

PUBLIC AUTHORITIES & THEIR PROCEDURES IN MALAYSIA: 1977—1981

1

The modern state is an administrative state. With the demise of the *laissez faire*, the state has assumed a very activist role. The state is called upon to undertake varied activities and functions to promote the socio-economic welfare of the people. This leads to an expansion of administrative process in the country. To meet the various demands made on it, the state establishes, from time to time, new and diverse public authorities, and lays down new administrative procedures, because most of the newly developing activities cannot be performed effectively through the traditional government departmental structure. Consequently, a large number of public authorities have already been established in Malaysia,¹ and many more are bound to be created in course of time. The creation of public authorities is a continuing process.

From a conceptual point of view, the powers exercised by these bodies can be labelled as administrative, legislative and quasi-judicial. From a functional point of view, the tasks performed by the various bodies may be characterised as regulatory, licensing, developmental, running of government undertakings, maintaining discipline among various professions, managing certain governmental activities etc. To achieve the objectives with which these bodies are established, they may have a variety of powers at their disposal: they may make regulations; undertake adjudication of disputes between individuals *inter se*, or between an individual and a government agency; they issue or cancel licences, grant or refuse permissions for various purposes, conduct inquiries and investigations, have the power to search and seize and so on. Some of these bodies may be set up directly by statutes; some under subsidiary legislation and some under administrative decisions without any statutory base.² These bodies use a variety of procedures for exercising their powers and discharging their obligations. These procedures may be prescribed by the parent statutes; and/or through delegated legislation; and/or developed through their own administrative practices over a period of time as a result of practical and functional experience.

¹For a brief description of some of these bodies see Jain, *Administrative Law of Malaysia and Singapore*, 152-170 (1980).

²In this paper, no reference is being made to such bodies as have been created under administrative decisions. A 'public authority' is defined in Art. 160(2) of the Malaysian Constitution, viz. "a statutory authority exercising powers vested in it by Federal or State law" or any "authority" appointed by or acting on behalf of the government. According to judicial interpretation of Art. 160 in *Merdeka*

At the present-day, much of the life of an individual is affected by the functioning of the public authorities. He comes in contact with different bodies, for different purposes. Accordingly, it is necessary for him to know what are the powers of the body with which he is dealing at a particular moment. It is therefore essential that a comprehensive study be made of the various public authorities in Malaysia, their powers and their procedures. To have a full picture of the administrative process in a country, it is extremely necessary to focus attention on the organization, structure and functioning of the various public authorities, tasks being performed by them and the procedures being followed by them in arriving at their decisions, affecting individual rights and interests, and in determining individual claims and controversies. Not only are the organization, powers and functions of these bodies important for the individual but their procedures are equally important. A good administrative procedure may produce a good administrative decision. It is much better to reach a good decision rather than later on seek to quash a bad decision. Many a time, the only safeguard available to an individual and his rights may only be in the due administrative procedures. In the U.S.A., a great emphasis is laid on administrative procedures. For this purpose, the Administrative Procedure Act has been enacted laying down minimum procedural norms for discharge of various functions by the administration.³ There is also the all important question of controls over the various authorities which seek to affect the rights and interests of the individual. Parliament's control of these bodies is minimal. Most of these authorities are under the administrative control of the executive. Any action of such an authority which falls outside the parameters of the powers conferred on it by law would be *ultra vires*. But to effectively apply the doctrine of *ultra vires* to such a body, one must have an idea of the substantive and procedural restrictions which may have been placed by law and regulations on the body concerned.

II

This paper purports to study briefly the public authorities established

University Bhd. v. Government of Malaysia [1981] 2 M.L.J. 356, [1982] 2 M.L.J. 243 (F.C.), for a body to constitute an 'authority', it must be a statutory body and there must be some public element and utility in its constitution, operation, functions, powers and duties. This means that it is subject to some degree of public control in its affairs. To be a public authority there are two tests (according to the first limb of the definition): (1) it is established by Federal or State law, and (b) whether the powers exercisable by it are vested in it by Federal or State law. This paper conforms mainly with this concept of public authorities and, thus, deals with statutory bodies. However, for purposes of administrative law and process, such authorities as are established purely under administrative decisions and without a statutory base cannot be ignored. They may be regarded as 'public authorities' under the second limb of the definition in Art. 160(2). The author hopes that such authorities will be included in the proposed full-fledged study as mentioned below in note 3a.

³See, Jain, *op. cit.*, 11, 27, 115, 123-4, 209, 216, 228, 230-1, 247, 249, 252, 376. Also see, Robinson, *The Administrative Process*, 33 (1960).

in Malaysia during the five year period from 1977 to 1981^{3a}. These authorities have been arranged from a functional point of view in the following seven categories:

- i) Disciplinary;
- ii) Managerial;
- iii) Licensing;
- iv) Regulatory;
- v) Developmental;
- vi) Adjudicatory or tribunals; and
- vii) Public Enterprises.

It is difficult to have a neat classification of these bodies because many a time the functions of an authority fall under more than one head. A disciplinary body has some adjudicatory powers as well. A body having power to issue licences is regulatory also and may also have adjudicatory functions as well. The authorities are classified here taking their dominant function into account.

III Disciplinary Bodies

Malaysia already has a number of statutory professional bodies regulating several professions so as to maintain professional standards and ethics and discipline amongst the practitioners of the concerned profession.⁴ Several more bodies have been added to this list during the period under survey. These professional bodies perform two main functions: (1) to control entrance into the concerned profession; and (2) to enforce the standards of practice among licensed practitioners of the concerned profession.

The Hospital Assistants (Registration) Act, 1977⁵ seeks to regulate the profession of hospital assistants. The Act provides for the registration of the hospital assistants, and, for this purpose, the Hospital Assistants (Registration) Board has been established. The Board consists of a Chairman, a Secretary and such other members as the Minister may determine. The Director-General of Health is the Chairman and he presides at all meetings of the Board at which he is present.⁶ The Chief Hospital Assistant in the Ministry of Health is the Secretary of the Board.⁷ Other

^{3a}This paper is part of a bigger project being undertaken by the author titled "Public Authorities in Malaysia". In this paper, reference is being made only to the legislation newly enacted during the period 1977-81, and not to the revised statutes issued during the period.

⁴For example, Bar Council enforces discipline amongst professional lawyers, see, Jain, *op. cit.*, 159-60. There are *inter alia* the following disciplinary bodies: Board of Surveyors, Board of Engineers, Malaysian Medical Council, Malaysian Dental Council.

⁵Act 180.

⁶Ss. 3(1), (2), (3), 4(1).

⁷Ss. 3(2), (3).

Members of the Board are appointed by the Minister for specified terms and the Minister can, at any time, and without assigning any reason therefor, revoke the appointment of any such member.⁸ It remains a moot point whether such a member can claim natural justice before he is removed. Ordinarily, according to the principles of Administrative Law, he should be able to claim natural justice.⁹

The Board has to maintain a register of hospital assistants.¹⁰ The Director-General of Health actually maintains the register on behalf of the Board.¹¹ No un-registered person is to be employed as a hospital assistant in government or private hospital or clinic.¹² A person having the necessary qualifications¹³ may apply to the Board for registration but the Board may refuse to register any person if it so deems fit.¹⁴ The person aggrieved by the Board's decision can appeal to the Minister whose decision is 'final'.¹⁵

The Board is empowered to remove the name of any person from the register on the following grounds: (1) death; (2) non-availability of his address in Malaysia; (3) non-renewal of his certificate of registration; (4) if in the opinion of the Board he is guilty of improper conduct; (5) supply of fraudulent or incorrect information to the Board; (6) if registered through an error as regards his qualification for registration; (7) if he is of unsound mind or by reason of some other infirmity is, in the opinion of the Board, not a fit person to remain on the register; (8) an undischarged bankrupt; (9) has been found guilty of an offence which, in the Board's opinion, renders him unfit to remain on the register; (10) has been found guilty of an offence under this Act.¹⁶ This is a significant power as it may affect the livelihood of the person concerned because any one whose name is removed from the register will not be able to function as a hospital assistant. Through this power, the Board is able to maintain discipline amongst the hospital assistants and to ensure that they do not indulge in any improper conduct. As a safeguard, the Act provides that the Board shall not remove the name of any person from the register without giving him an opportunity to be heard personally or through a lawyer. This means that the Board has to hold an oral hearing before the name of a hospital assis-

⁸Ss. 3(2), (4) & (5).

⁹See, Jain, *op. cit.*, 175 *et seq.*

¹⁰S. 6(1).

¹¹S. 6(2).

¹²S. 7(1).

¹³These qualifications are: Passing the prescribed examinations; successfully completing a prescribed course of training in an institution approved by the Board.

¹⁴S. 9(2).

¹⁵S. 9(3).

¹⁶S. 14(1).

tant is removed from the register, and the person aggrieved has a right of being represented at such an inquiry through a lawyer.¹⁷ In this connection, it may be noted that there is no rule of natural justice compulsorily requiring an 'oral' hearing and representation through a lawyer. Ordinarily, the courts in Malaysia are quite reluctant to concede either an oral hearing or legal representation as a part of natural justice. Reference may be made in this connection to such cases as *Najar Singh*¹⁸ and *Mahadevan v Anandarajan*.¹⁹

Does the Board give a reasoned decision? There is no specific rule to this effect either in natural justice²⁰ or in the concerned statute, though the provision for appeal from the Board's decision to the Minister would appear to make it necessary for the Board to give a reasoned decision. Wherever there exists a provision for appeal from one authority to the other authority, a duty of giving a reasoned decision on the lower authority can be implied by the courts, because in the absence of reasons, appellate function cannot be properly discharged and the appeal provision would be reduced to a facade.

In the disciplinary hearings by the professional bodies, the courts insist upon on a fairly high standard of natural justice. Reference may be made in this connection to a Singapore case *Tan Boon Chee, David v. Medical Council of Singapore*,²¹ which is of great persuasive value in Malaysia. Certain charges of infamous conduct were held established by the Medical Council against the appellant, a registered medical practitioner. The appellant appeared before the Council at a hearing of the charges; he was represented by a counsel, and witnesses were examined by both sides. The inquiry was held over two days and the Council suspended him from practice for nine months. However, on appeal, the court quashed the Council's order because of failure of natural justice insofar as not all members of the Medical Council who were present at the start of the inquiry were present throughout the hearing. Some who were present on the first day were absent on the second day. Some who attended on the second day were absent on the first day of the inquiry. Furthermore, on both days, members of the Council were walking in and out of the inquiry as and when they liked while evidence of witnesses was being recorded. Thus, some of the members of the Council who took part in its determination did not hear the full evidence and all submissions made. The court (Choor Singh J.) said that this procedure "shocked my sense of justice" and amounted to a "glaring" breach of natural justice. The court laid down the principle as follows:

¹⁷For principles of natural justice see, M.P. Jain, *supra*, note 1 at 201 *et seq.*

¹⁸*Najar Singh v. Govt. of Malaysia*, [1974] 1 M.L.J. 138.

¹⁹[1974] 1 M.L.J. 1. Also see, M.P. Jain, *supra*, note 1 at 209-214 and 231-236.

²⁰Jain, *supra*, note 1, at 229-231.

²¹[1980] 2 M.L.J. 116. For Malaysia, see, *Lim Ko v. Board of Architects*, [1966] 2 M.L.J. 80.

"A person who has not seen and heard a witness is as a rule quite incapable of estimating the value of his evidence."

The court emphasized that the council has tremendous power which may mar a man's professional career and such grave responsibility should not be exercised in a 'lighthearted or slipshod manner'. The court also ruled that a rule of natural justice which goes to the very basis of **judicature** cannot be waived. Thus, although the appellant was present with his lawyer at the hearing and he did not raise any objection there and then to the procedure being followed at the inquiry he was not disentitled from raising the objection in appeal. The case thus lays down that in an inquiry against a professional person, there must be an oral hearing; witnesses have to be examined for and against the concerned person and that every member of the inquiry body must be present to hear each and every witness and he must himself estimate the value of the evidence tendered by a witness. This idea is expressed by the maxim "one who hears must decide,"^{21a} i.e. the hearing and the decisional functions cannot be separated. The reason for this high standard of natural justice is that the consequences to the professional person as regards his reputation and livelihood may be very serious as a result of the inquiry.

In another case, *Keith Sellar v. Lee Swang*,²² the Federal Court of Malaysia has ruled that a high standard of proof is needed to hold a person guilty of professional misconduct. A body of professional men sitting in judgment of a colleague should not be "content to condemn on a mere balance of probabilities."²³

An appeal against the decision of the board cancelling registration of a hospital assistant lies to the Minister. The decision of the Minister is declared to be 'final'. Nothing has been said in the Act as regards the procedure to be followed by the Minister in disposing of the appeal and this appears to be a lacuna in the Act. While natural justice is ensured in the case of proceedings by the board in the matter of cancellation of registration, the Act is silent as regards the procedure to be followed by the Minister in disposing of the appeal against the decision of the Board. Presumably, the Minister has to follow natural justice in exercising this jurisdiction but the question is whether he is bound to hold an oral hearing. In view of the consequences to the individual concerned, the Minister should also be required to hold an oral hearing. As regards hearing of appeals by the Minister, the only provisions made by the Act are Sections 17 and 18, the main features of which are: (1) Appeal is to be filed to the Minister within

^{21a}It appears that in this case, hearing was held by the entire Medical Council. It is quite possible for a body like the Council (which is usually a large body) to delegate the hearing function to a small committee and then itself consider the entire record of hearing (evidence and submissions) and arrive at a decision. See *Jeffs v New Zealand Dairy Production and Marketing Board* [1967] 1 AC 551.

²²[1980] 2 M.L.J. 191. This was a case under the Legal Profession Act, 1976. Two senior members of the legal profession were suspended by the disciplinary committee for 12 months. They challenged the decision, *inter alia*, on the ground that the disciplinary committee had not adopted the correct burden of proof required in the proceeding before it.

²³Following *Bhandari's* case [1956] 3 All E.R. 742, and *Au Kong Weng v. Bar Committee, State of Pahang*, [1980] 2 M.L.J. 89.

a month of the making of the decision appealed against; (2) the Minister may confirm, set aside or vary the decision appealed against; (3) Minister's decision is final.

One thing more. Whenever there is an appeal to the Minister, his decision is declared to be 'final'. It is now conclusively established that a 'finality' clause does not bar judicial review of the relevant decision on application for *certiorari* on the ground of "jurisdictional error". It may also be noted that the courts take an expansive view of the concept of "jurisdictional error" rather than a narrow view thereof. It thus means that to say that a decision is "final" does not make it judge-proof in all cases.²⁴

The power to make regulations under the Act has been conferred on the Minister.²⁵ He may make regulations for the "better carrying out of the provisions of the Act". This is a very broad power to make subsidiary legislation. Under this regulation-making power, the Minister has promulgated the Hospital Assistants (Registration) Regulations, 1979.²⁶ A significant power given to the Hospital Assistant (Registration) Board, as noted above, is to remove the name of any person from the register of hospital assistants on certain specified grounds. As a safeguard, the Act provides for giving of an opportunity of being heard to the person concerned before removal of his name. The regulations articulate the hearing procedure further by providing for a notice. Where the Board proposes to hold a hearing under section 14(3) in connection with the question of removing of the name of a hospital assistant from the register, the Board has to serve on the person concerned, at least one month before the date of hearing, a notice in Form 6 of the Second Schedule.²⁷ In this notice, the reasons for the proposed removal of the name are to be mentioned. This provision is of a declaratory nature because an adequate notice is the *sine qua non* of the hearing procedure.²⁸

Another professional disciplinary body established during the survey period is the Board of Valuers and Appraisers.²⁹ The Valuers and Appraisers Act, 1981, provides for the registration of the valuers and appraisers. The Act makes provisions for appointment, within the Ministry of Finance, of the Director-General of Valuation and Property Services, Deputy Directors General, Directors and other officers needed to administer the Act. The main function of the Director-General will be to undertake valuation of property (moveable and immoveable) on the request of the Central Government, State Government, local authority, or a statutory

²⁴*South East Asia Fire Bricks Sdn. Bhd. v. Non-Metallic Mineral Products Mfg. Employees Union* [1980] 2 M.L.J. 165. For comments on the case by the author see [1980] *Survey of Malaysian Law (SML)* 101-109. Also see *Attorney General v. Ryan*, [1980] 2 W.L.R. 143. The *South East Asia* ruling has been applied in a number of cases. See [1981] *SML* 68-80; [1982] *SML* 70-73.

²⁵S. 22.

²⁶P.U. (A) 185/1979.

²⁷Regulation 18.

²⁸M.P. Jain, *supra*, note 1, at 204-209.

²⁹Act 242.

body. For this purpose, the officers authorised by the Director-General can enter at all reasonable hours into any building or premises and inspect the same without liability for trespass. The Director-General can with the approval of the Minister, delegate any of his powers and functions to any officer under his administrative control. The rule-making power vests in the Minister.

The Act provides for establishment of the Board of Valuers and Appraisers consisting of the Director-General, *ex-officio*; four valuers in public service, four valuers nominated by the Institution of Surveyors or other professional body recognised by the Board and one member nominated by the Board of Surveyors functioning under the Registration of Surveyors Act, 1967³⁰. The Board is to keep and maintain a Register of Valuers and Appraisers, to register these professionals, determine and regulate the professional conduct and ethics of valuers and appraisers, and hold disciplinary proceedings against them.³¹ The Board appoints a Register of Valuers and Appraisers with the approval of the Minister.³² No one can act as a valuer or appraiser without being registered with the Board. The Board can cancel or suspend the registration of a valuer or appraiser or admonish him under the following circumstances:³³ (1) conviction of an offence involving fraud, or dishonesty or moral turpitude; (2) obtaining registration by fraud or misrepresentation; (3) his qualification has been withdrawn or cancelled; (4) failure to comply with any provision of the Act or the rules made thereunder; (5) non-observance of restrictions subject to which he is registered; (6) repeated refusal or neglect to comply with any order of the Board; (7) found guilty by the Board of any professional misconduct or any infamous or disgraceful act or conduct.

The Board cannot make any such order unless there has been a hearing before not less than $\frac{2}{3}$ of the total members of the board and an opportunity of being heard 'with or without the assistance of counsel' has been given to the concerned person facing disciplinary action. The clause does not appear to give any discretion to the Board whether or not to permit legal representation to the concerned person. It appears to leave it to the choice of the concerned person whether to be represented through a lawyer or not. In view of the serious consequences which the professional person may have to face, this appears to be the only plausible interpretation. An appeal against the Board's decision lies to an Appeal Board consisting of a person qualified to be appointed as a High Court Judge (as Chairman) to be appointed by the Yang diPertuan Agong (after consultation with the Lord President), and two other persons also appointed by the Yang diPertuan Agong. The Appeal Board decides the appeal after hearing and can

³⁰S. 9.

³¹S. 10.

³²S. 15.

³³S. 24.

determine its own procedure at its discretion.³⁴ The decision of the Appeal Board is 'final'.³⁵

Though the Hospital Assistants (Registration) Board (HAB) and the Board of Valuers and Appraisers (BVA) discharge more or less similar functions, viz., maintaining discipline amongst the concerned professionals, in at least two respects there are obvious differences between them — (1) in case of the BVA, hearing is to be held before at least $\frac{2}{3}$ of its members while no such condition has been imposed in the case of HAB; (2) while an appeal from the BVA lies to an autonomous body which is more or less like a tribunal, in case of the HAB, appeal lies to the Minister. In all these respects, therefore, a valuer has better safeguards available to him than an hospital assistant. Why should there be such differences between the bodies discharging similar functions is really quite hard to explain.

IV

Managerial Bodies

The Statutory and Local Authorities Superannuation Fund Board was established to manage and maintain the Superannuation Fund. The Statutory and Local Authorities Superannuation Fund Act, 1977³⁶ laid down the power and procedure to be followed by the Board. The Board was to be a body corporate. The Board had to submit an annual report to the Minister which was then to be laid by him on the table of each House of Parliament. The Board had been given power to make regulations, with the approval of the Minister, for purposes of carrying out or giving effect to the provisions of the Act.

In 1980, the Act was amended and instead of the Board the Pensions Authority was substituted. The Director-General of Public Services (or any officer authorised by him in writing to act on his behalf) is the Pensions Authority.³⁷ The effect of this change is to transfer the function in question from an autonomous body to a department official.

The Malaysian Examinations Council has been created by the Malaysian Examinations Council Act, 1980.³⁸ This body is composed of —

- (a) Vice-Chancellors of the Universities;³⁹
- (b) the Secretary General of the Ministry of Education;

³⁴Ss. 28, 29

³⁵S. 29(6)

³⁶Act 185.

³⁷Act A496.

³⁸Act 225.

³⁹The Minister of Education can appoint an alternate member for a Vice-Chancellor on the recommendation of the concerned Vice-Chancellor.

- (c) the Director General of Education;
- (d) the Controller of Examinations, and
- (e) five members to be appointed by the Yang di-Pertuan Agong.⁴⁰

One of Vice-Chancellors is to be appointed as the Chairman of the Council by the Yang di-Pertuan Agong for a period not exceeding 3 years, but he may be re-appointed.⁴¹ The Council has been charged with the duty to conduct specified examinations and to do all necessary or incidental matters, including —

- (a) the preparation and publication of examination syllabuses;
- (b) the preparation of examination papers;
- (c) the admission or enrolment of candidates; and
- (d) the award of certificates.⁴²

The Council may collaborate with any person, body, organisation, institution or authority in or outside Malaysia in the conduct of examinations.⁴³

The Council has the 'prerogative' of awarding and withdrawing certificates, withholding and cancelling results of any candidate and barring any person from taking the examination.⁴⁴ The use of the word 'prerogative' in this provision may be taken note of. Usually, according to the principles of administrative law, before a degree is withdrawn or result is cancelled, the affected person is entitled to natural justice.⁴⁵ Does the use of the word "prerogative" suggest that the Council may take such an action without giving a hearing to the concerned person or being otherwise subject to judicial control in any way? It may be of interest to note that there was a time in England when the courts did take the view that no hearing was needed to be given when administrative action to withdraw 'privilege' was being taken.⁴⁶ But this view is no longer tenable. The trend has undergone a change since the celebrated case of *Ridge v. Baldwin*.⁴⁷ The Court of Appeal in England has ruled in *Laker Airways*⁴⁸ that the government's prerogative power being discretionary power, it must be sub-

⁴⁰Provisions have been made in the Second Schedule to the Act regarding the appointed members.

⁴¹S. 4(2) and (3).

⁴²S. 7(1).

⁴³S. 7(2).

⁴⁴S. 9.

⁴⁵See M.P. Jain, *supra*, note 1, 175-200 (1980). Also, *Board of High School v. Ghanshyam*, AIR 1962 SC 1110; *Board of High School & Intermediate Exams v. Chitra*, AIR 1970 SC 1039.

⁴⁶*Nakkuda Ali v. Jayaratne* [1951] A.C. 66.

⁴⁷[1964] A.C. 40.

⁴⁸*Laker Airways v. Dept. of Trade*, [1977] 2 All E.R. 182. Also see Jain, *op. cit.*, 305.

ject to judicial control just like any other discretionary power. In the U.S.A. also, the view is now held that natural justice is to be provided to a person even when a benefit conferred on him is being withdrawn.⁴⁹ The dichotomy between 'right' and 'benefit' has been very much reduced in the present-day Administrative Law.⁵⁰

The Council has to appoint a standing finance committee to regulate and control its finances. The Council may appoint such other committees as it thinks necessary to perform such of its functions as may be delegated to them by it. A Committee may appoint sub-committees with the Council's approval.^{50a}

A Fund consisting of all money and property receivable by the Council is to be set up which is to be administered and controlled by the Council.⁵¹ The Council is to submit to the Minister (of Education) estimates of its income and expenditure. The Minister has power to disallow, alter, modify or add any item in such estimate.⁵² The Council is required to keep proper accounts.⁵³ The Accounts are to be audited annually and a copy of the audited accounts are to be submitted to the Minister. The Minister must table the audited accounts in each House of Parliament.⁵⁴

The Council is to submit to the Minister an annual report dealing with its activities during the preceding year and containing such information relating to its proceedings and policy as the Minister may require. This report is to be tabled in Parliament.⁵⁵

The Council is responsible to the Minister. He may from time to time give to it directions of a general character not inconsistent with the Act. The Council is bound to give effect to these directions.⁵⁶ The Minister may at any time appoint a Committee of Enquiry to investigate into the affairs of the Council, and such Committee is to submit its report to the

⁴⁹See *Goldberg v. Kelly*, 397 U.S. 254 (1970). It is a landmark case of the U.S. Supreme Court. The court held that *public assistance payments* to an individual could not be terminated without a hearing as these were statutory benefits and not mere privileges. *Goldberg* is regarded as the watershed in the law of administrative procedure in the U.S.A. and subsequent cases have extended the hearing procedure to virtually all privilege cases. Schwartz observes: "the privilege-right dichotomy is in the process of being completely eroded", *Adm. Law*, 230 (1976).

⁵⁰Jain, *op. cit.*, 180; de Smith, *Jud. Rev. of Adm. Action*, 188-9, 389-92 (Fourth ed). In India also, the position is the same as in the U.S.A. see *Ramana v. International Airport Authority*, AIR 1979 SC 1628.

^{50a}S. 11.

⁵¹S. 17.

⁵²S. 18.

⁵³S. 19(1).

⁵⁴S. 19(4).

⁵⁵S. 20.

⁵⁶S. 21.

Minister.⁵⁷ The Council may, with the approval of the Minister, make rules with respect to the prescribed matters.⁵⁸

The Public Authorities Protection Act, 1948 is to apply to any action, suit, prosecution, etc. against the Council.⁵⁹ The Council is to be a corporation having perpetual succession and a common seal. It may sue and be sued in its name and, subject to and for the purposes of the Act, may enter into contracts, hold and deal in property. These are routine provisions to be found in statutes creating public authorities.⁶⁰

The Public Trustee Act, 1981⁶¹ provides for the appointment of a Public Trustee and a Public Trustee Investment Board. The Social and Welfare Services Lotteries Board Act⁶² provides for the establishment of a Board to promote public lotteries for social and welfare purposes. It is for the Minister to permit the Board from time to time to promote a public lottery. Every such order made by the Minister for Social Welfare is to be published in the gazette and the Minister can revoke or amend any order made by him.

V

Licensing Bodies

The Theatres and Places of Public Amusement (Federal Territory) Act, 1977⁶³ provides for a licensing system of the theatres and places of public amusement in the Federal Territory with a view to ensure better control of such places. For this purpose, a licensing officer is to be appointed by the Minister who functions under the general directions given to him by the Minister.⁶⁴ The licensing officer grants a licence on such conditions as may be specified in the licence. He may refuse to grant the licence if the theatre or the place of public amusement is likely to lead to a breach of peace, cause obstruction or annoyance to the residents in the locality; or if any performance therein is likely to be dangerous, indecent, immoral or improper in nature, or is likely to endanger human life; or if it is likely to be detrimental to the national interest.⁶⁵ The licensing officer may cancel any licence at any time if there is a breach of any condition of the licence or any act in contravention of any written law relating to control

⁵⁷S. 21.

⁵⁸S. 31.

⁵⁹S. 24.

⁶⁰S. 3.

⁶¹Act 247.

⁶²Act 252.

⁶³Act 182.

⁶⁴Ss. 3 and 4.

⁶⁵S. 6(4).

of buildings; or if any such circumstance has arisen on which he can refuse to grant the licence.⁶⁶ The licensing officer may demand a security from a licensee for the due performance of the conditions of the licence.⁶⁷ Any person who is refused a licence, or whose licence is cancelled, may within one month appeal to the Minister whose decision is 'final'.

The Act is silent as regards the procedure to be followed by the licensing officer in cancelling the licence, or by the Minister in disposing of the appeals. Presumably principles of natural justice are to be followed by both these officers in discharging these functions. In a number of cases in Malaysia, the Courts have clarified the position that cancellation of a licence is a quasi-judicial act and the licensee has to be afforded an opportunity of being heard before his licence can be cancelled.⁶⁸ The reason is that cancellation of a licence may cause great financial loss to the licensee.

The licensing officer or any officer authorised by him in writing may without warrant enter any premises where any performance is being held to ascertain whether the provisions of the Act or the licence are being complied with.⁶⁹ Such an officer has powers of search and seizure. He can enter any premises where any theatrical performance or public amusement is being held or is intended to be held with a view to ascertain whether provisions of this Act or any rules made thereunder or the conditions of any licence are being complied with.⁷⁰ If he has reason to believe that any offence under the Act or the rules has been committed, he may search any place or any person whom he reasonably believes to be concerned in the management.⁷¹ He may seize any document or any other thing which he reasonably believes to be or to contain evidence relating to an offence under the Act.⁷² He can close any theatre which he is satisfied is kept open in contravention of the Act, rules or conditions of the licence.⁷³ This power again, it is presumed, is to be exercised subject to natural justice.

The Private Employment Agencies Act, 1981⁷⁴ is enacted to regulate private employment agencies. Each such employment agency is to be licens-

⁶⁶S. 8(t).

⁶⁷S. 9.

⁶⁸*Ketua Pengarah Kasiam v. Ho Kwan Seng*, [1977] 2 M.L.J. 152; *Sarawak Electricity Supply Corporation v. Wong Ah Suan*, [1980] 1 M.L.J. 65; *Wong Ah Suan v. Sarawak E.S. Corp.*, [1982] 2 M.L.J. 89; [1981] SML 53 et seq.; [1982] SML 38; Jain, *supra*, note 1, 202.

⁶⁹S. 12.

⁷⁰S. 12.

⁷¹S. 14.

⁷²S. 15.

⁷³S. 16.

⁷⁴Act 246.

ed by the Director-General of Manpower.⁷⁵ No person can operate an employment agency without such a licence. To protect job seekers, the Act further provides that every agency places with the Director-General two bonds — cash and surety. The licence is to be renewed every year. The licence can be cancelled on the following grounds: (1) if the licensee contravenes any provision of the Act or any regulation made thereunder; or (2) he has been convicted of an offence under this Act; or (3) he has not complied with any direction issued by the Director-General to the licensee under this Act; or (4) he has supplied any particulars which he knows to be wrong or false.⁷⁶

Before cancelling the licence, an opportunity has to be given to the licensee to show cause. He has to give to the licensee two weeks' notice of the intended cancellation of the licence, stating the grounds thereof.⁷⁷ An appeal lies from the Director-General to the Minister whose decision is final. The time-limit for filing the appeal is thirty days from the notification of the Director-General's decision.

The Act also sets the maximum registration and placement fees that these agencies can charge. Each agency is required to keep a record of registration containing complete particulars like names and qualifications of the job-seekers. An agency is also required to keep a record of vacancies. The Director-General is empowered to request an agency to send all records and other particulars relating to changes in the agency set-up.

VI

Regulatory Bodies

The Wages Councils Act,⁷⁹ provides for the establishment of the Wages Council for the regulation of the remuneration and conditions of employment of workers in certain circumstances. The Minister may appoint a Wages Council if he is of the opinion that no adequate machinery exists for the effective regulation of the remuneration or conditions of employment of specified workers. The Minister has power to make regulations. These regulations as well as the order establishing the Wages Council are subjected to parliamentary supervision in so far as — (i) they are to be laid before the House of Representatives; and (ii) the House, within 40 days, may resolve that the regulation or the order be annulled. Thereupon, the regulation or the order will become void. This is an example of the

⁷⁵A licence fee of \$25 is charged. Besides, an applicant for licence must place a cash bond of \$1000 and a surety of \$5000 with the Director-General. Agencies for overseas employment must pay double the amount.

⁷⁶S. 25.

⁷⁷S. 26.

⁷⁹Act 195.

'laying procedure with a negative resolution'. It is only rarely that such a procedure is laid down in Malaysian statutes.⁸⁰

The Hire Purchase Act⁸¹ provides for the appointment of the Controller of Hire Purchase, Deputy Controllers and Assistant Controllers of Hire Purchase.

The Registration of Businesses Act,⁸² provides for the appointment by the Yang diPertuan Agong of a Registrar of Businesses and a number of Deputy and Assistant Registrars. The term 'Registrar' in the Act includes a 'Deputy' and an 'Assistant' Registrar, while a Deputy Registrar can perform all functions of the Registrar, an Assistant Registrar may exercise any functions of the Registrar except those under Ss. 13 and 14(2)(3). S. 13 deals with the sanction for prosecution and S. 14 authorises the Registrar to compound any offence by imposing a fine. All businesses (except those carried on by a company, government, registered cooperative society or any profession) are to be registered. A non-registered business cannot claim any right under a contract through any legal proceedings. An appeal from the Registrar's decision lies to the Sessions Court. Rule-making power is conferred on the Minister.

The Commodities Trading Council has been too much in the news lately. The Commodities Trading Act 1980 has created the Commodities Trading Council.⁸³ The function of this body is to supervise the trading in commodity futures contracts and to advise the Minister in matters connected therewith.⁸⁴ The Council is to be composed of the following members who are to be appointed by the Minister —

- (a) a Chairman;
- (b) a representative of the Minister of Primary Industries;
- (c) a representative of the Minister of Trade Industry;
- (d) a representative of the Minister of Energy, Telecommunications and Posts;
- (e) a representative of the Central Bank of Malaysia;
- (f) a representative of the Treasury;
- (g) not more than 3 persons to represent commodity interests;
- (h) a representative of the Association of Banks in Malaysia;
- (i) a representative of the exchange company;
- (j) a representative of the Clearing House; and
- (k) not more than 5 persons with appropriate experience, knowledge or expertise.

The period of office for each member is 2 years, although his office can be revoked earlier. The members hold their office upon such terms and

⁸⁰Jain, *supra*, note 37 at 100-1.

⁸¹Act 212.

⁸²Act 197.

⁸³Act 229.

⁸⁴S. 3.

conditions as are determined by the Minister. A member is eligible for reappointment.⁸⁵

The functions of the Council are as follows:⁸⁶ The Council is to—

- (a) be responsible for enforcing the Act;
- (b) be responsible for supervising the activities of the exchange company and to promote proper conduct amongst its members;
- (c) take all reasonable measures to safeguard the interest of persons who trade in commodity futures contracts;
- (d) suppress illegal and improper practices in relation to trading in commodity futures contracts and price manipulations in a commodity market;
- (e) promote and maintain the integrity of registered persons and encourage the promulgation by dealers and commodity trading advisers of balanced and informed advice to their clients;
- (f) advise the Minister on all matters relating to trading in commodity futures contract;
- (g) advise the Minister on all matters relating to the purchase or sale of commodities for spot delivery or for deferred shipment of delivery; and
- (h) consider and suggest reforms of the law relating to trading in commodity futures contracts.

The concerned Minister (Primary Industries Minister) may give such directions to the Council as he deems fit. Such directions are not to be inconsistent with the provisions of the Act, and are to relate to the exercise or performance by the Council of its functions.⁸⁷

The Minister may, after consultation with the Council, make regulations for the better carrying out of the purposes and provisions of this Act. Regulations may provide that a contravention of specified provisions thereof shall be an offence and may provide penalties by way of a fine not exceeding \$2,000 or 6 months or both.⁸⁸

The Act also authorises the Minister to appoint a Commissioner and a Deputy Commissioner of Commodities Trading. The Commissioner is to be responsible for carrying out the policy decisions of the Council and for the general administration of its affairs and perform such other duties as the Council may from time to time determine or as the chairman may from time to time direct.⁸⁹ The Commissioner attends the meetings of the council and has a right to vote at such meetings. The Commissioner registers the following:

⁸⁵S. 3(3).

⁸⁶S. 5.

⁸⁷S. 6.

⁸⁸S. 104.

⁸⁹S. 7.

- (a) a dealer carrying on a business of trading in commodity futures contracts;
- (b) a commodity trading adviser;
- (c) a dealer's representative; or
- (d) a commodity trading adviser's representative.

The Commissioner may refuse to register these persons under specified circumstances but not without first giving the applicant an opportunity of being heard. He may also revoke the registration of a registered person under specified circumstances but only after giving him an opportunity of being heard. He also enquires into charges of misconduct or unfitness against registered persons. In discharging this function, the Commissioner is bound to act in accordance with natural justice.

Without prejudice to the powers of the Public Prosecutor, the Commissioner of Commodities Trading may institute proceedings in respect of any offence against this Act.

According to the Commodities Trading (Dealers, Commodity Trading Advisers and Representatives) Regulations, 1980, all persons, corporations or firms that are carrying on business as commodity dealers or as commodity trading advisers, and all persons employed as representatives of dealers or of commodity trading advisers, are required to apply for registration by the Commissioner of Commodities Trading not later than 31st January, 1981. A dealer is a person who whether as principal or agent, carries on a business of trading in commodity futures contracts, or holds himself out as carrying on such a business. Other terms like 'commodity trading adviser', 'dealer's representative', 'commodity trading adviser's representative', are defined in these regulations. The word 'person' means an 'individual person', or a 'corporation' or 'firm'. Non-registration by such persons amounts to an offence punishable with fine up to \$25,000 and, in case of a continuing offence, to a further fine of \$500 for each day during which the offence continues.

The Industrial Relations (Amendment) Act 1980⁹⁰ seeks to bring industrial relations under further administrative control. A new office has been created, that of the Director-General for Industrial Relations, to have the general direction, control and supervision of all matters relating to industrial matters.

The appointment to this office is to be made by the Yang diPertuan Agong who may also appoint a Deputy Director-General for Industrial Relations and such number of Directors, Assistant Directors and Industrial Relations officers as he may consider necessary or expedient for the purposes of carrying out and giving effect to the provisions of this Act. The powers and functions of the Director-General have been defined in very flexible terms. In addition to the powers, duties and functions conferred on him under this Act, he may also exercise such other powers, discharge such other duties and perform such other functions as may be necessary or ex-

⁹⁰Act A484.

pedient for the purposes of carrying out and giving effect to the provisions of the Act.⁹¹ Some of the powers hitherto conferred on the Minister have now been transferred to the Director-General. The power of making a reference of a complaint to the Industrial Court for hearing still belongs to the Minister.

Under S. 7 of the Destitute Persons Act, 1977, the Minister of Welfare Services has promulgated the Destitute Persons (Welfare Homes) Rules, 1981.⁹² Provision has been made for the appointment by the Minister of a board of Visitors. This Board is to arrange frequent visits by members to the welfare home and can bring to the notice of the Director-General any defect in the administration thereof. The board may make recommendations to the Director-General on any matter relating to the welfare home which shall be forwarded to the Minister on the request of the Board.

VII Developmental Bodies

The Lembaga Kemajuan Kelantan Selatan Act⁹³ establishes a corporation under the name of Lembaga Kemajuan Kelantan Selatan. It is to be responsible for development in the Kawasan Kelantan Selatan which is an area or areas in the State of Kelantan to be determined by the Minister (charged with the responsibility for regional development) with the concurrence of the State Government. The Lembaga is to consist of the Chairman, Deputy Chairman, three representatives of the Federal Government and three representatives of the State Government. It is charged with the following three principal functions:-

- (a) to promote, stimulate, facilitate and undertake economic and social developments;
- (b) to promote, stimulate, facilitate and undertake residential, agricultural, industrial and commercial development;
- (c) to control and co-ordinate the performance of the aforesaid activities.⁹⁴

Section 4(2) specifies the powers of the Lembaga and the several activities which may be undertaken by it.

The Lembaga is responsible to the Minister and subject to his directions. These directions are not to be inconsistent with this Act. The Minister may direct the Lembaga as to the manner in which its capital assets are to be disposed of or the proceeds thereof applied. The Lembaga is required to submit to the Minister returns, reports, accounts and information as he

⁹¹S. 2A.

⁹²P.U. (A) 376.

⁹³Act 203.

⁹⁴S. 4(1).

may require or direct from time to time.⁹⁵ At the end of each financial year, the Lembaga shall send to the Minister a report, dealing with the activities of the Lembaga during the preceding financial year.⁹⁶

Part III of the Act deals with the responsibilities of the Chairman, the Deputy Chairman, the General Manager and the Deputy General Manager. The Lembaga may set up Divisions in the organization and each Division shall be under the control and charge of a manager.⁹⁷ The Lembaga is authorised to employ officers and servants for carrying out the purposes of the Act.⁹⁸

The financial provisions including provisions relating to the power to lend, borrow and invest are provided for under Parts IV and VI of the Act. The expenses of the Lembaga are to be authorised by the Minister.⁹⁹ The accounts are to be audited by the Auditor-General or some other auditor appointed by the Lembaga with the approval of the Minister.¹⁰⁰ A copy of the accounts is to be sent to the Minister every year which he has to lay before the two Houses of Parliament with his own comments.¹⁰¹ Additional powers and duties may be given and assigned to the Lembaga by the Federal Government and the Kelantan State Government.¹⁰² If the Lembaga thinks fit, it may establish a corporation to carry out any of its schemes or projects by an order published in the gazette.¹⁰³ Certain provisions given in the Second Schedule are applicable to each such corporation. This power thus enables a statutory body to create another statutory body by its own act.

Power is given to the Lembaga with the approval of the Minister to make any regulations as may be expedient or necessary for the better carrying out of the provisions of the Act.¹⁰⁴

The Highway Authority Malaysia has been created by the Highway Authority Malaysia (Incorporation) Act 1980.¹⁰⁵ The functions of the authority are to supervise and execute the design, construction, regulation, operation and maintenance of inter-urban highways as determined by the Government and of rest of service areas along the highways; to collect tolls

⁹⁵S. 11(1).

⁹⁶S. 11(2).

⁹⁷S. 14.

⁹⁸S. 15.

⁹⁹S. 21.

¹⁰⁰S. 22(2).

¹⁰¹S. 22(4).

¹⁰²S. 10.

¹⁰³S. 28.

¹⁰⁴S. 32.

¹⁰⁵Act 231.

from the users of highways; to plan research to ensure efficient utilisation of highways, and generally to do everything for the betterment and proper use of highways and other facilities along highways.¹⁰⁶

The Authority is to be a corporation, is to have perpetual succession and a common seal and it may sue and be sued in its corporate personality. The authority may enter into contracts and deal in property and other interests.¹⁰⁷

The Authority is to consist of the following members who are to be appointed by the Minister:¹⁰⁸

- (a) a chairman;
- (b) a representative of the Ministry responsible for public works;
- (c) the Secretary-General of the Finance Ministry or his representative;
- (d) the Director-General of Economic Planning Unit or his representative;
- (e) the Director-General of P.W.D. or his representative;
- (f) the Director-General of the Authority.

The Minister may, in addition to the above, appoint not more than four other persons to represent special interests in highways for a period not exceeding two years, but all these members can be re-appointed. The Authority may make regulations with the approval of the Minister, for the discharge of its functions.¹⁰⁹ The Authority may with the prior approval of the Minister appoint a Director-General who is the chief executive officer of the Authority.¹¹⁰

The Highway Authority Malaysia Fund is to be set up by the Authority. All money accruing to the Authority (by way of grants, tolls, loans, investments etc.) is to be paid into the Fund and the expenses are to be charged thereon. The Authority is also to establish and manage a reserve fund.¹¹¹

The Authority can impose, vary, revise or abolish toll on vehicles using highways with the approval of the Minister and the concurrence of the Minister of Finance.¹¹² The Authority may borrow upon terms stipulated by the Minister of Finance. The Authority has power to invest its surplus funds in securities, etc. with the approval of the Minister of Finance.¹¹³

The accounts of the Authority are to be audited by the Auditor-General or any other auditor approved by him. A Statement of Accounts and obser-

¹⁰⁶S. 11(1).

¹⁰⁷S. 3(1).

¹⁰⁸S. 4(1), (2) and (3).

¹⁰⁹S. 11(2).

¹¹⁰S. 8.

¹¹¹Ss. 12 and 14.

¹¹²S. 15(1).

¹¹³S. 17.

47
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vations made by the auditor are to be submitted to the Minister who lays them on the table of each House of Parliament.¹¹⁴

An Annual Report is to be submitted to the Minister by the Authority and this is to be laid in each House of Parliament.¹¹⁵ The Authority is responsible to the Minister who can issue directives on any aspect of its functioning which are to be binding on the Authority.¹¹⁶ The Minister has power to make regulations for the better carrying out the provisions of this Act.¹¹⁷ The Minister may, after consultation with the Federal Government and where applicable with the consent of the appropriate State Government, for time to time, by notification in the Gazette transfer any highway or part thereof to the Authority.¹¹⁸

A National Parks Advisory Council has been created by the National Parks Act, 1980.¹¹⁹ Its composition is as follows:

- (a) a chairman to be appointed by the Minister;
- (b) one representative from each State having a National Park or part thereof;
- (c) the Director-General of Wildlife and National Parks appointed under the Protection of Wildlife Act, 1972;
- (d) a Treasury representative;
- (e) a Representative of Economic Planning Unit of the Prime Minister's Department;
- (f) a representative of the Tourist Development Corporation;
- (g) a representative of the Department of Forestry; and
- (h) not more than 6 other persons appointed by the Minister.¹²⁰

The person mentioned in (a) or (h) above holds office for such period as the Minister may decide. The Minister may any time remove him from office without assigning any reason therefor.¹²¹

The function of this Council is to advise the Minister on matters relating to the conservation, utilization, care, control, management and development of National Parks, etc.¹²² The Act makes provisions for constituting a committee for each National Park.¹²³ The power to make regulations on matters specified is vested in the Minister.¹²⁴

¹¹⁴s. 19.

¹¹⁵s. 20.

¹¹⁶s. 28.

¹¹⁷s. 29.

¹¹⁸s. 21.

¹¹⁹Act 226.

¹²⁰s. 5(1).

¹²¹s. 5(2).

¹²²s. 6(1).

¹²³s. 7.

¹²⁴s. 11.

The Perbadanan Kemajuan Filem Nasional Malaysia Act, 1981¹²⁵ sets up the Perbadanan Kemajuan Filem Nasional Malaysia with a view to develop and stimulate the growth, and maintain the standards of the film industry. The Minister has power to issue directions to the Perbadanan (not inconsistent with the Act) as regards its functions and powers.

The Lembaga Kemajuan Wilayah Kedah Act, 1981¹²⁶ incorporates the Lembaga Kemajuan Wilayah Kedah to promote, stimulate, facilitate and undertake economic and social development in the Kawasan Lembaga Kemajuan Wilayah Kedah. The Lembaga is responsible to the concerned Minister who can give directions to it.

The Palm Oil Research and Development Act,¹²⁷ 1979 establishes the Malaysian Palm Oil Research and Development Board which is to be a body corporate. All its members are to be appointed by the Minister in charge of the oil palm industry. The Board is to consist of the following: Chairman; a representative each from (i) the Ministry responsible for oil palm industry; (ii) treasury; (iii) Federal Land Development Authority; (iv) Palm Oil Registration and Licensing Authority; (v) Palm Oil refiners; three representatives from oil palm producers; not more than three persons to represent other interests of the oil palm industry or the Government; and the Director-General. The function of the Board is to conduct and promote research into various aspects connected with the palm oil industry, such as production, extraction, storage, transportation, marketing, consumption and uses of palm oil and oil palm products. The Minister may, after consultation with the Board, give to it directions of a general character as to the exercise of its functions, which the Board has to comply with.

The Board is to establish the manage the Palm Oil Research Institute. The Chief Executive Officer of the Institute is the Director-General appointed by the Minister who can also appoint one or more Deputy Directors-General. The Board is also to administer the Palm Oil Research Fund. An example of taxation through subsidiary legislation is to be found in section 14 which authorises the Minister, after consultation with the Board and the Minister of Finance, to make orders imposing, cancelling or varying a research cess on palm oil; and the "order may specify the nature, the amount and rate and the manner of collection of the cess". Every such order is to be published in the Gazette and is to be laid on the table of the Dewan Rakyat as soon as practicable after its publication. This is an instance of the simple laying procedure.

A copy of the Board's audited annual account is to be sent to the Minister who will place it on the table of each House of Parliament. The Board is also to send every year a report of its activities to the Minister which is to be laid on the table of Dewan Rakyat but not that of Dewan Negara.

¹²⁵Act 244.

¹²⁶Act 249.

¹²⁷Act. 218. Besides this Act, there exist a number of other commodities developmental bodies, e.g., National Tobacco Board, Pineapple Industry Board, Malaysian Rubber Research and Development Board.

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The Board is bound to furnish any information which the Minister may require from time to time about its activities.

In exercise of the powers conferred by section 12(1) of the Palm Oil Registration and Licensing Authority (Incorporation) Act, 1976, the Palm Oil Registration and Licensing Authority (PORLA) has made the Palm Oil Industry (Licensing) Regulations, 1979 with the approval of the Minister of Primary Industries.

The purpose of these regulations is to control and regulate the palm oil industry by way of licensing. Basically the regulations relate to application for licence, procedures after grant of licence, period of licence, renewal and termination thereof and appeals in case of renewal of licence being refused. All those who wish to sell, move, purchase and mill the oil palm fresh fruit, as well as those who wish to do the same as well as store and broke with respect to palm oil or palm kernel have to take a license from PORLA. Surveying, inspecting and testing of palm oil also need to be licensed. A person aggrieved by the decision of the Authority refusing to renew a licence under the regulations may appeal to the Minister within a period of thirty days from the date the decision of the authority is made known to him. The decision of the Minister in respect of an appeal is final. It is also compulsory under the Regulations to register with PORLA all palm oil sales within 24 hours of their conclusion. The PORLA also compiles and distributes daily crude palm oil price through the media. The PORLA also plans to distribute processed palm oil price.

The Perbadanan Kemajuan Kraftangan Malaysia Act, 1979¹²⁸ establishes a corporation by the name of Perbadanan Kemajuan Kraftangan Malaysia. The corporation known as Lembaga Kraftangan Malaysia is to be known by the new name. All members of the corporation are to be appointed by the Minister. The Corporation is to be composed of the following members: Chairman; Deputy Chairman; Director General; five to nine other members of whom at least three are to be public officers. All members other than the Director-General are appointed for two years but the appointment can be revoked earlier. The Director-General of the Perbadanan is to be an *ex-officio* member thereof. The allowances payable to the chairman, Deputy Chairman and other members are fixed by the Minister. The function of the Perbadanan is to promote the traditional skill and craftsmanship and to promote quality, marketing and export of handicraft products. The Perbadanan has power, exercisable subject to the prior approval of the Minister, to do all things expedient or reasonably necessary for, or incidental to, the discharge of its duties. The Perbadanan may also establish subsidiary corporations with the approval of the Minister by its own orders published in the Gazette. Routine provisions regarding submission of annual audited accounts and an annual report of its activities to the Minister are to be found in the Act. These accounts as well as the report are to be placed on the table of each House of Parliament. The Minister can issue

¹²⁸ Act 222.

general directions to the Perbadanan which it is bound to give effect to. There is no condition that the Minister is to consult the Perbadanan before issuing such directions. Such a condition is laid down in the case of the Malaysian Palm Oil Research and Development Board noted above. The Perbadanan may, with the permission of the Minister, make regulations. It will thus be seen that practically every aspect of the working of the Perbadanan is subject to the Minister's control and the Perbadanan does not seem to enjoy much autonomy. The Perbadanan can issue a licence to any person who produces any handicraft product to use its logo. This licence can be cancelled by the Perbadanan if he contravenes or fails to comply with any provision of the Act or any regulation or any condition of his licence. The licensee is to be given an opportunity to show cause against the proposed cancellation. An interesting provision is section 23(3) which obligate the Perbadanan to supply particulars in writing to the licensee called upon to show cause or the contravention or non-compliance alleged against him and the licensee may appear in person or be represented by any person authorized by him in writing. Thus, the procedure is consistent with natural justice and provides for an oral hearing. Such provisions are rather rare in Malaysia. The licensee can appeal to the Minister against the order of revocation and his decision is final. This is the usual provision to be found in most of the Malaysian statutes.

The Felda Construction Corporation Order, 1980 has been issued under s. 42 of the Land Development Ordinance 1956 by the Federal Land Development Authority with the approval of the Minister.¹²⁹ Through this order, the Authority has created a Felda Construction Corporation. This is an example of one statutory body creating by itself under its own power another statutory body under its own control. Under Clause 19(1) of the Order, the Authority may give to the Corporation directions of a general nature, not inconsistent with the Ordinance and the Order, as to the performance and exercise of its functions, and the corporation is to give effect to such directions. The Corporation is bound to furnish the Authority with such information with respect to its activities as the Authority may require. The accounts of the Corporation are to be audited annually and a copy thereof is to be sent to the Authority. The Corporation is also to send to the Authority from time to time reports dealing with its activities. Thus, the place of the Minister is taken by the Authority vis-a-vis the Corporation.

VIII Tribunals

In modern times, not all disputes between one individual and another, or one individual and the state, are decided by the courts. A part of the adjudicatory function is discharged by a number of bodies outside the

¹²⁹P.U. (A) 210.

judicial hierarchy. For example, a licensing body exercises adjudicatory function in a limited way when it considers the question whether the licence of a particular individual may be cancelled because of some lapse on his part. Quite a good deal of adjudicatory work is assigned to Ministers, especially, by way of hearing appeals from decisions of various bodies in various matters and a number of examples of this technique can be found in the previous pages. Adjudicatory functions are assigned to administrative officers. In many cases, adjudicative work is discharged along with other type of administrative or legislative work. However, the expression 'tribunals' is used more appropriately for a body whose sole, exclusive or dominant task is adjudication and which is autonomous of government administrative control.¹³⁰ The idea of autonomy is rather significant. The effort is to free the tribunal from administrative bias and to enable it to approach its adjudicative task in an objective manner. "The existence of tribunals is in a sense due to awareness of the need to safeguard more effectively the individual in his dealings with the State."¹³¹ The tribunal system has made rapid strides in many common-law countries and because of this development, it is said that the common-law system is approximating the continental system or the French *droit administratif*. In Malaysia, so far, the tribunal system has not progressed very much. The usual pattern here is — initial adjudication by an administrative official and an appeal therefrom to the Minister whose decision is declared as final. This process shows that adjudication is subordinated to the exigencies of the administration.

An important body established during the period under survey is the Public Service Tribunal. The tribunal has been established by the Public Service Tribunal Act, 1977¹³² with a view to provide a mechanism for resolving anomalies¹³³ affecting the remunerations and terms and conditions of service in the Public Service arising as a result of the implementation of the Cabinet Committee Report in 1977. The genesis of the tribunal is as follows: As a result of the recommendations of the Cabinet Committee, the salary structure in the public service was revised with effect from January 1, 1976. This gave rise to complaints of anomalies and more than

¹³⁰See the *Report of the Franks Committee* (1957); Foulkes, *Introduction to Administrative Law* (1982); Jain, *Adm. Law in Malaysia*, 127-174.

¹³¹Keith H. Hendry, *The Tasks of Tribunals: Some Thoughts*, *Civil Justice Quarterly* 253 at 255.

¹³²Act 186.

¹³³The Act defines an 'anomaly' as (S. 2a): "any situation, affecting the remunerations . . . of any public officer . . . and arising from the implementation of the recommendations of a salaries commission, that constitutes a departure or deviation from the principles underlying the recommendations of the salaries commission . . ." S. 2(b) refers similarly to a Cabinet Committee. The Tribunal has elucidated this provision as follows: Looking at the definition, there are three elements to be satisfied to invoke the Tribunal's power to decide: (a) a situation affecting remuneration; (b) the situation arises from the implementation of the recommendations of the salaries commission or the Cabinet Committee; (c) there was a departure or deviation from the recommendation of the salaries commission or the Cabinet Committee. Ref. *Encik Rabun bin Abdul Ghani v. Public Services Dept., Malaysia*, Ref. No. 1/78; *Kerajaan Malaysia v. Malayan Technical Services Union*, Ref. No. 8/78.

500 memoranda were received by the Government pointing out various anomalies resulting from the implementation of the Cabinet Committee pay scheme. There was a danger that this might lead to some sort of industrial action by trade unions of public officers. The government was anxious to avoid any such eventuality resulting in disruption of the administration. The Government was anxious to avoid tensions in industrial relations between itself and public servants and wanted to promote harmonious relations between itself and its employees by settling these claims in a fair and reasonable manner. Therefore, the Public Service Tribunal was established to enquire into and resolve anomalies affecting the remunerations and terms and conditions of service in the public service arising as a result of the implementation of the Cabinet Committee Report.

The Tribunal is to be appointed by the Yang di-Pertuan Agong. It consists of a Chairman and two members. The Act does not lay down the qualifications of the Tribunal Chairman. But, in Parliament, the Prime Minister gave the assurance that the tribunal would be a "just and reasonable" machinery to resolve anomalies in the public service. A High Court Judge is appointed as the Tribunal Chairman. There is a panel of persons having experience and knowledge in matters of administration. To constitute the Tribunal, the Chairman selects two members from the panel. The decision of the Tribunal is to be arrived at by majority. The powers of the Tribunal are laid down in section 6 of the Act. The Tribunal is to regulate its own procedure subject to the express provisions of the Act and the regulations made thereunder. The Tribunal has power to summon witnesses, compel their attendance and admit any evidence, whether written or oral, which might otherwise be inadmissible in civil or criminal proceedings. The Government may bar the production of any document before the Tribunal if in its opinion it is not in the public interest to produce the same. The decision of the government in this respect cannot be questioned or reviewed by the tribunal or any court or any authority. As the Tribunal is a quasi-judicial adjudicatory body, ordinarily it has to follow the norms of natural justice under the general principles of administrative law. An anomaly may be referred to the government by any of the following persons: (i) a trade union where the alleged anomaly affects any of its members; (ii) an association of public officers not being a trade union where it affects any of its members; (iii) a public officer not a member of a trade union where it affects him. First, there has to be negotiation between the government and the aggrieved person to resolve the anomaly. If it is resolved by negotiation, the decision has the same effect and force as if it has been a Tribunal decision. The negotiating process thus ensures the collective bargaining process. It is only when such a process fails, that the Tribunal comes into the picture. After failure of the negotiations, the dispute may be referred to the Tribunal by either of the parties. The Tribunal investigates the circumstances of the anomaly and makes a decision thereon. In making a decision in respect of an anomaly, the Tribunal has to keep in view such factors as the national interest, financial implica-

tions and the effect of the decision on the economy of the Country.¹³⁴ The decision by The Tribunal is to be 'final and conclusive', and is binding on the government and the parties concerned. No Tribunal decision is to be challenged, appealed against, reviewed, quashed or called in question in any court.¹³⁵ This exclusionary clause is similar to the one found in the Industrial Relations Act in relation to the Industrial Court. During the pendency of the proceedings before the Tribunal or after its decision, it is unlawful for any person, trade union or an association to go on strike or undertake any industrial action proscribed under the Act.¹³⁶ The Yang diPertuan Agong has power to make "rules and regulations" for carrying out the purposes of the Act. In a schedule annexed to the Act, certain acts and omissions, amounting to "proscribed industrial action", have been listed. The Yang diPertuan Agong has power to "add to, delete from, or otherwise, amend or vary" the schedule in any manner he deems fit. This constitutes a power given to the executive to amend a parliamentary enactment.

The Public Service Tribunal Regulations 1978 have been made under the Act by the Yang diPertuan Agong. A reference by an aggrieved person to the Federal Government for the purpose of negotiation (pursuant to S. 11 of the Act) is to be commenced by way of a memorandum relating to a specific anomaly. The aggrieved person has to send ten copies of the memorandum together with supporting documents by registered post to the Director-General, Public Services, Malaysia. Thereafter the negotiation takes place between the concerned parties. If the anomaly is not resolved by negotiation, and there is a failure to arrive at an acceptable solution, the dispute can be referred to the tribunal by either party. The reference to the Tribunal is made by way of "case stated" in the prescribed form. The other party is required to file his case within 21 days of the receipt of the copy of the reference. At the hearing before the Tribunal, the aggrieved person may appear in person or be represented by a legal practitioner. If the aggrieved person is a trade union or an association of public officers not being a trade union, it may be represented by an office-bearer. The Federal Government may be represented by any person appointed by the Director-General. The aggrieved person is entitled to adduce evidence, call any witness or produce any document in support of his case. Similarly the Government representative may adduce evidence.

¹³⁴S. 14. On the question of 'national interest' the Tribunal has observed as follows: "... the question of national interest must be considered on the balance of interest of the claimants and that of the Government. Where there is established an anomaly that requires rectification upon consideration of various relevant factors, it is indeed in the interest of the claimants that direction be made to rectify such anomaly. In doing so it cannot by any stretch of interpretation be assumed that such decision is against the national interest." *Kerajaan Malaysia v. Malayan Technical Services Union*, Ref. 8/78.

¹³⁵S. 15(1).

¹³⁶S. 2.

Thereafter, a brief oral or written submission may be made by both the parties. The Tribunal has been given the power to require witnesses to attend and produce evidence.

The Commodities Trading Act, 1980, also creates the Commodities Trading Tribunal.¹³⁷ Its function is to enquire into any allegation of misconduct against the exchange company, the Management Board of the exchange company or the Clearing House.¹³⁸

The Tribunal consists of a Chairman and two other members who are to be appointed by the Minister on such terms and conditions as may be determined by him. The Chairman of the tribunal is to be a person with judicial or legal experience.¹³⁹ No qualifications are laid down for the two members.

The tribunal has jurisdiction to inquire into the allegations of misconduct. If allegations are proved, the tribunal may report its findings to the Minister and recommend exercise of his powers under s. 15, and/or may impose a fine not exceeding \$10,000 and/or reprimand the Management Board. At the hearing of any inquiry, and before doing any of the things mentioned above, the Tribunal is to give to the body against which allegations of misconduct have been made, or any action is to be taken, an opportunity of being heard and the body may be represented by a counsel.¹⁴⁰ The Tribunal's decision is to be in writing and contain a statement of reasons for the decision.¹⁴¹ The aggrieved party may appeal within 30 days to the High Court whose decision is final.¹⁴² This is one of the rare statutory provisions prescribing a full-scale hearing, right of legal representation, a reasoned decision by the tribunal and an appeal to the High Court.

The Minister may make rules in respect of the hearing and determination by the Tribunal of inquiries under section 61.¹⁴³

The Tribunal has now been made operative. It consists of three members. Its head is the Senior Federal Counsel, deputy head in the Civil Litigation division of the Attorney-General's Chamber; one member is an accountant having experience in the field of commodity trading and the third member is an industrialist. The Commodities Trading (Commodities Trading Tribunal) Inquiry Rules, 1984, have recently been gazetted. According to the rules, any allegation of misconduct against the KLCE, its management board and the KLCCH is to be in writing and signed by or on behalf of the complainant on a scheduled form. The form is to be sent

¹³⁷S. 60.

¹³⁸S. 61.

¹³⁹S. 60(3).

¹⁴⁰S. 61(2).

¹⁴¹S. 69(1).

¹⁴²S. 63.

¹⁴³S. 68.

to the tribunal chairman together with an affidavit in another scheduled form stating the misconduct. Upon consideration of the complaint, the tribunal may dismiss the allegation without requiring the respondent to answer the allegation and without hearing the complainant if the action does not merit disciplinary action.

When there are more than one allegations made by the same complainant or different complainants, the tribunal has the discretion to consolidate the allegations and inquire into all of them at the same hearing.

No proceedings can be withdrawn after they have been received by the tribunal unless the latter directs otherwise. But if a party fails to appear at a hearing, the tribunal may also dismiss the allegation without a hearing. However, any party which has failed to appear at a hearing may within 14 days from the pronouncement of the decision of the tribunal apply to the tribunal for a re-hearing.

The tribunal hearings will be similar to the hearings of a court of law in that all evidence given at the hearing is to be under oath and any person giving evidence can be cross-examined by the party against whom he gave evidence and re-examination by the party which called him.

Allegations of misconduct against the KLCE and the KLCCH by the Commodities Trading Tribunal are to be heard *in camera*. The rules however give the tribunal the discretion to open the entire or any part of the hearing to the public.

Hearing, when opened to the public, may at any time be adjourned and resumed *in camera* if the tribunal considers it reasonable and necessary to do so. The tribunal shall also determine who may attend a hearing held *in camera*.

Until the date of this writing, the tribunal had not heard any complaint though it was learnt that the tribunal had received a few complaints and that it would soon start hearing these.

IX

Public Enterprises

Malaysia has a large number of public enterprises.¹⁴⁴ However, during the survey period not many public enterprises have been established.

The Bintulu Port Authority Act, 1981¹⁴⁵ sets up the Bintulu Port Authority, a corporate body, with perpetual succession. The Chairman of the Authority is to be appointed by the Minister.¹⁴⁶ The Authority is to consist of the following: Chairman, General Manager, and not less than five or more than nine persons to be appointed by the Minister. The offices of the General Manager and the Chairman can be held by one person

¹⁴⁴Jain, *supra*, ch. XVI.

¹⁴⁵Act 243.

¹⁴⁶S. 4(1)(a).

if the Minister so desires.¹⁴⁷ The functions of the Authority are: to develop, control and administer and otherwise operate and maintain the Port.¹⁴⁸ For this purpose, the Authority is to have power to do all things "reasonably necessary for or incidental to the discharge of its functions."¹⁴⁹ Some powers of the Authority are particularized, one of such powers being to levy port dues and general charges upon goods or cargo loaded or discharged in the Port.¹⁵⁰ The Minister has power to give general directions to the Authority after consulting it and the Authority is bound to give effect to such directions.¹⁵¹ Provision has been made for appointing a Port Consultative Committee for advising the Authority which consists of, besides the Chairman and General Manager, of such persons as the Minister may determine.¹⁵² Funds are provided to the Authority as its working capital by Dewan Rakyat.¹⁵³ The Authority is to submit to the Minister the annual estimates of revenue and expenditure for his approval and the Minister may disallow or amend any time of capital expenditure within a month.¹⁵⁴ Some of the bodies mentioned earlier in the paper may also be placed in this category, e.g., Lembaga Kraftangan Malaysia, Felda Construction Corporation etc.

X

General

The Statutory Bodies (Accounts and Annual Reports) Act, 1980, holds some interest for an administrative lawyer. It is usual to incorporate in the statutes establishing various bodies (mostly corporations) provisions for submission of copies of audited accounts and annual reports to the concerned Minister for being laid on the table of each House of Parliament. The Act in question seeks to lay down a time table for these matters. This Act applies to each body corporate incorporated in pursuance of a federal law and which is a public authority or an agency of the Malaysian Government, but does not apply to a local authority or a corporation incorporated under the Companies Act, 1965.

Each statutory body is required to keep proper accounts. It has to prepare a statement of its accounts for each financial year. Within six months after

¹⁴⁷S. 4.

¹⁴⁸S. 5(1).

¹⁴⁹S. 5(2).

¹⁵⁰S. 5(2)(c).

¹⁵¹S. 7(1).

¹⁵²S. 11.

¹⁵³S. 12.

¹⁵⁴S. 19.

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the end of a financial year, the statement of accounts is to be submitted to the Auditor-General.¹⁵⁵ The Minister concerned may however grant an extension of time if the body concerned is unable to submit its statement of accounts within six months.¹⁵⁶ The Auditor-General is to cause the accounts submitted to be audited.¹⁵⁷ The Audit Act, 1957 applies to the Audit of the accounts of every statutory body. Within one month after the receipt of audited accounts and the Auditor-General's report thereon, the body concerned is to submit the same to the Minister along with a report of its activities. The Minister is then to cause all these papers to be laid on the table of each House of Parliament.

The Public Authorities Protection Act, 1948 fixes a period of 36 months for bringing any suit, action, prosecution or other proceeding against any person for any act done in pursuance or execution or intended execution of any written law or of any public duty or authority or in respect of any alleged neglect or default in the execution of any such written law, duty or authority.

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