

Subsidiary Legislation in Malaysian Administrative Law: Definition, Advantages & Grounds to Challenge it

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DOI: 10.29322/IJSRP.8.10.2018.p8238

<http://dx.doi.org/10.29322/IJSRP.8.10.2018.p8238>

Abstract- This article discusses on the definition of subsidiary legislation in Malaysian administrative law, its advantages and how to challenge it. Subsidiary legislation is part of Malaysian legal sources that supplements the legislative function of Malaysian legal system. Although the Parliament and State Assembly are the main bodies that have been vested with the legislative power in Malaysia, other non-elected members are also conferred to exercise the same function to assist the Parliament and the State Assembly in their law making roles. The abundance of subsidiary legislation in the legal systems serve a great deal of benefits and advantages especially to ease the burden of the legislative bodies especially in dealing with the details of the law and also to gain expert views on certain issues. However the power mandated in the hands of these authorised bodies comprising of non-elected civil servants could also result in illegality and abuse of power, thus, this article attempts to outline grounds on which the subsidiary legislation can be challenged. This article is a descriptive and comparative analysis research which involves library-based method. This method is based on the analysis of various literature materials from books, articles, journals, Acts of Parliament, as well as reference to decided cases from Malaysian courts and commonwealth countries. It is the finding of this article that the court has the power of judicial review over the subsidiary legislation if the subsidiary legislation is *ultra vires* its conferring Act (parent Act), substantively or procedurally and the parent Act or the subsidiary legislation itself is unconstitutional. The court will look into the provisions of the parent Act and also the subsidiary legislation to determine its constitutionality and if it is within the scope of the parent act and the Federal Constitution. It is recommended that the power to enact subsidiary legislation conferred to the delegated body shall not be abused to overstep legal and constitutional boundaries and the Parliament shall not over-delegate its power to subsidiary legislation since it may be seen as abdication or 'giving up' its actual constitutional role i.e. to make law.

Index Terms- Administrative Law; Advantages; Challenge; Subsidiary Legislation.

I. INTRODUCTION

The system of delegated, subordinate or subsidiary legislation has come into fashion in all democratic countries. Of the total legislative output in a country, only a small portion is made directly by the legislature, and by far the larger portion of it emanates from administrative authorities. These authorities frame such legislation under powers conferred on them by the legislature. While framing a statute, the legislature usually confines itself to enunciating the general principles and policies relating to the subject-matter in question, and delegates to some agency the power to legislate further and fill in the details. This technique is made use of very extensively so much so that there is no statute enacted by the legislature which does not delegate some power of legislation to an administrative agency.

In no democratic countries does the legislature monopolize the whole of the legislative power; it shares it with the administrative agencies to a substantial extent. The delegated legislation produced by these agencies is so voluminous that the statute book will not only be incomplete but even be misleading if not read along with the relevant subsidiary legislation which seeks to amplify it. The term delegated legislation is used to denote; (1) The subsidiary legislation itself made by the administration in pursuance of the power delegated to it by the legislature, and; (2) The exercise of the power by the agency.

I. RESEARCH METHODOLOGY

This article is based on the descriptive and comparative analysis research which involves library-based method. The method chosen is one of the well-known approaches to get the literature material such as books, articles and journals including the Acts of Parliament and any other legal materials. These texts are scrutinized to develop the concept and scope of analysis. Reference is also made by referring the cases decided by Malaysian and commonwealth countries.

II. SUBSIDIARY LEGISLATION: DEFINITION AND ADVANTAGES

According to section 3 of the Interpretation Act 1948 and 1967, subsidiary legislation is defined as meaning:

'any proclamation, rule, regulation, order, notification, bye-law, or other instrument made under any Act, Enactment, Ordinance or other lawful authority and having legislative effect'.

Based on the definition given by section 3, it means that an order and notification, etc can be regarded as subsidiary legislation only if it has legislative effect. In addition, According to Mohd Izzat (2018), the legal criteria of the subsidiary legislations are; (1) it is issued out by the authority appointed by the legislative power, (2) the delegation of power shall be made through the parent act (enabling act), and, (3) has legislative effect. It means that not every order, notification, etc is subsidiary legislation: it is so only if it has legislative effect; if it is not legislative in nature, it is not subsidiary legislation; it may then be regarded as administrative in nature (MP Jain, 1997).

In another perspective, the above mentioned provision impliedly indicates the clear status of subsidiary legislation in Malaysian administrative law. In other word, this type of legislation is recognized as one of the sources of law in our legal system (Sharifah Suhanah, 2012). As referred to Justice Hashim Yeop Sani in the case *S Kulasingam v Commissioner of Land, Federal Territory* [1982] 1 MLJ 204:

"There is nothing to prevent Parliament from delegating power to legislate on minor and administrative matters and for this very reason, we have in addition to statutes, innumerable subordinate or subsidiary legislation having the force of law. Without these subordinate or subsidiary legislation, the Government machinery will not be able to function effectively".

The implementation of subsidiary legislation is important as it may smoothen the administration by the executive power. The valuable time of the legislative power; namely Parliament can be saved by delegating its power to the executive authority. For instant, Parliament may focus only on the principles of law in general pertaining to a particular issue, while the delegated authority can look into the matter in specific manner. By this, the law has restores the matter into the specialist person due to the lack of expertise and different background of the Parliamentary

members. Other than that, the particular matters may be easily administered because of the flexibility of the subsidiary legislation. It can be released in nearest time without going through the complicated Parliamentary process. In addition, the flexibility and the speediness of the subsidiary legislation are very beneficial in handling emergency situations and accommodating the changing needs of the society which require immediate attention from the government and the executive. For example, there may be an emergency or crisis wherein the Minister has to act quickly as in an economic crisis where the Minister of Finance has to act promptly by making new regulations to alleviate or control the situation. Once the regulations become outdated, the Minister can rescind them easily.

One of the most common standard formula that is used to confer executive law making power is 'as necessary and convenient' to give effect to the enabling legislation. Whether the court would in any particular instance adopt a broad or narrow construction of this will depend primarily on statutory context and intendment. As a generalized statement, and no more than that, the more detailed the enabling legislation, the less room there will be for the courts to maneuver. Nevertheless, this factor alone is hardly conclusive. Some legislation may adopt only what is "necessary" to give effect to the enabling Act, or for carrying out or giving effect to the Act. The principles noted above would be equally relevant in this instance (Wu Min Aun, 1975). Another standard formulation commonly utilized in subsidiary legislation is "without limiting the generality of the foregoing provisions". This does not carry with it, and rightly so, an automatic position that the more specific provisions that follow it are of little significance in determining the scope of the executive law making conferred (Wan Azlan, 2006). Thus, in *Leon Fink Holdings Pty Ltd v Australian Film Commission* (1979) 24 ALR 513, Aickin J explained:

"At first sight [the words "without limiting the generality of the foregoing"] would appear to indicate a parliamentary intention that general words which precede the expression should be construed as if the more particular words which follow were not there. That however is too wide a proposition for in every case, it must depend upon the whole of the context."

III. GROUNDS TO CHALLENGE SUBSIDIARY LEGISLATION

In control mechanism of subsidiary legislation, an important place is occupied by judicial control (Puttick & Keith, 1988). This is where the courts may exercise control over subsidiary legislation based on its judicial review jurisdiction. First and foremost, a question may arise as to whether the parent statute which delegates the power of subsidiary legislation is itself constitutional or not. If the statute is unconstitutional then it is *non est*, and, therefore, it cannot be the source of any delegated legislation which will then automatically fall to the ground. For this purpose, reference has to be made to judicial review under the Constitutional Law. Reference may, however, be made in this

connection to *Johnson Tan Han Seng v Public Prosecutor* [1977] 2 MLJ 66.

Here, the validity of the Essential (Security Cases) Regulations 1975 was challenged on the ground that the Emergency (Essential Powers) Ordinance 1969 had lapsed and ceased to be law by effluxion of time and changed circumstances and, therefore, these regulations made thereunder also become void. The Federal Court rejected the argument ruling that it was for the executive and not for the courts to decide whether a proclamation of emergency under article 150(1) should or should not be terminated.

Then, the courts also exercise control over subsidiary legislation in the ground that the parent statute may be constitutional, but the subsidiary legislation made thereunder may be unconstitutional. The court will strike down delegated legislation (Michael Zander, 1994), as it strikes down any statute, if it comes in conflict, or does not conform, with a constitutional provision. Here again, reference has to be made to Constitutional Law to assess whether the regulation in question infringes a constitutional provision (MP Jain, 1997). The frame of reference to adjudge the validity of the regulation or subsidiary legislation is the Constitution.

Reference may be made in this regard to *Osman v Public Prosecutor* [1968] 2 MLJ 137. Certain emergency regulations made under the Emergency (Essential Powers) Act 1964 were challenged as unconstitutional on the ground that these were of a discriminatory nature and thus infringed article 8. The argument was, however, rejected by the Privy Council on the ground that emergency regulations could not be held to be unconstitutional because of article 150(6).

In *Public Prosecutor v Khong Teng Khen* [1976] 2 MLJ 166, the Federal Court, by majority, upheld the validity of the Emergency (Security Cases) Regulations 1975. The regulations were challenged as being inconsistent with article 8. The court held that: (i) the regulations were not inconsistent with article 8; (ii) even if inconsistent, the regulations were saved by article 150(6) on the authority of the plaintiff.

On 15 May 1969, the Yang di-Pertuan Agong proclaimed as emergency under article 150(1) of the Constitution. On the same day, he promulgated the Emergency (Essential Powers) Ordinance 1969 purporting to give power to him to make regulations for certain purposes. Thereafter, although the proclamation of emergency continued to subsist, and it exists even today, Parliament sat on 20 February 1971 and has been sitting since then, and even general elections have been held to the Dewan Rakyat. Nevertheless, the Yang di-Pertuan Agong continued to issue regulations under the ordinance of 1969 even after 1971, although under article 150(2), his power to issue an ordinance came to an end with the sitting of Parliament, for the Yang di-Pertuan Agong could promulgate ordinances during an emergency 'until both Houses of Parliament are sitting'. Accordingly, the Yang di-Pertuan Agong issued the Essential (Security Cases) Regulations 1975. The question in *Teh Cheng Poh v Public Prosecutor, Malaysia* [1979] 1 MLJ 50 was

whether these regulations of 1975 were constitutionally valid and could the Yang di-Pertuan Agong issue the same when he no longer had power to issue an ordinance? The Federal Court's response to this question was that while the ordinance-making power had come to an end, the Emergency Ordinance when made was valid and it continued to subsist and, therefore, the power conferred by it to frame regulations would also subsist.

From this point of view, the regulations were treated as subsidiary legislation under the Ordinance. On appeal, the Privy Council declared the regulations to be *ultra vires* the Constitution and hence void on the ground that once Parliament had sat after the Proclamation, the Yang di-Pertuan Agong was no longer left with any power to make 'essential regulations' having the force of law.

The Privy Council argued that the power to promulgate ordinances under article 150(2) was expressed to be exercisable only until both Houses of Parliament were sitting. It lapsed as soon as Parliament sat and this power would not revive even during the periods when Parliament was not sitting. The Security Regulations, which purported to alter in respect of security cases the mode of trial laid down by the Criminal Procedure Code, were made four years after Parliament's first sitting after the Emergency Proclamation.

Plainly, if the same provisions had been made through an ordinance, the ordinance would have been invalid since the ordinance-making power lapsed in 1971 as soon as Parliament had sat. The regulation in question was made under the Ordinance of 1969 which conferred power of the Yang di-Pertuan Agong. The subject-matter of 'Essential Regulations' having the force of law which by this Ordinance, the Yang di-Pertuan Agong purported to empower himself to make was 'no less broad' than the 'subject-matter of the 'Ordinance' having the force of law that he was empowered to make under article 150(2) of the Constitution'.

The maker of the law, the Yang di-Pertuan Agong, 'is the same' for both ordinances and for essential regulations; the subject-matter of the law-making power 'is the same for both'. The only difference 'is in the label attached to them'. But, emphasized the Privy Council, 'in applying constitutional law, the court must look behind the label to the substance'. The Privy Council thus equated the regulations to the Ordinance, and, as the Yang di-Pertuan Agong could no longer make the Ordinance after Parliament had sat according to article 150(2), he could not make the regulations.

This equation between the ordinance and the regulations was made possible because of the breadth of the regulation-making power which was coterminous with the ordinance-making power and also because in both the power was conferred on the Yang di-Pertuan Agong. The Privy Council pointed out that the power of the Yang di-Pertuan Agong to make ordinances given to him by the Constitution had come to an end as soon as Parliament first sat after the proclamation of the emergency. He could not prolong it, of his own volition, 'by purporting to empower him to go on making written laws, whatever description he may apply to

them. That would be tantamount to the Cabinet's lifting itself up by its own boot straps'.

Consequently, Parliament enacted the Emergency (Essential Powers) Act 1979, replacing the Ordinance. Section 2 of the Act is a *verbatim* reproduction of section 2 of the Ordinance. All the subsidiary legislation made under the Ordinance was validated and adopted under the said Act. The essential regulations are now made under the Act and so constitute subsidiary legislation. The Federal Court has upheld the validity of this Act. Commenting on the validation of the regulations, the Federal Court observed in *Teh Cheng Poh v Public Prosecutor* [1979] 2 MLJ 238:

"the regulations having been ruled to be ultra vires, it is open to Parliament to validate them and, further, to validate them with retrospective effect".

The regulations have thus been revalidated with effect from the date when they purported to come into force in the first instance. The Act in question has been made under article 150(5). Further, the Act confers a very broad power on His Majesty to make regulations generally. Thus, the *status quo ante* has been restored in all respects. The only difference now is that whereas formerly the powers of the executive were derived from an ordinance, they are now derived from an Act of Parliament.

In *Razali bin Ahmad v Public Prosecutor* [1981] 2 MLJ 81, it was submitted before the Federal Court that despite section 9(1) of the Emergency (Essential Powers) Act 1979, the Essential Security Cases Regulations 1979 were still not validated. Parliament failed in its efforts to revive these regulations because the expression 'every subsidiary legislation' used in section 9(1) of the Act must have the same meanings as defined in section 3 of the Interpretation Act. The appellant thus argued that when section 9(1) of the Emergency (Essential Powers) Act 1979 enacts that 'Every subsidiary legislation whatsoever made or purporting to have been made under the Emergency (Essential Powers) Ordinance 1969, on or after 20 February 1971, shall be valid and have effect as if the said subsidiary legislation has been made under the appropriate provision of the act, only those having the force of law could be validated.

As the Essential Security Cases Regulations were not made by lawful authority, they did not have the force of law by virtue of the Privy Council's ruling in *Teh Cheng Poh* [1979] 2 MLJ 238, and so they would not fall within the expression 'every subsidiary legislation' in section 9(1) of the Act, and therefore were not validated. Negating the contention, Salleh Abbas FJ, delivering the judgment of the court, observed that if the expression 'every subsidiary legislation' in section 9(1) were to have the meaning as assigned to the expression 'subsidiary legislation' in the Interpretation Act, then it would mean that the Act was validating something which was already validly done and could not validate what was not validly done. This was absurd and such exercise in futility could not be attributed to Parliament.

Therefore, the expression 'every subsidiary legislation' in section 9(1) of the Act was not intended to include a 'general species',

but was limited to a particular kind. This expression is amply qualified by the words 'whatsoever made of purporting to have been made under the Emergency (Essential Powers) Ordinance 1969 on or after 20 February 1971'. This qualifying phrase clearly shows that Parliament did not intend to import the definition of 'subsidiary legislation' in the Interpretation Act into the section. The qualifying phrase refers to all regulations made or purported to have been made under the Emergency (Essential Powers) Ordinance 1969, being regulations which were struck down by the Privy Council in *Teh Cheng Poh* [1979] 2 MLJ 238. These regulations must necessarily include the Essential Security Cases Regulations which were therefore validated by section 9(1) of the Act.

In the case of *Hajjah Halimatussaadiah bte Haji Kamaruddin v Public Services Commission, Malaysia* [1994] 3 MLJ 61. a departmental circular laid down dress code for civil servants. Women officers were prohibited from wearing *purdah* so as to cover their face while on duty. A woman officer was dismissed for not obeying the circular. She challenged the circular under Article 11 (1) of the Constitution which guarantees freedom of religion, but the Supreme Court rejected the argument saying that the circular did not affect her constitutional right to practice her religion.

Last but not least, the courts exercise control over subsidiary legislation on the ground that subsidiary legislation can be challenged before the courts if it is *ultra vires* the parent Act, i.e., it goes beyond the powers conferred by the parent Act on the concerned authority making delegated legislation. The chances of success in such challenge depend essentially on the terms of the parent Act, as interpreted by court (Anthony Wilfred, 2007). Delegated legislation should not travel beyond the purview of the parent Act; if it does, it is *ultra vires* and cannot be given any effect. Such a challenge can be sustained either when delegated legislation goes beyond the scope of the authority conferred by the parent statute, which is known as substantive *ultra vires*, or when the prescribed procedure is not complied with while making delegated legislation, and this known as procedural *ultra vires*.

a) Substantive *ultra vires*

Substantive *ultra vires* refers to the scope, extent and range of power conferred by the statute to make subsidiary legislation. It is based on the principle that, the Parliament owns the legislative power and any other subordinate agency has no power to legislate any law. Any other subordinate agency may only have the power to legislate if the legislative power is conferred thereon by Parliament making law. However, the limit of the power must not be crossed, if power is conferred to legislate only with respect to certain topics or certain purposes or in certain circumstances. The validation of the delegated legislation if the subordinate agency legislate any within the bounds of the power delegated. In the case of *McEldowney v Forde* [1969] 2 ALL ER 1039, Lord Diplock pointed out the validity of subordinate legislation is challenged:

- i. To determine the meaning of the words used in the parent Act itself to describe the subordinate legislation which the delegate is authorized to make.
- ii. To determine the meaning of the subordinate legislation itself
- iii. To decide whether the subordinate legislation complies with that description.

In *Wong Pot Heng v Kerajaan Malaysia*, Eusuff Chin J has phrased the doctrine of *ultra vires* as:

“There is also no doubt whatsoever that the courts have jurisdiction to declare invalid a delegated legislation if in making it, the person or body to whom the power is delegated to make the rules or regulations, acted outside the legislative powers conferred on him or it by the Act of Parliament under which the rules or regulations were purported to have been made.”

The efficacy of judicial review of delegated legislation on substantive grounds depends upon how broad the statutory formula conferring power of delegated legislation on the administration is. The efficacy of the doctrine of *ultra vires* is very much eroded if the power is delegated by the statute in very broad and general terms. The broader the powers delegated, lesser chance of control for the court.

In Malaysia, section 25 of the Interpretation Act provides that subsidiary legislation shall be deemed to be made under ‘all powers thereunto enabling, whether or not it purports to be made under in exercise of any particular power or powers (Wu Min Aun, 1975). A broad dimension to the validity of legislation has been given by this provision’. However, section 28 of the aforementioned Act, lays down the principle, when a statute is repealed either wholly or partly, subsidiary legislation made under the repealed law remains in force under the new law so far as the former is consistent with the latter until such time it is revoked or replaced by subsidiary legislation made under the repealing law. This provision covers the gap between the repealing of a law and making subsidiary legislation under the new law which may take some time. In the case of *Re Lee Kian Soo* [1953] MLJ 195, paragraph 8(1)(b) of the Architect Ordinance 1941 empowered the Board of Architects, after due inquiry, to strike an architect’s name off the register if he was ‘guilty of any act or conduct’ which in the Board’s opinion was ‘infamous in any professional respect’. Bye-law 13 of the Architects Bye-Law 1941 laid down what was misconduct on the part of an architect. The bye-law then went on to say that every misconduct would be ‘deemed to be conduct which is infamous in a professional respect under section 8’. This part of the bye-law was declared bad in the instant case on the ground that it was inconsistent with section 8. In that particular section, the legislature said in clear terms that whether professional misconduct was to be stigmatized as ‘infamous’ or not was for the Board to decide after inquiry, by applying the quasi judicial function. The board must form its opinion based on the facts of each particular case. But, what bye-law 13 purported to do was to settle by legislation the question of what was ‘infamous’ regardless of the facts of each case and thus prevent the Board

sitting in its disciplinary capacity from forming an opinion of its own. The bye-law deprived the Board of the power to form its opinion in its disciplinary capacity, whether the person’s conduct was ‘infamous’ or not and, therefore, bye-law 13 was held to be in conflict with section 8.

b) Procedural *ultra vires*

Subsidiary legislation may be challenged on the ground of procedural *ultra vires*. The parent statute may lay down certain procedures for the subordinate legislator to follow while making subsidiary legislation. If the subsidiary legislator fails to follow those procedures, it may result in making the subsidiary legislation *ultra vires*. However, the court will determine whether the procedural requirement is mandatory or directory. When mandatory procedural norm is not complied with, the subsidiary legislation will be found as *ultra vires*, but it is not *ultra vires* if the procedure is only directory. In *Wong Keng Sam v Pritam Singh Brar* [1968] 2 MLJ 158, Wee Chong Jin CJ stated that the disobedience of a directory procedural rule only results in an irregularity not affecting the validity of the subsidiary legislation made.

Generally, in the case of *Banwarilal Agarwalla v State of Bihar* [1961] AIR 849, the courts tend to treat a procedural norm requiring consultation with a specific body as mandatory. When, a statute says that the rule-making authority shall refer the draft rules to a statutory body and seek its advice as to the expediency or suitability of the proposed rules before finalizing them, the rules made without observing the procedure are *ultra vires*. In the same category falls the procedure seeking to provide an opportunity to the effected persons to file objections against any proposed measure. A requirement for pre-publication of draft rules is regarded as mandatory and the prescribed mode of pre-publication has to be adopted substantially by the rule-making authority concerned.

IV. CONCLUSION

Delegated or subsidiary legislation is an inevitable feature of modern government. If the Parliament attempted to enact all laws by itself, the legislative machine would break down, unless there was a radical alteration in the procedure for considering the Bills. The granting of legislative power to a department which is administering a public service may obviate the need for amending Bills. Section 3 of the Interpretation Act 1948 and 1967, subsidiary legislation is defined as meaning ‘any proclamation, rule, regulation, order, notification, bye-law, or other instrument made under any Act, Enactment, Ordinance or other lawful authority and having legislative effect’.

There are two grounds where the subsidiary legislation may be challenged before the court. First and foremost, a question may arise as to whether the parent statute which delegates the power of subsidiary legislation is itself constitutional or not. If the statute is unconstitutional then it is *non est*, and, therefore, it cannot be the source of any delegated legislation which will then

automatically fall to the ground. For this purpose, reference has to be made to judicial review under the Constitutional Law. Last but not least, the courts exercise control over subsidiary legislation on the ground that subsidiary legislation can be challenged before the courts if it is *ultra vires* the parent Act.

Substantive *ultra vires* refers to the scope, extent and range of power conferred by the statute to make subsidiary legislation. It is based on the principle that, the Parliament owns the legislative power and any other subordinate agency has no power to legislate any law. However, if the subsidiary legislator fails to follow the procedures in legislation making process, it may result in making the subsidiary legislation *ultra vires*.

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