MALAYSIAN ADMINISTRATIVE LAW : A REVIEW OF THE POST-*UEM* DEVELOPMENTS

I. INTRODUCTION

An attempt is made in this article to review the Malaysian Administrative Law with particular emphasis on the case law developments and their implications in the post-*UEM*[1] era.

II. The Position In The Pre-*UEM* Era

Before we begin with the subject matter proper, an overview of the position prior to the period under study is necessary because we cannot look at the present without knowing the past. First, it needs to be pointed out that Administrative Law is mainly judge-made law. Case law develops on a case-by-case basis and the pace of progress may be slow.[2] A more pertinent matter to bear in mind is that the development of our public law has always been determined and moulded by our perception of the basic principles of law that govern our system. Until very recently, there was not much realisation on our part that the Constitution is our supreme law and as such, no other law can override it. Due to this problem, ever since *Karam Singh*,[3] our courts have consistently and inadvertently rejected arguments seeking to defend,

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[1] *Government of Malaysia v Lim Kit Siang* [1988] 2 MLJ 12.

[2] Reference to the case law of another jurisdiction having laws *in pari materia* with ours is inevitable in view of the paucity in our case law.

[3] *Karam Singh v Menteri Hal Ehwal Dalam Negeri Malaysia* [1969] 2 MLJ 129.

protect and preserve the Constitution, particularly the fundamental rights which are protected and guaranteed under Part II of the Constitution without realising the consequences of what they have done to the development of our public law. The root cause of this lack of realisation can be traced to the Common Law traditions or system which we have inherited from the British. Under the British system, it is the Parliament which is supreme. Constitutional supremacy is alien to that system. Hence, the laws passed by Parliament are always valid and must be upheld. Another unique feature of the English system is that the British until today still do not have a written Constitution and a Bill of Rights guaranteeing certain fundamental rights. As such, under that system, a law may be passed by Parliament to curtail or even extinguish an existing legal or common law right if the legislative intention is clear. However, under the Malaysian system, the same cannot be done because of the concept of constitutional supremacy and the sanctity of fundamental rights. Under our system, we have a written Constitution which is the supreme law. There are certain elements safeguarded therein, such as the fundamental liberties protected under Part II thereof, which cannot be violated by any law passed by the Legislature or by any decision made by the Executive. A large number of Malaysian lawyers, particularly the senior ones were trained in England. Naturally, they have the tendency to follow and uphold the Common Law traditions when they return to practise law. Many of them have failed to realise that the system in which they work practises constitutional supremacy and the sanctity of fundamental rights. With their kind of background and perception, the Common Law traditions and values have been allowed to prevail and develop at the expense of our own laws. The Common law, albeit still having its role in our system, has been accorded undue recognition over our own laws. Until very recently, little did we realise that the Common Law approach of interpreting our laws and the Constitution will break down when it comes into direct conflict with our Constitution. The Constitution must prevail over all other laws[4] that come into conflict with it, particularly the fundamental liberty provisions. No laws enacted by Parliament or those promulgated by the Executive can override the

[4]Including the Common Law.

Constitution under our system. The fundamental rights or liberties which are specifically guaranteed under Part II of the Constitution are to be treated with sanctity. Section 25(2) of the Courts of Judicature Act 1964 specifically confers a statutory right in paragraph 1 of the Schedule to enforce any of the fundamental rights protected under the Constitution in the High Court. Hence, when it comes to protecting and safeguarding the fundamental rights and the Constitution, the basic rules operating in our system are fundamentally different. The problem with us all this while is that we have been inadvertently and unwittingly applying the English Common Law rules and values to our system causing a great deal of confusion and misconception at the expense of the enforcement of fundamental liberties and the growth of our own Common Law in our system based on our Constitution. Typical of the misconceived interpretation of our Constitution is the *Karam Singh's* case where our Federal Court inadvertently held that the word *'law'* in Art. 5(1) of the Constitution did not include procedural law. In that case, the Federal Court also unwittingly castigated the Indian judges, who were eminent jurists accustomed to expounding and illumining the complicated principles of constitutional jurisprudence, as 'indefatigable idealists'. In that case, instead of resolving issues of preventive detention by having recourse to the Constitution, the Federal Court chose to rely on the old English Common Law.[5]

Of course, not all was lost in the process in that era. Nevertheless, from time to time, good sense still prevailed amongst the judges. A few cases decided in the Pre-*UEM* era that we still often cite and

[5]Other cases may also be cited: *Government of Malaysia v Loh Wai Kong* [1979] 2 MLJ 33 where it was held that the right to travel overseas and the right to a passport were not part of Art. 5(1); and *Najar Singh v Government of Malaysia* [1976] 1 MLJ 203 where it was held that oral hearing was not part of Art. 135(2) in a case of dismissal because the relevant General Order was silent thereon. Moreover, the affected officer did not demand for an oral hearing. There is case law to the effect that a public officer has no right to an office, no right to pension and that a transfer cannot be challenged on substantive grounds. See *Government of Malaysia v Mahan Singh* [1975] 2 MLJ 155; *Pengarah Pelajaran, WP v Loot Ting Yee* [1982] 1 MLJ 68.

follow today are none other than *SS Kanda,*[6] *Ho Kwan Seng*[7] and *Sri Lempah Enterprise*.[8] Thanks to the Court of Appeal in *Tan Tek Seng,*[9] that costly mistake of ours as pointed out in the foregoing has been exposed in that case and hopefully realised by all concerned by now. It took us nearly 40 years to realise that the Constitution is the supreme law and all issues involving public law must be decided by having resort to its provisions. But, more importantly, it is sincerely hoped that in the post-*Tan Tek Seng* era, we will not revert and cling to the previous practice. In fact, with the advent of that landmark case of the Court of Appeal, we may even proclaim the dawn of a new era of public law in our country provided, of course, we continue to build and consolidate on what we have discovered. Needless to say, the Malaysian Constitution is not a perfect charter of rights because of the numerous amendments made thereto. There are numerous restrictions imposed therein on the exercise of fundamental rights. But we need not despair. A Constitution is a living and dynamic document and must be interpreted as such, irrespective of its defects. Fundamental liberties must always be interpreted liberally and broadly whereas the restrictions imposed thereon, narrowly and restrictively construed and in the event of any doubt or ambiguity, it must be resolved in favour

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[6] *SS Kanda v Government of the Federation of Malaya* [1962] 1 MLJ 168. The Privy Council held that it is against the rules of natural justice to condemn someone behind his back without affording him a reasonable opportunity to rebut and correct the adverse evidence used against him.

[7] *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152. This is the Malaysian equivalent of *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180. The proposition associated with them is that the rules of natural justice should apply in every case whenever an administrative action that has adverse consequences against a person is taken against him. The rules of natural justice apply even when a statute is silent concerning the right to be heard. They are of universal application and apply irrespective of the label attached thereto.

[8] *Pengarah Tanah dan Galian, WP v Sri Lempah Enterprise Sdn. Bhd.* [1979] 1 MLJ 135. The legal proposition advocated thereby is that an unfettered discretion is a contradiction in terms.

[9] *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261. This momentous case will be discussed in due course.

of the individuals affected.[10] By adopting this line of approach, we should be able to safeguard and salvage what is still left of our fundamental liberties.[11] Hence, in the post-*Tan Tek Seng* era, we must all strive hard to allow our public law to grow and develop and no attempt whatsoever should be made to restrict its proper growth and development.

III. The Position in the Post-*UEM*-Pre-*Tan Tek Seng* Era

Much need not be said about the *UEM* case as that case is generally taken by Malaysian lawyers as laying down the restrictive test of *locus standi* for public interest litigation.[12] The liberal 'sufficient interest' test could not be adopted partly because, according to the Supreme Court, our Order 53 of the Rules of the High Court 1980 has not been amended to accommodate the liberal test.

Some indications of judicial activism could be detected shortly after the *UEM* case. *Rohana bte Ariffin & Anor v USM*[13] had taken many people by surprise as it came just a year after *UEM*. That case involved disciplinary proceedings against two employees (lecturers) of a public university under the staff disciplinary rules of that university. A couple of new public law issues raised and decided in that case need to be emphasised.[14] The High Court introduced the term 'procedural fairness' for the first time in this country. The High Court also held that the right to a reasoned decision could arise particularly if there was a right of appeal against a decision and if the disciplinary action taken against an officer might result in grave consequences against him. The High Court approached the issues raised and discussed them liberally from the perspective of common law.

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[10] *Tan Hoon Seng v Minister of Home Affairs, Malaysia & Anor and another appeal* [1990] 1 MLJ 171, (SC).

[11] It is a well-known fact that constitutional amendments and legislation passed after 1957 have greatly curtailed the fundamental liberties conferred under Part II of the Constitution.

[12] *Boyce v Paddington Borough Council* [1903] 1 Ch. 109 test followed. See Part VI on this test.

[13] [1989] 1 MLJ 487.

[14] The other issues raised and decided need not concern us here.

A few years later, the High Court nullified an order of preventive detention for non-compliance with a mandatory procedure prescribed by a preventive detention law in *Puvanveswaran v Menteri Hal Ehwal Dalam Negeri, Malaysia*.[15] That case is subsequently cited as laying down a test for determining whether a procedure prescribed by law is mandatory or not. A procedure is mandatory if *"the requirements are vital and go to the root of the matter, in which case they would be mandatory and therefore a breach thereof cannot be condoned"*.[16]

In 1988, the High Court in *Yit Hon Kit v Minister of Home Affairs, Malaysia & Anor*[17] began to cast doubt on whether *Karam Singh* had been correctly decided. That case involved an application for a writ of *habeas corpus ad subjicendum* whereby the detainee challenged both the validity of the detention order and his detention under the Emergency (Public Order and Prevention of Crime) Ordinance 1969. After having disposed of the application in the detainee's favour, the High Court took the opportunity to comment on the *Karam Singh* case. Albeit strictly *obiter*, it would be of great interest to take a look at what the court said:

> So much for this case. But in the wider public interest, I feel bound to ask myself whether the time is not ripe for the Supreme Court to consider if the statement of the law in *Karam Singh* that the subjective satisfaction of the Minister in cases of preventive detention is not justiciable, is, after all, good law regard being had to recent English decisions of the highest authority to which I shall presently refer.[18]

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[15][1991] 3 MLJ 28. The Supreme Court affirmed the test subsequently in *Aw Ngoh Leang v IGP & Ors* [1993] 1 CLJ 373. In *Puvaneswaran*, the requisite number of form was not served on the detainee under the Public Order and Prevention of Crime (Procedure) Rules 1972.

[16]See also *Narinder Singh Jaswant Singh v Ketua Polis Daerah Georgetown Ors* [1997] 1 CLJ Supp. 592 on non-compliance with a mandatory requirement prescribed by a written law.

[17][1988] 2 MLJ 638.

[18][1988] 2 MLJ 638, p. 647.

After reviewing the English authorities, the Court at p. 648 commented further:

> It would appear, therefore, that a case could be cogently argued against the principles enunciated in *Karam Singh* and that the present case might perhaps provide the opportunity for this.[19]

IV. *SKMK* And *Tan Tek Seng*

A. *SKMK*'s Case

Then in 1995, the Court of Appeal caught many people by surprise in the first of a series of cases coming from that court. In *Syarikat Kenderaan Melayu Kelantan Bhd. v Transport Workers' Union,*[20] the Court of Appeal took an unprecedented step of not abiding by the doctrine of *stare decisis*. It refused to follow the earlier Privy Council case of *South East Asia Fire Bricks*[21] on the matter of the scope of judicial review by the High Court over the decision of an inferior tribunal or other public decision-making body in an application for judicial review in the face of an ouster clause. The Court of Appeal in *SKMK* in no uncertain terms held that, in spite of the ouster clause postulated in section 33B(1) of the Industrial Relations Act 1967 seeking to exclude judicial review of an award, decision or order of the Industrial Court, an inferior tribunal (or other public decision-making body), whether exercising a quasi-judicial function or administrative function, has no jurisdiction to commit an error of law, whether the error is jurisdictional or not. Since a decision of the body under review has no jurisdiction to commit an error of law, its decision will not be immune from judicial review even in the face of an ouster clause, howsoever widely drafted it is.

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[19] While commenting on the same case in respect of another aspect of the law decided, the Court of Appeal in *Tan Tek Seng* at p. 285 observed in passing that *"it must not be forgotten that the views in Karam Singh were expressed at a time when the learning upon the interpretation of written constitutions was still at its infancy."*

[20] [1995] 2 MLJ 317. It is referred to in this article as "the *SKMK's* case".

[21] *South East Fire Bricks Sdn. Bhd. v Non-Metallic Mineral Products Manufacturing Employees' Union & Ors* [1980] 2 MLJ 165.

The *SKMK's* case is also unprecedented in the sense that it abolished the distinction between error of law and error of jurisdiction created in the earlier *South East Fire Bricks'* case. As a consequence, all errors of law are now reviewable by the High Court, thus enlarging the scope of judicial review. The Court of Appeal then took the opportunity to examine the term 'error of law':[22]

> 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 never closed. But it may be safely said that an error of law would be disclosed if the decision-maker asks himself the wrong question or takes into account irrelevant considerations or omits to take into account relevant considerations (what may be termed an *Anisminic* error) or if he misconstrues the terms of any relevant statute, or misapplies or misstates a principle of the general law.

It may be observed that what the Court of Appeal did in *SKMK's* case was bold, drastic and unprecedented but extremely laudable. The error of law doctrine was later affirmed by the Federal Court[23] and the Supreme Court.[24] About a decade earlier, the Supreme Court was presented with a golden opportunity to steal the limelight in *Enesty*[25] but unfortunately missed it as the court merely observed that:

> Perhaps the time will come for this court to consider the view expressed by Lord Diplock in the House of Lords in *Re Racal Communications Ltd.* and thereby open the way for the acceptance of Lord Denning's suggestion in *Pearlman v. Harrow School* in

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[22] [1995] 2 MLJ 317, p. 342.

[23] *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia* [1995] 3 MLJ 378 and *Majlis Perbandaran Pulau Pinang v Syarikat Bekersama-sama Serbaguna Sungai Gelugor Dengan Tanggungan,* albeit *obiter* only. Hereinafter referred to as *'Majlis Perbandaran Pulau Pinang'* [1999] 3 MLJ 1.

[24] *Kumpulan Perangsang Selangor Bhd. v Zaid bin Hj Mohd. Noh* [1997] 1 AMR 13:1008.

[25] *Enesty Sdn. Bhd. v Transport Workers Union* [1986] 1 MLJ 18.

> discarding the distinction between an error of law which affected jurisdiction and one which did not.[26]

Ideally, the best thing is to avoid ouster clauses in statutes or subsidiary legislation excluding the writ jurisdiction. This is because such clauses are repugnant to the Rule of Law, constitutionalism and democracy. Besides, section 25(2)[27] of the Courts of Judicature Act 1964 read in conjunction with Part II of the Federal Constitution particularly Art. 8(1)[28] may not harmoniously co-exist with ouster clauses.

B. *Tan Tek Seng*'s Case

The most sensational case came along in1996 when the Court of Appeal used its creative ingenuity in *Tan Tek Seng* to invoke Arts. 5(1) and 8(1) of the Federal Constitution to protect and safeguard livelihood. The word 'life' in Art. 5(1) was liberally and broadly construed to incorporate livelihood or employment. The expression 'law' in Arts. 5(1) and 8(1) incorporates procedural law. More importantly, the combined effect of Arts. 5(1) and 8(1) imposes and ensures procedural fairness[29] whenever a person's livelihood is adversely affected by a

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[26] [1986] 1 MLJ 18, p. 24. Talking of another missed opportunity by the Supreme Court, the case of *Chai Choon Hon v Ketua Polis Daerah, Kampar* [1986] 2 MLJ 203 may also be mentioned albeit on a different matter altogether. There, a restriction was imposed by the police authority on the number of speakers who could speak during a meeting permitted under a licence granted by the police under the Police Act 1967. The Supreme Court chose an easier way out of the dispute by holding that the restriction imposed was unreasonable. If it wanted, it could have chosen the more unpopular path by coming down hard on the licensing authority by holding that the condition imposed was unconstitutional by using some relevant provisions under Part II of the Constitution. It must be pointed out that the High Court made the more unpopular choice in that case.

[27] Which specifically confers the wider writ jurisdiction on the High Court.

[28] Which houses the due process clause in the Constitution.

[29] And also substantive fairness in the sense that the punishment imposed must be fair and just. This point will be dealt with in due course.

decision of a public decision-maker.[30] The Court of Appeal also took the opportunity to explain the relationship between Art. 135(2) on the one hand and Arts. 5(1) and 8(1) on the other. It pointed out that the combined effect of Arts. 5(1) and 8(1) is of wider and general application in terms of procedural fairness than Art. 135(2). Art. 135(1) is a specific provision giving effect to the concept of procedural fairness in the narrower contexts of dismissal or reduction in rank of public officers. Since there is a specific provision, namely, Art. 135(2), that houses the doctrine of fairness in particular cases, it would, in all those cases, save for very limited purposes, be unnecessary to have resort to the wider and general application of Arts. 5(1) and 8(1).[31]

Equally significant is the approach of the Court of Appeal in *Tan Tek Seng* to the question of the interpretation of our Constitution. The Court of Appeal decisively pronounced that the Constitution is a living, organic and dynamic document. Of all laws or instruments, it has the greatest claim to be construed *ut res magis valeat quam pereat.* The courts should keep in tandem with the national ethos when interpreting the provisions of a living document like the Federal Constitution lest they be left behind while the winds of modern and progressive change passes them by. 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. They should not stubbornly cling to an archaic and arcane approach formerly adopted. *It is the primary duty of the courts to resolve issues of public law by having resort to the provisions of the Constitution which is the supreme law.*[32] In respect of the same, after referring to

[30]This point was forcefully driven home and affirmed in a subsequent case of the Court of Appeal – *Hong Leong Equipment Sdn. Bhd. v Liew Fook Chuan & anor appeal* [1996] 1 MLJ 481. See also *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145.

[31]It is submitted that the wide ambit of the combined effect of Arts. 5(1) and 8(1) is capable of being extended to the employees of a statutory body or a local authority in cases wherever livelihood is adversely affected by the decisions of the employers.

[32]Emphasis is added to indicate that this is the first time that a Malaysian court has come out openly to declare what is the proper approach to be adopted in cases involving the interpretation of public law issues affecting us.

the position in UK, Australia and New Zealand, the Court of Appeal, in *Hong Leong Equipment* reiterated that:[33]

> We, on the other hand, have a Federal Constitution which declares itself as the supreme law of the Federation. I am therefore of the view that while the decision of the courts of these countries may be useful guides, we ought not slavishly follow them in disregard to the provisions of the Federal constitution. I think that our courts owe it to those who won us our freedom from the colonial yoke, and gave to us an activist and dynamic written constitution, to decide issues of public law by reference to that supreme law, using as our primary guides, decisions of courts of countries which have constitutional provisions akin to our own. But when we do so, we should also bear in mind any difference in language between the like provisions in the respective constitutions. Regard should also be had to the national ethos, our own cultural background and the larger objective which a democratically elected government is seeking to achieve. For a constitution is a living document, and the concepts it houses in broad and liberal language, must be interpreted broadly and liberally in accordance with the particular needs of a developing society.

The significance of *Tan Tek Seng* is much more far-reaching than the concept of fairness it has introduced. On a more positive note, the Malaysian courts after that case have embarked on a dynamic interpretation of the Constitution and other laws.[34] If that activist and dynamic approach to interpreting our laws is maintained and forged ahead with, newer and wider horizons and trends in our public law will definitely be opened up in time to come. In other words, *Tan Tek Seng* is a precursor to more positive and dynamic things to come in the

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[33] [1996] 1 MLJ 481, p. 531.

[34] Three other cases decided after *Tan Tek Seng* that have added further dimensions to our public law will be looked into shortly. The cases referred to are *Hong Leong Equipment* [1996] 1 MLJ 481, *Rama Chandran* [1997] 1 MLJ 145, and *Sugumar* [1998] 3 MLJ 289.

arena of our public law provided of course our courts maintain a consistent approach in interpreting our laws.[35]

In terms of procedural fairness, it may not be out of place to refer to a couple of slightly earlier cases. In *Raja Abdul Malek Muzaffar Shah*,[36] one of the issues before the Court of Appeal was whether an oral hearing could be claimed under General Order 26 of Chapter D of the General Orders 1980[37] which prescribed the procedure applicable to a case of dismissal or reduction in rank of a public officer. It needs to be pointed out that General Order 26 was silent on the matter of oral hearing in a case where no Committee of Investigation was set up by the Disciplinary Authority. Ever since *Najar Singh*,[38] our courts

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[35]See the comment later in this article on a couple of cases, *Ng Hock Cheng v Pengarah Am Penjara & 2 Ors* [1997] 4 AMR 53:4193; *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & other appeals* [1997] 3 MLJ 23, to determine whether the courts have maintained a consistent approach to public law issues.

[36]*Raja Abdul Malek Mazaffar Shah bin Raja Sharuzzaman v Setiausaha Suruhanjaya Pasukan Polis & 2 Ors* [1995] 1 CLJ 619.

[37]It is to be noted that Chapter D has since been replaced by the Public Officers (Conduct and Discipline) Regulations 1993, P.U. (A) 395.

[38]*Najar Singh v Government of Malaysia* [1973] 2 MLJ 191. See the cases cited by the Court of Appeal where our courts have mechanically followed *Najar Singh*. It is not surprising that the same attitude persists even after *Tan Tek Seng*. Perhaps *Najar Singh* should now be given a decent burial in the post-*Tan Tek Seng* era. This is because *Najar Singh* was using the Common Law approach to interpret the Constitution. It is perhaps the source of the restrictive judicial attitude towards the civil servants' right to procedural fairness. On the matter of procedural fairness, a couple of recent cases may be cited for comment. In *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar, Ketua Polis Negara, Malaysia & Anor* [1994] 2 CLJ 333, and *Harbajan Singh v Suruhanjaya Pasukan Polis, Malaysia & Anor* [1999] 5 MLJ 222, it was emphasised by the court *"that we are dealing with general orders that have legislative effect and we must guard ourselves against adding words into them which were never intended"*. It needs to be observed that when we talk of procedural fairness or the rules of natural justice, we are talking of an implied right when the statute is silent thereon. The *dictum* cited fails to realise the very nature of the rules of natural justice or procedural fairness. Moreover, in Malaysia, the right to be heard is governed by the Constitution, not so much the General Orders. What is provided by the General Orders cannot be final of the right to be heard. Finality is to be determined by the courts by reference to the Constitution in the form of Art. 135(2) or Art. 5(1) read in conjunction with Art. 8(1). Moreover, we must also bear in mind that gaps in a statutorily prescribed procedure may be supplemented by the rules of natural justice.

have consistently held that no right of oral hearing needs to be granted in such a case.[39] However, the Court of Appeal in *Raja Abdul Malek* while agreeing with the general proposition that no oral hearing may be given in such cases, qualified it by adding a rider thereon. In the words of the Court of Appeal:

> Nevertheless, the principle that the right to be heard is non-inclusive of a duty to afford an oral hearing does not mean that the failure or refusal to afford such a hearing would render the decision reached safe and harmless from attack. Cases may arise where, in the light of peculiar facts, the failure to afford an oral hearing may result in the decision arrived at being declared a nullity and quashed. (See *R v Immigration Appeal Tribunal* [1977] 1 WLR 795).

The Court of Appeal's decision on the matter of an oral hearing is most encouraging and welcome because it refused to stick to the former narrow, pedantic and mechanical interpretation of the General Order[40] by using the Common Law approach. In 1994, the High Court in *Syed Mahadzir*[41] held that the rules of natural justice applied when a public officer's service was terminated on medical grounds. In such a case, the affected officer was forced to go on compulsory retirement. The court equated such a case with a case of dismissal for the purpose of conferment of the right to be heard. Of course, if *Syed Mahadzir* were to revisit us today, the problem may be easily resolved by bringing it under the combined effect of Arts. 5(1) and 8(1) of the Constitution for the purpose of imposing procedural fairness on the termination of services of a public officer on medical grounds. It may be observed that such a case involves the deprivation of livelihood whereby the right to procedural fairness arises as a matter of right.

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[39] For example, *Ghazi bin Mohd Sawi v Mohd Haniff bin Omar* [1994] 2 MLJ 114.

[40] Art. 135(2) of the Constitution which confers and guarantees a reasonable opportunity of being heard in a case of dismissal or reduction in rank of a public officer.

[41] *Syed Mahadzir bin Syed Abdullah v Ketua Polis Negara* [1994] 3 MLJ 391.

V. The Post-*Tan Tek Seng* Developments

A. Procedural Fairness Being Extended

Procedural fairness, the product of the combined effect of Arts. 5(1) and 8(1), was further extended by the Court of Appeal in *Hong Leong Equipment*. In that case, after holding that procedural fairness is part of our law, it went further to hold that, as a general rule, procedural fairness, which includes the giving of reasons for a decision, must be extended to all cases where a fundamental liberty guaranteed by the Federal Constitution is adversely affected in consequence of a decision taken by a public decision-maker. It needs to be pointed out that *Hong Leong Equipment* went further than the earlier case of *Rohana*. In *Rohana*, it was held that there was no general right to a reasoned decision whereas *Hong Leong Equipment* recognised a general right to a reasoned decision provided a fundamental liberty is adversely affected. Another matter to note is that in *Hong Leong Equipment*, the right to a reasoned decision is linked to the deprivation[42] of a fundamental liberty.[43]

In a recent case, *Sugumar Balakrishnan*,[44] the Court of Appeal took the opportunity to push the frontiers of procedural fairness even

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[42]It should also include curtailment or restriction on fundamental liberties provided that it has adverse consequences on individuals.

[43]The Court of Appeal in *Hong Leong* was of the view that there is no way to enforce the right to a reasoned decision against the Minister. This is in accord with a rule of law that held sway in the *Padfield* era. But it may be observed that if there is a fundamental right to a reasoned decision, it sounds absurd that that right cannot be enforced especially when the Courts of Judicature Act 1964 has a specific provision for enforcing fundamental rights. It is perhaps time to consider whether we should abandon the archaic Common Law rule which is in conflict with the Constitution, *a fortiori* a fundamental liberty provision. It may not be out of context here to refer to the position in India where the Indian courts have discarded self-imposed Common Law rules in calling up government files to determine if there is any basis in making a particular decision affecting the rights of an individual. See M. P. Jain, *Treatise on Administrative Law*, Vol. 1, pp. 884-889 under the sub-heading of *'Disclosure of Reasons'*. Then compare it with the practice of the Malaysian courts. See *Mohd Yusof Mohamad v Kerajaan Malaysia & Anor* [1999] 5 CLJ 386.

[44]*Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah, & Anor* [1998] 3 MLJ 289. Hereinafter this case shall be referred to as *'Sugumar Balakrishnan'*.

further. It held that the right to a reasoned decision extends to all cases where the rights of a person are adversely affected by the decision of a public decision-maker. It may be noted that this extension of the right to procedural fairness is most welcome and is based on Art. 8(1) of the Constitution which is the heart of due process[45] in this country. By relying on Art. 8(1) alone, there is no necessity to relate it to any breach of any of the fundamental liberty provisions of the Constitution and the scope of procedural fairness or the right to be heard generally is accordingly extended to its widest amplitude.[46]

Does procedural fairness include a right to an oral hearing, a right to be represented by another, a right to cross-examine witnesses, *etc.*, are questions that are bound to be raised for reconsideration by the courts.

In *Utra Badi a/l K. Perumal & Anor v Lembaga Tatatertib Perkhidmatan Awam*,[47] it was held that the right to make a plea in mitigation of the punishment proposed to be imposed on a public officer after the finding of guilt by a disciplinary authority is part of 'a reasonable opportunity of being heard' in the context of Art. 135(2)[48] of the Constitution. This is because consideration of the appropriate punishment to be imposed involves a separate decision-making process altogether whereby a second opportunity of being heard is rendered necessary. It may be added that to hold otherwise[49] will not be in accordance with the spirit of procedural fairness whether in the

[45] Both substantive and procedural. In fact, there is *dictum* to this effect upon a careful reading of the earlier case of *Tan Tek Seng*. It may be noted that the cases of *Tan Tek Seng*, *Air India v Nergesh Meerza* AIR 1981 SC 992 and *Ranjit Thakur v Union of India* AIR 1987 SC 2386 may be cited as authorities for substantive due process. *Tan Tek Seng* is also an authority for procedural due process.

[46] Observations on substantive due process will be made later under the sub-heading of *'Doctrine of Proportionality'*.

[47] [1998] 3 MLJ 676.

[48] This provision confers on the public officers a reasonable opportunity of being heard in a case of dismissal or reduction in rank. Even in the field of private employment, the second opportunity of being heard is required under s. 14 (1) of the Employment Act 1955. See the case of *Said Dharmalingam bin Abdullah v Malayan Breweries (Malaya) Sdn. Bhd.* [1997] 1 MLJ 352, (SC).

[49] *Ningkan Umu v Suruhanjaya Perkhidmatan Awam Malaysia* [1999] 1 CLJ 448.

wider context of the combined effect of Arts. 5(1) and 8(1) or Art. 8(1) alone or in the narrower context of Art. 135(2).

Further developments[50] in this area of the law are bound to take place in time to come provided that the liberal trend initiated by the Court of Appeal is maintained.[51]

B. Moulding of Relief

1. The rule and exception to the rule

The power to mould judicial relief in an application for judicial review is enjoyed and exercisable by the High Court,[52] the Court of Appeal[53], as well as the Federal Court.[54]

In the matter of the moulding of judicial relief by the High Court, the source of the power is to be found in the Courts of Judicature Act 1964. Under the heading of *'Additional powers of High Court'*, paragraph 1 of the Schedule to the Act read in conjunction with section 25(2)[55] thereof has it that:

> Power to issue to any person or authority directions, orders or writs, including writs of the nature of *habeas corpus*, *mandamus*, *prohibi-*

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[50]For example, right to an oral hearing or the right to counsel could be made part of *'reasonable opportunity of being heard'* under Art. 135(2) in cases of dismissal or reduction in rank in view of the recent extensions of the frontiers of procedural fairness.

[51]The Federal Court in *Majlis Perbandaran Pulau Pinang* did not endorse the liberal view of the Court of Appeal on the matter of the right to a reasoned decision. It preferred to follow the common law approach adopted in such cases like *Rohana*.

[52]In the case of the High Court, the power is conferred under section 25(2) of the Courts of Judicature Act 1964 read with paragraph 1 of the Schedule to the Act which shall be dealt with shortly. See also O. 92, r. 4 of the Rules of the High Court 1980.

[53]*Hong Leong Equipment*. See R. 76 of the Rules of the Court of Appeal 1994.

[54]*R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145; *Kumpulan Perangsang Selangor Bhd. v Zaid bib Hj Mohd Noh* [1977] 1 MLJ 789. See section 69(4) and (5) of the Courts of Judicature Act 1964, r. 51(4) and (5) of the Rules of the Supreme Court 1980 read with r. 136 of the Rules of the Federal Court 1995.

[55]Which confers additional powers as set out in paragraph 1 of the Schedule.

> *tion, quo warranto* and *certiorari*, or any others, for the enforcement of the rights conferred by Part II of the Constitution, or any of them, or for any purpose.

In respect of the said provision, the Court of Appeal in *Hong Leong Equipment* has pointed out and emphasised that:

> [T]he power of the High Court in the field of public law remedies is not confined to the grant of usual prerogative orders known to English law. Our courts should not consider themselves to be fettered by those antiquated shackles of restrictive traditionalism which the common law of England has imposed upon itself. They are at liberty *to develop a common law* that is to govern the grant of public law remedies *based upon our own legislation*. They may, of course, be guided by the decisions of courts of a jurisdiction which has an analogous provision. But ultimately, they must hearken to the provisions of our own written law when determining the nature and scope of their powers.
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> [T]he wide power conferred by the language of para. 1 of the Schedule enables our courts to adopt a fairly flexible approach when they come to decide upon the appropriate remedy that is to be granted in a particular case. The relief they are empowered to grant is by no means to be confined within any legal straitjacket. They are at liberty 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.[56]

Under the traditional inherent jurisdiction, the High Court always has the power to grant prerogative remedies or writs at common law. Under the inherent jurisdiction, which is still in vogue today, the rule is that in judicial review, the High Court does not probe into the merits of a discretionary decision. The High Court does not substitute its own discretion for that of the body under review. This is because judicial review is merely a supervisory function where the High Court is only concerned with the manner in which a decision is made or, in other

[56][1996] 1 MLJ 481, pp. 543-544. Emphasis is added on the words italicised. This passage was cited with approval by the Federal Court in *Rama Chandran*. See [1997] 1 MLJ 145, p. 227.

words, the decision-making process or the legality of a decision. The usual practice of the High Court in an application for judicial review is to stick to the general rule of the Common Law, *viz.*, judicial review is concerned with the decision-making process of a decision under review. However, sometimes, the general rule may be departed from where the exceptional circumstances or the factual matrix of a particular case warrant such a departure. It must be stressed here that in the discussion that follows hereinafter we are discussing what may be loosely labelled as *'an exception to the rule'* whenever the additional powers are invoked to supplement the inherent power. But before we discuss the exception to the rule, the general rule must be kept firmly in mind. This is because subsequent case law development seems to treat the exception as the rule causing some confusion with regard to the actual scope of the application of s. 25(2).[57]

Besides the inherent jurisdiction, the High Court also enjoys additional powers conferred by the Courts of Judicature Act 1964. They include, *inter alia,* the power to issue *any order or direction*, even writs of the nature of *habeas corpus*, *mandamus*, *prohibition, quo warranto* and *certiorari*, or any others for the purpose of enforcing any right conferred by Part II of the Constitution or for any purpose. Under the additional powers, besides quashing, for example, as the recent case law has shown, an award of the Industrial Court in a complaint by an employee that he has been dismissed without just cause or excuse under s. 20(1) of the Industrial Relations Act 1967, the High Court also possesses the power to make consequential orders for the purpose of assessing fair compensation to the dismissed employee without remitting the case back to the Industrial Court. This proposition was laid down and meaningfully applied by the Federal Court in *Rama Chandran* and reiterated by the Supreme Court in *Kumpulan Perangsang Selangor Bhd.*

Under this power, the High Court may, for example, if it finds that it is not appropriate to order reinstatement of the dismissed employee, assess the amount of compensation itself without remitting the case

[57] Except for cases like *Majlis Perbandaran Pulau Pinang* (FC) and *Menteri Sumber Manusia v Association of Bank Officers, Peninsula Malaysia* [1999] 2 MLJ 337 (FC).

back to the Industrial Court for the same to be decided as was the standard practice followed before *Rama Chandran* in the interests of the dismissed employee. The Federal Court in *Rama Chandran* justified this novel step of deciding the matter of fair compensation itself without remitting the case back to the Industrial Court in order not to prolong[58] the industrial dispute, to avoid incurring further delay and expenses as well as to prevent further mental distress and suffering to the dismissed employee.[59] Under the additional powers, the High Court may even grant interest on the amount awarded.[60] The power to order payment of interest, damages or any other order comes under the words 'directions' or 'orders' in paragraph 1 and can be resorted to after granting the appropriate writ remedy. Hence, if the writ remedy is combined with the appropriate order or direction, the powers under paragraph 1 is wider and more effective than the writ remedies at Common Law. Another observation to be made is that the phrase *"of the nature of"* contemplates not the original Common Law writ remedies but the wider ones specifically intended by s. 25(2). Writs of the nature of certiorari, mandamus, *etc.*, are the creation of s. 25(2) and are intended to break away from the restrictive writ remedies at Common Law. Hence, there is plenty of room for creativity in the moulding of relief under s. 25(2) in the field of public law remedies in this country.

Since the 1980s, the Indian Supreme Court has made use of the additional powers either under Art. 226 or Art. 32[61] of the Indian

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[58]The complainant had been out of job for 7 years and was already 51 years old at the time when the dispute came up to the Federal Court.

[59]See [1997] 1 MLJ 145, p.185.

[60]*Devaki Nandan Prasad v Bihar* AIR 1983 SC 1134 – a civil servant was unlawfully denied pension for 16 years. The Indian Supreme Court ordered payment of interest at 6% on the arrears of pension awarded as well as exemplary costs of Rs. 25,000.

[61]These two provisions of the Indian Constitution are similar to our provisions in the Courts of Judicature Act 1964.

Constitution in a very creative and dynamic manner.[62] Hence, the additional powers of the High Court in the matter of the moulding of judicial relief are very wide indeed in the field of public law remedies. It is a general power that cannot be truncated or confined within any legal straightjacket.

It is, therefore, submitted that what the Federal Court had decided in *Rama Chandran* was proper and most welcome and must be lauded because it dealt with a very important and unique feature of our law not discovered until very recently despite its presence in the statute book since 1964.[63] At the same time, it needs to emphasised that, the discretion to mould judicial relief under the additional powers, being a judicial discretion, like any other discretion, must not be abused by the reviewing court and the litigants.[64] The discretion in question may only be resorted to whenever the circumstances of a particular case warrant its invocation or application. For example, if a case needs further enquiry, surely the matter needs to be remitted back to the Industrial Court for that task to be carried out. This is to allay the fear of the faithful advocates of the common law principles of judicial review who somehow still cling dearly to the rigid common law principles in the post-*Tan Tek Seng* era. In respect of this very matter, it will be better to refer to a note of caution offered by the Federal Court in *Rama Chandran* and the Supreme Court in *Kumpulan Perangsang Selangor Bhd.* In *Rama Chandran,* it was said that:

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[62]In *Shivsagar Tiwari v India* (1996) 6 SCC 558, a minister who had abused his discretion in allotting shops/stalls to several persons without following policy guidelines was ordered by the court to pay exemplary damages to the Exchequer. The Indian Supreme Court has also frequently entertained public interest litigation with the appropriate orders and directions against the offenders like factories causing pollution and the relevant law enforcement authorities – *MC Metha v India* (1987) 4 SCC 463, for example.

[63]In fact, in India, this power under Art. 226 or Art. 32 of the Indian Constitution was only popular since the 1980s.

[64]It seems that there is much unhappiness amongst lawyers that after *Rama Chandran*, section 25(2) has been frequently abused. Instead of going by section 33A of the Industrial Relations Act 1967, attempts are made to circumvent section 33A by resorting to judicial review of the awards of the Industrial Court. The current practice may have to be resolved in the light of the rule, the exception to the rule suggested as well as the issue of alternative remedy.

> Needless to say, if, as appears to be the case, this wider power is enjoyed by our courts, the decision whether to exercise it, and if so, in what manner, are matters which call for the utmost care and circumspection, strict regard being had to the subject matter, the nature of the impugned decision and other relevant discretionary factors. A flexible test whose content will be governed by all the circumstances of the particular case will have to be applied.
>
> For example, where policy considerations are involved in administrative decisions and courts do not possess knowledge of the policy considerations which underlie such decisions, courts ought not to review the reasoning of the administrative body, with a view to substituting their own opinion on the basis of what they consider to be fair and reasonable on the merits, for to do so would amount to a usurpation of the power on the part of the courts.[65]

At another place, it went on to say that:

> It must be remembered that we are here concerned with an appeal which arises from Judicial Review proceedings whose target was an award of the Industrial Court, an inferior court, and not an administrative decision by bodies or persons who are charged with the performance of public acts or duties. It cannot be said, therefore, that by intervening in the manner which we propose to do, we would be trespassing into the domain of the executive, thus violating the doctrine of separation of powers, and so acting undemocratically.

In *Kumpulan Perangsang Selangor Bhd*, the Supreme Court pointed out that:

> ... Unlike the executive, the judiciary is not armed with all the information relevant to such matters and one could well understand a High Court, in the exercise of its discretionary power, declining to enter into the merits of a decision involving these considerations.[66]

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[65][1997] 1 MLJ 145, p. 197.

[66][1997] 1 MLJ 789, p. 799.

It needs to be pointed out that too much should not be read into the *dicta* quoted. The additional reviewing power of the High Court is meant to be used in circumstances where the archaic common law rules governing judicial review impose upon the High Court unnecessary restrictions. In such cases, the additional power may be resorted to particularly with a view to safeguarding and protecting rights protected by the Constitution. Any attempt to curtail or stifle the use of the additional powers must be viewed negatively. In appropriate cases, procedural restrictions must somehow give way to the enforcement of fundamental liberties or the vindication of the Rule of Law otherwise the fundamental liberty provisions of the Constitution become mere promises of unreality. And, it is also important to reiterate that the additional power of moulding judicial relief is *a general power*[67] and, as such, its use should *not* be restricted to reviewing the awards of the Industrial Court only.[68] That power may be resorted to so long as it involves the review of a decision of a public decision-maker, an inferior tribunal or even a statutory body, exercising a discretion adversely affecting a right protected by the Constitution or any other legal right.

2. Grounds of judicial review

Closely associated with the additional powers of the High Court in an application for judicial review are the grounds of judicial review. In *Rama Chandran*, the Federal Court also took the opportunity to lay down the grounds of judicial review. It adopted the three grounds of judicial review formulated by the House of Lords in *CCSU*[69] - illegality, irrationality and procedural impropriety:

> ... one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review.

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[67] Nowhere in s. 25(2) or paragraph 1 thereof may an expression be identified stating that the powers enumerated therein are to be confined to reviewing the orders, decisions or awards of the Industrial Court only.

[68] See the contrary remarks in the case of *Mohd Yusof Mohamad v Kerajaan Malaysia & Anor* [1999] 5 CLJ 386.

[69] *CCSU v Minister for Civil Service* [1985] AC 374. See also *Minister of Home Affairs v Persatuan Aliran Kesedaran Negara* [1990] 1 MLJ 351, p. 355.

> The first ground I would call "illegality", the second "irrationality" and the third "procedural impropriety". That is not to say that further development on a case-by-case basis may not in the course of time add further groups. I have in mind particularly the adoption in the future of the principle of "proportionality" which is recognised in the administrative law of ... the European Economic Community; ...
>
> By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it....
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> By "irrationality" I mean what can now be succinctly referred to as "*Wednesbury* unreasonableness" (*Associated Provincial Picture Houses Ltd. v Wednesbury Corp.*, [1948] 1 KB 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.
>
> I have described the third head as "procedural impropriety" rather than failure to observe the basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice.[70]

The Federal Court also adopted 'proportionality' as the fourth ground of judicial review as was proposed by Lord Diplock in the *CCSU* case.[71] This was confirmed by the Supreme Court in *Kumpulan Perangsang Selangor Bhd*.[72] It is now clear that the doctrine of proportionality is part of our law.[73]

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[70] [1985] AC 374, pp. 410-411, per Lord Diplock.

[71] See [1997] 1 MLJ 145, pp. 188-190.

[72] See [1997] 1 MLJ 789, pp. 798-799.

[73] See also *Sugumar Balakrishnan v Pengarah Imigresen Negeri Sabah & Anor* [1998] 3 MLJ 289, p. 323. In this respect, our law on the grounds of judicial review is slightly wider than that laid down in *CCSU*.

The Federal Court in *Rama Chandran* then went on to hold that an award of an Industrial Court could be reviewed *"for substance as well as process"*. This proposition, too, is now part of our law as it has been adopted by other cases such as *Said Dharmalingam*[74] and *Kumpulan Perangsang Selangor Bhd.* We may now pause to examine what is meant by the phrase *"for substance as well as process"*. It needs to be pointed out again that the usual common law practice of reviewing an impugned decision of a body under review is that the reviewing court will not look into the merits of the impugned decision. It is only concerned with seeing whether there exists any legal flaw or impropriety in the decision-making process of the body under review. However, under the additional powers conferred by the Courts of Judicature Act 1964, the High Court has the power to go beyond the traditional approach and look into the merits or substance of the impugned decision as well *in an appropriate case where the circumstances of a particular case warrant it*[75] and mould the reliefs accordingly. We must again pause to remind ourselves which is the rule and which is the exception as has been pointed out above and it is important that we do not mix up the exception for the rule. In other words, subsequent to *Rama Chandran*, we must not simply and mechanically regurgitate what was held in that case in every case without understanding what it is really all about. An exception should not be cited and regarded as the rule in every case. It is apprehended that this appeared to be the position for some time because in practically every case subsequent to *Rama Chandran*, the court just faithfully cited *in verbatim* what was laid down earlier.[76] A recent judicial pronouncement that the rule laid down in *Rama Chandran* is confined only to review of the awards of the Industrial Court appears to be a little

[74] *Said Dharmalingam bin Abdullah v Malayan Breweries (Malaya) Sdn Bhd* [1997] 1 MLJ 352 (SC).

[75] Emphasis has been added to the words italicised in order to indicate the limits of this additional power.

[76] For example from *Ekambaram a/l Savarimuthu v Ketua Polis Daerah Melaka Tengah & Ors* [1997] 2 MLJ 454 till *Mohd Yusof Mohamad v Kerajaan Malaysia & Anor* [1999] 5 CLJ 386. The position is clearer now after the recent Federal Court cases cited earlier.

confusing.[77] With a view to avoiding further confusion and any possible abuse of the judicial discretion under the Courts of Judicature Act 1964, it is therefore proposed that we need not be over-enthusiastic over the rule established in *Rama Chandran*. To recapitulate, it is the general rule of judicial review which has to be applied first, *viz.*, in almost every case, the rule should be that, in an application for judicial review, the reviewing court is only concerned with reviewing the decision-making process of the body or tribunal under review. It needs to be pointed that it is not in every case that the reviewing court must invoke the rule laid down in *Rama Chandran*.[78] The court may, however, in some exceptional cases, so to speak, review the merits of a decision whenever the peculiar factual matrix of a particular case warrants such review.[79] If it is not so, the litigant or litigants will try to persuade the reviewing court in every case that it has the discretion to go into the merits of the case under review and thereby turn a review function into an appeal.

C. Doctrine of Proportionality – Part of Our Law

The doctrine of proportionality was first introduced in this country by the Court of Appeal in *Tan Tek Seng* in the sense that a punishment imposed by a public decision-maker on a person who has committed a breach of a law must be proportionate to the wrongdoing complained of. However, if the punishment imposed is unduly excessive, then it is liable to be quashed or declared null and void in an appropriate application for judicial review for violating the doctrine of proportion-

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[77] *Mohd Yusof Mohamad v Kerajaan Malaysia & Anor* [1999] 5 CLJ 386. It needs to be pointed out that *Rama Chandran* is based on *CCSU* and *CCSU* is always regarded as laying down the grounds of judicial review generally. Hence, *Rama Chandran* cannot be interpreted to confine itself to the review of Industrial Court awards only.

[78] This is affirmed by the case of *Majlis Perbandaran Pulau Pinang*. The Federal Court in that case sent the case back to the Council to reconsider and re-determine the matter according to the law, together with some directions.

[79] It is best to see a couple of Indian cases on how the discretion is used: *Devaki Nandan Prasad v Bihar* AIR 1983 SC 1134 and *O.P. Gupta v India* AIR 1987 SC 2258.

ality. The application of this doctrine is based on Art. 8(1) of the Constitution which constitutes the heart of due process in our system. This was later adopted by the Federal Court in *Rama Chandran* and the Supreme Court in *Kumpulan Perangsang*. Recently, the Court of Appeal in *Sugumar Balakrishnan* again referred to its own earlier *dictum* in another case which summarises the law on the doctrine of fairness:

> The result of the decision in *Rama Chandran* and the cases that have followed it is that the duty to act fairly is recognised 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 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.[80]

In all the case law cited above, the doctrine of proportionality is said to be part of our law which operates as the fourth ground of judicial review besides illegality, irrationality and procedural impropriety.[81] It is submitted therefore that no rule of law may be cited as authority for saying that excessive punishment cannot found an action in an application for judicial review in the context of the application of the doctrine of proportionality under Art. 8(1). It is submitted that the case of *Ng Hock Cheng*[82] is no authority to the contrary because that case and the cases that followed it were decided totally on some old common law concepts which should no longer be in vogue in the present era. A case which sought to decide important issues of public law by avoiding the supreme law as enshrined in the Constitution, particularly Art. 8(1),

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[80] [1998] 3 MLJ 189, p. 323.

[81] The Federal Court in *Majlis Perbandaran Pulau Pinang* affirmed its earlier stance on the same in *Rama Chandran*.

[82] *Ng Hock Cheng v Pengarah Am Penjara & 2 Ors* [1997] 4 AMR 53:4193. See commentary on *Ng Hock Cheng* in the Survey of Malaysian Law 1997.

should be viewed with disfavour and suspicion. Moreover, that case was based on an earlier case[83] which was decided in conflict and ignorance of the earlier Federal Court case of *Fadzil bin Mohd Noor*.[84]

It is to be noted that the doctrine of proportionality is part of the wider concept of reasonableness or non-arbitrariness housed in Art. 8(1) of the Constitution. The concept of substantive unreasonableness or arbitrariness[85] under Art. 8(1) is wider than proportionality and *Wednesbury*[86] unreasonableness. It is capable of being deployed to strike at *'any law or action or decision of a public nature'*[87] which is arbitrary or unreasonable.[88] Used in the manner described, it may be observed that Art. 8(1) is capable of imparting a very activist and dynamic dimension to the field of public law in this country in time to come provided that the courts adopt an activist and dynamic approach in interpreting issues of public law which adversely affect the rights of the people.[89] Its use is preferred to '*Wednesbury* unreasonableness' partly also because it has the strong backing of a fundamental liberty provision of the Constitution. A couple of Indian Supreme Court cases may be cited here to indicate how the concept is used in India. In *Air India v Nergesh Meerza*,[90] the Supreme Court struck down a service regulation of Air India which provided that air hostesses had to retire upon their first pregnancy after marriage. The Supreme Court castigated it as unreasonable and arbitrary and 'an open insult to Indian

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[83] *Mohd bin Ahmad v Yang di Pertua Maljis Daerah Jempol, Negeri Sembilan & Anor* [1996] 3 AMR 27:2129.

[84] *Fadzil bin Mohd Noor v UTM* [1981] 2 MLJ 196.

[85] To put it positively, substantive fairness.

[86] *Associated Provincial Picture Houses Ltd. v Wednesbury Corp.* [1948] 1 KB 223.

[87] Emphasis is added to the words italicised in order to indicate the possible scope of application of this doctrine.

[88] Art. 8(1) is also capable of striking at any unfair procedure or any law prescribing an unfair procedure.

[89] Together with the *'equal protection clause'* which forbids unfair or discriminative treatment of persons similarly situated. It is submitted that Art. 8(1) may be more effectively used in conjunction with the additional powers provision in the Courts of Judicature Act 1964 already discussed above.

[90] AIR 1981 SC 1829.

womanhood' and therefore violative of Art. 14[91] of the Indian Constitution. In another case, *Express Newspapers v India*,[92] a government order forfeiting the lease of the land and the demolition of the press building standing on the land leased was made pursuant to adverse criticisms by the newspapers of the Central Government concerning the 1975 Emergency. The impugned order of the government was held, *inter alia*, to be arbitrary and thereby violating Art. 14 of the Indian Constitution. Some local case law, for example, *Chai Choon Hon*,[93] and *Sri Lempah Enterprise*, if they were to be decided today, may be brought under this heading as well rather than under the rigid and narrow Common Law concept of unreasonableness.

D. *Sugumar Balakrishnan*'s Case

The Court of Appeal in *Sugumar Balakrishnan*[94] made a few signifi-

[91] The counterpart of Art. 8 of the Malaysian Constitution.

[92] AIR 1986 SC 872.

[93] *Chai Choon Hon v Ketua Polis Daerah Kampah* [1986] 2 MLJ 203 (SC); *Pengarah Tanah dan Galian, WP v Sri Lempah Enterprise Sdn. Bhd.* [1979] 1 MLJ 135.

[94] In *Sugumar*, the appellant's entry permit into Sabah was cancelled by the Director of Immigration, State of Sabah, under section 65(1)(c) of the Immigration Act 1959/1963 on the ground of his poor or low morals. The appellant commenced certiorari proceedings to quash the said decision. Leave to issue certiorari was granted except that the learned judge refused to grant a stay of execution on the ground that it would amount to granting an injunction in violation of section 54(d) of the Specific Relief Act 1950 and section 29(2) of the Government Proceedings Act 1956. The application for certiorari was rejected on several grounds such as that the ouster clause postulated in section 59A of the Immigration Act 1959/63 applied to any act done or decision made by the Director of Immigration and that there was no error of law in the cancellation of the entry permit by the Director of Immigration. The appellant appealed to the Court of Appeal and the appeals were allowed. First, an order for a stay of execution under O. 53, r. 1(5) of the Rules of the High Court 1980 is not an injunction. This is because an order of stay in the realm of public law remedies has the effect of temporarily suspending the effect of a public law decision pending the outcome of certiorari proceedings brought to challenge the validity of a particular decision. Secondly, the High Court was wrong in refusing certiorari. It was mainly because the immigration authority had committed an error law in the cancellation of the entry permit and that the decision of the immigration authority in the cancellation of the entry permit was substantively unfair because private morals is not a relevant consideration prescribed in section 9(1)(c) of the Immigration Act in the matter of the cancellation of an entry permit.

cant pronouncements, some of which will be looked into here.[95] They are:

(a) Judicial review is a basic and essential feature of our constitutional system and without it there will be no Government of laws and the Rule of Law will become a teasing illusion and a promise of unreality. No law passed by Parliament in the exercise of its legislative power may abrogate or take it away.[96]

(b) The power of judicial review need not be expressly provided for in the Constitution. The fact that the phrase '*judicial power of the Federation*' has been removed from Art. 121 of the Federal Constitution does not alter the position.[97]

(c) The judiciary is the ultimate interpreter of the Constitution. It is the solemn duty of the judiciary under the Constitution to keep the different organs of the State within the limits of their powers conferred upon them by the Constitution and other written laws. It is also a basic premise of the Rule of Law which permeates every provision of the Constitution and which forms its very core and essence that the exercise of the powers of the Executive or any other authority must not only be conditioned by the Constitution but also must be in accordance with law. The Government derives its powers from the Constitution. It is a limited Government and both the Executive and Legislature must act within the limits of their powers.[98]

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[95] A significant one on the extension of the right of procedural fairness to a reasoned decision has already been dealt with above in Part IV(A).

[96] *Minerva Mills Ltd. v India* AIR 1980 SC 1789; and *Sampath Kumar v India* AIR 1987 SC 386.

[97] *Liyanage v The Queen* [1967] 1 AC 259. The basic feature doctrine is used in the sense that it is inalienable despite statutory attempts to remove it.

[98] *Ibid.* It needs to be remembered that in *Tan Tek Seng* the Court of Appeal emphasised that issues of public law must be resolved by reference to the Constitution which is the supreme law.

(d) Arts. 5(1) and 8(1) are the fundamental guarantees of the Constitution. Art. 5(1) must be interpreted broadly and liberally with the widest amplitude and be given an expanded meaning. *The liberty of an aggrieved person to go to court and seek relief including judicial review of administrative actions is one of the many facets of personal liberty guaranteed by Art. 5(1).*[99] Non-arbitrariness or reasonableness is the essence of Art. 8(1). It pervades that provision 'like a brooding omnipresence'. It may be used to strike down State laws or actions which are arbitrary or unreasonable.[100]

(e) Statutory provisions inconsistent with the Constitution may be saved by the courts by using the rule of harmonious construction whereby the courts, instead of striking down a statutory provision altogether as being unconstitutional, may prefer to permit the impugned provision to operate in harmony with the Constitution.[101]

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[99] Emphasis is added. It is to be noted that in this country the right to access the High Court to enforce any breach of fundamental liberty is to be founded on the Courts of Judicature Act 1964.

[100] *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261; and *Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 AMR 6:433. In respect of the right to be heard, the Court of Appeal expressed the view that it can be taken away by statute because it is not protected by the Constitution. *Kulasingam & Anor v Commissioner of Lands, FT & Ors* [1981] 1 MLJ 204 was cited in support. It is to be noted that as procedural fairness is protected by Art. 8(1), no law may be made to take it away. *Kulasingam* is inapplicable here because it deals with a situation where the right to be heard is not protected by the Constitution. The combined effect of Arts. 5(1) and 8(1) is to preserve procedural fairness, not to exclude it.

[101] *Venkataramana Devaru v Mysore* (1958) SCR 895. Under this proposition, the Court of Appeal had in mind the ouster clauses postulated in statutes like section 59A of the Immigration Act 1959/1963. The Court took the view that such clauses could be saved by the rule of harmonious construction save where an error of law has been committed. However, another view may also be offered. If judicial review is a basic feature of the Constitution and coupled with Art. 8(1) which forbids arbitrary laws, then any law which seeks to restrict or exclude judicial review may be regarded as unconstitutional. See also two other recent cases of some interest: *Majlis Perbandaran Pulau Pinang* dealt with the important point of the existence of an alternative remedy in an application for judicial review and *Teh Guan Teik v IGP & Anor* [1998] 3 AMR 27:2141 held that certiorari and declaration are concurrent remedies.

VI. Some Aberrations and Inconsistencies

Hitherto, the discussion has primarily been on the recent positive case law developments that are most welcome, albeit long overdue. However, there are cases which have not been viewed favourably by the ardent advocates of the Rule of Law. Whatever the grounds or reasons are for criticising those case law developments, we may now single out some cases for discussion and comment and see if there is any justification for viewing them negatively.

1. Public interest litigation

At the rate case law has developed subsequent to the *UEM* case, we may say that our courts do not allow public interest litigation (PIL) to take roots in our system.[102] Any case that adopts the *Boyce's*[103] or *Gouriet's*[104] test of *locus standi* is bound to have the direct effect of deterring PIL from taking roots in our system. The two English cases favour the restrictive test of *locus standi*. The said test requires the litigant, in order to proceed on his own without joining the Attorney-General, to show that he is the aggrieved party as a result of injury to his private right or special damage peculiar to himself over and above other members of the public arising from the interference with the public right. Otherwise, the litigant has to join the Attorney-General by way of a relator action or the Attorney-General, *suo motu*, prosecutes the offender himself upon becoming aware of a breach of law by the offender. It needs to be pointed out that the restrictive test was laid down in 1903 and, as law is a living and dynamic thing, it constantly adapts and changes in order to meet the changing needs and demands of our times. A rule of law that freezes at 1903 is bound to be arcane, archaic and totally out of tune with the needs and de-

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[102] *Abdul Razak Ahmad v MBJB* [1995] 2 AMR 21:1174; *Ketua Pengarah Jabatan Alam Sekitar & Anor v Kajing Tubek & other appeals* [1997] 3 MLJ 23. See a commentary on the latter in the Survey of Malaysian Law 1997 in the Chapter on Administrative Law.

[103] *Boyce v Paddington Borough Council* [1903] 1 Ch. 109.

[104] *Gouriet v Union of Post Office Workers and Others* [1978] AC 435.

mands of the present day society. In India, PIL has developed quickly since the 1980s[105] and in England,[106] the home of the *Boyce's* test, PIL too has grown steadily in recent years. However, our system is seen to put brakes on the development of PIL. This brings us to why PIL is allowed to develop in modern times. A system based on the Rule of Law and constitutionalism and practises democratic government will find it difficult to hold back the due development of PIL in its system for too long. The primary purpose of PIL is to vindicate the Rule of Law and get unlawful action stopped by bringing actions or petitions in the courts of law. There is nothing repugnant to the Rule of Law to vindicate the rights and interests of the poor, uneducated or under-privileged or to institute proceedings to protect the environment when the authorities entrusted with statutory duties to protect and safeguard the rights and interests of the public have somehow failed to do so. The only fear and objection to PIL is that it will open the floodgate to unnecessary, frivolous and vexatious law suits against the government. However, the experience of countries allowing PIL to grow indicate otherwise. PIL is allowed provided it is brought *bona fide* and *pro bono publico* and not in the self-interest or self-aggrandisement of the litigant or litigants. Another reason used by our courts to block PIL is that law enforcement is the business of the relevant law enforcement authority concerned and not the members of the public. Ever since *UEM*, this has been the judicial attitude. Should it really be so? In *R v Metropolitan Police Commissioner, ex p Blackburn*,[107] the applicant sought an order of mandamus against the Police Commissioner directing him to enforce the gaming laws and to reverse the policy decision of not enforcing the laws. The court found that there was a duty to enforce the laws and there was a failure to enforce the laws. As the Police Commissioner had given an undertaking to en-

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[105] *People's Union for Democratic Rights v India* AIR 1982 SC 1473; *MC Metha v India* (1987) 4 SCC 463; *Janamohan Das v State* AIR 1993 Orissa 157.

[106] *R v Inspectorate of Pollution, ex p Greenpeace Ltd. (No.2)* [1994] 2 ALL ER 329; *R v Secretary of State for Foreign & Commonwelath Affairs, ex p Rees-Mogg* [1994] 1 All ER 457; *R v Secretary of State for Foreign Affairs, ex p World Development Movement Ltd.* [1995] 1 All ER 611. It is to be noted that the corresponding English provision has long been amended to accommodate *'the sufficient interest test'*.

[107] [1968] 1 All ER 763.

force the laws, mandamus was not issued against him. In *MC Metha v India*,[108] also known as the famous *Ganga Water Pollution case*, the Indian Supreme Court, *inter alia*, ordered the closure of the tanneries causing the pollution to the Ganga River and directed the relevant enforcement agencies to enforce the court's orders faithfully. The next question is whether we have laws which will allow PIL to develop in this country. It needs to be pointed out that in India, PIL thrives on Arts. 32 and 226 of the Indian Constitution. Art. 226 empowers the Indian High Court to entertain petitions to enforce fundamental rights or other rights. Art. 32 confers a similar jurisdiction on the Indian Supreme Court. In *Hong Leong Equipment*, our Court of Appeal pointed out that our section 25(2) of the Courts of Judicature Act 1964 read in conjunction with paragraph 1 of the Schedule thereto is *in pari materia* with Art. 226 of the Indian Constitution. Under the provisions referred to, the court has the power to issue any writ of the nature of *habeas corpus*, *mandamus*, *prohibition, quo warranto* and *certiorari*, or any others or *'any order or direction'* to *'any person or authority'*[109] for any of the purposes already mentioned. A look at our own law is necessary. Section 25(2) of the Courts of Judicature Act 1964 confers additional powers on the High Court and paragraph 1 of the Schedule thereto enumerates those powers. The said provision has already been discussed under the sub-heading of *'Moulding of Relief'*.[110] One of the reasons given in the *UEM* case by our Supreme Court for opting for the restrictive test of *locus standi* was that our O. 53 of the Rules of the High Court 1980 has not been amended along the lines of O. 53 of the Rules of the Supreme Court of England. But, it needs to be pointed out that there is no need to rely on O. 53 for the purpose of commencing a PIL action in the High Court. Moreover, it is arguable whether the reason given in *UEM* is tenable because *locus standi* has always been regarded as a rule of practice to be decided by the courts in accordance with the factual matrix of each individual case.[111] This speaks for the silence of our O. 53 in the matter of *locus standi*.

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[108] (1987) 4 SCC 463.

[109] The relief given here could be declaratory in nature.

[110] See Part V(B).

[111] [1988] 2 MLJ 12, p. 33.

In the light of the developments in England and India in the field of PIL, we may want to seriously consider whether we should allow some form of PIL to take root in our system. After all, as has already been pointed out, our system is one based on the Rule of Law and consitutionalism and practises a democratic form of government and as such, PIL should be an inalienable part thereof.

2. Unfettered discretion

Two decades ago, the Federal Court realised the dangers of having unfettered discretions. It in no uncertain terms, rejected it. In the words of the court:

> Unfettered discretion is a contradiction in terms ... It does not seem to be realised that this argument is fallacious. Every legal power must have legal limits, otherwise there is dictatorship ... In other words, every discretion cannot be free from legal restraint; where it is wrongly exercised, it becomes the duty of the courts to intervene. The courts are the only defence of the liberty of the subject against departmental aggression.[112]

However, since then till the present time, quite a number of unfettered discretions have been created by the Malaysian courts. A few examples would suffice to illustrate the point. The Supreme Court in *Sim Kie Chon v Superintendent of Pudu Prison*[113] expressed the view that 'mercy is not a right' and 'proceedings in court aimed at questioning the propriety or otherwise of such a decision are therefore not justiciable'. It is to be noted that this decision has put the prerogative of mercy as conferred by Art. 42 of the Constitution beyond the pale of judicial review. In *Mohd. Nordin bin Johan v Attorney-General of Malaysia*,[114] the Federal Court held that reg. 2(2) of the ESCAR[115]

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[112] *Pengarah Tanah dan Galian, WP v Sri Lempah Enterprise Sdn. Bhd.* [1979] 1 MLJ 135, p. 148.

[113] [1985] 2 MLJ 385.

[114] [1983] 1 MLJ 68.

[115] Essential (Security Cases) Regulations 1975. Reg. 2(2) thereof empowers the Attorney-General to classify a criminal offence as a security offence and thereby triable thereunder.

1975 'attracts the pure judgment of the Attorney-General which cannot be subjected to an objective test and is accordingly not amenable to judicial review'. Art. 145(3) of the Federal Constitution confers on the Attorney-General the power *'to institute, conduct or discontinue any proceedings for an offence, other than proceedings before a Syariah Court, a native court or a court-martial'*. It has been consistently held by the Malaysian courts that the Attorney-General has complete discretion, for example, whether to charge a person under one law or the other pertaining to the offence of unlawful possession of firearms.[116]

In the light of the case law developments subsequent to *Sri Lempah Enterprise*, one wonders if there is much wisdom in the creation of unreviewable discretions and if more such discretions will be created by the courts. More importantly, the advocates of the Rule of Law are worried about the implications of creating unreviewable discretions. Ideally speaking, a system that professes itself to be governed by the Rule of Law, constitutionalism and democratic government will do away with all forms of unreviewable powers. In such a system, if one really exists, the question which has to be asked is what is the scope of judicial review, and in a few special cases the scope for the review of discretionary decisions may be minimal. In other words, the real question is whether the discretion is wide or narrow, and where the legal line is to be drawn. It remains axiomatic that all discretions are capable of abuse, and that legal limits to every power are to be found somewhere.[117]

VII. Building and Consolidating On The Grounds Already Gained

Perhaps, the root cause of all the problems and confusion in the realm of Malaysian public law is the case of *Karam Singh*. As *Karam Singh* was based on the old English case of *Liversidge v Anderson,*[118] whose

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[116] *Johnson Tan Han Seng v PP* [1977] 2 MLJ 66; *PP v Lau Kee Hoo* [1983] 1 MLJ 157.

[117] Wade & Forsyth, *Administrative Law*, 7th ed., pp. 391 and 393.

[118] [1942] AC 206.

ghost has long been exorcised and buried by the British,[119] the time is now ripe for us to dispose of that troublesome case of ours by giving it a decent burial too. In the aftermath of *Tan Tek Seng* and *Rama Chandran*, we are left to wonder why in a case of detention without trial involving a grave violation of personal liberty, the Federal Court in *Karam Singh* did not vigorously protect and uphold the fundamental right guaranteed under Art. 5(1) of the Constitution by insisting on a full review of the deprivation of personal liberty.[120] And as that case was excusably wrong because it was decided at a time of emergency and also "at a time when the learning upon the interpretation of written constitutions was still at its infancy", there is no reason now why we must still cling to it. It is therefore suggested that preventive detention cases should be subjected to the full force of the *ultra vires* doctrine or the error of law review in both its procedural and substantive aspects.[121] Once that is done, we may then proceed to tackle other areas of public law which hinder judicial review.

With the advent of *Tan Tek Seng*, the *locus classicus* in the realm of our public law since Independence, we may now declare that the Malaysian Courts have finally discovered the *'Golden Rule'* of interpretation of the Constitution that will provide a real impetus to the proper growth and development of our public law. The Golden Rule referred to is none other than – as we have a living and dynamic Constitution which is our supreme law, the primary duty of our courts is to resolve all issues of public law by having resort to its provisions.[122]

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[119] *Yit Hon Kit* [1988] 2 MLJ 638, pp. 647-648.

[120] In service matters, it is submitted that the correctness of the case of *Pengarah Pelajaran, WP v Loot Ting Yee* [1982] 1 MLJ 86 is also highly suspect. That case was decided on Common Law principles when the matter should have been decided on the restrictions imposed on the doctrine of pleasure by the Constitution. A few other cases already referred to on the security of tenure, the right to pension and the right to procedural fairness should also be reviewed in the post-*Tan Tek Seng* era.

[121] There is also a need to amend provisions of the Constitution so as to enable writs of a nature of *habeas corpus* to be issued under section 25(2) of the Courts of Judicature Act 1964.

[122] It must be confessed that there is still a lack of realisation on our part on the importance of this approach. The rule does not discard the common law doctrine of *ultra vires*.

Public law remedies dispensed or administered by our courts must be liberalised by having recourse to the additional powers conferred by section 25(2) of the Courts of Judicature Act 1964 and other analogous provisions read in conjunction with paragraph 1 of the Schedule to the Courts of Judicature Act 1964. All the rigid and archaic English Common Law rules on public law remedies should be abandoned if their continued operation in our system will hinder the proper and healthy growth and development of our public law, particularly if they are in direct conflict with the provisions of our Constitution. All efforts must now concentrate on developing our own Common Law based upon and in conformity with our Constitution, national ethos, cultural background and the larger objectives which the government is seeking to achieve.

Needless to say, in the realm of Malaysian public law in the post-*Tan Tek Seng* era, the laws enacted by the Legislature or promulgated by the Executive and all actions and decisions of a public nature, will be increasingly subjected to the test of constitutionality based on the provisions of our Constitution.[123] Art. 8(1), the heart of due process of our Constitution, will constitute the most powerful weapon in the hands of the courts to strike at any laws, any decisions or actions or even policies of a public nature which are regarded as unreasonable or arbitrary. It may even be proposed that laws which impose curbs or restrictions on fundamental liberties expressly sanctioned under a particular provision of Part II of the Constitution should be subjected to the rigid scrutiny of Art. 8(1), besides the possibility of contravening the provision that guarantees a particular fundamental right. It may be argued that laws that impose excessive curbs or restrictions on fundamental liberties may fall foul of Art. 8(1) for being arbitrary or unreasonable. If it is otherwise, then the sanctity of fundamental liberties, the Rule of Law and the supremacy of the Constitution *'will become a teasing illusion and a promise of unreality'*. Furthermore,

[123] It will be beyond the scope of this article to delve into the potential scope of operation of this proposition. Suffice it to say that its scope of operation is immense and exciting. Perhaps an example may be given. The decision of the High Court in *Chai Choon Hon's* case is a classic illustration of the possible operation of the proposition made.

all deprivation or restrictions upon our rights or interests are also to be subjected to the rigorous requirements of procedural fairness either under the combined effect of Art. 5(1) and Art. 8(1) or the wider protection of Art. 8(1) alone.

Another observation to be made is that we cannot now turn back on *Tan Tek Seng*, *Hong Leong Equipment* or *Rama Chandran*. The developments brought about by these cases were long overdue. They should have come a decade or two earlier. We have to accept them magnanimously as part of our law. They need to be there to protect and preserve our much-cherished fundamental rights as protected and guaranteed by the Constitution. Coupled with the need to defend, protect and preserve the more noble principles of the Rule of Law, constitutionalism and democratic government, we have to forge ahead and further develop our own Common Law in the field of Public Law in conformity with these principles.[124]

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[124] The most recent case law in this country on the whole does not seem to live up to the expectations and hopes kindled by the earlier cases of *Tan Tek Seng*, *Hong Leong Equipment*, *Rama Chandran* and *Sugumar*. It appears that the interpretation of our supreme law is yet to find the right key.

THE NEW AND MULTI-FACETED DIMENSIONS OF ARTICLES 5 AND 8 OF THE FEDERAL CONSTITUTION IN THE CONTROL OF ADMINISTRATIVE ACTION

A. Introduction

Of late, administrative law in Malaysia has witnessed a tremendous spurt of judicial activity. A distinct change in judicial policy on matters pertaining to public law may be discerned from the recent decisions. The courts are making a determined and conscious effort to break away from a slavish adherence to the common law in England and looking instead to the constitutional principles enshrined in the Federal Constitution for guidance in resolving disputes between the individual and the administration. In particular, a fresh breath of life has been infused into articles 5 and 8 of the Federal Constitution and both articles have now become important weapons in the artillery of the judiciary to control the abuse of administrative power. The purpose of this paper is to examine the new and multi-faceted dimensions that have been given to articles 5 and 8 of the Federal Constitution.

B. Articles 5(1) and 8(1) as a Doctrinal Basis for Procedural Fairness

The first attempt to revive articles 5 and 8 of the Federal Constitution in preference over common law principles can be perceived in the arena of natural justice. Natural justice is one of the grounds of judicial review invoked by the courts in Malaysia to strike down unlawful administrative action. As natural justice is a creation of common law,[1]

[1] *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180.