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REVIEWING JUDICIAL REVIEW: CONSTITUTIONAL AND INSTITUTIONAL COMPETENCE

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A511810454

Submitted pursuant to the requirement of the degree of Masters of Laws by Full
Dissertation at the Faculty of Law, University Malaya, 50603, Kuala Lumpur.

MAY 2004

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ABSTRACT

This work examines the foundations of judicial review. By doing so, it explores the constitutional and institutional capacity of the reviewing court. The reason for this is that court decisions have infused new vigour into judicial review by moving it away from formalistic concerns of jurisdiction. Nevertheless the extent of such judicial enthusiasm is shrouded in controversy. Too often judgments are based on standards that transcend the particular case, leading to complex and even contradictory decisions. Further, it cannot be denied that principles are ignored and *stare decisis* is flouted towards the end of “justice of the case”. Any occasional judicial incursion into matters formally within the purview of the original decision-maker’s realm is justified as a necessary and acceptable consequence of fulfilling this essential task.

Further, changes in patterns of governance through privatization, contracting-out, self-regulation and the like have served to blur the traditional distinction between the public and private sphere. The cross fertilization gives rise to accountability concerns because otherwise, private actors can muscle their way into the traditional state machinery without much fanfare. This forwards serious questions in relation to rights enforcement and how judicial review can be invoked in the public-private interaction.

These questions will continue to rage unless the foundational parameters are clarified. If the courts are constitutionally and institutionally competent, any controversies with regards its role will be extinguished. It will also be impetus towards developing a corpus of *constitutional review*, one that evolves with contemporary insight of the constitution. The focus is not whether the courts should decide all controversies or not, but how it can function as a mechanism of accountability in the interaction between the constitutional actors. This work concludes by showing that if the constitutional principles are clarified, then the constitutional actors will cease the current power play and instead work in partnership towards actualizing effective enjoyment of rights.

The law is as at 30 April 2004.

Acknowledgment

Bulat air kerana betung
Bulat manusia kerana budi
-Malay *pantun*

Gratitude of appreciation is due to many, many people. My supervisor, Associate Professor Dr. Gan Ching Chuan, who taught me in my undergraduate years and continues to teach me in so many ways till today. Thank you for all the guidance as well as indulging my idiosyncrasies.

Sudha Pillai and Prof MP Jain for initial introduction into the joys of Administrative and Constitutional law.

Prof Balan for the support and nourishment a student needs from the most able teacher. I am truly lucky for having had the privilege of being in his classes, imbibed not just with the law but many life lessons as well.

The law faculty deserves utmost thanks-for nurturing the wide-eyed undergrad into the self-assured student that I am today. This is not with reference to the bricks and walls of the building (though I must acknowledge fondness for my “spot” in the library staff room). It is to the people who give life to the building, the necessary intellectual support and cheers from fellow comrades who have trudged down the arduous road of research.

Special thanks goes to Janet Chew, Dr.Norchaya Talib, Dr.Azmi Sharom, Dr. Khoo Boo Teong, Dr. Cheong May Fong, Puan Nurhalida Khalil and Prof Gurdial Nijar who have all at one time or the other been subject to my ruminations. Gratitude of appreciation is also due to Allan Gomez for rushing me the copy of *Kekatong* fresh from the chambers of the Federal Court as well as Mariette Peters for Saturday morning discourses. Ooi Syn Chieh was indispensable in the technical aspects of this work.

Ratna Rueban for giving me support from across the miles. Brilliant at telling me “it’s crap” in the most diplomatic manner, Rueban’s insights lucidly emerge from many of these pages.

My family for being remarkably tolerant. Nobody else would have put up with my sullen mood swings unless they absolutely love me, so I am truly blessed. And Murali for understanding and for convincing me that it’s best we grow old together.

Jayanthi Naidu
May 2004

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ABBREVIATION

AC	Appeal Cases
AIR	All India Reporter
AJAL	Australian Journal of Administrative Law
ALJ	Australian Law Journal
All ER	All England Reports
ALR	Australian Law Reports
Am.Soc.Int.LProc.	American Society for International Law Proceedings
Anglo-Am.LR	Anglo-American Law Review
Bond LR	Bond Law Review
Bur.LR	Burma Law Reports
Camb.LJ	Cambridge Law Journal
Can.BarRev.	Canadian Bar Review
Ch	Chancery Division
CLJ	Current Law Journal
CLP	Current Legal Problems
CLR	Commonwealth Law Reports
DLR	Dominion Law Reports
EHRR	European Human Rights Reports
Fed.LRev.	Federal Law Review
FlindersLJ	Flinders Law Journal
Harv.LRev.	Harvard Law Review
HRLJ	Human Rights Law Journal
Ind.Int'l&Com.LRev.	Indian International & Comparative Law Review
Int.J.Socio.L	International Journal of the Sociology of Law
JLaw Reform	Journal Law Reform
JMCL	Journal of Malaysian and Comparative Law
KB	Kings Bench
Ky	Kyshe's Reports
LQR	Law Quarterly Review
Mal.LR	Malaya Law Review
McGill LJ	McGill Law Journal
Mich.LRev.	Michigan Law Review
Minn.LRev.	Minnesota Law Review
MLJ	Malayan Law Journal
Mod.LR	Modern Law Review
Neth YB Int'l L	Netherlands Yearbook International Law
NYULRev.	New York University of Law Review
NZLR	New Zealand Law Reports
NZULRev	New Zealand University of Law Review
OJLS	Oxford Journal of Legal Studies

Osgoode Hall LJ	Osgoode Hall Law Journal
PLD	All Pakistan Legal Decisions
Pub.L	Public Law
QB	Queens Bench
SA	South African Law Reports
SCal.LRev.	South California Law Review
SCC	Supreme Court Cases
SCR	Supreme Court Reports
SJLS	Singapore Journal of Legal Studies
SLT	Scots Law Times Reports
Stan.LRev.	Stanford Law Review
Syd.LRev	Sydney Law Review
U of Chic.LRev.	University of Chicago Law Review
U of Pa.LRev.	University of Pennsylvania Law Review
U of Toronto LJ	University of Toronto Law Journal
US	United States Supreme Court Reports
WLR	Weekly Law Reports
Yale LJ	Yale Law Journal

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Chapter 1 THEORETICAL UNDERPINNINGS OF JUDICIAL REVIEW

1.0 Scope

This work focuses on the constitutional and institutional capacity of the courts in judicial review action. First, the power of the court to supervise administrative action is dwelt upon. This involves studying the constitutional sanction as well as the reach of the courts in the interaction with the constitutional actors. Second, it dwells on the fragmented nature of administrative action in order to determine the spectrum of institutions that are subject to judicial review. This part will analyze how constitutional review can operate within the context of the changing facet of the state which can be an amalgamation of public and private actors.

Four limits of this work must be noted. First, the scope does not extend to analysis of the remedies that can be meted out by the court in its supervisory capacity as well as enforcement of such remedies. The remedies referred to are the prerogative writs of mandamus, certiorari, prohibition, quo warranto, habeas corpus as well as the remedies of declaration and injunction. This limitation may appear anomalous because judicial review is primarily based on its adjectival aspect. It is an area where the remedies are identified first along with the wrong that has been committed unlike some other areas like trespass in tort or breach of contract where the legal principles are sufficiently dealt with before any measure of remedy is considered. The primary reason for a remedies-based review is because an aggrieved applicant had to specify the particular remedy that is sought at the

outset and fashion the legal claim accordingly. However, with the amendment to Order 53 of the Rules of the High Court via Rules of the High Court (Amendment) 2000,¹ an applicant is no longer confined to a particular remedy. He is entitled for all specified remedies, either jointly or in the alternative, in a single application.

The procedural reform brought about by the amendment marks a forward leap. The earlier focus on remedies obscured development of a substantive nature. Substantive legal principles hovered in the peripheries of the adjectival framework. This work therefore intends to uncover principles governing the substance of the supervisory capacity of the courts. Further, developing the substantive law will inform any procedural reform. This is a more comprehensive way to bring positive changes into this area of law as procedural amendments alone, while can be laudatory, more often than not conceal application obstacles if not studied along with substantive law.

Secondly, this work is largely interpretative in the sense that it works from established norms, deconstructs conventional understanding and gathers principles that are already resident. There is recognition that some legal systems boast special administrative courts but no attempt here is made to prescribe a new institutional framework for judicial review. The basis for this is that the capacity of the courts in its current attire must be analysed thoroughly first to see if it can sufficiently meet the demands of administrative excess. If it is subsequently found that existing methodology is not sufficient, then it will be time to reimagine institutional support. If a new prescription is embarked at this point, the failings of the current framework will be unwittingly transplanted, the substitution of

¹ vide PU (A) 342/2000 w.e.f. 21.9.00.

one dubious structure to another. The scope of this work is therefore confined at the interpretive level and not the prescriptive.

Thirdly, the arguments forwarded are essentially doctrinal. This does not mean that a deeper level of constitutional and political theory cannot be discerned. It is conceded that it is quite impossible to delve into the intricacies of power without theoretical understanding. The doctrinal approach therefore belies the philosophical presuppositions that colour the underlying gist of this work. Throughout this work therefore, references will be made to theoretical conceptions for clarification and formulation of new ideas. In this sense the canvas of this work is broad and perforce broad brushstrokes.

Fourthly, this work does not expressly dwell on the murky quagmire of the “merits debate”. Judicial review is popularly believed to be concerned not with reviewing the merits of a decision but the decision making process.² Appeal is concerned with the merits of a case, in the sense that the appellate court can substitute its own opinion for that of the initial decision-maker. Appeals can lie on fact and law, or simply upon law. Such rights of appeal are statutory, and the courts possess no inherent appellate jurisdiction.³ Review is at least in theory, different from this. It is concerned not with the merits of the decision but with its “validity” or with the “scope” of the agency’s power. The reason for this is the premise that the courts power of review is based not upon

² *Chief Constable of the North Wales Police v Evans* [1982] 1 WLR 1155, *Pahang South Omnibus Co Sdn Bhd v Minister of Labour and Manpower* [1981] 2 MLJ 199 (FC), *Tanjong Jaga Sdn Bhd v Minister of Labour and Manpower & Anor* [1987] 1 MLJ 125 (SC), *Hotel Equatorial (M) Sdn Bhd v National Union of Hotel, Bar & Restaurant Workers & Anor* [1984] 1 MLJ 363 (FC).

³ *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145 at p191. See generally, Craig, *Administrative Law*, *op cit*, *infra*, n37 at p7

statute but upon an inherent jurisdiction of the superior courts. However, with the decision in *Rama Chandran*,⁴ the Malaysian courts have pointed that the cleavage between judicial review and merits review does not necessarily have to be distinct. This treads into controversial grounds as it saunters into the hitherto preserve of an appeal application. It is submitted that this debate will continue to rage unless there is study of the foundations of review. Vigorous arguments on the frontiers of merits/appeal is otherwise detached from the most important question of *legitimacy*.

1.1 Objective

Judicial Review is sometimes overemphasized, especially in a country with a written constitution like Malaysia. Most textbooks use decisions emanating from the courts as the only way to evaluate an administrative action. In fact, administrative law literature is inundated with the idea that the only truly important component is the judiciary. In actual fact, judicial review is a mechanism of a last resort. The vast many administrative actions are never litigated.

This work nevertheless focuses on establishing the constitutional and institutional capacity of the courts in judicial review action. There are two reasons for this. First is because it would be impossible to go down and analyze every decision-making body. Judicial review, as an end product, indirectly supplies standards for the decision-making bodies. The objective of this work is for judicial review to formulate a framework for administrative action. This is achieved from a bottom-up perspective in the sense that the

⁴ *Ibid.*

end-product is dissected to serve the unifying values and achieve conceptual clarity. Secondly, it enables review to be established as a mechanism of accountability in administrative action. This is because the courts are largely misunderstood as a brake in the administrative system, instead of being the engine that services the machinery of representative government. If the courts are seen as partners in the promotion of the system of government and not as antagonist, then a case is to be made for the development of constitutional duties among the institutional actors. The courts thus become a mechanism of accountability in this interaction.

The biggest hurdle is the bewildering judicial decisions that contradict each other. This staggering divide is of no help to the decision-making body. In order to make sense of this, the constitutional and institutional ambit of the courts performing judicial review must first be established. If this is clear, then the parameter of the courts role will no longer be controversial and standards of review will be worked on *principle*. This work therefore proposes that the courts must work from unifying principles when countering administrative excess. This however is easier said than done because of the astounding administrative bodies that exist and continually change to meet socioeconomic demands. Yet, it is submitted that there are underlying tenets upon which the court works and it is in search of the amalgamation of these values that this work is premised on.

1.2 Methodology

The research methodology adopted consists primarily of library research. Materials were obtained from text books, local and international law reports and journals as well as seminar papers. The writing involved in depth studies of cases and resources from these provisions. Cases and materials from other jurisdictions, particularly commonwealth jurisdictions was also sought for purpose of comparative study as well as to elucidate existing lacuna.

1.3 Structure

This work is divided into 2 parts, I and II. Part I consists of A and B which analyses the competence of the courts as a mechanism of review and strives to establish the two notions of constitutional and institutional competence. Part II studies review in the context of the “new” state.

Chapter 1 begins with a Prologue as a general overview of the tenets of constitutionalism, separation of powers and rule of law. This is a vital and relevant precursor to this study. The three concepts are backdrops to constitutional and administrative organization in Malaysia and therefore, form a central feature in the mechanism of judicial review of administrative action. The introductory notes here dwell largely on the wider historical and socio-legal context within which administrative action in Malaysia resides. What

more, judicial review percolates in a political cauldron.⁵ This is an attempt to elucidate the environment in which the mechanism of control is exercised.⁶

Part A consists of Chapters 2, 3 and 4 which study the constitutional competence of the court. Chapter 2 establishes the place of constitutional review in Malaysian jurisprudence. This requires a tracing of the history of the supervisory jurisdiction to its juridical context and finally, to the constitutional setting. The exposition works towards establishing the foundations of review and closes with the assurance that constitutional review has been placed in its proper framework.

Chapter 3 argues that if the courts are constitutionally competent to undertake the exercise of review, then review becomes a tool of substantive constitutional adjudication. Submitting that this will give review a transcendental effect, it will go on to establish how review gives rise to substantive as well as procedural rights. This being so, the correct approach to constitutional interpretation must be adopted by the courts. Chapter 4 progresses from this constitutional study towards an analysis of some new caveats of scrutiny that have arisen as a result.

Part B consists of Chapters 5 and 6 which dwell on the institutional competence. Chapter 5 establishes that for review to be effective, the courts must also be an institutionally

⁵ It is emphasized that this is however not an attempt to relegate it as “simply a sophisticated form of political discourse” as contended by Martin Loughlin in *Public Law and Political Theory*, 1992, OUP, London at p4.

⁶ In a somewhat *modified* tradition of the “green light theorist”, of Harlow and Rawlings. The writers argue that Red Light theorists look first to the law courts for control of the executive while Green Light theorists are inclined to pin their hopes on the political process. *Law and Administration*, 2nd Ed, 1994, Clarendon Press, Oxford at p1.

competent mechanism. This is because there are various structural obstacles in the performance of review. It is mainly failure to examine the institutional allocation of powers that the many conflicting decisions emanating from different courts appear justified. It proposes that it is for this reason that the focus should move from enjoyment of rights to the recognition and development of institutional transformation. This will resolve anomalies like administrative finalities.

In Chapter 6, the study proposes that the institutional structure of review must be consistent with the constitution. This is a key step towards *effective* enjoyment of rights. The role of the reviewing court in securing the objective of representative government will be seen as key to equitable distribution of powers and therefore, internalizing rights.

Part 2 consists of Chapter 7 which identifies the trajectories of purported private institutions that wield vast public functions and potentially, have great effect on rights. It goes on to analyze how judicial review functions as a mechanism of accountability in the cross fertilization between public and private action.

Chapter 8 provides concluding thoughts.

1.4 Introduction

The dynamics of contemporary society necessitates the forward march of the law. It is for the courts to so interpret the law of the land that the gap between the living law and societal needs are bridged. The courts thus discharge a creative function.⁷ Government is universally accepted to be a necessity, since man cannot fully realize himself-his creativity, his dignity and his whole personality-except within an ordered society. Malaysia, like many late industrializing states, features a highly interventionist and activist state.⁸ Yet the necessity for government creates its own problems for man, the problem of how to limit the arbitrariness⁹ inherent in government, and to ensuring that its powers are to be used for the good of society.¹⁰ There is an age old conflict between governmental power and individual liberty.¹¹

It is here that the great function of the courts comes to play. It is to draw a balance between the individual and the administration so as to ensure that administrative powers are not misused, and to infuse the ideals of fair procedure and just decision into the functioning of the bureaucracy.¹² Judicial control of administrative action primarily means review, and is based on a fundamental principle, inherent throughout the legal

⁷ MP Jain, *Constitutional Remedies in The Constitution of Malaysia: Further Perspectives and Developments*, F.A.Trindade and H.P.Lee (eds), 1986, Oxford University Press, Singapore at p 157.

⁸ See Kanishka Jayasuria, *Law, Capitalism and Power in Asia*, 1999, Routledge, London at p 177.

⁹ "Unfettered discretion is another name for arbitrariness", per Hashim Yeop Sani CJ in *Minister of Labour v Lie Seng Fatt* [1990] 2 MLJ 9 at p12.

¹⁰ B.O.Nwabueze, *Constitutionalism in the Emergent States*, 1973, C.Hurst & Co, London, at p 1.

¹¹ MP Jain, *Administrative Law of Malaysia & Singapore*, 1997, Malayan Law Journal, Kuala Lumpur at p6. See also WB Harvey, *Rule of Law in Historical Perspective* (1961) 59 Mich.L.Rev. 487 at p488. Harvey discusses the agonizing dilemma of Antigone, ever recurring in different context: "....whose conscience and sense of justice demanded that she perform the customary burial ritual rites for her brother, though Creon, regent of Thebes, had decreed that he should remain unburied as punishment for his treason. This apparent conflict between law and justice is still part of our daily lives".

¹² MP Jain, *The Evolving Indian Administrative Law*, 1983, Tripathi, Bombay at p2.

system, that powers can be validly exercised only within their true limits. The doctrine by which those limits are ascertained form the marrow of administrative law.¹³

Judicial review is therefore not confined to cases of plain excess of power; it also governs abuse of power, as where something is done unjustifiably, for the wrong reasons or by the wrong procedure.¹⁴ According to CV Das, judicial review of administrative action is concerned with the right of a person, whether citizen or not, to challenge and question governmental decisions adversely affecting him.¹⁵ This captures the essence of judicial review as not being mere adjectival law concerned with remedies for the aggrieved but also as one containing substantive content, which is very much tied with the constitutional scheme of a nation. CV Das elaborates that judicial review therefore could arise under a wide variety of circumstances in which governments make decisions affecting the rights of persons, ranging from matters relating to life and liberty down to the ordinary licensing cases involving livelihood.¹⁶

However, judicial review has not always been laudable, appearing to be erratic and inconsistent. This is because the proper perspective on judicial review is misplaced in Malaysia. Identifying the elements of judicial review is not an easy task. The early principles are largely derived from common law. Indeed, there are those who will say that this subject has no discernible principles, and the task of identifying principles has proved

¹³ Wade and Forsyth, *Administrative Law*, 2000, 8th Ed, Oxford University Press, Oxford, at p34.

¹⁴ *Ibid* at p35.

¹⁵ Cyrus V Das, *Accountability, Scrutiny and Oversight*, paper presented at the Commonwealth Workshop on Accountability, Scrutiny and Oversight, Canberra 23-25 May 2002.

¹⁶ *Ibid*.

difficult.¹⁷ The constitutional basis of review provided a fresh framework, wider than the common law provenance, but not without problems. Further, as the forms and sites of government become mixed (statute, contract, guidelines and so on, whether administered wholly or only partly by government) the mechanics for handling government must also change form.¹⁸ This work proposes that review must be seen in terms of promotion of rights as well as being concerned with the advancement of representative government. Understood thus, the role of the courts in balancing two at times competing interests is envisaged and explored further. If the constitution provides the courts power to review, then the parameter of the constitutional rights must be examined. The common law provenance forced upon our jurisdiction the concept of identifying review with control. There has been a consistent failure to consider review in terms of *rights*. Thus, when seen in terms of a constitutional sanction, the sublime definition of review is achieved. The guarantee of review triggers substantive and procedural rights.

1.5 Some Preliminaries

1.5.1 Theoretical Considerations

This dissertation is essentially interpretative. The arguments are doctrinal. This does not mean that a deeper level of constitutional and political theory cannot be discerned. Lord Steyn in *Pierson*¹⁹ expressed that it is quite impossible to delve into the intricacies of power without theoretical understanding. Neil MacCormick's insight was sought: "there

¹⁷ Emery & Smythe, *Judicial Review: Legal Limits of Official Power*, 1986, Sweet & Maxwell, London at p ix.

¹⁸ Mark Aronson, *A Public Lawyers Response to Privatisation and Outsourcing in The Province of Administrative Law* (M Taggart ed), 1997, Hart Publishing, Oxford at p40-70.

¹⁹ *Reg v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539 at p584.

is often a need in hard cases to dig down to the level of constitutional theory in order to solve questions about private rights and public powers”.²⁰ The doctrinal approach belies the philosophical presuppositions. Throughout this work therefore, references will be made to the theoretical conceptions for clarifications and formulation of new ideas.

In relation to the location of power and resolving any conflict as such, the constitution is the most important document. This is so even in UK which does not have a written constitution. It is the courts who give life to the otherwise dead letter of the constitution through interpretation. The courts can draw from many models of constitutional interpretation. Interpretation and judicial review are therefore mutually defining. Constitutional interpretation can be compartmentalized in two crude categories, one being the mechanical method and the other, the dynamic or organic method.²¹ Many situations have come about where the courts have saddled us with mechanical interpretation that hang like heavy millstones on the aggrieved person and form an uneasy heritage.²² In such an instance, deference to departmental aggression has been given the flavour of precedence and therefore, labeled as unavoidable. That is until it is extinguished by a subsequent creative court. Thus, the Malaysian courts must, in the last analysis, strive to find their voice within the constitutional sanction.²³

²⁰ Neil McCormick, *Jurisprudence and the Constitution* (1983) 36 CLP 13 at p20. See also Paul Craig, *Public Law* (2000) Pub.L 211.

²¹ *Ganesh Chandra Bhatt v Dist Magistrate, Almora* AIR 1993 All 291.

²² See for example, *Dredd Scott v Stanford* (1857) 60 US (19 How) 393 (slaves could not bring action as they were not deemed to be citizens), *AK Gopalan v State of Madras* AIR 1950 SC 27 (the validity of the Indian preventive detention provisions were determined on a subjective test).

²³ See generally Chapter 2.

The appropriate reach of judicial review is ongoing in many jurisdictions, including the American and British. The questions posed are the perennial ones that plague nearly all legal systems. How much power should the courts have over other branches of government? And in what circumstances, if any, is it appropriate for the judicial branch to overrule elected legislators and administrators in order to safeguard individual or group interests? Lord Irvine poses this question in a discussion on the American and British systems, and points towards an important fact which is sometimes overlooked.²⁴ The better view, according to him, is that they represent two different parts of a continuum, each reflecting differing views about how the judiciary and other institutions of government ought to interrelate. The conceptualization, he says, follows in part from the fact that both notions are elastic. This variation is evident from the level of activism. While constitutional supremacy is a fixed feature of the US constitution, the meaning of it is ultimately a product of contemporary legal and political thought.²⁵ Indeed, Carol Harlow has remarked that it is hardly surprising to find traces of American models in the current English practice of judicial review.²⁶

In the United States, where judicial review is a constitutional sanction as in Malaysia and India, the demand for the dynamic and progressive method of constitutional review has generated much controversy. This is because such methodology leads to more radical changes into the meaning of rights. Scholars are therefore divided. According to

²⁴ Lord Irvine of Lairg, *Sovereignty in Comparative Perspective: Constitutionalism in Britain and America* (2001) 76 NYULRev 1 available at www.lexis.com/research. This is the revised text of the thirty-first annual James Madison Lecture on Constitutional Law delivered at New York University School of Law on October 17, 2000.

²⁵ *Ibid.*

²⁶ Carol Harlow, *American Influences on Judicial Review in A Special Relationship, American Influences on Public Law in the UK* (Ian Loveland ed), 1996, Clarendon Press, Oxford at p91.

Alexander Bickel, judicial review is a counter-majoritarian force: the problem of how unelected and largely unaccountable judges invalidate the policy decisions of duly elected representatives.²⁷ Subsequent to Alexander Bickel's classic statement, there are two basically opposing camps. On one end is the so called interpretivists or originalists, those people who hold that the constitution must be interpreted according to the framers or ratifiers original intention.²⁸ On the other side, are the non-interpretivist or non-originalists, those who believe that constitutional meaning hinges upon changing social values.²⁹ Allan Hutchinson has remarked on the "growing sense of desperation" of American scholarly debate as the struggle to offer a theoretically valid account of jurisprudential enterprise is worked upon.³⁰ This is in relation to the ambition to explain the legitimate role and responsibility of the judiciary within a constitutional democracy.

Constitutional theory in the United States is noted at this point in order to facilitate further discussion later. It is observed that these debates may not have direct bearing or aid for our courts, but there are lessons to be gathered from them in order to fashion a better understanding of the Malaysian constitutional system.³¹ The demands of interpretation naturally change as the political system and notion of state matures. The suitable half-way point that is being endorsed in this work is largely the one that can be

²⁷ Alexander Bickel, *The Least Dangerous Branch*, 2nd Ed, 1986, Yale University Press, New Haven.

²⁸ See for example John Hart Ely, *Democracy and Distrust*, 1980, Harvard University Press, Massachusetts.

²⁹ Examples are Ronald Dworkin, *Law's Empire*, 1986, Harvard University Press, Massachusetts, Laurence Tribe in Tribe and Dorf, *On Reading the Constitution*, 1992, Harvard University Press, Massachusetts For critical overview, see Daniel Oritz, *The Price of Metaphysics: Deadlock in Constitutional Theory in Pragmatism in Law & Society* (Brint and Weaver eds), 1991, Westview Press, Colorado at p311.

³⁰ Allan Hutchinson, *Alien Thoughts: A Comment on Constitutional Scholarship* (1985) 58 S.Cal.L.Rev. 701.

³¹ The Indian Supreme Court has generally been more receptive to American influences. Ian Loveland rightly says that the "discovery of a supra-legislative right to procedural due process in *Maneka Gandhi* is a shining example of the Americaneque 'controls' fashioned by the Indian judiciary", in *A Special Relationship, American Influences on Public Law in the UK* (Ian Loveland ed), 1996, Clarendon Press, Oxford at p16.

called “moderate originalism”.³² Moderate originalism contends that the meaning of the Constitution depends on evidence of the founder’s intention but not on other evidence of concealed intentions. The theory further argues that resort to the founder’s intention cannot answer all, or probably even most interpretative disputes. In such a situation, judges can act creatively, being free to take into account contemporary concepts and values.³³

1.5.2 Effect of the UK Human Rights Act 1998

With the Human Rights Act 1998 [HRA] in place in the UK,³⁴ judicial reasoning in public law litigation will become a kind that is familiar to democratic rights from governmental interference.³⁵ According to Jowell, the Act provides a secure foundation for a rights-based approach when dealing with administrative action.³⁶ A common element of the rights based approach is that the courts should, whenever possible, be interpreting legislation and the exercise of administrative discretion to be in conformity

³² Jeffrey Goldsworthy, *Originalism in Constitutional Interpretation* (1997) 25 Fed. L. Rev. 1 at p20.

³³ *Ibid* at p21.

³⁴ The Act came into force in 2000 and has had a major impact in human rights jurisprudence in UK. First, HRA 1998 makes accessible the rights and freedoms termed “the Convention rights” for the purposes of the 1998 Act to all persons directly or potentially affected by actions of public authorities who act or propose to act incompatibly with breach of Convention right(s). It permits such persons to apply to the domestic courts to enforce their Convention rights and, where a breach is upheld, to be granted remedies against the public authority. Secondly, it requires authorities to act compatibly with Convention rights, making it unlawful to act in a contrary manner. Thirdly, it introduces a new method of interpretation, by which all legislation must be read and given effect so far as possible in a manner which is compatible with Convention rights. Fourthly, the Act requires all courts and tribunals to take account of relevant Strasbourg case law whenever a question concerning a Convention right is raised in the proceedings. Fifthly, a new and fast mechanism for amending incompatible legislation in cases where to amend by primary legislation would be inefficient is created. Finally, the Act provides for a public method of pre-legislative scrutiny by way of a ministerial statement, to be placed before each House of Parliament before the second reading of a government bill. See Parosha Chandran, *A Guide to the Human Rights Act 1998*, 1999, Butterworths, London.

³⁵ Jeffrey Jowell, *Beyond the Rule of Law: Towards Constitutional Judicial Review* (2000) Pub.L. 671.

³⁶ *Ibid*.

with fundamental rights.³⁷ Paul Craig stresses that the understanding of the “rights based approach” should also be extended to show “the articulation of principles of good administration” by the courts as well as a “particular theory of law and adjudication”.³⁸ Jeffrey Goldsworthy has called the British system in the light of the HRA 1998 as the ‘hybrid’ model-which allocates greater responsibility for protecting rights to courts, without altogether abandoning the principles of parliamentary sovereignty.³⁹ The effect of the HRA was surmised by Laws LJ as one building on developments in the common law so as to now provide a democratic underpinning to the common laws acceptance of constitutional rights and important new measures for their protection. Its structure reveals an “elegant balance” between respect for Parliament’s legislative supremacy and the legal security of the Convention rights.⁴⁰

Prior to the HRA, the European Convention of Human Rights was relied by the English courts on limited basis.⁴¹ The purpose of the HRA is to give effect to the rights guaranteed by the European Convention of Human Rights. The principles recognized by the European Commission of Human Rights and the European Court of Human Rights for the interpretation of the Convention will have considerable value for the interpretation of the Act.⁴² There have been many interesting and far-reaching decisions from the European Court of Human Rights at Strasbourg but due to dissimilarities not just of legal background but also history and culture, continental European jurisprudence will have

³⁷ Paul Craig, *Administrative Law*, 4th ed, 1999, Sweet & Maxwell, London at p21.

³⁸ *Ibid.*

³⁹ Jeffrey Goldsworthy, *Homogenising the Constitution* (2003) OJLS 483.

⁴⁰ *International Transport Roth GmbH v Home Secretary* [2002] 3 WLR 344 at p370.

⁴¹ See for example *R (On the Application of Anderson) v Secretary of State for the Home Department* [2002] 4 All ER 1089.

⁴² *Human Rights Law & Practice* (Lester and Pannick eds), 1999, Butterworths, London. See also Wade & Forsyth, *op cit supra* n11 at 193-194.

scant influence in Malaysian courts. With the HRA however, the English courts are persuaded by the European Court of Human Rights and therefore, hold the key for the infiltration of European principles into other common law countries, including Malaysia, albeit through the backdoor.

1.5.3 Some terminology

“Administrative action” is a comprehensive term and defies exact definition.⁴³ Decisions and acts can be invalid in the public sense, and in this respect there is no particular reason to distinguish between them.⁴⁴ However, the distinction between action and *inaction* (or decision and *non* decision-making) is important because the effect of the challenge will be different. According to Peter Cane, if the authority has decided not to perform some duty the applicant will often be satisfied with an order requiring it to act. If the authority has already been acted and the act can be easily undone, the applicant can challenge the decision to act and seek an order requiring the authorities to undo its action.⁴⁵ Throughout this dissertation, “administrative action” is employed very widely to encompass a whole range of exercise of public power. According to Basu, an administrative act is primarily the act of an administrative authority. Any agency or limb of the Government, other than the legislature or the judiciary is an administrative authority.⁴⁶ An administrative act

⁴³ IP Massey, *Administrative Law*, 2001, Eastern Book Company, Lucknow at p41.

⁴⁴ Peter Cane, *Administrative Law*, 2002, Dartmouth Publishing, London at p23.

⁴⁵ *Ibid.*

⁴⁶ Basu, *Administrative Law*, 5th Ed, 1998, Kamal House, Calcutta at p5.

accordingly may be statutory or non-statutory.⁴⁷ By far however, the largest slice of the functional area of the administration has a statutory basis.⁴⁸

1.6 Prologue

1.6.1 Constitutionalism

A written constitution, independent judiciary with power of judicial review, the doctrine of rule of law and separation of powers, free elections to legislature, democratic government, fundamental rights of the people, federalism are some of the principles and norms which promote constitutionalism in a country.⁴⁹ Constitutionalism recognizes the necessity for government but insists upon limitation being placed upon its powers. It connotes in essence therefore a limitation on government; it is the antithesis of arbitrary rule; its opposite is despotic government, the government of will, instead of law.⁵⁰ Modern constitutionalism then has always been linked with the problem of power, in theory as well as in practice.⁵¹

⁴⁷ *Regina v Panel on Take-overs and Mergers, ex p Datafin plc & Anor* [1987] 1 QB 815.

⁴⁸ MP Jain, *Administrative Law in Malaysia and Singapore*, *op cit*, *supra* n11 at p411.

⁴⁹ MP Jain, *Indian Constitutional Law*, 5th Ed ,2003, ,Wadhwa & Co, Nagpur at p7.

⁵⁰ B.O.Nwabueze, *Constitutionalism in the Emergent States*, 1973, C.Hurst & Co, London , at p 1.

⁵¹ Carl J Friedrich, *Limited Government: A Comparison*, 1974, Prentice-Hall, New Jersey at p12-13. On the evolution of constitutionalism, see C. Perry Patterson, *The Evolution of Constitutionalism* (1948) 32 Minn.L.Rev. 427-457: "Constitutionalism in a rather primitive form began in Greece some twenty-three centuries ago...To the Greeks, what was right was law, what was wrong was unlaw, what was right was discovered from "the law of nature"...Here is the idea of a higher law, a fundamental law, overruling man-made law-the idea of different kinds of laws varying in sanctity and validity. In other words, man-made law is only when in pursuance of a higher or fundamental law. This doctrine is basic in the development of constitutional government. In Greece, it was a matter of substance, not form".

According to de Smith, constitutionalism means the principle that the exercise of political power shall be bounded by rules, rules which determine the validity of legislative and executive action by prescribing the procedure according to which it must be performed or by delimiting its permissible content.⁵² Constitutionalism becomes a living reality to the extent that these rules curb the arbitrariness of discretion and are in fact observed by the wielders of political power, and to the extent that within the forbidden zones upon which authority may not trespass, there is significant room for the enjoyment of individual liberty.⁵³ At this juncture, it is noted that constitutional breakdown can and has occurred.⁵⁴ Malaysia for example, has consistently faced with an emergency situation⁵⁵ and this is necessarily a retardation of constitutionalism.

Without constitutionalism, the rule of law may be said to be fractured and incomplete.⁵⁶ According to Carl J. Friedrich, it is the application of judicial methods to basic problems of government that constitutionalism stands for.⁵⁷ The process is derived from the doctrine of separation of powers. Criticism however abounds in the contention that the understanding of constitutionalism in a broad sense is a basically western idea, exported to the countries of the east and south, either through conquest or political or ideological

⁵² SA de Smith, *Constitutionalism in the Commonwealth Today*, (1962) 4 Mal.L.Rev. 205.

⁵³ *Ibid* at p205.

⁵⁴ *Madzimbamuto v Lardner-Burke* [1968] 3 All ER 561, Lord Reid acknowledged the reality of constitutional breakdowns. He observed that "it is a historical fact that in many countries there are governments that derive their origins from revolutions or coup d'etat and that the law must account for this fact". See also *State v Dosso* PLD 1958 SC 533, *Asma Jilani v Government of Punjab* PLD 1972 SC 139.

⁵⁵ See Cyrus Das, *Governments & Crisis Powers: A Study of the Use of Emergency Powers under the Malaysian Constitution and other Parts of the Commonwealth*, 1996, Malaysian Current Law Journal Sdn Bhd, Kuala Lumpur. See also by the same author *Constitutional Supremacy, Emergency Powers and Judicial Attitudes* (1983) 10 JMCL 69.

⁵⁶ Rais Yatim, *Freedom under Executive Power in Malaysia*, 1995, Endowment Publications, Kuala Lumpur at p14.

⁵⁷ Carl J Friedrich, *Constitutional Government and Democracy*, 1950, Waltham, Blaisdell Pub. Co., Massachussets, at p117.

influences.⁵⁸ Views on constitutionalism appears to move in differing ends and political thought. An Asian brand of constitutionalism seems to proclaim esoteric tailor-made fittings for “Asian values”. The essence of a Malaysian brand of constitutionalism has been described by Dr.Mahathir Mohamad as “pragmatism”. The basis for using the terminology *pragmatism* is that “unfettered by any kind of ideological dogmatism, the government is free to adopt what will work and discard what seems to be unsuitable”.⁵⁹ The promotion of such thought would inevitably resound of nationalism, whether for better or worst.

It is also pertinent to note that the chartering of a national brand of constitutionalism influences trends in judicial law-making. This is especially apparent when courts act in their supervisory capacity. If *Government of Malaysia v Loh Wai Kong*⁶⁰ was to be decided today, the court would have perhaps come to an entirely different decision. The Federal Court in that instance took a restrictive view of personal liberty housed within Article 5⁶¹ of the Constitution as excluding the right to travel from Malaysia to a foreign country. The court held that the issue of passport is only a privilege which can be exercised with the concurrence of the executive, it is not a right. The vesting of fundamental liberties into the hands of the executive in this instance is an erosion of constitutionalism.

⁵⁸ Kevin Tan and Thio Li-ann, *Constitutional Law in Malaysia and Singapore*, 1997 Butterworths, Singapore, at p5.

⁵⁹ Dr. Mahathir Mohamad, *The Malaysian System of Government*, 1995, Prime Minister’s Office, Kuala Lumpur. See also RH Hickling and David A. Mishart, *Dr.Mahathir’s Thinking on Constitutional Issues* (1998-99) Lawasia 47.

⁶⁰ [1979] 2 MLJ 33.

⁶¹ Article 5 reads: *All persons have a right to life save in accordance with law.*

This decision however must be viewed within the socio-political landscape of a country trying to establish an identity after discarding the shackles of colonialism and still battling with the vestiges of communist stranglehold. Today, the communist insurgency is a historical note. Malaysia's voice is resonant in international fora. This has heralded heightened awareness towards fundamental rights. *Loh Wai Kong* will be quite untenable in this jurisprudence which has witnessed an amazing "forward march" especially with the dynamic interpretation to Article 5 and 8.⁶²

Further in Malaysia, there is a need to consider Islamic constitutionalism in the prevailing "religio-political" climate. Constitutionalism and religion in Malaysia are intertwined and must be considered as part of the collective value of the constitution. The application of transcendental religious laws along with the western-influenced constitution has achieved a sublime fusion that embraces the political reasoning of Malaysian constitutionalism. The utilitarian argument is that Islamic values have emerged along with secular politics to fashion a legal regime that is both mutually satisfying in the promotion of rights. In short, constitutionalism can consist of a fusion of evolving normative thought, political and sociological. Its underlying philosophy of good governance and freedom from arbitrary rule is however clear.

⁶² See *infra* 2.3

1.6.2 The Separation of Powers

The separation of powers is set out in Articles 39, 44 and 121 of the Federal Constitution. According to Article 39, the Executive authority is vested in the Yang di Pertuan Agong and exercisable by him, the Cabinet or any Minister authorized by the Cabinet. Parliament is authorized by law to confer any executive function on other persons.⁶³ In the exercise of his functions, the Agong must act in accordance with the advice of cabinet or minister acting under the general authority of the cabinet. This is so unless provided otherwise by the Constitution.⁶⁴

Legislative power is vested in Parliament⁶⁵ which consists of the Agong, a Senate (*Dewan Negara*) and a House of Representative (*Dewan Rakyat*). Members of the *Dewan Negara* may be appointed or elected but the *Dewan Rakyat* is wholly elected, thus being the voice of the people. Besides legislative functions, it also discharges some other significant functions, namely to control government, hold debates on contemporary issues of public importance, control of public finance by way of taxation and sanctioning of government expenditure.⁶⁶

The judiciary vests in the High Courts of Malaya and Sabah and Sarawak. Clause 1A of Article 121 further reads that the high court will not have jurisdiction in respect to any matter within the jurisdiction of the Syariah Court. There is no express enumeration of

⁶³ See *S Kulasingam v Commissioner of Lands, Federal Territory* [1982] 1 MLJ 204.

⁶⁴ Article 40.

⁶⁵ Article 44.

⁶⁶ Halsbury's Laws of Malaysia, *Constitutional Law*, 1999, MLJ, Kuala Lumpur at p15.

judicial power. Article 121 (1) was denuded of “judicial power”, an amendment precipitated, it is believed by the decision in *PP v Dato’ Yap Peng*.⁶⁷ The deletion of the words “judicial power” does not have the effect of taking away the judicial power from the High Court.⁶⁸ In accordance with well established principles of constitutional interpretation, it must reside within the structure of the constitution and therefore does not take away the judicial power from the High Court.⁶⁹ The Court of Appeal in *Sugumar* referred to *Liyanage v The Queen*⁷⁰ for support:

*These provisions manifest an intention to secure in the judiciary a freedom from political, legislative and executive control. They are wholly appropriate in a constitution which intends that judicial power shall be vested only in the judicature. They would be inappropriate in a Constitution by which it was intended that judicial power should be shared by the executive or the legislature. The constitution’s silence as to the vesting of judicial power is consistent with any intention that henceforth it should pass or be shared by, the executive or the legislature.*⁷¹

Understanding the workings of the doctrine is necessary because it provides the backdrop towards the governing of administrative bodies. The modern form of the doctrine can be

⁶⁷ *PP v Dato’ Yap Peng* [1987] 2 MLJ 311 at page 317, judicial power was broadly defined as “the power to examine the questions submitted for determination, with a view to the pronouncement of an authoritative decision as to the rights and liabilities of one or more parties. It is virtually impossible to formulate a wholly exhaustive conceptual definition of the term, whether inclusive or exclusive...the concept seems to transcend, purely abstract conceptual analysis...”

⁶⁸ *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor Appeal* [1998] 3 MLJ 289 (COA). Subsequent to the decision in *PP v Dato’ Yap Peng* [1987] 2 MLJ 311, “judicial power” was removed from the current Article 121(1).

⁶⁹ See *Ibid*, *Sugumar* at p307.

⁷⁰ [1967] 1 AC 259 at p287.

⁷¹ *Loc cit*.

traced back to the French political philosopher, Montesquie.⁷² The main underlying idea is that each organ of government; the legislative, executive and judicial must exercise mutual exclusiveness.⁷³ The clearest expression of this perspective may be found in Article 16 of the French Declaration of the Rights of Man of 1789: Any society in which the safeguarding of rights is not assured, and the separation of powers is not observed, has no constitution.⁷⁴

The purpose underlying the separation doctrine is to disperse governmental power so as to prevent absolutism and to allocate each function to the institution best suited to discharge it. The tripartite classification can be said to divide operations of government into three distinct power phases: first, the enunciation of generally applicable rules, second, the implementation of the rules and third, the particularization of rules to specific fact situations in the context of resolving disputes between parties. We tend to identify the legislature with enunciation, the executive with implementation and the judiciary with particularization.⁷⁵ However, administrative law and the separation of powers doctrine are somewhat incompatible, for modern administrative process envisages the mingling of

⁷² Montesquie had advanced the philosophy in *The Spirit of Laws* (1748). Translated by Thomas Nugent, 194, The Colonial Press, New York at p190: "There is no liberty yet, if the power to judge is not separated from the legislative and executive power". For overview of the history of separation of powers that runs from Montesquie and Locke to present day theorists, see Samuel Cooper, *Considering Power in Separation of Powers* (1994) Stan L. Rev. 46.

⁷³ "All constitutions on the Westminster model deal under a separate chapter headings with the legislature, the executive and the judicature. The chapter dealing with the judicature invariably contains provisions dealing with the method of appointment and security of tenure of the members of the judiciary which are designed to assure to them a degree of independence from the other two branches of government", *Hinds v The Queen* [1976] 1 All ER 353 at p360.

⁷⁴ Quoted by Eric Barendt in *Separation of Powers and Constitutional Government* (1995) Pub.L 599.

⁷⁵ B.Neuborne, *Judicial Review and Separation of Powers* (1982) 57 NYULRev 363 at p370.

various types of functions at the administrative level. On the other hand, the executive is either member of the Dewan Negara or Dewan Rakyat.⁷⁶

It has been observed that the courts and Parliament should be seen as partners, both engaged in the common enterprise involving the upholding of the rule of law. In general, Parliament, when enacting legislation, is presumed to intend that the future implementation and enforcement of its legislation should conform with the fundamental principles of the constitution.⁷⁷ All legislation is enacted in the context of these standards (which are being elaborated by the courts) which govern the exercise of all official power.⁷⁸ However, the reality of the situation is that the legislature is often an indolent defense mechanism against the onslaught of executive missiles. It has been said thus:

*...Not only does the executive control Parliament through the vehicle of the Party system, the mandate wielded by the parliamentary majority is best imperfect and temporal.*⁷⁹

Lord Hailsham proposes the term “*executature*” to elucidate the partial fusion of the executive and the legislature: “we have one very powerful branch of government virtually fusing the functions of legislature and executive, a sort of juggernaut I am tempted to label executature, and on the other hand a very small and relatively weak branch, the

⁷⁶ Tun Suffian surmises and says: “...in a parliamentary democracy there is no real separation of powers between the legislature and the executive, as there is between these two branches on the one hand, and the judiciary on the other”, in Tun Mohamad Suffian, *An Introduction to the Legal System of Malaysia*, 1988, Penerbit Fajar Bakti Sdn Bhd, Petaling Jaya, at p43. See also Tan Sri Salleh Abas, *The Executive and the Judiciary – Separation of Powers in Constitution, Law & Judiciary*, 1984, Malayan Law Journal, Kuala Lumpur.

⁷⁷ De Smith, Woolf & Jowell, *Judicial Review of Administrative Action*, 1995, Sweet & Maxwell, London at p16, para 1-028.

⁷⁸ *Ibid.* See also *Chokolingo v AG of Trinidad & Tobago* [1981] 1 WLR 106.

⁷⁹ Thio Li Ann, *Trends in Constitutional Interpretation* (1997) SJLS 240 at p256.

judiciary whose role is to uphold the rule of law against all corners.⁸⁰ This places judicial review of administrative action as a fundamental feature in checking the balance that is envisaged.

1.6.3 The Rule of Law

Judicial review is a necessary oracle of rule of law. The Court of Appeal in *Sugumar* remarked eruditely:

*Malaysia has a written constitution the basic framework of which has been fashioned in language that upholds the Rule of Law. The fundamental guarantees that all persons are equal before the law and have equal protection of it and that no person shall be deprived of life or personal liberty save in accordance with law clearly demonstrate that ours is not a Government of mere humans but of laws.*⁸¹

According to Wade and Forsyth, the rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to law.⁸² S.A de Smith observes: “the concept of rule of law has an interesting characteristic; everyone who tries to redefine it begins with the assumption that it is a good thing, like justice and courage”.⁸³ The context in which it exists is elucidated by Lon Fuller:

⁸⁰ Lord Hailsham, *The Independence Of the Judiciary in a Democratic Society* [1978] 2 MLJ cxv at p cxvii.

⁸¹ *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor Appeal* [1998] MLJ 289 at p305 (COA).

⁸² Wade and Forsyth, *op cit, supra* n11 at p20.

⁸³ De Smith and Brazier, *Constitutional and Administrative Law*, 6th Ed, 1989, Penguin, London, at p19.

*The rule of law exist first where there is respect for justice and human dignity, second where there is constituted a law-making authority whose decrees will be obeyed even when they are unjust; third, where the rules established by authority are faithfully enforced by judicial processes; fourth where there is an independent judiciary ready to protect the affected party against the arbitrary acts of established power, etc...*⁸⁴

The rule of law has attracted much critical thought since Dicey's controversial work, *An Introduction to the Study of the Law of Constitution*⁸⁵ was published. It is not clear if Dicey coined the term rule of law as contended by FH Lawson in *The Oxford Law School 1850-1965* or that he popularized it.⁸⁶ The rule of law enjoins the faithful conformance with laws and prescribed procedures on the part of the administrative bodies. According to Dicey, rule of law in England included the following institutional arrangements:⁸⁷

- (i) the absolute supremacy or predominance of the law as opposed to arbitrary exercise of power,

⁸⁴ Lon Fuller, *Adjudication and the Rule of Law* (1960) 54 Am.Soc.Int.L.Proc. 1 at p2. cf Joseph Raz, *The Rule of Law and Its Virtue* (1977) 93 LQR 195 at p205: For Raz, rule of law is a political ideal which should not be confused with any element of morality.

⁸⁵ AV Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th Ed, 1968, ELBS, London. According to Laws J, the Magna Carta is in truth the first general declaration of the principle of rule of law, *R (Bancoult) v Secretary of State for Foreign and Commonwealth Affairs* [2001] QB 1067 at 1095.

⁸⁶ Lord Bingham of Cornhill, *Dicey Revisited* (2002) Pub.L. 39 quotes HW Arandt, *The Origin of Dicey's Concept of Rule of Law* (1975) 31 ALJ at p117-123 : "I am not myself aware that anyone before Dicey used the expression "rule of law" although the meaning he gave to was itself not novel". cf Sir Ivor Jennings, *The Law and the Constitution*, 5th ed, 1959 University of London Press, London, at p45 n1 "The notion is to be found like every other notion, in Aristotle".

⁸⁷ See AV Dicey, *loc cit*. Many analysis on the workings of rule of law has been advanced. See for example WB Harvey, *The Rule of Law in Historical Perspective* (1961) 59 Mich.L.Rev 487-500, J.Raz, *The Rule of Law and It's Virtue* (1977) 93 LQR 195-211, P.P. Craig, *Dicey: Unitary, Self-Connecting Democracy and Public Law* (1990) 106 LQR 105, Jeffrey Jowell, *Rule of Law Today* in Jowell and Oliver (eds), *The Changing Constitution*, HW Arthurs *Rethinking Administrative Law: A Slightly Dicey Business*, (1979), Osgoode Hall LJ 1 and Bernard J Hibbitts, *The Politics of Principles, AV Dicey and Rule of Law* (1994) Anglo-Am.L.R. 1.

- (ii) equality before the law and that every man is subject to the ordinary law of the land,
- (iii) the principles of the constitution pertaining to personal liberties were a result of judicial decisions determining the rights of persons brought before the ordinary courts.

Dicey's idea had provided the framework for Parliamentary supremacy. The ultra vires principle became the tool for policing the boundaries set by Parliament. Dicey's assertion that only "ordinary courts" and "ordinary laws" raises the fact that rules accorded to any other body, tribunals for example is invalid. The manifest of tribunals and other mechanisms show that Dicey is wrong. Further, the formulation is a reference to the British legal system which thrives sans constitution. In Britain, parliament is supreme. This idea cannot find footing in Malaysia with a constitution entrenched as the supreme law of the land. In the words of Suffian LP in *Ah Thian v Government of Malaysia*:

*The doctrine of supremacy of Parliament does not apply in Malaysia. Here we have a written constitution. The power of Parliament and of State Legislatures is limited by the Constitution, and they cannot take or make any law they please.*⁸⁸

⁸⁸ [1976] 2 MLJ 112 at p113.

Dicey's parochialistic attitude and the glaring lackings of such a formulation has received much criticism.⁸⁹ Jennings for example considered Dicey's view that Englishmen are ruled by law and by the law alone as untenable:

*The powers of Louis XIV, of Napoleon 1, of Hitler and of Mussolini were derived from the law, even though that law be only "The Leader may do and order what he pleases". The doctrine involves some considerable limitation on the powers of every political authority, except possibly (for this is open to dispute) those of a representative legislature. Indeed it contains, as we shall see, something more, though it is not capable of precise definition. It is an attitude, an expression of liberal and democratic principles, in themselves vague when it sought to analyse them, but clear enough in their results.*⁹⁰

Criticisms notwithstanding, in substance, his enunciation of rule of law is on the absence of arbitrary power, equality before law and legal protection to certain basic human rights and these ideas remain relevant and significant in every democratic country.⁹¹ In an authoritative book on sovereignty, Jeffrey Goldsworthy concludes that Dicey's definition

⁸⁹ See for eg Jennings *The Law and the Constitution*, *op cit supra* n86 at p55, 305-317, MP Jain, *op cit, supra* n11 at p19-22, Wade & Forsyth, *op cit, supra* n11 at p25-28. In Le Seur and Sunkin, *Public Law*, 1997, Longman, London, the writers comment at p102: "In a way, Dicey has become a metaphor for an idealized or mythological constitution which is often used to illustrate failings of the modern British system and to expose fundamental shortcomings in the constitutional theory".

⁹⁰ Jennings, *ibid* at p131.

⁹¹ MP Jain, *Indian Constitutional Law*, 4th Ed Reprint, 1998, Wadhwa & Co, at p5. See however comment in Kevin Tan & Thio li-ann, *Constitutional Law in Malaysia and Singapore*, *op cit, supra* n58 at p36: "The rule of law is, however, viewed quite differently by Marxist legal scholars. In many instances, it is perceived as a devise to mask the real motives of those in power. It serves to confuse the masses and delude them into thinking that those in possession of political power are doing the "right" thing under the guise of legality, while their real motives are for the preservation of the status quo and the subjugation and oppression of the masses".

is still “basically sound”.⁹² Further, while Diceyan doctrine has no place for administrative law as something that sets the state and its functionaries in any way apart from the ordinary citizen, it did attach a great deal of importance to the supervisory role of the courts-to what nowadays we would call judicial review.⁹³

The phrase rule of law in Malaysia is more popularly known in Malaysia as part of the *Rukunegara*.⁹⁴ The rule of law in the *Rukunegara* did not necessarily mean the same as the rule of law conceived by Dicey or the various international instruments.⁹⁵ Dr. Khoo Boo Teong remarks that the *Rukunegara* was not part of the Federal Constitution and thus had no legal force. The content of the principle of Rule of Law as found in the *Rukunegara* was never really taken to heart by the organs of government or have matured in political practice. In other words, there was actual gap between the declaration of the principle and its actual practice.⁹⁶

The international dimension of the rule of law can be seen in the Universal Declaration of Human Rights 1948 which proclaims:

It is essential, if man is not to be compelled to have recourse, as a last resort, to rebellion against tyranny and oppression, that human rights should be protected by the rule of law.

⁹² Jeffrey Goldsworthy, *The Sovereignty of Parliament* (1999) at p142-220, quoted in Lord Irvine of Lairg *op cit supra* n24.

⁹³ Supperstone and Goudie (eds), *Judicial Review*, 2nd Edition, 1997, Butterworths, London at p1.10. See also *R v Horseferry Road Magistrates Courts ex p Bennett* [1994] 1 AC 42 at p62, *R v Home Secretary, ex p Pierson* [1998] AC 539 at p591.

⁹⁴ See Tan Sri Ghazalie Shafie, *Rukunegara, A Testament of Hope*, 1985, Creative Enterprise, Kuala Lumpur.

⁹⁵ See also Rais Yatim, *Freedom under Executive Power in Malaysia*, *op cit, supra* n56 at p28.

⁹⁶ Khoo Boo Teong, *Rule of Law in the Merdeka Constitution* (2000) 27 JMCL 59 at p98.

This aspiration is again echoed by the International Commission of Jurists which regards the rule of law as a living concept permeating several branches of the law and having practical importance in the life of every human being.⁹⁷ However, there seems to be a certain unease in the applicability of rule of law in an Asian/third world context.⁹⁸ Dr. Khoo Boo Teong succinctly remarks that law, including rule of law is never a static phenomenon. This is especially so when there is no clear meaning or content assigned to it by either the Constitution or the legislature of a country.⁹⁹ The notion of rule of law has been used as a polemical term and featured as an aspirational ideal for legal reformers in many Asian states.¹⁰⁰ Fundamental liberties have been codified in the United Nations 1948 Declaration of Human Rights (UNDHR), as a universal pre-requisite for the rule of law. The necessity for a composite formulation is to identify the rule of law in its true and universal sense. The western provenance of the doctrine should never be a constraint to its universality. According to CG Weeramanatry,

The philosophy of natural law...-all these are the property, the achievement and the inheritance of all mankind. Third World cultures did not bring their formulations of human rights to this degree of explicitness, and it would be un wisdom indeed to jettison this stream of tradition merely because it had its greatest development in the West. Indeed the

⁹⁷ See LJM Cooray, *The Twilight of Judicial Control of Executive Action in Sri Lanka* (1976) 18 Mal.L.R.230.

⁹⁸ According to Professor Yash Gai: "I am convinced that the rule of law is a powerful one and therefore can be used to protect people. However, there is uncertainty about how this can be used in the context of developing countries". Yash Gai, *The Rule of Law and Notions of Justice in The Rule of Law in Malaysia and Singapore*, 1989, Kehma-S, Belgium at p17. See also G.S.Nijar, *Rule of Law*, in *Reflections on the Malaysian Constitution*, 1987, Aliran, Penang.

⁹⁹ Khoo Boo Teong, *op cit*, *supra* n96.

¹⁰⁰ Yash Gai, *The Rule of Law, Legitimacy and Governance* (1986) Int'l J.Socio.L. 14(2) 179-208.

*Universal Declaration of Human Rights and other basic international formulations around these themes, on which the world order of the future needs to be built, draw heavily upon this stream of thought.*¹⁰¹

To what extent then are international standards of rule of law embodied by the Malaysian courts? In *Mohamad Ezam Mohd Nor & Ors v Ketua Polis Negara*,¹⁰² the Federal Court was invited to have regard to international standards in the treatment of prisoners as 'persuasive value and assistance'. In defining the content of the rights under Article 5(3) of the Federal Constitution – that requires a detainee to be informed of the grounds of his arrest and to be allowed to consult and be defended by his lawyer, the court refused to be persuaded so on the ground that the international documents were mere statement of principles devoid of any obligatory character and were not part of municipal law. *Ezam* is a missed chance to endorse the international standard, especially by invoking section 4(4) of the Human Rights Commission of Malaysia Act 1999.¹⁰³ Notwithstanding that the Declaration is not a Convention subject to ratification or accession, regard should be had to universally accepted rules relating to the rights of prisoners in construing the content of the constitutional right. The UNDHR has defined the norms of customary international law in relation to human rights and therefore, basis for precedent.

¹⁰¹ CG Weeramanatny, *Equality and Freedom: Some Third World Perspectives*, 1976, Colombo, Hansa Publishers Ltd at p67.

¹⁰² [2002] 4 MLJ 449 at p 514. Note that under the principle of dualism, treaties form no part of domestic law unless enacted by legislature: *JH Rayner (Mincing Lane) Ltd v Department of Trade and Industry* [1990] 2 AC 418. It is settled that domestic legislation should as far as possible be interpreted so as to conform to the state's obligation under such a treaty : *Matadeen v Pointu* [1999] 1 AC 98 at p114.

¹⁰³ The Human Rights Commission of Malaysia Act 1999 established the Human Rights Commission of Malaysia with functions to inquire, *inter alia*, into complaints regarding infringement of human rights which includes fundamental liberties as enshrined in Pt 11 of the Federal Constitution. Section 4 (4) of the Human Rights Commission of Malaysia Act 1999 singles out the UNDHR to be one document for which due regard can be had when considering complaints of infringement of human rights insofar as it is not inconsistent with the Constitution.

The many facets of rule of law consolidate the concept of power and its control. The development of an autochthonous rule of law is an evolutionary process which not merely reflects the political development of a nation but also the economic and social. The growth of rule of law is in tandem with maturity of the state. This in turn reflect the position of the courts. The developments chartered at this juncture reflect the need to transcend the monist/dualist dichotomy towards greater receptiveness to international standards especially in relation to human rights in Malaysia. Some cases like *Adong bin Kuwau & Ors v Kerajaan Negeri Johor & Anor*¹⁰⁴ have pointed in this direction and gives hope that the courts can be receptive to this capacity.

1.7 CONCLUSION

The broad background presented here provides an overview of the stage that is shared by the constitutional actors, the executive, legislature and the judiciary. Bari has rightly observed that given the complexities of modern government, it is no longer possible to understand the workings of the constitution without taking the practice into account.¹⁰⁵ After all, in law “context is everything”.¹⁰⁶ It is with this understanding that this feature intends to enlighten the enterprise that lies ahead. In establishing the constitutional and institutional competence of judicial review action, this work will explore how the

¹⁰⁴ [1997] 1 MLJ 418.

¹⁰⁵ Abdul Aziz Bari, *Cabinet Principles in Malaysia: The Law and Practice*, 1999, Univision Press, Kuala Lumpur at p1.

¹⁰⁶ Lord Steyn’s perceptive concluding line in an illuminating elucidation of the context in which intensity and proportionality apply, see *R (Daly) v Home Secretary* [2002] 2 AC532 at p548.

tripartite interaction between the constitutional actors can effectuate enjoyment of rights in Malaysia.

2.0 Introduction

The constitution of Malaysia was drafted in 1957 along with amendments that have been adopted from time to time since then. The constitutional heads of review¹ has emerged through a continuum, via a series of decisions, the contents of which responded to the evolving needs of a contemporary Malaysian society. Thus, this “constitutional review” has acquired the attributes of doctrine. The development can be said to have been extended in historical time; the time it takes the court to tell the story of the series of decisions, the contents of which respond to the questions the nation implicitly or explicitly asks the judicial branch?

By constitutional review, it is meant the judiciary has the unenviable task of compelling legislated and administrative machinery to function in accordance with the mandate of the constitution. It has been rightly observed that a constitutional principle requires practical application as a constraint upon the exercise of all public power. Where the principle is stated, it is followed by the courts which define and articulate its precise

¹ The phrase “constitutional review” is now popular in the UK as well with the implementation of the Human Rights Act 1998. See for example, Jeffrey Jowell, *Principles of Law: Towards Constitutional Review* (OUP, 1995), 1, 271 et seq.

² See Charles Reid, *Constitutional Jurisdiction* (1994) para. 1, para. 114, at p.112. Reid explains at p.114 that “the notion of constitutional review – for the most part, its basic regular production of some value or goal in the sense of the constitution is based upon decisions in the exercise of that goal, that is legal decisions. Accordingly, the constitutional principle and its effect must be fairly decided. It is only when a court makes a legal decision upon some issue that a public power must be exercised in the name of the constitution which confers upon the court its power to make a decision and not by determining an integrated whole”. See also Jeffrey J. Jowell, *Principles of Law: Towards Constitutional Review* (OUP, 1995) 154, at p. 154 May 1991 at 154 observing that there is a practice that develop with institutions, not simply as the outcome of individual judges.

CHAPTER 2 EVOLUTION OF REVIEW IN MALAYSIA

2.0 Introduction

The constitution of Malaysia was drafted in 1957 along with amendments that have been adopted from time to time since then. The constitutional basis of review¹ has emerged through a continuum, via a series of decisions, the contents of which responded to the evolving needs of contemporary Malaysian society. Thus, this “constitutional review” has acquired the semantic of doctrine. The development can be seen as one that is extended in historical time, the time it takes the court to tell the story in a series of decisions, the contents of which respond to the questions the audience implicitly or explicitly asks the judicial narrator.²

By constitutional review, it is meant that the judiciary has the unenviable task of compelling legislative and administrative machinery to function in accordance with the mandate of the constitution. It has been rightly observed that a constitutional principle achieves practical effect as a constraint upon the exercise of all public power. Where the principle is violated, it is enforced by the courts which define and articulate its precise

¹The phrase “constitutional review” is now popular in the UK as well with the implementation of the Human Rights Act 1998. See for example, Jeffrey Jowell, *Beyond the Rule of Law: Towards Constitutional Judicial Review* (2000) Pub.L. 671 at 682.

² See Charles Fried, *Constitutional Doctrine* (1994) Harv. L. Rev 1140 at p1152. Fried explains at p1148 that “Doctrine is constitutive reason. Judges and publicists have regularly proclaimed some value or goal in the name of law and sought to bend legal decisions to the service of that goal; this is legal decision according to the instrumental rationality and without more, hardly doctrine. It is only when a court moves beyond advancing some value on a particular occasion...that we enter the realm of doctrine ...such ordering is designed to further some goal, but it reaches that goal by designating an integrated whole”. See also Victoria F Nourse, *Making Constitutional Doctrine in a Realist Age* (1997) 154 U of Pa. L Rev 1401 at 1404 characterising doctrine as a practice that develop within institutions, not simply as the random act of individual judges.

content.³ This progression has a transcendental value over the constitution, the depth of which stretches the entire text.

The constitutional development however is not without problems. Multidimensional issues have accelerated the tension in the relationship between the institutional actors. The ability of the judicial system to meet the challenges from the executive and the legislature is an unrelenting plague. The courts, being an external reviewer are dangerously appearing to descend into the administrative arena. The legislature can and does override judicial pronouncements with legislative amendments. The constitutional sanction afforded to the judiciary at best is vague and unpredictable. Gaps in accountability and legitimacy remain, the constitutional apparatus notwithstanding. This gives rise to matters relating to balancing of powers.

There are too many questions with conflicting answers. At this juncture, the historical origins and development of judicial review must be studied before delving further into the constitutional aspect for an overview of current jurisprudence. What is hoped to be achieved by this inquiry is to cut across the historical, institutional and sociological relationship between the court and administrative action as well as the society that functions in this polity. The concern here is not to justify judicial review but more on placing the foundational understanding into perspective by examining fundamental postulates. The courts must work towards review that is principled. In order to achieve this, the correct approach to constitutional interpretation must be adopted. This endeavour

³ See Jeffrey Jowell, *Equality as A Constitutional Principle* (1994) CLP 1 at p3.

intends to extinguish misapprehension of the context in which judicial review functions in our courts today.

2.1 Origins of Judicial Review

Fools say they learn by experience. I prefer to profit by others' experience.

Otto von Bismark (1815-1898)

In order to evaluate the current and future role of judicial review action in Malaysia, a backward glance at its origins and growth must necessarily precede. In the words of RH Hickling, simply by seeking the truth of the matter, we can gain not only knowledge of the past, but a useful guide into that uncertain period we call the future.⁴ Changes are always improvements of current situations, rather than an explosion of something radically new. The first step towards any change must then begin with a study of the historical context of judicial review.

That some form of judicial institution is indispensable for the control of administrative action has been established since the judgment of Coke in *Dr. Bonham's case*.⁵ Chief Justice Coke had said:

⁴ RH Hickling, *The Historical Background to the Malaysian Constitution* in *Reflections on the Malaysian Constitution*, 1987, Aliran, Penang at p22.

⁵ Common Pleas 1610. See also de Smith, Woolf and Jowell, *Judicial Review of Administrative Action*, 1995, Sweet & Maxwell, London at p226, and Jaffe, *Judicial Review: Constitutional and Jurisdiction Fact* (1957) 70 Harv. L. Rev 953 for detailed historical judicial pronouncements.

*And it appears in our books, that in many cases, the common law will control acts of Parliament, and sometimes adjudge them to be utterly void; for when an act of Parliament is against common right and reason, or repugnant, or impossible to be performed, the common law will control it and adjudge such an act to be void.*⁶

This dictum however failed to take root in the domain of Parliamentary supremacy in England.⁷ Traces of uneasiness have always followed the judiciary with regards their role in judicial review. The judges have since appeared to be acting on a general but vague historic warrant. The accord of such a warrant can be traced back to the development of legal remedies. It must be understood that the structure of judicial review derives from two sources: the prerogative writs, later called prerogative orders (particularly certiorari and mandamus) and action for damages.⁸ Motivation behind early judicial review therefore resided principally in the desire to ensure the predominance of the high court over “inferior jurisdictions”, and to provide remedies to those whom the established judiciary felt had been unjustly and illegally treated by such authorities.

Lord Denning has mentioned of the “amplitude” of the prerogative writ.⁹ Wherever any body of persons having legal authority to determine questions affecting that authority, they are subject to the controlling jurisdiction of the King’s Bench division exercised in

⁶ *Ibid.*

⁷ Dicey, *An Introduction to the Study of the Law of the Constitution*, 10th Ed, 1968, ELBS, London at p60.

⁸ Jaffe and Henderson, *Judicial Review and the Rule of Law: Historical Origins* (1956) 72 LQR 345 at 348. For detailed history of writs see S.A.de Smith, *The Prerogative Writs* (1951) 11 Camb.L.J. 40 and also by the same author, *Wrongs and Remedies in Administrative Law* (1952) Mod.L.R.189.

⁹ *The King v Electricity Commissioners ex p London Electricity Joint Committee Company* [1924] 1 KB 171 at p204. See also *The King v Minister of Health ex p Davis* [1929] 1 KB 619 at p627.

these writs.¹⁰ The Court of King's Bench had an inherent jurisdiction to control all inferior tribunals, not in an appellate capacity, but in a supervisory capacity. This control extended not only to seeing that the inferior tribunals keep within their jurisdiction, but also to seeing that they observe the law. The control is exercised by means of a power to quash any determination by the tribunal which, on the face of it, offends against the law.¹¹

Thus in the years 1600 -1750, roughly, two new legal remedies were developed. It may be reasonably said that these two new remedies, certiorari and mandamus, made possible the whole complex structure of modern administrative law.¹² In striving to attain these objectives, the court would indeed often come into direct conflict with the legislative will.¹³ Today, the prerogative remedies remain at the centre of judicial review and they continue to manifest their early characteristics.¹⁴ Prerogative orders in Malaysia are enforced through Order 53 of the Rules of High Court.¹⁵

It is quite evident however, that the supervisory role of the courts in relation to administrative action is a product of the development and sophistication of modern societies.¹⁶ One apt observation is this:

¹⁰ *Ibid.*

¹¹ *Rex v Northlumberland Compensation Appeal Tribunal, ex p Shaw* [1952] 1 KB 338 at 346-347.

¹² Edith G. Henderson, *Foundations of English Administrative Law*, 1963, Harvard University Press, Cambridge at p1.

¹³ P.Craig *Administrative Law*, 4th Ed, 1999, Sweet & Maxwell, London at p6.

¹⁴ De Smith, Woolf and Jowell, *op cit*, *supra* n5 at p620.

¹⁵ The new order refers to the powerful and enabling provision introduced in para 1 of the Courts of Judicature Act 1964 ('the CJA'). The Rules of High Court (Amendment) 2000 introduced procedural reforms. See *Sivarasa Rasiah v Badan Peguam Malaysia* [2002] 2 MLJ 413. See further, *infra*, 2.1.4.

¹⁶ Supperstone & Goudie, *Judicial Review*, 2nd Ed, 1997, Butterworths, London at 1.2, "It is possible to trace some of the organizational forms of and practices of modern administrative practice back to the

*The doctrine of limited judicial review was worked out in England during the seventeenth and eighteenth centuries, in connection with the agencies of local government. Partly implicit in the older remedy of prohibition and in common-law damage suits, it was made explicit in the new remedies of certiorari and mandamus. In the eighteenth century, the doctrine was part of the great compromise by which the Tory gentleman of England did as they saw fit in the country while the Whigs controlled the central government. In later times, when English and American social conscience began to catch up with technical organization, it provided a means of regulating industrial life.*¹⁷ (emphasis added)

Judicial quietude from the First World War until the end of the 1950s judicial intervention in public administration coincided with the Civil Service's period of unimpeded growth and unchallenged power, a period which embraced the radical reforms of the post-war Labour government. Yet this phenomenon followed a much greater period of judicial interventionism, spanning the later Victorian years, in which legal and procedural challenges to the boards and commissions set up by the English Parliament to regulate public and private enterprise were entertained by often sympathetic courts, and the Edwardian years when the newly installed Northcote-Trevelyan Civil Service continued to attract judicial suspicion. It was in this era that practically all the modern

ancient polities of Egypt and Greece; the concept of a civil service is sometime said to originate in China during the Tang dynasty, of the seventh to the tenth centuries AD. But we can surely be confident in supposing that the rulers of those ancient civilizations would have blinked in amazement at the sheer scale and complexity of modern government".

¹⁷Edith Henderson, *Foundations of English Administrative Law*, 1963, Harvard University Press, Cambridge at p5. See also generally Craig, *op cit*, *supra* n13 at Chapter 2.

principle forms of judicial review were established. Much of the post-1960s flowering of public law in England has been no more than the rediscovery and reapplication of them.¹⁸

This will later explain why many English rules of judicial review are archaic and pedantic. Its feature in the Malaysian jurisprudence must be studied in the light of this. Further, the articulation of judicial review seems to have grown along side the politico-economic philosophy of the state. During the era of laissez faire, where notions of social regulation was at a bare minimum, it failed to pass muster. Only later, the advent of the welfare state¹⁹ heralded a transformation of the administrative structure. The background was set thereafter for the development of modern judicial review functioning in an interventionist state.

At this juncture, it is noted that the UK courts are experiencing a forward march themselves with the implementation of the Human Rights Act 1998. Although Parliament will, under the Act still be able to have the final word, courts will be charged with the duty of declaring the rights of individuals upon which even a democratically elected Parliament should not encroach. This is required under section 3(2), 4(2) and 6(1). It is left to the courts then to give meaning to the provisions. It is their task to formulate the principles, determine its scope and its relationship with European Community law.²⁰

¹⁸ Stephen Sedley, *Foreword in Administrative Law Facing the Future* (Leyland & Woods eds) 1997, Blackstone Press, London. See also by same author, *The Sound of Silence: Constitutional Law without A Constitution* (1994) LQR 270.

¹⁹ For an exposition of Friedmann's classic theory of welfare state, see Charles A Reich, *Individual Rights and Social Welfare: The Emerging Legal Issues* (1965) 74 Yale L.J. 1245. See also Calvin Woodard, *Reality and Social Reform: The Transition from Laissez Faire to Welfare State* (1963) 73 Yale L.J. 286.

²⁰ See *supra* 1.2.

2.1.1 Evolution of Review in Malaysia

Wherever an Englishman goes, he carries with him as much of English law and liberty as the nature of his situation will allow. Accordingly, when a Settlement is made by British subjects of country that is unoccupied or without settled institutions, such newly settled country is to be governed by the law of England, but only so far as that law is general and not merely local policy and modified in its application so as to suit the needs of the Settlements (Makepeace, Brook and Braddell, One Hundred Years of Singapore Vol 1. , John Murray, 1921 at p 160).²¹

In the Straits Settlement, The Letters of Patent established the Court of Judicature in September 1827,²² as a Court of Record for Prince of Wales Island (Penang), Singapore and Malacca.²³ The Court had powers to issue prerogative writs and orders:

And We hereby grant, ordain, and appoint That all Writs, Summonses, Precepts, Rules, Orders and other mandatory process to be used, issued or

²¹ For an introduction to legal history during the British period, see generally, Ahmad Ibrahim & Ahilemah Joned, *The Malaysian Legal System*, 2nd Ed, 1995, Dewan Bahasa & Pustaka, Kuala Lumpur, Wu Min Aun, *The Malaysian Legal System*, 2nd Ed, 1999, Longman, Kuala Lumpur, Suffian, *An Introduction to the Legal System of Malaysia*, 1988, Fajar Bakti, Petaling Jaya.

²² This is the Second Charter of Justice dated 1827. The first Royal Charter of Justice was conceived in 1807. Wu Min Aun contends that the first Charter is perhaps the most significant event in modern Malaysian legal history as it marked the first statutory introduction of English law into the country. Wu Min Aun, *The Malaysian Legal System*, 2nd Ed, Longman, Kuala Lumpur, at p14.

Before the arrival of the 1827 Charter which extended the jurisdiction of the Penang recorder court to Singapore, many Regulations had spawned in Raffles-led Singapore. According to RH Hickling, these regulations “offered an interesting view of the problems of government as manifest in law”. The issue of *ultra vires* crept in. An example of this is illustrated in 1835 when the Recorder, Sir Benjamin Malkin, came to the view that the Singapore Land Regulation of 1830 (the regulation for ensuring the due registry of lands held by the inhabitants of Singapore) was invalid, on the ground that the Government in Council only had power to promulgate regulation for imposing “duties and taxes”. See RH Hickling, *Essays in Singapore Law*, 1992, Pelanduk Publications, Kuala Lumpur, at p73. See also *Raffles Singapore Regulations 1823* (1968) 10 Mal. L.R. 248.

²³ MB Hooker, *The Laws of South-East Asia Vol 11*, 1988, Butterworth, Singapore at p352. See also RS Bradell, *The Law of the Straits Settlements*, 3rd Ed, 1982, OUP, Kuala Lumpur at p26-34 and J.W.Norton Kyshe, *A Judicial History of the Straits Settlements* (1969) 11 Mal.L.R. 38.

awarded by the said Court of Judicature, shall run and be in the Name and stile of Us,...

And it is Our further Will and pleasure, That the said Court of Judicature...have such Jurisdiction and Authority as Our Court of King's Bench and our Justices thereof; and also as our High Court of Chancery and our Courts of Common Pleas and Exchequer respectively... ”²⁴

The Third Charter of Justice in 1855 Charter sought to reconstitute the Court of Record.

The writ jurisdiction of the Court was reiterated in the following terms:

...to have such jurisdiction and authority as our Court of Queen's Bench, and our Justices thereof...have and may lawfully exercise within that part of our United Kingdom called England, and in all civil and criminal action and suits...and in the control of all inferior courts and jurisdictions, so far as circumstances will admit.²⁵

In one of the earliest reported cases, *R v Kuck Sin Loi*,²⁶ a statute governing the Magistrate's Court had not made provision for appeal. Ford J endeavoured to invoke the courts supervisory jurisdiction in order to grant relief by way of certiorari. The attempt was however aborted. He said thus, “With the doubts existing in this Colony even upon the powers of the Court under a certiorari, it is to be hoped, that the Legislature will at once provide a means of having these appeals satisfactorily brought before the Court”.²⁷

“The doubts” mentioned in the judgment was not elaborated and therefore open to

²⁴ *Letters Patent for reconstituting the Court of Judicature of Prince of Wales Island, Singapore and Malacca*, Mission Press, Malacca, 1827 at p21 cited in TKK Iyer, *Certiorari in Singapore and Malaysia in the Common Law of Singapore and Malaysia*, (AJ Harding ed.), 1988, Butterworths, Singapore at p297.

²⁵ *Ibid*.

²⁶ (1879) 3 Ky 110.

²⁷ *Ibid* at p113.

conjecture. The court could have perhaps felt uneasy to flex its jurisdiction in enforcing a new remedy. TTK Iyer attributes the judge's remarks to the atmosphere of novelty and discovery through trial and error that marked the early days of British colonial settlements.²⁸

With regards to the Malay states, originally each was a separate political entity with its own ruler, legislature, executive and judiciary.²⁹ In the 19th Century, each Malay state was one after another persuaded to sign treaties with the British to agree to act on British advice.³⁰ What seems clear is that the introduction of such laws coincided with the introduction of British-style constitutional practices. These practices and constitutions were eventually incorporated by increasing local representation on the Legislative and Executive Councils that were formed as part of the colonial constitutional apparatus.³¹ The modern constitutional development of Malaysia coincides with the era of British rule.³² Judicial review at that point in time was deemed to be "a general idea with an uncharted potential existing within governmental structures characterised by an accumulation, rather than a dispersal of power".³³

²⁸ TTK Iyer, *Certiorari in Singapore and Malaysia, The Common Law in Singapore and Malaysia*, *op cit*, *supra* n24 at p298.

²⁹ Conceived via treaty of 1895. See Braddell, *The Legal Status of the Malay States*, 1931, Malaya Publishing House, Singapore at p12.

³⁰ Tun Suffian, *An Introduction to the Legal System of Malaysia*, 1988, Fajar Bakti, Kuala Lumpur, at p5.

³¹ Kevin Tan and Thio Li-ann, *Constitutional Law in Malaysia and Singapore*, 1997 Butterworths, Singapore at p40.

³² Wu Min Aun, *op cit*, *supra* n22 at p33.

³³ Mohd Ariff Yusof, *Changing Conceptions of Judicial Review in Malaysia* (1982) JMCL 19 at p20.

One singular case from this era which reflected the institutional relationship of the legislation and the judiciary was *Anchom v Public Prosecutor*.³⁴ Johor had its own constitution in 1895 as the Sultan Abu Bakar had earlier negotiated a treaty with the British without giving up his sovereign status.³⁵ The issue before the court in *Anchom* was whether the Council of State was precluded by the constitution of Johore (Johor) from revising or amending the *Mohamedan* laws which was declared by the Constitution to be an immutable part of the land. The court opined thus:

*The legislature is the sole authority which can decide whether what it does is intra vires or not. It is constituted by enactment and the sole judge in its own cause.*³⁶

The significance of the case is to the extent that it reflects the evolution of judicial review, albeit a stunting one in this instance. Without legislative apparatus and political will, judicial review had no room for gestation.

It has been correctly surmised therefore that as a result, only during the period subsequent to independence that the doctrine of judicial review was given gradual articulation which in principle distinguishes it from power claimed and exercised by courts in this period.³⁷ This statement must necessarily be traced with subsequent happenings. Malaysian constitutional history recorded its first major challenge with the uproar over the setting up

³⁴ [1940] MLJ 18.

³⁵ Wu Min Aun, *op cit*, *supra* n22 at p36

³⁶ *loc cit* at p21.

³⁷ Mohd Ariff Yusof, *Changing Conceptions of Judicial Review in Malaysia*, *op cit*, *supra* n33.

of the Malayan Union.³⁸ The scheme introduced a streamline court structure with one Supreme Court for the whole union. The Malayan Union remains a lesson, a folly of establishing a constitutional structure without prior local consultation. The structure which superseded it was therefore established only after steps were undertaken to determine popular local opinion. This does not mean however that it became the best system for the emerging nation. Even at this stage, it was apparent that popular local opinion could very well be that of a few chosen leaders. The Federation of Malaya Agreement was ultimately signed in 1948, after agreements had been concluded between the British government and the Rulers jointly.³⁹ The agreement signaled the constitutional progress towards self government.⁴⁰

2.1.2 The *Merdeka* Constitution, 1957

It must be remembered that the freedom to which we aspire is the freedom to govern ourselves under a system in which Parliamentary institutions shall be exclusively representative of the people's will.

Tunku Abdul Rahman, in moving the second reading of the Federal Constitution Bill, Malaysian Constitutional Documents (2nd Ed), Vol 1, p iv.

The growth of the Malaysian constitution has been evolutionary. This is because as a system of restraint upon government, a constitution may originate as a matter of organic growth from immemorial customs, embodying natural reason developed and expounded

³⁸ HP Lee, *Constitutional Conflicts in Contemporary Malaysia*, *op cit*, *infra* n46 at p5.

³⁹ Ahmad Ibrahim, *Malaysia as a Federation* (1974) JMCL 1 at p5

⁴⁰ HP Lee, *Constitutional Amendments in Malaysia* (1976) 18 Mal LR 59 at p61.

by the collective wisdom of many generations or as an act of conscious creation in a written form by the people.⁴¹ The process of assimilation is a reflection of the heritage embodied by the constitution. RH Hickling surmises succinctly:

*Evolutionary in its character, it grew out of the mishaps of the past; out of the confused constitutional structure of the old Straits Settlements and the Malay states, the strengths and weaknesses of the advisory treaties, the disasters of the Japanese occupation, the peremptory nature of the Malayan Union and the various compromises of the Federation of Malaya Agreement. At each step the emphasis was more on the authoritarian and the utilitarian, than upon the democratic and the cosmetic. Other framers of constitutions tended to be carried away on tides of populist euphoria; not so, those who worked out the principle of the Malaysian Constitution.*⁴²

The ideas of Westminster and the experience of India have mingled with those of Malaya to produce a unique form of government.⁴³ To be sure, the strength of a constitution lies not so much in the elegant phraseologies which is used in the text, but more in the manner in which the various principal actors in the governmental process

⁴¹ B.O. Nwabueze, *Constitutionalism in the Emergent States*, 1973, C.Hurst & Co, London, at p4. cf *Phang Chin Hock v PP* [1980] 1 MLJ 70 at 73, “..the Constitution was the fruit of joint Anglo-Malayan efforts and our Parliament had no hand in its so drafting. When the British finally surrendered legal and political control, Malaya had a ready-made constitution and there was no occasion for Malaysians to get together and draw up a Constitution”. We have come a long way from this understanding.

⁴² RH Hickling, *An Overview of Constitutional Changes in Malaysia*, in *The Constitution of Malaysia*, (Suffian, Trindade & Lee eds), 1979, OUP, Kuala Lumpur at p3.

⁴³ RH Hickling, *Malaysian Public Law*, Pelanduk Publications, 1997 at p27. See also *Karam Singh v Menteri Hal Ehwal Dalam Negeri* [1969] 2 MLJ 129 (FC) “to a great extent the Indian constitution was the model for our Constitution”. Cf Shafruddin Hashim, *The Constitution and the Federal Idea in Peninsular Malaysia* (1984) 11 JMCL 139 at p140 n2.

view and implement it.⁴⁴ John Marshall, Chief Justice of the US Supreme Court had this to say:

*..to contain an accurate detail of all the subdivisions of which its great powers will admit, and of all the means by which they may be carried into execution, would partake of the prolixity of a legal code, and would scarcely be embraced by the human mind. It would probably never be understood by the public. Its nature, therefore requires that only its great outlines should be marked, its important objects designated, and the minor ingredients which would compose those objects be deduced from the nature of the objects themselves.*⁴⁵

As with most cases of territories which had managed to shake off the shackles of colonialism, the emergence from the colonial cocoon to adult statehood is usually proclaimed with the simultaneous promulgation of a written constitution.⁴⁶ In relation to judicial review, the constitutional warrant was apparent through the draft constitution.⁴⁷ This was conceived in the Report of the Constitutional Commission of 1957 which was headed by Lord Reid.⁴⁸

It must be appreciated that protection of the institution of judicial review in an instrument which inscribes the highest law of the land is crucially interconnected with the protection

⁴⁴ Raja Azlan Shah, *Supremacy of Law in Malaysia* (1984) JMCL 1 at p6.

⁴⁵ *McCulloch v Maryland* 4 Wheaton 316 quoted in Laurence Tribe, *American Constitutional Law*, 1978, Foundation Press, New York at p229.

⁴⁶ HP Lee, *Constitutional Conflicts in Contemporary Malaysia*, 1995, OUP, Kuala Lumpur at p4.

⁴⁷ See further *infra* 2.1.3.

⁴⁸ It became known later as the Reid Commission. Other members included Ivor Jennings, Justice Abdul Hamid, Justice B.Malik and WJ McKell. For an interesting account of the inner politics that shaped and affected the Reid Commission, see Joseph Fernando, *The Making of the Malaysian Constitution*, 2002, MBRAS, Kuala Lumpur.

of fundamental rights. Surely, depriving the court of its power of judicial review would be tantamount to making fundamental rights non-enforceable, a mere adornment as they will become rights without remedies.⁴⁹ If the fundamental rights provisions have been described as “conscience of the constitution”,⁵⁰ then the courts are enforcers of this conscience. Therefore, the constitutional sanction of judicial review must be sufficient and effective if it is to have any meaning. This analysis is what we turn to now.

2.1.3 The Dynamics of Constitutional Review

Like a moviegoer who arrived late and missed the important nascence of a story, the connection of judicial review with the constitution seems mysterious. Not only is there no textual warrant whatsoever to that end, there seems to be an express rejection by the framers.⁵¹ On the face of it, it appears that the exercise of review by the courts cannot be sustained. What more, there are constitutions with express enumeration for powers of judicial review. The Constitution of Ceylon, as a sample in contrast, provides for a Constitutional court.⁵²

Article 10 of the Malaysian constitution features in this example. Article 10 provides for freedom of speech, assembly and association. The executature it appears is free to restrict these rights any which way they choose to. This is because there was failure to include “reasonableness” as a standard to be adhered by the executive as well as legislature

⁴⁹ MP Jain, *Indian Constitutional Law*, 2003, 5th Ed, Part 11, Wadhwa, Nagpur at p1822.

⁵⁰ *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789 at p1806.

⁵¹ See *infra* text accompanying fn54.

⁵² Cooray, *Constitutional and Administrative Law of Sri Lanka*, 1973, Hansa Publishers, Colombo at p 191-203.

should they choose to restrict any of these rights.⁵³ A perusal of the Reid Report reveals that Justice Abdul Hamid of the Reid Commission had objected to any interference by the courts on restrictions imposed by the legislature against such freedoms. According to him, this is precisely what would happen if the guaranteed freedom is subject to “reasonable” restriction.⁵⁴ Justice Hamid’s dissent was accepted. Article 4(2) further consolidates this.⁵⁵ If this is so, it appears that the legislature has the ultimate say on the guaranteed rights.⁵⁶

The distinct Indian provisions are noted. Under the Indian Constitution, only “reasonable restrictions” can be imposed on some of the fundamental rights.⁵⁷ The presence of the word “reasonable” before “restriction” makes it possible for the courts to assess whether the restriction is reasonable from substantive and procedural points of view. If the court

⁵³ The relevant part of Article 10 reads: Subject to clauses (2), (3) and (4),

- (a) every citizen has the right to freedom of speech, expression
- (b) all citizens have the right to assemble peaceably and without arms
- (c) all citizens have a right to form associations

(2) Parliament may by law impose

- (a) on the rights conferred by para (a) of clause (1), such restrictions as it deems necessary or expedient in the interest of the security of the Federation or any part thereof, friendly relations with other countries, public order, morality and restrictions designed to protect the privileges of Parliament or of any Legislative Assembly or to provide against contempt of court, defamation or incitement to any offence.

⁵⁴ Para 12(ii) of his note of dissent states that “the legislature alone should be the judge of what is reasonable in the circumstances. If the word “reasonable” is allowed to stand, every legislation on this subject will be challengeable in court on the ground that the restrictions imposed by the Legislature are not reasonable. To avoid a situation like this, it is better to make the legislature the judge of the reasonableness of the restrictions”.

⁵⁵ Article 4(2) reads thus:

The validity of any law shall not be questioned on the ground that-

- (a) it imposes restrictions on the rights mentioned in Article 9(2) but does not relate to matters mentioned therein; or
- (b) it imposes such restrictions as mentioned in Article 10(2) but those restrictions were not deemed necessary or expedient by Parliament for the purposes mentioned in that Article.

⁵⁶ For a discussion on the partiality of the Reid recommendations, see KJ Ratnam, *Communalism and the Political Process in Malaya*, 1965, University of Malaya Press, Kuala Lumpur cf Joseph Fernando, *The Making of the Malaysian Constitution op cit, supra* n48.

⁵⁷ Article 19(2) to (6).

feels that the restriction is greater than what is warranted, it will quash the law.⁵⁸ This provided impetus for the vast supervisory role of the Indian Supreme Court.⁵⁹ Article 13 of the Indian Constitution further consolidates the powers of judicial review. Clause (1) of Article 13 says that all laws that were in force in the territory of India immediately before the adoption of the Constitution, in so far as they are inconsistent with the provisions containing the fundamental rights, shall, to the extent of such inconsistency be void. Clause (2) of the same Article provides that the states shall not make any law that takes away or abridges any of the fundamental rights, and any law made in contravention of this, shall, to the extent of that contravention, be void.

The emerging thread for concern is that there was never intention to provide for judicial review in Malaysia.

This textual conundrum cannot however mean that the constitution denies the existence of judicial review. The underlying tenet of separation of powers forms a backbone for the distinct and separate duties of the institutions of power. This doctrine, supported with provisions for judicial authority, invests power for judicial review. The Reid Constitutional Commission saw the courts as a necessary element to safeguard state autonomy as the states “cannot maintain their measure of autonomy unless they are enabled to challenge in the courts as *ultra vires* both federal legislation and Federal executive acts”.⁶⁰ In relation to the enumerated fundamental rights, it was provided that “the guarantee afforded by the Constitution is the supremacy of the law and the power

⁵⁸ See for example, *State of Madras v VG Row* AIR 1952 SC 195.

⁵⁹ *State of Bihar v Bal Mukund Shah* AIR 2000 SC 1296 at p1348 para 81.

⁶⁰ *Infra* n67 at para 123.

and duty of the Courts to enforce these rights and to annul any attempt to subvert any of them whether by legislative or administrative action or otherwise”.⁶¹ This is recognition that certain fundamental rights need to be protected against being overridden by the majority. No one has yet thought of a better form of protection than by entrenching them in a written constitution enforced by independent judges.⁶²

Textual enumeration of jurisdiction for judicial review can be traced back to Article 4(1) and (3) which proclaims that the constitution is the supreme law of the land. Article 4(3) provides that the validity of a Parliamentary or state legislation shall not be questioned on the ground that it makes provisions with respect to any matter with respect to which the concerned body has no power to make, except in proceedings for a declaration that the law is invalid. The role of guarding the supremacy of the constitution lies with the courts, whose powers are invested via Article 121.⁶³ Further, Article 128⁶⁴ provides for the jurisdiction of the Federal Court. Article 128(1) specifies the exclusive original jurisdiction of the Federal Court whilst under Article 128(2) sees that the Federal Court is invested with jurisdiction to resolve constitutional questions referred by any inferior court. Further, Article 130 confers advisory jurisdiction to the Federal Court.

⁶¹ *Ibid* para 161. See Ronald Dworkin’s illuminating insight: “The institution of the rights against the government is not a gift of God, or an ancient ritual, or a national sport. It is a complex and troublesome practice that makes the governments job of securing the general benefit more difficult and more expensive, and it would be frivolous practice”, *Taking Rights Seriously*, 1977, Harvard University Press, Massachusetts, at p198.

⁶² See *Matadeen v Pointu* [1999] 1 AC 98 at p110.

⁶³ *Supra* 1.6.2.

⁶⁴ Article 128(1) and (2) provides for jurisdiction of the Federal Court.

According to MP Jain, this jurisdiction can be invoked to determine an important constitutional question expeditiously.⁶⁵

However, to trace judicial review only to these articles is misplaced. The articles do not exhaust the power of judicial review and at best merely signify and symbolize the great importance attached to the supervisory powers of the courts guaranteed under the constitution: which leads to the inevitable conclusion that it is emphatically the province and duty of the judicial department to say what the law is.⁶⁶ It is because of this perhaps that judicial review did not receive express articulation.

Further, it appears that the philosophical presuppositions of the Reid Commission coloured the place of judicial review. Indeed initially, the commission felt that it was not necessary to include a chapter on fundamental liberties as, in the commission's view, such rights were already deeply entrenched in the land.⁶⁷ The commission however also saw the courts as a necessary element to safeguard state autonomy. This will later prove to be very crucial towards the understanding of constitutional interpretation, especially with regards to dispersal of powers in formulating constitutional review.

⁶⁵ MP Jain, *Constitutional Remedies in The Constitution of Malaysia: Further Perspectives and Developments*, F.A.Trindade and H.P.Lee (eds), 1986, Oxford University Press, Singapore at p161.

⁶⁶ See *Marbury v Madison* (1803) 1 Cranch US 137.

⁶⁷ *Report of The Federation of Malaysia Constitutional Commission*, 1957, FAO, Rome, para 161: "The rights which we recommend should be defined and guaranteed are firmly established now throughout Malaya and it may seem unnecessary to give them special protection in the constitution".

2.1.4 Jurisdiction for Review

Order 53 of the Rules of High Court 1980 ("the RHC") provides that an application for judicial review may seek any of the relief under para 1 of the Schedule to the Courts of Judicature Act 1964 Act (CJA). The additional powers are conferred by the CJA via section 25⁶⁸ read with para 1 of the Schedule thereto. Para 1 of the Schedule provides that the High Court has additional powers to issue "to any person or authority directions, orders or writs including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any others, for the enforcement of the rights conferred by Part 11 of the Constitution, or any of them, or for any purpose".⁶⁹ This suggests powers over and above those already enjoyed by the High Court. In *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan*,⁷⁰ the Court of Appeal reiterated the need to embrace the wide powers conferred by the language of para 1 in order to adopt the appropriate remedy that is to be granted in a particular case.

Order 53 of the Rules of the High Court was amended via Rules of the High Court (Amendment) 2000.⁷¹ The Court of Appeal in *Sivarasa Rasiah v Badan Peguam*

⁶⁸ Section 25 of the CJA reads thus: (1) Without prejudice to the generality of Article 121 of the Constitution the High Court shall in the exercise of its jurisdiction have all the powers which were vested in it immediately prior to Malaysia day and such other powers as may be vested in it by any written law in force within its local jurisdiction.

(2) Without prejudice to the generality of subsection (1) the High Court shall have the additional powers set out in the Schedule: Provided that all such powers shall be exercise in accordance with any written law or rules of court relating to the same.

⁶⁹ In *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan and another appeal* [1996] 1 MLJ 481, the Court of Appeal held that the schedule to the Act is part of the Act and must be construed to the meaning of the Act.

⁷⁰ [1996] 1 MLJ 481.

⁷¹ Vide PU (A) 342/2000 w.e.f. 22.9.00. See *supra* 1.0

Malaysia⁷² has since seized the opportunity to express views on the provision. The court held that the amendment was introduced to cure the mischief of its precursor, which was much narrower and restrictive. The new order refers to the powerful and enabling provision introduced in para 1 of the Courts of Judicature Act 1964 ('the CJA'). The scope of para 1 and its linkage to the constitution is surmised in *Sivarasa Rasiah v Badan Peguam Malaysia*:

Until 1964, the statute that governed the judicial arm of the government was the Courts Ordinance 1948 (the Ordinance). That Ordinance was passed by our colonial masters under whose yoke we lived until 31 August 1957. On 31 August 1957, we inherited a dynamic Federal Constitution (the Constitution) which conferred upon our citizens some of the most cherished and valuable rights that any human being can aspire for. Among these are fundamental liberties enshrined in Part 11. It was obvious to the meanest of intelligence that in the face of such a dynamic document the outdated, archaic and arcane provisions of a medieval society that fashioned remedies to meet its needs were wholly inappropriate. Of what use are to us are such ancient self-fettering remedies like certiorari, quo warranto and the like? Something had to be done to bring federal law in line with dynamism of the Constitution. And so Parliament acted. It incorporated para 1 conferring upon our High Courts powers much wider than those vested in the Queen's Bench division in England. But our courts were limping behind Parliament in the procedural sector. We still clung on the shackles and fetters imposed upon us by English adjectival law. We forgot all about para 1.⁷³

⁷² [2002] 2 MLJ 413

⁷³ *Ibid* 421.

This being so, the constitutional basis for enforcement of remedies in cases of administrative excess is settled. In *Rama Chandran*, the Federal Court remarked the uncanny similarity with the Indian Article 226.⁷⁴ It has however been commented that the Indian position is different as para 1 is contained within an Act of Parliament while Article 226 is a constitutional provision.⁷⁵ However, it is submitted that when the constitution invests power of review to the courts, such an accord will be impotent if not accompanied by capacity to issue remedies. Para 1 is legislative articulation of a constitutional sanction.

2.2 The Historical Conspectus Resolved

Much it seems can be culled from the detailed historical synopsis. The Malaysian constitution is not a perfect charter of rights because of the numerous restrictions imposed on the exercise of fundamental rights. But we need not despair. A constitution is a living document and must be interpreted as such, irrespective of its defects.⁷⁶ The “living document” notion captures the fact that a constitution is not self-implementing. It is for the courts to so interpret it in tandem with contemporary needs. The progressive method of interpretation is captured most elegantly by Lord Sankey in *Edwards v AG of Canada*⁷⁷ when he said that it can be likened to a “living tree capable of growth and expansion within its natural limits”. The judiciary could best fulfill this function by remaining free from majoritarian pressure. In order to insulate the judiciary from the

⁷⁴ *Rama Chandran*, *supra* at p195.

⁷⁵ Sudha Pillay, *The Ruling in Rama Chandran A Quantum Leap in Administrative Law?* [1998] 3 MLJ lxii at plxxi.

⁷⁶ Gan Ching Chuan, *A Review of the Post-UEM Developments* (1999) 26 JMCL 119 at 122.

⁷⁷ *Edwards v AG of Canada* [1930] AC 124 at 136.

whims of the majority, the constitution has singled the courts as the only branch of government that is granted the security of salary and tenure protection.⁷⁸

The initial days post *Merdeka* was at best bumpy. First, the judiciary had faltered and stumbled as conditioned minds had to be re-set.⁷⁹ One example that typifies the courts of the early era is *Loh Kooi Choon v Government of Malaysia*.⁸⁰ The court held thus: “The question of whether the impugned Act (the Restricted Residence Enactment) is “harsh and unjust” is a question of policy to be debated and decided by Parliament, and therefore not meet for judicial determination. To sustain it would cut very deeply into the very being of Parliament. Our courts ought not to enter this political thicket, even in such a worthwhile cause as the fundamental rights guaranteed under the constitution”. It would be a great many decades for the courts to find their true voices, even then not without problems.⁸¹

Second, the development of judicial review in England is different to that in Malaysia. The consequence of an omnipotent Parliament and absence of written constitution limited the growth of judicial review in England. Supervisory jurisdiction of the courts revolved around the area of ultra vires.⁸² This stultified development of judicial review on a *vires* based regime. Malaysian courts, subjugated by persuasive influence of these early English decisions, succumbed to precedent without considering the contextual distinction

⁷⁸ Article 125.

⁷⁹ See for example, *Chia Khin Sze v Mentri Besar, State of Selangor* [1958] 24 MLJ 105.

⁸⁰ [1977] 2 MLJ 187 at p188.

⁸¹ See further, *infra* Chapter 3.

⁸² See for example, *Council of Civil Service Unions v Minister of the Civil Service* [1984] 3 All ER 935 at p950 (CCSU). *Boddington v British Transport Police* [1999] 2 AC 143 at p171, *R v Hull University Visitor, ex p Page* [1993] AC 682 at p701.

in the constitutional landscape. The grounds of review were based on Lord Diplock's formulation in *Council of Civil Service Unions v Minister of the Civil Service*.⁸³ That the supervisory jurisdiction of the courts in Malaysia is premised on a written constitution supported by the theory of separation of powers was unfortunately not considered, until much later.

Finally, constitutional interpretation was at its infancy. This left judicial review in doldrums, a mere periphery in the exercise of judicial duty and scant regard given for fundamental rights clauses. The despair is however noted by the eminent Indian jurist, MP Jain, as being part of the evolutionary development of the role of the courts. He says thus:

*Judicial interpretation is after all a slow and gradual metamorphosis of constitutional principles, and is somewhat invisible, for the change has to be deciphered by an analysis of a body of judicial precedents. The process is slow for it develops from case to case over a length of time and it may take long for a view to crystallise. It is also somewhat haphazard because the courts do not take initiative; they interpret the constitution only when the question is raised before them and the course of interpretation depends on the nature of cases and constitutional controversies which are presented to the court for adjudication.*⁸⁴

It is submitted that the vigour of review by the courts reflect the maturity of a political system. The proper role of each constitutional actor is therefore important. The

⁸³ *Ibid.* See further, *infra*, Chapter 4.

⁸⁴ MP Jain, *op cit*, *supra* n65 at p158.

relationship should cease to be a power-play but instead one based on principles. This is because ultimately, administrative excess must be subject to proper standards and tests. These formulations are devices of the court, emerging from the existing corpus of decisions, informed by analyses and worked towards the fashioning of new apparatus - all in search of a deeper constitutional meaning.

2.3 Constitutional Review, post 1996

It is noted that judicial review had been left to develop incrementally along with pronouncements of the courts rather than being based on a constitutional dictum where the proper scope of principled review would have been elucidated earlier. This unfortunate trend has been changed. Today, Malaysian courts are heralded by the advent of a series of decisions which have crowned judicial review as a cornerstone of constitutional jurisprudence. A long road and time spans between *Karam Singh*⁸⁵ and the seminal decision of *Tan Tek Seng*⁸⁶ that breathed life into the hitherto dormant Article 5. Article 5 appeared at first to be a fairly conservative statement on the right to life which has now been invigorated by a dynamic court. The court asserted that it had a primary duty to resolve issues of public law by having resort to constitutional provisions. The court held thus:

⁸⁵ *Karam Singh v Menteri Hal Ehwal Dalam Negeri* [1969] 2 MLJ 129. The Court of Appeal in *Tan Tek Seng* at p285 reminded that the decision in *Karam Singh* must be studied in the light of its circumstances, noting that it was “expressed at a time when the learning of the constitution was still at its infancy”.

⁸⁶ *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan* [1996] 1 MLJ 261. A list of cases have built the momentum before *Tan Tek Seng*. This would include *Rohana bt Ariffin v Universiti Sains Malaysia* [1989] 1 MLJ 487, *Raja Abdul Malek Muzaffar Shah v Setiausaha Suruhanjaya Pasukan Polis* [1995] 1 MLJ 311, *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* [1995] 2 MLJ 336.

*the court should keep in tandem with the national ethos when interpreting provisions of a living document like the Federal Constitution...They should, when discharging their duties as interpreters of the supreme law, adopt a liberal approach in order to implement the true intention of the framers of the Federal Constitution. Such an objective may only be achieved if the expression "life" in Art 5(1) is given a broad and liberal meaning.*⁸⁷

The court also gave effect to the joint operation of Articles 5(1) and 8(1): "In the first category will fall cases in which a determination has to be made as to the nature and extent of a fair procedure that is required to be applied to the facts of a particular case. The second category comprises of those cases in which the punishment imposed is found to be disproportionate to the nature of the misconduct found to have been committed in a given case".⁸⁸ With this new interpretation for the aggrieved, natural justice took on a rebirth as "procedural fairness".⁸⁹ The incarnation of procedural fairness is not new.⁹⁰ The early decisions of *Rohana bte Ariffin v Universiti Sains Malaysia*⁹¹ and later *Raja Abdul Malek Muzaffar Shah v Setiausaha Suruhanjaya Pasukan Polis*,⁹² appeared to have paved way for this new wave of thought. *Tan Tek Seng* subsequently provided the

⁸⁷ *Ibid* at p286.

⁸⁸ *Ibid* at p290.

⁸⁹ The two latin tags that premised Natural Justice were *nemo judex in causa sua* (no man shall be a judge in his own cause) and *audi alteram partem* (no man shall be condemned unheard). See for example the Privy Council in *B Surinder Singh Kanda v The Government of the Federation of Malaya* [1962] MLJ 169. The courts have always been careful to maintain that the categories of Natural Justice are never closed: *Raja Abdul Malek Muzaffar Shah v Setiausaha Suruhanjaya Pasukan Polis & Ors* [1995] 1 MLJ 308. In *Tan Tek Seng*, the Court of Appeal expressed that the two maxims were sufficiently flexible to meet new fact patterns that emerge from time to time [1996] 1 MLJ 261 at p281.

⁹⁰ The court seem to have drawn inspiration from the American judiciary who have resorted to procedural fairness in administrative actions on the basis of the due process clause in the Fourth Amendment to their Constitution. See *Goldberg v Kelly* (1970) 397 US 254. See also Loughlin, *Procedural Fairness: A Study in Crisis in Administrative Theory* (1978) 28 U of Toronto L.J. 215.

⁹¹ [1989] 1 MLJ 487: Note that Edgar Joseph Jr. FCJ in this case had used the heading *Procedural Unfairness*, see p496.

⁹² [1995] 1 MLJ 308.

opportune forum to deliver a path-breaking overview towards sophistication and maturity in control of administrative action.

Tan Tek Seng marks a distinct severance from Dicey's *grundnorm*⁹³ and the beginning of constitutional review in Malaysia. Procedural fairness and proportionality (the court however used the term "disproportionate") has become a feature of judicial review. *Tan Tek Seng* establishes a broad approach to judicial review as opposed to the narrow approach which was grounded on English common law. This latter view was adopted by the dissenting judge in that case, NH Chan JCA. With respect, the latter position cannot feature in light of the current jurisprudence. English common law principles are persuasive but it is the constitution which naturally takes precedence.

Statutes never state that the power which it confers should be exercised unfairly or unreasonably. The statute may however (although not appreciated at that time) unwittingly, by its express provision, achieve this result. Where this happens, it is the duty of the court to remedy the defect in the statute by supplementing the statutory code.⁹⁴ Thus, the constitutional footing entrenched in *Tan Tek Seng*⁹⁵ is a mellifluous stroke of judicial creativity that has dilated the apertures which the courts had previously found themselves constrained by. *Tan Tek Seng* was followed suit by the laudatory

⁹³ The word *grundnorm* is used not in a classical Kelsenian term but for want of a better word to describe the basis upon which administrative law cases were decided. In this sense, Dicey's formulation became a kind of basic law.

⁹⁴ See for example *Doody v Sec of State for the Home Department* [1993] 3 All ER 92 and *Pepper v Hart* [1992] 3 WLR 1032. See also Lord Woolf of Barnes *Droit Public-English Style* (1995) Pub.L. 57.

⁹⁵ *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261.

decisions in *Hong Leong Equipment*,⁹⁶ *R. Rama Chandran*⁹⁷ and *Sugumar Balakrishnan*⁹⁸ at the Court of Appeal.

In *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan*,⁹⁹ the Malaysian Court of Appeal said that a duty to give reasoned decision was part of procedural fairness: "When a public decision-taker gives reasons, he reveals his mind and exposes for curial scrutiny the basis for his decision".¹⁰⁰ With regards to relief, the court asserted its powers to fashion the appropriate remedy to fit the factual matrix of a particular case and to grant such relief as meets the ends of justice based on the wide powers bestowed by paragraph 1 of the Schedule to the Court's of Judicature Act 1964. Further, the Federal Court decision of *Rama Chandran v The Industrial Court Malaysia*,¹⁰¹ pushed away more barriers by ordering consequential relief instead of remitting the case back to the initial tribunal, in that instance, the Industrial Court.

*Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah*¹⁰² at the Court of Appeal seemed to lay the ground not just for procedural fairness but substantive fairness as well. The court said thus: "The result of the decision in *Rama Chandran* and the cases that followed it is that the duty to act fairly is recognized to comprise of two limbs; procedural fairness and substantive fairness. Procedural fairness requires that when arriving at a decision, a public decision maker must adopt a fair procedure. The doctrine

⁹⁶ *Hong Leong Equipment v Liew Fook Chuan* [1996] 1 MLJ 481.

⁹⁷ *R. Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 154.

⁹⁸ *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289.

⁹⁹ *Op cit*, *supra* n96.

¹⁰⁰ *Ibid* at p538.

¹⁰¹ *Op cit*, *supra* n97. See also *infra* 3.3.1.

¹⁰² *Op cit*, *supra* n98.

of substantive fairness requires a public decision-maker to arrive at a reasonable decision and to ensure that any punishment he imposes is not disproportionate to the wrongdoing complained of. It follows that if in arriving at a public law decision, the decision-maker metes out procedural fairness, the decision may nevertheless be struck down if it is found to be unfair in substance”.

The Federal Court however overruled this decision. This reflects that review by the courts can also spring timorous turnabouts that render the *raison d’etre* behind earlier interventionist cases to a null. The pragmatic can be replaced by the diffident. The Federal Court decision in *Sugumar*¹⁰³ can be seen as an emasculation of constitutional dictum by succumbing to the ouster clause¹⁰⁴ and refusing to acknowledge any duty by the primary decision-maker to give reasons. To frustrate Article 5 and 8 by relying on any formal adjectival statute is to rob what the constitution treasures. The constitutional dictate cannot be left to illusory legislative provisions.¹⁰⁵ However, *Sugumar* does highlight the difficulty of predicting the enthusiasm with which reviewing courts will perform their role as constitutional policemen. Much it seems depends on who is sitting on the bench and current influences.

The reluctant “dragon”¹⁰⁶ of constitutional review has been released from its cage by the Malaysian courts and set to experience great growth. Towards this end, the constitutional

¹⁰³ *Pengarah Berkuatkuasa Negeri Sabah v Sugumar Balakrishnan* [2002] 3 MLJ 72 (FC).

¹⁰⁴ See further in Chapter 5

¹⁰⁵ The Federal Court decision *Sugumar* can be likened to *Liversidge v Anderson* [1942] AC 206 of Malaysia.

¹⁰⁶ Alluding to Oliver Holmes remark, “The rational study of law is still to a large extent the study of history. When you get the dragon out of his cave on to the plain and in the daylight, you can count his teeth

milieu of judicial review in Malaysia necessitates study. What the series of cases have achieved is setting the supervisory function of the court as *constitutional* review and by placing this role within the context of enforcement of the fundamental rights clauses. This being so, review triggers not just procedural rights but as to be later studied in further detail, can also furnish *substantive* rights. As such, the demands of substantive rights requires the formulation of proper standards. This must take into account the recognition of the particular circumstances of the case and the nature of the exercise of that power, beginning with the constitutional warrant. Thus, constitutional interpretation has and will play a large role in formulating the development of review in Malaysia. The scope of the dynamic and nebulous Article 8 is just one of the many unearthed treasures by a creative court. While the series of cases have placed these principles on the forefront, the merits of such an approach needs keen analysis after this, if it is intended to renounce any argument that judicial creativity has inexorably stretched the constitutions intention.

2.4 Conclusion

The historical overview clearly indicates that constitutional sanction was needed to give rise to the exercise of judicial review in the first place. The constitution confers and entrenches the power of the court to engage in judicial review. This however was achieved indirectly through provision conferring vast powers to the courts. There is no explicit enumeration of judicial review. The constitutional guarantee is singularly important for if the power of the court was to reside merely in legislation, the capacity of

and claws, and just see what is his strength", Oliver Holmes, *The Path Of the Law* (1897) 10 Harv. L.Rev. 457 at p469.

the court will be subject to the dictates of the executive through legislative whim and fancy.

Subsequent to this connection, the constitutional mandate was explored tentatively by the courts. It is clear that judicial review has witnessed incremental growth along with the sociopolitical development of the nation. The developments have heralded resounding recognition for *constitutional* review. The changes bring about sophistication in the control of administrative action in Malaysia. How then must the courts respond to this will be the concern in chapter 3.

CHAPTER 3 CONSTITUTIONAL INTERPRETATION AND THE REVIEWING COURT

3.0 Introduction

The constitutional basis of review is a leap from the fragile common law foundation which hovered in transplanted English principles. This development has its basis in case law. Significant alteration in approach has occurred especially when the judiciary is faced with vindicating fundamental rights. While this places review on firm footing, the nature of review has definitely changed. This is because constitutional interpretation by the reviewing court tends to determine the outcome of a challenge. Review has become a tool of substantive constitutional adjudication.

If constitutional interpretation is to take centrality in the enterprise of review,¹ the proper method of interpretation then becomes very important. Interpretation however is never an easy task as it works on the basis that the constitution is a “living document” and as such must cater for contemporary needs. What it is capable of achieving is the supply of solid, uniform standards-constitutional standards-to be applied when scrutinizing administrative excess. Further, some common law tenets like rule of law can continue to operate within this framework. Therefore, the potential of review to protect and promote a rights-based

¹ Note that interpretation is basically about ascertaining the meaning of the constitutional provision and the activity has been divided into 2 broad categories, namely (1) interpretation and (11) construction. While interpretation has been defined as “discovering the meaning of constitutional text”, construction has been defined as a creative discovery of the hidden meaning of the text within the founding document”, Keith E Whittington, *Constitutional Interpretation, Textual Meaning: Original Intent and Judicial Review*, Lawrence, Kansas, University Press of Kansas, 1999, p3 quoted in Abdul Aziz Bari, *The Malaysian Constitution-A Critical Introduction*, 2003, The Other Press, Kuala Lumpur at p228.

jurisprudence must be premised on clear principles. It is also emphasized that the constitutional basis for review informs standards of administrative behaviour.

This Chapter endeavours to study the context of constitutional interpretation in Malaysia. This merits close study for it gives meaning to constitutional review. Only if the correct approach to constitutional interpretation is achieved can the courts in the last analysis, be said to be constitutionally competent to exercise the mechanism of review. This chapter is then premised on achieving the proper approach to constitutional interpretation on the basis that it paves the way towards principled review.

3.1 The Background of Rights² and Constitutional Interpretation

The background of a constitution is an attempt, at a particular moment in history, to lay down an enduring scheme of government in accordance with certain moral and political values. Interpretation must take these purposes into account.³ Indeed constitutional interpretation would be denuded of much if it was conducted in a historical vacuum-what is important is that the historical focus must be studied in context and not for blind adherence. Only then will interpretation have meaning.

²Dworkin in *Taking Rights Seriously*, 1977, Harvard University Press, Massachusettes at p139 observes that "A man has a moral right against the state if for some reason the state would do wrong to treat him in a certain way. Even though it would be in the general intention to do so". Harold Laski has similar thoughts: "Rights are those conditions of social life without which, no man can seek, in general, to be himself at his best", Laski, *A Grammar of Politics*, 5th Ed, 1967, Allen & Unwin at p39.

³ *Matadeen v Pointu* [1999] 1 AC 98 at p108 PC. See also *S v Makwanye & Anor* 1995 (3) SA 391.

First, reliance on historical records to resolve ambiguity is never definitive. The optimism towards the framers ability to capture complicated words and ideas importing rights and governance structure may be misplaced. A very persuasive argument is that the meaning of a text never remains fixed. At any time texts are rich with meanings and competing accounts of the past are attributable to fresh perspectives as well as new information.⁴ Secondly, the widest possible adoption of humane standards is undoubtedly to be aspired for. But it is not properly to be achieved by subverting the constitution nor by a clear misuse of legal concepts and terminology; indeed the furthering of human rights depends upon confirming and upholding the rule of law.⁵ This is the end that must be drawn by the reviewing court.

What the historical lense does provide is that the many provisions in the Constitution are actually a collection of pre-existing rights and structures. And it is in this light that they must be seen, not merely the 1957 Reid Constitutional Report – that would be misplaced. With this understanding, instead of allowing the framers to rule from the grave, it would enable them to be a living force in the present. This submission is of course not without controversy. Argument to the contrary would be that there is no preamble to the Malaysian constitution that gives recognition to the continuous enjoyment of such rights. The preamble is exemplified in the Indian model. Case law seems to point in the direction that this is a significant omission and therefore disables any endeavour to read in a heritage of pre-existing laws. It was held in *Phang Chin Hock v PP*⁶ that the Malaysian constitution was not drawn up by a constituent assembly and was not “given by the

⁴ David Strauss, *Common Law Constitutional Interpretation* (1996) 63 Uni Chi Law Rev 877 at p896.

⁵ *Thomas v Baptiste* [2000] 2 AC 1 at p33.

⁶ [1980] 1 MLJ 70 at 73.

people". Further, it is also noted that in some newer Westminster-style constitutions, there is an express recognition of pre-existing rights. For example, section 3 of the Mauritius Constitution declares that certain human rights and fundamental freedoms listed in paragraphs (a), (b) and (c) "have existed and shall continue to exist" without discrimination.⁷ Other constitutions with similar provisions are that of St Lucia, Belize and Jamaica.⁸

It is contended that the notion of "pre-existing rights and structures" is sustained within the Malaysian constitution by *implication*. Some cases confirm this. For example, in *Ooi Ah Phua v Officer-in-Charge*⁹ the court observed and accorded this recognition for Article 5(3) of the Federal Constitution.¹⁰ The court held that "Article 5(3) does not introduce an entirely new right but merely re-states a right which had existed in some form before the constitution". The court in *Ooi Ah Phua* went on to remark that "a speedy trial is an unwritten right of every person accused of an offence".¹¹ This is a further recognition that although not all "pre-existing rights" were tabulated by the framers, this does not however deny the heritage of its existence. Fortifying this argument is the permeation of natural justice, which is not expressly enabled by the constitution but is inherent in the concept of civilization.¹²

⁷ See *Matadeen v Pointu* [1999] 1 AC 98.

⁸ See for example, *Deputy Public Prosecutor of Jamaica v Mollison* [2003] 2 AC 41 and *Riley v AG of Jamaica* [1983] AC 719.

⁹ [1975] 1 MLJ 93 at p94 (FC).

¹⁰ Article 5(3) reads: *Where a person is arrested, he shall be informed as soon as may be of grounds of his arrest and shall be allowed to consult and be defended by a legal practitioner of his choice.*

¹¹ *Ooi Ah Phua*, loc cit at p117.

¹² See *Higgs v Minister of National Security* [2000] 2 AC 228 at p260 para F: "A right inherent in the concept of civilization, it is recognized rather than created by international human rights instrument".

At this juncture, it is observed that Justice Hamid of the Reid Constitutional Commission had objected to the usage of “natural justice” in the draft provision of the constitution.¹³ The basis for this objection is that the concept cannot be defined uniformly. Justice Hamid’s dissent was endorsed in the Government White Paper.¹⁴ In fact, Justice Hamid is quite right. There is essentially no necessity to include natural justice in express terms. However, his reasoning is convoluted.¹⁵ It is argued that the basis for the exclusion of express enumeration of “natural justice” should be because it is part of the law of the land that has become entrenched within the “living” constitution. In fact, it has been noted earlier that because of this, the Reid Commission Report did not provide an exhaustive recommendation on the notion of rights or the scope of the relevant provisions. This seems to be an acknowledgement of the rights as being encapsulated within the existing laws of the land. Indeed there was the initial deliberation whether to even enumerate such rights.¹⁶

The relevant observation of the South African Constitutional Court in *Re ex p President of the Republic of South Africa & Ors*¹⁷ is noted. Chaskalson P enunciated that “powers that were previously regulated by the common law under the prerogative and the

¹³ Para 13 (i) of his note of dissent, See *Report of The Federation of Malaysia Constitutional Commission*, 1957, FAO, Rome. (Reid Report).

¹⁴ Constitutional Office, *Constitutional Proposals for the Federation of Malaysia*, White Paper Cmnd.210, June 1957, London, Her Majesty’s Stationary Office. For criticism, see Khoo Boo Teong, *Rule of Law in the Merdeka Constitution* (2000) 27 JMCL 59 at p64-71.

¹⁵ The fact that natural justice cannot be defined is no longer a point of contention. For example, see statement of Lord Reid in *infra* 6.2. See also powerful dissent of Fazl Ali J in *AK Gopalan v Madras* AIR 1950 SC 27 at p60 para 2: “I am aware that some Judges have expressed a strong dislike for the expression “natural justice” on the ground that it is too vague and classic, but where there are well known principles with no vagueness about them, which all systems of law have respected and recognized, they cannot be discarded merely because they are, in the ultimate analysis, found to be based on natural justice”.

¹⁶ Reid Report, *op cit*, *supra* text accompanying fn67 at 2.1.3.

¹⁷ 2000 (2) SA 674 at p695.

principles developed by the courts to control the exercise of public power are now regulated by the constitution".¹⁸ Further to this understanding, in considering the requirements of natural justice, it is relevant to have regard to international human rights norms set out in treaties to which the state is a party whether or not those are independently enforceable in domestic law.¹⁹ It is perplexing therefore to note that we have had the benefit of *Ong Ah Chuan v PP*²⁰ for many decades but failed to explore its unsurpassing thread of logic. The Judicial Committee in *Ong Ah Chuan* has indicated that what may amount to a fundamental principle of natural justice would be determined not upon a narrow view of the matter but upon a broadest canvass possible.²¹ The concept is indeterminate and reliant on an incremental case by case exposition. In *Haw Tua Tau v PP*,²² it was held that "the practice must not be looked at in isolation but in the light of the part it plays in the complete judicial process".²³

Examples of this would include the existence of what has been called "traditional elements" in the constitution.²⁴ This list includes the position of Islam as the religion of the land.²⁵ Another example that can be advanced is with regards to affirmative action for the bumiputra. The special privileges afforded under the Constitution was not an outcome of a sudden awareness of the economic weakness of the Malays, but was merely a

¹⁸ *Ibid* at p695.

¹⁹ *Lewis v AG of Jamaica* [2001] 2 AC 50.

²⁰ [1981] 1 MLJ 64.

²¹ *Ibid* at p71.

²² [1981] 2 MLJ 49 at p53.

²³ cf *Tinsa Maw Niang v Commissioner of Police Rangoon & Anor* (1950) Bur.L.R. 17.

²⁴ Salleh Abas, *Traditional Elements in the Constitution*, in *The Constitution of Malaysia: Further Perspectives*, (Trinadade & Lee eds), 1986, Fajar Bakti, Petaling Jaya at p1.

²⁵ See *Meor Atiquilahman bin Ishak v Fatimah bt Sihi & Ors* [2000] 3 MLJ 375. See further *infra* 3.1.2.

continuance of previously enjoyed rights.²⁶ As such, the embodiment of natural laws within the constitutional apparatus needs no greater advancement.²⁷

According to Rutter, it is instructive to observe how even when applying a document as authoritative as the Constitution, the common law, and its basic philosophy of liberty, has a role to play.²⁸ Very importantly, it is noted that the control of public power by the courts through judicial review is and always has been a constitutional matter. The common law principles that previously provided the grounds for judicial review of public power have been subsumed under the constitution and, insofar as they might continue to be relevant to judicial review, they gain force from the constitution. It has been noted that the two are intertwined and do not constitute separate concepts.²⁹ Common law in this context informs constitutional interpretation. Thus, the “philosophies animating the constitution”³⁰ is clear.

The conclusion to be drawn however does leave a strange sense of *déjà vu*. Is there a seemingly invisible unwritten constitution which the courts are reaching out to aid their purposes, especially when acting in a supervisory capacity?³¹ The short answer to this is that if common law development is an appropriate judicial function, falling within the

²⁶ Thio, *Constitutional Discrimination under the Malaysian Constitution* [1964] 6 Mal LR 1.

²⁷ *Ong Ah Chuan, op cit, supra* n20 at p71, “A system of law which incorporates those fundamental rules of natural justice that had formed part and parcel of the common law of England that was in operation at the commencement of the Constitution”. The Federal Court in *S.Kulasingam* noted that the Privy Council was referring to Constitution of Singapore but conceded that “this equally applies to similar written constitutions including ours”, [1982] 1 MLJ 204 at p211.

²⁸ MF Rutter, *Applicable Law in Singapore and Malaysia*, 1989, MLJ Sdn Bhd, Singapore at p606.

²⁹ *Pharmaceutical Manufacturers of South Africa: In re ex p President of the Republic of South Africa & Ors* 2000 (2) SA 674 at p692, judgment of the South African Constitutional Court, per Chaskalson P.

³⁰ Suffian LP had used the phrase “philosophies animating the constitution” in relation to the Indian Constitution in *Phang Chin Hock* [1980] 1 MLJ 70 at p73. Examples cited as being “philosophies animating” the Indian Constitution include the Preamble and the Directive Principles.

³¹ See Thomas C.Grey, *Do We Have An Unwritten Constitution?* (1975) Stan L. Rev. 703 at p706.

traditionally accepted judicial role, the functionality in case-by-case development of constitutional norms are justifiably appropriate as well. Clearly, the normative content of many apparently established principles are not visible from the face of the four corners of the constitution and it falls to the courts to articulate them. Consequently, this affords enormous scope for judicial creativity when there is ambiguity, vagueness or internal inconsistency. Mauro Cappelletti observes:

*The active work of the judiciary makes the vague terms of constitutional provisions concrete and gives them practical application. Through this work the static terms of the constitution become alive, adapting themselves to the conditions of everyday life, and values contained in the constitutions and judicial review synthesize the ineffective and abstract ideals of natural law with the concrete provisions of positive law.*³²

Thio Li-ann correctly submits that a written constitution represents a synthesis of the virtues of naturalism and positivism. According to her, the abstract values and immutable ideals which naturalism propounds and which are necessarily vague are “positivised” by being incorporated into written law-the Constitution. Thus, normative ideals are invested with legal significance. These values are given practical, real world effect through the judicial role in interpreting and applying the Constitution and the values contained therein.³³

³² Mauro Cappelletti, *Judicial Review in the Contemporary World* (1971) at vii, quoted in Thio Li-Ann, *Trends in Constitutional Interpretation* (1997) SJLS 240 at p251. See also TRS Allen, “As a constitutional framework, the common law is self-evidently adaptable to new insights and fresh demands..[and] must be developed with imagination to meet the needs of modern constitutionalism”, in *Law, Liberty and Justice*, 1995, OUP, London at p10.

³³ *Ibid.*

In short, there is a recognition that not all naturalism could be codified. It is widely accepted that there remains unwritten but binding principles of higher law. There was original understanding that unwritten natural laws are part of the constitution. This is more apparent than ever when a court acts in a supervisory capacity. It is however conceded that failure for express enumeration of natural justice in the constitution has resulted in judicial confusion with regards to its role. Indeed, a long span of time has lapsed before the unmasking of natural justice into its proper perspective of procedural fairness and beyond.

3.1.2 Understanding the Framers Intention

The framers command is still the starting point, and still authoritative in significant ways.³⁴ Similarly, the framers specific intentions are analogous to the earlier court reasoning. The reasoning counts for something. It cannot be brushed aside. But it definitely does not count for as much as the holding. The problems inherent in this reasoning can be illustrated in *Merdeka University Berhad v Government of Malaysia*.³⁵ Here, the appellant had sought a declaration that the rejection of the High Court of its petition to establish the Merdeka University, a proposed private institution of higher learning to be nullified. The High Court refused to declare that the Minister's rejection of their petition was an unreasonable and improper exercise of discretion. The thrust of their

³⁴ David A Strauss, *op cit supra* n4, at p87.

³⁵ [1982] 2 MLJ 243.

appeal was that Article 152 of the constitution permitted the usage of teaching and learning any language other than the national language if it was not for official purpose.³⁶

The Federal Court dismissed the appeal on grounds, *inter alia*, that the proposed university which would have Chinese as a medium of instruction runs counter to the national language policy. In coming to this conclusion, the court drew heavily from the Reid Report and differences between the Indian and Malaysian constitutional provisions. The Federal Court commented thus:

It is well known that the Reid Commission included Mr. Justice Abdul Malik of the Allahabad High Court who was presumably familiar with the Indian Constitution from which many provisions of our Constitution was taken..

...we cannot help but conclude that the word "using" in provision (a) to our Article 152 cannot also mean "teaching".³⁷

The courts reliance on the flimsy presumption of Mr. Justice Abdul Malik's *familiarity* with the Indian Constitution is source of discomfort. There was no consideration for the wider rights issue at stake, namely, freedom of speech and expression nor reference to the equality provision of Article 8. At the High Court, resort by counsel to Article 8(2) was dismissed on the basis that the framers had never envisaged protection of discrimination on the basis of language.³⁸ The decision reflects a pedantic court, refusing to develop its reviewing feature and choosing to be imprisoned by a literal stance. This is one of the

³⁶ Provision (a) to Article 152 is as follows: "no person shall be prohibited or prevented from using (otherwise than for official purpose) or from teaching or learning any other language".

³⁷ *Loc cit* at p251.

³⁸ [1981] 2 MLJ 356 at p363.

many examples where the court appeared to be torn, being custodians to individual rights as well carrying the cross of policy and other considerations under the ominous nomenclature of “public interest”. The Reid Report was resorted to not in order to throw light but as an easy exit from the constitutional quagmire. As if “hey presto” some mysterious “framers intention” would surface to solve all problems.

*Meor Atiqulrahman bin Ishak v Fatimah bt Sihi & Ors*³⁹ begs difference. The court in this instance held that Article 3⁴⁰ should be given a proper interpretation of Islam. Being the religion of the Federation, it should extend beyond rituals and ceremonies so long as it did not deny peaceful and harmonious practice of other religions.⁴¹ The plaintiffs were primary school children. They were dismissed from school after refusing to obey instructions to stop wearing turbans in school besides their school uniform. The defendant contended that by wearing a turban, the plaintiffs were in breach of rule 3(5)(v) of the School Rules. The court, *inter alia*, held that to forbid a Muslim from practising his religion, including wearing a turban is contrary to Article 3 and 11 of the constitution. In arriving to this decision, the court traced the historical development of Islam in the country and reviewed the relevant recommendations in the Reid Report and the White Paper.

The court observed that 'Islam' in the Constitution means *ad-deen*, a complete way of life and not just a mere set of rituals. *Meor* points out that the scope of the applicability of

³⁹ [2000] 5 MLJ 375.

⁴⁰ Article 3(1) provides that Islam is the religion of the Federation; but other religions may be practiced in peace and harmony in any part of the Federation.

⁴¹ Cf *Che Omar bin Che Soh v PP* [1988] 2 MLJ 55 (FC).

Islam in the country should not be confined to a narrow interpretation of Article 3. At the same time, the court was quick to assert the freedom of religion as embodied within Article 11.⁴² Admittedly, the court in *Meor* could have explored further into the aspect of freedom of religion as practiced by the people before the 1957 Constitution and the Reid Report's role in confirming it under Article 11.⁴³ It is noted however that *Meor* is a High Court decision; one that will pave way for more liberal understanding of the historical-constitutional interpretation.

It must be noted that this is not to say that the Reid Report is unimportant. It must however be understood as a gateway to principled constitutional interpretation, not as a dead end. So many early decisions chose to be shackled by the Report and therefore, failed to infuse dynamism into the interpretation of the constitution. It is worth remembering that the constitution was drafted at a time when the socio-political structure was rife with racism, sexism and elitism. If the court in *Meor* had not delved into the historical connection with the constitutional intent and instead merely resorted to looking at the letter of the Reid Report, the court would have been constrained. Having chosen to be so constrained, it would have had to decide that the boys had been *rightly* prohibited from wearing turbans. *Meor* is a salutary attempt in looking at seemingly established historical interpretations with fresh and informed insight.

⁴² The court's decision appears to be in synchrony with the Supreme Court pronouncement in *Jamaluddin bin Othman v Menteri Hal Ehwal Dalam Negeri* [1989] 1 MLJ 368 (HC), 418 (SC). In *Jamaluddin bin Othman*, the court looked at the entire structure of the constitution to rule the unlawfulness of the detention of the applicant. The Supreme Court opined that the freedom to profess and practice one's religion must be given effect unless the actions of a person go well beyond what can normally be professing and practising one's religion. The court therefore arrived at a prismatic understanding of the constitution.

⁴³ See Thio, *op cit*, *supra* n26.

Clearly, the problems with a historical inquiry are apparent. While it may be persuasive and may offer evidence of what a term or concept meant at the time of framing, the courts must caution. The circumstances surrounding early decisions must be studied instead of resorting blindly to some mysterious “framers intention”. It must be understood that the framers never intended that “life” could mean “livelihood”. Yet this is what the constitution provides for contemporary Malaysian society. The soundness of the dictum of the Federal Court in *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus*⁴⁴ is then perfectly consolidated. The oft-quoted principle of constitutional interpretation reads thus:

*A constitution, being a living piece of legislation, its provisions must be construed broadly and not in a pedantic way-with less rigidity and more generosity than other Acts.*⁴⁵

This does not mean that the constitution changes in any diametrical sense. Indeed, the assumption is that the original, intended meaning of a constitution persists until it is formally amended. Otherwise, the provision for amendment under Article 159 is rendered meaningless.⁴⁶ The thrust of *Dato Menteri Othman* is that even when construction of a particular constitutional text is seemingly settled by precedent, avenues for new scrutiny is always open. Thus, any misplaced application of the framers intention from earlier case law should not fetter the current court. At the same time, the court must keep in mind the historical development of the constitution. This call for a generous interpretation of the

⁴⁴ [1981] 1 MLJ 29.

⁴⁵ *Ibid* at p32.

⁴⁶ see further, *infra* 5.2.

constitution avoids the “austerity of tabulated legislation”.⁴⁷ One case which embodies this is *Meor Atiqulrahman*. Justice Eusoffee Abdoolcader explains the whole matter in lucid words:

*The Federal Constitution and the law subservient to it cannot be read through the distorting lenses of incompatible, inconsonant or inapplicable constitutional and legal tenets, as the Constitution prescribes a scheme to combine liberty with law-a formulation ensured by the provision for a broad separation of powers and an independent judiciary with the powers of judicial review-by conferring fundamental rights to secure liberty and imposing limitations on those rights to preclude their regressing into license.*⁴⁸

In the UK, the semblance of a bill of rights can now be seen in the Human Rights Act 1998. An early TRS Allan view pointed that the necessity for a Bill of Rights in the UK is misunderstood and exaggerated. He contends that constitutional rights can exist outside a charter, they are necessarily prior to it, and their practical content is a function of their weight in the particular circumstances of a particular case.⁴⁹ This notwithstanding, it is submitted that the Human Rights Act 1998 enjoins the courts to read and give effect to primary and secondary legislation in a way which is compatible with fundamental rights,

⁴⁷ The classic quotation is from *Minister of Home Affairs v Fisher* [1980] AC 319 at p328. “A constitution is a legal instrument giving rise, amongst other things, to individual rights capable of enforcement in a court of law. Respect must be paid to the language which has been used and to the traditions and usages which have given meaning to that language. It is quite consistent with this, and with the recognition that rules of interpretation may apply, to make a point of departure for the process of interpretation...”

⁴⁸ *Constitutional Process and the Doctrine of Police Power* [1977] 2 MLJ msxxxi at p msxxxiii.

⁴⁹ TRS Allan, *Legislative Supremacy and the Rule of Law: Democracy and the Constitution* (1985) CLJ 111.

so far as it is possible to do so.⁵⁰ Thus, the interpretive function of the judiciary now transcends the mechanical implementation of the words of which Parliament employs. The UK position is telling in that the courts there are striving to stretch their powers to infuse a dynamic approach in construing rights which Malaysian courts have been handed with a ready-made constitutional platter.

3.2 The Inter-Relationship of Rights

The historical background provides framework for understanding judicial review within the constitutional context. It is well known that in order to understand the Constitution we must not be satisfied with technical forms and ceremonial formulas in which the workings of its various organs may be concealed.⁵¹ What has been established is the philosophies animating the constitution: the positing of both higher natural laws and enumerated positive laws. If this is the operational framework of the constitution, how normative principles are expounded by the reviewing courts within this ethos must now be delved into.

One characteristic of a mature liberal society is that there are ways other than formal amendments adopted by a supermajority to change the Constitution in fact if not in name.⁵² Those other mechanisms exist because over time people have developed

⁵⁰ Section 3(1) of the HRA 1998, see *supra* 1.5.2

⁵¹ Taking the cue from HM Seervai in HM Seervai, *Position of the Judiciary in the Constitution of India*, 1970, University of Bombay Press, Bombay at p2.

⁵² cf The US Supreme Court in *Ullman v United States* (1956) 350 US 422 at p428.

“Nothing new can be put into the Constitution except through the amendatory process. Nothing old can be taken out without the same process”.

institutions that they trust. By contrast, in a fledgling society that lacks well-established understandings, traditions, and patterns of mutual trust and accommodation, the formal, written text may be the only usable institution. It does not follow that, owing to some kind of historical necessity, formal amendments cannot ever cause important changes. Rather the point is that the formal amendment process will be the means of significant change only in certain limited circumstances that hardly ever occur in a mature society. In fact, judicial review itself has developed without textual warrant. There is no sense in denying that it is every bit as much a part of the Constitution as the most explicit textual provision.⁵³ This understanding is important in the Malaysian context as well, as a rapidly forward moving society makes demands, which the constitution will inevitably find itself hard-pressed to meet. How the courts can cater for evolving needs without going through a cumbersome amendment process each time will now be examined.

*Maneka Gandhi v Union of India*⁵⁴ blazed a new trail towards constitutional maturity. The test in *Maneka Gandhi* is that an unenumerated right was a constitutional right if it were of the same nature of the enumerated right or facilitated the latter. "Personal liberty" under Article 21 is a vast sphere. This being so, it covers a variety of rights which go to constitute the personal liberty of man and some of them have been raised to the status of distinct fundamental rights.⁵⁵ The Supreme Court in *Maneka Gandhi*⁵⁶ opined that this is

For an overview of the amendment process under the Malaysian constitution, see HP Lee, *The Process of Constitutional Change in Malaysia*, in *Further Perspectives* (Trindade & Lee eds), 1986, Fajar Bakti, Petaling Jaya at p369.

⁵³ David A. Strauss, *The Irrelevance of Constitutional Amendments* (2001) Harv Law Rev 1457. In fact, *Marbury v Madison* is an example of non-textual based decision that has become a well established precedent.

⁵⁴ AIR 1978 SC 597.

⁵⁵ *Ibid* at p622.

⁵⁶ *Ibid* at p632.

the only way to ensure that the existing rights are not rendered illusory. Claim to the contrary will render the constitution otiose- for in any given case the putative right-holder makes a claim that a specific conduct is constitutionally protected, despite the inevitable fact that the constitution's text will not describe the details of the conduct.⁵⁷

For example, the Malaysian constitution with its enumerated fundamental rights clauses has no provision for prohibition against torture or inhuman treatment. However applying the *Maneka Gandhi* test, it would not be necessary for an amendment to expressly read so because this can naturally be encompassed by the omnipresent vindication of livelihood. Right to privacy⁵⁸ and freedom of press⁵⁹ are other significant examples. The future contemplates right to sustainable development, right to effective remedy and many more.⁶⁰ This acknowledgement of a penumbra of rights surrounding the named rights is a recognition of the existence of those rights since time immemorial and the inter-relationship between rights in order to preserve and enhance human dignity. The US Supreme Court decision in *Brown v Board of Education*⁶¹ which held that racially-segregated education violated the equal protection clause cannot be deemed wrong merely because it appears to be inconsistent with the framers intention. In fact, it is a moral decision that needed to be made.⁶² The enabling tool for the interpreting court was

⁵⁷ See Tribe and Dorf, *On Reading the Constitution*, 1992, Harvard University Press, Cambridge at p67.

⁵⁸ *Roe v Wade* (1973) 410 US 113, *R Rajagopal v State of Tamil Nadu* (1993) 1 SCC 645.

⁵⁹ *Romesh Thappar v State of Madras* AIR 1950 SC 124.

⁶⁰ cf *Matadeen v Pointu*, *op cit*, supra n3 at p110 PC: "Their Lordships think that the framers of a democratic constitution could reasonably take the view that they should entrench the protection of the individual against discrimination only on a limited ground and leave the decision as to whether legitimate justification exists for other forms of discrimination or classification to majority decision in Parliament".

⁶¹ (1954) 347 US 483.

⁶² Cf Robert Bork, *The Tempting America: The Political Seduction of the Law*, 1989, The Free Press, New York at p61.

ably formulated in *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor*:

*that in testing the validity of state action with regards to fundamental rights, what the court must consider is whether it directly affects the fundamental rights or its inevitable effect or consequence on the fundamental rights is such that it makes their exercise ineffective or illusory.*⁶³

The Federal Court in *Sugumar*, with respect, opined otherwise. The court appeared to be under the impression that the inter-relationship of rights cannot be given any accord. Citing Article 5, the court opined that “the words personal liberty should be given the meaning in the context of Article 5 as a whole”.⁶⁴ The court went on to disagree that “personal liberty should be generously interpreted to include all those facets that are an integral part of life itself and those matters which go to form the quality of life”. Further, the court was of the view that “other matters which go to form the quality of life are similarly enshrined in Part II of the constitution under “FUNDAMENTAL LIBERTIES” viz, protection against retrospective criminal laws and repeated trials (Art 7); equality (Art 8); freedom of speech, assembly and association (Art 10); freedom of religion (Art 11); rights in respect of education (Art 12) and right to property (Art 13)”.⁶⁵ The court seemed to be saying that all these rights have no co-relation. This appears to be anomalous to the earlier discussion wherein cases have displayed greater understanding

⁶³ [1992] 1 MLJ 697 at p709, applied in *Mohamad Ezam Mohd Nor & Ors v Ketua Polis Negara* [2002] 4 MLJ 449 at p515.

⁶⁴ *Sugumar* (FC) at p101.

⁶⁵ *Ibid* at p101.

of the intention of the constitutional provisions in promoting a holistic rights based jurisprudence.

It is however a mistake to suppose that these considerations release the judges from the task of interpreting the statutory language and enables them a free rein to whatever they consider should have been the moral and political views of the framers of the constitution.⁶⁶ The South African constitutional court in *State v Zuma*⁶⁷ says: "If the language used by the lawgiver is ignored in favour of a general resort to "values" the result is not interpretation but divination. It cannot be too strongly stressed that the constitution does not mean whatever we might wish it to mean. There is a real fear that inscription of constitutional values by the courts is like ascribing values that never existed to a society. The judges values become societies values. It is with this fear in mind that the Privy Council notes: "In defining a boundary between interpretative flexibility and illegitimate judicial amendment, it is clear that the court has no license to read its own predilections and moral values into the constitution. The role of the court is to consider the substance of the fundamental right at issue and ensure contemporary protection of that right in the light of evolving standards of decency that mark the progress of a maturing society".⁶⁸

It seems axiomatic that to be worthy of the label, any "interpretation" of a constitutional term or provision must at least seriously address the entire text out of which a particular fragment has been selected for interpretation, and must at least take seriously the

⁶⁶ *Matadeen v Pointu* [1999] 1 AC 98 at p108.

⁶⁷ *State v Zuma* 1995 (2) SA 642.

⁶⁸ *Reyes v The Queen* [2002] 2 AC 235 at p246.

architecture of the institutions that the text defines.⁶⁹ All this makes sense of why Article 5 and 8 is to be read together and why *Maneka Gandhi* was decided the way it was. American scholar Laurence Tribe surmises succinctly when he says that the constitution must be looked as a connected structure rather than simply a sequence of directives, powers, and prohibitions in these words:

*One must take into account how the entities of powers interlock with the other. Clearly, there is potential for the powers granted to each entity to clash with others. Thus, each of the constitutions numerous grants of power must be interpreted in the light of others.*⁷⁰

Clearly, the concrete application and elucidation of broad constitutional principles are not self-evident or static. It is for the courts to articulate them as rules and standards of good administration.⁷¹ In doing this, the judges are making the people identify themselves with the constitution. Without this sense of identification, of attachment and involvement, a constitution would remain a remote, artificial object, with no more real existence than the paper it is written on.⁷² This being so, principled constitutional interpretation dismisses any notion of activist or progressive court. Instead, it clarifies that by taking such a stand, the court is promoting the constitutional dictate. Constitutional review stokes the

⁶⁹ Laurence H Tribe, *Taking Text and Structure Seriously*, (1995) 108 Harv L Rev 1221 at p1233.

⁷⁰ *Ibid*, at p1248.

⁷¹ De Smith, Woolf & Jowell, *Judicial Review of Administrative Action* 1995, Sweet & Mazwell, London at p17, para 10-29.

⁷² BO Nwabueze, *Constitutionalism in the Emergent States*, 1973, C.Hurst & Co, London at p25.

nebulous, organic nature of the constitution, making it “a living piece of legislation”.⁷³ Principled based review legitimizes what is otherwise a counter-majoritarian⁷⁴ exercise.

3.3 Enforcement of Positive Rights

It is reiterated at this juncture that constitutional interpretation requires finesse of the reviewing court in construing textual enumeration and underlying philosophies. However it also becomes necessary to highlight that the potential of the Constitution as a rights protecting instrument is blighted by the failure to appreciate the distinction between positive and negative rights. To observe further, the philosophical presupposition of judicial review is that the courts interpret the constitution to enforce negative rights, that is those rights which protect against state interference. This distinction matters to constitutional interpretation such that a more deliberate application of the distinction between negative and positive rights might place rights on a better footing.

A negative right is the right not to have an object, not to engage in an activity, or to prevent a state of affair.⁷⁵ These are rights that deny power, not swords but shields.⁷⁶ Positive rights on the other hand call for affirmative action on the part of the state or someone else to provide the goods or services required for a person to exercise that right. Positive rights are those described as the right to obtain, or have an object, to engage in an activity, or to enjoy a desired state of affairs. For example, a right to life is a negative

⁷³ *Dato Menteri Othman, op cit, supra* n44 at p32

⁷⁴ Barry Friedman explains that the countermajoritarian difficulty “is born of a world in which courts are seen as insulated bodies decreeing rights without regard to popular will”, Barry Friedman, *When Rights Encounter Reality: Enforcing Federal Remedies* (1992) 65 S.Cal L.Rev 735 at p738.

⁷⁵ See Daphne Barak-Erez and Ron Shapira, *The Delusion of Symmetric Rights* (1999) OJLS 19.

⁷⁶ Lea Brilmayer, *Rights, Fairness and Choice of Law* (1989) 98 Yale LJ 1277 at p1280.

right when it prevents someone from killing another, but access to lifesaving medical resources is a positive rights claim.⁷⁷ Judicial review in Malaysia does not tread into enforcement of positive rights, those that entail help or subsidy from the state or any other related party.

The reason for this is that the Malaysian constitution is expressly enumerated in terms of *negative* rights.⁷⁸ It is noted that most of the negative rights are civil and political in nature, while positive rights are those which are economic and social.⁷⁹ The positive rights that is forwarded here is with reference to socioeconomic rights. Two scholars, Scott and Macklem, see the positing of political and civil rights and the abandonment of social and economic rights in most constitutions as “selective constitutionalization”.⁸⁰ They argue that as a result, a constitution implicitly views the values protected by social rights to be illegitimate aspirations of modern governance.⁸¹ According to them, any other approach serves to marginalize the centrality of rights, the values they seek to vindicate, and most significantly, the persons whose chance to be human and whose place in society is most dependent on these rights.⁸²

⁷⁷ L.Shanner, *The Right to Procreate: When Rights Claims have Gone Wrong* (1995) 40 McGill LJ 823 at p840.

⁷⁸ In relation to the US constitution which is similarly termed, Judge Posner had this to say: “Our Constitution is a charter of negative rather than positive liberties...the men who wrote the Bill of Rights were not concerned that government might do too little for the people but that it might do too much to them. The Fourteenth Amendment, adopted in 1868 at the height of laissez-faire thinking, sought to protect Americans from oppression by state government, not to secure basic governmental services” in *Jackson v City of Joilet*, 715 F.2d 1200,1203 7th Circuit 1983.

⁷⁹ Asbjorn Eide, *Realization of Social and Economic Rights and the Minimum Threshold Approach* in [1989] 10 HRLJ 35 at p36; EW Vierdag, *The Legal Nature of the Rights Granted by the International Covenant on Economic, Social and Cultural Rights* (1978) 9 Neth Y.B. Int’l L 69 at p93-95.

⁸⁰ Craig Scott and Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in A New South African Constitution* (1992) 141 U of Pa. L.Rev. 1 at p27.

⁸¹ *Ibid.*

⁸² *Ibid* at p39.

A clear example that transcends this frontier is the 1996 South African constitution, a celebrated parchment that has constitutionally entrenched social rights among the guaranteed fundamental rights.⁸³ As a result, the South African constitutional court has the power to require the government to implement the lengthy list of socio-economic rights in the constitution. Scott and Macklem observe that had the inclusion of positive rights been ignored, the South Africans would be constitutionalizing only part of what it is to be a full person.⁸⁴ For example in *Government of the RSA and Others v Grootboom and Others*,⁸⁵ the Constitutional Court held that a society must seek to ensure the basic necessities of life are provided to all if it is to be a society based on human dignity, freedom and equality.⁸⁶ As such, a constitution containing only civil and political rights projects an image of truncated humanity.⁸⁷

Seen this way, the oversimplified distinction between positive and negative rights appears to give rise to incongruity in giving effect to the constitution. It appears that all rights have negative and positive elements and any denial as such is a false dichotomy. This means that the state not only must *not* interfere with a rights provision but also has a *duty* to exert itself to make those rights possible. Only this way can the enjoyment of rights be facilitated. This discussion must also be related back to the dignity and equality

⁸³ Constitution Act 108, 1996 at Ch 2. See *Soobramoney v Minister of Health, Kwa Zulu Natal* 1998 (1) SA 430 (although the government has a duty to provide health services, in this case it was held that there was no discrimination for refusal of treatment), *Government of the RSA and Others v Grootboom and Others* 2001 (1) SA 46 (determination of a minimum obligation to right of access to housing), *Minister of Health v Treatment Action Campaign* 2002 (5) SA 703 (order to make Nevirapine available to pregnant women with HIV who gave birth in the public sector).

⁸⁴ Scott and Macklem, *op cit*, *supra* n80 at p39.

⁸⁵ *Government of the RSA and Others v Grootboom and Others* 2001 (1) SA 46.

⁸⁶ *Ibid* at p69.

⁸⁷ Scott and Macklem, *op cit*, *supra* n80 at p29.

objectives of human rights. Clearly, the courts effort to give recognition to dignity is much maligned without this consideration for the multidimensional possibilities of rights.

In the example of the Indian constitution, the notion of positive rights is linked to the Directive Principles of State Policy enshrined in Articles 36 to 53. By Article 37 of the Indian Constitution, these Directive Principles cannot be enforced by the court. The general thought is that the Directive Principle serves to inspire legislation.⁸⁸ Yet, the courts have shown a tendency to interpret the Directive Principle as a fuel for the fundamental rights clauses. The Indian courts seem to say that these provisions create an obligation for the government to take certain steps to achieve the goals and purposes specified. In *Minerva Mills Ltd v Union of India*,⁸⁹ Bhagwati J elucidates that the operation of the Directive Principles should not be subservient to the other parts of the constitution even if they are deemed non-justiciable.⁹⁰ This is because they nevertheless create a duty on the state to perform obligations. In *Bandhua Mukti Morcha v Union of India*,⁹¹ the Supreme Court illustrated this integration. Bhagwati J found that the right to live with human dignity “derives its life breath from the Directive Principles”.⁹²

Another Supreme Court case, *Parmanand Katara v Union of India*⁹³ held that as Article 21 protected the right to life, there was as a result to this, a duty on the part of the state to preserve life. MP Jain surmises that whereas fundamental rights are of a negative nature,

⁸⁸ Ireland has a similar bifurcated constitution.

⁸⁹ AIR 1980 SC 1789 .

⁹⁰ *Ibid* at p1848 para 115 cf *State of Madras v Champakan Dorairajan* AIR 1951 SC 226, an early case which held otherwise.

⁹¹ AIR 1984 SC 802.

⁹² *Ibid* at p811.

⁹³ AIR 1989 SC 2039.

that is requiring the government not to do anything to infringe a fundamental right guaranteed to the people, the Directive Principles lay down certain *social* obligations on the government to take some affirmative action in the interest of public good.⁹⁴ He says that by virtue of this, the courts have been able to increasingly spell out public duties which the government may be required to discharge.⁹⁵

By contrast, the United Kingdom has taken a regressive stand in relation to the positive rights enactment in the Human Rights Act 1998 [HRA]. The HRA also conforms to conventional rights entrenchment mindset and has omitted provisions for socioeconomic rights. Geraldine Van Beuren criticises the HRA for being silent over the rights of the poorer and more vulnerable sections of the community.⁹⁶

In the context of the Malaysian constitution, one must caution. The constitution has no textual enumeration of positive rights or any Directive Principle. It is difficult to see how the reviewing courts can enforce explicit positive rights as exemplified by the Indian and South African model. The dilemma however is that by being confined to enforcement of purely negative rights, the courts enforcement of rights is stultified and imperfect. In enforcing negative rights, the courts merely elucidate the extent of administrative transgression but more often than not, fail to give effect to that right. This makes the

⁹⁴ MP Jain, *Indian Administrative Law: Cases and Materials-III*, 1996, Wadhwa, Agra at p2842.

⁹⁵ *Ibid.*

⁹⁶ Geraldine Van Beuren, *Including the Excluded: The Case for an Economic, Social and Cultural Human Rights Act* (2002) Pub L. 456. Note the existence of the European Social Charter which is relatively unknown in comparison with the European Convention of Human Rights.

constitutional guarantee of rights impotent. This constitutional cul-de-sac was discovered by the Federal Court in *R. Rama Chandran v The Industrial Court of Malaysia & Anor.*⁹⁷

3.3.1 Reviewing *Rama Chandran*

In *Rama Chandran*, the appellant had been dismissed from employment purportedly in pursuance of a retrenchment exercise. However, the decision was really a device to cloak a colourable or male fide exercise of power, thus avoiding a fair enquiry into certain charges of misconduct, as required under the rules of natural justice and flouting *Wednesbury* unreasonableness. In making consequential orders in favour of the appellant, the Federal Court determined the monetary compensation to be awarded instead of remitting it with a direction to the tribunal of initial hearing, the Industrial Court. In other words, the court refused to be confined by the narrow precincts of quashing the impugned order on certiorari but iterated that it can also modulate its order so as to grant the appropriate relief.⁹⁸ Sudha Pillay remarks that by deciding not to remit the case to be determined again by the Industrial Court and in coming to its own diametrically opposite conclusion that the dismissal was without just cause or excuse, the majority at the Federal Court was going against a basic tenet of administrative law that

⁹⁷ [1997] 1 MLJ 154.

⁹⁸ *Ibid* at p181. The seeds for moulding of relief was already sown in *Hong Leong Equipement v Liew Fook Chuan* (1996) 1 MLJ 481 at p445. Gopal Sri Ram JCA explained, "In a proper case, I envisage no impediment to the High Court to make the appropriate determination and awarding fair compensation to the workman. In such cases, it is difficult to see what possible good could come out of prolonging the agony of the parties to the dispute by delaying the matter and adding to the cause list of an already overworked tribunal".

the reviewing court cannot substitute its own decision in place of that which is sought to be challenged.⁹⁹

The courts reason for not remitting the matter for readjudication was that it would be time consuming and would involve the appellant in another protracted litigation. The court found jurisdiction to order consequential relief by drawing similarities between Article 226(1) of the Indian constitution and para 1 of the First Schedule to the Courts of Judicature Act 1964 (CJA).¹⁰⁰ The dissenting judge, Wan Yahya FCJ however found it difficult to reconcile the vast powers conferred by Article 226(1) which is a constitutional provision with that of the CJA which was a statute enacted by Parliament. It is easy to agree with Sudha Pillay's contention that this is a technical distinction.¹⁰¹ Further to this, it is submitted that when the constitution invests power of review to the courts, such an accord will be impotent if not accompanied by capacity to issue remedies. Para 1 is legislative articulation of a constitutional sanction. She further goes on to remark: "Until such time as the provision in para 1 is repealed, there should rightly be no objection to the liberal and progressive interpretation given to the same by the Federal Court".¹⁰² The truth of her statement is undeniable. It however places before us the real possibility that the enforcement of rights in Malaysia, being resident in para 1, can be shackled or extinguished by a swift legislative stroke.

⁹⁹ Sudha Pillay, *The Ruling in Ramachandran-A Quantum Leap in Administrative Law?* [1998] 3 MLJ lxii at plxxi.

¹⁰⁰ For the scope of para 1, see *supra* 2.1.4.

¹⁰¹ *supra*, loc cit at plxxii.

¹⁰² *Ibid.*

It is submitted that *Rama Chandran* has been misunderstood. One primary reason is that the court had couched its effort to mould relief within the nomenclature of powers and (inherent) jurisdiction and not in terms of *rights enforcement*. As the court lapsed into the semantics of “powers” and “jurisdiction”, the truly sublime achievement of the decision remained buried. This is because the court had already recognized that in the instant case, the right to livelihood guaranteed under Article 5 was transgressed.¹⁰³ The court was then disturbed that it could not give meaning to the entrenched right by merely recognizing the transgression. In facing with the potential emasculation of the entrenched right to livelihood, the court had unwittingly embarked on a search for the positive dimension to the said right. Without realizing the magnitude of its achievement, the court nevertheless found itself empowered to mould relief by virtue of its para 1 powers. The court then directed the respondent to pay adequate compensation in lieu of reinstatement. By so doing, what the court has done is to ensure that all administrative action is responsive to the guaranteed fundamental rights.

Rama Chandran is truly remarkable because it had uncovered the true philosophical presupposition of judicial review which was hitherto confined to enforcement of only negative rights. The positive dimension places obligation on the court to function as an enabling mechanism towards enjoyment of the right. If this is so, the moulding of consequential relief should no longer be shrouded in controversy. What the Federal Court has articulated is the positive right to an effective remedy.

¹⁰³ *Rama Chandran*, at p190.

3.3.2 Ambit of Positive Rights

Coming now to the ambit of enforcing positive rights, it is difficult to see how express social obligations demanded of the state can be read into the Malaysian constitution. The fundamental rights clauses in the US constitution which is similarly couched in negative terms are also treated in such manner. In a notorious treatment of this principle, the US Supreme Court in *DeShaney v Winnebago County Department of Social Service*,¹⁰⁴ found no violation of federal constitutional rights when state social service workers, took no action to remove a four year old boy from the home of his physically abusive father despite warnings of danger. The father later inflicted brain damage on the boy that was so severe that the child was expected to spend the rest of his life confined to an institution for the profoundly retarded. The majority decision found that the due process clause is phrased as a limitation on the State's power to act, not as a guarantee of certain minimum level of safety and security. Blackmun J, in his dissenting judgement however called the majority decision a "retreat into sterile formalism".¹⁰⁵ He likened such a position with those judges who had denied relief to fugitive slaves by claiming the decision to be compelled by existing legal doctrine.

In Malaysia, a study of the structure of the constitution shows that the notion of positive right in this country may only be extended in the *Maneka Gandhi v Union of India*¹⁰⁶ sense. It is noted that Bhagwati J had said in that case that though couched in negative language, Article 21 confers the fundamental right to life and personal liberty. This

¹⁰⁴ *DeShaney v Winnebago County Department of Social Service* (1989) 489 US 189.

¹⁰⁵ *Ibid* at at p204.

¹⁰⁶ AIR 1978 SC 597, see *supra* 3.2.

contemplates the positive facet to the enumerated negative right. To reiterate, the test is whether the right claimed is an integral part of a named fundamental right or partakes of the same basic character as the named fundamental right. This means that the exercise of such a right is in reality and substance is nothing but an instance of the exercise of the named fundamental right. This illustrates the existence of a penumbra of unenumerated rights in the constitution which shadow those that are expressly enumerated. It is therefore possible, in fact necessary, to read the positive rights as arising as a corollary to a negative right.

This means that the positive right dimension that can emanate in the Malaysian constitution is confined to the *Maneka Gandhi* sense. By recognizing this, the courts will enforce the true meaning of an enshrined right. Choosing to talk in terms of *rights* rather than policies or interest or in the *Rama Chandran* case, jurisdiction, represents a fundamental jurisprudential commitment which is reflected in the way concrete problems are resolved. This is because rights arise primarily in deontological ethical theories while policies and interests are instrumental or consequentialist.¹⁰⁷ This clarifies the notion of duty within the constitution. Certainly negation of positive rights ignores the constitutional duties of the government. The presupposition of judicial review must thus give recognition to the multifaceted possibility of a constitutional right.

¹⁰⁷ Lea Brilmayer, *Rights, Fairness and Choice of Law* (1989) 98 Yale LJ 1277 at p1278.

3.3.3 Deconstructing Limitation

For too long, enforcement of positive rights remained an unconsidered possibility in constitutional discourse. The attendant problems are not nonexistent. The fear is that in enforcing positive rights, the courts will descend into the political realm as decisions will tread on budgetary implications in enforcement. It also poses questions on the danger of allowing the courts to make a variety of demands to enforce social rights. This would stretch the constitution to an unacceptable height and run foul of the doctrine of separation of powers. Also, the courts competency to undertake such a role is questionable.

It is emphasized that the multifaceted dimension places an onus on the courts to calibrate the true nuance of the embodied right. The courts, it was observed, are eminently suited for the task of interpretation. Further, budget constraints can be overcome if seen in terms of long term benefits. Of course, enforcement of positive rights exerts money. Then again, any remedy granted by a court will have some budgetary repercussions, whether it be a saving of money or expenditure of money.¹⁰⁸ Geraldine Van Beuren comments that although the focus is on immediate expenditure, incorporating economic, social and cultural rights may increase the wealth of a state. Applying a cost benefit analysis, she says that the right to education is an investment in human capital, the right to social security helps sustain consumer demand, the right to the highest attainable standard of health ensures a more efficient workforce.¹⁰⁹

¹⁰⁸ Observation of the Canadian Supreme Court in *Schacter v Canada* [1992] 2 SCR 679 at p709.

¹⁰⁹ Geraldine Van Beuren, *op cit supra* n96 at p459.

Further, no attempt is made to suggest that this is the *only* way or even optimal way to obtain social justice. Although the judiciary can spur societal reform, social changes are more often than not the result of years of struggle at the grassroots by individuals, NGOs and politicians. Invariably, the law reflects the outcome of struggles in economic, social or political arenas.¹¹⁰ As observed by Scott and Mackelml, constitutional adjudication should be seen as “one locus of struggle in a broader constitutional politics”.¹¹¹

Lastly, although Malaysia has not ratified the United Nations Covenant on Economic, Social and Cultural Rights, there is comprehensive legislation in place to ensure that the welfare of the people are taken care of. Whether the constitution will one day be amended to expressly enumerate social and cultural rights is yet to be seen. For now, as the constitution contemplates positive rights, it falls to the judges reviewing administrative action to give meaning to it. Current ignorance of positive rights provides an obstacle in the effective enjoyment of rights. Until the constitution is amended to meet the demands of positive rights, reliance on the judiciary is the only hope for recognition of the true value of rights. The courts must explore the possibilities of positive rights. Otherwise, the poor and downtrodden will be forgotten entities within the constitutional set-up. Only then will Malaysian rights jurisprudence embody the true meaning of rights.

¹¹⁰ Scott and Mackelml, *op cit supra* n80 at p32.

¹¹¹ *Ibid.*

3.4 Conclusion

Courts as an institution operate within a particular social and historical context, influencing and responding to community values. The constitution thus legitimizes as well as controls the supervisory jurisdiction of the courts. It also absolves the judiciary from being accused of excessive intervention and is instead focused on the clarity and coherence of constitutional review. The historical-moral approach to constitutional adjudication is the only way to formulate the constitution to best serve the society it has been created for, working towards the best form of the constitution, if that is possible. Thus, it would inevitably falls back to judges to move, develop and mould the constitution; a celebration of the constitution so to speak. The fear that by exercising constitutional review, the courts are going to use an already powerful tool into greater heights by ascribing all their values as constitutional values is then a misplaced notion.

Chapters 2 and 3 have deconstructed any misapprehension about review by establishing it as a constitutionally competent institution. It is fuelled by the tenets of constitutional interpretation. This postulate will be explored and refined further in Chapter 4. It is always easier to deconstruct than to construct. The latter endeavour will be undertaken in Chapter 4. The constitutional basis for review makes it clear that the question should be not if judges should descend into evaluation of administrative decisions but how. It is on this that the next chapter is premised on.

Chapter 4 CAVEATS OF SCRUTINY

4.0 Introduction

When the reviewing court is constitutionally competent, its exercise of power is no longer shrouded in confusion. In Chapter 2, an analogy was borrowed from Charles Fried in the development of constitutional doctrine.¹ According to him, doctrine may be halfway between argument and story. Constitutive reason displayed over time must take account not only of how commitments come into being, but also of changed plans and understandings.² What has been achieved is the laying of the internal logic of judicial rhetoric when faced with administrative excess. It is a mandate that must be acted upon. In this climate, new caveats of scrutiny will emerge. Further, old compartments that have lost their utility would be cast aside. This unearthing of new caveats of scrutiny is one that will see incremental growth, as the constitution is refashioned time and again to meet the demands of contemporary administrative control.

This chapter attempts to present some emerging trends in constitutional review. It does not pretend to offer a comprehensive overview of the many compartments of scrutiny that have been designed over the years by the courts in reviewing administrative action.³ Most of these grounds were borrowed finery of the English courts that may well have lost their aplomb in the light of current understanding of review. By providing an elucidation of

¹ Charles Fried, *Constitutional Doctrinaire* (1994) Harv.L.Rev. 1140. See *supra* 2.1.

² *Ibid* at p1153.

³ For comprehensive coverage, see MP Jain, *Administrative Law of Malaysia & Singapore*, 1997, Malayan Law Journal, Kuala Lumpur.

some of the most important emerging trends in countering administrative excess, this work not only displays a slice of the current state of constitutional review but also takes a peek into the untold possibilities of future sophistication in rights enforcement.

4.1 Deliverance from *Wednesbury Unreasonableness*

The traditional approach in analysing grounds of review has been one focused on remedies rather than the principles governing official action and individual rights.⁴ The grounds upon which judicial review can be sought was summarized by Lord Diplock in the GCHQ case⁵ as illegality, procedural impropriety and irrationality. “Illegality” refers to the situation where the decision-maker misunderstands or misapplies the laws which regulate his decision. “Procedural impropriety” refers to a failure to observe the common law natural justice or procedural rules. The third ground of “irrationality” is a reference to the test laid down in the *Wednesbury*⁶ case. The *Wednesbury* test in its simplistic understanding is the consideration whether the decision maker has come to a conclusion that no other reasonable decision maker could have reached. These grounds work more as convenient labels rather than definitive outlines.⁷ They capture the existing formula in policing administrative excess but not really used uniformly and more often than not overlaps.

⁴ See Jowell and Lester, *Beyond Wednesbury: Substantive Principles of Administrative Law* (1987) Pub L 368.

⁵ *Council of Civil Service Unions v Minister of the Civil Service* [1985] AC 374 at p411.

⁶ *Associated Provincial Picture House Ltd v Wednesbury Corporation* [1948] 1 KB 223.

⁷ *Ex p Brind* [1991] 1 AC 696, per Donaldson MR at p216.

Wednesbury unreasonableness has long proved to be a resilient ground of review. The time however has come to peer beyond *Wednesbury's* "ample cloak".⁸ According to Dyzenhaus in *Formalism's Hollow Victory*,⁹ *Wednesbury* unreasonableness turns out to require more or less toothless box-ticking exercise on the part of the decision-makers. Even if they are required to give reasons for their decisions, as long as they say that they took all mandatory considerations into account and did not take into account irrelevant considerations, their decisions will be deemed reasonable. The seemingly substantive test for limits on authority becomes proceduralised, so that the question for the judge is not whether the decision-maker has justified the decision, but whether he or she has gone through the motions of justifying the decision.

The *Wednesbury* principle has long been seen as open to development and manipulation. Its vague and circular definition has meant that it can be difficult to argue successfully in many cases but it remains attractive to applicants who might just be successful in arguing their judicial review actions.¹⁰ Because of its vagueness, it allows judges to obscure their social and economic preferences more easily than would be possible were they to be guided by established legal principle. Gopal Sri Ram's call to undertake "a critical scrutiny of the factual matrix of the case"¹¹ is actually a tell-tale of the fact that the distinction is meaningless and clothed in some illusory notion of compartmentalized reasoning.

⁸ Jowell and Lester, *op cit supra* n4 at p372.

⁹ David Dyzenhaus, *Formalism's Hollow Victory* (2002) NZULRev 525.

¹⁰ Fiona Donson, *Civil Liberties and Judicial Review: Can the Common Law Really Protect Rights?* in *Administrative Law Facing The Future* (Leyland and Fletcher eds), 1997, Blackstone, London at p350.

¹¹ *Hong Leong Equipement v Liew Fook Chuan* [1996] 1 MLJ 481 at p515.

The weakness supplied by the *Wednesbury* test reflects the incapacity of common law to meet the demands of judicial review. One main source of discord is that judicial review merely makes orders but fails to be sufficiently precise to guide public authorities in their daily operations. This has created a kind of tension among the administration and the judiciary. Further, public authorities resent that courts seem oblivious to the budgetary constraints which the administrative bodies constantly face. The time has come for attention to be directed away from negative aspects of the administrative process towards the promotion of the positive. Currently, judicial review is concerned exclusively with the negative aspects of decision making. That is, the courts only become involved in administrative decision-making when a wrong, transgression or violation has been committed.¹² For example the court should draw what is *rational* action instead of *irrationality*, *reasonable* decision instead of *unreasonable*. It would be more productive to concentrate on promoting good decisions so that the need to rectify bad ones would be eliminated. There is a need for greater articulacy of administrative standards. The constitution can supply this formula and it is in search of this that we now turn to.

4.2 Rule of Law as a Basis for Principled Review

Rule of law provides for legal certainty by demanding for certain framework principles even if it is not expressly termed by the constitution. Judges, as established earlier, not only interpret written law but create unwritten law all the time in this process, either through filling in the fissures in statutes and common law or unearthing values entrenched within the constitution. Law after all, is not just legislation, as established

¹² Naomi Sidebotham, *Dicey, Fig Leaves and Judicial Review* (2001) AJAL 89 at p99.

earlier in the *cause celebre*, *Ong Ah Chuan*. For if it so, fundamental liberties can be abrogated by legislation without much fanfare. The rule of law affords an elasticity into the constitution which the reviewing court can draw from. The rule of law is thus rightly regarded as a central principle of constitutional governance.¹³ Its meaning must necessarily be derived from the understanding of “law”. This was elucidated by the Court of Appeal in *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd*:

*The definition of “law” in the constitution is not exhaustive. It is open ended. It refers to a system of law that is fair and just. In our judgement, Article 8(1) is a codification of Dicey’s rule of law. Article 8(1) emphasizes that this is a country where government is according to the rule of law.*¹⁴

It is emphasized that if the court was to merely ape the Reid Report, such a dimension could never be afforded into Article 8. The fundamental liberties guaranteed under Part 11 of the Federal Constitution, including Article 8(1) should receive a broad, liberal and expansive interpretation. The rule of law, rightly placed, provides for principled constitutional review towards this end.

The position of the Court of Appeal in *Kekatong* was similarly espoused earlier by the Privy Council in *Thomas v Baptiste*.¹⁵ The constitution in reference was that of Trinidad and Tobago. Among other things, it affirms the right of the individual to life, liberty, security of the person and enjoyment of property and the right not to be deprived thereof

¹³ Paul Craig, *Formal and Substantive Conceptions of the Rule of Law* (1997) Pub L 467 at p487. See also *Supra*, 1.3.

¹⁴ [2003] 3 MLJ 1 at p15.

¹⁵ [2000] 2 AC 1.

except “by due process of law”. Interpreting “due process of law”, the Privy Council endeavoured to define “law”:

*..due process of law is a compendious expression in which the word “law” does not refer to any particular law and is not synonym for common law or statute. Rather it invokes the concept of rule of law itself and the universally accepted standards of justice observed by civilized nations which observe the rule of law.*¹⁶

Further, in *Lewis v AG of Jamaica*,¹⁷ the Jamaican Constitution was under scrutiny. The same clause was worded as “the protection of the law”.¹⁸ It was held that “protection of the law” covers the same ground as “due process”.¹⁹ This essentially means that the essence of the provision is what matters and not the mere terminology. This is explained on the basis that “you cannot have protection of the law, unless you enjoy due process of the law-and if the protection of law does not involve a right to the due process of the law, then a provision for protection of the law, would be of no effect”.²⁰

“Due process” of course is synonymous with the American constitution, an expression guaranteed under the 5th and 14th Amendment to provide that “no person shall be deprived of life, liberty or property, without due process of law”. Due process in the American context is much wider, encompassing procedural as well as substantive

¹⁶ *Ibid* at p22.

¹⁷ [2001] 2 AC 50

¹⁸ Like the Malaysian Article 8.

¹⁹ *Lewis*, *loc cit* at p85.

²⁰ *Ibid* at p82.

aspects.²¹ In India, the Supreme Court in *Sunil Batra v Delhi Administration*²² explained that although the Indian constitution had no due process clause, after *Rustom Cawasjee Cooper v Union of India*²³ (the *Cooper* case) and *Maneka Gandhi*,²⁴ the consequence is the same.

In Malaysia, by recognizing that Article 8 is an embodiment of rule of law and thus subject to the fairness and reasonable test, the Court of Appeal in *Kekatong* has also unearthed due process in the constitution. In Malaysia, as well as countries with an Article 8 equivalent like in India, due process is instituted under the umbrella of procedural and substantive fairness. Therefore, it is not just integrity of the process that must concern the court but also rightness of the outcome of the decision by the administrative body. This revelation is not controversial; in fact it shows that *Kekatong* is mere refinement of the notion established since *Tan Tek Seng*, *Hong Leong* and later, *Rama Chandran*. These series of cases have over a continuum recognized the principles of due process as inherent within the contemplation of the constitution.

²¹ *Mugler v Kansas* (1887) 123 US 623: "It does not follow at all that every statute enacted ostensibly for the promotion of these ends, is to be accepted as a legitimate exertion of the police powers of the state...the courts are not bound by the mere forms nor are they to be misled by pretences. They are at liberty-indeed, are under a solemn duty-to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcend the limits of its authority. If therefore a statute purporting to have been enacted to protect the public health, public morals or public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the constitution".

²² AIR 1978 SC 1675 at p1690.

²³ AIR 1970 SC 1318.

²⁴ AIR 1978 SC 597.

The Indian Supreme Court in *State of Bihar v Subhash Singh*²⁵ stridently enunciated that “judicial review of administrative action is an essential part of rule of law”. In the light of this, rule of law and judicial review are mutually sustaining. However, if the order of the court is to provide the framework for principled review, mere articulation of rule of law as a constitutional postulate is never enough. The courts have a duty to “identify positive contents of obligations arising from rule of law values”.²⁶ The substantive account of rule of law in this instance gathers no controversy in the light of it being an essence of Article 8.²⁷ Similarly, the Court of Appeal in *Kekatong* rightly placed denial of access to justice as amounting to an arrogation of the rule of law as such. Therefore, Article 8 seen in this terms, effects procedural and substantive fairness into administrative action in Malaysia.

Moreover, rule of law is not merely a guideline for the court to follow in scrutinizing actions. It infuses on the legislative and executive arms dynamism in the sense that the law making and executing must be in accordance with the constitutional value as such. This has been described as a progressive purpose of rule of law instead of its standard reactionary one.²⁸ For example, the legislature’s task will be to ensure that statutes must satisfy procedural and substantive fairness, the definition of which has been developed by the court. The executive is also subject to this formulation in the exercise of its power. This is the inter play which constitutional review, in the last analysis, must achieve.

²⁵ (1994) 4 SCC 430 para 3.

²⁶ See Baxi in *Introduction* in IP Massey, *Administrative Law*, 2001, Eastern Book Company, Lucknow pXIX.

²⁷ In UK, there is constraint to stretch the content of rule of law as having substantive facet. The formal facet is not a problem, see Craig, *Formal and Substantive Conceptions of Rule of Law* (1997) Pub L 467.

²⁸ Allan Hutchinson in *Rule of Law Revisited: Democracy and The Courts in Recrafting the Rule of Law*, (David Dyzenhaus ed) 1999, Hart Publishing, Oxford at p197.

Understood this way, rule of law can be developed from being a mere aspiration and invoked towards formulating principled constitutional review.

4.2.1 Limitations of Rule of Law

The scope of rule of law is broad if it is understood as the essence of Article 8. As a legal principle however, its value is greatest if not stretched beyond the core of basic doctrine centred upon legality, regularity and fairness, always with emphasis on the rejection of arbitrary power.²⁹ In short, this is recognition that there is indeed temptation to extend the rule of law as a one-size fit all panacea instead of being a *principle* offered by the constitution to formulate review. It works best when the executature intends to restrict any rights and the reviewing courts sit in the sensitive position that they have to.

At the same time, it is necessary at this juncture, to examine the zeal of invoking rule of law under the premise of guarding fundamental liberties. It appears to necessitate judicial incursion into the powers of executive and legislator.³⁰ To the extent that this linkage is employed to promote a higher degree of judicial consciousness of the importance of fundamental liberties, it presents no controversy. To utilize rule of law as a weapon to be brandished at all legislation however places the judiciary on a crisis of legitimacy.

²⁹ Wade and Forsyth, *Administrative Law*, 8th Ed, 2000, OUP, London at p23. See *R v Horseferry Road Magistrates Courts, ex p Bennet* [1994] 1 AC 42 at p62, *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539 at 591.

³⁰ Brown-Wilkinson, *The Infiltration of a Bill of Rights* (1992) Pub.L. 397 at 408.

There are situations when the courts have exceeded their authority in enforcing the constitutional postulate. An example is in the Indian case of *Sheela Barse v State of Maharashtra*.³¹ Here, the court descended into the legislators arena when it insisted on “fairness” to women in police lock-up and drafted a code of guidelines for the protection of prisoners in police custody, especially female prisoners. The court could have ventured into standards to be applied but providing a ready made code of guideline is a direct usurpation of legislative province. It is not difficult to perceive the dividing line between permissible legislation by the judicial directives and enacting law-the field is exclusively reserved for legislature.³² The courts must not transgress this limitation.

4.3 Reasonable Restriction of Rights: Achieving Proportionality

Although there appears to be no restriction on the powers of the executature to limit rights in Malaysia,³³ any limitation of those rights must be within reasonable limits. It is submitted that this arises by implication. The basis for this is that the interpretation demanded of rights is a broad one. Further, rights are interrelated. Then by implication, any limitation cannot be arbitrary or unfair because otherwise, the rights provisions become meaningless. This means that the executature must justify any departure as such.

³¹ (1983) 2 SCC 96. See also : *P Ramachandra Rao v Union of India* (2002) 4 SCC 578 at p601 para26. The Supreme Court quotes Professor SP Sathe, in his *Judicial Activism in India - Transgressing Borders and Enforcing Limits* (2002) at p 242. Here, in evaluating the legitimacy of judicial activism., the author has cautioned against court legislating exactly in the way in which a legislature legislates and he observes by reference to a few case that the guidelines laid down by court, at times, cross the border of judicial law making in the realist sense and trench upon legislating like a legislature. Directions are either issued to fill in the gaps in the legislation or to provide for matters that have not been provided by any legislation. The court has taken over the legislative function not in the traditional interstitial sense but in an overt manner and has justified it as being an essential component of its role as a constitutional court.

³² *P Ramachandra Rao, Ibid* at p599 para 22.

³³ See Article 10 of the Federal Constitution: Clause (2) says that the rights conferred in that part is subject to restriction that are deemed ‘necessary’ or ‘expedient’, See *supra* 2.1.3, fn52.

There is no definite test to adjudge reasonableness of restrictions.³⁴ The Indian Supreme Court in *State of Madras v VG Row* held thus: "It is important in this context to bear in mind that the test of reasonableness, whenever prescribed, should be applied to each individual statute impugned and no abstract standard or general pattern of reasonableness can be laid down as applicable to all cases".³⁵ In *S v Makwanye and Another*³⁶ the South African constitutional court studied various jurisdiction and came to the conclusion that in the balancing process the relevant considerations will include the nature of the right that is limited and its importance to an open and democratic society based on freedom and that purpose to such a society; the extent of the limitation, its efficacy and, particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to that right in question.³⁷

It may be well to draw the example of the Canadian Supreme Court in *R v Oakes*.³⁸ Here, the court prescribed a single standard of justification for all rights, to make the standard a high one and to cast the burden of satisfying it on the government.³⁹ Canadian constitutional scholar, Peter Hogg summarizes the *Oakes* test which constitutes of 4 criteria to be satisfied by a law that qualifies as a reasonable limit:⁴⁰

³⁴ MP Jain, *Indian Constitutional Law*, 5th Ed, 2003, Wadhwa, Nagpur at p1147.

³⁵ *State of Madras v VG Row* AIR 1952 SC 195. See also *LIC of India v Consumer Education & Research* (1995) 5 SCC 482 para 27.

³⁶ 1995 (3) SA 391 at p435-441.

³⁷ *Ibid*.

³⁸ [1986] 1 SCR 103. Note that the justification required in the Canadian context is one which is an express requirement of the Canadian Charter of Rights and Freedoms (which is part of the Constitution Act 1982). Section 1 of the Charter reads: *The Canadian Charter of Rights and Freedom guarantees the rights and freedoms set out in it subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.*

³⁹ Peter W Hogg, *Constitutional Law of Canada*, 4th Ed, 1997, Thomson Professional Publishing, Ontario at p817.

⁴⁰ *Ibid* at p878.

- (1) Sufficiently important objective: *The law must pursue an objective that is sufficiently important to justify the limiting of the rights*
- (2) Rational connection: *The law must be rationally connected to the objective.*
- (3) Least drastic means: *The law must impair the right no more than is necessary to accomplish the objective.*
- (4) Proportionate effect: *The law must not have a disproportionately severe effect on the persons to whom it applies.*

Hogg analyses that only in a rare case will a court reject the legislative judgement that the objective of the law is sufficiently important to justify limiting a right (step 1). It is an even rarer case where the law is not rationally connected to the objective (step 2). And the inquiry into disproportionate effect (step 4) is normally, if not always, precluded by the judgement that the law's objective is sufficiently important to justify the impact on civil liberties (step 1). What is left for serious inquiry is then the question whether the law has impaired the right no more than is necessary to achieve the objective (step 3).⁴¹

This comprehensive test provides that the direction for our courts should not be just whether the restriction of a right is without justification but also whether such a limitation is reasonable and necessary. This will fulfill the demand of Article 8. Rights carry with them notions of dignity which guide the constitutional actors to establish a positive content. The courts enforce them while the executive must never transgress them. In drawing the balance, the macrocosmic effect to society at large must be considered by the

⁴¹ *Ibid* at p879.

reviewing court in order to make the accord of such rights meaningful. This is how the issue of “reasonable and necessary” restriction arises.

Though the application of the principle must ultimately be on a case by case basis, the limitation of a constitutional right for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competitive values, and ultimately an assessment based on *proportionality*. In *Makwanye*, similar to the *Oakes* test, the court applied the proportionality to balance the relevant considerations, including the nature of the right that is limited and its importance to an open and democratic society based on freedom and equality, the purpose of which the right is limited and the importance of that purpose to such a society; the extent of the limitation; its efficacy and particularly where the limitation has to be necessary, whether the desired ends could reasonably be achieved through other means less damaging to the right in question.⁴²

Lord Steyn in *R (Daly) v Home Secretary*⁴³ surmises the difference achieved by proportionality and other traditional grounds of review. First, the doctrine may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions. Secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations. Thirdly, the intensity of review, in similar cases, is guaranteed by the twin requirements that the limitation of the right was necessary in a democratic society, in the

⁴² *Makwanye* at p436.

⁴³ [2002] 2 AC 532.

sense of meeting a pressing social need, and the question whether the interference was really proportionate to the legitimate aim that is being pursued.⁴⁴

As observed, the reasonable restriction test recognizes the margin of appreciation demanded from employing proportionality on a case by case basis. The implementation and enforcement of administrative decisions must take this account into consideration in order to satisfy a fast moving contemporary society. What the courts do achieve as a result of interpreting the constitution towards the enforcement of dignity is that the positing of constitutional review as a substantive right, not merely one that is procedural. The distinction between a procedural right and a substantive right is an important one. A procedural right is one that guarantees certain procedures to be met; ie right to be heard, right to be tried before an impartial tribunal. On the substantive side, the court can take objection in the bestowal of arbitrary and unregulated discretion on the administration.⁴⁵

Proportionality brings with it a new dimension to rights enforcement. Instead of the aggrieved litigant having to show that his right has been infringed by the administrative action, the administrative body is instead compelled to demonstrate that the interference with a protected right is proportionate to the aims being served by the action. The onus placed on the administrative body will reorientate administrative action. The administrative action must always be evaluated upon a human rights scale and thus influence the outcome of all action.

⁴⁴ *Ibid* at p547.

⁴⁵ See MP Jain, *Indian Constitutional Law*, 5th Ed., 2003, Wadhwa, Nagpur at p975.

4.4 The Underlying Value of Dignity

The celebrated *Tan Tek Seng* extended the meaning of “life” in Article 5 to include livelihood. This being so, “life” as read by *Tan Tek Seng* is an articulation of extra-textual right vindicating human dignity.⁴⁶ It was observed that the Constitution need not be amended to encompass “livelihood”.⁴⁷ Thus, by asserting that life includes livelihood, the court is actually giving recognition to *human dignity*. This is evident in other jurisdictions as well. The UK courts have ranked an individuals right to life as the “most fundamental of all human rights”.⁴⁸ It has been held that when the right to life is violated, the options available to the reasonable decision-maker are curtailed.⁴⁹ The courts seem to be moving in the direction of employing dignity as a legal value to fashion new rights towards greater enjoyment.⁵⁰

An illustration can be seen in the Indian case of *All India Imam Organisation v Union of India*.⁵¹ In this case, *imams* who perform religious rites in mosques filed a writ against the state. The *imams* had been working without remuneration and now claimed for salary. The court ruled that the Article 21 enshrined right to live with *dignity* and therefore, the

⁴⁶Note some constitutions which have express articulation of human dignity: Article 1 of German *Grundgesetz* reads: The dignity of man shall be inviolable. To respect and protect it shall be the duty of all state authority. Article 7(1) of the South African constitution “affirms the democratic values of dignity, equality and freedom”. Article 10 of the said constitution provides that “Every person has inherent dignity and the right to have their dignity respected and protected”.

⁴⁷ *Supra* 3.2. In *Olga Tellis v Bombay Municipal Corporation* AIR 1986 SC 180, Chandrachud CJ enunciated, “Deprive a person of his right to livelihood and you shall have to deprive him of his life”.

⁴⁸ *R v Lord Saville of Newdigate, ex p A* [1999] 4 All ER 860 citing *Bugdaycay v Secretary of State for the Home Department* [1987] AC 514 at p531.

⁴⁹ *R v Ministry of Defence, ex p Smith* [1996] QB 517 at p554.

⁵⁰ Feldman, *Human Dignity as a Legal Value* (1999) Pub L 658 at p697. Various international human rights instruments provide for dignity as underlying many of the rights. The Preamble to the Universal Declaration of Human Rights for example refers to the dignity and worth of the human person.

⁵¹ AIR 1993 SC 2086.

imams were entitled to be remunerated. The court rejected the argument that paying salary to the *imams* would burden the *wakf* board, saying that, “financial difficulties of the institution cannot be above fundamental rights of a citizen.”⁵²

This is not without problems. The legitimacy of constitutional review on the basis of a notion as malleable as dignity is not self-evident. Also, because it is indeterminate, the notion of dignity can be used in ways which restrict autonomy and respect as easily as it can be used to uphold them. Dignity can easily become a screen behind which paternalism or moralism are elevated above freedom in legal decision-making.⁵³ In *Shantisar Builders v Narayan Khimlal Totame & Ors*, the Indian Supreme Court observed thus:

*Basic needs of man have traditionally been accepted to be three—food, clothing and shelter. The right to life is guaranteed in any civilized society. That would take within its sweep the right to food, the right to clothing, the right to decent environment and a reasonable accommodation to live in...*⁵⁴

Will the state commit an unconstitutional act when it fails to provide for these rights? It is very well for the courts to make declarations and politicize but to what extent must the state go to implement them as such? After all, giving an oft quoted phrase an about turn, liberty too can corrupt and absolute liberty corrupts absolutely.⁵⁵ The question is how can the competing rights between the individual and the state be balanced. It appears that

⁵² *Ibid* at p2089 para 5.

⁵³ Feldman, *op cit, supra* n50.

⁵⁴ AIR 1990 SC 630 at p633.

⁵⁵ Himmelfarb, *Quotations of Our Times*, Laurence Peter (compiler), 1980, Methuen, London at p204.

the Indian courts have strived to achieve the necessary balance. In *MJ Sivani v State of Karnataka*,⁵⁶ the owner of a video arcade challenged regulation of video games as depriving him of his livelihood. The court recognized the right to livelihood as enshrined in Article 21 of the Indian Constitution but stridently noted that “its deprivation cannot be extended too far or projected or stretched to the avocation, business or trade injurious to public interest or has invidious effect on public morale or public order”.⁵⁷ The court deftly balanced the scope of right to livelihood with competing interests and drew the scale. The correct conclusion is that right to life is not absolute.

This balance was also sublimely explored by the Indian Supreme Court in *Olga Tellis v Bombay Municipal Corporation*.⁵⁸ The Bombay municipality had sought to evict pavement dwellers on the basis that no person has any legal right to encroach on a foot path over which the public has a right of way. The pavement dwellers contended that their eviction would adversely affect their means of livelihood, which was protected under Article 21 and therefore can only be taken away or abridged by following a fair and reasonable procedure. The Supreme Court agreed that “the eviction of petitioners would lead to deprivation of their livelihood and consequently to the deprivation of life”. The court however asserted that Article 21 is not absolute. Therefore, before such a right is deprived, the requirement of fair and just procedure must be complied with. This would include adequate notice and hearing. In this case, before eviction, the municipality must

⁵⁶ AIR 1995 SC 1770.

⁵⁷ *Ibid* at p1775.

⁵⁸ AIR 1986 SC 180.

follow “reasonable procedure and give notice and hearing to the squatters except in urgent cases where eviction brooks no delay”.⁵⁹

Similarly, the European Court of Human Rights has interpreted the scope of positive obligation of the state under the requirement to provide for life as “one of the most fundamental provisions of the convention”.⁶⁰ However, the court has also asserted that the duty must not impose an impossible or disproportionate burden on the authorities, “bearing in mind the difficulties in policing modern societies, the unpredictability of human conduct and the operational choices which must be made in terms of priorities and resources”.⁶¹

4.5 Conclusion

Proportionality and fairness are some of the new test that show great promise in countering administrative excess. What is so exciting is that these emerging caveats also tend to specify standards to be applied in administrative action. This is unlike the common law grounds of review which worked mostly as a brake. Further, the constitutional provenance ensures that these standards are one that is rooted within the demands of Malaysian community and ultimately, shaping the kind of government they want. In this sense, it resolves any counter-majoritarian difficulties in relation to judicial review. It is worth remembering that one of the most murky problems encountered by the

⁵⁹ *Olga Tellis* at p199 para 45. See also, *EP Royappa v State of Tamil Nadu* AIR 1974 SC 555.

⁶⁰ *Ertak v Turkey* 9 May 2000, unreported cited in *Human Rights Law and Practice* (Lord Lester of Herne Hill and Pannick eds) 2000, Butterworth, London at p19.

⁶¹ *Osman v UK* (1998) 29 EHRR 245 para 115 and 116 cited with approval in *R v Lord Saville of Newdigate, ex p A* [1999] 4 All ER 860.

court is accusations of playing the political field as unelected officers and therefore usurping the notion of representative government. As such, the standard of review would have constitutive effect on policy, profoundly affecting the shape of administrative action.

Constitutional competence has given the courts confidence to explore its new capacity. It is for this reason that this work keenly explored foundational perspectives. Seemingly controversial decisions like *Rama Chandran* exemplify the courts bold new strokes. It must be remembered that the articulation of constitutional review is still at its infancy and the many teething problems must be sorted. The future in the search for the dignity of rights holds great promise. There are however institutional failings which must be addressed before any semblance of rights based jurisprudence is achieved. This is because in the search for legitimacy, constitutional competence constitutes one arm of the case. The mechanism of review must also be institutionally competent and it is towards this that we turn to in Chapter 5.

Chapter 5 RETHINKING INSTITUTIONAL ARRANGEMENT

5.0 Introduction

The exercise of principled constitutional review must begin with a thorough understanding of the power it invests the courts and as such, the relationship with the other institutional actors. Again, this calls for interpretative analysis. What seems to be the problem is that the powers have not been placed in perspective. There has been much recourse into technicalities instead of any substantive development.¹ In this chapter, the emphasis is on the *process* of review. *Process* must be distinguished by the technical necessities of *procedure*. By process, it is meant the means of exercise of the power and capacity of constitutional review. This entails evaluation of questions like the reach of the courts, curtailment of its power and so on. Only if the process of review is established with clear demarcation can the enjoyment of rights be facilitated. This is the aim that is being strived for in this chapter.

The analysis of the process of review must begin with the understanding that there has been a consistent failure to appreciate the construction of the contrasting institutions and powers thereof in the immediacy to promote enjoyment of rights. Not that it is wrong, merely that it has failed to achieve what it has been set out to do-the *effective* enjoyment of rights. This is why even in rule of law society there remains scope for grave and continuing excesses of power. It is for this reason that the focus should move from

¹ "In public law, the emphasis should be on substance rather than form", per Lord Steyn in *Reg v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539 at p585.

enjoyment of rights to the recognition and development of institutional transformation. Thus, it is now, when we begin to explore ways of ensuring the practical conditions for the effective enjoyment of rights, we discover at every turn that there are alternative plausible ways of defining these conditions, and then of satisfying them once they have been defined.² This is the reason why the trajectory of change must dissect institutional failings first.

The triumvirate of executive, legislature and the judiciary must work as a cohesive unit. This would entail analysis of the interplay of actions and powers. Otherwise, over-zealous focus on “enjoyment of rights” will continue to provide an intractable problem of transgression among the constitutional actors. Some positivist even view judicial law making as a species of legislation.³ All this reflects a misapprehension of powers exercisable by the constitutional actors. This also means that purpose of re-looking at the arrangement must be directed not just at the court but each constitutional actor. The normative structural framework of the institutions that enforce rights must be scrutinised if the enjoyment of rights is to be meaningful. The proposed aim of intervention at this point is to reshape the schematic distribution of powers that is frustrating the effective enjoyment of rights. This is what constitutional review must achieve.

² Unger, *Legal Analysis as Institutional Imagination* [1996] 59 Mal.L.R. 1 at p3.

³ See Grey, *Do We Have An Unwritten Constitution?* (1975) Stan L. Rev. 703 at p715. For clarification, see Fitzgerald, *Salmond on Principles of Jurisprudence*, 12th edition, 1966 Sweet & Maxwell, London at p115: “we must distinguish law-making by legislators from law-making by the courts. Legislators can lay down rules purely for the future and without reference to any actual dispute; the courts, insofar as they create law, can do so only in application to the cases before them and only insofar as is necessary for their solution. Judicial law-making is incidental to the solving of legal disputes; legislative law-making is the central function of the legislator”.

5.1 Resolving Administrative Finality

Curtailement or denial of constitutional review is a concern that must be addressed. There is honestly no point in enunciating a melange of principles to counter administrative excess if the guarantee of constitutional review can be denied in the first place. Denial can take the form of legislative devices like ouster clauses or even self-imposed restriction by the courts themselves. This gives rise to administrative finality. When administrative action is final, the court cannot (and does not should it choose so) to intervene even if there has been unreasonableness or unfairness. Thus, constitutional review becomes an illusion. There is great danger in allowing public law actions to be beyond scrutiny of the courts.⁴

A courts decision represents the law because the judges accept it as a correct statement of the rules which they will apply, the judges do not accept that particular formulation of the rule any longer, then that decision ceases to represent the law. Such a result is entirely consistent with the tradition of the common law, for as Paterson observes, "it may be safely said, therefore, that judiciary law is a necessary ingredient of all statutory law and all common law, being nothing else than the development and adaptation of the rules to the business of life".⁵ Wade explains that judges base their actions "on the repugnance to allowing any subordinate authority to obtain uncontrollable power".⁶

⁴ See *supra* 1.1.

⁵ James Paterson, *Commentaries on the Liberty of the Subject of Laws of England relating to the Security of the Person*, Macmillan & Co, London at p143, quoted in MF Rutter, *Applicable Law in Singapore and Malaysia*, 1989, MLJ Sdn Bhd, Singapore at p605.

⁶ Wade & Forsyth, *Administrative Law*, 6th Ed, 1988, OUP, New York at p728. See also observation of the Indian Supreme Court in *Minerva Mills Ltd v Union of India* AIR 1980 SC 1789 at p1799: "It is the function of judges, nay their duty, to pronounce upon the validity of laws. If courts are totally deprived of

This is different from a piece of legislation which is inserted with an ouster. The action arising from such a statute will not be subject to any fairness or reasonableness test. What more, if parliament intended to render judiciary law impossible, it has only to issue its laws in a more detailed shape, so that in the vast complexity of human affairs there may always be at hand a rule sufficiently precise and definite to meet each particular case.⁷ Indeed, it is acknowledged with an almost tacit acceptance that legislators are free to make decisions along the most partisan and ideological lines.⁸ The courts, by virtue of their constitutional powers, decide the legal limits of those allocations of power. In so doing, they can not only castigate governmental agencies for abuses or excesses of power but equally importantly, they can legitimize controversial exercise of power by holding them to have been lawful. The courts, in short, perform an indirect power-allocation function.

Once this is realized, it can be seen how important it is to understand the nature of the courts function in this tripartite arrangement and the justification for it. It is relevant to take note of Peter Cane's observation that the courts are not detached umpires in the governmental process but that they play an integral part in deciding how it will operate.⁹ Since the legislature has a monopoly on making law, and judges on interpreting the law, it follows that the administration has to act within the law, as interpreted by judges. The ouster clause is itself a formal legislative command telling judges not only that the

that power, the fundamental rights conferred upon the people will become mere adornment because rights without remedies are as writ in water. A controlled constitution thus becomes uncontrolled".

⁷ Rutter, *op cit*, *supra* n5 at p605.

⁸ See Allan Hutchinson, *Rule of Law Revisited: Democracy and The Courts in Recrafting the Rule of Law*, (David Dyzenhaus ed) 1999, Hart Publishing, Oxford at p202.

⁹ Peter Cane, *Administrative Law*, 2002, Dartmouth Publishing, London at p352.

administrators have authority to interpret the law, but that judges are not to review these interpretations.¹⁰ The ouster is repugnant to the constitutional scheme and as such, its proliferation must be studied in light of this.

5.2 Of Ousters and Restrictive Clauses

Generally, administrative finality surges in many forms and measures with the intention to deny access to court. A clause is inserted in the statute by which the action(s) of an administrative authority is made final. Such a clause may be given various names, ie finality clause, privative clause, exclusion clause, ouster clause, conclusive clause.¹¹ The legislative intent in enacting such clauses is to place certain public law acts and decisions completely beyond curial review.¹² There is thus the reality of Parliament enacting a statute depriving the courts of its powers to review administrative action. As such, the device makes a mockery of the constitutional guarantee of review and other fundamental rights. The then Supreme Court in *Petaling Tin Bhd v Lee Kian Chan* explained:

It is right to say, at the risk of being trite that most ouster clauses-common examples are that a particular decision 'shall be final' (finality clauses , 'shall have effect as if enacted in this act' (as if enacted clauses), 'shall not be questioned' (shall not be questioned clauses) and 'shall not be subject to certiorari, prohibition, mandamus, injunction in any court in

¹⁰ See David Dyzenhaus, *Formalism's Hollow Victory* (2002) NZULRev 525.

¹¹ IP Massey, *Administrative Law*, 2001, Eastern Book Company, Lucknow at p274.

¹² See *Sugumar* (COA) at p304 For a comprehensive but dated overview of cases in the Commonwealth, see Peiris GL, *Statutory Exclusion of Judicial Review in Australia, Canada and New Zealand* (1982) Pub. L. 451.

any account' (no certiorari clause)- are now, in England, in disuse and have been disproved.¹³

Another sophisticated version can be seen through some modern drafting techniques which use words that do not exclude jurisdiction in terms but positively repose arbitrary power in a named authority.¹⁴ When the court is asked to say, by virtue of such a provision, that it has no power to correct a perceived error or law, it is little wonder that it strains to find an escape route.¹⁵ According to Sir John Laws, the denial of the courts jurisdiction is on the face of it a denial of rule of law itself.¹⁶ All this was clearly spelt out in the early decision of *Mak Sik Kwong [No.1] v Minister of Home Affairs, Malaysia*:

It is clear that the raison d'être for the inroads into privative and ouster clauses is that the courts constitute the channel through which the King's justice is dispensed to his people and are accordingly the bastion of the rights of the individual. The courts must therefore necessarily be the ultimate bulwark against the excesses of the executive. This does not mean however, that the courts have a roving commission to scrutinize and reverse or to approve and every decision of an administrative agency or statutory tribunal whenever it is challenged by an aggrieved person but they must make available at all times for recourse as a guarantee against any arbitrary action and to prevent injustice to the individual.¹⁷

¹³ [1994] 1 MLJ 657 at p68.

¹⁴ *Customs and Excise Commissioners v Cure & Deeley Ltd* [1962] 1 QB 340 at p64.

¹⁵ Sir John Laws, *Illegality: The Problem with Jurisdiction in Judicial Review* (Supperstone and Goudie eds), 2nd Ed, 1997, Butterworths, London at 4.34.

¹⁶ *Ibid.*

¹⁷ [1975] 2 MLJ 168 at p171.

The Privy Council decision in *South East Asia Fire Bricks*¹⁸ marked the insistence of the courts to be subject to the ouster clause. There seems to be an irreconcilable difference between the extensive review that was displayed before *South East Asia Bricks*¹⁹ and the limited basis for review that the courts felt bound to adhere after that.²⁰ The *locus classicus* preceding *South East Asia Fire Bricks* is *Anisminic Ltd v Foreign Compensation Commission*.²¹ *Anisminic* achieved two significant results with regards to the ouster. First, it diluted the efficacy of finality clauses by confining their protection to non-jurisdictional errors. Secondly, it extended the scope of jurisdiction. The purport of the pronouncement was that even if a tribunal enters into an inquiry within its jurisdiction in the first instance, it may yet do something during the course of the inquiry which may be outside its jurisdiction and render its decision a nullity.²² *Anisminic* made review broad based even in the face of an express ouster clause.

The Privy Council eschewed the position adopted in *Anisminic* in *South East Asia Firebricks*. In the latter case, the Privy Council held that if the inferior tribunal had merely made an error of law which does not affect its jurisdiction, and if its decision is not a nullity for some reason such as breach of the rules of natural justice, then the ouster will be effective. MP Jain criticises the decision in no uncertain terms. He says that the *Fire Bricks* ruling perpetuated the dichotomy between “error of law” within jurisdiction

¹⁸ *South East Asia Fire Bricks SB v Non-Metallic Mineral Products Manufacturing Employees Union & Ors* [1975] 2 MLJ 250.

¹⁹ See for example, *Mohamed v Commissioner of Lands* [1968] 1 MLJ 227, *Kannan & Anor v Menteri Buruh dan Tenaga Rakyat* [1974] 1 MLJ 90, *Sungai Wangi Estate v Uni* [1975] 1 MLJ 136.

²⁰ See for example, *National Union of Hotel Workers v Industrial Court* [1981] 1 MLJ 256, *Dunlop Estates Bhd v All Malaysian Estates Staff Union* [1981] 1 MLJ 249.

²¹ [1969] 2 AC 147.

²² MP Jain, *Administrative Law of Malaysia & Singapore*, 1997, Malayan Law Journal, Kuala Lumpur, *op cit* at p784.

and “error of jurisdiction”. The result of this approach was that mistakes of law committed by tribunals could not be corrected by the courts even when any such mistake was detected, if there was a finality clause. The decision of the Privy Council gave an unduly expansive interpretation to ouster clauses in the statutes.²³

In 1995, *Syarikat Kenderaan Melayu Kelantan v Transport Workers Union*,²⁴ (SKMK) the enormously important decision, dismantled the nagging distinction. The court declared that it is no longer of concern whether an error of law is jurisdictional or not. If an inferior tribunal or other public decision taker does make such an error, then he exceeds his jurisdiction. So too is jurisdiction exceeded where resort is had to an unfair procedure, or where the decision reached is unreasonable, in the sense that no reasonable tribunal similarly circumstanced would have arrived at the impugned decision. Since an inferior tribunal has no jurisdiction to make an error of law, its decisions will not be immunised from judicial review by an ouster clause however widely drafted.²⁵

It was settled in *SKMK* that where there is an error of law, an ouster clause will not prevent the judicial review.²⁶ It is no surprise then why *SKMK* became the resuscitating breath of fresh air at that point in time.²⁷ The Federal Court later endorsed the bold leap

²³ See MP Jain, *Ibid* at p794. Craig calls this decision a “persistence of the collateral fact doctrine” in Craig, *Administrative Law*, 4th Ed, 1999, Sweet & Maxwell, London at p463-465 and 483. By *Collateral Fact Doctrine*, he means the maintenance of the distinction between jurisdictional and non-jurisdictional error.

²⁴ [1995] 2 MLJ 317

²⁵ *Ibid* at p342. The Indian courts have generally taken a similar approach; See *Shiv Kumar Chada v Municipal Corporation Delhi* (1993) 3 SCC 162, *Kihoto Hollohan v Zachillu* 1992 Supp (2) SCC 651.

²⁶ Ian Chin J in *Sugumar v Director of Immigration, State of Sabah* [1998] 2 MLJ 217 at p230 (HC) citing cases *Petaling Tin Bhd v Lee Kian Chan & Ors* [1994] 1 MLJ 657, *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers Union* [1995] 2 MLJ 317, *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1997] 1 MLJ 789

²⁷ See for example, N. Shanmugam, *Deliverance from the Dominance of Fire Bricks* [1995] 3 MLJ cxxxvii.

in *SKMK* in the *Syarikat Bekerjasama* case.²⁸ The Federal Court remarked that *South East Asia Firebricks* is no longer good law because to hold otherwise would mean that a tribunal could misinterpret the law without worrying about interference and the tribunal would be the final judge of the law, thereby violating the constitutional principle that it is the High Court which determines the meaning of the legislature and not any other entity.²⁹

This notwithstanding, it is submitted that *SKMK* had failed to bring about the changes that it envisaged. Cases subsequent to it continued to fumble in semantic quibbling. The foremost problem is the definition of “error of law”. If the court can review when there has been an “error of law”, then the meaning of error of law becomes very important. Error of law according to Syed Othman J (later FJ) is a “decision not according to law”. He explained so in *Kannan*³⁰ saying that “if the decision is not according to law, the court could invariably interfere with it. To my mind, a decision not according to law is no decision at all”.³¹

Syarikat Kenderaan Melayu Kelantan embraced this wide ambit of error of law when it held that “it is neither feasible nor desirable to attempt an exhaustive definition of what amounts to an error of law, for the categories of such an error are not closed. But it may be safely said that error of law would be disclosed if the decision maker asks himself the wrong questions or takes into account irrelevant considerations or omits to take into

²⁸ *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor Dengan Tanggungan* [1999] 3 MLJ 1.

²⁹ *Ibid* at p45.

³⁰ *Kannan & Anor v Menteri Buruh dan Tenaga Rakyat* [1974] 1 MLJ 90.

³¹ *Ibid* at p92. See also *Lian Yit Engineering Works Sdn Bhd v Loh Ah Fun* [1974] 2 MLJ 41.

account relevant considerations (what may be conveniently termed as *Anisminic* error) or if he misconstrues the terms of the relevant statute, or misapplies or misstates a principle of general law”.³²

Naturally the court had thought that this definition afforded fluidity but failed to see that “error of law” could acquire as many dimensions as the reviewing court willed it. If a court wished to categorize an error as jurisdictional, it could do so by using the “wrong question” or “irrelevant consideration” formula. Otherwise, it need not. This relegates review into the recesses of the courts will. The weakness in this definition was inherited by *SKMK* from *Anisminic*. This being so, the weakness of the *Anisminic* dictum was transplanted into Malaysian jurisprudence, with further grave effects as our constitutional structure is supported by a different philosophy entirely.

John Laws, writing extra-judicially, famously or maybe infamously, described the recourse of the court in *Anisminic* as “fig-leaf”: “The fig leaf was very important in *Anisminic*, but fig leaf it was. And it has produced the historical irony that *Anisminic* with all its emphasis on nullity, nevertheless erected the legal milestone which pointed towards a public law jurisprudence in which the concept of voidness and the ultra vires doctrine have become redundant”.³³ With this, he submits that the utility of the ultra vires is eroding even in UK, noting that the rigour of the courts approach to ouster clauses is a function of the rule of law. The vindication of rule of law is the constitutional right of

³² See also *Sugumar* (COA) at p316. Lord Diplock in *Re Racal Communications Ltd* [1981] AC 374 said this of *Anisminic*: “The breakthrough made by *Anisminic* was that as respects administrative tribunals and authorities, the old distinction between errors of law that went to jurisdiction and errors of law that did not was for practical purposes abolished.”

³³ John Laws, *Judicial Review* (Supperstone & Goudie eds), *op cit*, *supra* n15 at 4.34.

every citizen.³⁴ Thus, while John Laws reveals the illusion of *Anisminic*, he does point to the directions which the UK courts should follow.

Clearly, although *SKMK* removed the shackles of *South East Asia Fire Bricks*, it had left Malaysian courts fumbling in the semantic of “error of law” instead of the real issue at stake which is the *infringement of rights*. The ultra vires doctrine cannot singly appreciate the proper relationship between the actors in a constitutional system. The discourse never was seen in the light of separation of powers and constitutional guarantee of rights. It has become a flimsy cover up shrouded in the nomenclature of ultra vires. The heritage of confusion and unpredictability of the *SKMK* reasoning can be seen in the position adopted by the Federal Court in *Sugumar* although it makes no express reference to it.³⁵

When the decision of the Court of Appeal in *Sugumar* went on appeal, the Federal Court merely chose to limit itself by succumbing to the ouster clause. According to the Federal Court, that section 59A of the Immigration Act 1959/63 was amended through the Immigration (Amendment) Act 1997 (Act A985) is important. The explanatory statement to the bill, which is an aid to interpretation, states that the new section 59A seeks to provide for the exclusion of judicial review in any court.

The court elaborated that the explanatory statement clearly shows that the intention of Parliament in amending section 59A is to *exclude* judicial review by the court, including any act done or any decision of the minister or the director general or the state authority

³⁴ John Laws, *ibid*, at 4.23.

³⁵ *Sugumar* (FC) at p91-94.

under the Act except on grounds of procedural non-compliance of the Act or regulations governing the act or decision.³⁶ Further, the Federal Court opined that as the new section 59A is more elaborately expressed and more exclusionary in its scope, Parliament must have intended that the section is conclusive on the exclusion of judicial review under the Act.³⁷ This is precisely what happens when the language of ultra vires is used. The Federal Court in *Sugumar* is thus a grave example of judicial self-limitation shielded by ultra vires.³⁸

5.2.1 Institutional Set-Up within the Constitutional Discourse

No case attempts to place administrative finality within a constitutional discourse as explicitly as the dynamic Court of Appeal decision in *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah*.³⁹ The Court of Appeal in addressing the issue of the statutory ouster had enunciated that any curtailment of judicial power as such was violation of the constitutional structure. This position is illuminating as cases previously were shrouded in the debate of “jurisdiction”. The decision was nevertheless subsequently overruled by the Federal Court.

The seeds sown at the Court of Appeal in *Sugumar* however progressed further at the Court of Appeal in *Kekatong*⁴⁰ where the restrictive clause was held to be a denial of

³⁶ *Sugumar* (FC) at p91.

³⁷ *Sugumar* (FC) at p92.

³⁸ See the US case of *Breen v Selective Service Local Board* (1970) 396 US 460 where the decision to be subject to the ouster or otherwise can be seen as judicial self limitation not the lack of power. See also *Shaugnessy v Pedreiro* (1954) 349 US 48.

³⁹ [1998] 3 MLJ 289.

⁴⁰ *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1.

access to justice and therefore a denial of the equality clause housed in Article 8. Both decisions pave way to the thought that any analysis of power whether it is creation, exercise or curtailment must be as contemplated by the constitutional architecture. It is important therefore to delve into the substance of both decisions. At the outset, it is revealed that although the Court of Appeal in *Sugumar* had sparked the initial discourse and is infinitely more ambitious in its ambit, it may however have misconstrued the constitutional order. The decision of the Court of Appeal in *Kekatong* seems to hold the premise for the future.⁴¹

Pausing to examine the development in *post Anisminic* England, the courts do tend to inquire as to the intention of Parliament in inserting the finality clause.⁴² This is so even when the constitutionality of the statute itself cannot be questioned. This still however does not explain why the courts persist in employing the ultra vires principle.⁴³ Craig suggests that it may be because it serves as a legitimate device for the exercise of the courts power.⁴⁴

John Laws proposes an enlightened view of ouster clauses and Parliamentary sovereignty: It may be said that, if Parliament has decreed that the decision of a subordinate shall not be subject to review, there is no affront to the rule of law in any failure or refusal of the court to supervise what it does, since Parliament, which is sovereign, has decreed that (in effect) it shall be within its power-and therefore *lawful*

⁴¹ It is noted that the Federal Court has overruled the decision, See *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd* [2004] 1 CLJ 701.

⁴² *Re Racal Communications Ltd* [1981] AC 374, *O'Reilley v Mackman* [1983] 2 AC 682.

⁴³ *R v Hull University Visitor, ex p Page* [1993] AC 682.

⁴⁴ Craig, *op cit supra*, n23 at p473.

power-to make decisions even though they may fall foul of other laws.⁴⁵ Seen in this light, the Human Rights Act 1998 may just salvage review in UK from drowning further and further in the ultra vires asphyxiation.⁴⁶ According to Wade, the ouster clause, whether total or partial, may come into conflict with this right to a judicial determination, since they have the effect of cutting off judicial remedies, at least in so far as the courts allow them to operate. The Human Rights Act may provide the judges with a powerful tool in their work, well advanced but not yet complete in their effort to demolish unjustifiable obstacles to judicial review.⁴⁷

⁴⁵ John Laws, in *Judicial Review* (Supperstone & Goudie eds), *op cit*, *supra* n15 at 4.24 -4.25.

⁴⁶ So far as material the relevant provisions are the following. Section 6 of the Human Rights Act 1998 states:

"(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

"(2) Subsection (1) does not apply to an act if-(a) as the result of one or more provisions of primary legislation, the authority could not have acted differently; or (b) in the case of one or more provisions of, or made under, primary legislation which cannot be read or given effect in a way which is compatible with the Convention rights, the authority was acting so as to give effect to or enforce those provisions."

Section 1(1) of the 1998 Act defines "the Convention rights" as including Article 6 of the European Convention on Human Rights. Article 6 of the Convention provides for *the right to a fair trial*. Section 3(1) of the 1998 Act states: "So far as it is possible to do so, primary legislation and subordinate legislation must be read and given effect in a way which is compatible with the Convention rights." Section 4 so far as material provides:

"(1) Subsection (2) applies in any proceedings in which a court determines whether a provision of primary legislation is compatible with a Convention right.

"(2) If the court is satisfied that the provision is incompatible with a Convention right, it may make a declaration of that incompatibility".

"(6) A declaration under this section ('a declaration of incompatibility')-(a) does not affect the validity, continuing operation or enforcement of the provision in respect of which it is given; and (b) is not binding on the parties to the proceedings in which it is made."

See generally, *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837.

⁴⁷ Wade & Forsyth, *Administrative Law*, 8th Ed, 2000, OUP, Oxford at p712.

5.3 Resolving the Tension of Administrative Finality

The ouster provision therefore continues to provide a tension which needs resolution. The scope of jurisdictional review should not be self-defining. It is not capable of being answered by linguistic or textual analysis of the statute alone, however assiduously that is performed.⁴⁸ The whole controversy is easily resolved by looking at the constitutional actors within the apparatus of separation of powers.

This path was first explored in *Sugumar* at the Court of Appeal. This decision tried to remedy the issue by placing the discussion on a constitutional footing. As observed earlier, this is the correct approach to ouster or finality clauses, however clearly or widely drafted they may be. The failure to study the constitutional principle in depth had left a big missing piece in the jigsaw. It cannot be denied that the English Parliament may by express words limit or altogether preclude any person from going to court.⁴⁹ The question then arises whether our Parliament is similarly empowered. After careful reflection we will arrive at the conclusion that that question should receive a negative response. This was what the Court of Appeal in *Sugumar* achieved. The Court of Appeal, while maintaining this, however missed the chance to elaborate the constitutional order as it had

⁴⁸ Craig *op cit*, *supra* n23 at p476. See similar position in Australia. The Australian High Court's response to the ouster is in the form of statutory construction, which can be seen as another version of ultra vires—this is known as the *Hickman* principle and so named after the decision in *R v Hickman, ex p Fox & Clinton* (1945) 70 CLR 598. The solution has been based on statutory construction, seeking to resolve an apparent discrepancy between obligations and limitations imposed by the statutory scheme itself and the apparent command that a failure to comply with such obligations is not intended to have any legal consequence for the validity of the exercise of power. The clause is given effect by treating it not as a law which deprives a court of the jurisdiction but as law which effectively expands the area within which the decision maker can validly operate. *O'Toole v Charles David Pty Ltd* (1991) 171 CLR 232 at p275 applied in *Darling Casino Ltd v NSW Casino Control Authority* (1997) 191 CLR 602 at p630, *R v Murray* (1949) 77 CLR 387, *R v Coldham* (1983) 49 ALR 259.

⁴⁹ *R v Lord Chancellor, ex p Witham* [1997] 2 All ER 779.

seemingly lapsed into the jargon of “Basic Structure”.⁵⁰ The discussion will now focus on the approach that *should* have been taken.

As early as 1980, Wade had observed the need to look at the constitutional order in this context. Not only did the administrative state lack an inherent authority to interpret the law, but the legislature was constitutionally incapable of delegating such authority to it. The judges have a moral duty under their role in the separation of powers to ignore any such stultifying tactics. Calling the ouster an ‘abuse of legislative power’, he said that the courts may be discovering a *deeper constitutional logic* than the crude absolute of statutory omnipotence.⁵¹

Some earlier Malaysian decisions had followed this constitutional track of reasoning but the later courts lost tangent. For example, In *Re Racal Communications*,⁵² Lord Diplock spoke of the ability of Parliament to oust the jurisdiction of the courts. The futility of such an attempt in a set-up embodying constitutional supremacy is well illustrated by the decision in *Re Yee Yut Ee*.⁵³ In the instant case, the relevant act that was in question was section 46 of the Industrial Relations Act (Cap 24) which contained a wide ouster of the courts jurisdiction. Choor Singh J said that the cases show that when the right to certiorari had been expressly taken away by statutes, the courts rely upon the proposition that Parliament could not have intended a tribunal of limited jurisdiction to be permitted to exceed its authority without the possibility of correction by a superior court. Earlier

⁵⁰ See *infra* 6.2.

⁵¹ Wade, *Constitutional Fundamentals*, 1980, Hamlyn Lectures, 32nd series, 1989, Stevenson & Sons, London at p83.

⁵² *Re Racal Communications Ltd* [1981] AC 374.

⁵³ [1978] 2 MLJ 142.

discussions like these were however subsequently shadowed. The High Court decision in *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah*⁵⁴ which will be studied shortly, is a brazen example.

In *Sugumar*, the facts were this. The applicant was a West Malaysian who lived in Sabah but was yet to “belong” to the state as he was not a permanent resident. To acquire that status, he had to fulfill certain requirements under the Immigration Act 1963 in so far as it applied to the East Malaysian states. Section 66 of the said Act provided that a citizen is treated as belonging to the state if he has within the two preceding years been a permanent resident of the state. In the interim, the applicant was issued with a work pass pursuant to regulation 16 of the Immigration Regulations 1963.

As the work pass placed him in an uncertain position, he applied for and obtained an entry pass which allowed him to reside in Sabah for two years and thereafter, could be categorised as according to the Act to be a person belonging to Sabah. However, 6 weeks before the end of the two year period, the applicant was served with a Notice of Cancellation of Entry Permit with no reasons provided for it. The applicant then took out an *ex parte* originating motion for leave to issue certiorari to quash the decision. Suleiman Hashim J granted the leave to apply for certiorari but refused to stay the order. The Court of Appeal however granted the stay that was being sought.

Following the grant of leave and order of stay, the applicant’s substantive motion for orders of certiorari came on for hearing before Ian Chin J.⁵⁵ The application was

⁵⁴ [1998] 2 MLJ 217.

dismissed. The judgment concerns many substantive issues but our immediate focus is the exclusionary or ouster clause. According to the court, the decision of the director and state authority could be judicially reviewed, notwithstanding the express ouster clause contained in section 59A of the Immigration Act 1963. The court held that where there is an error of law, then the decision could not be immunized from judicial review by invoking the ouster clause.⁵⁶ However, it was held in the instance that no error of law was committed.⁵⁷

Subsequently, the Court of Appeal, when perusing the same section remarked that it may be difficult to envision any wider provision than this as constituting an attempt to prevent judicial review of administrative acts and decisions.⁵⁸ However, the court held that section 59A even as widely worded as it was, could not and did not preclude judicial review to examine the validity of the exercise of administrative powers. The court very significantly recognized “free access to an independent judiciary” as a fundamental liberty. The virtue of such an access to obtain redress was found to be inconsistent with a provision in a statute that seeks to preclude that right by ousting the power of judicial review.⁵⁹ The most telling extract from *Sugumar* at the Court of Appeal appears to be:

The Federal Constitution has entrusted to an independent judiciary the task of interpreting the supreme law, and indeed, all laws enacted by the legislative arm of the government. Hence, it is to the courts that a citizen

⁵⁵ [1998] 2 MLJ 217 (HC).

⁵⁶ *Ibid* at p230

⁵⁷ *Ibid* at p231-239

⁵⁸ *Sugumar* at p303 (COA).

⁵⁹ *Ibid* at p308.

*must turn to enforce rights conferred by the Federal Constitution or other written law or existing at common law.*⁶⁰

This reasoning is based on the constitutional requirement and limitation thereof. The Court of Appeal refused to fall into the ruse of defining “error of law”. Had the Court of Appeal done so, it would have appeared to be a mere refutation of the High Court decision. Instead, the Court of Appeal rightly saw the constitutional question at stake and strived towards that end. By taking such an approach, the High Court decision collapses. The Court of Appeal emphasized on the separation of powers and its consequence to ouster clauses. The Federal Court subsequently chose to ignore this reasoning. Such a position is a reflection of failure to appreciate the vibrancy of the constitutional demands of rule of law and separation of powers.

5.3.1 Denial of Access to Justice

It is the essence of rule of law that the exercise of the power by the state whether it be the legislature or the executive or any other authority should be within the constitutional limitation and if any practice is adopted by the executive, which is in violation of its constitutional limitations, then the same would be examined by the courts.⁶¹ The decision of the Court of Appeal in *Kekatong* is a direction in search of the constitutional limitation as such. The Appellant in this case had appealed against the decision of the High Court which had refused an interlocutory injunction against the second defendant from exercising its rights pursuant to the Pengurusan Danaharta Nasional Berhad Act 1998.

⁶⁰ *Ibid* at p306.

⁶¹ *BL Kapur v State of Tamil Nadu* (2001) 7 SCC 231 at p293.

The section in question here is section 72 of the Pengurusan Danaharta Nasional Act 1998.⁶² According to the Court of Appeal, the question of power to grant injunction depends on whether section 72 constitutes a valid bar upon the power of the court to issue injunction in the usual way. This gives rise to a question of constitutionality of the said section. It is noted that section 72 is not an ouster proper but more of a legislative restriction but both achieve the same end which is essentially to cast away the exercise of the courts powers in relation to administrative action arising from the statute.

In order to determine this, the first step is to ascertain whether access to justice is a guaranteed fundamental liberty. The court found that access to justice was accommodated within Article 8(1) of the constitution.⁶³ In coming to this view, the court observed that Article 8 (1), being a codification of rule of law, places a requirement of fairness of state action of any sort, legislative, executive or judicial. The disabling of restrictive and ouster clauses to protect only those acts and decisions of public-decision makers are done or made in accordance with law is based upon and is consonant with, the constitutional right of a person to approach the judicial arm of government to seek redress for alleged wrongs. That the right is recognized in UK, a jurisdiction which has no written constitution; is demonstrated by the decision in *R v Secretary of State for the Home*

⁶² Section 72 *Pengurusan Danaharta Nasional Bhd Act* reads:

Notwithstanding any law, an order of a court cannot be granted-

- (a) which stays, restrains or affects the powers of the Corporation, Oversight Committee, Special Administrator or Independent Advisor under this Act;
- (b) which stays, restrains or affects any action taken, or proposed to be taken, by the Corporation, Oversight Committee, Special Administrator or Independent Advisor under this Act;
- (c) which compels the Corporation, Oversight Committee, Special Administrator Independent Advisor to do or perform any act, and any such order, if granted, shall be void and unenforceable and shall not be the subject of any process of execution whether for the purpose of compelling obedience of the order or otherwise

⁶³ All persons are equal before the law and entitled to the equal protection of the law.

Department, ex p Leech.⁶⁴ Lord Steyn observed thus: “It is a principle of our law that every citizen has a right of unimpeded access to a court”. In *Raymond v Honey*,⁶⁵ Lord Wilberforce described access to justice as a “basic right”.

There is of course caution to be had in the difference in both legal systems. In *R v Lord Chancellor, ex p Witham*,⁶⁶ the distinction is made clear. According to *Witham*, when a written constitution guarantees rights, there is no conceptual difficulty. The state authorities must give way to it, save to the extent that the constitution allows them to deny it.⁶⁷ The court elaborated that in the unwritten legal order of the British state, at a time when the common law continues to accord a legislative supremacy to Parliament, the notion of constitutional right can inhere only in this proposition that the right in question cannot be abrogated by the state save by specific legislative provision in an Act of Parliament, or by regulations whose vires in main legislation specifically confers power to abrogate. General words will not suffice.⁶⁸

The Malaysian Court of Appeal in *Kekatong* was quick to recognize the limitations as set out in the UK cases. The court held that in Malaysia, unlike the British constitution, the position is reversed. Here, the ultimate constraints upon legislative power are not political but legal that is to say that any law passed by Parliament must meet the fairness test contained in Article 8. Accordingly, the court held that it is contrary to the rule of law

⁶⁴ [1993] 4 All ER 539 at p548.

⁶⁵ [1982] 1 All ER 756 at p760.

⁶⁶ [1997] 2 All ER 779. The English courts could have been influenced by the ECtHR decision in *Golder v UK* (1975) 1 EHRR 524, which explicated that “access to justice” was part of Article 6 of the ECHR. Note that Article 6 itself makes no express guarantee of the right to access to a court, See *Human Rights Law and Practice*, Lester & Pannick (eds), 2000, Butterworths, London at p139.

⁶⁷ *Ibid* at p783.

⁶⁸ *Ibid* at p784.

housed within Article 8(1) of the Federal Constitution in that it fails to meet the minimum standards of fairness both substantive and procedural by denying to an adversely affected litigant the right to obtain injunctive relief under any circumstances, including circumstance in which the Act may apply.⁶⁹

In the Malaysian constitutional structure, the presence of the various types of ouster clauses freezes the constitution. It fails the notion of rule of law as well as separation of powers. The provision for constitutional review and remedies would be meaningless.⁷⁰ This being so, an ouster is simply unconstitutional. That the constitutional prescription cannot accommodate the ouster clause is an outcome which can be achieved by employing the Court of Appeal's test in *Kekatong*.

However, one criticism against *Kekatong* is that the court appears to give some room to accommodate a modified form of override/ouster- that the legislation is justified if it can show a certain level of relief to court. Also, there was no consideration of the separation of powers.⁷¹ For example, in *ex p Venables*,⁷² Lord Steyn perceived that the Home Secretary is carrying out, contrary to constitutional principle of separation of powers, a classical judicial function. The violations of the separation of powers between the executive and judiciary must be met by subjecting the former to the discipline accepted

⁶⁹ cf *Andrew s/o Thamboosamy v Superintendent of Pudu Prison* [1976] 2 MLJ 156: "...that if the government exercises a power conferred on it by Parliament and keeps within the law, then the court should simply apply the law, no matter how harsh its effect may be on the immigrant. His remedy is then not judicial, but political and administrative".

⁷⁰ "Finality is a good thing but justice is a better", per Lord Atkin in *Ras Behari Lal v King Emperor* [1933] All ER 723 at p726.

⁷¹ See for example dicta in *Hinds v The Queen* [1977] AC 195 at p 212 and *Duport Steels Ltd v Sirs* [1980] 1 WLR 142 at p 157.

⁷² *R v Secretary of State for the Home Department, ex p Venables* [1998] AC 407 at p528.

by the latter. The separation of powers argument is a cogent case for legitimate judicial action in the face of the ouster. It solves the apparent power wrestle as it is the grant of *unreviewable authority* for the administrative body, rather than the taking away of the courts power of review that is unconstitutional.

The reason why removal of the courts powers is not unconstitutional is that there is already in existence a category of “unreviewable discretion”. Over a period of time, some areas have acquired the tag of “non-justiciable”. This means that any administrative action arising from this category will lie outside the judicial domain. Galligan defines “non-justiciable” as that which is unsuited for adjudication.⁷³ Two scholars comment on justiciability as a “deceptive term”.⁷⁴ This is because its legalistic tone can convey the impression that what is or is not justiciable inheres in the judicial function and is written in stone. In fact, the reverse is true: not only is justiciability variable from context to context, but its content varies over time.

In Malaysia, some areas that fall under this category would include the exercise of power in the matter of prerogative mercy,⁷⁵ the power of the Attorney-General,⁷⁶ doctrine of pleasure⁷⁷ and preventive detention.⁷⁸ These are exceptions and whether the tag of non-justiciable is to be torn away is beyond present contemplation although it may be well to

⁷³ DJ Galligan, *Discretionary Powers: A Legal Study of Official Discretion*, 1990, Clarendon Press, Oxford at p241.

⁷⁴ Craig Scott and Patrick Macklem, *Constitutional Ropes of Sand or Justiciable Guarantees? Social Rights in A New South African Constitution* (1992) 141 U of Pa L.Rev. 1 at p17.

⁷⁵ *Chow Thiam Guan v Superintendent of Pudu Prison and the Government of Malaysia* [1983] 2 MLJ 116 (FC), *Sim Kie Choon v Superintendent of Pudu Prison* [1985] 2 MLJ 385 (SC).

⁷⁶ *Mohamed Nordin bin Johan v Attorney-General Malaysia* [1983] 1 MLJ 68 (FC).

⁷⁷ *Pengarah Pelajaran, Wilayah Persekutuan v Loot Ting Yee* [1982] 1 MLJ 68 (FC)

⁷⁸ *Minister of Home Affairs v Karpal Singh* [1988] 3 MLJ 29 (SC).

note that some of these quarantines have so fallen into this category because of common law tradition and nothing else. It also serves to insulate a wider range of governmental activity than necessary. What is emphasized is that this compartments, artificial necessities or otherwise, does show that the courts powers can be ousted under special circumstances. This makes it clear that what should be addressed is the *unreviewable authority* or *administrative finality* and not the courts powers.

5.4 The Federal Court decision in *Kekatong*-A Critique

The Federal Court's decision in *Danaharta Urus Sdn Bhd v Kekatong Sdn Bhd*⁷⁹ granting *unreviewable authority* to the administrative body sees the rise of the spectre of administrative finality. In this case, the Federal Court held that section 72 of Pengurusan Danaharta Nasional Act 1998 (the Danaharta Act)⁸⁰ constituted a valid bar upon the power of the court to issue injunction in the usual way. In the light of the discussion above, it is important to scrutinize the decision and its implication.

5.4.1 Decision of the Federal Court

First, access to justice is a common law right that the Court of Appeal had interpreted to be resident within Article 8 of the constitution.⁸¹ Common law in Malaysia operates to the extent of section 3(1) of the Civil Law Act 1956. The effect of section 3(1) is that common law will continue to operate "save where no provision has been made by statute

⁷⁹ [2004] 1 CLJ 701.

⁸⁰ See *supra* n62

⁸¹ *Supra* 5.2.1.

law”.⁸² In this context, the Federal Court observed that the common law will continue to evolve until it is crystallized by statute.⁸³ If this is so, it opined that section 72 of the Danaharta Act had crystallized the common law right of access to justice and can thus restrict the right accordingly. Secondly, as the said section restricts access to justice, it must also meet the equality demands of Article 8. The court held that as section 72 falls squarely within “reasonable classification”, it can accommodate Article 8. The decision merits close study.

5.4.2 The Constitutional Reasoning of the Federal Court

As access to justice was recognized as a common law right that has found its place in the constitution, the Federal Court endeavoured to delineate the scope of common law in the constitution. It appears that the Federal Court was concerned with the extent to which common law principles can control the meaning of constitutional provisions. In Malaysia, the reception of common law is dependent on section 3(1) of the Civil Law Act 1956.⁸⁴ It is observed that application of common law principles must be traced back to the definition of “law” in Article 160(2) of the constitution.⁸⁵

⁸² *Sri Inai (Pulau Pinang) Sdn Bhd v Yong Yit Swee* [2003] 1 MLJ 273 at p285.

⁸³ *Amato v The Queen* (1982) 140 DLR (3d) 405.

⁸⁴ Section 3(1) provides a statutory cut-off date for the reception of common law and equity in this country, in West Malaysia this date is 7 April 1956, in Sabah it is 1 December 1951 and in Sarawak it is 12 December 1949. Apart from common law and equity, in Sabah and Sarawak, the statute also provides for the application of statutes of general application as at the cut off date. See *Sri Inai (Pulau Pinang) Sdn Bhd v Yong Yit Swee* [2002] 4 CLJ 776 at p786-787.

⁸⁵ Article 160(2) defines “law” to include “written law, the common law in so far as it is in operation in the Federation or any part thereof, and any custom or usage having the force of law in the Federation or any part thereof”. See *Ong Ah Chuan v PP* [1981] 1 MLJ 64.

According to the Federal Court, the common law referred to in Article 160(2) is the common law that was brought into operation through section 3(1). This means that Article 160(2) and section 3(1) must be read together as section 3(1) envisages modification of common law in the future, which is crystallized by statute. The court opined that it is against this background that “law” as defined in Article 160(2) must be construed. In doing so, the Federal Court drew from the established cannon of construction whereby two conflicting interpretations must be so read to allow for the “smooth and harmonious working of the constitution”. Augustine Paul JCA, delivering the unanimous judgement of the court, enunciated thus:

*If Article 160(2) is not interpreted together with section 3(1) it would render the section otiose in so far as its power to modify the common law in the future is concerned. This will militate against one of the recognized cannons of construction of a constitution which is that if two constructions are possible the court must adopt the one which will ensure the smooth and harmonious working of the constitution and eschew the other which will lead to absurdity or give rise to practical inconvenience or make well-established provision of existing law nugatory.*⁸⁶

Indeed, section 3(1) of the Civil Law Act provides a statutory cut-off date for the reception of common law in this country. With respect however, the applicability of the statutory bar has been misconstrued. Enesty J, in an illuminating dissenting judgment in *Amato v The Queen*,⁸⁷ and cited with approval by the Federal Court in the instant case, explains that where a statute might be read as displacing the common law, the appropriate

⁸⁶ *Kekatong* at p715 (FC).

⁸⁷ *Amato, op cit, supra* n83 at p435.

cannon of interpretation is a preference for that construction which preserves the rule of common law where it can be done consistently with the statute. He says that the conventional view is that the common law is always speaking. Some theories hold that it is a process of discovery, others of evolution. Whatever it might be properly classified in jurisprudence, it will take the clearest and most precise language in a statute to so construe it as to crystallize the common law.⁸⁸ He noted that by virtue of this, the common law can be developed within a statute as long as it is not inconsistent with the statute.

However, even the clearest and most precise statutory language purportedly crystallizing the common law cannot be in any way contradictory to the constitution. The Federal Court in the instant case appears to imply that the constitution must be read to accommodate *a statute*, this being section 3(1). It is difficult to see how a statute can thwart constitutional provisions. The statute must be in harmony with the constitution, not the other way around. This view has been endorsed by many decisions including the Malaysian Federal Court in *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Alwi bin Syed Idrus*.⁸⁹

In the instant case, it is difficult to see how section 72 of the Danaharta Act can be accommodated by virtue of the section 3(1) Civil Law Act validation. It fails to recognize that Parliament cannot legislate in a way that conflicts with constitutional provision. This is repugnant to Article 4 which enshrines the notion of constitutional supremacy.⁹⁰

⁸⁸ *Ibid.*

⁸⁹ [1981] 1 MLJ 29.

⁹⁰ Article 4(1) reads: *This constitution is the supreme law of the Federation and any law passed after Merdeka day which is inconsistent with this Constitution, shall to the extent of the inconsistency, be void.*

Further, by so restricting access to justice, the fundamental rights provisions are rendered meaningless.

This does not however mean that Parliament cannot restrict the enjoyment of a right. Extinguishing a right and curtailing it is entirely two different things. The Federal Court rightly observed that the common law right of access to justice itself cannot render it absolute. Indeed there “must be in existence rules and regulations to enable the right to be exercised which may vary from time to time”.⁹¹ As observed above, the interpretation demanded of rights is a broad one as rights are interrelated as well as there being a penumbra of rights.⁹² By implication, any limitation cannot be unreasonable because otherwise, the rights provisions become meaningless. This means that the legislation must justify any departure as such. The test for our court is not just whether the restriction of the right is without justification but also whether such a limitation is reasonable and necessary. Yet the court made no real attempt to identify the matter in relation to reasonable restriction of a right.⁹³

5.4.3 On Administrative Efficiency

The Federal Court was of the opinion that greater judicial deference is to be paid towards legislative judgement in the field of economic regulation. The court found support from the Indian Supreme Court decision of *RK Garg v Union of India*.⁹⁴ It is unsettling that the court found economic exigency as a basis for “reasonable classification” and therefore

⁹¹ See Kekatong (FC) at p716

⁹² See *supra* 3.2.

⁹³ See *supra* 4.3.

⁹⁴ (1981) SCC 2138.

sufficient to oust curial scrutiny as being within the mandate of Article 8. It is unclear why the court never delved into the issue of *administrative efficiency*, which will be discussed in greater length shortly, in relation to this.

However wrong a decision of an administrative body is, the decision remains fully effective unless and until they are set aside by a court of competent jurisdiction.⁹⁵ In *Regina v Panel on Take-overs and Mergers, ex p Datafin plc & Anor*,⁹⁶ Sir John Donaldson MR recognized the necessity for the refusal of the court to set the administrative decision aside under certain circumstances. It illustrates the “awareness of the court of the special needs of the financial markets for speed on the part of decision-makers and for being able to rely upon those decisions as a sure basis for dealing in the market. It further illustrates an awareness that such decisions affect a very wide public which will not be parties to the dispute and that their interests have to be taken into account as much as those of the immediate disputants”.⁹⁷ One primary factor for deference is speed and another is that real possibility of unmeritorious applications as a guise for delay or harassing. It is worth noting submission of the counsel for the respondent in *Datafin*:

*the nature of the rulings of the take-over panel are particularly required to have speed and certainty: they may be given in the middle of a bid, and they clearly may affect the operation of the market, and even short-term dislocation could be very harmful.*⁹⁸

⁹⁵ *Regina v Panel on Take-overs and Mergers, ex p Datafin plc & Anor* [1987] 1 QB 815 at p840.

⁹⁶ *R v Monopolies and Mergers Commission, ex p Argyll Group Plc* [1986] 1 WLR 763.

⁹⁷ *Ibid.*

⁹⁸ *Ibid.*, at p839.

In *Reg v Monopolies and Mergers Commission, ex p Argyll Group Plc*,⁹⁹ Sir John Donaldson MR lists what amounts to good administration.¹⁰⁰ According to him, in sitting as a public law court, there is a need to approach the courts duties with a proper awareness of the needs of public administration. What is good public administration can be distilled from his judgment:

- (i) Good Public Administration (GPA) is concerned with substance rather than form.
- (ii) GPA is concerned with speed of decision, particularly in the financial field.
- (iii) GPA requires a proper consideration of public interest.
- (iv) GPA requires a proper consideration of the legitimate interests of individual citizens, however rich and powerful they may be and whether they are natural or juridical persons. But in judging the relevance of an interest, however legitimate, regard has to be had to the purpose of the administrative process concerned.
- (v) Lastly, GPA requires decisiveness and finality, unless there are compelling reasons to the contrary.

There are times that judicial intervention can do more harm than good. In this instance, the intervention of the court could be seen as impeding and frustrating the purposes for which the Danaharta exists. In relation to this, the Federal Court reproduced the

⁹⁹ [1986] 1 WLR 763.

¹⁰⁰ *Ibid* at p774.

Parliamentary speech of the then Minister of Finance while introducing the Bill to the Act.¹⁰¹ This emphasized the social object of the law,¹⁰² which is to address the economic downturn that had plunged the nation in financial crisis. The Federal Court appeared to say that considerations of speed and efficiency that went into the usage of section 72 of the Act satisfies the reasonable classification test and therefore makes it undesirable for Danaharta to be subject to review. Yet, it needs to be emphasized that mere efficiency cannot become the be all and end all of administrative process. Such reasoning leaves Danaharta as an essentially self-regulatory institution. This postulates that as long as any administrative body can show that an ouster or restrictive clause can meet the reasonable classification test, then the jurisdiction of the court can be legitimately ousted.

It is submitted that administrative efficiency has to be consistent with the attainment of justice. Administrative powers are exercised by hundreds of government officials and affect many people. It is thus necessary to ensure that powers are exercised properly and for the purposes for which these are conferred.¹⁰³ Further, it is emphasised that the circumstances of the operation ie the context of trust and speed and efficiency merely means that the intensity of review is low. What is really open to the court is a “spectrum of possibilities”.¹⁰⁴

¹⁰¹ On reference to the Hansard, see *Pepper v Hart* [1993] AC 593.

¹⁰² See *Ong Ah Chuan, op cit, supra* n85 at p72.

¹⁰³ MP Jain, *Indian Constitutional Law*, 5th Ed, 2003, Wadha, Nagpur at p1002.

¹⁰⁴ per Lord Hailsham in *London and Clydeside Estates Ltd v Aberdeen DC* [1980] 1 WLR 182 at p189.

5.4.4 Intensity of Review

The balance to be drawn can be seen in the intensity of the courts review of administrative action. Thus, instead of imposing an artificial embargo like an ouster or restrictive clause, what would be constitutionally appropriate is to calibrate the intensity of review. Considerations of weight are concerned with the seriousness of the impact on individuals of decisions, and in particular the weight to be given to their interests by decision-makers. The intensity of review depends on the nature of the body being subjected to review and the general decision making and appeal or review structure.¹⁰⁵

Where a fundamental rights clause is at stake the intensity of review in such an instance will be more rigorous.¹⁰⁶ As Laws LJ said in *R (Mahmood) v Secretary of State for the Home Department*,¹⁰⁷ the intensity of review in a public law case would depend on the subject matter in hand. Thus, as acknowledged in *R. Rama Chandran v The Industrial Court of Malaysia & Anor*,¹⁰⁸ if a decision interferes substantially with human rights, the courts require more by way of justification before they will be satisfied that the decision is reasonable. This heightened scrutiny is contrasted with the deference to pure policy decisions. For example, regulators in the financial field have in practice been subject to less intense scrutiny. In *R v Panel on Take-Overs and Mergers, ex p Guinness Plc*¹⁰⁹ cited

¹⁰⁵ De Smith, Woolf & Jowell, *Judicial Review of Administrative Action*, 1995, Sweet & Maxwell, London at paras 13-055-13069.

¹⁰⁶ *R. Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 154 at p190 (FC); *National Union of Newspaper Workers v Ketua Pengarah Kesatuan Sekerja* [2000] 3 MLJ 689 at p696 (FC).

¹⁰⁷ [2001] 1 WLR 840.

¹⁰⁸ *Loc cit* citing with approval *Bugdaycay v Secretary of State for the Home Department* [1987] 1 All ER 940 (HL).

¹⁰⁹ [1990] 1 QB 146 at p193

with approval by our Supreme Court in *Petaling Tin Bhd v Lee Kian Chan & Ors*,¹¹⁰ it was held that the takeover panel “will retain a very wide discretion as to how it performs the task it sets itself and the court will regard its role as being one of last resort reserved for plain and obvious cases”.

Similarly in *Kekatong*, the Federal Court could have employed the least heightened scrutiny benchmark. The Danaharta Act brings about conceptual changes into the financial climate of the nation emerging from the Asian financial crisis. The framework of the act was presented by the applicants in *Tan Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors*¹¹¹ submitting that it is infused with much public element:

- (i) The Danaharta Act is a public interest statute;
- (ii) Danaharta is owned by the Minister of Finance Incorporated: s9 of the Danaharta Act;
- (iii) Danaharta’s directors are appointed by the Ministry of Finance Inc and two of them are Government officials: s5(1) of the Danaharta Act and
- (iv) The special administrators roles are assisted by threats of penal sanction:

Section 33(4), 36(4), 37(6), 39(3) and 39A of the Danaharta Act.

Sometimes judges are incapable of understanding the workings of the administrative agency. This is not unrecognized. In such an instance, policy considerations will require

¹¹⁰ [1994] 1 MLJ 657.

¹¹¹ [2003] 4 MLJ 332.

the intensity of scrutiny by the courts to be lessened. Instead, the presupposition is that the administrative agency will always be the best authority to decide on the validity of an action. Unless there has been a failure to correspond to any test of fairness, the courts must defer to the administrative decision. This is to avoid the court to double guess the agency on substance.

5.4.5 Taking a Different Route to a Similar Destination

Deference to the regulatory authority in the *Kekatong* case does mean that upon scrutiny, the appeal has rightly been allowed. At all times, the loan was a non-performing one and the real reason for the Respondent to file the injunction is not clear. This brings the arguments here to the same about turn, which is really like taking a different route to arrive at a similar destination. This is not unimportant. Basically, approach for the court must be one that is principled which means that the institutional integrity of the exercise of review by the courts must be preserved. The Indian Supreme Court in *People's Union of Civil Liberties v Union of India*¹¹² relied on this observation made in *State of Rajasthan v Union of India* to provide an apt submission:

So long as a question arises whether an authority under the constitution has acted within limits of its power or exceeded it, it can certainly be decided by the court. Indeed it would be a constitutional obligation to do so. It is necessary to assert in the clearest possible terms, particularly in

¹¹² (2003) 4 SCC 399 at p421.

*the context of recent history, that there is no department or branch of Government that is above or beyond it.*¹¹³

By saying that the restrictive clause is a legitimate constraint upon the courts authority, the Federal Court has ignored its constitutional obligation. Speed and efficiency are important considerations, especially in the case of Danaharta where time constraints can lead to delay in action and defeats the very purpose for which the said Act is conceived. This can be overcome by priority hearings and certificates of urgency, not by ousting the courts jurisdiction. Ultimately, all institutional actors must conform to the dictates of the constitution.

5.5 Conclusion

Administrative finality makes constitutional review an illusion. The purpose of developing a corpus of substantive review is defeated when countered by legislative cul-de-sac. Ousters and restrictive clauses are examples of legislative intervention that freeze the constitution. The problem is aggravated further by judicial self-limitation. The courts have a tendency to resolve the matter by resorting to semantic analysis. The grave repercussion of this was discussed because it failed to understand the dictate of the constitution. This results in cases leaving a heritage of confusion in their wake.

The institutional arrangement was studied to cast light on this misconception. While the demands of separation of powers can make demarcation of the roles of the institutions of

¹¹³ (1977) 3 SCC 592.

power clearer, it is never an easy task as there are always “grey” areas in the operation. Yet, transgressions by the institutional actors can be resolved in a more informed manner. If access to justice is a constitutional sanction, then legislation cannot deny it. This does not mean that all administrative action must be subject to “anxious scrutiny”. The court will determine the intensity of review after considering the issue at stake. In this manner, the constitutional balance is achieved.

Chapter 6 TOWARDS INSTITUTIONAL COMPETENCE

6.0 Introduction

The constitutional competence of the courts to review administrative action has been established with clarity. This sanction provides the roots for the initiation of review action. For review to be effective, the courts must be institutionally competent. It was observed that there are various structural obstacles like ouster clauses, in the performance of review. In such an instance, the notion of review by the courts collapses and is often relegated to the fissures of the constitutional actors will. It is mainly failure to examine the institutional allocation of powers that has resulted in the many conflicting decisions emanating from different courts appear justified.

In Chapter 5, it was examined how the constitutional dictate required institutional impasse to be addressed. In this Chapter, the institutional make-up is *reconstructed* to see if it can facilitate effective enjoyment of rights. The most important feature of the proposed “institutional change” is to have a serious re-look at the arrangement of separation of powers. The separation of powers is a doctrine of democratic legitimacy.¹ Towards this end, the need to protect the power of the reviewing court is not unrecognized but we should not make the mistake of being apologist for it. We have to

¹ Bruce Ackerman, *The New Separation of Powers* (2000) Harv L. Rev 634 at p687. For wider overview, see *supra* 1.2

keep in view the scheme of the constitution and its basic framework that the executive has to be separated from the judiciary.²

To see the whole point, the courts can positively help to secure values that make the system of representative government a worthwhile one. This however can only be achieved if the roles of all the institutional players are explored and placed into its respective compartment (if such a thing is possible). Such an endeavour is of course easier said than done, especially as the allocation of power, in order to be placed in its best light, should be seen in terms of “network of rules and principles” that ensure diffusion of power.³ The importance of this effort is magnified by the fact that the reviewing courts do not function as the “will of majority”.⁴ The court is bound by the will of the constitution.

6.1 From Enjoyment of Rights to Notions of Power

The separation of powers should not be seen as a strict distribution of functions between governmental actors,⁵ but in terms of network of rules and principles which ensure that power is not concentrated in the hands of one branch.⁶ This will enable the exercise of power to be based on clear purpose. Further, it attempts to resolve the difficulty of clear compartmentalization as was recognized in *R (Anderson) v Secretary of State for the*

² *State of Bihar v Bal Mukund Shah* AIR 2000 SC 1296 at p1317 para 30. See also *Millar v Dickson* [2002] 1 WLR 1615 at p1633.

³ Barendt, *Separation of Powers and Constitutional Government*, *op cit*, *infra* n6 at p608.

⁴ Redish & Drising express this fear in *Constitutional Federalism and Judicial Review* (1987) 62 NYULRev. 16.

⁵ *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837.

⁶ Eric Barendt, *Separation of Powers and Constitutional Government* (1995) Pub. L. 599 at p608.

Home Department.⁷ It is noted that at no time must the allocation of functions be considered irrelevant. It is important but what is being advanced here is that a formulaic division is not to be favoured. The allocation of functions must be seen as a means to achieve this end. If the outcome of any arrangement is sought and clarified, the mechanism for operation becomes clear. The argument which could have easily lapsed into rhetoric would now acquire the mantle of principle. Thus, while the Constitution diffuses power, the better to secure liberty, it also contemplates that the practice will integrate the dispersed powers into a workable government. It enjoins upon its branches separateness but interdependence, autonomy but reciprocity.⁸ Powers and limitations are implied from the scheme and other provision of the constitution.⁹ The implication from the commitment to separation of powers is that the outcome is not just prevention of arbitrariness but also administrative efficiency.

The overview of separation of powers and the institutional arrangement leads to an important insight: the constitution must be seen as being beyond rights; that is as one that is couched in duties as well.¹⁰ Jeremy Waldron captures the argument succinctly: When a

⁷ [2003] 1 AC 837.

⁸ *Youngstown Sheet & Tube Co v Sawyer* (1952) 343 US 579 at p635 See also Laurence Tribe, *American Constitutional Law*, 1978, Foundation Press, New York at p17. According to Tribe, it is institutional interdependence rather than functional independence that summarizes the idea of protecting liberty by fragmenting power.

⁹ *BL Kapur v State of Tamil Nadu* (2001) SCC 231 at 243 para 3.

¹⁰ See JW Harris, *Trust and Powers* (1971) 87 LQR 31 at p47-50. JW Harris has compartmentalised the legal concepts of duty into 4 models.

- (i) the relational concept of duty (Hohfeld and Kocurek)
- (ii) the sanction concept of duty (Austin and Keslen)
- (iii) the rule concept of duty (Hart)
- (iv) the will concept of duty (Bentham).

Whenever a institutional actor is under a duty to do or not do something in the context in which there is a remedy for breach of that undertaking, the *sanction* concept of duty is being used. The *relational* concept of duty is in view whether that the institutional actor has to do is spoken in terms of a relative right that can be

principle is entrenched in a constitutional document, the right is compounded with immunity against legislative change. Those who possess the right now get the additional advantage of it being made difficult or impossible to alter their legal position.¹¹ Waldron elaborates that this is primarily a Hohfeldian idea, derived from Hohfeld's structure of duties and rights. The term correlative to the right is the duty incumbent upon officials and others to respect and uphold that right. This provides the right holder with a kind of constitutional immunity. It is the term co-relative to the constitutional immunity as such that Hohfeld would call a "disability"; in effect a disabling of the legislature from its normal function of revision, reform and innovation of the law.¹² The executature thus has duties to the citizen to promote and serve their interest.

If the promise of constitutional review is to have any meaning, there is then a case where duties must be read with rights. What distinguishes a duty from a power is the prescriptive nature of a duty as opposed to the discretionary nature of a power.¹³ This is

claimed by an aggrieved individual. When it is said that the institutional actor is under a duty to act in relation to the administration of its powers, the *rule* concept of duty is being used.

For the present discussion, the Hohfeldian model which envisages the concept of duty as being a correlative of a right is most relevant. Hohfeld wrote *Fundamental Legal Conceptions as applied in Judicial Reasoning* (Yale ed 1946). According to this concept, "duty" is by definition the correlative of a right (in the sense of an affirmative claim) vested in a specific individual. Faithful to this view, one ought not to say that "X owes a duty" unless one also means that he owes it to some individual, Y, and unless one could also say, without change of meaning, that "Y has a right against X."

cf AJ Harding, *Public Duties and Public Law*, 1989, Clarendon Press, Oxford at p22: "The idea of a right is unsatisfactory as a general criterion for the finding of a duty; although the use of rights-based reasoning is to be applauded as there are many duties which cannot exist without any such Hohfeldian correlation of right." It is noted that Harding does however concede that it is nonetheless legitimate to argue that from an individual right in deciding whether there is a duty to exercise a power, and the right may, as it were, be a legitimate card with which to trump a discretion.

¹¹ See Waldron, *A Right Based Critique of Constitutional Rights* (1993) OJLS 8 at p27. It is noted that Waldron himself does not subscribe to this notion. He says at p27: "To think that constitutional immunity is called for is to think that oneself justified in disabling legislators".

¹² *Ibid.*

¹³ AJ Harding, *Public Duties and Public Law*, *op cit*, *supra* n10 at p4.

so even if even if many public duties are implied by the courts rather than command by the legislature.¹⁴ It is submitted that if the scope of duties of the constitutional actors can be defined, then the perimeter of the meaning of rights can be discerned. Further, the case for duties is also capable of alleviating any polemical aspirations of rule of law. Seen in terms of duties, many issues of arrogation of rights can be resolved in an informed manner.

Even so, breach of duty by the constitutional actor can and does happen. We cannot sit and hope that the actors do not transgress the powers accorded to them. It merely aggravates our fear of arbitrary exercise and protection of power, for example in the proliferation of ouster clauses. Does the fear that arbitrary exercise of power means that we remove powers? This is like the possibility of accidents or food poisoning. It doesn't mean that we don't drive on the road or eat. Just like how we follow road signs and check the hygiene at eateries, we then must check the imposition of such power. The fact that objective norms are not prescribed in the constitution for the exercise of power does not mean that institutional actors can act any which way they want. Powers are not conferred in the abstract. They are intended to serve a particular purpose. If these limits are transgressed, a court is entitled to intervene and set the decision aside.¹⁵

¹⁴ *Ibid.*

¹⁵ See *Pharmaceutical Manufacturers of South Africa: In re ex p President of the Republic of South Africa & Ors* 2000 (2) SA 674 at p705.

6.2 The Basic Structure Doctrine and Constitutional Review Re-Explained

Although the constraint of administrative finality has been dwelled with sufficient detail in Chapter 5, attempts to restrict access to courts through the armoury of ouster and restrictive clauses has proved to be amazingly resilient. An ouster as such is an example of legislative intervention *before* review by the courts. In the first place, it might as well be to ask if the ouster is a solution to a perceived problem of excessive judicial intervention. Whether this can be achieved is to be seen.¹⁶ Although the summation of the analysis in Chapter 5 concludes that the ouster clause is simply unconstitutional, it does not resolve other questions. The primary issue is if there are any safeguards against the executature from amending the constitution to expressly declare the *constitutionality* of the ouster or restrictive clause.

The impetus for this is the question posed by Bari and Hickling. The writers ask:

*Even if some daring creative judge decided for example, that an ouster of judicial review was unconstitutional, would not the cabinet immediately propose an appropriate constitutional amendment? And if that amendment were challenged on the grounds of a break of the basic framework of the constitution, what are the chances of any such challenge being successful in the Federal Court if the issue ever got there?*¹⁷

¹⁶ See *infra* 6.4.

¹⁷ Abdul Aziz Bari & RH Hickling, *The Doctrine of Separation of Powers and The Ghost of Karam Singh* [2001] 1 MLJ xxi at xxvi.

This is an important question. It envisages that even if a court can actually go on to declare that the ouster was unconstitutional, there is seemingly *absolutely* nothing to stop the executature from amending the constitution to expressly exclude constitutional review (or any other guarantee or rights for the matter). Further, any declaration of unconstitutionality appears to reside in the will of the court, not on some principle. This gives rise to harrowing possibilities of constitutional amendments being made to suit the whim and fancy of the government of the day.

To reiterate, while any misapprehension with regards to the courts role in the face of an ouster or overriding clause has been dealt with as being a violation of the constitutional order, there is still no answer for the control of the vast powers of the executature. If this is so, it will leave the entire matter of constitutional review as one precariously hanging on the indulgence of the executature who are free to brush to it away, should they wish to do so. The Indian courts keenly examined these questions and fashioned for this purpose, the “Basic Structure Doctrine”. This doctrine is proposed to be utilized as a constitutional cul-de-sac against an all-pervasive executature. The basic structure therefore appears to be a very attractive theory and its applicability in the Malaysian constitutional structure needs to be analysed.

Further to this, it is observed that the Court of Appeal in *Sugumar* appears to have made an implicit endorsement of the basic structure doctrine, with judicial review as being part of it.¹⁸ The reasoning of the Court of Appeal at first, appears to be innocuous enough. It is merely to refute any removal of jurisdiction apparent from the ouster clause in the statute

¹⁸ Note that although the Federal Court has overruled *Sugumar*, it makes no reference to this point.

which the administrative body was shielding itself with. This position is not remarkable, indeed it is a mere reiteration of the courts constitutional duty and a solid recognition of the framework of separation of powers as established in the above submission. The Court of Appeal however went on to refer to *Minerva Mills Ltd v Union of India*,¹⁹ one of the classic “basic structure” cases, not in general terms but specifically on the fundamental principle of the constitutional scheme and the limits of such powers thereof. The effect of the decision in *Minerva Mills* was observed through a subsequent pronouncement in *Sampath Kumar v Union of India*:

*...judicial review is a basic and essential feature of the Constitution and no law passed by Parliament in exercise of its constituent power can abrogate it or take it away.*²⁰ (emphasis added)

The Court of Appeal in *Sugumar* remarked that “the view expressed in the foregoing cases are not only entitled to great weight but may be safely adopted by our courts”.²¹ If this means that the court has made a tacit approval for the applicability of the basic structure doctrine within the Malaysian constitutional structure, the Court of Appeal in *Sugumar* had ignored two previous Federal Court decisions that had dismissed its

¹⁹ AIR 1980 SC 1789. It is noted that the bench was unanimous with regards to the issue that judicial review as being part of the basic structure of the constitution. Bhagwati J whose elucidation was endorsed in *Sugumar* was actually the dissenting judge in *Minerva Mills*. He however agreed with the majority on this principle.

²⁰ AIR 1987 SC 386 at p388.

²¹ *Sugumar* at p307 (COA).

applicability, namely *Loh Kooi Choon v Government of Malaysia*²² and *Phang Chin Hock v PP*.²³

By way of introduction, the basic structure doctrine was founded by the Indian Supreme Court in *Kesavanda Bharati v State of Kerala*²⁴ (the Essential Features Case). The court held that the amending power enshrined within Article 368 of the Indian Constitution cannot be exercised in such a manner as to destroy or emasculate the basic or fundamental feature of the constitution. This is the basic structure²⁵ of the constitution and no amendment can offend it. The Indian Supreme Court went on to proffer some of the features of this basic structure, namely:

- (i) supremacy of the constitution
- (ii) republican and democratic form of government
- (iii) secular character of the constitution
- (iv) separation of powers between legislative, executive and the judiciary
- (v) federal character of the constitution

The basic structure was extended in *Minerva Mills Ltd v Union of India*,²⁶ to include judicial review. This essentially means that the courts power to review administrative action cannot be taken away in any form by the legislature via the amendment provisions.

²² [1977] 2 MLJ 187. The doctrine has also been rejected by the Singapore courts. See *Teo Soh Luang v The Minister of Home Affairs* [1989] 1 MLJ 120 and *Vincent Cheng v Minister of Home Affairs* [1990] 1 MLJ 449.

²³ [1980] 1 MLJ 70.

²⁴ AIR 1973 SC 1461. For a through analysis of the case and its implications, see MK Bandhary, *Basic Structure of the Indian Constitution*, 1993, Deep & Deep, New Delhi.

²⁵ This terminology was employed by Khanna J. The other majority judges has used terms like “essential elements” and “basic features”: all which amount to the same.

²⁶ AIR 1980 SC 1789.

In *Loh Kooi Choon*, Raja Azlan Shah FJ was of the opinion that fundamental rights provisions were not made inviolable by constitutional amendments. His Lordship said that “[i]t seems clear to me that if there is to be no restriction to the right to amend any of the fundamental rights set out in Part 11, such restriction would have been set out in one of the various clauses of Article 159 itself”.²⁷ In *Phang Chin Hock*, Suffian LP held that “it is enough for us merely to say that Parliament may amend the Constitution in any way they think fit, provided they comply with all the conditions precedent and subsequent regarding manner and form prescribed from the constitution”.²⁸ Both decisions appear to place reliance on the amendment provision as hindrance to the basic structure within the constitutional set-up.

One of the reasons for the formulation of the doctrine in *Kesavananda* was the fear of the bench that if no restrictions were implied on the amending power, “a political party with a two-third majority in Parliament for a few years could so amend the Constitution as to debar any other party from functioning, establish totalitarianism, enslave the people, and after having effected these purposes make the Constitution unamenable or extremely rigid”.²⁹ The grim prognosis however flies in the face of express amendment provisions in Article 368 of the Indian constitution.³⁰ (Article 159 of the Malaysian constitution

²⁷ *supra* n22 at p193.

²⁸ *supra* n23 at p74.

²⁹ Per Sikri CJ, at p365.

³⁰ Before the decision in *IC Golaknath v State of Punjab* AIR 1967 SC 1643, the said provision read as “*procedure for amendment*”. *Golaknath* tried to impress that procedure does not mean power to amend. *Golaknath* held that fundamental rights cannot be abridged by procedure provided by Article 368. The court resorted to Article 13(2) which provided that any “law” taking away or abridging fundamental rights was void. The court found that because a constitutional amendment is “law” within the definition of Article 13(2), it therefore can in no way remove the fundamental rights clauses.

The decision has since been overruled by *Kesavananda*.

corresponding). Both provisions define amendment to include “addition, variation and repeal”. The failure to address this with sufficient clarity will be examined shortly.

Kesavananda seems to be an almost emotional appeal to some mysterious “spirit of the constitution”. Law is never emotional, it is honest and fair in the business of justice. We must remember that *Kesavananda* was decided at the time of the almost dictatorial grip of Prime Minister Indra Gandhi and the courts reaction is a reflection of the need to break free from such perverse rule. This however cannot deny the fact that the theory itself is attractive and highly tantalising as a constitutional shield. An argument extended to justify flaunting of the express provision is that Article 368 has its limitations. The Indian constitution mentions “amendment” in a few places. In Article 4 and 169, amendment is nowhere defined as to include “addition, variation and repeal” as is in Article 368. This was contended in *Kesavananda* as evidence that the intention of Article 368 is to limit the power of amendment. It was argued that a necessary inference arises as a result, that there are implied limitations on the power of the Parliament.

However, whatever the justification, and many were advanced by the 7 majority judges,³¹ it appears suspect in the light of the words that couch both Indian and Malaysian provision for amendment.³² Another argument forwarded in *Kesavananda* was that although defining the essential features is a subjective task, the elusive nature of essential

³¹ Khanna J swaying in the last.

³² cf Sharon Chahil, *A Critical Evaluation of the Constitutional Protection of Fundamental Liberties: The Basic Structure Doctrine and Constitutional Amendment in Malaysia* [2002] 3 MLJ xii, Andrew Harding, *Death of A Doctrine* [1979] 21 Mal.L.R 365 and HP Lee, *The Process of Constitutional Change in Malaysia*, in *The Constitution of Malaysia Further Perspectives*, 1986, Trinadade & Lee (eds), Fajar Bakti, Petaling Jaya at p390-392. According to HP Lee in *Judges and Constitutional Government 2000/2001*, Lawasia, p30 at p44., “the basic structure is a doctrine which hovers in a brooding fashion over the constitutional systems of these countries”.

features must be likened to natural justice. The majority generally opined that just because it has no objective form does not mean that the notion should be dismissed. For rescue, Lord Reid's classic pronouncement in *Ridge v Baldwin* was resorted to.³³ It is submitted that the case for natural justice is sustained although it does not have a standard definition. This is because the nature and scope of natural justice is contemplated by the constitution.³⁴ On the other hand, the constitution never provided for a scheme of essential and non-essential features. There are instead express provisions for amendment.

Further, it is difficult to agree merely on the basis that natural laws have been in existence and further inferred as codified into the constitution, then amendment powers cannot be utilised to arrogate those provisions as such. It is not clear how the power to amend can be denied on the contention that the amendment may impinge on fundamental rights, even if such rights are described as natural rights or higher law. This further consolidates the perplexing disregard in the basic structure argument to consider the impact of the word "repeal". Taking note of the Malaysian context at this juncture, Article 159(6) of the Malaysian constitution provides that "amendment" includes "addition" and "repeal". Under the basic structure understanding repeal has been held to mean anything and everything but repeal itself.³⁵ For reference, the case of *Tengku Besar Zubaidah v Kong Cheng Whum* which discussed two English decisions is sought:

³³ *Ridge v Baldwin* [1964] AC 40 at p64-65, in relation to the nature of natural justice, Lord Reid described that any fear of natural justice just because it is abstract as wrong and that such a notion is "tainted in the perennial fallacy that because something cannot be cut and dried or nicely weighed or measured therefore it cannot exist", *Kesavananda* at p1535 para 300.

³⁴ *Supra*, 3.1.

³⁵ Khanna J was closest among the majority judges to provide a more holistic approach. At p688 he says that though the power of amendment is plenary and would include within itself, the power to add, alter or repeal the various articles including those relating to fundamental rights" it is "subject to the retention of the basic structure or framework of the Constitution". Note the blatant disregard for "repeal".

*“Lord Tenterden in Surtees v Ellison said, when an act of Parliament is repealed it must be considered (except to transactions past and closed) as if it never existed. In Kay v Godwin, Tindal CJ explained the effect of a repeal at page 582 as follows: I take the effect of repealing a statute to be to obliterate it as completely as from the records of the Parliaments as if it has never been passed.; and it must be considered as a law that never existed except for the purpose of those actions which were commenced, prosecuted and concluded whilst it was an existing law”.*³⁶ (emphasis added)

It is conceded that this definition is for statutes. Should the same apply to constitutional amendments? Arguably yes. The Concise Oxford Dictionary³⁷ defines “repeal” to include *revoke, rescind, annul*. By ignoring the fact that “repeal” amounts to revoke, rescind and/or annul, it appears that the basic structure understanding renders Article 159 otiose. Even if the word “repeal” is removed from the definition, the inclusion of powers to amend itself is sufficient to warrant changes into the constitution, including provisions that are seemingly held as sacred, viz the fundamental rights clauses. We must remember that a constitution without provisions for amendment becomes, to paraphrase, a dead piece of tabulated austerity.

What more, by seeking to enumerate certain provisions as fundamental, the basic structure may become an imprisoning feature instead of serving the future generations. This argument also amplifies the problems of defining what constitutes essential features and what does not. To find out essential or non essential features is an exercise in

³⁶ [1969] 2 MLJ 224 at p227.

³⁷ *The Concise Oxford Dictionary*, 8th Ed, 1990, Clarendon Press, Oxford.

imponderables.³⁸ It is not clear who or which organ will make such a distinction and on what touchstone is it to be measured. In fact, the exact thing happened subsequently in *ADM Jabalpur v Shivkant Shukla*.³⁹ In this case, the emergency provisions were held to be part of the basic features of the constitution. Article 352 of the Indian Constitution provides for the proclamation of an emergency by the President “if he is satisfied that a grave emergency exists whereby the security of India or any part of the territory of India is threatened, whether by war or external aggression or internal disturbance”. The Indian Supreme Court held that the article enumerating for emergency was as much a basic feature of the constitution as any other.⁴⁰ The appalling about turn is a lesson in folly.

Following this however, can entire guarantee of constitutional rights be removed? Does power to amend include power to destroy? Does this also mean that cherished constitutional entrenchments, including the supposed transcendental value of judicial review can be extinguished at the whim and fancy of an all pervasive executive? What is clear is that the basic structure doctrine is of no help to that end and is in fact a dangerous tool that can be fashioned at the whim and fancy of the instruments of power.

³⁸ Ray J (dissenting) in *Kesavananda* at p1856: “The objective standard is reasonableness. In the law of torts, the courts find out what reasonable care is, in the law of it is ironical if subjective law aims to seek fulfilment of reasonableness, it is strange that the constitution is to be left in an unreasonable quagmire of essential and non-essential”.

³⁹ AIR 1976 SC 1207.

⁴⁰ *Ibid* at p1331.

6.2.1 Beyond Basic Structure

In examining the Basic Structure Doctrine and its usage in relation to the courts powers of review, it is noted that one major *cul-de-sac* is that the character or nature of an amendment is not prescribed by the constitution. However, it is submitted that every insertion which effects a change in the constitution or adds or takes away from it should constitute an amendment. It is noted that the Malaysian constitution has nothing to the effect of Article 13(2) of the Indian Constitution. Article 13(2) reads thus:

*The state shall not make any law which takes away or abridges the rights conferred by this part and any law made in contravention of this clause shall, to the extent of the contravention be void.*⁴¹

This point constituted the first submission in *Kesavananda* and does form a valid argument for preservation of certain clauses in the Indian set-up.⁴² However, it further reinforces that the Malaysian constitution contains no allusion or premise for basic structure.

The dissenting judges in *Kesavananda* were focused on the broad provisions for amendment. This is misconceived and cannot be sustained either. Blanket endorsement of

⁴¹ For interpretation of this provision, see *Shankari Prasad v Union of India* AIR 1951 SC 458, *Sajjan Singh v State of Rajasthan* AIR 1959 SC 845. Both cases make a distinction with regards to the “constituent power” and “legislative power”. In the overruled case of *IC Golaknath v State of Punjab* AIR 1967 SC 1643, the Supreme Court by a majority of six to five held that an amendment to the constitution is “law” within Article 13(2). According to *Golak Nath*, the Indian Parliament cannot amend or abridge the constitution.

⁴² See similar provision in the Constitution of the Republic of the Philippines, Article 111, Section 4: No law shall be passed abridging the freedom of speech, of expression, or of the press, or of the right of the people to peaceful assembly and petition the government for the redress of grievances.

wide amending powers by the executature does not mean that there is no constitutional duty to safeguard the constitution on their end. Parliament cannot amend the constitution in “any which way it thinks fit”.⁴³ Neither is the dicta in *Loh Kooi Choon* sufficient to argue that any amendment is justified “as long as the process of constitutional amendment as laid down in clause (3) of Article 159 is complied with”.⁴⁴ It would be appalling to think that substantive constitutional rights can be mutated, mutilated and discarded as long as the *correct* procedure has been applied. Our understanding of administrative control is far too mature today to even entertain such anomalies. To begin, we have to look at the courts. The courts are able to scrutinize government decisions closely and must be prepared to exercise control over many non-legal ways in which government can achieve goals because it is constitutionally sanctioned to do so. This means that any arbitrary constitutional amendment can be struck down by the courts. In fact, it is the courts constitutional duty to maintain thus. The apparent simplicity of this statement is understandably fraught with controversy noting the executature’s vast powers provided by the constitution.

Before delving into this protracted debate however, there must first be an understanding that the power of the court is not unlimited. They do not have the “the power they say they have”.⁴⁵ The courts, like the executive, have the power which the constitutional order says they have. Of course, one of the noble aims of formulating the basic structure

⁴³ *Phang Chin Hock* at p74.

⁴⁴ *Loh Kooi Choon* at p190.

⁴⁵ Cf Sir John Laws in *Illegality: The Problem of Jurisdiction* in (Supperstone and Goudie eds.) *Judicial Review* 1st Ed , 1991, Butterworths, London, at p69-70: “Jurisdiction is like reasonableness, is a protean word. Its easiest application is in the case where a body has express but limited powers conferred on it by another body: so if it acts outside those powers, it exceeds its jurisdiction .But the superior courts in England are not constituted on any such basis. They have, in the last analysis, the power they say they have”.

doctrine could be the awareness that Parliament, being a creature of the constitution, must be subject to it and not the other way round. It is however an irony that in this zeal to preserve and promote the basic structure, the courts are at danger of emasculating another provision of the constitution, namely that for amendment. This is what happens when the courts try to supersede the constitution. Such an incarnation is no less to be disparaged than the executive wielding ouster powers. This is the paradox of *Kesavananda*. The courts too are subject to the constitution, not the other way around. The gist of this interaction is best described by Simon Brown LJ in *International Transport Roth GmbH v Home Secretary*.⁴⁶ His Lordship, referring to the constitutional caveats presented by the HRA, elucidated that “[t]here are limits to executive and legislative decision-making, just as there are to decision-making by the courts”.⁴⁷

The basic structure stretches the constitution to an artificiality that cannot be accepted. However, the rejection in *Loh Kooi Choon* and *Phang Chin Hock* is with respect, based on mistaken reasoning. At the same time, the decision in *Sugumar* so as not to be ousted by the ouster by applying the basic structure is a bold but misplaced endeavour. The only way to address a constitutional issue is from the constitution itself: the contemplation and the philosophies animating it.⁴⁸ There is a link provided for preservation of certain tenets of the constitution. If this link is drawn, the exercise of executive power can in no way support any abridgement of fundamental rights or change certain features, like constitutional supremacy and constitutional review. It is this link that we now turn to.

⁴⁶ [2002] 3 WLR 344

⁴⁷ *Ibid* at p365.

⁴⁸ See *supra* 3.1.2.

6.2.2 The Courts and the Dynamism of Separation of Powers

Misapprehension with regards to separation of powers has led to creation of artificial phenomenon like the basic structure doctrine. The case for separation of powers review begins with analysis of the dynamics of power. Parliament is conceived by the constitution and is subject to its dictates. So are the courts. This is trite. But what is often forgotten is, as was observed earlier, the objective of the constitutional actors. We have the advantage of a written constitution and it is our starting point, just as parliamentary sovereignty is the ending point in the UK. Lord Hoffman's speech in *R v Secretary of State for the Home Department, ex p Simms* is instructive:

*Parliamentary sovereignty means that Parliament can, if it chooses, legislate contrary to fundamental principles of human rights. The Human Rights Act 1998 will not detract from this power. The constraints upon its exercise by Parliament are ultimately political not legal. But the principle of legality means that Parliament must squarely confront what it is doing and accept the political cost. Fundamental rights cannot be overridden by general or ambiguous words. In the absence of express language or necessary implication to the contrary, the courts therefore presume that even the most general words were intended to be subject to the basic rights of the individual. In this way, the courts of the United Kingdom, though acknowledging the sovereignty of parliament apply principles of constitutionality little different from those which exist in countries where the power of the legislature is expressly limited by a constitutional document.*⁴⁹

⁴⁹ [2000] 2 AC 115 at p131.

Examining the role of the actors within our constitutional context, the tripartite actors function within the framework of separation of powers. The classification which divides the roles of enunciation, implementation and particularization is conceived to fragment power.⁵⁰ As observed earlier, separation of powers based review makes no requirement for the courts to ensure strict demarcation of the allocation of powers. The problem is not to classify the function but to allocate that function to the right actor on some principle.⁵¹ It is in search of this principle that the focus moves to now.

A striking example can be seen in the Privy Council decision in *Liyanage v The Queen*.⁵² After an unsuccessful *coup de tat*, the parliament of Ceylon dealt with the participants in a most draconian manner: it enacted legislation and retrospectively created offences, created a special tribunal to hear those offences, and changed normal rules of evidence. It was held that the powers of the Ceylon Parliament as in the case of all countries with written constitutions must be exercised in accordance with the terms of the constitution from which the power derives.⁵³ The Privy Council agreed with the Supreme Court of Ceylon which came to the conclusion that the Ministers nomination of judges was an infringement of the judicial power of the state which cannot be reposed in anyone other than the judicature.⁵⁴ According to the Privy Council, such acts are legislative judgement,

⁵⁰ *Supra* 1.2.

⁵¹ The observation of the Indian Supreme Court in *Minerva Mills* at p1806-07 is noted. The court said that "rights are not an end in themselves but are means to an end".

⁵² [1967] 1 AC 259.

⁵³ *Ibid* at p286.

⁵⁴ *Ibid* at p288. Applied in *R (Bancoult) v Foreign Secretary* [2001] QB 1067 at p1098. See also *Kable v DPP (NSW)* (1996) 138 ALR 577 where the Australian High Court had to deal with a specific legislation, the Community Protection Act 1994 to "protect the community" from one Gregory Wayne Kable. The Act intended to prevent the release of Kable who was imprisoned for murder. The High Court held that the Act was incompatible with the separation of judicial power.

and an exercise of judicial power.⁵⁵ To hold such acts as valid would be to have judicial power to be absorbed by the legislature.⁵⁶ The Privy Council held that these provisions were a gross violation of the separation of powers principle, “a grave and deliberate incursion into the judicial sphere”.⁵⁷ In fact, *Kesavananda* itself makes a reference to *Liyanage*. Sikri CJ said thus: “the judicial committee was of the view that there exists a separate power in the judicature which under the constitution as it stands cannot be usurped or infringed by the executive or the legislature”.⁵⁸ The court however failed to follow the constitutional logic and went on to fashion the complicated Basic Structure.

Another interesting case on point is the Privy Council appeal from *Bribery Commission v Ranasinghe*.⁵⁹ The Privy Council held that “they⁶⁰ represent the solemn balance of rights between the citizens of Ceylon, the fundamental conditions on which inter se they accepted the constitution: and these are unalterable under the constitution”.⁶¹ These comments, albeit *obiter*, can be seen as implying that the separation of powers acts as an impasse against the actions of the executive.

In *Deputy of Public Prosecutions of Jamaica v Mollison*,⁶² it was observed that the sentencing provisions under challenge in the *Hinds*⁶³ case were held to be unconstitutional not because of their repugnancy to any of the rights guaranteed by the

⁵⁵ *Calder v Bull* (1799) 3 Dallas 386 quoted in *Liyanage* at p291.

⁵⁶ *Ibid* at p291.

⁵⁷ *Ibid* at p290. See also *Hinds* [1977] AC 195 at p225-227, *Brown v The Queen* [2000] 1 AC 45.

⁵⁸ *Kesavananda* at p1529 para 263.

⁵⁹ [1965] AC 172.

⁶⁰ Referring to provisions which set out further entrenched religious and racial matters.

⁶¹ *Ibid* at p194.

⁶² [2003] 2 AC 411.

⁶³ [1977] AC 195 per Lord Diplock, “A breach of constitutional restrictions is not excused by the good intentions with which the legislative power has been exceeded by the particular law”.

constitution but because of their incompatibility with the separation of powers, “a principle on which the constitution itself was held to be founded”. *Anderson* reiterates these principles.⁶⁴ According to Lord Steyn in this case, the notion of separation of powers is reinforced by constitutional principles of judicial independence, access to justice, and the rule of law. The separation of powers based on rule of law was referred to by Lord Steyn as a “characteristic feature of democracies”.⁶⁵

6.3 On Representative Government and Constitutional Amendment

Institutional integrity between the constitutional actors as such is not a mere appeal to some vague political morality but grounded on the basis that exercise of powers can in no way be arbitrary and unlawful-if the constitutional requirement is to be achieved. If this is so, in order for institutions to be effective, they must be identified with interests and ideals, in connecting the realities of power and discourse of democracy.⁶⁶ Thus, it is emphasized that constitutional provisions are required to be understood and interpreted with an object oriented approach. The words may be used in general terms but their full import and true meaning are to be appreciated considering the context in which the same are used and the purpose which they seek to achieve.⁶⁷ This is why to outcomes as much as to principles that we need to look for the future, recognizing that even the future will

⁶⁴ *R (Anderson) v Secretary of State for the Home Department* [2003] 1 AC 837 at p890-891. See also *Duport Steels Ltd v Sirs* [1980] 1 WLR 142.

⁶⁵ *Ibid.*

⁶⁶ *R v Secretary of State for the Home Department, ex p Pierson* [1998] AC 539 at p587 per Lord Steyn: “Parliament does not legislate in a vacuum. Parliament legislates for a European liberal democracy based upon the principles and traditions of the common law...and...unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law”.

⁶⁷ *SR Chaudhuri v State of Punjab* AIR 2001 SC 2707 at p2717 para 33.

one day be the past and its decisions, seen like ours creatures of a dialectic time, place and principle. It is also why there is nothing unprincipled in arguing from outcomes.⁶⁸

This does not mean that any vacuous or flighty objective should be applied. The imperative of a higher order law merged in the ideal of democracy or some vague “people’s aspiration of democracy”⁶⁹ as the objective of the exercise of separation of powers must be rejected. In *Liyanage*, the Privy Council turned to the constitution and studied the provided objective. In the Indian context, the Preamble would appear to provide a form of objective. Thus, the objective must be construed from the structure of the constitution. This in the Malaysian case can only be achieved by implication.

In this instance, *Ong Ah Chuan* may again prove to be instructive: The issue was whether questions of dissimilarity in circumstances justifies any differentiation in the punishments imposed upon individuals who fall within one class and those who fall within the order, and, if so, what are the appropriate punishments for each class. The court held that “under the Constitution, which is based on the separation of powers, these are questions which it is the function of the legislature to decide, not that of the judiciary. Provided that the factor which the legislature adopts as constituting the dissimilarity in circumstances is not purely arbitrary but bears a reasonable relation to the social object of the law”.⁷⁰ *Ong Ah Chuan* can be seen to pave the way that “the social object of law” is paramount in the exercise of powers when a statute is concerned. Translated into

⁶⁸ Stephen Sedley, *Human Rights: A Twenty First Century Agenda* (1995) Pub. L. 386 at p395.

⁶⁹ cf John Laws, *Law and Democracy* (1996) Pub L 72 at 84.

⁷⁰ *Ong Ah Chuan v PP* [1981] 1 MLJ 64 at p72.

constitutional terms, it must imply that object or the purpose of the separation of powers must be considered.

6.3.1 Constitutional Duties

In relation to the executive and legislature, save by the few who are nominated, the rest, by virtue of being elected, are enabled through the ballot-box. The constitutional duty is contained via the oath ordained under Article 59. The legislators (as well judges) are partners in their duty to “preserve, protect and defend the Constitution”. The express enunciation is in terms where the voters elect their representatives. Thus, on closer study, it appears that there is implication that the objective of representative government underlies the constitution and powers must only be exercised towards promoting this end. Although the constitution itself makes no textual enumeration of representative government, it is submitted that the entire architecture of the text is designed to achieve this purpose. The exercise of separation of powers must therefore work towards achieving the objectives of representative government. The logic behind this notion may even appear to be elementary. MJ Detmold says that this implication “is a creative act of understanding the nature constitution. This can be shown by supposing the step to be legislated. Suppose an amendment was passed to the constitution which declared that we the people owned the constitution equally. How odd, we would say. Of course we own it equally. How could it be that some own it more than others?”⁷¹ Similarly, the function of the representative government which arises by implication in the Malaysian Constitution.

⁷¹ MJ Detmold, *The New Constitutional Law* (1994) 16 Syd L. Rev 228 at 229.

In the famous *Australian Capital Television Pty Ltd v Commonwealth*⁷² case for example, the Australian High Court held that federal legislation prohibiting political advertising was an infringement of the right to freedom of communication notwithstanding that the constitution stood sans a bill of rights. In coming to its decision, the court held that the reasoning was not based on an implied bill of rights but on the view that the constitution provided for a *representative government*. The freedom of communication arose because it was seen as a necessary element of that governmental system. Eminent scholar Leslie Zines sees that it is a reasonable conclusion from the election provisions of the Australian Constitution, reading them in their historical and contemporary social setting, that the objective was to create, in respect to the Commonwealth, a system of representative government.⁷³

Subsequently, in *Lange v Australian Broadcasting Corporation*,⁷⁴ a defamation case, the High Court affirmed the principle of representative government and that freedom of communication as an incident of the notion of representative government. The emphasis on the principle of representative government was analysed according to the constitution and not common law: the court held that freedom of communication was to be interpreted broadly. Its limitation was by a law satisfying a legitimate end if reasonably appropriate and can achieve the object of representative government.

⁷² (1992) 177 CLR 106 at p140. The decision was subsequently endorsed in *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520 and by the Australian Federal Court in *Coleman v P* (2002) 189 ALR 341.

⁷³ Leslie Zines, *The High Court and the Constitution*, 1997, 4th Ed, Butterworths, Sydney at p391.

⁷⁴ (1997) 189 CLR 520.

*McGinty & Ors v State of Western Australia*⁷⁵ classified the scope of “representative government” and has been applied in *Mulholland v Australian Electoral Commission*.⁷⁶ In *Mulholland*, it was held that since *McGinty*, it has been clear that the constitution gives effect to the institution of representative government only to the extent that the text and structure of the constitution establish it. In other words, to say that the constitution gives effect to representative government is a shorthand way of saying that the constitution provides that form of representative government which is to be found in the relevant sections. Under the constitution, the relevant question is not, “what is required by the representative, responsible government?” It is “what do the terms and structure of the constitution prohibit, authorise or require?”⁷⁷

McHugh J in *Australian Capital* accepted that the constitution gave effect to “representative government” by using the concept as a background against which the election provisions are to be interpreted.⁷⁸ It seems reasonable from reading the Australian constitution in its historical and social context that the object of the specific powers was to create a system of representative government. The implication from the express provisions does not seem any more removed from a “truly interpretive” approach of the constitution that the reasons given for supporting the doctrine of separation of judicial power and the implied restrictions on federal power to make law binding or effecting the states.⁷⁹

⁷⁵ (1996) 134 ALR 289 at p319.

⁷⁶ (2003) 198 ALR 278.

⁷⁷ *Ibid*, at p170 per Brennan CJ.

⁷⁸ *Op cit, supra* n72 at p228-229.

⁷⁹ Leslie Zines, *op cit supra* n73 at p 6-17.

Similarly, the terms and structure of the Malaysian constitution appears to require for a representative government.⁸⁰ Part VIII of the Constitution is designed to ensure that elections are conducted. Article 113 provides for the conduct of elections, including an Election Commission under Article 113(1). Article 119 entitles any citizen who has attained the age of 21 on the qualifying date as well as being a resident in a constituency on such qualifying date or if he is an “absent voter” is entitled to vote unless he is disqualified under Clause (3) or other connected laws. Therefore, it is submitted that any executive action or legislation can be questioned on the basis if it is reasonably appropriate and can be adopted to the fulfilment of compatibility with the notion of representative government, the system prescribed by the constitution. The Indian Supreme Court, taking a similar approach, has enunciated that representative government or democracy generally envisages:⁸¹

- (i) representation of the people
- (ii) responsible government
- (iii) accountability of the council of ministers to the legislature.

The essence of this is to draw a direct line of authority from the people through the executive to the legislature. Article 5 and 8 of the Malaysian constitution can and does contemplate a *right* to honest and efficient government. This is because if a government was to act any other way, then the right to livelihood and equality becomes meaningless. The notion of representative government bears a duty upon the executive.⁸²

⁸⁰ See however comment by Professor Abdul Aziz Bari that the idea of “responsible government” does not emerge as a reality as the government is looked upon as the master who deserves to have complete loyalty and undivided powers, see Abdul Aziz Bari, *The Malaysian Constitution-A Critical Introduction*, The Other Press, Kuala Lumpur at p240.

⁸¹ *SR Chaudhuri, op cit, supra* n67 at p2714 para 21.

⁸² See *supra* n 6.1.

In short, the notion of representative government necessitates accountability. Again, in another Australian case, *State of New South Wales v Commonwealth of Australia*,⁸³ it was held that “the very concept of representative government and representative democracy signifies the government by the people through their representatives. Translated into constitutional terms, it denotes that the sovereign power which resides in the people is exercised on their behalf by their representatives. In the exercise of those powers the representatives are accountable to the people of what they do to account of the views of the people whose behalf they act”. In other words, the accountability required by the constitution places the onus on the executive to act in furtherance of the purpose of representative government at all times. Seen in this term, the notion of representative government provides meaning to the guarantee of rights and all other constitutional provisions. It places great responsibility on the executive to act principally. Further, constitutional review is maintained at all times as a necessary partnership.⁸⁴ The notion of representative government is thus a constitutional prescription of utmost importance.

6.3.2 Constitutional Duties: Can the Courts Enforce Separation of Powers?

It was observed that the requirement of representative government prohibits the executive from abolishing fundamental rights and other constitutional entrenchments-that would be repugnant to the constitutional dictate. The court on the other hand has a duty to give the fundamental rights provisions an expansive treatment. Otherwise, the court has misused its power and the dictate of the constitutional order. For example, the legislature may

⁸³ (1992) 108 ALR 577.

⁸⁴ See *supra* 3.3.

decide to remove, alter or mutilate freedom of speech from the constitution. In reality this can be easily done due to the fusion of the executive and legislature. The court however must scrutinize this, when challenged, on the basis that it is arbitrary and unlawful exercise of the requirement of *representative government*. It is left to the courts to balance enshrined rights with the competing interest of government (for example the financial constraints that provoke certain policies) with that of the constitutional dictate of representative government. The court must see to it that the right to honest and fair government contemplated by Article 5 is given meaning. Total abolishment therefore cannot happen for that would pervert the duty that arises out of the notion of representative government and thwart the guarantee of rights.

This is why although the Court of Appeal in *Sugumar* was correct to couch the exercise of power within the constitutional order, the implied reliance on basic structure fails the virtues of separation of powers. Constitutional review will remain the preserve of the courts simply because the executive has no power to change such an order. In fact, as shown in cases like *Liyanage*, if Parliament were to encroach or curtail the courts reviewing power, it would amount to an *unconstitutionality*. With this understanding, the executive cannot change the scheme of distribution of powers by amendment or any other way-its power simply does not stretch to that extent. This would apply to any validation of the ouster clause via the constitution as well. Such an attempt would transgress the reach of representative government.

To summarize, by invoking the dynamism of the doctrine of separation of powers, the apparent power wrestle can be addressed. The appeal to a vague notion like basic structure not only fails to correspond to constitutional realities but is superfluous noting that the constitutional order never sanctioned amendments that are arbitrary or unlawful. This understanding of powers eases the debate and provides groundbreaking avenue for re-examination of the place of review within the constitution. The reality is that the executive and legislature are so fused that effective separation of powers can only be effected by the courts. Constitutional review enforces a legitimate regime of separation of powers. Thus, the constitutional order is clear-the courts must determine the relationship between the actors and the limits in the exercise of that power. The function of constitutional review is thus of paramount importance in re-institutionalising powers and placing it in proper function.

6.4 Executive Review of Judicial Action

The concern of amendment of the constitution at the whim and fancy has been resolved. However, the executure is still free to effectively annul a judicial decision by subsequently countering it through legislation. While it has been observed that the requirement of representative government places a great onus on the executive and enforces accountability, it is noted that judicial repudiation does not threaten the executure. The legislature has no power to defy the court order but it is still able to override the substance of the decision by subsequent amendment of statute. What is at

stake is the location of the ultimate decision-making authority-the right to the “final word”.⁸⁵

In the light of the notion of requirement of representative government, can a legislative sequel be countered where the executature acts like a “super court?”⁸⁶ If the executature can subsequently counter judicial decisions by statutory amendment, it can render the effect of constitutional review to be a mere transient device, exercised on a case by case basis, and non-binding subsequently. It comes to a realisation that principled constitutional review will be another illusion (again) if the executature continues to be unprincipled. There is a need therefore to draw out principled *legislation*. It is submitted that principled and dignified legislation *can* be achieved. The requirement of representative government is a first step towards this. This is also a concession that the courts are not absolved from making mistakes, and legislative response to unfavourable judicial decisions must be studied in the light of this. If both the executature and judiciary can work as partners, the accord of rights become truly meaningful.

The legislature can indeed counter a judicial decision. In *Municipal Corp of the City of Ahmedabad v New Shrock Spg and Wvg*,⁸⁷ the Indian Supreme Court iterated that no instrumentalities of the state can disobey or disregard decisions given by courts. However, the legislature can remove the basis of a decision rendered by a competent

⁸⁵ See Jeffrey Goldsworthy, *The Philosophical Foundations of Parliamentary Sovereignty* in *Judicial Power, Democracy and Legal Positivism*, (Campbell and Goldsworthy eds), 2000, Ashgate Publishing, England p229-230. It is significant that this question is perplexing even in English jurisprudence.

⁸⁶ Lorraine Weinrib, *Learning to Live With the Override* (1990) 35 McGill L.J. 541.

⁸⁷ (1970) 2 SCC 280.

court by subsequent legislative amendment.⁸⁸ In *Peoples Union of Civil Liberties*, it was “settled law” that the legislature may remove the defect which is the cause for invalidating the law by the court by appropriate legislation if it has power over the subject matter and competence to do so under the Constitution.⁸⁹

The Canadian Charter of Rights⁹⁰ is an example of a constitutional recognition of the inevitability of legislative sequence and therefore provides for principled legislature via section 33 of the Charter. Section 33 provides that the legislature may expressly declare that the Act or a provision thereof shall operate notwithstanding a provision included in section 2, 7 to 15 of the Charter. Section 2 and 7 to 15 specify certain fundamental rights and as such, section 33 provision operates as a “notwithstanding” or “override” clause, enabling the legislature to override those specified sections of the Charter, and the rights they protect, although only for renewable 5 year periods.

One reason for the override provision could be that the legislature must justify imposition of restrictions on fundamental rights clauses as being “reasonable”.⁹¹ Section 1 of the Charter states that charter rights restriction must be that which is *reasonably* justified in a free and democratic society.⁹² According to Weiler, the charter therefore conceived the

⁸⁸ *Ibid* at para 7, p285. See also *Shri Prithvi Cotton Mills and Another v The Broach Borough Municipality and Others* (1969) 2 SCC 283, a court’s decision must always bind unless the conditions on which it is bases are so fundamentally altered that the decision could not have been given in the altered circumstances. See further, *Indira Gandhi v Raj Narain* (1975) Supp SCC 1 at p 84 para 190, per Khanna J, *People’s Union of Civil Liberties v Union of India & Anor* (2003) 4 SCC 399, per MB Shah J.

⁸⁹ *People’s Union For Civil Liberties v Union of India* (2003) 4 SCC 399 at p420 para 9.

⁹⁰ The Charter was a result of a formal amendment to the Canadian constitution and was formally incorporated in 1982. See (1983) 61 Can.B.R.1-442.

⁹¹ See *R v Oakes* [1986] 1 SCR 103. See *supra* 4.3.

⁹² This is similar to Article 19 (2) to (6) of the Indian Constitution. See, *infra*, 2.2.1.

idea of dialogue between institutional actors.⁹³ Leighton Macdonald observes that “dialogue” has become a buzzword in debates about the legitimacy of courts involvement in human rights protection.⁹⁴ Of course, the Charter appears to be an extreme model in that it allows for legislative override of fundamentally entrenched rights. This cannot feature within the rule of law prescribed by the Malaysian constitutional set-up. The applicability of the Dialogue Theory in Malaysia is studied in the light that some legislation can make constitutional review an ephemeral event but cannot be stretched to the depth envisaged by the Canadian model. This theory can then be utilised towards formulating principled legislation.

6.4.1 Framework for Constitutional Dialogue

In a common law legal order, there must be dialogue between courts and legislature; and questions of constitutional authority are resolved by a mode of adjudication faithful to the legislative intent, fairly construed, within the constraints of reason that the rule of law

⁹³ Weiler introduces the attractiveness of the Canadian Charter idea: One cannot choose between formal amendments or constitutional overrides as the preferred method for revising judge made constitutional policy simply by *a priori* reasoning about rights and democracy. One must make a practical judgement about relative competence of two imperfect institutions in the context of a particular nation. ..under the (charter) approach, judges will be the frontliners; they will possess both the responsibility and legal clout necessary to tackle “rights” issues as they regularly arise. At the same time, however, the charter reserves for the legislature the final say to be used sparingly in the exceptional case where the judiciary has gone awry. This institutional division of labour from legislative thoughtlessness about particular intrusions, a fault that can be cured by thoroughly airing the issues of principle in a judicial forum. The Charter contemplates no serious danger of outright legislative oppression, certainly none sufficient to concede ultimate authority to Canadian judges and lawyers. See Weiler, *Rights and Judges in a Democracy: A New Canadian Version*, 18 JL Reform 51, at p83-84, quoted in Michael J. Perry, *The Constitution in the Courts*, 1994, OUP, New York at p198.

⁹⁴ Leighton Macdonald, *New Directions in the Australian Bill of Rights Debate* (2004) Pub.L 22 at p26. On applicability in relation to the HRA, see Richard Clayton, *Judicial Deference and “democratic dialogue”*: *The Legitimacy of Judicial Intervention under the Human Rights Act 1998* (2004) Pub. L. 22 at p33.

provides.⁹⁵ What is clear is that there is no point in review by the courts being principled when the executature continues to act according to its whim and fancy. Principled legislature is triggered, surprisingly by the courts. This is because it is the courts that interpret the statute and trigger the first dialogue with the executature. Once the court decides, the executature cannot merely amend the statute because it disagrees with judicial pronouncement. The notion of representative government read with the Dialogue Theory implies that the legislature must act on some principle. This analysis is what we turn to now.

It may make sense, especially if we are sceptical both of the capacity of the ordinary politics to specify constitutional indeterminacy and about the capacity of many of our judges and justices to do so, to subject judicial specifications of certain indeterminate constitutional values to the possibility of political control in the way or something like the Canadian Charter of Rights. The dialogue theory assumes that counter-majoritarian difficulties can be overcome if courts and legislature are engaged in a continuous dialogue. In this instance, the majority will is not circumvented; it is adjusted so that legislature, when it does have the last say, acts in a principled manner.⁹⁶

First, the executature must justify any amendment as being consistent with the rights provisions. This is very important because it was earlier shown that the executature duties arises from the notion of representative government. Thus, rather than being the final determination of a contested issue, a court's decision to annul a decision or declare a

⁹⁵ TRS Allen, *Constitutional Dialogue and Justification for Judicial Review* (2003) OJLS 23.

⁹⁶ See Michael J Perry, *The Constitution in the Courts, op cit, supra* n 93 at p197.

governmental action invalid can be the starting point or stimulus of public debate.⁹⁷ Before legislative reaction, the issue would have come under intense scrutiny. It been made clear that the animating philosophies and architecture of the constitution is explicit in the accord of rights and any arrogation as such will render them meaningless, which would then fail the *Maneka* test.⁹⁸ It was also established that even if there is no textual enumeration in the constitution that any limitation of rights must be “reasonable”, it does not mean the Malaysian constitution appears to give blanket authority to the executature to do as it pleases.⁹⁹ The executature’s action we must remember must abide by constitutional limitations of representative government. This is because otherwise it would make a mockery of separation of powers seen in terms of network of rules and principles.

Further, an informed and principled legislature will also feel that there is no need for the defiance in the form of an ouster. While the court is accustomed to interpreting text, specifying ideas, and offering legal reasoning, the executature is not. If an act that potentially violates rights is immunized completely from judicial scrutiny, this judicial quality will be absent form the system of rights protection. By contrast, if an act is examined by a court but is thereafter shielded from further judicial scrutiny, what is absent from rights protection is simply *additional* judicial protection.¹⁰⁰

⁹⁷ See Gal Dor, *Constitutional Dialogues in Action* 11 Ind Int’l & Comp.L.Rev 1 available at www.lexis.com/research. See *infra* text accompanying fn110.

⁹⁸ See *supra* 2.4.

⁹⁹ See *supra* 2.2.1

¹⁰⁰ Tsvi Kahana, *The Notwithstanding Mechanism and Public Discussion* (2002) 52 U of Toronto L.J. 22.

Of course, there have been examples of legislative sequels in existence but these can be seen as *formal* dialogues. What must be achieved is *substantive* dialogue wherein the executature must justify defiance of a court decision. Substantive dialogue places the onus on the executature to formulate new legislation that adheres to the courts standards, an example of partnership in practice.¹⁰¹ A sampling of formal dialogue can be seen in *Chng Suan Tze v The Minister of Home Affairs*,¹⁰² a preventive detention decision of the Singapore Court of Appeal.¹⁰³ The court held that all power has legal limits and the rule of law demands that the courts should be able to examine the exercise of discretionary power. The effect of this pronouncement is that a minister's decision to detain a person can be reviewed by the courts. This triggered a constitutional amendment¹⁰⁴ as well as legislative response¹⁰⁵ in Singapore. The major amendments were to preclude the courts from reviewing any act done or decision made by the Minister or the President under the ISA, except where it relates to compliance with any procedural requirements of the ISA. Further, the decision in *Lee Mau Seng*¹⁰⁶ was resurrected by enumerating for subjective exercise of powers. The relevant section 8B(1) of the Singapore ISA states that the law governing judicial review of decisions under the ISA shall be as it was on 13 July 1971, ie the date of the decision in *Lee Mau Seng*. As a "double shield", Section 8B (2) provided blanket ousting of judicial review.

¹⁰¹ Hogg and Bushell, *The Charter Dialogue Between Courts and Legislatures*, (1997) 35 Osgoode Hall. L.J. 75.

¹⁰² [1989] 1 MLJ 69.

¹⁰³ For overview of review in this area, see generally Gan Ching Chuan, *Judicial Review of Preventive Detention in Malaysia* [1994] 1 MLJ cxiii.

¹⁰⁴ Clause (3) was inserted to article 149 of The Constitution of The Republic of Singapore (Amendment).

¹⁰⁵ Section 8A and B of the Internal Security (Amendment) Act (Act 2 of 1989).

¹⁰⁶ *Lee Mau Seng v Minister for Home Affairs, Singapore & Anor* [1971] 2 MLJ 137. It was held in this case that it was not open to a court in Singapore to examine the grounds and allegations of fact supplied under the Internal Security Act, for the purpose of deciding whether they were so vague, unintelligible or insufficient to enable the applicant to make representations against an order of detention.

The Malaysian Parliament did not lag behind in enacting a few statutes in order to achieve the same purpose.¹⁰⁷ The constitutional amendment, which in effect is a denial of guaranteed rights can be challenged as violation of the separation of powers and repugnant to the notion of representative government; in effect an *unconstitutional* amendment.¹⁰⁸ The legislative action however, needs deeper analysis. Statutory law making is after all the prerogative of the legislature. Rutter criticizes the amendment post-*Chng*: “A reference to the law declared on the 13th day of July 1971 (In validation of *Lee Mau Seng*) does not set out the rule that is to apply. The Act does not purport to supplant the common law with a statutory rule or set of rules. It does not expressly codify or consolidate the law in the area in question or set down a statement of the rules to apply”.¹⁰⁹ This is what the executive achieved when it had strived to react by way of formal dialogue.

A substantive dialogue would have achieved a more equitable reasoning. Seen in such terms, as the amendment is triggered by the decision of the court, the executive must justify the reasons for departure. This is because the executive works under the constitutional requirements of representative government and legislation has to be in accord with rule of law.¹¹⁰ Further, at this juncture when the nature of rights is affected, the *Maneka* test would be triggered.¹¹¹ *Chng Suan Tze* was a decision that was waiting to be made and should have merited deeper study on the executive's end. If the

¹⁰⁷ See the Dangerous Drugs (Special Preventive Measures) (Amendment) Act 1989 (Act 738), the Internal Security (Amendment) Act 1989 (Act 739), the Emergency (Public Order and Prevention of Crime) (Amendment) Act 1989 (Act 740).

¹⁰⁸ See *supra* 5.3.1.

¹⁰⁹ MF Rutter, *Applicable Law in Malaysia and Singapore*, 1989, MLJ Sdn Bhd, Singapore at p604.

¹¹⁰ See *supra* 2.5.1.

¹¹¹ See *supra* 3.2

executature was still insistent on overriding it, then coherent justifications, which are consistent with rights provisions must be advanced. This makes sense in the nature of the relationship between the courts and the executature. Clearly, anomalous legislation can be thwarted by substantive dialoguing. If principled legislature is not achieved, it vitiates principled review. The basis for the dialogue model is the presupposition of separation of powers itself is wrong-it is too often seen as one which is based on the dynamic of "tension and competition" but not partnership.¹¹² A reasoned debate is superior to a power struggle. So, if after consideration by court, the legislature is free to amend the statute but with the requirement that it must take keen consideration of the courts decision and act in the capacity of representative government. The utility of this notion is that the concept of representative government is amplified- the executature cannot amend the statute any which way in plain defiance of a courts decision. That would open a political can of worms and jeopardise the position of the government of the day. The understanding of government practice is employed here to the advantage of the promotion of rights.

A further attraction of the dialogue model in relation to review is that it maintains that it is not the purpose of judicial review to check legislative power. This consolidates the earlier argument wherein the ultra vires model of judicial review was denounced.¹¹³ It fortifies the purpose of judicial review; which is to deliberate about the meaning of rights through sophisticated and carefully reasoned opinions, with the employment of constitutional tools. As a result, once the legislature is exposed to the product of judicial

¹¹² See *infra* 3.1 for proper approach towards the separation of powers doctrine.

¹¹³ See *supra* 3.1.1

review, it can decide whether it agrees with the courts interpretation, in tandem with the rights provisions.¹¹⁴ As a maturing nation, it is expected that the executature will be motivated to respect the constitution and therefore be bound by the court's decision. After all, reversing a court's decision comes with a considerable political price. This paradigm makes judicial review and legislative finality theoretically consistent. This theoretical unification reinforces the idea of partnership between the courts and the executature.

6.5 Conclusion

It was agreed in this chapter that a study of the institutional allocation of powers will give clarity and accountability in the exercise and control of such power. The study of institutional morality saw us deciding that the courts can then be rightly placed in their roles as interpreters of the constitution and by virtue of that, reviewers of administrative excess. It was also agreed that constitutional review will require judges to justify their pronouncements in terms of the dictates of representative government. Acting within its duties that arise out of the requirement of representative government necessitates regard to rights provisions.

The classic values served by the separation of powers are noted. The formulation of the theory rests on the observation that there are three distinct functions between the institutional actors which prescribe a structure of government. Given the framework, it is for the reviewing court to evolve a principled separation of powers based review. The separation of powers which works to create representative government internalises power

¹¹⁴ See generally, Tsvi Kahana. *op cit supra* n100 at p22.

allocation. Only then can there be *effective* enjoyment of rights. The above analysis provides insight into the institutions capable of fulfilling rights instead of the nature of the right. In doing so, the guarantee of constitutional review as a mechanism of accountability in promoting effective enjoyment of rights is achieved. Further, the institutional integrity of the exercise of review by the courts is preserved.

Chapter 7 JUDICIAL REVIEW AND THE PUBLIC-PRIVATE DIVIDE

7.0 Introduction

In Part 1, the constitutional and institutional competence of review was established. By so being competent, it has become a mechanism of accountability in the action of the state. The accountability is served by juristic formulations that have been fashioned when rights are transgressed. As such, review functions to promote the right of the aggrieved person as well as the interest of the representative government. This being so, the nature of administrative action that is being challenged becomes enormously important. It was established very early on in this work that administrative action is a compendious term that encompasses a broad range of governmental activity and even inactivity. According to Basu, an administrative act is primarily the act of an administrative authority. Any agency or limb of the Government, other than the legislature or the judiciary is an administrative authority.¹ An administrative act accordingly may be statutory or non-statutory.² This definition envisages fluidity under the vast umbrella that it can encompass.

Establishing the nature of administrative action in order for review to lie is no easy task. Part 1 saw an analysis of review in the context of the “traditional” state, that which centers around the notion of representative government and related to the political sanction which therefore gives an element of “public-ness” to the administrative action

¹ Basu, *Administrative Law*, 5th Ed, 1998, Kamal House, Calcutta at p5.

² *Ibid* at p6.

that is reviewed. This understanding, while important, does not recognize the vast trajectories of the “new” state and how the supervisory jurisdiction of the court is to be extended in such an instance. The state is no longer merely the “traditional” state as we understand it to be.³ It is a seamless web of the contracted out enterprises, regulatory authorities, multi national corporations (MNCs) as well as many other private entities. These are the various intermediaries between the state and the private corporation. How judicial review functions in this environment and its effectiveness is the focus in this Chapter.

7.1 Mixed Administration and Judicial Review

It is well to keep in mind when exploring the proper scope of judicial review in the present context Harlow and Rawling famous declaration, “behind every theory of administrative law is a theory of state”.⁴ Mark Aronson says that governments have self-consciously sought to reconfigure themselves. This is because they are spurred on by the theory that the state can formulate and mobilize policy but cannot effectively or efficiently implement it.⁵ At the same time, there are other factors weaved into the state. Governments around the world are increasingly moving from the central delivery of public services to mixed systems of delivery through both public and private agencies.⁶ This has given rise to the state extending its reach to hitherto private arrangements.

³ www.unesco.org/most/globalisation/Governance.htm.

⁴ Harlow and Rawlings, *Law and Administration*, 2nd Ed, 1994, Clarendon Press, Oxford at p1.

⁵ Mark Aronson, *Public Lawyers Response to Privatisation and Outsourcing in The Province of Administrative Law* (M Taggart ed), 1997, Hart Publishing, Oxford at p41.

⁶ *D.F.O, South Keri v Ram Sanahi* AIR 1973 SC 205.

Therefore, any formulation of judicial review must recognize the interface between constitutional law, administrative agencies and corporations.

Further, private actors are playing increasingly important public roles. Despite the fact that the law views business corporations as part of the private sphere, corporations are never private institutions devoid of any public role.⁷ They have never been. Corporations also play a large role in international social organization, co-ordination, dispute settlement and claims re-adjustment.⁸ With privatization of government activity and the increasing joint venturing between government and the private sector, the private halo of the corporation is becoming blurred. When one adds to this increased reliance of government on information and technology supplied by “private enterprises”, the extent of corporate power, informal though it may be, must be seen as authority mechanism that is frequently equal to that of the government. PS Atiyah observes that classical liberal forms of contract have declined in our century in part as a result of the increasingly prominent role of massive corporations, in which “relationships are conducted by administrative procedures and not by market contracts”.⁹

Thus, contemporary governance might be best described as a regime of “mixed administration”.¹⁰ Carol Harlow disposes any argument to the contrary when she says that the structure of the modern state is such that “no activity is typically governmental in

⁷ The public interest element ceases any notion of *juris privati* : See *Munn v Illinois* (1877) 90 US (4 Otto) 77.24 L.Ed 113.

⁸ See generally Brathwaite & Daros, *Global Business Regulation*, 2000, Cambridge University Press, London.

⁹ Atiyah PS, *The Rise and Fall of the Freedom of Contract*, 1979, Clarendon Press, Oxford at p724.

¹⁰ Mark Aronson *Public Lawyers Response to Privatisation and Outsourcing in The Province of Administrative Law* (M Taggart ed), *op cit*, *supra* n5 at p46 and 52.

character nor wholly without parallels in private law”.¹¹ The Malaysian legal system has however essentially failed to acknowledge the legal relationship that can be neither wholly “public” nor “private”. They involve a complex mixture of regulatory activity on the traditional “command and control” model, intertwined with regulation based upon contractual-type arrangements between the direct provider of services and the ultimate purchaser, consumer or customer.¹² For example, technical product standards are defined through multinational negotiations which are effectively conducted and controlled by the leading firms and their experts, but these standards are validated by government decree and enforced both by industry and government inspection.¹³ All this gives rise to worrisome implications for the regulatory capacity of the state.

7.2 The Emergence of Private Actors in the Public Sphere: Accountability Concerns

To begin with, the recognition of the extent that private actors perform increasingly traditionally public functions unfettered by the scrutiny that normally is attached to “traditional” administrative action is clear. This gives rise to accountability concerns. Identifying this is an important step in establishing a comprehensive framework for review. This is because the reviewing court must not purport to exert its authority on some vague or incomprehensible understanding. The project for the courts so far has been situation-specific in trying to make sense of the interpenetration of private and public

¹¹ C.Harlow, *Public and Private Law: Definition without Distinction* [1980] 43 Mal.L.R. 241 at p257.

¹² De Smith, Woolf & Jowell, *Judicial Review of Administrative Action*, 1995, Sweet & Maxwell, London at p165.

¹³ Harry Arthurs and Robert Kreklewich, *Law, Legal Institutions and the Legal Profession in the New Economy* (1996) 34 Osgoode Hall L.J. 1 at p28.

ordering. Case law is thus fragmented and confusing. What is needed is principles to conduct evaluation for the emergence of settled norms.

The ultimate aim in this chapter is to identify the scope of “public authority”. What is the standard of review will of course be very complex. The public-private cross fertilization could also give rise to procedural horrors. Another problem is that usually there is failure to address the extent of the power private actors wield in public action. Jody Freeman sees private actors as regulatory resources capable of contributing to the efficacy and legitimacy of administration.¹⁴ Current understanding largely discounts the role of private actors. For example, Wade clamps all these categories vaguely under the terminology of “realms beyond the law”.¹⁵ The appropriate legal and institutional response must be fashioned towards the governance of the new state.¹⁶ The twin objectives of policing the frontiers of legislative intent and protecting only traditional private rights could conflict.¹⁷ Whenever public powers is acquired or can be attributed to a body or person, judicial review is capable of being invoked.

In terms of a corporation’s social or governmental orientation, corporations can be arranged along a continuum. Starting with corporations that are, in fact, part of government-the so-called statutory corporation with ministerial involvement-we can move through a range of hybrid government/private corporations, statutory corporations

¹⁴ Jody Freeman, *Private Parties, Public Function and the New Administrative Law* in *Recrafting the Rule of Law*, David Dyzenhaus (ed), 1999, , Hart Publishing, Oxford at p331.

¹⁵ Wade and Forsyth, *Administrative Law*, 2000, 8th Ed, Oxford, at p626.

¹⁶ “a public body has no heritage of legal rights which it enjoys for its own sake...” Laws J in *R v Somerset Country Council, ex p Fewings* [1995] 1 All ER 513.

¹⁷ PCraig, *Administrative Law*, 1999, Sweet & Maxwell, London at p9.

which perform a public service such as running a university¹⁸ and a range of private corporations performing public deliveries¹⁹ to those with state monopolies,²⁰ on to other end of the spectrum to corporations which perform what we consider purely private activities.²¹ Basically, the “public” element is spread across the spectrum from intense to threadbare. Private corporations can surprisingly exercise an incredible concentration of economic and political power.

An understanding of the importance of judicial review as an accountability mechanism in the private sphere needs to be understood. Increasingly in possession of more economic muscle than all but the richest members of the international state system, MNC’s are also managing to outfit themselves with legal authority rivaling that of the nation-state itself.²² Many of the substantive norms of international business law are directly determined by the huge “industry leaders” who dominate the market, and a growing number of interstate economic agreements point in the direction of placing private business and nation-states on a level playing field in terms of legal status.²³ States soon may no longer be the sole bodies in possession of legally recognized sovereign power within the international order. More and more corporations exercise “sovereign” powers of law-

¹⁸ *Dr Chandra Muzaffar v University Malaya* [2002] 5 MLJ 369.

¹⁹ *Tenaga Nasional*: see *Tekali Prospecting Sdn Bhd v Tenaga Nasional Bhd* [2002] 1 MLJ 113; *Telekom Malaysia*, see *Telekom Malaysia Kawasan Utara v Krishnan Kutty* [2002] 3 MLJ 129.

²⁰ For example, *Petronas Bhd*.

²¹ Suzanne Corcoran, *The Corporation as Citizen and Government* (1997) Flinders LJ 53 at p58.

²² In the *Australian Capital Television Pty Ltd & Ors v The Commonwealth of Australia* (1992) 177 CLR 106 at p155 case, Brennan J remarked how private actors erode freedom of communication: “it can hardly be doubted that reduction in the cost of effective participation in an election campaign reduces one of the chief impediments to political democracy.”

²³ See *infra* fn24.

making while possessing legal “rights” no less impressive than those of the nation-state, the traditional carrier of sovereignty within modern times.²⁴

Against this background, it is submitted that there is no necessary inconsistency or tension between the perpetuation of the tendency to reduce the legal and normative significance of the public/private divide and the desires of many modern states to deregulate, privatize and corporatize. Rather, a credible argument can be made for the legitimacy of judicial application of the principles of administrative law in many of the deregulated, privatised and corporatised domains. In fact, David Mullan very importantly suggests that under this theory, in the downsized state, judicial scrutiny may become that much more important as a surrogate accountability mechanism in matters of public and state interest for previously existing internal, governmental and parliamentary controls.²⁵ Judicial review is said to provide a remedy of last resort, but it is also the primary constitutional remedy for ensuring consistency and fairness through the whole system of inferior courts, tribunals and public bodies.²⁶

²⁴ For example, in the area of international sales and international marine insurance, the industry leaders are the main source of international law and large firms play a decisive role in the standardization of terms. See illustration in NAFTA that grants firms rights hitherto generally limited to nation-states: Chapter 11(B) allows private businesses to submit complaints against member states to a three-member tribunal; member states and private firms have equal rights to name members to the tribunal. The latest draft of the OECD Multilateral Agreement on Investments (MAI) points in a similar direction.

²⁵ David Mullan, *Administrative Law at the Margins in The Province of Administrative Law* (M Taggart ed), 1997, Hart Publishing, Oxford at p136.

²⁶ Wade, *Judicial Review and Alternative Remedies* (1997) Pub L 589.

7.2.1 Judicial Review and Public Corporations: Evolution of the Corporate State

The common law has long recognized that special duties should be imposed, as a matter of public policy, on those “in common calling” such as innkeepers, common carriers and ferrymen. For example, persons engaged in these calling were obliged to serve all comers and to charge only reasonable prices for their services.²⁷ A corporation is a public authority and its own purposes are public purposes, but it is not a government department, nor do its powers fall within the province of the government, nor is it regarded as an agent of the government, anymore than a company is the agent of the shareholders.²⁸ MP Jain broadly categorizes the public undertakings under three broad heads:²⁹

- (i) Financial Institutions
- (ii) Promotional and Development Undertakings
- (iii) Commercial and Industrial Undertakings

Working under the guise of “government surrogates”, the sectors interpenetrate, and these bodies include voluntary and charitable sectors as well as regulatory and representational bodies. There may be no general provisions governing the links between such bodies and the government.³⁰ The courts in the early days appeared to be closed to

²⁷ Dawn Oliver, *Common Values and the Public-Private Divide*, 1999, Butterworths, London at p202.

²⁸ MP Jain, *Administrative Law of Malaysia & Singapore*, 1997, Malayan Law Journal, Kuala Lumpur at p850.

²⁹ *ibid*

³⁰ See generally John Alder, *Obsolescence and Renewal: Judicial Review in the Private Sector* In *Administrative Law Facing The Future* (Leyland and Fletcher eds), 1997, Blackstone, London at p164.

this idea. In *NTS Arumugam Pillai v Government of Malaysia*³¹ the Federal Court held that the Kedah State Development Corporation could not be equated with the government of Malaysia.

Now, the courts are more receptive in recognizing the “public” link to such corporations. This is especially if there is a statutory relationship like that of Tenaga Nasional and Telekom Malaysia. In *Tekali Prospecting Sdn Bhd v Tenaga Nasional Bhd*,³² the High Court examined the proper role of Tenaga Nasional, a statutory corporation providing utilities. The court commented that by reason of the Government’s privatization of certain public services among which is the Tenaga Nasional, their actions affect members of the public and the rights and interests of diverse private citizens. Hence, public corporations are capable of affecting rights and thus, should necessarily be subject to review by the courts

7.2.2 Straddling the Private Realm

It was established above that our understanding of the corporation as a singularly private entity may not be entirely correct. To show an example, the corporation in Germany is seen as a social institution which accommodates the interest of employees. For the Japanese, the corporation is seen in terms of social relations and gives low priority to shareholders but high priority to social, employee and consumer interests.³³ In relation to

³¹ [1977] 2 MLJ 62 (FC).

³² [2002] 1 MLJ 113 at p129 (HC).

³³ Charkham J, *Keeping Good Company*, 1994, OUP, Oxford quoted in John Farrar, *Frankenstein Incorporated or Fools Parliament? Revisiting the Concept of the Corporation in Corporate Governance*

a purely traditional concept of corporation, it is possible to imply that such corporations also play an increasingly public role for example through adherence with environmental legislation. Of course, this is part of the regulatory mechanisms that are in place. There is nothing radically different about this understanding merely that it extends the concept of “corporation”. The many legislation bind corporations on many core human rights norms. One writer however observes that these are weak concessions to the enormous economic and political power of multinational corporations.³⁴ From oppressive working conditions to pollution, corporations have vast muscle in the human rights transgression.

For example, investigation of working conditions in factories supplying goods to well know brands in the market like Nike and Levis have drawn attention to abuses including unpaid overtime, child labour, illegally low wages and dangerous working conditions.³⁵ Worst still is because they can collude or bully the government of the day into complying to their work, especially investor-starved third world nations. Malaysia has not been spared and a historical example can be seen in the stranglehold acquired by the colonial East India Company over the Malay states.³⁶ If a state committed such abuses and transgression, judicial review can be invoked. This makes it very important to examine how judicial review can operate in a purely private corporation and contractual relationship as such.

(1998) Bond LR 142 at 143. cf *Parke v Daily News Ltd* [1962] Ch 927: “The profit maximization must not affect responsibility to employees”.

³⁴ Beth Stephens, *The Amorality of Profit: Transnational Corporations and Human Rights*, 2002, Berk J of Int Law 45 at www.lexis.com/research

³⁵ See generally *No Sweat: Fashion, Free Trade and the rights of Garment Workers* at www.cleanclothes.org.

³⁶ See for example, Sharifah Suhanah, *Malaysian Legal System*, 1999, Malayan Law Journal, Kuala Lumpur at p5.

7.2.3 Corporations, Purely Contractual Relationship and Judicial Review

In *OSK & Partners v Tengku Noone Aziz & Anor*³⁷ it was held that certiorari may lie against the decision of a body owing its powers solely to contract provided that the contractual power is infused with a public element. Here, the Federal Court made an order against the Kuala Lumpur Stock Exchange (KLSE) as a hybrid corporation, having an element of public flavour superimposed on the contractual element in relation to its members. More importantly, the court also went on to study the KLSE's capacity to affect rights of licensed members to carry on business as stockbrokers. Further, in purporting to exercise disciplinary function it necessarily has the duty to act judicially in the exercise of that power. On 5 January 2004, arising from the demutualisation exercise, the KLSE has been converted from a company limited by guarantee to a public company limited by shares. This notwithstanding, there are no changes in its nature. Though it has become a public company, its central delivery is very much public in element. This will apply to a cross-spectrum of industry for example, when nationalized industry is privatized, its functions may not alter sufficiently to exempt it from public law review. Eschewing the source test³⁸ has enabled the court to transcend artificial distinctions in relation to exercise of power.

OSK is a laudatory judgment that recognizes the vast powers wielded in supposedly "private" arrangements. Yet, the courts more often than not succumb to the source test. In

³⁷ [1983] 1 MLJ 179 (FC).

³⁸ This test was propounded in *Regina v Panel on Take-overs and Mergers, ex p Datafin plc & Anor* [1987] 1 QB 815. See analysis at *infra* 7.3.

the later case of *Ganda Oil Industries Sdn Bhd v Kuala Lumpur Commodity Exchange*,³⁹ the Supreme Court refused to take into account the nature of the power vested within the respondent, the Kuala Lumpur Commodity Exchange (KLCE) and the rights its action can affect. The KLCE is a company limited by guarantee under the Commodities Trading Act 1980 to be a commodity exchange. In this case, the appellant asked for a certiorari to quash the decision of the KLCE for fixing the price of crude palm oil at \$1,350 in respect of the lots to be purchased by the appellant as it was made in excess of jurisdiction and bad faith. First, the appellant contended that there was a deliberate attempt to avoid rule 300(f) of the KLCE Emergency Rules. Further, it had fixed the price of \$1,520 in respect of other contracts and only the lots purchased by the appellants was fixed at a lower price. The vast public role played by the exchange did not see merit with the Supreme Court. It was held that ministerial control is only in respect of policy matters and not the day to day administration and business of the Exchange. The court went on to announce that as the relationship between the parties who are members are purely contractual, the act which was subject to challenge could not be made amenable to judicial review. The court seemed to say that as the KLCE was absolved from judicial review merely because the relationship between KLCE and the appellant was contractual.

Concentration on the institutional dimension is the result of this confusion. *OSK* stands tall among the welter of confusion. Unfortunately, there is a tendency to confine *OSK* to its facts. This is by choosing to situate it as a case of exercise of disciplinary powers leading to the imposition of fine. Coming back to the facts in *OSK*, it is noted that the appellant claimed that the KLSE had acted in excess of jurisdiction, contrary to natural

³⁹ [1988] 1 MLJ 174 (SC).

justice and wrong application of the rules when the Exchange fined him RM5,000 for breach of certain KLSE rules. The Federal Court reversed the High Court decision by holding that the Exchange was amenable to judicial review on the basis that there was an exercise of disciplinary powers leading to the imposition of a fine. It is very important that the Federal Court formulated a two tiered test in *OSK*. First, the “public” nature of the corporation was determined. Secondly and more importantly, the court also identified that the ability of the corporation to affect rights, in this instance of stockbrockers, as deciding that judicial review will lie. The second part of the test shows that the Federal Court has managed to transcend the limitations of the later decision of *Datafin*. *Datafin* is the leading UK case in relation to judicial review in a ‘private’ arrangement.

7.3 The Inadequacy of the *Datafin* Test

In *Regina v Panel on Take-overs and Mergers, ex p Datafin plc & Anor*,⁴⁰ the question whether the action of the Panel was subject to judicial review was answered in the affirmative unanimously. The Court of Appeal held that although the Panel of Take Over and Mergers had derived its powers solely from the consent of those whom its decisions affected, it was in fact operating an integral part of the governmental framework for the regulation of financial activity in the City of London. Further, it was supported by a periphery of statutory powers and penalties. Thus, it was under a duty to exercise what amounted to public powers to act judicially. By holding the Panel to be publicly accountable, *Datafin* reflected the constitutional reality that any attempt to fragment the public-private divide is otiose.

⁴⁰ [1987] 1 QB 815.

Lloyd LJ said this: “Of course there will be many self-regulating bodies which are wholly inappropriate for judicial review. The committee of an ordinary club affords an obvious example. But the reason why a club is not subject to judicial review is not just because it is self-regulating. The panel wields enormous power. It has giant strength. The fact that it is self-regulating, which means presumably that it is not subject to regulation by others, and in particular the Department of Trade and Industry, makes it no less but more appropriate that it should be subject to judicial review by the courts”.⁴¹ The Malaysian Supreme Court in *Petaling Tin Bhd v Lee Kian Chan & Ors*⁴² commented that “unquestionably, the significance of *Datafin* is that it marks a further extension of the boundaries of the court’s jurisdiction in cases of judicial review which springs from a desire to avoid the exercise of extensive power which is not subject to the supervision of the courts”.

Yet, the weakness of the *Datafin* test is apparent. Privately sourced power is public in the *Datafin* sense only where it is in partnership with government.⁴³ The courts would then be compelled to identify the state and to distinguish between the states public and private powers.⁴⁴ The fact that activities can be shifted from the public and private sector (and vice versa) suggests that the classification of functions or institutions as public or private

⁴¹ *Datafin* at p854.

⁴² [1994] 1 MLJ 657 (SC).

⁴³ Mark Aronson and Bruce Dyer, *Judicial Review of Administrative Action*, 2nd Ed, 2000, LBC, NSW at p100.

⁴⁴ Allison, *Theoretical and Institutional Undepinnings of a Separate Administrative Law*, in *The Province of Administrative Law*, M Taggart (ed), 1997, Hart Publishing, Oxford, Chapter 4.

according to their intrinsic nature is not the way to decide the scope of public law.⁴⁵ In short, the *ultra vires* basis espoused by *Datafin* is inadequate.⁴⁶

Further, *Datafin* appears to define public power as “acting judicially”. This is futile for it will then necessitate a further definition of what it is that constitutes acting judicially. It appears that what the court should really be looking at is the effect of the decision-making capacity that resides in the authority. The Scottish courts have managed to strike a clever equilibrium. The Court of Session held that its supervisory jurisdiction is available by rejecting the distinction between public and private law wherever a *decision-making power* is conferred on some body, whether by statute or private contract or some other instrument or where the body exceeds or abuses its power or fails in its duty.⁴⁷ The source of power test is inchoate because it characterizes the institution and formulates control based on this. The requirement for “publicness” fails to see that rights issues are at stake. The central question must encompass the monopoly of power and the effect. As observed, the Federal Court in *OSK* had already lead the way along these lines.

⁴⁵ Peter Cane, *An Introduction to Administrative Law*, 3rd Ed, 1997, Clarendon Press, Oxford at p18.

⁴⁶ Cf MP Jain, *op cit*, *supra* n28 at p848.

⁴⁷ *Naik v University of Sterling* (1994) SLT 449. See also Wade & Forsyth, *op cit*, *supra* n15 at p634.

7.3.1 Defining Public Authority

In Malaysia, application for judicial review is made in reliance of O53 rule 2(4) which reads as follows:

*Any person who is adversely affected by the decision of any public authority shall be entitled to make the application.*⁴⁸

As observed, defining public authority is not an easy task. There are various permutations to the exercise of an institution's power. Part of a transaction can be purely private, residing in a contract but the other part may be very "public". The intensity of "publicness" clearly varies.

In UK, there is similar confusion. Section 6(1) of the HRA states that "it is unlawful for a public authority to act in a way which is incompatible with a convention right". Section 6 (3)(b) further provides that "public authority" includes "any person certain of those whose functions are functions of a public nature". The question of which institution is subject to review on the basis of having "public authority" is a vexing one.

Wong Koon Seng v Rahman Hydraulic Tin Bhd & Ors,⁴⁹ bears direct relevance. The court had to examine whether special administrators, appointed by Danaharta Nasional Bhd should be classified as "public authority". The first respondent had defaulted under a credit facility and pursuant to the Pengurusan Danaharta Nasional Act 1998, the Non-

⁴⁸ Amended vide PU (A) 342/2000 w.e.f. 22.9.00

⁴⁹ [2003] 1 MLJ 98 (HC).

Performing Loan (NPL) was vested into Pengurusan Danaharta Nasional Bhd (Danaharta). Consequent to the vesting, the second and fourth respondents were appointed as special administrators of the first respondent. Subsequently, the various potential investors, including the applicant attended a briefing by the second and fourth respondents for submission to restructure/acquire the first respondents assets. This was condensed into a memorandum. The appellant submitted a proposal which was rejected as too low and subsequently, a fresh invitation was made to everyone, including the applicant. Upon studying the proposals from the second invitation, the second and fourth respondents awarded it to one that was deemed reasonable. The appellant did not submit any proposal in the second invitation and later challenged the decision made by the second and fourth respondents.

The High Court opined that judicial review ought only to apply to matters relating to public law and ought not be made available for enforcement of private rights.⁵⁰ This itself is uncontroversial. The court commented that if the applicant maintains that there is a contract, then his claim ought to have been for damages for breach of contract filed against the respondents. Here, the applicant's prayer for a mandamus and certiorari are in essence prayers for specific performance and an injunction, remedies which are available in private law. According to the court, the applicant should rely on private law remedies which are already available to him, instead of resorting to public law remedies. This is unsettling as it gives the impression that there is no necessity to even dwell on the "public authority" issue as long as a remedy is in existence in private law.

⁵⁰ *ibid* at p110.

The second respondent, Danaharta Nasional Bhd is conceived via the Danaharta Nasional Bhd Act 1998 (Danaharta Act). The court perused the relevant section in the Danaharta Act. Section 32 reads that “The special administrator shall, in the administration of the affected person, be deemed to be acting as the agent of the affected person”. The court found that as “affected person” is defined by s21(1) of the Danaharta Act as being “any company owing a duty or liability under a credit facility to the corporation (Danaharta) or any subsidiary of the Corporation (Danaharta), whether present, future, vested or contingent”. In the instant case, the respondent company was held to be an affected person within the meaning of the Act and as such, the special administrators appointed by Danaharta Nasional Bhd were the agents of the company. The court went on to say:

*...their decisions in rejecting the applicants offer...are commercial decisions taken for and on behalf of the first respondent as a private entity, or more particularly, a “business” entity. These decisions were made in the field of “private law” in accordance with the spirit of “freedom to contract” and certainly don’t have any character of public law.*⁵¹

To reiterate, the courts reasoning for the “private” nature of the second and fourth respondent was this. The first respondent was found to be a company incorporated by the Companies Act 1965. As both respondents were “agents” of the company which is a private authority, such a transaction would also fall under contract. As such, there was no issue of action against a public authority. The appellants case appears weak as there

⁵¹ Supported in *Tan Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors* [2003] 4 MLJ 332.

seems to no reason why the second and fourth respondent should not have accepted the higher offer which they did. This notwithstanding, it is anomalous for the court to have decided that the contractual relationship hindered any finding of publicness. The court held that the application was *male fide* and was instituted to prevent Danaharta from acting in the speedy mode demanded of its creation. The court's decision was found to be based on the terms of the statute, not the nature of the action that was being challenged. The court seems to imply that if similar remedies in a private law application, then the applicant is adequately satisfied. The serious misconception must be addressed. The transaction may take any form or colour but if it has a "public" element, then public law remedies ought to lie. That similar remedies can equally satisfy the litigant in a private law claim is not the point. The High Court's position was endorsed in another High Court decision, *Tan Kwor Ham & Ors v Pengurusan Danaharta Nasional Bhd & Ors*.⁵²

In *Tan Kwor Ham*⁵³ the High Court observed that with the amendments to the rules, the determination of public authority is based on the source test rather than the character of the power. The court cites the decision in *Wong Koon Seng* in approval and says that the workout proposal prepared by the special administrators under the Danaharta Act does not come within the decision of a "public authority" in O53 r2(4); but concerns commercial transactions made by persons or bodies who are private entities.

⁵² [2003] 4 MLJ 332 (HC).

⁵³ *Ibid* at p343.

The similar regressive approach was adopted by the UK court in *R (On the Application of Heather and Others) v Leonard Chesire Foundation and Another*.⁵⁴ In this case, the claimants were persons to whom the local authority owed a duty to provide accommodation under the National Assistance Act 1948. The authority ran a charitable home but later ceased operation and arranged for a private body to perform the task. The Court of Appeal held that the foundation was not performing manifestly public functions. In a clear application of the source test, the court declared that the provision provided statutory authority for the actions of the local authority, but provided the foundation with no powers.

Poplar Housing,⁵⁵ is a more promising look into the issue. In this case, the defendant was granted a weekly, non-secure tenancy of a property by the local housing authority, Tower Hamlet, pending a decision as to whether she was homeless. Subsequently, the property involved was transferred to the appellant, Poplar Housing, a housing association who were a registered social landlord under the UK Housing Act 1996. The local authority, Tower Hamlet, later categorized the defendant as being “intentionally homeless” and the housing association issued a summons for possession of the property. At the hearing for the summons, the district judge proceeded on the basis that Poplar was a “public authority” but nevertheless granted the order for possession.

On appeal, the Court of Appeal in determining if Poplar fell within the definition, endorsed the academic opinion that the real analysis should focus on a series of factors.

⁵⁴ [2002] 2 All ER 936.

⁵⁵ *Poplar Housing and Regeneration Community Association Ltd v Donoghue* [2002] QB 48.

First, the charitable status of Poplar, the fact that Poplar is subject to the control of the Corporation; the sanction which the standards can apply; the provision of public funding to Poplar, the standards which Poplar is required to adopt in the exercise of its power, the control which the corporation can exert over the exercise of Poplar's powers and local authority involvement. The court elucidated that in a borderline case, the decision is very much one of fact and degree. Taking into account all the circumstances in the case, the court held that the role of the appellant, Poplar was so closely assimilated to that of Tower Hamlets that it was performing a public and not private function. Poplar therefore is a functional public authority, at least to that extent. The court was also quick to emphasize that this does not mean that all Poplar's functions are public.⁵⁶

Seen this way, the analysis is not whether the power resides in states or corporations but the influence it has and the way it improves or arrogates any scheme of arrangement or individual. Dawn Oliver says that under the HRA 1998, all actions by public authorities will have to be compatible with Convention rights, and this includes "private activity".⁵⁷ Constitutional review in Malaysia and UK therefore heralds a new regime of supervisory authority for the courts on private institutions. There is honestly no need to draw an artificial link to the government. This was the approach of Lord Hoffman in *Aga Khan*,⁵⁸ who was not willing to "patch the remedies available against domestic bodies by pretending that they are organs of government".⁵⁹

⁵⁶ *Ibid* at p70.

⁵⁷ Dawn Oliver, *op cit*, *supra* n27 at p84.

⁵⁸ *Reg v Jockey Club, ex p Aga Khan* [1993] 1 WLR 909.

⁵⁹ *Ibid* at p933.

The High Court decision in *Tekali*⁶⁰ endeavours to formulate the standard with current understanding. The court held that judicial review will lie when the actions of the institution affect the rights and interest of diverse private citizens. The court draws support from *Mercury* and *Foster*. In the Privy Council decision in *Mercury Energy Ltd v Electricity Corp of New Zealand Ltd*,⁶¹ it was held that “judicial review involves interference by the court with a decision made by a person or body empowered by parliament or the governing law to reach that decision in the public interest”. This is one of the few cases that focus on *effect* of the decision by the authority. The effect test was also applied in *Foster v British Gas Plc*.⁶² In this case, it was held that a directive could be effective against bodies, whatever their legal form which has special powers beyond those which result from the normal rules applicable in relation between individuals.

Yet, the High Court in *Tekali* slips into the need to decide who is the state, that is these bodies should be treated as the state in determining the scope of their rights in the field of public law. The necessity to draw a line to the government is unclear but the approach has been endorsed by on appeal. Further, the Court of Appeal in *Tekali* asserts that whether judicial review will lie will depend on the terms of the particular statute.⁶³ By so doing, the court reverted to the impotent source test. Unless a contrary approach is taken, many corporations that deliver fundamental public services will be immune from review.

⁶⁰ See *supra* text accompanying fn33.

⁶¹ [1994] 2 NZLR 385 at p388.

⁶² [1991] 2 AC 306.

⁶³ *Tekali* [2002] 2 MLJ 707 at p716 (COA).

7.3.2 Standard of Review.

The standard of review must be considered in the light of the constitutional basis for review. First, it must be identified whether the wide arm of the institution reaches and encompasses a cross-section of society or that a group of people are compelled to become members of the body due to its autonomy, monopoly and what not. This would extend to many private regulatory bodies and sheds any reason for requirements of direct “government” or surrogate government connection.⁶⁴ Further, although a contractual relationship can be implied in such a relationships, contractual remedies cannot be mete out in all situations, especially in areas like setting of standards and quality identification. This is reference to the decision-making power of the body concerned.⁶⁵ This would satisfy the first element of “publicness” without necessitating drawing the line to the government. Yet, this does not articulate the standard of review. Analysis of this requires a study of the effect/impact of the decision by the institution. This is because once the membership is identified, then the ability of the decision-maker to effect rights is important. The High Court in *Tekali* manages to capture this essence to a certain extent. Faiza Thamby Chik J did this by adopting *OSK*’s “rights” requirement.⁶⁶ His Lordship also endorsed the extended meaning of the Atkin dictum so quoted from the judgement in *R v Electricity Commisioners, ex p London Electricity Joint Committee Co* which reads:

⁶⁴ Even the English courts are prey to this misconception. In *R v Chief Rabbi, ex p Wachman* [1993] 2 All ER 249. Simon Brown J maintained that the claim by a Rabbi for judicial review of his dismissal by the Chief Rabbi should be dismissed because there was no governmental connection with the Chief Rabbi.

⁶⁵ See above observation of the Scottish Court of Session in text accompanying fn 52.

⁶⁶ *Tekali* at p130 and 131

*Whenever any body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, act in excess of their legal authority, they are subject to the controlling jurisdictions of the Kings Bench Division exercised in the writs.*⁶⁷

The extended meaning is with reference to the requirement to act judicially. The “judicial” element has been expanded to mean decision-making powers.⁶⁸ This is then followed by the *OSK* requirement of the question whether the said decision making power have consequence of affecting the rights of subjects.

7.4 Effect of Institutional Understanding

It is important to note that some of these cases may meet equal success in private law action. Yet, by merely subscribing to the source test, the court will be tied to the remedies in a private law action. Thus, although private arrangements for example the corporation, can greatly affect the rights of many, the courts cannot peruse its action especially in areas like standard setting and quality control where damages are scanty adequate. Seen in this light, a corporation and the state are both actors in the “web of influence”:⁶⁹ a constitutional duty can be found on the corporate actor whereby breach of observance of rights and other constitutional sanctions can be subject to judicial review. First, judicial review can encompass where the legislature cannot. Legislation cannot pre-empt every

⁶⁷ [1924] 1 KB 171 at p205.

⁶⁸ The court drew support from similar view in Richard Gordon, *Judicial Review: Law and Procedure*, 1996, Sweet & Maxwell, London at p59-60.

⁶⁹ See John Brathwaite & Peter Drahos, *Global Business Regulation*, 2000, Cambridge University Press, Cambridge at p31.

violation and there are times an aggrieved person has no remedy. In such an instance judicial review can be sought. Then the caveats of scrutiny in public law can be invoked. This means that judicial review can be weaved into the elements of the governing private law. If it is sufficiently public, there must be general duty to give reasons, absence of bias, right to be heard, procedural and substantive fairness and what not. This will be additional to the regulatory framework already in place, for example regarding environmental laws-the basis of compliance will thus transcend from mere legislative sanction into a constitutional duty.

Secondly, in relation to human rights violence, many go unnoticed in the domestic regulatory regime either by oversight, lack of expertise, apathy or when the state is in collusion with the corporation. Then, judicial review may be the only mechanism in such a battle. Broadly a supervisory jurisdiction will be exercisable if a decision will seriously affect the vital interests of an individual, notably their interests in their dignity, autonomy, respect, status or security, or if other public policy interests are at stake, many which are related to monopolies and restraint of trade.⁷⁰

Thirdly, the dualist regime that accompanies international laws in this country is also a stumbling block. This approach requires domestic legislation to implement international treaties, agreements and conventions.⁷¹ Thus although numerous resolutions have applied human rights obligations in the area of discrimination, the environment, human rights and

⁷⁰ See de Smith, Woolf & Jowell, *Judicial Review of Administrative Action*, *op cit*, *supra* n12 at paras 3-029, 3-016 and 7-012.

⁷¹ Article 74 of the Federal Constitution. See for example, *PP v Ooi Hee Koi & Associated Appeals* [1968] 1 MLJ 48.

development to private corporations,⁷² it will have scant effect unless corresponded by domestic legislation. Judicial review will be the avenue to circumvent this current failing, especially with the courts becoming more receptive to judicially recognize norms of international law.⁷³

Further in relation to international law itself, there are various failings as well. For example, the draft UN Code of Conduct for Transnational Corporations, aimed primarily at regulating corporations meddling in the internal affairs of developing countries, was never adopted,⁷⁴ and so its effect is yet to be seen. Brathwaite and Daros provide the example of international environmental regulation⁷⁵. They estimate that there may be over five hundred international agreements that affect national regulation. Most however are pyrrhic victory as many of these treaties are essentially framework treaties; recognizing problems, express desires for change, and articulating principles. The problem is that the commitment to language is not matched by commitment to action. Until domestic environmental regulation can correspond with the pre-commitment, the only way is enforcement through the courts.⁷⁶ The only way the courts can come in and play a role as an accountability mechanism is to subject the public functions of these corporations to judicial review. At the domestic level there is a ready made enforcement mechanism in the form of judicial review. It is not the only avenue to address any arrogation of rights by corporations but it can prove to be a very effective and powerful

⁷² International Council on Human Rights Policy, *Business Rights and Wrongs: Human Rights and Developing International Legal Obligations of Companies* 39 (2001) (draft report) at www.ichrp.org.

⁷³ See *Adong bin Kuwai & Ors v Kerajaan Negeri Johor & Anor* [1997] 1 MLJ 418 and *Sagong bin Tasi & Ors v Kerajaan Negeri Selangor & Ors* [2002] 2 MLJ 591

⁷⁴ Development and International Economic Cooperation: Transnational Corporations, UN Economic and Social Commission, 2d Sess, Agenda Item 7(d), at 1, UN Doc E/1990/94 (1990).

⁷⁵ Brathwaite and Daros, *op cit*, *supra* n69 at p517.

⁷⁶ *Ibid* at p517.

accountability mechanism. The challenge for the reviewing court is to integrate international norms and standards to corporate violations. Otherwise, corporate human rights transgressions will continue to fester.

7.6 CONCLUSION

Carol Harlow has remarked that a public-private law distinction merely serves to promote “sterile jurisdictional litigation”.⁷⁷ There appears to be no reason to maintain the artificial conceptual basis. Significant areas of power reside within the evolving state and the corporations that exist in this spectrum. As the focus of judicial review is to control power in furtherance of its objectives, then such institutions should be subject to judicial review. The recognition of this paradigm shift in judicial review action is important because it enables rights based claims to be instituted with coherence.

⁷⁷ C. Harlow, *Public & Private Law: Definition without Distinction* [1980] 43 Mal.L.R. 241 at p242.

8.0 Introduction

This dissertation examined the function of the supervisory jurisdiction of the courts in reviewing administrative action within a legitimate framework and functional analysis. Providing a consistent and comprehensive framework of judicial review of administrative action is a seemingly elusive task. There seems to be an almost intractable debate to the limits of the appropriate relationship of the courts and the government. This work has attempted to harness the issue to a broader inquiry of constitutional principles, connecting the underlying values with interpretation as well as legitimacy for judicial authority.

A plaintiff reaches for the courts to stop the government from an action or to order the government to react to something. There are things a state can do and should be doing, and this provides the justification for creating and retaining administrative institutions and allocating powers to them. Those who overlook this in framing the goals of administrative law are as misguided as those who would say that the essence of a motor car is its brakes.¹ Seeing the goal of judicial review as keeping the brakes on the government without reference to the values of state power and co-operative endeavour can be a very misguided perspective. The great function of the courts is to draw a balance between the individual and the administration so as to ensure that administrative powers are not misused, and to infuse the ideals of fair procedure and just decision into the

¹ Charles Sampford, *Law, Institutions and the Public Private Divide* (1991) 20 Federal Law Review p185 at p 203.

functioning of the bureaucracy.² This work drew from this philosophy in order to fashion the appropriate ambit of the partnership between the constitutional actors.

Constitutional jurisprudence more than any other area of law reflects the pursuit of an autochthonous legal system. Constitutional review by virtue of that paves the way towards enforcement of rights that is in tandem with contemporary postulate. How the entrenched rights cater for evolving needs and the administrative response to this places a great task for the courts. A strong vote in favour was enunciated by Raja Azlan Shah J in *Pengarah Tanah & Galian, Wilayah Persekutuan v Sri Lempah Enterprises Sdn Bhd*,

*“...The courts are the only defence of the liberty of the subject against departmental aggression”.*³

This creates a flavour of the chief role of judicial review in articulating guiding principles in exercise of a broad range of decision-making powers. After all, judges perhaps even more than the rest of us, have an obligation to bring social practice into ever more perfect alignment with objective truth.⁴

² MP Jain, *The Evolving Indian Administrative Law*, 1983, Tripathi, Bombay at p2.

³ [1979] 1 MLJ 135 at 148, echoing the words of Farwell LJ in *Dyson v Attorney General* [1911] 1 KB 410 at 424.

⁴ See *The Price of Metaphysics: Deadlock in Constitutional Theory in Pragmatism in Law & Society* (Brint and Weaver eds), 1991, Westview Press, Colorado at p311.

8.1 A Rights Based Judicial Review

Too much time is spent justifying the grounds of review. This work was premised on the basis that such justification preempts the real underlying framework, especially the constitutional contemplation. This being so, there has been no overt attempt to study the grounds of review. Traditionally, the justification for judicial intervention hovered in the context of ultra vires. This work has deconstructed the ultra vires basis, namely as its application has diminished since the seminal decision in *Tan Tek Seng*. Before *Tan Tek Seng*, judicial review in this country percolated in the sterile climate of ultra vires. *Tan Tek Seng* urged a look into the constitution in relation to administrative control. The basis for the reviewing court is the constitution and this is why the term “constitutional review” is adopted. In this work, at all times the focus was on the study of constitution and its values in relation to administrative control and how the courts can employ it towards effective enjoyment of rights.

The average citizen is much more directly and frequently affected by the administrative process than by the judicial process. The ordinary person probably regards the judicial process as somewhat remote from his own problems; a large portion of all people go through life without ever being a party in a lawsuit. One main source of discord is that judicial review merely makes orders but fails to be sufficiently precise to guide public authorities in their daily operations. This has created a kind of tension among the administration and the judiciary. Further, public authorities resent that courts seem oblivious to the budgetary constraints which the administrative bodies constantly face.

This is why this work focused on how the courts can be utilized to infuse principles of good administration. For example, *rational* action instead of *irrationality*, *reasonable* decision instead of *unreasonable*. It would be more productive to concentrate on promoting good decisions so that the need to rectify bad ones would be eliminated.

The philosophical presupposition that judicial review is concerned exclusively with the negative aspects of decision making was denounced. That is, the courts only become involved in administrative decision-making when a wrong, transgression or violation has been committed. It was submitted that this essentially fails to recognize the positive dimension of rights. This paves the way to the thought the attention in constitutional review should be directed away from solely negative rights towards the promotion of the positive. In the Malaysian context it was argued that the elucidation of positive rights can only be made if it facilitated an enumerated negative right or facilitated or gave effect to the latter.

8.2 The Courts as Rights Enforcers

Seen in terms of a continuum, this dissertation can be fluidly divided into three distinct time frames: pre-*Merdeka*, the *Merdeka* constitution and post-*Tan Tek Seng*. What can be discerned is that the changing struggles of the nation reflect the changing needs and awareness of rights. Decisions emanating from the courts generally reflect this trend. This is important because it sends out signals of the kind of government that is in place as well as the level of enjoyment of rights.

Mauro Cappelletti writes of judicial review in its varied forms as a protection against the mutable whims and of passing majorities, a means of protecting minorities in democracies and expressing enduring values, the permanent will rather than the temporary whims of the people.⁵ Judicial authority can be seen as deeply rooted in society's daily needs, grievances, aspirations and demands.⁶ Galligan fortifies this view. Democracy means more than simply majority rule, it connotes a relationship between each individual and the majority, within which the individual is guaranteed certain protections, and that these in turn may constitute fetters upon majority rule. Accordingly, the values inherent in this fuller sense of democracy might be tapped by the courts.⁷ It was against this conception of democracy that the dynamics of the constitutional actors was explored.

The courts supplement administrative process with judicial hearings. This provide different kinds of opportunity for influence on administrative matters by citizens as litigants. Such a view is premised on the basis that the courts are relatively open to public view, accountable (through appeal systems) and in some sense participatory.⁸ In the UK, the trend towards constitutional review has similarly been espoused by a few judges, chief among them are Stephen Sedley, Lord Irvine of Lairg and John Laws. Writing extra-judicially, Laws has keenly explored the role of the judiciary in the light of current development.⁹ Similarly in Malaysia, the courts identification of such principles casts a

⁵ Mauro Capelletti, *Judicial Process* p16, quoted Roger Cotterrell, *Judicial Review and Legal Theory in Administrative Law and Government Action* (Gunn and Richardson ed), OUP, Oxford at p17.

⁶ D.Oliver *Is the Ultra Vires the Basis of Judicial Review* (1995) Pub L 543.

⁷ Galligan, *Discretionary Powers: A Legal Study of Official Discretion*, Clarendon, Oxford at p18.

⁸ Cotterrell, *op cit supra* n5.

⁹ See for example, John Laws, *Is the High Court the Guardian of Fundamental Constitutional Rights?* (1993) Pub L 59.

ripple effect on administrative action and the espousal of constitutional values. Until there is comprehensive legislative articulation that can provide framework for the administrative excess, decisions from the court is the only real guidance.

8.3 Limitations

That judicial review remains an important compartment towards good administration can never be denied. This notwithstanding it is important to note the limitations. This dissertation never pretended that legal challenge alone can create an equitable government. It would be professional parochialism to assert that the courts alone are competent to guarantee the legality of the executive administrative action. In many, perhaps most instances, they make no contribution at all, and every case they are but one of the modes for achieving the ends in view, together with the legislative, public and the administrative hierarchy itself.¹⁰ As observed throughout, there are systemic limitations and constitutional impediments on the use of legal redress against government power in Malaysia.

Further, judicial review is one of the range of options available to a person aggrieved from administrative action. For example, an immigration officer can detain an individual or a Minister can refuse a license. It is only if a person challenges that the exercise of those powers that a court becomes functional. An individual can always choose to instead pursue some further administrative avenue, for example to a senior officer.

¹⁰ See Jaffe and Henderson, *Judicial Review and the Rule of Law: Historical Origins* (1956) LQR 345.

8.4.1 Constitutional Review as a Mechanism of Accountability

Principled legislature is achieved when the executive and the courts work in partnership, not in a power struggle. This solidifies the notion of separation of powers as a dynamic scheme to optimize the outcome of representative government. The reviewing court functions as a mechanism of accountability in the promotion of representative government. In *People's Union*,¹¹ the Supreme Court of India stated that accountability was an important function of government by referring to the decision in *SP Gupta v Union of India*.¹² The court held that no democratic government can survive without accountability and the basic postulate of accountability is that the people should have information about the functioning of the government.¹³ As the reviewing court supplies the standards for the governmental action, its role as a mechanism of accountability is clear.

In order for the courts to function as a mechanism of accountability however, it must be constitutionally and institutionally competent. As observed earlier, the rule of law and the doctrine of separation of powers, conceived within the constitutional structure, are the enabling apparatus towards *constitutional competence*. With these tools, the interpretation of the constitution by the courts work towards employing dignity as a legal value.¹⁴ On the other hand, *institutional competence* involves a normative assessment of the proper role of institutions in a representative government. This includes the role of the

¹¹ *People's Union of Civil Liberties v Union of India* (2003) 4 SCC 399 at p432 para 26.

¹² 1981 Supp SCC 87.

¹³ *Loc cit*.

¹⁴ See *supra* 3.1.2.

executature *vis a vis* the courts, especially in relation to the curtailment of the power of the courts by the ousting of jurisdiction, amendments and legislative sequels. Institutional competence demands fulfillment of duties upon the constitutional actors. Ultimately, only when the competency requirements under both categories are satisfied can there be *effective* enjoyment of rights.

The problems and tension that are a continuous plague arise from the fact that those who have the power do not generally or always like to account for their actions. In UK, Parliamentary sovereignty demands accountability to Parliament. This according to Lord Diplock, must be understood in context. In *R v IRC, ex p National Federation of Self-Employed and Small Businesses Ltd*, Lord Diplock opined thus:

*It is not in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a court of justice for the lawfulness of what they do, and of that the court is the only judge...*¹⁵

In a country with a written constitution like Malaysia, accountability is to the constitution. If constitutional review is then seen as another means of accountability then it will provide for a more holistic understanding of representative government, not a jealous baton of an imperious court. Such vigilance strengthens the process of

¹⁵ [1982] AC 617.

representative government and further assists the courts to check that power is not abused. Ultimately, this works towards the promotion of rights because the courts enforce the executive's institutional capacity as provided in the constitution. The constitutional requirement of representative government demands accountability.

8.5 Constitutional Competence

The thesis of this work is that the many principles that the court can utilize to address administrative excess is already resident in the legal framework. The interpretive approach was applied to weave these principles on sound foundation. Individual rights are inadequately protected in Malaysia because there has been a basic failure by the courts to appreciate their roles within the constitutional structure. They are misled by a combination of political pragmatism, undue influence of the English courts and general failure to adopt an appropriate approach to constitutional interpretation.

The approach to constitutional interpretation is that first, there must be recognition that the constitution embodies pre-existing rights. Common law rights have come to be embodied along with the textual enumeration. This is not an appeal to a mysterious "spirit of the constitution" but a recognition that not all rights have been captured by the constitution. Our constitution assumes the application of principles of "higher" or "natural" law which act as a context for interpretation.¹⁶ This also enhances the role of the constitution as a living document, and thus should not be read in a way that is

¹⁶ See *Ong Ah Chuan v PP* (1981) 1 MLJ 64.

statistically fixed to the historical anchor. Rather, it should be read in a way that is sensitive to contemporary needs.¹⁷

Secondly, constitutional interpretation maintains that rights must be seen as being inter-related. This is necessary to ensure that existing rights are not rendered illusory as established in *Maneka Gandhi*.¹⁸ New rights can be formulated within this understanding. This also works towards maturity of the constitution. One primary reason why review remained stultified was its philosophical presupposition. It was thought that the courts in their supervisory function enforce only *negative rights*. The courts concerned themselves solely in the prevention of the exercise of arbitrary power or unfair.¹⁹ That courts could expand the definition of certain rights and even fashion some corollary rights was a very controversial notion. This is because the courts had worked within the confines of the legislature. Only now, with the ultra vires constrain removed, are the courts tentatively moving into enforcement of positive rights. Such attempt has however been couched as being within "jurisdiction" of the courts, as observed in *Rama Chandran* instead of being part its rights enforcement duty.

The proper approach to constitutional interpretation paves the way towards principled review. The interpretive mechanism can only function by advancing and adhering to the rule of law. The courts seem to be moving in the direction of employing dignity as a legal value to fashion new rights as well as crusade for the individual. In short, proper

¹⁷ See *Dato Menteri Othman bin Baginda & Anor v Dato Ombi Syed Ahwi bin Syed Idrus* (1981) 1 MLJ 29.

¹⁸ *Maneka Gandhi v Union of India* AIR 1978 SC 597.

¹⁹ See Nik Abdul Rashid, *Erosion of Fundamental Rights by Legislation*, paper presented at the 4th Malaysian Law Conference, 19-21 October 1977, Kuala Lumpur at p24.

constitutional interpretation informs the substantive content of review and ultimately, formulates procedural and substantive fairness.

The general insights were this. The question at stake is a legal one about how we understand our constitution. A case was developed for understanding the constitution that provides greater protection of rights through the mechanism of review. There was also a case to suggest that the apparatus for doing so is in terms of concepts and principles that are already resident in our system of law. The constitution, by virtue of rule of law invokes a conception of role morality. With all this proven, then our judges (and the other constitutional actors) are under a duty to act out of and upon the rule of law. With this, what has been developed is a conception of constitutional interpretation that is to be read with the understanding of rule of law.

8.6 Institutional Competence

Despite the formulation of *principled* constitutional review, the promotion of rights still remains stultified. Given the framework, it is for the reviewing court to evolve separation of powers based review. Understanding the operation of separation of powers elucidates the mechanism of representative. Only then can there be effective enjoyment of rights. The analysis here provides insight into the institutions capable of fulfilling rights instead of the nature of the right. In doing so, the guarantee of constitutional review as an institution of accountability in promoting effective enjoyment of rights is achieved.

The general insights are that the separation of powers demands keen analysis towards placing the constitutional actors within their proper roles and necessitates analyses of the scope of duties of the actors within this structure. It was established that the constitutional limitations in relation to the exercise of powers prescribes an answer towards handling legislative transgressions like ouster clauses and overrides by the courts. Further, the executive function within the demands of representative government and cannot transgress this requirement. If they do, then the courts can be sought to intervene. With this submission achieved, it was established that constitutional review is a mechanism of accountability.

Further, judicial decisions do have legislative sequence which can effectively annul them. In this situation, the executive have the “last say”, in the sense that legislation can be amended to control or even reverse, the judges decision. This makes the decision of the court impotent. This notwithstanding, it was argued that the executive must justify their non-compliance. The constitutional prescription of representative government invokes such a duty on the executive. This is an attempt to endorse the Dialogue Theory model that has been established under the Canadian Charter of Rights. Judicial decisions do have legislative sequence which effectively annul them. As such, although the executive have the “last say” when the legislation has been through the courts, the executive must still justify their non-compliance. There is then a case for *principled* legislation. Principled legislation gives meaning to principled review and makes all the institutional actors work as partners in the promotion of representative government instead of being placed in an intractable power play.

8.7 Delivering Holistic Rights Jurisprudence: Transcending the Frontier

There must be recognition of the extent that private actors perform increasingly traditionally public functions unfettered by the scrutiny that normally is attached to “traditional” administrative action. This gives rise to accountability concerns. Recognizing this is an important step in establishing a comprehensive framework for review. This is because the reviewing court must not purport to exert its authority on some vague or incomprehensible understanding. Retaining public-private distinction when rights are transgressed is otiose and must be discarded to enable judicial review to function. The time has come for Malaysian case law to adopt this notion with clarity.

This is more apparent than ever as government is reinvented. New forms and sites connect to the state with the onslaught of privatization, contracting out and what not. In such an instance, the *effect on rights* should be the concern, not the hapless reference to the source of power. Such a focus will enable review to stretch legitimately to institutions that have great capacity to effect right but have hitherto escaped scrutiny. Constitutional review in Malaysia must expand its focus towards this endeavour.

To devise a constitution for a new nation, as occurred in 1957, is itself a major achievement of the human mind, and to preserve it and adapt it to the needs of swiftly changing times is another, especially as such preservation has required the skills not only of politicians, but of judges.²⁰ This is a multi-level, multi-nuanced understanding of how the constitution gives voice to the people. This study has drawn from the constitutional

²⁰ RH Hickling, *Malaysian Public Law*, Pelanduk Publications, 1997, Introduction.

and pragmatic underpinnings of both contemporary and historical efforts to ground administrative legitimacy and in doing so, endeavours some direction for the future.

Judicial review does have limitations in countering administrative excess. However, this is not to say that judicial review per se should be regarded as *impasse* or ineffectual. This dissertation has shown that it can and does provide framework towards fairness and accountability, brings open issues and can put the onus on the administration to make decisions that are truly in the interest of the citizens instead of shielding in arcane tirade of public policy, national interest and the like. This perspective leaves cases as resources for persuasive tool and guidance. The ultimate role of the courts is to act as a quality control mechanism for administrative decision making.

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