SAVING "SAVE IN ACCORDANCE WITH LAW": A CRITIQUE OF *KULASINGAM* V *COMMISSIONER OF LANDS, FEDERAL TERRITORY*[1]

The phrase "save in accordance with law" occurs in two contexts in the Constitution of Malaysia: Article 5(1) ("No person shall be deprived of his life or personal liberty save in accordance with law") and Article 13(1) ("No person shall be deprived of property save in accordance with law"). In each the meaning ascribed to that phrase has in the past been generally narrow and positivistic. As far as Article 5(1) is concerned, the high-water mark is seen in *Karam Singh* v *Menteri Hal Ehwal Dalam Negeri*[1a] where "law" is articulated as to include substantive law but to exclude procedure. A slight broadening of judicial attitude appears in the later case of *Re Tan Boon Liat & Anor*[2] where the narrow view of *Karam Singh* (an approach sometimes attributed to the judgment of Suffian F.J. (as he then was)) is expanded and "law" is now interpreted as embracing within its purview rules of procedure, at any rate such rules as are regarded mandatory or as "conditions precedent"[3], the fulfilment of which is regarded necessary to preserve and uphold the right of personal liberty under Article 5(1). It needs mention too that the term "personal liberty" is limited by the Federal Court in *Government of Malaysia* v *Loh Wai Kong*[4] to cases relating to unlawful detention and does not, therefore, refer to a right to travel abroad, or indeed to freedom of movement generally.[5] In the context of Article 5(1) at least, and despite the slight broadening in *Tan Boon Liat*, the protection afforded by that provision has been narrowly construed, and there is scant evidence to suggest that Malaysian courts are willing to evaluate the "reasonableness" of law which bears on "life" and "personal liberty". In fact, *dicta* in several cases suggest that the American doctrine of "due process" has no place in Malaysian constitutional law[6] and that, as

[1] [1982]1 M.L.J. 204

[1a] [1969]2 M.L.J. 129 (Federal Court; Azmi L.P., Ong Hock Thye C.J. (Malaya), Suffian, Gill & Ali F.J.J.)

[2] [1977]2 M.L.J. 108 (Federal Court; Suffian L.P., Gill F.J., Lee Hun Hoe C.J. (Borneo) Ali, H.S. Ong F.J.J.)

[3] *Ibid.*, see e.g. Lee Hun Hoe C.J. at p. 114, and Suffian L.P. at p. 109

[4] [1979]2 M.L.J. 33 (Suffian L.P., Raja Azlan Shah, Wan Suleiman, Chang Min Tat & Syed Othman F.J.J.)

[5] Cf. the High Court Judgment in the same case; *Loh Wai Kong* v *Government of Malaysia* [1978]2 M.L.J. 175 (Gunn Chit Tuan J.)

[6] See e.g. *Re Tan Boon Liat & Anor* [1977]2 M.L.J. 108, 110

long as a law is enacted within the strict legislative competence of Parliament, "the courts should simply apply the law, no matter how harsh its effects may be. . ."[7]

"Save in accordance with law", as used in Article 13(1), also fits into the above frame of thought. The blame can of course be placed on the citation and approval in Malaysian cases of a doubtful decision of the Supreme Court of Burma in *Tinsa Maw Naing* v *The Commissioner of Police, Rangoon*[8] where the following passage appears:

> . . . when the Constitution speaks of "law" it speaks of the will of the legislature enacted in due form, provided that such enactment is within the competence of the legislature.[9]

"Law" has therefore been interpreted in a succession of cases as denoting "enacted law", and if it exists to support a deprivation of property, its harshness or unreasonableness is legally irrelevant. For example, in *Comptroller-General of Inland Revenue* v *N.P.*[10] the Federal Court declares that there can be "no resort to natural justice"[11] when determining the constitutional validity of a method of tax assessment. The tax law in question stipulates an assessment as conclusive, and even where an objection is filed, the full amount assessed must be paid beforehand. An overassessed amount is repayable only after the appeal procedure under income tax legislation has taken its course. The contested method of assessment and collection is held valid. As stated in *Arumugam Pillai* v *Government of Malaysia*,[12] there can be no questioning of a law's "reasonableness by invoking Article 13(1) of the Constitution however arbitrary the law might palpably be."[13] The only exception to this narrow interpretation appears in the High Court decision in *Lai Tai* v *Collector of Land Revenue*[14]. *Lai Tai* admits the relevance of natural justice rules in reading the provisions of the old Land Acquisition Enactment, holding:

[7] *Andrews s/o Thamboosamy* v *Superintendent of Pudu Prison* [1976]2 M.L.J. 156, at p. 158, per Suffian L.P.

[8] [1950] Burma Law Rep. 17

[9] Approved in *Comptroller-General of Inland Revenue* v *N.P.* [1973]1 M.L.J. 165, at p.166 (High Court; Chang Min Tat J.); *Arumugam Pillai* v *Government of Malaysia* [1975]2 M.L.J.29 (Federal Court; Gill C.J.(Malaya), Ong Hock Sim & Wan Suleiman F.JJ.). See also *Philip Hoalim* v *State Commissioner, Penang* [1974]2 M.L.J.100 (Federal Court; Azmi L.P., Ali & Raja Azlan Shah F.JJ.), esp. at p.103 where Ali F.J. holds: "Article 13(1) clearly does not restrict legislative powers but merely declares unconstitutional or prohibits any illegal executive acts of depriving property."

[10] *Ibid.*

[11] At p. 166

[12] [1975]2 M.L.J.29

[13] At p.30

[14] [1960]26 M.L.J.82 (Adams J.)

> Article 13. . . demands that no person shall be deprived of his property except in accordance with law. It is essential that the intention as well as the provisions of the enactment be observed.[15]

Here then at least is a call for creative constitutional interpretation, but the case remains an isolated example, to be glossed over or distinguished in later cases. The preponderant trend has been in favour of the cautious approach and unquestioning deference to "the will of the legislature enacted in due form": the method of judicial self-restraint, the strict constructionist, the literalist, the high positivist. In fairness, the Federal Court decision in *Selangor Pilot Association* v *Government of Malaysia*[16] hints differently, for here the Court has shown itself willing to expand the concept of "property", together with its "deprivation" and "compulsory acquisition or use", as to hold that loss of goodwill in a business carries with it a right to compensation (under Article 13(2)), and that negative restrictions on property rights may in some circumstances amount to "compulsory acquisition or use", even though there is no actual taking into possession by the state, or a state-controlled body, of property. This wide reading of Article 13 has been reversed on appeal by the Privy Council with a strong dissenting judgment.[17] Nevertheless, the point is not lost that the Federal Court of Malaysia can at times display a sensitivity to constitutional values (in this respect, the right to property and its ramifications), thus exercising its power of judgment creatively, if and when it chooses to do so. In this regard the recent decision in *Kulasingam & Anor* v *Commissioner of Lands, Federal Territory*[18], which holds against the existence of any right of pre-acquisition hearing, is an unfortunate backtracking to an attitude, understandable enough during the early period in the development of Malaysian constitutional law when courts may be expected to be more concerned with consolidating the position of judicial review and therefore eschews any attempt at activism, but questionable when evaluated in the light of present-day developments in constitutional jurisprudence. If the early cases on Articles 5(1) and 13(1) can draw on the persuasive authority of comparable decisions as *Tinsa Maw Naing* and the Indian Supreme Court holding in *Gopalan* v *State of Madras*[19], the Federal Court now has before it *Ong Ah Chuan* v *Public Prosecutor* (Privy Council)[20] and *Maneka Gandhi* v *Union of India* (Indian Supreme Court).[21] *Ong Ah Chuan* is in fact cited by the Federal Court in *Kulasingam*, only to be distinguished.

[15] At p.85

[16] [1975]2 M.L.J.66 (Suffian L.P., Lee Hun Hoe C.J.(Borneo) & Ali F.J.)

[17] *Government of Malaysia* v *Selangor Pilot Association* [1977]1 M.L.J. 133; Lord Salmon dissenting.

[18] [1982]1 M.L.J.204 (Federal Court; Syed Othman F.J., Mohamed Azmi & Abdoolcader J.J.)

[19] (1950)S.C.R.88 ("Law" refers to "lex", not "jus")

[20] [1981]1 M.L.J.64

[21] [1978]2 S.C.R.621

On balance, the Privy Council is not perhaps noted for its contribution to the development of the constitutional laws of countries with written constitutions, of which Malaysia is one.[22] The Board has in general brought to bear on constitutional interpretation an unduly restrictive approach, at times betraying a failure to appreciate the full significance of a written, supreme Constitution. The Board's reading of the term "law" in *Ong Ah Chuan*, however, stands on a different footing. It states:

> In a Constitution founded on the Westminster model and particularly in that part of it that purports to assure to all individual citizens the continued enjoyment of fundamental liberties or rights, references to "law" in such contexts as "in accordance with law", "equality before the law", "protection of the law" and the like. . . refer to 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. It would have been taken for granted by the makers of the Constitution that the "law" to which citizens could have recourse for the protection of fundamental liberties assured to them by the Constitution would be a system of law that did not flout those fundamental rules. If it were otherwise it would be a misuse of language to speak of law as something which affords "protection" for the individual . . . and the purported entrenchment . . . would be little better than mockery.[23]

This view is reiterated in the subsequent Privy Council opinion in *Haw Tau Tau* v *Public Prosecutor*[24], the Board adding that the "law" contemplated "must not be obviously unfair".[25] More generally, in the earlier case of *Minister of Home Affairs* v *Fisher*[26] the Board distinguishes between statutory interpretation and constitutional interpretation, regarding the latter as "calling for principles of interpretation of its own, suitable to its character . . . without necessary acceptance of all presumptions that are relevant to legislation of private law."[27] It finds in favour of taking, as a "point of departure", a recognition of the character and origin of a constitutional instrument so as to "be guided by the principle of giving full recognition and effect to those fundamental rights and freedoms with a statement of which the Constitution commences."[28] These recent cases

[22] For a critical view of the Board, see David Pannick, *Judicial Review of the Death Penalty* (1982), esp. at pp.16-17. A more generous evaluation is offered by Jaconelli, *Enacting a Bill of Rights* (1980), at pp.186-192.

[23] [1981]1 M.L.J.64, at p.71, per Lord Diplock delivering the judgment of the Board.

[24] [1981]2 M.L.J.49.

[25] *Ibid.*, at p.50, per Lord Diplock.

[26] [1980]A.C. 319

[27] *Ibid.*, at p.329, per Lord Wilberforce.

[28] *Id.*

thus suggest very strongly, if only on the level of general principles, that the Board prefers a more dynamic approach to the task of constitutional interpretation.

Both *Ong Ah Chuan* and *Haw Tau Tau* are appeals from Singapore, and both turn on the proper interpretation of Article 9(1) of the Constitution of Singapore, a provision word for word the same as Article 5(1) of the Constitution of Malaysia. Indeed, Article 9(1) of the former is one of the several provisions "borrowed" from the Constitution of Malaysia. It is therefore inappropriate and unwise to neglect this valuable cue given by the Privy Council, even though the Board is no longer a final court of appeal for Malaysia in constitutional and criminal cases.

It must be said, however, that the actual decisions in these two cases are restrictive. In *Ong Ah Chuan*, the Board finds against any violation of Article 9(1), denying that the common law "presumption of innocence" is included in the "fundamental rules of natural justice" which are supposed to pervade that provision. Thus the Singapore legislation in issue (the Misuse of Drugs Act, 1973), which creates a rebuttable presumption against a person proven to have in his possession a quantity of proscribed drugs (in this case, heroin) to the effect that he is thereby presumed, unless the contrary is proven, to have such for the purpose of trafficking, is regarded valid. A separate argument that the mandatory death penalty prescribed for the offence of trafficking in more than a legally determined quantity of heroin (15 grammes) is arbitrary, and therefore offends Article 9(1), also fails. In *Haw Tau Tau* the Board refuses to regard the common law "privilege against self-incrimination" as embodied in the term "law". It is therefore constitutionally permissible to amend the rules of criminal evidence and procedure as to enable courts to draw adverse inferences from an accused's failure to testify, the accused in this case being made a competent and compellable witness. In this respect, both cases do not go so far as comparable Indian decisions. In *Maneka Gandhi* v *Union of India*[29], "except according to procedure established by law", as found in Article 21 of the Indian Constitution,[30] is interpreted as enacted law which cannot obviously be "arbitrary, unfair or unreasonable". Since Article 21, like Article 14 (equality before the law)[31], must answer the test of reasonableness, the mere existence of "enacted law" does not satisfy constitutional requirements as "law" in the contexts of these Articles. Aside from a holding that Article 21 of the Indian Constitution (unlike Article 5(1) of the Malaysian) embraces a right to travel abroad, *Maneka Gandhi* subjects rules relating to the deprivation of a passport to the standards of

[29] [1978]2 S.C.R.621

[30] "No person shall be deprived of his life or personal liberty except according to procedure established by law."

[31] "The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India."

fairness and reasonableness. This broad view of "law" is repeated in *Hussainara Khatoon & Ors* v *Home Secretary, State of Bihar*[32] and *State of Maharashtra* v *Champalal Punjaji Shah*[33] which hold that Article 21 requires fair rules on the granting of bails and the speedy trials of prisoners.[34] The Indian Courts have, since the positivistic decision of *Gopalan* v *State of Madras*[35], moved in favour of according a more dynamic approach to constitutional interpretation, a trend seen clearly in other landmark cases as *Kesavananda Bharati* v *State of Kerala*[36], *Indira Gandhi* v *Raj Narain*[37] and *Minerva Mills & Ors* v *Union of India*[38] which curb the amendment power under Article 368 of the Indian Constitution, subjecting it to a "basic structure" doctrine. In *Minerva Mills*, for example, an attempt by the Constitution (Forty-Second Amendment) Act, 1976 to oust judicial review of constitutional amendments is struck down as invalid, despite the clear wording in that Act that there shall be "no limits whatever" on the constituent power of the Indian Parliament. Judicial review is part of the "basic structure" underlying the Constitution, the case argues, so that it becomes futile to insulate the actions of Parliament which is itself a donee of power and, therefore, cannot assume unlimited authority.

It is against the above developments that *Kulasingam* v *Commissioner of Lands, Federal Territory*[39] ought properly to be assessed. Although as a general principle the Constitution of Malaysia should be interpreted "on its own terms" and "not be guided by the extraneous principles of other Constitutions", a formula invoked in numerous cases (*The Government of the State of Kelantan* v *Government of the Federation of Malaya & Tunku Abdul Rahman*[40], *Public Prosecutor* v *Ooi Kee Saik*[41], *Loh Kooi Choon* v *Government of Malaysia*[42]), it is doubtful exercise to ignore contemporaneous developments elsewhere, especially where a Malaysian constitutional provision cannot be rationally distinguished from that found in others. It is proper constitutional interpretation to reach a conclusion by construing a provision independently, but in so doing the full breadth

[32] [1979]3 S.C.R. 169

[33] (1982)1 S.C.J. 52

[34] See also *Sunil Batra* v *Delhi Administration* [1979]1 S.C.R. 392.

[35] (1950)S.C.R.88

[36] [1973]Supp.S.C.R.

[37] [1976]2 S.C.R.347

[38] [1981]1 S.C.R.207

[39] [1982]1 M.L.J.204

[40] [1963]M.L.J.355 (High Court)

[41] [1971]2 M.L.J.108 (High Court)

[42] [1977]2 M.L.J.187, 188-189 (Federal Court)

of constitutional experience in countries with similar governmental systems ought perhaps to be appraised.

The facts in *Kulasingam* are relatively straightforward. A piece of land owned by a sporting and cultural body (Tamilian's Physical Culture Association) is compulsorily acquired by the Government under the Land Acquisition Act, 1960. The Government argues that it needs the land for a public purpose, namely the building of a hockey stadium. The society argues, *inter alia*, that its past activities fulfil the requirement of "public purpose" since members of the public are allowed to utilise its facilities. The society argues that it ought to be given a hearing *before* a final decision is taken as regards compulsory acquisition, and not only a hearing with respect to the quantum of compensation payable, as expressly provided by the Act. Three other arguments are also taken: that the operative section(s.3) of the Land Acquisition Act infringes the equality provision (Article 8(1)) since it fails to provide any guidelines or policy; that the relevant order supporting the acquisition (Federal Territory (Modification of Land Acquisition Act, 1960) Order, 1974) is void for excessive legislation; that the entire acquisition proceedings are void since a procedural requirement under section 9(1) of the 1960 Act (the placing of a notation of intended requisition in the register document of title) is not satisfied. The society's claims are rejected on all grounds. The decisions respecting the claims based on infringement of equality, excessive legislation and failure to fulfil a procedural requirement (an omission subsequently rectified before trial) are probably right. What seems disturbing is the dismissal of the claim for a pre-acquisition hearing, an argument latched on Article 13(1) of the Constitution of Malaysia.

In both the High Court and the Federal Court, the claim for a pre-acquisition hearing is rejected, though the routes followed differ. Hashim Yeop Sani J. in the High Court accepts that the phrase "save in accordance with law" must mean more than the mere existence of enacted law, holding:

> That clause [i.e. Article 13(1)] guarantees the right of any person not to be deprived of his property save in accordance with law which simply means that no one can be deprived of his property merely on the orders of the Executive but that he may be deprived of his property only in accordance with law. In my view the proper interpretation of "law" is not as in *Comptroller-General of Inland Revenue* v *N.P.* which is with respect, too restrictive, but as interpreted in *Ong Ah Chuan* v *Public Prosecutor*. . . [43]

The promise suggested in the above passage fails, however, to deliver, for a distinction is then drawn between Article 13(1) and (2). In his lordship's view, a case of compulsory acquisition is caught by clause(2). In other words the general injunction contained in clause(1) ("No person shall be depriv-

[43] [1982] 1 M.L.J. 204, at p.206

ed of property save in accordance with law") does not at all apply to cases of compulsory acquisition which fall to be considered wholly with reference to clause(2) ("No law shall provide for the compulsory acquisition or use of property without adequate compensation"). As such, the wide rendering of "law" in Article 13(1) becomes irrelevant. The analysis presented is clearly opposed to that offered by the Privy Council in *Government of Malaysia* v *Selangor Pilot Association*[44] which regards the two clauses as not being mutually exclusive. While all "compulsory acquisitions" amount to "deprivations" (clause(1)), *Selangor Pilot* holds, not all "deprivations" necessarily result in "compulsory acquisitions" (clause(2)). Taking "deprivation" as the lowest common denominator, it appears clear that all cases of compulsory acquisition must satisfy the requirements of clause(1) as well as clause(2). The Federal Court recognises the error made by the High Court, but, unlike the latter, it chooses to place a restrictive meaning on "save in accordance with law" so as not to include the argued right of pre-acquisition hearing. In either case the Tamilian's Physical Culture Association is put in no better position.[45]

It appears clear from the judgment of Abdoolcader J. (delivering the decision of a unanimous Federal Court) that the wide reading of "law" argued by *Ong Ah Chuan* is to be limited in its scope. A contrary rationalisation is difficult to support when the following passage is analysed:

> We therefore have to consider the connotation of the term "law" in Article 13(1) which stipulates that no person shall be deprived of property save in accordance with law. Lord Diplock in delivering the judgment of the Privy Council in *Ong Ah Chuan* v *Public Prosecutor* said . . . that "law" in such context refers to 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, referring to that of Singapore but this equally applies to such written constitutions including ours. We should perhaps add that *Ong Ah Chuan* dealt with the question of presumptions and burden of proof.[46]

Ong Ah Chuan deals *directly* with "question of presumptions" and "burden of proof", but there is no evidence to suggest that the principles adumbrated there are not intended as having a broad application. If the Federal Court accepts the meaning ascribed to "law" by the Privy Council, it cannot justify narrowing that reading when interpreting Article 13(1) of the Malaysian Constitution. If the Federal Court is right in distinguishing the case on the basis of "presumptions" and "burden of proof", it becomes

[44][1977]1 M.L.J.133

[45]The unfortunate applicant in this situation may well be reminded of the following anecdote, attributed to Marshall C.J. of the United States Supreme Court: "Judgment for the plaintiff (or in this case, the defendant). Mr. Justice Story will furnish the authorities." Quoted in Llewellyn, *Bramble Bush* (1950), 33.

[46][1982]1 M.L.J.204, at p. 211

difficult to appreciate how the broad meaning of "law" can have any worthwhile application in Article 13(1) since deprivation of property rights can seldom, if at all, be connected with such questions. As a result the *Ong Ah Chuan* interpretation becomes limited to cases covered by Article 5(1) of the Constitution of Malaysia, namely issues of unlawful detention, and, in general, criminal law.

The thrust of the Federal Court judgment suggests a heavy reliance on principles of administrative law, unobjectionable in itself if *Kulasingam* were a pure administrative law case. However, Article 13(1) is put in issue, and in this situation the interplay between constitutional and administrative laws cannot be ignored. In terms of hierarchy, rules of constitutional law should condition those of administrative law, not the reverse. The Federal Court judgment appears not to have appreciated the full impact and influence of Article 13(1), allowing ordinary principles of administrative law to override constitutional dictates. The Court notes the established propositions that natural justice rules vary in content according to circumstances and context, and that the rules may be excluded by legislation. It approves the view stated in the English Court of Appeal in *Regina* v *Raymond*[47] that "courts should not fly in the face of a clearly evinced Parliamentary intention to exclude the operation of the *audi alteram partem* rule." Likewise, the Privy Council decision in *Furnell* v *Whangarei High Schools Board*[48] (an appeal from New Zealand), which permits the exclusion of a right of hearing by legislation, is supported. The Land Acquisition Act, 1960 requires a hearing only in relation to the issue of compensation, and is silent as regards the decision to compulsorily acquire. Applying the *"expressio unius est exclusio alterius"*[49] maxim, the Court concludes against the existence of any right of pre-acquisition hearing. Persuasive authority is found in an old Privy Council appeal from India, *Ezra* v *Secretary of State for India in Council & Ors*[50] which so decides in connection with the Indian Land Acquisition Act, 1894 on which the Malaysian Act is based. In India, the Federal Court observes, a pre-acquisition hearing is now a requirement, but this change is achieved through an amendment in 1923 of the Indian Act.[51]

[47][1981]2 All E.R.247, referred to in *Kulasingam, ibid.*, at p.211

[48][1973]A.C.660. Also approved is *Maktu Ben & Anor* v *Suva City Council* [1980]1 W.L.R.767

[49]A maxim sometimes said to be "a valuable servant but a dangerous master" and "ought not to be applied where its application, having regard to the subject-matter. . . leads to inconsistency or injustice." (See *Colquhoun* v *Brooks* (1889) 21 Q.B.D. 52, 65) In *Lowe* v *Dorling* 1906 2 K.B. 772, it is said that the maxim's generality requires "caution" in its application. See generally, Dworkin, *Odgers' Construction of Deeds and Statutes* (5th edn., 1967), 268-270; Cross, *Statutory Interpretation* (1976), 120-121.

[50](1905)32 I.A.93

[51]Nevertheless, it is doubtful if Indian courts, since the adoption of that country's Constitution, will subscribe to the Privy Council reasoning, even assuming no such amendment is effected.

If Article 13(1), or for that matter the existence of a written, supreme Constitution, is ignored, the Federal Court reasoning is unimpeachable, assuming that the overall context of the Land Acquisition Act, 1960 evinces an intention to exclude a right of hearing except in relation to proceedings for the determination of the quantum of compensation. Where a higher constitutional rule intrudes, such reasoning becomes questionable. The requirements of Article 13(1) cannot be held to have been satisfied merely because an ordinary legislation excludes the application of a right of hearing. If Article 13(1) requires the inclusion of "fundamental principles of natural justice" in the term "law", which it should, then any legislative attempt, short of a constitutional amendment, to exclude the principles is of no significance. A proper approach to constitutional adjudication would require an ascertainment of the following questions, in order of priority: (a) does the term "law" in Article 13(1) include natural justice rules?; and (b) if so, does the relevant provision in the Land Acquisition Act meet this constitutional requirement? On this basis, the Federal Court judgment can be supported if "law" is held to exclude natural justice rules altogether. Despite the attempt to distinguish *Ong Ah Chuan*, it seems doubtful if the Court is willing to go so far. As seen earlier, Hashim Yeop Sani J. in the High Court at least offers a clear acceptance of the *Ong Ah Chuan* reading. An alternative line of argument can perhaps be considered. "Law" includes natural justice rules in the sense that Article 13(1) can be used to test the "fairness" or "reasonableness" of enacted law. Since natural justice rules are in themselves malleable in content and vary according to context, in some circumstances it may well be that a denial of a right of hearing in one stage of a course of proceedings does not offend the standards of "fairness" or "reasonableness". This approach would require courts to balance competing interests, and adopt a more dynamic stance on constitutional adjudication. Applied to the facts of *Kulasingam*, it can therefore be argued that the denial of a pre-acquisition hearing does not violate broad natural justice rules as required by Article 13(1). The Federal Court can still argue on this basis, as it does on the narrower premise adopted in the judgment, that "[it] is clear that any such right of a pre-acquisition hearing would stultify acquisition proceedings throughout the country and the scheme of the Act would appear in effect to specifically proceed on this basal premise."[52] Although administrative convenience should not be regarded as a conclusive answer to a claim for natural justice, it may provide one "objective factor" or "adjudicative fact" to be balanced against others in reaching a result.

On a more general level, a broad reading of "law" in the phrase "save in accordance with law", at least to the extent suggested by *Ong Ah Chuan*, invites a reconsideration of the previous Malaysian approach. If the term and phrase may now be construed as including natural justice rules, the course is now open for an incorporation of the "due process" doctrine,

[52] At p.21]

at any rate "procedural due process". In both Articles 13(1) and 5(1), the mere existence of legal process, or law enacted within the strict legislative competence of Parliament, will not be regarded as conclusive. The procedure on the "law" stipulated must, in addition, not be arbitrary, but fair and reasonable. On the evidence available, "due process" has thus far been regarded in Malaysian cases as almost verging on constitutional taboo. Lee Hun Hoe C.J. (Borneo) dismisses the doctrine in *Re Tan Boon Liat* ("The expression 'save in accordance with law' does not necessarily mean 'without due process of law'")[53], as does Abdoolcader J. in *Public Prosecutor* v *Dato' Harun*.[54] It is quite probable that the strictures levied against the doctrine by the Malaysian judiciary are focused on the *American* development, and may perhaps be taken as not denoting any *total* rejection of the idea that standards of "fairness" or "reasonableness" ought to govern legislation, unless, of course, Malaysian courts still choose to regard the view expounded in the Burmese case of *Tinsa Maw Naing* as correct.[55]

In the United States, "due process" is classified into two: procedural due process and substantive due process. The latter category enables courts to examine the content of legislation and invalidate as unconstitutional a law found to be "arbitrary", "capricious" or "unreasonable." Particular manifestations of the doctrine may be regarded as objectionable, and it is not suggested that Malaysian courts should follow the path of the United States Supreme Court. Differing textual and institutional factors ought rightly to be borne in mind.[56] It is, to say the least, doubtful if the Malay-

[53][1977]2 M.L.J.108, 110

[54][1976]2 M.L.J. 116, 123-124

[55]The view that enacted law *per se* satisfies the criterion of validity can also be challenged on the basis that, although it may superficially satisfy Articles 13(1) or 5(1), it need not necessarily conform with other constitutional prohibitions, e.g. Article 8. This view appears to have been by-passed in those cases which adopt *Tinsa Maw Naing*. A law enacted within the strict legislative competence of Parliament (ascertained by a study of the legislative lists) cannot therefore be regarded as valid *per se*, even in the contexts of Articles 13(1) and 5(1).

[56]The Fifth Amendment of the U.S. Constitution, applying to the federal government, stipulates that "[No person shall] be deprived of life, liberty or property, without due process of law", while the Fourteenth Amendment, applying to the states, provides in section 1 ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. "By broadening the ambit of "due process" under the latter, other constitutional provisions, expressly made applicable against the federal government (e.g. privilege against self-incrimination, right to counsel, cruel and unjust punishment), are incorporated into the Fourteenth Amendment and therefore made applicable against the states as well. See e.g. *Gideon* v *Wainwright* 372 U.S. 335(1963); *Escobedo* v *Illinois* 378 U.S.478(1964); *Miranda* v *Arizona* 384 U.S.436(1966). At one time the due process doctrine was invoked to invalidate governmental regulation of the economy and to uphold the "sanctity of contract", as in *Lochner* v *New York* 198 U.S.45(1905) where a maximum hours legislation was declared unconstitutional. The activist approach which in effect led to a conservative outcome was the subject of acute controversy. It was departed from in the 1930s. U.S. courts now employ a "double standard" by which economic regulation laws are liberally construed while laws affecting fundamental rights are closely scrutinised for violation of due process. See generally, Archibald Cox, *The Role of the Supreme Court in American Government* (1976), 33-36; Schwartz, *Constitutional Law*(1972), 165-168, 193-247; Abraham, *Freedom and the Court* (3rd. edn., 1977), Chap.IV.

sian system of constitutional law can justify a role for the Malaysian judiciary as active as United States courts. However, it is far from clear why Malaysian constitutional law should totally reject "due process" just because the American manifestations of the doctrine are found unsuitable. It seems apparent that some kind of "due process" is inherent in the English common law, a system on which the Constitution of Malaysia is broadly based. Indeed, "procedural due process", though not often described as such, has been accorded a pride of place in the development of administrative law, both in England and Malaysia. How else can one classify the ordinary rules of natural justice in administrative law, for example, except as "procedural due process"? In England such rules form a body of "presumptions" against legislation (aside from being relevant for controlling executive acts). Where, as in Malaysia, a written and supreme Constitution exists, these "presumptions" ought to be translated into constitutional imperatives. This is the valuable suggestion offered by *Ong Ah Chuan* with its wide reading of "law". Unfortunately, the suggestion is not fully heeded in *Kulasingam*.

Arguably, even "substantive due process" can be safely incorporated into Articles 5(1) and 13(1) of the Constitution of Malaysia, even if American examples are discarded. If procedure can be tested against standards of "fairness" and "reasonableness", there seems no rational reason why these ought not apply with respect to legislative content as well. Far from unleashing a tide of judicial activism, a judicious use of "substantive due process" can afford a further meaningful role for "save in accordance with law". Adjudicative tools of long-standing are available to curb any excesses that the doctrine may engender, as, for instance, the presumption in favour of the constitutionality of legislation. While judges must normally defer to the wishes of the legislature (the Malaysian Parliament being a major power-centre in terms of constitutional structure), they are nevertheless expected to strike down legislation which is patently arbitrary or lacks any rational basis. An assumption of such power is perhaps not as radical as it may seem, for in another context, Article 8(1), the principle that law must be based on "reasonable classification" is accepted.[57] In the major decision of *Datuk Harun* v *Public Prosecutor*[58] an exhaustive analysis of the "reasonable classification" doctrine is undertaken, and as Suffian L.P. (delivering the judgment of the Federal Court) makes clear, the injunction in Article 8(1) ("All persons are equal before the law and entitled to the equal protection of the law") cannot be construed as prohibiting altogether the power of the state to classify persons and circumstances provided "(i) the classification is founded on an intelligible differentia . . . and (ii) the differentia has a rational relation to the object

[57]Paradoxically, despite the general rejection of American concepts, this doctrine is essentially an American development received in Malaysia through Indian precedents.

[58][1977]2 M.L.J. 155(Federal Court: Suffian L.P., Ali Hassan & Wan Suleiman F.J.J.)

sought to be achieved by the law in question."[59] In simpler terms, such classification must be reasonable, and reasonableness is to be assessed in relation to the legislative purpose set out in the law. It is also conceded that the test applies to substantive as well as procedural laws. The Federal Court in this case rejects the argument that "reasonableness" should be left to be determined by the legislature alone. "As regards . . . the question whether or not the courts should leave it to the legislature alone to go into the reasonableness of the question, we think that the courts should not, that in other words the courts should consider the reasonableness of the classification", it holds in clear terms.[60]

There exists a close interrelation between Articles 5(1) and 13(1) on the one hand and Article 8(1) on the other, for it is quite conceivable that in some circumstances a law can be challenged on either ground, or on both. A patently discriminatory law (by definition "unreasonable") can likewise be argued as infringing the imperatives of "save in accordance with law", assuming of course "law" is broadly construed. In the light of *Ong Ah Chuan* and the comparable persuasive authorities from India, like *Maneka Gandhi*, Malaysian courts ought to revise their previous stand, and, in so doing, a desirable harmony between Article 8(1) and Articles 5(1) and 13(1) will be achieved. After all, these provisions are erected on similar, if not the same, underlying fundamental principles: that laws ought not be "arbitrary", "unreasonable", "unfair" or "capricious".

The old approach to "save in accordance with law", one which is not clearly dispelled by *Kulasingam*, is based on a very narrow and highly positivistic view of the judicial function. Since it leads to the result that Articles 5(1) and 13(1) are effective only against executive action, in such a legalistically regulated society as Malaysia executive action which cannot find support in some law or other will be hard to find. In effect, therefore, the old approach renders the two Articles constitutionally moribund. Before the phrase "save in accordance with law" atrophies and Articles 5(1) and 13(1) are rendered ineffectual altogether, perhaps distinguished only for their cosmetic attractions and literary elegance, a clear reversal of the old approach is timely. The decision in *Kulasingam* falls far too short of the mark in meeting this pressing need.

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[59] *Ibid.*, at p.165

[60] *Ibid.*, 166