Malaysian Administrative Law at the Crossroads: *Quo Vadis*?

Dr. Gan Ching Chuan*

Abstract

Malaysian Administrative Law was, until 1996, thought to be based solely on common law by concerning itself mainly with challenging the decision-making process of the administrators. In the landmark case of *Tan Tek Seng* in January 1996, the Court of Appeal began to invoke the doctrine of constitutional review by breathing life and great expectations into the broad and liberal interpretation of fundamental rights in the constitution whenever they are at stake as a result of governmental actions or decisions whether legislative or executive. However, the constitutional euphoria of broad interpretation was short lived as the Federal Court swiftly and decisively struck back with vengeance in *Ng Hock Cheng*, *Sugumar Balakrishnan*, and *Kekatong* thereby throwing constitutional review into grave doubt. Constitutional review, however, made a brief comeback in 2009 in a few Federal Court cases when the judge behind the broad interpretation of the Federal Constitution was elevated to the Federal Court. But with his retirement and departure from the Bench on 16th February 2010, the development of Administrative Law again encountered problems because very few judges have come forward to push the constitutional agenda in our public law. The writer has expounded his view into the root causes of the unsatisfactory growth and development of Malaysian Administrative Law over the last fifty-one years. However, the writer remains upbeat and hopeful over the faith and future of Malaysian Administrative Law in the years ahead because of his firm belief in the rule of law and constitutionalism which will eventually triumph over time so long as the struggle to vindicate the rule of law and constitutionalism continues unabated.

1. Introduction

The writing of this article began before the 51st Merdeka (Independence) Day celebrations and completed in December 2008. It was written with a few objectives in mind. First, it is a survey of the developments of Malaysian Administrative Law over the last 51 years ever since 31st August 1957. Hopefully with the current state of the law known, then the roadmap for the future may well begin with determination and optimism. There is no room for pessimism in the field of public law. Public law evolves slowly and painstakingly over time particularly in developing countries and, in some countries, the developments and progress may be extremely slow and frustrating but the struggle for

* Faculty of Law, University of Malaya. Email: gancc@um.edu.my. Key research areas: Administrative Law, Public Procurement Law and Marine Insurance.

the Rule of Law must go on unabated. The writer has sometimes been chided for being too pre-occupied and passionate with the search for a domestic constitutional model comprising of a modern day written constitution together with its accompanying legal framework that a modern democratic state needs to equip itself with in the face of the onslaught of globalisation and regionalization. These may well bring far more adverse economic as well as other ill consequences to developing countries eventually rather than the promised trade, economic and other progress if the individual states do not possess an adequate constitutional and legal framework that is able to withstand and contain the unruly forces or horses of globalisation and regionalisation. Secondly, this article is dedicated to the Rule of Law and the struggle for the Rule of Law particularly at the domestic or national level in a developing country like Malaysia which possesses a written constitution guaranteeing fundamental rights. It is often said that a written constitution which possesses the characteristics of the Indian Constitution is a dynamic constitution intended to create a dynamic nation and the Rule of Law underlies the foundation or basis of the constitution. Another ingredient for the building of a dynamic nation in the era of globalisation focusing on economic, technical and scientific progress is the human resources factor which is composed of a nation of liberal, united, harmonious and determined citizenry who are also strongly committed to the struggle for the Rule of Law. Of all the written constitutions in the common law world today, only the South African Constitution expressly provides in section 1 that South Africa is a modern democratic state founded on the Rule of Law as one of core national values. It must also be emphasised that regional administrative law and global administrative law, the relevance and significance of which must not be underestimated in the era of globalisation, are beyond the scope of this article. Nevertheless, the writer is no less committed to the fulfillment of Rule of Law at the regional and global levels. Thirdly, as Malaysian Administrative Law has moved on since the completion of this article, an update is inevitable.

2. The *Ultra Vires* Doctrine: Public Law Perspective

Malaysia is a Parliamentary democracy with a constitutional monarch as the Head of the Federation. The secularity[1] of the Constitution and judicial review could be regarded as more rudimentary of the basic features[2] of the Constitution.[3] Its constitutional system of

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[1] With the amendment to Art. 121 of the Federal Constitution, *viz*., by the inclusion of Art. 121(1A), the High Courts shall have no jurisdiction in any matter falling within the jurisdiction of the Syariah courts. Art. 3 provides that Islam is the religion of the Federation. The Government has long declared that Malaysia is an Islamic country. All these do not affect the secularity of the Federal Constitution. Secularity was guaranteed in the 1957 Constitution. Neither do those amendments confer any primacy on Islam over other religions in the country.

[2] Note the endorsement of this doctrine by the Chief Judge of Sabah and Sarawak in *PP v Kok Wah Kuan* [2007] 6 CLJ 341.

[3] Refer to Joseph M Fernando (2002), *The Making of the Malayan Constitution*, (Kuala Lumpur: Academic Art & Printing Sdn Bhd), pp 162-163.

governance is based on a written Constitution as the supreme law of the Federation and is committed to the Rule of Law ever since Independence.[4]

2.1 Commitment to a Written Constitution and the Rule of Law

Art. 4(1) of the Federal Constitution[5] in no uncertain terms stipulates that the Constitution is the supreme law of the Federation and any law passed after Merdeka[6] which is inconsistent with the Constitution is, to the extent of the inconsistency, null and void. Art. 162(6) further provides that a court or tribunal is empowered to modify any pre-Merdeka law which is inconsistent with the Constitution so as to bring it into accord with the Constitution. The Constitution is committed to the Rule of Law.[7] This is because the word "law" as used in Part II (the Fundamental Rights or Bill of Rights Chapter) of the Constitution is defined in Art. 160 to include "the common law". The Rule of Law is an important constitutional doctrine expounded by Dicey and this doctrine is still of great relevance and significance today particularly in a system with written Constitution guaranteeing fundamental rights. The Rule of Law as used and emphasised in this article refers to a body or corpus of core and inherently good moral values, standards and practices[8] which are of universal application. It has always been said that a modern state needs to endow itself with and practise these good values in the administration of the country.

2.2 The Ultra Vires Doctrine: Scope of this Doctrine

The *ultra vires* doctrine as discussed in this article is broader than what is traditionally understood at common law by administrative lawyers. At common law, it generally encompasses excesses of powers by an administrator or a tribunal. In the area of subsidiary legislation, it is concerned with the excesses of law-making power. The doctrine has two aspects- *viz*., substantive and procedural. In the era of globalisation, the doctrine may also be extended to the misconduct of private bodies or enterprises which take over the running of activities or provision of services traditionally provided by governmental bodies. In a country with a written Constitution committed to the Rule of Law like India, South Africa and Malaysia, the *ultra vires* doctrine, manifests its relevance and significance in the powerful constitutional parlance "unconstitutionality" or simply as "unconstitutional". Unconstitutionality also finds expression in procedural

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4 Besides the Federal Constitution, commitment to the Rule of Law is also declared officially in the Rukun Negara. The Rukun Negara is a Malaysian declaration of national ideology or philosophy after the 1969 May 13 Incident to bring about national unity and solidarity amongst the Malaysians of all races by using five unifying principles or virtues. They are belief in god, loyalty to king and country, the supremacy of the Constitution, the Rule of Law and courtesy and morality.

5 Hereinafter referred to as "the Constitution".

6 Independence.

7 The South African Constitution expressly incorporated the Rule of Law in section 2(1) thereof.

8 Owing their origin to common law.

and substantive aspects. A law[9] may be challenged as unconstitutional. So is the allegation of administrative misconduct in the sense of abuse of powers or non-exercise of powers. Due process, in its procedural and substantive aspects, may feature more prominently in the common law countries in future with the increasing realisation that it is an important component of the Rule of Law in all democratic states committed to the Rule of Law irrespective of whether that term is expressly incorporated in the Constitution or not. It is also argued that unconstitutionality has also exerted its mandate or influence in the field of private law such as requiring private employers to comply with minimum labour standards or respect for gender equality.[10] Hence, it is possible to argue that a contractual term, be it in the field of public or private[11] employment, may be struck down by a court as being unconstitutional if it does not comply with the test of reasonableness[12] or if it violates any human or fundamental right.

3. Judicial Control

Judicial control over the validity of an administrative action may be exercised in a number of ways. For the purposes of this article, emphasis will be placed on judicial review and the additional powers of judicial review of the High Court.

3.1 Judicial Review: Inherent Supervisory Jurisdiction of the High Court

Judicial review at common law is the inherent supervisory jurisdiction of the High Court over validity of actions or decisions taken or made by a public authority. Traditionally, the grounds of review are those laid down in the *Wednesbury*'s case[13] and any breach of the rules of natural justice. In 1985, those grounds have since been re-postulated by the House of Lords in the case of *CCSU*[14] as procedural impropriety, irrationality, illegality with proportionality as a possible ground of review in the future. The Malaysian courts fully endorsed the *CCSU* approach in a number of cases.[15]

3.2 Additional Powers of Judicial Review of the High Court under the Courts of Judicature Act 1964

The additional powers of judicial review of the High Court are those powers conferred on the High Court under para 1, Schedule to the Courts of Judicature Act 1964. These

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9 Including any subsidiary legislation made thereunder.

10 Also known as "constitutionalisation of private law".

11 A contractual term in a collective agreement.

12 Reasonableness or unreasonableness is protected under Art. 8(1) of the Federal Constitution, be it "the equality before the law" or "the equal protection of the law" clause. In *Air India v Nergesh Meerza*, AIR 1981 SC 1829, a regulation of Air India was struck down for unconstitutionality as it violated Art. 14 of the Indian Constitution. See also the Malaysian case of *Beatrice Fernandez v SPM & Ors* [2005] 3 MLJ 681, FC. It is submitted that no difference should be made between the Indian public law jurisprudence and that of Malaysia,

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

14 *Council for Civil Service Union v Minister for Civil Service* [1985] AC 374. The *CCSU* grounds of judicial review will be elaborated below under sub-heading 4.

15 *Minister of Home Affairs v Kesatuan Aliran Kesedaran Negara* [1990] 1 MLJ 351, (SC). *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, (FC).

are statutory powers over and above the inherent powers of judicial review adverted to above. In fact they constitute the heart of judicial review whenever rights-based review comes into play. Their role and significance in the field of public law will be discussed and elaborated below under sub-heading 9.

3.3 Power of Federal Court under Art. 128 of the Federal Constitution

Under Art. 128(1)(a) of the Constitution the Federal Court possesses jurisdiction to determine the validity of any State or Federal law on the ground that the impugned law was *ultra vires* the law-making power of the State or, as the case may be, the Federal Legislature. The Federal Court has the power and jurisdiction to give an advisory opinion on a constitutional issue under Art. 130 if that matter is referred thereto by the Yang di-Pertuan Agong. Section 84 of the Courts of Judicature Act 1964 also enables important questions of law to be referred to the Federal Court for authoritative interpretation and ruling.[16]

3.4 Power of the Federal Court to Review its Own Previous Decision

The Federal Court has the inherent jurisdiction and power under rule 137 of the Rules of the Federal Court 1995 in very limited and exceptional circumstances to reopen, rehear and re-examine its previous judgment, decision or order which has been obtained by fraud or suppression of material evidence or due to lack of quorum or as a result of a clear breach of the law or where bias has been established. Suffice it here to merely point out that this jurisdiction is sparingly invoked.[17]

4. Grounds of Judicial Review: *CCSU* and the Position Thereafter

In the common law countries, the grounds of judicial review of administrative action have been re-postulated by the House of Lords in the landmark case of *Council for Civil Service Union v Minister for Civil Service* ("*CCSU*").[18] They will be discussed and illustrated below.

4.1 Procedural Impropriety

This refers to the breach of any of the rules of natural justice[19] thereby rendering an administrative action taken null and void. This sub-head is broad enough to incorporate the

[16] *Badan Peguam Malaysia v Kerajaan Malaysia* [2008] 1 CLJ 521, (FC). The reference to the Federal Court was to interpret and rule whether an academic (*i.e.*, a law professor) could be appointed as a Judicial Commissioner under Art. 123 of the Federal Constitution. The Court by a majority ruled in favour of the academic.

[17] *Dato' Seri Anwar bin Ibrahim v PP* [2004] 3 MLJ 517 (FC).

[18] *Supra*, n 14.

[19] *Sarawak Electricity Supply Corp v Wong Ah Suan* [1980] 1 MLJ 65, (PC)- a case on the *audi alteram partem* rule. *Rohana & Anor v USM* [1989] 1 MLJ 487- a case on the *nemo judex in causa sua* maxim. *Chong Kok Lim & Ors v Yong Su Hian* [1979] 2 MLJ 11 was a case on personal bias. The earlier case of *Ketua Pengarah Kastam v Ho Kwan Seng* [1977] 2 MLJ 152 was in fact a letdown on the application of the *audi alteram partem* rule.

breach on any procedural requirement prescribed by a law. The breach of any mandatory procedure established by statute renders any administrative decision taken null and void. The term "fairness" or "acting fairly" may sometimes be used to denote this procedural aspect of the *ultra vires* doctrine. Procedural fairness brought into play by virtue of the combined effect of Arts. 5(1) and 8(1) of the Constitution is to be treated separately whenever constitutional review is invoked by the reviewing court.[20]

4.2 Irrationality

This denotes what has been described by administrative lawyers as "super-*Wednesbury* unreasonableness".[21] It means unreasonableness of the extreme or highest degree and if it relates to an administrative decision, it is a decision that no reasonable authority will ever make. The same is also true, *mutatis mutandis*, if it is a rule or regulation (*viz.*, subsidiary legislation) which is challenged.[22]

4.3 Illegality

This refers to that part of substantive *ultra vires* doctrine at common law usually termed as "sub-*Wednesbury* unreasonableness" by administrative lawyers. It is that part of the "abuse of discretion" shorn of "super-*Wednesbury* unreasonableness". It includes such substantive defects committed in the decision-making process by an administrator such as *mala fides*,[23] ignoring relevant consideration,[24] taking into account irrelevant consideration,[25] improper purpose[26] and others. Of course, it also encompasses non-exercise of discretion.[27]

4.4 Proportionality

In *CCSU*, the House of Lords speculated this substantive ground of judicial review as a future possibility. At common law, it has been used before in the limited sense of prohibiting excessive punishment or fine.[28] Proportionality as used in the broader sense in the field of public law whenever constitutional review is invoked will be discussed below under sub-heading 10.4.

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[20] To be discussed under sub-heading 10.5 below. It is most unfortunate that in Malaysia the discretion of the court to invoke this kind of review lies outside the Federal Constitution. Hence, it is odd to use the term constitutional review in Malaysia. But the temptation to do so is most irresistible. The fault lies with the Constitution or the Reid Commission.

[21] *Supra*, footnote 13.

[22] *Kruse v Johnson* [1898] 2 QB 91.

[23] *Kamari bin Kassan v MMA* [2000] 5 MLJ 84.

[24] *Tan Tek Seng v SPM & Anor* [1996] 1 MLJ 261, (CA).

[25] *Padfield v Minister of Agriculture & Fisheries* [1968] 1 All ER 694.

[26] *Pengarh Tanah & Galian, WP v Sri Lempah Enterprise* [1979] 1 MLJ 135, (FC).

[27] *P Patto v CPO, Perak* [1986] 2 MLJ 204, (SC). *Lam Eng Rubber Factory v Pengarah Alam Sekitar, Neg. Kedah & Perlis & Anor* [2005] 2 MLJ 493, (CA).

[28] *R v Barnsley MBC, ex p Hook* [1976] 1 WLR 1052- excessive punishment. *R v Northumberland Compensation Appeal Tribunal, ex p Shaw* [1952] 1 All ER 122- excessive fine.

4.5 CCSU: A Critique

It is often lamented that *CCSU* grounds of judicial review are nothing but in substance *Wednesbury*[29] revisited and repackaged in 1984 by the House of Lords merely under a different label. Those grounds of review have been criticised as being too narrow and rigid because they are all postulated negatively. The authorities relied upon by *Wednesbury* went back to 1910's and 1920's! Common law judicial review today is still caught in the time warp of the First World War! In this day and age, certainly a broader and more flexible regime[30] of judicial review is called for in the face of the constant assaults and upheavals caused by the evil forces of globalization and misrule by self-professed democratic governments based on Rule by Law where the legal limits imposed by the ancient regime of a bygone era have proven to be too narrow and inadequate.

5. Other Sub-heads of *Ultra Vires*: Flexibility of this Doctrine

The *ultra vires* doctrine as envisaged and advocated in this article is a broad and flexible one despite the rather rigid application of the doctrine in most countries. Sometimes, judges and administrative lawyers tend to use various nomenclatures relating to judicial review loosely or generally to denote specific aspects of the *ultra vires* doctrine.

5.1 Unreasonableness

The term "unreasonable" or "unreasonably" is used to connote "sub-*Wednesbury* unreasonableness" or "general unreasonableness".[31] This sub-head of review is that of 'illegality' under the *CCSU* re-categorisation. This is of course distinct from "super-*Wednesbury* unreasonableness" in the original *Wednesbury* review meaning unreasonableness/absurdity of the highest degree. What unreasonableness or illegality means in public law can be gleaned from Lord Diplock's *dicta* in *CCSU*.[32]

5.2 Perversity

Sometimes the word "perversity" is used to refer to the finding of a tribunal as being unreasonable. The extent of the substantive fault meant here is one of the extreme degree or kind; something which a reasonable tribunal would not arrive at that kind of finding or decision.[33] It must be pointed out and emphasised that in the field of public law perversity shall not constitute the basis for legal norms in a democratic state.

5.3 Acting Fairly

The term "acting fairly" may be flexible enough to refer to failure on the part of the decision-maker to act in accordance with the rules of natural justice or, in the substantive

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29 [1948] 1 KB 223.

30 See sub-headings 6.3 and 14.0 below on the dynamic South African regime.

31 *Savrimuthu v PP* [1987] 2 MLJ 173.

32 [1985] AC 374 at 410-411.

33 *Malayan Banking Bhd v Association of Bank Officers, PM & Anor* [1988] 3 MLJ 204, (SC).

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sense, to refer to any specific aspect of "sub-*Wednesbury* unreasonableness" or "general unreasonableness".

5.4 Jurisdictional defects

Occasionally, the *ultra vires* doctrine may manifest itself whenever jurisdictional issues or objections are raised alleging, for example, that a body or tribunal in question is not properly constituted in accordance with law or that it has no jurisdiction to adjudicate on a dispute brought before it.[34]

6. Procedural Regime: Applications for Judicial Review

In common law countries like Malaysia, Singapore and Hong Kong, the procedural regime to be followed by the applicants for judicial review has been inherited from the British. The procedure for such applications is prescribed in Order 53 of the Rules of the High Court 1980 in Malaysia.

6.1 Malaysian and English Practice

In the case of Malaysia, the current procedural law governing applications for judicial review is Order 53 of the Rules of the High Court 1980. This regime had its genesis in section 88 of the Courts Ordinance of the Straits Settlements. The laws of the early Straits Settlements were traceable back to the imperial procedural laws in use in Great Britain at that material time.[35] This shows the antiquity of the Malaysian law relating to court procedures. The current Order 53 of the Rules of the High Court 1980, introduced in the year 2000, is a mixture of the procedural regime in use in England before and during the procedural reforms introduced in that country in the period between 1977-1981. However, the Malaysian provision did not go as far as the English reforms. This is due to the procedural restrictions[36] introduced in the year 2000 in the new Order 53. These problems were compounded by the antiquated laws relating to judicial remedies as provided in the Specific Relief Act 1950 and the Government Proceedings Act 1956.[37] A few words may be said of the current Part 54[38] of the Civil Procedures Rules 1998 of England. This is a better and more liberal procedural regime in so far as "a claim for judicial review" is concerned in comparison with its predecessor.

6.2 Indian Position: Since 1950

India did the right thing from the very beginning when the Indian Constitution came into force in 1950. The Civil Procedure Code 1908 of India (the counterpart of the Rules of

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[34] MP Jain, *Administrative Law of Malaysia and Singapore*, (Kuala Lumpur: Butterworths Asia, 1997), p 679 under the sub-heading of "Error of jurisdiction".

[35] The Royal Charter of Justice was introduced in the Straits Settlements in 1807. This was the first English law to be introduced in this country. The first of the Courts Ordinance dated back to 1873 in the Straits Settlements.

[36] Such as the rigid provisions of rule 2(4) governing *locus standi* and rule 3(6) governing limitation period.

[37] See O 53 r 1(2) and proviso to r 2(3). These rules restrict the issue of mandatory orders and injunctions against the Government.

[38] This Part repealed and substituted its predecessor, *i.e.*, Order 53 of the Rules of the Supreme Court.

the High Court of Malaysia) was not used for purposes of judicial review under Art. 226 of the Indian Constitution. Writ petition is used instead of the Civil Procedure Code for the sake of flexibility and for facilitating the enforcement of fundamental rights. It is generally accepted that the use of the Civil Procedure Code (the equivalent of the repealed Rules of the Supreme Court of England)[39] will be counter-productive in terms of applications for judicial review.

6.3 South Africa: Post-Apartheid Era's Administrative Law Regime

Likewise, the post-Apartheid South African regime followed more or less the path taken by the Indians. In the year 2000, the South African Parliament enacted the Promotion of Administrative Justice Act (PAJA 2000)[40] with a view to facilitating and promoting judicial review. Suffice it here to further point out that the post-Apartheid South African Administrative Law regime is said to have revolutionised the administrative law regime in the common law world with its modern day dream Constitution guaranteeing three generations of rights.[41] The current South African public law regime is said to be more dynamic in many ways than that of the Indians.[42]

7. Inferior Tribunals: Review on Errors of Law

The decisions of inferior tribunals may be reviewed on the basis of errors of law in the *Anisminic*[43] sense. This has been the position ever since *SKMK* case.[44] Errors of law are basically procedural and substantive errors of law construed broadly which undermine the jurisdiction of the tribunal to hear a particular dispute. Generally speaking, all errors of law now go to jurisdiction and hence are open to judicial intervention.

8. Subsidiary Legislation: *Ultra Vires* Doctrine

The *ultra vires* doctrine is equally alive in the area of subsidiary legislation particularly if constitutional review comes into the picture. The operation of this doctrine will be briefly discussed below.

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39 Or in particular the repealed Order 53 of the Malaysian Rules of the High Court 1980, *i.e.*, the pre-2000 or the original 1980's Order 53.

40 The default procedural regime for purposes of judicial review in South Africa. Resort may still be had to S 33(1) of the Constitution despite PAJA in exceptional cases. May the same be argued in Malaysia with reference to the Courts of Judicature Act 1964 and possibly Part II of the Federal Constitution?

41 CC Gan, "Administrative Law and Judicialised Governance in Malaysia: The Indian Connection" in Tom Ginsburg and Albert Chen, ed., *Administrative Law and Judicialised Governance in Asia: Comparative Perspectives*, (London: Routledge (of Taylor & Francis Group) 2009), at p 269. See in particular footnote 115.

42 The problem today is that public lawyers in the common law countries do not see it worthwhile to study the dynamic Indian and South African regimes. The writer is fortunate to have studied public law at the feet of the late Dr. MP Jain of India.

43 *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147. This landmark case is said to have abolished the distinction between errors of law that went to jurisdiction and those that did not.

44 *Syarikat Kenderaan Melayu Kelantan v Transport Workers' Union* [1995] 2 MLJ 317, (CA) at pp 342 & 343. See *dicta* at the pages mentioned for endorsing the *Anisminic* ([1969] 2 AC 147) approach in Malaysia.

8.1 Procedural Ultra Vires

Procedural *ultra vires* in relation to subsidiary legislation and invalidating it refers to any non-compliance with mandatory procedure by the law-making authority in the law-making process. Requirement of publication in the law-making process, requirement of consultation with affected interests before the laws are finalised and laying procedure before the legislature may render a subsidiary legislation so made in defiance of a mandatory procedure laid down by the Parent Act null and void and of no effect.[45] On the other hand, non-compliance with a directory procedure will not render the subsidiary legislation so made null and void.

8.2 Substantive Ultra Vires

In a recent case[46] before the Federal Court, it was pronounced that the *ultra vires* doctrine has its roots in Art. 8(1) of the Constitution. This provision houses the powerful equality before the law clause and the equal protection clause in the Constitution. *Ultra vires* laws (including subsidiary legislation) are prohibited under Art. 4(1) of the Constitution.[47] In addition, section 23 of the Interpretations Act 1948 and 1967 also provides to the same effect in respect of any subsidiary legislation *ultra vires* any Act (not inclusive of the Constitution). In Malaysia, retrospective civil laws may be enacted even if there is no specific authorisation in the Parent Act.[48] The Constitution merely prohibits retroactive criminal laws.[49] Due to space constraint, it will be beyond the scope of this article to dwell into the other aspects of this doctrine.

9. Additional Powers of Judicial Review of the High Court: Para 1, Schedule to the Courts Judicature Act 1964

Judicial review in Malaysia like that of India is beyond the inherent supervisory jurisdiction of the High Court. Para 1, Schedule to the Courts of Judicature Act 1964 confers additional powers of judicial review on the High Court.[50] Unlike the Indian position, the additional powers of the Malaysian High Court are statutory in nature.[51]

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[45] This is an aspect of the *ultra vires* doctrine. The procedure so breached must be mandatory.

[46] *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils* [2005] 3 MLJ 97, (FC).

[47] See para 2.1 above for the additional information on the position of *ultra vires* laws falling under Art. 162(6) of the Federal Constitution.

[48] S 20, Interpretation Acts 1948 and 1967.

[49] Art. 7(1).

[50] Hereinafter referred to as "the Para 1 powers" or, as the case may be, "Para 1". Read the recent Court of Appeal case of *Ahmad Jefri bin Mohd Jahri @ Md Johari v Pengarah Kebudayaan & Kesenian Johor & Ors* [2008] 5 MLJ 773 where the additional powers of the High Court were highlighted and comparison made with the position in England and Hong Kong. The Malaysian Court of Appeal and the Federal Court enjoy similar powers under its respective rules of the court. Read the *Rama Chandran*'s case on this particular point of law.

[51] The Court of Appeal as well as the Federal Court enjoys similar powers in their respective rules. This aspect of the law was discussed in *R Rama Chandran*'s case [1997] 1 MLJ 145, (FC).

9.1 Origin of this Extended Jurisdiction: Art. 226, Indian Constitution

The Para 1 powers were sourced from Art. 226 of the Indian Constitution. Part II of the Malaysian Constitution dealing with fundamental rights were based on Part III of the Indian Constitution save that it is an abridged version of the Indian counterpart. The Indian Constitution contains an additional provision, *i.e.*, Art. 32, for the sole purpose of protecting and enforcing fundamental rights in the Indian Supreme Court. However, there is no such equipollent provision in Malaysia. Suffice it here to point out and emphasise that, unlike the position in Malaysia, the Indian courts (High Court and Supreme Court) have over time developed a vibrant jurisprudence on both Arts. 226 and 32 of the Indian Constitution.[52] For the purposes of removal of any lingering doubt and confusion, a point of great relevance and significance needs to be highlighted and emphasised here. It is that the Malaysian public law discussed in sub-headings 9 and 10 of this article has its roots in the great Indian Constitution, and hence, for the purposes of interpretation and application of those equipollent provisions, the established and dynamic Indian public law jurisprudence thereon, will be of relevance and significance to the Malaysian law. In fact, for the forward march of Malaysian public law, a lot of inspiration could be sourced from other dynamic public law regimes- that of post-Apartheid South Africa in particular and, to a certain extent, that of the United States of America.

9.2 Position under the Courts of Judicature Act 1964: Scope of this Remedy

Due to space constraint, only brief write-up will be attempted on this important aspect of Malaysian Public Law with regards the additional powers of judicial review and the remedies that may be granted by the High Court under Para 1.

9.2.1 Para 1: Extended Writ and Non-writ Jurisdiction

It has been judicially declared that this provision is of the widest amplitude in terms of the judicial powers and remedies that may be invoked by the courts or the applicants for judicial review. Before proceeding any further, para 1 will be reproduced *in verbatim* below:

> "Power to issue to any person or authority directions, orders or writs, including writs of the nature of *habeas corpus*, *mandamus*, *prohibition, 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."[53]

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[52] See *supra* footnote 41. More discussion on Arts. 32 and 226 of the Indian Constitution may be found in the article written by the writer. It was written for the University of Hong Kong and published as a special collection of essays. It must also be pointed out that the South African public law jurisprudence on the same (to be discussed in sub-headings 14.1.1 and 14.1.3 and 14.1.4.1 below) is far more rigorous and dynamic than that of the Indian.

[53] Read with s 25(2) of the Courts of Judicature Act 1964. The 1964 Act is hereinafter referred to as "the CJA".

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9.2.2 Salient Features of this Remedy

The rules governing judicial review under the common law inherent jurisdiction of the High Court have been endorsed and emphasised by the Malaysian courts.[54] These rules (just to mention a few, that the reviewing court cannot review the merits of a case or that the reviewing court cannot substitute its own decision for that of the body under review; and that the reviewing court has to remit the case back to the original tribunal for re-consideration)[55] are generally followed by the courts but they may be departed from, *albeit* rarely, whenever necessity or the special circumstances of a particular case justify a departure.[56]

Amongst the more remarkable and salient features of this provision of the CJA are as follows:

(a) The primary purpose of this provision is for the enforcement of fundamental rights. Other rights and any matter of great public interest may also come within the ambit of this provision.[57]

(b) Under this provision, the jurisdiction of the High Court to issue writ remedies is an extended one as distinct from the common law writ remedies because of the peculiar nature of the language used, *i.e.*, *"writs of the nature of"*.[58]

(c) Non-writ remedies of declarations or injunctions may also be issued thereunder by the High Court. This is because of the use of the words *"or any others"* in para 1.

(d) The phrase therein *"person or authority"* may empower the High Court to issue any writ and/or order or direction against a private person or body[59] breaching public law obligations as distinct from the usual position at common law which only empowers the High Court to issue the same to "a public authority".[60]

(e) In *R Rama Chandran*, the Federal Court for the first time in this country even went to the extent to point out and emphasise that in invoking the Para 1 powers, the reviewing court, that is to say the High Court, may review the award of the Industrial Court "not only for *process* but also for *substance* as being *manifestly* perverse". This simply means that an award may even be reviewed on its merits.

9.2.3 Moulding of Relief

The most distinguishing or outstanding feature of the para 1 powers is that the reviewing court is empowered to mould the relief in favour of the applicant or applicants according to the factual matrix of each individual case.[61] This special power would include both

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54 *Rohana & Anor v USM* [1989] 1 MLJ 487 at 489.

55 See the rules as enumerated by the High Court in *Rohana & Anor v USM* [1989] 1 MLJ 487at 488-489.

56 Indian case law. *Himmat Lal v MP*, AIR 1954 SC 403. *Shiv Shankar v State of Haryana*, AIR 1980 SC 1037.

57 See the recent *Petrojasa*'s case: [2008] 4 MLJ 641, (FC). Even a judgment debt owed by the State Government could be enforced via this provision.

58 *Abdul Ghani Haroon v KPN Anor Application (No. 3)* [2001] 2 CLJ 709, (HC). A case involving the issue of a writ of *habeas corpus* for unlawful detention by the police under s 73 of the ISA 1960.

59 *T. Gattaih v Commissioner of Labour* (1981) Lab IC 942 (HC).

60 The salient features of para 1 will be briefly discussed below until sub-heading 10.7.

61 *Hong Leong Equipment v Liew Fook Chuan & anor appeal* [1996] 1 MLJ 481, 545, (CA).

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the primary relief prayed for as well as the consequential relief.[62] The words *"orders, directions"* and the phrase *"or for any purpose"* in para 1 in particular are also broad enough to empower the court to:

(a) make an order of monetary compensation or damages;
(b) issue an order or direction for *ex gratia* payment to the victim of a public wrong;
(c) make an order for interim relief or payment;
(d) issue a temporary code of conduct or law to govern a particular matter;
(e) eventually develop our own common law rules to govern the grant of public law remedies based on our own legislation;
(f) allow public interest issues to be litigated; and
(g) rule or declare on the validity of any law or any other matter violating the Constitution.[63]

10. Unconstitutionality: Constitution (the Supreme Law) as the Ultimate Source of Reference for Purposes of Judicial Control

The Constitution is the supreme law of the Federation and hence the effect on any pre-Merdeka as well as post-Merdeka law inconsistent with the Constitution was already discussed above under sub-heading 2.1 above and need not detain us here. Art. 4(1) read with Art. 162(6) only codifies part of the *ultra vires* doctrine. Unconstitutionality may manifest itself elsewhere in the Constitution. Part II of the Constitution confers expressly certain fundamental rights. The breach of any of those rights renders the violation *ultra vires*. Art. 8(1), via its two-limb guarantees of equality before the law and equal protection of the law clauses, constitutes easily the most powerful of all the fundamental right protections.[64] It has also been ruled that Art. 8(1) is the source of the *ultra vires* doctrine in this country.[65] This interpretation would have indirectly constitutionalised the *ultra vires* doctrine as it operates at common law *via* either the *Wednesbury* unreasonableness or *CCSU* principles.[66] This brings us to the doctrine of implied fundamental rights which lies at the heart of all written constitutions in democratic countries committed to

[62] The classic case to illustrate this proposition is none other than the case of *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145, (FC). In that case, besides quashing the award of the Industrial Court upon finding that the dismissal of the applicant was without just cause and excuse, the Federal Court invoked the para 1 powers and section 30(5) of the Industrial Relations Act 1967 to make a number of drastic consequential orders including the payment of compensation beyond the usual practice of Industrial Court to award payment of up to 24 months at the most. It is also argued any law intending to overrule this part of *Rama Chandran*'s decision and making the said Industrial Court practice into an absolute rule is probably unconstitutional for at least two reasons. One is of course the constitutional right of the workman to reasonable compensation and the other is the curtailment of the judicial power thereby violating the doctrine of separation of powers.

[63] Due to space constraint, please refer to pp 259-269 of the writer's work cited in footnote 40 of this article under the sub-heading of "Constitutional Review".

[64] Originated from Art. 14 of the Indian Constitution. The Indian Supreme Court has given these two limbs an expanded interpretation. Reference must be made to the Indian constitutional texts on this Art.

[65] By implication of course. *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd* [2005] 3 MLJ 97, (FC).

[66] This is not broad enough to achieve the effect of S 33(1) of the South African Constitution.

the Rule of Law.[67] The issue or question of constitutional validity or invalidity in this country may also be raised for curial scrutiny *via* other numerous provisions or parts of the Constitution.[68] It would be beyond the scope of this article to deal with the last proposition. Before proceeding any further, it certainly makes sense to point out and emphasise the immense attractiveness and scope of application of this concept in a democratic country committed to the Rule of Law. Suffice it here to just mention that post-Apartheid South Africa is probably the only country in the common law world that has made great strides in upholding the Rule of Law and democratic values ever since the presidency of Mr. Nelson Mandela.[69]

10.1 Superiority, Broadness and Flexibility of this Concept

Ever since 1789 when the American Constitution came into force, enlightened judges of profound wisdom have propounded the proposition that a written constitution is a living, organic and dynamic document intended to create a great and dynamic nation. This proposition found expression through the *dicta* of many landmark cases in the common law countries.[70] This brings us to the rules of interpretation of the Constitution which are different from the rules of interpreting statutes. A constitution cannot be interpreted like a statute.

10.1.1 Rules of Construction of the Federal Constitution

In order to give effect and life to a written constitution which is living, organic and dynamic, the courts are bound to observe certain fundamental rules of construction of the constitution. These rules have either been established by the highest courts in the common law jurisdictions with written constitutions and are now presumed to be rules of good practices and governance which should be given due consideration and should be considered at least as of great persuasive authority. They are binding if they have been laid down or established by the domestic courts in earlier cases. Some of these rules of great significance in the field of public law are enumerated below:

(a) a written constitution being the supreme law of the land and also a living and organic and dynamic document and, hence, it necessarily follows that of all written instruments, it has the greatest claim to be construed *ut res magis valeat quam pereat*".[71] This rule represents the living spirit of a written Constitution and

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[67] *Maneka Gandhi v Union of India*, AIR 1978 SC 597. *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261, (CA).

[68] Such as Arts. 3, 40, 121, 128, 130, 153, *etc*.

[69] See in particular sub-headings 6.3 and 14.1.1 and 14.1.3 of this article for an idea of the South African public law regime.

[70] *Maneka Gandhi v Union of India*, AIR 1978 SC 597 (India). *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261, (CA) (Malaysia).

[71] Meaning "that the thing may rather have effect than be destroyed." See also the Hong Kong CFA case of *Ng Ka Ling and Ors v Director of Immigration* [1999] 1 HKLRD 315, 340. In *Ng Ka Ling*, the Court of Final Appeal ruled that the Basic Law of Hong Kong must be given a generous construction so that the residents of Hong Kong may enjoy in full measure the fundamental rights and freedoms so constitutionally guaranteed and that the Basic Law is a living instrument intended to meet the changing needs and circumstances of the people of Hong Kong, and hence a literal, technical, narrow or rigid approach is be avoided by the courts in interpreting the Basic Law and went further to point out that constitutional interpretation is question specific.

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supplemented by the other rules hereinafter stated, they should together constitute the foundation on which to build a dynamic public law regime and a progressive nation;

(b) fundamental rights in the constitution must be broadly and liberally interpreted by the courts and any restrictions thereon must be narrowly and restrictively construed.[72] The courts have no constitutional mandate to re-write the Constitution by construing fundamental rights or the provisions therein narrowly;

(c) that fundamental rights in the Constitution are enabling and empowering particularly in the context of the almighty state *vis-à-vis* the weaker or marginalized groups in our society;

(d) that fundamental rights in the Constitution are complementary and supplementary to each other and it is naïve to presume that each right operates individually and in isolation;

(e) the Judiciary in Malaysia is under a constitutional duty and mandate 'to preserve, protect and defend the Constitution' under Arts. 121 and 124 of the Federal Constitution read with Sixth Schedule of the Constitution. The role of the Judiciary in this context has been described as "a sentinel on the *qui vive*";[73]

(f) save as otherwise clearly and expressly provided in the Federal Constitution, the finality of fundamental rights or any important question or issue of public law is to be decided by the High Court. The administration or any other person or body must not usurp this important judicial and constitutional function;

(g) the courts[74] have to resolve all issues of public law by having resort to the provisions of the Constitution.[75] And as far as possible, no one should be turned away without a remedy if he or she has a genuine grievance in public law because the root principle of law "married to justice is *ubi jus ibi remedium*";[76]

(h) as a matter of public policy, fundamental rights cannot be waived by the subject or weaker party;[77]

(i) the superior courts are under a constitutional duty and mandate to develop our own "common law that is to govern the grant of public law remedies based on our own legislation";[78]

(j) in the field of public law if an earlier judicial precedent on the interpretation of a fundamental right or on an issue of great public interest and importance is deliberately perverse, then it is only right that there is no necessity or obligation on the part of the courts in later cases to follow it as a precedent by virtue of the constitutional mandate derived under the combined effect of Arts. 121 and 124 of the Federal

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[72] *Datuk James Wong Kin Min* [1976] 2 MLJ 245 at p 251.

[73] *Madras v VG Row*, AIR 1952 SC 196, at p 199, para 9.

[74] The superior courts.

[75] See *dictum* to this effect in *Tan Tek Seng* [1996] 1 MLJ 261 at p 281, (CA).

[76] *Shiv Shankar v State of Haryana*, AIR 1980 SC 1037.

[77] *David Tan Boon Chee* [1980] 2 MLJ 116. *Nar Singh Pal*, AIR 2000 SC 1401. But is this the case in *Beatrice Fernandez*? *Beatrice Fernandez* [2004] 4 MLJ 466, (CA); [2005] 3 MLJ 681, (FC).

[78] See *dictum* to this effect in *Hong Leong Equipment* [1996] 1 MLJ 481 at p 543, (CA).

Constitution.[79] On whether the apex court is bound by its own precedents, it is contended that the answer is in the negative, and only if, in rare and appropriate cases particularly when there is a need to correct an earlier *per incuriam* decision;[80]

(k) any attempt by Parliament to restrict or curtail or take away the judicial power protected and guaranteed under Art. 121 of the Constitution shall be deemed to be unconstitutional.[81] And any attempt by the administration or its agency to justify any curtailment or restriction on rights on account of Asian or Eastern values has no constitutional basis or mandate save in or under some very exceptional and rare circumstances. Any attempt to remove or curtail the para 1 powers should be strongly resisted as it is also indirectly and primarily aimed at undermining Part II of the Federal Constitution and hence could be regarded as unconstitutional to the extent of the inconsistency;

(l) that in very rare and exceptional circumstances and under compulsive necessity, a High Court, under Para 1 additional powers of the Courts of Judicature Act 1964 and the word "law" in Art. 160 of the Federal Constitution, may incorporate international law into the domestic public law if there exists a lacuna therein provided that the Executive and Parliament have deliberately failed or refused to ratify and domesticate an international human right convention as a part of the domestic law;

(m) it is of equal importance to construe provisions in the constitution which are apparently in conflict with each other in a harmonious manner. This is the doctrine of harmonious construction. This rule may even be extended to construing a provision in a statute and that in a constitution so that the former is saved from being struck down as unconstitutional. A good example is an ouster clause in a statute excluding judicial review;[82]

(n) that the rigid rules of civil litigation used in the field of private law must not be imported into the field of public law with the ulterior objective of hijacking the more important public interest agenda; and

(o) neither could the rules of judicial review established under the inherent jurisdiction of the High Court be used to restrict the broad additional powers of the High Court under Para 1 of the Courts of Judicature Act 1964.

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[79] For example, see the case of *SKMK* (*Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317, (CA)) where the Court of Appeal declined to follow the earlier authority of *SEA Firebricks* [1980] 2 MLJ 165, (PC). See also the case of *Tan Tek Seng* where the Court of Appeal refused to follow *Karam Singh* (*Karam Singh v Menteri Hal Ehwal Dalam Negeri, Minister of Home Affairs, Malaysia* [1969] 2 MLJ 129, (FC)) on the question of whether the word 'law' in Article 5(1) of the Federal Constitution included procedural law. See also the advice of the House of Lords in *Ridge v Baldwin* [1964] AC 40 on the same. A further proposition must also be added. That the word 'law' in the phrase "save in accordance with law" in Part II of the Federal Constitution denotes not any law *simpliciter* but a law that complies with the requirement of fairness and reasonableness (both substantive and procedural) in Article 8(1) of the Federal Constitution. On this latter proposition, see CC Gan, *Disciplinary Proceedings Against Public Officers in Malaysia*, (Kuala Lumpur: LexisNexis, 2007), Chapter 9.

[80] See MP Jain, *Indian Constitutional Law*, (Nagpur: Wadhwa, 2003), pp 1881-1885.

[81] By virtue of the combined effect of commitment to the Rule of Law, separation of powers and basic structure doctrine.

[82] See also the rules of interpretation enumerated in *Lee Kwan Woh v Public Prosecutor* [2009] 5 MLJ 301, (FC).

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10.2 Violation of Human Rights or Fundamental Rights

Violation of human[83] or fundamental rights is a serious infraction of the Constitution. Whenever such an infringement occurs, the complainant may proceed under para 1 of the Courts of Judicature Act 1964 and seek the appropriate relief specified therein including any appropriate consequential order or direction.[84] The role of the High Court will be discussed below.

10.3 Most Anxious Scrutiny Test: When Does it Apply?

Whenever any human or fundamental right is alleged to be under attack, the reviewing court adopts the most anxious scrutiny test[85] in protecting it as the court is said to play the role of a sentinel on the *qui vive*.[86] In such a situation, the three-step test of proportionality comes into play. The reviewing court will make the primary judgment, as primary reviewer, on the validity of the administrative action or law, as the case may be, and determine whether the restriction thereon is disproportionate or not, or whether or not it is based on a fair balancing of the human or fundamental right and the need for the restriction thereupon.[87] The intensity of review will depend on the seriousness of the allegation of impropriety against the offending authority. The more substantial the interference with human or fundamental rights, the more the court will require by way of justification before it is satisfied that the decision or law is reasonable.

10.3.1 When Does it Not Apply?

On the other hand, in cases where no human or fundamental right is at stake,[88] then the reviewing court or tribunal will only play a secondary role as secondary reviewer while the primary judgment as to the reasonableness of the decision or action will lie in the administrative authority or the executive, in which case the *Wednesbury* principles[89] apply.[90]

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[83] Fundamental rights may be construed to include the relevant human rights: *Sagong bin Tasi & Ors v Kerajan Negeri Selangor & Ors* [2005] 6 MLJ 289, (CA). See also *Vishaka v State of Rajasthan*, AIR 1997 SC 3011. The Indian Supreme Court has taken this broad approach to interpreting fundamental rights ever since 1980s.

[84] See the *Abdul Ghani Haroon* cases. See also *Abdul Malek bin Hussin v Borhan bin Hj Daud & Ors* [2008] 1 MLJ 668, (HC).

[85] Or even more than that: *Denbigh High School*'s case [2006] UKHL 15. This probably constitutes the better view because the strict scrutiny test was formulated before the HRA 1998 came into force in UK.

[86] *Prem Chand v Excise Commr, UP*, AIR 1963 SC 996. See also footnote 73.

[87] See *dicta* in *Om Kumar & Others v Union of India* (2001) 2 SCC 386. The Malaysian court relied upon *Om Kumar* in *Dr. Mohd Nasir* [2006] 6 MLJ 213, (CA). It must also be pointed out that sometimes the alleged infraction may be more than a mere limitation, it may even amount to a complete deprivation or denial of a right. See also *R v Ministry of Defence, ex p Smith* [1996] QB 517, (CA), at pp 554-555.

[88] For example, where the applicant for judicial review only applies for review of the punishment imposed on him on the ground that the punishment is arbitrary.

[89] Both in the context of super-*Wednesbury* and sub-*Wednesbury* unreasonableness. See sub-headings 4.2 and 4.3 above respectively. It may be recalled that these principles have been re-postulated by the House of Lords in *CCSU* in 1984. See sub-heading 4 above.

[90] *India v G Ganayutham* (1997) 7 SCC 463; *Om Kumar & Others v Union of India* (2001) 2 SCC 386 where the rules of judicial review involving both categories of review are succinctly discussed. See also the Malaysian cases such as *Rama Chandran* [1997] 1 MLJ 145, (FC), and *Dr. Mohd Nasir v Menteri Dalam Negeri Malaysia* [2006] 6 MLJ 213, at para 8, (CA).

10.4 Proportionality

Proportionality is a part of Malaysian law when a breach of fundamental right is alleged to have occurred.[91] It is a doctrine which envisages that an administrative action may be interfered with by the reviewing court if it is found not proportionate to the mischief at which it was aimed. In laymen's terms, it is often said that the administrator cannot use a sledgehammer to crack a nut. An administrative action must maintain a reasonable relationship to the general purpose for which the power has been conferred. A public authority or an administrator must maintain a sense of proportion between a particular goal and the means he employs to achieve that goal, so that the administrative action impinges on the rights of the affected party or parties to the minimum extent necessary in order to preserve public interest. It is said that balance, necessity and suitability are the ingredients of proportionality. Whenever an applicant for judicial review complains that his or her fundamental right has been violated or interfered with by an authority or person, this doctrine will immediately come into play and the reviewing court is put on most anxious or heightened scrutiny of the alleged violation as the primary reviewer. This usually involves a three-step process of review of whether: (i) the legislative objective is sufficiently important to justify limiting a fundamental right; (ii) the measure designed to meet the legislative objective are rationally connected to it; (iii) the means used to impair the right or freedom are no more than is necessary or proportionate to the object it seeks to achieve by the standards/interests of a democratic society.[92] It involves the reviewing court to search for *an error of law*, not merits or correctness review. The burden to justify the interference on fundamental or human right is on the public authority concerned, not the *applicant*. This is called a structured test of substantive proportionality review based on justifiability.

In *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia,* the Court of Appeal took the opportunity to elucidate the doctrine as it has been used by the Malaysian courts in recent years. In the words of the Court of Appeal:

> The other aspect to interpreting our Constitution is this. When interpreting the other parts of the Constitution, the court must bear in mind the all pervading provision of art 8(1). That article guarantees fairness of all forms of State action (see *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor* [1996] 1 MLJ 261). It must also bear in mind the principle of substantive proportionality that art 8(1) imports (see *Om Kumar v Union of India* AIR 2000 SC 3689). This doctrine was most recently applied by this court in the judgment of my learned brother Mohd Ghazali JCA in *Menara PanGlobal Sdn Bhd v Arokianathan a/l Sivapiragasam* [2006] 3 MLJ 493. In other words, not only must the legislative or executive

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[91] See the case of *Tan Tek Seng* cited in footnote 24 above. As distinct from that alluded to in *CCSU* as the fourth possibility in the future. See also *Kumpulan Perangsang Selangor Bhd v Zaid bin Hj Mohd Noh* [1977] 1 MLJ 789 at pp 798-799.

[92] *R v Secretary of State for the Home Department, ex parte Daly* [2001] UKHL 26, (HL); d*e Freitas* v *Permanent Secretary of Ministry of Agriculture, Fisheries, Lands and Housing* [1999] 1 AC 69; *Leung Kwok Hung v The Hong Kong Special Administrative Region* [2005] 887 HKCU 1.

> response to a state of affairs be objectively fair, it must also be proportionate to the object sought to be achieved. This is sometimes referred to as 'the doctrine of rational nexus'. (see *Malaysian Bar & Anor v Government of Malaysia* [1987] 2 MLJ 165). A court is therefore entitled to strike down State action on the ground that it is disproportionate to the object sought to be achieved.[93]

One aspect of the abovementioned *dictum* on fairness and proportionality as part of Malaysian law by virtue of Art. 8(1) of the Federal Constitution needs some clarification. One observation needs to be made here. Despite the devastating effect of *Eng Hock Cheng*[94] and *Sugumar Balakrishnan*[95] on *Tan Tek Seng*, the fact remains that Art. 8(1) of the Federal Constitution is supreme. Art. 8(1) prevails over and survives those two Federal Court judgments and it cannot be struck down by the Federal Court. The use of proportionality test in Malaysia under Art. 8(1) of the Federal Constitution was finally re-affirmed by the Federal Court on 17th November 2009 in the case of *Sivarasa Rasiah v Badan Peguam Malaysia and Anor*.[96] With the advent of *Sivarasa Rasiah* the ghost of *Eng Hock Cheng* and *Sugumar Balakrishnan* could finally be laid to rest once and for all. Moreover, the doctrines of procedural and substantive fairness can take their respective and rightful places in the field of our public law. It must also be remarked that with the acceptance of the three-step proportionality test as the standard test to gauge the validity of a law or executive action purporting to restrict the exercise of a fundamental right, the earlier test of whether the practice in question is 'an integral part' of the religion or 'of a mandatory nature', in the case of an alleged infringement of Art. 11 right to religion, is no longer good law. The integral part or mandatory nature test used to hold sway in India and Malaysia before the advent and establishment of the three-step proportionality test.

10.5 Procedural Fairness: Arts. 5(1) and 8(1)

Ever since 1995[97] the Malaysian courts took the unprecedented step to assess the constitutionality of a law or decision from the constitutional perspective. This approach constituted a quantum leap forward in the right direction in the positive development or forward march of Malaysian public law which had been clinging rigidly to common law. A few words need to be said about this very significant phase in the developments of Malaysian public law.

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93 [2006] 6 MLJ 213, (CA) at para 8. Art. 8(1) of the Constitution is the heart of due process or fairness in this country. See how the South African Constitutional Court dealt with the issue of proportionality in the case of *Sidumo* in 2007. In South Africa, proportionality is merely part of the broad ground of reasonableness under s 33(1) of the South African Constitution. The constitutional aspect of proportionality whenever rights are infringed in S Africa is codified in s 36 of the Constitution.

94 [1997] 4 AMR 53, (FC).

95 [2002] 3 MLJ 72, (FC).

96 To be reported in [2010] MLJ. For the position in South Africa, see Section 36 of the South African Constitution.

97 *Syarikat Kenderaan Melayu Kelantan Bhd v Transport Workers' Union* [1995] 2 MLJ 317, (CA). Popularly known as the *SKMK* case on 'error of law review' or *Anisminic* review. *Nordin bin Salleh & anor v Dewan Undangan Negeri Kelantan & anor* [1992] 1 MLJ 697, (SC) on the unconstitutionality of anti-party hopping law is of doubtful authority from the perspective of democratic practice, morality and public policy.

One significant feature of this recent Malaysian public law jurisprudence is that constitutional review[98] is a new and recent phenomenon. It only came into great prominence in the mid-1990s with the advent of the seminal case of *Tan Tek Seng* where the Court of Appeal in no uncertain terms expounded the doctrine of fairness, both procedural and substantive (*viz*., proportionality) from constitutional perspective by using the combined effect of Arts. 5(1) and 8(1) of the Federal Constitution. In fact, the seeds of this approach were sown earlier in the case of *Nordin*.[99] Its arrival, *albeit* much belated, was greeted with much excitement and enthusiasm and hope and expectations for the future. In fact, the Indian jurisprudence on this important aspect of public law was developed in India over a period of time ever since 1970s. It reached its peak in the 1980s. The cases of *Kesavananda*[100] and *Maneka Gandhi*[101] as well as the public interest litigation cases in the 1980s are symptomatic of and synonymous with this dynamic approach of the reviewing courts increasingly resorting to the supreme law (*i.e*., the Constitution) as the ultimate source of power or basis to strike at and condemn any *ultra vires* exercise of state powers adversely affecting the rights and legitimate expectations of individuals as protected and guaranteed under the Constitution.[102] In practice the condemnation is usually accompanied by the moulding of appropriate relief in favour of the applicant or applicants for judicial review.[103] Most importantly, there is proper constitutional and legal basis for invoking and exercising this additional and extraordinary jurisdiction of the courts in India and, hence Malaysia,[104] save that the Malaysian Constitution does not contain a provision similar to Art. 32 of the Indian Constitution.[105] Suffice it here

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[98] Based on para 1 powers. Once invoked, it latches on to the constitutional provision or provisions breached and a broad and liberal construction is given thereto. This is judicial creativity and activism on the part of the Judiciary in the discharge of its judicial duty.

[99] *Dewan Undangan Negeri Kelantan & Anor v Nordin bin Salleh & Anor* [1992] 1 MLJ 697. The *dictum* of the Federal Court in *Sri Lempah Enterprise* ([1979] 1 MLJ 135, at p 148) in the pre-*Tan Tek Seng* era bore all the hallmark of a regime committed to the Rule of law *sans* any reference to the Federal Constitution which was excusable in the 1970's. The relevant parts of the *dictum* referred to are "unfettered discretion is a contradiction in terms …" and that "every power must have legal limits, otherwise there is dictatorship". For serious comment on *Nordin*'s case, see *supra* n 97.

[100] *Kesavananda Bharati v Kerala,* AIR 1973 SC 1461.

[101] *Maneka Gandhi v Union of India* 1978 AIR SC 597. The judge behind this jurisprudence is none other Justice Bhagwati.

[102] This power may extend to declaring a law or governmental policy invalid on the ground of inconsistency with the Constitution. See also the recent case of *Petrojasa* cited in footnotes 115 and 126 below.

[103] *Rama Chandran, R v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145.

[104] To point out and emphasise, the genesis of Malaysian para 1 reviewing or supervisory power of the High Court is Art. 226 of the Indian Constitution. Para 1 (Schedule to the Courts of Judicature Act 1964, Malaysia) provides that the High Court has the "power to issue to any person or authority directions, orders or writs, including writs of the nature of *habeas corpus*, *mandamus*, *prohibition*, *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 India, Art. 226 confers jurisdiction on the Indian High Court to issue prerogative writs as well as orders and directions to bodies under review.

[105] A provision to enable an individual to approach the Indian Supreme Court (the highest court) to complain of a breach of a fundamental right in an urgent and appropriate case. Under Art. 226, the venue of complaint and adjudication is the Indian High Court. These are (Arts. 226 and 32) powerful constitutional writ remedies. It must be admitted that the source of reviewing power in Malaysia is statutory. Nevertheless, it is still a strong reviewing power hinging onto the Constitution which is alleged to have been violated.

to merely emphasise that this jurisdiction has vast and broad ambit and potential in the field of public law provided that there is judicial creativity and activism on the part of the courts based on their important role as guardian (sentinel *on qui vive*) of the Constitution. Procedural fairness has been interpreted to include the right to reasoned decision in *Hong Leong Equipment* based on the combined effect of Arts. 5(1) and 8(1) of the Federal Constitution.[106] As procedural fairness is a broad and expanding canvas, it may in the future be extended to cover the right to plea in mitigation, right to oral hearing or enquiry, right to counsel or assistance by another person and the right to cross-examine witnesses particularly if the accusation or accusations against the affected persons are serious ones entailing serious consequences such as dismissal or reduction in rank in the case of public officers or civil servants. Future developments in other countries such as India and South Africa will certainly be of interest to us on how we may want to shape our public law.[107]

This dynamic and innovative approach to interpreting the Malaysian public law will be further discussed and elaborated below in sub-headings 10.6 and 10.7.

10.6 Substantive Fairness or Unfairness

By using this approach, *viz.*, constitutional review, Arts. 5(1) and 8(1) of the Federal Constitution, in particular, have been used to invoke and construe fundamental rights broadly and liberally to incorporate procedural[108] as well as substantive fairness into the field of public law.[109]

10.7 Broad Construction of Fundamental Rights

Article 8(1) could be used alone as the source of fairness or unfairness[110] or to house the *ultra vires* doctrine.[111] Arts. 5, 8 and 13 could be jointly invoked to protect native land rights under the law.[112] In *Abdul Ghani Haroon* cases, the High Court issued the writ of habeas corpus[113] in the face of unlawful detention under section 73 of the ISA 1960 as well ordering the police not to re-arrest[114] the detainees on the same grounds of detention

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[106] Any attempt to take the law back to common law is to be resisted because the Federal Constitution is our supreme law. The rigidity of the common law cannot be used to restrict or oust the operation of the supreme law.

[107] Even Hong Kong and European law may be of relevance to us provided that the law on the forward march. We should not be associated with regimes which attempt to stifle the forward march of public law.

[108] *Tan Tek Seng*'s case. Footnote 24.

[109] *Sugumar Balakhrishnan v Pengarah Immigresen Negeri Sabah & Anor* [1998] 3 MLJ 289(CA). This case introduced the broad concept of substantive unfairness in an attempt to curb abuse of state powers by relying on Art. 8(1) of the Federal Constitution. See also footnote 87 above- *Dr. Mohd Nasir*'s case. *Quaere*: whether the procedure of informing the Vice-Chancellor of a public university on the last day of his or her contract that his or her services are no longer required violates any rule of procedural and/or substantive fairness? Or whether the re-appointment is question of discretion or doctrine of pleasure?

[110] *Sugumar Balakrishnan*, (CA). See the use of the concept of unfairness in English law: Preston v IRC [1985] 2 All ER 326. See also Wade and Forsyth, *Administrative Law*, (Oxford: Oxford U Press, 2004), pp 22-24.

[111] *Palm Oil Research and Development Board Malaysia & Anor v Premium Vegetable Oils Sdn Bhd* [2005] 3 MLJ 97, (FC).

[112] *Kerajan Negeri Selangor & Ors v Sagong bin Tasi & Ors* [2002] 2 MLJ 591, HC; [2005] 6 MLJ 289, (CA).

[113] *Abdul Ghani Haroon (No. 3)* [2001] 2 CLJ 709, (HC).

[114] *Abdul Ghani Haroon (No. 4)* [2001] 23 CLJ 606, (HC).

as the initial arrest which was held to be unlawful. In other words, the fundamental rights provisions in Part II of the Federal Constitution could be construed widely and broadly in various other ways for the purposes of protecting, upholding and preserving the Constitution whenever allegations are made that any of those rights guaranteed thereunder has been infringed. As this aspect of the Malaysian public law is relatively recent and still at its stage of infancy, the potentially broad ambit of this dynamic jurisprudence may only be gleaned by reference to the progressive Indian and South African public law jurisprudence on the same.[115] In the difficult task of construing our laws and the constitution, it is worthwhile to learn from the experiences of other countries whose judges have striven hard to construe their laws in a broad, harmonious and dynamic manner. It is argued that the absence of a provision similar to s 39 of the South African Constitution in the Malaysian and Indian Constitution will not hinder judicial creativity and activism on the part of the courts. The jurisprudence on Arts. 32 and 226 of the Indian Constitution (*i.e.*, *Vishaka*, AIR 1997 SC 3011; *Asiad Games Village*, AIR 1982 SC 1473; *Vellore Citizens Welfare Forum*, AIR 1996 SC 2715) lends support to this proposition.

11. Turning Back the Clock: Reinstating Positivism and Parochialism and Reverting to Antiquity

However, shortly thereafter, the Federal Court disapproved of this approach of invoking the additional powers of judicial review in a few cases[116] in quick succession and thereby relapsed and retreated into the gloomy state of affairs of the pre-*Tan Tek Seng* era. This negative development calls for one immediate comment, *viz*., whereas the public law in India, South Africa and Europe[117] marched forward, the Malaysian law chose to slide backwards into antiquity and anachronism. The rigidity, antiquity and harshness of the common law dispensation of justice are primarily caused by counsel representing the government and the Judiciary. Lawyers representing the government always tend to argue the law rigidly and narrowly. When this state of affairs becomes the norm, bad precedents will lead to more adverse law and eventually resulting in unfair governance.

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115 See elsewhere for this dynamic aspect of the Indian and South African public law. CC Gan, "Administrative Law and Judicialised Governance in Malaysia: The Indian Connection". Publication of the University of Hong Kong, 2009, pp 255-284. *Supra*, n 41.

116 The Federal Court overruled the Court of Appeal in *Sugumar Balakrishnan* [2002] 3 MLJ 72, (FC) on both procedural and substantive fairness. Also rejected was the Court of Appeal's interpretation of the ouster clause in s 59A of the Immigration Act 1959/63. *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1 impliedly overruled the extension of procedural fairness to right to reasoned decision. The Federal Court decided the issue of right to reasoned decision solely on common law alone. On the test of personal bias, the court also retreated from its earlier liberal stance in *Chong Kok Lim & Ors v Yong Su Hian* [1979] 2 MLJ 11. See also *Utra Badi a/l K. Perumal & Anor v Lembaga Tatatertib Perkhidmatan Awam* [2001] 2 MLJ 417, (FC); *Kekatong Sdn Bhd v Danaharta Urus Sdn Bhd* [2003] 3 MLJ 1, (CA); [2004] 2 MLJ 257, (FC); and *Beatrice Fernandez v SPM & Ors* [2005] 3 MLJ 681, (FC). See also footnote 126 on the post-2000 ISA cases cited.

117 *Case of Steel and Morris v UK* (2005) EctHR 68416/10; (2005) TLR 93. It must be pointed out that human rights in Europe (member states of the Council of Europe) come under the auspices of the European Court of Human Rights at Strasbourg. This court enforces those human rights under the European Convention on Human Rights and Fundamental Freedoms 1950. Enforcement of the Human Rights Act 1998 (of UK) will come before the European Court of Human Rights at Strasbourg.

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For example, in respect of procedural fairness in public service discipline, the most troublesome case of *Najar Singh*[118] lead to subsequent cases like *Ghazi bin Mohd Sawi*[119] and then culminated in the glaring injustices as seen in the recent case of *Senthivelu*. To end the year 2008 with *Senthivelu*[120] and to begin 2009 with *Abdul Jalil*[121] does not augur well for the forward march of Malaysian public law. It must be pointed out that the agenda for change in the field of public law is set and determined by the public lawyers who represent their clients and under the constitution, the courts are there to protect, defend and preserve the constitution and the rights of the affected parties. We need to constantly remind ourselves that public law jurisprudence is not carved in stone, but it is living and dynamic and constantly moves forward to accommodate and adapt to changes. Depending on the circumstances, in the field of public law, one plus one need not always be two. This is how great cases come along and are decided and developed further into an advanced and dynamic corpus of law. Another matter of great importance in the field of public law is that precedents, especially good ones, need not necessarily originate from the apex court. They may originate either from the High Court or the Court of Appeal. The more important thing to ask is whether it is good law or not. Of equal importance to emphasise here is that the doctrine of *stare decisis* will not be able operate properly in the field of public law if cases are not decided in accordance with law.

12. Recent Positive Case Law Developments: State of Uncertainty Remains

Recent case law developments since 2007 saw some conscious efforts on the part of a very small number of Malaysian judges to move away from the usual restrictive and positivist approach to cases involving rights-based jurisprudence in particular. These cases that deserve mention here are *Minister of Finance, Government of Sabah v Petrojasa Sdn Bhd*;[122] *Abdul Malek bin Hussin v Borhan bin Hj Daud & Ors*;[123] *Raja Segaran S Krishnan v Malaysian Bar*;[124] *Badan Peguam Malaysia v Kerajaan Malaysia;*[125] and *Raja Petra bin Raja Kamarudin v Menteri Hal Ehwal Dalam Negeri, Malaysia*.[126] It must be confessed that these cases are difficult to come by under the general atmosphere of judicial self-imposed rigidity and positivism and parochialism. Are these cases indicating a positive change in the role of Judiciary? It is difficult to say with certainty at the

118 [1976] 1 MLJ 203, (PC).

119 [1994] 2 MLJ 114, (FC).

120 [2008] 6 MLJ 1, (FC).

121 [2009] 1 MLJ 60, (CA).

122 [2008] 4 MLJ 641, (FC). A judgment debt against the Government was enforced *via* para 1 powers by way of judicial review.

123 [2008 1 MLJ 668, (HC). The High Court awarded damages and aggravated damages for unlawful detention of an opposition politician.

124 [2008] 5 CLJ 470, (HC). The High Court took a realistic approach to the question of *locus standi* when the applicant was least affected by the decision of the Malaysian Bar to hold an EGM.

125 [2008] 1 CLJ 521, (FC). The Federal Court was called upon by the Malaysian Bar to interpret Art. 123 of the Federal Constitution, *viz*., whether an academic could be appointed as a Judicial Commissioner under Art. 122AB?

126 Citation not available. Reported in *The Star* newspaper on 7th Nov 2008. *Re Raja Khalid* ([1988] 2 MLJ 182) and *Jamaluddin* ([1989] 1 MLJ 418) revisited.

moment. But public lawyers and defenders of fundamental rights or civil liberties need to be very optimistic, perseverant and continue to hold steadfastly to the Rule of Law by engaging those negative forces who are bent on diluting or destroying it and never give up hope easily until the struggle bears fruit no matter how long it takes. Indeed it may be argued that *Rama Chandran* and the recent *Petrojasa* case would have vindicated *Tan Tek Seng* and also the Court of Appeal case of *Sugumar Balakrishnan*. This being the case, procedural fairness and substantive fairness in particular should remain part of Malaysian public law. It is also argued that further transformation of the law is possible provided that our system continues to be committed to the Rule of Law.

13. Current State of Malaysian Public Law

In light of what has been discussed in the foregoing, the following conclusions, remarks and/or proposals for reform, as the case may be, are inevitable.

13.1 Jurisprudence on the Development and Application of CCSU Principles

Generally speaking, this aspect of the Malaysian public law is in accord with that of any other common law countries. This aspect has been discussed under sub-heading 4 above. But the antiquity of this aspect of common law has to be noted. There is an urgent need to liberalise this common law aspect of judicial review. The grounds of judicial review need to be postulated liberally and positively.[127] The other more important aspect of the Malaysian public law, *viz*., enforcement of fundamental rights or rights-based jurisprudence, will be dealt with below.

13. 2 Para 1 Powers: Enforcement of Fundamental Rights

After more than fifty one years of developments, generally speaking and assessed fairly by using the Rule of Law index, the Malaysian public law, in respect of rights-based jurisprudence, is still in a state of flux, anxiety and uncertainly. In particular, several aspects of the law will be highlighted hereinafter. In the case of *Karam Singh*, the Federal Court in condescending tone chided the attempt by the counsel for the applicant in a case of preventive detention under section 8(1) of the Internal Security Act 1960 to cite and rely on Indian case law relating to the same. The Indian judges were castigated as “indefatigable idealists”. Some 36 years later, the apex court in the case of *Beatrice Fernandez*[128] again

[127] The Indian Supreme Court performed a judicial feat recently in *Indian Airline v Prabha D. Kanan* (2006) 11 SCC 67. It postulated the grounds of judicial review broadly, liberally and positively and went further to rule that *Wednesbury* unreasonableness is giving way to the principle of proportionality.

[128] [2005] 3 MLJ 681, (FC). It must be pointed out that the issues involved in *Beatrice* were far more serious than mere contractual disputes. They involved serious infractions of public law which could not be condoned. Terms of service or employment, be they in the public or private sector, must comply with the standards or requirements imposed by the supreme law (*i.e.*, the Federal Constitution). Likewise, It is equally harsh and cruel and thus violating Art. 8(1) of the Federal Constitution to punish or sue university lecturers or civil servants (on government scholarship) who have failed to acquire their PhD degree.

without any qualms rejected the connection, relevance and significance of Indian case law[129] pertaining to the same on almost the same issues before the court- *viz*., reasonableness and validity of a term of the collective agreement requiring a pregnant air-stewardess to resign from her job; the right of a pregnant air-stewardess to employment and the right of such a person to bear a third child during her term of employment with the airline, her employer. In another matter, one aspect of the Privy Council legacy in *Najar Singh*[130] that Chapter D of the General Orders was exhaustive of all the procedural rights of the public officer disciplined continues to haunt Malaysian public till this day.[131] To date, an earlier perverse precedent in the field of public law continues to bind subsequent cases.[132] In a very recent case, *Ong Boon Hua @ Chin Peng & Anor v Menteri Hal Ehwal Dalam Negeri, Malaysia*,[133] it appeared that the Malaysian Government was not bound by the peace treaty and the Administrative Arrangement it had entered into with the Communist party of Malaya with particular reference to the applicant. Moreover, the High Court and the Court of Appeal had attempted to re-write the terms of the Administrative Arrangement by requiring the first appellant (*viz*., *Chin Peng*) to produce his birth certificate and citizenship certificate as these were not the terms of the Administrative Arrangement.[134] In some cases, valid constitutional questions brought before the courts for resolution had been conveniently converted into and hence diluted as mere administrative law questions.[135] In others, the Federal Constitution[136] or laws[137] had been rewritten restrictively and hence diluted too. Erosion of the Rule of Law is evident in the harassment of criminal or public interest lawyers[138] who legitimately discharged their duties towards their clients; the detention of

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[129] *Air India v Nerghese Meerza*, AIR 1981 SC 1829.

[130] [1976] 1 MLJ 203.

[131] *Selvaraju a/l Ponniah v Suruhanjaya Perkhidmatan Awam Malaysia & Anor* [2007] 7 MLJ 1, para 15.

[132] *Ibid*, para 23. See also the cases of *Nordin bin Hj. Zakaria Anor* [2004] 2 CLJ 777; *Senthivelu* [2008] 6 MLJ 1, (FC); and *Abdul Jalil bin Rahmat* [2009] 1 MLJ 60, (CA).

[133] [2008] 3 MLJ 625, (CA).

[134] Instead of commencing the proceedings by way of declarations, the applicants should have commenced their action by using the procedure under Order 53, RHC 1980 seeking to enforce the terms of the Administrative Arrangement read in conjunction with the peace treaty via the appropriate orders and directions of the court under its additional powers. See also *Petrojasa* case [2008] 4 MLJ 461, (FC) on the mode of commencement of proceedings.

[135] An example *par excellence* is *Chai Choon Hon v Ketua Polis Daerah Kampar* [1986] 2 MLJ 203, (SC). A complaint of a breach of fundamental right (Art. 10 right of a political party) had been decided and settled on the ground of unreasonableness of the conditions imposed by the licensing authority.

[136] *Ooi Ah Phua v Officer-in-Charge, Criminal Investigations, Kedah/Perlis* [1975] 2 MLJ 198, (FC) where the constitutional guarantee of right to counsel could be postponed at the discretion of the detaining authority (*i.e*., the police) without any clear words to that effect in the Constitution. In another case, *Subashini Rajasingam v Saravanan Thangathoray* [2008] 1 AMR 561, (FC), the word "parent" in Art. 12(4) of the Federal Constitution was restrictively interpreted as a single parent, not both parents, and hence rendering Art. 8(1) of the Federal Constitution (guaranteeing equality before the law or the equal protection of the law) a promise of unreality.

[137] For example, the misuse of the Police Act 1967 with a view to restricting the fundamental rights (Art. 10 rights under the Federal Constitution, for example) of the citizens.

[138] As reported on 17th November 2008 in the Malaysian News Straits Times. Democracy had been misinterpreted as "Democrazy" by the IGP. See NST 22-12-2008.

Hindraf's lawyers under the ISA;[139] the harassment of public interest activists via arrest or criminal prosecution; and the harassment of the members of the Malaysian Bar at their premises and arrests of some of them on the International Human Rights Day in 2007 while they were legitimately carrying out activities in conjunction with the International Human Rights Day. Other unresolved grievances are the difficulty in building places of worship and demolition of such places by the local authorities causing anxiety to the worshippers;[140] insensitivity to human rights abuses or exploitation of estate workers; complaints of Penan women in respect of human rights abuses against the workers of the timber camps and complaints of trespass by the natives to their customary land rights or interests, or loss of such rights or interests. The rising crime rate in the country is another cause of concern to the public. In view of all these glaring shortcomings in this important aspect of human and fundamental rights protection or enjoyment, much therefore remains to be done by the relevant authorities in the delivery or performance of their respective duties.

13.3 Non-constitutionalisation of the Fundamental Right Enforcement Mechanism

The failure of the Reid Constitutional Commission to constitutionalise para 1, Schedule to the Courts of Judicature Act 1964 was a serious omission[141] which could not be fathomed by administrative and constitutional lawyers today. That failure or omission has rendered para 1 precarious in that it may be repealed through an amendment to the Courts of Judicature Act. Assuming for a moment that para 1 is repealed, then judicial review could be thrown back to the position at common law or even worse, in a limbo, if the 1988 constitutional amendment to Art. 121[142] is interpreted to have the effect of removing the common law inherent jurisdiction of judicial review. The superior Indian

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[139] The subjective test laid down by the Federal Court in 1969 (in the infamous *Karam Singh v Menteri Hal Ehwal Dalam Negeri, Minister of Home Affairs, Malaysia* [1969] 2 MLJ 129) has withstood the test of time in Malaysia as opposed to "most anxious or heightened scrutiny test" or probably the "fullest and most anxious scrutiny test" coupled with the structured test of proportionality review based on justifiability when it is obvious that the law in UK has long moved on to adopt the latter test in deprivation of personal liberty cases. *Kerajaan Malaysia & Ors v Nasaruddon Nasir* [2004] 1 CLJ 81, (FC); *Lee Kew Sang v Timbalan Menteri Dalam Negeri & Ors* [2005] 3 CLJ 914, (FC) and other post-*Ezam* case law as well as the systematic abuse of the ISA over the years really give rise to serious concern by public lawyers. It may be noted that in the *Ezam*'s case, [2002] 4 MLJ 449(FC), the Federal Court applied the objective test to section 73 of the Internal Security Act 1969 while retaining the subjective test for section 8(1) detention. The time has come for a thorough review of the infamous *Karam Singh*'s legacy as well as the statute itself. It is submitted that the current scheme of preventive detention laws in this country violates both the human and fundamental rights protections under the Malaysian laws primarily due to failure on the part of the courts and the Ministry concerned to realise the significance and implications of Arts. 149, 121, 124 and 8 of the Federal Constitution as well as s 4(4) of the Human Rights Commission Act 1999. There is no basis for the use of both the common law subjective and objective test in preventive detention cases. This is because whenever deprivation personal liberty is alleged to have occurred, the minimum test applicable is "the most anxious scrutiny test", if not more.

[140] Position before the March 8th 2008 12th General Elections in particular.

[141] The other equally serious omission will be dealt with in the last part of this article when law and regulation in the globalization era is discussed. Suffice it here to merely point out that the said Commission also saw no relevance of Art. 19(1)(g) and Art. 19(6) of the Indian Constitution to the then Malaya.

[142] It is vehemently submitted that the constitutional validity of that 1988 amendment itself is doubtful. Constitutional lawyers have always argued that the 1988 amendment to Art. 121(1) should not have been attempted at all in the interest of Rule of Law.

position in respect of the same has already been discussed in sub-heading 10.1 above. India has Arts. 32 and 226 in its Constitution. In this day and age, it is also necessary for the courts to constitutionalise certain areas of the private law so that the effects of Part II of the Federal Constitution are also felt there. This may include the constitutional requirement by the private sector to comply with gender equality, labour[143] or environmental standards.

13.4 Restrictive and Antiquated Laws Hindering Judicial Intervention

The Malaysian public law has also to grapple with the lingering presence of some restrictive[144] and antiquated[145] laws which have to a large extent affected its proper development. Discussion on these two notorious aspects of the Malaysian public law has to be found elsewhere. The recent *Petrojasa*'s case has highlighted the presence of restrictive laws unnecessarily hindering the enforcement of rights or taking of actions against the governmental authorities. In that case the Federal Court took the bold and unprecedented step of circumventing all the restrictive laws by relying directly on the powerful and enabling provision of Para 1 of the Courts of Judicature Act 1964. All these call for reform of Malaysian public law.

13.5 Positivism and Parochialism

Generally speaking, from the above discussion on rights-based jurisprudence, it is fair to say that positivism and parochialism run deep in Malaysian system of public law.[146] Positivism is a British legacy. It needs to be given a decent burial like what the Indian and South African systems did in their own respective ways. Parochialism is self-imposed and self-inflicted. The problem lies with the courts. It cannot be denied that all common law countries are connected to each other particularly those with similar constitutional framework and the appropriate approach to adopt is to ask whether we could take a leaf from the more dynamic and progressive regimes. Common law regimes may even consider when they could adopt some salient features from the *droit administratif regime*

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[143] *Barat Estates & Anor v Parawakan & 335 Ors* [2000] 3 AMR 3030- Employment Act 1955 subjected to Arts. 6 and 8(1) of the Federal Constitution with regard to the right to an employee to be employed by the employer of his or her choice.

[144] Such as the Printing Presses and Publications Act 1984, Sedition Act 1948 and Official Secrets Act 1972.

[145] Such as the Government Proceedings Act 1956, Specific Relief Act 1950 and the law relating to relator actions.

[146] Note in particular the recent amendment (*via* Act A1322 in the year 2007) to the Industrial Relations Act 1967 overruling the compensation aspect of the earlier case of *Rama Chandran*. In the writer's opinion, the amendment itself is both *ultra vires* the Courts of Judicature Act 1964 (*i.e.*, the para 1 powers) and also unconstitutional (*i.e.*, violating the combined effect Arts. 5(1) and 8(1) of the Federal Constitution). For questionable case law: *Sugurmar Balakrishnan* (FC); *Utra Badi* (FC); *Beatrice Fernandez*; *Najar Singh*; *Karam Singh*; *Government of Malaysia v Mahan Singh* [1975] 2 MLJ 155; *Pengarah Pelajaran, WP v Loot Ting Yee* [1982] 1 MLJ 68; *Loh Wai Kong v Government of Malaysia & Ors* [1979] 2 MLJ 33; *S Kulasingam v Commissioner of Lands, Federal Territory* [1982] 1 MLJ 204; *Sim Kie Chon v Superintendent of Pudu Prison* [1985] 2 MLJ 385; *Loh Kooi Choon v Government of Malaysia* [1977] 2 MLJ 187; *Selangor Pilot Association (1946) v Government of Malaysia & Anor* [1975] 2 MLJ 66; and *Ooi Ah Phua v Officer-in Charge, Criminal Investigations, Kedah/Perlis* [1975] 2 MLJ 198.

as practiced in the European Union member states. A German scholar[147] in fact suggested that the Administrative Procedure Act should be enacted in the common law countries because of the obvious advantages that may enure or emanate from its imposition. We must always remind ourselves that public law in a democratic state is expected to be a dynamic regime and constantly moves forward with the passage of time and changed circumstances particularly in this modern era of globalisation. Positivism, parochialism and anachronism have no place in era of globalisation. In order to create a dynamic nation, the whole system must take the bold step to free and liberate itself and its citizenry[148] from the shackles of positivism, parochialism and anachronism. This will necessarily involve drastic changes in attitude, approach, laws and practices on the part of all the organs of government and the people. Judicial activism and creativity is a recent phenomenon in this country and involved only a few judges who dared or dare to be different and hence good cases that bring about positive changes in the law are few and far between. More are expected of the Judiciary to show the Executive and Legislature the way forward in the creation of a dynamic regime and state. The Executive and Legislature, too, must be committed to the Rule of Law. Another negative feature of Malaysian public law is the wide disparity between laws in the statute books and their practical and operational realities.[149] This weakness, too, needs to be addressed. It is also important for the administration to bear in mind that the law and the system must protect and empower the citizenry and it is part of the duty of the government and its agencies to make that happen in its policies and implementation of its policies. So far as the role of the courts are concerned *vis-à-vis* Arts. 121 and 124 of the Federal Constitution, hitherto they do more harm or damage than good to the Federal Constitution. With regard to the same, tribute is certainly due to the courts which, as well as the judges who, had decided cases such as *Tan Tek Seng*, *Hong Leong Equipment, Rama Chandran*, *Sugumar Balakrishnan* (CA), *Abdul Ghani Haroon (No. 3)*, *Abdul Ghani Haroon (No. 4)*, *Sabil Mulia* and also *Petrojasa*.

13.6 Current and Emerging Issues

Conversion issues, social contract dilemma, claims of Malay supremacy, increasing law and order problems, the extension of the NEP under the banner of NDP and a whole gamut of other public law issues will continue to plague the Malaysian public law for some or a long time to come. Lack of commitment to the Rule of Law on the part of the government can also be seen from the long-standing plight of a large number of stateless people in Malaysia who due to their parents' ignorance of the law had failed to have their births in Malaysia registered with National Registration Department. These people face endless problems such as inability to secure employment, enrolment into schools for the purpose of education and face frequent harassment or threats of arrests by the enforcement agencies.

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147 Mr. Jochen Hoerth, a PhD candidate at the Free University of Berlin, Germany. He has great interest in Malaysian Administrative Law.

148 The Universities and University Colleges Amendment Act 2008/2009 will indicate how sincere and serious is the government in liberating the students and staff of institutions of higher learning.

149 *S Kulasingam*; *Ho Kwan Seng*; *Najar Singh*; and *Ooi Ah Phua* cases.

In the face of the political and constitutional uncertainty and confusion occasioned by the forays of the state rulers into the arena of Malaysian politics, it is sincerely pleaded that we have to return to the spirit and intendment of the 1957 Merdeka Constitution which, it is submitted, still remains intact hitherto. Under that constitutional scheme, *save as otherwise provided for in the Constitution*, the role of the Sultan of a state is confined to that as the head of the religion of His Royal Highness's state. His Royal Highness is duty bound to remain free from party politics. Lack of commitment to the Rule of Law can also be seen in the harsh law enforcement against squatters, petty traders and possibly criminals. There is also a need on the part of the relevant authorities to show serious commitment to sustainable development and environmental and ecological issues. It is disturbing indeed to learn that the ban on hillside development has been lifted.[150] Besides all these, we have to grapple with the teething law and regulation problems arising out of globalisation and privatisation policies which have increasingly impinged on our life, rights, interests and the environment.[151]

13.7 A Sensible Approach Out of the Conundrum

Hence the harsh reality is that some fifty-one years into its nationhood, Malaysian public law, in the matter of enforcing fundamental rights enshrined in Part II of the Constitution, is still at its stage of infancy with hardly any clear signs of direction and objectives from our apex court. Many pressing issues still await clear and authoritative rulings and/or guidance from the apex court. Commitment to the Rule of Law from the apex court and the Government is still lacking in terms of good governance and upholding of fundamental rights. The legal and constitutional framework for the operation of the progressive and vibrant public law regime is still not in place particularly for the purpose of equipping the country for the full implementation of the WTO regime. The Rule of Law index still indicates several serious shortcomings in the system. These weaknesses need to be addressed urgently.

14. Reviewing Judicial Review: The Way Forward

The two streams of judicial review discussed in this article need to be reviewed for purposes of effective judicial review. The common law *CCSU* pathway has always been postulated negatively. All the principles involved should be reframed and re-postulated *positively*[152] into three main grounds of review along the proposition posited by the late Sir Robin Cooke of New Zealand, *viz*., "acting fairly, reasonably and in accordance with law".[153] In other words, they are "fairness, reasonableness and lawfulness". This transformation may be done by the apex court as the principles of judicial review have

150 Reported in the Star on 15-2-2009.

151 The implementation of Judicial Appointments Commission Act 2009, Malaysian Anti-Corruption Commission Act 2009 and the proposed amendments to Universities and University Colleges Act 1971 will also indicate the extent of the government's commitment to positive changes.

152 Emphasis added to indicate the significance and advantage of this move.

153 The late Rt. Hon. Sir Robin Cooke, "Administrative Law Trends in the Commonwealth", [1990] SCJ 35.

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by common law traditions been formulated judicially. The House of Lords missed the golden opportunity in the case of *CCSU* in 1984. The Malaysian Federal Court missed it in *Rama Chandran* in 1997. But the Indian Supreme Court also missed it in *Indian Airlines v Prabha D Kanan*.[154] Therefore, it is sincerely hoped that the next available opportunity will not be squandered again by the English and Malaysian courts. Needless to say, the best and wisest thing to do is to constitutionalise them into the Constitution like Section 33 of the South African Constitution. The most evident advantage of such a move is obvious as it will lead to broadening and strengthening of the scope of judicial review particularly if the South African model is adopted. The second stream is, of course, the constitutional pathway to judicial review. The current Malaysian framework in the Courts of Judicature Act 1964 urgently needs to be upgraded into the Constitution like Art. 226 of the Indian Constitution. There is also a need for another provision in the supreme law along the line of Art. 32 of the Indian Constitution for urgent and important disputes of public law to be brought directly to the apex court for adjudication. Ideally, a provision like Section 167 of the South African Constitution is to be preferred. This is the Constitutional Court. Its role is broader than that of the Indian Supreme Court acting under Art. 32 because the Indian provision confers jurisdiction on fundamental rights only. Reverting to the enforcement of fundamental rights and other important public law or constitutional matters in Malaysia, case law developments hitherto are still at the stage of infancy[155] and, therefore, far from being a developed and coherent corpus. Serious attention needs to be given to this much neglected aspect of Malaysian public law henceforth. As the genesis of this law is traceable to the Indian Constitution and, hence, the progressive Indian jurisprudence thereon including those on Art. 32 will serve as a useful source of reference for Malaysia.[156] Next to be considered is the overhaul of the judicial approach and attitude to entertain and hear public law disputes. The attitude of "more executive minded than the Executive" on the part of the Judiciary is a cause of grave concern to public lawyers. The systematic judicial attempts to delink judicial review from the Federal Constitution ever since *Karam Singh* are clearly inconsistent with the liberal judicial trends displayed in some common law countries. The post-Independence Indian, the post-Apartheid South African and the post-1997 Hong Kong[157] liberal judicial approaches to interpreting their respective countries' Constitutions may serve as very useful models in this regard. Reverting to the negative trends relating to judicial review

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[154] (2006) 11 SCC 67.

[155] The jurisprudence only commenced to take shape in mid-1990s and much uncertainty still remains due to the forward and backward swings of the law caused by the inconsistent approaches adopted by the apex court from time to time.

[156] See Section 39 of the South African Constitution. This provision gives authority to the courts in the event of a lacuna or ambiguity. It is pleaded that the judicial parochialism referred to above needs to be discarded for the sake of the forward march of public law.

[157] For an idea of the post-1997 public law developments in Hong Kong, please read Professor Johannes Chan's article entitled "Administrative Law, Politics and Governance: The Hong Kong Experience" in *Administrative Law and Governance in Asia: Comparative Perspective*, edited by Tom Ginsburg and Albert Chen, (UK & New York: Routledge Law in Asia) pp 143-174.

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in this country, sometimes there are deliberate attempts to curtail or suppress the broad dimension of fundamental rights provisions in the Constitution[158] or sometimes rights are completely denied or annihilated.[159] In fact, it is strongly argued that the existence or positioning of additional powers of judicial review in para 1 of the Courts of Judicature Act 1964, *viz*., outside the Federal Constitution, in no way restricts the scope and contents of those powers despite their being statutory and non-constitutional.[160] The peculiar wording of Art. 121(1) itself (*viz*., "the High Courts … shall have such jurisdiction and powers as may be conferred *by or under federal law*") supports this proposition. The courts must be reminded that their role is to apply the law, not to sabotage its application. They must make do with what they are empowered to do, either by a statute or the Constitution or both. Lastly, it needs to be pointed out and emphasised that it is naïve and wishful thinking for one to think that effective judicial review is a panacea to all public law problems and disputes in this day and age. This is because counsel or legal fees and costs for an application for judicial review[161] are expensive and are, therefore, a real deterrent to most potential litigants.[162] Hence, non-judicial redressal mechanisms have to be seriously looked into as well. This may include administrative arrangements inclusive of some elements of *Droit Administratif*. Of course, the legitimate role of NGOs and public-spirited citizens as well as the Bar and the mass media in the vindication of Rule of Law on behalf of the less advantaged groups in our society cannot be suppressed and underrated. They constitute part and parcel of our system of public law for the ventilation of public law grievances.

14.1 Other Fundamental Prerequisites for the Implementation of this Effective Regime

The effective multi-faceted regime of control of state powers or laws as bandied above may only bear fruit if other prerequisites are also put in place for the system to operate effectively.

14.1.1 Constitutional Framework Needed: Containing Three Generations of Rights

In this modern era of globalization where almost every mode of communication has gone digital or electronic, the only country in the world, *viz.*, South Africa, that has the kind of Constitution which contains three generations[163] of rights. India comes close, but not US and Malaysia. In the mid-1990s, when the Malaysian Court of Appeal proudly proclaimed that Malaysia possessed a living, organic and dynamic Constitution and that

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[158] *Karam Singh*; and *Sugumar Balakrishan* (FC).

[159] *Beatrice Fernandez*.

[160] This argument does not detract from the main argument that the constitutional validity of the 1988 amendment to Art. 121(1) is doubtful.

[161] In a country like Malaysia, Singapore and Hong Kong. Legal aid is not available for judicial review applications. But the judicial innovation in India and Hong Kong in the matter of promoting public interest litigation law suits will serve as useful models for purposes of law reform relating to judicial review.

[162] The Indian practice of writ petition or epistolary jurisdiction of Arts. 226 and 32 should be seriously considered.

[163] Meaning the traditional negative rights and the new positive rights and the green rights in a written Constitution.

all disputes of public law must be capable of being resolved by resorting to the provisions of the supreme document were uttered more in the context of broad and liberal rules of construction of the Constitution and certainly not intended for saying that Malaysia has a perfect Constitution containing three generations of rights. Even the Indian Constitution and its accompanying legal framework contains several shortcomings and need to be rectified in its move forward towards a developed state. The current Malaysian model fares even worse. An enlightened Government will certainly know where those weaknesses are and steps must be seriously taken to rectify them. It is disheartening indeed to learn that the Government has no plan to enact a Race Relations Act and also to set up a constitutional court despite lobbying by politicians, public interest individuals and groups. On the constitutional court proposal, the political as well as constitutional disputes and crises cropping up both before and after the last general elections clearly show the urgency and the need for such a court. It is contended that the existing Malaysian legal and constitutional framework cannot adequately cope with the existing problems, let alone impending and future constitutional crises of greater and more serious proportions and dimensions. A few more serious concerns must be addressed with great urgency. The Federal Constitution lacks a Preamble. Part I of the Federal Constitution appears weak and does not look like a proper and solid chapter on founding provisions. Part II of the Federal Constitution are grossly insufficient to protect the people in terms of human and fundamental rights. Directive Principles of State Policy and Fundamental Duties are nowhere to be found in the Federal Constitution. We must also remember that the 1957 Federal Constitution was an emergency constitution and the laws, which include case law, which support this agenda must be slowly removed for the sake of liberating and empowering the 'rakyat'. Steps must also be taken to look into the weaknesses inherent in the state constitutions and rectify them.

14.1.2 Rules of Construction of a Written Constitution

There is no point in extolling that we have a living, organic and dynamic Constitution if the courts in interpreting the laws are bent on rewriting the laws narrowly and restrictively. Generally speaking, it does hold water to say that hitherto the Malaysian public law jurisprudence is fraught with positivism and parochialism. This kind of image does not augur well for the forward march of Malaysian public law in the long run. It certainly calls for a drastic change as soon as possible.

14.1.3 Legal Framework Needed to Support a Dynamic Constitutional Framework

Besides a dynamic Constitution, a state also needs to possess a dynamic legal framework to support and put into implementation the commands and mandates of the Constitution. Again only the current South Africa system is said to possess the kind of legislation needed. The more important of those laws[164] may be mentioned below.

They are Promotion of Administrative Justice Act (PAJA), Promotion of Access to Information Act (PAIA), Promotion of Equality and Prevention of Unfair Discrimination

164 Subsidiary legislation included.

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Act (PEPCID),[165] Administrative Procedure Act,[166] Administrative Appeals Tribunal Act.[167]

Suffice it here to say a few words about PAJA 2000 of South Africa. It is the procedural default regime to be used by individuals who wish to challenge or review an administrative decision. Malaysia,[168] Singapore and Hong Kong still cling to Order 53 of the Rules of the High Court. This regime was inherited from the British colonial masters. Only India and South Africa took the trouble to do away with this British legacy and replaced it with their respective procedural regime. Suffice it here also to say that it makes sense to follow the footsteps of the Indians and South Africans because Rule 53 or Order 53,[169] as the case may be, is an ancient and rigid procedural regime particularly in terms of enforcement of human and fundamental rights.

14.1.4 Commitment to the Rule of Law

It may be worthwhile to reiterate that the theme of this article is to stress on the importance of modern states' commitment to the Rule of Law so as to ensure and guarantee good administrative governance in each individual state with the fervent hope that it will be extended eventually to the regional and global levels. The Dicean doctrine of Rule of Law is still of great importance and relevance today. It is a barometer used to assess and evaluate the performance of an individual state, person or body subject to public law regime in accordance with an established set of criteria, most of which have already been dealt in the foregoing. It makes sense to deal briefly with the others or to reiterate them below.

14.1.4(a). Political will and Commitment to the Rule of Law

Even if a state possesses a good modern day Constitution together with the necessary legal framework, the system still cannot get off the ground without a strong political will on the part of the Government and the system to commit themselves to the Rule of Law. Post-Apartheid South Africa probably outshines other democratic countries in fulfilling the criteria so stated.

14.1.4(b). Judicial Independence

Every democratic country must ensure that its system possesses an independent Judiciary which is committed to the Rule of Law. In order to achieve this lofty and noble objective,

[165] These first three laws are now the laws of South Africa. They were enacted in the year 2000.

[166] This is the law of USA. It was enacted in 1946 and it lays down all the minimum procedural requirements when individuals deal with administrative authorities. Procedural due process in the US Constitution is different from the APA.

[167] This law, enacted in Australia in 1975, empowers the administrative tribunals to review the decisions of administrative authorities on merits. Merits of an administrative decision may be reviewed *via* the doctrine proportionality in Malaysia, India and in UK under the Human Rights Act 1998. But an Act modelled after the Australian Act of 1975 will be better as it expressly confers jurisdiction on inferior tribunals to review merits.

[168] Order 53 of the Rules of the High Court 1980 (Malaysia).

[169] The current Part 54 of CPR 1998 (Civil Procedure Rules 1998) of UK enforced in the year 2000 have undergone substantial review in order to accommodate the Human Rights Act 1998. In terms of fair procedure, the current Part 54 of UK is a far cry from our current Order 53 of the Rules of the High Court 1980.

a system must possess laws that will guarantee the establishment and operation of an independent Judiciary.[170]

14.1.4(c). Equality Before the Law or Equal Protection of the Law

Most democratic countries possess a provision in its Constitution that states that "all persons are equal before the law and entitle to the equal protection of the law". In Malaysia, this constitutional guarantee is qualified by other provisions[171] in the Constitution which empowers the Government to enact laws, formulate and implement policies which amount to affirmative actions which safeguard the interests of the privileged groups.[172] Ever since 1969 the affirmative action programmes have been implemented successfully in compliance with the constitutional objective. Socio-economic justice in favour of others in need of assistance and who fall outside the privileged groups can always be justified under the main and primary provision of the Constitution.[173] In the long run, when the constitutional affirmative action objective has been achieved, the goal post should be adjusted back to the main and primary objective of "all persons are equal before the law and entitle to the equal protection of the law". As the Constitution is a living, organic and dynamic document, the adjustment can be legitimately made when the time finally comes. In a multi-cultural[174] country like Malaysia, serious efforts need to be made to achieve equality eventually. This is important for the sake of national unity and in compliance with international law and religious laws. Fifty-one years into its nationhood, administrative governance and practices in the country need to eventually comply with the true spirit of Art. 8(1). This should include international conventions that support the broad Art. 8(1) agenda. Our practices are not in line with international conventions or norms thereon. All self-imposed restrictions on the operation of Art. 8(1) need to be slowly dismantled. One feature of Malaysian politics, again the legacy of the policy of our past colonial master of "divide and rule", that need to be discarded is racial politics. This policy and

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[170] Closely connected with these will be a strongly committed and independent Bar. The mass media, NGOs and the citizenry must also play its respective active role in the struggle to achieve the noble objective. It is doubtful whether these three lofty ideals or prerequisites of the Rule of Law and related issues have been attained in full in Malaysia.

[171] Arts. 153(2), 8(5)(c). Note the imposition of the requirement of "a reasonable proportion" in both provisions of the Federal Constitution. Analyse also if this important constitutional restriction has been complied with in practice. In particular, the so-called quota system, for example the 10% quota on admission into a certain category of schools, needs to be re-examined in the context of 'reasonable proportion'. Another example is the policy and practices of government procurement contracts. On the need for a Race Relations Act in this country, the more pertinent question is whether the Act will promote the lofty objective of Art. 8(1) of the Federal Constitution.

[172] Malays and the natives of West and East Malaysia.

[173] Equality before the law and the equal protection clause in Art. 8(1) of the Federal Constitution. It needs to be pointed out that Art. 8(1) was not drafted with care. Instead of the conjunctive "and", the disjunctive "or" should be used therein. See Art. 14 of the Indian Constitution. On the possible scope and contents of Art. 8(1), see the Indian position on the equipollent provision in the Indian Constitution, *viz*., Art. 14. Read MP Jain, *Indian Constitutional Law*, 5th ed., 2003, Nagpur, Wadhwa, pp 999-1053 on the practical application of the Indian Art. 14. It needs to be emphasised that proportionality is likely to feature more prominently in rights-based jurisprudence in this country together with the broad test of reasonableness or fairness under Art. 8(1) eventually.

[174] Multi-culturalism should be regarded as a strength rather a weakness for the purpose of nation building.

practice is entrenched, but it defies logic and is a real hindrance to national integration and unity. Nation building and national integration just cannot bear fruit with obstacles littered in its path. The National Vision School Project, for example, is the true way forward for purposes of national integration, but unfortunately there are still sections in our society who lack the vision to see the significance of this forward-looking project. Our tasks at hand are still unaccomplished after five decades of nationhood and serious efforts must henceforth be made towards that end.[175] As a start we should focus on the November 2009 recommendations of the United Nations' Human Rights Council in its First Universal Periodic Review (UPR) on Malaysia that Malaysia needed to seriously look into improving and rectifying her serious human rights deficits in the country.

14.1.4(d). Civil Society, Rights Education and Others

One of the criteria of the Rule of Law is the establishment of a civil society. A civil society is one which is law abiding and is in a position to assert its rights[176] and ventilate its grievances in accordance with law. In order to build and nurture a civil society, serious and continuous efforts must be made to educate the citizenry, particularly the vulnerable groups, of their rights and role in a civil society. Fair and free elections are the hallmark of a modern democracy. Whether this is so or not under Part VIII of the Federal Constitution is a matter to be investigated seriously.[177] Of course, the more important aspect of democratic government is for the loser in an election to vacate office and hand over the administration to the winner gracefully and in full compliance with democratic practices.[178] *Coup d'etat* or deliberately staging a constitutional crisis is the antithesis of the Rule of Law and must not be sanctioned or allowed to take roots in any democratic country. It is also very vital for a modern democratic society in the era of globalisation to shed all its xenophobic tendency towards foreigners and strive for multiculturalism and pluralism in a global setting.

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175 The writer is particularly mindful of the restrictions imposed by Arts. 153(2), 8(5)(c). It is interesting to note that the Government has finally realised that it "must correct any unfairness felt by the citizens". This was reported in the Star on 23rd January 2009 at page N10. An observation may be entered here. Fifty-one years after Merdeka, would it be fair for the nation to stick to the social contract or to re-negotiate a new one? Hence, we are at the crossroads. Shall we maintain the current *status quo* or negotiate a new arrangement? See the upcoming exciting constitutional developments in Fiji where a new and fair constitution is expected to take shape in the coming years. Reverting to the Malaysian position, it must also be pointed out that Art. 153 does not empower the government to hijack the Art. 153 agenda by enriching the rich and well-connected Bumiputras at the expense of the poor and needy Bumiputras. It is also wrong for the government to manipulate the 30% Bumiputra Equity by extending indefinitely the NEP on the pretext that the 30% equity has not been achieved yet.

176 Including partaking in the democratic processes of the government.

177 With particular references to the 2008 General Election, the Permatang Pauh and the just concluded Kuala Trengganu parliamentary by-elections. It would be important to see if the requirement of fair and free election will be achieved in the next 13th General Election. Part VIII needs to be reviewed with a view to free and fair elections. Malapportionment is undemocratic. So is gerrymandering. Both have no place in a democracy.

178 With particular reference to the losses suffered by BN in five states in Peninsula Malaysia to the PKR coalition parties in the March 2008 General Election. It is also equally important for the winning party to win by fair and free elections, not by party hopping. There is obviously something very wrong with the decision in *Nordin*'s case sanctioning party hopping. With particular to the Perak Constitution, it also needs to point out and emphasise that there is no *prerogative* in the appointment of the Menteri Besar.

14.1.4(e). Globalisation: Importance of Law and Regulation and CSR

In the era of globalization, all the stakeholders must be Rule of Law complaint. This is particularly so in so far as the modern businesses, be they national, multi-national or transnational corporations, are concerned in the conduct of their business or trade activities. The conduct of businesses and trade must not result in the exploitation and manipulation of the weaker parties particularly the poor and vulnerable groups in our society, or the environment. Inter-state, regional or world trade must not be conducted at the expense of the weaker or poorer states or countries. The speculative, exploitative, manipulative, mercenary and rogue nature in the modern business, capital and financial markets violates the Rule of Law to its core.[179] Hence, law and regulation constitute important mechanisms meant to rein in the wayward modern businesses so as to ensure that they always remain on the correct side of the law.[180] The current trading, financial and economic regimes which operate at all levels are in need of tighter and more rigid regulation. History[181] has taught us that there shall be no more compromises when it comes to law and regulation of modern businesses. Modern corporate culture and practices are still not in compliance with good corporate governance. The culture of corporate social responsibility or corporate responsibility[182] which is still not a legal and constitutional responsibility should not be regarded as a mere philanthropy. It must be inculcated in all those who are involved in trade and business activities. It must also be pointed out and emphasised that corporate social responsibility is often not expressly provided for in most legal systems,[183] but notwithstanding this omission, it is should be regarded as part of the public law regime particularly in those jurisdictions[184] which possess a written constitution guaranteeing human and fundamental rights. The task of enforcing the law does not fall

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[179] With particular reference to the 1997 and 1998 speculative and merciless attacks on Asian stock and financial markets causing disastrous effects to the economies in several Asian countries. As this kind of misconduct (which could be categorised as economic torts and/or crimes) will recur in the future, a rigorous regime has to be put in place to prevent and thwart future attacks as well as to punish the tortfeasors and criminals. Flooding the market places with cheap, unsafe and non-durable consumer goods is worrying indeed to consumer bodies and public interest groups. The modern work culture in the work places, which places too much stress on productivity and value-added activities often at the expense of health and sanity concerns on the part of the workmen, may one day be hauled up for violating human rights of the workmen.

[180] See Art. 19(1)(g) and 19(6) as well as Arts. 23 and 24 of the Indian Constitution. None of these exists in the Malaysian Constitution. Is the Malaysian regime equipped to face and cope with globalisation?

[181] In particular the Great Depression of the 1930's, the 1997 global economic and financial meltdown, and the recent 2008 worldwide economic and financial crisis which started in the US. We are still haunted by the recent milk marketing scandals involving some milk producing and marketing companies in China. There must be no more compromises in ensuring that such evils do not revisit us again. Enough is enough.

[182] The term "corporate responsibility" is often used rogue businesses which are not committed to the Rule of Law with the objective of curtailing its legal responsibilities. Civil society and NGOs in particular must be weary of this cunning tactic.

[183] S 172 of the UK Companies Act 2006, which expressly provided for CSR as part of the duty of the director of the company to promote the success of the company, is exemplary. But it does not have the same impact if the attack is launched from the constitutional perspective as a public tort, for example.

[184] India, for example. See the Indian public law jurisprudence on socio-economic justice for the vulnerable groups in the Indian society under Articles 226 and 32 of the Indian Constitution. See the article of the writer (at pp 265-267) cited in footnote 41 of this article. See in particular those public interest litigation cases cited therein- the *Asian Games Village* case; the *Salal Electric Dam* case; and the *Bandhua Mukti Morcha* case.

on the shoulders of the government and its agencies alone. Public lawyers, civil society movement including NGOs and public interest activists, and also trade unionists, will certainly have a heavy task ahead in ensuring that modern businesses comply with labour, environmental, product safety standards and other industrial standards.[185] Transnational torts and crimes committed by unruly corporate or juristic persons will be an unavoidable and inevitable feature of modern days' businesses considering the past and present delinquent tendencies of business enterprises; and which tendencies are likely to re-occur in the future. Lawyers, public interest groups and activists and trade unionists in particular have to be innovative in bringing to book recalcitrant businesses which commit breaches of public law. Conflict of laws objections, defence of time bar or limitation period, claim of immunity from prosecution, for example, will certainly be resorted to by those who have breached the law in order to escape from the consequences of their misconduct. It is also often argued by business interests or on their behalf that a contract which has been entered into with a governmental agency or public authority, *albeit* apparently unfair to the government or public interest, cannot be re-opened subsequently in a court of law. It must be pointed out and emphasised that sometimes if public interest or national interest is so strong and overwhelming, the need to protect public interest or national interest may override or prevail over mere private contractual interests and objections. Hence, the rule in contract law that a party to a contract is bound by a bad contractual bargain may not hold water in the field of public law if there is overwhelming public or national interest to protect and if the contract is one which a law-abiding and duty-conscious authority would not have entered into in the first place. It is also submitted that in these types of transactions, the general rule is that the contractual documents involved are deemed to be public documents and hence open to public scrutiny and inspection.[186]

14.1.4(f). Regional and Global Administrative Law

In the era of globalisation, it is not sufficient for us to merely talk about and stress on the importance and relevance of Administrative Law at the domestic level in a particular state. Regional Administrative Law and Global Administrative Law are equally important if we are talking of regional administrative and global governance. It needs to be emphasised that Domestic Administrative Law, Regional Administrative Law and Global Administrative Law are supplementary and complementary to each other. But the problem today is that Regional Administrative Law barely exists in the various regions of the globe. The only vibrant and operative model is the European model with its European Court of Justice and European Court of Human Rights. In this part of Asia, ASEAN was formed way back in August 1967 but till today the ASEAN Court of Justice and ASEAN Court of Human Rights remain illusory. ASEAN remains largely a political and economic association.[187]

[185] Note in particular the plight of the factory workers depicted in the movie "Bordertown". The law must show no mercy to perpetrators of the torts and crimes.

[186] Note the messy contracts entered into previously by the Mahathir Government with the IPPs and water services providers/concessionaires have now begun to raise serious questions of public law.

[187] It is not sufficient merely to form the ASEAN. An association of Asian States would be better in terms of numbers and negotiating power at the world stage.

The ASEAN Charter has been ratified in December 2008 but implementation thereof is a different thing altogether. There is also a real lack of political will on the part of the ASEAN governments to establish the ASEAN Court of Justice and ASEAN Court of Human Rights. The current foreign policy of all ASEAN member states, *viz*., policy of non-intervention in the internal affairs of each member state, clearly indicates a lack of commitment to the Rule of Law. Global Administrative Law is still in the making and commitment thereto is much more far-fetched at the moment unless the G-8 or G-20 countries are prepared to be committed to the Rule of Law. The 1997 and 1998 World Financial Crisis and the recent 2008 Economic and Financial Crisis which originated in the Wall Street have finally dawned on us that law and regulation is the only and sure way forward to regulate rigidly the domestic, regional and global economic and financial policies and all activities connected therewith and related thereto. The same applies to inter-state, regional and world trade. We have now all realised that commitment to the Rule of Law and good governance are the only sure way forward. Hence, there must be no let-up in law and regulation towards the eventual and ultimate goal of domestic, regional and global governance and order with emphasis on common standards in our relentless endeavour to promote domestic, regional and world trade.

15. Conclusion

In so far as the developments of Malaysian Administrative Law over the last fifty one years are concerned, it is only fair to conclude that in the matter of rights-based jurisprudence, the Malaysian system still shows a lack of commitment to the Rule of Law particularly on the part of the apex court and the Federal Government. On the whole, the High Court and Court of Appeal fare slightly better than the apex court. Fifty one years after the Reid Commission had incorporated many provisions from the dynamic Indian Constitution into the Malaysian Federal Constitution, many Malaysian lawyers today (including the Judiciary) still think that the Malaysian public law is English law and continue to condemn the progressive Indian public law. To add insult to injury, what is promoted is antiquated British law[188] or legacy.[189] The Malaysian system still clings nostalgically to Order 53 of the Rules of the High Court, a British legacy, when the Indians and South Africans have rejected its relevance to applications for judicial review.[190] To add insult to injury, para 1, Schedule to the Courts of Judicature Act 1964 was incorporated into Order 53,

[188] The classic illustration is the case of *Majlis Perbandaran Pulau Pinang v Syarikat Bekerjasama-sama Serbaguna Sungai Gelugor dengan Tanggungan* [1999] 3 MLJ 1. What was promoted in that case is no right to reasoned decision at common law on the part of the adversely affected party instead of open government and participatory democracy. In this day and age, the trend is towards transparency in decision-making process, open government and participatory democracy. It was excusable to hold this view in *Chan Meng Yuen* ([1992] 2 MLJ 337) and *Rohana* ([1989] 1 MLJ 487), but to cling on to the same in 1999 is an affront to open government and participatory democracy or procedural fairness as viewed from the constitutional perspective. See also the comment on *Najar Singh*'s case.

[189] Some parts of Order 53, Rules of the High Court 1980 in its current form. In particular, those provisions that do not promote and facilitate judicial review.

[190] This comment should be of interest to lawyers in Fiji, Brunei, Singapore and Hong Kong. Read various parts of this article on references to the procedural regime for applications for judicial review.

Rules of the High Court 1980 in the year 2000. The recent clamp-down on public and political dissent by resorting unjustifiably to the Police Act and the Internal Security Act is a real cause of concern.[191] A High Court judge had to resign prematurely when his only complaint which he voiced publicly was Executive interference in the discharge of his judicial duties.[192] Part of the problems afflicting Malaysian public law is due to the deficiencies or deficits or imperfections in the constitutional and legal framework which need urgent redress if the Malaysians were to pin more hope on the forward march of public law in the future. In comparison with the position in India and South Africa, the Malaysian administrative law fares embarrassingly far behind its counterpart in those two countries some fifty one years into its nationhood.[193] It is still at its stage of infancy in terms rights-based jurisprudence. For the future of Malaysian public law,[194] it is earnestly pleaded that it makes sense for the system to revert and hold on firmly the living spirit of the constitution or the Rule of Law which was ignited by the Court of Appeal in the *Tan Tek Seng*'s case; doused by the Federal Court in *Sugumar Balakrishnan*; and re-ignited by the same court recently in *Pertojasa, Lee Kwan Woh*[195] *and Sivarasa Rasiah*. It is pleaded that our public law including also state laws must henceforth be put on the forward march and never turn back. In fact, it must gather momentum as time goes by in the hope that we may in the not distant future proclaim with great pride that our public law regime is comparable with that of the Indian and South African. It is also advisable for us to follow closely the developments in Hong Kong on how the Basic Law protects the rights, interests and legitimate expectations of the people in Hong Kong.[196] Outside India, Malaysia and Hong Kong are the only two common law countries in Asia which are expected to uphold the Rule of Law. The burden and expectations on our system to perform are great. In fact it is proposed that all common law systems, particularly those jurisdictions that possess a written constitution, be involved in some sort of transnational dialogue or comparative discourse so that we can learn from each other for the sake of the proper development and forward march of our public law. The Malaysian public law now is at the crossroads. It is sincerely pleaded that we must move forward lest we perish and lose what have painstakingly struggled for and gained thus far. On the regional front, ASEAN has proven to be a stumbling block to the Rule of Law. ASEAN needs to show serious commitment to the Rule of Law by taking a leaf from its European counterpart.[197]

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[191] Save for the state of Penang.

[192] Reported in the Star newspaper on 29th November 2008 under the heading of "Judge Chin tells why he's retiring early". Surprisingly, to date (April 2009) this matter has not been taken up by any person, body or group in Malaysia.

[193] For the future of administrative law in the common law countries, we can no longer shun the Indian and South African public law particularly the latter.

[194] Hopefully for other common law countries as well (in particular, Singapore, Brunei and Fiji) because such countries, too, share similar common law traditions. Attention must be paid to Fiji when the new Fijian Constitution finally comes into place in the years ahead.

[195] [2009] 5 MLJ 301, (FC).

[196] It is encouraging indeed to note that the public law in Hong Kong has made great strides in respect of both common law review and constitutional review in the post-1997 Basic Law era. See, *supra* n 157 on Professor Johannes Chan's survey on the ten years' of Basic Law in Hong Kong.

[197] Asean FTA modelled after EU model is expected to come into being in 2015.There was no agenda on Asean human rights convention and court at the recent Pattaya Summit. Dated 11th April 2009.

In fact, Asian countries need to take urgent steps to set up the Asian Union equipped with a human rights regime and a human rights court. The need for the Asian Monetary Fund to be set up is also very urgent and no other country or bloc or body can dictate to Asia or sabotage Asia on the Asian Economic or Monetary Agenda. As a regional bloc, we are sovereign and must determine our own destiny. Asian countries also need to actively engage the rest of the world towards the ultimate goal of establishing Global Administrative Law.[198] As a concluding remark, we must constantly remind ourselves that traditionally it is the solemn business of Administrative Law to promote and enforce good governance on the part of the Government and its various administrative agencies on the domestic front and in so doing it is always guided by the basic criteria imposed by the Rule of Law. That Administrative Law in the 21st Century must also possess a human and fundamental rights-based jurisprudence. It is also the business of Administrative Law to prevent exploitation and marginalisation of the poor, the weak and the needy. In the era of globalisation, the role of Administrative Law needs to be extended regionally and globally primarily to contain the evil forces of globalisation. Traditionally, International Law is expected to play its expected role to promote peace and enforce world order. However, times and again events, conflicts and crises around the world have shown and proven that it possesses weaknesses or deficits and hence Global Administrative Law's role in supplementing and complementing the former's role in maintaining peace and enforcing world order can no longer be questioned or procrastinated. Henceforth serious efforts must be made to make that happen. International Law and Global Administrative Law must eventually ensure that globalisation and world trade contain no hidden imperialistic and/or exploitative agenda on the part of the bigger and stronger trading nations and powers as well as the bodies and institutions of the WTO and its associated bodies and institutions, and the modern businesses particularly the transnational or multi-national corporations.

198 The same is also true of the Latin American and African blocs.

The Malaysian Contracts Act 1950: Some Legislative and Judicial Developments Towards a Modern Law of Contract

Cheong May Fong*

Abstract

The Malaysian Contracts Act 1950, modelled on the Indian Contract Act 1872, has encapsulated contract law tenets of English nineteenth-century laissez faire market capitalism, freedom of contract and classical contract law. Through time, however, new forces have challenged the traditional views of contract law, supported by legislative reforms and judicial developments. The shift from classical to modern contract law has been taken cognisance of and is generally accepted in the common law world. This essay, however, aims to show this movement in Malaysian contract law as provided in the Contracts Act 1950 and as interpreted by the Malaysian courts. It evaluates whether and to what extent values of modern contract law, such as fairness and justice, have influenced the law, and analyses the main theme of vitiation of free consent in the Contracts Act 1950 through the doctrines of unconscionability, undue influence and coercion. Reference will also be made to the law in the United Kingdom and other Commonwealth countries. The essay concludes by exploring the roles of legislative reform and judicial interpretation in developing Malaysian contract law, as embodied within classical law concepts in the Contracts Act 1950, towards a modern law of contract.

I. Introduction

The Malaysian Contracts Act 1950 (Revised 1974) (the Contracts Act) is the principal legislation governing contracts in Malaysia[1] and is modelled after the Indian Contract Act 1872 (the Indian Contract Act) which, in turn, is largely a codification of the then existing English common law and rules of equity.[2] Late eighteenth- and nineteenth-century English

* LLB (Hons)(Malaya), LLM (NUS), PhD (Sydney), Diploma in Shariah Law and Practice (IIUM), Advocate and Solicitor, High Court of Malaya; formerly Professor and Dean, Faculty of Law, University of Malaya, Kuala Lumpur, Malaysia. This essay is a revised version of an Inaugural Lecture delivered at the Faculty of Law, University of Malaya on 22 October 2008. It has been published in the 2009 issue of the *Journal of Contract Law* (*JCL*) and its reprint here as commemorative of the Inaugural Lecture is made possible with the kind permission of *JCL*.

1 Other relevant legislations include the Government Contracts Act 1949 (Revised 1973), the Specific Relief Act 1950 (Revised 1974) and the Civil Law Act 1956 (Revised 1972). For legislation governing specific contracts, see eg the Sale of Goods Act 1957 (Revised 1989) and the Hire-Purchase Act 1967 (Revised 1978).

2 See RK Abichandani (ed), *Pollock & Mulla Indian Contract and Specific Relief Acts*, Vol I, 11th ed, NM Tripathi Private Ltd, Bombay, 1994, p v. See also RN Gooderson, 'English Contract Problems in Indian Code and Case Law' [1958] *Cambridge LJ* 67;, Atul Chandra Patra, 'Historical Background of the Indian Contract Act, 1872' [1962] 4 *JILI* 373; Jain [1972] *JILI* (special issue) 178; Minnatur [1972] *JILI* (special issue) 107.