THE *ULTRA VIRES* DOCTRINE IN ADMINISTRATIVE LAW : A MALAYSIAN PERSPECTIVE

I. INTRODUCTION

The doctrine of *ultra vires* is the central doctrine of Administrative Law. This doctrine envisages that the powers of the administrative or statutory agencies or bodies are conferred and limited by law and, therefore, any exercise of power (be it discretionary or rule-making or even adjudicatory) beyond the confines or limits imposed by law will render the action taken or decision so made *ultra vires* and therefore null and void. This doctrine is a manifestation of the notion of limited government under the constitutional concept of the rule of law. The rule of law which underlies the basis of our constitutional system underlines, *inter alia*, two important aspects. The first being that every administrative act is sanctioned and controlled by law. The second is that discretionary powers, which constitute an indispensable feature of modern administration, must not be too wide and uncontrolled as absolute or arbitrary powers are inconsistent with the rule of law. The courts are duty-bound to keep the administration within the limits of its power. Discretionary powers are, therefore, subject to judicial review which is the inherent jurisdiction of the High Court in a common law system to review the *vires* of the exercise or non-exercise of any administrative or statutory power. Judicial control of the exercise or non-exercise of administrative or statutory powers is buttressed upon the *ultra vires* doctrine. Through judicial creativity and activism, the courts in the common law world have dispensed this doctrine in a refined and extended manner by imposing implied limits on administrative or statutory powers. In fact the main corpus of modern Administrative Law is built upon and accumulated around this vital doctrine. The scope or extent of the operation of this

doctrine depends on the attitude of the courts and the nature and the width of the powers conferred. Under a strong and interventionist judiciary, the scope of review will certainly be wider than under a docile and non-interventionist judiciary. The conferment of unnecessarily large and wide powers on the administration will inevitably whittle down the scope of operation of the *ultra vires* doctrine.

Traditionally, this doctrine has two important aspects - procedural and substantive *ultra vires*. Procedural *ultra vires* refers to the failure of the administration to observe mandatory procedures as expressly or impliedly established by law. On the other hand, substantive *ultra vires* involves the transgression by the administration of either the implied or the express substantive limits of its powers. In the common law jurisdictions, the scope of judicial intervention through the doctrine of *ultra vires* has steadily progressed with the passage of time and the process continues unabated. In more recent years, a number of significant developments have taken place. Judicial intervention has been extended to non-public bodies performing 'public law functions'.[1] Inroads, too, have been made into prerogative powers.[2] The distinction between an error of law and an error of jurisdiction has been almost abolished in some jurisdictions.[3] The most interesting of these developments is the simplification and reclassification of the conventional grounds of judicial review adverted to in the foregoing. The House of Lords in the landmark case of *Council of Civil Service Unions* v *Minister for the Civil Service*[4] (hereinafter referred to as *"CCSU"*) summarised and narrowed down the various conventional grounds of judicial review into three broad categories of *illegality, irrationality and procedural impropriety.*

In this article, it is proposed that in the examination of the operation of the *ultra vires* doctrine, emphasis will be placed on the more conventional approach as the *CCSU* approach is only

[1] *OSK & Partners* v *Tengku Noone Aziz & Anor* [1983] 1 MLJ 179; *R* v *Panel on Take-overs & Mergers, ex p Datafin Plc* [1987] 2 WLR 699.
[2] [1985] AC 374.
[3] England and New Zealand, for example. See Wade, *Administrative Law*, 6th Ed, 302-303.
[4] *Supra* n 2.

a recent development. Although emphasis will be placed on the Malaysian law, references to the more relevant and significant developments in other common law jurisdictions will also be unavoidable in the event of lacunae or weaknesses in the local law. It must also be pointed out that due to the width of the topic covered, viz. looking at the whole of the administrative law through the standpoint of judicial review, it will be beyond the scope of this article to delve into the intricacies of the various aspects of the *ultra vires* doctrine encompassed in this discussion. Only a cursory examination of the matters under discussion will, therefore, be attempted as a general line of strategy.

II. THE DOCTRINE AS APPLIED TO DISCRETIONARY POWERS

As pointed out above, this doctrine as applied to discretionary powers has two aspects, viz. substantive *ultra vires* and procedural *ultra vires*. Each aspect of the doctrine will now be examined.

A. Substantive *Ultra Vires*

Substantive *ultra vires*, too, can be divided into two types, namely simple *ultra vires* or extended *ultra vires*.

1. Simple *Ultra Vires*

Discretionary powers are the creation of statutes. The limits of the powers conferred are expressly stipulated in the statutes conferring the powers and the rule of law requires that an administrative authority exercising a discretionary power must keep within the express limits of its power. If it oversteps the limits of its power, it will offend *ultra vires* doctrine in its substantive aspect. This can be conveniently referred to as "simple *ultra vires*" or "substantive express *ultra vires*". A recent High Court case will amply illustrate the meaning and scope of operation of this aspect of the *ultra vires* doctrine. Rule 33 of the Universiti Sains Malaysia (Discipline of Staff) Rules 1979 empowers the Disciplinary Authority of the university to impose, *inter alia*, the punishment of reduction of salary after a staff member of the university has been found guilty of an alleged breach of

discipline as set out in the Discipline of Staff Rules. Rule 35(1) further provides that the Disciplinary Authority in imposing the punishment of reduction of salary may reduce the salary of the staff member "*to such point in the salary scale of his grade*" and for such period as it deems fit. A staff member dissatisfied with the decision of the Disciplinary Authority may, under section 16A(5) of the Universities and University Colleges Act 1979, appeal against such decision to the University Council and the Council "*may give such decision as it deems fit and proper*". Thus two things are obvious from the above provisions. In the first place, the power of the Disciplinary Authority to impose the punishment of reduction of salary is limited "*to such point in the salary scale of his grade*",[5] and secondly, no express power is conferred upon the University Council to increase or enhance any of the punishments imposed by the Disciplinary Authority. In the circumstances, a pertinent question can be raised - can the power to increase punishment be implied in favour of the Council by virtue of the general empowering words "*may give such decision as it deems fit and proper*"?[6] The High Court in *Rohana bte Ariffin & Anor* v *USM*[7] answered the question in the negative. In the words of the Court :

> It goes without saying ... that in no circumstances may the Council enhance the punishment imposed by the Disciplinary Authority since such a power, which must be a creature of statute, is not given to the Council. Certainly, neither the Disciplinary Authority nor the Council were empowered to impose the punishment of reduction in salary in excess of the limitation imposed by r 35 of the said Rules.[8]

In *Rohana*, punishment of reduction of salary by five salary increments for five years imposed by the Council had the effect of reducing the second applicant from salary grade A10 to grade A11[9] and was therefore *ultra vires* the Rules.

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[5]Emphasis added.
[6]Emphasis added.
[7][1989] 1 MLJ 487.
[8]*Ibid* at p 497. Per Edgar Joseph Jr J.
[9]Grade All is a grade lower than A10 in the salary scale for lecturers.

The same applies where a body purportedly exercises a power which it does not possess. In *Fadzil Mohd Noor v UTM*,[10] the purported exercise of the power to dismiss a staff member by the University Council was held to be *ultra vires* its powers because the body concerned did not possess the power of dismissal under the Universities and University Colleges Act 1971.

2. Extended *Ultra Vires*

In the application of the *ultra vires* doctrine, the courts do not confine themselves to the express letters of the statutory provisions conferring discretionary powers on the administration; had they done so the scope of judicial review would be very narrow indeed. The courts through their creative ingenuity have read and imposed certain implied restrictions on the exercise or non-exercise of discretionary powers even though Parliament in conferring the said powers did not expressly provide any limits or adequate limits to regulate the exercise or non-exercise of those powers. In this context, an administrative action may appear to be within the express wording of the statutory instrument conferring the power but may be unlawful because of infringement of some implied limitations read into the statutory instrument as a matter of statutory interpretation. This is technically termed as "extended *ultra vires*". This aspect of the *ultra vires* doctrine itself may broadly and generally be grouped into two categories - "abuse of discretion" and "non-exercise of discretion". The meaning and scope of operation of each category will be studied below.

a. Abuse of Discretion

Abuse of power by the administrative bodies or authorities is said to occur in a number of instances some of which will be enumerated and discussed below.

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[10][1981] 2 MLJ 196.

(i) Mala Fides

An administrative action or decision may appear to be within the ambit of a statutory power but it may be invalidated on the ground that the exercise of the power is motivated by *mala fides*. *Mala fides* is an instance of an abuse of power and is used in a narrow sense denoting "dishonest intention or corrupt motive or personal animosity"[11] on the part of the authority exercising the power. The Supreme Court in *PP* v *Dato Yap Peng*[12] said that "... the most noticeable thing about allegations of bad faith is that they have almost always failed, as the onus of proving *mala fides* is extremely difficult to discharge." In this country, case law amply demonstrates the truth of the above judicial observation as the allegation of *mala fides* has never been successfully established to the satisfaction of the courts.[13] However, in India, there is a body of case law[14] showing that the Indian courts have quashed administrative decisions on the ground of *mala fides* which was established from the facts and circumstances proved. Just one case will suffice to illustrate the point. In *Partap Singh* v *State of Punjab*,[15] a disciplinary action taken against a doctor on the allegation that he accepted a small bribe was quashed by the Supreme Court on the ground of *mala fides* because the action was motivated by the Chief Minister who was out to wreak private vengeance against the doctor due to mutual animosity between the Chief Minster and the doctor.

(ii) Relevant and Irrevelant Considerations

In the decision-making process involving the exercise of discretionary powers, the administration must take into account considerations which are relevant to the policy and objectives of

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[11]MP Jain, *Administrative Law of Malaysia and Singapore*, 2nd Ed, 350.
[12][1987] 1 MLJ 311, 366.
[13]Ranging from *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri, Malaysia* [1969] 2 MLJ 129 to *Mohd Zainal Abidin* v *Dato Seri Dr Mahathir Mohd, Minister of Home Affairs, Malaysia & Anor* [1989] 3 MLJ 170, one of the most recent cases.
[14]For example, *Partap Singh* v *State of Punjab* AIR 1964 SC 72, and *Sudanandan* v *State of Kerala* AIR 1966 SC 1925.
[15]*Ibid.*

the statute in question. More often than not, what these relevant considerations are, are not expressly spelt out in the statute concerned. So it falls on the court to determine what they are as a matter of statutory interpretation. Conversely, considerations which are irrelevant to the purpose or tenor of the statute must be ignored in the decision-making process. If these implied restrictions on the exercise of discretionary powers are not observed, the administrative action taken or any decision so made will be vitiated. A few cases may be cited to substantiate the point. Section 26(2) of the Industrial Relations Act 1967 provides that the Minister may of his own motion refer any trade dispute to the Industrial Court if he is satisfied that it is expedient to do so. The usual rule as to relevant and irrelevant considerations applies as section 26(2) involves a discretionary power. Therefore, there are relevant considerations which the Minister must take into account and the irrelevant ones must be excluded before a decision is made under the section whether to refer or not to refer a dispute to the Industrial Court. In *Minister of Labour, Malaysia* v *National Union of Journalists, Malaysia*,[16] a trade dispute between an employer and a workman was referred to the Minister who decided under section 26(2) not to refer the dispute to the Industrial Court. The workman was dismissed on the ground of misconduct prejudicial to the reputation and good image of his employer but the workman denied the allegation of misconduct and alleged that his dismissal was unlawful. The Supreme Court held that the Minister had acted contrary to section 26(2) because in coming to his decision the Minister had only addressed his mind and attached undue weight to the adverse publicity of misconduct against the workman, the unsatisfactory reply from the workman in response to his employer's letter and the letter of dismissal. The Minister had completely ignored or not given sufficient weight to the substantive allegations of misconduct against the workman, his public denial in the newspaper, the report and the submission made by the workman's union on his behalf. In the same context, the English cases of *Padfield* v *Minister of Agriculture and Fisheries*[17] and *Bromley LBC* v *Greater*

[16][1991] 1 MLJ 24.
[17][1968] 1 All ER 694.

London Council[18] belong to the same category where the decisions of the administration were invalidated because of the failure to take into account relevant considerations and to exclude the irrelevant ones. *Persatuan Pegawai-Pegawai Bank Semenanjung Malaysia* v *Minister of Labour*, Malaysia *and Ors*[19] and the recent case of *Re Haji Sazali*[20] are cases where the administrative decisions were faulted on the ground that certain relevant considerations were not included in the decision-making process but it must be noted that in these cases the requirement of taking into account relevant considerations was expressly imposed by statutes.

(iii) ***Improper Purpose***

Powers must be exercised according to the policy and objectives of the statutes conferring the powers. If the exercise of a power is influenced by a purpose not sanctioned by the Act in question, howsoever desirable the object may seem to be to the authority concerned, judicial intervention on the ground of 'improper purpose' might be allowed. This was the case in *Pengarah Tanah dan Galian Wilayah Persekutuan, KL* v *Sri Lempah Enterprises*[21] where the State Authority purportedly imposed a condition under section 124(5)(c) of the National Land Code requiring the applicant (landowner) to surrender the freehold title to his land to the Authority and accept in return a 99-year lease as a consideration for approving his application to develop the land. The condition was imposed in order to achieve an ulterior purpose, i.e. to bring developed land in line with newly alienated land as to which only leases and not titles in perpetuity were granted. The Federal Court quashed the decision of the Authority because the condition so imposed did not relate to permitted development, was unreasonable and was used for an ulterior purpose. Another classic illustration of the above principle is the Privy Council case of *Sydney Municipal Corporation* v *Campbell*[22]

[18][1982] 2 WLR 62.
[19][1989] 1 MLJ 130.
[20][1992] 2 MLJ 864.
[21][1979] 1 MLJ 135.
[22][1925] AC 338.

where the Municipal Corporation abused its power to acquire land for the unlawful purpose of profit making as the value of the land acquired was expected to increase because of some development in the vicinity.

(iv) Unreasonableness

Unreasonableness is used narrowly to denote administrative actions or decisions taken in the '*Wednesbury*'[23] sense of being "so unreasonable that no reasonable authority could ever have come to it". Administrative actions or decisions must be able to be adjudged as reasonable as unreasonableness constitutes an abuse of power. In *Sri Lempah Enterprises*,[24] a case adverted to above, the Federal Court held that the condition imposed by the State Authority, viz., the applicant surrendered his freehold land title in exchange for a 99-year lease as a consideration for allowing developments to be carried out on the land, was unreasonable. In another case,[25] the Supreme Court described a condition limiting the number of speakers to seven at a public meeting licensed under section 27(2) of the Police Act 1967 as unreasonable because there was already a specific time limit imposed in the licence and, moreover, the police had the means to cope with any infringement of the time-frame stipulated in the licence.

(v) Unfairness

'Unfairness' has only emerged recently as a separate and independent head of judicial review and because of its recent origin its exact scope of operation is yet to be demarcated. But one thing which is certain at this stage is that it is a wider concept compared with 'unreasonableness'. "Unfairness in the purported exercise of a power can be such that it is an abuse of power", said Lord Scarman in *Preston* v *IRC*.[26] Insofar as case law is

[23]*Associated Provincial Houses Ltd* v *Wednesbury Corp* [1948] 1 KB 223, 230. Per Lord Greene.
[24]*Supra* n 21.
[25]*Chai Choon Hon* v *Ketua Polis Daerah Kampar* [1986] 2 MLJ 203.
[26][1985] 2 All ER 326, 329.

concerned, this concept has been used to include the following:

(a) Breach of contract or representation on the part of the administration in its dealing with the subjects.[27]
(b) If an administrative action is motivated by improper motive[28] or irrelevant considerations.[29]
(c) If the administration acts inconsistently to the prejudice of those relying on its previous representations or promises.[30]
(d) If the action of the administration smacks of disproportionality.[31]

In Malaysia, there is a possibility of invoking article 8(1) of the Federal Constitution and using it in a wider sense than '*Wednesbury* unreasonableness' discussed above. Article 8(1) guarantees equality before the law and, therefore, any administrative action which is arbitrary or unreasonable (i.e. falling outside the purview and scope of the provisions, including the exceptions, of article 8(1)) can be regarded as violative of the equal protection clause enshrined in article 8(1).[32] The potentiality of usage of this novel concept remains untapped in this country as it has not been used so far.

(vi) Delay

Long and unreasonable delay in the exercise of a discretion by an administrative authority resulting in injustice and prejudice to the subjects has been judicially categorised as an abuse of power rendering an administrative action unlawful. In this country, this concept has so far been successfully used, for example, in land acquisition cases where unreasonable delay (seven years in *Pemungut Hasil Tanah, Daerah Barat Daya, Pulau Pinang*

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[27] *Ibid.*
[28] *Congreve* v *Home Office* [1976] 1 All ER 697.
[29] *Padfield* case, *supra* n 17.
[30] *HTV* v *Price Commission* [1976] ICR 170.
[31] *R* v *Barnsley Metropolitan BLC ex p Hook* [1976] 1 WLR 1052, for example, the court quashed the excessive penalty imposed on a market trader on the ground that the penalty imposed was disproportionate to the wrong done.
[32] The Indian Supreme Court subscribed to this view in a number of cases under art. 14. See MP Jain, *op cit*, n 11, pp 375-376.

v *Ong Gaik Kee*[33] and eight years in *Pemungut Hasil Tanah, Daerah Barat Daya, Penang* v *Kam Gin Paik*)[34] in making the award under the Land Acquisition Act 1960 had resulted in inadequate compensation to the landowner. More recently, this aspect of the *ultra vires* doctrine has been extended to restricted residence cases by the Supreme Court. For instance, in *Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia* v *Liau Nyun Fui*,[35] an unexplained delay of six weeks in the issue of a restriction order after the initial arrest and detention under section 2(ii) of the Restricted Residence Enactment 1933, was described as unreasonable and thus rendering the order so issued null and void. On the other hand, in *Phua Hing Lai* v *Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia and Ors*,[36] administrative delays varying from one to six days from the dates of the respective restriction orders until the time when the orders were served and the restrictees taken to the districts where their residence was to be restricted to, were regarded as reasonable in the circumstances as the delays in question were explained to the satisfaction of the court.

(vii) Unreasoned Decisions

In Administrative Law, there is no general duty on the part of the administration to provide reasoned decisions.[37] However, in a recent case,[38] the Supreme Court observed that:

> The absence of reasons for a decision where there is no duty to give them cannot of itself provide any support for the suggested irrationality of the decision. The only significance of the absence of reasons is that if all other known facts and circumstances appear to point overwhelmingly in favour of a different decision, the decision-maker, who has given no reason, cannot complain if the court draws the inference that he had no rational reason for his decision.[39]

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[33][1983] 2 MLJ 35.
[34][1986] 1 MLJ 362.
[35][1991] 1 MLJ 350.
[36][1990] 1 MLJ 173.
[37]*Minister of Labour, Malaysia* v *Sanjiv Oberoi & Anor* [1990] 1 MLJ 112.
[38]*Minister of Labour, Malaysia* v *Chan Meng Yuen* [1992] 2 MLJ 337.
[39]*Ibid* at p 341.

From the above dictum, the court may, albeit rarely, assume that an administrative decision is arbitrary or irrational if no reasons were offered in circumstances where all other known facts and circumstances appear to point strongly in favour of a different decision.[40]

b. Non-exercise of Discretion

An authority exercising a discretion is obligated to apply its mind to the facts and circumstances of each case that comes before it for decision and it must not allow another unauthorised person or authority to decide the matter on its behalf. It must not act under dictation or mechanically. Neither can it adopt an inflexible policy and apply it rigidly to all cases. If these cardinal rules are not observed by the authority wielding the power, its ensuing action or decision can be nullified on the ground of non-exercise of discretion. Each of the instances of non-exercise of power adverted to above will be examined separately below.

(i) Acting under Dictation

This may happen where an inferior authority having a discretion in a matter allows some unauthorised superior authority to dictate to it by declining to act without the superior authority's consent or by submitting to the wishes or instructions of that superior authority in its decision-making.[41] A case worth mentioning in this context is *P. Patto* v *CPO, Perak*.[42] Under section 27(2) of the Police Act 1967, the licensing authority to issue permits for holding meetings in public places is the OCPD of the district where the meetings are to be held. The CPO has no jurisdiction in this matter save that he is the appellate authority after the OCPD has decided the matter at first instance. In *P. Patto*, through a soi-disant departmental arrangement, the OCPD

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[40]See also *Padfield, supra* n 17. It must be noted that the various instances of abuse of power enumerated and discussed above are not exhaustive as there are others not covered in this discussion.

[41]Wade, *op cit*, n 3, p 368.

[42][1986] 2 MLJ 204.

did not apply his mind at all to applications for such permits. He acted as a mere conduit pipe to transmit such applications to his superior authority, the CPO, for decision. The Supreme Court in no uncertain terms ruled that the OCPD, as the licensing authority under the Act, had abdicated his functions by transmitting the applications for consideration and determination by the CPO. He had acted under dictation and in consequence fettering the discretion legislatively vested in him which must be exercised by him, and him alone and the court so declared accordingly.[43]

(ii) Acting Mechanically

This may happen where an authority having a discretion in a matter purportedly acts in a routine manner by following the advice of another authority mechanically without exercising his own independent judgment as the law requires him to do. A local case in point is *Lee Guan Seng* v *Timbalan Menteri Hal Ehwal Dalam Negeri and Anor.*[44] Sections 3(2)(c) of the Dangerous Drugs (Special Preventive Measures) Act 1985 and section 3(3) of the Emergency (Public Order and Prevention of Crime) Ordinance 1969 empower the police to arrest and detain a person suspected of being involved in activities relating to the trafficking of dangerous drugs for a certain number of days specified therein without an order of detention being first issued by the Minister provided that, *inter alia*, a police officer of or above the rank specified in the relevant sub-sections has reported the circumstances of the arrest and detention to a police officer designated by the IGP in that behalf and the officer so designated 'shall forthwith report the same to the Minister'. The detainee in *Lee Guan Seng* challenged the detention on the ground that the designated officers, upon receipt of the reports concerning the applicant's arrest and detention, had not applied their minds to such reports and thereby offended the relevant statutory provisions referred to above. With reference to this matter, the High Court emphasised that the provisions concerned mandatorily provide

[43]See also *Chong Cheong Wah* v *Sivasubramaniam* [1974] 1 MLJ 38.
[44][1992] 2 MLJ 878. See also *Tan Yap Seng* v *Ketua Polis Negara & Ors* [1991] 2 CLJ 1400, HC.

that the designated officers '*shall forthwith report*'[45] to the Minister the circumstances of the arrest and detention and not merely just submit or forward the reports, upon receipt thereof, to the Minister immediately and mechanically without applying their minds to the matter before them. The court explained that the legislature must have intended that the designated officers apply their minds to the reports concerning the applicant's arrest and detention before reporting the same to the Minister. The designated officers are, therefore, not acting as a mere rubber stamp or postman to the Minister. Applying this interpretation to the facts of the case, the court ruled that the detention order concerned was bad in law due to non-compliance with the mandatory requirements of the provisions concerned because it could be inferred from the affidavits of the designated officers that, upon receipt of the reports relating to the applicant's arrest and detention, the officers concerned immediately and automatically reported the same to the Minister without first applying their minds to the matter before them.[46]

(iii) Fettering Discretion

It is trite law that when an authority is exercising a power, it must consider each case on its own merits and decide each case as the public interest requires at the time. It is forbidden to lay down a rigid policy in advance and apply it blindly and inflexibly to each and every case that comes before it for consideration without looking into the merits of each individual case. It is contrary to the *ultra vires* doctrine to pursue consistency at the expense of the merits of individual cases by adopting and applying a rigid policy for otherwise the authority purporting to exercise a discretion will be condemned as fettering its discretion. The best case that readily comes to mind on this aspect of the *ultra vires* doctrine is none other than the House of Lords case of *H Lavender* v *Minister of Housing*.[47] In that case the

[45]Emphasis added.
[46]See also *Emperor* v *Sibnath Banerjee*, AIR 1945 PC 156 and *Lim Thian Hok* v *Minister of Home Affairs & Anor & other applications* [1993] 1 MLJ 214, HC.
[47][1970] 3 All ER 871.

Minister of Housing and Local Government had the discretion to allow minerals to be extracted from agricultural land under the Town and Country Planning Act 1962. However, the Minister adopted a rigid policy to reserve high quality agricultural land for purposes of agriculture against disturbance by gravel working whenever an application for gravel working was opposed by the Minister of Agriculture who had no authority to decide the matter under the Town and Country Planning Act. In *H Lavender*, the Minister of Housing and Local Government rejected an application to extract minerals from an agricultural holding on the ground that the Minister of Agriculture objected to the proposed use of the land for reasons of agriculture. The decision of the Minister of Housing and Local Government was quashed by the House of Lords. Under the law, the discretion was vested in the Minister of Housing and Local Government and therefore only the Minister alone could decide whether on planning grounds the land could be used for gravel working. He could consult the views of other departments, but he must keep the final and actual decision in his own hands. The Minister must not adopt an inflexible policy of not allowing gravel working on agricultural lands. His mind must be open to persuasion that the land should not remain as reserved land for agriculture.[48] In the *P Patto* case,[49] the court also mentioned in passing that the OCPD had fettered his discretion by transmitting an application for a permit under section 27(2) of the Police Act 1967 to the CPO for a decision. It is submitted, however, that *P Patto* is more of a case of abdication of power or perhaps acting under dictation rather than fettering discretion.

B. Procedural *Ultra Vires*

1. Non-compliance with Express Procedures

Non-compliance with any mandatory procedure expressly established by law will render an administrative action null and void. What then is the test applicable to determine whether a particu-

[48]See also *Bromley LBC, supra* n 18.
[49]*Supra* n 42.

lar procedure is mandatory or directory? In response to the question posed, reference must be made to *Puvaneswaran* v *Menteri Hal Ehwal Dalam Negeri, Malaysia*,[50] a case which dealt with rule 3(2) of the Public Order and Prevention of Crime (Procedure) Rules 1972. The High Court in that case articulated that a mandatory procedure is one where the procedural requirement is vital and goes to the root of the matter, considering its importance and its relation to the general object intended to be secured by it, in which case it cannot be condoned if there is non-compliance therewith. However, if, on the other hand, the requirement is directory only, a breach thereof could be condoned provided there is substantial compliance with the requirement read as a whole and provided no prejudice ensues. The test laid down in *Puvaneswaran* has since been endorsed and affirmed by the Supreme Court.[51] It is submitted that the test is of general application and should not be confined to preventive detention cases only because it is capable of applying to all types of cases. Reverting to *Puvaneswaran*, rule 3(2) of the Public Order and Prevention of Crime (Procedure) Rules 1972 provides that a detainee shall be served with two copies of Form 1 prescribed in the Schedule if he does not intend to engage an advocate to represent him and if he states that he wishes to engage an advocate he shall be provided with three copies of Form 1. The court clarified that the service of the requisite number of forms on the detainee is vital as it is a right designed to enable and not just to assist the detainee to make representations to the Advisory Board. If he does not intend to engage a counsel, then he shall be supplied with two copies of Form 1 - one to be sent to the Advisory Board and the other to be retained by him for his own reference later when he appears before the Advisory Board. In *Puvaneswaran*, the detainee was only provided with one copy of Form 1. The court pointed out that without his own copy, he might well be at a disadvantage in proceedings before the Advisory Board. Therefore, the court said that it was compelled to conclude that rule 3(2) is mandatory considering its importance and its relation to the general object intended to be secured by it and also

[50][1991] 3 MLJ 28.
[51]*Au Ngoh Leang* v *IGP & Ors* [1993] 1 MLJ 65.

that it was dealing with a matter involving individual liberty in a case of detention without trial. Non-compliance with such a mandatory procedure cannot be condoned even if no prejudice has ensued.

2. Non-compliance with Implied Procedures

Besides procedures expressly established by statutes, the courts in the common law countries are also willing to imply some procedural safeguards against improper or wrong use of powers. The most important of those implied procedural safeguards are none other than the rules of natural justice separately and popularly known as '*audi alteram partem*' and '*nemo judex in causa sua*'. The *audi alteram partem* rule requires that no man shall be condemned unheard by the exercise of discretionary powers if the exercise thereof adversely affects his rights or interests or legitimate expectations, no matter what label is attached thereto or whether or not the enabling statute makes provision for a hearing,[52] whereas the *nemo judex in causa sua* maxim obligates the adjudicators to be free from bias, be it pecuniary,[53] personal[54] or policy bias.[55] Failure to observe these implied procedural safeguards will render the administrative actions or proceedings taken *ultra vires*. Insofar as the right to be heard is concerned, sometimes statutes may expressly confer a right to be heard on those adversely affected by administrative actions or decisions. Denial of such a right by the administrators or adjudicators will also have the same effect as non-compliance with the *audi alteram partem* rule. A good example is the recent Supreme Court case of *Datin Azizah bte Abdul Ghani* v *Dewan Bandaraya Kuala Lumpur*.[56] In that case, Dewan Bandaraya through Datuk Bandar had failed to comply with rules 5 and 6 of the Planning (Development) Rules 1970 (made under s 47 of the Emergency (Essential Powers) Ordinance 1970) which in es-

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[52]*Ketua Pengarah Kastam* v *Ho Kwan Seng* [1977] 2 MLJ 152. For legitimate expectation, see *JP Berthelsen* v *Director-General of Immigration* [1987] 1 MLJ 134.
[53]*Dimes* v *Grand Junction Canal* [1852] 3 HLC 759.
[54]*Govindaraj* v *President, MIC* [1984] 1 MLJ 190.
[55]*Alkaff & Co* v *Governor in Council* [1937] MLJ 202.
[56][1992] 1 MLJ 393.

sence requires Datuk Bandar to notify adjoining landowners of their right to make objections to an application by a landowner for planning permission to develop his land. The development orders issued by Datuk Bandar were, therefore, quashed by the Supreme Court as the Datuk Bandar 'had contravened the law' or 'had acted unlawfully'.

C. Preventive Detention

Preventive detention cases entail separate treatment here because the Malaysian courts do not regard these cases as 'normal judicial review cases' as they involve the exercise of 'special powers'.[57] Hence the application of the *ultra vires* doctrine to these cases is somewhat much curtailed than the non-preventive detention cases to which the rules discussed above generally apply.

In this country, the laws empowering preventive detention are the Internal Security Act 1960, the Emergency (Public Order and Prevention of Crime) Ordinance 1969 and the Dangerous Drugs (Special Preventive Measures) Act 1985. Case law has so far indicated that such cases are subject to judicial review on the following grounds:

1. Procedural *Ultra Vires*

All the preventive detention statutes contain a privative clause stating that there shall be no judicial review save in regard to any question of compliance with any procedural requirement governing the detention. It is therefore clear that procedural defects of detention are subject to judicial control. Case law has established that non-compliance with the procedure of detention as established by the preventive detention statutes or the rules made thereunder will render the detention *ultra vires* if the procedure breached is mandatory. *Puvaneswaran* v *Menteri Hal Ehwal Dalam Negeri, Malaysia*, and *Aw Ngoh Leang* v *IGP and Ors*[58] are authorities that support the proposition. On the other hand, if the procedure is directory only, a breach thereof can be con-

[57]See dicta in *Re Tan Sri Raja Khalid* [1988] 1 MLJ 182, 186 & 187.
[58]*Supra* nn 50 & 51 respectively.

doned provided that there is substantial compliance read as a whole and that no prejudice has ensued to the detainee.

2. Substantive Express *Ultra Vires*

There is a small body of case law supporting the proposition that the grounds of detention stated in the detention order are open to judicial review if alleged to be not within the scope of the enabling preventive detention statute. It must be noted that under all the preventive detention laws, detention can only be made or justified if the grounds of detention coincide with the grounds of detention stipulated in the empowering statute. For instance, section 8(1) of the Internal Security Act 1960 stipulates three grounds upon any of which a detention order can be made by the Minister and hence, if the ground of detention provided by the Minister does not coincide with any of the grounds specified in section 8(1), the order so issued by the Minister will be *ultra vires* the express substantive provisions of section 8(1). In *Ré Tan Sri Raja Khalid*[59] and also *Minister of Home Affairs and Anor* v *Jamaluddin bin Othman*,[60] the Supreme Court nullified the detention orders for the simple reason that the grounds of detention proffered in the detention orders (i.e. substantial monetary loss caused to and suffered by a bank brought about by the detainee while he was a director and a member of its loan committee in the former, and the propagation of the Christian faith amongst Malays and the conversion of six Malays to the Christian faith in the latter) did not come within the scope of the enabling statute[61] because the alleged unlawful misconduct of the detainees could not be regarded as a threat to the security of the Federation.

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[59]*Supra* n 57.
[60][1989] 1 MLJ 418.
[61]S 73(1), ISA 1960 in the former and s 8(1), ISA in the latter.

3. Extended *Ultra Vires*

In *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri*,[62] the Federal Court enunciated an important rule that the sufficiency of the allegations of facts against the detainee is not open to judicial scrutiny as this is tantamount to questioning the subjective satisfaction of the Minister to detain a person which is non-justiciable. It must be noted that this rule applies to proving the legality of the detention by the detaining authority. However, once the legality of the detention is established, it is open to the detainee to prove that "the power has been exercised *mala fide* or improperly" if he wishes to challenge the *vires* of his detention. The dictum of the Federal Court indicates clearly that it is possible to challenge a detention order by alleging that the power has been exercised *mala fide*. However, the more important and pertinent question is whether, besides *mala fide*, it is open to the courts to review preventive detention on other substantive grounds falling within the purview of 'extended *ultra vires*' already discussed above. Such other substantive grounds referred to will include relevant and irrelevant considerations, improper purpose, delay, acting mechanically or acting under dictation. It is not easy to answer this question because hitherto no case law has ever directly addressed itself to this question. The privative clauses of the three preventive detention statutes, it is submitted, do not shed much light on the same either. *Prima facie*, each clause seems to say that it is not possible for the courts to review preventive detention save on the ground of procedural impropriety. However, recent case law[63] by the High Court and the Supreme Court (already dealt with above) seems to indicate otherwise. Thus there exists a small body of case law which says that it is possible to raise unreasonable delay (*Timbalan Menteri Hal Ehwal Dalam Negeri, Malaysia* v *Liau Nyun Fui*) and acting mechanically (*Lee Guan Seng* v *Timbalan Menteri Hal Ehwal Dalam Negeri and Anor*) as grounds of judicial review. In the circumstances, it is submitted that it is possible to question the *vires* or legality of preventive detention by invoking the principle of extended

[62] [1969] 2 MLJ 129.
[63] *Liau Nyun Fui*, *supra* n 35, and *Lee Guan Seng*, *supra* n 44.

ultra vires and that the approach adopted by the Malaysian courts recently regarding the application of the same is right for three reasons. In the first place, the dictum of *Karam Singh* seems to show that it is possible to invoke other substantive grounds other than *mala fide* because the word '*improperly*' is capable of being interpreted liberally and widely to include all the substantive grounds falling within the purview of extended *ultra vires*. Secondly, the privative clauses of the preventive detention statutes are not conclusive as they appear to be because they were only inserted into the preventive detention statutes in 1989 by three amendment Acts[64] and, moreover, the privative clauses are meant to reflect and clarify the legal position before 1989 and the legal position before 1989 itself seems to indicate that it is possible to embark on the approach adopted and suggested here. Thirdly, it must be stressed again that the first rule of *Karam Singh* was made with respect to proving the legality of the detention before the burden of proof shifts to the detainee to prove otherwise. Perhaps, we may take heart in the more activist Indian judicial approach to preventive detention as the Indian courts have been more willing to apply 'extended *ultra vires*' to such cases. They have quashed preventive detention orders on grounds such as *mala fides*, relevant and irrelevant considerations, mixed considerations, and acting mechanically.[65]

4. Other Purely Technical Grounds

Besides the grounds of review adverted to in the foregoing it is also possible for the courts to review preventive detention cases on purely technical grounds. An anthology of recent Supreme Court cases[66] may be cited to substantiate this proposition although most of them are of mere academic interest by now because they have been reversed and nullified by subsequent

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[64]Acts A738-740.

[65]Jain & Jain, *Principles of Administrative Law*, 4th Ed, pp 572-74, 579-80, 582-84 and 595-96.

[66]*PP v Koh Yoke Koon* [1988] 2 MLJ 301, *Tan Hoon Seng v Minister of Home Affairs, Malaysia* [1990] 1 MLJ 171, *Poh Chin Kay v Menteri Hal Ehwal Dalam Negeri, Malaysia* [1990] 2 MLJ 297.

statutory amendments[67] to the preventive detention statutes. Nevertheless, it remains trite law that it is possible to question the *vires* of preventive detention on purely technical grounds which by precedents turn primarily on the technical interpretation of some of the provisions of the preventive detention statutes themselves or the subsidiary legislation made thereunder. In this regard, two Supreme Court cases which are still good law may be cited. In *Rajoo* v *IGP and Ors*,[68] the court held that article 151(1)(b) of the Federal Constitution does not empower the Yang di-Pertuan Agong to allow an extension of time for the Advisory Board to consider the representations and to make recommendations thereon after the prescribed time period of three months has expired. It was ruled in *Lee Weng Kin* v *Menteri Hal Ehwal Dalam Negeri and Ors*[69] that an unsigned order which was not authenticated or certified to be a true copy of the order signed by the Minister is not a copy of the Minister's order as required under section 3(i) of the Restricted Residence Enactment 1933 and consequently the order was invalid.

D. Unreviewable Powers

In a constitutional system based on the rule of law, it is 'a contradiction in terms' for counsel acting on behalf of the government to argue that a particular discretion is unfettered or absolute in the sense of being non-justiciable in toto because 'unfettered discretion cannot exist where the rule of law reigns'.[70] This spirit of the rule of law has been echoed in a few cases[71] in this country. Thus, in a system based on the rule of law the question to be asked today insofar as discretionary powers are concerned is not whether a particular power is reviewable by the court or not. "The real question is whether the discretion is wide or narrow and where the legal line is to be drawn". "It

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[67]Acts A705-707 and A766.

[68][1990] 2 MLJ 87.

[69][1991] 2 MLJ 472. See also *Lim Thian Hok* v *Minister of Home Affairs, Malaysia & Anor & other applications* [1993] 1 MLJ 214, HC.

[70]Wade, *op cit*, n 3, pp 39 & 399.

[71]*Pengarah Tanah dan Galian Wilayah Persekutuan, KL* v *Sri Lempah Enterprises* [1979] 1 MLJ 135; *Minister of Labour, Malaysia* v *Lie Seng Fatt* [1990] 2 MLJ 9; *Minister of Labour, Malaysia* v *National Union of Journalists, Malaysia* [1991] 1 MLJ 24.

remains axiomatic that all discretion is capable of abuse, and that legal limits to every power are to be found somewhere"[72] even in respect of very wide and special powers. However, the fundamental principle so stated is not of general application in this country. It only applies to 'normal judicial review cases'. It has no application to cases involving the exercise of 'special powers'.[73] Hitherto, local case law has established a number of non-justiciable powers, some of which will be enumerated and discussed below.

1. In *Mohd Nordin bin Johan* v *AG Malaysia*,[74] the Federal Court expressed the view that Regulation 2(2) of the Essential (Security Cases) Regulations 1975 which empowers the Attorney-General to classify an offence as a security offence triable under the 1975 Regulations, "attracts the pure judgment of the Attorney-General which cannot be subjected to an objective test and is not accordingly amenable to judicial review."

2. The power of the Attorney-General under article 145(3) of the Federal Constitution "to institute, conduct or discontinue any proceedings for an offence" with respect to unlawful possession of firearms is also beyond the pale of judicial review. In fact, the Federal Court in *PP* v *Lau Kee Hoo*[75] said that "the Attorney-General has complete discretion whether to charge the respondent under one or the other law" relating to unlawful possession of firearms.

3. The Federal Court in *Pengarah Pelajaran, WP* v *Loot Ting Yee*[76] ruled, vis-a-vis article 132(2A) of the Federal Constitution, that whether a civil servant should be transferred and if so where and when the transfer was to be made were matters for the government to decide. No useful purpose could thus be served by holding a full trial of the respondent's allegations of *mala fide* and unreasonableness.

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[72]Wade, *op cit*, n 3, pp 399 & 401.
[73]*Supra* n 57.
[74][1983] 1 MLJ 68, 70.
[75][1983] 1 MLJ 157, 161.
[76][1982] 1 MLJ 68.

4. The Supreme Court in *Sim Kie Chon* v *Superintendent of Pudu Prison*,[77] observed that mercy is not a legal right and proceedings aimed at questioning the propriety or otherwise of such a decision are therefore not justiciable in relation to article 42 of the Federal Constitution which deals with the prerogative of pardon.

III. THE DOCTRINE AS APPLIED TO ADJUDICATORY BODIES

Certain refinements are introduced to the *ultra vires* doctrine when it applies to the decisions or actions of adjudicatory bodies such as statutory tribunals. The High Court may review the actions or decisions of an adjudicatory body if the body concerned is not properly constituted,[78] or if the cases it adjudicates do not fall within its jurisdiction,[79] or if its decision is not based on any evidence,[80] or if there is an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry,[81] or if the tribunal makes an error of law on the face of the record which is a sort of non-jurisdictional review.[82] The more important question, however, is how do the courts review errors of law made by a properly constituted tribunal hearing cases falling within its jurisdiction. In these cases, one has to enquire further whether the error made is jurisdictional or non-jurisdictional. Unless the error of law is one apparent on the face of the record, review is only permitted if the error goes to jurisdiction. However, if a wide and elaborate privative clause is postulated, then only jurisdictional review is permissible - *South East Asia Fire Bricks* v *Non-Metallic Mineral Products Mfg Employees Union*.[83] Another question to be considered is what constitutes a jurisdictional error of

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[77][1985] 2 MLJ 385.
[78]*Howard* v *Borneman (No 2)* [1976] AC 301.
[79]*Re Ijot bte Beliku* [1966] 1 MLJ 22.
[80]This point was stressed, for example, in *Hong Kong & Shanghai Banking Corp* v *Rent Tribunal for Ulu Kinta* [1972] 1 MLJ 70.
[81]*R* v *Agricultural Tribunal for Wales & Monmouth Area, ex p Davies* [1953] 1 All ER 1182.
[82]*Tan Hin Jin* v *Prabhulal G. Doshi* [1971] 1 MLJ 274.
[83][1980] 2 MLJ 165.

law? Jurisdictional errors are broadly construed by the House of Lords in *Anisminic* v *Foreign Compensation Commission*[84] as:

> There are many cases where, although the tribunal has jurisdiction to enter into the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive.[85]

It has been observed judicially that this definition of 'jurisdictional errors' is so wide that for all practical purposes the distinction between a jurisdictional error and a non-jurisdictional error is abolished.[86] The most immediate consequence of a full acceptance of *Anisminic* is the enlargement of the scope of judicial review into non-jurisdictional questions.

A further question to look into is what is the position in Malaysia. *South East Asia Fire Bricks* maintained that the distinction between the two categories of errors of law referred to above should remain. This has been followed by the Supreme Court, for example, in *Enesty* v *Transport Workers Union*[87] and more recently in *Harpers Trading* v *National Union of Commercial Workers*.[88] It must be noted that *South East Asia Fire Bricks* dealt with section 29(3)(a) (now section 33B(1)) of the Industrial Relations Act 1967 which postulated a wide and elaborate privative clause. It is hoped this ruling is confined to the Industrial Relations Act or to clauses of a similar nature and, therefore, should not be of general application.

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[84][1969] 2 AC 147.
[85]*Ibid.* Per Lord Reid at p 171.
[86]Lord Diplock in *Re Racal* [1980] 2 WLR 181, 187.
[87][1986] 1 MLJ 18.
[88][1991] 1 MLJ 417.

Mention must be made of what is apparently a trend in the use of wide and elaborate privative clauses in statutes in this country in recent years. The legislative intent of enacting such causes is undoubtedly to curtail or even exclude judicial review in toto. The clauses referred to include article 150(8) of the Federal Constitution, section 18C of the Societies Act 1966, section 8B(1) of the Internal Security Act 1960 and section 68A of the Land Acquisition Act 1960. If a literal judicial interpretation is adopted, then judicial intervention will be drastically curtailed, if not totally excluded. It is hoped that a strict interpretation of such clauses will be adopted with a view to maintaining the role of the courts to review at least on jurisdictional grounds because complete ouster is tantamount to conferring absolute powers on administrative or adjudicatory bodies which will run counter to the rule of law.[89] In a recent High Court case, *Senator Lau Keng Siong and Anor* v *Ng Cheng Kiat*,[90] which, *inter alia*, dealt with the scope of section 18C of the Societies Act, the court held that the clause in question will not exclude jurisdictional review. The approach taken is commendable because it seems to advocate the view that no matter how wide an ouster clause is, it will not be wide enough to exclude jurisdictional review. It is hoped that the approach to be adopted in future cases will be consistent, in line with the traditional strict construction approach.

IV. THE *CCSU* APPROACH

The House of Lords in *CCSU* case[91] simplified and re-categorised the conventional heads of invalidity already dealt with above under three broad categories of illegality, irrationality and procedural impropriety. The Supreme Court endorsed this approach in *Minister of Home Affairs* v *Persatuan Aliran Kesedaran Negara*.[92]

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[89]For a possible interpretation of these clauses, see CC Gan, "Privative Clauses : Post-*Fire Bricks* Development and Trend", [1991] JMCL 109, pp 120-126.
[90][1990] 3 MLJ 417.
[91]*Supra* n 2.
[92][1990] 1 MLJ 351.

According to Lord Diplock, illegality means that the decision-maker must understand correctly the law that regulates his power and must give effect to it. He will be guilty of an error of law in his action if he purports to exercise a power he does not possess.[93] Irrationality refers to '*Wednesbury* unreasonableness'[94] where the decision-maker exercises a power in so unreasonable a manner that a reasonable authority or administrator will not undertake. Procedural impropriety connotes failure to observe the basic rules of natural justice or failure to comply with the procedural rules in the enabling legislation.

What then is the utility and practicality of this 'new trilogy of labels'? It has been said that:

> [t]he broad correlation between each of these categories and the more numerous grounds for review as traditionally classified is reasonably self-evident; and insofar as the three categories provide convenient mental groupings for the traditional categories, highlighting the broad differences between those various grounds, the new trilogy of labels may be valuable. A danger exists, however, that if too much attention is paid to Lord Diplock's labels at the expense of attention to former, more sophisticated, distinctions an overly crude understanding of principle may ultimately result.[95]

It has also been noted that "such general formulations are not meant to be exhaustive".[96] For the reasons so stated, it will be more appropriate to continue to adhere to the more traditional classification of the various grounds of judicial review. This proposition is amply substantiated by recent Supreme Court cases[97] decided after the *Aliran* case.

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[93]This must coincide with the conventional grounds of review referred to as simple *ultra vires* and extended *ultra vires* excluding *Wednesbury* unreasonableness.
[94]*Supra* n 23.
[95]BL Jones, *Garner's Administrative Law*, 7th Ed, 117.
[96]Sir Robin Cooke, "Administrative Law Trends in the Commonwealth", [1990] SCJ 35, 38.
[97]*Minister of Labour, Malaysia* v *Lie Seng Fatt* [1990] 2 MLJ 9; *Minister of Labour, Malaysia* v *National Union of Journalists* [1991] 1 MLJ 24; *Datin Azizah Abd Ghani* v *Dewan Bandaraya, KL* [1992] 1 MLJ 393.

V. DOCTRINE AS APPLIED TO SUBSIDIARY LEGISLATION

The *ultra vires* doctrine is also operative to subsidiary legislation. The substantive and procedural aspects of the doctrine will be discussed below.

A. Principle of 'Excessive Delegation'

This doctrine forbids the excessive delegation of legislative power to the executive without any policy or standards or restrictions to guide the executive in the exercise of its rule-making power. Non-compliance with this principle will render the delegation unlawful. The operation of this doctrine is based on the theory of constitutional trust in the legislature[98] or the theory of Separation of Powers between the legislature and the executive.[99]

It is operative in the United States of America[1] and India.[2] In Malaysia, this doctrine is inoperative to emergency legislation because of the provision of article 150(6) of the Federal Constitution.[3] It is, however, still an open question whether the doctrine is operative to non-emergency legislation. It is submitted that the operation of this principle to non-emergency legislation cannot be objected to on any legal or constitutional ground because the primary intent of this principle is to prevent the delegation of essential legislative function to the executive.[4]

B. Unconstitutionality

A subsidiary legislation can be called in question if the parent statute under which the subsidiary legislation is promulgated is unconstitutional. If this happens, both the parent statute and the subsidiary legislation made thereunder will be invalid. If only the subsidiary legislation itself is unconstitutional, the same

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[98]As in India.
[99]As in the United States.
[1]*Panama Refining* v *Ryan* 293 US 388 (1935).
[2]*In re Delhi Laws Act* case AIR 1951 SC 332.
[3]*Eng Koeck Cheng* v *PP* [1966] 1 MLJ 18.
[4]For more details, see MP Jain, *op cit*, n 11, pp 51-55.

consequence ensues. In *Teh Cheng Poh* v *PP, Malaysia*,[5] the Essential (Security Cases) Regulations 1975 were invalidated for contravening article 150(2) of the Federal Constitution which provided that the Yang di-Pertuan Agong could promulgate any ordinance "until both Houses of Parliament are sitting". In that case, the 1975 Regulations were promulgated after Parliament had sat. The Privy Council declared the regulations to be *ultra vires* the Constitution and therefore void by virtue of the reason that once Parliament had sat after the Proclamation of Emergency, the Yang d-Pertuan Agong had no power to promulgate Essential Regulations having the force of law. In *Halimatussaadiah* v *Public Service Commission, Malaysia*,[6] a departmental circular forbidding female civil servants from wearing, among other things, 'purdah' was challenged on the ground of unconstitutionality in that it infringed the plaintiff's constitutional right, guaranteed under article 11(1) of the Federal Constitution, to practise the Islamic religion of her choice. The plaintiff was dismissed from the civil service because of her refusal to comply with the circular. She contended that the wearing of purdah during office hours did not conflict with her duties as civil servant. The High Court rejected the contention on two grounds. First, the Quran does not require Muslim women to wear purdah. Secondly, the religious freedom as guaranteed by the Constitution does not authorise any act contrary to any general law relating to public order, public health or morality. The wearing of purdah might, for security reasons lead to dangerous and disastrous consequences because another person might masquerade as a civil servant and gain unlawful access to secret government files. Therefore, the court concluded that there should be and could be no objection on constitutional ground to the government imposing conditions on the wearing of clothing by civil servants while at work even though the conditions imposed may restrict to some extent the religious practices of some of its officers. In India, some regulations made by Air India requiring the termination of service of an air hostess upon her first pregnancy was held to

[5] [1979] 1 MLJ 50.
[6] [1992] 1 MLJ 513.

be violative of article 14 of the Indian Constitution which enshrines the equal protection clause.[7]

C. Substantive *Ultra Vires*

Sections 23(1) and 87(d) of the Interpretation Acts 1948[8] and 1967 stipulate that any subsidiary legislation which is inconsistent with an Act of Parliament (including the Act under which the subsidiary legislation was made) is void to the extent of the inconsistency. The Supreme Court in a recent case, *Datin Azizah bte Abdul Ghani* v *Dewan Bandaraya KL*,[9] gave effect to section 23(1) of the Interpretation Acts in the context of the Federal Territory (Planning) Act 1982 and the rules made thereunder. Section 23(1) of the Federal Territory (Planning) Act 1982 provides that only the applicant for planning permission has the right to appeal against the decision of the planning authority if he is not satisfied with the decision affecting him. However, rule 11 of the Planning (Development) Rules 1970[10] provided that the applicant for planning permission and the adjoining landowners affected by the planning permission had the right to appeal to the planning authority against its decision. The Supreme Court held that rule 11 was *ultra vires* section 23(1) of the Federal Territory (Planning) Act 1982 because section 23(1) does not confer a right of appeal on the adjoining landowners. It is only valid to the extent that it makes provision for an applicant for planning permission to file his appeal.[11]

Sections 23(1) and 87(d) of the Interpretation Acts do not apply if the parent statute under which the subsidiary legislation is made contains a provision similar in effect to sections 23(1) or 87(d) of the Interpretation Acts. This was the case in *Major Phang Yat Foo* v *Brigadier Jeneral Dato' Yahya bin Yusof &*

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[7]*Air India* v *Nergesh Meerza* AIR 1981 SC 1829.
[8]S 23(1) applies to Acts passed after the coming into force of the Interpretation Act 1967 whereas s 87(d) applies to Acts passed before the Interpretation Act 1967.
[9][1992] 1 MLJ 393.
[10]These rules were promulgated under the Emergency (Essential Powers) Ordinance 1970. They are still operative under the Federal Territory (Planning) Act 1982.
[11]See also *Port Swettenham Authority* v *T.W. Wu* [1978] 2 MLJ 137.

Anor.[12] Section 119(1) of the Armed Forces Act 1972 provides that the Minister may make rules of procedures with respect to the matters enumerated therein. Section 119(5) goes on to state that a Rule of Procedure which is inconsistent with the provisions of the Act shall, to the extent of the inconsistency, be void. In *Major Phang*, the *vires* of rule 63(3) of the Armed Forces (Court-Martial) Rules 1976 was called in question. This rule was made under section 119 of the Armed Forces Act 1972. It conferred jurisdiction on the convening officer or authority to approve or disapprove a decision made by a court-martial. The High Court held that this rule was clearly inconsistent with section 119 of the Armed Forces Act and therefore void because section 119 only empowers the making of rules of procedure, not rules conferring jurisdiction on any person.

D. Substantive Implied *Ultra Vires*

At common law, the courts have implied a number of restrictions on the general power of the executive to make subsidiary legislation. If the subsidiary legislation made contravenes any of these restrictions, the subsidiary legislation so made will be *ultra vires* the parent statute under which it is made. Four such implied common law restrictions in comparison with the legal position in Malaysia will be looked at below.

1. The Rule against Retrospectivity

At common law, subsidiary legislation made cannot operate retrospectively without express or implied authority to that effect in the enabling parent statute. In Malaysia, article 7(1) of the Federal Constitution prohibits against retrospective criminal laws. However, there is no constitutional prohibition against *ex post facto* civil laws. In fact, section 20 of the Interpretation Acts 1948 and 1967 says that subsidiary legislation may be made to operate retrospectively to any date which is not earlier than the commencement of the Act or other written law under which it is made provided that no person shall be made or shall be-

[12][1990] 1 MLJ 252.

come liable to any penalty in respect of any act done before the date on which the subsidiary legislation was published. Section 86(2) postulates a similar provision save that it does not have a proviso. A case to illustrate that there is no prohibition against *ex post facto* civil law is the Singapore case of *AG* v *Cold Storage (Singapore) Pte Ltd.*[13] Section 23(2) of the Singapore Interpretation Act, 1964 is *in pari materia* with section 20 of the Malaysian Interpretation Acts.

2. Denial of Access to Courts

At common law, there is a presumption that Parliament does not intend to deny people access to the superior courts unless there are clear indications to the contrary. General empowering words will not suffice. Subsidiary legislation which purports to deny the right of the subjects to have access to the courts to litigate their grievances will not be able to withstand judicial scrutiny if challenged. This presumption was held to apply even to wartime emergency legislation in *Chester* v *Bateson.*[14] In this case, a Defence Regulation made under the Defence of the Realm Act 1914 purported to exclude house owners from having access to the courts to recover possession of their property from munition worker tenants without the consent of the Minister of Munitions. The Regulation was held to be void because the fundamental right of the subjects to have access to the courts could not be easily denied save by clear words to the contrary in the parent Act. This common law presumption applies here.

3. Financial Levy

Another implied restriction on the general power of the executive to make subsidiary legislation, which also applies here, is the prohibition against the imposition of a financial levy or tax without express Parliamentary authorisation to that effect. This presumption, too, seems to apply also to emergency legislation - *AG* v *Wilts United Dairies.*[15] In a Singapore case, *PP* v *MM*

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[13][1979] 1 MLJ 277.
[14][1920] 1 KB 829.
[15][1922] KB 897

Pillay,[16]the court upheld the regulation imposing a fee for the issue of an area licence for the entry of cars into the restricted zone even though the regulation in question was made under a general power to make subsidiary legislation. In the light of the principle articulated above, this case is, therefore, of doubtful authority.

4. Unreasonableness

A subsidiary legislation may be struck down by the court as unreasonable if it could be viewed as something "manifestly unjust ...[or] involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men".[17] In *Halimatussaadiah* v *Public Service Commission, Malaysia*,[18] a departmental circular which prohibited female civil servants from wearing, among other things, 'purdah', while on duty was regarded by the High Court as lawful and reasonable and therefore must be obeyed on pain of dismissal for disobedience thereof.

Besides the common law concept referred to above, it has been suggested that an unreasonable subsidiary legislation could be taken as violative of the equality clause of article 8(1) of the Federal Constitution. This novel concept is a broader and more flexible concept than the prevailing common law concept dealt with above.[19]It has been invoked in India by the Indian Supreme Court in *Air India* v *Nergesh Meerza*[20] where an Air India's regulation requiring an Air India's air hostess to retire upon her first pregnancy after marriage was characterised as unreasonable and arbitrary and therefore inconsistent with the equality clause of article 14 of the Indian Constitution.

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[16][1977] 1 MLJ 228.
[17]Per Lord Russell of Killowen CJ in *Kruse* v *Johnson* [1898] 2 QB 91, 99-100.
[18][1992] 1 MLJ 513.
[19]MP Jain, *op cit*, n 11, 103.
[20]AIR 1981 SC 1829.

E. Procedural *Ultra Vires*

Subsidiary legislation made without complying with the procedure established by the parent statute may render the resulting subsidiary legislation so made *ultra vires* if the procedure breached is of a mandatory nature. Non-compliance with a directory procedure "does not give a person aggrieved a legal right to redress in a court of law".[21] A procedure requiring prior consultation with a specified body or interest to be affected has been regarded as mandatory.[22] A procedure requiring that a few months' notice be given in order to effectuate the rules was treated as mandatory.[23]A requirement that draft rules be published in the official Gazette and also in a newspaper with a view to inviting public suggestions was characterised as mandatory in nature.[24] Insofar as laying procedures are concerned, an affirmative laying procedure may be taken as mandatory.[25] The same goes to a procedure requiring that draft rules are to be laid before Parliament.[26]

VI. CONCLUSION

In the light of the above discussion, the operation of the *ultra vires* doctrine in this country can be said to accord generally with the common law traditions of upholding the rule of law and hence the *ultra vires* doctrine save in two aspects. First, the abdication of judicial control over certain categories of discretionary powers referred to in this article as "unreviewable powers" is a cause of some concern. The abandonment of the objective test in those cases in favour of the subjective test is tantamount to undermining the rule of law to some extent. It must be noted that the application of the subjective test has been

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[21]*Wong Keng Sam* v *Pritam Singh Brar* [1968] 2 MLJ 158, 160.
[22]*Port Lois Corp* v *AG of Mauritius* [1965] AC 1111; *Rajnarain Singh* v *Chairman, Patna Administration Committee* AIR 1954 SC 569.
[23]*Lachmi Narain* v *Union of India* AIR 1976 SC 714.
[24]*Govindlal* v *Agricultural Produce Market Committee* AIR 1976 SC 263.
[25]MP Jain, *op cit*, 105.
[26]*Ibid*. See also ss 19(1) & (2) & 86(1) of the Interpretation Acts 1948 and 1967 on the rules regarding the publication of subsidiary legislation.

consistently questioned in some common law jurisdictions[27] ever since the House of Lords in no uncertain terms and decisively rejected the notion of unfettered discretion in *Padfield* v *Minister of Agriculture, Fisheries and Food.*[28] Secondly, the limited scope of judicial control over preventive detention cases is another matter that needs reconsideration. It is a little puzzling to the advocates of the rule of law why there is judicial reluctance to effectuate a wider application of the principle of 'extended *ultra vires*' to such cases as the Indian Supreme Court has exerted a much wider scope of control over such cases. The recent trend in the use of wide and elaborate privative clauses in some statutes is a little worrying because a literal interpretation of such clauses will inevitably lead to the whittling down of the scope of operation of the *ultra vires* doctrine in this country. It is sincerely hoped that such an approach will not be adopted by the judiciary. Instead, the traditional strict construction approach should be maintained at all costs in the face of an onslaught of such clauses. As a final remark, it must be said that the scope of judicial review is expanding in most common law jurisdictions and we must constantly ask ourselves whether we are swimming with or against the current tide of judicial activism and if it is realised that we are deviating from the common law traditions, efforts must be made to conform with the norms for the sake of preserving and upholding the rule of law in our system.

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[27]For example, *R* v *IRC ex p Rossminster* [1980] AC 92; *AG of St Christopher, Nevis and Anguilla* v *Reynolds* [1980] AC 637; *Chng Suan Tze v Minister of Home Affairs & Ors & other appeals* [1989] 1 MLJ 69; *Teh Cheng Poh* v *PP* [1980] AC 458.
[28][1968] 1 All ER 694.