policy underlying the decisions are not susceptible to review by the courts and the courts would be exceeding their proper function if they presumed to condemn the policy unreasonableò. Simon-Brown LJ in *R v Ministry Defence, ex p Smith* ([1995] 4 All ER 427 ,p.441) interpreted this as super-*Wednesbury* approach in that it call for the exercise of greater judicial-restraint in invoking *Wednesbury* unreasonableness ground when reviewing cases involving national economic considerations.

On the other hand, where fundamental rights of the individual are at stake, judges are given wider latitude to query the administrative decision which is sought to be impinged and permitted to insist on a greater justification by the public body for such impingement. This sub-*Wednesbury* approach had been adopted on the premise of the comments of Lord Bridge in *R v*

Secretary of State for the Home Department, ex parte Bugdaycay ([1987] 1 AC 514 at p 523) where he said ñthat the court be entitled to subject an administrative decision to the more rigorous examination, to ensure that is no way flawed, according to the gravity of the issue which the decision determines.ò He added that ñthe most fundamental of all human rights is the individualôs right to life and when an administrative decision under challenge is said to be one which may put an applicantôs life at risk, the basis of the decision must call for the most anxious scrutinyò. In consequence, whenever the fundamental rights of citizens have been violated, the courts using sub-Wednesbury approach are allowed to examine the merits of that decision.
In invoking *Wednesbury* unreasonableness as a ground for judicial review, the courts in Malaysia have strictly adhered to the traditional and limited common law definition. There is no room for the adoption of the super-*Wednsebury* approach; however, in writersô opinion, there is room for the adoption sub-*Wednsebur*y approach. Articles 5 and 8 of the Federal Constitution allow scrutiny of the administrative decisions which impinge on the fundamental rights enshrined in Part II of the Constitution. At this juncture, the Court of Appeal in *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* ([1998] 3 MLJ, p. 289) construe the liberal approach in interpreting article 8 (1) of the Constitution where Gopal Sri Ram JCA imposed the duty on public decision-makers to act fairly. He emphasized that:

> The duty to act fairly is recognized to comprise of two limbs: procedural fairness and substantive fairness. Procedural fairness requires that when arriving at a decision, a public decision-maker must adopt a fair procedure. The doctrine of substantive fairness requires a public decision-maker to arrive at a reasonable decision and to ensure that any punishment he imposes is not disproportionate to the wrongdoing complained of.

From the above, it is apparent that the doctrine of substantive fairness has two facets: one requiring a decision to be reasonable and the other requiring it to be proportionate (Sudha, 2002). The judicial-activism argued that Article 8(1) of the Constitution provides an examination of the merits of the decision on the ground of reasonableness. It is easier for the administrative bodies to prove that its decision is reasonable as compared to individual to prove that decision he is challenging is unreasonable (Sudha, 2002). Recently, Justice Mohamad Ariff Md Yusofôs decision in the case of *SIS Forum (Malaysia) v Dato Seri Syed Hamid Albar bin Syed Jaafar Albar,* (2009, Application for Judicial Review No. R3-25-347-2008) held that the court was empowered to enquire into reasons why the book was banned in order to form an opinion whether there has been an error of law or any abuse of discretion. Relying on a number of previous authorities he held that the deciding authority must have reasonable grounds and it is insufficient if he merely thinks he has reasonable grounds. In this case the administrative law principle of proportionality was also employed. The ministerôs reaction to the offending passages was wholly disproportionate to the concerns expressed and was vitiated by the administrative law principles of illegality and irrationality. (Shad Saleem Faruqi, 2010)

On the other hand, proportionality requires public authorities to maintain a sense of proportion between their particular goals and the means they employ to achieve those goals, so that their actions impinge on individual rights to the minimum extent necessary to preserve the public interest (Schwartz, 1992, p. 128). The meaning of proportionality under European law acknowledges the existence of three elements of consideration which consist of appropriateness of the measure, necessity and absence of disproportionate character. Proportionality proposes the

idea that the furtherance of a desired administrative aim may not be necessary if it could be achieved through different means. The court must examine those different means to match with the objective of the administration. Disproportionality may arise if the court is successful in its search for different means that would have less restrictive effect on the rights or interest of the individual to achieve the desired end or public goal. The principle has a reputation in the European Court as a tool to ensure that fundamental rights are sufficiently protected. (Rusniah Ahmad, 2008). The essence of the proportionality principle is that not only must discretionary power be used for legitimate purpose; it must also be proportionate in scope and effect. However, the common courts are reluctant in adopting proportionality as a separate ground of judicial review. If they do so, this would mean that the courts would be accessing the merits of discretionary decision taken by the administration.

The judicial self-restraint rejected the application of substantive unfairness as a new head of judicial review. In *Pihak Berkuasa Negeri Sabah v Sugumar Balakrishnan* ([2002] 3 MLJ, p. 72) the Federal Court ruled that the doctrine of substantive fairness could not be invoked as a separate or additional ground of judicial review of an administrative decision and held that Edgar Joseph Jr. FCJ was certainly not putting forward a new head for judicial review in *Rama Chandran* when his lordship observed that courts could scrutinise decisions not only for process, but also for substance. The Federal Court warned that it was not permissible for our courts to intervene and disturb a statutorily unreviewable decision on the basis of a new amorphous and wide ranging concept of substantive unfairness as a separate ground of judicial review which even the English courts in common law have not recognised. It appears that this decision will prevail over the majority decision of the Federal Court in *Rama Chandran.*

At the same time, judicial self-restraint also rejected doctrine of proportionality when the Federal Court in *Ng Hock Cheng v Pengarah Am Penjara* ([1988] 1 MLJ, p. 153) decided not to adopt this doctrine which was applied earlier by the Court of Appeal in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* ([1996] 1 MLJ 261, p. 281.) without even referring to its earlier decision in *Rama Chandran* where Edgar Joseph Jr. FCJ attempted to plant the seeds of the principle of proportionality.
In fact, however, some of the judgments on judicial review that originated from the superior courts in Malaysia suggest that the courts are in inclination in favour of upholding justice in the circumstances of a particular case, rather than what the law might literally require. An example was the case of *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & Anor*, where Gopal Sri Ram, JCA wrote:

> Consequently, the power of the High court in the field of public law remedies is not confined to the grant of usual prerogative orders know to English Law. Our courts should not consider themselves to be fettered by those antiquated shackles of restrictive traditionalist which the common law of England 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 legislation. They may, of course be guided by the decisions of courts of a jurisdiction which has analogous provision. But ultimately, they must hearken to the provisions of our own written law in determining the nature and scope of their powersé the wide power conferred by the language of paragraph 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 particular case. The relief they are empower 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 factual matrix of a particular case, and to grant such reliefs as meets the ends of justice ([1996] 1 MLJ, p. 481 CA).

The ruling of the Federal Court in *Rama Chandran*, is indeed a turning point in administrative law; this is because it altered the scope of judicial review drastically in that a court exercising judicial review has the power to review both the procedural and substantive aspects of a decision. Therefore, in respect of the review of the merits of case where illegality, *Wednesbury* unreasonableness / irrationality or proportionality is alleged, the courts treated it as exceptions to the principle of the supervisory nature of judicial review. The examination of the merits, therefore, although appearing to an exercise of an appellate function, is essence as exercise of the supervisory function of court in judicial review. (Wan Azlan Ahmad & Andri Aidham Ahmad Badri 2007, 16)

CONCLUSION

Although the Federal Court in *Rama Chandran* had made consequential orders after quashing the award of the Industrial Court, in my opinion not in all cases this step could be followed. In that case itself, the Federal Court when exercising the power of moulding relief had expressed several reservations on its availability. Firstly, the Federal Court had justified the making of consequential orders due to the exceptional circumstances of the case because to remit the case back to the Industrial Court would do harm and injustice to the claimant. Secondly, the case was dealing with powers of an inferior court (Industrial Court) and not an administrative body empowered by statute with discretionary powers. There was therefore no question of usurping the powers of the executive. Thirdly it was pointed out that the wider powers of the courts in Malaysia to make consequential orders in judicial review may only be exercised with utmost care and inspection. The theory of moulding relief as applied in *Rama Chandran* could only applied in very special circumstances or in situation where a decision of the public authorities impose excessive punishment deemed unreasonable/ irrational or not proportionate in the circumstances of the case, particularly the cases that affects the fundamental liberties of the people.

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