REFORM OF ADMINISTRATIVE LAW

1

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'.[1] All democratic countries have experienced a tremendous growth of administrative law in quantity, quality and relative significance.[2] There has been virtually an explosion of administrative law in recent times which has grown into an identifiable and definitive branch of law in its own right. Malaysia is no exception to this phenomenon. The number of cases in Malaysia involving some aspect of administrative law or another has been rising over the years.[3]

The growth of administrative law is the direct result of the growth of administrative powers, functions and apparatus. This development can be attributed partly to critical international and internal law and order situations creating a sense of insecurity which leads to conferment of vast powers on the government for defence and security of the country. For instance, because of the delicate internal situation in Malaysia, emergency under Article 150 has been in operation for several years. A number of laws have been enacted to meet the situation, conferring broad discretionary powers on the

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[1]Vanderbilt's introduction to Schwartz, *French Administrative Law and the Common Law World*, xiii (1954).

[2]For example, India has over 100 reported cases every year in this area. An idea of the immense amount of law produced every year can be had from the Annual Survey of Administrative Law by the present author in I.L.I. *Annual Survey of Indian Law*, 361–435(1980).

[3]See the Annual Survey of Administrative Law by the author of this paper in *Survey of Malaysian Law* (ed. Prof. Ahmad Ibrahim) published by M.L.J. Singapore. Also see, M.P. Jain, *Administrative Law of Malaysia and Singapore* (1980), for a discussion of the principles of administrative law in Malaysia and Singapore.

administration.[4] Under the Internal Security Act, 1960, the administration has power to detain a person in preventive detention without trial on several grounds.[5]

Besides security, a much more significant reason for the growth of administrative power in modern democracies is the demise of the philosophy of *laissez faire* and the increasing emphasis on the role of the state as a vehicle of socio-economic regeneration and welfare of the people.[6] *Laissez faire* philosophy denoted individualism, individual enterprise, self-help, minimum government and maximum contractual freedom and minimum government regulatory control over private enterprise. The government did not interfere with free enterprise and did not concern itself much with managing and regulating the social and economic life in the country. This philosophy resulted in human suffering as contractual freedom in effect degenerated into the freedom of the stronger to exploit the weaker economic groups,[7] which did not have much of bargaining position. In course of time, *Laissez faire* gave way to the modern philosophy of a social welfare state which has now assumed vastly increased functions. Friedmann puts the functions of the modern state into five categories.[8] The state as *protector* defends the state from external and internal aggression. As *provider,* the state seeks to provide social services and minimum welfare to the people to ensure a minimum standard of living for all. This is sought to be achieved through

[4]For cases on emergency see S. Jayakumar, *Constitutional Cases from Malaysia and Singapore*, 437–473 (1976). Formerly, the main source of emergency regulations in the country was the Emergency (Essential Powers) Ordinance No.1 of 1969, but now it is the Emergency (Essential Powers) Act, 1979.

[5] See, *Karam Singh* v. *Menteri Hal Ehwal Dalam Negeri, Malaysia,* [1969]2 M.L.J. 129; *Yeap Hock Seng @ Ah Seng* v. *Minister for Home Affairs, Malaysia,* [1975]2 M.L.J. 279, a case of preventive detention under the Emergency (Public Order and Prevention of Crime) Ordinance, 1969.

[6]Calvin Woodard, Reality and Social Reform: The Transition from *Laissez Faire* to the Welfare State, 73 *Yale L.J.* 286 (1963). Reference may be made in this connection to the Fourth Malaysia Plan launched by the Prime Minister on March 27, 1981. The plan involves an outlay of $100 billion. The thrust of the plan is on poverty eradication and social redressal.

[7]Dicey, *Law and Public Opinion in England,* 126–302 (1962); Jethro Brown, *The Underlying Principles of Modern Legislation,* 156–280 (1971).

[8]Friedmann, *The Rule of Law and the Welfare State;* MacIver, *The Modern State,* 460 (1964).

provision for pensions, medical assistance, welfare benefits and other social services.[9] The state acts as *regulator* to control various activities of the community. Town and urban planning, environmental control, regulation of private economic enterprise fall within this category. As *entrepreneur*, the state undertakes several enterprises through its own undertakings. Lastly, the state acts as an *umpire* and discharges arbitral functions between competing social interests. "The state must have standards and institutions which ensure minimum fairness, and the maintenance of a reasonable balance between the different economic and social groups in the community". As representing the community as a whole, the state has to administer justice between different sectors of the community. The five year plans in Malaysia are a testimony to the commitment of the state to the socio-economic development of the people. Examples can be found quite easily of the state functions in Malaysia to justify the abovementioned five-fold classification drawn by Friedmann. Provision of health services and education are examples of the state as provider. There are any number of regulatory laws extant in Malaysia and more and more such laws are being enacted every year. For example, there are the Industrial Coordination Act, the Antiques Act, 1976, the Control of Supplies Act. These statutes illustrate the expansive regulatory aspect of the function of a modern state. Then, Malaysia has established a large number of state enterprises and undertakings which underline the entrepreneurial aspect of the

[9]Harry W. Jones, *The Rule of Law and the Welfare State*, 58 *Col.L.R.* 143 (1958); Charles A Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues*, *74 Yale L.J.* 1245 (1965), and also by the same author: The New Property, 73 *Yale L.J.* 733 (1964), in which he makes the following significant point: "One of the most important developments in the United States during the past decade has been the emergence of government as a major source of wealth. Government is a gigantic syphon. It draws in revenue and power, and pours forth wealth: money, benefits, services, contracts, franchises and licenses. Government has always had this function. But while in early times it was minor, today's distribution of largess is on a vast, imperial scale." Schwartz asserts that Sir Henry Maine's classic generalization of the progress from status to contract (Ancient Law) has all but been reversed in our own day and in some ways, the contemporary society has reverted, to the medieval ideal of status: Bernard Schwartz, Crucial Areas in Administrative Law, 34 *George Washington L.R.* 401 (1966).

state.[10] The courts and tribunals functioning in the country emphasize the state's umpiring function. Many more examples can be added from the statute book and state activities under each of the above-mentioned heads. More and more instruments of power are being created every day.

An increase in the range of state functions inevitably leads to the assumption of large powers by the state. This means that all state organs have to be active. The legislature has to constantly enact new laws for, in a democracy, initiation of any socio-economic scheme may require a new law to start with. Increased legislative out-put demands increased judicial activity as the courts are required to interpret new laws and decide controversies arising under them. But, by far, the largest extension of powers and functions has taken place at the level of the executive-cum-administrative organ. It makes policies, provides leadership to the legislature, implements the law and takes manifold decisions. The administration discharges not only the traditional administrative functions, but a large miscellany of functions of various types: legislation, adjudication, licensing, search and seizure, enquiry, inspection, etc. Many functions are conferred on the administration to be discharged by it in its discretion. Thus, the hegemony of the executive is now an accomplished fact.[11] Administration is the all pervading fact of life today. The modern administration thus impinges more and more on the individual: it has assumed tremendous capacity to affect the rights, liberties and property of the individuals. New administrative techniques and processes are designed to achieve the desired goals. New administrative bodies designated in various ways, such as departments, directorates, boards, commissions, corporations, bureaus, have proliferated and this process still continues unabated. A plethora of tribunals, diversified in structure, jurisdiction, procedures and powers, and having liaison with the administration in varying degrees, existing outside the normal judicial hierarchy, and having power

[10] There are nearly 70 statutory and non-statutory corporations functioning in the Central sphere. Some of these bodies are: Federal Agricultural Marketing Authority; Muda Agricultural Development Authority; Tourist Development Corporation; Petronas, etc. See, for details, Jain, note 3, *supra*, Chap. XVI.

[11] Robson, *Justice and Administrative Law*, 34 (1951).

to pronounce binding decisions like courts have been established. These tribunals have excluded the courts from making initial decisions in a number of areas. Decisions of some of the tribunals have been declared to be final.

A new complex of relationship has thus arisen between the individual and the administration and this underlines the great significance of administrative law in a democracy. In this context, the basic problem is to control power, to draw a balance between the individual and the administration, to ensure that power conferred on the administration is not misused. As Lord Denning has emphasized, the vast powers of the administration, if exercised properly, may lead to a welfare state; but, if abused, they may lead to administrative despotism and a totalitarian state.[12] As Mr. Justice Douglas once said: "Absolute discretion, like corruption, marks the beginning of the end of liberty."[13] The main problem of today thus is: how executive power can be controlled by law and colonized by legal principles of fairness and proper procedure? As emphasized by Wade, the problem is how can the legal ideals of fair procedure and just decision be infused into the administrative power of the state?[14] Administrative law is an instrument of control of the exercise of administrative powers.

Expansion in the powers of the administration has become inevitable as most of the complex socio-economic problems demanding solution in contemporary society could be coped best, from a practical point of view, only through the administrative process and not the normal legislative or the judicial process. A legislature is best suited to determining the direction of major policy, but it lacks time, technique and expertise to handle the mass of detail. Therefore, the legislature must content itself more and more with laying down broad policies and leave the application of the law from case to case to the administration. As the fact situations vary so much from one case to another, it is inevitable that the administration be left with some discretion to apply the law. Adjudication by administrative officials and tribunals has come into vogue largely be-

[12] Lord Denning, *Freedom Under the Law*, 126 (1949).

[13] *New York* v. *United States*, 342 U.S. 882, 884.

[14] Wade, *Administrative Law*, 6 (1971).

cause the multitude of disputes arising for adjudication as a result of the enactment of modern socio-economic legislation, need to be settled expeditiously with less technicality and formality, at less cost, by persons having specialised skills. The courts having legally trained judges, with their elaborate and formal procedures are not able to fulfil these conditions. An additional advantage of the administrative process is that it could evolve new techniques, processes and instrumentalities, and can act expeditiously and in a flexible manner, acquire expertise, technical knowledge and specialisation, to meet and handle new and complex problems of contemporary society. Modern administration demands continuous experimentation and adjustment of details. Administration has to be dynamic, not static. If a certain regulation made by it is found to be unsuitable in practice, or appears to have become antiquated, a new regulation incorporating the lessons learned from experience, may be supplied by the administration with much ease and less delay than would otherwise be the case if the matter needs to be gone through the legislature. Such a process of adjustment needs to be gone through constantly because of the rapidly changing circumstances in a developing society. The administration may consult the affected interests before making the regulations. Such a flexibility is not available in case of legislative process in a legislature. Even if the administration is called upon to deal with a problem case by case (as a court does), it could change its approach according to the exigencies of the situation and demands of justice. The judicial process cannot have such a flexibility of approach bound as it is with the theory of precedents. Again, judicial process involves making of decisions after hearing, and on the basis of evidence on record. It is thus not very well suited to decide matters involving exercise of wide discretion, and application of departmental policies in the interests of public purpose and adjustment of competing claims. In many cases, preventive action may appear to be more effectual and useful than *ex post facto* punishing a person for breach of law. For instance, inspection, grading and quality control of foodstuffs by the state would much better answer the consumers' needs than prosecuting the seller for adulteration after injury has been caused to a consumer by unwholesome food.

In such a context, administrative law assumes great topical significance. The function of administrative law seeks to settle the conflicting claims of administrative authority and rights of the individual or draw a balance between private rights and public good. A well developed system of administrative law will therefore deal with the structure, powers and functions of administrative organs; the limits of their powers; the methods and procedures followed by them in exercising their powers and functions, and the methods by which their powers are controlled including the legal remedies available to a person against administrative organs when his rights are infringed by their operation.[15] It has increasingly been realised that administration is ubiquitous in modern times, that the individual is affected most in the name of public interest and that he is in the weakest defensive position against the almighty administration. It is therefore the function of administrative law to ensure that administrative powers are not misused and are exercised properly and according to law. Democracy is sustained not merely by conferring powers on the administration but also by 'devising proper checks and balances subject to which the power is to be exercised. The test of a good and adequate system of administrative law lies in whether adequate control over the administration exists so as to make it exercise its powers within the bounds of law? Whether redressal is available to an individual in case his rights are unduly affected? Whether an individual has adequate opportunities of challenging administrative decisions made against him? Whether administrative authorities follow such procedures as are reasonable, consistent with rule of law, democratic values and natural justice? Of course, these ideals have to be achieved consistent with maintaining administrative efficiency. It is necessary that the administration has at its disposal enough powers to get things done. In a developing society, a strong government endowed with powers is a great desideratum. But there is no antithesis between a strong government and controls over exercise of administrative powers. Administrative powers are exercised by thousands of government officials and affect millions of people

[15] For further discussion on this topic reference may be made to Jain & Jain, *Principles of Administrative Law*, 8–12 (1972).

and it is necessary to ensure that powers are exercised properly and for the purposes for which these are conferred. As the Kerr Committee has observed, administrative efficiency cannot be the end-all and be-all of administrative procedures.[16] Many substantive rights can be nullified if administration fails to follow due procedural norms. It is essential to draw a balance between administrative efficiency and securing justice to an individual. And it is not merely a question of protecting individuals but of good administration, for a fairer administration will also lead to better administration.

It is necessary that people have faith in the justice and uprightness of the administration rather than feel alienated towards it. It is the function of administrative law to ensure that government functions are exercised according to law, on proper legal principles and according to rules of reason and justice and that adequate control mechanism exists to check administrative abuses and errors without unduly hampering the administration in the discharge of its functions efficiently. A proper system of administrative law is thus a great desideratum in any democratic country otherwise it will become merely a *facade* democracy if rights of the people are infringed with impunity without affording them any redressal mechanism. In the words of Wade, legal control of administrative power "provides much of the substance of administrative law" and that its "primary objective" is "the protection of the citizen against abuse of power by the government".[17]

There is another angle to this matter of control of administrative power. Now-a-days, there is open talk of corruption in the bureaucracy in many countries. One of the reasons for creating such a situation is conferment of broad and uncontrolled discretionary powers on administrators. If power is conferred without any guiding norms to exercise it, then there is no way to determine whether a particular decision has been arrived at by an administrator *bona fide* or has been motivated by some corrupting influence. It will be very difficult, if not

[16] Report of the *Administrative Review Committee* (Australia).

[17] *Administrative Law*, 1.

impossible, to contain corruption in a country where uncontrolled powers are sought to be conferred on administrators.[18]

II

In the developed democracies of Britain, Australia, New Zealand and Canada, constant efforts have been and are being made to improve control-mechanism over, and the redressal process against, the administration. It has been realized that the traditional concept of collective ministerial responsibility to the legislature hardly provides enough protection to the individual as the executive has assumed far too much control over the legislative processes.[19] Similarly, the traditional judicial control over the administrative action has been found wanting and deficient in many respects. Therefore, other forms of control have been thought to be desirable. This has led to the creation of a number of new institutions and reformulation of some of the principles of administrative law in these countries.

There was a time in Britain when it was thought that administrative law was a 'continental jargon', that administrative law was inconsistent with the Dicean concept of rule of law and that Britain had no administrative law. This was because of the influence of Dicey who had misunderstood the real nature of the French *Droit Administratif* and had, therefore, wrongly thought that administrative law was meant to confer privileges and arbitrary powers on the administration as against the individual.[20] The myth has now been exploded. It has been

[18] As Wheare observes in *Maladministration* at 7: "We would also regard as falling within the scope of maladministration action which were influenced by what is loosely described as bribery and corruption. In most cases this would amount to a form of illegality, but there can be examples where influence may be used to persuade officials either to act or not to act in an area where they have discretion but where, though it might not be clear that illegality was involved, it could be urged that maladministration had occurred".

[19] Schwartz and Wade, *Legal Control of Government*, 14 (1972).

[20] Wade, *op. cit.*, 7–8. Also see, Harry W. Jones, The Rule of Law and the Welfare State, 58 *Col. L.R.* 143 (1958). A.V. Dicey, *The Law of the Constitution*, 202 (1959); Dicey, The Development of Administrative Law in England, 31 *L.Q.R.* 148; Lawson, Dicey Revisited, 7 *Political Studies*, 109, 207; Jennings, *The Law, and the Constitution*, 55, 214.

appreciated that the French *Droit Administratif* provides an effective mechanism to control administrative powers — perhaps, in some instances, it is more effective in some respects than the common law system of administrative law.[21] It has also come to be realised that over time a system of administrative law has grown in England as well. The British courts have now acknowledged that England has come to have a system of administrative law so much so that Lord Denning could say in *Breen* v. *A.E.U.*: "It may now truly be said that we have a developed system of Administrative law".[22] This observation has been inspired by the developments which have come about in this area since 1947. In the development of British Administrative Law, the courts have played a very creative and constructive role in any case since 1963 and thus have evolved a body of norms applicable to administrative functioning in various situations. Some of the landmark cases in this respect are: *Ridge* v. *Baldwin*,[23] *Malloch* v. *Aberdeen Corporation*,[24] *Lannon*,[25] *Lever Finance*,[26] and *Anisminic*.[27] The British judges have displayed a great creative genius in developing principles of administrative law in recent times. But the development of administrative law in Britain has not been left solely to the courts. The government and Parliament have also played a significant role in developing proper norms of administrative behaviour and strengthening the control and redressal mechanism. As early as 1929, the Donoughmore Committee was appointed to look into the institutions of delegated legislation and administrative adjudication. Its report led to the enactment of the Statutory Instruments Act, 1946 and the constitution of

[21] Z.M. Nedjati & J.E. Trice, *English and Continental System of Administrative Law* (1978). Professor J.B.D. Mitchell has argued continuously that Britain adopt a system of administrative law akin to the French. For Professor Mitchell's views see, *inter alia*, The Causes and Consequences of the Absence of System of Public Law in the United Kingdom, [1965] Public Law 95.

[22] [1971] 1 All E.R. 1148. Also *Malloch* v. *Aberdeen Corp.* [1971] 2 All E.R. 1278.

[23] [1963] 2 All E.R. 66.

[24] [1971] 2 All E.R. 1278.

[25] *Metropolitan Properties Co. (F.G.C.) Ltd.* v. *Lannon* (1968) 3 All E.R. 304.

[26] *Lever (Finance) Ltd.* v. *Westminster Corp.*, [1969] 1 All E.R. 208.

[27] *Anisminic Ltd.* v. *Foreign Compensation Commission*, [1969] 1 All E.R. 208.

the Statutory Instruments Committee in the House of Commons in 1944 to oversee legislation by the administration. In 1973, the two Houses of Parliament proceeded to set up a joint committee to make parliamentary control of delegated legislation more effective.[28] In 1947, Parliament enacted the Crown Proceedings Act to liberalise the law relating to civil proceedings against the crown. The next significant step was taken in 1955 when the Franks Committee was appointed to look into the system of administrative adjudication. The findings of this committee resulted in the enactment of the Tribunals and Inquiries Act, 1958, which effectuated various procedural improvements in the functioning of the tribunals in Britain and also established the Council on Tribunals to supervise the working of the tribunals and to seek to improve their procedure.

A further major step was taken in 1967 with the establishment of the institution of Ombudsman, officially known as the Parliamentary Commissioner for Administration.[29] Not satisfied with these developments, the Law Commission suggested in 1969 to the Lord Chancellor that a full-fledged inquiry be held into administrative law. The Commission felt that in spite of the notable developments and clarifications which the courts had brought about there remained "a need to consider to what extent the courts would be assisted by a legislative framework of principles more systematic and comprehensive than has so far been evolved by case-law". The Commission desired to have "a comprehensive and coherent system of administrative law".[30] The projected inquiry could not however take place as the Lord Chancellor thought that it was premature and the time was not ripe for such a purpose. But a limited inquiry was undertaken in one significant sector of the law, viz., Legal Remedies, and

[28] See, *infra*, Sec. III.

[29] Since then the Ombudsman principle has been extended to health services and local government by the appointment of the Health Service Commissioner and the *Local Commissioner, see The National Health Service Re-organisation Act, 1973;* The Local Government Act, 1974; Foulkes, *The Local Government Act*, 1974. For discussion on the institution of Ombudsman see: Wheare, *Maladministration;* M.P. Jain, The First Year of Ombudsman in England, (1972) 14 *J.I.L.I.* 159–186.

[30] Law Commission, No. 20.

the report has been released recently.[31] The commission's basic recommendation is that under the cover of "an application for judicial review", a litigant should be able to obtain any of the prerogative orders, a declaration or an injunction. The idea underlying this recommendation is to simplify and strengthen judicial review of administrative action in Britain. This recommendation has now been implemented through courts' rules. One single procedure, known as "application for judicial review" has now been introduced for applying to the High Court for securing one or more of the following remedies, viz., *mandamus*, prohibition, *certiorari*, declaration and injunction. An application for review may also include a claim for damages. The rule of legal standing has also been liberalised and made uniform for all these remedies, i.e. the court is not to grant any relief unless it considers that the applicant has a "sufficient interest in the matter to which the application relates." These reforms have been characterised as 'beneficial' by Wade. These reforms in England have deeply influenced the course of events in other Commonwealth countries as regards reform in administrative law.

In Australia, a systematic attempt has been made to tackle the problems of administrative law. In 1968, the Attorney-General appointed the Administrative Review Committee, known as the Kerr Committee, to make a comprehensive and intensive study of the prevailing system of administrative law. The committee reporting in 1971 suggested that the time had come when a general system of administrative law should be introduced in Australia and with this object in view it made a number of suggestions.[32] The report led to the appointment of the Bland Committee to review administrative discretions under the Commonwealth law and to advise the government as regards those discretions in respect of which a review on merits should

[31] Law Commission, Report on *Remedies in Administrative Law*, Paper No. 73, cmd. 6407 (1976). For comments on this report, see Wade, 92 *L.Q.R.* 334 (1976) and 94 *L.Q.R.* (1978).

[32] See the *Report of the Kerr Committee* at 105 (1971). For a discussion on this report see, M.P. *Jain*, Reform of Administrative Law in Australia, 15 *J.I.L.I.*, 185–216 (1973).

be provided.[33] Another committee known as the Ellicott Committee, was also appointed to review the prerogative writ procedures. The committee noted that the legal grounds on which remedies could be obtained were "limited and often complicated", and that the law relating to judicial review of administrative action is "technical and complex". The recommendations of the Ellicott Committee were similar to those made in England as regards the institution of the procedure by way of "application for judicial reveiw". This would eliminate the risk of an aggrieved person applying for a wrong remedy. All these studies have resulted in the establishment of several institutions in Australia. The Ombudsman has been established by the Ombudsman Act, 1976.[34] The Administrative Appeals Tribunal Act, 1975 has established the Administrative Appeals Tribunal which will review a large number of administrative decisions on the merits. The creation of the tribunal is very radical in conception. It is a kind of super-tribunal hearing appeals from a wide variety of administrative decisions. An Administrative Review Council has also been set up. This is the Australian counterpart of the British Council on Tribunals but with much wider terms of reference. It is to keep under review the classes of administrative decisions which are subject to review by a court, tribunal or any other body. It can also recommend to the minister regarding improving procedures for the exercise of administrative discretions for the purpose of ensuring that those discretions are exercised in a just and equitable manner. The council is thus a kind of standing body to keep a constant review over administrative procedures in the country.[35] The Administrative Decisions (Judicial Review) Act, 1977, confers on the Federal Court of Australia a jurisdiction to review federal administrative action. An all-purpose remedy, 'the order of review', has been introduced. A single, liberal test of standing has been introduced, namely, that the applicant be

[33] *Report of the Bland Committee, Parl. Papers 53 and 316* of 1973.

[34] For a brief discussion of the institution, see M.P. Jain, The Ombudsman in New Zealand, *6 J.I.L.I.* 307 and also, *Lokpal – Ombudsman in India* (1970); Aikman, The New Zealand Ombudsman, 42 *Can. B.R.* 399 (1964).

[35] See Katz, Australian Federal Administrative Law Reform, (1980) 50 *Canadian B.R.* 341.

aggrieved. Grounds for judicial review have been listed in the Act. These are radical innovations, but more changes are anticipated, e.g. a Freedom of Information Bill is on the anvil. Also, a code of procedure for all federal tribunals is proposed to be enacted. Obligation to give reasons has also been imposed on the decision-makers.

New Zealand has not lagged behind in reviewing its system of administrative law and making procedural and institutional improvements therein. It was the first common-law country to adopt the system of Ombudsman as early as in 1962 and this has had tremendous impact in other common-law countries in making the institution acceptable.[36] To undertake a systematic review of administrative law and to make necessary recommendations for the reform thereof, a standing committee, known as the Public and Administrative Law Reform Committee was established in 1967. The Committee has been working since then and makes one report every year. On the Committee's recommendation, a number of reforms have been introduced in the New Zealand Administrative Law, the most significant being the establishment of an Administrative Division of the Supreme Court to deal with problems of administrative law in the country. The Judges assigned to this Division will become experts in administrative law in due course.[37] The division has been created to promote expertise and specialization amongst the Judges to deal with problems of administrative law. If these problems are dealt with by the same Judges over and over again, they will acquire skill and experience to deal with problems of administrative law and it would also make for "consistency of judicial policy and approach". The Division could bring "greater consistency, coherence and authority" in administrative decisions. Appeals from many tribunals lie to this division on law, fact and discretion and it also exercises the jurisdiction of the Supreme Court in administrative law. New Zealand has also adopted an "additional remedy" styled as "application for judicial review". On such application, the applicant can get any relief from the

[36] see, *supra* note 34.

[37] J.F. Northey, A Decade of Change in Administrative Law, (1974–5) 6 *N.Z.U.L.R.* 25.

court to which he may be entitled in any proceeding for a writ, injunction or declaration or any combination of them. Steps have also been taken to improve the tribunal system and regulation-making powers and procedures. Many other reforms are on the anvil. The committee has claimed for itself the same status as the Council on tribunals in England. The Law Reform Commission of Canada is also engaged in studying various problems existing in the Canadian Administrative Law – some reference to which has been made later in this paper.

A word may perhaps be said here about the developments in the U.S.A. which has a somewhat sophisticated system of administrative law. In 1946, the Administrative Procedure Act was passed prescribing a code of administrative procedure.[38] The Act imposes general procedural requirements on American administrative agencies in the matter of adjudication and delegated legislation. In 1967, the Freedom of Information Act came into effect making it obligatory to publish certain types of documents in the Federal Register and making other documents available for public inspection. Thus, the system of publication of public documents has been strengthened.[39] For the first time, the Act has given to U.S. citizens a legally enforceable right of access to government files and documents. Another major innovation is the establishment of the Administrative Conference of the United States which carries on continuous research into the problems of administrative law and initiates proposals for reform.[40] In the area of judicial review, a finality clause is not sufficient to exclude judicial review.[41]

This survey shows that a ferment has been going on in several common-law countries in the area of administrative law. Conscious efforts have been made and are being made to improve the mechanism to control powers of the administration and to provide redressal to an aggrieved person.

With this rapid survey into the main trends in modern administrative law, the stage is now reached to evaluate the

[38] Byse, The Federal Administrative Procedure Act, 1 *J.I.L.I.* 89 (1958).

[39] Enid Campbell, Public Access to Government Documents, 41 *A L.J.* 74.

[40] For a description of this agency, see 24 *Business Lawyer*, 915 (1968–69).

[41] Schwartz, Recent Developments in American Administrative Law, (1980) 58 *C.B.R.* 320.

position in the Malaysian Administrative Law.[42] A comprehensive survey of Malaysian Administrative Law would need an analytical study of the entire statute law to ascertain what types of powers have been conferred on what types of agencies, what procedures have been prescribed for the exercise of these powers and what review mechanism has been set up. That obviously is a very ambitious undertaking.[43] What however can be attempted here is a modest task, viz., to pick up a few areas of administrative law in Malaysia, to compare the trends therein with the situation in other commonwealth countries in order to assess whether the situation in Malaysia accords with, or is deficient in any way as compared to, the position existing there.

III

Like any other democratic country, the system of subsidiary legislation has come in vogue in Malaysia as well. Of the total legislative output, only a small portion is made directly by the legislature, and by far the larger portion thereof emanates from administrative authorities. An analysis of the Malaysian statutes will give an idea of the breadth and depth of the various formulae used to confer powers of delegated legislation on administrative authorities. The reasons for the growth of delegated legislation were neatly summed up for England by the Donoughmore Committee as early as 1931. These reasons are valid for Malaysia as well and need not be stated here.[44] This Committee characterised delegated legislation as "a natural reflection, in the sphere of constitutional law, of changes in our ideas of government which have resulted from changes in political, social and economic ideas, and of changes in the circumstances of our lives which have resulted from scientific discoveries." This committee had also said: "The truth is that if Parliament were not willing to delegate law-making power, Parliament would be unable to pass the kind and quantity of

[42] See, for a discussion of developments in the Malaysian Administrative Law since Merdeka, Jain, [1977] M.L.J., special issue, ms ii – ms xvi.

[43] For this purpose, see Jain, *Administrative Law in Malaysia and Singapore* (1980).

[44] See Report 4, 5, 23, 51 and 52 (1932); also Jain, *op. cit.*, 31.

legislation which modern public opinion requires".[45] All these statements are valid for Malaysia as well. The committee had called the system of delegated legislation as 'inevitable'.

As the administration comes to possess vast powers of delegated legislation, the usual question of controls arises in this area and this aspect of the matter has bothered constitutional and administrative lawyers in all democratic countries. The power of delegated legislation is no less significant than the legislative power of the legislature for rights of the people can be as vitally affected by delegated legislation as by legislation by a legislative body. The main focus of inquiry therefore shifts from the question, whether delegated legislation is necessary or desirable (which is now accepted) to what safeguards are available to ensure proper exercise of the power of delegated legislation by the administration. The main question today really is not whether subsidiary legislation is desirable or not; the question really is what controls and safeguards operate in the area. The Donoughmore Committee itself exphasized this aspect when it stated: ". . . . . The system of delegated legislation is both legitimate and constitutionally desirable for certain purposes, within certain limits and under certain safeguards".[46]

As a precaution against broad delegations of legislative power, in some countries (U.S.A., India), courts have developed the doctrine of excessive delegation.[47] The advantage of this doctrine is that courts can declare too broad a delegation of legislative power as excessive and hence invalid.[48] The doctrine envisages that power be delegated subject to a defined standard. The delegation of power must be limited-limited either by legislative prescription of ends and means, or even of details, or by limitations upon the area of the power delegated or by procedural safeguards. As Schwartz explains:

> "The statute must, in other words, contain a framework within which the administrative action must operate; it must

[45] *Report* 5, 23; Jain, 31–32.

[46] *Report*, 51.

[47] Jain, *supra*, note 43, 31–43.

[48] See, *Federal Energy Admin. v. Algonquin SNG, Inc.*, 426 U.S. 458, 599 (1976).

lay down an intelligible principle to which the agency is directed to conform. . . . . "[49]

The advantages of the doctrine are many. In the words of Schwartz again:

"The principle that authority granted by the legislature must be limited by an adequate standard serves the function of ensuring that fundamental policy decisions will be made, not by some appointed officials, but by the body directly responsible to the people. As a federal judge has put it: "At its core, the doctrine is based on the notion that agency action must occur within the context of a rule of law formulated by a legislative body.[50] If there is no standard in the statute to limit delegations of power, the administrative agency is being given a blank check to make law in the delegated area of authority. In such a case, it is the agency, rather than the Congress, that is the primary legislator."

In India, the rationale of the doctrine has been explained recently by a Judge of the Supreme Court in the following words:

". . . . . Our Constitution-makers have entrusted the power of legislation to the representatives of the people, so that the said power may be exercised not only in the name of the people but also by the people speaking through their representatives. The rule against excessive delegation of the legislative authority flows from and is a necessary postulate of the sovereignty of the people. The rule contemplates that it is not permissible to substitute in the matter of legislative policy the views of the individual officers or other authorities, however competent they may be, for that of the popular will as expressed by the representatives of the people".[51]

[49] Schwartz, American Administrative Law – A Synoptic Survey, 14 *Israel L.R.* 413, 414 – 5.

[50] Wright, Beyond Discretionary Justice, (1972) 81 *Yale L.J.* 575, 583.

[51] Khanna J. in *Gwalior Rayon Mills* v. *Asst. Commr., Sales Tax*, A.I.R. 1974 S.C. 1660, 1667.

But, in Malaysia, no such doctrine has taken roots so far. The Federal Court ruled out any such doctrine in *Eng Keock Cheng* v. *Public Prosecutor.*[52] This means that there is no limit on the power of the Parliament to delegate any amount of power. In practice, very broad delegations take place in Malaysia.[53]

The scope of the *Eng Keock Cheng* ruling remains a question mark. The point to note is that the ruling in *Eng Keock Cheng* referred to the emergency period and practically depended on the existence of Art. 150(6) in the Malaysian Constitution. It can therefore be argued plausibly that the applicability or non-applicability of the doctrine of excessive delegation in Malaysia, as it is applied in India, still remains an open question as regards the non-emergency legislation to which Art. 150(6) does not apply. This specific point has not been considered by the courts in any other case so far and may as well be treated to be an open question. In *Eng Keock Cheng*, the Federal Court asserted that the Act in question "does set out the policy and scope" within which the power of delegated legislation was to be exercised. This statement is significant because that precisely is the touchstone for applicantion of the doctrine of excessive delegation. This observation may even be regarded as a tacit acceptance of the doctrine of excessive delegation in Malaysia. It needs to be remembered that the doctrine of excessive delegation in the U.S.A. or India is purely a Judge-made doctrine emanating from some of the basic postulates on which a written, democratic constitution is based.

A usual control over delegated legislation is through judicial review and such a system functions in Malaysia as well.[54] The judicial control is exercised by applying the doctrine of *ultra vires.* The effectiveness of this control depends on how broad is the formula conferring power of delegated legislation on the administration and how scrutinising an attitude the courts adopt. Usually, the powers are conferred in such broad language that it becomes difficult to say that any piece of delegated legislation is *ultra vires.* Further, on the whole, the courts adopt

[52] [1966]1 M.L.J. 18; Jain, 43–45.

[53] *Supra* note 51.

[54] Jain, 66–94.

a deferential, rather than a critical, attitude towards delegated legislation and it is only rarely that a court will hold a regulation *ultra vires.*[55] Usually, the courts interpret the power of delegated legislation broadly rather that narrowly.[55a] There is not much case-law in Malaysia denoting how the courts would exercise the power of judicial review. On the whole, one can say that judicial review of delegated legislation is more of a symbolic value rather than of much practical value. The result of this situation has been that attention has been directed to developing other safeguards. One of the suggestions mooted to increase the efficacy of judicial control may be for the statutes to avoid conferment of power in too broad and generalized language and for the delegating formula to contain whatever substantive and procedural safeguards are possible. This is what the doctrine of excessive delegation really envisages.

An important safeguard in the area can be legislative supervision vision. To strengthen legislative supervision, a mechanism adopted is the 'laying procedure'. In England, the mechanism is sought to be strengthened by the Statutory Instruments Act, 1946 In a simple laying formula, it is required that an instrument is to be laid before it comes into operation. In laying with annulment procedure, a House can resolve within 40 days to annul the instrument. In England, a simple laying formula is treated as merely directory in nature. In India, the situation is better in this respect insofar as a standard formula has now been evolved. Each House of Parliament has 30 days to modify or annul a rule after it is laid, and this formula is now invariably incorporated in every statute enacted by Parliament. This has introduced a uniformity in an otherwise chaotic situation. In Australia, a laying formula with negative resolution is used universally in Federal Statutes and this formula is regarded as mandatory by the Acts Interpretation Act. Regulations not laid in accordance with the formula become void and of no effect. On the other hand, in Malaysia, 'laying' provisions are not very common and occur only in a few statutes. It is rare to find a formula of the

[55] Ref. may be made to *Port Swettenham Authority* v. *T.W. Wu & Co. (M) Sdn. Bhd.* [1978]2 M.L.J. 137; Jain, 72, where a by-law made by the port authority has been held to be *ultra vires*. Such instances are however rare.

[55a] See, for example, *MacEldowney* v. *Forde*, [1969] 2 All E.R. 1039.

'affirmative' type i.e. which needs the appproval of the House of the regulations proposed to be made by the Executive. Most of the laying provisions require laying before Dewan Rakyat and ignore Dewan Negara. The absence of the 'laying' provisions weakens Parliamentary control over delegated legislation.[56]

Another gap in the parliamentary control of subsidiary legislation in Malaysia appears to be the absence of any parliamentary scrutiny committee. Such committees have been established practically in all commonwealth countries having parliamentary democracies. For the first time, such a committee was established in the House of Commons in England in 1944. It has been functioning since then. In 1973, this committee was converted into a Joint Committee on Statutory Instruments of both Houses of Parliament. In India, each of the two Houses of Parliament has a committee now. These committees have been quite active and have been able to win a number of improvements in the system of delegated legislation.[57] Such a committee has been found to be a useful instrument as a 'watchdog' of Parliament on delegated legislation. In the words of Griffith and Street:

> "The value and importance of this work (of the committee) are undeniable. The very existence of the committee must prevent more shortcomings than the committee detects; unjustifiable delay in publication and laying before Parliament has almost ceased; statutory instruments have become more intelligible."[58]

Such a committee does not concern itself with policy matters. It concerns itself with certain aspects of exercise of power by government departments like delay in laying, imposing a tax or any financial levy, ousting court's jurisdiction, retrospectivity of delegated legislation, unusual or unexpected exercise of power of making rules etc. Such a committee acts as

[56] See Jain, 99–105.

[57] Jain, 105–113.

[58] *Principles of Adm. Law*, 88, 94, (1973).

an agency through which Parliament may exercise some supervision over administrative legislation.

It may perhaps be of interest to note that in the U.S.A., because of the operation of the doctrine of Separation of Powers, for long the Congress exercised only very minimal control over delegated legislation. But now disenchanted by the efficacy of judicial control, more and more stress is being laid on legislative efforts to control exercise of delegated powers. More and more use is being made of statutory provisions similar to laying with annulment formulae. Schwartz explains the position in the U.S.A. in the following words:

> "The use of the legislative vote in America is a direct reflection of the growing malaise over uncontrolled delegation. The great need in an era of ever-expanding administrative authority, accompanied as it is by an almost reciprocal disillusionment with governmental agencies, is to establish effective safeguards. One response to that need has been the growing interest in more adequate legislative review of delegated legislation, through techniques such as the legislative veto. The movement to provide for legislative review has been spreading in recent years. . . . . There is strong sentiment in Congress for setting up an analogous federal system of general review of agency rules."

Schwartz feels that in the coming years, the legislative veto and comparable legislative review techniques will play an increasingly important part in American Administrative Law, " since they enable American legislatures to assume their rightful place as effective supervisors of delegated powers. This may help restore the balance which has been tilted unduly by the judicial reluctance . . . . to exercise control over the delegations of power themselves."[59]

One other safeguard against not so proper use of the power of delegated legislation by an administrative body is the requirement of consultation of the interests affected by the proposed delegated legislation. This introduces an element of demo-

[59] Schwartz, *American Adm. Law, supra*, note 49, at 416–7.

cratisation in an otherwise bureaucratic procedure. Consultative technique also helps the administration insofar as it can serve as a feed back to the administration as regards the real problems existing in the field sought to be regulated. There are many other ways in which the consultative technique can help the administration and the interests affected.[60] The technique of consultation is very widely used in the rule-making process in the U.S.A. The Administrative Procedure Act, 1946 in the U.S.A. lays down a general, minimal, obligatory procedural requirement of pre-publication of the proposed rules so that interested parties may submit their comments and observations on the proposed rules before they are finalised by the concerned agency. A more formal consultative technique is followed if the parent statute prescribes the rules being made on "the record after opportunity for an agency hearing."[61] On the other hand, in Malaysia, consultative technique is seldom prescribed as a formal statutory requirement for rule-making. Formal consultation of affected interests as a matter of right on an obligatory basis has not much developed in Malaysia though, informally, as in any democratic system, informal consultation in some way does go on. But such consultation is ad hoc and discretionary with the concerned administrative authority weilding legislative power. It seems that if greater use is made of formal consultative technique in the Malaysia administrative process, it will lead to greater mutual benefit both to the administration as well as the concerned interests and the people at large.

IV

In recent times great emphasis has come to be laid on the Administration following proper procedures in discharging its functions. Since the Administration has acquired vast powers to affect private rights without adequate substantive safeguards, it has come to be argued that some protection for people's rights may be found in the Administration being made to follow due procedures. As Justice Frankfurter has emphasized: "The

[60] Jain, 122.
[61] Jain, 123–4.

history of liberty has largely been the history of the observance of procedural safeguards.".[62] The American system lays great stress on administrative procedure. This is because of the requirement of due process of law embodied in the Vth Amendment. Procedural fairness is now regarded as an integral part of administrative law in other common-law countries as well. As has been emphasized by a Judge of the U.S. Supreme Court:

> "Procedural fairness and regularity are the indispensable essence of liberty. Severe substantive laws can be endured if they are fairly and impartially applied."[63]

Restrictions of power can be achieved procedurally on the theory that if administrators are compelled to act in the right way, they may generally do the right thing. This line of thinking has led the courts to develop the concept of natural justice which has been characterised as 'fair administrative procedure.' The statutes conferring power may not lay down any procedure for its exercise. Nevertheless, the courts may still imply that natural justice is available in certain types of proceedings.

A perplexing question over the years has been: *when can a person claim natural justice?* Several shifts in judicial opinion have occurred over time on this question. For some time, the court's general approach was to hold that natural justice would be available in case of a quasi-judicial proceeding as distinguished from an administrative proceeding.[64] But this conceptual differentiation led to confusion. For some time now, a change in judicial trend has been surfacing. The courts have started using the term 'fairness' instead of natural justice and are now insisting that 'fairness' is a necessary element of any administrative proceeding and that there is no need to characterise the same into quasi-judicial or administrative for the purpose of applying natural justice.[65] For example, in Canada,

[62] *McNabb* v. *United States*, 318 U.S. 332, 347 (1943).

[63] Jackson J. in *Shaughnessy* v. *United States*, 345 U.S. 206.

[64] *Ridge* v. *Baldwin*, [1964]A.C. 40; *Mardana Mosque* v. *Mahmud* [1967]A.C. 13.

[65] *Re K(H) – an infant*, [1967]1 All E.R. 226; *R.* v. *Gaming Board ex p. Benaim*, [1970]2 W.L.R. 1009.

in 1979, in *Nicholson* v. *Haldimand Norfolk Regional Board of Commissioners of Police,*[66] the Supreme Court has asserted that the courts could strike down even an "administrative" decision of an administrative authority if in making the decision the authority did not follow procedures conforming to minimum standards of fairness. In this way, the frontiers of hearing have been pushed further and the right of hearing may be conceded to the affected party in many different types of administrative procedure. The old dichotomy between 'right' and 'privilege' has also been done away with for purposes of the right to hearing. This trend is visible to some extent in all common law countries including Malaysia.[67] That this approach is fully reflected in Malaysia is evident from *Ketua Pengarah Kastam* v. *Ho Kwan Seng,*[68] where Raja Azlan Shah, F.J. underlining this approach has observed:

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

The Chief Justice also emphasized that the principles of natural justice "play a very prominent role in administrative law", that the rule requiring a fair hearing "is of central importance because it can be used to construe a whole code of administrative procedural rights." He further emphasized that "drastic statutory powers cannot be intended to be exercised

[66] [1979] 1 S.C.R. 311 Also see, *Martineau* v. *Matsqui Institution Disciplinary Board,* decision dated Dec. 13, 1979.

[67] Jain, 174–200. In the U.S.A., before 1970, a view was held that a person was not entitled to a hearing when a welfare benefit was being withdrawn. The theory was that if an individual was being given something by government to which he had no pre-existing "right," he was being given a mere "privilege" and was not entitled to protection under due process clause. All this was changed by the landmark decision in *Goldberg* v. *Kelly,* 397 U.S. 254 (1970) which held that public assistance payments to an individual could not be terminated without giving him a hearing. Such payments given under statutes could not be regarded as a mere privilege.

[68] [1977] 2 M.L.J. 152.

unfairly, and that fairness demands at least the opportunity of a hearing."

This is indeed a very admirable statement of law as regards the availability of natural justice in administrative process. A similar approach is discernible in *Sarawak Electricity Supply Corporation* v. *Wong Ah Suan*[69] where the Federal Court ruled that before the administration could change some conditions in the respondent's licence, he was entitled to a hearing. In this case, the licensee's exclusive privilege to supply electricity in an area was sought to be changed. The court ruled that to do so would be to affect his property rights. It in effect injuriously affected the rights of the respondents under the licence, in particular his profitability, and so the *audi alteram partem* rule would apply to him. But again one can find the old conceptual approach being advocated in *Minister of Labour & Manpower* v. *Wix Corporation South East Asia Sdn. Bhd.*[70] There Syed Othman F.J. has stated that "the rule of hearing both sides applies only when the officer is imposed with a duty to decide questions of law or fact". But he has added further . . . . . "a duty to act judicially in accordance with natural justice arises only in the exercise of functions that are analytically judicial". This statement is difficult to reconcile with what Raja Azlan Shah C.J. said in the *Ketua Pengarah* case noted above. The formulation in *Ketua Pengarah* is preferable to that in *Wix Corporation.*

While the courts in Malaysia have been influenced on the whole by the liberal trends emanating in England and other Commonwealth countries as to the application of natural justice in specific contexts, what appears to be a weak point at present is in the spelling out of the minimal procedural norms of natural justice. The courts emphasize that natural justice is not a fixed concept. This is true but this does not mean that the matter may be taken to the limit where natural justice just vanishes in thin air. Today it is difficult to say what is the minimal procedure, if any, which must be followed by a decision — making body. For example, it is difficult to say when, if at all, can an oral hearing be claimed? What is a proper notice? When

[69] [1980]1 M.L.J. 65.

[70] [1980]2 M.L.J. 248.

can a lawyer appear before an authority? When, if at all, are reasons to be given for decisions by administrators? Great vagueness surrounds these issues making the concept of natural justice practically effete. For example, the answer to the question, when can a person demand an oral hearing, is not clear. In none of the cases in which this question has been judicially considered in Malaysia so far, has the court clarified the circumstances and conditions when an affected person can claim an oral hearing. In none of these cases has the court conceded such a hearing.[71] Similarly, it is not clear whether legal representation can be claimed in any circumstances as a part of natural justice. The relevant cases give no guidance on this question.[72]

Is it necessary for adjudicatory authority to give reasons for its decisions? In Malaysia, the answer appears to be in the negative. But great emphasis has come to be placed on giving of reasons by adjudicatory bodies in other countries. In India, the courts have laid down such an obligation on such bodies as a part of natural justice.[73] In England, the Tribunals and Inquiries Act, 1958 has imposed an obligation to give reasons on request. Recently, the Law Reform Commission of Canada has emphasized upon the need of giving reasons as follows:

> "Since the effectiveness, and even the possibility of review depends to a considerable extent on the reasons given by an administrative authority, we think these authorities should give candid and adequate reasons for decisions, indicating at least the general nature of information relied upon. The desirability of giving reasons for decisions is, of course, supportable on other grounds as well. Satisfying the party that a decision was not taken arbitrarily, and ensuring that the deciding body has satisfied itself that it has dealt with all the issues, may be mentioned. These reasons are germane to

[71] *Najar Singh* v. *The Government of Malaysia* [1974]1 M.L.J. 138; on appeal to P.C. [1976]1 M.L.J. 203; *Mahadevan* v. *Anandrajan* [1974]2 M.L.J. 1; *Zainal bin Hashim* v. *Government of Malaysia*, [1979]2 M.L.J. 276.

[72] *Doreswamy* v. *Public Service Commission* [1971]2 M.L.J. 127.

[73] *Siemens Engg. & Mfg. Co.* v. *Union of India*, A.I.R. 1976 S.C. 1785.

the issue of statutory guide-lines for administrative authorities. . . ."[74]

In Australia, the Ellicott Committee endorsed the recommendation of the Kerr Committee that the person aggrieved or adversely affected by an administrative decision will be entitled to apply and receive reasons for that decision. The Ellicott Committee supporting this recommendation said: ". . . it is in the interest not only of the citizen but also of efficiency in the public service. It may also have the merit that persons who feel that they have been wronged by an administrative decision will abandon their claim when the reasons are known. The recommendation is also in accordance with the principles of open Government."

There is a danger that the concept of natural justice may be denuded of much of its substance, and we may be left only with the husk and shadow of natural justice if the courts take too indulgent a view in this matter.[75] What needs to be remembered is that natural justice is not merely an empty ritual or a formal incantation but the concept is conceived and promoted as an effective procedural safeguard against undue or improper use of power.

To strengthen administrative procedures and not leave the matter completely to judicial or administrative discretion, two expedients have been thought of: (i) Enacting an Administrative Procedure Act, and (ii) setting up a body to supervise administrative procedures. The first model takes its inspiration from the U.S.A. where the Administrative Procedure Act was enacted in 1946. The second model was adopted in England in 1958. Instead of going in for a uniform procedure covering all adjudicatory bodies, the Franks Committee suggested a supervisory body which could tailor procedure from tribunal to tribunal according to its nature and functions. A broad-based body known as the Administrative Review Council modelled on the Council on Tribunals has been established in

[74] Report 14 on *Judicial Review and the Federal Court*, 40.

[75] Such apprehensions are already being expressed: see, D.H. Clark, Natural Justice: Substance and Shadow, [1975] *Public Law* 27. For a detailed discussion on the norms of natural justice in Malaysia see Jain, 201–265.

Australia as well. But Australia is also moving in the direction of enactment of an Administrative Procedure Act. As regards the functions of the Council, it has itself explained the position in the following words:

> "The functions of the Council are set out in sub.-sec. 5(1) of the Administrative Appeals Tribunal Act. The functions relate to both primary and appellate decision-making; to substance and procedure; to examination of existing law and promotion of reform; to tribunals and individual administrators. The functions relate to the whole of the machinery of government for making administrative decisions. It is a wide field of inquiry. In this field, the Council is a promoter and not an executor—Council recommends, Government decides, and the public service implements. . . ."[76]

V

Another expanding sector of modern administrative law relates to discretionary powers of administrative authorities. There is an increasing tendency to confer discretionary powers on Ministers and other authorities. Many a time powers are couched in too broad language without any substantive or procedural safeguards, and thus a very large area of choice is given to administrators. Many discretionary powers have been conferred, and are being daily conferred, on the administration. The crucial question in this area is that of control. One method of control is a provision for review of an initial decision arrived at by one administrator by a highter administrator. Another method may be to provide for review by a tribunal. This is becoming increasingly an important method as is illustrated by the institution of an Administrative Appeals Tribunal in Australia. The advantage of this method is that there can be review on merits of the discretionary decision in question. The third method is the institution of an ombudsman and a number of common-law countries have opted for this institution. Lastly, there is the traditional institution of judicial review of discretionary decisions. Slowly and gradually the courts have

[76] Administrative Review Council, *First Annual Report* (1977), 7.

succeeded, after some initial hesitation, in claiming some review power over the exercise of discretionary powers. The judicial review is not on merits but on such grounds as *mala fides,* irrelevant considerations, non-application of mind, fettering discretion etc. The precursor of the new trend is the *Padfield* case.[77] In Malaysia, the case-law in this area for the present is scanty.[78] However, the study of the few cases which exist does justify the broad conclusion that the courts do accept the juristic norms evolved by the British Courts to control the exercise of discretionary powers. As the Federal Court has stated in *Government of Malaysia* v. *Loh Wai Kong,*[79] in exercising its discretionary powers, the Government "must act *bonafide,* honestly and honourably. If it is established that Government has acted *mala fide* or has in other ways abused its dicretionary power, the court may, in our judgment, review Government's action and make the appropriate order, and the principle which the court will apply are well established and may be found in two authoritative books: *Administrative Law* by Professor H.W.R. Wade and *Judicial Review of Administrative Action* by the late Professor de Smith."[80] This statement assimilates the principles of Malaysian Administrative Law to the English Administrative Law. There is authority to show that the court can interfere with the exercise of discretion by an administrative authority if it is based on a wrong interpretation of the law.[81]

In Malaysia, the most outstanding case in this branch of administrative law is *Sri Lempah*[82] where a discretionary decision of an administrative authority was quashed on the

[77] *Padfield* v. *Minister of Agriculture,* [1968] 1 All E.R. 694. The high water mark of judicial review of discretionary administrative power in England is denoted by such cases as *Metropolitan Properties Co.* v. *Lannon,* [1968]3 All E.R. 304; *Laker Airways* v. *Dept. of Trade, [1977]* 2 All E.R. 182; *Secretary of State for Education & Science* v. *Tameside Metropolitan Borough Council,* [1976]3 W.L.R. 641.

[78] Jain, 271–320.

[79] [1979]2 M.L.J. 33.

[80] *Id,* at 36.

[81] *United Hokkien Cemetries, Penang* v. *Majlis Bandaran, Pulau Pinang,* [1979]2 M.L.J. 121.

[82] *Pengarah Tanah dan Galian, Wilayah Persekutuan* v. *Sri Lempah Enterprises Sdn. Bhd.,* [1979]1 M.L.J. 135.

grounds of irrelevant considerations and improper purpose. This is one of the few cases in Malaysia in which a discretionary decision has been quashed by the courts. In this case, Raja Azlan Shah, F.J. has laid down the principle as follows:

> "Unfettered discretion is a contradiction in terms . . . Every legal power must have legal limits, otherwise there is dictatorship . . . In other words, every discretion cannot be free from legal restraint ;where it is wrongly exercised, it becomes the duty of the courts to intervene. The Courts are the only defence of the liberty of the subject against departmental aggression."[83]

The Chief Justice went on to emphasize that "public bodies must be compelled to observe the law and it is essential that burcaucracy should be kept in its place." This is as clear a statement as there can be rejecting the concept of uncontrolled and absolute powers. The situation will be the same even when the statute confers an "absolute discretion". The word 'absolute' is inefficacious as no 'discretion' can ever be 'absolute'.

The question of judicial control of administrative powers has again been considered by the Federal Court in *National Union of Hotel, Bar and Restaurant Workers* v. *Minister of Labour and Manpower*[84] in the context of S. 26(2) of the Industrial Relations Act, 1967 which provides that where the Minister is 'satisfied' that it is expedient so to do, he may refer any trade dispute to the Industrial Court. Explaining the scope of S. 26(2), Raja Azlan Shah, C.J., on behalf of the Federal Court, pointed out that the "subjective formulation" therein 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 discretionary power. The discretion is vested in the Minister and not in the courts. If the Minister's action is challenged for alleged abuse of discretion, the courts must resist the temptation to convert their jurisdiction to review

[83] *Ibid.* at 148.

[84] [1980]2 M.L.J. 189.

into a reconsideration of the merits as if on appeal. The duty of the courts is to see that the Minister has determined the matter in accordance with the policy and object of the Act. The courts can interfere in the following situation:

> "But if the Minister, by reason of his having misconstrued the Act or for some other reason, so exercises his discretion in a way so as to defeat the policy and object of the Act, then he has clearly exercised it wrongly. In that case the courts will interfere with the exercise of his discretion by saying that he has given no weight, or has given insufficient weight, to the considerations that ought to have weighed with him, or if he has been influenced by considerations which ought not to have weighed with him."[85]

Thus, while, on the one hand, the Malaysian Federal Court has very clearly and unequivocally rejected the doctrine of unfettered powers, on the other hand, it has also repudiated the theory of review of discretionary decisions on merits.

The question of review of discretionary decisions by Ministers is crucial in the modern Administrative Law. So many decisions are made by the Ministers under statutory powers affecting individual rights that it does not appear to be proper to exclude them from judicial review. The Kerr Committee and the Ellicott Committee in Australia have both concluded that since "so many discretions are reposed by law in Ministers", it was desirable that, "as a general rule, an effective system of judicial review should provide for relief in respect of their exercise if the Minister acts contrary to law". The court would not, of course, be entitled to review the merits of a Minister's decision or to substitute its view for that of the Minister as to how a particular discretion should be exercised. But, otherwise, the decisions should be subject to judicial review even though "the exercise of the Minister's discretion may involve considerations of policy, or be an implementation of policy." Some decisions, e.g. those relating to defence, national security, relations with foreign countries, criminal investigations etc. might be excluded from judicial review. However, judicial review of discre-

[85] *Id.* at 191.

tionary decisions will only be marginal unless the statute conferring discretion lays down some norms or principles according to which the administrator has to exercise his discretion. In India, courts invoke Art. 14 to insist on the statutory laying down of substantive and procedural norms to regulate discretion so that discretion is not uncontrolled. The courts argue that uncabined discretion is discriminatory and so is violative of the equality clause. Therefore, the courts can declare a law unconstitutional as infringing Art. 14 if it confers uncontrolled discretion.[86]

One point more needs to be noted. Courts can review discretionary decision if it is arrived at for an improper purpose or is based on irrelevant considerations. Such grounds do however give a potent weapon to the courts to intervene with discretionary decisions depending upon the attitude of the concerned court. An interventionist judge has great scope for judicial review under these rubrics, for the court is the ultimate arbiter of the meaning and purpose of a statute as well as of the relevance or irrelevance of various considerations. On the other hand, a conservative judge could take a more restrictive view of his function. He can argue that inconsistency with a statute or its purposes should be invoked only in flagrant cases, and never when an official has acted in a remotely reasonable manner. The interventionist theory prevails in England at present.[87]

In the common law world, the courts have traditionally been looked upon as a buttress against illegal or arbitrary action by administrators. Judicial review is regarded as the balance – wheel of administrative law in the common law system. In Malaysia, the courts have full-fledged powers to review administrative action like courts in any other common law country and to grant usual remedies by way of prerogative writs, declaration or injunction as the case may be on more or less similar grounds.[87a]

A number of crucial issues however arise in the area of judicial review of administrative action. These issues have been

[86] *B.N. Chettiar v. Central Government*, AIR 1976 Mad. 224.

[87] J. Grey, Discretion in Administrative Law, (1979) XVII *Osgoode Hall Law Jl.* 107–132.

[87a] For details of Judicial Review in Malaysia, see Jain, *Adm. Law in Malaysia and Singapore*, Ch. XIV, 341–428 (1980).

recently considered and debated in Canada, Australia, New Zealand and England as noted above.[88] In the common law world, the role of the courts to control administrative action still remains crucial although other methods of control are being adopted. What is necessary therefore is to make judicial review more efficient and effective so that the basic philosophy of administrative law, viz. to control power and to provide redress to the injured person, may be better fulfilled. The question has really two aspects: the machinery for judicial review, and judicial attitudes. As regards judicial attitudes, something has been said earlier in this paper. For long the courts have shown deference to the administration on the ground of administrative expertise. But, of late, there are signs of a greater activism on the part of the courts. Since administrative action affects important individual rights, it becomes necessary to insist on strict judicial scrutiny of administrative action. Courts and administrative bodies are both agencies of the government and both are instruments for realizing public purposes. There is no reason therefore for the courts not to play a dynamic role in overseeing the administration.[89]

As regards the machinery for judicial review, one of the lines of development in this area has been the creation of specialized tribunals to review administrative action. Such bodies can, while the courts do not, review on merits the decisions of administrative authorities. The Administrative Appeals Tribunal in Australia is an example of this development.[90] One can say that this line of development envisages importing some features of *droit administratif* into the common-law system. But a significant feature of this development has been that the setting up of tribunals does not exclude judicial review for these tribunals will fall under the supervisory powers of the courts. There has been a good deal of debate on the question of constitution, composition, procedures etc. of the tribunals.[91] Another

[88] *Supra*, sec. II.

[89] See Frankfurter, Foreword (1941) 41 *Col.L.R.* 585–6; *Federal Power Comm.* v. *Nat'l Gas Co.*, 320 U.S. 627 (1944); *Scripps Howard Radio Co.* v. *Federal Communications Comm.* 316 U.S. 4, 15 (1942).

[90] See, *Supra*, Sec. II.

[91] See, the *Report of the Franks Committee* (1957).

notable development in this area has been that in New Zealand an Administrative Division has been established in the Supreme Court to act as a specialized forum in administrative law matters. This division hears appeals from certain tribunals and decision – makers on law, fact and discretion and also exercises the normal judicial review of the administration.[91a] Another idea which is being implemented now to make judicial review more effective and simple is to introduce one omnibus remedy, viz. "an application for review," which combines into itself all the significant features of the present-day separate remedies by way of writs, injunction and declaration.[91b] The underlying idea is not to make remedy to an applicant dependent on his own choice of the remedy in the first instance, but to give him a remedy which he deserves, even though he does not ask for it or he may have asked for a wrong remedy. Formerly, an applicant would be given no redress if he happened to choose a wrong remedy to start with. But in the new scheme, he does not lose his remedy because he asked for a wrong remedy. He will get what he deserves. However, the old grounds on which the courts could review are still maintained under the new remedy. Another development to strengthen the institution of judicial review is to tabulate all the grounds on which the court can award a remedy to the aggrieved party. This is an improvement over the old system. For example, in Canada, the grounds have been laid down in the Federal Court Act and the Law Commision of Canada has recently proposed[92] re-formulation of these grounds as follows: "the court should be able to review administrative authorities for action contrary to law, including without limiting the generality of the foregoing:

i) failure of procedures to conform to natural justice or basic procedural fairness including bias and reasonable apprehension thereof;
ii) failure to observe prescribed procedures;

[91a] See, *supra*, Sec.II.

[91b] See, *supra*, Sec. II.

[92] Law Reform Comm. of Canada, Working Paper 18 – *Federal Court -- Judicial Review*, and *Judicial Review & Federal Court*, Report 14 (1980).

iii) error in law, including lack of jurisdiction, a wrongful failure to exercise jurisdiction, and abuse of discretion;
iv) fraud;
v) failure to reach a decision or to take action where there is a duty to do so;
vi) unreasonable delay in reaching a decision, or performing a duty;
vii) lack of any evidence to support a decision.[93]

Then, there is the question of what redress to give to the applicant. At present, most of the times, the courts can merely quash an infirm administrative decision. This is very inadequate. The current thinking is to give to the courts more options so as to enable them to give a variety of reliefs in addition to their power to quash. The Law Reform Commission of Canada has formulated the proposal that the court should be able to grant relief by way of[94]:

i) an order quashing or setting aside a decision (which should include a report or recommendation);
ii) an order restraining proceedings without jurisdiction or any breach of natural justice or any breach of procedural requirements prescribed by statute or regulation;
iii) an order compelling the exercise of jurisdiction or observance of natural justice or statutory or regulatory procedures;
iv) an order referring the matter back for further consideration;
v) a mandatory order compelling action unlawfully with-held or unreasonably delayed;

[93] In Australia also, the grounds of Judicial review have been formulated. The Kerr Committee suggested the following grounds: denial of natural justice; failure to observe prescribed procedures; want or excess of jurisdiction; *ultra vires* action; error in law; fraud; failure to reach a decision where there is a duty to do so; and unreasonable delay in reaching a decision. To these, the Ellicott Committee added two more grounds: (1) an authority acting contrary to law and (ii) lack of evidence. These grounds are enumerated in S. 5(1) of the Administrative Decisions (Judicial Review) Act, 1977. These grounds are very much similar to those stated in Canada.

[94] Also see S. 16 of the Administrative Decisions (Jud. Rev.) Act in Australia where also some of these reliefs have been specified.

vi) an order declaratory of the rights of the parties;
vii) such other order as may be necessary to do justice between the parties.

Another line of development in the area of judicial review is to re-define the principle of *locus standi* to seek review so as to make the requirement uniform for all remedies as well as to relax the rigidity of this requirement. The new test of *locus standi* is 'sufficient' interest in the subject matter.[95] This is the culmination of the Judicial process discernible for some time to liberalise standing requirements.[96] It is hoped that a more liberal standing requirement will improve the courts' power of review.

Another significant idea which is being projected now to give relief to the persons adversely affected by administrative action is that a general right to damages be created statutorily for loss resulting from unlawful administrative action. The argument is: why should an individual be made to bear exceptional losses as a result of administrative action taken in pursuit of public good. The concept is much broader than the present-day tort concept. To some extent, such a concept prevails in Continental Administrative Law.[97] There has been some academic writing lately on this question.[98] But, on an official level, the problem has been considered only in New Zealand where the Public and Administrative Law Reform Committee has recently suggested that no such general right be created for the present, but that – (i) the courts might be left to develop the law for government's tortious liability, and (ii) specific statutes may, while conferring powers on administrative authorities, also confer a right to damages or compensation in respect of certain exercises of the powers conferred.[99]

[95] This test has been adopted in England, *Supra*, Sec. II. In New Zealand, the Public and Administrative Law Reform Committee has made a similar recommendation: See, *XI Report* (1978).

[96] ***Blackburn v. Attorney-General*, [1972] 1 W.L.R. 1037; *R v. Greater London Council; ex parte Blackburn* [1976] 1 W.L.R. 550.**

[97] *Duguit, Traite de Droit Constitutionnel* 496 (3 ed.).

[98] Gould, Damages as a Remedy in Administrative Law, (1972) 5 *N.Z.U.L.R.* 105; Craig, Negligence in the Exercise of a Statutory Power, 94 *L.Q.R.* 428; Gaz, Compensation for Negligent Administrative Action, [1973] *Public Law* 84.

[99] XIV *Report* (1980).

Lastly there is the all important question of the frequent use of privative clauses to restrict, if not to exclude, judicial review of administrative action. Use of such clauses is rather common place now-a-days. There are a variety of such clauses in use.[100] The Courts have taken the stand that no privative clause can exclude judicial review of administrative decisions on the ground of "error of jurisdiction." The simple logic underlying this judicial approach is that a decision in excess of jurisdiction is not a decision at all and, therefore, it cannot be protected by any privative clause as such a clause can protect only a decision taken under, and not outside, the statute in question. In Malaysia, this question has been recently resolved by the Privy Council in *South East Asia Bricks Sdn. Bhd.* v. *Non-Metallic Mineral Products Manufacturing Employees Union.*[101] The question was regarding the scope of S. 29(3)(a) of the Industrial Relations Act, 1967. This provision says: ". . . an award of the court shall be final and conclusive and no award shall be challenged, appealed against, reviewed, quashed, or called into question in any court of law." The Privy Council ruled that the privative clause in question would not bar the issue of *certiorari* on the ground of 'excess of jurisdiction' or when its decision is a 'nullity', but that *certiorari* could not be issued on any other ground, e.g.: error of law apparent on the face of the record. The words 'quashed' and "called in question in any court of law" were held to oust *certiorari* to some extent. The scope of a mere 'finality' clause may however be narrower and, consequently, the scope of judicial review wider. Now, the "error of jurisdiction is a flexible concept and it is not always possible to distinguish articulately between "error of law" and "error of jurisdiction". In a large number of situations, what may be regarded as 'error of law' may also be characterised as 'error of jurisdiction' and *vice versa.* Much depends however on judicial attitude. If it is a sort of an interfering judge he can characterise most of the infirmities as "jurisdictional" and, thus, dilute the efficacy of privative clauses. Also, after the *Anisminic* case, the concept of error of jurisdiction has been given a broad con-

[100] Jain, 398–408.

[101] [1980]2 M.L.J. 165.

notation.[102] How far will a court regard its jurisdiction excluded by a privative clause now depends on the court's attitude itself. How far is the court prepared to expand the concept of "error of jurisdiction"? The difference between the two concepts has become so thin and artificial that Lord Denning has recently suggested in *Pearlman* v. *Harrow School*[103] that the distinction between an error of law which affected jurisdiction and one which did not should now be "discarded". Lord Denning's reasoning on this point is impeccable. He argues that the distinction between an error which entails an absence of jurisdiction – and an error made within the jurisdiction – is very fine. So fine indeed that it is rapidly being eroded. An error can be described on the one hand as an error of jurisdiction. But, on the other hand, the same error can equally well be described as an error within jurisdiction. So fine is the distinction that in truth the court has a choice before it whether to interfere with an inferior tribunal or an inferior court on a point of law. If it chooses to interfere, it can formulate its decision in terms of jurisdictional error. If it does not choose to interfere, it can formulate its decision in terms of error within jurisdiction. Hence Lord Denning's suggestion to discard the distinction. The High Court should have jurisdiction to control the proceedings of inferior tribunals by way of judicial review. When such tribunals go wrong in law, the High

[102] Lord Reid has given the following catalogue in *Anisminic* of what may amount to jurisdictional errors:

i) a lack of jurisdiction to enter on the inquiry in question;

ii) giving the decision in bad faith;

iii) a failure to comply with the requirements of natural justice before reaching the decision in question;

iv) making a decision, i.e. the formal order, which there was no power to make;

v) in good faith misconstruing the provisions giving the decision maker power to act so that he or it failed to deal with the question remitted to it and decided some other question which was not remitted to it;

vi) refusing to take into account something which a tribunal or official was required to take into account by the statute conferring the power;

vii) basing a decision on some matter which, under the provisions conferring the power, the decision maker had no right to take into account, in short upon "irrelevant considerations". Lord Reid made it clear that he was not giving an exhaustive list of jurisdictional errors. The list represents the variety of "jurisdictional" grounds of attack. See [1969]2 A.C. 147, 171.

[103] [1979]1 Q.B. 63.

Court should have power to put them right. This was necessary to promote uniformity of law. "It is intolerable that a citizen's rights in point of law should depend on which judge tries his case, or in which court it is heard." He thus suggested that "no court or tribunal has any jurisdiction to make an error of law on which the decision of the case depends. If it makes such an error, it goes outside its jurisdiction and *certiorari* will lie to correct it." Unfortunately, the Privy Council did not adopt this suggestion in *South East Asia.* It exhibited the traditional and conservative attitude on this point by maintaining and perpetuating the distinction between jurisdictional error and error of law. But it seems that sooner or later the Denning view will prevail. In the meantime, the courts should broadly interpret 'error of jurisdiction'.

There is a strong feeling among administrative lawyers that exclusion from the court's power of judicial review of decisions of administrative authorities should be kept to a minimum. The Franks Committee had suggested that "no statute should contain words purporting to oust" the remedies by way of *certiorari,* prohibition or *mandamus.*" Accordingly, the Tribunals and Inquiries Act, 1958, negatived all no *certiorari* clauses in pre – 1958 statutes and even went to the extent of providing a mechanism (case stated to the High Court) to bring questions of law before the courts in all matters. Recently, in Canada, S. 28 of the Federal Court Act has effect notwithstanding any other statute so that judicial review may take place despite a privative clause. The Ellicott Committee in Australia suggested that, in general, privative clauses, i.e., provisions in statutes aimed at ousting the jurisdiction of a court to grant judicial review of an administrative decision should not be retained in commonwealth legislation. The essential point to note is that an administrative body should not have authority to make a final decision. Either an appeal may be permitted to a tribunal, or to a court, at least on a question of law. The Law Reform Commission of Canada has recently suggested that "Judicial Review should not be restricted by privative clauses," and, further that:

1) Judicial review, whether for illegality or unfair procedure, should continue to extend to all federal administrative authorities – ministers, government officials or administrative bodies.

2) The Cabinet should be subject to review on the ground of illegality and, when acting as an administrative authority and not exercising its general political function, on the ground of failing to conform to natural justice or basic procedural fairness.[104]

In this connection, a reference may be made to *Minister of Labour & Manpower* v. *Paterson Candy (M) Sdn. Bhd.*[105] S. 9(5) of the Industrial Relations Act, 1967 makes the decision of the Minister "final" which "shall not be questioned in any court." This clause is not as extensive in phraseology as S. 29(3)(a) which was considered by the Privy Council in *South East Asia Fire Bricks*. It appears from the Federal Court's judgment that the court can issue *certiorari* when there is an error of jurisdiction. This is what Chang Min Tat F.J. observes:

> "The Court's power to investigate the question whether the Minister's decision was made with or without jurisdiction must mean that *certiorari* does not lie by way of an undisguised appeal on an error of fact."

Nothing has been said about error of law. The point to note is that a finality clause like the one contained in S. 9(5) does not exclude *certiorari* on the ground of error of law. As regards "final and conclusive" clause, Lord Denning says in *Pearlman* that it excludes an appeal from a tribunal to the court where the court reviews the decision of the tribunal and substitutes its own decision for that of the tribunal. But, in spite of such a clause, "*certiorari* can still issue for excess of jurisdiction, or for error of law on the face of the record". So, *certiorari* should be issuable on the ground of error of law when the statute contains only a "finality" clause without anything more.[106]

[104] Law Reform Commission, Report 14 entitled *Judicial Review and The Federal Court*, 38 (1980).

[105] [1980] 2 M.L.J. 122. The Federal Court had referred to the Privy Council decision in *Attorney-General, Bahamas* v. *Ryan* [1980] 2 W.L.R. 143. In this case, the privative clause went beyond a simple finality clause for it said the decision of the Minister "shall not be subject to appeal or review in any court." In *Ryan*, the Privy Council quashed a Minister's decision refusing grant of citizenship to the applicant because he had failed to give natural justice to the applicant. Ignoring natural justice makes a decision a nullity and makes it outside the jurisdiction of the decision making authority.

[106] There exists such a committee in England and in India: Jain, 454—6.

VII

To conclude, Malaysia is a vibrant democracy and has all the necessary paraphernalia of a democratic constitutional system – independent courts, elected and representative Parliament, a cabinet form of government collectively responsible to the Dewan Rakyat. The Administrative Law of Malaysia is still in its formative stages. It will take time for administrative law to mature into a viable, sophisticated and self-sufficient system fully capable of matching the needs of a mature and vibrant democratic society. A great responsibility thus lies on the courts to display a dynamic and creative attitude in expounding the norms of administrative law keeping in view its basic policy and purpose, viz., to create proper checks and balances on the exercise of administrative power. Exciting developments are taking place in this branch of law in other English-speaking democracies. The experiences of other common law countries of the Commonwealth indicate however that the courts alone cannot develop a viable system of administrative law as it is not only the norms, but institutions as well, which have to be established to make for a self-sufficient system, to strengthen overseeing of administrative functioning and to provide an adequate redressal mechanism. Institutions can be established only by Parliament by enacting necessary legislation. Parliament may also take care in future legislation to invariably incorporate a laying formula when delegating legislative power to the administration. Perhaps, Parliament could consider establishing a Parliamentary Committee on Subsidiary Legislation and a committee on public undertakings.[107] It may be a good idea to incorporate some substantive and procedural limits on discretionary powers and to avoid use of privative clauses in statutes. Tribunal system also needs to be strengthened. Many initial decisions on many matters may be taken by the tribunals rather than by administrative personnel, and where initial decisions have to be taken by administrators, at least one appeal may be allowed on merits to some tribunal. There is also the need to consider the question whether a body like the Administrative Review Council may be created. Such institutions can be created only by Parliament on the initiative of the Government. All these questions need careful consideration and examination. Norms and institutions

developed in other countries may need some adjustments and adaptation in the light of circumstances prevailing here.

In the area of administrative law, many useful lessons can be learnt from the experiences of other common law countries. Therefore, for students of administrative law in Malaysia, it will indeed be a rewarding undertaking to study comparative administrative law, some aspects of which have been mentioned in this paper.

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