

CURRENT TRENDS IN JUDICIAL REVIEW IN EMPLOYMENT LAW**

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1. INTRODUCTION

When presenting a paper on the aforementioned subject, it is sometimes necessary to recall the rationale or principle behind the administrative law remedy of judicial review.

It is trite law that due to the Constitutional separation of powers¹ of the State, the sole interpreters of the law is the judicial arm of the State. However with the modern proliferation of administrative tribunals² deciding matters involving both law and facts affecting citizens, the superior courts had asserted their inherent common law powers to supervise these tribunals by way of the prerogative orders of inter alia certiorari, mandamus, prohibition and the private law remedy of declaration.³ This is despite ouster clauses in Section 33 B (1) of the Industrial Relations Act 1967 (“the IRA”). In fact, the opening words of Section 33 B (1) of the IRA embodies the ultra vires doctrine by use of the words “... Subject to this Act...” In **Re: Racial Communication (1981) 2 AC 374** Lord Diplock stated that there is a presumption at common law that statutory “inferior” tribunals (a term given by Lord Morris in the **Anisminic Ltd v. Foreign Compensation Commission (1969) 2 AC 147**) cannot be final arbiters of questions of law.

The grounds on which relief in judicial review is given today has been succinctly summarised by Lord Diplock in **Council of Civil Service Union v Minister etc (1985) AC 374** (“the CCSU case”) under 3 developed heads

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** Paper presented at the Bar Council Seminar on “Employment /Industrial relations law - are they adequate or is a review necessary to meet new challenges?” on 25th July 2000.

1. See Article 121 of the Federal Constitution

2. The Industrial Court is one such Tribunal

3. See **R v. Northumberland etc. Ex-parte Shaw (1952) 1 KB 338** for a historical survey and the basis of the certiorari jurisdiction at common law.

i.e. “illegality”, “Irrationality” and “Procedural impropriety”. The future developing head for review is termed by Lord Diplock as “proportionality.”⁴

2. RECENT DEVELOPMENTS IN JUDICIAL REVIEW IN EMPLOYMENT LAW

The greatest activity in Judicial review has been in the area of employment law - at least as far as Malaysia is concerned. Almost all the leading cases in this area of administrative law have been cases concerning the Industrial Relations Act 1967 (“the IRA”) and to a lesser extent the Employment Act 1955 (“the EA”) and to a still lesser extent the Trade Unions Act 1959 (“the TUA”).⁵

For convenience and easy comprehension I have taken the liberty to classify the sub-heads under which these current developments can be examined.

(a) Dismissals - Constitutional right to livelihood

The Court of Appeal in two decisions - **Tan Tek Seng v Suruhanjaya P.P. & Anor (1996) 1 MLJ 261 (CA)** and **Hong Leong Equipment Sdn Bhd v. Liew Fook Chuan & Anor (1996) 1MLJ 481 (CA)** have “elevated” the right not to be dismissed without procedural safeguards and without substantive just grounds respectively as being constitutional rights of employees protected by Part II of the Federal Constitution. The Federal Court in **R. Ramachandran** has confirmed this “elevation”.⁶

(b) Dismissal - scope of that term

In **Wong Chee Hong v. Cathay Organisation (M) Sdn Bhd (1988) 1 MLJ 92 (SC)** the then Supreme Court had held that the common law test should be used to determine the scope or meaning of the term ‘dismissal’ in

4. See **R. Ramachandran v. Industrial Court & Anor (1997) 1 MLJ 145** (“the **R. Ramachandran case**”) for a discussion of these heads

5. See for example the recent case of **Menteri Sumber Manusia v. ABOM (1999) 2 MLJ 337 (FC)**

6. See the Writer’s article “Security of tenure in Employment - Constitutional and Proprietary rights of employees”. In **(1996) 3 MLJ cxviii** for a fuller discussion of this topic.

Section 20(1) of the IRA. Apart from the ‘termination simpliciter’ dismissal expounded in **Dr. A. Dutt v Assunta Hospital (1981) 1 MLJ 304**, the Supreme Court had in **Wong** held that “dismissal” includes “constructive dismissal” applying the ‘contract test’.

The Court of Appeal in the case of **Ang Beng Teik v. Pan Global Textile Bhd, Penang (1996) 3 MLJ 137 (CA)** had expanded the scope further to frame the test as the “just and equitable” test. The rationale, according to the Court of Appeal are the provisions of Section 20(1) itself as explained in **Goon Kwee Phoy v. J.P. Coats (M) Bhd (1981) 2 MLJ 129 at 135 (FC)** and section 30(5) of the IRA.⁷ However it is submitted that two years after **Ang** the Court of Appeal in **Anwar bin Abd. Rahim v Bayer (M) Sdn Bhd (1998) 2 MLJ 599 (CA)** had put the clock back.⁸

(c) Dismissal - Procedural unfairness

The perennial question haunting the law of dismissal pertaining to procedural pre-dismissal domestic inquiry has been subjected to judicial review by our superior courts. The cases like **Dreamland Corp (M) Sdn Bhd v Choong Chin Soon (1988) 1 MLJ 111** and **Wong Yuen Hock v. Hong Leong Assurance Sdn Bhd (1995) 2 MLJ 753** and **Milan Auto Sdn. Bhd. v. Wong Sek Yen (1995) 3 MLJ 537** are in point.⁹

However in **Syed Dharmalingam bin Abdullah v. M.B.(M) Sdn. Bhd. (1997) 1 MLJ 352 (FC)** the Federal Court has in effect joined the controversy by holding that a pre-dismissal inquiry is a statutory right of an employee covered by the Employment Act. I submit that based on the dicta in the Court of Appeal cases in **Tan Tek Seng** and **Hong Leong Equipment Sdn. Bhd.**

7. For an elaborate analysis see - the Writer’s article “Whither the test for unjust ‘constructive’ dismissal in Malaysia ?” in (1999) 3 MLJ XC.

8. The Federal Court had dismissed Anwar’s appeal in the case.

9. For a detailed examination see the writer’s article “The Domestic Inquiry in Industrial Law - Contractual, Statutory and Constitutional Implications”- (1996) 2 ILR ix. For the writer’s earlier articles on this subject - see “The Domestic Inquiry- Procedural unfairness ? (1994) 2 ILR i and The Domestic Inquiry -Old wine in a new Bottle ?” (1991) 1 ILR ix

referred to above, the right to a pre-dismissal inquiry is a Constitutional right of **all** employees.¹⁰

(d) Dismissal - who is a “workman”?

The then Supreme Court in **Inchape Malaysia Holdings Bhd v R B Gray (1985) 2 MLJ 297** held that to be a “workman” within the meaning of the IRA, the courts should apply the functions test to see if the dismissed person as a member of the Board of Directors of the employer was the “directing mind and will” of the company employer.

With respect, that decision was not only per incuriam but misapprehended the facts.¹¹ It was almost 10 years later that the Federal Court in **Hoh Kian Ngan v. Mahkamah Perusahaan (1995) 3 MLJ 369** pointed out the erroneous basis of that decision and finally two years later gave an unceremonious burial to the Inchape case in the last page of **K.Ganesan v Kojasa Holdings Bhd (1997) 2 MLJ 685**.

With respect, the decision in **Hoh Kian Ngan** is founded on long and established authority. It is consistent with the purposive approach in construing social legislation like the IRA and fundamental rights protected by Part II of the Federal constitution.

(e) The Appellate /Review function divide in Judicial review

This divide has been brought out recently by the dissenting judgement of Wan Yahaya FJ in **R.Ramachandran**¹² Wan Yahya FJ’s dissent in **R. Ramachandran** was two pronged. Firstly, the Learned Judge held that a review court cannot go into the facts of the dismissal to make a finding of a unjust dismissal. Secondly, the learned Judge held that on a construction of section

10. For an elaboration of this point - please see the writer’s 1996 article referred to in Note 9 supra.

11. See the Writer’s Article “Whither the “workman” ratio decidendi - the dichotomy in Inchape (M) Holding Bhd v Gray case” (1991) 1 ILR i

12 See for example “Judicial review and Appellate powers: Recent trends in Hong Kong and Malaysia” by Dr. K. Arjunan (2000) 2 MLJ 1xx.

25 of the Courts of Judicature Act 1964 (“CJA”) and 0.53 Rules of the High Court 1980 read together, the Superior Court cannot give consequential relief - a function reserved for the Industrial Court. On both prongs he relied on common law authorities.

We will discuss the first prong in this section and the second prong in section (f) hereunder. In the first prong, Wan Yahaya FJ proceeded in his dissent on the basis that the ground for review in **R. Ramachandran** was for “error of law on the face of the record.”¹³ With respect there was no factual basis for this assumption by the Learned Judge. In **R. Ramachandran** Wan Yahaya’s sole ground for agreeing to quash the Industrial Court decision was for “error of law on the face of the record”, as propounded in the dissenting judgement of Lord Morris in the **Anisminic case (1969) 2 AC 147**. However, the learned Judge, I submit, placed wrong reliance on this ground for review. There are two reasons to say so.

Firstly, the majority judgements in **R. Ramachandran** did not rely on this ground to quash. Secondly, that ground for review known as “error of law on the face of the record” had been despatched to the pages of English legal history in **Ex-parte Page (1993) AC 682**. (Per Lord Browne-Wilkinson at page 701) With the demise of that ground in 1993, I submit **that** the collateral rule to the effect that no consequential relief will be given for review on that ground, was also buried.

The traditional basis of judicial review that it “relates to the decision - making process and not the decision itself” is responsible for the divide. I say ‘traditional’ because if one examines the historical development of judicial review from the ancient ‘writ’ of certiorari, one will find that judicial review germinated from one single ground called review for “error of law on the face of the record”. In its original form, such a review was confined to the superior court examining decisions of ‘inferior’ tribunals for errors of law - apparent on the face of the ‘record’.

Whether or not such errors of law (i.e. mistake of pure law- usually a blatant misconstruction of a statute) were ultra vires or intra vires did not

13. At page 199, 202, and 214 of **R. Ramachandran**. At page 199 the Learned Judges states “... error of **fact** and law ...”

matter.¹⁴ If there was such an error, the superior court corrected the ‘certified’ record and sent it back to the inferior tribunal for a re-hearing of the matter and a decision in conformity with the corrected error of law.

This traditional narrow view of the remedy of certiorari saw its “darkest hour” in **R v. Nat Bell Liquors (1922) 2 AC 128** (per Lord Denning in **O’Reilly v Mackman (1983) 2AC 237 at 253**). Subsequent developments in the law of judicial review - especially by the use of the declaratory remedy saw leading cases like **Ass. Provincial Pictures Houses Ltd v Wednesbury Corp (1948) 1 KB 223**, **Ridge v Baldwin (1964) AC 40**, **Conway v Rimmer (1968) AC 910** and **Anisminic Ltd. v. Foreign Compensation Commission (1969) 2 AC 147** establishing and expanding the scope of the ultra vires doctrine.

Hand in hand with this expansion, review for process began to take the appearance of review for substance. The reason was not only because of the erroneous finding of a ‘**jurisdictional fact**’ but also an incorrect application or inference of a correct finding of a jurisdictional fact by the inferior tribunal. Review on this ground is done under the head of “error of law” (or the “illegality” head in the CCSU case) and **not** “error of law on the face of the record”. Cases like **Sec. Of State for Education etc v. Tameside MBC (1977) AC 1014** and **Re. Racial Communications (1981) 2 AC 374** are on point. The Supreme Court decision in **Malayan Banking Bhd v. ABOM (1988) 3 MLJ 204** is an example in Malaysia.¹⁵ Since Wan Yahaya FJ referred to “... error of **fact** and law ...” (at page 199 of **R. Ramachandran**) it is plausible that the learned Judge was referring to the ground for review termed as “error of law” and not “error of law on the face of the record”. If so, with respect the pivotal basis of the learned Judge’s dissent on the first prong will be untenable.

Apart from **R. Ramachandran** recent examples of cases in Malaysia are **Harris Solid State (M) Sdn. Bhd. v. Bruno etc (1996) 3 MLJ 489** which

14. See **Ex-parte Shaw (1952) 1 KB 338** at page 341 et seq for a historical analysis of the development of the remedy of certiorari for error of law on the face of the record.

15. The U.K. authorities on when a finding of fact can amount to jurisdictional error are set out in that case. See also **Min of Labour v. NUJ (1991) 1 MLJ 24**.

dealt with purported findings of fact or inferences of fact by the Industrial Court without evidential basis; **Amanah Butler (M) Sdn Bhd v Yike Chee Wah (1997) 1 MLJ 750** - which dealt with the Industrial Court not taking into account documentary evidence; **Swedish Motor Assemblies Sdn Bhd v Hj Isson (1998) 2 MLJ 372** - which dealt with the Industrial Court making a wrong inference of law and fact from the primary facts found by it and **Quah Swee Khoon v Sime Darby Bhd (2000) 2 MLJ 600** - which dealt with the findings of fact unsupported by the evidence.

However in **William Jacks v S Balasingam (1997) 3 AMR 2585** the court of appeal drew the boundary between review for substance and appellate interference i.e. there can be no review to see if evidence tendered in the Industrial Court was credible. Recently in **Quah's** case (above) the court explained the thin but definite boundary between review for substance and appellate interference.

With respect, in my submission Wan Yahaya FJ in **R. Ramachandran** failed to see the boundary. The Learned Judge also failed to appreciate that “error of law on the face of the record” as a ground for review was buried in **Ex-parte Page (1993) AC 682**. In my submission that burial also saw the demise of the collateral rule under that ground for review that no consequential relief could be given after an inferior body’s decision is quashed for “error on the face of the record.”

After that burial in 1993 in **Ex-parte Page**, when one examines the common law landscape, one will see (to borrow an imagery from the poet T.S. Elliot’s “The Waste Land”) prominent tombstones such as **Mc Celland v N. Gen. Health Services Board (1957) 1 WLR 594**, **Ridge v Baldwin (1964) AC 40**, **Anisminic Ltd v. F.C. Comm. (1969) 2 AC 147**, **Hill v. Parsons & Co. Ltd. (1972) I Ch. 305** in which consequential relief pursuant to the declaratory jurisdiction of the Superior Courts were given. Hence the majority in **R. Ramachandran** did not make a radical departure from the common law as has been suggested by some lawyers.

(f) Consequential relief in judicial review

We will now discuss the second prong of Wan Yahaya FJ's dissent in **R. Ramachandran**. In my submission, the question of consequential relief in judicial review was always, intertwined with the debate on the Judicial review /appellate function divide. The **R. Ramachandran** case followed on its heels by the **Harris Solid State case** on this point was the inevitable development in the law of judicial review in recent times. In the former, consequential relief was given to the Appellant- in the latter consequential relief was given to the Respondents. In both cases the High Court had refused to do so. The Federal Court in **R. Ramachandran** and the Court of Appeal in the **Harris Solid State case** acted on a construction of two statutes - the IRA and the CJA to found the jurisdiction to award consequential relief. The common thread that runs through both cases is the avoidance of delay in industrial adjudication.¹⁶ Wan Yahaya FJ dissented on this point of the construction to be given to section 25 of the CJA. With respect Wan Yahaya FJ was also wrong on this point in his dissent. This will be discussed below.

Although **R. Ramachandran** relies on section 30 (3) of the IRA to frame the policy of the Act on delay, I submit that section 29 (g) of the IRA is a better basis. Section 29 speaks of the "Power of the Court" in "any proceedings" to direct and do all things for the "...expeditious determination of the matter before it ...". I submit that the positive terms in which the power is couched implies that the **policy and purpose** of the IRA is that there should not be any delay in industrial adjudication. It is trite law that despite the discretion conferring word "may" in section 29 of the IRA, that discretion of the Industrial Court therein can be construed as imposing a **duty** on that court to expedite matters before it.¹⁷

Today- at least since 24th July 1997, when section 17A of Interpretation Acts 1948 and 1967 came into force, the courts have to give effect to this policy, and purpose of the IRA. Section 17A of that Act provides:

16. In **Dunlop Industries Employees Union v DMI Bhd (1987) 2 MLJ 81** the avoidance of delay in industrial adjudication also figured prominently.

17. See for example **Shelly v (1949) AC 56** and **Ex-parte Fire Brigades Union (1995) 2 AER 244**.

“17A In the interpretation of a provision of an Act, a construction that would promote the purpose or object underlying the Act (whether that purpose or object is expressly stated in the Act or not) **shall** be preferred to a construction that would not promote that purpose or object”

I submit that the majority in **R. Ramachandran** had carried out that purpose and object of the IRA. On the other hand, with respect, Wan Yahaya’s dissent on the construction to be given to section 25 of the CJA did not distinguish between the words “power”and “jurisdiction” as occurring in that section.¹⁸ Hence in my submission Wan Yahaya’s dissent was erroneous on this point. The majority in **R. Ramachandran** held at section 25 of the CJA read with paragraph 1 of the Schedule thereof gave power to the superior courts in review to order consequential relief.

In fact Wan Yahaya FJ in **R. Ramachandran** did not give effect to the disjunctive word “**or**” appearing in the proviso to section 25 (2) of the CJA when he said at page 212 of **R. Ramachandran**:-

“... section 25 (2) must be **read with** 0.53 of the rules of the High Court 1980; and when so read, the powers under the Act (CJA) do not seem to be unlimited...” (words emphasised and in brackets supplied)

When section 25 (2) is read with the disjunctive “or”, one will see that when section 25 of the CJA is read with the Schedule thereof there is power in the superior court to award consequential relief after quashing the award of the Industrial Court - as was done by the majority in **R. Ramachandran**. As suggested by Wan Yahaya one cannot read the provisions of the CJA “with” the provisions of O.53 RHC 1980- a subordinate legislation- to defeat the powers of the superior courts found in the CJA . This is because by virtue of section 23 (1) of the Interpretation Act 1967(now the Interpretation Acts 1948 and 1967) if there is a conflict between the CJA and RHC 1980 the former will prevail. With respect this point was not considered by Wan Yahaya FJ. I submit that on

18. See the dicta of Azmi FJ in **Majlis Peguam & Anor v. Tan Sri Mohd. Yusof (1997) 2 MLJ 271 at page 286**

this score also the dissent in **R. Ramachandran** was erroneous.

I submit that at common law consequential relief was always available in judicial review. Cases pursuant to the declaratory jurisdiction of the High Court are in point. Some of these cases are **Ridge v. Baldwin (1964) AC 40 (HC)**, **Mc Clland v N. G. Health Services Board (1957) 1 WLR 594 (HL)**, **Anisminic Ltd v. F. C. Comm. (1969) 2 AC 147 (HL)**, **Hill v Parsons & Co. Ltd. (1972) 1 Ch. 305 (CA)**. A local case example is **Shamsiah bte Ahmad Sham v PSC (1990) 3 MLJ 364. (SC)**

In fact it is implicit in the declaratory jurisdiction of the High Court as spelt out in O.15 r16 of the Rules of the High Court 1980 that consequential relief should normally be claimed - but if it is not done, the proceedings should not be objected to on the basis of that omission. O.15 r16 RHC 1980 provides :-

“r.16. No action or other proceeding shall be open to objection on the ground that a merely declaratory judgment or order is sought thereby, and the Court may make binding declarations of right whether or not consequential relief is or could be claimed”.
(emphasis supplied)

3. THE CURRENT SCOPE OF THE OUSTER CLAUSE IN SECTION 33 B (1) OF THE IRA

Today, in view of the developments aforementioned, I submit that a number of cases on judicial review in the past are no longer good law. Due to space and time constraints some of these cases only can be mentioned. They are **NUPCIW v API Sdn Bhd (1980) 1 MLJ 42** and **Dragon & Phoenix Bhd v KPPM Textile & Pakaian P. P. (1991) 1 MLJ 89.**

I submit that today the ouster section in section 33 B(1) of the IRA still shelters the following matters:- matters in the nature of non-statutory procedure in the Industrial Court- **Hotel Jaya Puri v. NUHBRW (1980) 1 MLJ 109;** matters relating to credibility of witnesses heard by the Industrial Court - **Quah Siew Khoon v Sime Darby Bhd (2000) 2 MLJ 600 at 613;** matters relating to adjudication of the “Ringgit and sen” in a dispute over a Collective Agreement - **Sabah Banking Employees v SCBA (1989) 2 MLJ 284** and matters

relating to finding of non-jurisdictional facts.

The decision of the House of Lords in **Ex-parte TSW Broadcasting Ltd (The Times 30/3/92)** as explained by Lord Browne-Wilkinson in **Ex-parte Page (at page 702)** will mean that a mere existence of a mistake of law made at some earlier stage of the decision making process will not vitiate the actual decision made. The test appears to be whether or not a relevant error of law in the actual decision making process which error affected the decision, was made by the inferior body. This development further enhances the scope of coverage of the ouster section.

4. PROBABLE FUTURE DEVELOPMENTS IN JUDICIAL REVIEW IN EMPLOYMENT LAW

In **R. Ramachandran**, (at page 198) Edgar Joseph Jr. FJ expressed the hope that the Federal Court had "... pointed the way to new horizons in the forward march of judicial review..." I submit that the following areas are fertile grounds for this forward march.

(a) Fact finding in non-compliance cases under section 56 IRA

Ever since the decision in **Dragon & Phoenix Bhd v. KPPM Textile etc. (1991)1 MLJ 89** the Industrial Court had to labour with a threshold jurisdictional question in non-compliance cases. This is the question "Is there a dispute of facts in the matter?" If the answer was "yes", the Industrial Court had to decline jurisdiction to deal with the complaint. With respect, I submit that the **Dragon & Phoenix** case is per incuriam. The reason is that the case did not consider a somewhat inconspicuous amendment to section 29 of the IRA in 1989 vide Industrial Relations (amendment) Act 1989 (Act A 718) which came into force on 10/2/89. The amendment removed the application of the provisions of section 29 to proceedings relating to only trade dispute references and references under section 20(3) of the IRA. After the amendment, section 29 applies to **all** proceedings in the Industrial Court. This will of course include section 56 proceedings. Section 29(c) of the amended IRA enabling the court to "... take evidence on oath or affirmation ..." will mean that if there are dispute of facts in section 56 proceedings, the Industrial Court can hear evidence and decide the matter before making an order.

Despite the principle in the **Dragon & Phoenix case**, I believe the Industrial Court has already begun to hear evidence in non-compliance cases - one example recently is **AMI (M) Sdn Bhd v. Chan Hock Liong (1998) 2 ILR 1025** (Award No. 379 of 1998).¹⁹

(b) Avoidance of delay in industrial adjudication

As we have seen, the policy and object of the IRA is to avoid delay in industrial adjudication **Dunlop Employees Union** case in 1987 (cited above) is one example of the application of this policy. The **R. Ramachandran** is another example. A third case in our apex court was **K. Ganesan v. Kojasa Holdings Bhd (1997) 2 MLJ 685**.

It should be noted that in each of the above cases - different fact situations arose. In **Dunlop**- it was a case concerning the jurisdiction of the Industrial Court to order reinstatement in the face of an admitted non-compliance by the employer. **R. Ramachandran** concerned giving speedy consequential relief to an unjustly dismissed workman. The **Kojasa** case concerned avoidance of delay in industrial adjudication due to preliminary objections taken by a party at the outset of proceedings in the Industrial Court. The central theme in all these cases is the policy, purpose and object enshrined in various sections of the IRA - in particular section 29 (g) and 30 (3). One might argue that the former section only gives **enabling** discretionary power to the Industrial Court to act to expedite matters and not a positive requirement that the power **should be exercised** to expedite matters. The answer to that suggestion is that it is trite law today that when Parliament gives a statutory power to a tribunal to act in a particular manner and for a particular purpose - failure to do so can amount to jurisdictional error and therefore subject to review by the superior courts.²⁰

The Kojasa case has thrown up fertile grounds for review in this area of the law based on statutory policy considerations. In this connection even the exercise of ministerial statutory discretion under the IRA will be subject to

19. The High Court had quashed the said Award on other grounds - the matter is now pending appeal in the Court of Appeal vide Civil Appeal No: W-02-926-99.

20. See the cases cited in Note 17 above.

judicial review on this ground. The **NUJ case** cited in note 15 above is an example.

(c) Proportionality - disciplinary sanction in dismissal cases

In the **CCSU case**, Lord Diplock spoke of the principle of “proportionality” as a possible future ground for review. Elsewhere in Europe, this ground is already established as a ground for review. In **R. Ramachandran** - Edgar Joseph Jr. F.J. noted this point when commenting on the “forward march” in judicial review - I believe, in Malaysia.

Taking the cue, our High Court in **Ekambaram a/I Savarimuthu v Ketua Polis Daerah Melaka Tengah & Ors (1997) 2 MLJ 454 at 456** had quashed an inferior’s body’s decision on the ground inter alia that the “...proportionality of the sentence vis-a vis that of the offence committed ...” was irrational. The court could not comprehend the inferior body’s finding that “...the offence justified the draconian decision of an immediate dismissal...” and went on to examine the substance of the case.

I submit that today since any error of law - including “... a principle of the **general law ...**”²¹ can be a ground for judicial review of an inferior tribunal’s decision, the proportionality principle is on the threshold of rapid development - (at least in employment law) as a recognised ground for review.

There are two reasons for this suggestion. Firstly as we have seen in **Tan Tek Seng’s case** and the **Hong Leong Equipment** case, followed by **R. Ramachandran** case (Supra) the right to a livelihood (i.e. not to be dismissed except on good and procedurally fair grounds) is protected by Part II of the Federal Constitution. Secondly the law reports are ‘littered’ with cases where the Industrial Court had held that a dismissal was unjust (although the reason advanced for the dismissal was established) because it was too harsh. Under the circumstances, since judicial review in Malaysia has developed rapidly in the field of employment law, I submit that we will soon have the principle of proportionality firmly embedded in our jurisprudence in the near future.

21. See **Sykt. Kenderaan Melayu Bhd v. TWU (1995) 2 MLJ 317** case at page 342

I submit that the development in that direction is overdue by almost 53 years - i.e. since the **Wednesbury** case in 1947. In this connection we will recall that in **Wednesbury**, Lord Greene when speaking of the second type of unreasonableness gave an example of an “absurd result”²² i.e. a red-haired teacher whose dismissal was to be justified because she had red hair!! The food for thought is whether that dicta was the germination of the developing “proportionality” principle in judicial review mentioned somewhat recently by Lord Diplock in the **CCSU case**.

5. CONCLUSION

The **CCSU case** has displayed a developing judicial attitude in judicial review - from concentration on the source of the power under review to the subject matter under review. Some writers have argued that Judicial Review has today reached a stage where the important factor whether or not the Court will give relief is dependent upon the subject matter rather than the source of the power under review.²³ This is presumably from dicta of Lord Diplock in the **CCSU case** in 1985 and the dicta of Lord Browne-Wilkinson in *Ex-parte Page* eight years later. However, it is my submission that in judicial review the courts had from the early 20th century (at least) given importance to the subject matter of the decision under review and not the source of the power. This is evident from the relief given liberally in cases involving fundamental rights - for example in matters concerning the liberty of the citizen contrasted with cases involving national security.²⁴ In the former category, I have in mind for example **Ex-parte Rossminster (1980) AC 952**. In the latter category, I have in mind for example **Liversidge v Anderson (1942) AC 206**. In my submission, modern cases simply reiterates this historical trend.

In Malaysia, I submit that this concentration on the subject matter is evident

22. See the succinct formulation on “absurdity” by E. Abdoolcader FJ in the **Malayan Banking Berhad (1988) 3 MLJ 204 (supra) at page 206**

23 See “Administrative Law” - by P. Leyland, T. Woods and J Harden (Blackstone Press) at page 274.

24 See De Smith, Woolfe & Jowell’s “Principles of Judicial Review” (Sweet & Maxwell London) 1999 at pages 137 and 493 - 502 for a further discussion on this point in modern cases but giving other basis for the concentration by the courts on the subject matter under review.

in the law of judicial review in employment law. Our courts have been vigilant in ensuring that the subject of employment be under the careful scrutiny of the superior courts. This perhaps explains why a number of ground-breaking decisions in judicial review are in the field of employment law. I have in mind cases like Malayan Banking Bhd case (1988), the NUJ case (1991), Tan Teck Seng's case (1996), Hong Leong Equipment case (1996), the R. Ramachandran case (1997), the Harris Solid State (1997) and the K. Ganesan case (1997) aforementioned.

In my submission, in Malaysia this developing judicial attitude began to surface in the dicta of the Federal Court in **Dr. A. Dutt v Assunta Hospital (1981) 1 MLJ 304**. In that case, Chang Min Tat FJ spoke of the respective positions of the employer and the workmen in relation to the Industrial law of unjust dismissals enshrined in section 20 (1) of the IRA i.e. that:-

“... the right to “fire” implied in a “hire”, in the social legislation of the Act, is limited to termination with just cause or excuse. Any other interpretation would fail to recognise that in entering into a contract of employment the employer holds the sword by the hilt and requires the employee to grasp it by the blade...”

The learned Judge went on to refer to “...the hackles of employers and calls for denunciation about the shackles on the freedom of contract..” that may arise as a result of the construction the court had given to the said section 20 (1) of the IRA. In my submission, the “hackles” (if any) today from employers as a result of cases like **Dr. A Dutt** and **R. Ramachandran** are due to the “hackles” raised by workmen “yesterday” (i.e. from the middle of the 19th century to the late 20th century) on the shackles in the common law of “Master and servant” pertaining to the workmen’s right to security of tenure. The name “master and servant” itself smacks of the social inequality in the common law between the “master” and his “servant”. An example is the right at common law to deprive a workman of his livelihood without any good cause - as long as contractual notice or wages in lieu thereof is given to the workman.

After more than 100 years, cases like **Dr. A Dutt**, **Tan Tek Seng**, and **Hong**

Leong Equipment followed recently by **R. Ramachandran** are attempts to correct that social imbalance. It is axiomatic that the cue was given by parliament in the form of social legislation like the IRA, EA, and the TUA.

Unfortunately, this correction has led to comments such as “the Labour Law always favours the workers” and “the courts always lean in favour of workers” sometimes heard coming from those who are not fully aware of the history and the policy behind modern labour legislation.²⁵ As is evident from the aforementioned cases, our superior courts in judicial review seem to be eminently aware of the history and policy behind social legislation like the IRA, EA and TUA and have acted robustly to correct that social imbalance. Therefore there can be no question of any “pro-labour” or “anti-labour” stance taken by the courts and lawyers. What is perceived by some as a “pro-labour” stance is in fact an attempt by the courts to rectify the historical social imbalance between labour and capital. It is gratifying to note that the law is doing its bit towards that socio-economic aim in the long term interests of the economy of the country.

Unlike in the U.K. where the common law and statutory industrial legislation were strange bedfellows, the same cannot be said about Malaysia. The position in U.K. was put aptly by that great labour lawyer Sir O. Kahn-Freund Q.C. in his work “Labour and the Law”:-

“...The *leitmotif* of the history of much of the British law of labour relations [has been] the clash between what the courts declared to be the principles of the common law, and what Parliament declared to be the principles of good social policy - in fact a clash of two policies ..”²⁶

It is in this context that many critics of our industrial jurisprudence must be understood. These critics are usually common law lawyers who have had a brush with the principles of equity - as is administered by our Industrial Court during the trial and the superior courts in judicial review. The critics can be forgiven since their training and background as common law lawyers perhaps

25. See “Labour Legislation and Public Policy - A contemporary History” by Paul Davies & Mark Freedland (Clarendon Law Series - 1992) - Pages 8 - 59.

26. Ibid at page 13

influences that criticism. These influences have been cryptically termed by that great American Judge Holmes J. as -

“... the inarticulate major premises of judicial reasoning ...”²⁷

Finally, I have concentrated my attention in preparing this paper on appellate Court decisions. I hope I will not be subjected to the comment the Jurist Jerome Frank made about the jurisprudential works of another great U.S. Supreme Court Judge Cardozo, wherein the latter concentrated his attention on the work of the appellate court and not a trial court:-

“...Cardozo, most of his days an appellate court lawyer or appellate court Judge, suffered from a sort of occupational disease, appellate - court -itis...”

I have concentrated on the appellate courts, not because of any paucity of important decisions of the High Court, but firstly because of the nature of the subject matter of this paper and secondly because the appellate courts are the forum where the “last bite at the cherry” is given to a litigant. I hope that I will be forgiven if I did not refer to some important decisions of the High Court in this area of law.

27. See “The Essential Holmes - Selections from The Letters, Speeches, Judicial opinions and other writings of O.W. Holmes Jr. “ Ed. R.A. Posner (The University of Chicago Press) - Pages 160 - 177.