



ADMINISTRATIVE JUSTICE: IT'S OPERATION  
WITHIN THE CONSTITUTIONAL AND LEGAL  
FRAMEWORKS IN MALAYSIA

BY

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## ABSTRACT

This thesis seeks to discuss the administrative justice working in modern public administration. Bad public administration leads to bad government. Though attempts to design mechanisms that can overcome problem of bad administration apart from constitutionalism and the legal means, it is still futile. Courts role is seen as paramount means to determine issue of mala administration. Yet many instances showed that public still suffers a lot when dealing with government administration. The suffering is due to the fact that justice is immeasurable. Such being the case this thesis will discuss the concept of limited government that underlie the principle of administrative justice as well as the inherent values behind the idea of this restraint and the administrative law role in enhancing administrative justice. The definition of administrative justices and what it stands for and how it works to prevent modern injustices through constitutional and legal framework will be shown to see how it is effective in making government accountable and responsible for their public actions. Further, there must be an agent for administrative justice. It is the courts role through judicial review that will interpret the administrative justice standards. The judicial review aspect in Malaysia highlighted the many facet of administrative justice among others via grounds of judicial review. How broad ultra vires and other aspects of abuse, been perceived by the court in Malaysia which include the idea of proportionality and how administrative justice are implemented in Malaysia as compared to Australia, US and UK. All were sought after in order to understand the importance of administrative justice to a system of government. The findings showed that injustices occur in many forms. The modern injustices for instance were overcome via meticulous scrutiny of hard look review where the court inquires into the whole mental process of decision maker to detect the abuse. So assessing the breadth of administrative justice depends on the method of review court adopt. The more rigorous the scrutiny is, the better administrative justice is served. Since Malaysia have not venture into this form of hard look review so suggestion for reforms include the insertion of hard look review in judicial review to enhance the administrative justice culture, found lacking in most administration. Public administrations are arms of government that are equipped with all kind of machineries to guard themselves against public protest and upheaval. Administrative justice role is to ease these tensions. Because of that the public need to be informed and equipped to cope with the injustices and maladministration well-known to all government system. Administrative justice provides the answers to this missing link and to all ill administrations.

## ملخص البحث

تسعى هذه الأطروحة الى مناقشه عداله العمل الاداريه في الاداره العامه الحديثه. الاداره العامه السيئه تؤدي الى حكومه سيئه. على الرغم من محاولات تصميم ادوات بأمكانها التغلب على الاداره السيئه كجزء من الوسائل القانونيه الا انه لا يزال غير مفيد. قواعد المحكمه تبدو كوسيله لتحديد قضيه الاداره السيئه. حتى الان العديد من الامثله تظهر ان العامه لا يزالون يعانون الكثير عندما يتعاملون مع الاداره الحكوميه. هذه المعاناه تعود لحقيقه ان العداله غير قابله للقياس. مع وجود حاله كهذه ، هذه الأطروحة سوف تناقش المهوم الحكومي المحدود الذي يؤسس مبدأ العداله الاداريه بالاضافه الى ان القيمه المتأصله خلف فكره هذا العائق و قواعد القانون الاداري في تعزيز العداله الاداريه. تعريف العداله الاداريه وما تقوم عليه وكيفيه عملها في منع الظلم خلال الاطر القانونيه سوف يتم عرضه لنرى كيف فعاليتها لجعل الحكومه مسؤوله ومحاسبه عن افعال العامه. بالاضافه, لا بد ان يكون هناك وكيل للعداله الاداريه. انها قواعد المحكمه التي تترجم معايير العداله الاداريه. جانب المراجعه القضائيه في ماليزيا يحدد عدده جوانب للعداله الاداريه ومن بينها اسباب المراجعه القضائيه. الحجم الواسع لكيفيه مؤامه القضيه مع الجوانب السيئه الاخرى الذي تم ادراكه في المحاكم الماليزيه والذي يتضمن فكره موزنه وكيفيه تطبيق العداله الاداريه في ماليزيا مقارنة بأستراليا، امريكا ، والمملكه المتحده. جميعهم سعوا لفهم اهميه العداله الاداريه للنظام الحكومي. النتائج اظهرت ان الظلم يظهر في عدده اشكال. الظلم الحديث على سبيل المثال، تم التغلب عليه من خلال المراجعه الدقيقه حيث المحكمه نتخرط الى العمليه الذهنيه بكاملها لمتخذ القرار لكي تقوم بتحديد المعضله. لهذا تقييم مدى اتساع العداله الاداريه يعتمد على منهج المراجعه التي تتبعه المحكمه. حيث ان ماليزيا لم تغامر بمثل هذا المراجعه الدقيقه، لهذا فبعض الاقتراحات لاعاده الاصلاح التي تتضمن ادخال المراجعه الدقيقه في المراجعه القضائيه لتعزيز ثقافه العداله الاداريه ، وجد محدود في معظم الادارات. الادارات العامه هي اذرع الحكومه التي هي مجهزه بكل انواع الادوات التي تضمن تأمين انفسهم من المعارضه العامه. قاعده العداله الاداريه تقوم بتخفيض هذه المعضله. وبسبب هذا فان العامه يحتاجون ان يتم اخبارهم وتجهيزهم لكي يتأقلموا مع هذا الظلم والمعضله المعروفه جيدا للنظام الحكومي. العداله الاداريه تزود اجابات لمثل هذا الخيط المفقود ولكل الادارات السيئه.

## **APPROVAL PAGE**

The thesis of Noor Fariah Mohd Noor has been approved by the following;

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## DECLARATION

I hereby declare that this thesis is the result of my own investigation, except where otherwise stated. I also declare that it has not been previously or concurrently submitted as a whole for any other degree at IIUM or other institutions.

Noor Fariyah Mohd Noor

Signature .....

Date.....

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Date

*This thesis is dedicated to my parents, Haji Mohd Noor Lobak and Hajjah Zaharah Zainal Abidin for encouraging me to work hard and instilling in me the strong belief and love in God.*

*AND TO*

*Those who love justice and who nurture them for justice; a divine command is the answers to all problems.*

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Income Tax Act 1967  
Industrial Relation Act 1967  
Statutory Instrument Act 1946  
Administrative Procedure Act 1946



## LIST OF ABBREVIATIONS

SC	Supreme Court
COA	Court of Appeal
UDHR	United Declaration of Human Right
US	United States of America
UK	United Kingdom
AJ	Administrative justice
ROL	Rule of Law
p/pp.	Pages
para	Paragraph
Anor	Another
ADJR	Administrative Decision (Judicial Review) Act 1977
FC	Federal Constitution
SRA	Specific Relief Act
JR	Judicial Review
PL	Public law
APA	Administrative Procedure Act 1946
SOP	Separation of Power
CLR	Commonwealth Law Report
FLR	Federal Law Report
ALR	Administrative Law Report
AC	Appeal Case
AAT	Administrative Appeal Tribunal
ACT	Australian Capital Territory
All ER	All England Report
MLJ	Malayan Law Journal
CLJ	Current Law Journal
Parl.Deb	Parliamentary Debate
MLRC	Malaysia Law Reform Committee
Govt	Government

# CHAPTER ONE

## ADMINISTRATIVE JUSTICE: WITHIN THE CONSTITUTIONAL FRAMEWORK IN MALAYSIA

### 1.1 BACKGROUND

The scope of administrative justice is extensive. It is an extremely elusive concept which embraces tribunals, ombudsman, citizen charters and the statutory process for the protection of consumer interests in privatized industries, special commission and public decision makings.<sup>1</sup>

It is also considered to be well-rounded as the categorization of administrative justice covers two stages. It not only delivers complaints, review of services and assuring those services to the citizens but also constructs the kind of resolutions intended to be accomplished.<sup>2</sup>

Indeed the importance of Administrative Law in our community, flows from the impact decisions made by the government agencies can have on our lives. The reality is that decisions made by the government can seriously affect our rights.<sup>3</sup> As in Australia and elsewhere, at the federal level they may determine whether a person has a right to a pension, whether a particular development will occur in our local area, whether a person liable to pay taxes and whether non-citizens are allowed to live in the country. At state level, government decisions may affect an individual's right to welfare benefits, to state housing and to attend a particular school. At the local government level, they may determine whether a person is liable to pay rates and

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<sup>1</sup> Ron McLeod. *Administrative justice: the core and the fringe*. Paper presented at the 1999 National Law Forum (AIAL, 1999), p. 58

<sup>2</sup> *Ibid.*, p. 59

<sup>3</sup> Hon Peter Duncan. *An overview of Federal and State Administrative Law systems in Australia: Administrative law; Are the States overtaking the Commonwealth* (AIAL, 1994), p. 10

whether has a right to hold particular licenses.<sup>4</sup> Based on these situations, the study of administrative justice is vital in order to gauge the overall harm inflicted on the aggrieved public by agencies' misconducts and to propose some reforms.

The view of public involvement and the concepts of administrative justice as integral to public decision making has grown increasingly compelling in this era.<sup>5</sup> In Australia for instance, the rise of tribunals representing every sector of living as well as the effectiveness of Ombudsman in dealing with public grievances speaks by itself. Statistics that shows the level of complaints received, actions taken and solved at all sections of life reflect the rigor of public involvement in government affairs.<sup>6</sup> Yet in Malaysia these are deemed to be extraordinary or strange. Public administrators struggle to adapt themselves to these positive changes. Their insensitivity and inconsideration have contributed to these failings. These problems are illustrated extensively in the newspapers and other mass media. For instance, a disabled worker complains that his grievances are not heard.<sup>7</sup> He was paralyzed due to an accident. But as the accident occurred outside office hour he had not been able to get his pension as well as other social welfare reliefs. The suffering had taken him up to 20 years. He claimed that though it occurred outside office hour his job as a police requires him to be on call any time and any day regardless of holidays. He claimed that the department in charge should take into consideration this matter in giving out his pensions. His disabilities had prevented him from earning money for a living and, thus, he was deprived of a decent living. In another case, a dropout who had been working in the padi field to help his divorced mother to make ends meet was jailed for

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<sup>4</sup> Ibid., p. 11

<sup>5</sup> John Clayton Thomas (1995). *Public participation in Public decision making- New skills and strategies for public managers*. Jossey Bass Publisher. p. 2

<sup>6</sup> <http://www.ombudsman.gov.au/>; <http://www.aat.gov.au/AATDecisions.htm>

<sup>7</sup> Harian Metro, Rabu (9-3-05) 20 Tahun Tunggu Pencen. p. 12

skipping National Services and was fined RM600.00. He was jailed for 14 days for not paying his fines.<sup>8</sup>

When one talks about curb the abuse of power the government, it is not only the exclusive control of political executives but also the exercise of formidable powers vested in the 1.2 million civil servants, local authorities and the police. The top brass of these services performs significant discretionary powers which encroach on the rights of the citizens. The granting of licenses, permits, planning, permission, scholarships, loans, subsidies, low cost houses, public schemes, appointments to and transfers, promotions and disciplines within the public services and the performance of other functions conferred by heap of statutes and subsidiary legislation need to be subjected to the principle of openness, fairness and impartiality.<sup>9</sup> Administrative justice serves a platform, to reprimand unnecessary and undue encroachment into citizens' rights. To avoid such flaws, they need to be responsive and sensitive to public grievances. Only by being open, fair and impartial can this purpose be achieved.

It is apparent that the administration has come to play a decisive role in influencing and shaping the socio economic order in today's society. The administration enjoys vast reservoir of power to order and affect the daily lives of the people over a wide canvass. Vesting of vast powers in the administration has generated possibilities and opportunities of abuse or misuse of powers by the administration resulting in maladministration and corruption. In the flush of powers, the administration often exhibits a tendency to disregard individual interests in the name of public good. Therefore, an urgent problem of the day is to evolve an

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<sup>8</sup> Utusan online, (15-5-2005) *Penjara 'calar' jiwa*. Ku Seman Ku Hussain

<sup>9</sup> Shad Faruqi. *Accountability & accessibility of Local Authorities in Malaysia*: Seminar Undang-undang Pihak Berkuasa Tempatan (Majlis Perbandaran Petaling Jaya, 1993)

adequate and effective mechanism to contain these dangers by controlling the administration in the exercise of its powers.<sup>10</sup>

Standards of Administrative Justice are good indicators of evaluating whether duty to act fairly has been achieved or not. Whether the application of procedures leading to that decision and the opportunities that a person has to participate in the process, whether they are accountable, lawful, fair and transparent, whether agency's complaint-handling system is highly responsive and whether its execution embraces many other facets of Administrative Justice. All these questions will in fact help to determine the extent to which administrative justice is exercised.<sup>11</sup>

If Administrative justice principles are to be exercised, it must be promoted. USA, Australia and UK have extensively shown the usefulness of applying administrative justice in order to bring about good governance. It disclosed that the means of achieving administrative justice are diverse and wide; it can be translated not only through judicial control but also non-judicial control like ombudsman, tribunals, public consultations and the like.<sup>12</sup> Thus, this has provoked the researcher to examine deeper into how these mechanisms are to be used in realising administrative justice in Malaysia. In order to arrive at a sound conclusion some comparison need to be taken. USA, Australia and UK have implemented administrative justice principles rigorously. By observing the depth of administrative justice there and measure it against Malaysia backdrop, this could be a necessary indicator to reflect the level of justice, compassion and care duly given to the public. It is a reflection of administrative justice standard in Malaysia as a whole.

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<sup>10</sup> MP Jain, *Administrative Law of Malaysia and Singapore* (MLJ, 1997), p. 811

<sup>11</sup> Stephen Argument (1993) *Administrative law & Public Administration*. AIAL. 172

<sup>12</sup> Supra n.10 p. 812

## 1.2 OBJECTIVE OF RESEARCH

As suggested by the title above, this research seeks to discuss the Malaysian Judicial Review within the context of the administrative justice which serves to be the fundamental constitutional requirement of Rule of Law. Unlike the United Kingdom's judiciary system of which there is no written constitution, Malaysia, on the other hand, were governed by a written constitution. As Malaysia has celebrated the 55<sup>th</sup> anniversary of Independence, the time has come for this country to examine the legal system so that we would be able to know whether the law has been rightfully developed along the line laid by our supreme law. Since the concepts of accountability, openness for improving the quality of the government's decision-making and the inclination to protect the public from arbitrariness is equally fundamental to the Public Administration, this area merits study.<sup>13</sup> The study of the administrative justice will be concluded within the constitutional context, manifested commonly in the judicial review. The idea of judicial review arises when people tend to seek the remedy to challenge whatever misconducts committed by the government machineries. Such challenges are instituted for violating constitutional fundamental rights of the people and principles of the good government which are reflected in the grounds of the judicial review. The phenomenon, thus, has triggered the researcher to give an emphasis on the study of the administrative justice within the constitutional framework evident in the Judicial Review and how the review is able to help limit the power of the government, thereby facilitate the attainment of Rule of law and justice. It is worth noting too, that the experiences of other modern countries like Australia, United Kingdom and United States in implementing the administrative justice will be cited to induce reform.

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<sup>13</sup> John Mc Millan, *The Administrative Appeal Tribunal – Twenty years Forward* (AIAL, 1994), 24

### 1.3 STATEMENT OF PROBLEM

From the literature, there has been no work that deals with the topic proposed in Malaysia, and one often finds that the constitution has been ignored as the supreme law and as the document that determines the rights and responsibilities of both government and the citizens. When confronted with the disputes involving citizens and the authorities, the courts often rely on English decisions without ascertaining the constitution's voice on the matter. Some classic examples include the decision made by Gopal Sri Ram in *Tan Teck Seng (1996) 1 MLJ 261*. Likewise the Federal Court has also rebuked the Court of Appeal in *Ng Hock Cheng (1998) 1 MLJ 153* but so far, the issue has never been thoroughly analyzed. The proposed research seeks to enlighten this problem in the light of the constitutional and administrative contexts. What is particularly important is that although the highest court of the land may have accomplished its job, it does not, actually address the problem. Instead of emphasizing the supremacy of the constitution, the court has merely noted that the Court of Appeal has crossed the line and ventured into the purview of the executive.

Apart from that, many administrative flaws are due to public administrators' misunderstanding of the Rule of Law. The government, according to law as defined under the Rule of Law, demands that government authorities should be subjected to the principles that uphold good government. This is due to the fact that it is unconstitutional and almost immoral for a government to misuse the law and powers to achieve its own end goals. The administrative justice thus seeks to solve these prevalent and intrinsic problems as substantiated by H.W.R Wade that the

administrative justice is the connecting thread to Rule of Law, without it, bad government is pervasive.<sup>14</sup>

Constitutionalism is the root to the administrative justice standard. According to Carl Friedman, the constitutionalism influenced by dividing powers provides a system of effective restraints upon governmental actions.<sup>15</sup> Lord Acton also claimed that modern constitution has always been linked with the problem of power. He added that “great men, almost always are bad men even when they exercise neither influence nor authority; still more when you super add the tendency or certainty of corruption by authority.”<sup>16</sup> He further substantiated that if the office approves the corruption that was the worse digression, “there is no worse deviation than that the office sanctifies.” Thus, unless the administrative justice is translated in the system, public will continue to be oppressed and deprived continuously.

Administrative justice is an extremely elusive concept. It comprises of a complex web of institutions and processes, judicial as well as non-judicial ones.<sup>17</sup> Due to this, the judicial review, tribunal, ombudsman, complaint procedures, citizen charters and statutory protection for consumers’ interest in private industries are all categorized under the domain of the administrative justice.<sup>18</sup> As such, all officials involve in public dealings should be regarded as confined within the scope of the administrative justice.<sup>19</sup> Administrative justice implies a complex set of values which is not always consistent (some cases need hearing while in others, not) including the natural justice, participation, democracy, efficiency, fairness, transparency, and cost

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<sup>14</sup> H.W.R Wade, *Towards Administrative Justice* (Ann Arbor The University Of Michigan Press, 1963), 3

<sup>15</sup> Kevin YL Tan, Thio Li Ann, *Constitutional Law in Malaysia and Singapore* (Butterworths Asia, 1997), 19

<sup>16</sup> Kevin YL Tan, *Ibid.*

<sup>17</sup> Robin Cyeyke, John McMillan, *Administrative Justice-the Core and the Fringe* (AIAL, 1999), 58

<sup>18</sup> *Ibid*

<sup>19</sup> *Supra* n.17