

**RECENT DEVELOPMENTS IN JUDICIAL REVIEW OF
ADMINISTRATIVE ACTION IN MALAYSIA:
A SHIFT FROM GROUNDS BASED ON COMMON LAW PRINCIPLES
TO THE FEDERAL CONSTITUTION**

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INTRODUCTION

The year 2007 not only marks the celebration of fifty years since we achieved independence, it also sees the completion of fifty years since our *Federal Constitution*, the foundation of our nation's strength, was enacted. The past decade has witnessed tremendous developments, both progressive and retrogressive, in the field of Administrative Law. Prior to the year 1996, the Malaysian courts referred to the rigid and technical common law rules governing judicial review of administrative actions. In 1996, with the trail blazing judgment of the Court of Appeal in *Tan Tek Seng v Suruhanjaya Perkhidmatan Pendidikan & Anor*,¹ the judicial trend shifted from referring to common law principles concerning the grounds of judicial review to the *Federal Constitution*. Recent case law in Malaysia shows that the courts are bold, creative and dynamic enough in the matter of judicial review by construing the fundamental rights provisions in the *Federal Constitution*² broadly and liberally. In particular, a fresh breath of life has been infused into Articles 5 and 8 of the Constitution and both articles have now become important weapons in the artillery of the judiciary to control the abuse of administrative power. The purpose of this paper is to highlight some of these developments based on four grounds of judicial review, *i.e.* procedural fairness, substantive fairness, proportionality and the right of access to justice.

PROCEDURAL FAIRNESS

The first attempt to revive Articles 5 and 8 of the *Federal Constitution* in preference over the common law principles can be perceived in the arena of Natural Justice. Natural Justice is one of the grounds of judicial review invoked by the Malaysian courts to strike down an unlawful administrative action. As Natural Justice is a creation of common law³, traditionally the Malaysian courts have been greatly influenced by the developments in the English common law in their application of the principles of Natural Justice. In the mid-1990s the Malaysian courts began to formulate a new and different version of Natural Justice in the guise of Procedural Fairness.

¹ [1996] 1 MLJ 261.

² Refer to Articles 5-13 of the *Federal Constitution*.

³ *Cooper v Wandsworth Board of Works* (1863) 14 CBNS 180.

Procedural Fairness was first introduced by His Lordship Gopal Sri Ram JCA in *Raja Abdul Malek Muzaffar Shah bin Raja Shahruzzaman v Setiausaha Suruhanjaya Pasukan Polis & Ors*,⁴ where his Lordship put forward the argument that the term 'procedural fairness' was to be preferred to the 'traditional nomenclature "rules of Natural Justice".⁵ The most sensational case came along the following year in *Tan Tek Seng*⁶, where Gopal Sri Ram took his argument on Procedural Fairness further to clothe it with a constitutional dimension. The doctrine of Procedural Fairness, which ensured that a fair procedure is adopted by administrative bodies in each case based on its own facts, was held to be a product of the combined effect of Articles 5(1) and 8(1) of the *Federal Constitution*.

The basis on which the court arrived at this conclusion is as follows: First, the expression 'law' in Articles 5(1) and 8(1) was held to encompass not merely substantive law but also procedure established by law. Secondly, the term 'equality' in Article 8(1) was interpreted to include 'fairness'. Thus, the combined effect of Articles 5(1) and 8(1) brought about the doctrine of procedural fairness. Further, the Court of Appeal gave a broad and liberal interpretation to the word 'life' in Article 5(1). It was construed to incorporate livelihood or employment. Therefore, the combined effect of Articles 5(1) and 8(1) imposes and ensures Procedural Fairness whenever a person's livelihood is adversely affected by a decision-maker.⁷

The above decision is significant in Administrative Law as it has infused new life into the *Federal Constitution*. The Court of Appeal decisively pronounced that the Constitution is a living, organic and dynamic document. The courts should keep in tandem with the national ethos when interpreting the provisions of a living document like the *Federal Constitution* lest they be left behind while the winds of modern and progressive change passes them by. They should, when discharging their duties as interpreters of the supreme law, adopt a literal approach in order to implement the true intention of the framers of the *Federal Constitution*. They should not stubbornly cling to an archaic and arcane approach formerly adopted. It is the primary duty of the courts to resolve issues of public law by having resort to the provisions of the Constitution, which is the supreme law.

The significance of *Tan Tek Seng* is much more far reaching than the concept of fairness it has introduced. On a more positive note, the Malaysian courts after that case have embarked on a dynamic interpretation of the Constitution. Procedural Fairness, the product of the combined effect of Articles 5(1) and 8(1) was further extended to include the following rights:

⁴ (1995) 1 MLJ 308.

⁵ *Ibid*, at p. 315.

⁶ *Supra* n.1.

⁷ This point was affirmed in the subsequent cases of *Hong Leong Equipment Sdn Bhd v Liew Fook Chuan & anor appeal* [1996] 1 MLJ 481 and *R Rama Chandran v The Industrial Court of Malaysia & Anor* [1997] 1 MLJ 145.

Right To Reasoned Decisions

The Court of Appeal in *Hong Leong Equipment Sdn. Bhd. v Liew Fook Chuan & anor appeal*,⁸ after holding that Procedural Fairness is part of our law, further held that Procedural Fairness imposed a duty on public decision makers to give reasoned decisions. The court however, restricted the operation of such a duty to situations where a fundamental right enshrined in Part II of the *Federal Constitution* is adversely affected in consequence of such a decision made by a public decision maker. It needs to be pointed out that *Hong Leong* went further than the earlier case of *Rohana bt Ariffin & Anor v USM*.⁹ In *Rohana*, it was held that there was no general right to a reasoned decision¹⁰ whereas *Hong Leong* recognised a general right to a reasoned decision provided a fundamental liberty is adversely affected. Another matter to note is that in *Hong Leong* the right to a reasoned decision is linked to the deprivation of a fundamental liberty.

Professor M.P. Jain criticized the judgment in *Hong Leong* by saying that 'the obligation to give reasons has been extended to the area of fundamental liberties and not to situations where other rights may be affected by discretionary decisions'. He further stated that 'it may be hoped that this decision will have its impact generally on Malaysian Administrative Law and the practice to give reasons for decisions taken by administrators may become more widely prevalent than is the case at present and extend to all cases rather than be confined to cases arising under fundamental liberties guaranteed by the Constitution'.¹¹

Two years later, in *Sugumar Balakrishnan v Director of Immigration, State of Sabah & Anor*¹² the Court of Appeal conceded to the abovementioned criticism and extended the duty to all cases where the rights of a person are adversely affected by a public law decision. The ruling in this case on the duty to give a reasoned decision marks a distinct and deliberate departure from common law where it has been consistently held that the rules of Natural Justice do not require a public decision maker to provide reasons for his decision.¹³

It may be noted that this extension of the right to Procedural Fairness is most welcome and is based on Article 8(1) of the Constitution which is the heart of due process in this country. By relying on Article 8(1) alone, there is no necessity to relate it to any breach of any fundamental liberty provisions in the Constitution and the scope of procedural fairness or the right to be heard generally is accordingly extended to its widest amplitude.

⁸ *Ibid.*

⁹ [1989] 1 MLJ 489.

¹⁰ Followed the common law principle laid down in *Padfield v Minister of Agriculture, Fisheries & Food* (1986) AC 997.

¹¹ M.P. Jain, *Administrative Law of Malaysian and Singapore*, 3rd ed. (1997) MLJ, at p. 428.

¹² [1998] 3 MLJ 289.

¹³ *Supra* n.10.

Right to make a plea in mitigation

In *Utra Badi all K. Perumal & Anor v Lembaga Tata tertib Perkhidmatan Awam*,¹⁴ the High Court held that the right to make a plea in mitigation of the punishment proposed to be imposed on a public officer after the finding of guilt by a disciplinary authority is part of 'a reasonable opportunity of being heard' under Article 135(2) of the *Federal Constitution*. This is because a consideration of the appropriate punishment to be imposed involves a separate decision-making process altogether whereby a second opportunity of being heard is rendered necessary. On appeal to the Court of Appeal,¹⁵ the court upheld the High Court's decision. Gopal Sri Ram JCA in allowing the right to make a plea in mitigation stated as follows:

The combined effect of articles 5(1) and 8(1) of the *Federal Constitution* is, in my judgment, to demand fairness both in procedure and in substance whenever a public law decision has an adverse effect on any of the facets of a person's life... Among these facets are a person's livelihood and his reputation.

Procedural fairness demands not only the right in a public servant to make representations on the truth of the charges framed against him. It includes the right, after a finding of guilt is made against him, to make representations on the question of punishment. That this must be the case may be seen by examining the disciplinary process itself'.¹⁶

Unfortunately, the Federal Court, on appeal,¹⁷ overruled the Court of Appeal's decision that the respondent should have been given a right to make a plea in mitigation. According to the Federal Court, Article 135(2) of the *Federal Constitution* which demands a reasonable opportunity to be heard be given to a public officer was complied with here. The show cause letter that was sent to the respondent conveyed with sufficient clarity and certainty the contemplated punishment of either dismissal or reduction in rank. Thus, the respondent had at the earliest available moment been informed of the two possible punishments under consideration in the event he is not able to exculpate himself of the charge made. He had been accorded every opportunity to defend himself, which he did by a letter. However he made no representation as regards punishment though he had been made aware of the two possibilities. It is submitted that if the respondent is supposed to make a plea in mitigation in his written representation, this would amount to an indirect admission of guilt, as the process of mitigation always takes place after the finding of guilt is made.

The Federal Court further examined General Order 26 para (4) of the General Orders and said that there is no separate right to make representations upon the punishment that ought to be meted out to the officer to be dismissed or reduced in rank. The General Orders, according to the Federal Court, in detailing the procedures

¹⁴ [1998] 1 AMR 9:699.

¹⁵ [2000] 3 MLJ 281.

¹⁶ *Ibid* at 296.

¹⁷ [2001] 2 MLJ 417.

have sufficiently complied with Article 135(2) of the Constitution and in the process are in accord with the concept of Natural Justice and Procedural Fairness.

It is submitted that the decision of the Federal Court in the above decision is a setback in the progress of Administrative Law in our country. The Federal Court did not examine the scope of Articles 5(1) and 8(1) so as to bring the right to make a plea in mitigation under both these articles, as was done by the Court of Appeal. Thus it is respectfully submitted that the Federal Court had denied the respondent his fundamental right to make a plea in mitigation as guaranteed by Article 135(2) read together with Articles 5(1) and 8(1).

Having examined the above cases which have linked Procedural Fairness to Articles 5(1) and 8(1), it is submitted that an even wider right to procedural fairness may be claimed under Article 8(1) alone if it (Article 8(1)) is given its widest and most liberal interpretation without being linked with any other fundamental right provisions in Part II or Part X¹⁸ of the Constitution. This is because Article 8(1) which postulates the equal protection clause has the inherent capacity of being interpreted as housing the concept of due process, both substantive and procedural. The scope of procedural fairness guaranteed under Article 8(1), standing on its own, is wider than that protected under any other provision in the Constitution. It is wider than the combined effect of Articles 5(1) and 8(1) as Article 5(1) is limited to 'life and personal liberty' and it is also wider than Article 135(2) which is confined to a reasonable opportunity of being heard be given to public officers before they are either dismissed or reduced in rank.

The procedural protection under Article 8(1) extends beyond fundamental rights. It is thus contended that Article 8(1) has the potentiality of becoming the heart or fountain of procedural due process or fairness in the face of administrative actions or decisions that have adverse consequences on an individual's rights or interests.

SUBSTANTIVE FAIRNESS

The traditional common law approach to judicial review is that a reviewing court is primarily concerned merely with the decision-making process and not with the merits of the decision itself.¹⁹ However, Edgar Joseph Jr FCJ pointed out in *R Rama Chandran v Industrial Court*.²⁰

'It is often said that judicial review is concerned not with the decision but the decision making process. (See e.g. *Chief Constable of North Wales Police v Evans*). This proposition at full face value, may well convey the impression that the jurisdiction of the courts in judicial review proceedings is confined to cases where the aggrieved

¹⁸ Part II is entitled 'Fundamental Liberties' and Part X confers some constitutional rights on the members of the public service.

¹⁹ *Chief Constable of North Wales Police v Evans* [1982] 3 All ER 141, 154, per Lord Brightman.

²⁰ *Supra* n 7.

party has not received fair treatment by the authority to which he has been subjected. Put differently, in the words of Lord Diplock in *Council of Civil Service Unions & Ors v Minister for the Civil Service*, where the impugned decision is flawed on the ground of procedural impropriety.

But Lord Diplock's other grounds for impugning a decision susceptible to judicial review make it abundantly clear that such a decision is also open to challenge on grounds of 'illegality' and 'irrationality' and, in practice, this permits the courts to scrutinize such decisions not only for process, but also for *substance*.

Thus the Federal Court decision in *R. Rama Chandran v Industrial Court* allows the courts to review both the procedural and substantive aspects of a decision. However, the first indication of the reception of substantive fairness into our jurisprudence could be seen in *Tan Tek Seng* although the Court of Appeal made no specific reference to the term 'substantive fairness' as such. In that case, the Court of Appeal held that the fairness requirement in Article 8(1) read together with Article 5(1) ensured not only a fair procedure, but also that a fair and just punishment is imposed. Therefore the second requirement of a fair and just punishment indicates that the court intended it to be an additional facet of fairness over and above Procedural Fairness. The only other context in which fairness can be said to arise is a substantive one. Thus, it is submitted that from the above requirement, the learned judge could only have been referring to the doctrine of substantive fairness.

However, in *Sugumar Balakrishnan*, the Court of Appeal clearly stated that 'fairness' under Article 8(1) included Procedural Fairness and Substantive Fairness. Gopal Sri Ram JCA stated:

The result of the decision in *Rama Chandran* and the cases that have followed it is that the duty to act fairly is recognised to compose of two limbs: procedural fairness and substantive fairness. Procedural fairness requires that when arriving at a decision, a public decision-maker must adopt a fair procedure. The doctrine of substantive fairness requires a public decision-maker to arrive at a reasonable decision and to ensure that any punishment that he imposes is not disproportionate to the wrongdoing complained of. It follows that if in arriving at a public law decision, the decision-maker metes out procedural fairness, the decision may nevertheless be struck down if it is found to be unfair in substance.²¹

It is submitted that the Court of Appeal's stance to incorporate Substantive Fairness into the doctrine of fairness in Article 8(1) and to adopt Substantive Fairness as a new ground of judicial review is to be applauded. By introducing Substantive Fairness as a separate ground of judicial review, the Court of Appeal has armed the judiciary with a very useful and effective weapon to strike down unlawful administrative action.

²¹ *Supra* n 12 at p. 320.

However, unfortunately, the Federal Court in the above case reversed the decision of the Court of Appeal and struck down the doctrine of Substantive Fairness. The Federal Court referred to the judgment of Edgar Joseph Jr in *R. Rama Chandran* and stated:

The Court of Appeal seems to introduce the doctrine of substantive fairness as a separate ground in its review of the administrative decision of the State Authority under the Act by invoking Article 8(1) read together with Article 5(1) of the *Federal Constitution*. The Court also relied on *R. Rama Chandran*.

In our view, Parliament having excluded judicial review under the Act, it is not permissible for our courts to intervene and disturb a statutorily unreviewable decision on the basis of a new amorphous and wide ranging concept of substantive unfairness as a separate ground of judicial review which even the English courts in common law have not recognised ... As was stated by Edgar Joseph Jr FCJ in *R Rama Chandran* (*supra*) when he observed that courts can scrutinise decisions not only for *process*, but also for *substance*, and he certainly was not putting forward a new head for judicial review...

[W]e cannot agree with the Court of Appeal that the doctrine of substantive fairness can be invoked as a separate or additional ground of judicial review of an administrative decision.

The Federal Court's judgment has attracted and continues to attract severe criticism. It is considered as a bad authority. Therefore it is respectfully submitted that the Court of Appeal's broad and liberal view on the doctrine of Substantive Fairness is preferred to the Federal Court's decision. The Federal Court's restrictive view on the same may be categorised as an anti-fundamental right. The Court of Appeal was invoking the constitutional dimension to our public law which is a broad and dynamic concept. The Federal Court unfortunately failed to realize and appreciate the significance of this approach as it was labouring under the spell or narrowness of common law regarding the same.

PROPORTIONALITY

Proportionality is a well entrenched principle in the Continental system of *Droit Administratif*. This principle requires public authorities to maintain a sense of proportion between their particular goals and the means they employ to achieve those goals, so that their actions impinge on individual rights to the minimum extent necessary to preserve the public interest.²² In essence the doctrine provides that a court of review may intervene if it finds that the harm attendant upon a particular exercise of power is disproportionate to the benefits sought to be achieved.²³

²² *Supra* n 11 at pp 482-483.

²³ Bailey, Jones and Mowbray, *Cases and Materials on Administrative Law*, 2nd ed. 437.

The principle of proportionality was first discussed in Britain in *Council of Civil Services Union v Minister for Civil Services*²⁴. Lord Diplock envisaged the possibility of adopting this principle at some future date as a ground of judicial review of administrative action in common law.²⁵ In the following year, in *Nottinghamshire CC v SS for Environment*,²⁶ the appellants relied upon proportionality as a primary ground to establish unreasonableness. The House of Lords refused to go into this question and neither expressly affirmed nor denied proportionality as a requirement of reasonableness.

In *R v Secretary of State for Home Dept; ex p Brind*,²⁷ there were differing opinions on the viability of proportionality as a ground of judicial review of administrative action. Lord Roskill stated that although this principle was not appropriate on the facts of the instant case, there is a possibility that it may develop in the future as a separate ground of judicial review. However, Lord Ackner and Lord Lowry rejected this principle as an independent head of judicial review and treated it as a part of *Wednesbury* unreasonableness.

The principle of proportionality was used as a ground of judicial review in very few cases in Britain. In *R v Barnesley Metropolitan Borough Council, ex p Hook*²⁸, the Council revoked a stallholder's licence for urinating in a side street after the market had closed. The Court of Appeal applied the ground of denial of natural justice when it quashed the Council's decision. The court also stated that the Council's decision was a 'disproportionately drastic step' or that 'the punishment (was) altogether excessive and out of proportion to the occasion.'

The common law courts are reluctant in adopting proportionality as a separate head of judicial review. If they do so, this would mean that the courts would be assessing the merits of a discretionary decision taken by the administration. Therefore, the courts, in most cases treat proportionality merely as an aspect of *Wednesbury* unreasonableness. This is because as a facet of unreasonableness, the court will interfere only when the action impugned is totally out of proportion to the mischief sought to be curbed so as to border on the absurd. On the adoption of proportionality as a separate ground of judicial review, Professor M.P. Jain states:

It is, however, possible that in the near future proportionality may develop into a distinct head as it has been asserted by the judiciary again and again that "judicial review is not fossilised" and that heads of judicial review are not exhaustive ... [A]lso Britain's membership of the European Economic Community may have its impact in the course of time.²⁹

²⁴ [1985] AC 374.

²⁵ Note that so far the British courts have applied the principles of proportionality as a part of the *Wednesbury* unreasonableness.

²⁶ [1986] 1 All ER 199.

²⁷ [1991] 1 AC 696.

²⁸ [1976] WLR 1052 (COA).

²⁹ *Supra* n 11 at p.485.

In Malaysia, this doctrine was for the first time applied in the landmark case of *Tan Tek Seng*.³⁰ The Court of Appeal, when deciding whether the punishment of dismissal imposed on the appellant by the Education Service Commission was too severe, stated:

A public servant against whom a criminal charge has been proved ... may or may not be dismissed solely in reliance of that ground. It depends on the particular facts of each case ... But it must, when deciding what punishment it ought to impose on the particular public servant, act reasonably and fairly. If it acts arbitrarily or unfairly or imposes a punishment that is disproportionate to the misconduct, then its decision, to that extent, becomes liable to be quashed or set aside.

The Court of Appeal eventually held that the punishment of dismissal was too severe a punishment and substituted it with reduction in rank. The Commission had failed to take into account all relevant factors before it imposed the sentence of dismissal. If it had taken the relevant factors into consideration, it may well have come to the conclusion that dismissal was too severe a punishment to impose upon the appellant and that a lesser punishment ought to be imposed.

The Court of Appeal based the application of this doctrine on Article 8(1) of the Constitution which constitutes the heart of due process in our system. This was later adopted by the Federal Court in *R. Rama Chandran*³¹ and the Supreme Court in *Kumpulan Perangsang Selangor Bhd v Zaid bin Haji Mohd Noh*³²

The Court of Appeal in *Sugumar Balakrishnan*³³ referred to its own earlier *dictum* in another case which summarises the law on the doctrine of fairness:

The result of the decision in *Rama Chandran* and the cases that have followed it is that the duty to act fairly is recognised to comprise of two limbs: procedural fairness and substantive fairness. Procedural fairness requires that when arriving at a decision, a public decision-maker must adopt a fair procedure. The doctrine of substantive fairness requires a public decision-maker to arrive at a reasonable decision and to ensure that any punishment he imposes is not disproportionate to the wrongdoing complained of. It follows that if in arriving at a public law decision, the decision-maker metes out procedural fairness, the decision may nevertheless be struck down if it is found to be unfair in substance.³⁴

However, the Federal Court ruling in *Ng Hock Cheng v Pengarah Am Penjara & 2 Ors*³⁵ was a setback to the forward march of this doctrine. Although the

³⁰ *Supra* n 1.

³¹ *Supra* n 7. Note that Edgar Joseph Jr FCJ in this case referred to this doctrine as a ground of judicial review.

³² [1977] 1 MLJ 89.

³³ *Supra* n 12.

³⁴ *Ibid* at p 323.

³⁵ [1997] 4 AMR 53:4193.

Federal Court did not specifically refer to the doctrine of proportionality as such, the cumulative effect of the decision in this case is that there can be no review of punishment and the express overruling of *Tan Tek Seng* on the same narrow point of law is that there appears to be no room for the operation of the doctrine of proportionality as envisaged by the Court of Appeal in *Tan Tek Seng*.

It is respectfully submitted that the above Federal Court's decision is no authority to the contrary because that case and the cases that followed it were decided totally on some old common law concepts which should no longer be in vogue in the present era. A case which sought to decide important issues of public law by avoiding the supreme law as enshrined in the Constitution, particularly, Article 8(1), should be viewed with disfavour and suspicion.

It is to be noted that the doctrine of proportionality is part of the wider concept of reasonableness or non-arbitrariness housed in Article 8(1) of the Constitution. The concept of substantive fairness under Article 8(1) is wider than proportionality. It is capable of being deployed to strike at any law or action or decision of a public nature which is arbitrary or unreasonable. Used in the manner described, it may be observed that Article 8(1) is capable of imparting a very activist and dynamic dimension to the field of public law in time to come provided that the courts adopt an activist and dynamic approach in interpreting issues of public law which adversely affects the rights of the people. Its use is preferred to 'Wednesbury unreasonableness' partly also because it has the strong backing of a fundamental liberty provision of the Constitution.

The Malaysian cases which have been highlighted so far on the doctrine of proportionality have examined the same in relation to whether the punishment imposed was proportionate to the wrongdoing. However the application of this doctrine was accurately described by the Court of Appeal in its recent decision, *Dr Mohd Nasir bin Hashim v Menteri Dalam Negeri Malaysia*³⁶ as follows:

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* [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) ... In other words, not only must the legislature or executive 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.

³⁶ [2006] 6 MLJ 213, at pp 219-220.

RIGHT OF ACCESS TO JUSTICE

A common feature of the statutory framework in Malaysia is the inclusion of a variety of ouster clauses designed to exclude judicial review of administrative action. The Malaysian courts have generally viewed ouster clauses as inimical and an unacceptable impingement of their inherent supervisory jurisdiction. The Court of Appeal's decision in *Syarikat Kenderaan Melayu Kelantan Bhd. v Transport Workers Union*³⁷ and the Federal Court decision in *Hoh Kiang Ngan v Mahkamah Perusahaan Malaysia*³⁸ clearly show the judicial abhorrence of ouster clauses. Both the cases have negated the efficacy of ouster clauses to a great extent by their ruling that errors of law fall within the ambit of jurisdictional errors and that consequently, ouster clauses are ineffective to prevent judicial review of decisions made in error of law.

A few years later, the judiciary (the Court of Appeal, in particular) moved a step further by placing emphasis on the right of an aggrieved party to have access to justice. A significant decision in this context is that of the Court of Appeal in *Sugumar Balakrishnan*,³⁹ where the court held access to justice to be a constitutional right. According to Gopal Sri Ram JCA, the right of a litigant to seek redress from a court is part of his or her personal liberty within Article 5(1) and hence a fundamental liberty. Parliament cannot therefore legislate to limit or restrict such right. An ouster of jurisdiction by an Act of Parliament would therefore be *prima facie* void. However, by resort to the rule of harmonious construction, such an ouster would only prevent judicial review of a public law decision that is made in accordance with law in the *Anisminic* sense.⁴⁰

Such an interpretation is unprecedented and clearly depicts the new judicial trend in Malaysia of invoking the provisions of the *Federal Constitution*, not only to curb the abuse of administrative power, but also to prevent any whittling of the scope of judicial review. The Federal Court, on appeal, however, reversed the Court of Appeal's decision, stating:

By deliberately spelling out that there shall be no judicial review by the Court of any act or decision of the Minister or the decision-maker except for non-compliance of any procedural requirement, Parliament must have intended that the section is conclusive on the exclusion of judicial review under the Act.

In our view, Parliament having excluded judicial review under the Act, it is not permissible for our courts to intervene and disturb a statutorily unreviewable decision on the basis of a new amorphous and wide ranging concept of substantive fairness as a separate ground of judicial review which even the English courts in common law have not recognised.

³⁷ [1995] 2 MLJ 336.

³⁸ [1995] 3 MLJ 369.

³⁹ *Supra* n 12.

⁴⁰ See *Anisminic v Foreign Compensation Commission* [1969] 2 AC 147.

As mentioned earlier, the judgment of the Federal Court in *Sugumar Balakrishnan* has attracted severe criticism and is considered as bad law. Nowhere in its judgment did the Federal Court say that access to justice is not a fundamental right.

The Court of Appeal, however, re-affirmed its stand that access to justice is a fundamental right in *Kekatong Sdn. Bhd. v Danaharta Urus Sdn. Bhd.*,⁴¹ but this time under Article 8(1) of the Constitution. The Court of Appeal in this case was asked to decide on the constitutionality of section 72 of the Pengurusan Danaharta Act 1998 (a partial ouster clause). The court took a drastic view and held that the section is unconstitutional vis-à-vis Article 8(1) of the *Federal Constitution* for violating the common law right of access to justice which is an important part of the Dicean Rule of Law housed in Article 8(1). The Court of Appeal expressed its view in the following words:

We would sum up our view on this part of the case as follows: (i) the expression "law" in art.8(1) refers to a system of law that incorporates the fundamental principles of natural justice of the common law: *Ong Ah Chuan v Public Prosecutor*; (ii) the doctrine of the rule of law which forms part of the common law demands minimum standards of substantive and procedural fairness: *Pierson v Secretary of State for the Home Department, ex parte Leech*; (iv) the expression "law" in art. 8(1), by definition (contained in art 160(2)) includes the common law. Therefore access to justice is an integral part of art. 8 (1).

Unfortunately, the Federal Court,⁴² on appeal, overruled the Court of Appeal's decision. The Federal Court referred to the right of access to justice as was discussed in the Court of Appeal and held that the court had erred in interpreting Article 8(1) and Article 160(2) of the Constitution. Article 160(2) authorises the reception of common law "[i]n so far as it is in operation in the Federation...", which refers to a law that has already brought into operation the common law of England in the Federation. That law is section 3(1) of the *Civil Law Act 1956* ('the CLA'). Section 3(1) of the CLA permits the reception of English common law subject to the qualification that it may be lawfully modified in the future by any written law. Thus according to the Federal Court, Article 160(2) of the Constitution must be construed in the light of section 3(1) of the CLA in that it may be modified when necessary. To that extent it is qualified and not absolute.

'Common law' in Article 160(2) is therefore a reference to common law and it is in that sense that the right must be incorporated into Article 8(1). As the continued integration of the common law right of access to justice into Article 8(1) depends on any contrary provision that may be made by any written law as provided by section 3(1), it cannot amount to a guaranteed fundamental right.

Secondly, the Federal Court stated that the right of access to justice must be subject to rules and regulations that enable the exercise of that right, which may

⁴¹ [2003] 3 MLJ 1.

⁴² [2004] 2 AMR 317.

be varied from time to time, in particular Article 121(1) of the Constitution, which confers jurisdiction to the High Court. Articles 8(1) and 121(1), according to the Federal Court, complement one another, in that Article 8(1) confers a general right, whereas Article 121(1) confers powers on the Parliament to set up an institutionalised mechanism with the power and jurisdiction on the extent and manner in which that right is to be exercised. The Federal Court stated that:⁴³

The jurisdiction and power of the courts as provided by law is clearly the dominant element which determines the boundaries of access to justice. Article 8(1) cannot therefore be read in isolation ... The corollary is that the manner and extent of the exercise of the right of access to justice is subject to and circumscribed by the jurisdiction and powers of the court as provided by Federal law.

Applying the above principle, the Federal Court held that section 72 of the *Pengurusan Danaharta Act* is a federal law made by the Parliament under the authority and scope of Article 121(1) and is a written law within the meaning of section 3(1) of the CLA, which modifies the right of access to justice as is permitted by the same. The right of access to justice integrated into Article 8(1) must therefore yield to the change made.

It is respectfully submitted that the Federal Court's decision has diluted the strength of Article 8(1), which as mentioned earlier, is a due process clause. If the right of access in Article 8 can be modified by written law, then that would mean that the provision that guarantees equality before the law in the Constitution (which is the supreme law of the land) is subject to modification by statutes. The Federal Court, instead of holding that the right of access to justice under Article 8(1) has to yield to changes made by written law, could have held that although Parliament is empowered to pass laws which confer powers and jurisdiction to the High Court, these laws are still subject to the provisions of the Constitution. Therefore, the right of access to justice under Article 8(1) (one of the provisions in Part II of the Constitution which enshrines fundamental liberties) should not be easily taken away by written law.

⁴³ *Ibid* at p. 336.

CONCLUSION

The developments brought about by *Tan Tek Seng*, *Hong Leong Equipment*, *Rama Chandran* and the Court of Appeal's decision in *Sugumar Balakrishnan* were long overdue. They should have come a decade or two earlier. We have to accept them magnanimously as part of our law. They need to be there to protect and preserve our much-cherished fundamental rights as protected and guaranteed by the Constitution. However, the recent Federal Court decisions that were discussed above on the whole does not seem to live up to the expectations and hopes kindled by *Tan Tek Seng*, *Hong Leong Equipment*, *Rama Chandran* and the Court of Appeal's decision in *Sugumar Balakrishnan*. It appears that the interpretation of our supreme law is yet to find a right leg. Nevertheless, coupled with the need to defend, protect and preserve the more noble principles of the rule of law, constitutionalism and democratic government, we have to forge ahead and further develop our own common law in the field of Public Law in conformity with these principles.

