Nemo Judex In Causa Sua & Audi Alteram Partem: A Legal Analysis on Its Application in Student's Disciplinary Proceeding at UiTM

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ABSTRACT

It is the quest of law to achieve justice in every legal proceeding. Thus, the court, tribunal or any legally constituted body must pursue justice by strictly adhering to the laid down principle that justice should not only be done but must seen to be done. The principles of natural justice laid down two essential elements to be observed by the adjudicator ie Audi Alteram Partem or also known as no one should be condemned unheard and Nemo Judex in Causa Sua or popularly known as the rule against bias. These cardinal principles of law believe that those called on to adjudicate not only have no link with either side but also they must maintain their impartiality and objectivity. On the other hand, the adjudicator also should provide proper notice and reasonable opportunity to the accused to defend his or her case. As a tribunal, the student's disciplinary proceeding conducted by Lembaga Tatatertib University is no exception. It must be seen to be impartial, independent and disinterested. Thus, Lembaga Tatatertib Universiti must take care not only that their decisions are not influenced by their personal interests but they must also avoid the appearance of laboring under such an influence. This paper will examine the bias rule and the right to be heard principle and its connection with the proceeding conducted by Lembaga Tatatertib Universiti with special references to Educational Institutions (Discipline) Act 1976, the Educational Institutions (Discipline of Students) Rules 1976 (Act 174) and the Educational Institutions (Discipline) Act 201. This paper concludes that as the nature and scope of administrative decisions made by university officers in particular Lembaga Tatatertib Universiti continues to expand, it remains more important than ever for the officers to be familiar with the law relating to bias as the decision which is a result of bias is a nullity and the proceeding is regarded as "coram non judice".

Keywords:*audi alteram partem, nemo judex in causa sua, rule against bias, justice, Lembaga Tatatertib Universiti, student's disciplinary proceeding.*

Introduction

In an early day, school or university is regarded as having *loco parentis* to their students. However, nowadays students are given more powers and voices through a new amendment of statutes or local circumstances. Generally, universities are established either under a statute or a royal charter. University of Bath, Queen's University at Kingston or McGill University of Canada are among universities which are established under royal charter issued by virtue of Royal Prerogatives. Therefore, for chartered bodies, its rules and regulations may only take effect through the contract. Thus, the students are bound and entitled to the rights and obligations just like a member of trade union where any disputes arising from the relationship between students and universities are resolved by the application of general contractual principles (Fridman, 1973). On the other hand, for universities formed under statutes, such as Universiti Teknologi MARA Malaysia and University of Hong Kong, these universities are required to observe the principles of natural justice because of the interpretation placed upon the empowering statute. Thus, as statutory bodies, these universities may only exercise powers derived from the statutes. Any act which goes beyond the statutes is ultra vires and thereby becomes void. The principle of natural justice is of very ancient origin and stands under the two pillars namely rules against bias and right to be heard. Lord Evershed, Master of the Rolls in *Vionet V. Barret* (1985,55LLJ QB,39, Page 5) remarked, "Natural Justice is the natural sense of what is right and wrong.". Before that, in the case of *Abboot v Sullivan* ([1952] 1 All ER 226 page 230) Lord Evershed stated that "the principles of natural justice are easy to proclaim, but their precise extent is far less easy to define".

The notion of natural justice embedded with two essential maxims that are *audi alteram partem* or no one should be condemned unheard (simply known as the right to be heard) and *nemo judex in causa sua* or rules against bias. It is also significant to understand how the expression of natural justice developed and

the interpretation of such term. Lord Cranworth in *Drew v Drew and Lebura* (1855) 25 LTOS 282 defined natural justice as 'universal justice", and in *Ridge v Baldwin* ((1962) 1 All ER 834 page 848) the court of appeal treated natural justice with "fair play in action". The question on how the principles of natural justice developed over the year can clearly be understood by referring to the two significant elements which had been stated before, and will be discussed later. Principles of natural justice need to be upheld in order to safeguard the aggrieved party against unfair administrative action, as it will provide the party the opportunity to make his defense. Natural justice is not only the good legal procedure because it is fairness itself, but also a standard of good administration insofar as it encourages just and right decisions by the administration.

One of a major dilemma in natural justice is the issue of entitlement to natural justice. The issue to decide whether a person who may be affected by a particular action is entitled to claim a right to a hearing. Putting it in another way; whether it is necessary for the administration to follow natural justice before taking a particular action against a person (Jain, 2011). Some of the statutes clearly stated the right of the affected person to be heard for example under article 135 (2) of the Federal Constitution stated that no member of any service specified in para (b) to (h) of article 132(1) , "shall be dismissed or reduced in rank without being given a reasonable opportunity of being heard". However not many statutes specifically prescribe a hearing before a decision is to be made. The statute did mention the power of the administration but was silent on the issue of the right of the affected party to be heard before any decision has been made. If the courts were to read such a provision mechanically by applying the literal interpretation, then no right to be heard could ever be claimed by affected person (Jain, 2011). Luckily, the judiciary has extended the concept of natural justice over statutory language, for the law must be humane. The concept of natural justice thus the creation of the courts (Jain, 2011). Therefore it is important for the administrator and also the adjudicator to observe the principle of natural justice in its action and decision.

The development of the doctrine of natural justice is not only limited to England but also had rapidly expanded into other countries such as America, Australia, Singapore and also Malaysia. The vital case of *Ridge v Baldwin* had laid down significant principles which had been followed and referred to by later cases. America on the other hand is not excluded from upholding this notion. In the American administrative law process, there is a broad availability of the right to be heard and it is claimable under the due process of law. In India, the influence of the House of Lords' approach in *Ridge v Baldwin* has itself played an inspired role in developing the concept of natural justice. Consequently, the courts have insisted in a variety of situations that an affected person be given a hearing before an authority comes to a decision. Further, in Australia, the development of natural justice in England have generally been followed as was decided in the case of *the University of Ceylon v Fernando ([1960] 1 WLR 223)*. Thus, the liberal movement of natural justice also been followed by Malaysia and Singapore. In the case of *Chief Building Surveyor v Makhanlall & Co* ([1969] 2 MLJ 118 the Federal Court held that the Magistrate should have given hearing before passing the demolition order. The court referred to the principle laid down by the Privy Council "that no man is to be deprived of his property without his having an opportunity to be heard." Therefore it can be concluded that the concept of natural justice is recognized universally and also been practiced throughout the world.

Objective of the Study

The concept of natural justice is normally understood in relation to the fairness of the procedures adopted for arbitration or court proceedings. The primary objective of this research is to determine the relevant principles of natural justice in Tatatertib Universiti. This research intended to observe the rule against bias and right to be heard theory and to identify whether the proceeding conducted by Lembaga Tatatertib Universiti complies with the two components of natural justice.

Research Methodology

The methodology of this research is by way of literature review. Much has been written on the topic of natural justice and this paper will review that system on the subject of the principles of natural justice. This research will analyze the relevant provisions of law related to the notion of natural justice and proceedings conducted by Lembaga Tatatertib and also identify the compliance of the Lembaga with these principles. In terms of research design, this study used primary data such as statutes and decided cases and the secondary

data which was obtained from relevant articles and websites. The data is thoroughly examined and analyzed in order to identify whether it is effectively followed by the Lembaga in giving decision.

Nemo Judex In Causa Sua & Audi Alteram Partem

Nemo Judex In Causa Sua

One of the important pillars of natural justice is *nemo judex in causa sua* or rules against bias. This principle suggested that a person should not be a judge in his or her own cause. In other words, this element provides that a judge should be impartial and neutral and in a position to apply his mind objectively as proposed by Lord Hewart in the case of *R x Sussex Justice* that justice must not only be done but be seen to be done. As such the adjudicator must not only be free from bias but there must not be any appearance of bias.

There are a few types of bias mainly actual bias; pecuniary bias; personal bias and policy bias. Actual bias is a real danger of bias against a party (Jain, 2011, Wan Azlan, 2006) Pecuniary bias also can disqualify a person from acting as a judge despite however small the interest was. It is simply to say that a person who has a financial interest in the outcome of a proceeding constitute bias. On the other hand, personal bias can occur when the adjudicator being against, or in favour of, one party to the dispute in many wide-ranging situations, for instance relationship, friendship or business dealing with, or hostility or animosity to a party.

The test of personal bias on the part of the adjudicator is whether there is a real likelihood of bias in the fact of a case and not whether there was an actual bias. As such it is necessary by a reasonable man's person would expect that the adjudicator would favor one side unfairly over the other. Therefore it is sufficient to constitute personal bias since reasonable person might think that the adjudicator had exercised bias. In *Rohana bte Ariffin v Universiti Sains Malaysia* [1989] 1 MLJ 487, the decision made by the authority was quashed by the High Court on the ground of bias when the Registrar who made the complaint against the lecturer was present during those deliberations.

The policy bias towards the department may exist when the administrator acted as an adjudicatory body in deciding the matter between an individual and a department. There is a higher possibility that the person who involved directly in making the policy could be later the adjudicatory body in deciding the policy in issue. In the modern administrative process, tasks of administration and adjudication are often mixed. As a result of this, an administrator was not to be disqualified from acting in a quasi-judicial capacity merely because that administrator is in administration. If so happen, the whole system of quasi-judicial could collapse. Hence, as long as the official given decision following the principle of natural justice, the decision could stand although the official also connected to the department. However, the official may be disqualified in deciding the matter in issue if personally involved too much with the making of the policy in question (Jain, 2011).

Audi Alteram Partem

The principle of *audi alteram partem* is a fundamental part of the natural justice (*Ketua Pengarah Kastam v Ho Swan Seng [1977] 2 MLJ 152).* Thus a person who has not given an opportunity of being heard had been denied the right under natural justice. Under this principle, notice plays an important role in order to make sure that natural justice being upheld (*Maradana Mosque Trustee v Badi-ud-din-Mahmud [1967] 1 AC 13).* Notice given to the affected party should be an adequate notice; a notice that clearly stated the particular of the alleged offense together with adequate time for the person to prepare his or her defense (*Mahadevan v Anandarajan [1974] 1MLJ 1)* In other word, the decision made by the adjudicator without proper or adequate notice shall be invalid. The question of the adequacy of the notice differ from case to case, depending upon the factual situation of the case.

A notice is said to be adequate or complete if it met two requirements; explain clearly the charge against the person and second explain the consequence or punishment if the person was found guilty of an offense. Therefore, the administrator should communicate to the person affected all grounds of possible action to be taken against him or her *(Mahadevan v Anandarajan).* Failure to comply will render such action as invalid. The party affected should be made known about the charge framed against him and also aware the consequence of being convicted of the offense. Knowing only the charge without the consequence render the

notice as incomplete, thus, constitute breach of natural justice. It is also against the principle of natural justice if a person affected been punished with severe punishment when he was under provision carrying a minor punishment without giving notice to such punishment. The law also did not allow the administrator to frame a 'trap' charges ie the situation whereby the affected party will be held guilty upon whatever explanation given by him. As such if there is any alternative to the charges, the alternative charges should be framed against the party. In the case of *Phang Moh Shin v Commissioner of Police [1967] 2 MLJ 186,* the court held that "the rule of natural justice does permit framing in one charge two separate offenses in the alternative". In brief, the party affected should be aware of the charge framed against him or her before any action is taken and aware about the consequence of being convicted of the offense.

Not only the notice should explain about the charge and the consequence of the charge, it also must give sufficient time to the person to prepare a defense or to file objections. At 24 hours notice will be regarded as unreasonable thus insufficient. The issue regarding what constitutes sufficient notice varies depending on the fact and circumstances of each case. Again in the case of *Phang Moh Shin*, the court ruled that failure to give sufficient notice constitute breach of natural justice. What constitutes reasonable and sufficient time also differs from one case to another.

Another important point need to be observed by the adjudicator a part of the notice is the disclosure of materials to the party. It is suggested that all the materials being referred to by the adjudicator in order to reach decision should be communicated to the party so that the party concerned has the chance to comment, criticize, explain or rebut on that material. In such a way, any document which does not come within the awareness of the party affected should not be relied upon making the decision. In the case of *Rohana bte Ariffin v Universiti Sains Malaysia [1889] 1 MLJ 487*, the court ruled that there was a denial of natural justice when the copies of the relevant documents were not supplied to the staff before her appearance before the panel. In *Shamsiah bte Ahmad Sham v Public Services Commissioner [1990] 3 MLJ 364*, the Court quashed the decision made by the concerned authority when they failed to inform the officer that her past record was taken into account in deciding the matter.

Another basic principle of natural justice is that a party concerned should have the opportunity to provide all relevant evidence in order to support his or her case. Therefore it is the responsibility of the authority concerned to receive the said evidence as long as it is relevant. Refusal of such evidence means that there was a denial of natural justice. In *Malayawata Steel Bhd. V Union of Malayawata Steel Workers [1978] 1 MLJ 87*, the High Court held that there was a breach of natural justice by the Industrial Court because it did not allow the party to call its key witnesses to give evidence in court.

It is the duty of the adjudicatory body to give reasoned decision as a protection against arbitrary and unfair decision. The panel required to justify its decision by giving reasons for it. Reasons should be adequate because otherwise the party has no way of knowing whether all that party's submission have been taken into account *(Rohana bte Ariffin v Universiti Sains Malaysia [1889] 1 MLJ 487).*

The rule pertaining to legal representation is one of the integral parts in natural justice. An affected person should be given the right to be represented so that the person will not be in a position of disadvantage. Denial of legal representation is a breach of natural justice. A number of statutes specifically confer the right to counsel in proceedings. But in different countries, different approach applying the right to counsel. For instance, in Australia, there is no need legal representation in small claims or consumer claims (Jain, 2011). In India on the other hand, grant the right to counsel if so allow by the adjudicating body, so it is not an absolute right of the a party. However in Malaysia, the right to counsel has been restricted either by expressing words in a statute or by necessary implication.

The rule relating to hearing is another issue that needs to be observed in natural justice. There is no fixed procedure of hearing to be followed in all cases. There are various types of hearing procedure which can be selected to, for example, oral hearing, written submission, consultation, interview or even a dialogue (Jain, 2011). A statute may specifically state for an oral hearing, but when the statute is silent, it is no longer compulsory to claim oral hearing. Oral hearing is considered as necessary where the case involved complex and technical legal issues or complicated question of fact.

It is not an easy decision by the adjudicatory body to decide a matter since a lot of procedures need to be observed in upholding justice. These procedures are important to make sure that the affected party be given a fair hearing and a reasonable opportunity of being heard.

Principle of Natural Justice and its application in the student's disciplinary proceeding

As stated above, there are two primary rules of natural justice. The rule against bias requires the disciplinary authority to be impartial and must have no personal interest in the matter to be decided whereas the right to be heard requires the student who will be affected by a proposed decision must be given an opportunity to express their view and being heard. Thus, it is the cardinal principle of administrative law that persons are entitled to have a just inquiry and hearing prior to an administrative decision being made which affects their rights or interests. As a statutory body , UiTM Pahang is no exception. Even though failure by a disciplinary authority to abide any of its provisions will not automatically invalidate disciplinary proceeding, but it may leave the institution open to challenge. Therefore, the disciplinary authority is expected to adhere to the principle of natural justice in conducting the disciplinary inquiry or hearing. For UiTM, Educational Institutions (Discipline) Act 1976, the Educational Institutions (discipline of Students) Rules 1976 (Act 174) and the Educational Institutions (Discipline) Act 2010 play an important role in ensuring that the disciplinary authority is observing the principle of natural justice.

Among the salient features of natural justice are the authorities must ensure that the students give a notice specifying the case that is being put against them, a reasonable time is given for preparation of defense before the case is heard, the student has the right to challenge the case against them, the body appointed to hear and decide the case does so without bias and there is an appeal and review mechanism against the decision.

The charges framed against the accused on the basis of allegations should be precise and specific and in accordance with specific provisions of the statute, regulation or the notified standing orders applicable to the establishment. The allegation also ought to be produced in writing. For this matter,section 5(3A) Of the Educational Institutions (Discipline) Act 2010 provides that the Students' Affairs Officer shall inform the student in writing of the grounds on which it is proposed to take action against him and shall afford him a reasonable opportunity of being heard. Of Act 174 Rule 49 of Act 174 provides that a disciplinary authority shall require the student to attend before it at such disciplinary room, on such date and at such time as it may specify. Such an order to attend is made in writing. In this respect, UiTM Pahang in practice has observed the rule by submitting the written notice to the students 7 days before the hearing so as to give the delinquent student an ample time to prepare his defense. The notice provides sufficient information to allow the student to make effective use of the right to respond and present arguments such as the substance of the allegation made against him, the relevant provision under which the student is charged and the possible penalties that might be imposed by the disciplinary authority.

Rule 50 to 44 of Act 174 further stressed the importance of observing natural justice. Among others, the disciplinary authority is required to explain to the student the facts of the disciplinary offense alleged to have been committed by the student and call upon him to make a plea. Before the student makes his plea, the disciplinary authority shall ensure that he understood the charge made against him. Therefore, the charge and the facts of the case will be explained again if request is made by the student. If the student pleads guilty, the disciplinary authority shall pronounce him guilty of the offense and shall invite him to make any plea he may wish to make for lenient punishment. However if the student pleads not guilty, or refuses to pleas or does not admit the facts of the case, the disciplinary authority shall examine any witness or any document or other article submitted as evidence in support of the case against the student; and the student shall be given the chance to challenge any evidence brought by disciplinary authority, to question such witness and inspect such document or article adduced as evidence. The disciplinary authority is also given an opportunity to re-examine such witness. In this respect, the student shall be given the chance to give his evidence, to call any witness or produce any document in his defense. Rule 55 of Act 174 on the other hand allows the disciplinary authority to question or recall any witness at any time before it has pronounced its decision. It should be noted that all witnesses should be examined individually in the presence of the delinquent student and their statements are recorded. If the investigating officers already have pre-recorded statements, it should be brought on the record of the disciplinary proceedings. After hearing and examining all evidences before the disciplinary authority, the authority found no case against him, he should be acquitted and the matter is at an end. Nevertheless, if the student is found guilty, Rule 56 requires the disciplinary authority to invite the student to make any plea he may wish to make for lenient punishment before the pronouncement of the decision. Section 5 (3D) provides that the decision made by the disciplinary authority shall be communicated in writing to the respective student within 14 days from the date of the decision. The Act also provides the mechanism to appeal to those who dissatisfied with the decision made by the disciplinary authority. Section

5(4) provides that if the student dissatisfied with the decision made by disciplinary authority, he may within 14 days from the receipt of the decision, submit an appeal in writing to the Student Disciplinary Appeal Committee established by the Minister. The Appeal committee later should reply to the matter within 30 days upon the receipt of the appeal.

There is no fixed rule that the right to be heard means the hearing must be made orally. Thus, in certain circumstances, representation is best to be submitted in writing. In this respect, Educational Institutions (Discipline) (Amendment) Act 2010 under section 5(3C) provides that a student shall be allowed to make a written or an oral representation in any disciplinary proceedings taken against him.

On the other hand, legal representation is not considered as a fundamental part of the fair hearing (Chewter,1994). Sometimes, the denial of legal representation is justified for disciplinary hearing because it might complicate the matters and obliterate the informality of the proceeding. Therefore whether legal representation is allowed or not will depend on the provisions of the statute. In this matter, Act A1375 with its new amendment under section 5(3B) has allowed the student to be represented by a staff or another student of the institution in any disciplinary proceedings taken against him.

Considerable care is required to be taken to avoid accusation of bias. Therefore, the inquiry officer or disciplinary authority appointed for conducting domestic inquiry should be totally unbiased and not connected with the incident. A person should not be involved in a decision making if such person has strong personal views which might cause a reasonable person to conclude that he would be biased against the respective student.
In this regards, UiTM Pahang has taken precaution in ensuring that the investigating officers and any officer who involves in case under investigation and the case before the tribunal must not participate in the proceeding as a panel or observer nor have any communication with the panels with regards to the case.

Even though a student has committed a similar offense on a previous occasion it is not by itself acceptable evidence that they have done so on the current occasion. However, this fact is relevant to the issue of determining an appropriate remedy to be imposed on the delinquent student if he commits the similar offense and is found guilty. The officers must be aware that the court has a right to exercise judicial review upon decisions made by the tribunal, and in this regard, UiTM is no exception.

Conclusion

The principle of natural justice cannot be divorced from the concept of humans' right which is well established and accepted by the civilized legal system. However it is interesting to note that in certain circumstances, it fails to accommodate some practical dilemmas in administrative decision making. Thus, sometimes it is difficult to provide procedural fairness as commonly understood. One such situation is where the Deputy Rector acts both as a person finalizing investigating reports and to decide to bring the case to the proceeding; and at the same time chaired the proceeding to decide the matter. In this respect, he usually has a viewpoint already about the fact of the case and may already form an opinion before the hearing takes place. In conclusion, to be tried with the observance of natural justice by the disciplinary authority in conducting any proceeding is the birthright of every man. Thus absence of it vitiates the proceedings, however well it is conducted as justice should not just be done but it should be seen to be done.

References

Clive B. Lewis, The legal Nature of A University and the Students-University Relationship.

Friedman, Judicial Intervention into University Affairs, 21 CHITTY'S L.J. 181 (1973).

Jain, M.P. (2011). Administrative Law of Malaysia and Singapore: 4th Ed. Singapore. LexisNexis.

Sivagnanam,T.S., and Justice.(2009). Principles of Natural Justice; lecture delivered at Tamil Nadu State Judiciary Academy at http://www.hcmadras.tn.nic,in/jacademy/article.

Wan Azlan Ahmad, Nik Ahlad Kamal Nik Mahmod. (2006). Administrative Law in Malaysia; Malaysia. Sweet & Maxwell Asia.

Zulkefli Ahmad Makinuddin. [2012] 5 MLJ p1 Disciplinary Proceedings Against Public Officers and The Right to be Heard under Federal Constitution of Malaysia.

Educational Institutions (Discipline) Act 2010.

Educational Institutions (Discipline) (Amendment) Act 2010.

Federal Constitution.

Abboot v Sullivan ([1952] 1 All ER 226 page 230).

Chief Building Surveyor v Makhanlall & Co ([1969] 2 MLJ 118).

Drew v Drew and Lebura (1855) 25 LTOS 282).

Ketua Pengarah Kastam v Ho Swan Seng [1977] 2 MLJ 152.

Mahadevan v Anandarajan [1974] 1MLJ 1.

Malayawata Steel Bhd. v Union of Malayawata Steel Workers [1978] 1 MLJ 87.

Maradana Mosque Trustee v Badi-ud-din-Mahmud [1967] 1 AC 13.

Phang Moh Shin v Commissioner of Police [1967] 2 MLJ 186.

Ridge v Baldwin ((1962) 1 All ER 834 page 848).

Rohana bte Ariffin v Universiti Sains Malaysia [1989] 1 MLJ 487.

Shamsiah bte Ahmad Sham v Public Services Commissioner [1990] 3 MLJ 364.

University of Ceylon v Fernando ([1960] 1 WLR 223).

Vionet V. Barret (1985,55LLJ QB,39, Page 5).

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